

TE TAU IHU  
O TE WAKA A MAUI



TE TAU IHU  
O TE WAKA A MAUI

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REPORT ON NORTHERN  
SOUTH ISLAND CLAIMS

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VOLUME II

WAI 785

WAITANGI TRIBUNAL REPORT 2008



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

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## ABBREVIATIONS

app	appendix	no	number
ATL	Alexander Turnbull Library	NRAIT	Ngati Rarua Atiawa Iwi Trust
CA	Court of Appeal	p, pp	page, pages
ch	chapter	para	paragraph
comp	compiler	PC	Privy Council
doc	document	pt	part
ed	edition, editor, edited by	ROI	record of inquiry
encl	enclosure	s, ss	section, sections (of a statute)
fn	footnote	sch	schedule
fol	folio	sec	section (of this report, a book, etc)
GIS	geographic information system	sess	session
intro	introduction	tbl	table
J	Justice	trans	translator
ltd	limited	v	and
MA	Department of Maori Affairs file, master of arts	VHS	video home system
MLCJ	Maori Land Court judge	vol	volume

## PUBLICATIONS

AC	<i>Appeal Cases (England)</i>
AJHR	<i>Appendix to the Journals of the House of Representatives</i>
AJLC	<i>Appendix to the Journals of the Legislative Council</i>
BPP	<i>British Parliamentary Papers: Colonies New Zealand</i> , 17 vols (Shannon: Irish University Press, 1968–69)
<i>Compendium</i>	Alexander Mackay, comp, <i>A Compendium of Official Documents Relative to Native Affairs in the South Island</i> , 2 vols (Wellington: Government Printer, 1872–73)
DNZB	<i>The Dictionary of New Zealand Biography</i> , 5 vols (Wellington: Department of Internal Affairs, 1990–2000)
HCA	<i>High Court of Australia</i>
HLC	<i>Clark's Reports, House of Lords (England)</i>
KB	<i>Law Reports, King's Bench Division (England)</i>
NZLR	<i>New Zealand Law Reports</i>
PRNZ	<i>Procedure Reports of New Zealand</i>
SCR	<i>Canada Law Reports, Supreme Court</i>
UKPC	<i>United Kingdom Privy Council</i>

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

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

## CHAPTER 7

### OCCUPATION AND LANDLESS NATIVES RESERVES

#### 7.1 INTRODUCTION

This chapter and the ones that follow consider the fate of the residual Te Tau Ihu Maori land after the Crown purchasing period. The residual land falls into three categories: the land reserved in the course of Crown purchases, the ‘tenths’ reserves that originated with the New Zealand Company transaction, and the three blocks that were not encompassed in either type of purchasing.

This chapter examines the first category of land: the occupation reserves created in the course of Crown purchases. These are reserves of a different nature to those included in Nelson tenths estate as endowment or trust reserves and the ‘occupied tenths’ in Motueka, tenths reserves that were set aside for occupation by Motueka Maori and were administered in conjunction with the tenths proper. These lands will be discussed in chapter 9. Nor are the Te Tai Tapu, Wakapuaka, or Rangitoto lands included in this chapter. Although often called ‘reserves’, these were lands that had been withheld by Maori from sale and thus remained in original native title, rather than lands reserved within purchases made by the New Zealand Company or the Crown. For this reason, they will also be discussed separately, in chapter 8.

The purpose of this chapter is to assess the extent to which the Crown carried out its Treaty obligation to ensure that Maori kept sufficient land to use in the traditional way and in new commercial ways, and on which to survive as communities.

After setting out the key issues raised by claimants and the Crown, the chapter moves on to a chronological narrative of how ‘occupation reserves’ were set aside for members of the iwi of Te Tau Ihu when their land was purchased in the years up to 1860. Earlier chapters have given detailed accounts of the various transactions by which land was acquired, mentioning the provision of reserves in each case, but in this chapter we bring this information together in order to paint a clear picture of the location, amount, and nature of land reserved by 1860. In a final section of the chapter, there is also a description of the second phase of reserve-making, in the 1890s and afterwards – the ‘landless natives’ scheme. We also make some mention of land purchased by Maori from the Crown in the 1850s and 1860s.

After reviewing the history of reserve creation from 1842 to 1860, we look at some of the legislative foundations of reserve ownership and administration, with particular attention to Crown grants, the natives reserves legislation, and the Native Land Court. We then go on

to make a close examination of the reserves themselves, and of what happened to them. In this part of the chapter the identification and description of the reserves is arranged geographically, moving westwards from the east coast (the Wairau) to the West Coast. The extent to which reserved lands were retained or alienated in the nineteenth and twentieth centuries is examined for each district. The work of David Alexander has made it possible to trace the ownership history of all the reserve land in Te Tau Ihu. We have been able to see when and how individual reserves were leased, sold, or reduced by Public Works takings, and this information is used extensively in what follows here. Our study of the history of the reserves is directed towards answering the question of whether they were adequate for the support, both for subsistence and development, of those for whom they were made.

One criterion of 'adequacy', although by no means the most important, is size. In this connection it should be noted that all statements of area in this chapter are quoted in acres, as was the practice in New Zealand until very recent times, rather than in the hectares of today. Also, while Mr Alexander's report states the area of parcels of land in very precise terms, we have chosen to make reading easier by omitting the subdivisions of acres (roods and perches). The 'acre' figures presented are thus close approximations of area, rather than exact representations.

After the history of the reserves created between 1842 and 1860 has been laid out, the submissions of claimant and Crown counsel are presented, followed by our comments on the issues raised, and finally our findings. We then follow a similar procedure for the landless natives reserves. At the end of the chapter, we present a summary of the whole topic of occupation reserves and of our findings.

## **7.2 OCCUPATION RESERVES AND LANDLESS NATIVES RESERVES: THE ISSUES**

As we will show, doubt has been cast in particular cases on whether the Crown fulfilled the promises it made about the creation of reserves. For all the claimant iwi, however, the most important question when considering the reserves created in the nineteenth century is whether they were sufficient, in both size and quality, for the support of the communities to which they were allocated. Adequate or not, the reserves constituted, along with the three unsold blocks and the tenths reserves, the remnant of Maori land holdings after the major mid-century purchases. It is therefore also of great importance whether the lands reserved for occupation were sufficiently protected against alienation. Another issue concerns those reserves (a considerable number) that came under the Crown's management: did the Crown administer them effectively and manage them for the benefit of their owners? This will also be considered in relation to the tenths in chapter 9. Finally, with regard to the second phase of reserve-making, the establishment at the end of the century of additional reserves for 'landless natives', the issue is whether this was an adequate remedy for the defects of the

reserves created in the earlier round. Underlying all these matters is the question of whether the inadequacy of the reserved land had serious socio-economic consequences for the owners. This is an issue that became increasingly significant as the years passed, and it is one to which we will give attention mainly in chapter 10.

In our coverage of occupation reserves and their history, then, we will be shaping our discussion in such a way as to throw light on the following principal issues:

- ▶ The manner in which reserves were established, especially the fulfilment of promises made to Maori landowners by the Crown or its officers between the 1840s and 1860 when the Crown was making the big land purchases. Issues of this kind relate to particular reserves in various parts of Te Tau Ihu.
- ▶ The size and quality of the reserves created in the period up to 1860. This was a matter raised by all the claimant iwi. In every case it was submitted that the Crown failed to allocate adequate reserves for the present and future needs of the iwi, with the result that great difficulties were experienced in continuing the traditional way of life or participating effectively in the emerging new economy of the region. The Crown did not dispute that there had been a failure to ensure that the reserves were adequate, although it pointed out that the Maori population of the region was small and that in terms of acreage alone the amount of land reserved was quite large. We will consider this point, along with other factors that might have played a part in the setting up of reserves of a particular size and in particular places. It would not be proper for us to decide that the Crown made inadequate provision for reserves, if we did not take into full consideration factors that were operative at the time, or if we did not attempt to view past situations and events in the perspective of the time. In the end, however, it is significant that before the end of the inquiry Crown counsel did concede, albeit with qualifications, that its purchasing policies and practices contributed to the overall landlessness of Te Tau Ihu Maori, and that this failure to ensure the retention of sufficient land was a breach of the Treaty.
- ▶ Protection against alienation to which Maori did not give free and informed consent. Given that the occupation reserves, small as they were, were practically all that remained of the tribal estate that had existed before the purchases it might have been expected that the Crown would go to some lengths to prevent further losses and consequent landlessness. As it turned out, however, much of the reserve land was eventually lost, by being sold. Therefore it must be asked whether the protective structures erected by the Crown against alienation were strong enough. The advent of the Native Land Court and the individualising processes it set in motion were clearly an important factor in much of the alienation that occurred. Reserve lands were vulnerable to Crown and private purchasing until well into the second half of the twentieth century, and we must consider whether any of this alienation occurred against the wishes of the owners or contrary to their long-term interests. A related issue is the amount of

reserve land alienated from its owners by compulsory purchase or takings under the Public Works Act. Land losses in Te Tau Ihu are particularly associated with the creation of scenic reserves and national parks. During our inquiry the Crown did not deny that alienations of the reserves left many Maori without enough land for subsistence or farming development. However, we must go beyond the fact that alienations occurred and try to determine whether the Crown had any responsibility for this situation.

- ▶ The management by the Crown of reserves entrusted to it by their owners. It will be shown that some reserves were vested in the Crown under the Native Reserves Act (1856) and later legislation of the same kind. We will also inquire into how this administration was conducted. The main issues are whether this arrangement was of benefit to the owners, and whether they were able to retain control of the lands vested in this way.
- ▶ The adequacy of the landless natives remedy. This project, initiated by the Crown at the end of the nineteenth century as a response to the plight of certain Maori in Marlborough and Buller, has been much criticised for falling short of what might have been expected. The new reserves were usually inaccessible and of inferior quality, and some people to whom they were allocated were never placed in possession. The scheme therefore did not settle the grievances of the landless natives, although it may have alleviated their distress. This, the Crown submitted was all it was intended to achieve.

We now proceed to recount the story of how occupation reserves were created by the Crown in Marlborough, Nelson, and Buller. We begin with the actions of the New Zealand Company in Golden Bay in the 1840s; a foundation upon which the Government built after it took over the company's activities. We end this section with an examination of with the making of reserves on the West Coast in 1860. The creation of reserves for landless natives at the end of the century will be dealt with separately in the last section.

### **7.3 THE MAKING OF RESERVES, 1842–60**

#### **7.3.1 Occupation reserves created by the New Zealand Company and the Crown, 1842–47**

The identification of certain blocks of land in areas acquired from Maori by the New Zealand Company, and their designation for continued use by the vendor iwi, was part of the company's practice in the 1840s. The parts of Te Tau Ihu covered by the company's transactions in these years were the coast of inner Tasman Bay and its hinterland (Nelson, the Waimea Plains, Moutere, and Motueka), a large part of the Golden Bay and north-western Tasman Bay coasts. This is where the 'native reserves' were created. As we will explain further in chapter 9, 'tenths' were created in the inner Tasman Bay districts of Nelson and Motueka in the 1840s, as an endowment estate. We are not concerned with that kind of reserve here,

but with the 'occupation reserves' created in the Golden Bay part of the area obtained by the New Zealand Company.

The concept of 'occupation reserves' featured prominently in the inquiries and decisions of Commissioner Spain. Early in 1844, the commissioner, the Governor, and the New Zealand Company met in Wellington and agreed on the principle that Maori village sites, burial places and cultivations would not be included in lands granted to the company. This exclusion of occupied land was intended to be additional to the reservation of one-tenth of the land for Maori endowment purposes.<sup>1</sup> As explained in chapter 4, Spain's Nelson award (March 1845) of 151,000 acres to the company included 45,000 acres in the Golden Bay area, from which both tenths and occupational reserves were to be provided. This was accepted by Governor FitzRoy and embodied in the Crown grant of July 1845, which required the exclusion of a tenth of the land and 'All the pas, or burial-places, and grounds actually in cultivation by the Natives' situated within the area granted.<sup>2</sup> In compliance with these arrangements, the deed of sale signed by Golden Bay chiefs in May 1846 stated that when 'the Lands are chosen by the white people there shall be left to the Maories, the pahs, the burial places and the cultivations as awarded by Mr Spain. There shall be also chosen for the Maories certain reserves from the lands surveyed by the Europeans.'<sup>3</sup>

As it turned out, however, the amount of land actually made available to Maori in the Golden Bay area after the finalisation of the company's transaction fell considerably short of what Spain had stipulated. We have mentioned already that the New Zealand Company objected to the commissioner's ruling, and rejected Governor FitzRoy's Crown grant. The new Governor, Grey, did not insist on a full implementation of the award as far as the extent of reserves was concerned. According to William Fox, a company official, Grey thought that only a small area need be reserved.<sup>4</sup> We will look at this more closely later in the chapter, and will also return to it, with regard to the provision of tenths, in chapter 9.

The New Zealand Company and the resident iwi had already discussed the location of reserves in Golden Bay, and areas to be reserved had been identified in parts of the district. In 1847, after Grey became Governor, Donald Sinclair was sent to Golden Bay to put the reserves policy into effect. Later in the chapter, we will describe this early phase of reserve-making, especially the work of Sinclair and the occupation reserves he identified in Golden Bay in 1847. At this point, it is sufficient to note that in 1848 the reserves created in this district during the previous year were included among the specified lands excepted from

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1. Dr Grant Phillipson, *The Northern South Island: Part 1*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1995) (doc A24), p76; see also Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District* (Wellington: Legislation Direct, 2003), pp125–127

2. Alexander Mackay, 'Crown Grant of Nelson to the New Zealand Company', 29 July 1845, *Compendium*, vol1, p69

3. John Tinline, memorandum, [1846], Tinline MS papers 26/1, ATL (Phillipson, *Northern South Island: Part 1*, p102)

4. Mary Gillingham, 'Ngatiawa/Te Atiawa Lands in the West of Te Tau Ihu: Alienation and Reserves Issues, 1839–1901', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A74), pp89–90

Grey's new Crown grant for Nelson and the Wairau. This document referred to the excepted Maori land as 'the pahs, burial places and Native reserves' that had been identified and listed on the attached plans and schedules.<sup>5</sup> As we will explain, however, the making of reserves in Golden Bay was still not complete, for there would soon be another acquisition of land (the Pakawau purchase of 1852) in the north-western part of the district. It would also be found necessary in the mid-1850s to adjust the reserve allocations made by Sinclair in the large area already obtained by the New Zealand Company.

### 7.3.2 Grey's Wairau purchase (1847)

The Crown grant of 1848 is also relevant to lands retained by Maori on the eastern side of Te Tau Ihu. As we explained in chapter 5, in the deal concluded by Grey on behalf of the Crown in Wellington with three Ngati Toa chiefs in March 1847 a considerable area of land in the Wairau area was excluded from the purchase and reserved for continued Maori occupation. The land was to the north of the Wairau Plains. Although the boundaries were described rather imprecisely, it apparently consisted of the area north of the Wairau River from its mouth west to and including the Kaituna Valley, extending north to Pelorus Sound and Queen Charlotte Sound but excluding most of the Tuamarina Valley.<sup>6</sup> Later, Alexander Mackay calculated the area at 117,248 acres, although we should note that some historians have suggested that this figure might have been an overestimate.<sup>7</sup> Although the reserved land had much less potential than the fertile Wairau Plains, being mainly hilly bush country together with some flood-prone flats near the river mouth, it did cover a sizeable area. In explaining why the amount of reserved land in the Wairau was so much larger than the Golden Bay reserves, Grey demonstrated that despite his policies and actions he was not unaware of Maori needs. Maori could not 'be readily and abruptly forced into becoming a solely agricultural people' reliant only on cultivated lands, he wrote, since they also needed larger areas for 'some of their most important means of subsistence' such as gathering fern root, running pigs, catching eels and birds, and fishing.<sup>8</sup>

The Wairau purchase was included in the Crown grant made to the New Zealand Company in 1848. In chapter 5, we examined some aspects of the reserve arrangements that

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5. Alexander Mackay, 'Deed of Grant to the New Zealand Company', 1 August 1848, *Compendium*, vol 2, pp 374–375

6. Alexander Mackay, 'Deed of Cession of the Wairau District', 18 March 1847, *Compendium*, vol 1, p 204. The map attached to the deed is reproduced in the same source, facing page 201.

