

THE
HAURAKI REPORT

THE
HAURAKI REPORT

VOLUME II

WAI 686

WAITANGI TRIBUNAL REPORT 2006



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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ABBREVIATIONS

a, ac	acre
AJHR	<i>Appendix to the Journals of the House of Representatives</i>
ALR	<i>Australian Law Reports</i>
app	appendix
App Cas	<i>Law Reports, Appeal Cases</i>
ARA	Auckland Regional Authority
Atk	<i>Atkyn's Reports</i>
ATL	Alexander Turnbull Library
BPP	<i>British Parliamentary Papers</i>
CA	Court of Appeal
CD	compact disc
ch	chapter
CJ	chief justice (when used after a surname)
cl	clause
cmmd	command
CMS	Church Missionary Society
DNZB	<i>The Dictionary of New Zealand Biography</i> (5 vols, Wellington: Department of Internal Affairs, 1990–2000)
doc	document
ed	edition, editor
ER	<i>English Reports</i>
GBPP	<i>Great Britain Parliamentary Papers</i>
ha	hectare
HCA	High Court of Australia
J	justice (when used after a surname)
KTC	Kauri Timber Company
LINZ	Land Information New Zealand
ltd	limited
LR Eq	<i>Law Reports, Equity Cases</i>
MA	master of arts and Maori Affairs file series
MD	Mines Department file
MA-MLP	Maori Affairs head office file
MS	manuscript
n	note
NMO	native medical officer
no	number
NO	Maori Affairs head office file
NT	Northern Territory
NZ Jur (NS)	<i>New Zealand Jurist, New Series</i>
NZJH	<i>New Zealand Journal of History</i>
NZLR	<i>New Zealand Law Reports</i>
P	perch

ABBREVIATIONS

p, pp	page, pages
para	paragraph
PC	Privy Council
Plowd	<i>Plowden's Reports</i>
r	rood
RDB	<i>Raupatu Document Bank</i> (139 vols, Wellington: Waitangi Tribunal, 1990)
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
SC	Supreme Court
sec	section (of this report, a book, etc)
sess	session
US	<i>Reports of Cases in the Supreme Court of the United States of America</i>
USSC	Union Steam Saw Moulding Sash and Door Company
v	and
vers	version
Ves	<i>Vesey Jun's Reports</i>
vol	volume
VUWLR	<i>Victoria University of Wellington Law Review</i>
WA	Western Australia

'Wai' is a prefix used with Waitangi Tribunal claim numbers

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

Unless otherwise stated, footnote references to Archives NZ are to the Wellington branch.

CHAPTER 10

THE OHINEMURI GOLDFIELD

10.1 OHINEMURI CLOSED TO MINING

10.1.1 The aukati at Omaha Stream

The southern boundary of the Thames goldfield was fixed at the Omaha Stream (north of Hikutaia) in 1868. As described at section 9.3.4, James Mackay found that south of this stream he encountered serious opposition to mining expressed by Herewini Te Rangai of Ngati Pu, a hapu of Ngati Rongo-u and Ngati Maru. At least for the time being, Mackay and the Government were obliged to acquiesce in the Kingitanga aukati, which included Ohinemuri. The opening of Thames contrasts with that of Ohinemuri, in that in the latter the Crown pursued the freehold of the land as much as a mining agreement. Treaty issues arise in relation to both goals.

The leading figure in the aukati was Te Hira Te Tuiri of Te Matewaru hapu of Ngati Tamatera, a Kingitanga supporter from at least 1862 (see sec 5.3.1). Te Hira remained at Ohinemuri during the war; he was not particularly belligerent but staunch in his desire for Maori to retain significant areas of land, and autonomy within them from the Crown. Among Te Hira's most important supporters was Tukukino, rangatira of Te Kiriwera hapu of Ngati Tamatera¹, who in the post-war years during which Ohinemuri remained closed to mining, repeatedly declared his willingness to fight in defence of the land.

The Ohinemuri district was a stronghold for supporters of the Kingitanga before gold-mining became an issue. A political boundary or aukati would probably have been established around it even if there had been no gold. The upper Thames had already provided a refuge for Maori displaced by the Waikato and Bay of Plenty confiscations. Ngati Porou of Mataora also came in from the coast when threatened by fighting around Tauranga in early 1867.

In the immediate post-war years, the Ohinemuri region remained unsettled, affected by the rise of the Pai Marire movement and Te Kooti's links to the area. In April 1867, Te Hira received a party of Pai Marire delegates from Waikato, which tried but failed to persuade

1. Document A10, pt 2, pp 204–206

In 1869, Mackay reported that he went to Ohinemuri in April 1868 to endeavour 'to prevent the Hauhau Natives from handing their lands and those of the friendly Natives over to the so-called Maori King'. He had little success. Although some Ohinemuri Maori were displeased with Te Hira for acting without their permission, with the backing of the King he had sufficient mana to effect the aukati. Mackay persuaded the Kingitanga followers to agree that the Queen's police would be allowed across the aukati to remove any trespassing gold prospectors.

10.1.2 A house divided

By March 1868, the aukati established, Ohinemuri had become a 'locked up box' as far as gold mining was concerned.⁴ Yet, as was pointed out by Dr Battersby, it was remarkable that it remained so long closed, given that serious differences about allowing mining had arisen among Ohinemuri Maori by 1869. Ohinemuri remained closed to mining until March 1875.

On 16 October 1867, provincial superintendant Williamson visited Thames where, advised by Mackay, Williamson counselled miners not to rush Ohinemuri by force.⁵ Armed conflict between miners and Maori remained a threat: in late 1868 and in 1869 tensions ran especially high because of the presence of unemployed itinerant miners and the nearby military campaigns against Hakaraia of Waitaha and Te Kooti.⁶

In September, Mackay urged the Native Minister to pass legislation imposing stiff fines or imprisonment on anyone mining on Maori land without the permission of the owners, in order:

to prevent the Colony being plunged into a frightful war of extermination. It has been argued by some persons that the best plan to settle the Native difficulty would be to allow the miners to rush the upper Thames Country. An unarmed undisciplined body of men would speedily be driven back by the Natives, and murderous onslaughts would be made which would effectively prevent mining operations being carried on, and destroy the confidence of capitalists who are now beginning to visit the country and assist in the development of the resources of the field.⁷

Mackay's urging contributed to sections 5 and 6 of the Gold Fields Act Amendment Act 1868, which banned prospecting on Maori customary land without a prospector's licence,

4. James Mackay, *Translation in English: Address of Mackay to Ngati Maru* (Thames: WM McCullough General Printer, 25 May 1896) (doc B11(a), p 30)

5. James Mackay, 'Report by Mr Commissioner Mackay Relative to the Thames Gold Fields', 27 July 1869, AJHR, 1869, A-17, p 7

6. Some Ngati Porou from Harataunga were involved in these wars: see Judith Binney, *Redemption Songs: A Life of Te Kooti-Arikirangi Te Turuki* (Auckland: Auckland University Press, 1995), pp 193-194, 202.

7. Mackay to Native Minister, 3 September 1868, Le 1/1869/133 (Phillip Hart, 'Maori and Goldfields Revenue', unpublished paper, University of Waikato, p 21)

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which in turn required the landowners' consent. Mackay soon used these provisions in turning unauthorised miners out of Ohinemuri.

While Williamson was in Shortland, Ropata Te Arakai (also known as Te Pokiha) came with Periniki and Wikiriwhi Hautonga of Ngati Taiuru hapu of Ngati Tamatera⁸ to offer their Ohinemuri lands to be leased for gold mining. Te Arakai, of Te Uriwha hapu of Ngati Tamatera or Ngati Hura hapu of Ngati Paoa (or both),⁹ was considered by Mackay as 'always . . . loyal and well-disposed towards Europeans.'¹⁰ He had wanted Ohinemuri to be opened from 1865, and the Kingitanga aukati created a rift between him and Te Hira. After Te Arakai's visit, Mackay arranged for Te Moananui to accompany Superintendent Williamson to Ohinemuri, but just then gold was discovered at Tapu Creek (see sec 9.3.3), diverting Mackay's attention. No agreement was made with Ropata at this time, but he was to become an important ally of Mackay's in future negotiations.

A year later, on 5 October 1868, Mackay attended a public meeting at which:

a quarrel arose between the Hauhaus and the friendly Natives, which resulted in two of the latter (Periniki and Wikiriwhi) coming forward and offering the whole of their lands for goldmining. This was seconded by the loyal chief Ropata Te Arakai and his people, to the great dismay of the Hauhau party, who left the meeting in anger and disgust at these proceedings.¹¹

Ropata's description of the events, as reported in the *New Zealand Herald*, was as follows:

Mr Mackay came to Ohinemuri in consequence of a letter he had received from Te Hira, which letter had nothing to do with the question of opening the land, but was respecting the aukati or boundary line which the Hauhaus wished to draw at Hikutaia, beyond which the pakeha was not to come. A large native meeting was then held. On this occasion there was a great amount of talk respecting the opening of the goldfields at Ohinemuri. The Hauhaus were totally opposed to it. One of us (the friendly side) then got up and handed over his ground to Mr Mackay. This was Wikirihi . . .

Robert [Ropata Te Arakai] said that after Wikirihi had handed his land over to Mr Mackay, the Hauhau showed a great amount of anger. Then my friend Piriniki [*sic*] stood up and said, 'No one has any authority over my land.' He then took a stick in his hand and laid it before Mr Mackay, saying, 'I put my stick into Mr Mackay's hands.' The stick was lying in front of Mr Mackay when the Hauhaus rushed at it to take it up, but Mr Mackay's hand was upon it.¹²

8. Document A10, pt 2, p 206

9. Document A8, p 195

10. Mackay, 'Report by Mr Commissioner Mackay', p 7

11. *Ibid*, p 9

12. *New Zealand Herald*, 26 October 1868 (doc 06, p 148)

In the week following, if press reports can be trusted, both sides were ‘standing to their arms.’¹³

Te Hira was not present on 5 October, but he sent representatives. This did not indicate personal animosity, but was consistent with his policy of permitting European deputations to come up the river to Ohinemuri, but not meeting them himself. He is said to have had cordial respect for Mackay as an adversary, and in 1870 Mackay was to represent him in the Native Land Court.¹⁴

Many Thames miners did not share Te Hira’s respect for Mackay; he was not regarded as their friend. Late in October, the second of two deputations of miners visited Ropata Te Arakai’s kainga at Puketea-waitapu and sought a private arrangement with him, but he rejected it, saying, ‘The Government advised me not to open that land until Te Hira and his party agreed to open theirs, which, I think can be arranged before long. I am desirous of avoiding bloodshed between the Kingites and the Queenites.’¹⁵ Te Hira’s representatives said that he ‘would not oppose the opening of the land to the miners if the Maoris, on being called together gave their consent.’¹⁶ The commitment at this stage of all parties, including the Government, to consensual decision-making was important.

Governor Bowen visited upper Thames in January 1868, but Te Hira did not meet him. Superintendent Williamson came to Ohinemuri in November 1868 at the invitation of Ropata. Mackay resented the interference, writing that ‘His Honor the Superintendent had considered it his duty to visit Ohinemuri also, and use his influence in the matter; and I must say that his proceedings there in no way assisted my efforts to arrange this very difficult question.’¹⁷ Te Hira wrote a friendly letter to the superintendent after the latter’s visit, but Mackay was correct that Williamson achieved little towards the opening of Ohinemuri.

About 200 Maori were estimated to have attended the meeting with Williamson at Ohinemuri on 12 November 1868, and around 500 were reported to have attended a further meeting on 18 November, including ‘Hauhaus’ from Piako and all the principal chiefs except Te Hira and Tukukino.¹⁸ If the estimates are correct, the second meeting would have involved a majority of the adults of Hauraki. At the first meeting, Maori divided themselves into pro- and anti-mining camps, and a message arrived from the King to Ropata, saying not to part with the land. However, Hori Pokai, one of the proponents of mining, was quoted as saying, ‘do not let strange tribes be dragged in to have authority over my land . . . My property is my own; it will be for me to speak of’.¹⁹

13. *New Zealand Herald*, 14 October 1868 (doc 06, p 148)

14. Document 06, p 287

15. *New Zealand Herald*, 5 November 1868 (doc 06, p 153)

16. *Ibid*, 27 October 1868 (pp 151–152)

17. Mackay, ‘Report by Mr Commissioner Mackay’, p 9

18. *New Zealand Herald*, 19, 24 November 1868 (doc 06, pp 153–155)

19. *Ibid*, 19 November 1868 (p 154)

At the second meeting, Williamson pointed out the peacefulness of the miners at Shortland and continued, 'There is one opinion you hold, viz, that if you throw open the country for mining purposes the land will be taken from you. This is a mistake – you will permit the gold to be dug out of the hills – the *mana* to the land will still, as it is now, be yours.'²⁰ But Pineaha of Ngati Hako, Reihana Te Tahua, Rota, and others disagreed. In debating with Reihana, Williamson offered the assurance that the Government 'would not give any money until they have obtained the consent of those concerned'. Reihana responded, 'if you spend your money amongst those who are giving up the land evil will arise. Your affairs will not be amicable to us.' Williamson concluded in a potentially divisive fashion, foreshadowing dealings on a hapu-by-hapu or individualised basis, by asking those who were offering to land for mining purposes for their names, so that their titles could be investigated by the Native Land Court and the 'true owners' determined.²¹

The issue of separating the interests of those in favour of mining from the interests of those opposed was the bone of contention at the meeting organised by Mackay for 16 December 1868. According to Mackay, the group opposed to mining 'were ably supported by all the Hauhaus who could be mustered from Piako and the adjacent districts.'²² At this meeting, Teni Te Kopara raised the analogy of the Waitara purchase, which had triggered the first Taranaki war. He pointed out that the land was jointly owned, there were many claimants, and there was no consensus as at Shortland, where 'Hoterene [Taipari] gave up the land and all the tribe consented'. He urged Mackay to be cautious. Mackay replied, 'It is true what you say, that the assertion of individuals that they own land which is common to the whole tribe has frequently caused trouble.' He maintained, however, that he had exercised caution; although he had accepted Ropata's offer of his own land, he had not given Ropata any money or placed miners on it. He blamed outsiders for inflaming the situation.

The meeting continued into a second day with the pro-mining speakers asserting their right to deal individually with their land, and the anti-mining speakers saying that rights were mixed, and they would not open their land. Te Hira wrote to Mackay requiring him to leave, but Mackay declared that he would 'hold' the land given to him for mining purposes by Ropata and others. He asked the pro-mining faction whether they agreed to hand over their lands for mining: they did. Mackay obtained some 63 signatures to a cession agreement, described as 'preliminary', dated 19 December 1868, in consideration of which he agreed to pay £1500, of which £1000 was an advance against miner's rights and £500 was a bonus payment, 'as a deposit to bind the said agreement.'²³ Some money, perhaps even the whole amount, was handed over at the meeting.²⁴

20. *New Zealand Herald*, 24 November 1868 (p 156)

21. *Ibid*, 24 November 1868 (p 156)

22. Mackay, 'Report by Mr Commissioner Mackay', p 9

23. *Ibid*, pp 9–10, encls M, MA

24. *New Zealand Herald*, 22 December 1868 (doc 06, p 162)

As written up by Mackay, the agreement covered ‘all the land at Ohinemuri’. However, Ropata told Puckey (Mackay’s successor as native officer at Thames) in mid-1869 that ‘the understanding in respect of their lands leased to the Government at Ohinemuri only had reference to the north bank (proper right bank) of the Ohinemuri Stream.’²⁵ So there is doubt as to the precise intentions of Ropata and his co-signatories. Taraia Ngakuti did not sign the agreement but instead wrote to Bowen giving his consent to the Governor having the gold but not the land. In addition, Mackay was handed the same day a letter dated 26 October 1868, which Te Wauo Toiwhare, a relative of Te Hira, had addressed to John Thorp of Opukeko, saying that he would give over ‘his auriferous lands’ to Mackay.²⁶

With support for Te Hira apparently crumbling, the *New Zealand Herald* reported: ‘The Hauhaus were busy talking the matter over amongst themselves, [they] were as a house divided against itself, leaving very little doubt that they would be talked over one by one until the arrangements were completed satisfactorily.’²⁷ These forecasts were, however, premature.

10.1.3 Outside influences and local Maori responses

With so many Maori of Ohinemuri committing themselves to the opening of their lands and the Kingitanga in apparent disarray, affairs at Ohinemuri appeared hopeful to miners and Mackay. On 10 January 1869, the ‘insurgent’ Hakaraia of Waitaha arrived at Piako with an armed party, but he was sent away by the Piako Maori, who said that they could manage their own affairs.²⁸

In January 1869, Mackay asked Te Moananui and others of the ‘loyal party’ to ‘assist in arranging the Ohinemuri question.’ On 4 February 1869, Mackay and ‘a large number of the friendly Natives of the Hauraki District’ travelled to Ohinemuri for a meeting which Te Hira attended. On 5 February, Te Moananui was reported as saying to him ‘I wish you to come and remain in Hauraki. You think a great deal of your king. He is not of any value to you.’ And, later that day, ‘The land was given you by the tribes to reside on, and to look after the land and the people. It was not meant that you should go away and leave the land and the people to confusion.’²⁹ The next day, Riwai Te Kiore, who had so reluctantly agreed to the mining of his own land, was reported to have ‘lamented the divisions in the once united people of Hauraki. These divisions had been caused by Hauhauism and Kingism.’³⁰

Neither chief, however, was reported as attempting to dissuade Te Hira from opposing mining. Their involvement appears to have had less to do with gold than with preventing the

25. Puckey to McLean, 19 October 1869, AJHR, 1870, A-19, p 4 (doc 06, p 179)

26. Mackay, ‘Report by Mr Commissioner Mackay’, p 10, encls MB, MC

27. *New Zealand Herald*, 22 December 1868 (doc 06, p 162)

28. *Ibid*, 23 February 1869 (p 163)

29. *Ibid*, 8 February 1869 (pp 166–167)

30. *Ibid* (pp 167–168)

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Maori of Hauraki from becoming embroiled in civil strife. Te Moananui's advice to 'remain in Hauraki' echoes the attitude he had adopted in 1863 during the wars in the Waikato. The meeting continued on 8 and 9 February without any substantial shift in opinions. On the last day, Mackay obtained just four signatures, on an agreement concerning the Waitekauri block.

Meanwhile, since December miners had begun to assemble in increasing numbers at Thorp's station in the expectation that the opposition would soon crumble. Some of these were conducted on prospecting trips or signed leasing agreements with individual Maori right-holders, to the displeasure of Te Hira, who wrote to Thorp and Wood ordering them and the Europeans who were living with them to leave. Thorp met with Te Hira, who was friendly but unhappy that there were so many miners starting to operate in the region.

Mackay was generally quite scrupulous about keeping miners out of areas not opened to mining, but in this instance he had particularly pressing concerns. By February, Mackay had learnt of attempts by a group of Irish miners – rumoured to be associated with the revolutionary Irish nationalists known as Fenians – to enter into a direct leasing arrangement with the 'Hauhaus'. The leading figure was thought to be a certain Michael O'Connor, also suspected of promising to supply weapons. Mackay held a public meeting at Thorp's farm on 7 February asking all Europeans to leave by 9 February 1869. When a few miners continued prospecting, Mackay swore in a force of 35 Maori special constables and removed all but established settlers and their servants from the Ohinemuri region.

Mackay was very concerned not to inflame a dangerous situation. He had heeded the comparisons made with the Waitara purchase at the December meeting in Ohinemuri and declared at Thames in February:

We know the result of the Waitara case, which was analogous to this. Teira wished to give up the land, but William King, who was a greater chief, and who owned a small portion of the land, determined that it should not be given up. Governor Gore Browne said 'I will survey the land and take what is Teira's' – thinking himself justified in asserting the right to Teira's land, and the result was a war.³¹

For once, Mackay found the miners willing to heed his warning. Reinforcing the need for caution was the presence of Te Kooti nearby; in March 1869 he was reported to be in the forest inland of Tauranga, and Te Hira warned settlers to leave Ohinemuri because he was concerned for their safety.³²

As related, Mackay resigned in March 1869. HT Clarke succeeded him as Civil Commissioner for Auckland, Waikato and the Bay of Plenty; in Hauraki Mackay was replaced by EW Puckey, occupying the new position of native officer (or native agent).³³

31. *New Zealand Herald*, 23 February 1869 (p171)

32. Mackay, 'Report by Mr Commissioner Mackay', p10

33. Document o6, p176

Others who were to take part in gold-mining negotiations were: John Thorp (the son of the pre-1840 settler Joshua Thorp), T B Gillies (who succeeded Williamson as superintendent of Auckland province), and Donald McLean, Native Minister from June 1869.

Puckey visited the Thames district in August 1869. Ropata Te Arakai told Puckey about 'opposition on the part of Taipari, Riwai Te Kiore, and Te Moananui . . . which added much to the opposition made by Te Hira and others.'³⁴ The nature of this 'opposition' remains obscure. In June, the *New Zealand Herald* reported that 'The Shortland natives are helping those natives, who are hard up, and advising them not to open Ohinemuri. It will interfere with their income, they fear.'³⁵ But the lending of material aid to kin did not necessarily imply a selfish motive.

In mid-October, Puckey attended a meeting at which the great majority were in favour of opening the land to mining, Te Moananui having called for a vote. Te Hira remained adamant in his opposition. In Puckey's words:

The chief argument made use of by those opposed to ceding the land to [the] Government was, that that course would eventuate in the loss of their land – the mana of the Queen would light down upon the land – their mana would be gone, and they would lose the land. This was replied to by Ropata's people, by saying that the benefits that would result from leasing the land would be substantial, and would be enjoyed by themselves and their children for many years, whilst they were gaining no advantage whatever.³⁶

All this while Te Kooti remained at large and the Government had to be careful not to act provocatively in Ohinemuri. In August 1869, emissaries of Te Kooti were reported by Thorp to have visited Te Hira, taught him karakia, and may have been supplied with munitions.³⁷

In October 1869, the anticipated arrival of McLean encouraged the hopes of miners, but Tukukino declared that he would resist any attempts to alienate Ohinemuri. Supporters of Ropata Te Arakai asked Thorp to appeal to the Government on their behalf for arms for, wrote Thorp, 'they are menaced by the hauhaus for taking sides with us.'³⁸

In November 1869, tempers flared at a runanga called to discuss land leasing. Te Hira was reported to have challenged his opponents to fight without the help of Pakeha. Te Hira's opponents replied that they would fight side by side with Pakeha against all Hauhau comers.³⁹ These challenges might have been rhetorical. But around this time Te Hira was seeking weapons from the suspected Fenian, O'Connor, reported as living at Ohinemuri in August 1869 'on terms of the greatest intimacy and friendship' with Te Hira.⁴⁰ In September

34. Puckey to McLean, 1 October 1869, AJHR, 1870, A-19, pp 1–2 (doc 06, p 175)

35. *New Zealand Herald*, 15 June 1869 (doc 06, p 175)

36. Puckey to McLean, 19 October 1869, AJHR, 1870, A-19, p 4 (doc 06, p 178)

37. Thorp to Cooper, 2 August 1869, Donald McLean papers, MS papers 32, ATL (Monin, p 218)

38. Thorp to McLean, 27 October 1869, MS-papers 32, folder 603, ATL (doc 06, p 179)

39. *New Zealand Herald*, 30 November 1869 (doc 06, p 182)

40. *Ibid.*, 25 August 1869 (p 194)

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1869, O'Connor was reported to have visited King Tawhiao on business for Te Hira.⁴¹ Some time during the year, he may have promised Te Hira to supply guns in exchange for the right to work gold. But O'Connor failed to supply the arms and Te Hira broke with him. Thorp reported these dealings to McLean in April 1870.⁴² However, Te Hira remained supportive of Te Kooti, invited him to Ohinemuri in January 1870, and gifted him powder and ammunition via emissaries.⁴³

Te Hira's connections with O'Connor, the Kingitanga at Te Kuiti and Te Kooti caused dissatisfaction within Ngati Tamatera, sensitive concerning their tribal autonomy. The damage was compounded in March 1870 when Puckey received a letter from Tana Te Waharoa of Ngati Haa on behalf of the King stating that Ohinemuri would be opened.⁴⁴ This revelation and the inference that Te Hira had permitted Te Waharoa to speak for Ohinemuri led to the disaffection of several of Te Hira's supporters.⁴⁵ Te Hira was censured at a meeting held in April 1870.⁴⁶

In June, senior leaders of the Kingitanga washed their hands of the matter. According to Wi Te Wheoro, Tawhiao himself said that he 'will have no voice in the matter, but that he will send a message to Te Hira recommending him to let go the land to the Europeans to be worked'.⁴⁷ Te Wheoro's next letter to McLean relayed the words of Te Paea Tiaho, sister of Tawhiao:

What you say is right. I agree to it [removing the Kingitanga's objections to mining]. I myself will send a message to Te Hira and Mere Kuru. Manuwhiri and myself have already written to Te Hira to say that if he were willing to open up Ohinemuri, he should do so without reference to us. But Te Hira was not willing to let it go – even on those terms.⁴⁸

The decision to agree to mining was for Te Hira and his sister Mere Kuru to make.

10.1.4 A different Crown agenda

After Mackay's resignation, there was little pressure from the Government to secure cession agreements. Puckey did not actively seek signatures in the way that Mackay had done. Donald McLean was by now very sensitive to strategic considerations and engaged in diplomatic approaches to the Kingitanga. He had not attended the October 1869 meeting at

41. *New Zealand Herald*, 10 September 1869 (p 194)

42. Thorp to McLean, 18 April 1870, MS papers 32, folder 603, ATL (doc 06, p 194)

43. Binney, p 201

44. *New Zealand Herald*, 30 March 1870 (doc 06, p 190)

45. Puckey to McLean, 11 April 1870, MS papers 32, folder 1022, ATL (doc 06, p 191)

46. Thorp to McLean, 29 April 1870, MS papers 32, folder 603, ATL (doc 06, pp 191–192)

47. Wi Te Wheoro to McLean, 9 June 1870, AJHR, 1870, A-21, p 25 (doc 06, pp 192–193)

48. Wi Te Wheoro to McLean, 11 June 1870, AJHR, 1870, A-21, p 26 (doc 06, p 193)

which Te Moananui had secured a vote in favour of mining, but when he did arrive on 9 December he was met by Te Hira's eloquent opposition:

I will not consent. If you give me what is not life I shall know. Of what is the use of the land after it is broken? When the land is broken, the owner perishes . . . This is my place, why do you seek after it? It is only a little piece. Let it remain to me.⁴⁹

McLean argued that each person in Ohinemuri 'should be allowed to deal with their own share as they think best'. But he counselled pro-mining Maori to be patient; he would retain what they had placed in his hands, and they should decide upon the location of reserves, in the event of the goldfield being opened.⁵⁰ He warned the miners assembled at Thorp's farm against indiscreet actions.⁵¹ Superintendent Gillies rejected their idea of paying cash advances to 'friendly' Maori:

until the negotiations show signs of success, and are put into some tangible shape as to terms, it does not appear to me prudent to make an advance to the friendly Natives, who appear to be unable to open even their own lands without the consent of their opponents.⁵²

By June 1870, the miners were losing hope and Puckey wrote to McLean that there was 'nothing new about Ohinemuri except that diggers are leaving it'.⁵³ Thorp continued attend Maori meetings and in October 1870 wrote to McLean urging the Government to act, yet in November he was writing again to complain of having received no response.⁵⁴

This Government diffidence may have been prompted by stiffening support for Te Hira; by December Te Moananui was residing at Ohinemuri and, wrote Puckey, 'will not fail to do all in his power to retard the opening of that part of the country'.⁵⁵ Te Moananui's disaffection with gold mining is difficult to interpret. He had received fairly substantial but declining goldfield revenues but distributed much of them to his people. In August 1870, he had failed to honour a promissory note and had departed for the King country to evade bailiffs.⁵⁶ He returned to Thames after the Government advanced £300 to his creditor. This episode may have been a proximate cause of his firm alliance with Te Hira.

49. Te Hira Te Tui, 'Notes of a Meeting which Took Place at Ohinemuri on 9 December 1869', AJHR, 1870, A-19, p10 (Monin, p 220)

50. 'Ibid, pp 8-11 (doc A8, p 198; doc 06, p 183)

51. *New Zealand Herald*, 13 September 1869 (doc 06, p 183)

52. Gillies to McLean, 'Correspondence Relative to Ohinemuri and Native Matters at the Thames', 9 February 1870, AJHR, 1870, A-19, pp 1-16 (doc A8, p 198)

53. Puckey to McLean, 25 July 1870, MS papers 32, folder 518, ATL (doc 06, p 195)

54. Thorp to McLean, 6 October 1870; Thorp to McLean, 11 November 1870, MS papers 32, folder 603, ATL (doc 06, p 196)

55. Puckey to McLean, 28 December 1870, MS papers 32, folder 518, ATL (doc 06, p 196)

56. Clarke to McLean, 31 August 1870; Pollen to McLean, 2 September 1870, Donald McLean papers, MS papers 32, ATL (Monin, p 229)

But Te Moananui's earlier support for gold mining was hardly wholehearted. Some Ngati Tamatera had adopted the strategy of ceding their lands at Coromandel whilst retaining the upper Thames district. Te Moananui's opposition to Te Hira's handing the block over to the King is not inconsistent with his making common cause with him in retaining control of it. When concessions had to be made from 1874, Te Hira and Te Moananui were willing to sell Moehau and Waikawau before surrendering the gold in Ohinemuri.

Rather than pursuing a mining cession, Government action was directed to three other areas: bringing the Native Land Court to Ohinemuri, completing the Auckland-Tauranga telegraph line, and eventually, purchasing the block. The best explanation of the Government's tactics is therefore that its goals had changed, or arguably reverted to the original primary goal of purchasing the freehold of land, either for mining or settlement. Opening fresh fields to mining was no longer urgently required as a source of social and economic growth. But a pressing concern was preventing private speculators from signing leases or purchasing land once it had passed through the Native Land Court.

10.1.5 The mail and the telegraph

Maori leaders were often opposed to the passage of the telegraph through their rohe, viewing it as the first step towards Pakeha settlement and stronger Government control. In 1871, encouraged by the Kingitanga, and supported by Ngati Porou at Mataora, Te Hira stopped the mail being carried from Ohinemuri to Waihi. Thorp reported that 'only some 70 old men' were so opposed and that most local Maori would accept a show of Government force on the issue.⁵⁷ McLean did threaten to arrest Te Hira, but that only increased his ire, and McLean's action was criticised in the local press. The officials returned to diplomacy.

In the latter half of 1871, the telegraph reached Shortland; Maori were bitterly divided over allowing its extension to Tauranga. Mackay, though not then in Government employ, and, taking advantage of jealousies between Te Moananui and Te Hira, succeeded in negotiating the telegraph's extension. It was understood that Te Hira could continue to oppose verbally; and that, as payment, Tukukino's hapu, Te Kiriwera, could muru Andrew's store at Paeroa (the only one permitted by Te Hira and Mere Kuru) to the tune of £80 or £90. On New Year's Day 1872 at Bowentown, the venerable Hori Tupaea turned the first sod for the telegraph; Te Hira sent two of his nephews to endorse the proceedings tacitly. Tukukino still opposed the mail, but after further diplomacy it was allowed through.⁵⁸ A regular steam-launch service was commenced up the Waihou to Ohinemuri and in May 1872, Te Hira, Mere Kuru and Te Moananui joined in petitioning the provincial government for a subsidy to maintain it.⁵⁹

57. Document 06, p 216

58. Ibid, pp 221-226

59. Ibid, p 230

Maori soon made regular use of these services, earning income from working on the telegraph and supplying timber for poles. They planted potatoes in the land cleared for the line, and their produce again reached the Auckland market.⁶⁰ The question remained, however, whether, as Te Hira had feared, this involvement would draw them inexorably into sale of land.

10.1.6 The advent of the Native Land Court

The Native Land Court will be discussed substantially in chapters 15 to 18, but in this context we note that, in contrast to the telegraph line, in Ohinemuri the court was relatively welcome. Part of the motivation was that private interests were active in pursuing purchases, leases or timber rights agreements, offering prices attractive to Maori as gold revenues declined. Private purchases occurred on the Waihou and behind Shortland in the late 1860s. Some Ohinemuri right-owners also began surveying in 1869, apparently with a view to private leasing. An attempt by private interests to survey a township at Paeroa was, however, blocked by Te Hira and Mere Kuru. Because of the intersecting rights of various tribes in Ohinemuri, and because non-Marutuahu groups such as Ngati Koi (or Ngati Tara) were pressing their claims to the land, it began to seem useful to groups opposed to mining to have their rights clarified by the court.

For their part, Government officials encouraged the court's adjudication of rights in Ohinemuri to break the impasse over gold mining. By 1870, those who had surveyed were ready to make application for a hearing. The court heard the Ohinemuri block in Auckland on 5 May 1870, having postponed it earlier because not all parties were ready to participate. At the hearing, the lawyer John Sheehan, under instruction from Te Hira, moved that the court adjourn to Ohinemuri. Despite pessimistic expectations of Te Hira's and Mere Kuru's support, on 17 May 1870 the court sat in Te Hira's meeting house with him and Mere Kuru in attendance. Mackay represented Te Hira, Te Moananui and all the Ngati Tamatera and Ngati Paoa respondents to the Ngati Koi applicants.⁶¹

An important element of the complex debates concerning the application was Ngati Tamatera fury that, first in the Owcharoa block, then in Waihi (Ohinemuri), Ngati Koi (Ngati Tara), whom they considered rahi to them, should claim the land. Even before the court gave its decision on Owcharoa, Te Moananui had taken a taua to Waihi to muru the Ngati Koi settlement. The court awarded Owcharoa to Ngati Koi and then had to adjourn hastily for fear of violence from Ngati Tamatera. When it resumed in Shortland in October, Te Hira and his group were awarded Waihi, but afterwards verbally recognised some Ngati Koi

60. Ibid

61. Ibid, pp197–201

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rights, provided they did not sell the land. Hauraki Maori did not reject the court outright but sought to pursue their own goals through it.⁶²

The Owharoa decision indicated the legal import of Mackay's 1868 agreement with Ropata Te Arakai and others. McLean ordered that Theophilus Heale (district surveyor at Tauranga) bring it to the court's attention, with the request that no certificate of title be issued without a restriction vesting in the Government the right to regulate the mining of gold. When the Owharoa award was made to Ngati Koi – parties to the 1868 agreement – a 'restrictive clause maintaining the agreement' was added. When Puckey asked for a similar addition to the Waihi award five months later, the court ruled that this would only be done if the grantees were party to the 1868 agreement.⁶³ This episode probably contributed to the Government's subsequent decision to proclaim a pre-emptive right over any Hauraki land thought to be auriferous.

Mackay now reappeared in new roles: as a representative for Te Hira and others in the court, and then as a Land Purchase Agent for the Crown. The Crown had recommenced large-scale and systematic land purchasing from 1871, empowered by the Immigration and Public Works Amendment Act 1871 to issue proclamations debarring private transactions over lands for which it wished to negotiate. The entire Coromandel Peninsula and the Hauraki Plains southward to Te Aroha were brought under this provision in 1872 and 1874, although an amendment to the 1872 proclamation exempted the cultivable land on the east bank of the Waihou and the reserves within the goldfield cessions, lands deemed most suitable for close settlement.⁶⁴ In March 1872, Mackay was appointed by JD Ormond, Minister for Public Works, on commission of fourpence per acre, to purchase the Waikawau, Moehau, and Ohinemuri blocks.

10.1.7 Raihana and other advances against land

From his commissioning as Crown agent in 1872, and although the land had not yet gone through the land court, Mackay began to pay individuals he considered to be right-owners raihana (licences for store goods) or advances for their interests or both. This contentious issue impacted upon Ohinemuri probably more than on any other Hauraki block. The questions at issue are whether Mackay's advances constituted reasonable and appropriate credit arrangements, or whether they amounted to ensnaring Maori in a debt trap.

Dr Battersby describes the 'food and other items obtained by Maori from general store-keepers, which were drawn on pre-approved orders [licences or raihana] from the government'. He cites contemporary evidence that the term came to be extended to include 'orders for goods given or satisfied by land purchase agents on security of land, or an advance in

62. Document 06, pp 204–209

63. Memorandum to Heale, 14 May 1870, 6 June 1870, AJHR, 1870, A-19, p 12 (doc 06, pp 210–211)

64. Document A8, pp 201–202

part payment of land'. But he suggests that raihana were 'not cash, or cash advances . . . Cash advances on land were usually the result of negotiations between a land agent and a Maori owner for the sale of land, or land interests', a payment for an individual's complete interest (in a multiple title), or a deposit on the balance, to be paid over at the completion of the sale.⁶⁵

The practice of issuing raihana seems to have emerged from the emergency credit arrangements made to help Waikato Maori resettle after the dislocation of war. At the time, Mackay, then a judge of the Compensation Court, was irritated that Maori ordered goods and charged them to Mackay privately or to the Government. He issued a notice saying that the Government would not redeem such orders. He also suggested that advances for food, seed potatoes and agricultural implements be redeemed by days of labour rather than held as a lien on the crop. However, Dr Battersby suggests that, as a private land agent, Mackay fell in with the usual practice of settling small sums outstanding at stores or providing food or other supplies at Maori request.⁶⁶ Dr Battersby argues that Crown agents often recognised real need: when Rawiri Taiporutu's wife died in 1880, he asked Wilkinson for £40 for the tangi and the cost of a coffin, but despite Wilkinson's pleading the Government authorised only £3. Again, when many Maori came from a distance to attend the court hearing of Ohinemuri, Wilkinson asked for food supplies for them, and was scathing when only £25 was authorised.⁶⁷

Dr Anderson's evidence suggests that the sums advanced against Ohinemuri were relatively small before 1872, but later hakari and tangi costs involved advances of a different order. John Thorp estimated that £3000 was spent on food for Taraia's tangi in March and April 1872. Mackay later revealed his opportunism in relation to that event:

After I was instructed to purchase these blocks, I attempted in vain to get the Hauhaus to treat for the sale of them to the Government. They refused to take 'the Governor's money'. At this time the old and influential chief Taraia Ngakuti died . . . and a very grand feast was contemplated, and although the obstructives would not take money they joined the friendly natives (secretly) in procuring some thousands of pounds worth of flour, sugar, tobacco, tea, bullocks, sheep and clothing.⁶⁸

Mackay sought and received from provincial superintendant Gillies an advance of £2000 for the purpose.⁶⁹ He told the Audit Department that it had first been arranged that the supplies should be charged against Waikawau (for which a preliminary sale agreement was drawn up and signed at or near the time of the tangi) but that 'as some members of the

65. Document 06, pp 231–232

66. Ibid, pp 232–233

67. Ibid, pp 270–271

68. Mackay, memorandum, 26 August 1875 (doc A8, p 220)

69. Document A8, p 219

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tribe had no interest in it, portions of the first and subsequent advances were charged to the Moehau and Ohinemuri blocks.⁷⁰ Discussions at meetings in 1874 show that many Maori owners of interests in these blocks either did not know of these arrangements or did not understand their implications.

Senior rangatira became concerned at the tendency to charge such costs against land, and sought to control it by treating the land as under Te Hira's authority. Te Moananui warned:

If any Pakeha wanted land at Ohinemuri, let him go to Te Hira . . . Let them not go to the owners of the land, for the mana (*authority*) is in the hands of Te Hira. The Pakehas would only waste money by paying it to those who go into the European's townships and ask for grog; and when asked for payment, say it will come from the lands at Ohinemuri.⁷¹

There was clearly concern among Maori that debts for liquor would be charged against land, though if detected this would, by the terms of the Native Lands Frauds Prevention Act 1870, have invalidated a transaction. Whether for this reason or not, Puckey and Mackay seemed alert to prevent liquor being charged as raihana. But Mackay hoped that, if enough Ngati Tamatera were brought into the sale of Ohinemuri by means of his payments to individuals or heads of hapu, Te Hira would not be able to 'stand alone against the wishes of the whole tribe.'⁷²

Various figures presented in evidence are difficult to reconcile. Notwithstanding Taraia's tangi, an official return cited by Dr Anderson indicates that less than £1500 had been charged against Ohinemuri up to early 1873, and £13,966 against Waikawau and Moehau.⁷³ Yet, in December 1872, Mackay informed McLean that Ngati Tamatera's debt overall approached £26,000. He suggested its possible apportionment against the main blocks under negotiation:

Moehau block as surveyed contains 54,827 acres. The Waikawau block 44,161 acres . . . From this has been deducted for reserves, and lands owned by tribes other than Ngati Tamatera, leaving a balance of 63,008 acres available for purchase from the Ngati Tamatera. To this may be added the Waikanae block containing 2,738 acres, making a total of 65,746 acres which at 3/- per acre amounts to £9,861.18.0 or say £10,000. The sum advanced to that tribe to the present date is about £25,000 which would leave say the sum of £16,000 to be provided for within the Ohinemuri district, including land on the west of River Waihou.⁷⁴

This statement explains Dr Anderson's comment that 'Mackay continued to advance monies after he considered the value of Waikawau and Moehau to be used up, so that the

70. Document A8, p 220

71. *New Zealand Herald*, 6 June 1873 (doc 06, p 235)

72. Mackay to Minister for Public Works, 22 June 1872 (doc A8, p 225)

73. James Mackay, 'Blocks under Negotiation but Price Not Finally Arranged', 24 March 1873, AJHR, 1873, G-8, p 13 (doc A8, pp 220-221)

74. James Mackay, 'Report to Native Minister', 3 December 1872, NLP75/117 (doc A8, p 225)

debt would begin to accumulate against their [Ngati Tamatera] interests at Ohinemuri.⁷⁵ The debt against Ohinemuri escalated in the next two years, largely as a result of store accounts charged by Maori against the block while Mackay was absent in Waikato from May 1873 to June 1874. At a great assembly at Whakatiwai in August 1874, a number of temporary stores and a bakery sold food, drink, and clothing to the thousands who attended.⁷⁶ At the end of 1874 Mackay denied that he had encouraged the practice – rather the opposite – but had accepted the charges on his return, partly, he said, to save members of Ngati Tamatera from imprisonment for debt.⁷⁷

10.2 THE LEASING OF OHINEMURI

As a result of the mounting debts against the land, the attitudes of the Government and former Maori objectors to gold mining were reversed. All the objectors bar Te Moananui came to accept mining as the best means of discharging debt. But the Government, now in pursuit of the fee simple title to the land, was less than eager.

Leasing and sale of land were prominent topics at a large hui at Whakatiwai in July and August 1874; so too was raihana, now the subject of serious criticism in the local press. But Mackay produced a pocketful of receipts for store debts which he said were forced upon him for blocks from Moehau to Te Aroha. The tribal leaders were clearly embarrassed and concerned, and met to try to find ways of dealing with the problem, now out in the open.

Mackay sought to embarrass Te Hira with details of raihana taken by his relatives, and asserted that Ohinemuri was now open. When Te Hira retorted that McLean, the Governor and Mackay himself had acknowledged that Ohinemuri was in his keeping, Mackay replied, 'Separate your own pieces from those of others, and keep them to yourself, pieces owned by other people are gone.' There were angry exchanges, Mackay asserting that Mere Kuru had received raihana and Mere denying it. Te Moananui blamed Mackay for failing to cease issuing or accepting orders on goods, and charging them against land. Te Hira said that Mackay had no right to charge him with what the young people had done. Again Mackay took the line of individual responsibility for individual interests in land: 'what solely belongs to you, you can keep solely for yourself'.⁷⁸

Te Hira, although still opposed to gold mining in Ohinemuri, reluctantly agreed to negotiate.⁷⁹ Another large meeting was held at Ohinemuri on 10 November 1874 at which Mackay put the question as to how the cash advances were to be redeemed. Many in the

75. Document E2, p 71

76. *Thames Advertiser*, 5, 8, 14, 17, 20 August 1874 (doc 06, pp 241–242)

77. Document A8, p 223

78. *Thames Advertiser*, 24 August 1874 (doc 06, pp 244–245)

79. *Ibid*, 22 October 1874 (p 247)

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past opposed to gold mining were now in support of it as the lesser of two evils as compared to land sales. Mackay met with each hapu in turn to go over the accounts and ascertain the debt of each.

Mackay also tried to explain in the local press his involvement with raihana. He asserted that he had never asked Maori to take orders for goods, instead of cash, for payment in land:

The difficulty I have to contend with . . . is to withstand the innumerable applications made to me for money and goods, and to find out which of the persons asking for payment or preliminary deposit is entitled to the land . . . The result of giving orders for goods is not at all satisfactory to me . . . I have to pay the storekeeper whether I get the money or not, and I frequently lose money by mistakes in accounts, and by natives repudiating the receipt of articles they have applied for on behalf of friends and relatives . . . I claim niether profit on [the goods] or interest on the money, which I frequently pay to storekeepers long before it can be charged against the land, and be refunded by the Government. I have therefore given these orders to oblige the natives, and to enable me to obtain lands which they would not sell for money down. It must not however, be assumed that I have paid for land with goods only. Many blocks have been purchased for cash, and nothing else; in all other cases payment has been in money and goods.⁸⁰

Meanwhile, hapu leaders had been amazed and troubled at the levels of debt revealed by Mackay as having accumulated against the land. A newspaper correspondent reported that they 'are tortured to think the land that the soil they almost worshipped must go, and yet cannot clearly see any other way of escape'. Informed of a debt of £5067 against Ngati Tawhaki, the hapu of Te Moananui, the latter accused Mackay of impatience and would not meet him, but he did not repudiate the debt. Te Hira said that his people's debts would have to be redeemed against other lands, not Ohinemuri.⁸¹ At a further meeting at Pukatea-wairahi on 19 October, Hohepa Te Rauhihi pointed out to Mackay that Te Hira, Te Moananui, and others had told him to stop issuing raihana. Mackay acknowledged that this was so, but those who had urged such a course 'were among the first to apply for more. He would rather have paid them in cash, but they themselves had pestered him for orders to get goods.'⁸²

At this meeting, serious discussion began concerning the apportionment of the £26,000 debt which lay over Ohinemuri, Waikawau, and Moehau. Mackay said he had over 100 signed receipts relating specifically to Ohinemuri for over £15,000, and pressed for the transfer of the block. The Maori leaders asked for the debt to be redeemed against the other two blocks. Ngati Koi and Whakatohea, however, said they had no interests outside Ohinemuri and would give up some of the land rather than live under obligation to others. By 28 November,

80. *Thames Advertiser*, 14 November 1874 (p 249)

81. *Ibid*, 18 November 1874 (pp 250–251)

82. *Ibid*, 20 November 1874 (p 252)

with Waikawau and Moehau in principle given up, the interests of the various hapu in those blocks were agreed and the balance still lying against Ohinemuri considered.

Now, perhaps for the first time, there was serious discussion of the per acre valuation of the land. Te Moananui and the runanga asked for 10 shillings an acre. Mackay considered this greatly excessive; in his view, most of the good land had been reserved or sold and much saleable timber already cut off the remainder. He stated that when the cash or goods was paid over to Maori it was understood that the price would be the established price for land of similar description in the vicinity. That, he said was on average 2s 4d an acre, as in the Waikawau–Moehau area. The bitter debate continued, with many Maori debtors agreeing to give up their interests in Ohinemuri, and Te Moananui, Tukukino and the Kiriwera hapu still refusing. Mackay told waiting settlers that if these chiefs did not agree to settle their debts he would ignore them and take much of Ohinemuri anyway, within certain boundaries.

However, on 3 December 1874 Mackay reported to McLean a possible solution. The ‘Hauhau’ and ‘neutral’ parties proposed that the right to mine for gold should be ceded, the revenues to expunge the £15,000 debt charged against Ohinemuri: ‘In the event of the country not proving auriferous, then land equivalent to the amount advanced to be conveyed to the Crown.’ Mackay remarked that ‘The only person making any strenuous objection to the above scheme is Te Moananui.’ Mackay argued that a mining lease could be obtained sooner than a purchase completed, and without the serious difficulties that still stood in the way of the latter.⁸³ It is not entirely clear from whom the proposal emanated. Te Hira had been suggesting that the debts be paid from timber and kauri gum revenue, but Mackay rejected that as impracticable, and later claimed that he had suggested payment via the gold revenue.⁸⁴

McLean replied immediately, revising Mackay’s previous instructions:

The Government recognising the importance of opening the Ohinemuri country as a Gold Field and finding that the Native owners do not desire to alienate the fee simple are prepared to accept the cession of say 60,000 acres in that district as a Gold Field, the natives receiving the fees from miners rights and other revenue after advances made by Mackay have been recouped.⁸⁵

Mining arrangements now began to fall into place. On 7 December another large meeting was held, and the issue of redeeming the debts again brought up:

Considerable discussion ensued as to whether the land or the gold should be given up. It was put to the meeting, and decided unanimously that the gold should be given up, and the land be placed in Te Hira’s hands, as trustee for the tribe.⁸⁶

83. Mackay to Native Minister, 3 December 1874. MA-MLP1881/246 (doc A10, pt 3, p 4)

84. *Thames Advertiser*, 21 December 1874 (doc 06, p 262)

85. McLean to Mackay (memorandum), 4 December 1874, MA13/54b, Archives NZ (doc 06, p 257)

86. *Thames Advertiser*, 8 December 1874 (doc 06, p 258)

The next day was spent arranging boundaries and reserves. The 1868 advance of £1500 to Ropata Te Arakai was explained by Mackay, who said he had 'given Ropata Te Pokiha an order for £1500 in December 1868, with the understanding that £1000 would be by way of advance on account of miners' rights fees receivable, and the remaining £500 by way of bonus.' He agreed to honour the bonus and would consider whether it should be deducted from the debt owing.⁸⁷

On 11 December 1874, Donald McLean arrived at Thames to complete the negotiations, and the bitter debate revived. Te Moananui criticised the lack of openness in the raihana system:

If my land is paid for with that which I do not know the cost of, I shall not know how much I am getting for it; if it were done in a straightforward manner in accordance with what I wish for it would be different. I thought there was good in that which I saw and wished for, but it was diverted and so a deep pit was yawning behind.⁸⁸

Te Moananui demanded of McLean: 'From whom did this ration system emanate? Was it from the Queen? or the Governor? or from yourself? Or from the Land Purchase Agents?' Mackay replied, 'you yourselves began it'. Te Moananui retorted, 'I learnt it from you', and demanded to know what was the best value of guns, flour, and coils of rope. McLean said, 'Money was the correct payment for land.'⁸⁹ Dr Battersby comments that 'This was the answer that Te Moananui was looking for and called on the government to deal in land with money.'⁹⁰

Relating to the issue of price, Mackay stated, 'I have paid large sums of money by your direction for orders, you said nothing about 10/- an acre then, nor did you complain, if you had asked that price you should not have received the money'. Both men, and Te Hira, then spoke of their efforts to stop the storekeepers giving Maori goods on credit. Te Hira referred to his public warnings to 'the Pakeha' (storekeepers?) that no debts would be allowed by him against Ohinemuri, 'however they paid no attention to me'.⁹¹

Te Moananui and Te Hira again pressed for the debt to be charged against Moehau and Waikawau blocks, not Ohinemuri. Mackay remained adamant: 'What has been written down in black and white cannot be expunged. I am unable to charge the Moehau and Waikawau Blocks with the indebtedness of Ngatikoi, Ngatitaharua, Te Uriwha and Ngatipinenga'.⁹²

87. *Thames Advertiser*, 10 December 1874 (pp 258–259)

88. 'Proceedings of Native Meeting Held at Thames on 11th and 12th of December 1874', MS papers 2520, ATL, pp 8–9 (doc A8(a), pp 553–554)

89. *Ibid*

90. Document 06, p 260

91. 'Proceedings of Native Meeting Held at Thames on 11th and 12th of December 1874', pp 18–20 (doc A8(a), pp 563–565)

92. *Ibid*, p 24 (p 569)

As to whether the land was implicated in the arrangement as well as the gold, Mackay stated to Te Hira that a division had been made:

you are to have the land, and I am to have the gold; this has been agreed to by the tribe and there is nothing else to say, the people have received payments on the land outside and on Ohinemuri, also in which you participated; this is the arrangement you are to have the land and I am to have the gold.⁹³

Mackay took credit for this division since, he said, *both* had already been conceded at the Pukatea-wairahi meeting: ‘your people not only gave me the gold, but also the land. It is I who proposed to accept the gold and to leave the fee simple of the land.’ Te Hira then observed: ‘There is gold sufficient upon the blocks I have already agreed to sell, upon Waikawau, Moehau, Te Puru and others.’ If gold were not found on Ohinemuri, the land would then have to be taken to pay the debt, therefore, ‘let the land already given be sufficient’. Either he had discerned or the officials had clarified that acceding to the mining arrangements afforded no absolute protection for Ohinemuri land.⁹⁴ However, on 22 December 1874 Te Hira withdrew his opposition.⁹⁵

In February 1875, Mackay and McLean finalised a mining lease. The goldfield revenues would, as discussed in the late 1874 meetings, be paid to the Crown towards repayment of the raihana issued – some £15,000 worth – against the purchase of the land.⁹⁶ The agreement covered gold and other minerals, gum, and coal. Official interest in coal in Hauraki came from discoveries at Miranda and in Ohinemuri itself (a discovery apparently kept secret from Maori by the prospectors who found it).⁹⁷ As in Thames, rights to cut timber went with miner’s rights, except for kauri, which was to be sold in lots by public auction subject to the right of miners to purchase trees at the standard 25 shillings per tree. Miner’s rights fees and rents would be charged and paid to the Crown. Significantly, the agreement also gave the Crown the right to grant agricultural leases under regulations in accordance with the Gold Fields Act then in force. The Crown had long been interested in the district for settlement purposes.

As drawn, the lease was between the Governor on the one part, and ‘the Chiefs and people of the tribe Ngatitamatera of Hauraki’ on the other. It appears that, at the official signing on 18 February 1875, in the presence of Pollen, McLean, and Puckey, 88 Maori signed or affixed their marks (both to the deed and to the boundary description and plan drawn

93. Ibid, p 12 (p 557)

94. *Thames Advertiser*, 21 December 1874 (doc 06, p 263)

95. Ibid, 23 December 1874 (p 264)

96. Henry Hanson Turton, *An Epitome of Official Documents Relative to Native Affairs and Land Purchases in the North Island of New Zealand* (Wellington: Government Printer, 1883), Auckland deed 835, deed 391A, pp 543–548

97. Document A8, p 227

on the back of the deed). They included Te Hira and Mere Kuru. Tukukino did not sign and subsequently refused to recognise the lease where it affected land in which he claimed interests. Meha Te Moananui's name does not appear either, although Hirawa Te Moananui, presumably his teina, did sign.

There was subsequently an allegation by some Hikutaia Maori (reported through Henry Alley, the purchaser of McCaskill's land) that Te Moananui received a personal advance on miner's rights fees, authorised by McLean, as an inducement to accepting the lease. Indeed there are eight entries in the table of 'payments of the £15,000' drawn up for the MacCormick commission, five on 10 November 1874 and three on 18 November 1874, specifically identified as 'advances against future payments'; they were the only entries in the list so described. The entries for 18 November include £718 to Meha Te Moananui.⁹⁸ The item is puzzling, given that Te Moananui was still strenuously opposing the mining agreement in the December meetings, and appears to have taken no part in the subsequent agreement. By the time purchasing of Ohinemuri resumed in 1877, he had died.⁹⁹

The signatories to the February 1875 agreement include a number of people recognisably from iwi other than Ngati Tamatera, including Ngakapa Whanaunga of Ngati Whanaunga and Tamati Paetai of Ngati Pu, but hapu or iwi affiliations are not noted on the deed, and most names do not otherwise appear in the documentary record. There were four subsequent signings, some at least at Shortland, before 24 March, organised by George Wilkinson (licensed interpreter) and witnessed by various settlers. These resulted in a further 61 names being added to the deed. There was no Maori-language version of the deed, but Wilkinson certified that he had translated it at each signing and that his translation was 'perfectly understood' by the Maori signatories. (Another licensed interpreter, Mackay's clerk, John Guilding, was present at the two main signings.¹⁰⁰) The Ohinemuri goldfield block was proclaimed under the Gold Fields Act 1866 and not under the Gold Districts Act 1873, which imposed some limitations on the kind of mining leases that could be issued.

When the Ohinemuri lease was proclaimed, a section of Hikutaia right-owners petitioned the Auckland superintendent (George Grey) in March 1875: they had not known that coal was to be included in the lease.¹⁰¹ Others also were unhappy: the lease (and the

98. 'Statement of the Facts and Circumstances Affecting the Ohinemuri Block', goldfields special block file MA13/35(b), Archives NZ (doc A8(a), pp 1026–1237). Dr Anderson has cited Puckey's report of 31 July 1880 as supportive of the Hikutaia allegation but this is incorrect – Puckey was referring to the advances made to Te Moananui and others in the Thames negotiations of 1867, discussed in the previous chapter: see EW Puckey, 31 July 1880, in Hauraki goldfield petition, Treasury statement, MA13/35(c) [MA13/35g], Archives NZ (doc A8(a), pp 686–692); Alley to Grey, 29 March 1875, Auckland Provincial Government general correspondence, AP2 29/280/75 (doc A8(a), pp 574–577).

99. Monin, p 243

100. Turton, pp 543–548. Mackay also told the Native Affairs Committee that he explained each paragraph 'three times': 'Petition of Epiha Taha and Other Natives of Ohinemuri Brought before Parliament and Select Committees', 18 August 1875, Le 1/1875/12 (doc A8(a), pp 578–614).

101. Document A8, p 227

proclaimed goldfield) covered 132,175 acres, an area that included the land of right-owners who had not received advances or been party to the 1875 lease agreement. Members of Ngati Hako and Whakatohea (led by Epiha Taha) petitioned the Native Affairs Committee in 1875, and again in 1876 (under Aperahama Tupu). Mackay told the committee in 1875 that the petition was instigated by Pakeha who wanted to make separate and private arrangements about coal. He claimed the petitioners were 'rahi' to Ngati Tamatera, whose chiefs could speak for them. He maintained that some of the petitioners had been present when coal was discussed, and one of their principal men, Pineaha Te Wharekohai had signed the deed. After confusing evidence about tribal relationships, the committee recommended that they should state their case to the Native Land Court.¹⁰² Included also in the leased area were promised, but unmarked, reserves at Mataora and Waihi. The last in particular was to lead to confrontations between Maori who had been promised the reserve and miners wanting to gain access to its gold.

Te Hira hoped that the land would eventually be cleared of debt and returned to Maori ownership. Paul Monin records him as stating, 'Although he [McLean] might take the flesh, [Ngati Tamatera] would keep the bone . . . The gold has been given to you . . . and when all our debts are paid you can give [the land] back to us.'¹⁰³ His view was that the mining agreement set a new boundary to Pakeha settlement, as 'Sir Donald McLean had promised him . . . that no new Europeans should be allowed to settle on lands south of the Gold Fields line.' He objected to a settler, George Cribb erecting a hut on the line of road from Paeroa to Mackaytown.¹⁰⁴

10.3 CROWN PURCHASING OF OHINEMURI

10.3.1 Purchasing resumes, 1877

With the completion of the Ohinemuri mining agreement, the Government had hoped to dispense with commissioned land purchase agents, but (partly because his 1872 instructions were about *purchase* of Ohinemuri, not a mining lease, and his remuneration for the latter was unclear) Mackay was retained as a commissioned agent until 1878. He was instructed first by McLean and then by Pollen to stop the raihana system and pay only in cash. 'Nothing but evil will come of your practice', Pollen wrote in December 1875. Mackay said he had issued no store orders since 10 June 1875, and was glad to stop because he had laid out £4000 in advances and was unsure of recovering the money. (Indeed, he quarrelled

102. Ibid, pp 229–231; 'Petition of Epiha Taha and Other Natives of Ohinemuri Brought before Parliament and Select Committees', 18 August 1875, Le 1/1875/12 (doc A8(a), pp 578–614)

103. *Thames Advertiser*, 19 February 1875 (Monin, p 243)

104. Document A8, p 229. This hut was in the contiguous Te Aroha block.

with the Government over his terms of employment and in 1880, still privately saddled with some of the expenses he had ‘incurred on behalf of Govt’, declared that he would take no further part in land purchase transactions.¹⁰⁵)

Before long, Crown purchasing of Ohinemuri resumed. The MacCormick commission believed that it recommenced as early as July 1877.¹⁰⁶ The 1875 leasing arrangement was in fact seen in Wellington as a poor return for the money laid out in advances. It was also poorly regarded by local bodies (the Thames Borough Council and various highway district boards which replaced the provinces in 1876), which pressed for the purchase of the freehold.¹⁰⁷ Their demand was supported by the fact that, in the early years of its opening, the Ohinemuri goldfield was not very productive.¹⁰⁸ Administrative costs were high, made more so by the complexities involved. From the Government’s point of view, the solution was to extinguish the difficulties by purchasing the freehold. In Dr Battersby’s words, the decision was made ‘to re-purchase, with cash, interests for which raihana or cash advances had been given before 1875, and to complete the sale by purchasing such other unsold interests as could be acquired’.¹⁰⁹

Early in 1878, a deed of purchase was drawn up for Ohinemuri (see sec 10.3.2). Purchasing of individual interests resumed under Mackay, at the rate of five shillings an acre, and was continued by G T Wilkinson and E W Puckey. Maori needed cash in a money economy and, with the goldfield revenues going to the Crown, had limited sources of income. Some took out miner’s rights and others worked as casual labour, but these activities provided little income. Maori felt that they had lost control of the land as a result of the 1875 agreement, which left them little room to make alternative uses of the land. Although goldfields warden Harry Kenrick seems to have consulted with the owners, virtually all commercial arrangements had to be mediated through him. Although mining was confined to very small areas, much of Ohinemuri passed quickly under agricultural leases, 96 of which had been issued by 1878. In 1882, Ohinemuri Maori complained to Richard Gill, the under-secretary of the Native Land Purchase Department, that the best agricultural land had been leased.¹¹⁰ In these circumstances, many individuals sold their interests in the freehold, and by 1879 Government agents had acquired some 260 signatures, which they estimated would entitle the Crown to two-thirds of the block. The main resistance still came from the Kiriwera hapu of Ngati Tamatera, residing at Komata and led by Tukukino.¹¹¹

105. Document 06, p 269

106. ‘Statement of the Facts and Circumstances Affecting the Ohinemuri Block’ (doc A8(a), pp 1026–1237)

107. Document A8, p 261

108. Document 06, p 271

109. *Ibid*, p 282

110. Gill to Native Minister, 29 July 1882 (doc A8, p 261); ‘Return of Goldfields Revenue from August 1867 to June 1882’, MD1 82/714 (doc A8, p 269)

111. Document 06, pp 271–272

10.3.2 Allocating the debt

In 1880, against considerable Maori opposition, Wilkinson brought Ohinemuri before the Native Land Court, with a view to having the various hapu interests defined and the outstanding debt allocated against them.

The question arises as to whether the £15,000 that Mackay advanced against Ohinemuri was against purchase of the freehold, or was 'a consideration for the right to proclaim and possibly, to occupy the gold fields, rather than on account of purchase'. In 1883, the Native Affairs Committee considered the issue in relation to a petition from the Thames County Council, which sought a determination that the advances constituted a legal purchase of land.¹¹² The committee rejected the county council's contention that the Government had commenced to purchase 'from the moment it first paid any sum of money to the Natives, which might by law have been assessed at any time in land to the value thereof by the Land Court'. Instead, it concluded that 'the evidence before the Committee is that the sum of £15,000 was not paid on account of purchase but was really a payment for the right to proclaim, and perhaps to occupy the gold fields.'¹¹³

Possibly, the committee was influenced by the fact that the Crown, when it decided to resume purchasing in 1877–78, paid the right-owners regardless of whether they had received pre-1875 payments (advances on mining revenue) or not. The committee's finding is nevertheless puzzling in that the documentary record shows that from 1872 to 1874 Mackay was employed to purchase the *freehold* of Ohinemuri (as well as other Hauraki blocks). Although his 1868–69 provisional agreement with Ropata Te Arakai and others had clearly involved a payment for a mining cession, the available documentation (quoted above) indicates that, once he had accepted the Government commission to purchase land in March 1872, Mackay regarded his payments against Waikawau, Moehau, and Ohinemuri to be payments for the freehold; he turned back to the negotiation of a mining lease only in the meetings of late 1874. Moreover, by producing the receipts or vouchers at those meetings, Mackay obliged a number of Maori present to acknowledge that they had accepted payment chargeable against the *land*, not miner's rights fees.¹¹⁴ The MacCormick commission of 1939–40 also quotes evidence from both before and after 1875 showing that Mackay's advances were on account of the purchase of the freehold.¹¹⁵

The MacCormick commission noted that:

Reference to the actual Deed of Conveyance [of the freehold] itself does not help as it is undated, but it does not seem that any further evidence upon the point is required. The

112. Thames county petition, in 'Statement of the Facts and Circumstances Affecting the Ohinemuri Block' (doc A8(a), pp 1026–1237)

113. Document A8, pp 262–263

114. *Ibid*, p 270

115. 'Statement of the Facts and Circumstances Affecting the Ohinemuri Block' (doc A8(a), pp 1026–1237)

[cession] Deed of 1875 broke into the purchase negotiations for a time but they were revived later upon the same Deed of Conveyance.¹¹⁶

This statement is puzzling in that it assumes that an undated deed of conveyance of the freehold existed before 1875. But there is no evidence that such a deed existed. If it had, Mackay would surely have produced it at the meetings in 1874, whereas he produced only vouchers and receipts.¹¹⁷ The purchase deed was drawn up only in 1878 after the purchasing of freehold interests had resumed in 1877. The deed was explained by Richard Gill in April 1882, who quoted a clause of the deed by which the Crown was to convey reserved areas to the vendors of the land. MacCormick thought it 'remarkable' that the deed was undated and did not state the purchase price, but praised Gill for specifying to the Native Land Court each interest already purchased and giving all signatories an opportunity to appear and make objections.¹¹⁸

The purchasing of interests in Ohinemuri seems adequately documented after 1878 but confusion persists about the pre-1875 payments. Mackay's purpose was to buy the freehold. But whether this was understood by Maori recipients of payments is not clear, because instead of signing a deed they signed vouchers and receipts. The appendices to the MacCormick commission show that payment was made on some 107 vouchers before December 1874, for a total of £12,000. (Nearly £6000 of this was in 'tribal' payments, apparently to heads of whanau, which were further broken down into 103 individual payments.) In November 1874, seven payments were made labelled 'advances against future payments' – presumably payments of miner's rights, because the lease agreement was now being contemplated. Then in January 1875 and the first fortnight of February, when the lease agreement had been negotiated but not yet signed, there were a further 30 payments made against vouchers (with no reference to 'advances against future payments'), building the total advances to £15,508.¹¹⁹ The Audit Office investigated Mackay's transactions in mid-1882 as accounts were being tallied for the Native Land Court proceedings. In the course of the inquiries, an official (probably of Treasury) noted, 'Mr Mackay was allowed credit for nothing except upon witnessed receipts signed by the Natives'. These receipts or vouchers were held by Gill of the Native Land Purchase Department.¹²⁰

But did Maori understand what interest they were alienating when they signed receipts for advances simply charged (according to the table in the MacCormick commission) 'On

116. 'Statement of the Facts and Circumstances Affecting the Ohinemuri Block' (doc A8(a), pp 1026–1237)

117. A check in Archives NZ in Wellington has disclosed no pre-1878 deed.

118. Gill to Native Minister, 24 April 1882, in 'Statement of the Facts and Circumstances Affecting the Ohinemuri Block' (doc A8(a), pp 1026–1237)

119. 'Statement of the Facts and Circumstances Affecting the Ohinemuri Block' (doc A8(a), pp 1026–1237)

120. Minute of J G Anderson, 3 July 1882, in 'Statement of the Facts and Circumstances Affecting the Ohinemuri Block' (doc A8(a), pp 1026–1237)

account Ohinemuri’?¹²¹ Tupeka Whakamau apparently did not, because when his involvement in a transaction with Mackay and a storekeeper was investigated by the court, he could not remember whether he had signed a voucher ‘as I do not understand writing.’ (His signature was on the voucher.¹²²) Possibly, Mackay failed, when making or authorising advances, to clarify that he was purchasing the freehold of Ohinemuri (not Waikawau or Moehau). To resolve this point is difficult, because the original receipts or ‘conveyances’ have not been located.

When Wilkinson first brought Ohinemuri before the court, he found that many Maori who had accepted payments (in cash or raihana) were reluctant to come to court to prove their claims, preferring to ‘stand to one side in order to allow those who have not sold to get large areas’. Wilkinson reported to McLean:

I have talked this matter over with the Judge and he is of my opinion viz. that it would be prejudicial to the Government to have its claims brought on too soon, as the Natives would be very sore when they found out how much of the block would go into Crown hands, considering how they have been all along trying to baulk the Government as much as possible, they would be sure to raise some excuse of obstruction to prevent the remaining portion of the block from going through the court.¹²³

The Crown was thus able to acquire further individual interests before 1882, when it applied to the court for its interests to be determined (as well as those remaining to Maori). The various hapu had unequal interests in Ohinemuri, and individuals had received different amounts as advances against the land. The debt against the block in 1882 was £15,000 less £6817 paid off in miner’s rights fees and other revenues from the 1875 lease agreement. With the court’s lists of owners determined, it was apparent that many of the 260 persons who had taken payment from Mackay or Puckey were not owners in Ohinemuri. Richard Gill, under-secretary of the Native Department had come to the district to take charge of the complex adjustments that followed. His analysis shows that, when Mackay resumed purchasing (in 1878 according to Gill), a deed of conveyance was prepared:

of those who signed the deed [between 1878 and 1880], 193 Natives were found to be owners in the land when the Title was investigated by the Native Land Court in July 1880. [Because] the Court found the interest of the Grantees to be unequal . . . Of the 193 Grantees 43 of them have been overpaid the sum of £4415.19.6 and 150 underpaid £5714.6.0, the price of the land in each case being calculated at 5/- an acre. Since the land passed the Court 141

121. ‘Purchase Money – Individual Payments’, in ‘Statement of the Facts and Circumstances Affecting the Ohinemuri Block’ (doc A8(a), pp 1026–1237)

122. ‘Statement of the Facts and Circumstances Affecting the Ohinemuri Block’ (doc A8(a), pp 1026–1237)

123. Wilkinson to Gill, [1880] NLP80/365; Wilkinson to McLean, 9 August 1880 (doc A8, pp 265–266)

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[further] Grantees have signed the conveyance, with these there has been no difficulty, their actual shares being an order of the Court.

There are as yet 85 Grantees who have not signed the conveyance . . . 9 have received advances.¹²⁴

Gill recommended that the 150 underpaid grantees be given additional payments to make up the rate of five shillings per acre, that the overpaid amounts be written off and that he be authorised to negotiate (at between five shillings and seven shillings sixpence per acre, because mining was raising the value of the land) with the 85 grantees who had not yet signed a conveyance.¹²⁵

Dr Battersby's evidence indicates that, while Native Minister John Bryce approved these arrangements, he also decided to write off all the remainder of the £15,000 debt that could not be recovered from the goldfields lease:

A schedule of payments made to owners, compiled from the Native Department ledgers for the MacCormack [*sic*] Inquiry, shows that moneys or moneysworth [*raihana*] paid to Maori before 1875 did not form part of the purchase of the block in 1882, and Maori owners were listed as non-sellers unless they had received a payment after 1875 at 5/- per acre; and this regardless of whether they had participated in the earlier advances.¹²⁶

While this write-off may appear generous, the situation had arisen from the Crown's determination to acquire the freehold. Had it allowed the mining agreement to continue, the whole of the pre-1875 payments would have been recovered within another seven to 10 years, Maori would still have had the ownership of the land, and at last begun to receive revenues from the mining agreement. The 1882 arrangements meant that some Maori owners had received quite high payments – their pre-1875 payments plus the later purchase price – while others received only five shillings an acre. None received goldfields revenue from the land before 1882; after 1882, with the pre-1875 debt written off, the owners of reserves where gold was found received some revenue.

The more serious impact of the 1875 agreement on Maori was that the burden of debt had resulted in loss of control of the block. In addition, right-owners who had had not received *raihana*, advances *or* payments for the freehold were particularly penalised. Dr Battersby cites Gill's account of a deputation of Ngati Koi who waited on him in 1882 saying that they had not received large money payments from Mackay and asking when they could expect the mining rights' fees they expected from the 1875 arrangement. Gill had to tell them that the 1875 agreement had charged the £15,000 debt against mining revenue from the whole

124. Gill to Native Minister, 24 April 1882, NLP82/323, in 'Statement of the Facts and Circumstances Affecting the Ohinemuri Block' (doc A8(a), pp 1026–1237); MA13/54b, Archives NZ (doc 06, p 283)

125. Gill to Native Minister, 24 April 1882 (doc 06, p 283; doc A8, p 266)

126. Document 06, p 284. The lists referred to by Dr Battersby are appendices G to I following 'Statement of the Facts and Circumstances Affecting the Ohinemuri Block' (doc A8(a), pp 1026–1237).

of Ohinemuri, including their block at Waihi, and they could not expect to receive any revenue until the whole debt had been paid.¹²⁷

Dr Battersby has referred to the view of the MacCormick commission, that in relation to prevailing land values, the Government was out of pocket for the purchase of the Ohinemuri blocks. The commission calculated that up to 1882 the Crown had paid overall £39,390 for land, which, when valued at five shillings an acre, was worth only £16,504.¹²⁸ Dr Battersby comments that:

After mining revenues (£7,838.12.0) and the value of the reserves returned (£1,659) had been accounted for, Maori appear to have received twice as much money as the land, which the government actually acquired, was worth. The cost to the Government was roughly 10/- per acre, coincidentally the price Te Moananui had attempted to obtain from Mackay in 1874!¹²⁹

This may be true for the land value, but if the value of the gold is factored in, the situation looks different, depending on how well the Ohinemuri field actually produced, and how much revenue flowed to the Crown. This matter, and the question of who, after sale of the land, should have received the revenue, will be taken up in the overview on gold issues and Maori in chapter 13.

10.4 OHINEMURI MINING AND FURTHER PURCHASES

10.4.1 Reserves

More than half of Ohinemuri was awarded by the Native Land Court to the Crown in July 1882. In arranging this application, the Crown promised reserves to those who had consented to sell, but was not generous with their extent and allocation. The non-sellers' interests were excised, at the rate of 10 per cent of the area examined by the court – that is 7237 acres out of 73,251 – but the non-sellers were not to be included in the 'reserves' made within the alienated land.¹³⁰

In his purchase negotiations Mackay had promised to the vendors: 2550 acres for Ngati Koi, and 1000 acres each for Ngati Tangata, Ngati Karaua, Te Uriwha and Ngati Hako. In 1882, the court was informed of these promises by the various hapu, but the Crown did not regard itself as bound by them because, whereas Mackay had been negotiating for an estimated 135,000 acres, Maori admitted the sale of only 73,251 acres. The vendors requested one-fifth of the land as reserves but this was declined by Gill; the vendors were offered 10 per

127. Document 06, p 284

128. 'Statement of the Facts and Circumstances Affecting the Ohinemuri Block' (doc A8(a), pp 1026–1237)

129. Document 06, pp 285–286

130. Document A8, p 270

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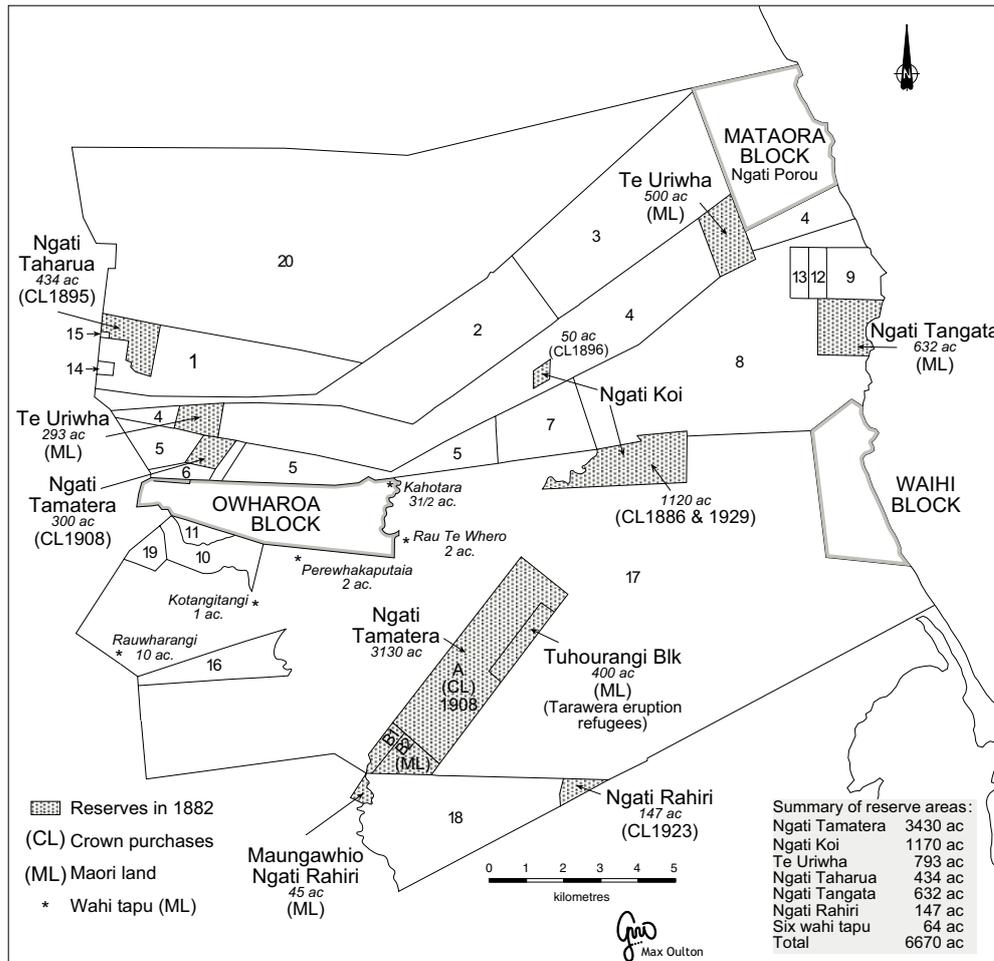


Figure 47: Reserves in the Ohinemuri block

Much land that would eventually produce very high levels of bullion was awarded to the Crown. The awards to the Crown and to non-sellers, and the intended reserves to be Crown-granted back to sellers, were marked on plans. Surveying took place in 1883 and 1884 and most of the interests awarded to the Crown were declared to be Crown land in August 1884.

10.4.2 Subsequent negotiations and personal connections

Some auriferous land within the Ohinemuri mining block did remain in Maori possession after the July 1882 awards to the Crown. Especially noteworthy were the Komata Reefs, Maratoto, the Waitekauri Valley, and the Ngati Koi reserve near Waihi. Crown purchasing of these lands continued steadily throughout the remainder of the nineteenth century. In these later transactions, mining activity was a determinant of the price that the Crown was willing to offer.

There is a noteworthy link in the Komata, Maratoto, and Waitekauri purchases. A major

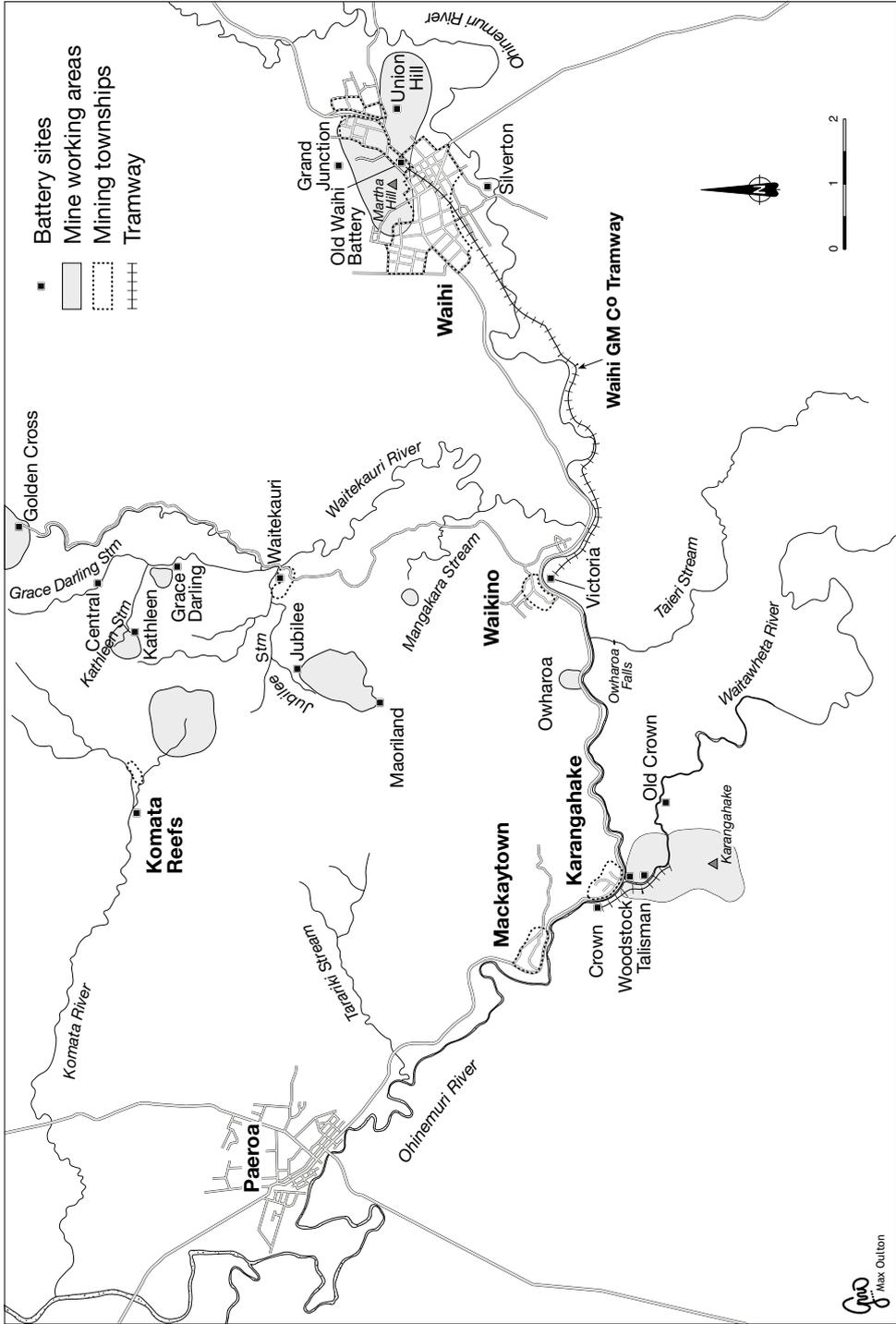


Figure 48: Ohinemuri gold mines

shareholder in those areas was Te Rihitoto Mataia whose husband, W G Nicholls, was chairman of the Ohinemuri County Council for a period and brother-in-law of Charles Dearle, collector of goldfields revenue in Thames. After Crown purchase, goldfield revenues that had gone to Maori owners would then go to the county council, so Nicholls represented a body that had a vested interest in Crown purchase. Dearle acted on occasions for the mining warden and resident magistrate on land matters, and at times facilitated or executed Crown purchases.¹³³ Such close connections between influential persons were not uncommon in nineteenth-century New Zealand.

Adding further complexity, native agent Wilkinson, the husband of Merea Wikiriwhi who was a co-shareholder with Rihitoto Mataia in Ohinemuri 20A block, was sometimes suspicious that Dearle was seeking to conduct purchase negotiations in such a way as to favour his brother-in-law's wife (Te Rihitoto Mataia). Wilkinson advised the Native Department not to give much credence to Dearle's advice in respect of the purchase of her shares.

10.4.3 The Crown purchase of Karangahake

When the Ohinemuri mining block was first opened most interest among miners focussed on the Karangahake Gorge, near the junction of the Waitawheta River and the Ohinemuri River, conveniently only a little above the head of navigation of the Ohinemuri River. On 3 March 1875, about 600 miners assembled to stake out their claims. Few were successful in staking good claims and, although a 20-stamp battery was erected in 1875, the field was said to be practically deserted by April.

More extensive reefs were opened in March 1882. Three companies acquired most of the claims and worked the Crown, Woodstock, and Talisman mines. After the adoption of the cyanide process in 1889, the New Zealand Crown mine became one of the first mines in the world to trial the process commercially. The population of Karangahake reached about 2000 at its peak, and the area was to become the second greatest producer of bullion, after the Waihi mines, in Hauraki.

The principal mines and the township of Karangahake were located in Ohinemuri blocks 10, 11, or 17, on land which was awarded to the Crown in 1882 and declared as Crown land in August 1884. In Ohinemuri 11, a 27-acre non-sellers' portion was purchased in March 1886.

10.4.4 Waitekauri mining and Crown purchases

The Waitekauri Valley runs from the headwaters of the Waitekauri River near Whakamoehau mountain to the north, to its junction with the Ohinemuri River near Waikino to the south. Gold was discovered along the river and on the slopes to the east and west. The Komata

133. Document A10, pt 2, p167

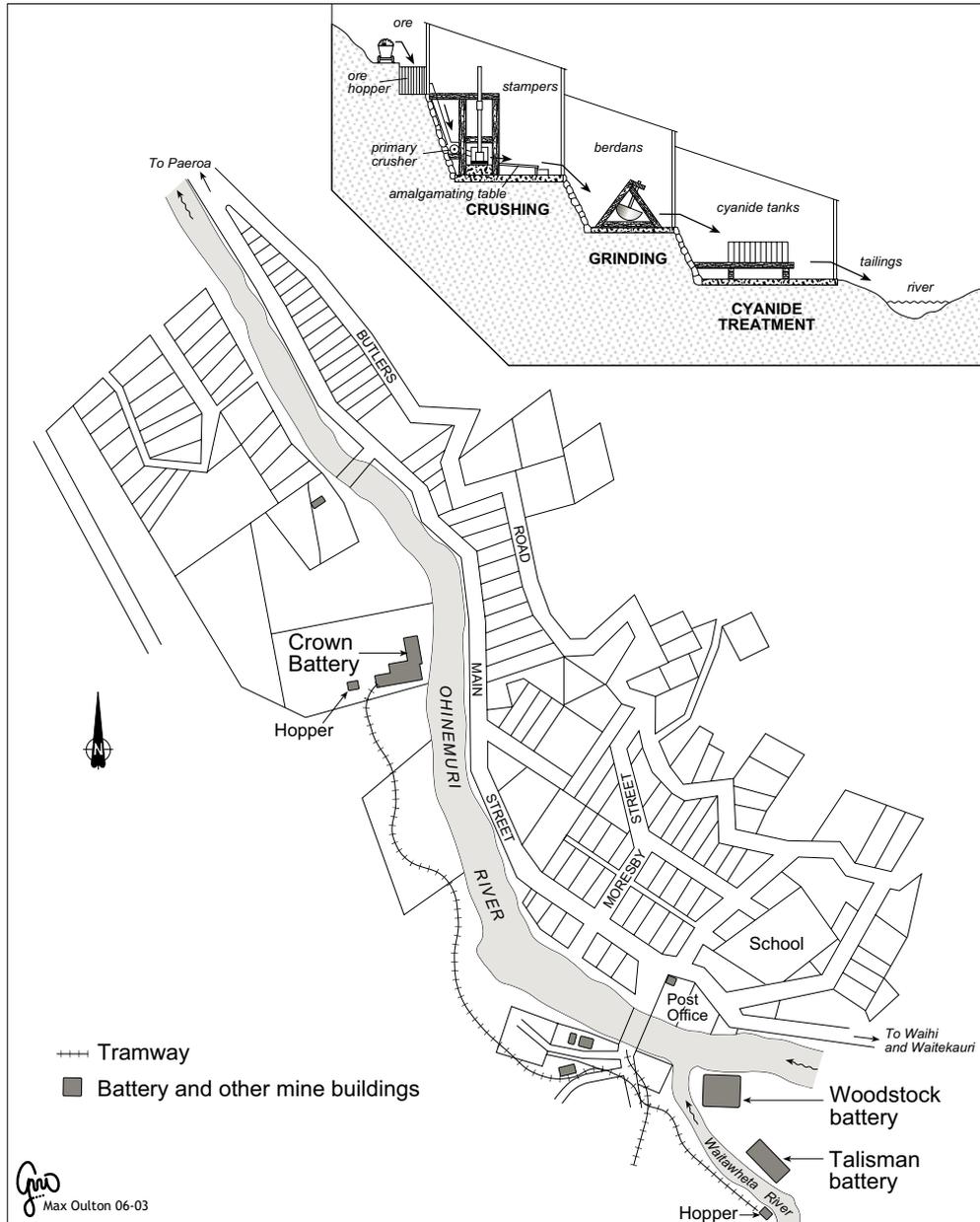


Figure 49: Karangahake, circa 1900. Inset: Diagram of a typical stamper battery.

Reefs lie on the upper reaches of the Komata River east of Paeroa and to the north-west of Waitekauri township. Both fields lie in the Ohinemuri 20 block, which was the last subdivision of the Ohinemuri block to be investigated by the Native Land Court, largely because of Tukurino's resistance. The block was created and title investigated in August 1884, and title was reheard in 1885.

The Waitekauri Valley was prospected prior to 1870, presumably under extra-legal private arrangements. Some claims were pegged out in 1875 and several were amalgamated to form

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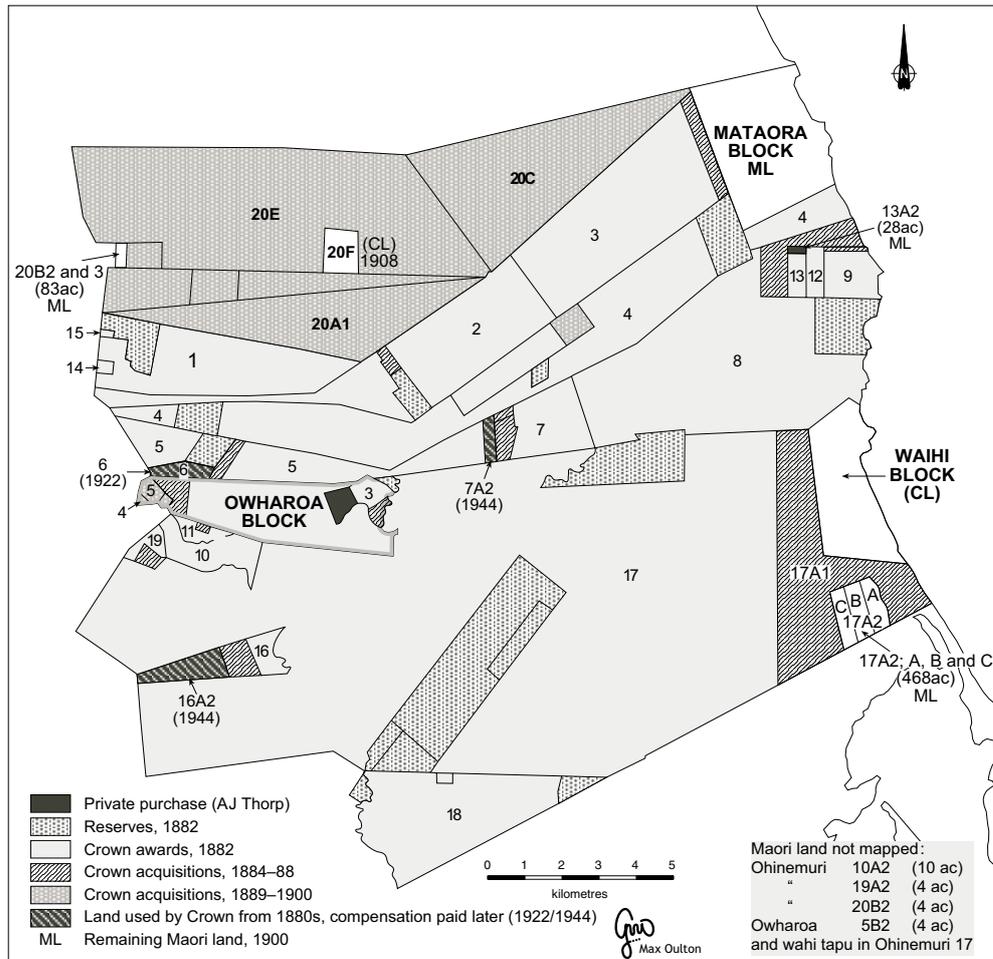


Figure 50: Crown purchases in the Ohinemuri and Owharoa blocks

the Waitekauri Company. Their mine was left to tributers (miners working for a share of the gold produced) in 1880 but revived in 1894 by London investors who formed the Waitekauri Goldmining Company. The richest deposits were discovered in 1892 high up in the valley and were worked by the Golden Cross mine, which became the biggest producer in the area. The second biggest was the Jubilee mine. The upper Waitekauri was intensively explored in the 1880s and a new mine opened in 1891 after the Empire vein system was located.

The Waitekauri battery and township was situated about half way up the valley in the Ohinemuri 1 subdivision, on land that was awarded to the Crown in July 1882. The upper-middle part of the Waitekauri Valley lies in Ohinemuri 20A. Ohinemuri 20A1 was partitioned out in 1884 and awarded to Rihitoto Mataia solely.¹³⁴ It contained several water races which fed the Waitekauri battery and part of the Jubilee special mining claim. This

134. Document A10, pt 3, p117

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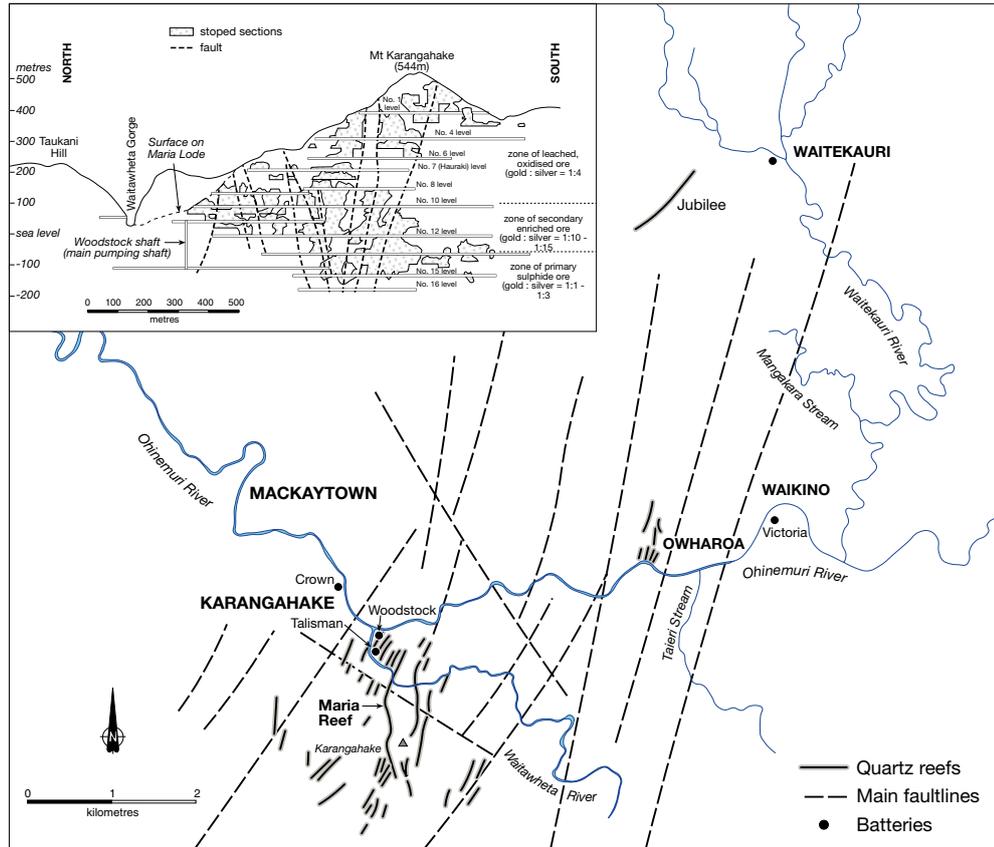


Figure 51: Karangahake geology. Inset: Cross-section of Talisman mine along Maria Reef.

Source: John Henderson and John Bartrum, *The Geology of the Aroha Subdivision, Hauraki, Auckland*, Geological Survey Branch Bulletin 16 (Wellington: Department of Mines, 1913) and P G Morgan, *The Geology and Mines of the Waihi District, Hauraki Goldfield, New Zealand*, Geological Survey Branch Bulletin 26 (Wellington: Department of Mines, 1924).

subdivision had been offered to the Crown at 12 shillings sixpence in May 1886 but rejected at that price. It was acquired by the Crown in July 1891 at nine shillings an acre after two well-known miners expressed an interest in the area.

The balance of Ohinemuri 20A was a wedge shaped block, which was subdivided into 20A2 and 20A3 in September 1890.¹³⁵ The upper part of the Komata River and the Komata Reefs lie in the thick western part of the wedge, and part of the Waitekauri Valley lies in the narrow end of the wedge, immediately to the north of 20A1. Presumably that part of the Jubilee Claim not lying in 20A1 must lie in 20A. In 1891, the owners of 20A3 offered to sell their undivided shares at seven shillings sixpence per acre. Native agent Dearle urged Native Minister Cadman to approve the purchase, telegraphing in mid-August 1891 that 'Considerable attention being called to this block just now on account of new find in

135. Document A10, pt 3, p126

Teomarama licensed holding recently taken up. 22 miners' rights issued for same block during last week.¹³⁶

The transaction could not proceed until the time statutorily allowed for applications for rehearing of title investigations had elapsed, but Cadman advised the under-secretary of the Native Department that everything should be put in readiness to complete the transaction: 'The amount of consideration asked by Mr Dearle, viz £12-10-0d is reasonable. If mining breaks out in the interim the Natives will double the amount now asked for.'¹³⁷ By the end of August, the increase in mining activity had in fact been such that Rihitoto Mataia had withdrawn her portion from sale and was asking nine shillings sixpence per acre. This price the Crown refused, and in January 1893 Rihitoto Mataia accepted seven shillings sixpence per acre. The sole owner of Ohinemuri 20A2, Mereā Wikiriwhi, likewise accepted seven shillings sixpence in March 1893, after having her offer at nine shillings sixpence refused.

The upper part of the Waitekauri Valley, containing the Golden Cross mine, was located in the Ohinemuri 20 parent block, still in Maori ownership. By March 1895, all interests in Ohinemuri 20 and 20C – the vendors wanting to link the transactions – had been purchased at seven shillings per acre save for the interests of Tareranui Tutana. Tareranui's successor, Haora Tareranui, held out for a higher price, writing that 'more gold than ever is being obtained from that land'.¹³⁸ His interest was partitioned out, he being allowed to choose the location of his share but having to bear the cost of the subdivision survey. The Crown's part of Ohinemuri 20 received the designation Ohinemuri 20E when it was awarded to the Crown in April 1896. Haora Tareranui's chosen ground was given the designation Ohinemuri 20F. In 1906, after a number of claims formerly held by the Waitekauri Goldmining Company were again taken up, Haora offered the block for 12 shillings sixpence per acre. He subsequently asked for 15 shillings per acre because he had had paid for the subdivision survey, but in 1907 agreed to sell at his original asking price.¹³⁹

10.4.5 Maratoto mining and Crown purchases

The Maratoto gold deposits lie to the north of the upper Waitekauri Valley in the upper reaches of the Maratoto Stream, a tributary of the Hikutaia River. Major reefs were discovered in 1887. In 1888, a New South Wales syndicate acquired the reef claim and formed the Maratoto Goldmining Company which ceased operations in 1891. In 1909, the Silverstream Company and the Tellurides Proprietary Company undertook serious reinvestigation. The area was worked until 1972.

136. Dearle to Native Minister (telegram), 18 August 1891, D20.51–52 (doc A10, pt 3, p 129)

137. Native Minister to under-secretary, Native Department, 18 August 1891, D20.53 (doc A10, pt 3, p 129)

138. Haora Tareranui to land purchase officer, Thames, 1 July 1895 D20.97–99 (doc A10, pt 3, p 134)

139. Document A10, pt 3, p 137

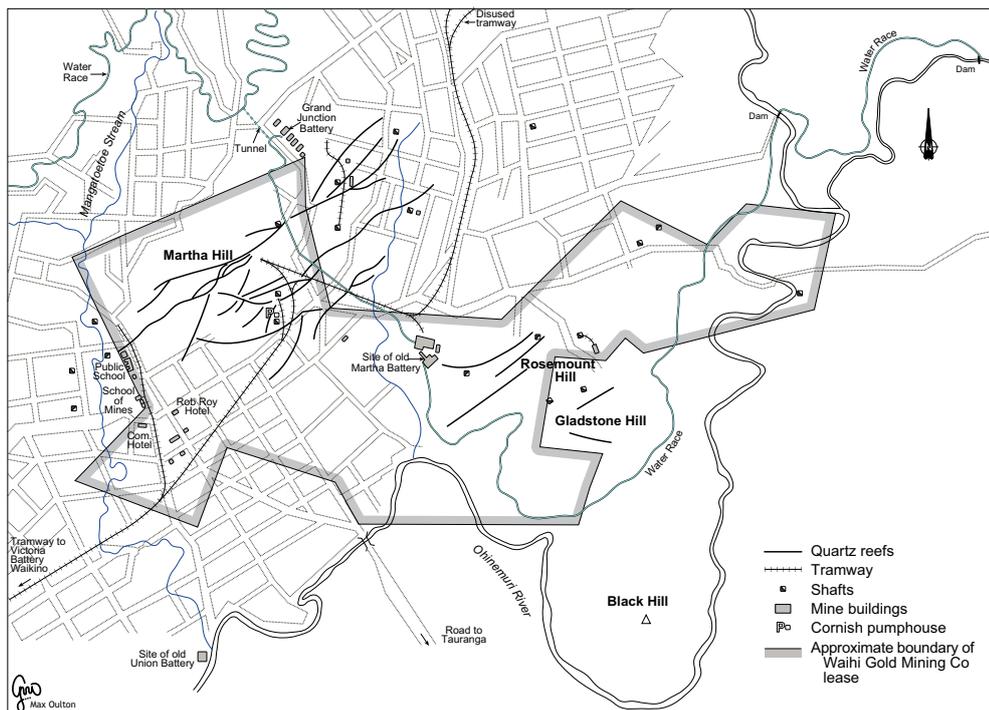


Figure 52: Waihi mines, 1924. Source: P G Morgan, *The Geology and Mines of the Waihi District, Hauraki Goldfield, New Zealand*, Geological Survey Branch Bulletin 26 (Wellington: Department of Mines, 1924).

The upper reaches of the Maratoto Stream traverse the boundary of Hikutaia 3 and Hikutaia 4 blocks. Hikutaia 3 was purchased by the Crown in December 1872, shortly after title had been awarded by the Native Land Court. (Auckland superintendant Gillies had been eager to have the block proclaimed within the Hauraki gold district as he anticipated a rush.) Hikutaia 4 lay at the northern edge of the Ohinemuri goldfield block. In March 1884, land purchase officer Wilkinson wrote to the Native Department requesting authorisation of the purchase of the block. None was given. However, the increase in mining activity in the late 1880s spurred the Government’s interest, and in August 1889 native agent Wilkinson was instructed to see if the block could be purchased ‘for any reasonable price.’¹⁴⁰ Wilkinson reported that:

Have made inquiries re possibility of purchasing Hikutaia 4, and think I can buy several shares at 10/- per acre. Some however want £1 per acre but I think they will take less. There is or has lately been considerable mining on the block and I am informed that over £300 goldfields revenue has already been disbursed amongst owners of the block.¹⁴¹

140. Under-secretary, Native Department, to native agent, Alexandra, 21 August 1889, B71.7 (doc A10, pt 2, p164)

141. Accountant, Native Department, 21 September 1889, B71. 8–11 (doc A10, pt 2, p164)

Wilkinson was instructed to offer seven shillings sixpence per acre and by late 1890 had purchased all shares, Rihitoto Mataia being the last to agree.¹⁴²

10.4.6 Waihi mining and Crown purchases

The Waihi deposits lie in low hills to the south of the Coromandel Ranges. The area is blanketed with volcanic lava and ash and the auriferous character of the area was not immediately recognised. In February 1878, two prospectors, McCombie and Lee, drove a test shaft into the Mount Martha quartz outcrop. While working they were disturbed by Maori who declared the area tapu. An altercation occurred, and a Maori woman was tumbled into a pit. According to the prospectors this fortuitously broke the tension; they were able to resume work. The two prospectors extracted trial quartz, the assay for which was high, but the yield obtained by available methods would have been low. The prospectors were unable to find backers and were obliged to abandon the project. We have heard no further evidence on the alleged tapu and are unable to comment.

Mount Martha lies at the western end of the Ohinemuri 8 block, close to the boundary with Ohinemuri 7. In 1882, the area in the vicinity of the mine was awarded to the Crown. As it turned out, the awards to non-sellers in Ohinemuri 8 and Ohinemuri 7 were both at the other ends of the respective blocks from the subsequent site of the mine. The nearest Maori land to Waihi was the Mangakiri reserve for Ngati Koi at Waitete, to the immediate south-east of Waihi.

The Martha Extended Goldmining Company was formed in 1883, but struggled to obtain profitable yields. In 1891, the mine was sold to the London-based Waihi Goldmining Company which in 1894 erected a cyanide treatment plant. A great increase in yield resulted. The mine continued to be worked as an underground mine until 1952. Substantial nearby deposits were also worked by the Grand Junction and Union Hill mines. The Martha mine was reopened as an open-cut mine in 1987, and a major expansion of the mine took place in 1999 to 2000. The Waihi mine is now New Zealand's second largest gold producer.

A number of owners of the Mangakiri reserve offered to sell it at 10 shillings per acre in November 1894, explaining that 'The value of this block of land consists in the gold mines which are situated upon it, also the mining quartz battery, the water race, tramway, butcher's shop, and some farm sections which are let at certain rentals.'¹⁴³ Land purchase officer Mair telegraphed the chief land purchase officer on at least three occasions, stressing that it was 'a most desirable block' and that the owners were in such want of money that it could be obtained for as little as seven shillings sixpence per acre. Purchase was approved and, by April 1896, 64 out of 74 shares had been purchased by the Crown, some 85 per cent of the

142. Document A10, pt 2, pp164-166

143. Ibid, pt 3, p99

10.4.6

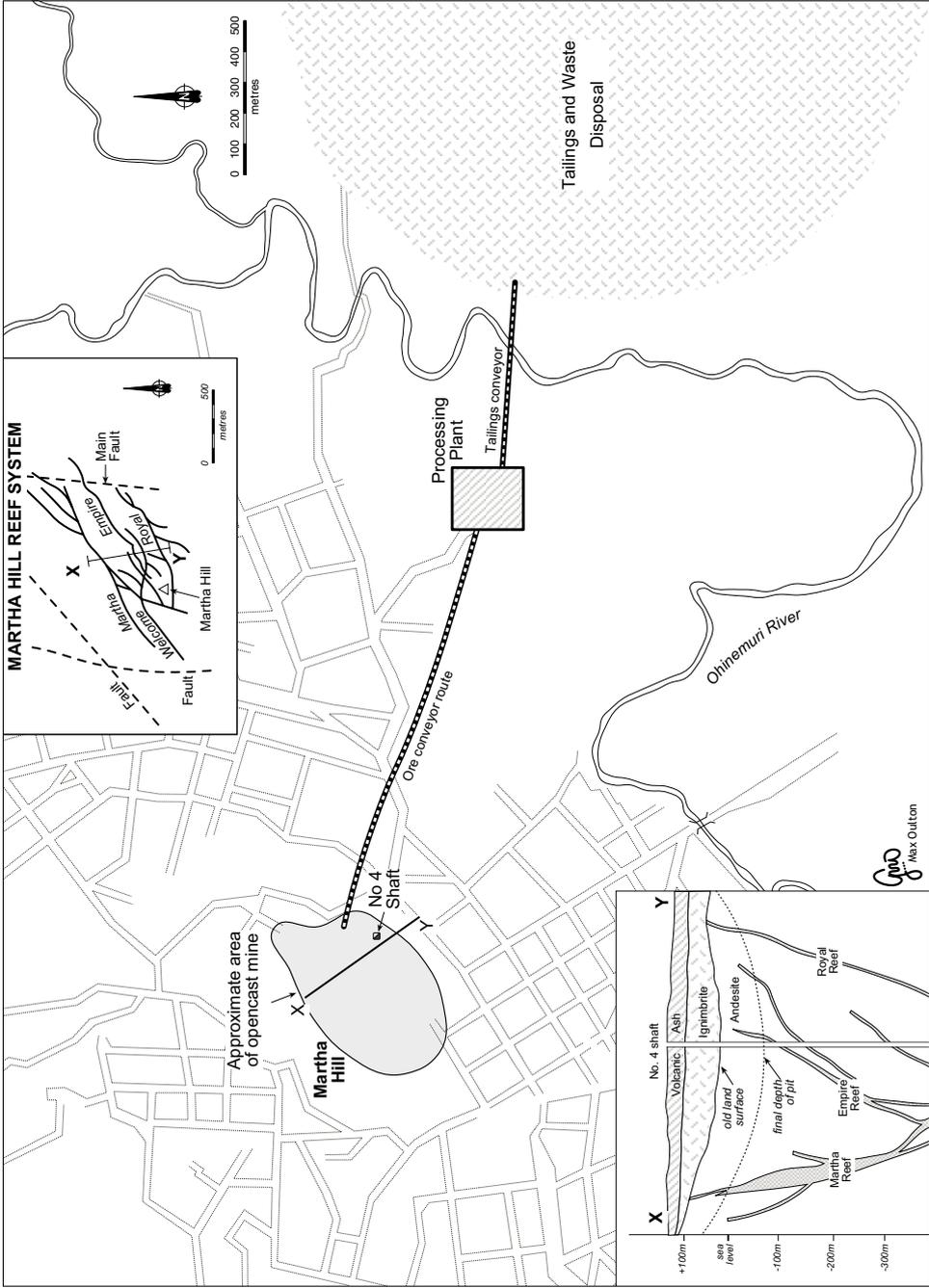


Figure 53: Waihi mining, 1980

reserve then being awarded to the Crown. The non-sellers were awarded acreages at the north-east of the reserve, away from Waihi.

10.4.7 Owcharoa and Waikino

The Owcharoa Falls are in the Ohinemuri River upstream of Karangahake. The Owcharoa diggings are in the Coromandel Ranges to the north and north-east of the falls, including the Owcharoa Stream and the lower Waitekauri Valley.

The largest operator was the Maoriland mine, located in Owcharoa 2 or Ohinemuri 5 block, on land awarded to the Crown in 1882. However, the most valuable land in the area was the site of Waikino township, above the Owcharoa Falls near the junction with the Waitekauri River, located in Owcharoa and Owcharoa 3 subdivisions. The land was good agricultural land. Both subdivisions were surveyed at the expense of A J Thorp. Owcharoa was privately purchased by Thorp in 1877, the land, although proclaimed, being excepted from the Ohinemuri purchase deed and the conveyance being permitted by the Land Purchase Department. Owcharoa 3 was purchased by the Crown in two sets of transactions at a price of around £1 per acre. Three of the four owners agreed to sell before the June 1882 awards and the remaining owner's interest was purchased from his successors in late 1885.

10.5 TREATY ISSUES ARISING

10.5.1 Claimant submissions

In closing submissions, counsel for the Wai 100 claimants, has stated that, given the expressed wish of many Maori to keep Ohinemuri:

the resultant saga of Crown pressure and coercion, initially to open the land for gold mining, and then simply to acquire the land is . . . a particularly striking example of the Crown's failure to actively protect the interests of Hauraki.

The Crown pursued its goals:

- ▶ By making targeted payments to Ngati Tamatera individuals who supported the opening of Ohinemuri for gold mining;
- ▶ By deliberately fostering debt amongst Ngati Tamatera individuals through advances of goods on credit and cash advances and charging the debt against lands including Ohinemuri;
- ▶ By securing a lease over Ohinemuri to satisfy the debts; and

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- ▶ By acquiring the freehold of Ohinemuri after Crown officials promised that the Crown would not seek to acquire the freehold.¹⁴⁴

Important steps in these processes included:

- ▶ the agreement of 19 December 1868 with Te Arakai, Wikiriwhi Hautonga, and others openly used the payment to ‘drive a wedge between those who were opposed to opening Ohinemuri and those who supported it’;
- ▶ the payment of raihana and ‘the exploitation of tangi and the cultural obligations that it created for Hauraki’;
- ▶ the acquisition of blocks adjoining Ohinemuri; and
- ▶ the transfer of debts incurred by individual Maori in respect of such lands as Waikawau and Moehau onto Ohinemuri.

Counsel points out that, although Mackay was to argue that raihana was a practice foisted on him by storekeepers and Maori, he admitted that he also viewed it as ‘the only way to break down the barrier of exclusiveness set up by the King party’.¹⁴⁵ Raihana payments were made to individuals without the extent of those individuals’ interests in Ohinemuri being known, or even if some of them had customary interests there. Because they were made piecemeal, the tribal leadership had little possibility of controlling the practice. Evidence is also cited to suggest that the storekeepers charged inflated prices for goods on raihana orders.¹⁴⁶

Counsel notes that:

The Crown has accepted that raihana contributed to the alienation of Maori land, but draws a distinction between ‘*debt, raihana, and advances on purchases*’. . . . In practice it is hard to see how such a distinction can be drawn. These practices fostered debt in an individual, satisfied by the alienation of *tribal* interests in land. In all cases the funding for the practice was provided by the Crown and in all cases the ultimate aim was to provide a wedge to enable the acquisition of land, often land not able to be purchased by more open, conventional means. In the case of Ohinemuri, the Crown set about acquiring the interests of individuals before the title had even been determined by the Court. . . . It is submitted that in Treaty terms there can be no distinction between the fostering of debt, raihana, and cash advances. . . . The Crown has conceded that the practice of raihana was prejudicial to Maori and all it can offer in mitigation is that it was abandoned from 1875, a matter of cold comfort to Hauraki. [Emphasis in original.]¹⁴⁷

144. Document Y1, p134

145. ‘Statement of Mackay Laid Before the Tairua Investigation Committee’, 7 October 1875, AJHR, 1875, I-1, p 45 (doc Y1, pp 135–136)

146. Document Y1, p137

147. Document Y1, pp 91–92

Regarding purchases of lands adjacent to Ohinemuri, counsel for Wai 100 notes that these included the private purchase by HC Young of Komata North, land awarded to Ngati Taiuru hapu of Ngati Tamatera (or 'Ngati Karua' in one account) against the claims of Tukukino and Te Kiriwera hapu at the first investigation of the court in May 1871. Young purchased the interests of Rihitoto Mataia, Mataia Te Ngahira, and others in April and May 1874, isolating Tukukino, who had been awarded a minority interest. He and Te Moananui protested to Puckey, but he said he could not intervene because the land was the subject of a Crown grant.¹⁴⁸

Counsel further notes that at Whakatiwai on August 1874, Mackay confronted the assembled Maori with the extent of the debts charged against their lands and, when Te Hira protested against Ohinemuri being charged, said that his particular interests could be partitioned out.¹⁴⁹ The implication is that the Crown was prepared to deal with individuals and hapu severally, but not to recognise Te Hira (and other Ngati Tamatera leaders) as having a right to control transactions respecting the whole of Ohinemuri. At the Pukatea-wairahi hui of 19 November 1874, Mackay sought to humiliate publicly the various rangatira with disclosure of their personal borrowings, or those of their immediate family.

It is submitted [that] Mackay deliberately waited until he had a large enough debt before he confronted Ngati Tamatera with the prospect that Ohinemuri would have to be surrendered. It was only at this late stage that they were able to see what he [Te Moananui] described as *'the pit yawning which had been hidden'*. Te Hira would always have stood firm, but in the end he had little choice in the matter. Mackay's tactics were simply reprehensible by any standards and constitute a severe breach of the Crown's duties to act with utmost good faith and to protect the interests of Ngati Tamatera.¹⁵⁰

Counsel for Wai 100 thus considers that the 'agreement' to open Ohinemuri to mining was a forced agreement. By it, the Crown acquired the right to mine not only gold but also coal, kauri gum, and other minerals, the right to cut timber other than kauri, and the right to grant leases. Moreover, the Crown failed to alert Ngati Tamatera that the 'cession' involved more than gold, or the potential value of the coal and other minerals: 'In essence, although the freehold remained with Ngati Tamatera all useful surface and sub-surface resources were taken by the Crown, as well as the right to utilise the land.'¹⁵¹

Counsel notes that Aperahama Tupu and 65 other of Ngati Hako and Whakatohea who petitioned Parliament in 1876 had received no advances and had not consented to the

148. Ibid, p137; doc A8, pp 221–223; doc A10, pt 2, pp 202–209. Alexander shows that Young sold his interests to the Crown in 1879 and that the block was subject to several rehearings in the court up to 1893.

149. Document 06, p 244; doc Y1, p 139

150. Document Y1, p 140; doc A8, p 205; 'Proceedings of Native Meeting Held at Thames', p 17 (doc A8(a), p 562)

151. Document Y1, p 141

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mining agreement. In its amended statement of response of 2 September 2002, the Crown denied 'that it is obliged to obtain the consent of all rightholders before making goldfield cession agreements.'¹⁵² This, counsel for Wai 100 suggests, 'appears to be a clear breach of the principles of rangatiratanga embodied in Article 2 of the Treaty of Waitangi'.¹⁵³

Counsel for Wai 100 then sets out a series of claims of Treaty breach, in respect of the purchase of the freehold of Ohinemuri:

From 1877–1882, the Crown acquired the freehold of Ohinemuri despite clear and express promises at the time of the cession that the Crown would not seek to purchase the freehold, but rather would give the opportunity to repay the debt . . .

The Crown claimed that it acquired interests in Ohinemuri by making advance payments to individuals and having them fix their name to an incomplete deed. The Crown, in fact, treated pre-1875 payments as payments on account when there is no evidence that these were intended to be so. Payments from miners' rights were not paid out by the Crown even to those who had received no payments for [the freehold of] Ohinemuri, but rather retained by the Crown to reconcile the debt owing. The Crown also argued that £15,000 that had been expended prior to the 1875 cession was a down-payment towards purchase rather than a payment towards the leasing of the land. This was also used to coerce Hauraki to sign the conveyance for the land. A Native Affairs Committee in 1883, responding to a petition from the Thames County Council found that the expenditure was for the right to proclaim the land open for mining, not as a payment towards the purchasing of Ohinemuri however its recommendations were ignored.

The Native Land Court assisted the Crown by advising its agents not to bring the Crown's claims to Ohinemuri [yet,] to allow further time for more interests to be acquired . . .

Ultimately the Crown arranged to have non-seller' interests partitioned out. It also ensured that the non-sellers' lands were placed in those parts of the Ohinemuri where miners' rights or leases had not been granted. In this way potential income was not made available to them.

It is a significant final note that many of the 260 signatures on the draft deed of conveyance that had been collected by Mackay and Puckey were found by the Court not to have any interests in the block whatsoever . . .

The Crown breached the principles of active protection, rangatiratanga and utmost good faith through its dealings with Ohinemuri.¹⁵⁴

152. Paper 2.550, p35

153. Document Y1, p142

154. Ibid, pp142–144

10.5.2 Crown submissions and claimant responses

Crown counsel has acknowledged that:

The practice of raihana, particularly in relation to Ohinemuri, is one of the more regrettable elements of the Hauraki claim. As Dr Battersby has noted, the basic concept was at the time ‘widely considered undesirable’. Such contemporary criticism can properly be seen as reflecting a moral judgement about the wrongness of exploiting the vulnerability of Hauraki Maori.¹⁵⁵

Having said that, Crown counsel took issue with a number of assertions by claimant counsel. He noted that counsel for Wai 100 had criticised the distinction Dr Battersby had sought to draw between ordinary debt, raihana and cash advances on purchase, stating that all these practices ‘fostered debt in an individual’. Crown counsel, however, has submitted that:

the notion of fostering ‘debt’ is not one that accurately describes the situation. As Dr Battersby has pointed out, raihana is not simply created by the actions of Crown Land Purchase Officers – and the practice continued despite attempts by both Mackay and Te Hira to curb it.

Crown counsel also noted Dr Battersby’s querying the contention that poverty and need drove Maori into debt and reliance on raihana. The evidence of Hauraki cultivations, and provision of food at hakari (even where raihana were also involved) suggests otherwise. Attention is drawn to Mr Monin’s book, *This is My Place*, which suggests that expenditure on hakari for cultural reasons was a significant cause of Hauraki ‘impoverishment’ in the 1870s. Counsel also challenges Dr Anderson’s statement that raihana were ‘instrumental in the alienation of interests in huge blocks – raihana payments were made for undefined areas within some 200,000 acres of land under negotiation’. Such ‘broad assertions’ he suggests should be critically assessed. He noted that Dr Battersby found ‘no further reports of raihana or negotiations to procure supplies’ after Taraia’s tangi in April 1872, and Mackay acted on Hauraki Maori’s instructions to provide raihana for large quantities of goods for the Whakatiwai hui of 1874, to be charged against the Waikawau block.¹⁵⁶

With regard to the Ohinemuri transactions generally, Crown counsel makes qualified concessions:

The Wai 100 claimants have described the Ohinemuri as a ‘saga of Crown pressure and coercion’. While there are elements of pressure and coercion the actions of the Crown throughout were generally slow, cumbersome and driven by a desire not to confront

¹⁵⁵. Document AA1, p179

¹⁵⁶. Document P5, p 68; doc A6, p 205; doc AA1, pp179–180

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opposition. Having said that, the Crown repeats its acknowledgement that Ohinemuri was a particularly regrettable transaction.¹⁵⁷

Crown counsel then observes that the Wai 100 claimants ‘have been particularly critical of the Crown driving a wedge between “those who were opposed to opening Ohinemuri and those who supported it”’, and, similarly, ‘that the Crown failed to obtain “the consent of all rightholders”’. Such criticisms, Crown counsel submits, overlook Dr Battersby’s point that ‘it is too simplistic to accept that the reality of chiefly authority over certain lands was manifest only in expressed opposition to the Government’, and ‘that it is essential to understand the depth of the debate which occurred between Hauraki communities over gold, land and other political questions’¹⁵⁸

Crown counsel also questions the Wai 100 claim ‘that the Crown acquired the freehold of Ohinemuri despite “clear and express promises at the time of cession that the Crown would not seek to purchase the freehold, but rather would give the opportunity to repay the debt”’. ‘This is not correct’, in Crown counsel’s view:

Ohinemuri had not been part of the original raihana arrangements, but numbers of Hauraki Maori had received cash for their interests in it. Mackay then moved to treat Ohinemuri as a purchase as well. However, Te Hira resisted, the Government conceded, and the owners of Ohinemuri were given an opportunity to repay the money.

Hence the mining lease agreement of 1875, from which the Crown would recover its debt (of nearly £16,000) and the plan that from then on Maori would receive the mining revenues:

However, only half that sum was recovered from the block after 1875 and the rest was written off in 1882. The debt then ceased to be an issue. From 1878 the block was completely repurchased [at five shillings an acre] . . . ie the Government did give the owners an opportunity to repay the debt – they repaid about half and the rest was written off . . . Ultimately the Government paid some £39,309.9.6 for the Ohinemuri Blocks – which at the Government price of 5 shillings per acre was worth only £16,504.15.0.

Crown counsel concludes by quoting Dr Battersby’s summary to the effect that ‘the Ohinemuri purchase was an elongated and unsatisfactory process to all concerned’: to Maori owners (whose interests were bought out over a long period of time); to Mackay, who ended up out of pocket personally for some of the advances made), and the Government (which spent thousands of pounds over many years buying undefined interests on a block to which it could not obtain title till the land had passed through the court).

157. Document AA1, p181

158. Ibid, pp181–182

The most at fault was . . . clearly the Government, the policy of which was inconsistent over time, moving from purchase to lease, to purchase, and from purchase on commission to salaried agents – all of which were influenced by practical responses to the circumstances (and these must be taken into account), but which left a considerably complex and easily confuse situation.¹⁵⁹

In response, counsel for Wai 100 questions Crown counsel's suggestion that raihana payments ceased in 1872, and notes that 'raihana payments locked a huge area of land into negotiations for purchase before the actual tribal right holders and leaders had been properly determined. Thus, even after the practice ended, the consequences continued for a considerable period.'¹⁶⁰

On the purchase of Ohinemuri, counsel for Wai 100 is dismissive of the Crown's defence that time was given for the debt to be paid off and the unpaid balance was written off and ceased to be an issue: 'This does not however get around the issue that the Crown nonetheless proceeded to acquire the freehold almost simultaneously with the writing off of the debt, which it was submitted was in breach of the agreement reached.'¹⁶¹

10.5.3 Tribunal comments and findings

We welcome the Crown's frank acknowledgement that the acquisition of gold-mining rights, then the freehold, of Ohinemuri were attained by a 'regrettable transaction'. But we wonder why the Crown does not go further and explain why governments persisted in pressing for the acquisition of Ohinemuri. There is no question that the Crown, first through James Mackay, then through other agents, sought from 1867 to the 1880s, with little if any remission, to 'open' Ohinemuri against the wishes of many Maori right-owners, and to overcome the resistance of Te Hira, Te Moananui and other leaders of Ngati Tamatera to either mining or sale.

Crown counsel's contention is that the Government did so because there was strong public interest in securing access for the telegraph, roads, and land for general settlement purposes. Gold mining would serve the interests of investors, miners, and some Maori, hoping to secure revenues from the opening of mines. A case can be made that the Crown should, in the public interest, have controlled transactions in relation to auriferous lands through the assertion of the pre-emptive right to negotiate. We are not persuaded, however, by the reason that Crown counsel has suggested for this action, namely 'to ensure that land would not be closed to mining once it had passed out of Maori ownership'.¹⁶² It would have been

159. Ibid, p 182

160. Document AA14, p 41

161. Ibid, pp 41-42

162. Document AA1, p 171

far more likely that private owners would have developed the field under their own aegis. Without a Crown monopoly, Maori owners would have been able to negotiate directly with private interests, possibly on a leasehold basis, as they did in the Thames reserves and foreshore. In assuming the pre-emptive right the Crown also assumed a particular responsibility to ensure that Maori were treated fairly in purchase negotiations.

In our view, the methods which the Crown employed to open Ohinemuri indeed breached Treaty principles. The central issue is whether the land was, as the claimants put it, 'tribal' land. The relevant concepts surrounding tribal leadership customary land tenure were discussed in section 2.2.6. We indicated there that we prefer the view that different kinds of land rights were held at several levels of Maori society – individual, family or whanau, hapu and iwi or even wider – within loosely defined boundaries. Most Maori testimony in these hearings, and most scholarly literature, indicates that the hapu or cluster of closely inter-related hapu was the core socio-political entity of Maori life, the various whanau exercising their rights in land and forest and waters by virtue of their membership of such a community, and (in addition to their day to day family life) contributing to the community's larger activities and helping to defend its territory.

It should be evident from this outline that the transfer of land rights to strangers – people who were not born into the community or had not married into and dwelt among it – could not be within the power of individuals and families alone, for such transfers touched upon the prerogatives of the wider community, the hapu or hapu cluster. Even the most senior men were constrained by that principle. A high-ranking rangatira might transfer certain rights to rangatira from other tribes, but ultimately his action reflected community opinion. This communal land control was clearly recognised by the British authorities in New Zealand and articulated by such men as McLean in the 1856 board of inquiry, who said that there was, strictly speaking, no such thing as individual tenure in Maori society.

The leaders of several Hauraki hapu and iwi had sought to make a controlled engagement with the wider world, engaging in its commerce and inviting Pakeha settlers into the district. But many Maori recognised from the outset that this was a risky enterprise, and that local communities could easily become overwhelmed and lose control. Hauraki involvement with the Kingitanga from the late 1850s reflected that anxiety, and the felt need to resist further land alienation.

Gold rushes posed a particular problem. Despite the concerns just mentioned, many Hauraki Maori had engaged with mining, themselves or through the leasing agreements of 1861 and 1867 which opened the Coromandel and Thames fields. But, although many Maori benefited from those fields, the anxieties remained. Some leaders like Te Hira and Tukukino had sought to limit Pakeha encroachment. Meha Te Moananui accepted mining in the Thames field, but by 1870 supported Te Hira in keeping Ohinemuri closed. In a situation of perceived threat to the wider community, he and other senior rangatira recognised in Te Hira an authority that over-arched the particular rights of the various local hapu.

In part, the governments of the day acknowledged this, because they did refrain from opening Ohinemuri to mining until the chiefs had withdrawn their opposition. It is to the Crown's credit (which Te Hira acknowledged to Mackay) that encroaching miners were removed from the land in 1869–70 and that the Government deferred declaring Ohinemuri open until 1875, after it had finally secured the reluctant acquiescence of Te Hira in a mining agreement. But, it is equally clear that the successive governments, through their principal agents, set out to isolate the people they called 'Kingites' and 'Hauhaus', and to force their acquiescence in the opening of the land. This is clear from the stated intentions of the principal Crown agents in the field, but also from the support these agents had from their superiors in Wellington, and from the provincial authorities in Auckland.

The Crown did not *create* all the divisions among Ohinemuri right-owners about opening the land to mining. Crown counsel rightly point to the fact that significant sections of right-owners, impressed by what could accrue to Maori from earlier mining agreements, wanted similar arrangements, and approached Mackay as readily as he approached them. But in December 1868, Mackay deliberately sought to exploit the division of opinion, indeed to widen it, by signing a 'preliminary agreement' with Ropata Te Arakai and others, and offering an advance on miner's rights fees of £1000 and a 'bonus' of £500, the latter essentially a bribe to win further support. It is unclear when the money was actually paid over: the £1000 was spoken of in late 1874 as an advance paid.

The saga of 'raihana' then ensued. The morality of authorising raihana payments was always ambiguous. In many senses it arose out of real need in Maori communities, such as the dislocation caused by war in Waikato, and intervals before crops could be grown or harvested. Dr Battersby, as noted in section 10.1.7, cites examples of Wilkinson's dilemmas after raihana had been stopped. These situations created real dilemmas for field officers. On occasion it would have been callous of them not to give way. There is also some justification for Mackay and other officials giving Maori credit for food and other necessities, rather than cash which could be spent on alcohol.

The issue in terms of Treaty rights, however, is whether the costs of raihana or other advances should have been charged against the land. We have discussed this issue in the previous chapter (see sec 9.7.3). In that instance (in Thames), advances were paid in the context of a nearly completed agreement to include the land in the goldfield, and the annual revenue was virtually assured. To charge lands where agreement had *not* been reached, and against the freehold of the land rather than anticipated revenue from mining, was very different from the Thames situation, and unacceptable in our view.

It is also offered in extenuation by the Crown that Mackay and other officials were not solely responsible for the raihana system: Maori and storekeepers colluded in passing credit arrangements on to Crown agents. This is correct, as Te Hira acknowledged in his debates with Mackay in late 1874, but it does not exonerate the Crown. Indeed, as Crown counsel acknowledges, 'Mackay did not attempt to stop the raihana system, although he did try to

limit it – but was thwarted by store-keepers who did not cooperate with this and ultimately Mackay paid them, encouraging the practice to continue.¹⁶³

Moreover, Mackay's own statements show that he was fully aware of the leverage over Ohinemuri that raihana gave, and used it for that purpose. Although Maori leaders asked him for supplies for Taraia's tangi and the hakari at Whakatiwai, his request to Gillies for £2000 additional funding for the former shows how deliberate was his use of the opportunity to gain leverage over the 'Kingite' Maori who had refused the cash advances he had been laying out for the purchase of Ohinemuri. He defended his practice before the committee investigating the Tairua purchase as the only way to break down the barrier of exclusiveness set up by the King party.¹⁶⁴ As the claimants correctly point out, this statement is tantamount to an admission that this was his ulterior purpose all along. He was persisting with raihana advances even after successfully negotiating the mining agreement over Ohinemuri and despite a flurry of public criticism of the practice. It took serious questioning in the Audit Department and Native Department in mid-1875 before McLean finally instructed Mackay to cease payments in goods, an instruction backed by Pollen's entreaty in December 1875.¹⁶⁵

One of the worst features of raihana was its secretiveness. While not every order or signing of vouchers was made secretly, *it was the cumulative effect of them that was hidden*. The aggregate of the multiple charges against Ohinemuri shocked and dismayed Maori leaders when it was revealed by Mackay in 1874. This was the source of Te Moananui's charge that the Crown's acquisition of rights in the land was not done 'in a straightforward manner'. Ngati Tamatera were ensnared, and it is impossible to deny that Mackay intended them to be. Even the local settler press found this repugnant. Although Mackay got his signed vouchers and never hid from individuals that a reckoning would be due some day, his methods, in our view, involved an abuse of the Crown's power: with the connivance and support of his superiors, he took advantage of the dispersed nature of Maori rights in land, and embarked upon a deliberate course of action designed to create a burden of debt among as many right-owners as possible, giving the Crown control of the situation. The Crown should never have allowed such a crippling debt to develop, without ensuring that the borrowers had the means to repay in cash. The transactions in Ohinemuri were engineered by the Crown through the cumulative effect of the many raihana payments or advances to individuals, and the authority of the rangatira in whom the control of Ohinemuri had been entrusted was circumvented.

We agree that another dubious aspect of Mackay's methods was (in Dr Anderson's words) the 'failure to define the ultimate price and acreage of the land concerned on the vouchers.'¹⁶⁶

163. Document 06, p 265

164. Ibid, p 267; doc A8, p 248

165. Document A8, p 250; doc 06, p 269

166. Document A8, p 250

The concern of the Audit and Native Departments was that this left *them* in an unsatisfactory position. But the lack of unambiguous discussion of the price to be paid for the land at the time the advances were made, left Maori not knowing how much land they would have to relinquish to meet the debt. Mackay was adamant that Maori who took raihana or advance payments knew that the land would be valued at the prevailing price on the day (which he later argued to be considerably less than five shillings an acre), and forcefully rejected Te Moananui's demand for a valuation of 10 shillings an acre. But what could have been the understanding of Maori at the time they signed the vouchers? Prices varied widely. Indeed, we query whether any valid contractual agreement had been reached at all through raihana and advances, when no per acre price had been stated on the vouchers, nor any precise area of land. The dismay of Ngati Tamatera was that not only were the lands of Moehau and Waikawau insufficient to meet the debt but also that a huge debt lay over Ohinemuri. Maori were often accused by Government officers of evading their obligations and engagements, but what impresses in this instance is that they were willing to accept that debt did lie over the land, and agreed to try and meet it through the mining agreement. But we accept the claimants' view that Te Hira, Te Moananui, and others were pressured into this agreement by their situation in 1874.

One question for us was whether a relevant distinction can be drawn between payments in cash and raihana. Part of the problem, about which the Ngati Tamatera leaders complained at the time, was the ambiguity about what goods were worth. They asserted that storekeepers inflated prices and sold goods of poor quality, and we have seen some evidence that this happened at times. Mackay said that he tried to ensure that Maori got goods at fair value; he probably did, but it was difficult to police the transactions. By 1875, everyone concerned was of the view that payments should be in cash. That at least gave Maori much more control over what they got for their money from the storekeepers.

We share the claimants more fundamental objection to the cash payments, both before 1875 and after purchasing resumed in 1877; namely, that they were made to individuals, privately, for land which was owned tribally. Transactions over tribal land should have been made with the acknowledged tribal leaders, in open meetings. The purchase of individual interests undermined and frustrated efforts by the Ngati Tamatera leaders in particular to retain the land. We also note that many of the 260 signatures collected by the Crown agents for Ohinemuri were of persons found eventually to have no customary interest in the block. Yet those signatures had been instrumental in causing the land to be brought into court and eventually partitioned.

Essentially, the complaint over purchase of the undivided interests of individuals in Ohinemuri is a sub-category of the claimants' fundamental criticism of the Native Land Acts: namely, that they facilitated and legalised dealing in the interests of individuals, thus effectively side-stepped the control of senior tribal leaders opposed to alienation. We accept the claimants' view on this most important issue, and accept also the view of the Waitangi

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Tribunal in the *Te Roroa Report 1992* that the making of advance payments ahead of the investigation of title was ‘undoubtedly an established pressure tactic, an unfair practice designed to purchase land as quickly and cheaply as possible, and incompatible with the Crown’s fiduciary duty under the Treaty.’¹⁶⁷ We shall discuss this issue further in the next part of this report.

Crown counsel have argued that it would have been unreasonable to have expected unanimity among the owners: such a requirement would have been tantamount to blocking many transactions altogether. We agree that this might have been so in many blocks, and that possibly more of New Zealand might have remained in Maori ownership. Article 2 of the Treaty clearly recognises the various levels in which property rights were held in Maori society. In the Maori version:

Ko te Kuini o Ingarani ka wakarite ka wakaae *ki nga Rangatira ki nga hapu ki nga tangata katoa* o Nu Tirani te tino rangatiratanga o o ratou wenu o ratou kainga me o ratou taonga katoa. [Emphasis added.]

In the English version, the Queen:

confirms and guarantees to *the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof* the full exclusive and undisturbed possession of their Lands Estates Forests Fisheries and other properties which they may collectively or individually possess. [Emphasis added.]

Both Maori custom and the Treaty recognised the collective property rights of rangatira and hapu, as well as those of individuals. In our view, for the Crown to seek ways and means of circumventing tribal or customary collective leadership, is very much in breach of the spirit of article 2. Te Hira and Te Moananui, with Ngati Tamatera, had eventually joined in the goldfield agreements in Thames. They had even agreed that the debts charged against Waikawau and Moehau would have to be settled by the alienation of the freehold of those blocks. They had also permitted (with no more than a show of protest for form’s sake) the mail and the telegraph to pass through Ohinemuri, although suspicious that this would lead to greater Pakeha control. They were then hounded by Crown agents into opening Ohinemuri first to gold-mining then to the alienation of the land. This Crown action shows its contempt at that time of Ngati Tamatera’s wish for a measured engagement with commerce. ‘This is my place’, said Te Hira in 1870. ‘It is only a little piece. Let it remain to me.’¹⁶⁸ But, despite Treaty promises, his wish was not allowed.

We note the complicating factor that not all interests in Ohinemuri were held by Ngati Tamatera. Many Ngati Koi and Whakatohea had supported a mining agreement before 1874. The question of whether these groups were rahi to Ngati Tamatera has been addressed in

167. Waitangi Tribunal, *The Te Roroa Report 1992* (Wellington: Brooker and Friend Ltd, 1992), p 60

168. Monin

section 15.4.1; that argument was still being asserted through appeals over blocks in the Ohinemuri district late in the nineteenth century. If in fact land was in the possession and control of Ngati Koi, Whakatohea, Ngati Karaua, or Ngati Hako as autonomous groups, then each should have been free to deal with their land (or not) as they saw fit, under their tribal leadership, just as much as Ngati Tamatera were free to deal with theirs. The principle seems clear.

The *facts* of customary ownership were, however, often far from clear. In those circumstances, the Crown could seek to negotiate only with the intersecting tribal leaders to agree on a division of their interests, or refer the problem to the Native Land Court. As it happened, all concerned in Ohinemuri seemed willing to accept the court, no doubt expecting to prevail over their rivals there. The outcome was not what Te Hira hoped for, and land on the borders of Ohinemuri began to be alienated, partly to meet the costs of the surveys necessary to win the victory in court.

We should make some comment on the question of divisions *within* Ngati Tamatera and the partition of that tribe's interests. Mackay argued that Te Hira was in the minority, many right-owners having agreed that they had sold their interests, and therefore he should partition out his individual pieces. Here, Mackay appears to be proposing to deal at whanau level. He might have thought that this was similar to what he had done in Thames in 1867–68, but there had been deep discussion within Ngati Maru which resulted in a general consensus (see sec 9.2.3). In Ohinemuri, Te Hira had withheld consent and was supported in doing so by the majority of Ngati Tamatera, and associated hapu. Te Moananui, for example, supported Te Hira's authority as was exemplified by his statement that even if the 'owners of the land' accepted Mackay's payments it would avail them nothing, without Te Hira's consent. Certainly, within Ngati Tamatera (and less certainly with associated hapu) there had been a decision in 1867–68 to take a stand over Ohinemuri, with the mana vested in Te Hira to hold the land.

In our view, then, for Mackay to propose that Te Hira should sever out his pieces and let him (Mackay) negotiate a deal with the vendor groups would have infringed Te Hira's right and role as the 'tribal' or collective leader. It would have been akin to the fatal course that Governor Browne and McLean took in 1860 when they told Wiremu Kingi that he could cut out his piece of Waitara but not veto the sale by Teira.

This time McLean did not press such a course and the issue was blunted by the mining agreement of early 1875. But the veto power of recognised senior tribal leaders in Ohinemuri was also circumvented by the titles created under Native Land Acts and the power vested in the court to partition blocks. We discuss below in chapter 17 the fact that Tukukino, one of eight owners named by the court in Komata North, had his interest partitioned out, and his authority circumvented, when the other seven owners sold their shares. In the end, the non-sellers in Ohinemuri also had their land partitioned out after the Crown applied to the court in 1882 for the share of the block to which the aggregate of their individual purchases

entitled them. By that time, Te Hira's strength had ebbed (he died in 1883) and the block was no longer under effective tribal control. Mere Kuru, who had long stood with her brother in holding Ohinemuri against mining and settlement, also gave up the struggle; in 1882 she too sold her individual interest to fund her son's education.¹⁶⁹

Two other matters require our comment: first, whether Crown agents acted deceptively in framing the 1875 mining agreement, failing to inform Maori that other sub-surface resources besides gold, especially coal, were subject to it. Secondly, whether the Crown agreed that it would not pursue the freehold of Ohinemuri in 1875 and then went back on its word.

On the first matter, we consider that no deliberate deception was practised. The agreement was a written document openly negotiated with the leaders who discussed it with Mackay in late 1874, and later with McLean. It was numerously signed, first by about 150 people in the major public meeting then by about 60 others in three subsequent signings. No Maori-language version was drafted, and this is certainly a weakness in the Crown's position, but the evidence indicates that it was explained in Maori by Mackay, paragraph by paragraph, at the main signing and formally translated by Wilkinson at each other signing. It is entirely possible, however, that those not present were not fully cognisant of the terms or realised the import of them. Certainly, many who had *not* accepted advances against the land were puzzled and angry when they found out that they too would have to do without miner's rights revenue until the debt was paid. There is a case to be made for the Crown officials to have allowed more time for the terms to be circulated and discussed before ratification by the leadership at a later hui. Too often in such negotiations the Crown acted to 'seize the moment' when it had Maori leaders on the back foot, and before full community understanding had been secured. But the making of the Ohinemuri lease agreement extended over more than two months, and no deliberate deception appears to have been intended.

It is also debateable whether the balance of advantage and disadvantage in the terms added up to a prejudicial effect. If the objective was to clear the debt off Ohinemuri as quickly as possible, then the more items that could be put into the agreement to reduce it the better. In principle, once the debt was cleared, the revenues from all those items would then have been payable to the Maori owners. The problem with Ohinemuri was not in the wide-ranging nature of the agreement: it was in the extent of the debt held against the land (and the Crown agent's methods of raihana and advances which resulted in this debt), the slow rate at which mining revenues could have cleared it, and the short-circuiting of the latter desirable process through Crown purchase.

As regards the Crown acquisition of the freehold, resuming so soon after the mining agreement which denied any such plan, in our view the claimants have a strong case. Mackay's rhetoric on 11 December 1874 was tantamount to an assurance that the Crown

169. Gill, report, 29 July 1882, in 'Statement of the Facts and Circumstances Affecting the Ohinemuri Block' (doc A8(a), pp 1026–1237)

would not seek the freehold. ‘You are to have the land and I am to have the gold’ he said. The Maori leaders concluded the agreement with Mackay and McLean on that basis, Te Hira expecting that the land would remain and the mining revenues eventually return to Ngati Tamatera. Crown counsel’s defence that Maori were given a chance to repay the debt is flimsy, for nothing was stated in the 1875 agreement about a *time-frame* within which the debt must be cleared, or the *rate* at which it must be cleared. As was all too common, the Crown’s agreements with Maori were loose. Maori had no protection, for the creditor (the Crown) had virtually complete possession and control of the land, including the right to licence mining and receive the fees therefrom, and the power to grant agricultural leases, indefinitely, or until the debt had been paid.

As noted earlier, the revenue stream from mining on Ohinemuri proved disappointing, but it was by no means insignificant. By 1882, almost half the £15,000 debt charged against Ohinemuri had been cleared, and mining was picking up considerably in that year; within another seven or 10 years most of the debt would have been paid. But in fact the Crown had waited barely two years before resuming the purchase.

This haste to purchase, in our view, is a breach of the spirit of the 1874–75 agreement and an act of bad faith. The onus was on the Crown to make clear that the debt had to be cleared by a certain time or at a certain rate. It failed to do so and it should have worn the consequences. At the very least, if the Crown considered the rate of repayment too slow, it should have reconvened a general meeting of Ngati Tamatera and other owners and sought to renegotiate the agreement. As it was, in 1877 the Crown proceeded (by unilateral decision, as the claimants point out) to purchase, then (in 1880) obliged the right-owners to come into court to establish their relative interests, and finally (in 1882) invoked its statutory power to have the court define the extent of its interests, measured at a price which the Crown itself, in a monopoly position, had set. The process was ruthless and remorseless, and the Crown secured the bulk of Ohinemuri. The fact that it then wrote off the balance of the pre-1875 debt did little to redress the Maori situation.

One group of right-owners was particularly affected: those had never received advance payments from Mackay, Puckey, or Wilkinson. They had not sold their individual interests, yet they too were saddled with a share of the debt which in 1875 was deemed to lie over the whole block. The MacCormick commission of 1939 drew attention to this issue.¹⁷⁰ Its recommendations are discussed in section 13.7.3.

Mr Hayes, for the Crown, has commented at some length on the claimants’ charge that the court was in collusion with the Government over the timing of the Crown’s application to have its interests defined and partitioned out (with the judge proving to be, as Dr Anderson put it, ‘an obliging instrument of Government policy’).¹⁷¹ Mr Hayes notes that the

170. ‘Statement of the Facts and Circumstances Affecting the Ohinemuri Block’ (doc A8(a), p1059); doc A8, p263

171. Document A8, p266

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conversation referred to (between Wilkinson and Judge Monro) occurred while Ohinemuri was in process of being heard and that it is likely that Monro saw that the Crown's claims were vulnerable at that point, with sellers and non-sellers both seeking to minimise the sellers' rights. The matter is complex, and Monro probably did not see himself as doing anything improper by indicating the likely outcome of the Crown's applying too soon, but Mr Hayes accepts that 'in the circumstances, it was inappropriate for Wilkinson and the Judge to have a private conversation on a matter that was for discussion in the Court.'¹⁷² We agree.

The overall view we take of the opening of Ohinemuri to mining and the subsequent purchase of freehold is that the Crown had abandoned much of the restraint it had showed in the opening of the Thames goldfield. Short of provoking outright confrontation with leaders such as Te Hira and Tukukino, it proceeded quite systematically to foster division among the Maori right-owners, buy off individuals, and create a burden of debt on the land, which eventually obliged those who sought to preserve the area in Maori ownership and control to give way. In these respects, it breached its Treaty obligations to deal with Maori in utmost good faith and to offer active protection of their interests.

172. Document Q1, pp 42-45

CHAPTER 11

TE AROHA AND THE GOLDFIELD

11.1 FIRST NEGOTIATIONS AND CROWN PURCHASE

Loose quartz or alluvial gold was observed near Te Aroha by a Colonel Chesney in 1852, although, ‘the land being then in Native hands’, he did not advise the Government of his find until 1864. The Government considered sending James Mackay to head a prospecting party to investigate, but ‘the disturbed state of the country caused the idea to be abandoned.’¹ In September 1867, the *New Zealand Herald* reported that Maori from the region were on their way to see Mackay about gold, and that their dead were being moved from Te Aroha mountain.²

11.1.1 Negotiations to open the field

A start towards opening the area to miners was made in January 1869, when Mackay signed a preliminary agreement with Ngati Haua for rights to mine at Te Aroha and paid them a deposit against miner’s rights fees.³ However, Ngati Haua’s claim there was contested by Ngati Maru and Ngati Paoa. In February–March 1869, the Native Land Court awarded the Te Aroha block to Ngati Haua; sections of the Marutuahu iwi immediately occupied the land, and fighting between armed groups from either side was narrowly avoided. Marutuahu lodged applications for a rehearing while ‘Hauhau’ adherents vested the land in Te Hira of Ngati Tamatera to hold it ‘closed’ in order to keep the peace.⁴ In the 1871 rehearing, the court reversed its decision, awarding the land to Marutuahu with the exception of the part known as Ruakaka, which was not reheard. Mackay’s mining agreement with Ngati Haua had come to nothing.

1. James Mackay, ‘Report by Mr Commissioner Mackay Relative to the Thames Gold Fields’, 27 July 1869, AJHR, 1869, A-17. Colonel Chesney wrote to the Colonial Secretary in February 1864. His letter reads in part: ‘a gold field, which I believe to be of considerable importance, was observed by me in the year 1852. It is on the right bank of the Waihou or Thames River, a few miles above Waiarakiki. The land being then in native hands I kept the discovery to myself; but it might now be useful to the Province of Auckland to have the spot tested’: doc G1, p 9 fn 17.

2. *New Zealand Herald*, 18 September 1867 (doc 06, p 142)

3. Mackay, ‘Report by Mr Commissioner Mackay’, pp 33–34

4. *Daily Southern Cross*, 20 April 1869 (John Hutton, ‘Troublesome Specimens: A Study of the Relationships between the Crown and the Tangata Whenua of Hauraki, 1863–1869’, MA thesis, University of Auckland, 1995, p 350)

Six months after the rehearing, WH Taipari (who besides being of Ngati Maru had connections to Ngati Kopirimau, a hapu of Ngati Rahiri), wrote to the Native Minister that he and 'others of us' were willing to hand their portion of Te Aroha to the Government to manage for gold-mining purposes. Whether Taipari was speaking on behalf of Ngati Maru, Ngati Rahiri, or both is not known. Taipari further advised that he had applied to the Native Land Court as advised by Government agent Dr Pollen and HT Clark, civil commissioner for Hauraki. This advice was that, since the court had awarded the block to Marutuahu, the court should subdivide the block among their iwi before any 'hapus or individuals' decided to open their lands for mining.⁵

Unlike its action in Ohinemuri, in this instance the Government was unwilling to enter into goldfield negotiations while Marutuahu tribal interests were undivided, since Taipari did not have authority to deal with the land autonomously. In November 1873, Te Moananui and Te Hira wrote to the Governor and Native Minister, saying that 'The Aroha is a part of Ohinemuri. The word that I uttered in the presence of the Governor (was) that the lands reserved by us as settlements as permanent places for us, must not be taken away.' Gold mining was not mentioned, but the two chiefs said that the roads or surveys consented to by 'one Maori and one whiteman' (Taipari and Mackay?) had not been ratified by all of Marutuahu.⁶ Te Hira no doubt viewed the aukati then in place against miners in Ohinemuri as applying also to Te Aroha, further south. As we noted in section 10.2, even after he had reluctantly withdrawn his opposition to a mining agreement over Ohinemuri in 1875, Te Hira regarded the southern boundary of the Ohinemuri field as a new aukati, beyond which Pakeha settlement was debarred.⁷

Given this attitude by important Ngati Tamatera leaders and given also the complicated and overlapping customary rights to Te Aroha and the undivided court award to 'Marutuahu' generally, Te Aroha remained closed to mining for some years, notwithstanding the favourable disposition of sections of Ngati Rahiri to its opening. The opening of a goldfield at Te Aroha would eventually result, not from further subdivisions by the Native Land Court, but by the Crown's purchase of all interests other than those of Ngati Rahiri, leaving them as the sole group with which a mining agreement had to be negotiated.

