PART III

PAPATUANUKU (PAPAAHUREWA/PAPAUENOKO)
AND LAND OWNERSHIP: MAORI LAND ALIENATION,
AND MAORI LAND AND TITLE ADMINISTRATION
IN THE CENTRAL NORTH ISLAND
Previous page: The tribal community of Waitahanui Pa, on the shores of Lake Taupo-nui-a-Tia, 1847. Detail from a lithograph by the English artist and naturalist George French Angas. The full image is reproduced in black and white on page 421.
This part of our report addresses generic issues of Maori land alienation, and Maori land and title administration in the Central North Island inquiry region.

In the five chapters that follow, we consider Crown provisions for the purchase and lease of land, and the way in which these were implemented in the Taupo, Kaingaroa, and Rotorua districts in the latter part of the nineteenth century and the first decades of the twentieth century. Claims relating to the Crown’s introduction of a new title system, administered through the Native Land Court under its own legislative regime, were of importance in this inquiry.

We also consider claimant concerns about the lasting impact of the Crown’s new title system on later generations of Maori owners – and their ability to utilise their lands and resources – into the twentieth century. The transformation of customary rights into individualised shares in newly created blocks meant that owners held scattered interests. Over time, as the Maori land base shrank, and as the Native Land Court rule of equal succession to owners’ interests took effect, the shares which owners inherited became progressively smaller, so that they were often measured only in fractions of a share. We examine the Crown’s policies at different times, to address what was a major issue for Maori landowners.

Public works land takings are a further alienation issue before us, and we examine public works legislation and, in a broad sense, the ways in which it impacted on Maori owners in the Central North Island.

Underlying all these land issues is the question of the exercise of autonomy which – as we have already seen – is central to the claimant groups who appeared before us. The rights of Maori kin communities to make collective, unpressured decisions about land sale, land retention, and land and resource development, post-1840, and the extent to which the Crown upheld those rights, are of great importance in this context.

We begin with a discussion of Treaty standards applicable to the Crown’s acts, policies, and omissions in respect of Maori land alienation and land administration.

Our chapters in this part thus comprise:

- Chapter 8: Treaty Standards for the Crown’s Dealings with Maori Land in the Central North Island;
- Chapter 9: Native Titles and the Native Land Court in the Central North Island, 1865–1900;
- Chapter 10: Nineteenth-Century Maori Land Purchasing in the Central North Island;
- Chapter 11: The Legacy of the Nineteenth Century: Maori Land, Titles, Alienation, and Retention in the Twentieth Century; and
- Chapter 12: The Taking of Maori Land for Public Works.

We note that in this part we make use of data from the Land History and Alienation Database, prepared by the Crown Forestry Rental Trust. This database was designed to provide a comprehensive chain of title for Maori-owned land from the first creation of Crown title through to final alienation, and covered the whole Central North Island region except urban land. At the Tribunal’s request, the Crown Forestry Rental Trust filed a complete set of data tables. A number of research reports drew on data generated from the database. In preparing this report, the Tribunal has used the filed data sets as well as research that relies on the database.

We have used the data for the purposes of establishing broad patterns of land alienation and retention, rather than detailed investigation of particular land histories. We note that because the database’s content was only made final near to the close of the evidential hearings, all researchers had to rely, to varying degrees, on preliminary
data. Limitations arising from the definitions of data categories, the scope of data capture and the lack of a documented quality control process were extensively traversed in the evidence of David Alexander, the chief architect of the Land History and Alienation Database. We are nonetheless satisfied that much of the data had been entered by the time researchers accessed it, and that its internal integrity was of a high standard. We have taken careful note of the limitations identified in evidence, which we consider are not so serious as to compromise the use of summarised data for the general purposes of this report.

Notes
1. David Alexander, LHAD data (CD), 2005 (doc 144)
2. See David Alexander, evidence re Te Matua Whenua: The Land History and Alienation Database, 2005 (doc A97); response by David James Alexander to questions for clarification of Te Matua Whenua: The Land History and Alienation Database raised by the Tribunal in July 2005, 2005 (doc I34); spreadsheet: updated LHAD information (takings with compensation), 2005 (doc H15(b)); spreadsheet: updated LHAD information (takings without compensation), 2005 (doc H15(c)); responses to written questions, July 2005 (doc I43)
Historical Treaty claims have from the outset raised concerns about the Crown’s land purchases from Maori, and its regulation of private transactions in Maori land. The impact of the native land legislation, under which the Native Land Court converted customary title into forms of negotiable title, has also been the subject of claims in many areas.

Assessing the Crown’s Treaty obligations in respect of its administration of Maori land and the new tenure system, and its conduct and regulation of Maori land transactions, is not new territory for the Tribunal. This is particularly the case where claims relating to nineteenth-century land administration and land transactions are concerned – though claims relating to twentieth-century Crown land administration, title issues, and alienation have increasingly been brought to the Tribunal’s attention. Public works legislation, and takings of Maori land for public works, have also been scrutinised in several reports.

In light of this, we review applicable Treaty guarantees and principles, as well as key findings already made by the Tribunal, which will guide us in our assessment of claims before us.

**ISSUES**

We address the following issues:

- What Treaty principles (and Tribunal findings) are applicable to the Crown’s introduction of a new system of native title, its regulation of the new title system, and its administration of Maori land?

- What Treaty principles (and Tribunal findings) are applicable to the Crown’s provisions for alienation of Maori land?

We turn now to the first major issue for this chapter.

**The claimants’ case**

The claimants, relying on both texts of the Treaty, argued that the Crown was clearly under an obligation to recognise and consult with tribal leaderships with regard to the introduction of the Native Land Court into their rohe. As the very introduction of the court, and its conversion of customary property rights protected under the Treaty, would affect the rangatiratanga of chiefs over their lands, the Crown was under a particular duty to actively protect Maori. In terms of this principle, the Crown was required to work with Maori to jointly design a process that would allow settlement and active Maori engagement in the economy.
Turning to twentieth-century land administration, the claimants cited the Rekohu Report in respect of the implementation of a policy of individualised title and its prejudicial effects on Maori. They submitted that if this Tribunal were to make a similar finding, there could be found a positive obligation on the Crown to recognise and address some of the relative disadvantage that the ‘pseudo-individualisation’ of title has placed Maori under. Such an obligation could be founded on article 2 obligations to recognise and protect traditional Maori land-holding structures undermined in the nineteenth century without Maori consent. It could also be based on article 3 obligations to ensure equal citizenship of New Zealand, in that the title situation with Maori land caused difficulties with developing and using their lands that would not normally be encountered by New Zealand citizens. Thus there might be obligations on the Crown to facilitate changes from the title situation inherited from the nineteenth century to alternative systems of landholding which would allow Maori a fairer basis from which to use their lands in their own interests.2

The Crown’s case
The Crown’s key Treaty arguments were made generally, rather than specifically in relation to land administration and alienation. Counsel did, however, consider article 2 of the Treaty, stating that it ‘contains a promise that Maori property rights and the authority contained within the term tino rangatiratanga will be respected’. Tino rangatiratanga, counsel stated, meant ‘more than ownership of the property rights contained in article 2. It connotes a degree of Maori control and management over what Maori own.’ And the Crown acknowledged ‘an element of mutuality’ in the promises made by the Crown and by Maori in articles 1 and 2 of the Treaty: ‘If the Treaty means that the Crown promised to protect rangatiratanga so did Maori promise to acknowledge and protect kawanatanga.’3

The Crown put it to us that there are ‘essentially two core Treaty principles apparent from the jurisprudence of the Courts and the Tribunal’:

- Maori and the Crown should act honourably, reasonably and in good faith towards one another because of their special relationship created by the Treaty of Waitangi.
- The Crown must actively protect the Maori interests protected by the Treaty. Such protection is not absolute but requires the Crown to do what is reasonable in the circumstances.4

As we have already seen in part II, the Crown placed considerable weight on the importance of applying Treaty principles in accordance with this requirement of ‘reasonableness’, rather than importing ‘presentist’ understandings into the discussion.

But in respect of nineteenth-century native land laws, the Crown conceded that such laws ‘can fairly be criticized for failing to provide for more effective corporate/communal governance mechanisms’. In Treaty terms, this ‘may be one of the principal failings of the native land laws generally.’5

In respect of previous Tribunal reports, the Crown’s submission noted that it did not intend to re-litigate the generic findings of the Turanga Tribunal, although in practice that concession was somewhat vitiated by a standing qualification:

The Gisborne Tribunal Report contains an extensive analysis of the scheme and intent of the native land laws and the design of the Native Land Court. It is not the intention of the Crown in this inquiry to re-litigate those issues. Rather, the focus of the Crown’s submission is on how the Court operated in the CNI region, and CNI Maori reaction to it.

It should not be assumed that the systemic faults of the native land laws identified by the Gisborne Tribunal necessarily apply in the CNI, or have particular application to it. As Dr Pickens, Crown Historian, stated, it is necessary to ‘drill down’ and to see how the Court operated on the ground. This is
necessary in order to test whether some of the more general assertions about the Court hold true in this region. There is significant variety of experience in the CNI with the Court.\(^6\)

The Tribunal's analysis
Successive Tribunals have considered the establishment of the Native Land Court, and the new tenure system introduced and administered through the court. In particular, their focus has been on the article 2 Treaty guarantee to Maori not only of their 'lands and estates, forests and fisheries' – that is, possession of their property – but also of Maori control over their property. This leads first to consideration of the right of the Crown, in exercising its kawanatanga, to make changes to the basis of customary title by which that property was held, and the circumstances in which any such right might properly be exercised.

The Crown, the Native Land Court, and its title system
The establishment of the Native Land Court was considered by the Turanga Tribunal in light of the 'essential treaty bargain.' The Tribunal found that there was no doubt that by the cession of 'sovereignty' or 'te kawanatanga katoa', the Crown secured the right, among others, to make laws for the regulation of Maori title, including the transfer of that title. But that right was not unfettered:

By the terms of the second article, the Crown offered two crucial guarantees in the context of the native title system. The first was that Maori title would be respected. This was most explicitly stated in the English text promise to protect Maori in the 'exclusive and undisturbed possession of their lands'. The second was that Maori control over Maori title would also be respected. This is best encapsulated in the Maori text promise of 'te tino rangatiratanga o o ratou whenua'. There can be no question but that both promises were absolutely fundamental to the Treaty bargain.

From this it followed, the Tribunal found, that:

the Crown's right to make laws for the regulation of Maori title could not be used to defeat that title or Maori control over it. On the contrary, the Crown's powers were to be used to protect Maori title and facilitate Maori control.

Maori had a corresponding obligation to accept:

that it was the Crown's role to develop and implement the native title system. Maori could be consulted over these matters, but they had given up the power to operate outside the Crown's laws.\(^7\)

The Hauraki Tribunal acknowledged that there were 'good reasons' in the context of the developing colonial economy for the Crown to establish an independent tribunal (the Native Land Court) to determine 'intersecting and disputed claims to Maori customary land, and to administer legislative modifications to customary tenure to meet new needs.'\(^8\) It did, however, issue a strong caution. At the very least, the Tribunal stated, the Crown's duty of active protection implies that such changes made by governments should have been made with the understanding and consent of Maori. Instead, the persistent and growing Maori demand that their own institutions be given more authority in determining customary interests was given little recognition.\(^9\)

That, it seems, to us, is the pivotal point. As the Rekohu Tribunal pointed out, an aspect of rangatiratanga was that, to the extent practicable, Maori would control their own affairs. "That must have included the development of their own institutions to resolve disputes between tribes."\(^10\) The alternative, as the Tribunal suggested, was that judges would attempt to manage Maori custom from the outside, looking in. Such an alternative was inconsistent with the autonomy guaranteed to Maori by the Treaty. There was a fundamental disjunction when Maori law was placed under the control of a British court, with the decisions to be made
not by the Maori people concerned but by a British judge. The Treaty could not be kept in those circumstances.\textsuperscript{11}

The Treaty standard universally adopted (by those Tribunals which have considered the introduction of external adjudication of Maori titles) is that a step fraught with such consequences for Maori, and for the system of native title that protected their customary rights, could only have been taken with their consent.

Did Maori consent to its introduction? The Turanga Tribunal considered expressions of Maori opinion at Kohimarama (1860) on the possibility of an independent adjudicator of titles. It also examined evidence taken before two inquiries, held after the establishment of the Native Land Court, which investigated the operation of the Native Lands Act 1865 – the 1871 inquiry conducted by Colonel Haultain, and the Hawke’s Bay Land Alienation Commission of 1873. It found that:

\begin{itemize}
  \item ‘Maori were always interested in the establishment of an independent forum for resolving inter-community rivalry over land, but only ever on the basis that it would be Crown-sponsored but Maori owned and operated’;
  \item ‘Maori at a national level never actively supported the establishment of the court in its 1865 form,’ and came to develop ‘deep suspicion’ of it after the Hawke’s Bay experiment; and
  \item by the time the Native Land Act 1873 was enacted, after eight years’ experience of the Native Land Court, Maori had come to view it in an ‘extremely negative light’.\textsuperscript{12}
\end{itemize}

The Tribunal found that in view of:

\begin{itemize}
  \item the explicit words of the Treaty, the imposition of the Native Land Court in a form which did not facilitate Maori control of title allocation questions, and against express Maori opposition, was in obvious breach of the article 2 control guarantee.\textsuperscript{13}
\end{itemize}

The Tribunal noted:

\begin{itemize}
  \item the Crown’s persistent refusal to allow Maori to manage their own affairs at community or tribal level in accordance with Treaty promises, and its insistence on treating Maori communities as unassociated collections of private individuals.\textsuperscript{14}
\end{itemize}

This was a fundamental breach of the principle of autonomy.

In the Crown’s submission, these findings must be tested for their applicability in the Central North Island region. We need to consider, therefore, the degree to which the Treaty principles of partnership and autonomy were honoured in the specific circumstances of how the court and title system were introduced (and then persisted with) in the Rotorua, Taupo, and Kaingaroa districts. Did the Central North Island tribes consent to the introduction of a title-adjudication body in the specific form of the post-1865 Native Land Court? Did the Maori leaders of the Central North Island endorse or oppose the introduction and continued operation of the court and its title system? Was their historical experience in that respect typical of the national experience, as described in the report *Turanga Tangata Turanga Whenua*, or does the evidence require a departure from the generic findings of the Turanga Tribunal? We address those questions in chapter 9 below, using the standards explained in the *Turanga Report*.

Also, in the Crown’s submission, we need to apply a test of reasonableness in our application of Treaty standards to its actions in the nineteenth century. What could or should the Crown reasonably have done in the circumstances of the particular time? We have already discussed such a test for nineteenth-century land laws and the operation of the Native Land Court – vis-à-vis the principle of autonomy and the near-unanimous Central North Island Maori request for collective tribal decision-making – in part II of this report. We do not repeat that discussion here.

**The nature of the titles created by the land laws**

We turn secondly to consider the nature of titles provided for in nineteenth-century legislation, a matter of key importance for claimants over many years that has been deliberated on by a number of Tribunals. In general terms, the
nineteenth-century land laws provided for individualisation of titles, and failed to provide some form of community title which would have reflected customary rights and authority.

The Hauraki Tribunal, considering the Crown’s argument that the objectives behind the first Native Land Act – that of 1862 – included a ‘civilising mission’, welcomed its ‘frank admission’ that paternalistic attitudes underlay the supposed betterment of Maori through a radical change to their land tenure. But Maori property rights are protected by article 2 of the Treaty. There may be some circumstances, carefully defined, in which they can be interfered with in the public interest. (We return to this point below.) But, the Tribunal stated: ‘Gratuitous interference with Maori land tenure for the purpose of transforming their social order is something else again’. However well-intended parliamentarians might be, unless full consultation and the consent of Maori were obtained, it was difficult to see how Parliament could interfere ‘without infringing the tino rangatiratanga recognised under article 2 of the Treaty’.15

To avoid charges that the ‘civilising’ aspect of land-tenure change was merely a cloak for settler self-interest and the overriding of rangatiratanga, various tests must be met: Maori consent to and cooperation with the design and implementation of the native land legislation; serious discussion with Maori about the constant adjustment of the legislation over the next century to ensure that the changes were what they wanted; and evidence that the Acts did include ‘realistic provisions for Maori advancement as well as that of settlers’.16

The Hauraki Tribunal concluded that the ‘civilising mission’ aspect was a motivation secondary to that of facilitating the acquisition of remaining Maori land, largely through direct settler purchase (seen as more likely to succeed than Crown purchase). The proponents of the ‘civilising mission’ prescribed the kinds of tenure to which Maori customary rights would be converted. This prescription was ‘ethnocentric and paternalistic’. Maori were not involved in the design of new forms of tenure. And far from producing beneficial outcomes for Maori, the opposite was the case.17

The article 2 guarantees to Maori have been seen as central by the Tribunal from the outset. The Orakei Tribunal, assessing the Treaty compliance of the early Native Land Acts, began by addressing the significance of the guarantee of tino rangatiratanga. Their discussion takes us to the essence of the undertaking given by the Crown in respect of continued Maori exercise of their rights over land and resources, and it is helpful to refer to it here. That Tribunal acknowledged their debt to John Rangehau of ‘Tūhoe, who emphasised the importance of the quality of ‘commonality’ which in his view distinguished the true rangatira. Recognition by the people was one of the most important factors in the assumption of leadership; the role of rangatira, he said, was ‘people bestowed’. The authority embodied in the concept of rangatiratanga is also the authority of the people. Thus, the Orakei Tribunal found, the acknowledgement in the Maori text of the ‘tino rangatiratanga’ of Maori over their lands ‘necessarily carries with it, given the nature of their ownership and possession of their land, all the incidents of tribal communalism and paramountcy’.18 These ‘include the holding of land as a community resource and the subordination of individual rights to maintaining tribal unity and cohesion’.19 This had consequences for the way in which decisions to alienate were made: ‘only the group with the consent of its chiefs could alienate land’.20

The title provisions of the key early native land legislation have been examined by successive Tribunals. The Orakei Tribunal found that the provisions of the Native Lands Act 1865 – which enabled tribal ownership of Maori land to be extinguished on the application of any one member of the tribe, without the consent of the remainder – were inconsistent with the principles of the Treaty,

whereby in recognising te tino rangatiratanga in and over their lands the Crown acknowledged the authority or mana of the Maori people for so long as they wished to hold their
land in accordance with long-standing custom on a tribal and communal basis.\(^1\)

The Tribunal was also deeply concerned at the empowerment of the Native Land Court under the 1865 Act to vest land in only 10 beneficial owners, so that the remaining members of the tribal community might be involuntarily dispossessed without their consent. Such dispossession ‘with a stroke of the pen . . . was a most flagrant violation of the Treaty.’\(^2\) Moreover, the Crown omitted to take ‘timely and appropriate action’ to ensure that the provisions of section 17 of the amending Native Lands Act 1867 – which required the Native Land Court to list on the back of the certificate of title the names of all owners in addition to those listed on the front of the certificate – were implemented by the court.\(^3\) Section 17, the Mohaka ki Ahuriri Tribunal stated, was clearly one attempt by the Crown to remedy the impact of the 10-owner rule, but Chief Judge Fenton refused to implement it.\(^4\) Thus the Crown recognised the shortcomings of the 1865 Act, in the Tribunal’s view, by passing amending legislation in 1867, by repealing the Act in 1873, and by legislating in 1886 for the readmission to titles of excluded owners. ‘But it failed to ensure that the judiciary complied with the 1867 amendment and it did not compensate any Maori for whom, by 1873 or 1886, it was too late.’\(^5\)

The Native Land Act 1873 was the particular focus of the Turanga Tribunal, which made a key finding in respect of its title provisions. The Tribunal found that the Act did not make provision for community ownership and management of Maori land, but instead provided ‘a kind of virtual individual title’. All customary right-holders in a block were named on a memorial, but they did not secure individual title in the true sense of that term. The right remained vested in common with all other owners. The land technically remained customary land. But the Native Land Court’s award identified the right-holders in each block, each holding individual shares, and each able to alienate his or her shares. But no more than that. The law made it easier to sell land than to retain and use it. This ‘selective individualisation’ breached the express guarantee of tino rangatiratanga in article 2 of the Treaty.

The 1873 Act breached a Treaty promise made explicitly ‘ki nga rangatira’ (to the chiefs), ‘ki nga hapu’ (to the tribes or communities), ‘ki nga tangata maori katoa’ (and to all the ordinary or Maori people), all of whom had layers of rights in tikanga Maori:

By excluding hapu from sale or lease decisions, the Act removed a separate right holder to which an explicit Treaty promise had been made. By failing to provide legal support to chiefly leadership in questions of land alienation, the Act similarly breached a Treaty promise explicitly made to hapu leaders. In this way, the Act confiscated rights formerly vested in tikanga Maori. It effectively removed from these two levels, the right to participate in the most important decisions the community collectively and its members individually would ever make.\(^6\)

This Treaty breach had major impacts on Maori control of their land at the community level. The prejudice was lasting. First, as noted, it removed from rangatira and hapu the right to participate in the most important decisions that the community would ever make – those about land sale and land retention.\(^7\) Sale or lease could only be achieved by the transfer of the newly created individual, undivided interests, and community decision-making was thus rendered irrelevant and legally impotent. Secondly, Maori quickly lost control of the process of alienation. There was, in the Tribunal’s view, a key (and intentional) link between the new title system and the operation of alienation processes, which we consider below.

The 1873 Act and its successors were the key nineteenth-century land laws for our inquiry. The Crown has accepted the ‘systemic faults’ of those laws as identified by the Turanga Tribunal, but asks us to test their applicability in the Central North Island. In this part of our report, we will consider the questions of how and to what extent title was individualised in the Central North Island, whether the tribes were able to obtain their expressed preference for community titles, whether they were able to deal with
their lands as they wished under the Crown-derived titles, whether communities were able to control alienation, and the extent to which the Turanga findings (described above) encapsulate the native title system as it also operated in our inquiry district.

In doing so, we will apply the Crown’s test of reasonableness to the native title system and to proposed policy alternatives in the nineteenth and twentieth centuries. As we discussed in chapter 3, the Crown submitted that it should have used ‘less penal’ policies and laws, where those policies and laws can be shown to have been penal in their effects, and where there were known and practicable alternatives at the time.

We have already explored some of those alternatives in part II. A significant part of the Crown’s case rested on the idea that the Waitangi Tribunal expects ahistorical behaviour from nineteenth-century officials and ministers, according to the standards of today rather than to standards known or conceivable at the time. In our view, which we reiterate here, the majority standards of the settlers of the day are not the principal criterion to be considered. We noted that two peoples had to live together in one country, and that the views of Maori with regard to those things over which they exercised tino rangatiratanga had to prevail in certain circumstances. In particular, the Treaty guarantees with regard to land were so strong and uncompromising as to require the full and active protection of Maori land in their possession for so long as they wished to retain it. Any alienation – including the fundamental basis on which it was held – had to be with their free, full, and informed consent.

In terms of the individualisation of title, we referred in chapter 3 to the critique by colonial politician W L Rees, in a paper tabled in the House in 1884. First, he stated that:

a very gross act of cruelty and bad faith as well as folly was perpetrated by us when we compelled the Natives to hold their lands as individuals. The Treaty of Waitangi assured them

‘Ki nga rangatira, ki nga hapu, ki nga tangata maori katoa’: the promises in the Treaty were made to tribal communities like the one that lived here at Waitahanui Pa, on the shores of Lake Taupo-nui-a-tia. This 1847 lithograph by George French Angas was based on an earlier watercolour.
of ‘all their rights in their lands.’ The chief right of all was the right of tribal ownership – but a tribe of five hundred persons is totally different from five hundred distinct and opposing claimants. It is the tribe which owns the land, and it is the tribe which, in justice, ought to have sole power to use it or deal with it.28

Secondly, Rees emphasised that British law and policymakers were in fact entirely comfortable in dealing with common property through a variety of legal mechanisms. There was no genuine or insurmountable problem in that respect. These mechanisms included corporations and joint-stock companies, community bodies (such as county or borough bodies), and the Crown itself. If nineteenth-century politicians were to be truly fair and consistent, Rees argued, then all such bodies by which European community lands were held in common and administered by representatives should be dissolved, and their assets held by all interested individuals as separate, saleable titles.29

Clearly, if Rees could think in that way and propose community titles for Maori land in the 1880s, it was at least possible for the Crown to have kept the Treaty guarantee of tino rangatiratanga over tribal lands. In 1894, a decade later, Sir Robert Stout told Parliament that, in his view, Maori must be dealt with ‘as they are, and not as we would like them to be’, which meant dealing with them as communal bodies. This was all the more so as there were moves within European society to correct extremes of its own individualism. He called for a return to the principles of Ballance’s 1886 Act (see chapter 6): ‘the Maoris are a communal people, and we ought to allow them committees to manage their land – committees of owners’.30 ‘I say,’ he added,

that it is entirely unjust, entirely inhumane, for this colony to kill the [Maori] race: for that will be the case if you force them into individualising their titles and introduce free-trade in land . . .31

The Crown did experiment with collective mechanisms from time to time: the New Institutions of the 1860s; the proposed native councils of the 1870s; the native committees and proposed block committees of the 1880s; the incorporations of the 1890s; and the Maori land councils of 1900. These abortive initiatives are testimony to what was possible.

In the following chapters, we will test the reasonableness of the Crown’s actions in light of the Treaty standards it had to meet and the circumstances in which it had to meet them. In particular, we will consider the known policy alternatives and how practicable they were likely to have been (accepting that we cannot know with absolute certainty all the likely consequences of any one proposal).

In taking this approach, we note the findings of the Hauraki Tribunal:

We note that the Crown accepts this criticism [of individualisation of title] up to a point, in observing that the balance between the 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 the 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 [the Stout–Ngata report], which had recommended a virtual cessation of this policy.32

This brings us to one of the major issues of our Central North Island inquiry: the legacy of the nineteenth-century title system in the twentieth century.

**Crown regulation of the title system in the twentieth century**

In the wake of its establishment of the new tenure system, and of pressure from the leaders of the Kotahitanga Paremata, the Crown moved in 1900 to lay the basis for
a new Maori lands administration system. According to the findings of the Turanga Tribunal, the Crown’s Treaty breach in failing to provide Maori with legal community titles (which could facilitate land management and retention) is well established. Also, in the view of the Rekohu Tribunal, the nineteenth-century land laws had long-term impacts in the following century. These included:

- fragmentation of ownership;
- fractionation of titles; and
- ‘acculturation’ (that is, although the system was imposed on Maori, and was antithetical to custom, shares in land blocks became proof of turangawae-wae and were not willingly relinquished. For the same reason, the inclusion of all successors on titles was favoured.)

As noted, we will test these findings for their applicability in our region. Nonetheless, certain facts are uncontested. The Crown accepts that titles in the Central North Island inquiry region became fragmented, that it had ‘some’ responsibility to correct that problem, and that twentieth-century land laws and solutions were at least ‘in part, a reaction to the impact of the 19th century native land laws’.

Given those admissions, we must consider what Treaty principles are applicable to a system which may in essence have been based on attempts to mitigate nineteenth-century breaches. In part, governments tried to provide Maori landowners with management options to overcome their disintegrating titles, and with mechanisms for recreating usable titles. In this context, we will be guided by the principles of partnership, good government, equity, and active protection.

**Partnership, consultation, and autonomy**

Partnership, it is generally understood, denotes the mutual obligations of the Crown and Maori to act in good faith towards each other, fairly, reasonably, and honourably. Vital to this partnership is the Crown’s duty to inform itself of the views and wishes of Maori. In the 1987 Lands case, Justice Richardson considered the extent to which consultation was necessary for the Crown to be able to make a properly informed decision, which meant that it had to be ‘sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty’. He went on:

In many cases where it seems there may be Treaty implications that responsibility to make informed decisions will require some consultation. In some extensive consultation and co-operation will be necessary. In others where there are Treaty implications the partner may have sufficient information in its possession for it to act consistently with the principles of the Treaty without any specific consultation.

As the Napier Hospital Tribunal pointed out, the significance of a decision to Maori who are, or might be, interested parties, must also be considered. In the New Zealand Maori Council v Attorney-General 1989, Sir Robin Cooke commented in respect of the principle of partnership:

We think it right to say that the good faith owed to each other by the parties to the Treaty must extend to consultation on truly major issues. That is really clear beyond argument.

In our view, major changes in Crown policy affecting Maori property rights and land management must count as such issues. It is clear that in this respect the Crown has an inescapable duty to consult. So also must the implementation of such policies, and the determination of their success or failure, be the subject of consultation and dialogue. Moreover, consultation must be wide and involve the tribal or broader Maori leaderships, which were always deeply concerned with such fundamental issues. Further, there is no difference between the nineteenth and twentieth centuries in the requirement that Maori must consent to fundamental alterations of their Treaty-guaranteed property rights. Thus, consultation on its own was not a high enough standard. If the Crown was to keep its promise of Maori control (tino rangatiratanga) over those things guaranteed them by the plain terms of the Treaty, then it had to obtain their consent through partnership and dialogue, leading to a negotiated agreement.
What was reasonable in the circumstances of the twentieth century? In the Crown’s submission:

It was not obvious or self-evident to policymakers until much later in the 20th century [meaning mid-century] that emphasis should be given to workable communal land management mechanisms. As late as the 1960s the Hunn Report was still advocating assimilation. However misguided that view might now be considered to be, it was a genuinely held one.18

The evidence available to this Tribunal is that the extent of Central North Island Maori engagement with the Crown, and of putting their views to governments on the subject of their lands, was as strong in the twentieth century as it had been in the decades before. It was evident in the deputations that went to Parliament in support of petitions (as in 1905), in the interest shown in the visits of the Stout–Ngata commission and in the presentation of evidence to the 1934 royal commission, in major hui (such as that at Tokaanu in 1909), and in the immediate feedback on policies which members sometimes referred to in the House.39 In 1914, for example, Ngata read out telegrams from Te Arawa conveying the tribe’s anger over proposals to proclaim lakes and rivers the property of the Crown. He also referred to a petition from the tribe, complaining of the Bill as a breach of the Treaty, and urged the Government to ‘go to the people on their marae’ and discuss the matter with them. The Native Minister, William Herries, agreed and the clauses were dropped.40

We add also – in respect of the courts’ criterion that the Crown should be satisfied that it has had due regard to the impact of the principles of the Treaty – that the Crown could not but have been aware of the importance of the Treaty to Maori leaderships in the first half of the twentieth century. ‘We have heard the Treaty of Waitangi mentioned so often in this House,’ said Maui Pomare in 1913, ‘that if it were a bit of steel it would have grown very bright with usage.’41 The Treaty took centre stage, for instance, when

Tahupotiki Wiremu Ratana in Taupo, 1920s. Ratana was known as the campaigner for justice, and he kept the Treaty prominently in the eye of the Labour Party.
Labour leader Harry Holland visited Ratana Pa in 1932, and received the Ratana petition with 38,000 signatures. He listened to Tahupotiki Wiremu Ratana state Maori grievances under the Treaty: the confiscations, the Ngai Tahu claims, funds for Maori servicemen, rating and taxation, and Lake Taupo. Ratana referred also to mana motuhake. On that occasion, Holland stated:

Where the Treaty of Waitangi, land and other claims or business of the Maori people are concerned, I personally would rather have you or your candidates come to Wellington to brief us, and advise us on these matters. Finally, let me say again, my party and I will support you in all of your works.  

The importance of article 2 Treaty guarantees to communities within our inquiry region was kept before the Crown by Maori leaders and political movements. The Ratana movement, for example, worked over many years for the recognition of the Treaty of Waitangi. Its first member of Parliament, Eruera Tirikatene, read the assurances of article 2 aloud in the House in October 1932, and soon afterwards presented a copy of the Treaty and seven books of signatures, totalling 45,000, asking Parliament to make it statutory. Among the communities of our inquiry region are a number with a long tradition of adherence to the Ratana Church and movement. The Ngati Hineuru kuia, Hinei Reti, spoke to the Tribunal of that spiritual tradition and the guidance it gave in seeking answers in the temporal and political worlds:

the Treaty of Waitangi, that’s Piri Wiri Tua [Ratana] has claimed that we need to have the Treaty recognized as part of the Government – that we are in partnership; that we have as much right as Government to say what our people need rather than be told what we need.  

Piri Wiri Tua, she explained ‘is the campaigner, a campaigner for justice’.  

The arikitanga of Ngati Tuwharetoa also urged Treaty guarantees on the first Labour Government later in that decade. Finding themselves faced with a massive bill in the aftermath of the collapse of the Tongariro Timber Company with which Ngati Tuwharetoa had had a long-standing agreement to mill their west Taupo timber and build a branch railway, the iwi embarked on both legal and political action. As their legal case wound its way to the Privy Council, Ngati Tuwharetoa held a large hui at Waihi in 1939, attended by tribal leaders from many parts of the central North Island. Two subsequent delegations urged consideration of the Treaty on the Crown, though they got little encouragement for basing their case on the Treaty. The Attorney-General stated, however, that the terms of the Treaty ‘do undoubtedly bind the conscience of the Crown’.  

Hoani Te Heuheu’s letter to the Prime Minister, Peter Fraser, written after the Privy Council had turned down the Ngati Tuwharetoa appeal, and shortly before he passed away, returned again to the importance of the Treaty. In his view, the Privy Council had turned the responsibility for rectifying the prejudice suffered by the tribe back onto Parliament:

Now we know where the responsibility for carrying out the Treaty lies. It lies with Parliament. Hitherto, Government departments have been allowed by various Governments to decide. As a result the Treaty has been more or less hidden from sight. Now it is in the lap of Parliament to nurse and nourish as something precious in the relations of the two races.  

A constant theme of Central North Island Maori leaders, in their many delegations, deputations, petitions, letters, and other representations to the Crown, was the need for representative tribal bodies to manage, control, and administer Maori lands.

Could the Crown have answered ‘yes’ to their pleas? We note first that, in its submission, the Crown acknowledged for the nineteenth century ‘that the native land laws can fairly be criticised for failing to provide for more effective corporate/communal governance mechanisms’. Secondly, it points out that there was a corporate ownership model available from the 1890s onwards – the incorporation. Thirdly, however, it argues that it was not ‘obvious’ or ‘self-
evident’ to policy makers that emphasis should be given to communal mechanisms until the mid-twentieth century. Fourthly, it suggests that it was reasonable for policy makers to identify economic progress with ownership in severely until later in the twentieth century.47

And yet its ministers sometimes clearly acknowledged – and explained their policies in terms of – the collective management that Maori were seeking from the Crown. In 1909, for example, the Native Minister, James Carroll, described the Government’s provisions for meetings of owners as ‘practically a resuscitation of the old runanga system, under which from time immemorial the Maori communities transacted their business’.48 Whenever there were more than 10 owners in a block, the runanga would take the form of meetings and resolutions of assembled owners, by which ‘the majority of owners’ in ‘communal blocks’ would be enabled to manage their land. ‘I cannot think,’ the Minister explained,

of any fairer way of ascertaining the wishes of the Native owners in regard to the disposition of communal areas, or consulting them in all larger questions relating to the settlement of their lands.

This ‘device for dealing with communal blocks’ had ‘been found of great use in the past’, and the Crown, he promised, would only purchase ‘from the runanga’ (and not from individuals) where blocks had more than 10 owners. The intention was for committees to farm as well as alienate land, and for communal reserves to be set aside, with provision for their ‘control, management, and government’.49 Carroll’s explanation was accepted as true in the House. The Opposition expressed concern that meetings of assembled owners and incorporations – and even the vesting of land in Government boards or the Native trustee – were ‘driving’ Maori into the ‘old communal system’, a ‘system which has never raised any race in the scale of civilisation’.50

In the Legislative Council, the Attorney-General did not describe the Bill as reinstating runanga and community decision-making for individualised land titles, but he did put some emphasis on incorporations. The Bill was designed to do many things, including facilitate settlement of Maori land by Europeans (see chapter 11). Among them, the functions of incorporations were extended. Dr Findlay, the Attorney-General, explained that the original purpose of incorporations had been solely to facilitate alienation of multiply owned land. The powers of incorporations had been changed later so that they could manage as well as alienate land. Having ‘done good work in the past, it is found prudent to extend their functions’.51

In 1909, therefore, far from being unable to conceive of or support it, the Government claimed to be restoring collective decision-making (by runanga), and to be strengthening the incorporation model for multiply owned Maori land. Meetings of assembled owners remained a key element of land administration for the remainder of the twentieth century. In chapter 11, we test that mechanism against what was, in the circumstances, believed to have been an achievable standard – a return to tribal collective decision-making.

In our view, the negotiation over the Central North Island lakes in the 1920s was also a model of what was conceivable and practicable in the first half of the century. The outcome of negotiations between the Crown and tribal leaders was the establishment of tribal trust boards, with legal powers to administer tribal assets. Although there were limitations to the model, it was negotiated in a climate of Maori claims (to tino rangatiratanga) and some settler views of assimilationism and individualisation. Treasury, for example, wanted the annuities to be administered by the Native Trustee and paid out to individuals. The tribes wanted hapu autonomy, representative self-government, and collective management of the annuities for community goals. The compromise achievable in the 1920s was the tribal trust board.52 It was achieved in circumstances in which, as the Crown points out, incorporations had also been available (at least in theory) since the 1890s.

In the case of Lake Taupo, the Government at first wanted a board appointed by itself and on which it was represented, and that could do nothing more than distribute
money to individuals. It gave way on these three points and agreed to a board constituted entirely of tribal members, which could administer the funds for the general benefit of the tribe. Tuwharetoa, on the other hand, gave up their goal in 1926 of having the board elected directly by the tribe. It was still to be appointed by the Government, but with the compromise that the tribe would nominate the members and that they would serve for two-year terms. The board was also given some limited management of fishing.\footnote{Importantly, in the evidence available to us, no Maori leader or representation from Maori in the 1920s sought payment of those moneys by Government to individuals. Disagreement among Maori, where it existed, was not over individualisation, but about whether the annuities should be administered at a hapu or a confederation level.}

In the Crown’s submission, policy alternatives had to be visible (known to the Crown) and practicable. Clearly, the creation of the trust boards in the 1920s, with incorporations still at least a legal possibility at the time (though not popular at the time, for reasons we will explore in chapter 11), meets both tests. More trust boards were created in the 1940s, showing that collective management of tribal assets by representative boards was not a short-lived or one-off possibility. In the circumstances, the Crown could have negotiated agreements with Central North Island Maori to establish (or improve) legal models for the collective management of their lands. There was nothing inconceivable or impracticable about it – it was done in one instance (tribal trust boards). The question for the Tribunal is: why did governments choose not to do it in other instances?

Consultation and negotiated agreement is thus of first importance in the Crown’s attempts to remedy the effects of its tenure system and of its failure to provide community management. The Crown submitted:

Fragmentation of title was clearly a problem that the Crown had some responsibility to attempt to resolve. Initiatives were progressively taken by the Crown from the late 19th century and included such matters as development schemes, consolidation schemes and legislation pertaining to trusts and incorporations, amalgamation and access to finance. The critical issue is the adequacy of the Crown response.\footnote{We agree that the adequacy of the Crown’s response is a key issue. In terms of Treaty standards, however, the degree to which Maori were involved in formulating, managing, and consenting to that response is equally important. We assume, for instance, that if entities were established by the Crown to manage Maori land, Maori would need to play a key role in those entities. In the first decade of the twentieth century – when the new lands administration was set up in 1900, before its massive redesign from 1905 to 1909 – it was a system decided on jointly by Maori leaderships (through Kotahitanga) and the Crown. We assume also that, as the Crown embarked on policy measures to tackle Maori title dilemmas, involvement of Maori from the outset was both crucial and known to be crucial. In 1909, it will be recalled, Native Minister Carroll described new provisions for collective management as ‘practically a resuscitation of the old runanga system’, an age-old method of Maori decision-making.\footnote{This, then, is the standard by which the 1909 initiative and its successors should be judged.}

The principle of equity

We consider that the principle of equity is crucial to twentieth-century land issues. That principle, it has been
observed, derives from article 3 of the Treaty guaranteeing Maori the rights of British citizens. In relation to property rights, it is axiomatic that Maori rights should be afforded no less protection than rights of other citizens. It is our view that the Crown assumed a particular obligation to protect the titles (and title-holders) created under the operation of the native land legislation. As Maori customary title was transformed, Maori lost the community protection which had always encompassed their rights to land and resources. While it is clear that the Crown could not replace the community as the protector of whanau and hapu rights, the new tenure system it introduced brought its own obligations.

Such obligations included monitoring the system to ensure that its operation was not disadvantaging Maori owners. We will review how, and to what extent, the Crown carried out this obligation in chapter 11. It needed to ensure, for example, that the new legal property rights of its Maori citizens – including the right to succeed to interests to which the law said that their heirs were entitled – were not infringed, unless with their consent. In respect of how the law protected property rights, we need also to examine the way in which the Crown used compulsion to dispossess owners of their small interests in land. We need to consider the way in which landed interests entrusted by owners to incorporations, as a way of managing their lands collectively, were transformed by law into ownership of shares in a company. Many such issues arise about how the Crown dealt with Maori land, which need to be measured against how it dealt with the property of its other citizens.

In the *Napier Hospital and Health Services Report*, the Tribunal found that an assurance of equality was implicit in the article 3 guarantees to Maori. In the context of health, the principle of equity meant that there should be ‘equal standards of health care’ for Maori and non-Maori citizens. In meeting this Treaty standard, the Crown might have to ensure equality of access by reducing barriers that disadvantaged Maori. In addition, equality of outcomes – in this case, for health – was one of the expected benefits of citizenship granted by the Treaty.

Such ideas were often expressed by politicians and leaders throughout the century, none more so than by various Labour governments. In 1939, for example, the Prime Minister, Michael Savage, told Tuwharetoa that:

> the greatest moral victory the Natives could have would be an assurance that they were going to be treated like other people . . . that they were going to get the same housing facilities, the same health facilities, the same educational facilities, the same facilities for earning their livelihood . . .

And, he added: ‘that their lands would not be bought or sold without their consent.’ He had made similar statements to the Maori Labour Conference the year before, emphasising that Maori were to be given ‘full equality of treatment, and possibly in some cases better treatment than [their] . . . European brethren.’

These assurances of equal standards, equality of access, and equal outcomes may in our view aptly be applied to the Maori land administration and title system as it developed over the late nineteenth and the twentieth centuries. The Turanga Tribunal has already raised the question of whether the new system assisted Maori owners to ‘extract reasonable value from their land asset, by giving them a useable title arrived at through a simple and efficient process.’ We will consider further in the following chapters whether the titles of generations of Maori owners, succeeded to through the Native Land Court, were as secure and useable as those of general landowners. This will assist us to answer the question of whether Maori who wished to retain their lands, and participate in New Zealand’s developing economy stood on a level playing field with other citizens.

**The principle of good government**

In our view, the principle of equity included both the obligation to ensure that multiple owners were not disadvantaged because of the inadequate recording or survey of their titles, and the obligation to ensure security of title under the Land Transfer system. Also, the Crown was required to meet a basic standard of good government.
As the High Court found in *Registrar-General of Land v Marshall*: "[I]f there is any area of the law in which absolute security is required without any equivocation – it must be in the area of security of title to real property." Put simply, the Treaty principle of good government requires the Crown to keep its own laws and not to act outside the law. In that respect, key features of New Zealand’s land registration system include the establishment of a register of titles, registration as conclusive evidence of the title of the person named, and state guarantee of registered titles. From 1894, the Crown provided for the registration of Maori titles under the Land Transfer Act. The legal protection that came with registration, and requirements governing that registration, were later amended by various statutes. That gave rise to a further obligation, in our view, for the Crown to monitor the provisions it had established and to ensure that Maori titles had the full protection of the law. In chapter 11 we will consider how far this standard was met.

**The principle of active protection**

In its report *Te Tau Ihu o te Waka a Maui*, the Tribunal found:

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

As we discussed in part 11, this principle was a cardinal one for the nineteenth century, expressed many times and on many occasions by ministers and officials in the language of the day. That remains true for the twentieth century. We could point to many examples in the evidence available for our inquiry. These include:

- the sentiments expressed by the Government and Opposition in the debates over the Native Land Act 1909 (which veered between calls for equality and claimed intentions to protect Maori and their interests);
- the sentiments expressed by the Government and Opposition in the debates over the Native Land Amendment Bill 1913 (which veered again between concepts of equality and protection);
- the opposition to the Maori Purposes Bill of 1945 by the Government’s Maori members (who called for the protection of Maori land interests from alienation without consent, equal rights, empowerment of Maori organisations, protection of the rights of absentees, and protection of the Maori minority);
- the 1956 Maori Land Court Committee of Inquiry (which saw the court’s function as protecting Maori interests until they no longer needed such protection, though not as protecting Maori land per se);
- the views of Jack Hunn in the 1960s (who stated that protection would continue to be necessary until full equality and integration was achieved);
- the Maori Land Court judges of the 1960s (who saw their function as being to protect land still in Maori ownership);
- the Labour Government’s White Paper of 1973 (which called for protective measures to assist Maori kin groups to retain, manage, and develop the land with which they had such important ancestral ties);
- the National Minister of Works, William Young, in 1981 (who promised that the Public Works Bill provided ‘extra protection “to our Maori friends”’); and
- the many court judgments and consequent political rhetoric of the 1980s and 1990s.

Michael Belgrave suggests that the thinking and language was often paternalistic, and the resultant degree of protection limited and weak. We will consider how well the Crown abided by the standard of active protection.
required of it in the following chapters, but here we note that it was an oft-expressed goal for twentieth-century governments.

The Crown raised two issues about its protective role in the twentieth century. First, it suggested that there was always a tension between protecting land so that Maori retained it, and the rights of all citizens to decide what to do with their land (including to sell it). Secondly, it argued that there was a tension between protection (which could be paternalistic), and autonomy (which allowed people to decide for themselves what risks to take). Counsel noted the evidence of Pirihira Fenwick, who stated in cross-examination:

Incorporations have advantages. Trusts have problems and they're commercially based problems, in that Te Ture [Whenua Maori] does not provide, within the, under the Maori Land Court, the format for commercial enterprise, without having to go back to the Court for approval. And that, I think, is fundamentally, well, I think it belittles the ability of those people who have the ability, knowledge and to have to go and still, with cap in hand, get permission to do it. I compare that against, you know, a Pakeha company. Counsel noted the evidence of Pirihira Fenwick, who stated in cross-examination:

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But Mrs Fenwick added that her people were determined to protect their core lands 'so that they are never, ever in danger of being lost through bad decision-making, financial bad decision-making.'

There is indeed a tension if protection is applied in a paternalistic, non-consultative fashion. But protection was necessary, as many Maori informed the Crown. In 1913, when the Government proposed to allow European lessees to freehold Maori reserved land, Carroll reminded Parliament of the Crown’s eternal obligation to Maori:

But in regard to tabooed [tapu] land – the land bequeathed from the past to the Natives – the position is very different. They should not be violated.

The Hon Mr HERRIES – With the consent of the Natives?

The Hon Sir J CARROLL – It is a paltry cry to say, ‘With the consent of the Natives.’ All Governments saw the wisdom – though the present Government fail to see any – of reserving Native Lands for their present and future maintenance. It was a cardinal policy, and, furthermore, it was an obligation cast upon all Governments, on an understanding with the Imperial authorities when the Constitution was granted to this country, that the Maori should be protected against the utter deprivation of his lands. The Imperial authorities had the administration of Native affairs before we got our Constitution, and would not hand them over until it was thoroughly recognized that every care would be taken of the Natives, and their affairs and their interests, by the Government of the country. When the honourable gentleman says, 'With the consent of the Natives,' he tries only to put the responsibility on the weak Native. I will put this to him: He has again tried to make this House believe that his policy has received the assent of the Natives – that they are willing to sell their reserves; but he has never shown us any proof or testimony of that.

In the same debate, Tame Parata, member for Southern Maori, told the House that without protection of their land and interests from the Government, it would mean ‘the crucifixion of the Maori. About 20 per cent. of them would survive; and the remainder would go to the wall.’

But, in the view of some of the Maori members, the answer to the tension between equality and protection was not paternalism, but the inclusion of the ‘protected’ in political and administrative decision-making about their interests. Carroll called for better Maori representation and genuine political influence in Parliament. Further, Maori had to be represented on the boards and bodies that made decisions about their lands. It would only be then,

with legitimate standing-room for him [Maori], he can stand erect and face on equal terms his pakeha brethren; but insidiously, by legislation year after year, we are gradually reducing his stand till he can hardly turn – he is bereft of the name of action...

The proposed removal of Maori representation on the 'Maori' land boards was critical:
Is that right? Are you going to handle people’s property without giving them a voice in the matter? Would any European tolerate such a doctrine? I ask any one on the other side whether, having landed property subject to the administration of a Board, he would like to be excluded from any voice in the administration. That is what the Government proposes to do in the case of Native lands. It is monstrous. We have this great high-sounding platitude, ‘No taxation without representation’ . . . Yet the Maori is denied any claim to consideration.74

Maui Pomare, for the Government, agreed with the Opposition Maori members that Maori should be represented on the land boards.75 But he also spoke in favour of ‘equal rights and equal opportunities’, and demanded:

Does the honourable gentleman mean to say, Sir, that the Native should become an everlasting minor and an everlasting lunatic, that his land should be administered for him by the Public Trustee for all time. Do you call that humanitarian legislation? Do you call that the right of British subjects?76

‘I say that the individualization of Native lands,’ Pomare also told the House, ‘means doing away with communism; and we all know that communism has been the death-trap of the Native race.’ Apirana Ngata interjected: “That is pakeha claptrap.”77

If the Crown wished to know the views of Central North Island Maori on this question, there was ample opportunity for it to do so. But it seems clear to us that the view of the majority of Maori members of the House in 1913 – that protection and autonomy could be reconciled by giving Maori communities a representative voice in managing their lands at all levels – was the solution favoured in the Central North Island (and the standard required of the Crown by the Treaty).

Maori views on the degree and nature of protection required have changed with the changing circumstances of the twentieth century. The Crown points, for example, to the well-supported provision in Te Ture Whenua Maori Act 1993 that 75 per cent of owners must agree to alienation. Maori today (more than a decade on) may feel that that threshold is too high.78

But the point is that active protection is required of the Crown, and its nature and extent depends on the circumstances. Decisions about such protection must be made in the spirit of partnership. The Crown submitted:

The Crown considers that initiatives have been taken across the 20th century to ensure that Maori are now in a position to be able to administer their own lands, and to enable Maori themselves to strike the appropriate balance between protection and alienation. The Crown also considers that it has some obligation to provide Maori with support to do this. The responsibility of active protection however must be considered together with what is reasonable and realistic for the Crown to offer.79

In our view, this is the correct standard and it should be applied to the whole of the twentieth century, not merely to the position today. Carroll’s view in 1913, for example, was that active protection of Maori interests was a fundamental obligation for the Crown, but that it must be carried out with Maori involved in the decision-making. Maori assent, as claimed by politicians rather than as demonstrated by the deliberate representatives of the Maori people, could not be used as an excuse to abandon active protection.80

But the ‘protected’ must have a voice in their own protection. We agree with the Te Tau Ihu Tribunal that the Treaty requires ‘full consultation with – and, where appropriate, decision-making by – those whose interests are to be protected’.81 This is the standard we apply in our analysis of claims about twentieth-century lands (see chapter 11).
Applying Treaty Principles to the Alienation of Maori Land

Key Question: What Treaty principles (and Tribunal findings) are applicable to the Crown’s provisions for alienation of Maori land?

In this section, we address the application of Treaty principles to the conduct of purchases by the Crown and, from the time when it waived the right of pre-emption in 1862, by private buyers. In particular, we consider the requirements of a Treaty-compliant purchase process, including provisions made for protection of a Maori land and resource base.

The claimants’ case

The claimants argued that throughout the Central North Island region, the Crown failed to protect the tribal land base of Maori and to provide for their present and future needs. The nineteenth-century Crown purchasing system as a whole in the Central North Island was in breach of its duty of active protection. Relying on the Report on the Orakei Claim in particular, the claimants submitted that any Crown monopoly of purchase imposed reciprocal obligations of fairness and of ensuring that Maori retained a sufficient endowment for their needs. Article 2 of the treaty (understood in light of Normanby’s instructions to Hobson) required nothing less, and also required the Crown to ensure that it only purchased such land as Maori genuinely and freely wished to alienate, so long as it was not essential to their well-being. In the claimants’ submission, this was not an anachronistic or modern standard, but quite simply the standard at the time the treaty was signed. The question for the Tribunal becomes: how well did the Crown discharge its reciprocal obligations?

The claimants further listed various fundamental Treaty principles as applicable to their claims:

- continued rangatiratanga over lands, resources, and their management;
- the protection and preservation of Maori property and taonga;
- the preservation for Maori of their customary title;
- the entitlement of Maori to good government;
- partnership and the duty to act reasonably and in good faith; and
- the duty of protection of sufficient resources.

In respect of twentieth-century alienation, the claimants argued that the Crown set up a legislative and regulatory environment which facilitated land alienation, which it then exploited to its own advantage, resulting in the alienation of a significant proportion of Central North Island Maori land to the Crown. This was in breach of the duties of partnership and good faith. Further, the claimants argued that Maori lost virtual ownership of other land because it was actually outside their control, and that the Crown did not ensure that they retained a sufficient land base. These Crown actions were, in the claimants’ view, a breach of the Treaty duty of active protection.

The Crown’s case

The Crown did not address Treaty principles appropriate to a consideration of land alienation directly. The two ‘core’ principles identified by the Crown – that Maori and the Crown should act honourably, reasonably, and in good faith towards each other; and that the Crown must actively protect Maori interests – are, however, clearly important in this context. The Crown argued that there is nothing in the Treaty that is inconsistent with its imposition of a monopoly and its purchasing of land as cheaply as possible.

In addition, the Crown cited comments about colonisation which had been made by Bill Oliver in the Hauraki inquiry as providing a ‘useful framework’ for the evaluation of Crown Treaty responsibility in relation to Crown purchasing and land alienation. Professor Oliver began from the premise that the colonisation and settlement of New Zealand was inevitable, and the question was thus not whether the Government should have prevented
colonisation, but what its responsibilities in land acquisition were. To answer this question, the Crown suggested, Crown purchase officers and Maori involved in land transactions must be judged by ‘broadly the same [nineteenth-century] standard’. In doing so, the Crown argued that there are two questions for the Tribunal. Should the Government have imposed the colonising policies it, in fact, adopted? And, were ‘less penal alternatives, still within the overall framework of colonisation, available to Government?’

For the twentieth century, the Crown argued that alienation (in terms of Crown purchasing) is only a significant issue for the Taupo district. There is insufficient evidence to show that its monopoly purchases resulted in unfair prices. Fundamentally, the 1909 legislation and its successors set in place a system that struck an appropriate balance between protection (restricting alienation) and the rights of owners to sell. Two key elements of the system – vetting of transactions by an independent institution, and decision-making by meetings of owners – have remained constant, even after the enactment of Te Ture Whenua Maori Act 1993. These may not have been adequate safeguards but, in the Crown’s submission, there is too little evidence to tell whether the Treaty has been breached.

The Tribunal’s analysis
The Tribunal has long accepted that the Treaty envisaged that Maori would alienate some land and resources; that colonists would acquire significant areas without necessarily damaging the capacity of iwi and hapu to participate in the benefits of settlement. Communities, left to themselves, might have been expected to make strategic sales for a range of purposes, including cash flow, and raising funds for development. But, the Turanga Tribunal pointed out, ‘no community would choose to sell land to the point of self destruction.’

As we have noted, the Crown submitted that it would not relitigate the ‘systemic’ findings of the report Turanga Tangata Turanga Whenua, but that it wished the Tribunal to test their applicability in the Central North Island. In that report, the Tribunal found that a key Treaty breach lay in the creation of a ‘virtual’ individual title in the native land legislation. This provided for the conduct of land purchases from individuals, on each of whom the new tenure system had conferred the right to sell their undivided, paper interests in a block. It was, however, a fundamental principle of the Treaty that alienations should be made by those who actually possessed and had authority over the assets at stake – the community of owners. The native land regime was thus ‘destructive of community decision making in respect of alienation and land development; and made it impossible for community leaders to rally their people around community planning. Because individuals or small groups of individuals could now decide to alienate (or had to alienate) without reference to the community, sales took place at an accelerated rate. By the second generation of owners, the Turanga Tribunal found, the problem was even worse.

In terms of land alienation in the twentieth century, the Turanga Tribunal drew attention to three key themes:

- the introduction of state-controlled alienation through the district Maori land boards, a system in which the boards ‘stood in the shoes of the owners’, who in practice lost control over and access to their lands for nearly two generations;
- the ‘strange phenomenon of uncontrolled land retention’ – land became fragmented through partitions, while titles became so fractionated through individualised succession that effective control of land was not possible (making it, in some cases, a liability instead of an asset); and
- controlled land retention either by or on behalf of Maori, through incorporations and trusts. In the Turanga inquiry district, the incorporations that survived were on the whole larger, with strong leadership, and managed to get access to finance.

In this section, we address the Treaty principles applicable in the Central North Island region to:
The principle of active protection

The Muriwhenua Land Tribunal considered that honourable conduct and fair process were required of the Crown, as an integral part of active protection. At the outset, the British Secretary of State, Lord Normanby, spelled out how Maori interests should be protected. In 1839 he required ‘the audit of the Government’s policies and practices through the appointment of an independent Protector of Aborigines, and the assurance of adequate land reserves.’

We return to the latter requirement below. In elaborating on the protective role, the Secretary of State further required that:

- All dealings with Maori were to be conducted on the basis of sincerity, justice, and good faith.
- Maori must be prevented from entering into contracts which would be injurious to their interests. Thus, Government agents were not to purchase from Maori any land ‘the retention of which by them would be essential, or highly conducive to their own comfort, safety or subsistence’.
- Government purchases for land settlement were to be confined to such districts as Maori could alienate ‘without distress or serious inconvenience to themselves.’

In accordance with Imperial policy, the Crown also reserved the right of pre-emption for itself, which had long been justified on the grounds of protecting indigenous sellers. As Justice Chapman said in *The Queen v Symonds*:

> the exclusive right of the Queen to extinguish the Native title... necessarily arises out of our peculiar relations with the Native race, and out of our obvious duty of protecting them, to as great an extent as possible, from the evil consequences of the intercourse to which we have introduced them, or have imposed upon them. To let in all purchasers, and to protect and enforce every private purchase, would be virtually to confiscate the lands of the Natives in a very short time.101

In article 2 of the Treaty, Maori, for their part, agreed to sell their lands only to the Crown. Subsequently, in 1844 (briefly) and again in 1862, the Crown waived that right. The Colonial Office, considering the waiver of pre-emption in the Native Lands Bill 1862, took comfort from the fact that the power to bring the act into force rested with the Governor, Sir George Grey, who at that time still retained its confidence.102

The Hauraki Tribunal noted that the principal protection for Maori was that the Governor was empowered to make reserves for the Maori owners, with alienation prohibited or restricted, before the Native Land Court issued a certificate of title. What had happened, however, was that Crown pre-emption had been abandoned in favour of direct dealing – an end the settlers had been anxious to achieve.103 The settlers, in the Tribunal’s view, ‘wanted possession of most of the undeveloped Maori lands.’104 The Mohaka ki Ahuriri Tribunal considered the Crown’s waiver a ‘direct violation’ of the Treaty; which was not to say that the Treaty could not be altered, but that any alteration or amendment needed the consent of both parties, the Crown and Maori.105 In chapters 10 and 11, we will consider the Treaty compliance of subsequent Crown acts in reintroducing a monopoly over land purchases in our region at various times, and in various circumstances, after 1870.

The application of the Treaty principle of active protection to the alienation of land is very clear, whether it was purchased by the Crown or by private buyers through mechanisms established by the Crown. Lord Normanby explicitly enjoined the Governor to observe high standards in this respect. The same standards still applied after the Crown unilaterally altered the terms of the Treaty. In admitting private buyers into the market, the Crown had a responsibility to regulate and scrutinise private transactions. Parliament, for example, enacted the Native Lands Frauds Prevention Act in 1870. This Act provided for the
declaration of native trust districts within which trust commissioners might be appointed. The duty of the commissioners, Henry Sewell explained to the House, would be ‘to inquire into the circumstances attending every alienation – the nature of the consideration, whether it has been paid, and whether the parties understood the nature of the transaction.’ They were required to certify every transaction before alienation was completed. The purpose of the measure was to ensure, in all transactions between Maori and Europeans, ‘a system of fair dealing.’

Sewell was at pains to point out the importance of steering a path between ‘two opposite dangers’. ‘We must not attempt,’ he said, ‘to take the Natives under our protection, controlling their free agency in dealing with their own lands’ – which Europeans and Maori and would both object to. On the other hand, the same protection must be extended to Maori as settlers were accustomed to in their own tribunals. Either party, therefore, might have recourse to the Supreme Court in the case of difficulty arising from their transactions. These provisions were extended in the Native Land Act 1873, which required the Native Land Court to be satisfied of ‘the justice and fairness’ of any transaction, the assent of all the owners, and the payment of the stipulated price together, with any charges in relation to partition.

The Turanga Tribunal considered that:

A broad construction [of Parliament’s intention in both Acts] would have gone a long way towards meeting the Crown’s Treaty obligation of active protection. The questions of whether transactions were equitable and in good conscience, whether a fair price had been paid, whether the proper forms and procedures had been followed, whether consent had been properly obtained, and whether the vendors had sufficient land left for their support, were all considered necessary at the time, and could have been administered in a spirit that was genuinely protective.

But the evidence in Turanga at least was that the commissioners and the Native Land Court were under-resourced. “There was no spirit of generosity in how the provisions were applied.” We will consider how well the Crown met this Treaty obligation in the Central North Island in chapters 10 to 11.

The question of a fair price

The Crown submitted that its attempt ‘to purchase land as cheaply as it could is, in itself, not in breach of Treaty principles’ and that the claimants ‘overstate the extent to which the Crown’s obligations extend to ensuring a fair price.’

The claimants, on the other hand, argued that the Crown had a fiduciary duty neither to use its pre-emptive powers to stifle competition for Maori land nor to deprive them of a fair price.

Strictly speaking, as the Ngai Tahu Tribunal has found, Normanby’s instructions were that the Governor should buy Maori land as cheaply as possible, on the understanding that their unsold lands would appreciate enormously in value as a result of colonisation. So long as Maori retained a sufficient endowment, both for traditional pursuits and for the development of wealth in the new economy, the Crown’s obligation would be met. We return to this point below.

Here, we note that pre-emption was waived by the Crown in 1862, although – for our inquiry region – it was reimposed selectively and extensively afterwards. From the moment there was a free market in Maori land, two strains of thinking were expressed frequently in official circles. First, direct purchase was claimed to allow Maori a fair, market-based price for their lands. The unfairness of the Crown paying lower prices than private persons was decried, often with copious examples. Secondly, auctioning of Maori land – rather than direct purchase by either the Crown or by settlers – was claimed to be the best way of getting a fair price for Maori land. Inevitably, whenever the reimposition of a Crown monopoly was discussed after 1862, one (or both) of those arguments would crop up.

It seems to us, therefore, that the situation in the Central North Island had to take account of what was truly ‘fair’ in
providing Maori an equivalent for their lands, certainly in the post-1873 climate. The Crown’s obligations of reciprocity, particularly strong whenever it reimposed a monopoly after 1862, required it to deal fairly and with honour. In 1894, for example, Stout urged that auctions were the fairest way to obtain a true equivalent for Maori, adding:

All I ask this House to do is to give the Maori people real justice; and we can give them that justice without doing any injustice to other parts of the population of this colony. We have by law – our honour itself – pledged to treat them as we treat Europeans. They have equal rights with us, and I say it is utterly unfair that we should seize their land at a less price than they can get for it from other people.115

This sentiment was fairly typical from the proponents of sale or lease by public auction, and also from the free traders. Any system, of course, may result in outcomes where sellers get less than the true market value of their land. But, in our view, if pre-emption was used to institutionalise that outcome, then it was inconsistent with the spirit and principles of the Treaty. ‘We have no right,’ said Stout, ‘to seize their land at a price less than they can get for it in the open market from other people.’116 We agree. We will test the Crown’s use of pre-emption against this standard in chapters 10 to 11.

Outside monopoly situations, the Crown and private buyers or lessees were sometimes in competition for Maori land. We note that, in its protective statutes, the Crown required an independent authority (trust commissioners or the Native Land Court) to check that private transactions were equitable (including price or rent). In the Turanga Tribunal’s view, this included a requirement that prices be certified as fair.117 The 1873 Act prescribed specifically that the fairness of rents should be examined but did not do the same for prices.118 In our view, fairness of price was, however, implicit in the requirement that an alienation be certified as equitable. That was also the view of Native Minister Ballance, for example, who condemned trust commissioners for certifying ‘transactions when the consideration was a mere bagatelle.’119 Trust commissioners, in the evidence of Robert Hayes, did understand that they were to satisfy themselves that a fair price was being paid.120 This was a standard set by the Crown itself. We agree that that should have been the standard and that there should have been an independent audit of it. There was, however, doubt about whether the trust commissioners really had the power to review Crown purchases. From 1883, the Crown legislated to exempt some of its purchases from trust commissioner scrutiny.121 In our view, it was not consistent with the Crown’s honour that its purchase officials should be held to a lesser standard than private buyers. A ‘fair price’ should have been required of both.

In 1893, legislation provided for a national board to conduct the Crown’s land purchases. The board was to have Maori representatives (including the Maori members of Parliament) and would commission an independent valuation of land before buying it, with one of three valuers to be selected by the owners.122 This legislation, however, was a dead letter. Valuation and a minimum price were not reintroduced by law for a further 12 years, until legislation in 1905 required a Government valuation to be the minimum price.123

In our view, the Crown was required both to check that Maori were getting a fair price from settlers, and to pay a fair price itself. How a ‘fair’ price was (or should have been) calculated, however, is a complex question. Nonetheless, this was the standard set by law and by the Treaty. We will measure the Crown’s actions in this respect in the following chapters.

**The question of compulsory acquisition for public works**

The claimants argued that much of the administration and alienation of their land has been coercive or has contained elements of compulsion. In particular, they complained of three forms of compulsory acquisition: the confiscation of land during the New Zealand Wars; the taking of land for public works (including for scenery preservation); and the compulsory purchase of ‘uneconomic’ interests in the mid-twentieth century. We dealt with raupatu in part II of this
report. In part III, we consider the other two complaints of compulsory acquisition (see chapters 11 and 12).

On the face of it, the Treaty standard with regard to compulsory acquisitions is very clear. In 1945, the Maori members of Parliament complained to the Government that taking people's land interests from them:

without the consent of (or against the wishes of) the owners is bad, not British justice, and politically disastrous for the following reasons:—

(a) It hits right into the heart and soul of Maori mental sentiment and Mana i.e. the alienation of his lands without his consent.

(b) To the Maori it will react as a violation of the Treaty of Waitangi and is against Labour's principle of equal rights and of the protection of the minority. 124

The claimants argued that the taking of land by compulsion, especially without compensation, is a direct and blatant breach of article 2 of the Treaty. Further, they argued that the various ways in which Maori and their lands have been discriminated against, especially in public works takings, is in breach of article 3 and the principle of equity. They rely on the Turangi Township Report and other Tribunal reports for the relevant Treaty standards. 125

The Crown, on the other hand, argued that the Turangi Township Report goes too far in its finding that the Crown can only override Treaty guarantees in exceptional circumstances, as a last resort in the national interest. 126 Rather, the Crown's view is that compulsory acquisitions for public purposes are a legitimate and necessary part of its kawanatanga responsibilities. In exercising them, it must, however, 'pay fair market compensation, consult with Maori and where possible protect Maori rights and interests in land'. 127

We will explore these issues in depth in chapter 12. Here, we note briefly the Treaty standards as found by the Turangi Township Tribunal. In its report, the Tribunal raised the question whether – in light of the 'overarching and far-reaching' importance of the key Treaty bargain – the Crown could ever be justified, when exercising its article 1 right to govern, in overriding the rights guaranteed to Maori. Under article 2, Maori were assured of the right to keep their land until such time as they wished to sell it. In the Tribunal's view, legislation such as the Public Works Act 1928, which provided for the taking of Maori land for certain purposes without notice to, or the consent of, the Maori owners, must be assessed against that guarantee. So fundamental were the rights guaranteed to Maori in article 2, that the Crown must meet a high threshold in overriding them. Only in 'exceptional circumstances and as a last resort in the national interest' could this be appropriate. 128 A lesser test, such as a Government proposal being in the public interest or for reasons of convenience, would not suffice. 129

The Tribunal also found that the Crown had to meet several requirements:

- Maori owners must give informed consent or agreement if at all possible;
- all practicable alternatives to taking the land had to be exhausted first;
- proposals to acquire land compulsorily should be referred to independent assessment; and
- the Crown should ensure that no other suitable land is available before seeking to acquire Maori land.

In short, the Tribunal proposed a higher test than equity with other landowners because a key Treaty guarantee was at stake. If no other land was suitable, and if exceptional circumstances justified a compulsory acquisition in the national interest, even then the Crown had to infringe the tino rangatiratanga of the claimants as little as possible. For example, land should be purchased only if a lease is not possible and taken only if a purchase is not possible. Compensation, it was assumed, would always be paid, and had to reflect the true value of ancestral land (and the true hardship suffered by its owners). 130

In terms of a compulsory acquisition without compensation, the Tribunal found in its Ngati Rangitakeaore Claim Report that such a taking 'turned an acquisition into a confiscation. 'Whatever the merits of compulsory acquisition, as a last resort,' stated the Tribunal, 'there can be
no justification for the failure to pay compensation. If it was ever necessary to take land, then compensation must always be paid.\(^{131}\)

In terms of the equitable treatment of Maori and non-Maori citizens, the *Ngai Tahu Ancillary Claims Report 1995* noted that some provisions in the public works legislation for taking Maori land differed considerably from those for taking general land, to the disadvantage of Maori. In particular, there was no serious requirement for the Crown to notify Maori owners of any proposal to take their land until as late as 1974. This was, in part, because of the Crown's own title system for Maori land, and the difficulties that officials said were insurmountable in terms of contacting or finding Maori owners for notification or negotiation. Maori were denied the opportunity given other citizens, therefore, to object to the compulsory acquisition of their land.\(^{132}\)

These, then, are the treaty standards for the acquisition of Maori land for public purposes as found by previous Tribunals. We will test their applicability in the Central North Island, and consider the parties' arguments in detail, in chapter 12.

**Retention of a Maori land and resource base**

The centrality of ancestral land to Maori culture, identity, and well-being was perceived by every generation of officials in New Zealand. The Prime Minister, Savage, for example, who set such stock on equality of treatment and opportunity, noted in 1938:

> The Maori is the representative of a great race of people. He has a tradition of which he is justly proud – and the pakeha as a New Zealander feels that he, too, shares in that tradition, and I am sure he desires to help the leaders of the Maori people to preserve and cherish all that is best in Maori culture on behalf of the future generations . . . Government recognised that the welfare of the Maori was inextricably bound up with his land and that the development of the Maori people could best be achieved through effective land settlement. The Government was doing all it could to encourage and assist the Maori in whatever field he desired to apply his talents, but since it was through the land that a new form of Maori life was being created, it was in that field that the principal effort was being made.\(^{133}\)

We have referred above to the Secretary of State's instructions that the Governor should be careful to ensure that Maori did not sell land essential for their well-being. Here we consider the Crown’s obligations in protecting Maori in the retention of land. The Ngai Tahu Tribunal considered that particular obligations arose from the granting of the 'valuable monopoly right' of pre-emption, and that it was a limited right: it 'was not to extend to land needed by Maori'.\(^{134}\)

Moreover, the two parts of article 2 must be read together and in the light of the circumstances of the time, including the importance to the chiefs of the assurance that their lands would be protected. The Tribunal found that article 2, read as a whole, ‘imposed on the Crown a duty first to ensure that the Maori people in fact wished to sell [and thus to be clear who the owners were]; and secondly that each tribe maintained a sufficient endowment for its foreseeable needs’.\(^{135}\) But how did the Tribunal define ‘sufficiency’ in this context? A wide range of factors might come into play: the size of the tribal population, the land they occupied or exercised rights over, and the principal sources of their food supplies. The tribe's future needs, however, would be different from their present needs. The Crown, intending to buy Ngai Tahu land as cheaply as possible in the 1840s and 1850s, had a 'correlative duty’ to ensure that adequate good-quality land was left in their possession so that they would later enjoy the 'added-value accruing from British settlement'. The Tribunal considered that the tribe should retain land ‘sufficient . . . to enable them to engage on an equal basis with European settlers in pastoral and other farming activities.’\(^{136}\)

The tribal base was not confined to land. The Muriwhenua Fisheries Tribunal found that the Treaty required the Crown to protect fisheries and other natural resources which Maori might wish to retain, and to
‘assure the retention of a sufficient share from which they could survive and profit, and the facility to fully exploit them.’ And the Taranaki Tribunal asked whether ‘adequate endowments were secured for the future support and development of the hapu.’ In our inquiry, the Crown admitted that it targeted key Maori-owned resources, including geothermal taonga and various scenic attractions, although it argues that claimants have overstated the extent to which it did so. We agree with the Muriwhenua Fishing Tribunal that the Crown’s Treaty responsibility was the same in terms of key resources as it was for land. It had to ensure that Maori retained a sufficient endowment for the maintenance of their culture and way of life, and also – should they so choose – for use in the new economy. We will explore how well the Crown abided by this Treaty standard in the following chapters, and also in parts IV and V of this report.

In the wake of the Crown’s waiving of pre-emption and its introduction of the Native Land Court, the question arose again of its obligation to ensure that Maori who sold land retained ‘sufficient’ for themselves. In 1873 the Native Minister, Donald McLean, introducing the Native Lands Bill, drew attention to the creation of District Officers whose role would be to keep a record book of the native titles in each district and to ensure that a minimum of 50 acres ‘per head’ was reserved for Maori. The Turanga Tribunal considered that the figure ‘took no account of the size of families, location, and quality of land needed for workable farms’, given that the land requirements of pastoral farming at the time were clearly greater. Such a requirement, therefore, was ‘fundamentally misconceived’.

The preamble of the Native Land Act 1873 appeared to have a more generous object than a sufficiency of 50 acres per individual, envisaging sufficient land for the support and maintenance of the Maori people as well as landed endowments on top of that for their permanent ‘general’ benefit:

And whereas it is of the highest importance that a roll should be prepared of the Native land throughout the Colony, showing as accurately as possible the extent and ownership thereof, with a view of assuring to the Natives without any doubt whatever a sufficiency of their land for their support and maintenance, as also for the purpose of establishing endowments for their permanent general benefit from out of such land…

We would add that the Government’s mechanisms sit oddly with the stated purpose of the measure. The Government’s ‘chief object’, McLean stated:

should be to settle upon the Natives themselves, in the first instance, a certain sufficient quantity of land which would be a permanent home for them, on which they would feel safe and secure against subsequent changes or removal; land, in fact, to be held as an ancestral patrimony, accessible for occupation to the different hapus of the tribe: to give them places which they could not dispose of, and upon which they would settle down and live peaceably side by side with the Europeans.

Had this stated intention been carried out, many of the claims before us may have been unnecessary.

Te Waka Maori a Niu Tirani, which printed a description of the 1873 provision for reserves, in both Maori and English, seems to have taken McLean’s assurance into account when it wrote:

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

Though we will examine further the extent of protection provided to Maori under this provision, the importance of McLean’s statement to us here is its recognition, 33 years after the Treaty, of the Crown’s obligation to ensure that
ancestral lands were made inalienable, and that the hapu would maintain rights of occupation.

The Turanga Tribunal concluded:

Ministers and officials knew very well that land was held communally; a principal function of the Native Lands Acts was to reverse that fact. They were also very aware of the importance of land to Maori. It follows, therefore, that a requirement for each man, woman, and child to own 50 acres was fundamentally misconceived, at least until after Maori had individual titles that they could use other than to sell or lease. Claimant counsel noted that the Crown did not attempt to ascertain and provide for sufficiency of land at a hapu level. The Crown responded that it had ‘some obligation’ to do so. It is instructive that the Crown’s remedial attempts, providing a 4000-acre block in 1877 ‘in recognition of the landlessness of Rongowhakaata’, and a 450-acre block to ‘landless Whanau a Kai’ after 1882, were both necessary and carried out at a hapu level. Too little too late does not negate the fact that the Crown was capable of conceptualising needs at a hapu level, had the land to provide for them, and needed to do so.\(^{145}\)

Some 30 years after the 1873 act, the Crown’s fiduciary duty was explained very clearly by Commissioners Stout and Ngata, as they considered the history of Maori land legislation and policy. In the first of their many reports, in which they drew attention to the ‘confusion of our Native-land laws’, they made a strong argument for the Crown to consider its obligations to Maori if land acquisition should resume. They cited with approval the detailed criticisms made by the 1891 Native Land Laws Commission of the individualisation of Maori title, and of the swings in the Crown’s purchase policy. They commented on deep Maori unease in the 1890s, and on tribal unanimity, evident in the 1897 petition to Queen Victoria, seeking an end to Crown purchase of Maori lands.

The commissioners admitted ‘the duty of the State to provide land for its increasing population’, but asserted its duty also to see that in doing so, it ‘does no injustice to any portion of the community, least of all to members of the race to which the State has peculiar obligations and responsibilities’. The State and the people of New Zealand had a duty to preserve the Maori ‘race’, who could be active and energetic citizens. (It was a mark of public attitudes that they felt the need to say so.) And the State must therefore consider not just the theory on which its land-acquisition policies were founded, but the practical outcomes of the system. How the native land question was handled in the immediate future, the commissioners argued, was the key to discharging this obligation.

In particular, the commissioners pointed to the responsibility of the Crown not just to the present generation, but to those who followed; and not just to individual owners, but to the community of owners. The settlement of their lands by Maori themselves was the first consideration – and provision must be made for the descendants and successors of the present owners as well. The State’s assumption that revenue from the minimum amounts of land set down would be sufficient for a Maori owner ‘without providing in any way for his descendants’ was not adequate. But, in any case, there was more involved than ensuring minimum individual portions of land. Native lands, because they were tribal, were different from individually held property: ‘in one sense they may be said to be impressed with a trust. To allow the present possessors to destroy the tribal land means that they should destroy the tribe.’\(^{146}\) That, it seems to us, could not have been a clearer statement of the nature of the Crown’s fiduciary duty. It was a duty to a tribal people. It was thus a duty to ensure that individuals were not empowered to alienate what remained of the tribal land base.

In our view, these findings of the Stout–Ngata commission in 1907 provide a standard by which the Crown’s actions should be assessed with regard to Maori land for the rest of the twentieth century. The commissioners gave an unequivocal answer to the question of the ‘freedom’ of the individual to alienate, weighed against the wider community good. As we discussed at the beginning of this chapter, the Crown referred in this inquiry to its duty not to restrict
Maori freedom of choice. The Hauraki Tribunal, which considered the Crown’s submission on that point in its own inquiry, considered this a ‘poor argument’. ‘Protection of Maori’, the Tribunal stated, ‘should have meant the making of inalienable reserves.’147 We agree, noting also our discussion above of how this very issue was seen by Carroll and Herries in 1913. Maori leaders had a range of views on such a crucial matter. Tame Parata perhaps summed up the position best – and indicated the basis of the different views Maori held – when he argued that putting Maori and Pakeha ‘on the same plane’ in respect of looking after their land interests would mean the ‘crucifixion of the Maori’. About 20 per cent, he said, would survive; the rest would go to the wall.148

It has seemed to various Tribunals that the scale and speed of land alienation in districts where they have examined the evidence indicates that the Crown was not exercising its duty of active protection of Maori land and resources. The Hauraki Tribunal found it ‘perfectly obvious that the Crown never embraced the responsibility of making certain core lands absolutely inalienable’. The Crown’s defence in that inquiry that it was avoiding ‘inappropriate paternalism’ had little validity in the Tribunal’s view, given 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’.149

In the Hauraki Tribunal’s 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.’150 In any case, the argument about ‘inappropriate paternalism’ vis-à-vis protections was unjustified:

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.151

We will examine these issues further, in terms of the Crown’s dealings with Maori land, including:

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**Summary**

- The essence of the Treaty ‘bargain’ was that Maori agreed to the Crown’s kawanatanga, which gave it the right to make laws, in return for the active protection of their own authority (tino rangatiratanga), including the authority of communities over the land held in their collective possession.

- Maori and settlers required certainty in their dealings with each other over land, which in turn required some security of title. The Crown, however, should not have introduced a new tenure system for Maori land, a matter so fundamental to their rangatiratanga, without their consent.

- The Crown’s imposition of a British court to allocate title, and its individualisation of that title, disempowered Maori and was – in the finding of many Tribunals – a serious breach of the Treaty. Maori communities wanted to decide their own entitlements and to manage them collectively, both of which were reasonable and possible in the circumstances of the nineteenth and twentieth centuries.

- In many ways, the alienation of land and resources was bound up with the new title system, which created a saleable individual interest outside the community’s control and in many ways useless to each ‘owner’ other than for sale.

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The twentieth-century title system was, in the findings of various Tribunals, an offshoot of the nineteenth-century one. Maori have struggled with fractionating titles and fragmented individual interests. The Crown has accepted ‘some’ responsibility for this, and its actions to remedy the situation must be measured against the Treaty principles of partnership, autonomy, equity, and active protection.

The principles of autonomy and active protection are (and have always been) perfectly reconcilable. The Crown must give effect to Maori autonomy while actively protecting Maori interests by ensuring that Maori are fully empowered to represent, define, and protect their own interests in any bodies or systems established to manage their lands and affairs. This was evident in 1913 to Carroll and others, and it is still evident today.

The essential Treaty ‘bargain’ also anticipated the alienation of land for settlement, in which Maori would retain a sufficient land and resource base for their customary lifestyle and – as they chose – for development in the new economy. Both peoples were expected to prosper and benefit.

In its dealings for Maori land – whether directly, or in regulating private transactions – the Treaty requires the Crown to actively protect Maori iwi and hapu in retention of a sufficient base, to act scrupulously and with utmost honour, to deal fairly and equitably, and to obtain full, free, and informed consent to any transactions. These principles were enunciated throughout the nineteenth and twentieth centuries, in the language of the times, and were both reasonable and achievable. These are the standards by which the Crown’s purchase of Maori land, and its regulation of private alienations, must be measured.

If Maori land is to be taken compulsorily, it must be exceptional, in the national interest, and as a last resort.
16. Ibid, p 671
17. Ibid, p 778
19. Ibid, p 190
20. Ibid
21. Ibid, p 254
22. Ibid, p 213
23. Ibid, p 215
24. Waitangi Tribunal, Mohaka ki Ahuriri Report, 2 vols (Wellington: Legislation Direct, 2004), vol 1, p 159
25. Ibid, pp 160–161
27. Ibid
29. W L Rees, Memorandum on the Native Land Laws, AJHR, 1884, sess 2, G-2, p 5
30. R Stout, 28 September 1894, NZPD, vol 86, 1894, pp 387
31. Ibid, p 388
34. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 258
35. New Zealand Maori Council v Attorney General [1987] 1 NZLR 641, 683, per Richardson J
37. New Zealand Maori Council v Attorney General [1989] 2 NZLR 142, 152, per Cooke P
38. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, pp 258–259
40. A Ngata and W Herries, NZPD, 1914, vol 171, pp 782–785
41. M Pomare, NZPD, 1913, vol 167, p 408
42. Harry Holland (as quoted in Keith Newman, Ratana Revisited: an Unfinished Legacy (Auckland: Reed, 2006), p 297)
43. Hinei Reti, evidence given under cross-examination, third hearing, 10 March 2005 (recording 4.3.3, track 2)
44. Tony Walzl, ‘Maori and Forestry (Taupo–Rotorua–Kaingaroa) (1890–1990)’, report commissioned by CFRT, October 2004 (doc A80), p 197
45. Hoani Te Heuheu to Peter Fraser, 13 March 1944 (doc E16(c))
46. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, pp 124–125
47. Ibid, pp 219–220, 258–266
49. Ibid
50. Ibid, p 1106
54. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 258
57. Ibid, p 62
He Maunga Rongo


63. 15 December 1909, NZPD, 1909, vol 148, pp 1102–1111

64. See, for example, 28 November 1913, NZPD, 1913, vol 167, pp 415–437


67. Ibid

68. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, pp 160–161, 220–223, 260–266

69. Pirihira Fenwick, evidence given under cross-examination, seventh hearing, 31 May 2005 (transcript 4.1.8, p 5)

70. Ibid, p 6

71. W Herries and J Carroll, 28 November 1913, NZPD, 1913, vol 167, p 428

72. T Parata, 28 November 1913, NZPD, 1913, vol 167, p 419

73. J Carroll, 28 November 1913, NZPD, 1913, vol 167, p 426

74. Ibid, p 427

75. M Pomare, 28 November 1913, NZPD, 1913, vol 167, p 408

76. Ibid, p 409

77. M Pomare, A Ngata, 28 November 1913, NZPD, 1913, vol 167, p 408

78. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, pp 220–221

79. Ibid, p 221


82. Te Kani Williams and Dominic Wilson, closing submissions on behalf of Ngati Haka Patuheuheu and generic closing submissions on the Native Land Court, 2 September 2005 (paper 3.3.90), p 31

83. Richard Boast, generic closing submissions on nineteenth-century alienation, 1 September 2005 (paper 3.3.58), p 46

84. Richard Boast, reply submissions on nineteenth-century land alienation in Taupo, Kaingaroa, and Rotorua, October 2005 (paper 3.3.143), pp 11–12

85. Ibid, p 12

86. Martin Taylor, generic closing submissions on political engagement, tourism, and geothermal issues, 2 September 2005 (paper 3.3.67), pp 28–30

87. Raewyn Wakefield, generic closing submissions on twentieth-century land alienation, 2 September 2005 (paper 3.3.60), pp 28–30

88. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 1, p 25

89. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, pp 168–169

90. Ibid, pp 170–172

91. Ibid, p 170

92. Ibid, pp 225–257


94. Ibid, pp 441, 514

95. Ibid, pp 515–517

96. Ibid, p 498

97. Ibid, p 494

98. Ibid, pp 502–508, 525


100. Ibid, p 389

101. *R v Symonds* (1847) NZPCC 387


104. Ibid, p 680


106. H Sewell, 29 August 1870, NZPD, 1870, vol 9, p 362

107. Ibid, p 361

108. Native Land Act 1873, s 59


110. Ibid, pp 456–457

111. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 169
112. Annette Sykes and Jason Pou, closing submissions on behalf of Ngati Makino, 2 September 2005 (paper 3.3.87), p18


115. R Stout, 28 September 1894, NZPD, 1894, vol 86, p388

116. Ibid


118. Native Land Act 1873, s 62


123. Donald Loveridge, evidence given under cross-examination, seventh hearing, 1 June 2005 (transcript 4.1.8), pp 99–100, 163–164

124. E Tirikatene on behalf of Maori members, ‘Maori Purposes Bill’, 30 November 1945, in ‘Consolidation – General, 1939–1949’,AAMK869 w3074 29/1, pt 2, Archives New Zealand, Wellington (doc A68(d)), p455

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126. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 1, pp 36–37

127. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p364


129. Ibid, p286

130. Ibid, pp 359–376


135. Ibid, pp 238–239

136. Ibid, p239


139. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, pp 168, 175


141. Native Land Act 1873, preamble

142. D McLean, 25 August 1873, NZPD, 1873, vol 14, p604

143. A reference to events in Hawke’s Bay, after the vesting of land under the 1865 Act in 10 chiefs, who in fact became the absolute owners.


146. ‘Native Lands and Native Land Tenure: General Report on Lands Already Deal with and Covered by Interim Reports,’ AJHR, 1907, G-1C, p13


148. T Parata, 28 November 1913, NZPD, 1913, vol 167, p419


150. Ibid

151. Ibid
NATIVE TITLES AND THE NATIVE LAND COURT IN
THE CENTRAL NORTH ISLAND, 1865–1900

The operations of nineteenth-century native land laws, the Native Land Court and their impact on Maori communities have been key issues in many previous Tribunal inquiries. Despite this, these issues remain some of the most important and most contested in the Central North Island inquiry. Claimants and the Crown advance differing interpretations of the operations and effects of the court. The Crown states, however, that it does not seek to relitigate broader issues relating to the ‘objectives and schemes of the original native land laws and the establishment of the Native Land Court.’ But it is necessary, in the Crown’s view, to test the extent to which some of the problems of the system, as identified in the Tribunal’s Turanga Report, apply to the Central North Island. In this chapter we address issues arising from the operations of the Native Land Court in our inquiry region.

Over an 11-year period between 1862 and 1873 native land legislation brought about the introduction of a new tenure system, providing for the determination of Maori titles and the issue of certificate of titles to those tribes, communities, or individuals whom the court found to be owners. The legislation fundamentally transformed the way in which authority over Maori land and resources was exercised. No fewer than four major Acts were passed in this time.

The Native Lands Act 1862 first provided for the establishment of courts to ascertain native titles. At the same time, Crown pre-emption was abandoned, and the Act allowed Maori owners to sell or lease their land directly to settlers. The legislation allowed for any Maori tribe, community, or individual to apply to the Native Land Court for a certificate of title over their land. It also provided for the Governor to approve plans relating to the development and settlement of Maori land. Only tribes or communities were entitled to apply for such approval, not individuals. Therefore, while parts of the tribal estate might be individualised, the balance would be held in tribal title.

Despite its detailed provisions, the 1862 Act was used only for facilitating direct sale by named individuals; and in any case it was applied only briefly, and not in our inquiry region. It paved the way, nevertheless, for a major new act, the Native Lands Act 1865, and the constitution of a single court comprising one chief judge, with other judges and assessors.

The preamble to the 1865 Act indicated the Crown’s intention ‘to encourage the extinction of [Maori] Proprietary Customs and to provide for the conversion of such modes of ownership into titles derived from the Crown’. Tenure conversion was a crucial objective of the Act. The whole approach to title determination changed as well. The 1862 Act had allowed for Maori judges, and for local juries to resolve title issues under the chairmanship of the local resident magistrate. The 1865 Act ‘opted instead for a formalised English style adversarial court’. It provided both for the issue of tribal title for blocks over
5000 acres and for awards to 10 owners (and no more than 10) for smaller blocks.

As it became apparent that the ‘10-owner system’ was leading to anger among Maori, particularly since named owners were able to – and did – alienate their interests without reference to other owners in a block, Parliament passed a new measure in 1867 which attempted to ensure that the named owners were, in practice, trustees for the group, rather than the absolute owners that they were in law. The Act is not clearly worded, but, where the land block was less than 5000 acres, it seems that the Native Land Court was required to issue a title to no more than 10 persons. For blocks bigger than 5000 acres where there were more than 10 owners, or any tribe or hapu was found to have an interest in the land, the court had discretion, if the owners, tribe or hapu consented, to order a certificate of title to issue to no more than 10 owners. In this case, the court was required to register the names of all persons interested in the land, and the particulars of their interests, in the court records. The named owners were not stated to be trustees.

The new Native Land Act 1873 abolished the 10-owner rule, and required that all members of the hapu be recorded on a memorial accompanying the Native Land Court’s declaration of title. In effect, the Act created an intermediate form of title, halfway between customary ownership and freehold title held by Crown grant. ‘Memorials of ownership’ were records of the membership list of landowning hapu at the time the court award was made. But although the land technically remained customary land, those named on the memorial now held individual shares in the land which, contrary to the rules of aboriginal title and the pre-emption clause of the Treaty, became alienable to private buyers and lessees. New safeguards for Maori had, however, been put in place. It remained to be seen if they would be effective.

Broadly speaking, claimants contend that the new tenure system was imposed on Central North Island Maori against their will, that it undermined their existing tribal structures and economies, and led to land alienation.

Crown historians maintain that the Native Land Court was a response to – rather than a cause of – changes in Maori society, political structures and economics. These changes, they add, were an inevitable product of colonisation and the economic development that came with it.

This chapter will address the introduction and operation of the Native Land Court in the Central North Island from 1865 to 1900. We do not attempt in this generic inquiry to provide a comprehensive coverage of the work of the court in the region; rather we provide examples as appropriate.

**Issues**

The fundamental question before us is as follows:

To answer this broad question we will address four areas of inquiry. Our key questions are:

1. Did Central North Island Maori engage willingly with the Native Land Court?
2. Was the Native Land Court the appropriate body to determine customary interests in the Central North Island?
3. What was the impact of the Native Land Court processes on Central North Island iwi and hapu?
4. Were the forms of title available to Central North Island Maori under the native land legislation appropriate to their needs in the developing colonial economy?

To assist our analysis, we ask a further series of questions as follows:
1. Did Central North Island Maori engage willingly with the Native Land Court? This will encompass the following:
   - Were Central North Island Maori consulted about, and did they agree to, the introduction of the Native Land Court into their region?
   - Did Central North Island Maori engage willingly with the Native Land Court, once it had been introduced?
   - Why did the Crown suspend the operation of the native land legislation in the region between 1873 and 1877, and was this suspension Treaty-compliant?
   - Did Central North Island Maori engage willingly with the Native Land Court when sittings began again from 1877? Did they consider it a useful institution?

2. Was the Native Land Court the appropriate body to determine customary interests in the Central North Island? This will include discussion of the following:
   - Did Native Land Court title-determination processes provide adequately for the recognition of customary rights?
   - Were Maori concerns about Native Land Court title-determination processes mitigated by the role of assessors in the court?
   - Did the Crown provide adequate recourse for Maori dissatisfied with decisions of the Native Land Court?
   - Did the Native Land Court deal fairly with those who had fought against the Crown in the wars of the 1860s?

3. What was the impact of the Native Land Court processes on Central North Island iwi and hapu? This will focus particularly on the question:
   - Were the costs that Maori faced in putting their land through the Native Land Court appropriate? To what extent did the costs contribute to land loss?

4. Were the forms of title available to Central North Island Maori under the native land legislation appropriate to their needs in the developing colonial economy? This will address the questions:
   - Were the forms of title available to Central North Island Maori under the Native Lands Acts 1865 and 1867 appropriate to their needs?
   - Were the forms of title available to Central North Island Maori under the Native Land Act 1873 and subsequent legislation appropriate to their needs?
   - Were the new titles appropriate for the protection of tribal taonga and resource rights?

**Patterns of Native Land Court Activity**

We comment first on the overall scope and nature of the Native Land Court’s activities in the Central North Island. Native Land Court sittings effectively began in the region on 15 October 1867, with the court hearing cases related to blocks on the Bay of Plenty coast and in Northern Taupo. At about the same time, the Tauranga commissioner and the Compensation Court in the eastern Bay of Plenty were sitting to allocate lands confiscated during the conflicts of the 1860s. Figure 9.1 below shows a small number of sitting days from 1867 to 1871. During this time, the Native Land Court held some 50 title investigation hearings for small blocks around Maketu, and largely inconclusive hearings in relation to Kaingaroa blocks and north-western Taupo blocks including Oruanui, the Tauhara blocks, and Whareto. The period from 1873 to 1877 saw the formal suspension of the native land legislation throughout the region with effectively no Native Land Court sittings during those years. The court resumed with a bang in 1878, a year which saw more days of sittings than the previous 11 years combined. These involved Kaingaroa and coastal Bay of Plenty lands in particular, but opposition from inland Te Arawa, much of Ngati Tuwharetoa and Ngati Raukawa meant that
Map 9.1: Land title hearings by decade
by 1880, the court had barely penetrated into the Rotorua lakes district, or to southern and eastern Taupo.

The Fenton Agreement – an agreement made in 1880 between the Komiti Nui o Te Arawa and the Crown for the joint development of a town at Rotorua on land leased from the Maori owners – was the major catalyst for the entry of the Native Land Court into the Rotorua lakes district. Title to almost all the blocks in this district was decided in court hearings in the 1880s and 1890s. The court finally reached southern and western Taupo with the title hearing of the massive Tauponuiatia block from 1886 to 1887. The 1880s saw a sustained period of court activity in the region, with an average of more than four months of sitting days every year from 1880 to 1889, the busiest year of the decade being 1887 when the subdivisions of Tauponuiatia were heard (see figure 9.1). With the exception of two relatively quiet years in 1892 and 1896, this trend continued into the 1890s, with a sustained period of very heavy court activity as the turn of the century approached. Between 1896 and 1900, the court sat for an average of six months (184 days) per year; this was its most active five-year period.

Some of the overall trends in the court’s sitting activity are shown in figure 9.1 and tables 9.1 and 9.2 (below).

Tables 9.1 and 9.2 supplement data on the number of days the Native Land Court sat with data on the number of hearings of each type which occurred. Definite patterns of change over time can be discerned.

Figure 9.1: Number of days of Native Land Court activity in relation to Central North Island blocks, 1867–1900

Source: Native Land Court minute books.
### Table 9.1: Number of Native Land Court hearings of different types by decade for the Central North Island region, 1861–1900

<table>
<thead>
<tr>
<th>Hearing Type</th>
<th>1861–1870</th>
<th>1871–1880</th>
<th>1881–1890</th>
<th>1891–1900</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Title Investigation</td>
<td>43</td>
<td>78</td>
<td>198</td>
<td>132</td>
<td>451</td>
</tr>
<tr>
<td>Crown Interests</td>
<td>0</td>
<td>4</td>
<td>31</td>
<td>18</td>
<td>53</td>
</tr>
<tr>
<td>Survey</td>
<td>0</td>
<td>1</td>
<td>9</td>
<td>142</td>
<td>152</td>
</tr>
<tr>
<td>Partition</td>
<td>0</td>
<td>8</td>
<td>235</td>
<td>150</td>
<td>393</td>
</tr>
<tr>
<td>Succession</td>
<td>0</td>
<td>5</td>
<td>62</td>
<td>148</td>
<td>215</td>
</tr>
<tr>
<td>Relative Interests</td>
<td>0</td>
<td>0</td>
<td>6</td>
<td>84</td>
<td>90</td>
</tr>
<tr>
<td>Rehearing</td>
<td>1</td>
<td>5</td>
<td>8</td>
<td>7</td>
<td>21</td>
</tr>
<tr>
<td>Appeal</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>32</td>
<td>32</td>
</tr>
<tr>
<td>Other</td>
<td>0</td>
<td>7</td>
<td>37</td>
<td>57</td>
<td>101</td>
</tr>
<tr>
<td>Unknown</td>
<td>0</td>
<td>3</td>
<td>85</td>
<td>45</td>
<td>133</td>
</tr>
<tr>
<td>Total</td>
<td>44</td>
<td>111</td>
<td>671</td>
<td>815</td>
<td>1641</td>
</tr>
</tbody>
</table>

Source: Native Land Court minute books

* Four blocks in the Central North Island region – Paengaroa, Rauotehuia, Pukehina, and Pokohu – were subject to the Special Powers and Contracts Act 1883. Under this legislation the Governor could declare title determinations to be null and void. This meant that the new hearings held for the blocks, although recorded by the courts as title investigations, were effectively rehearsings and have been recorded in these figures as such.

### Table 9.2: Proportion of Native Land Court hearings of different types by decade for the Central North Island region, 1861–1900

<table>
<thead>
<tr>
<th>Hearing Type</th>
<th>1861–1870</th>
<th>1871–1880</th>
<th>1881–1890</th>
<th>1891–1900</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Title Investigation</td>
<td>97.7</td>
<td>70.3</td>
<td>29.5</td>
<td>16.2</td>
<td>27.5</td>
</tr>
<tr>
<td>Crown Interests</td>
<td>0.0</td>
<td>3.6</td>
<td>4.6</td>
<td>2.2</td>
<td>3.2</td>
</tr>
<tr>
<td>Survey</td>
<td>0.0</td>
<td>0.9</td>
<td>1.3</td>
<td>17.4</td>
<td>9.3</td>
</tr>
<tr>
<td>Partition</td>
<td>0.0</td>
<td>7.2</td>
<td>35.0</td>
<td>18.4</td>
<td>23.9</td>
</tr>
<tr>
<td>Succession</td>
<td>0.0</td>
<td>4.5</td>
<td>9.2</td>
<td>18.2</td>
<td>13.1</td>
</tr>
<tr>
<td>Relative Interests</td>
<td>0.0</td>
<td>0.0</td>
<td>0.9</td>
<td>10.3</td>
<td>5.5</td>
</tr>
<tr>
<td>Rehearing</td>
<td>2.3</td>
<td>4.5</td>
<td>1.2</td>
<td>0.9</td>
<td>1.3</td>
</tr>
<tr>
<td>Appeal</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
<td>3.9</td>
<td>2.0</td>
</tr>
<tr>
<td>Other</td>
<td>0.0</td>
<td>6.3</td>
<td>5.5</td>
<td>7.0</td>
<td>6.2</td>
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<td>2.7</td>
<td>12.7</td>
<td>5.5</td>
<td>8.1</td>
</tr>
<tr>
<td>Total</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Source: Native Land Court minute books
**Types of Hearings**

**Title investigation**: At title investigation hearings, the court’s task was to investigate and determine the customary owners of a block of land, to record those owners on a memorial of ownership or order a certificate of title.

**Crown interests**: Crown interests hearings, a product of the Native Land Act Amendment Act 1877, were hearings where the Crown, having purchased the shares of some of the owners of a block could apply to the court to have an area of land proportional to the shares acquired defined and partitioned-out under a separate title.

**Partition**: In partition hearings, an owner or owners of shares in a collective land title could apply to have a separate title issued for their portion of a block.

**Succession hearings**: These were held in cases where an owner of a block of land died intestate, to determine his or her successors and transfer title to them.

**Relative interests**: In early title determination cases, a list of owners could be produced without any indication of the size of the shares of each of the owners. From 1873, the court was empowered to determine the relative size of these interests in certain circumstances.

**Rehearing**: Parties could apply for a rehearing after any judgment of the court. Initially these requests were to be decided on by the Governor in Council, but from 1880 this power was formally devolved to the chief judge of the court.

**Appeal**: From 1894, a formal Native Appellate Court was established to hear appeals against decisions of the court.

**Number of cases**: There were some 1640 individual cases heard by the Native Land Court in relation to Central North Island blocks to 1900. The total number of court hearings increased in each decade. But the most dramatic increases were in the 1880s and 1890s.

**Types of cases**: In the 1860s and 1870s the vast majority of cases were title investigations and, while the numbers of these continued to grow in the 1880s, there was an even more rapid increase in partition, succession and survey hearings as the century drew to a close. The vast majority of the title investigation and partition hearings in the 1880s can be attributed largely to the relatively late entry of the Native Land Court into inland Rotorua, and to the partition of the Tauponuiatia block in a single year, 1887, when there were 78 title investigations and 112 partition hearings. Some categories of hearings cannot be compared across the full range of time as they were created or removed by legislation throughout the period. It was not until the Native Land Act Amendment Act 1877 was passed, for example, that the Crown had the right to apply to the court to define and partition the proportion of a block representing the interests it had purchased. The Native Land Act Amendment Act 1878 (No 2) empowered the court, on application of an individual, to investigate and determine the relative interests of multiple owners of a block of land. There are no relative interest hearings before this date. There was no provision for appeal hearings before the 1890s.

**Maori Engagement with the Native Land Court**

**Key Question**: Did Central North Island Maori engage willingly with the Native Land Court?

We turn now to our first set of issues:

- Were Central North Island Maori consulted about, and did they agree to, the introduction of the Native Land Court into their region?
Did Central North Island Maori engage willingly with the Native Land Court, once it had been introduced?

Why did the Crown suspend the operation of the native land legislation in the region between 1873 and 1877, and was this suspension Treaty-compliant?

Did Central North Island Maori engage willingly with the Native Land Court when sittings began again in 1877? Did they consider it a useful institution?

**Extent of consultation and consent**

Were Central North Island Maori consulted about, and did they agree to, the introduction of the Native Land Court into their region?

**The claimants’ case**

The claimants argued that the Treaty clearly created ‘an obligation to recognise, and consult with, tribal leaderships with regard to the introduction of the Native Land Court into their rohe.’

Given the purpose of the Native Land Court to transmute customary interests into a title recognised under colonial law, ‘the very introduction of the court would affect the “Rangatiratanga” of the chiefs over their lands.’ In such circumstances ‘the Crown was under a particular duty to actively protect Maori’; ‘Treaty principles required the Crown to work with Maori to jointly design a process that would allow [both] settlement and Maori active engagement in the economy.’

The court was introduced without consultation and, in Treaty terms it was not sufficient for the Crown to simply introduce the native land legislation and rely on Maori agency (by the making of applications) to transform the customary interests. The process of the court, and its title outcomes, were not minor matters, but went to the very heart of the nature of the customary interests and property held by Maori. In the claimants’ view, ‘there was a burden on the Crown to ensure that it fully consulted Maori before introducing the Native Land Court legislation into the region, including properly explaining its terms and effects.’ This would be a ‘minimum requirement’ in terms of the Treaty. The claimants cited the evidence of several historians to the effect that there was no evidence of any such consultation with tribal leaders by the Crown. Rather, the evidence suggests that Central North Island Maori opposed the introduction of the court, and its operation, once it had been introduced.

**The Crown’s case**

The Crown has stated that it does not wish to reopen issues relating to the ‘objectives and schemes’ of the native land laws. Moreover, it accepts that there was no formal consultation at either a national or tribal level in relation to the introduction of the Native Land Court into some parts of the Central North Island following the enactment of the 1865 Act. But in practice, it suggests, the various iwi and hapu played a significant role in determining whether the court could operate in their rohe. It should not be assumed that the Crown played the active role in the court’s inauguration. The Crown’s further arguments in support of this position are referred to in later sections.

**The Tribunal’s analysis**

We acknowledge the Crown’s concession, as stated above, in respect of the lack of formal consultation about the introduction of the Native Land Court into the Central North Island. We note also that the Crown has qualified its concession. We will therefore consider this issue in some detail.

We comment first on the Crown’s failure to conduct meaningful consultation with Maori and secure their consent both in respect of far-reaching changes to their tenure system, and in respect of the introduction of new forms of title adjudication. Most recently the Hauraki Tribunal has pointed to the Crown’s failings in this regard. Governor Grey, they note, chose not to reconvene a Kohimarama-type hui of Maori leaders after the first one held in 1860, though his predecessor, Governor Gore Browne, had agreed to Maori requests that such assemblies become annual. The opportunity for Maori leaders to discuss a
He Maunga Rongo

draft Native Lands Bill thus passed. Rather than convene a national assembly, Grey set up his New Institutions, comprising officially recognised local and district runanga. Among their powers, it was contemplated, would be the determination of tribal, hapu, or individual interests before the issue of Crown grants, and direct dealing in land. The Hauraki Tribunal commented that although knowledge of what was implemented in each district was sketchy, it was evident that when magistrates tried to introduce discussion of land, they were commonly met by hostility. To the extent that the introduction of the New Institutions was intended to test Maori opinion on registration of titles followed by direct dealing, the answers returned were ‘negative or indifferent, rather than positive’. The Tribunal found that, given the ‘great changes the [1862] Act made to Maori land tenure’, explicit, prior consultation with Maori was warranted. The Crown’s failure to undertake such consultation was in breach of the Crown’s Treaty obligations.

We reiterate our point made earlier, in part 11, that the Native Minister, J C Richmond, was aware in 1861 that the Maori leaders assembled at Kohimarama would not commit themselves on the subject of the Governor’s proposals for ascertaining tribal interests, moving towards individualisation of title, and the constitution of tribunals to determine title disputes, even though (in his view) those leaders present were favourable to the proposals. (Many of course did not attend, in the wake of the outbreak of war in Taranaki.) The chiefs had made it clear that they had to consult ‘their respective tribes’ before giving an answer. Richmond, as he explained to the House, saw no difficulties in their doing so; at the time he was contemplating not only an 1861 conference at which these matters would be discussed, but the possibility that such an assembly would ‘become a part of the permanent institutions of the country’.17

Despite any lack of endorsement from Maori leaders, or their communities, not only was the Native Lands Bill 1862 passed, but also those of 1865 and 1867. We have no evidence of consultation and discussion with Maori leaderships on either of these latter acts – let alone consent. Nor were Maori represented in Parliament when these Bills were discussed. Vincent O’Malley’s evidence, as we have already noted, is that Colonel Haultain’s 1871 inquiry into the native land legislation was the first occasion on which Maori were consulted in any meaningful way about the process by which their customary interests in land were determined. Wi Te Wheoro, an assessor since 1865, told Haultain that: ‘It is a pity that the Maoris were not consulted before the Act was brought into the General Assembly.’18

The question of consultation with Maori, and securing their consent to the operations of the Native Land Court in new areas (once it had been established by law), is a different, if closely related issue. We are aware that when the operation of the Native Lands Act 1862 was pioneered in Kaipara two years later, William Fox, the Native Minister, travelled there to ‘tell them [Maori] about’ the new law, and emphasise that Maori owners could now sell freely on the open market.19 This, at least, indicates some acceptance of responsibility on the part of the Government for announcing a new system of dealing with Maori land – if not for consultation.

We have no evidence of consultation with Central North Island Maori, or discussions with them, about the arrival of the Native Land Court in their rohe. The Native Minister, Lieutenant-Colonel A H Russell, did visit Maketu in May 1866, and he met with Te Arawa and Ngati Tuwharetoa rangatira. But the account of their meeting contains only one brief mention of the court: Te Arawa raised the question of their possible participation in the court as assessors, which led to Russell expressing surprise that they might wish to be involved, as there was no salary, he said. Yet by then the new Native Lands Act 1865 – which made the Native Land Court a national institution – was, as J C Richmond put it, ‘the keystone of the policy, not of the Government particularly, but of the colony’.20 We might indeed look, at the very least – as the claimants suggested – for some Government strategy to discuss the purpose and workings of the court with Maori who were expected to be its users, given that the court’s operation was to have such a
dramatic impact on their land tenure. How otherwise were Maori to know how to engage with the court? The arrival of the court in our inquiry region coincided, however, with the demise of the official runanga – which might have acted as a conduit for communication – as the Government dismantled political machinery of self-government conceded to Maori in the 1860s. Communications about the court were left to the resident magistrates, whose role was confined to distributing the Kahiti (Gazette) with notice of hearing dates, and to other procedural matters such as seeing that surveys were ready, ensuring trustees for reserves were selected, collecting Crown grants when they were ready, and giving them to Maori owners once they paid court fees. According to Alan Ward, they were also often asked to act as agent for the Crown to support the Crown's claims to land.21

The Crown, citing their historian Keith Pickens, has argued that the Native Land Court could only operate if applications for sittings were received, and that Maori made key decisions about whether the court would be introduced in their districts. We accept the argument of claimants, however, that the application of one person or small group could draw in their wider community, and competing claimant groups, to the court; and that therefore the introduction of the court was a matter which affected the whole region, not just limited areas.22 This can be seen, for instance, in the early Kaingaroa hearings – and the number of ‘fresh claimants’ who arrived for a second hearing of Kaingaroa 2. An interlocutory order had been issued in October 1867, when the only claimants were Ngati Tahu; six months later the claimants included Ngati Rangitiki, Ngati Manawa, Tuhourangi (claiming at the northern end), and Ngati Tutetawha (at the Tauhara end).23 But the Crown approach begs the question of the extent to which Maori, especially in this early period, were informed about the day-to-day workings of the court: how they might best make applications and proceed with their cases; and also about its expected outcomes and particularly the kinds of title available to them. In 1871 Wiremu Hikairo, a Te Arawa assessor of the court, made a detailed statement to Haultain’s inquiry into the working of the native lands legislation. Among his concerns was the lack of a Maori translation of the Act and its amendments. ‘Many of the defects complained of’, Dr O’Malley comments, ‘might have been remedied . . . had the Acts been translated and circulated amongst Maori.’24 Judge Rogan complained in 1867 of the difficulties faced by native assessors in the court ‘adjudicating under an Act written in a foreign language, which is and must be prejudicial to the satisfactory business of the Court’. And Sir William Martin also drew the Government’s attention in 1871 to Maori dissatisfaction with the court, which dealt with their interests in a manner which they have no means of understanding, seeing that the law which prescribes the jurisdiction and powers of the Court is not accessible to them in any intelligible translation . . . 25

It is perhaps not surprising that Colonel Haultain reported that many communities had not heard of section 17 of the 1867 Act, which provided that the Native Land Court might record the names of all owners in the court records, along with those of the 10 named on the front.26

Further evidence of a failure on the part of the Crown to prepare Maori for Native Land Court processes lies in early problems with surveys. For instance, Dr Pickens points to the number of early cases at Maketu and at Taupo which could not be proceeded with because the land was unsurveyed, or there was no sketch map.27 But multiple surveys of the same land soon became a problem, as different claimants groups sought to clarify their own boundaries, or to pre-empt surveys by others.28 This reflected both the lack of discussion with Maori about surveys, which were essential to the issue of orders of title, and the way in which Maori began to understand the court system as an adversarial one. Te Pokiha Taranui made a very revealing complaint to Donald McLean early in 1871 at Maketu, to the effect that Ngati Pikiao had made the wrong call about opposing surveys before a previous court hearing, on the basis of advice from a Government official: ‘if we had interfered while the land was being surveyed’, he said, ‘we could have brought
In 1871, Henry Tacy Clarke was anxious that the survey system be reformed, and become a Government monopoly, both to reduce costs to Maori, and to ‘effectually lessen the chances of awaking those bitter inter-tribal feelings, so notorious among the Arawas’, as he put it. Dr Pickens suggests, however, that by 1871, ‘this horse had already bolted’. Reforms were enacted in 1873, after which there were fewer multiple surveys. However, for a number of years, Central North Island Maori seem to have been left to work out procedures themselves. Given the magnitude of the new processes, there was clearly an abrogation of responsibility on the part of the Crown in this respect.

It seems to us that the Crown took little interest from the outset in ensuring that Central North Island Maori wanted the Native Land Court, that the new laws were available in Maori and explained to them in laypersons’ language, that they had an opportunity to discuss the court among themselves and with ministers or officials before application processes began, and that they understood the kinds of changes to customary ownership that the court would bring. It is not unreasonable to expect that these steps should have been taken. When Grey’s New Institutions were being established, civil commissioners toured the districts, meeting chiefs and explaining the nature and purpose of them. If the court was as important and potentially beneficial to Maori as the Crown said it was, surely it was worth doing the groundwork to ensure Maori knew how the court’s processes would work. The alternative was to leave Maori on the back foot from the outset, unable to protect their interests in this new forum – not against others, but in the process itself. From the Crown’s point of view, well-informed users who were convinced of the benefits of the process and on board with it, would seem to have been the key to a smoothly functioning court.

In the absence of any such concern either to secure Maori consent to the arrival of the Native Land Court or to discuss its functions with Maori, we must assume simply that the Crown considered its very low threshold for court applications (initially ‘any person’) would suffice to trigger sittings, and that Maori owners more generally would find their way into the court on the coat-tails of those who did apply. That, it seems to us, was irresponsible in the extreme. Above all, it paved the way for adversarial contests in court, which could be damaging both to claimants’ cases and to relations among the hapu and iwi. The later suggestion of the Te Arawa assessor Wiremu Hikairo about how the court might work is an example of a more considered – and less adversarial – approach to the conduct of its business with Maori involvement. A judge in each of five proposed Native Land Court districts, he suggested, should appoint a kaiwhaka komiti (facilitating committee) for each subdivision within the district. This kaiwhaka komiti would identify those anxious to bring claims before the court, call meetings of interested parties, listen to the discussions, identify claimants, and report back to the judge. ‘[N]o applications for title investigation would be considered by the Judge without the prior endorsement of the Kaiwhaka Komiti.’ Hikairo was suggesting, in other words, that there be preliminary hui in which communities of owners sorted out among themselves how to deal with their claims in the court – and that there be an intermediary between the owners and the judge, who would thus be better informed about what the owners were trying to achieve.

As it was, Central North Island Maori responded to their early Native Land Court experiences by turning their back on it, and campaigning for the right to determine titles themselves.

The Tribunal’s findings
In sum, the Crown did not consult or negotiate consent for:

- the introduction of new forms of title adjudication;
- the introduction of a new tenure system; and
- the introduction of the Native Land Court into the Central North Island.

The significance of these moves must be understood in the context of the purpose of the Native Land Court to bring about fundamental transformation of customary
ownership: to destroy tribal ownership, and to individualise Maori land. It would remove community land-management rights and disrupt community decision-making processes at a crucial period when pressures to alienate would come from both the Crown and settlers.

The Crown also failed:

▸ to inform Central North Island Maori about the purpose, functions, and processes of the Native Land Court;

▸ to ensure that Central North Island Maori had access to copies of the initial legislation in their own language, and access to lay explanations of that legislation, before they began to engage with the Native Land Court; and

▸ to ensure that Central North Island Maori understood the forms of title that were available to them under the early native land legislation, so that they could make informed choices in court.

The failure to consult with Maori nationally, and in the Central North Island, or to obtain their consent for the establishment of a land court in whose workings and outcomes Maori had the greatest possible interest, was in breach of the Treaty principles of partnership, autonomy and active protection. The failure even to inform Central North Island Maori of the purpose, functions and processes of the Native Land Court, and to allow them the opportunity to discuss the court with disinterested Crown representatives before it began operating in their region, was also in breach of these Treaty principles. In our view, it also breached the principle of good government.

Central North Island Maori communities were prejudiced from the outset by their lack of opportunity to participate in such discussions, and to decide, for instance, how applications to the Native Land Court should be managed to suit their own purposes. It is clear that they were prejudiced also by their lack of understanding of the significance of the titles that the court ordered. (We will consider this further in a later section.) In these circumstances, they could not protect their own interests.

Initial Central North Island Maori engagement with the Native Land Court

DID CENTRAL NORTH ISLAND MAORI ENGAGE WILLINGLY WITH THE NATIVE LAND COURT ONCE IT HAD BEEN INTRODUCED?

We turn next to address the question whether, given the introduction of the Native Land Court into the Central North Island, Maori then engaged willingly with it. Our treatment of this question is divided into two parts: 1867 to 1871, and post-1877. This is because the period itself is divided by a major event in our region: the suspension of the native land legislation, and thus of Native Land Court sittings, between 1873 and 1877. The suspension of the court is a contested issue in our inquiry, and we will address it where it belongs chronologically, in a section which is interpolated into our broad consideration of the question of Maori engagement with the court. We return subsequently to consider Maori engagement with the court in the 1880s and 1890s.

We lay out the overall claimant and Crown cases in respect of this issue here; though we will recapitulate relevant points when we consider the latter decades of Maori engagement.

The claimants’ case

The claimants argued that Central North Island Maori both individually and collectively brought their land into the Native Land Court either unwillingly, or because they did not fully understand the role of the court. Engagement might be unwilling if Maori feared that by failing to apply for title determination themselves, they risked losing their land to other claimants. Or they might apply to the court on the understanding, encouraged by Government officials, that the scope of its powers and investigations would be limited and that significant power to decide ownership would remain in tribal hands.

In respect of the argument that people in certain places wanted the Native Land Court, the claimants submitted that the right of any individual Maori or, in some cases, small groups, to legally bring land before the court for
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title investigation drew in the whole group, and competing claimant groups, to appear as well or risk missing out on the title.\textsuperscript{34} Others saw getting an application in first and being recognised in the court as a ‘claimant’ rather than a ‘counter-claimant’ or ‘objector’ gave them an advantage in title investigation hearings.\textsuperscript{35} Claimant counsel indicated that the confrontational environment of the courts, compounded by the frequent presence of Crown land purchasing officers at sittings, increased participants’ anxiety about these issues and reduced the possibility of their settling land matters among themselves outside court.\textsuperscript{36} In light of these considerations, claimant counsel broadly agreed with Angela Ballara that ‘most Maori engaged with the Native Land Court because the system prevented them from doing anything else.’\textsuperscript{37}

Even active participation in the Native Land Court, in the claimants’ view, did not mean people were exercising free choice. Groups in all three districts, they argue, were nervous in the wake of the wars and confiscation. The Kingitanga, and chiefs who had stood against Crown purchase in their own districts, had been defeated. Those who had fought against the Crown, such as Waitaha and Tapuika in the coastal regions, did not see it as an option to stand back from the court – especially where other court claimants were those who had fought on the side of the Crown. In the claimants’ view, the decision of groups – such as Ngati Whakaue and Tuhourangi, who had supported the Crown – to object to the court, was surprising; but it is significant that they felt they had to defend themselves in this circumstance from accusations of disloyalty. It seems less surprising that others who had supported the Crown, and paid a high price for it in the wars, would adopt and accept Crown processes.\textsuperscript{38}

On the question of Maori acceptance of the need for new titles, claimant views vary; but they generally accept the proposition that there was some need for title reform in the latter part of the nineteenth century, at least to the extent that ownership in some areas needed to be clearly defined to allow land to be used for some ‘new’ economic activities. Claimants contend that Te Arawa were willing to:

abandon armed conflict as a means of dispute resolution, in favour of methods which would be more conducive to trade and commerce . . . but that such changes never extended to either embracing the Maori Land Court, abandoning tribal ownership or control of property, or accepting the individualism of title which the Crown forced on Te Arawa.\textsuperscript{39}

The claimants noted historian Bruce Stirling’s statement that hapu in the western and northern Taupo regions applied to the Native Land Court to protect their ‘runholders’ and to provide security of title. But they added that there was no evidence that those Maori who may have engaged in the court process to participate in the new economic order sought the changes that accompanied the Crown-driven title, such as individualised interests.\textsuperscript{40} They drew on the historical evidence to contend that, although better-defined titles were necessary for development in the nineteenth-century Central North Island, New Zealand governments changed the system of land tenure too much, too fast, and without sufficiently consulting Maori communities. This was to the advantage of the settler governments and settlers wishing to purchase land, and to the detriment of Maori continuing to exercise authority and control over their lands.\textsuperscript{41}

From the perspective that Maori neither needed nor wanted the Native Land Court as it was constituted, the question arises why the Native Land Court system was created in the form it took. Claimants argue that the evidence in the Central North Island reinforces the findings of the Tribunal in other districts. The underlying and fundamental purpose of the colonial Parliament in passing the legislation that created the court, in their view, was to make land available for European settlement. This point is demonstrated by comments of the Under-Secretary for the Native Department, Lewis, in his evidence to the Native Land Laws Commission of 1891, where he noted that:
the whole object of appointing a Court for the ascertainment of Native title was to enable alienation for settlement. Unless this object is attained the Court serves no good purpose, and the Natives would be better without it, as, in my opinion, fairer Native occupation would be had under the Maoris’ own customs and usages without any intervention whatever from the outside. . . . the object of the Native Land Court is to ascertain the native titles for the purposes of settlement.\textsuperscript{42}

Central North Island Maori dissatisfaction with the Native Land Court as a way of determining land titles, claimants argue, is demonstrated by the many mechanisms they devised to resist its introduction and to mitigate its effects. These will be explored later in this chapter.

\textbf{The Crown’s case}

The Crown argues that the Native Land Court was able to sit at Maketu from an early date only because of support from a ‘significant portion’ of the local people. But even then, a ‘significant show of opposition’ could effectively paralyse the court.\textsuperscript{43} There is also clear evidence in the Central North Island that Maori sought the assistance of external adjudicators to assist in the determination of disputes over land ownership.\textsuperscript{44} Many Central North Island Maori, the Crown argues, saw that the Native Land Court met their needs in terms of generating legal titles to their lands, and they willingly brought land forward to be investigated.\textsuperscript{45} Maori accepted that certainty of title was important for successful participation in the developing pastoral economy, and they accepted that this would require new techniques for the ascertainment of title. In some of the early Taupo claims, for instance, this gave the Maori owners an actual economic and legal incentive to go to the court.\textsuperscript{46}

The Crown argued that the Native Land Court ‘could not be ignored, that it could not be imposed, and that it could not operate without the consent of the local people.’\textsuperscript{47}
Ngati Tahu representatives. \footnote{Subsequently, St George got his lease drawn up, and then redrawn, after Ngati Tahu objected to some of its conditions.} The claim to the land then known as Kaingaroa 1 was presented to the Native Land Court by Charles (CO) Davis and Henry Mitchell, acting for Josiah Firth, who planned to lease the land. Mr Stirling states that no boundaries were given in court, but that it seems likely the land was significantly different from that known later as Kaingaroa 1; indeed it seems to have been ‘an entirely different area’. \footnote{The lessors were a group of Ngati Raukawa. And at the same time, William Grace was trying to get the Paeroa land where he and his brother were seeking to establish a run before the court, but could not get the survey finished before March 1869, too late for the last court sitting before the appearance of Te Kooti at Whakatane, and his rumoured progress to Taupo, caused panic.} Settlers themselves thus played an important role in early Maori engagement with the Native Land Court. They were, moreover, picking winners before the court sat. This was entirely at odds with a key purpose of the court: that title determination should precede land transactions. (We discuss this further in the next section.) That is not to say that Maori were not anxious to engage with and to benefit from new economic opportunities and relationships with settlers who appeared to have a long-term interest in their region. Clearly, they did see the need to secure titles through the court in order to clinch lease arrangements – sometimes spanning some years to come – with the new settlers. As the Turanga Tribunal found, Maori were ‘extremely enthusiastic about the opportunities the colonial economy presented to them. They accepted that certainty of title was important for successful participation in the new economy’. \footnote{We might add that Taupo Maori also saw the survey costs looming, and the importance of the future rent moneys to pay them. But these early ad hoc arrangements at Taupo, and the role that settlers played in them, underline, in our view, the failure of the Crown to institute an orderly process of title determination through the new court through discussions with Maori themselves.} In the Bay of Plenty, Dr Pickens states that, in terms of completed cases, the first two Maketu courts ‘look to have been only modestly successful. The number of applications, he points out, had increased, though many were adjourned or dismissed because no survey had been done. In one substantive early investigation (Motiti Island, outside our inquiry area) tensions were evident. Fenton was evidently nervous enough about the potential for disruption that he shifted the third court to Tauranga – though another factor may have been nervousness about Te Kooti’s movements. At this sitting some of the larger Maketu blocks, notably Ohineahuru and Pukaingataru, were heard. These claims went to the heart of the complex history – past and recent – of Maketu, to the toa claims of Te Arawa that arose from their defeat of Ngai Te Rangi at the battle of Te Tumu in 1836, and the circumstances of Arawa reoccupation of Maketu at different times subsequently. In these cases, the court’s judgments led to rising tensions. McLean arrived in Tauranga, and shortly afterwards the court was adjourned, on his advice. The resident magistrate at Maketu had informed him that the decisions of the Native Land Court were producing a good deal of discontent and that a ‘serious disturbance’ was brewing. In the wake of this experience in the court, dissatisfaction with it became general among Te Arawa.

Wiremu Hikairo, the assessor who considered the Native Land Court processes at length in 1871, criticised the operation of the court at Maketu – instancing Pukaingataru which, he stated, had been brought into the court by an individual ‘when the whole of the Arawa were unwilling that the case should be brought before the Court’. In a similar way, he said,

most of the Arawa lands [at Maketu] were brought into Court against the wishes of the majority, who wanted to settle amongst themselves how the land was to be divided, and then to bring it into the Court for ratification...
trouble and expense'; and Petera Te Pukuatua of Ngati Whakaue stated that

the coming of the Native Land Court is premature. It would be far better if we met amongst ourselves, and, with the assistance of the Resident Magistrate, determined our subdividing boundary lines; these all settled, then the Native Land Court could, as a matter of form, do the rest.⁵⁶

The Native Land Court was much discussed at a huge hui to mark the opening of Tamatekapua meeting house at Ohinemutu in February 1872, and Te Arawa leaders took the opportunity to express to the Native Minister their ‘dissatisfaction . . . as to the working of the Native Lands Act’.⁵⁷

Two years later, in the context of the Crown having commenced attempts to purchase and lease in the Rotorua and Kaingaroa districts, a petition was sent to Parliament representing the ‘almost unanimous’ opinion of the Arawa people (as the Native Affairs Committee put it), objecting to the Crown’s land purchase and leasing policies. Within this context they were highly critical of the role of the Native Land Court. The chiefs who spoke in support of the petition told the committee that:

When the Native Land Court was established, the tribe refused to take advantage of it for a long time, but ultimately, upon the repeated assurances of the Government that the survey and investigation of the titles to their lands would not facilitate leases or sales, they allowed one or two pieces to be surveyed and put through the court. At once trouble and confusion arose. Men of no standing in the tribe began to lease or sell without the knowledge or consent of the acknowledged leaders of the people.⁵⁸

The Tribunal’s findings

The effect of the Crown’s failure to discuss with Central North Island Maori the purpose and processes of the Native Land Court so that they could make informed decisions about engagement with it can be seen in early court hearings in the region. In Taupo, the initiative passed to settlers anxious to secure their leases by bringing Maori lessors into the court. While some Maori were willing to enter transactions, these were poor circumstances in which to begin a new process of title determination. In Maketū, the Crown failed to consider the recent contested history between tribes of the region, and the impact of introducing a new title-determination process in such circumstances, to the prejudice of hapu and iwi and their relations with one another.

The Crown suspension of native land legislation in the Central North Island between 1873 and 1877

Why did the Crown suspend the operation of the Native Land Legislation between 1873 and 1877, and was this suspension Treaty-compliant?

In August 1873, the Governor exercised his statutory authority under section 4 of the Native Lands Act 1867, and suspended the operations of the Native Lands Acts over the Rotorua, Taupo, and Kaingaroa districts.⁵⁹ The suspension was renewed in September 1874 under the new Native Land Act 1873 and then lasted until February 1877.⁶⁰ The
suspension was justified in 1874 by the threat of civil unrest as a result of the tension between Ngati Pikiao and Ngati Whakaue which had been brewing over the Native Land Court’s findings in relation to claims to Maketu blocks. The purpose of the suspension and its effect are important contested issues in the inquiry.

The claimants’ case
Claimant counsel, and historians Ms Rose, Mr Armstrong, and Mr Alexander, argued that the suspension of the Native Land Court was a cynical move on the part of Crown agencies to prevent Central North Island Maori from gaining Crown-derived titles to land that they could then transfer to private purchasers. In this way, the Crown sought to monopolise purchasing in the region to the detriment of competition which would have gained Maori better prices for lands they wished to alienate.

The suspension of the Native Land Court, claimants suggested, was linked to the Crown’s leasing policy. Mitchell and Davis entered into leases over large areas of Rotorua, Kaingaroa and Northern Taupo on behalf of the Crown through the years from 1873 to 1876. A written condition of many of these leases was that the Crown would not be liable to begin paying rent until titles had been settled by the court. The suspension of the court, therefore, meant that Maori who had leased land in good faith were denied the chance to collect rentals on them for an indefinite period while the court remained suspended. At the same time, because they had entered into legal transactions with the Crown, either sales or leases, they were precluded from entering into arrangements with other parties.

As a result, claimants contended, Maori were denied revenue from vast areas of land for an indefinite period until title was determined. The Crown, in turn, capitalised on this to place pressure on Maori to accept advances, not on leases of land, but on its purchase. Claimants pointed out that the suspension of the Native Land Court removed a means by which titles to land could be debated while at the same time Crown purchasing continued. In the case of Te Puke block, for instance, Government purchase officers made their own decisions about who the ‘true’ owners of the block were, and bought accordingly, before other groups had had an opportunity to put their cases for ownership before the court.

If the Native Land Court was suspended to respond to Maori concerns with it, then its resumption in 1877 was clearly contrary to the wishes of many hapu leaders who continued to oppose it. The resumption of the court was clearly an action designed to favour the Crown.

The Crown’s case
Crown counsel drew on the work of Dr Pickens to dispute many of these conclusions. First, they cited accounts of the serious disturbances surrounding the Native Land Court to argue that its suspension was wholly justified in the context of the time. The Government, Dr Pickens argues, had good reason to believe that armed conflict would result if the court had not been suspended and it would have been irresponsible to let it continue to sit. Dr Pickens argues that a threat of similar violence prompted the 1873 continuation of the suspension, when continuing tensions at Maketu and more recent disagreement between supporters of the Kingitanga and Crown-aligned Maori over Te Tatu block were ongoing. Secondly, the Crown contended that the exclusion of private purchasing was not the principal reason for the original suspension of the court, but was a factor in the duration of the suspension. Overall, the Crown argued that it was appropriate for it to have a reserve power to suspend the court to promote law and order; its objective in doing so was to promote peaceful relations among tribes and hapu of the Central North Island region.

The Tribunal’s analysis
In our view, the Crown’s suspension of the native land legislation in the Central North Island in 1873 raises grave questions about the Crown’s motives. There are, however, two issues to consider: the assumption of this right by the Crown as a matter of policy, and its exercise of the right in the Central North Island in the particular circumstances of 1873.
The suspension power had been debated in Parliament in both 1867 and 1873. J C Richmond, defending the Native Lands Act 1866 against a move to repeal it the following year, stated that one of its key principles was to restore the power given to the Government in the Native Lands Act 1862 to suspend the operation of the court (a power not in the 1865 Act). The object was ‘to meet the need of a country which was at all times bordering upon a state of war.’ Surely the power to allow a virtual suspension of the Act, he said, was a political power; it should reside in the House, not in the court. In its own measure to repeal the 1866 Act, introduced later that year, the Government thus incorporated into the 1867 Act (s 4) the same provision for the Governor in Council to define districts within which the Act or any of its provisions might be suspended; subsequently, it was also incorporated into the Native Land Act 1873 (s 6).

In 1873, the Native Minister was Donald McLean, who had been the Crown’s chief land purchase commissioner before the wars, and before there was a land court. He had had complete control of the Crown’s purchasing in the period when only the Crown could buy Maori land. Speaking to the Native Land Bill at its second reading in the House that year, McLean stated that the Government felt strongly that they must not shrink from the responsibility in future of taking a more active part in the administration of the Native Lands Courts: that while these were allowed to exercise independently their judicial functions, circumstances might arise involving the peace of the country, and the Government would eventually become responsible for allaying any dangerous outbreaks that might arise out of land disputes and quarrels in cases where the title to the land was not clearly and properly defined.

He tied this specifically to a rule adopted by Chief Judge Fenton that judges should take account only of evidence presented in court (the ‘best evidence rule’), and explained the importance of the judge being able to access information not before him which might nevertheless be crucial to his reaching a decision. Judges, he said, ‘should not jeopardize the peace of the country’ by hearing only what Maori told them in court. The role of the district officers, evidently, was to assist in this respect. But McLean’s wider point was the responsibility of the Government for administration of the Native Land Court; he underlined this by stating that the House would be asked to vote the salaries of the judges annually, so that the House would, as he put it, ‘exercise a control over this branch of the Native service.’ This was, it seems to us, a very telling remark – quite apart from McLean’s view that political control over the judges might be exercised through the purse. We note the context of the ‘long-standing rivalry between Fenton and McLean’, and of Fenton’s determination in the early 1870s ‘to gain for himself and his Court as much influence over Maori policy as possible’, while McLean was anxious to secure the role of the Native Department.

But McLean, it seems to us, was losing sight of an important principle. As another member reminded him in the same debate, Maori criticism of the conduct of Crown pre-emptive purchases of Maori land had led to the view that the Native Land Court ‘should be instituted to be a barrier between the Government and the Natives – a Court to which the Natives could appeal for justice, and which was not liable to be swayed by the Government of the day or by any political influence.’

It was indeed precisely for that reason that Sir William Martin, former chief justice, had argued strongly in 1860 that, to be sure that sellers of land could offer good title, and that others were not being deprived of their rights, an independent tribunal should be established. Martin was particularly perturbed that at Waitara the Crown had taken ‘forcible possession’ of the land on the basis of the decision of its ‘own agent’, when those who wished to defend their claims had ‘no legal and peaceable means of redress, through any tribunal capable of entertaining their suit.’ In a pamphlet directed explicitly at members of the Imperial and colonial Parliaments, he challenged the qualifications of land purchase officials, as ‘agents for the purchaser’, to decide on the validity of objections made to the purchase, pointing to their lack of judicial power, and the lack of
safeguards and checks which accompanied their inquiry. All this was very close to the bone for McLean. It was on his watch that Crown payment was made to a small group of claimants at Waitara in 1860, despite the opposition of the wider community – an action that precipitated the outbreak of war in Taranaki. He did not emerge very well from the controversy over the outbreak of the war.

In terms of policy, then, we might accept that the Government thought it necessary when the country, in Richmond’s words, ‘at all times [bordered] upon a state of war’ to retain the power to suspend court sittings. But this is not what McLean was talking about in 1873, when the wars were over. Rather he was pointing to the need for closer supervision of what the Native Land Court was doing, and Government responsibility for ensuring that court decisions did not lead to disturbances of the peace. It is our view that the evidence points to the fact that McLean preferred to conduct Crown purchasing as he had in the past before a court was invented, that he believed this was the best way to secure land for settlement and that, as Native Minister, he was able to proceed as he wished.

Against this background we can look again at the Government’s decision to suspend the Native Land Court in 1873. The research presented gives an incomplete and fragmented picture of the discussions within the Native Department leading to the initial suspension of the court. In support of the Crown’s position, there is evidence that serious disturbances had threatened in late 1870 in Tauranga relating to matters of tikanga and who should greet Prince Alfred, the Duke of Edinburgh, on his arrival in the town, and further tension had arisen in early 1871 when the court held a title investigation of the Pukaingataru block. On the other hand we might note that in December 1870 the judge declined Arawa applications for an adjournment to Maketu on the grounds that the disturbance had not been related to court proceedings. The conclusion that a real threat to the peace had lasted beyond 1871 and might have been a genuine reason for the court’s suspension could also be inferred from the reaction of some of the parties to the resumption of the court in 1878. As we have seen, the resumption of hearings in 1878 of some of the Maketu blocks subject to toa claims led to an armed party of Ngati Whakaue occupying a redoubt called ‘Fort Colville’, and their firing a volley over the Ngati Pikiao pa. Though Dr Pickens suggests that Petera Te Pukuatua chiefly wanted to shut the court down, and though a flying visit by the Native Minister, John Sheehan, was the occasion for an apparent reconciliation between the iwi, tensions certainly ran high in early June. The Paengaroa hearings of the toa claims in mid-1878 also ratcheted up the tension, such that the judge adjourned for several days; and the day after judgment was delivered, when preparations for the issue of certificates of title were under way, men came to the court armed with ‘pointed spears’. No actual clashes were reported however.

Other evidence, however, suggests a more complex picture of the suspension of the Native Land Court. Crown historian Michael Macky, who considers the closure of the court in the context of his report about Crown purchasing in the Central North Island, argues that its suspension was applied to a much greater area than was required for the purported purpose of preventing civil disturbances at Maketu. While the threat of civil disturbances may have been a factor, the primary reason for the suspension in his view was to suppress competition in the market for Maori land. In response to the proposition that ‘the suspension of the Native Land Court in 1873 was done for the purposes of securing a monopoly for the Crown rather than to protect Maori interests’, Mr Macky told the Tribunal that:

I think that that’s probably the most important reason for it [the suspension]. The Crown also, I think, was concerned about the possibility of conflict in Maketu. A memorandum that Clarke wrote in 1874 to McLean where he recommended that the 1873 Native Land Act be suspended. He gave two reasons for suspending it. One being that Crown purchase activities, sorry, not Crown purchase activities but the conflict over land claims was likely to lead to conflict amongst Maori and also that the Crown needed to protect its negotiations from private interests. I think though that the area that the Act was
suspended over extended well beyond the location where Clarke was concerned about the conflict between different Maori groups and I think that the extent of the suspension was that the Crown was trying to protect its purchasing from private interference, yes.\textsuperscript{84}

Mr Macky, like other historians, cites correspondence of the Native Department which supports this conclusion. Crown purchaser Mitchell, for example, told a royal commission in 1881 that the Native Land Court was suspended ‘to discourage the interference of private individuals with Government negotiations’.\textsuperscript{85} Under-Secretary of the Native Department H T Clarke told the Native Affairs Committee in August 1874 that the restrictions were placed ‘mainly because of the feuds existing’.\textsuperscript{86} But in June 1874, when recommending to McLean that a new suspension be proclaimed, he stated it was ‘absolutely necessary[:] 1st to secure the Government in the advances already made. 2nd to prevent private parties coming in and increasing the difficulties of which the natives already complain.’\textsuperscript{87} These were the difficulties caused by the Crown purchase agents, about which Te Arawa ‘constantly’ complained.\textsuperscript{88}

Mr Macky concludes that, while the evidence about the reason for the original suspension of the Native Land Court in 1873 is not clear, it was extended in 1874 primarily to help the Crown acquire the land cheaply and free from competition from other purchasers.\textsuperscript{89} Ms Rose draws broadly similar conclusions. She shows that the Native Minister, Donald McLean, justified the powers of the Crown to impose such suspensions as being of value to both peoples who would benefit from the Pakeha settlement of the land. McLean saw the acquisition of the land by private speculators as detrimental to the colony’s progress.\textsuperscript{90}

This view of the Crown’s motives is supported not only by the broad extent of land covered by the suspension, but by the lengthy period during which it remained in place. Mr Macky, Ms Rose and others contend that, irrespective of the reasons for its introduction, the suspension continued long after any concerns there may have been over security had dissipated. They argue that it is no coincidence that the suspension continued until 1877, when the Native Land Purchase Act provided the Crown with a new and effective mechanism to protect its monopoly in this region. Mr Macky states, moreover, that the Government finally decided to end the suspension of the native land legislation in the region ‘so as to facilitate the completion of many of the negotiations opened by Davis and Mitchell.’\textsuperscript{91} In short, when the Crown needed the Native Land Court, it re-opened it. We are thus unconvinced by Dr Pickens’ argument that one reason why the court did not resume sooner was that there were too few applications for hearings. This, in our view, confuses cause and effect, in that parties would not have applied to have cases heard by a court that they knew was formally suspended, especially where this involved commissioning an expensive survey.

On balance, the evidence that the suspension of the Native Land Court was justified for the reason of keeping the peace is inconclusive. It is possible that this was a factor in the Government’s decision. Notwithstanding that, any possible threat to the peace was localised to the coastal Bay of Plenty and the suspension of the court over a wide area for several years was inappropriate in this context. We accept the arguments put by a range of historians that the extension of the suspension in 1874, and possibly its initial imposition in 1873, were driven predominantly by the Crown’s desire to protect its role as a monopoly purchaser of Maori land in the Central North Island and that this was to the disadvantage of Maori wishing to lease or sell their land on an open market.

Given our view that the Crown’s introduction of the Native Land Court into the Central North Island was in breach of the Treaty, it might on the surface seem inconsistent that we should consider the suspension of the court to be injurious to Maori and in breach of the Treaty. The point, however, is that this left Maori without legally recognised mechanisms for title determination during this period. Yet the Crown sent in its purchase agents. The suspension of the court was not accompanied by any provisions to restore control over titles to Central North Island Maori; in fact, as we have seen, the Native Councils Bills
of 1872 and 1873 – which provided for councils with some legally enforceable powers of self-determination and of title determination – were withdrawn. It is true that the suspension of the native land legislation did not prevent Maori and settlers from entering into leases or sales with one another, though it would have meant a fast dash to the Native Land Court once the suspension was revoked. But the Crown outflanked Maori and settlers who might have wished to conduct transactions. It issued a large number of proclamations under the Immigration and Public Works Act 1874, which prohibited private purchases or leases of lands which were proclaimed as being subject to leases or agreement to lease to the Crown. In September 1874, blocks within the inquiry region totalling over 900,000 acres were proclaimed, including Whakarewa in the Bay of Plenty, over 400,000 acres in Kaingaroa, some Rotorua blocks including ‘Parekarangi’ (80,000 acres), Pokohu (80,000 acres), and, in Taupo, Oruanui (30,142 acres), Tauhara Middle (96,000 acres) and Tatura West (25,000 acres). The length of the leases, which had to be specified, varied from 21 to 30 years. Thus Maori in the region could enter into transactions with settlers only outside these notified lands. The Crown, meanwhile, refused to pay rent until the Native Land Court had determined title. These aspects of Crown policy will be discussed in more detail in chapter 10.

The Tribunal’s findings

While it was not in breach of the Treaty for the Crown to retain the power to close the Native Land Court in circumstances where the peace was threatened, it was inappropriate for the Crown to send in purchase agents to enter into transactions when neither its own court nor any recognised komiti had identified who the right-holders were. This meant a reversion to the pre-war processes when Crown agents picked and paid owners whom they thought they could arrange transactions with, excluding other owners or pressuring them to take part in the transactions. Dr Pickens’ statement that the land purchase commissioners, beginning work in the Bay of Plenty in the early 1870s, ‘generally had to determine for themselves, from their local knowledge, who was probably entitled to sell particular areas of land and who was not’, misses the point. They should not, in our view, have been doing any such thing. If there was a genuine fear that court sittings would cause conflict, surely this was precisely the situation into which Crown purchasers should not have been sent to make their own decisions about who were owners, or who might be willing to sell. This, after all, was the lesson of Waitara. Clarke underlined it early in 1875 when he wrote to McLean: ‘[M]y opinion as frequently expressed to you is considerably strengthened that if we are to have peace the sooner our land purchase agents are out of the District the better.’

It was entirely inappropriate for the Crown to exercise its power to suspend its own titles court to benefit its interests as a land purchaser, or to benefit either directly or indirectly from its suspension. By suspending the court’s operations, by extending that suspension both in time and across a broad swathe of the region, and by sending its purchase agents to buy or lease land from those whose rights had not been determined, the Crown was in breach of its duty actively to protect Maori interests, and in breach of the duties of good government. That is, having established a system to adjudicate titles, the Crown set aside its own law and acted outside it. And having used the new tenure system, implemented through the Native Land Court, to deprive Maori communities of the exercise of authority over their lands, in direct violation of article 2 of the Treaty, it now used the suspension of the native land legislation in the Central North Island for the same purpose. Maori communities were prejudiced as a result by the divisive proceedings of Crown purchase agents and by land loss.

This issue is further explored in chapter 10, which examines land transactions during the period when the native land legislation was suspended.
Central North Island Maori and the Native Land Court from 1877

Did Central North Island Maori engage willingly with the Native Land Court when sittings began again from 1877? Did they consider it a useful institution?

We return in this section to consider the extent to which Maori engaged with the court after its sittings were reinstated in the region, and its usefulness to them. As we have seen, a great many sittings were held in 1878. But the court opened in Taupo as early as August 1877. The two notable developments during the period were the first court sittings in Ohinemutu in 1881, followed by Te Arawa putting many blocks through the court; and the decision of Ngati Tuwharetoa to engage in 1885, bringing the vast Tauponuiatia block into the Native Land Court the following year.

The claimants’ case

The claimants (as we noted above) argued that Central North Island Maori both individually and collectively brought their land into the Native Land Court either unwillingly, or because they did not fully understand the role of the court. Engagement might be unwilling if Maori feared that by failing to apply for title determination themselves, they risked losing their land to other claimants. Central North Island Maori also participated in a variety of new political movements as responses or alternatives to the Native Land Court after it was introduced. These were discussed in chapters 6 and 7. The 1870s and 1880s saw many political attempts by Maori throughout the motu to keep land out of the court or to regain control over its processes. These included, in Rotorua, the Putaiki, the Arawa Komiti, the Komiti Nui, and several other bodies. Te Whitu Tekau and the Repudiation movement shared similar aims. Nineteenth-century governments viewed these initiatives as threats to the Crown’s undivided sovereignty, and claimants argued that their failure to work constructively with them meant that Maori were forced to engage with the alien and alienating system of the Native Land Court. This was, claimants argued, a missed opportunity for real cooperation in land-title determination which would have allowed economic progress within a Maori title determination framework.

Claimants argued that the Putaiki, the Rotorua Komiti and the Komiti Nui sought to control or manage the activities of the Native Land Court and land alienation. Ms Rose describes the Rotorua Komiti and then the Komiti Nui as responses to land alienations and court hearings at Maketu, and these komiti sought to fulfil the function of the court by hearing Rotorua land issues themselves.

The claimants further argued that in cases such as Pukeroa–Oruawhata (the block on which Rotorua township was sited), and the Tauponuiatia application, Central North Island Maori brought land to the Native Land Court willingly, but on the misunderstanding, encouraged by Government officials, that the scope of its powers and investigations would be limited and that significant power to decide ownership would remain in tribal hands. Critical to Maori motives in allowing the court into Rotorua was the Fenton Agreement, whereby certain Rotorua iwi allowed the court to sit in the district as one element of a scheme to jointly develop and manage a tourist town with the Crown at Rotorua. The claimants’ position is that promises made by Crown representative Fenton of a greater tribal role in determining title to lands implicit in the Fenton Agreement and the establishment of Rotorua township were not honoured. And it was these promises, rather than an acceptance of the court as it stood in 1882, that led to their consenting to its entry into the inland lakes area. Once in train in their district, they argued, the Native Land Court was impossible for the Arawa leadership to stop.

In respect of the Tauponuiatia application, counsel for Ngati Tuwharetoa argued that the Native Minister, Ballance, and Lawrence Grace, Te Heuheu’s son-in-law, agreed on a strategy to persuade Te Heuheu to submit one huge claim for Tuwharetoa’s remaining papatupu (customary) lands, and that Te Heuheu appreciated the strategic importance of a single application for the entire block to...
avoid being forced into responding to numerous smaller claims over a large area. A single application was in fact ‘defensive in nature’. The objective was to put an external boundary around the remaining lands of Ngati Tuwharetoa to secure a declaration of their ownership from the Native Land Court, after which the hapu would manage their rohe potae, without involving the court.

The Crown's case
The Crown accepts that there was strong opposition to the Native Land Court in the Rotorua area in the 1870s. It argued however, that the argument of claimant historians that ‘most Maori’ engaged with the court 'because the system prevented them from doing anything else' is 'very much an overstatement.' This may have been the case in some areas such as Maketu, where some early applications were about the need to settle land disputes, and the work of land purchase agents had led to heightened tension.

But it was not so elsewhere, as in Ohinemutu, and in relation to many Taupo applications. Here the Native Land Court was introduced into the districts under the auspices of the relevant Maori leadership. The Crown noted that the Tauponuiatia application was made much later than in other parts of the Central North Island region; there was previously no support for the court in much of the Taupo district. Kaingaroa 1, Tatua, and the toa blocks involved contentious and often protracted hearings, and were always going to be difficult for Maori and the Crown to deal with.

The Tribunal’s analysis
The arrival of the Native Land Court in inland Rotorua: the Fenton Agreement and its impact: In 1877, as the Crown reinstated Native Land Court sittings in the region, Ngati Whakaue and ‘Rotorua natives generally’ were reported in the press to look on the court ‘with suspicion’; and the Putaiki, or council of Tuhourangi, to be visiting all the principal settlements in the Bay of Plenty to ‘unite the tribes’ in resisting surveys, Government sales and leases, and the introduction of the court. Opposition to surveys was evident in the levelling of trig stations by Maori in 1877; Gilbert Mair, the district officer for the Bay of Plenty region, stated that the Rotorua people ‘will not allow any surveys to be proceeded with under any circumstances.’

The Ngati Whakaue ‘committee’, he explained early in 1878, reserved the right to decide whether surveys would proceed; and it is clear that they saw control of surveys in the context of their broader policy of ‘deal[ing] with the Land and Law Courts.’

The Komiti Nui o te Arawa, formed in 1878, included Ngati Rangiwhewa, Uenukukopako and Rangitakeorere as well as Ngati Whakaue. As we have discussed in part II, it comprised 60 kaumatua. Among the purposes for which it was established was the investigation of titles. According to the resident magistrate, Herbert Brabant, the committee considered they ‘will have the confidence of the Natives, and could settle intricate claims better than the Court.’ They did not wish the Native
Land Court abolished, he said, for they saw a role for it in confirming their claims.\textsuperscript{107}

If this was the case, there was a clear unwillingness that the Native Land Court should be entrusted with title determination; even if it might serve a useful purpose in providing legally recognised titles. The Komiti Nui quickly began its work; by June 1880 it had ruled on at least 20 blocks, and was reported to be working well.\textsuperscript{108}

But this was to change with Crown involvement in the establishment of the town of Rotorua. The Crown saw the Komiti Nui’s announcement that it was planning to lay out a township near the hot springs as an opportunity, and Chief Judge Fenton was sent to come to an arrangement with Te Arawa. The agreement of 1880 reached between the Komiti Nui and Fenton, as we have seen, cemented the plan of a township to support the tourist industry. It offered iwi participating in the komiti the appealing prospect of deriving significant revenue from their lands without selling them and with the security of the Crown as a partner in the venture. The land was to remain in Maori ownership with leases of sections administered on behalf of the iwi by the Crown.

We have already discussed the terms of the agreement in chapter 6, which included the survey of the land, and investigation of the title to the block on which the township was to be sited, Pukeroa–Oruawhata, by the Native Land Court. Thus the court came to Rotorua. Though we have found that the Fenton Agreement was not negotiated in bad faith by the Government or Fenton, we have also found that some matters ought not to have needed negotiation. Maori title should have been decided by Maori according to their own laws. On this occasion, it seems clear that the price the Komiti had to pay for the agreement, and the economic benefits they hoped for, was the involvement of the court – made palatable perhaps, in the context of the broader agreement the Komiti sought, by its understanding that it would play an official role in title determination. We have pointed out that there was no shared understanding between the parties to the agreement about the role the Komiti Nui would play in the court. In any case, when the Pukeroa–Oruawhata case opened, the court said that the komiti had no standing, which left the komiti trying to play a limited role behind the scenes. The court set about determining ownership of the block on its own terms.\textsuperscript{109}

The Komiti Nui had already made its own determinations in December 1880 about the owners of at least some parts of the block before the Native Land Court sat to hear the case. The court, which gave judgment in June 1881, then found almost entirely in favour of Ngati Whakaue, rejecting the cases of Ngati Uenukukopako, Ngati Rangiwehehi, and Tuhourangi, and finding that Ngati Tuara and Ngati Kea had small interests deriving from their relationship with Whakaue. It disallowed the claiming of rights under take tupuna, on the grounds that ‘all the claimants are more or less connected’, and placed great emphasis on occupation.\textsuperscript{110} The court then asked Ngati Whakaue to submit a list of names of owners of the block. The Chief Judge, Fenton, instructed the court not to accept a list of names submitted by Whakaue which included those from other tribes out of aroha.\textsuperscript{111}

The impact of proceedings in the Pukeroa–Oruawhata case on Te Arawa, in our view, was very great. Crown officials clearly had an expectation that the hearing would break the staunch resistance of inland Arawa to the Native Land Court. The resident magistrate, Brabant, described the court sitting in relation to the township at the time as ‘the thin end of the wedge which will eventually open their lands to European settlement and enterprise.’\textsuperscript{112} When the block was being heard, the chief surveyor, S Percy Smith, also wrote ‘it is perhaps needless for me to point out that one Block having passed the Court, then the whole district will follow, and thus become available for settlement.’\textsuperscript{113} Both men were right. A rush of applications for surrounding blocks followed the Pukeroa–Oruawhata hearing.

We do not think this is surprising. Te Arawa had seen the Native Land Court in action on their core lands. They had seen the sidelining of the Komiti Nui. They had seen hapu interests which in the komiti’s view were not in question, rejected by the court. As the ‘women of Rangiwehehi’,
Makari Hikairo and six others said, when they applied for a rehearing, the Komiti Nui had previously recognised their interests ‘by reason of our claims under maori custom’. Te Arawa had seen the court query lists of owners, and the attempts of Ngati Whakaue to make the lists inclusive met with little judicial sympathy. Tuhourangi had had their claim for a rehearing rejected by Chief Judge Fenton, though they had discussed their claim to interests in the block with him during his mission to Rotorua.

There can be no question that the Native Land Court was now seen as unavoidable if hapu and iwi wished both to protect their interests and to secure economic opportunities. We accept that, as the resident magistrate, Herbert Brabant, suggested in 1882, ‘large rentals obtained by the leases in the new Rotorua township’ may have encouraged Maori to ‘put all their lands through’. And with the court established in Rotorua, advances and surveys now took on a new significance. Ms Rose and Dr O’Malley have reminded us of the advances which had been paid on various blocks. Mair reported in April 1881 on the ‘considerable sums’ which had been paid by the Crown to Ngati Tuara for the purchase of Rotahokahoka, despite Ngati Whakaue opposition, which had prevented a survey. Further advances had been paid to two hapu in Rotorua–Patetere. Private parties had embarked on a survey of Okoheriki, leading to protests from the Komiti Nui in May 1881 on behalf of many hapu.

It seems evident to us that from this point on Te Arawa leaders were, to a considerable extent, managing applications to and cases through the Native Land Court. Tuhourangi now sought a survey of the Rotomahana–Parekarangi block; they were the claimants, and were awarded the bulk of the block. Ngati Whakaue stated their intention of submitting a claim to the court for all their tribal lands. The people were also holding hui, with non-Arawa neighbours as well as within Te Arawa, at which boundaries were evidently canvassed and agreements sought about how lands were to be apportioned which could then be presented to the court. Hui were held at Horohoro, Paeroa, and at Tikitapu before the Rotomahana hearing; and Ngati Whaoa called a hui at Paeroa to discuss Tuhourangi’s boundary. The same kind of management also appears to have been under way in a number of other blocks, such as Te Taheke block, where the applicants were of Ngati Te Takinga and Ngati Pikiao, also Ngati Pukeko, and the boundary was gazetted as ‘the tribal boundary of Ngatipikiao’ (awarded to ‘Ngati Te Takinga and the “hapus” included in that tribe’). The application for the block, numerously signed, appears to have included rangatira of different, closely related hapu who would give evidence in court. In the Rerewhakaitu block, Tuhourangi and Ngati Rangitihi were the claimants; Rangitihi secured a major award, while Tuhourangi withdrew. In Whakapoungakau, Ngati Rangiteaorere, Ngati Pikiao, and Ngati Uenukukopako were among the claimants; all were awarded land. In Patetere–Paeroa, Ngati Whakaue were the claimants, and the block was awarded mostly to them. In Mangorewa–Kaharoa the claimants were Ngati Rangiwewehi and Ngati Rehu; the block was awarded predominantly to Rangiwewehi. The applicants in Rotomahana–Parekarangi were leading men of Tuhourangi; and the same was true of the Ngati Whakaue applicants in Rotorua–Patetere–Paeroa. These are examples of decisions made by the leaderships to control the process of securing titles for their lands.

By the mid-1880s, according to Dr Pickens, titles to more than 600,000 acres of Rotorua land had been decided. This is not to say that Te Arawa chiefs had been converted to the Native Land Court overnight. Rather, they had accepted its inevitability. We accept the arguments of claimants that, whether or not individuals or groups brought land to the court, the point is that they individually and collectively had no real alternative. The Crown did not use the period when the court was suspended in the region to encourage the committees to determine titles themselves. It did not take the opportunity to work with the Komiti Nui, or with the Putaiki, in 1881, and establish how the komiti title-determination processes might strengthen the work of the court. This was despite the Native Land Court Act 1880 empowering the court
‘to record in its proceedings any arrangements voluntarily come to amongst the Natives themselves, and to give effect to such arrangements in the determination of any case between the same parties’ (section 56). The chief judge was clearly the person best placed to have had discussions along these lines with Ngati Whakaue and with Tuhourangi; yet all we know about him suggests that he was unlikely to preside over a compromise of the powers of his court. Rather, he presided over its successful introduction into theRotorua area.

Despite Te Arawa engagement with the Native Land Court, however, it is evident that they continued to seek more power for their committees. In 1885, Ngati Whakaue told Ballance, then Native Minister, that they wished their committee to have the direction of surveys, and Retireti Tapihana added that ‘[t]he members of the District Committee have been elected according to law by the people . . . but they are quite aware that they have not sufficiently large powers to deal with all the subjects they wish.’ Tuhourangi sought to have their own committee legally constituted under the direction of the Rotorua Native Committee (formed under the Native Committees Act 1883). The 600 owners of the Rotomahana–Parekarangi block had elected a committee of 19 persons, but the Native Land Court would not recognise the komiti because 100 absentee owners had not endorsed it. Yet the komiti was hearing ‘a great many land disputes and other disputes.’ And in 1891 when Te Arawa petitioned the Queen for an elected representative council to deal with all Maori affairs, they referred to the failure of the ‘different Governments
of New Zealand’ to give effect to the terms of the Treaty of Waitangi. The petition, signed by nearly 5000 Maori, was organised by the Kahui Wananga Nui o Te Arawa. Te Arawa were prominent also in the Kotahitanga parliament, whose 1893 petition in support of its Federated Maori Assembly Empowering Bill had a great deal to say about the Native Land Court and the laws governing it since 1865; it complained that ‘the administration of the Native Land Court is becoming more and more confusing and unsatisfactory. It injures, but never benefits, the people . . . the laws of Parliament have made us appear an ignorant and inferior people.’

Like iwi and hapu elsewhere, Te Arawa would engage with the Native Land Court. Yet in other forums Arawa continued to express their opposition to the court’s far-reaching power over their lands. The Turanga Tangata report offers us some insight into this paradox. In Turanga, the Tribunal acknowledged that Maori who opposed the court at a political level were, at the same time, forced to engage with it or risk losing their lands. ‘Protest against the court did not translate into refusal to use it. Quite the reverse in fact. For some, un-investigated customary title must now have seemed too precarious. For all of its faults, the land court could at least offer an officially sanctioned title.’

The Native Land Court and Taupo–Kaingaroa lands: In Taupo the Native Land Court held several sittings between 1878 and 1884, once the suspension of the native land legislation was revoked, as well as other sittings involving northern Taupo lands which were held at Cambridge; while some Kaingaroa blocks were heard at Whakatane or Matata. Some sittings involved Crown applications for definition of interests it had purchased; others were subdivision applications and rehearings. As Dr Pickens states, the court appears to have moved into ‘a second phase [of] development’. But a number were still title-determination cases.

Dr Pickens suggests that there was less opposition to the Native Land Court in Taupo than in Rotorua, and in respect of northern Taupo leaderships this appears to be borne out by the evidence. When the return of the court to Tapuaeharuru was announced in 1877, unnamed Taupo Maori were said to be ‘greatly pleased’ at the prospect – but only because this meant title to lands they had leased to the Government could be completed, and four years’ rent paid. Tuwharetoa leaders had clear views on the purpose of the court. We have referred above to the views of the large hui held at Tapuaeharuru in September 1875 which considered a range of economic and political issues. From the public responses of the various hapu on the matter of the Native Land Court it is evident that they considered the suspension of the land Acts should be revoked; but that they sought conditions on the operation of the court in their district. These included a concern that investigation of title should come first, before survey and before any advance payments for land were made. Clearly these were seen as unwelcome infringements on the title-determination processes of the court, and as a cause of trouble. The 1873 legislation required a survey before the court could investigate title or partition land, but the Taupo hui identified the problems that pre-emptive surveying by one party or another could cause.

Despite the evident willingness of the hui to accept the Native Land Court, if care were taken with its operation, it is hard to see that court proceedings subsequently in a number of important blocks would have convinced the Taupo and Kaingaroa people generally that it was a useful institution as it operated in that period. Rather, at best, it would seem to have been useful to some groups of claimants, while others were disadvantaged. We instance briefly the proceedings in several blocks:

Runanga 1, 1877: The case of Runanga 1, a Kaingaroa block, shows the difficulties that faced communities when advances were made to some, who therefore wished to secure title from the Native Land Court, while others preferred to keep it at arm’s length. Runanga 1 first came before the court in 1872, brought by a single applicant. The majority of owners had not agreed to the application,
and did not wish it to proceed. The rest of their land had been confiscated. The court adjourned the sitting sine die.