7. Alexander Mackay, 'Memorandum on . . . Native Reserves in the Southern Island', 15 May 1871, *Compendium*, vol 2, p 265. Two historians comment on the figure: Professor Richard Boast, 'Ngati Toa and the Upper South Island: A Report to the Waitangi Tribunal', revised ed, 2 vols, report commissioned by the Crown Forestry Rental Trust, 2000 (doc A56), vol 2, p 234; David Armstrong, "'The Right of Deciding": Rangitane ki Wairau and the Crown, 1840–1900', report commissioned by Te Runanga o Rangitane o Wairau in association with the Crown Forestry Rental Trust, not dated (doc A80), p 61.

8. Grey to Earl Grey, 7 April 1847 (Phillipson, *Northern South Island: Part 1*, pp 91, 132)

were part of this purchase, but we do not need to go any further into the matter here. As it turned out, the whole question of Maori ownership rights in Te Tau Ihu was revisited in the Waipounamu agreements of 1853 and afterwards. This meant that the arrangements made for the Wairau reserve in 1847 did not endure. The land reserved for Ngati Toa and other iwi in this area was drastically reduced, so that in the outcome finalised in 1856 a much smaller portion of the Wairau land actually remained in Maori possession.

### **7.3.3 Waitohi purchase (1850)**

Before the Waipounamu transactions were initiated, however, a purchase agreement was made for a small portion of the land that up to this time had remained unsold. It was explained in chapter 5 how the need for sea access for the New Zealand Company's Wairau settlement led in 1848 to the identification of Waitohi (now Picton) as a suitable port site. This area of flat land at the head of a harbour, in the inner reaches of Queen Charlotte Sound was inhabited and extensively cultivated by Te Atiawa. It was situated very close to the northern end of the corridor of land that under the terms of Grey's Wairau purchase of 1847 extended north from the Wairau Plains up the Tuamarina Valley between the two parts of the land reserved for Maori. Although willing to conduct land transactions and have Pakeha residents in the area, Te Atiawa preferred to retain Waitohi and make the next bay, Waikawa, available for purchase and Pakeha settlement. The eventual outcome of the dealings between the Crown and Te Atiawa in 1847–50, however, was the purchase of Waitohi for the port and town site. Instead of having their residential and cultivation sites excluded from the purchase and reserved for their use, the people living at Waitohi were asked to move out completely, to Waikawa where a laid-out Maori 'town' had been promised. As we have seen, a greater area of land around Waitohi was included in the purchase than the vendors had originally envisaged and agreed to. It may be that Te Atiawa had at first thought of Waikawa as merely being excluded from the purchase rather than, as it turned out, being purchased along with Waitohi and set aside as a formally designated reserve. We have already made findings on these and other aspects of the Waitohi purchase. Later in this chapter, we will look more closely at the fate of this land at Waikawa on which the people formerly resident at Waitohi established themselves afresh. Some related issues will be examined in chapter 12.

### **7.3.4 Pakawau purchase (1852)**

The purchase of this tract of land lying north of the Golden Bay lands already obtained has been described in chapter 6. Consisting of an estimated 96,000 acres, the land had not been included in the earlier New Zealand Company purchase and lay at the northwest extremity of the South Island, between the Aorere River, the Whanganui Harbour, and Cape Farewell.

In the Pakawau agreement made at Nelson in 1852 with chiefs of Te Atiawa, Ngati Toa, and some other iwi, only a very small area of land was reserved for Maori use.

### 7.3.5 Waipounamu purchase (1853–56)

As we saw in chapter 6, a series of transactions between 1853 and 1856 brought to a conclusion the long and complicated process by which the Crown purchased the rights of the various iwi to almost all land in Te Tau Ihu. The Waipounamu purchase included the Marlborough Sounds (except for Rangitoto), which apart from Waitohi had hitherto remained unsold, and also the extensive Wairau reserve lands that had been excluded from Grey's 1847 purchase. The new purchase was initiated by a deed signed in August 1853 by Ngati Toa in Wellington.<sup>9</sup> Included in this document was an agreement that 'certain places' would be reserved for iwi residing on the land. The Governor would have 'the right of deciding on the extent and position of the lands to be so reserved'. In late 1854, officials began the task of laying off reserves in the lands the Crown claimed to have purchased. They found however that the surveyors were often challenged and obstructed by iwi who had not yet been consulted about the sale of their land, the payment to be made for it or the land they wished to have reserved. Further negotiations and agreements with individual iwi were therefore necessary. These subsequent deeds concerned the extinguishment of iwi claims to large tracts of land across the northern South Island, but most also included agreements for the reservation of specific parcels of land occupied by iwi members.

An early settlement was reached with one group, Ngati Hinetuhi. The Crown's dealings with this hapu of Te Atiawa went smoothly, and the agreement made with them in November 1854 concerning their lands at Port Gore and Queen Charlotte Sound allowed reserves to be laid off at Port Gore in January 1855. Elsewhere the problems encountered were greater and the issues in contention more far-reaching. However, in a series of meetings in various parts of Te Tau Ihu, from November 1855 to March 1856 a number of significant agreements were made with the resident iwi. With regard to Golden Bay and Tasman Bay, reserves already existed in those districts. However, the deeds signed at Nelson in November 1855 and March 1856 by chiefs of Ngati Rarua, Ngati Tama, and Te Atiawa withheld Te Tai Tapu from sale and resulted in Government efforts to respond to simmering dissatisfactions about a number of issues in the Golden Bay area. Some of these issues, which we have referred to in earlier chapters, concerned reserves. In the first three months of 1856, four other deeds were signed by iwi in the eastern part of Te Tau Ihu, resulting in the creation of reserves in the Wairau area, in Queen Charlotte Sound, in the Kaituna and Pelorus Valleys, and in and near Croisilles Harbour.

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9. Alexander Mackay, 'Ngati Awa Deed of Sale', 10 August 1853, *Compendium*, vol1, pp307–308

As far as Maori landownership was concerned, the outcome of the Waipounamu agreements, or more particularly of the deeds signed in 1855–56, had several aspects. It was a slight modification of the situation already existing in the Golden Bay areas obtained earlier by the company and the Crown. It also included the loss of the large Wairau reserve of 1847 and its replacement by two much smaller reserves. Additionally, it included the creation of reserves for the first time in the newly purchased parts of the Sounds, and the retention for the time being of three areas (Te Tai Tapu, Wakapuaka, and Rangitoto) that remained in original Maori title.

### **7.3.6 Arahura purchase (1860)**

The last deed affecting the interests of the iwi of Te Tau Ihu was signed in 1860, as discussed in chapter 6. From March to May of that year, James Mackay conducted negotiations with Ngai Tahu for the finalisation of the sale of the West Coast lands extending from Kahurangi Point, the southern boundary of Te Tai Tapu, down to Milford Sound in the far south. Occupation reserves and endowment reserves were created in this area. One of the signatories to the Arahura deed was a chief of Ngati Apa. Members of this iwi, which had not been recognised in the Waipounamu deeds of 1853–56 and had not been granted any other reserves, received a share of the payment and were listed among the owners of a number of occupation reserves on the Kawatiri (Buller) River. Among the individual Maori listed as owners of many of the West Coast reserves, including those at Kawatiri, were members of three other Te Tau Ihu iwi (Ngati Tama, Ngati Rarua, and Te Atiawa).