11.1.2 Crown purchase

Te Aroha was one of the blocks classed as 'Upper Thames' by Mackay, and in March 1872 he was particularly directed to acquire them. This was less because they might have been

5. Taipari to Native Minister, 6 September 1871, Maori Affairs head office special file 120 (doc A10, pt3, pp158-159)

6. Te Hira and Tanumeha Te Moananui to Native Minister, 29 November 1873, Maori Affairs head office special file 120 (doc A8, p 250; doc A10, pt3, p161)

7. Witness Te Hira's statement that he had a promise from McLean to that effect: doc A8, p 229.

auriferous than because the Minister for Public Works, JD Ormond, perceived them to be suitable for the settlement of immigrants.⁸ As in Ohinemuri, Mackay proceeded with the purchase of Te Aroha by making advances to hapu and individuals. By 1875, Donald McLean was concerned that Crown purchase activities were inflaming tensions amongst different tribes, but Mackay was instructed to complete the purchase anyway. However, because gold was present and the scandal of raihana had emerged, Mackay was instructed in 1875 to make all his advances in cash and cautioned that ‘no such compromise as in the Ohinemuri business could ever be agreed to, and that he must accept strict personal responsibility for all his proceedings in regard to it.’⁹

In late 1876, an investor named Broomhall negotiated with the Waste Lands Board to purchase 47,000 acres of Te Aroha for a special settlement, even though Maori title had not yet been extinguished. Mackay told Broomhall that ‘the public would not be satisfied at the hill lands being granted to him, unless the right to mine for gold was reserved by the Crown.’¹⁰ But the issue was not addressed in the correspondence between the Waste Lands Board and Broomhall.¹¹ As further evidence that, in the Government’s eyes, gold was of much less concern than agricultural settlement, Mackay was urged to complete the purchase forthwith so that the proposed scheme could be implemented. By mid-1877, Mackay had acquired 204 signatures on the deed of purchase for payments totalling some £12,900, mostly made to Marutuahu groups but including also £2000 to satisfy the claims of Ngati Haua and Waikato.¹²

About this time, a serious quarrel broke out, Ngati Rahiri opposing the Marutuahu groups Ngati Paoa, Ngati Whanaunga, and Ngati Tamatera. Ngati Rahiri advanced what they believed to be a superior ancestral claim to that of Marutuahu, and repudiated the latter’s right to have accepted Mackay’s advances. The threat of conflict was averted, native agent Puckey giving considerable credit to Ngati Tamatera and the advice of Te Moananui and Te Hira.¹³ The resolution of this conflict may have seen Ngati Tamatera abandoning their claim to sole control of mining rights in Te Aroha.

Following the resolution of the quarrel, the topic of gold mining was broached in November 1877 by Reha Aperahama of Ngati Tumutumu–Rahiri, who telegraphed Hoani Nahe, a member of the House of Representatives and kin to Ngati Rahiri, to say that he was willing to open his land to miners. Mango Whaiapa and others of Ngati Ruinga, a hapu of

8. Under-Secretary for Public Works to Mackay, 4 March 1872 (doc A8, p 215)

9. Pollen to McLean, 24 November 1875; draft memorandum for Mackay, undated, MA-MLP1885/18, Archives NZ (doc A8, p 250; doc O6, pp 268–269)

10. Mackay to Minister for Public Works, 31 July 1877, AJHR, 1877, G-7, pp 7–10 (doc A10, pt 3, pp 165–166)

11. Document A10, pt 3, pp 165–166. For correspondence on, and details of, the proposal, see ‘Te Aroha Block and Mr Broomhall’s Proposed Special Settlement’, AJHR, 1878, D-8, pp 1–8.

12. Document A8, p 250; doc A10, pt 3, p 166

13. Puckey to under-secretary, Native Department, 24 April and 8 June 1877, AJHR, 1877, G-1, pp 4–5 (doc A10, pt 3, pp 164–165)

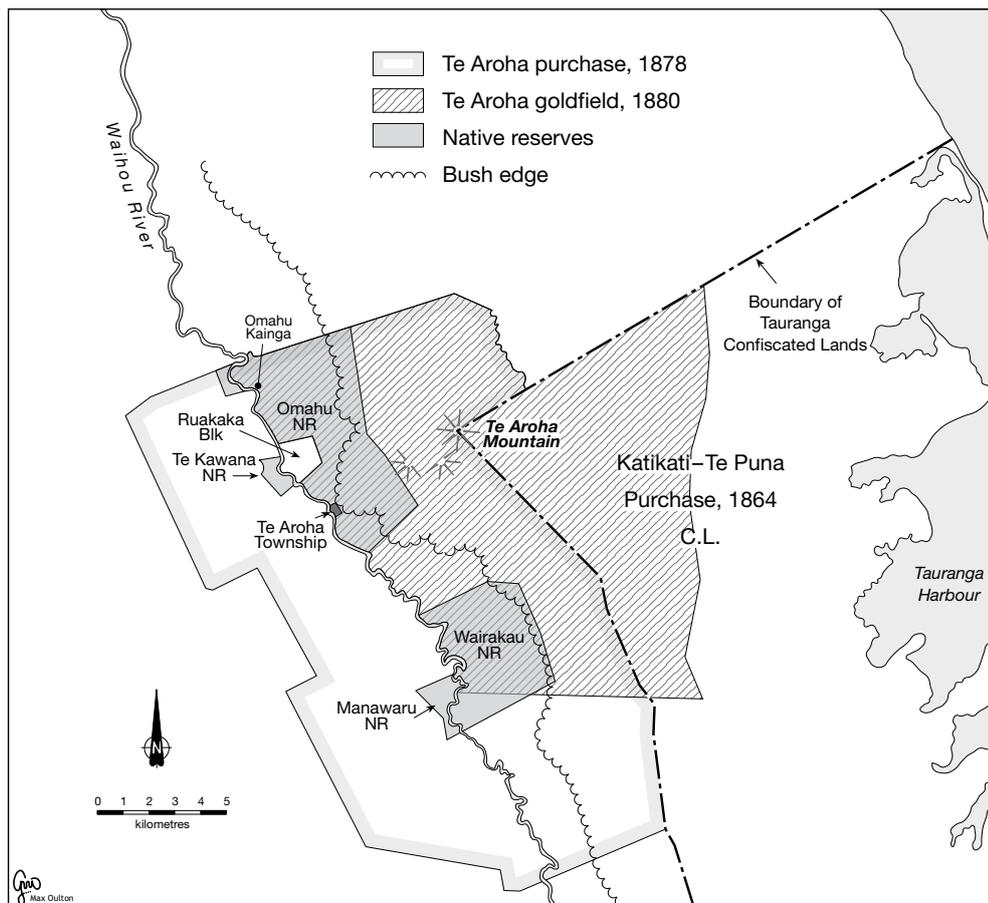


Figure 54: Te Aroha lands

Ngati Rahiri also wrote to native agent Puckey stating, in connection with lands at Wairakau, that a different section of Ngati Rahiri had arranged to lease land to a Mr Strange for a cattle run, that they opposed this lease and intended instead to let the land be managed by the Government for gold-mining purposes.¹⁴ We have also heard evidence that a Maori prospector named Hone Werahiko found gold in 1877 but was driven from the land by Ngati Rahiri; he had not obtained their permission to mine.¹⁵

The Government, however, was more concerned with completing its purchase than with effecting a mining lease. Puckey’s report on the negotiations between Ngati Rahiri and Strange mentions only that no time should be lost in ‘blocking speculators out’ so that the Crown’s purchase should not be involved in any further difficulty. Puckey was instructed to give notice that Te Aroha had been proclaimed to be under Crown purchase under the

14. Document A10, pt 3, pp 168–169

15. ‘Te Aroha Correspondent’, *Thames Advertiser*, 30 July 1880, p 31 (Phillip Hart, ‘Maori and Mining at Te Aroha’, unpublished paper, University of Waikato, pp 2–3). Hart states that prospectors were driven away from the vicinity of Te Aroha maunga before 1880, but that a shortage of money and the experience of revenue from the Thames and Ohinemuri fields brought a change of heart among Ngati Rahiri, and prospectors were encouraged.

Waste Lands Administration Act 1876, and that by that Act private dealings were prohibited. Following the enactment of the Government Native Land Purchases Act 1877, a further notice under that Act secured the land for the Crown.¹⁶

Early in 1878, the chairman of the Thames County Council and Native Minister Sheehan were negotiating to bring the road from Ohinemuri through to Te Aroha. During these negotiations, in April or May 1878 at Pukerahui, Taipari's marae at Shortland, the sale to the Crown of all the Ngati Paoa, Ngati Whanaunga, Ngati Tamatera, and Ngati Maru interests in Te Aroha was finalised. In July 1878, the Crown applied to the court to have its interests in the block defined. The court ruled that Ngati Rahiri had acquiesced in the sale at Pukerahui of all the Marutuahu interests, but in recognition of their distinct claims to the block awarded them 7500 acres at the Omahu end of the block. On the basis of these covenanted arrangements for the Ngati Rahiri reserves, the court, in judgment delivered on 28 August 1878, vested the remainder of the Te Aroha block, 53,908 acres, in the Crown.¹⁷

In fulfilment of the July award to Ngati Rahiri, separate grants of agreed areas of land on the east side of the Waihou near Omahu and near Wairakau were made to hapu and families (with each member listed) and to three individuals (Reha Aperahama, Wiremu Ututangata, Rihia Te Kauae) solely.¹⁸ Additional grants totalling another 1150 acres were arranged west of the Waihou River. Dissension amongst the grantees over what ground each should receive hindered the subdivision of the Omahu and Wairakau reserves (4268 and 3250 acres respectively), but by August 1879 the external boundaries of these reserves had been surveyed and the Crown's portion east of the Waihou was proclaimed; the western portion had been proclaimed in July.¹⁹ The subdivision of the two reserves was put on hold for the time being so that surveying could commence and grants be issued.

11.2 THE GENESIS OF TE AROHA TOWNSHIP

The need for a town near Te Aroha mountain – to serve miners and agricultural settlers – had been anticipated for some years. Ruakaka had been considered by Mackay in 1872: 'Te Ruakaka block . . . is a valuable property and likely to be the site of a Town if that country is opened up for gold mining. There is auriferous land immediately at the back of it.'²⁰ But, as late as December 1877, the block was too much in dispute for any settlement to proceed there, at that time being occupied by Ngati Rahiri, who were challenging its award to Ngati Haua.

16. 'Notification of the Payment of Money on and Entry into Negotiations for the Purchase of Native Lands in the North Island', 15 May 1878, *New Zealand Gazette*, 1878, no 44, p 606 (doc A10, pt 3, p 170)

17. Document A10, pt 3, pp 173–174

18. *Ibid*, p 173

19. *Ibid*, p 178

20. *Ibid*, p 249

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The Omaha reserve was seen as a better prospect; in 1878 Sheehan telegraphed to Preece:

I believe it might be made the site of the township, and, by a judicious admixture of freehold and leasehold of the town, suburban and rural lots, it might be made the source of great permanent profit to the Native owners. With this view, I wish you to do all that is in your power to induce them to make their lands inalienable except by the consent of the Governor. This [Native] Department will then take the matter in hand, should they agree to it; will survey, subdivide and dispose of the property making ample reserves for the natives, and debiting them also with only the actual cost of the operation.²¹

Preece replied that Ngati Rahiri were at that time unwilling to participate in such a scheme, but 'hereafter will see their advantage in coming under the system of management proposed by you.'²²

The site where Te Aroha township grew was the natural site to choose, being located close to the auriferous land and also to the hot springs, which had attracted visitors from the early 1870s and caused a small settlement to develop by 1879. The siting and growth of the town in fact owed a great deal to the entrepreneurial skills of George Lipsey (who arrived there in 1874) and his father-in-law, Te Mokena Hou (Morgan). He had married Ema, Te Mokena's daughter. Te Mokena Hou was one of the principal right-owners in the southern end of the Omaha reserve, at the foot of Te Aroha mountain. There appears to have been little dispute about his rights in the land within which the hot springs stood. Dion Tuuta has stated that the land was awarded to the Mokena whanau in 1878.²³ This is not strictly correct, since the subdivision of the Omaha reserve was incomplete in 1878, but an understanding was evidently in place: Puckey commented in July 1879 that 'Morgan and his family had already been dealt with liberally, having had the pick of the reserves'. Similarly, Preece and Wilkinson reported that it had been known for some time previous to the proclamation of the goldfield (November 1880) who were to be the owners of the southern end of the Omaha reserve.²⁴

Even before the opening of the goldfield, and presumably with Te Mokena Hou's assent, miners and merchants began to gather at the developing goldfield township. By mid-November 1880, with the opening of the goldfield imminent, the *New Zealand Herald* reported that several stores were being erected, a site for Government buildings had been selected and that the 'township near O'Halloran's Hotel will soon be an accomplished fact.'²⁵

21. Document A10, pt 3, p 172

22. Land purchase officer, Thames, to Native Minister (telegram), 10 August 1878, Maori Affairs head office special file 2 (doc A10, pt 3, p 172)

23. Document J5, pp 1-2

24. Land purchase officer, Thames, to Native Minister (telegram), 10 August 1878; native agent, Thames, to under-secretary, Native Land Purchase Department, 8 July 1879 (doc A10, pt 3, pp 172, 177)

25. *New Zealand Herald*, 19 November 1880 (doc G1, p 11)

11.3 THE OPENING OF THE GOLDFIELD

The discovery which occasioned the opening of the Te Aroha goldfield was made in late 1880 by a Government-subsidised prospecting party led by Adam Porter (Arama Poata), under the working management of Hone Werahiko, with Rewi, youngest son of Te Mokena Hou, assisting.²⁶ The party commenced operations in August, and in September reported the discovery of gold on a spur of Te Aroha mountain near the hot springs, on land in which Te Mokena Hou was a principal right-owner. Subsequently they found a small leader, and Harry Kenrick, warden of the Auckland goldfields, had a ton of ore crushed at Grahamstown; it yielded an ounce of gold.

Miners, officials and politicians all regretted that the find had occurred on the Omaha reserve, not on the Crown freehold. Porter considered that 'it would be a misfortune if the same complications should be allowed to take place that had caused so much trouble on the Thames Gold Field' (presumably a reference to disputes over access to land and the collection and payment to Maori of goldfield revenues).²⁷ Attorney-General Whitaker at first tried to purchase the reserve but Ngati Rahiri were aware of the potential revenues from the spa settlement as well as from mining and did not wish to sell.²⁸ But the usual pressure to open a field soon set in: despite the Government's efforts to keep the prospectors' finds secret, private interests began to approach Ngati Rahiri for further prospecting agreements.

The Government's first intention had been to extend the boundaries of the Ohinemuri mining district to include Te Aroha, but this would have enabled Thames and Ohinemuri miners to work under their existing miner's rights, and potential Maori revenue would thereby have been diminished. It was decided to open a new field, 'so that faith may be kept with the Natives'.²⁹

The Crown negotiators were fortunate that the gold was on land in which WH Taipari and Te Mokena Hou were principal right-owners and amenable to the opening of a field. Te Mokena had shares in at least one Thames claim, and for 13 years had received rents from land there.³⁰ Following preliminary agreement with these rangatira, a large meeting was convened at Te Aroha on 26 October 1880 to discuss terms.

The negotiations to open the field were conducted by Wilkinson and Kenrick. In May 1881, Wilkinson, sarcastically and prejudicially, reported:

the Natives, seeing what they thought was their opportunity (and being wrongly advised by some Europeans), did not hesitate to take advantage of it, and modestly demanded that the Government should first pay them a bonus of £1,000, after which they would agree to their promised reserves being thrown open for gold-mining. This extortionate demand was,

26. Hart, pp 9–10

27. Porter to Kenrick, 11 September 1880, MD1 12/353, Archives NZ (Hart, pp 3–4)

28. Kenrick to Wakefield, 22 October 1880, MD1 12/353, Archives NZ (Hart, pp 6–7)

29. Ibid (p 8)

30. Hart, pp 9–10

of course, out of the question, (especially when it is considered that the Natives were to get for themselves all the miners' rights fees, timber licences, &c, as well as town rents), and it was found necessary to discover a way by which to get over the difficulty. This was done by enlisting on the Government side several Natives – including W H Taipari, Makena [*sic*] Hou, and others – who, through owning lands within the Thames Gold Field, had tasted the sweets of being able to receive Native revenue from the same in the shape of miners' rights fees, &c, at regular intervals. These people were negotiated with, and after the matter had been explained to them, they readily signed the agreements to open the field in so far as their blocks were concerned. The result of this negotiation was a decided split in the opposition camp, who now reduced their demand for a bonus to £500. This was also denied them, and as it was now apparent that the bold but necessary stroke of opening the field, whether some of the Natives were willing or not, could be carried out without any real danger, it was decided to do so; and, acting under instructions from the Hon Mr Whitaker, arrangements were made for the opening, which took place by Proclamation, read by Mr Warden Kenrick from the prospectors' claim, on the 25th November last [1880], much to the surprise and chagrin of some of the dissenting Natives; who, seeing that this was the first time, for a number of years, that any policy (however necessary for the public good) at which they chose to express disapproval, should be forced on them, seemed quite taken aback, and unable at first to realize the position. When, however, they found that the opening was accomplished, and their opposition fruitless, they accepted the position, and the following day most of them came in and signed the agreement; and, in a great many cases, at once took out miners' rights, and went to work pegging claims with as much zeal as their European brethren.³¹

We have quoted this statement at length for its candour. We do not imply that we accept the subjective remark of Wilkinson, that this was the first time in years that a Government policy had been forced upon dissenters.

Several aspects of Wilkinson's 1881 report can be understood better from his more considered progress report to Whitaker of 30 October 1880, quoted in Dr Hart's unpublished research paper 'Maori and Mining at Te Aroha'. The demand for the £1000 'bonus' was led by Te Karauna Hou, a principal Ngati Rahiri rangatira, on behalf of many in the community who were sceptical of the benefits of agreeing to mining unless they could get 'an immediate cash benefit'. Wilkinson's adamant refusal stemmed from two advantages that he held: the Government's power to legislate for 'Peace and Good Order' (to quote the preamble to the Treaty); and the already-assured support of Te Mokena Hou and W H Taipari. As to the former, Wilkinson reported that he put to the meeting:

31. McKerrow, 'The Gold Fields of New Zealand', 1 July 1881, AJHR, 1881, G-8, pp 9–10 (doc A8, pp 273–274; doc G1, pp 14–15)

That Gold having been found, it was impossible to keep the Europeans from coming to search and dig for it – *That* as Maories could not well dig for it to the exclusion of others, it would be advisable to let the Europeans come. That if Europeans were allowed to come it would be necessary for the safety and protection of all that they should not be allowed to come unless the law came with them (ie, that they worked under the recognised laws for Gold Mining). *That* as the Maories had no laws and were not in a position to make any, affecting Gold Mining, and that as a much larger extent of Government land than Maori land would be included in the proposed Gold Field, I considered it would be advisable for them to include the Reserves that they were to get out of the Aroha Block within the land the Government proposed to open as a New Gold Field, in return for which they would be allowed to receive all the Revenue accruing therefrom in the shape of Miners Rights Fees, Business, Battery and Residence Site fees, also Kauri Timber and firewood licences, the Government binding itself to collect these monies and pay the same over to them quarterly.³²

Following the objection of Te Karauna Hou and others, Wilkinson let his proposals lie and turned to the negotiation of an agreement with Te Mokena Hou, the principal owner in 750 acres within which gold had been found, and 750 adjoining acres ‘ceded’ to the agreement by the Taipari family. The agreement – the prototype for the subsequent general agreement – involved a declaration of a new field under the Gold Mining Districts Act 1873. Every man mining on the field would be required to take out a miner’s right, at an annual fee of £1, and the Maori owners would receive these, plus other fees listed in Wilkinson’s 1880 report. However (as Kenrick explained in a letter of 22 October 1880), rents from licensed holdings (the former ‘leases’ of the Thames company mining system) were reserved to meet local government expenses in managing the field; Kenrick and Wilkinson considered that they duplicated miner’s rights fees.³³

Te Aroha township was a major issue in the agreement. Wilkinson and Kenrick suggested to Te Mokena Hou that part of the ceded land should be exempted from the mining agreement as a ‘cultivation reserve’ and part be surveyed for a township. Twelve acres were designated for the latter and Mr G Purchas, the Government surveyor then demarcating the reserves, sketched out the roads and 60 allotments for the town. The formal agreement included a clause that said ‘At the request of Ema Mokena, We undertake to cut out and reserve from occupation under the Gold Mining Districts Act all the land between the river and the foot of the hills, within the Reserve Block at Te Aroha required for the use of herself and children.’³⁴ The township was mainly a Mokena family enterprise.

32. Wilkinson to Whitaker, 30 October 1880, MD1 85/1006, Archives NZ (Hart, pp 11–12)

33. Kenrick to Wakefield, 22 October 1880, MD1 12/353; Wilkinson, memorandum, 16 November 1888, MD1 6/14, no 1, Archives NZ (Hart, p 17)

34. Kenrick and Wilkinson, ‘Minutes re Te Aroha Reserves and Land’, 26 October 1880, MD1 6/14, no 1, Archives NZ (Hart, pp 13–14)

In November 1880, negotiations resumed with the other owners of the reserve, according to the plan outlined in Wilkinson's 1881 report. Hart records a new complication which occurred the day before signing; a group of Ngati Rahiri assembled at Kenrick's office to seek further concessions. These were refused and when one man threatened to take the gold from miners on the reserve, Kenrick said that he must withdraw the threat or face arrest and detention until sureties were paid for his good behaviour.³⁵

Harry Kenrick's appointment as warden and regulations for the new goldfield were gazetted on 25 November. On the same day, the goldfield was opened with ceremony, in terms which underline the perception of the Crown officials present, that ceded land effectively passed to the Crown:

At 9 o'clock Mr Warden Kenrick, accompanied by Mr G T Wilkinson, Government Agent, Mokena Hou, *the late owner of the field*, and Mr F A Puckey, Court Interpreter, proceeded up the hill, and took their positions at the top of the Prospector's Claim, the point arranged at which the guns notifying that the field was opened were to be fired from . . . By the time the reading of the proclamation was finished the watches showed nine o'clock and at the signal from Mr Kenrick, Mr G T Wilkinson, and Mokena Hou fired off two double-barrelled guns, the reports of which were heard all over the field. [Emphasis added.]³⁶

A 'considerable rush' took place and 90 claims were pegged, some several times over by different claimants, which led to initial disputes.³⁷

The proclamation of Te Aroha as a goldfield under the Gold Mining Districts Act 1873 was gazetted on 18 November 1880. The Te Aroha goldfield block did not coincide with the Te Aroha land block: it was confined to the east bank of the Waihou at the northern end of the land block, extending into the Tauranga confiscation block. All of the Omahu reserve and most of the Wairakau reserve were included in the goldfield. Specifically excluded were the Ngati Haua-owned Ruakaka block and the hot springs reserve. However, when in 1884 the Mokena family brought an action in the Resident Magistrate's Court against a tenant on one of the allotments, the magistrate ruled that the effect of the goldfields declaration was that the land was let by the Maori owners to the Crown for a period of 21 years or for such time as it might be required.³⁸ It is not clear which portion of the township this refers to.

11.3.1 The terms of the agreement

The agreement reached with the Mokena and Taipari families was used for the main agreement with the other owners, but the reference to land for Ema Mokena was replaced by:

35. *Thames Star*, 15 December 1880, p 2 (Hart, p 18)

36. Document G1, p 18

37. McKerrow, 'The Gold Fields of New Zealand', 1 July 1881, AJHR, 1881, H-17, p 12

38. Document Y5, p 6

The necessary cost of enforcing the payment of the revenue will as at present in Hauraki be defrayed from the Revenue collected.

Native cultivations and Tapus together with the ground occupied by them for residence will be laid off and exempted from occupation under the Act.

Any additional land that may be wanted by the Natives for cultivation will be reserved as required by them.³⁹

These last provisions were regarded by Wilkinson as allowing any Maori landowners to exclude their land from mining if they wished.⁴⁰

The annual fees payable to Maori owners were the standard £1 fee for a miner's right, £1 for a residence site, £5 for a business site, £10 for a machine site, £1 5s per kauri tree, and £5 for a licence for cutting other timber.⁴¹

Dr Anderson has commented that the outcome of the negotiations 'represented a decline in the Maori position' because under the agreement the Maori owners, while entitled to revenue from miner's rights and other fees, were not to receive the rent from mining leases or licences; these were payments characteristic of company quartz mining. Dr Anderson considers that these contributed some 30 per cent of the income of Maori right-owners on the Thames field.⁴² Wilkinson reported on this exclusion in his 1889 'Report on the Question of Miner's Rights':

When the late Mr Warden Kenrick and I negotiated with the Natives for the opening of Te Aroha goldfield we, having in view the difficulties that had arisen in other goldfields through the introduction of the leasing system and its consequent reduction in revenue from Miners' Rights, made an arrangement with the Natives that they were not to receive the revenue from Mining Leases, and it was therefore not included in the sources from which the Native were to get their revenue, as set forth in the agreement.⁴³

The rationale given here for the exclusion of rents from leases from Maori revenues is difficult to comprehend. It is not as if leasing regulations would not apply at Te Aroha and that therefore all mining claims would be held under miner's rights. Wilkinson was simply subtracting lease moneys from the moneys that Maori would receive. Dr Anderson has stated, 'Negotiators for the Government insisted on this exclusion, in order to satisfy the mining

39. See copy of agreement, Te Aroha Warden's Court, mining transfers, BBAV A485/42, Archives NZ (Ak) (Hart, p17)

40. Wilkinson, memorandum, 17 October 1887, Te Aroha Warden's Court, BBAV A485/42, Archives NZ (Ak) (Hart, p18)

41. Province of Auckland, *Rules and Regulations for the Hauraki Gold Mining District* (Auckland, 1873) (Hart, p18)

42. Document A8, p 273

43. Wilkinson, 'Report on the Question of Miners' Rights and Other Revenues Payable to the Native Owners of the Thames, Coromandel, Ohinemuri and Te Aroha Goldfields', 30 May 1889, J1 96/1548, Archives NZ (doc A8(a), pp 701-719)

11.3.2

and local body interest which had so strongly criticised Maori receipt of those revenues in the case of the Thames field.⁴⁴

This interpretation is consistent with the explanation given in Kenrick's letter to Wakefield of 22 October 1880, cited above. Wilkinson may also have been concerned that there should be no excuse for not enforcing the holding of miner's rights. But this is a poor legitimisation.

We have not seen figures that would allow us to quantify the amount of revenue foregone by Maori as a result of the exclusion of lease moneys. That is, we do not know what sum of lease moneys were collected from miners or companies occupying Maori land at Te Aroha, which would otherwise have been payable to Maori. But Wilkinson regretted excluding lease moneys in the 1880 agreement when the Mining Act 1886 reduced the moneys receivable by Maori to 15 shillings per each £1 miner's right.⁴⁵ He protested that this would especially disadvantage Te Aroha Maori because (with mining lease revenues already foregone) miner's rights were their main source of revenue from mining.⁴⁶

11.3.2 The development of the Te Aroha goldfield

Hart's research shows that 20 Maori took out miner's rights on the opening day (among the 200 total) and a further 77 in the next month. Maori then traded in their shareholdings in various claims, as did Pakeha miners. Hart concludes that 131 Maori held shares in the rush of 1880–81; by tribal affiliation the largest single group (19) were Ngati Rahiri but there were considerable numbers of Ngati Tamatera, Ngati Koi, Ngati Haua, and others. Some claims were worked by parties of Maori, often on their own, sometimes with a Pakeha manager. Rangatira, like Pakeha businessmen, commonly bought and sold shares in companies, rather than actually mining, but Te Mokena Hou, aged 84, joined in the labour of sinking a shaft at the Whakapipi claim. Maori spouses or partners of Pakeha also invested, among them Ema Lipsey and Merea Wikiriwhi (Wilkinson's de facto wife and mother of four of his children).⁴⁷ Werahiko, who was paid a bonus of £350 for finding payable gold at Te Aroha, continued to prospect, with Maori colleagues.⁴⁸

Yet, despite the flourish with which the Te Aroha field opened, experienced miners were dissatisfied. As reported by mining inspector McLaren in May 1881:

the general opinion of the Thames gold-miners who had experience soon came to be that there was nothing to warrant an extensive rush. The gold obtained by the prospectors on the surface and in the leader which they afterwards found did not continue down to any great depth, as the rock became very hard and pinched out the quartz, and in the neighbouring

44. Document A8, p 273

45. Document P6, p 85

46. Wilkinson, 'Report on the Question of Miners' Rights'

47. Hart, pp 22–32

48. Ibid, pp 33–35

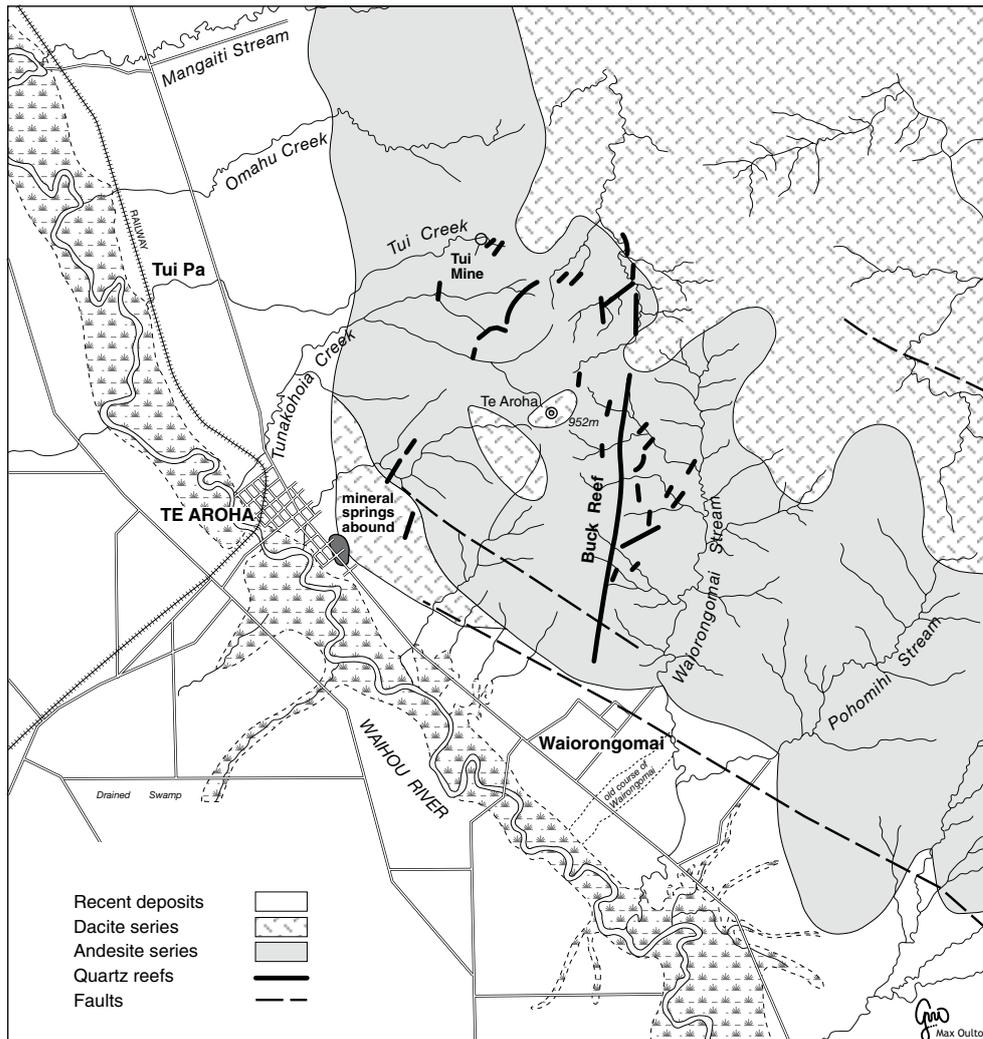


Figure 55: The geology of the Te Aroha goldfield. Source: John Henderson and John Bartrum, *The Geology of the Aroha Subdivision, Hauraki, Auckland Geological Survey Branch Bulletin 16* (Wellington: Department of Mines, 1913).

claims no discovery of any moment was made, the Prince of Wales Claim being the only one which might be said to have a slight show.⁴⁹

McLaren reported that the Morning Star claim, situated considerably south of the prospectors' claim, was said to have found fair gold, and two or three miles to the north thought that:

[the] Ruakaka District . . . [is] a much more kindly-looking country for mining, containing large bodies of quartz showing a little gold, and which might be made payable if a battery

49. McLaren to Under-Secretary for Gold Fields, AJHR, 1881, H-17, no 3, pp 17-18

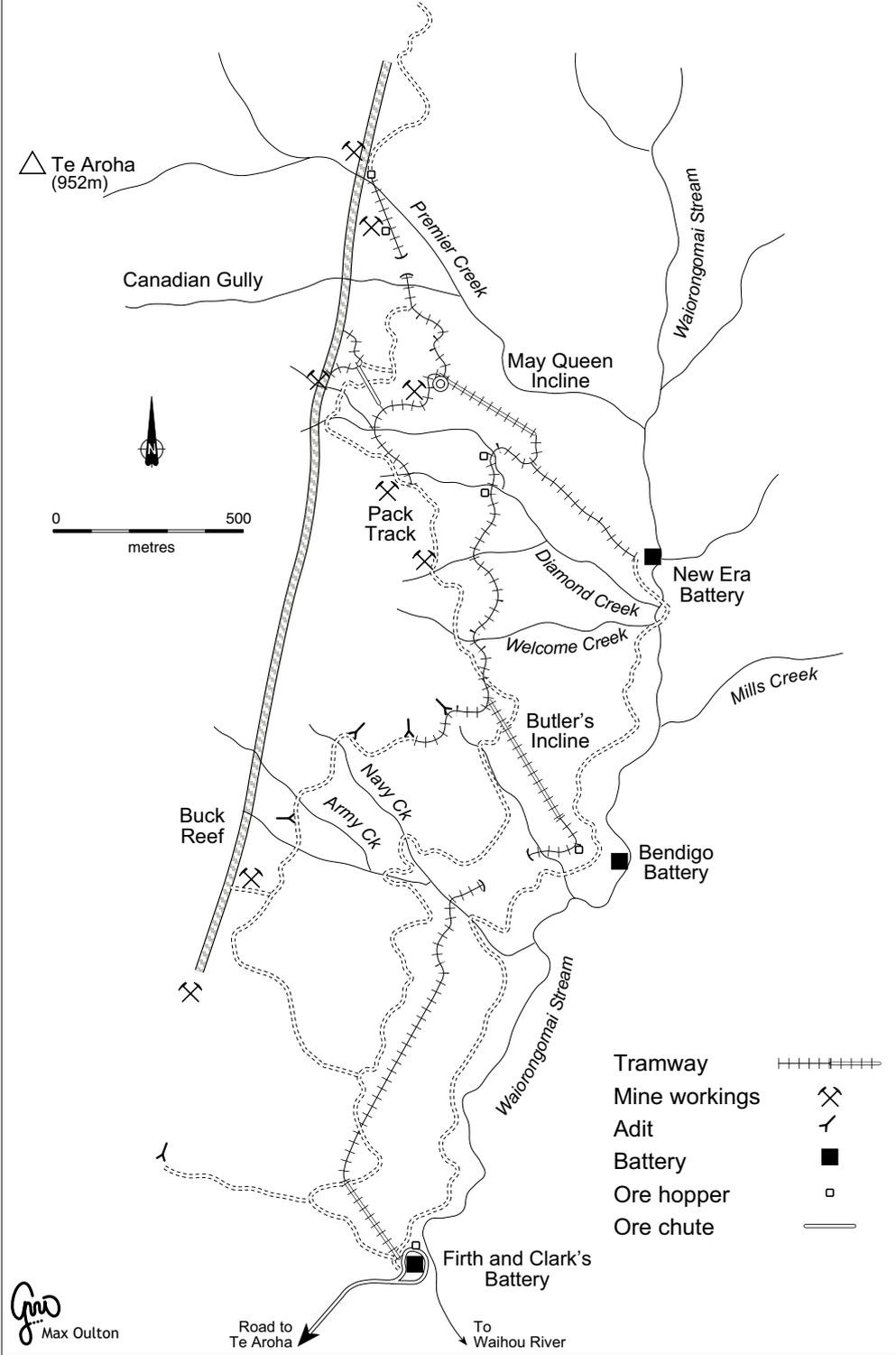


Figure 56: Waiorongamai mining area, Te Aroha goldfield

was erected driven by water-power, where large quantities of quartz might be put through at a cheap rate.

A crushing company was being formed which would allow the true prospects of the field to be determined, but McLaren was not enthusiastic:

Rushes of this unfortunate nature are to be deplored, sweeping away as they do, years' savings of many poor men; not but that there may be good gold in the district, but the nature of the prospecting work, the hard rock to be driven through, and the consequent slow progress that can be made, necessitate the expenditure of much time and money before any adequate returns can be had.⁵⁰

Warden Kenrick, however, was cautiously optimistic: 'To summarize the present and future prospects of this gold field, I may state that I still hold the opinion . . . that a permanent gold field has been opened; but it is one that will take both time and money to develop.'⁵¹

The more promising Ruakaka district, referred to by Kenrick as the 'Omaha line of reef' (near the headwaters of the Omahu and Tui Creeks, in the ranges behind the Ruakaka block) was the location of many Maori claims. Their work was interrupted by the brutal murder in February of Hamiora (or Haimona) Haira, probably by a European. Maori deserted their claims and gathered together, partly in fear but principally in mourning; some may have lost their claims in so doing.⁵²

Few if any mines in Te Aroha or near Ruakaka ever became very productive. Most gold produced from the Te Aroha goldfield came from the Waiorongomai Valley to the east of Te Aroha mountain, where Hone Werahiko located a reef in November 1881. These deposits were mainly within the Crown land between the Omahu and Wairakau reserves.

Two businessmen established the Te Aroha Battery Company. When this battery did not prove to be profitable in its own right they invested in developing a mine. Tens of thousands of pounds were spend on tramways and mine works and thousands of tons of quartz were crushed. However, the yields obtained from the ores were very low, and the mine operated at a considerable loss.

Mines inspector Downey wrote in 1935 that 'the history of mining on this field can scarcely be described as any other than one long chapter of disaster.'⁵³

50. McLaren to Under-Secretary for Gold Fields, AJHR, 1881, H-17, no 3, pp 17-18

51. Kenrick to Under-Secretary for Gold Fields, 2 May 1881, AJHR, 1881, H-17, no 2, p 13

52. Ibid; see also Hart, p 32. Kenrick does not give the murdered man's name, but Hart refers to him as Himiona Haira.

53. JF Downey, *Gold Mines of the Hauraki District, New Zealand* (Christchurch: Cadsonbury Publications, 2002), p 261

11.4 TE AROHA TOWNSHIP

Meanwhile, upon the opening of the goldfield in November 1880, the rush to register business sites (which, under the relevant mining legislation, it lay with the warden to grant), was perhaps even greater than the rush for mining claims. Kenrick reported ‘considerable difficulty’ in meeting the demand, and some sites were applied for by six or seven applicants. Dion Tutaa cites an account in which the door to the warden’s office was broken down by a stampede of applicants who, amid the struggle to be registered first, threw their applications to the warden. The demand for sites remained so high that Kenrick instructed surveyor Purchas ‘to survey another block in front of O’Halloran’s Hotel.’⁵⁴ Wilkinson reported in January the following year that Purchas was still engaged on work at the township.

The explanation for the sustained demand for township sites did not lie in high expectations of the goldfield alone. Warden Kenrick extolled the virtues of the goldfield township:

A more favourable site for an inland town than the Aroha could not have been selected. Placed on a navigable river, connected by fair roads to the Waikato, and by water to the Thames and Auckland, with a large extent of good agricultural land in the immediate vicinity, it is probable that a permanent town would sooner or later have been built in this locality, independent of any gold discoveries. The Lincolnshire farmer’s settlement [Broomhall’s scheme which was abandoned] would almost have insured this.⁵⁵

The Government was benignly paternalistic towards the developing township. Shortly after the opening of the goldfield, Wilkinson advised the Native Department against granting a request from Te Karauna Hou and other owners of the Omahu reserve to allow leases of longer than 21 years – the maximum allowed under the mining legislation – over parts of the reserve. Wilkinson argued that the field was only newly opened, and if long term leasing were allowed before the township site was fixed, land leased by Europeans might become the permanent site, ‘in which case the Europeans would then be reaping the benefit instead of the natives.’⁵⁶ The request to allow long leases was denied ‘for the present’. Hart remarks, ‘The persistent attempts of Reha Aperahama to sell the inalienable Te Kawana block to meet his debts were likewise declined.’⁵⁷

The original township site, agreed between Te Mokena Hou and Wilkinson in October 1880, was surveyed as ‘Morgantown’. It was rivalled by (but soon merged with) the subdivision organised by George Lipsey on his wife’s reserved land (‘Lipseytown’). By May 1881, the first four subdivisions had been surveyed, and by 1884 the settlement had grown sufficiently large to be constituted a town district under the Town Districts Act 1881. Whereas gold

54. Document G1, p 19

55. Kenrick to Under-Secretary for Gold Fields, 2 May 1881, AJHR, 1881, H-17, no 2, p 13

56. Wilkinson to under-secretary, Native Department, 10 December 1880, Maori Affairs head office special file 2 (doc A10, pt 3, p 210)

57. Hart, p 37

mining was to remain small scale and had largely petered out by 1914, the most enduringly valuable of the assets connected with gold mining were not goldfield claims but the township allotments leased under the provisions of the Mining Acts.

11.5 REVENUES ACTUALLY PAID

Dr Hart's careful research has shown that Ngati Rahiri owners received in goldfield revenue: £836 in 1881–82 (after deductions by officials and local bodies), £1123 in 1882–83, and £764 for 1883–84, thereafter declining steadily to £636 in 1898–89 and falling sharply to £291 in 1899–1900. There was apparently no marked fall after the 1886 Mining Act (see sec 11.4), but Dr Hart remarks that, because the reserved land was increasingly alienated to settlers or the Crown, the amounts payable to Maori decreased as a percentage of the total payments from the field. Thus, Maori landowners received £561 out of the total payments of £1366 in 1897–98, £636 out of £1775 in 1898–99, and £291 out of £633 in 1899–1900. Of the payments to Maori, the Mokena family received the largest: 'Morgan's block' yielded £2404 from December 1880 to March 1889, and 'Lipsey's block' £5481 from December 1880 to December 1894.⁵⁸ It is not clear whether these figures included town rents.

11.6 TRIBUNAL COMMENT AND FINDINGS

Neither claimant nor Crown closing submissions relate specifically to gold issues in Te Aroha. The Ngati Rahiri Tumutumu claimants (Wai 663) have made reference to aspects of the Te Aroha purchase, to the thermal springs and to Te Aroha township. The two latter issues are dealt with in chapter 19.

Concerning the Crown purchase of Te Aroha, Ngati Rahiri Tumutumu claimants note the 1877 petition of Ngati Rahiri against the right of Ngati Tamatera and other Marutuahu to sell the Te Aroha block (see sec 11.1), and argue that this challenges the Crown's contention that the purchase was negotiated 'in the main with traditional groupings.'⁵⁹ We note that the Native Land Court of 1878 concluded that Ngati Rahiri had acquiesced in the sale by the Marutuahu tribes of most of the block, but awarded Ngati Rahiri the 7500-acre reserve at Omahu in recognition of their distinct interests. We have not been provided with the evidence nor do we have the jurisdiction to go behind the specific finding of the court. However, we note that the location of the Ngati Rahiri reserves in effect divided Te Aroha Maunga between the Crown and the Omahu reserve, a point not clearly established until

58. Ibid, pp 38–39

59. Document Y5, p 3; paper 2.550, p 36

1880. It is odd that only the southern slopes of a mountain considered sacred by local Maori was included in the reserve. (The tapu of Te Aroha Maunga is discussed in section 19.2.) But we have seen no detailed evidence as to how the boundaries of the reserve were decided.

The subsequent subdivision of the reserve, the award of its constituent blocks to named individuals and their subsequent sale relate to the issues arising out of the Native Land Acts and Crown purchases, and will be considered further in that context (in chapters 15 to 17).

On Te Aroha township, the claimants assert that declaring the land a goldfield had ‘a serious impact on the way the Mokena whanau were able to manage their lands’, in that the declaration was held to amount to a lease of the township land to the Crown, for sub-letting under the goldfields regulations.⁶⁰ Undoubtedly, the goldfield regulations imposed certain restraints on how the Mokena family could manage its lands, but this is hardly a grievance. The evidence is clear that the Mokena family and Crown officials collaborated closely in the establishment of the town, and that the Crown rendered considerable assistance in such matters as survey, town planning and the collection of revenues from town leases. It seems likely that the costs of survey were deducted from revenues, judging by Sheehan’s 1878 instructions to Preece (see sec 11.2), but the Crown was willing to bear the initial cost, in the interests of getting the field opened. Moreover, Crown officials were protective of the Mokena family’s interests, refusing to lift restrictions on alienation beyond short leases in the first instance. Generally speaking, the Mokena family seems to have benefited from the Crown’s intervention and support in the late 1870s and early 1880s.

We wish to comment here, however, on the way the Te Aroha goldfield agreement was secured and its terms. It is clear from Wilkinson and Kenrick’s reports that Crown officials, supported by Attorney-General Whitaker, were heavy-handed in the way they opened the field. In 1880, they had the active cooperation of two leading right-owners, Te Mokena Hou and WH Taipari, respecting some 1400 acres. Although officials were aware that Ngati Rahiri were divided about agreeing to mining without an up-front grant of £1000 (later reduced to £500), on 18 November the Crown gazetted a goldfield over a vast area of land (Crown and Maori) and on 25 November opened the Te Aroha field. As Wilkinson reported in 1881, this policy, considered necessary for the public good, was ‘forced on’ those initially refusing to sign the agreement without bonus payments. Wilkinson and Kenrick had discerned that Ngati Rahiri were fundamentally supportive of mining; the hapu quickly abandoned their demand for a bonus and joined in the rush for claims. But the Crown officials’ actions were considerably short of negotiating in utmost good faith and securing full prior consent. The agreement did include clauses allowing Maori owners to opt *out* by having their land declared cultivation or residential reserve, but it would have been more consistent with Treaty principles to have opened the field on the Mokena and Taipari land and allowed others of Ngati Rahiri to opt *in*. However, as always in goldfield situations, there

60. Document x5, p 6

were indeed serious public interest considerations involved, and we accept as genuine the need to bring the whole area affected under regulation to deal with the anticipated rush.

The terms of the agreement were a diminution of entitlements previously agreed on the goldfields to exclude fees or rents for licences and pay these instead to local bodies. There may have been some effort to offset this by enforcing more vigorously the taking out of miner's rights at Te Aroha than at some other fields, but the effect of the 1886 legislation was to diminish the potential Maori earnings. The matter would have been more serious had the Te Aroha field continued to prove lucrative, but the issue becomes somewhat academic as it proved to be no bonanza. On the contrary, the extraction of gold on Te Aroha soon proved difficult and expensive, a factor which underlay the 1886 attempt by the Legislature to make the fee structure more attractive to investors (see sec 13.4.2).

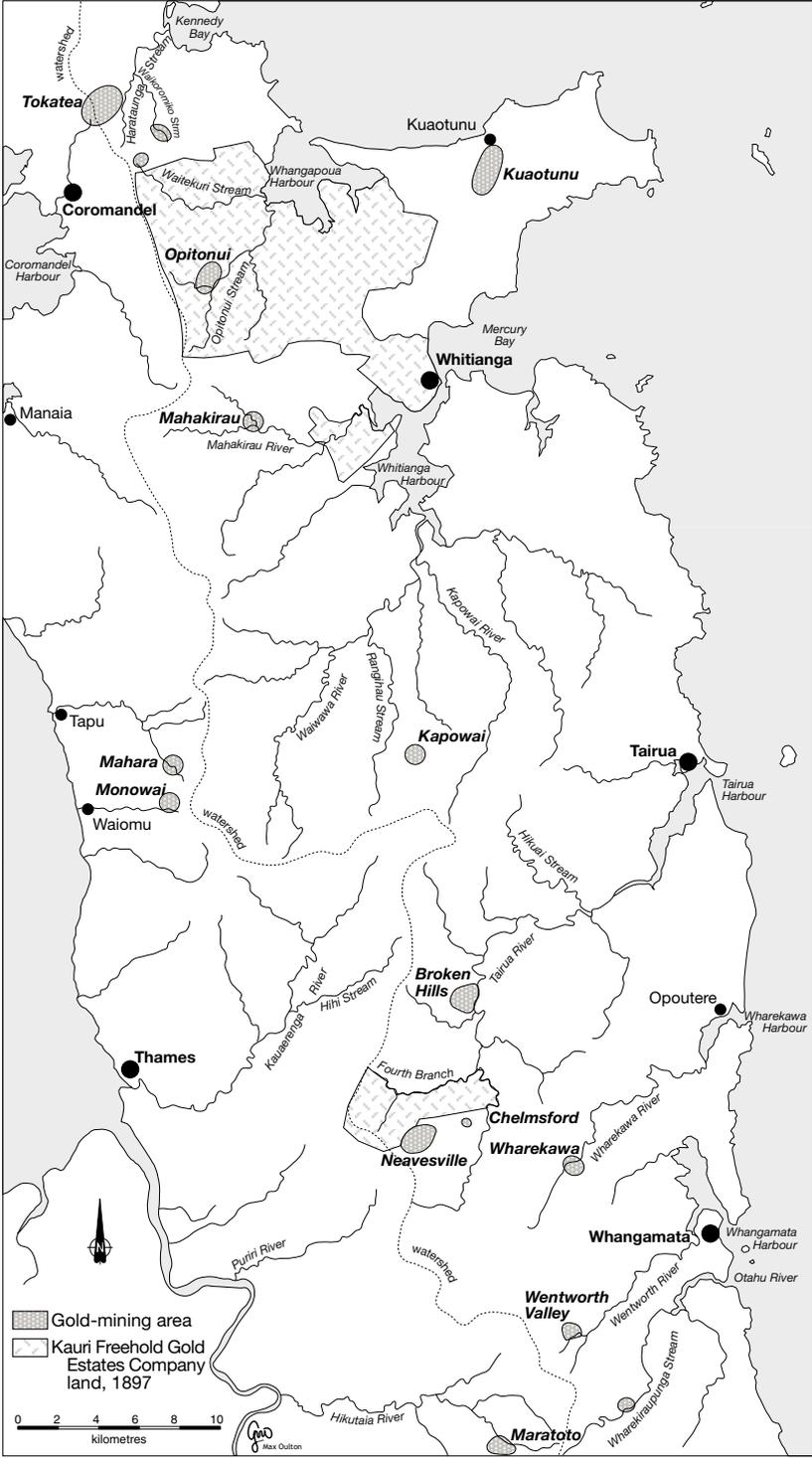


Figure 57: Gold-mining areas of eastern Coromandel

CHAPTER 12

EAST COROMANDEL GOLDFIELDS

12.1 INTRODUCTION

From 1868 to 1900, the eastern Coromandel Peninsula was the scene of several gold discoveries and small rushes. None assumed the proportions of the goldfields discussed in previous chapters. But the hope that they might yield great riches attracted miners and investors, and led to renewed efforts by the Crown and private buyers to acquire the land from Maori.

12.2 HARATAUNGA

12.2.1 The opening of the block

The Harataunga block was among many blocks ceded to the Crown for gold-mining purposes through James Mackay's efforts in the late 1860s. Gold was worked in the Waikoromiko Valley and Harataunga Stream upstream of their junction near the centre of the block and, most importantly, east of the Tokatea Hill. What some sources refer to as the Tokatea goldfield – named for the hill, not the mining block of the same name – actually straddled the Tokatea and Harataunga mining blocks, with many of the principal mines located in the latter. Maori retained ownership of parts of these auriferous areas into the twentieth century.

Customary rights in this block rested with various Ngati Porou hapu, including Te Aitanga-a-Mate, Te Aowera, and Te Whanau-a-Rakairoa, who had gained possession through a gift or *tuku* by the Te Matewaru and Ngati Tamatera chief, Paora Te Putu in 1852 (see sec 2.2.5). Mackay secured the cession agreement without opposition from Paora's hapu. What underlying rights his hapu might have retained over gold mining were not fully tested, as they might have been had they opposed the agreement. Some issues have been raised by claimants in connection with the administration of revenues and timber rights.

Mackay was prompted to seek the cession of mining rights at Harataunga by the report that a prospecting party led by George McLeod had found alluvial gold. This find was probably in the Waikoromiko or Harataunga Streams rather than on the reefs near the Tokatea Hill. Even within the Tokatea mining block, opened earlier, miners did not work those reefs until the discovery of the 'Tribute' leader in mid-1868. Even then, although these deposits

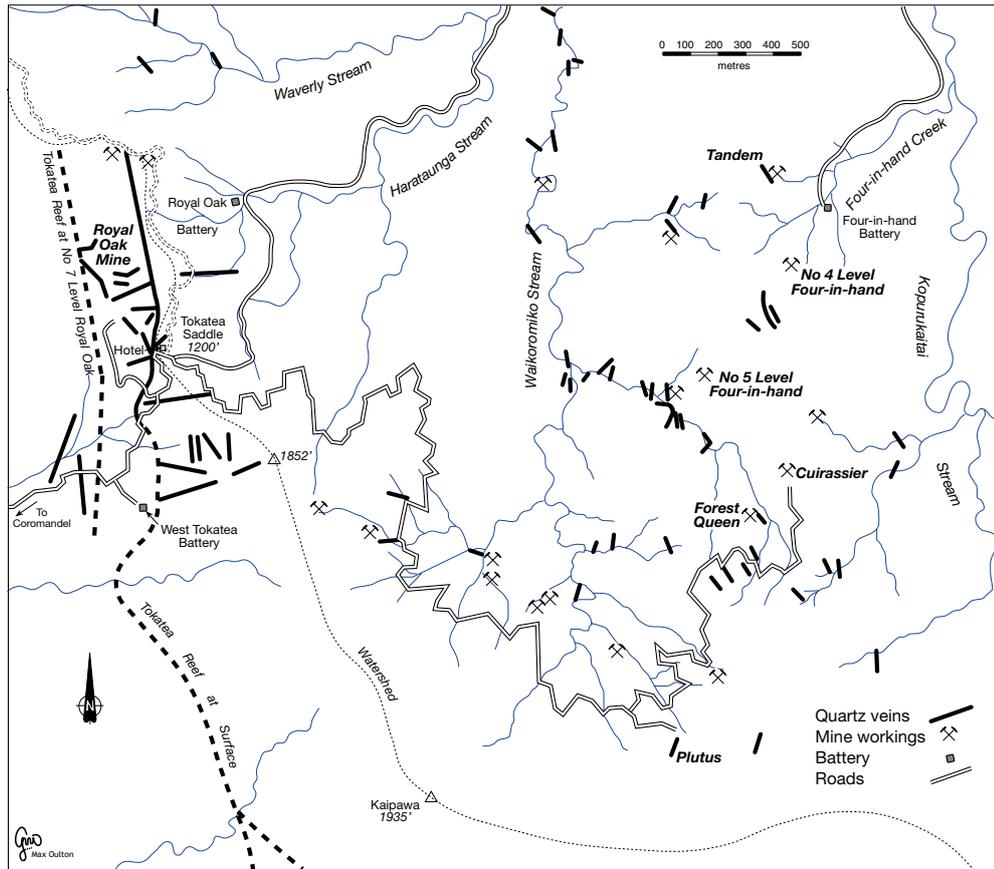


Figure 58: Tokatea-Harataunga gold-mining area. Source: *New Zealand Geological Survey Bulletin 4*.

extended into the Harataunga block, it is unlikely that miners had put any great pressure on the right-owners to allow them access.

Mackay negotiated the mining cession, dated 13 May 1868, with resident Ngati Porou led by Ropata Ngatai. The Ngati Tamatera chief, Te Moananui and Paora's niece, Riria Karepe, signed as witnesses but not as parties to the agreement. They did not claim the right to receive a share of goldfield revenues then or after. Ropata Ngatai then travelled to Tuparoa at Waiapu to visit the Reverend Raniera Kawhia, whom Mackay described as the principal man among the non-resident claimants. Kawhia approved the agreement on the condition that two pieces of the block formerly leased to Messrs Smart and Hogg were reserved. In subsequent dealings and land court proceedings (in 1878) to establish title to the Harataunga blocks, a leading role was taken by Rapata Wahawaha ('Major Ropata'), rangatira of Te Aowera hapu, normally resident at Waiapu.

The 1868 mining cession agreement was modelled on the Te Mamaku 2 agreement negotiated with Ngati Maru and Ngati Whanaunga. It stipulated that the land was ceded for gold-mining purposes under the Gold Fields Act 1866, and that revenues of £1 per miner's right issued would be payable to the Maori owners. As was usual by then, miners would be

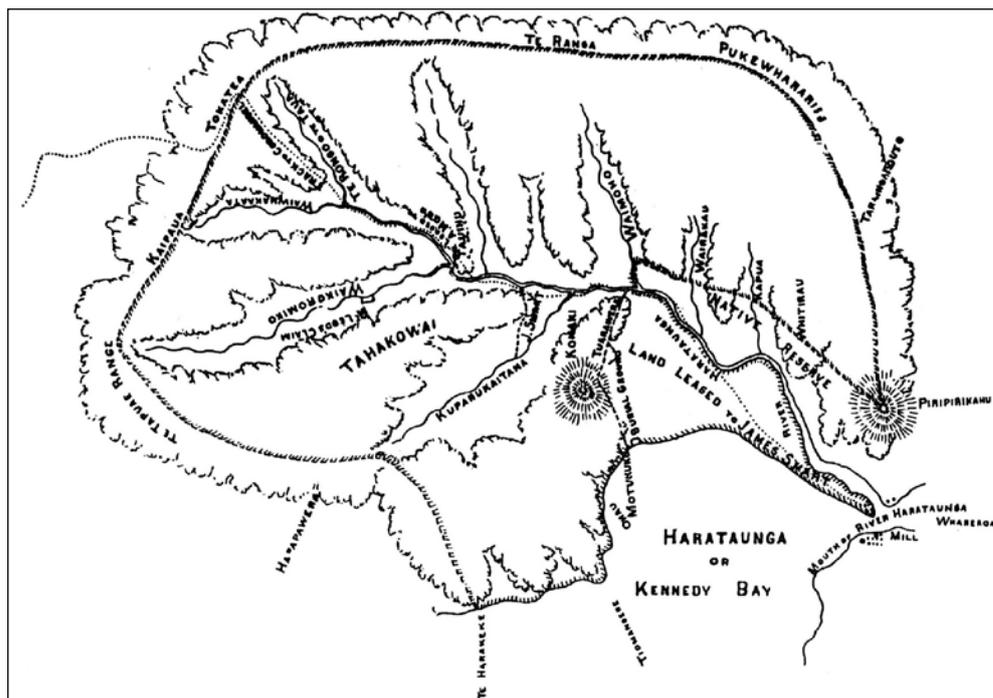


Figure 59: Harataunga block (goldfield), 13 May 1868. Source: Henry Hanson Turton, *Plans of Land Purchases in the North Island of New Zealand*, 2 vols (Wellington: Government Printer, 1877), vol 1, deed 344.

entitled to free use of timber other than kauri, for mining purposes only. Kauri could be cut for a fee of £1 5s per tree. Any person desiring to cut other timber for sale had to obtain a miner's right and a timber licence from the Crown for a fee of £5 per annum, also payable to the Maori owners.

The Harataunga block was proclaimed as part of the Coromandel goldfield on 18 May 1868. The proclamation was validated by the Auckland Gold Fields Proclamations Validation Act 1869, which also stipulated that the rights acquired by the Crown would not be affected by the conversion of customary tenure into Native Land Court titles. Mackay reported that, following the proclamation 'a considerable number' of miners came to Kennedy Bay but most soon left, for the gold deposits were not easily worked by individual miners.¹ By the early 1870s, however, some valuable reefs were being worked and new discoveries made, including Waikoromiko in the south of the block.

12.2.2 The administration of revenues

According to an 1880 report by Puckey (native agent for Thames and Coromandel), no payment of goldfield revenues was made to Harataunga Maori by Mackay in 1868–69. After

1. James Mackay, 'Report by Mr Commissioner Mackay Relative to the Thames Gold Fields', 27 July 1869, AJHR, 1869, A-17, pp 8–9

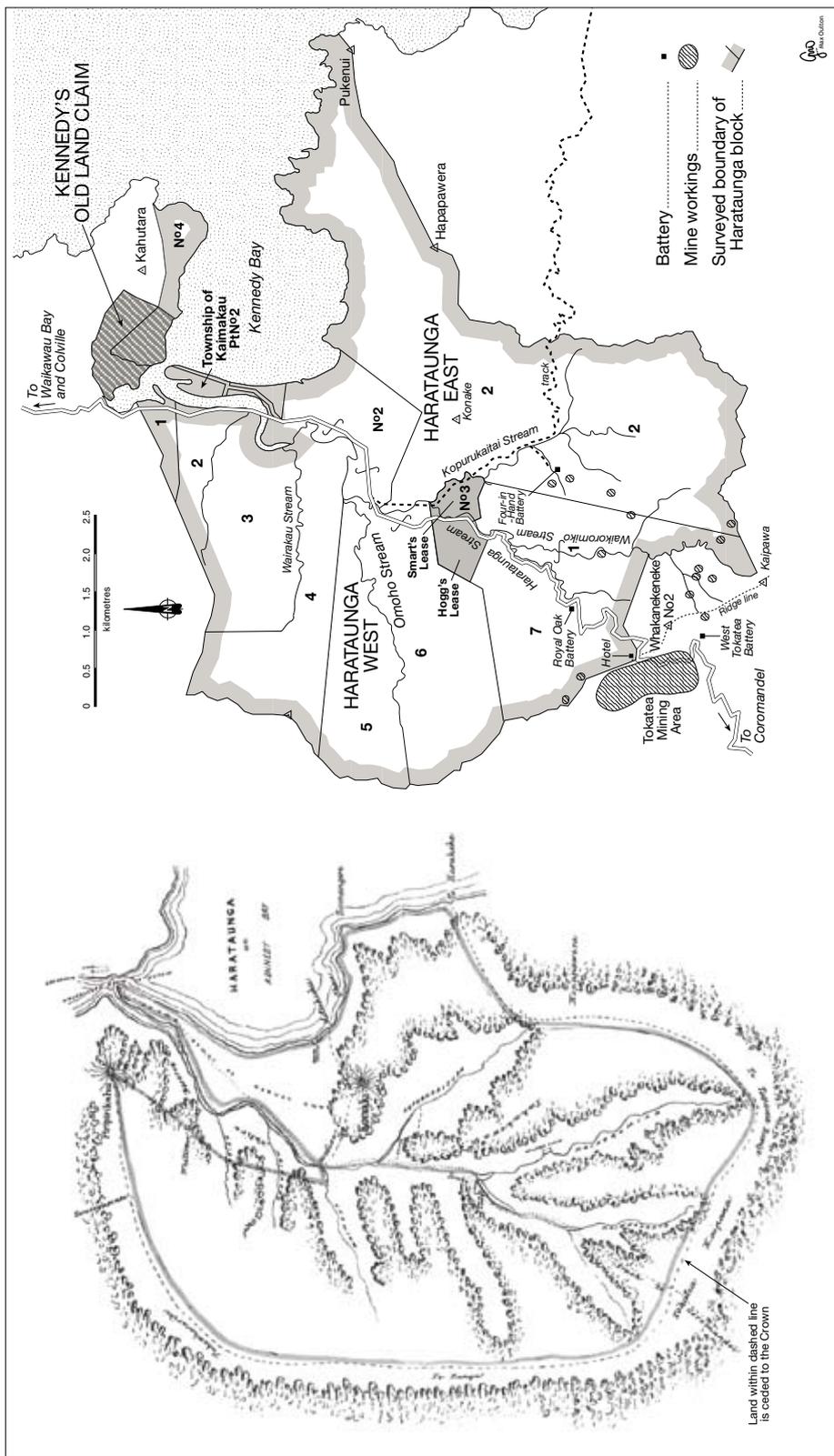


Figure 60: The Harataunga block. Left: Mackay's sketch map of the goldfield at Kennedy Bay, 1869. Source: AJHR, 1869, A-17. Right: Gold mining on the block.

repeated applications for them, Puckey went to Harataunga in December 1870 to resolve the matter. Ropata Ngatai and others claimed the whole accrued sum, but Puckey refused to pay more than half, pending clarification of the entitlements of the right-owners at Waiapu. After much dispute, the other half was paid to Rapata Wahawaha, the leader of the non-resident right-owners. Puckey explained:

Other payments have at intervals been made since to Major Ropata and Rev Ranura [*sic*] Kawhia who substantiated their claims to the whole known auriferous portion of the block in the Native Land Court at Coromandel in February 1878, since which time one payment has been made.²

In the land court hearing, the Harataunga block was divided into Harataunga East (4552 acres) and Harataunga West (4339 acres) divided by the Harataunga Stream, each containing a number of subdivisions. According to Puckey, Harataunga West subdivisions 1 to 7 contained most of the gold diggings. These blocks were awarded to Wahawaha's party of claimants. However, the Waikoromiko mines were in Harataunga East 1 and the southern portion of Harataunga East 2.

The issue of the distribution of revenues re-emerged in 1895 when some owners complained that they were not receiving any. Native agent Wilkinson wrote to the mining warden:

Until March 31st 1892, all revenues accrued from the Harataunga blocks (without distinction between East and West) has been paid to Ropata Wahawaha and Eruera [*sic*] Kawhia on behalf of all the owners. Since then, however, it has been retained, because of an objection by one of the owners to these chiefs receiving the money. There is now about £145 in hand, and what I propose should be done now is for the Mining Inspector to allocate that money to the particular subdivisions on which mining etc has taken place, and pay it to the owners of those subdivisions, or to those who they may appoint to receive it.³

No further evidence is available about the question of distribution of gold revenue.

12.2.3 Crown purchases in the block

Following the court determination of 1878, the owners indicated some willingness to sell the mountainous goldfield land but not the 600 or so acres of flat land fronting the harbour, where they had their houses and cultivations. The Crown showed little interest, however, until the 1890s, when the land purchase officer in Gisborne received offers to sell from Harataunga owners there, in particular an offer from Wahawaha in November 1892 to sell

2. Native agent, Thames, to under-secretary, Native Department, 31 July 1880, Maori Affairs head office special file 62 (doc A10, pt 1, p 6)

3. Wilkinson to mining warden, Thames, 23 March 1893, MA-MLP1899/48 (doc A10, pt 1, p 20)

THE HAURAKI REPORT

12.2.3

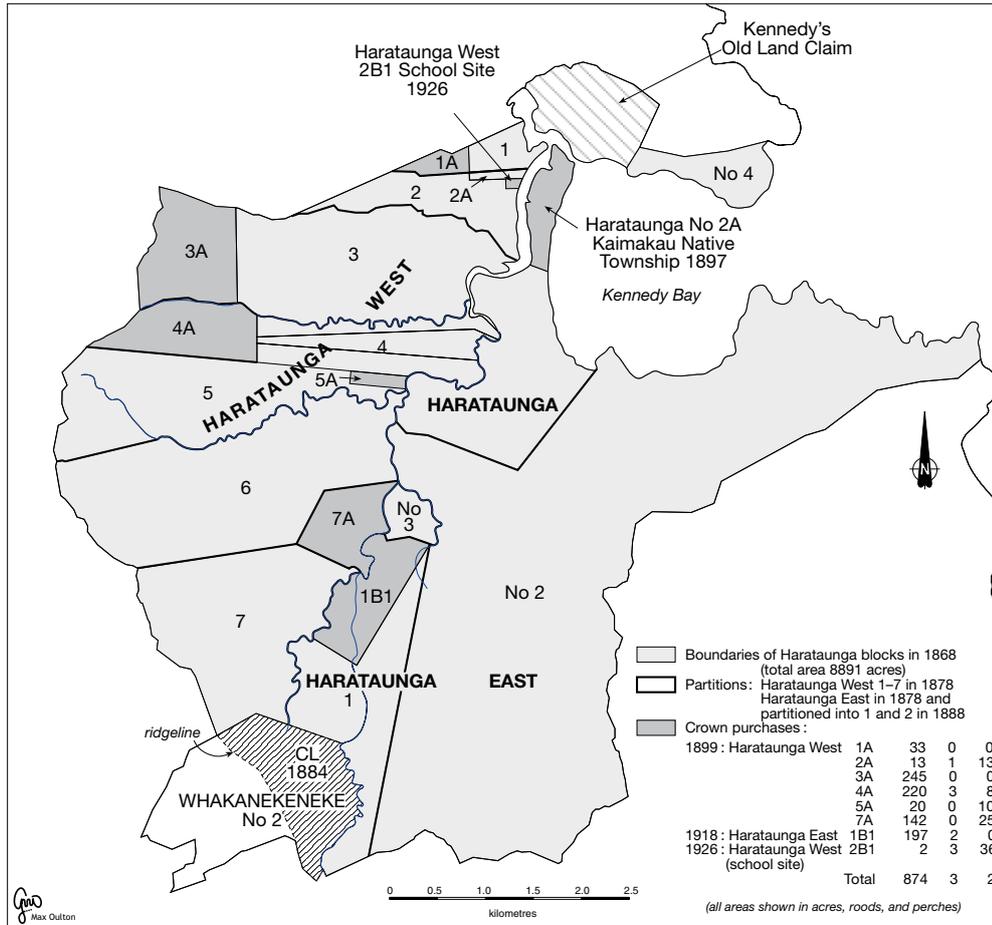


Figure 61: Crown purchases in the Harataunga block

the Harataunga West 1 to 7 blocks. Between 1893 and 1896, the Crown agent in Gisborne purchased a number of interests, at five shillings an acre, but in Coromandel Peninsula, where most of the owners lived, the land purchase agent, Gilbert Mair was able to obtain no interests at all.⁴ He reported:

Puterangi, the principal chief at Kennedys Bay, and his immediate relatives will not sell their interests as they say they have no other land whatever. It has been a great waste of money surveying the numerous subdivisions. The natives seem anxious now to have them all swept away, with a view, if it could be arranged, of taking the non-sellers shares in one or two pieces, and so save cutting up the 6 or 7 divisions into as many more by long narrow strips.⁵

4. Document A10, pt 1, p 18

5. Hauraki minute book 49, fol 318 (doc A10, pt 1, p 19)

In 1899, the Crown's interests in the Harataunga West blocks were partitioned out by the court. They amounted to 675 acres, the owners retaining 2248 acres. Mair reported that he had great difficulty in arranging 'a fair subdivision of the land' because the shares of each owner had never been defined, and their residences and cultivations were on the seaward end of each block. Another problem was that 'those natives who had resided on the land for the last 50 years were most unwilling to admit that the sellers, none of whom had ever probably seen the land, should have equal shares.'

But Mair insisted that the shares of residents and non-residents alike be treated as equal. The Crown selected the back portion of Harataunga West 1 (plus nine acres extra on account of the lack of frontage) and the back of 3 and 4 on account of the kauri timber. 'As to the rest, the Crown awards comprise the best of the land.'⁶ Mair made no mention of gold being a consideration in the Crown's choice of land; by that time, mining was of little importance in Harataunga.

The resident owners of the Ngati Porou hapu at Kennedy's Bay could scarcely have been pleased at their non-resident kin in Gisborne selling the land from under them, and it must be doubtful whether descendants of the non-residents today have any basis for claiming interests in the remaining Harataunga West lands. Moreover, whatever the strictly legal view of the matter, in our view it was unconscionable and not in keeping with the spirit of the Treaty for Mair to insist on treating the interests of non-residents as of equal worth with those of the resident owners. The issue touches upon the very large question of the way non-residents in land court titles can exert a much greater role than would have been possible in customary tenure and one which often prevented resident owners from developing the land and retaining the full value of their developments. This matter is discussed further in various sections of chapters 15 to 18.

12.3 PAKIRARAHĪ (AND ADJACENT BLOCKS)

Claims relating to Pakirarahi have been brought both by the Wai 100 and Marutuahu claimants, and by Gavin Caird and Shane Ashby on behalf of the Ngati Hikairo hapu (Wai 464, Wai 661). It has been submitted that not all the customary right-owners had consented to the cession of the block to the Crown for gold-mining purposes before it was declared open. More seriously, it has been submitted that in 1895 the district land registrar registered a freehold title to the Pakirarahi 1 block in favour of the Kauri Timber Company (KTC), without the transaction being approved by the Native Land Court, thereby depriving the Maori owners of both gold and timber revenue.⁷

6. Mair to chief land purchase officer, 23 March 1899, MA-MLP1899/48 (doc A10, pt1, p 20)

7. Document H3, pp 2-6

12.3.1 The opening of the block to miners

The Pakirarahi block is in the Coromandel Ranges east of Thames, in the watershed drained by the eastward-flowing Tairua River. It includes the so-called Neavesville goldfield.⁸ The block was included in the proclamation of 8 April 1875 extending the Hauraki gold district; also proclaimed were the Tairua, Kapowai, and Puketui blocks (the Crown purchase of which was either complete or nearly so), and parts of the Taparahi, Korongo, and Takatakaia blocks.⁹ However, only verbal – not written – agreements existed between Crown and Maori relating to these blocks.

James Mackay, in an ‘Address to Ngati Maru’ given in 1896, explained that the Pakirarahi block was among lands he had excluded from the 1868 Te Mamaku 2 mining agreement. It had then been proposed by Ngati Maru that one of the mining blocks into which their land was to be divided, namely the Kirikiri mining block, should encompass part of the Taparahi, Korongo, Takatakaia, and Pakirarahi blocks. Had it done so, the Kirikiri mining block would have extended across the crest of Coromandel Ranges into the watershed drained by the Tairua River. Mackay, however, having no surveyor at hand, insisted that it was necessary to adopt natural boundaries; the watershed ridge between the east and west coasts should be the eastern boundary described in the 1868 mining agreement. Mackay’s proposal was vehemently opposed by the Maori negotiators at the time on the ground that he was cutting off lands which, in terms of customary ownership, were one with the lands on the Thames side of the watershed.

Mackay recorded in 1896, that when the Hauraki gold district was extended in 1875, he again discussed the eastern lands which had been cut out:

I drew [the proclamation] out. But before writing it, I went to Hohepa Paraone Tarawerawera, Riwai Te Kioire, and Te Hoterene Taipari, and spoke thus to them – ‘Friends, do you recollect the portion of the Kirikiri block, which I excluded from the agreement of the 9th March, 1868, that is part of the Taparahi, Korongo, Takatakaia, and Pakirarahi blocks, which I have held ever since in my hand. At present, I and Dr Pollen are drawing out a fresh proclamation to include more land in the goldfield. What do you say about it?’ They said at once, ‘include it now, so that the lands may lay straight in their own places.’

Mackay also added, in response to a doubt raised by Cadman, then Minister of Mines, that the Crown had acquired Maori consent to mining on Pakirarahi:

8. The spelling ‘Neavesville’ was officially adopted by the New Zealand Geographic Board: *Decisions of the New Zealand Geographic Board Nga Pou Taunaha o Aotearoa*, 28 January 2004, <http://www.linz.govt.nz/rcs/linz/pub/web/root/core/Placenames/PlaceNameDecisions/28jan2004/index.jsp>.

9. ‘Proclamation Enlarging the Boundaries of Hauraki Gold Mining District’, 8 April 1875, *New Zealand Gazette*, 1875, no 21, p 237; *Auckland Provincial Government Gazette*, 20 April 1875, vol 24, no 20, p 238. Dr Anderson stated incorrectly that Pakirarahi was included in the March 1875 proclamation; it was the Ohinemuri block that was proclaimed in March.

EAST COROMANDEL GOLDFIELDS

12.3.1

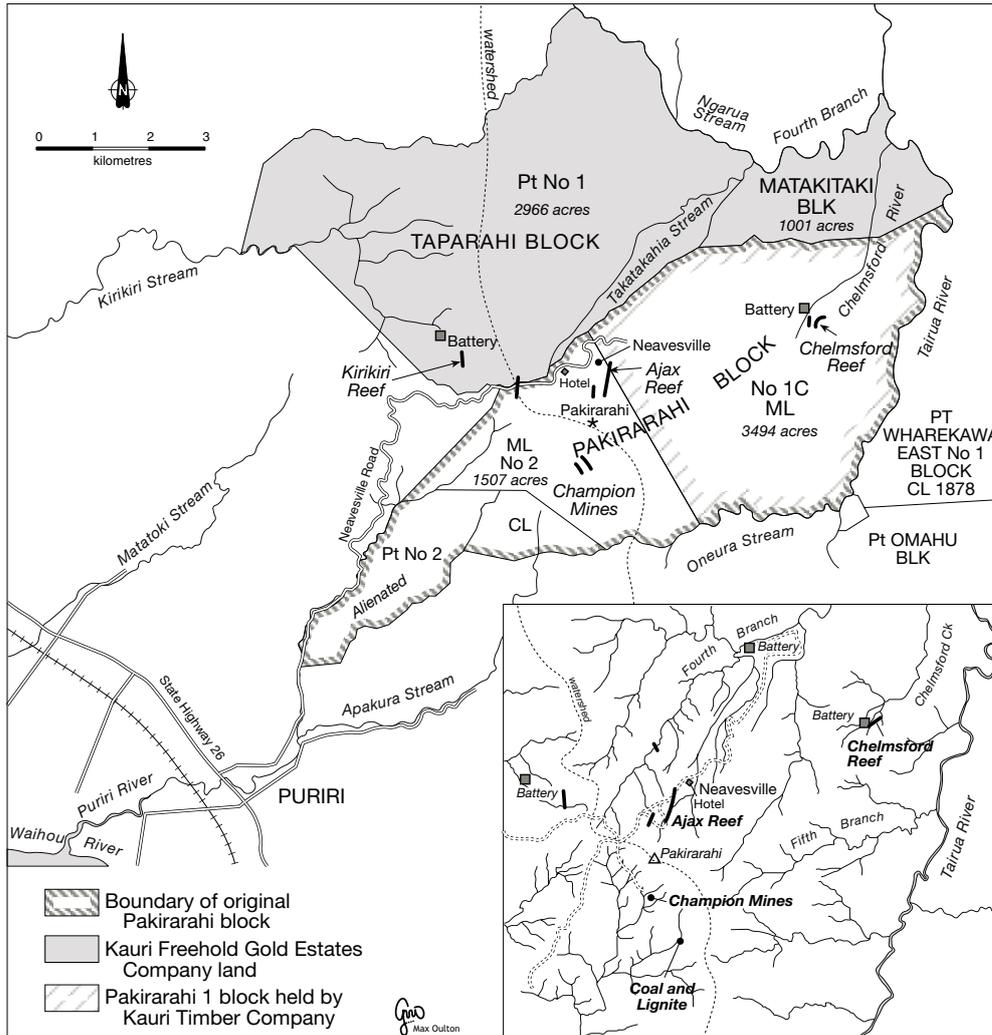


Figure 62: The Pakirarahi block. Inset: The Neavesville mining area.

If the Government had no authority to sanction mining on the Pakirarahi block, perhaps they will be able to show the reason why the Miners Right, and the lease money, has been paid to the Maoris all these years. Also the payment for such 'kauri' trees as have been bought for mining purposes.¹⁰

Mackay's account rings true. Yet, the opening of the Pakirarahi block had struck difficulties arising out of Mackay's complex negotiations in relation to the Tairua-Pakirarahi area. In the course of these, he apparently endorsed a promise by a private mining company of a share in a mining claim to Nikorima Poutotara, one of the presumed right-owners in the Tairua-Pakirarahi area, in exchange for his consent to the proclamation. Shortly after the

10. Translation in English: Address of Mackay to Ngati Maru (Thames: WM McCullough General Printer, 25 May 1896) (doc B11(a), p 31). Mackay mistakenly recollected the date of the proclamation as 8 April 1875.

1875 proclamation, Matiu Poono and Tauturo (Tauturo Tawa) asked the superintendent of the province not to approve any applications for mining leases: ‘The land is ours which has not been adjudicated upon. Therefore, do not be led ignorantly into granting a lease of that land but let the applicant come to us the owners of the land.’¹¹ Licensed interpreter WH Grace wrote on their behalf that they had not ceded any interests in the block nor been consulted in the matter, and that ‘One native only [Nikorima Poutotara] who claim[ed] a small interest in the Block, consented to the opening of the said land for gold mining purposes . . . without the knowledge of other claimants.’¹² Matiu Poono and others also petitioned the House of Representatives about the manner of the opening.¹³

Although Mackay seems to have believed that he had obtained the consent of the major right-owners to the proclamation, he had not done so. Nor had he held a general meeting to sanction the proclamation, arranged for the allocation of revenues, or come to a written agreement with the owners. These omissions, and the preferential treatment of Nikorima Poutotara, underlay the difficulties in the opening of Pakirarahi.

The Native Affairs Committee investigated. The main concerns raised by Grace, representing the petitioners, were who had a right to deal with the block and receive revenues from it and whether, as Grace espoused, all of the major right-owners in the block were entitled to shares in the claim equal in value to those promised to Poutotara. The committee also examined whether the receipt of such shares by those entitled to receive them was a necessary condition of the cession. The committee decided that the petitioners had not established a case for compensation and it recommended only that the ownership of the block should be determined by the Native Land Court.

The awards made by the court in December 1875 did confirm that Mackay had dealt with most of the major right-owners (assuming his 1896 account to be accurate). The portion known as Matakītaki was awarded to Te Hotereni Taipari solely. Pakirarahi 1 (3494 acres) was awarded to Hohepa Paraone, his wife Maata, Kataraina Te Whakaharuru, and

11. Tauturo and Matiu Poono to superintendent, 19 April 1875, 1875/1188, AP2/51 (Robyn Anderson, *Goldmining: Policy, Legislation, and Administration*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1996), p 43)

12. WH Grace, 24 June 1875, Auckland Provincial Government general inwards correspondence, AP2/51 1777/1873 (doc A8, pp 272–273). Mackay had not consulted with Nikorima alone but he had consulted with very few others of the Ngati Te Ahumua hapu, and the objectors were fundamentally right in respect of that hapu’s portion of the block. The promoter’s share promised to Nikorima may be the same share referred to in evidence before the Tairua Investigation Committee by WH Grace, who acted for those Maori protesting the proclamation of the Pakirarahi block. Grace refers to a dispute involving Te Moananui, Tanumeha, Riwai Te Kiore, Hohepa Paraone, Matiu Poono, and Tauturo Tawa regarding the division of shares in the Prospector’s Claim to which, according to Grace, they were entitled (this claim appears not to have been awarded in the end). Grace refers to a promise made by Mackay to these Maori that, if they agreed to the opening of Pakirarahi, then it would be arranged that some of the shares promised to Nikorima would be made over to them: see WH Grace, ‘Minutes of Evidence’, 7 September 1875, AJHR, 1875, I-1, pp 24–25; James Mackay, ‘Minutes of Evidence’, 7 October 1875, AJHR, 1875, I-1, p 47.

13. Anderson, p 43. Dr Anderson does not name the other petitioners or say how many there were.

Hona Pou.¹⁴ Pakirarahi 2 (2495 acres) was awarded to Nikorima Poutotara and 37 others.¹⁵ However, Matiu Poono and Tautoro Tawa were amongst the awardees of Pakirarahi 2 and thus their right to have been consulted by Mackay was borne out.

The subdivision of the block appears to have overcome potential objections: Kataraina Te Whakaharuru later gave evidence that she ‘was not agreeable for the miners rights to issue until the land had been partitioned between us and Nikorima – then it was said let us cut the survey line that it may be known upon whose land the miners rights [were to] issue.’¹⁶

All this evidence suggests that, despite the limitations of his proceedings, there had been considerable consultation by Mackay, and that from 1868 onwards most of the principal owners were willing to see the land included in a mining agreement. For want of much fuller documentation, we are unable to go behind the decision of the Native Affairs Committee on Poono’s petition. The fact that Kataraina Te Whakaharuru’s objection related to the *apportionment* of revenues, suggests that she was supportive of mining rather than opposed to it.

We conclude that most of the customary owners had given consent to mining on Pakirarahi and the related portions of the former Kirikiri block. However, Mackay’s arrangements for the opening of the block were less than thorough, and the proclamation including the block in the Hauraki goldfield was premature.

No information is available as to whether any shares in mining claims were made over to Nikorima; Tautoro Tawa and Matiu Poono may have come to some accommodation with him. Mining on a limited scale commenced, and it seems that some goldfield revenues were paid to the named owners in the next few years.¹⁷ The only indication of further discontent among the owners was that in June 1889 the Native Land Court partitioned Pakirarahi 1 into 1A and 1B ‘to cut the interest of Porokuru Tamamutu, who was not a blood relation of the owners, out of the block.’¹⁸ There is no further mention of this partition in the evidence until the re-amalgamation of the two parts as Pakirarahi 1C in 1991.¹⁹

Claimant research indicates that mining was difficult on Pakirarahi, and that several of the mines opened in 1875 had a short life. Production increased after 1900 following new investment. The most productive site was ‘the Golden Belt’, an area of about 30 acres embracing the Ajax reef. Claimant research indicates that some 11,000 ounces of gold and 18,500 ounces of silver were extracted from Pakirarahi up to 1940, and that 80 to 90 per

14. Document H3, pt 2, pp 8–12. The awardees of Pakirarahi 1 claimed from the ancestor Hikairo, whereas Nikorima claimed from a *tuku* from Hikairo to his wards Kaimoka and Te Kutu.

15. Document H3, pt 2, p 12

16. See the evidence of Kataraina Te Whakaharuru before the Native Land Court in the 1889 hearing regarding the subdivision of Pakirarahi 1: Hauraki minute book 21, fols 224–230 (doc H3, pt 4, pp 16–17).

17. Hauraki minute book 21, fols 224–230 (doc H3, pt 4, p 14)

18. Document H3, pt 4, p 13

19. *Ibid*, p 31

cent of this came from Pakirarahi 1.²⁰ However, this is indeterminate because the Golden Belt site straddles Pakirarahi 1 and 2 blocks. The claimant report also recognises that much capital had been invested in the development of the mines.

12.3.2 The alienation of Pakirarahi 1

Before mining in the Pakirarahi block took place on any significant scale the various owners of Pakirarahi 1 entered into a series of transactions with the Union Steam Saw Moulding Sash and Door Company (hereafter, ussc), with perhaps unintended consequences for their rights in the block.

The first set of transactions were recorded in three deeds of conveyance:

- ▶ The first, dated 31 March 1882, was signed by Hohepa Paroane, Mata Paroane, and Kataraina Te Whakaharuru and purported to convey to ussc 'all their estate and interest' for the sum of £770 10s. Subsequent to the signing, the investigation of title begun in 1875 was completed by the award of a certificate of title to the same three owners plus Hona Pou. The certificate is dated 29 August 1883. On 26 June 1884, T M Haultain, trust commissioner, attached his certificate to the March 1882 transaction.
- ▶ On 14 July 1884, Hohepa Hikairo and Matire Parehuitau, two of the three successors to the interests in Pakirarahi 1 of Hona Pou, who had died before the 1882 sale, conveyed their interests to ussc, in freehold, for £157. Haultain's certificate dated 30 July 1884 was attached. The need to find successors to Hona Pou and transact with them as well, had probably emerged when Haultain examined the 1882 transaction on 26 June.
- ▶ On 25 August 1884, Mohi Hamuera also conveyed his interest to ussc for £75.

However, within a few weeks the various owners had apparently decided to clarify what they had actually intended to convey, for on 19 September 1884 (having paid the nominal sum of 10 shillings to ussc) they signed a deed of covenant with ussc which reshaped the deal. This deed recited the previous deeds then stipulated that ussc would convey the block back to the Maori covenantees or their successors, either when it had taken out the timber, or at the end of a term of 99 years. It also reserved to the Maori vendors the right to receive mining revenues, in the following terms:

If at any time hereafter during the said term of ninety nine years any prospecting searching or mining for gold or other minerals shall take place on or in the said land or any part thereof all fees dues or monies paid for or on account of such prospecting searching or mining by any person or persons, Company or Companies or bodies or bodies corporate

20. Document H3, pt 5, pp 1, 13

shall be paid to and deemed to belong and be the property of the covenantees their heirs successors or assigns the deeds of Conveyance hereinbefore in part recited to the contrary notwithstanding.²¹

Two points should be made in clarification of these matters:

- ▶ First, provided the Crown held no unexpired pre-emptive right of purchase over Pakirarahi 1 (and none was asserted), it was perfectly lawful for the Maori owners to alienate their land to private parties, regardless of whether there was a mining agreement over it and it was within a mining district. A consequence of any such sale would be that the land would cease to be Crown land or land deemed to be Crown land under mining legislation. Provisions of the mining legislation relative to Crown land and regulations under it would then cease to apply.
- ▶ The terms of the September 1884 covenant embodied the company's promise to reconvey the land to the Maori vendors after the removal of the timber or after 99 years, and protected its entitlement to fees and dues from prospecting or mining. But they do not appear to have otherwise qualified the title that USSC enjoyed in the meantime, by virtue of its purchases.
- ▶ By virtue of its assumed title, USSC mortgaged the land to the Bank of New Zealand in 1888; the bank then, in default of repayment by USSC, sold the land to KTC. Mining on the block would first have been under USSC's terms, then those of KTC, not those of the Crown, as on Maori land subject to cession agreements. Among the arrangements that KTC made in relation to mining was in 1896 to 'give grant and assign' to Finlay McLiver of Nevesville 'all the right to the land and interest' in the 30-acre area known as the Golden Belt, one of the richest areas of mining on Pakirarahi.²²

The company's claimed freehold interests were further established by the fact that the three deeds of conveyance of 1882 and 1884 were able to be registered in the Land Transfer Office (although not without possible technical malfeasance), while the deed of covenant of September 1884 was not. The covenant itself was registered in the Deeds Registry Office on 1 October 1884 as number 89727.²³

A freehold title for Pakirarahi 1 (certificate of title 71/84) was first issued by the Land Transfer Office on 9 September 1895. The certificate of title was issued in the names of four of the original awardees,²⁴ and ante-vested to 1875 under the authority of section 73 of the Native Land Court Act 1894. By this time, KTC was in possession of the block. Its solicitor

21. Certified copy of deed of covenant (doc H3, pt4, pp15-16). The following account of the transactions and litigation is taken from document H3, pt 4.

22. Document H3, pt 4, p 19

23. Ibid, pp 17-18

24. The late Maata Paraone had been admitted by the other awardees out of aroha, and her interest had since been awarded to them.

applied to have the three deeds of conveyance of 1882 and 1884, and a number of subsequent deeds by which it claimed title, brought forward and registered under the land transfer system. The district land registrar, Edwin Bamford, agreed to register them on the conditions that KTC admitted notice of the deed of covenant of September 1884, and that a caveat pursuant to it be entered on the title. The transactions between USSC, the Bank of New Zealand, and KTC were also entered.

The result was that in February 1896 KTC became the registered proprietor of Pakirarahi 1 under the land transfer system. The company's freehold title was encumbered only by the caveat (caveat X1069) entered at Bamford's request. The caveat states that it was entered 'for the prevention of improper dealings and the protection of the interests of the several natives as mentioned in the Deed of Covenant registered in the Deeds Registry Office under No 89727'.²⁵ This caveat had the concrete effect of preventing the registration of further transfers of the freehold, which KTC found inconvenient. It is not clear what effect in law the caveat had on mining rights fees and dues, although (as noted above) the covenant appeared to protect the Maori covenantees' entitlement to them. We have seen no positive evidence that they received no revenues from fees and dues after the registration of the KTC title. There were, for example, no contemporary complaints that these had ceased. However, the claimants' understanding is that the revenues did stop at that time.

Registrar Bamford's right to issue freehold title and register the conveyances was never ruled on in the courts. There were, however, cases heard concerning the caveat. In 1902, the Supreme Court heard an action brought by KTC against the district land registrar seeking the removal of the caveat. After observing that 'it is perhaps rather unfortunate, but I cannot help it', Judge Conolly ruled that the intention to reconvey the land expressed in the deed of covenant was against the law of perpetuities and that the caveat must be removed. Bamford then appealed the decision. His appeal was allowed and the order to remove the caveat discharged.²⁶

Although the registrar's defence of the caveat was obviously protective of the Maori interest, comments made by Justice Stout in the Court of Appeal raise other serious questions about the officials' protection of the rights of the Maori covenantees. Stout commented:

It is clear that until the Registrar treated the conveyances as transfers under the Act, and registered them, the Kauri Company had no legal estate in the land. The conveyances and the deed of covenant constituted the agreement between the Maori and the Union Company, and the Kauri [Timber] Company had no greater rights than as assignees of that agreement. And if the Court had to spell out the real transactions from these conveyances and deed of

25. Document H3, pt 4, p 18

26. *Ibid*, pp 19–29

agreement, I am convinced the Maori did not understand they were parting with their land absolutely and forever. The transaction intended to be carried out was really in the nature of a lease. What was done by the District Land Registrar may amount to the giving of an estate in fee simple to the company unburdened with any conditions. Until, however, the conveyances were registered as transfers, this was not given . . .

What is asked now is to remove the caveat the lodging of which was the consideration for the registration of the conveyances. Removing it would deprive the Maoris of rights they possessed before the registration of the conveyances. In my opinion the Court should not do so until the Maoris interested are before the Court.

In Stout's view then, until the registrar had treated the deeds of conveyance as transfers under the Land Transfer Act 1885, KTC had no legal estate in the land other than as assignee of USSC's agreement.

It is doubtful whether Bamford should have registered the conveyances of 1882 and 1884 under the Land Transfer Act. The Maori awardees had not become formally entitled to a Crown grant until 1883, when they were awarded a certificate of title by the land court. But, for the ante-vesting to 1875, the 1882 conveyance to USSC could have been legally void under the Native Land Acts. The two later (post-1883) conveyances were not void as legal instruments but were possibly invalidly registered as transfers of the freehold.

We note that the judges in the Court of Appeal believed that some technical irregularities might have occurred, and that questions remained which required further evidence before they could be definitively answered, including evidence from the interested Maori parties, heirs to the original awardees of Pakirarahi 1. Thus, Justice Stout stated:

It may be that the first conveyance is void, and that the other conveyances, not being in the form provided by the Land Transfer Act, are invalid. It is clear that after the certificate of title of the 29th of August, 1883, a Provisional Register should have been opened if the order made declared the title to be freehold and did not leave it Native customary land.

The District Land Registrar appears to have treated the conveyances as transfers under the Land Transfer Act. If the conveyances were properly registered under the Deeds Registration Act he may have been warranted in so doing. But if he did not, and if a Provisional Register ought to have been opened, then he could only do so under sections 212 to 215 inclusive, of The Land Transfer Act 1885, and no facts are stated showing that he ought to have treated the conveyances as transfers. Did he act under section 212?

Stout answered his own question:

The Registrar according to his own statement, came to an agreement with the Kauri Company which he states as follows: 'Ultimately, however, it was agreed between the Kauri Timber Company's solicitors and the Registrar that the question of forms should be waived,

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that the company should admit notice of the covenant (which was done in writing) and that the Registrar should lodge a caveat for the protection of the covenantees' . . .

Stout did not believe that the Court of Appeal yet had enough evidence before it to answer all the questions arising:

But in my opinion this Court ought not at present to enter on the consideration of what the effect of the deed of covenant was . . . Removing it now would deprive the Maoris of rights they possessed before the registration of the conveyances. In my opinion the Court should not do so until the Maoris interested are before the Court. They do not seem to have consented to the registration, and whether the Registrar had power to register those conveyances has not been considered or contested. Further, on the facts stated, the first conveyance may be void. The facts are not sufficiently stated to enable any opinion on the validity of the conveyances, the registration, or the right of the District Land Registrar to enter the deeds on the Land Transfer Register to be arrived at. To remove the caveat would prevent these and other questions being raised.²⁷

He therefore declined to remove the caveat. Other judges also raised unresolved questions. Justice Edwards noted that the certificate of title awarded by the Native Land Court on 29 August 1883 did not of itself extinguish native title. When the conveyances were entered into, the vendors were entitled only to execute a memorandum of transfer, which required to be confirmed by the land court before the original land court title could be extinguished and a freehold order made in favour of the purchasers:

*So far as the material before this Court shows, the Native owners did not acquire a freehold title or become entitled to a Crown grant under the [Native Land Court] Act of 1894, No 43, came into operation, when their title became freehold by virtue of the 73rd section of that Act . . . Meanwhile the respondents' conveyances, if the facts are as they appear to be, came within the express prohibition of section 87 of the Native Land Act, 1873. [Emphasis added.]*²⁸

Edwards went on to say that *if* the facts showed that the conveyances ought not to have been registered, the district land registrar ought, in Edwards' opinion, to cancel the registration under section 69 of the Land Transfer Act. Moreover, because, '*very possibly*' the Maori parties had been deprived of an interest in the land they never intended to part with, they might be entitled to compensation from the legal Assurance Fund, although that might be barred by section 187 of the 1885 Act because more than six years had elapsed since the conveyances. Edwards continued:

27. Document H3, pt 4, pp 24–26

28. *Ibid*, p 26

If it has, the case is doubly hard to the Natives as it does not appear that they had any opportunity of objecting to the registration of the respondents' conveyances, or even that they knew that they had been registered. If so, it is doubly the duty of the officials of the Land Transfer Office to endeavour by every means in their power rectify the error, if there is an error.

If the registrar came to the conclusion that no error has been made, it was, in Edwards' view, still at least his moral duty to inform the Maori owners so that they could take steps to protect their rights.²⁹

Miss Connolly, witness for the Wai 464 claimants, has submitted evidence showing that an application made under the Official Information Act 1992 elicited the response that 'the District Land Registrar could find no records which would indicate that any investigation was made into any of the matters raised by the Court of Appeal'.³⁰ The land therefore remained effectively in the freehold title of KTC, which continued to extract the kauri timber and on-sold an acre of land in Nevesville for a hotel.

In the late 1960s, barrister and solicitor Finlay Phillips was instructed to find the descendants of the original owners and recover the land. Miss Connolly records that 'This was successfully achieved but not without great expense to the persons who were finally found to be the rightful owners'.³¹ On 22 November 1991, the owners received title to Pakirarahi 1C, being an amalgamation of the former 1A and 1B, declared Maori land by the Maori Land Court. It is not clear whether the acre sold for the hotel was included in the title but presumably it was, since the hotel itself was removed some decades ago. Miss Connolly further records that 'An attempt was made to negotiate with the Attorney-General and the district land registrar over the question of payment of costs, but these negotiations were never finished'.³²

12.3.3 The Crown's Treaty responsibility

The technical and legal history of Pakirarahi 1 includes many questions raised by the Court of Appeal judges in 1902 which were never finally determined. We are more concerned to consider whether and in what ways the Crown failed in its duty of active protection of the right-owners, and what prejudicial effects they suffered.

In that context we note the terms of the various deeds of 1882 and 1884, most particularly the covenant of September 1884 which seems to us (as it did to Justice Stout in 1902), to embody the Maori owners' intentions quite clearly: namely, to convey the land to USSC, for the lump sums named in the deeds, for the purpose of cutting the timber, at the same

29. Ibid, p 27

30. Ibid, p 28

31. Ibid, p 31

32. Ibid, p 32

time reserving to themselves the right to receive fees and dues payable for gold mining, and specifying an undertaking by the company to convey the land back to them when the timber was removed or at the end of 99 years.

It seems very likely, as the Court of Appeal judges set out in some detail, that proper technical forms or procedures were not followed in relation to the 1882 deeds and the transactions under them before 1896. But the judges did not have the full facts in front of them which could definitively resolve the technical questions, and neither do we. We therefore make no finding as to those questions.

Nor do we wish to speculate on the likely outcomes had some other course of action been followed: if, for example the conveyances had come to the Native Land Court for approval rather than simply to the trust commissioner. The Wai 464 and Wai 661 claimants have submitted that, 'If the conveyances had been submitted to the Maori Land Court for confirmation, confirmation would have been refused because the purported transaction was unconscionable.'³³

This is by no means certain. As we shall discuss in our chapter relating to land law, from 1889 to 1894 the Legislature passed several statutes aimed at validating agreements which were technically in breach of one of the myriad acts relating to Maori land, including the setting up of a special Validation Court and the subsequent granting of similar powers and functions to the judges of the Native Land Court. A great many technically flawed transactions throughout the North Island were validated, and it is entirely possible that had either USSC or KTC taken its transactions to one of those bodies, the court would have validated them, although not, it must be said, without the Maori parties concerned being heard. We would also point out that one of the most relevant statutory provisions was section 73 of the Native Land Court Act 1894, by which Justice Edwards considered the owners of Pakirahi 1 had their customary title converted to a freehold title.

However, the solicitors for KTC negotiated with district registrar Bamford for registration of the transfers. Instead of telling them to go to the Validation Court or the Native Land Court, Bamford took it upon himself to waive the question of 'forms' (ie, due processes) *in return for KTC's agreement to register the caveat referring to the September 1884 covenant*. It is very much to Bamford's credit that he secured that much legal force for the covenant. By this act, he did protect Maori interests, possibly as much as the Validation Court or Native Land Court would have done. On the other hand, there is no indication that the Maori owners themselves were heard at the time, as would have been the case if the issue had gone to the Validation Court or Native Land Court. Perhaps there was some attempt by Bamford to let them know informally what he intended, but Justice Edwards in 1902 seemed to think they were kept in ignorance as to what was being done with their land in 1895–96. This we consider to be a most serious failure on the part of the Crown officials.

33. Document H3, pt1, p5

We also note that, having secured the caveat, Bamford was active in protecting it, taking the matter on appeal after Justice Conolly had acceded to KTC's request to remove the caveat, and winning. Ultimately, the caveat, and the covenant, were the basis by which the Maori owners recovered the land in 1991. This return at least was a reasonably satisfactory outcome.

12.3.4 Actual prejudice

We now assess (although with difficulty) the actual prejudice suffered by the Maori owners of Pakirarahi 1.

(1) *Timber*

The transactions of 1882 and 1884 were made for payments totalling £1010 10s. This money was for the removal of kauri, for the owners reserved (or attempted to reserve) their entitlement to mining fees and dues. Possibly, the owners made a bad bargain, in comparison to being paid 25 shillings for each kauri tree as was normal under mining cession agreements. But they may have needed a lump sum, and USSC was probably pleased to transact on the basis of what was effectively a long lease. Miss Connolly suggests that 'Such arrangements were common practice in the King Country in the 1890s [and] early 1900s'. By then a more sophisticated system of timber purchase had evolved 'in that the Land Transfer Office began to issue titles to the trees on the surface of the land in addition to title to the land itself . . . If such a system had been in place in the 1880s then this present dispute would not have arisen.'³⁴

While this may be so, we believe that the deals made over Pakirarahi in 1882–84 must be evaluated with regard to the circumstances of the time. No evidence has been submitted as to the value of timber revenue lost under the transactions as compared to the lump sums paid. In chapter 24, we discuss damage to the economy, environment and similar issues, but without more evidence we cannot assess the monetary prejudice to Maori in respect of the timber taken from Pakirarahi 1.

(2) *Gold revenue*

The 1884 deed of covenant explicitly stipulated that any fees and dues payable for gold mining were to be the property of the Maori parties who transacted with USSC. The vesting of the freehold title in KTC, on the other hand, allowed the company to behave as if its ownership of the block was unconditioned by any such obligation.

In September 1896, KTC granted Finlay McLiver 'all the right to the land and interest or demand of the Company' in the 30-acre Golden Belt claim.³⁵ McLiver had held a number

34. Ibid, pt 4, p 5

35. See caveat X1134 on the registered title: doc H3, pt 4, p 19.

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of mining leases in Pakirarahi 1 and 2 since 1875, when the mining block was first ceded to the Crown. The 1896 transaction was recorded by a caveat on the certificate of title. We have heard no evidence concerning what consideration KTC received for making this grant.

In 1902, the Golden Belt Mining Company was formed and worked the claim between 1906 and 1920. In 1927, a syndicate took up the claim again and carried out testing but did not work the ground. The claim was then sold to a Mr Grace who also acquired some other claims on Pakirarahi 2. About 7800 ounces of gold was produced from the Golden Belt complex, making it much the biggest producer in the Pakirarahi mining block. The second biggest producing mine in the Pakirarahi mining block was the Chelmsford mine, located on Pakirarahi 1. The Chelmsford Goldmining Company started working this claim in 1889 and was wound up in 1905. We have heard no evidence concerning how the Chelmsford Company acquired its claim but, given that it commenced work in 1889, it must have acquired rights from the Kauri Gold Estate Company.³⁶

Mr Alexander's evidence indicates that the Native Land Court confirmed in June 1896 that mining rights in Pakirarahi 2A and 2B had been ceded to the Crown.³⁷ This block had not left Maori ownership, although was possibly in the possession of a timber company for logging purposes. As mentioned above, there are indications that goldfield revenues were paid to the Maori owners, at least to that date.

Evidence given on behalf of the Wai 464 and Wai 661 claimants suggests that KTC ceded mining rights over Pakirarahi 1 to the Crown in about 1898.³⁸ However, Judge MacCormick of the Maori Land Court commented in 1935: 'I am informed that no Mining Privileges have been granted over this block, which is not within the area ceded to the Crown for mining purposes.'³⁹ It is possible that KTC set the block apart for mining and made mining rights generally available under its own 'kauri freehold gold estates regulations' rather than by ceding the block to the Crown for mining purposes.⁴⁰ We do not have sufficient evidence to settle the question.

We also know that some mining revenue was paid to the Maori owners of 'Pakirarahi'. In his 1896 address to Ngati Maru, quoted above, James Mackay referred to payment 'during all these years'. It is not clear what years exactly Mackay was referring to, nor whether the payments were in respect of Pakirarahi 1 (subject of the 1882 and 1884 transactions) or Pakirarahi 2, which remained in Maori title and was still subject to the mining cession

36. Document H3, pt 5, pp 7–8, 14–21

37. Document A10, pt 2, p 265

38. 'Gold was also extracted through the operation of the Gold Fields Acts': doc H3, pt 4, p 29. 'In 1898, this problem [confusion regarding KTC's lease/ownership] had been resolved with the Kauri Timber Company surrendering their rights over the land to the miners': doc H3, pt 5, p 7.

39. Judge to under-secretary, Native Department, 18 February 1935, closed correspondence file, Maori Land Court, Hamilton (doc V3, p 63)

40. A copy of these regulations can be found in Charles Rhodes, 'Conditions for Mining on the Land Held by the Kauri Timber Company: Kauri Freehold Gold Estates Regulations', AJHR, 1896, I-4A, pp 35–38

of 1875. His reference to payments for timber suggest that he was most likely referring to Pakirarahi 2, because in the 1882–84 transactions the timber rights to Pakirarahi 1 had been sold to USSC for a lump sum. It is apparent from its transactions with Finlay McLiver and others that after 1896 at least, KTC was acting as if it owned the freehold of Pakirarahi 1 and would not have been paying mining fees and dues to Maori. Whether the previous company, USSC had continued to pay them, as per the terms of the September 1884 covenant, we do not know, but there was little successful mining until 1901 and then wildly fluctuating fortunes for various companies until 1940.⁴¹

Mr McEnteer's research indicates that about 10,000 ounces of gold and 17,000 ounces of silver were taken from Pakirarahi to 1940, the greater part after KTC acquired freehold title to Pakirarahi 1 in 1896. However, his tables and maps do not make entirely clear how much came from Pakirarahi 1 and how much from Pakirarahi 2 (still in Maori ownership).⁴²

Mr McEnteer's submits that the present (1998) value of the gold and silver extracted would be 'approximately \$6,000,000 . . . However, the true economic value of the gold and silver extracted would be many times that figure because the value for each year would have to be assessed and converted into present day dollars.' He suggests that the 'net present value' of the gold and silver could be calculated by an economist.⁴³

It is not clear what is meant by 'net present value' or why reckoning the return for each year would result in much higher figures. But if net return was assumed to account the costs of production – all the costs of machinery, capital works, and wages – the result might very well be negative rather than positive: most of the Pakirarahi mines failed and closed.

We consider that the legal issues remain unresolved (as per the Court of Appeal decision), These findings are based on a simple reading of the owners' clear intentions, as expressed in the covenant of 1884. The Crown officials' actions preserved the covenant but caused the owners 'loss of control' over Pakirarahi 1 block and attendant 'loss of resources' following the registration of the KTC titles in 1896. If the translation of the lease into a sale involved a breach of law then some question of compensation for the loss of goldfield *revenues* arises, although not for the 'net value' of the gold itself (as Mr McEnteer seems to be suggesting).

Under the covenant of September 1884 the Maori owners reserved to themselves all miner's rights fees, and lease rentals for claims, residence sites agreed in the 1875 cession. It appears that these ceased to be paid to the owners in respect of Pakirarahi 1 after about 1895 (when the KTC titles were registered), if not earlier. If, for example, the Maori covenantees received miner's rights fees or the lease equivalent for the 30 acres granted by KTC to Finlay McLiver, they would probably have been entitled to about £60 per annum, assuming all 30 acres were worked. Other, smaller areas would also have attracted fees. We consider that the

41. Deed of sale, 14 July 1884 (doc H3(a), pp 13–21)

42. Document H3(a), pp 14–19

43. Document H3, pt 5, pp 1–2

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clear intention of the covenant was grant a 99-year lease, not a freehold, reserving the mining revenues. The district registrar's registration of a freehold in KTC cost the Maori owners that revenue.

It must also be recognised, however, that the district registrar's defence of the covenant and the caveat endorsing it, saved the land itself and enabled the owners to recover it unencumbered in 1991. This was the result of their own initiative, however, not as the result of the successors at law of KTC recognising that a lease had expired (let alone that a 99-year term granted in 1884 would have expired in 1983). Maori owners were put to heavy (though unspecified) costs. In our view, the reconveyance should have been at the expense of KTC or its successors at law.

The extent of loss of mining revenue during the period between the registration of KTC as owners of Pakirarahi 1 in 1895 and the cessation of mining some time in the 1920s is impossible to determine, however, as the statistics of returns relate to claims rather than land blocks and many were on Pakirarahi 2. The issue falls within the general confusion about the collection and distribution of mining revenue from the late nineteenth century for which the Crown must accept responsibility, and should be addressed in the remedies considered appropriate under this head for Hauraki generally.

12.4 WHANGAPOUA AND KUAOTUNU

12.4.1 Whangapoua

On 15 October 1868, James Mackay signed a mining cession agreement in respect of lands behind Whangapoua Harbour, including the Opitonui Valley, east of the central divide. The Maori signatories to the agreement were Mohi and Hamiora Mangakahia and Makaore.⁴⁴ No significant gold discovery was made in the next few years, however, although it was the news that the Maori owners of Whangapoua were negotiating to sell the freehold of what was believed to be auriferous land that prompted Donald McLean to seek ways by which the Crown could acquire the title.⁴⁵

The Whangapoua lands became the subject of bitter competition between Thomas Craig and C A Harris for timber-cutting rights, involving the owners in litigation (see sec 14.4.1). David Alexander has reported that the Opitonui block was leased to Harris in January 1870 for a term of 99 years. In May 1870, Harris entered into purchase agreements with Paora Matutaera, one of the two principal owners of the block following the land court award of the title in September 1870. A complicated series of exchanges with Mohi Mangakahia, the other principal owner, gave Harris the full title. The adjacent Waitekuri block was also

44. Mackay, 'Report by Mr Commissioner Mackay', p 29

45. McLean to Fenton, 18 December 1869, McLean MSS, ATL (doc D2, pp 30-31)

leased by Craig and Harris and then purchased by Harris from Mohi Mangakahia in 1870.⁴⁶ (For a full discussion of these developments, see chapter 13.)

James Mackay wrote in January 1872:

This [block] has nearly all been granted to natives under the Native Lands Act. Gold has been found in two or three places in the neighbourhood of the Waitekuri River, but the workings were abandoned in consequence of the obstructive policy pursued by the Native owners . . . It is questionable whether much of the Whangapoua Block could be purchased, as it is probable the title to it is complicated by private arrangements between the Native owners and certain Europeans.⁴⁷

What obstruction Mackay encountered from 'Native owners' in 1872, after the Harris purchases, has not been explained. No evidence has been presented to us concerning the arrangements under which the gold deposits were worked, who authorised mining and who received any revenues accruing. A major reef was located in this block in 1889 and worked until 1939, but this was long after the block had ceased to be Maori land.

12.4.2 Kuaotunu

The Kuaotunu goldfield lies to the east of Whangapoua Harbour. It was the most productive of the Hauraki goldfields on the eastern Coromandel. Most of the mining took place on Crown land but some Maori land was affected. Mining commenced on the Maori land within it, and a goldfields township was planned by Warden Northcroft, before a goldfield cession had been negotiated.

Kawhina Rangitu, an owner in Kuaotunu 2B, found payable ore on the block in 1887 but would disclose its location 'only if he were given a share in the proposed mining company'.⁴⁸ However, late in 1888 European prospectors also made finds, and in January 1889 the Government declared the area part of the Hauraki mining district under the Mining Act 1886. Development of the field, including the lucrative Trifluke (or Try Fluke) claim, was initially hindered by the fact that Kuaotunu had been partitioned between blocks purchased by the Crown from 1878 to 1882 (Kuaotunu 1A and 1B), and blocks still in Maori ownership (Kuaotunu 1C, 1D, and 2A), the boundaries between them still unclear. The Crown's law officers soon advised that the Maori blocks could not lawfully be included in the goldfield until their owners consented to a mining agreement. There is early evidence that they were not unwilling: one of the successful prospectors, William Peebles, reported to the Northcroft in February 1889 that 'the natives say they will sign any paper you wish them to for the

46. Document A10, pt1, pp 293, 325

47. Mackay to Minister for Public Works, 24 January 1872, MA-MLP1885/18 (doc A10, pt1, p 293)

48. Document J7, p 13

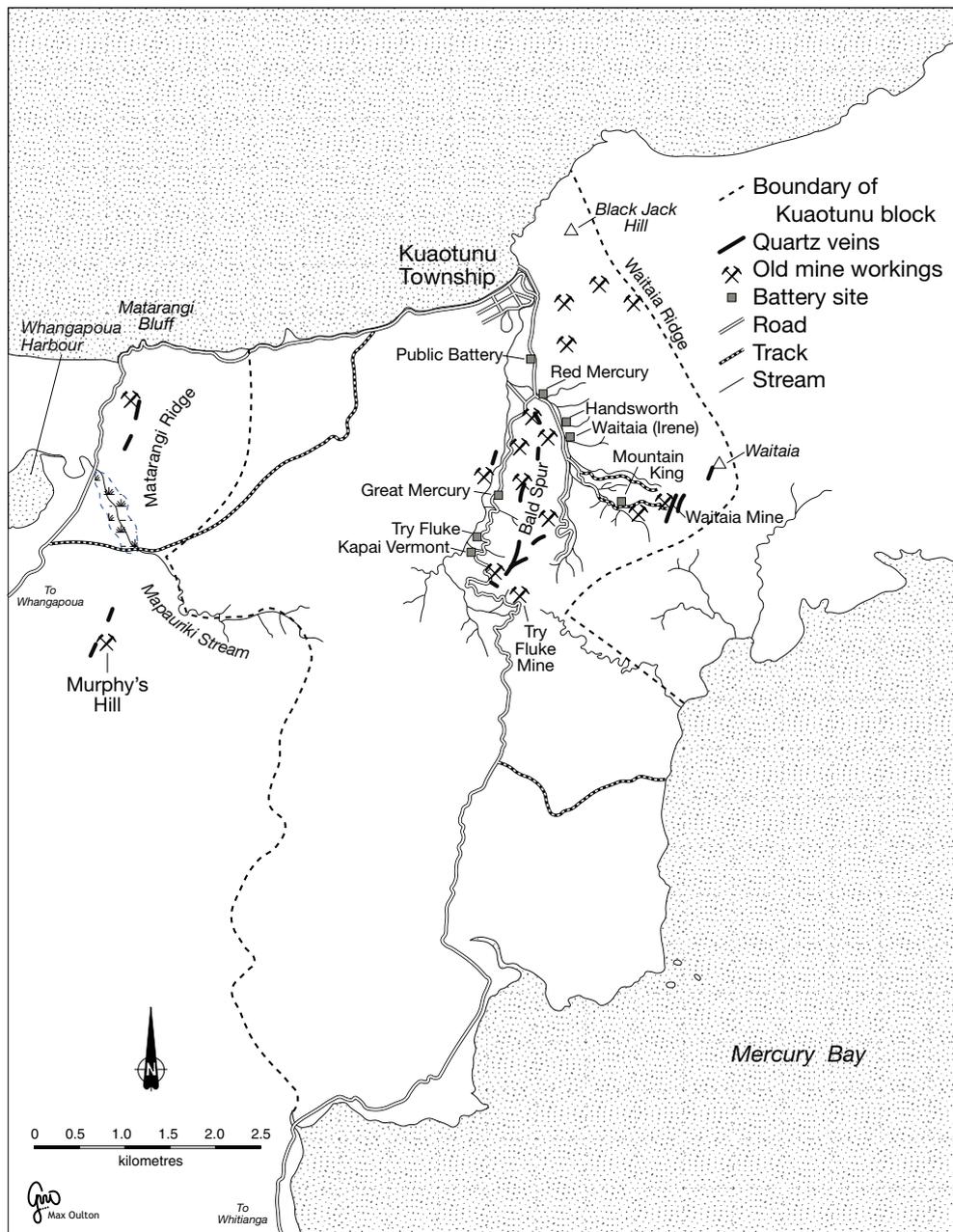


Figure 63: The Kuaotunu gold-mining area

purposes of opening the place . . . We have been waiting two months to get on the ground but have been afraid to on account of having no clear title.⁴⁹

But, by September 1889, with no mining cession agreed, mining was under way on both Maori and Crown land, and a township was springing up. Maori were making agreements

49. Peebles to Northcroft, 13 February 1889, MD1 92/932, Archives NZ (doc 17, p13)

directly with miners and storekeepers. According to James Mackay, Northcroft had approached the Maori owners to cede the land for mining purposes, but at that stage they had declined. The terms of their direct leases were apparently agreed at, or following, a public meeting between themselves and the miners. The terms showed good commercial sense, although the rent charged for a mining claim was low:

- ▶ Rent for a mining claim would be £1 per acre per annum, payable half-yearly in advance for lease of 21 years (10 shillings per acre for agricultural leases).
- ▶ Claims would be worked with 'a reasonable number of men' but if the claim was abandoned or the rent unpaid for more than three months the owners or their agent could re-enter.
- ▶ Rent for building on a main road was four shillings per foot frontage, payable quarterly in advance.

James Mackay, acting as a private agent for various miners and Maori, wrote to the Native Minister on 4 April 1889 that he had so far arranged for the lease of 39 mining claims, two agricultural holdings, and 11 town lots. Mackay also acted for Pierce Lanigan in leasing from some (but not all) of the Maori owners, a portion of land in Kuaotunu 1D near the landing site, for a stamping battery, an agreement which included the exhumation and reburial of koiwi. When Warden Northcroft laid out Kuaotunu township, Lanigan agreed to a resurvey of his land to conform with the town allotments; but whereas he had assumed that his sections would be reserved to him, Northcroft included them in the authorised rush for sites. Disputes then set in about the validity of Lanigan's lease and that of his sub-tenants, as against the residence permits authorised by Northcroft. Kuaotunu 1D was the one block for which a final Native Land Court order had not issued prior to the proclamation of the Kuaotunu goldfield, so that resolution of these difficulties in turn depended upon determining the correct Maori owners of the land and whether their consent had been obtained to any of these arrangements.⁵⁰

In early 1890, Northcroft reported that Kawhena Rangitu had offered to cede his land to the Crown for mining purposes. Cadman, the local member of the House of Representatives, urged Native Minister Mitchelson to accept immediately, as the situation was very confused: 'There are at least 40 claims on the native lands there, the arrangements for which must be irregular and illegal, and, being based on all sorts of terms, the whole place may at any moment become a scene of discord and lawsuits.'⁵¹ Though these were probably exaggerated fears, Cadman's comments further indicate the reasons for which central government Ministers favoured acquisition of the freehold. In January 1890, Mitchelson instructed the under-secretary of the Native Department, Lewis, to make inquiries about areas involved and purchase prices. Without waiting for Lewis's report Mitchelson then consulted with

50. Document A10, pt1, pp 239–248

51. Cadman to Minister of Mines, 20 March 1890, mining warden, Thames, miscellaneous inwards correspondence (doc A10, pt1, p 241)

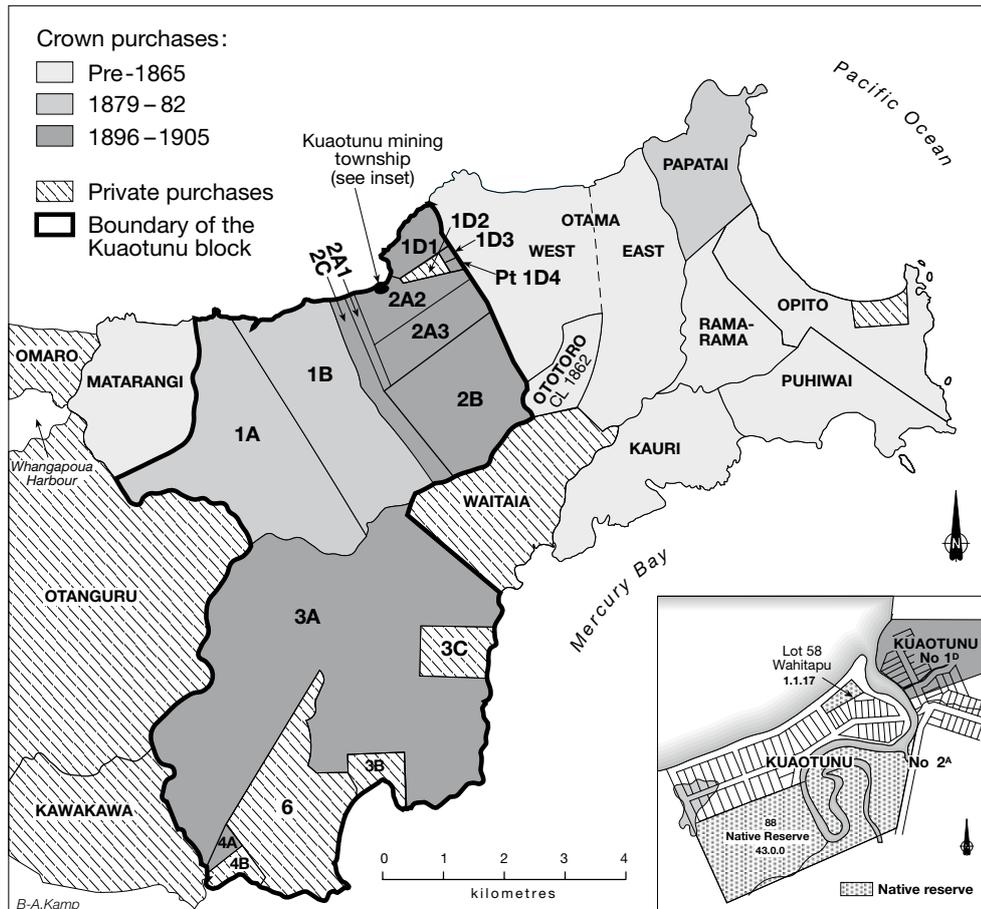


Figure 64: The Kuaotunu block. *Inset: The Kuaotunu mining township, surveyed by JI Philips, 1890.*

the Surveyor-General and decided to offer up to £2 per acre. Lewis then reported that purchase would be difficult as many minors held interests in the land: their shares could only be sold by their trustees with the sanction of the Supreme Court. Lewis also thought that the division of sellers and non-sellers interests might not result in the Crown acquiring the most valuable portions and doubted that the owners would accept the £2 per acre proposed. After consulting with the Minister of Mines, Mitchelson decided that cession agreements be sought as being the quickest solution, and in April instructed Northcroft to seek owners' signatures towards a cession agreement.

Northcroft soon found that many owners were willing, but collecting all signatures was protracted because some owners resided in another district or were minors for whom trustees had to be named, and because succession orders had to be sought for those deceased. By March 1891, Northcroft had the signatures of all living owners in 1C and 2A, although he awaited the successors of three deceased owners to be defined by the court. One owner in Kuaotunu 1D, Hohepa Mataitaua, held out. According to Mackay, he would have been willing to sign, but first wished to have the block subdivided 'as he considers that some of the

grantees are entitled to less interest in it than others'.⁵² An application for partition was in fact lodged in September 1891 but not heard till December, by which time (on 31 October) Hohepa Mataitaua had signed. He had first sought a guarantee that two allotments in the town, on which Kawhena's house stood, should be given to him; the Native Minister had declined to make such an exceptional arrangement, but Northcroft indicated that, under the powers he exercised through the Mining Act he would agree to Kawhena having the allotment.⁵³

The terms of the cession agreement were essentially those worked out 20 years previously in Thames, as modified by recent legislation. Fees payable were: the miner's rights fee of £1 per annum; an annual £5 fee for cutting timber for sale; kauri trees at 25 shillings per tree; mining and occupation licences; machine, business, and residence site licences as defined by the Mining Act 1886, its amendments, and regulations (the annual fee for business licences being £5 and for residences £1); and, for the digging of kauri gum or any other activity not already specified, a fee of £1. Reserves for Maori occupation and residence were to be set aside and exempt from the provisions of the Mining Act.⁵⁴ The receiver of gold revenue was to pay the collected revenue to the owners quarterly.

There is no evidence as to whether similar dissatisfaction over the collection and distribution of revenue to that at Thames and Ohinemuri was known at Kuaotunu, but if it was, it did not sway the owners of Kuaotunu from agreeing to the cession. The reasons why they should prefer it to their initial preference for directly dealing with miners are not made explicit in the evidence but they can be reasonably inferred. By agreeing to a mining cession, Maori owners passed over to Northcroft and his colleagues the complicated task of collecting a range of fees, while they themselves concentrated on sorting out their competing interests through the land court. The original Coromandel-Thames model thus still had much to commend it in Maori eyes, with the Crown assuming the burden of managing the field, the township and the miners, while assuring Maori owners a flow of revenue.

As mentioned, there was considerable confusion over the ownership of several Kuaotunu blocks, especially 1D, part of the township east of Kuaotunu Stream. This had intensified in 1889, partly as a result of Lanigan's attempt to lease, and resulted in a protracted land court hearing followed by partition of the block in December 1891. Both the Crown and a private buyer, Robert Comer, had begun to acquire interests in Kuaotunu 2 before the discovery of gold. Subsequently, in May 1889, Kuaotunu 2 had been partitioned, and then, in September 1891, 2A had been further partitioned. Kuaotunu 3 was the subject of a long-running dispute with KTC over a forestry agreement which the company also interpreted as giving them control of mining. Moreover, some owners in most of the blocks were absent from the district,

52. Mackay to Native Minister, 13 August 1891, MA-MLP1890/144 (doc A10, pt 1, p 247)

53. Document A10, pt 1, pp 248-249

54. Document 17, pp 24-25. It should be noted that between 1887 and 1891 'wagesmen' and 'tributers' working under a licensed miner were not required to take out mining licences: see below section 14.2.1.

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and it was difficult for miners to get complete titles from their direct dealings. Indeed, in the Native Minister's opinion, the Maori owners were not in a position to give legal title in Kuaotunu 1.⁵⁵ Probably, this applied to any block for which the Crown had begun to negotiate a purchase. In the confusion, many miners and other residents would have been unsure as to whom they should pay rents or fees; many probably resisted paying Maori owners at all, and preferred to pay the warden for residence permits. Amongst themselves, Maori owners disagreed as to their respective entitlements to any distribution, as Hohepa Mataitaua's comment above reveals.

Confusion also existed over the status of two reserves created by Warden Northcroft, acting under the authority of the Mining Act. One was an urupa of a little over an acre; the other, of 43 acres, was part of Kuaotunu 2A3, created at the 1891 partition. However, in 1899, at a hearing to ratify the sale of 2A3 to Dufaur of Auckland, the Native Land Court decided that the warden had not had sufficient authority to make the reserves and in 1891 the area had been included in 2A3 without any mention of restriction on the title. The 43 acres transferred with the rest of the block. The court did, however, recognise the Government's authority to create the urupa reserve, and it was vested in Kawhena Rangitu and others.⁵⁶

By the 1890s, however, mining cessions did not necessarily assist the other goal of Hauraki Maori in the 1850s and 1860s, namely to ensure that the land remained in Maori ownership. Yet the pattern of sales in Kuaotunu suggests that Maori owners were ambivalent about selling or staying with the mining lease system. Certainly, they became increasingly conscious about the money to be made from land, either by sale or lease. Some offers of sale began to be received by Crown officials almost as soon as the lease agreement had been negotiated, but these usually involved very high asking prices, which the Crown declined. The warden reported that when he was instructed to offer the owners at Kuaotunu £2 an acre (about the Crown's normal maximum for auriferous land at the time) 'the native owners all declined to sell at that price, some asking £10 an acre, others refusing to sell at all'.⁵⁷ A few years later, however, as mining at Kuaotunu began to decline, agreements for sale began to be reached, commonly at around £2 to £3 an acre. Several negotiations which stalled in the 1890s were completed in the early 1900s. Some examples drawn from Mr Alexander's evidence are:

- ▶ In October 1893, Harata Taiporutu and Hohepa Mataitaua offered to sell Kuaotunu 1D1 (122 acres) for £1000, including accumulated gold revenues. They were one of two parties in dispute over a partition of the block and opted to sell rather than await the trouble and expense of a rehearing that was due in the land court. The Crown purchased the block in 1895–96 for £2 an acre.⁵⁸

55. Native Minister to Mackay, 23 April 1890, MA-MLP1890/144 (doc A10, pt1, p 243)

56. Document J7, pp 89–92

57. Warden, file note, 12 July 1892, DH McPherson to mining warden, Thames, 24 June 1892, Mines Department head office file 1894/429 (doc A10, pt1, p 323)

58. Document A10, pt1, pp 251–253

- ▶ In 1895, the Crown purchased for £14, seven acres of 1D4, being the interests of two of the owners, which were partitioned out.
- ▶ In 1896 and again in 1901, Kawhena Rangitu offered to sell Kuaotunu 2A2 for over £10 an acre. He expressed some dissatisfaction with the collection of rents and fees due under the mining cession but was nevertheless receiving sufficient to cause him to decline an offer from the Crown of 10 shillings an acre. Eventually, in May 1902, he sold the block for £400, nearly £2 18s an acre.⁵⁹
- ▶ In 1901, the elderly Katerina Hauruia initiated the sale of Kuaotunu 1C, wishing to keep 50 acres of her 110-acre share as a homestead. She asked for £5 an acre but settled for £2 7s 6d. Alexander records that in 1902 she sold 2A1 (area not stated) for £145, reserving a life interest in her homestead.⁶⁰
- ▶ KTC claimed to have a lease of Kuaotunu 3, 4916 acres, dating from 1885, but the validity of the lease was challenged by some of the owners and by the Crown. When gold was discovered on the block, Peneamene Tanui offered to sell his undefined interest to the Crown for £1000. The Crown wished to pay no more than 10 shillings an acre, or about £2400 for the whole block. For the time being, it focused on securing agreement to a mining cession; in 1893 this was agreed and Kuaotunu 3 was included in the goldfield. In November 1894, new offers to sell shares were received and purchase negotiations began at 10 shillings an acre. Some of the owners, led by Peneamene Tanui, tried for a partition so that they could directly lease a portion of the block. But others were jealous of him 'and would not trust Pene to collect and divide the money'. The Crown did not support the arrangement. By 1895, the Crown had purchased all the interests save those of a deceased owner, Ereataira Tirirau. Those interests were partitioned out in 1896, as Kuaotunu 3B (100 acres) and 3C (213 acres), which were still subject to the mining agreement. The Crown was awarded the balance of 3867 acres as Kuaotunu 3A. An indication of its possible value came from Gilbert Mair, land purchase officer in the district, who urged his superior in Wellington to persist, despite the litigation with KTC and the need to determine the succession to Tinirau's interests.⁶¹ Mair wrote: 'I have always said that this block would be worth all the bother and more. It would sell at the present moment for £40,000 once open. The gold revenue would recoup all outlay.'⁶²

Mair's forecast may have been optimistic; after the speculative rush of the early to mid-1890s, mining on Kuaotunu would certainly have stabilised or declined. By 1914, mining had practically ceased. Nevertheless, Kuaotunu 3 was good coastal land.
- ▶ In 1899, the owners of Kuaotunu 3B and 3C offered to sell to the Crown for 10 shillings an acre. The Crown was not interested and 3B (100 acres) was sold to a private

59. Ibid, pp 259–261

60. Ibid, pp 249–250, 261

61. Ibid, pp 272–280

62. Mair to chief land purchase officer, 22 October 1895, MA-MLP1902/40 (doc A10, pt1, p 280)

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purchaser for £45 in 1913. Kuaotunu 3C remained Maori freehold land until 1970 when it was converted to general land under the 1967 Act.⁶³

The various transactions show that the Maori owners were able to exercise some choice as to whether they continued to receive mining revenue or sold their interests (either to the Crown or private buyers). They also show the influence of partitions under the Native Land Acts, and the want of a mechanism for corporate estate management.

12.5 OTHER EAST COROMANDEL BLOCKS PURCHASED FOR MINING

12.5.1 Tairua

The Tairua or Broken Hills goldfield was one of the less important Hauraki fields in terms of production. In January 1872, Mackay reported that the block was auriferous and that a 'rush' had recently taken place.⁶⁴ He included the 36,000-acre block in his 1872 recommendations for Crown purchase, oversaw its passage through the court in November 1872 and purchased the block for the Crown, subject to a timber lease to the Seccombe brothers, for £2900. The issues arising from the Tairua purchase have been discussed in section 14.3.6, and in various chapters in relation to the Ngati Hei and Mangakahia family claims.

12.5.2 Whangamata

As has been discussed in our earlier chapter dealing with old land claims and McCaskill's purchase, the Whangamata and Hikutaia blocks stretched from the east coast westward to the Waihou, not far south of the Thames goldfield. They were the subject of strong dispute between Ngati Pu and Ngati Karaua in particular, but also to claims by Ngati Tamatera, Ngati Hako, and Ngati Whanaunga. The superintendent of Auckland was particularly anxious that the lands should be acquired. His reasons, although not clearly stated in his correspondence, are fairly obvious: the Hikutaia lands and the coastal flats of Whangamata were scarce arable land, very desirable for settlement. They straddled the strategic route south-east from Thames (through which the telegraph was being constructed), yet were within the first aukati that Te Hira attempted to establish against settlement and the Queen's authority in the district broadly known as Ohinemuri. Finally, they were believed to be auriferous, to the extent that in January 1873 the superintendent reported that he anticipated a rush.⁶⁵

In June 1872, Mackay succeeded in prompting Ngati Pu to survey the land and submit an application to the land court. After delays due to the intervention of an armed party of Te

63. Document A10, pt 1, pp 281-282

64. Ibid, pt 2, p 89

65. Ibid, pp 99-103, 159-161

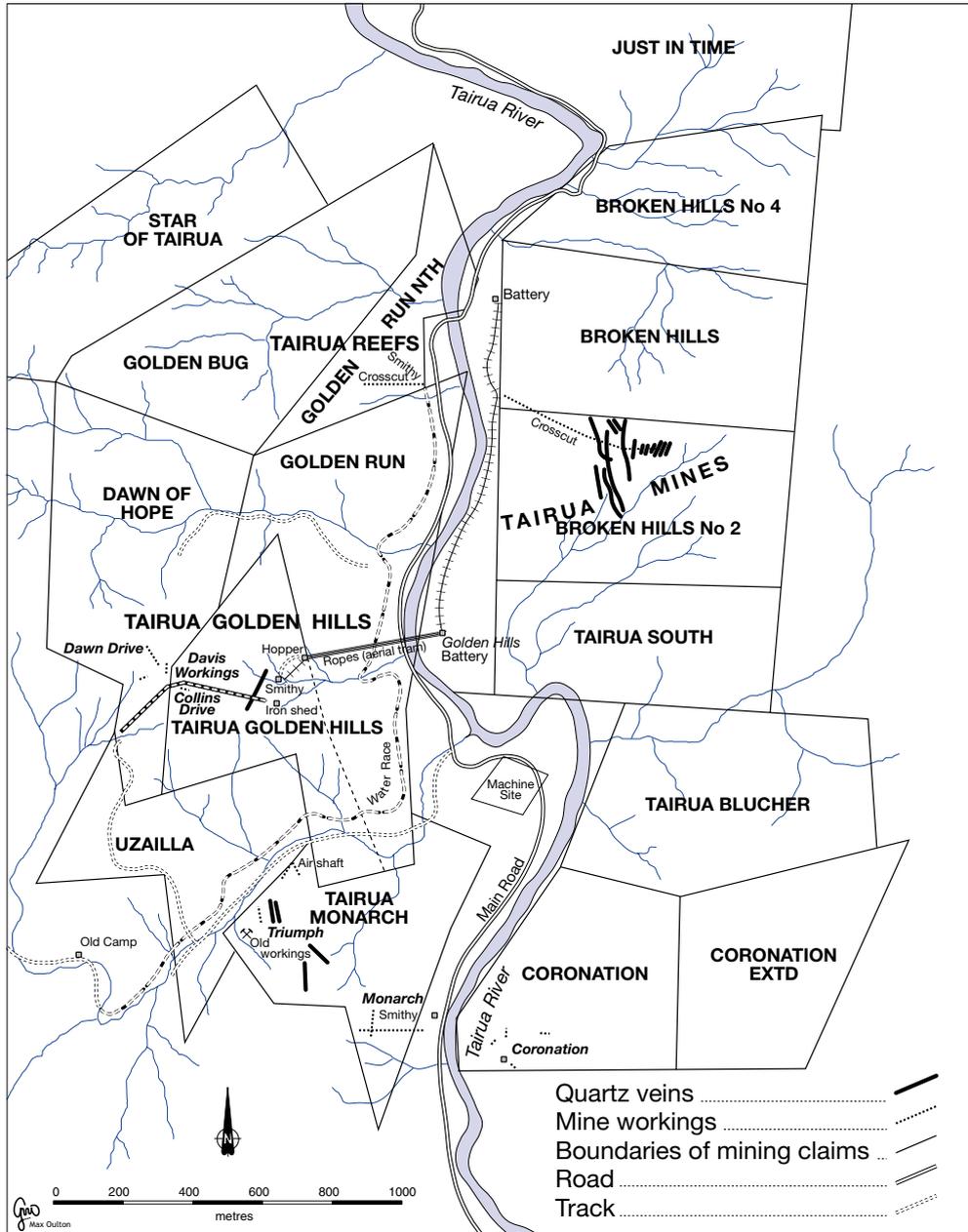


Figure 65: The lower Tairua mining area

Hira's men, claims to the blocks were heard by the court in November and December 1872. Whangamata 6 was surveyed separately. Hikutaia 1, 2, and 3 blocks, and Whangamata 1 to 5 were created by the court and awarded to the various claimant groups. By prior arrangement, Hikutaia 2 and 3 were immediately purchased by the Crown, partly to cover survey costs. At the same time, acting in his private capacity, Mackay arranged the lease of timber rights to

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Richard and John Seccombe.⁶⁶ In January 1873, Mackay also purchased Whangamata 1, 3, and 5 for the Crown, again subject to a timber lease to the Seccombes.⁶⁷

The Crown's focus then shifted to Whangamata 2, a coastal block of 5487 acres, close to the auriferous district and assumed to be gold-bearing. The block was restricted against private sale or lease beyond 21 years, and proclaimed as land for which the Crown was negotiating. As early as 1873, Hone Mihaia (John Davis, of Ngati Whanaunga and Pakeha parentage), a principal owner in the block, desired to remove the restriction, but both he and the Crown acted cautiously because of Te Hira's opposition. Matters lay dormant until 1886 when new offers of sale were received. The Crown became interested when Wilkinson reported in October 1887: 'I hear that gold has been discovered on Native land adjoining, and that the reef extends into Whangamata No 2. Claims have been pegged out on the former.'⁶⁸ This referred to the Wentworth Valley, which ran through Whangamata 2 and 3. The block was not part of any mining agreement, and as more reports of gold finds came in in May 1888 and again in September 1888, the Native Minister instructed his officers to seek either the purchase of the land or a mining cession. The September instructions included the sentence, 'You will have to be very careful in your negotiations and inquiries not to raise the cupidity of the Natives or give them an exaggerated idea of the value of their land.'⁶⁹

The Native Department accountant noted that the Crown had paid seven shillings sixpence an acre for Hikutaia, 'which is quite as good land . . . but as the right to mine on Whangamata No 2 has not been acquired, I think we might offer 8/- per acre for shares in it.'⁷⁰ This was approved and the purchase of interests began, beginning with that of Takerei Te Putu, successor to Riria Karepe. Hone Mihaia, then living at Otorohanga, offered to facilitate the purchase of other interests in return for a bonus price for his own share and travelling expenses. By January 1891, all signatures had been obtained, and Hone Mihaia was paid an £80 bonus.

In December 1889, Wilkinson suggested that the payment of goldfields revenue to Maori owners in respect of Whangamata 2 should cease.⁷¹ In the absence of a mining agreement, it is not clear if they had ever been paid, although it is possible that the boundaries of *land* blocks, as defined by the court, were in some way confused with those of declared *mining* blocks, such as Ohinemuri or Thames, and owners in Whangamata 2 may have had interests in other blocks for which gold revenues were payable.

66. Document A10, pt 2, p 162

67. Ibid, pp 102–103

68. Ibid, p 106

69. Under-secretary, Native Department, to Butler, 21 September 1888, MA-MLP1891/8 (doc A10, pt 2, pp 107–108)

70. Accountant, Native Department, to under-secretary, 27 September 1889, MA-MLP1891/8 (doc A10, pt 2, p 109)

71. Document J1, p 21

In April 1890, Wilkinson reported an offer of sale from Rihitoto Mataia of her interests in Whangamata 6. This block of 7402 acres was within the boundaries of the Thames goldfield and formed part of the northern boundary of the Ohinemuri goldfield, adjacent to Crown land within that field. For these reasons, the Native Minister authorised purchase at five shillings an acre. By July 1895, the Crown had acquired the vast majority of the shares in the block and applied to the court for a partition. Then there arose a difficulty: Gilbert Mair claimed an acreage for the Crown based on the proposition that all of the shares in the land were equal. Rihototo, however, who was retaining two shares for herself, claimed that the shares were not equal: that her father, Mataia, from whom she had inherited them, was of greater rank than most other owners, and that therefore the shares she retained amounted to a greater acreage than Mair was willing to allow. The land court found in her favour, awarding her a 75-acre 'excess'. Wilkinson was furious, saying that Rihototo's action was simply a 'try-on' and that 'old Mataia' had no greater status than other original owners in the block such as Tukurino, Ruihana Kawhero, and others. The Crown therefore appealed the original land court decision in order to diminish Rihototo's award, but lost. Mair reported that Rihototo was found to be fully entitled to her 75-acre 'excess', and would probably have received more had she argued for it. The Crown was awarded 6799 acres of Whangamata 6. The episode throws into relief a question of huge importance, namely, how Crown officials and land courts approached the unequal rank and authority of hapu members when it came to translating customary interests into a court title. This is considered in the relevant chapters on the Native Land Acts.

But Mair was rebuked by the chief land purchase officer over another matter. In purchasing the shares of Te Aowhakatere Ngaone, he had acceded to her request for a five-acre urupa reserve where her father and other kin were buried. She had returned £1 5s 6d of her purchase payment of £11 5s 6d for the purpose. Mair was told: 'The survey of the 5 acres reserve will have to stand over for the present, unless the Native interested is prepared to pay the surveyor. If you had consulted me beforehand I would have instructed you to not to purchase anything less than the full interest.'⁷²

Crown policy in the 1890s had clearly moved a long way from that of earlier decades when purchase deeds routinely reserved urupa and wahi tapu. Crown policy on these matters is discussed in chapter 21. We have no further information on this particular urupa.

Noted here also is the purchase of the 100-acre reserve awarded to Hori Ngakapa Whanaunga in 1867. Why Hori wanted to sell the land is unclear. He was not living on it but it was coastal and was used periodically by Hauraki Maori as a fishing station. Mair reported that 'it is one of the best sites on the Whangamata Harbour . . . the old man is in danger of being sent to jail for non-payment of a judgement summons, and is anxious to

⁷². Chief land purchase officer to land purchase officer, Thames, 19 October 1896, MA-MLP1898/21 (doc A10, pt 2, p114)

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know whether Government will entertain his offer.⁷³ The reserve was purchased for five shillings an acre.

The main point to emerge from these Whangamata examples is that they exemplify the Crown's policy of seeking the freehold of land known or likely to be gold-bearing, and adjacent to existing goldfield land. A negative example of the same principle is provided by Whangamata 4, where in 1893 some owners offered to sell for six to seven shillings an acre. Wilkinson had previously reported that 'All the Whangamata blocks are more or less of a gold bearing nature and are within the Thames Goldfield.'⁷⁴ The officials' decision depended on price and in 1893 the Surveyor-General did not think much of Whangamata 4: 'the only reason why the Government should acquire it is to get rid of the Native title and so allow mining and gum-digging'.⁷⁵ Just why the native title had to be 'got rid of' for such purposes is not clear, because in 1897 Mair reported that 'The owners will neither cede [gold mining rights] or sell at present. They are trying to arrange with some company to work the land'.⁷⁶ Maori aspirations to work goldfields themselves, and to seek joint ventures with investors, had not entirely died. But there was no significant find on Whangamata 4 and the importance of the block in the context of gold disappears. The bulk of the block was, however, purchased by the Crown under the legislation and procedures of 1911 to 1916.⁷⁷

12.5.3 Wharekawa

This discussion relates to Wharekawa East 2, the Wharekawa subdivision of 6921 acres near the harbour, on which gold was found in the mid-1880s. The alienation features in the claims of Te Tawera/Ngati Pukenga (Wai 285), Ngati Kotinga and Nga Whanau o Omahu (Wai 174), the Gregory–Mare whanau (Wai 177), the Mangakahia Whanau (Wai 475) and the Ngati Hikairo claimants (Wai 464, Wai 661). The alienation history of the block illustrates the intervention of the Crown to circumvent private control of the block by James Mackay and his associates.

The block was awarded solely to Hohepa Paraone Tarawherawhera in 1872, subject to restrictions on alienation, and devised by will to his nephew Hohepa Hikairo. In October 1885, Hikairo executed a lease for 21 years to James Mackay, for £100 per annum, giving Mackay the right to dispose of all timber other than kauri, the right to cut and sell kauri with one-seventh of gross profits payable to the lessor, and the right to mine for all metals and minerals subject to the payment of a royalty of £2.10.0 per cent on the net profits.⁷⁸

73. Mair to chief land purchase officer, 26 April 1895, MA-MLP1895/382 (doc A10, pt 2, p 115)

74. Wilkinson to under-secretary, Native Department, 15 January 1891, MA-MLP1893/147 (doc A10, pt 2, p 116)

75. Surveyor-General to chief land purchase officer, 11 October 1893, MA-MLP1893/147 (doc A10, pt 2, p 116)

76. Mair to chief land purchase officer, 9 April 1897, MA-MLP1893/147 (doc A10, pt 2, p 117)

77. Document A10, pt 2, pp 117–128

78. Document A10, pt 2, p 132

(This last provision was practically meaningless because of the difficulty of determining net profits and the ease of hiding any profits at all.) Although Mackay held a signed copy of the lease it seems not to have been registered.

Hikairo also asked Mackay to advance him £300 of the rent in order to clear an existing debt, which Mackay agreed to do as soon as he could find a company willing to work the minerals and timber. Because of the depression in Auckland, however, he had little success, and by February 1886 Hikairo considered the agreement had lapsed and offered to sell the block to the Crown for five shillings an acre. The Surveyor-General's comment was that five shillings seemed rather high, 'but the finding of gold would immediately raise the price above that'.⁷⁹ But Mackay's as-yet-unregistered lease proved to be a bar to immediate removal of the restriction and completion of the sale, and when gold was found in the locality, if not on the block itself, Hikairo immediately pressed for 10 shillings an acre.

Kenrick, the warden and resident magistrate in Thames, moved to block Mackay and win Hikairo over to a deal with the Crown. He urged the entry of a caveat with the trust commissioner against passing any lease with the right to mine, and requested an imprest to enable him to pay a deposit to Hikairo. 'It is of considerable importance that this block should not fall into private hands on account of gold discoveries', he wrote.⁸⁰ Kenrick also tried to negotiate with Mackay, who was willing to concede the right to mine to the Crown provided he was permitted to secure what land he required as a mining claim for himself. Kenrick then played a card which Crown officials presumably believed all along to be in their hand: 'I informed Mr Mackay that whether the Crown bought the land or not the preemptive [right] to the minerals would not be given up'.⁸¹

On 22 March 1886, Hikairo signed a deed of sale to the Crown at five shillings an acre, on a £3 deposit, the balance to be paid when the agreement with Mackay was cancelled, the restrictions removed and the transfer signed. There were to be no encumbrances on the title, but two burial grounds totalling 20 acres were to be reserved. Hikairo ceded to the Crown the right to mine, sell timber, and grant water rights, and business and residence leases 'upon the like terms and conditions as they are now being exercised in respect of the Te Aroha goldfields lands'. Mackay's agreement with Hikairo remained an obstacle, however, because although the lease itself had not been completed, there was no time limit stated on the associated memorandum whereby Mackay undertook to advance Hikairo £300 to clear his debts. He offered to match the Crown's purchase offer and denounced Kenrick's 'gratuitous threat'. The officials considered that Mackay's lease had been speculative from the outset, and that he was now manoeuvring to secure the best compensation he could for withdrawing. But Mackay was in a good bargaining position, which he subsequently

79. File note, 16 February 1886, MA-MLP1887/201 (doc A10, pt 2, p133)

80. Kenrick to under-secretary, Native Department, 23 March 1886, MA-MLP1887/201 (doc A10, pt 2, p133)

81. Kenrick to under-secretary, Native Department, 22 April 1886, MA-MLP1887/201 (doc A10, pt 2, pp 135-136)

strengthened by offering Hikairo 10 shillings an acre, an offer which the rangatira promptly asked Kenrick to match. The Government decided to try to negotiate with Mackay to withdraw his claim.