In 1877 however, following arrangements made by Crown agents Mitchell and Davis to lease the block, the land came back before the court. As Dr Pickens says: ‘both the Government and those who had agreed to the lease now had a motive to take the land through the Court.’ There were a large number of people in the court, including some from the ‘Napier repudiation native party’ opposed to the case proceeding; but the next morning (perhaps after intervention by Gilbert Mair, the district officer) the case went ahead. The claimants belonged to three Ngati Tuwharetoa hapu, while Ngati Hineuropi appeared as counter-claimants. Their spokesman, Petera Te Rangihiroa (who had been imprisoned on the Chatham Islands) produced a letter from the Napier people asking that the court not adjudicate on a number of blocks, including Runanga 1. The Repudiation movement, as it was called, which opposed both the native land laws and the court, exercised influence well beyond its Hawke’s Bay base. Ngati Hineuropi supported the movement. The judge’s only answer on this occasion, however, was that if they did not like the outcome of the case, they could apply for a rehearing.

In effect, Ngati Hineuropi had little choice. Having failed to convince other claimants to withdraw their claims, they were faced with the alternatives of watching the Native Land Court grant title to the land they claimed to those others, or of entering the court process themselves. The judgment recognised their claims along with those who had brought the land into court; it also recorded Te Rangihiroa’s opposition and the court’s decision that, in the circumstances, it had no alternative but to proceed.

It is clear in this case that claimants who wished to remain aloof from the court ultimately found they had little choice when applications were filed by others. To this extent, as claimants have argued, the Crown provided no protection for those who did not wish to engage. The opposite was the case. Section 107 of the Native Land Act 1873 recognised that the Crown might make payments to some claimants, and allowed the court to investigate the title to the land in question, after the event. The court could then make orders for such ‘agreements’ to be completed and make awards to the Crown, or divide the land among the parties.

**Kaingaroa 1, 1878**: Kaingaroa 1 also came into the Native Land Court on the back of a number of leases transacted in 1873 and 1874, with Ngati Whaoa, Ngati Rangitihi, and Ngati Manawa respectively (see app). Ngati Manawa, with whom the Crown had entered into a lease of 136,000 acres of land in 1875, were the applicants, and were granted title to the exclusion of the many groups of counter-claimants. (We refer to the extent of customary interests in the block in our next section.) The Crown had taken over the lease entered into in 1874 by Gilbert Mair as a private citizen. Mair’s lease arose from his particular relationship with Ngati Manawa, who had during the latter part of the wars contributed men, along with Te Arawa, to his No 1 Company. By the time the case was heard in the Native Land Court, Mair was district officer, and provided a statement to the court in that capacity, which focused largely on the claims of Ngati Manawa. The requirements of natural justice, in this case, were hardly seen to be met.

The evidence strongly suggests that when the case was heard a number of groups did not attend the Native Land Court because they were opposed to it. These included Ngati Hineuropi (supporters of the Repudiation movement), and Ngati Whare and Ngati Haka Patuheueheu, who supported Te Whitu Tekau (the council of 70), the Tuhoe body which emerged from the war fought in Te Urewera and from its subsequent peacemaking. Te Whitu Tekau, established in June 1872, had been in communication with Government agents at the time. According to Judith Binney, agreement had been reached with McLean for ‘regional autonomy for the Urewera, and to recognise each chief as having the authority within his own district.’ Te Whitu Tekau sought subsequently to gazette and protect their boundary, so that no surveys, Native Land Court claims or transactions would take place within it. But the early appearance of Kaingaroa lands before the court...
showed that their policy would run into difficulties in the Urewera borderlands, as settlers sought leases there.

We instance Ngati Haka Patuheuheu as a group of claimants who hoped to protect their interests, in the circumstance of their commitment to Te Whitu Tekau, by making an arrangement with Ngati Manawa: first for the withdrawal of some land in which they had rights from Ngati Manawa’s boundary; and secondly, as they stated in a later petition, for their non-objection to Manawa’s application with respect to the Kuhawaea block, on the understanding that Manawa would ensure the inclusion of their own names on the ownership list for Kaingaroa. In the Native Land Court, however, once the Kaingaroa 1 block had been awarded to Ngati Manawa, and their list of over 300 names submitted, only a shorter list of 31 names was accepted by the court – despite the requirements of the Native Land Act 1873. The list included a few Ngati Haka Patuheuheu names only.

We discuss the court’s role in this hearing further in the next section. But we note that the case left many dissatisfied iwi whose claims had not been recognised by the court.

**Wairakei, 1881:** This was a valuable block because of its hot springs and geothermal attractions, and the Huka Falls; its purchase was negotiated in 1881 by prominent Auckland businessman Robert Graham. We refer further to its alienation in part v. In the Native Land Court itself, Poihipi Tukairangi and others of Ngati Rauhoto were the applicants, and there were many groups of counter-claimants, all of whom, except Te Heuheu, were represented by an agent, James Mackay. (Te Heuheu was represented by
his son-in-law, Lawrence Grace.) The case was heard by Judge MacDonald, who would soon afterwards become chief judge of the court. Graham, who it seems had paid advances (Mr Stirling says ‘in either goods or cash or both’) on the land, and had built a house on it for one of his workers, had some competition from the Crown in court. A further cloudy role was played by John Sheehan, a lawyer who was a former Native Minister, whom Mackay accused of working for the Government, but who acted initially for one of the counter-claimants (Panapa Nihotahi), and finally for the claimants. Towards the end of the fourth day, according to Dr Pickens, the judge said he could only stay one more day; Dr Pickens considers it ‘a mystery’ that he did not simply adjourn the case till the next hearing. Subsequently, agreements were reached out of court: Sheehan withdrew Nihotahi’s case and Mackay was permitted to select three of his clients to go on the title. Other claimants wished to pursue their cases. Dame Evelyn Stokes has pointed to a private letter written by Gilbert Mair (who was also in court) to the Native Minister Rolleston; and Mr Stirling has further referred to Mair’s diary – both of which shed considerable light on proceedings. Mair referred to the judge’s anxiety to leave, so that ‘the unfortunate counter-claimants were rushed through with their cases’ on the last morning. Three of the four groups had only the morning to put their cases; while according to Mair the interpreter (J C Young, a former land purchase agent who had been dismissed) added to the pressure on those speaking by his unofficial instructions to hurry up. Young, it appears, was in fact in the pay of Robert Graham. The court issued its judgment after lunch, finding in favour of Tukairangi and Ngati Rauhoto, but admitting Mackay’s clients (Ngati Te Rangiita and Ngati Tuwharetoa) to the title with the odd warning that such admission was ‘for the purpose of this case only and is not to be quoted against them in any future questions before the Court.’

The order was made in the names of five people only, when ‘scores of natives asked for the names to be read out that they might know who they were.’ The court, having been advised by Sheehan, refused this request. Title was issued under the Native Land Court Act 1880, which required all those entitled to be registered as owners. There was considerable anger in the court, the people exclaiming: ‘He Kooti Whanako, he Kooti Tahae [Thieving Court, Stealing Court].’ Mair reported to Rolleston that in his view ‘numbers of Natives were kept out [of] the certificate by unfair means . . . that a great wrong has been done the natives’; he hoped they would get a rehearing. A rehearing was finally granted, in the wake of strongly worded petitions, despite Judge MacDonald’s rejection of such calls; but the five grantees, as Mair put it, had been ‘worried into signing the Deed of Sale and Purchase the same night for about 2/6 per acre.’ By the time of the rehearing, the following year, the various aggrieved appellants melted away, either before the hearing started, or soon afterwards, asking that the original title issued in June 1881 be confirmed. While the factors leading to this odd outcome are not clear, it is evident that Lawrence Grace had been working with Graham since before the first case to help him obtain Wairakei. Dame Evelyn Stokes considered his role, ‘at best . . . ambivalent.’ The court did cut off a small piece of land for one of the appellants, but did not issue a fresh order – a move which might have jeopardised Graham’s title, since the Thermal Springs Districts Act 1881 had now come into force, banning private purchases throughout an area that included Wairakei. The title was antevested to June 1881, and finally signed by MacDonald, who had by then become chief judge.

**Tatua, 1867–1883:** Tatua was a large block (about 57,000 acres) which had a long and involved history in the Native Land Court extending from 1867 to 1883, when title was awarded, and the land was sold to James Grice, a Melbourne speculator, and William Moon, his local agent. The block was the focus of dispute, according to Mr Stirling, even before it first appeared in the Native Land Court at Taupo in 1867. It was the focus of tensions between the Kingitanga and Kawanatanga adherents, and Mr Stirling suggests that the court offered a new forum in which ownership might be asserted (especially by Kawanatanga hapu). By the late
1870s the Putaiki of Tuhourangi was also taking a close interest in the land, because it was adjacent to the Paeroa East blocks of which it was protective – and the Putaiki was hotly opposed to the proposed district-wide trig survey of Tatua and other blocks.

Here, we focus on the problems that arose in the hearings of 1882 and 1883, which stemmed from the history of earlier hearings of the block (the block had been before the Native Land Court over half a dozen times before 1883), the failure of the court to familiarise itself with the outcomes of early hearings (which meant it proceeded to a new hearing in 1883 although the basis for court orders had been laid in 1869 and a new hearing was not needed). In addition, the court did not clarify a survey plan used in 1883, and the outcome was a mistake in the awards made of several thousand acres.

The land was initially taken to the Native Land Court by Piripi Te Amo of Ngati Rauhoto, and an interlocutory award made to 11 grantees under the 1867 Act; a survey had to be made within 11 months. Chief Judge Fenton’s view was that all proceedings in the Taupo court of 1867 were illegal because more than 10 names had been inserted in the interlocutory order, and there were no sketch plans, and the cases would have to be heard again. The land was thus back in the court in 1868. More claimants were before the court this time, including Ngati Huarere and Ngati Hinerau; representatives of the north-western Taupo hapu were also present, claiming a large part of the block for Ngati Te Kohera, Ngati Wairangi and others. On this occasion the court gave judgment for Ihakara and his co-claimants, and made an interlocutory order, naming 10 grantees. The 10 owners were stated by Ihakara to be representatives of the hapu, but no other owners’ names were recorded.

After an appeal by Hitiri Te Paerata a rehearing was granted. The land was before the Native Land Court again in 1869, and rights of Ngati Te Kohera, Ngati Wairangi and others over western Tatua were recognised by the court, which issued two interlocutory titles (subject to survey within 12 months), dividing the land: Tatua East and Tatua West were created. The blocks were divided by a straight boundary line. This was a crucial moment in the history of the block. The grantees were selected by the claimants and named. Tatua East was awarded to Ihakara Kahuao (of the hapu of Ngati Hinerau and Ngati Rauhoto) and nine others, similar to the names earlier given by Kahuao for the entire Tatua block. But the rest of the owners were not named on the back of the title. Te Paerata gave in nine names for Tatua West, but the names were then withdrawn; and no title order was actually made.145

Lack of surveys during the 1870s (as well as the suspension of the Native Land Court) meant that two further appearances of the land before the court (1872 and 1877) passed without progress being made. As Mr Stirling points out, Tatua was ‘a flash point for the opposition to surveys’.146 But in 1877 the judge promised Te Paerata that ‘an order would be made in his favour for Tatua West, provided a survey was made.’147 Three years later, however, when Ihakara Kahuao and others claimed Tatua West, the court decided that the 1869 interlocutory order had expired and the claimants were advised to send in a new application when the survey was done.

It was at the 1883 court sitting that the history of the Tatua blocks came to a messy denouement. A survey had finally been completed in 1882, and there were 12 fresh claims for the block, or parts of it. The case began in Cambridge in 1882 (not Tapuaeharuru), by which time the blocks were drawn into the sphere of the private land companies such as the Patetere Land Company. A further feature of the case was the involvement of lawyers, notably John Sheehan (connected with the Patetere Land Company) and Walter Buller (the lawyer of Aperahama Te Kume and later of Te Paerata). Being unfinished in 1882, it was adjourned to a further hearing (in Cambridge) in 1883.

The Native Land Court’s decision to hear the case as a new claim, not as a continuation of previous hearings, was finally challenged by Buller – after some days of hearing, on the grounds that the first decision on Te Tatua (that of 1867) was the right one. As he announced his attention of taking the case to the Supreme Court, to compel an issue
of a certificate under that judgment, the case ground to a halt. (Eventually it appeared that he would not do so.) In the meantime, the Native Land Court had to decide what to do. Normally, as Dr Pickens points out, it would have decided which of the past decisions in the case was the correct one. The chief judge however ran for cover; his statement was contradictory in the extreme. He stated:

- First, that he would issue a certificate of title in respect of Tatua West, on the basis of the 1869 judgment; but in respect of Tatua East, he did not think title had been determined. The Native Land Court would investigate it further, either on an application already before the court, or on one which might yet be sent in.

- Secondly, that he would like it to be understood that, given that the matter might be referred to the Supreme Court, he ‘had not formed my decided opinion, nor do I express any at all. I furthermore put on record that what I have expressed is not to be taken as a judgment of the Court, or in any way binding upon its mode of dealing with the several matters involved should they be ultimately left to be dealt with at its own discretion.”

As Dr Pickens puts it, the chief judge ‘[h]aving made what was in effect a decision about Tatua West . . . went on to say that the Court hadn't made a decision.’ Dr Pickens concludes that MacDonald knew nothing about the Native Land Court’s previous dealings with the Tatua blocks; ‘very evidently’ he had not read the minutes concerning the cases from 1867 to 1877. Finally, when it became clear that Buller was not going to the Supreme Court, the Native Land Court made a title order for Tatua West backdated to 2 July 1883, based on the 1869 decision. It did the same for Tatua East. Dr Pickens states that by this time it would have been clear to the chief judge that his decision to hear the blocks afresh had been wrong: Judge Rogan in 1877 had ‘placed both blocks on the same footing’ – that of 1869. In both cases, the court had said titles would issue as soon as there was a survey. “The Tatua East owners had a Court order that said that; the Tatua West owners had a minuted assurance that this was what the Court intended to do.”

But at this point, things went wrong again. This was because of an error with the survey plan, which was to have serious consequences. The Native Land Court used the plan prepared by the surveyor Gwynneth, at Te Paerata’s instruction, as the basis for the title order for Tatua West issued in October 1883. This was not in fact a map of the 1869 boundaries of Tatua West, but a map of Te Paerata’s 1883 Tatua West claim. The map ‘put the 1869 boundary line between [the two blocks] in the wrong place, transferring several thousand acres of Tatua East into Tatua West.” It also included a Ngati Rauhoto kainga. The mistake was not evidently picked up before title was issued to Grice and Moon, the purchasers, at the end of the year. As a result of the mistake, part of Tatua East was also conveyed to Grice and Moon, and the court subsequently found it could not issue title for the original Tatua East block because of the inclusion of part of it in the certificate of title issued to Grice and Moon.

It is unclear, in Dr Pickens’ view, who was responsible for this latter mistake; it may have occurred either in the Surveyor-General’s office or in the Native Land Court, when Te Paerata’s 1883 map was mistaken for the block defined by the court in 1883. He suggests that the fact that the boundaries were only cut on the ground at the beginning and end of the line, not along its length, may have been a contributing factor.” That Gwynneth did not give evidence about the survey, as was normal – perhaps because of his tense relations with the court at the beginning of the hearing – may also have been important. (Gwynneth was involved in an unusual stand-off with the court when he initially refused to hand over the plan he had done, evidently because he did not have his costs guaranteed.)

Either way, this was a case in which all claimants were prejudiced by evident incompetence on the part of the Native Land Court, which led to unnecessary (and costly) hearings, and a delay in the issue of title. The further mistake with the boundary – whether that of the court or the Surveyor-General’s office, leading to the transfer of several
thousand acres into the wrong block (Tatua West), was of great prejudice to the Maori owners. Despite petitions, despite the concern of the Justice Department, and despite the admission of a later chief judge that ‘a mistake has been made’, and that compensation might need to be considered, nothing had been done for the owners of Tatua East by 1900.\(^{152}\)

It does not seem to us that the protracted hearings in Te Tatua were the responsibility of disputatious Maori, as the Crown suggested, unless it refers to the general suspicion of survey and the court which initially delayed proceedings. The problem, rather, lay with the court itself.

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**If the Court does not understand the law it administers, what is the position of us natives?**\(^{153}\)

Aperahama Te Kume, June 1883

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**Tauponuiatia, 1886:** We have already examined in some detail, in part II, the circumstances in which Te Heuheu made a decision to file the Tauponuiatia application in 1885 – and thus to engage with the Native Land Court on his own terms. We have considered the broader context of the concerns of the iwi of the Rohe Potae alliance to hold their lands against Crown and settler encroachment, and to hold the Native Land Court at bay, in our discussion of the Rohe Potae petition of 1883, sent to Parliament by Ngati Tuwharetoa, Ngati Raukawa, Ngati Maniapoto, and the Whanganui tribes. We have drawn attention to the wish of the iwi to define their own boundaries; and to the fact that the Native Minister, John Bryce, had given an undertaking that a single outer boundary would be surveyed for all four tribes; that native committees had been given the means to inquire into titles, and that they could have a native committee for the district as soon as it was needed. In our view the machinery existed to honour this undertaking, a district committee representing all the Rohe Potae tribes, could have been created under the Native Committees Act 1883 to make the initial boundary determinations. Tribal komiti could then have proceeded to define hapu titles by the declaration of smaller districts under the Act. There was no need to have sent in the Native Land Court. The Crown, however, working through the Graces, had sought the Tauponuiatia application, and may even have arranged for the claim to breach the Rohe Potae. It was aware of Te Heuheu’s concerns to protect Tuwharetoa lands from the evident extension of the Ngati Maniapoto boundary. At the very least, we found, the Government did nothing to allay those concerns; though the four tribes themselves seem not to have worked to resolve the matter among themselves as they might have. Having said as much, we repeat that there was no reason why the four iwi could not have decided their own titles if the Crown had surveyed the external boundary of the Rohe Potae lands.

The Tuwharetoa application to the Native Land Court, dated 31 October 1885, was estimated by Lawrence Grace to cover about two and a half million acres. The court opened in Taupo in January 1886. The claim was a tribal one, and the evidence supports the claimants’ contention that Ngati Tuwharetoa wanted to subdivide the tribal rohe for their hapu, through their own komiti. They set up their komiti for this purpose, but the Government did not recognise it or give it any powers. Our view is that by the time the Native Land Court opened, Tuwharetoa expected – given the Crown’s response to their komiti – to subordinate the land themselves in the court.

Once the court opened, it adjourned ‘to allow the assembled Maori to discuss their issues’.\(^{154}\) From that point, Tuwharetoa komiti chaired by Te Heuheu arranged the case and the subdivisions. Ngati Maniapoto asked for the boundaries of the claim to be revised and Ngati Tuwharetoa selected a working party to revise the boundaries. A couple of days later, Te Heuheu described his revised claim. By 22 January, as Mr Stirling notes, the tupuna, iwi, and hapu for the vast block had been determined in just a few days.

In the wake of these decisions, as we have seen, Ngati Tuwharetoa were faced with a decision whether to hand in names for the whole block, or to proceed to subdivision. In the expectation that the land would be managed by block
and tribal committees, Tuwharetoa proceeded to subdivision. Many of the discussions were held out of court, as the court adjourned so that they could take place. Henry Mitchell recorded the benefits of such an approach:

Numerous subdivisions which were made under voluntary arrangements amongst the owners themselves – thereby relieving the Court of an immense amount of trouble and tedious work and removing all anxiety as to possible applications for rehearings in respect of the cases so arranged.\textsuperscript{155}

Over a period of 17 months, the court made interlocutory orders for 138 blocks, as well as 25 orders vesting land in the Crown.\textsuperscript{156}

In short, Ngati Tuwharetoa did their best in the circumstances to manage their lands through the Native Land Court themselves. But we are in full agreement with Tuwharetoa about the limits of the process. The tribal komiti, their counsel pointed out, ‘was facilitating the work of the Native Land Court, but was given no role in assisting the court.’\textsuperscript{157} And above all, there would have been no need for such concentrated periods of sitting, processing so much land so fast, if their wish to manage the lands themselves had been respected. The process was not trouble-free. Nor is this surprising, given the scale of the undertaking. Dr Pickens has shown that some 80 per cent of the court’s awards ‘produced no formal protests within the time frame allowed for rehearing applications’.\textsuperscript{158} But the remaining 20 per cent did produce applications. Mr Stirling points out that applications began to come in before title had even been issued, which meant that they could not be dealt with as they were ‘premature’. Various examples are given. Hohepa Tamamutu and others of Ngati Te Rangiita, Ngati Tarakaiahi, and Ngati Rauhoto sought a rehearing in May 1886 of three western blocks because they were unaware that the blocks were being considered – they knew of no survey, nor that a claim had been filed for the blocks in question – and they had not been heard: ‘[Too] late was (our statement of) our rights upon that land, and our occupation, and our mana, and our houses, our dead, and our cultivations.’\textsuperscript{159} Others had been away at clashing Whanganui court sittings. Even after these early applications had been set aside, 21 ‘properly prepared’ applications, covering about 20 per cent of the divisions named in the Tauponuiatia judgment, remained.\textsuperscript{160}

Mr Stirling shows that those who appealed had a range of concerns with the Tauponuiatia hearings. Some criticised the haste of the initial title determination and tipuna for the block, as well as the hapu to be included in ownership of its subdivisions; this might mean that those who arrived late had to ‘fit into the court’s existing determination as to tipuna and hapu in an effort to obtain a place on the block lists, rather than state their actual claim from other tipuna.

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{hohepa-tamamutu.jpg}
\caption{Hohepa Tamamutu. This studio portrait was taken some time during the 1870s by Samuel Carnell of Napier.}
\end{figure}
and on other grounds. Some were confused by the Kahiti notices, and failed to attend because they thought only succession or subdivision cases were being heard; others, aware of their lack of experience in the Native Land Court, complained of the role of Pakeha agents, Government agents and, in particular, the Grace brothers, assisting the claimants against the counter-claimants. Some thought the rapid management of lists of names disadvantaged them, and at least one woman, Amiria Te Tomo, who wrote with 21 others from Waipapa, objected to what she considered was the omission of women from lists: ‘for the land was not given by God to the men only among our ancestors, or by our ancestors to our men only, but rather to the men, the women, and the children’. Applications from Hitiri Te Paerata and from Taonui Hikaka in respect of various west Taupo blocks arose from early decisions of the court about how to proceed in respect of those blocks. We consider the applications of Te Paerata in the next section. All but one of the applications for rehearing were rejected.

Ngati Tuwharetoa thus gave engagement with the court processes their best shot. It is evident that some communities may have been left behind as tightly managed title determination proceeded at speed. For the wider tribe, however, it does not seem that the ultimate results of the court process were what they intended either. We consider these matters further in later sections.

The Tribunal’s conclusions and findings

In respect of iwi engagement with the Native Land Court in the region, post-1877, we consider that:

- Te Arawa were drawn into the Native Land Court in the context of negotiations by Chief Judge Fenton, the Crown representative sent to negotiate for land for a township at Rotorua in 1880, with some of their communities.
- Likewise, the Crown was anxious to open the Rohe Potae lands for settlement, and to secure Ngati Tuwharetoa engagement with the Native Land Court, and Tuwharetoa decided to apply to the court in the context of the Government’s failure to meet Rohe Potae wishes for a survey of their external boundary, or to allay Tuwharetoa’s concerns in respect of the extent of Ngati Maniapoto land claims (though the Rohe Potae iwi, we consider, might have moved to resolve such concerns among themselves).
- Tribal leaderships of the Central North Island had made it clear to the Crown that they wished to inquire into their own titles, rather than that the Native Land Court adjudicate on them; the Crown however rejected these wishes or, in the case of the Native Committees Act 1883, acted on them inadequately.
- Both the Komiti Nui and the Ngati Tuwharetoa Komiti set up to decide titles were sidelined – though the Komiti Nui certainly thought it had negotiated a role for itself in court proceedings (the chief judge was not present in court to clarify the position, because he had negotiated with the komiti as the Crown’s representative).
- When it was clear to the leaderships that engagement with the Native Land Court was the only way allowed to them to protect their lands, and to gain legal titles – which they understood were necessary for participation in the developing colonial economy – the next step was to try to manage their various lands through the court, and to retain, as far as possible, control of the process. Both the Komiti Nui and Ngati Tuwharetoa, however, had embarked on applications to the court in the expectation that they would participate in title determination and management of their lands.
- Where tribal leaders did shepherd blocks through the Native Land Court, we find, with the Turanga Tribunal, that ‘the ease with which so much land passed through the court paradoxically confirms that the court itself was an unnecessary imposition.’
- While we have not examined the process and outcomes of all Central North Island cases before the Native Land Court in the period from 1877 to 1885,
it is clear that some of these high-profile cases would have given Maori cause for concern, in various ways:

- in Runanga 1, right-holders were drawn in to the court against their wishes;
- in Kaingaroa 1, a block in which many communities claimed customary rights, the block was awarded solely to the applicants, and then only to a small number, despite their attempts to include several hundred people on the memorial of ownership, while the role of the district officer in court was seen to be compromised by his relationship with the applicants;
- in Wairakei, a valuable block because of its hot springs and geothermal attractions, the court was perceived to have favoured the case of the claimants at the expense of other groups, only five people were named in the title order, and the settler purchaser of the land, Graham, was seen to conclude his deal the night the judgment was issued;
- in Pukeroa–Oruawhata, Tuhourangi found their application for a rehearing turned down by the chief judge, who they were aware had reached an agreement with Ngati Whakaue about land for the township before the hearing – when he wore a different hat as the Crown’s representative; and
- in Tatua, after a number of hearings spaced over more than a decade, the court was revealed in 1883 to have held unnecessary and costly hearings because of errors on its part; all claimants were prejudiced by these errors, and by delay in the issue of title; and the further mistake with the boundary – leading to the transfer of several thousand acres into the wrong block – was of great prejudice to the Maori owners.

We find, therefore, that:

- The Crown’s failure to engage with, and support, the many initiatives that Central North Island Maori took to try and manage the process of title transformation outside or alongside the Native Land Court showed a lack of good faith by the Crown towards its Treaty partner.
- Despite this, the Crown persevered with its own title-determination process, even though it was evident that the Native Land Court was not always acting or being seen to act impartially, and though it was not always seen to be competent.
- Participation by Central North Island Maori in the Native Land Court process, whether individually or collectively, cannot be interpreted as an endorsement of the Crown’s title-determination system as a whole. Ultimately, as the Crown made clear, there was no alternative to the court.
- In all these respects the Crown was in breach of the Treaty principles of partnership, autonomy, and active protection.

The Native Land Court’s Determination of Customary Interests

Key question: Was the Native Land Court the appropriate body to determine customary interests in the Central North Island?

Over the course of a little more than a generation, from 1865 to 1900, the Native Land Court ruled on the ownership of almost all the land in the Central North Island region and created, in a binding and immutable fashion, Crown-derived titles defining who were the absolute owners of distinct parcels of land. Map 9.1 shows that almost all the blocks in the district had been subject to title hearings before 1900.

So far, we have found that the court mechanism was initially imposed on Central North Island Maori without consultation and without their consent, that the Crown failed to adequately explore alternatives to the court, and that it created a court system in which Maori who wished to sell or lease any part of their land had to participate in.
secure title. It remains, however, to examine just how effective the system that the Crown put in place was at awarding title to Maori lands in a way that recognised customary interests and met Maori aspirations for the future use of their lands.

Questions which will help us in making this assessment include:

- Did Native Land Court title-determination processes provide adequately for the recognition of customary rights?
- Were Maori concerns about Native Land Court title-determination processes mitigated by the role of assessors in the court?
- Did the Crown provide adequate recourse for Maori dissatisfied with decisions of the Native Land Court?
- Did the Native Land Court deal fairly with those who had fought against the Crown in the wars of the 1860s?

Title-determination processes and customary rights

Did Native Land Court title-determination processes provide adequately for the recognition of customary rights?

It is almost a truism that the titles created by the Native Land Court did not exactly reflect customary patterns of land ownership. As claimant witness Paul Tapsell put it in relation to Mamaku:

The complexity of hapu rights and responsibilities in the Mamaku after 14 generations of genealogically-ordered marae-negotiations did not lend itself to being lineally surveyed as boundary lines on a survey map.

As a result the 1884 Native Land Court hapu partitions in the Mamaku can only be read as rough approximations.

As a result of the 1884 non-customary process of dividing the Mamaku lands, the Crown created an inaccurate picture of true mana o te whenua as previously exercised.165

The establishment of a court which interpreted Maori custom and land tenure according to its own lights is an important aspect of the claims against the Crown. We have already reviewed the nature of customary Maori land rights in the Central North Island in chapter 2 of this report. Here, we consider the extent to which the Native Land Court and the new tenure system were equipped to give recognition to the interests of those who appeared before it.

Above all, it should be understood that Maori relationships with land were complex. In chapter 2 we introduced the idea that the strongest land and resource rights derived from a number of sources: from descent (take tupuna), ultimately from the original discoverer or namer of lands (take kite whenua hou or tapatapa whenua), and from continuous habitation (ahi ka roa) and continuous use of resources over generations. However land rights could also derive from conquest (raupatu), though such rights had to be reinforced by occupation; and were often consolidated by intermarriage with those previously established in possession. Gifting (tuku whenua or takoha) also conferred some rights, but in our understanding they tended to be impermanent; the mana of the land remained with those who made the gift.

A hapu – a kin group or community with common descent – held collective rights in land through that descent provided that they continued to live on it or to use its resources. The collective right to land was the basis of the operation of hapu as political and economic units. Collective hapu lands were managed under the authority or mana of rangatira on behalf of and with the endorsement of the community. Individuals or whanau might be given rights to cultivate land or to harvest particular resources, but the ultimate rights to the land remained with the community itself. If whanau ceased to cultivate or
use land or allocated resources, their particular association with it would diminish and the land would be considered at the disposal of the community.

A community’s sphere of influence, however, was not ringed by boundary lines. Complex relationships developed between kin groups over generations, and interconnected genealogies meant that a number of kin groups might be able to claim use rights in all or part of a given area. Rights to use certain resources could be ‘overlapping’, and arrangements reached whereby different kin groups could access them under various conditions and at various times. This was especially the case in lands where resources were collected, rather than planted. Underpinning such arrangements were shared understandings about mana, and about rights, obligations, and reciprocity.

We acknowledge in particular the submissions made by hapu and iwi of the Central North Island region on tikanga or custom law governing rights in land and resources.

The claimants’ case
Claimants’ arguments are broadly that the Native Land Court was not an appropriate body to determine title to Maori land, and that it did this poorly. They point out that this is a view shared by almost all scholars of this issue in recent historical inquiry.166

Dr Loveridge, Dr Ballara, and others observe that in the period before the Native Land Court era, some Crown officials did have very good understandings of how native land tenure operated, but that this did not come to be reflected in the court.167 Claimants contend that, although Crown officials were aware of the principles of Maori land tenure, the Native Land Court as it was constituted distorted narratives of tribal law. As a result it distorted land ownership patterns.168

Claimant arguments draw on the evidence of Dr Ballara,169 who writes that:

Every Land Court judgement involved the compromise of customary tenure and destroyed former community ties. The Court was unable to recognise such factors as the complex of shifting relationships with the land that was the reality of Maori land tenure; the different degrees of rights derived from ancestral occupation, overlaid by conquests and defeats; the layers of boundaries imposed on the land by different ancestors at different times in the past; the network of individual inheritance of interests; the delicacy of relations between at-one-time defeated peoples permitted to remain on the land by their one-time conquerors with whom, over time, they had intermarried. The Court could not recognize the obligations imposed by the reciprocal relationship between chief and follower, between the giver and receiver of gifts, including gifts of land.170

Dr Ballara also draws attention to the contradictions caused by ‘[p]resumed parallels between English concepts and Maori usage’: in particular, the Native Land Court placed an undue emphasis on ‘occupation’ – meaning houses and cultivations and visible boundaries – over other forms of resource use.171

Finally, in addition to causing land loss, claimants suggest that Crown awards themselves distorted tribal identities. When certain hapu were awarded lands in the Native Land Court, individuals would chose to identify with these winning lines rather than those who had lost in court.172

The Crown’s case
The Crown stressed that Central North Island Maori sought fundamental change in the form of title under which their land was held in the late nineteenth century. On the basis of this, the Crown’s response to allegations that the Native Land Court failed to reflect the complexity of Maori landholdings in its decisions is that no body set up to adjudicate on permanent titles could have satisfied all parties. In accepting the court, the Crown implied, Maori implicitly accepted some titles would be changed. ‘It is inconceivable’, the Crown argued, ‘that any new tenure system could have adequately accommodated for the complexities of the original customary rights’.173 Further,
the Crown argued that in exchange for imperfectly representing tribal ownership, the court offered certainty of title, and precise boundaries, which the Gisborne Tribunal noted was necessary for successful participation in the new economy. Some Native Land Court determinations, including those based on voluntary arrangements among the community of owners, would be compromises, in an attempt to try and accommodate some of the different types of pre-existing customary rights. In some cases also the parties made pre-hearing agreements which involved some exchange of rights, and the new titles recognised the kinds of agreements made. Thus the new land title system did not transform Maori land ownership in a way that was overwhelmingly contrary to Maori wishes.

The Crown noted the Turanga Tribunal finding that Maori, nationally and in Turanga, did not accept the need for an external adjudicator of land titles, but argued that evidence in the Central North Island inquiry raised the issue of whether some of the most contentious disputes, at least at an intertribal level, could only have been resolved by such an adjudicator. There is evidence in this inquiry, the Crown argued, that Maori sought the assistance of external adjudicators to assist in the determination of disputes over land ownership, for instance the toa claimants seeking a ‘judgment’ from McLean in 1875 in a ‘quasi-judicial investigation.’ Many Crown officials did genuinely believe that an independent tribunal was essential in a region where there were many intertribal disputes. Traditionally, as Dr Ballara points out, multiple and layered rights were often hotly disputed. Crown historian Dr Pickens argues that the value of the court as an ‘impartial’ party in settling disputes over Maori land meant that it could reach permanent settlements to land disputes in ways that tribally based committees could not. Organisations such as tribal committees, while sometimes useful for settling disputes within iwi, he contends, did not have the mandate or the authority to settle disputes between iwi that the court offered.

**The Tribunal’s analysis**

Our concern here is to consider the evidence before us in relation to the appropriateness of the title-determination processes of the Native Land Court introduced by the Crown into the Central North Island region. Was the court adequate to the task of deciding on appropriate recognition of a range of customary interests? Was it a suitable forum for disputes over customary rights to be decided?

It is true that the transformation of customary ownership into new forms of title was always going to pose challenges to Maori owners. But, as the Turanga Tribunal has pointed out, ‘the Native Land Court removed from Maori communities (where that power had resided) the power to control the nature and distribution of land rights both within and between those communities.’ It did so, we might add, at the crucial moment when, in the wake of the wars, communities in the Central North Island were facing the arrival of more numerous settlers, themselves eyeing lands which had been closed to them. Maori were not the only ones hoping to benefit from the developing economy. The question of how best to manage their economic relations with settlers and how to strategise the use of their lands, was now upon them. But the Native Land Court had arrived too. The result was that decisions involving the careful balancing of various customary rights and of the take on which they were based, decisions which should have been made by those with extensive knowledge of whakapapa, and which should have been made collectively, were instead arrogated to individual (or sometimes dual) Pakeha judges who – as the Rekohu Tribunal noted – could only ever be ‘outsiders looking in’:

No matter how well meaning the judges may have been, and no matter the extent of their former experiences with Maori, the tendency, which was only natural, was to conceptualise of native custom in terms of their own concepts and experience. The tendency was also to cope with customary complexities by reducing them to overly simplistic rules, and then to apply them without the customary pragmatism of Maori or the Maori sense of justice.
It is not within our jurisdiction to reconsider the judgments of the Native Land Court. We wish, however, to make some general points about the nature of the court hearing process. The Crown's historian, Dr Pickens, has suggested that the court was an appropriate body for the purpose intended. It might resolve disputes where Maori themselves could not reach agreement. The judges were generally knowledgeable about Maori law and custom, and assessors provided the expert Maori knowledge required.

It seems to us, however, that there is no escaping the crucial point that the arrival of the Native Land Court meant a fundamental shift in processes of deliberation on and assessment of customary rights. A reading of the summaries of judgments delivered by the court in the Rotorua and Kaingaroa regions, recorded in the reports of the Nga Mana Whenua o Te Arawa team, is instructive. At the outset, the blocks brought before the court were often very large. Many kin groups had interests in them. The decision-making was then solely in the hands of the court – the Pakeha judge, with the Maori assessor from out of the region. It was they who made the calls on a range of difficult matters:

- the importance of various ancestors in the history of the block;
- the relevance of different descent lines;
- what constituted 'occupation', and what did not;
- the significance of particular battles and the rights they gave rise to;
- the significance of intermarriage between kin groups which might be closely related and live in proximity to one another;
- the placing of survey boundaries to delineate the interests of different hapu and iwi;
- which claims would be deemed successful and which would not; and
- the relative interests of various kin-groups.

Given the complexity of these matters, it is not surprising in our view that Maori maintained throughout this period the importance of their securing the right to determine their own titles. The Komiti Nui, we should remember, comprised 60 kaumatua. The transformation of layers of customary rights into the inflexible new titles was a job for experts, not for outsiders. It required a knowledge not only of whakapapa, but of which relationships were crucial ones, and of the dynamics that underlay those relationships. It required a knowledge of which divisions of land would work, and which would not. It required an understanding of the vicissitudes of the distant and the recent past, and how they had impacted on different groups; and of the emergence of newer groups as part of the age-old processes of hapu formation. It required also a finely balanced appreciation of how rights surrendered in one area might justly be compensated for in another. Above all, it required consensus among those whose rights were at stake – even if, on occasion, this might take time. And in our view it clearly required an absence of pressure and outside interference in the form of payments to some individuals or groups before title had been determined.

In the examples we discuss below, various issues emerge:

- whether, in cases of multiple, overlapping or contested rights, the Native Land Court was able to resolve them to the general satisfaction of the various groups of claimants;
- the extent to which tribal leaderships could make decisions outside the Native Land Court – about boundaries and admission of hapu into particular blocks – which would be accepted inside it; and
- the adequacy of the new title system to reflect the range of customary rights.

For the sake of clarity, we have presented examples of the Native Land Court's determination below by region; but each helps us towards an understanding of the issues above.

**Maketu and the toa claims:** The Maketu blocks, which were greatly contested in the Native Land Court in the late 1860s and early 1870s, were drawn to our attention in this inquiry. The role of the court in such circumstances is of interest to us here.
As in other parts of New Zealand, the history of Maketu was one of upheaval in the 1830s, in the wake of broader conflicts, the movement of iwi and sometimes supra-iwi taea (notably those from Tai Tokerau) often armed with muskets, throughout the island in pursuit of both traditional and new economic objectives. Maketu, the landing place of the Arawa waka, was a place of origins, of great significance throughout the region in terms of history and identity. It had always also been a place of huge political and economic importance, and the emerging importance of the flax trade increased its economic pull. Until the musket wars of the 1830s, the descendants of Te Rangihouhiri (whose arrival at Maketu was a defining moment in the history of the area) dominated the Bay of Plenty coast, having taken it from Tapuika and Waitaha several generations before. Tapuika and some Waitaha had remained on the land alongside Ngai Te Rangi and later claimed that their mana whenua had not been extinguished. In a series of conflicts in the 1830s, a broader Te Arawa force helped Waitaha to expel Ngai Te Rangi and their Ngati Haua allies from Maketu. Some Tapuika who had ancestral links to both Arawa and Ngai Te Rangi fought alongside Ngai Te Rangi. In the wake of the battle of Te Tumu (1836), the coastal lands were occupied more substantially by Te Arawa groups, notably Ngati Pikiao and groups related to them, to Ngati Whakaue and to others. As part of this movement, though a little later, Waitaha and Tapuika also reoccupied their territories. Questions also arose, Dr Ballara states, about whether they could only do so because Ngati Rangiwhewehi and others of Te Arawa escorted them home and supported their renewed occupation.

Subsequent dispute in the Native Land Court centred around whether mana whenua rested with those who had ancestral rights to the land and had stayed on it, or whether, through expelling Ngai Te Rangi, mana whenua now rested with a broader Arawa community. There was also disagreement between Ngati Pikiao and Ngati Whakaue about whose occupation of Maketu was decisive, in the wake of Te Tumu, and who therefore held the best-founded claim to the land through toa.

From this complex history emerged the take toa claims. They have been described as deriving from a combination of conquest and ancestral rights, where a group with ancestral links to land claims superior rights, through greater military strength, or bravery (as it was often translated), than another ancestral claimant. This, it was suggested, is different from raupatu, which is the conquest by a complete outsider. Ben Hona explained to us that he had been taught ‘that toa usually arose when there was some relationship between the competing parties . . . take toa would go hand in hand with take tupuna or ancestral connection to the land. If you could conquer and maintain your control over land through bravery and corroborate that conduct by way of your ancestral connection, then your right was all the more stronger than anyone else’s. To our knowledge the concept of take toa is one particular to this region. Among claimants today there are differing views about its validity. But, as outlined in part II, the toa claims themselves were overlaid with the enmities generated in the Crown’s wars of the 1860s. Arawa relations with Waitaha and Tapuika, many of whom had fought against the Crown, seem still to have been tense in the mid-1870s.

Was the Native Land Court a suitable forum for adjudication of the toa claims? Dr Pickens suggests that:

Toa conquest had made it possible for the ancestral claimants to assert their full rights again, so there had been some obligation created between them and the Toa tribes. Exactly what this obligation was and what rights it created was the central issue around which the whole of the Toa claim revolved. There was never going to be easy agreement among the various groups on this question . . .

In the end, he concludes, no viable alternative to the land court emerged to solve the “Toa conundrum.”

The history of the Native Land Court hearings of these blocks is however a fraught one. There are several points we think should be considered. First, the way in which the court engaged with the evidence before it. Secondly, the number of rehearings that were sought in the wake of its decisions. Thirdly, the fact that tension over the claims
did not emerge simply from court hearings. We need to look outside the court to the operations of land purchase agents.

Dr Ballara considers that the judgments of the Native Land Court in the coastal blocks were:

often inconsistent . . . some judges tended to favour conquerors and their rights over other kinds of claims, including long-standing ancestral occupation. Other judges preferred to ignore mana, toa and conquest, and concentrate entirely on ancient and current occupation.

In Dr Ballara’s view: ‘These opposing opinions led to some bizarre, inconsistent and contentious judgements’, particularly in these blocks.186

Pukaingataru (3510 acres) was awarded in 1871 to counter-claimants Tapuika and Ngati Moko on the basis of take tupuna. The claimants were jointly: Ngati Whakaue, Ngati Uenukukopako, Ngati Rangiwewehi, and Ngati Rangiteaorere. Te Pokiha Taranui opposed their claim on behalf of Ngati Pikiao (also claiming ancestry through Waitaha). The Native Land Court found against the Arawa claimants, who claimed through ancestry and the toa of Te Tumu, and against the Ngati Pikiao claim through the same take.187 Paengaroa block (10,447 acres)188 was heard in 1878, and awarded by the judge to ‘the conquerors only’. Tapuika’s claim was dismissed on the grounds they had been completely conquered by Te Rangihouhiri and his followers.189 In the Te Karangi (Paengaroa 3, 1187 acres) hearing in 1895 in which Ngati Moko were the claimants, and the counter-claimants were all those claiming through ‘toa’, as well as Tapuika, the judge attached great importance to the dominance of Ngati Whakaue. He dismissed the claims of Ngati Pikiao. He also dismissed the Tapuika claim (through ancestry, occupation, and participation in Te Tumu) and found that they had taken part in Te Tumu ‘under the mana’ of Ngati Rangiwewehi, and been placed on the land subsequently by the ‘Arawa conquerors’. He also found that Ngati Moko occupation depended entirely on Ngati Whakaue, but awarded them half the block, while the other half went to Ngati Whakaue.190 In the Rangiuru block (12,255 acres) the court found in favour of Tapuika and its principal hapu. The cases of Ngati Whakaue, Ngati Rangiwewehi, and ‘Te mana o Te Arawa katoa’ were rejected.191

Dr Pickens has drawn attention to the number of rehearings that arose from judgments in the Maketu blocks. Otamarakau was split into three subdivisions in July 1878; there were applications for rehearing or petitions or both in respect of two of these, Pukehina and Waitahanui. Paengaroa was split into two subdivisions in August 1878; there were applications for rehearing and/or petitions for both of these, and finally for the original Paengaroa block as well. There were also rehearing applications or petitions or both for Haenga, Kaikokopu, Rauotetuhia, and Te Puke. Five other blocks ‘had opposed passages’ in 1878, but Dr Pickens could not find that they generated rehearing applications.192 Paengaroa was back before the court in 1880, and 1885 and as late (in the case of Paengaroa 3, Te Karangi), as 1895.

Applications for rehearings however are not the only test of the appropriateness of the Native Land Court’s involvement in these contested cases. When the court opened in Maketu in April 1878, as we have seen, Ngati Whakaue were hotly opposed to the court sitting at all, while Ngati Pikiao, Ngati Rangiwewehi, and the Maketu section of Ngati Whakaue were anxious that it should proceed. In the Otamarakau case, called in early June 1878, Henare Pukuatua stated that Ngati Whakaue had declined to give evidence. (According to Dr Pickens, some people identified as Ngati Whakaue did in fact speak later in the case.) By now there was considerable tension between Ngati Pikiao and Ngati Whakaue, and Ngati Whakaue had occupied Fort Colville. Though Sheehan’s brief visit apparently defused the situation, it became apparent once the court resumed that this was a short-lived reprieve. The hearing of the Paengaroa block produced renewed tension, and the delivery of the judgment in favour of the toa claimants led to ‘a great deal of confusion and dissatisfaction’.193 When the court tried to take names for the owners’ lists on 5 August, weapons were brought into the court, and women...
stayed away; the lists were however finally completed on 12 August.

In our view these major Maketu cases exemplify the difficulties faced by a Native Land Court in dealing with contested lands. The various take to the lands were very finely balanced. The authors of *Nga Mana o te Whenua o Te Arawa* report have pointed to the general approach of the inland Te Arawa ‘conquerors’, in acknowledging the take tupuna claims of Waitaha and Tapuika for certain lands in the region, but strongly claiming the lands between Otumatawhero and Waihi lagoon on the basis of toa, take tupuna, and subsequent occupation. Though their claims were largely based on toa, they often based their take tupuna case on their connections to Tapuika or Waitaha.194

Our purpose is not to revisit the judgments of the Native Land Court. Nor is it to discuss the take of those who appeared in court. We point simply to the tensions generated in the course of these hearings, and the number of judgments that had to be revisited. Even Judge Wilson’s 1880 decision in the Paengaroa rehearing (which Dr Ballara considers ‘very carefully balanced’ as he attempted not to depart too far from the earlier ruling of the court while giving more satisfaction to the parties) stood only for a few years before it was back before the court.195 In our view, the weighing of the complex factors involved in deciding rights in these blocks would best have been done by those who were knowledgeable in history and in whakapapa, and who were not trying to pick winners. The court system, with its adversarial approach, was the worst possible in which to decide matters which affected relationships among whanaunga so closely. We refer again to David Rangitauira’s statement, on behalf of his Ngati Whakaue clients, that take toa did not confer exclusive rights and was not the only tikanga that applied.196

We noted above that the problems experienced by communities at Maketu in this period were not solely generated by the Native Land Court. In the early 1870s, the Government sent land purchase agents into the Bay of Plenty. In other words, it was prepared to bypass its own processes for determining title and start buying land. This was despite the fact that one of the main reasons for establishing a land court was to avoid the criticisms levelled at the Government after war broke out in Taranaki in 1860 – that it should not make unilateral decisions about who the owners of land were, make payments to them, and refuse to admit the rights of others. In Maketu, as Dr Pickens suggests, the purchase agents ran with the Native Land Court’s 1871 Pukaingataru judgment, which rejected the toa claims of various Arawa claimants, and upheld the ancestral claims of Tapuika and Ngati Moko. The agents began to buy land accordingly. By 1876, before the court sat again on Maketu blocks, they had ‘managed to acquire . . . a grip on 90,000 acres of Maketu land.’197 This is not the place to consider land purchase in any detail, but we note that by 1876 even the Government agreed that the activities of its agents were counter-productive, and operations were suspended. Donald McLean, the Native Minister, had visited Maketu in 1875 and met with Te Arawa. He was prepared, in the discussions that followed, to give his own view that toa claims, within an area he defined, should be recognised – though he nodded in the direction of ancestral claims as well. Against this background, the court returned to Maketu.198

Thus, the title determination of Maketu blocks took place in difficult circumstances, exacerbated by the efforts of the land purchase agents. Our point is not, however, that the Native Land Court could have done better without the land purchasers. Rather, the combination of the Crown’s court and the Crown’s purchasers was very damaging to relations on the ground among Arawa kin groups. In the longer term, they had to carry the political and financial costs of continuing to relitigate cases which should not have been before the court at all.

We conclude from a study of the toa cases that if the Native Land Court could not prove its worth in the contested circumstances of these Maketu blocks, the argument that its impartial adjudication was necessary to assist Maori falls to the ground.
Was the Native Land Court’s recognition of individual rights appropriate? An issue raised by the Crown, in respect of small claims brought to the Native Land Court at Maketu between 1867 and 1871, was that the court was not out of step with customary tenure when it recognised what were evidently individual claims. Dr Pickens interprets the tightly defined individual or whanau use rights of communally owned land, which existed around Maketu, as directly comparable to absolute ownership in a European sense, or as leading to a desire to have those rights defined individually in the introduced court system. He argues that much land around Maketu was traditionally individually owned and tilled. In these circumstances, he contends, it was wholly appropriate for individuals to bring forward lands to court for determination of individual title. What happened in the Central North Island was less a transformation of the form of title under which Bay of Plenty Maori held their land than recognition of comparable rights within an introduced title framework.

In our view, there is no great mystery in these small claims brought before the Native Land Court. Our examination of the early Maketu minute books does indeed show some claims on behalf of individuals or whanau to small cultivated plots which had descended within whanau since the upheavals of the 1830s. Claims were based on ‘apportionment’ to a parent or other relative, which had been taken over by the applicant after the relative’s death. Sometimes these claims were rebutted by other claimants, who questioned either the boundaries of the allotments or the means by which the applicant acquired the land from the named relative at the time of his/her death.

The point, however, is that these claims were made in the context of the difficulties that had arisen in respect of the toa or ancestry take – overlain, as we have suggested, by the further tensions which developed in the wars of the 1860s. While we do not question that the Maketu lands were closely held, it is evident that claimants hoped by focusing on the small pieces where they lived, and which had been occupied only over one generation, to avoid the more difficult questions of the origin of their hapu claims. As we have seen in chapter 2, rights in land were often layered; in this circumstance, applicants claimed one layer of rights to circumvent those at a broader level. We note that where counterclaims were made, they immediately raised the issue of ancestral as opposed to toa claims.

In those circumstances, the Native Land Court tended to favour evidence of conquest and subsequent continuous occupation. Thus in one case the court found against a Tapuika claimant in favour of the Ngati Whakaue claimant whose father had been apportioned the land at the time of the conquest and whose family had occupied it since that time. In another, the claimant asserted: ‘I maintain that he [the counter-claimant] has no claim as it is not a claim from ancestry, but a portion of land which was subdivided among individuals.’ A Ngati Whakaue claimant to another block stated that, following the conquest of Ngai Te Rangi by Te Arawa, ‘our fathers took possession of Maketu and divided the land among themselves.’ A claimant in another case indicated that Maketu lands had not been divided into different areas for different tribal groups, but ‘appropriated’ by individuals: ‘there was no particular piece appropriated by individuals of any particular Tribe they were intermixed.’

Continuous occupation or cultivation was considered to be important to validating the claim to the Maketu allotments, and those who left the area were liable to have their lands encroached on by neighbours or relations who felt they had a claim. Witnesses sometimes refer to allotments being ‘renewed’ or ‘recovered’ from other individuals on their return to the Maketu area. In several cases it was suggested that ownership of allotments had been transferred to other individuals to atone for offences committed by owners. Frequently, the original participants in the events and agreements had died, and their descendants were left to present conflicting interpretations of events to the court, and hope other people would support their claims. In such cases the court almost invariably found in favour of the claimant in current occupation of the land.

Whanau rights, in short, were easier to defend before a court in a situation where the basis of hapu rights was
so hotly contested. The claimants thus stressed intergenerational whanau use of the lands over hapu rights. But, as we have seen, this does not mean that the ultimate take, whether by ancestry or toa, did not underpin such rights.

**Kaingaroa 1**: See also the appendix to this report, where Kaingaroa 1 is dealt with in more detail.

Kaingaroa 1 is important because so many kin groups had customary interests there; many of those interests, however, were not recognised by the Native Land Court. We comment further on customary interests in the block in our appendix. The case was one in which payments had been made to various groups for leases before the land went before the court; one such lease had been taken over by the Crown. Those with whom the Crown had an agreement, Ngati Manawa, were the claimants, and were awarded the block. Some groups opposed to the court did not wish to appear before it, though at least one of these tried to protect its interests by making arrangements with the claimants. The case also raises questions of the court’s handling of the claimants’ efforts to include many groups on the lists of names for the award of title.

Kaingaroa 1 came before the Native Land Court in 1878. By that time, the Crown held a lease from the applicants, Ngati Manawa. The Crown took over the lease in 1875 from Gilbert Mair, who held the position of district officer but had entered into the lease as a private citizen the year before. This was the period when the native land legislation was suspended in the region, so no court sitting was held immediately. When the suspension was revoked, Ngati Manawa were the applicants for a court hearing.

We note that in the wake of the Crown’s lease there was very widespread interest by Maori throughout the district in events at Kaingaroa. This was evident in the number of hui held. There was concern about the boundaries, payments – and the extent of land. Once attempts were made to survey the land, opposition at once became apparent. At various times, Ngati Tahu, Ngati Haka Patuheuheu, Ngati Manawa, Ngati Whakaue, and Ngati Whaoa all opposed survey, or stopped the surveyors. The Ngati Whaoa witness stated in the hearing that Arawa objected to the survey too. All, in other words, were concerned that their rights might be infringed by a survey, or that failure to stop survey by another party might indicate tacit admission of their rights before the court hearing took place. Ngati Haka Patuheuheu, who supported Te Whitu Tekau, may have opposed survey in accordance with Te Whitu Tekau policies designed to protect Urewera lands; or they may have been concerned about the particular siting of the trig station.

We make the following observations about the Native Land Court case:

- It was lengthy, heard over a number of weeks. Those who also presented claims alongside Ngati Manawa included Ngati Hape, Ngati Hinewai, Ngati Tuwharetoa, Ngati Awa and Nga Maihi, Ngati Whaoa, Ngati Tahu, and Tuhourangi. The Tuhourangi claimant withdrew his case after stating his take; and Ngati Hape also withdrew – it seems because they reached agreement with Ngati Manawa about their inclusion on the list of owners.

- The district officer present at the hearing was Gilbert Mair. Under the Native Land Act 1873 the district officer was charged with a range of duties to assist the court. These included compiling a ‘Local Reference Book’ (the result of his inquiries into holdings of tribal land in his district, with the assistance of the assessors and the ‘most reliable chiefs of the district’) and producing the book before any court which might require it, as evidence (sections 21 to 22). Mair did make a statement to the court, though it does not seem to have been presented in open court. It was he, however, who had initially leased the land from Ngati Manawa, with whom he had a long-standing relationship; many Manawa men had fought alongside Te Arawa in Mair’s No 1 Company during the latter part of the wars. He had transferred his lease (some 136,000 acres) to the Crown in 1875. His statement to the court largely concerned Ngati Manawa and their recent history, though he did refer to objections.
by representatives of various other iwi to the setting of boundaries in 1875, which he said had then been dropped.\textsuperscript{206}

- Mair had a clear conflict of interest in the case, and should not have been acting as the Crown's district officer.

- Despite the length of the case, the judgment was very short. The court made it clear that the decisive evidence was that of 'occupation', since the time of the Ngati Manawa 'conquest'.\textsuperscript{207} The judge did not take the trouble to expand on his reasons for dismissing some of the claims – as Ngati Hinewai later complained.\textsuperscript{208}

We note that the lengthy claimant summings-up are not recorded in the minute books at all.

- It is clear, however, that resource use was not given any weight, despite the evidence before the court of overlapping rights and shared interests. Extensive evidence had been given of fern root 'preserves', named flax swamps where flax was cut, kokowai (red ochre) preserves, and the importance of bird snaring and rat catching. The people knew where there were caves for shelter and where to find springs, and they also made temporary shelters while harvesting resources. Maori in the west of the block in particular were disadvantaged by the court's emphasis on 'occupation'.

- Kaingaroa was an important resource area for many right-holders; and the court's failure to recognise this demonstrates that it was an unsuitable forum for the recognition and determination of native title. This conclusion is underlined, in our view, by the number of applications for rehearing, and the judge's comment on that occasion – when the original judgment was revisited – that he found the evidence regarding the west of the block 'very perplexing and contradictory'. We cannot see that title was being decided in accordance with 'Native custom and usage', as the 1873 Act required (section 7).

- We note the later attempts of Wi Keepa Te Rangipuawhe (of Tuhourangi and Ngati Hinewai) to secure a rehearing – despite the purchase of the block – thereby underlining the importance to Maori of ensuring that their rights in a block were recorded. We note also Chief Judge Fenton's reservations about the judgment (though these were not expressed officially), and his statement that the judgment had been much discussed among Maori.\textsuperscript{209}

- The court's handling of the list of names of owners was not in accordance with the requirements of the Native Land Act 1873, which required all those found to be owners to be listed on the memorial of ownership.

- It is clear also that the court was not able on this occasion to recognise arrangements made by hapu and iwi which gave effect to their own imperatives for recording rights and interests in land. There was great interest in the district in considering the list, and Ngati Manawa presented a very inclusive list of names to the court. The evidence strongly suggests that Ngati Whare, Ngati Haka Patuheru and Ngati Hineuru did not attend the court because, as we know, they were opposed to it – though it seems that in Ngati Haka Patuheru’s case there is some evidence that they secured the withdrawal of some land in which they had rights from Ngati Manawa’s boundary. The evidence on this point is ambiguous, as Ngati Manawa clearly recognised their rights. Ngati Whare, like Ngati Haka Patuheru, supported Te Whitu Tekau; Ngati Hineuru supported the so-called Repudiation movement which wanted an end to the court’s work. Those hapu and iwi who did not come into court ruled themselves out of course as parties to the inquiry.

- Despite groups who claimed customary interests absenting themselves from the court because they did not wish to take part in its proceedings, the applicants were able to proceed with their case, once the court had gazetted it for hearing.

- Ngati Manawa, to whom the land was awarded, eventually presented a list of over 300 names to be entered on the memorial of ownership. Niheta
Kaipara of Ngati Hape sought to include 103 further names. (Mair referred in his diary disapprovingly of Kaipara’s attempt ‘to insert 103 of his own people’.)

Ngati Manawa were evidently attempting, in drawing up the lists, to accommodate their own wish to conduct a transaction with the Crown, to ensure that the rights of their whanaunga were recognised by the court, and also to respect the wishes of those who wished to refrain from engagement with the court. Ngati Manawa clearly recognised other right-holders, as is evident by their naming them (Ngati Whare, Ngati Apa, Te Patuheuheu, and Ngati Hineuru) right after the hearing, as groups who should share in an advance payment from the Crown. Ngati Manawa were still trying to expand the list in the wake of the rehearing, but failed.

Many groups lodged applications for a rehearing, which took place in October 1880, and lasted a few days. The judge found that there was no dispute about the eastern portion of the block, but stated that he found the evidence for the western side ‘very perplexing and contradictory’. He then excluded a portion in the south-west of the block, amounting to about 10,000 acres, from the award to Ngati Manawa, to be heard with Paeroa East.

When the list of names was put in, Ngati Manawa tried to expand the list to 120 names, but it was further reduced to just 28 owners. The list of 28 names was in Mair’s handwriting, with the exception of one name. Mair (now employed by the Land Purchase Department), noted in his diary and in correspondence that he had great difficulty keeping the number down to 28, so that the Government could ‘obtain title more easily.’

The restriction of the list to a small number of owners facilitated sale. The sale of the whole block could proceed if all named owners agreed. And the effect of the court’s judgment in favour of only one group of claimants was also to ease Mair’s job, as he only had one officially recognised group to deal with. (We address the alienation of the block further in chapter 10.)

In our view, the outcome of the court case did not reflect Maori understandings of customary rights in Kaingaroa. In the first hearing, the court’s judgment was slight, and did not convey to the various parties the basis for acceptance or rejection of their claims. It does seem, however, that evidence of rights which did not meet the judge’s own cultural understandings was passed over. In the rehearing, the court, on its own admission, found it difficult to weigh the evidence. In both cases, the court did not ensure that the names of all those who were found to have rights were entered on the memorial of ownership, though it was obliged to enter all such names. The full extent of right-holding in Maori terms was not reflected in the lists.

We consider that the case exemplifies the extent of the Crown’s failure, in establishing the Native Land Court system, to ensure that customary rights to land were protected in the new processes.

Rotorua blocks: In the hearing of Rotorua blocks, two aspects are noticed here. First, Te Arawa and their non-Arawa neighbours considered themselves how to make provision for their complex shared and overlapping rights before they got to court. They held hui before court sittings in the 1880s – for instance, in relation to the Rotomahana–Parekarangi block, Paeroa, and Pokohu. The influence of the Tuhourangi tribal komiti, the Putaike, was strong in these attempts to reach agreement on the apportionment of lands which could ‘then be presented to the Court as a fait accompli’.

In the context of an imminent court sitting, this was not always easy. No agreement was reached, for instance, about Pokohu (1881), where Ngati Rangitihi, the claimants, had called a hui before the court sat. But one group of counter-claimants, Nga Maihi, withdrew during the hearing because they reached agreement with another counter-claimant group, Ngati Pou. The Ngati Pou claims were successful in the court. In the case of Rerewhakaitu (1881), however, also claimed by Ngati Rangitihi, the outcome of
a similar pre-hearing meeting was that three of the four counter-claimant groups – Ngati Hape, Ngati Hinewai, and Te Urewera – all reached agreement with Ngati Rangititihi over their interests and agreed to withdraw. By the end of the case, Tuhourangi had evidently withdrawn too. The court ‘made an award in favour of a combined list of names’. Presumably Ngati Rangititihi’s list included those groups with whom they had made earlier agreements.\(^{214}\)

Even where agreement was reached, however – whether outside or inside the Native Land Court – the court did not always fall in with claimants’ wishes about how to present their claims in accordance with the importance they placed on particular lines of descent. Ngati Rangititihi were the claimants in the Ruawahia block (20,000 acres), which bordered Rotomahana–Parekarangi and contained the larger part of Lake Tarawera as well as the maunga and land stretching towards Pokohu block and including the headwaters of the Tarawera River. There were two other claims, one ‘by the combined Tuhourangi hapu of Tuwhakaorau and Tutekawaora’, and a second by the hapu Ngati Te Apiti. We note that these groups had sought to be included within the Rangititihi case and to have their names added to the list of owners. But the court deemed each of the groups to be counter-claimants, despite their close relationships, and then heard evidence from each. In its judgment the court dismissed the cases of all three hapu on grounds of insufficient occupation. In short, the court refused to allow claimants to identify and be acknowledged as they themselves wished.\(^{215}\)

Secondly, we note that there were cases where the Native Land Court found it difficult to know how to proceed in the face of the complex layered rights of communities, arising from a range of take. In Rotomahana–Parekarangi (230,000 acres), the ‘largest block in the Te Arawa rohe’, the court awarded the greater part of the lands to Tuhourangi, but confessed to finding it ‘quite impossible’ to define the interests of the two tribes (Ngati Whakaue and Tuhourangi) as it could not determine ‘where Ngati Whakaue end and Tuhourangi begin.’\(^{216}\) In one specific area where the claims of both peoples appeared to overlap, the court awarded it to both to be divided into two equal parts, leaving the claimants to arrange the boundary. The case was reheard in 1887, with 21 claimants rather than the original 16 (though two withdrew). The court upheld the 1882 decision to award Tuhourangi the bulk of the block, but defined a new series of boundaries for the portions claimed by each group. The court’s dilemmas in this case underline the inadequacies of the new tenure system.

**Tauponuiatia case**: Aspects of the Tauponuiatia case, in our view, exemplify the outcome of the inflexibility of the court in the face of the take of various groups of claimants.

In this case, a major casualty of the Native Land Court process was the claims of Ngati Raukawa. At the beginning of the hearing Te Heuheu Tukino defined the boundaries of the Tauponuiatia claim:

I commence at Ruapehu hence northerly to Wanganui River thence to Petania thence to Taringamotu stream and goes along eastern slope of the Tuhua range to Pakahi thence to Tuhihamata, thence to Maraeroa, thence to Turiohinetu thence to Tomotomoariki, thence by Waipapa Stream to the Waikato River to Atiamuri and there joins the boundary of the Kaingaroa, from Kaingaroa thence to Paeroa in an easterly direction to Ngati Whakaweawe, thence to the Rangitaiki river and there joins the boundary of Ngatimanawa, from there to Mohaka river, thence up the Mohaka river and joins on to the boundary of Oruamatua Block and from there to Waitangi the boundary of Rangipo, thence to Kahikatoa, then to the commencing point Ruapehu.\(^{217}\)

He stated that the tupuna for those lands were Tuwharetoa and Tia. But he was emphatic in declaring that some hapu descended from other ancestors also had interests within the block. He was recorded as naming Tahu (tupuna of Ngati Tahu), Tama Ihutoroa (a tipuna of Ngati Tama), Apa (tupuna of a hapu affiliated to Ngati Manawa), Manawa (tupuna of Ngati Manawa), Ngati Maniapoto, and Raukawa among these.\(^{218}\)

During an adjournment at the start of the hearing, a committee of leading Tuwharetoa in consultation with
people from neighbouring iwi amended the boundary of the Tuwharetoa claim to excise lands claimed by some Ngati Maniapoto in the west and by Whanganui peoples in the south. Most objectors then withdrew, leaving Kahungunu and some Arawa as the only official counterclaimants. However two significant other leaders, Taonui Hikaka who had been nominated by a meeting of Ngati Maniapoto to represent their interests at the hearing, and Hitiri Te Paerata of Ngati Raukawa, were absent at another court case at Cambridge and had not been present to register their counterclaims. Te Paerata had also been subpoenaed to court in Auckland on another matter. They had, however telegraphed from Cambridge to notify the court of their inability to be there and to request an adjournment.219

The enormous Tauponuiatia block contained a number of areas of overlapping interests, including those claimed by Ngati Raukawa and Ngati Maniapoto, which could have been no surprise to the presiding Judges Brookfield and Scannell. In 1875, a 15-day hui had been hosted by Tuwharetoa to discuss the lands on the western shores of the lake. It was chaired by Major Scannell, with two assessors, with the minutes forwarded to the Native Minister, McLean.220 This suggests that the Native Land Court should have taken more care in examining these issues when the block was brought before it. However, at the January 1886 hearing, the title to the block was settled within a week in favour of the descendants of Tuwharetoa and Tia, the ancestors put forward by the Tuwharetoa claimants. Te Heuheu, the principal claimant, submitted a list of 141 hapu descendant from those ancestors.221 Immediately after determining ownership of the overall block, the court started to determine ownership of its 151 subdivisions.

This broad decision about the Tauponuiatia parent block had downstream implications for claimants to all the subdivisions of the block. Claims through descent lines from tupuna other than Tuwharetoa and Tia would from this time not be accepted by the court to any land within the parent block. Thus, when the Tauponuiatia west blocks came before the court in March 1886, those who sought to claim through Raukawa and Maniapoto lines were not allowed to have their cases heard.222 Hitiri Te Paerata attempted to claim parts of the block through his Raukawa line, but was told that he had filed no counterclaim when the initial Tauponuiatia title was determined and that judgment had already been given. In response to his protest, the court told him that:

'It has already been decided that Tauponuiatia be awarded to hapu of Tuwharetoa, and that Ngati Raukawa were not in list of hapu, consequently Ngati Raukawa could not have anything to say within Tauponuiatia boundary.'

Maniapoto objector Taonui, who wished to discuss the court's judgment in the Maraeroa case, was also told by the court that 'the judgement was given and would not be discussed' and was then fined by the court for storming out and resisting the policeman who tried to return him to court to explain his conduct. Te Tawhaki Pineaha also stood to claim lands within the Tauponuiatia boundary on behalf of Ngati Te Rereahu, but the court also refused to hear this claim as the hapu did not appear on the list of Tuwharetoa hapu submitted by the winners of the Tauponuiatia hearing.223

Te Heuheu himself clearly did not intend to exclude neighbouring tribes.224 When naming the hapu to whom Tauponuiatia west belonged, he tried to include five hapu names which had not appeared on the original list named in the Tauponuiatia judgment, but the court struck out these hapu on procedural grounds.225 A number named by Te Paerata were struck out without explanation, even though they were on the court's approved list. After conciliatory discussions with the other parties, Te Heuheu then asked that the court withdraw from considering Tauponuiatia west block 'because it is divided between three tribes, viz., Ngati Tuwharetoa, Ngati Raukawa, and Ngati Maniapoto.'226 The court, however, ruled that the claims of non-Tuwharetoa hapu to the land, now acknowledged by all parties, could not be admitted because of the earlier decision.227 This left Te Paerata and his people unable to derive rights in the western blocks from their
tupuna Raukawa. We endorse the view of counsel for Ngati Tuwharetoa, that:

The failure of this result to reflect the true ancestral interests in the block cannot be disputed, given that it was common ground between the contestants that Ngati Tuwharetoa, Ngati Raukawa and Ngati Maniapoto all had rights in the block. This is a classic case of the tenurial system introduced by the native land legislation promoting a winner-takes-all outcome that was clearly unjust. 228

There are other similar, if less well-documented, instances of hapu who did not descend from Tuwharetoa or Tia being excluded from stating their claims to land before the court. Mr Stirling, for example, notes that the court refused to hear the Ngati Maionui claim to Tutukau because they were not one of the hapu named by Te Heuheu as descending from the ancestors of the larger Tauponuiatia block. 229

This intervention by the Native Land Court in intertribal negotiations to resolve issues of overlapping interests shows that the court could exercise its power in matters of title determination to the detriment of iwi before it. The court’s refusal to allow Tuwharetoa, Maniapoto, and Raukawa to reconsider the arrangements for the Tauponuiatia blocks, despite the specific request of Te Heuheu that they be allowed to do so, is an example of this. Nor was he even allowed to include further hapu himself whose rights he wished to acknowledge. Te Heuheu’s express desire to acknowledge the interests of non-Tuwharetoa iwi strongly suggests that an injustice in the interpretation of customary rights was done and an attempt to put it right was stifled by the court. The court, in this instance, operated in such a way as to discourage and undermine agreements between hapu and iwi which aimed to resolve customary issues at the point at which new titles were being created, and which might have produced more mutually accepted and more lasting decisions on land ownership.

The Tribunal’s conclusions and findings
The court provided by the Crown to determine titles has in our view a mixed record in terms of its recognition of customary rights. In the early years the Native Land Court was introduced into Maketu, arguably a poor decision given the contested nature of rights there. The Crown, in its arguments to us, attached considerable weight to the role of the court as an external adjudicator in settling contentious disputes. But at Maketu the court floundered (other than in dealing with very small whanau claims), and succeeded in increasing tensions rather than giving broadly acceptable judgments. This was reflected in contradictory judgments and in the number of rehearings sought. The court was not able in fact to assist Central North Island Maori by its impartial adjudication. In the major Kaingaroa case, where there were groups of claimants with a range of customary interests in an important resource area, many were left disappointed by the court’s decisions. The outcome of the case did not reflect Maori understandings of customary rights, and the court did not ensure that the names of all those who were found to have rights were entered on the memorial of ownership. In the post-1880 period, Maori leaderships decided that the best option in the circumstances was to play an active role in preparing cases for the court. They held hui and reached agreements about how hapu rights should be recognised within particular subdivisions, and on names to be put forward for various blocks. It always depended, however, on whether the court accepted the basis of their cases, and their arguments about admittance of hapu and of lists of names. This is evident, for instance, in the case of the Tauponuiatia block. The court’s failure to accommodate major claimant communities – Ngati Raukawa and Ngati Maniapoto – to the western blocks, which Te Heuheu was also anxious for, does not reflect well on its impartiality, its flexibility, or its understanding of customary rights.

Ultimately, it was the Native Land Court which made the decisions in this process. Sometimes, particularly in the early period, decisions were poorly explained to groups of claimants, who were left uncertain about the
reason why their cases had been rejected. In other words, the court’s decision-making was not transparent. On other occasions, the court was rather too blunt in explaining its views, and the language in which it dismissed the cases of various claimant groups was unhelpful. Judge Gudgeon, for instance, in an 1897 rehearing, told one group of claimants that their case was a ‘mere pleasantry’. Such comments are a reminder of the ultimate power of the court; and in some cases of its apparent lack of concern for the mana and standing of those before it, and for the relationships among claimant groups, who had to live with one another after the court had departed.

Above all, it seems clear from the sustained nature of Maori opposition to the Native Land Court in the 1880s and 1890s that they themselves were not satisfied with its title-determination processes, and that they continued to regard it as an intrusion into their own affairs. We must conclude that they preferred their own forums, conducted in accordance with tikanga, to settle matters which were of such importance to the respective rights of all communities involved, and to the relationships among them.

We find:
- that the Crown was in breach of Treaty principles in imposing on Central North Island Maori its own title-determination process that was based on its assumption that such a process was better able to deal with the transformation of customary rights into new titles than Maori processes; and
- that the operation of the Crown’s court resulted in prejudice to communities of right-holders whose rights were not recognised, or were inadequately recognised, by its determinations of customary rights.

**Title-determination processes and the role of native assessors**

Were Maori concerns about court title-determination processes mitigated by the role of assessors in the court?

The role that native assessors played in the Native Land Court has some significance when considering the degree to which the court was responsive to tikanga Maori in determining land titles. Under different iterations of the native land laws, Maori had varying degrees of responsibility in aiding the court make its decisions. Relevant to this question is the role of the native assessors in court. Native assessors were prominent Maori from outside the district who were appointed to sit with and assist the judges in court. The parties to this inquiry differ in their interpretations of how significant their role was. The importance of assessors revolves around two main questions. First, parties dispute the relevance of the fact that, for most of the latter part of the nineteenth century, the assent of assessors was required for a judgment of the court to be valid. Secondly, claimants and the Crown disagree over the degree to which assessors actively participated in the hearings of the court in the Central North Island.

The Native Lands Act 1862 appointed a European judge to sit with two Maori judges to determine title to lands. It also made provision for a jury to be empanelled. This legislation, which had to be activated on a district-by-district basis, was not applied in the Central North Island, and its operation is best documented in Kaipara where the Native Land Court sat under Judge Rogan in 1864. David Williams notes that this early version of the court left a degree of power in the hands of Maori communities and, within the context of its very limited use, it appears to have worked relatively well.

The Native Lands Act 1865 (sections 6 and 12) shifted the balance of power on the bench. It provided, as we have seen, for a court presided over by a Pakeha judge assisted by two Maori ‘assessors’. Under section 16 of the Native Lands Act 1867, the number of assessors was reduced to one. Under the legislation the concurrence of the assessor(s) was needed for the court’s decision to be valid. This remained the position under subsequent legislation (with the exception of a brief period from 1873 to 1874) until 1894. Scholars have argued convincingly, however, that these positions were of lesser authority than those
provided for under the 1862 legislation as assessors were considered to be assistants to the judge in reaching his decision rather than sitting alongside him as equals.231

**The claimants’ case**
Claimants drew on a body of Native Land Court historiography including work by Professor Ward and Professor Williams, as well as the conclusions of Dr Ballara and of Mr Stirling in his Taupo and Kaingaroa reports to support their contention that the authority and the active role of assessors in the court in the Central North Island was negligible.232

**The Crown’s case**
Crown counsel drew on the work of Dr Pickens and Mr Hayes to argue that the role of the assessors made the Native Land Court responsive to Maori. ‘In providing for assessors as part of the Court adjudicative panel, the system clearly recognised the need for expertise in Tikanga and Matauranga Maori.’ They add that the legislation initially required the concurrence of the judge and at least two assessors in court decisions; and though the court could sit without an assessor under the 1873 Act, this provision was repealed the following year after Maori protest. In 1874 the requirement for concurrence of at least one assessor was reinstated.233

**The Tribunal’s analysis**
We begin by revisiting the general findings made by the Hauraki and Turanga Tribunals on the role of assessors in court. In Hauraki, the Tribunal found that while assessors were sometimes active participants in the court process, this limited Maori involvement in a Pakeha-created process was no substitute for real Maori control over the process.234 The Turanga Tribunal noted that under the 1865 Act, the assumption in the 1862 Act that Maori members of the court were judges was dropped. The native assessors would hold their appointments at the Governor’s pleasure.235

We acknowledge the Crown’s argument that there was, for significant periods of the Native Land Court’s operation, a formal requirement that assessors concur in the court’s decisions. We also consider that, while they held this formal role, the evidence that their role was subordinate to that of the judge is also convincing.

On the question of the degree of involvement of the assessors in the court process, we note that there is limited evidence presented in the Central North Island of active involvement of assessors. Dr Pickens agreed that it was difficult to reconstruct the role of assessors, given that their questions are not generally recorded in the minutes of the Native Land Court; like those of the judges, they were recorded as having been asked by ‘the Court’. He suggested that assessors may not have asked questions simply because of their own knowledge of tikanga.236 He also argued that though assessors drawn from the Central North Island, who were ‘very able’, did not sit in courts in their own district, there is ‘no reason to suppose that the external Assessors who did were less able men.’237

We consider that Dr Pickens fails to provide sufficient evidence to sustain his assertion that minute books show that assessors ‘often’ took an active role in questioning witnesses and made site visits.238 At the same time, claimants’ suggestions that assessors were overwhelmingly inactive are also unconvincing. Mr Stirling’s Kaingaroa supplementary report, one of the few carefully detailed series of block histories, records four or five instances where assessors spoke in court.239 Dr Pickens notes that in the Runanga 1 hearing in 1877, the assessor provided his own judgment, which explained the reasons for the court’s decision – given that the evidence from parties was conflicting. This was, he says, ‘unusual.’240 In Putauaki and Pokohu blocks, the *Nga Mana o Te Arawa Whenua* team record that there is evidence of court reliance on the view of the assessor Raka Wi Kaitaia, following his visits to both blocks, and reports on particular matters. Having said this, we do not consider there is a significant evidential gap. Assessors played a role in a court system designed by the Crown, and their role in that system was defined by the Crown and, particularly after 1865, was subservient to that of the Pakeha judge.241 We give weight also to Dr Ballara’s reminder that assessors
may have found their role 'of pronouncing on matters outside their own rohe contrary to all forms of Maori etiquette' difficult. There was a difference between iwi involved in a dispute carefully selecting a mediator acceptable to both sides, and the arrival of a court with its own assessor, who might or might not have been known to the local people, to give judgment on their claims.

What Maori wanted, in any case, was simply the ability to determine rights to their land in their own way in accordance with tikanga. The provision of native assessors did not come close to meeting this aspiration. What it did do was provide an opportunity for some input from Maori into the decision-making process, finally determined by a non-Maori Native Land Court judge. In this respect, we agree with the findings of the Turanga and Hauraki Tribunals on the role of assessors.

**The Tribunal's finding**

There is insufficient information before us to judge the degree of assessor participation in the decision-making of the Native Land Court. To the extent that they did participate, however, the role of assessors was circumscribed within the tight constraints of a Pakeha system of determining title. The appointment of an assessor from another iwi to assist a judge could in no way substitute for locally based processes of title determination.

**Recourse available to dissatisfied claimants**

Did the Crown provide adequate recourse for Maori dissatisfied with decisions of the Native Land Court?

If Maori were dissatisfied with judgments of the Native Land Court, there was provision in the legislation for them to seek a rehearing of a case; but rehearings were not easy to secure. No grounds for a rehearing were specified, but, because rehearings involved starting the case again afresh, they would not be granted lightly. Not infrequently, applications were turned down. Reasons given for refusals 'indicate some inconsistencies in the court system' Under section 81 of the Native Lands Act 1865, and section 58 of the Native Land Act 1873, the Governor in Council could grant a rehearing of a case provided that application was made within six months of the court's original decision. From 1878 this period was reduced to three months. After 1880, applications for rehearing were determined by the chief judge of the Native Land Court, and, where a rehearing was ordered, it took place before two judges. Table 9.1 in this chapter showed us that in the Central North Island there was one rehearing between 1861 and 1870, five between 1871 and 1880, eight between 1881 and 1890, and seven between 1891 and 1900. However no data has been collected on how many applications for rehearing were filed, so we simply do not know what proportion of applications were granted.

The Native Land Court Act 1894 established a separate Native Appellate Court consisting of the chief judge and such other Native Land Court judges as the Governor appointed. An appeal was of right. When it sat, the Native Appellate Court comprised at least two judges, who had discretion to take the advice of an assessor. The concurrence of the assessor was not necessary for a judgment to be valid. The time for lodging an appeal was either 14 or 30 days, depending on the type of decision in question. None of the research in the Central North Island makes reference to blocks being heard by the Native Appellate Court in the nineteenth century, but a search of the *New Zealand Gazette* suggests that the court did sit in relation to Central North Island blocks: atRotorua in 1896 and 1898 to hear cases relating to title investigations, successions and partitions of a number of blocks, and at Taupo in 1897.

The claimants' case

Claimants contend that the process for deciding whether cases would be reheard was unfair, particularly before an independent appeal authority was established in 1894. They cited a conflict of interest in the case of the Pukeroa–Oruawhata block where the chief judge determined grounds for rehearing while he also had an interest in the
block as a lessee of one of the township sections. Several researchers have given details of specific applications for rehearing, and indicate that absence from an original hearing was not always considered sufficient grounds for a rehearing.

A key issue in respect of rehearings in the Central North Island is that of applications for rehearings in Tauponuiatia. There were 21 applications for rehearing of the Tauponuiatia subdivisions, including those of Raukawa, Maniapoto, and Tuwharetoa (five of which relate to lands within the Tongariro National Park district). Grounds put forward to support these applications included: that claimants were unable to attend because they were at other sittings; that gazette notices about sittings were unclear; that there was confusion over court rules or that they were inflexible; that assistance was rendered by Government agents to some claimants; and that evidence in court was not given proper weight. Counsel for Tuwharetoa argued that ‘Notwithstanding the clear evidence of unjust decisions, irregularities in the process that raise serious natural justice issues, and indeed even suspicions of corruption, nearly all the applications and petitions that were filed for rehearing were rejected without inquiry.’ All but one of these applications was refused by Chief Judge MacDonald who heard oral submissions from appellants at Cambridge. As Mr Stirling suggests, his refusals followed advice to the chief judge from the judge who had heard the original cases, Scannell. This also points to a less-than-robust process.

The Crown’s case
The Crown’s argument on rehearings in the Central North Island is that those who could either prove that the Native Land Court had made an error or produce new evidence were granted a rehearing. A theme running through Crown historian Dr Pickens’ work is that, with some notable exceptions, Maori were generally satisfied with the work of the court. He argues that most cases went through court in an orderly and efficient manner with minimal dispute. Where there was dispute or disagreement, he contends, Maori had recourse by applying for a rehearing.

On Tauponuiatia, the Crown argues that the number of rehearing applications for the vast number of Tauponuiatia blocks was relatively small – about one-fifth of the subdivisions of Tauponuiatia – and from this, the Crown infers that there was relative satisfaction with court decisions.

The Tribunal’s analysis
The Crown’s failure to provide a fully effective independent legal appeal procedure in the Native Land Court system before 1894 diminished the credibility of the system. It denied Central North Island Maori the benefits of a fair, transparent, and robust system of title determination. It is, however, difficult to ascertain the impact of this failure on Central North Island Maori communities from the evidence presented to this inquiry.

Dr Pickens suggests that when mistakes were made, various remedies were available to Maori. They could apply for a rehearing, or petition Parliament. We address the second of these points below. Dr Pickens considered the Maketu blocks heard from the 1870s to the early 1880s, and showed that there were applications for rehearings in the case of Haehaenga, Paengaroa north and south, Pukehina, Waitahanui and Kaikokopu, Rauotuhia, Te Puke, Pukaingataru, Rangiuru, Waipumuka, Okarito, and Ngatipahiko blocks. In cases where applications were declined, petitions were often sent to Parliament, and referred to the Native Affairs Committee. Dr Pickens considers that dismissed applications were those which could not point to a technical mistake on the part of the court, or which did not adduce new evidence. Applications which could do either of those things, he states, were generally approved. The Government decided to tackle problems which had arisen from ‘procedures’ in the court by allowing new hearings in the case of Paengaroa, Rau o te Huia, Pukehina, and Pokohu.

By section 2 of the Special Powers and Contracts Act 1883 – an Act which dealt with a number of unrelated matters – the Governor was empowered to declare the blocks
He Maunga Rongo

...to be customary land again and that it was the duty of the Native Land Court to investigate the titles to the land.\textsuperscript{258} In the case of two toa blocks, Pukaingataru and Paengaroa, rehearings were granted 'because of growing doubts about the validity of the original Pukaingataru judgment.'\textsuperscript{259}

We note that of these cases, Paengaroa was first heard in 1878, and heard for the third time in 1885. Pukehina was awarded in 1878 and, after a complex history, finally made its way to the Native Appellate Court in 1897 (by which time the appellants had withdrawn their objection). Rauotetutu was first awarded in 1878, and reheard in 1888, after which there was an unsuccessful application for a rehearing and a petition, referred to the chief judge but evidently without result. Pukaingataru, heard in 1871, was finally reheard in 1888. Te Puke was first heard in 1878, but there remained doubt about who owned the reserves, and other matters. Government accepted, Dr Pickens says, that mistakes had been made.\textsuperscript{260} These were cases in which there were long delays in finalising title. Certainly for those seeking title in Maketu blocks they point to unsatisfactory appeal processes.

We turn to Dr Pickens’ argument that redress might be had through the Native Affairs Committee – which until 1886 acted as a de facto appeal body for the Native Land Court.\textsuperscript{261} It is true that where Central North Island Maori did not gain satisfaction through the Native Land Court process, some chose to petition Parliament. We consider, however, that there is an important distinction between a true appeal court and the Native Affairs Committee as a de facto court of appeal. The Native Affairs Committee only had powers of recommendation to the Government and had no real authority to overturn decisions or order a rehearing or an inquiry into any petition. Dr Pickens states, however, that the committee itself recommended to the Government in 1876 that a Court of Appeals should be established to deal exclusively with cases arising from Native Land Court hearings. This was not done, and in 1884 the committee tried again, pointing out that:

\textit{it would appear that the Native Land Court is in the exceptional position that there is no appeal from its decision, and no remedy for its wrongful awards, except through special legislation.}\textsuperscript{262}

The Government, in their view, should remedy this, and legislation should state clearly the grounds on which a rehearing might be granted. The committee was also concerned that a great deal of its own time was spent hearing cases where the chief judge had refused a rehearing – and that often it was the chief judge’s own decision being questioned. In the committee’s view more transparency was needed. The Native Land Court Act 1886 indeed provided that the chief judge would deal with rehearing applications, and that rehearings would take place before two judges, of which he might be one; and before one or two assessors. But if the chief judge’s own decision was appealed, two other judges would deal with it (sections 76 to 77). The amending Act of 1888 provided that the chief judge assisted by an assessor would consider applications for rehearing, and rehearings themselves would take place before two judges and an assessor, none of whom had had any previous involvement in the case.\textsuperscript{263} But the Government had been slow to respond to the prompts of the Native Affairs Committee. In the meantime the Pukeroa–Owhara applications for rehearing had been handled by the chief judge, despite his previous involvement with the block (albeit not in the court). He had reached a clearly political agreement with Ngati Whakaue in 1880 about the new rotorua township and its leases, had applauded the Native Land Court judgment in Whakaue’s favour in 1881, telling Rolleston that it was ‘in favour of our people’, and had then turned down a rehearing application for the block from another group of claimants.\textsuperscript{264} This was clearly a situation which should not have been allowed to occur. It was the Crown, however, which had sent the chief judge to negotiate at Rotorua.

The limited role of the Native Affairs Committee is particularly important in relation to the Taunuiatia hearings. After all but one of the appeals for rehearing had been
refused, the committee recommended, on the basis of the petitions it received, that the Government should inquire into them. A royal commission of inquiry into certain Tauponuiatia issues began in 1889. The commission did make some significant findings: it did not exonerate land purchase officer William Grace on charges of a conflict of interest during the Tauponuiatia west hearings (and suggested that the Government address the matter), and as its report cast doubt on the western boundary of Tauponuiatia west block, the Government decided, too, that new investigations of title were needed, including Maraeroa and Pouakani. However, the Native Affairs Committee's further recommendation, in 1891, that other issues around the Tauponuiatia title investigation and award required a second commission of inquiry failed to bring about action on the part of the Government. Because the committee's recommendation had no binding force, the Government was at liberty to simply ignore it, and it did. The appellants had no further recourse.

The petition process, and the referral of petitions sent by Maori to the Native Affairs Committee, was clearly a significant mechanism provided by the Crown. Maori who were dissatisfied with court decisions were able to avail themselves of it, and not infrequently did. In this sense, the committee was a de facto appeal process – and it was one in which Maori as well as Pakeha members of the House of Representatives were involved. It was, as we have emphasised, a recommendatory body only, and the Government might reject its recommendations. With this in mind, we believe that the Crown provided insufficient recourse in the Native Land Court system for decisions to be revisited.

In the absence of statistics for the number of applications for rehearings that were declined, it is difficult to reach a view on the overall handling of applications by the court. We do not know, for instance, whether more applications were granted after the appeal procedures were improved from 1886. We do not know enough about the grounds on which applications were granted – though Dr Pickens' evidence provides some useful information over a small number of significant cases. We are reassured to know that the Crown took steps to remedy cases in which the court or the Government or both had made mistakes in the application of the law.

Above all, however, we do not know how many cases there were in which people whose claims were not upheld in court did not apply for rehearings because they could not afford them, or because they did not understand the procedures or the time they had in which to reapply, or because they were simply discouraged when their cases had been unsuccessful.

The Tribunal’s conclusion
Given that the Crown had imposed and persisted with a Native Land Court process, we consider that its failure to provide an independent legal appeal procedure before 1894 damaged the credibility of the system. The Crown did provide useful mechanisms, however, in its provisions for rehearings (though there were costs attached to these), and for petitions to Parliament. It is difficult to judge how effective rehearing procedures were: sometimes they seem to have been held promptly, while in other cases they might drag on over years. In contested cases, it does not necessarily seem that the court itself delivered prompt judgments which satisfied all parties; or that its rehearing processes provided speedy remedies.

The Native Land Court and claimants who had fought against the Crown

Did the Native Land Court deal fairly with those who had fought against the Crown in the wars of the 1860s?

The 1860s was a time when Central North Island iwi were involved in the wars which swirled around and sometimes into their district. The Waikato conflict and later the Tauranga Bush Campaign affected Taupo and western Bay of Plenty iwi. There was auxiliary conflict involving Te Arawa and their allies against the Tai Rawhiti contingent
in the eastern Bay of Plenty. The killings of Völkner and Fulloon provoked the military pursuit of those held responsible by Central North Island Maori in the eastern Bay of Plenty, and finally the region was criss-crossed with skirmishes between those who supported Te Kooti and the Crown. Together, these conflicts created political, economic, and social disruption for many Central North Island Maori communities through the 1860s.

While harmful in themselves, especially to relationships among Central North Island iwi and hapu, these conflicts also allegedly had an enduring effect on the way in which Crown-derived land titles came to be distributed. As we discussed in part II, following the confiscations some lands were returned selectively to Maori via the Compensation Court in the eastern Bay of Plenty and via the civil commissioner in the Tauranga district. In these forums, Maori deemed to have been ‘rebels’ were not entitled to have lands returned to them. We found that the lack of transparency in the processes of the Compensation Court and the vulnerable individual land titles that it conferred were injurious to Maori and represented a breach of the Treaty.

The main question which remains for us to address in the Central North Island relating to land laws and confiscation, is whether the Native Land Court, as distinct from the Compensation Court, treated those who were perceived as having been in rebellion differently from other applicants.

**The claimants’ case**

Unlike the Compensation Court, the Native Land Court was subject to no formal restriction on awarding titles to former rebels. However, claimants have raised the issue of the ability of those who were involved in hostilities, or were later perceived as having been ‘rebels’ to protect their lands in the court.

Central North Island groups who claim to have been prejudicially affected through the courts for their role in the wars include Waitaha, Tapuika, and Ngati Makino. They argue that as was the case in the Compensation Court, the Native Land Court gave unfavourable consideration to their claims. Some claimants argue that in Kaingaroa, Ngati Manawa who had fought on the side of the Crown were favoured in court over Ngati Awa and Urewera groups who were perceived as rebels. Others claim that, whether or not actual prejudice was suffered in court, many who had been tagged as rebels remained afraid or unwilling to appear in court and that, as a result, their interests were not represented in the permanent awards that the court made.

Speakers for Ngati Tutemohuta and for the Hikuwai confederation of Tauhara hapu also argued that ‘a number of Tutemohuta’s leading rangatira were essentially in “rebellion” against the Crown during the early investigation of their most important lands including Tauhara’ in 1869 and that this meant that they could not attend the court. This meant that others, deemed loyal to the Crown, were able to have their names inserted in the ownership lists. That was not a matter which had been forgotten in Tauhara, and Peter Clarke stated that the outcome was ‘part of the wider claims about manipulation and distortion caused by the Native Land Court’.

Tapuika also assert that there were strong links between Native Land Court awards in the Bay of Plenty and loyal Arawa. They suggest that this was a result of conflict of interest on the part of officials. Tapuika tangata whenua witnesses indicate that Retireti Tapsell, who as a senior policeman in Bay of Plenty had executed death warrants for ‘rebels at the battle of Kaokaoroa,’ also acted as court assessor at Maketu.

Finally, some claimants contend that the appointment of judges and court officials who may themselves have had a military background, to preside over cases involving both those they had fought with and those they had fought against, was inappropriate.

**The Crown’s case**

In general terms, the Crown’s position appears to be that there is little evidence at this stage in relation to claims that those considered loyalists were favoured in Native Land Court sittings. In relation to Tapuika, Crown counsel pointed to Dr Ballara’s answers to written questions...
which indicate that there is no evidence that a perception of Tapuika as Hauhau or rebels influenced their position in the court. In relation to early Taupo hearings, Dr Pickens observes that some groups may have failed to appear in court to stake their claims to blocks such as Kaingaroa because of their ‘hau hau associates’ or because, possibly due to disruption caused by war in the district, they had not received notice of the hearing. Pickens suggests, however, that such groups suffered little permanent prejudice because titles to the blocks in question were not finally determined at these early hearings. The Crown has not responded specifically on the issue of the Mair brothers’ alleged conflicts of interest.

The Tribunal’s analysis

It does not seem to us that there is a great deal of evidence to support a finding that the Native Land Court was influenced in its findings by the stance adopted during the wars by claimants before it. Nor does it seem that there was any particular stigma in Native Land Court proceedings attached to being declared a ‘rebel’ either by official declaration or by the Compensation Court or both. Indeed in one early Taupo case (the block then called Kaingaroa 1), Hitiri Te Paerata, described as a ‘hauhau’, attended and strongly opposed the claim, and the judge declined to issue an interlocutory order because he considered many claimants were absent – either because they did not know of the court sitting (as they were living behind the aukati), or because they might have been prevented from attending by those opposed to the court and the Government. Yet we think the claimants are right to be concerned. First, some cases were heard and interlocutory titles issued in the late 1860s, when conditions were very unsettled and fighting still in progress. Some were simply not in a position to attend courts and put their claims. In this sense, the introduction of the Native Land Court into the Central North Island was poorly timed. Secondly, the circumstances suggest that the odds were stacked against those who had fought against the Crown. Loyalists such as Ngati Manawa were more likely to have resources and advice from Pakeha friends and advisors, such as Gilbert Mair provided in the Kaingaroa hearings. Cases were also sometimes heard before judges and assessors who had fought on the side of the Crown. Particularly in the late 1860s, it was doubtless straining the credulity of Central North Island Maori to understand, let alone believe, that two new and alien institutions, the Compensation Court and the Native Land Court, held at the same locations and presided over and administered by the same officials, were different in that one would not grant land to rebels and another theoretically could.

Taken together, these factors strongly suggest that if there is no evidence of actual bias on the part of the court, those who had been tagged as rebels justifiably perceived that this was the case. There is evidence that this led to skewing of hapu identifications when people applied to or gave evidence in the court – as had sometimes also been the case in the Compensation Court. Dr Ballara notes that, where groups could choose from multiple descent lines, they tended to present their claims before the Native Land Court as Arawa (seen as loyal) rather than Mataatua, a group whose loyalty was more in question. This, she argues, reflected a perception that those with ‘rebel’ connections were likely to be treated less favourably by the court. She points for instance to witnesses for the hapu later known as Te Patuwai, who were giving evidence in the Native Land Court for their claim to Motiti in 1867 while there was still fighting in the region. Rather than emphasise their Mataatua identity, they relied on their Arawa ancestry from Waitaha through a female ancestor, Hiruwai. Dr Ballara does not go so far however as to suggest that claimants with ‘rebel’ connections were in fact prejudiced in court.

The Ngati Awa Tribunal found that it had been inappropriate for Judge William Gilbert Mair to preside over the Compensation Court’s hearing of Waitahanui in the eastern Bay of Plenty confiscation zone, because the hearing involved rival claims from Ngati Pikiao, whom he had led as part of an Arawa force, and two hapu of Ngati Awa, against whom they had been fighting. The Tribunal found that,
as a result, some of the military awards given to Te Arawa at Matata by the Compensation Court were Ngati Awa tribal lands and that the awards to Ngati Pikiao in Waitahanui were influenced by Judge Mair’s relationship with Te Arawa. In our view, Judge Mair faced similar conflicts of interest in relation to other claimant groups in other sittings of the 1867 Compensation Court. Indeed, Dr Ballara records the rather startling detail that he sometimes had to break off action against Te Kooti or Hakaraia to preside over hearings in which the claimants’ lands were at stake.

Dr Ballara also points to the large number of Native Land Court sittings in which either Mair the elder (William Gilbert) served as judge or Mair the younger (Gilbert) appeared as Government agent. She particularly notes the Taheke case in 1885, which saw them both playing a role at the same hearing. In some of these cases, the court overturned earlier judgments that had been in favour of ‘former insurgent’ ancestral claimants and instead awarded lands to Arawa ‘toa’ claimants.

The appointment of Te Pokiha Taranui as assessor of the Native Land Court to hear Kaingaroa title cases in 1868 could also be seen as a potential conflict of interest, given that he had also fought for the Crown against groups who would claim interests in the blocks. The case in question was in fact adjourned for want of survey and the role of the assessor would have been limited. Tuhoe groups must have felt even more apprehensive after Gilbert Mair was appointed as the district officer advising the Court while he was also advising Ngati Manawa in their Kaingaroa 1 court hearings. This was, according to claimants, an equally clear conflict of interest. He later gave evidence favourable to the Ngati Manawa case.

Though there is no compelling evidence of bias on the part of either of the Mair brothers, there was certainly a clear conflict of interest which should have excluded them from being placed in the positions they held in relation to these cases.
With regard to the concern of some claimants that Retireti Tapsell, who had fought in the wars with Crown forces and been police constable at Maketu, was later a Native Land Court assessor for hearings at Maketu, court records suggest that there may be some confusion as to Tapsell’s role in the court during these hearings. Though he did appear in the Maketu court over a period of years, it was as a conductor of Ngati Whakaue cases, rather than as a court official.  

The Tribunal’s conclusions and findings

While we do not consider there is sufficient evidence to find that the Native Land Court was biased against those who had fought against the Crown, it is not surprising that this has long remained an issue for claimants in the inquiry region. In circumstances where the fighting was not even over when court sittings began in the region, and where conflict over a number of years had left sometimes bitter tensions, clearly the Crown did not take sufficient care to ensure that justice was seen to be done when the court entered the region. All those with claims should have had equal access to the court, in terms of the timing of its sittings. Judges, assessors and Government officials should have been seen to be impartial.  

In failing to ensure that judges and officials who assisted the court were not sent to areas where they had themselves been involved in fighting against Maori who might be required to bring their land claims into the court, the Crown was in breach of the principle of active protection.

Was the Native Land Court the appropriate body to determine customary interests in the Central North Island?

At the beginning of this section we posed the question whether the Native Land Court was the appropriate body to determine matters of customary interests in the Central North Island.  

The first issue we addressed was whether Crown processes and the new titles provided for adequate recognition of customary rights. We considered particular issues arising from a range of cases heard in the region, as well as the way in which Te Arawa and Tuwharetoa leaderships handled the court in the 1880s. We concluded that Central North Island Maori themselves were best able to understand and make decisions about their own complex customary rights, and their transformation into new titles. That they continued to seek the right to do this, even though they worked with court processes, is evidence that they were not in fact satisfied with court determinations, and indicates that they preferred their own forums conducted in accordance with tikanga.  

The second issue we addressed was whether Central North Island Maori concerns about the court’s title-determination processes were mitigated by the role of assessors in the court. We found that there was insufficient detailed information before us to judge the degree of assessors’ participation in decision-making in the court. However, to the extent that they did participate, their role was circumscribed within the tight constraints of a Pakeha system of determining title. The appointment of an assessor from another iwi to assist a judge could in no way substitute for locally based processes of title determination.  

The third issue we addressed was the adequacy of recourse available to Maori aggrieved by judgments of the court. Given that the Crown had imposed and persisted with a court process, we considered that its failure to provide an accessible independent legal appeal procedure before 1894 diminished the credibility of the system. Those dissatisfied with court judgments could apply for rehearings, or petition Parliament, which would result in their petitions being referred to the Native Affairs Committee. Though both were useful mechanisms, rehearings, because they involved starting the case again afresh, were not readily granted. Appeal procedures were much less cumbersome, so that appeals were more likely to be granted. The Crown’s failure to provide a
readily accessible appeal mechanism for well-founded cases was a Treaty breach.

- Finally, we found that in respect of a lingering grievance for some Central North Island communities about the court’s role in title determination – namely that it did not treat fairly those who had fought against the Crown – the Crown did not ensure that justice was seen to be done. In particular, it was in breach of the principle of active protection in failing to ensure that all had equal access to the court when it began to operate in the Central North Island, and that judges and officials were not sent to areas where they had themselves been involved in fighting against Maori who might be required to enter the court to protect their rights to land.

Taken together, these factors leave us in little doubt that the Native Land Court as introduced by the Crown to the Central North Island was not the appropriate body to determine matters of customary interest.

We found that the Crown was in breach of Treaty principles in imposing on Central North Island Maori its own title-determination process; and that there is evidence that those processes operated to the prejudice of Maori communities, and to their relationships with one another.

**The Impact of the Native Land Court**

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**Key question: What was the impact of Native Land Court processes on Central North Island iwi and hapu?**

Were the costs that Maori faced in putting their land through the Native Land Court appropriate? To what extent did the costs contribute to land loss?

The Native Land Court sat for 3060 days and considered some 1640 cases in relation to Central North Island blocks between 1867 and 1900, an average of around three and a half months’ sitting a year. There cannot, in this time, have been a person in the region who was not affected by its activities in some way. In this section we consider the costs to Maori communities of this transformation of land titles on a massive scale. Court-related costs included the daily fees of the court, survey costs, and the costs of legal representation, as well as the costs of travel, accommodation, and food while claimants lived for extended periods in town during sittings. There is also the question of indirect costs, including the cost of being away from cultivations for extended periods while attending court, and, according to some, the costs to people’s health of living in substandard conditions in towns for prolonged periods of court sittings.

The issue of the costs to Maori communities of attending the Native Land Court in the latter part of the nineteenth century has been the subject of findings in a number of other Tribunal reports, and in scholarly works. The Te Roroa Tribunal found that the costs of the court were prohibitive and influenced decisions by Maori about whether to appear.\(^{287}\)

Closer to the Central North Island, the Pouakani Tribunal wrote that:

> There is nothing in the Treaty of Waitangi which required the transmuting of traditional Maori forms of land tenure into titles cognisable in British law. By imposing requirements for survey and associated costs, fees for investigation of title in the Native Land Court, and other costs such as food and accommodation while attending lengthy court sittings, many Maori were forced into debt. That there had to be a fair system of establishing ownership when a sale was contemplated is accepted.\(^{288}\)

And the Mohaka ki Ahuriri Tribunal found with regard to Ngati Pahauwera, for example, that the Native Land Court system:

imposed significant and unreasonable costs on Ngati Pahauwera through surveys (some lands were sold to recoup these costs), court sittings, and other litigation. In addition,
while attending hearings held in towns away from Mohaka, Ngati Pahauwera were liable for costs of living. In allowing or legislating for this situation, the Crown was in breach of its protective obligations.

The Hauraki Tribunal considered that survey costs in particular were high and were usually met by selling land, ‘often in a restricted market’. While Maori sometimes benefited from the defined land titles which they got from having their boundaries defined and titles clarified, usually they did not. The process of survey and passing land through the court was ‘most commonly . . . the prelude to a succession of partitions and sales’. The Hauraki Tribunal concluded that the Crown or private purchasers should have met a greater part of the cost of initial surveys of exterior boundaries of blocks, and the marking of reserves.

The claimants’ case
Claimants observed that the legislation governing costs, and the cost structures of the Native Land Court in the Central North Island, were the same as those in other districts. In the Central North Island, claimants contend that survey costs, court fees, and the associated costs of attending the court such as food, travel, and accommodation were excessive, that they fell disproportionately and unfairly on Maori, and that they contributed directly to the alienation of land after titles had been awarded by the court, and in some cases to ill health and even elevated rates of mortality. In generic submissions, claimants asked us to find that imposing survey costs on Maori to gain secure title to lands which were already theirs was wrong in principle.

The Crown’s case
The Crown conceded that survey costs were sometimes excessive and burdensome on Maori, and that the Crown ‘could have taken further steps to ease the burden’. Land was sometimes wastefully surveyed multiple times, and claimants before the Native Land Court were sometimes forced to pay surveyors to await the hearing of cases for extended periods of court sittings. Counsel argued, however, that it was fair to have expected Maori to pay some of the costs of survey because Maori benefited from the new and valuable Crown title they secured from the court process.

The Crown also argued that expensive cases were not the norm and costs were not uniformly excessive and burdensome. Counsel cited Dr Pickens’ point that the income of a community is an important factor in assessing the degree of burden of survey costs. Tuhourangi, he argues, derived considerable income from tourism which would have allowed them to easily meet court-related costs. In other cases, blocks passed quickly through court, incurring minimal costs. The Crown contends that claimant research provides an exaggerated picture of survey costs and that this error derives from non-systematic selection of examples by claimant historians.

There is, it argued, not enough quality data to accurately gauge the degree to which court-related costs affected Central North Island Maori. Many of the problems with survey were, in any case, resolved relatively early on in the Central North Island by provisions of the Native Land Act 1873. This Act created a greater centralisation of surveying to address the problem of multiple surveys being done of the same block and required the court to ensure that the survey application had been made in good faith and to notify interested parties that it was being undertaken.

Finally, the Crown questions the strength of claimant evidence which directly attributed disease and ill health among Central North Island Maori to the sittings of the court. Dr Pickens argued under cross-examination that hearings of the court were not unique as opportunities for disease to spread, and that any large gatherings of people at hui even in traditional settings would have acted as opportunities for infection to spread. The Crown also pointed to the way in which claimants have used the 1885 report of Dr Ginders on the health of the Arawa people which focuses on the negative aspects of their health, though in his sum-
mary Dr Ginders described the health of sections of the Arawa people as good.  

The Tribunal’s analysis

The Crown has acknowledged its culpability in not acting to alleviate those survey costs which were excessive. Its arguments on this issue revolve around the degree to which such excessive costs affected Central North Island Maori, and Crown counsel questioned the representivity of examples used by claimant historians to argue that costs were excessive.

In addressing the issue of representivity, we do not consider that the only way to evaluate Native Land Court-related costs is through a minute examination, block-by-block, of all costs. Our concern is to establish patterns of court costs. In our view there is enough data from which to draw reliable conclusions about the impact of court-related costs on Maori, to the standard reached by other Tribunals.

This section will address the issue of court costs in four parts:

- court fees;
- survey costs;
- the associated costs of the court; and
- court costs and alienation.

Finally, we will assess the cumulative effect of these costs to evaluate whether or to what extent court-related costs led to land alienation.

Court fees

The actual fees of the Native Land Court were usually the least of the court-related expenses for Maori communities. As the Tribunal’s Te Roroa Report noted, ‘Native Land Court fees were set periodically by notice in the [New Zealand] Gazette’. Fees for the greater part of the last three decades of the nineteenth century were as follows: each party to the case was charged a fee of £1 per day while the court sat. In addition to this, there was a fee of two shillings to be sworn to the court before giving evidence, five shillings was charged for each court order and £1 to make a partition order. There were also fees for tasks such as examining a plan, and substantial deposits were payable on filing for rehearing or appeal proceedings.

As James Carroll, member for Eastern Maori, put it in the House in 1891:

It is absolutely ruinous for Natives to attempt to enter the chambers of that Court and ask for a title to their land. Why? First of all they have to pay a heavy fee for a survey. Then they have to send in an application, which has to go through various channels. Then they have to attend the Native Land Court, and are charged £1 a day for laying their case before the Court, and they have to pay witnesses. If they employ an agent they have to pay him two or three guineas. They have to fight out the case, which sometimes lasts three or four weeks, and very often as many months; and, after the Court has given a judgment, that does not give them a title. It is purely interlocutory, it is not definite, it is not final, it has to run the gauntlet of a rehearing; and, after all, it is hung up for years before the Native can feel that he has a valid title; and consequently, if the Native does not die in the meantime, he is crippled and exhausted before he can sell his land.  

While no systematic study of court costs has been done in the Central North Island, snapshots of Native Land Court fees can be gained from various reports. The court, for example agreed to refund fees paid in the aborted Tatua hearing of 1883 where £59 3s was charged for 21 days of hearings. Mr Stirling also records that nine days of hearings in Paeroa East cost claimants £24 12s and estimates that 17 days of rehearings cost £75. This small sample suggests average costs for a day’s sitting of a little over £3 per day, which when multiplied by the more than 3000 days of court sittings throughout the Central North Island in the nineteenth century represents a considerable cost to those communities that were relatively cash-poor.

In one Kaingaroa appeal case, Pohokura, Mr Stirling records that a £50 deposit was requested of the appellants, most of which was later refunded. However, with this up-front cost it is not surprising that parties such as
Hapimana Parakiri of Ngati Manawa withdrew his 1897 appeal because of an inability to meet such costs, which were in the order of 40 weeks’ wages for an agricultural labourer (five to six shillings per day). On the issue of court fees, as on the broader issue of court costs, the Crown has pursued an argument that claimant researchers have tended to pick ‘regrettable’ cases in highlighting the issue of fees and that many cases passed through the court relatively quickly with little cost involved. Dr Pickens concedes that fees in some of the cases he examined could have discouraged parties from participating in court, but he also argues that the court had the discretion to charge lesser fees than the amount prescribed, and that the court could record fees as a charge against the land, allowing people to appear in court whether or not they had ready money.

We are not convinced by the Crown’s suggestion that conclusions cannot be drawn about the total extent of Native Land Court fees from Central North Island examples. While it is true that little can be said about the costs of specific block hearings and what the cost structure of the court was, it is known how many days the court sat in Central North Island districts, and the cost structure of the court’s fees was the same in this region as in other areas of New Zealand where findings have already been made that the fee regime was unfair and had the potential to be onerous, particularly when combined with other court-related costs. Dr Pickens’ other argument – that some were in a better financial position to pay fees than others – will be discussed in relation to survey costs.

Survey costs
To proceed to hearing in the Native Land Court of an initial title investigation or a partition application, certainly from 1873, the land in question had to be surveyed. Under the Native Land Act 1873, once an application was filed, and the judge had made inquiries to assure himself it was bona fide, a survey had to be made under the direction of the inspector of surveys, and the boundaries marked out on the ground. Only when the survey was completed could a date be set for a court sitting. The Governor could, at the request of Maori claimants, cause a survey to be made, and charge the amount against native purposes funds. Generally speaking, however, the onus was on the Maori owners to organise the survey of their land for court hearings.

From the outset there was a legislative expectation that survey costs would be paid in land. The relationship between land alienation and the payment of survey costs has a complicated legal history, but the general pattern of legislative change was to make it increasingly easy for land to be alienated to meet such costs. From 1873, the legislation allowed Maori to nominate whether they wished to pay survey costs in money or in land. Section 7 of the Native Lands Act Amendment Act (No 2) 1878 expanded the Native Land Court’s ability to order payment of survey costs and expenses to any authorised surveyor. From 1880, land could be sold by auction to meet survey costs if the owners failed to pay. The Native Land Court Act 1886 contained a raft of provisions about survey costs. Where costs had not been met, the court could make an order that the surveyed land be charged with the unpaid amount, and the charge was to have the effect of a mortgage in favour of the surveyor. If any claimant or counter-claimant had land surveyed at his own cost, and part or all of the land was awarded to others, the court could order those who were awarded title to repay part or all of the costs to those who had the survey carried out. Again, such an order had the effect of a mortgage. Alternatively, the court could make the order in favour of the surveyor himself. The Act also provided for Parliament to vote moneys for survey, and for
the Governor to pay the cost at the request of Maori. If the cost was not met by Maori when required, the court could make an order in favour of the Surveyor-General, with the effect that the land was mortgaged to him, with interest accruing at the rate of 5 per cent per annum.\textsuperscript{314} Finally, in 1894, the Native Land Court Act allowed the court to do one of two things: first, to place a mortgage over the land until the survey costs were paid; secondly, to award a piece, or interest in the land, to those entitled to payment for the cost of the survey. Before a mortgagee sale, the Minister of Native Affairs had to be given notice of the intended sale. After six months the Minister had the option of taking over the mortgage, which would then be in the name of the Surveyor-General.\textsuperscript{315}

The Crown and claimants broadly agree that in the late 1860s and early 1870s at least, there were significant problems with the survey regime. As Dr Pickens puts it: ‘surveys were often expensive, sometimes unnecessary and occasionally a source of confusion and dispute’; they could have been better regulated to avoid waste.\textsuperscript{316} In Maketu blocks, for example, different claimants wastefully paid for multiple surveys of the same lands to support their claims.\textsuperscript{317}

Accounts at the time by those knowledgeable in the workings of the system concur that surveys sometimes created excessive costs. Chief Judge Fenton, in 1871, described surveys as sometimes consuming almost the entire proceeds of some sales.\textsuperscript{318} This was also the broad conclusion of the report of the Haultain commission of 1871.\textsuperscript{319} Colonel Haultain recommended that surveys should be centralised through the Government Surveyor and this was effected in the Native Land Act 1873 – a change which appears to have significantly reduced the problems related to multiple surveys of land.\textsuperscript{320} But this in itself was not a solution to the fundamental problem of the high cost of individual surveys.

Even the use of trig surveys did not solve the problem, though it alleviated them in some cases we are aware of. As Crown-commissioned historian Mr Hayes observes, as early as 1867 and 1871, Inspector of Surveys Theophilus Heale recommended that the systematic triangulation surveys undertaken at public expense by the Crown in the South Island should be extended to the North Island. Heale estimated that this would save up to 50 per cent on the cost of all block surveys conducted after this.\textsuperscript{321} Mr Stirling shows for instance that reduced survey costs for the Tauhara blocks followed from the Government’s completion of a trig survey of northern and eastern Taupo before it allowed private surveyors to complete plans of land in the area.\textsuperscript{322} However, where trig survey costs were added onto the cost of block surveys, as in Tauponuiatia west, the owners faced a significantly greater burden.\textsuperscript{323} One remaining problem was that trig stations continued to be seen by those opposed to land alienation as the symbols of Crown and settler encroachment; for that reason, they might be resisted.

The Pouakani Tribunal expressed a ‘particular concern about the way large areas of land were acquired by the Crown in payment of survey costs.’\textsuperscript{324} We accept that a Maori judicial body as an alternative to the Native Land Court may still have required surveys to define land boundaries in such a way that they could be used either for sale, lease, or to raise capital by loan. But, as the Pouakani Tribunal pointed out, if the Crown had accepted Maori proposals to work out the areas to be sold or leased for Pakeha settlement themselves, there would not have been the need for so many surveys or subdivisions of blocks. The same would be true, in our view, if community titles had been available to Maori owners, facilitating their entry into the new economy as developers of their own land. Thus, even if the Crown’s cost-benefit argument is accepted, the extent to which the benefits of secure title compensated for the costs of survey needs to be considered in a broader context.

All parties agree that the costs of survey varied within the Central North Island region, and evidence of the magnitude of these costs comes from a range of sources. Mr Macky uses Crown purchaser Mitchell’s cashbook from the 1870s to compare the survey costs for a first survey with the price paid for several blocks. He found that the
proportions of sale revenue taken up for survey were as follows: Kaikokopu (44 per cent), Waitahanui (21 per cent), Paengaroa (12 per cent), Tauhara Middle (64 per cent), Tauhara North (19 per cent), Tauhara (43 per cent), and Te Puke (7 per cent). The average over these seven blocks was 21 per cent.

Mr Stirling has also made observations for some Taupo and Kaingaroa blocks. He notes a record made by William Grace that 36,362 acres of the 50,000 acre Tahorakuri block (73 per cent) had been cut off to ‘defray survey costs etc.’ Mr Stirling also found that survey of the Runanga 2 block had cost one-quarter of the price the Crown paid for the block. In Pukahunui, 5500 of the roughly 43,000 acres was sold to the Government to pay a combination of survey debt and back rents owing when the Crown abandoned its long-standing ‘lease’ in 1881, retrospectively converting earlier ‘rent payments’ made into land-purchase payments. Mr Stirling notes that the Crown’s determination to recover its rent payments in land was despite Gill’s earlier statement to the people that ‘government would not keep the land or rental at all.’ A survey lien of 15 per cent of the purchase price of the land was charged against the remaining portion of the block. In Paeroa South, Mr Stirling records, survey costs comprised 15 per cent of what the Crown was prepared to pay to purchase the block.

In cases where hapu and iwi chose to sell land from one block to meet survey costs on another, comparisons are difficult, but such cases should also be noted. For example, Ms Rose and Dr O’Malley observe that Tuhourangi sold 2820 acres of their military award at Matata to pay for the survey of their Rotomahana–Parekarangi lands.

Tauponuiatia survey costs require careful consideration. Mr Macky observes that in some cases the cost of survey accounted for over half the sale value of Tauponuiatia subdivisions. Tuwharetoa, however, chose to sell some blocks in their entirety to meet the costs of survey on others. Twenty-five blocks, including the mountain peaks of Tongariro, Ngauruhoe, and Ruapehu, passed into Crown hands during the subdivision of Tauponuiatia. Dr Pickens estimates that Ngati Tuwharetoa’s court costs and survey fees for the hearing and initial subdivision of Tauponuiatia led to the sale of 300,000 acres of land to the Government. This amounts to roughly 25 per cent of the total area of the block. Dr Pickens describes it as ‘a relatively small portion’ of the land involved. We find this an extraordinary statement.

We disagree that there is insufficient data to reach conclusions on the overall extent of survey costs. While systematically collected quantitative data across the districts about survey costs and court fees are unavailable, there is still enough evidence from the many research reports covering much of the inquiry region to develop an understanding of the patterns of these costs across the Central North Island. The costs relating to survey of Maori land in the region were frequently considerable. The Tauponuiatia block comprises around a third of the total Central North Island inquiry region, and the costs there equated to 25 per cent of the area of the block. In Rotorua and Kaingaroa, first surveys cost widely varying amounts for blocks – between 7 per cent and 75 per cent, with Macky’s work suggesting that survey costs came to around 20 per cent of the price of those blocks which were sold in Rotorua and Northern Taupo.

We would add two points. First, as the Turanga Tribunal pointed out, Heale, the inspector of surveys, pointed to the costs to Maori owners of having to pay for survey costs on credit:

> The Native owner is . . . placed at very great disadvantage in getting his land surveyed: rarely possessing ready money he is obliged to find some one to survey his land on credit, and so often pays double what it cost a European.

Maori were thus paying above market costs for surveys. Secondly, the costs of secondary surveys are not included in the figures given above. Nor do we have figures on them. But the costs of exponential partition of blocks through the late nineteenth and early twentieth centuries – which in our view reflects the individualisation of title, and the empowering of individuals to alienate their interests – cannot be overlooked. These costs were imposed proportionately on
both sellers and non-sellers. In other words, they had to be borne also by those who had not initiated partition, and did not want it.\textsuperscript{339} When Crown interests were partitioned out of the Mangorewa–Kaharoa block in 1896, for instance, it was agreed that land be given up to pay for the survey lien of £269 9s 2d; the proportion to be paid by the non-sellers was £180 7s 6d, which equated to 801 acres, partitioned off for the Crown.\textsuperscript{340} The magnitude of the problem of unpaid survey costs was evident by the early decades of the twentieth century. We discuss this further in chapter 11.

In conclusion, the Crown’s contention that survey costs were sometimes reasonable in light of the benefits derived from the court process cannot be sustained. The costs for Maori communities, in our view, were frequently unfairly burdensome.

\textbf{Associated costs of the court}

The direct court costs of fees and survey were compounded by the unavoidable costs to communities of travel to, and accommodation and food at, the sometimes protracted hearings of the court, as well as the costs of lost earnings through time spent at court away from other economic activities such as tending cultivations. Added to these costs, it has been argued, were the costs to communities of sickness and disease resulting from poor living conditions during attendance.

Related to questions of hardship for those communities attending court, an issue that was energetically debated between the parties before us was that of hearings held away from the areas where Maori pursuing court claims lived. Table 9.3 lists the locations of court sittings for blocks in each inquiry district.

Claimants pursue a general argument that the locations of Native Land Court sittings in relation to particular blocks, and their timing, created unnecessary hardships for Central North Island Maori communities by forcing them to travel long distances to court sittings in Pakeha towns. At times, these disrupted the economic cycle of rural life, for example during planting or harvesting seasons. The

\begin{table}[h]
\centering
\begin{tabular}{lll}
\textbf{Taupo Inquiry District} & \textbf{Rotorua Inquiry District} & \textbf{Kaingaroa Inquiry District} \\
Taupo & Maketu & Oruanui Taupo \\
Tokaanu & Rotorua & Taupo \\
Ohinemutu & Ohinemutu & Galatea (only one hearing) \\
Te Puke & Te Puke & Matata (only three hearings) \\
Te Taheke & Te Taheke & Te Teko (only one hearing) \\
Maketu & Whakatane & Whakatane \\
Whakatane & Tauranga & Ohinemutu \\
Cambridge & Awahou & Awahou (only one hearing) \\
Rotorua & Taupo (only one hearing) & Rotorua \\
 & Otorohanga & Te Taheke \\
 & & Maketu \\
 & & Tokaanu (only one hearing) \\
\end{tabular}
\caption{Locations of sittings of Native Land Court in relation to blocks in the Central North Island by district, 1865–1900}
\end{table}
implication is that the system was unresponsive to Maori wishes about the location and timing of hearings.

A further claimant concern was that in several instances the Native Land Court sat simultaneously in different locations, despite the fact that parties might have interests in blocks being heard at both, and that they were prejudiced by their inability to attend two sets of proceedings. For example, decisions were taken to hear Kaingaroa blocks at Matata and, in one case, at Hastings. Claimants allege that such sittings were located for the convenience of court officials and at great inconvenience and expense to Maori appearing. The Crown, claimants argue, failed to adequately consult with parties over the location of the court sittings.

The Crown has not responded to this as a general proposition, but in specific cases where it has responded it has argued that setting the location of sittings was a case of ‘you can’t please all the people all the time’ and that the courts were more sympathetic to requests for adjournments and changes of location than claimants have suggested.

One case much discussed before us was that of the Kaingaroa hearings which were held at Matata in 1878, despite requests from some that they be held closer to the block at Galatea. Mr McBurney indicates that in 1879 a significant body of claimants to Kaingaroa 1, including Ngati Manawa, Ngati Apa, Warahoe, Ngati Hineuru, Ngati Whare, Ngati Haka Patuherauhe, and Hamua, met and agreed to write to Chief Judge Fenton requesting that the Kaingaroa 1 and 2 rehearings be held at Galatea. This and subsequent approaches were refused, after advice from the assessor, Wiremu Hikairo, and from the land purchase officer, Mitchell, that Matata was more suitable for reasons of accessibility, food supplies, and communications.

Further, Dr Pickens argues that many of those who spoke at the hearing came from closer to Matata than Galatea, and therefore this was an appropriate place to have the hearing anyway. Of course, it is not clear whether the fact that many of the speakers at the title hearing were from around Matata was a cause or an effect of the hearing having been moved there. Dr Pickens also fails to take into account that it was not just the speakers who attended court, but whole communities of Maori; and that, in terms of tikanga, it was more appropriate for the court to sit on the land itself. However, Dr Pickens’ general point that such decisions were a result of a complex balancing of factors on the part of officials, makes it difficult for us to reach firm conclusions on this particular case.

Other complaints about the locations of court sittings in the Central North Island include the hearing of the Tatua blocks at Cambridge in 1883, which provoked protest from Taupo claimants who argued that the 100-mile journey to the hearing would be hard on the old and young, and proposed Taupo as a nearby alternative. The Native Minister, Bryce, while largely sympathetic, referred the final decision on to the judges who were to hear the case. While Dr Pickens notes that the reason why they refused the request to hold the hearing at Taupo is not known, he speculates that it may have been because Judge Puckey suffered from gout and preferred not to travel.

Many other complaints about the timing or location of court sittings have been documented. These include: a hearing at Ohinemutu which started three weeks late, while parties waited for the judge to arrive; a claim that a Gazette notice of a hearing, published just two weeks in advance, did not reach one party; a complaint that a widely supported request to have a case heard at Rotorua rather than Taupo required the applicants to travel to Rotorua to make the request; a claimant group’s wait of months at Cambridge without having their case heard or even securing its adjournment to Taupo, as they wished; and a Ngati Hineuru claim that they were unable to make their case because key witnesses were imprisoned on the Chatham Islands.

In several instances, claimants point to hapu or iwi which did not have a chance to fairly put their cases to a hearing of the Native Land Court because they were absent attending another session of the court elsewhere. Mr Stirling speculates that the reason why the Ngati Kahungunu counter-claim to Tauponuiatia was withdrawn was because no one had arrived at court to conduct the
Map 9.2: Locations of Native Land Court hearings 1867–1900. The three small maps show that in each district, Court hearings could sometimes be held at a considerable distance from the land being investigated.
Investigation of the Native Land Court minute books for Hastings for the period, however, reveals no hearing at Hastings at that time. Dr O’Malley’s assertion that during the first sitting of the court at Ohinemutu in 1881 there was a hearing at Cambridge in which Arawa also had interests is also un-referenced in the text and appears to be contradicted by a comparison of the records of the Cambridge and Ohinemutu courts.

In the Kaingaroa district, Mr Stirling indicates that the adjacent blocks of Pohokura and Runanga 1 were heard at the same time in different locations in 1884 and 1885. While Mr Stirling is correct that the Runanga 1 hearing did coincide with the overall sitting of the court at Hastings from October 1884 until May 1885, the Runanga 1 block was heard on 9 and 12 December 1884 at Tapuaeharuru, and the Pohokura block hearing began on 13 March 1885 at Hastings. The only way in which this clash could have disadvantaged claimants would have been if Ngati Hineuru stayed at Hastings from October until March waiting for their claim to be called. There is no evidence before us that this was the case. More certain is the impact of court clashes in the case of Hitiri Te Paerata of Ngati Rauru and Taonui Hikaka of Ngati Maniapoto, who lost the opportunity to put their cases at the beginning of the Taupouiatia hearing in 1886. This has already been discussed in detail. And Matuahu Te Wharerangi and others complained of the hearing of the Okahukura block in February 1886, when other courts were hearing cases that concerned them:

There is a court at Taupo, a court at Napier, and a court here at Whanganui. We are engaged with this court. Who is to attend the court at Napier? And who at Taupo? And who at Whanganui? Inasmuch as we are all interested in these sessions of the court... 

These examples suggest that some prejudice may have resulted from the timing or location of specific hearings, but we have an incomplete picture of the extent of the problem. A comparison of the Native Land Court records
for Central North Island hearings can be used very cautiously to give an indication of possible clashes. They show that between 1865 and 1900 there were 231 days out of a total of 3060 when courts were hearing Central North Island blocks simultaneously at different locations. But these records also offer an incomplete picture. The large number of ‘clash’ days does not necessarily mean that there were real conflicts, since a hearing of a block in Taupō might have concerned a completely different set of claimants from those interested in a coastal Bay of Plenty block.

On the other hand, Central North Island Maori might have been forced to attend hearings in which they had interests of blocks outside the present inquiry region, which would not be recorded in the count, at the same time as hearings of blocks inside it.

A rather better indication of possible clashes can be obtained by counting occasions when the Native Land Court sat in different locations in relation to blocks in the same inquiry district. In Rotorua there were 18 occasions or 62 days when there were hearings at different locations at the same time. In Taupō, there were six occasions or 13 days when the court sat simultaneously at different locations at the same time. There were no such conflicts in relation to Kaingaroa district. However, once again, adjacent or nearby blocks in different districts, such as Rotomahana–Parekarangi and Tauponuiatia, or Rotomahana–Parekarangi and Kaingaroa 2, are not detected within this analytical framework.

Overall there appear to have been individual cases where Central North Island Maori were prejudiced by the timing and location of court sittings, perhaps particularly in Rotorua but, given the number of variables involved, we consider it too difficult to draw firm and final conclusions about the problem or about its overall extent here.

We turn now to consider the costs to parties of attending hearings in towns at a distance from where they lived, and to the somewhat contentious proposition that attendance at court sittings contributed to poor health among Central North Island Maori. Peripheral costs, and particularly costs in health and lost earnings, are by nature hard to quantify, but historians in their evidence have presented many contemporary accounts from throughout the region of costs and the hardships created for Central North Island Maori communities by court sittings.

In the Te Puke hearing of 1878, Mary Gillingham estimates that, of the purchase price of £4500, about £500 was retained by the Crown purchasers to pay Waitaha’s debts, which included rations. The consequences of having to attend the court however, may have been greater than simply the cost of rations. As Wi Hotene Te Huruhuru of Waitaha argued:

> The Government should pay for all rations supplied to us during the hearing of the case of Te Puke in Court, as in consequence of our being obliged by the Government to attend the Court, we had to neglect our cultivations, and consequently were short of food during the whole year, and suffered from very considerably, having to buy food instead of growing it.

At the hearings of Maketu blocks the following year in November 1879 the Crown agreed to pay the costs of relocating the hearing from Maketu to Tauranga. Rations (food) for 200 people for six weeks cost about £300, the equivalent of five years’ wages for a single agricultural worker.

Food shortages and harsh living conditions are recorded regularly in contemporary accounts of Native Land Court sittings in the region, particularly where host communities tried to uphold responsibilities of manaakitanga towards those attending the court in their rohe. Dr Pickens’ account of the rehearing of Kaingaroa 1 through the winter of 1878 records many adjournments for bad weather, and to allow parties to obtain food, with one report that after four weeks the ‘hosts’ Ngati Rangitahi had run out of food. After 10 weeks the hearing was adjourned to allow parties to return to their homes and spring cultivations. The court at Whakatane also adjourned in 1880 because of a shortage of food. Ms Rose cites the Tauranga resident magistrate, Brabant, in his report of that year, as attributing poor crops and shortages of food in the Ohinemutu
and Maketu districts to the fact of Maori communities attending the court.\textsuperscript{355}

Ngati Rangitih\-i witness before the Tribunal, David Potter, described crops being left unattended and lives disrupted during Native Land Court sittings as Rangitih\-i struggled to feed those attending the court from their 84 acres of land at Matata. This land was later acquired by storekeeper Burt in satisfaction of debts. From the 1880s, Mr Potter noted, Rangitih\-i held no more land at Matata.\textsuperscript{356}

Some of the accounts of worst hardship while attending court come from 1882 when, we note, a number of large blocks went through the court in the Rotorua district. Wi Keepa Rangipuawhe, of Tuhourangi, complained that, in the hearing of Rotomahana–Parekarangi at Awahou:

Tuhourangi were put to great straits in providing food; and it was found that, although Tuhourangi had to bring their food from a great distance, yet they were liable to supply food for their adversaries.\textsuperscript{357}

This is not surprising as the \textit{Bay of Plenty Times} in May 1882 noted of the hosts during two Rotorua hearings that:

their ability to supply provisions to the numerous friends and relations, numbered at 1,500, must have been taxed to the utmost. How long supplies would have lasted it is hard to say, but many thought the time not far distant when we should be reduced to the state Taupo was in towards the end of the sitting of the last Court, when the only provisions in the market were rum and bran.\textsuperscript{358}

Subsequent reports described harsh conditions for Maori living in tents through the winter of 1882 until in December, after almost continuous sittings through the normal planting season, the paper reported that ‘the natives of Ohinemutu are in a state of semi-starvation’.\textsuperscript{359}

Another journalist who described scenes of ‘squalor and misery’ at a hearing of the Native Land Court at Ohinemutu in 1882 reported also on widespread sickness:

There has been an unusual number of deaths amongst the Maoris at Ohinemutu during the past two or three weeks, and in walking through the settlement I saw three persons, two youths and a woman, sick beyond hope of recovery. They were lying outside their whares to get the warmth of the midday sun. Their malady in each case was consumption . . .

Nearly every adult Maori you meet throughout the district has a cough. The children all appear to suffer from chronic catarrh. Many of the little creatures, tied behind their mother’s backs, look pinched and wan, as though they suffered from want of proper nourishment. Unwholesome dwellings and insufficient food are also helping on the sad work . . .\textsuperscript{360}

The year 1886 was another notably bad year following the arrival of the Native Land Court at Taupo. In April, after several months of hearings, the native medical officer for the district reported ‘a considerable amount of sickness among the natives, he having attended several hundred cases; and that, especially during the Land Court, there have been an exceptional number of deaths.’\textsuperscript{361} The court continued to sit at Taupo for a further two months after this comment had been made and, as Mr Stirling argues, Taupo Maori communities can scarcely have recovered before the leviathan Tauponuiatia sitting of the court began in December 1886.\textsuperscript{362}

Such conditions did not escape the notice of Parliament. In 1885, a member of the House of Representatives, Robert Bruce, argued that:

we could not devise a more ingenious method of destroying the whole of the Maori race than by these Courts. The Natives come from their villages in the interior, and have to hang about sometimes for months in our centres of population, where they are exposed to many demoralizing influences. They are brought into contact with the lowest class of society, and are exposed to temptation, and the result is that a great number contract diseases and die . . . Some little time ago I was taking a ride through the interior, and I was perfectly astonished at hearing that a subject of conversation at each hapu I visited was the number of Natives who had died in consequence of attendance at the Native Land Court at Whanganui. That has always appeared to me to be a disgrace to the colony.\textsuperscript{363}
The Crown has argued that the Native Land Court itself, to the extent that it created conditions for the spread of disease, was no different from any other large gathering of Maori – for instance, runanga determining land titles. We consider this argument to be flawed. Maori had a long-developed tradition of large tribal and intertribal gatherings for many purposes. In preparing for such gatherings, experienced community planners set well-oiled machinery in motion – based on careful timing and drawing on the relationships of the parties involved – to ensure that manuhiri were adequately fed and sheltered. Manuhiri, for their part, contributed both through koha and through the reciprocal hosting of other hui. The court did not accept this kind of responsibility. Had Maori been allowed to significantly participate in the design and running of forums to determine land titles, rather than having a court imposed on them by the Crown, it is hard to imagine that they would have placed the pressure on people and their economic and social well-being to the extent that the court did.

In their evidence, Tahu Kukutai, Ian Pool, and Janet Sceats argued that indicators of community health, including infant births per woman, show a significant trend to poor health among Central North Island Maori in the late nineteenth century which can be directly attributed to attending hearings of the Native Land Court. The data of the Pool team in itself is insufficient to establish a causal link between attending the court and poor health outcomes for Maori. But alongside it we set repeated anecdotal evidence, from a wide variety of sources, and over an extended period, of poverty, hardship, and ill health directly attributed to particular court sittings. We conclude with some confidence that the conditions in which many Maori lived during sittings, and the toll that absence from home took on normal economic activities, were a significant contributor to poverty and poor health in this period.

In our view, the Native Land Court could have been expected to accommodate reasonable requests in relation to locations and timings of sittings from parties, balancing the wishes of all concerned and ensuring that natural justice was observed. Officials should also have taken care to ensure that sittings of the court were not scheduled so that cases involving neighbouring blocks were heard simultaneously at different locations. In general, there is no accurate data about where those who attended each court hearing lived, and any attempt to systematically research this would be impossible. Qualitative evidence, however, including a range of contemporary accounts of the hearings as well as the minutes of the hearings themselves, strongly suggests that at times the location of hearings was prejudicial to Central North Island Maori communities.

**Court costs and land alienation**

We turn finally to the question of whether and to what extent the cumulative direct and indirect costs of the Native Land Court led to Maori land alienation in the Central North Island. According to claimants, the costs of the court had a significant impact on land alienation. They contend that loss of land as a result of the costs of the court process occurred through the Crown paying off survey and other court-related debt in exchange for an acknowledged stake in the land, and through the Crown advancing money directly to claimants and then applying to the court to have the interests they had acquired partitioned out. Legislative changes from the mid-1870s made it progressively easier for the Crown to acquire and partition out shares it had purchased in land and to recoup survey debt in land.

Several historians gave evidence of such actions by the Crown. As Ms Rose noted, Crown purchase agents Charles Davis and Henry Mitchell took advantage of low stocks of food and hardships at the 1878 hearings of Kaingaroa blocks at Matata to advance £221 to owners of Pukahunui, Heruiwi, and Kaingaroa 1. In the Tauhara hearings, moneys paid for provisions were also charged against the land. And Dr Ballara draws together evidence that Crown purchase agents deliberately targeted Native Land Court hearings to acquire land. In one instance she cites land purchasing agent, and later Native Land Court judge, Recorder S Bush, as telegraphing, ‘Natives short of food at present, of which opportunity should be taken.'
Dr O’Malley also cites several circumstances where Crown agents took advantage of Te Arawa’s need to pay court costs to purchase land. For example, he notes a report on a Native Land Court hearing at Rotorua that:

The natives here are in such an impoverished state that they have found it necessary to telegraph to the Native Minister to be allowed to have the fees charged against the various blocks and sections now coming before the Native Land Court.368

Cumulative evidence from historians suggests that the costs of surveys led to the loss of land by Maori communities. In reporting to their employer on their negotiations to purchase Tauhara Middle, Tauhara North, Otamarakau, Kaikokopu, and other Maketu blocks, Crown purchasing agents Davis and Mitchell wrote in 1873 that ‘the Native Owners are all extremely anxious that the surveyors charges should be paid off as soon as possible and the immediate liquidation of these costs is the main inducement to sell to the Government.’369 The evidence of Mr Alexander shows that when Davis and Mitchell began purchasing Bay of Plenty lands on behalf of the Crown, they bought up survey debts held by private parties who had advanced money to survey some of these blocks. That the payment of money for survey became a Government advance on the land is perhaps unfair. However Mr Alexander’s evidence includes a memo from the Under-Secretary of the Native Department noting that this was done at the request of the Maori owners.370

Davis and Mitchell also colluded with surveyors, sometimes paying them directly and charging this as an advance against land.371 The 5 per cent interest which accrued on survey debts under various Native Land Acts impelled Maori to sell land also.372 As Ms Rose records in relation to the Ngati Whakaue blocks Okoheriki, Kawaha, and Te Koutu, the compounding interest and administration fees increased the total debt; it rose by 30 per cent in the five years from 1893 to 1898.373

In some instances, such as the Waitahanui block, Davis and Mitchell clearly placed pressure on Bay of Plenty Maori to sell, purportedly threatening them with a survey debt which belonged to Pakeha would-be lessor John Chaytor. Chaytor gave evidence in the Native Land Court that:

the Natives stated to me that the agreement to sell Waitahanui was obtained by threats that the land would be taken to pay for the survey charges which Messrs Davis and Mitchell then demanded should be paid… 374

Others who had been present claimed that Mitchell and Davis had induced them to agree to pay the debt in land for fear that it would be held as a mortgage against the land that would accrue interest.375

In Pohokura in the Kaingaroa district, Mr Stirling builds a case that the land was sold, as one witness put it ‘to get money to pay for the survey’.376 In Tahorakuri, two pieces of land totalling 8000 acres were cut off to pay for the survey of the 36,362 acre block.377 And in Tutukau, the Crown refused an offer to refund the costs it had paid for the survey of the block and insisted on taking 2000 acres of the 10,494 acre block for survey costs.378

In Whakapoungakau – a block of 11,000 acres split into 17 subdivisions, where the Crown sought survey costs in court – Mr Alexander records that the owners were persuaded to agree to the Crown taking its award not in each subdivision, but in a single block of prime land, of 636 acres.379 And as noted earlier, Tauponuiatia blocks amounting to 300,000 acres, or some 25 per cent of the block, were set aside and awarded to the Crown to cover survey costs of the Tauponuiatia subdivisions.380

The Tribunal’s conclusions and findings on costs to Maori of the Native Land Court process

- We find that the direct costs of the Native Land Court, and the associated costs of attending court sittings out of claimants’ home areas, where they were often dependent on the purchase of food over many weeks, were a not-insubstantial burden on Central North Island Maori. Poor planning of court sittings, such as holding them in winter, added unnecessarily to that burden. Conditions in which many Maori lived
during sittings, and the toll that absence from home took on normal economic activities, were a significant contributing factor to poverty and poor health in this period.

- Native Land Court fees, though the least of the expenses Maori communities had to face, were unfair, and potentially onerous. We accept the Crown's argument that the cost of attending the court and the ability of groups to pay varied. But there was sufficient contemporary evidence of the social and economic costs to Maori users of the court that we consider a reasonable Crown should have taken steps to address the problems and ensure some remedy.

- In respect of survey costs, there were variations both in the level of costs and in the ability of communities to pay them. But contemporary accounts concur that surveys sometimes created excessive costs. The loading of external boundary survey costs entirely on to Maori owners was in our view also unreasonable; but Maori owners also had to pay for secondary surveys; and, in our inquiry region where many initial blocks were very large, the costs of surveys of even the first round of subdivisions (still big blocks) had to be met soon after that of external boundaries. The costs for Maori owners were frequently unfairly burdensome, and in some cases their debts led to the loss of disproportionate amounts of land.

- The various costs Central North Island Maori communities carried as a result of engaging with the court system were of course cumulative. The prejudice to them was compounded in some cases by the deliberate use of debt by Crown agents to effect land alienation, in serious breach of the Crown's obligations of good faith and active protection.

- We reject the Crown's contention that the costs of attending court were balanced by the advantage of secure title. While it is true that sale or lease might follow survey, bringing financial returns to assist with the defraying of costs, the crucial disadvantage to Maori owners was the individualisation of their title, which greatly compromised the ability of communities to benefit from the new tenure system. We discuss this further below.

### Forms of Title under the Native Land Legislation

**Key Question:** Were the forms of title available to Central North Island Maori under the native land legislation appropriate to their needs in the developing colonial economy?

Having found that the Native Land Court was not the appropriate forum to determine customary interests, we turn now to the actual titles that it provided. Once the court gave its judgments, were the forms of title it provided under the native land legislation appropriate to enable Central North Island Maori to enter the colonial economy in a variety of ways?

We begin with some consideration of what Maori required and what they might have expected from the new land tenure system. Some Central North Island Maori, as discussed earlier, wanted more certain titles in the new economy: they might wish to lease land, embark on some strategic sales, or develop the land in ways which would allow them to avail themselves of new economic opportunities which colonisation presented. The Native Land Court undertook a formidable task in translating complex customary Maori modes of land ownership into absolute geometrically defined blocks, for these customary modes were based on collectively held community rights as well as a range of resource rights which in some areas might well overlap with those of other hapu or iwi. Any form of title provided for by statute should have been designed to facilitate this translation. But new forms of title had also to recognise Maori realities of community-held rights and community-based endeavours, which were underpinned by the
strength of kin relationships. To the extent that Maori wanted transformation of titles, they wanted titles which provided for the exercise of rangatiratanga over community lands.

The Native Land Court, however, fundamentally transformed the nature of land tenure, replacing collective ownership with individualised titles. Whatever the outcome of the title investigation, this individualisation of title undermined the ability of Maori communities to deal collectively with their land and undermined the ability of chiefs to control and manage land and resources within tribal structures. At the same time, those awarded title were awarded it not as a recognised corporate body or as trustees, but as a list of right-holders who came to be treated in law or in fact as absolute owners of interests capable of being individually alienated. A consequence was that the traditional importance of consensus and open decision-making about land communally owned was irrevocably removed.

Many prominent legislators and officials at the time saw the individualisation and the alienation of Maori land as the true and legitimate objective of the new system of titles. As former Prime Minister and Minister of Justice Henry Sewell described it in 1870, this was part of the purpose of the 1865 Act:

The object of the Native Lands Act was two-fold: to bring the great bulk of the lands of the Northern Island which belonged to the Natives, and which, before the passing of the 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 detribalization of the Natives, – to destroy, if it were possible, the principles of communism which ran through the whole of their institutions, upon which their social system was based, and which stood as a barrier in the way of all attempts to amalgamate the Native race into our own social and political system. It was hoped that by the individualisation of titles to 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.

This section will focus on the forms of title created under the successive Native Land Acts and their appropriateness to Central North Island Maori needs. We have chosen to divide our discussion on this issue into three interrelated subquestions:

- Were the forms of title introduced by the native land legislation under the Native Lands Acts 1865 and 1867 appropriate to the needs of Central North Island Maori?
- Were the forms of title available to Central North Island Maori under the Native Land Act 1873 and subsequent legislation appropriate to their needs?
- Were the new titles appropriate for the protection of tribal taonga and resource rights?

**Forms of title under 1865 and 1867 Acts**

**Were the forms of title introduced by the native land legislation under the Native Lands Acts 1865 and 1867 appropriate to the needs of Central North Island Maori?**

The Native Lands Act 1867, which took effect five days before the Native Land Court sat for the first time in the Central North Island, amended the Native Lands Act 1865. The combination of these two laws established the forms of land title first applied by the court to the Central North Island region. The ‘10-owner rule’ introduced under section 23 of the 1865 Act stipulated that title for any piece of land of less than 5000 acres could be granted to no more than 10 individuals. Under its first chief judge, Francis Dart Fenton, the court routinely applied the rule to blocks over this size too, even though the Act empowered it to award title to such blocks in the name of a tribe.

The Native Lands Act 1867 amended the 1865 Act by indicating that a trust relationship was inherent in the arrangement. While section 17 of the Act gave the court
discretion to award title to no more than 10 people, if all those with interests in the land agreed, it then required that the names of all be registered in the court.\textsuperscript{383} It also limited alienation of the land, except for a 21-year lease, until it had been subdivided. Despite this reform, the rights conferred by the 1867 Act remained at best ambiguous. There was no clear recognition of community ownership.

Titles granted under the 10-owner rule in the Central North Island were not subject to review until the Native Equitable Owners Act 1886 was passed. This Act empowered the Native Land Court to inquire into the nature of title to such land and determine whether a trust existed or had been intended to exist. Where it found that the title was clothed with a trust, the court could declare who the beneficial owners were. However, the Act did not apply to lands which had already been sold by the original owners or their successors. The Native Land Court Act 1894 repealed the Native Equitable Owners Act 1886, but contained a similar provision that extended to any land the court had dealt with. However, under the 1894 Act, the court could exercise this part of its jurisdiction only if the Governor in Council authorised it to do so, and any order of the court only took effect 14 days after it had been laid before both Houses of the General Assembly.\textsuperscript{384}

\textbf{The claimants’ case}

Claimants argued that, to the extent that it operated, the 10-owner rule unfairly distorted Maori land ownership patterns.\textsuperscript{385} They cited a number of blocks where this was the case, and pointed also to cases in which section 17 of the Native Lands Act 1867 was not used by the court when it should have been, or where the court failed to use the tribal title option available to it under section 23 of the Native Lands Act 1865. Ngati Tutemohuta, for example, drew on the evidence of Dr Pickens and Mr Stirling to show that Wharetoto, the Tauhara blocks, Runanga 2, and Te Hukui were blocks in which land titles were distorted by the 10-owner rule.\textsuperscript{386} Counsel for claimants from the Tauhara hapu, including Ngati Hinerau, Ngati Te Uurunga, Ngati Tutemohuta, and Ngati Rauhoto, who are broadly north-eastern hapu of Ngati Tuwharetoa, submitted that the hapu were heavily affected by the 10-owner rule in respect of their most important lands, Tauhara Middle and Wharetoto, heard under this legislation. They claim that by the time the Native Equitable Owners Act offered them redress, the most valuable of their lands, the area around Tapuaeharuru (Taupo) township, had already passed out of their hands.\textsuperscript{387}

\textbf{The Crown’s case}

The Crown conceded that ‘the 1865 10-owner title by definition excluded some legitimate right holders’. However, later forms of title attempted to deal with this problem by ensuring that all legitimate right-holders were registered or listed. Counsel added: ‘There were of course legislative responses to this issue namely the enactment of Native Equitable Owners Act 1886.’\textsuperscript{388}

\textbf{The Tribunal’s analysis}

We note the fundamental agreement between parties that the 10-owner rule did result in legitimate Maori right-
holders being excluded from titles awarded under the Native Lands Act 1865.

We have already referred in chapter 8 to the findings of Tribunals which have considered titles provided for under this legislation. The Orakei Tribunal found that the vesting of blocks in only 10 beneficial owners, with the effect of dispossessing the remaining members of the tribal community, was a 'flagrant violation of the Treaty'. The Mohaka Tribunal pointed to the fact that the Crown recognised the shortcomings of the 1865 Act by passing amending legislation in 1867, by repealing the Act in 1873, and by its 1886 legislation. But it failed to ensure that the judiciary complied with the 1867 amendment Act, and did not compensate Maori for whom, by 1873 or 1886, it was in any case too late.

The forms of title provided for under the 1865 Act were deficient, in Treaty terms, in a number of respects. As the Hauraki Tribunal has shown, it provided only an individual title, with up to 10 owners named on the certificate of title; and there was no declaration of trusts for the hapu. The land itself was no longer customary land, but had been converted to a hybrid tenure; the named owners thus held a legal authority they did not possess in traditional Maori society. Each of the 10 owners held 'a one-tenth share (or more) in a fully negotiable title'. Chief Judge Fenton, the Turanga Tribunal observed, was prepared to accept the chiefs onto the titles as political representatives of the people, but not to translate such representivity into legal obligations owed to the wider land-owning community. The Native Land Court, in other words, intervened in matters of tikanga. The 10-owner rule 'cut the people out and let the chiefs act like individuals'. The creation of individualised alienable rights resulted in some chiefs acting, in the context of the new money economy, like individuals rather than as kaitiaki, whether because of 'debt, greed, or unfamiliarity with the new system'. And where this happened, the 'ancient social contract between rangatira and hapu', the obligations each owed to the other, was breached.

Maori reaction to the conferral of such rights on the 10 named owners, and the sales that followed in its wake, did lead to early attempts at reform. In particular, JC Richmond, who was effectively Native Minister in 1867, considered the creation of trusts. He told the House that there might be great difficulties if 'tacit and unrecorded trusts [were] placed in the power of a few Natives holding grants or certificates for large tracts of land'. In cases where they might nominally be the owners, while really holding the land for 'large bodies of Natives', and they found themselves pressed for money – which, as Richmond said, was not unlikely – and sold, it was the Government that would bear the brunt of the displeasure of those whose property was held in 'unacknowledged trust'. He himself wanted those granted certificates in such cases, to be 'called upon by the court to execute some declaration of trust'. The Attorney-General, however, advised him that 'it would be attended with very great inconvenience'. On the basis of the Attorney-General's advice, a proposal which might have been of great benefit to Maori owners was simply passed over. This, in our view, was a turning point; it was certainly a very great missed opportunity. The 'second-best' arrangement was Richmond's provision for listing in court records all others with interests in the land, enacted in section 17 of the 1867 Act, which would in turn be replaced by the memorials of ownership of the 1873 Act.

Above all, judges had discretion about whether to apply section 17. Chief Judge Fenton, it has been shown, was reluctant to apply the section and practically ignored it. Later he would explain that this was because creating trusts would 'build up communal ownership', thus perpetuating 'the evil' instead of removing it. The whole point of the native land legislation, in his view, was 'the putting to an end to Maori communal ownership'[sic]. The intended safeguard for Maori owners provided in the 1867 Act was thus no safeguard at all, since the court was able to, and did ignore it. This had implications for alienation too: land for which a certificate of title had been issued under section 17 could only be leased for up to 21 years, except with the consent of the Governor in Council (on application of the owners); but under the 1865 Act the
Map 9.3: Blocks where the '10-owner rule' applied, 1860s–1880s
The impact of the 1865 and 1867 Native Lands Acts in the Central North Island

In the Central North Island the Native Land Court, as elsewhere, in practice favoured the granting of titles to no more than 10 individuals until 1873. The impact of the 1865 and 1867 Native Lands Acts in the Central North Island

In the Central North Island the Native Land Court, as elsewhere, in practice favoured the granting of titles to no more than 10 individuals until 1873. Those groups with lands which were heard in larger blocks around the coastal Bay of Plenty, and those in Kaingaroa and northern Taupo were most affected by the 10-owner rule. As Mr Stirling observes, the provisions under section 17 of the Native Lands Act 1867 for lists of owners over the 10 recorded on the title to be recorded were ‘almost entirely neglected’ in court orders made in Kaingaroa and northern Taupo blocks.

One indication of the extent to which the 10-owner rule was applied in the Central North Island comes from the Land History and Alienation Database, which records 54 title orders made in the Central North Island under the 1865, 1867 and 1869 Native Lands Acts. These are listed in table 9.4. They include blocks which first came to court between 1865 and 1873, but for which title was not actually determined until after 1873.

As map 9.3 shows, the blocks subject to the 10-owner rule include mostly blocks on the Bay of Plenty coast on the Maketu Peninsula, but also some inland blocks around Taupo and Kaingaroa. While there are many Maketu blocks, few measure more than a few acres. The Kaingaroa and Taupo blocks in contrast, can be better measured in thousands or tens of thousands of acres. While blocks over 5000 acres could be awarded to tribes, the 10-owner rule was applied instead to blocks of this size in the Central North Island. Other blocks, including Kaingaroa 1, Kaingaroa 2, Runanga and Kaikokopu, although first heard before 1873, were later awarded to more than 10 owners. This was because title to these particular blocks was eventually settled under new applications for title made under the Native Land Act 1873.

What impact did the issue of titles under the 1865 Act have in our inquiry region? In the 1869 sitting of the Native Land Court at Taupo, interlocutory orders were issued for several blocks. For the Wharetoto block, Paora Hapimana Te Huriwaka produced a list of about 70 people from two ‘tribes’ with interests in the block, but only 10 were awarded title. In Te Pakuru, a small block, there were said to be 20 persons interested in the land, but only eight were selected for the title. In Te Hukui block, 10 were selected from 20 people said to be interested. In Otuhounga there were ‘upwards of 30 people interested in the land, from three named hapu’, who had agreed on seven grantees. The major Tauhara blocks appeared before the court at this hearing, and were divided into three parts (south, north and middle). The grantees were described as representatives of the tribes, but again, the 1867 provisions were not used. Dr Pickens suggests that the court seems to have been considering the ‘rarely used’ provision of a tribal title under section 23 of the Native Lands Act 1865. The orders for these blocks were confirmed at the 1872 sitting of the court.

Where there were more than 10 owners, Dr Pickens states, ‘Maori originally believed the 10 names selected to go on the title were trustees for the community or communities that had held the land under customary tenure.’ He cites ‘numerous statements’ by Maori from the minute books of courts held within the Central North Island region (including those for blocks referred to above) that show how they understood the status of the 10 ‘owners’:

it has been agreed upon by the tribes names, about 70 persons in all, who have all being [sic] here, that the persons names shall be the person to represent their interests [in Wharetoto]

There may be about 20 people interested in the [Pakuru] land. These are the names of the representatives as agreed to among ourselves…

an agreement has been come to amongst the claimants to divide the land [Tauhara] into three parts, for which
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</table>
Certificates are requested. They have selected person to represent them in the Grants [sic].

In the Central North Island minute books he looked at, Dr Pickens found no judicial explanations to Maori that the chosen 10 were trustees, though according to the report of the 1891 Native Land Laws Commission such explanations were given. It seems clear however, from the above examples, that judges were allowing Maori to construct their lists of names without correcting their misunderstanding of the legal position, and evidently also without explaining what the options available under the law were. As Dr Pickens concludes, the court in the Central North Island ‘did not extend the benefits of the section 17 titles to Maori as expeditiously as it might have done.’

It is our view that the Crown, having identified considerable problems with titles under the 1865 Act, had a responsibility to provide a more efficacious solution than it did in the form of a discretionary power to the Native Land Court to record the names of all owners. Richmond admitted in the House that the chief judge had not been shown the Bill, which points to his understanding that Fenton would have some difficulty with the provisions. In these circumstances, the interests of the Maori right-holders should have been regarded as paramount. Instead, in the years that followed, many owners who should have been recorded on the titles were not. The Crown’s assurances of the benefits of the new tenure system – had they been heard – would have rung hollow to these owners.

The Crown, as we have indicated above, did belatedly address the matter of the rights of those who had been left off titles under the 1865 Act. In 1886 the Native Equitable Owners Act was passed, stating (in its preamble) that certificates of title and Crown grants had been issued ‘to Natives nominally as absolute owners’; whereas in many cases ‘such Natives are only entitled and were only intended to be clothed with title as trustees for themselves and others, members of their tribe or hapu or otherwise.’ The Act empowered the Native Land Court to inquire into such titles and ‘intended’ trusts, on application by any Maori who claimed to be a beneficial owner, and either to declare that no such trust existed or, if it did, to declare who the beneficial owners were. But this would not apply where the land ‘or any share therein’ had been sold by any of the ‘nominal owners’ or their successors.

We note, however, that it took 20 years before the issue was addressed – even though the prejudice to owners left off the titles had been recognised as early as 1867. It is perhaps not surprising that this was the case. The parliamentary debates on the 1886 Bill reveal that there was some concern among members that considerable litigation might be the outcome. Sir Robert Stout, however, was a powerful voice in urging that: ‘The injustice done to the Native people under the Act of 1865 is one of the greatest disgraces to this colony.’ He assured the House that it had never been intended that only 10 names should be put in a grant where the land belonged to 100 people. It was important to ‘do justice to the Native race’ by allowing those wrongly excluded the opportunity of proving their title.

In our inquiry district, the 1886 Act had a limited effect. A search of the Native Land Court minute books for all three inquiry districts reveals that to 1900 there were only three hearings held in the Central North Island under the Native Equitable Owners Act 1886 and its successor the Native Land Court Act 1894. These were Tauhara North, Wharetong 9, and Oruanui. In the case of Tauhara North (10,605 acres), the block had been awarded in 1869 to two grantees of Ngati Tahu, with its alienation restricted until such time as it was ‘subdivided among the persons interested of the hapu Ngati Tahu.’ The court ordered titles to issue in 1872 once surveys had been carried out. An application under the Act for Tauhara North resulted in a hearing early in 1897, and the court’s interlocutory opinion that the two grantees ‘were not intended to be absolute owners, but trustees for others.’ The inquiry was proceeded with until it turned out that a substantial part of the land (6714 acres) had been purchased years before, so that the 1886 Act did not apply and the court’s proceedings were void; the application under the Act was therefore dismissed. The court, however, encouraged the claimants to apply for an
Order in Council under section 14(10) of the Native Land Court Act 1894, to authorise the court to investigate ‘native trusts’, that is, whether a nominal owner or owners held Maori land in trust, and whether other beneficial owners should be included in the title. The outcome of this was a new inquiry, and an award of title to the balance of Tauhara North block (3891 acres) to 103 individuals in equal shares. This highlights the limits of the Native Equitable Owners Act in providing redress. In cases where the land ‘or any share therein’ had been sold or conveyed by any of the (named) owners, the Act was of no assistance to them.

Our search of the minute books indicates that Te Rangitahau was the applicant for a hearing for Wharetoto 9 (awarded to nine owners under the 1865 Act), and that the court found a trustee relationship existed. Evidence was given by a number of parties wishing to submit new lists of owners. The Oruanui case came before the court in 1909, but appears not to have been resolved at that time. We are unable to comment further on the outcome of these cases.

The 1891 Report of the Commission on Native Land Laws found that the collective result of the 10-owner laws and regulations was that many Maori found themselves excluded from Crown-granted freehold titles where they would otherwise have had rights to land use under traditional systems of tenure. The commission was scathing of the ‘10-owner rule’, and the practice of the court to grant titles to small groups of individuals rather than to vest land in hapu or whanau. They contended that: ‘The property of the people other than the grantees was in all such cases taken from them, under this misinterpretation of the statute, in direct violation of the Treaty of Waitangi.’

We can only agree. The titles issued under the 1865 Act disinherited all owners other than the 10 named on the certificate of title. It took Parliament 20 years to provide an avenue of redress to those owners.
The Tribunal’s findings

We reiterate the findings of earlier Tribunals that the form of title known as the ‘10-owner rule’ provided under the Native Lands Act 1865 was deficient in Treaty terms, in bestowing legal authority on only 10 of those who held customary rights in a block. We find also that the Crown, though well aware of the problem, failed in the short term to provide effective solutions. In the Central North Island, where titles continued to be awarded under this system for a number of years, many Maori were prejudiced as a result. The Crown’s provision of redress for such owners, though it was based in recognition of the injustice to them, was too slow in coming, and in any case was not readily available to those who might wish to seek recognition.

Forms of title under the Native Land Act 1873 and subsequent legislation

Weren the forms of title available to Central North Island Maori under the Native Land Act 1873 and subsequent legislation appropriate to their needs?

The claimants’ case

Claimant counsel and tangata whenua witnesses who presented evidence in the Central North Island agreed that the findings of the Turanga, Hauraki, Pouakani, and the Mohaka River Tribunals are applicable in the Central North Island region. They argued that the system of tenure that individualised title and effectively allowed land purchasers to deal with individuals, rather than tribes, tore the fabric of Maori society and land management practices and contributed directly to land alienation. As Tony Mark Reihana in evidence for Ngati Tahu put it, ‘our tikanga, our kawa of how we interacted with each other, how we interacted with our neighbours has been affected. The ability to utilize our rohe has been affected’.

The Crown’s case

The Crown conceded that nineteenth century land laws ‘can fairly be criticised for failing to provide for more effective corporate/communal governance mechanism[s]’. In Treaty terms, it stated, that may be one of the principal failings of the native land laws generally.

The Tribunal’s analysis

The Native Land Act 1873, a long and complex piece of legislation, introduced the form of title most extensively used in the Central North Island. We have already referred in chapter 8 to the findings of recent Tribunals on the Act and its title provisions. Here, we reiterate the main points. The new Act required that the names of all members of land-owning hapu be recorded on a memorial of ownership (section 47). The act created an intermediate form of title, halfway between customary ownership and freehold title. Native freehold title would come later as the land was subdivided. But though the land technically remained customary land, there was one far-reaching change: the individual owners were now identified and listed; they held individual shares in the land, and they were empowered to alienate those shares without reference to the other right holders. This was, then, ‘virtual’ individualisation of title. The Turanga Tribunal stated categorically that:

There is no question . . . 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 . . . that purchasers deal with the community of owners as a community in securing agreement for sale. [Emphasis in original.]