## **7.4 THE LEGISLATIVE AND ADMINISTRATIVE BASIS OF RESERVES**

### **7.4.1 Introduction**

Reserves had been created to protect Maori from landlessness, but it is clear that ownership of reserved land was never entirely secure. When legislation was eventually enacted to govern the alienability of reserves, absolute protection against alienation was not offered. Under the Treaty, the Crown was required to act protectively, guarding Maori from transactions to which they did not give full, free, and informed consent, or in which they might unknowingly harm their own interests. This requirement was not easy to fulfil, however, since the context was one of intense Pakeha desire for settlement land. Furthermore, when the Crown adopted a paternalist stance that did not allow for much Maori participation in the making of decisions about their interests, it drew criticism for negating the Treaty's conferral of rights on individual Maori as British subjects. This included the right to sell property if Maori chose to do so. In principle, the owners of reserves enjoyed the freedom to retain their land, but in practice the weight of Pakeha desire for land and of Government

legislation and administration came down on the side of arrangements that facilitated and encouraged the transfer of land out of Maori hands.

As we have shown already in this chapter, reserves in Te Tau Ihu were created in various ways and did not share a common history or status. For many years, occupation reserves had an uncertain legal status. In Dr Grant Phillipson's words:

It was sometimes (but not invariably) held that the Government had purchased this land and returned it to Maori, thus extinguishing the Maori customary title. It could be returned to Maori as land held under Crown grant, but more commonly it was left under de facto customary tenure but without a clear title in terms of British law.<sup>10</sup>

We will show that from the 1850s a variety of ways were developed for the holding of reserve land, all with implications for the reserves in this region and for the Treaty principle of active protection.

#### 7.4.2 Crown granting and individualisation of reserves

Some of the land reserved for Maori in Te Tau Ihu was made over to individual owners under Crown grant, either from the beginning or at the subsequent request of those holding the land. There is evidence that Maori often saw this as desirable, perhaps in order to gain greater security of title, or because it allowed them to benefit from their ownership of the land by leasing or selling it, or because (for a time) it enabled them to vote. Crown grants conflicted with the collective basis of Maori landholding, however, since they could be made only to individuals (one or more). There appears to be very little information about how it was decided who would be named on the grants.

Officials were aware of the possibility that issuing Crown grants would encourage alienation, since land held in this way was not necessarily subject to alienation restrictions. As the letters and reports of James Mackay in the 1850s and 1860s demonstrate, however, officials did not regard this as a danger to be avoided at all costs. In 1861, Mackay wrote that, while there was much interest among the Maori of Golden Bay in having Crown grants issued for their land, he himself was not in favour as it would 'afford too much facility for the alienation of their interest in the land'.<sup>11</sup> A month later, however, when reporting the applications of two chiefs for Crown grants in respect of two Aorere reserves in which they had interests, he supported the applications, since the land was 'nearly useless for native cultivation,' and they had 'abundance of other lands for cultivation, in fact more than they will ever use'. He argued that the issuing of Crown grants would enable the owners to sell

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10. Dr Grant Phillipson, *The Northern South Island: Part 2*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1996) (doc A27), p 2

11. 'J Mackay to Native Secretary', 23 March 1861 (Tony Walzl, *Ngati Rarua Land and Socio-Economic Issues, 1860-1960* (Wellington: Ngati Rarua Iwi Trust, 2000) (doc A50(2)), p 41)

or lease the land, and the resulting revenue would permit them to pay their debts.<sup>12</sup> In 1863, Mackay again reported that many Maori in Te Tau Ihu were anxious to have Crown grants; indeed, he wrote, 'there is nothing the Natives complain more loudly of than not having Crown grants for their lands.'<sup>13</sup> Dr Grant Phillipson and Tony Walzl have clarified that from the late 1850s Mackay was in general opposed to the issuing of Crown grants, but was willing to support it in cases where alienation was unlikely or would not injure the sellers.<sup>14</sup> That Crown grants were in fact sometimes issued, especially in Golden Bay, is shown by the detailed information compiled by Dr Phillipson. Many of these grants were gazetted in 1865, after an investigation of unfulfilled earlier promises, and in most cases were without restrictions on alienation.<sup>15</sup> Mr Alexander's compilation shows that many of the newly Crown-granted lands were indeed subsequently sold, and quite soon, as Mackay had feared would happen. We will discuss this further when we look at the various districts.

The assumption of many Pakeha in the nineteenth century was that the future of Maori agricultural endeavour lay in the individualisation of land holdings on the European model. This assimilationist ethos eventually shouldered aside the awareness of many officials that Maori were not universally rejecting their traditional communally based economy and clamouring for a new individualised system. In Te Tau Ihu, James Mackay was in favour of the subdivision of the reserves and the allocation of the resultant defined parcels of land to particular families and individuals. His report in 1861 spoke of a 'growing desire' among Maori for this to be done, and mentioned their belief that 'although the Reserves are nominally theirs they cannot exercise the right of property over them.'<sup>16</sup> In another part of the South Island at this very time, the Kaiapoi reserve was being subdivided and individualised by the Government at the request of the Ngai Tahu owners.<sup>17</sup> Whether or not the owners of reserve land in Golden Bay were really wishing at this time to move from collective to individual ownership is impossible to establish. The issue does nonetheless point to the difficulty of maintaining a traditional land tenure system on small reserves surrounded by an expanding new economy geared towards individual ownership rights. Mackay himself believed that individualisation:

would have a beneficial effect, as it would break up for ever the system of several families living together in confined and unhealthy Pas. A family living on its own allotment of land would be likely to make greater improvements and advancement than when massed with others as joint cultivators.

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12. J Mackay to Native Secretary, 24 April 1861 (Walzl, *Land and Socio-Economic Issues*, p 11)

13. Alexander Mackay, 'J Mackay to Native Secretary', 3 October 1863, *Compendium*, vol 2, p 139

14. Phillipson, *Northern South Island: Part 2*, pp 8–9; Tony Walzl, *Ngati Rarua Land Issues, 1839–1860* (Wellington: Ngati Rarua Iwi Trust, 2000) (doc A50(1)), p 351

15. Phillipson, *Northern South Island: Part 2*, p 9

16. J Mackay to Native Secretary, 23 March 1861 (Walzl, *Land and Socio-Economic Issues*, p 41)

17. JE Murray, *Crown Policy on Maori Reserved Lands, 1840 to 1865, and Lands Restricted from Alienation, 1865 to 1900*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), pp 15–16

Indeed, he declared, it would be 'one of the best measures, which could be adopted for promoting the welfare of the Native inhabitants of the Middle Island'.<sup>18</sup> That this was also the wish of Maori is questionable, given the difficulties experienced by Mackay when he tried to persuade the owners of the Takaka reserves to follow his advice. Nevertheless, by 1861 some land at Takaka had been subdivided.<sup>19</sup> Some of the reserves that were Crown granted in 1866 and afterwards were divided into partitions for individuals before the grants were issued. Later, the Native Land Court would formalise the individualising of interests in land.

#### 7.4.3 Reserves under the Native Reserves Act 1856

Some reserves in Te Tau Ihu were affected by the New Zealand Native Reserves Act 1856 and its successors. The objective of this legislation as we will explain further in chapter 9, was to put the management of endowment reserves (including the tenths in Nelson and Motueka) on a more formal basis, in particular by placing them under the administration of appointed officials. The relevance of the new Act to occupation reserves in Te Tau Ihu lies in the provision it made for any reserved land over which customary title had not been extinguished to be formally conveyed to the Crown. A 'competent person' would be appointed to ascertain the owners' assent to the application of the Act to their land. An amending Act in 1862 altered the wording of the requirement for the owners' assent, stating that the Governor could by Order in Council declare such assent to have been obtained. In the view of the Wellington Tribunal, this did not mean that the requirement to obtain Maori consent was removed, since the Governor remained bound by section 17 of the 1856 Act to appoint a competent person to ascertain whether or not the owners consented to their land becoming subject to the provisions of the Act. The 1862 Act thus 'imposed a positive duty on the Governor to obtain Maori consent to placing their land under the Act'.<sup>20</sup> When the assent had been gazetted, customary title was deemed to be extinguished, and the land vested in the Crown. The amending legislation of 1862 meant that reserved land to which the Act applied was now placed under the control of the Governor without being formally conveyed to the Crown. All land declared subject to the Native Reserves Act in this way would then be managed by officials as if native title had been extinguished. Occupation reserves that were not made subject to the Act would of course continue to be managed by their owners.