When asked, Mackay estimated that, compared with the £1725 purchase price agreed with the Crown, Hikairo would have received from him £2100 in rent alone over the term of lease, plus £119 for kauri timber and mineral royalties which might have been substantial or nothing at all. He himself would have received the equity in 700 to 800 acres of agricultural land, four million feet of kauri timber valued at £714 (after payment to the Maori lessor) and 300 to 400 acres of white manuka, for which there was a market in Auckland at £1 a ton, less cutting and cartage costs. He claimed an equity of £1500 for the lease, but said he would surrender it for £1000 or let the matter go to arbitration. He claimed that, before the Crown's intervention, the New Zealand Timber Company had arranged to find the funds. The under-secretary considered Mackay's claim 'preposterously excessive', but because the Crown had difficulty completing its title while Mackay refused to withdraw his agreement, negotiations continued.

In the event, Hikairo completed his sale to the Crown in September 1886 and Mackay offered to withdraw his claim on payment of £300. The under-secretary wrote to the Native Minister, 'The purchase having been made from the native on very good terms, I think the Government could afford to offer £250 in settlement of this alleged claim.' The Minister agreed and Mackay accepted the offer.⁸² The implication of the under-secretary's statement is that Hikairo did not receive full market value for the land.

We have set out these details to indicate some of the possibilities that might have been available to Maori had the Crown not intervened so strongly. Although it did not have a prior declaration of pre-emptive right over the block, the Crown was in a position to make difficulties for Mackay, and to put pressure on Hikairo to deal with them. Over the longer term, Hikairo would almost certainly have done better to stay with Mackay and hope that he would find the financial backers to pay the rent and other agreed dues. In the absence of a really payable gold strike, however, that was by no means assured. Mackay had no capital of his own and the whole arrangement could well have fallen through if the Crown had advanced Hikairo's legal expenses to take him to court (as one official had suggested). As for Hikairo, like a great many Maori owners, he was feeling the pressure of debt. The Crown's cash offer proved attractive.

Little gold was ever found on Wharekawa 2, but the Crown's determination to ensure that it had control over auriferous land, and keep it out of private ownership is evident.

82. Document A10, pt 2, pp 139–142

12.5.4 Whitianga (Mercury Bay)

Some gold was discovered at Kapowai in the headwaters of the Rangihau Stream, a tributary of the Waiwawa River, but no mining occurred until 1898. A small amount of gold was extracted in the early 1900s. Further north, the Mahakirau block of 8385 acres, running down towards Mercury Bay, had been purchased by Donald McLean for the Crown in August 1862 at 4s per acre, mainly from Ngati Whanaunga.⁸³ In 1872, Mackay reported that 'gold in small quantities has been found' in Mahakirau block, but it was cut off from the harbour by Te Weiti and Kaimarama blocks. He therefore recommended purchase of Te Weiti, which also offered river access and homestead sites; 5000 acres of Te Weiti was purchased by the Crown in 1873.⁸⁴ Very little gold was extracted from the mines of Mahakirau.

Writing more generally of the Mercury Bay lands, Mackay reported in January 1872 that gold had been found in two places but that the workings were by now abandoned. Most of the area was subject to timber leases.⁸⁵ The Crown did, however, acquire the Kapowai block of 8663 acres in 1875, for £700, a mere one shilling sevenpence an acre.⁸⁶ It appears that new finds of gold were made on Kapowai late in the nineteenth century. This led the Crown to entertain offers of sale from some of the Maori owners of Te Kauanga Whenuakite block adjacent. The chief surveyor, Auckland, urged caution, however, because 'the success of the Kapowai goldfields close by is not yet assured.'⁸⁷ True to its policy of buying auriferous land in order to control mining, in 1902 the Crown purchased Te Kauanga Whenuakite 3, of 3160 acres, for five shillings an acre. This had become the established minimum price for land within the Thames goldfields, where mining was not actually taking place. In the event, there was no large-scale goldmining on the Mercury Bay blocks.⁸⁸

12.6 TRIBUNAL COMMENT

The purchase of the large areas of east Coromandel land illustrate the Crown's determination to acquire any land thought to be auriferous in order to keep out private 'speculation' and to control mining. By the 1890s, purchases were also made merely to 'get rid' of native title, and to ease the difficulties of administration including the gathering and distribution of goldfield revenues. In the case of Wharekawa East 2, apart from taking the land out of private ownership, the Crown's payments offered a lesser return than that offered under

83. Ibid, p 22

84. Ibid, pp 11, 22, 64-65

85. Ibid, p 11

86. Ibid, pp 12-13

87. Chief surveyor, Auckland, to chief land purchase officer, 28 October 1901, MA-MLP1902/67 (doc A10, pt 2, p18)

88. Document A10, pt 2, pp 15-20

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the leasehold negotiations undertaken by Mackay (assuming that these might have been carried through). In some blocks, including Whangamata 4, Maori owners tried to work the land themselves. But discovery of *payable* gold was a chancy business, and in the end gold proved to be of little importance in any of these areas. Maori lost land to the Crown purchases but may have sold it to private purchasers if the Crown had not pre-empted them. Beside the loss of the land and some revenue, the main area of actual prejudice to Maori is more likely to have arisen in relation to the kauri timber.

CHAPTER 13

GOLD : GENERAL ISSUES

13.1 INTRODUCTION

In chapter 6, we introduced gold prospecting and mining in Hauraki and Maori involvement in the process, and in chapters 7 to 12 focused on events in particular goldfields. Here, we turn to general subjects, including: the ownership of gold; rights of access to mine gold; the Crown's administration of goldfield revenues; statutory and regulatory changes affecting the terms and conditions of the various goldfield agreements, and in particular, the revenues payable to Maori under them; the connection between gold and land loss; and the MacCormick inquiry. The environmental damage caused by gold mining is discussed in chapter 24.

At the end of the nineteenth century, few former goldfield lands remained in Maori ownership; most of the gold-mining industry gradually shut down in Hauraki in the early twentieth century, with the notable exception of the Waihi mines. But most of the goldfield agreements remained in force until the passage of the Mining Act 1971. The Crown continued to manage some uses of the lands concerned, the most contentious aspect of which was the power to issue residential site licences. The Crown's failure to return the remaining gold lands to Maori control at the earliest practicable opportunity, and its failure to implement the recommendations of the MacCormick inquiry in 1940, are the major issues arising in the twentieth century.

13.2 THE OWNERSHIP OF GOLD AND THE INDIRECT ASSERTION OF THE ROYAL PREROGATIVE

13.2.1 The issue in brief

The core of the Hauraki claim in relation to gold is that the Crown's gold-mining policy and law should not have assumed that ownership of gold lay with the Crown by virtue of its assertion of sovereign authority in New Zealand. The claimants contend that it was wrongly assumed that the introduction of English common law carried with it the Crown's prerogative right to gold and silver. Counsel for the Wai 100 claimants has noted that the English Laws Reception Act 1858 provided that English law was received only so far as was

applicable to the circumstances of the colony: ‘An obvious circumstance where English law presumptions ought not to apply, was in circumstances where Maori had a clear proprietary interest over a particular resource.’¹ They claim that the Crown’s policy and law should have been grounded in continuing Maori ownership of their lands and all the mineral resources in the land, gold and silver included.

Counsel for the Crown has acknowledged that ‘the theory of Crown ownership [of gold] was largely maintained by Government officials throughout the 19th century’ and that ‘retention of the prerogative was a feature of legislation.’² However, the Crown refrained from asserting its prerogative right to ownership of gold when the first discoveries were made in Coromandel in 1852 and opted instead to negotiate with Maori for the right to manage the goldfield in exchange for a share of its revenues. The Crown continued this policy in later years, in respect of the other goldfields of Hauraki. As a result, the question of ownership of the gold slipped into the background, and, Crown counsel contends, was largely irrelevant.

The claimants have not disputed that the royal prerogative remained in the background. However, they consider that the position taken by the Crown in 1852 was pragmatic, borne out of recognition of Maori numerical superiority and strength, not a genuine acceptance that the royal prerogative was restricted by Maori rights. They suggest that the latent prerogative began to be progressively asserted, especially in the later nineteenth century, and that this affected their rights and interests. Crown evidence acknowledges that the prerogative was asserted more strongly in the 1890s but questions whether Maori rights and interests were seriously affected.

Claimant counsel also contend that the Crown did not honour the assurances given by officials that there would be *mutual benefit* to Maori and Pakeha if Maori opened their land to mining, under the Crown’s control. They submit that, on the contrary, they were disadvantaged and prejudicially affected by the Crown’s policies and laws which (among other things) denied them the opportunity to negotiate freely with miners and mining companies over the rights to gold in their land, or to claim payments related to the value of gold extracted from their land. Instead, the Crown, through its mining legislation and land purchase policies, maintained a monopoly over the negotiation of mining agreements with Maori. From this position the Crown weakened the capacity of tribal groups to withhold consent to access, and diminished the level of payments made to Maori. In the words of witnesses for the Marutuahu claimants, ‘The change in the balance of power meant that by the 1870s the Crown no longer needed to engage in the sort of pragmatic partnership implemented in 1852 to achieve its objectives.’³

We shall now explore aspects of these developments in more detail.

1. Document v1, p 27

2. Document p6, p 8

3. Document v1, pp 194–195

13.2.2 The royal prerogative held in reserve

Following the discovery of gold at Coromandel in 1852, most Crown officials took it as a given that, by virtue of its sovereignty, the British Crown's prerogative right to gold and silver applied in New Zealand. The problem, as officials saw it, was how to make the new goldfield publicly available for mining purposes, recover some of the costs involved, and yet not antagonise the Maori landowners. It was considered imperative not to abandon the royal prerogative, for in so doing the Crown would lose a means of achieving its goals; yet, any practical assertion of it was sure to be seen by Maori as an infringement of the Treaty of Waitangi and strongly resisted. The Crown escaped this dilemma by negotiating at Patapata for the right to manage the goldfield, thereby achieving its immediate goals, without pressing the issue of whom gold belonged to, or, for that matter, disclosing the existence of the royal prerogative (see ch 7).

Over most of the later nineteenth century the Crown continued to seek control over the goldfields, enabling them to be mined by the public, without confronting Maori over ownership rights. Although it did try to bargain Maori down, the Crown was prepared to purchase such lands, foregoing its prerogative right to the gold. When it could not purchase the land in advance of mining, the Crown negotiated the goldfield agreements discussed in preceding chapters. These cession agreements were the principal means by which Maori land in Hauraki was brought under the jurisdiction of mining legislation, and so made available to be worked by miner's rights, leases, or licences issued under that legislation. These goldfield agreements were reached without the negotiators invoking the royal prerogative. Usually, they secured to Maori the valuable right to receive most, if not all, of the goldfield revenues accruing from their land (not including export duty).

Yet, the Crown kept its prerogative rights more or less intact, and later in the nineteenth century, it asserted them more fully. Gold-mining statutes from 1858 to 1877 contained provisions expressly reserving the prerogative rights of the Crown, and although these provisions were dropped after 1877, no express statutory limitation was put on the royal prerogative. This meant, according to Parcell (the leading academic theorist on the subject) that the Governor in Council retained the authority to control mining on private as well as Crown land.⁴

Government Ministers were thus able to deny that the goldfield agreements made by the Crown with Maori infringed the royal prerogative in any major way. However, the agreements were sometimes construed as concerning rights in gold itself, and as a surrender in favour of Maori of part of the Crown's entitlements. In a parliamentary debate in 1896 – triggered by the question whether Maori held property rights in gold that they could transfer to private purchasers – a number of members argued that the goldfield agreements

4. JC Parcell, *A Thesis on the Prerogative Right of the Crown to Royal Metals* (Wellington: Government Printer, 1960), pp 73ff

constituted the recognition of Maori interests in gold. Yet, the agreements were also construed as concerning, not the ownership of gold, but rights of access or easements, and the right to occupy the surface and disturb the soil in order to get out the gold. This was the interpretation espoused by the Crown in 1881–82, and in the debate of 1896.

13.2.3 Statutory limitations to the Crown's prerogative right of access

As we discussed in chapter 6, there is a doubt in law as to whether the royal prerogative includes the right of entry onto private land where no mine has yet been opened. In his 1940 report, Chief Judge MacCormick considered that even in England the Crown must negotiate for access, but there is little doubt that the Crown has a prerogative right of entry when a mine has been opened. Many nineteenth century officials appear to have believed that the Crown had the right under all circumstances.⁵

The extent of the Crown's common law right of access which accompanies the Crown's prerogative ownership of gold was, in practice, not especially important in New Zealand, because it was, by implication, limited by statutes regulating access: under the goldfields legislation, Maori right-owners' consent was normally required before their land could be proclaimed as a goldfield. This limitation was, however, partly undone in the late nineteenth century, when the Crown gave itself expanded statutory powers to proclaim Maori reserves as goldfields, and to incorporate reserves set aside in previous goldfield agreements into proclaimed goldfields as if they had been ceded, but without further consent.

(1) *The requirement for Maori consent recognised in legislation*

The powers of goldfield wardens to issue licences to mine could be done only on proclaimed goldfields, and nineteenth century gold-mining legislation provided for the proclamation of Maori land as a goldfield only where Maori consent was obtained, as at Patapata in 1852. The first relevant Act, the Gold Fields Act 1858, set distinct limits to the land over which the warden could authorise mining: while the Governor could proclaim any part of the colony to be a goldfield, the definition of 'goldfield' was restricted to waste lands of the Crown. In other words, the legislation protected private land generally from the arbitrary assertion of the Crown's prerogative right of access. Sections 28 and 29 of the 1858 Act prohibited any person from mining on land belonging to a private individual without the consent of the owner or his agent. If the 'owner' as defined had included collective owners, the 1858 Act might have been interpreted as including land in the customary ownership of a tribe. Similar provisions were carried through into later legislation, with the addition in the Gold Fields Act 1862 of the authorisation of the owners of private land to sue for damages against the person mining. But until customary ownership had been determined under the Native

5. 'Petitions Presented to the House of Representatives', AJHR, 1869, G-6A

Lands Acts of 1862 and later, Maori could not readily avail themselves of these protections. Maori customary rights as such were not normally liable to legal consideration.

However, as described in section 6.10.1, the Gold Fields Act Amendment Act 1863 redefined the 'waste lands of the Crown' to include any lands where the Governor had acquired the right to authorise mining. Thus, Maori land could be included in proclaimed goldfields, brought under the wardens' jurisdiction, and be made the subject of mining licences. This provision implied a further Crown-imposed restriction on its prerogative right of access: without an agreement with the Maori owners the Crown's control over mining could not extend to Maori land. By the use of Parliament's legislative authority, the practical needs of the situation were met, without either the Maori right to refuse access or the Crown's prerogative right to issue licences being made explicit.

The 1863 definition of Crown waste land was continued in later legislation. The Crown made no statutory provision for issuing miner's rights except within a proclaimed goldfield and then in respect only of Crown demesne land or land that was deemed Crown land for the purposes of the mining legislation.

The statutory provisions regarding prospecting were somewhat different from those regarding actual mining. Prospecting licences could be issued in respect of land outside proclaimed goldfields but the consent of Maori right-owners was required in all legislation until at least 1898.⁶ But this would change in the twentieth century (see sec 13.7).

(2) The effect of tenure conversion and consequent legislation

During the 1860s, some doubts arose as to the standing in law of the agreements Maori had made for mining on their land. Validating legislation and other statutory provisions were then introduced to make the agreements binding. These included:

(a) The Auckland Goldfields Proclamations Validation Act: The Auckland Goldfields Proclamations Validation Act 1869 was necessary because of doubt about access to Maori land within goldfields when customary tenure was converted under the Native Land Acts. Section 3 of the Gold Fields Act 1866, under which the 'Auckland gold fields' had been proclaimed, stated that 'private lands shall be exempt from the operation of this Act except where *especial provision* to the contrary is made herein' (emphasis added). Crown-granted land would fall under the definition of land belonging to a private individual, and section 97 of the Act prohibited mining on land belonging to a private individual without the consent of the owner. Possibly, the 'especial provision' of section 3 applied to the widened definition of 'waste lands of the Crown' already discussed (ie, that Crown 'waste lands' could include Maori land in proclaimed goldfields). However, it was not clear that this could be relied

6. Crown authority to prospect was not required in respect of land alienated by the Crown after 1873 or by Maori after 1888, or (under the 1896 amendment Act), whenever it was alienated. But, in those circumstances, it was no longer Maori land.

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upon in respect of land brought under the Native Land Acts; the validity of the gold agreements became questionable because the status of the land covered in them had changed, as had the status of the owners: from right-owners according to tribal custom to private owners under Crown grant.⁷

To settle the doubts, the preamble to the Auckland Goldfields Proclamations Validation Act 1869 stated:

And whereas doubts have been raised whether such agreements so entered into as aforesaid by or on behalf of the Governor have been or will be extinguished or affected by the Native Title being extinguished over such land or by the obtaining of Certificates of Title or Crown Grants of such land. And whereas it is expedient to remove such doubts . . . Be it therefore enacted . . .

Section 2 of the Act declared the agreements to be 'binding on all persons whatsoever according to the true intent and meaning thereof' (thus including the governor, deemed to have obtained the power to authorise mining in the lands covered by the agreements. Furthermore, the lands described in the agreements would be deemed to be Crown land and not private land for the purposes of the Gold Mining Act.

The agreements validated by the 1869 Act were those negotiated by James Mackay in the late 1860s, namely the deeds of agreement dated 27 July 1867, 9 November 1867, 9 March 1868, and 13 May 1868. Curiously, these agreements did not cover all of the Maori land included by proclamation within the 'Auckland Goldfields' as at the date of enactment of the Validation Act; some, but not all of the signatories to the 1864 Coromandel agreement had also signed the 9 November 1867 agreement; section 2 of the Act could not bind those who had not signed the later agreement.⁸

(b) Other 'validating' provisions: Other 'validating' provisions are as follows:

- ▶ The February 1875 agreement between the Crown and Ngati Tamatera had included the right for the superintendent of Auckland to grant agricultural leases on the land covered by the agreement. The Ohinemuri Gold Fields Agricultural Leases Validation Act 1876 extended part v of the Gold Fields Act 1866 (relating to agricultural leases in goldfields) to allow such leases to be made.⁹
- ▶ Similarly to the 1869 Validation Act, section 17 of the Mining Act Amendment Act 1892 confirmed that the issue of a Crown grant did not abate or extinguish the rights of the

7. The issue in law was essentially that later ruled upon in the *Wi Parata* judgment of 1877; that is, whether a prior agreement could condition a Crown grant: *Wi Parata v Bishop of Wellington* [1877] NZLR 79 (doc B3, p 4).

8. The consequences of this omission emerged in the Supreme Court in *Aitken v Swindley* in 1897, which concerned land at Kapanga. The land was private European land and there were no consequences for Maori, but the case revealed the ambiguities surrounding Maori land subject to mining agreements, which the 1869 legislation sought to remove: *Aitken v Swindley* [1897] 15 NZLR 517.

9. Document P6, pp 80–81

Crown agreed in the 1875 agreement over the Ohinemuri goldfield block (which meant that the Ngati Koi block near Waihi remained under the jurisdiction of the Ohinemuri goldfield warden).

- Some land had escaped the net of the validating legislation of 1869, so section 32 of the Mining Act Amendment Act 1895 stated that all mining rights acquired by the Crown as at 1 January 1890, or which might hereafter be acquired:

shall inure to Her Majesty and remain unaffected, notwithstanding the extinguishments of the Native title, or the issue of a Crown grant or other instruments for title for such lands, or any portion thereof, at any time subsequent to the acquisition of such rights.

This legislation protected the mining agreements, regardless of changes of tenure. It also protected Maori entitlement to the agreed mining revenue, while they retained ownership of the land. However, like much land and mining legislation, the legislation carried with it other unstated consequences for Maori: the capacity of Maori owners to withdraw their land vested in the mining cessions and re-vest it in others was removed, even though they had received a Crown grant under the Native Land Acts.

(3) *Aitken v Swindley*, 1897

In the legal case *Aitken v Swindley*, referred to in note 8 above, the trial judge, Justice Conolly, used the occasion to review all the goldfields legislation from the Gold Fields Act 1858 up to 1896, including that passed in 1873 and 1888 whereby land sold by the Crown or Maori respectively could be resumed for mining purposes (without compensation for auriferous or argenteriferous content because the Crown already claimed the gold and silver by prerogative). Conolly's account summarised the limitations as to access within which the Crown worked. But these statutes did not touch upon Maori land not yet alienated.¹⁰

In sum, Justice Conolly concluded, that, as a result of the legislation in effect until 1896, the Crown, if it had a prerogative right of entry onto private land, had limited it and not reacquired it as at that year. The legal academic, Parcell suggests that Conolly might have erred: he suggests that it was only the power of the goldfields warden to issue licences that was limited, not the prerogative powers of the Crown. But the effect of the legislation was the same as a limitation of the prerogative. In a goldfields district, no one could mine without a licence; a licence could be obtained only from the warden, and the warden had no power to issue a licence for private lands within the district without having obtained the consent of the owners. Parcell suggests that, paradoxically, the prerogative was limited by statute in proclaimed goldfields districts but not limited outside of those districts.¹¹ Parcell

10. See doc P6, pp 76–77, 88–89

11. Parcell, pp 76–77

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may be correct, but for most practical purposes the legislation up to 1896 can be regarded as limiting the Crown's prerogative powers, not only the warden's authority.

(4) *Some increase in the Crown's statutory powers*

In the 1880s and 1890s, the warden's statutory power to issue mining licences on Maori land was strengthened by extending the provisions by which Maori land could be included in a goldfield, with weaker requirements for Maori consent, and in some cases no additional consent at all:

- ▶ The Reserves and Endowments in Mining Districts Act 1882, empowered the governor by regulation to permit mining on any public reserves within a mining district. The Act did not generally apply to native reserves but section 3 gave the governor a discretionary power to bring them under the Act, without express Maori consent.¹²
- ▶ The provision was re-enacted by section 205 of the Mining Act 1891, which empowered the governor to proclaim any native reserve under the operation of the Act in the same manner as if it were a public reserve, and to fix the fees payable. Again there was no requirement for express Maori consent. However, sections 94 and 95 still imposed a penalty on prospecting on Maori land without the owners' consent. It is not clear how the apparent contradiction was resolved in practice.
- ▶ The Mining Act Amendment Act 1892 authorised the Native Land Court, on application by the governor 'with the consent of a majority of native owners' to declare any Maori customary land to be ceded for mining purposes, on agreed conditions.
- ▶ Section 56 of the Mining Act Amendment Act 1896 provided that Maori lands (other than customary land) reserved within mining cessions for residences, cultivations and burial grounds could be declared available for mining purposes, without further consultation with or consent of Maori being required, 'provided the use for which they were so reserved is not thereby prejudicially affected'.

There is no question that these various amendments did increase the Crown's power to authorise mining on pockets of Maori land within the goldfields. However, apart from the 1892 provision, they referred to portions of land within areas already ceded for mining, and the original purpose for which they were reserved from mining often no longer obtained. Where that was the case, it was difficult to maintain 'islands' of land free of mining within wider mined areas.

To some extent, the amendments were intended to bring the administration of lands already ceded for mining into line with changing circumstances. Administrative convenience would be a poor reason for infringing upon the core principles of the mining agreements system, but the Crown has some ground for arguing that the basic principle of Maori consent being required before opening land to mining had not been seriously infringed,

12. See doc P6, p 83

particularly as there is almost no information on how the various measures were applied, if at all.

With respect to the 1892 amendment, it has been suggested by claimant witnesses and counsel that this weakened the Patapata principle by which the consent of all owners was required to open land to mining. In a strictly legal and technical sense this is so. But the implication of earlier statutes that *all* right-owners in a given area had to consent is somewhat illusory. In practice, as described in chapters 7 to 12, the opening of Maori lands in the 1860s involved a series of decisions over limited areas, reflecting the fact that not all Maori were of one mind at one time; in the 1870s and 1880s Crown officials, having secured the consent of a majority, tended to push through cession agreements or proclamations of a field, making reserves for dissentients or excepting certain lands from the boundaries of the agreed area where necessary. The principle of majority control was, in practice, in place all along. The mood of Parliament in 1892 had been to weaken the consent requirement further; after the committee stage it was amended to read ‘unless a majority of owners object’. But the Maori members in the House resisted this strongly and the original ‘majority consent’ clause was reinstated.¹³

13.2.4 The ownership of gold

As we have indicated in section 7.6.3, the question of the ownership of gold (as distinct from ownership of the land) was not raised in the Patapata hui, but left indeterminate. Some settler politicians and officials, perhaps overlooking the express reserving of the royal prerogative in the Gold Fields Act 1858 and its successors, believed (like J C Richmond) that it did not apply in New Zealand or else had been given up (see Richmond’s statement on the point in section 9.6).

However, at seminal points during the later nineteenth century the Crown reasserted the view that the royal prerogative rights to gold did apply in New Zealand and that its agreements with Maori had concerned easements only. Dr Anderson has characterised this trend as a ‘unilateral reinterpretation’ of the mining agreements. In the following sections, we examine the two most relevant events in relation to this issue:

- ▶ between 1876 and 1881, in the context of new financial arrangements consequent on the abolition of provincial government, Robert Graham and other private purchasers of Maori land within the Thames goldfield claimed the mining revenues previously paid to Maori;
- ▶ in 1896, private European owners brought serious pressure to bear in Parliament to limit the Crown’s prerogative in their own interests.

13. Document P6, pp 91–97

(1) *The transferability of rights: the Graham issue*

Normally, in common law, the royal prerogative means that gold and silver do not pass with the land when it transfers, but remain with the Crown, which can continue to access them. As discussed, the gold-mining legislation of 1858 and later had explicitly reserved the prerogative, but the 1860s agreements with Maori and accompanying legislation had limited its application, by making access conditional on Maori consent. This left unresolved the question of the consequences to mining revenues when the freehold of Maori land subject to cession agreements was transferred to private hands.

The question was, whether the right to the revenues attached to the land and was transferred to the purchaser of the land, or whether it remained with Maori who were party to the agreements in the first place.

The need to find an answer to this question first arose when Robert Graham, the lessee of the cultivation reserves on which Grahamstown had been laid out, acquired the fee-simple of portions of the Thames goldfield lands.¹⁴ E W Puckey, receiver of revenues and native agent at Thames during the 1870s, was asked by the former Maori owners of the land to continue payment to them of miner's right fees, claiming that they had sold only the surface to Graham but had sold the land subject to a reservation of the right to receive goldfield revenues. Puckey continued to pay them. In late 1875 or early 1876, Graham (recently returned from England) denied that there was any such reservation in the sale and laid claim to accumulated revenues totalling £740. The warden, Daniel Pollen, referred the matter to Wellington:

Will the Government be justified in paying the Miners Right fees to W Graham under authority of the original agreement – in other words, does the right to the fees follow the possession of the land and is the Government obliged to continue to collect this revenue and to account for it to the present owner of the soil. It is an anomalous position for a Government.¹⁵

The Solicitor-General, Reid, advised that:

In my opinion the right to receive the fees . . . does not pass with a simple conveyance of the land. The land is *Crown* land for the purposes of gold mining and not private land, and this is expressly declared by the 2nd section of 'The Auckland Gold Fields Proclamations Validation Act 1869' the effect of which is preserved by subsequent legislation. I think the right to receive these fees is attached to the lands in their condition of Crown lands for Gold

14. The file correspondence refers variously to 'R Graham' and 'W Graham'. There was a W A Graham, a prominent public figure in Auckland in the same period as Robert Graham, but almost certainly the latter is meant. He was the active land lessee and purchaser in the Thames district.

15. Pollen to Solicitor-General, 10 February 1876, in 'Extracts from Treasury File T82/3406', Audit inwards letters, A1 27/5/1, Archives NZ. All following quotations and references on the Graham case are taken from this file.

Mining purposes, and that this right should be distinctly disposed of by the owners before the Govt can safely deal with Mr Graham. [Emphasis in original.]¹⁶

Reid's opinion is ambiguous. He did *not* say that the right to receive revenues attached to the gold itself, and his advice is therefore puzzling. What kind of right is it that attaches to land but does not transfer to a new owner with a conveyance of the land? That is, what kind of right can attach to land and be transferred when it is Crown land, but not when it is Maori land?¹⁷ The answer is an on-going Maori right in gold mining, for the time being conveyed to the Crown, but still available for conveyance to another party. If so, Reid's advice was consistent with the principle established in the *Case of Mines* (discussed in section 6.3.1) that rights in the royal metals were distinct from rights in the soil and had to be separately disposed of by 'apt and precise' words.

In any event, Pollen was instructed to inform Graham that 'if the fees were still payable, then they were to be paid to the person with whom the agreement was made in the first place'.¹⁸ This meant the former Maori owners, but they had given Graham a power of attorney to receive the revenues. Puckey later reported that he did make the payments, as instructed.¹⁹ But the resort to the power of attorney was merely an expedient and did not really resolve the question of who was entitled to the revenues after the sale of the freehold.

In any case, the Audit Office blocked the payment because it had wrongly been charged by Pollen and Puckey to the consolidated fund rather than the miner's rights deposit account for Hauraki, which was within Pollen and Puckey's control.²⁰ In 1880, Treasury was taking control of the mining revenues and setting up an imprest account in Wellington. In February 1881, CJ Batkin, assistant controller and Auditor-General, wrote to Warden Kenrick and native agent Wilkinson, the incoming co-trustees of the miner's rights deposit account in Hauraki, informing them that payments of miner's right fees to Europeans who purchased ceded land were 'absolutely illegal', and should cease while the whole question was referred to the Government.²¹ Apart from the issue of who was entitled to the payments, Batkin was no doubt aware of the constraints on the officials' authority resulting from the Financial Arrangements Act 1876, which provided that mining revenues were to be paid to a separate account for each district (not to the consolidated fund) and were payable either

16. Reid to Colonial-Secretary, 2 March 1876, A1 27/5/1, Archives NZ (doc A8, p 233)

17. In the Mining Act 1866, under which the goldfield was proclaimed, the relevant definition of 'Crown land' is 'land over which the Governor has acquired the right to authorise gold mining'.

18. Pollen, examination before Native Affairs Committee, petition 286, app G3, 'Papers Brought before Parliament and Select Committees', Le 1/1876/7 (doc A8(a), pp 615-634)

19. Puckey to under-secretary, Native Department, 31 July 1880, Thames goldfields notes, MA13/35C [MA13/35G], Archives NZ, p 7 (doc A8(a), pp 686-692)

20. JE Fitzgerald, memorandum, 25 August 1881, A1 27/5/1, Archives NZ

21. Batkin to Kenrick and Wilkinson, 14 February 1881, Audit inward letters, A1 27/5/1, Archives NZ (doc A8, p 233)

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to the Maori owners or to the local bodies in which the revenue was accrued.²² There was no authority to pay from the district accounts to private purchasers such as Graham, even if they were entitled. Wilkinson was happy to comply with Batkin's direction, being 'quite certain that it was never contemplated [in the leases] that the money should be paid to Europeans.'²³

JE Fitzgerald, the Auditor-General, also responded to Batkin's concerns, stating in a memorandum of 20 May 1881 that the miner's right fees were Crown revenue, that the Financial Arrangements Act 1876 did not authorise payment to any but 'native owners', and that he could not admit 'that the natives have any right to dispose of the revenue of the Crown to any other person'. He continued:

Some of the land in question has been sold to the Crown and is it not certain that the Miners fees have not still been paid over to the Natives illegally. It is only recently however that this money has been paid into the Public Account, and so that the Audit Office has any control over the expenditure.²⁴

Dr Anderson cites this memo in support of the statement that, while Graham's entitlement was being considered, miner's right and other fees seem to have been paid to the original owners 'until such monies were claimed by local bodies in the early 1880s'.²⁵ But Fitzgerald's memo does not support that construction. Fitzgerald did not rule out the possibility that Maori had still been paid the revenues after they had sold land to the Crown, but he does not definitely say that this was the case; he suggests that *if* local officials had paid them they had done so illegally. The point is important because the MacCormick inquiry of 1939–40 found that the Crown claimed the revenues from the moment they purchased ceded land, and had not seen any evidence that Maori had contested the point (see sec 13.7.3).

This still leaves doubtful the effect of private individuals buying ceded land. On 16 May 1881, T W Lewis, the under-secretary of the Native Department, formally stated a 'case for opinion of law officers' on the whole question. He outlined the history of the mining agreements and the passage of ceded land through the court and its subsequent sale to the Crown or to private Europeans, relating that in several instances the Maori vendors gave:

with the conveyance a legal power of Attorney to the purchaser to draw the rights, rents etc which had previously accrued to themselves as owners of the land, though it has been argued that such power of attorney was not necessary to enable the purchaser to receive the rents etc . . . The question now raised is whether persons purchasing from the Natives the portion of the block to which they have obtained titles through the Native Land Court, become entitled by such purchase to receive the Miners rights fees, or other advantages

22. Document P6, p 80

23. Wilkinson to Treasury, 12 April 1881, A1 27/5/1, Archives NZ (doc A8, p 237)

24. Fitzgerald, memorandum, 20 May 1881, A1 27/5/1, Archives NZ

25. Document A8, p 233

attaching to the land under the agreements referred to previously paid to the Natives from whom the purchases were made.

Lewis attached correspondence between Wilkinson and Kendrick and a Mr Creighton, who had argued that his common law rights were infringed by their withholding the payments.²⁶

In August, assistant law officer W Miller Lewis advised the Government:

The effect of all of them [the mining agreements] seems to be 1st that the fees from timber licences and the sale of kauri timber as there prescribed have to be paid to the Natives though in the first instance paid to a Government Officer. 2nd that the Government binds itself to pay £1 for each miner's right . . . In one agreement this payment is prescribed to be made to the Natives signing it (naming them) or their heirs in the other two to the chiefs or people (naming the tribes) and their heirs.

These agreements are in all respects pleasingly vague, but seeing that these payments are really in the nature of rent, or at any rate as an annual payment for the Grant of Easement, I see no reason whatever to doubt that the right to receive such moneys passes to the purchaser of the lands whatever the colour of his skin may be. He buys the land subject to this grant of easement or lease, and unless in his conveyance the right to the payment is reserved I think it passes to him.²⁷

Thus, Graham, Creighton, and other private purchasers would have been entitled to the revenues. It was required only that there should be an appropriate statutory authority to make the payments from the public account.

In September, Miller Lewis wrote to the Minister of Mines confirming his previous opinion, while admitting that 'the question is a complicated and difficult one' and saying 'I shall be very glad if you will relieve me of the responsibility by not acting on my opinion unless endorsed by the other Law Officers.' Discussing the various points of debate, he wrote:

Mr Reid's [1876 opinion] is only to the effect that he thought in order to pass the right to a share of these Miners Rights fees the conveyance of the land should specially mention them – that they probably could not pass without such special mention. But he clearly by implication admits that they were alienable by the Natives either apart from or in connection with the land . . .

section 2 of the Validation Act of 1869 . . . rather confirms my view. The very fact that it is made so clear that the agreement is to hold good notwithstanding extinction of Native title shows that it is to hold good though the land may be alienated by the Natives and if so surely it must hold good as against the Government to the extent of continuing their liability as well as in their favour to the extent of permitting mining.

26. Miller Lewis, 'Case for Opinion of Law Officers', 16 May 1881, T82/3406, in A1 27/5/1, Archives NZ

27. Lewis to Native Minister, 26 July 1881, in James Fitzgerald, memorandum, 20 May 1881, A1 27/5/1 (doc A8, p237)

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Next the effect of declaring these lands Crown lands was not to interfere with these payments or royalties in any way but to bring them under all the numerous provisions of the Gold Fields Acts as to mining on Crown Lands from which mining on private lands is exempt.²⁸

Importantly for these proceedings, Miller Lewis's opinion was that the mining revenue was payable not for the gold as such but for the rent of the land or the right of easement by which the gold might be mined. The essence of his view was upheld by Justice Conolly in 1897, in *Aitken v Swindley*.²⁹ There is no evidence that this view has since been challenged in law.

In the light of Miller Lewis's opinions, officials made preparations to include in the Appropriation Act 1882 authority for actually paying the mining revenue to private purchasers.³⁰ Batkin of Audit continued to raise objections, however, and the authority was possibly not secure until section 8 of the 1882 Act authorised the Colonial Treasurer:

to issue and pay out of the Consolidated Fund all moneys lawfully payable to any Natives under and by virtue of the agreements validated by 'The Auckland Gold Fields Proclamations Validation Act, 1869', or to any persons lawfully entitled to the lands from which the revenues accrue in virtue of any such agreement.

Dr Anderson interprets this as a marked shift from the provision in the Financial Arrangements Act 1876 from payment to Maori, to payment to settlers and counties. Crown counsel, however, rightly point out that the 1876 Act did not provide for payment to Maori only: rather that they were entitled to be paid first, before the balance went to local bodies; secondly, that the 1882 Appropriation Act did not repeal the 1876 Financial Arrangement Act, but dealt with payments from the consolidated fund (which the 1876 Act did not), the two Acts operating together.³¹ But Dr Anderson and the Crown are in agreement that the 1882 Act provided the necessary authority for payment to private parties who had bought Maori land within goldfields.

Because the Audit Office was still resisting payments to private Europeans in late 1881, Fitzgerald wrote, 'I am finally of the opinion that an order should be made by the Hon the Colonial Treasurer based upon an opinion by the Hon the Attorney-General, as to who is lawfully entitled to these moneys and that the Audit should be guided thereby.'³²

The issue seems to have still been unresolved in mid-1882, at which point the Thames Borough Council pressed for payment to them of the revenues from Waiotahi A block, which had recently become the property of a European named Comer W Rolleston, the

28. Miller Lewis to Minister of Mines, 14 September 1881, A1 27/5/1, Archives NZ

29. Parcell, p 55

30. See exchange of minutes between Oliver Wakefield, L Rolleston, and J C Gavin, A1 27/5/1, Archives NZ

31. Document P6, pp 83-84

32. Fitzgerald, minute, 29 September 1881, A1 27/5/1, Archives NZ

Minister of Mines, wrote to the Attorney-General, Frederick Whitaker, 'It seems to me that all the advice to the present time goes in favour of the fees etc passing to the private purchasers. Will you say what you think should be done?' Whitaker replied, 'It appears to me that the fees are incident to the Land ceded for mining and are payable to the owners of the soil for the time being.'³³

That settled the issue. Treasury opened a 'European account' within the goldfields revenues imprest account, and Ministers and officials distributed the revenue between Maori owners, local bodies, and private Europeans. The opinion given by assistant law officer Lewis in 1881 and sustained by Attorney-General Whitaker in July 1882 was not so much a unilateral 're-interpretation' of the situation (as Dr Anderson suggests) but an authoritative interpretation of what had been unclear, namely the import of the goldfield agreements. The Crown had never recognised Maori ownership of gold, separately from the land. Even Solicitor-General Reid's opinion had not been posited on any such right.

What is noticeable, however, in the responses of Reid, Batkin, and Wilkinson to the issue, is that these officials had never contemplated that the Crown should act as agent for private Europeans in the collection and payment of the revenues, as it had for Maori. What Reid had apparently been trying to do was to preserve the concept that what Maori had granted to the Crown in the cession agreements was not simply an easement in the ordinary sense, but the right and responsibility of managing access for mining purposes. Reid felt that this right and responsibility still lay with the Crown even though the freehold of the land had been sold to private parties, and the Crown should continue to manage the mining access, collect the revenues and pay them to former Maori owners even after the sale. This view did not survive Miller Lewis's and Whitaker's dictum that rights passed with the land.

The whole episode does little to support the view of claimant counsel that the royal prerogative exerted a subtle influence; it was not mentioned by Reid's 1876 opinion. Rather the episode disclosed a continuing emphasis on the usual common law approach to land, namely that lesser rights such as easements passed with the freehold of the land. Governments continued to keep the prerogative in abeyance, to purchase Hauraki land (often under proclamations of pre-emptive right) and, when they had done so, to pay mining revenues to local bodies rather than to the former Maori owners. The episode also reveals the prevailing confusion among Ministers and officials of the Crown about the effect of purchase of the freehold of ceded land by private parties before 1882. Some officials remained far from happy about the Crown passing on to Europeans the mining revenue it was collecting for access privileges that had been negotiated with Maori. One outcome was a strengthening of the Crown's determination to buy the freehold of the ceded lands, and forestall Maori selling them to private parties. Field officers such as Wilkinson and Kenrick became zealots for this, constantly urging purchases of Hauraki lands upon their Ministers.

33. Rolleston to Attorney-General, 24 July 1882; Whitaker, minute, 25 July 1882, A1 27/5/1, Archives NZ

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The episode also reveals a little of the attitude of Maori owners, and of third parties. In at least some Maori minds the gold revenues were separate from the land and they sold only the latter. For their part, some of the purchasers thought all along that the revenues were part of their common law rights, and that they did not need any separate power of attorney to claim them. But the Thames Council had also chimed in, arguing that the revenues passed to the Crown, not to private purchasers, when Maori sold the land. There was thus a loose perception circulating that the gold revenues were somehow distinguishable from the other rights attaching to the land, though whether the payments were for the gold or for the access was unclear. However, no evidence has emerged of Maori strongly contesting the right to revenues accruing on goldfield land they had sold to private purchasers other than in the case of Graham. The resistance came rather from officials such as Wilkinson, and then on behalf of the Crown's interests rather than Maori interests (see sections 4.2.2, 7.6.2, 8.1, and 9.6 for Crown purchases targeting land known, or believed, to be auriferous).

It is relevant to this discussion, however, to note the transactions over Pakirarahi 1 (considered above in section 12.3.2). Between March 1882 and August 1884, various shareholders in the title executed deeds of sale over the land with USSC, but on 19 September 1884 the same owners executed a deed of covenant stating that they were conveying only timber-cutting rights, for a maximum term of 99 years, and *expressly reserving the mining revenue*. It is clear that, under advice, they had come to a better understanding about the effects of selling the freehold and tried to clarify their real intentions, via the covenant. The complex outcomes in the case of Pakirarahi 1 are discussed in detail above.

In our view, the confusion regarding the effect on mining revenues of sale to private purchasers – a confusion which obtained not least among Crown officials – supports the finding of the MacCormick commission in 1940 that Maori may not have been fully aware that the sales would mean they were no longer entitled to receive the mining revenue. They had not been adequately advised by Crown officials.

(2) *The 1896 debate: native rights versus easements revisited*

The debate on the Mining Act Amendment Act 1896 deserves fuller consideration for the light it throws on the nature of the goldfield agreements: in particular, whether they constituted or were evidence of a limitation that the Crown had accepted on its prerogative rights.

The Bill proposed to extend the powers of the Government to 'resume' (ie, acquire compulsorily) auriferous lands for gold-mining purposes, to include all lands within goldfields (including Maori and private settler land). Unlike previous resumption statutes, the consent of landowners would not be required. The largest category of land likely to be affected by the Bill was the auriferous land held by private timber companies. This included land purchased or held under long term or perpetual lease by KTC or its subsidiary, the Kauri Gold Estates

Company, particularly at Whangapoua and Tairua.³⁴ Section 56, however, allowed the warden to issue licences to mine on reserves made by Maori owners within the goldfields for residential or cultivation purposes or wahi tapu, without the owners' consent, 'provided the use for which they were so reserved is not thereby prejudicially affected'.³⁵

The Bill was introduced by the Minister of Mines and member for Waikato, Alfred Cadman. Although the Government had tolerated mining operations on private land, was it not time, he asked, 'that the Government should assert their position in the matter?' The position that Cadman advocated was as follows:

There is one of our own Judges, who tells us virtually that, unless we legislate to give effect to the Treaty of Waitangi, there is no treaty at all. Then, Sir, not only that but lawyers advise us in all directions that the law is clear that the Crown's prerogative rights to the Royal metals do not pass by a grant from the Crown; and not only that, but that the Crown has a right to enter upon any private lands and open Royal mines.

Cadman admitted that 'I myself was of the opinion that many entertain now – namely, that when you obtained a Crown Grant, and had a Land Transfer title, you obtained everything on or in the land. But I have found from experience and the information I have gained that this is incorrect.'

The debate that followed concerned Maori rights in gold and focused directly on the Crown prerogative and on limitations to the assertion of it. Hone Heke, the member of the House of Representatives for Northern Maori, was concerned that Parliament should acknowledge that Maori rights in gold had been recognised. Other speakers, on behalf of private landowners, supported the recognition of Maori rights to gold as part of the land, in order to further the rather dubious argument that, if for a while the Government had forfeited its prerogative rights, it should not now take away rights acquired by private individuals who had bought land from Maori while the Crown prerogative was in abeyance. However, Stout, the former premier, replied to Cadman:

Stout: There are, however, other points which the honourable member ought to have referred to in moving the second reading of the Bill. He forgot to state that, by a series of Acts passed in New Zealand, two things have been recognised. The first thing that has been recognised is that the Natives have still the right to the gold, and the second . . .

Cadman: Where is that recognised?

34. Cadman mentioned the purchase by an English syndicate of the Whangapoua estate from KTC, 'and I have no doubt in my mind but that the sale of the Royal metals in that land has been part of the consideration'. Cadman also made direct reference to a 'hundred thousand' acres held under lease by KTC. It likely that this included the land held under 99-year lease at Pakirarahi: Cadman, 29 September 1896, NZPD, 1896, vol 96, pp 279–280.

35. Document P6, p 112. The summary of the parliamentary debate is taken from pages 98 to 113.

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Stout: It has been recognised in a Bill passed this session, called ‘the Urewera District Native Reserve Bill’ . . . and it has been affirmed in the arrangements that were made at the opening of the Thames goldfields between the Maoris and the Government. At that time, even, it was recognised that the Maoris had some right to the gold.

Some of the criticism of the 1896 Bill was based on the argument that the compulsory resumption of the fee simple (introduced in respect of alienated Crown land by the Resumption of Land for Mining Purposes Act 1873) exceeded the Crown’s prerogative since it would take away more rights than just rights in gold. Of more interest to this inquiry is the argument that the Government had not asserted its prerogative rights before the resumption Act of 1873; from this it *might* be inferred that the Crown had abandoned its prerogative rights before that year. Moreover, no statutory provision had been made for the resumption of lands alienated by Maori until 1888, from which it *might* be inferred that the Crown had abandoned its prerogative rights as against the purchasers of Maori land alienated before that year. The proponents of this argument hoped that the purchasers might therefore have acquired Maori rights in gold.

In support of the claim that the Government had intended to abandon its prerogative rights, particularly as against Maori, opponents of the Bill cited both the Thames goldfield agreements, which had been statutorily validated in 1869, and the recent Urewera Native Reserve Bill. In this, the Government had indicated its willingness to pay a royalty to the Maori owners should gold be discovered there. Premier Seddon sought to clarify the Government’s position by reading to the House a letter attached to the second schedule of the Urewera Bill:

Should gold be found . . . the benefit accruing therefrom should be participated in by the hapus owning the land . . . and before the goldfield is opened arrangements should be made . . . either by the payment of a royalty per pound or ounce of the amount received from the working to the owners . . . or that the balance after paying the expenses of the administration of the goldfield, and the balance on the issue of licences and miner’s rights . . . be paid to the owners of the land.³⁶

In other words, as in Coromandel in 1861, the Government was willing to ensure that the Maori owners would participate in the benefits of mining either by a royalty-type payment or from revenue collected from miner’s licences. Ultimately, the option of paying a royalty was implemented in the Urewera Mining Regulations promulgated for the reserve in 1909, by which time it had been included in the Hauraki mining district. Regulation 9 provided that ‘A royalty of sixpence for every ounce of gold won within the [Urewera] reserve by the holder of any mining privilege shall be paid to the Native owners in manner set out in

36. Cadman, 29 September 1896, NZPD, 1896, vol 96, pp 285–286

section 23(c) of the Mining Act [1908].³⁷ (In fact, no gold was found in the Urewera and no royalties were paid.)

Later in the 1896 debate, other members picked up the points raised by Stout and drew a further response from Seddon:

Allen: Again, has the Crown in the case of the Natives always taken up the right to the Royal metals. I do not know of any single instance in which the Crown has authorised mining upon Native lands, except when the Natives have ceded the Crown rights to mine . . . Well, it may of course be argued that the right to mine does not mean the right to the Royal metals. That is, of course, an arguable point . . . However, there is the fact that where gold has been mined for on Native land it has never yet been done except when the Natives have specially granted the Crown the right to do so.

Button: Can we suppose for a moment that the Maoris had any idea that there was any such a thing as a Royal prerogative to take away the precious metals lying under the surface of the soil? . . . Well, has this right, which the Maoris have good ground to suppose pertained to them, been recognised from time to time by the British Crown? Most decidedly it has. [makes references to 1852 and subsequent agreements] . . .

When the Natives brought their land under the operation of the Native Land Court, what was the effect of it? Did they part with rights? . . . Did they by that means become tenants of the Crown, so as to lose rights which they were originally and inherently entitled to? . . . But I think it would be altogether unfair to suppose that the natives ought to conclude that, in exchanging their Native title for a title according to the British law, they parted with the right to the metals.

Both Allen and Button acknowledged that the Treaty of Waitangi had no force in law but thought that it had moral force.

Hone Heke maintained that the Treaty of Waitangi was 'still alive', continuing to guarantee Maori property rights, including Maori lands and all they contain. Heke made particular reference to lands held under timber lease by KTC:

Heke: The Natives have made leases over to this company so as to allow the company to cut away the timber and nothing else, therefore I submit that the right to the minerals under those lands belongs neither to the company nor to the Crown. I refer to what are claimed to be Royal metals, and I say these belong to the Natives, and any rise in the value of the land accruing from the finding of minerals should be secured to the Natives. Now the present Government and the present House have almost admitted the right of the Natives to the gold and silver on Native lands, and I would like to draw the attention of the House to the Urewera District Native Reserve Bill which has already passed this Chamber.

37. 'Bringing the Urewera District Native Reserve under the Operation of "The Mining Act 1908" and Making Special Regulations Relating Thereto', 10 April 1909, *New Zealand Gazette*, 1909, no 31, p 1022

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[S]ince 1852 the right of the Natives to the metals and to the lands carrying those metals has been recognised. It was recognised by the then Governor and by the then Government, and up to the present day that right still exists.³⁸

Premier Seddon, however, maintained that the Treaty of Waitangi was no obstacle to the Crown prerogative and denied that there had been any recognition of Maori rights in gold:

Seddon: the right of Royal metals went to Her Majesty [under the Treaty of Waitangi] just as she assumes rights in connection with her sovereignty over other lands . . . I will show how flimsy the contention is that these natives still have a right to the gold and silver. What has been recognised in respect to the Thames has been this: that the right of the Natives has been recognised on account of them owning the lands, not on account of the gold in the lands.

Stout: You gave them part of the gold.

Seddon: Certainly not; we gave them no part of the gold: we gave them the miner's rights and the business licences. For the sake of argument I will admit to the Opposition members across there that we said they [Tuhoe] should have a royalty on the gold produced; but that is only by way of fixing a definite rental based on the output of the gold, just exactly as you do with coal. You exact royalty on the coal, and it is a rental all the same; and you bring the royalty into the rental, and the one pays the other. That is what you do in respect of land leased for coal-mining purposes. In respect to the Thames, I say, what was given there was for the right to occupy the surface and to mine on those lands – the miner's-right and business-licence revenues went to the Natives . . .

Seddon's argument that the Thames and Coromandel agreements had concerned surface rights only was reiterated in Cadman's closing speech: 'Now, the agreements with the natives in the olden days had nothing to do with the right of the Crown to the Royal metals. The natives were granted certain revenues from miners' rights and licence-fees, but they were given for the right to have the surface broken.'

As a subsidiary argument, Seddon stated that if, contrary to his own understanding, Maori had been granted part of the Crown's prerogative rights in gold, then those rights remained with the original Maori owners notwithstanding the transfer of the freehold unless the royal metals were specially mentioned:

If the Natives who previously owned Taitapu, and other natives, have the same prerogative right as is contended for them, and those rights did not pass to Her Majesty at any time notwithstanding the Treaty of Waitangi, then I say, if this contention be sound, these Royal metals still vest in the Natives, because on their sale of land they were not specially mentioned, and, not being specially mentioned, did not pass to the purchasers of the land.

38. Cadman, 29 September 1896, NZPD, 1896, vol 96, p 314

This consequence, as Seddon well knew, would be unpalatable to many of those opposing the 1896 Bill. If correct it would close the door on the possibility of European purchasers having acquired rights in gold from Maori vendors of land before 1888, thus defeating the motive of one lobby group; it also raised the possibility that the Crown had not acquired the full rights to gold in lands that it had purchased, which would be abhorrent to the greater part of the mining lobby.

The Bill was duly passed, the Government's view of its prerogative rights to ownership of gold prevailing. It did not affect Maori customary land, which still required the consent of the majority of owners to be opened for mining. Where land had been ceded for mining purposes, however, section 56 of the Mining Act Amendment Act 1896 could be applied to the reserves within it, provided the initial purpose of the reservation was not affected.

(3) Denial of the rights to reserve gold from the sale of Waihi reserves

The official position had developed that any rights transferred under the cession agreements attached to the land and not to the signatories of the agreements, and therefore transferred with the freehold of the land. But what of Maori rights in lands exempted from the cession agreements? An occasion for the Government to seek advice on this matter arose in respect of the Waihi blocks 1 to 6, which had been reserved from the Ohinemuri mining cession.

The Waihi blocks had been granted by the Native Land Court with the restriction that 'the right to mine for gold and other precious metals in or upon the said land shall be inalienable . . . to anybody other than the Governor'. When, in the 1890s, the freehold of the blocks was transferred to a private purchaser by the name of Stewart, it appeared that the effect of this restriction was to reserve to the former Maori owners whatever rights they possessed in gold. The first response of Sheridan, Under-Secretary for Justice, was to seek to obtain a deed of cession of the mining rights from the former Maori owners, but on reflection he decided that perhaps there had been no special right to reserve and the restriction imposed by the Native Land Court could have no effect: 'I think that this restriction is *ultra vires* because it implies that the right to mine is or was vested in the Native Owners, whereas it belongs alone to the Crown by prerogative.'³⁹

The Minister of Mines, Cadman, instructed that legal opinions be sought as to whether or not the Government had any obligation to negotiate with the former Maori owners before opening the blocks to mining. Two reports are on file: the first, by Reid, advised that 'the mere reservation of the right to mine for gold only put the Crown in the like position it would have occupied at Common Law by virtue of the Prerogative.'⁴⁰ The second report, by Theo Cooper, advised that the restriction in the grant was 'mere surplusage' because 'the Native Owners never had the right to the gold and silver within these lands.'⁴¹ Indeed,

39. Sheridan to Under-Secretary for Mines, 11 June 1896, NLP96/15 (doc A9, p 158)

40. Reid to Mines Department, 3 October 1895, MD1 95/1583 (doc A9, p 159)

41. Report of Theo Cooper, 22 June 1896, MD1 96/1067 (doc A9, p 159)

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Cooper considered, on the transfer of sovereignty, Maori had possessed no more than an usufructory or occupation right in the land, and no absolute title:

The land affected by the Grants was originally Native Land, that is land owned by the Natives under their customs and usages but there is no doubt that in respect of all Native Lands the original title is in the Crown. In *Johns v Rivers* . . . the Court of Appeal expressly decided that 'by Common Law the whole territory of the Colony originally vested in the Crown as its demesne subject only to the rightful and necessary use thereof by the aboriginal inhabitants.'⁴²

Cooper advised that the Privy Council had decided that the royal prerogative to gold did apply to the colonies. It had been established in the *Case of Mines* that the prerogative 'carried with it the right on the part of the Crown to enter on such lands and to mine for and extract the mineral and although this right was in a subsequent case doubted there [was] not sufficient reason to question the soundness of such power' (see section 6.3.1 for a discussion of the *Case of Mines*).⁴³

Cooper's report confirmed Sheridan's revised belief that all the rights in the gold vested in the Crown by prerogative (including, according to Cooper, the right of entry, although the right of entry onto private land was limited by legislation). Such rights could not be reserved to the former Maori owners of the Waihi blocks. The advice offered by Cooper was adopted as the official view, as can be seen in the speech of Cadman in introducing the Mining Amendment Bill, 1896, later that year (see above).

There were material consequences from the Crown's interpretation of the royal prerogative in respect of the Waihi reserve. The former Maori owners of the reserve lost an opportunity to enter into a goldfield agreement with the Crown. That opportunity, however, passed to Stewart. Despite his not having negotiated a right of mining from the Maori owners, he had acquired it by his purchase of the land, and was able to proceed as if he himself owned the gold. The Crown's differential treatment of Maori and European land warrants fuller discussion.

13.2.5 Differential treatment of Maori and European land

(1) *Introductory remarks*

The Crown's opening submissions on gold disclose an important difference in the Crown's treatment of Maori and European-owned private land. Commenting on the Gold Fields Act 1858, Crown counsel state:

42. Report of Theo Cooper, 22 June 1896, MD1 96/1067 (doc A9, p159)

43. Ibid

While the royal prerogative meant that at common law the Crown had the power to enter private land where any mine had been opened and to take over that mine, there was no legislative provision that prevented a landowner from mining the gold or charging miners for access to his/her land where the Crown decided not to exercise its prerogative.

The situation with customary Maori land was different. The Native Land Purchase Ordinance 1846 prevented the sale and leasing by private individuals of mining rights on customary Maori land.⁴⁴

As we have seen, the cession agreements opened Maori land to mining by holders of miner's right licences, including Maori owners, but even after the repeal of the Native Lands Purchase Ordinance in 1865, the Crown by various means blocked Maori from dealing directly with private settlers to mine gold on their land. The case with European landowners was very different: not only were they *not* prevented from mining for gold on their land but in the Mining Act Amendment Act 1896 legislative provision was made expressly for that purpose. The Crown allowed them to make arrangements which would take precedence over or defeat its own prerogative rights.

(2) Different emphases emerging in the law

The situation with Maori land was developing differently. Generally, the ceded land began to go through the court, thereby becoming 'private land'. Validating statutes were passed, however, to ensure that mining agreements between the Crown and Maori, or rights granted to Crown under such agreements, would persist, in spite of tenure conversion in the court. As far as customary land was concerned, the Gold Fields Act Amendment Act 1868, provided a penalty for mining on customary Maori land unless one was an owner, or held a prospecting licence issued by the governor after obtaining the consent of the Maori owner, or if the land was included within a goldfield. (This provision was repeated in sections 113 and 114 of the Gold Mining Districts Act 1871 and section 37 of the Mining Act 1886.) Clearly, these provisions were introduced for the prudent purpose of preventing miners from encroaching on Maori land against the wishes of the owners (a particularly serious matter in 1868, when many Maori were opposed to opening their lands to miners; for example, Te Hira at Ohinemuri, Riwai Te Kiore at Otunui, and Aperahama Te Reiroa at Waiotahi). Nevertheless, the Crown's controlling hand restricted Maori freedom to authorise mining without the Crown's involvement. The prohibition was even stronger in the Shortland Beach Act of 1869, passed precisely to put a stop to miners and Maori arranging extra-legal leases of the foreshore. In 1888–89, the Crown did not act to prevent direct licensing by Maori of mining at Kuaotunu, but it did hasten to bring the goldfield under its jurisdiction by negotiating a mining cession and also commencing negotiations for the purchase of the freehold.

44. Document P6, p 51

13.2.5(3)

(3) The Resumption Acts

The Crown was unwilling to assert its prerogative right to mine gold on private land (if indeed it had the right where no mine had been opened). Instead, in respect of auriferous land locked up against mining by private owners, the Crown looked to various statutes for its authority:

- ▶ The Resumption of Land for Mining Purposes Act 1873, gave the Governor in Council authority to resume lands acquired and subsequently alienated by the Crown. It applied particularly to Crown lands in Otago under agricultural lease, and to other provinces by proclamation. We are not aware of it being proclaimed in Auckland province.
- ▶ Section 6 of the Native Land Act 1888 extended the Crown's powers of resumption to lands alienated by Maori within 'any existing gold mining district or any district which shall hereafter be proclaimed a mining district'.
- ▶ The Mining Act Amendment Act 1896 extended the Crown's powers of resumption to all land alienated by the Crown or by Maori within gold-mining districts, effectively a retrospective extension of the 1873 and 1888 resumption legislation. It applied to Crown lands alienated under lease, including timber leases. Cadman's speech introducing the Act included the statement:

Then we come to the portion of the Bill referring to the surrender of outstanding leases. Sections 27 and 29 meet these cases; and in dealing with this matter I wish to say that these sections refer principally to the lands in the North Island – lands held by the Kauri Timber Company.⁴⁵

(4) A crucial exception

Having prevented the owners of private land from keeping it locked against mining, the Government also provided – generously – in section 27 of the 1896 amendment act that the owner, or a person having the owner's written consent, might apply to the warden for the grant of a mining claim. In such a case, all revenues (later changed to all rents, revenues, and licences fees) would go to the landowner. Parcell comments:

There could hardly be a more complete statutory grant of the royal mines to the land owner, the strict position being that the royal prerogative applied in full but could be defeated at any time by a freeholder acting in accordance with the permissive provisions of the statute.⁴⁶

We note that this privilege operated in respect of former Crown land or former Maori land which had been alienated to private parties, overwhelmingly non-Maori. It did not apply to land in Maori ownership, either customary or under court title.

45. Cadman, 29 September 1896, NZPD, 1896, vol 96, p 282

46. Parcell, p 77

13.2.6 The situation in practice

In this way, the Crown accepted the development of private mining on private European land, and charged no royalties on the gold extracted. The practice began effectively at Coromandel in the late 1850s. Although the goldfield was not proclaimed until mid-1862, miners were being encouraged by Crown officials in the late 1850s to work the considerable areas of land in private hands around Coromandel Harbour, to keep them away from Paora Te Putu's land, which was closed to mining.

As the nineteenth century wore on, the Crown surrendered completely, and allowed private companies, notably KTC, to develop auriferous lands in whatever manner they chose, while introducing the resumption acts to ensure that they *did* develop it. The Crown was in fact consistent in refusing to condone either European or Maori owners closing their auriferous land to miners. The inconsistency lay in the Crown allowing European owners to license mining themselves while constantly striving to interpose itself between Maori and miners.

The contrast raises a serious question as to whether Maori were afforded a fair opportunity to secure the best terms for mining on their land. We have been given little evidence on the terms under which mining on private land took place, but in the 1896 debate (discussed above), Cadman gave examples suggesting that the private owners' demands were high:

considerable agitation has been going on for some years from one end of New Zealand to the other in the direction of having some provision made for resuming land for mining purposes . . . This agitation has been caused, no doubt, in great measure, by the exacting demands made by the owners of private property before they would allow miners to go on their lands at all . . . In one case in Otago the witness told us that he had to pay 10s an ounce royalty on any gold he might find, and had paid as much as £170 per acre as rent for the land.⁴⁷

Some very high figures were also being paid for the freehold. Crown counsel cite two examples where Maori owners were beneficiaries: the purchase by private interests of the 195-acre Waiotahi A block at Thames in 1880 for £1000 and the purchase by the Crown of the adjoining 10½-acre Kaipitopito block in 1881 for £316.⁴⁸ In some cases then, where it was not blocked by Crown pre-emptive proclamations, competition between Crown and private sector seemed to push up the prices Maori owners received for their land.

By the 1890s, KTC had itself acquired a virtual monopoly over large areas of Hauraki. According to Cadman, it held some 56,000 acres of freehold in the Thames and Coromandel counties and 100,000 acres of leasehold, originally acquired for timber but increasingly worked for gold on the company's terms.⁴⁹ The 1896 parliamentary committee that

47. Cadman, 29 September 1896, NZPD, 1896, vol 96, p 279 (doc A9(a), p 340)

48. Document A10, pt 2, pp 193–194 (doc P6, p 9)

49. Cadman, 29 September 1896, NZPD, 1896, vol 96, p 282

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investigated the situation attached to its report a copy of the regulations of Kauri Freehold Gold Estates Limited, the subsidiary formed to work the mines at Whangapoua, but they probably extended to other KTC holdings. They mirrored Government regulations in many respects but included, for example, provisions for new companies to pay the KTC subsidiary a quarter of their net profits.⁵⁰

Cadman stated the Government's position as he saw it:

Then, with respect to mining on private property, hitherto every Government has allowed mining on private property, and for these reasons: In the first place, the amount of mining on private land was insignificant; and, in the second place, every Government has had the same desire to encourage mining as much as possible. But when we find that people now set up a right to these Royal metals it is time the State should step in; and we have an instance before us that very markedly shows the necessity for a Bill such as this – that is, with regard to the sale by the Kauri Timber Company, in the Auckland District, of the Whangapoua Estate to a large English syndicate . . . The question arises, then, Is it not time that the Government should assert their position in the matter?⁵¹

Cadman claimed that KTC was:

virtually usurping the position of the Warden on the Thames Goldfield; because if two people desired to mine on these leaseholds, and one of them was prepared to give an interest in his mine to the company, the company waived all objection, and the Warden granted the claim; but if the other miner declined to pay or give an interest to the company, then they objected to the claim being granted, and the Warden had no power to grant it.

Cadman went on to give an instance of this in respect of the Matamata-harakeke block.⁵²

However, having taken the additional powers of resumption in 1896, the Government interfered little with KTC in the working of the gold on its lands, provided they did not leave land locked up. The main area of the company's operations was on its Pakirarahi lease, but we have no information on the precise terms by which this was done.

All in all, although the Crown never abandoned in law its prerogative over gold, in practice it allowed the private sector to manage their own fields, contenting itself with taking the duty on exported gold. Maori were given little scope or encouragement to develop mining on their own land in association with private industry, the Crown moving swiftly to assert its authority over – and then to purchase – the Kauaeranga and Coromandel foreshores, to control mining on the cultivation reserves in Shortland, and to secure mining cessions in the other fields, including Kuaotunu in the 1890s. The curtailment of private mining on

50. Charles Rhodes, 'Goldfields and Mines Committee: 18 and 22 Septmber 1896, Appendix: Conditions for Mining on the Land Held by the Kauri Timber Company', AJHR, 1896, I-4A, pp 35–38

51. Cadman, 29 September 1896, NZPD, 1896, vol 96, p 279

52. Ibid, p 283

Maori land is the obverse side of the protections provided under the mining agreements with the Crown.

13.2.7 Tribunal comment on the ownership of gold and the royal prerogative

It has been put to the Tribunal that Maori customarily viewed the land and its resources in a holistic way, rather than dividing and categorising its various substances like Europeans. Where subsurface minerals are concerned, this holism is a cultural expression aspects of which are similar to that which European jurists refer to as the natural law maxim that a landowner owns all that is in or on their land. The central issues for Crown and Maori alike relate overwhelmingly to the ownership of the *land*, access to the *land* and the transfer of the *land*, rather than to gold separately from land.

Whether in terms of the royal prerogative or affirmed in statute, Crown counsel has claimed that Crown ownership of gold and silver has been asserted in the national interest. The Crown has submitted that it was considered necessary in order to ‘control the gold-mining industry’. This was made particularly clear in the 1896 parliamentary debate on an amendment to the Mining Act which, though it impinged upon Maori reserved land within proclaimed goldfields, was far more concerned to regulate mining on private non-Maori land. The need for public ownership of gold, like public ownership or control of petroleum, uranium ore, coal or other valued resources, weighed against the private ownership of any of these resources, opens very large questions. The need or justification for public ownership has not been argued before us in any detail, and we are not in a position to make a comprehensive assessment of the question in relation to gold. We have noted, however, the reasons given by nineteenth century officials and Ministers for their determination to purchase Maori land ahead of private ‘speculators’ in order to make it available to those willing to invest capital and labour in prospecting and mining. And we have noted below (in section 13.7.1) the position taken (that gold is the property of the Crown) in the Mining Act 1971 and the Crown Minerals Act 1991.⁵³

We accept that there are good reasons why precious resources should be under public ownership or control, and by and large we are sympathetic to the Crown’s position on the issue. Our sympathy is tempered somewhat by the fact that, having taken the necessary statutory authority, the Crown, throughout the nineteenth century, regulated gold mining on private non-Maori land much less than it did on Maori land, where Maori were circumscribed in their opportunities by the cession agreements. But if the Crown’s justification for public ownership of gold in these proceedings is rather limited, so too are the arguments of the claimants on the subject. Given that gold was manifestly not a traditional taonga, we do not consider that Maori claims to ownership of gold *separately from the land in which gold*

53. Document P2

is found are so strong as to warrant making an exception for Maori as to the applicability of the royal prerogative, or the assertion of public ownership of gold in 1971. Gold acquired a value for Maori only after New Zealand's entry into the European economic order, and it is not unreasonable that its exploitation should be regulated with the developing economy from that time.

Therefore, we do not find that the retention of the royal prerogative over gold and silver was, of itself, in breach of the Treaty, taking into account the balance between article 1 and article 2 rights.

It is clear that in the 1880s and 1890s, the Crown's attitude to applying its prerogative to royal metals within Maori land changed. The Crown had never formally abrogated the prerogative; indeed, in legislation up to 1877, it had taken express care to reserve it. It had, however, curtailed its prerogative right of access by accepting that Maori consent was necessary to open new areas of Maori land to mining. Yet officials were uncertain as to the implications of the sale of land subject to mining cession agreements. This was clarified by the courts and in legislation during the 1880s and 1890s. The principle of the Crown's prerogative right of ownership was defended, which ended the fleeting efforts by Maori to reserve gold, or access to mine gold, when they sold the land. Those efforts had effectively ceased by 1881, with Crown law officers confirming the view of private purchasers that the access rights to mine gold transferred with the freehold of the land. Meanwhile, since the 1850s the Crown had allowed the private owners of the freehold to mine, or to sell mining rights, almost as if the Crown prerogative was in abeyance.

13.3 THE BASIS OF PAYMENT: THE QUESTION OF ROYALTIES

13.3.1 The Crown's promises

It will be recalled from chapter 7 that on receiving the news that gold had been found near Coromandel, Lieutenant-Governor Wynyard wrote to various chiefs to encourage them to allow prospecting of their lands. His letter concluded with these words, 'If no regulations are made, and the Natives are left to themselves, there will be nothing but confusion but if the Natives and the Government act together, *all will be well*' (emphasis added).⁵⁴

Native Secretary Nugent, who conveyed the message, explained that if Maori were to rely on Government management, order would be maintained and they would profit from gold miners and mining through receiving a share of the licence fee revenues as well as enjoying greater demand for their produce.

Promises of partnership and mutual benefit were reiterated by Crown agents as part of

54. Wynyard to chiefs, 18 October 1852, G8/8, Archives NZ (doc A8, p78). See section 9.2.2 for the context of this letter.

their efforts to persuade Maori to agree to the opening up of their gold-bearing lands to miners. The speech that the superintendent of Auckland province, John Williamson, delivered in 1867 has been highlighted in these proceedings. Williamson predicted that cooperation between Maori and Europeans in the development of goldfields would bring lasting, mutual prosperity.⁵⁵

Such promises, to European officials essentially rhetoric rather than solemn undertakings, probably helped to persuade Maori to enter into formal gold-mining cession agreements.

How well the Crown managed the ceded lands entrusted to it by Maori is not just a question of whether or not it met its strict obligations under the formal terms and conditions of cession agreements. It is also a question of how well the Crown at least attempted to follow through on the assurances of partnership and mutual benefit that accompanied these agreements. Gold mining probably could not have delivered the prosperous future promised by Williamson, but an important question for the Tribunal has been, whether the Crown's policies contributed to the outcome for Maori falling short of what was reasonably achievable.

13.3.2 Alternative payment systems considered by Crown and Maori negotiators

Some claimant statements have focused on the question of whether a royalty should have been paid to the Maori owners of gold-bearing land, rather than (or as well as) miner's right fees for the granting of access. But the issue is wider than that. We take it as self-evident that, regardless of whether they were being paid for ownership or for access, Maori were entitled to a fair and reasonable share of the proceeds of mining, in recognition of the diversion of their land to the purposes of mining and the disruption to their lifestyles.

We note that in the agreement opening the Urewera district to mining, the Crown did agree to pay a royalty (at six pence per ounce), and enshrined this in statute. In the 1896 parliamentary debate, however, Seddon argued that this payment was a rent for the cession of the land for mining purposes rather than a royalty based on ownership of the gold (which lay with the Crown, in Seddon's view): thus Tuhoe were given a choice between payment of the miner's right and business licences, 'or, in lieu of that, as a rental, a royalty to be fixed on the number of ounces produced from your land'.⁵⁶

In these proceedings, claimants have argued that the gold itself – as distinct from the land in which the gold was located – was theirs and thus they should have received payments in relation to its value. Dr Anderson, principal witness for the claimants, has also criticised the fact that no direct relationship was established between the value of the minerals taken out of Hauraki Maori land and the moneys received by Maori. It is at least implied that had Maori ownership of gold been recognised, that relationship would have been established,

55. *Daily Southern Cross*, 5 June 1867 (doc v1, p 193)

56. Cadman, 29 September 1896, NZPD, 1896, vol 96, p 310

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and Maori enabled to charge a royalty for the gold extracted.⁵⁷ Counsel for the Crown have responded:

It cannot, however, be assumed that Maori would have been better off if that had in fact been the case. The claimants' arguments about a lack of 'fair return' to Maori based on the allegation that the Crown denied them ownership of gold greatly exaggerate the relative importance of ownership over knowledge, skills and capital. The value of gold was, of course, the recovered gold multiplied by the mint price, less all the various costs such as transportation, wages, the cost of crushers and other machinery, the labour costs of exploration etc. The maximum return possible for those who control access to ore deposits . . . is the recovered gold multiplied by the mint price, less all those costs.⁵⁸

In support of this argument, Crown counsel cites the evidence of Evelyn Cole on the costs of recent gold mining in Hauraki: in the record year of production (by value) of the Martha Hill mine at Waihi, the 12 months ended 30 June 2000, the value of the gold produced (price received) was approximately \$57 million and of silver \$8.5 million; the costs of production, however, were \$45 million.⁵⁹

These statements set the parameters of the debate, but leave out the spectacular bonanza returns such as the yield from Hunt's reef at Thames. The holders of the mining rights, which covered six men's ground, paid a mere £12 per annum in fees but the mine yielded some £120,000 worth of gold, many millions of dollars by today's values.⁶⁰ Understandably, Maori, then and now, asked why they did not get a much more substantial share of the wealth being generated from their land. Hauraki Maori reasonably ask why, after all the wealth and economic growth fostered by gold mining in Auckland and Thames, they are left with so little, not even the land on which the mining boom took place. We bear in mind that gold mining in the nineteenth century was a very high risk enterprise, that bonanza returns were few, many companies collapsed, many investors lost everything and many miners left the district poor. But we must also ask whether there was not a better basis by which Maori could have shared in the economic benefits of gold mining.

The decision by Maori whether or not to open the land to mining at all is a different issue to that of a legitimate share of the wealth once opened: it concerned the defence of Maori autonomy and customary values, and Maori were often divided on this issue. But once that decision was taken, the basis and scale of payment for the gold formed part of the negotiations with Crown officials. Between 1852 and 1861, a number of possibilities were considered:

57. Document B2, p 10

58. Document P6, pp 7-8; doc 01, pp 45-46

59. Document P2, p 34

60. *The Thames Miner's Guide: With Maps* (Auckland: Edward Wayte, 1868), pp 77-81

- ▶ When gold was first discovered at Coromandel in 1852, it was first proposed (by Wynyard) that Maori owners should receive 10 shillings out of each miner's licence fee of 30 shillings a month (following the model of the Victorian goldfields). Governor Grey rejected this because he believed it would generate large sums which would be spent injudiciously and excite jealousy. He suggested instead a lump sum for the owners of the site and that the 10 shillings per month from each licence should go to a fund for general Maori needs such as schools and hospitals.
- ▶ At the Patapata hui in 1852, an agreement was negotiated based on a very low rate of payment per square mile of ground opened and two shillings a month from each miner's licence fee (assumed to be 30 shillings a month, on the Victoria model). The gazetted agreement explicitly stated that the terms for mining matrix gold were to be the subject of further consideration.
- ▶ In 1853, Heaphy negotiated with Paora Te Putu and others on the basis of four shillings per miner per month, plus a bonus related to the amount of gold extracted. This negotiation broke down over a Maori request that the whole of the licence fee be given to them, and that they reimburse the Government for the cost of services.
- ▶ The same year, Heaphy negotiated with Tararoa of Whitianga (Mercury Bay) on the basis of a miner having a fortnight in which to prospect free of charge, then five shillings per month for extraction of alluvial gold. Matrix gold was left for further consideration.
- ▶ After the battle at Eureka Stockade in Victoria in 1854, the Victorian Government replaced the exorbitant 30-shilling per month licence fee levied on each miner with a £1 per annum fee, and levied an export duty on gold to make up the revenue shortfall. The New Zealand Government adopted the same principles in the Gold Fields Act and Gold Duties Act of 1858, placing a levy of two shillings sixpence on each ounce of gold exported.
- ▶ When the Taitapu field was opened in 1861–62, James Mackay refined the £1 per miner system: no one was permitted to mine without a miner's right costing £1 per annum; Maori were to be paid £1 for every miner's right taken out in respect of their land. (This was essentially an accounting device, much more manageable than counting actual miners on the ground.) Other fees were stipulated for other uses of the field – such as timber-cutting or business sites – also payable to Maori.
- ▶ In 1861, Premier Fox instructed McLean to negotiate a new prospecting agreement for Coromandel with payment related either to the amount of gold collected or a fixed annual sum (see chs 7–9, 12). As it happened, Coromandel chiefs were willing to open their lands for prospecting without payment, but McLean appears to have asked whether they would cede their lands to the Crown for goldmining in the event of prospecting being successful, and on what terms. He reported that the chiefs had expressed themselves willing to enter into a mining cession agreement either on the basis of miner's

right fees, as in 1852, or for a proportion of the value of gold (ie, a share of duty collected by Crown) (see sec 8.2.1). At this stage then, both parties were holding open the option of a royalty-type payment.

- ▶ When negotiating the mining agreement of 1862, however, payment on the basis of gold extracted was not explored in negotiations; only a payment per miner or a fixed rent. A combination of these two models formed the basis of payment for the opening of Tokatea in 1862: Maori were to receive £500 per annum plus £1 per annum for every miner after the first 500; this inadvertently became a fixed rent because the number of miners never did exceed 500.
- ▶ Thereafter, the fee of £1 per miner per annum formed the basis of the Kapanga agreement of 1862 and all subsequent agreements. In 1864, and more especially in 1867–68, at Thames, payments for timber and annual rents for resident sites and business sites were added.
- ▶ This principle was modified in 1868 because company mining of matrix gold required long leases to support the very large capital investments required. Initially, this was disadvantageous to Maori because the mining lease rentals were only £3 per acre and the fee per miner was dropped. However, Maori petitioners supported by Mackay secured the 1869 amendment requiring lessees to pay in addition a miner's right for each man working the ground.
- ▶ In the agreement opening Te Aroha in 1880 rents from licensed holdings (leases) were not included in the payments to Maori, but went to the local bodies instead. Maori received only the miner's right fees, plus a lump-sum 'bonus' at the outset.

All these models for payment (other than Heaphy's failed agreement in 1853) related to the numbers of men on the ground, and to the area of land covered by leases, but not to the value of gold extracted.

13.3.3 The agreements and payment plans tabulated

Table 8 lists the agreements and payment plans.

13.3.4 Advantages and disadvantages of the payment system for Maori

The over-riding economic constraints saw governments under strong pressure to create conditions favourable for attracting miners and investors. In the 1860s, miner's right fees and lease rentals were deliberately set quite low for this reason. (Efforts in Parliament in 1866 to reduce the miner's right fee to 10 shillings failed; it remained at £1, partly because that was now the rate understood between Crown and Maori negotiators.) Once particular areas were open, Maori also had a vested interest in attracting and retaining miners (usually meaning, in Hauraki, investors and their employees, rather than individual miners).

The Crown has pointed out certain advantages for Maori in the system adopted. Notably, that landowners received payment related to the number of men working, whether or not mining was successful. This extended not only to the individual miners but to the syndicates and companies which were required to take out miners' licences equivalent to the number of claims their lease covered. The pressure of this requirement on companies, in situations of diminishing returns, led to the altered regulations of the 1880s which increased the size of claims and reduced the proportion of the fees payable to Maori (see sec 14.4.1(1)). But in the heyday of the system, from 1869 to the mid-1870s, Maori owners were effectively securing lease revenues at the rate of £6 per acre, comprising the £3 rent plus £1 miner's right for each claim. This was a high return for the lease of ground, compared with the few pence (or at most, a few shillings) per acre otherwise paid for the lease of rural land. In addition there were payments for resident and business sites in the townships, and for such items as timber and water races.

Official returns show that £17,761 was paid to the receiver of gold revenue in miner's rights from 1 August 1867 to 31 January 1869, £10,075 of this being distributed to Maori by the latter date.⁶¹ In addition, there were rents for residence and business sites, £1708 in the first three months of mining.⁶² Later returns show that £31,726 in miner's right fees were collected in Thames between 1867 and 1871 and £9081 more between 1872 and 1876, together with £9851 in lease rentals, residence site licences, and machine and other sites.⁶³ A return of 1883 shows that the goldfields revenue paid to Maori for the period 1 January 1877 to 31 March 1883 was £1155 at Coromandel, £6348 at Ohinemuri, and £14,405 at Thames.⁶⁴ From 1881 to 1897, the payments to Maori for all Hauraki fields totalled £27,370.⁶⁵

There is limited information on how the revenue was distributed among right-owners in goldfield land, or between rangatira and the various hapu generally. Mr Monin comments that if the income to Thames Maori for the boom years 1867 to 1871 averaged £15,000 a year ('a conservative estimate') that would amount to only £50 a year for each of the approximately 300 Thames Maori. He suggests that, in contrast, individual miners in Thames made about £100 a year.⁶⁶ In fact, the distribution was very uneven. WH Taipari described how he and Mackay divided the land for revenue purposes: 'The owners had nothing to do with

61. O'Neill, 'Return of Revenue Received from Miner's Rights at the Thames Goldfields, 7 August 1867 – 30 June 1869', 12 August 1869, AJHR, 1869, B-15

62. *Auckland Weekly News*, 16 November 1867 (Phillip Hart, 'Maori and Goldfield Revenue: Seeking to make Money from Mining', unpublished paper, University of Waikato, p 19)

63. 'Return of Goldfields Revenue from August 1867 to June 1882, MD1 82/714, Archives NZ (doc A8(a), p 695)

64. 'Treasury Return of Goldfields Revenue Paid to Counties and to Maori', 28 August 1883, Le 1 1883/138, Archives NZ (Hart, p 25)

65. 'Summary of Disbursements of Goldfields Revenue Collected at Goldfields Offices and Warden's Courts, Coromandel, Thames, Paeroa, Waihi, and Te Aroha, 1st April 1881 to 31st March 1939', AJHR, 1940, G-6A, app C, p 20

66. Paul Monin, *This Is My Place: Hauraki Contested, 1769–1875* (Wellington: Bridget Williams Books, 2001), pp 222–223; doc vi, p 198

Agreement	Payment plan
Tokatea (Koputauaki), June 1862	Maori to be paid £500 per annum, plus £1 per annum for every gold miner on the block above the number of 500.
Coromandel, July 1862 Patukirikiri, Ngati Whanaunga, and Ngati Paoa lands in the vicinity of Coromandel Harbour (Kapanga, Matawai, and Ngaurukehu mining blocks)	Maori to be paid £1 per annum for every gold miner on the field.
Coromandel, October 1864 Covers same area as, and supersedes, the 1862 Coromandel agreement	All goldminers to be required to hold a miner's right licence, and Maori to be paid £1 per annum for every miner's right issued. Maori to be paid £1 for every business licence and £2 for every publican's licence issued in respect of buildings on their land.
Kauaeranga, 1867 Part of Ngati Maru lands near Thames (Karaka mining block)	Maori to be paid £1 per annum for every miner's right held. Maori to be paid £1 5s per kauri tree felled. Crown may lay out a township at Shortland and set the rents to be paid for township allotments; rent moneys to be paid to Maori.
Te Mamaku 1, 1867 Ngati Tamatera lands north of line between Te Mamaku (on western shore of Firth of Thames) and Mercury Bay	Maori to be paid £1 per miner's right issued and £1 5s per kauri felled.
Te Mamaku 2, March 1868 Ngati Maru and Ngati Whanaunga lands on west of dividing range between, to the north, Te Mamaku, and, to the south, the Omahu Stream (tributary of the Waihou River), divided into nine mining blocks. Takes in all the goldfields near Thames-Shortland and supersedes the 1867 Kauaeranga agreement	£1 for every miner's right issued. £1 5s per kauri felled. Anyone cutting timber other than kauri, except for licensed miners cutting timber for use in their own mines or for their own domestic use, must hold both an ordinary miner's right and a timber licence costing £5 per annum. Maori to be paid the timber licence fee moneys. Rents from leasing of township allotments in Shortland, or any other township laid out on the goldfield, to be paid to Maori.

Harataunga, 1868	Similar to Te Mamaku 2.
Manaia, 1868	Similar to Te Mamaku 2.
Ohinemuri, 1875	Crown to have the right to authorise digging for kauri gum, coal, and all other minerals as well as gold. All persons mining for gold to hold a miner's right issued under the Gold Fields Act 1866, or under 'any other Act for the regulation of Gold Mining for the time being in place' (which left open the possibility that a fee lower than the £1 per annum fee payable under the 1866 Act might at some stage be introduced). A rent or royalty equivalent to that specified in Waste Land Act to be paid by all persons mining for minerals other than gold. Kauri gum diggers to hold a miner's right. Lands for goldfield townships may be reserved and business and residence allotments leased at the rate of £5 per annum and £1 per annum respectively. Kauri to be sold standing by public auction, subject to the right of holders of miner's rights to purchase kauri at £1 5s per tree. Government may grant goldmining and agricultural leases as per Gold Fields Act 1866. All rents, royalties, fees payable to receiver of gold revenue to be property of Maori but to be paid to Treasury until advances to Maori repaid.
Pakirarahi, 1875	No formal agreement made, but proclaimed as part of Thames goldfield
Te Aroha, 1880	All persons engaged in mining to hold a £1 miner's right. Fees from these, residence and business sites, machine sites (£10 per annum), kauri and firewood licences to be paid to Maori Rentals from licensed holdings not to form part of revenue payable to Maori (paid to local bodies instead)
Kuaotunu, 1891	£1 miner's right, £5 business site, £1 residence site, £10 machine site payable to Maori Kauri gum licence = £1/Miner's right. Same other unspecified occupations

Table 8 : Agreements and payment plans

laying out the lines, but Mr Mackay and myself did it at the best of our knowledge.⁶⁷ Even allowing for exaggeration of his role by Taipari, it is clear that the Crown agents made the payments through only a few chiefs. Dr Anderson has written:

A return, tabled in 1869, named thirty recipients of a total of over £10,000 paid out on the Thames field in the first two years of its operation. A total of £9,000 of this sum had gone into the hands of only four chiefs, for distribution to others. The subsequent apportionment of those sums fluctuated at their discretion, and as their circumstances permitted. Hoterene Taipari, for example, later indicated that in the first years of production on Te Hape and Karaka he had gradually brought in different tribal groups – his own people of Ngati Maru for the first two years, and then Ngati Te Aute, Ngati Kotinga, and Te Whakatohea. He was, however, far more reluctant to distribute gold field moneys when returns started to decline. Puckey . . . reported that ‘it was merely an act of grace’ on the part of the two original owners of Waiau, that any others were admitted into the block, from which they had ‘had almost exclusive enjoyment of the proceeds for some years.’⁶⁸

Dr Anderson’s research has given some indication of the order of payments to Maori from gold revenue, in relation to the value of gold duty collected. For the period 1867 to 1881, Maori throughout the Hauraki fields were assessed as entitled to receive £62,451, some £7000 of which went to pay for the debt owing on Ohinemuri. In the first three years, 1867 to 1869, revenues had amounted to over £25,000, then fell to under £13,000 in 1870 to 1873. Thereafter, ‘the annual return rarely topped £3000’. For the period 1881 to 1897, the total paid for the whole district totalled less than £27,000.⁶⁹ Meanwhile, exports from Hauraki goldfields totalled 2,167,375 ounces for the period 1857 to 1898, with an estimated value of £8,170,266.⁷⁰ These gross figures are of limited help in estimating what might have been a fair return for Maori owners. Claimants will have noted that miners and mining companies would not have invested money and labour in order to hand over to landowners the greater part of their earnings. It might reasonably be asked, however, what would have been a fair percentage return to the owners, based upon *net* profits after deduction of the undoubtedly heavy costs of extraction, such as wages, machinery, and infrastructure. Similarly it might be asked whether a percentage deduction from the two shillings sixpence per ounce gold export duty collected by the Crown should have been returned to Maori. It is inconceivable that the Crown would, or should, have returned all of it: governments spent huge sums in development works on the goldfields – on roads, bridges, water races, town subdivisions, drainage, sewerage, and general administration – and would have been unable to do so without some revenue return. (The boom years of mining occurred before income tax

67. Hauraki minute book 9, hearing for Hihi and Piraunui, 5 September 1872 (Robyn Anderson, *Goldmining: Policy, Legislation, and Administration*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1996), p 47)

68. Puckey to under-secretary, Native Department, 31 July 1880, MA13/35c [MA13/35g] (Anderson, p 47)

69. ‘Summary of Disbursements of Goldfields Revenue Collected’, app C (Anderson, p 45)

70. Cadman, ‘Mines Statement’, AJHR, 1898, c-2, p 15

was first introduced in 1891; until then customs duty was the main source of Government revenue.)

Whether royalties would have yielded significantly better returns to Maori than the miner's right system is difficult to gauge, because no detailed modelling of alternatives has been put to us in evidence. A percentage on the value of gold, collected by banks, might well have given Maori significantly higher returns, especially in the boom years. The costs of such levies would have been passed on by banks to miners and mining companies, and whether the industry could have accepted such a system *as well as* miner's right fees and other agreed payments is doubtful; the effect on the industry of trying to maintain both sets of levies would almost certainly have been depressing. Levies based on net profits – after deduction of all expenses – are a more realistic possibility, but administering such a scheme would have been a significant challenge. Evelyn Cole's evidence on the system now applying in New Zealand under the Crown Minerals Act 1991 shows that 'resource rent royalties' and 'accounting profits royalties' (reflecting both output prices and input costs) are feasible, though not without high standards of accounting, and significant administrative and compliance costs. If a royalty system had been adopted, serious consideration would have had to be given to the way it was levied. Ms Cole notes that:

No single royalty form can meet such multiple objectives as safeguarding the resource owner's right to a guaranteed minimum return and preserving the right to a share in any substantial profits. To meet multiple objectives of this kind, another option is to have a hybrid royalty that combines an output or price related form with a profit related form.⁷¹

The modern royalty regime on Crown minerals is a hybrid kind: higher rates of royalties cut in at particular profit thresholds. Ad valorem royalties and fixed price per quantity royalties, while easier to calculate, are considered less economically efficient than profit based royalties because they do not recognise production costs.⁷²

Another basis of payment might have focussed upon the profitability of companies as indicated by the value of their shares. Shares in claims were first marketed to promote syndicates of miners-plus-investors. Subsequently shares in companies were marketed, often very cheaply at first. Maori were free to buy them, and the Taipari family and other rangatira did so. But many of the companies *lost* money in initial years and had to make calls on their shareholders to stay afloat and keep mining. This might have deterred Maori, few of whom had ready cash to meet such calls. As the Crown suggests, it is not self-evident that a share-based system would have been preferable to the more modest but more certain scale and type of payments received by Maori.

Perhaps the main drawback to the payment system negotiated for mining on Maori land in Hauraki was its inflexibility. This was most obvious in the case of rents for residence and

71. Document P2, p 29

72. Ibid, pp 27–28

business sites. The scale of payments agreed in 1867–68 seemed low to Maori owners during the boom years at Thames, particularly when lessees began sub-letting at vastly higher rates. Because the land at Thames had been going through the Native Land Court, Maori dissatisfaction about rents became evident in that court. However, according to Dr Anderson, Chief Judge Fenton was reluctant to vary the terms of original agreements because he believed Maori demands would be exorbitant.⁷³ Growing dissatisfaction with locked-in terms contributed to the request of Taipari and others for the return of the 20 township sites given for public buildings and religious purposes at the time Mackay had negotiated the cessions.⁷⁴

13.3.5 Tribunal comment

The basis of payment adopted for Maori owners of land ceded for gold mining gave them significant revenue, at least during the boom years. As long as men were working the ground there was a certainty of return, regardless of the highs and lows of individual miners or mining companies. The Crown made reasonable efforts in 1869 to adapt the miner's right system, originally developed for individual miners in alluvial mining, to company mining of quartz gold. In these ways, and via payments for residence and business sites and timber, Maori were included in the prosperity of the fields, at least in the short term. The only serious Maori dissatisfaction with the basis of payment came in 1868, when the company lease system temporarily abolished their entitlement to miner's right fees. This was rectified the following year, and thereafter there is no evidence of Maori protest with the *basis* of payment (as distinct from how *well* their entitlements were collected and paid). Indeed, Maori negotiators wanted a similar basis of payment at Te Aroha in 1880 (with the addition of an up-front 'bonus' for agreeing to the cession), and at Kuaotunu in the 1890s.

On the question of whether payments to Maori owners should have been related more closely to the value of the gold mined, we have noted that up to 1861 the Government was not opposed to such a system in principle, but we have seen no evidence that it was raised by either Maori or Crown negotiators subsequently during the nineteenth century. This is *prima facie* evidence that Maori were by and large satisfied with the fees structure negotiated, *provided* it was maintained and efficiently collected. (Crown administration of Maori revenue is discussed in sections 14.4 and 14.5.)

The system of paying Maori owners miner's right fees, site fees, and timber fees did not give them revenue proportionate to the value of gold extracted (and hence to the super profits from the occasional bonanza finds at Thames). It did, however, provide an income stream from their land, involve no investment of capital by Maori owners other than making their land available, and involved them in no serious economic risks. Maori owners generally missed out on the high returns which resulted from the introduction of the cyanide

73. Document A8, pp 170–171

74. *Ibid*, p 171

process in the late nineteenth century, because they had already sold the freehold of most of the gold-bearing land. (The reasons that Maori could not prevent these sales collectively are discussed in chapters 15 and 16.)

Today, few Hauraki Maori even own the land on which mining took place. But the ongoing benefits of gold-mining to non-Maori in Hauraki are not great either. The loss of Hauraki land relates more to the Crown's land purchase policies than any other factor. However, it relates also to the dissipation of the revenue of the boom years, because no investment trusts were set up for the owners. This factor was at least as important as the *basis* of payment in determining whether Maori benefited in the longer term, as well as the short term, from gold mining on their land.

13.4 EROSION OF THE AGREED LEVELS OF REVENUE

13.4.1 Claims of maladministration

Over and above the basis of payment agreed between the Crown and Maori right-owners in respect of ceded lands, claimants have raised a number of concerns regarding the Crown's administration of the agreements. Chief among these are allegations touching upon revenue:

- ▶ That Maori did not receive their agreed-upon dues, because the Crown:
 - Was lax in enforcing the requirement to hold licences from which Maori revenues derived
 - Made regulatory changes which adversely affected the revenue stream flowing to Maori
 - Obligated Maori to subsidise the collection and disbursement of the revenue
- ▶ That the system was poorly administered, as seen by:
 - Bad record keeping
 - Frequent delays in payment

Other important issues include failure to consult with Maori, and the Crown's unilateral increase of its powers over ceded lands. We examine statutory and regulatory changes which eroded revenues in sections 13.4.2 to 13.4.4, and administrative issues in section 13.5.

13.4.2 The erosion of goldfield revenues through statutory and regulatory changes

How much goldfield revenue Maori received depended on how many miner's right licences were taken out. This in turn depended both on the richness of field and on the number of miner's rights the law required to be taken out in order to hold *and* work each individual claim. Had all miners been independent, working claims on their own accounts then this would have been relatively simple. However, the capital intensive nature of quartz mining

13.4.2(1)

meant that independent miners soon formed companies, or sold their claims to existing companies. (Companies were joint stock companies, either incorporated overseas or registered under the Joint Stock Companies Act 1860, until the passage of the Mining Companies Limited Liability Act 1865.⁷⁵)

How much revenue Maori received depended on whether both holders *and* workers of mining properties were required to hold miner's rights. Theoretically, there should have been payments to Maori from both sources: Mackay had told Maori that both 'masters and servants' (ie, holders and workers of claims) would be required to hold miner's rights. Early practice was that the principals of mining companies *and* their workers all took out rights. However, changes introduced by the Crown led to some fluctuation in the Maori owners' entitlements, and eventually (in the 1880s) to significant deterioration.

(1) Changes in Maori entitlements

In their opening submissions on gold the Crown has provided a comprehensive survey and discussion of the laws and regulations relating to the mining agreements, and contends that many of the changes following the waning of the Thames boom 'can properly be seen as a response to changes in the economics of goldmining' rather than as a favouring of settler over Maori interests.⁷⁶ The following points emerge:

(a) The benchmark – 'one man's ground': Regulations promulgated for the Coromandel Goldfield in 1862 specified that miners engaged in quartz mining could occupy a claim of '50 feet along the reef by 300 feet in width'. This area, 15,000 square feet, becomes the benchmark for 'one man's ground'.

(b) The Gold Fields Act 1866: Miner's rights were the only form of mining tenure for which regulations had been promulgated. Consequently, unless claims were amalgamated (see below), one acre (approximately 45,000 square feet or three times 'one mans's ground') yielded Maori right-owners at least £3 per annum in miner's rights fees. The 1866 Act, however, authorised the making of regulations for mining *leases* and for amalgamated claims.

(c) Concessions for consortiums or companies: Under regulations promulgated for the Hauraki goldfields in 1868, the owners of adjoining claims (necessarily a consortium of miners, because claims could not be contiguous unless pegged out by a single consortium) could apply to have several claims *amalgamated*, and the amalgamated claim could then be worked as if it were one claim. This would reduce the number of miner's rights to one. This regulation was important in its effect, although the same outcome might in fact have derived from the 1866 Act itself, which required that one person could hold up to six

75. Document P6, pp 52, 65–67

76. *Ibid*, p 5

miner's rights provided that at least one person, with a miner's right, was employed per *claim*. Amalgamation meant that fewer employees must be retained, although a company might choose to employ a high number of workers in any case.

(d) *The Mining Company Limited Liability Act Amendment Bill 1869*: As passed by the House of Representatives, this Bill contained a clause that meant that companies would have to pay only one miner's right fee per claim rather than at least two. This provision was removed by the Legislative Council. (The Crown has pointed to this as an example of the defence of Maori entitlements.)

(e) *The introduction of leasehold tenure*: In 1868, Superintendent Williamson, under the authority delegated to Auckland province, promulgated regulations for the issuance of Mining Leases (as provided for in the Gold Fields Act 1866), as an alternative tenure to miner's rights (discussed in section 9.4.4.) The regulations contravened the spirit of the Thames mining agreement, which specified that no one was to mine unless they held a miner's right. Arguably this condition was technically fulfilled, in that all persons *physically* engaged in mining or working on field were still required to hold miner's rights; it was only those holding the claim who were not required to do so. But claims were not obliged to be fully manned. In any case such a narrow interpretation of the agreement was hard to justify, and the injustice to Maori was acknowledged by the Government in 1869. Certainly, Maori income would have been reduced, since fewer miner's rights would need to be taken out, and lease rentals, not being moneys arising from miner's rights, were not payable to Maori. However, in practice it is unlikely that many, if any, leases were actually granted prior to the introduction of compensatory measures.

(f) *Restitution of Maori rights under the Gold Fields Act Amendment Act 1869*: The terms of this Act are discussed in section 9.4.4. It introduced the 'leaseholders miner's right' to compensate Maori for the loss of revenue from miner's rights proper. In James Mackay's opinion, this 'double payment' was appropriate for he had told Maori in negotiating the agreements that both '*claimholders and their servants*' would be required to hold miner's rights (emphasis added).⁷⁷ While it guaranteed Maori a certain minimum revenue, its primary purpose was to prevent speculation in claims, land grabbing, and to ensure that claims were diligently worked.

(g) *The Gold Mining Districts Act 1871*: The Gold Mining Districts Act 1871 introduced the concept of 'licensed holdings'. The proclamation of the Hauraki Gold District in 1871 meant that the 1866 Act no longer applied to Thames but existing leases under that Act were saved.

77. James Mackay, 'Report by Mr Commissioner Mackay Relative to the Thames Gold Fields', 27 July 1869, AJHR, 1869, A-17, pp 11-12 (doc A8(a), p 1369)

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13.4.2(1)(h)

As in the 1869 amendment, licensed holdings were to cost £1 per 15,000 square feet per annum, and at least one miner with a miner's right had to be employed per 15,000 square feet. Rents received from goldfields ceded by Crown–Maori agreements were deemed to be moneys arising from miner's rights. This preserved the Maori entitlement whilst obviating the need for the ad hoc 'leaseholders miner's right' created in 1869.

The 1871 Act also consolidated the entitlements due to Maori owners for water races and battery sites, the payments due for timber and the business and resident site licences. It should be noted that resident site licences normally applied to dwellings in the townships and other sites not actually on the miners' claims: a miner's right carried with it the entitlement to live on or near a claim being worked (which resulted in the hundreds of shanties that sprang up on goldfields in the early years).

(h) 1881 amendment to size of alluvial claims: In 1881, regulations relating to the Hauraki mining district and the new Aroha mining district allowed the holder of one miner's right over an alluvial claim to claim an area of 10,000 square feet. This was not very significant, however, as one miner's right per 15,000 square feet was still required for quartz claims.

(i) The Mining Act 1886 – the first big reductions of revenue to Maori: In the context of a marked decline in gold mining both in Australia and in New Zealand, miners and mining companies pressed governments for a reduction of the fees and rents payable. James McLaren, appointed in 1880 to oversee the miner's right system, reported:

there is great dissatisfaction . . . against the law itself, more especially in regard to the double payments that have to be made, thus under a licence, £1 per annum had to be paid for every man's ground included in the licence and the men employed have each to pay £1 per annum for a miner's right to work the same ground . . . this exclusive of residence sites that may be taken out on the surface.⁷⁸

McLaren believed that 'these and other monies' were 'over & above what is required to be given to the natives by the original agreement', and urged that, if they were returned to the Government or went to the county and borough, 'it would then be understood and not be so much objected to'. The Thames county and borough councils also lobbied the Government on this point. But McLaren was wrong. The Solicitor-General ruled that there was no other possible interpretation of the agreements and validating legislation, which provided that the Maori owners were entitled to all the fees, miner's rights and rents generated by the field. In the immediate term, the Minister directed the officials on the field not to be zealous in collecting for machine and battery sites and water races. Pressure continued from the councils, however, and the goldfield and mining committee in 1882 reported

78. McLaren to Under-Secretary for Goldfields, 3 July 1880, MD1 80/618 (doc A9, p148)

that, while the payments to Maori were lawful, the Hauraki counties were at a disadvantage vis-à-vis their southern counterparts, and recommended that they be ‘compensated’ or that the Government buy out Maori.⁷⁹

The Government resisted the councils’ efforts to recover moneys already paid out to Maori, but did begin to prepare a consolidating Act, passed in 1886, which (among other matters) diminished the following Maori entitlements:

- ▶ *Miner’s right fees*: following Australian states’ recent practice, the cost of a miner’s right licence was reduced from £1 to five shillings (payable to local bodies). However, on Maori lands subject to mining agreements it remained at £1, with five shillings to go to the local bodies and only 15 shillings to Maori. (This is referred to by the Crown as showing a willingness to maintain Maori revenues, against strong pressure from the industry and local bodies.)
- ▶ *Fees for licensed holdings (leases)*: according to Crown counsel’s opening submissions on gold which quotes the Government’s explication in Hansard, the Act reduced the rent from licensed holdings from £1 per annum *per acre* to 10 shillings per acre for the first three years, then 15 shillings per acre for the next two, and £1 per acre thereafter.⁸⁰ The effect is clear, but the Minister’s statement was a mis-statement; as the Crown summary in document P6 shows, licensed holdings previously cost £1 per 15,000 square feet not £1 per acre. In 1888, Taipari met with the Minister of Lands, questioning why Maori now received only 10 shillings an acre rather than £3 an acre rent as formerly (ie, three times 15,000 square feet).⁸¹
- ▶ *Size of quartz claims*: these were increased from 15,000 square feet to 60,000 square feet with only one miner per two acres required to be employed, rather than one per claim of 15,000 square feet as previously. This was potentially the most damaging to Maori, although a company might, for sake of production, employ more men than the legal minimum. The crucial point in the 1886 Act is that all miners employed by companies were still required to hold a miner’s right. The greatest impact of the 1886 Act was in relation to the land taken up by *independent* miners: they could now take up four times as much land under the same number of miner’s rights.

(j) The Mining Act Amendment Act (No 2) 1887: A further serious reduction on Maori revenue followed from section 10(5), which provided that persons working for wages or on payment of a ‘tribute’, or portion of the gold found, to a claim holder (‘wagesmen and tributers’) were no longer required to purchase miner’s rights. This was an unabashed breach of the terms of the mining agreements, which hitherto required that each man working a claim must hold a miner’s right.

79. Document A9, pp 148–149

80. Larnach, NZPD, 1886, vol 54, p 639 (doc P6, pp 85–86)

81. Minute, 15 December 1888, MD1 89/85, Archives NZ (doc A9, p 150)

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13.4.2(1)(k)

(k) *The Mining Act 1891*: Raika Whakarongatai and others petitioned in 1888 about loss of revenue as a result of the 1886–87 legislation. In relation to the 1887 amendment, the warden ascertained an immediate loss of £567 at Thames, £80 at Ohinemuri, and £30 each at Te Aroha and Coromandel. The new Liberal Government of 1891 was sympathetic to the complaint and passed the Mining Act 1891, section 50 again requiring wagesmen and tributers to take out miner's rights for working claims on Maori land. The Thames Miners' Union protested, and Seddon directed that the 1891 provision not be applied retroactively. (The law officer Reid agreed that this was lawful but urged that Maori had at least 'a strong equitable claim' for breach of the 1867 cession agreement.⁸²)

(l) *The Mining Act Amendment Act 1892*: The rent for licensed holdings was further reduced to one shilling per acre. Seddon stated:

that amendment was in the interests of the Natives. The Natives originally got £1 for the miner's right for every man working on the ground; but that had been taken away, and the rental given to the local bodies . . . This was to reinstate the Natives in the position they occupied under the original agreement.⁸³ The people who worked the ground would have to pay £1 each for the miner's rights, and that amount would go to the Natives and, to enable this to be done, the rents were reduced to the nominal sum of 1s.⁸⁴

Dr Anderson finds Seddon's logic obscure: 'It seems, however, that the rights of Maori were to be met in one area only at the sacrifice of their interests in another.'⁸⁵ Seddon was partly correct: the new Act reversed the 1887 amendment; however, the situation was now, apart from the nominal one shilling per acre rent, the same as in 1868. Miner's right licences were to be taken out on behalf of workers but Maori would receive (almost) nothing by way of rental from the employers (the licence holders). This was what Thames Maori and Mackay were protesting when leases were introduced in 1868 to replace miner's rights.

In 1893–94, W H Taipari and others again petitioned Parliament, arguing that the provisions of the 1886 and 1887 amendments, and the limited application of the remedial measures of 1891–92, resulted in a loss of revenues amounting to over £3000. Whereas some 4000 miners had been employed on the field, only £800 in miner's rights revenue had been collected since the 1886 Act came into force, and rents severely reduced. The goldfields and mines committee reported:

That the Petitioners have sustained some loss through breach of the agreement under which the Natives consented to throw open this portion of the Goldfield for goldmining

82. Anderson, pp 56–58

83. This was not true of Te Aroha, where Maori never did get the lease revenues.

84. NZPD, 1892, vol 78, p 430 (doc P6, p 92)

85. Document B2, p 48

purpose, and recommend the Government to take steps to ascertain the extent of the loss and recoup the Petitioners.⁸⁶

By Dr Anderson's account, the Government took no action. Hauraki Maori petitioned unsuccessfully in 1895, 1900, and 1905.⁸⁷

(2) The Crown's (inadequate) acknowledgement

In their opening submissions on gold, the Crown has stated that from 1862 to 1887, the requirement of one miner's right per 15,000 square feet of a quartz claim or leased or licensed holding was maintained. The Crown acknowledges, however, that 'Undoubtedly some legislation did affect the revenue stream to Maori', and it cites the 1886 Act, which reduced the miner's rights fee and increased the area of ground in a claim. However, 'whenever a potential injustice to Maori was identified Parliament sought to ensure that Maori were not deprived of what was owed them.'⁸⁸

The Crown's concession is welcome, but limited. The above summary of legislative and regulatory changes, shows that governments did make significant efforts to honour the agreements negotiated, especially in 1869. Later, however, only limited efforts were made to restore the revenues lost by the 1886–87 law changes. Moreover, the summary also shows that the Crown's acknowledgment misses a fundamental point: under the agreements Maori were entitled to *not one, but at least two miner's rights per claim when the land was worked by a company*. As Mackay explained in 1869, 'the Natives at the time of making the agreements asked who were liable to hold miner's rights, and they were informed, all claimholders and their servants.'⁸⁹ From the 1869 amendment Act up to 1886 Maori were entitled to receive £1 per annum per each 15,000 square foot claim *plus* one miner's right per worker, that is £2 or more (depending on number of workers) per 15,000 square foot claim. The only exceptions to this were:

- ▶ Lands held under leases granted in 1868–69, if any, where Maori were not entitled to lease moneys, although this *only* applied in that period.
- ▶ Amalgamated claims held under miner's rights but not leases, which, seemingly, could be held under just one miner's right.

(3) Wilkinson's report

The loss of revenue by Maori owners was reported by Crown agent George Wilkinson on 30 May 1889. In the Te Aroha negotiations of 1880, he and Warden Kenrick had arranged that Maori should no longer receive rentals from licensed holdings, so the erosion of miner's rights fees troubled Wilkinson as it had troubled Mackay in 1868.

86. 'Goldfields and Mines Committee Report', 31 August 1894, MD1 94/2887, Archives NZ (doc A9, p155)

87. Document A9, p155

88. Document P6, p117

89. Mackay, pp11–12

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Wilkinson wrote:

What . . . [Maori] complain of however is the very serious diminution of revenue for them that has taken place during the last few years, and which has not been caused so much by the area of the ground being less than formerly, but because the Mining Laws and the Regulations framed under them by Govt have been so altered since the agreements to open the country for goldmining were entered into between the Natives and the Govt as to make it impossible, under the existing circumstances, that they can get anything like so much revenue from their lands within the goldfields as formerly.

Wilkinson remarked that it was almost unnecessary to state that these changes in the laws and regulations had taken place without consultation with Maori, except for the 1869 discussion arising from the Thames petition. Starting from the basis of the Thames agreements which stated that miners should hold miner's right licences, Wilkinson attempted to calculate the order of loss of Maori revenues under the Mining Act 1886:

- ▶ The claim size was increased from 15,000 to 60,000 square feet, 'consequently, where four Miner's rights were formerly required, only one is now necessary, resulting in a loss to the Natives of $\frac{3}{4}$ ths of the revenue previously obtained from the Miner's Right source'.
- ▶ 'Under the Act of 1873, all holders of mining leases had to employ three men, holders of Miner's Rights, to each acre of land within their lease, whilst under the Act now in force (the Mining Act 1886) such licensees need only employ one man for every two acres, and, by the Act, it is not imperative that he should be the holder of a Miner's Right, which makes a further reduction of the Native revenues to less than $\frac{1}{6}$ th of what it formerly was from that source.'⁹⁰
- ▶ Thus, from the 30-acre maximum area that could be held as a licensed holding, whereas under the 1866 and 1873 Acts the holder paid £3 per acre or £90 *plus* £1 per worker, now he paid only 10 shillings per acre or £15, and could 'employ as many wages men and tributers as he likes none of whom need have a Miner's Right'.
- ▶ In sum, there was a loss of $\frac{5}{6}$ of revenue from lease rents and $\frac{3}{4}$ of revenue from miner's rights.

Wilkinson summed up:

In taking a retrospect on this Miner's Rights question it would almost appear as if Government after entering into certain arrangements with the Natives for the opening of

90. Wilkinson's concern with undermanning was possibly overstated. In most cases, large numbers were employed by companies, except during the height of the Thames boom, when there was a rush to secure mining leases that might be profitably on-sold, with little actual development of the claim. Still, one effect of undermanning and under-developing a claim was that, if sale of the freehold intervened before it was worked, the revenue generating capacity of the land sold, and hence the 'fair price', could be underestimated.

the goldfield . . . all of which arrangements tended to show that on their being carried out, as proposed, large sums would accrue to the Native owners, then, goes, as it were, into competition with its Native landlords by offering the gold diggers better and cheaper facilities for working the native lands than they originally had under the Goldfields Act and Regulations that were in force when the field was first opened. Government, in taking this step apparently overlooked, or ignored, the fact that such action, though beneficial enough to the gold digger, was disastrous to the Natives, inasmuch as it had the effect of reducing their revenue by altering and curtailing the sources from which they used to receive it, and thus, in a measure, broke faith with them

Wilkinson's solution was pragmatic. He concluded that the Crown was in a precarious position: it was not acting in keeping with cession agreements, and in order that the Act, 'so beneficial to the mining community', should be allowed to remain in force, the Crown should buy the goldfield lands still in Maori hands.⁹¹

13.4.3 The expansion of Crown control over minerals other than gold

The expansion of the Crown's control over mining on Maori land, without further Maori consent, was revealed in the arrangements made for minerals other than gold. Dr Anderson has shown that this first emerged in respect of the other 'royal metal', silver. The Gold Fields Acts from 1858 through the 1860s and agreements signed with Maori all explicitly mentioned only gold, as did the Auckland Gold Fields Proclamations Validation Act 1869, which confirmed the agreements. Yet silver was being taken from the Thames field from 1869. In the Ohinemuri agreement of 1875 and the Te Aroha agreement of 1881 the Government took care to include all subsurface minerals, and even kauri gum in the case of Ohinemuri. But similar powers were not yet taken in the mining statutes and Warden Kenrick, in 1880, felt obliged to decline an application for a licence to mine hematite and silver-lead ore, and recommended an alteration to the agreements. They were not altered (the Crown bought the block in question instead) but an 1885 amendment extended the Gold-Mining Districts Act 1873 to include all metals and minerals.

There is no record of the extensions being discussed with Maori owners and, because their revenues were not linked to the value of minerals extracted, apparently they did not raise the issue either. Not until 1945, when owners of Moehau 4A2 wanted to work limestone did they find that the warden in 1942 had issued a 42-year licence to private miners. The land concerned was still in the category of ceded lands, their status preserved under the Mining Act 1926. On complaining that the warden had acted beyond his authority, they

91. Wilkinson, 'Report on the Question of Miner's Rights and Other Revenue Payable to the Native Owners of the Thames, Coromandel, Ohinemuri and Te Aroha Goldfields', 20 May 1889, NO89/1255, Justice Department inwards letters, J1 96/1548 (doc A8(a), pp 701-719)

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were supported by the Crown Solicitor and the matter was rectified by negotiation.⁹² In a later section we refer to the Crown's taking of statutory control of the extraction of valuable minerals such as petroleum, iron and bauxite, and energy sources such as geothermal power.

13.4.4 Tribunal comment on statutory and regulatory erosion of Maori revenues

Crown counsel is no doubt correct that the new legislation and regulations of 1886 onwards were designed to sustain a flagging gold industry, and create conditions for new investment in the exploitation of 'increasingly marginal deposits and increasing marginal costs'. They were 'a response to changes in the economics of goldmining in an attempt to ensure that goldmining remained economically viable'.⁹³

But the evidence of Crown agent George Wilkinson, who knew the field situation intimately, supports the claimants' view that the changes were made unilaterally, breached the agreements made with Maori in the 1860s, and were disastrous in their effects on Maori owners' revenues. It is scarcely to be expected that the terms and conditions for mining could be maintained at levels beyond what the market would bear. (It is difficult to deduce 'what the market could bear' from the industry's interested representations.) Yet, in 1868–69, when the legislation was shaped to accommodate the necessary shift to company mining based on leases, the Crown had respected the essentials of the agreements, albeit after pressure from Maori petitioners assisted by Mackay. In the 1880s and 1890s, there is no evidence of consultation, although some representations may have been made through Maori members of Parliament (as is evident in the 1893 debate on the resumption legislation).

The Crown acted to sustain the industry in difficult times, but did not negotiate the changes with the Maori owners. Instead, it unilaterally breached the terms of the cession agreements. On Treaty principles or any other principles of equity, this was an action of bad faith. Had the Government taken Maori into their confidence and sought to negotiate a more flexible payment system, better linked to production and prices, so that Maori could share in the prosperity of the good years as well as the burdens of the poor years, the outcome might have been more equitable.

13.5 THE COLLECTION AND DISTRIBUTION OF GOLD REVENUES

Maori owners in the nineteenth century and claimants today have criticised the Crown for its poor execution of the responsibilities it had assumed for collection and distribution of the agreed revenues. Problems and delays in payment emerged as early as 1868. Complaints

92. Anderson, pp 85–87

93. Document P6, p 5

persisted into the twentieth century; the MacCormick commission was appointed in the 1930s because of Hauraki petitions about non-distribution of accumulated revenues. The questions we wish to pursue here are: how far the problems were intrinsic to the situation rather than of the Crown's making; how effectively the Crown moved to identify and remedy problems, and whether Maori in fact received all the revenues owed to them. We have been able to consult the 1940 report of the MacCormick commission, which pursued similar questions, and research reports by Dr Robyn Anderson, by the Crown, and by Mr Young, who analysed contemporary files on the subject.⁹⁴

13.5.1 The task of revenue collection and distribution

To a large extent, the difficulties in collection and distribution of revenue owed to Maori owners stemmed from the ad hoc way the mining agreements came into being, in face to face negotiations between Hauraki rangatira and officials such as Mackay or McLean. The written agreements were very simple documents, indeed crude documents in the estimation of Chief Judge MacCormick in 1940. They said almost nothing about the means of collection and disbursement of revenues, except that they would be paid to the owners quarterly. Such simple arrangements were in keeping with the relations between men like Mackay and the rangatira. Personal good faith was involved, admirable in its way. But the loose agreements were bound to lead to difficulties in implementation.

There were two other underlying sets of difficulties:

- ▶ First, the precise Maori ownership of the goldfield land was not known. During the 1850s and 1860s the Crown officials on the ground had attained a fairly good knowledge of the principal rangatira in any given area, but the complex and intersecting nature of Hauraki land rights was still insufficiently recognised. Sometimes agreements had to await the resolution of 'boundary' disputes; these often involved the first serious attempt to draw lines between groups which had not drawn them previously. It was a leap of faith to make agreements with particular rangatira on the assumption that they could speak for all the right-owners in the particular land concerned.

There were also some political factors. Dr Anderson has reported that many right-owners who were 'Kingites' or 'Hauhau' were not included in the distribution of revenues in the early years. This caused resentment, feeding a division among right-owners, in turn fed by Mackay's tendency to classify opponents of mining as 'Hauhau'.

These difficulties were affected, but not necessarily resolved, by the passage of the goldfield lands through the land court from 1865. Before 1873 at least, this process commonly confirmed prominent rangatira as the 'owners' of the land named in certificates of title. The Native Land Act Amendment Act 1867 (which required all owners to

94. Documents A8, A9, J7, P6

be named, not on titles but in the court memorials) was not applied widely in Hauraki (see ch 15); not until the 1873 Act were all owners named on the new 'memorials of ownership'. So, although court awards might help clarify which hapu held interests in particular blocks, most payments were still directed through named rangatira, during the boom years in Thames at least.

- ▶ The other inherent difficulty in administering goldfield revenue was the considerable proportion of casual or short-term miners and company employees on the field. This difficulty was partly overcome (from 1864) by the use of Mackay's Taitapu model (that payments were based on the number of miner's rights taken out rather than a head count of miners on the ground), and by the requirement that mining leases also involve the taking out of a minimum number of miner's rights per acre. The Crown deserves credit for dealing with the problem of fluctuating numbers of miners in this way. But the requirement of the legislation from 1869 to 1886, that each digger on the field should hold a miner's right, was more difficult to police, as men moved about and companies employed fluctuating numbers of workers. Officials continually complained about the difficulty of determining their numbers and ensuring that each held a miner's right.

13.5.2 Maori owners excluded from policy planning and governance

Where the Crown's approach to its task seems flawed is in its failure to involve formally the Maori leadership in policy planning for the on-going governance of the ceded lands. It will be recalled that when the Crown officials were negotiating the opening of Coromandel and other blocks from 1852, Maori leaders were invited to share in policing boundaries, and noting the numbers of miners on the ground (see sec 7.4). In 1869, Mackay enrolled Maori among his special constables, and the provincial government paid them out of gold duty remitted to it by the general government (see sec 10.1.3). Unfortunately, we have little evidence on how this system worked, and when or why it was discontinued. From 1862 to 1864, the official runanga system had operated at Coromandel. We know that there was some considerable consultation with rangatira at the outset in the laying out of Shortland town, but thereafter officials (of both provincial and general governments) seemed to have avoided the systematic involvement of Maori leaders in planning and managing goldfields.

In this way, the Crown set itself up for criticism. It had assumed the responsibility for collection and distribution of revenue, Maori owners being in the position of clients. They could blame only the Crown for any perceived shortcomings in the system, whether or not these were due to official incompetence.

13.5.3 Some of the problems and attempts at solutions**(1) Failure to remit the necessary funds**

Early difficulties arose because of the awkward sharing of responsibility between the general government and that of Auckland province, to whom the general management of the Thames field had been delegated. Daniel Pollen, the deputy superintendent of Auckland province opened a 'miner's rights deposit account' with himself and Mackay as trustees; the successive receivers of gold revenue paid the fees due to Maori into this account. Significant costs were incurred by the province for 'native police', and for the building of the court-house and gaol at Shortland, and the general government authorised the province to recoup its costs temporarily from the miner's rights deposit account, that fund to be repaid in due course from gold duty revenues collected by the general government at point of export. However, because the gold duty revenues had been 'impounded' to meet provincial liabilities, insufficient funds had been sent to Mackay to make the payment to Maori owners for the June 1868 quarter, to their considerable annoyance. Mackay urged Wellington to make the payments owed to Maori, together with the salaries of officers dealing with 'Native questions on the Gold Field', a first charge on goldfield revenues. The Minister, J C Richmond, heeded the advice and section 4 of the Gold Fields Act Amendment Act 1868 duly authorised the remittance of gold duty 'in such manner and at such times as the Governor shall order'.⁹⁵ There is no evidence that the problem of available funds arose again.

(2) Difficulties in allocation among Maori owners

Before goldfield lands went through the land court, a basis had to be found for allocating the mining revenue. Following the March 1868 agreement, the Thames field (later, the 'Hauraki mining district') was divided by Mackay, W H Taipari, and other rangatira into nine blocks for this purpose, apparently under the authority of the 1866 Act. A miner had to specify in which block he would exercise his right (he could transfer it to another block on payment of a small fee), and the mining revenue was then distributed among the principal Maori owners of the various blocks. (Te Moananui did not share in the miner's right revenue distribution for some years, because 'a large advance had been made by Mr Mackay from the miners rights deposit account to Moananui as an inducement for him and his tribe to cede the land on the understanding that this advance was to be recouped from Miner rights fees accruing from Waikowau block' (*sic*).⁹⁶)

EW Puckey took over Mackay's role in October 1869.⁹⁷ He attempted to distribute on the same basis, but 'found as the mining operations fluctuated in various parts of the field,

95. Document A8, pp 148–151

96. Puckey to under-secretary, Native Department, 31 July 1880, Thames goldfields notes, MA13/35c [MA13/35g], Archives NZ, p 4

97. Document 17, p 94

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that it was necessary to modify the amounts payable to the different owners accordingly'. He claimed that the Mining Districts Act 1871 contained no authority for the nine-block division. Moreover, as the land passed the court he found that blocks were being awarded to many more people than had been receiving revenue from them.⁹⁸ Puckey arrived at a fresh allocation of revenues by: finding out what area of each Maori group's land was held under lease or licence; finding from the warden's office what number of resident sites, water race rights, machinery and other sites were let on that land; and averaging the number of men working claims on the land in the course of a year. The latter was very hard to ascertain, with miners and companies constantly shifting their operations and grounds. Puckey acknowledged that the calculation was only 'approximate', although he seems to have made a genuine effort to get the necessary information.

Puckey tried to familiarise himself with the actual owners and discuss with them the distribution of revenue. He later complained, 'It was solely on account of the greed and jealousy of the owners of the land, and their inability to divide the money that Mr Mackay and I did it for them.'⁹⁹ He recalled, 'all the owners were inflamed, the disputes and fights between young and old – and old men who could barely totter were piteous to see'. Rather than simply allow the rangatira to take the bulk of the revenue Puckey tried to achieve a broader distribution (though not necessarily in equal proportions because some had greater rights than others):

In apportioning many of the payments I had to fight the battles of the weak against the strong so as to ensure justice being done to all the owners; several natives who had fair claims to participate in the Miners Rights fees but for me would have come very badly off. For some years after I came here the Miners Rights and other fees accruing from Opitomoko, Kuranui and Moanataiari [*sic*] were paid solely to Rapara Maunganou [*sic*] or his wife . . . I was aware there were other persons who ought to receive a portion but their claims were in no way recognised by the principal owners.¹⁰⁰

Puckey advised the lesser right-owners in these and other blocks to have the land surveyed and put through the court, and their interests ascertained. Some blocks went through the court under the 1865 Act and were awarded to a few chiefs as absolute owners, not as trustees. This complicated Puckey's task even more. Other blocks were not adjudicated until the late 1870s or early 1880s, and the court's decisions revealed a good many former 'Hauhaus' and others who should have shared in earlier mining revenues. An attempt by Haora Tareranui of Tokatea (Moehau 4) to claim in 1881 a share of past revenues was

98. Document A8, p166

99. Puckey to under-secretary, Native Department, 31 July 1880, Thames goldfields notes, MA13/35c [MA13/35g], Archives NZ, p1

100. *Ibid*, pp5–6

declined by the Native Land Court, on the basis that the moneys had been paid out before the title was determined.¹⁰¹

Puckey also tried to average out the annual payments over the four quarters, 'in order that the natives might know how much they were getting and regulate their living accordingly', and to retain a credit balance in the account to meet emergencies.¹⁰² Though Puckey tried to be fair, he was probably too paternalistic, and his well-meant efforts earned distrust. Complaints of delays in payments continued. Often these were for good reason, such as owners' absences from the district or their deaths with no successors yet appointed. Often the land was going through the court and payments were withheld pending determination of the ownership and applications for subdivision.

(3) Various officials appointed, some at Maori expense

In 1876, Te Moananui and Taipari complained to Parliament that their fees had not been paid and that they were without funds. Pollen considered that the fault lay with the chiefs themselves; the accounts were investigated. Dr Anderson has written:

The Native Affairs Committee accepted that no wrong-doing had occurred, reporting that accounts had been kept regularly and that no unnecessary delays had taken place, but also acknowledged the Maori sense that they had no way of knowing whether a correct accounting was being kept and recommended that the Government give full facility for an inspection of the books by a Maori appointee.¹⁰³

For a short period, the Maori owners appointed a solicitor, H E Campbell, for this duty.¹⁰⁴

An earlier attempt had been made to arrange Maori oversight of the collection and disbursement of revenue. In 1870, the provincial government had appointed a Mr McIlhone as inspector of miner's rights to ensure that all who were supposed to take out rights in fact did so. Because Maori leaders also wanted someone accountable to them to oversee their interests, some time in the early 1870s they agreed to pay half McIlhone's salary, then set at £156. Puckey thought McIlhone's appointment gave satisfaction to Maori owners, notably in stopping the cutting of timber without authority and ensuring the payment of appropriate timber fees.¹⁰⁵ Indeed, on the abolition of provincial government, Maori owners authorised the whole of McIlhone's salary to be deducted from the revenues due to them. In 1880, the

101. Document A8, p 166

102. Puckey to under-secretary, Native Department, 31 July 1880, Thames goldfields notes, MA13/35C [MA13/35g], Archives NZ, pp 5-6

103. Document A8, p 168

104. Document J7, p 94

105. Puckey to under-secretary, Native Department, 31 July 1880, Thames goldfields notes, MA13/35C [MA13/35g], Archives NZ, p 4

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owners of ceded lands at Te Aroha appointed a Mr Burgess for the same role at Te Aroha at a fee of £25 a year.¹⁰⁶

Problems continued over the requirement that all diggers must hold a miner's right. In 1869, Mackay had observed that the number of miner's rights held by the holders of small shares in claims probably no more than covered the 'deficiencies caused by many persons working without miner's rights'.¹⁰⁷ He feared that the introduction of leaseholds would diminish the incentive to take out rights to prevent claim-jumping. The 1869 amendment which required lessees to take out one miner's right for every 15,000 square feet worked helped. But it did not entirely meet the situation of many *more* miners than the minimum being employed on leases; hence the need for an inspector of miner's rights to check the actual numbers on the ground.

Phillip Hart has noted that, in the late 1870s, McIlhorne was accused by Maori owners of not deserving his salary because he selectively enforced the rule that every miner must possess a miner's right, thus depriving them of rightful income. E H Campbell, the solicitor appointed to inspect the accounts, objected to McIlhorne being paid from the revenue and sponsored a petition by local Maori asking that he be replaced by Hamiora Mangakahia. McIlhorne claimed that he had some discretion about whether to pursue the more transient miners or poorer miners for fees.¹⁰⁸ Warden Henry Kenrick, coming into the situation in 1880, reported that there had been 'the grossest abuse' of McIlhorne's discretionary power, but it is not clear whether he was referring to the matter of miner's rights or the allocation of revenues among Maori owners.¹⁰⁹

McIlhorne's role was scrutinised by the Audit Office. Meanwhile, Treasury took over the receipt and payment of the mining revenue: the total revenue was paid into the public account and the proportion due to the Maori owners imprested to the paying officers on the goldfields. McIlhorne was dismissed and an official of the Department of Mines appointed to distribute the revenue, Maori paying £50 towards the new inspector's salary. However, the appointee, McLaren, did little better. Dr Anderson has written:

According to Kenrick, 'beyond allocating the revenues to the different blocks once a quarter, McLaren did nothing. The heaviest part of the work . . . was thrown upon Wilkinson' [the native officer appointed by the Native Department]. Maori once again attempted to exert greater control over the administration by setting in place their own agent. In the following year, Charles Dearle, married to a local Maori woman [Hera Te Whakaawa], requested through Wilkinson, that the Government endorse his appointment.¹¹⁰

106. Puckey to under-secretary, Native Department, 31 July 1880, Thames goldfields notes, MA13/35C [MA13/35g], Archives NZ, pp 2-4

107. Mackay, pp 11-12

108. Hart, p 32

109. Kenrick to under-secretary, 1 May 1884, MD 184/497 (doc A8, p 169)

110. Kenrick and Wilkinson to Under-Secretary for Gold Fields, undated, MD181/1116 (doc A8, p 169)

The Under-Secretary for Gold Fields reluctantly agreed, having been informed that the accounts were intricate and that the Native Minister saw no reason to object. The arrangement was implemented in 1881, with Thames Maori paying £100 towards Dearle's salary and Te Aroha Maori paying £25 (in lieu of their former payment to Burgess). In 1882, it was arranged that Dearle would receive a further £25 per annum (2.5%) commission for distributing the rents for Tokatea (Moehau 4).¹¹¹

Dearle met with varying degrees of approval. In 1884, 34 owners petitioned for his removal because he did less than McIlhorne in ensuring that miners had taken out miner's rights. Warden Kenrick, however, noted that miner's rights were not really Dearle's job but that of the mining inspector appointed under the Mining Districts Act, 'and that officer has of late shewn considerable energy in enforcing the regulations both in respect of Miners Right and Timber Licences.'¹¹² In his view, Dearle was doing a good job, and was more impartial in revenue allocation than McIlhorne. But native agent Wilkinson had also played a key role, and difficulties soon emerged when he was sent to the Waikato in 1888, just when the Ohinemuri reserve block 20 was opened to mining. Tareranui and others were soon petitioning that the revenues due to them for Ohinemuri had not been distributed. Dearle was willing to add Ohinemuri to his duties, on commission, but needed official approval.¹¹³

The Mines and Native Departments in Wellington each wanted the other to take responsibility for the distribution. Their officials thought it was a simple matter of arithmetical division of the accrued revenue among the listed owners for each block. Northcroft, the current warden in Hauraki, urged that the Maori owners employ Dearle for the Ohinemuri distribution as they did for the other fields.¹¹⁴ Meanwhile, Wilkinson, recalled to Thames, had explained to the Wellington officials how the system worked:

the Mining Inspector provided the Warden with a list of all the claims that were located on Maori land and the Receiver of Gold Revenue supplied a summary of the money accrued from the miners. The Warden, as trustee, then requisitioned the amount required from Treasury and Dearle made the payments to each person individually.¹¹⁵

Complications included miners' holdings crossing land block boundaries, increasing number of non-resident Maori owners, succession disputes and a large clerical workload in preparing receipts in duplicate, making the payments, taking the receipts and accounting to Treasury for the imprest. Wilkinson queried the appropriateness of Maori owners having to pay someone to oversee a responsibility that the Government had accepted in the 1860s agreements. In considering Wilkinson's report, Treasury determined that the undistributed

111. Document A8, p 170

112. Hart, p 35

113. Document J7, p 96

114. *Ibid*, pp 95-96

115. Wilkinson to Sheridan, 8 February 1889, J1 96/1548, Archives NZ (doc J7, pp 98-99)

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revenues amounted to £360 1s; £4 5s was owed for Coromandel, £101 for Te Aroha, and £254 16s for Thames.¹¹⁶

Lewis, the Under-Secretary of the Native Department, in discussion with Northcroft and Wilkinson, found that the real source of Maori anger was not delays in payment (which were in fact few) but the falling off of revenue due to the changes in legislation and regulations after 1886. It was in response to a request from Lewis that Wilkinson wrote the damning report of May 1889 which we have discussed in section 14.4.2(3).

The immediate outcome was that the Ohinemuri distribution was added to Dearle's duties, at 2.5 per cent commission. He seems to have applied himself diligently to the task, which became increasingly difficult as blocks were partitioned and ownership fractionated through succession, but he took the time to discuss matters with Maori owners and showed them his accounts when they requested it. In 1894, Dearle fell seriously ill (he died the following year), the payments again became overdue and once again wrangling developed among officials of various departments about who should take up Dearle's role. Wilkinson, again recalled from Otorohanga to sort out the confusion, criticised the arrangements, especially as Dearle's original £100 fee was still being paid by Maori for distributing a mere 'skeleton' of their former revenues (about one-fifth of the moneys payable for Thames). He recommended payment of 2.5 per cent commission instead, or that all the various fees and rents for claims, leases, residence sites, business sites, battery sites, water races, and kauri trees be done away with and replaced by a rental based on average revenue for the last few years.¹¹⁷

Cadman, the Minister of Mines, wrote to Seddon that 'this is an important matter and should be settled definitely one way or another, the papers will show that no Department has either control or responsibility, while large sums of money are at stake.'¹¹⁸

Officials calculated that about £3000 a year was still being distributed. Ministers did now at last agree that the responsibility and cost of collection and distribution, lay with the Government, not with the Maori owners, but not on who exactly was to exercise it. Seddon suggested the Public Trustee, but that office charged 7.5 per cent commission.¹¹⁹ A Justice official, E W Porritt (the receiver of gold revenue and clerk of the Magistrate's Court at Paeroa), began to do the work on commission and at home in his spare time, with the assistance of his wife. Warden Kenny reported that Porritt kept much better accounts than Dearle, whose records were found to be hopelessly out of date and incomplete, although his 'excellent memory enabled him to work things smoothly'.¹²⁰ The accounts had to be redone and some balances going back to 1878 recalculated on the basis of up-to-date information from the Native Land Court. But Haselden, the Under-Secretary of Justice, stopped Porritt's

116. Document J7, pp 99

117. Wilkinson to Elliott, 30 March 1895, J1 96/1548, Archives NZ (doc J7, p 103); Hart, p 38

118. Cadman to Seddon, 5 March 1895, J1 96/1548, Archives NZ (doc J7, p 102)

119. Document J7, pp 103–105

120. Ibid, p 104

commission (because he did not think Maori should be charged), and Porritt refused to do the work for a mere £20 increase in salary. Again, the books and the payments drifted into arrears, and Maori complaints resumed. A young man with accounting skills named H C Haselden, probably a relative of the Under-Secretary of Justice, was then sent to Thames temporarily. He did so well that W H Taipari and others wrote to Wellington to have him retained: 'We all like the young man, he is courteous, and through him we received our money promptly and justly. But owing to him having been sent away, our minds are very greatly troubled.'¹²¹ The accounts having fallen into confusion again, the task was assigned to E W Cave, the receiver of gold revenue and clerk of the Magistrate's Court at Waihi, who received travelling expenses but no additional salary for the work.¹²² He worked on that basis from 1896 to 1906.

Mr Young's research has disclosed some figures for Coromandel goldfield revenues for 1890 to 1894; they vary sharply year by year from £471 in 1890–91 to £88 in 1892, then lifting again to £148 in 1894. His figures for Kuaotunu revenues, variously collected by the post-masters at Kuaotunu and Whitianga, and by the receiver of gold revenue at Coromandel, from 1891 to 1895 fluctuated between £97 and £194 a year. A schedule of payments to each of several owners living in Northland ranged from £113 2s to £1 4s in 1891 and then fell away sharply.¹²³ It is not clear how complete these figures are. Gold mining declined on all fields in the twentieth century, except on the Martha Hill mine, by now on private land. No answer had been found to the problem of the increasing fractionation of entitlements, often to less than a shilling by the 1890s, other than a suggestion from Cadman to 'vigorously' purchase the interests of the owners, a foreshadowing of how the Crown tried to deal with the problem of fractionating interests in other land in later decades.¹²⁴

As the interests declined in value and the numbers of owners multiplied, the books fell into increasing confusion and payments increasingly into arrears. In 1917, the imprest account was closed and vouchers sent through the Post Office. With addresses of payees not known, many small payments lay unclaimed. By the 1920s these amounted to some £2000. In 1928, the Waikato–Maniapoto District Maori Land Board took over responsibility for the distribution, but not the collection, of the revenue. Petitions by Rihitoto Mataia and others in the 1930s to recover funds owed to them led to the appointment of the MacCormick Commission (see below). MacCormick's report quotes a lengthy Treasury statement showing that a search had disclosed huge gaps in the records: destroyed, burnt in a fire or simply missing. MacCormick concluded 'Records are not now obtainable which would show the details of the distribution of revenue collected to the individual Natives entitled, or even the blocks from which the revenue came.'¹²⁵ He summed up:

121. Ibid, p 107

122. MacCormick, 'The Native Purposes Act, 1935', 28 June 1940, AJHR, 1940, G-6A, p 3

123. Document 17, pp 108–111

124. Hart, p 39

125. MacCormick, 'The Native Purposes Act, 1935', 28 June 1940, AJHR, 1940, G-6A, pp 2–3

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The Crown cannot now render any complete or satisfactory account of the revenue received and expended by it, firstly because the long delay has rendered it impossible to inspect many records formerly available, and secondly owing to the methods adopted for the distribution of money due to the Natives. Possibly nothing better was practicable under the circumstances, but more inspection and audit were desirable.¹²⁶

13.5.4 Tribunal comment on gold revenue administration

It is obvious that the Crown's management of Maori gold-mining revenues was poor in many respects, but not because of a lack of diligence on the part of individual officers: Puckey, McIlhone, Dearle, and others did their best with a very complex task. Delays in payment, at least in the peak years of 1868–78 were usually explicable and generally soon remedied. The fundamental problem was that the procedures had grown in a loose, ad hoc way, and responsibility for the various aspects of collection and disbursement fell between so many departments – Native Affairs, Mines, Treasury, and Justice – that no one Ministry took responsibility for it. Consequently, when officers who actually made the distribution to Maori moved on or died, the system (if it can be called that) fell into disarray. In the twentieth century, as mining revenues fell and the owners' interests became fractionated by succession, nobody in official roles cared much about the disbursement. Finally, the records got lost.

But practicable alternatives were few. It is regrettable that the Crown did not insist that the land should go through the court speedily, if necessary at the Crown's expense, and hold some of the revenue in trust, invested until ownership had been formally determined. But to rangatira at the time the loose arrangements between them and Civil Commissioner Mackay were mutually convenient, and worked well enough. Then, in the Thames boom, a small number of rangatira found themselves in possession of substantial revenue.

In the early days, Native Department officials remained in close touch with the Maori leadership on the various fields. Chiefs met officials regularly in their offices, in public meeting places or on the streets. There was some collaboration over the laying out of townships, setting aside of cultivation reserves and wahi tapu, and in the generous endowments by Maori for churches, schools and hospitals. Several officials including Mackay, Wilkinson, and Dearle had Maori partners. On this inter-personal basis, many problems about boundaries of claims, payments due, framing and enforcement of local by-laws or policing of crime were resolved, with remarkable cooperation between officials and chiefs.

But there is no evidence of any effort by Crown officials to organise the chiefs in some kind of owners' council or runanga, or to set up a trust to manage the flush of wealth for the

126. MacCormick, 'The Native Purposes Act, 1935', 28 June 1940, AJHR, 1940, G-6A, p7

benefit of the rank and file or for future generations. It would have been feasible to attempt this; it had been already done or planned elsewhere:

- ▶ In the 1840s and 1850s, trusts had been established for some of the New Zealand Company reserves, albeit with non-Maori trustees;
- ▶ When gold was first discovered at Coromandel Grey argued that any large sums resulting should be paid into a fund for general purposes such as education and medical care;
- ▶ At the Crown purchase of Stewart Island in 1865 it had been agreed that £2000 (a third of the purchase price) should be used to purchase land on the South Island to endow an education trust for the vendors' children.

Other than Grey's plan, ignored by other officials, nothing of this kind was suggested for the Hauraki goldfields, even as the Thames boom was yielding large revenues. The governments (general and provincial) seemed to think only in the most immediate and expedient terms. Unfortunately the attempts to create trusts and incorporations on the East Coast, which began in the 1880s through the collaboration of lawyers like W L Rees, rangatira like Wi Pere and politicians like James Carroll, came too late to serve as models for the Hauraki goldfields.¹²⁷

In 1870, Puckey found considerable discontent among Maori right-owners about the disbursement of revenues, with many receiving little or nothing. But he had no formal mechanism – such as an official runanga – through which to negotiate adjustments. His attempts to do so informally quickly aroused jealousy and bickering.

Eventually, the ceded lands went through the land court. Under the 1873 Act, especially, enlarged lists of names of those entitled to receive revenue emerged, but often not until after the boom years of mining had passed. The court also produced another problem: the dissipation of revenue into small sums, increasingly fractionated through succession. Essentially this revenue problem was a sub-set of the much wider problem of fractionated land titles generally, and the absence of a legal mechanism by which the owners could act corporately. Crown witnesses have acknowledged that this was a serious weakness in land legislation, not generally rectified until the provision for incorporation of owners in 1894 (see ch 16).

The question of who should have borne the cost of officials such as McIlhone or Dearle was controversial at the time because their appointments had dual origins and purposes. Cadman later described Dearle as 'employed by the Natives to act as a sort of scrutineer on their behalf, and to see that the monies were rightly allocated.'¹²⁸ The description fitted the earlier appointee, McIlhone even better, because Puckey was already employed for the work (among other duties) by the Native Department. In that sense, it is not unfitting that Maori owners should have paid all of Dearle's and part of McIlhone's salaries: they were their men,

127. See Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (Wellington: Legislation Direct, 2004), ch 9

128. Cadman to Native Minister, 9 May 1895, MD1 95/549 (doc A9, p144)

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watching over the officials. But just as McIlhone had also been a provincial government officer, overseeing the payment of miner's rights, Dearle also had official responsibilities. Cadman remarked, 'On account of Mr Dearle doing Land Purchase and other work he has gradually drifted towards the position of a Government officer – though employed and paid by the Natives.'¹²⁹

Wilkinson and most of the Native Department commentators thought this unfair, and, as we have seen, Cadman and other Ministers eventually agreed. MacCormick, reporting on the situation on 1940, did not see a problem. Dearle, he said, was appointed at the request of the Maori owners, who undertook in writing to pay his salary. (He could have said the same for McIlhone in the previous decade.¹³⁰) Indeed, he was unsympathetic to the wider complaint about the amount charged for administration expenses 'on the ground that no provision for them was made in the deed of cession'. Even if the Crown were constituted as a trustee by the cession deeds, 'I do not know of any principle of equity which requires the trustee to pay out of his own pocket for necessary expenses of administration.'¹³¹

This seems to us to be a harsh position, for the reasons Cadman stated. Though McIlhone and Dearle were appointed at Maori request, they were also involved in Crown administrative roles. Dearle's coordination of the collection and distribution through no fewer than four Government departments, *and* his close personal knowledge of how Maori interests were held in various portions of mined ground, saved Crown officials much work. The goodwill he won from Maori probably more than made up for the casualness of his bookkeeping.

As for the confusion and neglect into which the system fell following the death or retirement of Cave in 1906 we can only express our dismay and disapproval of the Crown's failing. It is regrettable that a new method of collection and payment of the revenues had not been negotiated with the beneficiaries, such as the consolidation of the diverse kinds of fees into an overall rent for each block as Wilkinson suggested in 1895, or the consolidation of the fractionated interests through the Public Trustee as suggested by Seddon.

In the last resort, the allocation of revenues could only be approximate. Any degree of precision depended not just on figures of miners and revenues amassed through the offices of the receivers and inspectors, but upon first hand familiarity with the miners working the ground and the complex and intersecting interests of the Maori owners. Once the land went through the court, the latter was largely predetermined by the court's awards. The shortcomings of that process are discussed in chapter 15. Certainly, the rangatira took the lion's share in the boom years and, we are told, spent much money on traditional purposes such as tangi and hui, in which their kin shared. But there is no evidence that the Crown, not slow to pressure the principal owners to achieve its own goals, such as purchase of the

129. Cadman to Native Minister, 9 May 1895, MD1 95/549 (doc A9, p144)

130. MacCormick, 'The Native Purposes Act, 1935', 28 June 1940, AJHR, 1940, G-6A, p 3

131. *Ibid*, p 4

freehold, made any effort to persuade them to invest for future needs such as the education of the children. That *had* been done in other cases (such as the purchase of Stewart Island), and in the early 1870s officers such as Mackay and HT Clarke were suggesting that part of the payment for *land* purchases should be in Government bonds, which might at least have carried the benefits forward for a time. No such suggestions were made in relation to Hauraki gold, and when the gold had gone, or the freehold of the ceded land had been sold, the mining revenue ceased.

13.6 THE CONNECTION BETWEEN GOLD AND LAND LOSS

The evidence of claimant witnesses (Anderson, Belgrave et al) indicates that by 1881 the Crown had acquired the freehold of most of the lands ceded in the 1860s: a total of 109,080 acres.¹³² The purchase of Ohinemuri in 1882 added another 66,000 acres to the Crown's freeholdings, much of which had been under the 1875 cession agreement. Governments had never been in doubt that the purchase of the freehold by the Crown meant that mining revenues would no longer have to be paid to the former Maori owners. As we have noted above, miners and local governments alike urged the Crown to buy auriferous land for this reason. (There had been some uncertainty whether private purchasers of ceded land were entitled to the mining revenues formerly payable to Maori owners, but by 1882 it was definitively decided by the Attorney-General in that they were: see section 14.2.4.)

The main beneficiaries of the Crown's purchase policy were the Crown itself and the local bodies, to whom the revenue was directed. By Warden Kenrick's calculations, by 1885 the division between Maori and local bodies was:

Coromandel:	County	$\frac{2}{3}$	Maori	$\frac{1}{3}$		
Thames:	County	$\frac{1}{4}$	Maori	$\frac{1}{2}$	Borough	$\frac{1}{8}$ European owners $\frac{1}{8}$
Ohinemuri:	County	$\frac{7}{8}$	Maori	$\frac{1}{8}$		
Aroha:	County	$\frac{1}{3}$	Maori	$\frac{1}{3}$	Thames High School (unexplained)	$\frac{1}{3}$ ¹³³

AJ Cadman, the Native Minister and Minister of Mines for most of the 1890s, told a delegation of miners in 1889 that Crown acquisition of all goldfield land owned by Maori was the 'only solution to the problem', in that the fee for a miner's right would be reduced, and the revenue 'at present being derived by private parties would be placed to the credit of local bodies.'¹³⁴ Maori ownership of Hauraki goldfields lands continued to fall throughout the

132. Document v1, p 212; doc A8, pp 234-235, 237

133. Kenrick to Under-Secretary for Gold Fields, 27 December 1884, MD1 85/2 (doc A8, p 239). Anderson notes that Treasury figures for Thames were different, overwhelmingly oriented still in favour of Maori.

134. *Thames Advertiser*, undated, MD1 89/85 (Anderson, pp 57-58)

nineteenth and early twentieth centuries. As MacCormick pointed out in his 1940 report, the Crown and local bodies benefited by many thousands of pounds from the Crown's ownership of it.

It should be noted that, within limits, the Crown was prepared to pay premium prices to Maori owners for the purchase of goldfield land. The evidence of Dr Anderson, Mr Alexander, and others reveals that Maori owners were generally reluctant to sell blocks that were yielding miner's rights and other fees but, under severe pressure to meet debts, from time to time bargained with the Crown to sell the freehold at a good price. In the case of Waiotahi A (94 acres), the owners were repeatedly being brought before the courts by creditors and even arrested. They were fortunate to have a private purchaser in competition with the Crown, and in 1880–81 they sold the block to him for £1000, 25 per cent better than the Crown's offer.¹³⁵ The Crown contemplated buying Waiau 1 (1098 acres) for £600; again, the owners were under pressure and were apparently prepared to forego £120 per annum in miner's right fees by selling the freehold. The sale did not go through, however, and the Crown did not succumb to the suggestion of the Auckland solicitor, Dufaur, that nearby land was selling for £3 10s an acre. There was a limit to the premium the Crown would pay. Eventually, in the 1890s it acquired 706 acres of Waiau 1 at 10 shillings an acre.¹³⁶

Land purchase agents' and Ministers' correspondence shows that governments, when pressed by local bodies and their own officers, were prepared to pay between 10 shillings and £3 per acre for auriferous land at a time when most other land was being purchased for about five shillings an acre. As we have shown in our discussion of the Kuaotunu field, for example, Maori owners often tried initially to maintain cession agreements, but tended to sell when the revenues fell after the 1886–87 legislation, or problems arose over collection and distribution of revenue, or production on the field fell and miners began to leave (for Kuaotunu, see section 12.4.2). In the case of the Ohinemuri and Waihi reserves in particular, purchased by the Crown in the 1880s and 1890s, the owners missed the entitlements that would have flowed from the rising production of the Martha Hill mine in the twentieth century, and the growth of the town of Waihi.