Thus, the 1873 Act did not try to repair the damage to the relationship between chief and community done by the 1865 Act. Instead, it severed that relationship. The severing is visible in the minute books of the Native Land Court: at the point when the court makes orders to named tribes or hapu (as it did for instance in Rotorua cases in the 1880s), the orders are followed by long lists of newly identified individual owners. The 1873 Act not only individualised
the sale of Maori land, it individualised Maori title only for the purpose of alienation. Customary land rights had been turned into negotiable titles. This selective individualisation, the Turanga Tribunal found, was in breach of article 2 of the Treaty and the guarantee of tino rangatiratanga. The breach, moreover, was exacerbated by the fact that the law facilitated Maori participation in the new economy only by the alienation of individual shares. The new regime made it easier for Maori to sell land than to retain and use it.

Changes to the native land laws throughout the 1870s provided for the further break-up of tribal estates. The power of the Crown as a party in Native Land Court proceedings was gradually increased. The Native Land Act Amendment Act 1877 allowed the Crown to appear as a party to the court at title and partition hearings if it had made payments to Maori who claimed an interest in lands. The court could then determine the share of the Crown, irrespective of the views of the other owners (section 6). In 1882, this right was extended to private parties who had acquired individual shares; to ‘any Native grantee’ who wanted a division of land in his or her grant, and to a majority in number who wanted a division of the land. A further path to individualisation, and to alienation, was through definition of owners’ relative interests. From 1878 the court might hold a hearing (if a single owner or any other person interested in the land applied) to determine the relative value of the owner’s interest; and vest a portion of land in him or her accordingly. It would not seem possible to determine the relative interest of one owner without determining the relative interests of all. And since vesting a portion of land in an owner would mean partition of the land, such an application would have the effect of destroying the unity of possession that existed hitherto among the co-owners. The Native Land Court Act 1886 Amendment Act 1888 provided that when the court first ascertained the title of a block owned by more than 20 Maori, it should, if practicable, direct the land to be partitioned into subdivisions owned by 20 persons or fewer. (We will consider the significance of these measures further in chapter 11.)

Underlying the provisions which facilitated individualisation and alienation is the key failure of the native land legislation: it did not expressly provide for community titles or for community management systems. Yet at various times consideration was given to the provision of community management, and to specific proposals. JC Richmond, as we have seen, envisaged trusts in 1867. Henry Sewell, in 1873, warned the House that the attempt evident in the Bill to ‘force upon the Natives the system of individual title to the subversion of tribal rights’ would have serious consequences. As he put it:

What the Natives contended for was this: they say, ’we are communistic in our territorial rights, our habits, and ideas. We desire to retain them . . . Do not force upon us the adoption of a system of law which is foreign to us. We are tribes, and we desire to remain so.’

While Sewell himself hoped for the amalgamation of Maori and Europeans under one law, as fast as possible, he did not think it would happen quickly. He was greatly concerned about the provision for memorials of ownership:

the tribal right was ipso facto disintegrated; the tribe ceased to be a tribe, and became individualized . . . they [the legislature] were introducing a system into the mode of dealing with Native lands wholly foreign to Native custom. The Natives of a tribe held a collective corporate interest in the whole of their lands, and had no idea of divided shares . . . What was now said was, that the Natives should be governed by majorities, and that their interest in their 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.

In Turanga, Wi Pere and W L Rees tried other models subsequently to achieve community management. They developed a trust scheme by which community leaders could be appointed trustees in accordance with English law. The Supreme Court found, however, in the Pouawa decision, that such a trust was illegal. The owners could legally only sell or lease; there was no provision for land to be vested in trust. Subsequently Rees tried again,
promoting a Bill in 1880 specifically to address such issues on the East Coast. The Bill provided for district boards involving leading rangatira as well as block committees. It was, however, defeated in the House.\footnote{424} In 1885 Ballance, then Native Minister, also promoted a system of communal land management, as we have seen in chapter 6. His scheme involved elected block komiti to manage lands on behalf of the owners, as well as elected Maori boards and Government commissioners who might act for the block komiti if they wished to lease or sell land. The Native Lands Administration Act 1886 did make provision for elected block komiti. But Maori leaderships were not satisfied because Ballance failed to respond to their strong representations that block komiti should only act at the direction of owners, and that district committees should have greater powers. Thus Maori did not use its provisions. Though Ballance did not bring his proposals to successful fruition, they showed at least that the Government could contemplate Maori community management of their lands.

In the absence of any such legal mechanism for collective decision-making, communities were greatly hampered in attempts to utilise their lands and resources in any planned way. Rees had pointed this out in 1884, when he argued for recognising the exact similarity between tribes and joint-stock companies, and for turning a tribe into a joint-stock company ‘for the ownership of its estate.’\footnote{425} Not only would this make for a simpler and certain system of land transfer, but it would allow Maori to utilise their own lands:

As an adjunct to the possession and ownership of land, the profitable occupation and enjoyment of that land ought to be essential; but, by the laws we have forced upon the Maoris, this, so far as they and their lands are concerned, is impossible. Without organization such as in this paper is recommended, it is vain for the Maoris to hope to utilize their lands: all they can do is sell or lease them. What other portion of Her Majesty’s subjects would be content with laws which impose such manifest burdens and such improper disabilities?

And he went on:

Why should not the Maoris, by committees appointed by themselves, have the power to manage their own estates, just as the properties of companies are managed by directors? Why should not they . . . be permitted to have sheep stations or cattle stations, or erect stores, or makes reserves for schools or charitable or other purposes? What right have we as free men to make laws without their concurrence, which place them at a tremendous disadvantage as compared with ourselves, and deprive them, by an iniquitous and tyrannical series of enactments, of the power to manage their own property for their own happiness, in a manner at once consistent with the genius of their customs and the public good?\footnote{426}

As the Hauraki Tribunal pointed out, Maori land could generate little income under the new titles by letting land or farming: “The returns were too low and the income could not be centrally managed.”\footnote{427} And above all, in this context, individualised, severable titles were unstable, and provided no security at all to potential lenders. This would prove an enormous handicap to Maori who wished to develop their land and resources. We will examine this in more detail in later chapters.

\textbf{The new titles and tribal taonga}

\textbf{Were the new titles appropriate for the protection of tribal taonga and resource rights?}

There is one further issue in respect of the new titles which we wish to address. We have already discussed the difficulties Maori faced when the Native Land Court sought to translate their layers of customary rights into new block titles. A further difficulty, however, was that there were no titles in British law appropriate to recognise Maori possession of their taonga – properties of especial importance to tribal communities. Thus the titles available to Maori could not protect the full range of their resources. In particular, for the purposes of this discussion, we refer to examples of geothermal resources, freshwater springs, and freshwater fisheries, to show how Maori rights were handled in the
Native Land Court. Rights to geothermal resources are dealt with more extensively in part V.

**Whakarewarewa:** The Whakarewarewa geothermal valley was an area of traditional importance to local iwi and hapu and by the 1880s had also become an important tourist attraction, with substantial benefits for the Wahiao, Tuhourangi, and Ngati Whakaue people. When the block containing the area was subject to lengthy title investigation and rehearing in 1883 it was clear that it was not possible to easily separate the interests in these taonga, and the geothermal resource and various rights in it were fundamental to various interests claimed. In the Native Land Court's original judgment, Judges Mair and O'Brien found that while parties fundamentally derived their claims to the block from the ancestor Uenukukopako, questions of ownership revolved around relatively recent patterns of occupation, use, and conquest. The court named six hapu, three of Ngati Whakaue, and three of Ngati Wahiao, as owners, but was unable to resolve how their various interests could be separated.

In 1889, when the block was partitioned, detailed evidence was given for the first time about resource use in and about Whakarewarewa. The judge stated that he thought Ngati Whakaue were entitled to a large share of the block, including 'a full moiety of the springs themselves', and drew a dividing line accordingly. In 1893 the Whakarewarewa partition was reheard. On this occasion the court stated that there were some parts of the block which it could not partition, 'viz. that on which the Ngawha’s, springs, and baths are situated. It is clear that these must have been in common and it is impossible to divide them.

Whakarewarewa 3, with the springs, baths and ngawha, was awarded to the various hapu: five-sixths went to Ngati Whakaue hapu, in proportions laid down by the court; and one-sixth to the Ngati Wahiao hapu, also in proportions laid down by the court.

Clearly what should have been available to the collective hapu at this point was a community title for the springs – perhaps vested in a trust in which all the hapu were represented. The court knew that the springs were a resource that could not sensibly be divided up among them. From the point of view of the hapu, a collective title would have protected the springs from alienation, and enabled hapu management.

**Hamurana Springs:** Hamurana Springs are another example of a resource that was not protected for those for whom it was a taonga. There are a number of beautiful freshwater springs at Hamurana. Ngahihi Bidois explained to us in our hearings that the main one is Te Puna i Hangarua, named after the chieftainess Hangarua who lived there. Hangarua had a pet taniwha named Hinerua who lived in the spring. The taniwha Pekehaua would travel through underground waterways to visit Hinerua. The method by which the Crown secured the springs at the end of the nineteenth century will be explained in chapter 10. Here, we are concerned with the Native Land Court proceedings in relation to the springs.

Ngati Rangiwehehi argued before us that 'the springs were communal properties, and as such, were only able to be dealt with in their own right, by the collective decisions of the people.' That seems to us an unambiguous statement. The importance of the springs as taonga was moreover obvious to us simply in the way Ngati Rangiwehehi spoke about them at our hearing. But in the 1890s the question arose of how to deal with the springs in the context of the new tenure system. A native committee investigated rights to land on both sides of Hamurana Stream, and awarded it to various hapu. It is interesting, however, that the committee made a separate award for the springs, to the descendants of two tupuna. It was aware that there had been a dispute about the springs; though according to later evidence the quarrel had passed over. The committee’s award reignited disagreements, but in our view they hardly sounded insoluble. But there was of course no means in the new title system of recognising the kind of award the committee made. Nor was there any provision for collective management of the springs. The outcome, as we will see in chapter 10, was that the springs, lacking any
protection, were awarded to the Crown in the 1897 partition on the strength of a) the Crown's purchase of undivided shares in the land block, and b) the determination of the Crown to secure the springs in its award when the block was partitioned.434

Lake Taupo fisheries: Evidence was presented to us about the problem of non-recognition of freshwater fisheries rights by the Native Land Court, particularly in Lake Taupo. Suzanne Doig pointed to the extensive evidence given in the Tauponuiatia case about property rights in fishing. Fishing villages and fishing grounds were among the types of property described in terms of ‘ownership.’435 Such rights were frequently claimed by descent or continuous exercise of the rights from earliest times, or both. Usually these rights were hapu rights, though it is difficult to tell on occasion whether the right was exercised by whanau under a hapu over-right, and difficult also to tell, she concludes, whether such rights were conceived as proprietorial rights or occupation or usufructuary rights. Such fishing sites were found all round the lake, and also in streams and other small bodies of water round the lake. Often fishing grounds were named, and nearly all were situated close to shore, and were associated with a shore settlement.

Dr Doig concludes from her reading of the Native Land Court minutes that many of the fishing rights in Taupo may be most usefully considered community rights. We note here in particular her comments on Judge Scannell’s judgment. Despite the fact that many of the Tauponuiatia subdivisions had lake frontages, and the extensive evidence given about fishing, the judge ‘did not give any indication of his general views on Maori fishing rights in his judgments.’ She points out that even in ‘the case which dealt in most detail with lake fisheries, Tauhara Middle subdivision, Scannell barely discussed fisheries issues.’ Nor did his judgments in the late 1890s, when he was dealing with relative interests and subdivision cases, comment on fishing rights.436

Dr Doig found that Native Land Court judges and other Pakeha officials tended to treat fishing rights as ‘inferior and supplementary to land rights, and simply a part of the bundle of rights represented by Pakeha concepts of land ownership.’437

Chief Judge Fenton, of course, had been prepared to acknowledge Maori fishing rights in the Hauraki foreshore in his Kauaeranga judgment. He did not vest the soil of the foreshore in the Hauraki applicants, but ‘granted a right of fishery, or piscatory right, to [them].’438 When it came to the issue of certificates of title, it was agreed that title would be ‘to the exclusive right of fishing upon and using for the purpose of fishing . . . the surface of the soil of all the portion of the foreshore or parcel of land between high water mark and low water mark.’439 The Hauraki Tribunal concluded that Fenton appeared to have regarded the right as ‘exclusive’ rather than non-exclusive.440 Subsequently, the Crown moved to suspend the operation of the Native Land Court in the Auckland district in respect of lands 'below high water mark.'441

Thus the court had been prepared to recognise Maori foreshore fishing rights in certificates of title, though the Crown had subsequently discouraged it from doing so. In respect of freshwater fisheries, at any rate, it is clear that by the mid-1880s the court was not considering such recognition of title.

We have already found the Crown in breach of the Treaty in failing to provide for the grant of community titles. This failure is compounded when we consider that such titles might have included tribal taonga, such as springs, or been issued specifically for such taonga; or which might have included freshwater fisheries. Such taonga, no less than land, might have been held in trust. The new tenure system was not inflexible; it was required to recognise differing circumstances in new colonies. In New Zealand, where the Treaty guaranteed to the indigenous people their lands, forests, and fisheries, and tino rangatiratanga over their whenua, kainga and taonga, the Treaty was a standing qualification on the application of the common law. The Tauranga Raupatu Tribunal has reminded us that:
It is a common-law rule that the English colonists take with them to a new land as much of their law as is appropriate to their new circumstances. That common-law rule was given a statutory basis in New Zealand in 1858 when the English Laws Act of that year declared that the laws of England, as they existed on 14 January 1840, ‘shall, so far as applicable to the circumstances of the said Colony of New Zealand, be deemed and taken to have been in force therein on and after that day and shall continue to be applied in the administration of justice accordingly.’

It is clear that Maori were prejudicially affected by the failure to provide for a community title to important natural resources. In the case of Lake Taupo fisheries, there was no legal recognition of Maori authority over their taonga, the lake, or its fisheries. There was thus no legal protection. It was this failure of protection which opened the way to acquisition of taonga in the course of the acquisition of land, simply by the purchase of shares in land, and securing carefully placed partitions. We return to this matter in part v.

The Tribunal’s Conclusions and Findings

The Crown, in our inquiry, conceded that the new tenure system did not recognise a range of title options including collective ownership that Maori were accustomed to and that ‘the Crown can be faulted for failing to take more care in the design of the system’. It further conceded that ‘the native land laws can fairly be criticised for failing to provide for more effective corporate/communal governance mechanisms.’ We welcome these concessions.

For our part, we see no reason to depart from the findings of recent Tribunals on this matter. The 10-owner rule of the 1865 Act disinherit all but those owners. And we agree with the Turanga Tribunal that under the Native Land Act 1873 Maori individuals, whose names were all listed on a memorial of ownership, found themselves the owners of undivided, undefined interests in a block that could nonetheless be sold piecemeal, without reference to the wider land-owning community. The power of decision-making was taken away from communities and their leaders whose rights were guaranteed in the Treaty, thus violating their tino rangatiratanga in the most fundamental of ways. The titles created under the native land legislation practically abolished community management and development of lands.

Community titles would have reflected the basis of customary native title, and the nature of customary decision-making. Communities would have been empowered, rather than disempowered, in a period when the colonial economy was rapidly developing. Legal titles should have allowed communities to make informed, strategic decisions about their lands and resources, and to control both the process of sale and the matter of land retention.

We conclude that Central North Island Maori were prejudiced in that the forms of title provided by the Native Land Court were not appropriate for Maori entering the new economy. They neither recognised customary imperatives nor met Maori aspirations for the future governance, management, and use of their lands. They were injurious to community authority over their land, and taonga and special resources, and the ability of communities to protect their lands and taonga. They created land titles which were the opposite of what had been guaranteed by the Treaty; disempowered communities and their leaders in the exercise of rangatiratanga; and (because of the nature of the title) created circumstances in which individuals were able to do little else with their interests than sell them. Nor were the titles adapted to meet particular Maori interests, to provide for protection of their taonga such as springs, geothermal resources, and freshwater fisheries. These were not the titles Maori wanted.
Central North Island Maori ultimately had little choice about entering the Native Land Court. Though they were willing to determine their own titles in what they recognised were new circumstances, the Crown resisted all their attempts to secure recognition of their komiti to undertake this task. This was in breach of the principles of autonomy and partnership. Central North Island Maori were prejudiced by their resulting exposure to a court which was not an appropriate body to deal with the complex matter of determining

**Summary**

*Did the Crown act consistently with the principles of the Treaty of Waitangi in its introduction of a new tenure system, and its introduction and operation of the Native Land Court in the Central North Island in the second half of the nineteenth century?*

In examining this broad issue, we considered a range of key questions relating to the Native Land Court and the native land laws:

- Did Central North Island Maori engage willingly with the Native Land Court?
- Was the Native Land Court the appropriate body to determine matters of customary interests in the Central North Island?
- What was the impact of the Native Land Court processes on Central North Island iwi and hapu?
- Were the forms of title available to Central North Island Maori under the native land legislation appropriate to their needs in the developing colonial economy?

**Summary of Key Findings**

- On the issue of the willingness of Central North Island Maori to engage with the Native Land Court we found that the Crown has a Treaty obligation to consult with Maori about how their lands should be managed and administered, and to secure their consent to the introduction of any new tenure and title determination systems. However, the Crown did not adequately consult them, or secure their consent; nor did it inform them about the purpose, functions and processes of the new court. Central North Island Maori were thus prejudiced from the outset in their engagement with the court, and their lack of understanding of the new titles that were available to them, which meant that they could not properly protect their interests in the court.

- Having established its own system of title determination, the Crown then suspended the operation of the native land legislation, and thus the Native Land Court, between 1873 and 1877, setting aside its own law and sending in land purchase agents to buy interests in land before title had been determined.

- The Crown was thus in breach of its duty actively to protect Maori interests, and in breach of the duties of good government.

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Leaderships of both Te Arawa and Tuwharetoa, in turn, decided to engage with the Native Land Court, after 1880, in the context of the Crown's determination to secure access to their respective territories, their respective wishes to protect their lands, the hope that the new titles might be of use to them in the developing colonial economy, and their realisation that the Crown was determined they should use its title-adjudication process. In these circumstances tribal leaderships also decided to manage the processing of their lands through the Native Land Court because they had no other legal options, but this was not an endorsement of the court's processes.

The Crown's failure to engage with, and support, the many initiatives that Central North island Maori took to try and manage the process of title transformation outside or alongside the Native Land Court showed a lack of good faith by the Crown towards its Treaty partner.

On the second issue, we found that the Native Land Court was not an appropriate body to deal with the complex matter of determining customary rights, which required a deep knowledge of history, whakapapa and relationships among the various kin groups with rights to land and resources in a district.

Central North Island Maori did not think the Native Land Court was an appropriate body, since they continued to seek recognition for their komiti to be empowered to determine titles instead.

The Crown's failure to support Central North Island leaderships in the exercise of their rangatiratanga in this way was in breach of the Treaty principles of partnership, autonomy, and active protection.

The operation of the Crown's court resulted in prejudice to communities of right-holders whose rights were not recognised, or were inadequately recognised, by its determinations of customary rights.

On the third issue, the impacts of the Native Land Court process on Central North Island iwi and hapu are evident on a number of levels. The costs of attending the court, including survey fees (in particular) and court fees, as well as the associated costs of travel, food and accommodation in court towns, while normal economic activities were suspended, placed an unfair burden on communities which had no alternative but to take part in court processes. The various costs owners faced were cumulative, and difficult to meet where communities had little cashflow. A frequent result of these costs was sale of lands. The prejudice to Central North Island communities was compounded in some cases by the deliberate use of debt by Crown agents to effect land alienation, in serious breach of the Crown's obligations of good faith and active protection.

On the fourth issue, we found that the forms of title provided by the Native Land Court under the native land legislation were not appropriate for Maori entering the new economy. They neither recognised customary imperatives (such as the protection of tribal taonga), nor met Maori aspirations for the governance, management and use of their lands in the new economy. Instead, they created individualised titles which were in fundamental violation of Treaty guarantees, deprived communities and leaders of their collective rights and their tino rangatiratanga, and created structural pressures for alienation of interests in land. The costs to Central North Island Maori of acquiring such titles were not offset by any real benefit to them.
And once the Native Land Court began to issue individualised titles which shifted decision-making about alienation from the community to the individuals who were awarded interests in a block, the impacts were far-reaching. The rangatiratanga, or authority over land of traditional tribal bodies and the new polities that grew out of them, was undermined.

In considering Crown actions in respect of the introduction and operation of the Native Land Court we have, in the interests of clarity, considered Crown breaches under various heads. For hapu and iwi in the late nineteenth century, such breaches were overlapping and cumulative. They were prejudiced not by a single act of the Crown, but by multiple Treaty breaches.

We find, in summary, that the Crown failed to act consistently with the principles of autonomy, partnership and active protection in introducing the Native Land Court and new forms of title into the Central North Island. The Crown was also in breach of its Treaty obligations to Central North Island Maori to actively protect them in their possession of their lands and resources, and control of them.

Notes
1. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), p2
5. Native Lands Act 1867, s 17; Native Lands Act 1865, s 23
7. Keith Pickens notes that Rotorua Native Land Court minute book 1 records a sitting at Ohinemutu on 26 October 1865, but that the court did very little on that day. He implies a possible confusion between this sitting and one recorded for the same day in 1867, with the same blocks before it, and the same outcomes; ‘Introduction of the Native Land Court in the Central North Island’ , report commissioned by CLO, October 2004 (doc A78), pp 6–7.
8. Oruanui was the only block in which titles were granted in this period in this area; LHAD.
9. The figure of 44 hearings for the 1860s must be considered in light of the fact that the court sat for effectively the first time in 1867.
10. Te Kani Williams and Dominic Wilson, closing submissions on behalf of Ngati Haka Patuheuheu and generic closing submissions on the Native Land Court, 2 September 2005 (paper 3.3.90), p31
11. Ibid, p32
12. Ibid
13. Ibid, p33
16. Ibid, p710
17. J Richmond, 9 August 1860, NZPD, 1858–1860, p 249
20. Ibid, p 226
22. Martin Taylor, generic closing submissions on political engagement, tourism, and geothermal issues, 2 September 2005 (paper 3.3.67), p 52
23. Bruce Stirling, 'Taupo–Kaingaroa Nineteenth Century Overview', report commissioned by CFRT, 2004 (doc A71), pt 1, p 44
25. Ibid, p 84
27. Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), pp 26–29
28. Ibid, pp 57–60
29. 'Reports from Officers of the Native Districts: Bay of Plenty, Bay of Islands, Thames, Waikato, and Raglan', AJHR, 1871, F-6A (as quoted in Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), p 52)
30. Ibid, p 57
31. Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), pp 51–52
34. Martin Taylor, generic closing submissions on political engagement, tourism, and geothermal issues, 2 September 2005 (paper 3.3.67), pp 51–52
35. Te Kani Williams and Dominic Wilson, closing submissions on behalf of Ngati Haka Patuheuheu and generic closing submissions on the Native Land Court, 2 September 2005 (paper 3.3.90), p 75
36. Martin Taylor, generic closing submissions on political engagement, tourism, and geothermal issues, 2 September 2005 (paper 3.3.67), p 94
37. Angela Ballara, comments on the Waitangi Tribunal's statement of issues, 5 April 2005 (doc A65(n)), p 36
38. Martin Taylor, generic closing submissions on political engagement, tourism, and geothermal issues, 2 September 2005 (paper 3.3.67), pp 95–98
39. Ibid, p 30
40. Te Kani Williams and Dominic Wilson, closing submissions on behalf of Ngati Haka Patuheuheu and generic closing submissions on the Native Land Court, 2 September 2005 (paper 3.3.90), pp 35, 79–80
41. Angela Ballara, evidence given under cross examination, 3 February 2005 (quoted in Martin Taylor, generic closing submissions on political engagement, tourism, and geothermal issues, 2 September 2005 (paper 3.3.67), p 31); Angela Ballara, 'Tribal Landscape Overview, 1800–1900 in the Taupo, Rotorua, Kaingaroa and National Park Inquiry Districts', report commissioned by CFRT, September 2004 (doc A65), p 590 (as quoted in Te Kani Williams and Dominic Wilson, closing submissions on behalf of Ngati Haka Patuheuheu and generic closing submissions on the Native Land Court, 2 September 2005 (paper 3.3.90), p 77)
43. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 133
44. Ibid, pp 133, 135
45. Ibid, pp 161–162
46. Ibid, pp 133, 135
47. Ibid, p 133
48. Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), pp 26–29
50. Ibid, pp 28–31
51. Ibid, pp 36, 39
52. Ibid, pp 27, 30. Stirling notes that Ngati Raukawa referred in court to Rangitoto (north of Taupo) in connection with the block.
54. Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), pp 18–39


58. 'Reports of the Select Committee on Native Affairs', AJHR, 1874, i-3, p 2 (as quoted in Vincent O'Malley, 'The Crown and Te Arawa, c1840–1910', report commissioned by the claimants in association with CFRT, 1995 (doc A49), p 66)

59. 'Operation of the Native Land Acts Suspended in Certain Districts, 20 August 1873, New Zealand Gazette, 1873, no 51, pp 475–476


61. Martin Taylor, generic closing submissions on political engagement, tourism, and geothermal issues, 2 September 2005 (paper 3.3.67), pp 105–106

62. Karen Feint, closing submissions on behalf of Ngati Tuwharetoa, 9 September 2005 (paper 3.3.106), pp 77–83

63. Richard Boast, generic closing submissions on nineteenth-century land alienation, 1 September 2005 (paper 3.3.58), pp 13

64. Te Kani Williams and Dominic Wilson, closing submissions on behalf of Ngati Haka Patuheuheu and generic closing submissions on the Native Land Court, 2 September 2005 (paper 3.3.90), pp 46–47

65. Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), p 11

66. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, pp 142–143

67. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 144

68. J Richmond, 11 July 1867, NZPD 1867, vol 1 pt 1, p 32

69. J Richmond, 1 August 1867, NZPD, 1867, vol 1 pt 1, pp 271–272

70. D McLean, 25 August 1873, NZPD, 1873, vol 14, p 604

71. Ibid, p 605

72. Ibid, pp 604–605


74. T B Gillies, 25 August 1873, NZPD, 1873, vol 14, p 610


76. Ibid, pp 47–48

77. J Richmond, 11 July 1867, NZPD, 1867, vol 1, pt 1, p 32

78. Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), pp 33, 39

79. Ibid, p 34

80. Ibid, pp 91–95

81. Ibid, pp 94, 103–104


83. Michael Macky, evidence given under cross-examination, third hearing, 10 March 2005 (transcript 4.1.4), pp 87–88

84. Ibid, pp 87–88


86. Michael Macky, 'Crown Purchasing in the Central North Island Inquiry District, 1870–1890', report commissioned by CLO, November 2004 (doc A81), p 52

87. Clarke to McLean, 29 June 1874, MA-MLP1 1874/316, ArchivesNZ (as quoted in Michael Macky, 'Crown Purchasing in the Central North Island Inquiry District, 1870–1890', report commissioned by CLO, November 2004 (doc A81), p 54)

88. Minutes of Native Affairs Committee Examination of H T Clarke, 21 August 1874, Le 1 1874/9, ArchivesNZ (as quoted in Michael Macky, 'Crown Purchasing in the Central North Island Inquiry District, 1870–1890', report commissioned by CLO, November 2004 (doc A81), p 54)

89. Michael Macky, 'Crown Purchasing in the Central North Island Inquiry District, 1870–1890', report commissioned by CLO, November 2004 (doc A81), pp 51, 54, 312


91. Michael Macky, 'Crown Purchasing in the Central North Island Inquiry District, 1870–1890', report commissioned by CLO, November 2004 (doc A81), p 139

92. Ibid, pp 59–60

93. Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), p 76


95. David Armstrong, 'Te Arawa Land and Politics', report commissioned by CFRT, November 2002 (doc A45); Peter McBurney, 'Ngati Manawa and the Crown 1840–1927', report commissioned by CFRT on behalf of the claimants, March 2004 (doc A37)

96. Kathryn Rose, 'The Fenton Agreement and Land Alienation in the Rotorua District in the Nineteenth Century', report commissioned

97. Martin Taylor, generic closing submissions on political engagement, tourism, and geothermal issues, 2 September 2005 (paper 3.3.67), p 98; John Kahukiwa, closing submissions on behalf of Te Kotahitanga o Ngati Whakaue, 9 September 2005 (paper 3.3.109), pp 55–65

98. Karen Feint, closing submissions on behalf of Ngati Tuwharetoa, 9 September 2005 (paper 3.3.106), p 52

99. Ibid, p 54

100. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 161


102. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 71

103. Ibid, p 63


105. Bay of Plenty Times, 12 December 1877 (as quoted in ibid, p 148)


107. Brabant, AJHR, 1879, sess1, G-1A, p 18 (as quoted in Keith Pickens, ‘Introduction of the Native Land Court in the Central North Island’, report commissioned by CLO, October 2004 (doc A78), p 143


113. S Percy Smith (as quoted in Kathryn Rose, ‘The Fenton Agreement and Land Alienation in the Rotorua District in the Nineteenth Century’, report commissioned by CFRT, September 2004 (doc A70), p 83; see also p 115)

114. Makari Hikairo and six others (as quoted in Kathryn Rose, ‘The Fenton Agreement and Land Alienation in the Rotorua District in the Nineteenth Century’, report commissioned by CFRT, September 2004 (doc A70), p 90)


119. Keith Pickens, ‘Introduction of the Native Land Court in the Central North Island’, report commissioned by CLO, October 2004 (doc A78), p 177


121. Ibid

122. ‘Despatches From the Governor of New Zealand to the Secretary of State’, AJHR, 1892, A-1, p 9


124. ‘Petition of the Federated Maori Assembly of New Zealand’, AJHR, 1893, J-1, pp 1–2

126. Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), p 241

127. This was recorded by both Te Wananga (3 March 1877) and the Bay of Plenty Times (11 April 1877) (as quoted in Bruce Stirling, 'Taupo–Kaingaroa Nineteenth Century Overview', report commissioned by CFRT, September 2004 (doc A71), pt 1, p 319)

128. Bay of Plenty Times, 2 October 1875 (as quoted in Bruce Stirling, 'Taupo–Kaingaroa Nineteenth Century Overview', report commissioned by CFRT, September 2004 (doc A71), pt 1, p 389)

129. Native Land Act 1873 (s 107) recognised that the Crown might make such payments, and allowed the court to investigate title to the land in question, after the event.

130. Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), p 222


132. Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), pp 222–223


134. Bruce Stirling, 'Taupo–Kaingaroa Nineteenth Century Overview', report commissioned by CFRT, September 2004 (doc A71), pt 1, p 385–386

135. Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), p 248–249


137. Bruce Stirling, 'Taupo–Kaingaroa Nineteenth Century Overview', report commissioned by CFRT, September 2004 (doc A71), pt 1, p 389


139. Mair Diary, 4 June 1881 (as quoted in Bruce Stirling, 'Taupo–Kaingaroa Nineteenth Century Overview', report commissioned by CFRT, September 2004 (doc A71), pt 1, p 389)

140. Mair to Rolleston, 6 August 1881 (as quoted in Evelyn Stokes, Wairakei Geothermal Area: Some Historical Perspectives (Hamilton: University of Waikato, 1991) (doc A20), pp 38–39

141. Ibid, p 38

142. Bruce Stirling, 'Taupo–Kaingaroa Nineteenth Century Overview', report commissioned by CFRT, September 2004 (doc A71), pt 1, p 394

143. Evelyn Stokes, Wairakei Geothermal Area: Some Historical Perspectives (Hamilton: University of Waikato, 1991) (doc A20), p 52

144. St George diary, 3 January 1868, MS-1842-1845, ATL, pp 1215–1216 (as quoted in Bruce Stirling, 'Taupo–Kaingaroa Nineteenth Century Overview', report commissioned by CFRT, September 2004 (doc A71), pt 1, p 37; see also statement of Ihakara Kahuao cited in ibid, p 567)

145. The court had ordered that as it found the rights of Ihakara Kahuao and one other also extended into western Tatua, their names were to be included in the list of grantees for Tatua west; or that some other arrangement be made by which their interests shall be recognised and secured. Taupo Native Land Court minute book 1, fol 185 (as quoted in Bruce Stirling, 'Taupo–Kaingaroa Nineteenth Century Overview', report commissioned by CFRT, September 2004 (doc A71), pt 2, pp 572–573)

146. Bruce Stirling, 'Taupo–Kaingaroa Nineteenth Century Overview', report commissioned by CFRT, September 2004 (doc A71), pt 1, p 228

147. Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), p 259

148. Chief Judge of the Native Land Court (as quoted in Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), p 267)

149. Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), pp 267–272

150. Ibid, p 273

151. Ibid, p 275


154. Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), p 277

155. Henry Mitchell (as quoted in Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), p 279

156. Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), p 279

157. Karen Feint, closing submissions on behalf of Ngati Tuwharetoa, 9 September 2005 (paper 3.3.106), p 67
158. Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), p 287
159. Hohepa Tamamutu and others to Chief Judge MacDonald, 2 May 1886 (as quoted in Bruce Stirling, 'Taupo–Kaingaroa Nineteenth Century Overview', report commissioned by CFRT, September 2004 (doc A71), pt 2, pp 997–998
161. Ibid, p 1005
162. Cited in ibid, pp 1006–1007
163. Ngati Maniapoto were not represented before us, and we do not comment on the case of Taonui Hikaka.
166. Te Kani Williams and Dominic Wilson, closing submissions on behalf of Ngati Haka Patuheuheu and generic closing submissions on the Native Land Court, 2 September 2005 (paper 3.3.90), p 38; David Ambler, closing submissions on behalf of Tapuika, 5 September 2005 (paper 3.3.86), p 17
169. Te Kani Williams and Dominic Wilson, closing submissions on behalf of Ngati Haka Patuheuheu and generic closing submissions on the National Land Court, 2 September 2005 (paper 3.3.90), p 44
170. Angela Ballara, 'Tribal Landscape Overview, c1800–c1900 in the Taupo, Rotorua, Kaingaroa and National Park Inquiry Districts', report commissioned by CFRT, September 2004 (doc A65), p 584
171. Ibid, p 611
172. Tame McCausland asserts that this was the case for Waitaha; Tame McCausland, brief of evidence, 16 February 2005 (doc B54), p 24
173. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 135
174. Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), pp 309–310
175. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 128
176. Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), pp 305, 335–336
180. Ibid, pp 12–13
181. Angela Ballara, 'Tribal Landscape Overview, c1800–c1900 in the Taupo, Rotorua, Kaingaroa and National Park Inquiry Districts', report commissioned by CFRT, September 2004 (doc A65), p 622
182. Ibid, p 622
183. Ben Hona, brief of evidence, 22 April 2005 (doc F5), p 4. Mr Hona gave this explanation when discussing Whakarewarewa, but we found it generally helpful.
184. Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), p 132
185. Angela Ballara, 'Tribal Landscape Overview, c1800–c1900 in the Taupo, Rotorua, Kaingaroa and National Park Inquiry Districts', report commissioned by CFRT, September 2004 (doc A65), pp 620–621
187. Note different figures given as to size of block; Merata Kawharu, Ralph Johnson, Verity Smith, Robert Wiri, David Armstrong, and Vincent O’Malley, 'Nga Mana o te Whenua o Te Arawa: Customary
He Maunga Rongo

192. Keith Pickens, ‘Introduction of the Native Land Court in the Central North Island’, report commissioned by CLO, October 2004 (doc A78), p 111
193. Ibid, p 116
196. David Rangitauira, oral submission, ninth hearing, 13 September 2005 (transcript 4.3.10)
197. Keith Pickens, ‘Introduction of the Native Land Court in the Central North Island’, report commissioned by CLO, October 2004 (doc A78), p 76
198. Ibid, pp 76–79
199. Ibid, p 51
200. Court minutes for Otairoa 3, Maketu Native Land Court minute book 1, 29 April 1868, fol 107–110
201. Katarina Ihaia, Maketu Native Land Court minute book 1, 29 April 1868, fol 113
202. Wikiriwhi Te Rorooterangi, Maketu Native Land Court minute book 1, 29 April 1868, fol 107
203. Piritika Tauaru, Maketu Native Land Court minute book 1, 29 December 1870, fol 305
204. See, for example, the Native Land Court minutes for Te Karu-o-te whenua 1, Maketu Native Land Court minute book 1, 6 January 1871, fol 329–336
207. Kaingaroa 1 judgment, Opotiki minute book 1, 17 September 1878, fol 208
209. Ibid, pp 44–45
213. Ibid, pp 345–353
214. Ibid, p 363
216. Rotorua minute book 3, 1882, fol 228f (as quoted in ibid, p 409); see also p 372
217. Te Heuheu, Taupo Native Land Court minute book 4, 16 January 1886, fol 38
222. Keith Pickens, ‘Introduction of the Native Land Court in the Central North Island’, report commissioned by CLO, October 2004 (doc A78), pp 283–285
224. Kiriana Tan, closing submissions on behalf of Ngati Raukawa Wai 443, 5 September 2005 (paper 3.3.80), pp 78–84
226. Te Heuheu (as quoted in Bruce Stirling, ‘Taupo–Kaingaroa Nineteenth Century Overview’, report commissioned by CFRT, September 2004 (doc A71), pt 2, p 962)
228. Karen Feint, closing submissions on behalf of Ngati Tuwharetoa, 9 September 2005 (paper 3.3.106), p 73


232. Te Kani Williams and Dominic Wilson, closing submissions on behalf of Ngati Haka Patuheuheu and generic closing submissions on the Native Land Court, 2 September 2005 (paper 3.3.90), p 43; Martin Taylor, generic closing submissions on political engagement, tourism, and geothermal issues, 2 September 2005 (paper 3.3.67), pp 78, 92

233. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, pp 138–138


237. Keith Pickens, ‘Introduction of the Native Land Court in the Central North Island’, report commissioned by CLO, October 2004 (doc A78), p 18

238. Ibid, p 308


240. Keith Pickens, ‘Introduction of the Native Land Court in the Central North Island’, report commissioned by CLO, October 2004 (doc A78), p 225


244. Native Land Act Amendment Act No 2 1878, s 10

245. Native Land Court Act 1880, s 47

246. Native Land Court Act 1894, s 95

247. Ibid, s 84


249. Te Kani Williams and Dominic Wilson, closing submissions on behalf of Ngati Haka Patuheuheu and generic closing submissions on the Native Land Court, 2 September 2005 (paper 3.3.90), p 67


252. Karen Feint, closing submissions on behalf of Ngati Tuwharetoa, 9 September 2005 (paper 3.3.106), p 75


254. Keith Pickens, ‘Introduction of the Native Land Court in the Central North Island’, report commissioned by CLO, October 2004 (doc A78), p 133; Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, pp 158

255. Keith Pickens, ‘Introduction of the Native Land Court in the Central North Island’, report commissioned by CLO, October 2004 (doc A78), pp 111–113

256. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, pp 158

257. In the case of Paengaroa, a toa block, a rehearing had been granted by the Native Minister after numerous applications for rehearing, but the rehearing was restricted to the Paengaroa North subdivision rather than the whole block, as evidently intended; in 1883 the court would decide that this decision had been wrong. The Government ultimately chose between authorising a rehearing of the whole block, and validating the court’s decision delivered in the 1880 rehearing; Keith Pickens, ‘Introduction of the Native Land Court in the Central North Island’, report commissioned by CLO, October 2004 (doc A78), pp 116–122.
258. Some blocks not in our inquiry district were included, notably Matahina and Hauturu.

259. Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), p131

260. Ibid, p126

261. Ibid, p323

262. Native Affairs Committee, 1884 (as quoted in Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), pp323–324)

263. The Native Land Court Act 1886 Amendment Act 1888, s 24. This section repealed ss 76–77 of the 1886 Act.

264. Kathryn Rose, 'The Fenton Agreement and Land Alienation in the Rotorua District in the Nineteenth Century', report commissioned by CFRT, September 2004 (doc A71), pt 1, p1142

265. Bruce Stirling, 'Taupo–Kaingaroa Nineteenth Century Overview', report commissioned by CFRT, September 2004 (doc A71), pt 2, pp1027–1028, 1074


267. Bruce Stirling, 'Taupo–Kaingaroa Nineteenth Century Overview', report commissioned by CFRT, September 2004 (doc A71), pt 2, p1142

268. After 1894 appeal was of right, and did not have to be approved by the chief judge first.

269. Annette Sykes and Jason Pou, closing submissions on behalf of Ngati Makino, 2 September 2005 (paper 3.3.87), pp 25–47; David Ambler, closing submissions on behalf of Tapuika, 5 September 2005 (paper 3.3.86), pp14–18; Karen Feint, closing submissions on behalf of Waitaha, 5 September 2005 (paper 3.3.85), pp7–8

270. This position is put forcefully by Lennie Johns in his submission: Lennie Johns, brief of evidence (doc D5), p5; Aidan Warren, closing submissions on behalf of Ngati Tutemohuta and Karanga Hapu, 2 September 2005 (paper 3.3.84), p103

271. Peter Clarke (as quoted in Martin Taylor, closing submissions on behalf of Tauhara, 2 September 2005 (paper 3.3.92), pp 16–17

272. David Ambler, closing submissions on behalf of Tapuika, 5 September 2005 (paper 3.3.86), p17


274. Ibid, pp13–14; David Ambler, closing submissions on behalf of Tapuika, 5 September 2005 (paper 3.3.86), p23

275. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, pp 131–132

276. Taupo Native Land Court minute book 1, 28 Oct 1867, fol6 (as quoted in Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), pp10–11)

277. Bruce Stirling, 'Taupo–Kaingaroa Nineteenth Century Overview', report commissioned by CFRT, September 2004 (doc A71), pt 1, p29


279. Ibid, p181


282. Ibid, p614

283. Kaingaroa 1 title hearing and Kaingaroa 3 hearing, Taupo Native Land Court minute book 1, 6 April 1868, fol 15; Kaingaroa 2 hearing, Taupo Native Land Court minute book 1, October 1867, fol 12


285. Ibid, p199; Bruce Stirling, answers to supplementary questions, 29 April 2005 (doc A71(t)), p 2

286. Tapsell conducted the Ngati Whakaue case, for instance, in the Paengaroa hearing in 1878, in the Tumu and Kaituna hearing in 1883, and in the Paengaroa hearing in 1885 (in the latter hearing he appeared for the second of two Ngati Whakaue cases). See Maketu Native Land Court minute books 3, fol 36, and 5, fol 37, 453


292. Martin Taylor, generic closing submissions on political engagement, tourism, and geothermal issues, 2 September 2005 (paper 3.3.67), pp 202–203

293. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, pp 149–150
294. Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), pp 37–38

295. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, pp 149–150

296. Ibid, pp 149–151

297. Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), p 37; Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 150

298. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, pp 149–151

299. Ibid, p 123

300. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, pp 123; David Armstrong, evidence given under cross-examination, second hearing, 17 February 2005 (transcript 4.1.3), pp 106–107


303. Bruce Stirling, 'Taupo–Kaingaroa Nineteenth Century Overview', report commissioned by CFRT, September 2004 (doc A71), pt 1, p 620

304. Ibid, pp 702–703


306. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 150; Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), p 37

307. Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), pp 36–37, 327

308. Ibid

309. Native Land Act 1873, s 33, 38, 69

310. Ibid, s 72

311. Native Land Court Act 1880, s 40

312. Native Land Court Act 1886, s 81–82

313. Ibid, s 83

314. Ibid, ss 84–86

315. Native Land Court Act 1894, s 65; see also Kathryn Rose, 'The Fenton Agreement and Land Alienation in the Rotorua District in the Nineteenth Century', report commissioned by CFRT, September 2004 (doc A70), p 326. Rose points to a number of survey liens taken over by the Crown in the Rotorua inquiry district from 1895, and to the award by the Native Land Court to the Crown in 1900 of 637 acres in Whakapoungakau for survey costs, on application (pp 274–278).

316. Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), p 38


319. Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), p 57


321. Ibid, p 101

322. Bruce Stirling, 'Taupo–Kaingaroa Nineteenth Century Overview', report commissioned by CFRT, September 2004 (doc A71), pt 1, p 435

323. Ibid, pt 2, p 1243


325. Michael Macky, 'Crown Purchasing in the Central North Island Inquiry District, 1870–1890', report commissioned by CLO, November 2004 (doc A81), p 64

326. Bruce Stirling, 'Taupo–Kaingaroa Nineteenth Century Overview', report commissioned by CFRT, September 2004 (doc A71), pt 2, p 1193

329. Ibid, pp352–353 (as quoted in Te Kani Williams and Dominic Wilson, closing submissions on behalf of Ngati Haka Patuheuheu and generic closing submissions on the Native Land Court, 2 September 2005 (paper 3.3.90), p105)
334. Ibid, pp 989–990, 1202
335. Keith Pickens, ‘Introduction of the Native Land Court in the Central North Island’, report commissioned by CLO, October 2004 (doc A78), p 301
336. Ibid, p 301; see also Bruce Stirling, ‘Taupo–Kaingaroa Nineteenth Century Overview’, report commissioned by CFRT, September 2004 (doc A71), pt 2, p1243
337. The land area of Tauponuiatia is around 1.2 million acres, but some of this also falls within the National Park inquiry district.
339. Te Kani Williams and Dominic Wilson, closing submissions on behalf of Ngati Haka Patuheuheu and generic closing submissions on the Native Land Court, 2 September 2005 (paper 3.3.90), cites Pukahunui, pp104–106. The point is also made in Rere Puna, brief of evidence, 28 February 2005 (doc C44), p5
340. Mangorewa Kaharoa government partition case, 27 February 1896 (doc B5(a)), p99
343. Keith Pickens, ‘Introduction of the Native Land Court in the Central North Island’, report commissioned by CLO, October 2004 (doc A78), pp 238–239
348. Matuahu Te Wharerangi and 13 others, Whanganui, to Native Land Court Judge, 29 March 1886 (as quoted in Bruce Stirling, ‘Taupo–Kaingaroa Nineteenth Century Overview’, report commissioned by CFRT, September 2004 (doc A71), pt 2, pp 996–997
349. Source, Native Land Court minute books. The figure of 3060 is the total number of sitting days. Because this figure includes instances where the court sat simultaneously at different locations it should be noted that there were 2829 days when the court actually sat.
352. Ibid, p176
353. Keith Pickens, ‘Introduction of the Native Land Court in the Central North Island’, report commissioned by CLO, October 2004 (doc A78), pp 231–232
355. Ibid, p120
356. David Potter, brief of evidence, 7 February 2005 (doc B53), p 6
357. ‘Notes of a Meeting between the Hon Mr Ballance and the Tuhourangi Natives at Whakarewarewa, 19 February 1885’, AJHR, 1885, G-1 (as quoted in Kathryn Rose, ‘The Fenton Agreement and Land
Alienation in the Rotorua District in the Nineteenth Century’, report commissioned by CFRT, September 2004 (doc A70), p.122


361. Major Scannell, Taupo Resident Magistrate, to Native Department Under-Secretary, 21 April 1886, AJHR, 1886, G-1, pp.15–16 (as quoted in Bruce Stirling, ‘Taupo–Kaingaroa Nineteenth Century Overview’, report commissioned by CFRT, September 2004 (doc A71), pt 2, p.923)


363. R Bruce, 5 August 1885, NZPD, vol.52, p.515


372. Native Land Court Act 1886, s.86; Native Land Court Act 1886 Amendment Act 1888, s.25; Native Land Court Act 1894, s.66; Native Land Laws Amendment Act 1895, s.67

373. Kathryn Rose, ‘The Fenton Agreement and Land Alienation in the Rotorua District in the Nineteenth Century’, report commissioned by CFRT, September 2004 (doc A70), p.271. The larger figure of 46 per cent which Rose gives does not correspond in any comprehensible way to a calculation of five years’ interest compounding at 5 per cent.

374. David Alexander, ‘19th Century Crown Purchases of Ngati Makino Lands’, report commissioned by CFRT on behalf of the claimants, 1995 (doc A3), p.74. This was hearsay on the part of Chaytor but witnesses who had been there corroborated it and Davis himself stated that ‘I mentioned to them [the natives] that they were hard pressed on account of survey charges, and advised them to consider the matter.’ Cited in ibid, p.75.


376. Rotorua Native Land Court minute book 44, fol.198 (quoted in Bruce Stirling, ‘Nineteenth Century Land Interests in Kaingaroa’, report commissioned by CFRT, April 2005 (doc G17), p.120)

377. Ibid, p.199

378. Ibid, p.226–229


381. Waitangi Tribunal, Report of the Waitangi Tribunal on the Orakei Claim (Wellington: Waitangi Tribunal, 1987), p.212. See Lewis (as quoted in Robert Hayes, ‘Protection Mechanisms (Issue 17)’, report commissioned by CLO, March 2002 (doc A73), p.29), and Kathryn Rose, ‘The Fenton Agreement and Land Alienation in the Rotorua District in the Nineteenth Century’, report commissioned by CFRT, September 2004 (doc A70); Fenton to W Rolleston, 22 July 1873, MS-Papers-446-034, Alexander Turnbull Library (as quoted in Vincent O’Malley, ‘The Crown and Te Arawa, c1840–1910’, report commissioned by CFRT, November 1995 (doc A49), p.47. ‘We have transferred several million acres of land from one race to the other, and even if a large portion of this is uncul-
activated and if capitalists have got large estates, it is infinitely [?] better than [the land] remaining in the hands of natives).


383. Hence the Native Land Court practice of recording names on the back of the certificate of title.

384. Native Land Court Act 1894, s 14(10)

385. Hemi Te Nahu, closing submissions on behalf of Tauhara Hapu, 5 September 2005 (paper 3.3.89), p 12; Martin Taylor, closing submissions on behalf of Tauhara Hapu, 2 September 2005 (paper 3.3.92), pp 15–16; Aidan Warren, closing submissions on behalf of Ngati Tutemohuta and Karanga Hapu, 2 September 2005 (paper 3.3.84), p 98; see also Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), p 58

386. Aidan Warren, closing submissions on behalf of Ngati Tutemohuta and Karanga Hapu, 2 September 2005 (paper 3.3.84), pp 98–101

387. Martin Taylor, closing submissions on behalf of Taupara Hapu, 2 September 2005 (paper 3.3.92), pp 16, 19

388. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 159


392. Ibid, p 686


394. Ibid, pp 437–438

395. J Richmond, 27 September 1867, NZPD, 1867, vol 1 pt 2, pp 1135–1136


397. Ibid, p 699

398. Native Land Act 1867, s 17

399. Bruce Stirling, Summary of ‘Taupo–Kaingaroa Nineteenth Century Overview’, A71(a), pp 42–43

400. Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), p 199 (as quoted in Aidan Warren, closing submissions on behalf of Ngati Tutemohuta and Karanga Hapu, 2 September 2005 (paper 3.3.84), p 99)

401. Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), p 310

402. Taupo Native Land Court minute book 1, 15 March 1869, fol 187 (Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), p 310)

403. Ibid, fol 188 (p 310)

404. Ibid, 16 March 1869, fol 195 (p 310)

405. Keith Pickens, 'Introduction of the Native Land Court in the Central North Island', report commissioned by CLO, October 2004 (doc A78), p 311

406. R Stout, 4 June 1886, NZPD, 1886, vol 54, p 303

407. Ibid, p 325

408. Taupo Native Land Court minute book 1, fol 200–202 (as quoted in Bruce Stirling, 'Taupo–Kaingaroa Nineteenth Century Overview', report commissioned by CFRT, September 2004 (doc A71), pt 1, p 433)

409. Taupo Native Land Court minute book 10, fol s 7–8, 18–21 (as quoted in Bruce Stirling, ‘Taupo–Kaingaroa Nineteenth Century Overview’, report commissioned by CFRT, September 2004 (doc A71), pt 1, p 535)

410. The 1894 Act (s 114, see also first schedule) repealed the Native Equitable Owners Act. It made it more difficult however for applicants, in that the court could exercise its jurisdiction only if the Governor in Council authorised it to do so. There was no such requirement under the 1886 Act.


412. Ibid

424. This was the East Coast Maori Land and Special Settlement Bill 1880; Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, p 489.


426. Ibid, p 4


429. Rotorua Native Land Court minute book 17, 29 November 1889, fol 137

430. Rotorua Native Land Court minute book 28, 23 October 1893, fol 126. That is, the judge considered Ngati Whakaue were entitled to half of the springs.

431. Ibid.


433. Martin Taylor, closing submissions on behalf of Ngati Rangiwewehi, 2 September 2005 (paper 3.3.79), p 36

434. Transcription of Native Land Court minutes relating to Hamurana Springs, February–March 1897, and Mangorewa Kaharoa judgment, 2 March 1897 (doc F3(a))


436. Ibid, pp 291–292

437. Ibid, p 317


443. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 124–125

444. Ibid, p 146

445. Ibid, pp 124–125
CHAPTER 10

NINETEENTH-CENTURY MAORI LAND PURCHASING IN THE CENTRAL NORTH ISLAND

This chapter is concerned with purchases of Maori land in the Central North Island inquiry region in the nineteenth century. The main period of purchasing in the century took place in the last three decades, from the 1870s to 1900, with the Crown a major participant in regulating as well as undertaking Maori land purchases. In this period of nearly three decades, or in around one generation, just over half the Maori land (52.9 per cent) in this Central North Island inquiry region had been purchased – this represented some 1.52 million acres of the total 2.89 million acres of Maori land in the region. This was despite the stated preference of iwi and hapu leaders to participate in settlement through leasing rather than sales of land, and, where sales were felt to be appropriate, for selling relatively small, defined areas, rather than extensive areas of land.

During this almost 30-year period, the Crown was actively involved in conducting the majority of land purchases in the inquiry region, as well as undertaking the role of legislating for and regulating purchases of Maori land both by itself and by private purchasers. The pattern of Maori land purchasing varied over the region, with the three inquiry districts – Kaingaroa, Rotorua, and Taupo – showing quite different patterns. By 1900, almost 87 per cent of Maori land in the Kaingaroa district had been purchased (see map 10.3). In Rotorua, 60 per cent had been purchased (map 10.2), and in the Taupo district, just under 33 per cent had been purchased (map 10.4). The Maori land purchased during this time included resources associated with the land, including forest resources and surface geothermal manifestations. The last decades of the nineteenth century therefore saw significant changes to the hapu and iwi estates of this region.

We note that there is a significant level of agreement between claimants and the Crown over the broad features of nineteenth-century purchasing of Maori land in the Central North Island inquiry region. We begin with a very brief overview of the main developments identified as relevant to the issues raised before us, before proceeding to our substantive analysis of the claims.

Overview of the Nature and Extent of Nineteenth-century Maori Land Purchasing

Early purchases

Although numbers of Maori communities in the Central North Island began engaging in new opportunities brought about by contact and settlement from the 1830s, significant purchases of Maori land did not begin to occur until the 1870s. The first recorded transaction is an agreement with the trader Phillip Tapsell in 1831, enabling him to acquire the use of a small area of Maori land at Maketu in the Rotorua district in return for a case of muskets, a case of tobacco, a case of pipes, and some lead and axes. This was followed over the next few decades by several small land transactions involving missionaries. The most important
of these involved 600 acres for the Anglican Church at Te Ngae, also in the Rotorua district, in 1839. This transaction has been the subject of a separate Waitangi Tribunal report prepared in 1990, which found that the transaction at the time was later confirmed as a ‘sale’ without adequate consultation and consent. Local Maori also gave 70 acres of land for the use of the Reverend Thomas Grace at Tokaanu in the Taupo district in 1853. The first legally recognised Crown purchase of Maori land in the region appears to have been the acquisition of 42 acres at Maketu in 1844, possibly for the Protector of Aborigines, Edward Shortland, who was installed there in 1842. The payment for this was recorded as two horses, one saddle, and two bridles.

During this period, numbers of iwi and hapu of this region, even well into the interior, became actively involved in growing agricultural produce and even participating in trading with the Auckland and Australian markets. They also began to participate in associated enterprises, such as flour milling for locally grown wheat and in coastal shipping, encouraged by missionaries and governors. The missionaries Thomas Chapman at Te Ngae in Rotorua, and Thomas Grace at Pukawa at the edge of Lake Taupo, encouraged local communities to participate in farming and agriculture. This was supported by Governor George Grey, who promised assistance to Ngati Whakaue of Ohinemutu as early as 1849 in their efforts to build a flour mill for their locally grown wheat. Hazel Petrie has described the mill-building efforts of Ngati Pikiao at Rotoiti, Tuhourangi near Tarawera, and Taupo communities on the edge of Lake Taupo. Some iwi of the Rotorua district also began to guide tourists to natural geothermal attractions, most notably the Pink and White Terraces, in return for payment. These early enterprises declined with changes in markets and the disruption of the wars of the 1860s. Participation in the colonial economy hitherto had been undertaken without the need for significant transfers of land in this region.

Following the wars, the first major alienation of Maori land in this inquiry region took place in the 1860s, when around 64,000 acres of land was confiscated by the
Map 10.1: An 1869 Lands & Survey map, showing leaseholdings
Government as part of the larger eastern Bay of Plenty confiscations. Some of this land was later transferred to Maori through the Compensation Court. We have discussed this confiscation in part II of this report.

During the early 1860s, the Government also passed Native Land Acts establishing the Native Land Court to determine Maori land title, instead of the Maori committees favoured by many iwi and hapu of this region. The creation of the court was accompanied by the abandonment of Crown pre-emption in purchasing Maori land. This enabled private interests as well as the Crown to deal directly with Maori over their lands. This change was accompanied by the closure of the Government Native Land Purchase Office in 1865.

1860s leases

Following the wars, Maori of this region did not immediately begin selling their land to either Crown or private purchasers. We received evidence that Maori communities of this region did want to continue to engage in new opportunities for economic enterprise but their preferred method of utilising their lands was through leasing. In the late 1860s, numbers of private Pakeha runholders began to negotiate leases of land with Maori of the region, particularly in areas with open natural pasture believed suitable for extensive pastoralism. These were the earliest significant private dealings in Maori land in the Central North Island and most involved what was still customary Maori land. An official map of 1869 shows the extent of 14 private leases in our inquiry region (see map 10.1). These include leases claiming to cover most of the Kaingaroa district to:

- Holt (Oruanui);
- Young (Tatua); and

There were also leases in the Bay of Plenty to Chater, Vercoe, Helyer, and Harrington, claiming to involve all land along the coast from the Tauranga confiscation boundary to the eastern Bay of Plenty confiscation boundary. Gilbert Mair was also leasing in part of what became Kaingaroa in the 1860s, and Chaytor leased land immediately to the east of the eastern Bay of Plenty confiscation boundary, which was later surveyed as Otamarakau.

Between them, these leases nominally covered about two-thirds of the Central North Island inquiry region. As many were negotiated privately, the full details are not always clear. It does seem, however, that there were significant variations in how they were negotiated, what they actually entailed in the way of rights (including whether some involved claimed purchases), and whether Maori right-holders were properly consulted. There appear to have been a number of reasons why Maori decided to enter into what were in many ways private joint ventures with these leaseholders. The runs offered landowners the prospect of a rental income while retaining underlying authority over land, they bound the parties together in a long-term relationship anticipated to benefit both, and they offered Maori the opportunity to gain experience of runholding enterprise. Runholders were also expected to provide Maori with immediate benefits as a source of goods, supplies, and often credit. Many of the runholders were also military men and a further motivation may have been that entering these leases would conciliate the Government in the volatile environment of the time. However, this volatility also discouraged the effective working of leases. Some leaseholders became involved in disputes over territory, what rights were involved, and whether all Maori right-holders had been properly consulted. It seems that some of these early leases were bought out by purchase agents Henry Mitchell and Charles Davis on behalf of the Crown in the early 1870s.
From the 1860s, the Government also built a number of military roads in the region, and established fortified redoubts in Taupo and Kaingaroa. These developments helped influence Crown acquisition policies, but for the time being they were not immediately followed by formal land transfers. By 1870, the only significant, legally recognised alienation of Maori land in the region was the land confiscated in the eastern Bay of Plenty. Maori still retained 97.8 per cent of their land base.

Maori land purchases and leases in the 1870s

From 1873, the Crown began a programme of large-scale purchasing of Maori land in the North Island. The purchasing context was partly the spread of extensive pastoralism and the realisation that large areas of the region might be suitable for this purpose. However, the major impetus was the Government decision to undertake and promote a massive public works and immigration programme in the North Island. The objective was to build infrastructure, introduce large numbers of new immigrants, stimulate settlement and economic development, and to ‘swamp’ Maori dominance. As part of this, the Government decided to purchase large areas of Maori land to provide the resources and farmland likely to be required for settlement. The Government also wanted to prevent private land speculators from undertaking transactions that might lock up large areas of Maori land and hinder settlement progress.

During the 1870s, the Government also began passing a series of legislative provisions intended to protect its purchase programme for Maori land. These included provisions to reinstate effective Crown pre-emption, to restrict or prevent private parties from dealing with Maori land, and re-establish a land-purchasing bureaucracy within the Native Department. Government land-purchase agents were then employed to begin purchasing Maori land.

While the Government preference was for outright purchases in the Central North Island region, its agents were also instructed to enter long-term lease agreements with Maori. When negotiations began in this region in 1873, some lands had already passed the Native Land Court before its suspension in that year. However, negotiations in the 1870s were particularly notable for the large amount of land in all three inquiry districts subject to negotiation before title was determined by the court, and ‘locked in’ by making advance payments.

The Government agents most prominent in undertaking these pre-title negotiations in this region were Davis and Mitchell, both of whom began working for the Government in 1873 after involvement in negotiations over Maori land for private parties. They undertook this Government work on the understanding that they would stop working for private interests, although they could buy out private arrangements for the Crown. They were also instructed to negotiate for extensive areas of land over as wide an area as possible, rather than limited, selected areas for particular purposes such as a railway or a proposed settlement.

These pre-title negotiations were conducted in a similar way to Government purchases before the wars of the 1860s, with payments of advances or deposits to those believed to be right-holders in lands. This was done before their rights were confirmed by the Native Land Court and outside the agreement and authority of the Maori committees favoured by iwi and hapu leaders, as noted in part II. These negotiations were also conducted from 1873 to 1878 while the court was suspended from operating in the region. This suspension effectively prevented private parties from legalising their deals and prevented opposing right-holders from having their interests legally recognised. However, it did provide Government agents with a virtual monopoly situation because private interests were unable to readily complete deals.

Maori leaders, and some of the settler community, were strongly critical of this system of pre-title negotiations, although for different reasons. Maori were concerned at its divisiveness and the willingness of Government agents to work outside traditional leaderships. Settler politicians were critical of the ineffectiveness of beginning negotiations over many blocks of land, but making little apparent
progress in completing them. Nevertheless, the system of pre-title negotiation was continued and by 1878, as the Native Land Court began sittings in the region again, the Government also began considering another round of extensive purchasing of Maori land. This was partly in anticipation of the need to pre-empt private speculators over the pending development of the North Island Main Trunk Railway line. By this time, the Crown had acquired 2.17 million acres of Maori land in the North Island and a further 6.5 million were classed as ‘under negotiation.’ A significant proportion of the Maori lands classed as ‘under negotiation’ were in the Central North Island inquiry region, predominantly in Kaingaroa, Northern Taupo, and inland Rotorua. However, while large land areas were still ‘under negotiation’ by the end of the 1870s, relatively few of them were considered legally complete formal transfers of defined blocks to the Crown.

According to the Land History and Alienation Database, around 62,000 acres of Maori land in Rotorua formally passed out of Maori hands during the 1870s, and around 7500 acres in Taupo and Kaingaroa. Pre-title negotiations and payments of advances for both leases and purchases were widespread in the region and involved large areas of land. Nonetheless, many of the Crown purchases were not yet legally complete and leases had not yet led to formal transfers of land, so Maori still technically retained 96 per cent of their land in this region (including almost 100 per cent in Taupo and Kaingaroa).

Maori land purchasing in the 1880s
The Government began the 1880s by retrenching spending as a result of economic recession. This also affected Government purchase policies for Maori land. As part of a review of its spending, the Government moved to a policy of tidying up the large number of its partially completed purchases of Maori land, including in this inquiry region. This involved identifying those areas of land least likely to be useful or attractive for settlement in times of recession and abandoning these, while trying to recover costs already spent on them in the form of advances as much as possible. Where lands were still felt to be useful, the policy was to try and make matters final, as quickly and cheaply as possible, generally by either completing the purchase or, more commonly, by partitioning out what could already be claimed by the Crown on the basis of its advances. The Government also abandoned entering leases in favour of a more determined focus on outright purchases and in transforming leases into purchases.

The Government had legal provisions available by this time to seek refunds of its advances either in cash or in land, or to apply to the Native Land Court to have claimed purchases defined and, if necessary, cut out from blocks where it had paid advances. Once this was undertaken, the Government also began lifting restrictions on private dealing in some blocks where it no longer had an interest, allowing private parties to begin negotiations instead. Nationwide, by 1883, the Crown had applied to the court to partition out 478,000 acres from blocks on which it had paid advances, and had abandoned negotiations on a further 576,000 acres. These policies were also applied in the Central North Island region.

The areas of land still believed useful included those lands and resources identified as likely to be immediately valuable for settlement, promoting economic opportunity and growth to overcome recession, and for providing necessary infrastructure. This included a continuing Government interest in promoting the proposed North Island Main Trunk Railway, and the access it was expected to provide to lands along the route and to resources such as stands of good-quality timber. It also included geothermal springs, which had been identified as likely to be useful for tourism. To achieve these objectives, the Government continued to implement a range of forms of regional purchase monopoly over areas of Maori land in the Central North Island. These included the Native Land Alienation Restriction Act 1884, which imposed Crown pre-emption in a ‘railway exclusion zone’, defined as over four million acres of Maori land surrounding the proposed main trunk railway route. This included western Taupo
lands. Another 640,000 acres of inland Rotorua and Taupo lands were also proclaimed under a Government monopoly through the thermal springs district from 1881 (see map 6.2).

The Government sought new cooperation with Maori leaderships in implementing some of these policies in the 1880s. There were a number of initiatives, such as consultation over the Rohe Potae and the main trunk railway route, the passage of the large Tauponuiatia block through the court, legislative reforms in response to Maori criticisms (including the Native Committees Act 1883), and a number of Crown–iwi joint ventures (including the agreement over Rotorua township).

As the Government moved into a new phase of Maori land purchasing from 1883 in pursuit of these policies, it also began to move from the system of pre-title negotiations and advances to focusing on the purchase of shares of individuals already determined to be owners by the Native Land Court. This process was used to not only complete some of the old negotiations begun under the system of advances, but also for new transactions for blocks identified as useful for purchasing objectives. It was under this system of purchasing undivided shares in blocks of land after title was determined that most legal transfers of Maori land in the Central North Island inquiry region took place, the majority of which were legally completed in the 1880s and 1890s. In some districts this also caught up lands where negotiations had already begun before title was determined. The Crown continued to be a major purchaser of Maori land in the region during this time, although in Kaingaroa private parties also purchased significant areas of land.

During the 1880s, three-quarters of the land in the Kaingaroa district legally passed out of Maori ownership. This was also the only district where private parties had the most impact on purchasing. According to evidence from the Land History and Alienation Database, the Crown purchased 215,066 acres of Maori land in Kaingaroa during this time, and private purchasers 269,062 acres. The Crown acquired 103,377 acres of Kaingaroa 1 block, after a Native Land Court rehearing in 1880, and 91,529 acres on completion of the Kaingaroa 2 hearings in 1881. In terms of large private purchases, an Auckland businessman, Morrin, purchased 49,000 acres of Paeroa East in 1883 after rehearings in 1881 and 1882. Glendinning and Sutherland acquired 20,000 acres of Pohokura following 1885 title hearings and rehearings on the basis of significant advances made. Pukahunui had been the subject of a Crown lease, but the moneys paid towards the lease were repaid by the owners after the title hearing, with 5500 acres taken for survey. The owners sold 40,000 acres to Platt in 1882. Runanga 1 and 2, both subject to leases, were alienated to a combination of private and Crown purchasers in the early 1880s.

While titles were closely disputed in the Kaingaroa blocks (as discussed in chapter 9), overall, the Kaingaroa blocks sold more rapidly than blocks in either Rotorua or Taupo, both to the Crown and to private purchasers. In both types of purchasing, a significant proportion of land was claimed to have already been sold through earlier negotiations and payment of advances. The result was that, by 1890, Maori retained just 23 per cent of their lands in the Kaingaroa district.

The 1880s was also an important decade for Maori land purchasing in the Rotorua and Taupo districts. In some cases, whole blocks were purchased in these districts, as in Kaingaroa. However, the process of constantly buying up undivided interests and then partitioning out a claimed Crown interest is also very evident. In the Rotorua district, purchasing began to affect inland areas, especially those areas and resources identified as immediately valuable for economic and settlement purposes, including geothermal areas. When the Native Land Court began operating in the region again from 1878, and following the Fenton Agreement and title determination of the Pukeroa–Oruawhata block, Government agents began purchasing undivided shares from individually listed owners in such blocks. The result of this purchasing was that whereas in the 1870s some 41,500 acres of Maori land was sold in Rotorua, during the decade of the 1880s, the total increased to 215,000 acres and the Maori land base in the
Nineteenth-Century Maori Land Purchasing

District was reduced from 96 per cent to 60.6 per cent in just 10 years.

Crown agents were also active in parts of the Taupo district during this decade, especially in some of the subdivisions of the large Tauponuiatia block after title to the block was determined by the land court in 1886 and 1887. Government land-purchase officers Henry Mitchell, and brothers William and John Grace, began purchasing shares in the various subdivisions, and then sought partitions where necessary to gain parts of the blocks for the Crown. In some cases, they also appear to have begun purchase negotiations while the subdivision hearings were taking place, then began purchasing shares as the blocks passed the court but before titles had been formally conferred. Some of these sales were deliberately negotiated by Maori to try and manage paying off survey costs as soon as possible. As in Rotorua, the Crown partitioning also targeted lands containing identified resources of value, including thermal springs. By 1890, the Land History and Alienation Database records that the Maori land base in Taupo had fallen by 316,000 acres including 20 per cent of the land area of the Tauponuiatia subdivisions, ceded to the Crown for survey costs. Maori had retained 99.5 per cent of the district at 1880, and this had fallen to 76.4 per cent by 1890.

Maori land purchasing in the 1890s

The final decade of nineteenth-century Maori land purchasing in the Central North Island took place under the Liberal Government. It wanted to ensure that as much land as possible was made available for settlement, especially for the new forms of modern farming possible with the new export opportunities arising from the development of refrigeration technology. Liberal land policies became focused during this decade on ensuring that the large ‘surplus’ and ‘idle’ estates of Pakeha runholders and what were seen as ‘unutilised’ Maori lands were made available for farm settlement. We will discuss Crown efforts to enable Maori to utilise their lands in this new form of farm development in part IV of this report. Here we note that, in terms of land purchasing, the Crown acquired 2.7 million acres of Maori land nationwide as part of this new initiative.

The Liberals passed numerous legislative measures in support of their purchase policies during this time, many of which impacted on Maori lands. Some measures went as far as contemplating compulsory acquisition of idle or unused lands for settlement. However, ‘voluntary’ purchases remained by far the most usual means of acquiring lands. The Government also continued to protect its efforts to increase Maori land purchasing, notably through the reintroduction of general Crown pre-emption in the Native Land Court Act 1894. The 1894 Act also finally provided for limited forms of incorporation for Maori to enable them to collectively manage and use their lands. We will consider the effectiveness of this measure further in the next chapter of this report, and also in chapter 14 (dealing with farm development opportunities). However, the provision for incorporation was generally too late and limited to significantly influence land alienation in the Central North Island.

In the meantime, the key feature of Government land purchase policies was to apply significant pressure to purchase ‘surplus’ Maori land nationwide, with the Prime Minister, Richard Seddon, vowing in 1894 to ‘break the annual record for Maori land purchase’. By 1897, the Crown had purchased 1.6 million acres of Maori land nationwide. Maori leaders responded to this increased purchase pressure with an upsurge in protests and political activity, including through the Kotahitanga movement. This strong political reaction, along with an increased awareness that numbers of Maori might well end up reduced to being effectively landless and a burden on the State, led the Government to reconsider its policies. By the late 1890s, Seddon agreed to cease new purchases of Maori land and to concentrate instead on making it available for settlement through leasing, as Maori leaders of the Central North Island had consistently preferred. This new policy, and agreements for more cooperative Maori and Crown
management of settling retained Maori lands, was enacted in the Maori Land Administration Act 1900.33

Ironically, while pressure to purchase Maori land remained a key feature of Crown purchase policy, it also led to a concentration on what was regarded as more immediately valuable land. There was also something of an effort to complete purchases already begun, to recover costs already spent and survey costs, as well as to target land and resources identified as immediately useful for settlement. It was still widely believed that even marginal lands could eventually be developed for farming, but the marginal and still inaccessible nature of large areas of the interior Central North Island, the reluctance of Pakeha settlers to take up such lands, and that many Maori land titles in this area were still not adequately settled, meant that Crown purchasing in much of the interior was a lower priority. In an effort to further promote settlement, the Government also began new joint-venture initiatives with the native townships of Rotoiti, in the Rotorua district, and Tokaanu, in the Taupo district, from the mid-1890s.

In the Taupo district generally, most Crown purchasing of Maori land in the 1890s was to complete purchases of large blocks of land with multiple owners that were begun by agents Grace and Mitchell in the 1880s.34 Purchasing shares from individuals in selected land blocks continued. As well as seeking to recover costs of earlier negotiations, and survey and other costs, Government purchase agents also sought to target better-quality lands, and resources such as timber where these were immediately accessible. Figures from the Land History and Alienation Database show that the area of land purchased in Taupo during this ‘mopping up’ phase fell from the 1880s when 190,000 acres were purchased, to the 1890s, when 124,000 acres were purchased. By 1900, this resulted in almost one-third of Maori lands in the Taupo district being sold, with 67.5 per cent of the Maori land base retained.

In the Rotorua district, the Crown was also a predominant purchaser of Maori lands in the 1890s. Unlike Taupo, there was a slight increase in Crown purchasing in this decade – from 189,000 acres in the 1880s, to 202,000 acres in the 1890s – reflecting the targeting of resources such as geothermal springs, and what were identified as better-quality lands. Crown purchase agents in this district also continued to follow what had become the standard process of purchasing individual shares in blocks of land that had passed the Native Land Court and then seeking partitions for the Crown.35 Many of the blocks purchased in this way had also been subject to long-standing Crown statutory monopolies, either under the Thermal Springs Districts Act, or under the Native Land Act Amendment Act 1877.36 Among the most important Crown purchases in this period, following the 1889 purchase of Rotorua township, were the purchase and partition of lands containing important thermal springs at Whakarewarewa, and the freshwater Hamurana Springs. By 1908, the Stout–Ngata commission reported for Rotorua that the ‘only springs of any importance’ remaining in Maori ownership were those at Tikitere on the Whakapoungakau–Pukepoto block.37 By 1900, 60 per cent of Maori lands in the Rotorua district had been sold, with 40 per cent retained.

The 1890s also saw almost exclusively Crown purchasing of remaining Maori lands in the Kaingaroa district, due in part to the effective reintroduction of Crown pre-emption in 1894. Purchasing there was well down on the 1880s. During the 1890s, 58,000 acres of Maori land was purchased, of which 373 acres was purchased by private parties. At the turn of the twentieth century, almost 87 per cent of Maori land in the Kaingaroa district had been sold, with just 13.1 per cent of the Maori land base retained.

In summary, in just under three decades from 1873 to 1900, just over half (52.9 per cent) the Maori land base of this inquiry region (and associated resources) had been sold, mainly to the Crown. Most of this purchasing was completed (in legal terms) in the 1880s and 1890s, under a process of buying up individual shares once title had been determined. However, significant numbers of purchases completed in that period were actually based on the payment of advances in earlier pre-title negotiations. This was particularly the case in Kaingaroa and northern Taupo. Purchasing in this period also impacted differently on the
three inquiry districts of this region. In the Kaingaroa district, where private purchases were also most significant, by 1900 almost 87 per cent of Maori land had been sold with just over 13 per cent of the land base remaining. In Rotorua, 60 per cent of Maori land had been sold with 40 per cent of the land base remaining. In Taupo around one-third of Maori land had been sold, with 67.5 per cent of the land base retained.

**Issues**

**The claimants’ case**

The claimants agree that there are no sharp divergences between Crown and claimant historians over the broad features of the nineteenth-century Crown purchasing system in the Central North Island inquiry region. They also acknowledged the fairness of much of the evidence produced by Crown historians, Dr Loveridge and Mr Macky. 

The claimants submitted, however, that these Crown purchase policies and practices combined to act coercively and unfairly on Maori of this region and breached the Crown’s Treaty obligations of active protection of iwi and hapu in their properties and taonga. They alleged that the Crown adopted and implemented these policies during this time to support its objectives of purchasing Maori land as extensively and cheaply as possible for settlement purposes, without taking adequate care to protect the interests of iwi and hapu. These Crown purchase policies and practices created systematic, economic, legislative, and structural pressures on Maori landowners that were overwhelmingly coercive and unfair, preventing Maori from being able to participate freely and willingly in land management and alienation decisions, causing economic marginalisation, and leaving some iwi and hapu with insufficient properties for their present and future needs.

The major features of Crown purchase policies identified as particularly damaging to iwi and hapu of this region included:

- the implementation of various forms of Crown monopoly;
- the early system of pre-title negotiations using advances; and
- the later system of purchasing individual undivided shares in land after title was determined by the court and then partitioning Crown interests.

It was alleged that the various forms of Crown monopoly excluded private competition, not only helping to drive prices down, but also preventing the possibility of Maori participating in joint ventures with private interests. In addition, it was alleged that the way these monopolies were implemented severely restricted the ability of owners to use their properties in the new economy, marginalising them economically, and making them more vulnerable to pressures to sell.

It was also submitted that the early system of Crown purchasing – which paid advances to selected groups and individuals, treating them as owners before title was legally determined – exacerbated conflicts and tensions in the region, preyed on communities already suffering hardship, and entangled whole communities in Government purchase monopolies and the Native Land Court process. This process caused economic pressures and increased vulnerability to selling.

Claimants submitted that most purchases in the region were, however, eventually conducted under a system of targeting individual owners as identified by the court, seeking to purchase their generally undivided interests in blocks. The purchase of shares was then followed by a system of partitioning out the Crown interest. It was alleged that this system targeted individuals in economic need and enabled the Crown to purchase blocks through a process of constant attrition, outside the collective management and decision-making powers of communities and in opposition to their long-term needs. This was exacerbated by unfair and manipulative purchase methods, and enabled the Crown to get a foothold in particular properties and resources, regardless of the known wishes of owners and their communities.
Map 10.2: Rotorua District: land still in Maori ownership, as at 1870, 1880, 1890, 1900 [from CFRT mapbook 3 (doc E38) plate 29]
Map 10.3: Kaingaroa District: land still in Maori ownership, as at 1870, 1880, 1890, 1900 [from CFRT mapbook 3 (doc E38) plate 35]
Map 10.4: Taupo District: land still in Maori ownership, as at 1870, 1880, 1890, 1900 [from CFRT mapbook 3 (doc E38) plate 31]. The hatched area is the Pouakani block, which was not included in the Land History and Alienation Database.
Claimants alleged that these combined pressures on Maori communities – already suffering hardship and continuing economic pressure, including the high costs of the Native Land Court process – were overwhelming and coercive to Maori individuals deprived of the support and leadership of their communities. Although there was some Maori agency in selling interests in land for a variety of reasons, and Maori of this region were willing to participate in the expected benefits of settlement, including through alienating some lands to attract settlement, Crown purchase policies and practices were overwhelmingly coercive and unfair, undermining the notion of genuinely willing sellers, and preventing Maori communities from participating and managing land alienation for their present and future needs.

The claimants further submitted that, as well as ensuring the purchasing process was fair, the Crown’s Treaty obligation of active protection of iwi and hapu required it to implement protection mechanisms to enable them to retain sufficient of their properties for their present and future needs. They alleged that the Crown failed to implement adequate protections or to monitor the needs of iwi and hapu, as can be seen in the wide variations in which purchasing at this time affected the region. The result of this failure was that some iwi and hapu of the Central North Island were left with insufficient lands to meet the challenges of the twentieth century.

The claimants alleged that iwi and hapu suffered serious prejudice as a result of this system of Crown purchasing. They were unable to manage alienations and participation in settlement opportunities as they chose. Many communities were economically marginalised by the end of the century both as a result of the low prices paid for land and resources, and the restrictions on their ability to participate in new opportunities. They had lost taonga important for cultural and economic purposes. Some iwi and hapu were left by the turn of the century with insufficient lands to support their communities, either for their traditional way of life or to participate in emerging economic opportunities.

The Crown’s case

Crown counsel agreed that there were ‘relatively few areas of difference between the Crown and claimants generally on 19th century land alienation’.39 They agreed that land purchasing and the Native Land Court are ‘critical issues for the inquiry’ and ‘the most likely topics for Crown Treaty breaches’. The Crown did not directly address Treaty principles relevant to land alienation, but did generally identify two ‘core’ principles for assessing Treaty responsibilities. These are that Maori and the Crown should act honourably, reasonably, and in good faith towards each other, and that the Crown must actively protect Maori interests.40 In terms of nineteenth-century Maori land alienation in this region, the Crown identified the major issues as being whether the Crown generally purchased for less than fair market value, the extent to which the Crown targeted quality Maori land, and the impact of the substantial lease negotiations entered into by the Crown in the 1870s.41

The Crown submitted that in considering these issues we need to take account of the context of nineteenth-century colonisation. This was a worldwide pressure that the Crown could not be expected to prevent. The major question is not whether the Government could have prevented it, but what responsibilities the Government had in acquiring land. This includes an assessment of alternative colonising policies that the Crown could have adopted, and whether ‘less penal’ alternatives within the overall context of colonisation were known and practicable. In relation to this, the Crown also submitted that while there were debates over whether the Government should be intervening to manage the acquisition of Maori land or whether there should have been more of a free market, it was always understood that colonisation and settlement would require the transfer of large areas of Maori land to settlers. Maori were recognised as the rightful owners of these lands, so it was inevitable that this transfer would mainly be through land purchasing. Large-scale purchasing of Maori land was regarded as vital to settlement and it was critical to the creation of the viable agricultural economy that was developed.42
The Crown agreed that it frequently relied on and reasserted monopoly purchase powers over Maori land in the Central North Island during this period. However, it submitted that such powers do not in themselves constitute a Treaty breach. The critical issue is the manner in which such powers were exercised. The Crown also agreed that it did generally purchase Maori land as cheaply as possible, but again this was not of itself a breach of Treaty principles, and the claimants overstate the extent to which Crown Treaty obligations extend to ensuring a fair price. In the Crown’s view, it is very difficult to establish what was a fair price for Maori land in the nineteenth century and there is little evidence of whether Maori received a fair price in this region. The issue of fair price is much less important overall than the scale and methods of purchase.

The Crown agreed that it did enter some early lease agreements as part of its negotiations. It regarded leasing of Maori land as a precursor to purchase at some unspecified time in the future. However, the Crown rejects allegations that its early leases were a deliberate and conscious attempt to lever sales, akin to a transaction in bad faith. Instead, the Crown submitted that its use of leasing was ‘an ad hoc response to Maori resistance to full alienation.’

The Crown also submitted that claimants have understated the extent to which their nineteenth-century tupuna either collectively or individually chose to exercise their rights as owners to alienate their land willingly. The Crown agreed that Government purchase agents could be aggressive and expedient in using survey costs, and other costs and debts such as tangi expenses, to pursue their purchases. However, there was also significant Maori agency in selling land in this region during this time, including for positive economic development purposes such as to raise capital to develop other lands. In setting protections and regulating purchases, the Crown also had to be mindful of the Maori desire to control their own lands. Many Maori objected to restrictions on alienating their lands, which did not exist for general lands owned by Pakeha. In regulating land purchasing and protections, the Crown had to try and find a balance at the time between imposing paternalistic controls and protecting Maori interests.

**Key questions**

On the basis of the evidence and submissions before us, we have identified the following key questions for consideration for nineteenth-century land purchasing in this stage of our generic inquiry:

- **Were the Crown’s nineteenth-century land purchase policies and practices consistent with the Treaty?**
- **Did the system of protections implemented by the Crown for Maori land purchasing in the nineteenth century fulfil its Treaty obligations of active protection?**
- **What was the impact on Central North Island iwi and hapu of this period of Maori land purchasing?**

**The Crown’s Land Purchase Policies and Practices**

**Key question:** Were the Crown’s nineteenth-century land purchase policies and practices consistent with the Treaty?

Given the general agreement over the main developments in land purchasing in this Central North Island inquiry region in the last three decades of the nineteenth century, a principal issue is the extent to which Crown purchase policies and practices were ‘coercive and unfair’ to Maori and in breach of Crown obligations of active protection (as alleged by the claimants) or reasonable steps in the circumstances of the time (within the overall context of general economic and colonisation pressures) as submitted by the Crown.

On the basis of the evidence and submissions before us, we have identified the following related questions:
Was the Crown’s use of purchase monopolies in this region in breach of its Treaty obligation of active protection?

To what extent did the system of pre-title negotiations using advance payments facilitate Maori land purchases in this region?

Was the system of purchasing individual interests after title determination in breach of the Crown’s Treaty obligations?

The claimants’ case
The claimants submitted that Crown purchase policies and practices of this period created systematic, economic, legislative, and structural pressures that were essentially ‘unfair and coercive’ to Maori of this region, resulting in significant sales of interests in land. It was alleged that during this period the Crown embarked on a policy of purchasing Maori land in the North Island as extensively and cheaply as possible to make the lands available to settlers. In pursuit of this policy, the Crown also acted to negate competition possible from private parties in dealing in Maori land. This enabled the Crown to remain the most significant purchaser of Maori land and to implement purchase policies and practices that were highly coercive because of a number of interlocking factors. These interlocking factors included the various forms of Crown purchase monopoly, the undermining of collective Maori authority and autonomy in land management, the lack of independent checks on valuation of land for prices, Maori poverty, and the high transaction costs Maori faced with gaining title through the Native Land Court process.

Crown purchase monopolies
The implementation of Crown purchase monopolies was undertaken through a variety of mechanisms during this time. As well as provisions enabling particular land blocks to be placed under Crown purchase monopoly, the suspension of the Native Land Court in the region from 1873 to 1877 also effectively created a Crown monopoly, and left Maori right-holders without any legal way of defending their interests or utilising them under secure title in other commercial opportunities during this time. This caused further hardship. The Crown took advantage of this situation by offering payments to poverty-stricken people without other forms of income, which could then be used to enforce negotiations over whole blocks. This took advantage of economically vulnerable people to pressure negotiations. The Crown continued with various forms of purchase monopoly, extending powers first over specific land blocks, then to regional forms of monopoly in the 1880s, and then to all Maori land from 1894. Forms of monopoly extended one way or another over some lands for many years.

These forms of Crown purchase monopolies not only excluded competition from private purchasers, preventing Maori from being able to sell their land in a more competitive market and therefore gain more reasonable prices, but the way they were implemented also prevented Maori whose blocks were under proclamation from otherwise utilising their lands and resources in commercial ventures, often for lengthy periods. This was held to preclude any form of leasing, mortgages, royalties, sale of timber rights, or even the placing of such land in trust. Any flouting of these restrictions rendered owners liable to stiff penalties of imprisonment or monetary fines. This severely restricted the ability of communities with lands under these restrictions from being able to utilise their properties to participate in new opportunities.

In the claimants’ submission, the Crown also failed to establish a reasonable system of protection to ensure that it did not take unfair advantage of the monopoly situation it had created. In particular, the Crown failed to establish a mechanism for ensuring that reasonable purchase prices were set for Maori land. Before 1905, prices for lands to be purchased were set by Government land purchase agents. In a monopoly situation, agents were able to set prices as low as possible. This was also closely tied up with survey costs, where low values could be used to maximise the amount of land taken to pay for surveys. There was no
requirement to consider a fair price for Maori, and the
Crown knowingly paid well below what were believed at
the time to be fair market prices for land in this region. Also,
Maori received even less benefit from the sale of their
land because of the very high transaction costs involved in
gaining title to what was sold. This included court fees and
costs, survey costs, and indirect costs of land court sittings.
After 1905, formal land valuations were required for pur-
chasing, but over half the land in the region had been sold
by this time.52 Because Maori gained so little benefit from
sales, the failure to pay reasonable prices contributed to
continuing economic pressure to sell yet more land.

The system of pre-title negotiations and payment of
advances
It was submitted that the early system of pre-title negotia-
tions and payment of advances for land purchases and leases
in this region from 1873 exacerbated conflict and economic
hardship, strained relations with the Government, and
undermined the collective authority of iwi and hapu over
their lands at a volatile time following the wars. Regardless
of whether it was still legal, the Crown's decision to continue
with a pre-Waitara style of negotiating (before owners were
legally determined) amounted to continuing a discredited
system that had already been seen to cause major disputes
and had eventually led to war. A major reason for establish-
ing the Native Land Court was ostensibly to avoid this kind
of conflict as a result of such purchasing. The Central North
Island region was clearly very volatile following the wars,
yet the Crown went ahead and implemented this same kind
of purchasing in its own interests, knowing it was likely to
increase conflict, and despite the complaints and warnings
of iwi and hapu leaderships about this.53

It was not surprising that within a short period the
Crown was claiming that conflicts caused it to suspend
the court in the region. However, the Crown took advan-
tage of the situation to continue to conduct purchase and
lease negotiations free from private purchasers, in the full
knowledge that it was not going to be able to legally com-
plete them while the court was suspended, exacerbating
tensions, restricting the ability of owners to support them-
selves from their lands and resources, and preventing them
from otherwise engaging in ventures with private interests.
Even though some of these early purchases were never
completed, the Crown gained considerable advantage
from this process while Maori suffered significant preju-
dice in having collective forms of authority undermined at
a critical time, in economic losses through being entangled
in long drawn-out negotiations, and in the significant con-
sequences in promoting land sales.

The possibility of a leasing economy
A number of claimants also alleged that the Crown’s will-
ingness to negotiate leases at this period was simply ‘bait’
to entangle iwi and hapu in lease arrangements that could
then be turned into purchases. This represented a Crown
failure to support iwi and hapu in their overwhelming pre-
ference to lease lands, and helped collapse a possible leasing
economy, leaving them vulnerable to purchase pressures.54

Claimants submitted that many Maori communities of
this region preferred to enter the new economy through
leasing, rather than outright sales, to gain the benefits of
ongoing income, contact with runholders, and – through
this – exposure to new ideas and opportunities, while still
retaining land ownership.55 It was submitted that Crown
claims that leasing was ultimately unsustainable are ‘coun-
terfactual’, and there is evidence of considerable private
interest in leasing for extensive pastoralism. Leasing was
of economic benefit to Maori. Maori were paid significant
sums for lease advances and according to lease agree-
ments negotiated, for example in Tauhara, they would
have received considerably more in rentals than the pur-
chase price they eventually did receive. Leasing would also
have given Maori more time and resources to assess their
options and the choice to respond to developing opportu-
nities, such as the development of tourism around what
became Taupo township. Outright sales from an early
period foreclosed such opportunity.56

While it was accepted that there was some settler antago-
nism to ‘Maori landlordism’, this did not make leasing itself
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While Crown settlement objectives may not have been fulfilled so quickly through leasing, it would not have prevented settlement. The Crown could still have subleased to settlers, even if at less of a profit. Maori were still likely to have decided to make some land sales, but could have done so in a more balanced and planned way with the benefit of a rental income to help pay their court and survey costs, a chance to take part in new opportunities such as tourism, and with time to engage with the Crown and its agents on a more positive and equal footing. Maori were also willing to cooperate with the Crown over joint-venture initiatives involving leasing, such as with Rotorua township in the 1880s. However, it was alleged that the Crown failed to actively protect Maori in acting as agent in this leasing, and instead turned these initiatives into further acquisitions of strategic lands and resources.

Purchasing of undivided shares after title was determined

The majority of Maori land purchases were eventually completed under a more systematic system of purchasing undivided shares in land from individuals determined to be owners by the Native Land Court, with subsequent use of partitioning to obtain a Crown estate. This targeted individual shares in land that were not necessarily even clearly defined on the ground, undermining attempts to collectively and rationally manage community lands – including for traditional and cultural needs, present and future needs, and for undertaking judicious sales of land for long-term development opportunities. It was alleged that the legal framework for implementing this purchasing, in combination with economic factors, also created significant pressures for Maori to sell individual shares.

Many Maori communities of this region were already under pressure from existing hardship and dislocation as a result of the wars. They faced further debts and costs in obtaining a usable form of title through the land court process that tended to swallow up much of any income they could make, and the restrictions on dealings implemented over much of their lands further restricted their economic options.

At the same time, purchase agents continued to use coercive practices to target individuals from the court’s ownership lists who were known to be vulnerable to selling their shares. This included targeting individuals known to be in debt, or facing economic pressures such as paying court and survey costs, or tangi expenses. Individuals known to be no longer living on the lands in question were also targeted where it was known they might need cash to try and protect and develop other lands. Agents were also able to continue to use restrictions on dealings in land and resources other than to the Crown – often over many years – to continue to target vulnerable shares, and gradually purchase interests. They could then force strategic partitions, and more debts among remaining owners to pay survey costs for these, and by a process of constant attrition gradually acquire lands by purchase.

Claimants acknowledged that Maori did want to participate in new development opportunities in the region. This included taking positive decisions to sell some of their lands in an effort to participate in the expected benefits from increased settlement, although there was a clear preference for leasing rather than sales. In some cases, Maori communities also cooperated over sale arrangements to mend, or continue building, long-term political relationships with the Government. Some were also encouraged by land purchase agents that selling lands to the Crown would lead to benefits for their communities in terms of trade, public works, and provision of amenities such as schools.

However, it was submitted that the Crown’s purchasing during this period undermined the attempts of Maori communities to rationally manage their lands for their future benefit. While individuals may well have been acting rationally to meet pressures they faced in selling their particular shares, the nature of purchasing and partitioning meant that community control over the sale or retention of defined areas for future needs was severely undermined. Maori individuals were not actually selling clearly defined and agreed areas on the ground.
such as a family farm but ‘negotiable signatures’ on a list, and this facilitated the alienation of land rather than its development.\(^6^5\) This purchase process resulted in constant attrition of land throughout this period that was outside the collective control of communities to manage for their long-term needs.\(^6^4\) It also meant that there were few real opportunities for Maori to be able to participate genuinely in a willing seller–willing buyer process.\(^6^5\)

Claimant counsel, Richard Boast, simplified this process in his submission to us in the following way when asking us to consider the position of the Crown in purchasing a farm from Maori:

(a) I, the Crown, have unlimited resources, whereas the would-be seller, though fond of the farm, is desperately poor, indeed possibly starving;
(b) The sellers are not allowed to sell their farm to anyone but me;
(c) While I am making up my mind about whether I want the farm or not, or how much I feel like paying for it, which can be for as many years as I like (decades sometimes), the owners are not allowed to mortgage or lease their farm or give it away to anyone else (if they dare to do so that is a criminal offence);
(d) I get to say what the farm is worth, and there is no way this can be challenged;
(e) If the farm is owned by four people as tenants in common, the two who do not sell will have to pay some of the costs of subdivision, and if they don’t or can’t they will be made to hand over some of their portion to me.
(f) If the farm is owned by four people and three of them decide not to sell, I can still buy the interest of the person who will sell, and force the rest to meet some of the costs of cutting out the portion of the seller.
(g) If I have bought one of the shares and am trying to buy the rest from the others I can take out injunctions stopping the remaining owners from cutting down trees (even for their own use) and if they do so I can force them to pay some of the profits to me.\(^6^6\)

It was submitted that this reflected the Crown purchasing system as it operated in its settled classic form from around 1880 to 1920, and that this was a ‘deeply unfair and one-sided system’ that can only be described as ‘coercive’.\(^6^7\) It was also submitted that this system contributed significantly to the ‘overwhelming’ poverty and marginalisation evident for many of the communities of this region by the turn of the twentieth century.\(^6^8\) By this time, some iwi and hapu of this region had been left with insufficient lands for their present and future needs.

**The Crown’s case**

The Crown agreed that the scale and methods of its purchasing of Maori land is a critical issue for this inquiry and a likely area of Treaty breaches. Major issues for this inquiry are likely to be whether the Crown generally purchased for less than fair market value, the extent to which the Crown targeted quality Maori land, and the impact of the substantial lease negotiations entered into by the Crown in the 1870s.\(^6^9\) The Crown submitted that the Land History and Alienation Database is useful for establishing general patterns of land alienation rather than providing a definitive picture in particular years or even decades.\(^7^0\) The Crown agreed that it was a significant purchaser of Maori land in this inquiry region, especially in the Rotorua and Kaingaroa inquiry districts (and to a lesser extent in Taupo) during the period up to 1900.\(^7^1\) In Kaingaroa, however, there were also significant large private purchases of Maori land. Further, the Crown noted the differences in impacts between inquiry districts – with some claimant groups retaining a much larger land base than others – and that the timing and intensity of Crown purchasing varied within the region.\(^7^2\)

The Crown submitted that the main objectives for Maori land purchasing were to open up the North Island to settlement and to develop infrastructure such as the North Island Main Trunk Railway. It wanted to encourage Pakeha settlement in the North Island, including for more security
following the wars of the 1860s. Dr Loveridge provided important contextual evidence for this and for why the Crown considered it necessary to purchase extensive areas of Maori land, although he also found that there has been little thorough historical examination of Crown purchasing policies of this period.73

The Crown argued that the decision to undertake more extensive purchasing of Maori land in the 1870s to meet these objectives required it to intervene to control and better plan for settlement, rather than allow Maori land to fall into the hands of speculators who might hinder settlement progress. When assessing these purchase policies it is necessary to understand that colonisation was an irresistible historical force well beyond the control of governments. Crown purchase policies were developed within this context. Once settlement began, it was inevitable that a good deal of land would pass from Maori to Pakeha ownership. It was also to be expected that this transfer would mainly take place through land purchase. The major issues therefore are the questions of Maori consent to purchasing, and the way the Government decided to act over purchasing within the overall context of colonisation.74

Purchasing Maori land for settlement was critical to promoting colonisation and settlement. While there was debate in the nineteenth century about how this might be best achieved – such as through Government planning and intervention, or through private initiative and enlightened self interest – there was nevertheless an underlying consensus that the colonial State and its citizens had a right to insist and require that all usable lands in the country be put to commercial–agricultural use in some way. The:

agricultural development of the kind and extent which took place in the period 1870 to 1910 would have been impossible if European settlers had not been able to gain access to sufficient land of sufficient quality in the first place.

This was a key aspect of the creation of a viable economic state based to a large extent on agriculture.75

**Crown purchase monopolies**

The Crown agreed that it frequently relied on and reasserted monopoly purchase powers over Maori land in this region during the late nineteenth century. This included both the early phase of purchasing in the 1870s and the later, more intense phase of Crown purchasing.76 The Crown submitted that the enactment of such monopoly powers is not in itself a Treaty breach; rather the critical issue is the manner in which such powers were executed. The Crown submitted that its monopolies could protect both Maori and the long-term national interest in promoting and managing settlement in this region. Further, monopolies such as that agreed for the thermal springs district could be protective of Maori in keeping out aggressive land speculators. The use of monopolies was a way of structuring colonisation in the Central North Island, to minimise negative impacts for both Maori and settlers, and prevent the negative impacts for both of unstructured development and private speculation in land.

The Crown agreed that monopoly purchase powers were implemented through a variety of mechanisms during this time. They were achieved most often by proclamation pursuant to legislation, but the suspension of the Native Land Court in the region for a period of years also had the effect of ‘disabling’ private competition.77 The Crown agreed that by the time the court was able to operate again, a very large quantity of advance payments on lands had been made that it wished to protect. It passed provisions from 1877 enabling it to undertake this protection by proclaiming blocks under negotiation for purchase or lease, restricted from any private dealing. The Crown agreed that over a million acres in the region were proclaimed in this way in 1878 and 1879, but argued that where these proclamations were not used, private parties could still deal with Maori over their lands. Proclamations restricting dealing could also be lifted, providing advances were repaid or land equivalent transferred, and there is evidence of this happening in some blocks after the Government acquired small areas of land it wanted.78 Crown purchase monopolies were also
implemented over significant districts as well as individual land blocks in the Central North Island under relentless settler demand to provide land for settlement. This included the thermal springs district from 1881, although this was by express agreement with Maori through the Fenton Agreement.

The Crown agreed that it generally attempted to purchase Maori land as cheaply as possible. This was not in itself a breach of Treaty principles and, in its view, claimants overstate the extent to which Crown obligations extended to ensuring a fair price. It is not a Treaty breach for the Crown to seek to buy cheaply, and it was required to spend public funds responsibly. The Crown was also funding purchasing from substantial and costly loans. The Crown was not under any obligation to subsidise Maori in terms of the amount of money paid for land. In addition, the notion of a fair price for Maori land in the nineteenth century is a fraught one, and there is very little evidence to determine whether Central North Island Maori generally received a fair price for lands purchased by the Crown. The issue of fair price is, in any case, much less important overall than the scale and methods of purchase. During much of the nineteenth century, for example, the science of land valuation was relatively unsophisticated. The first mandatory valuation requirement for Maori land was not made until 1905. Dr Loveridge found that prices generally rose for Maori land after this, some of which is likely to have been due to this requirement. However, there was also some inflation in land prices in the late 1890s and early twentieth century.

Before this, agents’ purchase prices for Maori land were set by the central government. The usual pattern was that land agents would be given a maximum price they could pay and then they had to attempt to purchase within that maximum. Many prices were negotiated on a price-per-acre basis. There was no clearly defined system for setting prices. Agents and officials relied on judgement and experience and it is likely that they and Maori sellers had a relatively good understanding of land values at the time. There is little evidence for claimant allegations that prices paid by the Crown were lower than they should have been. It was also not necessarily exploiting Maori when the Crown on-sold land to settlers at a higher price. The gap between the price paid and the price received when on-selling land was an important source of revenue and an appropriate instrument for ensuring that settlers helped to pay the cost of subsidised immigration and infrastructural development. This model was, however, being phased out as the Crown began to use a range of mechanisms to get settlers onto the land.

The use of monopoly powers and the exclusion of private purchasers did not necessarily mean that prices paid for Maori land were inevitably below market value. Not all private purchasers were excluded from dealing in lands in this region and the Government was able to periodically lift proclamations. The Government did compete with private parties in some areas, especially in Kaingaroa and parts of Taupo. The prices paid by the Government in Kaingaroa were similar to those paid by private parties. There is also evidence of Te Arawa support for restrictions to keep private dealers out. Further, it is very difficult to compare prices paid by the Crown and private parties. The Crown was often purchasing large areas of often marginal land, while private purchasers tended to be more discerning. The Crown acknowledged the comments made by the Stout–Ngata commission, but submitted that they needed to be placed in context. Further it was reasonably believed that lands sold for purposes such as the railway would enhance the value of lands retained by Maori (thereby justifying a lower price).

**Pre-title negotiations and advances**
The Crown agreed that it began purchasing in the Central North Island in 1873, and that it instructed its agents to begin pre-title negotiations in as much land as possible. Between 1873 and 1877, large areas of land were negotiated for and substantial advance payments were made for both purchases and leases, although transactions were not considered completed until title was determined by the Native Land Court. While some advances were made before title
was determined, the largest part of a payment was made once title was completed.\textsuperscript{57} The Government also took significant risks in this process in that the court might find that the people it paid advances to were not the correct owners. There were examples of this happening in the Paengaroa, Waitahanui, and Tapapa blocks.\textsuperscript{88} In these situations the Government also had to face further losses in making alternative purchase arrangements with the correct owners.\textsuperscript{89}

The system of pre-title negotiations and advances was continued for a time after the court began operating in the region again in 1877. However, in 1879 the Government instructed agents to stop this system of purchase. In the Crown's submission, its policy from the 1880s was that payments had to wait for the land to pass the court. The Crown conceded that the practice of paying advances still occurred in later years, such as in Taupo in 1886, but this was the result of the actions of individual land purchase officers rather than policy.\textsuperscript{90}

The Crown conceded that the purchase system using pre-title negotiations and advance payments was always likely to create difficulties in areas where rights in many blocks were strongly contested.\textsuperscript{91} It also agreed that this system was similar to the earlier period of Crown purchasing from 1840 to 1865, where Government agents decided the correct right-holders for themselves. However, it noted that this system was familiar and would likely have been expected by Maori.\textsuperscript{92}

There is also evidence that Government purchase agents were reminded to negotiate openly with all tribal groups in pre-title negotiations, not just those who claimed a right to sell. However, it was not feasible for the Government to tightly manage the activities of agents, and there is evidence that instructions were not always followed. There is also some evidence of individual dealing.\textsuperscript{93} However, it is not clear to what extent negotiations were conducted with just a few individuals rather than wider communities. Some individuals were clearly regarded as representing wider tribal groups and considered themselves able to do so. There is evidence of a mix of dealings with groups and individuals, but it seems likely that dealing with groups was more the norm at this time. It was also easier for the Crown to deal with large groups where Maori were agreeable and there is evidence of cooperation in some negotiations. There were also considerable risks in the early period of negotiations if not all owners were consulted. Nonetheless, Government agents did consider that advance payments committed all owners to the transaction, whether or not they had all agreed. However, it was not until the Native Land Act Amendment Act 1877 that the Crown was enabled to acquire the interests of any owners of a block who had sold, regardless of the opinion of the majority.\textsuperscript{94} The Crown also conceded that it did not require final payments based on these early negotiations to be paid to tribal groups.\textsuperscript{95}

The Crown accepted that from 1877 especially, advance payments made as part of pre-title negotiations could become the foundation for proclamations restricting the capacity of all right-holders in the block from dealing with private parties. Very large areas of land in this region were proclaimed under restrictions on this basis, even while many of the advances had been made on customary land and only paid to sections of owners. Some negotiations begun at this early period also extended over many years.\textsuperscript{96} In addition, some pre-title negotiations featured advance payments made before the final purchase amount or a means of fixing it was agreed. The Crown conceded that this could disadvantage Maori, locking them into a negotiating process with deposits already received, and making it easier for the Government to negotiate lower prices. In general, however, advances were not so much a debt as an advance or deposit of a part payment in consideration of the sale or lease of a block of land.

The Crown accepted that this system had become controversial in the Central North Island inquiry region by 1879. However, although there were problems with the system, relatively few purchases were actually completed in the region during its operation in the 1870s. When Crown purchasing was reviewed in the early 1880s, some of these early negotiations were abandoned. The Crown did require
refunds of the advances made in either cash or land. It would then lift restrictions preventing private dealings in the land, unless by then it was under some other form of restriction such as the Thermal Springs Districts Act.\footnote{97}

The Crown agreed that in an ‘ideal world’ it would have been better not to enter negotiations or make payments until title was ascertained. However, in practice the Crown had to face competition from private interests. Advance payments were used ‘to secure a firm foothold’ for the Crown in the face of such competition. Maori had shown themselves willing to negotiate over their land before title was ascertained, and they expected advances in part acknowledgment of their interests.\footnote{98} The failure to continue to make such payments and advances may have been seen as bad faith by Maori, even if land had not passed the court.

\textbf{Leasing}

The Crown agreed that at the time it entered early lease negotiations, it had provided no legal facility to sublease such lands to settlers. However, this does not mean the Government never intended to do so. It may have considered that there was no urgency to do so until titles were ratified by the Native Land Court.\footnote{99} It agreed that it did regard leasing of Maori land as a precursor to purchase at some unspecified time in the future. It used leases as a stopgap measure to prevent private parties from purchasing the land it hoped to purchase itself. However, the Crown rejected allegations that leases were a deliberate and conscious attempt to lever sales – including the deliberate non-payment of rents to force Maori into sales – akin to a transaction in bad faith. Many of the lease agreements clearly contained provisions that title had to be determined before rents became payable.\footnote{100} Leases were ‘an ad hoc response to Maori resistance to full alienation.’\footnote{101}

The Crown agreed that Government lease negotiations ‘obviously tied up Maori land to some extent’, particularly when the Native Land Court – the only forum provided for resolving title issues for much of the land subject to lease – was suspended from 1873 to 1877.\footnote{102} Rent deposits or advances were often held in abeyance until after the court determined title, and legislative proclamations meant the owners could not otherwise deal with their land, either by mortgaging or sale.\footnote{103} However, any prejudice to Maori as a result of this is, in the Crown’s view, unclear. The owners could and did still use the land for customary purposes, and may not have wished to sell anyway.

The Crown acknowledged that there was some Maori interest in private leasing, but it is not clear what kind of private market existed. It would have been short-lived in any case because much of the land was found to be poor for agricultural purposes.\footnote{104} The Crown also relied on the views of Professor Gary Hawke that any vision for a modern economy built on Pakeha–Maori partnership through leasing arrangements is thoroughly anachronistic. It does not accord with modern economic analysis.\footnote{105}

\textbf{Purchasing individual interests after title was determined}

The Crown agreed that the naming of individuals on Native Land Court title orders did facilitate negotiations with individuals, and from the 1880s the tendency towards individual negotiations increased.\footnote{106} From the 1880s, the Government also placed a new emphasis on outright purchases and moved away from leasing. Increasingly, agents began to purchase shares from individuals named on court title orders after title was determined. The Crown submitted that it did not abandon all attempts to purchase from groups, however, and noted provisions in the Native Land Administration Act 1886 to this effect. Although this was repealed in 1888, there were other Government initiatives to negotiate with tribal groups, such as over the Rotorua township.\footnote{107}

The Crown continued to protect its purchasing in the 1880s with the use of restrictions against private dealing in lands. It also continued to seek to purchase large areas of land, although it began targeting some key Maori-owned resources, including Whakarewarewa, Waiotapu, and Tokaanu hot springs. The Crown submitted that Hamurana Springs can best be described as an ‘opportunistic’ Crown purchase, which ‘does tend to highlight the problems of
The Crown also submitted that there was significant Maori agency in the selling of land in this region at this time. Maori recognised both that selling land was a means of accumulating funds for economic development, and that it was necessary to attract settlement and economic opportunity. The Crown submitted that there are examples of Maori taking positive steps to sell for these kinds of reasons in this region. This includes the example of Maori owners selling some land in the Pukehunui block, to acquire sheep to run on their retained lands.109

The Crown agreed that ‘[v]iewed from today’s perspective’ it is not difficult to identify unsavoury and immoral practices associated with nineteenth-century land alienation, including Crown purchasing. The Crown noted that Purchase Officer John Young's methods are a prime example of this, albeit a worst-case example. The Crown agreed that other practices, such as the large number of European traders gathered to take advantage of Gilbert Mair’s payment of moneys for Kaingaroa 1 in 1880, can also be regarded in a somewhat cynical fashion. The Crown agreed that there is some evidence that its purchase agents used survey costs to induce sales in this region, although such costs were not the only reason for selling. The Crown also accepted that there are examples of aggressive and expedient approaches to land sales, such as the use of intertribal rivalry, and taking advantage of the expected costs of tangi for prominent chiefs. However it submitted that it is not clear how representative these examples are.110

The Crown agreed that, particularly in early negotiations, Crown agents emphasised the benefits that Maori would derive from the expansion of European settlement as a means to persuade them to agree to enter transactions. However, the Crown submitted that there is little evidence of specific promises of collateral benefit to accompany a sale. Indeed, with regard to schools there is evidence of advice to owners to use some of the purchase payment to establish schools themselves. There were no specific undertakings about benefits, of the kind made for Rotorua township in 1880.111

The Crown also submitted that it is necessary to judge all actors in these events by broadly the same standard. Crown agents cannot be judged by today’s Treaty standards and Maori solely in their nineteenth-century context. The Crown submitted that while, in Treaty terms, its responsibility for some of these practices cannot be denied, the Tribunal must also recognise ‘that some CNI Maori were often actively involved in the various land transactions and, at times, there is some contributory fault and error on their behalf’.112

The Tribunal’s analysis
As we noted in chapter 8, the Tribunal has long accepted that the Treaty envisaged that Maori would alienate some of their land and resources, so that they could participate in new development opportunities. It was also expected that colonists would acquire significant areas without necessarily damaging the capacity of Maori to participate in the expected benefits of settlement. This was because it was anticipated that even if Maori alienated some lands and resources, they would nevertheless be able to prosper and support their communities by gaining from the added value expected to accrue to their retained lands as a result of settlement. These assumptions relied heavily on Maori being able to participate actively in management decisions concerning their lands, including any alienations. The Treaty also required a duty of active protection of Maori to ensure that they were not disadvantaged in dealing in their lands, and that they retained sufficient for their present and future needs.

A number of Tribunal reports have already noted that the way the Crown introduced new rights and responsibilities for Maori to deal individually in their lands – outside community control and decision making – had breached Treaty obligations of active protection.113 In chapter 9, we considered the way in which this individualisation of title
was created in our inquiry region through the native land laws. We now turn to the processes by which Maori land was purchased in this region, to consider to what extent Maori leaders of the Central North Island were able to manage alienations so that they could gain benefits for their communities, and the extent to which the Crown met its Treaty obligation of active protection.

**Purchase monopolies**

Was the Crown’s use of purchase monopolies in breach of its Treaty obligation of active protection?

As we have seen, and the Crown has agreed, the Government frequently resorted to imposing various forms of monopoly or pre-emption in its negotiations for Maori land in the Central North Island during the three decades from 1870 to 1900. In general, these forms of monopoly were implemented through direct legislative provisions. These began with fairly limited rights of monopoly for certain specified purposes. Under the Immigration and Public Works Amendment Act 1871, when the Crown began negotiations with Maori over land blocks required for the specified public purposes of gold mining, to establish special settlements, or for railway construction, before the land passing the Native Land Court, the Crown could proclaim this intention by gazette notice. After that, no private party could deal for any interest in the land until the notice was revoked or two years had passed. The Immigration and Public Works Act Amendment Act 1874 (section 3) provided a similar Government right for negotiating leases on Maori land in the North Island. Subsequent legislative provisions substantially increased the extent of these monopoly powers and restricted or removed limitations, such as time limits. These monopoly powers were then extended from blocks to whole districts, and eventually, from 1894, private parties were generally excluded from dealing in Maori lands at all.

Other Crown policies had the effect, as the Crown agreed, of providing a practical purchase monopoly for the Crown. These included the suspension of the Native Land Court in the inquiry region from 1873 to 1877 which, as the Crown described, effectively ‘disabled’ private parties from participating in recognised lease or purchase transactions with Central North Island Maori. This suspension was formally lifted in February 1877, although the court did not actually begin sitting in the Central North Island until later in the year. The effectiveness of this practical monopoly was recognised by Government purchase agents who advised the Government to delay renewed sittings until legislation could be passed to allow blocks in which the Crown had interests to be protected by some new mechanism. ‘Otherwise’, Henry Mitchell wrote, ‘the actions of private speculators may prove troublesome.’

The Government reply to this advice is not known, but the Native Land Purchases Act 1877 enabled proclamations preventing private dealing in land under negotiation. The Government began gazetting blocks under this new measure in March 1878, while the Native Land Court did not begin its sittings until May of that year.

The Native Land Purchases Act 1877 enabled the Government to proclaim any Maori land block on which its agents had paid moneys or entered negotiations, either before or after land had passed the Native Land Court, to be proclaimed, after which private parties were prevented from purchasing or acquiring any right, title, estate, or interest in the land or any part of it, or negotiating for this. This Act did not have a legislative time limit for the proclamations, but the Government could revoke them as it chose, after which private dealing was possible. The Government continued to make use of this measure through most of the rest of the nineteenth century. The Government was able to apply the proclamations as they best suited purchasing, in some cases for many years.

The provision was further amended in 1892, whereby the Government no longer had to have entered negotiations or begun purchases in a block, but private parties could simply be excluded by gazette notice.

As the Crown submitted, these powers for much of this time only precluded private parties from dealing in blocks of Maori land where the Crown was already negotiating.
In theory, private parties could still negotiate over all other Maori land blocks, or in blocks where restrictions were lifted or where (if this was applicable) time had run out. However, Crown agents were instructed to begin negotiations in as many blocks as possible in this region, even if these negotiations were with just a few claimed owners or involved just one small payment as a ‘deposit’. The proclamations then bound all those with interests in the block and prevented them from dealing in lands or resources in any part of the block. The restrictions could also be continued as long as agents wanted, so they could take as much time as they wished to either continue with negotiations or seek to complete them. There was no requirement to consider any matter other than what the Government needed in either applying or lifting the proclamations.

The Crown submitted to us that some 1,329,688 acres of Maori land in this region were proclaimed under the 1877 Act in less than two years following its introduction.116 This is based on figures supplied by the Crown’s historian, Mr Macky, showing that 60,089 acres of land in the parish of Matata; 383,539 acres in Rotorua district; 676,251 acres in Kaingaroa district; and 209,809 acres in Taupo district, were gazetted under this Act between March 1878 and June 1879. These proclamations of 1878 and 1879 account for almost half the total land area of the Central North Island.117 This power continued to be used in blocks in the Central North Island for most of the rest of the century.

The Crown agreed that other purchase policies applied to this region also had the effect of creating regional purchase monopolies in Maori land. In particular, the way the Crown implemented proclamations under the Thermal Springs Districts Act 1881 created a territory, excluding private dealings, that stretched across 650,000 acres of our Rotorua inquiry district, as well as northern Taupo and a small part of Kaingaroa.118 The Crown agreed that this Act had the effect of providing a mechanism that excluded private dealing in Maori lands in the affected region.119 Just a few years later, the Native Land Alienation Restriction Act 1884 created another regional monopoly in Crown dealing in Maori land, this time for lands through which it was intended the North Island Main Trunk railway would be built. This ‘railway exclusion zone’ covered over four million acres of land in the centre of the North Island, including a significant portion of lands within our western Taupo district from the western shore of Lake Taupo towards the main trunk route.

In addition, a nationwide form of Crown purchase monopoly was created by the Liberal Government under section 117 of the Native Land Court Act 1894, with the exception that private transactions already in progress could be completed. The later Native Land Laws Amendment Act 1895 (section 3) also provided that Maori could deal with private parties over land within the limits of town districts and boroughs for areas not exceeding 500 acres. However, in general, from 1894, private parties were excluded from dealing in Maori land or any interest in it, including leases, or rights to resources such as flax or gravel. The only option for Maori was to deal with the Crown as the Crown chose.

It is apparent that, throughout this time, much of the Central North Island inquiry region was subject to some form of Government monopoly in purchasing, often for lengthy periods. The Crown did not deny this, but submitted that creating a purchase monopoly was not in itself a Treaty breach. The issue was more how the monopoly was implemented. The Crown submitted that its use of monopolies was intended to protect both the Maori and the long-term national interest in promoting and managing settlement in this region. The use of monopolies was a way of managing colonisation in the Central North Island to minimise negative impacts for both Maori and settlers from unstructured development and private speculation in land.

We agree that Crown pre-emption in Maori land transactions had a long history of being promoted as being protective of Maori and as enabling more planned and structured settlement for the benefit of both Maori and Pakeha. We also agree that, during the latter part of the nineteenth century, there was a variety of political views on how far the Government should intervene in dealing in Maori land or whether free trade in land, with appropriate
protections, should be encouraged. As we have noted, a number of Tribunal reports have canvassed issues of Crown pre-emption in dealing with Maori land. It has been well established that the Treaty is to be regarded as a living document, capable of application to new and changing conditions, and that waiving or reintroducing Crown pre-emption was not necessarily a Treaty breach. However, such changes could not be made unilaterally by either Treaty partner. As the Mohaka ki Ahuriri Tribunal found, the Crown’s waiver of pre-emption in the Native Lands Act 1862 was a ‘direct violation’ of the Treaty because any alteration or amendment of its terms needed the consent of both parties, the Crown and Maori, and this was not done.\(^\text{120}\)

Nonetheless, the waiver had been in place for 15 years when the Crown began to reintroduce pre-emption selectively in the Central North Island to protect its purchase negotiations. By that time, its reintroduction (especially in a partial manner and for varying duration) required Maori consent just as fully and absolutely as its abolition in 1862.

**Crown pre-emption and consultation**

In our view, it may well have been reasonable for the Crown to seek some means of reapplying Crown pre-emption in transactions involving Maori land. The situation in the Central North Island in the late nineteenth century may have been one where the Crown and tribal authorities had to consider new forms of Government pre-emption, particularly to exclude potentially destructive ‘land speculators and jobbers’ in the interests of both Maori and settlers. But any such policy had important implications for the way iwi and hapu could engage in new economic opportunities with their most valuable property assets. Meaningful consultation and agreement was therefore required over this policy and how it might be implemented. As the Crown agreed, once it gained the advantage of a monopoly, this placed an even greater protective obligation on it to ensure that it did not misuse its advantage to the detriment of Maori interests.\(^\text{121}\)

On the evidence available to us, the Crown did not consult adequately over the various forms of monopoly that it implemented in this inquiry region. The Government’s decision to negotiate with select ‘owners’ before title was determined, and to work outside tribal forms of authority such as the komiti established by Maori communities to manage their lands and affairs, undermined the Crown’s ability to consult adequately over establishing monopolies for individual blocks of land. Nor did the Crown consult widely with Maori over the Native Land Purchases Act 1877. The Crown introduced the Native Land Court in this region and then felt obliged to suspend its operation in 1873, also with little consultation with Maori. There is no doubt that Maori communities were willing to cooperate with the Crown on occasion when they were consulted, to ensure that settlement was adequately managed. Maori communities were willing to enter joint-venture arrangements over townships for example, including Rotorua, to enable settlement to proceed while keeping out land speculators. In particular, Maori wanted to facilitate settlement and economic development through large-scale leasing, and were willing to lease land to the Crown (which could then control its settlement directly).

As we have noted in chapter 6, the Thermal Springs Districts Act 1881 was drafted within the context of the Crown’s negotiations with Ngati Whakaue, Ngati Rangiwhewhi, Ngati Rangiteaorere, and Ngati Uenukukopako to create a township at Rotorua. It was supposed to give legislative effect to Fenton’s agreement with the Komiti Nui.\(^\text{122}\) The claimants’ historian, Ms Rose, cited the Minister of Lands, William Rolleston, as declaring that this Act was primarily ‘designed to meet a special case, that of the township that had been laid out at Rotorua.’\(^\text{123}\) The Act was also regarded as providing a means by which further settlement could be agreed while excluding land speculators. The Act’s preamble declared that this would be both ‘advantageous to the colony and beneficial to the Maori owners of the land in which natural mineral springs and thermal waters exist.’\(^\text{124}\) The Crown could be the only
purchaser of Maori land proclaimed under the Act, and Maori could lease land through the Crown as their agent.

However, despite Te Arawa understandings that further consultation was required over other settlements to be established in the district proclaimed under the Act, the Crown used the legal powers provided to proclaim a very large district in which it effectively held monopoly powers over any kinds of land dealings (see map 6.2). On 13 October 1881, the 3200 acres of the Pukerua–Oruawhata block, the site of the agreed township, was proclaimed. Two weeks later, a further 640,000 acres of land was proclaimed under the Act, covering all the inland Rotorua district and northern Taupo. The official correspondence surrounding this, as well as subsequent petitions from Central North Island Maori, indicates that the Crown did not consult with iwi and hapu over this much larger area.

Ngati Whakaue were originally very supportive of the 1881 Act, believing it reflected an agreement for continuing consultation over the way settlement might be managed. There was significantly less support from other iwi and hapu, including hapu of Ngati Raukawa, who had not been involved in the consultation, but were now affected by the proclamation covering a much larger area of land than the Rotorua township. However, Ngati Whakaue support also began to falter and turn to opposition as the township leases began to fail, and continuing consultation over settlement did not materialise. In 1891, 2000 Te Arawa signed a petition calling for an end to the proclamation under the Act. In 1893, local member of Parliament, William Kelly, also called for repeal, explaining to Parliament that as a result of the way the 1881 Act was implemented, Maori landowners within the proclamation area were trapped with bills for survey which were accruing interest, but they had no alternative means of gaining revenue from their lands to pay them, other than by selling to the Crown.

The later Stout–Ngata inquiry of 1908 reported that the experience of Ngati Whakaue with the 1881 Act was ‘a bitter one’. The commissioners found that in the intervening 27 years, the Government had taken advantage of the leasing powers provided for all the lands proclaimed under the Act only once, and that was for the original Rotorua township. Otherwise, the Crown had focused on purchasing only, especially in lands where significant thermal springs were located until, by 1908, the only springs then recognised as important that Maori had retained were at Tikitere, on the Whakapoungakau–Pukepoto block. Otherwise the Crown had shown little interest in the lands, and the commissioners found that this and the prohibitions on private alienations under the Act ‘largely account in our opinion for the present unproductive state of the Native lands in the district’. Despite widespread criticism of the way the Government operated the 1881 Act, it remained in force until 1910.

The Rotorua township experience at least confirms that consultation with iwi and hapu of the Central North Island over the reintroduction of Crown pre-emption was possible, and not outside what the Crown could contemplate at the time. It also reveals that Maori communities were prepared to consider the need for planned settlement to make best use of lands and resources for settlement purposes as well as their own benefit. However, while pre-emption had the potential to be protective for Maori and to assist with settlement, the Rotorua case indicates that this is not what practically happened. Consultation was not adequate or ongoing in this case and, as the Stout–Ngata commission found, the Crown use of pre-emption in this case – while it had furthered Crown purchase interests – had neither assisted Maori nor the settlement of the district in the succeeding 30 years.

In terms of the reimposition of pre-emption nationally in 1894, we note that this was in express opposition to what many Central North Island Maori had sought, through their Kotahitanga representatives, in the Federated Maori Assembly petition of 1893.
The Tribunal’s findings
In sum, the Crown did not consult or negotiate consent for:

- the monopoly effects of suspending the Native Land Court in 1873;
- the imposition of a monopoly over the particular blocks it had under negotiation;
- the legislative powers to impose monopolies as provided for in the Native Land Purchase Act 1877;
- the regional monopoly imposed under the Thermal Springs Districts Act 1881, other than its negotiation of consent for the Pukeroa–Oruawhata block of 3200 acres; and
- the national monopoly imposed by the Native Land Court Act 1894.

The failure to consult Central North Island Maori, or obtain their consent for these forms of monopoly, was in breach of the Treaty principles of partnership, autonomy, and active protection. Having abolished pre-emption in favour of direct dealing in 1862, the Crown was required to obtain Maori consent to its reintroduction. In our view, as demonstrated by the negotiations with the Komiti Nui in 1880, there was every opportunity for the Crown to have done so. It could have entered into a genuinely fair and protective relationship with the Maori communities of the Central North Island, that would have excluded speculators and safeguarded both public and Maori interests. The opportunity remained for so long as the Thermal Springs Districts Acts remained on the statute books. Instead, the Crown reimposed pre-emption selectively and without consent, in the interests of obtaining the freehold of as much Maori land as possible, as cheaply as possible. We turn next to consider whether, in doing so, it carried out its monopoly powers in a fair and Treaty-consistent manner.

Crown pre-emption and a ‘fair’ price
The Crown agreed that when it implemented pre-emption again in the Central North Island through various mechanisms, it had an obligation to ensure that any advantage it gained from this was not misused to the detriment of Maori. The claimants alleged that the Crown failed in this obligation by taking advantage of its monopoly to drive down the prices paid for Maori land, below what was considered a fair value at the time. Nor, in the claimants’ view, did the Crown act reasonably so that its restrictions on dealings impacted as minimally as possible on Maori rights to otherwise utilise their properties and resources. This failure to act fairly, or to protect Maori interests, left the latter vulnerable to pressures to sell at unfairly low prices.

The Crown agreed before us that it did seek to purchase Maori land as cheaply as possible, but submitted that this in itself was not a Treaty breach. The Government had an obligation to spend public funds in a responsible manner and was not under any Treaty responsibility to ‘subsidise’ Maori when paying for their land. Further, a Crown purchase monopoly did not necessarily mean that prices paid by the Crown would have been lower than those private parties were willing to pay. Also, counsel suggested that it is difficult to determine what a fair price for Maori land was in the nineteenth century, especially when the science of land valuation was relatively unsophisticated at this time.

We agree that the Crown had an obligation to spend public funds responsibly. It was not required to pay exorbitant or unreasonable prices for land. The Crown was also under no obligation to ‘subsidise’ Maori in buying their land. We note, however, that the acquisition of Maori land for development was seen as the basis for the growing economy. In the Crown’s submission, settlers paid a much higher price for land than the Crown had paid to Maori, and the difference ‘subsidised’ immigration and infrastructure. The cheap acquisition, however, of Maori land – land surveyed and clothed with a title that came out of Maori pockets (either directly or deducted from their receipts for alienation) – was also subsidising immigration and infrastructure. Had the Crown paid a fair and reasonable price, therefore, it would not have been subsidising Maori but rather reducing their share of subsidising immigration. Had they benefited equally or fairly from that immigration and development, a share in subsidising it would have been
easier for the Crown to justify. Also, Liberal policies of closer settlement saw an end to the idea that settlers would subsidise immigration and growth through the prices they paid for land, but no corresponding increase in the prices paid to Central North Island Maori.

We do agree that it is very difficult now to determine what a fair price for Maori land was in the nineteenth century. This is even more problematic in much of the Central North Island, where comparisons are limited because the Crown prevented a market in land from developing over large parts of the region, often for lengthy periods. Also, a national system of land valuation was still only being developed in the later part of this purchasing period. In any case, there was no guarantee of fair prices for Maori land from either a monopoly situation or a private market. What was required was that if the Crown was operating in a monopoly situation, it took care to use any mechanisms available to it for ensuring that it acted fairly and that its prices were adequate.

Further, the Crown not only had an obligation to spend public funds responsibly. It also had a well-established obligation of protection of Maori in their important property assets, so that they could participate with other sectors of the community in new development opportunities. A ‘fair’ price had never been accepted as the same as the lowest price an aggressive, unscrupulous land speculator might achieve. As we discussed in chapter 8, the Crown recognised from the beginning of settlement that protection mechanisms were required so that, in dealing in their lands, Maori were able to retain sufficient for their needs and did not enter contracts detrimental to their interests. In the circumstances of the late nineteenth century, this clearly included the payment of a fair price for their lands. In Dr Loveridge’s evidence, it was a recurring theme in the parliamentary debates of the period that Maori should receive a fair price. This required the Crown, in taking advantage of pre-emption, to also establish mechanisms to ensure that a fair price was agreed and not the cheapest price such a situation might produce. As we noted in chapter 8, Sir Robert Stout told Parliament in 1894: ‘We have no right to seize their land at a price less than they can get for it in the open market from other people.’ Such sentiments were widely expressed at the time, and provide a compelling standard against which we measure the Crown’s actions in our Central North Island inquiry region.

The Crown had mechanisms available to ensure that a fair price was paid, including an independent authority to audit land dealings from 1870 onwards in the form of trust commissioners. The Native Land Court was also provided with additional monitoring powers from 1873 to ensure that transactions involving Maori land were equitable, including the price paid. However, as we will discuss further in the following section, these protections were largely ineffective and poorly implemented in practice. The Crown had other means of providing for a fair price. The concept of public auction of Maori land in place of either direct purchases by the Crown or by private parties, for example, was raised from time to time, but not adopted with enthusiasm by the Government during this period. The exception was in Rotorua township where leases were publicly auctioned and initially achieved high prices, even though the system of collecting rentals later failed. The public auction itself was a success, but the use of it in this case was the exception rather then the norm in this region.

Another way of ensuring fair prices was in the procedures and practices established for the officials involved in setting those prices and in pursuing purchases. We agree with the Crown that many of those involved in Government land purchasing were experienced and had a good knowledge of land, according to what was known at the time. However, the procedures established did not require them to consider anything other than the Crown’s interests, and part of their job was (in effect) to reduce prices as far as possible. The purchase systems adopted by the Government simply did not include procedures and requirements that might protect Maori interests.

In the case of pre-title negotiations, for example, the Crown conceded that in some cases negotiations and purchase advances were made without any requirement that a final price, or a means of fixing one, was agreed. This
meant that Maori could find themselves in a negotiating process where some deposits had already been paid on their land. This trapped whole groups in a monopoly situation, but without an agreed price having been set. Counsel conceded that this made it easier for Government agents to negotiate a lower overall price. The Crown's historian, Mr Macky, provided evidence that 14 blocks in this region, covering 125,000 acres for purchases, and 10 cases involving leases, covering 332,000 acres, were subject to this kind of negotiation up to 1876. Macky considered that this disadvantaged Maori in terms of the price eventually set. We agree. Whatever the owners actually involved believed these initial payments meant, the act of paying these advances enabled the Crown to hold negotiations to low prices, even if in the meantime the values of land had increased considerably. This was especially the case when negotiations to complete transactions based on early advances took place over a long period. This was clearly unfair, and it enabled the Crown to take advantage of its monopoly in setting low final prices without adequate protection for Maori owners.

Although it is problematic for us to determine now what a fair price may have been, there is evidence that the Crown had its own system of deciding a reasonable price for Maori land at the time. This was admittedly difficult without a free market in land in the region. However, while it relied largely on a few experienced individuals in the 1870s, from the 1880s the Government developed a more systematic means of determining values on the basis of a range of expert advice available to it, including from its own survey, land purchase and Lands Department officials. This predated the national system of land valuation established with the Valuation Department in 1896. However, while the Department was established in 1896, it was not until 1905, with the reintroduction of Crown purchasing of Maori land, that Parliament required a minimum price to be set at the capital value as assessed by Government valuation.

The important factor was not the degree of sophistication involved in land valuing at this time, or even the establishment of a national system of valuation, although this was helpful. The importance of the change in 1905 was the acceptance that a minimum price needed to be set for Crown purchasing of Maori land, according to some independently agreed value. The existence of a Valuation Department by then made this easier, but it was not essential. From the 1880s in particular, the Crown did have a standard means of establishing what it believed was a reasonable value for Maori land. This was based on a range of advice from purchase agents, surveyors, Department of Lands officials, and sometimes other experienced Pakeha. They took into account the resources on the block, such as timber, and the likely value of the land for settlement purposes. Having set this value, senior Department officials would then use it to set a maximum price for purchasing the land. A variety of factors were involved in this, including the common assumption that in its undeveloped state and under multiple title, Maori land was generally of lower value than similar general land. Whether this was fair is itself open to question, but of further importance is the Crown's use of this expert advice to set a maximum instead of a minimum price.

From 1905, when a minimum price set at Government valuation was required, Dr Loveridge has noted that prices paid by the Crown for Maori land did suddenly and noticeably increase. In the first decade of the twentieth century, they were about 50 per cent higher than they had been in the previous decade. Even taking into account some land inflation, we agree with Dr Loveridge that this increase was, at least in part, due to the requirement for the Crown to set minimum prices according to these valuations.

However, before 1905, there was no requirement for any minimum price to be set. Officials were not required to consider what was fair for Maori or any means of setting a minimum price on the basis of an agreed value, to protect Maori interests as well as the Crown's. Instead, the overwhelming evidence from official correspondence in this region is that prices were set as far as possible below what was thought to be the likely value. There was no mechanism for Maori owners to gain access to the advice the Crown
had in setting this value, or to participate in decision making over how this value might be set. Consideration of a fair price for Maori is rarely evident, and where it occurs it was ad hoc, inconsistent, and subordinated to purchase needs. Lower prices were justified in vague terms that any promotion of settlement must anyway inevitably be ‘beneficial’ to Maori.

We received many examples of the Government setting purchase prices below values set by its own expert advice. The Tahorakuri 3 and 4 blocks in Kaingaroa, for example, were valued on the expert advice of the Assistant Surveyor-General, Percy Smith, as having a value of between five to seven shillings per acre for those parts of the block containing valuable timber, and three to four shillings for the rest. These blocks were subject to the thermal springs district proclamation, and private dealing was excluded. The Government was subsequently able to set purchase prices for these lands of between one shilling ninepence and one shilling sixpence per acre. Similarly, the Whakarewa block was subject to restrictions on private dealings through gazetted proclamations under the Immigration and Public Works Amendment Act 1874. Although its value was estimated at five shillings per acre by District Surveyor Goldsmith, it was acquired by the Crown for three shillings fourpence in 1882. The Crown did not inform the vendors of the valuation. In Rotorua, in Patetere–Paeroa, Government agent Gilbert Mair recommended that the Crown pay six shillings per acre. This was rejected by the Native Minister, John Bryce, who considered that a lesser price could be set than the land’s agreed value on the assumption that the owners’ retained lands would gain in value once the railway was built. The land was purchased at five shillings sixpence per acre.

Numbers of observers claimed that the Crown was using its monopoly powers to target and purchase lands attractive for tourism at prices lower than those private parties were willing to pay. Examples include sections in Rotorua township and the Whakarewarewa thermal valley. In sections of Pukeroa–Oruawhata, the Crown purchased land for between three and five shillings per acre, while private parties were reported to be willing to offer £3 per acre. In Whakarewarewa, private parties were also willing to pay considerably more than the price paid by the Crown. Gilbert Mair later wrote:

I had been approached by the Hon. W. Casey and an influential syndicate in Melbourne, and offered a bonus of £5000 if I could secure 40 acres at Whakarewarewa at any price up to £36000. I refused the tempting offer, as even then I thought the thermal wonders of the district should pass to the Crown, for even the Native owners desired to sell, and only mention this matter for the purpose of pointing out that the Crown quite recently acquired a much larger area of Whakarewarewa for the utterly inadequate sum of £2500. This is merely one instance out of a hundred I could mention where the Natives have been starved into selling to the Crown their lands at as many shillings as the European would gladly have given pounds per acre.

We also received many examples of Government purchase agents reporting they were more likely to encounter resistance to prices they were offering, when Maori became aware that private interests were offering significantly more for similar lands. In the Tauponuiatia purchases, for example, Crown agent Mitchell reported difficulties in purchasing at the Crown rate of one shilling sixpence per acre because owners had seen similar lands go for amounts of four shillings to six shillings per acre in Tatuia and Patetere, where private purchasers had been able to operate. The lengthy time that the Government could hold lands in negotiations was also recognised as helping to keep prices artificially low. In the Te Puke block, which was proclaimed under the 1877 Act, the Crown eventually agreed to increase the total amount paid for the block and the size of the reserves in 1879, because of the considerable delay between the payment of advances and the closing of the transaction, but this was still only one-third of the price offered by private purchasers. In Okoheriki 1, covered by the Thermal Springs Districts Act, the Crown offered seven shillings sixpence per acre as well as paying survey costs. This was
considerably less than the seventeen shillings sixpence per acre that private purchasers were willing to pay by this time. \[^{145}\]

In addition, once a maximum purchase price was set, Government purchase agents were encouraged in the absence of any competition to drive the actual price they paid to individual Maori for their shares as low as possible below it. There were no protections that required them to pay a minimum price for individual shares. Instead, paying as little as possible was a positive benefit in enabling them to use surplus funds to pay relatively more to owners reluctant to sell their shares, to pay for assistance with sales, and to pay some of the costs incurred in purchasing. Agents were allowed the latitude to do this.

We received evidence from a number of historians, including Ms Rose, Mr Macky and Mr Stirling, all of whom described instances in this region where extra or discretionary payments were made to particular chiefs to promote purchasing. They were paid to encourage members of their communities to sell, to not contest title or partition hearings, or to cease obstruction of surveys. \[^{146}\]

Mr Stirling notes that, while this was contrary to the policy of the Native Department, the individual purchase system gave land purchasers enough latitude to allow them to make these kinds of ‘bonus’ payments to chiefs, which were often recorded on accounts as ‘contingencies’. \[^{147}\]

Government agents were also encouraged to pay as little as possible for shares because this was closely linked to how much land the Government could get for survey costs. Under various statutes, the Crown gave itself the right to apply to the court to recover moneys it had paid as advances or for survey costs by excising a portion of land from a block. In these instances, the area of land that could be taken depended on what price the Native Land Court accepted had been paid as the price per acre of the land. The lower this price per acre, the more acres had to be ceded to the Crown to make up the outstanding debt.

Overall, this purchase process significantly assisted the Crown to acquire Central North Island Maori land as cheaply as possible, without protections for Maori in monopoly situations to which they had not agreed, such as an independent valuation and a minimum price. We agree that some of the criticism of Crown purchasing was politically motivated. Not all private parties were necessarily willing to actually pay the prices they were offering had their bluff been called. Nor are we able to investigate all prices paid on a block-by-block basis. Nevertheless, the amount and range of evidence available to us is persuasive. It was clearly widely accepted by ministers and officials that the Crown was gaining considerable advantage from using its purchase monopoly to drive down prices in the Central North Island. It is in fact a major reason cited in official correspondence for seeking to have Crown monopolies proclaimed and extended over the region in the first place. It was also widely accepted by observers, including members of Parliament. Maori leaders of this inquiry region informed the Government that this was their experience when they sought to sell land for a variety of purposes, including to pay off debts as a result of the process they were obliged to go through to gain legally recognised title to their land.

We received considerable evidence of such Maori concerns that the Government was using its monopoly position and lack of protective mechanisms to coerce them to sell land at lower than fair prices, particularly when they had to sell land to pay survey and other costs. For example, Ngati Tuwharetoa ariki, Tureiti Te Heuheu, gave evidence to the Rees–Carroll commission of 1891, immediately following the period of intense Crown land acquisition in the late 1880s. He explained that in Tauponuiatia West:

> If the land is not very good land, there is nothing to stop the Government from fixing the price at any sum they like – say 1s. or 1s. 6d. an acre. That, of course, comes about through the market being restricted to only one purchaser, and that one the Government themselves. No matter how hard the Natives fight for a larger price, they are unable to alter the Government’s intention. But, on the other hand, if the public market were open to the Natives there is no doubt that they would obtain competitive prices for their land, and this would
very often get more than the Government chose to offer. If
the market were open to them in that way I am quite sure
the Maoris would not suffer as they do at present, but would
obtain a better price, and therefore less land would go to pay
for the survey. 148

The Liberal Government implicitly recognised this
widespread criticism when it considered extending its pur-
chase monopoly to all Maori land in the 1890s. The Native
Land Purchase and Acquisition Act 1893 provided for
areas of ‘Native territory’ to be proclaimed and gazetted.
Once this was done, the Governor could require a Native
Land Purchase Board to report on the suitability of land in
this area for settlement. On the basis of such a report, the
Governor could then issue a notice to the owners requiring
them to decide to either sell to the Crown at a value
fixed by the board, or to vest their land in the Crown in
trust to be leased. If relative interests had already been
determined, a majority of shares was necessary for deciding
which option to follow, otherwise a majority of owners
was required. 149

Despite Government claims that this proposed system
was not intended to be compulsory, at least for purchasing,
the Act nevertheless drew strong criticism for what was
seen as its compulsory nature (as well as criticisms that it
would not be effective enough). Possibly in anticipation of
such criticism, the proposed Native Land Purchase Board
provided for some Maori representation. What is most
relevant for our purposes was that the Act provided for the
value of the land to be fixed by ‘three indifferent persons’,
including one appointed by its owners. In addition, no
valuation could be made without the consent of owners. 150
This at least admitted the principle and the possibility that
values could be more fairly fixed by independent advice,
and that owners could be allowed to participate in this.

As it happens, Dr Loveridge was unable to find any dis-
tricts ever proclaimed under this 1893 Act, and it appears
that no such board was set up. Seddon was later reported
as saying that Maori had been offering their lands so freely,
that it had not been considered ‘necessary’ and anyway, it
was intended to introduce new land court provisions that
would give it more ‘free scope’. 151 Within a year, the measure
was overtaken anyway by a general return to Crown pre-
emption for all Maori land in the 1894 Native Land Court
Act, the combined provisions of which were intended to
further promote Government acquisition of Maori land. 152

This new Act provided some means for Maori either
individually or as incorporations to have their land dis-
posed of by ordinary land boards under similar condi-
tions to Crown lands, with sales by public auction and all
proceeds, less costs, handed to the Public Trustee for dis-
tribution. 153 However, it was major step back from the sys-
tem of valuing as provided in the proposed 1893 system.
There was no longer any Maori participation in valuations
and the ‘indifferent persons’ to assist with valuation were
presumably replaced by the land board, which was, how-
ever, very closely associated with Government purchase
officials and interested in acquiring Maori land for settle-
ment. Maori had never been keen to hand their lands over
to outside authorities, especially where they had no rep-
resentation, and they were even less likely to be inspired
by having the extremely unpopular Public Trustee control
any proceeds.

Within a few years (by 1899) the Government agreed
to cease new purchasing anyway. In 1905, when Crown
purchasing was reintroduced, minimum prices based on
national valuations were required. During the nineteenth
century, however, the Crown had recognised that its pur-
chase monopoly did offer significant advantages in driv-
ing down prices. Indeed, it relied on its monopoly for that
very purpose. There were, however, mechanisms available
to it for ensuring that its monopoly powers were not used
unfairly. These included:

- using the experts available to it to set a fair price for
blocks;
- setting a minimum price as well as a maximum one;
- setting procedures that required agents to pay a mini-
mum price for individual shares, and that did not
encourage them to drive individual prices as low as
possible below the maximum price;
the setting of prices by more independent, objective means, including with Maori participation; and
the use of public auctions for setting prices.

The Tribunal’s findings
The Crown failed to adopt any or all of the options outlined above. It was determined to purchase, not fairly, but as cheaply as possible. This was a breach of the Crown’s Treaty obligation of active protection, particularly in situations where the Crown had advantaged itself through purchase monopolies. It was also a breach of the Treaty principles of partnership and autonomy. Maori individuals were placed in a position where they could not negotiate a fair price. The communities in whom the land ought to have been vested were given no opportunity either to agree to a monopoly situation (for whatever reason), or to have a role in the assessment of land values or the setting of prices. During the early period, the payment of advances enabled prices to be kept low without an opportunity for communities to fairly and freely negotiate a final price. During the 1880s and 1890s, the Crown purchased from individuals who, again, were powerless to negotiate a fair price. As we have shown above, it is clear that the Crown knew, in its own words, of ‘less penal’ alternatives, but failed to adopt them to maximise its own interests at the expense of those over whom it had given itself monopoly powers. This was in breach of the Treaty.

Crown pre-emption and Maori rights to utilise their properties
The Crown had mechanisms available to limit the impact of its monopolies on Maori, so as to ensure that they suffered as little disadvantage and infringement of their rights as possible. We accept that in coming to an agreement over lands for a purchase or lease, it may have been appropriate, and of benefit to both Maori and the Crown, to prevent outside interference while the deal over that land was fairly considered and completed. However, this prevention of interference had to be applied carefully to enable a reasonable balance between what was necessary to enable a particular transaction to go ahead, and the right of Maori owners to otherwise continue to exercise their property rights. In gaining monopoly powers, and also in regulating them, the Crown had an obligation to be very careful that it did not use these powers unreasonably to infringe on Maori property rights, especially if this was likely to further its own interests and to press purchases at low prices. The Crown’s obligation of active protection therefore required it to ensure that the implementation of monopolies and restrictions on private dealing infringed Maori property rights as minimally as possible.

The Crown had a number of mechanisms available to it during its nineteenth-century purchasing that it could have used to ensure that restrictions on private dealing were not implemented in a way that infringed unduly on Maori property rights. These included time limits (through legislative provision or policy) for monopolies, excepting lands and resources from restrictions in cases where this was clearly fair, and requirements for the land affected to be limited and defined as narrowly as possible. Above all, the Crown had to have some clearly defined purpose that justified it in restricting dealings. All these protective limitations were used to some degree during this period of purchasing, but they were mainly used to protect the rights of private parties who wanted to deal with Maori land rather than to protect Maori themselves.

When the Crown began exercising pre-emption powers again from the early 1870s, they were initially subject to some limits. The Immigration and Public Works Amendment Act 1871, for example, included a time limit for proclamations of a maximum of two years. The proclamations could also only apply to specific land blocks and were limited to certain public purposes, including for railways and gold mining. These limitations recognised the owners’ rights to otherwise deal with their lands. The evidence suggests that the Government’s intention was more to protect settlers in their transactions, but these self-imposed limits show what was possible at the time...
for allowing Maori to continue dealing in their lands and resources in the market. The Crown progressively removed and weakened these kinds of limitations during this period in an effort to advantage its own purchasing in competition with private parties.

The Government Native Land Purchases Act 1877, for example, no longer included any maximum time limit or special purpose for restricting private dealing. Increasingly, the Government was able to issue proclamations restricting private dealings for whatever periods it chose, and to roll them over if necessary. This effectively left some blocks under restriction for many years, as is reflected in the evidence before us. The Act did at least require restrictions to be proclaimed on an individual block basis, but such blocks were often very large. In instances where only a few owners had taken advance payments, whole communities were nevertheless prevented from any commercial use of their land, or of the resources on it such as timber, while these proclamations continued in force. At least in theory, as the Crown submitted, this still left other land blocks open for use and transactions. However, this possibility was undermined when Government agents were allowed to start purchases or negotiations in many different blocks. As we noted above, half the region had been proclaimed under restriction within two years of the 1877 legislation being passed.

Although this may have been aimed at private parties, it also severely curtailed the way Maori could utilise their properties and resources in the new economy. By just beginning negotiations with a few owners and making a tiny payment, the Crown could tie up all the land and resources over a large area, without time limitations. This placed the Crown in a position of considerable advantage in using its monopoly powers to not only drive prices down, but to coerce Maori to sell the freehold, faced as they were with few other alternatives to earning an income from their properties.

This was even more serious when the Government extended monopoly powers from specific blocks to whole districts, with the very large areas covered by the Thermal Springs Districts Acts and the railway exclusion zone (see map 6.2). In enacting monopoly powers over such large areas, even more care was required to ensure that this did not cause severe disadvantage to Maori owners, especially in dealing in resources such as timber. In that instance, the Crown showed little interest in purchasing timber itself, but its cooperation was required, such as under the Thermal Springs Districts Act, before land could be leased for that purpose or the cutting rights be sold. Maori were legally prevented from utilising large areas of land and resources, even when the Crown showed little inclination to purchase or to deal in lands immediately. There were no maximum or mandatory time limits, no exceptions for resources like timber, and no easy means of emancipating lands and resources if Maori wished to enter commercial arrangements with private interests.

For example, the thermal springs district covered some 640,000 acres of land, including all the inland Rotorua district and parts of northern Taupo. However, almost 30 years after the passage of the first Act, as noted, the Stout–Ngata commission found that the Crown had only cooperated in developing the relatively small area of the Rotorua township. Otherwise, it had only shown an interest in purchasing selected areas, while the whole district languished under restrictions on private dealing. This prevented Maori from undertaking commercial arrangements to use their lands and resources to support themselves and their communities, to pay off debts, or to accumulate capital for development. Their only legal option was to sell at low prices to the Crown.

The commissioners found that some lands covered by the 1881 Act contained valuable timber that private companies were willing to mill in commercial ventures with Maori owners. However, to do this legally the Act required the Government to participate as agent for the owners. The Government had shown little interest in doing so and instead had remained focused on purchasing Maori lands. Maori who wished to gain an income from milling their timber therefore had no option but to enter potentially risky informal arrangements. Similarly, owners who
wished to lease lands from their fellow owners for the purposes of taking up timber milling themselves, or for farming, or beginning commercial fruit orchards, or even to sell a small area of their land to other owners to enable them to gain a more economic land area, were not legally able to do so without the Government’s agreement to act as agent. This, the commissioners found, had not been forthcoming. Stout and Ngata felt obliged to act themselves and to draft special agreements seeking Government assent to some of these arrangements.\textsuperscript{154}

We consider matters of farming and timber development opportunities further in part IV of this report. In the present context, the implementation of this monopoly without any set limits disadvantaged Maori. They were unable to use their lands and resources commercially, even when they were not in negotiations with the Crown for purchase. There were no limits to protect owners or to ensure that the Crown did not take advantage of this situation. It was able to revoke proclamations, but there were no requirements for it to consider anything other than its own interests in doing so.

The general reintroduction of Crown pre-emption under section 117 of the Native Land Court Act 1894 also failed to provide adequate limits to protect Maori properties subject to this new restriction in dealings. By this time, the situation had become reversed from the 1870s. From monopolies only being possible for specified land blocks, for specific purposes and with maximum periods, by 1894 virtually all Maori land was subject to a Crown monopoly. There were few exceptions or limitations that might protect Maori in otherwise using their lands and resources so as to maintain themselves and their communities, other than by selling to the Crown. The only protection by this time was that Maori (or others) could apply to have Maori land removed from restrictions on private dealing. This, however, was a cumbersome process requiring application to the Governor under section 117 for an Order in Council declaring the land removed from restriction so that it could be leased, mortgaged, or sold to private parties. Government officials advising on this were under no requirement to consider anything other than the Crown’s interest. The Stout–Ngata commission found that, by 1907, the procedure was subject to so much delay that comparatively little Maori land nationwide was brought under it.\textsuperscript{155}

The Crown’s reliance on monopolies as part of its purchase policies, and the way these were implemented over large areas of the Central North Island – without effective protection for Maori, either in terms of a fair price or minimal infringements on their property rights – put considerable pressure on Maori to sell lands containing some of their most valued resources at low prices, even when their stated preference was for leasing. We note the comments of a member of Parliament, William Kelly, who advised the House in 1888 about lands in the Rotorua district:

There was one block in that district which was sold to the Government at some 7s. an acre. The Land Purchase Commissioner received instructions from the Government not on any account to exceed that price. He was for months and months endeavouring to get this land at that price, and at last he succeeded, because the Natives were in debt to the storekeepers and others, and judgements had been obtained against them in the Resident Magistrate’s Court. Some of their horses and drays had been seized by Europeans. I may mention that these Natives had an offer of £1 5s. an acre for the land from outside buyers; but they were not permitted to accept that offer. They sold the land to the Government and received 7s. an acre for it, and the whole of the money went towards paying off their debts.\textsuperscript{156}

The Government’s own official inquires confirmed this kind of information. The Stout–Ngata commission found that prices paid by the Crown in the railway exclusion zone, for example, were significantly below market values:

In practice the Crown bought on its own terms; it had no competition to fear; the owners had no standard of comparison in their midst, such as the rents of land under lease or profits from farming might have afforded; they had been reduced by the cost of litigation and surveys, by the lack of
any other source of revenue, to accept any price at all for their lands.\textsuperscript{157}

The commissioners further commented in 1907 that while theoretically the Crown did not buy unless the owners were willing to sell, the experience of the previous 50 years was that the absence of competition in land purchasing produced by restrictive legislation, combined with the heavy costs of litigation and surveys in gaining title for Maori land, had created circumstances ‘which practically compel the Maori people to sell at any price.’\textsuperscript{158}

In creating and implementing purchase monopolies in the Central North Island inquiry region, the Crown’s Treaty duty of active protection required it to consult adequately with the iwi and hapu affected by such a major intrusion on their property rights, and to take particular care to ensure that these monopolies were not used unfairly to its own advantage in driving down prices and coercing Maori to sell. Consultation was well within what the Crown could contemplate and could undertake at the time, as evidenced in the Fenton Agreement for the Rotorua township, where the Crown did seek Maori cooperation. However, this was the exception rather than the rule, and the Crown failed to continue consultation over implementing the Thermal Springs Districts Act of 1881.

The Tribunal’s findings

The Crown could have set fair or minimum purchase prices for Maori land. It could also have set limits on its restrictions, so as to enable Maori to continue to exercise reasonable property rights. Instead, the Crown used its monopoly position to encourage the setting of prices as low as possible, and failed to fairly and adequately limit its restrictions on what Maori could do with their land and the resources on it. As many officials and parliamentarians commented at the time, a free market in their lands also carried grave risks for Maori. Under the Thermal Springs Districts Act, however, the Crown had legislated for itself a possibility of developing the lands and resources of the Central North Island in partnership with Maori, particularly through leasing. Instead, it concentrated on purchasing the parts it wanted under monopoly conditions, and ignored the rest. The Crown's failure to apply minimum safeguards for fair dealing, by the standards of the time, significantly contributed to economic pressures on Maori to sell land, regardless of their preferences to lease, or to participate actively in new development opportunities by dealing with private parties. It was coercive and unfair. In effect, it was Maori of the Central North Island who were required to subsidise the price paid for their land and its development by and for others. The Crown failed to fulfil the standards of care and protection it set itself when it established monopolies and then extended them over large areas and for lengthy periods of time. In doing so, it breached its Treaty obligation of active protection and caused serious prejudice to Maori landowners.

Over large areas of this region, and for lengthy periods of time, Maori were effectively denied their property rights. They could not use their lands and resources to support themselves and their communities unless by selling to the Crown at prices it was able to drive as low as possible. This was at a time when many Maori communities faced very heavy costs from the Native Land Court and survey process, and at a time they otherwise stood to gain important commercial experience from dealing in the private market for lands and important resources. In particular, joint-venture arrangements were possible with timber companies, with leasing to private parties to develop tourism attractions or associated businesses such as accommodation services, with selling timber or minerals such as sulphur from lands, as well as gaining financial and business experience in such ventures.

In denying Maori these opportunities while not providing a fair equivalent, the Crown was further in breach of the Treaty principle of options. In this crucial period, its purchase monopolies foreclosed on their ability to use their land and resources in the new economy. In our view, this compounded the prejudicial effects of the Crown’s other breaches of the Treaty.
Pre-title negotiations and advance payments

To what extent did the system of pre-title negotiations using advance payments facilitate Maori land purchases in this region?

The Crown’s policy of reintroducing a system of negotiations for Maori customary land before title was determined, and using cash deposits or advances to commit Maori to these negotiations, has been found in breach of the Treaty by a number of Tribunal inquiries. The *Te Roroa Report*, for example, found that with purchase negotiations, this ‘effectively committed the recipients to sell land before the title had been investigated’ and that it was ‘an unfair practice designed to purchase land as quickly and cheaply as possible, and incompatible with the Crown’s fiduciary duty under the Treaty.’ The *Ngati Awa Raupatu Report* found that the Crown’s system of paying advances on eastern Bay of Plenty lands awaiting award through the Compensation Court was an unfair practice. It enabled the land purchase officers to work ‘directly off the poverty of many owners and division that had been created between hapu (and individuals) to secure an initial foothold in the land.’ Similarly, the more recent *Hauraki Report* has found that the practice of making advances to individuals charged against land in customary title was ‘divisive and destructive of the traditional relationship between rangatira and their communities.’

On the evidence before us for the Central North Island inquiry region, we see no reason to deviate from this general view. In addition, we note the Crown concession that this purchase policy was always likely to create difficulties in areas where rights in many blocks were strongly contested. We are of the view that this concession applies across our inquiry region. The claimants and the Crown have, however, asked us to consider further how the system impacted on iwi and hapu in the Central North Island, given the circumstances in which it was applied.

There is general agreement that this purchase system was applied in the 1870s over the whole of our inquiry region. In 1879, for example, the Native Land Purchase Department Under-Secretary, Richard Gill, wrote of ‘frequent payments made as advances on the purchase of lands in the Taupo and Bay of Plenty districts, before the blocks have been before the Native Land Court and in many cases before the lands are even surveyed.’

Tribunal inquiries have already found that this purchase system was not illegal. The Native Lands Act 1865 had not made dealings before the award of a certificate of title illegal, but merely ‘void’. It was possible for purchasers to risk negotiating before a court title determination, and to pay advances or deposits to ‘lock’ this transaction in, taking the risk that those they were paying would later be confirmed as the ‘correct’ owners. The Native Land Act 1873 continued to make transactions conducted for Maori customary land by private parties ‘void’, but not illegal (section 87), while the Crown continued to be free to purchase interests in Maori land either before or after it passed the court. It has also been found that the 1873 Act effectively accepted that pre-title negotiations would take place by providing that such advance payments could be legally deducted from the final price paid (section 59).

The 1873 Act further assisted Crown involvement in this kind of purchase by authorising the Crown or Maori to apply to the court for orders to make its incomplete or ‘inchoate’ transactions final. The court was able to make orders to complete such agreements on terms and conditions as it saw fit, or to apportion the land between parties, or to order repayment of moneys paid by the Crown. The court could also declare such lands or any part of them ceded to the Crown (section 107). As the Crown has indicated, further 1877 measures confirmed and strengthened its ability to gain awards of land from those regarded as having sold interests in a block, on the basis of the payment of advances. Once negotiations and payments began in a block, even if they involved only a few of those believed to be right-holders, agents could continue making payments to other individuals or groups until they felt confident they could have sufficient confirmed as the ‘correct’ owners by the court.
The relevant statistics available to us for the Central North Island indicate that legally, while this system operated in the region during the 1870s, very few purchase transactions were actually completed. During the early 1880s, as part of overall retrenchment in spending, the Government made a concerted effort to 'tidy up' such dealings. In some cases, it was decided that the land involved was not a sufficient priority for immediate settlement. Negotiations were then abandoned, as long as the cost of advance payments could be recovered in either cash or land. In other cases, it was decided to continue to complete the purchase of a block or an important part of it by applying for a court award, either on the basis of sufficient advances to have completed a purchase or an award of land equivalent to what was claimed. In undertaking this process, the Crown was able to require refunds of advances in either lands or cash, or to partition out lands equivalent to the advances it had paid. Once the Crown had received the land it claimed, it was also able to lift restrictions against private dealing on the block, with owners free to deal as they wished in remaining lands. In other cases, where the Crown wanted to continue seeking a purchase, agents could continue buying shares from those the court had determined were owners. However, they could still use the advances and earlier negotiations as the basis for this continued purchasing.

By the 1880s, the Crown had moved to a policy of purchasing shares from individuals found to be owners by the court. We need to ascertain, therefore, what (if any) lasting consequences this earlier system of purchasing had, and whether the Crown's desire to prevent private land speculation in this region justified these policies.

The claimants allege that this was a particularly important time for iwi and hapu. They were faced with recovering from the economic dislocation and hardship during and following the wars, rebuilding internal relationships, and facing new challenges and opportunities from increased settlement. They allege that in this situation, the implementation of this purchase policy was particularly destructive, undermining the collective authority that was badly needed at the time, exacerbating tensions, and with consequences that continued to be felt for many years. Some communities were entangled in processes that were prejudicial to their interests, and which took advantage of the economic hardship and dislocation following the wars to trap individuals in negotiations that then caught up whole communities. Further, the pre-title negotiations and advances had economic consequences that continued after the 1870s. In particular, the Crown's negotiation of leases turned out to be little more than bait to trap those who wished to use their lands in new opportunities and force them into sales. These Crown policies, in the claimants' view, also prevented the development of a viable leasing economy. Many of the negotiations begun at this time became the basis for later proclamations preventing other forms of engagement in the colonial economy, enabling the Crown to complete purchases at later periods.

The Crown submitted, however, that whatever the flaws of this system generally, it was mitigated in the Central North Island because very few transactions were actually completed when it was in operation during the 1870s. The policy of paying advances on pre-title negotiations was formally abandoned by the Crown in 1879, when relatively few transactions were complete. In addition, many of these early negotiations were abandoned in a Crown review of purchasing in the early 1880s, and in some cases it allowed Maori to refund advances instead of insisting on land. The allegations of continuing and significant prejudice are therefore overstated, while this policy had the positive effect of giving the Crown enough of a foothold to prevent damaging private land speculation.

**Undermining collective authority and exacerbating tensions**

The policy of pre-title negotiations implemented in the Central North Island from 1873 gave Government purchase agents the responsibility to identify and negotiate with major right-holders over Maori lands in a district, without the benefit of any independent ascertainment of their interests. It also allowed the agents to work outside
tribal leaderships, where that suited their objectives, and to avoid the komiti that Maori had set up to manage their participation in the opportunities of the new economy (see part II). As we have discussed in chapter 9, this had many similarities to Government purchase policies before the warfare of the 1860s. The reintroduction of such policies while the Native Land Court was suspended, and without a legal requirement to take account of the views of tribal forms of authority, immediately raised the concerns of iwi and hapu leaderships. During the 1870s, the purchase process did require eventual land court confirmation that the correct right-holders had been negotiated with, but in the interim there were opportunities for the same kinds of problems identified in previous Tribunal inquiries.