There was no guarantee that reserves placed under the native reserves legislation in this way would be retained in Maori ownership. There was a measure of protection, however, in that they could not be alienated (leased for more than 21 years or sold), except with the Governor's assent. The effect was that they could freely be made available for leases of up to

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18. Alexander Mackay, 'J Mackay to Native Secretary', 3 October 1863, *Compendium*, vol 2, p 139

19. Walzl, *Land and Socio-Economic Issues*, pp 14, 40

20. Waitangi Tribunal, *Whanganui a Tara*, p 290

21 years, with the income to be applied to the benefit of the owners, and, with the Governor's consent, could be leased for longer periods or sold outright. The establishment of the Native Land Court in 1862 had further implications for the alienability of reserves, including those vested in the Crown under the native reserves legislation, and we will discuss this shortly.

Officials administered the reserves placed under the Native Reserves Acts of 1856 and 1862, and there was no provision for the owners' input into the management of the land or the allocation of the revenue it produced. The Native Reserves Act of 1873 did make such provision, but this Act remained inoperative. In 1882, a new Native Reserves Act vested reserves that had come under the Acts of 1856 and 1862 in the Public Trustee (in 1920, they were transferred to the Native Trustee, later renamed the Maori Trustee). The Act of 1882 provided for other reserves that were still in customary title to be brought under the native reserves legislation if the owners applied to the Native Land Court or consented to the Public Trustee's application to the Native Land Court for that purpose.

The 1882 Act also increased the length of time for which land could be leased, extending it to 30 years for agricultural purposes and three 21-year terms (with automatic right of renewal within this period) for building purposes. In 1887, new legislation (the Westland and Nelson Native Reserves Act) was motivated by concerns raised by tenants of the Grey River reserve in Westland. This location is beyond the bounds of Te Tau Ihu, but the legislation included within its scope a number of reserves in the area we are concerned with. Under the new law, restrictions on the duration of leasing were removed altogether: all leases were now to be for 21 years and perpetually renewable.

As the years passed a proportion of occupation reserve land in various parts of the region came under the native reserves legislation. With regard to Marlborough, for example, it was reported by Alexander Mackay in 1873 that of a total of 21,414 acres of reserved land in that province, 522 acres (evidently all in the Pelorus area) were under the Native Reserves Act. This seems a small area, but apparently it was the best land, for 'a large proportion' of the rest was described as 'hilly and worthless land'.<sup>21</sup> More land was vested under the Act later, in Marlborough, Nelson, and on the West Coast, but the disadvantages of having this done were evidently recognised by some owners at least. Reporting on his meeting with Maori at Motupipi in 1860, James Mackay wrote: 'I find that the bringing [of] Reserves under the Native Reserves Act is a very unpopular measure with the Natives of this Island – they say the Government either get all the rent, or do not let them to their wish'.<sup>22</sup> Nevertheless, vesting in the Crown was eventually a prominent feature of reserves management, as we will demonstrate in later sections. It should be noted that there is little or no evidence about

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21. Alexander Mackay, 'Native Reserves, Middle Island', 30 July 1873, AJHR, 1873, G-2A, p 2

22. J Mackay to Native Secretary, 13 August 1860, MA-Collingwood 2/1, outwards letterbook, 1858–1863, ArchivesNZ (Walzl, *Land Issues*, p 350). Alan Ward states that the new Act of 1862 was based on Mackay's suggestions: Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand* (Auckland: Auckland University Press, 1973), p 151.

the circumstances in which individual reserves were placed under the native reserves legislation.

We will review the history of reserves administration under the Act of 1856 (and the legislation that succeeded it) in chapter 9. There we will also point to the deficiencies of this management, as far as the interests of the owners were concerned. Our discussion of these matters in chapter 9 applies not just to the tenths, which are the main focus of that chapter, but also to the occupation reserves that are the subject of the present chapter – or at least to those that were vested in the Crown under the native reserves legislation. Later in this chapter we will show also that the protection against alienation offered by this vesting was significant only until the end of the century, for many sales occurred from the 1890s onwards. Some were kept, however, and in 1977, following the Sheehan commission's inquiry into Maori reserved land in New Zealand as a whole, the reserves in Golden Bay and on the Abel Tasman coast that remained under trust management at that time were returned to Maori control. They were transferred not to the descendants of their original owners, however, but to the new Wakatu Incorporation. Although the people with interests in these reserves are shareholders in the incorporation, they therefore still exercise only indirect control of the reserves in question. (These reserves consist of six blocks with a total area of about 560 acres, as well as another block of 91 acres that was purchased by the incorporation from the Maori Trustee in 1985.) We discuss these matters more fully in chapter 9. A similar development occurred on the West Coast where reserves were transferred to the Mawhera Incorporation. We examine this issue later in the chapter.

#### **7.4.4 Native Land Court**

The bulk of the land in Te Tau Ihu had been alienated to the Crown before the Native Land Court was established in the 1860s. Only three blocks in this region remained under Maori customary title at that time, together with the occupation reserves being discussed in the present chapter. The first Native Lands Act, that of 1862, put all lands over which native title had not been extinguished under the jurisdiction of the Native Land Court. From this time onwards, the owners of Maori land, including reserves, were obliged to go before the court, have their ownership rights determined, and obtain a certificate of title before they could legally lease or sell their holdings. From the beginning of the Native Land Court system, restrictions on alienation could be placed on the titles decided upon by the court. This provision was repeated in various forms in successive Native Land Acts, which usually prohibited any form of alienation other than a lease of not more than 21 years. The Native Lands Act 1866 specified the categories of reserve to which the land court legislation would apply. The categories included those vested in the Crown under the native reserves legislation, as well as the larger and hitherto unprotected category of lands reserved in deeds of sale to the Crown but not covered by the Native Reserves Act. Whether vested in the Crown or not, all

reserves were in the formula already used in the Native Reserves Act of 1856 and the Native Lands Act of 1865. They were made inalienable by sale or by lease for a longer period than 21 years except with the assent of the Governor in Council. The new Native Land Court now had a role in the making of decisions about the alienability of reserves. The Act required the court to append a report to every certificate of title as to whether or not it was proper to restrict alienability, and alienation restrictions were to be attached to the certificate of title by the Governor. In the thinking of the time, this would ensure that Maori would not be able to dispose of all their lands and become a burden on the Government.

In the 1880s and 1890s, the court entered Te Tau Ihu for the first time. As elsewhere in the country, it investigated the customary ownership of particular blocks of land, determining relative interests and apportioning these shares to named individuals. Another function of the Native Land Court was to determine succession to the interests thus defined. Traditional communal title was thus individualised, or rather, in Professor Alan Ward's words, 'pseudo-individualised', since an individual's new legal rights in land were not recorded or defined on the ground until physical partitioning took place, and not always then if the partitions were large ones. All that an individual owner possessed, in other words, was a paper share, sometimes differentiated in proportional terms but often just an equal, undivided, and otherwise undefined share that did not amount to ownership of an actual piece of land.

