PUBLIC WORKS TAKINGS,
HISTORY OF TOWN SECTION 542
AND UNSURVEYED LAND
IN THE WHANGANUI-A-TARA
REGION

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This report was commissioned by the Waitangi Tribunal for the Wellington Tenths Claim (Wai 145)

August 1996
ACKNOWLEDGEMENTS

I would like to express my appreciation to Alan Ward with whom I discussed the issues surrounding the unsurveyed land in the Whanganui-a-Tara region.

I would also like to acknowledge the help of the staff at DOSLI who consistently assisted me in my search for information.

I thank Terence Green for his advice and unfailing support.

I am also grateful to my brother Chris for his wonderful support and allowing me to stay with him while researching in Wellington.

Finally, thanks to my partner Carl, for everything.
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EXECUTIVE SUMMARY

Public Works

The compulsory acquisition of tangata whenua land for public works purposes has been widespread in the Whanganui-a-Tara region. Breaches of the Treaty of Waitangi (‘the Treaty’) with regard to the acquisition of land for public works in Whanganui-a-Tara include:

- lack of adequate negotiation and consultation
- lack of recognition of tribal right of self-regulation
- failure to actively protect tangata whenua rights
- failure to recognise the principle of partnership
- failure to compensate adequately

Where breaches of the Treaty occurred, the Crown is responsible either by active participation in the breach, or by failing to actively protect Tangata Whenua rights under the Treaty and allowing others to commit the breach.

The legislative history of public works takings shows that the Crown has had no hesitation in compulsorily taking tangata whenua land for public works.

The Crown passed various public works legislation, which although not necessarily breaching the Treaty itself, provided broad definitions of ‘public works’ and of who could take land for public works purposes.

The Public Works Act 1876, which consolidated legislation at the end of the Provincial Government period, defined public works as including:

... surveys, railways, tramways, roads, bridges, drains, harbours, docks, canals, waterworks and mining works, electric telegraphs, lighthouses, buildings, and every undertaking of what kind soever, which the General
Government or a County Council or a Road Board is authorized to undertake under this or any other Act or Ordinance of the General Assembly or of any Provincial Legislature for the time being in force.¹

Numerous breaches of the Treaty have occurred in relation to various substantive areas of takings in the Whanganui-a-Tara region, namely:

i) railways;
ii) roads;
iii) housing;
iv) river protection;
v) other miscellaneous takings.

Most, although not all, of the public works takings which constitute Treaty breaches were from the reserves awarded by McCleverty in 1847, and substantial amounts of these awards have been eroded.

Section 542

The Crown has breached the Treaty in its dealings with town section 542 in Whanganui-a-Tara. The primary breach by the Crown was that the large part of Town Section 542 known as Tod’s Grant should have reverted to the tangata whenua instead of being awarded by Crown Grant firstly to Alexander McDonald in 1845 and secondly to the Anglican Church in 1853. The fact that this portion of section 542 was permanently alienated made the remaining corners less attractive by themselves and may have been a factor in driving the tangata whenua away from the Pipitea Pa area.

¹ Section 3.
Unsurveyed (surplus) land

The Crown has breached the Treaty in its acquisition of and dealings with unsurveyed (or surplus) land in the Whanganui-a-Tara region. This land was never sold to the Crown by the tangata whenua.

There was no clear agreement between Maori and Crown about the balance of land comprised in the New Zealand Company’s 1839 Deed of Purchase but not included in the Pennington award to the Company (based on the 1840 Agreement between the Crown and the Company). Although in 1844 the Spain Commission determined payments to ‘complete’ the purchases as established by the 1840 agreement, these were in fact only for the surveyed areas of land.

The 1847 McCleverty awards, while supposedly generously ‘giving’ to the tangata whenua areas of the unsurveyed land, in fact effectively resulted in the Crown claiming the rest of the unsurveyed land in the Whanganui-a-Tara region without purchasing it. The only purchase made was that made by Governor Grey of land in the Porirua district in 1847.
INTRODUCTION

Personal

My name is Philipa Robyn Biddulph. In 1993 I graduated from Waikato University with a Bachelor of Social Science (BSocSc) and in 1995 with a Bachelor of Laws (LLB(Hons)). In 1996 I graduated with a Master of Laws (LLM(Hons)) from Victoria University of Wellington. I was admitted to the bar in May 1995. I have been researching for the Wellington Tenths Trust since January 1996.

The Report

The purpose of this report is to help draw together some remaining issues in the Wellington Tenths Claim. The approach this report takes will be to outline at the beginning of the each chapter what breaches of the Treaty of Waitangi (‘the Treaty’) have taken place with regard to each issue and then to substantiate the alleged breaches with evidence.

Chapters One and Two deal with the issues contained in the direction commissioning research. Chapter One gives an overview of public works takings from reserved land in the Whanganui-a-Tara region and Chapter Two a block history of Wellington Town Section 542.

With the permission of the Waitangi Tribunal, and in addition to the issues in the research commission, I have included Chapter Three which briefly deals with the further issue raised by the tangata whenua about unsurveyed (or surplus) land in the Whanganui-a-Tara region. After discussion with Alan Ward it seems that there is definitely an unresolved issue surrounding the unsurveyed land and it is therefore crucial that it be raised in this report.
CHAPTER ONE

PUBLIC WORKS TAKINGS

1.1 INTRODUCTION

1.1.1 The compulsory acquisition of tangata whenua land for public works purposes has been widespread in the Whanganui-a-Tara region. Where breaches of the Treaty occurred, the Crown is responsible either by active participation in the breach, or by failing to actively protect Tangata Whenua rights under the Treaty and allowing others to commit the breach.²

1.1.2 Compulsory taking of Maori land by the Crown cuts across the guarantee of tino rangatiratanga in Article 2 of the Treaty. Although it is not necessarily the case that Maori land should never be used for public purposes, options other than taking freehold title should have been exercised in order to carry out public works.³ Various breaches of the Treaty of Waitangi relating to public works takings have occurred, including:

- a lack of adequate negotiation and consultation
- a failure to compensate adequately
- a failure to return land no longer required for public purpose.⁴

1.1.3 This chapter will firstly provide a definition of public works, then briefly overview the legislative history of public works takings in order to show that the Crown has had no hesitation in compulsorily taking Tangata Whenua land for public works. Finally, it will seek to establish some

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² Waitangi Tribunal; Manukau Report, 1985, 95.
³ Waitangi Tribunal, Te Maunga Report, 1994, 81.
breaches of the Treaty in relation to various substantive areas of takings in the Whanganui-a-Tara region, namely:

i) railways;
ii) roads;
iii) housing;
v) other miscellaneous takings.

1.1.4 In doing so, this chapter draws together some existing research on public works takings in the Whanganui-a-Tara region.

**Definition of Public Work**

1.1.5 The Crown passed various public works legislation, which although not necessarily breaching the Treaty itself, provided broad definitions of 'public works' and of who could take land for public works purposes.