In the Central North Island, this kind of purchasing was introduced shortly after the wars, in a situation that was still tense and volatile. Many communities were suffering hardship following the dislocation of the wars. This was a time when those communities needed to be able to rebuild their relationships, organise themselves to protect their members from impoverishment, and meet the challenge of participating in new economic ventures while withstanding negative pressures of settlement. They needed to do this in ways that best suited their custom, tikanga, and preferences, even while they recognised the need to adjust to meet new challenges. Their preference was for community decision-making and control over their most important property assets, even while within this individuals might also seek benefits. Their chosen vehicle tended to be committees with British-influenced structures and procedures, able (they hoped) to provide finality in dealings for land and resources, and to operate with the approval and support of the Government.

The Crown began pre-title negotiations in this region in 1873, by employing agents who were already operating in the region on behalf of private interests. Two of the most prominent were Davis and Mitchell, who claimed that by 1873 they were already involved in private pre-title negotiations for leasing 10 blocks in this region, totalling 387,000 acres, and for purchasing in a further five blocks totalling 43,150 acres.\textsuperscript{164} ‘These ‘blocks’ were very large indeed, possibly reflecting the interest in runholding at the time, but it was also likely to confirm Government fears that private speculators were tying up large areas of land. The suspension of the Native Land Court helped to make these deals less attractive for private interests, while by employing Davis and Mitchell the Government also began to aggressively seek to supplant private parties in both leasing and purchasing in the region. Davis and Mitchell were employed on commission. They received a daily retainer of two guineas, as well as £100 for every 100,000 acres they secured for Government lease, and £200 for every 100,000 acres they secured for Government purchase. As part of this, they were encouraged to buy up the claims of private parties, and they were prohibited from continuing with any private deals. They were also under some pressure to begin negotiations on as much land as possible while the advantage of the suspension of the court lasted.

Within a year, by 1874, Mitchell and Davis claimed that they had entered purchase negotiations in the region involving 110,000 acres and leases for 320,000 acres. They clearly understood that they had to begin negotiations on as much land as possible for the Crown, paying advances even to just a few individuals in each block that could then be used to lock whole communities into land transactions. They described this process to the Minister of Native Affairs in 1874:

\textquote{the method adopted by us at the commencement of the land negotiations [sic] in Arawa and Taupo countries, and sought to be carried out in its entirety was the securing of every available block of land on behalf of the Government by making preliminary Agreements with and paying deposits to sections of the recognised owners thereby binding the Tribes, and shutting out private speculators.}\textsuperscript{165}

The ‘recognised’ owners were, of course, those whom the agents recognised, in the absence of any system empowered to determine entitlements – be it the court or komiti vested with legal powers. They were also quite clear that they intended to use sections of owners to ‘bind’ the rest
of their communities. We accept the Crown’s contention that agents were limited in their freedom to choose ‘owners’ by the eventual need to have the land court confirm that they had dealt with the right people, and by the necessity of avoiding the kind of outright conflict that might make transactions impossible. However, within this, they had considerable leeway to persuade just some of the most interested individuals or groups to begin taking payments. They could gradually work on persuading others that once a negotiation was in progress, they would need to join in or possibly miss out. They could play some right-holders off against others and they could judiciously use larger community meetings to affirm negotiations that had already begun. They did not have to seek collective community agreement before they went ahead, and they could use separate dealings with individuals to undermine or coerce community decisions. They could also rely on the primacy of individual rights that was recognised in the native land laws by this time. It did not matter that the individuals or small groups involved might change their minds or seek to renegotiate on the basis of community decisions. All that really mattered was that they had accepted payments and that these could be considered a charge against their individual interests in land.

We received evidence that in some cases the Government agents did attempt to hold large meetings, involving a range of right-holders, in lands where they were making payments. However, open and public as many of these meetings appeared and although in some cases they appeared to seek a community consensus, the evidence also indicates that agents were careful to call and manage these meetings in ways that supported their undertakings. Agents were able to exert considerable control over who was invited to such meetings and thus who would be involved in decision-making and who would be excluded. Many of these meetings were also prefaced by preliminary arrangements with selected individuals to ensure that the meetings would bring about the best result. In some cases, the agents did try to ensure significant Maori participation in the agreement.

In Pokohu, for example, Davis and Mitchell began by advancing money to people they considered to be owners, before attending a large intertribal hui at Umuhika, involving people from Ngati Awa, Ngati Pukeko, Te Patuwai, Te Urewera, and Te Arawa in May 1876, to discuss ownership of the block. At this hui, Davis and Mitchell selected 10 of the chiefs of the 300 present to act as a jury to determine who the owners of the block were, and based their advance payments on those selected by the committee. On other occasions, Davis and Mitchell are recorded as refusing to deal with individuals until they had met with broader hapu, or to deal with certain groups of owners until they had met with others also claiming ownership.

These meetings, however – while sometimes successful in gaining collective agreement to lease or sell land – were not the only method used. We also received evidence that when such collective meetings failed, or when it was thought that they might present resistance, the agents were willing to turn to advancing monetary payments to individuals or small groups if that was the way to get a sale or lease. The claimants’ historian, Ms Rose, found that, during the 1870s, ‘Public meetings were sometimes held during negotiations, but closed dealings with individual sellers was a common strategy employed both by the Crown and private land purchase agents.’

Government agents were willing to deal with individuals, or just small groups of owners, without public meetings. Mary Gillingham found they claimed to have begun purchase negotiations on the Te Puke block in 1873, for example, by dealing with just two alleged owners. When it suited, agents were also willing to deliberately go behind the decisions of Maori committees. In the lease of Parekarangi lands, for example, the Putaiki had refused to deal with the agents over the land at a meeting in April 1874, but Davis and Mitchell made payments to individual Ngati Tuara the following month.

Davis and Mitchell were quite open in that when they pursued collective dealings, they did so according to their own views about who were right-holders, and what they believed should be the limit of tribal authority:
It has been our practice from the first to ignore the mana, because it professes to be perfectly distinct from the ownership of the soil, and moreover the assumed mana by these dominant tribes is repudiated by the genuine owners of the soil.

While this was written in the context of Davis and Mitchell's purchasing of Bay of Plenty lands from the ancestral claimants while ignoring the toa claims of Ngati Whakaue and Tuhourangi, it also reflected a wider view of the limits of tribal and chiefly authority, as historian Vincent O'Malley has commented.

The actions of Crown agents in appearing to ignore Maori collective authority in their negotiations brought a swift response from leaders of the region. In 1874, for example, Te Arawa sent five petitions with 700 signatories opposing the suspension of the Native Land Court, but in particular objecting to the Government's agents operating to achieve sales and leases while the court was suspended, and bypassing chiefly authority. The evidence of Te Arawa before Parliament's Native Affairs Committee, which was investigating the petitions, was summarised as follows:

[after the arrival of the Native Land Court in the district in the 1860s]. At once trouble and confusion arose. Men of no standing began to lease or sell without the knowledge or consent of the acknowledged leaders of the people . . . The Government is still persisting in this course, and their agents are adopting the old system which in days gone by led to trouble and bloodshed; for in their eagerness to acquire lands, they are negotiating with and paying moneys to men of inferior rank, despite the protests and remonstrances of the principal chiefs.

The committee endorsed the petitions as representing what they considered to be the ‘an expression of opinion on the part of the Arawa people which appears to be almost unanimous.’

There is other evidence of the concern of tribal leaderships about the approach adopted by land purchase officers, which was ignoring collective authority and causing further division within communities. In 1873, the Bay of Plenty Times reported that:

Much dissatisfaction prevails amongst the Tuhourangi (resident at Wairoa near Rotomahana) regarding the modus operandi of Mr C. O. Davis in his land purchases on behalf of the Government. According to the statements of the Maoris, the policy of this gentleman is to negotiate with part owners of a block of land, who are ready to dispose of their individual interests in the same – pay a money deposit, and then quietly ignore the remonstrances of other claimants who are unwilling to sell.

This concern – that the payment of advances was undermining tribal authority – was given some support by former land purchasing officer, Gilbert Mair, writing in his twilight years (1923):

In 1874 Land Purchase Officers were sent into the district and under the peculiar L. P. legislation any native could get an advance from the L. P. Officers thus enabling the block to be proclaimed. It was not necessary for the would be vendor to be an owner, on the contrary, the more shadowy his claim, the more modest would be his demands. Then began a mad rush to sell . . . the Crown obtained large areas of best lands at moderate prices.

Maori leaderships quickly responded to what they recognised as serious interference with the forms of authority they preferred in dealing over lands. For example, Ms Rose has noted objections on the part of the Putaiki committee in relation to Davis and Mitchell's allegedly secret payments to individuals, against the will of broader tribal groups, in the purchase of Rotomahana–Parekarangi. Ngati Moko also protested to the Native Minister, Donald McLean, in his informal 1875 inquiry into land interests around Maketu, that Davis and Mitchell had dealt with two individuals and had ‘paid no attention to the tribe.’

In March and April 1875, McLean was also reported as meeting with a large contingent of Te Arawa leaders at Maketu, who complained about the methods used by the
agents and their willingness to go behind the will of the tribal leadership.181

The Government responded to criticisms at the time by instructing agents to ensure that they were dealing properly with all right-holders and communities. In 1874 and again in 1875, senior officials and the Native Minister, McLean, instructed that land purchase officers should only conduct negotiations over land at public hui and that, as a rule, it was not advisable for agents to pursue individuals in negotiations.182 This was repeated again in December 1875.183 However, Government agents were being paid on commission to engage in negotiations for large areas of land, as rapidly as possible. In this situation, such instructions meant little. Few real efforts were made to ensure that agents did not continue to use the easiest and most effective methods available to them, so long as the Crown continued to fund their efforts.184 While the court remained suspended and without any legal recognition of komiti authority, Maori were left with few legal means of combating the activities of the agents.

While some meetings may have been public and involved community participation, the legislative system established by the Crown, and under which negotiations were later ‘completed’, recognised only individuals, not collective tribal interests. As long as purchase agents dealt with some important right-holders and could then satisfy the court that they had made payments to enough individuals found to have interests in a block, the transaction could be declared complete and confirmed, regardless of what the collective community wishes might be. As the Crown also acknowledged in submissions to us, regardless of the extent to which the agents claimed to have involved the collective decision-making of communities, when it sought to complete purchases based on these negotiations, it still did not require final payments to be made to tribal groups.185 As the Turanga Tribunal has found, the legislation at this time provided no means by which community consensus could have any veto over transactions for individual interests.186

The pre-title negotiations and the ability of Government agents to make advances opened opportunities for abuse. Agents were under considerable pressure to ‘begin’ negotiations in this manner as widely as possible. Davis and Mitchell openly described their method as the ‘securing of every available block of land on behalf of the Government by making preliminary Agreements.’187 These preliminary arrangements, of course, involved cash payments distributed over large parts of the region, which they could then legally claim to be deposits on land negotiations. While in many cases Maori understood that these were in acknowledgement of land dealings and welcomed this – especially the opportunity to become involved in new leasing arrangements – there was also a great deal of room for confusion over what the payments were for and what the implications might be. This was especially the case when agents were seen as Government representatives who could have been making cash payments for a variety of reasons. They paid various ‘expenses’ to individuals in cash-strapped communities for such purposes as surveys, store debts, and the costs of calling hui and providing hospitality to discuss arrangements. As the Crown has agreed, many Maori had grown to expect cash payments in dealing with Government officials. This was not just for land dealing, but for a variety of purposes, including pensions and other payments to influential chiefs.

We received evidence of purchase agents making cash payments for a variety of purposes, including the payment of storekeeper debts, payments to meet costs of holding hui and undertaking surveys, and even, on occasion, to recognise ‘supportive’ chiefs in the volatile post-war environment. There is also evidence that in some cases, acceptance of money was seen as a first step to the recognition of rights. It is not clear that it was also always understood as an alienation of those rights. In the Kaingaroa Plains, for example, where traditional patterns of right-holding included overlapping rights of seasonal food gathering rather than permanent habitation, claims to interests were not necessarily as clear cut as those based on more permanent forms of occupation. Payments by agents were clearly seen as supporting claims to rights. Several witnesses appearing at the title hearing for Kaingaroa 1 referred to
the receipt of Government money as ‘demonstrating an acknowledgment of their interests’. It is not clear that in all cases it was understood that the variety of payments was supposed to be advances on land dealings. Importantly, the system of patronising certain chiefs also exacerbated tensions and internal conflicts among communities.

The Crown has suggested that at least some of the payments which appear to have been made to small groups or individuals at this time could better be understood as payments to important chiefs on behalf of their tribes, rather than to them as individuals. There is evidence in this region of chiefs attempting to distribute moneys among those they understood were communities of right-holders. However, it was not necessarily immediately apparent to those right-holders what the payments were for, especially since many negotiations began as leases rather than outright sales. Some payments were also made to help a chief out of debt, in acknowledgement of a chief’s authority, or to help pay survey, transport, or other costs. It was not immediately apparent that these payments were for general distribution (or for land), but they were still charged against particular blocks of land. Some payments were clearly made publicly and with full understanding of what they were for. However, there was no requirement for this when agents felt it might be counterproductive.

It was well known by this time that rangatira on their own did not have an absolute mandate to make decisions on behalf of their people about such important things as the alienation of collectively owned land, without discussion or consultation with the wider community. As Dr Ballara notes, this had been clear since the 1840s. Where payments were made to selected individual chiefs and then treated as advances in land dealings without the knowledge of larger communities of right-holders, this was clearly likely to cause or worsen conflict and tensions. To further their negotiations, agents were able both to exploit the way they made payments and to whom they made them, but they were not required to have regard to the damage that this might cause to the communities whose lands they were dealing with. The spreading of cash payments around individuals in communities trying to recover from the dislocation of war also took advantage of poverty to induce debt and enforce compliance in the negotiation process.

There is ample evidence from this region of the dissen- sion and conflict caused by these agents and their advance payments. The Crown’s historian, Mr Macky, has noted the dissension resulting from a payment of £25 to Ngati Rangitihi chief Arama Karaka in 1873, for example, where complaints were made that the money had not been distributed among the hapu. Similar complaints were also made about payments to some Ngati Whakaue chiefs for Maketu lands, where it was alleged that they had not acknowledged them to their tribes. In some cases, there is evidence that if one section or community accepted advances, this precipitated fears among others that they might eventually be paid less or miss out on title altogether. This was, claimants argue, particularly the case in disputed blocks such as Te Puke and Kaingaroa 1. In Te Puke, Davis and Mitchell made advances to the Waitaha ancestral claimants, who saw this as a means of staking a rival claim to that of the Ngati Whakaue toa claimants, who they believed were dealing with private parties over the land and accumulating survey debt against it.

In other coastal Bay of Plenty lands, payment of advances to one party led to calls for equal payments to others. This was of considerable assistance to agents seeking to claim payments as charges against lands. They could even claim that communities were ‘better off’ selling to the Crown if they wished to avoid continuing tensions among themselves, as Government agent Young claimed in relation to Whakarewa block, which was inside the eastern Bay of Plenty confiscation boundary.

Further, the requirement to have the process completed and confirmed by the Native Land Court – with pre-selected right-holders declared the ‘correct’ ones – encouraged agents to seek to influence how the court system was used, and could entangle whole communities in the court and its heavy costs. Communities were sometimes obliged either to seek to complete a transaction or to defend their rights in opposition to one, and the only
way of doing so legally was through the court. There were also opportunities for the agents to abuse or manipulate the court's title-determination hearings to suit their purchase agendas. There is evidence, for example, that Gilbert Mair worked behind the scenes at the Kaingaroa 1 rehearing, attempting to keep the number of grantees low with a view to facilitating a subsequent alienation of the land to the Crown. In so doing, he undermined attempts by Ngati Manawa, who were awarded the largest share of the block, to recognise the rights of other tribes, by including their names on the ownership lists. This undermined efforts of iwi and hapu to reconcile tensions between them (see appendix).

There is also evidence that Mitchell and Young encouraged Waitaha to omit the names of minors from ownership lists for the Te Puke block, because this would have complicated their claimed purchase of the lands. Agents made similar efforts to adjust lists for Pukahunui, to get around any problems that the entitlements of minors might present to their claimed purchase.

It is also clear that agents took advantage of the economic hardship of the time when making cash payments. In the 1870s, when many Maori were in need of cash, it was not always clear to them that payments would be recorded as a liability against land. In a number of cases, claimed advances were not properly recorded at all. In the first year that Mitchell and Davis acted for the Crown, the Audit Department criticised them for their ‘slovenly’ accounts, rejecting £1001 worth of claims because they had not been properly dated or witnessed. These practices had apparently improved little by 1876 when the Commissioner of Audit wrote that ‘the whole system is entirely irregular and illegal – public moneys are lying in the hands of an officer of which the Treasury and Audit knows nothing.’ The Under-secretary of the Land Purchase Department also commented that ‘there are many open questions between Mr. Mitchell and the office, in connection with the execution of land purchase Deeds, and of matters of account.’

One of the most notorious agents in using advances later charged (questionably) to land was John Young, who operated largely in the Bay of Plenty. Young was tried and found not guilty of fraud after a damning auditor’s report. This report had found that he claimed to have paid for blocks in circumstances where the parties in question had received no moneys. Purchase moneys had been paid direct to storekeepers, and store accounts were effectively bought out for land, although these had never originally been secured against the land. He recorded charges for goods as advances against land without the sanction, or sometimes the knowledge, of those who were liable for the debt; he forged signatures in his cashbook; he colluded with shopkeepers to overprice goods paid for with advances; and he took a commission on these transactions. He paid advances indiscriminately to individuals; he encouraged Maori to sign payment vouchers for store goods where the amounts (entered later) did not match the value of the goods; and he lent money without stipulating which block it was to be charged against. Young even charged one person’s goods, against another’s lands. He also paid for land in liquor (which was supposed to be automatically disallowed by the trust commissioners), and effectively took a commission from storekeepers in exchange for recovering their debts from Maori.

From the evidence in our inquiry, Young appears to be an extreme version of what was a general pattern among agents. There are many examples of confusing and questionable payments made in the Central North Island. Mitchell, Davis, and Gilbert Mair are among the agents who were known to have paid purchase money directly to storekeepers and to other creditors. Government agents were also encouraged to buy up leases and transactions begun by private agents, even if these had been made in dubious circumstances. For example, Gilbert Mair was one of a number of agents who began negotiating leases on his own account and then moved to working for the Government, buying out his own private claims in his Government capacity in the process. He made payments to Ngati Manawa chiefs in Kaingaroa in pursuit of a private lease in 1873. Mair supplied goods, including food and firearms, to Ngati Manawa – whom he had led in the recent
conflicts – sometimes as gifts, but other times recorded as debt or advances against lands. Mair’s accounting for these supplies appears to have been haphazard and sometimes retrospective. Some were marked as being tied to specific blocks, while others were recorded simply as ‘on a/c.’

Mair’s private lease, presumably including these poorly documented advances, was among those he subsequently sold to the Crown.

The Native Minister, Bryce, would later state that the practice of advancing money not actually agreed as an advance on a specific block was improper. Nonetheless, the Government was willing to take advantage of such dubious behaviour. Mr Macky found that ‘subsequent to Young’s dismissal [in 1880], the Government set about allocating the costs of many of the goods he had supplied to the blocks of land in which the Maori to whom Young had arranged the supply of goods had interests.’

The system of pre-title negotiations created opportunities and temptations that made it extremely difficult for agents to properly discharge their dual responsibilities to negotiate for as much land as possible while also fairly dealing with all right-holders in a block. The Native Minister, McLean, instructed George Burton, land purchase officer for Rotorua and Taupo, to purchase as much land as Maori could dispose of ‘without injury to themselves’ through sale, or otherwise by lease with purchase options. However, as we have seen, agents were also encouraged to begin negotiations over as much land as possible as quickly as possible, leaving them to decide when this might cause injury to the many communities inevitably involved. The conflicting responsibilities for agents to negotiate as extensively as possible, but to also consider what Maori could ‘justly’ alienate, and to negotiate on the basis of cash payments made in a range of circumstances, inevitably tempted abuse. This was especially the case when so much was necessarily left to agents’ initiative. If this was not readily apparent to the Crown, it must have become so when Maori leaders began complaining and petitioning about it. The Government was required to undertake a number of inquiries and to withdraw and even dismiss some agents by the mid-1870s.

Nevertheless, the Government continued with this form of purchasing even after the Native Land Court began sitting again in the region. Above all, it continued knowingly to complete transactions based on these early negotiations.

The Tribunal’s findings

From the evidence available to us, there were a number of aspects of pre-title dealings and payment of advances that were inconsistent with the Treaty. On a broad level, the system enabled Government agents to select a few favoured right-holders and lock their communities into a transaction by paying them advances. There were limits to how far this could be taken, especially since a Crown title was ultimately dependent on the select few proving to at least be among the correct owners. But it was an effective tool for tying up Maori lands and committing whole communities to purchases without their full, free, and informed consent. As such, it was in breach of the Treaty.

While we note that some purchases began with, or eventually involved, public meetings and potential communities of owners, these were dispensed with or circumvented when there was resistance to alienation. Ultimately, too, the agents could play a part in influencing use of the court process and compilation of lists of owners, enabling them to manipulate events at the final stage of title determination. More importantly, perhaps, advances were tied to blocks, even where the owners had no knowledge of them or deliberate intent that they be so, enabling the Crown to obtain land by partition, again without there having been any free, full, or informed decision to alienate it. This too was in breach of the Treaty. In situations where the Crown pursued the ‘completion’ of these flawed transactions in the 1880s, buying up further individual interests at old prices or seeking to define its interest by partition, this Treaty breach was compounded.

Further, the actions of agents were divisive and harmful to Central North Island Maori, leading to petitions and protests to the Crown. Agents took advantage of the poverty and tensions following the wars. The possibility for conflict and confusion was increased because
they had to negotiate for very large areas of land, making it much more likely that overlapping interests in the tense post-war situation would lead to conflict. The suspension of the Native Land Court in the region, and the Government’s refusal to give legal powers to tribal komiti, prevented any opportunity for recourse to independent means of determining title, the range of interests involved, or tribal decision-making to alienate or retain land. The reimplementation of such a policy after its contribution to the wars of the 1860s was a serious risk in a volatile situation. Further, it deprived Maori of their right to decide their own entitlements (or have those entitlements fairly and fully defined) before transactions that resulted in the loss of important tribal assets. This was a breach of the treaty principles of partnership, autonomy, and active protection.

Finally, it appears that the Government did too little to ensure that its agents acted with propriety. Although we do not have detailed evidence of all transactions, it was clear that the land purchase agents could not satisfy the Government’s desire for huge amounts of cheap land while at the same time protecting Maori interests. The Government’s failure to monitor their activities properly, to pay them on a basis that would have encouraged fair dealing, and to correct the core problems when identified, and its decision to complete rather than overturn some transactions, was in breach of the Treaty.

Pre-title negotiations and leasing

The pre-title negotiations and payments of advances to lock them in, at least in the early part of the 1870s, also included lease as well as purchase negotiations. The Crown abandoned leasing as part of its policies by the late 1870s, but in the meantime, leases were claimed as having been negotiated over large areas of land, especially since Maori preferred this form of utilising their land. The claimants alleged that this early Crown willingness to negotiate leases as well as purchases was primarily used as ‘bait’ to entrap Maori into transactions that could be turned into purchases, while the Crown actually had little intention of allowing a leasing economy to develop. The Crown denied this allegation, arguing that leasing was a reasonable short-term response to Maori opposition to sales, but that, for economic reasons, it could not have had a long-term future.

The claimants’ case

The claimants submitted that the Crown was well aware of the Maori preference for leasing, but deliberately sought to undermine any possibility of a leasing economy. In their view, it failed to seriously consider or protect Maori wishes to utilise their lands by leasing. It was nonetheless a viable economic opportunity at the time. The Crown’s claims that it was ultimately unsustainable are ‘counterfactual’. While the claimants accepted that there was some settler antagonism to ‘Maori landlordism’, this did not make leasing itself economically unviable. In their view, there was considerable private interest in leasing for pastoral runholding, which offered potential for Maori communities to gain the benefits of ongoing income, contact with runholders, and exposure to new ideas and opportunities, while still retaining underlying land ownership.

Runholders were willing to pay significant sums as advances on leases. Lease agreements negotiated at this time provided for regular, ongoing payments that would, in the claimants’ submission, have given Maori communities more time and resources to assess their options in the new economy, and to engage in more considered decision-making over land sales. Leasing may not have enabled the Crown to meet its objectives as rapidly as through purchasing, but it nonetheless negotiated leases that could have served as the basis for settlement, had it been willing to sublease to settlers. Over time, Maori may have decided to sell more land, but leasing would have given them time to share in the expected benefits of settlement, and to engage with the Crown and its agents on a more positive and equal footing.
The Crown’s case
The Crown agreed that it did prefer purchasing land outright to leasing when it entered pre-title negotiations. It considered leases as a stopgap measure to prevent purchases by land speculators in the broader interests of the development of the colony as a whole. It was an ‘an ad-hoc response to meet Maori resistance to full alienation’. The non-payment of rentals while the Native Land Court was suspended was entirely legal. Entering leases at this time was a reasonable response to the circumstances confronting the Crown, and not a deliberate attempt to deceive. The Crown also submitted that the claimants overstate the case that leases were transformed into sales. It noted that although 1.07 million acres were reported as under negotiation for lease in this region by 1876, only 210,000 acres of it was purchased by 1900.212

The Crown accepted that in terms of the possibility of a leasing economy, there was some interest in private leasing, but it is not clear what kind of private market there was, and much of the land was anyway soon found to be poor for agricultural purposes.213 Leasing, in other words, did not have a future. As noted above, the Crown also relied on the views of Professor Hawke that any vision for a modern economy built on Pakeha–Maori partnership through leasing arrangements is thoroughly anachronistic, and is not in accord with modern economic analysis.214 The transferring of large areas of Maori land to settlers through purchases was regarded at the time as being vital to settlement and it was critical to the creation of the viable agricultural economy that was developed.215

The Tribunal’s analysis
The Crown has agreed that it did prefer outright purchasing to leasing, which is clearly evident in this region from the beginning of the pre-title negotiations in 1873. Davis and Mitchell were employed by the Government on double the commission for securing purchase negotiations as opposed to securing leases, for example. We received evidence that there was a strong belief that entering leases with Maori would facilitate eventual purchasing. In 1873, for example, Davis and Mitchell reported that:

We may be permitted to state here that the lease of these lands to the Government will we consider render purchase hereafter if desirable comparatively easy . . . while the inalienation clauses inserted in all the leases, together with the political and commercial relations arising out of these transactions will, it seems to us, place the Government in a position to accomplish with comparative ease, whatever ends of public moment it may have in view relative to these wastelands.216

Ms Rose also cites the Colonial Secretary, Daniel Pollen, as informing the Legislative Council that entering into lease arrangements with Maori would ‘render purchase hereafter if desirable considerably easy’ and that it ‘was perfectly well known that, in dealing with Native land, the first step was the lease, and that obtained, the freehold inevitably followed in time’.217 The Crown has conceded that at the time leases were entered into, there was no legal facility for the Crown to sublease these lands for settlement; in other words, the Government had no immediate intention of using it for the purpose for which it had ostensibly been obtained. Nonetheless, the Crown also argued that there was no urgency for it to provide statutory powers for subleasing, since the Native Land Court could not sit to confirm the leases in any case.218 The remedy for that problem, of course, was in the hands of the Crown.

We accept that the Crown had a legitimate right to pursue purchasing to meet its policy objectives. However, the Crown also had an obligation of active protection towards Maori in the way that it pursued this objective. In entering negotiations with Maori over leases, the Crown had an obligation to treat with them honourably. However, in the Central North Island the Crown entered lease negotiations for significant areas of land at a time when it was not interested in creating large runs itself, and had made no legal provision to sublet to those settlers who wished to lease. By April 1876, for example, the Crown claimed to have negotiated leases over 200,000 acres in the Bay of Plenty and...
Kaingaroa, but there was only one block in this area, the 20,142-acre Oruanui block, where rent had actually been paid by this date.\textsuperscript{219}

The Crown entered these agreements at a time when it had suspended land court operations, making it difficult for private parties to legally complete agreements with Maori, and therefore lessening private interest in the region. While these lease agreements were very careful to provide for the possibility of eventual purchase, they were often not carefully thought out to enable Maori to gain any secure benefit from them. For example, in the case of the Ngati Manawa lease in Kaingaroa 1, the terms of the lease provided that the Crown could pay the rentals to any one of the lessors, without regard for how or whether it would be distributed to the rest.\textsuperscript{220} Leases were also entered into before the identity of the owners had been settled. This was also true of advance payments for purchases, but in the case of rentals the Crown became squeamish in some cases that not all right-holders had been properly determined, and therefore rentals could not be paid. It may not have been illegal for the Crown to have withheld rentals in these cases, but it was in marked contrast to the willingness of agents to risk payments for purchase advances. It is unlikely to have been obvious to Maori why they could gain cash for purchase payments, but not for agreed rentals.

The Government declined to pay rent on some leases until title was completed by the Native Land Court, but it applied this policy selectively. In some cases, the Crown paid part of the rent rather than refusing to pay any at all. This, if anything, demonstrates that the Crown did have discretion to pay rentals, but chose not to do so in some cases. The payment of part rentals or selected rentals added to confusion over what was actually being paid – that is, whether the payments were agreed rental payments or (as sometimes claimed) cash advances on purchases to individuals to turn the lease into a purchase. Maori leaders became well aware of this tactic, but had little real power to stop agents from making arrangements (with small numbers of owners) that the agents could subsequently claim as the beginning of a purchase, even if the agreement had originally been for a lease. Wi Maihi Te Rangiakaheke told the Native Affairs Committee in support of a petition by 700 Te Arawa objecting to the practices of Davis and Mitchell:

\begin{quote}
I would not object to the leasing – only we imagine these leases are simply made by the Government for the purpose of purchasing. The lease is the bait, the hook is the purchase.\textsuperscript{221}
\end{quote}

Whether or not the Crown entered all leases with the deliberate strategy of trying to turn them into purchases, there was much the same outcome. Government leases did not actually lead to settlement by sublessees – they were either turned into purchases, or ultimately abandoned. Maori communities were caught in limbo, not able to gain full profit from the leases they had signed in good faith, but unable to use their land and resources for alternative purposes either. The Native Land Court was suspended until 1877, preventing the finalising of leases, and the land often fell under various forms of restriction on private dealing after 1877. Of 19 leases covering 1,077,513 acres which were recorded as having been entered into by the Crown by 1876, 17 of these, totalling 925,000 acres, were proclaimed as restricted in terms of private dealing.\textsuperscript{222} However, the Crown had paid rentals on only one of the 19 leases, Oruanui, before the suspension of the court was lifted.\textsuperscript{223} The Crown’s buy-up of early private leases, and its attempts to turn them into purchases as well, further prevented Maori from entering the runholding leasing economy as they had intended.

The system of entering leases, buying up existing leases, and then trying to transform them all into purchases caught up even those arrangements where title had been decided before the court was suspended. As we have noted in the previous chapter, a number of communities in this region had gone to court relatively early and before it was suspended, often in an effort to gain legal confirmation of leases agreed with private parties. It was the only option lawfully available for them to protect their interests. By
1876, there were about six blocks totalling 378,513 acres where the Native Department believed that the leases were substantially complete, but rentals were still not being paid. The Crown chose not to pay rent for two of these because they had not passed through the Native Land Court for final title determination. However, three had already been subject to earlier court hearings before it was suspended. The Crown still refused to pay rentals on these on the basis that legal technicalities required further court action. Such technicalities included the appointment of trustees for minor successors of deceased owners, and partitioning the interests of a named owner who had chosen not to lease. The court process continued to entangle owners who wanted to utilise their lands in further hearings and costs, even when title had been determined. Without the court process land could not, it seemed, be used, even after the signing of leases with a Government apparently acting in good faith.224

An example of what was regarded as a relatively ‘complete’ lease, where the Crown still refused to pay agreed rentals, was Tauhara Middle block. The evidence produced by Mr Stirling and Ms Rose for this block shows that informal lease agreements with private parties had been arranged in the 1860s. The land was brought to the court before it was suspended, and in 1872 title was ordered with a survey lien for just over £650. In 1873, Government agents negotiated with the named owners for a 30-year lease over 94,000 acres of the block. The rental was to be £100 per annum for the first 10 years, £200 per annum for the second 10 years, and £300 per annum for the remaining 10 years, making a total of £6000 over the period of the lease. Apart from making £10 advances to each of the owners when the lease was agreed, the Crown refused to pay any further agreed rentals until 1879. Its reasons were: the court had not appointed a trustee for some minors in the title; there were continuing disputes over reserves from the block; and the terms of the lease were longer than the 21 years allowed under the restrictions that had been placed on the title. The Government refused to consider the lease valid and therefore that it was required to pay rentals until the court sat to resolve these issues, but the court was, of course, suspended in the region by Government action.

At the same time, the debt of the survey lien and interest on it of £32 per annum continued to increase and remained unpaid. The Government agreed to pay some back rent of around £400 in 1879 and some miscellaneous payments to individuals, in return for owners agreeing to smaller reserves out of the lease than originally agreed. The Crown then began to take advantage of economic pressure on the owners to transform the lease into a purchase. It was able to use its legislative powers to have advances used as the basis for the purchase, not as ‘advances against rentals’ as the owners had believed them to be, but as ‘advances against the land’, able to be recovered from purchase moneys.225

Similarly to Tauhara, the Crown was able to use a legal technicality to refuse to pay rent for its lease of Runanga 2. In this block, title had been determined by the court in 1872, and a lease was signed with eight of the nine owners in mid-1875. The Government then refused to pay the agreed rentals until the interests of the non-lessor could be partitioned out by the court, even though this could not happen while the court was suspended in the region.226

In the meantime, however, it did make payments which it recorded as advances towards purchase. The matter was complicated by Wi Maihi Maniapoto, the rangatira who opposed the lease and tried, when the court finally sat, to get a lot of people put back into the title (they had been excluded under the 1865 10-owner rule). By 1880, the Government had decided that the land was of too little value to continue efforts to purchase it. It was not interested in finalising the lease, although Wi Maihi was now ready to do so. It insisted instead on recovering its payments as if there had never been a lease, and eventually got 5020 acres of the block in satisfaction.227

The Whakarewa block was a Ngati Pikiao award within the eastern Bay of Plenty confiscation block. The Crown entered a lease over the land with eight court-recognised ‘trustees’ on behalf of 148 beneficiaries in 1873. It apparently honoured this lease until 1880, when disputes arose over how the rent should be distributed by the trustees.228
The Government decided not to pay rent on the land until the matter was resolved, but then offered an alternative solution of purchasing the land outright. A meeting was called, ostensibly to resolve the matter of the lease payments, but it was used by the Crown to pursue a purchase. The owners and trustees asked for three years of back rent to be paid and for the lease to be ended so that the matter could be settled internally. The Government land purchase agent, Gilbert Mair, then applied pressure on the owners to sell the land, threatening to seek the repayment of the full £470 of rent paid so far if they did not. Mair told them that ‘this will always be a cause of trouble between you. Better sell it. Govt will give you £5,500.’ The sale proceeded over the following two years.229

In many cases, the Government does appear to have eventually paid some back-rents for the time that the court was suspended in the region. However, the ability to decide when and how to do this placed the Government in a powerful position, and assisted it to transform leases into purchases. There was confusion over whether payments were for rentals or for turning the agreement into a purchase, or even for modifying the agreement in some way. In Tauhara, for example, an offer to pay some of the back rents was used by the Crown in negotiations to reduce the size of the still unsurveyed reserves.230 In other cases, notably Pukahunui, where the owners simply refused to sell to the Crown, the Government exercised its right under the Native Land Purchasing Amendment Act 1878 to take land in exchange for ‘advances’ paid.231

Of the 19 blocks totalling 1,077,513 acres listed as under negotiation for lease in 1876, by 1890 the Crown had purchased 11 of these blocks with a total area of 210,327 acres. In most cases, the Crown was able to use its legal powers to deduct any moneys paid as rentals from the final purchase price.232 The final acreage eventually transformed into purchases was considerably smaller than the area originally claimed to be under lease (around 20 per cent). The explanation appears to be, in Mr Macky’s evidence, that the Crown’s approach to purchasing moved towards the acquisition of land immediately valuable for settlement in the early 1880s. As a result, the Crown did not try to turn some of its leases for ‘worthless pumice country’ into sales.233

Nonetheless, the Crown gained significant benefits from leasing even when it did not pursue its option to purchase. Leases were a convenient foothold in lands the Crown did want to purchase. Leases also enabled the Crown to shut out private competition and manipulate payment of rentals to better achieve the purchases that it did want, while helping to keep final purchase prices low.234 By buying up private leases and gaining control of the whole leasing of land, and then refusing to sublease, the Crown effectively prevented the development of a leasing economy. Even for land that it did not ultimately purchase, the leases were not otherwise viable. This left Maori with few other choices than to leave their land ‘idle’ or enter new purchase arrangements once leases were abandoned.

Whether or not the Crown initially began leasing with the deliberate intention of transforming all its leases into purchases, it was certainly willing to utilise the advantages it gained with leases, in conjunction with the suspension of the court, to pursue its own interests. The Crown may well have had reasonable concerns about private speculators, but it also had an obligation to iwi and hapu and their right to be able to use their most important resources for the benefit of their communities. Leases may well have proved uneconomic eventually, especially as lands were found to be more marginal for pastoral runs than originally anticipated. However, this was not anticipated in the 1870s when the Crown was entering leases. The Crown not only sought to exclude private parties from purchasing land, but also from establishing any form of lease economy even in the short term. In doing so, it severely restricted opportunities open to iwi and hapu to engage in the new economy as they wished. Large station-style farming (as we shall see in chapter 14) was considered viable, even in the more marginal areas.

We accept that in the long term – and certainly by the early twentieth century – freeholding was the preferred system of tenure for colonisation and settlement. Nonetheless, the historical evidence is that there were always capitalists
willing to lease land from Maori throughout the nineteenth century, and times (such as the 1890s) when governments were in firm support of leaseholding. Even at times when the Government was officially opposed to leasing, such as the 1850s, there were pastoralists willing to risk their money on the basis of informal leases. The very fact that the Crown had to buy up private leases in the 1870s and then enter into leases itself shows that leasing was considered viable at the time. The Crown did, in its submission, state that it briefly considered subleasing to settlers in the late 1870s. Runholding in much of the Central North Island interior proved more difficult and expensive than initially expected, but that was the case whether the land was held in leasehold or freehold. We refer to this in more detail in chapter 14.

We note also that without the court to convert Maori communities into lists of individuals, under the 1873 Act, the Government found that it had to operate in part within the preference of Central North Island Maori leaderships to lease (not sell) their lands. That was so while the court was suspended. In 1879, for example, after the court had issued title for Kaikokopu to 166 individuals, the land purchase agent, Young, advised that it would be a waste of time and money to try to negotiate a lease with so many owners. His solution was to begin purchasing individual interests.235

While owning land in freehold was always an important feature of settlement, various forms of leasehold tenure were regarded as economically viable and at times politically preferable. There were forms of enterprise in the nineteenth century where leasehold was regarded as having a significant economic advantage. In particular, it freed up capital that could be directed from purchase to concentrating on making an income from the land. This was especially suitable where the land itself required relatively little improvement. Governments recognised this as appropriate for some classes of immigrants starting off in small-scale farming, for example, where lands were readily usable and they could spend their funds to buy stock and seeds from which they could make their income. This was better than having to spend most of their funds on land purchase. Some forms of business, such as hoteliers on tourist sites, might also prefer to rent their land and spend their capital on providing services and accommodation, from which they derived most of their income. The classic leaseholding enterprise by the 1870s was pastoral runholding where the early pastoralists derived most of their profits from their flocks, running them on relatively open lands with native grasses and using natural boundaries such as ridges and watercourses, without the need for fencing or other improvements. By obtaining leases, pastoralists could concentrate their capital largely on the stock from which they made their profits.

Although it may not have been the preferred method of tenure, leasehold was therefore regarded as economically viable for a variety of settlement circumstances in the nineteenth century, and many central and provincial settlement schemes provided for forms of leasehold tenure. The potential benefits offered by leasehold also became the subject of political debate in the later nineteenth century, especially as fears arose of wealthy landowners concentrating land ownership in just a few hands. During the 1880s, numbers of settlers of limited means who had borrowed to purchase land in freehold felt themselves badly treated by banks and private lenders in times of economic recession. This translated into political support for the Liberals by the 1890s, who, while they proved reluctant to pursue the more radical views on leasehold within their ranks, nevertheless continued to regard leasing as an acceptable form of land tenure, especially where it might encourage closer settlement of land.

During the 1870s, therefore, when the Crown entered pre-title negotiations for leases of Maori land in the Central North Island, leasing – especially for runholding – was regarded as a useful economic opportunity. The Crown clearly had a preference for outright purchases of Maori land for its own objectives, but this did not mean that Maori wishes to engage with settlement through leasing were unrealistic. We received evidence of considerable Pakeha runholder interest in leasing Maori land in this
region from the 1860s onwards, especially the more open areas of Kaingaroa and northern and south-western Taupō.

The Tauranga Bush Campaign of the 1860s and the pursuit of Te Kooti did undermine the immediate viability of some of these leases. However, there was renewed interest from the 1870s into the 1880s, before the real difficulties in runholding became apparent. We also have evidence of a willingness of Pakeha businesses to take leases in areas felt to be suitable for tourism, such as Tokaanu and Rotorua townships.

During the rest of the nineteenth century, leasing continued to be regarded as a possible means of engaging in settlement, particularly in less closely settled Maori lands. The Crown clearly recognised this. Even while it was abandoning leases or turning them into purchases in the early 1880s, it still agreed to leasing ventures in Rotorua township in 1880 and in the later native township system from the mid-1890s. The Crown itself submitted to us of Rotorua township that it did not expect the agreement over the township to fail, or intend it as a deliberate and premeditated attempt to facilitate land sales. It was optimistic that the scheme would succeed, and Ngati Whakaue shared this optimism. This also seemed confirmed by the initial successful sale of leases. We note that the Government also agreed in the late 1890s to stop new Maori land purchases in favour of focusing on enabling Maori land to be made available for settlement through leasing. At the time, this policy seemed to be economically viable if it made more land available for farming.

There was, however, significant and growing antagonism by settlers to what was regarded as 'Maori landlordism', particularly from the 1890s when there was increasing impatience with any form of landlordism that was thought to hinder the proper use of lands. However, this made the Government's joint-venture agreements over leasing, such as the townships and the provision for leasing in the thermal springs district area, even more important. Through such arrangements, the Crown could potentially act as a buffer to allay any settler fears associated with Maori landlords.

Attitudes to leasehold tenure changed significantly in the early years of the twentieth century, when modern farming required significant investment in land improvement, especially in the North Island. Farmers wanted to be able to gain the benefits of this, as well as the income from farm produce. Freeholding was a more certain way than leasehold of gaining this increase in land value. Demand for freehold tenure and antagonism to 'landlordism' became a rallying point for the new class of independent farmers that the Liberal Government had helped create, whether they held land by lease or freehold tenure, and in alliance with large property holders who traditionally favoured freehold. The New Zealand Farmers Union was established in 1899 and was strongly supported by North Island farmers. By 1908, the traditional acceptance of leasehold within the Liberal Party had become a clear political weakness, and the Reform Party, with a strong freehold policy, began to gain political ground against the Liberals.

However, while leasing was increasingly rejected as a suitable form of tenure from the early twentieth century, this left a period of around 30 years when leasing could have been an opportunity for Maori to at least gain some time, experience, and rental income. Also, given the Treaty guarantees that Maori should retain their lands for so long as they chose, and the determination of Central North Island Maori to alienate land for settlement by way of leasehold, not freehold, many settlers were willing to farm by leasing if that was their likeliest opportunity. The receipt of rents could have made a significant difference to Central North Island Maori at a crucial time of heavy expenditure – when their lands were going through the court – before they had to make important decisions on their lands that might foreclose future opportunities. It is possible, and even likely, that with experience and changing circumstances, Maori may well have deliberately chosen to turn some of their leases into judicious sales. We note the evidence given to a Select Committee by Tureiti Te HeuHeu in 1905, for example, that he wanted the right to sell some sections in Tokaanu township to promote the progress of the township.
However, the Crown policy of preventing and undermining leasing in pursuit of purchasing, where possible, prevented iwi and hapu of this region from being able to take advantage of this opportunity. In entering lease agreements in good faith, the Crown had a reciprocal obligation to deal honourably with Maori, and not simply to use the leases to secure a purchase or to prevent anyone else from transacting the land in the meantime. If, on the one hand, the Crown was prepared to pay advances on purchases before title was determined, and to enforce such advances as part of any future sale, then it could not – on the other hand – refuse to pay rents, having also entered leases before title was determined. Nor was it honourable for the Crown to begin purchase negotiations on the basis of its leases, without the clear agreement and understanding of the communities involved, especially for those leases agreed before title was determined and even more so for leases it had purchased on that basis from settlers. Acting in this way, the Crown was able to turn supposed payment of rents into advances against purchases. In cases where the court finally sat and determined a different (or larger) set of owners than had signed the lease, or where the Crown decided not to finalise the lease, it could claim land in return for what were supposed to have been rental advances on a lease.

The Tribunal’s findings
Leasing and purchasing were two very different kinds of transaction in their consequences for Maori authority and for the tribes’ ability to gain continuing benefit from their most important asset, their lands. The obligation of active protection required the Crown to very clearly separate the two transactions in its negotiations and payment procedures. This was particularly the case in a monopoly situation where the Crown had an additional obligation not to use its powers unfairly to Maori disadvantage. The Crown was well aware that leasing was a preferred form of land dealing for Maori of this region. Maori relied on the honour of the Crown, in entering lease agreements, that it would protect their interests and enable them to participate in the opportunities that were available.

In our view, the Crown did not act with the good faith and honour required of a Treaty partner. It bought up private leases and entered into leases itself – not with the object of facilitating settlement through this form of tenure, but to prevent private competition and to secure land purchases. It then manipulated its suspension of the Native Land Court to avoid paying rent during a crucial period, and turned the payments that it did make into advances for purchase, in a manner that was (to say the least) questionable. Ultimately, no land was ever subleased, no settlement was achieved, and the land was either sold to the Crown or leases were abandoned because the land was not considered worth immediate purchase. Even where it did not pursue sales, the Crown secured the refund of many of its ‘rent’ advances in either money or land. In one sense, this was fair because it had paid money on leases that were never actually finalised. In a broader sense, however, it was the Crown itself that prevented many of these leases from being completed. These actions of the Crown were in breach of the Treaty principles of partnership and active protection.

In the thermal springs district area, where the Crown had made itself agent to deal in leasing, it failed to do so for any lands other than the Rotorua township. The Stout–Ngata commission found that there had been clear interest from private parties to lease land for purposes such as timber milling. Instead, the commissioners found that almost 30 years after the first Thermal Springs Districts Act, lands not sold to the Crown remained in a largely unproductive state, save for some informal – and likely illegal – arrangements that had been made. In Dr Loveridge’s report for Ngati Pikiao, he argues that the Crown’s failure to implement effective assistance with leasing arrangements under the Thermal Springs Districts Act 1881 and into the early twentieth century was a major lost economic opportunity for the tribe.239 We agree, and consider further that this lost opportunity applied more widely over the thermal springs district.

Above all, therefore, the Crown foreclosed on the most important economic opportunity open to Central North
Island Maori in the nineteenth century. As we have noted, the historical evidence is clear that a leasing economy was viable in the circumstances, from at least the 1860s to the 1890s. Although the Government did contemplate the possibility of subleasing to settlers, it never did so. In our view, the Government's actions in respect of leasing actively prevented Maori from carrying out their clear preference to lease their land, and their option to develop their lands for the new economy in this manner. This was a breach of the Treaty principles of mutual benefit and of options. Under the latter principle, the Treaty provided for Maori to continue their customary economy and lifestyle, to adopt western ways, or to walk in both worlds. A key point of this principle, as the Crown put it in the Te Tau Ihu inquiry, was that its Treaty partner's choices should not be forced. In actively defeating the Maori option to lease (and retain) their land in the new economy springing up in the Central North Island, the Crown thus breached the principle of options.

The Crown's failure to act in good faith over leasing opportunities in the Central North Island from the 1870s through to the end of the nineteenth century had long-term consequences for iwi and hapu. They were denied the opportunities they expected when entering leases. They were denied the opportunity to enter the economy, obtain an income, and develop their lands. Some found that their willingness to cooperate over leases was used to part them from their lands. Much of their land, therefore, appeared to be lying ‘idle’ and unused by 1900, drawing the ire (and further purchasing efforts) of Parliament.

_Tidying up the pre-title negotiations and abolishing advances_

It was not only Maori who were strongly critical of the policy of pre-title negotiations and the payment of advances to lock in transactions. From very soon after this policy was implemented in the Central North Island, it provoked strong criticism in the settler press and Parliament. This criticism included accusations that it was wasteful of Government money, and that it encouraged widespread negotiations over many districts, many of which were then time consuming and difficult to complete. In response, the Government began issuing a series of instructions to its purchase agents to focus on completing negotiations they had already begun. This was much easier said than done, however, as the whole system relied on spreading negotiations as widely as possible, and, while the Native Land Court remained suspended, transactions could not be confirmed as complete.

As both Maori and Pakeha began to complain about evident abuses with the system, the Government withdrew Davis and Mitchell from purchasing, effective from June 1876. Mitchell’s accounts were audited and he alone was reappointed on salary (rather than commission) in November 1876, backdated to August. This offered potentially more Government control over agents, but the system of pre-title negotiations continued and the Government continued to press for lands to be purchased. When the court began sittings in the region again from 1878, the Government had already begun proclaiming lands restricted from private dealing on the basis of these negotiations and advance payments. As we have noted, almost half the region was proclaimed as under negotiation within another year. The renewed sittings of the court, however, brought new problems in completing transactions. The tensions and conflicts exacerbated by land dealings, and attempts to legally defend the interests of those whom the Crown had determined to be ‘owners’, resulted in lengthy litigation in many blocks. The system, while useful in bringing land blocks under negotiation, was found to cause delays and litigation at the court stage.

As the Crown has noted before us, purchase agents ran a risk in pre-title negotiations that they might have dealt with peoples whose claim to ownership was rejected by the court, or who represented only a small or non-leading section of the individuals found entitled. As court sittings began again in the region in 1878, these risks became more apparent, especially where there were significant challenges to the claimed purchases in many blocks. The potential for conflict and resulting delays, along with possible losses for
the Crown, brought the much criticised system into further disrepute. In 1879, senior official R Gill issued a general instruction to agents to stop paying advances, as it ‘rather delays than quickens the completion of purchases’.

The new Native Minister from 1879, John Bryce, was also a strong critic of the policy of purchases using pre-title negotiations and advances. He believed that the policy was wasteful, that it insufficiently targeted those lands most suitable for settlement, and that it was open to fostering abuse through the payments of cash advances. Bryce took advantage of economic recession to review Government purchase negotiations as part of overall retrenchments in spending, and to insist that they were finally tidied up, including in this inquiry region. As part of this review, it was decided to abandon some of the pre-title negotiations on which advances had been paid, including in the Central North Island, and to make the best of this by using legal powers where possible to recover the advances, either in cash or in land. In blocks still considered important for purchasing, it was decided to try and complete the transactions as far as possible. This included efforts to transform remaining leases into purchases, and applications to the court to have blocks declared purchased or a Crown interest defined and cut out.

As part of this new drive in 1880, the Government asked senior purchase official Gill to prepare a list of blocks in the Central North Island, identifying those that should be abandoned and those where purchases might still be completed. Gill provided a list of 20 blocks where he advised that negotiations should be abandoned. Accordingly, the Crown sought to have its costs recovered and, in some cases, accepted the repayment of its claimed advances in cash. In a significant number of blocks, it also began applications for awards of land on the basis of claimed advances. A number of purchases were also completed and confirmed by the court in the 1880s, that had been based originally on pre-title negotiations and payments of advances.

This process began to reveal the extent of advances that the Crown claimed to have paid and how they were being used. It is clear from the evidence that advance payments were significant in relation to the eventual value of the land in terms of the price per acre, and made up a substantial part of the final purchase price. An example is Kaingaroa 1, where advances in goods and cash accounted for one-third of the eventual price of the block. Another notable example is Te Puke, awarded in its entirety to the Crown in 1878 in exchange for advances paid before title determination. Karamurama, the site of Fort Galatea in Kaingaroa, was another block considered completely purchased before title investigation.

The evidence also indicates that the payment of advances was crucial to negotiations for large areas of land in this region. We received information compiled by Mr Macky, showing advances paid in the region before 30 June 1876, within three years of beginning negotiations. This reveals that in Kaingaroa, £150 had been paid as advances against the purchase of 317 acres and £550 on rental of 276,000 acres. In Rotorua, the Crown had advanced £7047 against the purchase of 117,871 acres, and £952 against the rental of 375,000 acres. In Taupo, the Crown had advanced £1540 against the purchase of 13,900 acres, and £346 against the rental of 78,400 acres. In total, advances for the region came to £10,585 against 860,488 acres.

These sums effectively tied up large areas of land, enabling agents to then use the legal powers available to the Crown to seek to ‘complete’ the transactions, no matter how small the payment or how representative of the community of owners its recipient(s) had been. As we have noted, the Turanga Tribunal found that with the Native Land Act 1873, Parliament accepted that pre-title negotiations would occur even if they were considered ‘void’ until confirmed by the court. Further, it was accepted that advance payments could be used to lock in these transactions and such payments could then be legally deducted from the final price paid (section 59). This legal ability to enforce transactions on the basis of claimed payments, even if they had been made in dubious circumstances, enabled the Crown to take significant control of the ‘tidying up’ process.

There is evidence that, in some cases, the Crown abandoned negotiations and agreed to accept refunds of
advances it claimed to have paid, leaving owners free to otherwise deal with their lands. This was especially the case for land that Gill’s review indicated was least immediately suitable for settlement. However, in other cases, where it was decided that the land was still well worth purchasing, the Crown refused to accept Maori offers of refunds. In Te Puke, for example, the Crown refused an offer to refund advances which had purportedly been paid to two individuals owners, although it was claimed that they did not represent the owners. Instead, in this case, the Crown chose to exercise its powers to pursue acquisition under the Government Native Land Purchases Act 1877.\textsuperscript{252}

In a number of other cases in the Bay of Plenty, the Government also refused refunds offered by owners. In some cases, the Government accepted partial refunds or recovered advances by an agreement to charge them against other blocks.\textsuperscript{253} “The Government also exercised its power to refuse a refund and take an equivalent share in land.”\textsuperscript{254} In Tutukau, for example, a refund was refused. In Runanga 2, the Government insisted on repayment of advances on an incomplete lease, but gave Maori the choice of paying in cash or land. As Mr Stirling notes, many of these advances were of a dubious nature and the Crown compromised on some, but not all. The Crown took 5020 acres of the block. In Pukahunui, an offer to make a refund was refused on purchase agent Mair’s advice, and payment taken in land.\textsuperscript{255}

Although Government agents were taking a risk in making payments before title determination, this was substantially lessened by their ability to have the same advances recorded against other blocks in which the recipients were considered to have interests.\textsuperscript{256} For example, in Waitahanui, moneys paid to the party not awarded title were instead recorded as an advance against Pukehina.\textsuperscript{257} Dr Ballara indicates that this was not an unusual practice. The Government could act across the whole region, allowing its recovery of moneys to be considerably detached from the initial ‘advance.’\textsuperscript{258}

The Pukahunui block illustrates the way in which the Crown was able to ‘tidy up’ a pre-title negotiation, in this case a lease, and use survey costs in conjunction with its claimed advances to obtain land. Crown agents negotiated a lease agreement over the lands with Ngati Manawa chiefs in 1873, before title was determined. The land involved was not clearly stipulated. The lease was for a 30-year period, with payments beginning at £100 per annum for the first decade, £150 per annum for the second and £200 per annum for the final decade. The terms also prohibited any other form of alienation without the consent of the Governor.\textsuperscript{259} While the Government made some payments until 1877, these were still short of the agreed amount of rent. The block was brought to the court to confirm the lease agreement in 1878. This resulted in survey charges being deducted from rentals, and the Crown had to gain the signatures of further owners to complete the lease. This was followed by a number of years of sporadic but incomplete payment of moneys, accepted and recorded as part payment of rentals due, and a lengthy period of trying to obtain further signatures to the lease.\textsuperscript{260}

In 1881, as part of its review of purchasing, the Government apparently decided to use the negotiations as a basis for purchasing in the block. However, with agreed rentals not paid, and not wishing to sell, Ngati Manawa sought to have the restrictions on private dealing lifted and they began to look at other uses for their land. In October 1881, they were reported as having gone to Napier to obtain a flock of sheep to place on the block.\textsuperscript{261} The Crown, however, used legislative powers available to it (in this case the Native Land Amendment Act 1877) to have an area cut out equivalent to the moneys it claimed to have paid and for survey costs owing on the block. The amounts paid, previously recorded as rentals, were now considered advances that could be recovered. Ngati Manawa responded by seeking to pay the ‘debt’ in cash, but this was refused. Historians have noted that the Crown, having cut out around 5500 acres to meet survey and other claimed advances, then charged the new survey lien arising from this partition wholly to Pukahunui 2 block, the share awarded to the Maori owners.\textsuperscript{262}
In the Tauranga Taupo block, an offer of a refund of moneys paid to a single owner was made, but not accepted by the Government, apparently on the advice of the officer who had made the original advance, Mitchell. In several other cases, the Government did agree to accept refunds relating to advances originally paid by private parties. These include Pukeroa 2, Otamarakau, Paengaroa, and Tauhara Middle, where refunds were paid.

The pattern is clear that the Government had a great deal of control over how pre-title negotiations would be tidied up, and to what extent communities could withdraw from them, even if they were willing or in a position to repay claimed advances. The tidying-up process was based very clearly on securing those lands the Government had decided were of most immediate importance, as well as to recover as much of the money paid as possible (even where that money had been agreed rentals). The objective was to protect the financial and settlement interest of the Crown, with little corresponding effort to protect the needs and interests of the Maori communities caught up in these negotiations. It should be remembered that many of these supposed advances were dubious in nature and charged against the lands of communities often uninvolved or inadequately represented in the original ‘transaction’. There was no attempt, however, to establish any fair, independent inquiry into the advances before recovering the costs in this way, which would have been one practicable option for taking fair account of Maori interests. The result was that lands of importance continued to be targeted and, in the efforts to recover costs as much as possible, more lands than were needed for settlement in the immediate future were caught up in this rationalisation of the Crown’s interests. At the same time, Maori ability to use or profit from their lands was hindered or, in some cases, foreclosed altogether.

The Crown submitted that the policy of advances was formally abandoned in 1879. However, the evidence is clear that the consequences of the system continued to impact on iwi and hapu of the Central North Island well after this time. The process of ‘tidying’ and ‘completing’ the claimed transactions in the 1880s was based on the pre-title negotiations, even if further purchases of individual interests were required in some cases. In many cases, the claimed pre-title negotiations and advances were used as the basis for proclamations that dragged on in one form or another for many years, preventing owners from otherwise utilising their lands and gaining an income from them. The conflicts and tensions exacerbated by this purchase process often played out in lengthy and costly court litigation.

Events in the Kaingaroa 1 block illustrate the long-term impacts of the policy of pre-title negotiations and advances. As we have noted, this large block involved a range of customary right-holders with a number of overlapping and layered interests. A number of communities had become involved in informal private leases in the late 1860s although boundaries of land, right-holders involved, and terms of agreements were far from clear. An early Native Land Court hearing was held for a Kaingaroa 1 block in pursuit of leases in 1867. However, the court declined to go ahead with it as many likely owners were absent at the time, and it seemed that there would be difficulties with getting a survey. It does not seem that this block was the same one which would later be called ‘Kaingaroa 1’. Another hearing for a Kaingaroa block was held in 1869, possibly for the same one heard two years earlier, but this was adjourned and then abandoned as Te Kooti and his people entered the area.

Communities with interests in Kaingaroa were then caught up in both sides of hostilities in the 1860s, and in some cases confiscations, causing considerable differences in the way they later felt able to participate in the Native Land Court process. They also suffered varying degrees of dislocation and hardship in the aftermath of this conflict. After the wars, private parties and the Government became involved in pre-title lease negotiations in ‘Upper Kaingaroa’ and in what would later become part of Kaingaroa 1. This included the payment of advances. A number of prominent chiefs entered into lease agreements in an attempt to engage in new opportunities for their communities, although at this time title was still not determined and nor were block
Gilbert Mair, who had served as an officer in the wars, also became involved in attempting to lease similar areas of land from different people. He then moved to working for the Crown, apparently transferring his private lease with Ngati Manawa to the Government in 1875. The evidence indicates some confusion over a number of leases for land in the same or overlapping areas, negotiated with different communities of right-holders by a range of purchase agents.

The Native Land Court was now suspended in the region and the Government refused to pay regular rentals due on its agreement, although it does appear to have made one payment. Government agents also appear to have begun making small payments to individuals from other communities thought to possibly hold interests in parts of the block, while a number of large hui were held to discuss matters with likely right-holders. In 1877, as surveys finally began to actually determine block boundaries, tensions among various groups became evident and surveys were stopped for periods of time before they were finally completed. At that point, the ‘block’ was found to contain over 114,000 acres. At the same time, Government agents appear to have decided to try and turn the lease into a purchase, paying more advances to selected individuals from 1877 on that basis.

A new court investigation for Kaingaroa 1 (as it was by then) began in 1878. These sittings involved or ought to have involved a number of iwi and hapu groupings. Some of them later claimed that they felt limited in their ability to participate as a result of the Government’s view of their participation in hostilities, or as part of their policy to refuse to engage with the court. During the hearings of Kaingaroa lands at Matata in 1878, pleas from those attending for an adjournment because they had run out of food were followed with a series of payments made by Mair and others to Ngati Manawa on the block’s account. In 1878, the court awarded title to Ngati Manawa, who then sought to represent other closely related kin groups in their lists of owners. Although the tribe submitted lists involving several hundred owners, these names were not entered on the memorial of ownership; rather it entered a second list of just 31 names.

Many of the communities involved then became caught up in a lengthy process of litigation, rehearings, and petitions over the block. Fresh surveys had to be carried out, including for additional lands. The rehearing was begun in 1880 and lasted just a few days, with the court rejecting claimants’ requests for adjournment. This rehearing reflected considerable disputes about interests in the block. Although a small area was excluded for some interests and successful owners tried again to increase the lists of names, the actual list was reduced further to just 28 names, for a block that now amounted to over 104,000 acres. The Government then completed the purchase in late 1880, acquiring the shares of the 28 owners to the block (equivalent now to just over 103,000 acres after a few small reserves were excluded) in around four days in late December 1880. Historians have claimed that this was assisted in large part by the heavy debts incurred as a result of the litigation.

This purchase was certified as equitable and fair by Trust Commissioner Haultain on 26 April 1881. Of the total purchase price of £7754 9s 7d, only £5650 was still owing, because £2104 was calculated as having been paid in advances and was therefore deducted from the final price. Many of those claiming ownership continued to protest about the process and a number of petitions were made for further rehearings in 1881 and 1882, and the Native Department also proposed a commission of inquiry in 1881. These were all rejected.

This case shows how – from very uncertain, and even dubious, beginnings – transactions could be negotiated and payments made before title determination that were then used as a basis for confirming title and ‘completing’ purchases quite different from the dealings as originally intended by some of those first involved. In this instance, whole communities were caught up in long-running conflicts and dissension, and then excluded from the final decision-making as a result of the combined actions of Government agents and the court.
It is also clear from the evidence that while the Crown decided to refocus purchasing on ownership lists, and to reduce its emphasis on pre-title negotiations and advances from 1879 onwards, this decision was not an absolute one. The Crown continued to pay advances as agents felt necessary. Under-Secretary Gill’s formal prohibition on payments of advances in 1879 was conditional, noting: ‘I am aware that in certain cases advances as a preliminary payment are necessary.’ This included, for example, Pukeroa–Oruawhata block, site of Rotorua township. Fenton suggested to the Native Minister, Rolleston, that he advance £150 against the purchase of the block, to meet the cost of provisions of those attending its title hearing – an advance which was ultimately not accepted by the purported owners. Advances were paid on 15 Taupo blocks in the 1880s, either before or during their lengthy passage through the court. Official correspondence suggests that the Government was willing to approve advances (sometimes retrospectively) for important blocks like Pukeroa–Oruawhata, Tauhara, and certain subdivisions of Taupouhuata.

Under the Native Land Act 1873, private parties were also able to enforce the completion of purchases on the basis of their advances. The Crown and hotelier Robert Graham competed to purchase the small but important Wairakei block, containing hot springs and geysers attractive for tourism ventures. This land acquisition is considered in more detail in chapter 20 of this report concerning geothermal resources. In terms of the influence of the system of pre-title negotiations and advances, Professor Stokes, in her careful analysis of the block’s acquisition, notes that Robert Graham had already been paying advances to some of those he believed to be owners. This was ‘void’ until the court sat to confirm it, but not illegal for private purchasers under the 1873 provisions.

Graham then sought to ensure that those owners he had dealt with were found to be correct when the court heard title to the block and in a later rehearing. Some of his methods appear to have been fairly typical of the time. He tried to influence the selection and number of names placed on the list in favour of those he had dealt with and against their challengers, so as to ensure that his negotiations and advance payments would be recognised. Some of his other methods provoked comment and criticism, including allegations that he influenced the court interpreter, Young, who interpreted for non-Maori speaker Judge McDonald, and who was accused of curtailing the hearing of those bringing counterclaims. Graham was eventually successful in having his purchase of the block recognised, based on his advance payments.

With the court sitting again, some of its hearings of particular blocks were very protracted. There was a temptation to pick winners and to make advancements while prospective owners were assembled. The Native Minister, Bryce, responded to continuing Maori criticism of advances in 1883 by agreeing to make such payments illegal by private parties, prior to or within 40 days of title determination. The Native Land Laws Amendment Act of that year imposed penalties on private purchasers, but Parliament still exempted the Crown, effectively allowing it to continue to rely on advance payments to help the completion of earlier negotiations, where this was considered necessary.

The Crown submitted to us that while in an ‘ideal world’ it would have been better for it not to have entered negotiations or make payments until title was ascertained, in practice it had to face competition from private interests. This system was therefore necessary ‘to secure a firm foothold’ for the Crown, while still recognising Maori interests in the process. We do not accept this argument. The Crown gave itself a number of ways of excluding private purchasers during this period, and it eventually (1883) made it illegal for them to make advances before or just after title was determined, while keeping the ability for itself. There was nothing in the public interest that required it.

The Tribunal’s findings
As we found above, the system of pre-title negotiations and advances was operated in a manner that was clearly in breach of the Treaty. This breach was compounded by the way in which the Government wound up the system and
resolved its negotiations in the 1880s. There was no fair and independent inquiry into the advances, many of which were of a dubious character, especially as a pretence to have committed communities of owners to sell particular blocks of land. Nonetheless, while admitting that the system had been inefficient and wasteful, and possibly (with agents like Young) close to fraudulent, the Government of the day insisted on recovering as much of its advance payments as it could in either cash or land. It also insisted, where it suited the Crown’s interests, on holding communities to the completion of purchases important to its interests. Further, it allowed private purchasers like Graham to do the same, manipulating the system to secure the desired results. Finally, the Crown repudiated the system in principle in 1879 but allowed a modified version of it to operate in the 1880s, making advances against land (especially during protracted hearings) and preserving its power to do so in 1883, while rightly making it illegal for private purchasers to do so. For these reasons, we find that the Crown acted in breach of the principles of partnership and active protection.

We note also here the Crown’s argument that some of its practices appear ‘unsavoury’ or immoral from a present-day perspective, but were considered acceptable in the nineteenth century. We found no evidence that the system as outlined above was acceptable to Maori in the nineteenth century, and nor was it consistent with the Treaty. It had many critics among nineteenth-century politicians and commentators. As Dr Ballard notes, the standards of active protection were known and publicised by nineteenth-century officials, but the policies that they chose to follow were inconsistent with those standards. The system of pre-title negotiations, advances, incomplete leases, and non-payment of rent – and its resolution by the ‘completion’ of purchases, or the recovery of advances in cash or land – was designed to lock up Maori land, prevent the development of a runholder–leasehold economy, and to obtain as much freehold land as possible (at monopoly prices) for the Crown. Its design and operation were in breach of publicly admitted standards of active protection.

Nor did the Crown act in the scrupulously honourable manner that its citizens were entitled to expect. Thus, the Crown’s actions breached the Treaty principles of partnership and active protection, and the Crown’s duty to act honourably and in good faith.

We turn next to the system of purchasing largely in vogue after 1879, involving the purchase of individual interests after the court had awarded title.

**Purchasing individual interests after title determination**

**Was the system of purchasing individual interests after title determination in breach of the Crown’s Treaty obligations?**

Most purchasing before 1879 relied on pre-title advances. There was some dealing, however, with individuals who had obtained titles before the court’s suspension in 1873, under the 10-owner rule (see chapter 9). This kind of purchasing became predominant in the Central North Island from the 1880s, and was the major means by which Maori land in this region was eventually transferred to the Crown in the nineteenth century.

The purchases conducted from owners with titles obtained before 1873, when 10 owners were supposed trustees for their hapu or iwi, have been found to be essentially individual purchases by previous Tribunal inquiries. As we discussed in chapter 9, the 10 named owners were not legally required to be trustees for their wider hapu communities. They effectively sold as individuals. There was no declaration of trusts for hapu, and no opportunity for Maori to seek a tribal title first and then engage in detailed planning and management of their land.\(^{281}\)

The Crown purchase of Tahunaroa 1 is an example of purchases conducted under conditions where the Crown was able to deal with individual chiefs named as ‘trustees’. In that case, the Government agent purchased the interests of three individual chiefs who were listed as among the 10 owners named on behalf of a broader community of owners. The chiefs involved were apparently not resident
on the block in question, but were able to sell land without regard to the wider hapu. No collective decision to sell was required, even among the 10 named owners. Nor was the purchase agent required to consider those named on the certificate of title as trustees for their wider community, even though the inclusion of a signature that was not one of the named 10 indicated his understanding that there were clearly other interests in the block.

The purchasing of shares once title had been determined became much more prevalent from the 1880s, under the form of title granted through the Native Land Act 1873. We have explained this Act in detail in chapter 9. Here, we note that it required all owners to be listed in a memorial of ownership issued by the court. Technically, no alienation was possible without the agreement of all the individuals involved. In practice, purchasers were able to go through the list and gradually pick off the interests of each owner without reference to the group as a whole. The Act also enabled the Crown to apply to the court for a definition of its interests in blocks where it had begun transactions. The Crown’s ability to apply for partitions was strengthened under the Native Land Act Amendment Act 1877, which enabled it – where it had purchased the interests of some of the owners – to apply to the Native Land Court to have its interests defined as portions of land and partitioned out of the block. From 1878, for all but four years (from 1882 to 1886), any private purchaser could also apply to have their interests defined and partitioned.

As more land in this region came before the court from the early 1880s, the system of purchasing individual interests from ownership lists and then, as necessary, partitioning them out, became the predominant means of purchasing. By this time, the Crown had also abandoned entering lease negotiations as a means of starting transactions for Maori land. At the same time, this system of purchase was used to ‘complete’ old, pre-title negotiations.

This system of purchasing involved land purchase agents obtaining a list of owners from the court. They would then calculate what an individual share represented in acres, based on the size of the block and number of owners. Blocks of land were identified as suitable for purchase as they passed the court. The Government would set a maximum price to be paid for such blocks, and this was also calculated as a price per acre. Purchase agents would then use the list of owners to calculate a nominal value for each individual ‘share’ in the block. This was based on the number of individuals, the acreage of the block, and the price as agreed by officials. At times, agents also had to take account of any court decision about relative interests, where such had been determined. Otherwise, all individuals were presumed to have equal shares.

While these calculations were proportionate to the numbers of owners, the acreage, and the price the Crown was willing to pay for a block, they represented a nominal price only for undefined areas of land. They did not have to be related to any particular, defined part of the block on the ground, the quality of any part of the block, or any resources on the land. In many cases, purchasing of shares took place before these issues were legally determined, although both owners and agents might well have their own ideas of what lands an individual’s shares represented. Having decided on an individual share price, the agents were then free to seek out each owner and negotiate to pay them for their ‘share’ of the block. The agents could seek out all individual owners and buy up all shares, and therefore the whole block, or they could buy just some shares and seek to use this strategically to claim areas they particularly wanted, getting them defined and partitioned out for the Crown by the court.

With a list of owners obtained from the court, purchase agents could also prepare a programme designed to target those individuals first who were thought likely to be most cooperative or vulnerable in selling their shares. This could be for a range of reasons. There were owners who were no longer resident on a block and who therefore might wish to gain cash to protect other lands. There were also people who felt their interests in the blocks were small and therefore not worth keeping (including those put into titles out of ‘aroha’, with less attachment to the particular land). Most significantly, perhaps, there were people known to
be in debt. Some of them were already committed because of advances in the 1870s, or were in pressing need of cash for major expenses such as a tangi or survey fees. Others might be known to be keen to sell in the belief that they still retained significant other lands, and selling for cash might provide a fund for investment in these. For all these reasons, there were owners considered ‘willing’ to sell, who would give the Crown at least a foothold in a block.

Agents were also able to target minors and seek to have trustees appointed for them who were willing to sell. The opportunities for this were greatly strengthened from 1877, when powers under the Maori Real Estate Management Act were expanded to enable officials such as resident magistrates, native officers, Native Land Court judges or even land purchase officers themselves to be appointed as trustees for minors. This only required formal confirmation from the court for appointment, and trustees could then alienate the interests of minors to the Crown.\(^{286}\)

Once the most likely shares were acquired, agents – especially with the protection of a monopoly – could then wait and target individuals as they got into financial difficulty, moved off the block, or otherwise became more likely to sell. This process could take months or even years in some cases, while agents continued to acquire shares until they believed they had sufficient to partition a worthwhile area for the Crown or that they had acquired the lot. As they began to acquire a significant number of shares in a block, they could also use this to pressure other owners to participate in the purchase or possibly risk even more debts and a lower share price as the block became less potentially useful.

Agents were assisted with this by the risks and expense faced by non-sellers each time one or some of their co-owners sold their interests. First, they had to go to court and battle the Crown over where their interests would be located, and over retention of particularly valued spots or taonga. Secondly, where the court ordered a partition of a block between sellers and non-sellers, the non-selling parties were usually expected to pay part or all of the costs of the partition survey.\(^{287}\) In some cases, as in Pukahunui

In 1881, non-sellers were forced to meet the entire cost of the Crown's interests being partitioned out.\(^{288}\) More commonly, non-sellers were faced with the costs of surveys of their portion of lands in a block, even when transactions had been initiated by others and they wished to have no part in them. Surrounded by repeated partitions and sales, they ran a real risk of being left with small, landlocked and uneconomic parcels of land saddled with survey debts, and this too left them vulnerable to having to at least take cash sums for their shares.

In other cases, agents might offer a higher cash payment in some circumstances to ‘mop up’ the most reluctant but sometimes strategically important owners. As previously noted, agents were also able to manipulate the price paid per share within the overall price set for a block, so that while they paid as little as possible per share on average, they could create a ‘surplus’ from which to entice more reluctant sellers. Similarly, when it came to having the Crown's share defined and partitioned, there was pressure on agents to claim that those who sold had the greatest interests in resources and locations most valuable for the Crown.

We received considerable evidence of the way this purchase system worked in this inquiry region. We have noted in chapter 9 that Maori owners faced considerable debt in taking their lands to the court to gain a title that they hoped to be able to utilise. There is evidence in the Central North Island that purchase agents were expected to take advantage of those known to be facing heavy costs or hardship, not just as a result of the court process, but also as a result of natural disasters or crop failures or just the necessity to secure shares in various blocks. In 1886, for example, Crown agents took advantage of the costs of an important tangihanga to commence its purchase of Pukeroa–Oruawhata, the site of Rotorua township, and also of the extreme hardship created by the eruption of Mount Tarawera to acquire land at Rotomahana–Parekarangi.\(^{289}\) The targeting of interests in this way was supported by Native Department officials. For example, Under-Secretary Lewis advised at the time of the eruption that:
The Government desire in the interest of the Natives as well as of the Colony to take advantage of [the] present opportunity to acquire for the Crown the large Blocks of Land containing Thermal Springs and that are not immediately suitable for Native occupation.  

As noted, Ms Rose, Mr Macky, and Mr Stirling all describe instances in this region where extra or discretionary payments were made to particular chiefs explicitly in exchange for encouraging members of their communities to sell, to not contest title or partition hearings, or to cease obstruction of surveys. Mr Stirling notes that, while this was contrary to the policy of the Native Department, the individual purchase system gave land purchasers enough latitude to allow them to pay bonus payments to chiefs which were recorded on accounts as 'contingencies'. Another tactic was the making of reserves in particular blocks, or the granting of favourable terms to repurchase land for particular chiefs, in exchange for their assistance in acquiring the signatures of others. Mr Stirling, in describing land purchasing by Grace in the 1880s in Taupo, notes several instances where he made 'bonus payments' to chiefs to encourage others to sell. As Grace told the Tauponuiatia royal commission:

in the exercise of his discretionary powers as a Land Purchase Officer, he has always considered himself empowered to make such payments under the head of 'Contingencies', provided he does not exceed the price per acre authorised by the government to be paid for the land; that he has on several occasions exercised this power; and that these payments, appearing in his accounts under the head of 'Contingencies', have never been questioned by the department.

The practice also occurred in Rotorua. Ms Rose argued that the Crown paid the Ngati Rangitiki chief, Tarakawa, after he requested payment for overcoming opposition from others who had opposed sales at a tribal hui. The land purchase officer was not slow to take advantage of Tarakawa's willingness to cooperate. Gill noted that he would be 'of further use to me when the land comes before the Court for ascertaining the Crown's interest.'

We also received evidence of purchase agents targeting non-resident owners. In 1898, for example, 146 Ngati Rangihi petitioned Parliament in relation to Ruawahia block, protesting the Crown's purchasing in 1897–98, when it had purchased the interests of 50 to 60 owners out of 380. They argued that those who had sold were not living on the land and were living among other hapu, or were 'half-castes' not living as Maori. Patrick Sheridan, head of the Native Land Purchase Department in 1880 instructed that purchase should continue nonetheless and, despite further protests, it did.

Legal provision for the protection of minors' interests was also used by purchase agents in this region to secure shares. This included agents who had Maori wives and children. In various Taupo blocks, land purchase officer William Grace used his family connections to Tuwharetoa to get family members who were minors placed on ownership lists, with himself appointed as trustee for them, or to have their shares increased by purchasing survey liens on their behalf. This made his own partition and acquisition of these interests relatively easy. In Tapapa in 1886, William and John Grace also purchased the interests of minors on behalf of the Crown from the court-appointed trustee, their brother Lawrence Grace.

William Grace also continued old tactics in the 1880s of paying storekeepers for food for Maori and then treating this as debt to be repaid by selling shares in land. The system of targeting selected individuals to push through sales of shares in particular blocks, and then seeking partitions, was implemented with considerable success by Richard Gill, operating in Rotorua in the 1890s. He secured partitions of many of the important blocks in which purchasing had taken place in this decade, including Rotomahana–Parekarangi, Pukeroa–Oriwhata, Whakarewarewa, Okohiki, Patetere South, Maraeroa Oturoa, Mangorewa–Kaharoa, Pukaingataru, Ngati Pahiko, Tahunaroa, and Ruawahia.
The effectiveness of this systematic approach of purchasing individual shares and strategic partitions is evident in strategically important areas such as Rotorua township, where the Crown purchased individual interests progressively in batches between 1889 and 1910, at which point it exercised its rights under a new Thermal Springs Districts Act to compulsorily acquire the shares of the 10 owners who were still holding out.\textsuperscript{300} This piecemeal approach took advantage of the hardship faced by individual owners deprived of income from the township leases.

Partitions were not just carried out by application from the Crown. In an effort both to protect lands and to gain a defined area of land that could actually be used for an economic purpose, Maori also began seeking partitions themselves, as we have noted in chapter 9. The Native Land Court Act 1880 enabled an individual owner to apply to have his or her interests partitioned out, and powers to do this were extended in a series of amendments. This offered the potential to partition out pieces to sell to pay debts and then to retain the rest for purposes such as a family farm. However, as numbers of owners grew rapidly, partitioning out economic areas of land became increasingly difficult and uneconomic. Many were also increasingly crippled by the costs of survey and litigation involved, making them more vulnerable to pressure from agents. These individual efforts could also be undertaken outside community control or long-term planning, effectively undercutting other longer-term efforts to develop and use the lands. There were no effective mechanisms for communities to devolve lands to some of their number for purposes such as farming, while maintaining security over the land, until the provisions for incorporations were finally enacted in 1894, just a few years before the century ended.

As we commented in chapter 8, the system of purchasing individual shares and partitioning out interests to support this has been considered in some detail by other Tribunal reports and found to be generally in breach of the Treaty. The Turanga Tribunal found, for example, that a key Treaty breach lay in the creation of a ‘virtual’ individual title, enabling land purchases to be conducted from individuals with a new right to sell their undivided paper interests in a block. It was, however, a fundamental principle of the Treaty that alienations should be made by those who actually possessed and had authority over the assets at stake – the community of owners. The native land regime was therefore ‘destructive of community decision making in respect of alienation and land development’ and it undermined the ability of community leaders to involve their people in community planning over lands.\textsuperscript{301} Also, the empowerment of absentees to alienate their interests in the community’s lands – giving the Crown a foothold and enabling it to force partitions – was antithetical to the way in which Maori held and managed their lands. In these two very fundamental ways, the system of purchasing individual interests was the antithesis of what Maori had been guaranteed by the Treaty.

The \textit{Hauraki Report} has commented in some detail about how the nineteenth-century purchase process, based on acquisition of paper shares, effectively undermined or destroyed community control and decision-making over lands, while leaving individuals open to pressure to sell their negotiable signatures outside the protection of their communities. In that sense, it reflects well on no one that the Crown permitted itself to (and did) bribe some Maori leaders to use their mana to persuade others to sell. While Maori society allowed for individuals or families to have use rights over areas of land, the power to alienate outside the community had always lain with the community acting through its rangatira. Selling an interest in land without reference to the wider community who had interests in it was a construct imposed through the Native Land Court. The piecemeal acquisition of interests on the basis of this was not a reflection of true majority decision-making over the land, or a true expression of freedom of choice for the community owning the assets. Rather, it was a manipulative process suited to the interests of purchasers.\textsuperscript{302}
Beside that fundamental breach, we add the many ways in which individuals often found themselves with little choice but to sell their signatures. Despite its much-vaunted emphasis on the rights of the individual, the new system in fact destroyed chiefly and community control without truly empowering most individuals in its place.

The *Hauraki Report* also found that the desire to retain collective control over alienation of lands was not contrary to economic development. Rather, it could have left Maori better able to balance economic advancement with social stability.\(^{303}\) It was certainly tried. When land was brought to court, tribal leaders sometimes tried to set aside some for immediate alienation (possibly sale) to meet expenses, some for long-term protection and the use of the community, and some that could be used for commercial purposes, involving some element of risk. These efforts were consistently frustrated and undermined. The ability of purchase agents to target shares without reference to the wider community or the stated wishes of the majority of owners was supported by the many legislative provisions and amendments passed during this period, which by the 1880s were ‘scarcely intelligible’. Leaders soon found themselves ‘hopelessly confused, caught up in heavy costs and obliged to sell much more land than they had intended’.\(^{304}\)

Unable to effectively participate in new opportunities and gain an income other than by selling their shares, it was hardly surprising that many individuals sold their signatures for cash to meet pressing needs. In addition, while some Maori voluntarily entered transactions, it is also clear they were caught up in selling more lands than intended.\(^{305}\) The *Hauraki Report* found that ‘it is inappropriate for the Crown, having created a system that permitted individual dealing in undivided interests to blame individual Maori for using it for short-term economic survival’. This is why Maori leaders ‘increasingly demanded a restoration of community control, even while they themselves were caught up in individual transactions’.\(^{306}\)

These findings are applicable in our own inquiry district. Numbers of Maori in the Central North Island did sell land by either individual or collective decision, as a positive effort to begin participating in new economic opportunities. There are examples of land being sold to buy flocks of sheep or to rationalise holdings for farm purposes. However, the purchase system meant that in many cases, even while they set land aside to run flocks of sheep and to farm, the nature of their ‘virtual’ individual titles and the aggressive and targeted purchasing by agents meant that shares in the land were already being acquired. Before they could gain an income, they were faced with new survey and partition costs. Weighed against this, there are also many more examples of land being sold to relieve pressure of debt, and to meet other pressing expenses related to basic consumption, traditional obligations, economic hardship, and the survey processes of the Native Land Court.\(^{307}\)

The eruption of Mount Tarawera in 1886, for example, was a major event in the history of Rotorua which caused financial hardship not just for those Tuhourangi and Pikiao affected, but also for their Arawa kin who supported them, reducing their tourism income and making all of them more vulnerable to pressure to sell shares in land.

The claimants, however, also alleged that there were features of the system particular to, or particularly important in, the Central North Island. First, the Crown’s implementation of monopoly powers over much of this region made the system more coercive in practice there than elsewhere. It left Maori with no other option in dealing in their lands and resources than to sell their individual shares to the Crown. This gave agents an added advantage in purchasing interests piecemeal, as over time the owners found that they had little alternative but to sell. Secondly, the system of purchasing undivided shares and then partitioning enabled the Crown to target important natural resources and taonga on blocks, which communities did not wish to alienate. As it became evident that much of the land in this district was marginal for farming, these natural resources (especially for tourism, but also for traditional subsistence) were all the more important to their survival. This included, for example, many of the geothermal and freshwater springs identified as immediately valuable for economic purposes in many parts of this region. It is notable...
that, as this system of purchasing individual interests succeeded the pre-title negotiations of the 1870s, the Native Minister, Rolleston, instructed that ‘no land with hot springs or other natural features of great interest’ should be abandoned by the Crown.\textsuperscript{308}

To illustrate the effectiveness of this process of purchasing individual shares and then partitioning to target important resources, we look briefly at the examples of Whakarewarewa, Hamurana Springs, and the township joint ventures.

\textbf{Whakarewarewa}

The Whakarewarewa thermal valley was an area of traditional importance to local iwi and hapu, and by the 1880s it had also become an important tourist attraction, with substantial benefits for the Ngati Wahiao, Tuhourangi, and Ngati Whakaue people. This will be referred to in more detail in chapter 15, where we discuss tourism opportunities. We have already discussed the title investigation of this area in chapter 9, where it became evident with a lengthy title investigation and rehearing that it was not possible to easily separate interests in these lands and taonga into individual or even hapu interests. The court awarded title to lists of owners for six hapu, three of Ngati Whakaue (Taiotu, Hurungaterangi, and Te Kahu) and three of Ngati Wahiao (Huarere, Tukiterangi, and Hingaroa), but without resolving how their interests could be separated. This was followed by a 10-year process of rehearings and partition hearings, trying to divide the block between these groups. All the individuals concerned were still owners with undivided, undefined interests in the 1890s, when the Crown began purchasing.\textsuperscript{309}

The Government was eager to acquire the hot springs in the valley at Whakarewarewa, as these were identified as an important tourism asset critical to the development of the township and the region. In the years following the original title investigation, Government officials recorded a series of offers from groups or individuals within Wahiao and Whakaue to sell shares in the block. At the same time, they noted proposals to lease rights to a private party to charge a toll on admission to the springs, as well as a substantial number of protests that offers of sale did not represent the communities of owners involved. Following usual practice by this time, Native Land Purchase Department officials declined to pursue purchase of the block until after the title was secure enough to begin. It originally hoped to encourage the iwi to vest blocks which they collectively wished to sell in a few individuals to make sale easier, but this did not eventuate.

Once individual titles to three subdivisions of the block had been settled in late 1893, the Government immediately began seriously pursuing individual shares without any attempt to gain collective consent over the springs. Sheridan, head of the Native Land Purchase Department, instructed purchase officer Gill to ‘Take any signature offering without waiting for general consent.’\textsuperscript{310} Officials were well aware of the court finding that the block containing the springs was collectively owned and indivisible, but Gill nevertheless began approaching individuals to purchase shares sufficient to gain all three of the Whakarewarewa subdivisions. This approach provoked protest from tribal leaders. Rehare Heretaunga, Te Katene Paora, and 24 others wrote to member of Parliament and former Premier Robert Stout in 1895:

\begin{quote}
We have seen the speech made by the Premier of the House of Parliament stating that in a very short time he would have his two feet in Whakarewarewa, and we have also seen a notice published in the Government Gazette notifying and applying for the Crown’s interest in Whakarewarewa to be cut out. This is the reason that we are troubled and we now turn to you to ask this question. By what law is the Government empowered to subdivide our land, and what empowers them to take the part that they want? And give us the persons who did not sell their interests to the Crown that portion which it likes, as a substitute for our homes which we have held for ages?\textsuperscript{311}
\end{quote}

This protest was ignored.\textsuperscript{312}

Between 1893 and 1895, Gill acquired interests calculated as equivalent to 747 acres of the 871-acre Ngati Whakaue award of Whakarewarewa 1, two interests in
Ngati Wahiao's 57-acre Whakarewarewa 2, and 32 interests in the 215-acre Whakarewarewa 3 block (held in common). This amounted to 157 of the 215 acres in Whakarewarewa 3: 9/206 of the Wahiao shares, and almost two-thirds of the Whakaue shares. At a hearing in 1895, Gill, on behalf of the Crown, applied under the Government Native Land Purchasing Amendment Act 1878 to have land equivalent to these undivided shares defined and partitioned out.

The critical question before the court was where in each of the subdivisions of the block the interests acquired by the Crown and those belonging to non-sellers would be located. There was fundamental disagreement between the Crown on the one hand and a relatively united body of Ngati Wahiao and Whakaue non-sellers on the other, about how the partition should be made. Gill was adamant that the non-sellers should be given their houses, cultivations, and land around them, and that the Crown should take from the rest, which included all the most important geothermal features. Non-sellers, such as Hipirini, argued that they had not alienated their shares in the thermal features and therefore they should not be deprived of their access to them and to the tourist revenue that they generated. Gill, in turn, claimed that the majority of shares purchased and most valuable were those of Ngati Whakaue and, as they owned the majority of the block containing the springs, the Crown should get the thermal features. Gill also described this proposed subdivision as removing what was seen as the nuisance of Maori charging tolls to enter the area, because 'the whole of the attractive part of Whakarewarewa will fall into the hands of the Crown.'

The court, without giving explanation, found in favour of the division proposed by Gill.

Gill immediately recommenced purchasing and between 1896 and 1901 purchased and partitioned an additional 19 acres of Ngati Whakaue shares in Whakarewarewa 3 and 36 perches of Wahiao shares, as well as further portions of Whakarewarewa 1 and Whakarewarewa 2. In 1902, a further award of 36 acres was made in favour of the Crown. By this time, the Crown had acquired 90 per cent of the block's three subdivisions by a lengthy process of attrition. Hamuera Walker Mitchell, in his submission before us, conceded that 97 per cent of the sellers had been Whakaue, but argued that this was also partly a reflection of the fact that they were awarded the predominant interest in the blocks.

Whakarewarewa is a particularly clear and well-documented example of how purchasing of undivided individual shares over a lengthy period, with use of strategic partitioning, could completely undermine the collective wishes of iwi to maintain control and possession of important taonga. In this instance, while even the Native Land Court recognised the practical impossibility of fairly dividing such a taonga into individualised shares in land, the title it conferred was nevertheless able to be used to calculate 'virtual' individual shares and then purchase them, followed by strategic partitions to acquire the treasured resource. This was carried out under Government direction and in the full knowledge of how important this asset was to the local communities claiming it.

Hamurana Springs

The evidence produced by the claimants' historian, Ms Rose, indicates that this same purchase process was used to acquire what was identified as a likely important tourism attraction, the freshwater Hamurana Springs (Mangorewa–Kaharoa 1). As we described in chapter 9, in 1881 the Native Land Court granted title to the 43,000 acre Mangorewa–Kaharoa block, which included the Hamurana Springs. The list of owners contained the names of 386 individuals from 28 hapu of Ngati Rangiwhewehi. Gill began seeking to purchase individual shares in the block in April 1895. He pursued the purchase despite having been told that there was division among the Ngati Rangiwhewehi owners – between a committee of resident owners who wished to retain tribal management and control of the lands, and predominantly non-resident sellers. Gill acquired shares in the block over an eight-month period in late 1895 and early 1896 from individuals, many of whom were not resident on the block.
It is clear from the correspondence between purchase officials Gill and Sheridan as the former was preparing to begin purchasing in Mangorewa–Kaharoa, and that it was the Department's intention that at least part of the desirable lake frontage be purchased. Gill informed Sheridan in April 1895 that the block ‘has over 4¾ miles of frontage to Rotorua Lake and takes in many places of great interest to Tourists’, and consequently recommended that the price offered for the block be elevated to five shillings per acre, ‘although parts of the block are worth more than 5/-’. Gill informed Sheridan that in terms of allocating reserves to the non-sellers, he would ‘do what is fair and just’. Sheridan instructed him to ‘take care that the eyes are not picked out of the block’ during the allocation of reserves.

As in the Whakarewarewa case, Gill was able to exploit the individualisation of title to target resources on the block for acquisition, including the Hamurana Springs. During 1895, he purchased the shares of 141 individuals, a number of whom now lived outside the area. In August 1895, Ratana Te Kapaiwaho and 29 others petitioned the Land Purchase Department, asking for Gill to stop purchasing in Mangarewa–Kaharoa until ‘the subdivision cases are finished and the divisions and boundaries according to their ancestral rights are made and laid off between each Hapu which then is the proper time for the Crown to pay moneys to persons in that block.’ The owners had applied for a partition hearing in the Native Land Court and Gill agreed, planning to have the Crown’s interest subdivided at the same time.

At the partition hearing in February 1896, Gill claimed that the Crown’s entitlement in purchased shares was now equivalent to 14,197 acres, including a large part of the lake frontage and the Hamurana Springs. Patoromu Ngamanu objected to this, saying that it was agreed between the sellers and non-sellers that the Crown should have the back of the block and not the lake frontage. Gill responded that he ‘was not consulted and am no party [to] such understanding.’ Patoromu further noted that the area the Crown was claiming was ‘absorbed by private claims’, and that others would protest if Gill pursued this claim. Gill stated that it was the Crown’s ‘right’ as purchaser to have a large block which was not broken into small sections. The question of having the Crown allotted the less valuable back part of the block, as per the apparent wishes of the sellers and non-sellers alike, was not entertained by the court or by Gill. Ngati Rangiwhewehi were forced into a position of trying to claim back small sections of the frontage which had their habitations, cultivations, and urupa. Although the claimants attested to a long history of cultivation in the area of the Crown entitlement, they had relatively few cultivations by 1896, which enabled their objections to be ignored.

Even if Gill was aware of the ‘understanding’ referred to by Patoromu Ngamanu, it seems clear that there was no realistic mechanism by which Ngati Rangiwhewehi hapu could collectively decide what land to sell and what land to retain. This problem was embedded in the practice of individual purchasing, which allowed the purchase of undivided interests piecemeal from owners, leaving the question of what that constituted on the ground to be decided by the court. Gill and Sheridan’s correspondence makes it clear that Gill began purchasing in the block in the face of considerable opposition from groups of owners, and focused his attention on purchasing the interests of non-residents. The strategic use of applications for partition then enabled the Crown to pre-empt any attempt by the owners to first have their interests defined so that they could decide what to sell. As a result, non-sellers were left in the position of trying to claim back slivers of land from the Crown, rather than entering into any serious discussion about where the Crown’s entitlement should be located. The court’s minutes record Gill’s response to Patoromo’s objection to the Crown entitlement as: ‘I decline the offer of Patoromo’ [sic].

The acquisition of Hamurana Springs through purchasing in the block seems to have been part of Gill’s object, as one of the resources likely to be useful for tourism, although it is not explicitly identified as such in the correspondence with Sheridan. Once the springs were found to be on the block in question, they were clearly one of...
its tourist attractions, along with the lake frontage that had been identified as desirable for the Crown to obtain. Shortly after the 1896 hearings, Gill described the newly acquired springs to Sheridan as ‘one of Rotorua’s show places, for seeing which a toll has been collected for some years past’.

The annual report of the Department of Lands for 1896 recorded the purchase of the springs, ‘together with a considerable area [of land] around them,’ and noted that ‘These springs are the source of attraction of tourists, and their acquisition will do away with the tolls hitherto charged.’

In February 1897, the Appellate Court heard the complaints of a number of Ngati Rangiwhewehi about the inclusion of Hamurana Springs in the Crown’s purchase award. The claims were based partly on the loss of fishing grounds, and partly on ancestral connection with the springs. The evidence given to the court suggests that the various hapu involved had yet to decide amongst themselves who had the rightful claim to ownership of the springs. Matenga Te Waharoa contested a comment of Gill’s that the owners would ‘suffer no injustice’ by losing the springs to the Crown, responding that the Crown, likewise, would suffer no injustice by the springs being retained by the owners. ‘Why should Mr. Gill be so anxious to get the spring? Is it to secure revenue from them? If so, I object to that agreement.’

The court accepted claims that the springs belonged to ‘the descendants of Kahawai and Maka,’ despite also acknowledging that there was significant disagreement from those attending. The court also upheld the Crown’s claim to the springs on the grounds that Gill had purchased most of the interests of the now relatively few descendants of Kahawai and Maka, and had purchased some interests of individuals belonging to the several hapu requesting the return of the springs. The court awarded some small allotments of land in the vicinity of the springs, containing cultivations and urupa, to various individuals, with the proviso that ‘this award carries with it no rights over Hamurana Springs or the approach thereto up the Hamurana Stream.’ The court appears to have taken Gill’s view that the individuals who dwelled near the springs had recently shifted there from elsewhere for the purpose of ‘reaping the advantage of the tourist traffic,’ and thus had no true claim to the area on the grounds of ‘occupation.’

Ngahihi Bidois and other claimants in our inquiry offered evidence that the springs as a resource were held tribally and should not have been alienable by individuals or sections of owners. They added that, within this context, to consider the springs as belonging to a single hapu with contiguous boundaries – the model relied on by the court in the partition hearing – was not an accurate representation of customary rights. Had the land laws allowed for tribal management of lands containing such significant tribal resources, the springs may not have been lost to the greater Ngati Rangiwhewehi community.

The loss of the springs to Ngati Rangiwhewehi was the consequence not just of the Crown’s policy of purchasing from individuals, but, as we have noted in chapter 9, the failure of the Crown to provide a form of title that adequately recognised the tribal nature of taonga such as the springs. We note the findings of the Native Appellate Court on the partition of the block that the ‘the Crown is entitled to have its area allotted in one piece even though this may interfere with the special rights of particular hapus or families.’ In effect, the system that was imposed on Central North Island Maori of scattered individual shares in land was recognised as just as potentially awkward for the Crown. While the court felt able to try and rectify this problem in awards to the Crown on the basis of its claimed purchases, there was no such recourse for the owners.

The Crown agreed that Hamurana Springs does highlight the problems of the system of purchasing undivided shares. It submitted that this case can best be described as an ‘opportunistic’ purchase, and conceded that ‘there was some targeting of key Maori-owned resources.’ Counsel also submitted, however, that the claimants generally overstate the extent to which quality land was targeted and acquired by the Crown. The evidence is clear that in this case the Crown did follow a pattern of identifying important resources and seeking to acquire them by
purchasing individual shares and then obtaining them in its partition award. This may not have been quality land in a farming sense, but the resource was clearly identified as being potentially important and already in use for the growing tourism industry. The case illustrates how in fact, the Crown was able to use the process of purchasing shares in land and strategic partitioning to target identified lands and resources with some precision.

Townships
We have already referred to another initiative in the Central North Island in the nineteenth century, which was the establishment of townships on Maori land in cooperation with the Government, with an emphasis on encouraging settlement through leasing land, as Maori preferred. These initiatives from the 1880s (Rotorua township) and the mid-1890s (native townships under the 1895 Act) recognised that, in parts of the interior of the region, there was some reluctance by settlers to take up lands. Establishing and formalising townships was considered to be a means of encouraging settlement. In the Central North Island, this began with Rotorua township, following the Fenton Agreement and the Thermal Springs Districts Act (see chapter 6). In the mid-1890s, the Liberal Government began a new system of native townships, two of which, Tokaanu and Rotoiti, were proclaimed in this region.

In our view, these townships require more detailed research and consideration beyond the scope of this present inquiry. However, we note that in terms of nineteenth-century land alienation in this region, claimants have alleged that in practice these townships also turned into a means by which the Crown was able to acquire lands and resources of identified importance in the region. This involved the transfer of lands in townships for public purposes such as roads and public reserves, and key taonga of use for tourism, such as thermal springs, to the Crown. These remained in Crown ownership even after the townships failed as leasing ventures or, in the case of Rotoiti, did not ever get started. The Crown also began targeting lands in Rotorua township for purchase through the system of buying up individual shares in land. Most of the Maori land in the township had been purchased by 1894. It was a sad end to the anticipated mutual benefits of the Fenton Agreement.

In Tokaanu, the Crown turned some original leases into perpetual leases from 1910, which were also, on the evidence, set at below market rents. Unlike in Rotorua, however, there was an opportunity for the Maori owners to get sections revested in them if lessees gave up their perpetually renewable leases. While we do not have enough evidence before us to comment in detail on these townships, it seems to us that in general they also reflect the nineteenth-century targeting and purchase process being implemented. In Tokaanu, the Crown was willing to settle for perpetual leases rather than freehold, but the principle was much the same.

Purchase tactics
Tactics used by Government agents to implement purchasing policies included: the pursuit of debt; the aggressive targeting of vulnerable individuals; the leeway within a maximum price to pay extra to some owners, less to others; the manipulation of appointments of trustees for minors; and the deliberate refusal to consider community wishes. All these tactics, while strictly legal, have striking similarities to some of the more dubious tactics used by purchase agents in the widely criticised pre-title negotiations of the 1870s. In some cases, of course – such as the Grace brothers – the same agents were involved. Claimants raised the issue of whether these tactics were compatible with the Crown’s obligations of good faith and active protection.

As we noted above in respect of pre-title negotiations, the Crown submitted that, ‘viewed from today’s perspective’, it is not difficult to identify unsavoury, immoral practices in nineteenth-century land alienation, including Crown purchasing. Purchase officer John Young’s methods are a prime example of this, even if a ‘worst case example’. Other cases are questionable, such as the large number of European traders gathered to take advantage of Gilbert Mair’s payment of moneys for Kaingaroa 1 in 1880.
However, the Crown also asked us to consider these practices by the standards of the time, not by those of today, while some account must also be taken of Maori agency. It was difficult at the time for the Government to closely manage its agents’ activities in a day-to-day sense, but we note that these practices occurred over many years and – on occasion – despite adverse auditor reports. From time to time, instructions were issued reminding agents to deal carefully with Maori and to protect their interests in certain ways. As we noted in chapter 8, the Crown accepted a responsibility to ensure that Maori were fairly and reasonably treated in land dealings from the beginning of settlement in New Zealand. The instructions issued to its purchase agents from time to time recognised this. Further, the evident abuses of the system were a matter of public comment and at times, official inquiry. As Professor Ward notes, ‘political and official bodies had repeatedly not denied but concurred in what Maori were saying.’ This included a succession of ministers such as JC Richmond, McLean, Sheehan, Grey, Bryce, and Ballance, all of whom had admitted ‘much of what Maori were saying’. This included a succession of ministers such as JC Richmond, McLean, Sheehan, Grey, Bryce, and Ballance, all of whom had admitted ‘much of what Maori were saying’. Similarly, commissions of inquiry such as the Haultain commission of 1871, the Hawke’s Bay commission of 1873, and – above all – the Rees-Carroll commission of 1891, had ‘expatiated on the “evils” and “abuses” of the system.’

This supports the evidence of Dr Ballara that: in the nineteenth century, the publicly acknowledged and promulgated standards of official behaviour in land purchasing and the conduct of Maori affairs, were much ‘higher’ than is sometimes acknowledged by historians. That is, many of these publicly promulgated standards were in accord with the Treaty of Waitangi, and with Lord Normanby’s instructions of 1839 to Lieutenant Governor Hobson out of which the terms of the Treaty were constructed. The problem was not that nineteenth-century standards of official behaviour were not based on the Treaty, but that these acknowledged Treaty-based standards were often knowingly breached or ignored by Crown officials.
The Tribunal’s findings
Mr Stirling, in his evidence, reproduces the following findings of the royal commission appointed to investigate the operation of the native land laws in 1891:

For a quarter-century the Native-land law and the Native Land Courts have drifted from bad to worse. The old public and tribal method of purchase was finally discarded for private and individual dealings. Secrecy, which is ever the badge of fraud, was observed. All the power of the natural leaders of the Maori people was undermined. A slave or a child was in reality placed on an equality with the noblest rangatira (chief) or the boldest warrior of the tribe. An easy entry into the title of every block could be found for some paltry bribe [advance]. The charmed circle once broken, the European gradually pushed the Maori out and took possession. Sometimes the means used were fair; sometimes they were not.

The alienation of Native land under this law took its very worst form and its most disastrous tendency. It was obtained from a helpless people . . . The strength which lies in union was taken from them.

We see little reason to dissent from these findings, which were arrived at more than a hundred years ago. Sometimes the tactics were fair, sometimes they were not, but the system was profoundly wrong. It disempowered the iwi and hapu of the Central North Island, took the ‘strength which lies in union’ from them, and turned their tino rangatiratanga into a virtual, saleable, individual interest. This was a very serious breach of the terms of the Treaty and of the principles of partnership, autonomy, and active protection.

On the basis of the evidence available to us, the resultant land purchase system deprived Central North Island Maori of their tino rangatiratanga without their meaningful consent. Tribal communities, acting through their rangatira and their komiti, sought to preserve their Treaty-guaranteed authority to manage and, if they so chose, alienate their lands and resources. They wanted to engage with settlement by leasing, a practice which was both possible and viable in the nineteenth century. Instead, individuals were given the power to sell a paper title – and there was little else that they could do with it in this period, especially under the Crown’s various monopolies. The fundamental basis of this system was in breach of the Treaty. It follows, in our view, that every purchase conducted under it was necessarily in breach of the Treaty.

In addition, the Crown used tactics that were unfair and dubious, to say the least. Perhaps the most important was its manipulation of partitioning so as to secure tribal taonga and valued sites despite the known wishes of Maori communities, who were, in the finding of the 1891 commission, ‘helpless’ in the circumstances. The practice of buying up individual, undivided, undefined interests in defiance of the community’s wishes, and then partitioning so as to obtain what it wanted on the ground, again in defiance of the community’s wishes, was in breach of the Treaty. We have noted the examples of Whakarewarewa and Hamurana Springs in this respect.

Other tactics included: the use of debt to pressure sales; the manipulation of prices to pay more to those who were holding out and less to early sellers; targeting absentees first or those put into titles out of aroha so as to get a foothold; and keeping prices and owners’ choices to a minimum by imposing monopolies. All these tactics were unfair and in breach of the Treaty. This was especially the case where the debts involved were created by the title system, particularly the costs of surveys and litigation, and by the further costs imposed on non-sellers by partitioning the Crown’s interests.

We find, therefore, that both in its essentials and in various of its features, the Crown’s purchase system was coercive and unfair. It deprived Central North Island Maori of their tino rangatiratanga and their lands without their full, free and informed consent, and without providing a fair equivalent, and it did so in serious breach of the Treaty of Waitangi.

We turn next to the question of whether, in operating this system of Crown purchase, nineteenth-century governments took due care to ensure that Central North Island Maori retained sufficient land and resources for their present and future needs.
Protection Mechanisms and the Purchase of Land

Key Question: Did the system of protections implemented by the Crown for Maori land purchasing in this region in the nineteenth century fulfil its Treaty obligation of active protection?

In the nineteenth century the Crown was a purchaser of Maori land and was also responsible for regulating Maori land transactions generally. While the Crown was facilitating the purchase of extensive areas of Maori land – sometimes under monopoly and at other times in competition with private purchasers – it also recognised some responsibility to implement protections for Maori selling their lands. In this section, we will examine the mechanisms that the Crown put in place to safeguard the interests of Maori involved in land transactions in the Central North Island region.

The claimants’ case

In general terms, claimants contend that the Crown’s duty of active protection meant that it had to safeguard Maori interests in land transactions, and to ensure that iwi and hapu retained sufficient land and resources for their present and future needs. However, the Crown allowed its obligations to Maori to be circumscribed by pressure to acquire their land for settlement. The result was that its protections were inadequate and undermined by later amendments and exemptions, or by half-hearted application. As a result, claimants alleged that the Crown failed to provide genuine active protection. Government was made well aware of Maori concerns about purchasing, but failed to implement adequate protections to meet those concerns. This lack of a coherent system of protection is evident in the uneven impacts of Crown purchasing in this region. Some groups lost practically everything, while others retained relatively more. In the claimants’ view, this demonstrates how capricious the system was for Maori, driven by opportunity rather than a carefully thought-out programme to protect their interests. Claimants further alleged that the Crown failed to properly implement even those protections that were available. This included the systematic provision of adequate purchase reserves, and monitoring to ensure that even minimum areas of land were retained by some iwi and hapu groups.

Claimants alleged that, for example, the Crown failed to adequately implement protections for land at the time that title was determined. There was provision to investigate whether sales of the land would render Maori substantially landless, and the Crown failed to fulfil this obligation. Claimants highlighted a number of cases in the Central North Island which, they alleged, illustrate the half-hearted way in which the court imposed and removed restrictions on alienation and monitored the amount of land remaining to various hapu. While there is little evidence about the work of the trust commissioners in the Central North Island, claimants also alleged that their effect as a protective mechanism was minimal.

The Crown’s case

In general terms, the Crown submitted that it had an obligation to balance its responsibility to provide protection to Maori with an obligation to not unduly fetter Maori in making choices about how they would dispose of their own lands. The Crown rejects the idea that protection mechanisms for Maori in the nineteenth century were inadequate. It contends that the Crown walked a tightrope between paternalistically imposing restrictions on alienation of Maori land that did not exist for general lands, and its responsibility to protect Maori. It was submitted that the actions of the nineteenth-century Crown need to be judged in this context.

The Crown did, however, concede that in Maori land alienations in this region in the nineteenth century it did not meet the minimum standard it set itself in legislation. The Crown agreed that ‘where reserves were created, they were often well below the 50 acres-per-head standard, as
The Crown also conceded that it did not systematically provide for reserves in Crown purchase deeds. The Crown also agreed that insofar as the provision of reserves bears on the sufficiency of land retained by Central North Island iwi and hapu, the experiences of groups in this region varied.

The Crown did not plead specifically on the issue of various types of protection.

The Tribunal's analysis

In chapter 8, we discussed the Treaty principle of active protection of Maori people in their lands. As we noted, it is now well established that the Crown recognised obligations of active protection of Maori from the beginning of settlement. The British Secretary of State, Lord Normanby, spelled out how active protection might be achieved in his instructions of 1839. These required that:

- All dealings with Maori were to be conducted on the basis of sincerity, justice, and good faith.
- Maori were to be prevented from entering contracts over their properties that would be injurious to their interests.
- No land was to be purchased from them that would be essential or highly conducive to their comfort, safety, or subsistence, and purchases for land settlement were to be confined to such districts as Maori could alienate 'without distress or serious inconvenience to themselves'.

It is also well established that this duty of active protection required the protection of a sufficient land and resource base for present and reasonably foreseeable future needs. Many governors and officials referred to the obligation to do so. Such needs included the traditional and cultural practices that Maori might wish to maintain, support of communities in their everyday needs, and the resource base necessary for participation in the new development opportunities expected to arise from the European settlement of New Zealand. Both Maori and settlers were expected to share in the anticipated benefits and prosperity from that settlement. Any assessment of whether the Crown fulfilled this obligation of active protection for Maori of this region requires us to take account of what steps it could reasonably have taken in the circumstances of the time.

During the nearly three decades of the nineteenth century when most purchasing of Maori land took place in this region – from the 1870s to 1900 – it is clear that the Government understood that mechanisms were needed to protect Maori interests in their land dealings. The major protections at this time were implemented through the Native Land Fraud Prevention Act 1870 and the Native Land Act 1873.

The Native Land Fraud Prevention Act 1870 created the office of trust commissioners, part-time officers of the Native Department whose certificate guaranteeing fraud-free transactions was required to complete an alienation of Maori land. The trust commissioners were supposed to ascertain that transactions, sometimes including those conducted by the Crown, were not contrary to equity and good conscience, did not contravene any trusts, and did not include any spirituous liquor or firearms in the payment. Trust commissioners were to consider (among other things) whether transactions were in breach of any trusts affecting the land, that the parties understood the effect of the transaction, and that Maori interested had sufficient land left for their 'support'.

Previous Tribunal reports have found that while trust commissioners had significant responsibilities on paper, their power to protect Maori was limited from the outset. The Turanga Tribunal found that a broad construction of Parliament’s intention with this protection mechanism would have gone a long way towards meeting the Crown’s Treaty obligation of active protection. The questions of whether transactions were equitable and in good conscience, whether prices were fair and proper procedures had been followed, whether consent was properly obtained, and whether Maori were left with sufficient land for their support, were all necessary. The very creation of the trust commissioners showed that it was considered...
possible and necessary to inquire into such matters, and the system could have been administered ‘in a spirit that was genuinely protective’. Their inquiries could also have been ‘resourced for varying degrees of intensity’. However, the evidence available to the Turanga Tribunal indicated that the commissioners were not adequately resourced and that they ‘carried out limited, mainly paper-based checks’. There was ‘no spirit of generosity’ in the way the provisions were applied.  

These findings confirm the views of historians generally as well as much of the contemporary opinion that was recorded about this system. Professor Ward, for example, found that official records showed that many trust commissioners, whether deliberately or inadvertently, passed sales of land where restrictions on alienation had still not been removed. The system provoked widespread criticism from Maori and by the 1880s, when most purchases were being completed in our inquiry region, it also seems to have lost the confidence of important Government ministers. For example, Native Minister Ballance commented in 1886, in the context of proposed improvements to the system of Maori land administration, that ‘it is notorious that the Frauds Commissioners in the past have performed their duties in the most perfunctory manner, and passed transactions when the consideration was a mere bagatelle’.

The evidence in this inquiry on the protective role of the trust commissioners and the Native Land Court in the Central North Island is not comprehensive. However, the evidence we do have suggests a pattern similar to the general one that has been identified for other parts of the country. TM Haultain was appointed trust commissioner for Auckland and appears to have had responsibilities for a very large area, including the Bay of Plenty and Taupo. There is some evidence that he had officials to assist him, but all commissioners were under official instructions not to pursue investigations too rigorously. In the evidence of David Alexander, for example, there was also pressure brought to bear on Haultain not to investigate the lease of the Whakarewa block too thoroughly. We received evidence that some transactions that appeared to breach the terms of the legislation were nonetheless enabled to proceed. Mitchell and Davis still seem to have managed to fall foul of the trust commissioner investigations for some of their transactions even so.

As a result of criticisms of the trust commissioner system, the Native Land Act 1873 provided for some new and additional protections. It provided for a system of district officers to work with Maori right-holders and the Native Land Court, to make preliminary inquiries into customary tribal ownership and to make inalienable reserves of not less than 50 acres per head. One of the purposes of this was to ensure that the court was prima facie dealing with the right people when applications for hearings were filed, and another was to ensure that those Maori alienating lands retained sufficient to support themselves. The Turanga Tribunal again found that this system was sound in theory but ‘[a]s is so often the case, the theory translated poorly into implementation’. The lack of impact of the district officer system is perhaps reflected in the fact that an official inquiry into the Native Land Court 18 years later wrongly believed that no district officers had even been appointed.

A few district officers were in fact appointed as part-time officials for ‘impossibly wide districts’. Samuel Locke, for example, was appointed in 1874 as part-time officer for the area from Hawke’s Bay to East Cape and inland to Taupo. In 1875, he complained of the size of the district he was expected to cover and the travelling required. In 1876, he had given up and was employed as a Government land purchase agent instead. The Turanga Tribunal found that he did succeed in making some reserves in Cook County (around 12 per cent of the land that had passed through the court at the time), but the reserves made were not inalienable so the effect was not long lasting. It also found no evidence that any district officer replaced him for that district.

According to Mr McBurney, Gilbert Mair – then a captain in the Armed Constabulary – was appointed a district officer under the 1873 Act for the Bay of Plenty area from March 1874 until 30 September 1878. This was at a
time when Mair was already acting in his private capacity to negotiate leases from Ngati Manawa in the Rangitaiki and Kaingaroa areas, and it appears that he continued to do so.\textsuperscript{364} He is reported as undertaking a census of the kin group he was negotiating with and discussing the boundaries of some reserves at the same time that he was negotiating a lease in 1874, possibly indicating that he regarded his district officer responsibilities as extending to this area. If so, he was negotiating transactions at the same time as undertaking district officer duties.\textsuperscript{365} Mair then appears to have transferred his lease to the Crown in 1875, again while he was still employed as district officer.\textsuperscript{366} In fact, Mair appears to have been actively involved in paying advances for leases and then beginning a purchase of Kaingaroa block – both in private and in official capacities, and in advance of a title hearing – all while he was still employed as a district officer.

Mair does not appear to have made much of an impact if he was exercising any district officer responsibilities, however, apart from possibly adding to the confusion for Ngati Manawa. The Crown’s historian, Mr Macky, informed us that his research found no evidence of the practical application of the district officer provisions in the Central North Island at all.\textsuperscript{367} The only cases where a district officer has featured in evidence in this inquiry is in relation to accusations of bias on the part of District Officer Mair in the Kaingaroa hearings. These also include allegations that he failed to implement any reserves in this role, even for those Ngati Manawa whom he favoured in negotiations.\textsuperscript{368}

The Native Land Act 1873, in addition to the existing role of the trust commissioners, also directed the Native Land Court to undertake its own supplementary inquiry into alienations whether by sale or lease. Judges were required to satisfy themselves that consideration in respect of a purchase of land was equitable, had been properly received in the case of absolute sales, and that all owners had signed the transfer. The court also had to ensure that translations were adequate and properly certified.\textsuperscript{369} The Turanga Tribunal found that this parallel system of inquiry, but possibly not identical set of duties, caused considerable confusion in practice even among those responsible for administering the provisions. This was added to further when from the 1880s Native Land Court judges were routinely also appointed as trust commissioners.\textsuperscript{370}

While the roles of trust commissioner and district officer were poorly implemented in practice, various other forms of protection provided for in the legislation have also been found to have been poorly translated into practice. The provision of reserves, for example – an integral part of protecting Maori in the retention of sufficient land – was poorly implemented (if at all), with the Crown failing to establish clear practices and requirements for making reserves.\textsuperscript{371} The definition of what constituted a ‘reserve’ for Maori added to confusion. Sometimes transactions were made without regard to reserves, because it was felt that Maori already had plenty of other land that they had ‘reserved’ or retained in their possession. In other cases, land was specifically reserved out of transactions, but it remained customary Maori land with little protection. At other times a transaction might include all land under negotiation and then reserves were ‘granted’ back to Maori in a ‘superior’ form of title, and therefore arguably more useful. There was also considerable confusion, in practice, about whether sufficiency of land should be monitored either at the time of purchase negotiations or at the time when transactions were confirmed.

In practice, we received evidence that when the court made checks about ‘sufficiency’ of land, judges generally relied on the advice of land purchase agents that those involved had ‘plenty’ of lands elsewhere. What they meant by ‘plenty’, and how it was monitored, was problematic. The evidence available for the Central North Island indicates that the major responsibility for considering whether Maori had sufficient land was placed in the first instance on the purchase officers, who were also under pressure to purchase as widely and extensively as possible. For example, the Native Minister, McLean, is reported as instructing George Burton, land purchase officer for Rotorua and Taupo, to purchase as much land as Maori could dispose of ‘without injury to themselves’ through sale, or otherwise
by lease with purchase options. This pressure (and protective obligation) continued into the period of purchasing shares after title was determined, as we have noted in the case of Hamurana Springs.

The 1873 standard of 50-acres-per-head appears to have remained the basis for judging sufficiency for the rest of the nineteenth century. It proved flexible in practice, because, as purchasing of individual interests gathered momentum, it must have been increasingly difficult for agents to be sure who was left with what interests in what block. They appear to have relied on assumptions in many cases that, as people often had interests over many blocks, they therefore always had ‘other’ interests to spare. It was even more difficult to ascertain what the interests meant in terms of quality of land when shares were paper ones, often undivided and not actually defined on the ground at the time of purchase.

In 1891, in providing evidence to the Native Land Laws Commission, TW Lewis (head of both the Native Department and the Land Purchase Department) explained that purchase reserves had become a major feature of Crown protections for Maori by this time. In practice, it was managed largely through land purchase officials. His understanding was that it was part of the role of such officials to monitor Maori land retention when purchases were made. He was confident that the office was well able to do this and that part of purchasing policy was to ensure that Maori retained ‘plenty’ of other land. Lewis gave the example to the commission of how Sir George Grey had stopped all purchasing from Tauranga Maori communities, when it was felt that they had reached an average land retention rate of around 50 acres per head.

Lewis further explained to the commission that as head of Maori land purchasing, he always took care to persuade Maori that holding on to ‘large tracts’ of their own land would be positively disadvantageous to them, as they would ‘remain locked up and unproductive’. Instead, they were encouraged to sell their interests and then the Government would ensure that they received reserves out of those purchases for their needs. Lewis also claimed that such purchasing took some account of the quality of lands. He claimed that if it was known that a Maori individual held only ‘50 or 100 or even more acres’ and it was of fair quality, ‘he would not be allowed to dispose of any of it’. However, under questioning Lewis admitted that purchase reserves actually were calculated in ways that took very little account of the quality of land. They were calculated as a percentage of the area actually sold. In the 1890s this was set at around 10 per cent, so if the individual interests acquired represented 500 acres, then Lewis claimed the Government would ensure a reserve equivalent to 50 acres. This kind of formula was relatively easy for the Government to work out, given its system of purchasing, but it actually bore little relation to the quality of land, the requirements of communities, or to any assessment of their tikanga or development needs.

In response to questions about what policy options existed regarding Maori use of their retained lands, Lewis repeated the general assumption of the time that Maori could easily sell large areas of their lands and still have sufficient left for their present and future needs, because settlement would increase the value of what was retained. He claimed that if Maori sold one-half or even three-quarters of their land, ‘the land retained by the Maoris for themselves would be worth much more in money value than the whole of it is at present, and it would be increasing in value every year’. In the hands of land purchase officials, it is easy to see how this simply became a convenient rationale for failing to implement practical protections for Maori land.

We note both the intention of the legislature in the 1873 Act that it would provide for tribal endowments, and the Minister’s explanation that the Government’s goal:

should be to settle upon the Natives themselves, in the first instance, a certain sufficient quantity of land which would be a permanent home for them, on which they would feel safe and secure against subsequent changes or removal; land, in fact, to
be held as an ancestral patrimony, accessible for occupation to the different hapus of the tribe: to give them places which they could not dispose of, and upon which they would settle down and live peaceably side by side with the Europeans.377

This was translated in practice as the retention of 50 acres per individual. As with the practice of buying individual shares, the concept of a Government agent ensuring that an individual kept 50 to 100 acres (somewhere) was fundamentally flawed. Under the Treaty, Maori communities were entitled to retain their lands and valued resources for so long as they wished. Such communities were guaranteed their tino rangatiratanga, their full and collective authority over those lands. We agree with the Crown that paternalism was not an appropriate form of active protection. For a purchasing agent to theorise that an individual had another 50 acres somewhere, and therefore could safely alienate undefined paper interests in a block, overturned the Treaty guarantees. Active protection, as we found in chapter 8, required Maori to have a full voice in the decision-making and operation of protective mechanisms, so that they could exercise their tino rangatiratanga in a meaningful way and help define and protect their own interests. That the 50-acre rule worked so badly in practice aggravated the fundamental flaw of such an approach.

As Cecil De Lautour put it to the Rees–Carroll commission in 1891:

Nor am I aware . . . that the individualisation of Native title was at all sought for by the Natives themselves. As far as I can judge, it has been forced on them with a view to purchasing from them. I have never been able to understand why the Natives should not be allowed the fullest freedom of decision as to what lands should be sold or reserved . . . Of course it may be a matter of individual right, if you apply our theories and English law, that every Native should be the arbiter of his own destiny, but I venture to say that is not in accordance with Native custom and usage, which is more inclined to act with the tribe or family than act under the English law, of which they have very little knowledge.378

The Turanga Tribunal has commented that a requirement of 50 acres per individual was ‘fundamentally misconceived’ for communally held land, especially for customary land. There was no attempt to provide for and monitor a sufficiency of land at hapu level.379 The intent was to promote individualisation, but it failed to recognise the reality of Maori living and needs. And yet, when the Crown did respond to cases of landlessness at this time, it often did so at a hapu level, practically recognising what Maori required. In our region, the Stout–Ngata commission reported on a reserve known as Hauani, which the Crown made for the Ngati Rangitihiri community in recognition of the devastation caused by the Tarawera eruption.380 This shows that governments of the time were capable of conceptualising and acting for Maori interests at the tribal level, as we noted with Donald McLean’s explanation of his intentions in 1873.381

The 50 acres per head, established as the standard by legislation from 1873, was variously defined in laws and in debates on the matter as an ‘ample sufficiency’, ‘sufficient’ for ‘maintenance’, or enough to ensure that Maori were not rendered ‘landless’.382 However, as the Tribunal noted in its report Turanga Tangata Turanga Whenua, this figure was set at a time when the land requirements for pastoral farming were clearly greater. Also, the figure ‘took no account of the size of families, location, and quality of land needed for workable farms’.383 We would add that in our inquiry region, it also took no account of the natural resources such as geothermal springs, which were important for alternative opportunities when lands were otherwise marginal for farming. It also took no account of the need and preferences of Maori who might wish or need to continue with traditional forms of resource harvesting. The ‘sufficiency’ of land set at a level of 50 acres a head was clearly meant for bare subsistence needs only. It failed to take account
of what might be required to actively participate in new economic opportunities arising from settlement.

For the Central North Island, Mr Macky’s evidence for the Crown confirms the general trend of perfunctory court checking on this matter, and that the Government’s protective responsibilities were largely devolved on its purchase agents. He also notes that, in their purchasing, Mitchell and Davis had little regard for the 50-acre guideline in practice.\(^{384}\) The claimants’ historian, Ms Rose, agreed that there was no systematic evaluation made by Crown land purchase agents of the extent of land remaining for those from whom they were purchasing.\(^{385}\) She cites the case of Mangarewa-Kaharoa where the court asked the purchaser, Mitchell, if it should accede to a request to reserve land.\(^{386}\) She also notes an official’s assumption that Government land purchasing agents Davis and Mitchell were the appropriate people to judge whether Maori were alienating too much land.\(^{387}\) In another case, the Crown purchased Tuhourangi lands despite advice from officials that they were almost landless.\(^{388}\) Finally, in their detailed study of the Crown’s acquisition of Whakarewarewa 1–3 blocks, Duncan Moore and Judi Boyd suggest that they saw no indication that the Crown agent or the court in any way assessed the sufficiency of the residue.\(^{389}\)

These are all examples of a general trend, in which the Native Land Court’s checks were in part dependent on the very people whose primary objective was to acquire as much land as possible. This was even less satisfactory because the purchase agents were also the first line of protection, supposedly considering the interests of Maori owners in retaining sufficient land. In negotiations for blocks such as Tauhara Middle and Te Puke, Maori communities ended with much smaller reserves than they wanted. Davis and Mitchell as purchasers, and paid on commission by the acre, actively sought to restrict the size of reserves.\(^{390}\)
The Crown has conceded that it failed to make a systematic provision of purchase reserves for communities in this region, and that this contributed to its clear failure to ensure a sufficiency of land base for a number of Central North Island iwi. Relatively few of its purchases, from the 1870s to 1890, had any reserves. There were also examples where the parties had agreed to reserves but these were not made. When they were created, they were often well below the 50-acres-per-head standard set by the 1873 Act. An inquiry in 1926, for example, criticised the Crown’s failure to set aside the Motumako reserve of 600 acres in Kaingaroa. These are welcome concessions.

We have evidence that this failure had lasting and serious consequences for a number of communities. One such grievance was over the Crown’s failure to actually make all the reserves to which it had agreed. This is illustrated by the long history of Ngati Tutemohuta and other hapu with their Tauhara reserves, which had been agreed in sales of land in the Tauhara blocks. The Wharewaka reserve, for example, was a small landing place required for fishing purposes, as Wi Maihi Maniapoto explained in 1886. It was one of three reserves in the Crown’s deed of purchase for Tauhara Middle, which was signed in 1875 and confirmed by a second deed in 1879.

In this instance, both the Crown and the Native Land Court failed to ensure that all the reserves specified in the deed were actually created. In December 1880, the court partitioned the Crown’s interest from Tauhara Middle block. In Chief Judge Jones’ finding (1937), the court made an error at that point in not excepting the reserves. Gill minuted on the court order that the Crown had agreed to return the Patuiwi and Waipahihi reserves to Maori by Crown grant, but we have no information on why Wharewaka was not likewise included. These reserves were then revested in the Maori owners by Crown grant.

The omission of Wharewaka was detected in 1886, when an application was made for the subdivision of the Maori-owned sections of Tauhara Middle block. When the Native Land Court attempted to issue an order including the Wharewaka Reserve, the Native Department noted that Wharewaka was Crown land and that the Native Land Court had no jurisdiction over it. The court appears to have been unaware of this, as it also dealt with the other two reserves, which were then Crown granted rather than held under a Native Land Court certificate or memorial. In August 1888, a senior land purchase official, Sheridan, explained that after Wharewaka was omitted from the 1880 order, ‘it was then decided not to grant Wharewaka but simply to reserve it under the Provisions of the Land Act’. Regarding the decision to declare Wharewaka a public reserve, Terry Hearn notes that ‘[n]o indication of who took the decision, why the decision was taken, and who was consulted, was given’ by Sheridan.

In 1905 the irregularity was once again brought before the court for consideration, and Judge Johnson requested instructions from the chief judge on the subject, noting that because of the reserve’s omission from the 1880 court order ‘at present it [Wharewaka Reserve] is nominally Crown land’. Sheridan wrote to Johnson that, in accordance with the records of the court, Wharewaka was a public reserve and that therefore ‘the Natives have no rights in connection with them other than as British subjects generally’.

Waaka Te Arakai and five others petitioned Parliament in 1936, contesting the Crown’s claim to ownership of Wharewaka Reserve. The Native Land Court heard the Wharewaka petition in August 1937 under the Native Purposes Act 1936. Judge Ayson concluded that Wharewaka Reserve should have been returned to the owners at the time of the original partition hearing, and that the Crown’s claim that Wharewaka had always been intended as a public landing place was not supported by the evidence. There was no recommendation to return the land at this time, however, and instead the chief judge recommended ‘that reasonable compensation be granted to the Natives’, possibly ‘applied to some object for their general good instead of being apportioned into infinitesimal shares’. The owners in the block were given no option but to consider compensation. However, the failure
to grant the land as originally agreed has continued to be a major claim issue to the present.402 One reason that it was still ‘rankling’ for Tauhara Maori in the 1930s, observed Judge Ayson, was that they had received so little money for their land. The Crown had paid two shillings per acre but, when surveys and other charges were deducted, they had received only fivepence per acre.403

Ngati Haka Patuheuheu also claim that they and Ngati Whare, as surrendered ‘rebels’, were promised title to a 500 to 600 acre reserve by Donald McLean at Te Putere. They did not obtain this reserve from the Compensation Court because the judge had expected that they would return to their inland ancestral lands. As a result, they claim that they were left with insufficient lands for their support.404 Other historians have also questioned the sufficiency of land left to various Central North Island tribes, and pointed out specific failures to reserve land or to actually make promised reserves.405

In our view, there were major flaws in relying on land purchase agents to monitor Maori landlessness, other than the obvious conflicts of interest. The purchase process adopted of piecemeal purchasing of shares in land hampered the necessary consultation, information gathering, and effective and judicious management of sales necessary to ensure that sufficient lands and resources were retained. Agents purchased individual shares, often in a number of blocks and over long periods, followed eventually by partitions to actually define what had been sold. This undermined the collective management of lands by Maori, but also cut across the ability of either the Crown or Maori to be adequately informed on what had been (or would be) sold, and its impact on particular iwi and hapu. This had a serious effect on the Crown’s ability to undertake its duty of active protection.

The other major form of protection at this time was that from 1865, the Native Land Court, whenever it was determining title to Maori land or partitioning it, had powers to recommend or impose restrictions on its alienation. This would have given Maori time to make management decisions free of pressures for alienation, or to protect the land so that it could only be leased and not sold. The laws governing these restrictions quickly became complicated. If alienation was restricted at the direction of the court, a block could usually neither be leased for a term of more than 21 years, nor could it be sold.406 The Native Land Act 1873 made further provisions for restrictions. No Maori land subject to a memorial of ownership could be sold or leased for more than 21 years unless all the owners agreed. However, as Turanga Tangata Turanga Whenua and other reports have shown, the protective effect of these provisions was undermined by other provisions in the 1873 Act that enabled owners to sell by majority decision or to partition the area for sale if unanimity could not be achieved. The effect was that while the manner of alienation was restricted, alienation itself was not. Even when specific reserves were created, ways were still provided to have the restrictions on alienation removed.407 In any case, not even majorities were required (nor anything in the shape of public, collective decision-making) when the Crown began to purchase individual signatures on a list, waiting till it had enough to force or warrant a partition.

However, the restrictions did not just protect ultimate ownership from being lost, as Maori might have expected. Restrictions on any form of ‘alienation’ were also found to operate against a range of activities in using a block, including selling off associated resources such as timber to pay costs and debts, raising loans against the land to further develop it, or even selling some portions to raise cash. Without any means of corporate management of a block to meet these needs, when there were many separate individuals with interests in many blocks, there were always some who found restrictions irksome and too inflexible to meet their personal circumstances. Community leaderships also often found that restrictions applied to individual blocks without overall planning undermined community efforts to participate in new opportunities. There were many applications made by Maori to have restrictions on blocks removed, and criticism that the restriction provisions were too cumbersome in practice.
We do not have comprehensive evidence on this issue for our inquiry region. What we do have suggests that Central North Island Maori were also critical of the way in which restrictions operated. The Rees–Carroll commission, for example, in meeting representatives of iwi including Ngati Raukawa and Tuwharetoa at Cambridge in 1891, was told that they objected to reserves and restrictions on their lands. Mr Stirling also notes a petition from Te Heuheu and 213 others calling for alienation restrictions to be removed from their lands, ‘in order that they may deal with them as they may deem fit.’

408 The measures were toughened in 1878 and 1880 when judges of the Native Land Court gained new discretion to place restrictions on titles and the court was required to ascertain the desirability of making restrictions. This has been described as an improvement, although by this time it was very difficult to ascertain whether each seller did have amply sufficient other land for their maintenance or if it would be in their interests to alienate it. Relying on the evidence of the claimants’ historian, Mr Stirling, there are examples of restrictions being applied and enforced in a half-hearted manner. In purchasing, it seems that restrictions could be relatively easily removed through a formulaic declaration. Mr Stirling also observes that the Crown itself took little account of restrictions on alienation when purchasing in the Taupo district.

411 From the late 1880s, the power of court-imposed restrictions was progressively reduced. From 1888, the consent of a simple majority of owners was needed to remove restrictions from a block. In 1892, restrictions could be removed unilaterally by the Governor for the purposes of sale to the Crown. From 1893, a majority of owners could sell land to the Crown, even if land did have restrictions on, and this decision was binding on all owners. And by 1894, restrictions could be removed if one-third of owners agreed and all owners retained sufficient land elsewhere.

412 The Crown submitted that it faced a difficult balancing act in protecting Maori while not being too inappropriately paternalistic, enabling them to deal in their lands as they chose. But, as De Lautour told the Rees–Carroll commission, it was not individuals but communities that needed to have that power of decision-making. There is no doubt that some of the tribal leaders in this region, such as those of Ngati Tuwharetoa, bitterly criticised what they saw as frustrating provisions preventing their communities from dealing with their lands as they wished. There were also many applications from individuals seeking to remove restrictions for their personal needs. However, criticisms were often made of the way protections operated, when it seemed relatively easy for purchasers to evade restrictions and undermine collective decision-making, for example, but communities were given no corresponding means of collective management until purchasing in this century had almost ceased. By that time, restrictions were so clumsy in practice that they frustrated efforts to utilise land for the needs of communities involved.

So long as the Crown refused to provide for adequate consultation and decision-making at community level, protections would always be of only marginal effectiveness. As the Hauraki Tribunal has commented, ‘inappropriate paternalism’ is an apt term for the taking of decisions about Maori property without consultation, treating Maori 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.

413 Protection, rather than paternalism, was required from the Crown under the Treaty.

The Tribunal’s findings
We have found that the Treaty recognised that Maori would alienate some lands and resources in order to participate in new development opportunities arising from settlement. As part of this process, the Crown recognised that it had obligations to protect Maori in their dealings in land, especially when absolute transfer of their valuable property asset was involved. During the nineteenth century, the Crown provided for and implemented a range of protective mechanisms which, if interpreted broadly and
implemented in a generous spirit, had the capacity to meet its Treaty obligations. However, the Crown’s refusal to recognise tribal decision-making and authority, and its failure to ensure that protections were properly implemented, were fundamental flaws in meeting its Treaty obligations of active protection.

The general protections in the Maori land-purchasing system have been considered in some detail by previous Tribunal inquiries and found to be in breach of Treaty obligations. The same system operated in this region, and we follow the general conclusions of those reports. We lack sufficient evidence to draw firm conclusions about the activities of trust commissioners in our region, or about the detail of exactly how restrictions on alienation were applied to titles in the Central North Island. We make no findings on those matters.

Otherwise, we find that the Crown’s protective measures were fundamentally flawed in the Central North Island. Purchase agents were responsible for carrying out instructions that Maori not be injured by their dealings in land, that Maori retain sufficient land for their present and future needs, and that Maori be treated honestly and fairly. These same agents were required to buy as much Maori land as possible, as cheaply as possible, and could do so in defiance of the wishes and deliberations of the communities involved. In this fundamental conflict of interest, the process of acquiring individual signatures was paramount, and Maori interests were not adequately protected. Nor, it appears from the evidence, were Maori interests sufficiently protected by their second tier of defence, the Native Land Court, which (in the admission of the Crown’s historian) did not apply the 50-acre minimum standard in this district. Mr Macky’s evidence was that the district officers and the 1873 provisions for a minimum tribal base were inoperative in our district. Also, the Crown admitted that it did not provide sufficient reserves in its purchasing in the Central North Island.

In any case, the 50-acres-per-individual requirement was fundamentally flawed. The Crown was supposed to protect a sufficient land and resource base for tribal communities, and for such communities to make their own decisions about what land and resources to retain, what to sell or lease, and how to obtain the mutual benefits anticipated in the Treaty. It did not do so. Rather, it deliberately undermined collective decision-making, to the point that neither the purchase agents nor the tribes could possibly know exactly what land (or where) was retained at any point in time. In such circumstances, the Crown’s heavy-handed restrictions on alienation could do little good. As we noted, they were easy enough to remove in any case, especially by the end of the century.

We find that, in actively undermining Maori communities of the Central North Island, their land and resource base, and their ability to use or manage it effectively, the Crown breached the Treaty principles of partnership, autonomy, active protection, and options. It failed to consult or to provide for the decisions of those with whom the Treaty had been negotiated and whose authority was guaranteed: a breach of partnership and autonomy. It admitted its obligations of active protection but entrusted them to the very people employed to strip communities of their assets, and failed to create proper protections or ensure that its own standards were met: a breach of active protection. It took away the power of Maori leaders and their communities to decide what land and resources would be retained, and frustrated their attempts to deal with them rationally in the new economy: a breach of the principle of options.

We turn next to the impact of uncontrolled (indeed, uncontrollable) alienations on the iwi and hapu of the Central North Island.
Having considered Crown purchase policies and practices in this Central North Island inquiry region, and the protections the Crown provided and implemented, we now consider the actual impacts of nineteenth-century purchasing on Maori of this region. In just under 30 years, they had sold just over half their land. This was a major change, but despite purchasing policies and weak protections, a significant amount of Maori land had been retained. The pattern of purchasing was also widely different in the three districts in our inquiry. By 1900, almost 90 per cent of the Maori land base in Kaingaroa was gone, while in Taupo almost two-thirds of the land base was retained. Rotorua was in the middle of this experience, having lost 60 per cent of the Maori land base and retained 40 per cent. This section considers issues raised concerning the impacts of land loss through purchasing on Maori of this region, and also the fundamental point that much of the interior was saved from the coercive system described above because its lands were marginal and therefore not pursued so aggressively by Crown agents. But this very point required care in the retention of valuable natural resources that might afford development opportunities.

The claimants’ case
The claimants accept that colonisation and settlement was happening by the last three decades of the nineteenth century, and that ‘[not] purchasing at least some land was hardly a realistic option for the government’. However, in purchasing, the Crown had a duty of active protection of Maori, to ensure that they retained sufficient land and resources for their needs. When the Crown was purchasing largely in a monopoly situation, this obligation was even greater. It included a duty to ensure that iwi and hapu retained a sufficient endowment. Claimants alleged that the Crown failed to make any attempt to design a purchasing system that would meet these obligations in the nineteenth century. The lack of a coherent system is reflected in the uneven impacts of Crown purchasing in this region. Some groups lost practically all their lands; others not so much. This demonstrates the capricious nature of the purchase system, driven by opportunity rather than a thought-out programme designed to meet settlement or Maori interests.

Claimants submitted also that the very rapid and extensive purchasing in many parts of the region in just 30 years had a major impact on those iwi and hapu subject to it, and foreclosed their opportunities to participate in new opportunities such as tourism in some areas.

Some groups of claimants alleged that that by the turn of the twentieth century they had been left with clearly insufficient lands for their present and future needs. They submitted that statistics compiled by inquiry district and region fail to adequately reflect the way land purchasing impacted very harshly on some groups exposed to it more than others. They submitted that the overall statistics are misleading in this regard, as some groups were left without sufficient lands in all three districts of this inquiry region. These include: communities with interests in the Kaingaroa district, where most of the Maori land had been purchased by the twentieth century, such as Ngati Hineuru; communities subject to intensive purchasing and confiscation in the Rotorua coastal area, such as Tapuika, Waitaha, Ngati Makino, and Ngati Te Pukuohakoma; inland Rotorua groups, with lands and key resources targeted by the Crown, such as Ngati Whakaue hapu; and communities of northern Taupo whose lands were subject to intensive leasing and purchasing during the 1870s and early 1880s, including Ngati Whaoa and Ngati Tutemohuta.

These groups submitted that extensive alienation by the twentieth century left them with too few resources to adequately support their communities or to participate in the new opportunities arising from settlement. This led to their long-term and continuing economic marginalisation.
A number of these groups – for example, Waitaha and Ngati Te Pukuohakoma – allege that this was devastating for them, leading to poverty and (for some) even the loss of ability to function adequately as hapu.418

Claimants also submitted that in this region, land acreage alone is not necessarily the best measure of sufficiency. Where lands were generally marginal, and many important resources had been targeted by the Crown, even apparently large surviving landholdings could be misleading, especially if these were of poor quality or still inaccessible for immediate use in new opportunities.419 In closing submissions on behalf of all claimants, Richard Boast described the impacts of land alienations for the region as a whole by 1900 as ‘very substantial’.420

The Crown’s case
The Crown agreed that the experience of hapu and iwi in the Central North Island region ‘has not been a uniform one.’421 It agreed that in general terms, by 1900, relatively little Maori land was retained in the Kaingaroa district, while experiences in Taupo and Rotorua were varied. Ngati Pikiao, for example, had retained relatively more land than other Rotorua iwi and hapu.422 Nevertheless, the Crown also conceded that ‘[v]iewed overall, and in Treaty terms, there was a clear failure by the Crown to ensure a sufficiency of land base for a number of CNI iwi’.423 The Crown was unable to specify, however, which iwi this referred to. Crown counsel also agreed with the claimants that the continuing sustainability of iwi and hapu varied not just in terms of how much land they retained, but also depended on its quality and on their other resources and potential sources of income.

The Tribunal’s analysis
We have previously noted that in the last 30 years of the nineteenth century, land purchases resulted in the alienation of just over half (52.9 per cent) of the Maori land base of this Central North Island inquiry region. This represented some 1.52 million acres of the total 2.89 million acres of Maori land in the region. It was agreed before us that land purchasing impacted differently in the three inquiry districts (Kaingaroa, Taupo, and Rotorua). The Maori land purchased (or retained) during this time also included resources legally regarded as being part of lands, including forest resources, surface geothermal manifestations, and the beds of some waterways. These ‘lands’ were also of varying degrees of quality and usefulness for various purposes, and the statistics include mountain tops as well as major river and lake beds, all of which has to be taken into account when considering sufficiency.

Table 10.1 shows the land retained in Maori ownership as a percentage by decade from 1840 to 2000, by each district as well as over the whole region (see also maps 10.2–10.4). This is from figures derived from the Land History and Alienation Database and shows the overall trends of land loss in the final three decades of the nineteenth century. A graphed representation of land remaining in Maori ownership in the same period (see figure 10.1) shows some distinct patterns.

While table 10.1 and figure 10.1 show the differences in alienation over the three districts, they also show that common to the three districts is an initial period of rapid land alienation in the 1880s, and a less steep – but still rapid – alienation through the 1890s.424 These figures also show how the legal definition of land as a basis for the database figures, including many lake beds and rivers, can significantly influence these overall patterns in some districts. The figures, and the trend-line for Taupo, would look significantly different if the 61,454 hectares of the bed of Lake Taupo and the Waikato River were not counted as ‘land’ for the purposes of the database. It is the 1926 loss of Maori control over the lake that accounts for the significant drop in the Maori landholding recorded between 1920 and 1930, and the return of the beds that explains the sudden rise in the 1990s (see chapter 18).

Table 10.2 indicates that in all three inquiry districts in this region it was the Crown and not private purchasers that acquired the majority of the land alienated by Maori in
<table>
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<th>Year</th>
<th>Rotorua Area (Ha)</th>
<th>Taupo Area (Ha)</th>
<th>Kaingaroa Area (Ha)</th>
<th>Total Area (Ha)</th>
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<th>Taupo %</th>
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<th>All CNI %</th>
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Source: Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 178
### He Maunga Rongo

Table 10.2: Areas alienated by purpose and by district and by decade (ha)

#### Rotorua

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<th>1850s</th>
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#### Kaingaroa

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### Nineteenth-Century Maori Land Purchasing

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<th>1930s</th>
<th>1940s</th>
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<th>1960s</th>
<th>1970s</th>
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the nineteenth century. The proportion was much greater in Rotorua and Taupo, which were covered to a greater extent by the Thermal Springs Districts Act and the ‘railway exclusion zone’, than in Kaingaroa.

As agreed by both parties, these figures also have limitations in that they cannot show the quality of land retained by Maori or the relative size of the populations to be maintained by these remaining lands. Nor can they show alienation of (or dependence on) significant resources, such as geothermal springs that – when land was found marginal for purposes such as farming – were identified as critical to alternative economic opportunities. This was especially the case in parts of inland Rotorua and Taupo.

The other major difficulty with these figures is that while they show overall patterns of Maori land retention and sales, they cannot reflect the patterns of alienation for iwi and hapu over the region or in their rohe. Mr Alexander advised that this was not possible from available official records for the purposes of compiling the Land History and Alienation Database. Ngati Tuwharetoa submitted too that some of their lands fall outside this inquiry region, in the Tongariro National Park district in particular, meaning that they retained considerably less of their overall lands than the figures for ‘Taupo’ (as defined in our inquiry) suggests. Several other groups had land outside this inquiry region. On the other hand, smaller groups such as Ngati Te Pukuohakoma, who claim to have been rendered virtually landless by 1900, are not readily visible in district-wide figures. A number of iwi and hapu also claim interests that extend over a number of districts, both inside and outside our inquiry, making their degree of land retention more problematic to identify.

We are of the view that while regional and district trends are very useful, it is also necessary to consider the sufficiency of land and resource bases protected for particular iwi and hapu. We accept that the available data does not make this an easy task and, at this stage of our inquiry, we are limited to considering general patterns and the likely importance of these for different groups. The actual extent of loss for each group is a matter for more detailed
research, perhaps as part of negotiations between the parties. We accept the important Crown concession that it did clearly fail to ensure an economic land base for a number of Central North Island iwi. Although it did not specify those iwi, this concession is significant. An insufficient land and resource base clearly compromised the ability of some iwi to participate in the land-based economic development opportunities that were opening up in this region by and throughout the twentieth century. This clearly resulted in prejudice to their ability to function as tribal communities and to their economic and cultural well-being.

It is not possible on the evidence available to us to identify all iwi and hapu of this region who had been affected in this way by the turn of the twentieth century. However, we do have sufficient evidence to identify some of them, and to note the likely pattern of land loss that should alert parties to where more detailed research and consideration is required. We would warn parties that even the general patterns show that the issue of an insufficient land base is not just a matter for those iwi and hapu with interests in districts where overall land loss was highest. In our view, the patterns of nineteenth-century purchasing indicate that even in the Taupo district and inland Rotorua – where overall land retention rates were relatively high – some tribal groups appear to have suffered considerable land loss by 1900. Also, as noted, the loss of a key tourist attraction or a fishery, or the inability to log timber or obtain credit for development, could be just as crippling as the loss of the land itself.

It was also agreed before us that any assessment of ‘sufficiency’ needs to take into account the quality of land, and that this was particularly important for the Central North Island, where large areas of Taupo and inland Rotorua had been retained by the late nineteenth century. That part of the region was still regarded as either not easily accessible or as containing large areas of pumice lands that by then had been recognised to have severe limitations for farming. This meant that even though some of these lands might one day prove to have value (such as for forestry), in the immediate future they were recognised to have little real potential for utilisation. As a result, the actual amount of immediately useful or even usable land for communities in those places was effectively much less. As we shall see in chapter 18, for example, Ngati Tuwharetoa were very dependent on the cropping lands immediately adjacent to the lake. However, even in these districts, the Crown had targeted immediately useful resources such as geothermal springs which, while not showing up as large areas of land, were nevertheless critically important for alternative economic opportunities at the time. The Crown’s failure to identify quality as well as quantity of lands for sufficiency in its 50-acres-per-head rule was, therefore, even more important in this region.

We will consider the major new economic opportunities becoming evident in this region in part IV of this report. In this section, we are concerned with the claims of those iwi and hapu who allege that land purchasing had left them without sufficient lands for their present and future needs as a result of nineteenth-century purchasing. We accept that a detailed analysis of ‘sufficiency’ of land requires consideration of a number of factors, including quantity and quality of lands, population to be supported, and proximity to infrastructure and markets. We do not have this information in sufficient detail for each hapu and iwi of this region and we cannot make a thorough and particularised analysis of sufficiency as at 1900. One of the major difficulties in terms of evidence is that the Crown failed to monitor the impacts of land purchasing and the needs of hapu and iwi in the nineteenth century.

We do, however, have the benefit of a Government ‘audit’ undertaken in the first decade of the twentieth century, which provides an overview of hapu and iwi land retention for at least part of our region. The general patterns identified by this audit also help inform us as to possible areas of concern in other parts of the region. It was conducted as a Government inquiry into ‘Native Lands and Native-Land Tenure’, known as the Stout–Ngata commission of inquiry after the two commissioners appointed to conduct it in early 1907. These were Sir Robert Stout (the chief justice since 1899) and Apirana Ngata (then a young barrister,
newly elected as the member for Eastern Maori). In their investigation, they were instructed to:

- identify areas of Maori lands in the North Island not occupied or ‘not profitably occupied’ and, if necessary, the nature of the owners’ titles and the interests affecting them;
- suggest how such lands could best be utilised and settled in the interest of the Maori owners and the public good, including: what areas (if any) could be set apart for the individual occupation of the Maori owners and for the purposes of cultivation and farming; what could be set apart as communal lands ‘for the purposes of the Native owners as a body, tribe or village’; and which could be set apart for future occupation by descendants or successors of the owners;
- recommend what lands might be settled by Maori other than the owners, and on what terms and conditions and by what method;
- recommend which lands might be available for settlement by Europeans, on what terms and conditions, by what method and in which areas; and
- recommend how existing institutions established among Maori for dealing in their lands might best be utilised or adapted for the above purposes.

The commission was to provide reports and recommendations which were sufficiently detailed to enable prompt action to be taken by Parliament, especially in respect of the lands available for European settlement. The major objective of the inquiry, as will be discussed further in the next chapter, was to identify and make recommendations on ‘surplus’ Maori land found to be idle or not properly utilised, and ways this could be made more available for settlement. However, the commissioners only investigated some of the remaining Maori lands in the Central North Island inquiry region, those they described as belonging to the Te Arawa people in a large part of our Rotorua inquiry district. The commissioners did not investigate Maori land in most of our Taupo district (other than a small area overlapping its Te Arawa inquiry), presumably because the lands were regarded either as too poor and not wanted for settlement purposes – such as the pumice lands of the region – or as being under agreement for ‘profitable utilisation’ through leases of accessible timber lands. The commissioners did report, for example, on the proposed Tongariro Timber Company venture for timber on Maori land in the Taupo district. The commissioners did not report on Maori lands in most of our Kaingaroa district (other than one block of land falling within this district, discussed at a meeting at Ruatoki in Te Urewera). This was presumably because almost all the lands in the district had already passed out of Maori ownership by this time.

In investigating the Te Arawa lands in the Rotorua district, the commissioners were under some restriction about the recommendations they could make for land utilisation, as the Crown has submitted. This was because the thermal springs districts legislation restricted what could legally be done in much of the interior lands without the Crown acting as agent. However, this did not restrict the commissioners’ investigation of how much land remained, and the impact of alienations on hapu and iwi. As the inquiry was announced in late 1906, the commissioners’ review of the pattern of land alienation to that time reflected nineteenth-century purchase – Crown purchasing of Maori land had only resumed in 1905. All purchasing in the years 1900 to 1904 was the ‘completion’ of purchases already begun by 1899.

The Tribunal’s findings

Commissioners Stout and Ngata reported in July 1907, with regard to their Rotorua inquiry, that they had met with 11 Te Arawa chiefs who had agreed that the commission could investigate and recommend on Te Arawa lands stretching from ‘Rotorua down to the sea-coast in the Bay of Plenty’. In 1908, the commission undertook a series of investigations and issued a series of reports that covered what it regarded as these Te Arawa lands. However, the commission was obliged to work on land information presented to it on the basis of local authority boundaries. Therefore, its investigation of this area was broken up into
a series of stages. The investigation of the Te Arawa interior lands was mainly based on information for land in Rotorua county. Coastal Te Arawa lands were investigated in reports based on information on land in Tauranga and Whakatane counties. At the end of their investigations, however, the commissioners were confident that altogether only ‘a very small area’ of Te Arawa lands proper had been left outside their inquiry.

Taken together, the investigations covered a large part of the Maori lands remaining in our Rotorua inquiry district by this time – certainly a large enough area to make the commissioners’ general observations applicable for our purposes. The commissioners found that in Rotorua county (inland Rotorua), of those regarded as broadly ‘Arawa’ lands, 43 per cent remained in Maori hands by this time. However, the Crown had used its monopoly powers under the Thermal Springs Districts Act 1881 to target and secure the purchase of almost all the important thermal springs on these lands. The only springs regarded as significant at this time that were still in Maori ownership were those at Tikitere.

The commissioners described much of the land remaining in Maori hands in this interior area as unsuitable for intensive agriculture. They noted that some of the lands contained valuable timber resources, although there was still no way of legally using them because of the Thermal Springs Districts Act. In effect, although interior Rotorua Maori had retained around 40 per cent of their lands, they had lost their most valuable lands and resources and had been left with those regarded as at least immediately useful, even if in relatively large quantities. The commissioners found that the economic effects of this had also been compounded by the introduction of trout into waterways of the region, which had decimated the native freshwater fish stocks on which Rotorua Maori had previously depended heavily.

As a result of their investigations, Stout and Ngata reported that the:
He Maunga Rongo

Rotorua hapus, except Ngati-Pikiao, cannot in our opinion be fairly said to have surplus lands for sale. They have not a large area available for lease, and the lands they now hold are the least suitable for pastoral purposes...  

The commissioners also reported that in the case of Ngati Whakaue, in particular, the hapu had already sold enough land and the remainder was clearly required for their present and future needs. In other words, apart from Ngati Pikiao, the commissioners found that by the first decade of the new century, the land that hapu had retained was all required for their support. The commissioners found that Ngati Pikiao had the best of the lands retained in this interior region, 'to the north and south of the Rotoiti, Rotoehu and Rotoma Lakes.' In the opinion of the commissioners, 'these were perhaps the most valuable of all the [retained interior] Rotorua lands.' Nonetheless, the commissioners noted that even these lands were not in a position to be used to their potential as, including Taheke and Okataina, they were still caught up in Native Land Court partition and subdivision hearings.

For the coastal Rotorua area, the commissioners found that most of the better-quality lands had already been sold to the Crown and Europeans, and that 'comparatively little' had been left to the Maori owners. They noted that Tapuika, who lived at Te Puke and Rangiuru, had 'very little land' and, even with lands they now leased to Europeans taken into account, the provision made for them was 'not too ample.' In context, this rather convoluted description indicates a serious doubt that Tapuika had retained sufficient land for their present and future needs. The commission also observed that the people of Maketu had very little land left in the coastal area, but did have some inland lands, meaning that they should have 'ample for their present needs.' No comment was made on future development opportunities.

The commissioners also reported on the position of Ngati Rangitiki at Matata. They reported that this iwi was now mainly located in the coastal area and wanted to sell around half its interior Pohu block to the Crown. By selling 3000 acres in this block, the tribe hoped to acquire full ownership of the coastal Hauani reserve for its support. The commissioners noted that this 2000-acre reserve had originally been made for them by the Government in recognition of the devastation caused by the Tarawera eruption. However, they had since found that they were obliged to pay a rental on it, which they could not pay. As a result, they had decided to sell their share of the Pohu block in order to buy the Hauani reserve and another small reserve on which they were living, and to obtain capital to stock and work the Hauani reserve. They informed the commission that their tribe was now over 4000 in number and was occupying fewer than 200 acres of land at Matata, which was inadequate to support them. They 'clung to' this land, however, on account of their schools, the large nearby fish supply, and the employment opportunities in developing lands in the area for Europeans. They required the extra Hauani reserve to support themselves.

Even with this Hauani reserve, the iwi would have been left with an average of some 50 acres each. Despite coastal land being of better quality and offering the possibility of horticultural development, this was not a generous amount for their present and future needs. It is not clear whether the tribe retained any other lands in the interior, but given the relatively poor quality of the interior lands, it is unlikely that they had, by any standards, a great deal of land for a tribe of 4000 people. This reinforces the pattern that the commission found for coastal iwi and hapu generally as already being in a precarious position in terms of sufficient lands for their present and future needs. The commissioners also investigated the eastern part of our Rotorua coastal district in their Whakatane report. They found that most of this area had been sold by 1907 and very little remained in Maori ownership, other than that still retained by Ngati Rangitiki of Matata, whose situation has already been described above.

The commissioners identified a clear pattern with nineteenth-century purchasing that the better-quality lands of Te Arawa, especially the more fertile coastal lands, and some of their most important natural resources (especially
thermal springs), had been heavily targeted. The Tapuika and Ngati Rangitihia communities were identified as particularly at risk. Although the commissioners did not mention other coastal iwi and hapu such as Waitaha or Ngati Te Pukuhakoma, the pattern of land loss in the Rotorua coastal area meant that all those who had had substantial interests there were in a precarious position by this time. This view is confirmed by Ms Gillingham's report, which details the insufficiency of Waitaha's reserves. The result was that, as the commissioners had identified for Ngati Rangitihia, coastal communities were not able to rely on their lands but were living off fishing and seasonal work.

Most of the land that Te Arawa had retained was located in the more marginal and inaccessible parts of the interior and, even in this area, important identified resources such as significant geothermal springs had been lost. Stout and Ngata considered trees as the most valuable resource left in much of this area, and as the most valuable crop such marginal lands might ever grow. However, much of this forested land appears to have been retained because it was either still too inaccessible, or the land was under restriction in the way in which it could be used. There was clear future potential that had been kept alive by such land retention to this date, such as for the milling of indigenous timber and the development of an exotic forestry industry. However, for the present, the interior lands were incapable of producing much in the way of income for communities, except for informal and illegal timber leases. At the same time, traditional means of support, such as fisheries, had been heavily damaged by settlement.

On the basis of this, the commissioners warned the Government that even those iwi and hapu of the interior who appeared to have retained ample lands were generally not in the position of having 'surplus' lands. The retention of a sufficient base could not be measured by the quantity of land. Much of it was not immediately useful for farming, and this significantly restricted opportunities for development. With the possible exception of Ngati Pikiao, the sufficiency of the Rotorua interior lands was questionable, and it was not the significant 'surplus' that might be assumed from land acreages alone. In some cases, such as for Ngati Whakaue, they had already lost major resources and could afford to lose no more land.

As we have noted, the commissioners did not investigate lands in detail in the Kaingaroa and Taupo districts. They considered the Taupo district only within the context of a proposal to exempt Ngati Tuwharetoa lands from the provisions of the Native Land Court Act 1894, which restricted their ability to alienate other than to the Crown, including the sale of timber-cutting rights. In considering timber-utilisation opportunities, the commissioners observed that Ngati Tuwharetoa still retained large areas of land with valuable forests. These were, however, not yet accessible for logging. This was expected to change for the valuable western Taupo forests when the North Island Main Trunk Railway was finally completed. The commissioners were not required to consider land holdings generally in this area for other purposes, and they did not look at specific hapu and iwi needs outside forestry.

However, we have already established from the evidence before us that parts of northern and south-eastern Taupo and large parts of Kaingaroa had undergone heavy land purchasing in the 1880s and 1890s, often based on pre-title negotiations from the 1870s. In our view, the sufficiency of the resource base remaining to the iwi and hapu of those areas is of concern. Further consideration needs to be given to their likely precarious position by this time. This includes at least the Ngati Tutemohuta, Ngati Whoa, and Ngati Tahu communities with interests in northern Taupo and Kaingaroa. We note the submission of Ngati Tutemohuta, for example, that by 1900 large areas of their lands had been alienated as a result of lease negotiations followed by purchases, facilitated by court and survey costs. They had also lost almost all their valuable lands near Taupo township, reducing their economic opportunities to participate in the growing tourism trade at the time.

For the other iwi and hapu of Taupo, Mr Stirling based his assessment on the reports of resident magistrates Scannell, Bush, and others. It was clear that pastoral farming was only possible in Taupo on a very large scale – in
terms of amount of land committed to each farm – and that capital was required for such development. But Taupo Maori were ‘not burdened with much money since the land purchasing was discontinued,’ as Bush observed in 1889. In other words, Taupo Maori had no capital to invest after the low-price sales of the 1870s and 1880s. Their key assets were their timber, the natural features important to tourism and, above all, their lake. They depended on its shores for horticulture and its waters for fish. In terms of the geothermal features so central to tourism opportunities, Mr Stirling describes how the Government targeted hot springs in its nineteenth-century purchasing in Taupo and Kaingaroa, especially in the Paeroa East and South blocks. In insisting on obtaining whatever hot springs it could, the Crown was foreclosing opportunities for Maori of these districts, regardless of how many acres they retained (see also chapters 15 and 20).