13.7 THE TWENTIETH CENTURY

Claims relating to gold and Maori in the twentieth century in these proceedings have focused upon two legacies of the nineteenth century:

- ▶ The Crown's failure to return to Maori control, at the earliest opportunity, the lands ceded for mining and still in Maori ownership. The Crown did not relinquish its rights

135. Document A9, pp 34–37; doc A10, pt 2, pp 310–317

136. Document A9, pp 37–38

until 1971, one result being that residence site licences issued during the mining years were continued, for rents which were well below prevailing commercial rates;

- ▶ The 1939 report and recommendation of the MacCormick commission into the Crown's management of mining revenues owed to Maori.

We will discuss these two matters, following a brief outline of changes in the gold-mining industry and mining legislation.

13.7.1 Changes in the industry and mining law

Details of the industry to 1960 are provided by JWH Salmon's *A History of Goldmining in New Zealand* and an outline of changes since then by Veronica Jacobsen, in 'The Evolution of Institutional Arrangements for Gold Mining in New Zealand', both referred to in submissions to these proceedings.¹³⁷ The Crown has provided the valuable 'Evidence of the Ministry of Economic Development on the Crown Minerals Act 1991 and the Management of Access to Gold', written by Evelyn Cole.¹³⁸

Through the cyanide process used from the late 1890s, the value of gold and silver extracted from Hauraki mines greatly exceeded the peak years of the Thames rush. But the costs of processing huge quantities of ore rendered most mines uneconomic by the second decade of the century. The Martha Hill mine at Waihi was a notable exception but it too closed in 1952. It was reopened in 1988 as a result of the rise in the price of gold on world markets, but remains a heavily capital-intensive operation. Ms Jacobsen has shown that, while the quantity of gold produced has waned over the twentieth century, its value has increased markedly since 1977.¹³⁹ She has also shown that the value of gold in the national economy fell from a peak of 73 per cent of the value of exports in 1866 to a statistically insignificant proportion since 1968.¹⁴⁰

With the waning of the Kuaotunu field in the early twentieth century, very little mining took place on Maori land. Moreover, most remaining auriferous land in Hauraki had been purchased by the Crown, or by KTC. A significant exception is the 7000-acre Pakirarahi 1 block, acquired on long lease by USSC, and thence by KTC, as much for the timber as for the gold. The Maori owners, assisted by Crown officials, successfully defended the caveat that the land be returned to the owners, which took place in 1991.¹⁴¹

The main legislative changes were:

137. JHM Salmon, *A History of Goldmining in New Zealand* (Wellington: Government Printer, 1963); Veronica Jacobsen, *The Evolution of Institutional Arrangements for Gold Mining in New Zealand*, Working Paper in Economics 94/3 (Waikato: Department of Economics, University of Waikato, 1994)

138. Document p2

139. Jacobsen, p 25, table 5.1

140. Ibid, p 34, table 5.3.4

141. Document v3, pp 50–64; see also secs 12.3–12.3.4

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- ▶ The Mining Act 1926, which declared all land alienated from the Crown to be open for prospecting and liable to resumption (under the terms of the Public Works Act), without the consent of the owner and occupier. However, the consent of owners and occupiers was necessary to prospect for gold on land alienated from the Crown before 1873 and outside a mining district in 1896. The Maori Land Court was authorised, in certain circumstances, to declare Maori land open for mining with the owners' consent.
- ▶ Section 6 of the Mining Act 1971 clearly reiterated that 'all gold and silver existing in its natural condition on or under the surface of any land within the territorial limits of New Zealand, whether or not the land has been alienated from the Crown shall be the property of the Crown'. As regards access, the Act allowed prospecting on some categories of land under licence without the consent of owners and occupiers, although notification of entry was required. In this 1971 Act, the Crown at last relinquished its mining rights over Maori ceded land. Private land, including Maori land, was declared open for gold mining with the consent of owners and occupiers. If consent were not granted, the holder of a licence could apply to the Minister to declare the land open as if it were Crown land.
- ▶ The Crown Minerals Act 1991 applies only to the management of Crown owned minerals. It does not apply to privately owned minerals such as pounamu. The Act involved the following principles:
 - As regards ownership of the royal metals, section 10 of the 1991 Act replicates the provision of section 6 of the 1971 Act.
 - However, the 1991 Act reversed the previous trend regarding access. It states that a permit to explore, prospect, or mine does not provide a right of access, and cancels any Crown right of entry reserved by statute. The consent of the owner and occupier is required for exploration, prospecting and mining. Rights of access without consent are permitted for activities with minimum environmental impact, except that entry onto Maori land requires 10 days notice to the local iwi authority whose consent is necessary if the land is wahi tapu.
 - Section 4 states that 'All persons exercising functions and powers under this Act shall have regard to the principles of the Treaty of Waitangi'.
 - Sections 12 to 21 of the Act govern the formulation of 'minerals programmes', including the allocation of permits to explore, prospect, and mine, and the securing by the Crown of 'a fair financial return for the extraction of its minerals'.¹⁴² (Current negotiations for the opening of the Favona mine, two kilometres east of Waihi, will involve the payment of royalties to the Crown for the first time in New Zealand mining history.¹⁴³) And, under the programme for minerals other than

142. Document P2, pp 5–6; Jacobsen, pp 21, 32, table 5.3.2

143. *New Zealand Herald*, 2 September 2003

coal and petroleum issued by the Ministry of Commerce in 1996, the Crown is to consult with tangata whenua before granting consents, to act reasonably and in good faith with Maori, and to avoid creating impediments to providing redress for grievances under the Treaty of Waitangi (eg, where there is an application for a permit in respect of lands or resources that are the subject of claims before the Government or the Waitangi Tribunal).¹⁴⁴

- Section 15(3) provides that defined areas of importance to the mana of tangata whenua may be excluded from the programme or from permits. This is designed to protect wahi tapu and other significant lands. (Certain Crown lands in the Moehau Ranges have been excluded from mining programmes on that basis.)
- 'For activities other than minimum impact activities, the owners of Maori land also have an absolute right of veto on all mining activities on their land. There is an exemption for Maori land from access arrangements being determined by an arbitrator where there might otherwise be public interest grounds to support an access arrangement being negotiated'.¹⁴⁵

Jacobsen considers that the return of control over access rights on private property, after decades of Crown control over them, followed a period of disputes between landowners and prospectors, particularly on the Coromandel Peninsula. The revival of gold prices had prompted renewed prospecting, but the peninsula was now largely occupied by an environmentally aware population, anxious to preserve the lifestyle and tourist potential of an ecologically sensitive area against the possible actions of large companies.¹⁴⁶

The Crown concurs. Ms Cole's submission states:

During the 1980s the provisions of the Mining Act were the subject of considerable criticism for providing more favourable treatment for mining over other land uses. This included prospecting and mining applications having to be favourably considered on conservation estate land. By the late 1980s this legal position was publicly untenable.¹⁴⁷

The Wai 100 claimants have been critical of the way the 1991 Act was developed.¹⁴⁸ However, the drafting process involved regional hui (including one at Te Pai o Hauraki Marae, Paeroa) and a national hui, attended by the Minister of Energy, senior officials, and Maori. It is evident that the concerns of Maori for their rights under the Treaty influenced the drafting of the Act, although the Crown retained ownership of gold, silver, and other minerals of national importance. Reference was made in these proceedings to an exchange of correspondence on the ownership issue between the then Minister in Charge of Treaty of

144. Ministry of Commerce, *Minerals Programme for Minerals Other than Coal and Petroleum* (Wellington: Energy and Resources Division, Ministry of Commerce, 1996), ch 3

145. Document P2, p 21, see also pp 16–21

146. Jacobsen, p 33

147. Document P2, p 3

148. Document Y1, p 29

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Waitangi Negotiations and the then Minister for Enterprise and Commerce. Crown counsel point out, however, that the correspondence concerned ‘privatisation’, which would have involved the transfer of the Crown mineral estate not to Maori ‘but to private land owners generally (which might include some Hauraki Maori).’¹⁴⁹

13.7.2 Residence site licences

(1) *The origins of the problem*

The Wai 100 claimants have brought a claim regarding residence site licences introduced in the mining cession arrangements of the 1860s being continued, inappropriately and inequitably, into the twentieth century. The licences entitled holders of mining rights to build a cottage on a site of up to one acre. They were an addition to the right to reside on the claim itself (which came with the miner’s right) and seem to have been designed mainly for the villages established on the fields. The licence fees were collected by Crown officials and paid to Maori landowners, along with other mining revenues due under the cession agreements. Dr Anderson has pointed out that the original purpose had become redundant as mining declined, but because the Crown did not rescind the declarations of goldfields, the residence site licences and the land they related to remained subject to official control. In the late 1920s, the mining warden in Hauraki used his powers under the Mining Act 1926 to grant a number of residence and business site licences over some Thames, Coromandel and Te Aroha properties, which were subsequently used for commercial purposes or for holiday accommodation. Rents were not regularly revised. Consequently, a Maori Affairs Department report of 1968 showed that licensees were able to occupy for annual rents of between five shillings and £2, sites which were then worth up to £5 per annum, with the licensees having the right to build on or sublet the land, and assign their rights. The report listed 51 such licences still operating on Maori ceded land, with a total annual rental of \$81.50 on property with a total unimproved value of some \$20,000, a return of 0.4 per cent on the land.¹⁵⁰

(2) *The owners protest but legislative changes are adverse to them*

Maori protest over the warden’s anachronistic powers over the ceded land had apparently died out since the 1890s, partly because the sums distributed to owners amounted to only a few cents each. They were derisory sums which were not easily distinguishable from other mining revenue payments and apparently not specifically related to identifiable blocks of land.¹⁵¹ However, in 1948 Crown officials themselves noted the anomaly and Judge Beechey of the Maori Land Court also noted that it was inequitable for the land to be retained under

149. Document P2, pp 22–23, 35–36; doc AA1, p 13

150. Soutar to Minister of Maori Affairs, 1 July 1968, AAMK869/202A (doc A9, p 172)

151. Document D20, pp 3–4

Crown control and used for purposes ‘apart altogether from mining’. Anderson comments that despite this, no effective action was then taken, and Hauraki Maori had to wait many years before the Government addressed the issue of residence site licences. Moreover, the Mining Tenures Registration Act 1962 (which was enacted when the outmoded authority of the mining wardens was ended and control passed to the Department of Lands and Survey) created conditions even more favourable to the holders of residence and business site licences, and less favourable to Maori owners. The Act abrogated the Government’s power to cancel licences for breach of the original conditions of use, and provided that the licences would be registered under the Land Transfer Act on terms which included the right to renew the lease every 21 years in perpetuity. The legislators were mainly concerned with the Crown land affected, and the fact that Maori still owned some of the land to which the licences referred seems scarcely to have been noticed. Although the Act did except Maori-owned land from the provision that licensees could convert their tenure into freehold, Maori owners were not given the opportunity to object to the issuing of the new leases (even over land then unoccupied) or to protest at the level of rentals.¹⁵²

The matter was brought to official attention again by Hauraki Maori in the context of claims regarding the non-payment of the settlement recommended by the MacCormick commission (see the next section). Mr Ivor Prichard, while investigating that matter in 1968, drew the Minister’s attention to what he considered ‘a definite grievance’ with regard to residence site licences, though at the time he recommended no action or compensation. In 1968, officials decided that the Crown should renounce its rights under the initial cessions, but all rights and titles granted by the Crown within the ceded lands should be excepted. The tenants of residence site licences were thus left undisturbed.¹⁵³

In 1969, Ms Mairehau Williams approached the solicitor Finlay Phillips of Otorohanga to seek a return of her family land at Amodeo Bay, subject to a residence site licence. Phillips found some 40 such sites, mainly on the slopes behind Thames. In many cases, the former miners’ cottages had now been replaced by substantial residences.

Hauraki Maori also organised a Maori ceded lands committee, which protested against the provisions of the Mining Bill of 1971 and sought the return to them of the goldfield blocks still in Maori ownership. The committee also showed that the Crown’s management had locked the lands subject to residence site licences into rent levels set 100 years before. The Crown did relinquish its mining rights over the ceded lands by section 34 of the Mining Act 1971, but the same section preserved the existing arrangements regarding residence sites.¹⁵⁴

Mr Phillips’ office had meanwhile been coordinating a joint approach by all the owners of land subject to the residence site licences, and in 1972 over 100 owners met at Tapu and

152. Document A9, p 173; doc D20, p 4

153. Document A9, p 174

154. Ibid, pp 174–175

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set up a trust to pursue compensation or the return of ceded lands. The advisory trustees elected were Huhurere Tukukino, Toko Renata, Emily Paki, Mairehau Williams, Barney Raukopa, and Betty Nicholls, many of whom subsequently brought claims to this Tribunal. Miss Connolly, a former legal secretary to Mr Phillips, has outlined in her submission the difficulties faced by the owners in the negotiations which unfolded over the next 14 years.¹⁵⁵ In most cases, the licensees (or lessees as they had become under the 1962 Act) were opposed to relinquishing their leases; moreover, some were making improvements upon the land which would put it beyond the reach of the Maori owners to buy back the lease.

(3) The 1980 settlement

The Hauraki leaders then took a test case to the High Court in 1976, but the judgment brought down in 1980 was adverse to them. In effect, it interpreted the loose and general terms of the 1867 cession agreement as permitting uses other than those strictly associated with mining. It also referred to legislative changes such as a 1953 provision that a miner's right was no longer required in order to take out a residence site licence, and of course the changes brought by the Mining Tenures Registration Act 1962. As Mr Phillips stated, the court's interpretation meant:

That the express stipulation of the deed that only persons who held a miner's right specifically referring to the subject Maori land could hold a resident site, was subsequently removed by legislation so that government could use the power it obtained under the deed to give perpetual possession of the land to any person.¹⁵⁶

The court also applied the rule that 'if there is any doubt or ambiguity in the construction [of a contract granting property rights] recourse may be had to the rule that to remove a doubt the document must be construed adversely to the grantor.'¹⁵⁷ Such a rule clearly has the potential to bear cruelly upon inexperienced Maori vendors or grantors of interests in their land, as was in fact the case in respect of these licences granted back in the 1860s.

However, the Crown recognised that Maori owners had been treated inequitably in this matter and in November 1980 entered upon a negotiation with them and their counsel. The Crown was still clearly reluctant to infringe upon the rights now granted by law to the licensees or lessees, who for the most part were very opposed to relinquishing their leases. Nevertheless the negotiations with the Maori owners did result in an agreement. It contained four elements:

- ▶ The Crown would acquire the land subject to the residence site licences and offer Crown land to the claimants in exchange, or if the land offered was not acceptable, pay the claimants compensation equal to the current value of the sites concerned.

155. Document D20

156. Ibid, p10

157. *New Zealand Insurance v Attorney-General* [1980] 2 NZLR 660 (doc D20, pp 10–11)

- ▶ The Crown would pay compensation for the past inadequacy of rentals, according to a formula which assumed that over the previous 25 years the rentals should have been revised at five-year intervals in line with rateable land value. The compensation packages have been negotiated on a case by case basis since the agreement. We have received little information on the levels of payment under this heading but note that a 1987 report to owners by Finlay Phillips refers to Crown offers of compensation of \$385.20 for each of two sites adjacent to the Coastal Motor Lodge on Ngaromaki 2A and 4 blocks and \$131.70 for another site on Ngaromaki 2A.¹⁵⁸
- ▶ The Maori owners would be compensated for the fact that they had little or no alternative but to agree to their ancestral land being acquired by the Crown. The appropriate level of compensation, which the owners regard as a solatium, was the subject of long debate between the Crown and trustees for the owners. Eventually the trustees agreed to accept \$100,000 under this heading, to be divided amongst the owners according to the proportion of Maori land involved in each site licence. In the case of the two blocks adjacent to the Coastal Motor Lodge, the proposed sum was \$2450 per licence.¹⁵⁹
- ▶ The Crown agreed to pay the cost of the claimants' legal action and the subsequent negotiations.¹⁶⁰

(4) Crown submissions on the issue

In their opening submissions on gold issues, Crown counsel stated:

The Crown accepts that the resident site grievances are well founded and that in particular, the Mining Tenures Registration Act 1962 (which converted resident site licences into leases in perpetuity renewable every 21 years) to be in breach of Treaty principles. There is, however, no basis for the Tribunal to revisit the settlements secured in the 1980s (and the Crown does not apprehend the claimants to be asking the Tribunal to do that).¹⁶¹

Counsel for Wai 100, however, referring to the Government's continued control of the residence sites up to and including the Mining Act 1971, notes that Hauraki Maori were 'forced into negotiation and court action in order to free their land from continuing occupation' and then 'forced to accept the compulsory purchase of the occupied sites'. He continues, 'The level of compensation hardly reflected the value of the land and loss of income.'¹⁶²

(5) Tribunal comment

The strict legalism of the 1980 judgment is one indication of a thread that has run through the claims relating to goldfields in Hauraki. That is that legislative changes, made without

158. Document x34, app 1, pp 6-7

159. Ibid, p 11

160. See doc D20, p 12, attachment c

161. Document P6, p 33

162. Document A51, p 19

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the consent of Maori owners or even after consultation with them, modified the original cession agreements in ways adverse to the owners.

As for the terms of the settlement agreed between Hauraki Maori and the Crown after the 1980 judgment, we are inclined to agree that the compensation of \$100,000 for the compulsory nature of the alienation is not in itself especially generous; nor is the level of compensation for over 100 years of unrevised rentals on what in some cases have become prime sites. But these payments are over and above the first leg of the 1980 settlement, namely that the Crown agreed to pay for the land itself (either in land elsewhere or in money), at current valuation. We note that the total unimproved land value for the residence site licences given in Miss Connolly's evidence was \$243,600 in 1979–84.¹⁶³ We have received no other information as to land values and how the buying out or exchange programme is working out in practice.

We therefore accept the Crown's view that no grounds have been shown for revisiting the 1980 settlement.

13.7.3 The MacCormick inquiry

The question of whether the Crown breached its obligation towards Maori owners of land subject to mining cession agreements came under consideration by a commission of inquiry in 1938–40. This was established initially to examine certain petitions concerning the collection and distribution of mining revenue to which the petitioners were entitled.

(1) *Origins and purpose*

During the nineteenth century, there had been no comprehensive judicial inquiry into the meaning and operation of the goldfield agreements. Instead, the Crown had sought legal opinions on an ad hoc basis whenever some pressing problem arose.

In 1935, a series of petitions concerning mining revenues from the Hauraki goldfields were referred by the Native Affairs Committee to the Native Land Court for inquiry and report under section 22 of the Native Purposes Act 1935. Charles MacCormick, the chief judge of the Native Land Court, presided over the subsequent inquiry. Preliminary investigation of the petitioners' claims and the preparation of the case to be presented began in 1938 and involved, among other matters, the standing in a Hauraki inquiry of Mr Mafeking Pere of Ngati Porou ki Tairawhiti. Hearing of the 'Hauraki goldfield claim' proper commenced in March 1939 and MacCormick's report was handed down in June 1940.¹⁶⁴

The claimants have referred to the fact that the petitioners were denied access to Government records. This was partly remedied by the fact that MacCormick himself sought

¹⁶³. Document D20(a)

¹⁶⁴. MacCormick, 'The Native Purposes Act, 1935', 28 June 1940, AJHR, 1940, G-6A, pp1–21 (doc A9(a), pp370–390)

from Treasury and other officials as much information as was available on the revenues received and payments made. The records proved to be so poorly kept that it must be doubtful that the claimants could have got more accurate information. Claimants also note that the inquiry was limited in that it did not accept that the Treaty of Waitangi was a basis for examining the Crown's record of administration, but worked mainly within the common law and the relevant statutes.¹⁶⁵ Within those limitations, MacCormick did, however, go beyond the question of unpaid revenues, examining the basis on which the revenues were to be paid and the effect of the Crown purchases.

The long title of the report is:

Report and recommendation on petition no 23 of 1931, of Rihitoto Mataia and others, relative to the goldfields revenue in respect of gold-mining rights over native lands within the district extending from Moehau (Cape Colville) to the Aroha mountain; petition no 347 of 1934–35, of Rihitoto Mataia and others, relative to the purchase or acquisition by the Crown of Ohinemuri block and other lands within the Ohinemuri and Hauraki districts which were subject to certain agreements dated the 19th day of December, 1868, and the 18th day of February, 1875, and to the purchases and payments referred to in the said petition; and petition no 196 of 1935, of Hoani Te Anini and others with regard to the mining rights in respect of native lands within the Coromandel and Hauraki districts and the payment of goldfields revenues arising therefrom.

The gist of the petitioners' claims was summed up in Hori Watene's statement before the Native Affairs Committee. As he poetically expressed it:

There is a saying in the Good Book . . . 'Where the carcass is there will the ravens be gathered together' . . . There my good people, humble descendants of our beloved Marutuahu, lay the misfortune of our forefathers. That ugly carcass – gold, laid right there in our very midst. As far back as 1852, the ravens flew to the Coromandel ranges to dig for that carcass of gold. Why! What a curse! . . . We have come to search for the remnants of the missing carcasses of our natural resources, in this instance – the Hauraki Maoris Gold Revenues Claim.¹⁶⁶

More prosaically, the general claims of the petitioners were classified by MacCormick under three headings:

Firstly, the matter of the accounts in respect of the mining revenue received by the Crown; secondly, the effect in law of the deeds of cession or mining agreements; and thirdly, the circumstances relating to the subsequent purchase by the Crown of some of the blocks affected by the deeds.¹⁶⁷

165. Document B2, pp 54–55

166. Anderson, p 72; doc A8, p 27

167. MacCormick, 'The Native Purposes Act, 1935', 28 June 1940, AJHR, 1940, G-6A, p 2

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MacCormick was not particularly concerned with the issue of the Crown's prerogative rights in gold versus Maori rights in gold, and saw no need to interpret the agreements narrowly:

Be that as it may, the Crown in the present case, having entered into contracts with the Natives and expressly recognised their validity by legislation, could not now challenge the Native ownership, and, in fact, no such claim or suggestion has been made in these proceedings in regard to the lands affected.

This ready acknowledgment should, however, be seen in the light of MacCormick's inquiry not being an inquiry into the Maori ownership of gold as such but only into the effect in law of the deeds of agreement themselves.

(2) Arguments presented on the interpretation of the goldfield agreements

According to MacCormick's report:

The contention of counsel for the Natives was that the deeds of cession created an absolute grant of mining revenue from the lands described in them notwithstanding any change of ownership of the freehold, and that as the manner in which the deeds could be terminated was prescribed by the deeds themselves they could not be terminated in any other way.¹⁶⁸

Counsel for the petitioners asserted that Maori had possessed 'everything there was to possess in connection with the soil' and that the Crown prerogative should not apply, although this was 'not absolutely necessary for our case'. He submitted that the fact that the Crown entered into the mining agreements at all, showed that the rights of Maori were recognised. He also stated that 'those old Native Chiefs clearly separated in their minds the gold from the land'.¹⁶⁹ (This was significant, because the argument was to be made that the gold-mining bargains made were intended to be unaffected by the subsequent sale of the land.)

The deeds other than the 1875 Ohinemuri deed provided for the revenues due under them to be paid to the signatories and their heirs (uri), although, as MacCormick noted, it was never intended that these payees should be the sole beneficiaries. The 1875 Ohinemuri deed, for example, provided that the revenue would be 'deemed to be the property of the Native owners of the lands comprising the Ohinemuri Block'.

Cited in support of the petitioners' contention were the various statutes continuing the powers obtained by the governor under the agreements. For example, section 2 of the Auckland Gold Fields Proclamations Validations Act 1869 reads in part:

168. MacCormick, 'The Native Purposes Act, 1935', 28 June 1940, AJHR, 1940, G-6A, p 5

169. 'Notes of Continuation of Inquiry of January 1938', 6 March 1939, B9, MA13/35C [MA13/35g] (Anderson, p 73)

every such agreement shall continue in full force and operation for and during such time as may be expressed therein *notwithstanding that the Native title may have been or may hereafter be extinguished over the land* described in referred to or affected by such agreement. [Emphasis added.]

MacCormick was, however, of the ‘decided opinion’ that the purpose of section 2 of the Validation Act and of other legislation preserving the agreements:

was not mainly, if at all, for the purpose of protecting the rights of the Natives. It was to protect the rights of the Crown in respect of land reserved for the Native owners from the sales to the Crown, which represented very considerable areas, and also in respect of lands sold to Europeans.¹⁷⁰

MacCormick considered that the error about the appropriate rate for miner’s rights fees had arisen because the Crown had always proceeded on the assumption that the *right* to receive revenues under the agreements vested in the Crown, and merged with its own rights in respect of lands that it had purchased. But he focused on the lack of Maori protest, referring to:

the several statutory provisions validating payments to local bodies and others and dealing with the incidence of payments of the mining-revenue. The Legislature, of course, has full power to pass such legislation if it thinks fit, but where it is founded on an assumption which affects the rights of subjects with whom the Crown has entered into solemn contracts it cannot at all events in natural justice prevent the subjects from challenging the correctness of such assumption. *But there has been long acquiescence by the Natives. I have not been referred to and have not found any protests or complaints in respect of the revenue from lands sold which has for a great many years been paid to the Crown or to private persons owning such land.* [Emphasis added.]¹⁷¹

This absence of protest until the petitions he was considering led MacCormick to dismiss the arguments that the intent of the legislation had been to preserve for Maori a continuing right to receive revenues irrespective of who owned the land. MacCormick seems not to have had drawn to his attention the debate of 1876–82 arising from the sale of the freehold of ceded land, and instances of Maori giving separate powers of attorney to access gold revenues when they sold ceded land to private purchasers (see sec 13.2.4). Probably, it would have made little difference; the issue was resolved firmly by Attorney-General Whitaker in 1882 in favour of purchasers acquiring the revenue rights along with the freehold, without the need for wording specifically transferring such rights.

170. MacCormick, ‘The Native Purposes Act, 1935’, 28 June 1940, AJHR, 1940, G-6A, p 5

171. Ibid, p 6

MacCormick was much more concerned about the wording of the original agreements themselves. He concluded that ‘the deeds themselves . . . are crude documents in many respects . . . The true intent and meaning of the deeds can only be gathered from the language of them, together with the circumstances existing at the time.’ In this dilemma, unwilling to make a finding contrary to the usual principles of law, MacCormick concurred with Whitaker’s 1882 view, and reported that he could not abrogate ‘*the ordinary and usual principle that the rights, benefits, and liabilities created by grants of estates or interests less than the fee-simple, or licences such as are now being considered, should pass with the ownership of the fee*’ (emphasis added).¹⁷²

The other line of the petitioners’ argument which MacCormick considered important concerned the agreements themselves, which in their counsel’s view constituted the Crown a trustee for the Maori ceding the land. Here, the relevant principle is that trustees may not purchase for their own benefit any of the property held in trust. However, Crown counsel submitted to MacCormick that the Crown had not been constituted as a statutory trustee, and characterised the agreements as merely ‘a bargain for a right or easement . . . a profit a prendre that created no trust’.¹⁷³ MacCormick was not entirely convinced, and decided that even if the Crown was not an actual trustee it had become a fiduciary agent. However, he agreed that the Crown’s fiduciary responsibility did not extend to the ownership of the land; that is, the right to sell the land was not in trust, but remained with the owners. The Crown was a fiduciary agent responsible to the Maori only in respect of its actions in issuing mining privileges, and in collecting and distributing the revenues that Maori were entitled to receive.¹⁷⁴

Counsel for the petitioners, Mr Cooney, had to proceed on the basis that there was no Crown trust in the land itself and in subsequent argument did not deny the Crown’s right to purchase the land. Instead, he argued that, because the Crown was a fiduciary agent for the Maori in respect of the issuing of mining rights and the collection of the resulting revenues, and because the Crown must be presumed to be the fountain of equity, it could not be presumed to have intended to extinguish the right of Maori to receive revenues by purchasing the land. But, since MacCormick had decided that the right to receive revenues transferred with the freehold, it followed that the right to receive revenues was no more in trust than the land.¹⁷⁵

MacCormick found that there was no evidence that the Crown had intended to keep alive the right of Maori to receive the revenue after its purchase of the land. ‘In every case it took to itself from the date of purchase the mining revenue. As an indication of intention that is practically conclusive.’ In MacCormick’s view, ‘the main object of the Crown in

172. MacCormick, ‘The Native Purposes Act, 1935’, 28 June 1940, AJHR, 1940, G-6A, pp 5–6

173. ‘Notes of Hauraki Goldfields Inquiry’, 6 March 1939, H8–9, J5, MA13/35C [MA13/35g] (Anderson, p 75)

174. MacCormick, ‘The Native Purposes Act, 1935’, 28 June 1940, AJHR, 1940, G-6A, p 6

175. Ibid, p 7

making these purchases was to secure the mining revenue with the freehold. The Crown had assumed only the fiduciary responsibility to collect revenues on behalf of the Maori who were party to the goldfield agreements.¹⁷⁶

(3) Summary of MacCormick's findings

The state of the goldfield accounts was not such as to allow a detailed audit and MacCormick could not accurately determine whether the Maori entitled to receive revenues had received their due. The inquiry into the purchase of lands did not get far either: according to a Native Department memorandum summarising the inquiry, 'as it proceeded, counsel for the petitioners more or less dropped any claim in relation to the purchases by the Crown.'¹⁷⁷ MacCormick reported that, apart from the question of a trust, 'no reason has been shown for attacking the purchases.'¹⁷⁸

The Native Department had also advised that the question of the adequacy of payment for the purchase of the land should not be reopened so long after the event.¹⁷⁹ Indeed, counsel for the Crown (Mr Prendeville) submitted that no question of law was involved, 'because such claims as these were all statute barred long ago'. MacCormick replied:

That, of course, is obvious; these petitions have no legal claim on the Crown. Whatever the Crown does in the matter is a recognition of some moral right or an act of grace. There have been a number of similar cases, however, which have been statute-barred, but the Crown has not allowed that to stand in the way. That is not a matter for this Court. It will be a matter for Parliament.¹⁸⁰

Very little information appears to have been submitted to the commission on the question of price. MacCormick remarked, 'I am not in a position to judge as to the adequacy of the consideration given.'¹⁸¹ He continued:

Looking back from the present time it would appear that the Natives made very bad bargains. Had the transactions been subject to judicial review it is unlikely that they would have been approved, at all events without modification. In that respect the transactions are similar to many other early purchases made by the Crown from the Natives. If these now are under consideration are to be challenged now on grounds of insufficient consideration, the same argument must be applied to practically all of the early purchases.

176. Ibid

177. Under-Secretary, Native Department, 'Memorandum for the Native Minister re Hauraki Gold-Fields Petitions', 11 November 1940, MA1 19/1/93 (doc A9(a), pp 391-393)

178. MacCormick, 'The Native Purposes Act, 1935', 28 June 1940, AJHR, 1940, G-6A, p7

179. 'Hauraki Goldfields Petitions: Notes Taken by Shepherd at Conference', 22 January 1938, MA1 19/1/193 (Anderson, p 73)

180. Document s8(c), p 83

181. MacCormick, 'The Native Purposes Act, 1935', 28 June 1940, AJHR, 1940, G-6A, p7

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MacCormick shrank from that implication. However, he continued:

But these present ones are in a special position . . . owing to the existence of the prior deeds of cession.

Although the Crown, in purchasing the land and receiving revenues due from the cession, was exercising 'its unfettered prerogative rights', and although until the investigation he was heading there had been no protest, a similar transaction between subjects of the Crown would not, in MacCormick's view, withstand judicial scrutiny '*unless it was shown that the Natives were competently advised of the whole facts*' (emphasis added). MacCormick acknowledged that there was doubt that the Maori vendors of goldfields lands had been fully advised and were aware that their right to receive goldfield revenues would be extinguished by the sale of the land. This awareness was almost certainly lacking in the case of the many who signed vouchers, individually and piecemeal, charged against their undefined interests within vast areas of Ohinemuru, Waikawau, Moehau, and Te Aroha.

MacCormick therefore concluded:

That in view of the very large sums of money received by the Crown by reason of its purchase of the freehold previously ceded to it for mining purposes, and the doubt whether the Natives fully appreciated the effect of their sales, and the further doubt as to the proper distribution to the Natives of the moneys they were entitled to, the advisers of the Crown might well consider favourably the making of an *ex gratia* payment for the benefit of the Natives whom the petitioners represent.

MacCormick then qualified his own argument:

When the purchases were made about sixty years ago [dating back from 1940] the future of gold-mining was in doubt. A reference to Treasury statements . . . shows a heavy drop in receipts after 1870 which continued until 1896. Therefore the purchases, if considered at the time they were entered into, would not appear such bad bargains as they appear in the light of after events.

On this basis, MacCormick recommended an *ex gratia* payment in the order of £30,000 to £40,000. He questioned, however, if the time was opportune for such a grant. (The Second World War had just begun.¹⁸²)

(4) The continued deferral

Not only was the recommended payment deferred, but Dr Anderson shows that several senior officials and Ministers did not accept the rationale for MacCormick's recommendation. F Langstone, the Minister for Native Affairs, minuted the file in favour of deferral and

182. MacCormick, 'The Native Purposes Act, 1935', 28 June 1940, AJHR, 1940, G-6A, p 8

added 'In fact . . . the Natives are indebted to the Crown'. Dr Anderson suggests that this view may have been formed in response to the Crown waiver of part of the debt on Ohinemuri in 1882.¹⁸³ In 1946, other reasons for non-payment were suggested by GP Shepherd, the Under-Secretary for Native Affairs: that MacCormick's recommendation was not 'referable to any certain loss or definite injustice suffered' because the land had been purchased not confiscated; that MacCormick had found insufficient evidence to show any illegal action by the Crown; that Maori had made no complaint in the past about revenues stopping when the freehold was sold; and that the door might be opened to similar claims based on the inequity of early contracts. HGR Mason, the Minister for Native Affairs, accepted Shepherd's advice and TT Ropiha, Shepherd's successor, held similar views.¹⁸⁴

Hauraki Maori continued to press for the recommended payment, however, and a delegation of their leaders won sympathy from Prime Minister Peter Fraser, that the payment be made, either as a lump sum or by annual instalments, for the general benefit of the Hauraki tribes. A second meeting was held in 1949, but the Labour Government fell before Cabinet approval could be given. Had the payment been made, as others were by the Labour Government of the period, a multi-iwi trust board would have probably been set up along the lines of the Te Arawa and Tainui boards, to receive and administer the fund.

EH Corbett, the Minister of Maori Affairs in the first National Government, accepted that Fraser's statement to the Hauraki delegation 'really constitutes an understanding which could hardly be disregarded now', although he stressed that 'whatever would be done would be above the legal rights'.¹⁸⁵ Treasury advice, however, was against any *ex gratia* payment, on the grounds that it would create a dangerous precedent for claims against other nineteenth century transactions which in retrospect seemed inequitable.

Nevertheless, renewed Hauraki petitions secured a favourable recommendation from the Maori Affairs Committee in 1959 and Prime Minister Walter Nash accepted the advice of J K Hunn, the Acting Secretary for Maori Affairs, that MacCormick's recommendations placed a moral obligation on the Crown and that the judge had not ruled categorically that the grievance was unfounded. Again, the Labour Government fell before further action could be taken, but in 1961 the incoming National Minister, JR Hanan, recommended payment. However, after further Treasury protest about the danger of setting precedents, the payment was not made. In 1967, the Holyoake Government referred the issue for investigation by Ivor Prichard (a retired chief judge of the Maori Land Court). Like Treasury, Prichard took the view that if the Government set out to redress issues of adequacy of consideration, fairness of land transactions, and Maori understandings of them, the effect would be to 'reopen the majority of sales throughout New Zealand'. Prichard also assumed that the onus was upon Maori to prove wrong-doing by the Crown, and that many years had elapsed between their

183. Under-Secretary for Native Affairs to Native Minister, 11 November 1940 (doc A9, p169)

184. Document A9, p169

185. Corbett, memorandum, 6 December 1950, MA1 19/1/193 (doc A9, p170)

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dealings with the Crown over land subject to mining cession agreements or purchases of goldfield lands, and the time when they complained about them.¹⁸⁶ After Prichard's report, MacCormick's recommendations were shelved until they came before this inquiry.

(5) *The Crown's concession*

In their opening statement on gold issues in these proceedings, Crown counsel conceded that the Crown ought to have acted on the recommendations of the MacCormick commission. However, in their closing submissions Crown counsel noted that, in respect of the bad Crown–Maori bargains, 'the concession was made in the light of two critical findings by the Commission':

The Commission noted, however, that when the purchases were made the future of gold-mining was in doubt – there was a heavy drop in goldfield revenues after 1870 which continued until 1896 . . . and the purchases 'if considered at the time they were entered into, would not appear such bad bargains as they appear in the light of after events'.

Concerning the recommended £30,000 to 40,000 ex gratia payment Crown counsel continued:

The Crown rejects the submission made by the claimants that the evidence of Mr Michael Copeland, Consulting Economist, who gave a present day value of the sum recommended by MacCormick, provides some sort of benchmark for redress. The contention that the Crown 'does not appear to oppose' a full and immediate implementation of the MacCormick findings is not correct. Factors to be taken into account when determining the nature and extent of redress provided in settlement is more appropriately addressed in settlement negotiations.¹⁸⁷

Crown counsel also challenged two particular sets of criticisms brought by claimants regarding the MacCormick commission:

- ▶ The Wai 100 claimants are critical of the terms of reference of the MacCormick commission and the lack of access at the time by Hauraki Maori to Government files on goldfields administration. But Crown counsel suggests that these criticisms are 'of a rather technical kind'. MacCormick dealt with the essence of the Hauraki claims and recommended substantial compensation.
- ▶ Belgrave et al, for the Marutuahu claimants, have suggested that the MacCormick commission found that the Crown failed to 'administer the agreements in such a way as to ensure that the terms were adhered to in a readily verifiable manner'.¹⁸⁸ However, Crown counsel submits that these witnesses appear not to have had regard to Dr Battersby's

186. Document A9, pp 171–172

187. Document AA1, pp 27–28

188. Document v1, p 178

evidence on the Native Affairs Committee's report on the Hauraki petitions of 1876–77, which found that the accounts had been regularly kept and that no unreasonable delays had occurred in paying moneys owed to Maori.¹⁸⁹

(6) Tribunal comment

We comment on these issues in reverse order:

- ▶ Dr Battersby's comments on the criticism of Belgrave et al are confined to a very limited period and place – essentially to the early years of distribution of the Thames revenue. We accept that it is difficult now, without much fuller information before us, to go behind the findings of the Native Affairs Committee on that matter, but we do note that the committee's report also led to the appointment of an official, paid for by Maori themselves, with authority to scrutinise the account, if only to reassure them that the revenues were being properly and efficiently collected and distributed. We also observe that there was evidence in later decades of inefficiency in administrative matters; this was reported by MacCormick and partly underlay his recommendation. The lack of adequate records meant that MacCormick himself could not be sure of what was due; only that the system left room for serious concern. We see no reason to qualify his finding on inefficiency, but also observe that there were many problems for officials to overcome, including constant shifts in the mining population, fluctuating revenues, uncertainty about the relative interests of customary right-owners including the relative rights of rangatira and their kin, intestate succession and a mobile population. But that does not negate MacCormick's findings nor the criticism by Belgrave et al.
- ▶ Criticism of the terms of reference of the MacCormick commission, and access to documents for Hauraki Maori owe much to hindsight. In its own time, the scope of the commission was praiseworthy, not blameworthy. By today's standards, the access to official information is no doubt limited, but it would have been unusual in 1939–40 to open all official records. The constraints of those times are the main reason why the inquiries of the Waitangi Tribunal are wide-ranging; it is incumbent on us to take a wider view than MacCormick, based upon the Treaty.
- ▶ MacCormick considered the effects in law and equity of the goldfield agreements. He made his findings and recommendations on the basis of moral obligation, not of actual illegality on the part of the Crown. The fact that the Treaty had no legal force in 1939–40 may have made little difference to MacCormick's view of the agreements. It is clear that he thought that advantage was being taken of Maori inexperience and lack of sound advice when it came to selling the freehold rather than persisting with the gold-mining leases, and he doubted whether Maori vendors 'clearly realised' that sale of the land would necessarily lead to a loss of mining revenue.

189. Document AA1, p 28

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- In the light of the historical evidence which we have surveyed in considerable detail in previous chapters we would add the following:
- There is evidence of some confusion among Hauraki Maori as to the effects on the mining revenues of selling the freehold, especially in the 1870s. This is not surprising; there was also confusion in the minds of private settlers, Ministers and Crown officials, as evidenced by the conflicting opinions of law officers and other officials between 1876 and 1882 on the effect of the private purchase of land (see sec 13.2.4). This confusion also derived from uncertainty about the boundaries of land sold to the Crown and land retained, land still being mined and yielding revenue and land no longer doing so, together with the fact that many Maori were owners in a number of blocks. Such factors would have blurred the effect of the sale of land on revenues. The parliamentary debates of the 1890s also show that even the Minister of Mines at the time, Cadman, had only recently firmed up his views on the Crown's prerogative rights vis-à-vis private owners. If Maori were confused about rights related to gold mining they were not alone.
 - Maori were clearly concerned about the falling off of goldfield revenues and petitioned the Government about the reductions in entitlements made by the 1886–87 legislation, as well as on-going problems with collection and distribution. By the 1890s, we noted a tendency among some owners to sell their interests for a lump sum of cash, rather than bother with the vagaries of collection and distribution of revenue. By that time (in contrast to the earlier situation of the many owners of Ohinemuri, Te Aroha, or Piako), there is strong evidence that the owners of the smaller blocks which *had* gone through the court knew they would be relinquishing what annual revenue there was when they sold their shares. In Kuaotunu many weighed the options of selling to the Crown or to private owners, or ceding mining rights to the Crown. The fact that some owners asked very high prices when mining was flourishing, and only dropped their price when mining revenues waned, shows some awareness at least of the relative returns from renting and sale. Bargains in this later climate of awareness could not have been wholly bad.
 - This does not fully address the issue of *anticipated* revenues from gold. We would respectfully differ from the implication of MacCormick's remark (highlighted by Crown counsel) that 'there was a heavy drop in goldfield revenues after 1870 which continued until 1896'. By 1896, the cyanide process was tested and new investment was flowing into the Ohinemuri fields in reasonable anticipation of significant returns. The 1890s were precisely the time when the Crown was purchasing almost all auriferous land offered, provided it could be got for no more than about £2 an acre. But Maori were in no position to enter upon the far-reaching fiscal strategies that private investors or the Crown could make. In many cases, especially in

the Waihi district, Maori should have been advised to hang onto their land, in the hope of better returns.

- The switch from mining agreements to sale of the freehold does put the goldfield land in a different category from the purchase of the freehold of other blocks. Under the mining agreements, the Crown had a strong hold on the land already and if competing private purchasers appeared, the Crown usually moved quickly to purchase ahead of them, often by using its statutory power to declare a pre-emptive right. Of course, this is only a sub-category of the whole question of the Crown acquiring most of New Zealand by means that were not wholly equitable or consistent with Treaty principles. We discuss this question in chapter 17. Meanwhile, we note with considerable interest the apprehension of Treasury officials and Ministers after 1945 that acceptance of MacCormick's recommendations in Hauraki would set a precedent for much of the country, and Ivor Prichard's admission that the effect would be to 'reopen the majority of sales throughout New Zealand'. If the majority of purchases from Maori were inequitable, then the sooner that is acknowledged the better.
- ▶ We note that Hauraki leaders about 1935 requested that the final, belated payment of revenues due (then about £1030), should be held as a fund for the benefit of all, rather than be dissipated in individual payments and that it be administered by a tribal body to be established by statute. In 1938, the Government gave effect to this request under section 17 of the Native Purposes Act, which authorised the setting up of a committee to expend the money on the advancement of the interests and general welfare of Ngati Maru, Ngati Whanaunga, Ngati Tamatera, and associated tribes.¹⁹⁰ MacCormick's recommendation, and Prime Minister Peter Fraser's meeting with a delegation of Hauraki chiefs, also appeared to have that wider intention in view. We are sympathetic to that approach.
- ▶ We also consider that it is highly likely that, if it was not for the accident of political changes and determined opposition from Treasury, the payment would have long since been made. Unless the rationale of MacCormick's recommendation is to be rejected, and the views of successive Ministers set aside as erroneous (as they were by Prichard during the Holyoake Government), we are of the view that Hauraki iwi have an added grievance in the fact of non-payment of the grant recommended by MacCormick.
- ▶ As to the amount that implementation of the MacCormick recommendations would represent today we note the calculations of Michael Copeland, the consulting economist who gave evidence for the Wai 289 claimants.¹⁹¹ We note that MacCormick himself

190. Document A9, pp164–165

191. Document M38, item 6

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doubted that the payment should be paid during wartime, but it would not be unreasonable to date it from 1946 or (given Peter Fraser's acceptance of it in principle) not later than 1949–50. Other settlements by the Crown with Maori claimants in that period were subsequently reviewed in the light of the unexpectedly high levels of inflation in the 1970s and later.

- ▶ Ultimately, however, we are sceptical about the validity of separating out the issue of purchase of land subject to mining agreements from other Treaty breaches relating to gold mining, or from the excessive Crown purchasing which has been such a marked feature of Hauraki history, and we are sympathetic to the Crown's view that the nature and extent of redress for Treaty breaches related to gold mining are for negotiation along with other aspects of the Hauraki claims.

CHAPTER 14

TIMBER

14.1 INTRODUCTION

14.1.1 Early development of the Hauraki timber industry

Timber – especially kauri timber – was among the most commercially valuable resources in Hauraki, and timber provided one of the district's leading industries throughout the nineteenth century and into the twentieth. Kauri was nearly as important as gold to the fortunes of the Coromandel Peninsula region and its peoples. Whether Maori were able to exercise adequate control over – and receive equitable returns from – the commercial exploitation of timber on their land, are major issues in these proceedings.

In chapter 3, we have described the early timber trade, along with flax, in attracting European settlement to the district and providing an arena for early Maori engagement with the commercial economy. Between 1790 and 1810, a succession of Royal Navy and merchant ships came to Hauraki from Sydney to cut timber for use as spars. In 1820, came the store-ship *HMS Coromandel*, after which the Coromandel Harbour and Peninsula were renamed. Subsequently, entrepreneurs began to establish shore-based timber stations where consignments of sawn timber, firewood and spars awaited shipment, for merchant ships, or for the Admiralty which had begun to contract for their supply (see sec 3.1.1).

Perhaps the first timber station in Hauraki was established by the Sydney merchant Ranulph Dacre and John Skelton at Mercury Bay in 1830–31. Operations were abandoned after Dacre's schooner was lost at sea and the timber station burnt down by Maori, but Dacre then went into business with Gordon Browne at Mahurangi. In 1836, they returned to Whitianga (Mercury Bay) and erected a sawmill, reputedly the first in New Zealand. Another early timber trader in Hauraki was William Webster, who by the late 1830s had established trading stations at Waiau and on Waiheke Island. Webster's patron was Horeta Te Taniwha, who, when asked about cutting rights at Waiau, said 'Yes, go to Waiau and we will follow' (to cut and prepare the logs). Both Webster and Browne made transactions with Maori which they at least may have intended to yield them title to the land where their enterprises were situated. (The nature of these early land transactions, whether strictly tuku whenua or combined with aspects of European-style purchases, is discussed in section 3.2.)

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Other important pre-1840 transactions were George White's 1839 purchase at Tairua and the 1839 McCaskill–Martin purchase at Hikutaia, intended to support a timber mill.¹

In 1840, the British Crown assumed responsibility for regulating transactions in land and timber by article 2 of the Treaty, the Crown undertaking to protect Maori in the possession of their 'lands, forests, and fisheries' until such time as they wished to dispose of them to the Crown.² But many Maori did not want to be bound to deal only with the Crown. In practice, as the next section will show, they were not so bound and continued to transact timber privately in the 1840s with little interference from the Crown.

In the 1850s and 1860s, timber mills proliferated in Hauraki, with accompanying timber purchase agreements. Most of these agreements, entered into while the 1846 ordinance was in force, were technically illegal. The ordinance was repealed by the Native Lands Act 1865. Post-1865, the millers' timber purchase agreements usually covered lands not yet subject to court awards, and were statutorily void under the Native Lands Acts of 1865 and 1867. Millers could overcome this problem by arranging with the Maori vendors of timber to have their lands surveyed and investigated by the court, and then to grant them (the millers) legal timber leases with terms similar to those of the earlier agreements. However, most millers had not perfected their timber purchases in this way before James Mackay was commissioned, under the Immigration and Public Works Act 1871, to purchase land on the Coromandel Peninsula on behalf of the Crown. Fortunately for these millers, the Government agreed to Mackay's proposal that the Crown purchase the land subject to established timber agreements, and afforded them time to complete legal leases before Mackay completed Crown purchases (at a discount because of the alienation of the timber-cutting rights).

This chapter discusses the development of the timber industry in Hauraki after 1840 and assesses how well the Crown discharged its Treaty obligation to protect Maori rights to their forests. In our view, article 2 of the Treaty means that even when pre-emption was effectively waived the Crown retained an ongoing responsibility to ensure that Maori sold their lands or forests only with full understanding and consent and on equitable terms.

14.1.2 Claimant submissions

The Wai 100 statement of claim lists below various causes of action in relation to timber and timber leases (see also sec 14.5.1):

1. The failure of the Crown to prevent the exploitation of Hauraki [iwi resources – ie, timber] by private third parties and the tacit endorsement by the Crown of illegal leases of large

1. Paul Monin, *This Is My Place: Hauraki Contested, 1769–1875* (Wellington: Bridget Williams Books, 2001), pp94–97

2. We recognise that the Treaty stipulates only that the Crown was to have the pre-emptive right of purchase of 'lands (wenua)', but we understand this to mean 'real property', which in common law includes rights in standing timber.

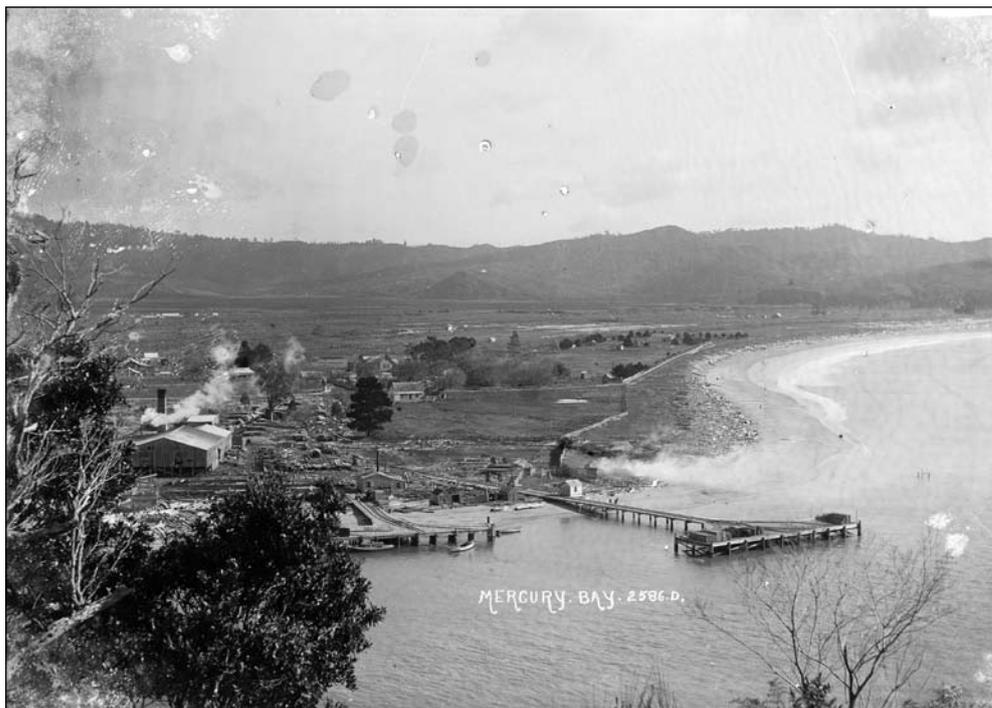


Figure 66: Whitianga, Mercury Bay, Coromandel Peninsula, circa 1911. Photograph by William Price. Reproduced courtesy of the Alexander Turnbull Library, Wellington, William Price collection (G-678-½).

tracts of land on the north-eastern side of the Coromandel Peninsula by private saw-milling companies, such leases giving extensive cutting and water rights for significant periods of time for sums far below the market value of the timber resource.

2. The use of existing illegal leases by the Crown in land purchase negotiations with Hauraki as a means of reducing the purchase price of the land.
3. The pre-emptive arrangement of timber leases by individuals in collusion with the Land Purchase Department immediately prior to purchase with the effect of reducing the purchase price which might be payable by the Crown.³

(The use of the term 'illegal leases' by counsel for Wai 100 appears to embrace both the technically illegal agreements of the early 1860s and the legally void agreements of the later 1860s.)

Several other groups who lodged claims separately from or in addition to those of the HMTB, have focused upon the sale and purchase of forests and forested lands, notably Tairua. These include Hariata Gordon for Ngati Paoa (Wai 72), Ngati Hei (Wai 110), Ngati Porou ki Harataunga (Wai 289, Wai 792, and Wai 866), the Mangakahia whanau (Wai 475), Ngati Hikairo (Wai 464 and Wai 661), Reremoana Jones on behalf of the descendants of

3. Paper 2.576, p 44

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Hori Kerei Tuokioki, one of the five original grantees of Tairua and Te Karo (Wai 694), the descendants of Peneamene Tanui (Wai 705), the Purungatawa Whanau Trust (Wai 754), and Patukirikiri (Wai 811). Many of these groups were and are interrelated, and their customary interests mingled in the catchment areas of eastward-flowing rivers such as the Tairua, and around Mercury Bay and Whangapoua. This intermingling of interests is detailed in the claimants' various research reports.

14.2 THE HAURAKI TIMBER INDUSTRY, 1840–70

14.2.1 The early 1840s

As described in chapter 3, pre-emption was established by means of Crown proclamations in January 1840, by the Treaty, and by the Land Claims Ordinances of 1840 and 1841, which made early private purchases and leases null and void unless investigated by the Land Claims Commission. These measures did not specifically address such land uses as pasturing live stock or cutting timber and flax, and these activities continued after 1840 on the strength of pre-1840 transactions or new agreements between entrepreneurs and Maori. By 1840, the Surveyor of the Navy had become concerned by the rapid rate of destruction of the accessible kauri forests, especially timber fit for use as masts by the Royal Navy, and persuaded the Lords of the Admiralty that steps should be taken to preserve kauri for Naval purposes. Accordingly, Captain WC Symonds was appointed conservator of kauri forests, and Lieutenant-Governor Hobson was instructed to try to stop the waste.

Hobson responded by issuing a proclamation, published in the *New Zealand Government Gazette* of 3 November 1841. Its wording assumed that pre-1840 land transactions extinguished Maori customary title, but created a title in the Crown rather than the purchaser. It reflected the then common expectation that the 'surplus lands' policy would net the Crown much land subject to 'old land claims', since all lands purchased from Maori had 'become vested in, and are now the property of the Crown'. It cited a British Act of Parliament which provided that it was a felony to 'steal' trees of a certain value, and gave notice 'that all persons found stealing, cutting, or destroying Koudi Pine [*sic*]', would be prosecuted.⁴ This proclamation was not, and probably could not have been actively enforced, and the Crown's claim over kauri forests on Maori lands subject to old land claims appears to have been dropped after the deaths of Symonds and Hobson in 1841 and 1842 respectively.

Despite this episode, Crown officials in New Zealand wanted to encourage the timber industry. Hobson's proclamation had led McCaskill to consider abandoning his plans to erect a sawmill at Hikutaia, but he proceeded, Hobson apparently having given him to

4. Willoughby Shortland, 30 October 1841, *New Zealand Gazette*, 1841, no 16, p 97

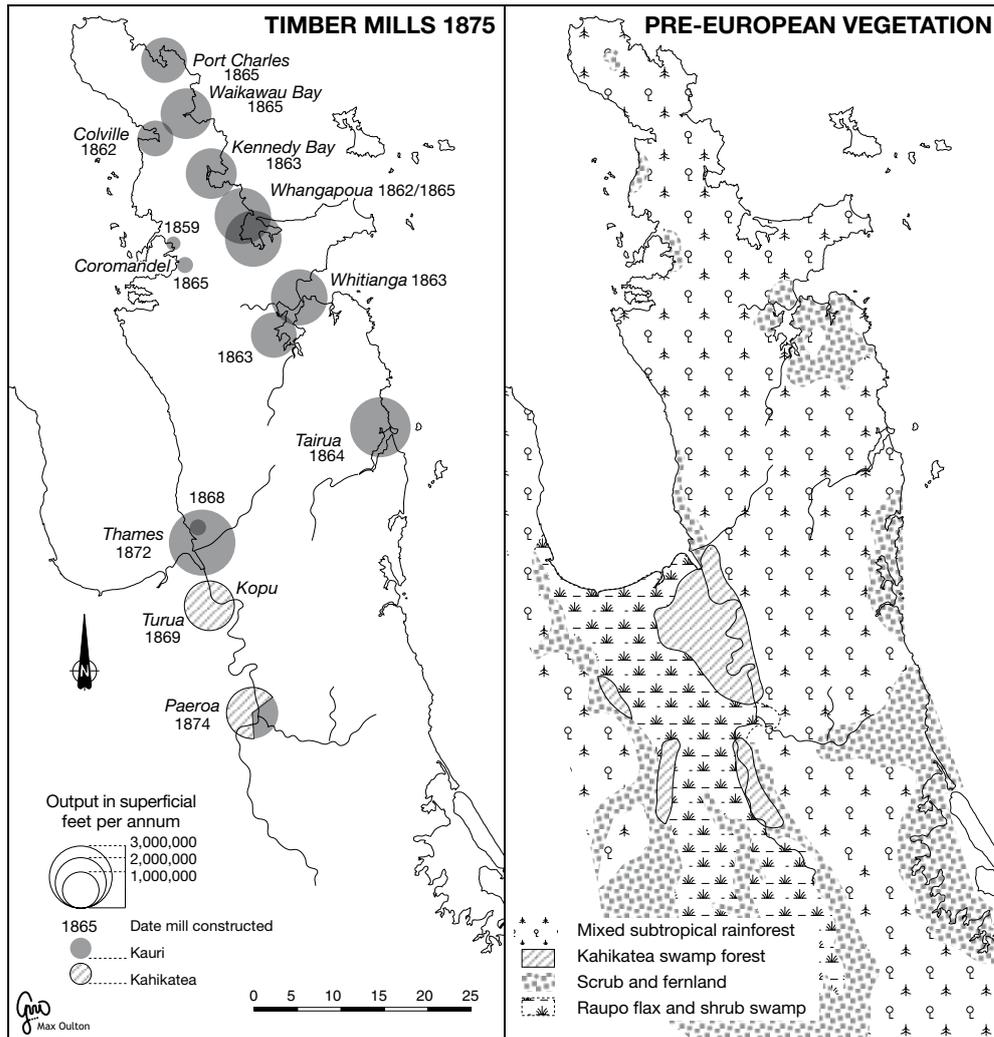


Figure 67: Exploitation of Coromandel forests. Source: M McCaskill, 1949.

understand that if he did so his land claim would be considered favourably.⁵ As discussed in chapter 3, Governor FitzRoy ultimately approved grants involving timber cutting totalling 10,000 acres to Martin and McCaskill at Hikutaia (see sec 3.10.1), Dacre's grant of 3580 acres at Mercury Bay, Webster's grants at Coromandel and Waiheke, and Willis's grant (derivative from White) of 1797 acres at Tairua.

Crown encouragement of timber-cutting ventures was not, however, a guarantee of financial success in the 1840s. Local demand for timber was not high. Overseas trade was circumscribed by high transport costs and the difficulty of meeting Admiralty spar specifications.

5. See Michael Roche's account of the 1840-42 period in *History of New Zealand Forestry* (Wellington: New Zealand Forestry Corporation and GP Books, 1990), ch1, specifically the account of McGaskill's partner Samuel Martin: pp 32-33, 38-39.

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Wage costs for European sawyers were high, and bringing kauri out of the bush to ships was labour intensive, involving large parties of Maori, who, by the 1840s, had come to expect to be paid individually. Dacre and Browne's expensive sawmill at Mercury Bay ceased operating about 1841; Webster, the most important timber trader in the Hauraki region in 1840, had over-reached himself and about 1846 fled New Zealand to escape his creditors.

In the 1840s, European timber cutters began to move into the Whangapoua area. The situation was complicated both by the intersecting hapu interests in the area and by the fact that tangata whenua were still returning to the area which they had left during the Nga Puhi incursions. About 1846, McCormack and George White came to the area probably at the invitation of the Ngati Hei chief, Te Ngarahu, whom they had met at Coromandel. They bought some standing timber from him at Waitekuri and more from Paora Matutaera of Te Patukirikiri at Opitonui. But Riria Poau of the Mangakahia whanau (of Ngati Pare hapu of Ngati Huarere) also claimed interests in Opitonui and later both she and Paora Matutaera considered the millers' payments inadequate and refused to let felled trees to be moved.⁶

14.2.2 The Native Land Purchase Ordinance 1846

Under the Native Land Purchase Ordinance 1846, the Government could, *at its discretion*, instigate summary proceedings against any person who purchased or agreed to purchase any estate or interest in land from Maori, including mining rights, grazing rights, and timber-cutting rights, or who used or occupied Maori land without a licence for the purpose from the Government; upon conviction a fine of between £5 and £100 would be payable (see secs 3.6–3.8).

The ordinance was intended to introduce a system of licensed use and occupation of Maori land. Indeed, a number of applications for licences were approved during the year following its passage. Two of these concerned Hauraki timber lands: a certain Merrick was granted a licence for the purpose of cutting timber on Waiheke Island, for a fee of £5; Messrs Walker, Bolton, and Nicholas were granted a licence to fell 300 trees at Coromandel 'in completion of [an] agreement with the Chief Paora Te Rutu [*sic*] for [the] purchase of a vessel'; the Crown did not charge a fee.⁷

Although regulations were put into effect for the licensing of timber-cutting on Crown land, the scheme was soon abandoned.⁸ Instead, under pressure from London to acquire more land, Grey turned his attention to large-scale Crown purchasing, and avoided licensing

6. Document K1, pp 9–12

7. See 'A Return of All Applications for Licences to Occupy Government Land or Native Lands', *New Zealand Government Gazette of New Ulster*, vol 7, no 23, pp 125–126

8. However, because gold-mining legislation was not applicable to Maori land at the time, the Native Land Purchase Ordinance was resorted to as authority for the issuing of miner's rights when the Coromandel goldfield was proclaimed in 1862.

the use of Maori land for timber cutting or grazing in case doing so would hinder the purchase of the freehold.

The Crown rarely if ever prosecuted those who occupied Maori land *without* a licence by private arrangement. Whereas gold was regulated from its first discovery at Coromandel,⁹ the commercial exploitation of the Hauraki timber industry was not closely monitored.

14.2.3 Increasingly rapid expansion in the 1850s and 1860s

Timber traders such as Dacre, Browne, McCaskill, and Webster having all encountered serious setbacks, for a number of years Hauraki Maori themselves supplied timber to the market. During the 1840s and early 1850s, they frequently brought firewood and other timber to Auckland, along with other produce, in canoes and newly acquired sailing vessels.

However, growing demand for construction timber in Auckland, and the surge in trans-Tasman trade brought on by the Australian gold rushes, stimulated investment in the Hauraki timber industry in the 1850s. By then, most of the forested land on Waiheke Island and elsewhere in the Hauraki Gulf had passed out of Maori hands via private and Crown land purchases, so most new development occurred chiefly in the Coromandel Harbour area and in Kaipara. Mathew Roe had a sawmill erected on the Waiau River in 1853 and John Gibbon possibly had a mill erected at Kikowhakerere about that time.¹⁰ By 1859, a sawmill had been erected by the Ring brothers on the Karaka Stream (Driving Creek).

Te Patukirikiri, Ngati Tamatera, and other Coromandel Maori appear to have benefited financially from timber sales in the 1850s. Land purchase commissioner Preece wrote to Donald McLean in 1857 appealing for authority to offer higher prices for land; Maori were reluctant to sell, partly out of anti land-selling sentiments, but also because they could earn a good income by selling kauri trees for 10 shillings to 25 shillings each. For example, Preece was able to purchase the Awakanae block but only after much of the kauri on it had been sold; the purchase was subject to the reservation of 250 kauri trees that had been sold privately.

Domestic demand for timber rose sharply in the early 1860s, fuelled by an increased settler population and burgeoning economic activity. Between 1862 and 1865, no fewer than 10 new sawmills were erected on the Coromandel Peninsula from Waikawau (South) to Tairua. Whereas all the earlier Hauraki mills had been water-driven, these new timber mills were steam-powered and involved large capital investment. To ensure a continuous supply, most agreements with Maori right-owners purchased the kauri for a lump sum, or all the timber

9. One of the few times the prohibitive provisions of the ordinance were invoked was when gold was discovered on Maori land on the South Island at Taitapu in 1862.

10. There is some evidence that he did. In 1853, Gibbon was given permission of sorts to set up a timber mill at Mercury Bay, as mentioned later in this section, but perhaps he went to Kikowhakerere instead. Heaphy's 1861 sketch map of the Coromandel goldfields shows a mill at Kikowhakerere and Mackay made mention in 1872 of one Gibbon having but recently removed his mill from there.

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trees on large areas of forest land. They included cutting rights, and the right to occupy a mill site for an annual rental. Some witnesses have referred to these agreements as ‘timber leases’ but this term is better kept for the later legal leases; we refer to the earlier transactions as ‘timber purchase agreements’ or ‘timber agreements.’

Dr Anderson has suggested that the move from purchasing a specified number of trees to purchasing whole areas of forest ‘represented a profound shift for Maori on the peninsula.’¹¹ This may be overstating the case. First, trees were not always sold in small lots; the practice of the time was for settlers to put their mark on and buy many trees at once. Secondly, there were limited numbers of extractable trees; forest lands had groves of kauri scattered through them, only some of which would have been near sizeable streams and therefore accessible without prohibitive cost. (Nevertheless, we note that, after completing a timber agreement over Opitonui – 8837 acres – in 1862, Thomas Craig had felled no fewer than 2500 logs by 1867.) In any case, the sheer number of new mills and accompanying timber purchases meant that by the mid-1860s Coromandel Peninsula Maori had agreed to sell the most commercially valuable part of their timber resources. It is likely that the passage of the Native Lands Act 1862 played a part in this rapid increase in the number of mills, by opening up to millers the prospect of buying or leasing the lands and forests of which they had gained possession, once Maori had secured a transactable title from the Native Land Court.

The increased number of mills also resulted in more widespread clearing of forests, greater use of streams to float logs, more building of dams, tramways, and other infrastructure. Although millers continued to employ Maori, European timber workers were also increasingly involved.¹² These developments led to social and environmental effects explored in parts v and vii. The kauri timber industry did not reach peak production until the 1880s or 1890s.

The Native Land Purchase Ordinance remained in force until 1865. Counsel for the Crown have acknowledged that, although many timber transactions were technically in breach of it, the Crown ‘did not actively prevent Maori from dealing with their timber, gum, flax and other resources with third parties’, though, they submitted, officials ‘did investigate complaints when so requested by Maori.’¹³ In the course of the Tairua investigation, which we discuss below, McLean agreed that illegal timber purchasing ‘had been permitted since the foundation of the colony to the present day.’¹⁴ On another occasion, Mackay commented: ‘The Government of the colony were never in a position to strictly enforce its provisions, because the voices of the settlers and Natives were against it.’¹⁵

There are several examples of Crown officials actively facilitating extra-legal timber purchases:

11. Document A8, p 240

12. Monin, pp 164, 167, 207, 223

13. Document AA1, p 203

14. James Mackay, ‘Examination by Tairua Investigation Committee’, 12 August 1875, AJHR, 1875, 1-1, pp 5, 11

15. Mackay to Colonial Secretary (memorandum), 7 July 1875, AJHR, 1875, C-3, p 4

- ▶ In 1853, John Gibbon requested permission from the Government to purchase or occupy a piece of land situated at Mercury Bay. Gibbon was advised that he could not purchase the land without committing a breach of the law but that ‘With respect to arrangements with the Natives for the occupation of the land or the cutting of timber on it, the Govt will not interfere.’¹⁶
- ▶ When the Tokatea block was ceded for gold-mining in 1862, Governor Grey agreed that the kauri purchased by the Ring brothers on the Tokatea and Kapanga blocks would be reserved for the Maori owners, together with the right to use the water of the Kapanga Stream (Driving Creek) for milling purposes. In 1863, in response to a claim by the Ring brothers for loss of amenity and damage done by miners silting up the stream, Superintendent Graham, representing the Government, agreed to protect the Rings’ rights to kauri and to pay them £350 for injuries sustained.¹⁷
- ▶ According to Mackay, when Dr Shortland was acting as Native Secretary, ‘Maoris frequently came to the Native Office about sales of kauri timber’, and in 1864 Shortland drew up the agreement for the Seccombe brothers’ purchase of Tairua timber.

Mackay reported that, ‘In order to preserve the peace of the country, the Native Department were frequently compelled, although with considerable reluctance, to take part in these transactions.’¹⁸

Thomas Craig’s first application to purchase timber at Cabbage Bay was declined by the Native Office as contravening the Native Land Purchase Ordinance, but, ‘on a further application being made by the Native Hata Pata Ngahi [*sic*] to be allowed to sell the timber’, Native Minister Mantell was given to understand by the Attorney-General and FD Fenton (then assistant law officer) that it was ‘still possible to leave the Ordinance inoperative during the good behaviour of the person [concerned]’, and, that the effect of the Government’s promise not to appoint a person to lay an information under the ordinance was ‘precisely the same as a revocable licence.’¹⁹ Mantell gave his consent to Craig, and although Craig purchased timber at Whangapoua, not Cabbage Bay, Mantell regarded his consent as warranting negotiations ‘on the same tenure in any part of that locality.’²⁰ There was, then, a substantial measure of formal Crown approval for the transaction.

Early in 1862, Craig purchased the timber on Waitekuri (Whangapoua), later found to include 4245 acres, from various rangatira – Te Arakuri (hapu unknown), Pita Taurua of Te Patukirikiri, and Mohi Mangakahia of Ngati Pare and other hapu – for £700. He rented a mill site at Opera, Whangapoua Harbour, from Mohi for £10 per annum. Between February and June 1862, Craig negotiated the purchase of the kauri on Optonui (8837 acres) from

16. LS1853/1861 (doc N9, p35). There is no evidence that Gibbon went ahead with setting up his timber mill at Mercury Bay, but, as mentioned, he may have gone to Kikowhakerere instead.

17. See Ring to Mackay, 6 July 1875; Graham to Ring, 4 March 1863, AJHR, 1875, C-3, pp 8–9

18. Mackay to Colonial Secretary (memorandum), 7 July 1875, AJHR, 1875, C-3, p 4

19. Mantell, ‘Minutes of Evidence on the Petition of Thomas Craig’, AJHR, 1871, H-15, p 5

20. *Ibid*

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Paora Matutaera and Te Hopihana of Te Patukirikiri and Riria Poau (Mohi's mother) for £350. These leaders warned Craig against recognising renewed claims by Ngati Tamatera, but he paid £20 of the purchase money to the daughter of Kiharahi in acknowledgment of a small Ngati Tamatera interest in the land.²¹ Riria Poau was unhappy at the leading role taken by the Patukirikiri chiefs and by the distribution of the payments for the Opitonui trees. She denied Craig access and three times cut the booms he erected to collect and drive the logs. Craig mollified her for a time by extra payments and purchased more trees from her son, Mohi Mangakahia, at Hikutawatawa (1650 acres) for £350 in 1864, but later Mohi stated that Craig's payments were not completed.²² It is apparent that the parties to these transactions had different understandings, and, in the absence of a full process for witnessing and recording agreements, defining the land to which they referred, and the parties to them, there was potential for confusion and disputes.

Details of few other timber purchase agreements of the late 1850s and early 1860s have emerged in evidence. Seccombe's 1864 agreement at Tairua, negotiated by one Charles Tothill, involved a single payment of £500, plus a rent of £12 per annum for a 50-acre mill site. It was for 'all the Kauri timber on the lands of Tikaokao and Miriama' (of Ngati Hei).²³ The Native Land Court subsequently awarded the whole of the 36,000-acre Tairua block to Miriama Pehi, principal claimant, and five others.²⁴ Although the timber agreements made in this period often involved written and witnessed deeds of purchase they were not formally recorded or registered in a Government registry.

More private timber deals were made in the Thames area after the opening of the goldfield. The Hauraki Saw Mill Company, in which W H Taipari was a shareholder, erected a mill on the edge of the Hauraki Plains at Turua, sourcing its timber at least partly from Maori land, and by 1872 sales of timber had taken place on the Opango block (on the upper Kauaeranga River), at Otuturo, at Tararu on the Otunui block, on the banks of the Mangakirikiri and Mangarehu Streams, on the Whakairi and Kirikiri blocks. Many of these transactions concerned lands within the proclaimed boundaries of the Thames goldfield (although not usually where mining was actually taking place), despite the fact that the goldfield agreement had specified that Maori were to be paid 25 shillings for each kauri taken from their goldfield lands. For the moment, we will defer discussion of the issue of whether private timber agreements and leases permitted by the Crown in relation to forests on goldfield lands were in breach of this aspect of the agreements. This issue was raised by Harataunga Maori in a petition to the MacCormick inquiry in 1939, and is best discussed in connection with that inquiry.

21. Document K1, pp 13–16

22. *Ibid*, pp 16–17, 20–22

23. Document N4, pp 14–15

24. Document N9, p 71

14.2.4 Perfecting timber purchases under the Native Lands Acts

Private dealings over timber and other Maori resources ceased to be technically illegal when the Native Land Purchase Ordinance 1846 was repealed under the Native Lands Act 1865. But all Hauraki timber millers to that date still faced the difficulty that the Act and its successors stipulated that agreements in respect of Maori land not subject to court awards were void. Most, if not all, of the private timber agreements entered into in the Thames area between 1865 and 1872 were made in advance of court investigations and were therefore void.

Under the Native Land Act, the millers could acquire a legal estate in the forests covered by their former agreements by coming to an arrangement with the Maori right-owners with whom they had transacted. The latter were encouraged to take their land through the court, secure a certificate of title and conclude fresh, legal agreements with the millers in place of the old void agreements. Fresh *timber purchase* agreements as such appear to have been out of the question, because the legal regime did not yet provide for the purchase of the timber on Maori land separately from the land itself, but millers could perfect their old transactions by negotiating leases of the relevant forest *land*, these leases involving the grant to the millers, for a term of years, of the cutting rights to the timber they had earlier agreed to purchase.

Maori were not legally bound by any void timber purchase agreements into which they had entered, nor were they under any legal obligation to confirm them by granting a legal timber lease, as the miller Craig was to find to his cost at Whangapoua (see sec 14.4.1). As a rule, however, millers who had made unlawful agreements in the 1860s enjoyed interrupted access to the timber they had purchased, and later secured formal timber leases from the Maori owners they had previously dealt with.

This process was greatly expedited by the enactment of the Native Lands Act 1867. Section 33 of that Act authorised Maori to charge their lands with survey and title investigation costs, and section 34 provided that, after the court had ascertained the interest of the borrower in the land in question, no certificate of title or Crown grant was to be delivered to the Maori owners while the debt was outstanding. As Crown witness Mr Hayes has pointed out, these provisions did not, of themselves, give the holder of the lien a remedy against the land itself. But section 35 provided that, once title had been ascertained, the Maori owner could grant the lender a mortgage over such part of the land as the court considered sufficient security for the debt. These sections went far towards ensuring that the entrepreneurs who advanced money for the surveys of forested land were likely to secure a lease or purchase from the Maori owners of such land. As Mr Hayes comments:

the owners who wanted to alienate . . . had to first deal with the holder of the survey lien/charge and likely did so in practice . . . Of course, in many instances, the lien holder and

the owners had either an existing relationship or prospective relationship concerning the land.²⁵

Mr Alexander has found that ‘a substantial number of blocks’ were put through the court, ‘financed by and in order that timber leases or purchases by timber millers could be completed.’²⁶ Most Hauraki timber millers were slow to put this process in train, but, as will be seen below, they were afforded the opportunity to do so before the lands covered by their agreements were purchased by the Crown.

14.3 CROWN LAND PURCHASES AND TIMBER LEASES

14.3.1 Mackay’s arrangement with the Minister for Public Works

As we discuss in chapter 17, the Crown made virtually no purchases of Maori land in Hauraki between 1865 and 1872, relying instead on cessions of mining rights. However, large sums were set aside for the purchase of Maori lands in the North Island in the Immigration and Public Works Act 1871, and in late 1871 or early 1872, James Mackay, then running a private land agency, was informed that the Government intended to begin a programme of land purchase in the Coromandel and Thames districts, and was asked by the Minister for Public Works, JD Ormond, to act as the Government’s land purchase agent on commission.

Before 1872, some timber millers, including Harris at Whangapoua, Cadman at Coromandel (Kapanga), and the Mercury Bay Saw Mill Company and the Auckland Saw Mill Company at Mercury Bay–Whitianga (and possibly Smart and Hogg at Harataunga) had managed to secure legal timber leases, but the majority had not, and were now in a vulnerable position. Their timber agreements nearly all concerned land within the area over which the Government was shortly to reclaim the right of pre-emptive purchase by proclamation under the Immigration and Public Works Act. Legally, there was nothing to prevent the title to the forests, for which millers had paid money, from passing from Maori vendors to the Crown with the purchase of the land.

Before setting about acquiring land for the Crown, however, Mackay wrote to Ormond urging that the rights of those holding void timber agreements be acknowledged:

With reference to the vested interests and claims of Europeans to Kauri timber, situated within the blocks of lands proposed to be purchased, some of which are held under valid

25. Document Q1, p 116

26. Document E3, p 18. Mr Alexander lists the following as examples: in Whangapoua district, Hikutawatawa, Otangauru, Owera, and Waitekuri; in Mercury Bay district, Kaimarama, Kapowai, Maruerue, Ounuora, Ounuora 2, Rangihau, Taranoho, Te Weiti, Waipaheke, Waiwawa, and Whenuakite 2; in Tairua–Whangamata district, Te Karo, Matapaia, Omahu, Puketui, Tairua, Taparahi 1, Whangamata, and Wharekawa East; in Thames–Hikutaiia district, Hihi, Hikutaiia, Hotoritori, Ipuwhakatarā, Mangakirikiri, Mangarehu, Mangarehu East, Manginahae, Opango, Piraunui, and Waiwhakaurunga: doc A10, pt 2.

leases made subsequent to the issue of certificates of title by the Native Land Court, and others by agreements made previous to the issue of certificates of title for the lands comprised in such agreements, I would beg to recommend that in all cases where the parties are in actual possession of the timber, and do not obstruct the Government in negotiating for the purchase of the lands, that all such agreements, leases, and private interests shall be respected, and the conveyances by the Natives to the Crown shall take notice of and confirm all such reasonable and fair leases, agreements, and transactions. I would point out that the timber trade is of vital interest to the goldfields, and is one of great importance to the Province of Auckland, and very large capital is invested in it; and although the agreements for the acquisition of timber are not in the majority of cases strictly legal or valid; yet many of these so-called illegal agreements have been made by and with the assistance of officers of the Native Department.²⁷

Mackay said later that he would not have undertaken to purchase land for the Crown if the Government had objected to conserving the rights of sawmill owners.²⁸

Mackay's stand probably carried considerable weight since his services were considered valuable; but the Government could not have taken the claims of timber millers lightly anyway, since they were occupying so much of the land it wished to purchase, had so much influence with the Maori owners, and had invested so heavily with the tacit or sometimes explicit consent of Government officials. The Under-Secretary for Public Works, Knowles, wrote in reply to Mackay's letter:

Mr Ormond is fully aware of the influence which the holders of timber rights and claims might exercise in opposition to the sale of the lands by the Natives and the policy of respecting those claims whether legal or equitable; but it must at the same time be borne in mind that many of the blocks on the Coromandel Peninsula have, apart from their mining value, no other value than that which their timber gives them, the right to which you state has in many cases been alienated and required to be conserved. In estimating the purchase money of all such blocks as have not acquired a value for mining purposes this should be taken into consideration, as the Government will have no option but to avoid interference with these old arrangements wherever it is practicable to do so.²⁹

Ormond thus acceded to Mackay's recommendation that lands covered by existing timber agreements be purchased subject to those agreements, regardless of their legal status, but instructed him to pay a discounted price.

27. Mackay to Ormond, 24 January 1872, AJHR, 1873, G-8, p 5

28. Mackay to Colonial Secretary (memorandum), 19 May 1875, AJHR, 1875, C-3, pp3-4; Mackay, 'Report of Tairua Investigation Committee', 12 August 1875, AJHR, 1-1, p 4

29. Knowles to Mackay, 4 March 1872, AJHR, 1873, G-8, p 6

14.3.2 Mackay's transactions

In November 1872, the Government gave Mackay much latitude in fixing the price for Tairua and other blocks then under negotiation, provided that the consideration did not exceed 'the average price of that paid for other land in the Coromandel Peninsula.' He was given access to sufficient funds for the purpose, and his proposal to buy the interests of individuals and hapu separately – rather than concluding one single agreement – was accepted.³⁰ The Government also knowingly acquiesced in his collaboration with millers: at the same time as bargaining with Maori for the Crown purchase of their interests in the freehold, he was getting blocks surveyed and investigated by the court so that millers could secure legal timber leases.

Mr Alexander's block histories include many examples of this sequence. Dr Anderson also included in one of her reports a table from the MacCormick inquiry (which we discuss below) that shows that more than 20 land blocks were purchased by the Crown subject to timber leases executed in 1872 or 1873, during Mackay's tenure as land purchase agent for the Crown.

14.3.3 The trust commissioner

Timber leases, including those granted in place of earlier void agreements, required certification by the trust commissioner, Haultain, appointed under the Native Lands Frauds Prevention Act 1870. This procedure provided only limited protection for Maori.

Mr Hayes, for the Crown, has provided evidence that Haultain declined to pass timber leases (sales of cutting rights) unless they specified a term – even if as long as 99 years – because he had received legal advice that 'the sale of timber implies the alienation of the land on which it is growing' while the miller was in possession.³¹ However, Mr Hayes acknowledges that Haultain was cursory in his examination of the adequacy of consideration where lump sums were paid, possibly because it was difficult to ascertain their fairness when there was no official record of past timber leases to draw on for comparison, and Haultain could not know how much timber remained and how much had already been felled.³² Mr Walzl, for the Ngati Hei claimants, has cited statements from a Mr Maunsell (investigating transactions for Haultain) that Ngati Hei owners did not have in their possession a duplicate of the written agreement. Maunsell remarked that this was usual. In the case of Whenuakite 2, he thought the owners had only a vague understanding of the term of the lease they were giving, or of the payment, or that a mortgage had effectively been registered over their land in respect of £300 advanced for survey and other costs.³³

30. Document Q1, pp 156–157

31. Ibid, p 134

32. Ibid, p 135

33. Document N10, p 12

14.3.4 Timber and section 108 of the Native Land Act 1873

In 1873, the Government belatedly provided a specific process for dealing with agreements for the sale and purchase of timber, flax, or other natural productions of the land made before the passage of the Native Lands Act 1865. The inclusion of section 108 in the Native Land Act 1873, was probably prompted by Craig's predicament at Whangapoua after being ousted by Harris and the Mangakahia whanau, his early timber agreement thrown out as void by the Supreme Court (see sec 14.4.1). Craig's plight had been widely publicised, and he also petitioned Parliament about it in 1871. Under section 108, any party to a pre-1865 agreement could apply to the court to have the agreement examined, and:

it shall be lawful for the Court . . . if the Court shall see fit, and if the circumstances and justice of the case shall appear to demand the same, to make an order that the Memorial of ownership to be issued shall be subject to such agreements or such part thereof as the Court may think just, or to impose such restrictions on the alienability of the land comprised in such Memorial as shall give protection to the rights of the applicant: Provided nevertheless that no right reserved or conferred under this clause shall extend to a longer period than twenty-five years from the date of the order of the Court.

This meant that, if the court found that a pre-1865 timber agreement was fair, it could award title to the land covered in that agreement subject to the continued enjoyment by the miller concerned of the timber-cutting and other rights granted therein, for a period of up to 25 years.

Section 108 had not come about, however, because of concern for Maori interests. It had come about because of Craig's petition. Many in the Government and Parliament felt that Craig had been hardly done by and the clause in the 1873 Act was to authorise more equitable arrangements. The provision might have been beneficial to Maori owners of the trees, at least by limiting the term of lease to 25 years. But as it was, almost all the early agreements had been formalised before the 1873 Act came into effect, the majority with longer terms.

14.3.5 Terms of timber leases and the price of lands subject to timber leases

In this section, we make frequent reference to two pieces of primary evidence: first, the 'Schedule of Blocks Acquired by the Crown Subject to Timber Leases' prepared for the MacCormick commission of 1939–40, which is reproduced in an appendix to Dr Anderson's overview report;³⁴ secondly, a return prepared by Mackay in June 1875 showing the value of sawmills, forests, and felled timber owned by saw mill proprietors in Hauraki at that time. These tables provide the salient information analysed below.

34. Document A8

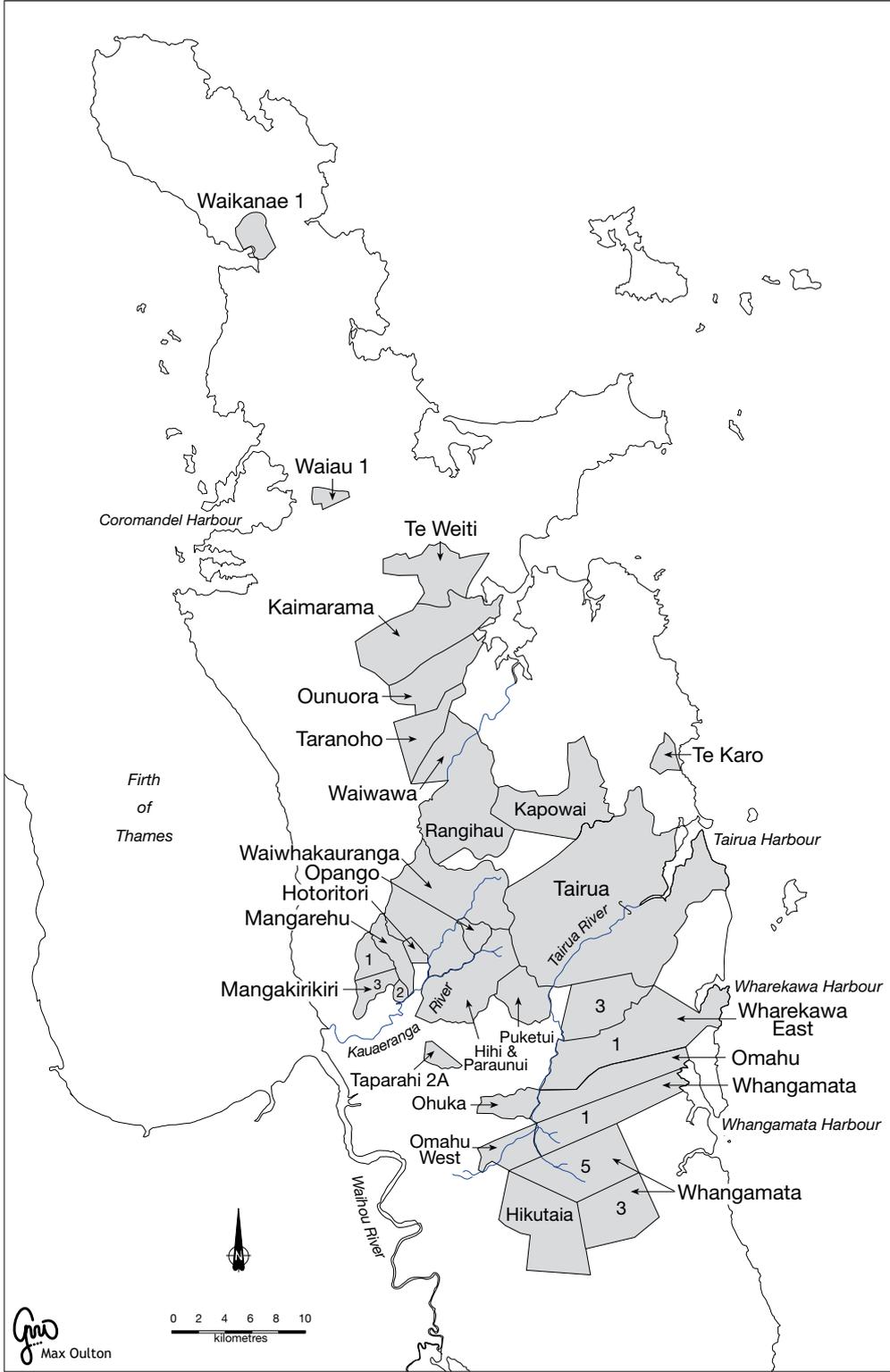


Figure 68: Crown land subject to timber leases at time of purchase, 1870-89

(1) Terms of the timber agreements and leases

The unlawful timber agreements made in the 1860s had no limit placed on the period the purchaser would be able to enter those lands to remove the timber. The later legal timber leases included limits on how long millers could enjoy cutting rights, but all of the leases were for long terms: almost a third of the leases shown in the MacCormick table were for 21 years but the majority were for 45 or 99 years. According to Mackay, when the land was sold to the Crown the lessors agreed to reduce the term of the lease to 21 years 'or other reasonable limit'.³⁵ No evidence is available as to why the millers were willing to take a shorter term from the Crown than from Maori owners, or what bearing this would have had on the Maori owners' decision to sell the freehold, which in most cases they did within a few years. Timber leases also involved the grant of extensive easements: the timber lease over the Opango block, for instance, specified that the grantees would have the right to construct mills, sawpits, watercourses, dams, timber booms, roads and tramways, and the exclusive use of natural watercourses.³⁶

(2) Prices paid for timber-cutting rights

The MacCormick schedule gives details of 33 leases most of which were for periods of 21, 45, or 99 years, in roughly equal numbers. Typically the consideration paid was a lump sum of between £50 and £300, plus a nominal five shillings a year 'if demanded'. Two payments were considerably higher: the £1500 paid by Thomas Russell and others for a lease of Waiwhakaurunga (14,168 acres), and £775 paid by the Mercury Bay Saw Mill Company (Harris's company) for a lease of Te Weiti blocks 1, 2, and 3.

Dr Anderson has written: 'According to the MacCormick schedule, the leases on blocks acquired by the Crown amounted to the purchase of timber over 132,000 acres of Maori land for a sum of £7000.'³⁷ More precisely, a tally of the columns in the MacCormick return shows that a total of just over £7300 in lump-sum payments was given in consideration by millers for the grant of timber leases that collectively covered 133,202 acres. Thirty of the 33 leases were executed between 1870 and 1873, most in 1872 or 1873. On the basis of her analysis, Dr Anderson has commented: 'Clearly . . . an increasingly valuable resource was acquired very cheaply by Pakeha companies in this period.'³⁸

Matters are, however, more complicated than Dr Anderson's quoted remarks suggest: the terms of most of the leases shown in the MacCormick schedule, *considered in isolation*, do

35. Mackay to Colonial Secretary (memorandum), 19 May 1875, AJHR, 1875, C-3, p 4. At Mackay's behest, in 1875 the directors of the Mercury Bay Saw Mill Company agreed to recommend to the company's shareholders that the terms of the leases over the Kaimarama and Taranoho blocks be reduced from 99 years to 21 and 40 years respectively: secretary, Mercury Bay Saw Mill Company, to Mackay, AJHR, 1875, C-3A.

36. Henry Hanson Turton, *An Epitome of Official Documents Relative to Native Affairs and Land Purchases in the North Island of New Zealand* (Wellington: Government Printer, 1883), Opango lease, Hauraki district, deed enclosure in no 368, p 454

37. Document A8, pp 241, 341-342; doc Y1, p 160

38. Document A8, p 241

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seem very favourable for the millers and poor for the Maori granting them. However, the leases *cannot* be taken in isolation, since, as we have seen, they were not normally negotiated from scratch but typically replaced void timber purchases from the 1860s. Any estimate of overall level of payments made by the lessees must take into account not only the payments shown in the leases but also the following: first, that lump-sum payments had been made at the time of the earlier purchases; secondly, that some of the lessees had helped finance the survey of the lands on which the timber they had purchased stood, in order to be able to obtain legal leases; and, thirdly, that some of the lessees had paid mill-site rentals, and possibly other casual payments, in the interval between making a void purchase and securing a formal lease.

We have heard little evidence comparing the rates of payment shown in the timber leases of the 1870s and those made by the lessees for earlier unlawful timber purchases. They might have been similar, but this is conjecture. There is also the strong possibility that in at least some cases the payments shown in the timber leases were actually ‘top-up’ payments, made to Maori in addition to earlier payments, in return for agreeing to formalise the deals. Schaap and Anselme, for instance, did not pay any lump sum for the grant of a lease over the Kapowai block in 1872, instead undertaking to pay an annual rental of £10, but this does not necessarily mean that they had not made a lump-sum payment when they first bought timber on the block; indeed it is virtually certain that they had done so in 1863, otherwise they would not have been permitted to take the trees. The Seccombe family at Tairua provide another example (see sec 14.3.6).

Both Mackay’s and MacCormick’s schedules have limitations: MacCormick’s deals only with those blocks subject to timber leases that were acquired *by the Crown*, and does not include blocks that passed into *private hands*, such as the Whangapoua blocks purchased by Harris, or blocks where millers purchased timber but did not go on to secure a legal timber lease (eg, the Ring brothers – by the early 1870s, they had cut down most of the timber they had purchased in 1859, and did not conclude a formal lease). Mackay’s return suggests that millers did not acquire timber rights particularly cheaply; those operating in June 1875 had paid Maori for the purchase of timber, including the cost of surveys, £42,045. Mackay’s return was compiled from figures supplied by the millers themselves, who may have exaggerated their expenditures, but the figure is not implausible, taking into account the cost factors mentioned in section 14.3.5(1).

Another aspect of the timber leases entered into in the 1870s was that, contrary to the indications in the MacCormick table, the detailed block histories submitted to us suggest that in at least two cases stumpage (a ‘royalty’ per tree felled) was paid, as well as an initial lump sum. According to Matthew Russell’s research, the Mercury Bay Timber Company lease of Te Weiti for 45 years included an initial lump sum of £775, an annual rental of £10,

and 15 shillings for each totara tree.³⁹ This last element (indicative of the growing market for timber other than kauri) is not mentioned in the MacCormick return and his schedule lists only a nominal five shillings annual rent, not £10. Secondly, Gibbon's lease of Te Ipuwhakatara in January 1873 was for a lump sum of £5 and 11 shillings per tree for a period of 45 years.⁴⁰ We also note below that the later timber-cutting agreements over Harataunga, although never formally passed through the court and registered, also involved stumpage payments rather than lump sums.

Mr Hayes suggests that there was little net difference between a lump sum and a stumpage system; in arriving at the former the parties would have counted each tree anyway. He offers evidence that this did occur in some cases at least and suggests that the lump-sum payments varied so widely that 'it is reasonable to assume that both parties must have undertaken some calculation of the value of the millable timber available in setting the consideration payable'.⁴¹ There is inadequate evidence to prove or disprove this assumption.

(3) *The value of the forests purchased*

Counsel for the Wai 100 claimants have alleged that the Crown allowed timber companies to obtain 'leases giving extensive cutting and water rights for significant periods of time for sums far below the market value of the timber resource'.⁴² We have discussed the *prices* paid but this issue concerns the *value* of the timber resources.

Although the legal timber leases were mainly executed between 1870 and 1873, most of the trees on the lands the leases covered had originally been purchased between 1859 and 1865, when the timber industry had not yet entered its boom years. By all accounts, it was events and trends after the opening of the Thames goldfield in 1867 that really pushed up the price of timber.⁴³ These developments, such as the growth of Auckland and the Thames mining boom, were a boon to the millers who had bought timber beforehand. In a sense, Maori who sold their forests before 1867 were unlucky in comparison with those who sold later, but prices paid before 1867 need to be viewed in their own time and context.

In Mackay's 1875 return, the value of logs in stock, in the bush or at the mills was estimated to be £64,982, the average value of timber cut to be £120,750 annually, the then value of the mills, plant and standing timber to be £144,750, and the total cost of mills and plant to be £106,855. Comparing the last two totals puts the value of standing timber in 1875 at

39. Document K2, p 4

40. Document D5, pp 18–19

41. Document Q1, p 160

42. Claim 1.1(a), para 3.12(a)

43. Mackay to Colonial Secretary, 7 July 1875, AJHR, 1875, C-3, p 5; MM Roche, *Forest Policy in New Zealand: An Historical Geography, 1840–1919* (Palmerston North: Dunmore, 1987) pp 15–16; RCJ Stone, *Makers of Fortune: A Colonial Business Economy and its Fall* (Auckland: Auckland University Press, 1973) p 100; doc A12

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£37,895 (£144,750 minus £106,855), plus depreciation in value of mills and plant since their construction. The figures in the return are only estimates and involve certain assumptions, but indicate that the value of the standing timber formed a considerably lesser proportion of the millers' equity than the value of their mills, plant and cut timber. This suggests that millers had cut out much of the most accessible timber by 1875 and did not value what remained very highly. (As noted, Craig had felled and squared 2500 trees on Opitonui (8837 acres) by 1867, but we have no information about how much standing timber remained.) Although an estimated £120,750 of timber was being sold annually about 1875, this price reflects the high costs of extraction.

In the 1870s, sharemarket investors and financiers continued to pour money into listed timber companies, but, as Professor Russell Stone has noted, the large timber companies formed in the 1870s had borrowed heavily to invest in mills and plant, and even though they were getting good gross annual return from cut timber from 1870 to 1885, the industry was over-extended. The most easily accessible timber was becoming exhausted and costs of extraction were rising.⁴⁴ Many of the timber companies formed in the 1870s collapsed in the 1880s, including USSC, suggesting that millers had not been wrong to value their stocks of standing timber fairly modestly in 1875.

(4) Prices paid by the Crown for the purchase of lands subject to timber leases

Giving evidence to the Tairua Investigation Committee, Mackay reported that purchases of land subject to timber leases had been 'advantageous' for the Crown, and that 'the Government have got the land very cheap'. Regarding the 36,000-acre Tairua block, he told the committee that 'the cost per acre including survey was only one shilling and eight pence'. Mr Walzl has provided evidence that Mackay purchased the Rangihau block (9000 acres) for just over one shilling sixpence an acre.⁴⁵ His table of payments – for the eight blocks totalling 72,474 acres in which Ngati Hei interests were concentrated – shows that the average price was two shillings an acre.⁴⁶

14.3.6 The Tairua inquiry

In May 1875, George Grey, then superintendent of Auckland province, suggested modifications to the arrangements made between the Minister for Public Works and Mackay, which we have described above in section 14.3.1. The provincial authorities, Grey among them, were dissatisfied with what they regarded as the 'slow' pace of the general government's acquisition of Maori land in Auckland province, so much of which was encumbered by timber leases. Grey was interested in the Pukiora reserve in the Tairua purchase as a possible

44. Stone, p 97

45. Document N10, p 15

46. Ibid, p 22

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	Name of owner	Situation of timber purchase	Date of purchase of timber	Date sawmill erected	Amount paid for timber, including surveys of land (£)	Cost of mill and plant (£)	Estimated present value of mills, plant, and standing forests (£)	Value of logs in stock in bush or at mill (£)	Average annual value of timber cut (£)
1	Tairua Sawmill Company	Tairua	1864	1864	3000	23000	26000	5500	13500
2	Mercury Bay Sawmill Company	Mercury Bay	1863	1863	5500	9000	12000	8666	11250
3	Schapp and Ansenne	Mercury Bay	1863	1863	3750	4500	8000	5000	6750
4	CA Harris	Whangapoua	1862-70	1862	2500	15000	40000	15000	22500
5				1865	4025	10000			
6	Cruickshank and Company	Kennedy Bay	1863	1863	2600	4500	5000	3000	9000
7	R Cashmore	Cabbage Bay	1862	1862	2500	5000	3000	3400	4500
8	Pollard and Company	Port Charles	1863-64	1865	1200	2500	4000	2500	8100
9	Charles Ring	Coromandel	1859	1859	1000	2700	2000	150	2250
10	AJ Cadman	Coromandel and Matamataharaake	1864 and 1872	1865	1150	3500	5000	1000	1350
11	WC Daldy	Waikawau and Mata Rivers and tributaries	1864	1865	2500	8000	7000	3000	9000
12	Shortland Sawmill Company	Waiwhakauranga River and tributaries	1869	1872	5427	9291	15000	11666	15750
13	John Gibbons	Kirikiri and on bank of Waihou and Ohinemuri Rivers	1871-72	1874	2200	4700	6000	4750	8550
14	Hauraki Sawmill Company	Turua Forest, Waihou River	1868	1869	3843	3964	10000	650	6000
15	Holdship and Company	Otuturu block	1870	1868	850	1200	1750	700	2250
	Totals				42045	106855	144750	64982	120750

Table 9: Financial returns of Hauraki sawmills, 1875. Source: AJHR, 1875, C-3A, p.2. The return in the AJHR also includes the number of men employed in the bush and at the mills; the number of vessels employed in the timber trade; the number of men employed in those vessels; the average amount of timber cut annually, in feet; and Mackay's remarks.

Name of block	Original lessee	Term of lease	Area in lease (acres)	Consideration	
				Lump sum (£ s d)	Annual rent
1 Hikutaia 3	R and J C Seccombe	21 years from 13 January 1873	638	50 0 0	One shilling if demanded
2 Hihii and Paraunui	Russell, Stone and Wilson	99 years from 20 December 1872	6755	200 0 0	Five shillings if demanded
3 Hotoritoti	Russell, Stone, and Wilson	99 years from 24 August 1872	523	200 0 0	Five shillings if demanded
4 Kapowai	Schapp and Anselme	99 years from 10 October 1870	8663	—	Ten pounds 10 shillings
5 Mangakirikiri 1	Russell, Stone, and Wilson	45 years from 19 December 1873	1683	271 0 0	Five shillings if demanded
6 Mangakirikiri 2	Russell, Stone, and Wilson	45 years from 26 November 1873	386	203 0 0	Five shillings if demanded
7 Mangakirikiri 3	Russell, Stone, and Wilson	45 years from 19 December 1873	1570	304 0 0	Five shillings if demanded
8 Mangareru	Russell, Stone, and Wilson	99 years from 5 September 1872	1825	195 0 0	Five shillings if demanded
9 Mangareru East	Russell, Stone, and Wilson	99 years from 5 September 1872	468	100 0 0	Five shillings if demanded
10 Manginahae	Russell, Stone, and Wilson	99 years from 7 September 1872	147	25 0 0	Five shillings if demanded
11 Opango	Russell, Stone, and Wilson	99 years from 24 August 1872	1000	100 0 0	Five shillings if demanded
12 Omahu	R and J C Seccombe	21 years from 21 December 1872	1880	50 0 0	Five shillings if demanded
13 Ohuku	The Kauri Timber Company	15 years from 28 December 1898	1135	—	One peppercorn
14 Oteao 1, 2	Mercury Bay Sawmill Company	21 years from 20 October 1876	236	25 0 0	Five shillings if demanded
15 Oumiora ? 2	Mercury Bay Sawmill Company	21 years from 1 May 1872	5093	250 0 0	One shilling if demanded
16		21 years from 10 May 1872		15 12 6	One shilling if demanded
17 Puketui	J Preece and W A Graham	45 years from 31 October 1873	3180	200 0 0	One shilling if demanded

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18	Rangihau	Mercury Bay Sawmill Company	21 years from 27 December 1873	9000	400 0 0	Five shillings if demanded
19	Te Weiti 1, 2, 3	Mercury Bay Sawmill Company	45 years from 1 July 1871	6450	775 0 0	Five shillings if demanded
20	Taranoho	Mercury Bay Sawmill Company	99 years from 11 October 1870	3796	280 0 0	Five shillings if demanded
21	Tairua	R and J C Seccombe	40 years from 6 December 1872	36000	500 0 0	Five shillings if demanded
22	Kaimarama	Mercury Bay Sawmill Company	99 years from 10 October 1870	8300	470 0 0	Five shillings if demanded
23	Te Karo 1	John Hawkins Graham	99 years from 16 December 1870	1270	100 0 0	Five shillings if demanded
24	Te Karo 2	John Hawkins Graham	99 years from 17 January 1873	100	25 0 0	
25	Taparahi 2A	James Darrow	21 years from 12 August 1885	984	—	
26	Waiwawa?	Mercury Bay Sawmill Company	99 years from 11 October 1870	4642	315 0 0	Five shillings if demanded
27	Waiwhakauranga	Russell, Stone, and Wilson	99 years from 23 August 1872	14186	1500 0 0	One shilling if demanded
28	Wharekawa East 1	J Preece and W A Graham	45 years from 17 December 1873	2873	70 0 0	Five shillings if demanded
29	Wharekawa East 3	J Preece and W A Graham	45 years from 31 October 1873	5089	50 0 0	One shilling if demanded
30	Waiau 1	C Fraser	21 years from 1 June 1873?	1098	400 0 0	One shilling if demanded
31	Whangamata 1	R and J C Seccombe	21 years from 28 December 1872	2662	75 0 0	Five shillings if demanded
32	Whangamata 5	R and J C Seccombe	21 years from 13 January 1873	1600	105 0 0	One shilling if demanded
33	Whangamata 3	R and J C Seccombe	21 years from 11 January 1873	944	50 0 0	One shilling if demanded
Total				134176	7303 12 6	

Table 10: Blocks acquired by the Crown subject to timber leases. Source: Hauraki goldfields special block file MA13/35(b) Archives NZ (doc A8, app 6).

township for the Tairua Valley and was angered that it was already the subject of a lease agreement to two of Mackay's employees, Guilding and O'Halloran, without having come onto the open market.

Grey proposed that when lands covered by unlawful timber agreements were purchased by the Government, the agreements in question should be subjected to official scrutiny and extinguished on payment of fair compensation.⁴⁷ Grey also called for an inquiry to be held into past transactions made under the authority of the arrangements between the Minister for Public Works and Mackay, and stated that property rights pursuant to those arrangements clearly ought not have been 'dealt with secretly, in a private room, by one man'.⁴⁸ He then headed the parliamentary inquiry into Mackay's transactions in respect of the Tairua block.

The Tairua block was one of those purchased by Mackay subject to a legal timber lease that the lessors, the Seccombes, had secured with Mackay's collaboration before the completion of the Crown purchase; the lease replaced an earlier extra-legal timber agreement. When the Tairua block passed the court on 29 November 1872 the declared Maori owners, Peneamene Tanui and others, immediately granted the Seccombes a 40-year timber lease for a lump sum of £500; this was probably in addition to payments made when or since the Seccombes bought timber extra-legally at Tairua in 1864. On 30 November 1872, the owners sold the freehold of the land to the Crown for £2900, less reserves of 1000 acres. (The Wai 694 claimants point out that the adjacent Te Karo 1 block, 1270 acres, was also passed through the court in November 1872, vested in four grantees, all of whom were grantees in the Tairua block, and sold to the Crown in December for £100, with no reserves.⁴⁹) In the course of these transactions, Mackay's employees, Guilding and O'Halloran, reached a provisional agreement to lease the larger of the two Tairua reserves themselves. The complexity of Mackay's roles in 1872 was increased by the fact he was still advising Seccombe in the latter's attempt to on-sell his timber lease.⁵⁰

The Maori owners had been dissatisfied with the purchase price Mackay offered for the Tairua block and had asked for reserves totalling 2000 acres. Mackay was willing to agree to only 1000 acres of reserve, to be chosen in two localities within three months, and (it would appear) to be surveyed by the Crown. When the deed was signed, the vendors had nominated the clearing called Pukiore for one reserve and left the other unspecified. Within three months they applied to Mackay to have both reserves surveyed. Mackay, about to

47. Grey to Colonial Secretary, 19 May 1875, AJHR, 1875, C-3, pp 1-2

48. Ibid. Grey's letter was passed on to Mackay for comment and he wrote a lengthy report in response (which we have cited several times in this chapter), in which he remarked, 'The peroration indulged in by Sir George Grey about arrangements made in private rooms . . . is clearly uncalled for, as nothing has been done respecting timber rights which is not supported by long-standing agreements': Mackay to Colonial Secretary (memorandum), 7 July 1875, AJHR, 1875, C-3, p 6.

49. Document Y11, p 6

50. Document A8, p 243

leave the district on Government business, deferred action. In 1875, reminded by the Maori vendors, he arranged for the survey of two reserves: 990 acres at Pukioire and 10 acres at Te Kutakuta at the mouth of the river. The Crown grants were not issued until November 1879 in the case of Pukioire, and February 1881 in the case of Te Kutakuta.

In 1875, Guilding and O'Halloran's offer to lease Pukioire (which had so annoyed Grey) was still open and they had paid upward of £50 towards it. However, perhaps because of the delay between 1872 and 1875 and the controversy that had erupted, the Maori owners did not consider themselves bound by the arrangement, and discussed with George Wilkinson the possibility of a lease to the Crown, provided the Crown would indemnify them against any action by Guilding and O'Halloran.⁵¹ After they had received their Crown grants, they sold the two reserves to other parties, Pukioire for £315.⁵² A further element of complexity was that, about this time, W A Graham offered Mackay a share in a gold-mining claim, referred to in the inquiry as the prospector's claim, in the Tairua–Pakirarahi area.⁵³ Mackay declined, and demurred at the suggestion that it be given to O'Halloran because he was related to him by marriage. In the end, though, it went to Crippen, another 'faithful servant' of Mackay, who split it equally with O'Halloran.⁵⁴

Mackay did not seek to deny his various roles in dealing with Tairua before the parliamentary inquiry. He argued that there was no conflict between his work for the Crown and his assistance to the Seccombes and Maori owners with the timber lease. He said he was not responsible for the private activities of his employees; he had expressed disapproval of the proposed lease of the reserve by Guilding and O'Halloran.

After inquiry, the committee did not advocate prosecution of Mackay or his associates but concluded that 'the leasing of the reserve by persons employed by Mr Mackay, and presumably with special knowledge on the subject, not accessible to the public generally, is open to the gravest objection'. As for the share in the Prospectors' Claim, 'The Committee consider that this transaction was highly improper, and that, while Mr Mackay declined the share himself, he should have peremptorily refused to allow any of the persons in his employment to accept it.'⁵⁵ (The commission was also critical of the commission system of purchasing land and the Crown's reliance on the pre-emptive right of purchase, issues we discuss in chapter 17.)

51. Document Q1, p 160

52. Document A10, pt 2, p 94; doc Y11, pp 9–10; Wilkinson, report, 2 July 1875, AJHR, 1875, 1-1, pp 65–66 (doc Q1, p 160). In May 1875, Peneamene Tanui had also asked Mackay to reduce Pukioire by a further 20 acres, instead reserving 20 acres at Te Karaka on the Pauanui side of Tairua Harbour, but this request seems not to have been acted upon.

53. The Pakirarahi area is discussed in sections 12.3 to 12.3.4. The evidence from the Tairua inquiry does not make it clear why the share was offered to Mackay, but it was explained that shares in undeveloped claims were not infrequently given to prominent men.

54. 'Report and Evidence of the Tairua Investigation Committee', 11 October 1875, AJHR, 1875, 1-1, esp pp 1–2; doc Q1, pp 157–160

55. 'Report and Evidence of the Tairua Investigation Committee', p iii

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On the issue of Mackay assisting millers to perfect their old agreements before the Crown purchase of the land, the committee reported:

it ought not to have been left to the Land Purchase Agent, considering his previous relations with those transactions, to determine the nature and extent of those rights of private persons which the Government had authorized to be respected. It is clear to the Committee that the equity and value of such rights as have no legal sanction should, in these and all future cases, be the subject of investigation by some independent tribunal; and some means should now be taken satisfactorily to adjust the claims to timber, the title to which may require validation, and to settle upon a permanent basis the respective rights of the holders of these leases, and of the public.⁵⁶

We note that the recommendation that ‘rights’ that had no legal sanction should be the subject of investigation by some independent tribunal was redundant and not acted upon by the Government: by 1875, there were few timber agreements which had not been transmuted into legal leases.

We note also Mr Hayes’ observation that the committee (and claimant witnesses) may have exaggerated Mackay’s authority in the process. Mr Hayes has pointed out that Mackay could not perfect existing timber agreements and bestow legal timber leases on millers: ‘All that Mackay could do was to facilitate the transmutation of such arrangements. His facilitation required the cooperation of the Maori partner, at least prior to the enactment of section 108 of the Native Land Act 1873 (October 1873).’⁵⁷

Mr Hayes’ point has some validity, but it is also true that in the absence of any prior investigations by the court or any other agency, Mackay must have had considerable influence on the renegotiation of the old agreements. To say that all that Mackay did was facilitate the transmutation of the arrangements between millers and Maori does not answer the fundamental question touched on by the committee’s recommendation, which is whether the rights conveyed in the old agreements *ought* to have been preserved in legal timber leases without intervening judicial scrutiny.

(1) Crown submissions

Crown counsel do not dispute that the Crown acquired the 36,000-acre Tairua block and the adjacent 1270-acre Te Karo block as part of its largescale purchase program in Hauraki. They accept also that the Tairua Investigation Committee was ‘more concerned with the public interest by the Crown as purchaser . . . than the private interests of the Maori owners as sellers’, but submit that ‘There was at the time little reason for the Crown to consider it necessary to investigate the private interests.’⁵⁸ Crown counsel also deny that Maori

56. ‘Report and Evidence of the Tairua Investigation Committee’, p iv

57. Document Q1, p 159

58. Document AA1, p 185

were prejudiced by Mackay's various roles in 1872, and reject the submission of the Wai 694 claimants that Mackay was concerned to effect the transaction before the Maori owners were fully aware of the value of the potentially auriferous land.

Mr Hayes, for the Crown, suggests that the Tairua Investigation Committee tended to overlook the question of 'Maori agency' in respect of the negotiations in question; he considers the leasing of the reserve to be 'an excellent case study of the owners . . . being alive to their own capabilities.'⁵⁹

(2) Tribunal comment

From his own statements to the parliamentary committee, Mackay coordinated with the Maori owners the lease to the Seccombes as well as the sale to the Crown, both in advance of the court award. He also facilitated the passage of the land through the court. However, Mackay had been open with Ormond since January 1872 about his view that the Crown should, when purchasing, recognise existing timber agreements, and the Government had accepted his recommendation. The Maori owners were content to conclude a lease with the holders of the void agreements. They were not obliged to do so and Mackay had no power to compel them.⁶⁰ This does not amount to collusion between Mackay and the Crown to drive down the price.

However, the Crown's system of buying under the protection of pre-emption denied Maori access to an open market for land, and on the evidence it is questionable whether the Crown did pay a fair price for the freehold of Tairua. Mr Hayes shows that the one shilling eightpence per acre price was comparable to two other purchases (one private, one Crown) for similar land about the same time.⁶¹ But his comparison is not flattering to the Crown because the private purchase he cites (that of Waitekuri by C A Harris, also for one shilling eightpence an acre) occurred in the Whangapoua land where Harris controlled the situation with considerable ruthlessness (see sec 14.4.1). Moreover, the Crown's payment for Tairua was considerably lower relative to the two shillings sixpence per acre average, relative to the prices paid by the Crown for some other Hauraki blocks at the time, and relative to the five shillings an acre that Mackay himself said private purchasers were willing to pay. The Crown had paid more for Hikutaia, for example, and would pay more for Ohinemuri and Te Aroha. That land was generally less steep, more cultivable and more auriferous than Tairua, and the timber had not been sold off. But Tairua also had a band of fertile river flats, a river navigable for some distance and a harbour (albeit with a bar and strong tides). We are of the view that because the Crown could exercise its pre-emptive right, private buyers stayed away from Tairua; regardless of the timber issue, the Crown acquired the land very cheaply.

59. Document Q1, pp 158–159

60. Ibid, pp 153–163

61. Ibid, p 163

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The matter of the 1000-acre reserve is complex. For Maori vendors, good title to reserved lands of their choosing was often as important as the sale price for the wider block. It is clear that the offer by Guilding and O'Halloran to lease the reserve was in the nature of 'insider trading', an arrangement made by people who (even if they were not acting as Mackay's agents at the time) knew about the reserve from official activity. This is dubious conduct by the standards of this time, but it seems that the Maori owners were not particularly injured by the Guilding-O'Halloran offer, for despite the down-payment they eventually transacted with others. Similarly, the offer to Mackay of a share in the Prospector's Claim and its eventual acceptance by Crippen was dubious by the standards of 1872 as the investigating committee pointed out. But again it has not been established that the Maori owners were prejudiced.

They were prejudiced, however, by the fact that the reserves were created with no restrictions on the title and soon alienated, as the Wai 694 claimants have pointed out.⁶² It is one example among hundreds in Hauraki where the Crown's policy meant that 'reserving' land was to do little more than temporarily delay its sale. We discuss this policy in part iv.

Mr Hayes' suggestion that the Maori owners showed considerable understanding in their dealings over Tairua is only partly borne out by the evidence.⁶³ In choosing to conclude a timber lease with the Seccombes, they were honouring a longstanding relationship rather than, or as well as, pursuing their own economic advantage. It is not clear whether the £500 referred to in the MacCormick return was additional to the 1864 payment or the same £500. Certainly, there was no stumpage payment. They accepted a low per-acre price for the sale of the freehold of Tairua to the Crown, and although they asked for a 2000-acre reserve they acquiesced when Mackay agreed only to a 1000-acre reserve. They then tested the market over the 1000-acre reserve and eventually chose not to go through with their preliminary agreement with Guilding and O'Halloran, which indicates some commercial awareness. But then they sold the reserve.

There is no evidence of any particular pressure or coercion by Mackay in respect of Tairua or of his hiding the potential value of the land, any more than in his purchases in Hauraki generally. We have not seen evidence of Maori protest at the time over the purchase, other than over the Crown's tardiness in surveying the reserves (including the wahi tapu). But Mackay's tough bargaining enhanced his advantages under the protection of the Crown pre-emptive proclamation. Crown counsel states 'It is submitted that Tairua is best understood in terms of the issue of the extent of Crown purchasing within Hauraki generally.'⁶⁴ We agree, as we agree with the Crown's concession that it purchased land excessively in Hauraki. We repeat our criticism that purchase under the protection of pre-emption precluded sale on an open market, which might have given better prices.

62. Document AA10, p 23

63. Document Q1, pp 153-163

64. Document AA1, p185

14.4 TRANSACTIONS IN PARTICULAR LOCALITIES

Ngati Hei (Wai 110), and the whanau of Peneamene Tanui of Te Rapupo hapu (Wai 705), give the history of Maori land losses around Whitianga Harbour. Alienation began with the Dacre–Browne old land claim discussed in chapter 3. Between 1850 and 1882, the Crown purchased over 24,000 of the 28,000 acres in which Te Rapupo claimed interests, about half of it before 1865.⁶⁵ Detailed block histories are provided in the reports of Mr Alexander, Mr Russell, and Mr Ellis.⁶⁶ These show that many of the blocks were acquired soon after passing through the court in the late 1860s, the purchasers in many cases being already established in the area. Thus, George White, established miller and storekeeper, acquired three harbour blocks totalling some 200 acres and, between 1873 and 1883, the Mercury Bay Sawmill Company acquired four blocks (including Te Weiti) totalling some 4000 acres, over which it held timber leases or through which it had been driving timber. One of the owners of Whakau, one of these purchased blocks, claimed in 1883 that a reserve of 100 acres had been promised but the company admitted only 50 acres. The Native Land Court declined jurisdiction on the dispute, effectively preventing a clear resolution of it. The disputed area today is said to lie within the proposed ‘Waterways’ development, about which the claimants have serious concerns.⁶⁷ We do not have sufficient information to make a finding on that matter.

14.4.1 The Whangapoua transactions: *Craig v Harris*

These complex transactions have featured strongly in the claims and evidence of Ngati Hei (Wai 110), the Mangakahia whanau (Wai 475), and the descendants of Peneamene Tanui (Wai 705).

(1) *Craig's early transactions*

We have noted in section 14.2.3 that, with the approval of Native Minister Mantell, Thomas Craig bought cutting rights to timber at Whangapoua in September 1861. In early 1862, he purchased a kauri forest at Waitekuri and leased a mill site at Opera, and between February and June 1862 he negotiated the purchase of another kauri forest at Opitonui.⁶⁸

Not surprisingly, Craig was quick to take advantage of the opportunity provided by the 1865 Act to legalise his situation. He paid for the survey of the 62-acre Opera block on which his mill was located. Application was then made to the Native Land Court by Ngati Pare and Patukirikiri leaders; they had sunk their differences over the land, arranged the claim among themselves and presented it uncontested. The 33-acre Maungatapu block was applied for at the same time (late 1865). In October 1866, certificates of title for both blocks

65. Document R5, pp 33, 37–39, 43

66. Document A10, pt 2, pp 2–76; docs K2, R5

67. Document R5, pp 54–57

68. Document K1, p 14

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were awarded to Mohi Mangakahia, Pita Taurua, and Peneamene Tanui (who had been the whangai of Riria Poau of Ngati Pare, Mohi Mangakahia's mother, but who now identified with his own hapu, Te Rapupo.)⁶⁹

A letter of October 1866 indicates that the Maori owners intended to sell Opera to Craig, but by December Craig had decided to sell his mill and cutting rights to the firm of Harris and Laurie and leave the district. The financial arrangements between the Europeans were complicated and need not concern us here.⁷⁰ The essential point is that Harris and Laurie were unable to complete their title to Opera as expected and unable to raise a mortgage to buy out Craig.⁷¹ The deal consequently fell through. At the end of 1867 Craig returned to Whangapoua, returned the deposit paid by Harris and Laurie and attempted to recover his mill and the 2500 trees he had felled and squared on Opitonui.

Craig's vulnerability was immediately exposed. Despite Mantell's approval of his 1861 application, his dealings from 1862–65 were technically illegal, and his relationship with the Maori owners had deteriorated. Riria had died in 1866, and her son, Mohi entered into close relations with C A Harris jnr, the active member of Harris and Laurie in Whangapoua. With the Opera purchase from Craig in abeyance Harris bought Maungatapu at an exaggerated price and built his own mill there.

Harris quickly took advantage of sections 33 to 35 of the Native Lands Act 1867. In 1868, he advanced £327 to Mohi for the survey of Te Ranga, Waitekuri and Opitonui blocks at Whangapoua, thereby effectively obtaining the first right to purchase them. In March 1868, he manoeuvred the Maori owners of Opera (with Craig's mill on it) into selling the block to him for £2 an acre, a high price at the time. Mohi then gave notice to Craig to desist from cutting timber on Opitonui, alleging non-completion of payments due to Riria.⁷²

(2) Litigation: Craig's downfall and Harris's triumph

Craig then had recourse to the Supreme Court, launching an action against Harris for alleged fraud in the purchase of Opera and against Mohi for a debt of £137 incurred in 1867.⁷³ By January 1870, however, the parties had thrashed out a settlement, involving a division of the cutting rights, permission for Craig to take the logs on Opitonui and payment for Craig's mill.⁷⁴ The apparent reconciliation, close to collapse over a number of issues, broke down when one of Craig's clerks assaulted Mohi, knocking his pipe from his mouth. Harris and Mohi then blocked Craig from extracting the felled logs. Between March and May, amidst physical confrontations on the land, Craig managed to extract 500 logs from

69. Document A30, pp 13–22; doc K1, pp 30–31

70. Document K1, pp 31–33

71. Ibid, p 34

72. Ibid, pp 34–35

73. Ibid, pp 31, 35

74. Ibid, p 40; doc A29, pp 10–11

Opitonui. Mohi and Harris, with the latter's funding, then manoeuvred to block him in the Supreme Court.⁷⁵

Again his lack of legal right proved Craig's undoing. In January 1870, Opitonui had gone through the land court, with Harris providing the funding for the survey and court costs, charged against the land. On 22 January, the court awarded the land to Mohi Mangakahia and Paora Matutaera. The same day Harris entered into a 99-year lease for the land for a rental of £10 per annum and £1 for each tree over 24 inches in diameter. On 14 May, Harris acquired the interest of Paora for £200 and on 31 May on-sold it to Mohi, also for £200. This removed from the ownership of the block the Patukirikiri group, who were sympathetic to Craig. On 17 May, Mohi sued Craig in the Supreme Court claiming £2000 damages for trespass on Opitonui since December 1867 and removal of the logs. Despite strong public sympathy for Craig and the jurors' view that the logs were his property, the judge directed that they find for the plaintiff. Mohi was granted costs of £500 and an injunction against Craig from entering Opitonui. A full statement of the judge's direction is not available in evidence, but, since all of Craig's purported dealings since 1862 were either illegal or void in law, the court was bound to find that he had no right in either the land or the logs. Mohi was regarded by the court as owner of the land on the basis of the certificate of title from the Native Land Court. Craig now had no other recourse than to file for bankruptcy and to petition Parliament (vainly as it turned out).⁷⁶

Given the extent of his investments in the mill and in timber cutting, Craig was probably treated unfairly. Mr McBurney and Mr Walzl, however, suggest that his misfortune may be traced to his failure to make equitable payments to the Mangakahia whanau. The evidence is somewhat contradictory: Craig had made payments for the Opitonui timber totalling £350, divided between the Mangakahia whanau and Te Patukirikiri; there is a possibility that some of the payment intended by Craig for Riria Poau was retained by Hopihana of Te Patukirikiri; Craig maintained that he had paid in full but Mohi argued that a further payment promised to Riria was still due. However, Mohi had signed a promissory note to Craig for a debt which he acknowledged in court.⁷⁷ Over and above all this, Mr McBurney observes that Craig had paid only £350 for all the trees on the 8800-acre Opitonui block and that the 2500 felled logs alone had a value of £6000. At an average of £2 8s per log, only 146 cut logs would suffice to pay the cost of the lease. McBurney comments:

75. Document K1, pp 42–43. Mr Walzl quotes a statement by Harris which suggests that there was much more to the breakdown of the agreement than the pipe incident: Harris was apparently incensed by Craig's arrival at 'Coromandel' with a bag of sovereigns to 'buy up all the bushes', get behind the agreement, and render his mill useless: doc K1, pp 38–9. Why Craig would want to wreck an agreement very favourable to him is unclear; Harris's account suggests suspicion and jealousy on Harris's part.

76. Document A29, pp 9–13; doc K1, pp 42–43

77. Document K1, pp 20–21, 35

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The Opitonui forest was a huge resource and Mohi may well have perceived Craig's original purchase price of £350 as being far too low. In Harris he found an ally with few scruples, who understood the implications of the new land legislation and how it might be turned to their mutual benefit.⁷⁸

McBurney also rightly points out that huge capital outlays were also required to establish a milling operation and that millers' profits remained marginal. JS McFarlane, Craig's creditor, estimated that Craig's outlay in mill, engines and log booms amounted to £10,000.⁷⁹

(3) Harris's purchases

Meanwhile, aided by the leverage they gained from advancing money for surveys and court costs under the 1867 Act, the Harrises, senior and junior, acquired most of the Whangapoua lands in private deals. As Mr Walzl sums up, 'A total of 23,594 acres had passed through the Court and all of it had been alienated to Harris.'⁸⁰ Mr Walzl notes that the total purchase price recorded on deeds for all the Whangapoua blocks was £1500. He adds:

Hidden payments made by [Harris] are those where he paid for costs which were in turn registered in liens which disappeared when the blocks were sold. Even with these factored in, the price to Harris is little over £3000.⁸¹

On this arithmetic, the average price received by the Maori owners was about two shillings sixpence an acre. This is about the price the Crown was paying in 1872–73 for Coromandel lands, a price which James Mackay himself considered low.

In several cases, however, the Whangapoua timber itself was the subject of separate payments, not recorded on the deeds. It is thus difficult to establish precisely what Maori actually received overall for the timber and land. Mr Walzl suggests that Harris received a handsome profit when he on-sold Waitekuri, Maungatapu, Opera, Hikutawatawa, and Opitonui to the New Zealand Timber Company in 1881 for £7300. If this was for land and timber alone, then Harris made a profit, but if he also sold his mills and other infrastructure as well, then this was a fire sale (in which prices are considered suspiciously low, for reasons other than the value of the commodities on offer). For Harris had laid out very large sums for mills, dams, tramways, and ships on his Whangapoua operations, estimated in the 1875 return to be worth £55,000, including two mills valued at £25,000, £6525 paid for timber (including surveys) and logs in stock or in the bush to the value of £15,000.⁸²

78. Document A29, p14

79. Ibid

80. Document K1, p47. The above summary of alienations is taken from document K1, pp33–47. Mr Walzl's account is in turn largely drawn from document A30, Mr McBurney's 241-page report on the history of the Whangapoua blocks in which the Mangakahia whanau had interests.

81. Document K1, p62

82. 'Return Showing Approximately the Value of Saw Mills and of Forests and Timber Owned by Saw Mill Proprietors within the District of Hauraki, on June 30 1875', AJHR, 1875, C-3A, p2 (doc A29, p18)

Harris's profit from his sale to the New Zealand Timber Company seems poor in relation to the £38,440 received by that company when it on-sold in 1888 to KTC, an emerging monopolist of the Coromandel Peninsula.⁸³ Given that KTC then closed the two mills at Whangapoua, this price most certainly reflected not only the value of remaining timber but also the belief that the land was auriferous: it was prospected for gold in 1889 and subsequently worked privately by KTC, with limited success, until 1894–95, when the workings were sold to the Freehold Gold Estates Company, which persevered with them until 1903.⁸⁴

In relation to the Whangapoua transactions Mr Hayes, for the Crown, has argued that, under the 1867 Act, Maori owners borrowed – and European alienees willingly loaned – more than was strictly necessary for surveys and title investigation costs.⁸⁵ This assertion is challenged in closing responses of counsel for Wai 475.⁸⁶ However, in the case of Te Ranga block, a lien of £40 was taken for a survey costing £18; two liens were taken out in respect of Opiitonui; one of £150 in 1869 which appears to have covered the survey cost and one for £400 in 1870, which the claimant witness Mr McBurney believes to be a down payment on purchase (either of the timber or of the land).⁸⁷ This lends support to the Crown's view that one must be careful about generalising that sales were a consequence of debts incurred in order to comply with the requirements of the Native Land Acts; in some instances it is likely that 'debts' were advances on purchase.⁸⁸ Similarly, counsel for Wai 495 refers to the impact of legal costs. However, counsel's suggestion that the Supreme Court case *Mangakahia v NZ Timber Company (1882)*⁸⁹ 'precipitated the whanau's financial demise and was a considerable factor in its land loss' is in conflict with the fact that the bulk of the Whangapoua alienations occurred a decade earlier. Nevertheless, the costs of that case would certainly have added to the pressure to alienate remaining land in Te Pungapunga 1, 2, and 3 to (among others) Frederick Earl, counsel for the whanau in the case.⁹⁰ In chapter 16, we discuss how it was the very ambiguous nature of a memorial of ownership which left the whanau in an impossible position in relation to the New Zealand Timber Company. As Mr Walzl has put it, concerning the Mangakahia whanau:

Having entered into a world where their land was controlled through the system brought about by the advent of the Land Court [the Mangakahia whanau increasingly found that], the land had become removed from the world of customary rights . . . [Whangapoua land became part of] a legalistic world of property rights where the only way to enforce rights

83. Document K1, p 62

84. Document A29, pp 19–20

85. Document Q1, p 115

86. Document AA12, pp 18–19

87. Document A30, pp 50, 52–56

88. Document Q1, p 117

89. *Mangakahia v New Zealand Timber Company Ltd (1882)* 2 NZLR 345 (sc)

90. Document A29, pp 47–51; doc A30, pp 113–178

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or gain payments due [in association with the land or its resources (especially in the face of blatant trespass)] was to go further into the Pakeha legal world with its associated increased costs and uncertain results.⁹¹

(4) Tribunal comment

We wish to comment here that comparisons between payments to Maori owners for timber (or for land) with transactions in the wider timber industry have to be made very carefully to ensure that like is being compared with like. We are not sure that this is true of Mr Walzl's figures. Even taking the prices for timber and land by themselves it is difficult to make comparisons between the prices paid in different times and different circumstances. In 1867–73, Whangapoua Maori were selling during a period of rising prices for timber but before the industry reached its most lucrative years. The 21-year lease of Pungapunga 1 (1560 acres) in 1879 for £2000 provides some comparison: it is a much better return for a relatively small area than the Whangapoua owners received a decade earlier.⁹² In retrospect, it is evident that Mohi and the other rangatira were drawn into selling too much, too quickly, and made some bad bargains. It is not so easy, however, to show what would have been a fair price at the time the transactions were made. A more open market or tendering system for the timber, overseen by the Government, such as Grey had hinted at in his 1846–47 proposals, might have done that. By not opening the forests to competitive public tendering, nor providing for an investigation of the equitable interests of millers (or Maori) by the Native Land Court (for which the 1873 Act provided) the Crown left the way open to the influence of powerful men such as Harris. As Mr Walzl puts it: 'the suspicion arises whether the direct involvement of Europeans in the process as money lenders, bankers and then purchasers allowed them to exert undue influence in the setting of land value and the amounts to be paid for it.'⁹³

The 'undue influence' of such people was fostered by the provisions of the 1867 Act which allowed the registration of survey and other costs against the land. Harris jnr was able to acquire control of the kauri forests by means of survey liens over the lands under the 1867 Act, by advancing mortgage money, acquiring leases or cutting rights, encouraging Mohi and others to apply to the court, and then acquiring the freehold from the few owners named in titles. By the time Harris had driven Craig into bankruptcy, he had little private competition and the Crown was not buying in Whangapoua. Within a few years, Harris had acquired 80 per cent of the Whangapoua lands.

The Mangakahia whanau, which had entered into alliance with Harris against Craig, was in greater financial peril than it realised. The want of due inquiry by the court into the

91. Document K1, p 61

92. Document A29, p 32

93. Document K1, p 62

pre-1865 transactions had enabled Mohi Mangakahia to withdraw from a relationship with Craig which he considered unsatisfactory and make what initially appeared to be a better one with Harris. The evidence does not make clear why the Maori owners then chose to sell the freehold to Harris when they had sometimes made quite sound leasehold arrangements on the basis of £1 per tree. The lump-sum payments for forests were less satisfactory than the price per felled tree, but some of these were substantial too, by the standards of the day. Possibly the rangatira were in need of ready money to meet immediate costs, for cultural obligations, for attendance at the Native Land Court and (for the Mangakahia whanau), attendance at the Supreme Court as well. (Mr Walzl notes that, although Mohi was granted costs of £451 for his 1870–71 action with Craig, the associated travel and accommodation costs were met initially by Harris.⁹⁴) Mohi Mangakahia's 1874 petition regarding the Native Land Acts reveals the pressure of survey liens.⁹⁵ But as long as Harris was milling timber on leased blocks, much greater sums could have been obtained by the Maori owners, and over a much longer period, than the two or three shillings per acre prices they accepted for the freehold. It is difficult to suspend suspicion that Harris never intended such a generous rate of payment for cutting rights to last, nor did it. It is possible that Mohi, in particular, had become used to having considerable sums at his disposal when he came under Harris's influence in late 1867. But there is much evidence throughout Mr Alexander's block histories that Maori greatly disliked having lingering debts against their names, for cultural reasons as much as from concern about interest charges, and commonly sold land in order to clear them quickly. As Mr Walzl points out, Mohi in fact never received actual cash for many of his transactions: they simply led to a writing off of liens and mortgages.⁹⁶

There was virtually no Government regulation of the timber industry. The trust commissioners' scrutiny of transactions does not seem to have extended to advising Maori against bad bargains, notwithstanding that the Frauds Prevention Act 1870 required that transactions should only be passed if they were 'equitable'. Mohi Mangakahia was obviously a leading figure in the transactions, manipulated by Harris. No doubt he believed that he was acting in the best interests of his whanau but Mr Walzl provides evidence that initially at least he did not understand the effect of giving liens over land.⁹⁷

The Crown was not a direct party to these events (other than as regards the Timber Floating Act which emerged from them, discussed in the next section). What form Crown involvement might have taken or in what ways it would have benefited or protected Maori is unclear. Painful as the private Craig–Harris saga was to the Maori parties concerned, we are unable to identify the particular prejudice arising from Crown action (or inaction) in relation to timber per se. However, Whangapoua Maori were also undoubtedly injured by

94. Document K1, p 57

95. AJLC, 1874, no 8 (doc K1, p 51 fn193)

96. Document K1, p 57

97. Ibid, p 59

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the way land law facilitated the easy acquisition by Harris of most of their lands, and we give our findings on that large question in part IV, relating to land law (including the 1867 Act) and land purchasing.

14.4.2 The Timber Floating Act 1873

Prior to the Timber Floating Act 1873, Whangapoua Maori had often assisted in clearing snags from rivers where timber was being floated. They did so possibly because their timber-cutting agreements involved easements to remove the timber, and probably for the wages involved.

Dr Anderson has suggested that the Timber Floating Act 1873 was prompted by Mohi Mangakahia's attempt to levy a toll on a miller for floating logs down a stream containing eel weirs, winning an action in the Supreme Court on the matter.⁹⁸ This is presumably a reference to the case of *Mangakahia v Craig*, discussed earlier. But Mr Walzl's evidence shows that the case had more to do with preventing Craig entering the Mangakahia land to remove the logs he had felled years before, than it did with Mohi's concern about weirs.

On-going rivalry between timber millers at Whangapoua led to the Timber Floating Act. When Craig's principal creditor, JS MacFarlane, a member of the House of Representatives, acquired Craig's interests at Whangapoua, he began to fell timber on Waitekuri block. His log-driving down the Waitekuri River damaged the banks and eel weirs in the river.⁹⁹ At that stage, Harris held a 999-year lease of the adjacent Hikutawatawa block. Mr McBurney writes:

The Waitekuri and Hikutawatawa Rivers converged at the boundary between the two blocks, with the outflow to both crossing a short span of the Hikutawatawa block to the sea. Both parties were using the rivers to drive felled logs to the harbour and thence to their respective mills.¹⁰⁰

The ensuing manoeuvres between Harris and MacFarlane do not concern this Tribunal, but ended in a charge of trespass against MacFarlane in the Supreme Court, and a claim for £5000 damages. After MacFarlane had exhausted his legal avenues, the Government took up the matter and passed the Timber Floating Act 1873, which made lawful the driving of timber down creeks and rivers, regardless of who owned the banks, while making provision for claims for damages to the banks.

Mohi Mangakahia and other Maori petitioners opposed the Bill because of the way it took control of the rivers for the timber industry and failed to address the damages to eel weirs. Their views were taken up by the Maori members of Parliament but were brushed

98. Document A8, p 274

99. Document A29, p 15

100. Document L18, p 7

aside by Vogel.¹⁰¹ (We address below in our chapter on environmental issues the general question of damages to the ecology and customary Maori usages of waterways.) We note here that the Legislature was quick to meet the requirements of the timber industry. But because of the swift acquisition of title to riparian lands by the Crown and private purchasers in most of the claim area it is doubtful if Hauraki Maori ever received compensation for the loss of customary usages of the rivers, other than some early payments to individuals for the loss of specific eel weirs. In 1883, Peneamene Tanui was still petitioning Parliament about damage to river banks.

14.4.3 Harataunga and timber agreements in respect of goldfield lands

(1) *Timber-milling on Harataunga*

Mackay's 1875 return shows that a sawmill was built at Kennedy Bay in 1863 by Cruikshank and Company for an estimated £4500. In 1868, the Harataunga right-owners negotiated a mining cession with the Crown, covering about 9500 acres, exclusive of about 600 acres leased to Messrs Smart and Hogg, and the area was proclaimed a goldfield. In 1872, Mackay attempted to purchase Harataunga for the Crown, reporting that the 600-acre lease to 'Messrs Cruikshank and Smart' was now abandoned. However, the Harataunga right-owners declined to sell. In subsequent years, they entered into a number of private arrangements concerning kauri timber, none of which was officially sanctioned or registered. There is mention of an 1880 agreement between Ropata Ngatai, Rapata Wahawaha, Wiremu Paikea, and others with Johnson and Vickery; the Maori owners were to be paid £1 for each kauri tree over three feet in diameter and five shillings for each tree between two and three feet in diameter, but it is not clear whether this agreement was actually completed. By the 1890s, most of these agreements had been assigned to the millers, Smythe, Preece, and Johnson, who commenced extensive operations and built a tramway to carry the timber to the harbour, at the cost of several thousand pounds. Smythe and Company indicated that payment to Maori was on the basis of a fixed price for every tree cut, although the rate per tree and total payments are not shown in evidence.¹⁰²

Crown officials did not interfere, but by the late 1890s the Crown had begun to acquire interests in the block and was concerned not to lose the timber. The chief land purchase officer advised that the land had been ceded to the Crown for gold mining before the title to the block had been investigated. The cession had made the land 'Crown land' for the purposes of mining legislation and subject to the provisions of that legislation concerning timber. All of the private timber leases were legally invalid, with the possible exception

101. Document A29, pp14–16. Mr McBurney's account removes the confusion that has arisen between Mohi's case against Craig for trespassing and taking logs from Optonui and CA Harris snr's action against MacFarlane, which, although arising out of the struggle between Craig and Mohi (with Harris jnr), is distinct from it.

102. Document A10, pt1, pp6–14

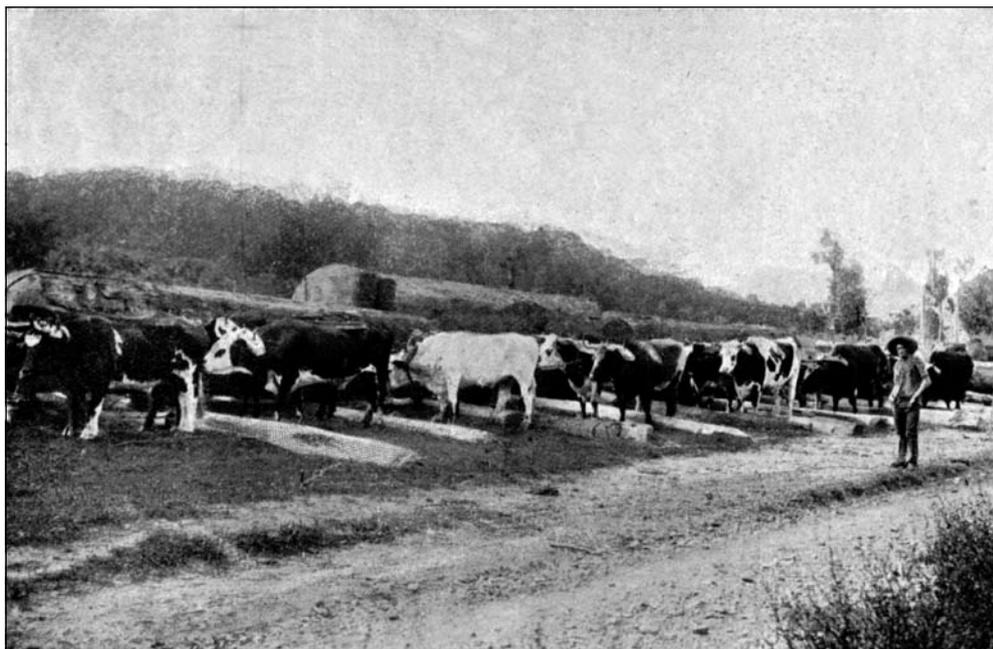


Figure 69: Logs being hauled on a skidded road to the beach at Kennedy Bay

of those which concerned the lands leased to Messrs Smart and Hogg before the cession and reserved from it. The Under-Secretary for Mines advised the Surveyor-General that the commissioner of Crown lands should consider instituting proceedings to stop the removal of timber. Smythe and Company made it clear that they would defend their rights and protect their heavy investment in the mill and tramway. They also suggested that any attempt by the Crown to insist on its rights to the timber and stop the payments to Maori would be certain to 'cause trouble'.¹⁰³

The Crown wavered about its position under the 1868 mining agreement.¹⁰⁴ The mining warden and commissioner of Crown lands thought that it was ambiguous as far as payments for timber cutting were concerned, and the Under-Secretary for Mines did not think the Crown could interfere in respect of land in Smart and Hogg's leases, exempted from the 1868 mining cession. Nevertheless, Smythe and Company had no registered lease. Official wrangling continued, and Mr Alexander comments: 'It is not known whether any further action was taken by the Crown.'¹⁰⁵

103. Document A10, pt1, p14

104. James Mackay, 'Report by Mr Commissioner Mackay Relative to the Thames Gold Fields', 27 July 1869, AJHR, 1869, A-17, pp 23-24

105. Document A10, pt1, pp14-16

(2) MacCormick's finding

In 1939, the question of the extra-legal timber leases in relation to the Harataunga block was brought before the MacCormick commission by various members of Ngati Porou. They argued that the Crown had failed to honour the terms of the mining cession, under which it could either have debarred private timber cutting or controlled timber sales, and charged the fees prescribed under the 1868 agreement. The implication of their petition is that the Maori owners would have done better under the terms of the 1868 agreement, which involved payments of £1 5s for each kauri tree felled, freedom for miners to cut other timber for mining purposes and fees of £5 per annum to cut other timber for commercial purposes. MacCormick summarily dismissed the claim as 'quite without merit'. The right-owners having sold the timber themselves and received payment, they could not 'eat their cake and still have it' (ie, seek compensation for the sold timber as well).¹⁰⁶

Although the terms regarding cutting of timber had been put in the mining agreements in order to ensure that Maori received equitable payments for their forests, in the absence of detailed records or evidence of the payments made for Harataunga timber or the number of trees involved, it is impossible to check whether Maori owners were manifestly disadvantaged by the Crown's non-enforcement of the timber clause of the mining agreement.

(3) Had the mining agreements effectively lapsed (the Moehau example)?

It should be recalled that relatively little gold-mining in fact occurred on Harataunga and the Crown asserted little authority over the area under the Gold Fields Acts. Indeed, in these proceedings claimants have argued that the goldfields proclamations should have long since been revoked, because of their disadvantages for Maori owners (most conspicuously in respect of residence site licences). It is paradoxical to support a 1930s argument that the cessions should have been upheld. That would have meant that Maori owners of forests, as well as Pakeha purchasers of trees, should have come under the wardens' authority.

Some light is thrown on the issue by negotiations over the Moehau blocks, which also came under the 1868 mining agreement. In 1882, the Auckland Timber Company had begun negotiating directly with the owners for the purchase of kauri on Moehau 1G and 1H; but earlier Mackay had purchased some interests in the freehold on behalf of the Crown. Land purchase officer Wilkinson drew attention to the fact that the goldfields proclamation still lay over Moehau and therefore 'private parties have no right to acquire timber over these blocks, unless through the Warden of the Goldfields, and at the fixed rate of one pound five shillings per tree.'¹⁰⁷ Approached for clarification of the Auckland Timber Company's position, its solicitor, Dufaur, replied:

106. 'Report of Judge MacCormick', 28 June 1940, AJHR, 1940, G-6A, p 2 (doc s8(c), p 86)

107. Wilkinson to under-secretary, Native Land Purchase Department, 21 December 1882 (doc A10, pt 1, p 42)

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I have this day seen some of the owners of the various blocks in that district and have been specifically requested to call the attention of the Government to the *unfair proclamation* that at present exists over their lands.

The claim of the Government in respect of the lands purchased by Mr Mackay have been settled and the land awarded to the Crown by the Court, yet the proclamation still exists. Although the land from its mountainous character is worthless for the purposes of settlement, there are here and there patches of ti tree and other wood fit for fuel, yet although the natives were told by Mr Mackay at the time of their signing the Deed [of sale] to the Crown the lands awarded to them by the Court would be released from the Government lien [over the mining revenue], it is found in their attempting to deal with their wood that it has not been released.

Will you therefore bring this matter before the Department in order that the lands belonging to the natives can be released from these unfair restrictions. [Emphasis added.]¹⁰⁸

The Moehau owners might have been protected by the Crown's insistence that mature kauri be purchased at not less than 25 shillings per tree, but there was considerable trade in other kinds of timber (including manuka firewood) and it is by no means clear that the Maori owners would have been better off selling that timber through the warden for the £5 annual licence fees under the 1868 agreement than by selling it directly to the market. Their own preference as to how to proceed seems clear from Dufaur's statement.

(4) Tribunal comment on Harataunga timber

We lack firm data on how much was paid for the Harataunga timber either in the 1860s or subsequently, but Mackay's return of 1875 shows a £2600 payment (including survey) by Cruikshank and Company, and the references in subsequent negotiations to payments per tree felled suggest that the total payments were not trivial. As MacCormick implied, the agreements were made by the Maori owners themselves, and it is difficult to believe that the Harataunga owners would have been any less impatient with Crown control over their direct sales of timber than the Moehau owners. Without quite detailed calculations about whether a minimum of 25 shillings per mature kauri, set against the probable lower returns for other timber, it is far from clear that the Crown's assertion of its authority under the mining cession agreement would have resulted in better outcomes for the Maori owners. It might well be that Harataunga Maori would have received more for their kauri timber *if* it had been sold, via the warden, at the rate of 25 shillings per mature tree, rather than in the arrangements actually made. For the Crown to insist that kauri were sold at 25 shillings per tree, or not at all, is one thing, and kauri actually selling at that price is another. But there is no evidence that 25 shillings was an achievable price, except, perhaps, for the

108. Dufaur to land purchase officer, Thames, 24 September 1883 (doc A10, pt 1, p 43)

most accessible kauri. In other words, the rigorous enforcement of the Crown's goldfield regulations in respect of timber could well have resulted in most timber on goldfield blocks remaining unsold rather than sold for a better price. We do not consider that prejudice has been established in this matter.

14.4.4 Later transactions: Taparahi, Pakirarahi, and Titirangi

In the 1880s, as they were frantically expanding their operations in order to counter a slowing market, the timber companies began to buy interests in relatively inaccessible inland blocks.

For example, Taparahi 1 (4237 acres) was purchased by USSC from Hoani Nahe and others in 1882. In 1888, Hoani Nahe was obliged to sell much of Taparahi 2 and 3 to the Crown, at much less than his asking price, because of a botched timber deal. In 1885, several of the grantees of Taparahi 2 had undertaken to enter into a timber agreement with the New Zealand Timber Company, but Nahe vetoed it because the other grantees of the Taparahi 2 block had previously committed themselves to entering into a different timber agreement with James Darrow. On 12 August 1885, timber-cutting rights for Taparahi 2 (3280 acres) were sold to Darrow for £3500.¹⁰⁹ This was a large payment relative to payments in 1872–73 or earlier. (By contrast, Mr Walzl cites the sale of timber-cutting rights on Kuaotunu 3 in 1885 for £60 to Mr Meikle. He adds, 'It was later stated that there was six million feet of kauri timber on the block to say nothing of the vast quantity of puriri, pohutukawa and titee.' The lease was approved by trust commissioner and on-sold to KTC in 1888.¹¹⁰)

The New Zealand Timber Company asked for a refund of the £10 deposit they had paid on Taparahi 2 and £200 as payment for damages and Nahe gave the company a promissory note. The majority of owners then signed the agreement with Darrow.¹¹¹ During the next few years, Nahe was hounded by bailiffs because of the promissory note, which he was not in a position to pay, and had to approach the Crown with an offer to sell Taparahi 2. The Crown agreed to buy the block at two shillings sixpence per acre, and though this was much less than his asking price, Nahe was ultimately obliged to accept. Claimant witnesses argue that the Crown's refusal to raise its price was mean-spirited, given the assistance that Nahe and other Ngati Maru were then giving in the purchase of Piako.¹¹² Perhaps it was, but it is difficult to construe the Crown's action as a Treaty breach except in so far as the purchase was yet another step in the Crown's excessive acquisition of Hauraki land.