1.1.6 The Public Works Act 1876, which consolidated legislation at the end of the Provincial Government period, defined public works as including:

... surveys, railways, tramways, roads, bridges, drains, harbours, docks, canals, waterworks and mining works, electric telegraphs, lighthouses, buildings, and every undertaking of what kind soever, which the General Government or a County Council or a Road Board is authorized to undertake under this or any other Act or Ordinance of the General Assembly or of any Provincial Legislature for the time being in force.\(^5\)

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\(^5\) Section 3.
The Public Works Act 1928 similarly defined a public work as that which:

His Majesty, or the Governor-General, or the Government; or any Minister of the Crown, or any local authority is authorized to undertake under this or any other Act or Provincial Ordinance, or for the construction or undertaking of which money is appropriated by Parliament...6

The list of public works was even broader than in 1876:

Any survey, railway, tramway, road, street, gravel-pit, quarry, bridge, drain, harbour, dock, canal, river-work, water-work, and mining work; also hospital, school, university, college, and associated teachers’ residences; electric telegraph, fortification, rifle range, artillery range, lighthouse, or any building or structure required for any public purpose or use, including lands necessary for the use, convenience, or enjoyment of the same.7

It is evident, therefore, that land could be taken for a huge range of purposes and the only authority required was that of local government.

1.2 BRIEF OVERVIEW OF LEGISLATIVE HISTORY

1.2.1 Early Colonisation Period - 1840s and 1850s

According to Cathy Marr, public works legislation in the early years of colonisation aimed to acquire Maori land by a process of purchase and negotiation and to make provision for public purposes well ahead of the needs of settlement. Marr suggests that this was primarily because the

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6 Section 2(a).
7 Section 2(b).
numbers of Maori were greater than settler numbers and that there would have been no way to enforce compulsory taking of Maori land.\(^8\)

Although the Crown encouraged Maori to believe that the process of consultation and negotiation adopted in the early years was evidence of Crown commitment to Treaty of Waitangi guarantees, in fact evidence shows that it was largely dictated by circumstances, especially after some early violent incidents, the superior strength of Maori at the time had to be acknowledged.\(^9\)

1.2.1.2 Thus, early legislation such as the Public Roads and Works Ordinance 1845 was primarily concerned with works at a local level and paying for them rather than taking land for them.\(^10\)

1.2.1.3 However, in Lt-Governor Eyre’s memorandum on 23 June 1848, he indicated the Crown’s intention to take Maori land for public purposes, and it seems not necessarily by legislation. He proposed that the Government should retain control of the reserves, with a view to ‘total alienation’ of some of them for public purposes, a policy which was put into practice with some of the sections reserved for tangata whenua.

It is essential that the Government should retain in their own hands control over the reserves, because circumstances have made it desirable that in some instances total alienation of the land should be sanctioned, as for Ordnance purposes, to provide sites for Hospitals, for churches, for public offices, or for other similar indispensable objects of general and public utility: the Government having no land left them in the Province of New Munster available for such important and necessary purposes... It is proposed


\(^9\) Marr, p 26.

\(^{10}\) Marr, pp 34-35.
therefore in all cases where the Government finds it necessary for the purposes of public utility or promoting the general advantage, to appropriate any of the reserves, that such portions of them should be taken as may be required for the object in view and that the native reserve fund should be compensated by the Government allowing a fair and reasonable rate for the purchase money taken.11

1.2.1.4 According to Ward, although Eyre's memorandum proposed that the Native Reserve Fund be compensated and that there was inherent in the proposal a notion of the Tenths being a permanent endowment in the Crown, essentially for Maori purposes, there is no evidence that he actually compensated the fund.12 This accords with Eyre's memorandum of 24 June 1848.

1.2.1.5 On 24 June 1848 Eyre sent a memorandum to the Board of Management, enclosing the general memorandum of 23 June. In his instructions to the Board he referred to previous arrangements and set out procedures and guidelines for administration of the reserves:

... with regard to the sum which the Board may assess as fair and just for the Government to allow to the reserve fund for any section which they may find it necessary to alienate for public purposes - it is not proposed to pay such sums over immediately to the fund, but simply let a record of circumstances of the amount assessed be entered into the Board's book until such times as returns, showing the sums expended in procuring lands for the natives or promoting objects being in their view [consistent with] their welfare and improvement, shall have been obtained and laid before the

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Executive Council and some general arrangements resolved upon for balancing the account between the Government and the fund.\textsuperscript{13}

1.2.2 1860s

1.2.2.1 The Public Works Lands Act 1864 gave for the first time authority to take Maori land for public works.\textsuperscript{14} The Act indicates that the ability to take land was necessary for 'the civilization of certain parts of the Colony'.\textsuperscript{15} Those whose land was taken would have compensation determined under the provisions of the Land Clauses Consolidation Act 1863, with all its protections, but only where title was derived from Crown grant.\textsuperscript{16}

1.2.2.2 However, Marr highlights the different treatment for those holding land by customary title. For them, compensation was to be determined under the provisions of the wartime confiscatory legislation, the New Zealand Settlements Act 1863.

Those deemed 'rebel' under that Act would therefore be ineligible for any compensation at all. 'As a result for Maori customary land there was very little difference in practice between punitive confiscations and compulsory taking for public works. This was especially true as 'public works' at this time were of a military nature, such as military roads and telegraph lines, obviously intended to help crush Maori resistance.\textsuperscript{17}

\textsuperscript{13} Eyre Memo 24 June 1848, NM8/1850/1151, in Wai 145 A40 Vol.2 pp 306-309.
\textsuperscript{14} Crown Forest Rental Trust, \textit{Maori Land Legislation Database} (Wellington, National Library) p 30. Section 2 - 'lands' includes Native land.
\textsuperscript{15} Preamble.
\textsuperscript{16} Marr, above n8, p 48.
\textsuperscript{17} Marr, above n8, p 48.
1.2.2.3 It is important to note that Marr asserts that a legislative right to take certain Maori land without compensation developed which was usually separate from main public works provisions. This ‘right’ was invoked particularly in times of war with the tangata whenua when roading and railway works were used to help suppress Maori.18

1.2.3 1870s

1.2.3.1 The Immigration and Public Works Act 1870 provided the legislative base for a massive public works scheme devised by Julius Vogel. According to Marr, this Act allowed for the continuation of taking provisions in other legislation such as the right to take certain Maori land for roads without compensation.19 In the 1872 Immigration and Public Works Act this right was extended to allow Maori land to be taken for railways without compensation.20

1.2.3.2 The Public Works Act 1876 consolidated existing legislation at the end of the period of Provincial Government and confirmed the power of local bodies to take Maori customary land. The Public Works Amendment Act 1878 excluded all protections regarding notice, objections and public notice of taking (ss 21-25 of the 1876 Act) from land taken for railways. Land for railways could be taken by proclamation alone.21

18 Marr, above n8, p 61. See Marr, Chapters 4 and 5 for extensive discussion of this point.
19 Part 6.
20 Section 36. Marr, above n8, pp 71-2.
21 Sections 5 and 6. Marr, above n8, pp 73-76.
1.2.4 1880s and Beyond

1.2.4.1 The 1870s legislation set the scene for further harsh taking provisions for Maori land, including those in the 1880, 1882, 1894, 1905, 1908, 1928, and 1981 Public Works Acts.  

1.3 RAILWAY ACQUISITIONS

This section is largely drawn from Alan Ward’s work ‘Draft Report on the Legal and Administrative Regimes Affecting the Porirua and Petone Reserves’.  