In 1883, the Native Land Court exercised its jurisdiction over the three unsold blocks in customary title (Te Taitapu, Rangitoto, and Wakapuaka), and in 1892 it investigated ownership of the Nelson tenths. Our coverage of these inquiries is in chapters 8 and 9. In the present chapter, we are concerned with the occupation reserves, which passed through the land court in 1889 and 1892. The Native Equitable Owners Act 1886 had given the court jurisdiction over any Maori reserve in the South Island if this was authorised by an Order in Council. An Order in Council dated 5 February 1889 gave the court power to exercise its jurisdiction over a large number of blocks of reserve land in both Nelson and Marlborough.<sup>23</sup> In that year the court began to investigate occupation reserves in the region. The presiding officer was Alexander Mackay, who had become a judge of the Native Land Court in 1884. This category of reserves included both those vested in the Crown under the Native Reserves Act 1856 and its replacement legislation, and those that had not been so vested. It also included those reserves that had been Crown granted to more than one Maori. It might have been expected that Crown granting would confer on land to which it was applied a status identical to that of blocks Crown granted to settlers, and at first it did. In 1873, however, the Native Grantees Act gave the Native Land Court jurisdiction, in respect of succession and partition, over this category of Maori land also.<sup>24</sup> An example from Te Tau Ihu is in

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23. 'Order in Council Relating to Reserves Subject to the Jurisdiction of the Native Land Court', 5 February 1889, *New Zealand Gazette*, vol 1, no 7, pp 144–145

24. Dr David Williams, 'The Crown and Ngati Tama ki te Tau Ihu: An Historical Overview Report', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A70), p 127

Aorere, where in 1883 Huria Matenga was granted succession to section 16, a reserve that had been Crown granted to two named owners in 1866.<sup>25</sup>

Later in the chapter, we will mention the investigations and decisions of the court with respect to the title of some of the reserves in various parts of Te Tau Ihu. At this point, however, we emphasise the role of the Native Land Court in the diminution of remaining Maori land holdings. This is well known for the North Island, where much land was still in Maori ownership when Crown purchasing ceased and the land court began its work in the 1860s. When the court commenced its operations in Te Tau Ihu, however, most of the land had already been alienated by Crown purchase, and the impact of the court on the small land base that remained was therefore all the more significant.

The land court's role in the fragmentation of ownership rights appears to have been a major factor in the amount of alienation that occurred. The process was of concern to many of the claimants who appeared before us. Alexander Watson explained for Te Atiawa that their reserves had been communal in nature from 1856 to 1889. In his view, many whanau and hapu had rights in these reserves, with the power of alienation restricted to the leading chiefs of the hapu.<sup>26</sup> 'These lands were for all Te Atiawa who could whakapapa to them. For almost thirty years [1856 to 1889] there had never been a problem.'<sup>27</sup> But individualisation and subdivision:

disheartened many of my people. The consequences have been severe. Giving title to the blocks meant that owners could sell them. This is evident in the information contained in this brief. Communal interests were no longer represented. It was easy for sales to take place. The Crown, as promised under the Treaty of Waitangi, did not protect our rights as Te Atiawa. The lands became individualised and there were no longer any rights for iwi.<sup>28</sup>

Anthony Keenan expressed the claimants' concern about the subsequent sale of reserves:

Even though this land at Ngakuta [a reserve near Picton] was set aside for the original owners and for us, their descendants, we have no land left in the ownership of the descendants of the original owners today. What is most upsetting to us is how quickly the land went from us. We lost all this land by 1910.<sup>29</sup>

The court's rules of succession meant that titles became increasingly crowded: interests became uneconomic and the owners were more and more disconnected from their land, so that sale became almost the only option. Margaret Ward-Holmes Little of Te Atiawa gave us an example from the Pariwhakaoho lands:

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25. Miriam Clark, 'Land Alienation of Ngati Tama Manawhenua ki te Tau Ihu, 1855-1999', report commissioned by the Ngati Tama Manawhenua ki te Tau Ihu Trust, 1999 (doc A49), p 22

26. Alexander Watson, brief of evidence on behalf of Te Atiawa, 30 January 2003 (doc 11), p 25

27. Ibid, p 31

28. Ibid, p 32

29. Anthony Keenan, brief of evidence on behalf of Te Atiawa, January 2003 (doc 17), p 9

Block 101 [of 154 acres] was supposed to be granted for all the families, but the amount granted was so small that the economic reality was that the land wasn't even adequate enough to sustain one family, let alone the many families that now descend from the original owners. This was clearly illustrated in 1965 when lot 101 was sold, there were 156 owners to 154 acres.<sup>30</sup>

Where such a situation did not lead to sales, dislocation persisted. Amoroa Luke, who grew up on the Wairau reserve, saw the problem for Ngati Rarua at first hand:

Another problem was that as the older people died and left their interests in lands to their families, there became more people involved in the land. So younger people weren't able to get a building section. As time went on all the family became involved in each piece of land and so it just grew. We had so many people in different blocks. There is still a lot of unresolved issues. People believe they have land at the Pa but they don't know where it is.<sup>31</sup>

One such person is Makere Love Reneti, who gave evidence for Ngati Toa, explaining to the Tribunal:

We also have family land on both my mother's and father's sides in the Wairau reserves. I know that because my cousin, the late Frank Hippolite, showed me a list of named owners and our family was on it but that's the most connection I've ever had with that land.<sup>32</sup>

Laurelee Duff, in her brief of evidence for the Ngati Tama claim, told us how her large whanau took an alternative course. They went through what was effectively a voluntary consolidation of their interests in the Golden Bay reserves so that a small number of the whanau would have enough land to operate as farming units. In many cases, this was not possible, however, and of course the cost was that for some family members there was a severance from their turangawaewae and a need to migrate from the district.<sup>33</sup> Furthermore, the restrictions on alienability that we have described were increasingly ineffective in the period when the Native Land Court was active in Te Tau Ihu. From the 1880s, rather than being strengthened, the restrictions on the alienation of Maori land were progressively weakened. Power was given to the Governor and the Native Land Court to remove them, with the role of the owners in this decision gradually decreasing. The concept of inalienability was more and more under threat in the 1880s and 1890s as changes in the law affected the provisions

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30. John Ward-Holmes and Margaret Ward-Holmes Little, brief of evidence on behalf of Te Atiawa, [2002] (doc G8), p 4

31. Amoroa Luke, brief of evidence (no 2) on behalf of Ngati Rarua, 11 August 2000 (doc A89), p 10

32. Makere Reneti, brief of evidence on behalf of Ngati Toa, 9 June 2003 (doc P13), pp 6–7

33. Laurelee Duff, brief of evidence on behalf of Ngati Tama, 12 February 2003 (doc K17). On the same lines, see Margaret Louise Ward-Holmes Little and John Tahana Ward-Holmes, brief of evidence on behalf of Ngati Tama, 12 February 2003 (doc K19), pp 3–4.

for restricting alienation.<sup>34</sup> This is a matter of particular grievance to the claimants, many of whom drew the Tribunal's attention to the failure of this supposed protection to prevent the actual alienation of their lands.<sup>35</sup>

In respect of reserves vested in the Crown (or rather, from 1882, in the Public Trustee), protection against alienation was diminished in 1882. The new Native Reserves Act of that year allowed the Public Trustee, or the owners of the land, to apply to the Native Land Court to have any restrictions on alienability removed. Admittedly it was stipulated that the court had to be satisfied that 'amply sufficient' land was retained 'for the future wants and maintenance of the tribe, hapu, or persons to whom the reserve wholly or partly belongs,' but the Act increased the risk that the land would be sold. In 1895, the Native Reserves Act Amendment Act enhanced the role of the Public Trustee and reduced the involvement of the Native Land Court in the administration of reserves vested in the Public Trustee, including the application and removal of restrictions on alienation. For other land, including reserves not vested in the Public Trustee, the Native Land Court Act of 1894 reduced the role of the owners in the removal of restrictions. The court could remove restrictions if at least one-third of the owners agreed, although restrictions imposed prior to 1888 could be removed only by the Governor on recommendation of the court.

The comprehensive new Native Land Act of 1909 'swept away all the previous web of restrictions on alienation of Maori land.'<sup>36</sup> The Maori land boards set up in 1905 played a central role in the new system, but since the South Island had no land board until 1914, some parts of the Act passed in 1909 were not applicable in Te Tau Ihu for several years. With regard to sales to private purchasers, the Act stated simply that 'a Native may alienate or dispose of land or any interests therein in the same manner as a European'. The safeguards against inappropriate sales were now to be found in owners' meetings and procedural checks rather than in title restrictions. Land with fewer than 10 owners could be sold as if it were European land, provided that the sale was 'confirmed' by a Maori land board. Before issuing a certificate of confirmation, the board had to be satisfied that the transaction had been fully understood, was not contrary to 'equity or good faith' or the interests of the owners, would not render anyone landless, and resulted in an adequate payment. Land owned by more than 10 owners could be alienated only by a meeting of assembled owners. The quorum at such a meeting was five owners 'present or represented', irrespective of the extent of their shareholding. 'Given that blocks of land could have hundreds of owners,' comments Bennion:

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34. Alan Ward, *National Overview*, 3 vols (Wellington: GP Publications, 1997), vol 2, p 275. For the subject generally, see Murray, *Crown Policy*; David Williams, 'Te Kooti Tango Whenua': *The Native Land Court, 1864-1909* (Wellington: Huia Publishers, 1999), pp 63-64, 134-135, 209-210, 215-216, 275-283.