The complex alienation history of Pakirarahi 1 has been told in our chapter on the East Coromandel goldfields, although the initial purchasers, USSC, were as interested in the

109. Document R33, p 55; see also doc A10, pt 2, pp 286–287

110. Document N9, pp 122, 124–125; doc N10, p 27

111. Document R33, p 55; see also doc A10, pt 2, pp 286–287

112. Document V3, pp 70–74; doc A10, pt 2, pp 239–243

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timber as much as the gold. Pakirahi is one of the blocks which revealed the growing indebtedness of New Zealand companies (such as USSC) to the Bank of New Zealand and the bank's connections with the burgeoning monopoly of KTC from the late 1880s. (Thomas Russell, a founder of the Bank of New Zealand in 1861, was a director of KTC from 1902 to 1910.¹¹³)

These transactions show that the timber industry, like the gold industry, had inevitably been brought under the ambit of investment capital as New Zealand entered the international economy, and experienced the rationalisations which the investors made in the face of market fluctuations. Much of this was beyond the Crown's control, but it meant that the small and inexperienced players, mostly Maori but also including some of the local Pakeha timber millers, could not prevail against the pressures of international capital. For Maori, the outcome was usually loss of land. Hamiora Mangakahia's testimony to the Rees–Carroll commission of 1891 showed that Maori little understood the nature of mortgages, the effect of giving survey liens and the way the 10 per cent duty paid by purchasers of Maori land was reflected in lower prices to Maori vendors.¹¹⁴

Experience sometimes led to greater commercial understanding. In an agreement between Peneamene Tanui and KTC in respect of the Titirangi 2 block in 1894, Tanui was being paid for the logs he delivered to the collecting booms, and had subcontracted the actual cutting and trimming to two experienced local bush contractors, paying them 'one shilling and ninepence per 100 ft usual bush measurement'.¹¹⁵ We do not know how much Tanui was paid by KTC, but transactions of this nature stand in sharp contrast to the 1860s sales of all the kauri within an area of thousands of acres for a few hundred pounds.

14.5 SUMMARY, CONCLUSION, AND FINDINGS

14.5.1 Claimant and Crown submissions

(1) *Claimant submissions*

In addition to those causes of action listed in section 14.1.2, Counsel for Wai 100 submit that the Crown failed to prevent the exploitation of Hauraki timber by third parties in ways disadvantageous to Hauraki iwi. During the period 1840 to 1865, the Crown did not assert its right of pre-emption to prevent Maori from dealing with timber and other resources on their land (unless responding to specific complaints from Maori). In particular, it did not enforce the Native Land Ordinance 1846 which, until its repeal in 1865, made dealings in Maori land or resources on Maori land illegal unless licensed by the Government. In the

113. Document A12, pp 33–34; 'Professor Russell Stone', DNZB, vol 1, p 377 (doc v3, pp 58–59)

114. Evidence of Hamiora Magnakahia, 16 March 1891, AJHR, 1891, G-1, p 36 (doc A29, p 23); doc K1, pp 66–67

115. Document N4, pp 18–19

late 1850s and 1860s, timber companies obtained cutting rights over large areas of forest 'for sums below market value.' Indeed, Crown officials often assisted the extra-legal negotiations between Maori and timber millers, in which the interests of Hauraki Maori were inadequately protected. While they provided some income to Maori, the unlawful deals resulted in Maori being unable to benefit significantly from one of their key resources. Then, in 1871–73, when the Crown purchased some 132,000 acres of land subject to timber leases, Land Purchase Department officials and private timber millers, 'worked together to use the existence of the timber leases to drive down the price the Crown would eventually pay for the land.'¹¹⁶ In these ways, claimants allege, the Crown breached its duty of active protection of Maori.

Counsel for Wai 72 and a number of other claimant groups argue more specifically that the conduct of James Mackay in 1872 in the Tairua and some other instances was 'duplicitous'.¹¹⁷ Mackay worked for timber companies as a private agent as well as being a Crown land purchase agent. Mackay's desire to reach a financially attractive accommodation for the timber barons suitably reconciled with the Crown's policy of settlement on the peninsula made it necessary to procure the forested land at as cheap a bargain from the Maori owners as possible. Crown officials, the claimants' argued, acquiesced in the desire of Mackay to work with and protect the interests of the timber industry in his transactions with Maori owners. Mackay was repeatedly in situations of conflict of interest and facilitated timber agreements that disadvantaged Maori by depressing land values: because of the timber agreements, the Crown paid a lower price for the land itself.¹¹⁸

(2) Crown submissions and claimant responses

The Crown's case is that, while it enjoyed power under the Native Land Purchase Ordinance 1846 to proceed against settlers occupying and using Maori land, 'the voices of the settlers and the Natives were against it', as Mackay stated in 1875. The Crown therefore chose not to 'actively prevent Maori from dealing with their timber, gum, flax and other resources with third parties, but did investigate complaints when requested to do so by Maori'. Crown counsel submitted that this did not constitute a failure to protect Maori, but was rather an honouring of their arrangements, though these arrangements were void at law. If the Crown had strictly enforced the Native Land Purchase Ordinance 'it would have insisted that land be sold to the Crown rather than allowing Maori to make such arrangements.'¹¹⁹ In all likelihood a Crown monopoly would have been much less satisfactory to Maori than the ability to transact directly with timber millers.

116. Document Y1, p 159

117. Document Y9, p 14

118. Ibid, pp 14–15; see also doc Y11

119. Document AA1, pp 203–204

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As to the later formalisation of these arrangements under the Native Land Acts, Mackay himself 'had no power of validation'. He could only facilitate arrangements between Maori landowners and timber millers either to formalise existing arrangements or make new ones. The evidence from Mr Alexander's block histories indicates that in most cases the Maori owners clearly wished to honour existing arrangements and signed deeds of lease with the established millers as soon as land passed the court. Counsel quote the statement by Wiremu Hikairo that renegeing on previous agreements in order to make new ones was reprehensible in Maori eyes. On the other hand, Maori *were* legally free to make new arrangements, and in some cases did so.¹²⁰

As to prices paid, Crown counsel notes that Maori on the Coromandel Peninsula had been negotiating timber agreements since the late 1850s, were experienced, and by no means 'at the mercy of agents loosely connected to the land purchase department', as claimant counsel had put it.¹²¹ The per-acre prices for the 1871–73 Crown purchases do not reflect the total payments received for the timber and land. In many cases, Maori had received a lump sum for the timber agreement when it was first negotiated, some Maori were in the employ of sawyers, and 'fees charged for the floating of logs and other costs . . . such as for the survey of blocks', were met by the timber millers. 'It is submitted that there is no full picture of the total price paid for this acreage of land.' Nor was the Crown's upholding of the formal timber agreements an indication of sharp practice in order to depress prices. If prices paid for the land were low in the early 1870s it was because most of the timber had by then been cut.¹²²

In short, Crown counsel submit, if the Crown was prepared to purchase the land subject to the timber leases it is hard to see the prejudice to Maori. There is no clear evidence that the payments for cutting rights were too low. In the Crown's view, Maori could not have run the timber industry by themselves, with all the complex requirements for transport and the marketing of timber (let alone, presumably, the high capital cost of steam-powered saw mills). The critical argument, counsel suggests, is 'whether the Crown did enough to enable Maori to acquire the skill to gradually become independent sub-contractors and eventually to progress to participation throughout the timber industry.'¹²³

In closing responses, counsel for the Wai 100 claimants takes up the Crown's argument that, unless Maori protested or complained, they were allowed to make their own arrangements in regard to timber on their land even though these were void at law. This does not bear scrutiny, he submits, 'as the Crown also had a duty of active protection to ensure that Maori were not entering into transactions that were detrimental to their future needs.'¹²⁴

120. Document AA1, pp 204–205

121. *Ibid*, p 205

122. *Ibid*, pp 206–207

123. *Ibid*, pp 207–208

124. Document AA14, pp 47–48

14.5.2 Tribunal findings

(1) *General observations*

From a twenty-first century perspective, the exploitation of Hauraki timber, especially kauri is widely regarded as rapacious vandalism. In nineteenth century terms it was a resource ripe for harvest, viewed no differently from flax. The timber harvest was regarded as a legitimate source of income, even though it was recognised from at least the 1870s that it was not a renewable asset. Agricultural settlement, rather than timber, dominated long term prospects in colonial perceptions. Today, the nineteenth century importance of flax to the Royal Navy and in general commerce is largely forgotten, whereas kauri now enjoys iconic status, and figures largely in the Hauraki claim. This is probably because indigenous forests took centuries to grow, and also because the commercial value of kauri and other native timbers has risen over the years while that of flax has declined. The timber industry is one in which fluctuating markets and prices are endemic. Kauri has figured largely in the Hauraki claim and we have examined the issues involved in some detail.

We are required to examine the Crown's role, in terms of its Treaty obligations. Should the Crown have been more assiduous in promulgating and enforcing regulations to control the harvesting of kauri? We note the Crown's ambivalence on the matter, but also note the absence of complaint or protest from Maori at the time. In our view this is a strong indication that both vendors and purchasers were confident and competent in making private agreements and generally satisfied with the outcomes. Those in possession of trees bargained with traders and millers to reach a price satisfactory to both parties, otherwise a sale did not occur. Those so engaged sought the assistance of local Crown official when they needed to resolve disputes or to witness their agreements. Maori vendors, we believe, would have been aware of the marketable timber on their lands, and willing to trade when it was apparent that there were buyers in the area. While trading in land, as a commodity, was a new and alien concept to Maori, barter in the resources of the land was closer to the system of traditional, reciprocal exchange.

(2) *The technically illegal dealings before 1865*

We have discussed in chapter 4 that Grey's stated intention in passing the Native Land Purchase Ordinance was not to debar occupation of Maori land and use of Maori resources by pastoralists and timber millers but to bring them under Crown scrutiny and control, for the protection of Maori right-owners as well as the occupiers themselves. We noted that indeed, in the year following the passage of the ordinance, licences were granted by the Government for timber cutting on Maori land, including two in Hauraki. It is not apparent to us that these arrangements were prejudicial to Maori. There were mutual benefits for Maori and timber cutters, and development of the industry was not inhibited.

But the licensing system was formally applied to Crown land only. From about mid-1847 through to 1872, agreements between Maori and timber cutters were made without any

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regulatory or licensing system. However, the informal arrangements (legally void under the 1846 ordinance and the 1865 Act) for the rapidly increasing numbers of timber mills in Hauraki in the 1860s, and the associated cutting rights agreements, were often made with the assistance of Government officers, on official premises, which means that the Crown had some responsibility for them. (One at least – Craig’s – had the approval of a Minister of the Crown on the advice of the Crown’s law officers.) Many of the agreements were for large areas and indefinite periods. Effectively they could last until the timber was exhausted.

We do not think that it is clear that Maori would have gained significantly from the Crown prosecuting timber millers under the Native Land Purchase Ordinance or extending its pre-emptive right to oblige Maori to sell their interests in timber only to the Crown. A central pillar of the claimants’ submissions in relation to *land* in these proceedings is that the Crown monopoly was prejudicial to Maori, in that it denied them access to an open market, and the Crown itself has conceded that it used its pre-emptive right of purchase excessively in Hauraki. It is therefore somewhat contradictory to suggest that the Crown should have closed down the private market for *timber*-cutting rights and obliged Maori to sell only to the Crown. Certainly, as Mr Hayes points out, it is flattering to the Crown to imply that Maori would have got better returns for their timber under a Crown monopoly than by making private agreements with the millers.

Nevertheless, if it allowed private transactions, the question arises as to whether the Crown should have regulated the industry more closely, providing guidelines as to lease terms, and using its licensing power to ensure that contracts for timber-cutting rights were equitable to all parties. The data available to us as to the terms of agreements and prices paid to Maori for their timber, discussed in previous sections of this chapter, is somewhat limited. This is largely because, with no Government-supervised regulatory system in place, agreements over a very valuable resource were not systematically recorded or registered.

The system worked up to a point, because it was in many respects on Maori terms, managed largely by local rangatira with as much (or as little) involvement of Government officers as the parties required. As Mr Walzl acknowledged in cross-examination, the Mangakahia whanau, for example, could modify arrangements as need suggested and circumstances allowed; formal agreements would have denied them much of that flexibility.¹²⁵ Moreover, the agreements were made in a relatively open market, with a numerous millers competing for cutting rights in a situation of growing demand for timber. Many of the lump sums paid were substantial and the total payments for timber would have represented considerable wealth for the small Maori communities involved, or for their rangatira.

Yet, the agreements were usually without any fixed term or defined area. Maori were selling their timber rights, in areas usually unsurveyed and loosely defined, without time limits, for lump sums. We note that later, when the agreements were formalised, trust commissioner

125. Document R33, p 54

Haultain refused (because alienation of timber rights was tantamount to alienation of the land while the miller was in possession) to give his certificate unless a fixed term was stated in the agreement. We note that disputes about who should receive payments – when the rights of hapu intersected – affected prices received by Maori. As with land sales, disputes resulted when rangatira were more eager to win the contract against rival chiefs, than to bargain hard over price. (Generally speaking, clearly defined interests, within clearly defined boundaries, for express terms of years, are worth more than ill-defined interests.)

Provided that the cost of determining ownership rights and boundaries was not exorbitant, Maori and millers would have benefited from having them defined by some due process and publicly recorded or registered. Maori stood to benefit even more if the cutting rights for these defined interests were sold by tender, and for fixed terms. An appropriate term of years for a timber lease would have been for the market to determine: millers were unlikely to invest heavily in steam-powered mills and other infrastructure unless they could get reasonably long terms. But the fact that they did not need agreements in perpetuity or for 99 years, was shown when, as Mackay reported that when the Crown bought the freehold, many millers ‘agreed to waive their rights over such a lengthened period, and to reduce the term to twenty-one years, or other reasonable limit.’¹²⁶

(3) The formalisation of agreements in 1872–73

The early Native Land Acts did not provide for a systematic review and formalisation of the extra-legal and void agreements until the enactment of section 108 of the 1873 Native Land Act. This expressly provided for the court to review them and issue leases of up to 25 years, but only upon application. By this time the millers had invested heavily in the infrastructure and had felled much of the timber in the areas covered by the agreements. Most Maori owners were not in a position to initiate new agreements with other investors. In most cases, anyway, they did not wish to renege on their previous deals. We note that usually they accepted advances from the existing millers to survey the land concerned, take it through the court and make formal lease agreements under the Native Lands Act 1865 and its amendments. But we also note that until that process was completed, the previous agreements were unprotected in law, as in the case of Craig, found by the Supreme Court to be a trespasser on Mangakahia land.

In our view, it would have been unsatisfactory if the Crown had intervened to the extent of requiring the opening of all the cutting rights agreements to new, competitive tenders. By now, the established millers had invested thousands of pounds in building mills and most had amicable, long-standing relationships with the Maori right-owners. Mackay’s January 1872 proposal to Ormond that he negotiate Crown purchases *subject to* the existing

126. Mackay to Colonial Secretary, 7 July 1875, AJHR, 1875, C-3, p5

agreements (in so far as Maori wished to continue them) was therefore a practical proposal to recognise substantial developments already well and truly in place.

The renegotiation of the timber agreements was confused by the fact that it took place in conjunction with the Crown's purchasing of the freehold of most of the Coromandel Peninsula. We see nothing inappropriate about this in principle. As noted, the millers had invested heavily on the basis of their previous agreements with Maori owners and their investments merited protection. Nor was it inappropriate for the Crown to pay a discounted price for land that was subject to timber leases, given that the timber did constitute most of the value of the land at that time.

What is questionable in our view is that the purchases took place under proclamations of Crown pre-emption, and largely through the agency of one man, James Mackay. This situation attracted the suspicion of Sir George Grey in 1875 and led to the setting up of the Tairua Investigation Committee. As discussed earlier in this chapter, the committee did not find any particular malfeasance or illegal action by Mackay and his associates in the simultaneous negotiation of Seccombe's timber lease over Tairua and the Crown purchase of the block. But it did conclude that the renegotiations of the informal timber agreements should have taken place through an open and public process in court, in order 'to settle upon a permanent basis the respective rights of the holders of the leases, and of the public.'¹²⁷ The report might well have added 'and of Maori'.

In practice, the void agreements were formalised through the agency of Mackay in private arrangements. In our view, that gave too much influence to Mackay. For the sake of openness at least, we consider that a provision such as section 108 should have been enacted much earlier and all the holders of void agreements required to observe it. As it was, the Crown's involvement in the process of formalising or 'perfecting' the agreements was limited to the trust commissioner's certification under the Native Lands Frauds Protection Act. He seems to have ratified the agreements with little questioning about equitable terms, other than to require that the duration of the lease be stated.

What is less easy to determine is whether, and to what extent, Maori owners were prejudiced by the arrangements actually effected. Through the formalisation of the timber agreements in 1870–73 all the leases now at least acquired finite terms.¹²⁸ The payments made at this time to formalise the leases varied widely and some seem very low. However, they must be considered not in isolation but in relation to the payments previously made for the timber, in the 1850s or 1860s, many of which were substantial, and, as we have remarked earlier, the 1870–73 payments may have been regarded essentially as 'top up' payments for the formalisation of the leases rather than payments for the remaining timber as such. The millers had also usually paid for the surveys necessary for putting the land through the court, and

127. 'Report and Evidence of the Tairua Investigation Committee', 11 October 1875, AJHR, 1875, I-1, p iv

128. Mackay to Colonial Secretary, 7 July 1875, AJHR, 1875, C-3, p 5

this was a significant factor given the expense and difficulty of surveying in forested country. In the absence of clear evidence as to what was paid in the period of informal dealings, and of what the payments of 1872–73 were actually for, it is difficult for us to comment further, or to conclude that Maori were poorly paid for their timber in every case. However, we have noted the wide variations in the terms agreed in 1872–73 including the fact that in two cases at least, the millers agreed to pay a stumpage as well as a lump sum.

(4) Particular cases

We have discussed earlier in this chapter the particular transactions relating to Tairua, the Whangapoua lands, Pakirarahi, and Taparahi, in so far as they relate to timber, and we refer to our findings in those sections. We consider that in all of these cases the serious injury to Maori arose out of land law and land purchase rather than from timber transactions per se.

(5) Overall findings

There is no question that Maori in the 1860s were eager to engage with entrepreneurs who came to their areas with proposals to build timber mills and buy cutting rights, much as they had engaged with timber cutters in the 1830s and 1840s. Taking the various facts related in this chapter into account, we find that the claimant case for collusion between the Crown and Mackay (on behalf of the timber millers) to ‘drive down’ the prices that the Crown paid for the freehold of the land has not been made out. If the freehold of Hauraki land had to be bought at all (another matter, which we deal with in a later chapter) the policy of buying it subject to the timber leases was not unreasonable, nor (in such cases) was it unreasonable to discount of the price for the land where the timber (already cut or contracted for) constituted much of its value.

Claimants have suggested the fact that the principal negotiator for the timber millers, James Mackay, was also negotiator for the Crown implies a conflict of interest, but those two roles were not in conflict. Multiple responsibilities were not unusual in the nineteenth century. Mackay had begun to act for the millers over the formalisation of their leases well before the Crown approached Mackay to purchase Hauraki lands on commission. Mackay was open about his obligations to his private clients, as was the Government in directing him to go ahead with the Crown’s purchases, but to discount the price for land subject to timber leases. Certainly Mackay bargained hard in the Tairua purchase, and he reported to the Government that he was getting Hauraki land cheaply, compared with some of the prices paid by private purchasers. But the Crown’s land purchase agents throughout New Zealand were directed to keep payments within certain limits, and it is not self-evident that Hauraki Maori would have got better prices for their land had the Crown put different officials in charge of the purchase negotiations. In our view, low prices were more a consequence of the Crown’s systematic programme of purchase under pre-emption, rather than of any conflict of Mackay’s roles in the timber blocks.

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It is difficult to assess the extent of prejudice experienced by Maori in the ad hoc agreements which followed, though it is clear that the absence of a finite term of years in the agreements was unreasonable, that prices varied considerably and that disputes arose about customary ownership of land and the timber upon it. After 1865 the Crown allowed the pre-1865 agreements to be formalised or renegotiated by private arrangements, most conducted by Mackay, and subject only to a check by the trust commissioner. The enactment of section 108 of the Native Land Act 1873 introduced an optional mechanism by which any of the parties to the pre-1865 agreement could have had their agreement inquired into by the Native Land Court before the award of court title. We note the view of the Tairua Investigation Committee of 1875 that, for the better protection of all parties concerned (as well as in the public interest), such a process should have been available from 1865, and all pre-1865 timber agreements formalised under it. However, there is insufficient information available to conclude that payments to Maori for the timber were inadequate in all cases, taking into account the substantial original payments made in the 1850s and 1860s, the payments made in 1872–73 and the value of survey and other costs borne by the millers.

PART IV

LAND ALIENATION

PROLOGUE

As the claimants have demonstrated, by far the greatest proportion of Hauraki land – some 80 per cent of the claim area – was alienated under the Native Land Acts and related legislation. Not surprisingly, these subjects are given more space and attention in Crown and claimant submissions in these proceedings than any other issue, and demand comparable attention in this report.

The impact of the Native Land Acts is central to the Hauraki claims. They established the Native Land Court and its procedures, which converted Maori customary tenure into forms of negotiable title. The claimants acknowledge that it was not unreasonable to introduce a system for resolving disputes over customary rights or to assist Maori to bring land into the commercial economy. But, to facilitate European settlement of Maori land, the land laws converted customary tenure in which land was held communally into a form of transferable title in the names of individuals empowered by law to lease, mortgage, or sell the land. The claimants maintain that the land laws undermined traditional rangatiratanga, tribal control over land, and social cohesion. They did not assist Maori to engage fruitfully with the commercial economy but rather embroiled them in expensive processes which contributed to or even caused the sale of most of the land.

We must consider the developing legal and administrative regimes, and also the alienation of land under those regimes. In order to deal with the numerous submissions received on the many complex issues, we have broken this part of the report into four chapters: chapter 15 will focus on the evolution of the land law up to about 1872; chapter 16 will discuss the changing land law from circa 1872 to 1899; chapter 17 will focus on the alienation of Hauraki land until 1899; and chapter 18 will consider developing legislation and land alienation in the twentieth century. Each chapter will include the relevant findings and conclusions.

We note that there were two related – but essentially distinct – aspects of the Native Land Acts: the court and related machinery for adjudicating claims to Maori customary land and the kinds of title which the court was directed by the legislation to award. Both aspects have been the subject of sustained criticism, historically and in these proceedings, but they are commonly confused in witness statements.

For some years, the Crown has accepted that land alienation under the Native Land Acts breached Treaty principles, although the extent of land loss has to be shown for each district by Maori claimants. The issue is already being factored into negotiations between claimants

and the Office of Treaty Settlements.¹ However, the seriousness with which it is viewed is unclear. Generally, in terms of Treaty breach, it seems to have been ranked below raupatu (land confiscation) or other compulsory acquisitions. Yet, alienation under the Native Land Acts affected far more land, and far more iwi and hapu, than raupatu. Many claimants see aspects of the law as designed to undermine community control over land and resistance to selling and, therefore, as ‘raupatu by another name’.²

Notwithstanding the general Crown concession that the legal-administrative regime of the Native Land Acts breached Treaty principles, the Crown has chosen, in these proceedings, to revisit the whole question. The Crown took the same approach in respect of the Turanganui-a-Kiwa (Gisborne) claims; some of the major submissions of principal Crown witnesses such as Dr Don Loveridge and Bob Hayes have been deposed in both sets of proceedings. Like ours, the Turanga Tribunal has therefore been obliged to consider the subject in detail. In particular, we have noted in the *Turanga* report the comprehensive analysis of the Native Land Act 1873 and its amendments, the litigation to which it gave rise and its effects on Maori. We see no need to replicate in this report the detailed legal analysis of the *Turanga* report. We will refer to those of its findings which are particularly relevant to Hauraki, but our report will complement rather than replicate them. This is not only because we must appraise the particular impact of land legislation in Hauraki but also because there are issues there which did not arise in Turanga, or were of much greater concern to Hauraki. For example, the Native Land Acts were not fully applied in the Turanga district until the 1870s, but the legislation of 1862–69 was applied in Hauraki from 1865. Also, the Crown purchased a far greater proportion of land in Hauraki than it did in Turanga. Finally, the Hauraki claimants have brought before us issues not raised in previous Tribunal proceedings, including the effects of transferring land by will outside of the customary owner group. Although the Turanga and Hauraki inquiries have much in common, there are significant differences, both of subject matter and, in some respects, of interpretation.

1. The current Office of Treaty Settlement guide *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Direct Negotiations with the Crown* (Wellington: Office of Treaty Settlements, 2004) states on page 15:

The Crown acknowledges that the operation and impact of the Native land laws had widespread and enduring impact on Maori society. In cases where claimants can demonstrate a prejudicial impact in their rohe, the Crown will acknowledge, in the context of an agreed settlement, that it breached its responsibilities under the Treaty of Waitangi.

2. See Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claim* (Wellington: Legislation Direct, 2004), p 536

CHAPTER 15

THE NATIVE LANDS ACTS TO 1872

15.1 INTRODUCTION

15.1.1 Claimant and Crown submissions

(1) *Crown submissions and concessions*

In introductory submissions on the Native Lands Acts and the Native Land Court Crown counsel poses the rhetorical question: ‘Was the system which was created and operated by the Crown for the hundred years from 1865 so contrary to Maori tradition and Maori control, and so inconsistent with overall Maori interests that all that followed from it or through it was also wrong?’ The answer given was a qualified negative: ‘the operations of such a complex and important institution . . . as the Native Land Court cannot fairly [be] reduced to any simple proposition.’ Counsel continues:

the Crown acknowledges responsibility for injustices experienced by Hauraki Maori arising from large scale alienation. It does, however, take issue with the claim that the system of the Court itself was fundamentally flawed.

It is submitted that a more balanced and better informed judgement on the issue of Treaty breaches is to be made by focusing on the scale and nature of Crown purchase practices (a major issue in Hauraki), rather than to condemn the whole system and institution of the Native Land Court itself.¹

The Crown then offers evidence – mainly that of Dr Loveridge and Mr Hayes – seeking ‘to redress the balance to the debate about the Court and the intentions of the native land laws.’²

In closing submissions, Crown counsel concedes:

The issue of Crown purchases is a critical one for the Hauraki inquiry – and key to an informed understanding of the substantive Hauraki Treaty claims. Many of the grievances of Hauraki Maori, including gold, timber and foreshore, are not, in the Crown’s submissions, really stand-alone grievances but a sub-set of the more fundamental complaint about the level of Crown purchasing.

1. Document P6, p 36

2. Ibid, p 37

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It is acknowledged that there was large-scale and rapid Crown purchasing of Hauraki Maori land in the latter part of the 19th century. The Crown acknowledges that Crown purchasing contributed to the overall landlessness of Hauraki Maori and this failure to ensure retention of sufficient land holding by Hauraki Maori constituted a breach of the principles of the Treaty of Waitangi.³

(2) Claimant submissions

Claimant counsel dismiss the Crown's attempt to separate the question of excessive purchase of Hauraki land from that of the land Acts and the court. For example, Mr David Ambler, counsel for the Wai 355 claimants (Ngati Pu), notes that, having in one sentence made the major concession that it failed to ensure that Hauraki Maori retained sufficient land, the Crown then 'spends the next 50 pages of its submissions defending the Native Land Court'. The Crown refuses, says Mr Ambler, to admit that the main instrument of the dispossession was seriously flawed; it 'acknowledges "effect" but denies "cause"'.⁴

Claimants argue that the legislation (and the court and the titles system created under it) did not set up a benign process, concerned merely with substituting clear titles for the complexities of customary tenure, and facilitating the transfer or development of Maori land when its owners so opted. Rather the land Acts and the courts were instruments created for the control of Maori society and rapid settlement of the country by Europeans.⁵

Counsel for the Wai 100 claimants submits, 'The break up of the vast North Island Maori estate required a system which undermined collective autonomy at iwi and hapu level, involving fundamental breaches of Treaty principles. Counsel, having cited the Tribunal's report on eastern Bay of Plenty claims, stated:

The introduction into Hauraki of the system which was designed to undermine tribal authority is as much the fundamental breach here as it was in [Ngati Makino's case in the Bay of Plenty]. Put in its simplest form the Native Land Act and the court which operated it introduced a regime of tradeable scrip in land interests which could be converted into cash in order to ameliorate or advance the economic circumstances of the individual and this without reference or obligation to kin folk. The effect this had on the status and authority of traditional chiefs and on the simple communality of Maori life was very significant indeed.⁶

Counsel's submission goes on to discuss the divisive effects in Hauraki of the 10-owner system introduced by the Native Lands Act 1865, and the listing of all owners under the 1873

3. Document AA1, p166

4. Document AA11, p 4

5. Document D30, pp 2-4

6. Ibid, pp 6-7

Act, so that each owner's signature was individually negotiable.⁷ Counsel considered that the land Acts and the court, expressly designed for facilitating the alienation of Maori land for Pakeha settlement, also had political purposes, namely 'to provide the level of deep penetration into Maori society which could not have been achieved by military means'.⁸

Dr David Williams, witness for the Wai 100 claimants, suggests that the fundamental issues before this Tribunal were in fact stated succinctly 130 years ago when Hirini Taiwhanga and northern chiefs petitioned Queen Victoria in 1882, condemning (among other things):

The making of unauthorized laws relating to Maori lands – namely, the Land Acts of 1862, 1865, 1873, 1880 – which Acts were not assented to by the Native Chiefs in all parts of the Island. Nor is there any basis in the Treaty of Waitangi for these laws, which continuously bring upon our lands and upon our persons great wrongs.

In rebuttal, the then Premier, Frederick Whitaker, asserted that:

The special legislation referred to in the memorial . . . is not restrictive but enabling. The object of the Native Land Acts enumerated was to provide a special tribunal for the determination of Native title; to relieve the Maori owners from the monopoly held by the Government; and to enable them to sell their lands to whomsoever they pleased. In no way are the provisions of the Act compulsory. The Maoris were and are at liberty to avail themselves of the powers conferred, or to abstain from doing so, at their pleasure.⁹

In other words (according to Whitaker), the Native Lands Acts were benign both in intention and in substance. If Maori alienated most of their land under them, it was entirely a matter of their own volition.

Dr Williams, however, submits that Whitaker's claim that the Native Lands Acts involved no compulsion on Maori was 'utterly illusory', and that 'Whitaker and all the ministers of the Crown were well aware of the torrent of Maori complaints about the manner in which the Land Court system operated'.¹⁰ Moreover, if one of the purposes of the Native Lands Acts was to provide clear titles (in contrast to the complexities of custom) that outcome was not achieved in the nineteenth century.

7. Holders of court titles usually held their interests 'severally', as tenants-in-common rather than 'jointly', as joint tenants: see WT Byrne, *A Dictionary of English Law* (London: Sweet and Maxwell Ltd, 1923), p 814. The signatures of each owner were solicited to secure a conveyance of their various individual interests, or 'shares', in the court titles. The question of what interest, if any, was actually being conveyed by each signatory to the transactions is a central issue in these claims and will be discussed in the body of the following chapter.

8. Document D30, p 2

9. 'Petitions from Maoris to the Queen', 8 August 1882, AJHR, 1883, A-6, pp 2-5 (doc E1, pp 47-48)

10. Ibid (p 48)

15.1.2 The central questions about the Native Lands Acts

Analysis of the Native Lands Acts requires reference not only to Maori society and land tenure as they were traditionally but also to the changing aspirations of Maori as they engaged with the new commercial economy. It is fundamental to the Crown's position that not all change should be seen as negative, and that there was no Treaty obligation on the Crown to maintain Maori tenure and social structure unmodified or frozen in time. We agree with the Crown on those points. Most Maori did not seek to keep their society frozen; since Cook's landfall in 1769 to 1840 they had been active innovators in respect of new technology, ideology and social organisation. The widespread adoption of Christianity and engagement in trade are two prominent examples.

But it is also clear (and much discussed by professional historians) that Maori had a variety of views about the extent, nature and pace of change. While many rangatira and hapu encouraged some European settlement, there was always deep concern that extensive settlement – and acceptance of external authorities – would introduce unwelcome and disruptive changes. Above all, Maori wanted to maintain control of their own social order and the land and other resources on which it was based. They sought to control their interaction with outsiders and make changes at a pace and manner of their own choosing. In this context, land and land tenure change were at the heart of their concerns.

The questions that must be addressed here are thus not about whether there should have been change in land tenure: some change was virtually inevitable once Maori accepted extensive settlement and entered the commercial economy, regardless of state intervention. But claimants have pointed out that some settlers had begun commercial agriculture, and pastoral farming had been developed with considerable success, through adaptations of customary tenure. How much *formal* tenure change was necessary, and what *manner* of change, was still unclear in the 1850s.

We must consider whether settler and Maori needs and aspirations could have been met within the framework of customary law, or whether the customary framework would have proved too limiting. There was also the problem that land was not just the basis of economic development; it was also an important foundation of the Maori world view. We must also consider how willing Maori were to adapt their cultural values related to land and their social structure. These sorts of questions also confront other indigenous but colonised societies.

In our view, the Crown's duty of active protection of Maori rights under the Treaty implies that, at the very least, the changes introduced by governments should have been made with the understanding and consent of Maori, and should have assisted Maori to engage, in a controlled and positive manner, with the new needs and exigencies that confronted them, including development of their own land for the commercial economy.

15.1.3 The evidence

The lengthy submissions by claimant and Crown counsel have created a dialogue of assertion and counter-assertion, proceeding from opening submissions, through the lengthy hearings of 1998–99 to claimant and Crown closing submissions. In this dialogue, actual evidence about Maori land legislation was patchy, with most detailed submissions focusing on the origins of the legislation and the first two decades of their operation. However, the evidence concerning particular blocks offered additional insights into how land legislation and the Native Land Court affected land alienation. We were also assisted by a number of academic publications and a series of studies completed for the Tribunal's Rangahaua Whanui research programme between 1996 and 1998.¹¹

15.2 ORIGINS AND PURPOSES OF THE NATIVE LANDS ACT**15.2.1 The Crown's 'civilising mission'**

In these hearings much debate on the origins and purposes of the Native Lands Acts has focused on Dr Donald Loveridge's report, which covers policy and law relating to Maori land from the foundation of the colony to the passage of the Native Lands Act 1865.¹² Dr Loveridge has argued that the Native Lands Act 1862 was the 'cornerstone and foundation for all subsequent native land legislation up to 1909'. In turn, he grounds the 1862 Act in policies set 20 years earlier through the influence of English humanitarians when the colony was founded and the Treaty of Waitangi signed. These policies, as expressed in the preamble to the 1862 Act, were to 'promote the peaceful settlement of the colony and the *advancement and civilization* of the Natives'.

Crown counsel has suggested that this 'civilising' purpose 'should not be too cynically dismissed'; it was a genuine purpose of governments.¹³ In closing submissions, he states:

11. The evidence of Dr Loveridge and Mr Hayes was prepared for the Hauraki inquiry but admitted by consent also into the Turanga inquiry. Important academic publications concerning land law, written before the enactment of the Treaty of Waitangi Act 1975 include John A Williams, *Politics of the New Zealand Maori: Protest and Co-operation, 1891–1909* (Auckland: Oxford University Press, 1969), and Alan Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand* (Auckland: Auckland University Press, 1974). The Waitangi Tribunal's Rangahaua Whanui reports most concerned with the Native Lands Acts and their administration include Michael Belgrave, *Counting the Hectares: Quantifying Maori Land Loss in the Auckland Rangahaua Whanui District, 1865–1908* (1997); Ralph Johnson, *The Trust Administration of Maori Reserves, 1840–1913* (1997); Donald Loveridge, *The Maori Land Councils and Maori Land Boards: An Historical Overview, 1900 to 1952* (1996); Jenny Murray, *Crown Policy on Maori Reserved Lands, 1840 to 1865, and Lands Restricted from Alienation, 1865 to 1900* (1997). See also Rachael Willan, 'Maori Land Sales, 1900–1930', report commissioned by the Crown Forestry Rental Trust, March 1996.

12. Document P1

13. Document P6, p38

The intention of the humanitarians and their allies was that Maori would benefit from the presence and example of British colonists in New Zealand, and over time become indistinguishable from their fellow colonists [*sic*]. Sales of land to the Crown would provide both localities for settlement, and resources which Maori could use to develop their remaining lands upon the European commercial model. In most cases, Maori did not make extensive use of a large portion of the lands in their possession, and it was felt that they could sell a large proportion of their holdings without disadvantaging themselves. Many Europeans felt that this was necessary as well as desirable, arguing that Maori could not and would not readily adopt European customs and habits until they began to concentrate their agricultural efforts on particular pieces of land, and to give up their communal lifestyles.¹⁴

Dr Loveridge's study focuses upon how officials and politicians in New Zealand tried to pursue their self-proclaimed 'civilising' mission, through the conversion of Maori customary estates into individual titles held from the Crown and cognisable in the courts.

This tenure conversion process was commonly called by legislators of the 1850s and '60s, the 'enfranchisement' of Maori land. It should not be confused with the granting of the parliamentary franchise to Maori, another (minor) issue in these proceedings. Crown counsel noted that very few Maori could vote in parliamentary elections because they lacked the required *individual* property qualification specified in the New Zealand Constitution Act 1852.¹⁵ Dr Loveridge and other historians have noted that it was assumed by legislators in the 1860s that the acquisition by Maori of individual titles through land legislation would overcome this problem in time, and thus contribute to drawing Maori and settler together. But claimant counsel has rightly pointed out that was not a major purpose behind the land legislation and it has not been discussed further in evidence.¹⁶

15.2.2 Proposals for tenure conversion and direct purchase

The evidence is abundantly clear that the central concern of colonists was the acquisition and development of the 'waste' or uncultivated lands. They increasingly believed that tenure change would be required for this purpose. In our view, moving from a land tenure appropriate to a subsistence economy to one for a commercial economy meant finding an equitable system. Such a system would give proper rewards to those who risked the investment of labour and capital in the land (who might include individual Maori or their hapu), while at the same time providing for the continuance of tribal identity and heritage. Establishing such a system was not easy, especially as a commercial economy was almost inevitably one

14. Document AA1, p 114

15. *Ibid*, p 115

16. Document AA14, pp 31–32; see also Ward, *A Show of Justice*, pp 153–154, 183–193, 208

which involved incurring debt, including the costs of clothing the land with suitable forms of title. We suggest that the promotion of *leasing* rather than the *purchase* of Maori land could have shielded Maori from the most serious impact of such debt, albeit at the cost of a slower rate of debt recovery.

Many settler leaders believed that English society had only achieved real prosperity and progress when medieval and quasi-communal forms of land tenure had given way to individual property, supported by registered deeds and laws of contract. In similar vein, most officials and legislators of the mid-nineteenth century believed that Maori customary tenure was so confused and conflict-ridden that no individual Maori or group could safely invest labour and capital on tribal land. As a result, they believed that no long-term progress could be made towards the emergence of clusters of Maori farms and their associated services, leading to the sustained production of marketable surpluses.

But officials and settler politicians had become very pessimistic that individual holdings could be secured by *voluntary* arrangements or through tribal title. The board of inquiry convened by Governor Browne in 1856 had rightly concluded that Maori land tenure was fundamentally communal in nature rather than individually based, and that the award of 'clear and undisputed titles' to Maori individuals would necessarily involve 'mutual' concessions by Maori.¹⁷ But there were serious practical difficulties in achieving them. Donald McLean stated to the 1856 Board:

there is really no such thing as individual title that is not entangled with the general interest of the tribe, and often with the claims of other tribes who may have migrated from the locality [In endeavouring to subdivide tribal land in Taranaki] . . . I found it took about 30 days to define the boundaries of the claims of 40 individuals over an extent of 30 acres, and even then they considered the arrangement as altogether imaginary . . . When I considered the title settled of some individuals on this basis, I found the natives quarrelled among themselves about the boundaries, and prevented any definite arrangement being carried out until I afterwards purchased the whole of the tribal claim, in order to secure a clear title.¹⁸

It was this experience that led McLean to experiment in Taranaki, Hawke's Bay, and the South Island by *selling back* to Maori who had just alienated a tract of land subdivisions of that land, under Crown grant. Professor Ann Parsonson has commented that this scheme was 'wildly popular' with the Maori owners of the Hua block in Taranaki.¹⁹ Unfortunately, there was no opportunity for the system to evolve before the onset of the first Taranaki war,

17. Document P1, pp 48–49

18. Ibid, p 54

19. Ann Parsonson, 'The Challenge to Mana Maori', in *The Oxford History of New Zealand*, edited by WH Oliver and BR Williams (Wellington: Oxford University Press, 1981), p 153; doc P1, p 55

and there is no indication that it was applied in Hauraki.²⁰ There were other failed experiments, but most settler and official proposals proceeded on the basis of McLean's assessment: that it was impracticable to create Maori small-holdings without first extinguishing the tribal title by Crown purchase, and then returning land under individual Crown grant.

Both claimant and Crown counsel concur that the legislators' interest in changing Maori land tenure was not driven primarily by concern for Maori advancement, but to bring 'waste' or uncultivated land into production, by vesting Maori land with negotiable titles allowing it to be transacted between Maori and settlers. Many settler leaders were no doubt sincere in their belief that there was no necessary contradiction between the advancement of settlers and that of Maori through the large-scale purchase of undeveloped Maori land.²¹ It was assumed that both peoples would advance together on land held under individual Crown grants. As Henry Sewell put it in 1859:

I want to see every native supplied with ample extent of land *and with all the means of turning it to account*, but the really waste land (what at present, to use Wakefield's expression, is dog-in-the-manger) to be laid open for systematic colonization in such a manner as shall amalgamate the two races[,] the proceeds of land sales being expended on public objects – partly in advancing the social condition of the natives themselves. [Emphasis added.]²²

Most of the Bills drafted between 1858 and 1862 embodied this strategy.

A significant aspect of the settler programme was the increasing pressure after 1859 for the abandonment of Crown pre-emption and the legalisation of direct purchase by settlers from Maori. A number of draft schemes envisaged this on customary land vested with Crown title and 'partitioned'.²³ It is worth noting that this was a direct *purchase* movement; there was already considerable informal leasing from Maori taking place, and some interest among settlers in having such leases officially recognised and formalised. Nevertheless, Dr Loveridge's evidence indicates that the main interest of settler politicians was in schemes which led to their securing freehold titles. 'Direct purchase' was opposed by Governor Browne with the support of the Colonial Office, out of various concerns: to protect the Governor's prerogative, to protect Maori from fraud or undue pressure, and to protect the colony's financial arrangements (discussed in sections 3.1.2 and 3.7, and elsewhere in chapter 3).

Further significant aspects of the various proposals leading up to the 1862 Act were the provisions designed to make the conversion of their customary land into negotiable blocks

20. There is, however, considerable discussion of the development of the 'repurchasing' policy in a recent thesis: Leanne Boulton, 'Native Reserves, Assimilation and Self-determination: Te Atiawa, the Crown and Settlers, North Taranaki, 1840–1875', MA thesis, Canterbury University, 2004. See especially folios 133 to 136 and 143 to 151 for the application of the policy in the Hua and Waiwakaiho blocks.

21. For Selwyn's view, see document P1, p 55.

22. Sewell, journal 2, vol 1, 25 March 1859, ATL, p 13 (doc P1, pp 104–105)

23. Document P1, pp 89–93

attractive to Maori, *and to relieve them of serious expense in the process*. They included the following:

- ▶ The Native District Regulations Act 1858, which authorised local runanga under Pakeha chairmen (usually the resident magistrate) to make by-laws on matters of local concern, and the Native District Circuit Courts Act 1858, which authorised the appointment of circuit court judges to sit with Maori assessors and juries to enforce the by-laws. Although these mechanisms did not directly decide land tenure questions, they were intended to deal with questions such as minor civil claims, wandering stock, fencing, and marauding dogs, all important issues to settlers and Maori communities. Efforts were made to bring the system into effect in Hawke's Bay and in the lower Waikato, but not in Hauraki.
- ▶ The Native Territorial Rights Bill 1858, drafted by Native Minister CW Richmond, envisaged that resident magistrates, assisted by Maori juries, could investigate customary land and issue titles. It involved a gradual approach, with a maximum of 50,000 acres per year being brought under Crown grant. When this land was purchased, the purchaser was also to pay 10 shillings per acre surcharge to the Crown, to be applied to local purposes such as bridge-building, drainage, and roading. The Bill proposed that individual Crown grants would *not* be issued to Maori unless they indicated a willingness to submit disputed land to arbitration.²⁴
- ▶ The Native Districts Colonization Bill, 1859, which provided that when Maori ceded a district of not less than 30,000 acres, the Governor in Council would have a town surveyed on the land (with suburban and rural allotments), provide regulations for the sale and lease of the land, and apply the funds for the benefit of the district. Governor Browne thought that 'education, [and] public purposes, including the social improvement of the native race' should be given priority over development works such as roads and bridges.²⁵
- ▶ The Native Crown Grants Bill, also of 1859, provided that up to one-tenth of land sold by Maori would be returned to the vendors under Crown grant, and the Governor in Council could set aside further portions of the land 'for the formation of a native settlement'.²⁶
- ▶ Henry Sewell's Bill of 1859 included a similar scheme for laying out of townships, for reserving 'all paha and cultivations' unless expressly surrendered, and for providing allotments for the Maori vendors under Crown grants at no charge (having regard 'to the rank and station of the respective allottees, and as nearly as may be to their wishes').²⁷

24. Ibid, pp78-80

25. Ibid, pp100-101

26. Ibid, pp101-102

27. Ibid, pp105-106

15.2.3

- ▶ When the Native Territorial Rights Bill was rejected by the Colonial Office (see sec 15.3.1), Sewell proposed another plan for a ‘Native Council’ of leading settlers and officials, to assist the Governor administer a fund of up to £250,000 borrowed for the purchase of Maori land. Inducements to Maori included direct payment, public works beneficial to the owners, loans to individuals, annual payments to chiefs or others, and the maintenance of social institutions for their benefit.²⁸

This list is not exhaustive. But if we wish to appraise the Crown’s discharge of its responsibilities in the light of the then *contemporary* knowledge and expectations rather than in terms of those of *today*, we have only to examine the proposals which officials and settler politicians themselves put forward in order to see what might have been. Many of the proposals included benefits to Maori which were *not* provided in the Native Lands Act that was actually implemented.

15.2.3 Plans for mechanisms to determine customary Maori land rights

Dr Loveridge has also provided valuable information on the thinking of officials and Ministers as to what authority should determine Maori customary land rights and who should receive the proposed new titles. The Native Territorial Rights Act 1859 (disallowed in London) provided that ‘some qualified person’ would certify to the Governor as to who was entitled to land ‘according to Native custom to the use and occupancy’; these persons would then be included in certificates of ownership. McLean, however, proposed that ‘Commissioners’ (perhaps himself and his subordinates) should ascertain the boundaries, and estimate the extent and ‘proposed partition’ of the land. This was not very different from what he was doing already for the purpose of Crown purchasing. Most interesting perhaps, was FD Fenton’s proposal, that an uninterested jury of Maori ‘*guided* only by the judicial officer of the district’ (normally the resident magistrate appointed under the Resident Magistrates Court Ordinance 1847 and the Native Circuit Courts Act 1858) should ascertain customary rights and enter the findings in a book of record, which would be the basis of a future certificate of ownership. If a partition was called for this too would be decided by the resident magistrate, his assessors, and a jury. The process of certification should thus “be thrown upon the Maories, so that the dignity of the Crown should in no case be compromised, or its interference needed”, for which purpose “the investigation must be *purely local*’ (emphasis in original).

Importantly, ‘Any tribe, subdivision of a tribe, *or individual*’ (emphasis added) wishing to have their lands registered was to give notice of their intent to the native magistrate (assessor) of the district.²⁹ Fenton was to have a crucial role in the shaping and implementation of

28. Document P1, p108

29. Ibid, pp 96–97

the Native Lands Act 1865 and it is instructive to consider what he then retained, or rejected, of his 1859 proposals.

15.2.4 Purposes of the Native Lands Act 1862: claimant and Crown perceptions

Counsel for Wai 100 cites another, oft-quoted, statement by Sewell which revealed frankly the Minister's intentions behind the 1862 legislation, as he saw them from the viewpoint of 1870:

The object of the Native Lands Act was two-fold: to bring the great bulk of the lands in the Northern Island which belonged to the Maoris, and which before the passing of that Act, were extra commercium – except through the means of the old land purchase system, which had entirely broken down – within the reach of colonisation. The other great object was the detribalisation of the Maoris – to destroy, if it were possible, the principle of communism which runs through the whole of their institutions, upon which their social system was based, and which stood as a barrier in the way at attempts to amalgamate the Maori race into our social and political system. It was hoped by the individualization of titles to the land, giving them the same individual ownership which we ourselves possessed, they would lose their communistic character, and that their social status would become assimilated to our own.³⁰

Crown and claimant counsel cite essentially the same core evidence about the purposes of the Native Lands Act. Crown counsel argues that beneficent intentions should not be confused with actual outcomes, and should be recognised in any evaluation of Treaty breach. He quotes Dr Loveridge: 'From the perspective of a relativistic age such as our own it [the settlers' view of the world] was an arrogant point of view, to be sure, but not an inhumane one.'³¹ And:

It is ironic, to say the least, that the Native Lands Act of 1862, which was meant to place this 'especial people' on the same footing as other British subjects with respect to land tenure and to bring their lands under the protection of British law, should now be seen in many quarters as the root of so many of the problems facing Maori, and New Zealand as a whole.³²

Putting it another way, the Land Acts were not 'racist' (a much over-used word in our opinion); they did at least purport to offer equality between Maori and settler and assume that Maori could advance in parallel with settlers. However, they were highly ethnocentric,

30. Sewell, 29 August 1870, NZPD, 1870, vol9, p 361 (doc Y1, p 105)

31. Document P1, p 20 (doc AA1, p 117)

32. Ibid, p 237 (p 117)

in that they reflected the colonists' belief that Maori advancement would come only from the substitution of British values and institutions for Maori ones.

Claimants and their counsel agree that the Land Acts aimed at deliberately breaking up the collective aspects of Maori society. Indeed, counsel for the Wai 968 claimants characterises the Crown as 'despotic' in its assumptions of cultural superiority, leaving little room for an indigenous evolution of land tenure.³³ Moreover, the settler politicians' statements reveal frankly that a primary purpose of the Land Acts was the advancement of settlement.

15.2.5 'Civilising mission' not the main purpose of the Native Lands Act

We accept that the objectives behind the 1862 Act included a 'civilising mission' towards Maori. General academic histories have long established that such a goal had been espoused since the foundation of the colony. Professor Keith Sinclair's work in the 1950s showed how English humanitarianism influenced the drafting of the Treaty of Waitangi (including article 3 rights for Maori).³⁴ In 1974, Professor Alan Ward showed how the same sense of civilising mission led to the policy of 'amalgamation' of Maori with the settlers through national institutions, rather than sequestering them within 'Native Districts' to pursue a version of their own social system.³⁵ The concept of a 'civilising' purpose running through Crown policies towards Maori is not therefore doubted.

But at issue are three further questions:

- ▶ whether the 'civilising mission' was deflected, corrupted or overlaid by an even greater concern for settler interests;
- ▶ whether the changes in tenure were introduced to Maori with their full understanding and full consent;
- ▶ whether the changes were actually beneficial to Maori

As to the first issue, settler self-interest undoubtedly did supervene; the governments elected under the 1852 constitution were representative of a settler electorate, not a Maori one. (There were no Maori members until the elections of 1868.) The officials – the governors and their appointees – while charged with a duty of protecting Maori from fraud and aggression, were also expected to open the colony to British settlement, a conflict of roles which they had struggled to balance with greater or lesser success since 1840. By 1860, the Crown purchasing of Maori land in the 1840s and 1850s was almost at a standstill. As Sinclair, Ward, and other professional historians have long since argued (and the Marutuahu claimants' historians concur), the need to overcome Maori resistance to further sales was the

33. Document AA9, pp 9–10

34. Keith Sinclair, *A History of New Zealand* (Middlesex: Pelican, 1959) and *The Origins of the Maori Wars* (Auckland: Auckland University Press, 1961)

35. Ward, *A Show of Justice*

dominant Government policy in the early 1860s.³⁶ In that context, the ‘civilising mission’ to Maori was rendered ineffectual, as is revealed in the actual terms of the legislation and the manner of its implementation.

As to the second issue, we welcome the Crown’s frank admission of the paternalistic attitudes underlying the supposed betterment of Maori through a radical change to their land tenure. The question of whether these attitudes led to a breach of Treaty principles depends mainly on the nature of the changes, but also on whether they were made on the basis of discussion with Maori and with their understanding and consent. It is arguable – and has been accepted by previous Tribunals – that Maori property rights can be interfered with by governments where the public interest clearly requires it. Some public works takings, for example, might be so important that even compulsory taking is warranted. But it has always been the Tribunal’s position, and one with which we concur, that Maori property rights are protected by article 2 of the Treaty and that such interference can only be made in situations of real exigency, after as much consultation and negotiation as is practicable, and with just compensation payable. The imposition of general laws affecting Maori property, intended for the betterment of Maori as well as Pakeha – conservation laws for example, or laws for the control of noxious weeds and animals – may be seen as comparable to public works, and again, in the last resort, are imposed by Parliament for the general good. But here, too, we believe that Treaty principles – indeed basic democratic values – require as much prior consultation with and consent of Maori landowners as is practicable.

Gratuitous interference with Maori land tenure for the purpose of transforming their social order is something else again. However well-intended the tenure changes might be, in the absence of full consultation and consent of Maori it is very difficult to see how the Legislature can interfere without infringing the tino rangatiratanga recognised under article 2 of the Treaty.

It is therefore important to know whether the Native Lands Acts were designed and implemented with Maori consent and cooperation, whether their constant adjustment through the following century reflected serious discussion with Maori and reflected their wishes, and whether they actually did include realistic provisions for Maori advancement as well as that of settlers. For if this were not the case, the ‘civilising’ aspect of land policy was merely a cloak for settler self-interest and the over-riding of Maori rangatiratanga.

A further important question for our appraisal is whether, once the court’s new tenurial system was introduced, Maori were obliged – or subject to excessive pressure – to bring their land under it, or whether they were actually free to choose to keep their land in customary tenure. It is the contention of claimants and their counsel that in practice Maori had

36. Alan Ward, ‘The Origins of the Anglo-Maori Wars: A Reconsideration’, NZJH, vol1, no2 (October 1967), pp148-170; doc v6, pp93-95

little or no choice, and were indeed under some legislation, subject to compulsion. Crown counsel on the other hand, point to the quick acceptance by Maori of the court and their readiness to bring land before it. Before considering this question further, we consider the evidence concerning the 1862 and 1865 Acts.

15.3 THE 1862 AND 1865 NATIVE LANDS ACTS

15.3.1 Developments from 1860–62: no consultation with Maori

The disallowed Native Territorial Rights Act 1859 would have allowed a measure of direct purchase under Ministers' control. However, the Colonial Office drafted an alternative Bill for a 'Native Council', which in Dr Loveridge's view would have laid the ground both for the legal leasing of Maori land and for an element of direct purchase.³⁷ The movement in both imperial and colonial circles towards legalising a measure of direct dealing was given sharp impetus by the Waitara crisis, bringing into disrepute the practice of determining Maori customary rights by the Land Purchase Commissioners, and the Crown's monopoly of purchase. In 1861, Grey was reappointed to replace Browne and was advised that the British Government would 'be willing to assent to any prudent plan for the individualization of Native Title, and for the direct purchase under proper safeguards of native lands by individual settlers, which the New Zealand Parliament may wish to adopt'.³⁸ Renewed efforts were soon made in the New Zealand Parliament to develop such a plan, building upon the legislation of 1858 and the various proposals of 1859.

As Crown counsel has pointed out, these efforts were supported by some of the staunchest defenders of Maori rights, including former Chief Justice Martin. With others, Martin believed that determination of intersecting Maori customary claims in land could no longer safely be left to the land purchase commissioners but must involve an independent tribunal of some kind. As Dr Loveridge has shown, Martin had become a supporter of direct dealings between Maori and settler, believing that Maori would thereby be able to secure market value for land and be brought into closer association with the settlers in the commercial economy.³⁹

But Maori involvement in the planning at national level was confined to the Kohimarama conference of 1860, convened mainly to rally support for the Government's stand in Taranaki. It was not attended by chiefs from that district or the Waikato. Dr Loveridge has set out Governor Browne and chief land purchase agent McLean's general proposals to the assembled chiefs. Browne suggested that, to avoid further violence, disputes between tribes could be referred to a committee of disinterested chiefs, chosen by a conference such as that

37. Document P1, p 115

38. Ibid, p 142

39. See doc AA1, p 118 fn 30; doc P1, p 228 fn 542

then sitting at Kohimarama; once tribal rights were ascertained they could be protected by law, and possibly lead to negotiable Crown grants.

Eleven chiefs spoke to the proposals, giving general approval. Seven were from the west coast of Wellington province, including Tamihana Te Rauparaha of Otaki. There, Archdeacon Hadfield had led in the formation of a 'model village', where Maori had experience of the connection between individual tenure and qualification for the parliamentary franchise.⁴⁰ Their statements gave general support to the goal of defining the interests of individuals or families. One speaker was interested because chiefs were 'grasping at great quantities of land for themselves.'⁴¹ Only one speaker (Paora Tuhaere of Ngati Whatua, who defined his people frankly as 'a land-selling tribe') spoke of a Crown title as leading to sales to Pakeha.⁴² Dr David Williams is correct in stating that there was nothing in their speeches which indicated 'significant Maori support for the general alienation of tribal lands.'⁴³ There was support for the concept of a state-sponsored tribunal to decide customary interests. But they were quite divided as to how it should be constituted, one speaker favouring decision by magistrates, another by a mixed Maori-Pakeha tribunal, a third by Maori committees.⁴⁴ The subject was deferred for further discussion at local level and at a later general conference. But there was no later conference. On his arrival, Governor Grey set aside Browne's suggestion that a Kohimarama-style assembly be convened annually, and also the various proposals from colonial and imperial Ministers that some form of Native Council, including Maori chiefs, be established.

Instead, Grey set up his 'new institutions'. These comprised officially recognised local runanga and district runanga, empowered to make by-laws under the revived 1858 legislation. The by-laws were to be enforced by resident magistrates and civil commissioners assisted by salaried Maori assessors and the police. Following earlier proposals by Fenton and others, it was contemplated that the official runanga be empowered to determine tribal, hapu, or individual interests in land, prior to the issuance of Crown grants, and direct dealing.

Details of what was actually discussed or implemented in each district are sketchy. The only general history which discusses the introduction of the 'new institutions' at local level

40. Document P1, pp 127–132; William H Renwick, 'Self-government and Protection: A Study of Stephen's Two Cardinal Points of Policy in their Bearing upon Constitutional Development in New Zealand in the Years 1837–1867', MA thesis, Victoria University of Wellington, 1961

41. Document P1, p 129

42. A letter written by the Ngati Whatua chiefs to Browne after the introductory speeches demanded a very open process: 'Let not the lands be bought carelessly, but let them be surveyed by the Surveyors of the Government. Let the lands be advertised for three months before purchasing them, that the Pakehas and the Maoris may see, and let the sellers themselves point out the boundaries': chiefs to Browne, 17 July 1860, BPP, 1861, cmmd 2798, pp 115–116 (doc P1, p 207).

43. Document E1, p 53

44. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (Wellington: Legislation Direct, 2004), pp 410–411

notes that most tribes with Kingitanga sympathies, and outlying districts such as Poverty Bay, greeted the Government's proposals with great distrust, or rejected them, mainly from concern for their autonomy and their lands. Others had developed their own runanga and were disinclined to bring them under Grey's system. Some groups and regions, often politically opposed to the Kingitanga, were inclined to accept the 'new institutions'. But even then, when the magistrates tried to introduce discussion of land, they were commonly met by hostility and threatened walkouts, as in Hokianga. If the introduction of the 'new institutions' was intended to be a form of consultation or testing of Maori opinion about the registration of titles followed by direct dealing, the answers returned were negative or indifferent, rather than positive.⁴⁵

Grey's 'new institutions' were not attempted comprehensively in Hauraki. At Coromandel, resident magistrates Henry Turton and Charles Lawlor arranged for the appointment of Maori assessors and police, who helped in maintaining order. But the area was the subject of a gold-mining cession and proclaimed goldfields: issues relating to land – such as the important questions of leases of residence sites and business sites – were worked out under the cession agreement and the authority of the goldfields warden.

As for the numerous draft Bills and paper schemes that passed between governors, Ministers, officials, and the Colonial Office between 1859 and 1862, Dr Loveridge devotes over 100 pages to their analysis without a single mention of their being referred to Maori. It is likely that many settler leaders were chary of too much explicit discussion with Maori; Walter Buller, for example, hoped that the proposed laws would 'pave the way to a more general alienation by the Natives of their waste lands.'⁴⁶ It may reasonably be supposed that there was some informal discussion in each district between officials, settler politicians, and rangatira about land tenure and land law generally, but the claimants are amply entitled to their view that there was no formal consultation between the Government and Maori leadership on the embryo Native Lands Act itself; such consultation might have come about if, for example, a Kohimarama-type assembly had been convened to consider a draft Bill. It will be recalled that there were no Maori members of Parliament at this time.

15.3.2 The essence and terms of the Native Lands Act 1862

Dr Loveridge has analysed the Native Lands Bills of 1862, both the first Bill drafted by Sewell and introduced by the Fox Ministry (which resigned early in the session), and the second Bill introduced and finally carried by the Domett Ministry, mainly under the charge of Dillon Bell. The first Bill had reflected Grey's plan to empower district runanga, under officials to be called Civil Commissioners, to define the ownership of customary land, make

45. Ward, *A Show of Justice*, pp 132–140

46. 'Mr Buller's Final Report on the Partition and Individualization of the Kaiapoi Reserve', AJHR, 1862, E-5, p 11 (doc E1, p 53)

regulations governing the sale or leasing of it directly to settlers at the rate of not more than one farm per settler. The process would have remained under the Governor's control. The second version greatly reduced the role of the Governor and officials. Bell explained that its object was 'the unqualified recognition of the Native title over all land not ceded to the Crown, and of the Natives' right to deal with their land as they pleased, after the owners according to Native custom had been ascertained by Courts to be established for the purpose.'⁴⁷

The courts were to be under the presidency of a European magistrate, and the Governor could make rules regulating their sittings, including provision for a Maori 'jury' (thus continuing the system envisaged under the 1858 to 1859 legislation described above in section 15.2.2). Upon the application of 'any Tribe Community or Individual', the court in the area concerned was to ascertain and define 'the right title estate or interest of the applicants or of any other claimants' in the land concerned. Upon confirmation by the Governor, and subject to the provision of a survey certified by a licensed surveyor, the court would issue a certificate of title. That certificate would be conclusive as to the particulars of the land described 'and as to the Native proprietors thereof'. Provision was to be made for registration of the certificates by the court or by any land registry office. Certificates could be exchanged for Crown grants. But, by section 15, certificates made out to not more than 20 individuals 'shall have the same force and effect as if the same were a Grant from the Crown in fee simple'. By section 17, individuals named in certificates were empowered to dispose of their interests, 'by way of absolute sale or lease', to any person whomsoever.

In other words, Crown pre-emption had been abandoned in favour of direct dealing. The principal protection available to Maori – a protection crucial to Grey's consent to the Bill – was that the Governor was empowered to make reserves for the Maori proprietors, with alienation prohibited or restricted, prior to the court issuing its certificate of title.

Dr Loveridge has also shown how the Bill was amended in passage through Parliament. The most important changes are:

- ▶ Section 2 in Bell's Bill held that all lands in New Zealand over which Native Title had not been extinguished shall be deemed 'the absolute property of the persons entitled to it by Native custom.'⁴⁸ Led by Stafford, who believed it would not be accepted in London, many members opposed this clause and Domett eventually withdrew it.⁴⁹ Had such a provision been retained it might have impacted heavily on the established common law doctrine that after 1840 the Crown held radical title to all land in New Zealand, subject to Maori customary rights.
- ▶ A new section 3 appeared in the final Bill to the effect that:

47. FD Bell, minute, 5 November 1862, BPP, vol 13, cmmd 467, pp 76–80 (doc P1, app 14)

48. See D Bell, 25 August 1862, NZPD, 1861–63, pp 608–610, for this most important statement.

49. Sewell, journal 2, vol 2, 1862, ATL, p 124 (doc P1, pp 176–177)

Nothing herein contained shall be construed as rendering the rights of the Natives in respect of such lands or the usages or customs on which such rights depend cognisable or determinable by any Court of Law or Equity or other Judicature until the same shall have been defined and a Certificate of Title issued according to the provisions of this Act.

Thus, 'native title' rights, as they would be called today, were liable to legal consideration only under the terms of the legislation. In principle, Maori proprietary interests in all land had at last been recognised, including interests in the uncultivated or 'waste' lands, long a bone of contention in the colony. Yet, the Legislature had effectively limited the exercise of such rights by providing that, if Maori wanted them supported in the courts, they had to seek certificates of title or Crown grants. As much as anything, *it was this provision, repeated in later legislation, which obliged Maori to bring their land before the court.* The new system was not as optional as some Crown witnesses maintain.

(It is convenient to note here that, although the Native Lands Act was greatly amended in later years, the Native Rights Act 1865 carried forward the essence of section 3 of Bell's Native Lands Bill. It gave statutory effect to article 3 of the Treaty by deeming Maori to be natural-born subjects of the Crown, with the right to sue and be sued in the Supreme Court. The main purpose was to allow Maori much-needed protection for their property, especially their customary land. But the Legislature considered, with good reason, that the determination of customary land rights was a matter for a more specialised tribunal. Consequently, the Act provided that where a decision was required on the ownership of disputed customary land, the matter would be referred to the Native Land Court (where, in practice, almost all such cases originated). Importantly, it was in a Hauraki case that the Supreme Court later decided that the Native Rights Act 'excludes the idea that tenure of land according to Native custom is to be equivalent to, or have the incidents of tenure according to English law'.⁵⁰ Thus, the Native Rights Act of 1865 did not significantly improve the legal status of customary tenure and in practice, Maori had access to the Supreme Court regarding their land *only* after it had received a land court title.)

- ▶ While sections 15 and 17 of the 1862 Act provided for a significant degree of individualisation, it was apparently still assumed that most Maori applications would be for *tribal* titles, and that it was that level of ownership which would first be embodied in the courts' certificates. Sections 21 to 26, deriving almost certainly from Sewell's 1859 Bill, elaborated on the partition of a *tribal* title, and these tribal titles were not supposed to be negotiable. Section 21, however, provided that:

50. *Mangakahia v New Zealand Timber Company* (1881) 2 NZLR 345 (sc) (Ward, *A Show of Justice*, p185)

If any *Tribe or Community* in whose favour a Certificate shall have been issued shall be desirous that Regulations shall be made or that a Plan should be adopted for the purpose of the Sale Letting Occupation or other Disposal of the Lands included in such Certificate or any part thereof or for a Partition Grant Lease Appropriation or Disposal thereof or any part thereof to between or amongst themselves or any other person or persons or for granting Licences to dig or work mines or minerals or cutting timber or depasturing stock or for any purpose of common use or benefit *Such Tribe or Community* may apply to the Court to recommend to the Governor the adoption of any such Regulations or plan and the Governor may either approve and confirm the same or return the same to the Court with amendments or alterations and so from time to time until such Regulations or Plan shall have been finally approved. [Emphasis added.]

The next four sections provided for the setting apart of land for roads or for vesting of lands in trust for the endowment of schools, hospitals, or churches, and the management of moneys raised for surveys or development work for these objects. Bell explained the concept further in a memorandum to the Governor; in view of its reference to Coromandel, Bell's explanation of these sections is worth quoting for its emphasis upon planning by and for the community:

if any tribe wish to lay out a township for sale and settlement in their own district they may obtain the whole value and profit of the allotments; or if gold is discovered in the interior, as it has been at Coromandel, they may propose regulations for mining it. They are also empowered to raise money on the security of their land, for making roads, building and endowing churches and schools, paying for their surveys, building mills, sowing land with grass, and so forth; in fact, for any objects they may themselves consider conducive to their own welfare and advancement.⁵¹

These clauses in effect authorised thorough-going cooperation between Governor, court, and tribal group in the planned development and settlement of land. In other words, as Crown counsel pointed out, the 1862 Act was seen by many of the legislators as (among other aims) offering Maori a chance of securing for themselves and their heirs 'the full money-value of, their great territorial possessions' and showing that 'colonisation by our race means wealth and power for them as well as for us'.⁵² This would indeed have been economic partnership. As Bell explained, a two-stage process was envisaged, with tribal groups, having received an initial award of the court, then pursuing further orders from it for individuals and families in respect of parts of the tribal estate, for either alienation or development, while retaining the balance in tribal title.

51. Document P1, p192

52. Ibid

Dr Loveridge and other Crown witnesses have rightly drawn attention to these provisions.⁵³ They would have allowed for a more gradual approach towards individualisation, with stronger residual rights in the tribe, than is recognised in previous writings on the subject of Maori land legislation, *or indeed in any subsequent land legislation*. But the problem for this Tribunal is that these provisions were not used.

- ▶ Contrary to some earlier proposals, the 1862 Act provided that Maori were to pay for development costs themselves, including all title work. Opposition was expressed in the Legislature to the provisions that surveys, at least of reserved lands, could be charged ‘against any fund specially appropriated to native purposes’. Consequently, section 28 of the Act, relating to surveys and roading, applied to ‘any Native lands’ and any costs were to be repaid by the native proprietors in such manner as the Governor may direct.⁵⁴
- ▶ Grey secured some last-minute amendments to reduce the tax implications for Maori. The Bill had imposed a tax of two shillings sixpence per acre when lands held under a certificate were alienated for terms longer than seven years, and when certificates were exchanged for Crown grants. Parliament somewhat reluctantly accepted Grey’s proposal that instead a ‘transfer duty’ of 10 per cent of the purchase price be paid to the provincial government on first sale of the land and 4 per cent on each sale thereafter. This meant that Maori did not have to pay a transfer tax so long as they retained ownership or only leased the land. Bell remarked ominously in his explanatory memorandum, ‘As the tendency of this will be to encourage improvidently long leases, it is probable that some alteration will have to be made in the next Session.’⁵⁵
- ▶ To preclude any rash introduction of the Act in districts where it was likely to arouse Maori hostility, Bell added a clause to the effect that it would come into effect in districts proclaimed by the Governor.⁵⁶

With these changes, the Bill was accepted by Grey and in London, and became law. There were clearly advantages and disadvantages to Maori in all this. We have gone into some detail on the 1862 Act because the Crown has advanced the view (rightly, we believe) that it was the foundation of all subsequent Native Lands Acts, and of the impact of land laws on Hauraki.

15.3.3 The legislators’ purposes in 1862; little protection for Maori

It is perfectly clear, from the parliamentary speeches and memoranda quoted by Dr Loveridge, that the legislators of 1862 intended to make huge inroads into the Maori customary estate, by purchase of the freehold. The fact that that was not *all* they intended scarcely

53. Document P1, p 192

54. Native Lands Bill 1959, cl 15 (doc P1, p 164 fn 354)

55. BPP, 1863, cmmd 467, p 77, encl 26 (doc P1, p 187)

56. Document P1, p 174

alters the case. Dr Loveridge reports, for example, that JC Richmond of Taranaki, a future Native Minister, supported the Act not because he believed Maori had a ‘just claim’ to the undeveloped lands, but because ‘the colony was at bay’ due to the Maori refusal to sell land. They had therefore to take ‘any means that offered’ to escape from the impasse. He thought that Maori would find the sudden acquisition of wealth ‘a Pandora’s box’. Richmond predicted that the Bill would generate:

a perfect revolution among them . . . The whole race would be sifted; they would be purged with fire. Doubtless a remnant would emerge of men fit for any position in the colony . . . but as to the body of the Maori people he . . . could not but utter his grave doubts as to the result upon them.⁵⁷

Other members followed this line. Premier Domett said that colonisation had virtually ceased as a result of the refusal of Maori to sell land, and it was essential to start it again. There were widespread fears that speculators rather than bona fide settlers would buy up all the land, but one member of the Assembly, O’Neill, said that even if they did he ‘would rather see it in the hands of a few white men than of the Natives, as roads might, at all events, then be made through it.’⁵⁸ Settler control of the country, challenged by the Kingitanga and by Maori resistance in Taranaki and elsewhere, was closely linked to the Bill: two military men in the Legislative Council supported it because it would in time make the settlers ‘masters of the country.’⁵⁹

Sewell, for all his concern to *include* Maori in the development process, was one of the most determined to see the bulk of their lands colonised. In ringing ‘white man’s destiny’ rhetoric he told the Legislative Council:

we are fulfilling one of our appointed tasks. It is our duty to bring the waste places of the earth into cultivation, to improve and people them . . . In doing this work we are fulfilling our mission. As a matter of abstract theory, I utterly deny that the land of these favoured Islands were meant by Providence to be retained in a state of waste – that a territory as large in extent and possessing as great natural advantages as the British Islands was to be rendered for ever inaccessible to civilization and forbidden to the use of man by an imaginary title vested in fifty or sixty thousand semi-barbarous inhabitants scattered thinly over the country in miserable villages in a few scarcely perceptible spots. I deny that, in the sense of any inherent right, this people can maintain their exclusive title to forests and plains which they never trod, and mountains, teeming probably with unlimited store of wealth, which it may be they never have seen. Those who in opposition to such imaginary rights, maintain

57. Ibid, p171

58. Ibid, pp171–172

59. Speeches of Colonel Russell and Colonel Kenny (Alan Ward, *An Unsettled History: Treaty Claims in New Zealand Today* (Wellington: Bridget Williams Books, 1999), pp130–131)

and assert the rights and duties of colonization have to my mind great truths on their side. In conformity with these truths the work of colonization proceeds.

Sewell could see no alternative but 'to admit the rights of Native ownership.' This alone, he believed, would prevent 'a deadly struggle between the races.'⁶⁰ The fundamental lack of respect men like JC Richmond or Sewell had for Maori rights over 'waste' land, is revealed in their plain statements that they were agreeing to recognise them only out of expediency and as a prelude to acquiring such lands. We have also noted Bell's statement that the next Parliament would amend the transfer tax to discourage Maori from entering into 'inordinately long leases'. Furthermore, Mr Hayes, a Crown witness, has repeated Dr Loveridge's observation that 'Crown officials and settlers at that time did not and could not conceive of Maori retaining most of their land'.⁶¹

There can be no question that the settlers wanted possession of most of the undeveloped Maori lands. Mr Hayes pointed out that the Act legalised direct leasing as well as sale, and might well have referred (as did Dr Loveridge) to the 1862 provisions for Maori to implement comprehensive development schemes on tribal land, with the assistance of the Governor and the court. However, his suggestion that it was not the intention (as well as the outcome) to acquire the freehold of most Maori land is unconvincing. That intention is plain, on the evidence of the Governor and Ministers themselves, and of Crown witnesses. Dr Loveridge has commented that millions of acres of Maori land were acquired for settlement by the end of the nineteenth century, and one of the two principal 'goals' of the 1862 Act was thereby met.⁶²

At the time, Governor Grey expressed considerable anxiety about the 1862 Act. He favoured more gradual settlement of the country by settlers 'agreeable to the Natives of the district', under the aegis of Maori runanga:

At the same time, as there appears no hope of convincing a majority of the Assembly that my views are the soundest and best, I think the recognition of the title of the Natives to their lands a matter of such importance, that I will, as I have before stated, accept the bill in the form in which it passed the House of Representatives.⁶³

Much would depend upon the protections put in place by the new legislation. There was an obvious risk of Maori becoming entangled in processes they little understood and in their inexperience, being taken much further in the direction of land alienation than they wished. The Colonial Office had long foreshadowed the risks to Maori of abandoning Crown pre-emption. As protection for Maori, Grey relied upon the power included in the Act for the Governor to make reserves. That and the two-stage process outlined by Bell

60. Document P1, p185

61. Document Q1, p10

62. Document P1, p232

63. Ibid, p182

(see sec 15.3.2) were the only real protections in the Act against an impending scramble for Maori lands. However, the two-stage process provided for in theory, was effectively abandoned by the time the Act was introduced in Hauraki (see sec 15.3.4).

Section 34 of the Act permitted the Crown to continue the purchase of Maori land before customary ownership was determined by the court. It did so, including in Hauraki. James Preece purchased a dozen small blocks on both coasts of the Coromandel Peninsula, and the Te Puia block of 8350 acres at Mercury Bay, between late 1862 and early 1865, without their first going through the court.⁶⁴

One further point on legislators' intentions is that Sewell's remarks quoted above typified a certain genre of comments frequently found in the historical record: namely that it would be in the best interests of Maori themselves to be relieved of the bulk of their land, so that they would cease to live on a subsistence basis or on rentals from industrious settlers, but become industrious themselves. As the historians for the Marutuahu claimants point out, 'in something of a cruel twist, policy makers sometimes saw policies of aggressive land purchase as being 'protective' of Maori interests.'⁶⁵

15.3.4 The 1862 Act applied in Kaipara and Coromandel

Dr Loveridge has shown how the 1862 Act was applied in Kaipara in 1864. Courts were constituted for 'Kaipara, North' and 'Kaipara, South' each with resident magistrate John Rogan as president and two Maori members as designated judges. The Maori members were not from the specific area but were of the wider Ngati Whatua people. The arrangements having been publicised, it appears that local Maori were quick to request a hearing of claims to a number of relatively small blocks. On 7 and 8 June 1864, juries were empanelled from among the Maori bystanders and the examination of customary rights was apparently detailed and careful. But, in sharp contrast to Bell's explanation of the 1862 Act as a two-stage process (with tribal title defined first and then parts of the land partitioned for alienation or development or both), the first two Kaipara blocks heard (Otamateanui, 396 acres and Te Pua a Mauku, 67 acres) were acknowledged to be *already under agreement of sale to local settlers* (the McLeod brothers, local timber millers). It was agreed by the court that 14 owners were entitled to the first of these and nine to the other, but 'for the sake of convenience' only one owner in each case was put into the grant.⁶⁶

The 1862 Act was also applied in Hauraki. Mr Hayes notes that in July 1864, Lawlor, the resident magistrate at Coromandel, advised the Colonial Secretary that several Patukirikiri chiefs – Pita Taurua, Kapanga Te Arakuri, and Makoare (Te Ahuroa?) – had complained about the restriction on their selling land directly to settlers and querying why the 'Natives

64. Document A4, pp 5–6

65. Document v6, p 11

66. Document P1, pp 214–216

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of Kaipara' were allowed to do so.⁶⁷ Coromandel minute book 1 in fact reveals that on 18 July 1865, before the 1865 Act had passed into law (in October 1865), a court sat in Coromandel, under regulations promulgated in December 1864 (see next section), with H A H Monro as judge and Hori Te Whetuki and Kitahi Te Taniwha (both local chiefs) as assessors. It adjudicated upon 10 claims, brought by one or more of the three men named by Lawlor, for blocks of between 10 and 400 acres. They were awarded, uncontested, to those applicants.

Mr Hayes records that the Coromandel minute-books contain repeated and uncontested assertions by the claimant rangatira that they had agreed on a division of their interests amongst themselves, sometimes relinquishing rights to each other as between blocks. The claims, as presented in court, were uncontested.⁶⁸ Judge Monro then reported, in June 1867, that:

In the Coromandel District, the most [*sic*] of the land passed through the Court has been sold to settlers in small blocks, as sites for shops, homesteads, and sawing stations. The Natives never have cultivated extensively in this district, it being for the most part hilly and densely wooded.⁶⁹

This suggests that the Coromandel chiefs had carried through their intentions as expressed to Lawlor in 1864, and that the leading rangatira still controlled the decisions regarding the land of their hapu. Now that they had access to the private market, they were prepared to use it.

It is crucially important to note that there was no indication whatever, either at Kaipara or Coromandel, that Bell's two-stage process was applied. For this reason, with respect, we are doubtful that the comments of the *Turanga* report on the Kaipara experience wholly meet the situation. That report observes that 'the court did not attempt to transform customary rights but merely declared them.'⁷⁰ Yet, neither in Kaipara nor in Coromandel had there been an initial award of a 'tribal' title followed by a second application under sections 21 to 26 for confirmation by the court of a plan of subdivision and development, including awards to individuals leading to sale. The two-stage process outlined by section 21 of the 1862 Act was not mandatory: a tribe or community might apply, it said, for a plan or regulation for land use to be worked out. Without that option being taken, the two stages in effect appear to have been conflated into one, with the declaration of customary rights being made in the names of one, two, or three rangatira, who had power of sale. There is no suggestion that the local Maori leadership was not in agreement with these outcomes, which perhaps illustrates from the outset a degree of 'Maori agency' in the alienation process, which Crown witnesses before us have stressed. But, in what would prove to be a trend-setting course of

67. Lawlor to Colonial Secretary, 20 July 1864, BA CL A208/634, A208/688, Archives NZ (AK) (doc Q1, p 16)

68. Coromandel minute book 1, fols 7–30; Hauraki minute book 1; doc Q1, pp 20–23

69. Document Q1, p 47

70. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, p 413

action, the 1862 Act had been used only for facilitating direct sale by named individuals, not for determining tribal titles or facilitating development by Maori owners. More cases of a similar nature followed in Kaipara and Whangarei.⁷¹

15.3.5 The Native Lands Act 1865

Belgrave et al, for the Marutuahu claimants, have pointed out that by 1865 the political context had changed markedly. Whereas in 1862 the colonial government was still officially declining to accept full formal responsibility for native affairs, the government of Frederick Weld, which took office in November 1864, did so. Weld's 'self-reliant policy', promulgated in 1865, was welcomed in London because, in return for assuming full ministerial responsibility for Maori affairs, the colonial government also took on full financial responsibility and accepted a progressive withdrawal of the British regiments. Grey's influence in government was sharply reduced. He was not yet 'sent packing' as Mr Young suggested; Crown counsel has correctly noted he remained in office until 1867 and retained considerable influence on the conduct of the war so long as British regiments remained. But counsel is scarcely correct to say that he 'played a central role in the government of the colony' after 1865, at least in respect of civil matters.⁷² He had little or no role in the redrafting of the Native Lands Act, and from 1865, references in it to 'the Governor' were replaced by references to 'the Governor-in-Council' (ie, the government of the day).

The settler governments were also emboldened by the fact that the military conquest of the Waikato up to the Ngati Maniapoto borders had been accomplished.⁷³ Weld seized upon the Native Lands Act as an instrument of pacification. His strategy was to provide access to the court even to those Maori who had 'been in insurrection', and to:

indulge the natives in their passion for litigation . . . not only to occupy their minds, but to give them real and substantial justice, by means of a Court in which they were to a great extent themselves the judges; and to give themselves the means of raising themselves above that communism which was weighing them down, to enable them to make themselves individual landowners, able to sell their lands in the open market at a fair price, or to let them, and thus to become rich, and interested in the maintenance of law and order.⁷⁴

Premier Weld's words indicate that Native Lands Acts in and after 1865 were not intended merely to give security of title and facilitate transactions. Although those remained central aims, the ideological purpose of advancing individual tenure against tribal 'communism' was still apparent, as was the political goal of securing Maori acceptance of colonisation.

71. Document P1, p 217

72. Document AA1, pp 118–119

73. Document V1, pp 233–234

74. F A Weld, *Notes on New Zealand Affairs: Comprising a Sketch of its Political History, in Reference Especially to Native Questions* (London: Edward Stanford, 1969), p 31 (doc P1, p 221)

The competitive and litigious side of Maori culture had been discerned, and was to be used to further these wider objectives.

Fenton was given the task of reworking the 1862 Act, under Walter Mantell and later JE FitzGerald as Native Ministers. Again, there was no formal seeking of Maori opinion: the new Act was translated into Maori and circulated *after* its promulgation. Meanwhile, a proclamation of 29 December 1864 abolished the previous 'Native land districts' and brought the 1862 Act into force throughout New Zealand. New regulations established a single court comprising one chief judge (Fenton was formally appointed in January 1865), with other judges and Maori assessors.⁷⁵ In May 1865, the Native Land Purchase Department was abolished. As Dr Loveridge states, after May 1865, 'The Native Land Court was now to be the principal vehicle by which Maori customary land was made available for colonisation, through its conversion to freehold land which could be purchased or leased by European settlers.'⁷⁶

Crown counsel has emphasised Dr Loveridge's view that there was a lack of significant differences between the 1862 and 1865 Acts, and 'no new principle' involved.⁷⁷ But this is not correct. The preamble to the 1865 Act made clear the intention (once customary ownership had been determined), 'to encourage the extinction of such Proprietary Customs and to provide for the conversion of such modes of ownership into titles derived from the Crown'. This time the Act was not simply about ascertaining customary rights and authorising direct dealing; it was also emphasising tenure conversion.

In a further change, as Dr Loveridge notes, sections 21 to 26 of the 1862 Act were not carried forward into the new Act.⁷⁸ These were the sections which provided tribal titles *followed* by certificates of title for subdivisions (see sec 15.3.2). The omission of these provisions effectively removed the 'two-stage' approach which Bell had envisaged in 1862, an approach which had at least offered the possibility of careful planning by Maori communities between the first stage (supposedly tribal title) and subsequent transactions or partition of the land to individuals.

By section 21 of the new Act, 'any Native' could apply to the court for his or her claim to be identified, describing the land, 'stating the name of the tribe or the names of the persons whom he admits to be interested therein with him' and 'that he desires that his claim should be investigated by the Court in order that a title from the Crown may be issued to him for such piece of land'. Section 24 empowered the court to issue two or more certificates respecting any piece of land comprised in any one claim: 'if they shall find on investigation

75. The modification of the court by the December 1864 proclamation and new regulations has been overlooked in previous writings on the subject. For example, in its *Turanga Tangata Turanga Whenua* report, the Waitangi Tribunal assumes that the changes to the structure of the court were not introduced until the 1865 Act a few months later: pp 413–414.

76. Document P1, p 223

77. *Ibid*, pp 11, 224 (doc AA1, p 119)

78. *Ibid*, p 224 fn 530

that there is more than one owner or set of owners thereof who desire that their respective estates or interests therein shall be divided or that the land shall be apportioned.'

Section 25 provided that, before the court reached any decision and ordered a certificate, a survey by a licensed surveyor must be provided and the boundaries of the land distinctly marked on the ground.

Mr Hayes, for the Crown, considers that there *had been* an intention to have a two-stage process in the 1865 Act because section 23 provided for a tribal title for blocks in excess of 5000 acres and for blocks under 5000 acres to have no more than 10 owners, but Fenton later stated that the intention was to encourage or compel partitioning. Partly because of the cost of survey and other costs, claimants were forced by the practice of the court to accept that all blocks, of whatever size, were awarded to 10 or fewer owners. This is the origin of the notorious '10-owner rule', whereby the named owners were in law absolute owners, with no trust stated or implied for the rest of the hapu. Mr Hayes notes (from Mr Alexander's evidence) that in Hauraki the court minutes in respect of Harataunga 2 and 3 do record that certificates were to issue to named individuals in trust for their hapu. This was unusual, indeed exceptional. Mr Hayes accepts that 'A reasonable criticism of the 1865 Act was the failure to provide for trusteeships *within the Act*, or, rather, a code regulative of the management of tribal or community-held land' (emphasis in original).⁷⁹ In other words, there were no provisions for corporate or tribal titles as there had been, at least in embryo, in sections 20 to 26 of the 1862 Act.

Mr Hayes argues for the Crown that there were 'two pathways' which Maori could follow to manage their land. One was to leave it under customary tenure; the other was to seek a Crown grant and proceed under English law. Mr Hayes has also argued (and has cited Supreme Court cases in his support) that, technically, land under a certificate of title from the court under the 1862 and 1865 Acts was still customary land. Apparently, only when it was transmuted by a Crown grant did it cease to be customary land, in law. But as the Supreme Court has also stated (and as Mr Hayes conceded) land under certificate of title (under the 1862 and 1865 Acts) or memorial of ownership (under the 1873 Act) was no longer customary land *as it stood before it passed through the court* (see ch 16). It had become a kind of hybrid: customary land modified by the statutory incidents of title governing certificates and memorials. Before the Turanga Tribunal, Mr Hayes characterised memorials of ownership under the 1873 Act as creating a tenure 'intermediate' between customary tenure and Crown grants.⁸⁰

The nature of the titles issued by the court are at the heart of most Hauraki complaints about the Native Lands Acts, because under those titles, it is argued, the customary controls upon alienation which the tribal collectivity could exercise were greatly reduced, and the

79. Document Q1, p 49

80. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, p 400

capacity of individuals named in the titles to alienate the tribal patrimony greatly enhanced. This being so, the legal doctrine that the lands were still customary land is merely a technicality. In reality, the tenure of the land had been converted from customary forms to a hybrid tenure with the named owners holding a legal authority they did not possess in traditional Maori society.

The power of named owners to alienate the land was all the more dangerous for the communities concerned because the powers accorded to the Governor in the 1862 Act were dropped, as Ministers took full responsibility for Native Affairs. The most important of the Governor's powers had been the right to make reserves. In the 1865 Act, the court *could* recommend restrictions on alienation but was not *required* to. In short, all of the main protections for Maori included in the 1862 Act had been dropped or substantially weakened in 1865.

Section 75 of the 1865 Act provided that dealings in Maori land prior to the award of a certificate were void rather than illegal. This opened the way for intending purchasers or lessees who were willing to risk their money to enter into dealings with Maori right-owners and assist them to promote their claims in court, with the expectation that the successful claimants would then complete a legal sale or lease on the basis of certificate of title. The clear danger in this was that inexperienced Maori, finding themselves possessed of a one-tenth share (or more) in a fully negotiable title, and in debt or under huge pressures to find ready cash in a money economy, would be tempted to sell their legal interest in what was really a tribal patrimony. They might also sell it for less than market value. This latter possibility was foreseen by Sir William Martin, the retired chief justice, who recommended in June 1865 that Maori lands should be sold only by public auction, and some of the payment compulsorily invested. Martin gave his support to the Act, subject to these important qualifications. Professor Ward writes:

FitzGerald however, did not adopt this provision or the proposal of Fenton, who, to his credit, had proposed making private dealings with Maori land prior to the Court's award, not merely void, but illegal. On the contrary, FitzGerald stated that the Bill was to repeal the Native Land Purchase Ordinance and let speculators risk their money in prior dealings if they wished . . . [He] frankly stated that the Bill was a compromise and in bringing it forward 'he had to give up some of the views he had held'. In other words he was surrendering to speculator pressures. A move by John Hall and others in the Legislative Council to include Martin's proposal for sale by public auction only, was defeated.⁸¹

It was also in reference to the 1865 Act that Sewell, in 1870, made his oft-quoted statement of the two-fold purpose of the Native Lands Acts, quoted above (in section 15.2.4). Dr David Williams comments that Sewell's statement revealed 'determined social engineering

81. Fitzgerald, 27 October 1865, NZPD, 1864-66, pp 370, 729; Rolleston to Fenton, 4 November 1865, MA24/21, Archives NZ (Ward, *Show of Justice*, p185)

to force Maori to abandon their laws and social system and to lose the bulk of their lands to settlers in the process', and fully supports Professor Kawharu's view of the court as 'a veritable engine of destruction for any tribe's tenure of land'.⁸² Indeed, Maori wishing to obtain through New Zealand law a clearer definition of their land rights, and then either transact or develop the land, could do so *only* through the process defined in the Native Lands Act, a process deliberately shaped to achieve the *settlers'* objectives. As David Williams puts it, 'The detribalisation of Maori was not . . . some unfortunate and unintended consequence of otherwise unimpeachable policies which might have been consistent with Treaty principles'.⁸³ It was a central purpose of a majority of the framers of the 1865 Act.

Mr Hayes has pointed out that the Crown retained for itself significant advantages under the 1865 Act. The Crown did not subject itself to the 'void' provision applied to private purchases conducted before court hearings. In both the 1862 and the 1865 Acts, it had specifically reserved the right to continue to acquire interests in customary land. Section 83 of the 1865 Act authorised it to have the court investigate its entitlements, whether acquired before or after 1865.⁸⁴ By section 77, it could also advance money for surveys, at the request of Maori, and charge them against the land.

15.3.6 Succession to land interests in the 1860s

Various claimants in these proceedings (notably those of Wai 177) have raised issues regarding the principles of succession to land rights established by legislation and adopted by the court, which they claim contributed to loss of control over land by those who would have inherited according to custom, and thence to alienation of land. The theme is a complex one. Governments and jurists have tried to steer a course between customary principles and values and the legal norms of the wider society. Maori leaders have accepted that their values and priorities have evolved over time, though not always in the direction wished for by Pakeha planners. There has been considerable vacillation in the law about the respective rights of children and of widows, about testate and intestate succession, and the respective jurisdictions of the Native Land Court and the former Supreme Court (since replaced by the District and High Courts) concerning probate over Maori estates. The subject has been studied in depth by the Law Commission, more than is possible in these proceedings.⁸⁵

We consider the specific cases raised by Wai 177 (see below and in section 16.3.5), but we will also consider the broader issues in a general discussion, in three stages. In this chapter,

82. Document E1, pp 51–52

83. *Ibid*, p 52

84. Document Q1, p 164

85. Two helpful commission papers are Professor Richard Sutton's 'Draft Preliminary Paper on Maori Succession Laws', revised ed (internal working paper, Law Commission, 1997), and *Maori Custom and Values in New Zealand Law*, Study Paper 9 (Wellington: Law Commission), pp 66–68. Tom Bennion and Judi Boyd's Rangahaua Whanui Series report *Succession to Maori Land, 1900–52* (Wellington: Waitangi Tribunal, 1997) is also very helpful.

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we will set out the principles laid down in the 1860s. In chapters 16 and 18, we will follow the issues through in the later nineteenth and twentieth centuries. The issues were not all fully argued before us in these proceedings; for a fuller treatment, we refer readers to the Law Commission papers.

(1) *Intestate succession and the fractionation of interests in titles*

Many Treaty claims, including those of Hauraki, depose that the laws governing succession to Maori land which had received a court title were prejudicial to Maori. They led to excessive fractionation of interests (or shares) in titles, but rarely to the demarcation of individual holdings on the ground. This facilitated the piecemeal purchase of interests but hindered the effective management of land by the owners themselves.

The Wai 100 claimants emphasise succession issues through Dr David Williams' report on the Native Lands Acts and in counsel's opening submissions. The Wai 177 claimants (the Gregory–Mare whanau) have also addressed the question, principally through a report by Ms Bridget Dingle on 'Wills, Probate and Succession' and through the opening submissions of Mr Hirschfeld.⁸⁶ Ms Dingle and Mr Hirschfeld have traced the various statutory references to succession under the theme 'The imposition of European rules', and we set out the salient features.

The Intestate Native Succession Act 1861 provided that intestate succession to land owned by Maori under a Crown grant should be determined by a commissioner 'according to Native custom, or most nearly in accordance therewith'. This was repealed by the 1865 Act, section 30 of which required the court to determine succession to 'hereditaments' (land subject to a court award) 'according to law as nearly as can be reconciled with Native custom'.⁸⁷ Section 57 of the Native Land Act 1873 (see ch 16) provided that intestate succession should be 'according to Native custom', but later Acts (notably, the Native Lands Acts Amendment Act 1882 and the Native Land Court Act 1886) reintroduced the 1865 wording.⁸⁸

Meanwhile, in 1867, Chief Judge Fenton laid down his interpretation of the 1865 provision, in regard to land at Papakura. This was awarded by certificate of title under the 1865 Act to Ihaka Takanini only, as his hapu's rangatira.⁸⁹ When Takanini died intestate, his widow and children claimed the estate, but this was contested by other hapu members. Fenton considered that the intention of the Legislature in section 30 was that English law should apply except where it 'would be very repugnant to native ideas and custom'. The court would therefore uphold English principles of law and decline to consider equities behind the grants unless the evidence disclosed strong reasons for doing so; it would be 'highly

86. Documents D3, R21

87. Document D3, p 10; doc R21, p 31

88. Document D3, pp 12–13; doc R21, p 34

89. Document E1, pp 111–112

prejudicial' he believed, to allow 'the tribal tenure to grow up and affect land that has once been clothed with a lawful title.' Fenton went on:

Instead of subordinating English tenures to Maori customs, it will be the duty of the Court, in administering this Act, to cause as rapid an introduction amongst the Maoris, not only of English tenures, but of English rules of descent, as can be secured without violently shocking Maori prejudices. In this case we think the evidence discloses no equities in favour of the tribe, and we see no reason to make any interference with the ordinary law, except in one particular. The Court does not think the descent of the whole estate upon the heir-at-law could be reconciled with the native ideas of justice or Maori custom; and in this respect only the operation of the law will be interfered with. The Court determines in favour of all the children equally.⁹⁰

This judgment (henceforth called 'the *Papakura* judgment') became the norm for intestate succession to land subject to court awards. As Mr Hirschfeld points out, the court principles meant that:

- ▶ The estate of the deceased was inherited by all the children in equal shares, as tenants in common, regardless of sex, rank, residence, or participation in the parent community.
- ▶ The children were entitled to succeed to the estates of both parents, which meant an increasing tendency for titles to involve people from several whanau and hapu, and (since one could not live everywhere or maintain all possible connections, even by visiting) for many or most of the owners to be absentees.

Mr Hirschfeld adds, 'By the time the 1873 Act was law, Fenton's *Papakura* jurisprudence operated as a forensic *fait accompli* in the Native Land Court . . . and . . . the Anglicization of Maori custom in matters of succession was complete.'⁹¹

This 'complete' anglicising is doubtful. Certainly, the *Papakura* principle was applied to the great bulk of Maori land as it passed through the court and the original awardees died. Over several generations of intestate succession, and especially after the Maori population began to increase, interests in Maori blocks fractionated. This was *not* usually the outcome in English succession law, which tended to favour primogeniture in cases of intestacy. (This rule was soon modified in New Zealand to allow widows to inherit an interest – commonly a third – in their husband's estate as a matter of right.)

Williams suggests that in framing succession rules Fenton ignored other areas of Maori custom:

the Chief Judge made no allowance for mana, for the status of members of the hapu, or for ahi ka in occupation of land. There is no obvious reason, and none given, why ignoring

90. Native Land Court, *Important Judgements Delivered in the Compensation Court and Native Land Court, 1866–1879* (Auckland: General Steam Printer, 1879); doc E1, p 112; Bennion and Boyd, p 6

91. Document R21, p 37

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maintenance of ahi ka occupation rights was possible whereas 'native ideas of justice and Maori custom' were supposed to require that all children, rather than only one, should succeed to freehold property.

With reference to ahi ka, Williams goes on to quote Professor Hugh Kawharu on the 'wide divergence' between the land court version of 'native custom' and Maori tikanga:

Every individual had rights of bilateral affiliation, and in consequence could succeed to rights of usufruct bilineally, but only to the extent that the rights in the submerged line (ie that parental community with whom he did not live) might lie dormant for no more than three generations before being extinguished. Since the advent of the Land Court, however, rights have been unrestricted by [the necessity for] acts of occupation, and have been transmitted both indefinitely through successive generations and equally to children of both sexes.⁹²

Mr Hayes has criticised David Williams' apparently 'limited' understanding of the English principle of primogeniture.⁹³ But Williams' comments relate to Maori more than English rules; he recognises, correctly, that the purpose of primogeniture was to avert fragmentation of estates. However, he suggests that the same result could have been attained in the *Papakura* case by awarding the land to one successor of Takanini on behalf of the hapu (assuming that Takanini did regard himself as trustee for the hapu). The issue was whether Native Land Court awards implied a trust for the hapu (as most Maori attending the court intended, at least at initial hearings) or conferred shares in ownership on individuals (as colonial officials such as Fenton intended). As we have seen, Fenton declined to acknowledge hidden trusts ('equities in the tribe') behind the court awards to individuals, but he did balk at excluding children by awarding intestate estates to a single 'heir-at-law', as was then the tendency in English law.

The departure from Maori customary inheritance practices by the 1865 Act and by the court was radical, notably the abandonment of any ahi ka requirement for children before they could succeed, and reliance on descent alone. More fundamentally, though, the difference lies in the nature of the interest to which the children were succeeding. Under custom, children succeeded to certain rights and obligations in the land of their whanau and hapu, including use rights and duties of kaitiakitanga. An inherited interest in land which had passed the court was very different: it was a legal interest in a title, defined not by custom but by statute and judicial interpretation. Problems such as fractionation of interests in titles thus stem not so much from the succession rules per se but from the conversion of customary tenure to the new forms of title.

92. Ian Hugh Kawharu, *Maori Land Tenure: Studies of a Changing Institution* (New York: Clarendon Press, 1977), pp105-107 (doc E1, p114)

93. Document Q1, p 61

The quotation from Professor Kawharu cited above shows (as also alluded to by Mr Hirschfeld) that in customary tenure land rights were not acquired by descent alone. People *lost* rights by failure to activate them through residence and participation in some way with the group that lived and worked on the land. Rights were normally activated in two or three groups with which an individual could associate. Rights potentially traceable through other lines of descent were usually deemed lost, when no connection had been made with someone in the grandparent generation still living on the land.

Yet, there are other relevant factors besides customary tenure and legislation affecting succession. Maori were always mobile, often shifting as individuals from settlement to settlement, but from the late nineteenth century and especially in the twentieth, Maori economic migration increased. But non-resident heirs were reluctant to say they had no connection with ancestral land: indeed the social and psychological need to retain a *turanga-waewae* in one's birthplace, even while living far away, *intensified* the pursuit of interests through genealogical succession alone. Many Maori would not have wanted to continue to insist on a residential qualification as well as a genealogical one. Perhaps the law could have attempted to oblige Maori to *choose* in which line, the paternal or maternal, they could claim their inheritance (as some did, voluntarily), but such a measure would have challenged the inclusivity of whakapapa and the multiple tribal identities Maori often embraced. We are not aware that anyone, Maori or Paheha, has suggested this, and doubt that any such limiting of succession would have been well received.

In their Rangahaua Whanui report, Tom Bennion and Judi Boyd referred to the brief effort by Parliament in section 3 of the Native Succession Act 1881 to have Maori hereditaments 'guided by the [general] law of New Zealand' (ie, made closer to English rules). But this was immediately found to be so 'repugnant to the ideas of the Natives and contrary to their customs', that, in the following year (1882), section 4 of the Native Lands Act Amendment Act restored the 1865 formula (ie, 'according to the law of New Zealand as nearly as can be reconciled with Native custom', the formula which underlay the *Papakura* judgment).⁹⁴ This is a rather rare instance in which the overwhelming preference of Maori people, as expressed through their members of Parliament, was explicitly heeded. The episode suggests that Fenton seems to have gauged Maori succession preferences relatively accurately, or perhaps that Maori had come to prefer the *Papakura* principle to any narrowing of the succession.

Moreover, many Maori pursued succession through the lines of both parents, with the result that non-resident heirs soon came to outnumber resident heirs. Management of land became more difficult, underscoring the need to provide mechanisms by which the owners of multiply owned titles could corporately make and implement decisions about their land. This need was not seriously addressed until the provision for incorporation of owners in the

94. Bennion and Boyd, pp 7–8

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Native Land Court Act 1894, and the establishment of trusts in the Maori Affairs Act 1953 and (more comprehensively) in Te Ture Whenua Maori Act 1993 (discussed in chapters 16 and 18).

(2) *Spouses*

Another important aspect of the succession issue concerns the rights of spouses. By the *Papakura* rule, in intestate succession, spouses could not normally inherit a share in the land. We pursue this matter, and issues arising from the devolution of land by will and probate of Maori wills, in section 16.3.5.

Another aspect of this question – the status of customary marriages – emerged on the death of a prominent rangatira in Thames in 1876. He left the large sum (for those days) of £7000, but when his wife by customary marriage applied for access to the funds she was refused without legal proof of marriage. The Intestate Native Succession Act 1876, passed to the Native Land Court the power to define (and certify for the guidance of the Supreme Court) the person or persons entitled to succeed, under custom, to personal estate as well as ‘hereditaments’.⁹⁵ Customary marriages were usually recognised for the purpose of succession to land, but the court frequently had to deal with successive marriages and their respective issue.⁹⁶

15.3.7 Tribunal comment on succession in the 1860s

We take the view that on the question of succession, as in Maori land tenure generally, the Crown is not bound by the Treaty to preserve custom frozen in its pre-1840 state. As we have commented previously, Maori values regarding land adapted to meet changed laws, new needs and social conditions, and it is reasonable that the law sought to match such changes. However, we are concerned that the land law may have got too far ahead of Maori opinion, and become predominantly an instrument of social engineering by non-Maori who thought they knew best what Maori should do with their land.

The evidence cited above indicates that, as regards succession, English law principles were not imposed entirely to the exclusion of Maori ones, not even by Fenton in his *Papakura* rule. As Professor Sutton puts it, the legislative provision of 1865 ‘appears to give the Courts power to attempt a blend of Pakeha and customary law’.⁹⁷ Although it distorted pre-1840 patterns of inheritance and, more damagingly, failed to recognise implied tribal trusts, Fenton’s *Papakura* rule was more liberal than English rules at that time in recognising the rights of Maori children to succeed to their parents’ estates. The likelihood that (in consequence) titles would be increasingly fractionated was recognised by the Legislature in 1881,

95. Intestate Native Succession Act 1876, ss 3, 4 (Bennion and Boyd, p 5)

96. Bennion and Boyd, pp 21–30; see also Sutton, pp 50–56

97. Sutton, p 32

which attempted to narrow the succession along English lines, but the attempt was resisted by Maori and reversed in 1882. The evidence suggests that over time, Maori came to prefer Fenton's rule.

The prejudicial consequences for Maori intestate succession appear to derive not so much from the legislation or the court's interpretation of the rules but from the nature of the titles created, in which every individual named in a title or inheriting an interest in a title was absolute owner and manager of that interest and could alienate it without referring to the wishes of the community. Whether absent or resident, such individuals were entitled to a share in the revenues from the land. The fundamental issue, then, is the nature of the titles imposed through legislation.

15.4 THE NATIVE LANDS ACTS APPLIED AND AMENDED

15.4.1 Initial Maori responses to the Native Land Court system

As Crown witnesses have shown, the governments responsible for the Native Lands Acts of 1862 and 1865 were uncertain if Maori would welcome and use the court. Although the Kaipara experiment of 1864 gave them hope, they had also experienced Maori reluctance to arrange titles and transactions through the official runanga of 1861–62. Many Maori were still bearing arms against the Crown and others were reluctant to receive Crown institutions into their rohe. Many settlers and officials were therefore surprised that, as Dr Loveridge puts it, Maori 'flocked to the Court, and quickly acquired titles which enabled them to sell and lease large quantities of land'.⁹⁸ Among settler politicians and officials:

This outcome was greeted not with alarm that Maori might divest themselves of too much land (it being axiomatic then and for many years afterwards that they had far too much land for their own good), but with satisfaction that Maori had seen the light, and were evidently prepared to take advantage of the opportunities being offered to them.⁹⁹

We have referred above to the adjudication of several Coromandel blocks in July 1865, under the 1862 Act (see sec 15.3.4). A further 13 blocks (many of an acre or less but one of 240 acres and one of 325 acres) were adjudicated in October and December 1865 under the 1865 Act and awarded to chiefs of Patukirikiri and Ngati Whanaunga. Twelve more were adjudicated in 1866, including blocks at Whitianga and Tairua.¹⁰⁰ James Mackay appeared in the Whakahau Island claim (Tairua), mediating an arrangement which the court ratified.

Coromandel minute book 1 shows that the court convened at Taupo Bay on 19 December 1865, and in Auckland and Taupo Bay in 1866, to adjudicate on blocks on the western side

98. Document P1, p 235

99. Ibid, p 236

100. Coromandel minute book 1, fols 18ff

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of the firth, including the 4600-acre Mangatangi block. It convened again in Kauaeranga on 16 July 1867. We have noted earlier (in chapters 9 to 11) that Te Moananui and Hori Ngakapa were having lands surveyed around Thames in 1869, that Te Aroha was heard in 1869 and reheard in 1871, that Ngati Pu took Hikutaia–Whangamata through the court in 1870–71, and that various blocks in the Waihi and Ohinemuri districts were heard from 1871–72.

Like Fenton, Judge Monro was surprised and pleased at the acceptance of the court in 1865–67. The Patukirikiri chiefs' communications to Lawlor indicate that there was already a private market and prior negotiations. Not all blocks were promptly sold, however. From his tabulation of Mr Alexander's block histories, Mr Hayes concludes that many of the timbered blocks were first leased, with gum digging rights reserved, and sold considerably later. He notes Dr David Williams' contention that 'nearly 80%' of the land that passed through the court under the 1865 and 1867 Acts was not immediately sold.¹⁰¹

Mr Hayes considers that Maori responses to the court show that:

[It is apparent that . . . many Maori welcomed the tenurial revolution], settled amongst themselves their complex and fluid rights, and presented their settlements to the Court [and] . . . that Maori fully understood and valued the transmutation of customary rights for a Crown grant.¹⁰²

This assertion has been strongly challenged by the historians for the Marutuahu claimants.¹⁰³ As the *Turanga* report has shown, bringing land claims urgently to the court need not mean full understanding and acceptance of a 'tenurial revolution'.¹⁰⁴ The early sales in Coromandel and Thames support Mr Hayes' conclusion to only a limited extent: it appears that the land was promptly sold under certificate of title, rather than Crown grants being sought for it. Moreover, many blocks were brought to the court mainly because the ownership was contested between several other hapu or iwi, seeking to resolve ancient disputes in a new arena. This was being done in areas where the owners were still explicitly resisting either gold-mining cessions or sale, and trying to keep land under tribal possession and control.

Despite early and continuing participation in the court, unsatisfactory features of its procedures provoked increasing concern among Hauraki Maori, reflected in many of the claims before us. For example, the Wai 693 claimants (Ngati Raukatauri of Ngati Huarere), cite the proceedings concerning the Matamata-harakeke block (4100 acres), south of Coromandel. The block went through court in 1871 on the application of one person (Paraone Te Awa) who had initiated a survey in 1869, incurred a lien and claimed the land for his group on the basis of occupation. Other right-owners, who claimed by ancestry (Arama Karaka,

101. Document Q1, p 91; doc E1, p 96

102. Document Q1, pp 13–14

103. Document V1, pp 246–248

104. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, ch 8 (esp pp 444–446 on 'individualisation' of title)

Wikitoria Rangipiki and Wikitoria Nohohau) were unable to stay the proceedings; they tried to oppose the claim but were unable to attend the hearing. The court, under Judge Munro, awarded the block to Te Awa alone. The appeal by Arama Karaka was also heard by Munro who admitted other owners but left Te Awa in the title as a principal owner, despite the fact that his group did not share a common ancestor, and Te Awa's witnesses came from a distance or were from a different line of descent.¹⁰⁵ The case showed that the court had difficulty in deciding between claims based on occupation and those based on ancestral right.

Several claimant groups have submitted that the court's proceedings, essentially adversarial, exacerbated divisions in Maori society, creating wounds which last to this day. For example, the Ngati Koi claimants, Wai 714, have submitted evidence to show that they intermarried with the invading Ngati Tamatera and lived amicably with them after the initial period of hostilities. Claims to the court, however, awoke old wounds, with Ngati Koi claiming to hold land in their own right and Ngati Tamatera arguing that they held the mana of the land and that Ngati Koi were 'rahi', holding the land as their tributaries.¹⁰⁶ They submit that, had the court not forced the two groups into an adversarial position, they would still have been living in harmony, and Ngati Koi (who won one of the claims in consideration) would not have had to put up with the 'rahi' slur ever since.

The issue has also been discussed by Belgrave and Young from the point of view of the Marutuahu claimants. They note that:

Maori customary rights to land did not exist in the abstract. Rather they were a practical application of tribal political and civil rights . . . Maori customary rights were fundamentally about relationships. That is, how people interacted with each other over access to resources and land. They were always in flux and always subject to debate.¹⁰⁷

They refer to the court's failure to recognise the relationship between early tangata whenua, still in occupation, and the incoming Marutuahu:

As we have seen in relation to Marutuahu and Ngati Hako on the Hauraki Plains, some Courts could not understand why Marutuahu had open access to sources of food there even though they did not permanently occupy the land. The Court, in the 1890s, did not accept that kinship groups could be given rights of occupation under the authority of other kinship groups who retained overall control. There was a recognition of the Marutuahu claims, but an increasing emphasis on the right of occupation meant that neither the full extent of their claims nor the nature of their relationship with Ngati Hako were recognised.¹⁰⁸

105. Document A35; doc M6, pp1-4

106. Document R33, pp 62-63

107. Document v2, p 114; see also Angela Ballara, *Iwi: The Dynamics of Maori Tribal Organisation from c1769 to c1945* (Wellington: Victoria University Press, 1998), p 269; doc R7, p 55

108. Document v2, p 115

In the light of such examples, the Tribunal queried whether there was not always an adversarial element in customary society, and asked how a non-adversarial land claims tribunal might have operated.¹⁰⁹ In similar vein, Belgrave and Young suggested that, rather than try to capture all the complexity and fluidity of traditional tenure, ‘The Court’s key function was to *close down* the debate over customary rights to land and render previously fluid relationships fixed both in time and in place’ (emphasis added).¹¹⁰

The argument of Ngati Koi and other claimants is that, while closure in the debate might be needed to create negotiable titles, a more equitable outcome could have been obtained had the Native Lands Acts initiated inquiries in the style of a formalised traditional runanga, encouraging intersecting right-owners to seek a consensus about who would be included as ‘owners’ of a given area. This would have resulted in some inevitable compromises and simplification of the pattern of rights within agreed boundaries, but would have been preferable to picking ‘winners’ and ‘losers’.

We recognise that the actual practice of the court varied over time and between judges and that in the 1870s and 1880s, as its awareness of the complexity of Maori customary rights to land increased, the court increasingly adopted the practice of adjourning to allow those claimants who were in attendance (and their agents) to try to agree among themselves upon the lists of names to be taken into court and formally accepted as lists of owners of the block in question. Sometimes, this was in reference to a hapu which the court had already accepted as the owner group; sometimes the lists included members of more than one hapu. John Hutton, in a report for the Tribunal’s Rangahaua Whanui programme, has given several examples of the use of this procedure in Hauraki.¹¹¹ The advantages and limitations of this approach – including the fact that the land was often already under negotiation, with purchase agents influencing the outcome – are discussed in Professor Ward’s *National Overview*, in the Rangahaua Whanui programme.¹¹² In any case, it is not what the Ngati Koi and other claimants have in mind when they refer to a runanga-style forum teasing out the complexities of customary rights and trying to accommodate them.

The Tribunal considers that, while the court did not *create* the ancient rivalries and tensions within Maori society, its procedures stimulated their revival or continuance. A principal reason for this, as the Turanga Tribunal has observed, is that under Fenton’s rules, the court considered only the evidence presented to it by initial claimants and ‘objectors’, and did not make its own independent inquiries.

In these proceedings, as in most others before the Waitangi Tribunal, claimants have deplored the recognition in law of the named owners as absolute owners, rather than

109. Document R33, pp 69–70

110. Document v2, p 115

111. Hazel Riseborough and John Hutton, *The Crown’s Engagement with Customary Tenure in the Nineteenth Century*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), pp 168–179

112. Alan Ward, *National Overview*, 3 vols (Wellington: GP Publications, 1997), vol 2, p 224

trustees for their whanau or hapu. The Ngati Pukenga claim in respect of Manaia 1 and 2, which passed the court in 1872, is but one of many examples cited in evidence.¹¹³ The individual named owners could subsequently partition or sell without reference to other owners. Mere Taipari sold Manaia 1A and 2A to the Crown in 1891. Shane Ashby remarked in his submission: ‘Mere Taipari was simply exercising her legal rights, but these were rights that should never have been created in the first place.’¹¹⁴

15.4.2 Controls on alienation: the ‘10-owner system’, trusts, and section 17 of the 1867 Act

We cannot know how much understanding there was of tenure conversion and its relationship to land sales among the hapu and rangatira of Coromandel and Thames who lodged claims with the court. Belgrave and Young accept that, although early awards may have been made under section 23 of the 1865 Act (the ‘10-owner system’), and the court titles legally excluded all but the named owners, those owners ‘did not stop being Maori, they did not stop [all at once] engaging in traditional customary activities, nor were their value systems transformed.’¹¹⁵ Rangatira did not act in isolation: the practical steps of arranging surveys and taking land through the court would have involved many in the community. But the degree of consensus is impossible to gauge.

Mr Hayes concurs with the established historical interpretation that, with section 23 of the 1865 Act, the intention of the Legislature was ‘not to encourage the appointment of trustees or representatives for blocks, but to encourage the partitioning of land’. Communities were not prohibited from entering into formal trust arrangements, and Mr Hayes concludes from his extensive reading of court minutes that ‘a number of certificates and Crown grants were issued to named individuals in trust for their tribe.’¹¹⁶ In 1868, Harataunga 3 was awarded to Ropata Ngatai, Hakopa Ihaka, and Tautuhi Rongo to hold in trust for themselves and 11 other named individuals.¹¹⁷ But the Harataunga example was highly unusual in Hauraki, and probably exceptional.

It has long been accepted in official reports and in scholarly literature that nationally, named owners often exercised their new powers to alienate the tribal patrimony, sometimes because they had incurred debts charged against the land, and were under pressure from creditors.¹¹⁸ Mr Hayes debates whether abuses should be held to the account of Maori

113. Document v7, p 5; doc A10, pt 1, pp 167–168

114. Document i5, p 7

115. Document v6, pp 34–35

116. Document Q1, p 49 fn 187. Mr Alexander’s evidence indicates that Mr Hayes is referring to two small blocks – Harataunga 2, of 546 acres, and Harataunga 3, of 59 acres – which were awarded in 1868 to Raniera Kawhia, Ropata Ngatai, and Hekiera Tuterangi in trust for several named Ngati Porou hapu and were leased to J Smart: doc A10, pt 1, pp 22–23.

117. Document A10, pt 1, p 23

118. An example is Hawke’s Bay, but Hauraki was also subject to this phenomenon: see, for example, sections 10.1.7, 12.5.2, and 16.1.5(3).

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owners themselves, or whether exposing 'owners' with limited experience to the pressures of financial credit, especially when what they risked was not exclusively or even mostly their property, was evidence of failure by the Crown of its reasonable duty of care. As mentioned in section 15.3.5, he concludes, and we agree, that 'A reasonable criticism of the 1865 Acts [*sic*] was the failure to provide for trusteeships *within the Act*, or rather, a code regulative of the management of tribal or community-held land' (emphasis in original).¹¹⁹

The Crown did, however, take some steps to deal with the emerging problem. Ward's *A Show of Justice* relates that Native Minister JC Richmond listened to the concerns of local officials at how quickly the named owners were alienating land, and failing to distribute the proceeds to others who had held customary rights; he sought to introduce controls. An 1866 amendment required the court's judges to report on whether restrictions on alienation should be imposed on land subject to court awards; all reserves were restricted to alienation by lease up to 21 years. Ward has noted that, so unpopular with the settler community was this mild attempt at restriction, the Native Office felt obliged to issue a press statement explaining that:

It is not meant to restrict permanently the alienation of any native land, but only to retard the alienation of some small portion till the Maori race have taken their ultimate position in the colony, and can be relied upon to provide for themselves as the European does.¹²⁰

The following year, finding the judges reluctant to recommend restrictions, Richmond proposed a further step:

Where it appeared that a large number of persons was really interested in the land, and desire that a few not exceeding ten persons should hold the land in trust, the interest of the [other] persons should be recorded by the Court and the land held inalienable, and not subject to be leased for longer than 21 years without again coming to the court to have the titles individualized further.¹²¹

In effect, this would have been a partial return to the protective, two-stage process envisaged in the 1862 Act. But section 17 of the Native Lands Act 1867 did not fully adopt Richmond's proposals; instead, it required the court to issue a title to no more than 10 persons, but granted it a discretion to record the names of other right-owners in the court records or on the back of the certificate. The alienation of section 17 land was limited to lease for up to 21 years, save with the consent of the Governor in Council (on application of the owners). It attempted to ensure that the named owners were in practice trustees for the group, rather than absolute owners as they were in law. Effectively, it replaced section

119. Document Q1, pp 49–51

120. *Daily Southern Cross*, 28 February 1867 (Ward, *A Show of Justice*, p 215)

121. Document Q1, p 53

23 of the 1865 Act, which allowed the court the option of granting a 'tribal' title for blocks of over 5000 acres. However, as the Tribunal reporting on Mohaka ki Ahuriri claims has pointed out, the section 17 title 'should not be mistaken for the effective grant of form of tribal title . . . since that required the creation of a truly corporate title with tribal leaders installed as trustees.'¹²² Richmond had intended to require the named owners, where they were not the sole owners, to execute in court a declaration of trust but was advised by the Attorney-General that this 'would be attended with great inconvenience.'¹²³ His provision for listing the other owners in court records or on the back of the certificate was a second-best arrangement. The main practical benefit to Maori of the section 17 titles was the restriction they imposed on alienation.

Section 17 of the 1867 Act did not automatically apply to all titles issued after the date of its enactment; judges could choose to apply it. Chief Judge Fenton was reluctant to do so, because in his view it tended to restore Maori 'communal' title. He acknowledged that intemperate selling was occurring after land had passed the court, but went on:

it is not part of our duty to stop eminently good processes, because certain bad and unpreventable results may collaterally flow from them; nor can it be averred that it is the duty of the Legislature to make people careful of their property by Act of Parliament, so long as their profligacy injures no-one but themselves.¹²⁴

In 1880, Fenton told a parliamentary committee that he opposed the concept of the named owners being trustees or agents for a larger group because:

The whole theory of the Native Lands Act, when the Court was created in 1862, was the putting to an end to Maori communal ownership. To recognise the kind of agency contended for would be to build up communal ownership, and would tend to perpetuate the evil instead of removing it.¹²⁵

Given that ending communal tenure was the primary intention of the Legislature, Fenton claimed in 1880 that the judges still had a discretion whether to apply section 17, and continued to award certificates to 10 or fewer owners. Dr Anderson states that:

Most judges in Hauraki appear to have followed Fenton's lead in this matter. Few blocks were awarded under section 17 in the period up to 1873. . . . In the case of blocks awarded to iwi willing to sell lands to the Government, restrictions were entered on the title of ten

122. Waitangi Tribunal, *The Mohaka ki Ahuriri Report* (Wellington: Legislation Direct, 2004), p 447

123. Debate in the House of Representatives on the Native Lands Bill, 27 September 1867, NZPD, 1867, vol 1, pt 2, pp 1135–1139; Dr Grant Phillipson, 'The Ten Owner Rule: A Selection of Official Documents with Commentary', report commissioned by the Waitangi Tribunal, August 1995 (Wai 64 ROI, doc K13), doc 4

124. Fenton to Richmond, 11 July 1867, AJHR, 1871, A-2A, p 41; see also 'Opinion of Chief Judge on 17th Clause of Act, 1867', 7 April 1868, AJHR, 1871, A-2A, pp 40–41

125. R Stout, 'Owhaoko and Kaimanawa Native Lands', 18 May 1886, AJHR, 1886, G-9, p 13; Ward, *A Show of Justice*, pp 216–217

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of the blocks, while six others (four of them awarded under section 17) were left without protections [ie, restrictions], and immediately sold to the Crown.¹²⁶

Harataunga again offers a rare Hauraki example. In the 1872 hearing to consider ownership of the remaining Harataunga lands (ie, all but Harataunga 2, 3, and 4, which were awarded in 1868) 10 names were submitted to go into the title, together with 36 names to be registered under section 17 of the Native Lands Act 1867. A further five names were added to the list at the hearing.¹²⁷ In the context of escalating concerns among Maori about survey costs, it is also worth noting that the lands had been surveyed by John Gwynneth in November 1871 at the Government's expense.¹²⁸

Other than in Harataunga, Mr Hayes concludes that the provision was little used, and blocks continued to be awarded to 10 or fewer claimants as absolute owners, though James Mackay 'occasionally' invoked section 17 on behalf of Maori claimants whom he represented.¹²⁹ Dr Anderson also noted that Judge Monro used the provision on request. It was apparently used in the Hikutaia and Whangamata blocks, both for the subdivisions the owners wished to sell and for those they wished to retain.¹³⁰

Richmond reported to Parliament in 1868 that:

the Government, finding themselves foiled by the unwillingness of Mr Fenton to co-operate with them, had sent circulars round to discover cases where the 17th Section had been over-leaped by the Court and to obtain declarations of trust on the part of those Natives who had received grants for their tribes.¹³¹

No evidence has been submitted as to whether such declarations were obtained in respect of Hauraki blocks.

Mr Hayes has invited the Hauraki Tribunal to take note of Dr Fergus Sinclair's submission in the Rekohu (Chatham Islands) claims concerning section 17.¹³² Dr Sinclair provides evidence showing that Fenton's reluctance stemmed from his intention, as a principal drafter of the 1865 Act, that there should be no hidden trusts: the owners named on certificates were to be absolute owners. Where there were more than 10 owners under custom the correct course, in his view, was not to declare trusts, but to partition the land. Fenton was aware that Maori themselves were reluctant to subdivide because of the survey costs. In Sinclair's words, he 'shifted the blame onto the Maori owners for the way they chose to

126. Document A8, p182

127. Document A10, pt1, p7

128. James Mackay, report to Minister for Public Works, 24 January 1873, AJHR, 1873, G-8, p1

129. Document Q1, pp 54–55. Paradoxically, Belgrave and Young, for the Marutuahu claimants, state that 'extensive use' was made of section 17 (doc v1, pp 257–258), but they cite no sources for this conclusion.

130. Document A8, p182

131. Richmond, 8 October 1868, NZPD, 1868, vol 4, p 231 (Ward, *A Show of Justice*, p 216)

132. F Sinclair, 'Ten Owner Rule', report commissioned by the Crown (Wai 64 ROI, doc L3); doc Q1, pp 56–57

use the Court, and their misguided faith in the honour of the grantees' Mr Hayes quotes approvingly Sinclair's comment that:

Fenton might have been too willing to shift responsibility onto Maori shoulders. But the argument that Maori bear no responsibility for arrangements they made, and which later turned sour, is also an extreme position which may cloud the real state of affairs.¹³³

However, Mr Hayes also notes that 'Fenton, for one, appears to have been reluctant to implement the provision [s17].'¹³⁴ The Crown's closing submissions in the Rekohu claims observe that 'There may be some debate about the constitutional propriety of Fenton's position.'¹³⁵

Mr Hayes agrees that Fenton was wrong to claim that he had a discretion not to apply section 17. The law was clear that, while the court had a discretion whether to enter on its records the names of all customary owners other than those named on the certificate of title, it did not have a discretion as to alienability, which was restricted to lease of up to 21 years. In short the alienability of the land was limited until the owners had returned to court and applied to sell or partition. Mr Hayes sees this as a partial return to the two-stage process contemplated in the 1862 and 1865 Acts, and regards the section 17 certificate as 'similar in effect to a Deed of Trust registered in the Deed Registry Office or a caveat under the Torrens system [introduced in New Zealand in 1870] . . . a notice to all the world of beneficial interests affecting the land as well as protecting those interests.'¹³⁶

There is evidence from other districts that Maori claimants were often content to see titles vested in the names of a small number of rangatira, and continued to do so even after the 1873 Act formally required every owner to be entered on the title.¹³⁷ There is also evidence that they often did not want a restriction on the title limiting alienability to a 21-year lease: in some cases at least they intended to sell, and collaborated with the court in making the simplest title arrangement possible to avoid the necessity of further surveys and court hearings. But Colonel Haultain, appointed as commissioner to investigate the working of the Native Lands Acts, also reported in 1871 that many communities had not heard of section 17.¹³⁸

In comparison with the section 17 attempt to limit the named owners' power of sale, other provisions of the 1867 Act facilitated alienation. Section 4 empowered the Crown to declare

133. Document Q1, p 51

134. Ibid, p 49

135. H Aikman, Crown closing submissions, September 1996 (Wai 64 RO1, doc P1), para 37

136. Document Q1, p 54. Mr Hayes also suggests that Fenton laboured under the mistaken belief that Maori could not legally lease or sell under a certificate of title and that such dealings were void until the issue of a Crown grant: AJHR, 1885, I-2B, p 40 (doc Q1, pp 57-58).

137. Michael Belgrave, *Counting the Hectares: Quantifying Maori Land Loss in the Auckland District, 1865-1908*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), pp 43-46

138. Document Q1, p 54 fn 200; see also 'Colonel Haultain's Report on the Working of the Native Land Court Acts', AJHR, 1871, A-2A, pp 25-52

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districts in which the 1865 Act did not apply: this meant that where the Crown wanted to acquire land it could issue proclamations over the areas concerned and effectively by-pass restrictions on alienation. (This provision was a forerunner of similar provisions enacted from 1871, discussed below.) As discussed in chapter 14, sections 33 to 35 had major effects on land alienation: section 33 authorised Maori to charge their lands with survey and title investigation costs and section 34 provided that, after the court had ascertained the interest of the borrower in the land in question, no certificate of title or Crown grant was to be delivered to the Maori owners while the debt was outstanding. As Mr Hayes has pointed out, these provisions did not, of themselves, give the holder of the lien a 'stake' in the land or remedy against the land itself. But section 35 provided that, once title had been ascertained, the Maori owner could grant the lender a mortgage over such part of the land as the court considered sufficient security for the debt. The three sections went far towards ensuring that entrepreneurs who advanced money for surveys were likely to secure a lease or purchase from Maori owners. From this time on, survey debts were an important reason why Maori owners alienated significant portions of the land they had just put through the court.¹³⁹ Mr Hayes comments:

the owners who wanted to alienate . . . had to first deal with the holder of the survey lien/charge and likely did so in practice . . . Of course, in many instances, the lien holder and the owners had either an existing relationship or prospective relationship concerning the land.¹⁴⁰

Mr Hayes has also shown that Fenton, unhappy with Richmond's amendments, drafted his own amendment Act in 1869, while serving briefly in the Legislative Council. This Act provided that grantees under Crown grants were to be tenants-in-common, not joint tenants, and that a majority in value of the grantees had to agree to an alienation to make it effective.¹⁴¹ This was the beginning of the 'majority rule' provision governing alienation which (together with tenancy-in-common), provided a measure of protection against piecemeal alienation of shares by individual owners. But, as Dr Anderson points out, it was of limited effect while blocks were regularly awarded to only a handful of owners.¹⁴²

Other amending legislation was considered in 1869 but not proceeded with. Because it had long been apparent that Maori were getting into debt, and selling land to clear their debts, Richmond, initially with support from Donald McLean, introduced a Bill to restrict credit to Maori to £5, but the Government changed and the proposal was dropped in favour of the 'majority-rule' provision of Fenton's Bill. Fenton also introduced a Native Reserves Bill which would have given the court the right of setting aside reserves, administering

139. See doc D5, pp 5, 22

140. Document Q1, p 116

141. Ibid, pp 60–61

142. Document A8, p 182

them as trustee and restricting or permitting alienation. That was opposed by Government speakers who considered that Fenton was seeking to enlarge his and the court's powers.¹⁴³ Rivalry between Ministers and officials often affected what measures actually came onto the statute book.

15.4.3 The Native Lands Frauds Prevention Act 1870

Prevailing attitudes among the now-dominant settlers also did not augur well for the implementation of measures to protect Maori land-holdings. With respect to reserves, Richmond wrote to his brother in 1868:

At present they are almost absolutely in the hands of the Executive, who are subject to heavy pressure on political grounds from friends and foes . . . The public morality is not delicate on such points, and a trust property which stands at all in the way of a public improvement or a public desire would be summarily dealt with by the public if it had the chance.¹⁴⁴

The attitudes illustrated by Richmond are relevant in considering the next important measure to offer some protection to Maori landowners. The Native Lands Frauds Prevention Act 1870 authorised the appointment of part-time officers, employees of the Native Department rather than of the court, whose certificate guaranteeing fraud-free transactions was required to complete any 'alienation' of Maori land. (In an amending Act of 1873, 'alienation' was defined as including any 'charge, lien or disposition'.) The trust commissioners were required to ascertain that the transactions were not contrary to equity and good conscience, did not contravene any trusts ('expressed or implied'), and did not include liquor or firearms in the payment. The efficacy of the measure has been strongly debated before us, mainly in the submissions of Dr Anderson and Mr Alexander for the Wai 100 claimants and Mr Hayes for the Crown.¹⁴⁵

Mr Alexander has shown how the Act was the Government's alternative to Fenton's proposed Bill to check abuses in the management of Maori reserves. A Legislative Council select committee report stated that, while seeking to check frauds and abuses:

it will be necessary to avoid all appearance of attempting to interfere with that free right of disposal of their lands by the Natives which has been conceded to them by the Native Land Acts, or to re-establish the old protectorate system, which would be rejected by the general opinion of the settlers.

143. Ward, *A Show of Justice*, p 251

144. JC Richmond to CW Richmond, 13 January 1868, Scholefield, Richmond, Atkinson papers 2, p 267 (Ward, *A Show of Justice*, p 216)

145. Document A8, pp 182–183, 317–330; doc E3, pp 45–65; doc Q1, pp 128–152

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In introducing the measure Henry Sewell (now Minister of Justice) claimed that the legislators sought to ‘steer a middle path’: they had no wish to control ‘the free agency’ of Maori to deal with their own lands but to recognise the underlying trusts behind Crown grants and land court certificates, and that the individuals named on titles had obligations to the wider tribal group. The debate showed the mood of Parliament: Colonel Russell emphasised that, while the Legislature should protect Maori from fraud and oppression, ‘they should not allow them to retain a greater quantity of land than they should make use of; and the sooner the rest passed into hands of Europeans the better.’¹⁴⁶ Several members of the Legislative Council wished to make the law retrospective and secured an amendment to that effect, but it was defeated in the House of Representatives on McLean’s motion.¹⁴⁷

The trust commissioners had huge responsibilities on paper, but from the outset their power to protect Maori was limited. Deeds for transactions in Maori land were to be declared null and void if commissioners considered (among other things) that the transaction was ‘in contravention of any trusts affecting the said land or is not made in conformity with such trusts.’ They had to satisfy themselves that the parties understood the effect of the transaction and that interested Maori had sufficient land left for their ‘support’. But Mr Alexander has set out the instructions drawn up by Sewell and issued to trust commissioners on their appointment; these indicated that, while the equitable rights of all parties were to be preserved, the object of the legislation was ‘not to throw difficulties in the way of bona fide transactions; on the contrary to give every facility to their completion’ and ‘Except in cases where you have reason to believe there is fraud or illegality, you should give the certificate as a matter of course. Your inquiries need not, in ordinary cases, be too minute.’

Most seriously, the instructions limited the power of the commissioners to inquire into implied trusts:

It is not considered to be part of your duty to inquire minutely into the question whether there is any undisclosed trust. It is considered that where lands have been granted by the Crown to certain Natives, after investigation of title in the Native Lands court, and the grant discloses no trust, none is to be implied; nor is the fact that it was by arrangement with others interested in the land that the certificate of the Court was ordered to the grantees, instead of those others, to be taken by you as evidence of any constructive trust. It is considered that the term ‘implied’ in the fourth section of the Act means implied from the terms of the instrument under which the Natives hold.¹⁴⁸

This meant that the 10 or fewer owners named under the 1865 Act remained absolute owners. The commissioners were not instructed to check the court records for the lists of

146. Document A8, pp 317–318

147. Ibid, p 319. Professor Ward suggests that McLean and Ormond did not want their Hawke’s Bay dealings investigated: Ward, *A Show of Justice*, p 252.

148. ‘Report of Committee of Legislative Council’, 6 November 1871, AJLC, 1871, p 142 (doc A8, p 320)

other customary owners required to be recorded under section 17 of the 1867 Act. It appears that Sewell had become so mindful of the unpopularity of interfering with the settlers' drive to secure Maori land that his instructions had virtually nullified one of the main purposes of the Act.

Finally, it is doubtful how far the jurisdiction of the trust commissioners applied to the Crown. In closing submissions, Crown counsel acknowledged:

Section 13 of the Native Land Laws Amendment Act 1883 provided that the Crown was not bound by the Trust Commissioner regime. As a matter of strict legal interpretation the Crown may not have been bound by the Trust Commissioner regime at all. However, in other districts, Crown transactions were the subject of Trust Commissioner scrutiny, eg in Turanga. The extent to which that occurred in Hauraki remains unclear.¹⁴⁹

Despite the limitations in the legislation, the Tribunal commented in the *Turanga* report that 'A broad construction [of Parliament's intention] would have gone a long way towards meeting the Crown's Treaty obligation of active protection.'¹⁵⁰ They concluded, however, that the commissioners and the court were not adequately resourced to carry out thorough checks on whether the transactions were equitable, the vendors' consent was properly obtained and they had adequate land remaining. Only 'limited, mainly paper-based checks' were carried out and 'There was no spirit of generosity in how the provisions were applied.'¹⁵¹

Mr Alexander has analysed the returns of the trust commissioner for the Auckland province (which included Hauraki) for the period 1874 to 1884 and shown that of 1992 applications received, only in 69 cases (3.5%) were certificates refused. But Mr Hayes has examined the letter-book of Thomas Haultain, the trust commissioner in Hauraki for the period 1873 to 1877, and concluded that, within the parameters of the law, Haultain performed his duties conscientiously, scrutinising documents to ensure that all technical requirements of the legislation had been met and that Maori understood the transactions, and requiring parties to negotiate further if he thought they did not. Mr Hayes' examination of Charles Heaphy's minute book as trust commissioner in Wellington shows a similar probity and conscientiousness.¹⁵²

Haultain stated that he considered it part of a trust commissioner's duties to satisfy himself that Maori vendors had obtained a 'fair price' for their land. But Mr Hayes acknowledges that 'I cannot discount the possibility that unless the consideration was grossly inadequate, he did not challenge the same.'¹⁵³ Mr Hayes gives examples where the price stated on

149. Document AA1, p174

150. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, p 456

151. *Ibid*, pp 456-457

152. Document Q1, pp 133-152

153. *Ibid*, p135

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the deed was less than the amount paid over, and vice versa, and of apparent discrepancies regarding area. He notes also that it was scarcely possible for the Commissioners to check on the adequacy of lump-sum payments for timber-cutting rights (or leases) without a good knowledge of the amount of timber involved.¹⁵⁴

The various block histories submitted by claimants show that despite the best efforts of Haultain, various transactions, flawed or inadequately understood by the Maori alienors, slipped through the system. For example, Dougal Ellis's report for the Wai 705 claimants shows that, although Haultain refused 13 transactions in 1878 because of restrictions on the title, the alienation of Te Weiti 4 block at Mercury Bay was approved that year both by the court and by Haultain, with no indication that the restrictions on the title had been removed.¹⁵⁵ Dotted through many other research reports and block histories are other examples of irregularities such as alienation before formal removal of restrictions, registration of purchasers' titles before the court had confirmed the alienation, or failure to obtain or to witness all vendors' signatures, or to carry out other requirements of the 1865 and 1873 Acts.¹⁵⁶

The Wai 705 claimants have raised the issue of Peneamene Tanui's claim in 1883 that the signature of an owner, Kaitu, to the sale of Te Weiti block was forged. The claimants realise that a finding on the truth or falsity of this claim is beyond our jurisdiction. They do ask us to find on the Crown's alleged failure to investigate the claim at the time. On the slender evidence available to us it appears that this was also beyond the jurisdiction of the Native Land Court, and that that body acted correctly in stating that the Tanui whanau would have to take the matter to a higher court. We do note, however, that Mr Ellis's evidence shows that the trust commissioner did not certify the 1873–74 purchase of interests in Te Weiti until 1882, after Kaitu had died.¹⁵⁷ This delay contributed significantly to the difficulty faced by the Native Land Court and the parties before it in 1883 when the validity of Kaitu's signature was questioned. In our view, this demonstrates the limited protection afforded Maori by the Native Lands Frauds Prevention Act 1870.

It was difficult for the (part-time) trust commissioners to visit each area and closely scrutinise each transaction. For the more remote areas they relied mainly on reports from resident magistrates; in the 1880s, resident magistrates themselves were often also appointed as trust commissioners. Mr Hayes also notes the commissioners' reliance upon Maori alienors correctly disclosing all necessary information. He is no doubt correct in remarking that discovery of implied trusts (among other things) would have been 'a daunting, even impossible task' unless Maori owners were prepared to acknowledge them.

154. Document Q1, pp 136–138

155. Document R5, pp 52–53

156. See doc A10, pt 2, p 103 (Whangamata 1, 3, 5); doc D4, p 13 (Ahuroa 1); doc H1, pp 22–24 (Papakitatahi); doc J6, p 3 (Te Horete 1, 1B1); doc K2, pp 10–11 (Peneamene's transaction of Wharetangata 6); doc N9, p 69 (Wheunua-kite 2). The list is far from exhaustive.

157. Document R5, pp 50–51

Perhaps that difficulty underlay the later Native Lands Frauds Prevention Act of 1881, similar to the 1870 Act but providing for a statutory declaration that alienors had to sign, affirming that the consideration had been duly paid, that arms and spirituous liquors formed no part of the payment, that the land concerned was not held in trust for the benefit of any Maori community, and that the alienors had sufficient land remaining for their future wants.¹⁵⁸ But a reliable statutory declaration would have required a very high level of understanding and probity on the part of all concerned, alienors, alienees, and officials alike. The 1881 Act shifted the responsibility away from close inquiry by an independent authority and threw it heavily upon the alienors themselves. It is tantamount to an acceptance by the State that no independent system of checks was possible, unless with a considerable input of personnel and resources.

In the debate on the 1881 Bill, Major Wiremu Te Wheoro, an assessor in the land court, pointed to an added source of difficulty:

A great many of the Natives disposed of their land without understanding what they were doing . . . He thought this showed the necessity that there was for appointing Maoris in each district to assist the Commissioners in their duties, so that every transaction might be placed upon a clear footing . . . He knew himself that Commissioners had confirmed the transfer from Natives to Europeans without fully inquiring into the circumstances of each case and making their minds clear as to the particulars of it. Many troubles had arisen in consequence of Commissioners confirming transfers that had taken place between parties concerning land in this way; some of the owners signed their names to instruments of disposition, while others did not, and still a Trust Commissioner had given his certificate. This was the cause of a great deal of trouble amongst the owners of the land, and led to their fighting against each other.¹⁵⁹

Mr Hayes has shown that Haultain had involved Te Wheoro in his investigations in the late 1870s, and the cases Te Wheoro was referring to might have been Hauraki ones.¹⁶⁰ Te Wheoro's statements point to a disjunction between the Maori world and the formal legal and administrative systems to which Maori were supposed to relate. Such insights call into serious question the somewhat idealised world which Mr Hayes depicts, in which Maori were assumed to understand the system, commissioners behaved with industry and probity, and Maori agency was respected. Presumably as a result of complaints such as that of Te Wheoro, the 1881 Act included the provision that trust commissioners 'may from time to time call in the assistance of a Native Assessor' (s7). We have seen no evidence as to how frequently Maori assessors were called upon by trust commissioners, but we do know that Te Wheoro himself, a Queen's officer since 1863, had become disgusted with the way Maori

158. Document E3, p 60

159. Major Te Whero, 2 August 1880, NZPD, 1880, vol 37, pp 59–60 (doc A8, p 325)

160. Document Q1, pp 140–141

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and their lands were being treated, had entered Parliament in 1879 (with the support of Hauraki adherents of the Kingitanga) in an effort to lay Maori grievances before the House, then, finding that futile, assisted King Tawhiao in his visit to England in 1884 to lay the grievances before Queen Victoria.¹⁶¹

Alexander cites further evidence of Maori dissatisfaction with the trust commissioners: during Native Minister John Ballance's meetings in Maori districts in 1885, John Ormsby asked that they be done away with and their powers transferred to native committees.¹⁶² Alexander cites Ballance's dissatisfaction with the trust commissioners' performance, his proposal to replace the whole system with one involving Maori committees, the limited success of that initiative, and the beginning of the practice of appointing Native Land Court judges also as trust commissioners.¹⁶³

Emma Stevens for the Marutuahu claimants reports the comment of one of the trust commissioners themselves, G E Barton, who, on the basis of evidence taken in Tauranga, stated in 1886:

that the system of inquiry before the Frauds Prevention Commissioner is useless for the prevention of fraud while the 'Form c' [the alienors' statutory declaration] which plays so prominent a part in proving before the Commissioners the *bona fides* of sale, is a positive cloak for fraud.¹⁶⁴

Amendments to the Act progressively weakened it. In January 1890, procedures under the Frauds Prevention Act were amended to allow a commissioner to hear a case without any Maori alienor present, provided the statutory declaration created in 1881 was filed. The system by now was becoming little more than a formality. Particularly serious was the continued lack of any vigorous process for disclosing concealed trusts. On this point, Mr Alexander writes:

Deciding whether land was held in trust for the tribe seems to have rested on the word of the Registrar of the Native Land Court. He would examine what the title issued by the Court said. If the title made no reference to the land being held in trust, then he would not alert the Trust Commissioner. Yet subsequent events, such as the extensive use of Section 14(10) Native Land Act 1894 to inquire into the true ownership of blocks awarded with ten or fewer owners [the successor provision to the Native Equitable Owners Act 1886] show that many lands were intended to be held in trust for the tribe.¹⁶⁵

161. Ward, *A Show of Justice*, pp 273, 291–292

162. Document A8, p 326

163. Document E3, pp 61–68

164. G E Barton, 'Removal of Restrictions on Sale of Native Lands', 14 May 1886, AJHR, 1886, G-11, pp 3–4 (doc v3, p 25)

165. Document E3, p 66

By this time, the appointment of officials such as resident magistrates to act part-time as trust commissioners was considered unsatisfactory. In 1894, the office of trust commissioner was abolished and the commissioners' functions vested in the Native Land Court. Alexander's overall conclusion on the subject is that:

The best that can therefore be said of the legislation, and of the Trust Commissioners' administration of it, is that, while it might have been well intentioned, it had limited impact, was relatively cursory in its implementation, and was largely ineffective in preventing or slowing the process whereby the Maori owned estate dramatically shrank in size during the latter part of the nineteenth century. It trimmed only the harshest edges off the land purchasing juggernaut.¹⁶⁶

As Mr Hayes rightly points out (and as Mr Alexander's evidence shows) it was not the *purpose* of the Frauds Prevention legislation to slow the alienation of Maori land. Rather it was to facilitate it, but free of fraud. Mr Hayes also remarks that 'the regime required a large degree of Maori co-operation for it to be effective'. He argues that Haultain's letterbook shows no evidence of Maori complaint with the system.¹⁶⁷

But there could be a great many reasons why either Maori did not complain to Haultain, or why Haultain did not record their complaints in his letter-book. The comments of Te Wheoro to the 1881 Parliament, and those of the chiefs who spoke at Ballance's meetings, suggest that Maori tried to cooperate with the system that the Crown (not Maori) had put in place, but only partly understood it. Their comments are only one facet of mounting island-wide Maori protest trending in the direction of demanding more Maori control over alienation. This became the platform of the Kotahitanga movement and also shaped the legislation of 1893–1900 (see below). Barton's 1886 conclusion that the system was a cloak for fraud is particularly damning and it is hardly surprising that the system was abolished in the 1890s.

15.4.4 Tribunal comment and findings

Three great changes were introduced by the 1862 Native Lands Act and have run through amending Acts ever since. First, a tribunal had been created to ascertain Maori customary rights to land, replacing the previous reliance on administrative processes. Secondly, direct dealing between Maori and settlers was legalised (though Crown purchase could also continue). Thirdly, customary tenure would be replaced by the new certificates of title (potentially leading to Crown grants) in respect of land which passed through the court. This

166. Ibid, pp 67–68

167. Document Q1, pp 146–152

Tribunal must assess to what extent, if any, did these changes involve breaches of Treaty principles.

We do not consider that the establishment of a tribunal to ascertain intersecting or disputed rights to Maori customary land *of itself* infringed Treaty principles. The dangers of proceeding by administrative process alone had been amply revealed by the inadequate investigations of Te Ati Awa rights at Waitara, in Hawke's Bay and elsewhere. We concur with the view of the Tribunal in the *Pouakani Report* that 'there had to be a fair system of establishing ownership when a sale was contemplated'.¹⁶⁸ In principle, the establishment of an independent judicial authority offered greater protection for Maori than they had hitherto received. But for the system to be 'fair', much would depend upon the *nature* of that tribunal, and how well it met the changing needs of Maori in respect of their land and other resources.

The preamble to the 1862 Act recited article 2 of the Treaty and then stated the Legislature's intention to modify it to allow direct dealing. We do not consider that this, of itself, involved a breach of Treaty principles: as we have stated with regard to FitzRoy's earlier waiver of Crown pre-emption, there may well be circumstances when it is in the Maori as well as the public interest to modify the strict *terms* of the Treaty. We consider (as did the Court of Appeal judges in 1987) that it is the *spirit* of the Treaty which must be respected. Nevertheless, it is obviously a very large step to modify the terms of the Treaty. Given that there were two parties to the Treaty, it would seem to be rather obvious that both should be involved in the decision to make the change and agree on the essentials of the new approach. Given also that a major purpose behind the introduction of Crown pre-emption in 1840 was the protection of Maori from manipulative and fraudulent land transactions, it would also follow that adequate alternative protections should be provided in a system of direct dealings. In our view, the legalisation of direct dealing heightened rather than diminished the Crown's responsibility to protect Maori from inequitable dealings and excessive land alienation.

We consider that the great changes the Act made to Maori land tenure warranted explicit, prior consultation with Maori. We note that, although there was some general discussion of land matters at Kohimarama and possibly more during the establishment of official tribal runanga, there was no explicit referral to Maori leaders of an outline or draft Bills leading to the 1862 Act. This we consider to be a breach of the Crown's Treaty obligations to Maori. Especially in the light of the manifest reluctance of most district runanga to consider 'enfranchisement' (conversion of tenure) of their land and direct dealing, the Crown could hardly be said to have had a mandate from Maori to enact the 1862 law. By the admission of Ministers of the day (and of Crown witnesses in these proceedings) the law was a unilateral Act of the settler assembly, done to overcome Maori reluctance to sell land.