1.3.1 1872-1873

1.3.1.1 The first public works takings for railways were from the Petone reserves in 1872-1873. In 1872 the Government and the Brodgen Construction Company signed a series of contracts for building local railway lines, including the Wellington/Masterton line.

1.3.1.2 The steep wall of the fault line on the west of the Hutt Valley meant the Masterton line had to go into the valley across the apron of the Petone foreshore which involved crossing a portion of the McCleverty sections there (Hutt 1, 2, 3, 16 and 20). According to Ward, when the Petone Maori were consulted they asked for compensation of £150 an acre for the land taken, possibly in an effort to stop the land-taking altogether. The request was declined and work apparently began nevertheless.

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22 See Marr for an excellent discussion of the discriminatory legislation.
23 See above n 12.
24 NZ Gazette 23 Sept 1872 p 737, see doc A1.
25 AJHR, 1872, D14, see doc A3.
26 Ward, see above n 12, 20.
1.3.1.3 The Tangata Whenua were clearly unhappy as Heaphy’s minute of 28 November 1872 demonstrates. Heaphy recorded that Henare Te Puni and seven others came to see him, angry and upset, and asked the government to buy all their reserves at the Hutt so that they could go elsewhere ‘in consequence of alleged injury done by [the Railroad] to their properties and fences’. 27

1.3.1.4 Heaphy told them that the Railway would increase the value of the Hutt land and not diminish it, that he was not there to buy Native Reserves and that whatever money was received from the Railway site should be spent on the purchase of ‘another reserve in some fertile spot’. 28

1.3.1.5 Heaphy subsequently reported:

The Wellington and Masterton Railroad is surveyed through a number of Native Reserves, chiefly those awarded by Colonel McCleverty. Some difficulty was experienced in causing the Native owners to comprehend a measure of compulsory land surrender for purposes of public works. Ultimately the sum of £55 was agreed to between the valuators and the owners, as the rate to be paid for land in Sections Nos. 1, 2, 3, 16, and 20, Pitoni. The area required was 11 acres, 1 rood and 39 perches and the payment £632 3 shillings and 2 pence. 29

1.3.1.6 This compulsory taking of McCleverty award land at Petone for the Railway in 1872-3 was vigorously opposed by the resident hapu but they eventually had to accept the compensation offered or risk getting nothing. The Treaty breach therefore is that the taking was compulsory and there was a lack of adequate consultation and negotiation.

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29 AJHR 1873, G2, p 1, see doc A6.
1.3.1.7 A further Treaty breach was the lack of adequate compensation. It has been argued that the land was paid for at reasonable rates and that the Railway benefited the hapu, both as a means of transport and by increasing the value of their land. However, the land taking bisected the coastal flat and made it more difficult to traverse north-south, a feature which was probably not compensated for.

1.3.1.8 The payment of compensation was done in two stages. The first payment of £270 18s 6d was made in December 1872 to those of the 21 awardees still living. The second payment of £361 4s 8d was presumably made after the Native Land Court in 1875 determined the successors of those who had died.

1.3.1.9 As a result of the Maori Land Court hearing on 11 and 12 February 1875, three certificates were ordered in respect of:

- 2 acres 3 roods 38 (39?) perches, being portions of Sections 1 and 2, taken for Railway purposes, Henare Te Puni and five others
- 2 acres 3 roods of Section 3, taken for Railway purposes, Hapurona Hamana and seven others
- 2 acres 3 roods of Sections 16 and 20, taken for Railway purposes, Komene Hokai and eight others.

1.3.2 1876

1.3.2.1 In 1876 a further 6 acres, 2 roods and 20 perches of land was acquired from Hutt sections 1, 2 and 3 by the Crown, this time for Railway workshops and yards. Heaphy reported that:

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30 Ward, see above n 12, pp 64-65.
31 Ward, see above n 12, p 71.
This was necessary to the purposes of the Wellington and Masterton Railroad, for workshop sites, etc. The negotiation was very protracted; eventually the sum of £622 10 shillings was accepted and a conveyance executed by Henare Epuni and others to the Queen for the land.\footnote{AJHR 1877, G3, p1, doc A8.}

1.3.2.2 The price paid was twice that of 1873, at almost £100 an acre. Ward says:

It was not clear why that particular land was taken for the Railway workshops, unless it was necessary to be close to the foreshore as well as to the railway track. Otherwise non-Maori land further inland or further eastward could presumably have done just as well. Heaphy’s comment, and the higher price, suggests that the Maori owners were unhappy about the acquisition. The possibility of compulsory acquisition under the Public Works Act, as in 1873, may well have influenced the negotiation, though there is no evidence of its being threatened.\footnote{Ward, above n 12, p 22.}

1.3.2.3 The Crown failed to protect Tangata Whenua rights to their reserved land. Tangata whenua were clearly unwilling sellers and, in conjunction with further alienations of the Petone foreshore, this taking effectively eroded the McCleverty award to that hapu of Te Atiawa. It split the land in half and seriously affected the locality by laying the basis of its development as an industrial zone rather than a prime residential zone.\footnote{Ward, above n 12, pp 65, 71.}
1.3.3 1879

Perhaps also falling into a similar 'unwilling seller' category was the 'purchase' by Heaphy in 1879 of 3 roods 34 perches in Hutt sections 2 and 3. This land was purchased 'for the site of a new Railway Station at Pitone' for the sum of £117 10s.37

1.3.4 1880s

In 1880, 1881 and 1884 land was taken from reclaimed areas in Thorndon for the Wellington Railway Station.38 Since reclaiming land at Thorndon was a Treaty breach in itself due to obliteration of tangata whenua kaimoana, using reclaimed land for a railway station also constitutes a Treaty breach.

In 1881 and 1882 land was taken by Proclamation from sections 7 and 8 Kinapora district and possibly also from reserved sections in Harbour and Kaiwharawhara districts for the Wellington to Foxton railway.39

Further land was taken from Hutt section 3 in 1882 for the Wellington-Napier railway,40 3 acres 4 perches was taken for a portion of the Hutt Station in 1884,41 and in 1885 5 acres was taken for a ballast-pit at Petone.42

Proclamations in 1886,43 1887,44 1888,45 and 188946 took a further seven or eight acres for Railway purposes.

37 AJHR 1879, G-7, p1, doc A9.
38 NZ Gazette 1880 p 460, doc A10; 1881 p 1565, doc A14; 1884 p 1405, doc A19.
39 NZ Gazette 1881, p 798, doc A13; and 1882 p 2, doc A16.
40 NZ Gazette 1882 p 144, doc A18.
41 NZ Gazette 1884 p 1407, doc A20.
42 NZ Gazette 1885 p 323, doc A22.
43 NZ Gazette 1886 p 1305, doc A24.
45 NZ Gazette 1888 p 12, doc A27.
46 NZ Gazette 1889 p 758, doc A28.
1.3.5 1890s

1.3.5.1 In July and August of 1894 caveats were lodged by Hutt Park Railway Co. on CT 35/226 while in 1895 there was an Order of Court whereby part of the land in CT 35/226 was vested in the Hutt Park Railway Company Ltd under the District Railways Act 1877 and section 90 of the Public Works Act 1894.47

1.3.5.2 1899 saw even more land taken at Petone from sections 2 and 3 Hutt district for the Wellington-Napier Railway.48

1.3.6 Post 1900

1.3.6.1 Land was taken by proclamation for railway purposes in 1904,49 1905,50 190751 and 191952 and so the railway took almost one quarter of the 107 acres of flat land in Hutt Sections 1, 2 and 3.