The loss of around 90 per cent of Kaingaroa lands foreclosed on both the continued use of traditional resources and the future opportunity and benefits that may have been available from these lands. In terms of the tiny remnant left to Maori such as Ngati Manawa, Ngati Hineuru, Ngati Haka Patuheuheu, and all those with customary interests there, as described in part 1 and our appendix, Mr Stirling observes that the land was of ‘very low economic value’ in terms of its utility in the new economy. At the same time, problems like pests and the decline of birding meant that the remaining patches of bush were of little use for traditional purposes either, and this had been its great value originally for its Maori right-holders. Some tribal communities had already lost their rights in Kaingaroa through the Native Land Court. The remainder had too little land left there for that district to provide a land or resource base for either their present or future needs.

The overall patterns of land retention show that even where there were apparently relatively high retention rates in some districts, purchasing had targeted much of what were regarded as the immediately valuable lands in economic terms. In some cases, as for Kaingaroa and northern Taupo, this assumption proved wrong in the short term, when lands snapped up for runholding were discovered to be much less suited to this activity than expected. Maori communities were not protected in sufficient lands (nor did they obtain sufficient capital) to take part in these ventures, and the loss of significant lands foreclosed future possibilities for some, such as the timber industry forecast by Stout and Ngata as early as 1908. At least large areas of the Taupo district remained in Maori ownership for possible future uses, and the timber lands did eventually prove very valuable, as will be discussed in part 1v. However, in the immediate future, even with these lands, the loss of important resources such as the geothermal springs at Tokaanu was still very significant. Stout and Ngata warned the Government that even apparently significant acreages could be illusory. Mr Stirling provides convincing evidence of the poverty of Taupo Maori at the turn of the century. It remained to be seen whether they retained a sufficient base for development after 1900, which we will assess in part 1v.

The Crown has conceded that some iwi and hapu of this region had been left without a sufficient land base for their present and future needs by the turn of the century. We have indicated those areas and communities we feel are most likely to fall within this description. This is necessarily not comprehensive but we wish to warn parties that we are of the view that the patterns are sufficiently clear to indicate that the retention of a sufficient base was not just an issue for those groups in districts where overall land retention was lowest. Nor in this region can sufficiency be considered only in terms of acreages retained. In large parts of the interior, a quantitative measure was meaningless on its own. Acreages alone were clearly illusory, and this was known to the Government from at least the time of its review of purchasing in the early 1880s, when it decided to recover its advances on lands of little immediate economic value.

In sum, we think that the tribes of coastal Rotorua were left with insufficient land and resources by 1900. The tribes of inland Rotorua retained more land but none of it was ‘surplus’ to their needs, and they had lost possession of many of the key natural features on which to base development in tourism. Only Ngati Pikiao, in the view of the
Stout–Ngata commission, really had sufficient land. The tribes with interests in Kaingaroa had either lost them in court or to alienation, leaving insufficient land and resources for that district to form a base for their customary practices or for economic development. The tribes of northern Taupo may have retained insufficient land, but the evidence is not entirely clear. Many key geothermal features of value for tourism development in Taupo had been lost. Some Taupo groups retained sufficient land and resources for the possibility of economic development in the twentieth century. Land sales had left them with no capital for such development.

We turn next (in chapter 11) to the issue of Maori land in the twentieth century, and the legacy of the Crown’s nineteenth-century title system.

We conclude with the metaphor presented to us by claimant counsel, which was an apt one and underlines the coercive and unfair nature of nineteenth-century Crown purchasing of Maori land in the Central North Island:

(a) I, the Crown, have unlimited resources, whereas the would-be seller, though fond of the farm, is desperately poor, indeed possibly starving;
(b) The sellers are not allowed to sell their farm to anyone but me;
(c) While I am making up my mind about whether I want the farm or not, or how much I feel like paying for it, which can be for as many years as I like (decades sometimes), the owners are not allowed to mortgage or lease their farm or give it away to anyone else (if they dare to do so that is a criminal offence);
(d) I get to say what the farm is worth, and there is no way this can be challenged;
(e) If the farm is owned by four people as tenants in common, the two who do not sell will have to pay some of the costs of subdivision, and if they don’t or can’t they will be made to hand over some of their portion to me.
(f) If the farm is owned by four people and three of them decide not to sell, I can still buy the interest of the person who will sell, and force the rest to meet some of the costs of cutting out the portion of the seller.
(g) If I have bought one of the shares and am trying to buy the rest from the others I can take out injunctions stopping the remaining owners from cutting down trees (even for their own use) and if they do so I can force them to pay some of the profits to me.446
**Summary**

**Treaty breaches**

- The Crown’s purchase system foreclosed on the possibility of a viable leasing economy, despite the clear wish of Central North Island Maori to lease instead of sell their land. The Government bought up private leases, entered into leases without subleasing or necessarily paying rent, and either turned them into purchases or abandoned them after tying up the land for many years.

- The Crown’s purchase system in the 1870s made advances before title determination, which dealt with ‘owners’ as picked by agents, and locked whole communities into transactions without genuine consent or an agreed price. When the Crown abandoned this system in the 1880s, admitting its many flaws, it nonetheless insisted on ‘completing’ many of the flawed transactions.

- The Crown’s purchase system in the 1880s and 1890s bought up individual shares, undermined community decision-making, undermined tino rangatiratanga, and took advantage of debt (much of it title-related) to obtain individual sales. The Government then manipulated the court process to partition out its interest, in such a way that it secured the award it wanted on the ground from its purchase of individual, undivided, paper shares. Hapu communities had no control and their tino rangatiratanga was subverted. No one knew what had been ‘sold’ until the full number of individual transactions was revealed in court, and the court then made a decision on where those interests should be located on the ground. This allowed the Government to obtain taonga (on partition) with which Maori did not wish to part, and assisted its targeting of key geothermal and other valued resources. Further, the system obscured how much land had been sold or retained, of what quality, and where, so that official protections of a sufficiency of Maori land were no more than nominal.

- The Crown’s purchase system used monopoly powers to prevent other uses of the land, to keep prices low, and to coerce sales to the Crown.

- The system of determining prices was unfair to Maori. It was unrelated to a market value and there were no auctions or independent valuations, both of which were suggested as remedies. Prices were kept low, and no
minimum price was set. Instead, the Government left its agents to operate within a maximum price, and many individuals (especially the first to sell) received less than others.

- Parliament’s intention in 1873 to secure the retention of sufficient tribal endowments of land was defeated in implementation. The 50-acre-per-individual rule was inappropriate, district officers did not set apart reserves, and purchase agents were not the appropriate officers to ensure that sufficient land was retained. In sum, the official protections did not ensure the retention of a sufficient tribal base for many Maori of the Central North Island.

- All the above features of the Crown’s purchase system were in breach of the Treaty.

Prejudice

- The tribes of coastal Rotorua were left with insufficient land and resources by 1900.

- The tribes of inland Rotorua retained more land, but none of it was ‘surplus’ to their needs, and they had lost possession of many of the key natural features on which to base development in tourism. Only Ngati Pikiao, in the view of the Stout–Ngata commission, really had sufficient land by the first decade of the twentieth century.

- The tribes with interests in Kaingaroa had either lost them in court or to alienation, leaving insufficient land and resources for that district to form a base for their customary practices or for economic development.

- The tribes of northern Taupo may have retained insufficient land, but the evidence is not entirely clear. Many key geothermal features of value for tourism development in Taupo had been lost.

- Some Taupo groups retained sufficient land and resources for the possibility of economic development in the twentieth century. Land sales, however, had left them with no capital for such development.
Notes

4. Land History and Alienation Database block histories, Maketu District, p. 1469
6. Ibid, p. 140
7. Ibid, pp. 135–136
11. 'Sketch Map of Bay of Plenty and Taupo districts Derived from Trigonometrical Survey' certified by Theophilus Heale, Inspector of Surveys, May 1869, Geographic Board Collection (cited in Bruce Stirling, 'Taupo–Kaingaroa Nineteenth Century Overview', report commissioned by CFRT, September 2004 (doc A71), pt. 1, p. 12)
13. Ibid, pp. 26, 40
15. Michael Macky, 'Crown Purchasing in the Central North Island Inquiry District, 1870–1890', report commissioned by CLO, November 2004 (doc A81), pp. 18–19
17. For example, James Belich, Making Peoples: A History of the New Zealanders from Polynesian Settlement to the End of the Nineteenth Century (Auckland: Allen Lane and the Penguin Press, 1996), ch. 11
19. Ibid, p. 15. Rose also notes that Davis had famously been charged with sedition and acquitted for his part in publishing a pamphlet in support of the King movement, and had worked as a land purchase officer. Mitchell was a trained surveyor who had worked in Taupo, 70 Mile Bush (Wairarapa–Hawkes Bay), and had been a land agent in the Bay of Plenty (pp. 16–18).
25. Ibid, p. 126
26. Ibid, pp. 133, 134, 146–147
27. Bruce Stirling, 'Taupo–Kaingaroa Nineteenth Century Overview', report commissioned by CFRT, September 2004 (doc A71), pt. 2, pp. 1152–1299
28. Ibid, pp. 1162, 1168
29. Ibid, pp. 1162, 1168


34. Bruce Stirling, 'Taupo–Kaingaroa Nineteenth Century Overview', report commissioned by CFRT, September 2004 (doc A71), pt 2, p 1280


36. Ibid, pp 292, 296

37. 'Native Land and Native Land Tenure: Interim Report of the Native Land Commission, on Native Lands in the County of Rotorua', AJHR, 1908, G-1E, p 2

38. Richard Boast, generic closing submissions on nineteenth-century land alienation, 1 September 2005 (paper 3.3.58), p 2

39. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 168

40. Ibid, pt 1, p 25

41. Ibid, pt 2, p 179

42. Ibid, p 170

43. Ibid, p 169

44. Richard Boast, generic closing submissions on nineteenth-century land alienation, 1 September 2005 (paper 3.3.58), p 3

45. Ibid, p 6

46. Ibid, p 7

47. Ibid, pp 3, 7; Richard Boast, reply submissions on nineteenth-century land alienation in Taupo, Kaingaroa and Rotorua, October 2005 (paper 3.3.143), p 13

48. Richard Boast, generic closing submissions on nineteenth-century land alienation, 1 September 2005 (paper 3.3.58), pp 13, 23

49. For example, Martin Taylor, generic closing submissions on political engagement, tourism, and geothermal issues, 2 September 2005 (paper 3.3.67), pp 105–106


51. Richard Boast, generic closing submissions on nineteenth-century land alienation, 1 September 2005 (paper 3.3.58), pp 9–12

52. Ibid, pp 33–35

53. Martin Taylor, generic closing submissions on political engagement, tourism, and geothermal issues (paper 3.3.67), pp 108–109

54. See for example Aidan Warren, closing submissions on behalf of Ngati Tutemohuta and Karanga Hapu, 2 September 2005 (paper 3.3.84), pp 72–80

55. Ibid, pp 61–66; Martin Taylor, closing submissions on behalf of Tauhara, 2 September 2005 (paper 3.3.92), p 26

56. Aidan Warren, closing submissions on behalf of Ngati Tutemohuta and Karanga Hapu, 2 September 2005 (paper 3.3.84), pp 61–66

57. Ibid, pp 61–66

58. Richard Boast, generic closing submissions on nineteenth-century land alienation, 1 September 2005 (paper 3.3.58), p 9


60. For example, Richard Boast, generic closing submissions on nineteenth-century land alienation, 1 September 2005 (paper 3.3.58), pp 6, 11, 40–41

61. Ibid, p 41


63. Ibid, p 9

64. For example, Richard Boast, generic closing submissions on nineteenth-century land alienation, 1 September 2005 (paper 3.3.58), pp 39–42

65. Ibid, p 13; Martin Taylor, Central North Island claimant replies: political engagement, tourism, geothermal, claimant specific, 31 October 2005 (paper 3.3.141), p 30

66. Richard Boast, generic closing submissions on nineteenth-century land alienation, 1 September 2005 (paper 3.3.58), pp 3–4

67. Ibid, p 4

68. Richard Boast, reply submissions on nineteenth-century land alienation in Taupo, Kaingaroa, and Rotorua, October 2005 (paper 3.3.143), p 10

69. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 1, pp 1–2; pt 2, p 168

70. Ibid, pt 1, p 11–12

71. Ibid, pt 2, p 181

72. Ibid, pt 1, p 5; pt 2, pp 168, 173–175

73. Ibid, pt 2, p 171

74. Ibid, pp 170–171

75. Ibid, p 169

76. Ibid, p 208
77. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 208
78. Ibid, pp 208–209
79. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 1, pp 1–2; pt 2, pp 209–210
80. Ibid, p 205
81. Ibid, p 169
82. Ibid, p 203
83. Ibid, p 204
84. Ibid, p 205
85. Ibid, p 207
86. Ibid, pp 182–183
87. Ibid, p 197
88. Ibid, pp 197–198; see also Michael Macky, 'Crown Purchasing in the Central North Island Inquiry District, 1870–1890', report commissioned by CLO, November 2004 (doc A81), pp 283–287
89. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 198
90. Ibid, pp 196–197
91. Ibid, p 195
92. Ibid
93. Ibid, p 211
94. Ibid, p 200
95. Ibid, p 213
96. Ibid, pp 185–186, 200
97. Ibid, p 194
98. Ibid, p 196
99. Ibid, p 193
100. Ibid, pp 192–193
101. Ibid, p 169
102. Ibid, p 190
103. Ibid, p 191
104. Ibid
105. Ibid, p 192
106. Ibid, p 213
107. Ibid, p 214
108. Ibid, p 168
109. Ibid, p 215
111. Ibid, pp 215–216
112. Ibid, pp 171–172
114. Immigration and Public Works Act Amendment Act 1871, s 42
116. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 209
118. Ibid, pp 206–208 (as quoted in Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 91)
119. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 92
121. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 92
122. The identity of the parties to the agreement was a subject of discussion in the inquiry. Hamuera Mitchell cites these as being the parties; Hamuera Walker Mitchell, brief of evidence, 26 April 2005 (doc f68), pp 12–14.
129. ‘Native Land and Native Land Tenure: Interim Report of the Native Land Commission, on Native Land in the County of Rotorua,’ AJHR, 1908 g-18, p 2

131. See ‘Petition of the Federated Maori Assembly of New Zealand’, AJHR, 1893, 1

132. Donald Loveridge, evidence given under cross-examination, seventh hearing, 1 June 2005 (transcript 4.1.8, p 150)

133. R Stout, 28 September 1894, NZPD, 1894, vol 86, p 388


135. For example, Waitangi Tribunal, The Hauraki Report, 3 vols (Wellington: Legislation Direct, 2006), vol 2, p 749

136. Michael Macky, ‘Crown Purchasing in the Central North Island Inquiry District, 1870–1890’, report commissioned by CLO, November 2004 (doc A81), pp 83–85. Macky cites the example of Te Puke, where the Crown reduced its intended price after substantial advances had been paid (p 86).


141. Gilbert Mair (as quoted in Ron Crosby, Gilbert Mair: Te Kooti’s Nemesis (Auckland: Reed Books, 2004), p 292)

142. See examples in Martin Taylor, generic closing submissions on political engagement, tourism, and geothermal issues, 2 September 2005 (paper 3.3.67), appendix 3, pp 211–213


144. ‘Notification of the Payment of Money on, and Entry into Negotiations for, the Purchase or Acquisition of Native Lands in the North Island’, 26 February 1878, New Zealand Gazette, 1878, no 21, pp 293–300; Mary Gillingham, ‘Waitaha and the Crown, 1864–1981’, report commissioned by CFRT, February 2001 (doc A35), p 144


146. Rose notes an extra payment made to Nutana in Kaikokopu on the grounds that he was considered ‘a man of great influence’; Kathryn Rose, ‘The Fenton Agreement and Land Alienation in the Rotorua District in the Nineteenth Century’, report commissioned by CFRT, September 2004 (doc A70), p 186. Rose also records that in 1895, Gill paid Takaanui Tarakawa in relation to Mangarewa–Kaharoa in exchange for assisting with convincing members of Rangiwewehi to sell land. Stirling notes that Grace, while negotiating lease of Runanga 2 on behalf of Morrin, paid £6 to Te Rangitahau ‘to induce him to influence Hira Te Rangipumamah to sign subdivision application and to act favourably in your interest’ (p 418). This tactic was also employed in the early 1870s to overcome opposition to road-building, and payments were frequently adopted by survey parties to quieten opposition to surveys in the district; Bruce Stirling, ‘Taupo–Kaingaroa Nineteenth Century Overview’, report commissioned by CFRT, September 2004 (doc A71), pt 1, pp 417–418; pt 2, p 1082


148. ‘Minutes of Meetings with Natives and others and Correspondence’, AJHR, 1891, G-1, p 12


150. Ibid, p 168

151. Ibid, p 170

152. Ibid, pp 170–171

153. Ibid, p 171


157. ‘Native Lands in the Rohe-Potae (King-Country) District: An Interim Report’, AJHR, 1907, G-1B, p 4

158. ‘Native Lands and Native Land Tenure: General Report on Lands Already Dealt with and Covered by Interim Reports’, AJHR, 1907, G-1C, p 8


162. R Gill to Native Minister, 11 November 1879 (as quoted in Waitangi Tribunal, The Ngati Awa Raupatu Report (Wellington: Legislation Direct, 1999), p 93)

He Maunga Rongo


164. Michael Macky, 'Crown Purchasing in the Central North Island Inquiry District, 1870–1890', report commissioned by CLO, November 2004 (doc A81), p 78


167. Ibid, pp 36–37


177. Bay of Plenty Times (as quoted in Michael Macky, 'Crown Purchasing in the Central North Island Inquiry District, 1870–1890', report commissioned by CLO, November 2004 (doc A81), p 69)


179. Kathryn Rose, 'The Bait and the Hook: Crown Purchasing in Taupo and the Central Bay of Plenty in the 1870s, An Overview Report', report commissioned by CFRT, July 1997 (doc A54), pp 39–42. Davis and Mitchell's response was to reassert their stubborn refusal described above to acknowledge tribal authority over land. They wrote 'the Putaiki, will we assume, try their utmost to prevent our obtaining a footing at Rotomahana, we trust, however that we shall be able to prevent the rightful owners from being coerced on from surrendering their prerogative to any assumed power apart from the real interest in the soil' (p 75).

180. Ibid, p 111


182. In 1874 correspondence and directive in Kathryn Rose, 'The Bait and the Hook: Crown Purchasing in Taupo and the Central Bay of Plenty in the 1870s, An Overview Report', report commissioned by CFRT, July 1997 (doc A54), pp 53–55. These show that the advice not to purchase was less proscriptive in 1874, framed in terms of 'it would not be advisable', and 'it is not as a rule considered advisable' (pp 58–59). 'Land purchase officers are reminded that all land transactions in behalf of the Government must be conducted as openly as possible that in all cases the leading chiefs must be consulted, and they are to strictly avoid making payments to individuals who stealthily offer to part with their interests; such a course is decidedly objectionable as leading in some instances to natives receiving money without due inquiry as to their right to dispose of the land, thereby causing much discontent among the real owners and prejudicing the native mind against the action of Government officials; this is the 1875 directive (as quoted in Michael Macky, 'Crown Purchasing in the Central North Island Inquiry District, 1870–1890', report commissioned by CLO, November 2004 (doc A81), p 71).


184. Walzl argues that 'the use of advances appears to be something of an unofficial policy' during this period; Tony Walzl 'Ngati Awa Land, 1870–1970', report commissioned by the Waitangi Tribunal, 1996 (Ngati Awa inquiry (Wai 46), doc M18), p 14 (as quoted in Kathryn Rose, 'The Bait and the Hook: Crown Purchasing in Taupo and the Central Bay of Plenty in the 1870s, An Overview Report', report commissioned by CFRT, July 1997 (doc A54), p 42

185. Virginia Hardy, Sally McKechnie, Damien Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 213


188. Bruce Stirling, 'Taurpo–Kaihikaroa Nineteenth Century Overview', report commissioned by CFRT, September 2004 (doc A71), pt 1, p 27

190. Davis and Mitchell attempted to resolve this by holding a hui with the broader hapu; Michael Macky, ‘Crown Purchasing in the Central North Island Inquiry District, 1870–1890’, report commissioned by CLO, November 2004 (doc A81), p 70.

191. Ibid, pp 70–71


203. Ibid, pp 147–151


205. Ibid, p 32

206. Aidan Warren, closing submissions on behalf of Ngati Tutemohuta and Karanga Hapu, 2 September 2005 (paper 3.3.84), pp 61–66

207. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, pp 169–170, 192–195

208. Aidan Warren, closing submissions on behalf of Ngati Tutemohuta and Karanga Hapu, 2 September 2005 (paper 3.3.84), pp 57–58

209. Ibid, pp 61–66; Martin Taylor, closing submissions on behalf of Tauhara, 2 September 2005 (paper 3.3.92), p 26

210. Aidan Warren, closing submissions on behalf of Ngati Tutemohuta and Karanga Hapu, 2 September 2005 (paper 3.3.84), pp 61–66; Martin Taylor, closing submissions on behalf of Tauhara, 2 September 2005 (paper 3.3.92), p 26

211. Aidan Warren, closing submissions on behalf of Ngati Tutemohuta and Karanga Hapu, 2 September 2005 (paper 3.3.84), pp 61–66

212. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, pp 169, 192–195

213. Ibid, p 191

214. Ibid, p 192

215. Ibid, p 170

216. Michael Macky, ‘Crown Purchasing in the Central North Island Inquiry District, 1870–1890’, report commissioned by CLO, November
204 (doc A81), p 56, p 199; David Alexander, ‘19th Century Crown
Purchases of Ngati Makino Lands’, report commissioned by CFRT, June
1995 (doc A3), p 68

217. D Pollen, 24 July 1874, NZPD, 1874, vol 16, p 209 (as quoted in
Kathryn Rose, ‘The Bait and the Hook: Crown Purchasing in Taupo
and the Central Bay of Plenty in the 1870s, An Overview Report’, report
commissioned by CFRT, July 1997 (doc A54), pp 43–44

218. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter
Andrew, closing submissions on behalf of the Crown, 14 October 2005
(paper 3.3.111), pt 2, p 193

Taupo and the Central Bay of Plenty in the 1870s, An Overview Report’, report
commissioned by CFRT, July 1997 (doc A54), pp 145–257

commissioned by CFRT, March 2004 (doc A37), p 166

221. Wi Maihi Te Rangikaiheke (as quoted in Kathryn Rose, ‘The
Fenton Agreement and Land Alienation in the Rotorua District in the
Nineteenth Century’, report commissioned by CFRT, September 2004
(doc A70), p 38

222. Michael Macky, ‘Crown Purchasing in the Central North Island
Inquiry District, 1870–1890’, report commissioned by CLO, November
2004 (doc A81), pp 59–60

223. Ibid, p 172

224. Ibid, pp 170–171

225. Bruce Stirling, ‘Taupo–Kaingaroa Nineteenth Century Overview’, report commissioned by CFRT, September 2004 (doc A71), pt 1,
pp 446–454; Kathryn Rose, ‘The Bait and the Hook: Crown Purchasing in
Taupo and the Central Bay of Plenty in the 1870s, An Overview Report’, report
commissioned by CFRT, July 1997 (doc A54), pp 134–137


227. Ibid, p 173

228. David Alexander, ‘19th Century Crown Purchases of Ngati

229. Ibid, pp 199–222

230. Bruce Stirling, ‘Taupo–Kaingaroa Nineteenth Century Overview’, report commissioned by CFRT, September 2004 (doc A71), pt 1,
p 499


232. Michael Macky, ‘Crown Purchasing in the Central North Island
Inquiry District, 1870–1890’, report commissioned by CLO, November
2004 (doc A81), pp 181–185


234. Kathryn Rose, ‘The Bait and the Hook: Crown Purchasing in
Taupo and the Central Bay of Plenty in the 1870s, An Overview Report’, report
Stirling, ‘Taupo–Kaingaroa Nineteenth Century Overview’, report commissioned by CFRT, September 2004 (doc A71), pt 1, pp 156–159; Peter

235. Michael Macky, ‘Crown Purchasing in the Central North Island
Inquiry District, 1870–1890’, report commissioned by CLO, November
2004 (doc A81), p 180

236. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter
Andrew, closing submissions on behalf of the Crown, 14 October 2005
(paper 3.3.111), pt 2, p 61–62

237. Len Richardson, ‘Parties and Political Change’ in The Oxford
History of New Zealand, edited by GW Rice (Auckland: Oxford
University Press, 1992), pp 201–229

238. ‘Native Affairs Committee’, AJHR, 1905, 1-3B, p 19

239. Donald Loveridge, “‘The Most Valuable of the Rotorua Lands’:

240. Waitangi Tribunal, Te Tau Ihu o te Waka a Maui: Preliminary

Lands, 1865–1910: A Preliminary Survey’, report commissioned by CLO,
October 2004 (doc A77), p 107

Taupo and the Central Bay of Plenty in the 1870s, An Overview Report’, report
commissioned by CFRT, July 1997 (doc A54), pp 184; Michael
Macky, ‘Crown Purchasing in the Central North Island Inquiry District,
1870–1890’, report commissioned by CLO, November 2004 (doc A81),
p 139

243. R Gill (as quoted in Michael Macky, ‘Crown Purchasing in the
Central North Island Inquiry District, 1870–1890’, report commissioned by CLO, November 2004 (doc A81), p 82

244. Donald Loveridge, ‘The Development of Crown Policy on the

245. Kathryn Rose, ‘The Bait and the Hook: Crown Purchasing in
Taupo and the Central Bay of Plenty in the 1870s, An Overview Report’, report
commissioned by CFRT, July 1997 (doc A54), pp 243–249; see also

246. Michael Macky, ‘Crown Purchasing in the Central North Island
Inquiry District, 1870–1890’, report commissioned by CLO, November
2004 (doc A81), pp 161–166

247. Ibid, p 204

260. Ibid, pp 309–310
261. Ibid, p 310
262. Ibid, pp 312–313
267. Ibid, p 9
283. Ibid, pp 163–164
284. The legal mechanism through which the partition of Crown interests was effected, as stated above, was the Native Land Act Amendment Act 1877; the Native Land Court Act 1886 ss 66; Native Land Court Act 1894, ss 76–78; David Williams, ‘Te Kooti Tango Whenua: The Native Land Court 1864–1909’ (Wellington: Huia, 1999), appendix 13, pp 329–339
287. Claimed in Richard Boast, generic closing submissions on nineteenth-century land alienation, 1 September 2005 (paper 3.3.58), p 46, but no reference to legislation here. Under the Native Land Act 1873 ss 65–66, if non-sellers were in the minority, they were obliged to bear the whole cost of partition; David Williams, ‘Te Kooti Tango Whenua: The Native Land Court 1864–1909’ (Wellington: Huia, 1999), p 287. Native Land Laws Amendment Act 1896 allowed the court to award additional land to compensate for costs incurred in partition or definition of relative interests (s 11).
292. Ibid, pp 1119–1120
293. Ibid, pp 1230–1235
294. Ibid, p 1232
296. Ibid, pp 305–308
298. Ibid, pp 947, 1166
299. Ibid, pp 1088, 1164, 1230
303. Ibid, p 788
304. Ibid, p 787
305. Ibid, p 842
306. Ibid, p 758
308. Michael Macky, ‘Crown Purchasing in the Central North Island Inquiry District, 1870–1890’, report commissioned by CLO, November 2004 (doc A81), p 166
310. P Sheridan (as quoted in David Rangitauira and Miharo Armstrong, closing submissions on behalf of Ngati Whakaue, 6 September 2005 (paper 3.3.82), pp 19–21); Kathryn Rose, ‘The Fenton Agreement and Land Alienation in the Rotorua District in the Nineteenth Century’, report commissioned by CFRT, September 2004 (doc A70), pp 259, 260
313. R Gill (as quoted in Duncan Moore and Judi Boyd, 'The Alienation of Whakarewarewa: Collective Customary Possessions; Tourist and Health Resources; Geothermal Taonga; Rights of Way; Reserves', report commissioned by the Waitangi Tribunal, February 1995 (doc A30), p 69)

314. Duncan Moore and Judi Boyd, 'The Alienation of Whakarewarewa: Collective Customary Possessions; Tourist and Health Resources; Geothermal Taonga; Rights of Way; Reserves', report commissioned by the Waitangi Tribunal, February 1995 (doc A30), pp 95–96


320. Ibid, p 283

321. Ratana Te Kapaiwaho and 29 others, 6 August 1895 (doc A70(i), p 4578)

322. File note from Gill to Sheridan, 15 December 1895 (doc A70(i), p 4577)

323. R Gill, 24 February 1896 (transcription), Rotorua MB 36 (doc F3(a), p 75)

324. Patoromu Ngamanu, 24 February 1896 (transcription), Rotorua MB 36 (doc F3(a), p 76)


326. R Gill, 24 February 1896, Rotorua MB 36 (transcription), F3(a), p 75

327. Gill to Sheridan, 13 March 1896 (as quoted in Kathryn Rose, 'The Fenton Agreement and Land Alienation in the Rotorua District in the Nineteenth Century', report commissioned by CFRT, September 2004 (doc A70), p 40)

328. Annual Report for Department of Lands, 1896 (as quoted in Kere Cookson-Ua, 'Pekehaua Puna Reserve and Hamurana Springs Reserve', report commissioned by the Waitangi Tribunal, February 1996 (doc G12), p 40)

329. Matenga Te Waharoa, 2 March 1897 (transcription), Rotorua MB 23 (doc F3(a), p 346)

330. Judgment, 2 March 1897 (transcription), Rotorua MB 23 (doc F3(a), pp 350–352)

331. Ibid, p 351

332. Ngahihi Bidis, brief of evidence, April 2005 (doc F3)


334. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 168

335. For example, Matanuku Mahuika and Ebony Duff, closing submissions regarding generic issues on behalf of Wai 316, 8 September 2005 (paper 3.3.98), pp 19–21


337. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, pp 171–172


341. By the term ‘slave’, the commissioners were referring to captives taken in war, many of whom had remained living outside their own tribal communities after 1840.

342. 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws,' AJHR, 1891, G-1 (as quoted in Bruce Stirling, 'Taupo–Kaingaroa Nineteenth Century Overview', report commissioned by CFRT, September 2004 (doc A71), pt 2, p 1449)

343. Richard Boast and Liz Macpherson, reply submissions on behalf of Ngati Rangitihi, 31 October 2005 (paper 3.3.117), pp 11–14

344. Te Kani Williams and Dominic Wilson, closing submissions on behalf of Ngati Haka Patuheheu and generic closing submissions on the Native Land Court, 2 September 2005 (paper 3.3.90), p 72

345. Richard Boast, generic closing submissions on nineteenth-century land alienation, 1 September 2005 (paper 3.3.58), p 33

346. Aidan Warren, closing submissions on behalf of Ngati Tutemohuta and Karanga Hapu, 2 September 2005 (paper 3.3.84)
347. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, pp 160–161
348. Ibid, p 163
349. Ibid, p 177
350. Ibid, pp 177–178
361. Ibid
362. Ibid
367. Michael Macky, evidence given under cross-examination, third hearing, 10 March 2005 (transcript 4.1.4, p 85)
370. Ibid, p 456
373. ‘Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws’, AJHR, 1891, G-1, p 157
374. Ibid, p 158
375. Ibid, p 159
376. Ibid, pp 157–158
377. D McLean, 25 August 1873, NZPD, 1873 vol 14, p 604
378. ‘Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws’, AJHR, 1891, G-1, pp 7–8
380. ‘Native Lands and Native-Land Tenure: Interim Report of Native Land Commission, on Native Lands in the County of Rotorua’, AJHR, 1908, 1, p 2
384. Michael Macky, evidence given under cross-examination, third hearing, 10 March 2005 (transcript 4.1.4, p 85)
385. Kathryn Rose, evidence given under cross-examination, fourth hearing, 18 March 2005 (transcript 4.1.5, p 325)
389. Duncan Moore and Judi Boyd, 'The Alienation of Whakarewarewa: Collective Customary Possessions; Tourist and Health Resources; Geothermal Taonga; Rights of Way; Reserves', report commissioned by the Waitangi Tribunal, February 1995 (doc A30), p 60 (as quoted in Richard Boast, generic closing submissions on nineteenth-century land alienation, 1 September 2005 (paper 3.3.58), p 33)
390. Kathryn Rose, evidence given under cross-examination, fourth hearing, 18 March 2005 (transcript 4.1.5, p 325)
391. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 177
393. O N Campbell to Chairman of Native Affairs Committee, 5 August 1936, AJHR, G-6D, 1937, p 22
394. 'The Native Purposes Act, 1936', AJHR, 1937, G-6D, p 1
396. Ibid, p 23
398. 'The Native Purposes Act, 1936', AJHR, 1937, G-6D, p 11
399. Ibid, p 12. No response from the chief judge is on record.
400. Ibid, pp 3–4
401. Ibid, p 1
402. Aidan Warren, closing submissions on behalf of Ngati Tutemohuta and Karanga Hapu, 2 September 2005 (paper 3.3.84), pp 40–42
403. 'The Native Purposes Act, 1936', AJHR, 1937, G-6D, p 4
405. Mr Stirling suggests that despite retaining relatively large areas of land, Taupo Maori did not retain sufficient because of poor land quality; Bruce Stirling, 'Taupo–Kaingaroa Nineteenth Century Overview', report commissioned by CRFT, September 2004 (doc A71), pt 2, p 1471. Mr McBurney laments a Ngati Manawa reserve, Kioremu, that was not laid out as agreed and once the error was acknowledged the Crown offered not to lay out the reserve, but to pay money; Peter McBurney, 'Ngati Manawa and the Crown 1840–1927', report commissioned by CRFT, March 2004 (doc A37), p 470.
408. Bruce Stirling, 'Taupo–Kaingaroa Nineteenth Century Overview', report commissioned by CRFT, September 2004 (doc A71), pt 2, p 1597
410. Bruce Stirling, 'Taupo–Kaingaroa Nineteenth Century Overview', report commissioned by CRFT, September 2004 (doc A71), pt 2, p 1304
411. Ibid, pp 1183–1184
414. For example, Richard Boast, reply submissions on nineteenth-century land alienation in Taupo, Kaingaroa, and Rotorua, October 2005 (paper 3.3.143), p 10
415. For example, ibid, pp 10–12
416. Ibid, p 13
417. For example, Martin Taylor, closing submissions on behalf of Tauhara (paper 3.3.92), p 33
418. Te Kani Williams and Dominic Wilson, closing submissions on behalf of Ngati Te Pukuohakoma, 9 September 2005 (paper 3.3.105), p 16
419. For example, Martin Taylor, closing submissions on behalf of Ngati Rangiwewehi, 2 September 2005 (paper 3.3.79), p 18; Karen Feint, closing submissions on behalf of Ngati Tuwharetoa, 9 September 2005 (paper 3.3.106), p 245; Martin Taylor, closing submissions on behalf of Tauhara, 2 September 2005 (paper 3.3.92), p 20
420. Richard Boast, generic closing submissions on nineteenth-century land alienation, 1 September 2005 (paper 3.3.58), p 18. Many of those pleading on the sufficiency of land base remaining to them have not specified to what extent they retained sufficient land specifically in the nineteenth century.
421. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 177
422. Ibid, pp 177
He Maunga Rongo

423. David Alexander, responses to written questions, July 2005 (doc 143)

424. These figures are subject to quite a lot of interpretation. For example the bed of Taupo Moana is included in the Land History and Alienation Database as Maori land and is later recorded as a public works taking.

425. Karen Feint, closing submissions on behalf of Ngati Tuwharetoa, 9 September 2005 (paper 3.3.106), p 9

426. Kathryn Rose, 'The Fenton Agreement and Land Alienation in the Rotorua District in the Nineteenth Century', report commissioned by CFRT, September 2004 (doc A70), p 300. As the Stout–Ngata commission observed, by 1909 Te Arawa did not have surplus lands but they considered that Pikiao (of whom Makino are arguably a hapu) did. Te Awanuiarangi Black, brief of evidence, 7 February 2005 (doc B30), paras 30–35.

427. ‘Interim Report of the Commission Appointed to Inquire into the Question of Native Lands and Native Land Tenure’, AJHR, 1907, G-1, p ii

428. ‘Native Land and Native Land Tenure: General Report on Lands Already Dealt With and Covered by Interim Reports’, AJHR, 1907, G-1c, p 5

429. Ibid, p 23

430. ‘Native Lands and Native-Land Tenure: Interim Report of Native Land Commission, of Native Lands in County of Rotorua’, AJHR, 1908, G-1e, p 1; ‘Native Lands and Native-Land Tenure: Interim Report of Native Land Commission, of Native Lands in County of Tauranga’, AJHR, 1908 G-1d, p 1

431. ‘Native Lands and Native-Land Tenure: Interim Report of Native Land Commission, of Native Lands in County of Tauranga’, AJHR, 1908, G-1n, p 6

432. ‘Native Lands and Native-Land Tenure: Interim Report of Native Land Commission, on Native Lands in County of Rotorua’, AJHR, 1908, G-1e, p 5

433. Ibid, p 4

434. Ibid, p 2

435. Ibid, p 3

436. ‘Native Lands and Native-Land Tenure: Interim Report of Native Land Commission, of Native Lands in County of Tauranga’, AJHR, 1908, G-1d, p 1

437. Ibid, p 1

438. ‘Native Lands and Native Land Tenure: Interim Report of Native Land Commission on Native Lands in the County of Rotorua’, AJHR, 1908, G-1h, p 2

439. ‘Native Lands and Native-Land Tenure: Interim Report of Native Land Commission on Native Land in the County of Whakatane’, AJHR, 1908, G-1c, p 1


441. Aidan Warren, closing submissions on behalf of Ngati Tutemohuta and Karanga Hapu, 2 September 2005 (paper 3.3.84)


443. See, for example, ibid, pt 1, pp 341–342, 349, 375, 385–388, 443–446, 462–463, 696–697, 723–787

444. Ibid, pt 2, p 1472

445. See, for example, Bruce Stirling, ‘Taupo–Kaingaroa Nineteenth Century Overview’, report commissioned by CFRT, September 2004 (doc A71), pt 1, p 347

446. Richard Boast, generic closing submissions on nineteenth-century land alienation, 1 September 2005 (paper 3.3.58), pp 3–4
THE LEGACY OF THE NINETEENTH CENTURY: MAORI LAND, TITLES, ALIENATION, AND RETENTION IN THE TWENTIETH CENTURY

Chapter 11

Introduction
This chapter considers the ways in which the sale and lease of Maori land, and the management and development of the land retained by Maori, were administered in our inquiry region during the twentieth century. At the beginning of the century the Crown set up a unique land administration system, which was modified during subsequent decades. This system was designed to address the problems which Maori owners faced by the end of the nineteenth century – in relation to land transactions and land use – arising from the tenure system introduced by the Crown. The new system failed to provide for community titles, and thus shattered the ability of hapu communities to manage their land collectively.

In this chapter we seek to address two broad issues. First, we ask whether Crown policies and practices relating to both the alienation and the administration of Maori land were compliant with the Crown’s Treaty obligations. We therefore examine the land alienation policies and practices in the inquiry region from around 1900 through to the 1930s, the Crown’s changing policies governing Crown purchasing, private purchasing, and the leasing of Maori land, and the impacts of those policies on Maori owners.

Secondly, we explore whether the Crown’s efforts to mitigate the negative impacts of its nineteenth-century tenure system were compliant with its Treaty obligations. To that end we examine the Crown’s attempts to address the difficulties which its new system, and ‘virtual’ individualisation of title, caused succeeding generations of Maori owners who wished to retain and develop their land.

Crown policies to address title difficulties were of two kinds. At first the focus was on simplifying Maori titles by regrouping owners’ scattered interests into workable farms or plots. By the mid-twentieth century the Crown had introduced a range of title ‘improvement’ measures, designed to remove large numbers of owners who had only small interests in land from the titles altogether. Secondly, the Crown tried to restore the ability of Maori to manage their lands collectively. Its early provisions were for joint Crown–Maori management of land through the land councils, succeeded by Maori land boards which could manage land on behalf of the owners. There were also provisions for incorporations and for land to be placed in trust – which however would not be of real importance in the Central North Island till the mid- to late-twentieth century. From that time they became an important vehicle for collective owner management of their lands.

Overview of twentieth-century Maori land alienation and administration
From 1900, new Crown agencies were charged with the administration of Maori land, including its alienation. Maori land councils, set up under the Maori Lands Administration Act 1900, had a brief existence. Maori from each of the regions in which councils were established
were able to elect representatives to the councils, alongside appointed members; land councils thus offered the possibility of joint Crown–Maori land management. Councils were charged not with selling land on behalf of the Maori owners, but with leasing it. But the Liberal Government’s moratorium on land purchasing was short-lived. From 1905 Crown purchases began again. The land councils were replaced by smaller district Maori land boards comprising three appointed members, only one of whom was Maori. The boards, like the councils, stood in the shoes of the owners in the conduct of land transactions: they handled leases on behalf of Maori owners, collected and distributed rents, and paid any taxes and rates. It was also their job to ensure that Maori were not left without means of support when their land was leased. In 1908 their role was extended to confirming all alienations.

In 1909 there was another major change in policy. Private buyers were allowed back into the market, and all existing restrictions on the alienation of Maori freehold land, whether statutory or imposed by the Native Land Court, were invalidated. Greater provision was made for Maori owners to have a role in decision-making about the sale or lease of their land through a ‘meeting of assembled owners’, in cases where there were more than 10 owners. But it was for the land boards to decide whether to call such meetings, when either an owner or a buyer wanted to proceed with an alienation. It was also the board’s job to decide whether to confirm any resolution passed by the Maori owners, and to ensure that no owner would be left ‘landless’ once an alienation proceeded. The Crown’s purchases were to be conducted by a new Native Land Purchase Board.

The administration of Maori land was streamlined in 1913. From then on the land boards would have only two members: the judge of the relevant Native Land Court district, and the registrar of the local Native Land Court. The Maori appointee was dispensed with. The judge and court registrar were to exercise the functions of the land board when they sat as the board, but retained their respective functions in the Native Land Court. This arrangement lasted until 1932, when responsibility for confirmation of alienations was taken over by the Native Land Court, but the boards were not abolished till 1952.

By the time the land boards disappeared from the scene, purchases of Maori land in the Central North Island had dwindled. The Crown continued to buy in Taupo till the 1940s, though elsewhere in the Central North Island inquiry region it was much less active after the 1910s. Private buyers, however, continued to make many smaller purchases in both Rotorua and Taupo, even into the 1980s. Leases also continued, and the land boards’ role in administering them was taken over by the Maori Trustee.

Alongside this system for the administration of purchasing and leasing, the Native Land Court continued to have a crucial function in administering land. Maori came to the court to seek successions to the interests of original owners, and partitions of blocks, and to confirm applications to purchase made by the Crown or private buyers. The court also played a key role in implementing the Crown’s policies for title simplification and for collective owner management of land and assets. The need for simplification of title to produce workable land holdings for owners was recognised as early as 1900, and the court was empowered under various Acts to exchange their interests where the owners desired it. A much more ambitious project was instituted for the consolidation of the interests of owners in different blocks, and several consolidation schemes were implemented in the inquiry region from the late 1920s. Consolidation, however, was overtaken by Sir Apirana Ngata’s development schemes. Ngata, who became Native Minister in 1929, gave up trying to sort out title problems and focused his attention on encouraging development. For the first time he secured state loans for Maori land development, and he was anxious to bring the land into production in what he suspected might be a small window of opportunity. This focus on development, without the resolution of title problems, ultimately caused difficulties for owners. Meanwhile, the Government backed away from consolidation as a title solution: it was too slow, and too hard.
The Crown took new initiatives in what was now called title ‘improvement’ in the post-war era. By this time, there was great concern with what was seen as the ‘problem’ of crowded Maori land titles. The Maori population boomed, and numbers of those succeeding to individualised interests, or entitled to succeed to them, increased with every generation. National governments, anxious to speed individualisation of title, and to bring remaining Maori land into production, tackled this ‘problem’ in two key pieces of legislation, the Maori Affairs Act 1953, and the Maori Affairs Amendment Act 1967. Their policies were based on the principle of removing the owners of small interests in land from the titles. This might be done with owners’ consent or, in certain circumstances, without their consent. The Maori Land Court and the Maori Trustee were to work together in this project, the court identifying interests below a specified value and the Maori Trustee buying them and, where possible, on-selling them. It was hoped that interests might be disposed of to ‘other Maori’, or the Maori incorporations which were being set up by this time. Maori disquiet with these policies, evident from the outset, erupted in the late 1960s, and the policies were abandoned in legislation in 1974.

Meanwhile the Crown had also put in place provisions whereby Maori owners could manage their land collectively. These signalled a rather different route to overcoming title dilemmas for Maori owners. Provision for incorporations, and also for management of land by trustees, had been made as early as the 1890s, but Maori did not take up the trustee option, and even incorporations were slow to be adopted in the Central North Island. Only in the post-war era did incorporations come to be seen as useful, as some owners began to make a success of them, and the Department of Maori Affairs, poised to return land development scheme farms to owners, saw that they would be a useful device for this purpose. At the same time, provisions for owners to form trusts (embodied in the Maori Affairs Act 1953) were made use of, encouraged by some proactive Maori Land Court judges who saw it as part of their job to advise the Maori owners who visited their court so often about land and title matters. By the 1960s, many trusts were being formed, often with a commercial body acting as the ‘responsible trustee’, though increasingly owner representatives became involved as advisory trustees.

The Te Ture Whenua Maori Act 1993, which was prepared over a number of years, finally provided for a range of trusts which might suit various purposes for Maori block owners. Incorporations have also remained important in Central North Island Maori land administration. The 1993 legislation was based on the principle of the retention and development of Maori land for the benefit of the owners. And the Maori Land Court, here as elsewhere, retains its advisory role, seeing itself as protective of Maori owners – those who are actively involved in land management, and those who, for a range of reasons, are not.

**The Tribunal’s Key Questions**

Our broad key questions in this chapter are:

| Section 1: Were Crown policies and practices relating to Maori land administration and alienation compliant with the Treaty? |
| Section 2: Were the Crown’s efforts to mitigate the negative impacts of the nineteenth-century tenure system compliant with its Treaty obligations? |

**Our key questions in section 1**

- Were Government policy changes in 1905 contrary to the 1900 agreement with Maori leaderships? Were the new policies Treaty-compliant?
- Were Crown policies for the alienation of Maori land between 1909 and 1913 Treaty-compliant?
- How were Crown policies implemented on the ground in the Central North Island in the period from 1900 to the 1930s? Were they Treaty-compliant?
Our key questions in section 2

- What title-simplification schemes were put in place by the Crown to mitigate the impacts on Maori owners of the introduced tenure system, and were they Treaty-compliant?
- Have trusts and incorporations provided an effective and Treaty-compliant form of collective owner control of land and resources?

**Section 1: Crown Policies and Practices Relating to Maori Land Administration and Alienation**

**Key question**: Were Crown policies and practices relating to Maori land administration and alienation compliant with the Treaty?

**The claimants’ case**

In general terms, the claimants in this inquiry were concerned about:

- Crown policies which resulted in limited Maori involvement in decision-making about the alienation, management, or development of their lands;
- continuing Crown purchase of large blocks of land, especially in Taupo up to the 1940s, and the methods by which purchase was conducted;
- Crown policies which facilitated continuing private purchase of Maori land throughout the inquiry region, lasting well into the twentieth century;
- continuing fragmentation of land parcels as land was sold and partitioned; and
- Crown responses to the continuing fractionation of titles (meaning that many Maori held interests expressed only in fractions of a share), which focused on reducing the numbers of owners in land parcels, coercively if necessary.

The claimants argued that the regulatory and legislative environment, especially in the first part of the century, facilitated land alienation. The Crown, they said, may have acted within the law, but the acts were intended to facilitate and expedite Crown purchase of Maori land. The land alienation process hindered the development of the land retained, and the resources associated with that land. According to the evidence of Ms Kukutai, Professor Pool, and Dr Sceats, sales – especially at the beginning of the twentieth century – left Maori worse off than they had been before, rather than providing them with a base for economic growth through development of their land.

The claimants also argued that the land boards had a crucial role in land policy during the first half of the twentieth century, functioning as the vehicle through which the Crown carried out its policy in relation to the lease and sale of land, with the focus being on sale. The regime took control out of the hands of owners and placed it in the hands of the boards (effectively Crown agencies). The revised composition of the boards excluded owners from any say in the disposal of their lands, while the boards and the courts being effectively merged in 1913 served to expedite approvals for alienation.

Leased lands were brought under control of the boards by 1910, but the boards were not vigilant in protecting Maori interests, keeping track of transfers of leases, or maintaining sufficient funds to pay compensation for improvements to lessees. In terms of sales:

- there was little protection for owners who did not want to sell; meetings of owners provisions put power to alienate in the hands of a small minority;
- land boards, when implementing protections against landlessness, ticked the boxes but did not provide effective protection for owners; and
- the Crown also targeted successors to shares, especially where it suspected a meeting of owners might not agree to sell, or where an offer had been rejected. It would apply for succession orders itself, then invite successors (who might be non-resident, or owners of small interests) to sell.

The claimants alleged that – despite the Stout–Ngata recommendations that the land boards should act as agents for the owners in all transactions, including those with...
the Crown – the Native Land Act 1909 reflected a more free-market-style philosophy. By 1909, it was clear that a resumption of large-scale Crown purchasing was imminent, and two decades of large-scale purchasing followed. The 1909 Act, and its crucial amendment in 1913, facilitated this purchase programme, and disempowered Maori as owners and vendors in a range of ways. Under the 1909 Act the Crown could purchase Maori land without confirmation from the land boards. The quorum requirements for a meeting of owners also effectively allowed alienation by a significant minority of owners. The boards were not careful in ascertaining whether Maori would be rendered ‘landless’ by alienations, and few sales were stopped on this count.

In assessing Crown purchase practices in this period, the claimants argued that the Crown benefited itself at the expense of Maori, in a range of ways. For instance:

- prices paid for land were below value;
- provisions to provide against landlessness were not effectively applied; and
- Crown agents used purchasing practices that facilitated land alienation.

This was in breach of the duties of partnership and good faith.

The claimants argued that the period from 1909 to 1928 was a key period of Crown purchase under the new Native Land Purchase Board, especially in Taupo and south Taupo; the latter area had been comparatively untouched by previous Crown purchasing activities. The Crown attempted to acquire as much land as possible as quickly and cheaply as possible, mostly for distribution among settlers and the development of public works infrastructure.

Above all, the Crown was privileged as a buyer. It could restrict alienation (defined widely) to any private party, reimposing an effective form of Crown pre-emption through proclamations. The claimants stressed in their reply submissions that under the 1913 Amendment Act the Crown could again acquire individual interests, and even if a meeting of owners rejected a Crown offer, the Crown could proceed to buy such interests. That the Crown could thus ignore the collective wishes of owners in this way is of major concern to the claimants. The Crown could control prices, and partition the land at its leisure once it had bought sufficient shares. Provisions in the 1909 and 1913 Acts enabled the Crown, as well as the owners, to request a partition hearing. Thus the Crown was well placed to ensure it got the most desirable land. The claimants quoted historian T J Hearn on the assumption underlying the Crown purchasing programme, that Maori would ‘maintain their traditional ways and remain marginal to the wider New Zealand society and economy’.

Only after 1929 did Crown purchasing diminish. The focus of Crown policy shifted away from purchase and redistribution of Maori land to settlers, and towards title reform and the development of remaining Maori lands. The claimants attributed to this shift to Ngata’s new approach as Native Minister, the Government’s strained financial circumstances in the 1930s, and a growing concern about Maori landlessness by this time. Even so, the Crown continued to acquire Maori land, usually for purposes such as afforestation, scenic reserves, public works, and to operate under the protection of orders prohibiting private alienation. The claimants pointed to the role of the Maori Trustee in land administration and alienation after 1953, and more will be said about these submissions in a later section of this chapter.

The Crown’s case

In relation to twentieth-century acquisition of Maori land, the Crown stated that productive land was fundamental to New Zealand and its economy in the early twentieth century. In the Central North Island the majority of Crown purchasing took place at this time, and mostly in the Taupo district – an area where a significant amount of land remained in Maori hands at the beginning of the century. In Rotorua, where more land had been purchased during the nineteenth century, there was comparatively little Crown purchasing during the twentieth century. Most of the land sold during that century was to private purchasers.
In Kaingaroa there was extensive Crown and private purchasing during the nineteenth century, and thus very little land bought by Crown or private purchasers in the twentieth century.

The Crown argued in general terms that the ability to lease and sell land is ‘fundamental’ to ownership. ‘For the Crown to have prohibited Maori from selling their land would have been a serious fetter on the rights of owners’; and the evidence suggests that there would always have been significant Maori opposition to any such proposal. The Crown, counsel suggested, ‘had a responsibility to put appropriate measures in place to ensure that land alienation reflected the wishes of the owners’, and to give them a range of choices.\(^5\)

Counsel was prepared to concede that it was ‘likely that the Crown could have done more to actively protect the land base of Maori, but this would likely to have been seen to have, and actually resulted in, potentially significant economic consequences’.\(^6\)

At the beginning of the twentieth century, the Crown argued, there was ‘no singular view of Maori’ regarding the best balance between utilisation and protection, and between freedom and limits on alienation.\(^7\) The Crown took consultation initiatives as part of title reform and land-administration initiatives, including the Stout–Ngata commission in 1907. But Stout and Ngata also had to recognise the wish of many Maori in the first decade of the century to deal with their lands as they pleased.\(^8\)

The Crown argued that the Native Land Act 1909 was a ‘very significant piece of legislation’. The Crown did not address the 1913 amendment in its submissions – a fact noted by the claimants. The 1909 Act, counsel said, was the culmination of a ‘decade of radical and extensive reforms to 19th century systems of land administration’, reflecting the experience gained by Maori and the Crown since 1900. It reintroduced competition into the market after a decade of restrictions. It marked the beginning of the twentieth-century system of administration, and the system ‘lasted with remarkably few fundamental changes down to the present day’.\(^9\) The Crown emphasised ‘two key elements’ of the legislation as lasting elements of the system, ‘namely the vetting of purchases by an independent institution and the approval of alienation by a meeting of assembled owners’.\(^10\) The 1909 Act, in which Ngata was ‘deeply involved’, also contained a number of important safeguards for sellers.\(^11\) The Crown acknowledged that there were problems with issues of notification and absenteeism, and difficulties experienced by owners in attending meetings. But such problems, it was stated, cannot be divorced from the general socioeconomic position of many Maori at the time.

The Crown quoted Dr Hearn to the effect that the 1909 Act (and its 1913 Amendment) were intended to encourage and expedite the alienation of Maori land as the owners saw fit. It sought to strike a balance between restrictions on alienation and the fundamental right of owners to sell if they so wished to do so. The Crown submitted that there were, and are, a range of views within the Maori community about how this balance could be struck. It became clear, in the context of wider societal and demographic changes of the twentieth century, that Maori could not be sustained by their landholdings alone. Nor did some Maori wish to be.\(^12\)

The Crown admitted that – despite the protections in the Act, and Ngata’s view that Maori would use the Act to lease through the land boards – a great deal of land was permanently alienated in the next 20 years. In Taupo this was predominantly through Crown purchasing. In the Crown’s view, what was critical in assessing its purchasing in Taupo was the extent to which the Crown observed various statutory tests and requirements relating to the alienation of Maori land, and the extent to which the land alienation process itself hindered efforts by Maori to initiate the development of their resources. There is no evidence, the Crown states, that Crown monopoly powers of purchase in relation to twentieth-century purchasing resulted in Central North Island Maori receiving an inferior price for their land, or that the independent valuation requirement in the 1909 Act was regularly undermined. The Crown adopts Dr Hearn’s view that it is reasonable for the Crown to buy land from anyone at the lowest possible
price, since it is spending taxpayers’ money. In Taupo, the principal Crown purchases were between 1919 and 1932, and this is not surprising considering the amount of land which was ‘unused’. No land, the Crown emphasises, was compulsorily purchased. Maori owners chose to sell, and accepted the price, and therefore there was no obvious prejudice to the owners – except possibly the lack of a free market. No figures are available, the Crown states, for land affected by what Dr Hearn calls a second-tier line of purchase, that is, the Crown approaching individual owners to purchase interests. The Crown further argues that there is very little known about what happened to money acquired by Central North Island Maori from the sale of land, though Dr Hearn notes that in blocks with many owners it would be difficult for individual sellers to accumulate enough capital for reinvestment. This raises the question of whether Maori favoured consumption over accumulation and reinvestment.

In respect of the Land History and Alienation Database, the Crown accepted that it can be used for broadly illustrative considerations but not for determinative analysis. It reiterated some concerns with the database, noting that no data was available for leasing or other forms of alienation, despite the importance of leasing in the Rotorua district.

**The Tribunal's Analysis on Crown Policies for Land Administration and Alienation**

**Government Policy Changes in 1905**

**Key Question: Were Government Policy Changes in 1905 Contrary to the 1900 Agreement with Maori Leaderships? Were the New Policies Treaty-Compliant?**

Our subsidiary questions are:

- Why were the policy changes made?

**The Role of Land Councils, 1900–1905**

**What was the role of the Maori land councils in the Crown's alienation policy of 1900–1905?**

In our view, the introduction of a new lands administration system from 1900 must be understood in two contexts. First, there is the political context of the pressure brought to bear during the 1890s, by leaders of the Kotahitanga Paremata, for Maori control of their own lands. As we have seen, the Liberal Government had embarked on an extensive land-purchasing programme during the 1890s. Between 1892 and 1900, 2.7 million acres of Maori land were purchased nationally. Maori leaders clearly expressed their desire that purchasing should cease, and that Maori should be given a means of controlling their own lands and resources. Secondly, the context of land administration is crucial. Here we draw attention to the Crown's attempts to develop a policy for managing Maori land with individualised title, when the owners had been left in a position in which they could not collectively manage their lands, or transfer title to purchasers or lessees themselves. We have discussed the political context in part II, and we turn here to the land administration context. Land administration involved providing mechanisms through which Maori were better able to overcome title difficulties which the new land tenure system had created for them, and to enable them to manage, lease, and sell their lands. With the new system of land administration introduced from 1900, the district Maori land councils and their successors, the district Maori land boards, were intended to play a crucial role in filling a management vacuum, operating on behalf of the owners who could not act corporately themselves. This included a range of functions for assisting with land development, as we will see in part IV. It also included other Crown initiatives to tackle the Maori title problem: simplifying titles and providing for collective owner management, in incorporations or, alternately, for vesting land in trust. We discuss these later in the chapter. But it is our
view that the Crown’s prime concern was that the land councils facilitate land transactions on behalf of owners, and this is the focus of our discussion here.

Problems with land administration, and transfer of title, had been highlighted by the Native Land Laws Commission in 1891. The commissioners pointed out that such problems could have been avoided if there been recognition that ‘all lands in New Zealand were held tribally’, if certificates of title had been issued ‘to the tribes and hapus by name’, and if a simple method of dealing in land based on working with a corporate body had been devised.\textsuperscript{16} The commission was particularly concerned with problems reported by prospective purchasers of Maori land, as it considered that neither sellers nor purchasers should find themselves victims of a system of land transfer which was so difficult, costly, and ineffective. The Liberal Government dealt with the matter by setting up a special Validation Court in 1893, to deal with various problematic purchases which had taken place since 1873 under the system of individualised purchasing.

The commission recommended that a native land board should be established, with full power to act as trustee and with the power to lease Maori lands, but the Government did not immediately adopt this recommendation.\textsuperscript{17} With the Native Land Court Act 1894, however, it did move away from direct Maori–settler dealings. From that point onward, only the Crown could acquire any interest in Maori land.\textsuperscript{18} Two methods of alienation were provided. First, if owners incorporated under the Act, a majority of the committee could alienate the land on terms prescribed by the Governor in Council. The proceeds went initially to the Public Trustee, so that expenses and any charges owing to the Crown could be deducted.\textsuperscript{19} Secondly, a majority of Maori owners could apply to the district land board to dispose of land on their behalf, under laws regulating the disposal of Crown lands.\textsuperscript{20} The next part of the process demonstrates the extent of the title problem. The land board had to apply to the Governor, who (in keeping with the thrust of Crown protection mechanisms since 1873) had to satisfy himself that the Maori owners had sufficient land for their support. The Governor would then issue an Order in Council granting his consent to the sale, and when the Order was gazetted the legal estate would be vested in the Crown. The board, of course, could then properly sell the land. The proceeds of sale were to be paid to the Public Trustee to distribute among the owners.\textsuperscript{21} Clearly this circuitous procedure was a new attempt to resolve the problem that Maori owners and settler buyers faced in their dealings, that owners could not necessarily transmit a secure title to the purchasers. The answer in this case was to declare the land to be Crown land before it was sold, with the sale being conducted by an agency at one remove from the owners. Such a system of administration would confer security of title on settlers.\textsuperscript{22} The Crown’s next move was to set up special boards.

In the Maori Lands Administration Act 1900, the Liberals provided for district Maori land councils, on which Maori had elected representation. Each council was to have between five and seven members: a president and two to three appointed members, and two to three elected members. Seddon explained to the House that where the board consisted of five members, three of the five would be nominated by the Government (two plus the president), and, of the two, one must be Maori. There would also be two elected Maori members. Where a board had seven members, the Government would nominate the president and three other members, one of whom would be Maori, with three elected by the Maori landowners.\textsuperscript{23} Maori land should be leased for settlement rather than sold, though purchases already under way could be completed, including private purchases. (We note that Mangorewa–Kaharoa, Whakapounga, Ruawaia, and Whakarewarewa blocks passed into Crown ownership during 1901–02.\textsuperscript{24}) The Crown would continue its 1899 policy of buying no more land. Instead alienation would generally be by lease to settlers through the land councils (which had to consent to all leases). Sales were not prohibited, but the consent of the Governor in Council had to be obtained.\textsuperscript{25} Where there were no more than two owners in a block, the Act did not affect their right to alienate, unless the land was
transferred to the council. No Maori was to alienate any land whatever until he had been issued with a papakainga certificate. These certificates were to be issued by the land councils, which were charged with speedy investigation of how much land each Maori person needed for their support, and issuing papakainga certificates accordingly. We will say more about these provisions in a later section.

The Act also provided for owners to convey their land to the land councils in trust, for the councils to lease (not sell), cut up, manage, or improve. In the case of unincorporated owners, all owners had to sign the transfer. We think it significant that terms of the trust were to be agreed between owners and the council, and might include reservation of part of the land, to be inalienable, for the owners’ occupation and support, or as burial grounds, or for fishing grounds, eel weirs, protection of birds, or conserving timber for fuel. The council could lease the balance of the land on behalf of the owners by public tender, subject to the provisions of the instrument creating the trust; and could borrow money on the security of the land, or a part of it, to defray survey liens or other costs, to prepare the land for lease, ‘or generally [to] impro[v]e such land or any other land of the same owners’. For these purposes the council might borrow from the Public Trust Office, or certain Government departments. A second option for owners, where there were more than 10, was to seek council administration of their land so it could be leased or mortgaged, in which case the council was deemed to be the owner of the land. There was also a third option. Maori owners could incorporate under the Native Land Court Act 1894, and a committee of owners could then transfer all or part of their land to the council on trusts which were agreed between them (with the consent of a majority of owners).

In other words, the councils would act on behalf of the owners in all land transactions, other than those conducted by up to two owners, who could elect whether to act on their own or have the councils act for them.

How well did the land councils function?
The land councils took some time to become functional, and it was the end of 1901 before the first were operating. In our inquiry region, the Hikairo–Maniapoto–Tuwharetoa Maori Land Council came into being in mid-1902, and the Waiariki Land Council, based in Rotorua, was not functional till the end of 1902. In terms of membership of the councils, Central North Island Maori did secure what Seddon had promised: majority Maori representation. The presidents were always Pakeha. The Waiariki Maori Land Council, chaired initially by Judge Scannell and then by Judge Edger, had six members in all, four of whom were Maori. Timi Waata Rimini was a Crown-appointed member, and the elected members were Te Kanapu Haerehuka, Wikiriwhi Te Tuaaha, and Pouawha Meihana. The Hikairo–Maniapoto–Tuwharetoa Maori Land Council, containing six members, was chaired by G T Wilkinson (a former land purchase officer). John Ormsby was one of the two other Crown-appointed members, and the elected members were Pepene Eketone, Eruiti Arani, and Te Papanui Tamahiki. We note that every Maori over the age of 21 was able to vote, and every Maori male was eligible to stand for a land council in the district ‘in which he resides’. Women, though land owners, were not eligible to stand, though they had won the right to vote and stand for the Maori Parliament in 1897.

The reports of Judge Scannell, the president of the Waiariki Maori Land Council from December 1901 to December 1902, and his successor, Judge Edger, make it clear that Government inattention to detail about the functioning of the Act meant that Maori were slow to engage with the new institutions. The new process of drawing up of trust deeds for vesting lands was inevitably slow, and even in the Aotea district, where Maori were more willing to adopt the new system than elsewhere, it was 1903 before any property was ready for leasing. Maori were clearly nervous about transferring their land to the councils, and surrendering their title to them, and we are aware that trepidation was evident among both Te Arawa and Ngati Tuwharetoa. In the Waiariki district, Judge Edger did his best to persuade Maori to vest their
He Maunga Rongo

lands in the Waiariki Land Council, following a visit by Carroll in May 1902 to explain the Act to the local people. Ngati Whakaue thought they could not vest their lands in the council until the Thermal Springs Districts Act appear to have been interested in vesting their lands in the Council. The judge specified Ngati Pikiao as ‘not favourable to the [Lands Administration] Act’, and reported that:

Speaking generally, feeling [among Waiariki District Maori] is divided; some are in favour of administration by the Council; others are not. But all wish the experiment to be made on someone else’s land.  

It seems clear from the judge’s other comments that one reason for this holding back was fear of ‘losing control of their lands’, and lack of clarity about exactly what the council would do with them.  By mid-1903 he thought that ‘the prospects of the working of the Act in the Waiariki District are not at present encouraging.’  And by the end of 1904, he asked to be relieved of his duties. He had been unable to achieve anything in the two years since his appointment. This was because:

(1) the Act is in its present form unworkable, in that there is no practicable method of vesting lands in the Council for administration
(2) the Natives generally are not favourable, and view the Act and Councils with suspicion,
(3) Europeans are – for reasons of personal interest – generally hostile.

As the Stout–Ngata commission would point out later, the Rotorua iwi experience of the Crown leasing their lands under the Thermal Springs Districts Act was not a happy one, and did not ‘popularise the system of leasing’ the Act provided.  We assume that this experience also impacted on their caution towards the land councils, and the powers that councils might exercise over land vested in them. Ngati Whakaue, it seems, were split over the vesting of land in the council in 1903, and those opposed were uncomfortable about the terms of the proposed leases. They had been told 42 years, but they feared they would become perpetual (‘riihī mutunga kore’).
Little land was vested in the Waiariki Council. By July 1903, 2282 acres had been vested; and Edger stated that 20,000 more acres might soon be vested, but less than a fifth of the owners of this land had signed. By 1908, however, only 3377 acres had been vested in the council (and its successor the Waiariki Maori Land Board); all during 1903.47

Among Ngati Tuwharetoa, too, there was trepidation. This was expressed when spokesmen for petitioners headed by Mahuta Te Wherowhero, representing ‘the people... under the control of the Maniapoto Tuwharetoa Council’ appeared before the Native Affairs Committee in September 1905. They expressed opposition to a number of aspects of the 1900 act, among them ‘[a] kind of intimidation of the Maori mind, which is the reason why the lands have not been speedily given over to the control of the Council’.48

Te Heuheu Tukino, who spoke on behalf of Ngati Tuwharetoa, spoke very strongly against the provision that vested the fee-simple of their land in the councils. Because of this provision he would not advise any of his people to sign their land over to the councils.49 Te Heuheu saw a limited role for the councils. He was prepared to concede that unless the fee-simple passed to the councils they would not be able to give proper titles to settlers who wished to lease.50 But he thought they should only exercise that role to carry out the wishes of the owners. The owners should decide which lands they wished to retain, which were to be leased, and which were to be sold. He did not think owners should pass large blocks to the councils, or the bulk of their lands, but rather ‘a few of the lands which are the property of many owners.’51 In other words, councils should administer those lands which might be difficult for owners to lease themselves. Nor should the councils acquire the fee simple of any other lands than those they were to lease. Papakainga should remain outside their control, and so too should lands required for ‘settlement for Maoris themselves’.52 Te Heuheu was further opposed to the councils’ power to sell timber on the land, or allow the flax to be cut and removed. He complained that the law did not allow Maori to deal with their own forests, and secure the returns from them directly.53 In short, the ariki was prepared to accept the argument that the councils might be necessary to give good title to settlers, but beyond that he did not want the councils involved. In particular, he did not want to be in a position where the owners handed all their lands over to the Council, which might then decide which to hand back for papakainga and for their own use. It was for the owners to say what lands they would keep, and the rest to be handed to the councils. ‘The Maoris are to retain the mana of the land; the Council is to have the mana of the law’.54

It is not surprising, perhaps, that little Taupo land was vested voluntarily in the land councils. In the present Kaingaroa and Taupo inquiry districts, according to Dr Hearn, only the Wharetoto and Tapapa blocks were vested, originally in the Maniapoto-Tuwharetoa District Maori Land Board and subsequently in the Aotea District Maori Land Board. And only Wharetoto blocks 5 and 6 (7880 acres and 13,530 acres respectively) were vested per the 1900 Act.55

How did the policy change in 1905?

Despite the great political importance attached to the legislation of 1900 both by Maori leaderships and by the Crown, new policies were enacted only a few years later, in the Maori Land Settlement Act 1905. It provided for:

- the replacement of the Maori land councils with nominated Maori land boards of three members, only one of whom would be Maori;56
- compulsory vesting of land in the Tai Tokerau and Tairawhiti Maori land boards, where in the opinion of the Native Minister, the land was not required or not suitable for occupation by the Maori owners;57
- the reinstatement of Crown purchase in all districts other than those selected for the compulsory vesting trial;58
- substantial Government borrowing of up to £200,000 for the purpose59 (a 1907 amendment allowed a further £50,000 to be raised.).60 Seddon told the House that
He intended to spend a large amount on the purchase of ‘surplus Native lands’ (which ought, he said, to be secured at an average price of some 20 shillings); the Crown now had to buy Maori land at Government valuation: prices paid could not be less than the capital value of the land as assessed under the Government Valuation of Land Act 1896; the new land boards gained full authority over the process of leasing; and they became responsible for confirming all alienations of Maori land.

There were some remarkable provisions dealing with Crown purchase of Maori land in the 1905 Act. The Governor could purchase from a committee of incorporated owners. But in far more usual circumstances, where the owners were not incorporated and numbered more than 10, he could buy with the consent of a majority of the owners (in numbers and in land value). The Government could then proceed to cut up the land for settlement, ‘and deal with the rest of the owners later on’, as Seddon blandly put it in the House. This would overcome the difficulty of securing the signatures of all native owners. Or, we could say, this was designed to overcome the difficulty of securing the consent of Maori owners who, if they were not incorporated, lacked any legal capacity to act collectively. Once a majority (in value) of owners had executed a deed of transfer to the Crown, the land became Crown land. The Receiver-General would receive the amount due in respect of the shares of non-sellers. The title of the Crown would then be complete. In short, where there were more than 10 owners, the Crown had no qualms about the interests of a minority of owners being sold over their heads. It was left to the Governor to decide, if sellers lacked enough land for their ‘maintenance’, what land he should reserve for them. He did not need to reserve land from the block being sold, but could make reserves for them in any block of Crown land. It was thus possible that owners who had not agreed to sell could find themselves moved off their land once it had been declared Crown land. The more draconian of these provisions (section 20(2)) was repealed in 1907. From that time the Governor was empowered simply to buy land from the Maori owners, rather than from a majority in value. But at the same time, a further important provision was added in the Maori Land Settlement Amendment Act 1907: the Governor might now again acquire undivided interests in land. This signalled a return to the practices of the late nineteenth century.

Leasing was also freed up from 1905:
- all restrictions on alienation by lease, whether statutory or recorded on the title, were deemed to be removed;
- all leases however were to be approved by a land board, which had to be satisfied that certain conditions were met: that the rent was adequate, that the owners retained a papakainga, or sufficient income, that the term did not exceed 50 years, and that the lease was ‘for the benefit of the Maori lessor’;
- ‘any Maoris’ could apply to a land board to lease their land; if there were more than 10 owners an application might be signed by owners selected at a meeting of owners called for the purpose; alternatively, a majority of owners could execute a transfer without a meeting;
- such land was to be leased by the board through public tender, and the board would receive the rent payments; and
- the boards were also given increased powers to borrow to survey and develop roads on the land, and advertise it for lease, but all such advances were to be a charge on the income earned; boards were to repay such loans every half year, and deduct the cost, as well as their own administration costs, from the income, before paying the rest out to Maori owners.

Why were the policy changes made?
The replacement of the land councils, and the resumption of Crown purchase, constituted a remarkable shift away from the provisions agreed to with Maori leaders in 1900. Carroll, the Native Minister, explained the demise of the
land councils to the House on the grounds of cost: fewer members would be cheaper, and avoid the cost of elections being loaded onto the land.\textsuperscript{75} This might have seemed a plausible explanation, given Maori concerns at the costs of land administration, and the councils’ small income. But it was hardly a justification for such an important change. The figures show that the clerks and staff were far more expensive than the council members.\textsuperscript{76} Election costs, to March 1903, made up less than 20 per cent of total administrative costs. In any case, Carroll stated, the Government’s view was that ‘better men’ might be found by nomination than election.\textsuperscript{77} This hardly sits comfortably with Carroll’s defence of the councils in 1900 as embodying Maori control of their lands, similar to Crown lands boards administering Crown lands. If Pakeha had that right, he had said, so also should Maori.\textsuperscript{78} As he explained it then, land councils paralleled the directorate of a joint-stock company, administering and leasing the joint property of owners, and paying out a dividend. The councils were corporate bodies, providing the only way to administer the many blocks of poor-quality land which had large numbers of owners.\textsuperscript{79} Irked by the speeches of some members at that time, Carroll had asked why Maori suggestions for a measure for the regulation and administration of their own lands should be assailed: ‘Are we dealing with your property? Do we touch yours in any way? No. All we want is to deal with our own.’\textsuperscript{80}

\begin{hrule}

In our view, the reason why the Liberals changed tack was simply because of political pressure. Maori leaders certainly thought this was the case. As Te Heuheu put it to the Native Affairs Committee in 1898:

\begin{quote}
It does not matter to me what Government may come into power at any time, and it does not matter how they may propose to legislate for the benefit of the Maori people and redress the wrongs of the Maori people, I do not believe they will ever do it . . . they are afraid of the votes behind their backs. They have got to consult that first.\textsuperscript{81}
\end{quote}

And in 1907 the Stout–Ngata commission concluded that the Crown had been ‘forced’ by recent restraint in land acquisition into a position where it had to resume purchases, resort to compulsory vesting of land in the land councils, and reopen the free leasing of Maori lands, to replenish the supply of land for close settlement.\textsuperscript{82} In fact, the Liberals constantly had to fend off allegations from the Opposition about the dangers of allowing Maori to live as ‘idle’ landlords, because their lands were leased rather than sold. Herries, the Opposition’s Native Affairs spokesman, suggested in 1903 that if the 1900 Act really did work, Maori would hardly be helped:

\begin{quote}
They would lease the whole of their lands to Europeans and they would be people without occupation. They would just draw their rents. They would live in their kaingas, have enough to eat and drink and smoke, but they would not be farming their own lands. Is that an ideal existence for the Maori? Is that the desire of the country, that the Natives should live merely as rent receivers, with no occupation; simply to be drones on the surface of the earth and useless? . . . The present policy does not allow the Maori to rise in the world or to hold any of those positions which their ability entitles them to hold, and it does not draw them out of their communism and servitude which we would like to draw them from.\textsuperscript{83}
\end{quote}

The Government was also strongly criticised by the Opposition in 1904 during debates on legislation to extend the rating of Maori land (Herries introduced his own Bill in an attempt to put further pressure on Carroll, who had been working on a Government Bill). One member referred to ‘that bastard Maori Council . . . [the] creature of the present Government’, and followed it up by calling the councils ‘the absolute laughing-stock of the people of the North Island’; another referred to ‘that abomination the Maori Councils.’\textsuperscript{84} The theme of many speeches was (as one speaker expressed it) that:

\begin{quote}
the Natives [must] be brought to understand that they stand on same footing as ourselves, that we want them to become good settlers in every sense of the word – not . . . as the landlords or owners of huge tracts of country that are no earthly use to them . . .\textsuperscript{85}
\end{quote}

\end{hrule}
The councils prevented Maori from managing their own lands; if they had a free hand ‘we would have seen many thousands of . . . acres occupied by European settlement.’

The pressure in Parliament reflected the pressure from the press. During 1905, for instance, the New Zealand Herald seldom let up; as Dr Hearn states, it conducted a ‘sustained campaign of attack’ over many months. The land retained by Maori was, the Herald suggested, averagely very much better than the land occupied by Pakeha and incomparably better than the average land still left in the hands of the Crown. For the Maori . . . sold the worst land first and held on to the best till last. With the result that today he is the richest and greatest of landowners, although made a pauper by the deliberate action of the Government in locking up his land against all possibilities of alienation.

The Government, it was alleged, was South Island-run, with little concern for the stalled settlement of the North Island, and Carroll’s ‘taihoa’ policy was intended to ‘lock up’ Maori land long enough to increase its value significantly, or to encourage settlers to accept leases from the owners, or both.

Further pressure came from the royal commission on ‘Land-Tenure, Land-Settlement, and other matters affecting the Crown Lands of the Colony’, which in 1905 reported more generally on land tenures, the position of lessees, and land valuations. The commission reported that:

The settlement of the North Island is very much retarded by the extensive areas of unoccupied Native lands that are scattered over it, producing nothing, paying no rates, and yet participating in the advantages of the roads, railways, and other public and private works and settlement that surrounds them . . . The Natives show no disposition to . . . [develop this land] so that so far as they are concerned, it will probably remain for many years a wilderness, and a harbour for noxious weeds and rabbit pest.

Underlying such criticisms were several assumptions (which were widespread):

- Maori were not in general capable of developing their own ‘vast’ lands, and would indeed neglect them – development was a job better undertaken by settlers;
- Maori might be able to farm, but only on the same basis as (individual) settler families; and
- the land councils were an unwelcome hindrance to Maori ‘management’ of their own lands; left to themselves, Maori would continue to sell.

How did the Liberal Government respond to this pressure? Within the Government itself there was a split between the leaseholders and the freeholders. In combination with the Opposition, David Hamer argues, the strong ‘freehold’ element of the Liberal members ‘proved capable of making the “right to the freehold” one of the major issues of the day.’

Hamer suggests that the ending of the ‘experiment’ in leasing Maori land was a ‘major concession to the “freeholders”’. The Liberal Premier, Seddon, reacted quickly to criticism of his Government’s leasing policy – despite the fact that such pressure was to a large extent prejudiced, ignorant, and self-serving – not by defending it, but by preparing the ground for a shift in policy. The theme of ‘Native land lying waste’, which ‘retarded’ settlement, was reiterated in the Governor’s speech at the opening of Parliament in 1905. And Seddon ‘repeatedly’ voiced his own impatience to Maori. Speaking in Rotorua in 1905, he told a large hui at the marae at Ohinemutu that the Land Council system ‘hitherto has been entirely too slow’, and that: “The Natives and the Native Land Councils must bestir themselves. There has been too much of “Taihoa”.”

Seddon proceeded to outline a proposed new scheme: that Maori enter voluntarily into an arrangement by which the Crown assisted them to farm their own lands, with particular blocks divided into individual farms for Maori communities, while the remainder was ‘voluntarily handed over to be settled by the ordinary law, the proceeds going to the Native owners.’ These ‘surplus’ lands would be treated similarly to land acquired under the Land for Settlements Act 1892 (an Act which provided for the compulsory acquisition, if no voluntary arrangement could be
reached, of large private settler estates suitable for closer settlement, with compensation payable to the owner). By June 1905, this commitment to assisting Maori owners to use and develop the lands they ‘required’, with provision for ‘landless’ Natives as ‘tenants’ and Crown acquisition of ‘surplus lands’ to be dealt with through the land boards, had become the Government’s official policy.\(^{94}\)

For the Native Minister, Carroll, it is clear that in these circumstances the threat of compulsory acquisition of Maori land under the Land Settlements legislation was a factor in his acceptance of change. His colleague, Hone Heke Ngapua (Northern Maori), also nervous, had tried to explain to the House in 1903 that there was a considerable difference between applying the legislation to private settler family estates, and to lands held ancestrally for the benefit of kin communities: ‘Europeans [individuals] require large holdings, but the Natives hold in common’. He took the example of lands north of Gisborne, amounting to 27,950 acres, where 25 blocks were managed by a committee. The people lived in 27 kainga, and there were 1395 owners. This was why applying the Lands for Settlement legislation to Maori lands would be difficult; the effect, he suggested, would be quite different from what it was in a large estate. It would also, he said, be contrary to the policy of the 1900 legislation, and ‘detrimental to the interests of the Native themselves.’\(^{95}\)

Alongside the qualms of Maori members about the possibility of the Land for Settlements provisions being applied to Maori lands, was the looming demand that Maori pay full rates on their land (as provided for in Herries’ Bill). Carroll was not in favour of Maori exemption from rates, but he argued strongly that Maori had to be assisted to bring their land into production if they were to be able to pay on the same basis as settlers. But Carroll also knew that to give the ‘leasing only’ policy a chance he had to deliver more land for settlement – in other words, he had to ensure more land was vested in the land councils and boards. It was in this context that Carroll was prepared to introduce compulsory measures in 1905. In particular, he wanted compulsory vesting in land boards of land which in the Minister’s opinion was ‘not required or . . . not suitable for occupation by the Maori owners.’\(^{96}\)

He wanted the policy introduced nationwide, to kick-start large-scale leasing, but was unable to carry it through the Native Affairs Committee, which did most of the work on Maori Bills. He had to compromise on a trial in two districts: Te Tai Tokerau and Tairawhiti. It is very telling, we think, that Hone Heke, who would have been well aware of the strength of Maori opposition to compulsory vesting when the councils were first discussed, was prepared to support Carroll, with great reluctance, because he feared the alternative. Recognising the strength of Pakeha agitation to take Maori lands, Heke was prepared to agree ‘to what I would never have agreed to under any other circumstances’: compulsory vesting, to enable ‘surplus’ lands to be leased, but not sold.\(^{97}\) In the end, however, Seddon carried the day on land acquisition policy, and Carroll was defeated by his own party.

**Government policy changes in 1905**

**Were Government policy changes in 1905 contrary to the 1900 agreement with Maori leaderships? Were the new policies Treaty-compliant?**

In our view, the abandonment of the land councils scheme, its replacement with the Maori land boards scheme, and the resumption of Crown purchasing in 1905 cannot be justified in Treaty terms. The Crown abandoned the land councils without giving them a fair trial. Its denial of the right of Maori to elect representatives was in breach of the duties of partnership and active protection, and undermined an important step taken to mitigate its Treaty breach in failing to provide for community title and community management of land. The Crown’s restitution of purchasing was contrary to the wishes of Maori leaders, and was in breach of the Treaty principle of consultation.

The policies under the Maori Lands Administration Act 1900 were the outcome of a negotiated settlement
with Maori leaderships achieved over three years. In our view, the 1900 Act was an acknowledgement of the concern amongst Maori that they should control the process of alienation and manage their own lands. Though it did not provide the total control that Maori had sought, it did provide for joint Crown–Maori administrative bodies which might have played a useful role in Maori land management, and assisted Maori to gain experience in administering trusts and leases. The 1900 Act also responded to long-expressed Maori wishes to limit land loss through purchasing. In establishing a system that was based on leasing rather than purchasing, the 1900 Act represented a real attempt by the Liberal Government to put alienation on a basis which Maori could accept.\textsuperscript{98}

It is our view that the Crown failed to sufficiently support and promote this system in practice. With the endorsement of the 1900 Act by Maori, it is reasonable to expect the Crown to have supported the work of the land councils, and to have offered them adequate funding and guidelines, rather than shutting them down shortly after they had become functional. They should also have been offered the opportunity to meet in conference (as the Maori councils did), to discuss policy and administration, and make recommendations to the Government on how the new system could be improved. For example, it was clear by 1905 that there was some reluctance among Maori owners to vest land in the councils, because of a concern that they might never regain control of their land. In light of such concerns, some means might have been found by which the legal title of the land was passed to the councils, but the owners retained equitable title in the land.

Above all, it is reasonable to expect that the Crown would have given the land councils time to become established and settled in the rhythm of their work. The two councils within our inquiry region were not operating until 1902, yet by 1903 the Opposition was already complaining of the lack of results from the councils.\textsuperscript{99} It would have been reasonable to give Maori landowners time to come to terms with the new institutions, and gain confidence in them, especially since they were being asked to hand their land over to the councils. The Crown did not undertake a formal process of consultation, but it did get iwi feedback, as we have seen, in 1905. On that occasion Te Heuheu said that he thought the land councils should stay, though the Act should be amended. The people had needed time to get used to them.\textsuperscript{100} Now he wanted to see the Government place more confidence in the councils, so that they might function autonomously. His concern was that 'the Councils have not been given full powers'; that there were knowledgeable people on them, 'carefully selected from amongst the principal people of the tribe', who were frustrated with the attempts of Wellington bureaucrats to interfere with their decisions.\textsuperscript{101}

The change in policy was despite the evidence that at a national level Maori were beginning to entrust their land to the councils by 1904–05.\textsuperscript{102} In 1904, J G Ward told the House that Maori had already brought 750,000 acres\textsuperscript{103} before the councils, which was evidence against the assumption that they were not going to work. Given that they had not been in operation long, the act was (as Ward pointed out) ‘worthy of a fair and reasonable trial.’\textsuperscript{104} Seddon had spoken in 1900 of the importance of Maori having confidence in Government policies if they were to engage with them and ensure their success,\textsuperscript{105} but his party had given them little time to develop confidence in a range of new policies.

In view of the discussion between Maori leaders and the Crown at the time of the preparation of the 1900 legislation, we must conclude that the decision made in 1905 to overturn the right of Maori to elect representatives to the land boards was not made in good faith. The change in the land boards’ composition evidently did not concern the House. Heke’s attempt to amend the provision– so that two Maori members rather than one would be appointed – was soundly defeated.\textsuperscript{106} The Crown’s message in 1905 appeared to be that land boards need not be accountable to the owners whose land they administered.\textsuperscript{107} The 1905 decision (and the subsequent 1913 one, which reduced the membership of boards to a Native Land Court judge and registrar) also had long-term as well as immediate ramifications. In
particular, they established Crown expectations of non-involvement of Maori owners in land administration.

It is our view also that the Crown’s decision to resume Maori land purchasing was not taken in good faith. It is hard to argue that such a rapid shift in policy was consistent with the interests or desires of the Maori community, given that it was only a short time since Maori leaders had waged such a determined campaign against further purchase of land at the end of the 1890s. Seddon had admitted in 1900 that Maori who discussed the Lands Administration legislation wanted alienation only by lease, noting the anxieties of the ‘older chiefs – men who think deeply of the result and of the effects of land dealings on those of the present generation, and those that will follow.’ Carroll, the Native Minister, had not intended the shift to purchase in 1905, and it is clear that he had hoped to preserve the lands policy of 1900. When he introduced the 1905 Bill, he emphasised that the ‘whole aim of the Bill is confined to a system of leasing, and leasing only.’ Ultimately, however, he was defeated in this initiative by his own party. The terms of the restoration of Crown purchase allowed the land of minority owners to be sold over their heads. Ngata spoke strongly against this in the House in 1907: ‘I do not know what Parliament was doing when it allowed that provision to be placed on the statute-book . . . So far as the minority in value is concerned, it is practically confiscation.’ The Stout–Ngata commission criticised the provision as ‘contrary to natural justice.’

Carroll was in a difficult position within the Liberal Party, trying to encourage Maori to utilise the legislation to their own benefit, but attacked by the Opposition for keeping Maori in a state of ‘tutelage’, unable to make their own decisions. It was unfair, argued William Herries on behalf of the Opposition, to compel Maori to work through councils and boards, which they did not trust. Such criticisms made for easy political point-scoring, but put pressure on Carroll as he tried to stave off widespread settler demand for more Maori land, especially within the context of broader Liberal land policy. The Opposition’s criticisms did not acknowledge the compromises that Maori leaders had made in giving up their parliament, in the hope that they might achieve control of their affairs and lands through the new councils. They did not acknowledge the extent of Maori suspicion of the land councils, and the failure of the Crown to put sustained effort into making them work. Nor did they acknowledge the title problems produced by the Native Land Court system, to which land councils and boards had been proposed as a solution. Such criticisms also arose from the long-held belief that Maori who held their land individually were more likely to sell.

**The Tribunal’s findings on the changes to the 1900 system under the 1905 Act**

We find that:

- the 1900 system of land administration, which provided for strong regional Maori representation on land councils, was not given a fair trial, and was not adequately supported or resourced; the Crown did not do enough to engender Maori confidence in the land councils; the Crown’s failure to give full support to the land councils was in breach of the duties of partnership and active protection;
- the Crown’s limited consultation and failure to secure Maori consent about changes to the 1900 system, given that the land councils had been the result of negotiation with tribal leaderships through the Kotahitanga Parliament, did not meet its obligations under the Treaty to act in good faith, fairly, and reasonably;
- the demise of the councils also deprived Central North Island Maori of the potential benefits of a major new land administration initiative, including management experience;
- the Crown’s removal of elected Maori representatives from boards which were charged with decision-making about Maori land was in breach of the principle of active protection and the requirement, in the spirit of partnership, that Maori be the predominant voice in decision-making about
their own lands through the choice of their own representatives;
► the reintroduction of Crown purchase in 1905, despite clearly expressed Maori preferences for a halt to land purchase, was also in breach of the Crown’s Treaty obligations to act in good faith, fairly, and reasonably, and to actively protect Maori land;
► the Crown’s provision in 1905 for land blocks to be purchased even though a minority of owners might not wish to sell, though repealed in 1907, was also in breach of the Treaty; in effect this was a provision for compulsory purchase from owners who did not wish to sell; this was in breach of the Crown’s duty of active protection;
► we make no finding on the compulsory provisions of the 1905 Act, since these affected areas which are not within our inquiry region; but we note compulsory provisions in the legislation; and
► the policy change of 1905 was contrary to the Crown’s 1900 agreement with Maori leaderships, and in breach of Treaty principles.

Crown policies for Maori land alienation, 1909–1913

Key question: Were Crown policies for the alienation of Maori land between 1909 and 1913 Treaty-compliant?

In this section we first address the following questions:
► What guidelines for future Maori land policy did the Stout–Ngata commission suggest?
► What policies were adopted for the alienation of Maori land from 1909 to 1913?
► Did the Crown ensure that Maori landowners retained sufficient land when it reintroduced purchasing in the period from 1905 to the 1930s?

In chapter 10, we discussed the appointment of a commission in 1907, charged with a ‘stocktaking’ of Maori land.113 This policy initiative closely followed the decision to resume Crown purchasing. In our view, this was also the outcome of political pressure to deliver more Maori land for settlement. In 1904, Seddon noted the connection that the Government made between such a survey, and achieving the goal of ‘opening up every acre not required by the Maoris for their occupation and support.’114 In mid-1906, a Native Department memorandum suggested the importance of establishing which lands were ‘needed by Maoris. Owners, however, should have direct input into decisions about which lands they would retain themselves, and how their ‘surplus lands’ should be dealt with.’115 Sir Robert Stout and Apirana Ngata were appointed as commissioners in January 1907, and were instructed to identify Maori lands in the North Island which were not being used to their full potential, or which were ‘unoccupied’ or ‘not profitably occupied.’ They were also to recommend which areas (if any) should be set apart for Maori occupation, farming, and community purposes, and which might be set aside for settlement by Europeans. Carroll intended the commission to be the broadest possible exercise in exploring the possibilities for remaining Maori land. The commission was to provide reports and recommendations which were sufficiently detailed to enable prompt action to be taken by Parliament, especially in respect of the lands available for European settlement.116

In chapter 10, we discussed the commissioners’ reports on Rotorua, the district within our inquiry region to which they devoted most attention. Here we are concerned with their broader considerations of Maori land policy, which provided important contemporary guidelines to the Crown.

What guidelines for future Maori land policy did the Stout–Ngata commission suggest?

In the first of their many reports, Stout and Ngata took the opportunity to draw attention to the ‘confusion of our Native-land laws’ in recent years. They cited with approval the detailed criticisms made by the 1891 native land laws commission of the individualisation of Maori title, and of the major shifts in the Crown’s purchase policy. They commented on the deep unease among Maori in the 1890s,
and the ‘numerously signed’ petition to Queen Victoria in 1897, seeking an end to purchasing of Maori land. The commissioners noted that despite being ‘divided on many points’, the signatories to the petition were ‘unanimous’ in asking for the cessation of purchasing, and that ‘the adjudication, management, and administration of the remnant of their lands be vested in controlling Councils, Boards, or Committees composed of representative Maoris.’

The commissioners argued that the Crown should consider its obligations to Maori if land acquisition were to resume. While the State had a duty to provide land for its increasing population, it also had a duty to see that in the process it ‘does no injustice to any portion of the community, least of all to members of the race to which the State has peculiar obligations and responsibilities.’ In other words, they considered the Crown to have a fiduciary duty to Maori, and therefore an obligation to consider not just the theory on which its land acquisition policies were founded, but the practical outcomes of its policies.

How the native land question was handled in the immediate future, the commissioners argued, was key to discharging this obligation. The settlement of those lands by Maori was the first consideration, and provision must be made for the descendants of the present owners as well. The Crown’s assumption that the revenue arising from minimum individual portions of land would be sufficient for a Maori owner ‘without providing in any way for his descendants’ was inadequate. In any case, there was more involved than ensuring minimum individual portions of land. Native lands, because they were tribal, were different from individually held property; ‘in one sense they may be said to be impressed with a trust. To allow the present possessors to destroy the tribal land means that they should destroy the tribe.’

Stout and Ngata also warned at the outset that once provision for Maori farming was made, the land available for general settlement was not as substantial as had been generally supposed. They made the point, not explicitly stated, but not much disguised either, that Maori were not considered to be equals in terms of their access to land for farming. They did this by considering how Maori might fare if the provisions of the Lands for Settlements Act were applied to their land. If, they pointed out, the Government were to succumb to pressure to apply the compulsory provisions of this Act to Maori land, it might be found to be self-defeating, for under that law only a small amount of land would ultimately be acquired for the State. Under the provisions of the Act, Maori could exercise their statutory right to retain a maximum of 1000 acres of first-class land, 2000 acres of second-class land, or 5000 acres of third-class land – and surely it would not be held that they were entitled to less than Pakeha under the terms of that Act. But, the commissioners noted, if each Maori owner selected only half that amount, there would in fact be little land left for (Pakeha) settlement in most Maori-held areas. (We note that they did not argue explicitly for equality in terms of land area to be retained by Maori when selling, and must conclude that they considered this path – in light of the nature of their commission – simply impracticable.)

Stout and Ngata’s emphasis on the Crown’s fiduciary duty to Maori explains why they placed so much reliance on the future role of the land boards. They recommended that future alienations be transacted only through the boards, which they saw as having a wide-ranging role in selling and leasing land, and setting aside sections for Maori other than owners when leasing to the general public. The boards could also authorise borrowing on the security of land for a whole range of purposes, such as roading, opening land for settlement, discharging liens, farming, or purchase of other lands for owners. While the boards should be constituted in the same way as previously, presidents should be ‘drawn from men experienced in the cutting-up and letting of lands.’ All sales and leases should be at auction to the highest bidder, and three-quarters of the proceeds of sales was to be paid to the Public Trustee to be invested for the benefit of owners, or used for the improvement of their other lands. The Crown should stop buying land ‘under the present system’ (that is, by direct negotiation with the Maori owners).
At the same time, lands were to be set aside by the boards for Maori ‘occupation and farming’. These lands could include village sites, papakainga ‘for individuals, families, or tribes’, and blocks or parts of blocks ‘as communal farms under the management of communal farmers, and to form the nucleus of farming communities’. The boards could also grant leases to Maori tenants specified by the owners, ‘or issue certificates of partnership to members of families wishing to farm their subdivisions’, or declare owners to be incorporated so they could farm under their committees. Leases could include provisions for exemption for payment of rent for up to four years, a requirement for annual improvements and residence, and for forfeiture of the lease. Boards could also raise money on the security of the land or revenue to lend to Maori owners farming.

Ngata told Parliament in October 1908 that he considered it the role of the Maori members to help ensure that enough land was retained for Maori use:

That is our duty. I quite recognize the duty of the European members to comply with the sentiment of the people they represent, and that sentiment is strongly freehold. The area that the Commission has set apart for Maori settlement . . . [is] for the needs of the present generation of Maoris . . . [F]urther provision has to be made for the future generation of Maoris, and that has to be made out of the area set apart for European settlement. In other words, it was the lands to be leased which would provide for future generations; they were the insurance for the future. They were to come back to the owners. And boards, by implication, were exercising that protective function.

Ngata and Stout thus made a strong argument for the Crown to consider Maori rights and requirements carefully. They provided:

- a clear historical context in which legislators might consider the impact of any further policy moves taken;
- a plea for consideration of the impact on Maori communities of Crown alienation policies;
- a strong reminder that the State had particular obligations to Maori; and
- a recommendation that these obligations might be discharged through boards which were to be proactive in ensuring the best possible price for lands sold or leased, investing the income, and borrowing to ensure land settlement by both Maori and non-Maori.

The commissioners provided a useful guide for the Crown on policy development. It may seem to us now that it was in some respects a paternalistic policy – particularly the provisions about compulsory investment of proceeds of alienation for benefit of Maori owners. This might have been difficult for some owners to accept, given the lack of Maori representation on the land boards, and it is perhaps surprising that Stout and Ngata did not push for a change to the composition of the boards given that they clearly saw the boards as active agents of the owners. But we stress the context in which they were working, namely, huge public pressure on Maori to be seen to make their land productive. Clearly, since the commissioners knew that those who wanted faster land purchase disliked the boards (as they had the land councils), they also saw the boards as protective of Maori, in both land transactions, and land development. The boards would stand between individual Maori owners and a public which seemed largely anxious to facilitate settlement of Maori land by non-Maori. What Stout and Ngata wanted to see was vigorous boards which sped up the process of settlement – thus relieving the pressure on Maori owners to bring their land into production – but which also ensured that Maori were active participants in settlement at a community level. Underlying their specific recommendations, however, was the importance they attached to the Crown’s obligation to preserving a tribal land base. We might therefore measure Crown policies accordingly.
What policies were adopted for the alienation of Maori land from 1909 to 1913?

The Native Land Act 1909 was a major consolidation of the existing native land law, but it also heralded major changes to the land administration system. A consolidation of native land legislation had been contemplated since 1906, and it was finally undertaken under Carroll’s supervision by John Salmond, Counsel to the Law Drafting Office, with the help of Ngata. A draft of the Native Land Bill was scrutinised by two successive conferences of the judges of the Native Land Court, and the presidents of the Maori land boards. The Act was ultimately far more than a consolidation, and a range of new provisions were included.

The Native Land Act 1909 is substantial, and only a brief summary of some of its key provisions in respect of alienation is given here, as outlined in the Hauraki Report:

- 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 on alienation 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.

The land boards remained in place, and were required to vet all alienations in accordance with terms of the Act. A new Native Land Purchase Board was established to conduct purchases for the Crown. The Act also provided that the Crown, when embarking on or considering embarking on a purchase, could prohibit all alienations to private parties for up to one year. This was the Liberals’ last major legislation on Maori land.

The Reform Party, the parliamentary opposition led by William Massey, capitalised on growing dissatisfaction with the Liberals, including dissatisfaction with Liberal leaseholding policies. Massey was able to form a government in 1912, drawing particular support from urban and rural propertied interests. William Herries, who had for years been Reform’s spokesman on Native Affairs, and engaged in vigorous debate with the Liberals on their policies, became Native Minister. Herries’ land purchase policy echoed nineteenth century policies, with its emphasis on determined Crown purchasing of land for settlement. His major policy initiative was embodied in the Native Land Act Amendment Act 1913, which allowed the Crown to proceed to buy owners’ undivided interests without needing to take a proposed purchase before a meeting of owners, or to gain the confirmation of a land board. At the same time, Herries slimmed down the composition of the land boards even further. The nominated Maori member was dispensed with, and boards’ membership was composed of only a Native Land Court judge and registrar, meaning that the boards functioned as the Native Land Court from then on. This system remained in place till 1952, when the boards were finally abolished.

Provisions for private purchase

Under the 1909 Act private individuals could freely purchase again, but there were two new mechanisms to avoid the tangled situations that had occurred in the late nineteenth century, when private buyers dealt directly with individual Maori owners of undivided shares. The first
was the land boards, which could transmit secure title to purchasers, and the second was the provision concerning ‘meetings of assembled owners’ which were empowered to reach decisions about alienation. Concerning these meetings, the Act determined that:

- meetings of owners were to be summoned by the board on the application of any owner or ‘any person interested’;¹³¹
- five owners ‘present or represented’ constituted a quorum, and a resolution could be carried if owners voting in favour owned a larger aggregate share of the land than those voting against;¹³²
- successors of a deceased owner could not vote unless they had secured a succession order from the Native Land Court;¹³³
- meetings of assembled owners could vote only on certain specified matters: to vest land in a land board for sale or lease, to lease land through the board for Maori settlement purposes, to incorporate, to accept a Crown offer for purchase or lease, or any other offer to purchase land, or to agree to the sale of certain types of vested land;¹³⁴
- any owner, trustee, or proxy who voted against a resolution before the meeting could sign a ‘memorial of dissent’, which went to the land board along with the report of the board representative who was present;¹³⁵
- the board could confirm or disallow a resolution reached by the meeting, taking into account the ‘public interest’ and the ‘interests of the owners’; once a resolution was confirmed, the board became the agent of the owners to see the alienation through;¹³⁶
- alternatively, the board could postpone confirmation, so that owners who were opposed could apply to have their shares partitioned out; it could itself apply to the court for partition orders to cut out the interests of someone who might be made landless by the sale.¹³⁷

Until 1912, a potential purchaser could avoid having to call a meeting of owners if they could get the board’s consent, known as ‘precedent consent’.¹³⁸ The board could decide that a meeting was not required, taking into account the ‘public interest’ and the interests of the owners. In such a case a purchaser had to apply to the board before proceeding to secure written owner consent to sell; the board would not give its consent if any ‘instrument’ had been signed first. The board still had to confirm an alienation at the end of this process.

**Provisions for Crown purchase**

For Crown purchases, the Native Land Act 1909 provided that:

- a Native Land Purchase Board was established, (consisting of the Native Minister, Under-Secretary for Crown Lands, Under-Secretary of the Native Department, and Valuer-General) to carry out and complete all negotiations;¹³⁹
- the Crown could buy as a result of the decision of a meeting of owners; once the land board had confirmed the resolution, the land purchase board could decide whether to proceed with the purchase;¹⁴⁰
- it could also buy any interest in Maori freehold land from the owner, but only where there were fewer than 10, in which case no confirmation by a board was needed (there were exceptions: this provision did not apply to land vested in or administered by a board, or in an incorporation);¹⁴¹ and
- there were particular provisions for the Crown to issue ‘prohibition orders’ for a period of one year, prohibiting all alienations (including leases) other than those to the Crown; if the Crown made a contract to buy any native land, or interest in land, or when it contemplated negotiations for purchase, the Governor could issue such an order, which could be extended for up to six months; there were substantial penalties for negotiating an alienation of land affected by such an order.¹⁴²

In 1913, the Reform Government made substantial changes to provisions for Crown purchase of Maori land.
The Native Land Amendment Act 1913 expanded Crown powers of purchase as follows:

- the Crown could buy or lease any undivided interest in Maori land from an individual owner or a trustee; and every owner was empowered to alienate interests directly to the Crown, meaning that owners could sell their interests without a meeting of owners being called;\(^\text{143}\)
- even lands vested in a Maori Land Board ‘without power of sale’ could now be sold, not only as a result of a meeting of owners, but even by individual owners; though the board had to secure the consent of either the assembled owners or the individual owner concerned;\(^\text{144}\)
- the Crown could apply at any time to the Native Land Court to partition out the interests it had purchased;\(^\text{145}\)
- the Native Land Purchase Board was to ensure that no purchase of the interest of a Maori owner would leave the owner ‘landless’;\(^\text{146}\)
- the Minister of Finance was authorised to raise up to £500,000 per year for Crown acquisition and settlement of Maori freehold land;\(^\text{147}\) and
- where proclamations had been made to protect purchases or leases by the Crown, they could be extended for a further period of 12 months; but successive orders should not extend beyond two years.\(^\text{148}\)

In addition, there were provisions designed to speed up the availability of lands for settlement:

- the Act required Native Land Court judges to periodically inform the Minister about Maori freehold lands in their district which were fit for settlement but ‘not actually used’;\(^\text{149}\)
- the Minister could apply to the court to ascertain the relative interests of the owners of any land, and partition it amongst them;\(^\text{150}\)
- when a partition took place, the land was to be subdivided into such areas ‘according to quality and utility’ as would enable each allotment to be disposed of to an individual purchaser or lessee by the owner(s); the court could lay out road-lines at its discretion, or create private rights of way;\(^\text{151}\)
- the Crown could lease native freehold land on terms which the Native Land Purchase Board could set, and such lands could then be subleased under the terms of the Land Act 1908, either as a whole or in allotments; the terms of any such lease could include the Crown’s option to purchase the freehold, and a tenant who took up a sublease would have the same right of purchase from the Maori owners as did the Crown; however if the ‘head lease’ from Maori owners did not contain a purchase right, and the Crown bought up the freehold, or any undivided interests in the land, the tenant would be entitled to a grant of the freehold or of any undivided interest the Crown had bought;\(^\text{152}\) and
- a tenant under a sublease who made substantial improvements to the property could notify the commissioner of Crown lands that he wished to purchase the land, and, on payment of 10 per cent of the land’s value, the Minister could then negotiate with the owners for its sale.\(^\text{153}\)

As previously noted, it was this Act which reconstituted Maori land boards to comprise only two members, the judge of the relevant Native Land Court district, and the land court registrar of the district. The judge also became the president of the land board, and in that role could exercise any judicial functions he considered appropriate. Likewise, while sitting as judge of the Native Land Court he could exercise any powers of the board he wished.\(^\text{154}\)

New Native Land Court districts were to be constituted, and those districts were to be identical to new Maori Land Board Districts.\(^\text{155}\) The judge could appoint any Maori or European assessor to sit with him on any or all matters before the Board, although the President had the sole power to confirm alienations.\(^\text{156}\)
Crown purchase policies for the alienation of Maori land, 1909–1913

Meetings of assembled owners

It could be argued that the requirement that owners had to meet to reach a decision before land could be leased or sold made better provision for Maori to control and manage their land. Carroll, introducing the 1909 Bill in the House, described these provisions as crucial to the new system, as ‘practically a resuscitation of the old runanga system’, an age-old method of Maori decision-making. He may well have hoped, as the Crown suggested to us in the hearings, that owners would be re-empowered to act collectively under the benign supervision of the boards. But the very low quorum set for meetings – five owners ‘present or represented’ – does not seem evidence of much confidence in the process working like this. The provision for proxy voting meant that only one owner, armed with proxy votes, actually needed to attend.

We consider that provisions which allowed decisions regarding alienation to be made irrespective of whether all owners had been notified of the meetings, or enabled decisions to be made when only a handful of owners had given their consent, are evidence that careful thought had not been given to the best means by which the property rights of Maori landowners could be protected. A vote carried by a majority of those present was sufficient to achieve a sale or a lease, or to vest a block in a land board. But such a vote might well dispossess, or remove from the decision-making process, not only a number of owners, but even a majority of owners. They might own only small interests, but these were the interests the new tenure system had provided them with.

As we have suggested in chapter 8, it was the duty of the Crown not just to protect the right of Maori owners to alienate – as it argued before us – but to protect the individualised rights which it had created through its new tenure system. Maori property rights were no longer community rights, and the community could no longer offer its protection in land transactions. With each owner being given the right to make decisions about their land interests, they were forced to rely on the protection of the legislation and the land boards. That protection therefore should have embraced each individual owner, but it was well known by 1900 that this was very difficult in practice. The issue, therefore, was how to reform the system of transfer, and to provide for owners to make collective decisions, while protecting the rights the tenure system had created. As the Crown has suggested, 1909 was a turning point.

We consider that the meeting of assembled owners process had more to do with responding to the critics of Liberal land policy than with protecting the rights of Maori owners. In attempting to silence their critics, the Liberals adopted a system which might seem to empower the owners, and which might allow Maori owners to reach decisions about alienations more quickly and easily. The decision to institute a quorum of five owners, a figure unrelated to the number of owners in a block, or the size of their interest in it, suggests that ease of transfer was considered more important than the protection of owners’ rights. We find it hard to reconcile this with Carroll’s intention that owners were to be reconstituted as a runanga. If it was not simply cynical, the choice of such a minimal quorum must reflect a lack of confidence among both judges and parliamentarians about the extent to which Maori would participate in the new system of administration and alienation.

We accept the characterisation of the meeting of assembled owners by the Hauraki Tribunal as a ‘manipulative’ device, by which ‘minorities of owners in a block could alienate the land without the consent or even the knowledge of other owners.’ We note that alongside the meeting of owners’ provisions, the provisions for ‘precedent consent’ were also designed to facilitate the process of alienation.

It is clear that the Government envisaged an important role for private buyers in the new regime. As the Attorney-General, Sir John Findlay, commented during the debates, the Bill removed the obstacles:

that have stood in the way in connection with the alienation of Native land for at least twenty years . . . by facilitating all
these operations of alienation the Government has done an immense amount to help the settlement of native land . . . It is not through the State alone that we are going to settle large areas of Native land: we are going to settle them as much through private operations between the Native owner and the settler as between the State and the settler.

Crown purchasing
The provisions for Crown purchasing in the 1909 Act signalled a return to large-scale Crown purchasing of Maori land, alongside private purchasers. As the Prime Minister, Joseph Ward, put it in Parliament in 1909, 'It is proposed to purchase from the Natives as large an area as possible.' With the Native Land Amendment Act 1913, the Reform Government moved to increase the Crown's powers. It now returned to the old system of purchase of individual interests, removing the requirement to call meetings of assembled owners. The wheel had turned full circle, back to Crown purchase policies of the late nineteenth century. The Crown was also prepared to spend up to £500,000 a year on purchasing Maori land, and enabled itself to shut out private purchasers through prohibition orders. In effect, as the claimants argued, this amounted to a right of pre-emption. Thus, the Crown ensured that it could have the inside running on the blocks it wanted. It could also choose whether it dealt with owners through meetings of owners or on an individual basis, according to which tactic was judged the most effective in any given situation. In keeping with Reform's long-standing concern that the Government should ensure that more Maori land be made available for settlement, Native Land Court judges were required to report back on land which might be suitable in their district. This practice opened the door to Crown intervention in partitioning the interests of owners to secure individual allotments which might be alienated.

Herries justified the provisions for Crown purchase under the 1913 Act on the grounds that the current law privileged Pakeha purchasers (his term) over the Crown. His policy now was to 'restrict to a certain extent the Pakeha power and to increase the powers of the Crown to purchase.' The Crown having the advantage was in the best interests of settlement, he suggested, because it would help keep land speculators at bay. This was an interesting argument coming from a defender of laissez-faire capitalism! Herries' provisions for leasing Maori land are interesting. They might be useful if Maori did not want to sell, he said. He was also prepared to admit that 'probably some Natives have a sentimental attachment to the land – they might like to keep what is known as their “mana” over it.' We think the leasing provision was useful, though it seemed to be assumed that such leases would probably eventually lead to the purchase of the freehold.

We consider that the negative impacts of purchasing undivided shares were well known to Parliament in 1913, and that Herries' explanation for the resumption of this policy cannot stand as a justification for it. It was only a few years since Seddon had stated that when the number of Maori people was set alongside the amount of Maori land remaining, it would be 'manifest injustice to take more land from them under the old system. If that system were continued . . . we would have claims for land on behalf of landless Natives.' And in the Legislative Council in 1911, Dr Findlay was critical of those who declared that the solution of the land problem was to individualise native title so that each person could sell their title, ending up landless.

Did the Crown ensure Maori retained sufficient land?

As we have discussed in chapter 8, in the 1870s the Crown had recognised the need to ensure that Maori retained sufficient land. However, despite Donald McLean's intention that there be hapu estates, reserves provisions were based on allowances of land to individuals. The acreage set down...
was small, and no allowance was made for the quality or accessibility of the land, or its suitability for particular purposes. In our view these policies indicated that the Crown was concerned more with providing for Maori subsistence, rather than for their participation in economic development and prosperity. All these factors, we consider, greatly undermined the usefulness of the Crown's protective mechanism.

We draw attention here to the way in which Crown provisions for Maori land retention changed substantially over a brief period in the first dozen or so years of the twentieth century. The Maori Lands Administration Act 1900 provided a benchmark at the beginning of the century for Crown policy relating to Maori land retention. Under the 1900 Act, land councils were charged with finding out what land each ‘man, woman, or child’ had, suitable for their ‘occupation and support’, and they were to determine how much of this land was ‘necessary’ to be designated a papakainga. Such land was to be absolutely inalienable, and each person was to be issued with a papakainga certificate. The possibility that some people might own land which was unsuitable for their support was considered. In this case an owner might, with council consent, either exchange the land for other suitable land, or sell it; the purchase money would go to the council which could then buy replacement land. Provision was also made for reservation of traditional food sources. Where owners transferred land to the councils, a majority could request land to be set aside for their support and also for the reservation of burial grounds. In addition, eel pa or eel weirs, fishing grounds, birding preserves, and land for timber and fuel could be reserved and made inalienable.

The broad assumption underlying the 1900 Act was that Maori owners should retain their lands, and be entitled to the benefits of leases, as their land was ‘opened up’ for settlement. Regulations under the Act stated that councils could classify Maori land into three classes for purposes of leasing: town lands (that is, township or village sites set aside for Maori); suburban lands (land near town lands); and various classes of rural lands. To ‘open up’ lands for lease, councils might borrow money, seek advice from the Chief-Surveyor on forming roads, and lease lands by public tender for 21 years (renewable).

These might be considered comprehensive provisions for the retention of Maori land. As we have already noted, however, the papakainga provisions of the 1900 Act, like those for reserves which preceded them, were still based on the concept of individual provision, rather than community provision. Judge Edger complained in 1903 that Maori in his area were very suspicious of the papakainga requirements because they did not know how they were to work. Seddon, speaking in Parliament in 1900, stated that members of the councils would select papakainga lands because their local knowledge would be invaluable. But it is clear from the judge’s comments that the mechanics of the procedure were slow to be worked out.

The Maori Land Settlement Act 1905 defined ‘sufficient’ acreages for the first time: not less than 25 acres of first-class land for each man, woman, and child (which would mean 150 acres for a family of six), 50 acres of second-class land each, or 100 acres of third-class land. Such land could be vested in each Maori, but could also instead be vested by the Governor in a corporate body (a land board, for instance) to be administered for him.

The 1905 Act determined that where the Crown was buying from Maori, the Governor had to be satisfied that the Maori owners had sufficient other land for their maintenance. If not, he could either reserve the whole of the block for the owners, or, if he proceeded to purchase the whole block anyway, he could set aside Crown land for owners who might otherwise be left without land. Where alienations to private lessees were involved, it was the job of the land boards to ensure that Maori were not left without a means of support. The boards had to vet leases (including those arranged by the owners themselves), and in doing so had to consider whether the lease was for the benefit of the Maori lessors. This, in turn, required consideration of whether a sufficient area had been reserved as a general papakainga for all the owners, whether separate holdings had been reserved for agricultural purposes for
those owners who wanted them, and, in the case of subdivided land, whether each section to be leased had a frontage to a surveyed road.\(^{76}\)

Two new qualifications are evident here. First, the Crown might reserve any Crown land for Maori if it wished to buy the whole of a block. In other words, the relationship of Maori owners with their lands might not be deemed to be a consideration at all, so long as some land was provided for their support. Secondly, the legislation marked the first shift away from the assumption that Maori should in fact retain land. Now ‘income’ might be sufficient.

The Native Land Court Act 1909 contained a significant change in wording relating to Maori land retention. Whereas the 1900 and 1905 acts had stated that Maori must retain ‘sufficient’ land, the 1909 Act provided that a land board or the land court could not confirm an alienation unless it was satisfied that ‘no Native will by reason of the alienation [being considered for confirmation] become landless within the meaning of this Act.’\(^{77}\) Nor could it confirm a resolution of a meeting of owners if ‘any Native owners’ of the land would become ‘landless.’\(^{78}\) If the Crown were purchasing, the Native Land Purchase Board was not to buy an interest in native land ‘unless the Board is satisfied that no Native shall become landless within the meaning of this Act by reason of that purchase.’\(^{79}\) In section 373(1) of the Act it was the duty of the board to make ‘due inquiry’ on that score. But section 373(2) of the Act watered this provision down. It provided that no purchase would be invalidated ‘by any breach of the requirements of this section.’ The definitions contained in the Act state that ‘Landless Native’ ‘means a Native whose total beneficial interests in Native freehold land (whether as tenant in fee-simple or as tenant for life, and whether at law or in equity) are insufficient for his adequate maintenance’ (emphasis added). The attempt to define ‘sufficient’ land had been abandoned.

Section 425 of the 1909 Act also contained a provision for effectively waiving the ‘landless’ provision. The Native Land Court or the land board could recommend to the Governor that an alienation – including those to the Crown or decided by assembled owners – could proceed even if a Maori did become ‘landless’ as a result; and the Governor in Council could confirm the alienation in question, so long as he was satisfied that the person ‘is able to maintain himself by his own means or labour,’ and that the transaction was not ‘contrary to the public interest.’\(^{80}\) Section 232 of the 1909 Act enabled native reservations to be set aside for ‘common use of the owners,’ which included villages, fishing grounds, landing places, springs, wells, and church sites. Such a reservation might be vested in a Maori land board, or in the Public Trustee, or any other body corporate or trustee, and was to be inalienable.\(^{81}\)

The Native Land Amendment Act 1913 weakened the land retention provision even further. The Act enabled boards to set aside the concern for potential landlessness if it considered that the land was ‘not . . . likely to be a material means of support,’ or if the seller ‘is qualified to pursue some avocation, trade, or profession, or is otherwise sufficiently provided with a means of livelihood.’\(^{82}\) This provision was repeated in the Native Land Act 1931 (section 273(1)(c)). Thus the boards were given even more discretion to allow alienations. Anyone who had a job might be deemed not to need land, and if the board decided that the land in question was already inadequate for the needs of an owner then an alienation might proceed.

**Crown provisions for Maori land retention**

We consider that the emphasis placed on ensuring that Maori retained sufficient land diminished with remarkable speed in the early twentieth century. In the 1900 Act there was an assumption that everyone, including children, needed land and access to traditional resources. There was thus a concern with providing for the next generation. The succeeding Acts increasingly attempted to define the minimum amount of land required for subsistence for an individual, and assumed that owners might be able to live off the rental income instead. From 1913, the boards could dispense with the requirement to ensure that sufficient land was retained so long as the seller had a job.
These changes highlight the vulnerability of Maori in the wake of the Crown's earlier failure to provide for community titles. They also highlight Maori vulnerability to changing Crown policy. Maori were to be provided for as individuals, meaning that the Crown could excuse itself from any obligation to ensure that hapu or iwi retained a landed base, or resources which were of importance to the whole community. The provision for making reservations acknowledged that a village or fishing ground could be considered community resources, but the purpose of such reservations was narrowly conceived. The changing provisions indicate a rapid departure from the concerns expressed by the Kotahitanga Parliament and the Stout–Ngata commission about Maori land retention. The commission, as we have noted, placed great importance on the duty of the State and people of New Zealand to preserve the Maori 'race', and to ensure that the 'present possessors' did not 'destroy the tribal land', and consequently the tribe itself.\(^{183}\)

We consider that the statutory provisions concerning alienation put in a vulnerable position those Maori who had not applied to seek succession orders to the interests of their parents or relations who had passed away. Technically they were not 'owners', and land in which they were entitled to interests could be alienated without their approval.\(^{184}\) Given (as outlined later in this chapter) that so many successions were never proceeded with, we can only assume that the shares of substantial numbers of those entitled to be owners were alienated without any check having been made of their landholdings.

Underlying all these provisions were the anxieties of both Maori and settler leaderships that Maori who sold might be left with no land at all. For settler politicians, the fear was that, if there was no protection, Maori might become a charge on the State. Papakainga certificates, at first, were to provide reassurance that this would not happen. This was replaced, however, by empowering land boards to make decisions about whether an alienation might safely proceed. We will consider how this worked in practice in the next section.

The Tribunal’s findings on Crown policies for the alienation of Maori land

We find that:

- The Crown failed in its responsibility to heed the caution of the Stout–Ngata commission about its fiduciary duty to Maori, and the importance of preservation of a tribal estate for future generations.
- Removal of Maori elected representation from the land boards in 1905, and failure to reinstate strong Maori representation, denied Maori the opportunity for involvement in decision-making about the development of their lands, and was in breach of the Treaty principles of partnership, autonomy, and active protection.
- The provisions of the Native Land Act 1909 were evidently designed to encourage collective decision-making by Maori owners regarding the alienation of their lands, but the potential for collective decision-making was undermined by the small quorum required for meetings of owners;\(^{185}\) this was in breach of the principle of active protection.
- The Crown breached Treaty principles of autonomy and active protection by reinstating policies for Crown purchase of undivided interests, and by permitting itself to bypass the provisions for collective decision-making by owners on alienation.
- The section of the 1909 Act relating to the blanket removal of all restrictions on the alienation of Maori land, irrespective of their purpose or function, breached the Crown's duty of active protection.
- The Crown breached its Treaty obligation of active protection by failing to provide adequate safeguards for individual owners and for communities, to ensure the retention of a land base for present and future generations.
Crown Purchase Policies

**Key question:** How were Crown purchase policies implemented on the ground in the Central North Island in the period from 1900 to the 1930s? Were they Treaty-compliant?

We turn now to consider the way in which Crown purchase policies were implemented on the ground in our inquiry region, to the 1930s. We note first that under the 1909 Act and its 1913 Amendment, the increase in sales of Maori land is marked.

It is clear that under the 1909 Act and its 1913 Amendment there was substantially more Crown purchasing in Taupo, while the greater part of the land purchased in Rotorua was bought by private buyers. We consider Crown purchasing in Taupo first, particularly during the period from 1918 to the 1930s, and then turn to Crown and private purchasing in Rotorua.

**Taupo–Kaingaroa: Crown purchasing on the ground**

Large-scale Crown purchasing began in south Taupo lands from 1918. Previously, the Crown had bought in a few blocks to the north of the lake, though title to some of the large southern blocks was not completed till 1914–16. Herries, Native Minister in the Reform Government, expressed his hope of buying some of those blocks in September 1917. Sawmillers, the Returned Soldiers Association, and ‘various sections of the media’ were interested in the potential of the ‘Taupo’ lands, as they were called. In particular, by the end of the First World War, the Government was under pressure to find land for several thousand returned servicemen – which focused attention on the undeveloped lands of the Central North Island: ‘the last empty space where farm colonies or communities have room to spread their wings’, as one newspaper put it. In 1918, the Native Land Purchase Officer, WH Bowler, was instructed to prepare a report on the Hautu, Ohuanga, Waipapa, and Tokaanu blocks, and he recommended that the Crown should acquire ‘all large areas of virgin country’ to stop speculators getting involved.

In May 1918 the Native Land Purchase Board decided to acquire the Hautu block (estimated total 107,969 acres, later set at 102,075 acres), the Waipapa block (10,346 acres), the Tokaanu block (3376 acres), and Ohuanga block (8574 acres). Prohibition orders on alienation covering a number of blocks (including sections of the Hautu, Tokaanu, Waipapa, Ohuanga, Pupepotu, Rangipo, Tauranga Taupo, Tauhara, and Kaimanawa blocks) were issued for one year from 20 August 1918, while valuation details were gathered. Some of these blocks – Okahukura, Oraukura, Pupepotu, Ruamata, Waimanu, Waione, Whangaipeke – were included in an agreement made in 1906 between Ngati Tuwharetoa and the Tongariro Timber Company for the development of the west Taupo timber lands. By this agreement, the company agreed to build a railway from the blocks to the Main Trunk Railway Line in exchange for timber cutting rights. The Crown had been involved in the agreement, accepting the recommendations of the district land board and the Stout–Ngata commission that it should go ahead. When the agreement ran into difficulties, the Crown turned its attention to purchasing within the forest blocks that were included in the agreement. By 1929, 35,054 acres had been acquired within the Tongariro Timber Company agreement lands, comprising a quarter of the total land included in the agreement. The timber, on 19,130 acres of land, was valued at £1,200,000. During the 1930s Crown purchasing declined in the Taupo and Kaingaroa districts. The Crown proceeded with further acquisitions, mostly by purchase of individual interests, predominantly in four blocks: Waihaha, Tihoi, Tauranga Taupo, and Opawa Rangitoto.

It was suggested to us by Dr Hearn that Crown purchasing in these districts, carried out by the Native Land Purchase Board from 1917, was driven by ‘a plan and a timetable [and] . . . a comprehensive strategy intended to secure as much land as possible in the shortest time possible and at the least possible cost to the state.’ The Crown sought land for farm settlement, timber milling,
and afforestation, and was anxious to acquire Maori land before state expenditure on roads and railways enhanced the value of the land. We add that the Crown also targeted valuable natural resources in its purchasing.

Dr Hearn argues that the Crown adopted a number of key land purchasing strategies:

- important block information was compiled;
- succession orders were secured (to ensure that purchases were not impeded because Maori had delayed succeeding to the interests of deceased owners);
- purchasing through meetings of assembled owners was a cost-effective and efficient method, though when this method failed the acquisition of individual interests could be pursued;
- prohibition orders, which were repeatedly extended, enabled the Crown to control prices and the process of alienation, and cancelling partitions meant fewer separate land valuations and a reduced number of owners for the Crown to deal with; and
- prices which were higher than Government valuation could be offered when necessary, and securing the cooperation of Maori leaders, and exploiting owner dissatisfaction, were also useful tactics.

It might be argued that these mechanisms show no more than that the Crown was conducting its purchases in an efficient manner. That Crown has suggested that it had a responsibility to the taxpayer in spending public money. In our view, however, as we have already stated, the Crown

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<th>District</th>
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<td>1920s</td>
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Source: David Alexander, LHAD appendices, appendix 2 (doc A97(b)). Note that the figures for ‘Crown purchases’ do not include lands acquired for roads, taken under the Public Works Act or lands otherwise ceded to the Crown. Figures in acres have been added to those provided by Alexander.
Map 11.1: Rotorua District: land still in Maori ownership, as at 1910, 1920, 1930, 1940 [from CFRT mapbook 3 (doc E38) plates 29 and 30]
Map 11.2: Kaingaroa District: land still in Maori ownership, as at 1910, 1920, 1930, 1940 [from CFRT mapbook 3 (doc E38) plates 35 and 36]
Map 11.3: Taupo District: land still in Maori ownership, as at 1910, 1920, 1930, 1940 [from CRT mapbook 3 (doc E38) plates 31 and 32]. The hatched area is the Pouakani block, which was not included in the Land History and Alienation Database.
also had Treaty responsibilities to Maori. We examine some of the Crown's purchases in light of this consideration.

**Hautu blocks**
The first Crown purchases in southern Taupo were the six Hautu blocks, which the Crown evidently wanted for soldier settlement. A large block was selected by the Prisons Department in 1921–22, with the aim of preparing it for settlement; in accordance with contemporary prison reforms, prisoners were to be employed developing the land.\(^{194}\)

At a meeting of owners in November 1918 there was considerable initial opposition to the prospect of Crown purchasing. But purchasing was agreed to after the price was raised and an agreement had been made to cut out the shares of the non-sellers. The Crown agreed that it would not claim kainga, cultivations, or urupa, or oppose non-sellers' retaining a ‘fair share’ of the frontage, open country, and bush, or object to partitioning between itself and non-sellers. This is a telling comment, which seems to imply that the Crown considered it a concession to the Maori owners not to oppose their retaining the lands they wished to keep.

The negotiations were carried out by F O V Acheson, who returned to a second meeting in January 1919 with ‘substantial increases’ in the valuations, though Dr Hearn notes that the increase was limited to portions of the lake frontage, open and bush lands that the Crown wished to secure. On 7 February 1919 the Native Land Court partitioned out 55,634 acres for the Crown, more than half the total acreage, leaving 45,009 acres for the non-sellers.\(^{195}\) Acheson recorded ‘considerable satisfaction’ among the owners at the Crown's conduct of the purchases, and hoped that he had secured the assistance of all the principal owners with the ‘other big purchases we have in view. These other purchases are really far more important to the Crown than the Hautu one.’\(^{196}\) He also commented that the Crown had done well out of the partitioning process.

Acheson counselled the Crown ‘at present’ not to attempt to secure any of the land actually used by Maori. “The Hautu Natives are on the whole a very fine lot of people and it would be a great pity if the Crown purchases interfere too much with their use of the convenient flats.”\(^{197}\) Yet he had already decided on a strategy of waiting for a couple of months while the purchase money went into circulation, then calling fresh meetings of owners to secure further interests. At the same time, after the Crown's interests were first partitioned out, the prohibition orders were extended by six months from February 1919, and a further 12 months from August 1919.\(^{198}\) Once the number of owners had been reduced to 'reasonable limits,' the Crown could begin to buy individual interests. This process of purchase, partition, and fresh prohibition orders continued till 1928.

Some owners unsuccessfully sought to have the prohibition orders removed, to partition their lands into ‘family holdings’. Acheson speculated that this was so they could sell parts of the blocks to ‘Europeans,’ and said that they did not need the restrictions lifted if they wanted to partition.\(^{199}\) Evidently he regarded owner applications to partition with some trepidation. Noting that owners of a number of Hautu blocks were likely to secure further partitions, he recommended in September 1917 that the Crown resume buying individual interests at once. We note that Acheson himself moved seamlessly from the position of land purchase officer to that of Native Land Court judge. He was appointed to that role on 1 November 1919, and presided over partition hearings for the block from early 1920.\(^{200}\) By the end of 1929 the Crown had purchased 86.5 per cent of the total area of Te Hautu.\(^{201}\) Dr Hearn states that even in 1952 the Hautu subdivisions were still considered subject to prohibition orders issued in 1933.\(^{202}\)

**Tauranga-Taupo blocks**
The Crown also used prohibition orders, along with purchase of individual interests over some years, as a successful purchase tactic in the Tauranga-Taupo blocks. In Tauranga-Taupo 1B (5279 acres, 263 owners), 2B (10,669 acres, 218 owners), and 3B (1884 acres, 242 owners), prohibition orders were issued in August 1918. Meeting with opposition from the owners in 1919, the Native Land Purchase Board suspended purchasing, but called meetings of owners in July 1920 to consider Crown offers on all
three blocks. The owners of 1B and 2B rejected the offers, and the Land Purchase Officer reported that ‘I could make no headway . . . [but] I have now made a good bite into them through purchase of individual interests’.

The owners of 3B agreed to sell 1350 acres, but the prohibition order was maintained over the rest of the block, and the owners’ other two blocks, during the 1920s. By March 1929 the Crown had secured 37.7 per cent of the block.

**Tauhara North 1**

The Crown also used a combination of prohibition orders and purchase of individual interests in Tauhara North 1. Within the block are Lake Rotokawa, puia (geysers), and a sulphur resource, which stimulated Crown interest after the potential value of the sulphur became evident in 1916. The Crown issued its first prohibition order in July 1916, and regularly extended it until the purchase was completed. It decided to proceed to buy the interests of individual owners after three unsatisfactory attempts to secure a resolution to sell at a meeting of assembled owners. In the first meeting, which few owners attended, the Crown’s offer was too low, while the second meeting was adjourned because of a typhoid outbreak. At the third meeting the owners agreed to sell if offered £100 per acre.

After these setbacks, the Crown decided to abandon meetings of owners, and acquire individual interests in the block. Professor Stokes analysed the Memorandum of Transfer, and found that of 123 signatures, over 60 were obtained in an ‘initial burst’ in December 1917 and the early months of 1918, but that it took four years to secure the remainder. It is evident, too, that the majority of the signatures were obtained from single or dual signatories. Bowler was prepared to proceed to partition in 1920 – when interests equivalent to 1000 acres (of 1400 acres) had been secured – but the Crown wanted the sulphur deposits which were awkwardly placed for partition in the centre of the block, and Bowler persevered with purchasing. A meeting of some of the remaining owners (nine present or represented) agreed to sell in 1921. Bowler was sent, literally with his cheque book, to buy individual interests if the meeting rejected the resolution to sell.

As he had already noted, all the original owners had not been accounted for; there were still 56, but a large number of them were dead, and no successors had been appointed. In fact, an official list of non-sellers compiled after the meeting contained 105 names. Nevertheless, the Waiairiki Maori Land Board confirmed the resolution to sell on 14 June 1921, and the following month Tauhara North 1 was proclaimed Crown land.

Professor Stokes concluded that:

> Individual owners were systematically pursued by Crown land purchase officers offering payment for their interests in the block. There was no opportunity for a full meeting of owners to consider alternative options. Leasehold or other arrangements which might have been more favourable to Maori owners had been ruled out by this series of Orders prohibiting alienation . . . Nor was there any negotiation over the price.

We agree. It is hard to discern any concern for the interests of the owners in this transaction, other than as sellers of their land to the Crown.

**Tokaanu and Waipapa**

The Crown’s single-minded approach to purchasing, and lack of concern for owners, was encapsulated in its approach to the lands at Tokaanu and Waipapa. The Tokaanu block was another selected by the Native Land Purchase Board in 1918 for extensive purchasing. The block had been partitioned on 16 January 1918, and the owners of Tokaanu B1 (1361 acres), one of the newly partitioned blocks, secured a further partition into 16 blocks, with provision for roads. In February the Crown imposed an order prohibiting private alienation on Tokaanu B (33,766 acres), and applied to have the partition orders cancelled in both Tokaanu B and Waipapa 1 (2345 acres).

Bowler, who appeared for the Crown, told the court in April 1918 that the cancellations were necessary so that Crown purchase could proceed. Though he recognised that the court and the owners had been to a ‘great deal of trouble’ in making the partitions, it was important that
the Crown could consolidate the individual interests it had bought to best effect, especially since it had borne the cost of making two roads in the district. The cancellation of the partitions would not greatly prejudice the owners, since it was ‘doubtful that more than a few of them are likely to make any serious effort to work the land.’ As Dr Hearn suggests, Bowler made it clear that ‘the interests of the Crown would take precedence over those of the owners.’ The court indicated that it would not have granted the partitions had it known the Crown intended buying in the blocks.

Tokaanu had been earmarked by its owners (identified as Ngati Turangi) to be kept for themselves ‘as much as possible.’ P A Grace, an owner in both blocks, explained that Ngati Turangi had been anxious to have the partitions approved. Even before the title was investigated, homes and fences had been built there, and pastures established by the 100 or so members of the hapu. Opposition to the Crown’s plans was strongly expressed. Te Heuheu Tukino stated that Tokaanu, ‘the home of our ancestors and ourselves’, and Waipapa, were intended for their young people returning from the war. Ngati Tuwharetoa, we are reminded, had their own returned servicemen to consider. Other speakers emphasised the care given by the owners to partitioning in both blocks so that the owners might work them amicably. In the end the owners sought a reinstatement of their own partitions, and the native land purchase officer was instructed to agree, and to take advantage of this ‘concession’ to try and buy interests of the owners in other blocks. The Crown gave up on a meeting of owners called for March 1919, deciding to try and buy individual interests instead – but recognising the need to move ‘tactfully’ and to ‘endeavour first to get whole families to join in a sale.’

In fact, the Crown was not able to buy many interests in the Tokaanu block in the period from 1920 to 1928. It continued to try and buy in Waipapa, on which there was considerable timber, and which the Native Land Purchase Board had decided to acquire in June 1918. Acheson (then a land purchase officer), suggested in May 1919 that given
the opposition to selling, which he attributed to the influence of Te Heuheu and other leaders, the Crown should try to buy individual interests. P A Grace, meanwhile, tried to secure the reinstatement of the hapu’s scheme of partition. The land, he said, was owned by one hapu, which had its principal kainga on the block. It was suitable for subdivision into small farms, and a small dairy factory was being constructed. Acheson (judicially) suggested in July 1920 that the Crown should reinstate the partitions, and offer more for the land all around Tokaanu, to ‘induce the Natives to sell to the Crown all the land that they are not likely to require themselves.’ In fact, it took till 1921 for the Crown to give up its opposition to the partition orders; though it had by then secured 84 shares which it took in 70 acres of bush land. The cancellation, a representative of the owners told the court, had caused them ‘great hardship and delay.’

Paeroa East 4B1B

The same lack of care for Maori owner interests was evident in the Crown’s acquisition of Paeroa East 4B1B, which contained the Waiotapu geothermal resource, with geysers and hot springs. The Waiairiki District Maori Land Board was anxious that the Crown secure the resource. The Native Land Purchase Board rejected the land board’s recommendation in 1910 that it call a meeting of owners, and began to buy privately. By 1917 it had purchased most of the shares, and had its interests partitioned out. The block awarded to the Crown contained not only Waiotapu, but the kainga and cultivations of the non-sellers. The non-sellers appealed, and were told that the Crown had bought too many shares – meaning that the kainga and cultivations could not be excluded. Some of the owners then offered to return their proceeds, suggesting that the partition be cancelled. The land purchase agent, Bowler, later wrote that he had assured the non-sellers they would retain their kainga, and recommended the partition be amended (though he did not think they should get a full 160 acres returned). Judge Wilson urged the Crown to give ‘favourable consideration’ to the owners’ request for cancellation of the partition – adding, we note, that he believed this ‘would have the effect of facilitating other purchases required by the Crown in the neighbourhood of Waiotapu.’ And though the partition was amended (giving the Crown an extra 20 acres), the non-sellers’ portion was then left in two separate blocks. The Crown continued to try to acquire more individual interests, while the non-sellers prepared to petition Parliament to try to secure their interests in one block. Tai Mitchell, acting for them, asked why, when Waiotapu itself had been secured by the Crown, achieving the Crown’s main object in purchasing from individual owners, some thought could not be given to meeting the requests of the non-sellers. ‘This would have been just, and was the least you could have done for them . . . This is a case where the dictates of the Pakeha’s heart and not those of his head should lead.’ In the end the matter was resolved by an exchange.

The Tongariro Timber Company agreement lands

Alongside Crown proclamations over lands to the south-east of Lake Taupo, were those which affected a number of the west Taupo timber blocks subject to Ngati Tuwharetoa’s agreement with the Tongariro Timber Company. We have already considered the terms on which this agreement was entered into, and we will examine its significance further in chapter 15. Here, we draw attention to the fact that the Crown was aware from the outset that blocks it selected for purchasing, with their valuable timber resource, were subject to the agreement. It had, as we have noted, played a key role in the birth of the agreement. But the Tongariro Timber Company had struggled since 1908; it had sought and secured changes to the original agreement, but by 1918 had achieved little. The owners of some of the blocks, whose hopes for economic development, a railway, and royalties had been dashed, were finally becoming impatient, and considering selling their interests to the Crown instead. Acheson, the land purchase officer, considered that the Crown could buy interests in the blocks, and noted in 1919 that if the timber and the lands were valued separately it would be possible to pay the Maori owners (through the
land board) for both. That way they could receive payment for the land initially and the timber later, when a formula for deduction of royalties and charges had been worked out by the board. But once the board had been paid, the Maori owners ‘would then have no further interest in the land or in the timber. The Crown would step into the shoes of the Natives’, and would take over the benefits and the liabilities of the timber agreements.

Even in 1919, then, the Crown had its eyes on the west Taupo timber blocks. In fact they were considered far more important than those south and east of the lake, where it began buying for settlement. The new Commissioner of the State Forest Service, Sir Francis Bell, was very anxious to acquire the company’s forest rights, and opened negotiations with the governing director of the company (which eventually stalled). At the same time the Crown began buying into the west Taupo timber lands, having established that there were no legal restrictions on its doing so. Skerrett, counsel for Ngati Tuwharetoa, wrote to the Native Minister on behalf of ‘leading Maori’ to urge that no steps be taken to acquire any interests in the Tongariro Timber Company lands, and was ignored. He reminded the Minister of Parliament’s approval of the terms of the agreement, of its importance for all the tribal owners so that their lands were not squandered, and of the protective role that the land board should be exercising. In December 1918 the Native Land Purchase Board had an order issued prohibiting private alienation in the Hauhungaroa blocks 1 to 11 (55,918 acres), against which Te Heuheu protested. Prohibition orders were also used in the Waituhi Kuratau blocks.

**Ohuanga South 282 block**

On a rather smaller scale, we note the fate of the owners of Ohuanga South 282 block (304 acres), whose wish to utilise their property and make a living was of little interest to the Crown. The two owners sought in May 1922 to have the proclamation covering their land revoked so that they could mill and sell the timber. This was rejected on the grounds that removal of the timber would spoil the ‘great scenic beauty of Pihanga.’ The State Forest Service reported that because of the ‘good milling forest’ on the

[Image: Thermal pool, Waiotapu Valley, 1886. This photograph by George Valentine shows the ground covered with a layer of volcanic ash and mud from the Tarawera eruption.](https://www.waitangitribunal.govt.nz)
block (and its neighbour), it was ‘highly advisable’ that the Crown should possess the land. The prohibition order was maintained in place. The owners complained two years later that because of the order they could receive no benefit from their land, though they had paid the Native Land Court costs and survey liens:

The Crown has not offered any suitable scheme whereby this Block could be made productive and of benefit to us. It is quite satisfied to impose on it a prohibition thus debarring us from improving it and receiving some benefit from it. We consider the attitude of the Crown towards us unreasonable.

In 1926, after a further complaint, the owners were invited to sell their land to the Crown. In 1927 they wrote that because of the prohibition ‘undue hardship has been inflicted upon us in respect to obtaining an income for the maintenance of our families.’ Eventually one of the owners began logging some areas anyway, but he was still seeking the lifting of the order in 1940. In 1941 the owners executed an instrument for alienation of the timber. The order was finally revoked in 1941, some years after it had been imposed. It is clear that in this case the lost opportunity cost would have been substantial.

**Were prices fair?**

The claimants have suggested that the Crown’s monopoly over land purchase, through the use of proclamation orders, meant that the system was structurally unfair. There was no free market for the sale of Maori land; Maori had to sell to the Crown at the Crown’s price. The Crown has challenged the view that Crown monopoly powers of purchase resulted in Maori receiving an inferior price for their land.

How did the Crown set its prices? We consider the question of valuations first. In an earlier chapter, we discussed the importance of the Crown accepting a minimum price for its purchase of Maori land. We acknowledge that the fixing of such a minimum price in 1905, under the Government Valuation of Land Act 1896, was a very considerable step forward. The Native Land Act 1909 (section 372) provided that no interest in Maori land should be purchased by the Crown at a price less than its capital value under the Valuation of Land Act 1908. If there was no valuation, the Native Land Purchase Board had to secure a special valuation, and could not buy below that. As Dr Loveridge has shown, these provisions led to a substantial increase in prices offered for Maori land. Prices paid by the Crown during the first decade of the twentieth century rose by about 50 per cent per acre over pre-1900 averages.

Dr Hearn agrees that the evidence indicates that the Crown abided by the valuation requirements, but raises questions about the basis on which the valuations were prepared, and what impact the Crown’s position as monopoly purchaser had on prices. Dr Hearn shows the steady rise in the number of prohibition orders during the period of the Crown’s focused purchasing in Taupo. The number issued in the Taupo and Kaingaroa inquiry districts rose from 42 in 1918, to 127 in 1921, then declined, and peaked at 160 in 1927. Most of these related to blocks in the Taupo inquiry district. Dr Hearn notes also that private purchasing in the district was on a limited scale, reflecting the ‘widespread and prolonged use’ the Crown made of prohibition orders.

Despite provision for Government valuation of Maori land, statements of land purchase agents sometimes suggest that Crown valuations and prices offered were less than adequate. Acheson, the Government agent at Taupo, noted in 1919 that all the Tongariro Timber Company’s lands had been valued by the Government ‘on a very conservative basis.’ He referred to a meeting with the Pukepoto owners, who, by agreement with Te Heuheu, were proceeding to sell their lands to the Crown, despite their involvement in the Tongariro Timber Company agreement. They were told the Crown could not offer more than the Government valuation, and their asking price of £4 10s 0d was evidently higher than this. But Acheson pointed out that in the adjoining block the land had recently been valued at £2 10s 0d an acre for the land alone, and £6 an acre for the timber.
He recommended that the Crown offer £3 10s 0d per acre for Pukepoto, though he must have had some reservations about this recommendation. He added that he hoped that if the Crown made a large profit out of the timber royalties, some extra payment should be made to the owners. This, it seems to us, is a very telling comment about the basis of the Crown’s valuations. We note that on another occasion later the same year, Acheson suggested that the Crown could perhaps ‘see its way to offer an increased price’, so long as half the purchase money were placed with the Maori land board – evidently with a view to assisting the owners to retain it for future development. We note also that a Dr Chapple, who Commissioner Bell met in London in 1922, and who kept a diary of their conversations, would write later of the ‘ridiculous’ prices the Government had offered Maori – an average of £2 per acre for land carrying timber to the value of £64 per acre.

The Crown’s agent also had reservations about the price offered owners in various Hauhungaroa blocks (blocks with extensive areas of indigenous timber involved in the Tongariro Timber Company agreement). In meetings of owners, the Crown’s offer of two shillings sixpence per acre was rejected. The owners of Hauhungaroa 4 and 5 agreed to sell subsequently, but at £3 per acre rather than at the Government valuation of 35 shillings. In 1924, owners in Hauhungaroa 1D and 2D rejected the Crown’s offer of £1 7s 5d for 1D, and £1 3s 5d for 2D, offering the blocks at not less than £4 10s per acre. But then the Crown completed its purchase of 1D1 through buying individual interests at the price it originally offered.

The owners of Paeroa East 4B2E1B did not secure the price they wanted for their land either, despite the support of the Native Department. In 1911 the capital valuation of Paeroa East 4B1B, the block which contained the Waiotapu hot springs, was £874, that is, eight shillings an acre. The Waiariki District Maori Land Board recommended that the Crown offer the owners £2 10s 0d per acre. In 1912 the owners hoped to sell the block privately for £10 an acre, though the sale did not eventuate. Tai Mitchell later wrote that the Crown had secured ‘the unique and priceless thermal sights of Waiotapu . . . at a very moderate figure – and these sights are the cream of the block.’

Taufaruru North 1, which was rich in natural resources, is also an instructive example. The Crown’s first offer for the block was three shillings per acre, based on the 1906 valuation. Six years later, when the Government took more interest in the sulphur, a special valuation of Taufaruru North 1 was sought. The land was valued at £350, and the sulphur at £1750 (total £2100). This appears to have been a guess. Professor Stokes notes that ‘no detailed scientific examination of the area had been carried out by the NZ Geological Survey or any one else’, and that there was no
scientific basis for a valuation of the resource.\textsuperscript{234} On 9 July 1917, 10 owners wrote to the Honourable Maui Pomare to express their view of the Government's price (£2100), and to ask that he pass their views on to his colleagues. The owners stated that they would never accept the price, which was simply too low, the block was worth £8 an acre because of the value of the ‘kupapa’ (sulphur):

Kua tino mohio marama matou he tino taonga utu nui te Kupapa, mo te ao katoa he Iwi hoki matou kua mahi Kupapa i Tikitere. Ko Rotokawa koinei te Kupapa tino nui kei tenei takiwa katoa, he maha hoki nga ahua Kupapa kei runga i tenei whenua.

(Translated officially at the time: 'We knew perfectly well that the “Kupapa” is a valuable property all the world over; for we have worked the “Kupapa” at Tikitere. And this at Rotokawa here is the greatest deposit of “Kupapa” throughout the Island. Also, there are many kinds of it on this land.')\textsuperscript{235} As Professor Stokes points out, the writers referred to their sulphur deposits as ‘taonga’, a highly prized, inherited resource, and it was for this reason that they later requested £100 per acre, as noted above. The owners explained that the land was rich in sulphur, that the ngawha and the lake had high scenic value.\textsuperscript{236}

We note that the New Zealand Geological Survey did not undertake a systematic geological exploration of the Taupo area until the late 1920s. At that time it was estimated that the Rotokawa deposits contained 73.99 per cent sulphur on average, from a total of some 2500 tons. But in 1921 the Under-Secretary of the Mines Department told the Native Department that after examination of the sulphur deposits, it had been concluded that they ‘are located in a field which has high potential value, and that this field can be economically worked when in the future more satisfactory means of transport are available.’ The fields were needed for the country’s future requirements.\textsuperscript{237} From the time when the sulphur was recognised as valuable, the Crown determined on purchase, without considering a lease, and without taking steps to ensure that the owners would receive a fair price for the block.\textsuperscript{238} In fact there was no serious attempt to mine the Rotokawa sulphur until the 1960s, and it proved difficult to extract. This does not, in our view, excuse the Crown’s acquisition of this block at such a low price.

Was Crown purchasing in Taupo and Kaingaroa Treaty-compliant?

We found above that the Crown had a particular obligation to ensure that its policies for Maori land were framed in accordance with the guidelines established by its own commission, the Stout–Ngata commission, which urged the Crown to discharge its fiduciary duty to Maori.

We note first that the Crown did not, in fact, move to stem the purchase of Maori land as the commissioners had recommended. In light of the overall thrust of the commissioners’ recommendations, it seems to us that Crown agents should have trodden very carefully in the next two decades. In particular, since the commissioners had not visited Taupo or Kaingaroa, no guidelines had been provided on the extent of ‘surplus’ or ‘unutilised’ Maori land in these districts. The Crown should thus have inquired into Maori landholdings here before it embarked on purchasing. The commissioners’ own activities during the term of their commission should also have been instructive to the Crown: they provided a model of how the Crown might engage with Maori owners to discuss their wishes for the utilisation, development, and alienation of their lands.

In chapter 10, we considered the obligations of the Crown when it engaged in monopoly purchases. We found that although there were circumstances in which it may have been appropriate for the Crown and tribal authorities to consider new forms of Government pre-emption – particularly if potentially destructive ‘land speculators and jobbers’ were to be excluded – the Crown had to consider the implications for Maori, whose valuable property assets were at stake. The Crown’s first obligation was to consult with and gain the consent of communities whose lands it singled out for monopoly purchases. Dr Hearn found no evidence, however, ‘which would indicate that the Crown
discussed its plans with, much less secured the agreement and co-operation of, the iwi and hapu whose lands were included in its purchasing plans. On the contrary, Ngati Tuwharetoa protested against the proclamations. On 1 June 1918, Wanikau Hohepa, chairman of a body called the United Committee of Ngati Tuwharetoa, wrote to the Native Minister about the tokaanu, Waipapa, Te Hautu, and Taurewa East and West blocks, invoking their earlier generosity to the Crown in respect of Tongariro mountain and Owhaoko lands for returned servicemen:

[W]e humbly ask that you and the Government will be good enough to remove these restrictions . . . because Ngati Tuwharetoa is not a people who have not made gifts to the Government of New Zealand . . . We are not clear why the law bears such ill will to these gifts of Ngati Tuwharetoa as to actuate it to come and take away the lands on which we are living.

And a hui called by Te Heuheu some months later discussed the Crown's power to acquire Maori land under proclamation for settlement by returned soldiers and, according to a newspaper report,

decided to approach the Government through Maori members of Parliament with a protest against this acquisition by proclamation and to ask that Government assistance be given to the natives in order that they may make their lands reproductive.

Clearly, Ngati Tuwharetoa should not have been put in this position.

In respect of the lands that were part of the Tongariro Timber Company agreement, and the Crown's decision to buy into them, we accept that there were some owners who by 1918 were in despair at the lack of outcomes, and who were therefore willing – or felt they had no choice but – to try some other course of action. Sale to the Crown was an obvious escape route in what had become an enormously frustrating, and difficult, situation for owners. But it is our view that the Crown had a particular obligation, in the case of the timber company lands, to consult with the representatives of the owners, before embarking on purchase. Here there were unique circumstances, of which the Crown was well aware. It knew that the owners of the blocks placed great importance on the collective nature of the agreement, and its ‘hotch potch’ clause, designed so that all owners would benefit equally from a regular stream of income, whatever the order in which the blocks were cut. The Crown was also aware of the importance Te Heuheu attached to retaining and developing the lands for the tribe. As he told the Aotea District Maori Land Board in 1910: 'He had spent 17 years trying to devise a scheme for the profitable use of the lands without selling them. He saw no benefit to natives in selling their lands.'

Not only were Maori owners not consulted about the Crown's policies, however, but their opposition to purchase was often regarded by agents as merely an obstacle to be overcome. In 1919 the Native Department Under-Secretary pressed the Valuer-General for valuations of Taupo lands, ‘as it is desired to take advantage of the present mood of the Natives in order to secure a footing in the Taupo District.’

In 1921, when a Lands and Survey surveyor was about to arrive in Tokaanu, it was suggested that his presence:

might have the effect of stiffening the opposition of the non-sellers and others opposed to the Crown's purchases, and it might be advisable for the surveyor to withhold the fact of the proposed settlement scheme from the Natives . . .

Though there was often opposition to purchase, many owners did sell their interests. Dr Hearn has drawn attention to the importance of the wider social and economic context in which Crown purchasing took place in Kaingaroa and Taupo (the two districts he dealt with). In the early twentieth-century economy, he reminds us, Maori often had only their land from which they could generate any income they needed. It was their sole capital asset. In these two districts there was considerable evidence of Maori hardship and hunger. In 1907 the Maniapoto–Tuwharetoa District Maori Land Board was supportive of Ngati Tuwharetoa’s agreement with the Tongariro Timber Company because the ‘owners of the blocks affected who live principally on
the shores of Lake Taupo are practically isolated and are at times in a state of semi-starvation. Food shortages were not infrequent as potato crops failed periodically.

Simple hardship, attested to in contemporary reports, was clearly a factor in decisions whanau made to sell interests in blocks. Crown purchasers were aware of this – and aware also of the fact that people sold to supply day-to-day expenses. As Acheson put it, for instance, in 1919:

The Natives at Tokaanu and Kakahi are badly in need of money at present, both for their personal needs and for purposes of stocking and improving their other lands. They are very anxious to receive early payment and are hoping to be paid within one month.

In the early 1920s, an official who visited Waitahanui discovered that hapu were charging anglers for fishing rights, out of economic necessity, dividing the fees ‘among the tribe to buy food during the winter when work was unprocurable’ (see chapter 18). In the late 1920s, unemployment (or ‘intermittent and uncertain’ employment) was a continuing problem. And the failure of the Tongariro Timber Company to pay expected royalties added to the difficulties many faced during the 1930s.

Dr Hearn argues that while the evidence may show that many Maori owners chose to sell, and generally accepted the price the Crown offered, it would be more accurate to conclude that many owners wished, for a variety of reasons – whether poverty, family circumstances, the need to pay rates or (above all) a desire to generate income for the development of their remaining lands and resources – to sell or at least lease a portion of their lands.

We have further found, that in exercising monopoly powers of purchase, the Crown was obligated to pay fair prices. While Government valuations for Maori land clearly provided some protection for owners, Maori were unable to test the value of their land in the market. Yet we noted earlier a widespread view that Maori were entitled to market values for their land. Even the New Zealand Herald, in the early years of the century, considered that Maori owners should be paid ‘the full present value of the lands we take from them.’

Dr Hearn pointed to the remarkable example of the speculative purchases made by Dr Frederick Rayner and other Aucklanders in the bush blocks to the north of Lake Taupo. Here, there were no prohibition orders. Though the prices paid to the owners for some of these blocks did not greatly exceed the Government valuations, we note that both New Zealand Railways and the commissioner of state forests had paid, or been prepared to pay, very high prices to Rayner and those entering into transactions on his behalf, for the blocks and their resources.

The evidence in respect of the Crown’s purchases in this period suggests that its use of prohibition orders left Maori with little negotiating power over prices. Though there are some cases where the owners secured an increase in price, we are struck by the number of cases in which purchase agents or land boards urged a higher price, and more consideration for the owners – often without success. This would seem to indicate recognition among those with some expert knowledge that Maori were not achieving market prices. Given that their land was the sole asset of so many owners, in our view it was the Crown’s obligation to protect their interests, and, in accordance with the Treaty and its principles, to agree on prices with the owners.

The Crown’s use of its monopoly powers of purchase, finally, is of particular concern where it extended prohibition orders in order to buy up individual interests, despite collective decisions of owners that they did not wish to sell, or did not wish to sell at the Crown’s price. This highlights the step backwards taken by the Reform Government in 1913, to allow the Crown purchases to bypass meetings of owners. The readiness of the Crown to adopt both tactics simultaneously lends considerable weight to Dr Hearn’s view that the Crown created a “coercive market environment” which pivoted on a serious imbalance between vendor and purchaser. In other words, the Crown held all the cards in establishing the conditions for purchase. In such circumstances, too, Maori initiative in planning for land development was undermined.
The Crown had a further obligation, in our view, to use its monopoly powers where they would clearly be of benefit to the district in which they were exercised, and thus to the benefit of the Maori owners. Though we are aware that the Crown was initially concerned to provide land for returned soldiers in particular, the evidence points to a rather unfocussed approach to purchase. Bowler, the ubiquitous land purchase agent of this period, was in no doubt that it was the Crown’s role to acquire ‘all large areas of virgin country’, to protect settlers (not Maori) from speculators. And, like Governor Grey decades before him, he thought the Crown should buy ahead of the land being needed. The land might not be very good, he wrote, but ‘sooner or later [it would] become capable of being profitably utilized’.

As Dr Hearn has noted, this might suggest that the Crown itself was merely speculating. Much of the land purchased between 1911 and 1928 remained idle, as the National Expenditure Commission pointed out in 1932.

In its report at that time, the National Expenditure Commission found that it was not in fact to the advantage of the State to buy as it had been. The experience of the Crown concerning purchase of native lands, they found, was ‘disastrous’. By then, ‘the Native Land Settlement Account out of which purchases of Maori land were funded had an accumulated loss of £1,167,000’. They pointed to inadequate returns on leased lands, and to ‘capital locked up in unproductive lands’ which had not been placed on the market. They were critical both of the failure to secure settlement of blocks of native land purchased years before – which would lead to a ‘substantial capital loss in respect of these lands’, and of the delay before acquisition of compact blocks could be completed, leading to mounting interest payable on the purchase price from date of purchase. By the time such lands were handed over to the Lands and Survey Department for settlement, they complained, land was over-capitalised. The commission felt so strongly on the subject that it recommended that further purchase of native lands should cease (except to consolidate areas suitable for immediate settlement) until economic conditions improved to the extent that further land settlement was possible, and until the law was changed to provide better rental returns, equal at least to the interest paid on borrowed money. In short, whatever the philosophical basis for the Crown’s purchase programme, the financial viability of that programme was now called into question. When times were hard, the policy of purchase for the sake of it no longer made sense.

We are persuaded, in any case, by Dr Loveridge’s argument, that ‘the country in general, and Maori in particular would have been much better off in the long run’ – if the funds employed for the continuing Crown purchase of Maori lands in the early twentieth century had been devoted instead to a rather different kind of investment which might have ensured full Maori participation in the colonial economy through development of their own lands. We consider this in greater detail in part IV.

Rotorua – the implementation of Crown and private purchasing

The changes in land alienation policy in this period had a particular impact in Rotorua, since the alienation of lands there (and of certain east Taupo lands) had long been governed by the Thermal Springs Districts Act 1881, which prohibited private alienation in any proclaimed district. Only the Governor could lease or buy land. The Maori Land Laws Amendment Act 1908 amended the Thermal Springs Districts Act 1881 (section 15) to allow owners to lease direct for the first time, with the permission of the Governor. The Native Land Act 1909 had explicitly excluded the Thermal Springs Districts Act 1908 from its operation. It was not till 1910 that the Government tackled the future of the thermal springs district lands in light of the new alienation regime introduced in 1909. At the beginning of the year some 100,000 acres was withdrawn from the proclaimed area. But some 300,000 acres (it was estimated) remained within the Proclaimed area.

The Thermal Springs Districts Act 1910 repealed the thermal springs districts legislation. Ngata, introducing the Bill, stated that he had consulted ‘the wishes of the Arawa people’ in several conferences. According to him, their
views in favour of repeal, and placing their lands on the same footing as other native lands, were 'practically unanimous'. He went on to say, however, that '[a] number of the older men oppose the repeal from sentimental grounds chiefly.' It seems therefore that a number of Arawa kaumatau were not in favour either of giving up the thermal springs legislation (regarded as their Magna Carta) or of moving to the new system of alienation. We note that Herries, the Reform leader, was very clear about what the outcome of the new legislation would be: 'This opens up a very large district for European settlement'. He congratulated the Government for taking steps which would '[unlock] the door' to the district.

In fact, some 60 per cent of Rotorua land had been alienated by 1900 (considerably more than in Taupo). And although Crown purchasing had been halted in 1899, steps to complete purchases already begun continued, with court sittings in 1901–02, which saw a number of blocks pass into Crown ownership. The statistics thus show that alienations to the Crown exceeded 9700 hectares (23,969 acres) in the 1900s, and in fact dropped in the 1910s; but that the impact of the 1909 Act on private purchasing was marked, and remained high through the 1920s.

Stout and Ngata, as we have already noted, spent some time in Rotorua during 1908, meeting with Te Arawa. They drew attention to Arawa wishes to bring their land into production, mill the timber on some blocks, farm extensively, and lease some miles of lake frontage for tourism. The commissioners' Rotorua reports recommended the sale of very little land. Their main recommendations in respect of Rotorua lands were for land that should be set aside for Maori settlement, or incorporated. Their view was that most remaining Rotorua land was needed by Maori for their own use and development.

The Rotorua hapus, except for Ngati-Pikiao, cannot in our opinion be fairly said to have surplus lands for sale. They have not a large area available for lease, and the lands they now hold are the least suitable for pastoral purposes.

Stout and Ngata also drew attention to the grievances of Ngati Whakaue in respect of their lands and resources: the failure of the Rotorua township leases, the amount paid by the Crown to the Thames Valley Railway Company for the land gifted by the people for the railway, the destruction of the indigenous fish in their lakes and other waterways in the wake of the introduction of imported fish, and the cost of licenses they had to buy to fish the new species. In a long memorandum on 'Matters affecting the Arawa tribe', tribal leaders explained that they had been liberal in making land available for settlement, but their experience of the Crown had not been a good one. They had emerged, as they put it, 'ignorant and suspicious and tenacious of our lands'. They sought the help of the commission in retaining the lands they still held. But by the time the commissioners wrote their final report, Ngati Whakaue had offered 'practically the whole of their lands for settlement', simply insisting that no part of the land be sold, that terms of lease should not exceed 42 years, and that the Government, in taking lands for public works and scenic reserves, should pay adequate compensation. They wanted their land to be leased by auction.

Stout and Ngata observed that of 629,768 acres in Rotorua County, 358,512 acres had already been acquired by the Crown and Europeans. It is somewhat difficult to disentangle the commissioners' recommendations for Rotorua land in total, as they were spread over four reports, and they revised some of their recommendations in their fourth one. But it is clear that the great majority of their recommendations were for Maori land to be reserved for Maori occupation and settlement, for incorporating and leasing.