168. Waitangi Tribunal, *The Pouakani Report 1993* (Wellington: Brooker and Friend Ltd, 1993), p 308

It was disingenuous of Bell in 1862 to say that all the Act did, fundamentally, was to provide a process for giving security and clarity to Maori titles and leaving Maori 'free to deal with their lands as they wished'. It is clear that the settler politicians of the time had other objectives. It is equally disingenuous of Crown witnesses or counsel to imply that the 1862 Act was wholly benign in intent, simply offering to Maori the equivalent of a level playing field with British settlers. It will be recalled that the 'rights of Maori as British subjects', and 'freedom for Maori to deal with their land as they wished', were the catch-cries of speculators and others in 1840, seeking to resist Crown controls on dealings in Maori land in order to maximise their own opportunities.

The 1865 Act was shaped mainly by Chief Judge Fenton and reflected his priorities as well as those of Ministers. Sections 21 to 26 of the 1862 Act were not carried forward to the new Act, so there was no explicit opportunity for Maori to seek a tribal title first then engage in more detailed planning for alienation or development of some of the land. The '10-owner' system provided only an individual title, with up to 10 owners named on the certificate of title for a block of land. There was no declaration of trusts for the hapu.

Moreover, three other proposed safeguards were either omitted or not applied: first, dealings prior to a court certificate were not made illegal, but merely void; secondly, the sale of land only by public auction was not required by the legislation (then or at later periods when the proposal was revived); thirdly, the '10-owner system' was supposed to apply only to blocks of 5000 acres or less but in practice was applied to blocks of any size. Without these safeguards, purchasers were free to negotiate with the named owners individually and privately for their share of the block, as if the named owners were absolute owners.

Protective aspects of the legislation between 1866 and 1872 did not much improve the situation for Maori, because (like section 17 of the 1867 Act) they were not applied in Hauraki or (like the Frauds Prevention Act 1870) they were applied without vigour. Sections 33 to 35 of the 1867 Act authorised survey and title investigation costs to be charged against land, and intending purchasers to advance money on mortgage to cover the debt.

In our view, these various acts and omissions reflect the Crown's primary concern with facilitating the alienation of Maori land, by means and on terms most favourable to the Crown and settler purchasers. The opportunity provided for purchasers to acquire separately the individual signatures of owners named on court titles undermined Maori community control of land alienation and denied Maori the opportunity to secure the fullest access to the market. In our view these are serious breaches of Maori Treaty rights.

CHAPTER 16

THE NATIVE LAND ACTS, 1873–99

16.1 THE NATIVE LAND ACT 1873

Much land in Hauraki was alienated under titles issued under the Native Land Act 1873. We have heard extensive evidence about the nature of these titles and their effect upon Hauraki Maori society.¹ The *Turanga Tangata Turanga Whenua* report's chapter 'The Native Land Court and the New Native Title' also concentrates mainly on the 1873 Act. We see no need to recapitulate its evidence and findings, with which we concur, but we discuss matters argued closely in this inquiry, or of particular relevance to Hauraki.

16.1.1 Revising the land law: options considered

By the early 1870s, the Government could not ignore the mounting problems over the operation of the Native Land Acts. These included threatened violence over the Te Aroha block in 1869–71, controversy over the '10-owner' system, over clandestine and costly surveys, and over (as the *Turanga* report calls it) Fenton's adoption of the 'best evidence rule' (that judges were to take account only of evidence presented in court, and not make independent inquiries²). A flow of appeals and petitions to the Native Affairs Committee resulted.

In 1871, in the light of these and other problems, McLean commissioned the former Attorney-General, Sir William Martin, to draft a new Native Land Bill. Martin considered that Maori were 'not only disturbed and unsettled, but exasperated by the present system.'³ Martin's Bill proposed major changes: surveyors attached to the court; inalienable reserves at a minimum acreage per head; the alienation of other land only through public auctions supervised by the court (which would also supervise distribution of payments and compulsorily invest some of the purchase moneys); and preliminary investigation to check that applications to the court were supported by a majority of the owners.

1. In addition to the many statements by tangata whenua witnesses about the impact of the land law on their society, we have found particularly useful the specialist submissions by Dr David Williams (doc E1), Dr Robyn Anderson (doc E2), David Alexander (doc E3), Drs Young and Belgrave (doc V2), and, for the Crown, Bob Hayes (doc Q1). Many of the matters discussed below are enlarged upon in these submissions.

2. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (Wellington: Legislation Direct, 2004), p 414

3. 'Memorandum by Sir William Martin on the Operation of the Native Land Court', 18 January 1871 (doc E1, p 42)

Chief Judge Fenton declared some of Martin's proposals to be 'ridiculous'. He said that they were likely to destroy the judicial authority of the court, reducing it to the role of an administrative commission and land broker. He considered that a desirable criterion for reserves was the amount of land reserved in the Ngai Tahu deed. He accepted openly that Maori would not be satisfied with a system which was 'reducing their holdings to some relation to their necessities', and considered 'that the final struggle between the races has yet to come'. He did not believe it possible to transfer the soil of the country 'without suffering and unhappiness', but in Fenton's view, this had to be accepted.⁴ Fenton was articulating commonly held settler views and policy objectives. His brother judges offered similar views, duly published in official papers. In a private 1873 letter to William Rolleston, superintendent of Canterbury, Fenton expressed satisfaction that 'We have transferred several millions of acres of land from one race to the other, and even if a large portion of this is uncultivated and if capitalists have got large estates, it is infinitely [better?] than [the land] remaining in the hands of natives.'⁵

There is a degree of blatant racism in this attitude: what was offensive to Fenton was uncultivated land *held by Maori* rather than uncultivated land as such. Getting the land out of Maori hands was an object in itself. That the chief judge of the Native Land Court held such views did not augur well for protective legislation for Maori land. In 1871, Fenton submitted his own draft Bill which tended to strengthen the authority of the court; for example the use of Maori assessors was to be at the judge's discretion. Yet, Fenton also reiterated his 1865 view that dealings with Maori land before it had received a Crown grant should not merely be void but illegal. Mr Hayes comments, 'In this respect, as we shall see, Fenton was at odds with Crown policy.'⁶

Colonel Haultain, heading a commission of inquiry at McLean's request in 1871, also criticised heavily the 10-owner system, the cost of surveys, and the impact of mortgages. He cited as an example the experience of the Ngati Whanaunga chief, Hori Ngakapa Te Whanaunga, who got into debt due to extortionate charges by a private surveyor, who botched the work into the bargain. The judgment summons secured from the Supreme Court by Hori Ngakapa's creditors obliged him to sell land at Shortland and his schooner, and to mortgage Wharekawa West 4.⁷ Haultain also cited the heavy expenses incurred by Maori in the Te Aroha hearings. But he reported that Maori witnesses in his inquiry sought no major alteration of the court itself; he considered that 'as a forum for the investigation and determination of title, the Court was almost universally accepted as satisfactory.'⁸

4. Alan Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand* (Auckland: Auckland University Press, 1974), p 254; Fenton to McLean, 28 August 1871, AJHR, 1871, A-2A, pp 10-12

5. Fenton to Rolleston, 22 July 1873, Rolleston family papers, MS papers 446-034, ATL (Vincent O'Malley, 'The Crown and Te Arawa, c 1840-1910', Whakarewa Forest Trust, 1995 (Wai 1200 ROI, doc A49), p 47)

6. Document Q1, p 60

7. Document D33, pp 3-6

8. Document Q1, pp 67-68

Haultain's commission had made some effort to consult Maori opinion, notably that of Maori assessors. But, as the *Turanga* report has pointed out, their submissions do not appear to support wholly Haultain's endorsement of the court. Crown witness Mr Hayes also comments that the assessors held diverse views.⁹ Professor Ward concluded that:

many Maori witnesses, including Wi Te Wheoro [Waikato] and Paora Tuhaere [Ngati Whatua], favoured settling titles among themselves through a form of traditional *runanga* and bringing their decision to the Court to secure the requisite confirmation and authoritative support.¹⁰

Dr Vincent O'Malley supports that conclusion: 'The thrust of almost all of the Maori submissions made before Haultain was that some measure of tribal control ought to be retained in the investigation of titles to and subsequent alienation of lands.'¹¹

A second inquiry – into the alienation of Maori land in Hawke's Bay in 1872 headed by CW Richmond – also condemned the 10-owner system as 'a very serious grievance', supported the concept of preliminary inquiries into ownership before court hearings, the making of reserves (by Native Department officers rather than the court), and a return to a two-stage system as in the 1862 Act: first, a tribal title would be determined with no power of alienation, then the alienation of some of the land if the owners wished, through trustees whose powers would be defined in the court certificates. But, like Haultain, Richmond argued that the court had attained a judicial authority among Maori seeking to resolve inter-tribal claims to land, and that this should not be weakened. Richmond's associate commissioner, Wi Hikairo (who had also given evidence to Haultain) objected particularly to owners named on titles dealing with the land as absolute owners, especially by way of mortgage. He also pointed to the practice of store-keepers encouraging Maori into debt with easy credit, and then pressing them to sell their interest in land to clear the debt. Hikairo considered that dealings should be conducted with all the grantees assembled, and the terms of the proposed purchase discussed openly. If some did not agree, the land should be partitioned between sellers and non-sellers.¹²

We note that Te Wheoro and Hikairo were not alone in their views. The concept and experience of officially empowered *runanga* (provided for in the 1858 legislation and Grey's

9. Ibid, p 68

10. Ward, *A Show of Justice*, p 254. The Waitangi Tribunal's *Turanga Tangata Turanga Whenua* report quotes Te Wheoro's proposal that 'the Judges and Assessors should be done away with, and six Maori arbitrators should be appointed by opposing claimants, three by each side, who should hear and decide the cases; and if they agreed, their decision should be ratified by an officer of the Government'. The experienced Arawa assessor Wi Hikairo suggested that panels of Maori judges (*kaiwhakawa*) should work with judges permanently stationed in their districts: Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, pp 414–415.

11. Vincent O'Malley, *Agents of Autonomy: Maori Committees in the Nineteenth Century* (Wellington: Crown Forestry Rental Trust, 1997), p 27

12. Wi Hikairo, 'Report of the Hawke's Bay Native Lands Alienation Commission', AJHR, 1873, G-7, p 52; see also O'Malley, pp 28–29

‘new institutions’) continued to be widely supported both among Maori and by some senior officials. Professor Ward writes:

Rolleston also raised the [runanga] idea in the House in 1869, Sir William Martin put it to McLean in 1870, and several of the Resident Magistrates supported it warmly. In 1872, therefore, McLean drafted a Native Councils Bill proposing to allow local councils under a Maori president to pass and enforce appropriate by-laws regulating the familiar problems of *puremu*, sanitation, drunkenness, noxious weeds, dogs and trespassing stock. The councils were also to investigate and determine disputed land boundaries, their decisions to be ratified by the Land Court . . . The Bill was introduced late in 1872 after the out-districts had heard rumours of it and numbers of Maori communities had elected committees in preparation for its passage. The Premier, Waterhouse, claimed [perhaps with some exaggeration] that ‘so firm a hold on the Native mind has this question obtained, that it has now risen to the prominence that the King Movement did some years ago’. Although the Native Minister recalled that Fenton’s attempt to introduce a Runanga system in 1857 had aroused chiefly jealousy he said he would try to introduce it cautiously in a few districts. However, the Bill roused the same objections that had greeted Grey’s ‘new institutions’ of 1861–3. Gillies said that the measure gave the Maori too much authority over important matters which affected settlers and that it destroyed the authority of the Land Court. Wi Parata, member for Western Maori, said that he knew that settlers feared that through the councils Maori would regain control of their lands.

Having withdrawn the Bill until the 1873 session . . . McLean tried to make [it] more palatable to European tastes by restricting its application to Maori customary land and by allowing settlers to opt to come under it and elect members to the council. It was to no avail. The House objected to granting the decision on land title to ‘a set of outside Republics, presided over by Government officials.’ Fenton too, had expressed his jealousy and contempt of the measure. McLean again, and finally, withdrew the Bill.¹³

This evidence must be set against the statements cited by Mr Hayes that Maori generally accepted the court’s judicial role. Other evidence in primary sources and published histories also shows that the Maori demand for empowerment of their runanga, committees and parliaments grew steadily through the nineteenth century, became a major demand of the Kotahitanga movement, and underlay the Native Committees Act 1883, Ballance’s Native Land Administration Act 1886, and the 1900 legislation sponsored by Seddon, Carroll, and

13. Draft of Native Councils Bill and supplementary notes, circa 1872–73, McLean MSS, 31; NZPD, 1872, vol13, pp587, 894–899; McLean to Campbell, 5 November 1872, MA4/66; under-secretary to Campbell, 7 February, 22 April 1873, MA4/67; Campbell to McLean, 29 January 1873, McLean MSS, 177; Draft of Native Councils Bill, circa 1873, McLean MSS, 31, 118; NZPD, 1873, vol 14, p106; NZPD, 1873, vol 15, p1514; Fenton to Mantell, 6 November 1872, Mantell MSS, 277 (Ward, *A Show of Justice*, pp 247–248)

Ngata, discussed in chapter 18.¹⁴ We note here that, while there was considerable Maori use of the court (in Hauraki as elsewhere), there was concurrent, widespread, and mounting concern among Maori that, rather than giving them increased security and control over their lands, the court was disempowering them and exposing the land to what the *Turanga* report characterises as ‘the slow and often secret process of piecemeal purchase.’¹⁵ But, as the *Turanga* report has also indicated, the court was the only available official arbiter of Maori entitlements to customary land; Maori had little option but to use it or risk being left out of titles. This did not mean that they were satisfied with the process or with the kinds of title the court awarded. On the contrary, they protested increasingly about both.¹⁶

Meanwhile, in 1873, the withdrawal of McLean’s Native Councils Bill meant that the new Native Land Bill was the only option still before the Legislature.

16.1.2 Key provisions of the 1873 Act

Both claimants and Crown have discussed the 1873 Act, with sharply differing opinions. For example, claimant witness Dr David Williams suggests that the concerns Hikairo outlined above had little impact on Government policy in 1871–73, while, according to Mr Hayes, ‘It is also apparent that the 1873 act reflected the sentiments of Hikairo.’¹⁷

The Act itself was complex; it embodied many amendments made in both Houses, reflecting some of the demands of pressure groups. Among its 111 sections, the Act provided the following:

- ▶ There was a return to a version of the two stages of tenure change, as in the 1862 Act. When Maori first brought claims to the court, successful claimants would normally receive a ‘memorial of ownership’, with *every* owner’s name listed. In Mr Hayes’ view, this was the ‘first stage’, still ‘customary land’ (even though the owners could transact it according to the terms of the Act).¹⁸ The second stage of tenure change was Crown-granted land, which, according to Mr Hayes, ‘was to be the subject to the English doctrine of tenure, although many of the rights and privileges of hereditaments were circumscribed by the 1873 Act and by other Native land legislation.’¹⁹ The preamble to the 1873 Act does suggest that McLean intended that land under memorial of ownership would remain tribal land, controlled by communities who could retain certain areas under traditional usage; the land they wished to alienate was to be brought under

14. See, for example, Ward, *A Show of Justice*, pp 264–275; O’Malley

15. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, p 417

16. *Ibid*, pp 424–425

17. Document E1, p 57; doc Q1, p 70

18. See Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, pp 440–441. Note Mr Hayes’ concession quoted earlier in section 15.3.5.

19. Document Q1, p 70

Crown grant. But we note that the law did not in fact establish any such clear, two-stage distinction. Like the certificates of title of the 1860s legislation, memorials of ownership under the 1873 Act established a hybrid tenure, including custom and statutory incidents of title, further defined by a series of judicial interpretations in the Supreme Court and Court of Appeal.

- ▶ Sections 21 to 32 provided for ‘district officers’ to work with the assessors and chiefs to compile a ‘local reference book’ of tribal lands in each district including a list of all reserves, and to ensure that not less than 50 acres per head was reserved for the owners’ benefit.
- ▶ Sections 34 and 38 provided that a minimum of three Maori claimants could apply to the court for the investigation of customary ownership and the court was to make preliminary inquiries to ascertain that the application was ‘in accordance with the wishes of the ostensible owners’.
- ▶ Section 48 provided that the holders of a memorial of ownership could alienate the land only by lease for up to 21 years, if the court was satisfied that *all* consented. By section 63, the court could appoint no fewer than four owners to be receivers of rent and accountable to the court for its equitable distribution, but no other mechanism for corporate control by the owners was provided in the Act.
- ▶ Section 49 provided (as did section 59) that notwithstanding section 48, sale was not precluded provided all owners agreed.
- ▶ Sections 59 to 68 (and particularly section 65) provided that on the application of a *majority* of owners the land could be partitioned between those wishing to lease or sell and those who dissented from the transaction. The dissenting minority was also supposed to agree to the partition and alienation. In the event of a sale the creation of a new subdivision embodying only the interests of sellers, enabled the technical requirement of sections 48 and 49 to be met.²⁰
- ▶ Section 80 provided that where land was awarded to 10 or fewer owners, the native title could be ‘commuted’ by Crown grant into, ‘an English title in fee simple’ or a ‘freehold tenure.’ This was the ‘second pathway’ (in Mr Hayes’ terms) that Maori could follow, in respect of portions of their tribal estate.
- ▶ By section 87, all transactions ‘affecting Native land before it shall become vested in freehold tenure by order of the Court shall be absolutely void’ (not illegal), except that ‘contracts by *parole*’ not exceeding two years could be made in respect of flax, timber and other produce growing on the land.

20. In theory, partition applications were supposed to arise from disputes among the owners about whether to transact. In 1874, the Act was amended so that the owners could apply for a partition, dispute or no dispute. Historians for the Marutuahu claimants also point out that the purchaser had to get a majority to agree to the partition, although only a minority interest might actually be alienated: doc v1, p 255.

- ▶ Section 88 provided that no judgment of any court could be enforced against the owner of an undivided share in any land; this was an important restriction on enforcement of mortgages or debts against undivided interests.
- ▶ Surveys would henceforth be undertaken by Government surveyors, at rates to be agreed in advance with Maori claimants, the Surveyor-General to be satisfied that the cost would be repaid either in money or in land.
- ▶ Before and after the 1873 Act, the Crown was free to purchase individual interests in Maori land, either before or after it had passed through the court and the Immigration and Public Works Acts of 1871 and 1872 empowered it to declare districts subject to Crown pre-emption. The Crown was not bound by section 87 (the ‘void’ provision.) Section 107 of the 1873 Act also assisted the Crown’s purchasing process by authorising the Crown or Maori to apply to the court for orders to complete incomplete or ‘inchoate’ transactions, or apportion the land.²¹ (Not until 1879 were instructions issued to Crown purchase agents to terminate the practice of making advances prior to title investigation.²²)
- ▶ All dealings in land under memorial of ownership had to be certified and recorded by the court (which thus became the principal registry for Maori land). The judges were directed by various sections of the Act to satisfy themselves that the consideration paid was equitable, had been received and that all owners had signed the transfer. The court was to certify that any translation was prepared by a licensed interpreter and independently witnessed.

We have heard much evidence about the adequacy or inadequacy of the protection mechanisms for Maori provided in the 1873 Act, and who was responsible for the limited effect of some of these measures. It is apparent that some of them were marked improvements on previous legislation. One of the more vicious features of the 1865 Act had been eliminated, namely the awards to 10 or fewer owners, which excluded most hapu members from a legal interest in the title and enabled the named owners to alienate the tribal patrimony without any formal trustee obligation. However, the protection offered by naming all owners on memorials was sometimes frustrated by Maori themselves, some of whom chose to include only a few leading men in the titles, especially if a transaction was intended. It became common practice for the court to decide which hapu – one or several – held interests in the land, and in what proportion, and for Maori claimants to arrange lists of owners out of court, for acceptance or rejection by the court. Other important protective reforms were the section 88 prohibition on the enforcement of debts against undivided interests in Maori land and the Government’s taking responsibility for surveys. We discuss these reforms further below.

21. Mr Hayes has listed the most relevant statutory provisions, including section 6 of the Native Land Act Amendment Act 1877 and the Government Native Land Purchase Act 1877: doc Q1, p 85 fn 305.

22. Paper 2.550, p 32

16.1.3 The kind of title created by memorials of ownership

(1) Questions at issue

Henry Sewell opposed the 1873 Bill on the grounds that:

By those provisions they were introducing a . . . mode of dealing with Native lands wholly foreign to Native custom. The Native[s] of a tribe held a collective corporate interest in the whole of their lands, and had no idea of divided shares. Now it was proposed to say to them, 'One-third of you, it may be, are King Natives, who will not sell, and two-thirds of you are Queen Natives, who will sell. If you come to the Native Land Court, the Court will direct that two-thirds of the tribal estate shall be alienated, and one third shall be set apart for those who dissent' . . . What was now said was, that the Natives should be governed by majorities, and that their interest in land should no longer be tribal or collective, but that each individual should have a distinct aliquot part. That was a fundamental vice in this Bill.²³

Mr Hayes, for the Crown, accepts that Sewell's analysis is correct in so far as the 1873 Act developed the system of 'majority rule', already implicit in Fenton's 1869 Act. But the Crown is reluctant to accept the suggestion that Maori tenure was 'individualised' by the 1873 Act, or that alienation by majority decisions was seriously disruptive of Maori society. In responding to the Crown's reluctance, we note that much must depend upon how Maori society was evolving. Much depends too, on whether individuals could actually sell their interests. The vehement debate between claimants and Crown on these points is in part technical and legal, and in part (when it focuses upon Maori society and tenure) sociological and anthropological. We shall consider the second aspect first.

(2) 'Individualisation' and Maori society

The question of whether the 1873 Act disrupted the Maori social order depends on the nature of that social order. Mr Hayes endorses Dr Ballara's recent warning against the simplistic proposition that 'all land ultimately belongs to the tribe'.²⁴ But the *Turanga* report has pointed out that Dr Ballara's comment was aimed at the incorrect assumption that descent alone determined ownership rights. The *Turanga* report further notes that, while her comments challenge the concept of *iwi* title, they affirm the concept of *hapu* title, *hapu* being recognised as a group normally sharing a considerable degree of common residence as well as common descent.²⁵

23. Henry Sewell, 25 September 1873, NZPD, vol15, p1370 (doc Q1, p75; doc E1, pp 98–99)

24. Document Q1, pp13–14

25. Angela Ballara, *Iwi: The Dynamics of Maori Tribal Organisation from c1769 to c1945* (Wellington: Victoria University Press, 1998), pp 270–271; Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, p 436

We have noted in chapter 2 that territorial rights in Hauraki were particularly complex: iwi did not have discrete, continuous territories and the interests of the various hapu were not necessarily contiguous with those of other hapu of the same iwi. On the contrary, as Dr Ballara suggests, there were scattered colonies of descendants spread over a wide territory, interspersed with groups from other iwi or major hapu.²⁶ Within the groups, different kinds of rights were held at different levels of the society, and Ballara has noted that some use rights over specific resources could be inherited within whanau, or gifted or transferred between individuals or whanau, without necessarily involving the hapu leadership.²⁷ Mr Hayes himself continues:

Ballara provides an excellent overview of the complexity of intersecting use rights individuals, whanau, hapu and communities (defined by Ballara as a cluster of descent groups or hapu living together as a community). In addition to individual and whanau rights there were rights available to and used by the community as a whole, and liable to the potential administration of an influential chief. The Court's Minute Books for Hauraki are replete with evidence of this complex environment.²⁸

For these reasons, Mr Hayes considers it more accurate to speak of forms of 'communal' title, rather than an over-arching 'tribal' title. All this being so, Mr Hayes implies, the titles created by the 1873 Act were not as disruptive of Maori society as is commonly suggested, and he offers evidence that the traditional authority of chiefs was already waning before that time.

Claimant witnesses and counsel have strongly challenged these opinions, arguing that Dr Ballara's views have been misinterpreted, and that the rights of individuals in customary Maori society have been over-emphasised by Mr Hayes. Belgrave et al point out that Dr Ballara emphasises the 'collective' nature of Maori society (as they put it), with individuals deriving rights from membership of their wider kinship group and exercising those rights subject to its 'collective oversight' or stewardship.²⁹

The Crown's closing submissions include an allegation that Belgrave et al are suggesting that Maori should have been 'compelled by law to operate collectively'. Crown counsel suggest that this involves a 'moral judgement', and possibly prejudices the rights of Maori as citizens to individual property, with its social and economic advantages. They consider that there is no fundamental difference between the parties on the interpretation of Dr Ballara's work, at least over the terms 'collective' and 'communal'. However:

26. Ballara, p194

27. Ibid, pp194–195

28. Document Q1, p13

29. Document v1, pp 247–248

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16.1.3(2)

The point that Mr Hayes seeks to demonstrate, and in a way entirely consistent with Ballara, is that the particular collective or Maori community entitled to land in accordance with custom varied significantly – and that some of the institutions could be relatively small and not today what we would consider to be a tribe.³⁰

Crown counsel cites in support of this view:

- ▶ Paul Monin's published statement that Hauraki Maori society was 'competitive and decentralised' and that the numerous hapu coalesced into a larger political entity – a single iwi or confederation of iwi – only in situations of greater military need.³¹
- ▶ Mr Monin's evidence for the Ngati Pu claimants which suggests that 'not all members of the same community enjoyed the same communal land ownership rights', as evidenced by the fact that only half the owners in Hikutaia 1 were also recorded as owners in Whangamata 1. This, counsel suggests, implies that 'common kinship ties alone were not regarded as determinative of land ownership'.³²
- ▶ Fenton's evidence to the Rees–Carroll commission that 'the primary land-owning unit of Maori society was the hapu and that the hapu could sometimes be many families and sometimes only one'.³³
- ▶ The evidence of the minute books that in many cases before the court in the Coromandel Peninsula, the majority of the communities had already made a division of the land: 'some of those divisions were long standing, while others appear to have been prompted by the opportunities presented by the advent of the Court'.³⁴

In contrast to this evidence of Maori organising themselves in relatively small communities to assert land rights, Crown counsel find no contemporary evidence that would support the Marutuahu claimants' view that either 'Marutuahu' or 'Pare Hauraki' should have been recognised as entities by the Crown, with the possible exception of pan-iwi action at Patapata in 1852 and over Ohinemuri in 1868–78.³⁵

In the light of this evidence:

The Crown argument is that that Native Land Court title was not as revolutionary or alien as is sometimes claimed – and that there had to be a system for determining who held rights and the relativity of those rights amongst the community, if Maori were to have effective economic opportunity.

30. Document AA1, p 125

31. Paul Monin, *This Is My Place: Hauraki Contested, 1769–1875* (Wellington: Bridget Williams Books, 2001), p 15

32. Document J8, pp 121, 147 (doc AA1, p 126)

33. Francis Dart Fenton, 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws', 18 March 1891, AJHR, 1891, G-1, pp 45–55 (doc AA1, p 126)

34. Document Q1, p 16; doc AA1, p 126

35. Document AA1, p 125

It is difficult to envisage a different system which could have better accommodated the notion of multi-layered collective rights which would not have constrained the ability of the community to fully and effectively take up new economic opportunities or have otherwise provided the necessary flexibility for taking advantage of new opportunities.³⁶

Claimant counsel advance different interpretations. In final responses, counsel for Maruatua asserts that the Crown statements just quoted ‘simply cannot be sustained against the substantial weight of evidence’. The Crown’s failure to understand the nature of customary rights and the way they operated, he suggests:

rests entirely on the unstated assumption that those rights could be reduced to individual property rights which were legally enforceable. This was just not possible. It should also be noted that even though a system was established, the evidence shows [that] Maori did not gain the opportunity to participate in the economy, primarily because the system was designed to alienate their land and it was so difficult to develop and manage land held through the title system. The title system provided very limited options for Maori other than alienation.³⁷

The Wai 100 claimants accept the Crown’s point that ‘the particular collective or Maori community entitled to land varied significantly (and, of course, was subject to complex layers of rights)’. The key point, however, is ‘that what ever the case in any given situation, the rights to lands remained by nature collective, and any individual recognition was by definition anathema’. As to whether a system could have been designed which better accommodated multi-layered collective rights, ‘Hauraki Maori were not consulted on the introduction of the Native Land legislation and had no input into its creation’. The Crown had acted unilaterally and imposed its system.³⁸

There is, then, a measure of agreement between Crown and claimants on these matters, namely that the concept of ‘tribe’ is ambiguous and can refer to various forms of collective entity, and that within that entity rights to land were multi-layered, overlapping and intersecting. The key point of difference is that the claimants emphasise the importance of maintaining a collective level of control, and object to the Crown’s promotion of individual rights at the expense of the collective level. They object to the kind of title the Crown created, that it was created without consultation with Maori, and that in fact it led not to Maori economic development but to the alienation of land.³⁹

36. Ibid, pp 124, 128

37. Document AA13, pp 27–28

38. Document AA14, p 34

39. Ibid, p 36

(3) 'Individualisation' in the law

A question for this Tribunal has been whether, or in what way, the titles to Hauraki land were, in law, 'individualised'. The 1873 Act is widely considered to have taken individualisation to an extreme, especially as shares in titles soon became increasingly fractionated through intestate succession. This tendency was criticised from 1873 onwards (as evidenced by Sewell's speech, quoted above in section 16.1.3(1)), and by Maori demands for a return to communal title and management of land through runanga or committees of owners. Historians who focused on these developments include the American, Dr John A Williams, writing in 1969, and Professor Ward, whose *Show of Justice* was first published in 1974.⁴⁰ In the 1997 *National Overview* of the Rangahaua Whanui programme, Ward has adopted the new term 'pseudo-individualisation' to describe the nature of court awards under the 1873 Act: it was a list of individuals, each possessing negotiable shares or interests in a multiply owned title.⁴¹

Dr Anderson, for the Wai 100 claimants, endorses this view of court titles. She too has argued that purchasers could target individual Maori owners and 'gradually acquire enough signatures to force a partition'.⁴² Mr Hayes, for the Crown, acknowledges that, 'while some purchasers did pursue that strategy, the purchaser took a significant risk – such deals were void'. He quotes the important case of *Poaka v Ward* (1890) to show that land under memorial of ownership was 'effectively and completely transferable only in Court – that is, that until the certificate and declaration of the judge had been indorsed [*sic*] on the records of the Court the purchaser did not hold as "freehold"'.⁴³ Mr Hayes continues:

The term 'individualisation' (of interests) does not aptly describe McLean[s] or Parliament's intention under the Memorial of Ownership regime. A prospective lessee or purchaser had to deal with the community of owners as a community in order to progress a transaction . . . the ability of an individual owner to deal with his or her interests as though held in severalty – to have a portion of land to the exclusion of co-owners – did not have full effect until 1882.⁴⁴

Mr Hayes cites McLean's law draftsman, Curnin, to the effect that rather than individualisation, McLean 'anticipated that tribes would partition land into manageable allotments by size and number of owners (by hapu) in order to deal in their lands'.⁴⁵ Mr Hayes

40. John A Williams, *Politics of the New Zealand Maori: Protest and Cooperation, 1891–1909* (Auckland: Auckland University Press, 1969); Ward, *A Show of Justice*

41. Alan Ward, *National Overview*, 3 vols (Wellington: GP Publications, 1997), vol 2, p 236; Alan Ward, *An Unsettled History: Treaty Claims in New Zealand Today* (Wellington: Bridget Williams Books, 1999), pp 136–138

42. Document E2, p 26

43. *Poaka v Ward* (1890) 8 NZLR 338, 348 (doc Q1, pp 83–84)

44. Document Q1, p 86. This occurred when the Native Land Division Act 1882 allowed an individual to partition out an interest held under a memorial of ownership or a certificate of title.

45. Document Q1, p 84

considers that some Hauraki communities, notably the Mangakahia whanau and others at Whangapoua, did partition their land ‘with considerable overlap in ownership’ between blocks, in order to deal with the land in manageable allotments.⁴⁶ How widespread this practice was is not clear.

Mr Hayes acknowledges, as discussed above in section 16.1.2, that the Crown was not bound by the general restriction (s 48) on dealing with individual interests under memorial of ownership as private purchasers were. ‘Prior to the 1873 Act, the Crown was free to purchase individual interests either before or after the land in question had passed through the court. The 1873 Act did not alter that position.’ If that was not abundantly clear under section 107 of the 1873 Act, Mr Hayes notes that it was made so by section 42 of the Immigration and Public Works Act 1872, by section 6 of the Native Land Act Amendment Act 1877, and by the Government Native Land Purchase Act 1877.⁴⁷ In its closing submissions, the Crown accepts that ‘this is a significant feature in relation to Hauraki, where the vast majority of alienations were alienations to the Crown.’⁴⁸

But we question how real, in practice, was the restriction on *private* purchasers buying individual interests under the 1873 Act. Professor Ward has stated that section 48 (the general restriction of alienation to a 21-year lease) was a ‘nullity.’⁴⁹ Jenny Murray, writing for the Rangahaua Whanui programme, states that ‘there was apparently no clear provision for restricting alienability on titles issued between 1873 and 1878’, and she cites the contemporary view of Judge Edger that section 48 was held to be inoperative.⁵⁰

Mr Hayes considers that Ward, Anderson, Murray, and Judge Edger were mistaken; he writes that ‘Edger had either wrongly described or misunderstood the relation between section 48 and the other sections setting the elements to be satisfied before any dealings could be undertaken.’⁵¹

Ward’s comments and Mr Hayes’ response arise from a case in 1882 when a proposed purchase by a settler named Smith came before the then Native Minister, John Bryce, for approval. Bryce asked his under-secretary, T W Lewis, how Smith could get a freehold title in the face of section 48 limiting alienation of land under memorial of ownership to a lease of up to 21 years. Lewis replied, ‘The clause in the Memorial to which you refer is in my opinion an anomaly & your minute shows how very misleading it is.’ He recommended that Smith have his solicitor apply under sections 59 to 68, which provided for partitions.⁵² Mr Hayes comments:

46. Ibid

47. Ibid, pp 84–85 fn 305

48. Document AA1, p 131

49. Ward, *National Overview*, vol 2, pp 236–237

50. Jenny Murray, *Crown Policy on Maori Reserved Land, 1840 to 1865, and Lands Restricted from Alienation, 1865 to 1900*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), p 49

51. Document Q1, p 85

52. Minutes of John Bryce, 31 July 1882, and T W Lewis, 1 August 1882, N082/1914, MA13/23(a), Archives NZ

16.1.3(3)

Ward claims that the general restriction on alienation under a memorial of ownership was a ‘nullity’. In doing so he misconceives the regime applicable to dealings in land held under Memorials of Ownership. He also appears to misconceive the purpose of those officials who described the general restriction on alienation endorsed on a Memorial of Ownership in terms of Section 48 as ‘anomalous’. The regime never contemplated a general restriction on alienation. Instead it specified the elements to be satisfied before alienation could take place. As with Anderson, Ward seemingly fails to appreciate that the piecemeal dealings with individual interests were void when he claims that ‘individual signatures [were] able to be bought piecemeal.’⁵³

We feel that the debate about whether section 48 was ‘anomalous’, ‘inoperative’ or a ‘nullity’ is basically semantic. It is clear that sections 59 to 68 were operative but that section 48 *was* inoperative and confusing to at least one Native Minister.

Moreover, contrary to the Crown’s contention, the ‘void’ provision has not been overlooked by Ward and other historians. We note that their histories, written well before these proceedings, have described the 1865 proposals that dealings with Maori land prior to Crown grant (or at least prior to court award) should have been made illegal rather than void, and that Maori land clothed with court title should have been sold by public auction only. Ward and others note that the ‘void’ provision was ineffective against people with capital to risk, and purchasers, including the Crown, *did* regularly risk their money in buying individual signatures, and then applied to the court for a partition when they had acquired a majority. Maori blocks became whittled away by a succession of ‘individualising’ partitions over the decades.

We note the different perceptions submitted to these proceedings about whether land clothed with a court title was still customary land. Belgrave et al have firmly stated that ‘It is simply wrong to suggest that land held under a memorial of ownership remained customary land . . . it was a title issued by the Court.’⁵⁴ In closing submissions, Crown counsel responds: ‘While it is correct that the concept of a Memorial of Ownership was a statutory construct, it is submitted that in principle Mr Hayes is correct.’ Counsel then cites an excerpt from Richmond’s *Puhatikotiko* decision to the effect that ‘the title under the Memorial of Ownership was the native title, and therefore not of an alienable nature.’⁵⁵ But we feel that counsel should have included Richmond’s further statement cited below, to the effect that sections 49 to 69 did modify customary title, and did provide the means by which it could be alienated:

The condition restraining alienation which, in compliance with the provision of section 48, is subjoined to every memorial of ownership is merely *expressio eorum quae tacitae*

53. Ward, *National Overview*, vol 2, pp 236–237 (doc Q1, p 85)

54. Document v1, p 251

55. Document AA1, p 132

insunt [‘The expressing of those things which are tacitly implied, is inoperative’].⁵⁶ The Act really enabled and did not restrict alienation. Section 49 makes that clear. Section 50 and the following sections make provision as to the mode of alienation, which, but for these enactments would have been impossible. In my opinion, therefore, those provisions in regard to the alienation of lands held under memorial of ownership are incidents of native title *as modified by the Act of 1873*. [Emphasis added.]⁵⁷

Part of the difficulty in interpreting the 1873 Act arises from ambiguity about the point at which the purchase of signatures legally effected a transfer. By Justice Richmond’s opinion in *Puhatikotiko*, Maori in selling their signatures were not yet actually alienating their interests; that is, they had not legally completed an alienation. The legal transfer did not take effect until the court had received and granted an application for partition, whereupon the alienated portion was granted as a freehold title. Consistent with this view was McLean’s comment (cited by the Crown) that ‘The Act 73 preserves Native rights from encroachment until they choose to alienate their land and differs from past Acts in that respect.’⁵⁸

Before the court approved any partition and sale, it had to satisfy itself that all the named owners understood and consented to the transaction. The agreement had to be translated or explained in Maori and each signature verified. The trust commissioners also had to give their certificate, verifying that there had been no fraud and that the vendors understood the transaction. Mr Hayes suggests that transactions could not be surreptitious, because the land had to be surveyed and it was unlikely that the Maori community concerned would not be aware of what was happening.⁵⁹

Mr Hayes himself cites John Sheehan’s criticism of the 1865–67 10-owner regime: ‘One or two of these [owners], perhaps in a moment of drunkenness, had been induced to sell and then, *the chain of ownership being broken*, the remainder were easily persuaded to part with their shares.’⁶⁰

Sheehan hoped that section 48 of the 1873 Act would prevent this in the future. Yet, as the Crown acknowledges, there was no mechanism provided in the Act for the persons named in a memorial to act corporately. There was nothing to stop ‘the chain of ownership’ also being broken under the 1873 Act, and (as Ward, Anderson, and Murray had said) signatures being bought piecemeal until a majority had been acquired and an alienating partition forced through.

56. The complete maxim includes the words ‘*nihil operatur*’: see W J Byrne, *A Dictionary of English Law* (London: Sweet and Maxwell, 1923), p 369.

57. *In re the Puhatikotiko No 1 Block* (1894) 12 NZLR 131, 135 (CA)

58. Annotation on judges to Governor, (memorandum), 2 July 1874, MA18/2, 74/3522, Archives NZ, p1 (doc E1, p109)

59. Document AA1, p 132; doc Q1, pp 86–88

60. John Sheehan, 25 August 1873, NZPD, vol 14, p 618 (doc Q1, pp 77–78)

16.1.3(3)

Mr Hayes has himself shown that, although the judgments of the superior courts indicate that the sale of individual signatures conveyed no legal estate to the purchaser until all the requisite steps had been completed, the delay did not in practice stop the purchase of consents to the sale of undivided individual interests seriatim; that is, one after another as listed on the memorial. Mr Hayes acknowledges: ‘It is fair to say that there was probably some undeniable commercial reality about pre-partition transactions, ie prior to the particular interest/interests crystallising into a piece of land on the ground as vetted by the Native Land Court.’⁶¹ In short, individual consents to a sale *could* be purchased seriatim, although they were void as conveyances of an estate until a majority had consented to go to the court for confirmation of the sale. As the *Turanga* report states: ‘The court’s role was merely as a final check on deals that had already been done.’⁶²

The *Turanga* report also notes that, while payments made as ‘earnest money’ to bind the sale were void under section 87, ‘they could under section 59 be legally deducted from any price paid’. The Turanga Tribunal therefore concludes:

There is no question therefore but that the intention and effect of the memorial of ownership was to create individually tradable interests in land where none had existed in Maori custom. There is no provision in the Act that required, as Hayes has argued, that purchasers deal with the community of owners *as a community* in securing agreement for sale. What is more, section 59 contemplated ‘any number of collective owners’ wanting to partition for sale. The community was not required to make a single community decision as a pre-requisite to sale. The section contemplated agreements with any number of collective owners – including individual ones.⁶³

In Hauraki, the evidence (especially the correspondence of Mackay, Wilkinson, and other land purchase officers) indicates that both Crown and private land purchase agents were constantly active in the market for land under memorial of ownership, and that individuals or sections of hapu signed documents conveying their interests in various blocks. It is difficult to regard these dealings as the considered decisions of the communities concerned. In traditional tenure, individual families had distinct rights of occupation and use, and they could transfer such rights among *their close connections* without necessarily referring to the hapu leadership. However, it is simply inconceivable, in the customary context, that those rights could be transferred to complete outsiders. It would have fallen to the hapu leadership to admit or debar the strangers.

Majority rule under the 1873 Act was quite different from this traditional principle. Under the Act, the majority was essentially a collection of individuals, each with their

61. Crown counsel, closing submissions (Wai 814 ROI, doc H14(12)), p14 (Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, p 442)

62. Ibid

63. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, p 443

‘distinct aliquot part’ of the title, as Sewell had put it. Under custom, the community as such, through its rangatira and in community discussions, was able to exert control over alienation but under the Act, the potential for such control was undermined by the fact that *each individual* named on a memorial of ownership or certificate of title could sign an agreement to sell his or her interest.

Any remaining statutory control of the partition process passed from hapu leadership after 1877. At first, only Maori owners could apply for a partition, but from 1877 the Crown, and from 1878 (apart from a brief period between 1882 and 1886) any ‘person interested’ could apply.⁶⁴

(4) *The Crown's limited concession*

Crown counsel states that Fenton regarded the memorial of ownership as ‘rebuilding communal ownership’, and takes this as evidence that the memorial was a form of communal title. The Crown accepts, however, that there were serious limitations in the memorial of ownership regime. The Crown:

can fairly be criticised for failing to provide a corporate management mechanism under the 1873 Act. This would have enabled the better utilisation of the land retained by Maori for their own use and relieved transaction costs when the land was either sold or leased. Furthermore, it was not legally possible to borrow money on the security of a Memorial of Ownership under the legislation. It is accepted that it was an omission of [on?] the Crown's part that the more sophisticated corporate management mechanisms as provided under the 1886 and 1894 legislation were not available earlier . . . The legislators of the time clearly envisaged that Maori, in time, would choose to commute their land to Crown grant where formal legal mechanisms for borrowing and developing were available.⁶⁵

The Crown thus concedes that the 1873 Act did not provide a mechanism whereby the named owners could make a decision corporately. (Mr Hayes' mention of legislation in 1886 and 1894 refers to the provisions made then for decision by block committees, and for legal incorporations of owners.)

The Crown has argued that there was a balance to be struck between individual and collective rights, if Maori were to have adequate development opportunities.⁶⁶ Crown witness, Mr Hayes, has suggested that the claimants are in effect arguing that the law should have ‘compelled’ the hapu to operate collectively in respect of land alienation. Claimants do not

64. David Williams, *Te Kooti Tango Whenua: The Native Land Court, 1864–1909* (Wellington: Huia Publishers, 1999), p 285. The *Turanga Tangata Turanga Whenua* report takes over a page to set out the twists and turns of the law regarding who could apply for partition between 1873 and 1894, including three u-turns over a 10-year period. Among other things, ‘the rules applying to the Crown and private purchasers were sometimes different and sometimes the same’: Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, pp 458–459.

65. Document AA1, p 133

66. Grant Young, oral submission on behalf of Crown, 22nd hearing, tape v9B

16.1.3(5)

actually do so, but they do voice strong and sustained objections to the fact that the law ‘allow[ed] individuals to act independently without regard for the collective interest.’⁶⁷ The Crown’s failure to uphold collective decision-making on land alienation is the claimants’ most fundamental criticism, and charge of Treaty breach.⁶⁸ Claimant counsel do not appear to mean that hapu decisions needed to be unanimous, but that they should at least have been arrived at through community discussion. A majority decision would thus have been a genuine majority decision rather than one arrived at by the piecemeal acquisition of signatures which ‘broke the chain’ of ownership. On this point we are wholly in agreement with the claimants.

(5) *The authority of chiefs*

One aspect of this issue is the debate between Crown and claimant witnesses as to whether the authority of rangatira was waning. The Crown alleges that it was waning well before the advent of the 1873 Act, which could not therefore be held responsible.⁶⁹ But the evidence presented by the Crown is confused: some of Mr Hayes’ references are to chiefs’ complaints about their ‘slaves’ (war captives) becoming cheeky and not to their authority over land. It will also be recalled that Dr Loveridge cites the statement of one of the speakers at Kohimarama in 1860 that the chiefs were ‘grasping at great quantities of land’ (see sec 15.3.1). But this suggests not so much a waning of chiefly influence, as a tendency towards opportunism, encouraged by the commercial economy and Crown methods of purchase.

Conversely, the evidence of claimant witnesses Belgrave et al is to the effect that even after 1873 it was still common for the names of rangatira (only) to be put on court titles. Tribal communities seemed willing for this, no doubt expecting rangatira still to act in traditional ways, consulting with their people over land transactions and distributing any benefits. Counsel for Marutuahu observes that, just as in pre-contact Maori society, there were ‘shifting power relations within tribes and the authority of individual chiefs declined while others increased’. He continues:

Moreover [the Crown, having quoted him] ignores Professor Ward’s focus on new structures (such as runanga, kingitanga and kotahitanga) which developed in a way to protect and enhance traditional forms of Maori leadership. They actually demonstrate the substantial and continuing influence of chiefly authority.⁷⁰

Such evidence shows that rangatira felt that they, and Maori communities generally, were losing control of land because of the type of titles created by the Act and because of the activities of land purchase agents, who were purchasing individual interests piecemeal. They

67. Document v1, p 257

68. Ibid, p 256; Grant Young, oral submission on behalf of Crown, 22nd hearing, tape v9B

69. Document AA1, p 122

70. Document AA13, p 29

therefore organised in the movements mentioned to demand restoration of their authority over the determination of customary rights to land and its subsequent management.

(6) Titles under the 1873 Act: not yet truly individual?

Mr Hayes has sought to develop his argument that memorials of ownership (which listed owners able to alienate individually their undivided interests) were a form of communal title. In so doing he has noted that ‘the ability of an individual owner to deal with his or her interests as though held in severalty – to have a portion of the land to the exclusion of the other co-owners’, did not come fully into effect until the law was amended in 1880 (sections 43 and 44 of the Native Land Court Act) and 1882 (section 12 of the Native Land Division Act). Thereafter, an individual could apply to the court for a partitioning out of his or her interest.⁷¹

We have noted that in the 1840s and 1850s there were brief Government efforts to place Maori on individual Crown grants. But from 1862 there was virtually no mention of this objective in policy, or provision for it in law. The amendments of 1880 and 1882 were a belated return to a true individualisation. No evidence has been advanced, however, to show how many Maori took advantage of them. The table in Dr Williams’ report shows that some 23 per cent of blocks under 5000 acres and 6 per cent of blocks over 5000 acres were awarded to only one owner, up to the year 1885, but in many or most of these cases the owner was (or should have been) the representative of a larger group, rather than the sole owner of a partitioned block.⁷²

The 1873 Act, like the 1865 Act, provided a form of title which fell between two stools, undermining the control of land at hapu level under customary tenure, while not providing truly individualised titles. In this regard, Mr Young for the Marutuahu claimants and Mr McBurney for the Wai 475 claimants cite an important Hauraki case, *Mangakahia v New Zealand Timber Company Ltd* (1882), which concerned the construction by the timber company of a railway and other works on Pungapunga 3 block, without the consent of the Maori owners holding the block under a memorial of ownership. But when the owners sought to enter the land and sue the company for trespass they were unsuccessful. The Supreme Court found that the memorial conferred an estate only of a customary nature, which could not be supported in law *unless the owners occupied the land themselves*: ‘So long as he [the Maori owner] is in possession he has his remedy. If out of possession he must perfect his occupationary title by exchanging it for a title under the Crown, when he can claim all the rights and remedies incident to such a title.’⁷³

71. Document Q1, pp 86, 96. The word ‘not’ appears to have been accidentally omitted from Mr Hayes’ statement on this page, but his meaning is made perfectly clear on page 96 in his discussion of the Native Land Court Act 1880 and the Native Land Division Act 1882.

72. Document E1, pp 107–108

73. *Mangakahia v New Zealand Timber Company Ltd* (1882) 2 NZLR 345, 351 (sc)

As Mr Young has commented, the court's decision showed that land under a memorial of ownership was in a kind of legal limbo, with owners not in occupation being obliged to proceed to seek a Crown grant before they could evict trespassers. This was no advance on leaving the land under custom.⁷⁴ It is hardly surprising that Hamiora Mangakahia who brought the 1881 action, though himself an assessor, spoke in the 1891 Rees–Carroll commission in favour of radically reforming the court.⁷⁵

As the *Turanga* report observes, the 1873 Act had opened tribal land to direct lease or to sale (when sufficient individuals signed deeds of sale and they or the purchasers applied for a partition of the block), but that was about all that the owners could lawfully do.⁷⁶ They could not even convey their interests to trustees, so filling a gap in the legislative regime and restoring a form of communal control over the land. (In the *Pouawa* case at Turanga, when Rongowhakaata owners tried to do this, Chief Judge Prendergast found this to be illegal.⁷⁷)

Crown and claimant witnesses have debated the actual impact of the 1873 Act on the rate of alienation of Maori land. Mr Hayes, for the Crown, accepts Dr Williams' statement that more land was alienated nationally after 1873 than under the 1865 and 1867 Acts, but argues that the 1873 Act itself did not 'affect or enhance' the rate. He points out that some of the sales would have been of titles issued under the previous Acts, and that increased purchasing by the Crown would have had a large impact. He also notes the criticism by the lawyer and politician WL Rees of the requirement that all signatures in the title had to be obtained to effect a transaction (albeit only of that portion subdivided for sale). This was 'burdensome and expensive, resulting in many European lessees and purchasers being unable to perfect their deals,' a detriment to both Maori and settlers. By the 1880s, the North Island was littered with incomplete or technically flawed transactions. For the settlers, development was held up, but for Maori there was the distracting effect upon their communities of pre-occupation with land deals, and the futility of trying to develop any part of a block when it was known that interests in it had been purchased. Rees pointed out that the purposes of 'titling' land were: certainty of title, facility of subdivision, simplicity of transfer, promptness of completion and economy of cost. In his view, none of these things had been achieved by the 1873 Act.⁷⁸

16.1.4 The adequacy of the protections provided

We have already discussed above the protection intended by the Native Lands Frauds Prevention Act 1870, in section 15.4.3. Here, we investigate whether the additional protections intended by the 1873 Act were effective.

74. Document A29, pp 36–46; doc v12(a), pp 3–4

75. Hamiora Mangakahia, 'Minutes of Evidence', 16 March 1891, AJHR, 1891, G-1, pp 25–26, 35–38

76. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, p 444

77. *Ibid*, pp 488–489

78. Document Q1, p 91

(1) 'District officers' and reserves

Historian witnesses for Crown and claimants agree that certain administrative provisions in the 1873 Act did not work well: notably, the provisions for district officers to work with Maori right-owners and the court, make preliminary inquiries into customary tribal ownership and inalienable reserves of not less than 50 acres per head. This was largely because these officers were caught between their court and Government responsibilities. From 1871, Fenton had resisted the court being given extra supervisory functions and had 'consistently opposed any activity he perceived as deviating from the Court's judicial function.'⁷⁹ In consequence, after 1873 the judges therefore objected to being 'embroiled in disputes' over the distribution of rents.

It was understandable that early courts felt a need to command respect in their judicial role, especially when land was first brought before them. But Anderson (citing Ward) and Dr Williams heavily criticise Fenton and the court for the failure of the protective safeguards of 1873. Their primary evidence includes a critique of the 1873 Act by Fenton and his fellow judges, published in 1874, and evidence given to an 1886 select committee by TW Lewis (under-secretary of the Native Department) and Bridson (a clerk of the court).⁸⁰ Mr Hayes argues for the Crown that Fenton's non-cooperation with the 1873 Act is overstated, and considers that the Native Department failed to fund and support adequately the district officers such as Puckey (who usually also acted as resident magistrates or native officers).⁸¹ But Puckey himself was inclined to blame Hauraki Maori for their failure to provide a minimum acreage of reserves:

I have repeatedly urged upon the Natives of my district the extreme necessity which exists of land being set apart for reserves for their future use and maintenance, but so far without avail, owing to the want of unanimity, the local jealousies, and the conflicting interests of the claimants.⁸²

District officers in other regions also reported that Maori leaders and communities were reluctant to admit administrative interference, preferring to keep the land in their own hands. Mr Hayes concludes that the provision for reserves was 'well-intentioned' but 'impracticable' in many districts, including Hauraki.⁸³

Confused official roles meant that the Crown pursued no clear practice on the making of reserves. It assumed that Maori would pursue their commercial interests through court titles and Crown grants, but setting aside residential land in perpetuity, or endowment of

79. Ibid, p 64

80. Document A8, pp 184–188; doc E1, pp 57–61; 'The Native Land Act, 1873: Remarks upon by Native Land Court Judges', AJLC, 1874, no 1, pp 1–10; 'Minutes of Evidence: Mr Fenton Examined', 20 July 1886, AJHR, 1886, 1-8, pp 6, 32; 'Minutes of Evidence: Mr TW Lewis', 20 July 1886, AJHR, 1886, 1-8, p 66

81. Document Q1, pp 86–90

82. Ibid, p 89

83. Ibid, p 90

16.1.4(2)

trusts for Maori purposes (as had been done in the New Zealand Company settlements in the 1840s) was neglected.

(2) How obligatory was the court process?

A long-standing criticism of the court process is that Maori often had no choice but to engage in it. Once a few individuals had made application to the court, others also had to take part or risk being excluded from the title. The legislators recognised that problems had arisen after 1865 from only one or a small number of owners dragging others into court, but the 1873 Act still required only three signatures to an application. Under section 37, the district officers were supposed to make inquiries and report to the court on the application, and whether there were any difficulties or objections relating to it, in which case the judge was required to suspend proceedings. But no evidence has emerged that Puckey, the part-time native officer in Hauraki, made preliminary inquiries as indicated in the Act.

Under section 38 of the 1873 Act, the land court judge himself was required to make preliminary inquiries to satisfy himself that the application was bona fide and that hearing it would not give rise to a disturbance of the peace. If satisfied, he was to require the land to be surveyed under the direction of the inspector of surveys, with the boundaries marked on the ground. But Fenton and his fellow judges strenuously objected to making preliminary inquiries, lest they prejudice the actual hearing of applications.⁸⁴ As Mr Hayes has shown, this position was supported by the petition of Mohi Mangakahia and others of Whangapoua. As a result of recommendations by the Native Affairs Committee on that and other petitions, the preliminary inquiry was dropped.⁸⁵ Section 38 became a dead letter.

The Crown has submitted that the criticism that one party could drag other unwilling parties into court 'is much overstated'. Crown counsel notes that many of the court's determinations in Hauraki, especially on the Coromandel Peninsula and the western Firth, were uncontested, and were probably made by one or two elders on behalf of the small local communities there. Counsel also submits that 'Maori had the power and capacity to virtually annul legal reform should they have so chosen', and regards the 1886 and 1900 Acts (see below) as 'complete failures' for this reason.⁸⁶

In closing responses, counsel for the Marutuahu claimants rejects these arguments. In particular, he argues that because the 1886 and 1900 legislation empowered Maori committees to control the land, Maori communities were at last able to withhold applications to the court.⁸⁷ (We discuss the effectiveness of these Acts in sections 16.3.1 and 18.1.1.)

As we have indicated, under the 1862 and 1865 legislation, unchanged in 1873, Maori customary titles were not recognisable in law except in the Native Land Court. Consequently,

84. 'The Native Land Act, 1873: Remarks upon by Native Land Court Judges', AJLC, 1874, no 1, pp 1–10

85. Document Q1, pp 82–83

86. Document AA1, p 127

87. Document AA13, pp 19–20

as counsel for Wai 100 points out, the land court system was virtually obligatory if Maori wanted to transact their land, and economic pressures often impelled them to do so.

(3) Mortgages

Under the 1873 Act, mortgages could still be enforced against Maori land. Section 84 provided that a mortgagee could not foreclose on a mortgagor's right to redeem a mortgage, but (as Mr Hayes has explained) this only meant that the mortgagee could 'no longer institute the legal process of vesting the property in himself absolutely'.⁸⁸ In reality, he still had the power to force a partition and sale of the land to redeem a mortgage. This situation continued to cause serious hardship to Maori, their poverty preventing them from paying the interest on mortgages, let alone accumulating capital to redeem them, and enforced sales deprived all the right-owners as well as the mortgagor (sometimes, one or two rangatira) of the land. After repeated urgings by the trust commissioners, Native Minister John Sheehan legislated in 1878 to prohibit Maori from mortgaging their land, whether under memorial of ownership or Crown grant.⁸⁹

Some claimants have mentioned that the legislative bar on mortgaging of Maori freehold land in multiple ownership inhibited its development.⁹⁰ This became an issue of increasing concern in the twentieth century (see ch 18.) We are in no doubt, however, that the 1878 amendment prohibiting the mortgage of land under memorial of ownership had an important protective effect, and stands to the Crown's credit. But it was overdue, having been discussed in drafting both the 1865 and the 1873 Acts but not then enacted. The negative effect – that an avenue of raising development capital by mortgage was no longer available – no doubt added to the pressure to sell land outright in order to raise capital, but at least that decision could be made with clearer understanding. Mortgaging Maori land had delayed and hidden consequences, usually resulting in alienation. In the nineteenth century, many Maori did not understand the long-term consequences of taking credit or giving mortgages on the security of their land, and purchase agents took advantage of this.

16.1.5 Costs

(1) Court costs generally

A great deal has been said and published about the costs to Maori resulting from the Native Land Acts. In closing submissions counsel for Wai 100 states:

The Native Land Court process was expensive for Hauraki Maori in time and money. The costs of participating . . . included the direct costs of the Court itself, the costs of lawyers and

88. Document Q1, p 81

89. See Native Land Amendment Act 1878 (No 2), s 4; doc Q1, pp 77, 81

90. Rodney Renata, oral submissions, Thames, 24th hearing, 26–29 August 2002, tape x6B

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interpreters, the survey costs for each block, and the food and travelling expenses that were incurred by tribal groups in order to attend hearings and protect their interests. Each of these various costs added up and clearly contributed to Hauraki debt that would ultimately have to be repaid in land.⁹¹

High costs were not inevitable. Crown and claimants witnesses concur that many early applications on the Coromandel Peninsula and Western Firth were uncontested and the hearings short. Crown counsel suggests that they would therefore have been relatively inexpensive. On the other hand, the costs of the lengthy hearing and rehearing of Te Aroha in 1869 and 1871 attracted the criticism of the Haultain commission. Costs to Marutuahu alone were estimated at £575, of which £430 was for the licensed interpreter, £82 for food, £50 for travel and £12 for attendance of witnesses.⁹² Crown counsel accepts that costs in Te Aroha and Ohinemuri were 'significant' but argues that they were exceptional. However, the evidence is clear that claims on the Hauraki Plains, Paeroa, and Ohinemuri districts were also hotly contested, with rehearings becoming increasingly common in the 1880s and 1890s.

Dr Anderson and Mr Alexander cite a number of blocks sold to cover court-associated costs and costs of survey. Even the settler press was critical. Dr Anderson has cited a *Thames Advertiser* report of 1885:

the natives assemble from all parts . . . Weeks run into months . . . No one knows when his case is going to be called, he cannot leave lest he misses his opportunity. Thus it is that hundreds of natives are kept about town, thrown into the temptation of the public houses . . . unable in most instances to provide themselves with food . . . In many instances it would be more profitable to the native owners to make their lands a present to the Government than incur the costs of surveys, court fees, and expenses in attending at court . . . It has often occurred that a native has returned home from attending a sitting of the Land Court to find himself not only minus the land he went to acquire, but burdened with a load of debt, incurred through the delay, . . . his cultivation overgrown with weeds, or destroyed by vagrant cattle.⁹³

Dr Anderson has provided a schedule of 99 rehearings and appeals, on top of initial hearings, across the Hauraki inquiry district between 1870 and 1910.⁹⁴ But Crown counsel, in closing submissions, is still of the view that '99 cases over 40 years (on average 2.5 cases per year) is not a large figure at all and probably to have been expected . . . the right to appeal and the right to a rehearing were intended to be important safeguards in the process.'⁹⁵

91. Document V1, p108

92. Ibid, p109

93. Ibid, p110

94. Ibid, pp108–109; doc A8, app v

95. Document AA1, pp138–139

In closing responses counsel for Wai 100 refers to several factors which were not recognised by Crown counsel. He cites examples from Dr Anderson and Mr Alexander's evidence to show that even uncontested hearings could go on for days, and notes that due allowance has not been made in the Crown statements for frequent adjournments, not only for initial applications but also for subsequent hearings to consider the awarding of survey liens, the subdivision of purchased interests, succession orders, and internal partitions. The example of Kuaotunu 1 block is given, involving 10 separate hearing days between 1878 and 1896. Further examples are given which suggest that Te Aroha and Ohinemuri were not as exceptional as the Crown claims. Nor is the figure of 99 appeals or rehearings compiled by Dr Anderson as small as the Crown suggests. While the average may have been only 2.5 hearings per year from 1870 to 1910, counsel for Wai 100 note that of the approximately 1000 Hauraki blocks surveyed by Mr Alexander, 99 appeals and rehearings would be some 10 per cent of all title investigations, a significant figure when it comes to costs. Not counted in the above statistics are the attendances at the court which were required for subdivision hearings, applications for survey liens (or their discharge), and for succession orders. No systematic reckoning of these has been presented to us but they were probably very numerous.⁹⁶

(2) Costs to purchasers

We note the costs incurred by purchasers of Maori land. Mr Alexander's block histories indicate that, in order to complete their titles, it was not uncommon for purchasers to pay the court fees for succession orders, for the trust commissioners and for registration of the conveyance. They also normally paid the stamp or native land duty imposed since 1862 on the first transactions in land under court titles. But these fees were commonly passed on against the purchase price of the land, although only survey costs were legally chargeable against the land.⁹⁷

(3) Survey costs

The Crown has accepted that survey costs were a burden for Hauraki Maori but have suggested that their impact may have been exaggerated. In any case the Crown considers it appropriate for landowners to meet the cost of survey of their own land.⁹⁸

Both claimant and Crown witnesses have provided examples of the huge costs that surveys could involve. The case of Hori Ngakapa Te Whanaunga, which led to the sale of of Ngati Whanaunga land well below its value, has been outlined in section 9.6. Mr Hayes, for the Crown, has referred to the detrimental effects exposed by Theophilus Heale, the inspector of surveys, of the expensive and sometimes inefficient private surveys commissioned by

96. Document AA14, pp 37–38

97. See doc A10, pt 1, p 217

98. Paper 2.550, p 28

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Maori under the 1865 Act, the criticisms of the system by Haultain in his 1871 report, and the demand by Maori leaders (expressed through Haultain), for the Crown to take control of surveys. This it did in the 1873 Act, with a resulting improvement in professional standards.

Mr Hayes has traced the law changes relating to recovery of survey costs to 1909. At first, Maori had to agree specifically to charge the land, but section 7 of the Native Land Amendment Act 1878 introduced a compulsory element: although forced sale by holders of survey liens was restricted, the court could award payment in land or money to cover survey charges, acting as arbiter of the value of the land affected. Additional land could be awarded to cover partitions. The Crown also commonly took over the private survey liens in lands it was interested in acquiring. Mr Hayes concludes that the Crown took ‘an increasingly hands-on approach’, trying to offer both Maori and surveyors a measure of protection.⁹⁹

A 1901 comment by the Appellate Court, cited by witnesses for the Wai 100 claimants, suggests that in the 1870s when the Crown wanted its own interests in a block defined, it commonly surveyed free of charge reserved or unsold land excepted from its purchases. But this service was reflected in lower prices paid. In 1901, in declining to grant a charging order against reserves in the Moehau parent block, the judge remarked: ‘Though it is not now the custom to survey reserves or other unsold parts free of cost to the Natives, such appears to have been the general practice in earlier days, when also much smaller prices were paid for the land.’¹⁰⁰

With some exceptions, however, Maori owners still had to meet the survey charges for the initial hearings of their blocks, and for partitions. Delay in meeting the payments compounded the problem because interest was charged and ultimately the surveys had to be paid for, usually in land. Crown and claimants both note that, towards the end of the nineteenth century, survey costs were criticised by Hamiora Mangakahia in his evidence to the Native Land Laws Commission of 1891, particularly if duplicate surveys had to be provided by rival claimants.¹⁰¹

Claimants have provided numerous examples in their block histories of the costs of surveys. Early in the land court period, Ngati Pu incurred costs of £531 for the initial Hikutaia–Whangamata survey, plus additional charges for marking out the reserved blocks (Hikutaia 1 and Whangamata 4). The £531 amounted to 20 per cent of the total proceeds of Whangamata 3 and Hikutaia 2, sold to meet survey costs plus the costs of five weeks of hearing at Shortland.¹⁰² A late nineteenth-century example was the securing of a Supreme Court order in 1896 by the surveyors Graham and Cheal (described as ‘rapacious’ by Gilbert Mair, the Crown land purchase agent) against Ngati Paoa for some £2597 10s 4d in survey

99. Document Q1, pp 100–118

100. Decision of Appellate Court, 6 August 1901, Lands and Survey file 4017 (doc A10, pt 1, p 37; doc A9, p 73). An example of the Crown paying for a subdivision survey in order to define its own interests is the survey of the Ahuroa 1 block in 1881: doc D4, p 19. Other examples can be found in the block histories.

101. Document Y1, p 113

102. Document AA11, p 8

costs, plus £62 15s 10d interest and £136 9s other costs for work in the Te Hoe o Tainui area. Ngati Paoa were obliged to sell quickly in order to avoid the mounting interest charges and, because the land was under negotiation by the Crown, had to accept a price for Te Hoe o Tainui 3 (1390 acres) well below the price for comparable land, and well below the price recommended by Mair.¹⁰³ Erueti Tumakere and other owners offered the Te Hoe o Tainui North 3 block (1390 acres) to the Crown for seven shillings an acre, Mair advised that it was worth six shillings an acre, but the Crown paid only three shillings sixpence per acre.¹⁰⁴ Early in the twentieth century, the Crown applied to the Native Land Court for an award to cover the cost, plus interest, of a subdivision survey at Te Hoe o Tainui; Ngati Paoa had to make over some 4000 acres.¹⁰⁵ This is estimated by counsel for the Wai 808 claimants (Ngati Horowhenua of Ngati Paoa) to amount to 37 per cent of Te Hoe o Tainui A, and 24 and 27 per cent of Te Hoe o Tainui North 4 and 5 blocks respectively.¹⁰⁶

Witnesses and counsel for other claimant groups make similar points.¹⁰⁷ Another example is given by the Ngati Hei claimants (Wai 110) in relation to Te Kauanga Whenuakite 3. Estimated to be 3160 acres (but found to be 3070 acres on survey) this block was set aside by the court in 1899 to cover the expenses of survey of the parent block. At 3160 acres, it encompassed 38 per cent of the total Te Kauanga Whenuakite blocks (8280 acres). It was sold in 1902 at the Crown's price, £790. Expenses of £440 were deducted, including £125 for the survey and £200 'refund of monies advanced'.¹⁰⁸

Ngati Porou ki Harataunga (Wai 289, 792, 866) give the following example. In 1899, Gilbert Mair reported that the owners of the Harataunga blocks had paid survey charges owing from subdivision of their lands:

As the proposal to take land at the rate of 5/- an acre [the price paid by the Crown when purchasing interests] to pay for the surveys would, in some cases, have absorbed the major portion of the blocks, the natives were permitted to pay the survey liens in cash, which they did on the 18 March direct to the Chief Surveyor Auckland.¹⁰⁹

The amount paid to cover the liens and interest was £187 12s 7d.¹¹⁰

103. Document Y6, pp 10–12

104. Document A10, pt 4, pp 40–42; see doc A9, pp 67–74; doc E2, pp 41–43; doc E3, pp 73–75; doc T30, p 6

105. Document Y1, p 112

106. Document Y6, p 13. Other examples are provided in document Y7, pp 8–10, referring to the Ngati Pukenga lands at Manaia, document AA10, p 19, and document T2, pp 86–87.

107. Mr McBurney, for the Wai 177 claimants, shows how the surveyor made up his bill for the cost of surveying Ngawahakapoupu in 1888: survey, 726 acres at one shilling threepence an acre, £45 7s 6d; Te Raho block (subdivision), eight acres, £6; 'Expenses & loss of time incurred in meetings with Natives prior to commencement of survey', £6 6s; mileage from Thames, nine miles at four shillings a mile, £1 16s. Total, £54 9s 6d: docs D6, s 14.

108. Document N5, p 4

109. Land purchase officer, Thames, to chief land purchase officer, Wellington, 23 March 1899, MA-MLP1899/48 (doc A10, pt 1, p 8)

110. Chief surveyor, Auckland, to chief land purchase officer, 22 April 1899, MA-MLP1899/48 (doc A10, pt 1, pp 7–8)

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The Wai 174 claimants, Ngati Kotinga and Nga Whanau o Omahu, cite the case of Kuaotunu 1 (1555 acres) where survey costs were extinguished by alienation of some interests in the block, the Crown subsequently purchasing remaining interests in the block and applying to the court for title to the land. Eleven of the 13 owners of Kuaotunu 1 sold their interests for £288 15s.¹¹¹

Claimant counsel and witnesses, including Dr Anderson for Wai 100 and Mr Young for the Marutuahu claimants, point to the influence of survey costs and court costs in some of the alienations of the 1890s. Separating out complex intersecting rights (in what was often swampy land, which many groups used for eeling and birding) involved very large survey costs. In the 1890s, Ngati Hei were offering to sell land previously reserved as papakainga, in order to clear survey debts or to pursue cases in court, including succession cases and wills.¹¹² Mr Walzl quotes the comments of Judge W G Mair in 1902 that the claimants of Te Kauanga Whenuakite 3 block attending his court were so destitute that he paid for their keep out of his own pocket.¹¹³

Costs escalated in the 1890s because claims on the Hauraki Plains were strongly contested between the Marutuahu claimants (on the basis of conquest, gift, and occupation) and the previous tangata whenua (notably Ngati Hako), who were even less inclined than they had been in the court hearings of the 1870s to accept that they occupied under the mana of Marutuahu, claiming instead by ancestral right. In the circumstances, Gilbert Mair was able to purchase many blocks on the plains for prices lower, in his own estimation, than the land was worth. He reported explicitly in regard to several of them that the owners did not really wish to sell but felt obliged to try to clear their debts, both as a matter of honour and to try to stem the mounting tide of interest charges.¹¹⁴ The threat of imprisonment for debt also still operated, and the possibility must have added to the pressure to sell. Mair gave an example:

Came here to meet Wiri Kerei's daughter. Her husband has been sent to jail for debt for two months. She is in great distress and offers Koromatua No 2 for 3/6d [an acre]. I have just been all over these Waitoa blocks, some of which contain some excellent land and are honestly worth more than the prices offered.¹¹⁵

In its amended statement of response, the Crown acknowledged that:

in some of these cases, Hauraki Maori had little choice but to sell or lease a portion of their Hauraki Plains lands to meet the cost of these drawn-out title investigations, and associates

111. Document A10, pt 1, pp 234–239; see also doc J14, pp 7–8; doc Y2, pp 12–13

112. Document N9, pp 110–150; doc N10, pp 25–31

113. Document N10, p 30

114. Document A9, pp 63–72

115. Mair to chief land purchase officer, 18 December 1894 (doc A9, p 72)

survey costs. The Crown denies that it actively exploited the debts incurred to acquire the Hauraki Plains against the wishes of the declared owners.¹¹⁶

This statement does not entirely match those of Gilbert Mair, cited above, that Maori were selling land reluctantly and only because they were desperate to stem the mounting interest charges on survey debts; and that, in his own estimation, he was able to acquire the land below its worth. Nor does it square with the deliberate drive to secure the bulk of the Ohinemuri reserves, including almost all of Ohinemuri 20. The Crown might not have been ‘actively exploiting Maori debt in the sense of itself fostering that debt (as it did in the original Ohinemuri purchase and others of that period) but it was certainly taking advantage of Maori need for money to buy a great deal of formerly reserved land, and to buy on its terms, at low prices.’¹¹⁷

In 1906–07, the Crown made an effort to recover, in land, a backlog of costs which it had advanced for surveys in Hauraki. One outcome was that, though the Crown was awarded Moehau 2B3 (500 acres), among other blocks, in lieu of survey charges, the court declined to grant the charging order for reserves made in the Moehau parent block, because James Mackay affirmed that he had promised that the Crown would carry that cost. The court observed: ‘Though it is not now the custom to survey reserves or other unsold parts free of cost to the Natives, such appears to have been the general practice in earlier days, when also much smaller prices were paid for the land.’¹¹⁸

In closing submissions, to avoid evaluating the problem on the basis of anecdotal evidence or possibly unrepresentative samples, Crown counsel has provided an analysis of all 116 cases in David Alexander’s block histories where data on survey costs is available. Those costs are expressed relative to the value of the parent block *as a whole* (as demonstrated by sale proceeds and revenue from sources such as mining rights and timber-cutting rights), not simply relative to the value of the portion sold to cover the cost of survey. Thus, in relation to Te Kaunga Whenuakite again, Crown counsel argues that, although around 39 per cent of that block and 39 per cent of Ngarua block were sold to cover survey costs:

When survey costs for the whole of Te Kaunga Whenuakite Block are apportioned between the individual allotments, and then calculated as a percentage of sale and other proceeds, the survey costs as a proportion of those sales’ other proceeds represents 20% of the value of the block sold. Further, the area sold (3,160 acres) to cover survey costs of £440 (12 pence per acre) for the parent block was more than was necessary to recover those survey costs . . . Had the owners decided to sell only such land as was sufficient to settle survey costs, then the area sold would have amounted to 1,760 acres (21% of the 8,200 acre parent block [not 39 per cent].)

116. Paper 2.550, p 37

117. Document A9, pp 72–73

118. Decision of Appellate Court, 6 August 1901, Lands and Survey file 4017 (doc A10, pt1, p 37; doc A9, p 73)

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Crown counsel sums up the findings of the survey in three main findings:

- ▶ survey costs as a percentage of sale and other proceeds average 15.28 per cent over 93 cases;
- ▶ 70 per cent of survey costs amounted to 12 pence or less per acre; and
- ▶ the greater the survey costs, the greater the sales and other proceeds were likely to be.¹¹⁹

Crown counsel continues: 'In making the above submissions the Crown does not seek to minimise the burden of survey costs experienced by Hauraki Maori. It simply seeks to present a more accurate view of the degree of that burden.'¹²⁰

Crown counsel further notes that, while some blocks of land were sold to meet survey costs, and were even deliberately created for the purpose, Maori could also meet costs from revenue, by negotiating cost-sharing with purchasers, examples of which counsel provided. With reference to the 1867 Act (but in a remark clearly intended to have wider application) counsel states that, as regards survey costs, the Crown was 'seeking to strike a balance between protection in dealing and freedom to deal'.¹²¹

In response, counsel for Wai 100 queried how representative the Crown's figures are, but notes that they show that in more than 50 per cent of cases, survey costs rose above 10 per cent of the proceeds of blocks, and in 25 per cent of cases, above 20 per cent.¹²²

Apart from the question of actual costs, claimants have argued that despite its reform of some abuses by private surveyors, Crown land purchase agents systematically used survey debts to lever Maori into selling land. James Mackay wrote of his intention in 1872:

On finding any Natives willing to survey their lands, to then arrange for the survey, taking a lien over the land for the amount to be expended and for the estimated costs of investigating the title . . . It will be found in many instances, especially outside the proclaimed Gold Field, that natives will agree to survey their lands long before they consent to sell them; but the survey once completed, the difficulty of defraying [repaying?] the money advances for the survey will gradually compel them to sell part of it. I would therefore deem it advisable to undertake all surveys applied for, provided the blocks were of reasonable size, taking care to secure proper liens under 'the Native Land Act' for the sums advanced for that purpose.¹²³

TW Lewis, the under-secretary of the Native Department, told the Rees–Carroll commission in 1891 that this was standard practice among land purchase officials in the nineteenth century.¹²⁴ Even the non-sellers had to pay for surveys to have their part of the land

119. Document AA1, pp 140–142, 146–64

120. Ibid, p 142

121. Ibid, p 144

122. Document AA14, pp 38–39

123. Mackay, letter, 4 March 1872, MA-MLP1 85/18 (doc Y1, p 111)

124. Document Y1, pp 111–112

partitioned out, usually by giving up part of the land. Counsel for Wai 100 cites the case of Mangakirikiri 1 and comments, ‘Maori non-sellers had to pay in land to keep it.’¹²⁵

On the apportionment of survey costs, witnesses and counsel for Ngati Koi, Ngati Pu, and Marutuahu claimants have argued that, because the Crown made surveys compulsory for the prosecution of claims in the court, the Crown should have met the cost.¹²⁶ Mr Hayes, for the Crown, comments that, while he has some sympathy for the argument, ‘as a rule, it is appropriate for the land owner to meet survey costs’. He acknowledges, however, that the costs were ‘a heavy burden’ on many Maori communities: partly because of the low market value of much of their land, and partly because surveyors inflated their charges in a situation where timely payment was uncertain, ‘but also because they [Maori] were not fully immersed in the new cash economy’. Moreover, securing a Crown grant (with its higher value in comparison with a memorial of ownership or ‘tribal’ title) was a stage often not reached before the land was sold.¹²⁷ These are considerable concessions, based on valid economic and legal arguments.

For his part, counsel for Wai 100 has commented, ‘it was perhaps reasonable that [Maori] should bear some part of the cost. It seems inequitable however that Maori should have borne nearly all of those costs as the European settlers were also gaining from the creation of the country’s infrastructure.’ He suggests that it was unfair to require Maori to pay for surveys where there was no intention to sell or lease.¹²⁸ Crown counsel sees some practical difficulties in separating out land intended for transaction from that where the owners merely wanted their rights identified. In the latter case:

It is unlikely that they (or their successors) would have maintained their intention not to sell or lease, or otherwise transact in their land, over the longer term. However, in relation to this category (ie those who simply wanted identification and security – but didn’t want to transact immediately) the Crown accepts that it could have taken further steps (ie beyond those actually taken) to ease the burden of survey costs. This could have relieved Hauraki Maori of the need or pressure to sell land to satisfy survey costs in some cases. Often part of the sale negotiation included the requirement that the purchaser would meet the survey costs.

In some contradiction to Mr Hayes’ concessions cited above, counsel continues: ‘With respect to the second category (ie those who wished to transact in their lands), the Crown argues that it was entirely appropriate for those Maori owners to be primarily responsible for survey costs.’¹²⁹

125. Ibid, p 112

126. Document D19, pp 12–13; doc Y8, p 35; doc Z6, pp 43–44; doc AA11, p 9

127. Document Q1, p 101

128. Document Y1, p 114

129. Document AA1, p 143

In closing responses, counsel for the Marutuahu claimants points to possible flaws in Mr Hayes' analysis of the data from Mr Alexander's block histories: the methodology adopted does not allow for changes over time of either survey costs or land values and how that might affect the calculations. More fundamentally, counsel suggests that the Crown has not met the Marutuahu claimants' argument that because the Native Land Court system was imposed on Maori by the Crown for the purpose of acquiring the bulk of the 'waste' lands for settlement, Maori should not have had to meet the costs of survey. The Crown has also not met the claim that survey debts were used as leverage to force the sale of land.¹³⁰

Counsel for Wai 100, in closing responses, draws attention to the point that survey costs *combined with* the overall costs of the system resulted in debts 'that were invariably repaid in tribal land'. The Crown's analysis does not take account of partitions other than the ones made at initial investigation.¹³¹ With or without compulsory powers of recovery, debts and court costs spiralled upwards with interest charges, and were a major factor in the loss of Maori land.

16.2 DEVELOPING CRITICISM OF THE 1873 ACT

16.2.1 Maori criticisms of the 1873 Act

(1) Hauraki criticisms of the 1873 Act

Crown and claimant witnesses have debated the contemporary Maori statements about the 1873 Act. Mr Hayes has drawn attention to the 1874 petition of Mohi Mangakahia and others, citing Wi Parata: 'The petitions . . . were not against the Act itself, but were merely to suggest certain amendments to it.' He refers to the petitioners' alleged concern that 'The Act was too paternalistic, and treated Maori as children.'¹³² But Grant Young, for the Marutuahu claimants, correctly points out that this concern is raised only in the *summary* of Mangakahia's petition by the Native Affairs Committee, and in their recommendations on it. Young notes that the petition 'was, in general, a plea for greater Maori control of the process.'¹³³ Mangakahia had requested that the presence of Maori assessors in court be mandatory, not an option, that they have equal authority with the judge in decisions, and that Maori agents should conduct cases but European lawyers and agents be excluded.¹³⁴

130. Document AA13, p 24

131. Document AA14, pp 38–39. Counsel draws the Tribunal's attention to document Y1, pp 111–112, and document Y7, pp 8–10, for examples of the impact of survey costs.

132. Document Q1, pp 82–83

133. Document v12(a), p 5

134. 'Petition of Mohi Mangakahia and 19 Others', AJLC, 1874, no 8

(2) Maori protest generally

The way in which Mangakahia's petition has been used in evidence illustrates the danger of drawing upon a relatively small sample of contemporary statements, and placing large constructions upon them. The land law was complex and its effects often slow to be fully recognised. Nationally, however, there was a mounting stream of petitions and protests about the working of the 1873 Act, and widespread movements throughout whole districts, such as the Arawa rohe, the Rohe Potae (King Country) and the Urewera, opposed to the court and seeking the empowerment of Maori councils or committees. As this protest mounted, Maori continued to bring land before the court, since there was no alternative available for securing a title supportable in the courts of the colony.

Maori demands were for the restoration 'to us [of] the control of our own land', or, as commonly expressed by Maori members of Parliament or leaders of the Kotahitanga movement, 'the mana over our own land'. Maori were increasingly dismayed at the results of applying for court titles, and sought lawful authority, both over the determination of customary entitlements and subsequent dealings in the land. At least since 1878, the court's memorials of ownership could not be used to secure loans; consequently, there was also a growing demand from Maori for assistance to develop land.¹³⁵

16.2.2 Pakeha criticism: the complexity of the law

Mr Hayes has pointed out that, contrary to the tendency in the established historiography to suggest that the Native Land Acts and the 1873 Act in particular hastened the alienation of Maori land, much contemporary criticism was that the law made transactions in Maori land slow and cumbersome. He cites the criticisms of the Liberal politician, W L Rees:

He considered the requirement of obtaining all signatures as burdensome and expensive, resulting in many European lessees and purchasers being unable to perfect their deals. For Rees, the detriment fell on both Maori and Europeans, with the latter paying paltry sums in rent or for the purchase of individual shares.¹³⁶

Although such dealings by private Europeans were 'void' at this time, Mr Hayes does not query the word 'purchase' in this statement. He continues:

Rees clearly measured the procedures of the Act against the infant Torrens system when he opined that the regime did not satisfy the requisite for any land registration system of (a) certainty of title (b) facility of subdivision (c) simplicity of transfer (d) promptness of completion; and (e) economy of cost.

135. For a full exposition, see O'Malley.

136. Document Q1, p 91

Rees argued for a (tribal) title akin to a joint stock corporation so that the chiefs could exercise control over tribal lands.¹³⁷

In citing these comments, Mr Hayes effectively concurs in large measure with the criticism of the 1873 Act by later historians and claimant witnesses. If McLean and the Legislature in 1873 had intended to provide a simple procedure for dealings through memorials of ownership on a community basis, the outcome had proved very different.

Arguably, the requirements of the 1873 Act and the amendments that were made almost every year thereafter, proved so complex that they did slow the rate of completed alienations of Maori land. But this did not mean that the rate or extent of dealings with land were slowed, or that various purchasers (including the Crown) did not begin acquiring signatures from Maori owners. The listing of multiple owners actually facilitated the commencement of transactions because there were now more owners with negotiable signatures. The completion of transactions became more difficult, not only because of the increasingly complex law and technical requirements but also because interests in title became more fractionated due to intestate succession.¹³⁸ Indeed, many confused and inchoate transactions developed over the next decades, resulting in increasing litigation, absorbing the attention and funds of Maori and settler alike. Private purchasers increasingly resented the complexity of the process and some lobbied for 'free trade' in Maori land (which was generally considered to favour the investors or speculators.) Others favoured some form of Crown control (which would see the land pass in smaller holdings to actual settlers.)

The 1873 Act was far from assisting the development of land, whether by Maori or by settlers. For Maori, it increased divisions amongst right-owners, further undermined the reciprocal relations between chiefs and their kin, and through title complexities, made their development of the land more difficult.

16.3 SHIFTING SANDS : LAW AMENDMENTS AND POLICY CHANGES

16.3.1 Some law changes and proposed law changes, 1876–86

The Native Land Act 1873 was amended almost every year. The various historian witnesses and Crown counsel have traced the important changes. They have also referred to various draft Bills intended to modify the 1873 regime, which did not become law. All reflect serious dissatisfaction with the system. But the changes or proposed changes tended to pull in contrary directions, as the following selection indicates.

¹³⁷. Document Q1, p 91

¹³⁸. For a tabulation of the number of owners in each block for the period to 1885, see document E1, pp 107–108, which notes that 79 per cent of blocks were awarded to 10 or fewer owners.

(1) Facilitating partition

Under the 1873 Act, it was still sometimes the practice, at least in Hauraki, for very large blocks to be awarded to only a handful of owners. In other cases, blocks were subdivided on paper among whanau, but the subdivision was not always followed by survey and division on the ground. For example, when the 8891-acre Harataunga block was investigated in 1872 it was divided into Harataunga West (4339 acres) and Harataunga East (4552 acres). Subsequently, in 1878, Harataunga West was divided into seven portions, with between three and 11 owners in each, but the subdivisions were not surveyed until 1892, at a cost of some £187. Harataunga East was not subdivided 'because the owners were not able to agree among themselves.'¹³⁹ About this time, however, as shown in Mr Hayes' useful summary, important law changes simplified the procedure relating to partition.¹⁴⁰ Under the 1873 Act, a majority of Maori owners of a block could apply for a partition in order to complete a transaction. Section 107 of that Act also authorised the Crown to apply for a partition in order to complete an existing 'inchoate' transaction; section 6 of the Native Land Amendment Act 1877 and subsequent legislation reaffirmed and clarified the right of the Crown to partition out its interests. From 1878, private purchasers could also so apply, but in 1882 this right was revoked. Importantly, under the Native Land Court Act 1880 an individual Maori (not just the majority) could apply to have his or her interest in certificates of title created under the 1880 Act partitioned out. By the Native Land Division Act 1882, this was extended to land held under memorials of ownership under the 1873 Act.

Mr Hayes regards these latter changes as the first real individualisation of former customary interests. 'It is the 1880 and 1882 Acts, rather than the 1873 Act, that enabled the individual to undermine the collective purpose of a community or, at least, the majority of its members.'¹⁴¹

This is not wholly correct (as we have discussed in section 16.1.3(6)). But the 1880–82 legislation allowed an individual Maori or Maori family, to secure a title in their own name for their own piece within the former tribal patrimony. It was more than an individualisation of the title; it offered an individualisation of the land itself.

The measure had a potentially positive aspect, since many Maori had evinced an interest in making their own family farms. Now the law provided a mechanism to achieve this, even in defiance of community opinion. Data on what actually happened has not been systematically gathered and presented to us, but from the information scattered through various block histories, it appears that a trend now set in to apply for partitions, either for development or transaction of land.¹⁴²

139. Document A10, pt 1, pp 7–8

140. Document Q1, pp 95–96

141. *Ibid*, p 96

142. Examples are Te Horete 1B, partitioned in 1889 on the application of one owner, and Te Horete 2A and 2B, partitioned in 1914 on the application of three owners and one owner respectively: doc J6, pp 3, 6. Many more examples can be found in the block histories.

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An example of partitioning is given by Ngati Porou ki Harataunga (Wai 289, Wai 792, and Wai 866): in 1878, the Native Land Court heard Ropata Wahawaha's application to have the Harataunga block subdivided. According to the evidence of Parekura White:

members who identified with Te Whanau a Rakairoa were allocated the Harataunga West blocks. Members of Te Aitanga a Mate and Te Aowera were allocated the Harataunga East blocks. The Harataunga River was the dividing boundary between Harataunga West and East blocks.

Mr White states that members of Te Aitanga-a-Mate had strongly opposed the Crown's attempts to purchase the block, and that it was this stance that 'resulted in the separation of the members of the three hapu'.¹⁴³

The partition trend in Harataunga then took a different direction, for in 1897 Gilbert Mair reported:

Puterangi, the principal chief at Kennedys Bay, and his immediate relatives will not sell their interests as they say they have no other land whatever. It has been a great waste of money surveying the numerous subdivisions. The natives seem anxious now to have them all swept away, with a view, if it could be arranged, of taking the non-sellers shares in one or two pieces, and so save cutting up the 6 or 7 divisions into as many more by long narrow strips.¹⁴⁴

Partitions multiplied in Hauraki over the following decades, and (along with succession applications) come to dominate the work of the court. (Initial hearings of blocks were mostly completed by the 1890s.) A serious problem was that many of the partitions were uneconomic, and the survey costs alone fatally crippled the intended enterprises or required that some of the land to be sold. By the 1890s, there are examples of judges trying to persuade applicants not to go ahead with their application for partitions. There are no clear instances cited of the court actually refusing an application on the grounds that the resulting divisions would be uneconomic. There are, however, instances of partitions being approved but not marked out on the land, only to be discovered when some subsequent transaction was proposed.

It is important here to recognise the distinction between *fractionation* of interests through intestate succession and *fragmentation* of the land into separate titles through partition. In many respects, as Mr Hayes has suggested, fragmentation of titles had the most serious impact on community control and planning. Certainly some family farms did emerge from the process, sometimes on the basis of leases from the owner group. The Hauraki tangata whenua evidence includes many statements from people who grew up on such farms, but

143. Document s8(a), p18

144. Hauraki minute book 49, fol 318 (doc A10, pt1, p19). Note that Parekura White has referred to 'Tuterangi' in document s8(a), pp122-123.

usually indicates that they were struggling economically. In our view, the partition provisions of the Native Land Acts are another example of the confused and ad hoc way in which land law was developed and applied.

(2) Sale at public auction with the Crown as agent

We have drawn attention to the proposals that appeared from time to time that when Maori were to sell land it should not be by private treaty but by public auction, with the Crown maintaining some oversight of the process. They all failed, but the concept was not wholly lost sight of. In 1876, Vogel and McLean, apparently dismayed by the failure of the protections introduced in the 1873 Act, revived it. Professor Ward writes that Vogel:

proposed to abolish direct purchase altogether and take up the principle of sale by public auction, the Crown to act as agents on commission and the Maori vendors to state what areas of a block should be exempted from sale and what minimum price they wanted.¹⁴⁵

A Native Land Sales Bill, introduced to authorise the system, did not get beyond preliminary stages in 1876 and McLean died in early 1877 before it could be reintroduced. There followed the spate of energetic Crown purchasing under Grey and Sheehan and not until 1880 did John Bryce, Native Minister in the Hall Government, reintroduce a further Native Land Sales Bill. But it was again opposed in Parliament both by settler members, who feared that leaving it to Maori to offer land for auction *voluntarily* would effectively ‘shut up the country’, and by Maori members who were ever-distrustful of Government paternalism in respect of their lands and alarmed at the 10 to 30 per cent commission and roading expenses proposed to be deducted from sale profits.¹⁴⁶ (An attempt at applying the public auction principle to a leasing system in Rotorua under the Thermal Springs Districts Act 1881, the Government acting as agent for Maori lessors, was a partial success in 1865, the first year, and a failure later.) The debates on these various public auction proposals nevertheless revealed that members understood that the existing system *did* involve confusion, fraud and pressures upon Maori to bring their land onto the market.

(3) Shifting policy on the removal of restrictions

The removal of restrictions has been discussed in chapter 15 and in section 16.1.4, but Dr Anderson has traced in more detail the law and policy relating to the placing of restrictions on Maori lands under court title, and the removal of those restrictions.¹⁴⁷ The usual restriction was that the land could not be alienated except by a lease of up to 21 years, except with the consent of the Governor in Council. A few titles in Hauraki had been granted under section 17 of the Native Lands Act 1867 (see sec 15.4.2), but as we have noted (in sec

145. Ward, *A Show of Justice*, p 257

146. Native Land Sales Bill, NZPD, 1880, vol 35, pp 265–274; vol 36, pp 363–387; vol 37, pp 91–116

147. Document A9, pp 91–107

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16.1.4) the administrative mechanism of the 1873 Act for creating a minimum acreage of inalienable land was inadequate and not systematically applied. Anderson concludes that 'Up into the late 1870s and early 1880s, land was rarely reserved in the Hauraki district.'¹⁴⁸ In 1878, however, amending legislation restored a discretion to the judges of the court to place restrictions on titles, and section 36 of the Native Land Court Act 1880 required the court to ascertain in every case whether it was desirable to restrict alienation of any part of a block. Dr Anderson states that following this measure:

judges regularly placed restrictions on the title of the Hauraki blocks brought before them. By 1888 . . . restrictions against sale had been placed . . . on the title of 45 blocks in Thames County comprising 25,684 acres; 27 blocks at a total of 7,683 acres in the Coromandel-Kennedy Bay portion of the Peninsula; and 17 blocks, totalling 12,301 acres in Ohinemuri County [plus reserves in Te Aroha and Waikawau].¹⁴⁹

In relation to the question of the Crown's responsibility to protect Maori against excessive alienation, this was a significant improvement on the previous decade. The process of removing the restrictions then became extremely important. There is no question whatever that Maori owners regularly applied for restrictions to be removed, for a great variety of reasons, ranging from the need to settle debts (including survey liens), to pay the costs of tangi, to provide for themselves in old age when they could no longer work the land, or to sell land of which they made little or no use in order to develop other land, build a house, pay for children's education or similar purposes. In some cases, it was argued that they had promised a lessee the right to acquire the freehold and that they would be better off with the purchase money rather than the lease money which was a pittance when divided among multiple owners.¹⁵⁰

The applicants were some or all of those whose names had been entered upon the title, or their heirs. Sometimes, but by no means always, applications reflected discussion in the whanau or hapu, but 'block committees' were still only coming into being and were not normally bodies corporate, even after the provision for incorporation of owners became generally available in 1894.

For most of the 1870s and 1880s the decision to remove restrictions lay mainly with the Native Minister of the day, acting on the advice of district officials. In 1882, Under-Secretary Lewis drew up guidelines for his Minister (Bryce) – guidelines which paralleled those under which the trust commissioners operated, namely:

148. Document A9, p 92

149. 'Return of Lands in . . . Ohinemuri, Thames and Coromandel upon which Restrictions are Placed Preventing Owners of Disposing of Them Other Than by Lease', Le 1/1888/7 (doc A9, p 93)

150. Document A9, pp 99–100

1. That the Natives have amply sufficient other land for the maintenance of themselves and their successors, or that from the unsuitability of the land to be alienated, for native occupation, or other considerations, it is to their interest to dispose of it.
2. That the owners . . . are *unanimous* in their desire to sell.
3. That the price proposed is *prima facie* fair and reasonable. [Emphasis in original.]¹⁵¹

As Dr Anderson points out, however, the first two of these criteria became increasingly difficult to apply as interests became fractionated through succession. This factor, and movement of people away from traditional land, made ascertaining whether each seller had sufficient other land and obtaining unanimous consent almost impossible.

The block histories submitted to us suggest that in a number of cases land under restriction was sold without the restriction formally being removed, apparently through a failure by either the trust commissioner or the land court judge concerned (or by both) to note that the title was restricted.¹⁵² These kinds of errors were among those which the Validation Court was later empowered to investigate and approve if they were equitable and not contrary to the wishes of the owners (see below).

However, many officials and politicians in the mid-1880s were mindful of their responsibilities under the law regarding removal of restrictions. Dr Anderson has cited a number of examples showing that Wilkinson, the responsible official in Hauraki after 1878, regularly recommended against applications for removal of restrictions. He considered Ngati Rahiri of Te Aroha (and many others as well) to be ‘reckless and improvident people, having no thought at all for the future’, and opposed the alienation of land which, though sometimes in individual names, he thought to be really intended for the future of the tribe.¹⁵³ Native Minister Bryce took his advice, although restrictions were sometimes removed to allow gifts of land for churches or schools. His successor, Ballance, was also cautious, and appointed a special commissioner, GE Barton, to investigate the circumstances surrounding all applications already lodged. Barton took a conservative approach, although he did reverse Wilkinson’s recommendation not to grant Reha Aperahama’s application to remove the restriction on Kawana Reserve (Te Aroha) because the grant had been to Aperahama personally and he had already accepted most of the payment for it.¹⁵⁴

Whatever their inclinations in relation to purchases generally, both Bryce and Ballance had been reluctant to accept applications from individuals or sections of owners to alienate their interests in restricted land (although the Native Lands Division Act and the Native Reserves Act of 1882 had both provided a procedure for partition out by the court

151. Lewis to Bryce, 9 December 1882 (Jenny Murray, *Crown Policy on Maori Reserved Land*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), p 58)

152. For example, see document H1, ch 3, which discusses the sale of Papakitatahi.

153. Wilkinson to under-secretary, 10 December 1888, Le 1/1884/108 (doc A9, p 94)

154. Document A9, p 94

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of individual interests without the requirement for majority agreement). By the late 1880s, however, with 'free trade' in Maori land restored, the removal of restrictions was made easier. Section 5 of the Native Land Act 1888, the main vehicle of the 'free trade' policy, empowered the Governor in Council to remove restrictions on the application of a simple majority of owners. This could be a general removal, not necessarily in respect of a specific transaction. A companion measure, section 6 of the Native Land Court Amendment Act 1888, gave authority to recommend removal of restrictions to the court. The court was to ensure that each owner had a 'sufficiency of inalienable land for his support', but, on the application of the majority of owners and with the concurrence of the remainder, could remove restrictions on other land.

Dr Anderson notes that in the three years following the passage of these measures, 12 applications were approved in respect of Te Aroha reserves (relating to 1044 acres) and one covering Whangamata 2 (5487 acres), reserved since it had gone through the court in 1871–72.¹⁵⁵

(4) Maori permitted to advise the court: the Native Committees Act 1883

In early 1883, when the Government was negotiating with Ngati Maniapoto, Tuwharetoa, and others for the opening of the Rohe Potae, the various central North Island iwi petitioned Parliament, asking to be 'relieved from the entanglements incidental to employing the Native Land Court to determine our titles to the land, also to prevent fraud, drunkenness, demoralisation, and all the other objectionable results attending sittings of the Land Court'. The petitioners asked to be allowed to fix their boundaries for themselves, with official endorsement to follow.¹⁵⁶ Anxious to woo the Rohe Potae tribes, Bryce responded with an Act to establish elected committees with limited powers to make inquiries and advise the court. But Bryce was prepared to establish only about seven or eight district-level committees for the whole North Island, which meant that they were generally unpopular with Maori, since quite unrelated iwi and hapu were sometimes bundled together.

In Hauraki, not all iwi were embraced by the committee boundary defined by the Government, but the Thames people took up the concept eagerly. In late 1883, Raika Whakarongotai was appointed chairman, and in 1884 WH Taipari informed Wilkinson, the Government agent, that they had met to decide on the division of representatives among the iwi. Whakarongotai wrote to Bryce:

Your letter . . . has arrived and I have seen the information you give in it as to the powers Native Committees will possess to investigate titles to land and to adjudicate on offences.

155. Document A9, p 96

156. 'Petition of the Maniapoto, Raukawa, Tuwharetoa and Whanganui Tribes', 26 June 1883, AJHR, 1883, J-1, p 2

Now . . . that is exactly what we desire – namely that our committees should have lawful authority.¹⁵⁷

The committee had assumed that it had jurisdiction in minor disputes amongst Maori and tried to issue summonses, but Maori expectations quickly ran ahead of what the Government was willing to grant, and the committee was informed that it had only an advisory role.

(5) Some changes in court procedure and nomenclature

From 1880, the court was empowered to impose restrictions on alienation (as distinct from recommending them to the Governor).¹⁵⁸ The Native Land Court Act 1880 attempted to simplify the procedures for investigating titles, surveys, succession and partition, but the 1873 provisions regarding alienation generally remained in force. The term ‘certificate of title’ had been used in the 1865 Act in respect of blocks awarded to 10 or fewer owners; in the 1873 Act, as related, the term ‘memorial of ownership’ was introduced. But in theory at least, subdivisions of 10 or fewer owners were still to receive certificates of title. From 1880, the term ‘certificate of title’ was applied to all blocks given a court award. These should not be confused with certificates of title under the Land Transfer Act (which tended to replace ‘Crown grant’ in the terminology). Mr Young, for the Marutuahu claimants, considers that the court’s certificates of title were ‘immediately registered under land transfer legislation.’¹⁵⁹ This is doubtful, but by section 22 of the Native Land Court Act 1886, the court’s certificates of title could be forwarded by the chief judge, via the Minister of Lands to the Governor, and a certificate of title under the Land Transfer Act 1885 provided. The use of this provision seems to have been sporadic and little evidence has been supplied to us on the actual practice. In 1894, a referral to the Governor was no longer required. As the *Turanga* report notes: ‘Instead, after a court order . . . the district land registrar issued the purchaser with a Land Transfer Act certificate of title in lieu of a Crown grant. This meant that court orders themselves became directly registrable.’¹⁶⁰

Generally, the ‘void’ provision remained in force for private dealings in Maori land prior to the completion of partitions in the court. Only for the period 1883 to 1894 was it made ‘illegal’ to negotiate for the purchase or lease of Maori land prior to 40 days after the title had been ascertained by the court. While it was in force, the prohibition probably helped to deter private purchasers from the familiar practice of soliciting Maori agreements to a purchase piecemeal and then bringing them to the court to secure a partition. But the Crown was not bound by the prohibition.

157. Whakarongotai to Wilkinson, 7 November 1883, NO84/157 (doc A9, pp 22–23)

158. Document Q1, pp 92–97; see also the appendices in Williams, 11 of which set out the manifold amendments according to their various purposes.

159. Document v1, p 252

160. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, p 465

(6) *The Native Equitable Owners Act 1886*

Mr Hayes and Dr Williams have also debated the consequences for Maori of the Native Equitable Owners Act 1886. This was an attempt to provide some remedy for the many owners who had been left out of titles awarded under the 1865 Act. In response to a stream of Maori petitions, the injustice of treating the named owners as absolute owners rather than trustees for the group had eventually been acknowledged by the Government and Legislature. The remedy provided in 1886 was to empower the Native Land Court to inquire whether trusts were intended in respect of land still held by Maori under the 10-owner system, and if so to insert the names of the beneficial owners on the title. But no redress was available if the land had already been sold, as most of it was.¹⁶¹ Evidence has not been collated as to how many Hauraki blocks were the subject of applications under the Native Equitable Owners Act, but several claimant groups refer to blocks affected.¹⁶²

Dr Williams, for the claimants, is highly critical of the outcome of the Act, in that it created titles similar to those awarded under the 1873 Act, and (in the words of the Waitangi Tribunal in the *Report on the Orakei Claim*) ‘merely allowed more individuals to be included in the individualisation process’. In Dr Williams’ words, the Act ‘did not in any way recognise the trusteeship or kaitiakitanga concepts of tikanga Maori’.¹⁶³ Dr Williams is also critical that the 1886 Act did not take up the question of Maori rights in blocks sold before that year, since ‘particular care was taken to ensure that the vested rights of Pakeha purchasers and lessees were not upset’.¹⁶⁴ But Mr Hayes notes that there were Maori purchasers and lessees too, albeit a minority, and that ‘Williams is seemingly oblivious to one of the principal tenets of the Torrens system – the indefeasibility (and State guarantee) of title. To upset transactions already made would have upset the foundations of social and commercial prosperity’.¹⁶⁵

We consider this is a fundamental point. In his *National Overview*, Ward refers to a land court decision in respect of which the Native Affairs Committee of 1887–88 wrote:

If the discontent of the Natives left out is to be weighed (without a legal rehearing) there is no title in the country worth the paper it is written on. That there has been a great deal of injustice and miscarriage of justice with regard to Court titles seems to be beyond dispute

161. Figures for the proportions of Hauraki land awarded under the 1865 Act and alienated before 1886 are not available. Dr Michael Belgrave’s analysis of the rate of alienation in Auckland province shows that half of the area awarded in the period 1865–69 had been alienated by 1869 and that only 10.5 per cent remained in Maori ownership in 1908: Dr Michael Belgrave, *Auckland: Counting the Hectares: Quantifying Maori Land Loss in the Auckland District, 1865–1908*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), p 53. The percentage as at 1886 is not given.

162. For example, see doc Y7, p 7; doc A10, pt 1, p 174

163. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim* (Wellington: Waitangi Tribunal, 1987), p 154 (doc E1, p 106)

164. Document E1, p 104

165. Document Q1, pp 98–99

but the evil would be multiplied many fold if the Government set itself to override the law and to indirectly or directly review titles.¹⁶⁶

It was scarcely practicable to upset titles, even with clear statutory authority. The likely outcome would have been a spate of actions for damages at unaffordable levels, and a complete collapse of investment confidence. A potential solution would have been to leave titles undisturbed, but authorise compensation to Maori customary owners (or their successors), who had not been included in pre-1873 titles and received no payment when the land was sold. But this would also have been difficult. This was because of the problems in evidencing the facts in each case, often well after the land had been sold. Such a proposal would have opened large questions as to whether the compensation should have been provided altogether by the Crown, which set up the system under which right-owners could be deprived, or contributed to by the named owners who exploited it (in an unknown number of cases) by not observing the implied trustee role and distributing payment. The practical result of these difficulties was that Maori had to make do with the Native Equitable Owners Act 1886.

16.3.2 Increasing Maori pressure for community control

(1) *Land titles and tino rangatiratanga*

A crucial question in terms of the Crown's Treaty responsibilities was whether the hybrid titles provided by governments and parliaments since 1865 breached the Crown's obligation to respect tino rangatiratanga undertaken in article 2. It should be recalled that the promise was made in the Maori version, 'ki nga Rangatira ki nga hapu – ki nga tangata katoa o Nu Tirani', and in the English version, 'to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof'. The Treaty thus recognised that land rights were held at various levels of customary Maori society, and the implication of article 2 is that they were all to be respected. We have discussed the determination of governments and parliaments, in shaping the law relating to Maori land, to diminish tribalism and promote the rights of individuals, partly in order to encourage their economic advancement along with that of the settlers. We have also noted that, while there were some Maori aspirations to secure a clearer individual or family interest, there were also mounting demands for authority over land to be vested in tribal committees or runanga. We must ask whether these aspirations were balanced in the law and its administration.

Claimants and their expert witnesses are in no doubt that the hybrid titles created under the Native Land Acts did not meet Maori aspirations and needs. Belgrave and Young assert that there is 'one issue which is beyond doubt' which impacts significantly on why Maori

166. 1887 and 1888 Native Affairs Committee of Parliament, undated minute, Le 1/1887/8 Archives NZ (Ward, *National Overview*, vol 2, p 253)

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sold land: ‘That is the way in which the title created by the Native Land Court allowed individual owners to act independently without regard for the collective interest.’¹⁶⁷ The Crown, however, considers that:

Many owners continued to operate on a communal basis and the Crown dealt with them on that basis. A critical issue to examine is whether over time, and particularly in the late 1880s and 1890s, dealings were conducted on a progressively more individualised basis as a result of Native Land Court determinations.¹⁶⁸

The implication of the Crown’s comment is that increasing individualisation was an inevitable concomitant of the Native Land Court system.

There is evidence of both individual and community input into dealing with land under court titles. But the first evidence on land block files is often the application for partition of land in order to alienate part of it. How the various individuals in the alienating group were approached or arrived at their decision is not usually recorded. Land purchase officers record discussions of purchase offers in meetings with hapu and whanau. But there is also much evidence in the published histories, the block histories in these proceedings and in the reports of land purchase agents, that the practice of buying undivided interests from individuals or sections of owners, in order to get a toehold in a block, began in the 1860s and continued into the twentieth century.¹⁶⁹

The Crown has acknowledged that the law provided no simple legal mechanism under which Maori could organise to make collective decisions over land management. Different groups of owners under prominent leaders could propose different courses of action, and meanwhile, individuals could and did offer to sell their interests and sign agreements to partition and sell. This situation greatly handicapped the ability of Maori communities to earn revenue from their land (except, in Hauraki, by mining revenues and associated leases or short-term agreements such as timber leases) and left them exposed to the pressure and temptation to sell their interests. Long-term development work organised by, and on behalf of, the community was almost impossible.

(2) Maori ‘agency’ in selling

The fact that individuals could sell their undivided interests in what was a multiple (not a communal) title is crucial to an understanding of the contradiction that runs through the post-1865 period. As the *Turanga* report points out, Maori owners increasingly met in tribal committees and councils to denounce the Native Land Acts and the court and to demand

167. Document v2, p 83

168. Paper 2.550, p 26

169. See J Williams, *Politics of the New Zealand Maori*; Ward, *A Show of Justice*; Tom Brooking, “‘Busting Up’ the Greatest Estate of All: Liberal Maori Land Policy, 1891–1910”, NZJH, vol 26, no 1 (April 1992), pp 78–98; Don Loveridge, *Maori Land Councils and Maori Land Boards*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997)

that control be returned to the communities, while those same men and women were offering their interests for sale and writing to Ministers and officials to have restrictions on titles removed so that they could sell.¹⁷⁰

In these proceedings, the Crown has repeatedly drawn attention to Maori desire to sell land. For example, in closing submissions Crown counsel writes:

Thus, whilst it can be argued that in Treaty terms the Crown should have done more to have halted land alienation, in Hauraki, it ought equally to be acknowledged that there would have been real pressure from some Hauraki Maori to overcome restrictions on alienation and that in practice enforcement of such a regime would have been difficult. Hauraki and other Maori regularly rejected attempts to fetter their ability to manage their land as they saw fit.¹⁷¹

Such statements fudge a number of crucial issues, such as what is meant by ‘their land’. As we have discussed previously, in customary society, use rights were commonly held at individual and family level, but the power of alienation outside the group was controlled by the group, acting through its rangatira. In this case, ‘their land’ meant communally controlled land. But, if by ‘their land’, Crown counsel means the interests Maori held in court titles which were alienable outside the group *without* reference to community veto, then we are discussing a construct imposed by the Crown through the court. Once the law had turned customary land rights into negotiable titles – saleable commodities – then of course individuals often took the opportunity to sell, living as they did in a money economy in which Maori needed ready money, or credit resulting in debt.

Under the titles, the Native Land Acts had created, Maori land could generate little income by letting land or farming. The returns were too low and the income could not be centrally managed, since the law provided no mechanism for communal management. When revenue was distributed, it amounted to so little for each owner that there must have seemed little point in holding on to an interest: better to sell it for a lump sum and use the money for some pressing need: paying off survey and other debts or providing housing, education of children, or health care. The applications for removal of restrictions often listed such needs and intentions.

It is nonsense to suggest that the enforcement of restrictions on the alienation of reserves would have been difficult. Had the right of veto indeed been vested in the community as a legal corporation, the responsibility would not have lain with Pakeha officials, but with Maori corporations. When these were finally created (too late for Hauraki, since most of the land had already gone), they did not exhibit any tendency towards reckless alienation of land. Quite the contrary.

170. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, pp 422–423

171. Document AA1, p168

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There were some deliberate and careful decisions by tribal leaders when land was first going through the court: to mark some blocks for immediate sale (to meet expenses), to leave others under no restriction (with a view to possible sale) and place others under restriction. But this kind of strategic planning (or 'strategic selling' as Belgrave et al call it) was all but destroyed by the titles created under the Native Land Acts. It is inappropriate for the Crown, having created a system which permitted individual dealing in undivided interests, to blame individual Maori for using it for short-term economic survival. These are the reasons why Maori leaders increasingly demanded a restoration of community control, even while they themselves were caught up in individual transactions.

(3) A role for tribal committees?

Dr Anderson has noted a common thread running through Maori protests over a number of specific issues in Hauraki. Whereas Pakeha saw resistance to the court and other Maori protest as impediments to settlement and progress:

The intent of the Hauraki leaders was, however, to regain control of the pace of economic and social transformation rather than to stop change altogether . . .

These protests reflected the growing fissure which separated the two races. Maori had almost nothing to do with the machinery of local administration, being unrepresented on highway and harbour boards, local bodies, or on the Provincial Council which [until 1876] exercised considerable influence over the development and management of the gold fields, rivers and harbours by means of the powers of the Superintendent. Hauraki Maori looked for greater power within the new institutions transforming and regulating their lives, often pointing out that legislation which materially affected their rights should have been discussed with them before being introduced. They asked for representation on the Provincial Council, for their own scrutiny of the gold-mining revenues, and for more Maori control over the machinery of local government.¹⁷²

In many regions of the country, Maori tribal organisations flourished and began to coalesce through organisations such as the Te Whitu Tekau of Tuhoe, the 'Tiriti o Waitangi' movement in the Bay of Islands, the 'Repudiation' movement led by Henare Matua in Hawke's Bay in the 1870s, Paul Tuhaere's parliament, which first met in Auckland in 1879, and various committees and councils among the Arawa. By the early 1880s, these movements were drawing together in the Kotahitanga, and their main concern was the loss of tribal control over the land.¹⁷³

Maori demands for greater control over both the determination of title and the subsequent management of land influenced several major policy developments in the early 1880s. Successive governments experimented with limited concessions to Maori demands.

172. Document A9, p 21

173. Ward, *A Show of Justice*, pp 271–274; O'Malley

However, as Belgrave et al have shown in a succinct summary, experiments with empowerment of Maori committees was more likely to occur when Crown and private demands for Maori land had, for the time being, been satisfied.¹⁷⁴

(4) Maori legislative proposals

The 'Native Lands Act Amendment Bill' introduced in Parliament in 1884 by Wi Pere, the member for Eastern Maori, is an indication of Maori thinking on land legislation. Building upon the Native Committees Act 1883, Pere proposed that each district committee select five persons to be assessors of the land court, three to sit with the judge on each application in the district, a majority of assessors to concur in each finding. Moreover, when lists of owners were handed to the court for each piece of land, the names of a committee of five to 15 members should also be handed in. The committee was to 'at once proceed to ascertain the extent and nature of the interest of each owner, or family, or hapu'. Section 7 of the Bill stated that 'All dealing with such land or any part thereof shall be conducted by such Committee only, and all dealings with any individual owner shall be penal[ised]'. Similar committees were to be appointed for blocks which had already passed the court. The judge or the trust commissioner would still be required to make the necessary inquiries under the Frauds Prevention Act. The committees were to have power to make reserves, partition land, transact land, raise money upon debentures secured on rentals of land for improving the land or purchasing stock, employ managers and agents, and farm, manage, or improve land. All such proposals by block committees had to be ratified by three-fourths of the owners at a meeting to be duly called at the kainga of the owners. The interests of parties dissenting from a duly approved sale would be excluded from the sale, but the committee would have power to farm or lease the land for the benefit of the dissentients.¹⁷⁵

The Bill, probably influenced by WL Rees, then in partnership with Wi Pere in trying to create trusts for the development of Maori land in Poverty Bay, is a strong indication of Maori preferences as regards land law.¹⁷⁶ Many of its provisions were still being repeated in Bills proposed by the Kotahitanga movement in the 1890s. Wi Pere's 1884 Bill reflected the Maori aspiration to have titles determined through local committees. As regards management of the land, they wanted to balance tribal leadership with the controlling authority of a general meeting of owners, a much closer approximation to the traditional control of land than the Native Land Acts provided; the role of the committees was as much to farm and develop the land as to deal in it.

Many of Wi Pere's principles underlay the system of block committees and incorporation of owners that was eventually legislated for in the 1890s under the influence of Pere, Paratene Ngata and James Carroll, and put into practice on the East Coast in the twentieth

174. Document v1, pp 236–237

175. Native Lands Act Amendment Bill, 'Bills Rejected 1884', General Assembly Library, Wellington

176. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, pp 486–487

16.3.2(5)

century with some success. This stream of Maori legislation stands as a commentary on the existing land laws, which constantly tended towards the alienation of Maori land (largely by the piecemeal acquisition of undivided individual interests), rather than to the retention and development of land by the owners.

But Maori demands for empowerment of tribal committees faced huge obstacles from the settler-dominated Parliament. An example of common attitudes can be found in the statement of Sir George Grey, speaking in support of the Native Land Alienation Restriction Bill 1884, which imposed Crown pre-emption on the Rohe Potae (King Country):

The Crown bought for the public good . . . But, after a time, the colonists of New Zealand engaged to give up this right of pre-emption; which was an extraordinary boon to the Natives. That had this effect: It was at once to create a great race of landowners in the colony, probably some of the largest landowners in the world, and to tell them that the price they could realize from the sale of their lands under the advantageous circumstances of the colony was to become their property. But I do not think the settlers, in giving up the pre-emptive right, at all undertook to agree that the Natives should dispose of their lands exactly as they pleased . . . Now, I apprehend that, if we gave over to the [Maori] Committees the power of selling the land exactly as they liked, they might probably send an agent to England, and the whole of this valuable land might be sold in the markets of England to large speculators and to persons there, and the settlers might be deprived of a valuable right . . . and I think we should place a restriction on that kind of sale. I think, also, we have the right to reserve to the public power to dictate the size in which the blocks of Native land are to be offered to the public in this country, and the conditions under which they are to be sold.¹⁷⁷

(5) *The Native Lands Administration Act 1886 and its demise*

Settler governments remained reluctant to allow Maori real control over the retention or alienation of their lands, which meant that the powers of committees continued to be circumscribed. Nevertheless, the Crown, in the shape of John Ballance, the Native Minister from 1884 to 1847, and his colleagues in the Stout–Vogel Ministry, made an effort to adopt some of the preferred Maori principles in the Native Lands Administration Act 1886. Ballance developed the Act after a tour of Maori communities in 1884–85, in which there were many frank exchanges of views. Ballance was overtaken by political realities after it, so that its results did not reflect its potential, but at the time this tour appeared to be one of the most serious and systematic consultations the Crown had ever undertaken with Maori leaders and people.

Ballance met with the Hauraki Native Committee and other Maori at Thames on 12 February 1885. Maori leaders present included Hoani Nahe, then chairman of the committee,

177. George Grey, 7 November 1884, NZPD, 1884, vol 50, p 479

and Tukukino. Besides these, 23 other Maori spoke, and Ballance gave an answer on each point raised.

Ballance elaborated on the very large role he expected the native committee to play in the district. It was to make a preliminary investigation of the customary ownership of land and advise the court; applications for survey would be sent to the chairman, so that 'no case would be brought secretly before the Court'. Ballance also envisaged the committee settling disputes over small debts between Maori. In addition to the district committee, committees of about seven members would also be elected for each block of land by its owners, with power to deal with the land if there were more than 20 owners. Actual sales and leases would be conducted by a board comprising the chairman of the district committee, a Maori member nominated by the Governor and a Pakeha member nominated by the Governor: that is, a Maori majority. After arranging for surveys and roading it would alienate the land in accordance with the wishes of the block committees. A majority of owners, by petition, could stop the action of their committee at any time: 'This will give the people power to deal with their own lands, the Government acting as mediator and assisting the Natives, but giving the people themselves the right to say what shall be done with their own lands.'

Hoani Nahe said that he was pleased and satisfied with what Ballance had said, and asked for the Bill to be circulated among them. He had stated initially:

They were very pleased to hear that they were to be allowed to manage their lands for themselves. It was his opinion that, if the preliminary investigation of land were gone into by the Native Committee, it would be much easier for the Native Land Court, and thereby the Maoris would be relieved of the expenses they were now put to in attending Court and paying Court fees &c.¹⁷⁸

Other matters which the Hauraki meeting put before Ballance were: the question of rents owing from townships laid out on Maori land; the Crown's undertaking to pay for surveys of reserves made in blocks purchased by the Crown; the taking of Maori land for roads; the need for a public pound to control wandering stock; payments owing for timber taken before land was sold; payment due for stones taken from the Komata Stream; wahi tapu not reserved; the clearing of eel traps from the Waihou River; the right to bathe in Te Aroha hot springs without charge; exemption from rates in view of their giving land for a road; the ownership of the tidal mudflats and the right to charge for the taking of oysters from the foreshore; the need for a medical officer in the district; the sale by individual owners of raupatu land returned by the Compensation Court, and the need for a land court to sit in the district. Disputes over boundaries to and rights in various specific blocks were also raised.¹⁷⁹

178. 'Notes of Native Meetings Interview between the Hon Mr Balance and the Thames Native Committee', 12 February 1885, AHJR, 1885, G-1, pp 30-31

179. Ibid, pp 32-41

After his tour, Ballance introduced in Parliament in 1885 a 'Native Land Disposition Bill' along the lines he had outlined to the Thames hui of February 1885. But the Act was renamed the Native Land Administration Act, and as passed in 1886, was considerably modified. It adopted the principle of the Crown selling land on behalf of Maori (as McLean in 1876 and Bryce in 1880 had proposed in their respective Native Land Sales Bills), and also adopted the Wi Pere-Rees proposal of authorising block committees, elected by the general body of owners, to direct what land was to be sold or leased. Direct purchase, except under the Act, was punishable by fine or imprisonment. But the actual alienation was to be conducted, not by a district board with a Maori majority, as Ballance had suggested to the Hauraki hui, nor even (as proposed in the first form of the Bill) by a board which comprised an official 'commissioner', the chairman of the native committee, and one other Government nominee.¹⁸⁰ It was to be conducted solely by an official commissioner appointed for each district. This was far from Ballance's proposal to the Thames meeting, and in this respect the 1886 Act barely reflected the extensive consultation that preceded its passage, as O'Malley has remarked.¹⁸¹

In Maori eyes, the powers given to the commissioners (along with the proposed 5 per cent deductions for administrative costs, plus unknown costs of surveys and laying off of roads) were fatal to the Act. In his meetings with Maori communities, Ballance had given the impression that the mana of the land would be returned to the Maori people, but instead the law involved the owners entrusting their lands to committees over which they would have limited control, and the disposal of the land through a Government agent. Most Maori saw it as another attempt by the Crown to increase its control. In the event, the 1886 Act was virtually inoperative, though Anderson comments that 'The government did use the Thames district Native Committee to arrange a settlement of the Crown's debt on Piako lands . . . but these negotiations were unable to prevent an expensive battle in the land court, and by survey.'¹⁸² Ballance's policy towards Maori land became a major issue in the 1887 general election. He was supportive of Maori wishes to lease as well as sell, but this had heightened settler fears of 'Maori landlordism', and the Government was defeated.

The discrediting of Ballance's policy and the 1886 Act opened the way for the 'free-traders'. By the Native Land Act of 1888, only eight sections in length, the conservative Atkinson Ministry repealed the 1886 Act and provided that, subject to the Frauds Prevention Acts, 'Natives may alienate and dispose of land or of any share or interest therein as they think fit' (s4). Restrictions in the title could be removed by the Governor in Council on the application of a simple majority of owners (s5). The Government supported the Act with the usual rhetoric of giving Maori the same rights as Englishmen to have full control of their property and not treating them like children, but Hoani Taipua, Hirini Taiwhanga (a new member and a Kotahitanga supporter), and Major Ropata Wahawaha in the Legislative Council, all

180. See Native Land Disposition Bill 1885, 'Bills Rejected 1885', General Assembly Library, Wellington

181. O'Malley, p 150

182. Document E2, p 59

criticised the 1888 Act. Ropata said, ‘Do not say, or pretend to say, that these clauses do fulfil that [aspiration of Maori] and that they do return to the Maoris the *mana* of their land.’¹⁸³

The Native Land Court Act of 1888 further undermined community control. As the *Turanga* report comments, section 21 of that Act required the court not only to name a list of individuals on titles but also to define their respective interests. The practice of listing the fraction of ‘shares’ apportioned to various owners in titles had already begun in the making of succession orders, and to some extent in partitions. It was now made general but (apart from the respective shares of children inheriting from parents) the Turanga Tribunal rightly wonders on what basis or principle the individual shares were awarded.¹⁸⁴ There is little evidence available on the subject but what there is suggests that the practice of judges varied, particularly with regard to whether rangatira were given much larger shareholdings than their lesser-ranked kin. Nor is the evidence as to Maori preferences in this regard at all clear. The fundamental difficulty remained that whatever an owner’s share in a title it was separately alienable.

(6) Hauraki and Te Kotahitanga in the 1890s

Disappointed over the 1883 and 1886 legislation, Maori leaders continued to press for the recovery of community control over land. The Hauraki Native Committee and pro-Kingitanga groups in Hauraki drew closer together in support of the Kotahitanga petition of 1892, protesting the Government’s perceived nullification of the Treaty.¹⁸⁵ The Maori Parliament which met regularly from that year sought to arrange a boycott of the Native Land Court and further land sales. A large gathering of Hauraki Maori at Ohinemuri in 1895 hosted the Maori King and 300 followers and resolved to support the campaign. Among the national leaders of the Kotahitanga movement from Hauraki (periodically its premier) was Hamiora Mangakahia, who had sought constructive engagement with the colonists and their institutions but had become profoundly disillusioned. His evidence to the 1891 Rees–Carroll commission is noted in section 16.3.3.

(7) James Mackay’s proposals

Maori complaints about the land laws were matched by criticisms from experienced Pakeha. Amongst these was James Mackay, a Crown official often mentioned in this report who held various posts in Hauraki in the 1860s and 1870s. He strongly supported the acquisition of most Hauraki land by the Crown in order to facilitate settlement and, as we have seen, his methods of overcoming non-sellers were at times manipulative. But he also stood up against his superiors for what he considered to be Maori entitlements, and saw himself as a person of integrity, concerned for Maori as well as settler advancement in the new economy. It is

183. Ropata Wahawaha, 21 August 1888, NZPD, 1888, vol 43, p 230

184. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, p 435

185. Document A9, p 76

not unimportant that this tough servant of the Crown became a determined opponent of the Native Land Acts and the court.

In 1887, Mackay published a 60-page booklet surveying the legislation since 1862 and offering his own draft Bill. He objected (among other things) to the ‘peripatetic nature’ of the land courts, with judges not permanently stationed in defined districts, and consequently ignorant of the landscape and its Maori occupants; the ‘enormous expenses’ of surveys; the holding of courts far from the land being investigated; the English procedures of the court, rather than a Maori approach to land questions; the frauds practised on Maori; the expense of procuring hundreds of signatures to conveyances; and doubts about title due to ‘conflicting legislation’. The main features of his proposed Bill included dividing New Zealand into ‘native land districts’, each with a district commissioner, district registrar, and district surveyor, and a chief commissioner over all. The determination of ‘tribal’ and hapu boundaries would largely be achieved through the commissioner or commissioners meeting on the ground with the claimants, discussing and traversing them, and the surveyor marking their lines. The land of each hapu would be divided into ‘reserved lands’, absolutely inalienable, and ‘disposable lands’, which could be leased or sold by the hapu acting through elected trustees. The district commissioner would receive, manage, and disburse rent and purchase money. A deduction would be made for the cost of surveys, but huge savings would be derived from the systematic surveying of all intersecting groups’ interests in the course of a single adjudication. Mackay claimed that these proposals were supported by many chiefs with whom he had discussed them, and derived from his early experience in Hauraki. Despite the complexities of tribal tenure and ‘upwards of fifty disputed boundaries’ in the Thames goldfields, he claimed that ‘the whole of these disputes were thoroughly settled within less than eighteen months, without the intervention of the Native Land Court, and by one person only.’¹⁸⁶

This was an idealisation, and Mackay understated the extent to which the Native Land Court was by now relying on advice from Maori committees and negotiated out-of-court agreements. But the booklet was refreshing in its frank acceptance that fixed tribal and hapu boundaries were unfamiliar to Maori customary tenure and required a mix of open negotiation between the communities themselves and arbitration of intransigent points by a commissioner very familiar with his district and known and trusted by local Maori. So too was Mackay’s support for the prohibition of dealings prior to determination of title (introduced in 1883), the clear division into reserved land and alienable land, and subsequent dealing by the hapu as a whole, acting through trustees. Some of these provisions harked back to the intentions, later overlaid, of the 1862 and 1873 Acts (see secs 15.2, 15.3, 16.1), and to the principles being advanced by Wi Pere and others in the Gisborne–East Coast area (see sec 16.3.2(4)).

¹⁸⁶ James Mackay, *Maori Lands or Comments on European Dealings for the Purchase and Lease of Native Lands and the Legislation Thereon* (Auckland: Kidd and Wildman, 1887), p 59

16.3.3 The Liberals' early policy and legislation**(1) *The Rees–Carroll commission, 1891***

The return of a Liberal Government in 1890 saw the establishment of the Royal Commission into the Native Land Law, chaired by WL Rees. Much evidence was heard by the commission from former and current officials (including James Mackay), former land court judges, Maori assessors and others, most of it condemnatory of the existing legislation. Much of this has been discussed in the published histories, and it is unnecessary to cover it in detail again. Significant to Hauraki, however, was the evidence of Hamiora Mangakahia. He criticised the confused land laws, and related his own confusion over the nature of a memorial of ownership and the limited control it gave him over the land:

there is a continual changing of these laws, and a constant taking of clauses from one Act and then putting them in another, and then afterwards repealing them, and then, with all this, there are amendments going on, the effect being to so complicate matters that the greatest confusion prevails.

With reference to lands which had not yet been before the court, Mangakahia stated that 'in their case they should stay in their existing state, and that there should be no surveys and no Courts . . . The Natives see that great evils befall them through the Native Land Court, and through the Survey Department, and through litigation generally.' Mangakahia gave examples to show how the costs of securing court titles absorbed most of the sale price of Maori land, and supported the efforts of the Kotahitanga leaders and Maori members of Parliament to secure the passage of a land law along the lines of Wi Pere's 1884 Bill.¹⁸⁷

In essence, the commission condemned the underlying trend of land law since 1865, namely the emphasis upon so-called individualisation of title, which had resulted not in the subdivision of land into family holdings but rather in the listing of multiple names on titles, often to very large areas, but without any legal mechanism whereby the owners could act as a body corporate. Instead, apart from the abortive 1886 Act, the law had made every individual's signature alienable, and land blocks subject to a sequence of partitions and purchases. It had been the worst of all worlds for Maori: a destruction of customary control by iwi and hapu in a corporate sense but also a failure to achieve a truly individual title which the British colonists had promoted throughout the 1850s and 1860s as the fount of economic and social progress. The Commission recommended a return to a hapu-based tenure, through the empowerment of block committees. The commissioners also favoured restoration of Crown pre-emption. The exception was James Carroll, who submitted a statement of dissent objecting to pre-emption as a violation of the spirit of the Treaty, in that it removed from Maori control over their resources and kept prices at an artificially low level.¹⁸⁸

187. Hamiora Mangakahia, 'Minutes of Evidence', 16 March 1891, AJHR, 1891, G1, pp 35–36

188. Brooking, 'Busting Up', pp 84–85; Carroll, 'Note of Dissent', AJHR, 1891, G-1, pp xxvii–xxx

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The concerns of settlers and officials for simplification of the land law were also reflected in the 1891 commission. Mr Hayes, for the Crown, has argued that despite the tangle of legislative changes the Native Land Act could be viewed as a 'simple conveyancing code'. But because of the constant swings in policy and law, by 1890 there was a chorus of complaint from leading officials and politicians. The historians for the Marutuahu claimants cite the 1891 commission's report:

So complete has the confusion both in law and practice become that lawyers of high standing and extensive practice have testified on oath that if the Legislature had desired to create a state of confusion and anarchy in Native-land titles it could not have hoped to be more successful than it has been. Were it not that the facts are vouched upon the testimony of men whose character is above suspicion and whose knowledge is undoubted, it would be well-nigh impossible to believe that a state of such disorder could exist.¹⁸⁹

The third member of the commission, Thomas Mackay, died before the completion of the commission's work. He had dissented from some aspects of the main report, considering the other members had strayed into matters outside their commission. He presented his own (but unfinished) report, collated after his death by Alexander Mackay. In it, he compiled a table of no less than 12 types of title prescribed in the native land legislation.¹⁹⁰

(2) Legislation of the 1890s

Following the 1891 commission, neither Rees nor Carroll was appointed Native Minister. The post went to AJ Cadman, then the member for Thames, and he worked in conjunction with the Minister of Lands, McKenzie, in a renewed drive to purchase Maori land, funded by renewed Government borrowing.

Further legislative changes supported the Crown's policy and assisted both Crown and private purchasers more readily to complete their titles. In 1892, The Native Lands Purchase Act restored Crown pre-emption in proclaimed areas and simplified procedures for removal of restrictions on titles. The law changes of 1886 and a series of judgments in the superior courts between 1887 and 1890 'exposed a host of cases in which the processes and safeguards under the 1873 regime were not being complied with.'¹⁹¹ This cast doubt on the validity of

189. 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws', AJHR, 1891, G-1, pp xi-xii (doc v1, p 239)

190. Thomas Mackay, 'Unfinished Report by the Late Mr Thomas Mackay Relating to Native Land Laws', AJHR, 1891, G-1A, pp 1-23

191. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, pp 463-464. A number of examples have been cited in evidence in these proceedings. For example, the evidence of the Wai 174 claimants in relation to the alienation of Te Horete 1 (1240 acres) suggests that the technical requirements of the legislation as to the witnessing of signatures and confirmation by a judge of the Native Land Court were not complied with, although there is no evidence that the Maori owners' wishes or intentions were overridden: doc G11, pp 9-10; doc J6, pp 1-3; doc J14, pp 3-4; doc Y2, pp 3-4.

many purchases from Maori. The Native Land Act (Validation of Titles) Act 1892 therefore empowered the court to investigate transactions and recommend their validation, provided there was no fraud and no intent to evade the law, that the transaction was not contrary to equity and good conscience and that validation would not be contrary to the ‘true interests’ of the Maori sellers. In 1893, a separate Validation Court (albeit comprised of Native Land Court judges) was established to fulfil this function.

The Native Land Court Act 1894 made further important changes:

- ▶ It restored pre-emption nationally except for expressly exempted blocks.
- ▶ It provided for multiple owners to form bodies corporate and manage or deal in land through elected block committees, under the supervision of the court. This system, important in the Poverty Bay–East Coast district in the twentieth century, had been introduced nationally partly in order to facilitate transactions, by enabling purchasers and lessees to deal with a single legal entity rather than a multiplicity of individual owners. But apart from the Hauraki Plains, which we discuss below, there was little good land left in Maori ownership in Hauraki, and Maori incorporations were not introduced in Hauraki.
- ▶ It empowered the court to determine whether any trusts lay behind the named owners on court titles.
- ▶ It abolished the trust commissioners and transferred their functions to the judges of the court. The court was given greater powers to investigate the many legally confused agreements that had arisen in the previous 30 years and to validate those it considered equitable.¹⁹²
- ▶ It established the Native Appellate Court. This improved the prospects of a full analysis of intersecting customary rights, and provided a venue for appeals, promptly and frequently made use of by contending Maori claimants.
- ▶ It attempted to clarify the definitions of land, and the effects of granting a court title. Somewhat confusingly, the term ‘native land’ was henceforth to apply to land owned according to Maori customs and usages, the ownership of which had *not* been determined by any court; *but* ‘customary land’ was land owned by Maori according to their

192. It seems that numerous technically flawed transactions in Hauraki were accepted by the Native Land Court, rather than being referred to the Validation Court, or they were simply overlooked. Some examples of block histories in these proceedings which reveal apparent irregularities are as follows: Te Horete 1, 1896 (not all owners attesting to instruments of alienation) (doc J6, pp 1–4); Te Horete 1B1, 1896 (registration of transactions without the court’s certificate) (doc J6, p 3); Te Horete 1B2, 1896 (lack of explicit deed of transfer or deed receipt) (doc J6, p 4); Ahuroa 1, 1873 (alienation before formal removal of restrictions) (doc D4, pp 13–16); Papakitatahi, 1891 and 1896 (doc H1, pp 22–24). There are many such examples, but it is not always clear whether there was an actual failure to comply with the legal requirements or simply an absence of documentation showing that the requirement had been fulfilled.

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customs and usages the owners whereof *had* been determined by the court.¹⁹³ By section 73, customary land was to come under the Land Transfer Act and a certificate of title under that Act was to issue in respect of any order of the court. Meanwhile, the court was to maintain a provisional register of land subject to its orders. In practice, most Maori land was still not registered under the Land Transfer Act and in effect New Zealand still has a separate land registry for Maori land, in spite of efforts to consolidate it into the registry for general land.

Important changes were also made to the law regarding to succession to Maori land in an effort to better meet Maori preferences (see sec 16.3.5).

A central feature of Liberal policy towards Maori land in the 1890s was that Crown land purchase officers were still empowered to buy undivided interests in Maori land, then apply to the court for a partitioning out of the Crown's share of the block. Crown purchasing proceeded vigorously, including in Hauraki, as we discuss in the following chapter.¹⁹⁴ Under the Lands for Settlement Act 1894 settlers were assisted by State loans to take up newly purchased or subdivided Crown lands, but Maori generally did not qualify for loans from the Advances to Settlers Office because of the complexity of Maori titles. In the face of rising protest from the Maori members of Parliament, a small concession was made in 1897 to the effect that Maori holders of individual titles could get state advances provided the land they offered as security was let and the rents were assigned to meet instalments on the loan as they fell due.¹⁹⁵ We have no information as to how much this provision was used in Hauraki, but few Maori there would have qualified for it.

Another feature of the 1890s saw restrictions on alienation weakened. Further amendments in 1892 and 1893 limited the application of restrictions in respect of Crown purchases. Section 52 of the consolidating Native Land Court Act 1894 allowed the court to remove restrictions on the application of one-third (rather than a majority) of the owners, save that restrictions placed before 1888 also required the authority of the Governor in Council on the advice of the Justice Department.¹⁹⁶

193. Section 2 of the Native Land Act 1909 reversed this nomenclature and introduced the definitions which we know today: 'Native land' includes both 'customary land' and 'Native [Maori] freehold land'. 'Customary land' is land which, 'being vested in the Crown is held . . . under the customs and usages of the Maori people' and 'Native [Maori] freehold land' is land or undivided shares in land 'owned by a Native for a beneficial estate in fee simple, whether legal or equitable'.

194. Brooking, 'Busting Up', pp 78–98. Brooking has written 'busting' but the word actually used by Ministers (in relation to the Liberals' policy of breaking up great landholdings, largely in the South Island, for closer settlement) was 'bursting'.

195. J Williams, *Politics of the New Zealand Maori*, p 122; Tom Brooking, *Lands for the People?* (Dunedin: University of Otago Press, 1996) p 316 fn 57

196. Document A9, pp 97–98. Dr Anderson also notes the impact of an 1893 Court of Appeal decision regarding the Puhatikotiko block in the Gisborne district which effectively annulled restrictions placed under section 48 of the 1873 Act, where memorials of ownership had been replaced by the issue of Crown grants under the Native Land Court Act 1888.

As we have seen, Native Department officials had attempted some paternalistic control on removal of restrictions, but the court lacked resources to make careful checks on applications. Unless objections were made in court, judges seem to have accepted vendors' assurance that they had sufficient other land for their subsistence and approved applications for removal as a matter of form. Dr Anderson states:

From 1889 to 1909 the Native Land Court seems to have almost invariably endorsed owner requests for the removal of restrictions from title in the Hauraki district. It recommended that restrictions be removed in 70 of the 80 blocks for which application was made and the disposal of which has been traced in this study.¹⁹⁷

16.3.4 The Validation Court and Kuaotunu 3

The Validation Court was little used in Hauraki, but the Wai 110 claimants (Ngati Hei) claim to have been prejudicially affected by it in respect of the Kuaotunu 3 block. Counsel for the claimants states:

it is alleged that this court, although supposedly investigating the bona fides of the original transaction with Maori, was in general terms actually only another mechanism to confirm settlers in disputed blocks. Evidence will be led indicating that Ngati Hei, at considerable expense, sought relief from this court and protection against exploitation by private commercial interests, but were turned away for lack of jurisdiction.¹⁹⁸

The evidence in Mr Walzl's overview report for Ngati Hei shows that the dispute involved the Maori owners of Kuaotunu 3, the Crown, a timber merchant named Meikle, and KTC, to whom Meikle sold his interests in 1888. About 1885, the Maori owners entered into an agreement for the extraction of the kauri on the block, receiving the approval of the trust commissioner. Meikle and KTC subsequently treated the transaction as a lease, not merely a timber agreement. In 1889–90, gold was found on Kuaotunu, and the Maori owners, after discussion with the mining warden at Thames, initiated negotiations with the Crown, first for a mining cession and later for purchase of the freehold. These negotiations were blocked by KTC, which in 1895 applied to the Native Land Court to have its lease and timber rights validated. Gilbert Mair, who took up duties as land purchase officer in the district in 1894, wrote condemning 'the selfish and arbitrary action of the Company in obstructing mining operations. Moreover, it had objected to the Natives residing on the block, claimed the gold revenue and exclusive right to all timber, whereas the owners asserted that they only agree to sell the kauri trees.'¹⁹⁹

197. Document A9, pp 96, 98

198. Document N12, p 11

199. Mair to chief land purchase officer, 16 July 1868, MLP1902/40 (doc N9, p 135)

Mair urged his superiors to oppose KTC's lease because of irregularities he had detected in it, and because the company was blocking development under the mining cession or Crown title. Wellington officials, suspecting that the company was trying to position itself for a compensation claim against the Crown, instructed Mair to oppose the company in the Validation Court.

Meanwhile, one of the Maori owners, Ereata Tinarau died before he could sign the deed of sale to the Crown. Two women appointed as administrators of his estate travelled to Thames and Auckland hoping to be recognised as his successors: a vain effort because of confusion about Tinarau's will.

In November 1895, the Validation Court dismissed the company's application on the ground that the Validation Act 1893 prevented it making any decision prejudicial to the interests of the Crown (which claimed under a deed of conveyance and also under the Mining Act 1892). The following year, the Crown applied to the Native Land Court to have its purchase defined, and was awarded 3867 acres, partitioned out as Kuaotunu 3A.

The Maori owners had received no relief from the Validation Court. Mair later reported:

So strongly did the Natives feel on this matter [their dispute with KTC] that they travelled via Auckland to Thames per steamer, at considerable expense, to oppose the Company in the Validation Court, retaining Mr Earl to assist them. At this time most had sold to the Crown, but had not drawn all the purchase money, besides they claimed an interest in the unsold share . . . [When the company's application was dismissed, the] Natives were greatly disappointed at not having the opportunity of bringing forward their objections, as they wished to show that they had been deprived as to the sale of kauri trees being converted into a lease over the whole block for 21 years and made to include all the other kinds of timber . . . The Natives were advised that the Deed [regarding the timber] was contrary to the provisions of the Native Land Act of 1873, containing as it did a premium and pregift and section 62 had not been complied with. The Maori interpretation was quite unintelligible and appears to have been added after the deed was executed, as it is a matter for wonderment how a Trust Commissioner came to grant a Certificate on such a document.²⁰⁰

The company petitioned Parliament, claiming that it had been deprived of its interests in the timber. The Native Affairs Committee concluded that the company was not aware of the deficiencies in the deed when it purchased from Meikle, and the Crown, having approved Meikle's transaction according to Native Lands and Frauds Prevention laws, was obliged to pay the company £750 in settlement. The Maori owners had lost their claim over the timber but had received payment for the freehold at the rate of 10 shillings an acre.²⁰¹

200. 'Report of Native Affairs Committee on Petition 287/1897', MLP1902/40 (doc N9, pp 135–136); see also doc N10, p 29

201. Document N9, pp 121–136

In this instance, the Validation Court had not assisted Hauraki Maori. It is not evident, however, that the reference to the Validation Court of itself had prejudiced their interests further, except in the costs they had incurred in expectation that their grievance would be investigated. They had alienated mining rights and then most of freehold interests in the block to the Crown before the KTC claim came before the court, and the court supported the Crown against the company. What the whole episode shows, however, is that the Maori owners were caught up in legal wrangling not of their making, but deriving from the Native Land Acts and their application. In this situation, the Kuaotunu owners were at a disadvantage from the outset, because (according to Mair) the Crown, via the trust commissioner, had certified a very dubious transaction by Meikle in 1885: namely, the alienation for ‘£60 and 13s [*sic* one shilling?]' per annum of ‘six million feet of kauri timber, to say nothing of the vast quantity of puriri, pohutukawa, titree [manuka and kanuka]’ over a block of 4900 acres, for a period of 21 years.²⁰² Then they were obliged to attend court at considerable expense, not only over KTC’s claims but over a succession dispute involving a will. The confusion and hopelessness of the situation was well expressed by the chief land purchase officer over a suggestion by the court’s registrar to schedule a hearing over the succession to Tinarau’s interest: ‘He can if he likes, but I am not going to bother any further. I wish we had let the whole thing alone. I am sick of it. It is a muddle from end to end.’²⁰³

If a senior Government officer felt tired and muddled, Maori must have been at least as confused and frustrated. This was the end result for Kuaotunu owners and Maori generally of 40 years of Crown intervention, including many commissions and committees of inquiry, many changes of government and policy, and endless amendments to the law. The Kuaotunu owners’ attempt to alienate only the timber and the mining rights was blocked, or only able to be secured (if at all) after yet more heavy expense in attending court in Auckland and Thames. Under the circumstances, some owners apparently saw no better option than to offer their interests to the Crown, get money in hand and be rid of the difficulties. Once some owners took that course, others would be under even greater pressure to follow. As we discuss in chapter 17, it was a sequence repeated frequently in Hauraki.

16.3.5 Succession issues from the 1870s to the 1890s

(1) *Problems with wills and probate*

While the courts had decided by 1890 that non-Maori could not succeed to Maori land which had *not* passed through the court (such land being still under customary tenure), they had also decided that land which *had* been clothed with a court title could be passed

202. Mair to chief land purchase officer, 16 July 1898, MLP1902/40 (doc A10, pt 1, p 272)

203. Document N9, p 132

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by will to persons outside the lineage of the testator, including non-Maori.²⁰⁴ This differed markedly from the more usual situation, intestate succession, by which interests of the deceased were divided among their children or (if there were no children), among other kin in the descent line.

In the first decades of operation of the Native Land Acts, Maori other than important rangatira rarely made written wills, although customary ohaki – oral expressions of wishes regarding succession and other matters made shortly before death in the presence of kin – were quite common. However, ohaki sometimes gave rise to confusion in the Native Land Court as to their interpretation, and section 33 of the Native Land Laws Amendment Act 1895 declared that neither land nor personal estate could be devised by ohaki. Bennion and Boyd comment, however, that the Native Land Court still commonly had regard to ohaki in deciding disputes about the disposition of undivided interests in land (as opposed to whole blocks), gifts, and disputes about the rights of whangai (adopted children).²⁰⁵

Meanwhile, as the decades passed Maori written wills became more common, and the procedure for granting them probate came under review. Under the general law, probate of written wills, including those drawn up by Maori, lay with the Supreme Court, and until 1890 the Native Land Court had no jurisdiction over the succession to land devised under a will. A report by Ms Dingle for the Wai 177 claimants points out that the Native Lands Act 1865, the Native Rights Act 1865 and the Native Land Act 1873 all required matters relating to Maori interests in land inter se to be referred by the Supreme Court to the Native Land Court. Supreme Court judges regularly disavowed any expertise in the area and referred to the Native Land Court any matters requiring clarification of rights as between Maori. It was therefore anomalous for probate of Maori wills to remain with the Supreme Court, since although they could involve devolution of an estate to a non-Maori, as we have discussed, land under land court titles was still regarded as a modified form of customary tenure.²⁰⁶

A second problem concerning Maori wills was that the procedure of the Supreme Court made it difficult for Maori with concerns about them to object. The executor of an estate could apply for probate and have the matter heard in chambers, often in a town distant from the land. Notification of pending probate hearings in the nearest Supreme Court often did not reach interested Maori in rural areas, and the caveats had to be lodged before the hearing. In short, it was difficult for interested Maori to know of, or involve themselves in, a probate hearing in the Supreme Court.²⁰⁷

204. Tom Bennion and Judi Boyd, *Succession to Maori Land, 1900–52*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), p 15

205. Bennion and Boyd, pp 12–13

206. Document D3, pp 23–29; doc R21, p 38

207. Document D3, pp 29–38; doc R21, pp 38–39

(2) Case studies from the Wai 177 claim

Counsel for the Wai 177 claimants (the Gregory–Mare whanau) and the Wai 693 claimants (Ngati Huarere–Raukatauri) claim that by permitting the devolution of land by will outside the descent line the Crown failed ‘to actively protect the customary principles of Maori succession and therefore their landed interests.’²⁰⁸ They cite the following three examples from the 1880s and 1890s in which land was transferred by will outside the kinship line (including to a Pakeha spouse) and soon sold.²⁰⁹

(a) Totara-whakaturia 4: The Totara-whakaturia block of 1642 acres, south of Coromandel, was surveyed and partitioned (for no obvious reasons and at excessive cost in relation to the size of the partitions) in 1886–88. There is evidence that some of the subdivisions were sold in order to meet the costs, but not the 226-acre Totara-whakaturia 4, which was vested in sole ownership to Maraea Takitu, who died childless on 22 May 1890. If Takitu had died intestate, the land would have passed under land court rules and practice to other close kin in her lineage, probably brothers and sisters. But her written will devolved her interests in the block – and in nearby Pukewhau and Tutaemahia – to her Pakeha husband, Gwyn Glesson (who was also executor of his late wife’s estate). Without reference to Takitu’s kin, Glesson applied for probate in the Supreme Court. It was granted and Glesson promptly sold the land (or it was sold on his behalf by the sheriff of Auckland) to cover debts. When objections were later raised in the Native Land Court by Takitu’s Maori kin, that court ruled that the Supreme Court’s decision was binding. Claimants have submitted that the law allowing alienation by written will away from the hapu, and in this case to a Pakeha, breached the Crown’s duty under the Treaty to protect Maori land.²¹⁰

We note that, once it became aware of Maori concerns that Maori land was being transferred out of the line of deceased Maori by will (in contrast to the provision in regard to intestate estates), the Legislature moved to bring the law regarding written wills into line with Maori wishes. This is tantamount to an acknowledgement by the Crown that Maori tikanga in regard to succession had not previously been adequately protected in this respect, and that alienation of the land outside the line of the deceased could occur. We are therefore satisfied that the claimants’ view of this matter has been established in respect of Totara-whakaturia 4, and that there was a prejudicial effect in relation to the 226 acres concerned.