1.3.6.2 Ward maintains that:

The climate of the day indicates the preparedness on the part of the settlers and the Crown to acquire Maori land compulsorily if it was not being used to their satisfaction. Under the circumstances some further 25 acres of the Petone reserves were alienated between 1900 and 1907. Seven portions totalling 3 acres 2 roods were acquired by proclamation under the Public Works Act for railway purposes.53

48 NZ Gazette 1899 p 1805, doc A30.
49 NZ Gazette 1904 pp 469, 1569, docs A31 and A32.
50 NZ Gazette 1905 pp 815, 530, docs A34 and A35.
51 NZ Gazette 1907 pp 1767, 3461, docs A36 and A37.
52 NZ Gazette 1919 p 895, doc A38.
53 Ward, above n 12, p 39.
The Crown breached the Treaty by using public works legislation to take reserved Maori land for railways over and over again, eroding the original award, and often without any or adequate compensation or consultation.

1.4 ACQUISITIONS FOR ROADS

1.4.1 The Crown acquisitions of Maori reserved land for roads similarly breached the Treaty by using public works legislation to take reserved Maori land. Unlike railways, which follow an easily traceable path, takings of land for roads are more difficult to trace because of the multitudinous and fragmented nature of the takings. Therefore, I will provide examples of a tiny fraction of takings of Maori reserved land for roads and hope that this will provide a glimpse of the whole picture. Further, a difficulty with establishing whether any or adequate compensation was paid for land taken for roads is that nineteenth century public works files were lost in the Hope-Gibbons fire.

1.4.2 In 1882 part of Hutt section 2 was taken by Proclamation for road use, and in 1884 land was taken from sections 7 and 8 Kinapora district, also for road purposes.

1.4.3 Land was taken from Hutt sections 1, 2 and 3 at various intervals, including in 1887, 1889, 1899, 1905, 1907, and 1919.

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54 NZ Gazette 1882, p45, doc B1.
55 3 D 273 Index/ 3 D 274 Index, Proc 40 4/2/1884.
56 NZ Gazette 1887 pp 1003, 1430, docs B3 and B4.
57 NZ Gazette 1889 p 111, doc B5.
58 NZ Gazette 1889 pp 693, 1130 and 1586, docs B7, B9 and B10.
59 NZ Gazette 1905 p 5, doc B11.
60 NZ Gazette 1907 pp 1612, 3547, docs B12 and B13.
1.4.4 Further parts of Hutt section 3 were taken for road purposes in 1936\textsuperscript{62} and in 1943, when part of Hutt section 16 was also taken for road purposes.\textsuperscript{63}

1.4.5 Land was taken for an accessway in 1956\textsuperscript{64} and vested in the Wellington City Council.

1.5 ACQUISITIONS FOR HOUSING PURPOSES

1.5.1 1937

1.5.1.1 In 1937 land was taken from section 8 Kinapora District for housing.\textsuperscript{65}

1.5.2 Waiwhetu 1938-1942

1.5.2.1 Although the Waiwhetu lands are the subject of claim Wai 105, which is currently being directly negotiated with the Crown, in order to provide a complete picture of public works takings in Whanganui-a-Tara, the Waiwhetu takings must at least be outlined in this paper. The events surrounding the Waiwhetu lands in sections 19 and 58 Hutt district are highly indicative of the Crown’s disregard for tangata whenua Treaty rights in relation to public works takings.

1.5.2.2 Under the McCleverty awards in 1847, the Waiwhetu people were reserved sections 57, 58, 19 and part of section 20 Hutt District. The Waiwhetu public works takings were from sections 19 and 58.

\textsuperscript{62} NZ Gazette 1936 p 2250, doc B15.

\textsuperscript{63} NZ Gazette 1943 pp 1092-3, doc B16.

\textsuperscript{64} NZ Gazette 1956 p 1029, doc B18.

\textsuperscript{65} NZ Gazette 1937 p1029, doc C1.
following summary is drawn largely on a paper by Elena Michaels, A Summary History of the Waiwhetu Lands. 66

Section 58 Hutt District

1.5.2.3 All except two subdivisions of section 58 were in Maori ownership until 1942, when the Crown took it under the Public Works Act 1928 in order to form part of the Hutt Valley state housing scheme. 67

1.5.2.4 Interest was shown in acquiring section 58 in 1939. A memorandum to the Director of Housing Construction from the Registrar of the Native Land Court dated 21 November 1939 refers to 'Land for Housing: Hutt District Native Land Taita and NaeNae'. In the memorandum, the Registrar urges taking the land compulsorily through the Public Works Act [1928]:

I cannot suggest any suitable method of acquiring the subdivisions enumerated therein under a comprehensive scheme. It seems to me that your best course to effect a change in title would be to take the land under the machinery provided by the Public Works Act, and then lodge applications with the Native Land Court for assessment of compensation in respect of each block.

The only alternative would be to proceed by memorandum of transfer. However, in view of the numerous owners whose signatures would have to be procured, and the subsequent expense of obtaining confirmation the first method suggested would appear the more suitable. 68

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66 Draft paper prepared by Elena Michaels, Policy Analyst, TOWPU for the Waiwhetu Land Claim (Wai 105).
68 Memorandum for the Director of Housing Construction from C V Fordham, Registrar, Office of the Ilaroa District Native Land Court and Maori Land Board, 21 November 1939, MA 29/71/1/1.
1.5.2.5 In 1941 the Director of Housing Construction similarly advised that the land should be taken by Proclamation:

One or two of the Natives have approached the Department to purchase their interests, but in my opinion the whole of the Native-owned land should be acquired by Proclamation, as it would be a protracted, if not practically an impossible task, owing to the large number of owners involved and their widely divergent places of residence, to obtain all the necessary consents for the purchase of the land.

The matter has been discussed with officers of the Maori Land Court, who agree, that to take the land by Proclamation would be the most sensible and expeditious method of acquiring the property.69

1.5.2.6 A Proclamation was consequently issued on 4 August 1942 taking for public works those parts of section 58 which had not already been purchased by the Crown.70 The lands were not identified as being for housing purposes until 1945,71 for the reason that war-time security measures required secrecy about which lands taken under the Public Works Act were to be used for defence purposes.72

1.5.2.7 The Treaty breach was that there was a lack of adequate negotiation and consultation resulting in the loss of the turangawaewae of the Waiwhetu people. The compulsory acquisition of tangata whenua land cannot be justified merely on the grounds of inconvenience and expense.

69 Memorandum to Minister of Housing from Director of Housing Construction, 16 January 1941, MA 29/7/1/1, doc C5. See also docs C6 and C7.
71 NZ Gazette 1945, p1551.
72 Michaels, above n 66, p 19.
1.5.2.8 A further breach was that the compensation awarded was less than it should have been because it was based on the land being valued in its subdivisions, which were long narrow strips, rather than as a whole block.\(^7\)

**Section 19 Hutt District**\(^7\)

1.5.2.9 The land in section 19 was not acquired under one Proclamation, but was taken in several stages over 1942, although an intention to take the land was indicated in 1938.