Because the greater part of the Rotorua lands (about a quarter of a million acres) and a large area of the east Taupo lands were subject to the Thermal Springs Districts Act 1881, they were in any case excluded from the operation of the Native Land Settlement Act 1907, which provided for the vesting in a land board of land reported by the commissioners not to be 'required by the Maori owners', and the sale and lease of that land. The commissioners did recommend that some blocks which did not fall
within the operation of the Thermal Springs Districts Act, be available for settlement under part I of the Native Land Settlement Act 1907: several Paengaroa South blocks in the Bay of Plenty, totalling 2428 acres 2 roods 18 perches. On the evidence available to us from the Land History and Alienation Database we have not been able to establish that these blocks were vested in a land board under part I of the act, or sold. The commissioners also recommended the sale of Pokohu A block (6870 acres) which was offered by Ngati Rangitih to the Crown. Some other small blocks included in the category of ‘Lands for settlement by Maori or Europeans’ (totalling 1572 acres) were recommended for sale. Most of the land in this latter category was, however, recommended for lease. The only other indication in the reports that land might be sold is to be found in comments on some lands recommended for incorporation, where the commissioners stated that such lands might be leased or sold.

Despite the work of Stout and Ngata in Rotorua, the Young and Belgrave team conclude that: ‘The recommendations of the commission and the legislation enacted to give effect to those recommendations appear to have had only limited impact in retaining Maori land in Maori ownership.’ The claimants told us that of the more than 36,000 hectares (88,958 acres) recommended by the Stout–Ngata commission for retention in the Rotorua district, less than 16,000 hectares (39,537 acres) remain in Maori ownership today. These figures testify to the Crown’s failure to take the recommendations of its commission seriously, and to take active steps to implement them. Dr Loveridge notes the ‘surge of activity’ in the Waikato Maori Land District soon after the commissioners’ recommendations, when the 1909 Act came into force. By April 1913, more than 100,000 acres had been sold, and as much again leased. In 10 years, the totals rose to 248,048 acres sold, and 283,897 acres leased. By this time, he suggests, ‘most of the more desirable land had probably been alienated but both sales and leasing continued at a fairly steady pace during the 1920s.’

What conclusions can we draw from the evidence before us about alienation in Rotorua in these decades? The Young and Belgrave team, which presented the twentieth-century Rotorua overview report, drew attention to the constraints on a study of twentieth-century sales and leases; potentially this could involve the examination of many thousands of different blocks through their file histories, and would not be possible in a limited time. The team chose instead to sample 12 of the 69 master blocks created by the Land History and Alienation Database. On the basis of this sample, the team presented us with a useful appendix of block histories, comprising notes from native land alienation files, which gave us some insight into the alienation procedures in the land board era with which we are concerned here. Unfortunately the notes – or the records on which they were based – were not recorded systematically enough to allow us to proceed to a statistical analysis of the involvement or non-involvement of owners in alienation processes.

We therefore make some general observations on the processes we observe in the notes presented to us, the evidence of the Young and Belgrave team, and that of Dr Loveridge about the Ngati Pikiao blocks. Much of the evidence relates to private purchases, and we will therefore focus our discussion there. But we refer first to Crown purchases.

**The Tribunal’s analysis of Crown purchasing in the Rotorua district**

We do not have comprehensive evidence relating to Crown purchasing, but what we have suggests that in certain blocks at least, as in Taupo, the Crown was prepared to use prohibition orders freely when it wished to purchase. But it appears to have been selective. In particular, as Dr Loveridge has pointed out, the Crown did not buy Ngati Pikiao land, despite its quality. Dr Loveridge considers this ‘more than a little puzzling,’ and was at a loss to explain it. Private buyers, however, were very active in the district. Young and Belgrave also considered that Crown
### Table 11.2: Alienations in the Waiariki Maori Land District, 1911–30

<table>
<thead>
<tr>
<th>Year</th>
<th>Lease (acres)</th>
<th>Sale (acres)</th>
<th>Annual Total (acres)</th>
<th>Cumulative Leases (acres)</th>
<th>Cumulative Sales (acres)</th>
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<tr>
<td>1911–12</td>
<td>59,464</td>
<td>89,601</td>
<td>149,065</td>
<td>59,464</td>
<td>89,601</td>
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<tr>
<td>1912–13</td>
<td>58,862</td>
<td>18,692</td>
<td>77,554</td>
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<td>14,589</td>
<td>37,549</td>
<td>141,286</td>
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<tr>
<td>1914–15</td>
<td>10,572</td>
<td>12,203</td>
<td>22,775</td>
<td>151,858</td>
<td>135,085</td>
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<tr>
<td>1915–16</td>
<td>18,280</td>
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<td>34,315</td>
<td>170,138</td>
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<td>18,827</td>
<td>46,128</td>
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<tr>
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<td>87,604</td>
<td>267,647</td>
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<tr>
<td>1918–19</td>
<td>7010</td>
<td>26,108</td>
<td>33,118</td>
<td>274,657</td>
<td>213,451</td>
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<td>1919–20</td>
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<td>15,933</td>
<td>20,582</td>
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<td>4591</td>
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<td>283,897</td>
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<td>18,903</td>
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<td>2946</td>
<td>13,308</td>
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<td>1925–26</td>
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<td>1363</td>
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<td>490</td>
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<td>6074</td>
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<td>27,820</td>
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<td>2422</td>
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<td>6019</td>
<td>324,786</td>
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<td><strong>Totals</strong></td>
<td><strong>324,786</strong></td>
<td><strong>338,764</strong></td>
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</table>

purchase activity was limited compared with that of private buyers, and was focused primarily on the Rotomahana–Parekarangi block. But Crown interest was limited, because the block was subject to bush sickness, and deemed not suitable for ‘settlement’. The Crown thus took a cautious approach when individual interests were offered, and preferred not to proceed unless it could secure a whole block for settlement. In other cases, however, where it wanted a block for a particular purpose such as forestry, it would buy undivided interests, often over a long period. Later it acquired undivided interests in blocks associated with the development schemes, and the Rotomahana–Parekarangi consolidation scheme. The purpose of these purchases was either to buy out owners who did not wish to be involved in the schemes, or to give the Crown greater flexibility in arranging exchanges in the consolidation scheme.

From the limited evidence before us, it is difficult to draw general conclusions. We draw on the examples given to us to observe:

- That there was some negotiation between owners and the Crown about price, as in Rotomahana–Parekarangi 2D (447 acres); here the owners were able to secure an increase, having rejected the Government valuation unanimously. There is conflicting evidence over the amount offered by the Crown (10 shillings or 30 shillings an acre), but at a meeting of owners a resolution was passed to sell at £2 per acre. The Crown then imposed a prohibition order, after a private offer to lease, then buy the block. The owners then accepted 15 shillings per acre for this block and two others. The increase in the Crown's price, for land which was reported by the Crown lands ranger to be not of good quality, may have been because of the hot springs on the block.

- In Rotomahana–Parekarangi 2E: after an offer to sell by one owner, and a meeting of owners, Judge Browne, president of the Native Land Purchase Board, reported to the Native Department that block 2E was poor land worth from five to ten shillings. The board, however, was prepared to pay up to 20 shillings for 2E. An offer was made of 15 shillings per acre for 2E and 3A1B blocks; then a prohibition order was issued. The owner who wished to sell was informed that the Crown price would only hold if all interests were acquired; it would not be paid for individual interests. A meeting of owners then agreed to sell at the Crown's price.

Young and Belgrave stated that it did not appear that the Crown had a policy of pursuing owners to sell; they found only one case, Pukehina M, where the Crown was very anxious to acquire a block and did persevere with the owners – who didn't want to sell. We note, however, that in both cases above the Crown used prohibition orders, and that it was also prepared to apply pressure to owners in the form of a refusal to buy individual interests at the price it offered. In the case of Pukehina M, in the Bay of Plenty, the key factor appears to have been that the land was valuable, and the Crown was obviously anxious to secure it. Here also, with Europeans said to be buying in the area, the Crown used prohibition orders for three Pukehina M blocks, extending them several times, and told their purchase agent, Bowler, to proceed by buying individual interests. In fact, he was unable to do this, as the owners were living on the land and wanted to stay there. In the latter case it is hard to see why the Crown should have entered the market at all, if buyers were already present, other than to make a quick profit: Bowler's comment that it was a ‘great pity’ that the owners would not sell, because the block was ‘a very fine one and would cut up well for settlement’ points to this.

**Rotomahana–Parekarangi 3A2B:** The Crown's approach to purchasing blocks that it wanted for a particular purpose, such as forestry or forest protection, seems to have involved use of prohibition orders. Thus the Forest Service wanted Rotomahana–Parekarangi 3A2B, and instructed Bowler to prepare lists of owners and make other arrangements to buy a number of Rotomahana–Parekarangi and Paeroa...
East blocks. The owners of Rotomahana–Parekarangi 3A2B were initially unwilling to sell. But a prohibition against private alienation was issued, the price was increased above Government valuation, and Bowler was evidently right in thinking that ‘the owners may be induced to come into line, especially if the ice is broken before hand’.

**Rotomahana–Parekarangi 6L2B:** We note three other cases in which the Crown was anxious to purchase – in both of which the evidence reveals owner resistance, and its outcome. The commissioner of state forests sought Rotomahana–Parekarangi 6L2B (314 acres, partitioned into five parts), because it was adjacent to state plantations – though it also adjoined Lake Tikitapu, the Blue Lake; and here a range of methods was used. Two of these parts of the block had over 10 owners, and meetings of owners were continually arranged, but a quorum was never assembled. Bowler prepared deeds and sent them to the registrar at Rotorua where they would be easily accessible to owners coming into the Native Land Court; the registrar was authorised to take signatures and make advances. Bowler also increased the price per acre. When he found that many owners were dead, he made applications for successions, in the hope he could then get enough owners for a quorum at a meeting, but his applications were not dealt with. Five meetings of owners were held, and still no quorum was achieved. 279 Meetings were persisted with – in the case of no 1, which had 120 owners, it was felt that purchase of individual interests would not be feasible. Prohibition orders were issued in 1922, and renewed until 1932. Compulsory acquisition was considered, but the Native Department was not enthusiastic about this. By 1925 there was still ‘great opposition’ to the sale of no 1 part, but purchase of individual interests was slowly proceeding. One family insisted on an exchange of Crown land for their interests because this ‘was the only land in which they are now interested’; but this offer appears not to have been taken up by the Crown. The State Forest Service finally gave up in 1929. 280

We add that Lands and Survey revived the matter in 1947, now being interested in the block for scenic purposes and a recreation area, and hoping to acquire the interests of the last owners who had not sold, amounting to some nine acres. There was still opposition among these owners, and Lands and Survey appears to have taken the initiative on this occasion in offering one family a housing site in Rotorua in exchange for their land. This option was pursued quite vigorously until the Assistant Secretary of Maori Affairs poured cold water on the proposal, saying that ‘these ten Maoris could not deal with the section and almost certainly would not pay the rates.’ 281 Two members of the family were still being described as ‘very difficult . . . in negotiations’ in 1963, when they finally sold (for £10 each), evidently because the Crown was on the point of getting a court direction for the sale of the interests under section 175 of the Maori Affairs Act 1953. 282

**Rotomahana–Parekarangi 6L2B5:** In the case of Rotomahana–Parekarangi 6L2B5 (184 acres) the Crown first tried to buy the land in 1915 for 10 shillings an acre, but repeated attempts to hold a meeting of owners over the next five years failed because there was no quorum. Various owners wired their refusal to sell. The Crown doubled its price in 1922, but at a meeting of owners held in August the owners were said to be ‘very unwilling to sell’, and anxious to retain their interests. After this meeting the Crown issued a proclamation order in September 1922, and renewed it until it secured the sale. In April 1924 it doubled its price again – and at this point the owners agreed to sell the land. 283

**Rotomahana–Parekarangi 1C:** In the case of Rotomahana–Parekarangi 1C, the evidence allows us to see how the use of prohibition orders, however logical it appeared in Wellington, might have deeply felt effects on a community. Here the Crown wanted 1200 acres of the block as a protection forest. Prohibition orders were issued for this and other blocks. This led to resistance from some of the
owners, in particular Raharuhi Pururu, a kaumatua who took his concerns to Justice Herdman, whom he knew, and who interceded on his behalf with Gordon Coates, the Minister of Native Affairs. Pururu’s own letter explained the basis of his concern to the Native Minister:

This Block is the property of my tribe and was with other blocks adjacent to it was placed under proclamation... I wish to point out to you that any alienation of this Block of land would be very much against the interest of my people for the following reasons. Many of the owners in this Block would if their interest in the Block were sold be without sufficient land to maintain themselves and their children and this I think you will grant would be very detrimental to them individually as well as a tribe, also on this Block are the only suitable portions for cultivations, crops etc that they have.

The prohibition was finally revoked in November 1924, but a new order was imposed on sections 2 to 16 of the block in 1929, this time for ‘further Native Settlement by sale to particular natives’. The owners, in meetings subsequently called, rejected the offer to sell because they wanted to farm themselves. Afterwards some offers to sell were received from owners who needed to pay bills, but by 1933 the Under-Secretary decided it was not necessary to acquire any further shares.

We are astonished at the lack of consultation with owners in this last case. Pururu’s people were simply left to find out that a prohibition had been slapped on their block. His people were fortunate that they had a very articulate spokesman who was able also, we assume, to bring some influence to bear in Wellington. But while the needs of the State Forestry department can be appreciated, it says little for the Crown that a block could be selected for acquisition with so little appreciation of its importance to both families, and their community.

As we stated at the outset, the evidence before us on Crown purchasing makes it difficult to draw general conclusions. We consider, however, that the Crown had a Treaty obligation not to impose prohibition orders without consultation or consent of the owners; nor should it have hounded owners to attend meetings of owners in the hope of achieving a sale.

Private purchasing and leasing in Rotorua

If Crown purchasing was limited, private transactions, as we have noted, flourished under the provisions of the 1909 Act. Dr Loveridge has noted that in the Ngati Pikiao blocks ‘leasing was the preferred form of alienation’. At least 27,900 acres, nearly half the total area, had been leased by the end of 1930 – over 80 per cent of this by 1915 – and the land was rapidly taken up. There was also, he suggests, a ‘brisk trade’ in leaseholds.

A comparison of sales and leases in the period may be found in table 11.3.

The Tribunal has also compiled information both from the Land History and Alienation Database and from the Belgrave block histories based on alienation files of the Waiariki District Maori Land Board, the files of the Maori Trustee in Rotorua, and alienation files held at the Maori Land Court, Rotorua. In the first half of the century, over the 12 blocks involved in the Young and Belgrave study, the number of leases varied, jumping dramatically from the 1900s to the 1910s, when the restrictions of the Thermal Springs Districts Act were lifted, falling in the 1920s, and increasing again in the 1930s (see table 11.4).

Given the sample size, and the limits of the sources readily available, these figures are obviously indicative only, but they do indicate a moderate use of the leasing option by Maori owners.

Did the land boards protect Maori interests? Private transactions and meetings of owners

The emphasis in the Rotorua evidence before us is on private transactions; and it is here therefore that we are best placed to assess the role of the Crown’s land boards in confirming alienations. The Turanga Tribunal was critical of the role assumed by land boards in what it called ‘state-controlled alienation’. While long-term leases ensured
ongoing income without loss of title, ‘it meant in practice that owners lost control over and access to their lands for nearly two generations.’

Dr Loveridge points to the impact of this system on Ngati Pikiao, whom he suggests had ‘little or no experience with long term leases of any kind’, or with the procedures involved in putting together such contracts. Within a decade of 1911, almost half their lands were tied up in leases for the next half century. He notes, for instance, the arrival in Rotoiti of some determined European investors ‘intent upon carving large pastoral units out of the 17,000-odd acres’ of the blocks on the northern shores of the lake, in Rotoiti blocks 3 to 7. Large portions were leased to Pakeha in the 1910s, including Hilda Lichtenstein of the Auckland firm Lichtenstein, Arnoldson and Co, who applied for several leases in 1913. By mid-1917 the firm had a continuous block of some 3446 acres within Rotoiti 3, which they developed as ‘Rotoiti station’, soon adding to it two large subdivisions in Rotoiti 6 and 7. Hilda Lichtenstein made repeated efforts to secure the freehold of blocks she leased during the 1920s, through meetings of owners, and had some (but not total) success; by the end of 1929 Lichtenstein held 1867 acres in freehold title and leases covering some 5800 acres. Other ‘serious businessmen’ who took up leases were D G A Cooper, who by 1921 held leases for all the large shoreline blocks in Rotoiti 3, 4, and 5 from Te Arero Bay to Lake Te Hapua, and W R Levin, who bought up various of Cooper’s leases, while the remaining lands remained in Cooper’s name, but were operated as part of the Levin station through the 1940s and 1950s. The property was purchased by the Waiariki Maori Land Board in 1947.

In Dr Loveridge’s view, given Ngati Pikiao’s inexperience, the Waiariki Maori Land Board should have been especially vigilant. But their vigilance did not appear to extend beyond the paperwork before them. Where leases were concerned, they seem not to have considered changing their terms: the contracts were generally for 42 or 50 years, at the lowest rental which Government valuation

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**Table 11.3: Alienations in Ngati Pikiao blocks, 1911–30**

<table>
<thead>
<tr>
<th>Period</th>
<th>Sale (acres)</th>
<th>Lease (acres)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1911–15</td>
<td>619</td>
<td>23,427</td>
</tr>
<tr>
<td>1916–20</td>
<td>1,868</td>
<td>2,468</td>
</tr>
<tr>
<td>1921–25</td>
<td>1,972</td>
<td>2,004</td>
</tr>
<tr>
<td>1926–30</td>
<td>974</td>
<td>0</td>
</tr>
<tr>
<td>Totals</td>
<td>5,433</td>
<td>27,899</td>
</tr>
</tbody>
</table>


**Table 11.4: Rotorua leases, 1900s–1910s**

<table>
<thead>
<tr>
<th>Decade</th>
<th>No of leases</th>
<th>No of active leases</th>
<th>Total area of land leased (acres)</th>
<th>Mean size of leases (acres)</th>
<th>No of owners leasing</th>
</tr>
</thead>
<tbody>
<tr>
<td>1900</td>
<td>5</td>
<td>2</td>
<td>219</td>
<td>110</td>
<td>7</td>
</tr>
<tr>
<td>1910</td>
<td>74</td>
<td>10</td>
<td>2,889</td>
<td>289</td>
<td>69</td>
</tr>
<tr>
<td>1920</td>
<td>28</td>
<td>81</td>
<td>33,155</td>
<td>3,409</td>
<td>5,619</td>
</tr>
<tr>
<td>1930</td>
<td>46</td>
<td>96</td>
<td>33,774</td>
<td>352</td>
<td>6,309</td>
</tr>
</tbody>
</table>
He Maunga Rongo

would allow, and little or no provision was made for a royalty or bonus for timber removed from the land. Nor could owners depend on the board to take action against lessees who breached their contracts.  

Dr Loveridge is even more critical of the board in its role in confirming resolutions to sell. The prices paid were low. Half the land sold was acreage already under lease, which suggests that this shows many buyers were taking advantage of their relationship with owners to secure purchases – as with the leases of Rotoiti 3, 5, 6, and 7, a number of which were soon ‘transmuted into permanent alienations under pressure from private investors.’ In these circumstances, he suggests, the board should have scrutinised such transactions for evidence of undue pressure. But he found no evidence that it did so. He concluded that, as far as Ngati Pikiao was concerned, ‘the system of alienation set up under the 1909 Act served the interests of lessees and purchasers much better than those of Maori landowners.’  

**How far were owners involved in decision-making?**

This conclusion was echoed by Young and Belgrave after their study of the land board’s files. They noted in particular the operation of the low quorum requirements. Meetings might thus be poorly attended. Not only were the requirements for attendance low, but owners might not live locally, might not get notice of meetings in time to attend, or might find it hard to get time off work to attend meetings of owners. In Kaitao–Rotahokahokaha 1M3, for instance, it was found that only five of twenty-two owners lived in Ohinemutu; most lived at Matata or Maketu. After two abortive meetings, a third was held at which two owners were present; three were represented by proxy. The land was sold at Government valuation. In Tihoi 3B8A (4160 acres, 4840 shares), after an offer to purchase was received for £1050, fourteen owners were recorded as present at a meeting on 26 June 1918, held at Tokaanu; but in fact only three actually attended. One acted as proxy for five others (all six being successors to one owner deceased), representing 51.65 per cent of the shares. That single owner agreed to sell the block. Two owners who represented 1800 shares were opposed to the sale, and marked as ‘withdrawn.’ The sale was confirmed by the land board. And in the case of three blocks noted by Dr Hearn – Tauri 3B and 3C, and Tutukau West B – resolutions were carried in October 1918 with only one owner present, who had sufficient proxies to constitute a quorum.

An important question that arises is the involvement of successors, or potential successors, in decision-making. As we will see in the next section, many people were slow to go to the Native Land Court to seek succession to the interests of deceased relatives; or did not succeed at all. They might thus play no part at all in meetings of owners who considered the alienation of land. A not-atypical meeting was that which considered the sale of Paengaroa section 10 block 8 (50 acres). One owner wished to sell. A meeting of owners on 20 July 1917 was attended only by that owner, holding 26 proxies in favour of the sale; the resolution to sell was passed. There were 41 owners in the block; 27 were deceased, and succession orders had been made for only six. It would appear that the potential successors of 20 owners were not represented in the decision-making.

**The land boards and ‘landlessness’**

We drew attention earlier to rapid changes in Government policy in respect of Maori retention of land. The Native Land Act 1909 (section 220 (1)(c)) required that Maori selling land should not be left ‘landless,’ and the 1913 Amendment qualified this: land boards need not consider landlessness a bar to alienation where land was not considered ‘a material means of support,’ or where the owner was ‘qualified to pursue some avocation, trade, or profession, or is otherwise sufficiently provided with a means of livelihood’ (section 91). Regulations under the 1909 Act stated that a land board ‘may require a statement to be lodged showing the beneficial interests in Native freehold land of each Native alienating, the extent of his interest, and the revenue, if any, derived therefrom.’

How did this work in practice? The Young and Belgrave study provides a number of examples of the board’s use of these criteria when assessing landlessness. Such examples...
show that evidence of a person having a job at the time was considered adequate: two owners in Rotomahana–Parekarangi 6A2 No 2B1 (1916) were able to earn a living at flax mills; two owners in Rotomahana–Parekarangi 6J2B2 (1917) were left landless by the sale but both were in regular employment – one as a drover, and one as a licensed guide at Whakarewarewa. In Rotomahana–Parekarangi 6A2 No 2B1 an owner facing landlessness if a sale proceeded was an invalid unable to work, but the sale proceeded on the grounds that the purchase money would be useful to him. In the case of this owner it appears that there was a choice to be made between his land and survival.

There are other cases where sales proceeded despite the fact that small shares of some owners were involved – precisely because they were small. In Rotohokahoka D North 9 (1917) the shares of two minors were included in the sale because it was stated that if partitioned out, these would be insufficient for their support. In Mangorewa–Kaharoa 6E3 No 2T (1923) several owners, each owning seven acres in the block, were stated to be landless. But the seven acres owned by each of them was ‘too small to be of material means of support’, and in any case the land was leased for 21 years with a right of renewal. Two of the owners were in labouring jobs, one was a farm labourer, and one was married and supported by her husband. All had moved to Hawke’s Bay and had not resided on the block being sold. In Rotomahana–Parekarangi 6F2B (1919) a block of 55 acres had 29 owners – but many were dead, and successors had not been appointed. Two owners had ‘plenty of other land’, the rest did not have large holdings ‘but the interests they hold in this block are very small’. In any case the land was ‘not suitable for . . . practical purposes . . . [and] cannot be a material means of support to the Natives’.

In one example in the files, relating to Mangorewa–Kaharoa 6E3 No 2W2 (290 acres), the president of the Waiairiki Board did consider the position of successors when land was alienated. He was not happy with the lists of ‘other lands’ of those selling supplied to him by the purchaser. There were fourteen owners in the block of whom seven were deceased; successors had been appointed to some. A meeting of owners in July 1917 was attended by one owner, with four proxies, who together held 66.75 shares out of 288.88 shares. The board representative present recorded the decision to sell as unanimous. But the president later expressed concern:

The list of owners’ other lands is not satisfactory. Where owners are dead I think the other lands of successors should be shown, as the Board executes on behalf of the owners for the time being. In cases of owners who were dead prior to the meeting of owners the succession orders would relate back to date of death. And if a Native owner is out of the district a list of lands should be supplied also.

The president seems however to be referring only to successors who had been appointed, though he implies a general concern about whether their landlessness had been taken into account. (In this particular case he changed his mind on being told that the purchase money had been paid some time in the past.)

Dr Hearn also examined the records of the Waiairiki District Maori Land Board relating to alienations of blocks within the Taupo–Kaingaroa inquiry districts. In Tihoi 3B8A (4160 acres, 4840 shares), the applying purchaser attached a standard form of ‘Schedule of other lands owned by Maori vendors or lessors’, based on a search of the records of the ‘Native Office’ in Wanganui. It listed 10 owners (14 were recorded as attending the subsequent meeting), all of whom held interests (recorded in the ‘Land occupied or suitable for Personal Occupation’ column) in four other blocks, with six holding additional interests in three other blocks. In the column marked ‘Other land’, all held mostly small areas in four other blocks. The board accepted the list without comment. The sale, as we have noted above, proceeded.

In Paeroa South c2B (2208 acres), after an unsuccessful lease arrangement, a sale was approved in August 1925 by 17 owners present or represented by proxy. There were 81 names on the list drawn up by the purchaser’s solicitor, 24 of whom were deceased. Of 53 living owners, two who were listed held less than 10 acres, seven held between 11
and 20 acres, 14 between 21 and 50 acres, 12 between 51 and 100 acres, and 18 over 101 acres. (Some entries included two names and were evidently jointly held.) One owner who appeared ‘landless’ was a licensed interpreter with the Native Department. As in Rotorua cases, the small interests of some owners were adduced as a reason why the sale should proceed – one owner held three roods, which were ‘practically worthless’, 11 others held interests worth £10 5s 0d or less. Thus the lawyer submitted that it would not be worth it to these owners to partition out their shares. The land board confirmed the sale. We note that in this case, 17 out of 53 living owners took part in the decision to sell.303

Nine owners sold Tatua East A to a private buyer, the sale being confirmed in September 1927. The president of the land board noted on the file of ‘other lands’ prepared by the purchaser’s solicitor: ‘Certain signatures only. Shortage of land in two cases. No occupation. Land not suitable for Native occupation. Board will confirm under section 91 if usual conditions complied with.’ Which it did. Section 91 allowed the board to confirm a sale if the land could not support its owners, whether they owned other lands or not.304 Tatua East 11B (18 acres, five owners) was sold to the same purchaser in 1927. The schedule of ‘other lands’ presented to the board showed that the owners held respectively almost 40 acres, almost 22 acres, 13, 17, and 75 acres. The board confirmed the alienation.305

These kinds of examples show that the 1913 amendment was being used by boards, and that owner ‘landlessness’ was no longer a reason for a sale to be refused.

The role of the land boards, in confirming alienations, raises various issues.

We note first their general approach to their role. Tom Bennion suggests that the land boards had a basic conflict of interest: once the personnel of the land boards and the Native Land Court became the same, in 1913, where was the independent guardian of Maori interests? Boards shared a commitment to the prevailing Government policy of Maori land alienation – underlined by the ‘sheer number’ of assembled owners’ meetings called by boards, and the number of alienations approved with little or no comment. The boards, he suggests,

\[ \text{did not see their primary goal as the development of Maori } \]
\[ \text{land for Maori, but rather its alienation at a reasonable price,} \]
\[ \text{with Maori retaining enough to provide a living, or none} \]
\[ \text{where a living could be made away from the land.} \]

Thus, though on the face of it, boards were supposed to protect the interests of Maori alienating, in fact they saw their job as processing alienations smoothly and efficiently.

Young and Belgrave also concluded from the many files their team inspected that the role of the Waiairiki Maori Land Board in confirming sales ‘can best be characterised as one of maintaining procedural correctness.’ The key concern of the registrar and the president, as well as the board clerks, was to ensure that all the necessary paperwork had been done. If the papers were in order, a sale would be confirmed. If the procedure was not correctly followed, the application would be referred back to the acting solicitor with instructions for amending it before it was presented to the board again. But this, they concluded, did not provide protection for Maori landowners.307

In any case, the boards’ assessment of landlessness was based on a minimal requirement, in terms of individual needs. This gave no security to succeeding generations. The process of partitioning was well under way in Rotorua district by this time: between 1910 and 1916, 1098 blocks were created from partitions; and between 1921 and 1925, 690 blocks. This process of reduction in the size of blocks, alongside fractionation of interests, must have contributed to a situation in which it could be shown that a particular sale would not leave an owner worse off, in the sense that his or her shares were too small to matter.

The evidence does not suggest that the interests of the Maori owners were considered paramount by the board, or determined the outcome of an application. The board did not consider the location or quality of lands retained by Maori vendors, a factor which was of crucial importance in
the Central North Island region. As Dr Hearn points out, this meant that it could hardly hope to assess whether such lands might provide sustenance, which in any case was not the same as a livelihood. We accept Dr Hearn’s conclusion that the Waiariki Land Board failed to establish and apply criteria or standards which would have given meaning to the terms ‘landlessness’, ‘adequate maintenance’, and ‘sufficiently provided’, and that more generally it largely failed to meet the statutory test imposed by law... \[308\]

We observe further that Dr Hearn found that the many land alienation files of the Aotea Board shed very little light on the process of confirmation adopted by that board, or its observance of the statutory tests. It is not reassuring that he concludes that the reason for this was that most lands in the Taupo inquiry district under its control were sold to the Crown. They were thus not subject to the same scrutiny which was required of alienations to private purchasers.\[309\]

In respect of Crown purchases, Dr Hearn notes that he had still located no records which might show whether and how the Native Land Purchase Board carried out its obligations under section 373 of the Native Land Act 1909, or section 109(10) of the 1913 Amendment Act. He did note two Crown purchases, one in Paeroa South A2 (1403 acres) put to a meeting of owners in July 1911, and another in Kaingaroa South 1A (574 acres) put to a meeting of owners after a Crown offer in October 1927. In neither case was there was any schedule of ‘other lands’ included in the file.\[310\]

**The Tribunal’s Findings on the Treaty-Compliance of Crown Purchase Policies and Practices**

- The Crown failed to implement the recommendations of the Stout–Ngata commission that no more land, except possibly for Ngai Pikiao’s, should be purchased in Rotorua, and that land must be retained not only for present owners, but for future generations. Though its own purchases were not large, it opened the door in 1909 to purchase by private buyers instead. This was a breach of its duty of active protection. The Crown’s imposition of prohibition orders on certain blocks without consultation with, or the consent of, the owners, was also in breach of the Treaty.
- The Crown breached its duty of active protection in its own purchasing in Taupo in particular. In Taupo and Kaingaroa, it proceeded to buy in the absence of any report on ‘surplus’ Maori lands, and thus failed to inform itself about whether Maori in these districts did have such lands available for European settlement, which lands they wished to keep, and how they wished to use them.
- Crown purchasing in Taupo – given the scale of its purchasing there – was careless of the interests of Maori, and their expressed wishes to retain land for development; and in Kaingaroa it proceeded though the remaining land base of the owners was very small.
- The Crown’s imposition of prohibitions against private alienation without consultation with, or the consent of, the owners of blocks affected, was in breach of the Treaty; and its combined tactics of regular extension of prohibition orders, circumvention of meetings of owners, and purchase of individual interests, in circumstances where Maori were unable to achieve a market price, was in breach of the duty of active protection, and of its duty to act fairly and honourably in its dealings with Maori. In such circumstances Maori were prejudiced by Crown purchase tactics.
- In the absence of records of the Crown, it is not clear to us how, or whether, the Crown ensured, in its own purchasing, that Maori retained ‘sufficient’ lands, even by the limited standard it established.
The Crown failed to monitor the working of the new meetings of assembled owners system, and to take measures to remedy the situation when it became evident that many owners were not involved in decision-making about the alienation of their lands, and that in their absence their descendants were also thus dispossessed, to the prejudice of owners and their descendants.

The Crown failed to monitor carefully the way in which land boards were implementing such safeguards as it provided for Maori owners, and to ensure that the interests of the owners were paramount. It also failed to ensure, in accordance with Stout and Ngata's urging that it had a fiduciary obligation to a tribal people, that tribal land bases were being protected, to the great prejudice of later generations.

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Section 2: Crown Efforts to Mitigate Impacts of the Nineteenth-Century Tenure System

Key question: Were the Crown's efforts to mitigate the negative impacts of the nineteenth-century tenure system compliant with its Treaty obligations?

In this inquiry, major issues arising from the nature of Maori land titles in the twentieth century were drawn to our attention. We have seen in earlier chapters the transformation of customary titles which resulted from the implementation of native land legislation of the 1860s to 1880s, and which led so often to unmanaged land sales. The consequences of the new tenure system, however, have been long term; they were not confined to the late nineteenth century. The twentieth century saw the slow playing out of the consequences of the failure of the Crown to provide for legal community titles, and its provision instead of individualised titles to Maori land. We take the view therefore that the prejudice arising from the Crown's original Treaty breach in establishing the Native Land Court, contrary to Maori wishes, providing for individualisation of title, failing to make provision for community ownership and management of Maori land, and in rendering community decision-making irrelevant, was deep-seated, affecting many generations of Maori owners. The Crown has admitted before us that it did have some responsibility to repair titles – and stated that it did in fact provide a range of mechanisms for doing so, such as consolidation schemes, incorporations, and trusts. We acknowledge the Crown's continuing concerns with and initiatives in addressing title issues, and we will examine the provisions for title repair and land management in this chapter.

But the scale of the problem of disintegrated titles was very great and, as is well known, it became worse in the course of the twentieth century. An early Native Land Court decision that children of owners should succeed equally to individualised shares led to continually enlarging bodies of owners holding fractions of interests in what were often shrinking blocks of land. The effect of this decision – reflecting the power which was bestowed on the land court in matters of custom and title – was to be dramatic. In a legal and commercial climate hostile to the multiple ownership of land, Maori owners faced great difficulties in attempts to manage, use, and develop their land and resources, to raise finance, or sell or lease land. Moreover, multiple titles, and the lack of community management, led to difficulties for owners in engaging with authorities which took land for public purposes, or sought payment of rates. In the Central North Island, where in some (though not all) districts a relatively higher proportion of land had been retained by 1900, the problems owners faced in developing their land were to assume a particular importance, and we consider these further in part IV.

Because of the nature of the new title system, the Native Land Court assumed a key role in Maori land administration, which has lasted to the present day. As its role in the determination of customary title was superseded – simply because nearly all customary land had been clothed with
Crown-derived titles – the court was increasingly occupied, from the first decade of the twentieth century, with hearing succession cases to determine who were the rightful successors to original individual owners in land blocks, and with partition cases. It was also empowered to make decisions which would lead to a reduction in the number of owners succeeding and, in the second half of the century, to better management of Maori land through the formation of trusts and incorporations. Alongside the land court were Crown agencies charged with the administration of land – its alienation, management, and title improvement. Maori land councils were replaced by Maori land boards in 1905, and the land boards were superseded by the Maori Trustee in 1953. From this point the trustee became a key agent in the administration and alienation of Maori land. The Department of Native (later Maori) Affairs was involved with Maori land development from the 1930s.

Throughout the first half of the century two kinds of processes thus took place side by side. On the one hand, in innumerable land court hearings, and court orders, the fractionation, or rationalisation of title among whanau members continued, and accelerated generation by generation; and the process of partition of the land continued alongside it. On the other hand, in Parliament, and in official circles – and amongst Maori themselves – the search for solutions to these two problems continued, and accelerated, in the last decades of the century.

In this chapter we consider different kinds of solutions proposed and enacted during the course of the century. We have already seen in the first part of this chapter that from 1900 the Crown provided for vesting of title in land councils, and then boards, and for management of land and its alienation by such agencies, as a means of overcoming owners’ title problems. Here we focus on the Crown's two main twentieth-century approaches to title issues.

First there was a range of title ‘improvement’ schemes aimed directly at reforming title itself. These were persevered with for well over half a century. They included provision for consolidation of owners’ interests from a number of blocks into an equivalent in land in one block; and, from the 1950s, for the determined reduction of the number of owners in a block through purchase by the Maori Trustee – even compulsory purchase – of interests under a certain value, deemed ‘uneconomic’; as well as continued encouragement of individualisation.

Secondly, there were initiatives to re-empower Maori owners to act collectively in respect of their lands, through incorporations and trusts. Very early provisions of this kind did not make much impact in our inquiry region; it was not until mid-century, with new initiatives by Maori themselves, new statutory provisions, and active involvement of the Maori Land Court in assisting owners to form trusts and incorporations, that these began to appear in any number. At the end of the twentieth century, the passing of Te Ture Whenua Maori Act 1993 marked the climax of over a decade of endeavour to produce a range of trust structures that would best give effect to Maori cultural and economic imperatives.

**Claimant and Crown approaches**

The claimants have, in general terms, acknowledged the Crown’s attempts at title reform, while remaining critical of the Crown’s role in creating the conditions in the nineteenth century that produced crowded and unworkable titles by the twentieth century. The Crown has emphasised positive outcomes of its initiatives, while acknowledging that not all have been as successful or efficient as it could have wished. It stresses that some of its initiatives, deemed inappropriate subsequently, were not always obviously so; and there was evidence of Maori support for them at the time.

Claimant and Crown counsel agreed that there is not a great deal of material before the Tribunal on actual local and practical effects of policies introduced in the 1953 Act such as conversion and ‘live buying’, and compulsory changes from Maori freehold title to general title under the 1967 Act; but the claimants suggest that there is cer-
certainly enough to allow the Tribunal to discuss main policy debates and legislative changes.\footnote{311}

**The claimants’ case**

The claimants focused on the land administration problems caused by the ‘virtual’ individualisation of title of Maori lands under the nineteenth-century native land Acts. Individuals, however, did not receive sole ownership of land; they were simply listed on titles as ‘several’, or owners in severalty, each with individual alienation rights. As time passed, many owners became ‘dispersed around the country, losing contact and affiliation with the tribal group who customarily controlled the land’.\footnote{312}

The situation was accentuated, the claimants argued, by European-styled succession rules which further fractionated interests at an exponential rate. Intestacy successions became common, and in time this created a custom or expectation of succession to children which did not customarily exist among Maori. Share fractionation became a major issue in Rotorua, though its total effect was masked by the fact that succession records were not up-to-date on titles. Many Maori resorted to partitioning their lands into smaller blocks to try to reduce owners to workable groups. This process, however, could leave owners with sections without access or economic use.

Share fractionation had a major impact on any attempted development of land; it was difficult for owners to coordinate development and raise finance. Increasingly, the sale of land became the only feasible economic option for owners.

Over the twentieth century, the claimants argued, a variety of policies and measures were adapted and implemented to try and address these issues, including Maori land boards, consolidation schemes, land development schemes, trusts and incorporations, ‘conversions’ (purchase of interests under a set value), and title amalgamations. These have met with only partial success, and to a large extent the root problems remain. They suggest, citing Belgrave and Young, that Central North Island Maori who have been able to retain their interests in land ‘have done so despite the title system, not because of it’.\footnote{313}

In considering whether the Crown’s legislative framework assisted Central North Island Maori to develop their land, the claimants pointed (among other factors) to Apirana Ngata’s identification of the problem of obtaining necessary finance, and the related problem of having suitable titles which would provide security for loans. Before 1953 the two significant steps the Crown took to address concerns over fragmentation of Maori land were consolidation and land development schemes. Consolidation schemes were capable of amalgamating small blocks into larger, communally owned blocks (as in the Taheke blocks). But the bulk of the schemes appear to have been aimed at placing individuals or families on their own blocks. The sheer enormity and complexity of the task of negotiating consensus on rearrangement of titles among the parties involved appears to be one of the major reasons why ultimately the schemes had few successes. The schemes continued to be undermined by long-established succession practices. And as fractionation of land interests continued, fewer Maori could aggregate sufficient interest to create economic holdings.

Land consolidation and development schemes, though well-intentioned, took land and its farming out of the hands of owners for decades. Moreover, there was often complete uncertainty as to how long the lands would be subject to the scheme. (Other aspects of the claimants’ case on land development are dealt with in chapter 14.)

**The Crown’s case**

The Crown admitted that fragmentation of title was clearly a problem that the Crown had some responsibility to resolve. It took initiatives progressively from the late nineteenth century, including development schemes, consolidation schemes, and legislation pertaining to trusts and incorporations, amalgamation, and access to finance. The critical issue, the Crown stated, is the adequacy of its response.
The Crown submitted that the goals that have guided the shape of Maori land administration over the twentieth century have evolved and changed. This has happened as part of a discussion between Maori and the Crown and between Maori themselves. It suggests that there is comparatively little in the written record about the views of Maori and how these views have changed across the twentieth century; moreover, the Crown has been presented over the period with a range of Maori views and preferences. It did take consultation initiatives, notably in 1907–08, 1959, and 1965, and in the context of development schemes.

The Crown admitted that some of its title-reform initiatives and land-administration structures in the twentieth century were partly a reaction to the negative impacts of the nineteenth-century title system. But the Crown did not agree with Professor Belgrave's fundamental criticism that twentieth-century administration was trying to deal with very different circumstances, using a mechanism invented in the nineteenth century. Twentieth-century administration, the Crown argued, came into being with the Native Land Act 1909, a piece of legislation which emerged from a decade of radical and extensive reforms to nineteenth-century systems of land administration. The system set in place lasted with remarkably few fundamental changes down to the present day. It was not obvious to policymakers until much later in the twentieth century that emphasis should be given to workable communal land-management mechanisms; those who advocated assimilation, such as Hunn, were genuine – however misguided they may seem today.

By the beginning of the twentieth century, the severable nature of the title system was firmly established. It was the Crown's belief (and not an unreasonable one, in Dr Hearn's view), that production and productivity were equated with titles in severalty. That objective was followed through with some persistence, at least till the end of the 1950s, when the Crown decided, for various reasons, that collective ownership was an alternative which it could accept.

Even if the original native land laws had provided for a robust form of communal title enabling collective management of land, some fundamental problems would likely have remained. A form of title would have had to respond to a change in the balance between land area and population, urbanisation, absentee owners and economic imperatives for development. The Crown suggests there was no simple solution to the problem of recording the ever-increasing number of owners (via rights of succession); any title system would have had to address the impact of enlarged communities of owners; which was an inevitable consequence of population increase. It accepts that bilineal succession does not take account of the Maori concept of ahi ka (maintaining occupation rights) but argues that it is not at all clear that Maori would have accepted the Crown making provision for any other form of succession.

The Crown submitted that the principle of consolidation was 'a positive one', enabling 'rationalisation and for clarity in title'. But the schemes were not without problems: the process was 'complex and time-consuming' and because of this the Crown's support for and promotion of the schemes waned by 1953. The Crown noted that there seems to have been a good deal of consultation about the schemes with Maori communities, judging by what is known. Younig and Belgrave's contention, that Maori may have been enthusiastic about the schemes because they were the only feasible alternative to title difficulties, is considered unsustainable. It is suggested 'that there is no evidence that prejudice arose from the implementation of consolidation schemes.'

Development schemes often did not resolve title difficulties, but 'stepped over' them. What is important is that title difficulties did not paralyse development or prevent the flow of development finance from the Crown. The Crown did not allow such difficulties to impede its partnership with Maori communities for developing the remaining land base.
Section 2: Key Questions

We approach our analysis in two parts, by asking:

What title-simplification schemes were put in place by the Crown to mitigate the impacts on Maori owners of the introduced tenure system, and were they Treaty-compliant?

Have trusts and incorporations provided an effective and Treaty-compliant form of collective owner control of land and resources?

Each of these issues requires us, in this generic report, to take a broad approach, spanning much of the twentieth century.

Title-simplification schemes

Key question: What title-simplification schemes were put in place by the Crown to mitigate the impacts on Maori owners of the introduced tenure system, and were they Treaty-compliant?

Our subsidiary questions are:

► What were the Crown’s main provisions for title simplification from the 1890s to the 1940s?
► What were the key title ‘improvement’ measures of the 1950s and 1960s?
► Did the Crown adequately consult with Maori over its title ‘improvement’ measures of the 1950s and 1960s, and gain their consent?
► Was the Crown’s approach to mitigating title ‘problems’ in the 1950s and 1960s Treaty-compliant?
► What were the impacts of the title ‘improvement’ measures of the 1950s and 1960s in the inquiry region?

The Tribunal’s analysis

The origins of share fractionation: individualisation, succession, and the definition of relative interests

One of the statutory functions of the Native Land Court was to provide for succession. The Native Land Act 1865 stipulated that succession was to be determined ‘according to law as nearly as it can be reconciled to native custom’. Chief Judge Fenton interpreted this to mean that ‘English law shall regulate the succession of real estate among the Maoris except in a case where a strict adherence to English rules of law would be very repugnant to native ideas and customs.’

What this meant in the court’s practice was set by the precedent of the Papakura case of 1867. In that case, the chief judge determined that interests should be shared individually and equally among all children of the deceased. He was evidently anxious that land, once under Crown grant, should not be reclaimed by tribal law at the point of succession. Fenton saw it as the court’s duty to ‘cause as rapid an introduction amongst the Maoris, not only of English tenures, but of the English rules of descent, as can be secured without violently shocking Maori prejudices.’ And he explicitly discarded primogeniture on the grounds that in his view it could not be reconciled with ‘native ideas of justice or Maori custom’ – without explaining his reasoning further. His decision was of course of immense importance; it ‘set the pattern for all future discussion and action on succession to Maori land.’

Fenton’s judgment reflected the values of English businesspeople and property owners, rather than landowners who were concerned to keep their estates complete after their deaths, and who thus favoured primogeniture. In England, the transmission of landed property was ‘patrilineal, primogenitive, and patriarchal.” It was protected, from the mid-seventeenth century to the early twentieth century, by the strict settlement (generally a marriage settlement, made on the marriage of the eldest son), which ensured that the estate would descend to the settlor’s unborn grandson, and would not descend to the
son’s female heirs. This is not to say that other children, including daughters, were not provided for, but simply that they were provided for in the context of a system which preserved the inheritance of family estates from father to eldest son. But among the middle classes, by the early nineteenth century, equitable division among heirs had become the norm. The practice emerged however in a particular social and economic context. Valuable real property – cash, household goods, furniture, silver, clocks, business plant, stock in trade – was divided among dependants as well as real estate, or the income stream from it; and male and female dependants might also be provided for in a variety of other ways, such as a settlement on marriage, or purchase of a living in a church. In other words, middle-class Englishmen had considerable amounts of property at their disposal, and the custom of equitable division could be seen to make sense.

Chief Judge Fenton, it may be argued, presided over the transferral of this practice to Maori, whose economic circumstances, on the whole, were very different. Equitable division was applied to undivided interests in land, where such interests were generally the only asset (other than their labour) people had to assist their economic engagement with the new economy. The impact of this decision, which would see continually enlarging bodies of owners in what were often shrinking blocks of land, was to have dramatic consequences in the course of the twentieth century.

In the wake of the operation of the Native Land Court under native land legislation from 1873, the individualisation of interests became quickly entrenched. Provisions for listing individual owners on memorials of ownership and for the definition of their relative interests were reinforced by land court practices in respect of succession to interests. By the end of the nineteenth century the battle Maori had fought against individualisation in the early years of the court had been lost. Individualised interests were taken for granted even by the 1891 Native Land Laws Commission, which was so critical of the system that created them.

The commission found that the 1873 Native Land Act had established the principle of individual title where no such title existed. ‘The certificates of title, they said, ‘should have been issued to the tribes and hapus by name.’ They were also scathing of provisions in recent legislation for the definition of respective interests and succession to them: ‘How was the Court to decide the individual interest of those who held no individual interest at all?’ But in the context of their recommendation for a new land board, the commission went on to recommend that Maori themselves decide title, settle boundaries, prepare lists of owners – and indeed, arrange respective interests.

**The definition of relative interests**

The legislative provisions ensuring definition of relative interests by the Native Land Court were crucial to individualising title. Such provisions dated from 1873, and they were rapidly refined. The Native Land Act 1873 (section 45) provided that if the majority of awardees desired, the court could ascertain ‘the amount of the proportionate undivided share that each owner is entitled to according to native usage and custom’. The Intestate Native Succession Act 1876 (section 3) made it mandatory for the court to define proportionate shares when determining successors to a deceased owner, and the Native Land Amendment Act (No. 2) 1878 (section 11) allowed any owner or interested party to ask the court to determine their share of a block of Maori land.

The Native Land Court Act 1886 (section 42) provided that the court might, on making an order on an original investigation of title to native land, or a partition order, decide (on the application of any individual interested in the land) relative shares or interests of owners in the land concerned. The Native Land Court Act 1886 Amendment Act 1888 (section 21) required the court, on making an order under the 1886 Act (section 42), to ‘forthwith exercise the power of deciding relative interests . . . whether such procedure is applied for or not’. In the Rules of the
Court, gazetted 20 March 1890, rule number 21 stated that relative shares or interests might be expressed in any order of the court either as fractional parts of the whole in value or area, or as a determined area.

Provisions for ascertaining relative interests were reiterated in the Rules and Regulations of the Native Land Court under the Native Land Court Act 1894:

It shall be the duty of the Court on every investigation of title or partition, and on determining any succession, to ascertain and define the relative interests in the land of owners or successors . . .

Relative interests were in all cases, ‘where it can be conveniently done’, to be expressed in shares or fractional parts of a share. Additional rules under the 1894 Act gazetted 19 March 1896 went further, empowering the court when dealing with partition applications, to appoint successors to any deceased even though no application had been made. Conversely, it should be noted, where the court had an application for definition of relative interests, it might proceed to partition the same land.

Early identification of title problems

Even while a raft of provisions to define relative interests was instituted in the last decade of the nineteenth century, the Crown was aware of two major problems. The first was the disintegrating, unusable, and insecure nature of Maori land titles, which impacted on owners who wished to use their lands; and the second was the problems associated with the acquisition of undivided interests by private buyers. The first attempts to address these problems were in place by 1900, and they included all the kinds of solutions we have referred to: schemes for title improvement (such as exchange); for statutory bodies to exercise control and management over land; and to pass title to lessees or purchasers (Maori land councils and boards), and for collective Maori owner control (incorporations and trusts).

The various difficulties Maori owners experienced with the titles the court awarded them, in the form of undivided interests in a number of blocks, were clearly apparent by the 1890s. The difficulties did not emerge as a product of urbanisation, and though they coincided with the beginnings of the revival of the Maori population, they preceded its rapid recovery. As the recovery gathered speed, however, the title problems also got worse.

This early identification of title problems is evident from the measures put in place by the Crown and from a range of official statements from the time. Seddon, speaking in favour of exchanges in 1894, pointed to a tribe which might hold land in different locations, with Maori in each holding ‘little bits of land’, some hardly big enough for a person to live on. Nor was it even worth selling, because the land had so many owners. Carroll explained to the House in 1908 that it was not unusual for a Maori to have interests in up to 20 blocks, which if individualised would amount to maybe only 15 to 20 acres per block. Because they were scattered, they were ‘absolutely useless’ to the owner.

There was also recognition of the impact of title problems on Maori owners who wished to utilise their properties. One of the key aims of Ngata’s development schemes, begun in 1929, was to bring Maori land into production with state loans, because it was recognised that private lenders were so unwilling to lend on the security of Maori land. This in itself is telling evidence of the lack of confidence in Maori titles. In the debates on the 1929 Bill, Ngata, who had then become Native Minister, justified the importance of state assistance by referring to the problems faced by Maori who wished to develop their lands. Singling out a number of areas where assistance was needed, he pointed to North Auckland ‘where no bank will make an advance on Native land’, nor would State Advances. Coates, the leader of the Opposition, also flagged the problem, putting it more forcefully:

I do not think that the pakeha fully realizes the difficulties in which the Natives find themselves . . . it is hopeless generally for the Maori to get assistance from private sources, because
the security is regarded as being not altogether satisfactory from the viewpoint of private lenders. Ngata’s decision to sidestep the title issue as he embarked on his major land development schemes is further evidence of the difficult state of titles at the time. Development would have to come first, as a community effort, and the repair of titles would have to wait. Reporting in 1931 on the progress of the development schemes over the previous two years, Ngata further explained the difficulties which impeded effective utilisation of land by Maori owners, emphasising:

- the obstacles to utilisation of Maori land, and the complexities of native title where it comprised a number of individuals or a community; this problem, he said, had long been considered ‘insuperable’;
- that ‘communal’ titles were based on the findings of the Native Land Court, and the court’s preoccupation with recording both ‘the names of individuals then living who . . . were declared to be beneficial owners’ and ‘the relative interests or shares of the various individuals’;
- the congestion of titles by succession and inter-marriage;
- the impact of state policy on alienation; and
- indiscriminate partitioning among individual owners, which he considered was at the root of many of the difficulties in the settlement of Maori land. Ngata’s approach to land development is testament both to the magnitude of title problems and to the difficulties he perceived in resolving such problems by the end of the 1920s, despite having struggled with these issues for years. In the early years of the twentieth century, these problems gained added urgency as the problem of unpaid rates and survey charges on Maori land began to attract national attention.

We now turn to consider the title-simplification schemes put in place by the Crown during the twentieth century.

What were the Crown’s main provisions for title simplification from the 1890s to the 1940s?

Discretionary powers bestowed on the Native Land Court in exchanging owners’ interests, and partitioning

We begin by drawing attention to the early powers bestowed on the Native Land Court to intervene in partitions and exchanges, in what it deemed to be the interests of owners. The purpose of these interventions was to mitigate the effects of multiple ownership, by translating owners’ undefined shares in blocks into an equivalent section of land. Provisions for exchange were soon complemented by those for exchange on a large scale, that is, for consolidation schemes.

Initial provisions for exchange of interests were included in the Native Land Court Act 1894, which gave the court jurisdiction ‘to effect an exchange between Natives of any land owned by them’, or, if the Governor applied, to make an exchange between Maori and the Crown. The court had to be certain that Maori involved in an exchange were left with enough land for their support, and had to specify if money should be paid by any of the parties to make the exchange equal. The regulations under the Act, however, appear to limit exchanges to any two Maori owners owning land in severalty, or owning undivided interests in different blocks. The provisions were extended in 1908 to exchanges between Maori of ‘any land or of any part or share thereof’, repeating the requirement that compensation should be paid if the properties being exchanged were of unequal value. The Native Land Act 1909 reiterated these provisions, but also gave the court wide powers relating to exchange or partition at the point of succession. In making succession orders the court could make partitions, or exchange the interests of successors, as it chose, and did not require the owners’ consent to do so.

The court could also use its partitioning powers in other ways to address problems relating to titles and land use. Under the 1909 Act, the court could treat land
where owners had interests in adjoining blocks as a ‘single area owned by them in common,’ and make its partition orders accordingly. The Act also recognised that owners’ undivided interests might be too small to partition. If the court considered it ‘inexpedient or impractical’ to partition land, partitioning could be managed to award owners more or less than they were entitled to, though no owner could be awarded a parcel of less than two-thirds of the full value to which they was entitled. From 1913 the court could determine that the interests of successors were so small that there was no point in partitioning them, leaving the majority of owners to apply to the Maori land board for sale or lease of the land. The board would receive the proceeds and divide them among the successors.

These early provisions may be seen as sensible measures to enable the Native Land Court to assist owners. But we draw attention to three things:

- the court was empowered to override the wishes of owners, when partitioning or exchanging interests;
- the court was empowered to encourage those succeeding to small interests to sell them; and
- the court was empowered to award successors more or less than the amount they were entitled to by the court’s own rules.

These provisions point to early evidence of the problematic nature of the scheme of individualisation. Problems in succession were encountered as early as the second generation of owners. Even at the beginning of the twentieth century it was considered that the court might need to act coercively to bring some order to title dilemmas, and the sale of small interests was already considered a solution.

**Consolidation schemes**

A major title improvement measure instituted under the Native Land Act 1909 was consolidation, which effectively constituted exchange on a large scale. Consolidation involved the simultaneous grouping of owners’ interests in a number of blocks so that their scattered interests were transformed into workable pieces of land. Carroll had pointed out privately in 1909 that exchange might be effective where few owners were involved, but was not much use where there were many, a comment which foreshadowed consolidation.

In the House in 1909, Carroll described the provisions relating to consolidation as ‘some of the most valuable clauses’ in the Bill.

The Waipiro consolidation scheme (35,000 acres) at Waiapu, pioneered by Ngata in the six years following 1911, was clearly an attempt to assist owners by dealing with ‘congested titles’, in an area where most owners held small interests in many different blocks. It is clear that the scheme of grouping the interests of families (from a number of blocks) was conceived in a context where the alternative was individualisation of interests. By 1930 there were widespread schemes on the East Coast, in the Bay of Plenty, in Northland, and in the King Country.

In all, 28 consolidation schemes were completed nationally. Six schemes were completed in Rotorua, amounting to 82,992 acres. Four of these, dating from the 1930s to the 1950s, were examined in the evidence before us, as well as some in Taupo, after the Second World War, which were started but not completed.

How did a consolidation scheme work? Ngata later wrote that:

> The idea of consolidation is to reduce everything to a valuation basis. You take the interest of an individual, 30 or 40 different blocks scattered throughout the country, and upon adjustment you get the net value of that individual. Then you seek to give him an area of equivalent value. The object of consolidation is to give the Natives compact blocks instead of scattered interests. These blocks are settleable worthwhile developing and so on.

And in the process the opportunity could be taken to ensure that farms were viable, by ensuring practicable fencing boundaries, access, water supply, and local roading.

The mechanisms for consolidation were laid out in various acts. The 1909 Act outlines a complex series of moves that might be taken by the Native Minister, the Governor, and the Native Land Court to ensure that such a scheme got off the ground. The general consolidation
provisions are contained in sections 130–132 of the Act. The initiative lay with the Native Minister, who could apply to the court to prepare a scheme for the exchange (‘or otherwise’) of owners’ interests into suitable areas; the court was then required to do so, making ‘necessary inquiries’. The court submitted the scheme to the Governor for his approval, who in turn could put it back before the court or the Appellate Court for reconsideration and amendment (Native Land Act 1909, section 130(3)). If he were satisfied that such a scheme was ‘just and equitable and . . . in the public interest’, he could confirm it by Order in Council (Native Land Act 1909 section 130(4)). The Native Land Court would then proceed to give effect to the scheme by making the necessary orders of exchange. The court had absolute discretion to make orders for consolidation, and did not have to proceed judicially or in open court, and there was no facility to appeal against any order it made. At a broader level, however, there was no provision for landowners to present their views about a scheme, or challenge it, while it was in preparation, and there was no provision for redress for owners who might be aggrieved by decisions taken when a scheme was being prepared.

Various changes were made to these provisions in the years that followed. The 1913 Act enabled a Native Land Court judge to inform the Native Minister of cases where a consolidation scheme could be carried out, and the Minister might then direct the court to prepare a scheme. In 1923, when consolidation provisions were again revised, the court was required to submit a scheme to the Native Minister for his approval and final confirmation. The 1923 Act also gave the court a range of additional powers:

- for the purpose of partition, the court might, to assist consolidation, grant land to any Maori, or any other person with an interest in any land, even though they had no interest in the land before, and it might choose a name for the land, even though a title had been issued in another name;
- the court could make any succession and trustee orders necessary to prepare or implement a scheme, and no fees or native succession duty on any succession orders were payable;
- it might also define the interests of the Crown, where the Crown had acquired interests, and make an order vesting land in the Crown, freed from all Maori interests. And the court might award additional land to the Crown for the purpose of liquidating any survey or other charges upon any land included in the scheme, or for providing for any payment of rates due on any of the areas concerned. The Crown or any local body might compromise on any amount due.

The provisions were largely repeated in the Native Land Act 1931. Ngata wrote to Te Rangihiroa (Peter Buck) with some pride that ‘the provisions regarding Consolidation of titles and assistance in regard to farming patiently built up over the years are brought together for the first time.’

We draw attention to these statutory provisions concerning consolidation:

- the initiatives in such schemes lay with the Native Minister or the court, not with the Maori owners;
- the process was an odd hybrid, involving executive approval and confirmation, with the right to seek amendment to a scheme resting with the Governor (and later the Native Minister);
- there was no provision for the involvement or consent of landowners; the court was merely to prepare a scheme and ‘make all necessary inquiries’.

In light of these provisions, we consider that the denial to owners of a right of appeal to the Appellate Court to be draconian.

In practice, however, consolidation commissioners, who were appointed by the Governor under the 1909
Act, worked closely with owners in the preparation of a scheme.

We therefore conclude that:

- the inquisitorial role which the court exercised in such schemes was deemed to be the best approach in dealing with large groups of owners, who had to agree to redistribution of their interests on a substantial scale; it seems that the oversight of the Native Minister was considered a safeguard; and
- the unusual nature of the process, in judicial terms, underlines the remarkable title problems which it was designed to address.

**Why consolidation?**

Ngata persevered with consolidation because it seemed to offer some prospect of dealing with three further problems: rates, unpaid survey charges, and non-succession to owners’ interests, which meant that titles were often out of date. We consider that the scale of these problems by the 1920s is further evidence of a tenure and land administration system which was not working for Maori owners. Undeveloped land which attracted charges put many owners in a difficult financial position.

**Consolidation and the impact of the rates and survey charges**

**Rates:** Consolidation, therefore, was not just about making family farms. It also became very important to the Crown, to local bodies – and to Maori owners – because of the problem of rates. In the early years of the twentieth century Maori came under increasing pressure to pay rates, despite the difficulties they faced making their land productive, and the consequent inability of many owners to pay. The increasingly politically powerful view that Maori landowners should be rated the same as Pakeha had led to increasing statutory provision for charging rates against Maori land. In 1910 the Rating Amendment Act made Maori rating law ‘as close to Pakeha rating law as was feasible.’

From that point all Maori freehold land was to be subject to rates in the same manner as European land, unless otherwise provided. The system of nominating owners to pay rates was continued, allowing a nominated owner to get a charge against their interests and have first claim on any profits. Mr Bennion notes that this legislation gave local bodies some assurance of rate payments on Maori land, and they consequently shifted their efforts to collecting rate arrears. During the 1910s and 1920s, the Counties Association, and various local bodies, were very active in pressing their case on the Government. The National Efficiency Board supported this cause during the First World War, arguing that non-payment of rates by Maori was unjust. Rates should be recoverable on Maori lands in the same way as on European lands, and the State should subsidise local authorities where rates were unpaid, and recover the cost when land was partitioned or sold.

The Crown reaction, however, was muted. There was an unwillingness to proceed with measures unpopular with Maori during wartime, when many Maori were serving in the armed forces. Herries stressed that Maori owners held their land in common, and had no individual interests until those interests were defined and separated, meaning that their position was different from owners holding land in severalty. It would be ‘unfair to treat them as if they were able to get as much enjoyment out of the land as they could if it was held in severalty’, and:

> contrary to the universal policy of all New Zealand governments to allow Native land to be sold for non-payment of rates or to be so charged with liens as to destroy the equity of redemption, and thus render a Native landless without giving him a chance of occupying the land and getting enough out of it to pay the rates.

To Herries, the remedy was individualisation.

Pressure from local authorities continued. Dr Gould notes that annual local body rating obligations on the farming community had risen from £897,000 to £2,144,000 between 1913 and 1926. The Crown dealt with the question in various ways during the 1920s:

- After considerable discussion of the options, the Crown instituted the Native Land Rating Act 1924.
This provided a means of (as Bennion put it) ‘getting liens to “stick” to land’, using the Native Land Court.\textsuperscript{347} Local authorities could lodge a claim for rates they sought to recover with the court, and the court could then make an order granting a charge over the land. The registration of charges against the land meant that owners could not deal with the land until the rates were paid. Various sanctions were available to the court: it could, for instance, vest native land in a local body in satisfaction of rates, or vest such land in the Crown, which would in turn pay the rates.\textsuperscript{348}

\textbf{\textsuperscript{349} In 1927 the Crown responded favourably to a deputation from a local body conference, which was assured by Coates that the Government would consider consolidation wherever it was possible.}\

\textbf{\textsuperscript{350} A provision in the Native Land Amendment and Native Land Claims Adjustment Act 1927 established a system for the payment of outstanding rates on land involved in a consolidation scheme. The Native Land Court could vest Maori freehold land in the Crown to the appropriate value, and the Crown could pay that amount to the district Maori Land Board to be paid to the local authority.}\textsuperscript{349}

\textbf{\textsuperscript{351} Ngata established the Native Lands Consolidation Commission when he became Native Minister in 1928, to apply consolidation in all suitable areas of the North Island. The commission concentrated on the Waikato–Maniapoto and Te Tai Tokerau districts, but Waiariki was also included.}\textsuperscript{350}

All this underlines the close connection between consolidation schemes and rating. Gordon Coates, who was Native Minister in 1927, echoed Ngata’s concern that unpaid rates sent a message to local authorities that Maori could not use their land well. Coates suggested that consolidation would solve the problem of Maori rating by putting Maori in a position to pay them, adding that the key to this outcome was individualisation, so that Maori could farm their own land.\textsuperscript{351} Ngata wrote to Dr Te Rangihiroa that the argument made by local authorities for equality of treatment for Maori landowners with their European neighbours was ‘illusory’. Large areas of Maori land were ‘shamelessly treated’ in the provision of services, and charging orders had been issued for ‘poor lands quite unfit for settlement’.\textsuperscript{352} We note that a Native Department report in 1941 recorded that:

\begin{quote}
a good many [applications for rate-charging orders] will be withdrawn by the [Whakatane] County Council on account of the indigency of the owners and the impracticability of making any productive use of the land.\textsuperscript{353}
\end{quote}

Ngata and his Maori colleagues put pressure on the Government, ‘and extracted from Government agreement that consolidation would be pursued throughout the North Island (where applicable)’. The cost would be substantial remissions of survey liens, and a promise of substantial funding for Maori farmers.\textsuperscript{354}

In Rotorua, rates were a key consideration in the Rotomahana–Parekarangi consolidation scheme, which started in 1925. In 1928, after a meeting of owners, £250 was offered to the Rotorua County Council to pay off outstanding rates on the blocks, and rates till 31 March 1929. The County Council wanted another £100, but finally accepted the amount offered, writing off just over £1000 in rates. Ngata, to whom the request was referred, did not want more paid, in case relativity with other rates compromises was disrupted.\textsuperscript{355} In the Taheke scheme, comprising a number of blocks, the council agreed in 1928 to accept £160 in full satisfaction of the amount of £315 14s 7d owing.\textsuperscript{356} But rates on Maori land would remain a problem for owners and the Rotorua and Whakatane County Councils into the following decades.\textsuperscript{357}

\textbf{Consolidation and unpaid survey charges:} The problem of survey liens was also emphasised in the 1920s and 1930s when preparations for consolidation schemes led to an official audit, though it was only a partial audit because it only considered blocks destined for consolidation schemes. By 1930 many lands were encumbered with unpaid rates and survey debts, on which heavy interest charges were accruing. In the context of consolidation,
this made it very hard for officers to determine the value of individual interests, and thus to provide a basis for the consolidation of those interests.

A conference of officials from the Lands and Survey Department, the Native Department, and Treasury was called in 1930 to examine the question of remitting certain debts, when it had become obvious that the case-by-case approach provided by the 1927 legislation was totally inadequate, given the huge number of blocks involved. Subcommittees were set up to look at various districts to assess the size of the problem, and to make recommendations about debts that might be written off. In Rotorua and Taupo districts, survey liens (with interest) in the various consolidation schemes alone amounted to some £14,000, of which it was recommended that some £10,500 be remitted, and £3,435 paid. (In 1926, on the 11,498 acres proposed for the Taheke scheme, there were £1969 0s 11d of survey charges owed. The following year, however, Lands and Survey reported that the amount (with interest) then owing over the ‘whole Taheke block’ was £2551 9s 4d.) At the end of 1930 Cabinet agreed to accept lands assessed at £33,359 (over the whole country) in part settlement, to write off interest totalling £37,859, and to write off survey liens principal of £44,153. It was agreed that on 31 March 1931 all interest would cease to accrue.

The issue was not resolved. We note that when the Horohoro scheme (6478 acres) was presented to the Native Land Court in 1938, the rates amounted to £707 11s 0d. In the course of the 1930 audit some telling admissions were made. First, the recommendation for substantial relief for survey debts was based on the ‘poorness of the land over the greater portion of the area of this district [Rotorua, Taupo]. Secondly, it was admitted that ‘the security for [survey] liens is practically unenforceable and partially non-existent’. Officials blamed the court for ordering too many partitions with little or no economic value, but which still attracted survey costs. Thirdly, officials argued that ‘many of the partitions were made in accordance with native custom [as they put it], and to satisfy the demands of individuals or party factions’. The blocks were too small for farming.

This outcome was exactly what Maori members of the House of Representatives had predicted some 30 years before. It was also what Stout and Ngata had warned against in 1907, when they argued that ‘minute sub-division of land is not in the interest of the Maori people as a whole; that it is in many cases unnecessary, in some merely wasteful’. It was practically impossible to partition land among so many owners, and would incur enormous costs ‘upon the land and its owners.’

In other words, this was an outcome of which the Crown had had fair notice long before. We note that the Crown to its credit was ultimately prepared to help meet the particular costs of survey. But the problem was not solved: it continued, as we will see, throughout the century. We return below to consider the prejudice to Maori owners.

**Consolidation and succession problems**

Because it required up-to-date knowledge of block ownership, consolidation also revealed the extent of problems with succession. The minute books of the consolidation commissioners show what a huge job it was to carry out the necessary work of making succession orders to bring titles up to date so that owners could be grouped into family groups, and such problems with titles sometimes took decades to work through. The succession system, which was supposed to assure the transmission of property rights from one generation to the next, had limited success. Many Maori did go to the Native Land Court to secure succession orders, and the statistics suggest that such orders formed the ‘overwhelming bulk’ of the court’s work after 1909. Up to 1930 there were generally some 5000 to 6000 orders made nationally per year. But it is clear that from an early date many people were not succeeding, or were delaying succeeding. Tom Bennion and Judi Boyd note that the minute books they studied showed many succession orders were made more than five years after the death of the owner; 10 years was not unusual, and in some cases it was more than 20.
Evidence of non-succession is widespread. The legislation itself gave the court the power to hurry the process along when no successors had come forward, and non-succession is evident in the minute books of the consolidation commissioners. In Rotorua, Young and Belgrave’s study of the minute books showed that the most time-consuming work for the consolidation commissioners and officials was processing the outstanding succession orders required to bring titles up to date, such orders numbering in the ‘hundreds if not thousands’. Many owners evidently saw no point in succeeding to small interests, or preferred to leave them in the name of the original grantee in their family. The Te Roroa Tribunal found that in Tai Tokerau this was a widespread whanau reaction to the problem of share fractionation, to prevent sale of rapidly diminishing land. Consolidation at least provided a forum where owners saw a reason to engage with officials to assist with clarifying succession.

Consolidation on the ground in the Central North Island
Consolidation schemes were managed on the ground by consolidation commissioners, among them, in our inquiry region, Tai Mitchell, Tiweka Anaru, Albert Bennett, and Bartholomew Sheehan. Consolidation officers of the Native Department at Rotorua compiled lists of names and sizes of interests. Ngata, at the outset, saw the chief role in the consolidation process being played by native committees, rather than the Native Land Court. In other words, Maori owners had to buy into the process if it was going to work. The court would simply make the necessary orders. And in both Rotorua and Taupo the evidence before us is clear that there was a high degree of consultation between officials and owners over the implementation of consolidation schemes.

Rotorua district
Rotomahana–Parekarangi scheme: The Rotomahana–Parekarangi scheme aimed ‘to create a financially viable farming unit in as small a family group as possible’. The scheme proceeded in several instalments. It was under way in 1928, but then appears to have stalled as it was overtaken by Ngata’s land development scheme. Consolidation commissioners became key officials in land development instead. The first and second instalments of the consolidation scheme were not confirmed till 1936, the third in 1939, the fourth (Rotomahana–Parekarangi 6A2) in 1950, the fifth (10 partitions of Rotomahana–Parekarangi and Tumunui) in 1951, the sixth in 1952, and the seventh in 1954 (dealing with 26 parts of Rotomahana–Parekarangi 6A2 totalling 10,124 acres). These were submitted to the Minister in 1955, but recast, and finally approved in 1957. There was also an eighth instalment.

The scheme thus took over 30 years to be completed. Many owners suffered from the delay, which was largely the result of the suspension of the scheme for a number of years. This may have reflected official qualms about consolidation policy, and certainly reflected a shortage of highly skilled staff necessary to make the schemes work. Rotomahana–Parekarangi was taken off the priority list, with difficult consequences for owners, who were left in mid-air. Owners in Rotomahana–Parekarangi 6A2 (fourth instalment) were ‘restive’ by 1951. The Department decided to continue with the scheme, and one owner in particular spent ‘hours on end’ assisting in identifying deceased owners so that successions could be made. Only then could owners be grouped, and then located.

The sixth instalment, covering some 17,000 acres, was based on consolidation orders issued in November 1942, and was approved 10 years later as 121 economic farms. The delays had once again caused difficulties for owners, and the assistant district officer, McIntyre, reported in June 1953 that these had stemmed from problems with obtaining up-to-date valuations, fixing a formula to ensure apportionment of surplus or debt, and getting ministerial approval for the plan. There was a need to sort out the respective spheres of the commissioner and the judge, and to secure the services of staff, a valuer, a land utilisation officer, and the consolidation officer. McIntyre considered that the whole question of consolidation needed a ‘complete overhaul’, with a special committee set up to examine the
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scope and complexity of the schemes, and the extent to which ‘the continued delay in Consolidation proceedings is hampering the advancement of the Maori people (if any)’. In McIntyre’s view, the Department had to act as ‘pressure from the Maori people to get clarification of their landed interests [was] becoming greater and greater’.

We note that McIntyre referred to the possibilities of the new Maori Affairs Bill, with its provisions for the purchase from owners of ‘uneconomic interests’, and his concerns about whether it would assist owners. (The general ‘conversion’ provisions of the Act are discussed further below.) He was anxious that power be secured to buy ‘live persons’ interests (rather than only when successions were made). He had recently been trying to assist one owner in Rotorua district ‘to get her landed interests in some form to permit security for advances. It was hopeless. She had a list a mile long’. Another owner, who he had helped to get a house some years earlier, had ‘heaps of land interests. But all in the melting pot.’ McIntyre had no idea how to help ‘get his affairs to a definite state’. A third case, involving a family McIntyre was helping to get a Board of Maori Affairs building loan, left him struggling to find securities, though the wife had ‘a variety of lands interests scattered here and there’; the list of interests ‘ran into pages’. Such cases, he said, were numerous, and it was obvious that many Maori were going to suffer ‘by not being able to utilise their available assets for home building, cropping and such other work’.

The experience of Rotomahana–Parekarangi owners underlines:

- the title difficulties which consolidation had been designed to solve;
- the difficulties in bringing a scheme to completion; and
- the further difficulties caused by delay in prosecuting a scheme that was underway.

**Taheke scheme**: The Taheke consolidation scheme was approved by the Governor in November 1926, and some blocks were under consolidation by 1929, but the work was then interrupted. Consolidation arrangements continued after the development schemes got under way, with the scheme involving 126 blocks, covering an area of 12,986 acres, by 1934. More owner hearings were held, and several exchanges of interests arranged, but it seems there were some problems with the scheme. Ngata, the Native Minister, was not happy on various grounds. The scheme did not achieve the consolidation of the Crown’s purchased interests in the Tikitero development scheme, where Ngati Porou farmers from outside the district were established, whom the Crown wished to accommodate. The plan had been to move the owners’ interests out of these lands into purchased development lands on the north side of the Ohau Channel, to which the owners had agreed. Nor had a number of the proposed consolidated areas been provided with road access, which he considered crucial. It seems the Minister’s concerns were not followed up, though in 1936 the laying off and survey of access roads had not been done because the Survey Office had not supplied the data.

In 1946 the registrar stated that the scheme could have been finished 10 years earlier if the Minister’s issues had been acted on at the time. He thought it unlikely the scheme could now be finished, as the rise in value in lakeside properties meant the valuations would have to be redone. The Lands Department refused to accept the Crown award in land, and the consolidation staff who knew the history of the scheme had all gone.

Nevertheless, it was 1954 before the Order in Council from 1932 – which prohibited alienation of blocks intended to be consolidated – was revoked. We are not able to comment on any prejudice to the owners specifically from the long life of the prohibition. Some owners, who sought exemption of their sections, were accommodated, but we do not have any further understanding of its impact. We consider that the Crown did not act in good faith in failing to complete a scheme in which the owners had been involved for a number of years; in failing to ensure that there were sufficient staff to carry out schemes; in failing to consult the owners about whether...
they wished the scheme to be continued or abandoned, and in allowing the fate of the scheme to remain unresolved for so long.

**Koutu scheme:** The Koutu consolidation scheme (120 acres), adjacent to Ohinemutu village, took from 1937 till the mid-1950s. It was an unusual scheme in that its purpose was to provide further residential sections for the people of Ohinemutu, in a block with internal subdivision ‘based upon ancient occupation.’

A substantial number of very small blocks were affected, as ‘many small and sometimes tiny pieces of land had been partitioned from parent blocks’ and not surveyed. Some of the owners requested the creation of a consolidation scheme so they could get building sites for housing. The Native Land Court approved the idea the following year, but again the scheme was held up because of a lack of staff. Hearings were held in 1944, and it appears that the final stages were dealt with by Commissioner Sheehan in 1954. Some 400 sections were laid out.

The difficulties with roading and rates arose in this scheme too, and it was a long time before they were resolved. The Maori owners, using their own land for housing, and saving sections for their children, did not fit the usual pattern of a single owner or developer subdividing a block to sell it off; yet the necessary roads for a subdivision such as Koutu were the owners’ responsibility. The County Council would not make the roads until it was assured of payment, and until then it could refuse to issue building permits because there was limited access. The Department of Maori Affairs was anxious to build houses for the owners, and many individuals had made deposits, but the problem remained that no provision had been made for the cost of roading, and few of the owners could afford them. With some determination to settle the problem on the part of both the local Department officials and the council, it seems that an arrangement was reached by which Maori Affairs would ensure the payment of rates to the council until the roads were formed, by adding the amount to owners’ mortgages. In return the building permits would be issued so houses could be built.

It appears that the Koutu scheme was operated on behalf of the owners by prominent community leaders, notably Raniera Kingi and Kepa Ehaun, and that they shepherded the process of consolidation through. We note again the delay caused by lack of consolidation staff, and the patience of the Maori owners in seeing the scheme to conclusion. Yet in this case the scheme was finished, and Crown officials provided important assistance in sorting out the very real problem of financing suburban access roads needed simultaneously by a whole community.

**Taupo and Kaingaroa districts**

Few consolidation programmes were undertaken in the Kaingaroa and Taupo inquiry districts. Plans were prepared throughout Waiariki district by 1931, among them a major plan for Taupo district involving 246,484 acres and 6567 owners, but it was not considered a priority. It is unclear whether this was because of the problems identified with Tokaanu in the early 1920s (incomplete titles, lack of standard valuations, poor quality of much of the land), or whether it was because no ‘recent requests’ for consolidation had been received in the late 1930s.

Department effort was channelled instead into the development schemes; then the Second World War slowed things further.

Dr Hearn, however, notes that southern Taupo Maori had tried to reform titles themselves by consolidating family interests in land in Hautu 3, Tokaanu B1, and Waipapa into family farms. As we outlined above, the Crown applied successfully to have the partitions cancelled on the grounds that this would interfere with its own purchasing plans – and though the decision was later reversed, it had not sent a helpful signal to the communities involved.

In the post-war period, when there was briefly renewed interest in consolidation, Judge Harvey of the Waiariki District Maori Land Court listed five schemes in the Taupo district (Tahorakuri, Rangatira, Mokai, Paeroa, and Taupo);
he thought that Tahorakuri and Rangatira should proceed as large-scale schemes.\textsuperscript{382} But the Minister wanted to prioritise schemes in which considerable work had already been invested. The Rangatira blocks were described as ‘a horrible example of the worst type and Maori Land Court partition, many of the sections being narrow “bootlace” strips running back from the water’s edge in a dog-leg form for a considerable distance’; many had not been surveyed.\textsuperscript{383} Judge Harvey memorably described some of the sections in Rangatira 8A as ‘suitable for greyhound racing, about three miles long and about 18 inches wide.’\textsuperscript{384} But although the Rangatira owners agreed to consolidation and development, and appointed a committee to work with the court and consolidation officers, the scheme was deferred because of pressure to complete schemes already underway in the Waiairiki district. The owners agreed instead to the amalgamation of their titles and reparation of the land ‘into economic holdings for settlement.’\textsuperscript{385}

**Why did consolidation schemes falter?**

Much had been expected of consolidation. Apirana Ngata favoured it for years as the best approach to title difficulties, and convinced Coates, the Native Minister during most of the 1920s, that it was. But he also converted Coates to the idea that the important thing was land development and its funding, and that this could not wait on the slow process of cleaning-up titles.\textsuperscript{386} This, and his appointment to the Native Affairs portfolio in 1928, gave him the opportunity to get on with land development, and to finally put state funding into it. He explained to Parliament in July 1929 that title improvement was only a tool, and that financing development was crucial:

\textit{a long time must elapse before the titles can be put into such shape that they form a good and legal security for advances. That work is being done through the consolidation schemes; but it is not very much encouragement to proceed with those schemes [consolidation] unless you see behind them, on their completion, sufficient finance for the purpose of carrying such farming as the Maori people are capable of.}\textsuperscript{387}

As land development got under way, title repair was put to one side.

Ngata’s advocacy for consolidation till this point was perhaps based on his view that it would confer the kind of certainty of title which would assist whanau to farm, and would therefore ultimately protect tribal lands. He was very conscious of the growing charges on Maori land, and anxious to stop things getting worse. He knew successions were lagging, and that title fees and survey charges were being left unpaid. He considered it important that a stock-taking of all titles within a consolidation scheme should take place, and that their classification for rating purposes should be tackled because of the pressure on the Government.\textsuperscript{388} In the case of Taheke, for instance, he was aware of the sizeable survey lien, and the fact that the owners wished to farm, yet had no hope of paying off the liens and thus of obtaining finance.\textsuperscript{389} Above all, he was well aware that the ‘difficulty of recovering local body rates from unproductive Maori land in the 1920s reinforced a belief in the wasteful nature of Maori land possession.’\textsuperscript{390}

For some years Ngata talked up consolidation in the hope of getting Government support, and converting what Dr Gould has called a ‘skeptical press and public’ to his way of thinking.\textsuperscript{391} ‘It is doubtful’, he wrote in 1931, ‘whether any movement ever aimed at the solution of the Native-land problem is so deserving of the encouragement and assistance of Parliament.’\textsuperscript{392} He pointed to Maori enthusiasm for the idea, and to the fact that the schemes were the best way of ‘approximating the goal of individual or, at least, compact family ownership.’ His emphasis on individual ownership was, of course, also a useful selling point. This is not to say that he spoke of individualisation purely for that reason. He had often in the past talked of the value of individual, or whanau farms. But Ngata, by this time, knew his Pakeha audience well, and we think he consciously addressed himself to that audience in terms it could relate to.

Only three years later, however, when the implementation of development schemes, and Ngata himself, had
fallen under a cloud, Ngata was ready to admit that consolidation would not produce the kind of results the Crown wanted. In a paper called ‘Tenure of Holdings under Native Land Development Schemes’, which the commission investigating his schemes appended to their report, he gave a rather different picture of the success of consolidation. He focused on the East Coast Consolidation scheme, which had started many years before, and its limitations:

- that the number of separate individual holdings resulting did not reach 10, out of several hundred consolidation titles issued;
- even in cases where the dominant owner had more than sufficient area in his own right, he insisted on grouping one or more members of his family with him in the title;
- in the majority of cases this was due to prevalent ideas regarding family holding of land, but in many cases it was a necessary alternative to throwing small interests of members of the family or relatives into residue areas, leasehold blocks, or areas for sale to the Crown; and
- in short, owners were using the process to protect the interests of whanau.

Ngata concluded that the ‘ideal’ of separate and individual holdings was not really achievable. The best-quality lands were already closely occupied by communities, and presented the greatest challenge to consolidation officers. It was hard to produce one viable-sized dairy farm for an individual owner on such land, and the people were also attached to their own areas, including family cultivations, burial places, and villages.

The 1934 Commission on Native Affairs was also critical of the policy of consolidation. The commission reported that though consolidation was very valuable, it had proved too slow in some districts and impracticable in others. Consolidation would not help the situation with the development schemes; in many cases it could not be completed in time to be of use.

Thus by the mid-1930s – not long before the Rotomahana–Parekarangi and Te Koutu schemes got underway in Rotorua – the limitations of consolidation as a title solution were being publicly discussed. Professor Belshaw, writing in the 1940 centennial volume, *The Maori People Today*, outlined what he saw as the strengths and weaknesses of consolidation:

- consolidation served the essential purpose of actually resolving title problems, while incorporation was merely a ‘temporary measure to overcome the handicaps of communal title’ while developing the land;
- by clarifying titles, consolidation provided security for finance, and offered hope to local authorities that Maori landowners would be able to meet their full share of county rates;
- but consolidation was very slow, and in fact it would ‘never [be] complete’ while succession continued; and
- some individuals or families would be left with allotments too small to be economic, and aggregation of titles might be necessary; in such cases some occupiers will be allotted land at the expense of others.

Professor Belshaw did not see an end to the problems as the ‘individualisation’ of holdings continued. Some interest in consolidation remained, and a ‘consolidation conference’ was held by Maori Affairs in 1949 to consider how schemes could be advanced. By the early 1950s, however, official lack of enthusiasm was again evident. In internal Maori Affairs memoranda, consolidation was now criticised as a slow and difficult process. Few people, it was complained, ended up with titles in severalty. Echoing Ngata, Dr Hearn argues: ‘Such was the size of many shares that however many were aggregated the result was frequently not the creation of a single economic holding.’ Consolidation was only a ‘palliative’ in terms of title problems, as it did not stop further fractionation of interests. This sentiment would be reiterated in the Hunn report in 1960 (which we discuss further below), which described consolidation as ‘long laborious and futile’ – futile because, despite the initial reduction in numbers, the ownership began to increase immediately, ‘so consolidation is never really completed at all.’
Because of continuing fractionation of interests, the limits of consolidation were also explicitly recognised in the Maori Affairs Act 1953. The Act established that when the land court was preparing a consolidation scheme, it could recommend that ‘uneconomic interests’ (not exceeding £25) be acquired by the Maori Trustee. The owners thus affected would be compensated and excluded from participation in any subsequent redistribution of land within the scheme. This provision would be invoked where it was considered that an owner’s interest would not entitle them to an area that could be ‘used with advantage to the owner as a separate unit of occupation or production’. Consolidation could not produce a farm, or a viable-sized holding, for all owners.

The provisions for consolidation schemes were finally removed from the statute books in 1974.

The Tribunal’s conclusions about consolidation
The enormity of the reallocation of owner interests through consolidation schemes, in our view, says a great deal about the aftermath of the colonial project of individualising tribally held interests. Substantial problems for owners had emerged by the 1920s. Not only were their titles disorderly, but this led to the under-utilisation of their lands, and rates and survey charges were mounting. Consequently consolidation was accepted by governments, because it was hoped it would ease the pressure from local councils about unpaid rates on Maori land.

Consolidation was ultimately not a success. Statutory provisions for it, and later Crown support for the scheme, were genuine attempts on the part of the Crown to provide satisfactory outcomes for owners. In accordance with the contemporary preoccupation with family farms, however, consolidation aimed to produce workable individual holdings; and in Ngata’s view this raised difficulties for owners both in terms of their wish to accommodate whanau and relatives, and in practical terms because there might not be enough good land.

The process of consolidation itself – the job of regrouping interests and bringing successions up to date – was long, difficult, and slow. Maori owners, who had had no choice about the kind of titles they were issued with, now had to agree among themselves on ways to go forward. For older people at least, this raised issues of tikanga. The predicament of the family of Mamahi Tamatahi is a reminder of this. The koroua appeared at a hearing at Mourea to state that he could not come into the Taheke consolidation scheme, because ‘he could not forsake his ancestral rights in 1 block and consolidate in land where he had no right’. His family wanted to go ahead because they realised ‘that it is the only chance that they have of obtaining suitable pieces upon which they could work without interruptions from outside owners and with any reasonable chance of success’. But they were not prepared to rush their grandfather.

Maori owners did accept the schemes as a good faith initiative on the part of the Crown, and participated in them in our inquiry region and elsewhere in the country. The schemes could hardly have worked otherwise, although Maori did have some reservations. Tai Mitchell told the 1934 commission that Arawa were very diffident about participating in consolidation; when asked by counsel for the Maori interests, Findlay, if ‘consolidation limit[ed] their mana to one locality instead of distributing it over a number of localities and for that reason they were resistant’, he replied ‘yes’. But Harry Vercoe stated that he thought it would be a pity if consolidation were to stall ‘for the simple reason that it was our desire that those living on one block should have at heart the interest of those who lived on other blocks’. In other words, it was hoped that a community of owners might survive, at least in some limited sense. Clearly owners became disenchanted when their titles were left in mid-air, sometimes for a number of years, because the Crown decided against prioritising their scheme. At the outset, in Rotorua, this was because development schemes took precedence once Ngata was able to proceed with them. Once consolidation restarted,
delays seem to have been caused by a lack of official commitment, evident in lack of staff to run the process. But once a scheme was under way, it was the owners who went through the process of making the hard decisions. As the Turanga Tribunal found: ‘The people believed that this was the price that had to be paid to repair disintegrated titles and make them useful again.’

The benefits of consolidation were thus circumscribed, in the sense that fractionation of titles continued. It is difficult to believe that Ngata was not aware of this. In our view he must have persevered, despite this, in an effort to provide some kind of remedy for Maori owners.

The Tribunal’s findings on exchange and consolidation

- We find that the provisions for exchange of interests and consolidation schemes were genuine attempts by the Crown to provide solutions to Maori owner title difficulties, and thus to mitigate the Crown’s Treaty breach in imposing the system of individualised title which created those difficulties.

- The discretionary powers bestowed on the Native Land Court at the beginning of the twentieth century already reflected the view of Parliament that the rights and wishes of owners might have to be sacrificed to the goal of producing better titles.

- The Crown in our inquiry has acknowledged problems with the consolidation schemes, but has failed to acknowledge any problems beyond administrative ones (‘the process was complex and time-consuming’).

- In particular the Crown has not acknowledged the high price paid by Maori landowners in the course of consolidation schemes, in terms of owners having to abandon interests in land which they were legally entitled to, and had particular association with; in terms of the investment of their own time in ensuring the difficult consolidating processes worked at all; and in terms of the removal of their right to seek independent review of decisions made in respect of their property rights.

Photograph from 1907 with (left to right, standing): Frederick Bennett (1871–1950), Peter Buck (1877–1951), and Taiporutu Mitchell (1877–1944). Seated in front is William Baucke, a writer and farmer from Otorohanga. The then Reverend Frederick Bennett was later to become the first Maori bishop of the Anglican Church. Dr Te Rangihiroa became a member of Parliament and later (as Dr Peter Buck) won renown as a writer and anthropologist. Director of the Bishop Museum, Hawai‘i, he was knighted in 1949. Tai Mitchell, then a licensed surveyor and member of the Waiairiki Maori Land Board, was to serve in a number of public capacities including on the Rotorua County Council and the Rotorua Borough Council. He also chaired the Te Arawa District Maori Council and the Te Arawa Maori Trust Board. He walked in two worlds and was influential in both.
He Maunga Rongo

- The Crown’s failure to ensure that schemes were completed expeditiously, and to deploy sufficient staff to ensure that this happened, was inconsistent with its obligation of active protection.
- Maori landowners were disadvantaged by delays in completing the schemes, and it seems that little attention was paid to the impact of delay on their present and future land use, and the economic viability of their farms.
- Consolidation did not address continuing succession and fractionation of interests, and this was ultimately a key reason why the Crown abandoned this first major attempt to repair titles. The abandonment of consolidation underlines the intractable nature of the title problems it addressed.

What were the key title ‘improvement’ measures of the 1950s and 1960s?

The post-Second World War years saw major initiatives for Maori title repair by National and Labour governments, with both conscious of the increased ‘crowding’ of Maori land titles as the Maori population continued its recovery. At the same time the remarkable urbanising movement of Maori was underway. Thousands of families were leaving their home districts, and losing their connection with those areas and the blocks in which they had interests. For Maori owners – both those who went and those who stayed at home – this led to concerns about decision-making and management of land, and the kinds of returns (if any) they might expect from land development or sales and leases of their interests in blocks.

A change in government in 1949 saw a new National Minister of Maori Affairs, Ernest Corbett, who would work with the Secretary, Tipi Ropiha, ‘to bring a degree of administrative coherence’ to the Department. With Labour holding office for only one three-year term during the period (from 1957 to 1960), it was the National Party which created the policies of the 1950s and 1960s. Policy was shaped within two key contexts. The first was the importance placed on bringing Maori land into production, at a time when the New Zealand economy was growing steadily. Agricultural productivity was increasing and, at least until Britain joined the European Economic Community in 1973, there was a sustained demand for New Zealand agricultural produce. The second was the rapidly growing Maori population, which ‘was expected to rely on urban employment rather than agriculture for economic well-being and on suburban life rather than rural communities’.

Within the Government, the chief concern was to accelerate Maori land development and to bring about title improvement, in order to find ways to address the continuing fractionation of shares in Maori blocks. This concern led to a succession of reports – the Bremner and Winkel report in 1952 (an internal report on land title improvement), the Hunn report in 1960 (a much broader inquiry into Maori affairs, which however included a discussion of land titles), and the Prichard–Waetford report of 1965 – and to continuous discussion within the bureaucracy. Official concerns, and the various reports which addressed them, led to two major pieces of legislation: the Maori Affairs Act 1953, and the Maori Affairs Amendment Act 1967. Here we consider the key policy initiatives for simplifying titles that were given effect in this legislation.

Our analysis in this section is confined to title ‘improvement’, as it was called in this period. We consider the management mechanisms of trusts and incorporations separately in the next section.

The claimants’ case

The claimants accepted that post-war Crown policy was ‘well-meant and saw itself as – and to some degree, was – progressive and modernising.’ Yet, as embodied in the 1953 and 1967 legislation, and as reflected in key state papers such as the Hunn and Prichard–Waetford reports, it had a number of flaws and can be criticised in terms of Treaty principle.

The reforms contained in the Maori Affairs Act 1953 were part of the general drive of the National Government
to complete the earlier attempts to arrange Maori land into more closely owned economic units. The key planks were title ‘improvement’ and bringing Maori land into full production, which were defensible goals at the time. But the Government also had a particular mindset relating to fragmentation of interests, the claimants suggested, which was seen as inimical to land development. This was an ideological stance – not the result of any informed understanding of the issues relating to Maori land – and the National Government acted more in response to political pressure from its farming supporters than in an attempt to accommodate the needs of the Maori community.  

Retention of small and ‘uneconomic’ interests (valued under £25) was actively suppressed. The Maori Affairs Act 1953 enabled such interests to be compulsorily vested in the Maori Trustee on the recommendation of the Native Land Court. This was largely a matter of administrative convenience, which completely ignored the threat this provision posed to turangawaewae; the Government completely failed to take this vital component of Maori identity into account. After 1953 the Maori Trustee became the key agent in administration and alienation of Maori land. As statutory agent for the owners, the trustee eased the process of alienation (as opposed to multiple owners having to sign), and was found to have frequently ignored or set aside the wishes of Maori owners. Maori had not created the problem of fragmentation, and to respond to it by trying to extinguish private property rights was unfair, unnecessary, and coercive; other solutions could have been tried, such as trusts, which were also provided for in the 1953 Act.

The Maori Affairs Amendment Act 1967, the claimants argued, may have been well-intentioned in the sense that the aim was improving output from Maori land, rather than alienating it, but the Act was interventionist and coercive. The legislation treated Maori landowners differently from non-Maori landowners, and its effects can be seen in part as an article 3 issue. The most controversial aspect of the legislation was the provision for change in status to European land of Maori land owned by fewer than four people. Owners had no choice about this; and it is impossible to imagine owners of general land having their freedom of action interfered with in this way. It meant that a large class of beneficiaries were disinherited of their interests, albeit with payment of compensation. The Act also implemented a ‘very ambitious programme’ relating to ‘improvement officers’, on whom ‘coercive and interventionist’ powers were bestowed to investigate occupation and use of land, and bring it into production. The provisions, however, ‘seem to have been something of a dead letter’.

The claimants regarded the Maori Affairs Amendment Act 1974, which removed ‘most of the objectionable aspects of the 1967 amendment’, as ‘enlightened and progressive’. But they stressed that no Maori land enactment, however well-designed and enlightened, could ‘readily overcome the complex historic legacy deriving from the original Maori land acts’.

The Crown’s case
The Crown noted that its ‘legislative changes and consultation initiatives’ were responding to societal changes in the second half of the twentieth century, notably urbanisation. It submitted that in the 1950s and 1960s there was ‘no clear understanding that one of the principal problems with the original native land laws was the emphasis on the individualisation of title’; it was also ‘unlikely that tenurial reform was understood to be a key problem before the 1970s and 1980s’. It pointed to ‘considerable consultation’ with Maori during the later twentieth century on issues of land administration, and suggested that the Crown and Maori had shared many concerns. The Hunn report, for instance, should be seen in this light. The Crown disputed Professor Belgrave’s evidence that the strength of Maori opposition following the Prichard–Waetford report was such that the commission could not have the support claimed. The Crown suggested that there was no evidence that there was widespread opposition to the commission’s
recommendations in 1967, and that it was actually the 1967 Amendment which galvanised Maori protest.\footnote{416}

Conversion, as provided for in the 1953 Act, was designed to curb the proliferation of small shares in land in multiple ownership through compulsory purchasing, normally at the time of succession, though no shares were supposed to be alienated from Maori ownership. The 1953 Act represents a shift in policy by the Crown towards promoting retention and development of Maori land. The power of ‘live buying’ (or buying from owners with their agreement) was given to the Maori Trustee under the 1953 Act.\footnote{417} The Crown accepted that ‘some owners’ will permanently have lost their interests in land as a result of conversion, though it is not clear how many owners in the Central North Island inquiry region may have been affected. It accepted that Maori resisted the compulsory nature of conversion.\footnote{418}

In respect of the 1967 legislation, the Crown stated that it is unknown how many landowners were affected during the period of compulsory Europeanisation of title; but the 1974 legislation altered a number of parts of the 1967 Act which had been ‘more objectionable’ to Maori.\footnote{419}

The radical changes of the 1967 legislation were short-lived, and it is difficult to assess the impact of the legislation on Maori land and Maori landholdings, though it is clear it led to political protest. There were dilemmas facing the Crown. The conversion scheme is a good example: on the one hand it was a genuine attempt to try to ensure that Maori landholdings were more economically efficient; on the other, it could be seen as an intrusion into the private property rights of Maori landholders.\footnote{420}

The Crown accepted that ‘good intentions have at times had unintended negative consequences’, but reiterated that the Tribunal must consider whether consequences were foreseeable, and whether the Crown’s response to resolving problems was adequate once problems were identified.\footnote{421}

In this section, we address the following questions:

- What were the key measures in the Maori Affairs Act 1953?
- What further discretionary powers were bestowed on the Maori Land Court to assist title ‘improvement’?
- What title ‘improvement’ measures were considered by the 1960s?

The Tribunal’s analysis

We begin our analysis by discussing the objectives of land and title policy in the 1950s and 1960s, and the proposed solutions for perceived title problems as embodied in various reports and statutes. In particular we consider the provisions of the Maori Affairs Act 1953, and the Maori Affairs Amendment Act 1967. Our main purpose is to consider how far Crown policies were Treaty compliant.

What Maori lands and title policy objectives were identified by the Crown in the 1950s and 1960s?

Dr Hearn argues in his Taupo–Kaingaroa overview report that by 1950 the ‘problem of fragmentation’ of title was becoming acute.\footnote{422} Official concerns in respect of Maori land titles focused on multiple ownership of land, tiny interests which were not economically viable, and the worsening problems created by ongoing successions. There is a note of resignation in official papers. Departmental efforts, it was noted in a Cabinet memo entitled ‘Multiple Ownership of Maori Land’, should be directed: ‘1) To prevent the position deteriorating in the future 2) To cleaning up the existing mess.’\footnote{423}

An annual report of the Department of Maori Affairs stated that:

- In land titles work, the aim is to preserve Maori land to the Maori people and rationalise its ownership by preventing succession to useless and uneconomic interests and by encouraging individuals and family groups to acquire proper titles to useful areas by succession, partition, purchase, exchange, and the devices of consolidation and conversion;

What Maori lands and title policy objectives were identified by the Crown in the 1950s and 1960s?
In its land settlement policy the department aims to assure for Maori settlers a good title to their farms, to assist them to develop the land, to teach them modern methods, and to establish farming as a way of life that can be regarded as economically and socially rewarding.

There was a clear determination to address the problem of title in the belief that it would be in the best interests of Maori, of the Department (which carried a heavy burden of land administration), and of the nation. It was considered to be in the public interest that all Maori land should play its part in the national economy, at a time when the agricultural sector was thriving. These concerns were echoed in the Hunn report (1960), the wide-ranging ‘stocktaking’ of Maori affairs conducted by the Department of Maori Affairs at the behest of the Labour Government. The Report’s discussion of Land Settlement was dominated by the importance of bringing ‘idle’ land into production:

Table 11.5: Uses of Maori land listed in the Hunn report (1960)

<table>
<thead>
<tr>
<th>Uses of Maori land</th>
<th>Area (acres)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Farmed by Maori trusts and incorporations</td>
<td>1,477,770</td>
</tr>
<tr>
<td>Leased to Europeans</td>
<td>750,000</td>
</tr>
<tr>
<td>Under the control of the Department and the Maori Trustee</td>
<td>445,230</td>
</tr>
<tr>
<td>Idle land suitable for development</td>
<td>550,000</td>
</tr>
<tr>
<td>Idle land not suitable for development</td>
<td>777,000</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>4,000,000</strong></td>
</tr>
</tbody>
</table>

The objects of title reform, the report stated, must be ‘to bring about sole ownership’ and to ‘prevent it from disintegrating’.

The report singled out the problems of getting Maori farmers who were ‘good enough’ to be ‘settlers’ on land development schemes, title complications which had to be cleared, and the availability of finance. Crown purchase, it concluded, would be the ‘best way’ of overcoming the obstacle of multiple ownership. Multiple ownership, it stated bluntly, ‘obstructs utilisation’. The outcome was Maori land lying ‘in the rough’ or grazing a few animals ‘apathetically’, ‘while a multitude of absentee owners rest happily on their proprietary rights, small as they are’. Yet ‘everybody’s land is nobody’s land’. Clearly what was meant, of course, was that because of multiple ownership it was nobody’s responsibility to develop the land.

Multiple ownership, the report stated, was the outcome of the succession system, and the fractionation of shares. It drew attention to the ‘alarming’ rate at which titles were ‘degenerating’. Current figures for each district were laid out, and these showed, for instance, that Rotorua had the highest number of separate titles registered (13,000), followed by Wanganui with 10,000. Rotorua ranked second in a listing of the highest number of owners in one title, with 2329 owners. The estimated average increase in owners per succession order was highest in Wanganui (4.5), with Rotorua next (4.3), leading to an annual net increase in owners in those two districts of 10,800 in Wanganui and 8508 in Rotorua. In a single year the number of owners nationally added to titles was over 32,000, equal to 20 per cent of the Maori population.

The objects of title reform, the report stated, must be ‘to bring about sole ownership’ and to ‘prevent it from disintegrating’.

The authors of the 1965 Prichard–Waetford report were preoccupied with the impact on titles and land administration of ‘absentee’ Maori, who had moved to towns and cities, with the importance of integrating Maori and Pakeha land ownership, and with the need to reduce the number of owners on titles and consequently reduce the Department’s administrative burden. They expressed some horror at the ever-increasing number of
owners in blocks, the smallness of shares, the futility and costs of meetings of owners where decisions might not be reached, and the wastefulness and cost of systems designed to record shares of rent, royalties, and purchase money, received for countless Maori beneficiaries by the Maori Trustee. They painted a picture of staff engaged in a myriad of meaningless recording activities, at considerable cost to the nation – £6 a year per block or section of Maori land.

We note that the committee also drew attention, when considering the ‘proper use’ of Maori land, to the problem of unsurveyed Maori land, and the high percentage of blocks in this category. In Waiairiki district (Rotorua), for instance, 5180 blocks were unsurveyed, over half the total. The owners of over half the blocks in the district, therefore, could not obtain a registered title for their land under the Land Transfer Act.428 This was, in their view, the result of the court’s having made orders of partition without having required survey. The result was that New Zealand had ‘one good [title] system for European land and a very poor one for Maori land.’ This state of affairs ‘should not continue.’429

**How were perceived title problems to be tackled?**

The policy of reducing the number of small interests in Maori land, by empowering the Maori Trustee to buy them up, was taking firm shape by 1952. We examine the evolution of policy, and key measures which gave effect to it here, and return to an analysis of the measures in later sections. The memorandum before Cabinet in 1952 suggested the creation of a fund from the Maori Trustee’s profits to allow the purchase of such interests, voluntarily in the case of living Maori, compulsorily in the case of deceased persons.430 These interests should be redistributed in the form of ‘suitable areas for sale for Maori use as farms, house sites etc.’ In other words this would be a two-pronged attack on further fractionation at the point of succession, and on reducing the number of living owners.431 These provisions already had a history: even as early as 1931 the Native Land Act made provision for voluntary ‘conversion’ at the point of consolidation of interests; and in 1945 the Native Department had proposed that the Native Land Court be empowered to compulsorily vest ‘small’ interests in the trustee, and be given discretion, when making exchanges of family interests, to proceed without the consent of any owner whose interest did not exceed £25.432

The Maori Affairs Department considered other possibilities in the early 1950s, but raised objections to all of them:

- Using the special discretionary powers given to the court on succession, the court could make arrangements for one successor to take the deceased’s interest in one block, the second successor to take an interest in a second block, and so on. But it was noted that disparity in values of the various interests could cause problems.
- Giving the court authority to decline to vest in one rather than all successors, subject to payment to the others. This was considered fraught with difficulties, given that some of the interests ‘could not be looked upon as trifling;’ and that it would doubtless be difficult to get all successors represented before the court.
- Creating trusts, which was conceded to offer considerable advantages, but dismissed because of practical difficulties in applying any income. ‘Even if trusts were made general for Maoris of a certain tribe or district, it was argued, there would come a time when there would be great difficulty in determining who are the persons entitled to participate in benefits.’433 In short, the solution of community distribution was not considered.

A tension is evident in the memorandum between an anxiety to rationalise titles, while keeping Maori land in the hands of Maori – there was considerable emphasis on the fact that interests in the conversion fund would be sold to Maori – and recognition that the solution of ‘clearing uneconomic interests’ was arbitrary and interventionist, and might meet with opposition. But there was thought to be no alternative.
What were the key measures in the Maori Affairs Act 1953?

The Maori Affairs Act 1953 has been described as the 'cornerstone of the National Party’s Maori affairs policy.' It embodied major new initiatives for title improvement (and land administration), which would be of great importance for Maori landowners over the next two decades. The Act, like the 1909 legislation, was the outcome of a long process. The Minister for Maori Affairs in the National Government, Corbett, called it a rewrite of all Maori land legislation, and he had not stinted on its preparation. The initial Bill, introduced in 1952, was the subject of consultation and amendment (which we refer to below), and was replaced by the Maori Affairs Bill (No 2).

Corbett wrote that the Act was based on three principles: that the land should remain in Maori ownership; that multiple ownership should continue; but that the number of owners in the title should be reduced so that only major owners remained. Owners with small interests were to be progressively removed from the titles. The outcome would be a better position for the ‘average Maori landowner’ trying to farm his land.436

‘Conversion’: The Maori Affairs Act 1953 provided a number of avenues by which owners with small interests could be removed from titles. The crucial – and controversial – measure embodied in it was the ‘conversion’ programme, which was directed squarely at reducing the number of owners on a title. As the explanatory note to the Bill put it:

It is proposed in the Bill that . . . the law [relating to succession] should be varied so as to avoid the necessity of transmitting to the beneficiary interests that in his hands are of no appreciable value.437

One major component of the conversion programme was contained in part xii of the Act, which provided a mechanism on succession for the disposal of ‘uneconomic’ freehold interests in Maori land. The Act defined an ‘uneconomic’ interest as one which, in the court’s opinion, did not exceed £25 in value.438

When the owner of a freehold interest in Maori land died, whether or not the owner had left a will, that interest did not vest immediately in the executor or administrator of the deceased’s estate. Rather, the court was to ascertain those who were legally entitled to succeed to any freehold interest in the land, define those beneficiaries’ interests and only then dispose of the interests as prescribed in the Act. The court could give effect to agreements or arrangements made among the beneficiaries themselves; otherwise, it was to vest the freehold interests in those entitled to them.439

The key provision, however, gave the court power to vest ‘uneconomic’ interests in the Maori Trustee, instead of beneficiaries.440 Such interests were not to vest in a beneficiary unless:

- the deceased owner had specifically devised that interest to them by will, or
- if the court considered that the interest either by itself or in conjunction with any other interest would, if a partition order were made, be suitable for certain uses (Maori Affairs Act 1953, section 137).

These provisions governing conversion at succession were amended periodically. For example, in 1957, the court’s options for dealing with the freehold interests of a deceased owner were expanded, but at the expense of some beneficiaries. Amongst other things:

- the court could vest the whole of the deceased’s interest in one or more beneficiaries and to the exclusion of other beneficiaries without the consent of, or payment to, those excluded;
- in doing so, however, it could not exclude a beneficiary entitled to succeed to an interest that was greater than £10 in value; and
- no beneficiary could acquire shares or interests under this provision if the aggregate value of those shares or interests was more than £10 above the value of the interests that the beneficiary would have otherwise received.441 (Hence this provision was referred to as the ‘ten pound rule’.)
However, the 1957 amendment act did not affect the requirement that the court vest ‘uneconomic’ interests in the Maori Trustee, although it was now only to do so if it had decided not to dispose of such interests under any of the expanded options now available to it.  

‘Live buying’: A second component of the conversion programme was voluntary conversion (‘live buying’, so called to distinguish it from the acquisition of the interests of deceased owners). The Maori Trustee could at any time, with the owner’s consent, buy any Maori freehold land or any interest in land (not confined to ‘uneconomic’ interests), and secure an order from the court vesting the land in the trustee.  

The disposal of ‘uneconomic interests’: To enable the operation of the conversion programme, a Conversion Fund of £50,000 – comprising the reserves of the trustee and his profits – was established to fund the trustee’s acquisition of ‘uneconomic’ or other interests in Maori land. Section 152 of the Maori Affairs Act 1953 empowered the Maori Trustee to sell any Maori land vested in him or otherwise acquired out of the Conversion Fund. Where he acquired interests in a Maori incorporation, the trustee had to offer those to other owners in the incorporation, or to the body corporate itself. Otherwise he might sell any other land or interest:  

- to any Maori, or descendant of a Maori;  
- to any Maori incorporation; or  
- to the Crown, for the purposes of Maori housing or for any land development scheme.

In other words, the process enabled a sale, Maori to Maori, by the Maori Trustee (except in the case of sales to the Crown). But it did not require that such interests be sold to Maori, except in the case of interests in an incorporation, though it is unclear to us how this worked in practice. And it did not specify that land or interests in a block should be offered to another owner in that block, or a relative of the owner. It specified only that the purchaser be ‘Maori’.

What further discretionary powers were bestowed on the Maori Land Court to assist title ‘improvement’?

Other measures in the 1953 Act were also designed to assist title ‘improvement’. In particular we draw attention to the way in which the court was empowered to intervene to recommend the disposal to the Maori Trustee of ‘uneconomic interests’ either when it undertook the making of consolidated orders, or if owners applied for a partition which the court was not willing to approve:  

- Consolidated orders were designed to give the court power to update lists of owners. If the record of title to any Maori freehold land was not up to date, the court might issue a ‘consolidated order’ setting out the names of those entitled, together with their shares and interests, at the date of the order. Once the consolidated order was registered against the title to the land, it vested the land in the named owners in the relative shares defined. In other words, it was a short-cut to updating titles. Such orders cleared the path to exchanges or consolidation. But they were also designed to unearth ‘uneconomic’ interests. This was made clear in the Explanatory Note to the Bill: “The preparation of a consolidated order necessarily affords to the court an opportunity of examining the nature and value of the interests of the several owners, and advantage is taken of this fact to give to the court power to recommend that uneconomic interests be acquired by the Maori Trustee for the purposes of the Conversion Fund.” The court could recommend that any such interests be acquired by the Maori Trustee, and attach such recommendations to its draft order (it was left up to the court to decide how to notify its orders, though a copy had to be open for public inspection). If the trustee did not object within 28 days, the court was to proceed to vest the uneconomic interests in the trustee. In other words, inaction by the trustee effectively meant that he consented. The court was not specifically required to notify the owners of a recommendation to vest in the trustee, though it was obligated to ‘make all necessary
inquiries and investigations’ (section 196(1)). It is possible this was not a sufficient safeguard to ensure that affected owners were informed. The trustee could object to such vesting. But there is nothing in the Act setting out criteria the trustee was to consider when deciding whether to consent or not. Nor is there anything which suggests that he was to be the guardian of those owners who did not want to lose their interests, however small they were.

**Partition.** The court also acquired powers to initiate the disposal of land if applications were made for partition. If it considered any partition would be ‘impracticable’ it might direct that the land be sold. It was then required to make an order appointing the Maori Trustee to be the agent for the owner in the sale. The trustee had to call for applications from the owners to buy the land, on terms which he fixed. If a sale did not take place, the trustee had to offer the land for sale to ‘Maoris or the descendants of Maoris’, though he could get the consent of the court to sell it to a non-Maori. The court’s powers to partition were discretionary, and it could partition amongst owners to give effect to any arrangement they had made, or get their agreement to a change in the arrangement. Or, if any ‘uneconomic’ interest were involved which was not taken care of by an arrangement among the owners, the court should recommend that it be acquired by the trustee at a price it had fixed. The explanatory note to the 1952 Bill stated that this provision was also designed ‘for avoiding the multiplication and for ultimately getting rid of so-called “uneconomic interests”’. In short, the court was to take a proactive role in disposing of ‘uneconomic interests’ when it first dealt with either updating lists of owners or with owners’ applications for partition.

It seems to us that in both these cases, protection of the property rights of Maori owners was not a priority. Rather, it was the State’s job to empower the court to channel owners’ interests to the Maori Trustee, where they were deemed to be of no economic use.

As well as these measures for the disposal of small interests, further title improvement measures were provided for in 1953, aimed at assisting owners to better use their land. These included:

**Combined partition orders:** The court might make combined partition orders (section 182) which allowed it to treat several areas of land held under different titles whether or not they were adjacent as if it was a single area held in common. With the consent of the owner, it could combine any land owned severally with any other lands and deal with it in a partition order (section 182(1)). I H Kawharu described it as ‘in effect, a small-scale scheme of consolidation’.

**Amalgamation of titles:** The court could also amalgamate titles where it considered that a continuous area of Maori freehold land comprising two or more areas held under separate titles could be more conveniently worked if held under common ownership under one title.

Finally, provisions for the creation of trusts under section 438 and section 439 of the Act, and for incorporation were also to prove significant measures for both title improvement and management of land; we will discuss them further in a later section of this chapter.

**What title ‘improvement’ measures were considered by the 1960s?**

The Hunn report of 1960 included a section on the ‘Land Title System’. It offered some interesting recommendations to tackle the ‘problem’ of continuing disintegration of Maori titles. Citing a work by Sir Ernest Dowson and VLO Sheppard on land registration, designed for use by ‘colonial governments’, it drew attention to the fact that fragmentation through the operation of the law of succession was to be found in other countries (though seldom those where a system of primogeniture operated), and that various remedies existed elsewhere. In countries where all children shared equally in inheritance, and owners multiplied in each generation (such as those under Sharia law), remedy might be sought either by sale of vested rights by family groups to one or two of their number, or by vesting
family group rights in trustees with power to deal. Egypt was cited approvingly as a country where heirs commonly applied one of these remedies themselves.456

Against this background, the Hunn report considered various possibilities to achieve title reform, by bringing about ‘sole ownership’, and preventing the list of owners from increasing. The report adopted the ‘trustee’ principle which Dowson and Sheppard outlined, considering it the ‘simplest and easiest device for converting land titles into sole ownership’.457 The principle, it pointed out, already existed in New Zealand, in the form of the Maori Trustee, and of incorporations. Both could be adapted to produce the desired result:

- **The role of the trustee at a national level.** The Maori Trustee would act as an agency for buying and selling ‘uneconomic’ interests (which should be altered from ‘under £25’ to ‘under £50’; the trustee would either on-sell to Maori owners whose interests would then exceed £50, or to bodies of incorporated owners.458

  ‘Live buying’ – that is buying small shares from owners with their agreement – was considered the key to the simplification of titles.459

- **Establishment of investment farms in trust for Maori people.** Failing resale, the trustee might retain the interests he had purchased in trust. Periodically, he would apply to the land court to consolidate all his accumulated interests and exchange them for compact areas of an adequate size for economic farms. These could be sold for development to the Board of Maori Affairs (a Crown agency established in 1935 which had to approve all new capital expenditure by the Native Department, Maori Trustee and Maori land boards) or sold or leased to Maori settlers.460 Once loans were paid off, income from the investment would be payable to the Maori parent body (for example, the Maori Purposes Fund Board or a new national body which could be called the New Zealand Maori Trust Board) for distribution in a range of purposes, such as health, social and economic welfare, education and training; but the terms of the trust would have to be defined.

Maori themselves would thus have prime responsibility for deciding how the money was spent.461

- **Incorporated tribal authorities.** At a regional level the report also considered the importance of the principle of incorporation: it was ‘possible to conceive of all the Maori tribes being incorporated by statute as land-owning bodies.’ Incorporations might over time buy up all the uneconomic interests in their tribal districts until they became the sole owner in the district, holding all the land in trust for ‘all members of the tribe’. This would be a twentieth-century version of the ‘ancient Maori land system’, its benefits available to all recognised by the tribe; and it would perpetuate Maori ownership of Maori land, as Maori wanted.462

  It was a short step from the principle of voluntary incorporation of Maori owners to that of statutory tribal trust boards (10 existed at the time) to produce a ‘new form of sole ownership’ of Maori land – ‘the incorporated tribe’.

  Incorporated tribes were the report’s second preference, however, to the alternative of using the Maori Trustee as corporate owner in trust for the beneficial owners, that is ‘the Maori people in general’.463

  Thus the report acknowledged the wish of Maori to retain land in Maori ownership – and at a tribal level, supported the role of incorporations. Clearly the growing holdings of incorporations had made an impression; it was noted that there were 123 active, and more inactive; those that were active held land and other assets valued at £7,661,541.464

  At the same time a national process was envisaged for divesting Maori of ‘uneconomic’ interests, at greater pace, and applying the benefits to national Maori projects.

  In the wake of the Hunn report the Maori Affairs Department had circulated to its district officers a memo headed ‘Ideas for Dealing with Maori Problems’, in which it sought their input. The first of three categories related to title improvement. The Department was already contemplating the possibility of converting land ownership in incorporations into shareholdings, the possibility of converting small areas of Maori land with a single owner
into European land, and increasing the £10 rule to £25, and making it mandatory.  

**The Prichard–Waetford report, 1965**

The Government's next initiative in improving titles to Maori land, and improving land use, was the establishment of a committee of inquiry. The committee, whose members were Ivor Prichard, former chief judge of the Maori Land Court, and Hemi Waetford, special titles officer in the Department of Maori Affairs, was, as Professor Ward has pointed out, 'heavily constrained' by its commission. It was directed to investigate: 'What measures should be adopted to overcome the difficulties inherent in the system under which Maori freehold land is held in common ownership; to improve the existing state of the ownership; and to make for the better use of the land.' The resulting report was very substantial.

What did the Prichard–Waetford committee see as the solution to the problems they identified? Among its key recommendations for title improvement were that:

- Maori who had moved to towns (except for a 'very few who own valuable revenue producing interests'), and wished to realise their land interests so as to establish themselves in the towns or reduce mortgages, should be given every facility to do so.

- The process of conversion should be stepped up by increasing the limit of £25 to £100, and in appropriate cases be applied to all interests in a block up to such amount; but the interests of any owners who showed that they wished to buy up other shares in the block should be excluded from conversion.

- The Crown should offer to sell fragmented interests to other owners, failing that other Maori, on time payment; but if it could not sell, it might retain them as Crown land and dispose of it, if it so decided.

- The Crown should take over the process of conversion from the Maori Trustee – and should buy not only land suitable for development, but also 'the hilltops for which no suitable use can be foreseen.'

- All sections of Maori land of two roods or less owned by up to four persons now on the Land Transfer Register or the provisional register should be given the status of European land; or that such sections not covered by this provision, should become European land when first placed on either of the registers.

- Maori owners should take a greater role in development of remaining Maori land, which was important to maintaining export levels and the national standard of living. Owners were criticised as being too ready to assume that the Crown would develop the land. (If they were, this was perhaps not surprising, given the Crown's established role.) Instead they should receive advice from court officers, special titles officers, and land utilisation officers and decide whether to lease land, incorporate and lease, or sell.

- Incorporations were commended as legal entities which could act for multiple owners; some could be called 'big business', they had moved well beyond what was anticipated when they were first legislated for. Despite fragmentation, the incorporation would 'be the means of preserving considerable areas of Maori land'; and those that provided a certain sum each year to 'buy up the small interests' were commended.

- The law relating to Maori incorporations should be amended to provide that the beneficial interests of the owners be shares in the incorporation and not in the land (and if this recommendation were adopted a further inquiry should be held).

The committee thus sketched what seemed on the face of it a cohesive picture. They argued that the great majority of Maori had left their own areas, and were struggling to establish themselves as urban dwellers. They were owners of tiny interests in many distant blocks, which kept a small bureaucracy tied up in recording annual returns too small to pay out to those entitled. If those interests could be realised, at one stroke the urban owners would be delivered very useful small cash injections, the ownership of the small rural blocks would be rationalised, and the bureaucracy would be relieved of much of their wasteful duties.
The Maori land title and administration system was a relic of the past, and the time had come to recognise this and bestow on Maori owners the benefits of modernity. In this context the proper role of the State was to help Maori to convert their assets.

We comment further on this report below.

The Maori Affairs Amendment Act 1967

The 1967 Bill was a direct result of the recommendations of the Prichard–Waetford report, and according to the Minister of Maori Affairs, Hanan, it embodied his own approach to ‘carrying the canoe of Maoridom toward a progressive future’ by providing an ‘outboard motor’ to increase speed. He contrasted this with the approach of ‘some Maori leaders’ who thought ‘winds of change’ were adequate for the purpose. What was needed, in his view, was a ‘drastic approach to some basic Maori land problems’.

The Bill was designed to ‘promote the rationalisation of existing ownership and to prevent future fragmentation’.

The initial Bill was subject to considerable amendment as a result of representations by tribal bodies, the Maori Council, and Maori members of Parliament. Key provisions in the Act that concern us here are:

- **The Europeanisation of title (part 1: ‘Status of Maori Land’):** Maori land owned by not more than four owners was to be compulsorily changed from Maori freehold land to general land. The registrar was to play a proactive role in ascertaining from court records which blocks the Act applied to and, once satisfied that certain conditions were fulfilled, declare a change in status of the land. The land would then cease to be Maori land. The owners would have the same rights and responsibilities as the owners of non-Maori land. The change went beyond the Prichard–Waetford recommendation, with no limits on the size of the block that could be Europeanised.

- **The promotion of the ’better use and administration’ of Maori land (part 2):** The Department of Maori Affairs might instigate investigations, through an officer, called an improvement officer, into the use and ownership of any Maori freehold land, examining access, boundaries, occupation and current use, the number of owners and the extent of their various interests, the best potential use of the land, whether the rates were paid, and what charges there were on the land. The improvement officer, after such consultation with the owners and other interested persons as was ‘conveniently practicable’, was to decide whether it was ‘necessary or desirable’ to improve the use of the land, or to provide for its ‘more efficient’ administration, including partition, title amalgamation, incorporating the owners, vesting the land in trustees to facilitate alienation, or acquisition from the Conversion Fund of ‘uneconomic’ or other interests in the land.

- **The incorporation of owners of Maori land (part 4: “Maori Incorporations’):** The Act provided for the incorporation of owners of one or more areas of land, and for the land specified to be vested in the incorporation in fee simple. The owners would cease to have any interest in the land at that point, and would be allocated shares in proportion to their former share in the value of the land or assets. Incorporations were empowered to set a minimum share unit and acquire all interests below that value. This worked on very similar principles to conversion of uneconomic interests. A key difference was that though the level of an ‘uneconomic’ interest was defined by statute, the minimum share unit was to be set by resolution of a meeting of assembled owners, and interests that fell below this were to be acquired by the incorporation on behalf of the other incorporated owners. The legislation stipulated that the minimum share value must be $50 or more (that is, it was kept in line with ‘uneconomic’ interests elsewhere in the Act). We consider incorporations further, later in the chapter.

- **Amending the system of conversion to increase its pace (part 7):** The Bill as first proposed increased the value of an ‘uneconomic’ interest from £25 to £50 (the Prichard–Waetford committee had recommended...
Hanan justified the £50 figure on the grounds that the £25 interest was too small to be of practical effect. Ultimately, however, the value was allowed to remain at $50 (in the new decimal currency, that is, the equivalent of £25). Two amendments ‘allowed the Maori Trustee to cast the net of acquisition wider’. First, the trustee could acquire interests when Maori land was before the court for partition, consolidation, amalgamation, or for the issue of consolidated title orders. In this case, he could give notice to the court of his wish to acquire interests, require the court to determine what interests in the land were of a value of $50, then indicate which interests he wanted to buy; the court was then required to vest such interests in the trustee. The other amendment provided that the Conversion Fund would for the first time receive Government funding, rather than having to be operated from the Maori Trustee’s profits. Thus the financial limitation on the Trustee’s acquisition of interests was removed.

Crown consultation with Maori over title ‘improvement’, 1950s–1960s

Did the Crown adequately consult with Maori over its title ‘improvement’ measures of the 1950s and 1960s, and gain their consent?

We consider that, given the far-reaching consequences of the policy measures of 1953 and 1967 for Maori property rights, consultation with Maori should have met a high threshold. The Minister of Maori Affairs himself, Corbett, said as much himself when introducing the 1953 Bill.

Consultation and the Maori Affairs Bill 1953

The Maori Affairs Bill was canvassed quite widely, as we have noted, within a small group, particularly those who were professionally interested. The Maori members of Parliament also attended a conference on the Bill. It was distributed more widely, to a group including tribal executives; and the main changes in the proposed legislation were also set out in English and in Maori. Both the broadcasting system and Te Ao Hou (a widely read magazine published by the Department of Maori Affairs) were used to publicise the measures. But the Minister explained in the House that the Government had also received representations (and in some cases, deputations) from the ‘principal tribal districts’, including Tai Tokerau, Ngati Porou, Ngati Kahungunu, and Ngati Tuwharetoa.

This led, the Minister said, to two major changes in the Bill. Initially it had been proposed that any interest in land of £50 or less should be automatically vested in the Maori Trustee, who would consolidate and reallocate ‘farming units’. There was, however ‘considerable opposition to that automatic change.’ All the tribes who addressed the issue asked that if there was to be any such vesting, it should only take place after the Maori Land Court had considered the implications, and if it made a vesting order. This proposal had been adopted. The second change arose from the ‘very strong criticism’ made of the £50 figure, which, it was considered, ‘would result in the dispossessing of far too many people.’ Moreover, £50 in unimproved value might mean quite an area of land that might ‘under better tenure’ be made productive. Such were the arguments put to him that the Minister concluded that the drastic reduction in numbers of owners which might result from the £50 threshold was ‘further than I was prepared to go’. The Minister was also aware of a memorial distributed ‘throughout Maoridom’, asserting that the Bill ‘threatened the welfare of the Maori people in that it alienated their land’. He denied that wholesale alienation would occur; the Bill simply dealt with ‘minor interests.’

Despite the changes, during the debates three Maori members expressed strong reservations about aspects of the Bill – particularly about the disposal of uneconomic interests – and its cultural impact on those affected: the total loss of land rights, of mana, and connection with the tribe. ‘Most of us know’, said Tiaki Omana, the member for Eastern Maori, ‘that the Maori guards jealously his traditions and customs, and that his life and his affiliation with
his tribe are wrapped up in the ownership of land. The members were all pleased that the definition of an uneconomic interest had been halved from £50 in the original Bill. But their wish to have the limit reduced still further had not been met. As Omana and Tirikatene explained, they had accepted the £25 limit because the Minister had refused to budge beyond that, and they were nervous that if they kept pushing he might have put it back to £50. Omana, arguing against the £25 limit in the House, stated that it would cause many Maori to be classed as landless. Maori opposition was so great that they had employed counsel. The Act, he said on another occasion, ‘was a first class disinheritance Act, and many Maoris would be landless as a result of it.’ Belgrave, Deason, and Young consider, however, that although Maori members had concerns about the process of conversion and increasing Maori landlessness, they supported the general direction of the legislation.

On the evidence before us, it seems clear in fact that Maori opposition, in and out of the House, was focused particularly on the conversion provisions, and that Maori were able to secure two significant changes in the Bill; but less than they had wished. In particular the Government did not concede on the key principle of its wish to reduce the number of small interests, despite what this would mean for those Maori who lost them.

**Consultation and the Prichard-Waetford committee**

The question of consultation became a much more contested issue in 1967. The drafting of the controversial Maori Affairs Amendment Bill, which produced extensive Maori opposition, put the spotlight on the Prichard–Waetford committee of inquiry which preceded it. The Crown, in our hearings, drew attention to the committee’s hearings as an example of extensive consultation with Maori. But the representativeness of those hearings was challenged by Maori spokespeople within a short period of their being held.

Historians have drawn attention to the apparent anomaly between the committee’s claim – after 46 meetings all over the country – that they had ‘the approval of the great majority of Maoris to the far-reaching recommendations which we make,’ and the reaction to the report itself. The Royal Commission on the Maori Land Courts (1980) was also puzzled by the difference, concluding that either there was ‘a widespread change of opinion in Maoridom or a failure on the part of the Maori people to state their opinions.’ The Belgrave team concluded that the committee’s views ‘were most likely echoed back to them.’

It is the Tribunal’s view that we need to look at the broader context in which the Government’s land policies were shaped at this time. In fact, the appointment of the committee of inquiry took place in the context of a stand-off over the direction of land policy between the Government and the Maori Council, a national body established in 1961. In 1953 there had been no national body accustomed to speak on behalf of Maori. The National Government pointed this out itself when it provided for the establishment of district councils and a New Zealand Maori Council to ‘complete the structure of Maori tribal organisations’ – that is the committees established under the Maori Social and Economic Advancement Act 1945. According to the Minister for Maori Affairs, JR Hanan, the new council would provide a ‘channel of communication between the Government and the Maori people’ which the Government was anxious for, because there was a ‘pressing need for closer contact with the voice of the Maori people.’

By the mid-1960s, the council ‘was firmly committed to a policy of ensuring that Maori land remained in Maori ownership and if Maori land was to be developed it was developed by Maori for Maori.’ But, as we have seen, the Government was anxious to speed up the process of removal of ‘uneconomic’ interests from titles, to shift land with only a few owners into European title, to increase the threshold for identifying interests as uneconomic, and to allow for more liberal leasing and alienation of Maori land. Belgrave, Deason, and Young state that because of the ‘intransigence’ of the council, officials considered it would strengthen their hand to have their proposals adopted by
The Legacy of the Nineteenth Century

The Government, which had intended to invite the Maori Council to appoint a member of the committee, gave up the idea. And Prichard himself referred, in a letter to the Minister of June 1965, to the ‘problem’ presented in recent years by the Maori Council, which he regarded as Gisborne-dominated and unprogressive. In an attempt to defuse its opposition, he met with council members at the outset and explained the:

uselessness of many owners having trivial interests and of the fact that the winds of change were blowing, and that it was our duty to see that those winds were made to blow in a sensible, practical and useful manner.492

It seems clear that he approached the committee’s hearings with his own clear agenda, rather than with a series of options for people to consider. Prichard described the groups he met during the hearings as thoughtful, and stated that ‘[g]enerally, the great majority have been with us – it is never unanimous. But clearly the tension between himself and the council persisted: he considered the council reactionary, and as having put the word round that he ‘had all the answers prepared and that the going round was to get support from the people to those answers.’ As Prichard put it however: ‘I hope that I am, at the meeting, getting it across why there is the need for changes.’493

The council would later criticise the handling of such an important inquiry by an informal committee, rather than a commission of inquiry.494

It does not seem surprising to us, in the circumstances, that at meetings the committee held it may have seemed that there was general agreement with Prichard about the solution that he evidently presented to his audiences. It may be that many who attended the meetings (which seem to have been modest enough in size)495 were bemused by the maze of apparently insoluble title difficulties, and how to find any path forward. As with consolidation in earlier years, many may have considered that drastic measures would have to be contemplated. Professor Hugh Kawharu suggests also that it was not until the committee’s report was released that the people realised how much hung on the exercise, that the inquiry had been ‘no idle academic exercise, and that it presaged radical changes in land policy, perhaps in development programmes, and certainly in the status of tribal land.’ Meetings and conferences followed in every tribal district.496

It seems significant to us that after the report was released the Maori Council took a lead role in articulating opposition to it. The council was opposed to conversion as the ‘least desirable way of overcoming fragmentation’, and wanted to solve the difficulties created by idle Maori lands by a ‘partnership between Government and people.’497 In a letter to the Minister, Prichard gave the council’s views an uncompromising reception. In his opinion the council failed to consider the administrative difficulties of recording small interests, ‘which modern New Zealand simply cannot countenance’, and the needs of Maori town dwellers for ‘education and housing.’498 He found it unsatisfactory that the council rejected the committee’s proposal for Europeanising Maori land (blocks with up to four owners and up to half an acre to become European land at once, and larger areas with the same ownership in 1971). The council’s suggestion of a voluntary basis for the changes was unsatisfactory and would ‘mean no progress towards a common rule of law.’499

In general, Prichard considered the Maori Council out of touch; as an internal Department paper put it, in summarising his views, the Council evidently envisaged the ‘indefinite continuation of the separation in law of the two races.’500

Consultation and the Maori Affairs Amendment Bill 1967

We note however the extent of Maori opposition to the Maori Affairs Amendment Bill. In May 1967, a large public meeting at Tamatekapua (Ohinemutu), addressed by Sir Turi Carroll, chairman of the Maori Council, passed a unanimous resolution seeking its deferment. Sir Turi said that the proposed legislation ‘could undermine the spirit of the Treaty of Waitangi’, and he did not see how the Government could reject the call of the council, the Maori members and the people for more time to consider the Bill.501 Representatives from Arawa, the East Coast,
Gisborne, Hawke's Bay, Tuhoe, Maniapoto, Waikato, Taranaki, Tuwharetoa, Hauraki, and the South Island were present. Leaders from our inquiry region played a prominent role at the hui. The principal resolution was moved by P H Leonard, chair of the Te Arawa Trust Board, and seconded by Hoani Te Heuheu, ariki of Ngati Tuwharetoa. It expressed deep concern at the lack of consideration given by the Minister of Maori Affairs to the question of giving Maori people more time to consider the ‘revolutionary changes’ in the proposed Bill, and urged a delay of 12 months.502 Opposition to the Maori Affairs Amendment Bill proceeding was also expressed to the Minister by the Arawa Trust Board ‘on behalf of Arawa Confederation of tribes’ in a subsequent telegram. The chairman deplored what he called ‘government policy to force [the] bill through parliament’ before the end of the session, and requested a year’s delay.503 Further telegrams were sent by the Arawa No 2 and Rotorua City tribal executives and the Ngati Pikiao West Tribal Committee, as well as a letter from the Owhata Maori Committee.504

The following weekend the Minister addressed the Association of Maori University Graduates at Tamatekapua, and rejected the proposal that in view of the strong Maori reaction to the Bill, it should be abandoned, and a ‘fully representative committee’ should be set up to draft a new Bill for the next parliamentary session.505

We address below the range and substance of Maori views of the legislation, but note here that a number of tribal groups, as well as the Maori Council, prepared submissions. Opposition members, notably the Maori members, pointed to the overwhelming opposition to the Bill by those who appeared before the Maori Affairs Committee (22 submissions, including the Arawa federation and the Tuwharetoa tribe). They would attempt during the debate to delay the Bill so that Maori might have more time to consider and understand it. Press reports of the passage of the Bill spoke of ‘angry scenes,’ ‘an explosive three-hour battle’ as the House embarked on the committee stages, and ‘dogged resistance’ by the Opposition.506

The Maori Council subsequently expressed its unhappiness with the Act, even though it conceded that ‘most of its objectionable features’ had been removed. Sir Turi considered that the Bill ‘continued to allow self-interest to dominate group interest.’507 In particular he referred to ‘the increased power to sell tribal land to the non-Maori given the Maori Trustee,’ as well as the new power to transfer it to the non-Maori by vesting order.508 On the other hand, hope that organised Maori leadership might exercise some of the protection hitherto exercised by the land court was ‘given no substance at all by the Bill.’509 But the council welcomed Government statements about the importance of Maori land development and the financing of incorporations.510

Conclusion

We conclude, in respect of consultation and consent, that in 1953 the Crown was anxious to let Maori know what measures were proposed in its new Bill, and took a range of appropriate measures for this purpose. It took care to consult with the land court judges and their registrars, and the Maori members; and the publicity it gave the measure resulted in important representations from some tribal areas which resulted in at least two major changes to the legislation. While there was no systematic consultation in tribal areas, some tribes made themselves heard, and were (at least to some extent) listened to. We note, however, that the Maori members, seeking further protection of Maori owners’ small interests, backed down because they feared their opposition might actually make things worse. This is scant testament to their confidence in their ability to secure a good faith reception from the Minister. Nor did the Government depart from the principle of conversion of small interests.

In 1965, when further changes to the Maori land law were contemplated, a consultation process was embarked on by Prichard and Waetford, who certainly travelled widely through the country. It seems, however, that they did so with a pre-set agenda, to explain why particular changes which had been decided on were necessary. We agree
with the view expressed by the Maori Council at the time that the importance of the proposals contemplated by the Government was such that a royal commission would have been a better vehicle for discussing them with Maori, and with tribal and national leaderships. Alternatively, consultation might have taken the form of a sustained dialogue between the Crown and Maori leaders. That, it seems, would have led to a more representative spread of views on Maori land policy and administration, at the outset. That such views had to be expressed subsequently as comments on a Bill which was already formulated meant that Maori had to proceed in reactive mode, which is never a satisfactory basis for consideration of far-reaching proposals. Prichard and Waetford conducted a consultation process, but we do not think they conducted meaningful consultation. In the wake of their report, and the introduction of the Bill on which it was based, Maori leaderships engaged in a sustained rearguard action, and succeeded in securing some changes with which they were satisfied.

But the passing of the Bill was a very divisive exercise, which marked an unhappy watershed in Maori–Crown relations. That in itself indicates that the Crown’s approach to such a major policy change was not considered reasonable by Maori leaderships at the time. Moreover it is evident from the range of tribal representatives who attended hui and made submissions on the Bill that it would not have been difficult for the Crown to engage with tribal leaders – or with the Maori Council, which had been established precisely so that Maori would have a representative forum at national level. The Minister of Maori Affairs had, in 1961, referred specifically to the role the council might play in consultation on ‘land reform’; on this question, he said then, ‘I myself would hesitate very much to tell the Maori people what I think ought to be done. I might have logic on my side, but the feelings of the people are to be considered on a question like that.’

It seems to us that in 1964–65 the Maori Council should thus have been relied on to a considerable extent to provide ‘communication’ from the Maori people, if that was why it had been set up. It was not appropriate for the Crown to sidestep the council because it did not like what it said. Clearly the Crown should have entered into dialogue with the council, and at the very least, its views should have carried considerable weight.

The Tribunal’s findings on consultation and consent in the 1950s and 1960s

- We find that the Crown’s consultation processes on policy and Bills directly affecting Maori property rights in the 1950s and 1960s were not Treaty-compliant. The Court of Appeal has found that it is ‘beyond argument’ that ‘the good faith owed to each other by the parties to the Treaty must extend to consultation on truly major issues’. Policies to address Maori title problems must count as such an issue.
- Crown consultation on the Maori Affairs Bill as first drafted, effective to a limited extent, made it clear that the Crown, having decided on a policy of ‘conversion’, was prepared only to moderate it, rather than abandon it. The Crown’s policies were not developed from the outset in consultation with Maori leaderships.
- In the mid-1960s the Crown did not engage with tribal or national leaderships on proposed changes to satisfy itself that the legislation would reflect Maori wishes. The outcome was legislation which led to sustained protest.
- In its failure to consult Maori leaderships on major policy changes affecting Maori property rights, and secure their consent, the Crown breached the principles of partnership, autonomy, and active protection.
The Crown's and title 'problems', 1950s–1960s

Was the Crown’s approach to mitigating title ‘problems’ in the 1950s and 1960s Treaty-compliant?

While we appreciate the Maori title problems that the Crown saw itself facing by 1950, and its attempts to address them, we find it difficult to consider any solution Treaty-compliant which involved provision for the systematic dispossession of Maori of the often small interests which they had managed to retain by 1950. Those interests might well represent the remaining links of many owners to their ancestral lands.

We accept that the Crown saw the acceleration of fractionation of interests as a major problem. In that it was anxious to see that ‘individuals or family groups’ who were farming got good, uncluttered title, we accept also that this seemed a reasonable approach. In that there was acknowledgement that Maori wished to retain their land, and that making the land ‘productive’ would assist this, we accept that this was well-intentioned.

Were good intentions enough though? Was it reasonable for the Crown to define the ‘problem’ of Maori land title in the way that it did? The Crown’s Treaty obligation is to make informed decisions on matters affecting interests of Maori. We consider that in such circumstances, with the property rights of so many Maori potentially affected, its obligations included the following:

▶ to understand the problem it was trying to solve;
▶ to consider the cultural implications of its policies; and
▶ to protect residual Maori property rights.

We consider each of these in turn.

The Crown's obligation to understand the problem it was trying to solve

The title ‘problem’ was defined officially in this period as one of multiple ownership of Maori blocks of land, of extremely small shares held by too many owners, the failure of most Maori to make wills, and the obligations of the land court to apply the law of intestate succession ‘based on Maori custom’. Corbett, Minister of Maori Affairs in 1953, referred in Parliament to ‘outmoded’ customs, in which he included gift and succession: ‘natural in their day but which have now resulted in a confusion of titles and in the breaking up of interests to such a degree that practically no use is being made of the land’.

JR Hanan, who would hold the same portfolio in the next National Government, was of the view that the difficulties stemmed:

from the system whereby much Maori land is owned in common by a number of owners in varying and often very small shares. Another problem is the awkward and impracticable size and shapes into which Maori land over the years has become divided.

From here it was an easy step to solutions aimed at helping Maori escape from what was evidently a strange and out-of-date system of land ownership by reducing the number of owners. And it could seem sensible to make such reduction compulsory where owners’ interests were small, so that the process had some real momentum.

But this was an easy analysis which failed to acknowledge the roots and nature of the title problems that so many Maori owners faced, both historically, and every day. This point would be made early in 1967 by the Maori Council, which put to the Minister the importance of considering the historical origins of the title problem. The council took issue with this aspect of the Prichard–Waetford report on several grounds:

▶ It seemed to suggest that defects in the Maori land title system were the fault, if not of landowners themselves, then of their forebears.
▶ If there was any culpability, it should rest with the Crown, and the changes it made to the Maori tenure system through its legislation and the Native Land Court, and through its appointees, the judges who adopted a system of succession which was ‘a one-sided interpretation of Maori custom’ and who were thus ‘unwittingly’ the authors of the problems of land use pointed to in the report.
The partitions made by the court, and alienations, led to grossly uneconomic parcels of land; ‘silly’ partitions inhibited proper use of the land far more than multiple ownership.

Consideration of the conflict between Maori custom and the court’s interpretation of it, and of Crown responsibility for fragmentation and bad partitions would, in the council’s view, have led the committee to ‘more constructive conclusions’.  

The Hunn report had accepted in 1960 that fragmentation was not ‘the ancient Maori title system’ and acknowledged that it was a ‘European invention’ imposed on Maori through the land court system. But at the same time it argued that this made it difficult to understand why Maori held onto the fragments the system had bequeathed them. In other words, Maori should give up the struggle to retain small remnants of their ancestral land. This seems to us to point to an almost complete abdication of responsibility on the part of the State for the failings of its own tenure system. The Crown put it to us that it was not apparent in this period that individual title provided for in the early Native Land acts was a problem. We reiterate that the individualisation of interests had become entrenched by 1900, simply because Crown policy had been dedicated to that end. The problems individualisation caused for Maori owners, as we have seen, had certainly been highlighted in that period – by the native land laws commission, and by the Stout–Ngata commission. The Crown’s own title-repair measures from that point had in fact been designed to address those problems. Despite this, the Crown, for much of the early twentieth century, had not questioned the wisdom of its policy. And when Ngata, as Minister of Native Affairs, stood before the commission investigating his land development schemes in 1934, his motives in parking title issues in favour of getting on with development were called into question. The commission’s report indicates that they suspected Ngata was not as committed to individualisation as they thought he should have been. In other words, a perceived departure from the policy by a Minister of the Crown was not acceptable. In our view, it is not surprising that mid-century solutions which skirted round an understanding of the problems they aimed to fix were not well conceived.

The Crown’s obligation to consider the cultural implications of its policies

The second obligation of the Crown in proposing changes to Maori land laws was to consider the cultural implications of its policies. Workable solutions could not be proposed in a cultural vacuum. This was, in our view, a reasonable requirement in the circumstances of the time. It cannot be maintained that the Crown was unaware of the value to Maori of the small interests that they might retain in ancestral land. The Maori members often spoke of this in the House, for instance. In 1945, the Maori Purposes Bill was drafted with a clause which would have given the court discretion to dispense with the consent of any owner whose interest did not exceed £25 in value in any case where exchange of family interests was deemed desirable. In the words of the Under-Secretary for Native Affairs, ‘fiddling little interests’ were involved. But the Maori members objected. In a memorandum signed by Tirikatene on their behalf, they stated that such powers as were embodied in the clause to effect exchanges and ‘manipulate’ transfers of interests without the consent of the owners, or against their wishes, was ‘bad, not British justice, and politically disastrous [in the Maori electorates, and Parliament]’. It was not the value of land which was at stake but the principle. In particular:

(a) It hits right into the heart and soul of Maori mental sentiment and Mana i.e. the alienation of his lands without his consent

(b) To the Maori it will react as a violation of the Treaty of Waitangi and is against Labour’s principle of equal rights and of the protection of the minority . . .

The failure of the Native Department to have developed a machinery to trace absentee owners, they added, was no reason for it to wield a ‘big stick’ in the matter of titles.
Within our own inquiry region we also have evidence of interchanges between tribal spokesmen and Government officials which point to mutual understanding of the importance of ancestral land. At Tokaanu, when proposals were being mooted for a new township in the early 1940s in the wake of the raising of the lake level, P A Grace expressed to Government officials the importance of the cultural value of the lands where Tokaanu Maori then lived:

The land on which these buildings were built belonged to our ancestors and handed down from them to our parents. We would like the Govt. to keep in view that our sentimental value in regard to these lands is very high also.  

The registrar of the Aotea Land Board expressed the board’s strong opposition at the time to proposals that the new site would be a Crown township: ‘this will have the ultimate effect of alienating and extinguishing all sentimental and historical associations which the Natives in this locality have attached to the township in the past.’

And an internal memorandum for the Native Minister about preparations for setting up a special court to assess compensation for damage resulting from the raising of the lake level pointed to the fact that if claims for ‘injurious affection’ were not allowed, it was clear that Maori ‘will suffer a great deal of loss’ which might not be able to be compensated. If a Tokaanu owner were uprooted from his home to a state house in the new township he would be in a ‘far worse position’ than at present – even if he were given the freehold of his new house:

The Maori has a great attachment to his land. It has belonged to his people, his hapu, or his family for generations. It is his and the compulsory taking of his home removes him from all the traditions and loyalties belonging to his home.

Tirikatene, then member of the Cabinet representing the ‘Native’ race, supported the people's position, explaining to the Prime Minister their ‘strong desire of retaining Tokaanu with all its historical and present significance’. In 1957, when the Maori Purposes Bill was before the House, Tirikatene spoke again about the cultural importance of land: ‘to the Maori his land is his foothold, and, regardless of how small or uneconomic it may be, it has always been looked upon by the Maori as a platform from which he could give expression to his feelings. Maori should not be deprived of the last vestige of the soil owned by their forebears.

Pakeha politicians, too, often made statements indicating an awareness of the significance of land to Maori. In 1953 Walter Nash, leader of the Opposition, expressed his concern over the removal of ownership of uneconomic interests; ‘if I were a Maori I would like to feel I had an interest in the land.’ The member for Waitakere, Mr Henry Mason (a former Native Minister), in a backhanded but revealing comment, pointed to the dedication of Pakeha in the Department of Maori Affairs, who dealt with the ‘tedious’ detail of Maori affairs, which in his view arose in part from the fact that ‘the Maori has a sense of blood relationship and history and family relationship which we have not, and those matters come into his discussions.’

In 1957, the Prime Minister, Keith Holyoake, discussing the ‘10 pound provision’, stated that he knew ‘that a Maori with even a small interest in land feels that it is very dear to him.’ The Hunn report also acknowledged the importance of Maori cultural attachment to land, before suggesting it could be abandoned (and that Maori would be realists enough to accept that it should). Instead, it would be useful if Maori came to regard the ownership of a modern home (in town or country) ‘as a stronger claim to speak on the marae than ownership of an infinitesimal share in scrub country that [they had] never seen.’ This was famously conceived as ‘turangawaewae based on home ownership’, involving acknowledgement of good citizenship and ‘love of a particular plot of land’. We hesitate to use overworked terms like ‘cultural imperialism’, but to tell Maori how they should run kawa on the marae must come very close to it. Paradoxically, the Hunn report accepted the continued existence of ‘tribal marae’, and of the importance to Maori of being able to exercise speaking rights there.
These kinds of statements strongly suggest that the Crown was not in fact unaware of the importance of tribal identity, and tribal culture and relationships; nor did it consider that marae had no future. The Hunn report’s discussion of the role that tribal incorporations might play in the future underlines this. Though the report referred to ‘a new form of sole ownership’, it did not mean ‘individual’ ownership, but rather the tribe holding all land in its district in trust for all its members. The weight given to this proposal suggests that it was at least considered a serious possibility.

Yet at the same time the solution preferred in the report was that the Maori Trustee operate supra-tribally, pooling small interests nationally so that they might be put to use for all Maori, particularly in education, health, and social welfare. Maori property assets, in other words, were to be separated from the tribal context in which they originated, to be distributed on the basis of ethnicity – or, as it was termed at the time, ‘race’. This also reflected, as Belgrave, Deason, and Young suggest, a tendency to ignore Maori ownership as kinship-based, which sits uneasily with the Government’s acknowledgement of tribal existence.

In short there was, we think, a degree of official confidence about redefining the relationship between a community, their land, and their institutions, which we cannot see was reasonable or justifiable in the circumstances of the time. Maori cultural attachment to the land was acknowledged by officials and politicians, but discounted as a cultural hangover in the contemporary world. This was spelt out in Department memoranda, and in statements by the Minister of Maori Affairs. Though Corbett and his Department emphasised that Maori land should be preserved for Maori – it is clear that they interpreted this in their own way, with their own objectives in mind. The first was to ensure that Maori land was brought into full production. The second was acculturation. Corbett told Parliament that:

love of the land is shown by the way you use it. That is what I want to provide for the Maori people in this measure. And with regard to sentimental attachments … I say let us beware lest blind sentiment becomes a barrier to progress. We would fail in our duty as administrators if we did not attempt to provide a solution to this very difficult problem that has developed. . . This is a case where it is necessary to face up to a problem and deal harshly with tradition, much as I deplore having to do so. It is inevitable, in the interests of the Maori people themselves, and to ensure the retention of the remaining areas of their land. [Emphasis added.]

The Department of Maori Affairs, it is evident, was concerned with more than cleaning up land titles. Its memorandum, listing projected outcomes of the 1953 Bill, included:

- rationalisation of titles and bringing ‘more and more’ land into production;
- the increasing landlessness of many Maori as live purchases proceeded, ‘without any hurt to them’; and
- the change of Maori attitudes to land, so that within a generation they would be ‘the same as that of Europeans’.

This brings us to consideration of the broader aims of the title improvement policies which the Crown embarked on in this period. As historian Aroha Harris suggests:

In the government’s view, multiple ownership impeded much more than land development; it obstructed the overall progression of Maori people and their cultural adjustment to the modern world, and indulged Maori people’s so-called sentimental attachment to land.

By the 1960s, land policy was linked strongly to the Government’s policies of integration, and to a focus on the rapidly urbanising Maori population. Belgrave, Deason, and Young, pointing to the key role of Jack Hunn, Ralph Hanan and Jock McEwan in Maori Affairs policy during the 1960s, state that their:

enthusiasm [for integration] made them dismissive of opposing views. They believed in social and economic equality for Maori and while they saw a culturally separate future for
Maori, relationships with tribes and tribal lands were not important to them.536

We can contrast this with expressions of cultural values and attitudes evident in some other publications of the time. An article headed 'Maoritanga', by the Reverend JG Laughton, who was well-known in the Maori world, was published in the Maori Affairs department magazine Te Ao Hou in mid-1954. Laughton considered the 'keynote to Maoritanga' to lie in the fact that the 'Maori race has distinct racial personality' expressed culturally in a wide range of ways, and the 'demand for the recognition and protection of Maoritanga', embodying the 'nationalism' of the Maori, would be equally recognisable to a visitor to Scotland or Wales. Laughton wrote at length of the importance of the Maori language, and of the importance of community to Maori; he contrasted the 'individualist' Pakeha with Maori who were 'trained to think in terms of community rather than of self'. And not merely the community of the living, but the community 'with the long and storied past'. Laughton wrote of the importance at every great Maori gathering of the songs of the past and the recitation of genealogies interrelating the living 'with ancestors of the dim and distant past':

It is not merely that the Maori has a better historic sense than the average Pakeha. His community life stretches back over the centuries and unites him with the whole cavalcade of this race. Try to make him a Pakeha and a mere individualist and you have stripped him, like some plant, of every leaf and flower-bud and left him with a gaunt and naked stem. Because Maori life is community life the village Courtyard, the marae, is its true centre.537

Laughton’s article was cited in an annual report of the Waiairiki District Maori welfare officer dated 14 April 1954, which contained a section on race relations, reiterating concerns expressed the previous year about the kinds of 'far-reaching' policy decisions being made, in the officer’s view, facilely:

Frequent use of such terms as integration, assimilation or association and any other ‘ation’ do not help. It is not possible to clearly state a case for future race relations by the use of these words which can be interpreted according to the bias or inclination of the individual.538

The officer stressed that those who had close relations with Maori should be listened to, referring to Laughton’s article, which had been unanimously approved by the Maori section of the National Council of Churches.

We draw attention also to Joan Metge’s book A New Maori Migration, which was first published in 1964. Between 1953 and 1955 Metge worked on a study of Maori urbanisation, working both with Maori living in Auckland and with Maori living in a small rural community in Northland.539 She challenged views that urbanisation produced a breakdown in traditional values, and stressed the importance of continuing links with the ‘home’ rural community, even after 25 or 30 years in the city. She described a rural community, Kotare, where ‘membership in a tribe was regarded as axiomatic’, where tribal membership meant a connection with a past that was important, and a ‘defined place in the modern Maori social world’ – even though their tribe held no corporate assets, or land in trust.540 Its leaders were kaumatua, men in their fifties or older, whose descent lines were important, and who were further qualified by ‘an extensive knowledge of whakapapa and Maori tradition and by ability as orators’.541 And though the landed base of the community did not support more than a small proportion of those who lived there, the strongest reason why the majority stayed was because of their ‘attachment to Kotare as the land and community of their ancestors’, reinforced by their own association.542 This strong feeling of association was evident also among the people Metge worked with in Auckland. They held onto their land interests at home so that their links with the community would not be weakened, and they would still belong there.543

We refer to these studies because they variously demonstrate in the period we are discussing the importance
of the continuing links between urban migrants and their rural kin-groups, and of the strength of tribal identity and cultural values and knowledge in the rural communities. In the case of the welfare officer’s report, there is also expressed a clear cynicism about abstract statements, proceeding from an ignorance of the realities of Maori community life, being made about the future of race relations. It seems important, in light of the kind of picture being portrayed in official statements and reports, to remind ourselves of the limits of this picture, and of the fact that more culturally attuned views were available to the Crown.

In light of Professor Belgrave’s discussion of the views of three key policy-makers of the period, we might point to a confusion on their part between ensuring that Maori were not treated as unequal citizens, and assuming a right to ignore core Maori values. The Crown’s obligation, in our view, was to inform itself of those values, not to dismiss or ignore them as if they were unworthy of any respect.

**The Crown's obligation to protect residual Maori property rights**

The third obligation of the Crown in developing its title policies of the 1950s and 1960s was to protect residual Maori property rights. Professor McHugh has called the Crown’s approach to adjusting the number of owners on titles, whether by preventing succession or removing an individual’s interest in Maori land, ‘Reform by disenfranchisement.’ The claimants put to us that the Crown’s attitude to Maori property rights as embodied in the 1953 and 1967 Acts was ‘unfair, unnecessary and coercive’, and that Maori landowners were treated very differently from non-Maori landowners. We find ourselves in complete agreement with this analysis. The Crown also accepts that Maori resisted the compulsory nature of conversion.

We draw attention to several points:

- The Department of Maori Affairs, as we have seen, was aware at the outset that its proposals for rationalising titles might be seen as arbitrary and interventionist, and might meet with opposition. Since Eruera Tirikatene had already invoked the Treaty and equality under it – article 3 rights – this was not surprising. Tipi Ropiha, Secretary of Maori Affairs, also pointed out in 1953 that Conversion Fund proposals in the Maori Affairs Bill ‘could not unreasonably be said to constitute encroachment on private rights of ownership.’

- The 1953 Act provided a range of opportunities for court intervention to assist the divesting of owners’ small interests. Not only were they vulnerable at the point of succession, but also if the court decided to prepare a consolidated order, or if owners came into court to get a partition. The legislative provisions, it seems to us, meant that owners might come into court to secure a partition, but find instead that the court ordered their land to be sold. Or, if the court made a consolidated order, and offered uneconomic interests to the Maori Trustee, we cannot see that an owner would necessarily be aware that his or her interests had been sold. These were intrusive powers. And though we do not know how they worked in practice, it is clear that their exercise by the court might potentially result in owners being divested of their interests without their involvement, without their objections being heard, or even without their knowledge.

- Similarly, under the 1967 Act, the Maori Trustee could notify the court of his wish to acquire interests, and require the court to determine what interests was ‘uneconomic’; the court was then required to vest such interests in the trustee.

- Nor did the provisions for Europeanisation in the 1967 Act require Maori owners to be consulted when a change of status from Maori to European land was made. Under the Act, the registrar was entitled simply to work from court and Maori Trustee records; subject to certain criteria he had then to make an appropriate status declaration, and forward it to the district land registrar. As counsel for the claimants observed, owners could not object; nor were they given the opportunity to choose what status their land
The only protection they had came at the point of registration: if there were outstanding charges on the land, such as survey liens or charging orders, these had to be paid before a status declaration could be registered. This was, it seems to us, a very indirect protection. These provisions did not give adequate protection to Maori property rights.

Impacts of title-‘improvement’ measures

What were the impacts of the title-‘improvement’ measures of the 1950s and 1960s in the inquiry region?

We have noted that the parties agreed before us that it is difficult to quantify the effects of the Crown’s policies of the 1950s and 1960s in this inquiry region. The Crown pointed out also that a number of sections in the 1967 Act which Maori found ‘objectionable’ were repealed in 1974, so that their effect was short-lived. The claimants agreed that the Maori Affairs Amendment Act 1974, which included provisions abolishing the conversion of ‘uneconomic’ interests, had been beneficial to Maori owners. The evidence allows us only to indicate something of the practical effect of title improvement policies of the mid-century, including conversion and Europeanisation, on the ground.

The impact of conversion and other title-improvement measures in the inquiry region: We have some evidence about conversion from the Waiariki district. According to Dr Hearn, the Rotorua district began implementation slowly, regarding conversion as ‘time consuming and costly’, and the district officer had to be directed by Wellington to make greater use of the provisions. A head office minute on the district officer’s report of 15 February 1956, stated that ‘much greater use of conversion powers in future’ was expected. But conversion was still not favoured. This was partly because of the practical difficulties of finding a purchaser for uneconomic interests, and partly, as the court registrar stated, because people in the district preferred to use family arrangements, exchanges, vestings, and combined partitions to eliminate ‘uneconomic’ interests. It is evident from the statistics he gave, that Maori owners were engaged themselves in the task of removing small interest holders from blocks, on a large scale. To March 1962, the statistics were as follows:

<table>
<thead>
<tr>
<th></th>
<th>Number of orders</th>
<th>Area (acres)</th>
<th>Original number of owners</th>
<th>Reduced number of owners</th>
</tr>
</thead>
<tbody>
<tr>
<td>Combined partitions</td>
<td>19,683</td>
<td>6,501</td>
<td>1,422</td>
<td></td>
</tr>
<tr>
<td>Consolidated orders</td>
<td>381</td>
<td>37,968</td>
<td>25,580</td>
<td></td>
</tr>
<tr>
<td>Amalgamation orders</td>
<td>94</td>
<td>12,454</td>
<td>4,953</td>
<td></td>
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<td></td>
<td></td>
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</tbody>
</table>

Between 1965 and 1970, 31 amalgamation orders were issued in the Taupo and Kaingaroa inquiry districts, involving 42,804 acres. Likewise, between 1961 and 1967 large numbers of consolidated orders (363, affecting 151,272 acres) were issued in Taupo and Kaingaroa districts. It is noticeable that such orders, with the one exception of 1972, fell away to almost nothing after the 1960s. George Asher told us of owner reaction when the Lake Taupo Forest Trust (combining 58 blocks, later increased to 61) was started at the end of 1968. The owners refused to allow their individual titles to be cancelled in favour of a total amalgamation. ‘Maintaining their hapu and whanau relationship with their land, especially their connections with their waahi tapu, was very important to the owners.’ We consider below an example of the impact on a small group of Rotorua owners, of Ngati Rangiteaorere, of an amalgamation of titles.