35. See, for example, Keenan, p 11

36. Ward, *National Overview*, vol 2, p 380

the quorum of five owners, or their representatives, was very low. Resolutions to alienate were passed if those voting in favour of the alienation owned more shares in total in the land than any person voting against. In other words, one or a few large shareholders could carry a matter against the wishes of many smaller shareholders.<sup>37</sup>

Agreements to sell could be confirmed when it had been ascertained that the transaction had been made without fraud, that the sale would provide a proper return to the sellers, that no individuals were impoverishing themselves as a result of the transaction, and that minority opposition to the alienation was properly recorded. Responsibility for making these checks lay with the Native Land Court and Maori Land Boards. Provision was made for the partitioning out of the interests of any owners dissenting from the decision to alienate.<sup>38</sup>

It is clear, then, that the legislation pertaining to Maori land did not lack provision for limiting the sale of reserves. Mechanisms always existed for ensuring that Maori owners retained enough land on which to live and maintain themselves. Quite apart from the question of whether these safeguards were effective, however, it is noteworthy that the laws were usually very vague about how much land needed to be retained. Legislation in 1870, for example, stated simply that sellers must have sufficient land left for their support. The Native Land Act of 1873 (only partly implemented and soon superseded) was notable for a rare quantification of the amount of land needed: the area to be considered sufficient was an average of not less than 50 acres per head for every man, woman, and child. The Native Reserves Act of 1882, as we have said, simply required that ‘amply sufficient’ land was retained ‘for the future wants and maintenance’ of reserve owners. Other Maori land legislation in the 1880s and 1890s usually did not go beyond stipulating that sellers must have other land sufficient for their maintenance and occupation. This requirement was expressed much more specifically in 1893, however, in the Native Land Purchase and Acquisition Act. The Act defined ‘sufficient land’ to mean at least 25 acres of first class land per head, 50 acres of second class land per head, and 100 acres of third class land per head. This formula was repeated in the Maori Land Settlement Act of 1905, but in 1909 the new Native Land Act simply required an inquiry to ensure that no Maori became ‘landless’ by selling land. A ‘landless’ Maori was defined to mean one whose total interests in Maori freehold land were ‘insufficient for his adequate maintenance’; no particular acreage was specified.<sup>39</sup>

Despite these safeguards, one of the outcomes of the new Maori land legislation of 1909 was the sale of much undeveloped Maori land in the early years of the twentieth century – including, in Te Tau Ihu, many reserve lands. In Professor Ward’s opinion, the mechanisms

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37. Tom Bennion, *The Maori Land Court and Land Boards, 1909 to 1952*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), pp 4–5

38. *Ibid*, pp 3–7

39. Williams, *‘Te Kooti Tango Whenua’*, pp 214–215, 269–274

set up in 1909 for preventing land loss were inadequately implemented.<sup>40</sup> With reference to the whole history of land transactions in Te Tau Ihu after the creation of reserves, Dr Morrow aptly writes: ‘Over the years, numerous legislative measures to restrict alienation of reserves were progressively eroded. The existence of an elaborate judicial and governmental structure ostensibly dedicated to overseeing and implementing policies designed to regulate and restrict reserve alienation did not prevent huge quantities of reserves being sold or taken.’<sup>41</sup>

More recent developments are also relevant to our discussion here. As we will explain again in chapter 9, in 1955 the Maori Reserved Land Act empowered the Maori Trustee to compulsorily acquire interests deemed to be uneconomic. This was a provision that soon resulted in a significant flow of shares away from the owners, and opened the way for the sale of entire reserves or subdivisions. In 1967, the Maori Affairs Amendment Act authorised the Maori Trustee to sell reserves to lessees. This too resulted in the alienation of some of the reserved land that had been vested in the Crown under the native reserves legislation. Sales ceased only with the Maori Purposes Act of 1975.

Reporting in 1975, the Sheehan commission examined the reasons why the owners of reserves seemed so little concerned to retain their interests. The commissioners found that these reasons included the lack of a voice in the management of the reserves, the perpetual renewing of leases, and the insignificant returns received.<sup>42</sup> The faults identified in the administration of the reserves led in October 1975, in the Maori Purposes Act, to changes in the law relating to Maori reserves (which we will discuss in chapter 9). In Te Tau Ihu, an important outcome was the transfer of some of the occupation reserves that were still under the Maori Trustee, along with the tenths reserves, to the owner-controlled Wakatu Incorporation established in 1977. On the West Coast, similarly, the occupation reserves that had been under the Maori Trustee were transferred, together with the ‘schedule B’ endowment reserves, to the new Mawhera Incorporation.

#### 7.4.5 Purchase of land by Maori

Also to be noted alongside the history of reserves is the fact that some land was brought into Maori ownership through purchase: portions of the land transferred to the Crown not long before were purchased from the Crown by Maori. In Te Tau Ihu, a regulation made in 1856 by the Nelson Provincial Council allowed for Maori residing in districts sold to the Crown to purchase land there (initially at 10 shillings an acre).<sup>43</sup> A particular instance

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40. Ward, *National Overview*, vol 2, pp 392–393

41. Dr Diana Morrow, ‘A Legacy of Loss: Ngati Awa/Te Atiawa Reserves in Queen Charlotte Sound, 1856–c 1970’, report commissioned by the Crown Forestry Rental Trust, 2000 (doc D6), p 37

42. ‘Report of Commission of Inquiry into Maori Reserved Land’, AJHR, 1975, H-3

43. David Alexander, ‘Reserves of Te Tau Ihu (Northern South Island)’, report commissioned by the Crown Forestry Rental Trust, 1999 (doc A60), vol 1, p 43

of land buying by Maori was the purchases made by Ngati Toa chiefs. As we explained in chapter 6, 15 of them were each offered, as an inducement in the Waipounamu sale of 1853, scrip to the value of £50 for the purchase of Crown land anywhere in the country. Eight of them used their scrip to buy land in Nelson province.<sup>44</sup> With regard to other Maori purchases, we have already, in chapter 6, referred to the wider context in which the Governor had lowered the price of Crown land in most parts of the colony to 10 shillings an acre in 1853. We also quoted Grey's statement that after he returned to New Zealand as Governor in 1861 he heard complaints by would-be Maori purchasers that they had been prevented from buying Crown land because some Pakeha settlers did not want Maori neighbours. We referred too to James Mackay's account of the difficulties he had encountered in trying to assist Maori purchasers in Te Tau Ihu. The example he gave was the case of Rangitane and Ngati Rarua who wanted to buy bush land near Tuamarina in 1860 but were obstructed by Lands Department officials.<sup>45</sup> In this particular case the reason for purchase was said to be the lack of timber on the Wairau reserve, and deficiencies of this kind, not to mention the smallness of the reserves in general, probably help to explain why some Maori tried to find land to supplement the reserves. In 1855, John Tinline recommended that such purchases be encouraged in order to help allay the dissatisfaction aroused by the smallness of the reserves.<sup>46</sup>

Mr Alexander's work has enabled us to see how much land was actually purchased in this way, and what happened to it. In later sections of this chapter, we will show that Maori purchasers in most parts of Te Tau Ihu took advantage of this provision to buy back a certain amount of land after the sales of the 1840s and 1850s. However, other than noting this category of land in each of the districts we cover, and pointing to the possibility that it was purchased in an effort to offset the inadequacy of the Crown's reserve-making, we will not be including it in our discussion of the reserves proper.