1.5.2.10 On 2 March 1938 a notice of intention was issued that subdivisions 8 No.1 - subdivision 23 of section 19 were to be taken for housing purposes.\(^7\) The notice also requested that any land owners who objected to the proposal write to the Minister of Public Works within forty days of the publication of the notice.

1.5.2.11 The owners of sections 58 and 19, Hutt District met with the Deputy Native Trustee on 6 June 1941. There was a mixed response from the Waiwhetu people to the proposal that their land be taken. Although some of both section 58 and section 19 land owners wanted to know what the Crown would give them for their land, there were several more deep-seated objections to the scheme.\(^6\) For example, Hapi Love pointed out that the Waiwhetu land had always been looked upon as a reserve for the Maoris and was practically the last land in the Hutt Valley remaining to them. He made a plea that the Government would not deal too harshly with his people.\(^7\)

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\(^7\) Maori Land Court Wellington Minute Book 34, Ikaaroa District, pp. 250-60, doc C12.
\(^6\) See docs C2 and C3 for survey plans.
\(^6\) NZ Gazette 1938, p404, doc C4.
\(^6\) Michaels, above n 66, p 24.
\(^7\) Memorandum from the Registrar (Maori Land Court?) to the Under-Secretary (for Housing), 10 June 1941, MA 29/7/1/1, doc C7.
1.5.2.12 Despite this concern and others from land owners about where they would live if their land was taken, a second notice of intention was published in 1942, also requesting notification of any public objections to the proposed taking of the land for public works. This notice also included subdivisions 3, 4, 5 and 6. The lands were formally acquired on 27 January 1943.

1.5.2.13 The Treaty breach was that although the compensation ordered by the Maori Land Court was £47,873, the land should never have been compulsorily acquired. There was a failure to properly negotiate and there is evidence that the compensation was insufficient to buy more houses in a different location and many people had to rent instead. The Crown should have protected one of the few remaining pieces of land reserved for the tangata whenu.

1.5.2.14 Subdivisions 7A and 7B of section 19 were taken on 13 July 1942 for public works and were used as a vehicle park for American troops, and, as with the section 58 lands, were not proclaimed as housing lands until 1945. The land was not used for housing and today subdivisions 7A and 7B, comprising approximately 27 acres, form the bulk of Te Whiti Park. The Treaty breach, along with the failure to protect the land in the first place, was the failure to return the land when it was not used for the intended public work.

78 Memorandum from the Registrar (Maori Land Court?) to the Under-Secretary (for Housing), 10 June 1941, MA 29/7/1/1, doc C7.
79 NZ Gazette 1942, p2024.
80 NZ Gazette 1943, p52, doc C13.
81 Compensation order, doc C14.
82 Michaels, above n 66, p 36.
83 NZ Gazette 1942, p1886.
84 Michaels, above n 66, p 26.
1.5.3 Post 1943

1.5.3.1 In 1944 land was taken from section 8 Kinapora District for public works (again, wartime security meant the real purpose was not indicated), and in 1949 land was taken from section 7 Kinapora District for housing.

1.5.3.2 In 1959 58 acres 1 rood 22 perches was taken from subdivision 9 Maungarakai Reserve for housing.

1.6 RIVER PROTECTION

1.6.1 This section is based on Damian Stone’s report on Waiwhetu Pa, Seaview, Petone.

1.6.2 In 1847 Lieutenant-Colonel McCleverty reserved Waiwhetu Pa to the tangata whenua. The Crown has subsequently breached the Treaty by firstly failing to prevent the Hutt-River Board taking most of this land, supposedly for river protection purposes, and secondly by acquiring some of the land itself from the Hutt River Board for ‘better utilization’.

1.6.3 In 1928 land was taken by the Hutt River Board under the Public Works Act 1908 from Waiwhetu Pa - sections 1A, 1B, 2A, 2B1, 2B2, 2C and 3 within Block XIV Belmont Survey District. This land was purportedly taken to enable river protection works to be carried out in order to prevent flood damage.

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85 NZ Gazette 1944 p357, doc C15.
86 NZ Gazette 1949 p2776, doc C16.
87 NZ Gazette 1959 p1266, doc C17.
88 D Stone, Waiwhetu Pa, Seaview, Petone Waitangi Tribunal Commissioned Report, date unknown.
89 McCleverty Deed, Wai 145 A10(a) doc 3, p 8.
90 W.D. 2709, doc D1
NZ Gazette 1928 p 2464, doc D2.
1.6.4 The Waiwhetu Pa was situated at the junction of the Waiwhetu Stream and the Hutt River, a very valuable position in terms of river protection works. However, there is no evidence that the area was actually used for river protection purposes. It is even possible that the land was taken to assist in the reclamation process.91

1.6.5 The owners of the Waiwhetu Pa land protested that the £895 compensation paid by the Hutt River Board for the taking was unjust and unfair. The Treaty breaches are that the compensation paid was inadequate and that the land was taken with little consultation and consideration92.

1.6.6 In 1952 the Crown acquired the land from the Hutt River Board by proclamation, taking it for ‘better utilization’.93 The Crown paid the Hutt River Board approximately £13 500 for this land. A further proclamation was issued in 1953 changing the status of the land to Crown land, subject to the Land Act 1948. The Treaty breach is that the Crown should have returned the land to the tangata whenua at this point, particularly if the land was not used for the purpose for which it was taken.

1.7 MISCELLANEOUS TAKINGS

1.7.1 Waterworks

1.7.1.1 In 1904 195 acres 3 roods 20 perches of subdivision 3 of the Maungaraki Reserve were taken for the construction of waterworks.94

91 Stone, above n 88, p 10.
92 Stone, above n 88, p 17.
93 NZ Gazette 1952 No. 41, taking effect on 16 June 1952.
94 NZ Gazette 1904 p 1479, doc E1.
1.7.1.2 Further land was taken from the Maungaraki Reserve for waterworks in 1911:

- 87 acres 3 roods of section 4
- 119 acres of section 7
- 10 acres of section 8A
- 53 acres 1 rood of section 8B. ⁹⁵

1.7.2 Lighthouse

1.7.2.1 In 1865 the Marine Board selected 69 acres for a Lighthouse Reserve at Pencarrow Head. This was taken from the Parangarahu Block. ⁹⁶

1.7.2.2 27 acres 3 roods 10 perches more land was taken from Parangarahu Block for lighthouse purposes in 1931. ⁹⁷

1.7.2.3 In 1939 land was taken again for lighthouse purposes; this time 42 acres 2 roods was taken from Parangarahu Block. ⁹⁸

1.7.3 Sanitary

1.7.3.1 In 1961 the taking of 69 acres for lighthouse purposes in Pencarrow Survey District was revoked and in 1963 land was taken from the same Parangarahu Block for a sewer outfall. ⁹⁹

1.7.3.2 In 1964 another 25 acres was taken for a sewer outfall from Parangarahu Block and vested in the Hutt Valley Drainage Board. ¹⁰⁰

⁹⁵ NZ Gazette 1911 p 704, doc E2.
⁹⁶ Block V, Pencarrow Survey District, 46 D 731, SO 10738.
⁹⁷ Block VIII, Pencarrow Survey District, NZ Gazette 1931, p 2853, doc F1.
⁹⁸ Block VIII, Pencarrow Survey District, NZ Gazette 1939, p 2, doc F2.
¹⁰⁰ NZ Gazette 1964, p 1588, doc G2.
1.8 EFFECT

1.8.1 Most, although not all, of the public works takings which constitute Treaty breaches were from the reserves awarded by McCleverty in 1847, and substantial amounts of these awards have been eroded by public works takings of land, for, in particular, railways, roads and housing.