208. Document Y9, p 74

209. Mr Te Iri, for the Wai 355 claimants, also cites an instance of intestate succession by a Pakeha spouse to the interests of a deceased Ngati Pu woman, which contributed to the erosion of the original hapu estate: doc K16, para 2.5. David Robson, for the Marutuahu claimants, cites the alienation by will of a large proportion of his whanau’s interests to a Pakeha lawyer, partly as a result of a compulsory status change of Maori land to general title in 1967: doc X33, pp 10–11. We discuss the implications of the 1967 Act for succession in chapter 18.

210. Document D12

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16.3.5(2)(b)

(b) **Pukewhau:** As with Totara-whakaturia and Tutaemahia, Maraea Takitu's interest in the 117-acre Pukewhau block was alienated by written will to her Pakeha husband Glesson. Glesson died soon after Maraea and the Public Trustee sold his interest in Pukewhau to one John Lynch, who was in process of acquiring other owners' interests in Pukewhau. Had Maraea's kin, rather than her husband, succeeded to her interest in Pukewhau (as would have occurred had she died intestate) it is likely that her interest would have been sold to Lynch along with the other interests, but at least they would have received the payment.

(c) **Wharekawa East 2:** The 6921-acre Wharekawa East 2 block was created in 1872 during the hearing of the Whangamata, Hikutaia, and Wharekawa East blocks, with alienation restricted to a lease of up to 21 years. Although the title was in the name of Hohepa Paraone solely, as the oldest living descendant of the ancestor through whom the block was claimed, it is probable that the wider group of owners would have viewed him as their trustee. Paraone died in March 1882. He had drawn up a will in favour of his wife, Maata, itself a departure from customary norms, but she had pre-deceased him. A second will devolved the entire block to Hohepa Hikairo who, although not a close kinsman, had nursed Paroane in his final illness. Te Uruwehea Caird stated that Mikaire, her grandfather, was a whangai of Paraone.²¹¹ Hikairo presented this will to the Supreme Court in July 1883 for probate, which was granted. Paroane's closer kin subsequently contested the will in the Native Land Court, WH Taipari alleging it to be a forgery, and Hikairo's own solicitor expressing some puzzlement about its existence. However, the land court declined to go behind the decision of the Supreme Court. In 1886, the district land registrar registered Hikairo as the owner of the fee simple of the block. He had already begun to try to sell the land, and then (because the title was restricted) to lease it.

In October 1885, James Mackay secured a lease over the block – which Hikairo signed – at an annual rental of £100, for which he would receive the right to cut timber other than kauri and to mine for all metals and minerals, subject to payment of a royalty to the lessor of £2 10s per centum on net profits. Mackay paid an advance of £5 and undertook to advance £300 to Hikairo, to be charged against the first three years of rent, in order that Hikairo could discharge a debt to a Mr Douglas and others. Mackay agreed to make this payment as soon as he could form a company to work the minerals and timber. (The land was not within any proclaimed goldfield.) He was also prepared to let miners cut kauri timber for mining purposes on payment of fees to the Maori owner or owners at the same rate as set in the mining regulations.

Before Mackay got far with his negotiations, however, Warden Kenrick, on behalf of the Crown, began (in October 1885) to negotiate with Hikairo for the freehold of the land, at the rate of five shillings an acre. After a brief attempt to secure 10 shillings an acre (possibly on

211. Document 125, p 5

the basis of a tentative offer by Mackay of this amount) Hikairo accepted the Crown's offer. The Crown, however, now had to see that Mackay's leasehold interest was extinguished. After some legal manoeuvring seeking a much higher figure, Mackay reluctantly accepted £250 to relinquish his interest, complaining that the interference of the Government had caused the New Zealand Timber Company to withdraw from negotiations to work the timber and minerals on the land. The Crown then withdrew the restrictions from the title in favour of its own purchase (having told Mackay that they would not do so in favour of a purchase by him). It completed its purchase in September 1886, for payments totalling £1750. A wahi tapu reserve of 21 acres was demarcated in the block, but still within the Crown's freehold, not under a separate title.

The history of the block reveals a number of features which the claimants consider prejudicial to their interests:

- ▶ First, Paraone's written will transferred the land to Hikairo, whereas by intestate succession it would have passed to his close kin. It is beyond our jurisdiction to comment on the alleged forgery of the will, nor is there adequate evidence to decide the question. However, we can comment on the effect of the relevant law. The root of the problem lay in the original award of the title (in this case to a very large block) to Hohepa Paraone solely, as an absolute owner in law, not as a trustee for the hapu. We have commented earlier on the prejudicial effects of this. As regards the devolution of Maori land by will, it is clear that the whanau of the deceased were affronted by not inheriting, as they would have had Paraone died intestate.
- ▶ Secondly, the restrictions on the original title were consistent with the desire of the hapu to reserve the land for their future needs. Their removal by the Crown to facilitate its own purchase frustrated the negotiations being pursued by Mackay. The claimants' researcher, Ms Dingle, points out that had his lease been completed the rentals offered by Mackay would have amounted to some £350 more (over the 21 years) than the Crown paid for the freehold. There might also have been additional payments of the kauri (and in principle for gold, though none was found.) How much of the rental payments would have reached the wider group of owners, as distinct from Hikairo personally, is another matter.²¹² Although it did not proclaim the block under the 1877 Act, the Crown's control was secured through the process of removing restrictions (which at that stage lay with the Governor in Council rather than the Native Land Court).

(3) Legislative changes regarding succession, 1890–94

Ms Dingle, for the Wai 177 claimants, has shown that the problems surrounding wills were highlighted by James Mackay in his 1887 booklet, and by evidence given to the 1891 Rees–Carroll commission that some Maori were forging wills or forging signatures on wills.²¹³

212. Document D14, pp 17–19

213. Document D3, pp 39–42

16.3.5(3)

The Legislature was becoming aware that the Supreme Court was an inappropriate forum for probate of Maori wills, and the Native Land Laws Amendment Act 1890 gave the Native Land Court the same powers as the Supreme Court of granting probate and letters of administration of Maori estates, both personal and landed.

The Native Land Court Act 1894 then made several changes which affected succession to interests in land:

- ▶ The Native Land Court's jurisdiction over probate of Maori wills was made exclusive. It was now possible for concerns about the devising of property through wills to be heard in a forum with which Maori were familiar and where they could raise issues of customary right which might conflict with disposition of property by will.
- ▶ The concept of 'successor' was introduced, varying the formula used since 1865. A successor was 'the person who, on the death of any Native, is, according to Native custom, or, if there be no Native custom applicable to any particular case, then according to the law of New Zealand, entitled to the interest of such Native in any land or personal property'. For intestate succession, this reinforced the existing preferences in favour of children, then others of the bloodline (rather than spouses), as established under the Papakura rule.
- ▶ The Native Land Court was empowered, within limits, to vary the strict terms of a will. As counsel for the Wai 177 and Wai 693 claimants point out approvingly, section 46 provided that if, as a result of devolutions of property by will, any successor 'has not, with the land so devised, sufficient land for his support', the court could award him or her part or all of the land concerned. Thus, the court could at least consider modifying the terms of a will in cases where the testator had devised the land to persons other than his customary successors (eg, to spouses), and where it appeared that a successor had not sufficient land for his or her support.

There were obviously competing priorities as between the rights of widows and the rights of customary successors, and the Legislature was trying to find the appropriate balance. In 1894, it had gone some way towards bringing testate succession closer to intestate succession, where successors were found to be land-short. Had the 1894 Act been in force in the cases cited by the Wai 177 claimants, the Native Land Court might, on the protests of the whanau, have prevented the whole Wharekawa East 2 and Totara-whakaturia 4 passing by will outside the bloodline. We can never know this for certain, however, because the court would also have had to be satisfied that the successors would, without its intervention, be without sufficient land for their support.

The problem of striking a balance between the rights of whanau and the rights of spouses, the principles of custom vis-à-vis the right to devolve one's property by will, persisted into the twentieth century. The Wai 177 claimants, among others, are unhappy that section 46 of the 1894 Act was repealed by the consolidating Native Land Act 1909, and that other

measures taken by the Crown (notably in 1967) further eroded Maori tikanga regarding succession to property. We discuss succession in relation to the twentieth century in chapter 18.

16.4 THE NATIVE LAND ACTS 1873–99 : TRIBUNAL COMMENT AND FINDINGS

We have commented in the various preceding sections on a number of specific issues, such as the nature of titles created under the principal Acts, court and survey costs, and other matters. We refer readers to our comments in those sections. We summarise here our views on Maori land law from the 1873 Act to 1899, in the light of the Crown's Treaty guarantees to Maori.

In the light of the evidence analysed in this chapter (notably the main trends of legislation relating to Maori land) and the arguments set out above, we have reached the following conclusions:

- ▶ There were good reasons for the Crown to establish a tribunal, independent of the Executive, to determine intersecting and disputed claims to Maori customary land, and to administer legislative modifications to customary tenure to meet new needs. The tribunal actually established, however – the Native Land Court – was in many respects unsatisfactory, particularly because of the kind of role that Maori were limited to playing in it. We accept the evidence that the Maori assessors could and occasionally did play a significant role in the court, and that the court commonly allowed or required claimants to draw up lists of names outside the court for inclusion on titles, a practice that may have contributed to genuine Maori consensus. But we note also the persistent, growing and legitimate Maori demand that their own institutions be given more authority in determining customary interests, and that this demand was given little recognition. We draw particular attention to the alternative and practicable proposals put forward by Maori leaders (notably Wi Pere's 1884 Bill) and by James Mackay in 1887, which proposed vesting much more authority in the local Maori leadership, guided but not supplanted by Crown officials.
- ▶ We accept also that Maori land tenure could not remain static, frozen in 1840 modes. To meet both Maori and settler needs, it had to evolve in response to demographic change, population movements, the requirements of mining, commercial agriculture and other land uses, including its sale, lease or development, both in townships and rural districts. But there were many possible options for giving greater clarity and definition to land rights without full-scale tenure conversion and abrogation of the customary base. Full tenure conversion to English forms of title would have been appropriate in some situations but need not have been applied to all Maori land.

- ▶ We note Mr Hayes' comment that 'The conversion process was arbitrary.'²¹⁴ If this means that it was imposed upon Maori without serious discussion with them of possible options, which the evidence reviewed above confirms, then it was arrived at by processes that were inconsistent with Treaty principles. There was very little formal consultation with Maori over the goals of tenure change and over draft legislation. Before the 1868 elections Maori were not represented in Parliament, and when they were, they were not seriously asked what *they* wanted by way of land law. Maori were consulted to a limited extent in the 1880s, especially 1885, but the results of that consultation did not fully reflect the understandings arrived at.
- ▶ The evidence of Crown and claimant witnesses alike leaves no doubt whatever that the primary purpose of the Native Land Acts was to facilitate in this period the acquisition for settlement of the remaining 'waste' land still in Maori ownership in the North Island, and to do so largely through direct, private purchase. Some settlers were prepared to occupy a proportion of the land through leasehold, though reluctantly. In general there was a determined drive to acquire the freehold, and fierce resistance to the prospect of 'Maori landlordism'. This was reflected in the way that the land laws evolved. Crown purchase was facilitated by some governments and 'free trade' in Maori land by others, but the alternative proposed, of control of the adjudication and alienation processes by committees and boards of Maori owners, assisted but not dominated by the Crown, was repeatedly rejected in Parliament.
- ▶ Many settler leaders were quite genuine in their assumption that Maori would benefit economically and socially from converting their customary tenure to a title from the Crown. But the 'civilising mission' aspect was a secondary motivation, not the primary one, and it exhibited an ethnocentric and paternalistic tendency to prescribe the kinds of tenure to which Maori customary land would be converted, rather than work closely with Maori to design forms of tenure which reflected Maori aspirations. The changes did not provide the beneficial results intended – rather the reverse – and this was frequently acknowledged in official inquiries and parliamentary debates. Good intentions are not enough for adequate fulfilment of the Crown's Treaty obligations to Maori.
- ▶ Even when successive governments and official inquiries recognised the damaging effects of the land law on Maori society, the remedial or protective measures taken were often limited or temporary, and were reversed by later governments. The stream of legislation from 1873 to 1899 continued to be overwhelmingly directed towards facilitating the acquisition of Maori land by the Crown or private purchasers, not towards development by Maori of their own land.
- ▶ On the issue of whether the court process was virtually obligatory upon Maori, the weight of evidence supports the claimants' view:

214. Document Q1, p13

- First, while Maori had been empowered (in the 1862 and 1865 Native Lands Acts, and the Native Rights Act 1865, an empowerment continued in and after the 1873 Act) to sue in the regular courts in relation to their land, it was provided that those courts could not have cognisance of such actions until the owners had been identified in the Native Land Court. This policy effectively obliged Maori to put their land through the court if they wanted their rights to it recognised in law.
- Secondly, where (as was usual) the rights of various groups intersected, an application to the court by one party would oblige others to join the process. The legislation, other than the 1886 and 1900 Acts, made it relatively easy for a small number of individuals or one claimant group among many intersecting owner groups, to apply to the court.
- Thirdly, governments regularly denied requests by Maori to empower their runanga or councils to perform the functions entrusted to the court. The most that Maori committees and councils could do was advise the court on customary ownership. Some committees, including the Hauraki committee, did useful work in this regard. (Under the inoperative 1886 Act, they could have instructed a Government commissioner as to the terms of alienation.) But Maori requests for stronger powers to determine ownership were declined, and attempts to boycott the court could not be sustained, as one or other intersecting groups of owners would lodge an application.
- Lastly, it was not only Maori who could initiate action in the court. From 1873, the Crown could apply to the court for a definition of its interests in blocks where it had commenced transactions. From 1878, so too could any interested private party.

It was thus very difficult for Maori not to be drawn into the court, especially in respect of blocks in which some of the owners had accepted payment charged against the land. The fact that Maori went to the court (even when they did so entirely voluntarily) does not mean they were content with the process or the forms of title that emanated from it.

- ▶ Because the court was virtually obligatory, the issue of court and survey costs is important in Hauraki.
 - The costs of surveys and of attendance at court were undoubtedly high, especially for people who had little or no reliable income stream. Survey costs usually had to be met by selling land, often in a restricted market. The ‘titling’ of Hauraki land was usually a prelude to its sale, rather than to its development. Some Maori right-owners may have gained some potential benefit through having boundaries defined and disentangling their interests from those of rival hapu and iwi. They also received immediate payment for sales, though much of that was commonly subsumed in covering debts already accrued in putting the land through the court,

and in day-to-day living expenses. But it is difficult to see what Maori gained, in the medium and long term, from having their land surveyed and passed through the court: most commonly it was the prelude to a succession of partitions and sales. On the other hand, the purchasers of land, including the Crown and the general community, gained from putting Maori under the obligation of having full surveys made of their land.

- The Crown's efforts in this inquiry to arrive at more accurate data on the costs of survey and court attendance than is usually available are helpful, but mostly serve to confirm the high cost of surveys for Maori (and the interest that accrued on unpaid survey liens). We note the Crown's concession that, because of the public benefit involved in surveys linked to the national triangulation system, and because of the national interest involved in settlement of the land, some contribution by the Crown towards survey costs would have been appropriate. In this context, we note also the remarks of Mr Hayes that undeveloped Maori land had low commercial value and that Maori were as yet not well-integrated into the commercial economy. For these reasons, survey costs bore heavily on them and involved the alienation of considerable areas (commonly between 10 and 20 per cent of the land by value). We agree with the claimants that the costs of survey and titling of Maori land should have been shared more equally between Maori owners, private purchasers, and the Crown than was in fact the case. (There is some evidence to show that the Crown did accept the cost of surveys in some of its 1870s purchases; there is also evidence that it was neglectful of surveying the reserves promised in purchase negotiations.)
- For all these reasons, we believe that with respect to initial surveys of exterior boundaries of blocks, and the marking off of reserves, the Crown or private purchasers should have accepted the greater part of the cost – as was in fact suggested in some early Crown proposals, such as Grey's 1847 proposals for direct dealing and in some of the draft proposals leading to the Native Lands Act 1862.
- Subdivision surveys may often have had different purposes, some community oriented, some factional; it is not unreasonable that Maori should have carried most of the cost of these. Many of the subdivision surveys were unnecessary, they often quickly became redundant. The multiplication of surveys was a by-product of a land law that fostered partition or allowed it too readily. However, we note that many partitions ordered by the court were 'paper' partitions only, not followed by survey or physical demarcation of the land.
- The Crown has pointed out that until 1878 Maori had to agree to have their land charged with survey costs (which they commonly did). Or they simply accepted it as a debt, which they felt obliged to repay, usually by selling land. From 1878, the Crown began to take power to recover survey costs, by court order charging

the land. The question of how far Maori understood the extent to which taking land into court would cost them (usually as a proportion of the land) is very problematic.

- Finally, on this question, we note that, although they may have received some benefit and added value from having their land surveyed, non-sellers too were faced with costs for survey of their portion of lands which were the subject of transactions initiated by others, and in which they wished to have no part. Repeated partitions and sales commonly left the non-sellers with small, land-locked and uneconomic parcels of land, saddled with debt incurred for survey.
- ▶ Claimants have strongly criticised court awards for failing to recognise accurately the customary pattern of rights. This failure entailed either or both of two faults: (a) that the court, in trying to determine which among intersecting or competing claimants actually did own the rights in the land according to custom, failed to interpret tikanga correctly and awarded the land to the wrong people or at least excluded some who customarily owned interests; or (b) that, even where it had accurately discerned the customary right-owners, the titles the court awarded ignored or did not accurately reflect the complexity and fluidity of custom.
 - As to the first, the Waitangi Tribunal is not in a position to comment on the findings of the courts, including the Native Land Court, in particular cases. We believe that the process of adjudication would have benefited from community meetings and discussion, in which whakapapa and the history of connection with the land could be publicly heard and tested. In this regard, the 1862 version of the court (with a local official chairing a commission of Maori judges and possibly a local jury) might have met Maori aspirations better than the more formal post-1865 court, dominated by the European judge. The limitations of the latter form of tribunal were potentially offset, to some extent, by the court's increasing encouragement of out-of-court arrangements and by the advisory role given to Maori committees after 1883. We have concluded earlier that such committees should have been given much greater powers. Whether they should even have completely replaced the court (perhaps with an official chairperson), as many Maori leaders demanded, is a matter for serious consideration, but was only lightly touched upon in evidence in these proceedings. We have noted above that rehearings occurred in some 10 per cent of cases and that there were numerous petitions to Parliament in respect of cases where rehearings had been refused or lodged after the expiry of the period allowed for application. The establishment of the Maori Appellate Court in 1894 was a needful reform, but one which was not made until most customary land had already passed through the court.
 - As to the second criticism, the 1862, 1865, and 1873 Acts (and later Acts) made no pretence that the titles to be awarded would reflect custom in all its complexity

and fluidity. On the contrary, the legislation aimed at simplifying custom for the purpose of dealing in or developing the land. This would not be inconsistent with the Treaty *provided* it involved reasonable Maori input at the planning stage in the tenure changes proposed and the introduction of tenures suited to Maori needs and purposes and a genuine choice for the owners as to whether they put their land through the system. In neither respect was this the case.

- ▶ The 1862 Act offered the prospect of a two-stage process for tenure change: first a 'tribal' title would be defined, then (under sections 21 to 26) Maori could come back to the court with a 'plan' or 'regulations', defined with the help of the Governor (ie, officials) for the subdivision of part of their tribal land into individual holdings, townships, roads, and so forth. The Crown has argued that the 1873 Act returned to this two-stage plan. Had such a plan been implemented, Maori communities *as communities* could have made genuine choices as to how far they wanted to modify customary tenure and over what portions of tribal land. But under the 1873 Act this process could not readily be used. Individual shares in practice were negotiable and there was no mechanism to ensure that hapu members as a whole were fully informed and consenting parties. The objective of facilitating sale became dominant, land development was subordinate and the two-stage process effectively non-existent, in 1873 as in 1862.
- ▶ The court-developed rules on intestate succession (essentially a division of the estates of both parents equally amongst all children, without any residence requirement) were a significant departure from custom and, along with increasing mobility of population, contributed significantly to land interests being held by absentee owners. They also led to the increasing fractionation of shares in titles once the Maori population started to increase (although the extent of this was hardly foreseeable in the 1860s, when the Maori population was declining). However, by the 1880s Maori themselves had become accustomed to the principles adopted; although the right of all children to succeed in equal shares to their parents' interests was not entirely customary, they tended to regard the right as a version of tikanga and resisted efforts by the Legislature to have succession conform more closely to English rules. Being possessed of an interest in the land of one's parents or grandparents became increasingly valuable as a mark of identity and belonging to a hapu, regardless of the economic worth of the interest. But with the increasing numbers on titles, the want of a legal mechanism for the named owners to act corporately was increasingly felt.
- ▶ There was undoubtedly resistance on the part of some owners to restrictions being placed on titles, and over the decades there was a steady stream of demands for removal of restrictions where they had been placed. The Crown's view is that excessively restricting alienation could have involved 'inappropriate paternalism' which would have interfered with the balance between freedom and protection that governments, and many Maori too, were seeking. However, it is often unclear whether transactions

by the named owners, and requests for removal of restrictions, were underpinned by community discussion and consent. The most common practice in Hauraki after 1873 was the piecemeal purchase by the Crown of undivided individual interests, followed by application to the court for award of its proportionate share and a partition of the block; the process was then repeated at a later date, with many blocks being alienated completely over the years. We accept that there is a very strong case (as was made, for example, in the proposals by Wi Pere and by James Mackay) for some land not merely to be under (removable) restriction on title but to be made a permanent hapu patrimony, absolutely inalienable save for fixed-term lease or occupation licence (including leases and licences to members of the hapu).

- ▶ The Crown has raised the issue of ‘inappropriate paternalism’, meaning measures taken or considered by governments to protect Maori from unrestrained market forces or Maori inexperience in forms of commerce new to them. But protection of Maori was the duty of the Crown under the Treaty. To us, ‘inappropriate paternalism’ suggests the taking of property decisions for Maori without consultation, treating them in law as irresponsible and incompetent minors, and failing to provide them, through participation in the administration of their own property, with the experience and mechanisms to make their own commercial decisions. An example would be to limit the extension of credit to Maori, as McLean suggested in 1869, or to exclude them from participation in the administration of their own lands, as was done in the goldfields. In our view, the provisions made in the 1873 Act were appropriately protective rather than paternalistic: these provisions debarred the taking of undivided interests in land for debt, and prevented mortgagees from foreclosing on a mortgagors’ right to redeem a mortgage. Maori land with a court title could, however, be mortgaged until 1878, when the law was amended to prevent it on the advice of the trust commissioners.

Claimant witnesses and counsel seem ambivalent on this issue. Some complain at the restriction on Maori access to credit, but the stronger complaint is about the loss of land due to pressure of debt, mortgage foreclosure and other causes. Given the inexperience of most Maori in land transactions and credit arrangements in the period 1873 to 1899, we think it appropriate that mortgaging of land under court titles was halted. Only in the case of a person holding a genuinely individual title under Crown grant would it be appropriate.

The issue of appropriate or inappropriate paternalism also arises in relation to the issue of compulsory investment of purchase moneys, a measure considered in the drafting of both the 1865 and 1873 Acts but not implemented. Crown counsel has said that Maori would not have accepted that kind of interference by the Government, but the principle was applied in the Crown purchase of Stewart Island in 1865. A comparable equivalent in the post-gold rush economy, and one actually suggested by some former senior Crown officials, including Sir William Martin and James Mackay, was

that some of the payment should be in Government bonds, or in shares in mining ventures. It is likely that there would have been some resistance to the compulsory investment of purchase moneys, but there is no obvious reason why such arrangements as investment in revenue-producing ventures, or in education and training, should not have been put before the leaders of Hauraki tribes, as part of a planned development of the rohe after 1873. There is no evidence of such proposals being discussed with Maori leaders in this period.

- ▶ The 1873 Act was a complex Act. Its final form and administration did not reflect all the intentions of its principal planners (notably McLean, using a draft by Sir William Martin). Maori opinion was not systematically sought on a draft, and the evidence is unclear as to how far the opinions of Maori witnesses before commissioners Haultain (1871) and C W Richmond (1873) influenced the outcome.

The central feature of the Act was the memorial of ownership issued by the court, and widely used in Hauraki (before the term 'certificate of title' was resumed in 1880). The memorials were supposed to list the name of every 'owner' (person interested in the block), and they are regarded by most historians, and by the claimants, as an extreme expression of the individualising objective of the Legislature. Mr Hayes, however, has argued for the Crown that the memorials were intended to be a form of 'communal' title, a customary title (albeit modified by statute.) It certainly seems to have been the intention of some of the principal authors of the legislation to restore a measure of 'tribal' control, but the general provision (s 48) that land under a memorial was alienable only by lease of up to 21 years, was inoperative. Instead, in practice the piecemeal purchase of undivided individual interests was commonplace. This was so even though investors risked their money because of the 'void' provision, carried forward from the 1865 Act. The Crown itself was not debarred from purchasing individual interests before the land had been adjudicated by the court, and did so at least until 1879.

The Crown accepts that the 1873 Act was flawed in other respects, notably that no mechanism was provided by which the listed owners could act as a collective or corporate body. This left individual, court-defined 'owners' of the hapu's lands exposed to pressure to sell their signatures. Fenton's proposal that purchase be illegal (not merely void) before land was owned under Crown grant was not adopted, neither was Martin's proposal for sale by public auction only. A sale by public auction would have allowed the owner group to decide together on the land they would transact and the terms they would accept.

We consider that the 1873 Act was disastrous for Maori. It created a hybrid title (the memorial of ownership) which was not a truly individual title, but a form of multiple title which allowed each individual to sell his or her interests piecemeal. We concur with the claimants that court titles fundamentally changed Maori social relationships

and relations with the land. The memorial undermined community control and chiefly rangatiratanga. It allowed individual owners to do little other than sell their interest (except lease it for 21 years). Owners could not even legally convey their interest in trust to some of their own number or to external trustees. The 1873 Act ushered in the system of tenure and a system of purchase by which most Hauraki land was alienated. It contributed greatly to Maori being caught up in a morass of dealings and legal complications, and divided amongst themselves. It was utterly destructive of efforts to develop the land, pauperising, socially damaging and psychologically dispiriting.

- ▶ Crown witnesses and counsel, to their credit, have drawn attention to the fact that the Crown did not legislatively bind itself by many of the restrictions that applied to private purchasers. Legislative provisions (in the Immigration and Public Works Acts and the Government Native Land Purchase Act 1877, discussed more specifically in chapters 16 and 17) enabled the Crown to assert a pre-emptive right over the areas which it wished to acquire and facilitated the purchase of undivided interests, and subsequently to apply to the court for a definition of the Crown's share of the land. The greater part of Hauraki land was alienated in this way. Mr Hayes offers a guarded recognition that the Crown's ability to acquire individual interests and to prohibit private purchasers opened the way to possible abuses, and unconscionable pressure on individual owners. 'The Crown's use of the prohibition potentially created a matrix of coercion, and appears to have been deliberately used in some cases.'²¹⁵
- ▶ Majority decisions in land dealings, introduced in Fenton's 1869 Act, were in effect continued in the 1873 provisions for partition of land under memorial of ownership. The claimants consider decision by majorities inadequate protection in that it led to the slicing away of blocks by a sequence of partitions. We concur with the claimants in this, especially as the majority was not necessarily secured by a formal community consultation but was commonly acquired by the piecemeal accumulation of individual consents. The pressure from the Crown and settlers to make transactions on the basis of these unsatisfactory majorities increased as the century wore on, because the numbers of owners on a title multiplied through intestate succession, and many owners had moved out of the district, their whereabouts unknown to agents and transactors. It became increasingly unrealistic to require unanimous decision in all cases. But it would not have been impracticable to have required a genuine majority *community* decision, involving discussion among those living on or near the land. The outvoting of a senior rangatira like Tukukino by the majority of named owners in the Komata block was not a 'community' decision. As probably the senior rangatira in that block it would have been appropriate for Tukukino to have a right of veto on alienation (much as Te Hira exercised for a long time over Ohinemuri). An intermediate position would have

215. Document Q1, p165

involved the use of block committees, empowered to act as legal corporations, being instructed by general meetings of owners, as suggested in Wi Pere's 1884 Bill. It will be recalled that his Bill required a two-thirds majority of owners to authorise block committees to sell.

- ▶ In the nineteenth century, political environment it would not have been easy (as the Crown points out) to define the ideal legal and administrative arrangements to reflect overall community control, yet allow development by individuals or sections of the owners. We note and welcome the Crown's acknowledgment that the balance between collective and individual rights in the 1873 and many subsequent Acts was too heavily weighted against the collective, and that the 1886 and 1900 legislation was better. We note also the important debate between claimant and Crown witnesses as to whether *any* individual dealing should have been permitted. Claimants and Crown agree that rights in Maori customary tenure were multi-layered, with claimant witnesses emphasising that control over alienation outside the community lay with the community and its leaders (in reciprocal relation with each other.) The Crown suggests that the claimants are implying that collective control of alienation should have been made mandatory, whereas the Crown believes that a balance should have been struck between individual and collective rights. It seems to us that mandatory collectivity is exactly what the claimants considered should have been in place where permanent or long-term alienation outside the group was concerned, and that in their view, any derogation from that was and is a breach of the iwi and hapu levels of Treaty rights.

In our view, a community decision to devolve part of the land to some of their own number on a long-term basis would not have been unreasonable or inconsistent with the Treaty. This was so especially if, by considered community decision, part only of the tribal patrimony could have been devolved in this way (eg, in small farms or urban sections), provided always that inheritance by kin or eventual reversion to the tribal estate was built in to the process; another substantial percentage of the tribal estate should have been held permanently in community title, and alienable only on lease or occupation licence. The system of incorporation of owners introduced in 1894 involved new legal and administrative processes for ascertaining community opinion, notably the regular election of block committees and certain powers being reserved to annual general meetings (to whom block committees were accountable). The system had its limitations, but too little Maori land was left in Hauraki by the end of the nineteenth century for the system to be useful in that district. No Maori land incorporations were formed in the district. (Some trusts were formed under the Maori Affairs Act 1953 and subsequent legislation. These are discussed in chapter 18.)

- ▶ The Crown's concession that the individual was unduly favoured vis-à-vis the collective was qualified by the suggestion that this perception relies heavily on hindsight. But that

is not so. We have noted that some of the early advocates of ‘individualisation’ such as JC Richmond and Henry Sewell quickly realised how damaging the purchase of individual interests was, and by 1867 (in Richmond’s case) and 1873 (in the case of Sewell) had become critics of the Native Land Acts *without the restoration of some measure of collective control by the group*. But when a measure of corporate control was granted (as in the 1886 Act), Maori ceased offering land for sale, or even lease (since they wished to retain it), with the result that the next incoming government soon restored the practice of buying individual interests and using the court to partition them out, a policy sustained until 1899.

- ▶ The claim by Mr Hayes for the Crown that the Native Land Acts created an essentially simple code for dealing with land is manifestly wrong. That might have been the original intention but the 1873 Act itself was confusing, even to the Ministers and officials administering it. With amendments the year after and sharp changes of direction in 1886 and 1888 it became chaotic. There is a huge weight of evidence, from official inquiries such as the 1891 commission and from senior public figures (including judges) that by the late 1880s it was scarcely intelligible even to legal specialists. Maori evidence – including that of Hauraki leaders Hoani Nahe and Hamiora Mangakahia – is that in taking land to the court and beginning transactions they had soon found themselves hopelessly confused, caught up in heavy costs and obliged to sell much more land than they had intended. Far from assisting Maori to engage with the new economy and society the Crown had put insurmountable obstacles in their path.
- ▶ Not surprisingly, at the end of the nineteenth century Maori were still seeking to have both determination of customary interests and subsequent management of land vested in their own communities. Most tribal groups, including Hauraki iwi, wanted greater authority for the committees elected under the 1883 Act, and supported the Kotahitanga programme. As noted earlier, settler governments were reluctant to grant the Kotahitanga demands since they would have meant that purchase of freehold would be more difficult and much land would have had to have been leased.

If the authority over land alienation were to have been restored to the collective level, the issue of Maori being ‘free to deal with their land as they saw fit’ takes a new meaning. We ask what ‘free’ means in this context. The question is, who among the multiple owners should have been ‘free’ (or rather empowered) to make the decisions. It is very clear that Maori claimants do not think it should have been each individual owner acting autonomously even if in the end they amounted to a majority of the whole; the serial and piecemeal acquisition of individual interests, in what had been the patrimony of the group, was not a true expression of ‘freedom of choice’ for the owning group. Rather, it was a manipulative process suited to the interests of purchasers. It became even more so when the proportion of consents required to remove restrictions

on titles was reduced to one-third under the 1894 Act (and the authority to sell vested in a majority, on the night, of a handful of ‘assembled owners’ under the 1909 Act: see chapter 18).

To state the issue somewhat differently: the essence of Maori protest historically, and as reiterated by the claimants today, is not merely whether the individual or the collective side of Maori land tenure should have been favoured but rather that the Native Land Acts did not give Maori control – rangatiratanga – over their land. On the contrary, they represented for Maori the *loss* of control (as well as no development opportunities and the inexorable alienation of their lands). On this central issue, we consider that the claimants’ perception is correct, and that the Crown, in stressing its obligation to give Maori the opportunity to participate in the new economy, is missing the essential point. The basis of the Maori yearning to return to a greater measure of collective authority over land was that they believed it would give them the opportunity to balance economic advancement with social stability. The desire to retain a collective title was not contrary to development. There were few more strenuous ‘developers’ than the leaders of Maori collectivities, such as Wiremu Tamihana for the Ngati Haua portion of the Kingitanga, the Arawa leaders who sought to develop the thermal area of Rotorua, the East Coast leaders such as Wi Pere or James Carroll, or Hauraki leaders such as W H Taipari, Mohi and Hamiora Mangakahia, and Hoani Nahe. But the Native Land Acts undermined rather than assisted their aspirations.

CHAPTER 17

LAND ALIENATION IN HAURAKI, 1865–99

17.1 INTRODUCTION

17.1.1 The scale and pace of land alienation

This chapter examines the alienation of Maori land under land court title in the period 1865 to 1899. There can be no question as to its pace and scale. Pre-1840 transactions, pre-emption waiver purchases, and Crown purchases before 1865 had resulted in the alienation of some 19 per cent of the land area of the inquiry district, according to Dr Anderson, citing calculations based on a digitalised reading of maps.¹ This appears to us to be an over-estimate, in the light of actual acreages alienated by 1865 (see secs 3.11.2, 4.3) set against the percentages cited by Dr Anderson and Terry Innes cited elsewhere in evidence.² Possibly no more than 7.5 per cent of the land area of the inquiry district had been alienated by 1865, leaving at least 90 per cent still in the customary ownership of some 2000 Hauraki Maori. Whatever the precise percentage in 1865, by 1900 over 80 per cent of the district had been alienated (see section 17.3.5 for a detailed discussion of the figures as reported by different witnesses). By far the greater proportion had been purchased by the Crown.

These figures indicate a remarkable transformation of the region. For the first 25 years of colonial rule, Hauraki Maori had continued their measured engagement with the incoming settler society but in the next three decades the major part of the district passed into settler ownership and control.

Demographically, the Maori population of Hauraki continued to decline until about 1900, but their numbers relative to settlers show the most dramatic change. Nineteenth century censuses are best regarded as informed estimates, and some allowance has to be made for fluctuations in Maori numbers due to outsiders coming in for gum-digging and Hauraki Maori moving out in search of employment. However, Dr Cybele Locke's careful collation of available data, suggests that in 1858 Hauraki Maori numbered roughly 3000 as against a mere 500 settlers. By 1886, the Maori population had fallen to 2500. (See sections 2.3 and 25.1.1 for discussions of Maori population figures. Official figures were lower; the 1881 figure

1. Document E2, p 2

2. Document A9, pp 178, 179; doc H5, pp 5–6

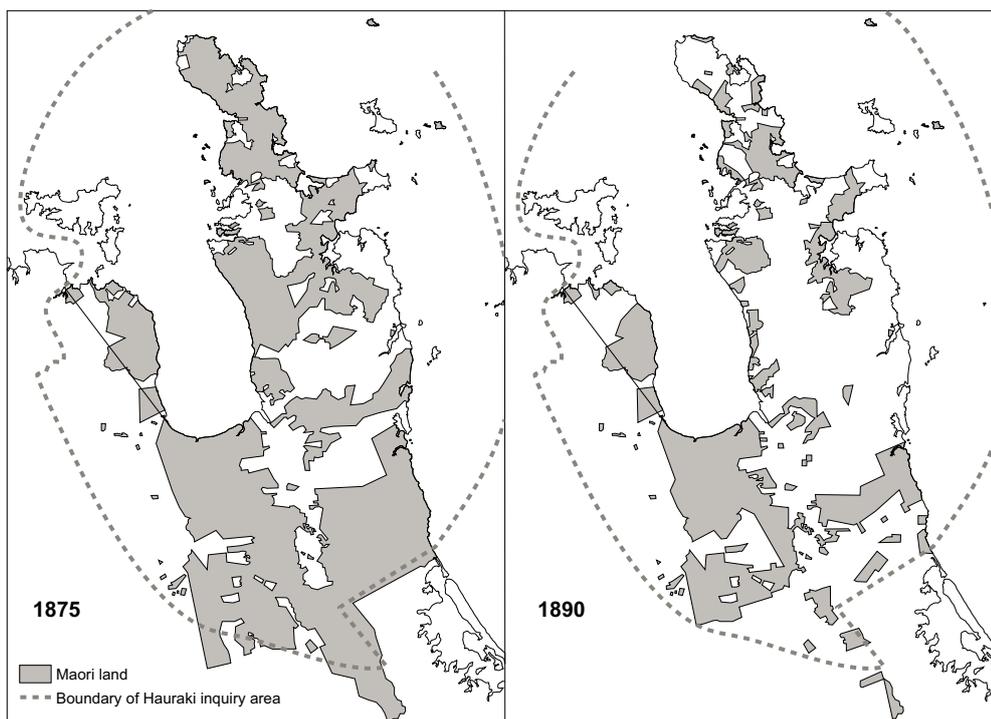


Figure 70: Maori land in Hauraki in 1875 and 1890

for Hauraki Maori was 1582.) However, the settler population had leapt to 12,493 in 1886; in 1901 there were 2161 Maori and 23,366 settlers.³

17.1.2 The Crown’s concession

In closing submissions, Crown counsel acknowledged that serious issues accompanied Crown purchasing in Hauraki:

The issue of Crown purchases is a critical one for the Hauraki inquiry – and key to an informed understanding of the substantive Hauraki Treaty claims. Many of the grievances of Hauraki Maori, including gold, timber and foreshore, are not, in the Crown’s submission, really stand-alone grievances but a sub-set of the more fundamental complaint about the level of Crown purchasing.

It is acknowledged that there was large-scale and rapid Crown purchasing of Hauraki Maori land in the latter part of the 19th century. The Crown acknowledges that Crown purchasing contributed to the overall landlessness of Hauraki Maori and this failure to ensure

3. See document v4, pp62, 98–99, where complete tables by county are provided for the years 1886, 1891, 1896, 1901, 1906, and 1911.

retention of sufficient land holding by Hauraki Maori constituted a breach of the principles of the Treaty of Waitangi.

Counsel continued, however, that the Crown was not acknowledging ‘that landlessness equates with poverty’: ‘The purchase of Hauraki Maori land was not in itself a determinant of Hauraki economic fortune.’⁴

We return to this argument in chapters 18 and 27. First, we consider in more detail the extent of purchasing, both by private settlers and the Crown, and some aspects of the methods adopted in its purchase.

17.1.3 The evidence

Of the vast quantity of evidence submitted in the Hauraki inquiry, the greatest proportion deals with land alienation. The principal data base (which includes summary and index) is David Alexander’s four volume study prepared for the Wai 100 claimants. This traces the passage of most Hauraki land blocks through the court, their partition, and their alienation.⁵

The Wai 100 claimants, and most of the 55 other claimant groups, have submitted historical overview reports which focus on land alienation in their rohe. In addition, many specific block histories have been compiled.⁶ In addition to these commissioned histories, there are over 100 witness statements given by claimants themselves, incorporating their unique insights into land alienation and its effects, and sometimes their puzzlement as to how it came about when the land was reserved as inalienable.

This report would become unmanageable if every block was discussed in detail. This chapter therefore focuses on the main trends in the alienation of Hauraki lands, and the issues disclosed by them. To provide examples of these trends and issues we shall briefly outline the alienation of some blocks, and refer to others in illustration of particular issues. All the block histories submitted have informed this analysis, but we ask claimants’ indulgence if their particular blocks are not individually discussed.

4. Document AA1, p166

5. Document A10, pts 1–4; doc F5

6. These include Emma Stevens’ nine Marutuahu block reports for the Marutuahu claimants (doc v3), Dr Tracy Tulloch’s study of seven Hauraki blocks for the Wai 704 claimants (doc 11) and her study of alienation in 11 Hauraki blocks for the Wai 475 claimants (doc M2); 11 detailed block histories by various authors for the Wai 177 claimants (the Gregory–Mare whanau) (docs D4–D14); some 15 other commissioned histories on particular blocks for various claimant groups, including Mathew Russell’s reports on the Waikawau reserves and on Papakitatahi A and Horahia Opou 5A; P Johnston and P MacDonald’s work on the Puhuiwai block; Peter McBurney’s writing on the Whangapoua and other blocks for the Mangakahia whanau; S Woodley on Manaia 1A and 2A; the Bassett–Kay research on Matamata-harakeke and on Manaia 1B and 2B; J Neal on Tairua D21 and D21A; D Ambler on the Wairoa and Otau blocks; David Alexander on the western Firth; Peter Cleaver on Tairua, the Tairua reserves, and Te Horete 1 and 2; G Young on Waitotara and Parawaha; and Paul Monin on Ohinau Island.

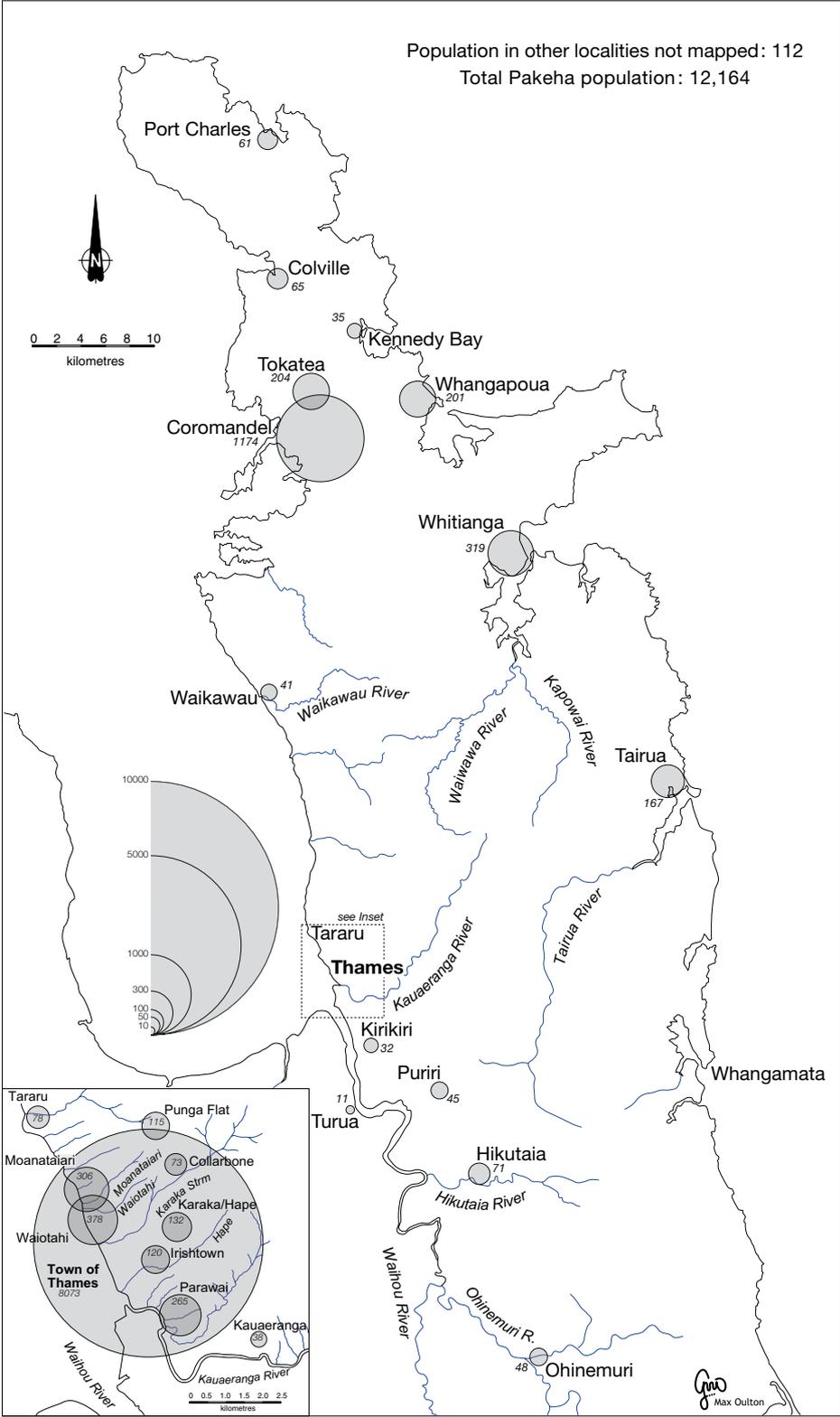


Figure 71: The Pakeha population in the Coromandel Peninsula, 1874. Source: NZ Census.

17.2 PRIVATE PURCHASING

We have noted in previous chapters that many Hauraki Maori sought to make a controlled engagement with the commercial economy by transacting some lands while seeking to hold and develop other lands. We have also discussed in chapter 15 the early Native Land Acts which allowed direct dealings by private purchasers. We have noted in sections 15.3.2, 15.3.4, and 15.4.1 that some 35 small blocks passed through the court in 1865–66 and many of these soon sold.⁷ Alexander's research also shows that 29 blocks totalling some 47,542 acres on the western side of the firth were alienated between 1866 and 1867, from Mataitai and Orere to Wharekawa West.⁸ This trend was fostered by the Compensation Court hearings into the East Wairoa confiscated block, discussed in chapter 5. Blocks were commonly awarded to fewer than 10 persons, usually of Ngati Paoa and Ngai Tai, with the same rangatira being named in many titles. It is impossible to say now whether other iwi and hapu members concurred in the subsequent sales to private purchasers.⁹

Paul Monin has shown how most remaining Waiheke land also quickly passed through the court, with five owners (some of them absentee) acquiring 4621 acres in 14 blocks (all but one before 1869), many of which were then sold. Ngati Paoa largely withdrew from the island, with only one western block, Te Huruhi (2100 acres), remaining as a reserve with restrictions on alienation.¹⁰

Harataunga land began to be put through the court in 1868. That year Harataunga 4 (143 acres) was sold to James Smart, who also appears to have leased Harataunga 2 (546 acres) and Harataunga 3 (59 acres).¹¹

In sections 9.2.3 and 9.6, we have discussed the township blocks in Shortland (Thames), initially leased by the Ngati Maru chiefs with Crown cooperation, but then put through the court and sold. So, too, were the former cultivation reserves on the northern edge of the town, initially leased to Robert Graham for the development of 'Grahamstown', discussed in section 9.4.2. In the boom atmosphere in Thames, numerous private speculators, land agents, solicitors, and surveyors (notably O'Keefe, Brissenden, and Tole) were eager to advance money to Maori for survey and court costs, and take their signatures to loan agreements (see sec 9.4.3). These were not necessarily secured against land but if the

7. The transactions summarised by Mr Alexander include the 780-acre Te Karaka 1 block, adjacent to the Coromandel, which was awarded by the court to Pita Taurua solely in 1871 (whose interests were succeeded to by Wiremu Taurua in 1878). In June 1871, immediately after the court award, five acres of Te Karaka 1 were purchased by William Fraser for £50, and four acres two roods by Alfred Jerome Cadman (of whom we shall hear more) for £30. The following month, Cadman leased 583 acres of Te Karaka 1 for an initial payment of £100 and an annual rent of £1: doc A10, pt 1, p 164. The sale prices, and Cadman's initial rental payment, were high by the standards of the time, probably reflecting the location of the land close to the harbour, the kauri it carried, and the surge of demand for kauri and other timber, out of which Cadman made his fortune.

8. Document A8, p 174

9. Ibid

10. Document C5, p 64

11. Document A10, pt 1, pp 22, 23, 24; doc R16, pp 4–5; doc S8(a), pp 271–272. The court deferred other Harataunga blocks, probably to make awards only in the blocks in which Smart was interested.

debts were not paid holders of credit notes were prone to seek default summonses from the Supreme Court and orders for the sale of assets to cover the debt, then the help of the bailiff to recover the sum owed. Effectively this was a pressure on Maori debtors to sell land.¹² We have discussed in sections 9.6 and 16.1.1 the pursuit by bailiffs of Hori Ngakapa Whanaunga, which led to the forced sale of his Thames land for well below its value.

Private purchases transformed the ownership pattern of urban and suburban lots in and around Thames. In 1874, the trust commissioner, Haultain, reported that 65 town lots of Maori owned land had been sold in the previous 18 months, 'chiefly at the Thames.'¹³ Dr Anderson believes that private purchases also affected much of the land along the eastern side of the Waihou and at Coromandel. The former area had been exempted from the Crown's declaration of pre-emption zones in 1872 but became divided into many small blocks, the alienation history of which has not been researched by claimants or Crown.¹⁴

We have briefly discussed private purchasing in the important Komata block, gateway to Ohinemuri, in section 10.5.1, and the Crown's purchasing there in section 17.4.2. The private negotiations for Komata, where Tukukino was a principal right-owner, were assisted by his exclusion from Komata South block (676 acres), when the land went through the court in 1870. He was refused a rehearing, apparently because he did not attend the first hearing. Some officials felt he had a legitimate grievance, but tended to blame other Maori – including the selling faction – for not including him on the list of owners. Seven out of the eight grantees in Komata North (888 acres), of Ngati Taharua hapu, ignored Tukukino's wishes and signed deeds of sale to HC Young, a private purchaser. Tukukino held out, backed by the influential chief, Te Hira who condemned the secrecy of the deal with Young, and said that on behalf of Ngati Tamatera he would not permit the sale. A group of senior Marutuahu rangatira – Te Moananui, Riwai Te Kioire, Hotereni Taipari, Hohepa Paraone, and Haora Tipa – wrote to Governor Ferguson protesting against the purchase and seeking his help to induce Young to take back his money. The Native Minister, McLean, refused 'for political reasons' Young's attempt to have the court partition out his interests, a remarkable indication of the Crown's capacity, under the 1873 Act, to intervene in private transactions. (The politics of the situation are discussed in section 17.4.2.¹⁵)

Another important area of private activity was the negotiation of formal leases by timber and flax millers, who had made agreements with Maori right-owners before 1865, which have been discussed in chapter 14. Between 1865 and 1872 (but particularly in 1871–72), millers funded Maori claimants to survey their lands and put them through the court, on the understanding that a formal lease would then be granted to them. The advances were commonly registered in the court as survey liens under sections 33 to 35 of the 1867 Act, as were

12. Document E3, pp 18–19

13. Document A8, pp 232–233

14. Ibid, p 224, map 8

15. Ibid, pp 221–223

mortgages taken by Maori owners for other expenses. Private agents commonly assisted both Maori and millers. Some timber millers, such as CA Harris, went on to purchase the land in private deals (see sec 14.4.1).

Among the most prominent of the private purchase agents was the former Civil Commissioner, James Mackay, who in mid-1869 set up a firm, the New Zealand Native Land Agency, employing a number of clerks, interpreters, and sub-agents. He was also a shareholder in a number of mining and other companies (including the Tokatea Gold Mining Company, with WH Taipari among others).¹⁶ He began negotiating timber leases and land purchases on behalf of various private individuals and associations, and by 1871 was seeking to purchase of the whole of the Coromandel Peninsula, subject to the mining rights acquired by the Crown and rights acquired by private timber companies. He had capital at his disposal to purchase at up to five shillings an acre.¹⁷ In the course of his negotiations, Mackay developed the practice of paying advances to rangatira and assisting them to bring the land before the court.¹⁸

Reporting to the Government in 1871, Commissioner Haultain noted that:

The sales by the Natives within these five years have not been so extensive as during the corresponding periods under the old system. The settlers purchase only the better quality of soil, and will have nothing to do with a great deal of [lands of] an inferior description, which the Government were compelled to take over when they acquired large tracts of country.

The money paid to the Natives for this smaller quantity has, however, been in excess of what they have been accustomed to receive. By the Registrars' of deeds returns it appears that for 470,000 acres they have realized £162,844, an average of 6s 6d per acre; but a great deal of this money must have gone towards the expense of surveying the other 2,000,000 acres which have passed through the Court.

Haultain thought that the average land price in Auckland province, including Hauraki, was 'about 5s 9d an acre'.¹⁹

17.3 CROWN PURCHASING RESUMED IN HAURAKI

17.3.1 Reasons for Crown purchasing: the purchase of auriferous lands

The Crown's purchase of gold-bearing lands has been discussed at times in the gold chapters of part III, and specifically in section 13.6. The Thames gold rush of 1867–68 had provided

16. Document D2, pp 31–32

17. Mackay to Colonial Secretary (memorandum), 7 July 1875, AJHR, 1875, C-3, p 3

18. Document F5, paras 13–15

19. Haultain to Native Minister, 18 July 1871, AJHR, 1871, A-2A, p 9

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opportunities to Maori landowners to enter into leasehold and prospecting agreements with private entrepreneurs, but from the outset the Government was uneasy about this trend. In October 1868, Mohi Mangakahia and others of Whangapoua on the eastern Coromandel coast entered into an agreement with a private party for the prospecting of their land. When the Mangakahia whanau began to put their land through the court in late 1869, Donald McLean, who had recently taken office as Minister of Defence and Native Affairs, wrote to Chief Judge Fenton:

It is desirable that protection should be extended to those persons who on the strength of the above arrangements have gone to considerable expense in prospecting their lands. It appears to me that if their or any other auriferous lands pass through the Court and Certificates of title without reservation issue, these lands would pass into the hands of speculators to the great injury of the Public generally – and in this particular instance to the heavy loss of those who have expended considerable sums of money in ‘propecting’ . . . I should like very much if you would have the goodness to devise some means by which the public interest could be protected against a course which may lead to the alienation of auriferous land to individuals instead of accessing them to the public.²⁰

McLean was not successful with this approach. As noted earlier, Fenton was reluctant to use the 1867 provision for restrictions to be entered on court titles and was also averse to the court interposing itself in transactions by Maori owners and their clients (see sec 15.4.2). From 1872, the Government began to resort to the more direct expedient of buying auriferous land itself.

A further motive for the purchase of land already subject to gold-mining cessions is revealed in an 1875 comment by James Mackay:

great pressure was put on the General Government by the provincial authorities, and persons interested in gold mining in the Province of Auckland, to induce them to assent to purchase from the Native owners the whole of the lands within the Coromandel Peninsula and Hauraki District, as there was a strong popular feeling against the arrangements which had been made for giving the Native owners the fees derived from miners’ rights as a rental for the occupation of their lands for gold mining purposes.²¹

The themes of ‘public interest’, aversion to ‘speculators’ buying auriferous land, and protest at Maori receiving miner’s right fees were reiterated throughout the nineteenth century.

20. McLean to Fenton, 18 December 1869, McLean MSS, ATL (doc D2, pp 30–31)

21. Mackay to Colonial Secretary, 7 July 1875, AJHR, 1875, C-3, p 6 (doc A8, p 215). In his evidence to the Tairua Investigation Committee that year, Mackay also stated, ‘There was great pressure brought to bear by the public and the Superintendent constantly. Public meetings were held and the Government was called upon to purchase’: G Grey, ‘Report of the Tairua Investigation Committee’, 11 October 1875, AJHR, 1875, I-1, p 6.

17.3.2 ‘Vogelism’: close settlement and strategic considerations

Claimant and Crown witnesses concur that the Crown’s systematic land purchase programme was integral to the national strategy of Colonial Treasurer, Julius Vogel, underpinned by the Immigration and Public Works Act 1870 and its successor Acts. The Act authorised the borrowing of large amounts of capital to finance immigration, railway construction and public works expected to encourage close settlement, which would in turn provide the tax base for financing the loans and the development of public services. But the plan depended on acquiring large areas of land for settlement at low cost from Maori; otherwise, the massive borrowing would become a mounting debt burden, contributing to economic depression. In view of the imperatives of the borrowing scheme, it was unthinkable – to settlers and their governments – that Maori land should remain undeveloped.

Between 1870 and 1878, over £11 million was borrowed. Dr Anderson has shown that much of this went to Auckland province, including 60 per cent of the money allocated to land purchase, some £353,000 by 1878. The Thames gold boom, and the possibility that other Hauraki lands were auriferous, encouraged governments to purchase land and spend on the construction of the Thames water-race and other infrastructure. Ohinemuri and Te Aroha were also considered suitable for agriculture and thus for settlement schemes.²²

In the 1870s and early 1880s, the Government’s concern to extend the telegraph and road through the upper Thames, and to locate settlers there, also involved strategic considerations. The Ohinemuri purchase, for example, was seen as advancing Crown hegemony in the district, against the influence of the Kingitanga.

17.3.3 The Crown as privileged purchaser

These various motivations together justified, in the Government’s view, taking control of land purchase in Hauraki to an extent that was not repeated until similar reasons came together in the central North Island in the 1880s, and the Urewera in the 1890s.

The laws which facilitated and privileged Crown purchases were many. A tabular summary of the relevant clauses in legislation occupies 11 pages of Dr Williams’ book.²³ Most importantly, section 42 of the Immigration and Public Works Amendment Act 1871 empowered the Crown to gazette a notice of intention to purchase, that excluded private purchasers from specified areas required for goldfields, railways, or special settlements. Dr Anderson has cited the *Gazette* notices of 1872 and 1874, which established a virtual Crown monopoly of purchase over most of the Coromandel Peninsula and the Hauraki Plains. Excepted from

22. Document A8, pp 189–190

23. David Williams, *Te Kooti Tango Whenua: The Native Land Court, 1864–1909* (Wellington: Huia Publishers, 1999), pp 329–339, app 13

the proclamations were areas of traditional cultivations along the Waihou River, and the reserves excepted from the goldfield cessions; despite their status as reserves for Maori, it was thought appropriate to allow private purchase of these areas, considered suitable for close settlement.²⁴

In the proclaimed areas, as Anderson comments, Maori were denied the opportunity to compete on the open market in leasing or selling their land. It is clear from the 1872 correspondence between James Mackay and Ministers that the Crown monopoly was not for the paternalistic purpose of offering Maori protection from private ‘land sharks’; it was to safeguard its own objectives, which included preventing land considered likely to be gold-bearing from falling into private hands. Obliquely, this may have offered some protection to Maori from a scramble for goldfield land, but the policy was identified in Maori minds with ‘denying them equality under the law’, and (along with a demand for greater Maori representation in the parliament and on juries) was the subject of an 1876 petition by Te Moananui and 165 others.²⁵

Other legislation privileged the Crown. Section 107 of the 1873 Native Land Act enabled the court to recognise the ‘inchoate agreements’ made by the Crown’s land purchase commissioners for the purchase of land before the land had passed the court, and order the award to the Crown of an equivalent value in land, or ‘the repayment by the Natives’ of the moneys received. It provided that the Crown could take incomplete agreements to the court, which could order the completion of the agreement, partition out the interests of the Crown, order the repayment by Maori of moneys advanced to them, or declare land of equivalent value ceded to the Crown.

When the Grey Government took office in 1877, with John Sheehan as Native Minister, a range of other measures was passed which further strengthened the Crown’s position:

- ▶ Sections 2 to 4 of the Native Land Amendment Act 1877 enabled the court to award costs, which could be recoverable as a debt, and to require Maori applicants to deposit security with the court before proceeding with a case, while section 6 strengthened the authority of the Native Minister to apply for a partitioning out of its proportion of interests in a block (first granted by section 107 of the 1873 Act). In Belgrave and Young’s terms, the court was regularly used by the Crown to ‘tidy up’ the messy negotiations which its agents had initiated and sustained over many years.²⁶
- ▶ Of particular importance was the Government Native Land Purchases Act 1877, a measure occasioned by doubts that had arisen about the validity of proclamations under the Immigration and Public Works Act. The new law empowered the Government by

24. Document A8, pp 200–202; see also doc v1, pp 261, 263

25. Document A8, p 202

26. See the table of relevant legislation in Williams, pp 329–339, app 13.

proclamation to bar private purchasers from negotiating for land for which the Crown had already made payments.²⁷

- ▶ The Native Land Act Amendment Act 1879 empowered the court to compel the attendance of witnesses in order to assist the Crown to complete titles.²⁸
- ▶ The powers of trustees appointed under the Maori Real Estates Management Act to deal with the interests of minors were strengthened. JC Richmond had secured the first Act of that name in 1867, but the powers of trustees were then limited to lease of 21 years. But, through succession, interests in a great many blocks were held by minors and (under the 1873 Act) purchases could not be completed without the consent of their trustees. Under the 1877 Act, officials such as resident magistrates, native officers, Native Land Court judges, or even land purchase officers could be appointed as trustees for minors, with power to approve the alienation of the interests of minors in respect of purchases by the Crown. The involvement of officials as trustees, with a power of sale, was a step towards the increasing control over land by the court.
- ▶ This was extended in 1878 to private purchases. The consent of a land court judge was required in each case. Witnesses for several claimant groups (including Marutuahu) have queried whether this requirement, and the trust commissioner's certificate (or after 1893 any land court judge's certificate) provided adequate protection for the minors whose interests were being alienated.²⁹ According to Mr Alexander, 'In some instances two trustees were appointed, one a pakeha in whom both the Court and the minor's family had confidence, and the other a Maori relative'. Commonly, this occurred where all or most of the other interests in a block had been purchased and the signature of the trustee would complete the purchase. Thus, 'it could be viewed as a protective mechanism, to ensure that the minor's interest was dealt with fairly, and above all that a fair price was paid'. Mr Alexander considers that the appointment of a European was never actively sought by Hauraki Maori, who tended to view the appointments as facilitating transactions.³⁰ However, we have seen no specific evidence that European trustees in Hauraki acted improperly.³¹

27. Proclamations under the Immigration and Public Works Acts were valid for only two years, after which they had to be renewed, but the renewals were often neglected. Moreover, the proclamations were supposed to define the public purpose for the Crown's monopoly. This too was neglected, and in the parliamentary debate on the Government Native Land Purchases Act 1877, Native Minister Sheehan said that he believed that the whole of the proclamations were 'bad' in law. By section 18 of the Waste Lands Administration Act 1876, the Government had given legislative backing to proclamations in respect of blocks in the 'Native Land District of the Thames' over which the Crown had made payments; the 1877 Act extended the provision nationally: Sheehan, 30 November 1877, NZPD, 1877, vol 27, pp 600–601; Whitmore, 4 December 1877, NZPD, 1877, vol 27, p 671.

28. Document A8, p 247

29. Document G11, pp 18–19; doc s31; doc v3, pp 19–20

30. Document E3, pp 33–34. An example is the sale of Te Horete 1B2 in 1901, with Judge WG Mair consenting as trustee for Eruini Taipari: doc J6, p 4. The Ngati Pu claimants cite the sale of Hikutaia 1A2 under section 3 of the Maori Real Estate Management Act 1888: doc Y12, p 4.

31. Instances of trustee misbehaviour occurred in Hawke's Bay and were exposed by the 1873 commission.

All of these provisions were used in Hauraki. The spate of legislation designed to facilitate Crown purchasing was the work of Premier George Grey and Native Minister John Sheehan, who apparently regretted the introduction of direct purchasing in 1862. Sheehan sought to empower the Crown to complete Crown purchases on which large sums had been spent as advances, and by 1878 claimed that his policies had trebled the quantity of land passing through the court.³² In debate on the Government Native Land Purchases Act 1877 he gave his rationale for the Government's monopoly: 'they found that private persons were endeavouring to interfere with Government purchases, and were offering higher prices, and picking out the eyes of the country which was supposed to be in the possession of the Government.'³³ A supporter, Colonel Whitmore, said in the Legislative Council that, without Government power to proclaim Crown pre-emption, the land 'fell into the hands of all sorts of persons – persons who had no interest of settling on it or improving it'.³⁴

Grey and Sheehan's policies increasingly roused the ire of the proponents of 'free trade' in Maori land, led by Frederick Whitaker. In 1877, Whitaker introduced a Native Land Court Bill which proposed to reduce the Crown's role and facilitate private purchase. The Grey Government, like the later Liberal Government, was eager to open Maori land to white settlement. But it also opposed land speculation, supported close settlement, and access by governments (rather than speculators) to the revenue from resale of land purchased from Maori, revenue which would pay for roads and bridges. But Crown pre-emption denied Maori full market value: there are examples in the block histories of private purchasers offering more than the Crown's price but being blocked by proclamation of the land as under Crown purchase. The Crown had its views on what were appropriate prices for land according to quality and access and would pay no higher.

Finally, we note in this context the concluding remarks of the leading Crown witness, Mr Hayes on the Crown's assertion of pre-emptive right. It was understandable that the Crown would want to use such powers where they served the interests of infrastructure development and settlement:

However, one may reasonably expect that the Crown and its agents would be scrupulous in the exercise of these powers. The code pertaining to private dealings required that the transaction, at least from 1870, not be contrary to equity and good conscience. In short, the transaction had to be fair, including the consideration paid.

But, from his reading of Mr Alexander's block histories, Mr Hayes concedes that:

32. Sheehan, 17 September 1878, NZPD, 1878, vol 29, p 226. At the core of Grey's beliefs was an entrenched dislike of land being held in large private estates while others toiled as tenants – an attitude he had developed as a young army officer in Ireland.

33. Sheehan, 30 November 1877, NZPD, 1877, vol 27, p 600

34. Whitmore, 4 December 1872, NZPD, 1877, vol 27, p 671

it seems that the Crown was not scrupulous in the exercise of these powers in some cases. In these cases, the Crown appears to have used its power to inhibit private dealings to encourage Maori to accept their offer. In these cases, Maori sought a higher price claiming that they could obtain that higher price from Europeans. Whether they could or not is difficult to determine. Maori were, of course, free to refuse the Crown's offer and ultimately the prohibition on private dealings would lapse. Nevertheless the Crown's use of the prohibition potentially created a matrix of coercion, and appears to have been deliberately used in some cases.³⁵

Mr Hayes suggests that the matter needs to be examined on a case-by-case basis. But it is obviously impracticable to examine individually every land purchase in Hauraki (or even to discuss in detail every block history submitted in these proceedings), but we will in following chapters have regard to particular examples.

17.3.4 The Crown reasserts the pre-emption right of purchase in Hauraki

To secure the desired Hauraki lands against competition from private purchasers, the Crown used the powers it had given itself from time to time in legislation. In July 1872, it proclaimed its intention, under the Immigration and Public Works Act 1871, to negotiate for the Coromandel Peninsula and as far south as a line from Ngakuri-a-whare to Te Aroha mountain, thence to Huakaramea on the Waihou River and northward to its mouth, embracing the Ohinemuri and Te Aroha blocks. In October 1872, this proclamation was revoked and a new proclamation redefined to exclude the cultivable areas on the north bank of the Waihou and the reserves excepted from the goldfield cessions. But these areas remained open to private purchase provided restrictions on the title were removed. The 1872 proclamation expired after two years but was reissued in October 1874 and extended to include the Hauraki Plains (see fig 72).³⁶ The Crown had thus established a monopoly of purchase over most of the Hauraki claim area, at least for two more years. As James Mackay wrote:

When the colony committed itself to the great scheme of public works and immigration, it was deemed necessary to revert partially to the original system [of 1840–62], and an additional reason was given that it was not desirable that lands of auriferous, or supposed auriferous, character should pass into the hands of private persons to the exclusion of the public.³⁷

35. Document Q1, p165

36. 'Proclamation under the Immigration and Public Works Amendment Act 1871', 23 July 1872, *New Zealand Gazette*, 1872, no 38, p 637; 'Proclamation under the Immigration and Public Works Amendment Act 1871', 9 October 1872, *New Zealand Gazette*, 1872, no 51, p 763; 'Notice of Intention to Negotiate for the Purchase of Certain Native Lands in the Province of Auckland', 15 October 1874, *New Zealand Gazette*, 1874, no 55, p 693 (doc A8, pp 201–202)

37. Mackay to Colonial Secretary (memorandum), 7 July 1875, AJHR, 1875, c-3, p 6

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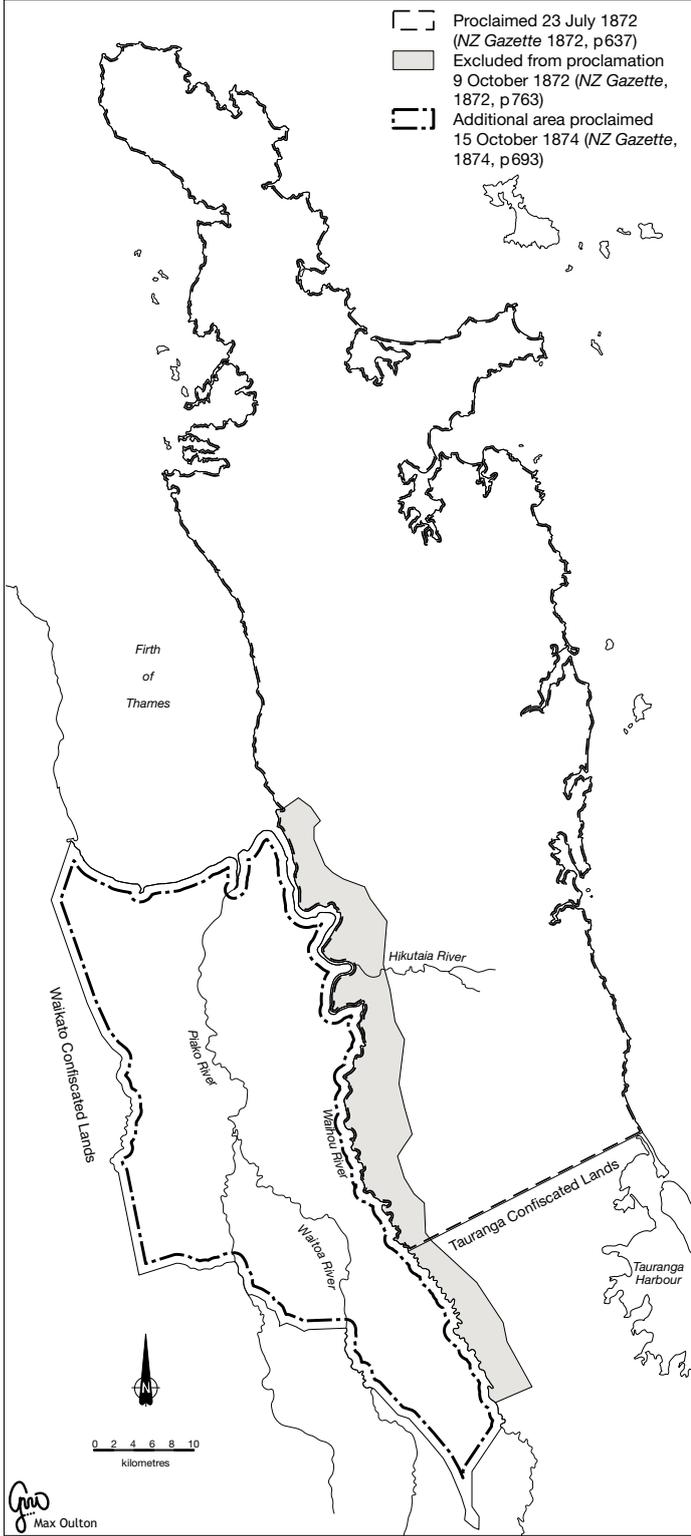


Figure 72: Hauraki lands proclaimed under the Immigration and Public Works Amendment Act 1871

Numerous blocks were gazetted under section 2 of the Government Native Land Purchases Act 1877 in May 1878 or tidied up under section 107 of the Native Land Act 1873. The terms of these Acts are discussed in the previous section. Essentially, the Crown had reverted to the strategy that it had employed in the South Island and southern North Island in the 1840s and 1850s: large purchases conducted under pre-emption. The purpose of the eventual court hearing was to define the Crown's interests and the rights of various hapu to the reserves, rather than to determine Maori interests over the whole area of the purchase. This approach is described by Mackay in his 1872 reports on the Moehau (Cape Colville), Waikawau and Ohinemuri purchases.³⁸ Crown purchases involved many advances and raihana given to sections of owners. In the Crown purchases of the 1870s, the purchase price was low relative to prices paid by private purchasers, being commonly in the order of two shillings to two shillings fourpence an acre. However, the Crown often paid for the survey of both the external boundary and the reserves.

The pre-emption proclamations obviously curtailed Maori aspirations to develop land for the general private market. For example, in 1873 Puckey reported a request by Hone Mahia and others to remove the proclamation over part of Whangamata 2. 'The object the writers have in view is to cut up a portion of the land lying near the Harbour into a township which would then be leased.' The Minister eventually agreed, but for reasons not explained in the evidence the subdivision did not go ahead; in 1886 the Crown began to buy Whangamata 2.³⁹

17.3.5 The scale of Crown purchasing

David Alexander has tabulated the blocks of land acquired by the Crown both within and outside the areas subject to a cession of gold-mining rights. In the decade 1870–79, some 332,000 acres had been acquired by the Crown (much of it under timber lease agreements with private parties), while advances had been paid to the presumed Maori owners of a further 200,000 acres. By 1885, the purchase of some 73,000 acres more had been completed.⁴⁰

Most of the interests had been purchased prior to title investigation, the Crown then bringing the blocks into the court under the 1873 or 1877 legislation in order to have the ownership determined. In addition, the proportion of the land deemed equivalent to the Crown's advances to Maori owners was charged against the land. Belgrave and Young, using Anderson's data base and other sources, note that the purchase of Moehau, Te Aroha, Ohinemuri, Whangamata–Hikutaia, Piako, and Waikawau 'occurred over many years and took the Crown a great deal of effort to finalise'.⁴¹ This prolonged process is why it is difficult

38. Document A10, pt 1, pp 354–363; pt 3, pp 3–138

39. Ibid, pt 2, p 105

40. See doc A8, pp 217, 234–235, 238; see also 'Lands Purchased and Leased from Natives in the North Island', AJHR, 1884, C-2, pp 5–7 (doc A8, p 191)

41. Document v2, p 11

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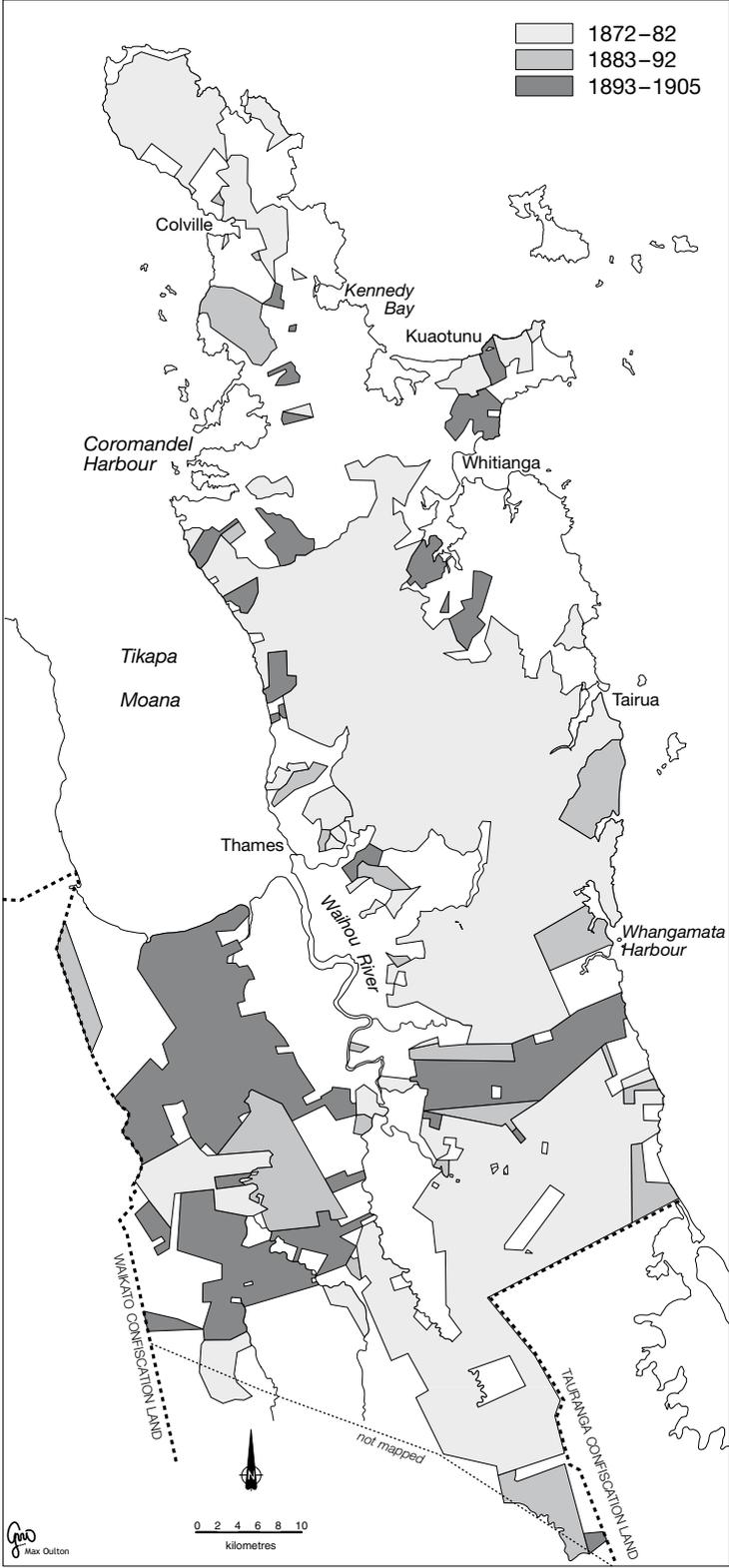


Figure 73: Crown purchases, 1872-1905. Source: document A14.

to compute precise totals of alienated land for any given year, but it is accepted by claimants and Crown that between 1870 and 1885 the Crown acquired at least 400,000 acres of Hauraki land. The true figure of land and interests in land acquired by the Crown was probably higher.

While figures in official returns are somewhat inexact, Anderson has calculated from the maps of purchased lands that in 1865, 19 per cent of the original Hauraki rohe had transferred out of Maori hands, but by 1875, 44 per cent had been alienated either to the Crown or settlers and by 1885, 65 per cent of the rohe.⁴² Mr Alexander has calculated that about 70 per cent had passed out of Maori ownership by 1877 (including part-purchases it seems), 75 per cent by 1892, and 85 per cent by 1910.⁴³ As Dr Anderson has pointed out, the alienations involved the transfer not only of land but also of resources, including timber on the surface and gold in the subsurface.

Over 30 blocks purchased by the Crown containing some 132,000 acres were subject to timber leases, according to the calculations of the MacCormick commission. These purchases extinguished tribal holdings on most of the north-eastern side of the Coromandel Peninsula.⁴⁴ Dr Anderson has suggested that the prices the Government was willing to pay (about two shillings per acre, as compared with four shillings sixpence an acre for some Hikutaia and Whangamata land) reflected the Minister for Public Works' view that, because the timber rights had already been sold, the price for the land should be depreciated accordingly, even though some was suspected to be auriferous.⁴⁵ We discuss this in section 14.3.1.

17.4 CROWN PURCHASES: A CHRONOLOGICAL SUMMARY

In his submissions for the Wai 100 claimants, Mr Alexander has divided the Crown's purchases into periods according to the main methods and strategies involved, and provided useful maps of the lands acquired in each period.⁴⁶

- ▶ In the period 1865 to 1871, the Crown purchased some Hauraki lands, partly by taking over the survey liens of private purchasers. It also purchased Maori interests in the Thames foreshore following Fenton's 1870 judgment which awarded a right of fishery on the Kauaeranga foreshore to named individuals, before the Government withdrew the jurisdiction of the court over foreshores.⁴⁷ (This is discussed in chapter 22.)

42. Document E2, p 2

43. Document A48, pp 11–14

44. Document A8, pp 241–242

45. Under-Secretary for Public Works to Mackay, 4 March 1872, AJHR, 1873, G-8, p 6 (doc A8, pp 241–242)

46. See document A48 and see also document F5 for a chronological list of purchases.

47. See doc A8, pp 156–165, 208–212; doc A10, pt 2, pp 299–305. Document A8, p 208, refers to Puckey opening negotiations for the Crown in 1870, but it then refers to Fenton's judgment as already in place; presumably, 1871 is when Puckey began negotiating.

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- ▶ When it resumed systematic purchasing in 1872, the Crown recruited a number of private agents for the work, mostly paying by commission for each acre purchased. The Crown's principal agent in Hauraki was James Mackay. He acquired a number of large blocks for the Crown and made part-purchases in others. But the commission system of purchasing came under increasing criticism, notably from the parliamentary Tairua Investigation Committee in 1875, which examined Mackay's purchase of that block and related transactions. The committee recommended that purchases of Maori land should be undertaken by Government officers; the commission system was phased out.
- ▶ Mackay's contract terminated in 1877 and George Wilkinson became the Crown's principal land purchase officer in Hauraki until 1894.⁴⁸ Mr Alexander's analysis shows the period 1877 to 1882 to be dominated by the completion of purchases begun by Mackay. As economic recession set in during the 1880s, the Crown became much less indiscriminate in its purchasing policy. Few new purchases were initiated in these years, but land purchase officers continued to acquire Maori owners' signatures to deeds, and a succession of court hearings, held to define the Crown's interests, saw large areas – notably much of Ohinemuri – pass into Crown ownership. (The Piako purchase, however, was not finalised until 1889.)
- ▶ From 1883 to 1892, the Crown purchased a number of blocks in which it was particularly interested, notably those thought to be gold-bearing (Wharekawa East 2, Te Kapua 1, Pukehinau, Waiwhariki, Moehau 4, and Kuaotunu) and large areas of Ohinemuri previously awarded to non-sellers. Te Ipu o Moehau 2 was acquired because of its haematite (ferric oxide) ore which investors considered mining.
- ▶ From 1892 to 1905, with the Liberal Government's renewed borrowing and drive for close settlement, the Crown increased its purchases of Maori land (under the aegis of the Department of Lands and Survey). There was a focus on the Hauraki Plains, including the swamps, for which a comprehensive drainage scheme was planned. From 1894, Gilbert Mair became the principal land purchase officer in Hauraki.

We now consider aspects of the four last periods in more detail.

17.4.1 The commission period

(1) *The Crown's strategy developed by Mackay and Ormond*

Since resigning his post as Civil Commissioner in 1869, James Mackay had successfully developed and operated his private firm (see secs 14.3.1, 17.2). However, on 24 January 1872, he set out proposals for JD Ormond, the Minister for Public Works, for the acquisition of some 500,000 acres of Hauraki land for the Crown. He defined three categories of land it was desirable for the Crown to purchase:

⁴⁸ James Preece succeeded McLean with Wilkinson as his assistant, but Preece died soon after being appointed, and after a brief period when William Grace occupied the post, Wilkinson took over: doc F5, para 21.

- ▶ land within proclaimed goldfields, mostly in blocks of 1000 to 10,000 acres but also including the 60,000-acre Waikawau block
- ▶ land within the Hauraki region not yet subject to agreements between Maori and the Crown, including Whangapoua, Mercury Bay, Tairau, and Wharekawa East
- ▶ land in the ‘Upper Thames and Upper Waikato Districts held by Hauhau and obstructive Natives’. This included Ohinemuri, Te Aroha, Patatere, and Hikutaia.

Mackay drew attention to some 14 sawmills operating or being constructed in Hauraki under agreements between timber millers and Maori. These extra-legal agreements were being renegotiated as valid leases as the land concerned went through the court. In view of the vital importance of the timber trade and the very large investments by the lessees (some of whom were Mackay’s private clients) in mills and other infrastructure, Mackay proposed that the Crown purchase the land subject to the timber leases of millers still in possession. Mackay estimated that the cost of the land to the Crown, depreciated because the timber had already been sold, would be an average of two shillings sixpence to three shillings an acre.

He further suggested that ‘reserves for Native residence, occupation and cultivation’ would require serious attention, and that these ‘in most cases’ should be made inalienable. He suggested a scheme for Maori investment: ‘In cases of very large purchases, it might be found desirable to make the payments by instalments running over a term of years. It would also be beneficial to induce the Natives to invest some of their money in Government annuities.’⁴⁹ Other agents had apparently been approached to undertake purchases at sixpence an acre commission, but Mackay was willing to work for fourpence an acre. Backed by Gillies, the superintendent of Auckland, and Dr Pollen, agent for the general government in Auckland, Mackay was chosen and authorised by Ormond to begin purchase negotiations for the Crown.⁵⁰

On 4 March 1872, the Under-Secretary for Public Works wrote to Mackay clarifying several points: Ormond was anxious about land prices. Blocks on the Coromandel Peninsula subject to timber leases, he suggested, would have no value to the Crown other than mining. Mackay was asked to provide further details of each block, ‘giving particulars not only of the probable acreage and cost, but the value of the land as regards its relative position, mining potential, timber, or other resources’, so that the Government could assent to or decline the purchase. He was directed to give priority to blocks in the third of his categories, ‘as these lands – being suitable for the location of immigrants, and otherwise advantageous for settlement – come more immediately within the scope and objects contemplated by the Immigration and Public Works Acts’. As regards the first two categories, preference was to be given to blocks thought to be auriferous. Ormond ‘cordially endorsed’ Mackay’s suggestion as to reserves ‘and to the consent of the Natives being obtained to render them inalienable’.

49. Mackay to Minister for Public Works, 24 January 1872, AJHR, 1873, G-8, pp1–5

50. Mackay to Colonial Secretary, 7 July 1875, AJHR, 1875, C-3, p3

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Ormond also thought it advisable to make payment over a term of years and ‘wherever practicable to induce the investment of a portion of the purchase money in Colonial securities or in Life Annuities, &c, in the Government Annuities Office.’⁵¹ At the highest level, some consideration was being given to medium and long-term Maori needs.

In March 1872, Mackay wrote again asking for authority to be given to the agent of the general government in Auckland to advance him money from time to time so that he could make cash advances to Maori owners, since ‘delay in the payment of money [was] often fatal to Native Land Purchases’. He also indicated his intention, on finding any Maori willing to survey their lands, to immediately arrange for a survey, since he had found that Maori were often willing to survey their lands long before they agreed to sell them; once the survey was completed the resulting debts would ‘gradually compel them to sell’ (see section 16.1.5(3) for the full quote and its implications).⁵²

Ormond agreed to make available funds for advances, up to 20 per cent of the estimated purchase expenditure, and to the ‘desirability of taking a lien on the lands’ for advances for surveys.⁵³ He was agreeing to advance payments being made to the probable owners before the land went through the court. (Advances for surveys had been legalised by the 1867 Land Act (s33), but advances for purchase were illegal until section 59 of the 1873 Act.)

The evidence disclosed by the Tairua Investigation Committee in 1875 shows that Ministers did not insist upon a detailed prior report by Mackay on each block before purchase.⁵⁴ Mackay was free to advance money to Maori right-owners, and did so, not only for surveys preparatory to a court application but also as part-payments for purchase of the land, payments to chiefs being pursued for debt, or simply for costs of living (raihana). The Government had provided Mackay with ‘very deep pockets’ (as Mr Alexander has put it) and he could lay out funds liberally. Until 1875, when Sir George Grey became superintendent, he also had support from the Auckland provincial authorities.

Mackay’s advances to various rangatira gave the Crown a foothold in various huge blocks, including Ohinemuri, Moehau, Waikawau, Te Aroha, and Piako, as well as numerous smaller blocks in Mercury Bay and north of the Ohinemuri River. He faced serious competition from the private sector, including timber merchants and speculators in land thought to be auriferous. Mackay wrote:

the high prices at present given for land at the Thames and Coromandel, and the increasing demands for homesteads, make it every day more difficult to deal with the Natives, and adding to this the probability of large areas being taken up for mining purposes, has compelled me to push on the negotiations, make final payments and procure absolute cession to the

51. Under-secretary to Mackay, 4 March 1872, MA-MLP1 85/18 (doc A8(a), pp 720–964)

52. Mackay to Ormond, 4 March 1872, MA-MLP1 85/18 (doc A8(a), pp 720–964)

53. Ormond to Mackay, 4 March 1872, MA-MLP1 85/18 (doc A8(a), pp 720–964)

54. Document Q1, p 159

Crown by deed previous to the title to the land being investigated by the Native Land Court, but I propose after the completion of the question [ie, transaction?] to submit it to the Native Land Court in accordance with the provisions of the Public Works Act. In the meanwhile I am quite prepared to accept responsibility as to dealing with the proper owners.⁵⁵

By mid-1872, the dominant Crown strategy for the acquisition of Hauraki land was in place, systematically applied, with little variation, for the next half-century. Under the 1873 Act, which involved (in Mackay's words) 'every rag, tag and bobtail' being put on memorials of ownership, he could make small advances to anyone he thought likely to be included on the titles to land in which the Crown was interested, in advance of the land going through the court.⁵⁶ In October 1872, however, he was relieved of pressure from private competition by the Crown proclamation over most of the Hauraki district (see sec 17.3.4).

(2) Some early successes for the Crown

The use of survey liens soon proved an effective road towards a Crown purchase. In many cases, Mackay advanced the money and Maori owners agreed to the land being charged; in others, the Government purchased liens already taken by private parties.⁵⁷ Notably, in 1872, the Government purchased for £1700 a £2105 survey debt owed to O'Keefe, Logan, and others in respect of Omahu, Otama, Wharekawa (East and West), and Whitipirorua. On payment of additional sums to the Maori owners, the bulk of these lands, some 24,000 acres, was acquired by the Crown between 1872 and 1878. The Omahu purchase in 1872 was particularly important at the time because it made a breach in the aukati that Ngati Tamatera was trying to maintain at the Omahu Stream.⁵⁸

Mr Alexander has provided details of the Crown's purchase method in respect of Hihi-Piraunui (6755 acres), behind Thames. In 1872, one of the right-owners, Karauna Hou of Ngati Matau, borrowed £400 from Mackay to survey the land and take it through the court, against the opposition of another hapu, Ngati Hineahi. The land was awarded to Ngati Matau and the £400 charged against the block. A rehearing was declined by the chief judge. Meanwhile, before taking employment with the Crown, and before the land had gone through the court, Mackay had purchased the timber rights (already under informal lease between Maori claimants and millers) for £500, then on-sold them to Russell, Wilson, and Stone, who paid a further £1000 to the assumed owners. Following the court award, a 99-year timber lease was formalised on payment of a further £200. The following day, Mackay purchased the freehold for the Crown for £700 and cancelled the survey lien.⁵⁹ This is an example of why it is necessary to take all payments into account in trying to assess fairness

55. Mackay, memorandum, 22 June 1872, MA13/35(b), Archives NZ (doc A8, p 199)

56. Mackay, 'Report of the Commission into Native Land Laws', AJHR, 1891, sess 2, pp 39–40 (doc A8, p 201)

57. Document A8, pp 217, 234–235

58. Ibid, p 202

59. Document A10, pt 2, pp 152–158

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in transactions, not just the price finally paid for the freehold. Unfortunately (as is usual), we lack details of the extent of the timber, the price paid for it in the informal arrangements, and the money invested in extracting it.

From March 1872, Mackay was purchasing individual interests in the Hikutaia–Whangamata lands from the main claimants, Ngati Pu, and also from Ngati Whanaunga–Ngati Karaua. The details are discussed in section 12.5.2. These groups' interests were intermixed, and Ngati Pu considered that Ngati Whanaunga and Ngati Karaua had compromised them in their early dealings with McCaskill and Martin (see sec 3.10.1). The non-selling Ngati Tamatera and Ngati Hako also had interests in the land but were outflanked. By the early twentieth century, the Crown had acquired at least 90 per cent of the Hikutaia–Whangamata lands.⁶⁰

The Ngati Pu claimants have suggested that Mackay acted deceptively in his negotiations over Hikutaia in 1872, in presenting himself as a friend of Ngati Pu and assisting them with their claim, but all the while taking commission from the Crown for successful purchases. They suggest that this constituted '*an uneasy blurring of public and private interests*' (to quote Dr Anderson) which breached the Crown's duty of active protection for Maori under the Treaty. They also claim that Mackay had promised them that the survey would be paid for by the Crown, citing in support the assertion to that effect of Tamati Paetai in the court in 1898, backed by their then counsel, Kensington. The matter was referred to the Surveyor-General, who stated that the Government had not authorised Mackay to make such a promise.⁶¹ This last claim does not square with Mackay's June 1872 report to Ormond, in which he proposed to *advance* funds for surveys, charged against the land.⁶² But there is considerable room for confusion about what he actually said to the Maori claimants, especially given that an incomplete survey was submitted to the August 1872 hearing of the court and two surveys prepared for the November 1872 hearing (see sec 12.5.2).

These examples reveal patterns of factors repeated elsewhere in the district:

- ▶ the difficulty Maori often had in translating their understanding of the landscape (as networks of the key locations of each whanau and hapu, sometimes interpenetrating or overlapping each other) into the alien concept of a continuous boundary with each group owning discrete territories on either side of the line;
- ▶ the purchase of some interests by the Crown agent before a court hearing, and the advancing of credit for a survey, charged against the land;
- ▶ the encouragement of a court application by one group in particular, which impelled other interested hapu also to become involved;

60. Document v2, pp 40–43

61. Document v8, pp 34–35; Hauraki minute book 49, fols 204–206 (doc j8, p97)

62. Mackay to Minister for Public Works, 22 June 1872, MLP1881/246 (doc A10, pt 2, p 160)

- ▶ the interests of the various parties being determined by the court (not to the satisfaction of all concerned), and the Crown acquiring a large part of the land to cover its advances for survey.

(3) Purchasing on commission: Mackay and the Tairua purchase

A possible conflict of interest in Mackay's multiple roles was brought under public scrutiny following his purchase of the 36,000-acre Tairua block in November 1872, and its subsequent investigation by a parliamentary committee in 1875. The background to the investigation has been outlined in section 14.3.6. Seemingly unaware of the Maori vendors' right to select the reserve (and lease it as they pleased), Grey considered that Mackay and his colleagues were involved in a serious conflict of interest, if not downright corruption, and succeeded in having the Tairua Investigation Committee established. The outcome of the investigation in relation to Mackay is also discussed in section 14.3.6.

Besides any conflict of interest of Mackay and his staff, the commission system of Crown purchasing was also called into question. Asked whether he did not consider that it required revision, Native Minister Donald McLean replied:

The system is one which has been forced upon the Government from the circumstances of the country. They had to compete with numerous capitalists coming in, and to employ the best agents they could to secure the land for the public . . . As soon as it is possible, the system which I prefer will be adopted, to employ officers on salary to acquire land, and not on commission.⁶³

The committee was certainly of that view. They noted that Mackay's staff were in a position to learn the intentions of the Government and have access to Government records yet 'are not in any way whatever under the control of the Government'. They recommended that:

in future all persons employed by the Government as agents for the purchase of land, no matter whether paid by salary or commission, and all persons in their immediate employment, should be taken to be Government officers, and be subject to the ordinary rules of the Civil Service

Critical comments were also made about the Crown's pre-emptive right:

As the law affecting the purchase of Native land now stands, and in view of the power which the Government has to intercept or to prohibit private negotiations, the public generally refrain from entering upon private purchases, knowing the difficulty of completing

63. D McLean, 'Report of the Tairua Investigation Committee', 18 August 1875, AJHR, 1875, I-1, p 11

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them without the consent, tacit or expressed, of the Government. This has already, in some instances, as shown by the evidence, subjected officers of the department to solicitations from private parties, on various grounds, to allow them to complete, and sometimes to assist them in completing, private transactions. The Committee consider that the law should be altered so as either to re-establish the Crown's right of pre-emption, or else to permit the direct-purchase system to have full sway.⁶⁴

This recommendation was not acted on. Instead, the Government strengthened its monopoly over the best Hauraki lands in the next decade. The commission system was phased out rather than swiftly terminated. As we have noted in our discussion of Ohinemuri, Mackay was sharply criticised for his use of 'raihana', payments for day-to-day needs charged against the land. But he continued to purchase on commission for the Crown until Grey formed his 1877 government. From that time, purchases of Maori land were conducted by salaried land purchase officers (sometimes called native officers because they also had more general duties), supervised by the Land Purchase Office within the Native Department. The person mainly concerned with purchases in Hauraki was George Wilkinson, whose priority was to complete the purchase of blocks in which Mackay had begun to purchase interests. Later, in 1894, when the Native Department temporarily disbanded, Gilbert Mair was employed as land purchase officer in Hauraki working to the Department of Lands, again working on commission, but this time under direct departmental control in respect of each purchase.

(4) Prejudice to Maori in the Tairua and other purchases subject to timber leases

Several claimant groups in these proceedings have submitted that Maori owners of land and timber were prejudiced by the Crown's purchase of land subject to existing timber agreements. Many of the claims focus on the Tairua purchase and the failure of the parliamentary committee of 1875 to address Maori concerns, as discussed in chapter 14.

The Tairua purchase investigation disclosed several features typical of many other purchases, which the Wai 100 and other claimants consider prejudicial. The first relates to the '10-owner' system. As Dr Anderson comments, the Tairua purchase 'demonstrated how easy it was for a few grantees [on the title] to dispose of tribal interests, and how vulnerable they were to the advice of agents ready to make on-the-spot advances.'⁶⁵ In short, Tairua was not so much a special case but a very typical case.

Secondly, the Tairua Investigation Committee referred to the fact that Maori were not selling their timber or their land in the open market.⁶⁶ Thus, the effect of the Crown's proclamation of its pre-emptive right over most of Hauraki under the Immigration and Public Works Act was that private buyers generally stayed clear of the market. (The exception was

64. G Grey, 'Report of the Tairua Investigation Committee', 11 October 1875, AJHR, 1875, I-1, p iv

65. Document A8, pp 242-246

66. G Grey, 'Report of the Tairua Investigation Committee', 11 October 1875, AJHR, 1875, I-1, pp iii-iv

those timber millers who had a pre-existing right that the Government recognised by buying the land subject to their leases, discussed in chapter 14.) Mackay was quite boastful about the way he was able to acquire Maori land for the Crown at low prices, in a situation of near-monopoly:

I know that nearly all the land is auriferous, and will become valuable for gold mining. I think the Government have got the lands very cheap. I have got land for 2s 6d [per acre] for which private individuals would give 5s. I have bought some land for 3s, land alongside of which has been sold for 15s.⁶⁷

Mackay qualified his remarks somewhat later by adding that:

The circumstances of private and Government purchase are not the same. The Government buys good and bad, taking a large block, and calculates the average rate. A private individual will pick the eyes out . . . , and give more for it than the Government average rate.⁶⁸

The price paid was also adversely affected by the fact that, while the Crown was buying the freehold, Maori owners were selling the timber-cutting rights separately. Claimants' concerns about this process are discussed in chapter 14.

A further element of market restriction resulted from the commission system. This was the facility it provided for interests that were *not* being purchased by the Crown – such as the Tairua reserve – to escape the knowledge of the general public before pre-emptive deals had been struck through 'insider trading'. That is, it was possible for commercial information available to the commissioned agent's employees and acquaintances to be misused for private gain. Had this occurred it might have been prejudicial to the wider public interest (as Superintendent Grey thought) and might also have been prejudicial to Maori, since they might have got better offers from the open market. Any such prejudice has not been established in respect of the Tairua reserve however. It seems to have been convenient to the Maori owners in 1872 to deal with Guilding and O'Halloran, yet they were not *bound* by the provisional arrangement they then made.⁶⁹

The more evident prejudice to Maori from the commission system was the sheer scale of purchasing it fostered. In 1872, Mackay had been instructed to report the details of each block to the Government before entering into any contract with Maori owners, but Mr Hayes acknowledges that:

67. Ibid, p 6

68. Ibid, p 8

69. There was some obscure discussion in the Tairua Investigation Committee of Mackay himself purchasing timber and other rights from Maori owners of the Hihi, Piraunui, and Opango blocks and then transferring them to Messrs Russell, Wilson, and Stone, but these transactions seem to have been well advanced before Mackay was engaged by the Crown, and he had openly stipulated as a condition of his employment that he be permitted to complete such transactions. Mackay had declined to act for Russell in the purchase of the freehold: G Grey, 'Report of the Tairua Investigation Committee', 11 October 1875, AJHR, 1875, 1-1, pp 1, 9.

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it seems that the Crown waived its original intention for a report on each proposed purchase. In November 1872, Mackay pressed for funds and immediate authority to purchase Tairua and 8 other blocks that were presently being investigated by the Court. . . . In response, the Crown gave Mackay a considerable degree of latitude in fixing the price for Tairua and other blocks, stipulating that the price to be paid was not to exceed 'the average of that paid for other land in the Coromandel Peninsula'.⁷⁰

Mackay then set about laying the groundwork for potential purchases in a great many blocks by advance payments to sections of the owners, sometimes for the cost of surveys necessary to take the land through the court, sometimes to meet the needs of special events such as major tangi and hui, sometimes to chiefs to help them meet debts they had incurred with various private parties, and frequently for day-to-day living expenses for items such as saddles and bridles or food from local stores. Mr Alexander comments that:

The commission system of course encouraged this individualistic signing up of sellers. As each payment was made, the worth of the payment could be converted, on paper, into an amount of acres of a certain block which it represented, and Mackay could then ask for and be paid on the basis that he had acquired in part these acres. The more payments made and deals done, the more acres were assumed to have been acquired, and the more the commission agent was paid . . . Mackay was allowed by his masters to have very deep pockets, there were next to no limits on what he could purchase, there was no need to be selective because [in the mid-1870s] good as well as not so good land was equally welcome, and there was not pause to consider the effect of the system on Hauraki Maori.⁷¹

By the time Mackay's part-purchases had been completed, around 1882, between 70 per cent and 75 per cent of the claim area had passed to the Crown. Much of the land did not in the end prove to be auriferous – or not commercially so at least – and was too steep for settlement as well. The Crown became more discriminating in what it purchased in the 1880s but Hauraki Maori, meanwhile, had lost huge areas of land.

No land was permanently reserved. Sections of many blocks that went through the court had restrictions placed on the titles limiting alienation to 21-year leases. But, as we consider in more detail below (in sections 17.4.2(4) and 17.4.3(1)), these restrictions could be and were removed in most cases, and the land sold. The 1000-acre reserve in Tairua, as we have seen, was not subject to restriction in the title, and was sold soon after it was Crown granted. Many other 'reserves' were in that category.

The purchase money was not paid by instalments, nor were Maori persuaded (or obliged) to take some of the payment in Government annuities, as Mackay had proposed and Ormond had endorsed in 1872. Much of the payment went to pay existing debts.

70. Document Q1, pp 156–157

71. Document F5, pp 16–17

The commission system as such continued after the Tairua investigation in 1875; Mackay continued to purchase on that basis until Grey's Government terminated his employment in 1877.

17.4.2 Crown purchasing from 1878 to 1888

(1) *Crown purchases slow during economic depression*

The Grey Ministry, which took office in 1877, considered that Auckland province should be getting a larger share of the Crown's expenditure on purchase of Maori land, and that road and other communications should be pushed through the upper Thames district. As related above, the Government terminated the commission system of purchasing.⁷² However, it armed itself with even stronger legal powers to compel completion of agreements in all Maori-owned blocks in which the Crown had purchased interests. In May 1878, by proclamation under the Government Native Land Purchases Act 1877, the Grey Government barred private interests from offering for 625,000 acres or more of Hauraki land, for which Crown agents had paid deposits and were seeking to complete the purchase. They included Piako; Waihou West 1, 2, and 3; Ohinemuri; Harataunga; Wharekawa East 1; Te Weiti 1, 2, and 3; Waikawau; Moehau; Omahu West 1, 2, and 3; Mangakirikiri 1 and 3; Te Aroha; Whenuakite 2; Kuaotunu; Waiharakeke; Ounuora 2; Te Tipi; and numerous smaller blocks.⁷³

With the onset of economic depression in the 1880s, retrenchment followed; the Government did not hurry to complete the purchase of all the blocks proclaimed, and new Crown purchases were not initiated as indiscriminately as before unless believed to be auriferous. But successive governments – with John Bryce and John Ballance the principal Native Ministers of the period – strove to claim through the court large portions of the blocks on which the Crown had paid advances in the 1870s.

The principal Crown purchase agent in Hauraki from 1877 to 1893 was George Wilkinson, who informed his Ministers of likely purchase opportunities, and in particular, auriferous lands. For example, he wrote in relation to the 2000-acre Ngaromaki or Taruru South block:

I have only been able to see some of the Native owners and they are not very willing to sell at a reasonable price, on account of some private agents having tried to negotiate with them for the sale of a small portion of the block at a large price. Nothing has however yet been done in the matter, and if you think it is an advisable purchase, it would be well to have

72. The full title of the Government Native Land Purchases Act 1877 is 'An Act to make better provision for protecting the interests of Her Majesty the Queen in the Purchase of Native Lands, and for Discontinuing the system of Purchasing Native Lands on behalf of Her said Majesty upon Commission.'

73. Document A8, p 247

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it proclaimed at once as land under negotiation by the Crown. This will keep off the private purchasers and enable me to go on with the purchase more easily for the Government. I believe it is the wish of the public here that the Government should acquire the freehold of the Gold Field whenever possible, and not private speculators.⁷⁴

The Crown was unwilling to pay the price sought by Raika Whakarongotai for the block and the purchase did not then proceed, but the example illustrates the use of proclamations as part of the Crown's purchase strategy in this period.

(2) Some important purchases in this period

We comment here on some of the larger purchases which fell largely within the period under consideration. We devote a separate sub-section to Piako because its history straddles many phases of Crown policy.

(a) Te Aroha: As noted in chapters 2 and 11, the 53,900-acre Te Aroha block had been contentious from the outset. It was the subject of protracted and very expensive proceedings in the land court in 1871, including serious tension between Ngati Haua and the Marutuahu tribes and fighting pa built on the land. Following the award to Marutuahu, there began the familiar pattern of advance payments on the block by Crown agents. In 1878, the Marutuahu owners were obliged to acknowledge that they had received substantial payments. The whole of the block save for reserves (including 7500 acres for Ngati Rahiri) was then awarded to the Crown.⁷⁵ (See sections 2.2.6, 11.1.1, and 11.1.2 for detailed accounts.)

(b) Waikawau, Moehau, and Komata: In 1878, the Government completed the purchase of Waikawau, commenced in 1872. The court determined that Ngati Tamatera were the customary owners and then determined the Crown's interests purchased by advances, awarding it 44,161 acres; the court created 16 reserves totalling 5017 acres. The purchase of some 32,930 acres of the Moehau or Cape Colville block was also completed, after complex negotiations to fix reserves for the four tribes involved.⁷⁶

Attempts to push the Thames to Tauranga road through Tukukino's land at Komata and Ngati Hako's land just south of Paeroa struck trouble, arising from the Crown's purchase of undivided interests in the intersecting interests of Ngati Hako, Ngati Koi, and Ngati Tamatera, from Tukukino's continued fury at being excluded from Komata South (see sec 17.2), and from his efforts to hold Komata North on behalf of the whole tribe, against the agreement of the other seven grantees to sell to H C Young. While McLean was Minister, the Government had been prepared to wait for Maori consent to put the road through, but

74. Wilkinson to Whitaker, 21 March 1881, NLP1898/119, Archives NZ (doc R14, p 21)

75. Document A8, pp 249–253

76. Ibid, pp 247–248

Sheehan was more willing to accede to pressure from the local county authorities and use the Crown's compulsory powers to take land for roads. Amidst rising tension on this question, in September 1879 a surveyor was shot and wounded by a Ngati Hako man, when Ngati Koi tried to survey Pukehange, near Tirohia, in an effort to identify land with which to meet the Crown's advances. Sheehan at first threatened confiscation and the use of force, but Puckey persuaded him to allow Tukukino and others to settle the matter by a tribal runanga. The Government approved the appointment of Raika Te Whakarongotai (lieutenant in the Hauraki Native Volunteer Corps) as chairman, and representatives of all hapu concerned, except Ngati Hako, took part. The runanga agreed that Ngati Hako should not have used violence but it also utterly condemned the Government's practice of secretive purchase of interests in land before it had passed the court, and Ngati Koi for misrepresenting their boundaries and persisting with the survey against longstanding Ngati Hako objection.

In the aftermath, the Government purchased from Young his seven-eighth share of Komata North and warned Tukukino that it would push through the Hikutaia–Paeroa road, protecting the survey by arms if necessary. There were 18 months more of complex negotiation with Tukukino, partly because of continued Government respect for his primary customary rights in Komata and also to avoid giving cause for renewed resistance by the Kingitanga, with which Tukukino was associated. But, by mid-1881, the chief had to recognise that settlement of the district was now a *fait accompli*; he let the survey through with only symbolic resistance. He was allowed reserves in Komata North of about twice what his one-eighth share would have notionally entitled him to. Thereafter, there was no more physical resistance to the public works in the region, including the road, the railway, and the straightening of the telegraph route to Tauranga.⁷⁷

(c) Ohinemuri: We have discussed in chapter 10 how the resistance of Te Hira, Tukukino, and others was gradually overcome or circumvented by the Crown's land purchase officers in Ohinemuri. We have commented on their methods and strategy, such as the payment of *raihana* and advances to individuals. In Ohinemuri, the Crown did in fact await the withdrawal of opposition by Te Hira (his active consent was never secured) before concluding a mining agreement. But the purchase of the freehold was achieved by the purchase of a series of individual or sectional interests followed by an application to the court to partition out its share of the block (see figs 46, 47, 50).

In 1882, by which time the Crown agents had acquired some 400 signatures for £25,000 of advances, Wilkinson brought the land before the court (see section 10.4.1 for a more detailed account). Once the land was before the court, the only sensible option for the resisters was to participate. A determination of the outside boundary was followed by an internal

77. Ibid, pp 253–261

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subdivision on a hapu basis, then hearings on the Crown's entitlement within each partition. Of the 73,251 acres adjudicated in June and July 1882, the Crown was awarded 65,000 acres for its acquisitions over many years; subsequently it was awarded a further 4500 acres out of 5800 acres adjudicated in 1887. The Crown denied non-sellers a share in the reserves made for the sellers, even though they were all tenants-in-common in the original blocks. Instead, an area deemed equivalent to their proportion of interests was excised from the purchase. The sellers were granted less by way of reserves than they requested, and most of the reserves had no restriction on the titles. Ohinemuri 20, of some 18,035 acres, was not the object of Crown purchasing prior to the court hearings but was purchased vigorously in the 1890s, until by 1907 only 81 acres remained in Maori ownership.⁷⁸

(d) Moehau 4 (Tokatea): Moehau 4 or Tokatea was included in the 1878 list of blocks proclaimed as under negotiation, apparently on the basis of the Crown's acquisition of two private purchasers' interests. In section 8.4.4, we discussed the opening of Tokatea to goldmining in 1862; here, we discuss the Crown purchase of Tokatea.

Title to the Tokatea mining block was investigated in the Moehau investigation from 1878 to 1882. This was set in motion because of disputes about the proper recipients of the gold revenues. By January 1882, the goldfield boundary had been transcribed onto the plan for Moehau 4, and the Native Land Court awarded shares in that part of the block.

Three-fifths was awarded collectively to Riria Karepe of Te Matewaru, and to Rangituia, Hapihana Te Pukeroa, and Makoare Te Ahuroa of Te Mango hapu.⁷⁹ The boundaries of Moehau 4 were by 1885 adjusted to coincide with the goldfield boundary; the Papaaroha goldfield reserve on the coast and Moehau 4A were separated out, leaving Moehau 4 with an area of 7250 acres. Revenues were not paid between late 1879 and early 1882 while the title was being investigated.

In 1878, and again in February 1882, the Crown gazetted that it had paid advances and entered into purchase negotiations for the block. The 'advances' paid in 1882 were, however, merely rent arrears, but these payments served to reimpose Crown pre-emption. In August 1882, the Native Minister authorised purchase at seven shillings sixpence per acre. By 1885, the only unpurchased shares, apart from a one-sixth fraction of a share held in trust, were those of Riria Karepe and party – now numbering three shareholders: Makoare Te Ahuroa and Huihana Rangituia were the successors to Hapihana Pukeroa's share. These three had no desire to sell and were 'very bitter' with the Government for having purchased other shares.⁸⁰

78. See doc A9, pp 29–57, 59–60

79. Document A10, pt 1, p 88. Rihitoto Mataia and five others of Ngati Te Roro collectively received one-fifth. Hoara Tareranui and Paruku Haimoana also received a one-fifth share between them.

80. Document A10, pt 1, p 93

In 1885, Kenrick, the resident magistrate and goldfield warden at Thames, under instruction from the Mines Department, gave notice that the £500 per annum rental arrangement agreed in 1862 would be terminated, the last payment to be on 1 March 1886. Thereafter, Maori owners would receive only the goldfield revenues accruing from the block. No invitation was made to renegotiate the 1862 agreement, nor was the 1862 proclamation of the goldfield revised to exclude the area not being mined. Mining simply continued, with the Crown unilaterally deciding a lesser rate of payment for Maori than the £500 per annum that it had agreed in 1862.

Soon after the 1885 announcement, Kenrick made an offer for the freehold at a rate higher than that authorised by the Government. By May 1886, the purchase was close to completion, but his death in July caused it to lapse.

In 1887, the Native Minister applied to have the Crown's interests cut out. At the court hearing, subdivision boundaries were proposed which were found acceptable by the Crown representative and the Maori owners. The Maori portion was to include the English-owned Kapanga mine, which was generating three-quarters of the revenue accruing from the block, or about £80 to £100 per annum. As part of the arrangements, land purchase officer Wilkinson attempted to obtain a goldfield cession agreement in respect of the Maori portion, but negotiations broke down on the issue of collection of revenues. No rent or goldfield revenue payments had been paid over since the 1862 agreement had been terminated in 1886; the Maori owners were unhappy at the delay and wanted to collect the revenues themselves rather than entrust this to the Crown.⁸¹

Wilkinson telegraphed for instructions. He was concerned that if the subdivision proceeded without a cession agreement the Maori owners might then be able to take legal steps to have the proclamation of their portion as a goldfield lifted. This would jeopardise the operations of the Kapanga mine. Wilkinson asked:

Under such circumstances would it not be better to withdraw case and let matters remain as they are at present, trusting in the meantime either to be able to purchase the unsold shares or that the natives will eventually sign new agreement to get the revenue which is now in Warden's hands for them.⁸²

The Native Minister was briefed that under such circumstances it might be better to leave the land undivided, with the Crown in the position of tenants in common. Wilkinson withdrew the Crown's application for subdivision, reporting that:

I think matter had better be allowed to remain in abeyance for a short time as they [the Maori shareholders] are rather sore at action of Government in giving up paying rent

81. Ibid, p96

82. Native agent, Coromandel, to under-secretary, Native Land Purchase Department, 25 October 1887, NO1889/853 (doc A10, pt1, pp96–97)

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without being prepared to return the unsold portion to them as Maori land free from gold-mining laws, or without first consulting them as to new agreement.⁸³

Wilkinson also inquired into why goldfield revenues were not being paid to the Maori owners and was told by Warden Stratford that he, Stratford, was waiting until an agreement was signed or the block subdivided. In December, Cadman, the local member of Parliament, telegraphed the Native Minister: 'Would strongly urge its completion as matter of utmost importance to Auckland on account title to English company. Natives are now wanting money but will not deal with Wilkinson.'⁸⁴

In January 1888, the Native Minister instructed Lewis, the under-secretary of the Native Land Purchase Department to raise the offer from seven shillings sixpence per acre to 10 or 12 shillings per acre, because 'it is of the utmost importance that the matter should be settled as soon as possible.'⁸⁵

Lewis arranged for Charles Dearle, clerk to the Thames resident magistrate and collector of revenues for Thames Maori, to assist with the Crown purchase. Dearle replied that Riria was the key, and that the other shareholders 'would agree to do whatever Riria Kerepe [*sic*] had agreed to, as she has always been looked upon as the principal in this matter of the sale of the this land'. But, advised Dearle, Riria would not sell at the Crown's price if the matter of the accumulated goldfield revenues to which she was entitled was not settled.

On 6 February 1888, Riria Karepe agreed to sell for £500 (a little over the £427 10s valuation of her share at seven shillings sixpence per acre) plus her share of the accumulated mining revenues, totalling £217 10s 6d. A week later, though 'with great difficulty' Lewis obtained the remaining shares on the same terms – £500 per share, or £750 for the 1½ shares that Rangitua and Makoare owned, plus the accumulated revenues, and an additional £150 to Rangitua, whose husband, the late Kenrick, had earlier offered the bonus of a higher purchase price.

Cadman telegraphed the Native Minister gratefully: 'Lewis has completed purchase Moeatu [*sic*] under great difficulties. I have to congratulate you on having rendered this district very material assistance, as failure on Lewis' part meant stoppage of all English capital to Northern Goldfields.'⁸⁶ The sale was confirmed by the trust commissioner in April 1888.

83. Native agent, Coromandel to under-secretary, Native Land Purchase Department, 27 October 1887, NO1889/853 (doc A10, pt1, p98)

84. Native Minister to under-secretary, Native Land Purchase Department, 29 December 1887, NO1889/853 (doc A10, pt1, p99)

85. Native Minister to under-secretary, Native Land Purchase Department, 7 January 1888, NO1889/853 (doc A10, pt1, p99)

86. Cadman to Native Minister, 14 February 1888, NO1889/853 (doc A10, pt1, p103)

(3) The Piako purchase

Because Piako was such a vast purchase, and straddled a number of periods in our chronology, we address it specifically in this section, commenting on a number of issues as they arise.

(a) The early phases: The early phases of the Crown's purchase of Piako have been analysed for the Tribunal's Rangahaua Whanui programme by Mathew Russell, who examined William Webster's old land claim in Piako, and showed how the Crown took up the Webster claim and began to repurchase Piako in the 1850s, mainly from Ngati Paoa (see sec 3.10.2).⁸⁷ By 1860, Drummond Hay reported that he had completed the purchase of at least 20,000 acres (see sec 4.3.1).⁸⁸ Negotiations were suspended during the wars, and resumed in 1872. By this time, the East Wairoa and central Waikato confiscations had taken place and Ngati Paoa rangatira were urging the Crown to abandon all claims outside the confiscation lines, since it had taken virtually all the land within them.⁸⁹

Dr Anderson's account of subsequent events to 1907, drawing on Russell's work, shows the complexity of the Crown's purchase process and the pressures it brought to bear on a large area in which several iwi (notably Ngati Paoa, Ngati Maru, and Ngati Hako) had intersecting rights.

In the 1870s, HT Kemp and E Puckey negotiated for the Crown. They aimed at satisfying various claims to land already under negotiation and distinguishing the interests of various tribes by having land surveyed and put through the court. In 1872, about £1000 was paid in various sums to a number of individuals to complete earlier purchases, but new negotiations were also commenced:

In general Puckey attempted to clarify the state of Government interests along the Waitoa and Piako Rivers, agreeing to forego monies paid on some blocks in order to gain the consent of Maori to the alienation of others, or following through down payments to complete transactions. He reported in late 1873 that the purchase of 12 blocks, totalling some 38,000 acres, had been now successfully completed by the Government [including the Piako block of 19,500 acres].⁹⁰

The Crown's blocks had not been demarcated and excised before negotiations for even larger areas were set in train by James Mackay.

87. See Duncan Moore, Dr Barry Rigby, and Matthew Russell, *Old Land Claims*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), ch 4

88. Document A10, pt 4, pp 209–218; doc A4, app

89. Document A8, p 213

90. *Ibid*, p 214

17.4.2(3)(b)

(b) The 1874 agreement and subsequent negotiations – claimant and Crown submissions: In 1874, Ngati Paoa chiefs requested Mackay to purchase in Auckland on their behalf large quantities of food for a great hui at Whakatiwai in August of that year, and possibly in the period immediately following the hui. By Dr Anderson's account, at or soon after the hui, Mackay secured the signatures of 48 rangatira to a deed stating that the advances for food were accepted as:

part payment for our lands adjacent to the rivers Piako and Waitoa and on the West side of the river Waihou (Thames) and some pieces of land in the neighbourhood of Waitakaouru and Pukorokoro, which we have consented to sell to Queen Victoria.⁹¹

The area was estimated by the Crown to cover 200,000 acres. Dr Anderson continues:

The deed then set out the price that would be paid on each acre ranging from 3/- for the best quality land to 6d for the poorest swampy areas. The Government agreed to undertake the cost of survey and promised to set aside an area for permanent residence and cultivation.⁹²

There has been considerable debate in these proceedings about the 1874 agreement. Dr Anderson quotes Mackay's recollections at a conference in 1889 between officials and Ngati Paoa:

The [1874] meeting lasted for a long time. A good deal of money was given to the people during its continuance. I saw the principal chiefs and showed them the accounts . . . It [*sic*] was included in the agreement when it was drawn up, and the agreement was read over twice in the open air before it was signed . . . All I have to say is you had the £4,500 and signed for it. The vouchers you now have admitted were for money and supplies obtained subsequent to the meeting at Whakatiwai as the dates will show.⁹³

Counsel for Wai 100 submits that Mackay's 1889 account 'shows quite clearly that there had been no agreement before the expenses were incurred that they were to be secured against the land'.⁹⁴ He submits that the written agreement to charge the debt against the land came *after* the commission to Mackay to buy the food; that by this means, and by the Crown's proclamation of Piako among the blocks under negotiation and debarred to private transactions, 'the block was now entrapped in the legislative framework of the Crown land purchase policy'; that through raihana arrangements and cash payments further debt amounting to some £16,500 by 1877 was loaded against the land; that other tribes with rights in Piako (such as Ngati Hako and Ngati Maru) who received little or none of the

91. Ngati Paoa deed, 5 September 1874, NLP81/167, MA13/64(b), Archives NZ

92. Document A9, p 44

93. Ibid, pp 50–51

94. Document Y1, p 146

advances were nevertheless caught up in the Piako purchase; that when Ngati Maru and Ngati Hako objected to paying for a survey preliminary to bringing the land before the court, and obstructed the survey, this was treated as Kingite-inspired opposition to the law rather than an act of tribal rangatiratanga; that eventually Ngati Paoa and the other iwi supported the application to the court as the only way to settle the debt to the Crown, and allow the proclamation to be lifted so that other debts could be settled and other transactions entered into; that in settlement of the debt Ngati Paoa agreed to the Crown retaining 23,742 acres within the confiscation boundary that they understood Daniel Pollen to have promised to return to Ngati Paoa, plus nearly 21,253 acres more; and that other iwi withdrew their claims to customary interests in the land in order to allow Ngati Paoa to settle their debt to the Crown.

Counsel for Wai 100 further states, ‘The acquisition of Piako represented the loss of one of the last remaining vestiges of the tribal estate of Ngati Paoa’, much of the Ngati Paoa rohe already having been alienated in pre-Treaty transactions, pre-emption waiver purchases, Crown purchases before 1865 and raupatu during the wars of the 1860s. This outcome is considered by counsel to show a failure by the Crown to act with utmost good faith and actively protect the landholdings of Hauraki in general, and of Ngati Paoa in particular.⁹⁵

Counsel for the Crown contests the view of the Wai 100 claimants that there had been no agreement before the Whakatiwai hui of August 1874 that the expenses incurred were to be secured against the Piako lands:

The Crown submits that the true nature of the transaction from the outset was that there was to be a sale of the land, rather than a debt to be settled at some future date. At the 1889 meeting, Mackay stated that before he went to Auckland to purchase supplies, the Ngati Paoa chiefs had fixed £4,500 as the maximum amount to be spent on the feast. . . . It is reasonable to deduct [deduce?] from the totality of the circumstances that both parties considered the sum to be expended was an advance on account for the purchase of the land. It is critical to note that one of the matters discussed at the Whakatiwai hui of August 1874 was the settlement of all advances made by Mackay and debt to store-keepers picked up by Mackay, relating to the Moehau and Ohinemuri lands. In these circumstances the Crown submits it was not credible to contend that those Ngati Paoa chiefs who fixed the limit to be spent on supplies for the hui would have regarded the £4,500 limit as a debt rather than an advance on the sale of the land. A second critical point is that the Ngati Paoa chiefs signed an agreement for the sale of a particular locality of the Piako lands shortly after the hui had ended. This suggests that they had intended to sell sufficient land so as to settle the cost of their hosting the hui.

95. Ibid, pp145–149

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The 1874 agreement . . . also contained a formula for setting the price for those lands. Subsequent to the 1874 deed, the signatories and other Ngati Paoa continued to draw advances on the basis of the agreement and its formula for settling the price. Moreover, a settlement of the transaction was not achieved until some 15 years later. . . . Under the terms of the original agreement, the Crown was entitled to around 140,000 acres. It ultimately accepted 40,000 acres. The Crown eventually wrote off a significant amount of its advances, including the original advance of £4,500.⁹⁶

Crown counsel also rejects the allegation that the Crown ‘pressured’ Ngati Hako and Ngati Maru to alienate a large portion of Piako and failed to take into account the views of other tribes including Ngati Paoa, opposed to giving up their rights in Piako. Rather, the Crown requested Taipari and Hoani Nahe, as leading political figures in the region, to facilitate the transaction, and consulted leading Ngati Hako chiefs such as Paora Tuinga and Te Ngahoa Ripikoi, who approved the terms of settlement. Nevertheless:

the Crown accepts that it did not have sufficient regard to the amount advanced in relation to the lands Ngati Paoa were committing under the agreement. In short, the Crown does not appear to have undertaken an audit from time to time, either for its own benefit, or for that of Ngati Paoa, as to the amount of land it would pass to the Crown had the terms of the 1874 agreement been strictly enforced.

Ultimately, a compromise was appropriate. The 1889 minutes suggest that significant endeavours were made to reach a reasonable compromise. Again, however, the Crown does accept that it had insufficient regard to the issue of a sufficiency of land base for Ngati Paoa. It is nevertheless interesting [that] the issue of landlessness does not appear to have been raised during the extensive negotiations leading up to the settlement.⁹⁷

The Crown monopoly was increasingly frustrating to iwi such as Ngati Maru and Ngati Hako, whose interests were intermingled with those of Ngati Paoa over much of the plains. However, substantial payments were made to *some* sections of the right-owners by the Crown: by 1877 Crown agents had paid out some £16,500 in advances, all but £500 of it to ‘friendly’ (as opposed to ‘Kingite’ or ‘Hauhau’) Ngati Paoa, plus a small payment to Ngai Tai. But in the absence of surveys and determination of the respective tribal interests, no one knew exactly which land was the Crown’s. Ngati Maru, and Ngati Paoa non-sellers, were opposed to survey during the term of the Grey Government, which ceased advancing credit to Maori in Piako.

In 1881, however, Wilkinson succeeded in getting applications lodged in the court from several tribes to have their interests defined. Ngati Maru in particular were anxious to have the Crown’s transactions completed so that their own lands could be freed from the

96. Document AA1, p 183; doc A10, pt 4, pp 261–262

97. Document AA1, p 184

prohibition on private dealing. The court defined (on paper) a boundary between Ngati Paoa and Ngati Maru, starting on the Piako about seven miles above Te Kerepehi. Taipari of Ngati Maru accompanied Wilkinson to the spot and said that he would be willing to have the line cut, provided the survey was not made a lien on Ngati Maru land.⁹⁸

But another Ngati Maru leader, Horomona Mahoetahi based at Te Kerepehi, objected to the survey, and when the incoming Native Minister, John Bryce, said that Ngati Maru must 'bear their portion' of survey costs, Taipari also refused to cooperate. Bryce then criticised Taipari for sustaining Kingite influence in the region and threatened to prosecute Mahoetahi for obstructing the survey. T W Lewis, the under-secretary of the Native Department, told Taipari that, as a paid assessor of the Crown, he had a duty to assist the survey and was putting himself in a serious position. Taipari, however, continued to support Mahoetahi, telling Lewis that Mahoetahi was not acting as a 'Kingite' but 'as a Chief and representative of the Ngatimaru'. He remained resolute despite a telegram from Bryce saying that 'if it [the opposition to the survey] is a deliberate attempt by you and your friends to obstruct a lawful and proper order of the court, I shall regard it as a serious matter'. Two months later Ngati Hako also announced their opposition to the survey, unless they were consulted and had agreed with Ngati Maru on the boundary. The Government then decided not to press the issue until the Maori right-owners were more amenable. By 1888, the Crown had expended some £22,000 on Piako (including £2500 commission to Mackay) and still had no title. Maori meanwhile used the land for gum-digging and for their traditional economy.⁹⁹

In 1888–89, Native Minister Mitchelson and Under-Secretary Lewis tried to negotiate again, working through the Hauraki Native Committee, whose elected members reported back to their tribal constituencies. It soon emerged that, at the per acre prices set in 1874, Ngati Paoa did not have enough land left to meet their accumulated debt. The Government realised that it could not insist on the terms of the 1874 deed, but a majority of Ngati Paoa did accept that some land should be transferred to meet their obligations. A series of proposals and counter-proposals ensued as to the area to be transferred. There was also an effort to identify which individuals or which hapu had accepted payments, with a view to charging their land and not that of others. The largest single payment, however, was the £4500 payment in 1874 for food on behalf of the whole tribe.

As time went on the right-owners in Piako became increasingly impatient to settle the debt. W S Graham reported that 'adjournments are impoverishing the natives'; settling the debt to the Crown would allow the prohibition on private purchase to be lifted, other land sold and other pressing debts paid. In this situation, Ngati Paoa then offered 45,000 acres to satisfy its obligations to the Crown. This included 23,742 acres within the confiscation boundary which Daniel Pollen had formerly offered to return to Ngati Paoa, 10,295 acres on the eastern side of the Piako River, Patatai (2500 acres), Kopuatai 1, 2, and 4 (4379 acres), and

98. Document A9, pp 44–47

99. Ibid, pp 47–49

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Waitakaruru 6 (4084 acres). The Government reluctantly accepted this offer because Ngati Paoa had less right in the Piako area than the Crown had thought, and the hapu which had received the greatest payments from the Crown had insufficient land to recompense the Government's outlay.

Piako was then brought to the court in May 1889, Ngati Maru withdrawing its claims over the land Ngati Paoa was committing to the settlement. Complex adjustments ensued among the main Marutuahu iwi and Ngati Hako. There was nevertheless still resistance to the survey over a 7000-acre reserve at Pukorokoro believed to have been promised by Pollen to Tarapipipi Te Kopara and other 'Ngati Paoa Hauhau' of Te-Hoe-a-Tainui in 1870, resistance to the erection of a trigonometrical station at Kerepehi, and resistance by Kerei Kaihau on behalf of the Kingitanga, which still considered that the land had been committed by Hauraki to the trust of King Potatau and his successors.¹⁰⁰

These difficulties were overcome, partly by the arrest and imprisonment of Kerei Kaihau, but the Crown abandoned the balance of its advances because officials considered the land to be worth less than the cost of pursuing its claims. Over subsequent decades, Crown agents purchased fresh undivided interests within the subdivisions of particular hapu, taking them regularly to the court to have the Crown's interests defined and separated from those of non-sellers.¹⁰¹ Dr Anderson comments: 'The definition of complex tribal interests in Piako, initially in order to allow that purchase to go through, was to provoke competing tribal survey, and to generate large-scale court costs which had to be paid for in yet more land.'¹⁰²

(c) Tribunal comment on Piako: Mackay's 1889 statement is not, in our view, clear and positive proof that there had been no agreement between the Ngati Paoa leaders and James Mackay that the £4500 he spent on provisions for the 1874 hui at Whakatiwai should be charged against the land. Seemingly, the *written* agreement was not drawn up and signed until after Mackay had purchased the supplies and produced the receipts, but it is unlikely that he would have spent such a vast sum without a definite *verbal* agreement that it would be charged against land, as were most of his advances to Maori. There was no potential for such a sum being repaid from any other revenue available to Ngati Paoa at the time.

100. The Crown states that 'There is an issue as to the extent or acreage of land ultimately purchased by the Crown. It appears that the Crown ultimately obtained 20,071 acres and not the 45,000 offered by Ngati Paoa': paper 2.550, p 36. The issue turns on the interpretation of Pollen's negotiation with Tarapipipi Te Kopara regarding the approximately 24,000 acres within the Waikato confiscation boundary – 24,000 acres which Piako Maori understood to have been relinquished to them. It would seem on the evidence available to us that there was room for genuine misunderstanding about this, since Pollen had not put any offer in writing and later denied promising to return the land (see ch 5). For Pollen's negotiation with Tarapipipi Te Kopara and subsequent negotiations with Mackay, see document A8, pp 129–134.

101. Document A9, pp 49–53

102. Document A8, p 214

In our view, regardless of the precise sequence of events in 1874, the Crown's on-going accumulation of debt against Piako, combined with the proclamation that 200,000 acres of Piako land was under Crown pre-emption at a time when private purchasers were expressing considerable interest in the land, involved unfair pressure prejudicial to the Maori owners.

The Crown's eventual compromise settlement (accepting 45,000 acres in settlement instead of 120,000 acres which officials considered equal to the debt charged) should be seen in the light of its prior actions, which placed the Maori owners from various iwi under considerable pressure and denied them access to the land market.

(4) *The purchase of reserved or restricted land*

Dr Anderson has noted that the Government distinguished between lands formally reserved for vendors (placed under restriction on alienation) and land which Maori had simply withheld from sale. In Ohinemuri, for example, land merely withheld was considered open to further approaches by the Crown agents immediately, whereas in the case of reserved land the restrictions had formally to be removed by the court before either Crown or private parties could acquire the freehold (see sections 15.4.2 and 17.4.2(1) for the easing of the process in favour of the Crown).¹⁰³ In practice, negotiations for either category of land were commenced by Crown agents whenever they or Ministers wished to obtain it.

Belgrave and Young, for the Marutuahu claimants, have traced the stages by which the Ohinemuri lands were acquired (see secs 10.3.1–10.4.1, 17.4.2(2)(c)). It is clear that these purchases resulted from the high costs of the increasingly intense contests in the court between the intersecting iwi, and that Crown agents took advantage of the situation. Dr Anderson cites Gilbert Mair's report of 1894 that Ngati Koi were in 'such want of money for Court fees' that he would be able to acquire shares in Ohinemuri reserve block 17 at a lower price than previously possible.¹⁰⁴ Dr Anderson states that Otutoru 2, Waiomu 1 and 2, and Waikawau North were also sold to pay the costs of Ohinemuri hearings.

In the 1880s, although generally retrenching, governments continued to buy Maori land in response to pressure from local authorities or in relation to public works, discussed in chapter 23. In the 1880s, the Crown acquired the hot springs and surrounding land at Te Aroha, as discussed in chapter 19.

The Crown was also interested in mineral-bearing lands, as Dr Anderson's account of its purchase of Te Ipu-o-Moehau (1850 acres) illustrates. Mackay had made a £6 advance on Te Ipu-o-Moehau in 1874 because haematite (iron oxide) had been found there. This was enough for the Crown to proclaim the block as under its pre-emptive right of purchase. Wilkinson resumed negotiations in 1881 but advised that, because the land lay within the

103. See Williams, pp 275–283, app 7

104. Document A9, p 31

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goldfield and was yielding an income to the Maori owners in miner's rights of some £17 per year by a group working the haematite, he would have to pay higher than the standard five shillings per acre for land in that area. Payment of seven shillings sixpence an acre was approved. In the usual way, Wilkinson purchased the shares of some of the owners and the Government applied to the court to have its interests defined. The Crown was awarded 1245 acres, being the equivalent for the purchase of six shares plus the original £6 advance. The following year the Crown began to negotiate for the remaining 605 acres. The principal remaining Maori shareholder, Te Arani Watana, rejected seven shillings sixpence per acre because of the miner's rights income, and because a private purchaser had offered 15 shillings for 100 acres of the land. However, this would have involved Te Arani in survey costs and consequently she offered the whole of the block to the Crown for 10 shillings an acre. Wilkinson urged acceptance, because of the pressure from the Thames public for the Crown to acquire the freehold of land within the goldfields. The purchase went ahead.¹⁰⁵

The Maori owners of Waiau 1, another block within the goldfields, were reportedly willing to sell 'only owing to the great want of money on their part, to pay their debts.'¹⁰⁶ Since it held the mining rights the Crown was not greatly interested, and declined a suggestion that it should purchase from the Official Assignee the interest of one of the owners who had become bankrupt, at the expected upset price of £3 10s an acre. Eventually, the Crown did acquire four and a half out of the seven shares at 10 shillings an acre, and applied to have its interest defined; this amounted to 706 acres, leaving 392 acres for the non-sellers.¹⁰⁷ The marked difference between the Crown's price and anticipated upset price on the open market is apparent.

17.4.3 'Free trade' in 1888–89, followed by the Liberals, 1890–99

The mid-1880s, with Bryce then Ballance as Native Ministers, had seen the Crown purchasing selected lands in Hauraki under the cover of proclamations excluding private purchasers. We have noted the tentative efforts by the Government to establish native committees in 1886, and then block committees which would empower the Crown to sell or lease land on their behalf. In 1888, these experiments were swept away by a Conservative government. The Native Land Act of 1888 repealed the 1886 Act and reintroduced 'free trade' (direct private purchase) in Maori land. Most purchases in Hauraki, however, continued to be Crown purchases under proclamations of pre-emptive right.

The Liberal Government, returning to power in 1890, appointed the Rees–Carroll commission of inquiry into the native land laws. We have noted in section 16.3.3 the views of that

105. Document A9, pp 36–37

106. Frederick Preece to under-secretary, Native Department, 21 February 1888, MA-MLP1897/238, Archives NZ (doc A9, p 37)

107. Document A9, pp 37–38

commission and its outcomes: a restoration of Crown pre-emption in most of the country and a renewed drive by the Liberal governments to purchase Maori land.

Purchase policy was largely controlled by the Department of Lands and Survey, a trend strengthened by the disestablishment of the Native Department in 1893 and the transfer of its judicial functions to the Justice Department. The long-standing resident magistrate system was abolished in favour of stipendiary magistrates trained in law. There was still a Native Minister, now Alfred Cadman (successively, the member for Coromandel, Thames, the city of Auckland, Waikato, and, finally, Ohinemuri), who was also the Minister of Mines, Minister for Justice, and Minister for Railways from 1893 to 1899. The tenor of the administration of Maori affairs changed: the paternalistic role of district officials (such as it was) of guarding against too rapid alienation of Maori land, was diminished and removal of restrictions became easier. Gilbert Mair was appointed land purchase officer in the district in 1894.

(1) Removal of restrictions made easier

Law changes are outlined in sections 16.3.1 and 16.3.3, but are discussed here in relation to the Liberals' purchasing policy. In the light of the purchases of the Ohinemuri and other reserves, described above, Belgrave et al have observed that:

The provision of reserves proved a very limited form of protection of Maori interests. The administrations of the early to mid-1880s were aware that Marutuahu and Pare Hauraki had been heavily affected by the extent of land sales in the district. As a result they generally maintained restrictions on titles in this period. However, this awareness diminished over time. New legislation introduced during the late 1880s and 1890s relaxed the regulations governing the lifting of restrictions from native titles.¹⁰⁸

The Maori population was actually increasing by 1893. Although it might not yet have been apparent that the demographic slide had been arrested, and Maori would need more, not less land for the future, Anderson observes that 'An assumption pervaded the legislation that restrictions [on alienation] were to guarantee a subsistence in order to prevent Maori from becoming a burden, rather than as a means of ensuring the retention of a capital base for future expansion.'¹⁰⁹

Throughout the various law changes (reviewed in sections 16.3.1 and 16.3.3) the Liberal Government's policy remained constant, being (in the words of the Stout–Ngata commission) the 'vigorous pursuit of purchase by the Crown and constant use by the Governor in Council of the power [of] excepting restrictions against alienation.'¹¹⁰ According to Dr Anderson's evidence, each easing of the procedure for removing restrictions on title was

108. Document v1, p 269

109. Document A9, p 106

110. 'Interim Report on Native Lands and Native Land Tenure', AJHR, 1907, G-1C, p 4 (doc A9, p 58)

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followed by a spurt of removals, affecting over 40 blocks in Hauraki after the 1892–93 changes (particularly in respect of Waikawau and Te Aroha reserves), and again after the 1894 legislation.¹¹¹ The Under-Secretary for Justice did routinely make inquiries whether they should be removed, from Maori applicants and buyers, and their counsel, and of land purchase officers in the case of Crown purchases. In many cases, however, the transactions were well advanced and money paid in anticipation of the final approval, which seems increasingly to have become a formality. The Justice Department, however, routinely consulted the Valuer General and insisted on prices paid being consistent with Government valuation, which may have offset the effect of Crown pre-emption on prices to some extent.¹¹² The Liberals were in fact so successful in acquiring Maori land in the 1890s, that they became concerned at the prospect of an emerging class of indigent Maori.

By 1899, the Government had purchased enough land for the immediate needs of settlement and ceased launching new purchases. Premier Seddon appointed James Carroll as Native Minister and allowed him to pursue his ‘taihoa’ policy, which favoured alienation by lease rather than sale, with the hope that the next generation of Maori would farm the land themselves after expiry of the leases.

(2) Notable Crown acquisitions in the 1890s

It is impracticable to examine closely all the early Liberal Government’s purchases in Hauraki, though there is much information about them in Mr Alexander’s and Dr Anderson’s evidence, and in the block histories submitted by various claimant groups. Although huge Crown purchases were concluded in the 1880s, further purchases were undertaken in the 1890s of auriferous land or land considered suitable for settlement.

(a) Kuaotunu: Among the more significant purchases were the Kuaotunu blocks, the land of Ngati Hei and others on the east coast of the Coromandel Peninsula, where gold had been discovered in the late 1880s. Despite prior private agreements for sale or lease and negotiations for a cession of mining rights (discussed in section 12.4.2), purchase of the freehold was attractive to the Crown: it automatically made all the interest-holders subject to the mining laws. The Kuaotunu township had evolved under informal arrangements, so the lessees also preferred that the Crown should purchase. Notable among the evidence on Kuaotunu is Kawhena Peneamine Rangitu’s reason for alienation, reflecting his weary struggle to preserve his community’s resources:

I would like them to offer me a lump sum for my block, and by doing so it will take a great responsibility and also worry from me. I meet with such reverses in guarding the timber

111. Documents A9, A10

112. Document A9, pp 99–100

upon the property . . . I will surrender them for a lump sum under a new lease, and let them make what they can out of the revenue.¹¹³

Rangitu was not yet willing to relinquish the freehold, but the Crown was not interested in a lease. Negotiations were lengthy but, as mining declined in the first years of the twentieth century, Rangitu and other Maori owners agreed to a sale of the freehold, discussed in detail in chapter 12.

(b) *The Hauraki Plains:* Purchases in the Hauraki Plains had been precluded while the huge Piako purchase was under consideration, and the rights of Ngati Paoa, Ngati Maru, and other iwi were undetermined. The 1889 settlement of the Crown's claims in Piako opened the way for consideration of other neighbouring lowlands. Much of the area was wetland, but successive governments were turning their attention to the agricultural possibilities of drained swamps and the fertile higher land adjacent. Mr Alexander lists 29 blocks acquired on the Hauraki Plains between 1897 and 1902, notably at Te Hoe o Tainui, Mangawhero, and Opepeka.¹¹⁴ We refer below to the high survey costs incurred by Maori owners in the course of putting the land through the court.

(c) *Reserved and withheld lands in Ohinemuri, Te Aroha, Whangamata, and Waikawau:* Dr Anderson's text and tables covering the years 1888 to 1899 show that most of the lands formally reserved or withheld from sale during the purchase of large blocks in previous decades, were now acquired by the Crown. Substantial purchases were made: 4220 acres of Ohinemuri reserves in the early twentieth century; 1044 acres of Te Aroha reserves and 5487 acres of Whangamata, mentioned in earlier sections. (In addition, the 200-acre Ohinemuri 6 block was mistakenly thought to have been purchased; the land was subdivided and settled and compensation paid after the error was discovered in 1920.¹¹⁵) The systematic purchase campaign continued through the 1890s. Belgrave and Young discuss Ohinemuri 20 as a distinct block of an estimated 18,000 acres, but found to contain more land after survey. By the end of the century, the Crown had acquired some 18,200 acres or 99.5 per cent of the block.¹¹⁶ We discuss its acquisition in detail in section 10.4.4.

According to Dr Anderson's figures, in addition to the 60,000 acres acquired by the Crown in the initial purchase of Ohinemuri in 1882, nearly 6000 more had been acquired by 1887. This left some 26,000 acres still in Maori ownership, either as reserves or lands held

113. Kawhena Rangitu to resident magistrate and mining warden, 17 April 1896, MA-MLP1902/20, Archives NZ (doc A9, p 61)

114. Document F5

115. Document v2, pp 55–57

116. *Ibid.*, pp 57–60

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back from sale (including Ohinemuri 20). Over the next 10 years, a further 19,557 acres passed to the Crown, mostly from Ohinemuri 20.¹¹⁷

Other reserved or withheld land purchased in the 1890s included Hikutaia 4 (3350 acres), Whangamata 6A and 6B2 (6855 acres), 1000 acres of Moehau, and the 999-acre Ngati Koi reserve (Ohinemuri 17), as well as blocks such as Kakatarahae (3189 acres), Marokoka (2540 acres), and 3315 acres of Taparahi blocks.¹¹⁸

In 1878, the Crown was awarded the Waikawau block of some 44,246 acres, subject to reserves which were to be for all of Ngati Tamatera. Names of owners were recorded for 12 reserves, but only as trustees in respect of three wahi tapu. All the reserves were vested in the Crown as trustee.¹¹⁹ At first the Crown grants were not issued, because:

the land, being absolutely inalienable, and Her Majesty being by the wording of the Order of Court Trustee for the native owners of the reserves, there was no necessity for the Grants to issue. But it is difficult to make the Natives understand this, and the non-issue of the Crown grants makes some of them doubtful whether they have any title to the land.¹²⁰

Legal vesting of the land in the Crown prevented the owners from leasing it, but by item 5 of the schedule to the Native Promises and Contracts Act 1888, the Crown divested itself of its trusts. Grants were issued over the next few years (including for the wahi tapu) as if the named owners were absolute owners. Alienation was restricted to 21-year leases but the usual removal of restrictions process was put in train in the 1890s and the Crown began to buy the reserves.¹²¹ It had acquired 71 per cent of them by 1896.¹²² Other reserves were acquired by a private purchaser.¹²³

The Waikawau reserves reveal an important aspect of the Crown's policy on survey costs. When the reserves were deemed inalienable the Crown had accepted the survey costs, but when some owners contemplated selling them, Crown officials proposed to place survey liens against them. However, the court declined to charge the Waikawau reserves because they had been agreed and identified before the purchase of Waikawau: 'These reserves were made in connection with the Gold Fields agreement entered into by Mr Mackay and the natives, section 5 of which agreement provides that these lands shall be surveyed at the cost of the Government.'¹²⁴ We note that in defining the Crown's interests and vendors' reserves in Ohinemuri the Crown also accepted the survey costs.¹²⁵

117. Document A9, pp 59–60, table 2. See also document D7 regarding the 8701-acre Ohinemuri 20E block.

118. Document A9, pp 59–60

119. Document J2, p 2

120. Wilkinson to under-secretary, Native Department, 7 October 1885, Maori Affairs head office file 1907/507 (doc A10, pt 1, p 364)

121. Document A10, pt 1, pp 368–379

122. Document J2, p 3

123. Ibid, pp 5–6. See also document Y3 with respect to the Waikawau block.

124. Coromandel minute book 6, fols 42A–43A (doc A10, pt 1, p 366)

125. Document A10, pt 3, pp 53–55

(d) Morgantown: In this period, the freehold of the Morgantown portion of Te Aroha was also acquired. Dr Anderson notes that this was part of a wider pattern, evident elsewhere in the district, that Maori ownership of urban commercial property was regarded as detrimental to development.¹²⁶ We shall return to this subject in chapter 19.

(e) Harataunga: In the 1890s, the land purchase officer in Gisborne received offers to sell from Harataunga owners there, in particular an offer from Major Ropata in November 1892, to sell the Harataunga West 1 to 7 blocks.¹²⁷ This is discussed in detail in section 12.2.3. Between 1893 and 1896, the Crown agent in Gisborne purchased a number of interests, at five shillings an acre, but in Coromandel Peninsula, where most of the owners lived, Gilbert Mair was able to obtain no interests at all.¹²⁸

(3) Some statistics of land alienation in Hauraki, 1890–99

At the beginning of this chapter, in section 17.1.1, we discussed some statistics of the pace and scale of Crown purchasing. Dr Anderson's table 2, 'Crown Purchases in Hauraki Lands (Excluding Hauraki Plains), 1890–1899' covers the period of vigorous Crown purchasing under the Liberal Government and totals some 57,000 acres, including various subdivisions of Ohinemuri 20 totalling at least 17,000 acres, Hikutaia 4 (3350 acres), Whangamata 2 (5487 acres), Kakatarahae (3189 acres), Kuaotunu 3A (3987 acres), and Whangamata 6A and B2 (6855 acres).¹²⁹ These of course were substantial areas out of the balance of the lands remaining to the various iwi. About one-third of these purchases bear the comment 'restrictions removed'. All in all, by 1899, Hauraki Maori retained between 15 per cent and 20 per cent of their former rohe, and this was to diminish swiftly in the first decades of the twentieth century.