Consolidated orders, which produced up-to-date lists of owners and their shares, provided the basis on which the court could effect exchanges and use conversion provisions, thus reducing numbers of owners; during the 1960s the Department put considerable effort into them, because they were regarded as a successful route to title improvement. Dr Hearn states however that further research would be required to establish the extent to
which amalgamation and consolidated orders involved the elimination of small interests.\footnote{551}

Arranged successions in Rotorua resulted in the elimination of 18,212 interests (the highest total for all districts). Conversion, on the other hand, involved purchase of 1937 interests in 148 blocks, of which 1507 had subsequently been sold.\footnote{552} Young and Belgrave, who studied the land court files in Rotorua relating to conversion after the 1967 Amendment Act was passed, state that the bulk of the files relate to ‘live buying’, that is, Maori Trustee purchase of ‘uneconomic shares’ from owners. Many of the letters on file from owners offering their shares for sale, they state, are from owners who did not live in the Rotorua area and ‘were in need of money to alleviate their financial situation’ – whether for housing or furnishing.\footnote{553} Compulsory acquisition of uneconomic interests, as we have noted, ceased with the passing of the Maori Affairs Amendment Act 1974. The Conversion Fund was abolished in 1987. Issues concerning shareholdings acquired, but not ‘used’, by the Maori Trustee, remained to be resolved. The Government agreed in 1984 to return land interests, and in 1987 it was enacted that compulsorily acquired shares would be returned to owners. Blocks with aggregate share values of less than $1000 were to be transferred to the present owners, and blocks with aggregate share values exceeding $1000 were to be sold to the present owners.\footnote{554} We are unable to comment on the extent to which landowners within Central North Island inquiry region were affected by these provisions.

Amalgamation of titles: Ngati Rangiteaorere and the formation of Rotoiti 14 and 15 trusts: One example of the impact on Maori owners of amalgamation of titles to assist utilisation of their land was that brought to our attention by Ngati Rangiteaorere. It involves the loss of their block Whakapoungakau 4K2E2 (901 acres). The circumstances in which this happened are complex. Various factors were involved, but two seem to have been of particular importance:

- the Crown’s wish to secure land to extend the Lake Okataina Scenic Reserve; and
- a plan to amalgamate 33 land blocks, east of Lake Okataina and south of Lake Rotoiti, into a single block that would come to be known as Rotoiti 14. This was done by the Maori owners who were investigating a lease to the Tasman Pulp and Paper Company for afforestation.

It is probable that neither of these factors would have appeared immediately relevant at the time to Ngati Rangiteaorere, whose Whakapoungakau lands are some distance away on the eastern side of Lake Rotorua. However, the convergence of the two strands of activity set in motion a train of events that would result in Ngati Rangiteaorere’s loss of Whakapoungakau 4K2E2 and the acquisition, instead, of a small stake in a large block named Rotoiti 15, totally outside their core area of customary interests. They have no close whakapaapa connections there, and their loss of Whakapoungakau 4K2E2, accompanied by the transfer of their interests into Rotoiti 15, has been a lasting grievance. Ngati Rangiteaorere represented to us their strong view that there had been ‘very little consultation’ in the events leading up to this outcome.

How, then, did Ngati Rangiteaorere lose control of their block?

The Maori owners of the Rotoiti 14 blocks (which included various Haroharo, Haumingi, Okataina, and Waione subdivisions) applied for their amalgamation in January 1970, planning to vest it in 12 trustees. The proposed trust was to utilise and manage the lands, and to grant leases for the whole or part of the land for afforestation. Eileen Barrett-Whitehead notes a range of factors behind the owners’ interest in amalgamation and land utilisation, including the fear that their ‘uneconomic’ shares might be converted, and continuing concern in Rotorua County about unpaid rates on Maori land.\footnote{555} Before the amalgamation, the Rotoiti 14 owners had become aware of the Crown’s plans with regard to the Lake Okataina Scenic Reserve. The Rotoiti Riding Land Committee, which in December 1969 advertised a meeting
of owners to discuss afforestation proposals for the blocks, had been advised over a year before of the Crown's wish to extend the reserve. Although we do not know exactly what details were conveyed to the committee, we do know that the intention, if possible, was to secure an uninterrupted view of native bush from the lake's edge to the skyline. Mr McBurney refers to frequent discussions along these lines in the 1960s, between the owner of the Lake Okataina Fishing Lodge and 'local officials in Rotorua', and the Minister of Lands had stated in Parliament in June 1967 that:

[to provide fully effective protection of the scenic values it would be necessary to extend the reserves back to the skyline. The department . . . is currently investigating what would be involved in such an extension so that the full scenic beauty of the lake and its environs can be safeguarded.]

Land 'to the skyline' would have included part of Rotoiti 14 and also a number of blocks down the western side of Lake Okataina. We note in that context that Ngati Rangitaneorero's Whakapoungakau 4K2E2 contained the maunga Whakapoungakau – somewhat higher, at 758 metres, than the hills immediately bordering the western side of the lake.

As regards the Rotoiti 14 blocks, it is clear that at hui held around the time of the amalgamation there was owner opposition to selling any more land to the Crown for scenic purposes – despite the registrar of the land court's suggestion that the trustees be empowered to do this. As the Crown contemplated alternatives for securing further land for the reserve (including a lease, and declaring a Maori reservation) a proposal surfaced for exchange of Crown land at Matahina, in return for the land the Crown wanted to secure for scenic purposes. Counsel for Lands and Survey suggested that the Crown land might be more suitable for afforestation, though he could not say at the time what land might be offered. In March 1970 the court gave the Crown till November to complete such an exchange. It also amalgamated the 33 blocks to create Rotoiti 14 trust (16,454 acres), and issued orders creating the trust. New Zealand Insurance became the responsible trustee. Twelve owners were named advisory trustees. Some 2670 acres of Rotoiti 14 was identified for addition to Okataina Scenic Reserve.

From this point, Crown efforts to find land suitable for the exchange intensified. Briffaut, a local official of the Maori land division of Lands and Survey, held discussions with the advisory trustees. They wanted land at Ruawahia and at the outlet of Lake Tarawera; but the latter had been promised by the Crown to the Tarawera Forestry Company and was not available. This created problems for the Crown, because valuations showed that the value of the Maori land it wanted to the east and west of Lake Okataina (plus timber) was twice that of the Ruawahia land. The Crown now had to find more land for the exchange, and so offered land at Matahina.

It is in November 1972 that Whakapoungakau 4K2E2 enters the story. Mr Alexander argues that in the previous eight months, the Rotoiti 14 trustees, appointed with power to negotiate an exchange, had 'radically overstepped' those powers by discussing the inclusion of other land over which, at the time, they had no responsibility. Whether this was an overstepping of their powers is perhaps open to question, given the trustees' responsibility to their own owners. The crucial point would seem to be the extent of consultation with owners of other blocks about such a proposal. Two meetings had been held before this, one between New Zealand Insurance and the Crown and evidently the trustees; another a few days later, which Mr Alexander surmises must have been a meeting of owners although the court minutes are unclear on this point. On 11 November 1970, 15 blocks, including Whakapoungakau 4K2E2, were brought before the land court for amalgamation into Okataina 12. We know that objections to the proposal were called for, and that none were made. But this does not tell us a great deal about the extent of consultation beforehand, or even the extent of information which had been available to Whakapoungakau owners. There were 414 owners in the block at the time. The court proceeded to amalgamate Whakapoungakau 4K2E2 and other
Waione and Okataina lands into the new Okataina 12, at the same time creating the Okataina 12 Trust of which New Zealand Insurance was made responsible trustee. One of the purposes of the new trust was stated as being ‘to negotiate exchange of land with the Crown.’ As responsible trustee for both Rotoiti 14 and Okataina 12, New Zealand Insurance was clearly now well placed to deal with the Crown in the matter.\(^{559}\) The 12 advisory trustees for Rotoiti 14 were also made advisory trustees for the trust over Okataina 12. It is suggested that they were now trustees for lands in which they may not have been owners.\(^{560}\)

In July 1971, final orders for exchange were made. Okataina 12 and part of Rotoiti 14 passed to the Crown. The former Whakapoungakau 4K2E2 block thus became part of the Crown's Lake Okataina Scenic Reserve. In exchange, the owners of Okataina 12 and Rotoiti 14 were given Ruawahia 10 (otherwise known as the Makatiti Dome), and Matahina 10. Under a new order issued on 19 July 1971, these two areas, totalling some 7000 acres, were amalgamated with the remainder of Rotoiti 14, and Rotoiti 15 came into being. The new block was vested in New Zealand Insurance to lease to Tasman.\(^{561}\)

This was not, however, the end of the matter. In October 1982, the Director-General of the Department of Lands and Survey informed his Minister that:

the Department has sought 2470 ha of Maori land (Makatiti Dome) for reserve purposes. To equate[,] the Department has offered 2491 ha of Crown land (Rerewhakaitu) to the Maoris in exchange.\(^{562}\)

The exchange was effected in July 1983.

While we are not in a position in a generic inquiry to make findings on Ngati Rangitaeorere’s specific claim, the claimants made plain to us their dismay at the effect of all these various transactions. They emerged at the end as small shareholders in a large block with which they had no cultural association. While there are various factors at work here – the anxiety of the Maori owners of the original 33 Rotoiti blocks to enter into a forestry lease with Tasman; the Crown’s wish (we might say determination) to add land to the Okataina Scenic Reserve; the unavailability of the land at the outlet of Lake Tarawera that the block owners sought from the Crown – a key point seems to us to be the powers that the trustees of the Rotoiti 14 block were able to assume from the time of its amalgamation. A large new entity had come into being, anxious to complete a deal with the forestry company. Other blocks were drawn in to the project. It is likely that the voice of the Whakapoungakau owners was lost in a decision of great importance affecting them, in a system which did not place great emphasis on the active involvement of block owners. In the context of the overall enterprise with Tasman Pulp and Paper, and the Crown's anxiety to secure land for the scenic reserve, the rights of a small body of discrete owners, Ngati Rangiteoerere, were perhaps overlooked.

**The impact of Europeanisation in the Central North Island Inquiry region:** In terms of Europeanisation of Maori land after the Maori Affairs Amendment Act 1967 was passed, the evidence before us indicates that when the Act came into force, the Aotea land court district estimated that it had 2007 titles with four or fewer owners, while the Rotorua district estimated 4640 titles.\(^{563}\) By 1972, in the Rotorua district, 1871 titles embracing 14,418 acres had become European land under the provisions of part I of the 1967 Act.\(^{564}\) Declarations were issued under part I of the Act, in Kaingaroa inquiry district, for a total of 514 acres, and for Taupo inquiry district, for a total of 18,546 acres.\(^{565}\) A large number of status declarations were for residential and 'other sections' in both urban and rural areas.\(^{566}\) Within the inquiry region as a whole, 1577 hectares (591 blocks) became general land under part I of the Act during the 1960s, and another 923 hectares (338 blocks) during the 1970s.\(^{567}\)

We note that the initial approach of the Department of Maori Affairs to the implementation of the Act was to prioritise the work of Europeanisation, and to rank it above all other title improvement work except development amalgamations. 'It is the intention' wrote the Deputy Secretary of Maori Affairs, 'that as many blocks
Map 11.4: Land absorbed into Lake Okataina Scenic Reserve, including Whakapoungakau 4K2E2 block
be got rid of as soon as possible by the issue of status declarations. District offices were to take a proactive approach and begin examination of titles at once, listing every block with four owners or fewer which met the requirements of the Act. This work proceeded at speed, such that there was concern that the district land registrars would have difficulty processing them, and they would have to be ‘fed’ to them in batches. Belgrave and Young conclude that

officials at both Head Office and the Rotorua Office saw the . . . amendment as a quick and simple method of getting Maori land off their books and into the general land transfer system.

They do note that some Maori landowners ‘wanted their land to be declared European land’; the files show that many of these were sole owners of Maori land and the land they owned was residential sections. A number of requests for status declarations came from owners wishing to sell their land, or from owners wishing to use their land as security for a mortgage or seeking development finance. There was very little evidence on the files of Maori opposition to the issue of status declarations; and only one letter of complaint, involving a block of land outside Rotorua district.

On the evidence before us we are not able to comment on the extent of prejudice to Maori owners in the inquiry region as a result of the change in status from Maori to general land under the legislation. We would however make two observations. First, it does not seem surprising that sole owners in particular should have sought such a change; clearly it must have made sense to these owners to improve the title of land which under the Maori land legislation had second-class title. Secondly, we are not aware of the proportion of owners who sought a change in the status of their land, as opposed to those who did not. As we have pointed out earlier, there was no requirement for owners to be consulted while investigations into status change were under way – or, unless unpaid charges on the land were discovered, when the status was changed. It is very likely, then that an unknown number of owners may have had the status of their land changed without their knowledge.

Certainly the period during which status declarations were made was relatively short. By 1971, the Rotorua office was planning to scale down their Europeanisation work. One reason, according to the deputy registrar, was that in a ‘large number’ of cases land had been vested in trustees under section 438 of the Maori Affairs Act 1953. In other words, there was a move to protect Maori land by using this provision. The provisions relating to status declarations were repealed in 1974, and owners could apply to have land which had been declared general land converted back to Maori title. But we note nevertheless that a high number of titles had been declared general land while the provisions were in force.

Were Maori land titles protected under the land transfer system? We pause at this point to comment on a matter which seems to us germane to any consideration of Maori land title, namely the adequacy of registration provisions for Maori land.

Detailed criticisms of the failings of the registration system of Maori titles were made by the Royal Commission on the Maori Land Courts which reported in 1980. It considered that there should be immediate implementation of a scheme to bring the title records for Maori land under the same administrative system as that for general land, so that Maori could overcome ‘many of the disadvantages . . . which are a direct consequence of a second-best system of land registration’.

It pointed to the fact that because a system had developed of recording the ownership of land within the Maori Land Court, large areas of land had not been brought within the land transfer system; or if it had been the records relating to it were deficient or out of date. In effect there was a dual system of ownership, which in its view had created a situation confusing to Maori and frustrating to lawyers. Partial registration in the Land Registry Office was ‘extremely dangerous’, bringing into question the guarantees of the
Land Transfer Act. And Maori were thus at a considerable disadvantage in dealing with their lands compared with Europeans because of the ‘cumbersome, inefficient’ system of records of Maori land.

By way of example, the records of many partitions were held only in the Maori Land Court, even though, when the court partitioned Maori land, the resulting order created a legal estate and not merely an equitable interest. (Figures supplied for the Waiairiki district, centred in Rotorua, showed that there were 4455 unregistered partition orders, the highest in the country; 2148 unsurveyed partition orders, the third highest; 320 unregistered roadway orders; and 624 unregistered leases.) Thus, two registers or records of title to Maori land coexisted.

Yet even if a Maori owner had legal title as shown in the court records, the commission pointed out, he was ‘disadvantaged in his dealings with it.’ Lacking an indefeasible title, as given by a certificate of title, it might be difficult for owners to mortgage their property.

Non-registration of Maori Land Court orders prohibits lessees of unregistered leases of Maori land from being eligible for development loans offered by the Rural Bank. Although a Maori Land Court title provides proof of ownership it is not considered satisfactory security by many lenders.

So there was no certainty of title, and it was needlessly expensive to maintain a dual system of land registration. Yet the Department of Maori Affairs itself questioned whether it was ‘remotely practicable’ for all Maori land to be on the land transfer register.

In many cases the only impediment to registration of orders was the failure of the parties to have the orders lodged and pay the registration fees. If the court registrar sought to do this he would be liable for the fees for which he did not have funds. In fact many orders were never forwarded for registration in the Land Registry Office, because the registration fees were not paid, or because there was no acceptable survey.

In the commission’s view there were two main obstacles to the registration of all Maori freehold land in the land transfer register and the issuing of certificates of title:

a. the large numbers of partition orders which had never been surveyed (28.9 per cent of all Maori titles, that is of the area of Maori land). Even if the unsurveyed partitions were completed by survey, they stated, many would not meet the requirements of the current law.

b. the multiple ownership of most blocks of Maori land, and incomplete ownership lists, which conflict with the purposes of the Land Transfer Office.

The commission noted that the problems had been known for many years. In 1965 the Prichard–Waetford report clearly recognised them – but they had become worse since then. According to an estimate from the Surveyor-General, some 269,580 hectares (666,146 acres) would need to be surveyed, at a total cost estimated at $2.1 million. A further estimate showed that if the Government provided for partition surveys at the rate of $50,000 a year, it would take about 40 years to survey all unsurveyed land. Moreover, as the commission pointed out, the experimental exercise showed that figures given for unsurveyed partition orders contained errors.

The commission considered that Maori would derive real advantages from a state-guaranteed system of land title under the control of the Land Registry Office. This would give a simpler system, with certainty of title and thus access to loan finance. An up-to-date record of title would also enable steps to be taken to amalgamate uneconomic blocks. It went on to make a number of recommendations so that the problem might be tackled immediately, including a study of how best the ownership records of Maori land could be transferred to a central office of land record, or the Land Registry Office, the establishment of a working party, facilitating the provisional registration of titles, and recording multiple ownership lists in the Land Transfer Office.
MJ Miller, the District Land Registrar in Napier, pointed out that the provisional registration of titles had always been provided for under section 50 of the Land Transfer Act 1952; but what was needed was the repeal of section 34(9) of the Maori Affairs Act 1953, which prevented the signing and sealing of freehold, partition, and certain vesting orders of unsurveyed land until a plan of the affected land had been prepared so as to meet the requirements of registration under the Land Transfer Act 1952. Provisional registration of Maori freehold land would mean that most of the indefeasibility provisions in the Land Transfer Act would 'apply to it and any instrument such as a mortgage or lease could be registered against it.' It would not be guaranteed as to survey, but this should not be a problem as it would be protected from attack by adverse possession (section 21 of the Land Transfer Amendment Act 1963).

It seems remarkable that as late as 1980 solutions were still being considered for recording multiple-ownership lists in the land transfer register. The Surveyor-General suggested that the entry on the certificate be 'Maori Owners' when the number of owners was greater than the allowable Land Registry Office limit. The court would be responsible for holding an up-to-date ownership list. The Auckland District Law Society suggested that the court compile updated lists of owners, and forward them to the district land registrar; or, that the Maori Trustee should go on the certificate of title as bare trustee for the owners. The trustee would have the legal estate, but the equitable interests of the owners would be dealt with by the court. K Morrill of the Department of Maori Affairs suggested that when blocks had an ownership list over a fixed limit, say 100, the owners should be required to form an incorporation or appoint section 438 trustees to administer the block. The incorporation or the trustees would then become the legal owners of the land and be recorded as such in a Land Transfer office, maintain an up-to-date list of shareholders or owners; have power to alienate; distribute rent; and take over from the Maori Trustee his rights and responsibilities of policing the covenants of leases.\textsuperscript{582}

In the aftermath of the report, the Minister of Maori Affairs, Ben Couch, proposed to introduce legislation to assist Maori land in to the land transfer system, with a limited statutory exemption of registration of the Maori Land Court from payment of Land Transfer office registration fees, and compulsory registration of a wide range of Maori Land Court orders. He believed that few Maori would be persuaded to register their land title if they had to pay a fee.\textsuperscript{583} It is, in our view, a measure of how distanced Maori owners were from the land transfer system that the Minister himself suggested that they would not consider such registration had any advantage, since they already had Maori Land Court title. The Registrar General of Lands agreed that the wholesale registration of Land Court orders necessary to achieve the total integration of titles in the land transfer system could only be accomplished if the Government accepted responsibility for meeting the registration fees.\textsuperscript{584}

In 1983, the Maori Council, in its discussion paper \textit{Kaupapa}, would also urge that all Maori Land Court title orders be duly registered and that the necessary surveys be carried out, so that Maori owners were assured of the 'most secure title.'\textsuperscript{585} Te Ture Whenua Maori Act 1993 finally required all orders made in the Maori Land Court affecting title to land to be registered under the Land Transfer Act 1952.\textsuperscript{586}

The report of the royal commission, in our view, makes chastening reading. It draws attention in no uncertain terms to the lack of certainty of Maori titles, to the fact that this had been long known, and to the difficulties Maori owners would face as a result. Registration of Maori freehold titles had been provided for since 1874.\textsuperscript{587} The Native Land Court Act 1894 declared that all ‘customary land’ (defined as land whose owners had been ascertained by the land court) at the date the Act came into force was subject to the Land Transfer Act 1885, and every native owner of such land was deemed the owner in fee-simple, subject to all equities and existing restrictions on alienation. Further, when the court
ascertained the title of ‘Native land’ (defined as land whose owners had not previously been ascertained), the registrar of the court was to forward the order to the district land registrar, who was to issue a certificate of title to those named in the order, and enter the order on the Provisional Register, whereupon the provisions of the Land Transfer Act 1885 applied. However, while the Native Land Court Act 1894 provided that every order affecting land could be registered, it did not require it.

Indeed, despite frequent revision of the legislation governing Maori land, the mandatory registration of all orders affecting title to Maori land – including partition and succession orders – did not eventuate until almost a century later. For example, the Native Land Act 1909 provided that land included in any freehold order became subject to the Land Transfer Act 1908. Other orders could, as a matter of law, be registered, but it was not required. Both the Native Land Act 1931 and the Maori Affairs Act 1953 continued that approach. It was not until the enactment of Te Ture Whenua Maori Act 1993 that all orders affecting or relating to title to Maori freehold land had to be registered under the Land Transfer Act 1952.

It is true that Maori may have reacted to a title system they disliked by resisting registration; they may also have found the costs of registration, and especially survey, simply too hard to meet. But the Crown’s failure to ensure that the system was working, we may suggest, had long-term prejudicial effects, still evident today. Multiple title was hard enough for lenders to cope with. Unregistered multiple titles were worse. The outcome of the way in which Maori titles were recorded was the pervasive and lasting view among lenders that Maori land was a low value, high risk proposition. And, as has often been noted, the difficulties owners faced securing finance, as well as the limited options during the first half of the century for community decision-making and management, led in many cases to owners’ decision to sell their interests.

This leads us to ask why it has taken so long to address what was clearly such a major problem for so many New Zealand landowners. The Maori Freehold Land Registration project, recently established, is finally doing just that. But the Privy Council judgment in 1905 should have served as a warning to the Crown of the jeopardy in which Maori titles stood. As the Turanga Tribunal pointed out, the Privy Council reversed the decision of the New Zealand Court of Appeal on three Turanga cases. In a single consolidated judgment, it found that unless there had been fraud, no irregularity in the land court’s processes could disturb the registered proprietor’s title.

Ninety years later, that judgment would be echoed in the High Court. In the Registrar-General of Land v Marshall, the court made its much-cited dictum on the importance of security of title: ‘if there is any area of the law in which absolute security is required – without any equivocation – it must be in the area of security of title to real property.’ The case, ironically, had arisen ultimately from the fact that the Land Transfer Office and the Maori Land Court had different people recorded as owners of the same parcel of land. The court held that the registered proprietor’s title defeated the claims of the block owners as recorded by the court. It acknowledged that the court:

is an important institution in New Zealand. It is an institution to which many Maori in fact look before turning their attention to the Land Transfer Office. Maori rightly regard the Court as an important guardian of their interests. But at the end of the day . . . there can by no equivocation on a matter of such importance as where paramountcy of title lies.

This being the case, it is our preliminary view that the Crown had a Treaty obligation to ensure that Maori owners were protected in their land titles. The Maori Land Court became the repository over time of a remarkable record of the origin and transmission of Maori freehold titles, designed, as Judge Durie put it, ‘so that owners might know what they own.’ If the Crown could not guarantee Maori freehold land titles, it should in our view have ensured that the procedures it initially put in place for the registration of Maori titles in the land transfer system were working. Nor, in our view, should it have relaxed them. It should, at the very least, regularly have monitored
the implementation of its procedures and considered how to address any shortcomings that were evident. Maori landowners, under article 3 of the Treaty, were entitled no less than owners of general land, to indefeasibility of title.

The Tribunal’s conclusions on the Crown’s approach to mitigating title problems

As we indicated at the outset, the impact of the Crown’s Treaty breach in shattering the existing system of community rights and decision-making over land, providing for individualised titles, empowering the court to determine succession, and vesting alienation rights in individual owners and their successors, was inescapable for Maori owners. We have been concerned here with examining some of the Crown’s twentieth-century policies in mitigation of this key breach.

The history of Maori land titles in the twentieth century makes sobering reading. We have no difficulty agreeing with Belgrave and Young that Maori retained their land, to the extent they did, despite the title system, not because of it. It is clear that the Crown did become quickly aware of the extent of the problems, and that it did try to address them in various ways. But for much of the twentieth century its main solution was to complete the process of individualisation. This, in our view, was the heart of the problem. The collision between a private-property-owning society and an indigenous society whose property rights were held collectively on the basis of kinship was a long and painful one. Crown actions were based for decades on the belief that if enough pressure and persuasion were applied, Maori would fall into line. That Maori leaders were saying the same kinds of things in the 1970s as they had been saying in the 1870s about their wish to manage their own land seems to show that this was a battle the Crown could not win. Yet Maori did not win either.

Crown policy may be seen in the context of the broader determination of colonists everywhere to impose individual title – but in New Zealand there had been a strong history of resistance to such policies, which the Crown nevertheless largely overrode. Maori leaders in and out of Parliament struggled against state preoccupations which were generally not in tune with their own: the land settlement agenda of the early decades of the century, which still reflected colonising impulses; maximum land productivity through individually owned family farms (and an evident determination to see Maori communities as an obstacle to this vision) and, by the 1960s, integration and a uniform law – including a uniform land law – for all.

In these circumstances a politically astute leader such as Ngata tried to trim his sails according to the wind, and to salvage as much as he could for Maori owners along the way. But if the Crown heard what he and his Maori colleagues said about what made Maori society tick, it was not listening. Dr Te Rangihiaho, who became our foremost contemporary anthropologist, facing Herries’ habitual assault on communal tenure in a debate in the House in 1911, explained to Parliament the historical importance of Maori social organisation, of relationships at a tribal and subtribal level, and of family interests in land. There was great difficulty, he said, in working out a system whereby shares could be allotted equitably to individuals. Ngata himself was upbraided by the royal commission investigating his land development schemes in 1934 because he would not give his unequivocal support to individualised title. In a Government paper in 1931, he pleaded for recognition of Maori social organisation, and the role of chieftainship, if any land settlement schemes were to be successful. Though the institution of chieftainship had been, he suggested, ‘modified in form and reduced in status and in its appeal to the individual members of a family or sub-tribe or tribe, although overlaid by the cult of individual equality and freedom, it is one of the most persistent elements of the ancient regime.’ And intimately connected with chieftainship were tribal organisation, tribal relationships, tribal cohesion. Professor Belshaw wrote in 1940 about the impact of individualised farming on community relations, which bothered him:
One cannot expect to fit Maori settlers into an individualist farm economy without weakening existing community relations and traditions. The more successful is the policy of training them as commercial farmers, the more probable it is that the character of community relations will change.\textsuperscript{600}

Yet 20 years later the Prichard–Waetford report was still unencumbered by any sense of Maori cultural values.

We have acknowledged that the Crown's title-simplification policies were well-intentioned, but we have also stated that we do not think that good intentions were enough.

Both consolidation and conversion were eventually admitted to be failures in terms of stopping the fractionation of title. We conclude that they had not really been carefully thought-out solutions. Rather, they had proceeded from a certain belief that the key objective was individualisation. It was almost an article of faith that therefore, they must work. (In Ngata's case the objective may rather have been to secure the support of his colleagues for schemes which had to be funded, and which could also bring the local bodies on board, as they saw the hope of individual farms paying rates.) We might well regret the energy applied to such solutions, that might more profitably have been applied in more appropriate directions. As Dr Harris argues:

Decades of effort, and human and material resources were put into consolidation, amalgamation and other devices of title improvement . . . Ultimately, though, the great emphasis placed on title improvement was unwarranted . . . No title improvement method ever prevented what the government considered to be the root of the problem: succession, which entered new owners into the title every time an existing owner died . . .\textsuperscript{601}

A further Crown policy was to ensure the removal of owners from titles: either owners could do it themselves, or it would be done for them. From the early decades of the twentieth century, for whatever reason, owners either made decisions – or were called on to make them (if required by the court) – to sacrifice the individualised rights to which at the outset the court had not only said they were entitled, but which they must have. These, we underline, were the rights which replaced the community-held and community-protected rights of the pre-Native Land Court era. The new tenure system had required Maori to surrender the protection of the community; the question, then, is the extent to which the protections of the new law which replaced it worked. We do not know how many people may have lost their connection to their land because of decisions the court made over their head. Nor do we know how many may have forfeited the right to participate in decisions about the alienation or management of their land – who never even got to first base in such decision making because they were not legal successors. It is clear however that if the property rights of some Maori may have been protected by the Native Land Court succession system, those of all Maori were not.

We conclude that incomplete and out-of-date lists of Maori owners, substantial amounts of unsurveyed land, and widespread non-registration of title under the Land Transfer Act all pointed to a system that was not serving Maori. We note the Crown's emphasis on alienation as a fundamental property right. We consider other property rights of Maori owners should also have been upheld in the new tenure system: the right to secure, registered title; the right to protection of successors' rights; and the right of owners not to have compulsory decisions made over their heads (for instance in respect of partitions). In short, Maori owners had the right not to be divested of the property rights with which the new tenure system had provided them in place of customary titles without their consent. The Crown suggested to us that Maori valued bilinear succession – and we accept that Maori of necessity adapted to the new system, which offered them the only way of preserving links to ancestral land – but that, in our view, underlines the Crown's obligations to preserve the rights of successors. Solutions to title dilemmas like conversion and Europeanisation, where they removed choice from Maori owners, compounded rather than mitigated the original breach. A solution as drastic as the removal of property
The Legacy of the Nineteenth Century

Maori continued therefore to be prejudiced by the title system both economically and culturally. We add that there was also a high social cost. We refer to the prejudice to Crown–Maori relations because of the perceptions of a Pakeha public which did not understand the title problems Maori faced. Corbett, in introducing the Maori Affairs Act 1953, referred to this problem (which he hoped his legislation would assist). The view that any land covered in gorse and blackberry ‘must be Maori land’ is enshrined in rural folklore. But the underlying cause, the relationship between the ‘fragmenting effect of succession to interests in Maori land and the cumbersome procedures whereby land under multiple ownership is administered’, was not understood. As Professor McHugh noted in 1983, it reflected the ‘popular pakeha image of the Maori and his land as lazy and idle.’

The Tribunal’s findings on the Crown’s attempts to simplify titles in the 1950s and 1960s

- In this inquiry, the Crown has indicated it accepts some responsibility for resolving fragmentation of title which was the outcome of its native tenure system. We cannot in fact see that it has any alternative. We have endeavoured to assess the adequacy of the Crown’s response, as it suggested we should. But we must begin by stating that Crown attempts must be seen in the context of the awful dilemmas that the new tenure system had already created for Maori owners. In our view the Crown simply sent a number of ambulances to the bottom of the cliff.
- The Crown’s attempts to mitigate Treaty breaches through various forms of title simplification were well-intentioned and sustained. They must also be considered alongside provisions for trusts and incorporations, which we discuss in our next section.
- Both the 1953 Act and its 1967 amendment contained provisions which must be considered in breach of the Treaty.
- The 1953 conversion provisions that applied on succession, leading to disinheritance of individuals and families who had thus far succeeded in retaining their interests in land, amounted to a breach of article 2 rights, and of the Crown’s duty of active protection. Provisions that interests might be offered by the Maori Trustee to ‘any Maori’, while well-intentioned, ignored the importance of ancestral rights and of kinship, and assumed that recognition of ethnicity was appropriate as a basis for the assumption of land rights. The provisions were also discriminatory in applying coercive provisions to Maori property rights and were thus in breach of article 3 rights.
- Provisions in the 1967 Act, similarly coercive, notably for the Europeanisation of Maori land with no more than four owners, were also in breach of article 2 rights, and of the Crown’s duty of active protection; and, because discriminatory, were also in breach of article 3 rights. This includes the provisions which, as we will see, radically altered the nature of incorporations, changing the status of land invested in them from Maori to general land, and transforming the interests of owners in land into shares in the incorporation. The breach was mitigated to some extent by section 57 of the Maori Affairs Amendment Act 1974, which allowed Maori landowners to have the status of land that been changed in 1967 restored to Maori land, provided certain conditions were met; and for incorporations to apply similarly.
- The prejudice to Maori owners, including Central North Island Maori owners, extended beyond the direct prejudice to those who lost their interests in land. The broader prejudice was to Maori owners generally, who bore the brunt of Government analyses of the title difficulties they faced, and of a climate in which it was expected that owners would divest themselves voluntarily of small shares in land, as being in their own best interests, and those of other owners.
Our subsidiary questions are:

- Were early twentieth-century legislative provisions for trusts and incorporations appropriate for Maori owners who wished to manage their own land collectively?
- Have provisions for trusts and incorporations since the mid-twentieth century been a reasonable Crown response to the difficulties Maori owners faced in utilising and managing their land and assets, given the problems of individualised title?

**Introduction**

Having examined two twentieth-century Crown approaches to Maori difficulties in managing their land arising from the individualisation of their titles – the early provision of Crown entities such as land councils and boards, and various Crown provisions for title simplification – we turn in this section to a third Crown approach to overcoming or sidestepping title difficulties. Trusts and incorporations offered a potential solution for Maori who wanted to overcome these difficulties, and control and manage their own economic development. This section looks first at initial provisions for Maori land incorporations, dating from 1894, and early provisions enabling Maori owners to place their land in trust. Secondly, we examine trusts and incorporations from the 1940s through to the end of the century. We will consider key legislative provisions relating to trusts and incorporations, and ask whether they have met Maori wishes to enable the management and development of their own land and assets, to overcome the constraints of the title system, and to provide them with accountability and appropriate benefits. It is generally accepted that Maori trusts and incorporations – because they represent Maori landowners and their interests – are unique institutions which have to balance cultural and commercial considerations in their operations. Their emergence as an important land-management structure for Maori should be seen in the context of political and cultural pressure by Maori leaders, organisations, and politicians to ensure that no more Maori land was alienated.

Trusts and incorporations became institutions of importance in the Maori world, and in the Central North Island, during the twentieth century. In the early twentieth century, incorporations were adopted to a small degree in the region, though they became popular from the middle of the century both for timber development and for farming. The growth of trusts began in the late 1960s, under section 438 of the Maori Affairs Act 1953 (hence the term ‘438 trusts’), and an amendment to the Act in 1967, and their numbers proliferated during the 1970s and 1980s. The amount of land vested in incorporations remained reasonably static from the 1960s to the 1990s, while the amount of land placed in trusts has continued to increase since the 1980s.

**The nature of incorporations**

It is often said that when incorporations were introduced in the Maori Land Court Act 1894, they were designed to facilitate the alienation of land. That, to some degree, is correct, but they were also an attempt to solve the emerging problems of overcrowded block titles. This model of corporate management was available to Maori landowners so that they could more easily manage their lands. The owners could elect a committee of management to carry out the powers and functions of the body corporate. The committee of management administered incorporations in accordance with Maori land legislation and regulations. Before 1967, owners held beneficial interests in the land. A radical change came with the Maori Affairs Amendment Act 1967 which converted owners’ interests in land into shareholdings in the incorporation, so that incorporations more closely approximated commercial or limited liability
companies.606 This provision led to strong Maori protest, though it was not until the enactment of Te Ture Whenua Maori Act 1993 that the owners’ full beneficial interests in land were restored.607

Trusts

The Crown made early statutory provision for Maori land to be placed into trusts. But really the main developments in trust law occurred following the enactment of the Maori Affairs Act 1953 and its amendments. Trustees were able to manage one or more blocks using this structure, and Maori owners came to assume a role as advisory trustees alongside the responsible trustee (often the trust department of a commercial company, or the Maori Trustee). All modern Maori land trusts are created by order of the Maori Land Court.608 ‘Trusts are administered in accordance with their trust orders and the Maori land legislation, often but not always drawn up by the landowners and ratified by the court. These provisions enabled the creation of trusts to manage Maori land for the benefit of Maori or any group of Maori.

Our concern in this section is to provide a basis for assessing the extent to which trusts and incorporations were of assistance to Maori in managing their land over the greater part of the twentieth century; in part IV we consider how useful they have been to Central North Island Maori in development.

Claimant and Crown approaches

The claimants accept that trusts and incorporations have offered a number of relative advantages in the administration of Maori land, including: providing a basis for coordinated decision-making in respect of land; reinstating a degree of tribal authority over the land; and, potentially, providing security for raising finance for development. In providing for various forms of trusts and incorporations, the Crown has offered Maori alternative landowning structures to move them away from multiple individual holdings and its accompanying problems.609

In general terms, the claimants said that they have no significant differences with the Crown; that incorporations and (especially) trusts are popular and effective means of Maori land administration. These are the models that have been provided by legislation, and therefore Maori use them. Te Ture Whenua Maori Act 1993 has significantly expanded and improved the law relating to Maori trusts.610

But the claimants cautioned that ‘however progressive and enlightened’ provisions of today may be, they cannot undo the legacy of decades of Crown purchasing and Maori alienation and the impact of these policies on the amount of land retained by Maori, and its quality.611 Also, in a number of respects, trusts and incorporations ‘continue to carry forward some of the debilitating effects of individualisation.’612

The Crown has submitted that trusts and incorporations ‘have played a vital role in allowing Maori to manage and control their land’. They have also assisted ‘in ameliorating the impacts of multiple owners on a title and share fractionation.’ They are fundamental to an assessment of the Crown’s legislative provision for the administration of land in the twentieth century.613

Early twentieth-century legislative provisions for trusts and incorporations

Were early twentieth-century legislative provisions for trusts and incorporations appropriate for Maori owners who wished to manage their own land collectively?

Introduction

The notion of using trust law as a means of overcoming title difficulties has a long history in Maori land law, albeit with paternalistic connotations. For example, the Native Land Laws Amendment Act 1897 enabled Maori owners to convey their lands by way of trust to the local commissioner of Crown lands, the Surveyor-General, or some other
person appointed by the Governor in Council. However, this provision was little used in the Central North Island. The Maori Lands Administration Act 1900 also provided for the transfer of land to councils by trust, for councils to lease, ‘cut up’, manage, or improve. The land councils, as we have seen, were short-lived, but a very small amount of land in the inquiry region was vested in them voluntarily. We have referred earlier in this chapter to circumstances in which land might be vested in land boards by the Native Minister.

The Crown also made early provision for Maori owners to establish land incorporations, and elect a committee of management, in the Native Land Court Act 1894. Over the next two decades these provisions were progressively expanded to extend the powers of the committees, including their powers to manage and develop land. The Stout–Ngata commission expected incorporation to be taken up quite widely in Rotorua, where owners expressed considerable enthusiasm in 1908, but only about a quarter of the lands designated were in fact brought under incorporations.

**The claimants’ case**

The claimants, noting early provisions for incorporation in particular, considered that the intent of the 1894 incorporation provisions was to simplify the alienation of multiply owned land. They drew attention to the limited quantities of land incorporated in the Rotorua thermal springs district, suggesting that this was because the Native Minister opted not to initiate applications, as he was required to. They noted ‘some provisions’ for incorporations to obtain finance, but pointed also to the fact that incorporating did not in itself make finance any easier to get.

**The Crown’s case**

The Crown also commented briefly on the early provisions for incorporation, and on their ability to access finance. Counsel directed our attention to the regulations issued under the Native Land Court Act 1894, and challenged the conclusions of the authors of the “Trusts and Incorporation Report’ that the legislation encouraged alienation of lands by incorporations. The Crown submitted also that provisions under the Native Land Laws Amendment Act 1897 for owners, or their incorporations, to vest their land in a competent trustee, while seeming ‘paternalistic’ today, might also be seen as ‘appropriately protective’ on the part of the Legislature.

**The Tribunal’s analysis on early legislative provisions for trusts and incorporations**

The main point to be made here is that the title system was in such an obviously problematic state that by the late nineteenth century, it was already apparent that some form of corporate management or agency was needed to facilitate utilisation because of overcrowded titles. In developing policies designed to address this problem, it appears to us that there were obvious tensions. On the one hand was emerging recognition that the Crown should provide some solution to the problems of the Maori land title system, while, on the other there was the widespread view that Maori land should be made available for settlement. In other words, Maori should alienate the land they could not utilise. Thus the models for corporate management must be considered within that policy context. We turn now to consider if the models provided were capable of addressing the difficulties plaguing the Maori land title system.

**Trusts:** There were several trust models or arrangements akin to trusts available to Maori landowners at the turn of the twentieth century, although none were widely adopted by Central North Island Maori during this period. There was the early provision for the Public Trustee to control Maori lands which, as we have seen, Maori in this inquiry region found unacceptable. The Stout–Ngata commission rejected this model in 1907, on the grounds that it concentrated too much control in a Department that was not in close touch with the Maori beneficiaries. Moreover, it had primary obligations and responsibilities that were not always in the interests of the beneficiaries, and exercised a level of control that was distasteful to Maori.
A second form of trusteeship for Maori land – referred to by the Crown as an option for addressing the difficulties holders of land in multiple ownership faced in raising finance – was the provision for Maori owners to vest their lands in a trustee, generally the local commissioner of Crown lands or the Surveyor-General, so they could be used as security for loans. This was provided for under the Native Land Laws Amendment Act 1897, and was not well received by Maori either. The Stout–Ngata commission noted that, by 1907, very little land had been conveyed to trustees under the 1897 Act, and ‘[i]t is practically a dead letter’.  

A third model was that of the Maori Lands Administration Act 1900. As discussed earlier in this chapter, the 1900 Act created Maori land councils, to which Maori could convey their land in trust. The terms of the trust were to be agreed between owners and the council. The council could lease the land, collect the rent payments, distribute income to the owners, and pay debts owed against the land. Despite the possibilities of this form of trust, little land was voluntarily vested in land councils in the inquiry area: only 1326 hectares (3277 acres) in Rotorua and 7313 hectares (18,071 acres) in Taupo. Ngati Tuwharetoa had clear views on the role and usefulness of the councils. They found for instance that when it came to using lands as they wished, the councils actually lacked sufficient authority to implement owner proposals. Owners might take their proposals to Maori members who were respected people of experience, and gain approval from them; but then a report had to be prepared and sent to officials to gain the necessary authority, and delays meant that the proposals might not in the end be viable. Yet new applicants were required to go through the whole process again. Te Heuheu Tukino, giving evidence in 1905, referred to the Ohutu block as an example of land handed to the local council where there had not been any benefit in return for the owners.

On the basis of the evidence before us, we are of the view that early provisions for trusts were not capable of meeting Maori concerns regarding the land title system. The land councils and the trust relationship created when the land was vested in them, might have worked to the satisfaction of owners if the councils had survived and been properly resourced, and with the ability to work with owners on terms that both parties agreed on. After the councils were superseded by land boards this was not really an option.

**Incorporations:** Incorporations were the other early model available to Maori owners who wished to maintain some semblance of collective control over their lands despite the individualised title system. The Native Land Court Act 1894 was passed in the wake of clear Maori dissatisfaction with the committee system of 1883, and Ballance’s 1886 committees (which we have discussed in chapter 6). The Native Land Commission in 1891 had described the Native Committees Act 1883 as a ‘hollow shell’, mocking Maori with a ‘semblance of authority’ when they had wanted a ‘living Act, giving them power to do something for themselves.’ The inquiry also took evidence from Maori leaderships, including Ngati Tuwharetoa. Tuwharetoa wanted tribal committees to deal with their land and they wanted Government support for these to make them effective. However, they preferred that once the tribal committees were legally recognised they should manage their lands themselves, without joint management with a proposed Government commissioner. The report of the 1891 inquiry recommended the establishment of a board with Maori representation to manage and utilise lands, under the direction of owner committees. The Government did not take up this recommendation at the time, though the idea of a Crown management agency with Maori representation was briefly a focus of Government initiatives in the first years of the twentieth century.

It does not seem that the Government intended incorporations to be widely taken up, but rather intended that they be used in remote areas where the main policy of title individualisation was not likely to lead to land development. So, for example, at least something could be done with lands where the soil was unsuitable for small family farms. Seddon noted that incorporations would be particularly suited to the East Coast.
The tension in Crown policy can be readily seen in the provisions of the native land legislation dealing with incorporations. Regulations made under the 1894 Act, gazetted in 1895, provided that committees of management could mortgage (as well as sell and lease) land, and could raise investment money through the Public Trustee for the purpose of either settling the land or stocking and farming it. The regulations stated that the committee had ‘full power’ to ‘withhold any land from sale’ for the purpose of farming it for the owners. We will consider this further in part IV of our report.

The committee might also occupy and manage the land as a farm, and borrow on the security of crops, stock and property. But to mortgage the land, it needed the consent of the Governor in Council to borrow from a State Loan Department. This money would be paid to and spent by a land board. In short, it was anticipated that incorporations would manage and commercially utilise their lands. As will be discussed in our part IV, a number of provisions were also passed during this time to better enable incorporations to borrow money and undertake land improvement for farming.

**Incorporations and land alienation:** In the wake of the difficulties which had arisen for the Crown with the purchase of individual interests in a block, it considered incorporations would be useful for facilitating purchase. Several sections of the Native Land Court Act 1894 related to alienation of land by the incorporations, and what was to be done with proceeds from alienations. The committee of management could alienate all or part of the lands, though the commissioner of Crown lands, or after an appointed official consented. There was no requirement, however, for the committee to gain the consent of even a majority of the owners. The proceeds were to be paid to the Public Trustee, who would distribute them among the owners or dispose of them for the owners’ benefit ‘in any manner prescribed by the Governor in Council’ after deducting his own expenses, those of the Committee, and any charges payable to the Crown. The trustee might, for instance, apply them to paying off any mortgages. These provisions foreshadowed what would become a feature of Maori land law, the role of Public Trustee to receive the proceeds from alienations for distribution to the owners. That role would pass in later years to the Maori Trustee.

Another feature of the legislation was that the Crown could continue to buy individual interests in incorporation land, and there was no requirement that owners selling their shares needed the consent of a majority of owners, or the committee of management. In this respect the incorporated owners had no protection from Crown buying if they were trying to develop their land. This aspect of the incorporation model was well known to the Crown. Seddon explained to Parliament that as long as there was enough money for land purchasing, he anticipated no difficulty in getting as much land as the Government required from the corporate bodies which East Coast Maori would establish under this measure.

Under the 1909 Act the committee might alienate land (for example, by lease), but not sell it unless the Governor in Council consented. However the Crown retained its power under successive Acts to buy land from incorporated owners – either through a resolution of assembled owners, or from the incorporation – without the confirmation of either the land court or a land board. The Crown's failure to provide more user-friendly incorporations, in particular, meant that in the Central North Island Maori owners were limited in the kinds of commercial possibilities they could pursue.

Further moves to facilitate the use of incorporations (though not necessarily with Maori consent) were made in the Native Land Settlement Act 1907, which provided that the Native Minister could take the initiative in applying for orders of incorporation if he thought it desirable that land should be administered and farmed by a committee of the owners. Where the Native Minister made such a declaration he was deemed to do so with the consent of the majority of owners. However, the Native Land Act 1909 removed the Minister’s power and the initiative returned...
to the owners alone. By an order of incorporation the legal owners of the land became a body corporate, and the land vested in it in fee-simple, held in trust for the owners, and their successors.\textsuperscript{634} There was no attempt to bring succession in incorporations to an end; instead, successors would continue to be appointed in accordance with their interests in the land.\textsuperscript{635} The incorporated owners would elect their own committee (who did not have to be owners), which would then be appointed by the land court.\textsuperscript{636}

**Did incorporations appeal to Central North Island Maori?**

It might be expected that incorporations would have been attractive to Maori owners. Certainly in Turanga, where Wi Pere and W L Rees had long been interested in giving effect to community land management, incorporations were adopted with enthusiasm between 1900 and 1910. We note however that W L Rees, who had a long history of involvement with Turanga Maori, filed most of the applications to incorporate before the court, and that, in any case, the majority of the blocks were quickly leased. The Turanga Tribunal recorded the difficulties many early incorporations faced in that area.\textsuperscript{637} In our inquiry region some iwi and hapu groups were persuaded that incorporations might provide a solution to the title problems obstructing the efficient utilisation of their lands, notably Ngati Pikiao who expressed great interest in them to the Stout–Ngata commission. The commission recommended that a number of other groups in the Rotorua district incorporate to lease or farm their lands.

But only one incorporation of note was established in the inquiry region under the 1894 Act: 40,678 acres of the Pohokura block, in 1898, which was then rapidly sold.\textsuperscript{638} Some 10,767 hectares (26,606 acres) were incorporated in the region, following the commission’s recommendations.\textsuperscript{639} This land was mainly in the Rotorua district. In particular, Ngati Pikiao incorporated only about a quarter of the land that had been recommended by the commission. Other smaller amounts were drawn into incorporations over the next two decades, but evidently sold forthwith; by 1940 the net amount held in incorporations across the inquiry region was just 14,153 hectares (34,973 acres).\textsuperscript{640}

The Stout–Ngata commission had recognised that there were generally significant problems and financial hurdles in the path of the establishment of incorporations in the first place, and that legislation surrounding the powers of incorporations was still not clear, raising ‘many disputed and doubtful points.’\textsuperscript{641} Instead, the commission was more hopeful that the Maori land board system might be able to work for Maori interests. From the owners’ point of view, the powers bestowed on the commissioner of Crown lands and the Public Trustee, at the expense of those of the owners, was doubtless a cause of concern, particularly because owners were required to vest their lands in the incorporation. The expenses which might be incurred by the new entity, and the extent to which any financial benefit at all might return to owners, were a complete unknown. Even at the outset, owners could not incorporate until any Crown interest in the lands was partitioned out, and all land court fees and charges paid. A further possible factor in Te Arawa hesitancy has been suggested by Dr Loveridge. The passing of the Native Land act 1909 (after the commission had written its reports), along with the removal of restrictions under the Thermal Springs Districts Act, may have deterred owners from incorporating; the provisions for incorporations placed a great deal of power in the hands of committees. There was no requirement for the committee to gain the consent of even a majority of owners for the alienation of land. The experiences of owners in Rotoma and Tautara blocks in respect of leases by committees of management, in Dr Loveridge’s view, show that such fears were not unjustified.\textsuperscript{642}

In our view, the legal uncertainties pointed to by the Stout–Ngata commission reflected the general reluctance of the Government to ensure such entities were given effective powers at this time when the preference was still for Maori to individualise their lands. Stout and Ngata, who were well aware of this, were supportive of incorporations in their report on the East Coast. There was hardly one block there, they stated, that could conveniently be
individualised. Incorporation was already being tried successfully on one block, with an established farm run by members of a committee, with a manager. This, they suggested, was an important social experiment, marked by a union of capital and labour – for labour on the incorporated blocks was supplied wholly by the landowners or their relatives. European colonists might try it too, to their benefit: a ‘higher village life’ might be led, with better social communication – rural communities, after all, had been established in other countries. And in this context the commissioners felt able to make their main point:

The Maoris are a communal people, and this system, which preserves a community of interest, but also allows and rewards individual exertion, may be the best means of creating a better industrial life amongst a communal people.643

Ngata, however, came to prefer consolidation to incorporation. He later described incorporation as a ‘temporary measure’, which allowed a community to manage and farm its land despite title difficulties, and it is possible that he saw consolidation as conferring the kind of certainty of title which he thought would assist whanau to farm and therefore ultimately protect tribal lands.644 As we have seen, he was also keenly aware of the public-relations advantages of the consolidation process, knowing that the councils and the Government could relate to solutions which involved individual farms – and he was anxious, as always, to impress on the Pakeha public that Maori could be good farmers given the right circumstances. He was thus able to tie consolidation to remission of rates and survey liens – which had important spin-offs in terms of establishing and improving relations with the county councils, and the public. Incorporation perhaps did not seem to him to offer the same benefits.

It is clear is that in our inquiry region incorporations were not taken up in the first decades of the twentieth century to any great extent. We consider this was because they were seen as too difficult to establish, too uncertain, or as providing too few tangible benefits, to be effective. The establishment of an incorporation was a major undertaking, and in our view Maori owners would have needed continuing support and assistance to be convinced of their benefits – as happened with consolidation and with the land development schemes.

The system of Maori incorporations provided for in 1894 and subsequent legislation did enable Maori to collectively manage their land. But in practice there was much more Government concern with individualisation of Maori land, and incorporations were seen more in the light of a temporary solution to crowded titles. It seems that there was thus little enthusiasm for promoting these entities to Maori and ensuring they were an accessible and practicable option. We note that as late as 1961, Dan Kingi, welcoming the Minister of Maori Affairs at Ohinemutu, stated that:

we were under the impression that the incorporation of our lands were not to our best advantage as far as we were concerned and probably not to the best advantage as far as the use of that land could be to the Government . . .

Ngati Whakaue had incorporated their lands not to make an income and provide dividends, but ‘for the purpose of mothering and covering our uneconomic holdings’ so that the rates could be paid.645 And Mr Kingi referred with some enthusiasm to the emphasis in the Hunn report on incorporation to assist land use and benefit owners.646

The Tribunal’s findings on early twentieth-century provisions for trusts and incorporations

- Trusts in Maori land law during this period were capable of addressing title issues in certain circumstances. The early provisions in 1897 for vesting land in trustees to manage, and in 1900 for vesting in trust in land councils, are two examples.
- Incorporations, on the other hand, were the embryo of the notion that provision should be made for Maori landowners to function corporately; and in this way, some of the issues of title fractionation preventing land use might be addressed. The system of
incorporations provided for in the 1894 legislation attempted to create legally recognised entities that would enable Maori owners to act collectively (either for sale or lease of their land, or for its management and utilisation). In that sense incorporations reflected the tension in Crown policy of utilisation whilst ensuring the Crown's ability to purchase shares could continue.

In practice, however, these early trust and incorporation models were inadequate to assist Central North Island owners solve their title and management problems. Given that the Crown had laid the legislative basis for both trusts and incorporations, we think it could reasonably have taken more active steps to increase their uptake by Maori owners – including consultation with Maori owners to establish what the barriers were.

Trusts and incorporations since the mid-twentieth century

In this section we consider the Crown’s attempts to tackle the title problem through trusts and incorporations. We also consider the practical workings of trusts and incorporations as presented in the evidence of the claimants in part IV. We do not analyse the usefulness of trusts and incorporations for development, which we consider in part IV of this report.

The claimants’ case

The claimants, as we have seen, have not disputed that incorporations and (especially) trusts are popular and effective means of Maori land administration. They offer a number of advantages to Maori owners, including a basis for coordinated decision-making about land administration; for reinstating a degree of tribal authority over the land; and raising finance for development. This is not to say that the claimants have no concerns about various aspects of the legislative models.

The claimants contended for instance, that even when owners remained directly in control of the trusts and incorporations for development purposes, there were still issues concerning the extent to which these entities enabled owners to manage their lands in accordance with their own preferences, and the extent to which they can operate without disadvantage in a commercial environment, given competing objectives not faced by other businesses. They were also concerned at the extent to which the entities provide adequate means for managing tensions inevitable in meeting development objectives, such as those between owners and business managers, the distribution of income and the need to build investments, and competing objectives with regard to the use of ancestral resources for development.

Maori, they said, should be left to manage their own lands in a manner consistent with local customs and situations. The Ngati Hinekura submission contended that the laws which govern trusts and incorporations undermined the tikanga of the tribal group, and the mana of the Maori leadership who manage the tribal lands. Some claimants viewed trusts and incorporations as alien structures forced on tangata whenua by the Crown, which have reduced the ability of owners to manage their resources in a manner determined by Maori tradition and tikanga.

Several claims alleged that the laws governing trusts and incorporations sometimes allowed management decisions to be made against the wishes of the owners, and could be used to separate owners from management of their land and resources. For example, trusts have left tangata whenua relegated to the status of beneficiaries or advisory trustees at best, while complete strangers with purely commercial motives were installed in decision-making positions. This could happen without the owners’
knowledge, and be confirmed against their opposition. The trustees could then make significant commercial decisions – such as leases and agreements for land utilisation – which conflicted with the owners’ wishes for the use of their land. Another general concern was continuing control by the land court, which remains the overseer of most administrative decisions; some saw this as paternalistic.\textsuperscript{650}

Despite some advantages offered by trusts and incorporations in the commercial environment, the claimants pointed to administrative burdens which work against the chances of commercial success. Crown efforts to overcome title problems through trusts and incorporations did not remove the difficulties the title system caused for development. There were still problems for trusts and incorporations in attempting to access finance.\textsuperscript{651}

Claimants further questioned the ability of trusts and incorporations to enable Maori owners to manage their land collectively, and suggested that the law governing trusts and incorporations privileged the interests of owners as individual shareholders over the interests of the group of owners as a whole. As a result of this, there has tended to be a tension between the pursuit of individual financial gains and the ‘communal/traditional objectives’ of the tribal group.\textsuperscript{652} Further, individual interests in incorporated and trust lands have remained subject to the general succession rules applying to Maori land, which had the general effect of increasingly dividing the interests among succeeding generations.\textsuperscript{653} Thus it is almost impossible for trusts and incorporations to translate economic success into real and sustainable benefits for landowners. It becomes increasingly difficult for many incorporations and trusts to keep track of shareholders, to arrange for meaningful attendance at meetings and pay dividends. Trusts and incorporations often have thousands of beneficiaries, meaning their income represents relatively little per person. Because of their past history, they are also often in a development phase where investment capital and assets have to be built up, but they are under pressure to distribute income, especially to those more elderly who have already forgone income for many decades in some cases. They alleged that they are unfairly being treated as ‘rich’ when this is actually far from the case, and this perception is doubly damaging when it affects the way they are treated now (for example, councils considering that they can absorb losses in income from restrictive policies). As for the new forms of trusts under Te Ture Whenua Maori Act, which have been restructured to avoid some of the problems of individualised interests, the claimants argued that these ‘can only be regarded as only being partially successful in this regard.’ Trusts and incorporations continued to carry forward some of the ‘debilitating effects’ of individualisation.\textsuperscript{654}

The Crown’s case
The Crown submitted that trusts and incorporations have played a central role in allowing Maori collective ownership and control of tribal lands.\textsuperscript{655} They are not a panacea for the challenges of the administration of Maori-owned land, but they have played a major role in enabling Maori control and management of their land. They have assisted in ameliorating the challenges of multiple ownership and share fractionation.

The Crown argued that Maori have not protested about the system of trusts and incorporations, but rather have wished to modify particular elements. Tangata whenua evidence was predominantly favourable about trusts and incorporations. Trusts and incorporations offer flexibility to Maori owners in managing their land, and may have assisted with the retention of tribal lands. The Crown contended that trusts and incorporations have been adapted to suit Maori cultural concerns and tikanga, noting Ngata’s comments on incorporation as ‘an adaptation of the tribal system’, Chief Judge Durie’s articulation of section 434A trusts as tribal trusts, and the Maori Council’s description in 1993 of Maori trust boards as ‘a clear example of parliamentary statutes sustaining a tribally based body in the exercise of its rangatiratanga’.\textsuperscript{656}
In terms of economic success, the Crown contended that trusts and incorporations have been a vehicle by which Maori owners could make relatively independent decisions regarding the appropriate uses for their land. The evidence is unclear about whether trusts and incorporations have been an overall commercial success in the Central North Island region. As private organisations they are vulnerable to the fluctuations of the market and other factors outside the Crown’s control. It is also not possible to view these entities purely in terms of commercial success, as they also had cultural imperatives, and there can be tensions between these two objectives. The Crown submitted that while it has an obligation in relation to the legislative framework, trusts and incorporations are private enterprises that should succeed or fail on their own merits, and any Crown intervention would undermine their independence.

**The Tribunal’s analysis on trusts and incorporations since the mid-twentieth century**

It seems to us that claimant concerns reflect the history of evolution of trusts and incorporations – which has not taken a smooth path. In particular they seem to reflect an impatience with the extent of Crown oversight, through the Maori Affairs Department, the Office of the Maori Trustee and the Maori Land Court since the 1960s – and the fact that the system of individualised title which gave birth to them has remained in place.

Our focus here is to determine whether trusts and incorporations – as they evolved during the second half of the twentieth century – have been an adequate Crown response to the difficulties Maori owners faced as a result of the new tenure system and the individualisation of title. Did trusts and incorporations enable Maori owners to exercise the rights of owners in the twentieth century: to utilise and manage their lands, collectively if they so chose, for development opportunities arising from participating in the broader New Zealand economy?"}

**Trusts**

**The emerging importance of trusts to Maori owners, and Crown engagement:** In our previous section we have pointed to the Crown preoccupation in the 1950s and 1960s with removing small interest holders from titles. It is therefore important that alongside conversion and the provisions for compulsory changes of status from Maori land to general land, we consider the intentions behind the Crown’s policies for trusts and incorporations, and the extent to which they embodied a more appropriate response from the Crown.

The most important development after 1953 in trust law was the introduction of provisions for land trusts. The origins of these trusts (later to become section 438 trusts) appear to lie in section 8 of the Native Purposes Act 1943, which empowered the Native Land Court to vest land in trustees upon trusts declared by the court, ‘being trusts for the common use of the land by Natives for any purpose, or for the support or education of Natives, or for the physical, social, moral, or pecuniary benefit of Natives or for some purpose having for its object the benefit, betterment, or welfare of Natives or the promotion of any tribal or communal project’.

In the Maori Affairs Act 1953, section 438 is included in a section on ‘special powers of the court’; it was inserted only into the final version of the Bill. The Minister made no reference to it when he introduced the legislation into the House. It was certainly not presented as a key provision of the legislation. At this stage the land court was empowered to vest Maori land in trustees ‘for the benefit of Maoris or the descendants of Maoris or for any specified class or group of Maoris or their descendants’. The Maori Trustee, or any other persons, might be appointed trustees, with power to administer the trust property. The powers of the trustees were specified only in relation to the alienation of land. Dr Harris suggests that the Government had not intended the court to use section 438 widely, but that it might be useful in difficult situations to be able to appoint a trustee.
Important changes to the nature of trusts in 1967 and 1974 'gave them a new importance'. In particular, the Maori Affairs Amendment Act 1967, following Prichard and Waetford’s recommendations, changed the nature of the trusts, from having general or charitable purposes to being vehicles for ‘facilitating the use, management, or alienation’ of Maori land, or land owned by Maori. A new section 438 replaced the original section in the 1953 Act. In this provision it appears that trusts were intended for the benefit of owners of the land in respect of which the trust was constituted, and if a trust were terminated, the land would be revested in the beneficial owners.

It appears that the role of the Maori Land Court in promoting trusts was in fact crucial. According to Ms Harris there was ‘some early opposition to 438 trusts within the department’ and it was Maori Land Court judges who breathed life into the section, because they held the view ‘that owners, and not the department, should manage Maori land’, and use of trusts provided a structure for owners to manage their land rather than seeing it move in to a department development scheme. Oral accounts, she says, credit Judge Gillanders-Scott with first applying the section on any significant scale, first in Te Taitokerau district, and then in Waiariki. The McCarthy Commission on Maori Land Courts (1980) drew attention to the role of the court in its report, finding that the court had been ‘largely responsible for promoting the formation of trusts’. It had provided technical information and advice on appropriate land management, as well as assisting with the reconciliation of various groups of owners. The court, stated the commission, ‘is thus in a powerful position in being able to influence the form and extent of corporate land management’ – though judges took differing views on the extent of their involvement.

Even if the mechanism was unheralded at the outset – and its importance perhaps not immediately recognised – over time the court, and Maori owners, began to use it. In the Waiariki district, the number of new trusts accelerated after 1967, almost doubling between 1966 and 1968 (from 58 to 111), and climbing to 392 by 1971. The 1974 Maori Affairs Amendment Act was even more significant, in that section 434A allowed multi-block trusts to be established, without cancelling existing titles.

Chief Judge Durie, who saw clearly the possibilities of section 438 and 434A trusts as hapu or tribal trusts, prepared and distributed to the other judges a handbook of model trust orders under section 438. And in his preface he ‘expressed the hope that eventually every block of Maori land would be subject to regimes similar to his prototypes’. Clearly what made the difference in terms of owner engagement with the new structures was the assistance and advice a specialist institution was able to provide.

**Trusts – empowerment of owners?** A key factor in the exercise of external control over section 438 trusts was the provisions for Court appointment of trustees. The 1953 Act specified that ‘the Maori Trustee or any other person or persons’ could be appointed – in fact, Bayley, Boulton, and Heinz argue, ‘almost anyone’. As Belgrave, Deason, and Young point out, this did mean that Maori acceptable to the owners could be appointed. The Maori Land Court could, however, appoint other candidates and confer on those trustees such powers as it ‘deems necessary for the proper administration of the trust property’. Otherwise, the powers of the trustees were specified only in relation to land alienation. There is nothing in the section that indicates trusts were to generate income. From 1953 trusts were able to determine their own activities through the contents of their trust deeds, and changes were to be approved by the Maori Land Court.

The Labour Government’s White Paper of 1973, on proposed amendments to the Maori Affairs legislation, suggested that section 438 of the Maori Affairs Act 1953 be amended to allow for the involvement of ‘advisory’ trustees. The trust property would remain vested in the trustee who would now be referred to as the ‘responsible trustee’. It was noted that this amendment would ‘put beyond doubt a practice which has appertained for some time past’. This recommendation was embodied in the Maori Affairs Amendment Act 1974, though it was not specified...
that advisory trustees had to be appointed from among the owners.\textsuperscript{674}

Responsible trustees hold legal title to land and are responsible to the landowners (the beneficiaries of the trust) and the advisory trustees are not. Despite the statutory terminology, advisory trustees are not in law trustees with the same trust duties as the responsible trustees.

In this regard, the claimants pointed to the fact that the Maori Trustee was and still is often called on to assume the role of responsible trustee for Maori land blocks. In such cases, he or she will make final decisions about land utilisation, and at times exercise rights as the legal owner of the land against the wishes of owners. One example cited in evidence concerned the application for judicial review to the High Court by the owners of the Taheke–Paengaroa block against the Maori Trustee, who they alleged was tying up their land in a long-term forestry lease.\textsuperscript{675} Tensions can often emerge between owners such as Ngati Wheoro and responsible trustees who may end up exercising legal powers to pursue commercial development, despite the owners’ wishes.\textsuperscript{676} But in the end the trustees, as the legal owners, hold the legal power to control access to a block.

On a positive note, we also heard evidence that when New Zealand Guardian Trust stepped down as Responsible Trustee for Rotoiti 15 trust, and a new trust order was drawn up in 1992, five responsible trustees were appointed from among the shareholders. In doing so the flexibility of the modern trust procedures can be seen. The objects of the trust in its Trust Order were greatly expanded as follows:

- to provide for the use management and alienation of the land to best advantage of the beneficial owners or the better habitation or use by beneficial owners, to ensure the retention of the land for the present Maori beneficial owners as a family group or groups, and to represent the beneficial owners on all matters relating to the land and to the use and enjoyment of the facilities associated therewith.\textsuperscript{677}

In summary, we have some evidence indicating that the management of trust lands by professional trustees appointed by the Maori Land Court has been a concern in Central North Island. It has not proved easy to obtain precise figures for the amount of land held in incorporations and trusts in the Central North Island, but calculations by the authors of a report presented to the Tribunal put the figures for 2000 at 39,274 hectares (97,048 acres) in incorporations, and 144,364 hectares (365,731 acres) in trusts.\textsuperscript{678}

\textbf{Incorporations}

\textit{The emerging importance of incorporations, and Crown engagement:} Incorporations, as we have seen, got off to a shaky start in this inquiry region, despite early provisions for them. But in the post-Second World War years they got a new lease of life. In particular, as we will see in part \textit{iv}, Ngati Tuwharetoa took the initiative in forming timber incorporations in our inquiry region from the early 1940s to negotiate logging contracts. By 1948, 14 committees of management had been established to deal with the Tongariro timber lands.\textsuperscript{679}

Incorporations began to attract Crown interest as entities to which land development schemes could be returned. Some of Ngata’s depression schemes had proved uneconomic, others unsuitable for cutting up into dairy farms, while others still repaid their debts during the 1951 wool boom and were being returned to owners earlier than expected. In 1953 the Minister of Maori Affairs introduced ‘very substantial amendments’ to the provisions relating to incorporations, stating to the House that the ‘old legislation was quite inadequate to deal with the extension of that aspect of Maori administration,’ and so a complete review had been undertaken, drawing on the experience of existing timber and land incorporations. The example of the Puketapu Incorporation led the Minister to consider ‘what could be done by the people themselves’ if they had the necessary funds.\textsuperscript{680} (This was an incorporation established in 1945 to manage the largest forest block in the Tongariro area.) The potential of successful incorporations to invest in development schemes in their own region, alongside Government loans, was also considered – particularly it seems because the Maori Trustee would not lend on
Map 11.5: Land in Maori trusts and incorporations as at January 2000, as compared with other Maori land.
reverting land. The Minister also noted with approval the ‘very wide powers’ now given to incorporations to buy the interests of their owners.\textsuperscript{681} This fitted, of course, with the Government’s preoccupation at the time with reducing the number of small interests. Incorporations, in other words, could serve another useful function as far as the Government was concerned.

In 1960 the Hunn report was prepared to acknowledge Ngata’s view, expressed in 1940, that: ‘The system known as incorporation of native land owners is in effect an adaptation of the tribal system, the hierarchy of chiefs being represented by the Committee of Management.’ The report noted that incorporation was a ‘simple but effective method of freeing congested titles and bringing land into use.’\textsuperscript{682} It recorded 123 active incorporations and 175 inactive ones; of those active, their total holdings in land and assets were worth £7,661,541, and the average value was £62,289. Some concerns were expressed about maladministration, and it was suggested that it might serve the interests of owners if the Minister had power to appoint a representative to the committee of management. The report hardly gave incorporations a ringing endorsement. ‘Prima facie’, it said, ‘the figures above could be interpreted to mean that the majority of active incorporations are tolerably well conducted and afford little or no cause for anxiety.’\textsuperscript{683} As we have seen, it was prepared to suggest the possibility of tribal incorporations – though the Government did not pursue this possibility. The Prichard–Waetford report, only a few years later, conveyed rather more of the importance of existing incorporations: ‘Some Incorporations can properly be called “big business” and own most valuable assets. They have moved far beyond anything anticipated when the legislature first authorized the establishment of them.’\textsuperscript{684} As we will see, the report went on to suggest substantial changes to the system of ownership in incorporations.

Finally in 1980 the McCarthy commission on the Maori Land Courts stated that, contrary to a view ‘widely held in the early 1960s, multiple ownership was not necessarily a bar to the economic use of land,’ as the successful establishment of incorporations and trusts had shown. It drew attention to the importance of incorporations and trusts as vehicles for using Maori land for the economic benefit of the owners – and it stressed (in the case of incorporations) the fact that they were ‘kin-based’ and (in the case of trusts), that they were ‘well suited for land management on a tribal or hapu basis.’\textsuperscript{685} Moreover the many ‘thriving’ incorporations and trusts showed that fragmented incorporation and trust ownership could contribute to the country’s economy just as efficiently as land that was individually owned.\textsuperscript{686}

Our preliminary view is that Maori owners took the initiative themselves in making incorporations work in the 1940s, thus giving a lead to the Department of Maori Affairs – and that their success and potential motivated the Crown to investigate them further.

**Incorporation management – empowerment of owners?**

Trusts and incorporations have clearly allowed for greater owner management of their land and assets. Incorporations allowed owners to bring multiply owned land under the control of an elected management committee, and trusts under the control of a trustee who could act as a ‘sole owner’ on behalf of the owners as a whole.

This enabled the owners to negotiate with Crown agencies and private organisations from a stronger position, allowing greater control over the use of their land and resources. Incorporations, like trusts, could repurchase ‘uneconomic’ interests on behalf of their owners, and deal collectively with Crown agencies and local bodies over rates and other encumbrances, making it easier to retain control over the uses and alienation of land. They were also a vehicle through which owners could raise loans against land for development purposes (something which was usually extremely difficult under fragmented multiple ownership) and distribute income. The evolution of these entities, however, has not followed a smooth path. The rights of owners might still be defined, or constrained by Parliament, in ways which might diminish their value as vehicles of Maori self-management of their lands and resources.
Since 1894, owners have been able to nominate or elect an incorporation’s committee of management, generally consisting of between three and seven members. All appointments, however, required validation by a land court order. Between 1909 and 1953 the court had the power to refuse to appoint any person elected, and between 1909 and 1967 it could appoint committee members not elected by the incorporation in some circumstances. Incorparations have become increasingly accountable to their owners. The 1909 Act allowed a committee to exercise its powers by a majority, though at least three members had to concur in every act they took; this provision was dropped in the Native Land Act 1931, but reinstated in the Maori Affairs Act 1953, and has remained in the legislation since. From 1953 the committee of management was empowered to regulate its procedures as it wished, except for restrictions imposed by owners’ resolutions, and regulations under the Act.

The key to the question of development potential is the degree to which land held in incorporations could be used to borrow money. They had long been authorised to borrow against the security of incorporated land, and from 1953 they gained complete control of loan money (which until that point had been managed by Maori land boards). From 1966 finance was available to incorporations through Department of Maori Affairs loans under section 438 of the Maori Affairs Act 1953, financed by section 460 loans. But these loans have been considered expensive, and they also involved considerable loss of incorporation control of their affairs. Development funded by a loan was overseen by a group of trustees on which owners had only one representative. Moreover, incorporations faced barriers accessing such loans. For example, the owners of the Taheke 8c and Adjoining Blocks Incorporation ran into trouble because their farming blocks were in separate titles; the Board of Maori Affairs wanted the titles amalgamated. But, like other incorporations, Taheke 8c Inc faced the problem of unsurveyed or partly surveyed land, making it difficult for them to complete their titles. In 1975 they had a number of blocks in this position, meaning that the incorporation could only be partly registered. In 1979, 25 years after the issue of their incorporation order, some of their titles were still not registered.

Earlier restrictions on the activities of incorporations began to be relaxed from 1953. Their ability to invest was still limited in 1953, but was expanded in the 1967 Act. Barriers to their freedom to buy land were largely removed in 1953, and in 1967 the need to get Maori Land Court consent for a purchase was removed. Incorporations have been subject to some oversight of their operations, however. The 1953 Act specified the purposes of incorporations as farming, forestry, coal mining or other mining operations, and sale or lease of land; and although it provided that the incorporation might carry on any other activity, this was limited to the land in the order of incorporation. During the 1970s there was some debate about whether these functions should be expanded, but ultimately the law was not changed until Te Ture Whenua Maori Act 1993, which did not prescribe functions for incorporations.

This raises questions about how suitable the incorporation structure is for modern commercial development. Hamuera Mitchell, chairman of Ngati Whakaue Tribal Lands Incorporated, stated that there were doubts about whether the incorporation of Ngati Whakaue under Te Ture Whenua Maori Act 1993 was appropriate for taking the development of their lands into the future. The incorporation had been created some decades ago, when farming was the only option. Today, he said, the bulk of Whakaue land is adjacent to the city, and there are pressures to look at alternatives to farming. The incorporation was thus looking at a more corporate structure for management of its assets.

The Crown also provided for the close monitoring of the financial activities of incorporations. From 1953 incorporations had to submit annual accounts to a general meeting of owners and to the land court, and share registers had to be maintained from 1967. Incorporations which did not submit an annual account could be wound up. The Maori Land Court took an interest in the financial activities of incorporations, and owners had to seek
permission for their incorporation to enter into any additional business than those noted in the statute.696 The use of incorporation funds was strictly defined, and were principally to maintain the costs of running the incorporation’s business. Loans to owners or committee members were prohibited.697

The Bayley, Boulton, and Heinz report points to ‘long-standing opposition’ to the principle of the land court inspecting incorporation accounts – a power which it was granted in 1931, and which was reinstated and greatly extended in 1967 after it had been omitted in the 1953 legislation.698 The court could also impose sanctions if not satisfied with the results of its investigations, including removing any member of a committee, imposing restrictions on the powers of the incorporation, or winding it up. The ‘deep opposition’, recorded by the assistant Maori trustee in 1969, was such that he considered any good which might be done by examination might be outweighed by the adverse impact on relations with incorporations. It was seen as interference – and indeed counter to the general trend in policy of removing restrictions on control by Maori of their other assets.699 The Maori Council considered the supervisory power exercised by the Maori Affairs Department (who inspected accounts) ‘really discriminatory’. Despite this, the powers of inspection remain under Te Ture Whenua Maori Act 1993, though with some changes.700 The court can only initiate an inquiry when shareholders request one; since 2002 the court can no longer initiate an investigation itself. But, as a result of an investigation, it still retains a broad discretion to exercise a raft of powers, including the suspension of all or part of an incorporation’s constitution for such a period as it thinks fit.701

Breaking the connection between owners and their land: the Crown turns land interests into company shares, 1967:
In any consideration of the control of incorporations over their own affairs, and their ability to protect their owners’ interests in land, it is difficult to pass over the far-reaching changes in the Maori Affairs Amendment Act 1967. In the mid-1960s, incorporations again attracted the interest of the Government, and the Prichard–Waetford committee’s attention was specifically directed to the system of ownership in Maori incorporations, and whether a system ‘other than that of the beneficial ownership in the land, should be prescribed.’702 They therefore raised the question at their meetings, and with secretaries of incorporations, about whether incorporations might in future be more like private companies, and owners might cease to have an equitable interest in a block of freehold land and would instead hold a defined number of shares in an incorporation. It is clear that their key concern was the administrative cost to the State of ‘servicing the ownership.’703 They looked carefully at the question of purchase of ‘uneconomic’ interests. As in their consideration of small interests in Maori land generally, they were concerned that owners who had moved away from home might want to convert their assets to cash; though they also considered the position of those who might hold valuable interests, which the incorporation was not able to buy.

On this matter they approached the Maori Council, and met with a ‘divergence’ of views. Sir Turi Carroll and Mr Henare Ngata were strongly opposed, stating that it was so important that an incorporation ‘remain as it is’ that a Maori owner should not be able to sell their shares. But the committee dismissed the views of these leaders of the council, despite recognising ‘the depth of tradition’ behind them, and stated that they agreed with others who thought an owner should be able to sell – even though this might mean that if a majority wished to sell, the enterprise would be lost to its owners unless minority shareholders could buy out those who wished to sell.704

This led them to their recommendations that a ‘shareholder’ should be able to sell, first offering their shares to the committee, which might either buy itself, or offer the shares to another shareholder; failing that, in six months, the shares might be offered to ‘any other Maori’, and failing that, in say two years, to a European.

The committee also recommended that where more than one block was being incorporated the values being
brought in by each owner be assessed and shares issued accordingly ‘and that it be impressed on the owners that this means that they own shares in the whole enterprise and not in any one block.’ They were particularly concerned with farming ventures that had been returned from development schemes, and legal confusion about whether – if an incorporation bought interests in one of the blocks – those interests belonged to the incorporation, that is, all its members, or to the owners of the one block from which those interests originated. Hence their view that all block titles of an incorporation be amalgamated, and that in future incorporations be ‘of one block only.’

This particular recommendation did not meet with approval in our inquiry region. When the draft Maori Affairs Amendment Bill 1967 was scrutinised by the iwi, Te Arawa flatly rejected the whole of part IV, which changed the status and operation of incorporations, in line with the Prichard–Waetford recommendations. They disliked its mandatory nature as well as the specific aspects of Europeanisation of the land, and free trading in shares. They thought any change in the legislation would be premature. Tuwharetoa also expressed detailed views about part IV. Like the Maori Council, they stressed that incorporations were in the nature of a perpetual trust; the rights of an individual to dispose of his interests should not jeopardise the basic trust concept. They thought it unlikely that there would be many incorporations which would not decide on a ‘closed shop principle’. Tuwharetoa also wanted an incorporation to be able to fix the maximum number of shares that any shareholder could acquire by purchase or exchange, so that in their own incorporations – all with several hundred shareholders representing many family groups – none might buy too great an interest. Such a provision was in fact included in the Act.

Under the 1967 legislation, the key changes the Prichard–Waetford committee had sought were enacted. On an order of incorporation, the owners’ interests in land converted into shares in the incorporation. Thereafter, the former owners ceased to have any interest in the land, whether legal or beneficial, and all Maori land vested in an incorporation ceased to be Maori land. The interests of the shareholder were now dealt with as personal property rather than property in land. A shareholder could sell all or part of their shareholding at any time. Shares in incorporations could only be transferred to those persons specified in the Act, but this included the Crown, the Maori Trustee, and the State Loan Department, as well as the incorporation itself, another shareholder, or family members.

These changes were reversed over time. In 1974 the Maori Affairs Amendment Act enabled incorporations to apply to the land court to have the status of land deemed European land under the 1967 Act returned to Maori freehold land. The following year all land vested in incorporations under the 1967 Act and deemed European land, automatically reverted to the status of Maori freehold land. And by Te Ture Whenua Maori Act 1993, shares once again represent a beneficial ownership in land. Shareholders thus hold a direct interest in the land of the incorporation. Because shares are deemed to be an undivided interest in Maori land, provisions about succession to land apply to successions to shares, unless a whanau or putea trust is formed in respect of incorporation shares, in which case there is no succession.

Reducing number of shareholders in incorporations: minimum shareholdings: Incorporations were not immune, either, from Government preoccupation with combating fractionation of shares. The Maori Affairs Amendment Act 1967 included provisions for minimum share units. As Bayley, Boulton, and Heinz point out, they were clearly modelled on the compulsory conversion provisions, to provide a way for dealing with ‘uneconomic’ interests held in incorporations. In fact the Maori Affairs Act 1953 assumed that interests in incorporated land might be acquired by conversion, requiring the Maori Trustee in such cases to offer the interest for sale only to the incorporation, or to any of the owners – a provision which showed
at least that the Government was aware of the cultural importance of keeping land interests within the group of incorporated owners.

Under the Maori Affairs Amendment Act 1967 a general meeting of shareholders of an incorporation might set a minimum share unit and acquire all interests below that value. The owners themselves might set the value; though it had to be confirmed by the Maori Land Court. The legislation did however state that the value set should not be more than $50. Once the incorporation had set its value, shareholders could not transfer shares with a value less than that minimum, unless they transferred their entire shareholding either to an existing shareholder or to the incorporation. Moreover, a meeting of shareholders could resolve that once the court confirmed a resolution setting a minimum share unit, the incorporation was deemed to have acquired all the shares beneath that minimum. At that point the incorporation had to amend its share register and delete the name of the shareholder.

Evidence we received, while based on only a limited sample of files from the Aotea and Waiariki District Maori Land Courts, showed some interesting responses from incorporations to these provisions:

- a number of incorporations set their minimum share unit around the time when the 1967 Act came into force at two shares, with 3 per cent of the shareholding to be the maximum held by any one shareholder – suggesting they may have received advice on this point;
- incorporations seem to have been using the minimum share unit alongside other means of reducing fragmentation; thus the Opawa Rangitoto Incorporated advised its shareholders in 1971 to consolidate family shares in one member of the family, where only a small number of shares were involved; and
- in at least one case – Waerenga East and West Blocks Incorporation – the incorporation did not move at once to resume shares less than the minimum they had set, and instead sought advice from the district Maori Affairs officer in Rotorua about whether an annual general meeting could consider a proposal to adjust the shareholding so everyone held five shares. Unfortunately the outcome of this proposal is not known; but it indicates a considered approach to the issue of share redistribution.

We are aware that when accountants for the Ngati Whakaue Tribal Lands Incorporation raised the question of whether the incorporation was obliged to register succession to shares, where these would create shareholdings that fell below the minimum share unit the incorporation had set, Judge Gillanders-Scott’s opinion was that the right of successors to succeed overrode the minimum share unit and resumption of shares in the circumstances put to him. This opinion was not passed on to the incorporation’s accountants because the registrar stated that the rules of the court precluded him from doing more than transmitting the court’s succession orders to the incorporation. They were advised to get their own legal advice. This seems however to point to the judge’s view that the rights of successors should be preserved.

Nevertheless the Te Ture Whenua Maori Act 1993 has retained provisions for shareholders to fix a specified number of shares as the minimum share unit.

The impact of Te Ture Whenua Maori Act 1993: We have discussed the nature of trusts and incorporations as models for the corporate management of Maori land titles. Professor Ward has suggested that Te Ture Whenua Maori Act 1993, seeking to ‘marry tradition and modernity, customary principles and Pakeha law, traditional social values and economic development’, did so through the vehicles developed for land management over the past century – the incorporation and the trust. We would agree, but note that the principles of Te Ture Whenua Maori Act 1993 as outlined in the preamble, and sections 2 and 17, make it clear that the Maori Land Court must exercise its jurisdiction in a manner that furthers the retention of Maori land
in the hands of the owners, their whanau and their hapu and its utilisation.

We note that Te Ture Whenua Maori Act 1993 has recognised a wider range of trusts than under the 1953 Maori Affairs Act and its amendments.

- **Ahu whenua trusts (section 215)** are the successors to 438 trusts and are the most widely used trusts for land development; the objects of these trusts are to promote and facilitate the use and administration of the land in the interests of its beneficial owners; the land, money and other assets must be held in trust in proportion to the respective shares of the beneficial owners. All or part of the trust income may be applied for ‘Maori community purposes’ for the benefit of owners or it may be paid out to the owners depending on their trust order. Succession continues with these types of trusts, administered by the Maori Land Court.

- **Whenua topu trusts (section 216)** enable Maori land to be held by trustees to promote and facilitate the use of the land in the interests of the hapu or iwi rather than the beneficial owners. Generally there is no succession to the interests vested in the trustees. This is the closest model of corporate management to a customary collective title held that exists within Te Ture Whenua Maori Act 1993.

- **Whanau trusts (section 214)** are designed to enable families to consolidate their land or shareholdings in one trust. Their land shares in any block of land, whether administered by an ahu whenua trust or an incorporation, may be vested in responsible trustees, usually family members, and there is no further succession. The land and other assets of a whanau trust must be held for the descendants of an ancestor (living or dead) named in the trust order, and the income derived from the assets is to be applied for their benefit, including health, social, cultural, and economic welfare. The whanau trusts have put an end to successions.

- **Putea trusts (section 212)** can be used to manage very small shares or interests, or where those entitled to benefit from those interests cannot be traced; or such trusts can be set up where all beneficial owners agree; the trust may include blocks of land or shares in one or more incorporations, or both; the assets or income of the trust must be held for the Maori community purposes specified in the trust order. The beneficiaries are the beneficial owners of the land when the trust was constituted and their descendants or, in the case of shares in an incorporation the persons entitled to those shares when the trust was constituted and their descendants. No succession to interests vested in the trustee is permitted.

- **Kai tiaki trusts (section 217)** may be set up to protect the interests in land, or in incorporation shares, of owners under disability, including minors.

### Powers of the Maori Land Court over trusts

The Maori Land Court has extensive powers over Maori land trusts. It constitutes such trusts, appoints trustees and can monitor the performance of trustees. It has the same powers that may be exercised by the High Court in respect of trusts generally. The court can require that the trustees furnish reports to the court on the administration of the trust under section 238 of the 1993 Act and matters pertaining to the administration of the trust. The court still has broad powers to appoint trustees.

Under section 222 of Te Ture Whenua Maori Act 1993 the court may appoint responsible trustees, advisory trustees, and custodian trustees. Being a trustee is not an easy role for the uninitiated. Trustees have responsibilities under the Trustee Act and must act to protect trustee property for the benefit of the owners. Under section 223, the responsible trustees appointed by the court must carry out the terms of the trust; the proper administration and management of the business of the trust; the preservation of the assets of the trust; and the collection and distribution of the income of the trust. If they do not do so, they may be liable for breach of trust. There is greater opportunity to have trustees acceptable to the owners appointed under Te Ture Whenua Maori Act 1993. That is because
the Maori Land Court rarely fails to appoint a person who holds the mandate of the people. Advisory trustees merely make themselves available to advise the responsible trustees. A custodian trustee may be appointed by the court and the sole function of the custodian trustee is to hold the trust property, invest its funds, and dispose of its assets, as the responsible trustees in writing direct. In general terms, trusts under Te Ture Whenua Maori Act 1993 have been seen by Maori as an attempt to increase their options in hands-on management and land development.

As we have already noted, the Maori Land Court could initiate an investigation into the affairs of an incorporation, under section 280 of the 1993 Act, and on its own motion, until an amendment in 2002. Since then an investigation may only be launched if shareholders in the incorporation bring the application.

The Maori Land Court continues to have broad supervisory powers over trusts and incorporations that does raise issues about the whether the model is Treaty compliant.

The Tribunal’s conclusions on the provisions for trusts and incorporations since the mid-twentieth century

Have trusts and incorporations been able to provide appropriate benefit to Maori owners? We may state at the outset that in so far as incorporations and trusts have been vehicles for the retention of Maori land, they have clearly been of benefit to their owners. Professor Ward has pointed to the success of incorporations in this respect, in contributing to Maori wealth, providing an income for the staff they employ – especially in afforestation – and for farmers who work portions of their land. It is also evident that trusts have afforded Maori owners better opportunities to develop their land. The Labour Government’s White Paper of 1973 included a section on the use of 438 trusts over Maori land. Matiu Rata, the Minister of Maori Affairs, stressed the acceptability of the trusts to Maori, because the process ‘afford[ed] them responsibility in dealing with their own lands, also involvement and identification therewith. Many, many thousands of acres of land have been so put to use with resultant productivity as a consequence.\(^726\) In short, trusts were good for land development too. But, in the case of both incorporations and trusts, profitability clearly depends on a range of factors.

More specifically, the question raises issues of the size of the putea, continuing succession, and the extent to which trusts and incorporations can invest and distribute in accordance with various legislative provisions and the expectations of owners. As Professor Ward points out, the issue of contradictions between the ‘community’ or ‘social functions’ of trusts and incorporations, on the one hand, and their duties and responsibilities as income-generating enterprises, on the other, is an important one. Businesses have to be run as businesses.\(^727\) But research by Tanira Kingi on Maori agribusiness shows that while profitability was obviously important, the ‘unique nature of Maori land’ meant that it was just one objective; others included developing employment opportunities for its owners, providing grants for education, and supporting marae.\(^728\)

From claimant evidence given to us it is evident that managing the tensions between its functions is an ever-present challenge. In addition there remain issues regarding the extent to which the Maori Land Court should exercise broad powers of control and inquiry over trusts and incorporations. That is particularly an issue for large trusts and incorporations, whose managerial expertise and resources leave not doubt about their ability to administer their resources without judicial oversight.

Distribution, and increasing numbers of owners in trusts and incorporations: We draw attention here to the lasting impact of individualisation of title and continuing succession on the administrative resources of trusts and incorporations. The numbers of owners in shares and incorporations have continued to increase. Until the 1993 Act there was no provision to halt succession in trusts. Succession to interests in ahu whenua trusts (the successors to section 438 trusts) continues as for interests in Maori freehold land not in trust. Succession also continued in incorporations. Even under the 1967 Amendment Act, which converted interests in land into
shares in an incorporation, the land court still had the role of determining succession to shares in incorporations, as if shares were a corresponding beneficial interest in land vested in them. After 1973 this role was handed over to the incorporations themselves.

Examples of the order of increase in owner numbers are not difficult to find. In 1908 there were 122 owners in the Rotoma 2 block, which had grown to 1817 owners in the Rotoma No 2 Ahu Whenua Trust by May 2005. In Rotoma 3, there were 31 owners in 1908; by 2005 there were 427 owners in Rotoma 3 Ahu Whenua Trust. And the Rotomahana–Parekarangi 68 block had 71 owners in 1908, which had grown to 864 owners in the Rotomahana–Parekarangi No 6 Ahu Whenua Trust by 2005. In large trusts the increase is even more noticeable. In the Rotoiti 15 Ahu Whenua Trust, for instance, there were 5377 owners in 1971 when the trust was created. By 2001, there were about 8720 owners, while the Maori Land Information Service database gives 10,723 owners in May 2005. The number of owners has thus doubled since the trust was created.

How, then, do trusts and incorporations manage the expectations of their owners? Malcolm Short, giving evidence to us on behalf of the Te Arawa Federation of Maori Authorities Inc, pointed to the spread of shares in one of their member trusts, Te Tumu Kaituna 14 Trust, as being fairly typical. A third of the 3275 owners, holding less than one share each, hold together less than 1 per cent of the shares. A dividend is out of the question because there are so many very small interests. This means the large shareholders will also miss out on a dividend. But the average return through dividends and other forms of distribution across the federation’s 26 authorities is 31 per cent of before-tax profits. One third is paid out, and the remaining two-thirds pays tax and is available for reinvestment. Often distributions are by a combination of dividend and grant – increasingly the latter. Mr Short expressed a concern that this led owners to expect that trusts and incorporations ‘are vehicles to provide social benefits’. This in his view is not their role; they ‘should never become an easy alternative to the responsibility of the Crown to provide for social needs.’ Moreover, where grants are paid from unpaid dividends, many shareholders who would not qualify for grants are left without a return; this also raises questions of equitable dealing by the trust with its beneficiaries.

In Rotoiti 15 trust, where returns to shareholders in general were ‘small and declining’ over the 1980s and 1990s, trust deeds have since 1996 included an extra clause covering the distribution of funds for community purposes in accordance with section 218 of Te Ture Whenua Maori Act. At the same time, the pool of unclaimed dividends began to increase ‘steadily and steeply’ – and was thus available for distribution. Benefits to shareholders, alongside payment of dividends, have thus taken the form of grants to marae, and educational scholarships.

George Asher, chief executive of the Lake Taupo Forest Trust, also stated that owners question the size of their dividend payments. There are about 9500 owners in the trust; one-third receive less than $10 per annum, 64 per cent receive less than $100 per annum. Just 7 per cent receive $1000 or more. The percentages for Lake Rotoaira Forest Trust are even lower. Over half the Lake Taupo Trust owners are unregistered – a fact related to the low payouts most of the owners receive. The unclaimed dividends are held in trust and the interest is used for community grants, including education and marae grants. In this way the trust hopes that unregistered owners and the hapu ‘receive some benefit from the forests.’ But counsel for Ngati Tuwharetoa put it to us that:

the limitations of the Maori land title system make it almost impossible for Maori trusts and incorporations to translate economic success into real and sustainable benefits for landowners . . . The fragmentation of interests dilutes the benefits to the point that they do not make a real difference in people’s lives.

The claimants have expressed their general satisfaction with trusts and incorporations as management structures, and their disappointment that there are limits to both in a tribal context. Te Ture Whenua Maori Act 1993 has been seen as ‘a compromise between individual property rights
and the collective rights of Maori communities and to some it is a compromise that is strained. As Professor Ward points out, there are those who argue that the Act does not go far enough to the recovery of a customary structure of ownership. Some have suggested a ‘one title’ system. The late Judge A G McHugh thought there was a ‘strong case’ for a return to a ‘tribal body [however tribe is defined] corporate ownership of all multiply owned land’, with safeguards to protect successful trusts and incorporations. At the other end of the spectrum, whanau trusts have now increasingly been taken up. The Act, of course, has come late in the piece. Certainly it is proving of great assistance to Maori owners, though it is important that regular reviews of its operation continue. Consultation with Maori, and their consent to changes, is of key importance.

The Tribunal’s findings on the provisions for trusts and incorporations since the mid-twentieth century

We conclude that:

- The provisions in the Maori Affairs Amendment Act 1967 for converting interests in land to shares in a company, and for removing land vested in an incorporation from the category of Maori land, reflected a preoccupation with administrative convenience and tidiness, and with the rights of the individual to sell his or her shares, rather than the rights of the collective owners, and amounted to a failure actively to protect Maori in their enjoyment of their land as Maori land.

- These provisions were enacted despite opposition from our inquiry region, and more general Maori opposition. In particular, Arawa and Tuwharetoa drew the Crown’s attention to the fact that incorporations were in the nature of a trust on behalf of their landowners, and should not be glibly equated with purely commercial companies.

- The Crown was aware of the view of Maori Council and tribal leaderships within the inquiry region that the rights and interests of the wider body of landowners outweighed those of individuals who wished to sell.

- While the concerns of Maori owners that shares be kept within the incorporation were taken account of, there was also provision for shares to be transferred outside the control of the original landowners.

- The Crown was obliged not to dismiss the views of those rangatira who saw it as their obligation to protect the residual tribal estate.

- While incorporations were empowered to choose whether to set their own minimum share unit, there was a clear message that they should do so; like the provisions for conversion, this reflected an ideological position, translated into Crown policy, that small interests in land were not of importance to owners, and also that they were an administrative nuisance.

- While we are not in a position to say that incorporations taking this step were or were not aware that the effect of their doing so was to effectively sever the link with the body corporate of those whose shares were beneath the minimum, we think it probable that where this step was taken there would have been owners who, as a result, found their names deleted from the share register, to their prejudice and that of their descendants.

- Trusts and incorporations have been important tools for addressing crowded titles inherited from the native land laws. They have provided a form of corporate management that has allowed the claimants to develop their land, all other factors such as access to finance being present. The issues with these models, remain, however. These are the administration of fractionated shares, the extensive and sometimes intrusive powers of the Maori Land Court and a statutory regime that restricts development opportunity. In our view more needs to be done to build on these models by exploring other forms of collective land ownership to accommodate in a relevant way the development needs of the claimants.
Central North Island Maori, like other Maori owners, have struggled in the twentieth century with the legacy of the Crown's individualised title system. It continued to undermine their ability to resist land purchase, even though their leaderships had so strongly indicated at the turn of the century that they wished land loss to stop. Instead, in the first decade of the century, the Crown allowed private purchasers back into the market, and its apparent safeguards for Maori were largely toothless. The Crown bought only limited quantities of land in Rotorua in this period, but private buyers proceeded with enthusiasm in the district. At the same time the Crown reverted to buying individual interests as it had in the late nineteenth century, particularly in parts of Taupo where it had not had the opportunity to buy till the early twentieth century.

Deprived of any kind of legal community title, which would have recognised their rangatiratanga over lands and resources in a modernising economy, Maori were offered various approaches to overcoming the title dilemmas that had been visited on them. Initially the possibility of Maori co-management of their lands with Crown representatives was raised, in the forums of the new land councils. This was however a short-lived solution. The councils were also conceived as a solution to the difficulty of passing good titles to lessees (in this case), and Maori were too slow for the Crown's liking in vesting their lands for leasing. Representatives chosen by Maori themselves were removed from the councils; with them went the possibility of their gaining experience in land management. The land boards that replaced the councils were in practice not able to live up to the expectation of Stout and Ngata that they would play a key role, with the support of Maori owners, in leasing and land development.

Subsequently, Maori were offered the opportunity of various forms of title simplification. In particular, there were the long and difficult processes to consolidate their interests in individual blocks. Central North Island Maori grappled willingly with consolidation from the 1930s to the 1950s, despite the cultural costs, and often long delays in the process. Conversion, and Europeanisation of Maori land, which followed in the 1950s and 1960s, were solutions that proceeded on the basis that it did not matter if Maori gave up their small (dubbed 'uneconomic') interests in land – despite a general awareness in the wider community that Maori had a strong cultural attachment to their land. Both consolidation and conversion were later discarded when they were deemed a failure, given that owners continued to multiply.

A further Crown approach to title dilemmas was that of collective owner management, first introduced in the form of incorporations in 1894, but this also involved difficult processes in getting established and raising finance. Central North Island Maori did not in general find incorporation helpful, though they were interested in its possibilities, and the Crown did not assist them to make it work. It was not until the post-Second World War years that Central North Island iwi began to use incorporations extensively, and the Government also found incorporations useful for returning farm development schemes. Trusts were provided for in 1953.
without any real understanding of how they might assist Maori owners – but the land court, increasingly an institution which saw itself assisting Maori owners, picked up and ran with the opportunity, assisting Maori owners to manage land, and appointing responsible trustees for this purpose. The legislative provisions were certainly of importance, because as Maori owners came to engage with them, they led to a change in official perceptions that multiple ownership must be a barrier to land development. Finally, in 1993, after sustained consultation with Maori, a new Act brought in much more flexible trust provisions, which Maori have in general terms been enthusiastic about. The role of trusts and incorporations in development opportunities will be considered in part IV of this report.

Summary

Key Chapter Findings

► The Crown’s key Treaty breach in its introduction of a new system of tenure for Maori land in the 1860s, and its failure to provide for legal community titles which would have enabled hapu to make community decisions about land management, development, sale, and lease, was the cause of extensive and long-term prejudice to Maori, including Central North Island Maori.

► Maori, including Central North Island Maori, held their blocks subsequently as multiple owners, in a legal and commercial climate which was hostile to multiple land ownership.

► In terms of the sale and lease of land, the problem identified by the end of the nineteenth century was the inability of individual Maori owners, who held shares in a block of land but no legal title, to pass good title to buyers or lessees.

► The Crown attempted to fill the vacuum in 1900 by providing for Maori land councils, the result of a carefully negotiated agreement with Maori leaderships; at the same time it suspended Crown purchasing, in response to sustained Maori pressure, providing instead for the councils to lease the land.

► Five years later, without consultation or the consent of Maori leaderships, including Central North Island Maori leaderships, and without a fair trial period or adequate support, the councils were replaced by land boards with only minimal Maori membership, in breach of the Treaty principles of autonomy, partnership, and active protection.

► From 1905, without consultation or the consent of Maori leaderships, including Central North Island Maori leaderships, Crown policies were based on a resumption of purchase of Maori land, in response to settler pressure, despite clearly expressed Maori preferences that sales be halted.
Despite the clear reminder of the Stout–Ngata commission to the Crown in 1907 that it had a fiduciary duty to Maori, and must ensure the preservation of a tribal estate for future generations, the Crown embarked on new policies to free up Maori land purchase while at the same time watering down the provisions for its retention. The emphasis was on protecting individual Maori from ‘landlessness’ (unless they were qualified for employment). It failed to monitor the implementation by the land boards of such safeguards as it provided to ensure that the interests of owners were paramount. It also failed, in breach of the Treaty, to provide policies to ensure protection of tribal estates.

The Crown provided for private buyers (and for itself) to deal with Maori through a new system of ‘meetings of owners’ via the land boards (which could pass good title). Though this could have been a useful mechanism, it was undermined by provision for a very low quorum, which led to decisions to sell being made by a small number of owners, and the dispossession of many others without their consent. In failing to monitor these provisions and address the problems that soon became evident, the Crown breached the plain meaning of article 2 of the Treaty, and the principle of active protection.

In providing also for purchase mechanisms which favoured the interests of the Crown at the expense of Maori owners (that is, the issue and reissue of prohibition orders, without Maori owner consultation or consent, which gave the Crown a monopoly on purchase in blocks it wanted and denied Maori the benefits of a market price; and allowing the Crown to circumvent meetings of owners and buy from individual owners) the Crown further breached the Treaty, to the prejudice of the Maori owners.

The new tenure system caused lasting prejudice also for Central North Island Maori owners who wished to develop their lands and resources. The Crown recognised these problems as early as the 1890s, and made genuine attempts to provide solutions, and thus to mitigate the prejudice caused by its imposition of a system of individualised title. That prejudice was aggravated by the fractionation of individual interests in each generation, as a result of the land court’s adoption of an interpretation of the native land legislation that deemed all children of an owner to have the right to share equally in that interest.

A second key solution devised by the Crown to tackle the problems of its title system was provisions to simplify titles, by the exchange of interests among owners, and consolidation schemes (exchange on a much larger scale). Though well-intentioned, consolidation in particular was a long and difficult process for Maori owners; in the Central North Island the Crown failed to allocate sufficient resources to ensure that the schemes were completed expeditiously, to the prejudice of the owners.
The Crown made early provision for Maori owners to vest their land in trust, and to incorporate so that their land might be collectively managed; but in practice these provisions were inadequate to help Central North Island Maori solve their title and management problems. By failing to consult Central North Island Maori to establish what the barriers were, the Crown breached the Treaty principles of active protection and partnership.

In the post-Second World War years, the Crown offered two kinds of solutions. The first was a sustained attempt to remove Maori owners of small interests (because of the fractionation of title) from block titles, the second was provision for collective owner management through trusts and incorporations, and through new forms of trust.

The provisions for ‘conversion’ that applied on the death of an owner (vesting of his or her small interests in the Maori Trustee, rather than in the owners’ successors) were in breach of the Crown’s duty of active protection. They were also discriminatory in applying coercive provisions to Maori property rights and were thus in breach of the principle of equity.

The Crown’s failure to actively protect the owners’ land interests, which its own tenure system (including the rule of equal succession devised by the court) had bestowed on them, and which represented their remaining link with ancestral land, was a clear Treaty breach.

Provisions for Europeanisation of Maori land with no more than four owners were similarly coercive, and were also in breach of article 2 rights, and of the Crown’s duty of active protection. Because they were discriminatory, they were also in breach of the principle of equity.

Trusts and incorporations, the claimants and the Crown agree, have been popular and effective management structures, though the Crown’s decision in 1967 to legislate to convert the land interests of incorporated owners to shares in their incorporations, breached the Crown’s duties of active protection, and article 3 in altering the property rights of Maori owners. The breach has been mitigated by later provisions reversing the effects of these changes.

The provisions of the Te Ture Whenua Maori Act 1993, in relation to trusts in particular, have provided a greater range of options for Maori owners. For the first time they have also provided for succession, and for fractionation of interests, to cease. This important policy shift by the Crown has offered more suitable choices to Maori owners.
Notes
1. Raewyn Wakefield, generic closing submissions on twentieth-century land alienation, 2 September 2005 (paper 3.3.60), p 4
2. Ibid, pp 25–27
4. Raewyn Wakefield, generic closing submissions on twentieth-century land alienation, 2 September 2005 (paper 3.3.60), p 8
5. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, pp 235, 263
6. Ibid, p 264
7. Ibid, p 265
8. Ibid, pp 237, 239
9. Ibid, pp 238, 261
10. Ibid, p 226
11. Ibid, p 226
12. Ibid, pp 239, 244
13. Ibid, pp 245–255
15. Ibid, p 247–249
16. 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws', AJHR, 1891, G-1, p vii
17. Ibid, pp xxiii, xxvii
18. With certain exceptions, spelt out in the Native Land Court Act 1894, ss 117–121.
19. Native Land Court Act 1894, ss 126, 128–129
20. Native Land Court Act 1894, s 131
21. Native Land Court Act 1894, s 131
22. The Act also provided an alternative procedure for alienation by a committee of Maori land owners who incorporated under section 122; we discuss this later in the chapter.
23. R Seddon, 12 October 1900, NZPD, 1900, vol 115, p 168
24. David Alexander, appendix two to brief of evidence, February 2005 (doc A97(b)), p 11.
25. Maori Lands Administration Act 1900, s 24. The Maori Land Laws Amendment Act 1903 empowered the Governor, on the recommendation of a land council, to remove any restriction on alienation of Maori-owned land, whether statutory or contained in an instrument of title, subject to certain conditions being met.
26. Maori Lands Administration Act 1900, s 22
27. Maori Lands Administration Act 1900, s 21, 23
28. Maori Lands Administration Act 1900, s 28. This provision was amended in 1901, and again in 1903. In respect of unincorporated owners, section 6 of the Maori Lands Administration Amendment Act 1901 empowered at least 10 owners to execute the necessary instrument of transfer provided they had been authorised in writing by a majority of owners in number and interest in the land. However, section 20 of the Maori Land Laws Amendment Act 1903 removed the requirement to have prior, written authorisation of the majority of owners. Section 20(3) of the Act provided that where there were more than 10 owners the instrument of transfer was to be executed by 'such of the owners as may be selected at a meeting of the owners called for the purpose' by the President of the Land Council.
29. Maori Lands Administration Act 1900, s 29 (1)
30. Maori Lands Administration Act 1900 s 29 (2) (3), (6). It was also provided (s 29 (6)) that Councils might not borrow from any bank, private institution or private person without the authority of the Governor; in other words the possibility that such borrowing might occur was at least envisaged.
31. Maori Lands Administration Act 1900, s 31
32. Maori Lands Administration Act 1900, s 30
33. The Hikairo–Maniapoto–Tuwharetoa Maori Land District was not created till the end of 1901; notice of the appointment of the president and two other members of the council was published in the New Zealand Gazette, 24 July 1902, p 1558. See also Donald Loveridge, ‘The Most Valuable of the Rotorua Lands’ : Alienation and Development in the Ngati Pikiao Blocks, 1881–1960, report commissioned by CFRT on behalf of the claimants, August 1998 (doc A6), pp 59–60
34. R J Seddon, 12 October 1900, NZPD, 1900, vol 115, p 168
35. Donald Loveridge, Maori Land Councils and Maori Land Boards: A Historical Overview, 1900–1952, Waitangi Tribunal Rangahaua Whanui Series, 1996 (doc A60), pp 32–33. The Maori Land Laws Amendment Act 1903 changed the quorum requirements from a majority of Council members to the President and two Maori members for ordinary business, and the President and 1 member for formal business.
36. Regulations under the ‘The Maori Lands Administration Act, 1900’, 7 January 1901, New Zealand Gazette, no 1, p 1
37. Tania Rei, Maori Women and the Vote (Wellington: Huia, 1993), p 21
38. Of the total transferred to Land Councils in 1902 and 1903 (some 98,000 acres), 96 per cent was located in Aotea District. Donald Loveridge, Maori Land Councils and Maori Land Boards: A Historical Overview, 1900–1952, Waitangi Tribunal Rangahaua Whanui Series, 1996 (doc A60), pp 36–37
40. Section 23 provided that nothing in the Thermal Springs Districts Act 1881, or in any Crown grant, court order, or other instrument of title imposing restrictions on alienation, barred or should be deemed to have barred the transfer of any land to the council under the 1900 Act. Regulations gazetted on 18 February 1904 (Amending Regulations under ‘The Maori Lands Administration Act, 1900’, 13 February 1904, New Zealand Gazette, 1904, n 14 pp 549–551) provided that the council,
with agreement of the Minister, could lease any land within boundaries of the Thermal Springs Districts Act 1881 (s 87A). Dr Loveridge notes that the special status of lands within the district 'frequently caused questions to be raised concerning the application of other Acts to them [Rotorua Maori]. Donald Loveridge, “The Most Valuable of the Rotorua Lands”: Alienation and Development in the Ngati Pikiao Blocks, 1881–1960', report commissioned by CFRT on behalf of the claimants, August 1998 (doc A6), p 60


42. The fears as to loss of control were expressed at the Judge's meeting at Whakatane, but there is no reason to think that such fears do not explain the lack of engagement elsewhere in his district. It is echoed, for instance, in the complaints of the Waiotapu owners in 1904. Donald Loveridge, “The Most Valuable of the Rotorua Lands”: Alienation and Development in the Ngati Pikiao Blocks, 1881–1960', report commissioned by CFRT on behalf of the claimants, August 1998 (doc A6), p 63


44. Edger to Native Minister, 22 December 1904 (as quoted in Donald Loveridge, “The Most Valuable of the Rotorua Lands”: Alienation and Development in the Ngati Pikiao Blocks, 1881–1960', report commissioned by CFRT on behalf of the claimants, August 1998 (doc A6), p 63

45. ‘Native Lands and Native-Land Tenure: Interim Report of Native Land Commission, on Native Lands in the County of Rotorua', AJHR, 1908, G-18, p 2


48. ‘Native Affairs Committee', AJHR, 1905, 1-38, pp 2–3

49. Ibid, p 15

50. Ibid, p 20

51. Ibid, p 20

52. Te Heuheu Tukino, 5 September 1905, ‘Native Affairs Committee', AJHR, 1905, 1-38, p 18

53. Regulations under the 'The Maori Lands Administration Act, 1900', 7 January 1901, New Zealand Gazette, no1, p 6, allow councils to sell standing timber on any land transferred to it, on such terms as it saw fit, or to allow flax to be cut and removed; and to grant a right of access for a term not exceeding five years.

54. Te Heuheu Tukino, 5 September 1905, ‘Native Affairs Committee', AJHR, 1905, 1-38, p 20


56. Maori Land Settlement Act 1905, ss 2, 3

57. Ibid, s 8, sch

58. Maori Land Settlement Act 1905, s 20. Tokerau and Tairawhiti districts were thus exempted from Crown purchase until 1 January 1908; see Maori Land Settlement Act 1905, s 20(3).

59. Maori Land Settlement Act 1905, s 23

60. Maori Land Settlement Amendment Act 1907, s 2


62. Maori Land Settlement Act 1905, s 16(2)(a)

63. Ibid, s 17

64. R Seddon, 13 October 1905, NZPD, 1905, vol 135, p 712

65. Maori Land Settlement Act 1905, s 20(1)

66. Ibid, s 20

67. Ibid, s 22

68. Maori Land Claims Adjustment and Laws Amendment Act 1907, s 13(5)

69. Section 3 of the Maori Land Settlement Amendment Act 1907 said that this might be done under the 1905 Act, notwithstanding anything in that Act to the contrary. This suggests that the Crown could start buying individual interests again.

70. Maori Land Settlement Act 1905, s 16(1)

71. Ibid, s 16(2)

72. Ibid, s 17(b); Maori Land Laws Amendment Act 1903, s 20

73. Maori Land Settlement Act 1905, s 17

74. Ibid, s 810–13

75. J Carroll, 13 October 1905, NZPD, 1905, vol 135, p 703

76. Total Government contribution to the Councils, 1901–1903 had been just over £3000; by 1905 the figure since 1900 was just over £8000. ‘Expenses in Connection with Administration of Native Lands under Maori Lands Administration Acts', AJHR, 1903, G-8, pp 1–2


78. J Carroll, 12 October 1900, NZPD, 1900, vol 115, p 186

79. Ibid, p 185

80. Ibid, pp 183–184

81. ‘Native Affairs Committee', AJHR, 1898, 1-3A, p 12

82. ‘Native Lands and Native Land Tenure: general report on lands already dealt with and covered by interim reports', AJHR, 1907, G-1C, p 7

83. W H Herries, 12 November 1903, NZPD, 1903, vol 127, p 538

84. A L D Fraser and Moss, 21 July 1904, NZPD, 1904, vol 128, pp 612, 614

85. A Remington, 7 July 1904, NZPD, 1904, vol 128, p 204

86. A L D Fraser, 21 July 1904, NZPD, 1904, vol 128, p 612

88. ‘Crown Lands: Report of the Royal Commission on Land-Tenure, Land Settlement, and other matters Affecting the Crown Lands of the Colony’, AJHR, 1905, c-4, p xviii (as quoted in Terry Hearn, ‘Taupo-Kaingaroa Twentieth Century Overview: Land Alienation and Land Administration, 1900–1933’, report commissioned by CLO, September 2004 (doc A68)), p 30. Dr Hearn states that Carroll challenged the authority of the commission to make such a statement, since native lands were outside its terms of reference, and it had taken no Maori evidence. None of the 10 members of the commission was Maori. Report submitted on 27 January 1905.


90. Ibid, p 291

91. W Plunket, 27 June 1905, NZPD, 1905, vol 132, p 2


95. H Heke, 12 November 1903, NZPD, 1903, vol 127, p 530

96. Maori Land Settlement Act 1905, s 8, See also J Carroll, 13 October 1905, NZPD, 1905, vol 135, pp 703–704

97. H Heke, 13 October 1905, NZPD, 1905, vol 135, p 719

98. However, as we have noted, the Maori Lands Administration Act 1900 s 34 enabled the Crown to complete negotiations it had started for the purchase of Maori land and section 35 provided a means by which lawful private dealings that had commenced after the enactment of the Native Land Court Act 1894 could be completed by giving notice to a Land Council. See also section 37 in respect of certain lands gazetted under the Native Land Court Act 1894.

99. See for instance W Massey, 12 November 1903, NZPD, 1903, vol 127, p 528

100. ‘Native Affairs Committee’, AJHR, 1905, 1-38, p 15

118. 'Native Lands and Native-Land Tenure: General Report on
Lands Already Dealt with and Covered by Interim Reports', AJHR, 1907,
g-1C, p 9
119. Ibid, p 13
120. Ibid, p 9
121. Ibid, p 18
122. Ibid, p 16
123. Ibid, p 18
124. Ibid
125. These requirements paralleled those for other lessees of Maori
or Crown land.
126. A Ngata, 9 October 1908, NZPD, 1908, vol 145, p 1128
128. The composition of the land boards would stay the same, and the
seven Maori land boards continued for the time being (though in June
1910 the boundaries of the districts would be redefined; the Maniapoto–
Tuwharetoa district was abolished, and its territory redistributed among
the Waikato, Aotea and Waiariki districts. A new seventh district was
added in 1914 to cover the South Island and offshore islands.
129. Waitangi Tribunal, The Hauraki Report, 3 vols (Wellington:
Legislation Direct, 2006), vol 2, p 857
130. Native Land Act 1909, s 365. Such prohibitions could be extended
for not more than six months.
131. Ibid, s 341(1)
132. Ibid, ss 342(5), 343
133. Ibid, s 342(4)
134. Ibid, s 346
135. Ibid, ss 344(2), 345
136. Ibid, s 348(1)
137. Ibid, ss 348(1), 349
138. Ibid, s 209. In 1912, the Supreme Court ruled that alienations
contemplated by section 209 of the Native Land Act 1909 (the section
concerning more than 10 owners) were 'dealings by the whole owners,' and
the Land Boards, in granting precedent consent, must grant its
consent not to alienation of the individual shares, but to a proposed
alienation of the whole block and by all the owners'; Tom Bennion,
Maori Land Court and Land Boards, 1909 to 1952, Waitangi Tribunal
Rangahaua Whanui Series, 1997, pp 16–17. See also Harvey and Another v
The Tairawhiti District Maori Land Board and Another (1912) 31 NZLR
1267.
139. Native Land Act 1909, ss 361, 362
140. Ibid, s 368
141. Ibid, ss 369–370. The Native Land Act 1909 repealed the 1907
Act, with its provision for the Crown to buy undivided interests.
142. Native Land Act 1909, ss 363, 365
143. Native Land Amendment Act 1913, s 109
144. Ibid, s 109(12)
145. Ibid, s 109(9)
146. Ibid, s 109(10)
147. Ibid, s 113
148. Ibid, s 111. The Native Land Amendment and Native Land Claims
Adjustment Act 1916, s 8 extended this to three years.
149. Native Land Amendment Act 1913, s 44
150. Ibid, s 45
151. Ibid, ss 46, 48
152. Ibid, ss 115–116
153. Ibid, s 116(e)
154. Ibid, s 27
155. Ibid, ss 3, 15–16
156. Ibid, ss 23(3), 25
158. Originally, the regulations under the Act merely stated that
a proxy might be appointed by an owner by filling in the appropriate
form, duly attested, and that the proxy was available only with the
leave of the Board's representative at the meeting; see regulation 49 of
the regulations relating to Maori land boards under the Native Land
Act 1909, promulgated on 13 June 1910, New Zealand Gazette, no 58,
p 1720. However, regulations effective from 24 August 1914 introduced
additional requirements: the proxy had to be beneficially interested in
the land; the form was valid only if it stated whether the person giving
the proxy was in favour of or opposed to the proposed resolution, and
the proxy could not vote other than in accordance with the declaration;
see regulation 53 of the Regulations relating to Maori land boards under
the Native Land Act 1909, promulgated on 24 August 1914, New Zealand
Gazette, no 91, p 3272.
159. Native Land Act 1909, ss 342(5), 343
160. Waitangi Tribunal, The Hauraki Report, 3 vols (Wellington:
Legislation Direct, 2006), vol 2, p 897
162. Quoted in Donald Loveridge, 'The Development of Crown Policy
on the Purchase of Maori Lands, 1865–1910: A Preliminary Survey',
report commissioned by CLO, October 2004 (doc A77), pp 197–198
163. W Herries, 28 November 1913, NZPD, 1913, vol 167, p 385
164. Ibid, p 389
165. R Seddon, 12 November 1903, NZPD, 1903, vol 127, p 532
166. J Findlay, 27 October 1911, NZPD, 1911, vol 156, pp 1179–1185
167. The Maori Lands Administration Act 1900, ss 21 (1), (2), (4). See
also Regulations under 'The Maori Lands Administration Act, 1900', 7
January 1901, New Zealand Gazette, no 1, p 7
168. The Maori Lands Administration Act 1900, s 21(7)
169. The Maori Lands Administration Act 1900, s 21(1). Such provisions
were continued into the Native Land Act 1909: they provided for the
setting apart of native reservations for community use, for a narrow
range of purposes which included burial grounds, springs, fishing
grounds, meeting places, recreation grounds (s 232)
170. Regulations under ‘The Maori Lands Administration Act, 1900’, 7 January 1901, New Zealand Gazette, no 1, p 3

171. R Seddon, October 12 1900, NZPD, 1900, vol 115, p 168

172. The Maori Land Settlement Act 1905, s 22 (1) (2)

173. Maori Land Settlement Act 1905, s 22 (1)

174. Maori Land Settlement Act 1905, s 16 (2)

175. Rules of Procedure laid down by District Land Boards, 16 August 1906, New Zealand Gazette, 1906, no 70, pp 2203–2205

176. Ibid, Rule 10, pp 2203–2204. Slightly different rules applied to leases containing, or licences granting, timber or flax-cutting rights or gum-digging rights; see rule 12 (p 2204).

177. Native Land Act 1909, s 220 (c)

178. Native Land Act 1909, s 349 (1)

179. Native Land Act 1909, s 373

180. Native Land Act 1909, s 425

181. The Governor in Council might make regulations for the management of a reservation, by the owners, or by a land council or land board, or corporate body.

182. Native Land Amendment Act 1913, s 91


184. In 1916 the Supreme Court found that even where succession orders had been made, if those orders had not been registered against the title to the land, then those successors had no right to participate in decisions of owners to sell the land. Foster v Tokerau Maori Land Board, [1915] NZLR 1006 (SC)

185. We address provisions for incorporation in a later section of the chapter.

186. W Herries, 14 September 1917, NZPD, 1917, vol 180, p 152


189. Ibid, p 108

190. Ibid, p 186

191. Ibid, p 192

192. The Native Land Amendment Act 1913 allowed for an extension of 12 months for a maximum of two years, and the Native Land Laws Amendment Act 1916 extended the maximum to three years.

193. Terry Hearn (comp), supporting documents to ‘Taupo–Kaingaroa Twentieth Century Overview: Land Alienation and Land Administration, 1900–1993’ (doc A68 (a)), vol 1, pp 4–5


196. Native Land Purchase Officer to under-secretary, Native Affairs Department, 30 January 1919 (as quoted in ibid, p 114)


198. The blocks over which prohibition orders were extended in February 1919 were Hautu 1, 2, 4, 5, and 6, amounting to over 105,000 acres (New Zealand Gazette, 1919, no 17, p 426); in August 1919 orders were extended for one year over Hautu 1B, 2B, 4B, and 5B, amounting to over 25,000 acres (New Zealand Gazette, 1919, no 107, p 2716). Subsequently, the orders were extended over various partitions of the blocks.


200. Judge of the Native Land Court Appointed, 6 November 1919, New Zealand Gazette, 1919, no 126, p 3385


202. Ibid, p 122

203. Native Land Purchase Officer to under-secretary, Native Affairs Department, 28 February 1921 (as quoted in ibid, p 114)

204. Evelyn Stokes, Rotokawa Geothermal Area: Some Historical Perspectives (Hamilton: University of Waikato, 1994), pp 88–91


206. Evelyn Stokes, Rotokawa Geothermal Area: Some Historical Perspectives (Hamilton: University of Waikato, 1994), p 93


208. Cited in ibid, p 125

209. Ibid, p 127

210. Only in 1965 were some of the Tokaanu blocks proclaimed Crown land.


212. Judge Wilson to the under-secretary, Native Department, 11 October 1917, MA-MLP1 1910/155: Paeroa East 4B1E, Archives New Zealand, Wellington, p 3

and Land Administration, 1900–1993, report commissioned by CFRT, September 2004 (doc A68), pp 151–152


217. Ibid, p 232


221. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 225


224. Ibid, p 190

225. Acheson to under-secretary, Native Affairs Department, 12 May 1919 (as quoted in Tony Walzl, ‘Maori and Forestry (Taupo–Rotorua–Kaingaroa) (1890–1990)’, report commissioned by CFRT, October 2004 (doc A80), p 65


232. Ibid, p 148

233. Ibid, pp 150–152

234. Evelyn Stokes, Rotokawa Geothermal Area: Some Historical Perspectives (Hamilton: University of Waikato, 1994), p 83

235. Ibid, p 85

236. Ibid, pp 85–86

237. Ibid, p 92

238. In 1939–1940 this estimate was revised to around 4800 tons, of which 3000 tons was ‘reasonably accessible’: Evelyn Stokes, Rotokawa Geothermal Area: Some Historical Perspectives (Hamilton: University of Waikato, 1994), p 131.

239. Terry Hearn, oral evidence, fourth hearing, 14–18 March 2005 (transcript 4.1.5), p 76


243. Under-Secretary, Native Affairs Department, to Valuer-General, 29 January 1919 (as quoted in Tony Walzl, ‘Maori and Forestry (Taupo–Rotorua–Kaingaroa) (1890–1990)’, report commissioned by CFRT, October 2004 (doc A80), pp 62–63

244. Under-Secretary, Native Affairs Department, to under-secretary, Lands and Survey Department, 22 September 1921 (as quoted in Terry Hearn, ‘Taupo–Kaingaroa Twentieth Century Overview: Land Alienation and Land Administration, 1900–1993’, report commissioned by CFRT, September 2004 (doc A68), pp 117–118


246. Acheson to under-secretary, Native Affairs Department, 12 May 1919 (as quoted in Tony Walzl, ‘Maori and Forestry (Taupo–Rotorua–
Kaingaroa) (1890–1990); report commissioned by CFRT, October 2004 (doc A80), p 67


248. Ibid, pp 244–245

249. New Zealand Herald, 15 May 1906 (as quoted in ibid, p 219)

250. Ibid, pp 223–229

251. Ibid, p 246

252. Tony Walzl, ‘Maori and Forestry (Taupo–Rotorua–Kaingaroa) (1890–1990); report commissioned by CFRT, October 2004 (doc A80), p 58


256. The Maori Land Laws Amendment Act 1908 also required that the Maori Land Board recommend the owner’s application to the Governor and compliance with the leasing provisions of the Maori Lands Administration Act 1900.

257. Lands Brought Under the Thermal Springs Districts Act, 1908, 14 June 1910, New Zealand Gazette, 1910, no 59, pp 1734–1735

258. A Ngata, 28 November 1910, NZPD, 1910, vol 153, p 1058

259. Ibid, p 1059


261. Their terms of reference did not preclude them from inquiring into these lands, meeting Maori owners, or making recommendations under the Act.

262. Michael Sharp and Jolene Patuawa, generic closing submission on twentieth century land administration, 6 September 2005 (paper 3.3.81), pp 13–15

263. ‘Native Lands and Native-Land Tenure: Interim Report of Native Land Commission, on Native Lands in the County of Rotorua,’ AJHR, 1908, G-1E, p 4

264. Ibid, p 8. The memo was dated 16 January 1908

265. ‘Native Lands and Native-Land Tenure: Interim Report of Native Land Commission, on Native Land in the Rotorua County and within the Thermal-Springs District’, AJHR, 1908, G-1N, pp 2–3

266. Native Land Settlement Act 1907 s 3

267. ‘Native Lands and Native-Land Tenure: Interim Report of Native Land Commission, on Native Lands in the County of Tauranga,’ AJHR, 1908, G-1D, p 6

268. We discuss the circumstances of this offer above, in chapter 10. Ngati Rangitahi decided to sell the block in order to purchase the Hauani Reserve, which the government had made available to them after the Tarawera eruption. They thought it had been a gift, but discovered this was not the case. See ‘Native Land and Native-Land Tenure: Interim Report of Native Land Commission, on Native Lands in the County of Rotorua,’ AJHR, 1908, G-1H, p 2

269. Grant Young, Michael Belgrave, Hazel Petrie, Anna Deason, Sara Buttsworth, and Judy Walsh, ‘Rotorua Twentieth Century Overview, the Alienation and Administration of Maori Land in Rotorua, 1900–1999’, report commissioned by CFRT, October 2004 (doc A79), p 83

270. Michael Sharp and Jolene Patuawa, generic closing submission on twentieth century land administration, 6 September 2005 (paper 3.3.81), p 15. Young and Belgrave told us that the total number of recommendations issued by the commissioners for the retention of individual blocks of land in Maori ownership, whether for occupation, leasing or incorporation, was 239. They were unable to compile data for 50 of these. Of the rest, no parts of 33 blocks were alienated (1132.6161 hectares). Parts of another 72 blocks, totalling 25,285.7962 hectares, were alienated. The remaining 84 blocks (10,017.5813 hectares) were alienated in their entirety.


272. The blocks were Haumindi, Kaitoa Rotokohukoha, Mangorewa Kaharoa, Owhatiura Ngapuna, Paengaroa North, Pukehina, Puketawhero, Rangiuru, Rotomahana Parekarangi, Wharenui, Rotoiti, and Te Taheke. The authors explained to us that because of delays in receiving Land History and Alienation Database data, the sample blocks were chosen without being able to test their representativeness on a statistical basis. The sampling process was therefore based on several key representative criteria, particularly: area still owned by Maori; area affected by key issues (including private alienation, Crown purchase, consolidation schemes, development schemes, geographical location, tribal inclusiveness, different forms of land use (rural/urban); Grant Young, Michael Belgrave, Hazel Petrie, Anna Deason, Sara Buttsworth, and Judy Walsh, ‘Rotorua Twentieth Century Overview, the Alienation and Administration of Maori Land in Rotorua, 1900–1999’, report commissioned by CFRT, October 2004 (doc A79), pp 50–51.


274. This latter figure may be a mistake, given the Crown’s later offer.

275. Grant Young, Michael Belgrave, Hazel Petrie, Anna Deason, Sara Buttsworth, and Judy Walsh, ‘Rotorua Twentieth Century Overview, the Alienation and Administration of Maori Land in Rotorua, 1900–1999’, report commissioned by CFRT, October 2004 (doc A79), p 127, and Block History Appendix, vol 5, Rotomahana Parekarangi 2D, in ibid, pp 126–128

276. Grant Young, Michael Belgrave, Hazel Petrie, Anna Deason, Sara Buttsworth, and Judy Walsh, ‘Rotorua Twentieth Century Overview, the
Alienation and Administration of Maori Land in Rotorua, 1900–1999, report commissioned by CFRT, October 2004 (doc A79), p 128; and Appendix, Block Histories, vol 5, Rotomahana Parekarangi 2E2, in ibid, p 128

277. Grant Young, Michael Belgrave, Hazel Petrie, Anna Deason, Sara Buttsworth, and Judy Walsh, ‘Rotorua Twentieth Century Overview, the Alienation and Administration of Maori Land in Rotorua, 1900–1999’, report commissioned by CFRT, October 2004 (doc A79), p 133

278. Ibid, pp 136–137

279. Ibid, pp 140–142

280. Ibid, pp 146–147

281. Ibid, p 150

282. Ibid, p 151

283. Grant Young, Michael Belgrave, Hazel Petrie, Anna Deason, Sara Buttsworth, and Judy Walsh, ‘Rotorua Twentieth Century Overview, the Alienation and Administration of Maori Land in Rotorua, 1900–1999’, report commissioned by CFRT, October 2004 (doc A79), Appendix, Block Histories, vol 5, pp 113–114

284. Raharuhi Pururu to Coates, enclosure in Herdman to Coates, 26 March 1924 (as quoted in Grant Young, Michael Belgrave, Hazel Petrie, Anna Deason, Sara Buttsworth, and Judy Walsh, ‘Rotorua Twentieth Century Overview, the Alienation and Administration of Maori Land in Rotorua, 1900–1999’, report commissioned by CFRT, October 2004 (doc A79), p 154)


287. Ibid, p 499


289. Ibid, p 107

290. Ibid, p 109

291. Ibid, pp 111–116

292. Ibid, pp 143–144

293. Ibid, p 145


295. Ibid, pp 213–214

296. Grant Young, Michael Belgrave, Hazel Petrie, Anna Deason, Sara Buttsworth, and Judy Walsh, ‘Rotorua Twentieth Century Overview, the Alienation and Administration of Maori Land in Rotorua, 1900–1999’, report commissioned by CFRT, October 2004 (doc A79), p 242

297. Grant Young, Michael Belgrave, Hazel Petrie, Anna Deason, Sara Buttsworth, and Judy Walsh, ‘Rotorua Twentieth Century Overview, the Alienation and Administration of Maori Land in Rotorua, 1900–1999’, report commissioned by CFRT, October 2004 (doc A79), Appendix, Block Histories, vol 3, pp 200–202

298. ‘Regulations relating to Maori Land Boards under the Native Land Act, 1909’, 13 June 1910, New Zealand Gazette, 1910, n 58, p 1719

299. Grant Young, Michael Belgrave, Hazel Petrie, Anna Deason, Sara Buttsworth, and Judy Walsh, ‘Rotorua Twentieth Century Overview, the Alienation and Administration of Maori Land in Rotorua, 1900–1999’, report commissioned by CFRT, October 2004 (doc A79), p 229. For Whakarewarewa see p 232; for ‘land and survival’ see pp 230–239.

300. For these examples and those above, see ibid, pp 229–232

301. Grant Young, Michael Belgrave, Hazel Petrie, Anna Deason, Sara Buttsworth, and Judy Walsh, ‘Rotorua Twentieth Century Overview, the Alienation and Administration of Maori Land in Rotorua, 1900–1999’, report commissioned by CFRT, October 2004 (doc A79), Appendix, Block Histories, vol 2, pp 230–233


303. Ibid

304. Ibid, p 208

305. Ibid, pp 208–209


307. Grant Young, Michael Belgrave, Hazel Petrie, Anna Deason, Sara Buttsworth, and Judy Walsh, Summary of ‘Rotorua Twentieth Century Overview, the Alienation and Administration of Maori Land in Rotorua, 1900–1999’, report commissioned by CFRT, October 2004 (doc A79(a)), p 38


309. Ibid, p 204

310. Ibid, pp 206, 210–211


312. Ibid, p 5

313. Ibid, p 7

314. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 272

315. Ibid, pp 271–275

316. Papakura case for succession, 1867, Important judgments delivered in the Compensation Court and Native Land Court, 1866–1879 (Christchurch: Kiwi Publishers, 2003 (first published 1879)), p 19
Upon the marriage of his eldest son, a landowner could settle his estate on his eldest son for life, but it would be entailed on the son’s as yet unborn son. But if the eldest son should die without a son, then the estate would pass to his younger brother for life, and be entailed on the brother’s son; Eileen Spring, Law, Land and Family: Aristocratic Inheritance in England, 1300 to 1800 (Chapel Hill: University of North Carolina Press, 1993), pp 138–139.

No owner however was to be allotted less than two-thirds of the full value he or she was entitled to. And the deficiency in value was to be a charge on the parcel of land which was correspondingly increased. Native Land Act 1909, s 120.

The board had to notify any such application, and hear any objections, and might either give effect to the application or decide to partition the interests of objectors, in which case the president of the board could apply to the court for partition. Native Land Amendment Act 1913, s 67.

302. Carroll to MacDonald, 30 September 1909, MA16/1, document A62(a), pt 2, pp 5–6.


306. ‘Native Land Development: Statement by the Hon Sir Apirana T Ngata, Native Minister’, AJHR, 1931, g-10, p ii.

307. The absence of appeal rights and the sole ‘just and equitable/public interest’ criterion were repeated in the Native Land Amendment and Native Land Claims Adjustment Act 1923 and the Native Land Act 1931.

308. Native Land Amendment Act 1913, s 63.

309. Native Land Amendment and Native Land Claims Adjustment Act 1923, ss 6, 7.

310. Land owned by the Crown or by Europeans might be included in a scheme, if this would make for a more effective consolidation; this followed a 1919 provision for a consolidation scheme to include any land owned by Maori, not just Native freehold land.

311. Even succession orders already made, considered necessary for a scheme, could be exempted from the succession duty.


314. ‘The only limitations were on lands held by Maori Land Boards or the Public Trustee, which were to be liable only to the extent that [they] produced revenue.’ The Act still envisaged that some areas of land would remain exempt; the Governor could exempt them if the owners were deemed ‘indigent’, or for other reasons; but now all exemptions were provided for in a discretionary manner; ibid, p 37.

315. Herries to Minister of Internal Affairs, 24 May 1918 (as quoted in ibid, pp 40–41).


321. ‘The only limitations were on lands held by Maori Land Boards or the Public Trustee, which were to be liable only to the extent that [they] produced revenue.’ The Act still envisaged that some areas of land would remain exempt; the Governor could exempt them if the owners were deemed ‘indigent’, or for other reasons; but now all exemptions were provided for in a discretionary manner; ibid, p 37.
353. This followed some 1500 applications for rates charging orders by the Whakatane County Council and the Rangitaiki Drainage Board, which led to the involvement of the Land Court, and a prominent Maori leader: half were settled; some were still to be dealt with, and the rest (as above) were to be withdrawn. ‘Native Department: Annual Report of the Under-Secretary for the Year Ended 31st March 1941,’ AJHR, 1941, G-9, p 6


355. Grant Young, Michael Belgrave, Hazel Petrie, Anna Deason, Sara Butterworth, and Judy Walsh, ‘Rotorua Twentieth Century Overview, the Alienation and Administration of Maori Land in Rotorua, 1900–1999,’ report commissioned by CFRT, October 2004 (doc A79), pp 410–411

356. Ibid, pp 438–439


359. These figures include Tuhoe, Ngati Manawa and Ngati Awa series.

360. Grant Young, Michael Belgrave, Hazel Petrie, Anna Deason, Sara Butterworth, and Judy Walsh, ‘Rotorua Twentieth Century Overview, the Alienation and Administration of Maori Land in Rotorua, 1900–1999,’ report commissioned by CFRT, October 2004 (doc A79), pp 436–437


362. ‘Report and Recommendation of Conference of Departmental Officers with Regards to the Extinguishment of Survey Liens on Native Lands,’ AJHR, 1932, G-7, p 6

363. Ibid, p 4

364. ‘Interim Report of the Commission Appointed to Inquire into the Question of Native Lands and Native-Land Tenure,’ AJHR, 1907, G-1C, p 13


366. Ibid, p 28

367. Grant Young, Michael Belgrave, Hazel Petrie, Anna Deason, Sara Butterworth, and Judy Walsh, ‘Rotorua Twentieth Century Overview, the Alienation and Administration of Maori Land in Rotorua, 1900–1999,’ report commissioned by CFRT, October 2004 (doc A79), pp 405–406

368. We have located the Gazette notice appointing Tiweka Anaru a commissioner of the Native Land Court under the Native Land Act, 1909 (s 7). Under that provision, a commissioner appointed by the Governor might exercise such judicial powers as were determined by the Governor by Order in Council.

369. Grant Young, Michael Belgrave, Hazel Petrie, Anna Deason, Sara Butterworth, and Judy Walsh, ‘Rotorua Twentieth Century Overview, the Alienation and Administration of Maori Land in Rotorua, 1900–1999,’ report commissioned by CFRT, October 2004 (doc A79), p 406

370. Ibid, pp 408–411

371. Grant Young, Michael Belgrave, Hazel Petrie, Anna Deason, Sara Butterworth, and Judy Walsh, ‘Rotorua Twentieth Century Overview, the Alienation and Administration of Maori Land in Rotorua, 1900–1999,’ report commissioned by CFRT, October 2004 (doc A79), pp 418–423

372. Assistant District Officer to the Secretary, Department of Maori Affairs, 5 June 1953, MA 1, 29/4/1/5 pt 2, box 566, Archives New Zealand, Wellington

373. Ibid

374. Ibid

375. Ibid

376. Grant Young, Michael Belgrave, Hazel Petrie, Anna Deason, Sara Butterworth, and Judy Walsh, ‘Rotorua Twentieth Century Overview, the Alienation and Administration of Maori Land in Rotorua, 1900–1999,’ report commissioned by CFRT, October 2004 (doc A79), p 453

377. Ibid, p 446

378. Mitchell to Judge Carr, 28 May 1937 (as quoted in Grant Young, Michael Belgrave, Hazel Petrie, Anna Deason, Sara Butterworth, and Judy Walsh, ‘Rotorua Twentieth Century Overview, the Alienation and Administration of Maori Land in Rotorua, 1900–1999,’ report commissioned by CFRT, October 2004 (doc A79), p 451)

379. Grant Young, Michael Belgrave, Hazel Petrie, Anna Deason, Sara Butterworth, and Judy Walsh, ‘Rotorua Twentieth Century Overview, the Alienation and Administration of Maori Land in Rotorua, 1900–1999,’ report commissioned by CFRT, October 2004 (doc A79), p 453

380. Ibid, pp 453–473


382. Ibid, p 489


384. Ibid

385. Ibid, p 492


388. ‘Native Land Development: Statement by the Hon Sir Apirana T Ngata, Native Minister,’ AJHR, 1931, G-10, p ii

389. Grant Young, Michael Belgrave, Hazel Petrie, Anna Deason, Sara Butterworth, and Judy Walsh, ‘Rotorua Twentieth Century Overview, the
Alienation and Administration of Maori Land in Rotorua, 1900–1999, report commissioned by CFRT, October 2004 (doc A79), pp 437–438


391. Ibid, p 33

392. ‘Native Land Development: Statement by the Hon Sir Apirana T Ngata, Native Minister’, AJHR, 1931, G-10, p ii

393. ‘Native Affairs Commission: Report of the Commission on Native Affairs’, AJHR, 1934, G-11, p 176

394. Ibid


398. Maori Affairs Act 1953, s 200

399. Maori Affairs Amendment Act 1974, s 55

400. As quoted in Grant Young, Michael Belgrave, Hazel Petrie, Anna Deason, Sara Butsworth, and Judy Walsh, ‘Rotorua Twentieth Century Overview, the Alienation and Administration of Maori Land in Rotorua, 1900–1999’, report commissioned by CFRT, October 2004 (doc A79), p 449


402. Ibid, p 145


405. Ibid, pp 35–37

406. Ibid, p 13

407. Richard Boast, generic submissions in response to Tribunal questions on 20th century land alienation and other matters, 6 October 2005 (doc 3.2.414), p 3

408. Ibid, pp 4–5

409. Ibid, p 11

410. Ibid, p 15

411. Ibid, pp 16–17

412. Ibid, p 17

413. Ibid, pp 21–22

414. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 277

415. Ibid, pp 279–280

416. Ibid, pp 283–285

417. Ibid, p 286

418. Ibid, pp 287–288

419. Ibid, pp 290–291

420. Ibid, pp 258

421. Ibid, pp 263–264


426. Ibid, p 52

427. Ibid, p 54


429. Ibid, p 44


432. Ibid, p 495


Revenue from the lands acquired under the conversion programme was to be paid into the Conversion Fund (s 149(3)). In the first version of the Bill, it had been proposed to vest the interests of a deceased Maori in the Maori Trustee in his capacity of 'Maori Land Administrator'; and it was the administrator's duty to apply to the court for an order determining those entitled to succeed; it was also his to role to value the shares and class them as 'economic' or 'uneconomic'. Maori Affairs Bill, Bills, 1952, p vi, General Assembly Library

Maori Affairs Act 1953, s 137(3)

Maori Affairs Act 1953, s 136 (3)-(4). In the first version of the Bill, it had been proposed to vest the interests of a deceased Maori in the Maori Trustee in his capacity of 'Maori Land Administrator'; and it was the administrator's duty to apply to the court for an order determining those entitled to succeed; it was also his to role to value the shares and class them as 'economic' or 'uneconomic'. Maori Affairs Bill, Bills, 1952, p vi, General Assembly Library

Maori Affairs Act 1953, s 137(1)

Maori Affairs Act 1953, s 116(2)(d), substituted by Maori Purposes Act 1957, s 2. With the consent of a beneficiary, the Court could also vest all or part of that beneficiary's share in any other person or persons.

Maori Affairs Act 1953, s 136(4), substituted by Maori Purposes Act 1957, s 2.

Maori Affairs Act 1953, s 151.

Maori Affairs Act 1953 s 149(2) stated that the money was to come from the 'General Purposes Funds of the Maori Trustee's Account': Revenue from the lands acquired under the conversion programme was also to be paid into the Conversion Fund; (s 149(3)).

Maori Affairs Act 1953, s 152(2).

Maori Affairs Act 1953, s 152(3).

Maori Affairs Act 1953, s 445


Maori Affairs Act 1953, s 175

An 'uneconomic' interest was defined for these purposes as one which, by itself, or together with any other interests of the owners, would not entitle him to an area of land which in the Court's opinion could be used with advantage to the owner as a separate unit of occupation, or production.' Maori Affairs Act 1953, s 137(b)

Maori Affairs Bill 1952, Explanatory Note, Bills, 1952, General Assembly Library

Such orders might include Maori or European land where the land was owned or partly owned by Maori; any European land acquired by a Maori in severalty, or acquired by a Maori in common with any other person or persons, became Maori freehold land (s 182(1), (2)). See also Hugh Kawharu, Maori Land Tenure: Studies of a Changing Institution (Oxford: Clarendon Press, 1977), p 93.

Maori Affairs Act 1953, s 435, in part xxviii, 'Special Powers of the Court'

Both sections remained largely unchanged until 1993.

E Dowson and VLO Sheppard, Land Registration (London: HMSO, 1956)

Ibid, p 65


Ibid, pp 57, 68, 73

Ibid, p 58

Ibid, pp 58, 66–68

Ibid, p 60

Ideas for Dealing with Maori Problems, extract from District Office memorandum, 3 July 1965, MA 1, 1/9/11, Box 16, Maori Problems 1963, Archives New Zealand, Wellington


Ibid, p 8

Ibid, p 9

Ibid, pp 9–10

Ibid, pp 97–101

Ibid, pp 119, 123

Ibid, pp 126–127


Alan Ward, 'Ngati Pikiao Lands: Loss of Tribal Ownership and Control', report commissioned by the Waitangi Tribunal, 2001 (doc A9), P 94


Ibid, p 96

Maori Affairs Act 1953, s 151A, as inserted by the Maori Affairs Amendment Act 1967, s 124

Maori Affairs Amendment Act 1967, s 122

E Corbett, 18 November 1953, NZPD, 1953, vol 301, p 2303

Ibid, pp 2303–2304

Ibid, p 2304

T Omana, 18 November 1953, NZPD, 1953, vol 301, p 2314
He Maunga Rongo

484. Ibid, pp 2314–2315
485. Ibid, 3 September 1954, NZPD, vol 304, p 1573
486. Michael Belgrave, Anna Deason, and Grant Young, ‘Crown Policy with respect to Maori Land, 1953–1999’, report commissioned by CFRT, September 2004 (doc A66), p 70
487. Ibid, p 140
488. Ibid, p 142
491. Ibid
492. P Leonard to Minister of Maori Affairs, 29 May 1967, MA 1, 1/16/3 pt 1, 1966–67, box 126, Archives New Zealand, Wellington
493. Ibid
494. Booth to Hanan, 15 March 1967, MA 1 1/16/3 box 26, pt 1, Archives New Zealand, Wellington. The Council also pointed to the lack of any reference in the Report to written submissions, and contrasted the omission of remarks by speakers opposed to the Committee's conclusions, with lengthy quotations from speakers supporting those conclusions.
495. Hugh Kawharu pointed out that at the Auckland meeting, 80 out of a population of 30,000 attended. Meetings at which 80–100 people attended were well in a minority. I H Kawharu, Maori Land Tenure: Studies of a Changing Institution, Oxford: Oxford University Press, 1977, p 385
496. Ibid, p 307
497. Booth to Hanan, 15 March 1967, MA 1 1/16/3 box 26, pt 1, Archives New Zealand, Wellington
498. Prichard to Secretary, Maori Affairs, 10 April 1967, MA 1 1/16/3 box 26, pt 1, Archives New Zealand, Wellington
499. Paper for the Information of the Caucus Committee on Maori Affairs Legislation, MA 1 1/16/3 box 26, pt 1, Archives New Zealand, Wellington
500. Ibid
501. Newspaper clipping dated 16 May 1967, MA 1 1/16/3 box 26, pt 1, Archives New Zealand, Wellington
503. J M Booth, Secretary, The New Zealand Maori Council to the Minister of Maori Affairs, 15 March 1967, MA 1, 1/16/3 pt 1/1966–67, box 126, Archives New Zealand, Wellington
504. Arawa No 2 and Rotorua City Tribal Executives to Minister of Maori Affairs, 23 May 1967; Peter Whata, Secretary Ngati Pikiao West Maori Committee to Minister for Maori Affairs, 22 May 1967; H Pirika, Secretary Owhata Maori Committee to Minister of Maori Affairs, 24 May 1967, all filed in MA 1, 1/16/3 pt 1, 1966–67, box 126, Archives New Zealand, Wellington
506. MA 1 1/16/4, box 27, Archives New Zealand, Wellington
508. Ibid, p 292
509. Ibid, p 292–293
510. Ibid, pp 292–293
513. E Corbett, 18 November 1953, NZPD, 1953, vol 301, p 2309
515. J M Booth, Secretary, The New Zealand Maori Council to the Minister of Maori Affairs, 15 March 1967, MA 1, 1/16/3 pt 1/1966–67, box 126, Archives New Zealand, Wellington
517. 'Native Affairs Commission: Report of the Commission on Native Affairs', AJHR, 1934, G-11; see for instance pp 46–47
518. Minute to Native Minister on Memo, 20 December 1945 (in Terry Hearn (comp), supporting documents to 'Taupo-Kaingaroa Twentieth Century Overview Land Alienation and Land Administration: 1900–1993' (doc A68(d)), p 454)
519. Memo of ET Tirikatene on behalf of 'Maori MPs and self', 'Maori Purposes Bill', 30 November 1945, Consolidation general 1939–1949, AAMK 869 W3074 29/1 part 2 (in Terry Hearn (comp), supporting documents to 'Taupo-Kaingaroa Twentieth Century Overview Land Alienation and Land Administration: 1900–1993' (doc A68(d)), p 455)
520. Grace to Registrar of the Aotea District Maori Land Board, 24 November 1942 (as quoted in Michael Belgrave, Anna Deason, and Grant Young, Hydro Electricity Issues: The Waikato River Hydro Scheme, report commissioned by CFRT, February 2005 (doc E1), p 70
521. Registrar of the Aotea District Maori Land Board to Assistant Under-Secretary of Public Works, 9 December 1942 (as quoted in Tony Walzl, Hydro Electricity Issues: The Waikato River Hydro Scheme, report commissioned by CFRT, February 2005 (doc E1), p 74
522. Memorandum for Native Minister, 22 November 1944 (as quoted in Tony Walzl, Hydro Electricity Issues: The Waikato River Hydro Scheme, report commissioned by CFRT, February 2005 (doc E1), p 92
523. J M Booth, Secretary, The New Zealand Maori Council to the Minister of Maori Affairs, 15 March 1967, MA 1, 1/16/3 pt 1/1966–67, box 126, Archives New Zealand, Wellington
524. E Corbett, 18 November 1953, NZPD, 1953, vol 301, p 3058
526. W Nash, 18 November 1953, NZPD, 1953, vol 301, p 2320
527. H Mason, 18 November 1953, NZPD, 1953, vol 301, p 2317
530. Ibid
531. Ibid, p 63
533. E Corbett, 18 November 1953, NZPD, 1953, vol 301, p 2309
540. Ibid, pp 57–58. Ahipara was the community given the pseudonym Kotare in Metge's study.
541. Ibid, p 59
542. Ibid, p 45
543. Ibid, p 231
544. Paul G McHugh, Maori Land Laws of New Zealand: Two Essays (Saskatoon: University of Saskatchewan Native Law Centre, 1983), p 55
548. A McIntyre to Secretary of the Department of Maori Affairs, 15 February 1956, MA 68/1 (as quoted in Terry Hearn (comp), supporting documents to ‘Taupo-Kaingaroa Twentieth Century Overview Land Alienation and Land Administration: 1900–1993’ (doc A68(a)), vol 1, p 329)
550. George Asher, brief of evidence, 29 April 2005 (doc E39); p 26; see also George Asher, brief of evidence, 29 July 2005 (doc 130), p 2
552. Figures cited in ibid, pp 500–501
553. Grant Young, Michael Belgrave, Hazel Petrie, Anna Deason, Sara Buttsworth, and Judy Walsh, ‘Rotorua Twentieth Century Overview, the Alienation and Administration of Maori Land in Rotorua, 1900–1999’, report commissioned by CFRT, October 2004 (doc A79), pp 525–526
556. Ibid, pp 17, 20
558. David Alexander says the participants in this second meeting are not identified; ‘Some Crown Dealings in Whakapoungakau Block’, report commissioned by Ngati Rangiteaorere in association with CFRT, April 2005 (doc G19), page unnumbered
559. The delay in issue of the final exchange orders was because one of the blocks had not been surveyed.
564. Grant Young, Michael Belgrave, Hazel Petrie, Anna Deason, Sara Buttsworth, and Judy Walsh, ‘Rotorua Twentieth Century Overview, the Alienation and Administration of Maori Land in Rotorua, 1900–1999’, report commissioned by CFRT, October 2004 (doc A79), p 506
566. Cater to Head Office, 17 October 1972 (as quoted in Grant Young, Michael Belgrave, Hazel Petrie, Anna Deason, Sara Buttsworth, ...
and Judy Walsh, 'Rotorua Twentieth Century Overview, the Alienation and Administration of Maori Land in Rotorua, 1900–1999', report commissioned by CFRT, October 2004 (doc A79), p 565

567. Figures given in Grant Young, Michael Belgrave, Hazel Petrie, Anna Deason, Sara Butworth, and Judy Walsh, 'Rotorua Twentieth Century Overview, the Alienation and Administration of Maori Land in Rotorua, 1900–1999', report commissioned by CFRT, October 2004 (doc A79), p 507

568. Williams to District Office, Rotorua, 1 August 1967 (as quoted in Grant Young, Michael Belgrave, Hazel Petrie, Anna Deason, Sara Butworth, and Judy Walsh, 'Rotorua Twentieth Century Overview, the Alienation and Administration of Maori Land in Rotorua, 1900–1999', report commissioned by CFRT, October 2004 (doc A79), p 494)

569. Grant Young, Michael Belgrave, Hazel Petrie, Anna Deason, Sara Butworth, and Judy Walsh, 'Rotorua Twentieth Century Overview, the Alienation and Administration of Maori Land in Rotorua, 1900–1999', report commissioned by CFRT, October 2004 (doc A79), pp 494–497

570. Ibid, p 498

571. Ibid p 493

572. Ibid, p 513

573. Ibid, p 522


575. See The King v Waiariki District Maori Land Board [1922] NZLR 417 and re Hinewaki No 3 Block 1922 GLR 591. As the court put it in The King v Waiariki District Maori Land Board [1922] NZLR 417 section 114 of the Native Land Act 1909 made 'special and elaborate provision of the registration of partition orders', and this displaced the general provision of section 34 that an unregistered order affected the equitable title only. Furthermore, section 111 provided that a partition order 'shall constitute without any transfer or other instrument of assurance of the title to the parcels of land therein included.' The court held that any section was to be construed literally and that a partition order was in itself, and apart from registration under the Land Transfer Act, the title to the legal estate in each subdivision. In the case of general land, however, an unregistered instrument of ownership gives just an equitable interest in land.


577. Ibid, p 40

578. Ibid

579. The commission followed an appendix in the Mete-Kingi report, but stated that the percentages given in the report were incorrect, and had been corrected in their own. T P McCarthy, 'Report of Royal Commission of Inquiry: The Maori Land Courts', 16 May 1980, AJHR, 1980, H-3, p 42. The figures differed however by district.


581. Ibid, pp 113–114

582. Ibid, p 115


584. Ibid


586. Te Ture Whenua Maori Act 1993, s 123

587. Under the Land Transfer Act 1870 Amendment Act 1874

588. Native Land Court Act 1894, s 73

589. Native Land Court Act 1894, s 30

590. Native Land Act 1909, s 95. On receipt of a freehold order, the District Land Registrar was required to embody it in the Provisional Register and all the provisions in the Land Transfer Act 1908 relating to provisional registration applied; section 96 of the Native Land Act 1909. Where there were more than 10 owners, the registrar had a discretion to retain any title on the Provisional Register: Native Land Act 1909, s 97.

591. Native Land Act 1909, s 34

592. See Native Land Act 1931, ss 46, 123, and Maori Affairs Act 1953, ss 36, 164

593. Te Ture Whenua Maori Act 1993, s 123. The only exception concerns orders vesting beneficial ownership of land or any interest in the land in a person other than a person in whom the legal ownership is vested: see s 122 of the Act.

594. LINZ and the Ministry of Justice are working together to plan the completion of all registration within five years.


598. Te Rangihiroa, 24 October 1911, NZPD, 1911, vol 156, pp 971–972

599. ‘Native Land Development: Statement by the Hon Sir Apirana T Ngata, Native Minister’, AJHR, 1931, G-10, p xi


602. Paul G McHugh, Maori Land Laws of New Zealand: Two Essays (Saskatoon: University of Saskatchewan Native Law Centre, 1983), p 55

603. Section 57 of the Maori Affairs Amendment Act 1974, which inserted section 433 of the Maori Affairs Act 1953. Restoration of status to Maori land was not automatic. For example, section 433A(2) limited restoration to cases where the court was satisfied that ‘by reason of the number of owners or for any other reason the land cannot be satisfactorily managed or dealt with as European land.’
604. Nicholas Bayley, Leanne Boulton, and Adam Heinz, 'Maori Land Trusts and Incorporations in the Twentieth Century in the Central North Island Region,' report commissioned by the Waitangi Tribunal, 2005 (doc G4), pt 2, p 163


606. Maori Affairs Amendment Act 1967, ss 31, 32

607. Te Ture Whenua Maori Act 1993 s 260 provides that the shares in a Maori incorporation are deemed for all purposes to be undivided interests in Maori freehold land.


609. Michael Sharp and Jolene Patuawa, generic closing submission on twentieth century land administration, 6 September 2005 (paper 3.3.81), pp 57, 59–60

610. Raewyn Wakefield and Richard Boast, generic reply submissions on twentieth-century land alienation, 31 October 2005 (paper 3.3.137), p 20

611. Ibid, p 20

612. Michael Sharp and Jolene Patuawa, generic closing submission on twentieth century land administration, 6 September 2005 (paper 3.3.81), pp 57, 59–60

613. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, pp 312–313

614. Michael Sharp and Jolene Patuawa, generic closing submission on twentieth century land administration, 6 September 2005 (paper 3.3.81), pp 22, 52–53

615. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, pp 307, 313

616. Ibid, p 304

617. 'Native Lands and Native-Land Tenure: General Report on Lands Already Dealt with and Covered by Interim Reports,' AJHR, 1907, G-1C, pp 13–14

618. Ibid, p 14

619. Nicholas Bayley, Leanne Boulton, and Adam Heinz, 'Maori Land Trusts and Incorporations in the Twentieth Century in the Central North Island Region,' report commissioned by the Waitangi Tribunal, 2005 (doc G4), pt 2, p 135. We discuss compulsory vestings earlier in this chapter.

620. 'Native Affairs Committee,' AJHR, 1905, 1-3B, p 15

621. Ibid, 1-3B, p 24

622. 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws,' AJHR, 1891, sess 2, G-1, p xvi

623. Ibid, p 12

624. J Carroll, 28 September 1894, NZPD, 1894, vol 86, p 374

625. R Seddon, 28 September 1894, NZPD, 1894, vol 86, p 371

626. Rules and Regulations under Division II, Part II, of 'The Native Land Act, 1894, 1 April 1895, New Zealand Gazette, 1895, no 25, pp 610–614

627. Native Land Act 1909, s 334

628. Native Land Act 1909, s 335. The board was to pay out of the proceeds any fees, expenses incurred in alienating the land, rates or taxes owing, any other charges on the land, before distributing the residue among the beneficial owners.

629. Native Land Court Act 1954, sec 126–129

630. However, the committee did need the consent of the commissioner of Crown lands for the particular district, or of such other person the Governor appointed as the native lands administration officer for any Crown lands district; Native Land Court Act 1894 s 126.

631. R Seddon, 28 September 1894, NZPD, 1894, vol 86, p 371

632. Native Land Act 1909, s 330

633. Native Land Settlement Act 1907, s 61

634. Native Land Act 1909, s 332

635. Native Land Act 1909, s 325

636. Native Land Act 1909, s 327


638. Michael Sharp and Jolene Patuawa, generic closing submission on twentieth century land administration, 6 September 2005 (paper 3.3.81), pp 51–53

639. Nicholas Bayley, Leanne Boulton, and Adam Heinz, memorandum of Dr Bayley, Mr Heinz and Ms Boulton addressing issues arising from the cross-examination of the ‘Maori Land Trusts and Incorporations’ report, 2005 (doc 148), table 15. This table replaced that included in Nicholas Bayley, Leanne Boulton, and Adam Heinz, ‘Maori Land Trusts and Incorporations in the Twentieth Century in the Central North Island Region,’ report commissioned by the Waitangi Tribunal, 2005 (doc G4), pt 2, page not numbered.

640. Nicholas Bayley, Leanne Boulton, and Adam Heinz, memorandum of Dr Bayley, Mr Heinz and Ms Boulton addressing issues arising from the cross-examination of the ‘Maori Land Trusts and Incorporations’ report, 2005 (doc 148), table 15

641. 'Native Lands and Native-Land Tenure: General Report on Lands Already Dealt with and Covered by Interim Reports,' AJHR, 1907, G-1C, p 14


643. AJHR, 1908, G-i, p 3

644. 'Native Land Development: Statement by the Hon Sir Apirana T Ngata, Native Minister,' AJHR, 1931, g-10, p ii

645. Minutes of meeting between Minister of Maori Affairs and several hapu at Ohinemutu, 1961, (as quoted in Nicholas Bayley and Tim Shoebridge, 'Indexed Document Bank on Land Use in the Twentieth
Century for the Central North Island Inquiry Region', document bank commissioned by the Waitangi Tribunal, 2005 (doc G1), p 1958

646. It seems he may have been referring to the suggestion in the report for tribal incorporations. Minutes of meeting between Minister of Maori Affairs and several hapu at Ohinemutu, 1961, in Nicholas Bayley and Tim Shoebridge, 'Indexed Document Bank on Land Use in the Twentieth Century for the Central North Island Inquiry Region', document bank commissioned by the Waitangi Tribunal, 2005 (doc G1), p 1958

647. Michael Sharp and Jolene Patuawa, generic closing submission on twentieth century land administration, 6 September 2005 (paper 3.3.81), p 63

648. David Rangitauira and Miharo Armstrong, closing submissions on behalf of Ngati Hinekura, 2 September 2005 (paper 3.3.72), pp 32–33

649. Ibid, p 34

650. Michael Sharp and Jolene Patuawa, generic closing submission on twentieth century land administration, 6 September 2005 (paper 3.3.81), p 63

651. Ibid, p 59

652. Ibid, p 57

653. Ibid, p 58

654. Ibid, pp 58, 60

655. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, pp 305–327

656. This is a reference to trust boards constituted under the Maori Trust Board Act 1955. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 321

657. We do not comment on the two important trust boards within our region, which are fundamentally different from trusts and incorporations. The original purpose of these trust boards was to receive and administer compensation awarded by the Crown in settlement of particular grievances, and they are established under a separate statutory regime. We received very little evidence relating to trust boards.

658. Native Purposes Act 1943, s 8(1)

659. Maori Affairs Act 1953, s 438(1)

660. Nicholas Bayley, Leanne Boulton, and Adam Heinz, 'Maori Land Trusts and Incorporations in the Twentieth Century in the Central North Island Region', report commissioned by the Waitangi Tribunal, 2005 (doc G4), pt 2, p 90

661. Aroha Harris, 'Maori Land Title Improvement since 1945', New Zealand Journal of History, vol 31(1), 1997, p 150

662. Nicholas Bayley, Leanne Boulton, and Adam Heinz, 'Maori Land Trusts and Incorporations in the Twentieth Century in the Central North Island Region', report commissioned by the Waitangi Tribunal, 2005 (doc G4), pt 2, p 18

663. Section 438 of the Maori Affairs Act 1953 was substituted by s 142 of the Maori Affairs Amendment Act 1967

664. Section 438 (3) (c), as substituted by s 142 of the Maori Affairs Amendment Act 1967.

665. Aroha Harris, 'Maori Land Title Improvement since 1945', New Zealand Journal of History, vol 31(1), 1997, p 150


669. Nicholas Bayley, Leanne Boulton, and Adam Heinz, 'Maori Land Trusts and Incorporations in the Twentieth Century in the Central North Island Region', report commissioned by the Waitangi Tribunal, 2005 (doc G4), pt 2, p 90


671. Maori Affairs Act 1953 s 438(7). However, the broad power was narrowed somewhat by the Maori Purposes Act 1963, s 112, which confined it to 'the keeping, filing, inspection and auditing of the accounts of trustees'; and empowered the land court to apply the detailed audit provisions of the Trustee Act 1956, s 81B.