1.8.2 The McCleverty Awards included substantial areas in the Hutt Valley and these areas were to substitute for Maori pa and cultivations in Wellington and the Hutt Valley on sections required for settlement. Their main purpose therefore was to provide an equivalent subsistence for Maori indefinitely.¹⁰¹

1.8.3 However, for example, although Hutt Sections 1, 2 and 3 at Petone were granted to Te Atiawa hapu, the consistent taking of land for public works in this area eroded their pa, cultivations on the foreshore and in the bush behind, foreshore shellfish gathering and sea fishing from canoe landings on the beach. The development of the foreshore meant it ceased to be a waka landing place and consequently the foreshore fisheries were lost to Te Atiawa. Shellfish in the harbour were polluted by industrial waste by the 20th century and the western Petone foreshore had ceased to be a prime area of human habitation.¹⁰²

¹⁰¹ Ward, above n 12, p 70.
¹⁰² Ward, above n 12, p 73.
CHAPTER TWO

HISTORY OF TOWN SECTION 542

2.1 INTRODUCTION

2.1.1 This chapter gives a brief block history of town section 542 in order to demonstrate where Treaty breaches by the Crown occurred.

2.1.2 This report will show that the primary breach by the Crown was that the large part of Town Section 542 known as Tod's Grant should have reverted to the tangata whenua instead of being awarded by Crown Grant firstly to Alexander McDonald in 1845 and secondly to the Anglican Church in 1853. The fact that this portion of section 542 was permanently alienated made the remaining corners less attractive by themselves and may have been a factor in driving the tangata whenua away from the Pipitea Pa area.

2.2 1839 - NEW ZEALAND COMPANY'S PURCHASE

2.2.1 When the New Zealand Company made its original purchase in 1839, it divided the town site of Wellington into 1100 one acre sections. One tenth of these sections was to be set aside as Native Reserves. Town section 542 was one of these, located, along with other reserved sections,\(^{103}\) at Pipitea Pa in Thorndon.\(^{104}\)

2.2.2 At around the same time, a whaler named Robert Tod 'purchased' land at Port Nicholson, including a large part of section 542. Neville Gilmore maintains that this transaction between Te Matehou and Tod was one where 'Te Matehou would have retained, in the Maori view, residual

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\(^{103}\) Town sections 514, 539, 543, 545, 580, 584, 593 and 594.

\(^{104}\) See 1841 Plan of the City of Wellington, doc H1.
rights in respect of these allotments, of access, traverse and control of later disposition. In other words, Tod was essentially granted usufructuary rights over the land and therefore it was not his to further alienate.

2.3 1845 SPAIN COMMISSION

2.3.1 William Spain was sent to New Zealand to resolve ongoing land disputes between Maori, the Crown and the New Zealand Company. While the New Zealand Company was awarded 71,900 acres in the Whanganui-a-Tara region, Maori were told that they could not back out of the negotiations and unwillingly accepted:

- £1,500 in exchange for giving up their remaining interest in the land which the Crown had surveyed and sold
- all the pa, burial places and grounds in cultivation by the Natives
- the Native Reserves comprising 41 country sections of 100 acres each and 110 town acres.

2.3.2 Although a large part of native reserve was contained in Tod's 1839 'purchase', Spain upheld the 'purchase' with no compensation to Maori and despite the fact that section 542 was part of the original Pipitea pa area. A Crown Grant for this land was issued to Alexander McDonald on 29 July 1845. This grant should never have been issued.

2.3.3 Section 542 was one of the native reserves assigned by the Company in 1839, and therefore the remainder of it was included in the reserves awarded by Spain.

107 For the vicinity of Tod's Grant, see doc II.2.
2.4 1847 McCLEVERTY AWARDS

2.4.1 The New Zealand Company, however, was not satisfied with the outcome of the Spain Commission, particularly the exception of pa, burial grounds and ngakinga from the planned settlement and Colonel McCleverty was sent to resolve the problem.

2.4.2 McCleverty did not alter Tod’s grant but awarded the rest of section 542 and a corner of section 544 to Chief Porutu.\textsuperscript{109}

2.5 1851 BOUNDARY CHANGES

2.5.1 In the 1850s there was extensive resurveying and reshuffling of the Pipitea pa area, including changes to the streets. The bottoms of Pipitea and Hobson Streets were closed off and three more were added - Moore Street, Moturoa Street and Davis Street.\textsuperscript{110}

2.5.2 The changes in streets meant that Moore, the owner of section 544 (a section adjacent to section 542) lost part of the section to roads. It seems that parts of sections 542 and 543 were given to Moore as compensation for the loss of part of section 544. This was achieved by resurveying in 1851\textsuperscript{111} and tangata whenua were neither consulted nor received any compensation for the loss of parts of sections 542 and 543.\textsuperscript{112}

\textsuperscript{109} See McCleverty map, doc H5 and Native Land Court Map 3140, doc H6 also shows areas awarded by McCleverty.

\textsuperscript{110} Compare doc H1 with H3

\textsuperscript{111} See doc H4; DOSLI Maps WD 3140, doc H6; A 00823, doc H7; ML 01539, doc H8.

\textsuperscript{112} Swainson wrote in 1865 that Porutu and Pipitea Natives were never compensated. AJLC 1866 p43, doc H9.
2.6 1853 CROWN GRANT OF TOD’S GRANT TO ANGLICAN CHURCH

2.6.1 The part of section 542 that was Tod’s grant was awarded by Crown Grant as an endowment land to the Anglican Church on 26 July 1853. It is thought that the reason for this is that in 1844, an Anglican Church was built upon what are now Parliament grounds, but in 1848 work was begun to convert the area into the Lieutenant-Governor’s town residence, leaving insufficient space for the Church’s planned Cathedral and school. The Church was asked to choose another site from one of the Native Reserves, and was told that the government would compensate the Native Trust Fund in some way. The Church chose part of section 542: the Tod’s grant area. This is where the Old St Paul’s Cathedral is now situated.

2.6.2 On 20 July 1853, presumably in anticipation of obtaining the Tod’s grant land, the Bishop of New Zealand applied for and was awarded a Crown Grant of the remaining corner of section 542, that is, the corner adjacent to Mulgrave Street. This corner was next to St Paul’s Cathedral and it was requested in order to provide proper access to the church. All of the land in section 542 was native reserve and should have been returned to the tangata whenua when no longer in Tod’s hands.