17.5 CLOSING SUBMISSIONS AND RESPONSES

17.5.1 Wai 100 closing submissions

The closing submissions of the Wai 100 claimants in respect of land alienation (as distinct from submissions on the Native Land Acts and the court) have focused upon the Crown's acquisition of Ohinemuri and Piako. We have discussed Ohinemuri in chapter 10, and Piako in section 17.4.2(3). In general, counsel for Wai 100 concludes that the current consequences of Crown policies for Hauraki Maori are 'abject landlessness', and that 'Even the

126. Document A9, pp 62–63

127. Native Minister to under-secretary, Native Department, 4 November 1892, MA-MLP1899/48 (doc A10, pt1, p17)

128. Land purchase officer, Thames, to chief land purchase officer, 28 September 1897, MA-MLP1899/48 (doc A10, pt1, p19)

129. Document A9, pp 59–60

tiny amount of land that remains is largely fragmented and development is hamstrung by multiple ownership issues.¹³⁰

17.5.2 Crown closing submissions

In closing, Crown counsel has presented 20 pages of submissions on ‘Crown purchases post 1865’. For convenience, we summarise them under a number of sub-headings:

(1) *The Crown accepts substantial responsibility, but Maori were not passive parties*

Crown counsel accepts that the Crown’s failure to ensure retention of sufficient land holding by Hauraki Maori constituted a breach of the principles of the Treaty. A number of points are then submitted in mitigation, including the observation (discussed in the previous chapter) that settler leaders genuinely believed that modifications to Maori customary tenure and trade in land would benefit Maori as well as settlers. Other points made are that, with 10 million acres in their possession throughout New Zealand in the late nineteenth century, Maori were still believed to be ‘rich in land’; and that ‘there was little dissent on the fundamental issue of the need for economic growth, roads, railways bridges and close economic settlement’. These ideals and the prevention of land aggregation underlay the Liberals’ drive to acquire Maori land.¹³¹

Counsel also cites evidence to suggest that Maori were themselves not passive parties in land alienation. They took the initiative in many transactions and tried to bargain for higher prices. As Belgrave and Young have observed, they were interested in ‘strategic selling’, to serve a variety of goals. Their motives were mixed. Counsel cites parts of Young and Belgrave’s summation of the reasons for alienation. We quote the paragraph in full:

The evidence is extremely problematic on this point and far from conclusive . . . the range of explanations which are suggested include the place of debt, use of the proceeds as a form of income, a way of freeing up capital to invest in other lands, the sale of land which is not a site of direct occupation or cultivation and the sale of land as a way of continuing or ending a traditional rivalry between kinship groups. Nevertheless, the ability of Maori to exercise independence in each [situation] is highly problematic and no definite conclusion either way is possible. There appears to have been a continuum between coercion (in its variety of forms) and choice and the evidence indicates that both could be involved in any sale. While the volition of Maori to sell land can be acknowledged in some of the evidence, the reasons for their doing so are seldom clear.¹³²

In the light of such statements, Crown counsel states:

130. Document Y1, pp 206–207

131. Document AA1, pp 166–167

132. Document v2, p 82; doc AA1, p 167

While the Crown does not seek to deny responsibility for Treaty breaches, it is easy to overstate the extent and degree of Crown responsibility. As Paul Monin has written, Hauraki Maori cannot be seen as victims in terms of absolute disempowerment. Outcomes for Hauraki Maori were still influenced by their decisions and by continuities in their culture.

Thus, whilst it can be argued that in Treaty terms the Crown should have done more to have halted land alienation, in Hauraki, it ought equally to be acknowledged that there would have been real pressure from some Hauraki Maori to overcome restrictions on alienation and that in practice enforcement of such a regime would have been difficult. Hauraki and other Maori regularly rejected attempts to fetter their ability to manage their land as they saw fit.¹³³

Counsel also refers to the Crown's earlier statement in its amended statement of response:

the issue is whether it was within the capacity of 19th century Governments to act more effectively in the interests of Maori and had they done so would they be acting in an improperly paternalistic manner by not leaving Maori to work out their own destiny?¹³⁴

Crown counsel notes the comment of the Marutuahu claimants that this is an attempt to 'take refuge' behind the concept of 'improper paternalism' but considers the criticism misconceived:

In posing the question the Crown is *not* seeking to invoke some doctrine of 'fatal necessity' that somehow discounts any element of Crown Treaty responsibility. Rather the framing of issues in this way is intended to emphasise that the focus must be on alternatives that would have been practically possible within the particular policy environment of the time. [Emphasis in original.]¹³⁵

(2) Not every transaction involved a Treaty breach

Crown counsel considers that 'the fundamental issue of land loss can only be sensibly addressed at a broader level' that by an examination of particular transactions, which 'may in themselves have been benign and cannot be assumed to be wanting in Treaty terms simply because a whanau or hapu's landholdings were reduced in size'. By way of example counsel cites the sale of some of the Lipsey–Mokena property in Te Aroha for prices which Mr Dion Tuuta characterised as 'nothing short of outstanding'.¹³⁶ Counsel states that the Crown

133. Document AA1, p168; Paul Monin, *This Is My Place: Hauraki Contested, 1769–1875* (Wellington: Bridget Williams Books, 2001), p 4

134. Paper 2.550, p 32

135. Document AA1, p 169

136. Ibid

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‘regards the notion of a total Treaty breach theory as quite unconvincing ([that is], that virtually every land alienation was wanting in terms of Treaty principles.’¹³⁷

(3) *The proclamations creating Crown monopoly were open to abuse but some protection mechanisms were available*

Crown counsel surveys the trends in Crown purchasing of Hauraki lands which he does not seriously dispute. They include the Crown’s acquisition, under proclamations authorised by the Immigration and Public Works Act excluding private purchase, of some 400,000 acres between 1870 and 1885, including lands believed to be suitable for settlement or likely to be auriferous. ‘The Crown acknowledges that the proclamations likely affected an area more extensive in size than was reasonable in the circumstances’ and notes Mr Hayes’ reference in evidence ‘to the potential for the Crown to abuse its monopoly powers under this legislation’.

The Crown, however, rejects ‘the sweeping assertion’ of the Wai 100 claimants that because of the 1872 and 1874 proclamations, Hauraki Maori were forced to accept the prices offered by the Crown without any formal protective measures. There were ‘many examples’, Crown counsel suggests, of ‘Hauraki Maori bargaining in sophisticated ways to extract higher prices for their land’. Counsel cites Mr Hayes’ comment that the Crown’s performance as purchaser of the proclaimed lands ‘needs to be assessed on a case by case basis’. Counsel also observes that the Wai 100 criticism overlooks the role of the trust commissioners in ensuring that prices paid were fair, and notes Mr Hayes’ evidence that Haultain did not merely rubber-stamp transactions. Counsel acknowledges, however, that the Crown may not have been bound by the trust commissioner system at all, and was expressly excluded from its operation by section 13 of the Native Land Laws Amendment Act 1883. Although in other districts the trust commissioners may have examined Crown transactions, the extent to which this was done in Hauraki remains unclear.¹³⁸

Other protection mechanisms included the Maori Real Estate Management Acts (affecting the interests of minors), restrictions on alienation and the creation of reserves. Crown counsel notes that Maori as well as Pakeha sometimes criticised the restraints imposed by these measures, and submits that:

the familiar variation between the intention of some of these mechanisms and practice on the ground demonstrates a fundamental and difficult problem, namely, how to provide simple and clear rules whilst at the same time providing practical and workable protection for Maori. While in Treaty terms the outcome of the various protection mechanisms can be seen to be wanting, there was an ongoing search by the Crown to strike an appropriate balance.¹³⁹

137. Document AA1, p 170

138. Ibid, pp 172–174

139. Ibid, p 174

(4) Crown agents were not unsupervised

Crown counsel also challenges the allegation that the Crown failed to monitor adequately the actions of its land purchase agents. McLean's instructions of 1875 to negotiate at public meetings and avoid secret dealings are cited, as are the instructions to Mackay to 'discontinue the ration system'.¹⁴⁰ Nevertheless, although the *final* agreement over the purchase of Te Aroha was made at a public meeting, counsel accepts that 'over time the Crown moved increasingly to negotiate with individual right-holders'.¹⁴¹

Counsel notes Young and Belgrave's observation that the close and intimate relations developed by James Mackay, George Wilkinson and Charles Dearle with Hauraki Maori communities (meaning that they all had local Maori wives or partners) were 'essential to the success of the Crown's purchasing activity in Hauraki' but considers it 'not at all remarkable that the intimate knowledge acquired was useful and applied in negotiating the purchase of land'. Counsel contends that 'nothing sinister ought to be inferred from these facts alone'.¹⁴²

(5) Debt, raihana, and the diverse wishes of rangatira

Crown counsel also deals with Crown agents' methods including the use of debt, raihana and 'advances against the proceeds of sale' to gain land. The main point of principle raised in respect of raihana (in chapter 10) concerns the way that Mackay drove a wedge between those willing to sell and those opposed to sale: Crown counsel draws attention to Dr Battersby's point that 'it is too simplistic to accept that the reality of chiefly authority over certain lands was manifest only in expressed opposition to the Government' and that 'it is essential to understand the depth of the debate which occurred between Hauraki Maori communities over gold, land and other political questions'.¹⁴³

(6) Reserves

With respect to the claimant allegation that the Crown failed to provide adequate reserves, Crown counsel states:

This is a corollary to the landlessness submission and in general terms the Crown has accepted that this claim is made out. Having said that, Crown Treaty duties are not absolute and Crown's responsibility to ensure that reserves for Hauraki Maori were created and retained, was qualified by a requirement to accord Hauraki Maori a significant say in the future status of the reserved lands.

Counsel notes that under the 1873 Act this was not primarily the responsibility of the court but of administrative officers, the district officers, 'and required the cooperation of

140. Ibid, p175

141. Ibid

142. Ibid, p176

143. Document v2, p181

Maori'. Counsel quotes Puckey's statement (cited in section 16.1.4) that he had urged upon Hauraki Maori agreement to define lands to meet the 1873 target of 50 acres per head of reserves, but in vain.¹⁴⁴

Counsel notes that it was not the intention of the legislation that reserves be permanently inalienable or that restrictions on title could not be removed. His summary of the statutory provisions for removal of restrictions conforms with the outline set out in sections 16.3.1(3) and 17.4.3(1), and (like the summary provided by Dr Anderson) shows that consent was transferred from the Governor to the court and that pre-conditions for removal were relaxed. Counsel objects to the 'rather simplistic assertion' of the Wai 418 claimants that the vesting of the Waikawau and Tapu reserves in individuals absolutely rather than as trustees was the 'key factor' why most reserves were alienated: 'There were many factors at play, including the wishes of the owners themselves, that led to the removal of restrictions on alienation. Having said that the Crown does and has of course acknowledged a failure in respect of reserves policy generally.'¹⁴⁵

17.5.3 Claimant closing responses to Crown

(1) *Counsel for the Marutuahu claimants*

Despite Crown counsel's concessions, claimant counsel have reacted strongly against some of the Crown's final submissions. Counsel for the Marutuahu claimants considers that the Crown has misrepresented Young and Belgrave's argument regarding evidence of 'coercion' and 'choice' governing the alienation of Maori land. 'The Crown's attempts to emphasise 'choice' cannot hide clear evidence of coercion (at least in its broadest sense) in the same transaction'. Counsel also suggests that Maori requests that restrictions should not be imposed on their court titles up to the mid-1880s should not be construed (as the Crown has done) as evidence that 'Many Maori in this period strongly object to any fetter on their ability to deal with their land as they saw fit'. Equally, counsel suggests, this could show that Maori simply did not see the need for restrictions as they had no intention of alienating.¹⁴⁶

More importantly, counsel for Marutuahu suggests, while there is little evidence showing that Maori offers to sell were driven by poverty or the desire to free up capital for other ventures, there is a great deal of evidence to show that debt created by the land court system was a major consideration. Especially after the mid-1880s, the correspondence and reports of Wilkinson and Mair show time and again 'the degree to which decisions to sell were influenced by considerations of debt and economic marginalisation, often in consequence of the costs associated with surveying land and having title determined by the Court.'¹⁴⁷

144. Document AA1, pp187–189

145. Ibid, p189

146. Document AA13, p37

147. Ibid

Counsel's responses also focus on the nature of the titles created by land law, and the collective title wanted by responsible Maori leaders. (This was the central issue of chapter 16.) Counsel for Marutuahu claimants picks up this question with reference to the Crown's comment that 'no such concept (ie tribal land ownership) was argued for' by Maori in the court, and observes 'this would hardly be surprising in sources generated by the operation of an institution which could not give a tribal title' (under the 1873 Act.)¹⁴⁸ Claimant counsel states that 'In other contexts, particularly political contexts, there were regularly calls from Maori leaders for a title system which recognised the fundamental place of a collective framework in the ongoing management of land use and occupation.'¹⁴⁹

In relation to this issue, counsel for Marutuahu claimants strongly rejects Crown counsel's suggestion that the vesting of the Waikawau reserves in individuals as absolute owners rather than as trustees was not a 'key factor' in their alienation. Far from being a 'simplistic assertion' (as Crown counsel has suggested) the kind of title granted 'explains why Marutuahu land holdings were so severely depleted over a period of more than one hundred years'. Young and Belgrave's nuanced assessment:

does not in any way mitigate the Crown's responsibility for imposing a system of title on Maori which was fundamentally at odds with their customary decision making processes regarding the ongoing management of rights to land use and occupation and which was guaranteed by Article Two of the Treaty. Options for ongoing management were strictly determined and defined by the Crown and this had a massive impact on the capacity of Maori to retain their land because the system was organised almost entirely in favour of alienation.¹⁵⁰

As to Crown counsel's claim that the Crown attempted to curb undesirable land purchase practices, counsel for Marutuahu claimants argues that the land purchase agents remained 'highly pragmatic and used a variety of negotiating techniques according to the particular circumstances in which they were working'.¹⁵¹ He notes that, notwithstanding Mr Hayes' evidence that the trust commissioners scrutinised transactions conscientiously before approving them, other expert witnesses – David Alexander and Jenny Murray – have provided evidence that the commissioners' efforts and capacity were patchy.¹⁵²

At the fundamental level, the Crown's closing submissions are criticised by counsel for Wai 100 for their assumption that it was unlikely that Maori owners or their successors 'would have maintained their intention not to sell or lease, or otherwise transact in their land, over the longer term'.¹⁵³ Counsel for the Marutuahu claimants states:

148. Ibid, p 38; doc AA1, p 125

149. Document AA13, p 38

150. Ibid, p 39

151. Ibid

152. Ibid, p 40

153. Document AA1, p 143

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The Crown continues to view the alienation of Maori land in terms of free choice but it also assumes that choice would usually be exercised in favour of sale [or some form of alienation]. It still denies that the title system itself and other external pressures – coercion in its broadest sense – was responsible for the relentless and persistent long-term acquisition of Maori land even when there is so much evidence to the contrary.¹⁵⁴

Counsel for the Marutuahu claimants refers the Tribunal to the conclusions in Young and Belgrave's report on the operation of the Native Land Court in Hauraki. The essence of those researchers' analysis is that, amidst the manifold reasons for the Maori dispossession, there is, however, one issue that is 'beyond doubt': 'That is the way in which the title created by the Native Land Court allowed individual owners to act independently without regard for the collective interest.'¹⁵⁵

(2) Counsel for Wai 100

The key general points discussed by Counsel for Wai 100 relate to the Crown's concession that it failed to provide an adequate '*corporate management mechanism*' in the Native Land Acts, whereby the holders of court titles listing multiple owners could make genuinely collective decisions.[emphasis in original.]¹⁵⁶ To this might be added Crown counsel's concession with regard to titles fractionated through succession:

the Crown accepts that this created considerable administrative difficulties for some Hauraki Maori communities and this did impact on their ability to deal with their lands and did lead to sale in some cases. The Crown ought to have provided a better range of options to address these problems (ie beyond incorporation and consolidation models).¹⁵⁷

Counsel for Wai 100 notes the implicit contradiction between these concessions and Crown counsel's persistent emphasis on Maori having considerable choice as to whether they sought court titles or alienated land. For example:

The Crown suggests at paragraph 540 [of document AA1] that Maori held some control in the Native Land Court system as they '*largely determined the outcome*'. The emphasis of the complaint was however that Hauraki Maori did not control the process that determined the outcome, but were participants in the Court system. It was also a system that was imposed by the Crown without consultation or Maori input, and it was a system into which the tribe could be drawn by the Crown or by individuals. [Emphasis in original.]¹⁵⁸

154. Document AA13, p 41

155. Document v2, p 83

156. Document AA14, p 36

157. Document AA1, p 177

158. Document AA14, pp 36–37

Counsel notes also that, while conceding that the Crown failed to ensure that Hauraki Maori had adequate land reserves, Crown counsel has suggested that its “*Treaty duties are not absolute*” and were qualified by a requirement to accord Hauraki with a significant say in the future status of their reserved lands.¹⁵⁹ Counsel for Wai 100 continues:

It is submitted that the Crown’s Treaty duties were not qualified in this way. On the contrary, the very reason it was recognised that the Crown had to exercise a protective function was because there was a recognition that unless appropriate steps were taken by the Crown, landlessness was a likely outcome. To suggest that the protective duty could be abrogated by [to?] those who needed protection is illogical and an abrogation of the Crown’s responsibilities.¹⁶⁰

Counsel points out that the Crown’s own analysis of the native land law shows that it ‘became progressively easier for Hauraki to alienate their land’. Moreover, the statement by district officer Puckey that he was unable to get Hauraki tribes to define a minimum of 50 acres per head of reserves as required by the 1873 Act ‘illustrates exactly why it was necessary for the Crown to create proper protections to ensure Hauraki retained sufficient lands for their present and future needs.’¹⁶¹

17.6 TRIBUNAL COMMENT

We have given our comments on a number of particular issues in the sections above. Here, we seek to draw together our views on the main themes of the chapter.

17.6.1 The main issue: governments’ determination to acquire the bulk of Maori land for settlement

The Tribunal’s responsibility to make findings on whether the principles of the Treaty have been breached by the post-1865 land alienations, and Hauraki Maori prejudiced thereby, are easier than would otherwise have been the case for two reasons: first, by facts which speak for themselves very clearly indeed and, secondly, by the number and extent of the Crown’s concessions.

As to the first, in 1865 the Hauraki tribes still owned and controlled between 80 and 90 per cent of their rohe. By 1899, they owned between 15 and 20 per cent. This outcome must be

159. Document AA1, pp 168, 187; doc AA14, p 42

160. Document AA14, p 42

161. *Ibid*, p 43

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read in conjunction with two other facts of Hauraki history. First, that from Cook's landfall in 1769 to the 1850s, Hauraki iwi had engaged eagerly but selectively with the wider world, through trade, exploitation of timber and other resources and joint ventures with Europeans, encouragement of nodes of settlement, and interaction with the growing town of Auckland. Secondly, in the late 1850s and up to 1865, realising that they were losing control of their engagement with the Pakeha world, they had reacted against the land acquisitions of the previous 25 years. They showed increasing resistance to land sales and gave strong support to the Kingitanga. Even mining leases were only cautiously entered into before 1865. Hauraki Maori continued, however, to contract for the sale of timber on their land.

That situation of Maori voluntary engagement with the colony changed abruptly with the introduction of the Native Land Acts, with imposed forms of title which enabled individuals named on certificates of title and memorials of ownership to sell their interests. Collective tribal control was circumvented. Moreover, negotiations for purchase commonly began before the owners were determined (despite the fact that such contracts were formally void until the court had granted its certificate or memorial and approved the purchase).

The first effect of this was to facilitate private purchase at Coromandel, Thames, and the western Firth of Thames. Much more seriously, the law allowed the Crown to buy up undivided individual interests in titles, without many of the restrictions that applied to private purchasers, and then apply to the court for a partition of the blocks concerned. The Crown's position was greatly strengthened by provisions within the Immigration and Public Works Acts and the Native Land Acts which empowered governments to proclaim large areas as subject to Crown pre-emption. This greatly circumscribed the options available to the Hauraki tribes and, coupled with periods of vigorous Crown purchasing (notably, 1870–85 and 1890–99), led to most of the claim area passing to the Crown within 30 years.

While it is clear that some Maori volition entered into many of the transactions, it is also clear that Maori owners were caught up in selling far more land than they had intended. The correspondence of Crown officials repeatedly refers to Maori owners being caught up in debt, including debt incurred in establishing court titles over land in which customary rights had been intermingled. An application to the court by one section of right-owners, or an application by the Crown for a determination of interests it had acquired, obliged all right-owners in the affected land to join the court proceedings. In areas which the Crown targeted it was extremely difficult for Maori owners to avoid being caught up in the process. Even when land was excepted from sale, placed under restriction, or formally reserved, much of it was alienated within a decade or so, partly because of financial pressures from survey liens or legal complications arising from half-completed transactions, or further court hearings to resolve disputed succession, but mainly because the Crown was actively buying throughout the period, particularly in the period 1888 to 1899. Young and Belgrave's balanced assessment, quoted by Crown counsel, reflects this mix of factors, with genuine Maori choice in any given situation being 'highly problematic'.

Underlying the Crown's argument in extenuation is that most of the leading politicians and officials of the day genuinely believed that they had an obligation to help Maori, even to induce them to relinquish their traditional tenure and social order and enter the new economy and society, based largely on individual enterprise. As we have discussed in the previous chapters, there is no doubt that this attitude was genuinely held by many settler leaders, including idealists such as Sir William Martin with a record of support for fair treatment and justice for Maori. But we also cannot fail to notice that some of the measures that people such as Martin warned should be included in the land law and the administrative machinery – measures such as making illegal any dealing in Maori interests before Crown grants had been issued, and sale of land by public auction only – were deliberately rejected by governments, as too restrictive to their plans to acquire land.

Dealings with individuals prior to the passage of land through the court were among the matters most complained of by Maori leaders in their protests against a system that was sweeping the land from under their feet. So long as the Crown allowed the purchase of undivided individual interests or practised it systematically itself, then applied for a partitioning out of its share in the blocks concerned, it is idle to talk of Maori volition. A debt-driven people, without any other ready source of cash or credit, could do little to prevent alienation when the system dealt with them as individuals, rather than as a community.

17.6.2 The questions of the price paid for land and the need for survey

The correspondence of Mackay, Wilkinson, and Mair with their respective Government Ministers makes clear that the regime favoured the acquisition of land by the Crown at the lowest possible prices. To that end, the Crown's monopoly was extended over the greater part of the region. This was often done not only for the purpose of excluding Maori from access to market prices but also to ensure that the public interest was protected by Crown ownership rather than that of 'speculators', or the private sector generally. But the official correspondence also discloses the hope and expectation that Crown pre-emption should be declared earlier rather than later over the lands in which it was most interested, so that the Crown agents could buy before Maori became fully aware of the prices that might be paid by the private sector. Hauraki Maori rarely had access to an open market for their land. There are many examples of Crown agents expressing surprise, or self-congratulation, at the low prices they were able to get Maori to accept.

Against this, it must be observed that, where restrictions had been placed on court titles, their removal generally involved showing that the price to be paid was 'prima facie fair and reasonable' (in the 1880s) or consistent with Government valuation (in the 1890s). However, this provision meant that the Government still set the price scale.

Once the cash economy was established and land had become a commercial commodity, Maori land needed both legal identity, and to be precisely located for the purposes of

land registration and valid transactions. We note that the task in Hauraki was difficult and expensive. The rough terrain, forest cover or swampy character of much Hauraki land meant that the cost of accurate survey outweighed its value for agricultural development. Yet Hauraki was rich with valuable indigenous timber, flax and minerals which, though they faced volatile and speculative markets, were additional to actual land values, and significant drivers of the total prices paid. The provincial and general government intruded heavily in the situation because of their interest in the extraction of these commodities for the wider economy, commonly proclaiming the land to be under Crown pre-emption. Over much of Hauraki we can never really know what the full market price might have been because the market was never tested.

It cannot be denied that, regardless of who pays for the cost of survey and registration, the market regards clearly identifiable land, particularly with indefeasible registered title, as more valuable than land of which the boundaries and the ownership are not clearly defined. Yet, the Tribunal, in attempting to make a judgement on the fairness of prices paid for Hauraki Maori land and the costs charged for its survey and registration, was faced with the difficulty that the Crown precluded most of the land from entering the open market. In many cases, such as Ohinemuri and Piako, the Crown called up debt it was itself a party to creating, and invoked compulsory partition and determination of its interest, in circumstances where any attempt to attach a per acre value on the land was highly problematic.

Therefore, while we are unable to be definitive on the fairness of the price paid by the Crown in all cases, we find that Maori did in effect generally subsidise the price paid for their land by being denied access to the free market, while being compelled by law to pay the costs of survey (including interest on outstanding liens) and court and legal costs. By any measure, Hauraki Maori were treated unjustly, and survey costs must be included in the mix of market distortions which were of the Crown's making.

17.6.3 The Crown's reluctance to make land inalienable

It is apparent from Crown counsel's submissions that the Crown today still believes that Maori should not be overly bound by paternalistic restrictions but allowed to make free choices to deal with their land as they saw fit, even if that freedom could result in landlessness. Hence the Crown's view that reservation of land or restriction on title should not be absolute; governments generally believed that Maori should be free to lift the restrictions and deal in the land, subject to certain checks that they were not thereby rendered landless, or that at least they had other sources of income. We have noted that procedures for removal of restrictions were made progressively easier, during the late 1880s and 1890s, until by 1894 application by only one third of owners was required.

This, of course, was in part a reflection of the fact that titles were now becoming fractionated by intestate succession and it was difficult to locate owners. But the introduction of a

fairly rigorous control, then its slackening, raises questions about the purpose of establishing the system in the first place. Absolute prohibition on sale of reserves was not a primary Crown policy. Ease of dealing still was.

As claimants have indicated, however, the Crown is in something of a contradiction in accepting that it is responsible for excessive alienation of Hauraki land while at the same time maintaining that it would be inappropriate to make substantial areas permanently inalienable, instead of temporarily inalienable for terms up to 21 years. It is difficult to see how the first outcome could be avoided without embracing the latter obligation. In fact, it is apparent that officials and Ministers realised this, and from time to time introduced tighter restrictions on alienation. But changes of Government policy and later Land Acts soon removed them again.

Throughout the whole period under review it is perfectly obvious that the Crown never embraced the responsibility of making certain core lands absolutely inalienable. In our view the claimants are correct when they argue that the Crown's defence of 'inappropriate paternalism' has little validity in the face of evidence that Maori were constantly driven by the pressure of debt or day-to-day needs for money to sell almost all the patrimony of their forebears and the needful inheritance of their children. In our view the duty of active protection certainly extended to the need to preserve a substantial proportion of the patrimony for future generations, notwithstanding the immediate needs of nineteenth century owners.

The argument about 'inappropriate paternalism' is itself inappropriate. The insistence of settler politicians and officials that it would be better for Maori if they divested themselves of the bulk of their land was itself paternalistic, as was the repeated refusal to comply with Maori requests to return the real control over the land to their tribal organisations.

It is true, as the Crown has suggested, that for many Maori other sources of income were likely to be more lucrative than the land. Indeed, once the demographic upsurge got under way it became manifest that remaining Maori land could not support every Maori in the rohe of their birth. But too much reliance should not be placed on this argument, which depends on hindsight. It was not until the 1940s that it was fully realised that the land could not support everyone and that the future of most Maori, like that of most Pakeha, had to be an urban one. Even in Ngata's time as Native Minister it was assumed that the future of most Maori would be on the land. In Hauraki in the late nineteenth century, had the court's titles enabled the 2000 to 2500 Maori owners to utilise and develop the 15 to 20 per cent of their land still remaining, there was still the possibility that many of them could have enjoyed reasonable living standards.

17.6.4 The Crown's reluctance to restore community control

We have noted in our discussion of the Native Land Acts in the previous two chapters, that the Crown showed great reluctance to restore community control of land to Maori. We

reiterate that observation here and note that this can only be viewed as deliberate policy, adopted because such a return of authority to Maori threatened to 'lock up' land and render it unavailable for Pakeha settlement and development.

That the policy was deliberate is made through such Crown tactics as the payment of advances or raihana to individuals. But above all there was the imposition of a form of title that enabled the Crown or private parties to buy the interests of the named owners piecemeal. The argument that these transactions were legally void and involved risk to private Europeans or the Crown does not negate their commercial reality. Huge purchases such as that of Ohinemuri or Piako were based upon years of payments to individuals or sections of right-owners, all carefully recorded on documents with the marks or signatures of the debtors affixed. Armed with a sufficiency of such deeds or credit notes charged against the land, the Crown could then apply to the court for an award of the equivalent in land.

Against such methods the tribal leadership as a whole was virtually powerless. Indeed, as individuals, most of them had themselves accepted credit of some kind, as Mackay, other land purchase officers and Crown counsel were not loath to point out. That this constituted 'volition' in the sale of land on the part of Maori is to strain the meaning of that term, and unfairly shift the responsibility from the Crown that set up the system to individual Maori.

As the previous chapter explains, and we cannot reiterate too strongly, the land law did not merely serve to allow the various iwi and hapu to define their intersecting interests. It created a form of negotiable title wherein every named owner could individually sell his or her interest. As the claimants point out this prevented the corporate group from deciding the future of the land, undermined the traditional reciprocity and consensus in decision making which existed between rangatira and people, and paved the way for individual opportunism and factionalism. It rendered almost impossible any long-term, collective planning for the development of land, either as small family farms or as community ventures. Almost every block history shows how some of the land was charged with the costs of securing title and alienated for this reason only, and that subsequently land purchase agents began to acquire interests in the blocks under court title, followed by partition applications.

The evidence suggests that once the spirited community resistance under leaders such as Te Hira or Tukukino had been undermined and a purchase pushed through, a kind of resignation overtook many of those who had tried to withstand the purchase. By the 1880s, many, perhaps most, Hauraki Maori had become dependent upon or habituated to taking credit on their land, pressing for the removal of restrictions, and selling their land via a series of partitions. In short, they had become increasingly divided, demoralised and pauperised by land law and the land purchase system.

This reflects badly on the Crown in terms of its Treaty responsibilities. Stronger corporate control of the land might have given the hapu leadership a chance to negotiate better economic arrangements based upon a mix of leasehold, joint venture timber milling, and farming on the river valleys, as well as sale. In this context, we note and welcome the Crown's

concession that the land law was flawed in this respect, that not until the 1894 provision for incorporation of owners was there a serious option for corporate management, and this came too late to be helpful to Hauraki.

17.6.5 Inadequacy of protection mechanisms

On the Crown's own evidence the various protection mechanisms in the law were of limited effect. As Mr Hayes acknowledges, it is not clear that the Crown was obliged in law to submit transactions to the trust commissioners. Despite the conscientious efforts of commissioners like Haultain there is also considerable evidence that securing the commissioners' certificates was something of a formality for private purchasers, especially after the amendment Act of 1881 had introduced pro forma statutory declarations as the way of ascertaining relevant facts.

The placing of restrictions on court titles also seems to have been limited in the 1870s, when much of the land went through the court. The early and mid-1880s saw a period when the removal of restrictions was done conscientiously and conservatively, notably by Ministers Bryce and Ballance, and Commissioner Barton. But later it was made almost formulaic, as long as Maori vendors affirmed that they had interests in other land and the price offered was reasonable.

17.6.6 Is there a need to study each block singly for evidence of Treaty breach?

Despite the above general faults and failures, Crown counsel considers the 'total Treaty breach theory as quite unconvincing (ie that virtually every land alienation was wanting in terms of Treaty principles):¹⁶² Many transactions 'may in themselves have been benign and cannot be assumed to be wanting in Treaty terms simply because a whanau or hapu's landholdings were reduced in size.'¹⁶³ Claimant witnesses Young and Belgrave have acknowledged that transactions were diverse and that Maori were not merely passive victims but engaged in strategic selling, to draw nodes of settlement into their territory and give themselves markets and employment.¹⁶⁴

But Crown counsel continues:

Having said that, the Crown does accept that the particular feature of the Hauraki inquiry, and a factor contributing to eventual outcome, is the combined effect of the facilitation of alienation created by the native land laws, and a vigorous Crown land purchasing policy.¹⁶⁵

162. Document AA1, p 170

163. Ibid, p 169

164. Document v2, pp 11–13

165. Document AA1, p 113

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In closing responses, counsel for Wai 100, quotes this and other concessions by the Crown, namely that ‘over time there was protest and dissatisfaction by Maori with the Court, particularly from the mid 1880s onwards and there were also complaints directed at fundamental elements of the system.’¹⁶⁶

Counsel for Wai 100 also quotes the general concession by the Crown quoted at the beginning of this chapter, and has drawn together with the following more particular concessions:¹⁶⁷

- ▶ ‘the practice of raihana, particularly in relation to the purchase of Ohinemuri, is one of the more regrettable elements of the Hauraki claim;’¹⁶⁸
- ▶ there were ‘elements of pressure and coercion’ in the Ohinemuri transaction, a transaction which was ‘particularly regrettable;’¹⁶⁹
- ▶ the proclamations of 1872 and 1874 under the Immigration and Public Works Act, ‘likely affected an area more extensive in size than was reasonable in the circumstances;’¹⁷⁰
- ▶ the various protection mechanisms for Maori were ‘wanting’;¹⁷¹
- ▶ That over time the Crown ‘moved increasingly to negotiate with individual right holders’¹⁷²
- ▶ That in relation to reserves policy, the Crown ‘failed to provide adequate reserves in the general context of Crown purchasing practice’ and there was a ‘failure in respect of reserves policy generally’¹⁷³
- ▶ That the problem of fragmentation of title through succession ‘created considerable administrative difficulties for some Hauraki Maori communities and this did impact on their ability to deal with their lands and did lead to sale in some cases. The Crown ought to have provided a better range of options to address these problems’¹⁷⁴
- ▶ ‘[B]etween 1840 and 1865 the Crown almost never set aside reserves from Crown purchases in Hauraki. There was some improvement following 1865, although through the late 1870s and early 1880s land was still rarely reserved in Hauraki’; and ‘Much of the remaining reserves would be alienated in later periods’¹⁷⁵

166. Document AA1, p 135; doc AA14, p 5. Crown counsel’s paragraph in fact states that ‘there is no suggestion at the time [circa 1873] that the nature and structure of Native Land Court title itself was fundamentally defective’ but then continues with the point quoted by counsel for Wai 100. This of course points to a growing realisation by Maori as to what the land laws involved. There had in fact been much Maori complaint in the period 1865 to 1873, but mostly from Hawke’s Bay rather than Hauraki.

167. Document AA14, pp 5–8

168. Document AA1, p 179

169. Ibid, p 181

170. Ibid, p 172

171. Ibid, p 174

172. Ibid, p 175

173. Ibid, p 189

174. Ibid, p 177

175. Ibid, p 189

We welcome the Crown's concessions on these general points, not least from the sheer impracticality of examining every transaction in detail. More importantly, the Crown's concessions relate to the first, fifth, and sixth causes of action lodged by the Wai 100 claimants, namely the failure to protect a Hauraki land base, excessive Crown purchases and the prejudicial nature of the Native Land Court, all of which are well founded in our view.¹⁷⁶ It is somewhat beside the point that some of the land purchases may have been 'benign'. In fact, because of the power of sale given to each individual owner named on court titles, because there was no satisfactory mechanism for the customary right-owners to make considered decisions as a community, and because many if not most of the purchases were founded on piecemeal acquisition of individual interests, it is difficult to be sure that *any* of the transactions was wholly benign.

17.6.7 The situation at the end of the nineteenth century

Dr Loveridge has summed up his study of the Native Land Acts as follows:

[The authors of the Native Land Acts intended] that Maori (if they did not become extinct first, as some expected), would in time be drawn into the mainstream of colonial life, enjoying and exercising the same rights and duties under the law as their settler neighbours, and sharing equally in the prosperity of a progressive country and empire. This goal . . . clearly, had not been achieved by the end of the Nineteenth century.¹⁷⁷

This is another welcome acknowledgement by a principal Crown witness, but, as our remarks in the previous paragraph indicate, it is manifestly an understatement. The period from 1865 to 1899 had brought Hauraki Maori flushes of temporary prosperity in the height of the gold or logging booms, and the habit of living on credit against anticipated land sales. The proud, independent iwi and hapu of the 1860s had alienated most of their land, with as yet no efficient corporate system of land management emerging, and with the income from gold and timber declining. Yet, the pressures of day-to-day living and debt remained. Hauraki Maori in the late nineteenth century remained on the margins of the mainstream economy.

176. Claim 1.3(b), pp 7–10, 22–30

177. Document P1, para 7.1.2

CHAPTER 18

TWENTIETH-CENTURY LAND LAW AND LAND ALIENATION

18.1 EARLY TWENTIETH-CENTURY LEGISLATION

The see-sawing of policy and legislation relating to Maori land continued into the twentieth century. We set out below their impact upon Maori. For further detail, we refer readers to reports written for the Tribunal's Rangahaua Whanui research programme, and to the *Turanga Tangata Turanga Whenua* report of 2004.¹ Policy and law under the Liberal governments of 1891 to 1909 have also been discussed by the historians John A Williams and Tom Brooking.² In these proceedings, the analysis by Young and Belgrave of the impact of legislation since the Native Land Act 1909 has been very helpful.³

18.1.1 Te Kotahitanga, Carroll, Ngata, and the legislation of 1900

Major changes of policy and practice were introduced by the Native Land Councils Act 1900, which resulted from the collaboration of Seddon with Carroll and the young Apirana Ngata, and their attempt to respond to the long-standing demands of regional Maori committees and of the Kotahitanga. We have mentioned that a former assessor in the land court, Hamiora Mangakahia of Whangapoua, became one of the leaders of the Kotahitanga, following the loss of family land through debt to lawyers and timber companies. He supported Maori self-government under the Treaty, abolition of the court, repeal of the existing land law, and management of remaining land by Maori committees.⁴ He and Hoani Nahe, a prominent member of the Thames Native Committee, represented these views to the Kotahitanga hui at the Bay of Islands in 1892.⁵ Nahe had died, but Mangakahia was among the leaders of the attempt launched in 1895 to boycott the court. The Kotahitanga

1. Alan Ward, *National Overview*, 3 vols (Wellington: GP Publications, 1997), vol 2, pp 245–254, 369–438; Don Loveridge, *Maori Land Councils and Maori Land Boards*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1996), p 17ff; Tom Bennion, *The Maori Land Court and Land Board, 1909 to 1952*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997)

2. John A Williams, *Politics of the New Zealand Maori: Protest and Cooperation, 1891–1909* (Auckland: Auckland University Press, 1969); Tom Brooking, “Busting Up” the Greatest Estate of All: Liberal Maori Land Policy, 1891–1910, NZJH, vol 26, no 1 (April 1992), pp 78–98

3. Document v2, pp 93–118

4. ‘Hamiora Mangakahia’, DNZB, vol 2, pp 307–308; doc A9, p 75

5. ‘Hoani Nahe’, DNZB, vol 2, pp 342–344

also sought to secure legislation along the lines of Wi Pere's Bill of 1884.⁶ The boycott had only limited effect, but the energy displayed by the Kotahitanga movement and the widespread support for it influenced the Liberal Government in the shaping of important legislation in 1900, including the Maori Lands Administration Act and the Maori Councils Act.

The latter Act provided for the establishment of local councils at tribal level, to deal mainly with social issues. The Maori Lands Administration Act harked back to Ballance's 1886 Act. Six (later seven) 'Maori land districts' were to be created across the country, each with an associated Maori land council with a partly elected membership and (depending on who was elected) the possibility of a Maori majority. The councils were to determine what land Maori required for their own future 'maintenance and support' and to set it apart as papakainga, absolutely inalienable except in exchange for more suitable areas. Once a papakainga certificate had been issued, the remainder of the land was to be leased through the councils for terms of up to 50 years, but the goal was that every Maori man, woman, and child should retain the ownership of a minimum of 25 acres per head of first-class land, 50 acres of second-class land, or 100 acres of third-class land. Crown purchases were for the moment suspended.

This was Carroll's 'taihoa' policy in action, an attempt to facilitate leasing, in the hope of forestalling a renewed drive to purchase the freehold of the remaining Maori land. But the Kotahitanga demand that the powers of the Native Land Court be transferred to the tribal councils or committees was not granted. Section 9 theoretically gave the Maori land councils (assisted by the block committees) many of the powers of the court to determine ownership, succession, relative interests and partition. But they were not to be used unless directed by the chief judge, and then only in an advisory role. Apirana Ngata assisted Carroll to win a guarded acceptance of the legislation by the Kotahitanga.

18.1.2 The renewed drive for settlement of Maori land

Having at long last got some respite from the constant pressures and temptations to sell undivided individual interests, Maori communities began to discuss the future disposition of their remaining lands. Dr Loveridge has shown how alienations dwindled in most districts.⁷ However, settler impatience with the slow rate of alienation under the councils could not long be contained. In 1905, the Liberals took the first steps in the weakening of the councils as genuinely autonomous Maori authorities, and again facilitated the removal of restrictions on alienation. Under the Maori Land Settlement Act 1905, the partly elected Maori land councils were replaced by wholly appointed Maori land boards of three members, only one of whom had to be Maori. The historian, John Williams commented that by

6. 'Hone Heke Ngapua', DNZB, vol 2, pp 355-356

7. Loveridge, p 35

these changes ‘the pretence of the 1900 Act that the Maoris were being granted a measure of self-government was all but dropped.’⁸

Section 8 of the 1905 Act empowered the Native Minister to vest land compulsorily in the boards for subdivision, followed by granting of allotments to owners in the first instance, and leasing of the balance. Section 16 removed all restrictions on alienation by direct lease to private parties, provided the rent was not less than 5 per cent of Government valuation per annum, and the owners had a papakainga certificate for the land they wished to occupy themselves. Section 20(2) of the Act provided that, where a majority of Maori owners had agreed to a sale, the Crown could make payment to the Receiver-General for the interests of the dissenting minority and complete its title, in effect a compulsory purchase of the minority shareholding. As a partial trade-off for these provisions, Carroll and Ngata were able to secure explicit authority for mortgage finance for Maori farmers under the Land for Settlement legislation, up to one-third of the unimproved value of the land. In short, Maori were to be given some assistance to farm their land, but if they did not do so, it could be compulsorily vested in boards and leased, or purchased by the Crown.

In 1906, the commissioners of Crown lands were instructed to identify Maori land in their districts suitable for settlement. The commissioner for Auckland district advised that all Maori land in Ohinemuri and Thames Counties was suitable, with priority for the Turua–Piako lands so that the Piako drainage scheme could be commenced. The ageing James Mackay was again commissioned to purchase the relevant land. The Under-Secretary for Lands wrote: ‘As you know all the tribal distinctions, and that all the Government wish to do is secure as large an area as possible within the different blocks, I leave the matter entirely in your hands, as you know what best what areas to negotiate for.’⁹

Mackay used some of the same tactics he had employed decades earlier. Ngati Hako in particular were opposed to selling, as were some Ngati Maru:

Knowing some of the Ngatihako were unwilling to sell, I went to see the Ngatimaru first, because if they agreed to sell, then from a Maori point of view the position of Ngatihako would be untenable, as the Government acquisition of the Ngatimaru interests would sandwich between those of Ngatihako, which the Maoris hate, calling it tipokapoka, which means injuriously divided and scattered.¹⁰

Dr Anderson has commented that ‘Mackay derogated the integrity and desires of those who were holding out, arguing that there were “always a certain number of Natives in every community who purposely delay selling in order to levy blackmail from the purchaser”’.¹¹

8. Williams, p 127; Loveridge, p 63

9. Under-Secretary for Lands to land purchase officer, Paeroa, 20 October 1906, Land and Survey head office file 55607 (doc A10, pt 4, p 171)

10. Mackay to Under-Secretary for Lands, 14 September 1906, Lands and Survey head office file 55607 (doc A10, pt 4, p 170)

11. Mackay to Under-Secretary for Lands, 6 July 1907, Lands and Survey head office file 54769 (doc A9, p 81)

In the event, the Government suspended the purchase negotiations, partly because available funds had been committed elsewhere and partly because the Stout–Ngata commission was beginning to report. Meanwhile, where Mackay had acquired only minority interests, the Crown applied to partition out those interests in the usual way, but where Mackay had acquired majority interests the Crown completed the purchases compulsorily under section 20(2) of the 1905 Act.

Notwithstanding his derogatory comments about reluctant minorities, Mackay in fact protested bitterly in court about the use of section 20(2), considering that Ngati Hako, for whom ‘The Piako has been their home for generations’, would be seriously antagonised, because he had been instructed to inform Maori that their rights would be protected. He was being put in a position of bad faith, and ‘wished to explain this matter, so that what I say may be on record after I die.’¹²

The Stout–Ngata commission also strongly criticised section 20(2), arguing that it bound the minority ‘regardless of their wishes’ and ‘contrary to natural justice.’¹³ Section 20 of the 1905 Act was later repealed by section 13 of the Maori Land Settlement Act 1907. But according to Dr Anderson’s analysis, 13,468 acres of the Hauraki Plains had been purchased under the 1905 Act, of which 5118 acres were acquired under section 20(2). The Crown, however, has calculated that only ‘some 863 acres’ was acquired under section 20.¹⁴ The Crown has also suggested that ‘the operation of the 1905 Act was similar to a Public Works taking for those who had not consented to sale.’¹⁵ But the analogy is dubious, as public works takings involved a different procedure and means of determining the level of compensation (see fig 111).

18.2 THE STOUT–NGATA COMMISSION, 1906–09

18.2.1 The commission’s recommendations for Hauraki

The Stout–Ngata commission into Maori landholding and future land use arose out of James Carroll’s attempt to save some land for the Maori people while encouraging mainly Pakeha leasing. It was essentially a Liberal Government strategy to counter settler pressure, coming particularly from Auckland province, where some 4 million of the 7.5 million acres of remaining Maori land was located. Massey and the Reform party were critical of the Commission, condemning it as part of Carroll’s taihoa policy. By 1907–08, even as the

12. Mackay to Under-Secretary for Lands, 16 August 1907, Lands and Survey head office file 54769; Hauraki minute book 57, fol 129 (doc A10, pt 4, pp 175–177)

13. ‘Interim Report on Native Lands in the Rohe-Potae (King Country) District’, 4 July 1907, AJHR, 1907, G-1B, p 5

14. Paper 2.550, p 37. It has not been possible to verify the correct figure from the information available.

15. Ibid

Commission was working, the press was reflecting the 'tide of anti-taihoa sentiment' and popular condemnation of 'Maori landlordism'.¹⁶

Against this unpromising political background, the Stout–Ngata commission provided the most thorough consultation of Maori opinion, and most measured appraisal of Maori aspirations and needs, undertaken to that date. Liberal politician and Chief Justice Sir Robert Stout and a Maori member of Parliament, Apirana Ngata based their recommendations on a systematic, county by county examination of Maori land-holding, and consultation with local Maori at hapu level via a series of meetings. Hauraki hearings were at Coromandel in 1908 with Maori from Kennedy's Bay, Manaia, and Tikouma, and later at Thames and Auckland, leading to recommendations concerning Thames, the Hauraki Plains, and the Western Firth.

In one of the few positive assessments of conditions in Hauraki, the Stout–Ngata commission reported some farming development at Harataunga. According to the evidence of Mr White for the Wai 792 and Wai 866 claimants, in 1906, having observed the farming techniques of their relatives in the Waiapu district, the Ngati Porou hapu at Harataunga had cleared and grassed some 2500 acres of land and intended to put all available land under grass. A September 1908 interim report by the Stout–Ngata commission listed the Harataunga blocks under farm development at this time, showing that some 650 sheep and 40 cattle were being run on land that was described as improved or partly improved.¹⁷

In Parliament in 1907, Ngata indicated his perception that in the Thames district 'the Natives have almost wholly denuded themselves of their landed estate'.¹⁸ The commission subsequently recommended that only 5.3 per cent of the lands examined by it within the district should be opened to sale.¹⁹ In Coromandel county, in addition to 1057 acres already under negotiation, only 328 acres could be spared for sale and 220 acres for lease. The remaining 18,015 acres were recommended for Maori occupation and development. In the Thames area, 12,262 acres were already under negotiation, and 1828 acres were considered suitable for papakainga and Maori farms. This left 4688 acres for lease and 1290 for sale. In Ohinemuri, 2837 acres were under negotiation, 4435 acres were suitable for owner occupation, 11,722 for lease and only 1546 for sale.²⁰

Young and Belgrave have analysed the recommendations of the Stout–Ngata commission, and the impact of subsequent Crown purchases. The commission's report for Coromandel county was that the 695 Maori of the county owned about 50,000 acres, with farms scattered

16. Anne-Marie O'Brien, 'The Stout–Ngata Commission, 1907–1909', honours dissertation, University of Otago, 1991, pp 22–61

17. 'Native Lands and Native Land Tenure: Interim Report of Native Land Commission on Native Lands in the Coromandel County', 8 September 1908, AJHR, 1908, G-1S, pp 1–3 (doc s8(a), p 33)

18. Ngata, 8 August 1907, NZPD, 1907, vol 140, p 142 (doc A9, p 85)

19. Document A9, p 85

20. 'Interim Report of Native Land Commission on Native Lands in the Coromandel County', pp 1–3; 'Native Lands and Native Land Tenure: Interim Report of Native Land Commission on Native Lands in Manakau, Waikato, Thames and Ohinemuri Counties', 16 December 1908, AJHR, 1909, vol 1, G-1A, p 1

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throughout, but the land was 'of inferior and poor quality, and the Maori owners are not, in our opinion, asking for too great an area when they wish for practically the whole of the remnants of their ancestral lands to be reserved for Maori occupation.'²¹ Young and Belgrave have also compiled tables of the Stout–Ngata commission's recommendations for 89 blocks in the Manukau, Waikato, Thames (Coromandel), and Ohinemuri counties, adjusted to the Hauraki inquiry area, and analysed from current Maori Land Court records the situation of those lands at present. In summary, of the 70,300 acres investigated by Young and Belgrave, 49,920 acres have been sold, 1550 acres converted to the status of 'general land' under the Maori Affairs Amendment Act 1967, and 16,710 acres remain in Maori ownership as Maori freehold land. Of the 33,170 acres of lands of Marutuahu iwi that Stout and Ngata expressly recommended should remain in Maori hands, just 20 per cent remains.

Among Hauraki iwi, Te Aitanga-a-Mate (the Ngati Porou iwi at Kennedy's Bay) and Ngati Pukenga (at Manaia) have been relatively more successful than others in retaining their lands: of the 12,830 acres subject to Stout–Ngata recommendations, 10,150 acres remain in Maori ownership as Maori freehold land. Young and Belgrave consider that the main reason for this is that the lands of Te Aitanga-a-Mate and Ngati Pukenga are in a more confined locality. The lands of the main Marutuahu tribes, on the other hand, were spread across the rohe, fragmented and isolated from each other. This inhibited collective use or control at hapu level:

In such circumstances, land was sold because it was of little use to them individually or collectively, and the purchase money was useful given the high levels of poverty. Moreover, where individual landowners were dispersed about the rohe it was much more difficult for kinship groups to maintain any sort of collective control over individual landowners under title created by the Native Land Court.²²

In sum, the evidence surveyed by Young and Belgrave indicates that the recommendations of the Stout–Ngata commission of 1906–09 – the only occasion on which the land required for future Maori needs was systematically assessed and local Maori opinion systematically consulted – were substantially ignored, especially in respect of Marutuahu lands.²³

18.2.2 Law changes cut across the Stout–Ngata commission's work

Even while Stout and Ngata were making their detailed local-level inquiries, the Liberal Government, under huge political pressure, introduced more legislative measures to

21. 'Interim Report of Native Land Commission on Native Lands in the Coromandel County', pp 1–3; doc v2, p 87

22. Document v2, pp 87–92

23. Ibid, p 13

expedite transactions. The Government's Native Land Settlement Bill 1907 required Maori land boards to market land vested in them at the approximate proportion of two-thirds by lease and one-third by sale, but the Liberals were obliged in Parliament to accept an amendment that the ratio should be 50:50.²⁴ The Maori owners' wishes, as revealed to Stout and Ngata, were being over-ridden by a measure that was tantamount to confiscation in the commissioners' view, and would not have been tolerated by Pakeha if it were applied to their land.²⁵ The 1907 Act did, however, adopt the principle that alienation was to be by public auction or tender, and subject to an upset price. In this respect, the Act at long last promised an end to covert dealings at less than market value.

However, the legislation of 1900 to 1907 was then swept up in the consolidating Native Land Act 1909, which laid down the main legal and administrative regime for the next 50 years. The 1909 Act, largely the work of the jurist JW Salmond but also worked on by Carroll and Ngata, simplified the law considerably but made alienation of Maori land easier. The main provisions were that:

- ▶ The accumulated complexities of the previous Native Land Acts were done away with, restrictions removed, and the process of transacting in Maori land simplified, whether by private parties or the Crown. Maori land was subject to the protective oversight of the Maori land board of the district; this included papakainga land, a category created in 1900 but now, for the most part, practically ceasing to exist.
- ▶ All restrictions were removed from titles and Maori were deemed free to deal with their land 'in the same manner as if it were European land', subject to certain checks.
- ▶ Where land was owned by 10 or fewer persons, alienations *other than sale or lease to the Crown* were subject to the approval of the Maori land board; the board was to satisfy itself that (among other things) the transaction was not fraudulent or 'contrary to equity or good faith or the interests of the Native alienating', was alienated for 'adequate' consideration (in relation to valuations under the Land Act 1908), and would not render the alienor landless.
- ▶ A 'landless' Maori was defined as one whose 'total beneficial interests in Native freehold land . . . are insufficient for his adequate maintenance'. The provision in the 1900 Act that every Maori man, woman and child should retain a minimum of 25 acres per head of first-class land, or 50 acres of second-class land or 100 acres of third-class land was not retained.
- ▶ Because the ownership of many blocks had been fractionated through succession, and many of the owners were absentees and difficult to locate, a mechanism was provided in respect of blocks with more than 10 owners by which alienation could be approved by majorities (according to the proportions of shareholding) present at meetings of

24. O'Brien, p 40

25. 'Native Lands and Native-land Tenure: Report of Native Land Commission on the Operations of Section 11 of "The Native Land Settlement Act, 1907"', 11 March 1908, AJHR, 1908, G-1F, pp1-2, 4 (Ward, vol 2, p 378)

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‘assembled owners’. The president of the Board or his representative and only five owners (later three) or their proxies constituted a quorum.²⁶ Any party to an alienation could apply to the Board to summon a meeting of owners. Decisions on alienation were made by a majority in value of shareholders present at the meeting.

- The Board had to apply most of the checks required for land with 10 or fewer owners, before approving the alienation.

The key point in respect to blocks with more than 10 owners is that by majority vote of a meeting of assembled owners, the wishes of those *not* present at meetings could be bypassed, even if they owned a majority of interests in a block. Dr Loveridge considers that, overall, the 1909 Act ‘more than anything else facilitated further sales of Maori land’. Indeed, sale both to the Crown and private purchasers increased again from 1910. Dr Loveridge believes that Carroll (who shepherded the Bill through the House and stated that ‘ample protection’ had been provided ‘against the improvidence of the average Maori’), may have hoped that land would largely be alienated by lease. If that were so, he and Ngata ‘seriously underestimated the area of land which would actually be lost to Maori over the following years.’²⁷

18.2.3 The Hauraki Plains drainage scheme

We have noted earlier in section 17.4.3(2) that, following the completion of the main Piako purchase of 1889, the Crown put considerable effort into acquiring land on the Hauraki Plains with a view to a systematic drainage scheme for the area. The Hauraki Plains Act 1908, supplementing a revised Public Works Act, also of 1908, authorised the compulsory acquisition of Maori land for inclusion in the scheme. In the course of the scheme, Maori communities on the plains lost almost all of their remaining lands along the floodplain between the Piako and Waihou Rivers, and the swamps which had been a source of food and materials for generations. We discuss the scheme in chapter 23.

18.3 RAPID DECLINE IN HAURAKI MAORI LANDS TO 1912

The law changes from 1905, accompanying a renewed drive for Crown purchases, saw a further sharp decline in ownership of Maori land in Hauraki.

Drawing her data from Mr Alexander’s four volumes of block histories, Dr Anderson lists at least 106 purchases affecting some 160 blocks.²⁸ Leaving aside about 38,000 acres which Dr Anderson allocates to Piako and other purchases commenced in the 1850s and

26. Detailed analyses of these provisions are to be found in document F2, pp 6-16, Loveridge, ch 9, and Bennion, ch 1.

27. Loveridge, p 87; Ward, vol 2, p 381

28. Document A9, pp 69-71

completed by 1872, the list encompasses some 122,317 acres. Of this, some 60,000 acres were purchased in the years 1898 to 1909. Nineteen purchases were for the purpose of meeting survey and court costs and 20 were made compulsorily under the Maori Land Settlements Act 1905.²⁹

Table 4 in Dr Anderson's report lists 27 other blocks purchased, totalling some 11,760 acres.³⁰ Seven of these purchases were for settlement of survey charges (including Te Kaunga Whenuakite 3, of 3160 acres), three others carry the comment 'removal of restrictions' and two were purchases under the Maori Land Settlement Act 1905 (including the Tamatera reserve in Ohinemuri 17, of 2458 acres).³¹

At the end of 1912, Hauraki Maori were left with only 171,000 acres or 12 per cent of their original holdings, according to Dr Anderson's calculations.³² These figures, which have not been contested by the Crown, show a sharp decline from the estimated 44 per cent still remaining in Maori ownership in 1885 or the 15 to 20 per cent still owned in 1900. Moreover, most of the lands alienated after 1885 were lands reserved from the earlier purchases of huge blocks; they were the lands which Hauraki Maori had, in the earlier waves of purchase, deemed necessary for their occupation and use and either withheld from sale or formally reserved, with the cooperation of Crown officials and the court. Whatever the prejudicial effects of the purchases before 1885, the loss of these reserved lands after 1885 (and more especially after 1905) was arguably even more serious in its impact, affecting not only the potential for revenue earning by Hauraki Maori but their subsistence needs. In addition, the Maori demographic decline had stopped and the population had begun to increase. This might not have been fully realised until about 1912, but before this local officials had from time to time observed that particular groups of Hauraki Maori were in danger of becoming land-short. Moreover, the Stout–Ngata commission had made the most detailed inquiries and was quite explicit that, as at 1906–08, Hauraki Maori could not afford to sell more than 3000 acres and needed most of their remaining land for their own use.

18.4 FURTHER LEGAL AND ADMINISTRATIVE CHANGES AND FURTHER LAND ALIENATION

18.4.1 Weaknesses in the protection mechanisms

(1) *Conflating the personnel and functions of board and court*

In 1913, important administrative changes were made by the Reform Government of William Massey, with William Herries (the member of Parliament for Te Aroha) as Native Minister.

29. Ibid, pp 69–71

30. Ibid, p 86

31. Ibid; see also doc F5, paras 47–51, tables at rear

32. Document A9, pp 2–3

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To further simplify what were perceived (at least by the politicians) as unduly complex and time-consuming procedures for dealing with Maori land, the Native Land Court, and the Maori land board for each district were effectively amalgamated, the judge and registrar of the court becoming the chairman and registrar of the board for each district. The number of districts was also reduced: Hauraki came within the Waikato–Maniapoto district, administered first from Auckland and then from Hamilton. While the court remained formally responsible for questions of title and succession, and the boards for administration of land, both roles were now fulfilled by the same individuals (who rarely included Maori until the 1960s).

Young and Belgrave, in their evidence, outlined this altered role of the boards. They had originally been created to assist Maori land development. Now ‘Their role as trustees of Maori land was overshadowed by their role in promoting land alienation.’³³ With key roles in the court and board combined in the same individuals:

A conflict between the two was thus created . . . When the two were distinct, the board was concerned to facilitate an alienation and obtain the best price while the Court could independently protect the interests of dissenting owners. The 1913 amendment ended this division of responsibilities. Moreover, the board itself was given two very different and incompatible roles. It was required to ‘act both as trustee for land which Maori wanted to retain and settle themselves, while also being responsible for calling meetings and assisting purchasers to progress resolutions to alienate land.’³⁴

(2) Limited capacity of boards to make statutory checks

Several witnesses in these proceedings have referred to inadequate checks by the Waikato–Maniapoto Land Board before it approved the alienation of land.³⁵ The most detailed account is David Alexander’s analysis of the procedures followed by the board, including a 75-page study, based upon the board’s minutes, of successive partitions of the Papaaroha 1 block (252 acres), recommended by the Stout–Ngata commission for retention by the owners but largely alienated between 1900 and 1940. Alexander’s analysis shows how the 1909 Act facilitated the private purchase of the shares of various owners, followed by applications to the board for partitioning out the purchasers’ interests. The necessary statutory declarations and other documentation required under the 1909 Act before the board could approve the alienation were commonly prepared by the purchasers and their solicitors, and, provided the documentation was complete and the price paid was in line with Government valuation, the board regularly approved the partition and alienation with little or no additional

33. Document v2, p 97

34. Ibid; Bennion, p7

35. Document 13, pp 6–8; doc H2, pp 41–51; doc 124, p7

inquiry.³⁶ A further detailed study, that by Dr Grant Young of the Waitotara and Parawaha blocks at Manaia, cites board files which disclose unusual features and do not fully explain them: different payments to owners of Waitotara for the same area and proportionate interests; and the mysterious purchase of marginal lands in far-off Tai Tokerau, apparently to satisfy the requirement that the owners of Parawaha were not landless. But (as the author acknowledges) the information is inconclusive as to how well the board discharged its duties.³⁷ Mr Cleaver, who analysed the partition and alienation of most of Te Horete for the Wai 174 claimants, concludes that the Waikato–Maniapoto Maori Land Board did confirm that the alienations were properly executed, that the price was not below Government valuation, and that the owners did receive the purchase money. But the board's inquiries as to the landholdings and economic circumstances of the alienors were limited and appear to rely on the watered-down, 1913 version of what constituted landlessness (see below).³⁸ Mr McBurney, for the Wai 177 claimants, provides an example where the board appears to have relied on a declaration by the *purchaser* that the vendors had duly executed the instrument of alienation.³⁹

The following case casts doubt on the adequacy of the protective regime of the land board and court. In 1911, most of the last substantial block of Maori land on Waiheke was sold. This was Te Huruhi reserve (2100 acres), which was created after the Crown's Waiheke purchases of the 1850s. Jamieson, the teacher at Te Huruhi school, lost 10 children as the families sold up and moved off in search of employment. Jamieson attached to his report a copy of a petition in which 'It is stated that the vendors had no other land for their maintenance, and it is contended that the Native Land Board [*sic*] had no right to give a confirmation of the transfer'.⁴⁰ Evidence by Moana Te Waero adds further details. Subsequent to the 1911 purchase, Te Huruhi 13A (28 acres, including a kaumatua home and urupa) and 5D (63 acres, the present site of Oneroa township) were sold in 1923. The evidence indicates that the lawyer EC Blomfield, who represented the purchasers, also certified to the Maori land board the consent of the principal owner, Te Kani Mihi Wiremu. But Wiremu was intermittently a patient of Auckland Mental Hospital, and Blomfield may have taken advantage of his illness.⁴¹

In another case, concerning two Waikawau wahi tapu reserves, the 1878 court award had indicated that the owners were trustees for 'the people of Ngati Tamatera'. Approval by the land board under section 220 of the 1909 Act had to meet the criterion that 'the alienation

36. Document F2, pp 6-98

37. Document H2, pp 44-51

38. Document J6, pp 7-8

39. Document D6, p 41

40. Jamieson to Secretary for Education, 1 October 1914, BAAA 1001 798b, Archives NZ (Ak) (doc V4, p157)

41. Document T9, pp 5-6; doc T18

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is not in breach of any trust to which the land is subject. There is no evidence that the 1878 award was considered; the wahi tapu reserves were alienated to private purchasers.⁴²

We do not have the benefit of complete documentation of these examples, and have not been provided with a comprehensive analysis on the full range of alienations approved by the Waikato–Maniapoto board and court. However, the examples cited support Young and Belgrave’s citation of the opinions of scholars who *have* examined the twentieth-century regime, for the Tribunal’s Rangahaua Whanui programme. These include:

- ▶ Hutton’s finding in a study of the Waikato–Maniapoto board that:

much of the work of the Board was performed by the solicitors of the purchasers. The Board itself lacked the resources to scrutinise each application closely for the confirmation of alienation. Streamlined procedures meant that the statutory restrictions were rarely assessed in any detail and the brevity of the board minutes reflects this streamlined process.

- ▶ Bennion’s view that the complex set of checks the Board was supposed to administer before approving alienations ‘often did not apply or were poorly applied’;
- ▶ Ward’s view that the provision that the *purchaser* was to supply the information required by the Boards in respect of private purchases opened a window to sharp practice; and ‘it is difficult to see how, without making its own independent checks, the boards could be sure of the facts alleged’.⁴³

By 1913, the legislative definitions of Maori ‘landlessness’ had been watered down. The 1873 Act had provided that not less than 50 acres per man, woman and child was to be reserved. This had been modified but not significantly weakened in 1900 (see sec 18.1.1), but the 1909 definition of a landless Maori as one whose total freehold land was ‘insufficient for his adequate maintenance’ was highly subjective. Since many – probably most – Maori already had, on average, insufficient land for more than subsistence, or a part-income at best, it is difficult to see how this provision could be used to beneficial effect. Land courts had few support staff: the only feasible check was to consult the registers to determine the remaining holdings in the alienor’s name; the quality of these holdings, the revenue they yielded, the debts they carried, and the needs of the alienors and their families remained unchecked.⁴⁴ Bennion believes that the board or court could try to gauge only ‘whether [alienating] owners would be able to continue to support themselves, or whether they would become a burden on the state’.⁴⁵ Perhaps accepting the practical limitations of checks, section 91 of the

42. Document J2, p 4

43. John Hutton, ‘The Operation of the Waikato–Maniapoto District Land Board’, in *Twentieth Century Maori Land Administration Programme Research Programme*, 2 vols, edited by DM Loveridge (Wellington: Crown Forestry Rental Trust, 1998), vol 1, pp 17–18; Bennion, p 28; Ward, vol 2, p 392 (doc v2, p 98)

44. Ward, vol 2, pp 392–393

45. Bennion, p 29; doc v2, p 99

Native Land Amendment Act 1913 provided that ‘landlessness did not occur where the land being sold would not in any event provide sufficient support to the Maori owners and also where a vocation, trade or profession or other form of income could provide an alternative adequate income.’⁴⁶

Probably most of the scattered fragments of Maori land under highly fractionated titles would have been caught by this definition. Hereafter, interests could be alienated piecemeal as long as owners agreed to transact, either individually or at ‘meetings of assembled owners’.

(3) Low quorums for meetings of assembled owners and limited notification procedures

Claimant witnesses in these proceedings and historians have pointed to other legislative provisions which facilitated alienation. Notable among these was the very low quorum (five) for a meeting of ‘assembled owners’ under the 1909 Act, including proxies. This meant that a majority of *those present* (by value), even if a *minority of all* owners, could legally alienate the land concerned. Mr Cleaver gives an example of a unanimous decision of six out of 60 owners, plus five proxies (ie, about 15 per cent of the total ownership) agreeing to charging orders for rates and survey costs in relation to Te Horete 2C2.⁴⁷ Professor Ward considers that notification procedures were inadequate; with increasing fragmentation of ownership through succession, and the increased mobility of the population, ‘many Maori simply never heard of advertised meetings of land board or assembled owners’ concerning blocks in which they had interests.⁴⁸

This view is supported by a number of examples provided by claimant witnesses in these proceedings. In particular Mr Walter Ngamene has provided a detailed account of his returning to ancestral land, Okahutai B at Port Charles about 1973, following the death of his grandfather, only to find it had been sold on the authority of a meeting of assembled owners some years previously. He had received no notification of the meeting, and later found other owners in a similar situation. They had attempted to have the decision to sell reviewed, but were refused by court, on the ground that the ‘irregularity or failure complained of [lack of postal notification] . . . has not been conclusively proved, that ‘postal errors’ were not uncommon’, and that if the rules concerning notice were enforced to the letter, almost every application to summon a meeting would have to be rejected. The meeting which approved the alienation of Okahutai B included only one-fifth of the Maori shareholders, plus the Pakeha purchaser who had already acquired some shares. Mr Ngamene doubts whether anything could be done to get back the land, now planned for residential subdivision. But ‘if

46. Bennion, p 30

47. Document J6, pp 9–11

48. Ward, vol 2, p 391

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it was accepted by this Tribunal that the sale was not legitimate, I would at least have a piece of paper to justify my anger and my sadness about the loss of this land'.⁴⁹

It is outside our jurisdiction to comment on specific lands now privately owned, but we give our views on the 'meeting of assembled owners' procedure in the final section of this chapter.

(4) Dissent from alienation to be recorded in writing

Section 4 of the Native Land Amendment Act 1915 further simplified the procedure for purchase by providing that any owners not dissenting in writing from a motion for sale should be deemed to have consented to it. Mr Alexander cites the case of Whangamata 4D where a resolution to sell the block was carried and the dissenting owners failed to record their dissent in writing, but applied to have the block partitioned in order to retain their share. (This was done but most of the subdivisions were eventually purchased by the Crown.⁵⁰)

(5) Changes to the 1953 Act

Under the 1953 consolidation of the Maori Land Act, purchasers no longer had to file evidence in the court that Maori vendors owned sufficient other land. The quorum for a meeting of assembled owners was lowered to three, and the law specifically provided that no resolution could be affected by the failure of any owner to receive notice of a meeting.⁵¹

18.4.2 The decline of the Maori land boards and the rise of the Maori Trustee

Young and Belgrave have shown how later legislative changes simplified the machinery governing alienation. The Native Land Act 1931 formally shifted responsibility for the statutory checks from the Board to the court, but since the district judge was also the president of the district board this was probably a change of form rather than substance.

Of greater significance was the increasing role of the office of the Native (later Maori) Trustee. The Native Trustee Act 1920 was introduced by Native Minister William Herries following on the pre-war efforts by Dr Maui Pomare, Minister in Charge of Maori Councils in the Reform Government. It had been accepted then that administration of Maori reserves of various kinds, and the interests of Maori minors, required special skills and functions not wholly suited to the office of Public Trustee.⁵² The Native Trustee was based in Wellington, closely associated with the Native Department. Its district officers worked closely with the local Native Department offices and Maori land boards. The trustee was empowered to use

49. Document E6, pp 5–6. Mr Ngamene's quotations are from his attachment A and an extract from Maori Land Court minutes, unidentified except by the context of the date – 26 February 1971. See also document J6, pp 9–10, in relation to the alienation of Te Horete 2C2.

50. Document A10, pt 2, pp 116–126

51. Document V2, pp 100–103

52. G V Butterworth and S M Butterworth, *The Maori Trustee* (Wellington: Maori Trustee, 1991) pp 24–27

revenues from reserved lands as loans to assist Maori farmers, provided they had individual title.

In the following 30 years, duties which once might have been given to the Boards were increasingly given to the Native Trustee. These included the administration of intestate estates and (from 1925) of lands vested in the trustee by the court for non-payment of rates. From the late 1920s too, the trustee was given authority not only to make loans to Maori farmers but also to farm the lands for which he had responsibility. Through both roles, the trustee became closely involved with the development schemes launched by Apirana Ngata, the Minister in turn having power to vest in the trustee the control and management of any native land.⁵³ The court was also empowered to direct the trustee to lease or sell any Maori land subject to a charging order – a power which local authorities were prone to use – in respect of unpaid rates and survey charges, charges for clearance of rabbits and noxious weeds, and similar matters.⁵⁴

The owners of Maori land, including Hauraki owners, were thus directly affected by the interventions of the Native (later Maori) Affairs Department and the Native Trustee. In 1932, the Native Trust Office and Native Department were formally amalgamated, the offices of Under-Secretary of Native Affairs and Native Trustee being held by the same person. The expenditure of trustee funds, and department funds, on land development was regulated by the Maori Land Settlement Board (1933–35) and thence by the Board of Native Affairs (1933–89).⁵⁵

In 1952, the Maori land boards (vestiges of the councils created in 1900, but more directly the creations of the 1905 Act) were abolished, and their remaining functions given to the Maori Trustee. The powers of the trustee were considerably extended in subsequent decades. For example, section 6 of the Public Works Amendment Act 1962 gave the trustee exclusive responsibility to negotiate and settle on behalf of the owners of multiply owned land the compensation payable for public works takings.

18.4.3 The continued alienation of Hauraki land

(1) Evidence of trends

Concerning the pace and scale of land alienations in the twentieth century, Dr Anderson argues that there were relatively few large-scale purchases after the finalisation of those initiated under the 1905 Act, but ‘the priorities of the Public Works Department, local government bodies, and the Pakeha populace continued to take precedence over Maori needs in the application of policy under the Massey, National and Coates Governments’, and the Crown continued to acquire land considered suitable for settlement and commercial

53. Ibid, pp 32–35

54. See doc 76, pp 9–10

55. Butterworth and Butterworth, p 40

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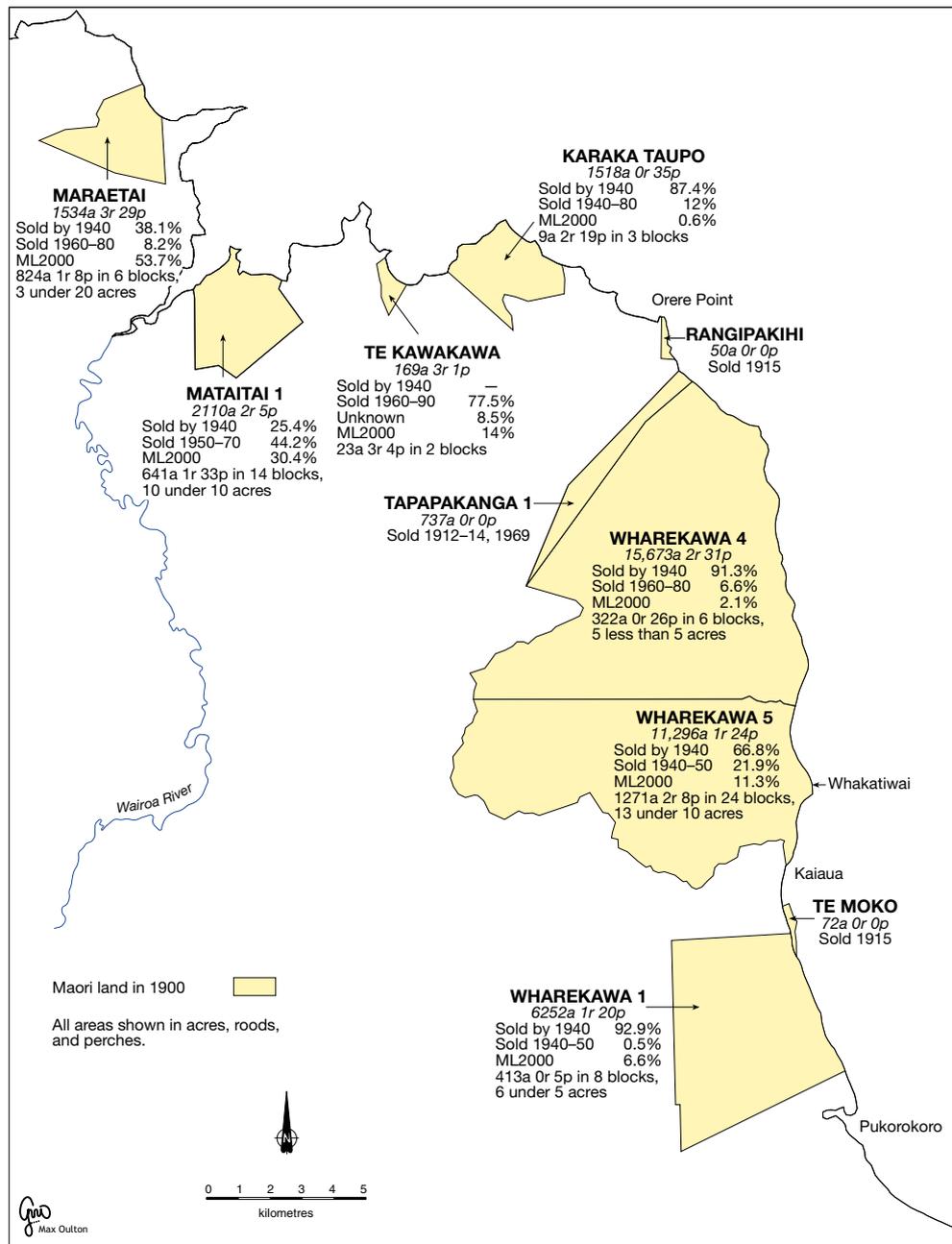


Figure 74: Alienation of land west of Tikapa Moana, 1900-2000

development where it saw fit. From 1913 to 1946, 22 Hauraki purchases together totalling over 5000 acres are listed in her table 5.⁵⁶ Her table 3, relating to the Hauraki Plains, lists another 19 Crown purchases after 1909, affecting some 3700 acres. This included about 1500 acres at Te Hoe o Tainui for returned soldiers; this was an area where, by Dr Anderson's

56. Document A9, p87, table 5

analysis, the Crown had already acquired over 7700 acres since the parent block had been taken through the court in the 1890s.

Mr Alexander's block histories also show that the Public Works Act 1908 and the Hauraki Plains Act 1908 were used to acquire a further 2000 acres on the Plains between 1908 and 1911, and numerous small parcels thereafter.⁵⁷ Mr Alexander and Dr Anderson both cite the Ngarua lands, of which 16,000 out of the 17,000 acres in the parent block were purchased by Mair in 1896–98 and Mackay in 1907. Then, despite the recommendation of the Stout–Ngata commission that the remainder be reserved for papakainga, about half was taken in 1916 for drainage purposes.⁵⁸

Even larger areas were alienated, largely from Ngati Paoa and Ngati Whanaunga lands, to the west of Tikapa Moana.⁵⁹ Mr Alexander's evidence for the Wai 100 claimants shows that some 37,000 acres of by-now scarce tribal land in Hauraki was acquired, largely by private purchase but also by the Crown for public purposes. This includes over 90 per cent of Wharekawa 1 (6252 acres) and Wharekawa 4 (15,673 acres), 88 per cent of Wharekawa 5 (11,296 acres), and most of Mataitai 1 (2110 acres), Karaka–Taupo (1518 acres), plus several smaller blocks (see fig 74). Most of this land was acquired through private purchases before 1930, but there was a further spate of purchasing and acquisitions for public purposes between the late 1950s and early 1970s. This included the acquisition by the Auckland Regional Authority in 1968–73 of some 1200 acres in the Hunua Ranges and coast between the ranges and the sea for the Auckland catchment area and the Waharau regional park (see fig 96).⁶⁰ Mr Alexander's detailed analysis of the alienations shows that the private acquisitions commonly proceeded via the purchase of the interests of some of the owners, followed by application to the land board for approval of the sale by a meeting of assembled owners and an application to the court for a partitioning out of the interests acquired. This often left the non-sellers with uneconomic portions which they too eventually sold. (See chapter 23 for our discussion of public works, drainage, and river-control issues.)

Young and Belgrave have also analysed 14 sample blocks.⁶¹ The table of aggregate figures for these blocks shows that their original area (when the blocks were defined in the late nineteenth or early twentieth century) was 65,000 acres, that 42,000 acres were subsequently sold, 1300 acres converted to the status of general land under the 1967 legislation and about 6000 acres remains as Maori freehold land.

57. Document A9, pp 69–71, 87–90. Peter Tiki Johnston for the Wai 100 claimants (Ngati Hei) has drawn attention to section 193(1) of the 1909 Act, which prohibits the purchase of Maori freehold land of more than 3000 acres at any one time, and section 204 (1), which states that every acre of first-class land shall be reckoned as 7½ acres: doc N4, p 29. This point was not responded to by the Crown or discussed, but these provisions may in part account for the purchase of Maori land in a succession of small parcels.

58. Document A9, p 90

59. See doc F3

60. See doc F3, p 56, app

61. Document V2, pp 121–162

18.4.3(1)

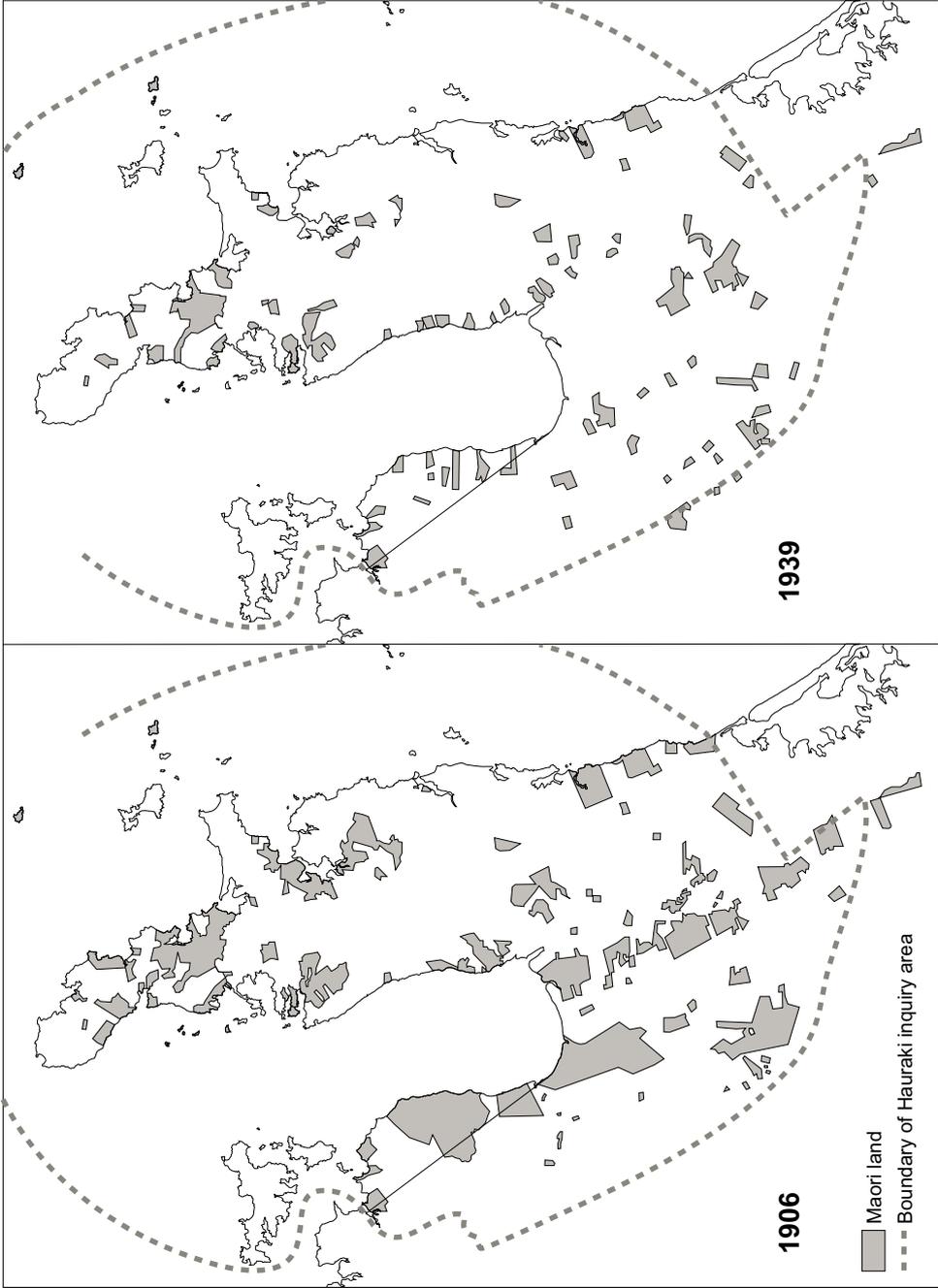


Figure 75: Maori land in Hauraki in 1906 and 1939

In the process, the 14 blocks were the subject of 785 partitions.⁶² Young and Belgrave also selected five blocks in their sample to analyse, decade by decade, when the alienations occurred. These tables show that ‘during each decade, and up to 1970, more land was alienated from these five blocks’. Although the biggest single decade of alienation was 1910–19 (which concurs with the analysis of Dr Loveridge, Dr Anderson, and Mr Alexander), each decade thereafter shows the five blocks being reduced by 100 to 300 acres.⁶³

Thus, land continued to pass out of Maori ownership in the six decades after 1913. For example, whereas Ngati Pu had 7787 acres in 1873, and sold little of this before 1909, only 1500 acres remained to the hapu in 1930.⁶⁴ By Dr Anderson’s analysis, in 1939, the area of Maori freehold land remaining to Hauraki iwi was 88,500 acres, or 6 per cent of the original land base.⁶⁵ But this was to decline still further.

(2) Other examples cited by claimants

Numerous examples of the way land alienation was facilitated by the provisions of the 1909 and subsequent Acts, through the gradually weakened definition of ‘landlessness’, and through the failure of protective mechanisms, have been provided in the block histories submitted by claimants. Mr Monin for the Wai 355 claimants (Ngati Pu) gave details of the alienation of over 3000 acres of Whangamata 4D to the Crown over a period of 10 years. The Waikato–Maniapoto Maori Land Board shifted from its initial position in March 1917 – that the owners could not afford to alienate more than 1340 acres before they were effectively landless – to an acceptance of the Native Department argument that section 7 of the Native Land Amendment Act 1915 applied. This was that land could be sold if it did not seem likely to provide a material means of support. As the department argued, ‘a sale of the land would make them hardly more landless than they were before.’⁶⁶ (The Crown made little use of Whangamata 4D and later returned some of it to the Hauraki development scheme: see below.)

Mr Monin gives details of a dispute over Hikutaia 1H (83 acres). This land was given as a marriage portion to Mata Te Kura, a Ngapuhi woman who married into the Parata whanau of Ngati Pu. After her husband died Mata executed a deed of sale to a Ngati Pu elder, Te Rare Pukeroa, on the understanding that this would return the land to the rightful ancestral owners. The deed was drawn up by a Mr Clendon but was not promptly confirmed and registered. On Mata’s death in 1906, the Parata family claimed to succeed to Hikutaia 1H, and in 1920 sold the land. The Rare whanau objected, and a bitter dispute raged until 1931, when the sale was confirmed by the court and part of the money paid to Hone Rare.⁶⁷

62. Document v2, p 103

63. Ibid, pp 103, 163–165

64. Document K19, p 34

65. Document A9, pp 88, 179

66. Jordan to registrar, 29 May 1917, BCAC A110/7627/97, Archives NZ (Ak) (doc J8, p 154)

67. Document J8, pp 126–129

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The Wai 174 claimants cite the alienation of Te Horete 2 (690 acres). The title had become fractionated through succession and in 1917–19 most of the interests were acquired by private purchasers. The evidence raises doubts as to the adequacy of the checks by the land board. The unsold portion of the block, Te Horete 2C2, was charged with arrears of rates and vested in the Maori Trustee for alienation. In 1952, a meeting of assembled owners, although a small minority of the total ownership, agreed to the sale on the terms arranged by the board, in order to discharge the debt.⁶⁸

Commenting on these alienations, Whaitiri Williams, for the Wai 148 and Wai 285 claimants (Ngati Pukenga), has remarked that the way the land law had allowed the creation of uneconomic interests, ‘explained why our lands were owned by so many but occupied by so few and often left idle’ and why the lands or its resources were easy targets for Crown or private purchase.⁶⁹

18.4.4 The effects of partitioning

The evidence presented suggests that Maori owners partitioned blocks for a variety of reasons. Hapu and whanau had divisions of opinion over what to do with land; sometimes the difficulty of dividing what limited income came from rents or farming led to factional splits. Part of the difficulty was the very fact that the partition mechanism was readily available, provided the owners paid for the court costs. Survey costs continued to eat into the Maori estate following most partitions, the Crown being empowered to recover the cost of surveys through court orders under section 398 of the 1909 Act. Some partitions, however, were left unsurveyed until the late 1960s when the owners had to comply with general and district planning provisions.⁷⁰ Ngati Pukenga have submitted evidence of charges for a survey which was not in fact carried out.⁷¹

The analyses provided by Alexander and Young and Belgrave also point to the repeated partitioning of the blocks due to the piecemeal purchase of interests, and the partitioning off of the non-sellers’ portion. As in the nineteenth century, in the twentieth it was still very difficult for Maori owners to undertake systematic long-term planning for development of their land. The prospect of the sale of some interests, followed by partition, hung over them. The outcome by about 1920 was numerous fragments of blocks, too small for economic use. This prompted Ngata to embark on the consolidation schemes, but it also contributed to Maori land boards approving alienations even though the owners were nearly all landless, because (as in the case of Rawhitiroa 2 cited by Young and Belgrave), ‘this interest is small and of no material benefit to them so confirmation [of alienation] will be granted.’⁷²

68. Document G11, pp 20–50

69. Document I17, p 6

70. Document Y7, p 10; doc D19, pp 23–29

71. Document D19, pp 30–31

72. Rahwhitiroa 2 alienation file, BCAC A110/155 10642, Archives NZ (Ak) (doc v2, p 104)

The buyers most interested in these small uneconomic parcels were the owners of adjacent land, who could add them to existing farms. The 1909 Act facilitated the process: a purchaser would acquire several individual interests in a block, and after the board had confirmed the purchase, would apply to the court (after 1913, the same official wearing his other hat) to have the purchased interests partitioned out. There was no longer a requirement that a majority of interests had to be acquired for this to happen. Instead, the same purchaser would acquire further interests at a later date, when more owners were willing to sell, and apply for a further partition. Young and Belgrave have shown that a considerable number of parcels were purchased by the same private purchaser, individual, company or family, over a period of years. In other words, the piecemeal acquisition of blocks of land characteristic of nineteenth century purchases was still operating, and was facilitated in the twentieth by not having to await the acquisition of a majority of interests or shares before partition. Those initially disinclined to sell were placed under the pressure of serial part-purchases and partitions, as the remaining interests were rendered even more uneconomic.⁷³

Young and Belgrave also comment that during the 1950s and 1960s many of the remaining blocks had small pieces cut off in quarter acre sections as residential housing sites for individual owners. Some were subsequently sold and many were later declared European (or general) land by status declaration under the 1967 amendment Act (see below).⁷⁴

The Wai 177 claimants, Gregory–Mare whanau, provide an example of an attempt to manage Te Rerepahau (110 acres). The block was formed from a partition and because of division of views among the owners, partitioned again. The survey costs were assumed by the Pakeha lessee of Te Rerepahau 3B (84 acres) about 1920. The lease was then managed by the Waikato–Maniapoto Maori Land Board but the rent was not pursued after the illness and death of the lessee in 1929. Legal costs were incurred by the owners in recovering control. In 1934–40 the owners sold their interests to a private purchaser.⁷⁵ This was a common outcome in the twentieth century, deriving from the compound effects of multiple ownership without a ready and inexpensive management system, excessive partitioning incurring survey costs which absorb much of the value of the block, inefficient management by a Maori land board poorly resourced for its complex tasks, and the facility provided to purchasers to acquire the undivided individual interests of the owners sequentially.

Perhaps the most significant point that Young and Belgrave make is just how little control over their own land Maori believed they had under land court titles. Young and Belgrave illustrate the point by reference to Raeotepapa North E3B2, a subdivision of two acres, three roods, created in October 1921 with 16 owners. In January 1943, it was set aside as a reserve and site of Te Kotahitanga Marae, but the Maori Land Court file shows that in September 1932 the Maori land board had confirmed the alienation of the land – with a

73. Document v2, pp105–106, 166–171

74. Ibid, p106

75. Document D10

continued sale of individual interests and the whittling away of the remaining Maori estate in the twentieth century.

18.4.5 The Hauraki development scheme

Maori land development schemes were launched by Apirana Ngata under section 23 of the Native Land Claims Amendment and Native Land Claims Adjustment Act 1929, the Minister working with groups of local owners through the Native Trustee and the Maori land boards. The trustee contributed some of the estates under his management to the schemes where appropriate, and the 'conversion' of uneconomic interests could also help consolidate titles. The Hauraki development scheme shows some of these techniques being applied. The scheme in Hauraki did not involve a single contiguous estate, but rather was an umbrella arrangement applied to a number of farms throughout the district, brought under the scheme to overcome title problems and qualify for loans from the Maori Affairs Department. Dr Cybele Locke provided information from department correspondence that in 1945, in 'the Thames district', 6890 acres was being developed for 'unit farms' (a 'unit' usually being held by a nominated owner-occupier), 3872 acres were under grass, 1469 cows were being milked, and there were 833 other dairy stock on the properties, which supported 200 people.⁷⁷

Mr McBurney and Mr Walzl have written extensively, for the Wai 475 claimants (the Mangakahia whanau), on the involvement of Whangapoua lands in development schemes.⁷⁸ A Native Department report of 1937–38 records that the department had responded to 'representations' from three individual Kennedy Bay farmers to inaugurate a Harataunga development scheme. The report noted that the Harataunga owners had been relying on unemployment relief to carry on their farms but were hampered by want of farm equipment and 'dairy utensils'. About the same time, July 1937, Mangakahia whanau lands at Whangapoua (Te Pungapunga 2A and 2B) were brought into the scheme, with the owners' consent (as was necessary for any land to be included), or possibly at their request.⁷⁹ By the following year the Harataunga–Whangapoua scheme comprised around 1250 acres, of which 20 per cent was in pasture. One of the farmers was especially praised by the department for his industry (he had built a house and cowshed from kauri cut on the land), and the report indicated that other good results followed from a very small outlay from the department. Six 'settlers' had set up dairy farms, which supported 102 people.⁸⁰

77. Document v4, p185

78. Document A30, pp164–177; doc A29, pp29–31; doc K1, pp89–92

79. 'Report on Native Land Development by the Board of Native Affairs, Harataunga', AJHR, 1937–38, G-10, p16 (doc A30, pp164–165)

80. 'Native Land Development and the Provision of Houses for Maoris, Including Employment Promotion, Harataunga', AJHR, 1938, G-10, pp24–25 (doc A30, pp165–166)

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Meanwhile, other blocks had been brought under the umbrella scheme in other parts of Hauraki. This included Wharekawa 4B2A1B in 1938 (the Royal family land). Other blocks were at Papaaroha, Waitakaruru, and Kaimapo. Two Ngati Pu blocks totalling 205 acres were included in 1938–39 and advances made of £1735 at 5.5 per cent interest for development work.⁸¹ From 1940, a considerable area at Whangamata was also brought under the scheme.⁸²

Other land was committed by the Maori land boards and Maori Trustee. Mr Alexander has outlined how between 1917 and 1925, the Crown had purchased, under pre-emptive right, a series of subdivisions in Whangamata 4 (Ngati Pu land) totalling several thousand acres. It is not clear why the Crown bought the land then because most of it was hilly and difficult of access. In the 1950s, however, the Crown incorporated much of the land into the development scheme. A further two subdivisions, totalling 106 acres were then purchased and added to the scheme. A minority of owners in Whangamata 4B2B1 could not be located, so their interests were compulsorily acquired by the Maori Trustee under section 447 of the Maori Affairs Act 1953, on-sold to the Crown and contributed to the scheme.⁸³ These fragmented additions show that there was no longer sufficient suitable Maori land in Hauraki for a large consolidation and settlement scheme, as compared to other districts. These examples also illustrate how the Crown's very considerable powers over Maori land worked towards repeated partitions until the 1920s, but later were used to achieve consolidations in selected areas.

We have not seen detailed evidence as to the degree of consultation that was undertaken before land was committed to the development scheme. A considerable mood of optimism when the scheme got under way meant that it is likely that most owners would have been eager to avail themselves of what seemed like an unusual opportunity to secure state support. Later, Ngata's administration of the schemes incurred much criticism, leading to his resignation in 1934. The schemes were then brought under part 1 of the Native Land Act Amendment Act 1936, control being vested in the Board of Maori Affairs serviced by the Department of Maori Affairs. A considerable amount of bureaucratic oversight was thus introduced about the time the Hauraki scheme was getting under way. The owners found that when they borrowed they were effectively marginalised, having to relinquish overall management of the land to the department until the debt was repaid.

The Hauraki development scheme brought mixed results for the families concerned. Early advances made on the properties were for good and necessary purposes. For example, Te Pungapunga 2B was charged with £590 in 1938, comprising £150 for livestock, £120 for grass seed, and £105 for buildings. According to Mr McBurney, interest was 10 per cent per annum. With additional development loans, the debt on Te Pungapunga 2B rose to between

81. Document J8, p 139

82. Document v4, pp 185–186

83. Document A10, pt 2, p 126

£1200 and £1300 over the next 10 years, then fell in 1948 to £888. Te Pungapunga 2A followed a similar pattern.⁸⁴

Some families clearly benefited, at least from improved housing. By 1945, 23 houses had been built on the development schemes in the 'Thames district' and five repaired.⁸⁵ Tangata whenua evidence indicates that the families concerned were very glad of their new homes. Others were not so lucky, partly because of the wartime shortage of building materials and skilled labour. In 1945, following public concern about conditions on the Whangamata scheme, an investigating official reported conditions to be 'not great but not scandalous': three families lived in huts of 18 feet by 9 feet, and there were five huts for single men.⁸⁶

The main difficulty was that the department invested more on development costs (such as fertiliser) than the properties could bear. Several witnesses testified about expenditure by the department on fencing material, fertiliser, farm machinery, and new cowsheds not sought by the owners and charged against the property.⁸⁷ Reducing debt became very difficult. Difficulties also arose between the owner-farmers and the farm supervisors of the department. For example, on Te Pungapunga 2B, a misunderstanding over an allegedly unauthorised sale of bobby calves caused the unit's farmer, Ruka Mangakahia, to go off and join the army. In his absence, the department det the farm to another family member, but the rent barely met the interest on the debt. When Ruka returned, the farm was run down and not paying its way. The whanau virtually lost control of the land in the scheme until, with the consent of the district land board, two members of the whanau paid off the debt and took over the property. It remained unprofitable, however, and ultimately it seems that the whanau resolved its financial difficulties by subdividing and selling sections behind Whangapoua Beach, some to family members, others apparently to outsiders.⁸⁸

The Royal family's accounts of their experience with the development scheme are similar. Turoa Royal, for the Wai 100 claimants, gave evidence concerning the family farm at Waimango on the western shore of the firth (Wharekawa 4B2A1B). In 1938, Haunui Royal borrowed £1200 from the Board of Maori Affairs for a new house; the loan brought the Royal family farm at Waimango under the umbrella of the Hauraki development scheme. Further loans for capital improvements included £6015 in 1964 in return for a 42-year lease to Ngaiwi Royal. By 1969, the department was concerned that the debt was greater than the family could recoup and wanted the balance of the lease tendered on the open market. The department refused to let Caud Royal take up the lease and it appeared to the family that officials were more concerned with servicing the mortgage than resettling Maori on their own land. When the department sold the lease in 1976 to a Pakeha farmer the covenants were not well supervised, and the farm fell into a poor state. The family formed a section

84. Document K1, p 89; doc A30, pp 165-177

85. Document v4, p 184

86. Ibid, p 186

87. Document 127, p 6; doc 131, para 8

88. Document K1, pp 90-91; doc A30, pp 174-175

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438 trust in 1982, and obtained a loan to repurchase the lease. The loan has been repaid and the farm is now debt free.⁸⁹ In Turoa Royal's view, 'The development schemes were poorly thought out by government and incompetently administered by petty bureaucrats.'⁹⁰ Wiremu Royal indicates that over time, the cost of family work on the property, loan repayments, and meetings to ensure that it remained in their ownership was \$350,000.⁹¹

This Hauraki evidence supports the general findings on the development schemes in the *National Overview* of the Tribunal's Rangahaua Whanui programme.⁹² After early years of initial optimism by all concerned, difficulties arose, because many of the farms were too small to sustain the development debt levels as well as provide a living. Struggles to meet the debts led to difficult relations between owner-farmers and the department's managers. There was some cultural insensitivity among the bureaucrats but they too were caught in the dilemma of marginal ventures. After the Second World War, in an effort to achieve greater efficiency, the department began to amalgamate many of the small farms. Original 'unit' farmers had sometimes left the land, which was then let or managed by professional managers responsible to the land boards and the Maori Trustee rather than to the owners.⁹³ In other cases, 'units' were given long leases under part 24 of the 1953 Act, which created a better situation for them as farmers but excluded the involvement of the owners.

These outcomes have led Mr Bennion to the view that generally, the development schemes 'had been largely a waste of time.'⁹⁴ Mr McBurney, for the Wai 475 claimants, concludes that 'The Harataunga Development Scheme did not benefit the owners of Te Pungapunga 2B farm in any tangible way.'⁹⁵ Professor Ward, in the *National Overview*, was reluctant to generalise, noting that nationally, some schemes were very successful, much useful experience had been gained and that some families have remained on the farms virtually to the present. Mr Walzl also considers it difficult to evaluate the Harataunga scheme without more research in official files.⁹⁶

We do not have enough information to evaluate the economics of the Hauraki schemes: information needed would be loan totals, the amount repaid, how much debt was written off and what tangible improvements remained. The dominant impression coming through the submissions is of a debt burden which families struggled to reduce, with little to spare for daily needs. The other major impression is of frustration with a sometimes insensitive bureaucracy.

89. A detailed discussion of these events, including extensive quotations from official files, is to be found in document F3, pp 96–144.

90. Document F9, pp 15–16; see also doc F10

91. Document F12, para 11

92. Ward, vol 2, pp 413–423

93. Ibid

94. Tom Bennion, *Maori Land and the Maori Land Court, 1909–1953*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1996), p 65; Ward, vol 2, p 421

95. Document A30, p 173

96. Document K1, p 91

The problems with the schemes resulted from inept planning, idealistic commitment to a small-farming utopia at a time when small dairy farms were already economically marginal, for Pakeha as well as Maori. But whether these flawed ideals amount to a breach of Treaty principles is not clear. As mentioned earlier, the schemes promoted optimism, in that the State was at last assisting Maori to develop their land. The spirit and intention behind the schemes was laudable, albeit many decades overdue. Their benefits were diminished by the tendency to treat the schemes as a form of welfare, the corollaries of which were a less-than-hard-headed approach to the economics of small dairy farms, and increasing bureaucratic interference to make them pay.

It is arguable that the State's intervention in the lives of Hauraki Maori via the Hauraki development scheme was so maladroit that it amounts to a failure of the duty of active protection. But the scheme was bedevilled by economic difficulties that were to a large extent beyond the Crown's control in the twentieth century: insufficient good land, remoteness, and wartime shortages. Moreover, for all its shortcomings, the scheme derived, for once, from the Crown's wish to do something other than relieve Maori of yet more land. Coming *after* the Crown had relieved Hauraki Maori of all but a remnant of land suitable for small family farms, the scheme was facing difficulties from the outset.

18.4.6 The 'conversion' of uneconomic interests and status changes to Maori freehold land

(1) Law changes

From the mid-twentieth century, the State tried to grapple with the unsatisfactory state of Maori land titles, with very mixed results. The root problems continued to be that titles were increasingly fractionated through succession, and that blocks were being partitioned into uneconomic holdings; for both reasons they were vulnerable to continued piecemeal alienation.

The consolidating Maori Affairs Act 1953 introduced the principle of the compulsory conversion of uneconomic interests. Under section 137, the Maori Land Court was required to offer shares worth less than £25 to the Maori Trustee; under section 152, the trustee could sell them either to Maori owners with more substantial interests or to a Maori incorporation. An allied provision, known as the £10 rule, empowered the court to vest interests of up to that value in other owners, without payment, if the trustee did not want to purchase them. The trustee could also acquire other and larger interests at his discretion (if owners were willing to sell) in the interests of simplifying titles. This was known as 'live-buying'. A 'conversion fund' was established in the Maori Trust Office from which to purchase uneconomic interests and to receive the income from interests sold. The compulsory aspect was retained until 1974, although until 1987 Maori could also apply to the conversion fund to assist voluntary consolidations of interests, for example for a house site. The positive intention behind the measure was to reduce the fractionation of interests and the number

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of owners, in order to build viable holdings. The purposes for which the conversion fund could be used were laudable, in that they were aimed at helping other Maori to have economic farms. However, the conversion programme compulsorily deprived many owners of some or all of their connection with ancestral land. For this reason it roused immediate and increasing resentment.⁹⁷

Despite Maori protest, the Hunn Report of 1961 and the Prichard Waetford Report of 1965 were both concerned to press on with reducing the fractionation of interests in rural areas, partly to try to create viable rural holdings but also to assist Maori to obtain housing in the towns and cities. Both recommended that the conversion programme be stepped up. The compulsory conversion process was thus extended in the Maori Affairs Amendment Act 1967, applying not only at the point of succession but also when applications to the court were made for partition and consolidation. The conversion fund could also be applied to wider purposes than before, including contributions to the Maori Education Foundation and even the running costs of the Maori Trust office.⁹⁸ Complaints by those dispossessed of their interests in ancestral property, uneconomic though they might be, mounted rapidly.

The 1967 Act also included the provision that land in the title of four or fewer owners would be converted from the status of 'Maori freehold land' to 'general land'. This meant that the general succession law applied, not the law applying to Maori freehold land. Young and Belgrave investigated some 1550 acres in Hauraki subject to this status change. There were positive purposes behind the measure: freed from the constraints surrounding Maori freehold land, Maori owners could mortgage or sell the land and use the income for other purposes, such as purchasing urban housing. Again, however, it was the compulsory nature of the change, and the way it made the land more readily alienable to non-Maori (without the checks, however inadequate, that applied to alienation of Maori freehold land), which angered Maori. David Robson for the Marutuahu claimants has also noted that subdivision of papakainga land into blocks with four or fewer owners enabled it to be used as security for building loans or business purposes. He has expressed great regret that in 1979 the ability to alienate land with four or fewer owners readily caused some of his whanau's land to pass into Pakeha ownership.⁹⁹ This evidence illustrates the inherent difficulty about allowing Maori land to be given as security for mortgages, even in recent times.

The 1967 amendment Act triggered vehement Maori protests, which led to street protests and land occupations in the 1970s and 1980s, and to the mounting demand for 'ratification' of the Treaty.¹⁰⁰ A further amendment Act of 1974 allowed Maori to apply for the restoration of Maori freehold status over land which had become general land. Information is not

97. Evelyn Stokes, *The Individualisation of Maori Interests in Land* (Hamilton: University of Waikato, 2002), pp 141–143

98. *Ibid*, pp 143–146

99. Document x33, p 10

100. Document v2, pp 107–113

available as to whether this was widely used in Hauraki, but applications are at the owners' expense and are not granted automatically: a clear majority of owners must apply and the court has to be satisfied that the land 'can be managed or used effectively as Maori freehold land'.¹⁰¹ More importantly, the drafting of Te Ture Whenua Maori, 1993, largely under the aegis of the New Zealand Maori Council, resulted in the belated restoration of a measure of community authority over the fractionated titles and fragmented lands, by facilitating the vesting of land in a range of trusts at whanau, hapu and iwi level.

(2) Case studies

A case study of the sale of uneconomic interests is provided by the evidence of the Wai 792 claimants (Parekura White and others) and Wai 866 claimants (Pakariki Harrison and others) for Ngati Porou ki Hauraki. This evidence relates to properties in the Hauraki development scheme (see the previous section), where the designated occupiers of farms in the scheme were enabled first to take out leases of up to 42 years, then to acquire the freehold. The Maori Affairs Department and Maori Trustee assisted them in this by transferring to them the uneconomic interests of other owners, and facilitating their purchase of other interests. In a number of cases the occupier became the owner of the majority shareholding and sometimes of the freehold title. Some of these owners then subdivided the land and sold off parts of it, to outsiders as well as to hapu members. This created a division within the community, between those who knew how to use the law and official advice, and those who lost their uneconomic interests and hence their turangawaewae in their ancestral land. Resentment in the community among the many who had not been fully aware of the initiatives that could be taken by the Maori Trustee under the legislation of 1953 and 1967 has led to this issue being brought before this Tribunal by the Harataunga claimants.¹⁰²

Another example is provided by Matamata-harakeke reserve A (70 acres). By the 1960s, there were over 70 owners in the block. A meeting of assembled owners rejected an offer by their Pakeha tenant, a Mr Goudie, to buy the land for £700. One of the owners, Muriaroha Andrews, then applied under section 175 of the 1953 Act to vest the block in the Maori Trustee for sale, with a view to buying it herself (she wanted a coastal section). The court had authority to determine if 'any partition of the land on an equitable basis would be impracticable'. It so decided, on the basis that the land could not be partitioned into economic units. It ordered that the block be sold by the Maori Trustee as the appointed agent of the owners. Muriaroha Andrews then purchased the whole block in 1966 for £715. The land remains Maori freehold land but in the ownership of descendants of Andrews, not of the Raukatauri hapu.¹⁰³

101. Professor Richard Sutton, 'Draft Preliminary Paper on Maori Succession Laws', revised ed (internal working paper, Law Commission, 1997), p 71

102. Stokes, pp 146–148; doc s8(d), pp 53–57

103. Document A35, pp 79–87

(3) Tribunal comment on conversion of uneconomic interests

Undoubtedly, Crown officials, the Hunn and Prichard–Waetford inquiries, and then the Legislature in turn paid insufficient regard to the full range of Maori opinion in regard to the conversion of uneconomic interests. In particular, the Crown failed to take adequate account of the *non*-economic values that Maori attach to land: traditional attachments, spiritual values and a need to belong to a particular iwi, hapu or locality for which some element of land ownership is required.

Undoubtedly, there were good intentions behind tenure conversion, notably the desire to aggregate into usable holdings the myriads of small interests that had emerged over time, partly as a result of court-applied succession rules (discussed below). Many interests were so small that they were already in danger of being lost to legitimate successors because of the increasing intricacies of non-resident succession, and the cost of succession orders, which not all Maori had the time or money to pursue. Also, some owners had moved away for work or education and it was difficult for them to keep in touch. In other words, compulsory conversion was not the first or only means by which some owners lost their rights.

The record is clear that many – probably most – Maori did not like the compulsory solution introduced by the Crown under the 1953 Act and applied even more vigorously by and after the Hunn and Prichard–Waetford inquiries. A voluntary relinquishment of one's interest, in favour of known kinsmen, is one thing. Quite another is the compulsory taking of the interest by the bureaucracy, for the ultimate benefit of a person or persons possibly quite unknown, sometimes non-Maori let alone non-kin.

It is also indicative of Maori preferences that Te Ture Maori Whenua Maori Act 1993 (mostly the product of long planning by Maori themselves) has generally abolished compulsory tenure conversion, allowed fractionation of interests (as distinct from fragmentation of title) to take its course, and sought to deal with the problem of making economic holdings out of multiple interests through the system of trusts. Succession to a minute interest in a Maori freehold block now may not entitle the owner to anything of much economic value, or even to a voice on the hapu planning body which controls economic development of the land. But it does retain ancestral connection with the land and turangawaewae. All trusts are required to maintain a list of owners and report back to them.

On balance, we consider that the claimants have established that in respect of uneconomic interests, the Crown's zeal for economic and social reform outran its discretion, failing to ensure that Maori opinion at grass-roots level was not over-ridden. The practical outcome of tenure conversion is that some Maori benefited significantly by being enabled to make viable, even very profitable, holdings out of a multiplicity of uneconomic interests. But many more have lost their right to succeed to particular blocks. The Maori Trustee is now returning some interests, but can do nothing in respect of interests on-sold to third parties. The lost interests cannot be recovered, because the facts of a right to succeed which

might have otherwise been claimed have now been lost. To try to recover them would mean that parties who have meantime acquired the rights legally could also be injured.

We believe that because descent can be traced through many lines it would be unusual for any member of a Hauraki iwi to lose their connection with ancestral land wholly on account of tenure conversion alone. Long absence from the district and loss of knowledge of whakapapa would probably be just as potent in causing loss of connection. But the compulsory taking away of interests, and thus the imposed loss of the possibility of establishing a right of succession in court, contributed to the sense of alienation and loss, and, in our view, breached the Crown's duty of active protection of Maori land rights.

18.5 SUCCESSION IN THE TWENTIETH CENTURY

18.5.1 Intestate and testate succession

In previous chapters, we have traced the rules of succession to Maori estates established by the Legislature and the native land and other courts from the 1860s (see secs 15.3.6, 16.3.5). Submissions have been made by some Hauraki claimants that in this century these rules continued to breach Treaty principles by weakening Maori owners' control of their land, and resulting in land being alienated from the hapu.

(1) *Life interests for widows*

The nineteenth-century rules regarding succession to Maori land granted intestate estates in equal shares to all children of the deceased rather than to their spouses. Bennion and Boyd's account indicates that Maori were generally happy with this arrangement and from time to time, provided the children of the deceased did not object, widows were also made administrators of their deceased husbands' estates. But Maori generally remained strongly opposed to admitting into the title itself the widows or half brothers of the deceased 'not being from the source of the land', that is from the primary group of customary owners.¹⁰⁴ Later, land could be passed by will to spouses, subject to the provision of section 46 of the 1894 Act that, if this left a direct successor (a member of the whanau) land-short, the court could vary the terms of the will. Meanwhile, general law had provided that a widow who had been excluded (by will) from her deceased husband's estate could be awarded a life interest by the Supreme Court. The discrepancy between the general law and the Native Land Acts was ended in respect of Maori land by section 45 of the Native Land Claims Adjustment and

¹⁰⁴ See the Administration Act 1879 and the 1885 amendment Act, the consolidating Administration Act 1908, and the Real Estate Descent Act 1894: Tom Bennion and Judi Boyd, *Succession to Maori Land, 1900–1952*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), p19. The principle is discussed in (1910) 29 NZLR 1150, 1150–1151.

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Laws Amendment Act 1901, which conferred on the Native Land Court the power to award a life interest to widows, a power continued in the consolidating Native Land Act 1909 and all subsequent legislation to this day.¹⁰⁵

(2) *The Native Land Act 1909*

The succession provisions in the consolidating 1909 Act still revealed some ambivalence between giving priority to spouses or to successors in the bloodline:

- ▶ By section 137, no Maori could pass 'Native land' by will to a 'European', 'Native land' was defined as including both 'customary land' (land held by Maori 'under the customs and usages of the Maori people'), and 'Native freehold land' (land or an interest in land held owned by a Maori 'for a beneficial estate in fee simple, whether legal or equitable'). 'Native land' was not to include land which had once been 'European land' or 'Crown land'. However, subsection (2) of section 137 provided that the section *did not apply* to bequests to a child or other descendant *or the spouse* of the deceased. Land could thus be passed outside the bloodline by will to non-Maori spouses.¹⁰⁶
- ▶ In contrast, section 140 continued the principle established in 1901 whereby in *intestate* succession the wife or husband of the deceased could not take an interest in the estate as such, but the court could award a life interest to a widow (and all personal estate).
- ▶ In the case of land left by will, if the court considered that inadequate provision had been made for the widow, the children or orphaned grandchildren of the deceased, it could (under section 140) award a life interest to the widow and an absolute interest to the children or orphaned grandchildren. (Section 141 of the Family Protection Act 1908 gave the court similar powers, in respect of widows at least, if not of widowers. The section 140 provision was maintained until 1963, by which time a new Family Protection Act 1955 provided for spouses and dependants of people who had not provided for them adequately in their wills.¹⁰⁷)

The Wai 177 and Wai 693 claimants have submitted to us that, under section 46 of the 1894 Act, 'tikanga . . . was to be regarded as the guiding tenet of the law of succession', but because section 46 was not retained in the 1909 legislation, the rights of successors according to tikanga were not so well protected, being open to be overridden by the making of wills.¹⁰⁸ It is not apparent to us that this is necessarily so. As we noted earlier, section 46 of the 1894 Act had given the Native Land Court a discretion to vary the terms of a will if a 'successor' had been left land-short. Section 140 of the 1909 Act preserved this discretion in

105. The Administration Act 1879 and amendment Act 1885, the consolidating Administration Act 1908, and the Real Estate Descent Act 1894: Bennion and Boyd, p 18.

106. It may seem odd that the child of a Maori could be considered European and thus need the protection of the subsection in order to inherit. But the definition of a Maori at that time was not 'any descendant of a Maori', as it is today, but a person of half Maori blood or more.

107. Sutton, p 36

108. Document 19, pp 76-77

respect of children and grandchildren at least, the successors the court would probably have chosen under the 1894 provision. Certainly, the 1909 provision was somewhat tighter, but we would need to see a more detailed analysis of actual outcomes, before and after 1909, to determine the seriousness of the change.

In the 1960s, Professor Sutton was of the view that:

The 1908 [*sic*] legislation had provided a stable framework for a distinctive Maori law of succession. It had begun with an emphasis on the distinctive legal needs of Maori as compared with Pakeha. As it developed, however, it came more to emphasise the distinctive legal characteristics of Maori ancestral property, as compared with property held under Pakeha title. An established and well-understood set of rules of succession had emerged, which were applied to land whose title was held (and protected) under the Maori land legislation. In respect of that land, the Court applied principles which had their origin in Maori custom, and which from time to time still required resolution of legal issues according to that custom. In respect of other land, the general law of the country applied, irrespective of whether the land was owned by a Maori or a Pakeha.¹⁰⁹

Later, Professor Sutton wrote that the legislation ‘was largely effective in assuring that property passed, on succession, downwards to the descendants of the land-owners, and not across families through the wives and husbands of former owners’. However, Sutton qualified this comment in a crucial footnote which reads, ‘But only because will-making was uncommon; the will could leave Maori freehold land to anyone who was a Maori.’¹¹⁰

This last comment suggests that the key distinction in Maori succession rules before 1974 was not so much between succession to Maori freehold land or ‘general’ land, but between testate and intestate succession. Bennion and Boyd’s assessment supports this view. They reveal a range of opinions amongst Native Land Court judges in the lead-up to the 1909 Act, as to whether a different view had emerged among Maori in respect of succession to land which was held under Crown grant, from that which had obtained before the advent of commercial uses of land; and more pointedly, whether general land acquired by Maori on the open market should be brought under the Papakura rules of succession or devolved according to English rules as received and applied in New Zealand. Similar issues were considered by the Court of Appeal in the case of *Willoughby v Panapa Waihopa* in 1910, which decided that principles derived from customary law would apply to the estates of deceased Maori, even when forms of property not previously known to custom (such as freehold title) were involved. Bennion and Boyd conclude:

The judgment contains perhaps the most considered discussion by the superior courts in New Zealand of the philosophical issues raised when judges were asked to find Maori

109. Sutton, p 37

110. *Ibid*, p 61

18.5.1(2)

customary law in a colonial context. It confirmed that the land court approach, partly investigative and partly creative, was the correct one [as far as succession is concerned]. The 1909 Act in effect cemented this approach in place when it simply assumed that *there was a Native custom to be applied in all the succession matters involving Maori and Maori land.* [emphasis added.]¹¹¹

Tikanga thus remained strong in respect of intestate succession to all Maori property.

The matter of written wills, however, is more confused. Professor Sutton's footnote concedes something to the position of the Wai 177 and Wai 693 claimants: wills could override tikanga to some extent, as noted above, although tikanga was still maintained to a degree through the Family Protection Act and the 1909 Native Land Act as discussed above. The evidence is contradictory on the question of whether land could be willed to non-Maori spouses. We have seen that section 137(2) of the 1909 Act did allow land to be willed to a non-Maori spouse, but Professor Sutton's footnote, just quoted, suggests that an absolute interest could only be devolved by will to a Maori spouse. Also, Bennion and Boyd cite Chief Judge Jones in 1931 as stating that there was 'no law forbidding a Native to will his land to a stranger, provided it is not a European.'¹¹² More research would be necessary to clearly establish this point.¹¹³

As regards the general pattern of succession, Bennion and Boyd have studied many court succession orders. In most cases, children succeeded to their parents' estates in equal shares. But Maori increasingly made written wills – one in every 20 to 40 cases according to Bennion and Boyd – often to embody arrangements made by the family in advance of an impending death. These sometimes devolved the land to particular branches of the family (in order to limit fractionation of title), or to marriage connections outside the hapu. Bennion and Boyd also comment that "The land court was not backward in using its power to alter wills to provide for spouses and children."¹¹⁴ Bennion and Boyd's survey shows that there were few appeals against the decisions of the court; its complex hybrid rules generally satisfied the Maori clientele.

Some discontent was reflected in the cases cited to us about the devolution of land by will outside the bloodline. This was often to *Maori* spouses, and although the court could and did intervene to protect the children of the deceased, inheritance by spouses complicated the matrix of multiple ownership and created the potential for disputes with claimants by the bloodline.

111. Bennion and Boyd, pp 17–23

112. *Ibid*, p 32

113. The issue is further complicated by the fact that the law tended to regard a devolution by *ohaki* as a gift, which would revert to the original owner's line on the death of a spouse, and some judges apparently took this view of written wills as well (but not Stout CJ). Some complex amendments to the law regarding 'reversion' are discussed by Sutton, pp 47–49.

114. Bennion and Boyd, pp 17–22, 31–34, 41

The Wai 693 claimants (Ngati Huarere–Raukatauri) have provided details of succession to the interest of Ngapera Te Akau in the Matamata-harekeke reserve of 240 acres. On the application of Ngapera's husband, Hare Te Rararaha, a Nga Puhi, the block was partitioned in 1908, Matamata-harakeke reserve B, 223 acres, being awarded to Ngapera. After her death, Hare, in 1912 applied to the court for probate of her written will. They had no children and the 223 acres passed to Hare, that is, out of Ngati Raukatauri ownership. (The problem was compounded by the court mistakenly awarding succession to Hare's brother Henare, an error which was apparently not corrected.) In 1962, the owners, living at Kawakawa, sold the 223 acres.¹¹⁵

In 1927, a Supreme Court decision gave further consideration to the issue. In *In re Hokimate Davis*, the court held that, because written wills were unknown in Maori custom, no custom could apply to them. The Legislature responded by enacting section 4 of the Native Land Amendment and Native Land Claims Adjustment Act 1927, which provided that, on the complete or partial intestacy of a Maori, the successors to his or her freehold interests which had been derived by will 'shall be determined in accordance with Native custom as it applies to gifts of land from one Native to another, and for the purpose of determining the successors the devise of such land shall be deemed to be a gift thereof'. This provision was continued in the 1931 and 1953 Acts.¹¹⁶ Bassett and Kay for the Wai 693 claimants (Ngati Raukatauri) have submitted that had this provision been in effect when Hare died (in the example above) the land could conceivably have returned to Ngapera's line.

(3) *The Maori Affairs Amendment Act 1967*

Any discontent related to succession rules before 1967 was overwhelmed by that arising from the provisions of the Maori Affairs Amendment Act 1967. The Act arose out of the Hunn report of 1961 and the Prichard–Waetford report of 1965. With Maori urban migration under way, Professor Sutton considers that both reports took the view that:

The Maori's need for a stable rural land base would be replaced by the need for adequate urban housing. The rural base, and legal interests that Maori held in ancestral lands, were best seen as a form of wealth (which could be rapidly transmuted from one form to another) rather than as a part of a continuing ancestral inheritance. The most sensible course was to treat interests in Maori freehold land as no different from any other form of property that a New Zealander may own.¹¹⁷

The 1967 Act, among other matters, therefore repealed the provisions regarding wills dating from 1909. All restrictions on Maori disposing of their land by will were repealed; Maori wills come under the same provisions of law as European wills and their effect would

115. Document A35, pp 52–55, 65–66, 68–72, 74–76; doc Y9, pp 76–77

116. Document A35, pp 71–72

117. Sutton, pp 37–38

18.5.1(4)

be the same; intestate succession would also be determined in the same manner as if the deceased were a European; probate, and the administration of the Family Protection Act, was removed from the Maori Land Court to the Supreme Court (now the High Court).¹¹⁸

The new regime created a significant 'window' during which various people, but particularly wives and de facto partners of deceased Maori, received interests previously debarred to them. This included absolute interests, not merely life interests, in Maori estates. The window lasted in respect of devolution by will until 1993, and by claim under the Family Protection Act for the same period. It lasted in respect of intestacy until 1975. Professor Sutton notes that 'As a result, we have been told, many Pakeha now have an indelible share in Maori freehold land, inconsistent with Maori custom.' He continues:

certainly there are voices in Maoridom today [1997] who are concerned about their culture becoming too backward-looking, and insufficiently attuned to economic progress and wider social movements. Nevertheless those Maori who have spoken to us on this subject appear unanimous in the view that the 1967 legislation had disastrous consequences for many individuals and groups holding blocks of land, with very little in the way of counter-vailing benefit.¹¹⁹

The discontented include a number of Hauraki Maori claimants whose kin lost interests in land under the 1967 regime. This tendency was of course exacerbated by other provisions of the 1967 Act, notably the compulsory change of status of interests in Maori freehold land owned by not more than four owners into the status of general land; and by the compulsory 'conversion' of uneconomic interests through purchase by the Maori Trustee.

(4) *The Maori Affairs Amendment Act 1974 and the Te Ture Whenua Maori Act 1993*

The assimilationist and paternalistic tenor of the 1967 Act evoked strong protests from Maori, and an amendment Act of 1974, drafted under Minister of Maori Affairs Matiu Rata, repealed many of the 1967 provisions. Succession rules governing Maori intestate estates remained the same as for Europeans with the very important exception that undivided beneficial interest in Maori freehold land passed to the children of the deceased or (if there were no children) to the brothers and sisters or others in the bloodline, the spouse being entitled to a life interest only.¹²⁰ However, Maori land could still be passed by will outside the whanau or hapu until 1993. A number of instances were given at the hui convened by the Law Commission. 'The practice appears to have been common', partly because one of the standard forms of will available at that time left all the will-maker's property to the spouse,

118. Maori Affairs Amendment Act 1967, ss 75-79

119. Sutton, p 40

120. Maori Affairs Amendment Act 1974, s 25

and would probably have been routinely used by solicitors in urban areas, neither they nor the client being fully aware of the consequences for land in the ancestral area.¹²¹

Part 4 of the Te Ture Whenua Maori Act 1993 restored distinctive Maori succession rules akin to those of the 1909 Act: 'the new Act placed greater emphasis on the origins of Maori land, and less on the personal status of the will-maker[s] and their successors.'¹²² Succession to Maori freehold land (not general land), *whether devolved by will or through intestacy*, is now confined to children and other blood relatives of the deceased, and whangai (or their trustees). Spouses of the deceased can take only an interest for life or until remarriage.¹²³ And while the High Court (the former Supreme Court) retains probate over Maori estates, it applies to the Maori Land Court for the determination of beneficial entitlements to deceased estates.

The Te Ture Whenua Maori Act was shaped over many years and reflected a very widespread and determined movement among Maori to check the constant erosion from Maori ownership of remaining Maori freehold land. It sought to restore Maori customary principles of land ownership and management, therefore limiting of the right of spouses to a life interest, in testate as well as intestate estates.

The 1993 change supports the view of the claimants in these proceedings that previously the Crown, by its legislation concerning inheritance by will, failed to protect Maori customary principles of succession and allowed some land to be passed by will outside the hapu, including to non-Maori. In this respect, the Crown had moved beyond the preferences of most Maori in seeking to modify tikanga in favour of the general law.

But we also note the evidence that Maori generally came to accept the Papakura principles of succession to all children (which was *not* modified in the 1993 Act) and the principle of a life interest for widows, even though these were not strictly customary as custom stood before 1865. Moreover, the 1993 legislation limited the succession in respect of Maori freehold land only. General land and other property passes in the same manner as non-Maori estates.

Professor Sutton, for the Law Commission, has tried to assess the lasting effects of ill-advised legislation such as that of 1967. He has some very strong words to say in regard to section 88 of that Act, which sought to limit the succession rights of children not born of legal marriages (of whom a liberal view had been taken in 1909). The 1967 change was bitterly resented by Maori and quickly repealed by section 4(1) of the Maori Purposes Act 1969, 'But it has left an indelible scar', says Sutton, who continues:

121. Sutton, p 64

122. Ibid, p 40

123. Richard Boast, Andrew Erueti, Doug McPhail, and Norman Smith, *Maori Land Law*, 2nd ed (Wellington: LexisNexis, 2004), pp 157–158

Getting a matter as fundamental as this right is important for any legislative system of succession. This is true of laws which relate to any ethnic group, but especially to those applying to Maori. The problem here [of customary marriages and the rights of children born of them] was not complex, and it was well analysed right from the beginning [of the colony]. But, with the best will and expertise in the world, it took a long time to get it right [in 1909]. Even then, it would be exposed to the risk of ill-advised meddling by those who had other goals in mind. The earlier well-trying law eventually succumbed to that risk [in 1967], if only briefly. It is an object lesson in what can happen when a legislature dominated by one community, undertakes continuing supervision and control over the personal laws of another.¹²⁴

18.5.2 Tribunal comment on succession rules

We believe that criticism is properly directed, not so much to the Papakura principle of succession (which contributed to fractionation of interests) but to the failure of the law to provide for the corporate management of the land by owners particularly to those who lived on or near it. But this and similar effects of the land laws are a question of the nature of Maori titles as defined by statute, rather than of succession law as such.

We note that there was a genuine conflict of principle or values between the rights of children and others in the bloodline, and the rights of spouses. Under some twentieth century legislation, in intestate succession children and kin were favoured but in the case of land passed by wills, spouses not of the ancestral line (including non-Maori) could succeed. This conflict was resolved in 1993 in favour of retaining Maori freehold land in the bloodline, in both testate and intestate succession. This resolution undoubtedly reflects considered Maori contemporary opinion.

We note that Crown was not completely out of step with evolving Maori opinion. But we think that the claimants have a valid point: the Crown did cause the patrimony of the hapu to be eroded by the provisions relating to wills, and that this did cause significant injury in particular cases in the 1880s and 1890s, and between 1909 and 1974. Examples are Wharekawa East 2 (6921 acres), Totarawhakaturia 4 (226 acres), Pukewhau (117 acres), and Matamata-harakeke reserve B (70 acres).¹²⁵

The prejudicial impact of the 1967 Act was of a wholly different order, and although it was corrected in respect of intestate estates by 1974 and testate estates by 1993, some families and individuals meanwhile had lost interests in ancestral land and some social relationships were damaged. We note that the problems in the law were largely remedied by the Te Ture

124. Sutton, p 56

125. Documents D3, D9, D12, D14

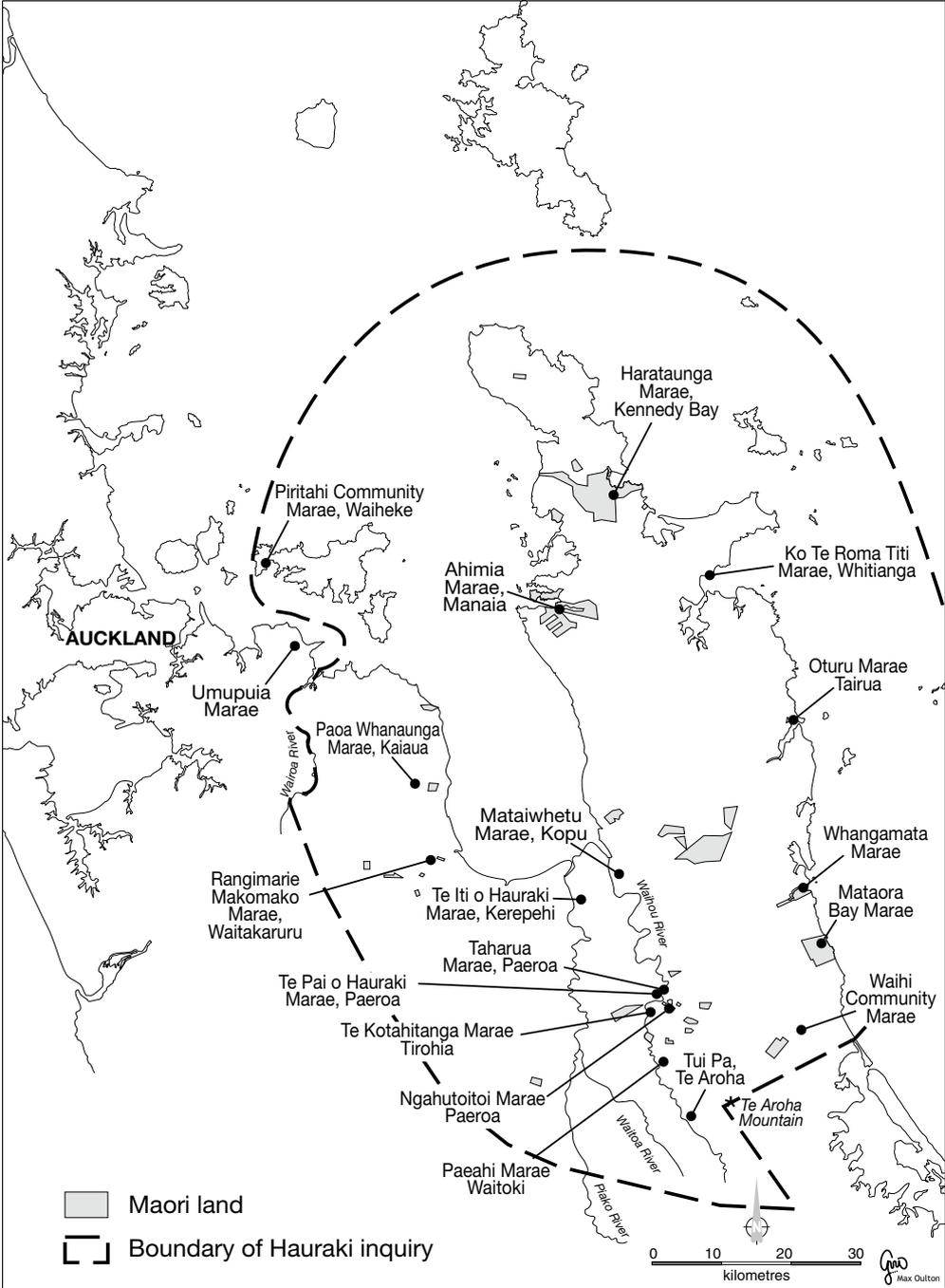


Figure 77: Maori land and marae in Hauraki, 1997

Whenua Maori Act 1993, which provides a balance between tikanga and English principles much more in accord with Maori preferences than previous laws, while still protecting widows and widowers by enabling the grant of a life interest in deceased estates. We note that that Act is under constant review and that the succession question is also under consideration by the Law Commission.

18.6 HAURAKI LAND IN MAORI OWNERSHIP TODAY

The Wai 100 claimants have concluded from their detailed mapping project and calculations that Hauraki Maori today own no more than 38,500 acres, or 2.6 per cent, of their original patrimony as Maori freehold land.¹²⁶ This finding is substantiated by Terry Innes's research, commissioned by the Trust Board. Innes covered a somewhat smaller area, omitting the gulf islands and islands off the east Coromandel coast. From a search of Land Information New Zealand (LINZ) and Maori Land Court records, he concluded that only 32,711 acres (13,237 ha) remained, or 2 per cent of the research area.¹²⁷ This land was in 627 blocks, with an aggregate of 23,934 ownership interests in the titles. Around 37 per cent of the blocks were without road access. About 23 per cent of the land was leased, and most was covered in scrub and bush. No attempt was made to estimate land under general title owned by Hauraki Maori.¹²⁸

On a per capita basis, Hauraki iwi are thus among the most land-short peoples in New Zealand, as regards Maori freehold land.¹²⁹ To the figure of Maori freehold land may be added an unknown quantity, perhaps a few hundred or a few thousand acres, of general land in Maori ownership. This was either land converted to general status under the 1967 amendment and not yet sold, or land purchased on the general land market. Drs Mervyl McPherson and Michael Belgrave for the Marutuahu have submitted an analysis of the 2001 census which show that Hauraki iwi members make up only 15 per cent of Maori resident in the inquiry district¹³⁰ McPherson and Belgrave were careful to distinguish between Ngati Maru of Hauraki and Ngati Maru of Taranaki in their analysis, and included Ngati Porou ki Harataunga and Ngati Pukenga ki Manaia in their Hauraki count (not in Tairāwhiti and Tauranga respectively). They were aware, however, that iwi identification in censuses, particularly where it involves multi-iwi affiliation, is somewhat variable. They consider, nevertheless that the 15 per cent calculation is accurate to within one or two percentage points. They have also found that Maori of Turanga iwi resident in the Turanga inquiry district make up

126. Document A3, p 7; doc A9, pp 178–179

127. Document H5, pp 5–6

128. Ibid, pp 1–2, 5–9, app

129. Ward, vol 1, p 11; doc A9, p 180

130. Document V5, pp 30–32

only 19 per cent of all Maori resident in that district. These samples therefore demonstrate a trend of considerable mobility of Maori outside their ancestral areas. Within this pattern (if it can be deemed such), the percentage of Hauraki iwi resident in the Hauraki inquiry district is clearly low. On the other hand, considerable numbers of affiliates of Hauraki iwi live in the Hauraki takiwa outside the inquiry district, and in Auckland and Waikato adjacent. We shall consider the implications of these statistics in our chapters on socio-economic outcomes (chs 25, 26).

18.7 CLAIMANT AND CROWN SUBMISSIONS ON TWENTIETH-CENTURY LAND LAW AND ALIENATION

18.7.1 Crown closing submissions

(1) *Twentieth-century purchases the most 'problematic'*

In their amended statement of response dated 2 September 2002, Crown counsel states:

The Crown accepts that from 1909 the issue of ensuring sufficient land for the maintenance of current and future Maori needs was known to the Crown. There appears to be a serious case for the Crown to answer with respect to claims made under this head.

There is nevertheless evidence of Maori seeking to have restrictions on alienation removed.¹³¹

Crown counsel acknowledges the further Crown purchase of Hauraki lands following the audit conducted by the Stout–Ngata commission to be ‘perhaps the most problematic in Treaty terms’.¹³² Other ‘problematic’ features of Crown policy and legislation discussed in this chapter include: section 20 of the Maori Land Settlement Act 1905 (authorising the compulsory acquisition of the interests of dissenting minorities;); simplified procedures for the removal of restrictions on alienation via the 1909 Act; inadequate resources vested in the Maori land boards to permit the required statutory checks; the 1915 provision that dissenters from a motion to sell land must record their dissent in writing; provisions to bypass absentees or minorities who did not respond to notification (including powers given to the Maori Trustee in the 1953 Act to purchase their interests compulsorily.)

(2) *'Landlessness' should be considered against other income opportunities*

Crown counsel also comments on the revised definition of ‘landlessness’ in section 91 of the Native Land Amendment Act 1913. This provided that a Maori alienor was not considered landless if the land concerned was not ‘a material means of support’ or that the alienor ‘is

131. Paper 2.550, p 38

132. Document AA1, p 170

18.7.1(3)

qualified to pursue some vocation, trade or profession, or is otherwise sufficiently provided with the means of livelihood'. Counsel continues:

It is submitted that the 1913 definition is a reflection of the view that income is more important to material prosperity than mere ownership of land which is, of course, no guarantee of income or material wealth.

The policy of the 1913 legislation can be seen to be consistent with the Crown's long held aspiration (as discussed in the evidence of Dr Loveridge and Professor Hawke) that Maori would ultimately embrace new economic opportunities made available through settlement of the colony. It also reflected the view that Maori should be free of the paternalistic fetters on their ability to manage their affairs as they saw fit.¹³³

(3) Partitions not wholly a consequence of land purchases

Crown counsel also takes up the matter of Hauraki Maori lands becoming increasingly fragmented through partition: 'It is said that partition, itself a product of individualisation, contributed to the alienation of land.' This is claimed by many claimants, including Ngati Rahiri Tumutumu, and by Young and Belgrave.¹³⁴ The Crown submits that this is 'a very much overstated criticism and flawed in its failure to acknowledge both the complexity of the issue and the degree of Maori agency in the process of partitioning'.¹³⁵

Crown counsel observes that the 'fragmentation' of parcels of land ought not be confused with 'fractionation' of the title to any parcel of land (to use Professor Sir Hugh Kawharu's term).¹³⁶ The Rahiri Tumutumu claimants do indeed appear to be referring to fractionation of title through so-called 'individualisation' while Young and Belgrave seem to be referring to fragmentation of parcels of land through partition.

As to the fractionation of interests in titles, Crown counsel concedes that:

The Crown accepts that this created considerable administrative difficulties for some Hauraki Maori communities and this did impact on their ability to deal with their lands and did lead to sale in some cases. The Crown ought to have provided a better range of options to address these problems (ie beyond incorporation and consolidation models).¹³⁷

As regards partitioning, however, Crown counsel suggests that there are 'numerous examples' of Maori owners undertaking partitions for reasons other than sale, or if for sale, at the request of the owners themselves. Counsel instances the Harataunga and Manaia blocks,

133. Document AA1, pp 170–171

134. Document Y5, p 13; doc v2, pp 105–106

135. Document AA1, p 176

136. Ibid, p 177

137. Ibid

which were partitioned at the owners' request and not immediately sold, and the Te Aroha lands, in respect of which Taipari wrote to McLean stating that 'it will be for the Court to divide the lands between the different hapus and individuals of the tribe of Marutuahu, so that persons desirous to hand over their portions can do so, and persons wishing to retain theirs can also do as they wish.'¹³⁸

18.7.2 Claimant closing submissions

The Wai 100 claimants have observed that, 'Although the Crown was on notice following the Stout–Ngata Commission of 1907 that Hauraki were all but landless, the Crown nevertheless continued to erode that remaining land base through ongoing Crown purchases.'¹³⁹ This included further purchases in the Hauraki Plains. Compulsory purchases of minority interests under section 20 of the 1905 Act, although involving only 863 acres, included marginally over 50 per cent of shares in some blocks, and the mechanism involved no necessary public works or national interest. It simply made Crown purchases easier to complete.¹⁴⁰ After 1910, the Crown allowed further settlement of Hauraki by private purchases under the 1909 Act.

In relation to the purchase of the Hauraki Plains, counsel for the Marutuahu claimants has drawn attention to the Crown's acknowledgement that in some cases 'Hauraki Maori had little choice but to sell or lease a portion of their Hauraki Plains lands' to meet the cost of protracted title investigations and associated survey costs. He notes that Maori had little opportunity to benefit from the drainage scheme, because more land was compulsorily acquired (see sec 24.4).¹⁴¹

Counsel for the Marutuahu claimants has also commented on the changed definition of 'landlessness' in the 1913 Act (see sec 18.4.1(2)). He notes the Crown's attempt to defend that change on the basis that 'income is more important to material prosperity than mere ownership of land' and the Crown's long-held aspiration that Maori would embrace the new economic opportunities created by settlement of the colony.¹⁴² Counsel notes that these comments, do not recognise that the purchase of Maori land was not intended to be an act of 'highminded humanitarian idealism', that Maori had little opportunity to raise capital to develop land, and that very limited options were available to Maori under the title system imposed by the Crown. That system was designed to alienate Maori land and made it very difficult to manage and develop land.¹⁴³

138. Ibid, pp 177–178

139. Document Y1, p 99

140. Ibid, p 100

141. Document Z6, pp 51–52

142. Document AA1, p 31

143. Document AA13, pp 31–33

Counsel also takes up remarks by Marutuahu witnesses Young and Belgrave as to the extent of ‘coercion and choice’ involved in alienation of Maori land.¹⁴⁴ It is useful to recall their comments; the witnesses refer to the pressures which led Maori to sell far more land than they would have wished. In the late nineteenth century, the reports of Crown agents Wilkinson and Mair show that ‘Time and time again . . . decisions to sell were influenced by considerations of debt and economic marginalisation, often in consequence of the costs associated with surveying land and having title determined by the Court.’¹⁴⁵

There is no reason to believe that the early twentieth century sales were very different.¹⁴⁶ Young and Belgrave conclude that pressures of various kinds were often evident:

the range of explanations which are suggested include the place of debt, use of the proceeds as a form of income, a way of freeing up capital to invest in other lands, the sale of land which is not a site of direct occupation or cultivation and the sale of land as a way of continuing or ending traditional rivalry between kinship groups. Nevertheless, the ability of Maori to exercise independence in each [situation] is highly problematic and no definite conclusion either way is possible. There appears to have been a continuum between coercion (in its variety of forms) and choice and the evidence indicates that both could be involved in any sale. While the volition of Maori to sell land can be acknowledged in some of the evidence, the reasons for their doing so are seldom clear.¹⁴⁷

Young and Belgrave note that under the 1967 legislation:

the property rights of the individual would be further privileged over those of the collective kinship group by the proposed legislation. By then the Court had presided over a system which did precisely this for 102 years. It was probably the most destructive aspect of the structure of the title created by the Court and is perhaps one of the most convincing explanations for the massive land loss suffered by Marutuahu.¹⁴⁸

18.8 TRIBUNAL COMMENT AND FINDINGS

We have commented above on specific matters such as the Hauraki development scheme (sec 18.4.5), conversion of uneconomic interests (sec 18.4.6(3)), and succession (sec 18.5.2). We add the following general findings on land law and its application in the twentieth century.

144. Document AA13, pp 36–38

145. Document v2, pp 77–78

146. *Ibid*, pp 76–78

147. *Ibid*, p 82

148. *Ibid*, pp 113, 267

- ▶ We note that the late nineteenth and early twentieth century attempts to improve the land law derived from two disparate sets of pressure. One set, from Maori, including Kotahitanga/Hauraki leaders, aimed at securing greater control over land management. Pressure from Pakeha was aimed largely at simplification of the law to make transactions cheaper, swifter, and more secure. These two pressures often collided, and the outcome was large swings in policy and law. Most of the legislation of the Liberal governments, from the early 1890s to 1910, facilitated alienation and Maori lost more land. The 1900 Acts restored substantial control over land to Maori communities via elected or appointed councils and boards: alienation of Maori land slowed and nearly ceased under these Acts. But only a few brief years later (1905) the law was changed again to facilitate alienation. There is no single fact that more clearly demonstrates the fundamental demand of the settler electorate to acquire the freehold of Maori land, than this sequence of law changes. Even when the Stout–Ngata commission of 1906–09 reported that Hauraki Maori were so land-short that very little more could be spared for lease or sale, governments continued vigorously to purchase land and to facilitate private purchasing under the 1909 Act. The evidence of Drs Anderson, Belgrave, and Young and of Messrs Alexander and McBurney on the erosion of most of the remaining Hauraki patrimony, just at the time the Maori population was burgeoning, is one of the most damning indictments of the failure of the Crown to observe its Treaty responsibility of active protection. It is manifestly clear that the primary objective of governments to secure Maori land for white settlement persisted well into the twentieth century, and that Maori preferences and priorities did not prevail until (to a considerable extent) in the Act of 1974, and in the Te Ture Whenua Maori Act 1993.
- ▶ We have noted Dr Loveridge’s conclusion in section 17.6.7 that the 1860s goal of drawing Maori into the mainstream of colonial life and enabling them to share equally in the prosperity of the country had not been achieved by the end of the nineteenth century. It had not been achieved for most Hauraki Maori in the twentieth century. The achievements of Carroll and Ngata in the Acts of 1900 and their implementation were nullified from 1905 until the Coates Government of the 1920s recognised and supported Ngata’s land development schemes. But, as the historians for Marutuahu point out, the combined effects of the kinds of title created under the Native Land Acts and persistent Crown purchasing had already eliminated most of the Hauraki land base.¹⁴⁹
- ▶ On the question of Maori ‘agency’ in land alienation, we note and accept Young and Belgrave’s evidence that it resulted from a mixture of volition and pressure, but that it is impossible to distinguish the proportions of each in any given case. ‘Volition’ often arose from ‘pressure’ which often meant the pressure of debt, including debt incurred in surveying land and taking it through the court. The key point in the claimants’

149. Document v1, pp 280–281

analysis, is that customary, community decision-making over land alienation was undermined by the land law, and no adequate legal authority at community level substituted. Individuals and sections of owners were privileged by the law, their signatures acquired seriatim, and communities divided and distracted from serious development planning. As discussed in previous chapters, the claimants have established to our satisfaction that this system was imposed upon Maori by the settler-dominated Legislature. We note that the Crown accepts this criticism up to a point, in observing that the balance between collective and individual rights and interests should, in hindsight, have been weighted more towards the collective. We do not think that hindsight was necessary. In 1900, the Government introduced legislation which recognised that Maori had lost community control and restored it. But as in the nineteenth century, the measures were soon withdrawn or weakened, and alienation by individuals or sections of owners again facilitated. In short, our review of evidence in this chapter leads to the disturbing conclusion that the Crown persisted with a legal system oriented to the acquisition of Maori land, even *after* considerable consultation with Maori and its own commissioned report, which had recommended a virtual cessation of this policy.

- ▶ The Crown has cited some examples of Hauraki Maori partitioning for other reasons than sale; but this evidence is slight in comparison with Young and Belgrave's systematic survey and sampling of repeated partitions and alienations in the twentieth century, resulting in a plethora of uneconomic fragments. Many Maori with a fractional interest in fragmented holdings found them of no economic use except to sell.
- ▶ Other protective provisions (such as the reservation of minimum acreages of reserves) broke down or were loosely applied. We have noted the evidence of the many requests by Maori to remove restrictions on alienation, and of offers to sell. In respect of these matters Crown counsel has emphasised the Crown's obligation not to restrict Maori freedom of choice. We consider this a poor argument. Protection of Maori should have meant the making of inalienable reserves. There is no doubt whatever that the immediate needs of Maori for cash were pressing, but the Crown had an obligation to look to the interests of future generations. The distribution of land ownership in Hauraki today would look significantly different if the 50 acres per head of inalienable reserves (proposed in the 1873 Act) had been applied and adhered to: for the approximately 2000 Maori living in Hauraki in 1873 that would have left a minimum of 100,000 acres in Maori ownership, not 38,500 acres as is the case today. The formula of the 1900 Act, had it been applied – 25 acres of first-class land per head, or larger areas of land of lesser quality – would have yielded a similar result.
- ▶ The renewal of land purchase programmes in Hauraki in the twentieth century stands in stark contrast to the recommendation of the Stout–Ngata commission that Hauraki Maori could little afford to alienate more land. Censuses from 1901 to 1906 and 1911 showed that the Maori population had stabilised after decades of decline and was

possibly rising (see sec 25.1.1). In the twentieth century, it was as if the State still saw no other purpose for Hauraki Maori but to be a source of land for the use of others, or as labourers on public works schemes. Henry Sewell (though commonly denounced for his statement about breaking up Maori tribal communism) had said as early as 1859, 'I want to see every native supplied with an ample extent of land and with all the means of turning it to account'.¹⁵⁰ This was not a proposal merely to sustain Maori in a bare subsistence. But not until the twentieth century, and then only hesitantly at first, did Maori receive from the State, material assistance with turning land to account, and by that time, in Hauraki especially, they did not have an 'ample extent of land' left.

- ▶ We note that the Maori Affairs Act 1953 and the Maori Affairs Amendment Act 1967 continued to reflect the purposes of official planners and legislators rather than the weight of Maori opinion. They were geared towards the economic goals of more efficient land use and urbanisation, making interests in titles more readily transferable, setting up and continuing a programme of compulsory tenure conversion, and converting Maori freehold land owned by four or fewer owners into general land. The legislation under-estimated the non-economic values which Maori attach to ancestral land: identity with an ancestral group, turangawaewae, and spiritual connections with the land itself. We note that Hauraki Maori continued to lose ancestral land under the 1953 and 1967 provisions, although some retained or acquired general land. We note contemporary Maori reaction against the paternalistic attitude of the Crown, especially to the compulsory aspects of the legislation, and the increasingly centralised and bureaucratic control of decisions by the Department of Maori Affairs and Maori Trustee. Positive outcomes were the important amendments to the land law in 1974 and 1993. The compulsory elements of conversion have disappeared, as have manipulative devices such as the 'meeting of assembled owners' (dating from 1909) whereby minorities of owners in a block could alienate the land without the consent or even the knowledge of other owners. Such insidious practices, which do not measure up to the usual canons of informed consent which apply to Pakeha property, let alone to Treaty principles, are mercifully no longer with us. We note with approval that ongoing consideration is being given to improving the Te Ture Whenua Maori Act.
- ▶ But much damage had been done between 1905 and 1993, including the vigorous purchase before 1920 of most of the relatively little land which still belonged to Hauraki Maori. Even after 1920, the steady whittling away of much of the remainder continued. We believe that Hauraki Maori were greatly injured, not only by the loss of this land but by the *manner* of its alienation, which prevented owners from entering the modern economy through development of their land.

150. Sewell, journal 2, vol 1, 25 March 1859, p13 (doc P1, p104)