672. Nicholas Bayley, Leanne Boulton, and Adam Heinz, 'Maori Land Trusts and Incorporations in the Twentieth Century in the Central North Island Region', report commissioned by the Waitangi Tribunal, 2005 (doc G4), pt 2, p 97


674. Maori Affairs Amendment Act 1974, s 59. Where advisory trustees were appointed, the Trustee Act 1956, s 49, applied.

675. Michael Sharp and Jolene Patuawa, generic closing submission on twentieth century land administration, 6 September 2005 (paper 3.3.81), p 19

676. Aidan Warren and Rachel Hall, closing submissions on behalf of Ngati Wheoro, 6 September 2005 (paper 3.3.83), pp 21–24


678. Memorandum of Dr Bayley, Mr Heinz and Ms Boulton addressing issues arising from the cross-examination of the 'Maori Land Trusts and Incorporations' report (doc G4), 5 August 2005 (doc G4), pp 14–15


680. Nicholas Bayley, Leanne Boulton, and Adam Heinz, 'Maori Land Trusts and Incorporations in the Twentieth Century in the Central North Island Region', report commissioned by the Waitangi Tribunal, 2005 (doc G4), pt 2, p 14–15

681. E Corbett, 18 November 1953, NZPD, 1953, vol 301, p 2307
The Legacy of the Nineteenth Century


683. Ibid, pp 60–61


686. Ibid, p 36

687. Nicholas Bayley, Leanne Boulton, and Adam Heinz, 'Maori Land Trusts and Incorporations in the Twentieth Century in the Central North Island Region', report commissioned by the Waitangi Tribunal, 2005 (doc G4), pt 2, pp 79

688. Ibid, p 111

689. Ibid, pp 28–29, 112

690. The Maori Affairs Act 1953 s 285 empowered incorporations, where authorised by resolution passed at a general meeting of owners, to invest money in New Zealand Government securities or in debentures issued by any local authority, or in loan money secured by a mortgage. The Maori Affairs Amendment Act 1967, s 46(4), extended the power so that incorporations were able to invest money belonging to them on the same basis that trustees under the Trustee Act 1956 were able to invest trust funds.

691. Nicholas Bayley, Leanne Boulton, and Adam Heinz, 'Maori Land Trusts and Incorporations in the Twentieth Century in the Central North Island Region', report commissioned by the Waitangi Tribunal, 2005 (doc G4), pt 2, p 74

692. Hamuera Mitchell, oral evidence for Ngati Whakaue, response to Tribunal questions, 6th hearing, 13 May 2005 (recording 4.3.6, track 3)

693. Section 298 of the Maori Affairs Act 1953, and, as from 1 April 1969, section 58 of the Maori Affairs Amendment Act 1967.

694. Maori Affairs Amendment Act 1967, s 32(4); Nicholas Bayley, Leanne Boulton, and Adam Heinz, 'Maori Land Trusts and Incorporations in the Twentieth Century in the Central North Island Region', report commissioned by the Waitangi Tribunal, 2005 (doc G4), pt 2, p 79

695. Section 303 of the Maori Affairs Act 1953 and, as from 1 April 1967, section 65 of the Maori Affairs Amendment Act 1967; Nicholas Bayley, Leanne Boulton, and Adam Heinz, 'Maori Land Trusts and Incorporations in the Twentieth Century in the Central North Island Region', pt 2, report commissioned by the Waitangi Tribunal, 2005 (doc G4), p 81

696. Nicholas Bayley, Leanne Boulton, and Adam Heinz, 'Maori Land Trusts and Incorporations in the Twentieth Century in the Central North Island Region', pt 2, report commissioned by the Waitangi Tribunal, 2005 (doc G4), pp 94–95

697. Ibid, p 100

698. Section 61 of the Maori Affairs Amendment Act 1967; Nicholas Bayley, Leanne Boulton, and Adam Heinz, 'Maori Land Trusts and Incorporations in the Twentieth Century in the Central North Island Region', report commissioned by the Waitangi Tribunal, 2005 (doc G4), pt 2, pp 81–82

699. Nicholas Bayley, Leanne Boulton, and Adam Heinz, 'Maori Land Trusts and Incorporations in the Twentieth Century in the Central North Island Region', report commissioned by the Waitangi Tribunal, 2005 (doc G4), pt 2, pp 81–82

700. Te Ture Whenua Maori Act 1993, s 280

701. Te Ture Whenua Maori Act 1993, s 280(7) (f)


703. Ibid, p 120–122

704. Ibid, p 124

705. Ibid, pp 127–129


707. Maori Affairs Amendment Act 1967, s 40(1)(a)

708. Maori Affairs Amendment Act 1967, s 31

709. Maori Affairs Amendment Act 1967, s 38

710. Maori Affairs Amendment Act 1967, s 41

711. Maori Affairs Amendment Act 1974, s 77

712. Maori Purposes Act 1975, s 17

713. Te Ture Whenua Maori Act 1993, s 260

714. Nicholas Bayley, Leanne Boulton, and Adam Heinz, Summary of 'Maori Land Trusts and Incorporations in the Twentieth Century in the Central North Island Region', June 2005 (doc G4(b)), pt 2, p 13

715. Maori Affairs Amendment Act 1967, s 33(2)

716. Maori Affairs Amendment Act 1967, s 34

717. Maori Affairs Amendment Act 1967, s 33(1)(b), 35

718. From this time shares could be transferred only by registration in a share register. Initially the land court still had the role of determining succession to shares (as if they were a corresponding beneficial interest in land vested in the incorporation). After 1973 however this role was handed over to incorporations themselves.

719. Nicholas Bayley, Leanne Boulton, and Adam Heinz, 'Maori Land Trusts and Incorporations in the Twentieth Century in the Central North Island Region', report commissioned by the Waitangi Tribunal, 2005 (doc G4), pt 2, pp 53–54

720. Ibid, pp 55–56; Leanne Boulton, answers to questions, 29 July 2005 (doc I14), p 2


722. The Act does not provide an exhaustive definition of 'Maori community purposes' but they include the promotion of health, the promotion of social, cultural and economic welfare and the promotion of education and vocational training; see s 218.

723. Te Ture Whenua Maori Act 1993, s 212 (8)

724. Te Ture Whenua Maori Act 1993, s 237
He Maunga Rongo

725. Te Ture Whenua Maori Act 1993, s 222


728. Cited in Nicholas Bayley, Leanne Boulton, and Adam Heinz, 'Maori Land Trusts and Incorporations in the Twentieth Century in the Central North Island Region', report commissioned by the Waitangi Tribunal, 2005 (doc G4), pt 2, p 101

729. Maori Affairs Amendment Act 1967, s 86

730. Nicholas Bayley, Leanne Boulton, and Adam Heinz, 'Maori Land Trusts and Incorporations in the Twentieth Century in the Central North Island Region', report commissioned by the Waitangi Tribunal, 2005 (doc G4), pt 2, p 46

731. Malcolm Tukino Short, 'Report to the Waitangi Tribunal (Wai 1200) on Administration Costs and Dividend Returns of Maori Trusts and Incorporations', 27 July 2005 (doc I31), p 10


734. George Asher, brief of evidence, 29 July 2005 (doc I30), p 6

735. Karen Feint, closing submissions on behalf of Ngati Tuwharetoa, 9 September 2005 (paper 3.3.106), p 249


The taking of Maori land for public works is a major grievance for Central North Island iwi and hapu. This is not because tribes lack a commitment to the economic and social development of their communities, nor is it from any unwillingness to contribute to local and national development. Rather, the compulsory taking of land and resources – without consent and sometimes without compensation, by legislation unsanctioned by Maori communities – has given rise to an enduring and powerful grievance. The construction of roads and the main trunk railway in the 1870s and 1880s showed that Maori groups would give negotiated consent to public works. But the taking of their land by compulsion is something to which they have not consented. Every claimant group has a grievance in this respect. This chapter deals with the actual taking of land and resources for public works. The environmental impacts of public works are a major issue in their own right, and some will be addressed in part v.

The compulsory taking of land has been considered in detail by earlier Tribunals, and the following general principles have emerged. First, any taking of land without consent or compensation is a flagrant breach of the plain meaning of article 2 of the Treaty. Secondly, unfavourable discrimination between Maori and general land is a breach of the plain meaning of article 3 of the Treaty. Both of these infringements are also breaches of the Treaty principles of partnership, active protection, and equity. According to the Turangi Township Report, the only circumstance in which the Crown might be justified in overriding Treaty guarantees is an exceptional one in the national interest. This is no light constraint, and it requires the least possible interference in the title and state of the affected land. We note, in this respect, that the Crown has had the statutory option to negotiate a lease of land for public works since 1928. This is an important consideration in terms of what was possible – as opposed to preferred or convenient – in the circumstances of the times.

Many claimants presented us with evidence about particular public works takings. We do not have the detailed evidence and submissions that would enable us to deal with these takings, other than to note examples that illuminate general principles applying to all claimants. The overall quantity of land taken was not large. We do not have full figures on the amount of land taken, especially the pieces taken without compensation under the 5 per cent provision for roading. Nor do we have full evidence on the number of apparently voluntary transactions in which the threat of compulsion was a factor. In our view, a measure of quantity is not the right one to apply to compulsory takings. The compulsory taking of a single acre of Maori land, especially without compensation, is automatically in breach of Treaty principles. If the land is truly required in the national interest, and the Crown has first honoured its partnership by negotiation, then the taking of land might be justified as a last resort. Even in that circumstance, a compulsory lease (rather than outright taking) would be more compliant with the Treaty.
From the evidence available to us, there are systemic problems underlying the Crown’s approach to public works. This country’s legislation (both Public Works Acts and related Acts) has involved sustained and systematic Treaty breaches over a long period. Given that the lands taken have sometimes been taonga of irreplaceable value to the tribes concerned, and that a strong sense of grievance persists to the present day, there are serious Treaty issues for the Crown to face in any settlement of these claims.

All claimant groups have grievances about the taking of land for public works. To give some indication of the depth and breadth of this sense of grievance, we heard evidence about it from the claimants listed in table 12.1. That table is not an exhaustive list of all claimants who gave evidence about public works takings, but it shows something of the extent to which this is a key issue for claimants, despite the comparatively small amount of land involved. The evidence of Colleen Skerrett-White, for Ngati te rangiunuora, is typical of the sense of grievance handed down from generation to generation:

I have a specific interest in the Taumanu Block, taken under the Public Works Act 1908 for Scenic Reserve, as my whanau and I still live on the adjacent land to the reserve. Every day I am reminded of the fact that my tupuna had no choice in this matter, that my grandfather asked us to fight to get it back and that they always felt aggrieved about the taking of the Reserves, Lakes and Roads.

The Tribunal’s Approach to these Specific Grievances

We have not conducted an exhaustive inquiry into each of these takings, nor do we make findings on particular takings. Additional evidence would be required before we could do so. Rather, we have identified the key generic issues common to all these takings, with the assistance of submissions from counsel, in the hope that this will assist a settlement of these particular and heartfelt grievances. In taking this approach, we do not want to undervalue the specific nature of these grievances, nor the possible need for site-specific redress. Our stage one inquiry, however, has identified sustained, systemic Treaty breaches, which underlie these particulars and which need to be taken into account in settling specific claims.

The Claimants’ Case

The Tribunal received two submissions on generic issues, filed on behalf of all claimants. These were Hemi Te Nahu’s submission on general public works issues, and that of Annette Sykes and Jason Pou on related scenery preservation matters. Their arguments will be outlined in this section. Mr Te Nahu did not provide examples or case studies, which were dealt with in particular claimant submissions. These will be considered in the following section, after which we will outline the Crown’s responding submissions.

Generic submission on public works takings

Mr Te Nahu made a submission on generic issues on behalf of all claimants, which argued that public works legislation caused significant losses for Central North Island Maori, and even amounted to legislative racism. The sheer number and diversity of Acts (and sections of Acts) caused confusion about which one was being applied for any particular taking, especially for roads and railways, and therefore whether compensation provisions applied. But the key Acts for the Central North Island were the Native Land Acts (with provision for road takings of up to 5 per cent without compensation), the Public Works Acts of the 1880s and 1890s, and the major consolidating Act of 1928.

Mr Te Nahu submitted that much of the legislation had provisions that discriminated against Maori land:
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Table 12.1: Tangata whenua witnesses

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lesser or no notification for multiply owned Maori land, depriving Maori of opportunities to object (or even to know about the taking until after it had happened);

- easier acquisition of Maori than general land, making Maori land a softer target, and easier compulsory acquisition of Maori land than negotiated acquisition of Maori or general land, again making it a softer target;

- different and less fair compensation provisions (including a different court, different standards, systemic undervaluing, overriding of owners by statutory negotiators, dispersion or even non-payment of compensation, and lengthy delays); and

- more extreme and longer-lasting opportunities to take Maori land for roading and railways without compensation.

The Public Works Act 1928 provided for the return of surplus land taken, but no longer required for public works. Later amendments, however, excluded Maori land from the offer-back provisions and allowed it to be used for ‘secondary purposes’. In practical terms, the claimants argued that fragmentation of title made it more difficult to return land to Maori owners than to general landowners, which was ironic given that it also made it easier to take than general land. Also, land was offered back at the current market price (often impossibly high for Maori owners), and it was not until 1982 that the law allowed for discretion to offer it back at a lower price. Some provisions did treat Maori and general land in the same or similar ways, but were nonetheless fundamentally inconsistent with the special guarantees the Crown had made to Maori in the Treaty.

In particular, the claimants’ view is that public works legislation allowed the Crown:

- to negotiate for the purchase of the land with a statutory representative of the owners [the Maori Trustee] rather than with the owners directly;

- to impose the ground rules upon which payment for the land would be made, in particular establishing the rule that the price paid for the land would not have reference to its future use and usefulness, and that not all uses of the land would be compensated for;

- to impose the form of land tenure (namely outright purchase of freehold) under which the land would be used by the Crown;

- to regulate the amount and nature of the information that was available to owners about the dealings with their land;

- to change the purpose for which the land was originally taken without reference back to the owners;

- to set the terms upon which the land, when no longer required by the Crown, could return to the former Maori owners; and

- to determine that, in certain circumstances, the former Maori owners would have no opportunity to purchase back or otherwise regain the land.\(^4\)

In terms of quantities taken, the claimants argued that the impact was not only on their total land holdings, but contributed to the loss of remaining ancestral land and taonga of cultural, political, and social importance. As a result, Central North Island Maori have been devastated by the Crown’s public works policies. In terms of the Treaty, the compulsory taking of Maori land for public works, especially without compensation, is fundamentally inconsistent with Treaty principles, and it ‘borders on raupatu’. Acquisition of Maori land by the Crown via public works legislation is thus in direct contravention of the Treaty. Its prejudicial effect has been losses of significant land and taonga. The tino rangatiratanga of Central North Island Maori (at whanau, hapu, and iwi level) was and continues to be compromised.\(^5\)
Generic submission on scenery preservation
Ms Sykes and Mr Pou offered generic submissions on scenery preservation, which involved the use of compulsory powers and compensation, under interactions between the scenery preservation and public works legislation. Scenery Preservation Acts from 1903 onwards (which also included provision for thermal springs takings) – notably the Amendment Act of 1910 – led to petitions from Rotorua Maori protesting the compulsory taking of land for scenic purposes. Maori members expressed their misgivings in Parliament on a number of counts, such as the lack of consultation and the use of compulsory powers. The legislation was confused at first, but the 1910 Amendment Act restored the Government’s ability to acquire Maori land, by compulsion if necessary, and deemed all Maori land taken for scenic purposes under recent public works legislation to have been taken validly. It also provided some protections for Maori (rights to take birds, to bury their dead) in scenic reserves that had formerly been Maori land. The main impact was felt from 1907 to 1931, and examples include Waiotapu, a key thermal area taken in 1907, takings over a number of years at Rotoma, and also the Crown’s acquisition of the beds and banks of lakes and rivers (addressed in part V).  

In contrast to public works, where Maori of the time wanted (consensual) development, the claimants questioned the fundamental need to take land or resources out of Maori ownership to preserve their scenic beauty. There are two main reasons for questioning this need. First, the claimants queried whose benefit was at stake, and who chose the so-called ‘scenery’ that needed to be preserved, and in what state. This was actually a process of ecological imperialism, in which ‘conservationists’ of various kinds have used the powers of central government against the local people, with inadequate priority given to tangata whenua rights or control over decision-making. Tangata whenua have been cast as ‘the Other’, with the needs of ‘visitors’ taking precedence over those of local tangata whenua. Maori places of special significance were suddenly characterised as places from which they had to be denied access. This was fundamentally unfair and in violation of the Treaty. In practice, scenic reserves, and the associated regulatory regimes for flora and fauna, interfere with the exercise of tangata whenua rights over resources, and with their obligations of kaitiakitanga.  

Secondly, the claimants questioned the need not only to preserve Maori taonga in a state preferred by settlers, but the further need to take taonga out of Maori ownership to do so. Counsel highlighted tangata whenua evidence before the Tribunal, which showed extensive Central North Island Maori knowledge of their environment, complex practices for regulating and protecting resources, strong ties with specific sites, and values that underpin a Maori philosophy of kaitiakitanga. The Crown, they submitted, could have trusted Maori to preserve and protect the nation’s scenic beauty. Instead, the Crown demanded Maori give up land that could not be used for development, just as much as it demanded they give up the land that could be used in the economy. This was doubly unfair, philosophically unsound, and in breach of the Treaty.

Particular claimant examples
In addition to their submissions on generic issues, claimant groups provided particular examples of public works takings within their rohe, or of the impact of public works takings on their mana, tino rangatiratanga, and cultural survival as Maori communities. As noted above, all claimants in our inquiry have grievances about public works takings. We provide a brief selection here of the kinds of issues raised, and of some specific examples that illustrate the claimed nature or impact of broad, generic processes.

Ngati Te Rangiunuora and Ngati Rongoma
For these hapu of Ngati Pikiao, Kathy Ertel submitted that public works legislation dispossessed them of very significant land, resources, and taonga, in breach of the Treaty, specifically for scenic purposes. The Crown eroded their
tino rangatiratanga by using threats of compulsory acquisition, playing on the tribes’ fear of land loss to force them into ‘gifting’ land as scenic reserves. In the process, the Crown breached its obligation to actively protect the claimants’ taonga and wahi tapu, scorning their kaitiakitanga and manaakitanga. There was no real consultation about the need to acquire Maori-owned land and use it for a time, or to seek real alternatives such as a leasehold or an easement. Compulsory acquisition is nothing short of raupatu. Unless the Crown reached a genuine and willing agreement with the owners about acquiring the land, and also about the compensation to be paid, then any taking was necessarily a Treaty breach.  

Examples affecting these hapu included Okataina Road (lack of consultation), Rotoiti roadway (no compensation), and Okere Falls (a ‘gift’ for hydro purposes that was taken rather than treated as a gift). In its actions, the Crown was not constrained by the procedures laid down in its own legislation. When the Supreme Court found that public works takings were done incorrectly, the Government merely passed validating legislation.

Ngati Rangiwewehi

The example of Taniwha Springs is an iconic issue for Ngati Rangiwewehi. They argued that the site was targeted by the Crown, despite its importance to them as one of their two prime tourist spots, and the lease bringing them an annual rental income. The key part of the site was acquired by the Crown for water supply purposes. Ngati Rangiwewehi claim that the taking does not meet the appropriate test, in that it was not taken only as a last resort, and in the national interest. Many other options were available. The Crown did not consider the headwaters of the Ngongotaha Stream, where the water supply was being taken at the time, because it had a trout fishery there. For the Crown to put its own convenience and that of recreational fishers above the Treaty guarantees to Ngati Rangiwewehi was, the claimants argued, an obvious and serious breach of Treaty principles.

Ngati Tutemohuta

Aidan Warren submitted that the claimants accept the rationale for public works and scenery preservation, in so far as Maori are a part of the public and benefit along with everyone else. Nonetheless, the Treaty guarantees about property are such that the Crown was absolutely required to obtain Maori consent before the enactment of public works and scenery preservation legislation. Any compulsory power to take Maori land required prior consultation and consent before enactment. Further, having passed the laws, the Crown failed to consider the needs of Ngati Tutemohuta when implementing them, and failed to carry out alternatives to outright acquisition, such as leasehold. The claimants noted a number of takings from blocks such as Tauhara and Waipahihi, but pointed out a lack of evidence on the specifics. This does not alter the general principle at issue – that no compulsory powers should have been enacted (let alone used) without consultation and consent.

Ngati Whakaue

Ngati Whakaue gave the example of Ngongotaha, their sacred maunga, the summit of which was taken for a scenic reserve in 1916 (with further additions in later years). This site is of enormous spiritual and cultural importance to the tribe, and its compulsory taking and continued ownership by the Crown is a major grievance. The claimants argued that the Crown took the site despite its knowledge of Maori opposition, and that it used the public works legislation in part because its own systems made it impossible (in an official’s words) to deal directly with 116 owners. Having taken the site, it then made inappropriate modifications, including the erection of an antennae tower. There is, in the view of the claimants, ‘no good reason’ for the Crown to keep ownership of this land, which should be returned to Ngati Whakaue. All these matters are in breach of the plain meaning of article 2 of the Treaty, and of the principles of the Treaty.
We turn now to consider the Crown’s case, reiterating here that the specific examples mentioned above are a brief selection from the many provided to us, and not a full account of all claimant grievances with regard to specific takings.

**The Crown’s case**

The Crown argued that the taking of land for public works is not a significant issue in the Central North Island inquiry region. This is because the total amount of land taken represents about 0.7 per cent of land alienated from Maori, and about 0.5 per cent of land in the inquiry district. Of the land acquired for public works, 69 per cent was compensated. The Crown recognises, however, that ‘particular resources or pieces of land which were acquired through public works may have a significance to the local iwi or hapu that is not revealed by their size in hectares’. This needs to be proven on a case-by-case basis, and there are ‘few examples before the Tribunal where sufficient evidence enables such as assessment’. Even so, the small amount of land involved must make public works takings a comparatively minor issue. Because of the nature of the evidence, it is not possible to say whether particular iwi or hapu suffered greater land loss than the overall figure of 0.5 per cent would suggest. At the same time, we do not have information on how much general land was taken for public works, so it is not possible for the Tribunal to reach a general conclusion that Maori land was targeted or made a disproportionate contribution to public works.

The Crown’s Treaty obligation to Maori in respect of public works is based on the balancing of article 1 powers and responsibilities with article 2 obligations. As a general principle, the Crown stated that it has a legitimate kawanatanga power to take land compulsorily ‘for projects of national importance provided it pays fair market compensation’. It has a duty to consult adequately with Maori and, ‘where possible’, protect Maori rights and interests in land. This includes a consideration not just of economic impacts, but also whether the loss of land would have major adverse social and cultural impacts. The Treaty principle of active protection requires the Crown to ensure that Maori are left with sufficient land for their present and foreseeable needs. Given the tiny proportion of land alienated for public works, however, this cannot have been an issue in the Central North Island.

The Crown noted the Tribunal’s Turangi Township and Te Maunga Railways reports, and suggested that a general position has been reached that Maori land should only be taken where there are no other practicable options, and after appropriate consultation with those affected. The restriction that the Crown can only take Maori land in the last resort in the national interest is, however, too stringent. The Crown cannot be confined to acting only in ‘extremely constrained and unusual circumstances’. It has to balance the interests of all sectors of the community, and to give Maori interests ‘significant weight and protection’. But to meet its obligation to all citizens, the Crown will sometimes have to take land where issues of significant national infrastructure are concerned, such as electricity.
this position, counsel drew the Tribunal’s attention to various Canadian cases, where the rights of aboriginal peoples (entrenched in the constitution) have been infringed in the ‘national interest’. The definition of ‘national interest’ has become very broad, but must include ‘objectives of compelling and substantial importance’ to the community as a whole.\(^{18}\)

At the same time, the Crown rejected the Tribunal’s finding that, in acting in the last resort to take land, Governments must make the infringement as minimal as possible in the circumstances:

A particular infringement is not a breach of the Treaty simply because it is possible to point to some smaller or more limited infringement that might be available. While the Crown is obliged to consider the impact of a particular act or omission on Maori and to take reasonable steps to limit adverse impact the courts have been clear that this does not go beyond requiring the Crown to make a decision which is reasonable in all the circumstances. A reasonable Treaty partner might well decide that particular infringements, while not being the absolute bare minimum, are nonetheless a proper accommodation of Maori and non-Maori interests in all the circumstances.\(^{19}\)

That being the case, how should the Tribunal assess whether public works takings have breached the principles of the Treaty, and caused prejudice? In the Crown’s view, the Tribunal must assess each public work on a case-by-case basis. The questions that it should ask are:

- Was there compensation?
- Was there consultation?
- Were other sites considered?
- Were alternative forms of tenure considered?
- Were the owners left with sufficient land for their present and reasonably foreseeable needs?
- Was there a general benefit to owners from the work, in common with other citizens?
- Was the value and utility of the owners’ remaining land enhanced by the work?\(^{20}\)

At least one of these questions is capable of a generic answer, as the Crown submits that Maori benefited along with everyone else by the development of necessary infrastructure in the Central North Island. Otherwise, these questions are not capable of a generic answer. This is because the Tribunal lacks comprehensive and convincing evidence on how the legislative regime was actually applied in the Central North Island. Peter McBurney’s historical report on public works was based on too few case studies, does not assess the quantitative data nor provide a general analysis, and relies too heavily on models more appropriate to other regions. It does not, therefore, allow the Tribunal to draw conclusions on generic issues. Although there is tangata whenua evidence on some takings, this is not enough on its own for the Tribunal to reach conclusions.\(^{21}\)

In particular, the Crown argued that there is insufficient evidence to determine:

- whether Central North Island Maori were consulted before the introduction of compulsory acquisitions to their district;
- that the Crown did not take into account the sufficiency of land remaining to Central North Island Maori;
- the qualitative impact of land takings, balanced against benefits (given that all takings necessarily have some kind of impact, and it is not necessarily a bad one overall);
- the impact of multiple ownership on notice requirements, in terms of how it operated in the Central North Island;
- the circumstances in which the 5 per cent rule was applied, and its impacts;
- that Maori land was taken in preference to general land;
- whether there was a fair and effective process for objections to takings; and
- whether there was a pattern of less fair compensation for Maori than general land.\(^{22}\)
Horse-drawn coach on the Tarawera Saddle, Napier–Taupo Road, some time during the 1880s.

An Internal Affairs vehicle off the road, Hatepe Hill, 1920s.

An early postcard showing the road running along the edge of Lake Rotoiti which, at that time, was narrow, winding, and unsealed.
On the question of consultation, the Crown argued (as noted) that there is no evidence of whether Central North Island Maori were consulted before the introduction of compulsory acquisition. Counsel added that there is no general duty to consult Maori, so long as the Crown can make informed choices. Nor does consultation require consent – even if there had been a duty to consult Maori before introducing a public works regime of compulsory acquisition, the Crown was not obliged to obtain Maori consent. 'A duty to consult is not a duty to reach an agreement that the consultees approve of.'  

In terms of offering to return land after it is no longer required, the Crown accepted that a failure to do so will often amount to a Treaty breach, but only where there is a positive statutory duty to offer back surplus land. In cases where there was a statutory discretion to offer land back, a failure to do so may be a Treaty breach. There has been insufficient evidence on the process and practice of offer-backs for the Central North Island Tribunal to make generic findings.

The special case of roading
Information from the Land History and Alienation Database suggests that all the non-compensated takings in the Central North Island were for roads. In the Crown's view, the initial laying-out of roads in a district was not normally compensated. This was 'not necessarily inappropriate.' A transport infrastructure was needed for better access and to facilitate commercial development. Maori actively sought the advantages that would come with roads, and there was a direct cash advantage for those iwi which obtained employment in building roads in the 1860s. This gave a private benefit for owners, irrespective of the wider public benefit to the whole community from having a transport infrastructure. Mr McBurney cites the example of Ngati Rangiwewehi, who bargained hard for their payment – such a negotiated result must have been satisfactory to all concerned.

The special case of scenery preservation
Reserving public spaces for public access was part of the Crown's vision for New Zealand from 1840. This included free public access to places of natural beauty and recreation. At first, the main thrust was to reserve Crown land for these purposes, but this was eventually widened to the acquisition (compulsory if necessary) of private land. According to the Crown, its intention in creating such reserves was mainly protective and preservative – that is, to preserve places in their existing state, as part of New Zealand's unique heritage. There was a range of views about the desirability of doing so, among both settlers and Maori. The Crown argued that Mr McBurney emphasised Maori opposition unduly and incorrectly characterised it
as a general one. Drawing on the evidence of Robin Hodge for the Whanganui inquiry, the Crown noted the support of Maori members such as James Carroll and Hone Heke, and the reported support of some Maori communities, for the principles of scenery preservation.\textsuperscript{27}

The Crown accepts, however, that there was concern about how land was valued for compensation, and the manner in which it was being taken. Maori wanted historic sites and wahi tapu preserved, but they also wanted to keep control of them, and to have a voice in determining which sites were to be conserved. The Crown noted that the scenery preservation legislation gave scope for special boards, and that land gifted for Rotoiti and Okataina Scenic Reserves was controlled by predominantly Maori boards. Also, continued access and use (such as for burials at urupa) could be agreed. There was thus a mechanism that allowed for the exercise of tino rangatiratanga after acquisition.\textsuperscript{28}

In the Crown’s view, a critical issue is the dilemma faced by Maori to reconcile preservation with development. Although Mr McBurney argues that the Crown distrusted and undervalued kaitiakitanga or Maori stewardship, the issue is rather that there was a genuine tension among tribes about what should be preserved or developed. There was a risk that Maori would sell key sites to private buyers, rather than preserving it in its existing state. An outcome of public reservation was a ‘more favourable’ one. When the Crown and Maori were in agreement about a site, however, kaitiakitanga and Crown regulation could be complementary. Ngati Pikiao, for example, have played a dominant role in managing scenic reserves. Ngati Tuwharetoa saw value in the proposed basin reserve scheme and some were willing to cooperate with the Government. Ngati Rangitihi saw merit in special Department of Conservation reserves, as a ‘forum for assisting the Crown with management of our whenua’.\textsuperscript{29} The Crown’s objects could have been achieved through leasing or other alternative tenures, but there is insufficient evidence to show whether this was considered, or why not.\textsuperscript{30}

Quantitative analysis

The Crown contended that there is insufficient information about how much land was reserved for scenic purposes, and how much land was purchased by the Crown for that purpose (instead of taken under public works legislation). The two main examples in the technical evidence, Rotoiti and Okataina, were not taken compulsorily. Data from the Land History and Alienation Database suggests that most compulsory takings were in the Rotorua district between 1910 and 1920 (711.1 hectares), but that a further 1717 hectares were ceded to the Crown for scenic purposes in the 1920s and 1930s. The only compulsory taking in the Taupo district was 30 hectares from Tauhara Middle. There are no database records of compulsory takings for scenic purposes in the Kaingaroa district. According to David Alexander, most acquisitions for scenic reserves were sales, which (in the Crown’s view) ‘would give considerable agency and control to the Maori owners’.\textsuperscript{31}

Specific examples

The Crown argued that a number of examples supported by evidence in the Central North Island show that the Treaty requirements for a public work have been met and there is no prejudice. One example is Taniwha Springs (see below). Nonetheless, any specific example must be tested for representativeness before it is used in the stage one inquiry. At the same time, a number of examples used by Mr McBurney are actually the subject of direct negotiations, and the Tribunal did not hear tangata whenua evidence about them. These include Rotorua Airport and the Te Ariki peninsula between Lake Tarawera and Lake Rotomahana. The Crown suggested that it would not be appropriate for the Tribunal to comment on these cases.\textsuperscript{32}

Taniwha Springs

There has been detailed evidence from Mr McBurney, Kere Cookson-Ua, and Te Ururoa Flavell on the taking of land at Taniwha Springs, and the ongoing taking of water
Map 12.1: Taniwha Springs land taken under the Public Works Act 1928
under a water extraction permit. In the Crown’s view, this is an example of a taking that satisfies all requirements. Compensation was negotiated between the Crown and owners, and a sum of $4200 plus interest was agreed. The owners had legal representation and there is no evidence of any bad faith. There are also ongoing discussions between the Rotorua District Council and owners about water extraction. Given these points, there is no Treaty issue for the Crown to answer in respect of this taking.\textsuperscript{33}

\textbf{Rotoiti and Okataina Scenic Reserves}

The Crown argued that these extensive reserves, because they involved mainly gifted land and were administered by boards with majority iwi control, are ‘unique in the CNI and are not appropriate as the basis for wider consideration’.\textsuperscript{34} The Crown acknowledged that there are ‘serious issues’ for it to address in respect of these reserves, but that these are the subject of its direct negotiations with Ngati Pikiao and Ngati Tarawhai.\textsuperscript{35}

\textbf{Ngongotaha}

The technical evidence suggests that the only compulsory taking of Maori land was in 1916 (114.4 hectares). A Native Land Court hearing was held to determine compensation. The Government valuation of £428 was accepted as fair by at least two owners, and the court ordered that amount to be paid to the Waiairiki Maori Land Board. The Crown submitted that the land is managed ‘in a relationship with’ neighbouring land – protected private land vested in Ngati Whakaue Tribal Lands Incorporated in 1985. Together, these lands form a significant reserve that is still fulfilling the original purpose. Since compensation was paid, the owners appear to have accepted the desirability of reservation by creating a neighbouring reserve, and there is a management relationship (undefined), the Crown submitted that the creation (and continuation) of the scenic reserve has involved no prejudice to Maori owners.\textsuperscript{36}

\textbf{Summary of the Crown’s concessions}

The Crown conceded that:
\begin{itemize}
  \item particular sites may have a value to Maori independent of their size, so that qualitative measures must be applied as well as quantitative ones;
  \item the compulsory taking of land must be for projects of national importance, and must involve the payment of fair market compensation;
  \item the Crown has a duty to consult adequately with Maori for every taking, and ‘where possible’ to protect Maori rights and interests;
  \item the Crown is obliged to consider whether a taking may have a major adverse economic impact on Maori;
  \item the Crown is obliged to consider whether a taking may have a major adverse social impact on Maori;
  \item the Crown is obliged to consider whether a taking may have a major adverse cultural impact on Maori;
  \item the Crown is obliged to consider whether Maori have sufficient land left for their present and foreseeable needs;
  \item the Crown is obliged to consider alternative sites;
  \item the Crown is obliged to consider alternative tenures (instead of outright acquisition);
  \item the Crown’s scenery preservation objectives could in fact have been achieved by leasing or other alternatives, but there is insufficient evidence to show why this was not done;
  \item scenery preservation legislation provided mechanisms for the continued exercise of tino rangatiratanga after acquisition, but examples of their use (Okataina and Rotoiti) were unusual and not representative of the Crown’s actions in the Central North Island; and
  \item the failure to offer surplus land back to Maori owners may be a Treaty breach in certain circumstances.
\end{itemize}

In its Deed of Settlement with some iwi and hapu of Te Arawa, which was negotiated while our inquiry was in process, and initialled on 8 August 2005, the Crown
Map 12.2: Ngongotaha land taken in 1916 for a scenic reserve.
He Maunga Rongo

acknowledged that it had taken lands of ‘particular significance’ to Te Arawa. This included land at Te Ariki, Okere Falls, Orakei Korako (with geothermal surface features) and Rotorua Airport. The Crown further acknowledged that these takings ‘have impeded the ability of Affiliate Te Arawa Iwi/Hapu to exercise control over their taonga and wahi tapu and maintain and foster spiritual connections with those ancestral lands’. This has ‘resulted in a sense of grievance among Affiliate Te Arawa Iwi/Hapu which still exists today.’

The Crown acknowledged in particular that the taking of lands containing geothermal features had caused such a sense of grievance among Te Arawa. It admitted that there was a commercial objective in its scenery preservation programme, directed towards controlling and encouraging the tourist industry. It also noted that powerful Maori opposition, especially from Rotorua, had resulted in the abolition of compulsory taking powers for scenic purposes in 1906, but that these were reinstated in 1910.

These important concessions and acknowledgements have assisted the Tribunal in its evaluation of the claims.

**The Tribunal’s analysis**

Having considered the parties’ arguments and the Crown’s concessions, the following issues emerge as key for our inquiry.

First, we address the issue of compulsion and pose the key question:

- **Did the compulsory taking of land (sometimes without compensation) abrogate fundamental Treaty guarantees and, if so, were those guarantees waived with Maori consent?**

In addressing this question, we will also consider:

- Were there contingencies in possible mitigation of Treaty breach?

- Was the compulsory taking of land for roading without compensation a special exception?

- Was the taking of land for scenery preservation (rather than a work) a special exception?

In answering that final question, we will consider the claim about the sacred maunga, Ngongotaha, as an example of generic issues.

Having addressed matters of compulsory taking and consent at the level of general principle, we will then consider the article 3 rights of Central North Island Maori and, in particular, whether discrimination against them has been written into public works legislation. Our key question in that respect is:

**Has historical public works legislation discriminated against Central North Island Maori in breach of their article 3 rights and of the Treaty principle of equity?**

In the course of answering this question, we address the following related issues:

- Was there discrimination in the legislative provisions for notification and consultation?

- Was there discrimination in the legislative provisions for compensation?

- Was there discrimination in the categories of land entitled to special consideration or protection?

- Was there legislative discrimination in the offer-back procedures?

- Was there legislative discrimination in the 5 per cent takings for roading or railways?

All Central North Island Maori have had land taken compulsorily for public works. Our analysis of the above issues will show whether there has been Treaty breaches applying to all claimants, regardless of exactly how the regime has operated in practice; that is, whether all Maori land that was taken was acquired under a discriminatory regime and therefore each taking was necessarily in breach of the Treaty.
Having established if there have been Treaty breaches at that level, we will then turn to the practical operation of the public works regime on the ground in the Central North Island. Our key question there is:

**What was the impact of the public works regime in practice on Central North Island Maori?**

Associated issues include:

- How much land was taken for public works?
- What do the figures mean for our findings on generic issues?
- Is quantity the most important measure, in light of the Crown’s admission about social and cultural impacts (of even small takings)?
- Is the Crown correct that there is insufficient evidence on some aspects of how the public works regime worked in practice in the Central North Island?

In addressing that final question, we consider in turn:

- Were Central North Island Maori consulted before the introduction of compulsory acquisitions to their district?
- Did the Crown take into account the sufficiency of land remaining to Maori before proceeding with compulsory takings?
- Did the benefits of particular takings outweigh their adverse impacts?
- What was the impact of multiple ownership on notice requirements, as it actually operated on the ground?
- Did the Crown purchase land or obtain it by gift more often than it took it by compulsion?
- How exactly did the 5 per cent rule operate on the ground and what was its impact?
- Was there a general pattern of taking Maori land in preference to general land?
- Was there a fair and effective process for objections to takings?

- Was there a pattern of paying lower compensation for Maori land?
- Has the Crown carried out its statutory duty or discretion to offer land back?

Finally, we consider the question of takings in the national interest. For that matter, the principal question is:

**Was land taken as a last resort in the national interest?**

Having set out the key questions for our inquiry, arising from the claimants’ and Crown’s cases as summarised above, we now turn to our analysis of these issues.

**Compulsory Taking of Land**

**Key question: Did the compulsory taking of land (sometimes without compensation) abrogate fundamental Treaty guarantees and, if so, were those guarantees waived with Maori consent?**

The claimants argued that compulsory takings of land, especially without compensation, are breaches of the plain meaning of article 2 of the Treaty. In particular, Mr Warren argued for Ngati Tutemohuta that such a departure from the Treaty required the Crown to consult Maori before introducing it, and to obtain their consent. The Crown argued that consultation does not require consent, but in any case that there was no evidence of whether Central North Island Maori were consulted before introducing compulsory acquisition.

We accept Mr Warren’s submission. The Crown cannot depart from the express terms of the Treaty without first obtaining the consent of its Treaty partner. As the Tribunal put it in its *Turangi Township Report*:
if the Crown is ever to be justified in exercising its power to govern in a manner which is inconsistent with and overrides the fundamental rights guaranteed to Maori in article 2 it should only be in exceptional circumstances and as a last resort in the national interest.40

This is because the Crown cannot simply pass whatever laws it chooses, when they affect Maori land (and Treaty guarantees) in a fundamental way. The Turanga Tribunal concluded that there may not be a general right to be consulted about all policies affecting Maori, but:

there is no question that the Crown must at the very least consult with Maori landowners before compulsorily acquiring of their lands in prima facie breach of the article 2 promise of exclusive tribal possession. The Crown acknowledged that there appears to have been no general practice of consultation with Maori owners before compulsory takings were effected in Turanga.41 [Emphasis in original.]

We note the Turanga Tribunal’s view, with respect to Maori land legislation, that:

If the transfer of sovereignty was non-negotiable to Captain Hobson, then the promise to respect both title to and power over tribal lands was no less so for Maori. There would have been no Treaty at all, if the two sides had not been prepared to make these key concessions. It follows that the Crown’s right to make laws for the regulation of Maori title could not be used to defeat that title or Maori control over it. On the contrary, the Crown’s powers were to be used to protect Maori title and facilitate Maori control. On the Maori side, it had to be accepted that it was the Crown’s role to develop and implement the native title system. Maori could be consulted over these matters, but they had given up the power to operate outside the Crown’s laws.42

In effect, any compulsory taking of land is a violation of the plain meaning of article 2 of the Treaty. Cathy Marr points out, however, that Maori communities were accustomed to the (conditional) allocation of land to outsiders for their use, and the reallocation of land and resources within the community as per need. This customary approach, in combination with the Maori desire for economic development, ensured a considered and fair response from Maori owners in the period before compulsory powers were introduced. Thus, road-making in Rotorua commenced on a negotiated and consensual basis. Many roads were built to the benefit of the community, without the necessity of their being in Crown ownership. Such roads were officially taken by the Crown much later, in the twentieth century. When the Crown consulted Maori and negotiated public works, such as the main trunk railway in the 1880s, it received a fair hearing and a cooperative response (see chapter 6). It is ahistorical, therefore, to assume that the national interest necessarily required or requires compulsion.43

It is not enough to say that both Maori and settlers were subjected to compulsion, and that this was in accordance with the obligations of citizenship and the legitimate execution of articles 1 and 3 of the Treaty. What was needed, for both peoples, was community consent to infringements of their property rights. Article 3 of the Treaty involved the transplantation of British property protections. In Britain at the time, the first approach was to acquire the land by voluntary transaction. If that failed, property could be acquired compulsorily for full and fair compensation, but every single transaction had to be scrutinised and authorised by the community’s representatives in Parliament.

When British law was transplanted to settler New Zealand, Sir William Martin wrote:

Much more then are the rights of the New Zealanders [Maori] to be respected, who have at least all the claims which the North American Indians possessed [aboriginal title & domestic nation status], with the additional title of British subjects. And especially when those general rights of British subjects, clear in themselves, are further defined, in respect of the territorial rights of the New Zealanders, by Article 2 of the Treaty.
No right of any British subject can justly be, or in practice ever is, taken away from him, even by a legislature in which he is represented, without compensation for the loss of that right; therefore,

1st. By national compacts and assurances on the part of Great Britain;
2nd. By the common law of the British Colonies; and,
3rd. By the constitutional rights of British subjects;
the New Zealanders are entitled to retain against the Crown all lands in New Zealand which are owned according to native custom, whilst all lands not so owned fall to the Crown. 

The settler community, as represented in the New Zealand Parliament, enacted legislation that provided for the compulsory taking of land for public works. It also legislated for the taking of up to 5 per cent of new land titles for roading and railways purposes, without compensation. This provision was applied extensively in the Central North Island, with almost one-third of all Maori land taken for public works being acquired without compensation. It was perfectly legitimate for British subjects to qualify their own rights by legislation, in the new circumstances of a colony. What was not legitimate, however, was for a settler Parliament to qualify Maori Treaty rights, and Maori rights as British subjects, without the proper representation and consent of Maori. Qualifying the rights of British subjects, and violating the absolute guarantee of voluntary cession, both of which were promised in the Treaty, was a very serious action.

As we have found above in part II, the Crown did not provide for Maori autonomy or self-government at a central or local level. During the period of the 5 per cent clause (from 1862 to 1928), Maori sought full and fair representation in the settler Parliament, a national Maori body to decide policy and regulation for Maori land, and local self-government through runanga and komiti. None of these things were granted by the Crown. Public Works Acts and relevant parts of the native land laws could have been, at the very least, the subject of consultation in the way that the Native Minister, John Ballance, consulted over the Native Lands Administration Act in the 1880s, with local, regional, and national hui. They could have been submitted to the Kotahitanga Paremata in the 1890s, as with other draft legislation. By 1928, when the Crown passed the main public works legislation for the twentieth century, even the innocuous general conferences of the Maori Councils had been discontinued. The Crown thus denied Maori self-government at a central level, and thereby defeated or rejected opportunities to obtain Maori consent to a public works regime at a national level.

At a regional level, the Crown failed to set up Maori provinces or counties, as was mooted from time to time. There were no hui called to consult Rotorua, Taupo, or Kaingaroa Maori and obtain their consent to a regime of negotiated or compulsory and compensated takings for public works, let alone compulsory takings without compensation. We do not accept the Crown's submission that the technical evidence does not address this point. In our view, the reports of Dr Ballara, Mr Stirling, Mr Armstrong, Ms Marr, Dr Hearn and others, as well as the published works, uncovered the evidence of political engagement between the Crown and Maori leaders. We are aware of the Crown's negotiations and consultation with the Kingitanga, Kotahitanga, and other leaders. Although consent was negotiated for the main trunk railway in the 1880s, there was never a regional or subdistrict negotiation of the general principles of compulsory takings, to which the settlers had consented (for themselves) in their Parliament. The available evidence makes this clear.

The claimants point to Ngata's warnings in this respect, when scenery preservation was debated in Parliament. He informed the House in 1906:

it would pay the colony if the Natives were approached in a proper way, and in a way that Europeans would be approached. The Maori was not accustomed to giving his consent in writing, but from time immemorial he had been accustomed to give it in a meeting in his own way. It was necessary to explain the policy of your legislation to him there in his own environment, and when he had once given his consent you could go...
and take the land under any Act; but it was necessary, first of all, to get the approval of the leading men in the district. 45

On Ngata’s evidence, such consultation and negotiation of consent had not been done for the ‘Hot Lakes District’ (the central North Island). 46

Further, Maori local self-government institutions were denied legal powers. Before 1900, 90.4 per cent of Central North Island Maori land taken for public works consisted of uncompensated takings for roading. 47 The Native Councils Bills of the 1870s, the Native Committees Act of 1883, and other opportunities had arisen to give Maori powers of local government. In addition, the possibility of specialised boards alongside settler boards existed. Maori school committees and special representation on Licensing Benches gave them some power in those areas. 48 Health boards were also mooted, but rejected as the thin end of the wedge (giving Maori too much self-government). 49 More particularly, McLean enacted the Native Districts Road Boards Act in 1871. On the application of a majority of the Maori inhabitants of a district, a Native Road Board could be elected to control roading (and rating for roads) in their district. Settler provincial authorities would lose jurisdiction over roading in such districts. 50 Professor Ward notes that few applied to set up their own boards, because rating was beyond their means. McLean fell back on ‘urging local European road boards to include Maori leaders’, with scant success. Maori were virtually excluded from local administration, including the various taking authorities and road decision-makers of the time. 51

The Native Districts Road Boards Act was repealed in 1891, at the very time that takings for roading were becoming significant in the Central North Island. 52 In combination with the failed Native Councils Bills and Native Committees Act, it shows that Maori could have been included in the key decision-making about public works. If Maori had been able to set up their own road boards, decide what roads were needed and where, and develop sufficient capital to pay rates for roading, then a transport infrastructure could have been set up in a Treaty-compliant manner. This was entirely possible in the circumstances of the time. The settler Parliament had been willing to legislate for Maori to control roading in their own districts in 1871, but this willingness was gone by the 1890s. Where ‘less penal’ (in the Crown’s phrase) policy alternatives were known and available, but rejected, the Treaty could have been kept – but was not. The repeal of the Native Districts Road Boards Act in 1891, without providing a fair and proper alternative means of Maori decision-making, was in breach of Treaty principles.

This lost opportunity was repeated in the following decades, after the enactment of the Maori Councils Act 1900. The councils were, as we have seen, undermined and rendered ineffective by the Crown (see chapter 7). Nor were they given any authority over public roads. In fact, there was a problem of Europeans living on Rotorua Maori land taken for public roads, causing trouble, but escaping the jurisdiction of Maori Council bylaws. 53 Maori institutions could not shape decision-making about what kinds of public works were required in their districts in the early twentieth century, and what land or resources would be taken to establish them. Mr Alexander notes that for the period 1900 to 1950, 37.2 per cent of takings were uncompensated takings for roading (the figure was 67.9 per cent for Taupo). 54 Since taking authorities decided what works were needed and what land should be taken, and even ruled on objections to their own plans, the Crown’s failure to provide for Maori self-government at a local level deprived Maori communities of the opportunity to control or influence public works for infrastructure.

This was compounded when the Crown established special national decision-making bodies. It was aware, for example, that Maori land was a key target for scenery preservation, and that Maori objected to compulsory takings and inadequate compensation. At the same time, Maori had considerable sympathy with some of the objects of scenery preservation, and could have played a very constructive role in it (as opposed to sometimes destroying sites to express their opposition in the only way that mattered). These views were expressed in the settler
Parliament, where, as we have shown, the four Maori seats were too few to provide fair representation (as ministers such as Ballance conceded). Governments could at least, in this circumstance, have provided full and fair Maori representation on the national Scenery Preservation Commission/Board and its successors. Instead, these were settler-dominated bodies. The Crown’s serious Treaty breaches in respect of Maori autonomy, self-government, and self-management, as described above, led directly to serious breaches in respect of public works.

The Tribunal’s findings on autonomy and consent

The Crown introduced a policy and legislative regime for public works that breached articles 2 and 3 of the Treaty, without Maori consent and in face of some active opposition. Regardless of how exactly the regime operated in the Central North Island, we make the general finding that the regime itself was fundamentally inconsistent with Treaty principles. The Crown breached the Treaty when it:

- enacted a legislative regime inconsistent with the Treaty without consulting Maori or obtaining their consent, at either a central, regional, or local level;
- enacted legislative powers for the compulsory taking of Maori land without their consent; and
- enacted legislative powers for compulsory takings without compensation, again without consent.

It follows that all such takings, especially those without compensation, are individually in prima facie breach of the Treaty. Further, in failing to provide Maori with self-government to manage the development of infrastructure and public works in partnership with other communities and local authorities, the Crown has compounded the breach and the ensuing prejudice.

Was the compulsory taking of land for roading without compensation a special exception?

Almost one-third of the land taken for public works in the Central North Island inquiry region (31 per cent) was acquired compulsorily for roading, without compensation. We take this to be a minimum figure, as compensation – though payable on other takings quantified by the Land History and Alienation Database – was not always actually paid. There is sufficient evidence from claimants, such as Sydney Waiwiri of Ngati Hineuru and Aronia Ahomiro of Ngati Moko, to raise a serious doubt in this respect.\(^55\) Also, we are not satisfied that all non-compensated takings have been captured. Mr McBurney’s evidence established that up to 5 per cent of various Ngati Whakaue blocks was taken in the 1890s for railways purposes, without compensation.\(^56\) When questioned on this, Mr Alexander explained that the net result was the issuing of compensation orders for blocks where the takings exceeded 5 per
and thus the entire taking appeared as ‘compensated’ in the database. Further, four of the compensation orders were actually nil, yet these also contributed to a net result of ‘compensated’. In Mr Alexander’s view, no other railways takings were subject to the 5 per cent rule, although he admitted that he only knew of this one because of the more detailed research of Mr McBurney. That being the case, we think that the Crown’s submission that 69 per cent of land was taken with compensation, should actually be that compensation was payable but not necessarily paid.

In our view, all takings without compensation were in breach of the plain meaning of the Treaty and its principles. The Crown made two arguments in mitigation. First, it suggested that some uncompensated roading takings may have been purely for access to subdivisions, and therefore only of benefit to private owners. This argument is not correct. Private roads were not taken by the Crown, and any public road is, by definition, available for and usable by the public. In its submission on Waipahihi, the Crown argued that the claimants should have anticipated the growth of Taupo, and the consequent growth of public traffic on the road through their reserve. Ultimately, its promotion to highway status, with consequent widening, should also (the Crown argues) have been foreseen. What this underlines is that a public road is exactly that – once taken by the Crown, it is available to the public according to the circumstances of the time, and former owners have no control over what or how much traffic it will eventually carry. In our view, the Crown cannot justify the non-payment of compensation because roads might initially have had a limited or confined benefit. The generic evidence of Ms Marr is that, in any case, roads were built much more for the convenience of settlers than Maori. We do not have specific evidence on that point for the Central North Island.

Secondly, the Crown argued that the initial laying out of roads in a district was not normally compensated. This was ‘not necessarily inappropriate’. Settlers also had to surrender part of their titles for non-compensated roading. A transport infrastructure was needed for better access and to facilitate commercial development for everyone in the district. Maori actively sought the advantages that would come with roads, and some iwi were satisfied with cash payments for working on roads in the 1860s. This gave a private benefit for owners, irrespective of the wider public benefit to the whole community from having a transport infrastructure.

The Crown’s argument here might have had weight if the appropriation of Maori land for community purposes had been done with negotiation and consent. It was not. We note the following four points.

First, payment for labour on roading, however much it may have had a political or pacificatory purpose, was payment for a service. Unless specifically contracted, it cannot be counted as payment for land.

Secondly, Ms Marr’s evidence establishes that general and Maori land titles were not in fact treated equally. Discrimination was built into the system by legislation, which treated Maori land unfairly in respect of uncompensated takings for roading. It allowed the Crown a much longer period to take land from Maori titles than from general; it continued the provision for Maori titles after it ended for general ones; and it covered an ever-expanding number of Maori titles and land, while general titles were soon freed of it despite the need for increased roading with closer settlement. Even after the end of the 5 per cent clause in 1928, the Crown still took Maori land for roads without compensation – partly on the grounds that they had always been ‘public roads’, partly on the recommendation of the Maori Land Court.

Thirdly, it is correct that general landowners were not usually compensated for the loss of up to 5 per cent of their land for roading, in the strict sense of the word. That is, there was no calculation of the value of the land, adjustment for betterment, and payment of a resulting sum, as usual in the public works system. But this does not mean that general landowners were not paid under the 5 per cent rule. Ms Marr’s evidence shows that most legislation provided for payment in money or land in recompense of the taking. The Crown Grants Act 1866 required the payment
of an equivalent in land or money. The Lands Act 1877 required the Crown to pay twice the original purchase price for the land taken. The benefit or loss to the landowner would depend on how much the value had risen in the intervening time (it had to be within five years of the original purchase), but they would still get some payment. This requirement was continued in the Land Act 1892, which also provided compensation to lessees as a proportion of the rental. The Land Act 1924, by when very little general land was still affected, required payment of compensation. Thus, owners of general land were usually paid for takings under the 5 per cent rule, although possibly less than the market value of the land. Maori, on the other hand, received no payment at all under the 5 per cent rule for their land, from 1862 to 1927.60

Fourthly, even if Maori and general land had been treated the same, there was no common law principle that a work of general benefit, like a road, should be considered its own compensation when private land was taken for the benefit of the community. The exception would be a situation where the owner's remaining land increased in value to a point equal to compensation for what had been lost, and that this increase in value was not shared by others who had kept all their land. Settlers chose to accept a reduction of this common law right in Parliament, but, as we have noted, Maori did not consent to it. Also, settlers enacted a minimum payment for their own land, but no payment for Maori. If Maori land was to help the development of an infrastructure for the benefit of all, then it had to be by negotiation, with consent, and with compensation.

The Tribunal's finding

We conclude that takings without compensation or payment were in breach of the Treaty, with prejudice to those not compensated or paid.

Was the taking of land for scenery preservation (rather than a work) a special exception?

The process and practice of scenery preservation in the Central North Island has been a major source of grievance, mainly for claimants in the Rotorua district. According to Mr Alexander, most transactions took the form of cessions or purchases.61 A significant number, however, involved compulsory takings under the public works regime. This type of taking was a special case, in that its intention was to keep land unaltered (rather than modify it for a public work), and for an esoteric rather than practical outcome (the public's enjoyment of scenery). The Crown also wanted to protect sites for tourism purposes. Increasingly, protection of waterways and prevention of flooding and erosion became a primary factor, leading to a further subset of takings later in the twentieth century. Set against the settlers' conservation drive and desire for public recreation was the land development imperative. The compromise, during the main period of scenery preservation, was that forested and scenic land should be preserved only where it was not capable of being farmed. So long as it could not be cleared for sheep or cattle, and if it was pretty to look at from a train or road, then it should be preserved. This definition of the public interest clashed with the concerns and views of Maori landowners, who had their own imperatives for the preservation or development of sites.62

Since the entire purpose of a scenic reserve was to give everyone access, there was a potential for Maori continuing to use these sites in a way not permitted for other types of takings. What is most important here, however, in terms of autonomy and consent, is the question of whether this very particular and unique use of sites for public purposes was carried out with consultation, consent, and consistently with Treaty principles.

We have already noted Ngata's 1906 explanation to Parliament, of the consultation and consent required before Maori land could justly be used for scenery preservation. In 1900, the Maori Councils Act gave councils the power to pass bylaws for the preservation of river banks and 'river bush-scenery', the protection and control of urupa.
(including powers to fence them and restrict access), and for the control of ‘recreation-grounds’, again with power to restrict access.\textsuperscript{63}

The scenery preservation legislation, however, came over the top of any Maori self-government in this area. The Government gave itself the power to take land for scenic, thermal, and historic purposes, rather than encouraging and working with Maori Councils to start the task of setting aside and controlling their own land for urupa, river scenery, and recreation areas, as provided for by statute. There was no requirement for the Scenery Preservation Commission (later Board) to take any notice of Maori Councils. From the evidence available to us, the latter were simply disregarded, and the taking authority of the Government overrode any arrangements that they might make. In 1906, the Minister of Lands noted this point, and hoped that Maori would accept it and work with the Scenery Preservation Commission:

He hoped those who had influence would point out to the Maoris that, so far as machinery lay, this was the very best that had ever been brought forward to preserve these spots. It was better than any reservation they could have of their own, and as time went on he hoped they would work better with the Department. The fault might have been more with the Commission than the Maoris, but he hoped in future they would work better together.\textsuperscript{64}

Instead of empowering Maori Councils, the Government gave Maori land boards the power to sell reserves to the Crown for scenic purposes in 1907. This was after the elected Maori representation on the former land councils had been abolished.\textsuperscript{65} The scenery preservation regime, therefore, missed a known and vital opportunity to work in partnership with Maori autonomy to reserve and protect wahi tapu and other places of great value.

Having commenced a national undertaking that would override Maori local self-government, it was necessary for the Crown to consult Maori and obtain their consent for the compulsory taking of land for scenic purposes, and indeed to the whole process of setting land aside for such purposes by whatever means. There was a very real opportunity for a meeting of minds and a harmonising of values. This is evident in the 1906 comments of Ngata, which address so many pertinent points regarding Maori autonomy and the need for consent, compulsory takings, discriminatory compensation, and the reservation of things valued by Maori, that we produce them here in full:

He [Ngata] did not want it to be understood that there had been any organized opposition on the part of the Native race to the Government taking historic and other spots as reserves under the Act. The objection of the Native people had been to the manner or method of reserving certain of these areas. While admitting that most of the historical spots and the old burial-grounds should be reserved, under such control as would insure their protection from acts of vandalism in the future, there was a suspicion in the Maori mind that in the matter of compensation they did not receive full justice — that there was a disregard of what he might call the sentimental side of the question. During the last three years a great deal of dissatisfaction had been felt by Natives throughout the colony — and more particularly by the Maori in the Hot Lakes District — with respect to the action of the Commissioners under the Act of 1903. It very often happened that the Commissioners held their meetings a hundred miles from the lands proposed to be taken, and they made recommendations and reservations without viewing the spots proposed to be reserved. They were guided to a great extent by the reports of interested persons in the district, without, in many cases, consulting the Natives concerned; and owing to that great many spots that should have been reserved had been deliberately destroyed by the Natives as a sort of protest against the methods of the Scenery Preservation Commissioners. There was a way of dealing with Natives and their lands, and if the method was not pursued tactfully the Maori was inclined to be irritable and take objection. As he had said, there was a way of dealing with the Natives, and it would pay the colony if the Natives were approached in a proper way, and in a way that Europeans would be approached. The Maori was not accustomed to give
his consent in writing, but from time immemorial he had been accustomed to give it in a meeting in his own way. It was necessary to explain the policy of your legislation to him there in his own environment, and when he had once given his consent you could go and take the land under any Act; but it was necessary, first of all, to get the approval of the leading men in the district. In regard to the question of compensation, they had found from experience that there was a great deal of difference of opinion in the mind of those who had to settle the amount to be paid for Native land. There was, to say the least of it, an unconscious bias in the minds of the Court, which caused a distinction to be set up between the value of land owned and occupied by Maoris and that of Europeans’ land. The Maori was not inclined to make the same trouble about the taking of his land as the European would. One European in a thickly populated Maori district would make more noise and attract more attention than a thousand Maoris, and possibly on account of that the amount of compensation payable for Maori land had been underestimated in the past. If they got true compensation for their lands according to surface value and with due regard to sentimental value, and if they were properly approached, their land could be taken for useful purposes under any Act, and there would be no apprehension that there need be any opposition on their part.66

In response to Ngata’s suggestions, the Government did not agree to consult Maori leaders in the Central North Island for the purpose of negotiating consent to a takings regime. Nor did it agree to Maori institutions having a full or even deciding role in the making of such reserves, although the Minister of Lands, as noted above, wanted Maori and the board to work together to preserve land in this safest-of-all titles. Nor was there an attempt to overhaul the compensation regime, to bring it into line not just with the losses of settlers, with their recent titles, but for those who had a longstanding ‘sentimental’ attachment to their turangawaewae. What the Government did do, however, as a gesture towards Maori input, was to add a Native Department official to the board in 1910. Also, the Government could authorise Maori to hunt birds or continue to use urupa for burials, on Maori land taken for scenic reserves.67

Local Maori could also continue to exercise authority over particular reserves by membership of their governing boards. Mr McBurney describes how this operated in Rotoiti and Okataina.68 The Crown cautions us that the two boards were unique in this respect:

The Crown submits that the Rotoiti and Okataina examples are unusual and not representative of the wider application of scenic reserves legislation. The gifting of land for the formation of the reserves and administration with significant representation by the iwi who gifted the land means that these two examples are unique in the CNI and are not appropriate as the basis for wider consideration.69

This appears to be confirmed by Ms Hodge, who notes that in 1953, two Rotorua scenic boards had Maori representatives – two out of only four in the whole country.70

The Crown, therefore, had mechanisms available to it that it did not use. Recognising the need for Maori input to decision-making, it could have acted more effectively than appointing a Native Department official to the Scenery Preservation Board in 1910, and former Maori owners to only two of many scenic reserve boards. Having recognised the need and the principle, it could have appointed Maori to the central board and relevant local reserve boards, it could have worked with Maori Councils and provided for Maori reserves, and it could have operated on a consensual basis. The Rotoiti scenic boards show what was possible in the circumstances of the time.

Also, given that the intention was not to remove land from access but to preserve it as it was, the Government could have made many covenants and agreements for Maori to continue to use the reserves in various ways. In the 1960s, for example, the Government tried to find out whether any ‘special conditions’ were attached to its taking of Ngongotaha Scenic Reserve, but the Maori Land Court replied that there had not been any. By 1969, the Government was setting up a regional scenic reserve board for Rotorua, and saw the need to ‘get “on side” with
the Maoris. It proposed to appoint two Maori members to the regional board, in recognition of their interest ‘in those areas that were gifted or otherwise acquired from them.’ It is particularly disappointing in Treaty terms that the Crown had mechanisms that could have mitigated its compulsory taking of scenic reserves, by allowing for partnership and continued exercise of tino rangatiratanga in various ways, and did not use them. This greatly aggravates the Treaty breach of taking such land compulsorily, and the prejudice suffered by Maori as a result of their loss of ownership, control, and, in some cases, special access and use, of their taonga.

The situation may have improved from the 1960s onwards, but we have little evidence on that point. In the late 1960s, for example, the Crown made determined attempts to buy land from Ngati Whakaue for the expansion of the Ngongotaha Scenic Reserve. A compulsory taking was not considered, and the owners, now organised and represented by an incorporation, resisted the pressure to sell their land. The Reserves and Domains Act 1953 provided for the creation of private scenic reserves, and in the end the owners negotiated the setting up of such a reserve in the 1970s. This enabled them to retain title, control, and management of the land, which was now protected but also made available for public use. The Reserves Act 1977 continued provisions for private reserves, and also empowered the Minister to appoint a Maori trust board to control and manage reserves vested in the Crown. As Ms Hodge notes, the Reserves Acts of 1953 and 1977 provided for a greater degree of Maori control and management of reserves, on both their own and Crown land. We lack evidence for how this legislation was carried out in the Central North Island.

As we have noted, the Minister of Lands referred to a major inequality in the law in 1906, when he averred that Maori could not protect their own land sufficiently by any of the legal mechanisms available to them. It was safest as a scenic reserve, he argued, in Crown ownership. The claimants take issue with the policies of the time, their reliance on the Crown’s aesthetics and decision-making about what was pleasing and should be preserved, and their evident inconsistency in preventing clearance only where it could not be followed by farming. We agree with the claimants that the evidence in our inquiry is overwhelmingly that Maori people (then and now) valued certain places very highly, and – in the normal course of things – could have retained ownership of them and still protected them for the nation. We also accept the Crown’s submission that there was some harmony in Maori and settler values for preserving sites of special historical or scenic importance, as Ngata’s speech demonstrates. But, at the end of the day, it was the settler values that prevailed.

A responsible community, whether tribal or otherwise, may decide to sacrifice some values or interests in pursuit of economic development. At the time of public works takings for scenic reserves, the Maori land title system had placed many tribes in the position where they could not make community decisions about what to keep and what to develop. Nor could they necessarily save even their most sacred places from the attrition of individual interests to the Crown or private owners. In the case of Ngongotaha Scenic Reserve, for example, it was one of the owners who, as a surveying official, first alerted the Crown to the need to protect the forested mountainsides for scenic purposes. It was pressure from the Tourism Department, which feared the loss of one of its ‘side trips’, which was decisive. A Tourism Department agent warned the Government that the land was in danger of being sold to speculators. The Government intervened with a proclamation that it could only be sold to the Crown. Then, instead of trying to negotiate with the owners, and despite awareness that some were opposed to alienation, it took the land compulsorily for a scenic reserve.

Had it not been taken, the summit of Ngongotaha might have been lost to private buyers (as other parts of the block had been). In one sense, therefore, the Crown is correct to argue that taking land into public ownership was sometimes necessary to guarantee its protection. The evidence before this Tribunal, however, is that this was necessary
because of the native land title system, which had deprived some communities of the power to make responsible (or any) decisions about their land. As we have seen in part II and in chapters 9 to 11, Maori sought to change this situation for decade after decade, with little success. Eventually, use of incorporations and trusts improved the situation for some.

Finally, we note the issue of compensation. As we have seen, Ngata argued in 1906 that the ‘sentimental’ value Maori had for their ancestral land ought to be a factor in determining compensation, especially for the kind of sites targeted for scenery preservation. This situation had not changed some 60 years later – and nor had the law. A valuer noted in 1964:

> At the outset, it must be recognised that to a Maori, his land is his most prized possession – to a far greater degree than to any Pakeha – and he is extremely loath to relinquish ownership of it, for any purpose whatever. Whilst it is readily admitted that this element is bordering on the sentimental, and as such, no compensation can be allowed, it is in all truth a factor that must be recognised, at least in some degree.  

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So the issue was clearly known and capable of remedy. To some extent, the payment of money was beside the point, as Dame Evelyn Stokes noted in her report on Orakei Korako.

79 Even so, some recognition of the immense value of these sites to Maori would have been appropriate when awarding compensation. It certainly should have been the basis for consultation.

The Tribunal’s findings

For the main period in which Central North Island Maori land was taken compulsorily for scenic purposes (from 1907 to 1931), we find the Crown in breach of the Treaty principles of partnership, autonomy, and active protection, for the manner in which it acquired this land.

We also find the Crown in breach of Treaty principles for its acts of omission, in

- failing to use mechanisms available to it for obtaining consent to the scenery preservation regime;
- failing to provide for continued exercise of tino rangatiratanga on scenic reserves after their taking (or other acquisition) when it could have done so; and
- failing to provide appropriate principles for measuring compensation, although this was suggested at the time.

Prejudice

In 1975, James Wilson of Ngati Whakaue wrote to object to the proposed expansion of a motel that the council had permitted to be built on the sacred slopes of Ngongotaha. He explained the traditions relating to the site, and commented:

> This story no doubt is simple and depicts that manner of appreciation peculiar to the Maori race. A free analysis thereof shows it to be interesting from the point of view that in the acceptance thereof, the early inhabitants of this district notably the Te Arawa people have thought about Mount Ngongotaha as an altar of God or in other words, as a place which should not be desecrated. In order to attend to the needs of preservations, the story peoples Mount Ngongotaha with unnatural beings probably as a law enforcement measure. In addition they have also thought of Mount Ngongotaha as a place of music or as a place to which the senses respond and also as a place where there is exceptional beauty from which may be drawn therapeutic benefits and enjoyment.

> If an appreciation of these values still pertain, then Council should not grant its consent to this application.

80 In our view, this letter captures the prejudice suffered by central North Island Maori, no longer able to exercise tino rangatiratanga or kaitiakitanga over their taonga. Instead,
they were reduced to pleading with the Crown and local authorities not to desecrate their sacred sites.

**Historical Public Works Legislation and Article 3 Rights**

**Key question: Has historical public works legislation discriminated against Central North Island Maori in breach of their article 3 rights and of the Treaty principle of equity?**

Article 3 of the Treaty promised Maori the rights and privileges of British subjects. We have noted Sir William Martin's view (above) about what those rights entailed, in terms of constitutional law, the common law, and the Treaty. Previous Tribunals have noted the principle of equity, which arises from article 3 and the Treaty as a whole, that Maori were entitled to fair and equal treatment with their fellow non-Maori citizens. Here, we consider whether discriminatory features were written into public works legislation. Counsel for the claimants has accused the Crown of legislative racism, because of the extent and degree of discrimination. The Crown has denied this allegation, suggesting that less attention should be paid to systems and policies, and more to whether they were actually unjust as they operated on the ground. In our view, if unfair and discriminatory provisions were contained in legislation, then the Crown has acted in breach of the Treaty principle of equity. It is difficult to see, if the law provided fewer and lesser protections for Maori than general land, that this could somehow have been translated into fair and equal practice on the ground. The Crown's argument is not sustained in that respect.

There is not space here for a comprehensive recital and analysis of public works legislation from 1840 to the present day. There were many Acts and amendments, in addition to related provisions in scenery preservation, native land, and other legislation. We rely on the accounts of Cathy Marr, Peter McBurney, and Robin Hodge, which have been referred to by claimants and the Crown in our inquiry. Also, the *Turangi Township Report* contains an analysis of the Public Works Act 1928, the key twentieth-century piece of legislation (until 1981).

After reviewing this evidence and the submissions of counsel, we have identified a pattern of systematic discrimination in public works legislation. We do not think it racist per se. It arose largely from the prejudicial effects of the Maori land title system, and not from negative perceptions of Maori people. For part of the period, discriminatory provisions applied to lessees or 'occupiers' of Maori land as well, even where these were Europeans. Fundamentally, it reflects the key failure of the Crown to provide for Maori autonomy or self-government. The harmful effects of the Maori land title system could never have been perpetuated, had Maori possessed community titles and legal powers to govern their own lands and affairs.

**Was there discrimination in the legislative provisions for notification and consultation?**

The main public works legislation affecting the Central North Island was the Acts of 1882, 1894, 1928, and 1981, with their various amendments. The Public Works Act 1882 was enacted in the era of Bryce and Parihaka. It was 'harsh and vindictive' in its provisions for Maori land. In 1888, the Minister of Works admitted that Maori land was being taken in preference to general land, in a manner 'decidedly unfair'. This was in part a consequence of fewer and weaker protections for Maori land, which formed, as we shall see, the basis of systematic discrimination, well into the twentieth century.

**Notification and consultation for takings**

A key principle of public works legislation, as it applied to general land, was that owners and occupiers would receive personal notification of the intention to take their land, and have a 40-day period in which to object. This
period was also used to negotiate compensation, where the authority (either Crown or local) was determined on a taking, or to negotiate a sale or (from 1928) lease. If convincing objections were made – that the impact would be disproportionate, that other land was more suitable, or some other compelling reason – then the taking authority had an opportunity to review its position and decide whether to proceed.\textsuperscript{83}

Legislation deprived most Maori land of these protections. The 1882 Act provided for the Government to take Maori land without complying with any of the protections mandatory for general land. The Government would gazette an Order in Council, and then could enter and take any Maori land. With no notification or consultation, Maori had no opportunity to object, nor the Crown to weigh any consideration of Maori submissions about their interests. There was no opportunity for negotiation. Government could also enter land for survey purposes, on the same authority. The only exception was that occupiers should consent to the entry of land where there were buildings, or crops would be damaged (but not to the taking). This provided a little protection for European lessees, as well as Maori owners in occupation.\textsuperscript{84}

This situation was improved in 1887, when a Public Works Amendment Act restored the usual notification and consultation protections to Maori land with a Crown title, but not for customary land. The latter was still a large area of land in the Central North Island at the time.\textsuperscript{85} From 1882 to 1962, Maori customary land could only be taken (there was no provision for purchase or lease), and without notification or consultation. The major Public Works Act of 1894 continued this status quo, but its definition of customary land as Maori land 'held by Natives under their customs or usages, whether the ownership thereof has been determined by the Native Land Court or not', became increasingly problematic.\textsuperscript{86} It was repeated in public works legislation for the next decade, but was seriously out of synch with definitions in the Native Land Acts. In practice, it meant that Maori land could be taken without any notification or consultation, not just if it had not been through the court, but also where it had not been registered under the Land Transfer Act. This definition appears to have included most Maori land, whether it had been through the court or not.

After litigation on the point, the Government passed the Public Works Amendment Act 1909. This specified that the owners and occupiers of Maori land only had to be notified if their title was registered under the Land Transfer Act. All other Maori landowners would get a notice in the Gazette. But to ensure that even that level of notification was not required, the Act specified that failure to publish a notice in the Gazette would not invalidate a taking.\textsuperscript{87} By 1909, therefore, Maori land had been subject to discriminatory notification, consultation, and objection provisions for 27 years.

This remained the case with the passage of the Public Works Act 1928, the principal Act for much of the twentieth century. Maori customary land, of which there was little by this time, would still be taken without any notification or consultation. It could only be taken, not purchased or leased. General land, on the other hand, could be made the subject of a purchase or lease agreement. If compulsion was needed, then the usual rights of notification and objection continued for owners of general land, except for certain categories of taking, such as railways and defence. Protections for general land were increased in 1952, with the provision that notices of intent would expire after a specified time, and in 1973, when objections were to be heard by an independent board instead of the taking authority.\textsuperscript{88}

As we have noted, none of these protections applied to customary land. Maori freehold land was protected the same as general land, but only so long as it had been registered under the Land Transfer Act. As we have found above, in chapter 11, much Maori freehold land was not registered under this Act. Entry on the Provisional Register, which had happened for some Maori land, was specified as not enough to oblige the taking authorities to
He Maunga Rongo

notify owners. Ms Marr notes that the Crown was aware of how little Maori land was actually registered under the Land Transfer Act, citing a 1959 report from the Secretary of Maori Affairs. Even so, this legislative discrimination remained in place until 1974.89

Instead of being served with notification, Maori landowners would be notified simply by a notice in the Kahiti. When the Government stopped publishing its Maori gazette, a notice in the English-language Gazette was substituted (1931). Later still, there was a further substitution – publication in the Maori Land Court panui. As with the 1909 Act, if the Crown failed to publish a notice in these gazettes, the taking would still be valid.90 This meant that many owners of Maori land had no legal protections. They would not be notified individually and in person, but by gazette notice. If the Crown failed to put a notice in the gazettes, their land could be taken anyway. General land could never have been treated in such a way. Maori owners would not be identified until it was time to pay them compensation. This deficient notification process meant that Maori ability to object, and therefore to have their interests considered – as the Crown was obliged to do under the Treaty – was abrogated by law for much of the twentieth century.

This situation was finally remedied 46 years later, in the Maori Affairs Amendment Act of 1974. From that year, taking authorities had to serve notice on the Registrar of the Maori Land Court, who would then call a meeting of assembled owners under the Maori land legislation. In urgent cases, however, the court was authorised to appoint agents or trustees to act or negotiate on behalf of the owners.91 The ability to call meetings of assembled owners had been in existence since 1909. Although those provisions were not adequate in themselves, as we have noted in chapter 11, they represented a very bare minimum of what the Crown could have been doing since 1909, in terms of offering Maori a chance of notification, consultation, and objection in public works takings. This belated and inadequate measure in 1974, therefore, was too little too late. From 1882 to 1974, the public works legislation was in sustained and serious breach of Treaty principles. This was only possible because, as we have found, Maori lacked the political power to get such matters remedied or placed on a proper footing. It is inconceivable that general land could have been treated in such a way, in the circumstances of the times.

Notification and consultation for compensation

In terms of compensation, the Public Works Act 1882 gave the Native Land Court the power to determine compensation for customary land, and this was extended to all Maori land in 1887, and to lessees or mortgagees of Maori land in 1889. The only notification required for a compensation hearing was a notice in the Gazette and Kahiti. Thus, Maori owners were not notified of this kind of Land Court sitting, any more or better than any other.92 We have already addressed Treaty issues in respect of the inadequate and unfair procedure for notifying owners of court hearings. Our findings on that matter apply equally here.

In Ngongotaha, for example, we know that only two owners (out of 116) expressed their willingness to accept the Crown’s offer of compensation. We do not know whether other owners were present, but none objected. Government officials knew that some owners opposed the taking, and feared inadequate compensation – in particular, they wanted Crown land rather than money.93 None of this came out in court. This was, in our view, far too chancy a process for determining such serious matters. As we explained in part II, various governments (after 1885) accepted the principle of committee management of Maori land. Ballance’s 1886 Act, the incorporation provisions of the 1894 Act, the 1900 Act, and the meeting of owner provisions of the 1909 Act, all pointed to what was possible, but not ultimately allowed. For notification of compensation hearings to be left to the chance of owners seeing or finding out in time about a Gazette notice, and for their consent to be determined on how many made it to court (without any minimum requirements as to quorum), was inadequate, unfair, and provided significantly less protection for owners of Maori than general land.

In particular, Ms Hodge notes:
It is reasonable to conclude that Maori owners would have been better served in the compensation process if awards could have been made under an arbitration system as was the case with private [general] land. These were hearings in the Compensation Court which consisted of, either a magistrate or judge (if the amount claimed exceeded £250), and two Assessors appointed by the Crown and the claimant. Maori owners then would always have been represented.\(^\text{94}\)

From 1962, the regime was changed. Maori incorporations could negotiate compensation for themselves, but other owners of land in multiple, individual title had to be represented by the Maori Trustee, as described in the next section. Previously, individual owners had to turn up at the Maori Land Court, where they could have a say but the judge made the decision. From 1962 to 1974, the Maori Trustee became the statutory agent of the owners, although the word ‘agent’ is a misnomer, as the trustee was in no way accountable to them or even required to consult them. Owners had no right to either agree or object to the sum negotiated, and no say over how it would be spent. The Maori Trustee and Maori Land Court would decide apportionment and then distribute the money to all individual owners. There was no right of legal challenge to such decisions. Thus, the owners’ only right and privilege was to receive an individual compensation payment. Owners of general land would never have tolerated (and could never have been made by Parliament to tolerate) such a system. Finally, in 1974, long-existing provisions for meetings of assembled owners were permitted to apply to public works takings, both for notification of taking and negotiating compensation.\(^\text{95}\)

**Was there discrimination in the legislative provisions for compensation?**

The provision of different (and less protective) notification and consultation requirements was mirrored by different (and less protective) compensation requirements. As with the former, these were first introduced by Parliament in the Public Works Act 1882, and remained a long-term legacy of that troubled time. Maori freehold land and general land were still treated the same in this Act. Full compensation was required (except in certain circumstances that applied to both). Owners had five years from the taking to apply to a compensation court, which would determine compensation on established British legal principles. Maori customary land, however – which was still a significant component of Central North Island land at that time – was subject to a different procedure. Owners could not seek compensation for themselves. They had to rely on the Minister to apply for it. There was no requirement for the Minister to make such an application within a reasonable, or indeed any, timeframe. Also, compensation would be determined by the Native Land Court, not the general Compensation Court. This was presumably because the Native Land Court was required to identify the land and its owners, as well as the compensation, but it became a long-term feature of the public works regime.\(^\text{96}\)

In 1887, it was extended from customary land to all Maori land, and remained in force until 1962.\(^\text{97}\) Maori complained frequently that the court lacked the expertise to determine appropriate compensation, but these complaints did not result in amendment. In 1905, for example, Hone Heke, the member for Northern Maori, asked the Government to: consent to an amendment in the Public Works Act relating to the Maoris, which at present placed them under peculiar and hard conditions. If Maori land were taken under the Public Works Act, the Judge of the Native Land Court was to ascertain and decide the value of the property; but such Judges might know nothing at all about the value of the property. They know nothing about the value of the property, and they had no Assessors who did. He wished to draw the attention of the Minister for Public Works to this position, and to ask him to have this anomaly removed by applying the provisions of the Public Works Act which applies to European lands to Maori lands.\(^\text{98}\)

Ms Marr notes also that compensation for general land was often negotiated before the taking, as a result of the
better notification and consultation procedures for that class of owners. European lessees were also guaranteed the specialist compensation court as their final arbiter, until 1889 when not only Maori owners of Maori land but also European lessees and mortgagees of Maori land had to have their claims determined by the Native Land Court.99 Lessees (as with owners) at first had no power to make claims of their own, but were forced to wait on the Minister to do it for them.

Maori and general land had the same legal protections until 1882, when a discriminatory regime for Maori land was introduced. By the late 1880s, this regime remained in place mainly because of the known and horrendous difficulties of the Maori land title system. We have already noted the Crown's Treaty responsibilities in this respect in chapters 8 and 11. Here, we identify prejudicial effects of that system, leading to further Treaty breaches and prejudice in terms of public works. By the late 1880s, European lessees and mortgagees were also caught up in its inescapable toils. They received the same lesser protection in notification, consultation, and compensation as their Maori lessors and mortgagees. But ultimately, the owners suffered considerable hardship, because of the disadvantages and lack of incentive for capital investment or development of Maori land.

What is clear is that owners had to be identified at some point in any process. The legislative regime required the identification of owners of general land at the beginning of the process, and gave them an enhanced role and greater protections. The same regime could have required the identification of Maori owners at the start of the process, so that they could have been consulted, have an opportunity to object, or even be the subject of a negotiated agreement for the taking or the compensation, or both. Instead, the legislation required the identification of Maori owners at the end of the process, when it came time to pay compensation. This feature remained in place until 1974.100 It dominated, therefore, the majority of public works takings of Maori land in the Central North Island inquiry region. It seems to us that a requirement for owners to be identified at the beginning was entirely feasible, since it was always going to have to be done at some time. Leaving it to the end – the opposite of the practice for general land – was in serious breach of the fair and equal treatment that Maori landowners were entitled to expect under the Treaty, and under British legal principles.

There was a slight improvement in 1894. Although there was still no time specified for the Minister to lodge compensation applications, local authorities were required to do so within six months of the taking.101 Otherwise, the separate compensation regime remained largely unchanged until 1962. Maori continued to object to this system, citing the inexperience of Native Land Court judges in valuing land. Also, as we have seen in chapters 4 to 9, Central North Island Maori objected strongly to any system in which the court decided their entitlements. The Crown, on the other hand, became worried in the twentieth century that the court might be too favourable to Maori in its compensation awards. We lack evidence to determine whether this aspect of legislative discrimination was ultimately favourable to Central North Island Maori interests or not. In any case, the system continued unchanged until 1962, when compensation for Maori land was transferred to the Land Valuation Court (the specialist authority for general land at the time).102

Some discriminatory features remained. Unlike for general land, it was still the practice that Maori owners would not be identified or involved until the end of the process (payment of compensation), unless they found out about the taking from a gazette or by informal means. The previous process had required a court hearing and a judicial determination of compensation. Most owners of general land, on the other hand, negotiated compensation before the land was taken. Now, compensation for Maori land could also be negotiated – but not by its owners. Instead, the Maori Trustee was given the responsibility of negotiating compensation for compulsory takings of multiply owned land. Incorporations were exempt from this
compulsory requirement, unless they authorised the trustee to act on their behalf. 103

Before 1962, owners who found out about the court hearing could at least turn up and make their views known, although the judge was not in any way bound by them. But from 1962 to 1974, the Maori Trustee had absolute discretion to negotiate compensation, accept or reject the taking authority’s offer, and take matters to the Valuation Court if agreement could not be reached. Maori owners had no say in any of it, unless they had established an incorporation. The trustee might consult owners if they happened to be known, but was not bound to carry out their wishes. Owners also had no say in how the money would be allocated or spent. They could not hold a meeting of owners or decide to invest the money or spend it on a community project. The Maori Trustee either distributed the money to individuals automatically, or applied to the Maori Land Court to decide the appropriate proportions for individual distribution. The decisions of the Maori Trustee were legally binding, and were not subject to legal action. 104

In addition to discriminatory provisions for notification, consultation, and compensation, there were two other major forms of discrimination written into the law. The first relates to categories for land entitled to special protection or consideration. The second involves the fundamental basis on which land could be offered back to Maori, given its conversion to general title. Ms Marr suggests that both features involved lesser protections for Maori, in law and in practice. We turn first to categories of protected land.

Was there discrimination in the categories of land entitled to special consideration or protection?

Ms Marr suggests that the Public Works Acts gave special protection to categories of land valued by both cultures, but not to those unique features valued by Maori alone. Matters for special consideration or protection included gardens, buildings, ornamental grounds, and other things of particular value to settlers. Some of these were also valued by Maori. From time to time, such protections only applied to general land, or Crown-granted Maori land. There was no corresponding protection or special consideration for things valued by Maori, but not by settlers, such as eel weirs, wahi tapu, and particularly urupa (burial grounds).

It is not sufficient to argue that settlers wanted to assimilate Maori, and that this made such protections unlikely in the circumstances of the time. We disagree. Both cultures valued fishing and cemeteries, for example, and there was some sympathy for Maori at the desecration of their urupa by what Gilbert Mair described in 1903 as ‘white savages’. 105 There was also sympathy at the destruction of native fisheries, where these did not interfere too much with trout, as we will see in chapter 18. But this sympathy, while it gave the possibility of assistance, was not acted on to remedy the discrimination in the public works legislation.

It was certainly possible to have done so by the standards of the time. Native land legislation did protect pa and urupa, as well as more Eurocentric places of value, when up to 5 per cent of Maori land was taken for roading. These provisions were duplicated by public works legislation, such as the Public Works Act 1894. Yet governments refused to apply them to public works in general, restricting protection of pa and urupa to the 5 per cent takings in the very same Acts. 106 The Public Works Department did claim that it routinely inquired about possible burial sites, but these inquiries were normally to the Native Affairs Department, not (unidentified) Maori owners. How could it be otherwise, when the Government did not know who the owners were? The Maori Councils Amendment Act 1903 made interference with or desecration of urupa a criminal offence, empowering Maori Councils to lay actions before magistrates and prescribing punishments. 107 But public works could disturb or destroy such sites with impunity. Governments did not give urupa legal protection from public works takings until as late as 1948. 108 This underlines the built-in deficiency of the legislation, which
allowed the loss of so many iconic sites and taonga, as the Central North Island claimants described in our hearings.

The problem was foreseen and preventable. Mr Taipua, the member for Western Maori, appealed unsuccessfully to Parliament in 1889:

I hope the Minister will also consider the necessity of protecting Native burial-grounds and other places which are of great value to the Natives, so that they may not be lightly tampered with. I will submit amendments to the Minister for Public Works on these matters in Committee. The Maoris are extremely jealous of any liberty being taken with their burial-grounds; and I should like that matter to be clearly defined, so that no further trouble shall be caused. 109

Had these concerns been acted on, many claims would not need to have been brought before this Tribunal. Instead, public works legislation acknowledged settler but not Maori values, in terms of identifying sites for special protection.

This built-in flaw dominated how the regime operated in the Central North Island. The Crown has acknowledged, in its Deed of Settlement with sections of Te Arawa, that it has taken lands of ‘particular significance’ to Te Arawa. This has impeded the tribes’ control over wahi tapu and taonga, and their ability to ‘maintain and foster spiritual connections with those ancestral lands’. The result was ‘a sense of grievance among Affiliate Te Arawa Iwi/Hapu which still exists today.’ 110 We agree.

Was there legislative discrimination in the offer-back procedures?

During the nineteenth and early twentieth centuries, most legislation provided for surplus land to be offered back to the original or adjacent owners for repurchase, before being auctioned to the public. This was the same for Maori and general land. Ms Marr points out, however, a significant feature of this process. Maori land became Crown land when it was taken, and it could only be offered back as general land. Europeans would get land back in the same title as it had been taken, but Maori would not. The Government remedied this for roads in 1920. The Native Land Amendment and Native Land Claims Adjustment Act of that year provided that surplus road land could be vested in former owners by the Native Land Court, as land in Maori freehold title. This only solved the problem for roads. Sometimes, individual revesting Acts were used, but the complication of having to get such legislation passed cannot have encouraged taking authorities to return land to Maori. 111

By the time a more general arrangement was enacted in the Native Purposes Act 1943, the whole climate had turned against offering land back to its original owners. Ms Marr concludes: ‘It is questionable, given the lack of provision for meeting such difficulties [until 1943], whether legislators contemplated returning much Maori land anyway.’ 112

Was there legislative discrimination in the 5 per cent takings for roading or railways?

Under the legislation governing public works, up to 5 per cent of new titles (Maori and general land) could be taken for roading or railways, without notification, consultation, or compensation, for much of the period under review. The evidence of Ms Marr identifies the following features:

- The period in which the Governor could take 5 per cent of general land was usually five years after the issuing of the title. For Maori land, it was usually 10 to 15 years.
- Under most legislation, the taking of up to 5 per cent of general land would be recompensed by money or land. For Maori land, there was no payment.
- As Maori customary land was brought before the court and clothed with a legal title, an ever-growing amount of Maori land was made subject to the 5 per cent rule. General land, on the other hand, was
increasingly escaping it as the shorter time limit expired, and it was gradually restricted to the outermost areas of settlement.

At certain times, Maori customary land was made subject to the rule, even though such land had not received any kind of Crown title. ¹³³

**The Tribunal’s findings**

We are forced to conclude that, from 1882 to 1974, Maori land was the subject of sustained and serious discrimination in public works legislation. Maori landowners had significantly fewer legal rights and protections in:

- notification of takings;
- consultation before takings;
- opportunities to object and have their special interests identified and considered;
- consultation about compensation;
- calculation or negotiation of compensation, or both; and
- payment of compensation.

Maori landowners also suffered legislative discrimination by:

- the exclusion of their highly valued places from the legislative protection accorded types of sites valued by settlers; and
- the weighting of offer-back procedures in favour of general land.

The special category of land taken without compensation for roads and railways (the 5 per cent rule) discriminated against Maori because:

- general land could be taken for up to five years, while Maori land remained subject to taking for a further five to ten years after that;
- general landowners were paid for land taken under the 5 per cent rule, while Maori owners were not paid; and
- Maori land came more under the 5 per cent rule than general land. This was especially inappropriate for customary land, which was sometimes subject to a rule supposedly meant for new titles.

These serious forms of discrimination were written into the laws governing the taking of Central North Island Maori land for public works. The relevant legislation was in breach of the Treaty principles of equity, active protection, partnership, and reciprocity. The Crown did not act honourably and in good faith towards its Treaty partner when it enacted laws which provided fewer legal rights and less protection for the lands of its Maori citizens. Fair and proper protections were especially important where the Crown was taking land by compulsion, in itself antithetical to the Treaty (except as a last resort in the national interest). By enacting legislation with fewer or lesser protections for Maori, the Crown compounded the Treaty breach of taking land by compulsion without consent. The failure to compensate Maori properly (or, in some cases, at all) further compounded the Treaty breaches, and was itself a prejudicial effect of them. When taonga of irreplaceable value have been taken in this manner, it is not surprising that many Central North Island Maori have been left with a strong and just sense of grievance.

There were some improvements to the system from 1974, when notification, consultation, and compensation requirements were finally improved for Maori landowners. The Maori Land Court became the primary deciding force, with discretion to call a meeting of owners, identify ‘readily available representative owners’, and direct the Crown to consult with them, or, in case of urgency, appoint trustees or agents to act on behalf of the owners.¹³⁴ The parties did not make submissions about these improvements or the Public Works Act 1981. There is little evidence before this Tribunal of matters after 1974. Our findings in this section, therefore, apply to the period from 1882 to 1974.
The Practical Impact of the Public Works Regime

Key Question: What was the impact of the public works regime in practice on Central North Island Maori?

Having established that fundamental aspects of the public works regime were in breach of the Treaty, but with possible factors in mitigation, we turn now to the operation of the regime in the Central North Island inquiry region. For quantification, we rely largely on the evidence of David Alexander and the Crown Forestry Rental Trust’s Land History and Alienation Database. Although the Crown and some claimants have questioned the reliability and completeness of the data, there is broad agreement that the public works statistics are a useful tool. The Crown was not sure that the figures were definitive, but expected that they were internally consistent, and useful to show and compare patterns and illustrate issues. The Crown also noted that they were the only region-wide data available on public works takings.

Richard Boast and other claimant counsel were mainly concerned about the assumption that compensation had actually been paid (to the right people or at all), in the category ‘Public Works Taking (Compensated)’. We will address this concern in the following section. Otherwise, all parties used and relied on the database for public works, while acknowledging its limitations.

How much land was taken for public works?

Before proceeding to a quantitative analysis, it is necessary to clarify which evidence the Tribunal has used for its deliberations. We received tables, spreadsheets, and briefs of evidence based on the Land History and Alienation Database from Mr McBurney, Mr Alexander, and Crown counsel. Mr McBurney included tables in his report, but those tables were later replaced by a new set of tables filed separately. He did not rely on this data in the preparation of his report. Mr Alexander filed tables and analysis based on information from the database as at February 2005. In response to questions from the Tribunal, he provided a further brief with updated tables and information as at July 2005. Also, the Crown prepared its own tables of public works takings, derived from the database, on which it relied in its submissions. For the purposes of consistency, we have used the evidence of expert witnesses in its most final form.

According to Mr Alexander, 4147 hectares of Central North Island Maori land has been taken compulsorily for public works, for which compensation was payable. An additional 1852 hectares has been taken compulsorily for roading, without payment of compensation. Central North Island Maori have gifted 1738 hectares to the Crown for public purposes, and a further 159 hectares have been vested in the Crown or local authorities by compulsory means. The Crown has calculated that 6004.4 hectares have been taken compulsorily for public purposes, of which 31 per cent was not compensated, and 69 per cent was compensated. Of these figures, however, 413.2 hectares were taken for the Turangi township, and Treaty issues regarding that taking have already been settled by the Crown.

There are two key points to note about the data on which these figures are based. First, it is the most thorough and comprehensive exercise ever done, and the data is reliable for showing patterns and proportions of alienation. Secondly, there are some problems with the categorisation for public works takings. In particular, the Crown submitted that 69 per cent of land taken compulsorily was compensated. The database researchers relied mainly on legislation (that compensation was payable) or Maori Land Court compensation orders (where compensation was ordered). The database does not establish, therefore, whether compensation was actually paid. Some claimants, such as Sydney Waiwiri and Rere Puna of Ngati Hineuru, gave evidence that compensation was, to their knowledge, not paid sometimes for land on which it was due. Mr Waiwiri worked for the Ministry of Works at Tarawera.
at the time of several takings from the Runanga block. Although the Land History and Alienation Database lists these takings as ‘compensated’, Waiwiri’s evidence is that no compensation was actually paid. Similarly, Aronia Ahomiro told the Tribunal that compensation was never actually paid to his grandmother, despite evidence of a court order to do so. Given the methodology employed for the database, we are satisfied that the figure of 4147 hectares should be reclassified as ‘compensation payable’, rather than ‘compensated’.

Having made that adjustment, we set out a tabulated summary of the data presented in evidence (table 12.2). In addition to the statistical information in table 12.2, which shows broad patterns within and between districts, Mr Alexander compiled the following evidence on the proportion of non-compensated takings to other takings. For the nineteenth century, 657.2266 hectares of land was taken compulsorily, of which 90.4 per cent was not compensated. In the inquiry districts, all Kaingaroa takings were without compensation, as were 99.5 per cent of Taupo takings, and 83.5 per cent of Rotorua takings. For the first half of the twentieth century, 2713.5 hectares were taken by compulsion, of which 37.7 per cent was taken without paying compensation. This included two-thirds of the Taupo takings (67.9 per cent), one-third of the Rotorua takings (35.2 per cent), and only 12.6 per cent of the Kaingaroa alienations. Between 1870 and 1950, therefore, the great majority of land taken in Taupo was for roading, and it was not compensated. Fairly close to half (43 per cent) of Rotorua land was taken without compensation. A smaller proportion of Kaingaroa land was involved (close to one-third of the takings, at 31 per cent). There was a significant change to this pattern after 1950. Much the same amount of land was taken as in the first half of the century – 2710 hectares – but only 10.9 per cent of it was taken without compensation. It was not until the 1990s, however, that there was a truly significant fall in compulsory takings, reflecting, we hope, a permanent change in the Crown’s approach to public works.

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<th>Rotorua Compensation payable</th>
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<td>1990s</td>
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Table 12.2: Land taken compulsorily, by inquiry district, and decade (in hectares)

What do these figures mean for our findings on generic issues?

The pattern revealed above is that for the period 1880 to 1950, just under half (49 per cent) of land taken for public works was not compensated. Overall, as the Crown submits, 31 per cent of land taken compulsorily before 2000 was uncompensated. These figures are a minimum, because we do not have evidence for how many of the compensable takings resulted in actual payment of compensation. The methodology used for the claimants’ database also categorised land as ‘compensated’ where more than 5 per cent was taken, resulting in compensation orders for the excess (but not listing the 5 per cent in the non-compensated category). The total of 1858.4 hectares, which the Crown accepts was taken without compensation, must be considered a minimum – but the pattern that about one-third of land taken was uncompensated should be correct.
As we have already found, land taken for roads before 1928 was subject to the 5 per cent rule, and this was the basis on which no compensation was paid. The Crown submitted that it was appropriate to take up to 5 per cent of new titles without payment, to make roads for the benefit of all. The evidence available to us is that this was not in fact what happened, regardless of whether the principle is valid. Rather, ancestral land was taken without payment, while general land was taken with a mandatory payment of twice what the settler had paid for it. This was blatantly unfair. The taking of land without consent is a prima facie Treaty breach. The taking of land without consent and without compensation compounds the breach, and has a prejudicial effect for all owners deprived of land without payment. The taking of Maori land without consent and compensation, while general land could only be taken for a much shorter period and with mandatory payment, compounds the breach (and comparative prejudice) even further. On Mr Alexander’s figures, 1296.5 hectares of land was taken for roading without compensation before 1930. We find the Crown in breach of the Treaty for these takings, and recommend that the breach be remedied by negotiation and settlement on terms consistent with the Treaty and agreed by the parties affected.

After the end of the 5 per cent rule in the late 1920s, the Crown continued to take Maori land compulsorily for roading, without paying for it. According to Mr Alexander, this was done partly by taking roads still in private ownership, though used by the public, or on the recommendation of the Maori Land Court. We do not have detailed evidence of the legislative provisions or circumstances of these takings. We note, for example, the enactment of special legislation in 1974 to bring Ohinemutu roads into public ownership, without payment of compensation.129 When abolishing the 5 per cent rule in 1927, the Native Minister, Coates, told Parliament that the time had come when the Crown could forgo this right:

all Natives as far as compensation is concerned should in future be treated in the same manner as the pakeha [with] . . .

the same right to claim compensation as the pakeha for the taking of land . . .130

On the face of it, the Crown’s policy of continuing to take roads without compensation after this was in breach of the Treaty. These were not private roads of use only to their owners, but land and roadways either already shared with the public or now made available to the public. Compensation ought to have been payable, as Coates conceded. We would like to know more about the circumstances under which land was taken in this manner, but we find that in taking a minimum of a further 579 hectares without compensation after 1930, the Crown has acted in prima facie breach of Treaty principles, with prejudice to those owners whose land was taken without payment.131

Is quantity the most important measure?

Is quantity the most important measure, in light of the Crown’s admission about social and cultural impacts (of even small takings)?

The Crown submitted that public works takings are not a significant issue for the Central North Island, because only 0.5 per cent of Maori land was alienated by compulsion. The Crown’s duty of active protection requires it to ensure that Maori communities retain sufficient land and resources for their present and future needs. There is insufficient evidence, however, to determine whether there were exceptions, where any one particular group lost a substantial proportion of its land to compulsory takings. The Crown qualified its argument, however, by conceding that the importance of a site may be much greater than its physical extent in acres. The Crown also acknowledged that the Treaty requires it to weigh the cultural and social impacts of taking or damaging a particular site, as well as the economics of it (see above).

Broadly, we agree with the Crown. The taking of 0.5 per cent of Maori land is not significant as a quantity, compared to much greater quantities of land lost by other
means. We lack evidence to determine whether particular iwi suffered disproportionately from public works takings. Some patterns, however, are apparent from the evidence before us. The tribes who relied on the Kaingaroa Plains for economic, social, and cultural sustenance lost the bulk of that land comparatively early. Compulsory takings from the tiny land base remaining, especially without compensation, must have had an impact on those communities. Also, coastal tribes such as Waitaha and Tapuika, and inland Rotorua tribes, identified by Commissioners Stout and Ngata as at the limit of what they could safely relinquish by the first decade of the twentieth century, must have been significantly affected by any further alienations – especially, in Treaty terms, where land or treasured sites were taken from them without consent. Finally, it is a disturbing feature of the twentieth century that as Crown purchasing declined, compulsory takings became a principal way for governments to obtain Maori land. This pattern was not fundamentally altered until the 1990s. This is significant for the quality of relationship and partnership between the Crown and Central North Island Maori before the 1990s.

The Crown is also correct, however, that the value and significance of sites may be unrelated to their physical size or the economic uses to which they may be put. Claimants in our inquiry were very aggrieved that taonga of immense value to them have been taken by compulsion. Derisible levels of compensation – or sometimes no compensation at all – have added insult to injury. Ngati Rangititi, for example, explained how sites of cultural significance have been taken or destroyed or both. Pa Whakapoukorero, in the evidence of Andre Patterson, has been virtually destroyed by quarrying. Land very sacred to the tribe has been taken at Station Gully and Quarry Gully. Also, land sacred as the burial site of ancestors killed in the Tarawera eruption, and awarded to the tribe by the Native Land Court, has been taken compulsorily for ‘internal communications’. Professor Boast submits for this iwi that their sense of grievance is justifiable, and compulsory takings of taonga are serious Treaty breaches. Ngati Te Rangiunuora and Ngati Rongomai submitted that they have lost wahi tapu sites to the Crown for scenic purposes. In their case, they argued that they gifted the land in the hope of preventing its compulsory taking, and of protecting it forever, only to be disappointed with the results. Ngati Whakaue, on the other hand, were not consulted and did not agree to the taking of the summit of their sacred mountain, Ngongotaha, for scenic purposes. Ngati Tahu told us of their grief at the taking, damage – and in some cases total destruction – of their ngawha, urupa, and marae at Orakei Korako and Ohaaki. These things have had a profound effect on them as a tribe. Ngati Raukawa and Ngati Tuwharetoa have lost wahi tapu to takings for hydroelectric development. Ms Feint also submitted that the Crown targeted hot springs in the Tokaanu township takings, and the acquisition of Maunganamu, a tapu hill with an urupa, for a road. The forced alienation of taonga and wahi tapu – concealed behind the apparently bland statistics – had a devastating cultural and social impact out of all proportion to the apparently small amount of land taken. Many tribes had similar complaints to bring. They do not consider their loss, deeply felt in cultural and spiritual terms, to have been mitigated because it is less than one per cent of their land.

We do not have detailed evidence on many of these individual takings. Our review of systemic Treaty breaches, however, showed that owners of Maori land were put to serious disadvantage by the prejudicial effects of the Crown’s title system. Takings of multiply owned Maori land involved inadequate notification procedures. This in turn deprived many owners of the opportunity to object. The Crown submitted that the Treaty requires it to weigh the interests of Maori and the public, to give due weight to Maori interests, and to consider whether a taking would cause major adverse economic, social, or cultural impacts.

Owners were not identified until it came time to pay them compensation. This left the Crown or local authority the option of consulting Maori community leaders, or known owners. Otherwise, Maori owners simply did not
have the same rights of objection as general landown-
erers under the law. Without the opportunity to object, or
better yet to have been consulted in the first place, Maori
landowners could not inform the Crown of wahi tapu,
taonga, or the particular value of sites to them that might
not be readily apparent to officials. The Crown, therefore,
was often simply not in a position to weigh Maori inter-
est, until it finally improved notification and consultation
procedures from 1974. Regardless, therefore, of whether
the Crown should have or did give appropriate weight to
Maori interests as a factor, legislation actually placed the
Crown in a position where it did not know and could not
weigh Maori interests at all.

This was apparent from the evidence about Ngongotaha,
the sacred mountain of Ngati Whakaue – yet its summit
belonged not to the tribe, but 116 individuals. Rather than
consult these owners or seek their agreement to a purchase
or lease, the Government decided that 116 owners were too
many to identify, locate, or deal with. There is no evidence
on file that any owners knew or had opportunity to object,
except for local surveyor, Tai Mitchell. He reported that
some owners were opposed to alienating the land, in his
capacity as a Survey Department official. Similarly, the
Crown’s offer of compensation was accepted by the Native
Land Court with the agreement of just two owners (less
than 2 per cent of owners), one of whom was Mitchell.138

By the 1960s, however, when the owners had an incor-
poration and were able to make their views and objections
known to the Government, further expansion of the scenic
reserve took the form of negotiation, private reservation,
and continued Ngati Whakaue authority. The difference is
striking.139

Incorporations were no guarantee of this type of
outcome. In the case of Taniwha Springs, a taonga of
immense cultural, spiritual, and economic value to Ngati
Rangiwhakawhia, the owners of this site were incorporated
when the local authority wanted it for a public water sup-
ply in 1964.140 The council notified the chairman of the
Awahou Maori Committee, P H Leonard, who was also a
member of the incorporation’s Committee of Management,
of its interest in acquiring part of the Springs reserve.
There was one meeting with Mr Leonard, at which time
the council was considering a sublease from the lessees.
Mr Leonard was supposed to meet with the owners and
report their views to the council, but there is no record of
this having happened.141

Soon after, the council decided it would be too difficult
to negotiate with the lessees and owners, and proceeded
to a compulsory taking without actually trying negotia-
tions. The lessee filed an objection, and wrote to the incor-
poration about it, but there was no objection filed by the
owners. In part, this was because the latter were anxious
to obtain a water supply for their marae. But it emerged
later that the incorporation was not in fact functioning
at the time, its committee was defunct, and there was no
one legally empowered to act for the 200-plus owners. The
incorporation was replaced by a section 438 trust in 1968,
but that was too late to affect the taking.142
On the positive side, the existence of legal trustees from 1968 enabled the owners to represent themselves in compensation negotiations, and to spend the compensation on an object of their choosing. This contrasted favourably with other multiply owned land, whose owners were legally entitled to nothing more than a mandatory individual payment at the end of someone else’s process. An example of this is the ‘Cherry Grove’, an area ‘famous’ among local Maori for its kumara gardens and cherry trees, as well as its provision of access to an urupa. The land was entered and used as a ‘muck disposal area’ in the 1960s, as part of the Aratiatia hydro project. When it came time to negotiate compensation with the Maori Trustee in 1970, the Government decided that the damage to the land’s ‘character and attractiveness’ had been so extensive that it might as well acquire it outright. It offered to buy the land instead of paying compensation, and the Maori Trustee agreed. Although there was a reference on file to ‘long discussions with the owners and the Maori Trustee’, the decision-maker was the Maori Trustee. When Maori objected to the Minister of Works, Percy Allen, he replied that there had been no compulsion – the full agreement of the Maori Trustee had been obtained. This was, indeed, exactly what the law prescribed.

For the owners of non-incorporated land, the situation had improved not at all in the 50 years since the taking of Ngongotaha in 1916. National’s Minister of Works from 1964 to 1972, Percy Allen, admitted in Parliament that his Government never consulted for multiply owned Maori land, but always took the land first and identified the owners later for compensation. There was simply no opportunity for owners to inform the Crown of wahi tapu or other taonga on the land thus taken, or have their cultural and social interests identified and considered.

In situations where the Crown was aware of the cultural, spiritual, or economic value of sites to Maori, legislation only required it to take into account or protect things also valued by settlers. These included buildings, crops, ornamental grounds, and gardens. As we have found above, urupa and pa sites were only protected from acquisition for roading under the 5 per cent rule. Although clearly possible in the circumstances of the time, therefore, protections for pa and urupa were not carried over to the rest of public works takings. Nor did these categories cover all the wahi tapu and sites of value to Maori, such as sacred mountains or traditional fishing spots. Maori burial grounds were not protected from general public works takings until as late as 1948. We repeat this point here, because it is key to our finding that the quantity of land taken was not significant in the case of sites of great cultural or spiritual significance. We accept the claimants’ evidence that they have lost such treasured sites through compulsory takings.

The Tribunal’s finding
We are not in a position to make case-by-case findings on these takings, nor was that the intention of our stage one inquiry. We find that, as a result of systemic Treaty breaches in public works legislation, the Crown acquired various sites of cultural and spiritual importance to Central North Island Maori, which it would or could not otherwise have done. Where this has happened, the Crown and claimants should negotiate a settlement of these strong and justified grievances.

Sufficiency of evidence

Is the Crown correct that there is insufficient evidence on some aspects of how the public works regime worked in practice in the Central North Island?

In its submission, as summarised above, the Crown argued that the Tribunal has insufficient evidence to assess:

- whether Central North Island Maori were consulted before the introduction of compulsory acquisitions to their district;
- that the Crown did not take into account the sufficiency of land remaining to Central North Island Maori;
the qualitative impact of land takings, balanced against benefits (given that all takings necessarily have some kind of impact, and it is not necessarily a bad one overall);

the impact of multiple ownership on notice requirements, in terms of how it operated in the Central North Island;

the circumstances in which the 5 per cent rule was applied, and its impacts;

that Maori land was taken in preference to general land;

whether there was a fair and effective process for objections to takings;

whether there was a pattern of less fair compensation for Maori than general land; and

the process and practice of offer-backs in the Central North Island.  

We address these points in turn.

**Did the Crown take into account the sufficiency of land remaining to Maori before proceeding with compulsory takings?**

The Crown answered this question with the argument that losing 0.5 per cent of the land base could not have made a material difference to anyone. We do not have specific evidence on the majority of takings. Nor do we have evidence on whether any particular group was affected disproportionately by public works takings. Our finding, from the evidence available to us, is that the Kaingaroa and Rotorua tribes could ill-afford any further land losses in the twentieth century, let alone compulsory takings (especially without compensation). We lack the detailed evidence to make more particular findings.

**Did the benefits of particular takings outweigh their adverse impacts?**

We lack sufficient evidence to make a general answer to this question.

**What was the impact of multiple ownership on notice requirements, as it actually operated on the ground?**

We do not have sufficient evidence to answer this question, in terms of proving exactly how it operated in every case. We are left with the question of how far we can make assumptions (based on what the legislation was designed to do, and the general evidence of its operation). The law, as we have found, provided fewer and lesser protections for Maori land in notification and opportunities to object, from 1882 to 1974. These were in part the prejudicial effects of the Maori land title system.

Mr Allen, Minister of Works from 1964 to 1972, told the House in 1973:

The National Government, in agreement with the Maori Trustee, always used the Public Works Act in taking Maori land for projects, and dealt with the Maori owners after that,
because it was impossible to contact all the individual owners. That was an agreement the National Government had with both the Maori and Island Affairs Department and the Maori Trustee.\[147\]

This policy was also a core tenet of the Public Works Department. In the 1940s and 1950s, for example, lands abutting Lake Taupo were flooded as a result of raising the lake for hydroelectricity (see chapter 18). Compensation claims were heard by a special court in 1947 and 1960. In 1961, the Crown’s lawyer suggested that much time and expense could be saved if officials dealt with future claims on the spot, the next time the lake went above the maximum level. Surely, he argued, the Crown had enough information on the land and its owners from the court cases for it do so.\[148\] The Commissioner of Works, who headed the Department, replied:

The great majority of the claims which were heard by the Special Court [in 1960], in fact 260 out of a total of 266, were in respect of properties which were in multiple Maori ownership and certainly it would have been quite impracticable to settle most of these claims by negotiation either before or after the claims were received.\[149\]

Because of the nature of their Crown-derived title, therefore, the department dismissed even the possibility of negotiating with Taupo Maori landowners.

The Maori Affairs Amendment Act 1974 was the subject of extensive consultation by the Minister of Maori Affairs, Matiu Rata, and he explained its reform of public works notification very clearly. The new procedure required an increase in the quorum for meetings of owners, and notifying the registrar of an intention to take, so that the court could call meetings of owners, identify representative owners, or appoint trustees. The new procedure:

- will enable the receipt of notices of intention, the objections to the Crown or local authority with respect to entry or the taking of the land, negotiating for terms of entry or acquisition, taking legal proceedings, and so on. The procedure tackles the long-standing grievances of the Maori people when their land is taken for public purposes.\[150\]

Given these admissions by governments of the day, and the systemic breaches we have identified in the law, we conclude that Central North Island Maori must, as a consequence, have suffered from inadequate notification, consultation, and opportunities to object. The main exception to this would have been Maori landowners who had set up incorporations. As we have seen, this improved the opportunities of Ngongotaha owners, who were seriously disadvantaged at the time of the first taking in 1916, but were in a better position in the 1960s after establishing an incorporation. We do not have evidence of how much land was taken from incorporations, as compared to other forms of multiple ownership. That is our principal caveat.

Otherwise, we reiterate that an unjust law is unlikely to have been made just in its administration. The examples of takings from multiply owned Maori land described in the McBurney report, the Shoebridge document bank, other reports, and tangata whenua evidence – though not in any sense a representative sample – point to inadequate notification, consultation, and opportunity to object.\[151\] With no contrary evidence of adequate notification procedures operating despite the law, we are satisfied that a general finding of Treaty breach and prejudice should be made. This applies to the period before 1974. After the reforms of that year, the Public Works Act 1981, and a climate more favourable to Maori interests, there is evidence of improved notification and opportunities to object. We are not in a position to assess the extent of the improvement, although we note that there was no significant decline in compulsory takings until the 1990s.
Did the Crown purchase land or obtain it by gift more often than it took it by compulsion?

Some acquisitions for public works – especially scenery preservation – were gifts or Crown purchases rather than compulsory takings. We do not have evidence to determine how many times the Crown sought to buy rather than take land, nor how far a ‘willing seller, willing buyer’ arrangement was genuine, in light of the Maori land title system and possible threats of compulsory acquisition. Even in the 1980s, the Ohaaki owners were threatened with a taking (and lower compensation) if they refused the Crown’s offer of a lease. It is axiomatic that the Government could not normally put public works on hold for a decade or so, while it bought up individual interests. Also, Crown purchases tailed off in the twentieth century. In any case, the Land History and Alienation Database provides fairly full data of all the occasions on which land was taken compulsorily under the legislation described in this chapter (see table 12.3). In addition to the figures in table 12.3, 159 hectares has been vested in the Crown or local authorities (mainly during subdivisions) in the twentieth century.

Table 12.3 shows some disturbing trends. First, the principal way by which the Crown has acquired land in the Central North Island after 1960 has been by compulsion. In terms of both number of alienations and area acquired, compulsion has outweighed voluntary transactions with the Crown since 1960. Given the number of taking events, more Central North Island groups have had parts of their land taken compulsorily.
land taken than purchased since 1900. More land has been taken compulsorily in the second half of the century than in the first, and the only significant drop in takings (both in number and in quantity of land) has been in the 1990s. Some compulsory takings have been by local authorities. The data suggests that land for public works has mainly been acquired by compulsion than voluntary agreement since at least 1960. This situation cannot have been consistent with Treaty principles.

How exactly did the 5 per cent rule operate on the ground and what was its impact?

In our findings above, we identified systemic Treaty breaches in the conceptualising and operation of the 5 per cent rule. The rule was first introduced to the Central North Island in the 1870s, as land passed through the court, and was operative there until 1927. It would have had its biggest impact from 1880 to about 1920, allowing for its operation for 10 to 15 years after title was granted. We have identified the exclusion of Maori from infrastructure decision-making at that time (especially roading), and the failure to provide them with legal powers of local or regional self-government. These matters are very clear for the period from 1865 to 1928, in which Maori autonomy and self-governing institutions were either repressed or denied legal powers. During that period, a minimum of 1296.5 hectares of Central North Island Maori land was taken without compensation for roading. We do not need to know the exact circumstances of each road taking in order to find this process in serious breach of Treaty principles.

Was there a pattern of taking Maori land in preference to general land?

We do not have sufficient data to answer this question for the Central North Island. The Crown pointed out that more land remained in Maori ownership in the Taupo district than elsewhere, especially around the lake, and that this gave the Crown fewer alternatives to taking Maori land. The claimants pointed out that, because of the types of land surviving in Maori ownership (because unwanted for development), Governments consciously targeted Maori land for scenery preservation, and we do have examples of this. Other than these general observations, both of which seem reasonable, we have insufficient data to identify comparative patterns.

Was there a fair and effective process for objections to takings?

Again, we do not have comprehensive evidence on all takings. We are not in a position to examine every taking and determine whether a fair opportunity for objections was provided. We note, however, the systemic disadvantage created by legislation for the owners of Maori land. As we have found, they had fewer protections and less opportunity to be notified and make objections, except in the case of incorporations. This systemic disadvantage, written into legislation from 1882 to 1974, meant that there was not a fair opportunity to make objections.

In terms of the process followed if objections were received, Professor Boast submitted that the pre-1973 regime was inherently subjective and unfair. Relying on the taking authority to evaluate objections fairly and objectively, without any right of appeal to an independent body, was in breach of Treaty guarantees. He argued:

The best form of notice would obviously have been to contact the Maori owners personally. However, due to multiple ownership and the fact that many people had moved away, owners would be difficult to locate. The responsibility was then left to Maori to search the gazette and post office for relevant notices. Until 1974 there was no requirement to notify and convene a meeting of all owners. Maori people who did not see the notices, would not know of the takings, and would not be able to object... Maori could only object if they knew about the taking. Even if Maori did object, up
until 1973 [it] was in the discretion of the Minister of Public Works or the relevant local authority to sustain or reject their objection. The Crown did not establish an independent body to assess objections. This did not afford Maori a reasonable opportunity to object. 156

In the Public Works Amendment Act 1973, the Labour Government provided for objections to be heard by the Town and Country Planning Appeal Board. 157 The need to provide an independent appeal right for all citizens was considered long overdue, and supported by the Law Society and both sides of the House. 158 In the words of Mr Moore, the member for Eden, the Minister’s power to decide on objections had made him ‘the judge, the jury, and the executioner. That was not on’. 159

In its report on the Turangi township taking, the Tribunal agreed with the Ngai Tahu Ancillary Claims Report that Maori citizens were entitled to have their objections heard by an appropriate and independent body:

The proposal that the right of the Crown to acquire Maori land compulsorily as a last resort should be referred to an appropriate person or body independent of the Crown avoids the Crown being a judge in its own cause and should ensure an outcome consistent with the Treaty. 160

We agree. It follows, therefore, that the absence of any appeal body at all before 1973, with the Crown or local authority acting as its own ‘judge, jury, and executioner’, was in breach of Treaty principles. We accept Professor Boast’s submission on this point.

In 1973, the Planning Appeal Board had recommendatory powers only, and no obligation to consider Maori interests per se. We do not have evidence on the statutory framework of appeals after that, nor how the process has worked in practice. We are unable to make findings on this issue for the period after 1973.

Was there a pattern of paying lower compensation for Maori land?

The claimants submit that the Native Land Court was ‘widely known to offer low value of compensation’. 161 Ms Marr notes that there were issues and concerns about this, and whether Maori were getting fair compensation. 162 Mr McBurney notes examples of Pakeha lessees resisting adjudication of their claims by the Native Land Court in the Rotorua district. He argues that ‘it was seen as offering lower values compared to compensation commissions specially constituted to deal with claims by the general public’. 163 Ngata stated in 1906 that ‘there was, to say the least of it, an unconscious bias in the minds of the court, which caused a distinction to be set up between the value of land owned and occupied by Maoris and that of Europeans’ land’. As a result, ‘the amount of compensation payable for Maori land had been underestimated in the past’. 164

Mr McBurney also cites the observation of Gilbert Mair in 1918:

Then when the question of compensation has to be decided, what chance has the owner? Absolutely none. It is fixed by Government servants and finally adopted by a Judge of the Court, who only holds office by the Crown’s pleasure, and there is a feeling among the Natives that many of the young officials would not dare to differ widely from the Government experts, who can be produced in crowds to swamp any contrary evidence the helpless Maories [sic] might procure. How very different is the lot of the lucky European, who when his lands are taken under the same legislation, has better opportunities for getting justice: he can appoint his own arbitrator and procure competent valuators, [sic] where the unfortunate Native owner would be helpless. I could give cases which would shock conscience, but have remained silent during the Empire’s great crisis [World War I], also in the hope that the Government might – even belatedly – remember the splendid loyalty of the Arawa Tribe. 165
Can these anecdotal observations be substantiated? There was certainly legislative discrimination of the type described so eloquently by Mair, as we have already found. General landowners were notified and consulted, could negotiate compensation, and could take their own case to the Compensation Court (later the Land Valuation Court) if agreement could not be reached. Maori owners, on the other hand, were not identified and contacted, other than by gazette notice. They could not negotiate compensation or even lodge their own claims for compensation. Instead, the Minister brought a claim, which was then decided by the Native Land Court, without a requirement that a quorum of owners be present.

We have evidence about the compensation for the Ngongotaha Scenic Reserve, which was decided in 1918, the very year that Mair wrote of 'cases which would shock conscience', and which conformed exactly to Mair's complaints. A Government offer of compensation was delivered in court. There was no independent valuation, nor any valuation made by or for the owners. The judge did not hear any evidence about the Government valuation. Instead, two owners (out of 116) were present and agreed that the Crown's offer was a fair one. The judge called for objections, and there were none. There was no requirement for a quorum of owners to be present, and we do not know if others were in fact in court. The judge then ordered compensation to the value offered by the Crown. We are not in a position to say whether the compensation of £425 was in fact fair in the circumstances, but it appears to us that the process by which it was decided was not a safe one.

Better results were possible if owners had the chance to negotiate. The taking of Okere Falls and other Rotoiti land for hydroelectricity purposes would have gone the ordinary route for compensation, had the Native Land Court not decided that the taking was illegal. The Supreme Court and Court of Appeal agreed, forcing the Government to pass validating legislation in 1909. In this circumstance, the compensation was decided by Parliament itself after negotiations between Crown and owners, both represented by counsel. The owners claimed £5500: £2000 for the value of the land, £2000 for the loss of 'regular and substantial income' from sightseers, £1250 for the loss of 10 years' use and occupation since the land had been taken, and £300 for legal costs. Whereas Ngongotaha was restricted to the Government valuation of the land, this negotiated case resulted in a recognition of other compensatable factors. The Minister agreed to £3000 (for the land valuation plus an extra sum for the loss of income), and £300 for legal costs. Parliament endorsed the £3000, but struck out the legal costs. This example, brought before us by Ngati Te Rangiunuora and Ngati Rongomai, shows that the Government would validate illegal takings, but also that more generous compensation was possible for those allowed by law to negotiate. We make no comment on whether the final sum, £3000, was fair compensation in all the circumstances.

As the twentieth century progressed, and the Maori Land Court became more protective of Maori interests (though not more expert in assessing the technicalities of compensation), the situation may have changed. In 1965, the solicitors for the King Country Electric Power Board queried compensation for the Kuratau and Pukawa blocks, commenting that the Maori Land Court had a statutory duty of 'protecting the interests of the Maori owners in land transactions'. In the view of these solicitors, this influenced the court when it was sitting as a compensation court, and they felt that the Maori owners would have been awarded lower compensation by the Land Valuation Court. There was no appeal, however, as 'it is always difficult to establish that the decision of a Court is erroneous'. Although these lawyers were interested parties, we note that the Government had in fact transferred compensation questions to the Land Valuation Court in 1962. Pre-1963 applications continued to be heard by the Maori Land Court throughout the decade. In this case, though owners were represented by counsel and claimed £12,911, the court...
awarded £6106 plus costs. But the owners were not the decision-makers. This Taupo Maori land, taken for hydro development, was in land development schemes, and the decisions were made by the Maori Affairs Department. Threatened with an appeal, the Department settled out of court in 1965 for £4000, which was less than the court’s award and actually lower than the Power Board’s original valuation in 1959.169

Other than these general observations, which carry some weight, there is insufficient evidence for the Tribunal to give a definitive answer to this question. We lack detailed evidence of exactly how compensation was usually decided by the courts, or whether comparable general land was compensated better as a result of the better opportunities and fairer processes available to that class of landowners. We make no findings, other than that a prima facie case has certainly been established. The situation may have changed when the Maori Land Court became more protective of Maori interests from the mid-twentieth century, and Maori in general became legally able to negotiate their own compensation from the mid-1970s.

Statutory provisions for offering land back to former owners have varied enormously over time. In the evidence of Ms Marr, they were weighted against Maori until the mid-1940s, because of the lack of legislative provision for revesting land in Maori title. From the mid-1940s, when a general legal authority existed to do so, the policy tide had turned against the offering of land back to owners, whether Maori or non-Maori. This was the case until public opposition forced policy change in 1981.171 Due to insufficient evidence, we are not in a position to evaluate the Crown’s statutory duties over time, nor the manner in which those duties have been carried out in the Central North Island. It is surely significant that the Crown cannot tell us this, even for recent times, and appears to have no information on the point. We note the Crown’s concession that where it has a duty or discretion to offer land back, but has not done so, then that is likely to have been in breach of the Treaty.172 We leave the matter for negotiation between the parties.

Summary of the Tribunal’s findings
The evidence available to us is sufficient to determine that:

- Central North Island Maori were not consulted before the introduction of a system of compulsory acquisitions to their district, and never consented to it;
- the impact of multiple ownership on notice requirements was in breach of the Treaty and prejudicial to many claimants before 1974, in terms of notification, consultation, and opportunities to object;
- the 5 per cent rule, its implementation, and its impact were discriminatory, in breach of the Treaty, and prejudicial to many claimants in the Central North Island;
- the Crown did not provide fair and adequate opportunities to object, nor a fair and effective process for evaluating objections, before 1973–1974. This was in breach of Treaty principles and to the prejudice of claimants who lost land and taonga thereby; and
compulsory takings have been the main method for acquiring land for public purposes since at least 1960, and more land was taken compulsorily (in both area and number of transactions) than acquired voluntarily by the Crown after 1960. (Compulsory acquisitions by local authorities are included in this figure.) The number of takings and area taken did not drop significantly until the 1990s.

The evidence before us is insufficient to determine, for the Central North Island:
- whether Maori land was taken in preference to general land;
- whether notification procedures provided sufficient opportunities for consultation and objection after 1974;
- whether there was a fair and appropriate process for evaluating objections after 1973;
- whether there was a pattern of lower compensation for Maori than general land, although a prima facie case has been established;
- whether the Crown failed to take into account the sufficiency of land remaining to any particular groups;
- whether the benefits of takings mitigated the adverse impacts, on a case-by-case basis; and
- whether the Crown has carried out its statutory duties in respect of offering back land.

Although we cannot answer all these questions on the basis of the evidence currently available, we have allowed for this in our findings. None of our findings – as recited so far in this chapter – are altered thereby. Further evidence would assist us to make additional findings on relevant issues. Some, however, would require exhaustive research, without necessarily adding anything of great significance to the settlement of these claims.

The fundamental point remains that compulsory takings, especially without compensation, were in serious breach of the plain meaning of the Treaty. Provisions that gave Maori landowners less protection than general landowners compounded the breach. We share the view of the Tribunal in its Petroleum Report:

We are somewhat surprised by the Crown’s unwillingness to accept that the compulsory acquisition of land for public works in most cases has been, and will be, in breach of the Treaty guarantee of te tino rangatiratanga. Given the extent of Maori land lost to public works even in the twentieth century, when Maori landholdings had fallen to very low levels, and given the strength of Maori feeling on the issue, the Crown’s approach seems ungenerous. It may be that the Crown wishes to preserve its ability to acquire Maori land compulsorily in the future unencumbered by an acceptance that to do so would breach the Treaty in all but exceptional circumstances. If that is indeed the Crown’s position, it is greatly to be regretted.

As we noted above, previous Tribunals have found that the Crown may override the protections of article 2 of the Treaty and take land compulsorily, in exceptional circumstances, and as a last resort in the national interest. It is to this final argument, in possible mitigation of the Crown’s public works takings in the Central North Island, that we now turn.

**The national interest**

**Key question:** Was land taken as a last resort in the national interest?

**Balancing of interests and the ‘national interest’**

The Crown argued that the Tribunal has set the bar too high, in its findings that governments should only resort to compulsion in exceptional circumstances, and as a last resort in the national interest. Rather, the Crown suggested that a balancing exercise is required, in which the Maori interest is important, but not *that* important. Governments cannot be restricted to acting only in
‘extremely constrained and unusual circumstances’, such as for defence in war or the prevention of civil disorder. The Treaty requires the Crown to balance the interests of all sectors of the community, and to give Maori interests ‘significant weight and protection’. To meet its obligation to all citizens, the Crown will sometimes have to take land for the nation’s infrastructure, especially in such important cases as electricity generation. In support of this position, the Crown referred us to Canadian litigation, where the definition of ‘national interest’ has become very broad, but must include ‘objectives of compelling and substantial importance’ to the community as a whole. Further, it may sometimes be proper to infringe Maori interests more than is strictly necessary, so long as the Crown is satisfied that interests have been balanced appropriately.\footnote{174}

\footnote{174}

The Crown’s position is an important one, rejecting as it does the findings of the Tribunal in its Ngai Tahu Ancillary Claims Report, Turangi Township Report, Whanganui River Report, and others – all of them different panels which came to the same serious and considered view. We think that the position is best clarified by reminding the Crown that the issue here is one of compulsory takings. Regardless of how the Crown should balance interests in general according to its kawanatanga responsibilities, the standard must necessarily be higher when property rights are being expropriated. It is not the Tribunal’s view that Maori land can only be acquired for public purposes as a last resort, but that it can only be acquired compulsorily as a last resort, and for a matter of compelling and substantial importance. The Crown has advanced no arguments that would cause us to depart from this view. Counsel have paid too much attention to the words ‘exceptional circumstances’ and ‘national interests’; and none at all to the requirement that a taking be a last resort. For much of the twentieth century (until 1973), the philosophy was that when general land was required for a public work, it should only be taken as a last resort, after negotiations had failed. When multiply owned Maori land was needed, on the other hand, it was generally taken as a first or early resort, and the owners not identified until afterwards.\footnote{175}

\footnote{175}

Previous Tribunals have considered this question mainly for particular cases, with evidence and submissions about the nature of the ‘national interest’ involved. It is not the role of the Waitangi Tribunal to provide a prescriptive definition of the national interest for entire regions over time. Nonetheless, we offer some general comments.

**National versus local interest**

There has been conflict between the interests of ‘the nation’ and local communities in the Central North Island. Takings for the country’s electricity needs are a major issue in the Taupo district, and have affected Ngati Tuwharetoa, Ngati Raukawa, Ngati Tahu, Ngati Whaoa, and others. In her study of Ohaaki, Dame Evelyn Stokes wrote:

> I have perhaps got a little carried away but I do feel this national interest versus local community welfare is a critical issue that we must face. There is a lot of loose talk about our multicultural society but unless we are prepared to accept alternative ways of communicating, and make it possible for the less well educated, less articulate minorities or lower socio-economic groups, however measured, to voice their objections and be heard, we will go on making decisions that are handed down from above in the national interest, and
Table 12.4: Compensatable public works takings in the Central North Island by category

<table>
<thead>
<tr>
<th>Type of taking</th>
<th>Number of takings</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Transport infrastructure</strong></td>
<td></td>
</tr>
<tr>
<td>Roading purposes</td>
<td>620</td>
</tr>
<tr>
<td>Railway purposes</td>
<td>60</td>
</tr>
<tr>
<td>Road and railway combined in a taking</td>
<td>15</td>
</tr>
<tr>
<td>Motorway</td>
<td>10</td>
</tr>
<tr>
<td>Streets</td>
<td>9</td>
</tr>
<tr>
<td>Tramways</td>
<td>5</td>
</tr>
<tr>
<td>Aerodrome</td>
<td>100</td>
</tr>
<tr>
<td>Access ways</td>
<td>3</td>
</tr>
<tr>
<td>Wharf</td>
<td>1</td>
</tr>
<tr>
<td><strong>Education</strong></td>
<td></td>
</tr>
<tr>
<td>Native schools</td>
<td>17</td>
</tr>
<tr>
<td>Other schools</td>
<td>10</td>
</tr>
<tr>
<td>Teacher's residence</td>
<td>2</td>
</tr>
<tr>
<td><strong>Protection of sites and prevention of flooding</strong></td>
<td></td>
</tr>
<tr>
<td>River protection</td>
<td>11</td>
</tr>
<tr>
<td>Soil conservation and river control</td>
<td>86</td>
</tr>
<tr>
<td>Scenery preservation</td>
<td>14</td>
</tr>
<tr>
<td>Wildlife reserve</td>
<td>1</td>
</tr>
<tr>
<td><strong>Use of water for public purposes</strong></td>
<td></td>
</tr>
<tr>
<td>Water-power or electricity</td>
<td>87</td>
</tr>
<tr>
<td>Waterworks</td>
<td>15</td>
</tr>
<tr>
<td><strong>Use of resources for industrial and economic development</strong></td>
<td></td>
</tr>
<tr>
<td>Gravel, clay, metal, and pumice pits</td>
<td>19</td>
</tr>
<tr>
<td>Quarries</td>
<td>18</td>
</tr>
<tr>
<td>Forest plantation</td>
<td>8</td>
</tr>
<tr>
<td>Access and storage for forest products</td>
<td>4</td>
</tr>
<tr>
<td>Fish hatcheries</td>
<td>2</td>
</tr>
<tr>
<td><strong>Public buildings</strong></td>
<td></td>
</tr>
<tr>
<td>Post Office</td>
<td>5</td>
</tr>
<tr>
<td>Police station (and police purposes)</td>
<td>2</td>
</tr>
<tr>
<td>County depot</td>
<td>3</td>
</tr>
<tr>
<td>Automatic telephone exchange</td>
<td>3</td>
</tr>
<tr>
<td><strong>State housing</strong></td>
<td></td>
</tr>
<tr>
<td>Maori housing</td>
<td>89</td>
</tr>
<tr>
<td>General state housing</td>
<td>1</td>
</tr>
<tr>
<td><strong>Other</strong></td>
<td></td>
</tr>
<tr>
<td>Horse and stock paddocks</td>
<td>3</td>
</tr>
<tr>
<td>Thermal purposes</td>
<td>5</td>
</tr>
<tr>
<td>'Public work' (unspecified)</td>
<td>5</td>
</tr>
<tr>
<td>Better utilisation</td>
<td>24</td>
</tr>
<tr>
<td>Internal communication purposes</td>
<td>3</td>
</tr>
<tr>
<td>Child welfare institution</td>
<td>2</td>
</tr>
<tr>
<td>Roadman's cottage</td>
<td>4</td>
</tr>
<tr>
<td>Rubbish tip and sewage plants</td>
<td>3</td>
</tr>
</tbody>
</table>

The information in this table has been drawn from Peter McBurney’s revised tables, based on the LHAD, in the spreadsheets filed with the Tribunal as David Alexander, spreadsheet: updated LHAD information (takings with compensation), (doc H15(b)); and David Alexander, spreadsheet: updated LHAD information (takings without compensation), (doc H15(c)). The electronic file of H15(b) includes both compensatable and non-compensated takings. We have left out the takings without compensation, which were almost all for roads, and which further enhance roading and the transport infrastructure as the dominant cause of compulsory takings in the Central North Island. We have also excluded all takings identified in the table as having been for the establishment of Turangi township. We have not calculated the area of land involved in each type of taking, as the intent is to show the pattern of taking events.
store up more local community resentment to create future problems.\textsuperscript{176}

The relationship between ‘national’ and local interests is a major issue in general for the development of the Taupo district. We note the evidence of George Asher:

A consistent thread running through the history of Crown intervention in our Rohe is that the Crown has exercised a deliberate policy of harnessing the resources of our Rohe for the ‘national interest’. Consider the acquisition of large areas of land for a pittance; the construction of the main trunk line through National Park; acquisition of the Tongariro National Park; the acquisition of geothermal springs for tourism or electricity generation; the protection of indigenous forests on Maori land; acquisition of the Kaimanawa Forest Park; taking the bed of Lake Taupo and the right to control the water through the 1926 Act; promotion of the Lake Taupo Reserves Scheme; the Wairakei Geothermal power generation scheme; the Waikato Hydro Electric power generation scheme; the Tongariro Power Development Scheme; establishment of power transmission lines over Maori land; establishment of its main highway roading system and the statutory and regulatory systems to maintain these developments. Current proposals for the management of nitrate emissions into Lake Taupo confirm the historical intentions of the Crown to maintain its ‘public good’ investment.\textsuperscript{177}

For public works takings, the issue emerges most clearly with hydroelectricity. In most other takings, the ‘public interest’ was a regional rather than nationwide one, except in so far as the nation benefits from the development of all its regions. Ngati Tuwharetoa has calculated that 524.4 hectares of Maori land were taken compulsorily for water-power and electricity.\textsuperscript{178} In the evidence of Tony Walzl, an additional 30,000 acres was rendered unusable economically by hydro development.\textsuperscript{179} Many taonga have been taken, damaged, and in some cases destroyed. The local people saw no great benefit of any of this for them. Hemi Biddle told us:

Our kaumatua always disagreed with and fought against the hydro schemes. They didn’t see any benefit in it for our people, and they saw a great deal of harm in the effect it had on our waters and our land.\textsuperscript{180}

Ngati Tuwharetoa do not dispute that the development of hydroelectricity was necessary in the national interest. Their claim is rather that the Crown has failed in its Treaty partnership by not negotiating agreement, and also in its duty of active protection. Some impacts could have been (and in some cases were) anticipated better, and therefore preventable damage to taonga and infringement of Maori spiritual values could have been minimalised, and the use of the claimants’ taonga to power the nation should have been better compensated.\textsuperscript{181} They conclude:

Notwithstanding the fact that the nation is benefitting from the provision of electricity through the use of Ngati Tuwharetoa taonga, the waters called forth by Tongariro, Ngati Tuwharetoa do not receive any benefit from the profits of the Waikato River hydro scheme.\textsuperscript{182}

In this instance, the Crown considered the likely impacts on the locality to be minor in comparison to the national interest in obtaining electricity.\textsuperscript{183} The parties agree that the power schemes were necessary in the national interest.\textsuperscript{184} In 1943, representatives of Ngati Tuwharetoa put it to the Crown that the ‘Maori people as a whole were very sympathetic to the Crown and fully appreciated that the major project of hydroelectricity came first, despite their selfish interests’. But officials had not had the ‘decency’ to consult them first and discuss impacts. What was required was the preservation of Maori identity and ancestral land, as far as possible. As an embodiment of their relationship, they invited ‘the Crown to join them as neighbours’ in any new township to replace Tokaanu, on a ‘50–50’ basis.\textsuperscript{185} The question for us, therefore, becomes whether the compulsory taking of land was necessary, let alone used as a last resort.
A last resort in the national interest?
The definition of ‘public works’ became very loose in the twentieth century. The Land History and Alienation Database statistics show that the majority of takings in the Central North Island have been for infrastructural development – regional, in the form of roads and railways, and national in the form of hydroelectricity (see table 12.4).\textsuperscript{186} This has remained the case in both centuries. But the nineteenth-century focus on infrastructure later expanded to include takings for public convenience, especially in the growing towns. Ms Marr reports that public concern about this was strong by the 1960s. Eventually, the National Government confined takings to ‘essential works’ in their major overhaul of the 1928 Act in 1981. This was reversed in 1987, but the principle of negotiation rather than taking has become entrenched.\textsuperscript{187}

Some works are site-specific, and we lack the kind of engineering evidence for most of them that would enable us to reach a general view of whether power stations, dams, railway lines, and roads absolutely had to be placed on the particular (Maori) land chosen. But some public works – such as police stations and telephone exchanges – could presumably have been built in a variety of places. The need to take land for them, and to take Maori land in particular, could hardly have arisen in the national interest. For all such compulsory takings of Maori land, there is a prima facie case of Treaty breach.

We note, in this respect, the example of Taniwha Springs. The claimants provided evidence that other sites were considered possible for the water supply, but their reserve was the preferred site. As we have seen, the Rotorua County Council contacted PH Leonard, a prominent Ngati Rangiwewehi leader, and informed him of its interest in acquiring part of the reserve. There was later a meeting with the council, at which Mr Leonard discussed the possibility of connecting Awahou Village to the new water supply. There was discussion of thus compensating the owners, and of a separate settlement with the lessee. The council sold the proposition on the basis that there would be minimal impacts – no effect on the rent or the tourism value of the site. The idea of compensating the owners with just a water supply was mooted because the council sought a sublease rather than a purchase or compulsory taking. Mr Leonard was to meet with the owners and report back, but the owners’ legal mechanism – an incorporation and its committee – was not actually functioning at this time. The council was having problems contacting the lessee and decided to take the land compulsorily without any further reference to its owners. This course was chosen, explained the County Clerk to its lawyers, ‘due to the many legal difficulties which arise if the matter is left to provide consent and negotiation.’\textsuperscript{188}

Ms Hall and Mr Taylor submitted, for Ngati Rangiwewehi, that there was no compelling reason for the council to take this land by compulsion. We agree. It had barely begun the process of negotiating with the owners and lessees. Its lawyers advised:

We have heard nothing from Dr. Foden, who is acting for the Company leasing the land on which your Council desires to erect a pump. We can envisage recurring difficulties with continued negotiations which we feel will only delay your reservoir programme. Further, these negotiations were along the lines of a sublease from the Company which, in fact, still leaves the question of title and compensation . . .\textsuperscript{189}

The residents of Ngongotaha had been asked to restrict their sprinkler usage. Otherwise, the existing supply was still working, although a greater supply was required for the future.\textsuperscript{190} Regardless of whether Taniwha Springs was the only site possible (which it was not), there was no compelling reason why it had to be taken compulsorily. This taking of a taonga of such great value to Ngati Rangiwewehi does not meet the required Treaty standard of a last resort, let alone being in the ‘national interest.’ The Crown argues that because the final compensation was negotiated and agreed, that this taking ‘satisfies the requirements for such acquisitions’, and that ‘there is no on-going Treaty obligation of the Crown arising from this public works taking.’\textsuperscript{191}
In our view, the failure to consult the owners adequately before the taking, and the decision to take it compulsorily after a token effort at reaching voluntary agreement – especially given Mr Leonard’s positive reception – does not meet the Treaty requirements for a public works taking. Although the Crown was not directly responsible for the taking, it enacted the legislation that set the conditions under which this taking occurred; it failed to ensure that the taking authority acted fairly and appropriately under the Treaty; and it failed (and is still failing) to remedy the Treaty breach. Given an example such as Taniwha Springs – where a local authority took a taonga compulsorily simply because that was easier than starting lease negotiations – we are confirmed in our view that compulsion should be a last resort.

For matters that were of national importance, such as hydroelectricity, the same standard applies. As the Under-Secretary of Maori Affairs reminded the Commissioner of Works: ‘As you are aware, compulsory taking in itself is often a course [sic] of resentment among Maoris, unreasonable as this resentment may be.’ In our view, given the very clear guarantees in the Treaty, there was nothing unreasonable about this resentment, well known (as it was) to the Government. The main technical evidence is Mr Walzl’s report on the Waikato hydro schemes, which is largely concerned with the raising of lake levels and the flooding of lake and riparian lands. Mr McBurney’s report does not assist us materially on this particular point.

Mr Walzl gives some examples of compulsory takings – to replace the Tokaanu township (but not used for that purpose), and land taken from Pouakani, Orakei Korako, Kuratau, and Pukawa. We also have Dame Evelyn’s report on Orakei Korako, which shows no consultation with the owners or attempts to reach a voluntary agreement, nor any attempt by the taking authority to evaluate Maori concerns or perspectives, and protect the interests of Ngati Tahu. A pattern emerges of consultation with the relevant Maori Land Board and Maori Affairs Department, and informal meetings and discussions with Maori owners or tribal leaders, usually during the process of taking, rather than to negotiate agreement. It is not possible to say how typical these examples are, and we lack evidence on the bulk of hydro takings.

### Summary of the Tribunal’s findings in this chapter

Although we have not been able to inquire into all takings on a case-by-case basis, it is clear from the evidence available to us that there have been sustained Treaty breaches in respect of compulsory takings, built into legislation and applying to all such takings in the Central North Island. We summarise our findings in this section.

### Abrogation of article 2 and breaches of the principles of partnership, autonomy, and active protection

First, the Crown introduced a legislative regime for public works that was not merely inconsistent with the Treaty, but actually abrogated its principal guarantees. It:

- enacted this fundamental modification of the Treaty without consulting Maori or obtaining their consent, at either a central, regional, or local level;
- enacted legislative powers for the compulsory taking of Maori land without their consent; and
- enacted legislative powers for compulsory takings without compensation, again without consent.

It follows that all such takings – especially those without compensation – are in breach of the Treaty. Further, in failing to provide Maori with self-government to manage the development of infrastructure and public works in partnership with other communities and local authorities, the Crown has compounded the breach and the ensuing prejudice.
Serious legislative discrimination, breaching article 3 and the principle of equity

Secondly, the Crown has acted in serious breach of article 3 of the Treaty, its guarantee of equal rights of citizenship to Maori, and the Treaty principle of equity. From 1882 to 1974, multiply owned Maori land was the subject of sustained and serious discrimination in public works legislation. Maori landowners had significantly fewer legal rights and protections in:

- notification of takings;
- consultation before takings;
- opportunities to object and have their special interests identified and considered;
- consultation about compensation;
- calculation or negotiation of compensation, or both; and
- payment of compensation.

Maori landowners also suffered legislative discrimination by:

- the exclusion of their highly valued places from the legislative protection accorded types of sites valued by settlers; and
- the weighting of offer-back procedures in favour of general land.

The special category of land taken without compensation for roads and railways (the 5 per cent rule) discriminated against Maori because:

- general land could be taken for up to five years, while Maori land remained subject to taking for a further five to ten years after that; and
- general landowners were paid for land taken under the 5 per cent rule, while Maori owners were not paid.

These serious forms of discrimination were written into the laws governing the taking of Central North Island Maori land for public works. The relevant legislation was in breach of the Treaty principles of equity, active protection, partnership, and reciprocity. The Crown did not act honourably and in good faith towards its Treaty partner, when it enacted laws which provided fewer legal rights and much less protection for the lands of its Maori citizens. Fair and proper protections were especially important where the Crown was taking land by compulsion, in itself antithetical to the Treaty (except as a last resort in the national interest). By enacting this discriminatory legislation, the Crown compounded the Treaty breach of taking land by compulsion without consent. The failure to compensate Maori properly (or, in some cases, at all) further compounded the Treaty breaches, and was itself a prejudicial effect of them. When taonga of irreplaceable value have been taken in this manner, it is not surprising that many Central North Island Maori have been left with a strong and just sense of grievance.

The operation of the public works regime in practice

Thirdly, in the operation of this legislative regime in practice in the Central North Island, we have also found that:

- the impact of multiple ownership on notice requirements was in breach of the Treaty and prejudicial to the claimants before 1974, in terms of notification, consultation, and opportunities to object;
- the 5 per cent rule, its implementation, and its impact were discriminatory, in breach of the Treaty, and prejudicial to all claimants in the Central North Island; and
- the Crown did not provide fair and adequate opportunities to object, nor a fair and effective process for evaluating objections, before 1973–1974. This was in breach of Treaty principles and to the prejudice of claimants who lost land and taonga thereby.

The evidence before us is insufficient to determine:

- whether Maori land was taken in preference to general land;
whether notification procedures provided sufficient opportunities for consultation and objection after 1974;
whether there was a fair and appropriate process for evaluating objections after 1973;
whether there was a pattern of lower compensation for Maori than general land, although a prima facie case has been established for the Central North Island;
whether the Crown failed to take into account the sufficiency of land remaining to any particular groups;
whether the benefits of takings mitigated the adverse impacts, on a case-by-case basis; and
whether the Crown has carried out its statutory duties in respect of offering back land.

Scenery preservation
Finally, with regard to the compulsory taking of land for scenic purposes, we have found the Crown in breach of the Treaty principles of partnership, autonomy, and active protection, for the manner in which it acquired this land.

We also find the Crown in breach of Treaty principles for its acts of omission in:

- failing to use mechanisms available to it for obtaining consent to the scenery preservation regime;
- failing to provide for continued exercise of tino rangatiratanga on scenic reserves after their taking (or other acquisition) when it could have done so; and
- failing to provide appropriate principles for measuring compensation, although this was suggested at the time.

A last resort in the national interest?
In mitigation, it is possible for the Crown to take land as a last resort, if reasonable efforts at negotiation have failed, in exceptional circumstances and in the national interest. Again, we have not conducted a case-by-case examination, but it appears from the evidence that the compulsory taking of Maori land was all too often a first or early resort, let alone a last resort or necessarily in the national interest.

Prejudice
Central North Island Maori have suffered the loss of land for public works by compulsion, sometimes without compensation. Both are serious forms of prejudice. In return, they (along with others who have not made the same sacrifice) have received ‘public’ works. In our view, compulsory takings – especially because non-Maori land has been better protected and better compensated – are such serious Treaty breaches that no benefit from a public work could mitigate the prejudice. The Crown accepts that the land taken may have a value out of proportion to its apparently small quantity. Where taonga of immense value have been taken, the prejudice is serious indeed. When such taonga, and any ancestral land, remain in Crown ownership and/or closed to Maori for the proper expression of their authority over and relationship with the taonga, then the prejudice remains.
Summary

- The taking of Central North Island Maori land without consent was in breach of the plain meaning of article 2 of the Treaty of Waitangi.
- The taking of Maori land in the Central North Island without compensation was in breach of the Treaty.
- The enactment of the public works legislation was a fundamental modification of Treaty rights. To pass such laws without consulting Central North Island Maori or obtaining their consent was in breach of the Treaty.
- In failing to provide Maori with self-government to manage the development of infrastructure (and of takings) in the Central North Island in partnership with other communities and authorities, the Crown has compounded the Treaty breach and ensuing prejudice.
- From 1882 to 1974, the public works regime operated in the Central North Island in breach of the Treaty principles of equity and active protection, because Maori landowners had significantly fewer legal rights and protections than general landowners.
- Compulsory takings for scenic reserves were a special case in which the Crown could have provided for the continued exercise of tino rangatiratanga on this type of reserve after taking, and could have provided appropriate means of measuring compensation, but failed to do so. This was in breach of the Treaty.
- From the evidence available, it appears that Maori land was not taken as a last resort, in exceptional circumstances in the national interest. Rather, because of the lesser requirements for notification, consultation, and opportunities to object, Maori land (when wanted for a public work) tended to be taken as a first or early resort, instead of seeking agreement for purchase or lease. This was in breach of the Treaty.
- It is not possible to be prescriptive in defining the national interest, which ought to be decided jointly by the parties in partnership, but some takings (such as for telephone exchanges or police stations) cannot have been site-specific, and therefore need not have involved Maori land. To take such land, without an overriding necessity in the national interest, was in breach of the Treaty.
- Central North Island Maori have suffered the loss of land by compulsion, sometimes without compensation. Both are serious forms of prejudice. The Crown accepts that the land taken may have a value out of proportion to its apparently small quantity. Where taonga of immense value have been taken, the prejudice is serious indeed.
Notes
3. The following summary is from Hemi Te Nahu, generic closing submission on public works takings, 2 September 2005 (paper 3.3.70)
4. Ibid, para 94 (no page numbers)
5. Ibid, para 87
7. Ibid, pp. 4–20
8. Ibid, and passim
9. Kathy Ertel, closing submissions on behalf of Ngati Rangiuunuora and Ngati Te Rongomai, 2 September 2005 (paper 3.3.71), pp. 154–180
10. Ibid
11. Aidan Warren, closing submissions on behalf of Ngati Tutemohuta and Karanga Hapu, 2 September 2005 (paper 3.3.84), pp. 89–93
12. John Kahukiwa and Lewis Bunge, closing submissions on behalf of Wai 1204, 9 September 2005 (paper 3.3.103)
13. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt. 2, p. 365
15. Ibid, pp. 371–373
16. Ibid, pp. 365, 369
17. Ibid, pp. 369–370
18. Ibid, pt. 1, pp. 36–41
19. Ibid, p. 35
21. Ibid, pp. 367–371
22. Ibid, pp. 380–383
23. Ibid, pt. 1, pp. 28–29
25. Ibid, pp. 375–376
26. Ibid, pp. 376–377
27. Ibid, pp. 385–389
28. Ibid, pp. 389, 394
29. Delwyn Buckley, Evidence re Ngati Rangitihhi Wai 524, 28 February 2005 (doc c6), para 18 (as quoted in Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt. 2, p. 390)
30. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt. 2, pp. 389–391
31. Ibid, pp. 392–393
32. Ibid, pp. 373–375
33. Ibid, p. 378
34. Ibid, p. 399
35. Ibid, p. 400
36. Ibid, pp. 400–401
37. Deed of settlement with affiliate Te Arawa iwi/hapu, 29 August 2006 (paper 6.1.9), p. 43
38. Ibid, p. 43
39. Ibid, p. 40
42. Ibid, pp. 534–535
44. ‘Remarks by Chief Justice Martin’, n.d. [1860], BPP, vol. 11, p. 64
45. Apirana Ngata (as quoted in Annette Sykes and Jason Pou, generic closing submission on scenery preservation, 2 September 2005 (paper 3.3.76), p. 29)
46. Annette Sykes and Jason Pou, generic closing submission on scenery preservation, 2 September 2005 (paper 3.3.76), p. 27
47. David Alexander, response to questions for clarification of Te Matua Whenua – The Land History and Alienation Database raised by the Tribunal in July 2005, 2005 (doc I34), p. 13
50. Native Districts Road Boards Act, 1871
52. Repeals Act, 1891; See also Tom Bennion, *Maori and Rating Law*, Waitangi Tribunal Rangahaua Whanui Series, 1997, pp. 8–11
54. David Alexander, response to questions for clarification of Te Matua Whenua – The Land History and Alienation Database raised by the Tribunal in July 2005, 2005 (doc I34), p. 14

57. David Alexander, response to questions for clarification of Te Matua Whenua – The Land History and Alienation Database raised by the Tribunal in July 2005, 2005 (doc I34), pp 12–13


59. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, pp 375–376


61. David Alexander, appendix two to brief of evidence, February 2005 (doc A97(b)), p 36


63. Maori Councils Act 1900, s 16

64. McNab, 24 October 1906, NZPD, 1906, vol 138, p 597


66. 24 October 1906, NZPD, 1906, vol 138, p 596


68. Ibid, pp 98–185

69. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 399

70. R Hodge, 'The Scenic Reserves of the Whanganui River, 1891–1986', Wai 903 (doc A34), p 22. The other two boards with Maori representatives were in the Bay of Islands.

71. Tim Shoebridge, Indexed document bank on selected examples from tangata whenua evidence for the Central North Island Inquiry, commissioned by the Waitangi Tribunal, 2005 (doc H43), doc 62, p 1090

72. Ibid, docs 62–64


74. McNab, 24 October 1906, NZPD, 1906, vol 138, p 596–597

75. Annette Sykes and Jason Pou, generic closing submission on scenery preservation, 2 September 2005 (paper 3.3.76), passim

76. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, pp 388–390

77. Tim Shoebridge, Indexed document bank on selected examples from tangata whenua evidence for the Central North Island Inquiry, commissioned by the Waitangi Tribunal, 2005 (doc H43), doc 59

78. Tony Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', supporting documents (doc E1(a)), vol 1, p 298


80. J A Wilson to the County Clerk, 21 March 1975 (in Tim Shoebridge, Indexed document bank on selected examples from tangata whenua evidence for the Central North Island Inquiry, commissioned by the Waitangi Tribunal, 2005 (doc H43), doc 63, pp 1098–1099

81. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 1, p 46; pt 2, 366–371


84. Ibid, p 108

85. Ibid, pp 111–112

86. Public Works Act 1894, s 2


88. Ibid, pp 135–138

89. Ibid, p 138

90. Ibid

91. Ibid

92. Ibid, p 112. See the Public Works Amendment Act 1889, s 16.

93. Tim Shoebridge, Indexed document bank on selected examples from tangata whenua evidence for the Central North Island Inquiry, commissioned by the Waitangi Tribunal, 2005 (doc H43), doc 59, p 1043; doc 59, p 1071


96. Ibid, pp 108–109

97. Ibid, pp 111–112, 139–143

98. 12 July 1905, NZPD, 1905, vol 132, p 537


100. See, especially, ibid, pp 126–127

101. Ibid, p 114

102. Ibid, p 142

103. Ibid


107. Maori Councils Amendment Act 1903, s 11


109. 27 August 1889, NZPD, 1889, vol 66, p 118

110. Deed of settlement with affiliate Te Arawa iwi/hapu, 29 August 2006 (paper 6.1.9), p 43


112. Ibid, p 147


114. Maori Affairs Amendment Act 1974, ss 72–75

115. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 372


117. David Alexander, spreadsheet: updated LHAD information (takings with compensation), 2005 (doc H15(b)); David Alexander, spreadsheet: updated LHAD information (takings without compensation), 2005 (doc H15(c))

118. David Alexander, appendix two to brief of evidence, February 2005 (doc A97(b))

119. David Alexander, response to questions for clarification of Te Matua Whenua – The Land History and Alienation Database raised by the Tribunal in July 2005, 2005 (doc A97(b)); and David Alexander, response to questions for clarification of Te Matua Whenua – The Land History and Alienation Database raised by the Tribunal in July 2005, 2005 (doc A97(b)), pp 13–14

120. S McKechnie, ‘All takings with compensation by decade’, 2005 (doc H15(b))

121. David Alexander, appendix two to brief of evidence, February 2005 (doc A97(b))

122. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, pp 371–373

123. Ibid, pt 2, p 371

124. See Alexander’s explanations of methodology in David Alexander, appendix two to brief of evidence, February 2005 (doc A97(b)), and the handbook filed with David Alexander, response to questions for clarification of Te Matua Whenua – The Land History and Alienation Database raised by the Tribunal in July 2005, 2005 (doc A97(b)).
146. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, pp 377, 380–383
148. A J Quill to General Manager, NZED, 27 January 1961, in Peter McBurney, supporting documents (doc A82(c)), p 2276
149. Commissioner of Works to Controller and Auditor General, 6 July 1961 (in Peter McBurney, supporting documents (doc A82(c)), p 2250)
152. William Tredegar Hall, brief of evidence for Ngati Tahu, April 2005 (doc G10)
153. This figure includes land taken by local authorities for public purposes. Mr Alexander’s evidence appears to be that most ‘private purchases’ in the 1970s to 1990s were of subdivisions and residential sections. It is not likely that purchases by local authorities for public works (if any) are a significant proportion of this category, so we have excluded it from consideration in this context.
154. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 368
155. Annette Sykes and Jason Pou, generic closing submission on scenery preservation, 2 September 2005 (paper 3.3.76), pp 24–29 and passim
156. Richard Boast and Liz McPherson, closing submissions on behalf of Ngati Rangitihiti, 2 September 2005 (paper 3.3.62), pp 141–142
159. Ibid, p 5073
161. Richard Boast and Liz McPherson, closing submissions on behalf of Ngati Rangitihiti, 2 September 2005 (paper 3.3.62), p 144
164. 24 October 1906, NZPD, 1906, vol 138, p 596
166. Tim Shoebridge, Indexed document bank on selected examples from tangata whenua evidence for the Central North Island Inquiry, commissioned by the Waitangi Tribunal, 2005 (doc H43), doc 58
170. David Alexander, response to questions for clarification of Te Matua Whenua – The Land History and Alienation Database raised by the Tribunal in July 2005, 2005 (doc G14), pp 16–18
172. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 377
174. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 1, pp 35–41
175. The exception has been certain classes of taking, such as the 5 per cent rule for roading, and special categories of taking, such as defence or railways, where both Maori and general land have had fewer protections.
176. Evelyn Stokes, Ohaaki: A Power Station on Maori Land (Hamilton: University of Waikato, 2004), p 2
He Maunga Rongo

177. George Asher, 29 April 2005 (as quoted in Karen Feint, closing submissions on behalf of Ngati Tuwharetoa, 9 September 2005 (paper 3.3.106), p 239
178. Karen Feint, closing submissions on behalf of Ngati Tuwharetoa, 9 September 2005 (paper 3.3.106), p 162
179. Ibid, p 156
181. Karen Feint, closing submissions on behalf of Ngati Tuwharetoa, 9 September 2005 (paper 3.3.106), pp 128–165
182. Ibid, p 165
183. Tony Walzl, summary of 'Hydro Electricity Issues: The Waikato River Hydro Scheme' (doc E1(b)), pp 10–16
184. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, pp 484–485
185. Tony Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', report commissioned by CFRT, February 2005 (doc E1), p 78
186. David Alexander, appendix two to brief of evidence, February 2005 (doc A97(b)), and passim
188. Meriana Thompson and Te Rangikaheke Bidois, Evidence re Ngati Rangiwewehi, Wai 218, 219, supporting documents, April 2005 (doc F2(a)). The quote from the County Clerk is in para 31.
189. Meriana Thompson and Te Rangikaheke Bidois, Evidence re Ngati Rangiwewehi, Wai 218, 219, supporting documents, April 2005 (doc F2(a)), para 30
190. Ibid
191. Virginia Hardy, Sally McKechnie, Damen Ward, and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005 (paper 3.3.111), pt 2, p 378
192. As quoted in Tony Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', report commissioned by CFRT, February 2005 (doc E1), p 142
193. Tony Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', report commissioned by CFRT, February 2005 (doc E1)
196. See Tony Walzl, 'Hydro Electricity Issues: The Waikato River Hydro Scheme', report commissioned by CFRT, February 2005 (doc E1), passim