2.7 ALIENATION OF PORUTU’S CORNER

2.7.1 Porutu’s part of section 542 was awarded by Crown Grant to Ihaia Porutu, Henare Piti Porutu and Ruhia Porutu on 18 March 1868. It

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113 Deeds Register, vol. 2, fol. 494, conveyance of 2r 10p from A. McDonald to Bishop of NZ for £85.
116 Deeds Register, vol. 9, fol. 38.
stayed in the hands of the whanau\textsuperscript{118} until at least 1900 when section 542B was sold some time prior to 1906.\textsuperscript{119} It seems that this piece of land was transferred to the Public Trustee on 11 November 1926. In 1946 part of section 542B was transferred to the Crown for buildings of general government.\textsuperscript{120} In 1969 it became known as part section 1269 and on 4 December 1969 a new Certificate of Title was issued transferring this land to the Maori Trustee for purposes of a hall site.\textsuperscript{121}

2.7.2 Sections 542A and 542C were sold to S. Wood and Son Ltd in 1919.\textsuperscript{122} The land was then taken by proclamation in 1942 for buildings of general government.\textsuperscript{123} In 1976 section 542A was transferred to the Maori Trustee for purposes of a hall site.\textsuperscript{124}

\textsuperscript{118} See docs H10-14.
\textsuperscript{119} Date unclear, CT 113/275, doc H19.
\textsuperscript{120} CT 401/66, doc H22.
\textsuperscript{121} CT 401/66, doc H22 and CT 7C/1250, doc H23.
\textsuperscript{122} Docs H15-17; DP 8705, doc H18; and CT 234/47, doc H20.
\textsuperscript{123} SO 20886, doc H26.
\textsuperscript{124} CT 16A/350, doc H24.
CHAPTER THREE

UNsurveyed (SURPLUS) LAND

3.1 INTRODUCTION

3.1.1 This chapter identifies the breaches of the Treaty by the Crown in its acquisition of and dealings with unsurveyed (surplus) land in the Whanganui-a-Tara region. This land was never sold to the Crown by the tangata whenua. The chapter briefly overviews the events which led to Crown Treaty breaches and highlights when these breaches occurred.

3.1.2 There was no clear agreement between Maori and Crown about the balance of land comprised in the New Zealand Company's 1839 Deed of Purchase but not included in the Pennington award to the Company (based on the 1840 'Russell' Agreement between the Crown and the Company). Although in 1844 the Spain Commission determined payments to 'complete' the purchases as established by the 1840 agreement, these payments were in fact for the surveyed areas of land only.

3.1.3 The main treaty breach occurred with the 1847 McCleverty awards, which supposedly generously 'gave' to the tangata whenua areas of the unsurveyed land, for example, in Ohariu and Orongorongo, but in fact effectively resulted in the Crown claiming the rest of the unsurveyed land in the Whanganui-a-Tara region without purchasing it. The only purchase was that made by Governor Grey of land in the Porirua district in 1847. It is therefore impossible to assert that the unsurveyed lands were purchased via any combination of the 1839 Deed, 1840 Agreement, the Spain Awards and the McCleverty Awards.

125 Ward, above n12, p.60.
3.2 1839 - NEW ZEALAND COMPANY'S INITIAL PURCHASE

3.2.1 The New Zealand Company, without the consent of the British Government, sent a preliminary expedition to New Zealand under Colonel William Wakefield on the Tory which arrived in Port Nicholson on 20 September 1839. Wakefield immediately commenced negotiating with the tangata whenua for land.\textsuperscript{126}

3.2.2 After completing three deeds of purchase for land between 39°S latitude and 42°S latitude (one of which was for the Port Nicholson area), Wakefield claimed to have purchased approximately 20 million acres.\textsuperscript{127}

3.2.3 The deed of purchase for Port Nicholson and a surrounding piece of territory 30-40 miles long and 25-30 miles wide was drawn up on 27 September 1839.\textsuperscript{128} This deed conveyed to the Company all the land from Sinclair Head to Cape Turakirae and inland to the Tararua Range. Included within that area were the islands of the harbour and part of the inland Porirua district.\textsuperscript{129}

3.2.4 Claimants assert that the 1839 deed of purchase was invalid because the Company failed to negotiate the sale with all the hapu of the region, for example, pa such as Pipitea, Te Aro and Kumutoto were not involved in the initial negotiations. The deed resulted from the Company's initial dealings with Te Puni and Te Wharepouri of Pito-one and Ngauranga Pa, who became the major protagonists of land 'sale' to the Company.\textsuperscript{130}

\textsuperscript{126} Report of Commission of Inquiry into Maori Reserved Land (Wellington, Government Printer, 1975) p 303. See doc II for map of New Zealand Company's initial 'purchase'.
\textsuperscript{127} Report of Commission of Inquiry into Maori Reserved Land, above n 126.
\textsuperscript{128} Report of Commission of Inquiry into Maori Reserved Land, above n 126.
\textsuperscript{129} Anderson, Wai 145 A44, p 21. See doc II.
\textsuperscript{130} Anderson, above n 129.
3.3 1840 - AGREEMENT BETWEEN CROWN AND COMPANY/ PENNINGTON AWARD

3.3.1 The New Zealand Company had difficulty obtaining recognition for its purchase from the British Government and it was not until Lord John Russell became Secretary of State for the colonies that it was able to do so by an agreement with the Crown in 1840.

3.3.2 The agreement signed between the New Zealand Company and the Crown on 19 November 1840 adjusted retrospectively the claims which the Company had established. The results of the agreement were:

- the Company would receive a Crown grant of land, determined by James Pennington, a government appointed accountant, equal to the amount expended on colonisation in the ratio 4 acres per £1 spent
- land would be assigned to the Company in those areas to which it had established a claim prior to annexation
- the Company would waive all claims to most of the 20 million acres of lands in New Zealand it ‘purchased’ from the natives

3.3.3 On 12 February 1841 the company was formally incorporated and the terms of the agreement were incorporated in the charter. Pennington awarded the Company 111 000(?) acres in Port Nicholson.

3.3.4 However, the 1840 agreement assumed the validity of the Company’s original purchases, reflecting a Colonial Office supposition that much of the New Zealand Company claim was for unoccupied ‘wasteland’. The Colonial Office supposition was incorrect and evidence given to the 1844 Select Committee on New Zealand reflects this.

133 Report of Commission of Inquiry into Maori Reserved Land, above n 126, pp 304-5.305.
134 Anderson, above n 129, p 34.
3.4 1844 - REPORT OF SELECT COMMITTEE ON NEW ZEALAND

3.4.1 There is strong evidence that people knew that the tangata whenua did not think of unoccupied land as 'wasteland' and believed that it had not been sold along with other land.

3.4.2 Mr Walter Brodie's evidence to the Select Committee on New Zealand on 4 June 1844 shows that not only were unoccupied lands not sold but the 'natives' would not have agreed to it either.\textsuperscript{135}

534-535. ... Mr McDonald was mentioning the other day that half the land in New Zealand was not claimed by the natives; I mean to say that every inch is claimed by them.

866. If, before any sales had taken place on the part of the Government, the Government had asserted a general claim to all land not actually occupied, assuring to the natives that they should be liberally treated; do you think that the natives would have acquiesced in that? - No; they would have wished to know what the treatment was to be.

868. Do you think that they might have been made to understand that, as the only mode in which they could have the benefits of the white settlement which they desired, they must surrender their claims to all the land not actually occupied, to the Government? - I do not think that they would have agreed to that, under any circumstances.

\textsuperscript{135} GBPP Vol 2, 1844, Minutes of Evidence, docs 13-5.
869. You think that the principle of Government being the owners of all the wild land could not have been asserted successfully? - I do not think that it could.

871. Do you think that they would not have acknowledged the sovereignty of this country, and, as appertaining to the sovereignty, the right to the waste land? - No.

961. You seem to think, [...] that at the Treaty of Waitangi the chiefs would not have sold their wild land, and that they did not so understand it; have you not said, in the course of your examination, that the treaty was explained to them? - Yes; but there was no mention that they were to give up their wild lands to the Government.

3.4.3 F. A. Carrington, giving evidence on 6 June 1844.\(^{136}\)

1395. You have heard the evidence given already; do you concur in thinking that there is no such thing as what can be called waste land in New Zealand, taking that in the sense of land not claimed by anybody? - There is a great extent of waste land; but, as I have mentioned, sometimes a native will tell you that he possesses so much; and if you admire any district, he will say, “That is mine.”

3.4.4 Similarly T. Heale, on 27 June 1844.\(^{137}\)

4143. Therefore they do not consider that there is any land, absolutely waste, in the sense of being without a proprietor? - Certainly not.

\(^{136}\) GBPP Vol 2, 1844, Minutes of Evidence, docs I6-7.

\(^{137}\) GBPP Vol 2, 1844, Minutes of Evidence, doc I8.
3.4.5 J. W. Child, giving evidence on 2 July 1844, indicated the tribal ownership of unsurveyed land:138

What is the course as regards wild lands; is the same right claimed over them by the natives as over those lands which they have occupied and cultivated? - Not individual rights; the waste lands appear to be the property of the tribe in common.

3.5 1844 - SPAIN COMMISSION

3.5.1 The 1844 Land Commission found the Company's 1839 deed to be flawed because the agreement was not made with all the hapu of the district.139 Land Commissioner Spain decided that rather than declaring invalid the 1839 deed (and therefore also invalidating the 1840 agreement between Crown and Company), the best option, given that settlers were already established, was to 'complete' the 1840 agreement.140 However, Commissioner Spain dealt only with the lands originally surveyed by the Company.

3.5.2 For Spain's final awards, see Chapter 2.

3.5.3 The Treaty breach was that Spain's view emphasised de Vattel's principles of occupation and cultivation as the basis of proprietorship,141 when the tangata whenua clearly considered that the unsurveyed lands were theirs. Spain's view was not in accordance with the guarantee to tangata whenua in article 2 of the Treaty of rangatiratanga over all their lands.

138 GBPP Vol 2, 1844, Minutes of Evidence, docs 19-10.
140 Armstrong/Stirling, Wai 145 C1, pp 145-8; Ward, A44, p 57.
141 Spain Report, 31 March 1845, Wai 145 A10(a), doc 6, p 11.
3.6 1847 - PURCHASE OF PORIRUA

3.6.1 The only area purchased that included unsurveyed land was that purchased in Porirua by Governor Grey in 1847.\textsuperscript{142} The New Zealand Company's Porirua claim had been disallowed and the land acquired by Grey comprised the Company's 270 100-acre sections, in order to meet 'the specific claims of European settlers' and 'a very extensive block of country to meet the probable prospective requirements of the Government and settlers'.\textsuperscript{143} The consideration for the sale was £2000 (at 7d per acre).

3.6.2 At the time of purchase, the boundaries were unsurveyed and only vaguely described within the deed. On 27 January 1848, a Crown grant was issued to the Company for 68 896 acres. Ward describes the land reserved from the sale:

Three large, contiguous blocks, extending from Arataura to Wainui and incorporating sixteen of the country sections claimed by the Company, were excepted from the 'sale' and reserved to Ngati Toa. The exact acreage of this area is not known. The index to Turton's states that 7000 acres were reserved. This underestimates the total which Certificates of Title (subsequently issued) indicate as amounting to over 10 000 acres.\textsuperscript{144}

3.7 1847 - McCLEVERTY AWARDS

3.7.1 Various unsurveyed land, for example in Ohariu and Orongorongo, was 'given' to the tangata whenua by the Crown as a result of the McCleverty Awards in 1847.

\textsuperscript{142} Ward, A44, pp 61-2.
\textsuperscript{143} Despatch from Governor Grey to Earl Grey, 26 March 1847, GBPP vol. 6 1847-8 p8.
\textsuperscript{144} Ward, 62.
3.7.2 The Crown used the notion that it 'gave up' this unsurveyed land to claim the rest of the unsurveyed land in Whanganui-a-Tara for itself. Duncan Moore says:

[T]he Crown first effectively claimed the surplus at Port Nicholson in 1847 when it claimed it 'gave up' the occupied parts of the surplus at Ohariu and Wainuiomata and Korokoro, 'in exchange' for Maori giving up their claim to their ngakinga on lands claimed by colonists.¹⁴⁵

3.7.3 The Treaty breach was that Lieutenant-Colonel McCleverty acted on his false belief that the unsurveyed land did not belong to tangata whenua, although he acknowledged their use of it. McCleverty's initial report indicates his view that he never intended to purchase the unsurveyed land from the tangata whenua:

I have been guided by the grant to the New Zealand Company of the Port Nicholson district and the objection thereto, in which no allusion is made to the Town Belt or unsurveyed lands within the limits of that grant. The area is 209 372 acres within the boundaries, part of which only, viz., 71 900 acres, are surveyed by, and granted to, the Company, accepted by that body, and acknowledged hitherto as part of 1 300 000 acres granted by Lord Stanley in liquidation of expenditure, etc.

An objection is raised by the principal agent of the Company, not to the quantity granted within the boundaries of the Port Nicholson District, but as to its distribution in favour of certain bodies of natives on settlers' sections and the Town Belt; the 71 900 acres are defined, viz., 70 800 acres of country sections of 100 acres each,

¹⁴⁵ Duncan Moore, WAI 145 E5, p 545.
and 1100 town sections of one acre each, and in which the Town Belt is not included. I conceive, the balance, as per margin, viz., 137 472, includes the Town Belt and other unsurveyed lands as waste and pertaining to the Crown.146

BIBLIOGRAPHY

Armstrong and Stirling *A Summary History of the Wellington Tenths* (Wellington, Waitangi Tribunal Claim 145, C1).


‘Report of Mr. Commissioner Spain’ 12 September 1843 in 1844 GBPP Appendix, p 291, in Wai 145 A10(a) doc 5.

‘Report of Mr. Commissioner Spain’ 31 March 1845 in 1846(203) GBPP/NZ5 p4, in Wai 145 A10(a) doc 6.

Quinn, S Evidence of Stephen P Quinn in Support of Application for Resumption of Land: Pipitea Street, Wellington: Certificate of Title 36c/251 Wellington Registry Section 1 (Wellington, 28 February 1996).

Salmon, P The Compulsory Acquisition of Land in New Zealand (Wellington, Butterworths, 1982).

Stone, D Waiwhetu Pa, Seaview, Petone (Waitangi Tribunal Commissioned Report, date unknown).


Waitangi Tribunal Te Maunga Railways Land Report (Wellington, Brookers, 1994).