## 7.5 THE RESERVES CREATED IN TE TAU IHU BETWEEN 1847 AND 1860

### 7.5.1 The Wairau

#### (1) Introduction

The reserves established in Grey's purchase of 1847 were superseded by the Waipounamu transaction. The reserves actually created for Maori in the Wairau area were the outcome of the agreement signed by McLean and Rangitane in February 1856, as part of the Waipounamu series of transactions.<sup>47</sup> These Wairau reserves turned out to be far smaller than

44. Alexander Mackay, 'Land Purchases, Middle Island', 1 October 1873, AJHR, 1874, G-6, p 3

45. J Mackay to Native Secretary, 3 October 1863, *Compendium*, vol2, p 138

46. Tinline to commissioner of Crown lands, Nelson, 18 December 1855, *Compendium*, vol1, p 296

47. Phillipson, *Northern South Island: Part 1*, pp174-178, 239; Armstrong, 'Right of Deciding', pp104-117, 126-128

what had been reserved in 1847. As we explained in chapter 6, only two reserves (the Wairau and Pukatea) were made in 1856, along with 50-acre blocks promised to two chiefs of other iwi. Maori in the Wairau area had been led to believe that ‘good large reserves’ (McLean’s words) would be created for them. McLean had in mind a reserve ‘about 10 miles long by 2 miles wide’, consisting of land at the Wairau River mouth and continuing north into the coastal hill country towards Port Underwood.<sup>48</sup> Dr Phillipson says that this reserve would have been about 13,400 acres in area.<sup>49</sup> The document signed by Rangitane was not specific on the matter of reserves, however, referring merely to ‘the places set apart for us by the Government as residences and cultivations’, and officials lacked precise documentation of what had been agreed upon.<sup>50</sup> The evidence later located by historians shows that in the aftermath of the agreement McLean had second thoughts, apparently prompted by the provincial authorities in Nelson, and departed from his original concept of a reasonably large reserve. The land was finally surveyed in 1862. Officials then understood it to be confined to a block of less than 800 acres on the north bank of the Wairau River, near its mouth, and a fishing reserve of about 200 acres at White’s Bay (Pukatea) on the hilly coast north of the river flats. Even after protests brought about an adjustment to the size of the Pukatea reserve, its area when finalised in 1865 was only 2169 acres (later resurveyed as 2161 acres). Furthermore, although we do not know exactly how this arrangement was discussed with the three resident iwi, both reserves were to be shared by Rangitane with Ngati Rarua and Ngati Toa. In David Armstrong’s words, the reserves, ‘thanks to McLean’s machinations, never amounted to anything like the extent agreed upon in terms of acres, nor were Rangitane granted exclusive ownership of them.’<sup>51</sup>

### (2) *The Wairau reserve*

As the surveyor Charles Ligar observed in 1847, the broad lower reaches of the Wairau Valley were ‘well adapted for agriculture’. He also noted, however, that ‘the lower part of the Wairau near the sea is subject to floods in the winter, and will require extensive draining.’<sup>52</sup> It was in this low-lying riverside area that the Wairau reserve was created in 1856. Originally estimated at 770 acres, it was later found, on being surveyed in 1894, to be 960 acres in area (from which 26 acres were excluded for roads, leaving 933 acres). The wetlands and river gave continued access to traditional resources, but in other respects the allocated land was of low value. Alexander Mackay wrote in 1865 that the reserve had ‘barely 50 acres suitable for cultivation, the rest consist of a deep swamp. The amount of good land in this block is so

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48. McLean, journal, 29, 30 January 1856 (Phillipson, *Northern South Island: Part 1*, pp175–176)

49. Phillipson, *Northern South Island: Part 1*, p175

50. Alexander Mackay, ‘Receipt for £100 paid to Rangitane’, 1 February 1856, *Compendium*, vol1, p 313

51. Armstrong, ‘Right of Deciding’, p116

52. CW Ligar to Lieutenant-Governor, 8 March 1847, *Compendium*, vol1, p203

very limited that many of the resident Natives have purchased land from the Government.<sup>53</sup> (We refer to these purchases below.)

As well as having to do their best with land that was mostly of poor quality and periodically suffering the effects of river flooding, the three iwi sharing the reserve experienced tensions between them. There is evidence of such conflict in the 1860s.<sup>54</sup> During the next few decades, Rangitane complained several times about having to share their two reserves, which in their understanding had been promised to them alone, with the other iwi.<sup>55</sup> In their petition of 1889, which we refer to again below, they asked for a reconsideration of the allocation of the Wairau reserves, which they claimed had been ‘wrongly awarded to other tribes’ (they also stated that their elders had wanted a reserve of 60,000 acres).<sup>56</sup> Disputes about the occupation and use of the land inhibited its economic development, and led the owners to favour partitioning.<sup>57</sup> During our hearings in Blenheim, Mr Armstrong explained that Rangitane put their land through the individualising processes of the Native Land Court since that was the only way the disputes between the three iwi could be resolved and the land utilised.<sup>58</sup> Similarly, Mr Walzl expressed his opinion that the desire for partitioning probably arose as a desperate search for a solution to the troubles between the three iwi.<sup>59</sup>

James Mackay marked out boundaries defining the shares of the three iwi in 1862. When the land went through the Native Land Court in 1889, it was awarded to members of the three iwi, with 300 acres going to Rangitane, 300 to Ngati Rarua, and 170 to Ngati Toa (later altered, after surveying increased the acreage, to 317, 369, and 215 acres respectively).<sup>60</sup> The court, presided over by James’s cousin, Judge Alexander Mackay, identified 96 original owners who had survived, as well as the descendants of those who had died, making a total of 117. Not only were these interests very small (fewer than eight acres per person), but the division of the land proved to be highly contentious. Rangitane objected to the judge’s proposal, arguing that ‘they were entitled to abide by the division of the reserve made by Mr James Mackay in 1862.’<sup>61</sup> This earlier allocation had been more favourable to them, and Mr Armstrong suggests that the relatively large areas allotted then to Rangitane and Ngati Toa had been influenced by Mackay’s feeling that Ngati Rarua possessed land in other places and consequently did not need large Wairau reserves. Rangitane’s earlier expectation of

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53. Alexander Mackay to Native Minister, 6 December 1865, *Compendium*, vol 2, p 312

54. Armstrong, ‘Right of Deciding’, pp 119–125; Walzl, *Land and Socio-Economic Issues*, pp 32–34, 64–66

55. Armstrong, ‘Right of Deciding’, pp 138–139, 141

56. ‘Petition No 24/1889 of Teoti Makitonore and 10 Others (No 1)’, 22 August 1889, AJHR, 1889, 1–3, p 7

57. Armstrong, ‘Right of Deciding’, pp 150–153; Walzl, *Land and Socio-Economic Issues*, pp 109–110, 201

58. David Armstrong, under cross-examination, eleventh hearing, 5–9 May 2003 (transcript 4.11, p 83)

59. Tony Walzl, under cross-examination, first hearing, 21–25 August 2000 (transcript 4.1, p 203)

60. For the tenure and alienation history of the Wairau reserve, see Alexander, ‘Reserves of Te Tau Ihu’, vol 1, pp 51–113, map facing p 50; Armstrong, ‘Right of Deciding’, pp 125, 174–180; Walzl, *Land and Socio-Economic Issues*, pp 32–34, 110–113, 148, 178–181.

61. Native Land Court, Nelson, minute book 2, 29 March 1889, fols 1–2; see also Armstrong, ‘Right of Deciding’, p 174

exclusive ownership of a much larger reserve explains their dissatisfaction with the late nineteenth century arrangements that further disadvantaged them. After hearing evidence about the 1862 agreement and the subsequent history of the land, the court proceeded with the apportionment initially proposed. This left Rangitane feeling highly aggrieved. Later in 1889, Teoti Makitonore and others petitioned twice for a rehearing. The Native Affairs Committee referred these petitions to the Government for inquiry, initially without result.<sup>62</sup> The same petitioner asked again for a rehearing in September 1890, without success. In 1891, he wrote (with one other) to Judge Mackay asking again for a rehearing, and in 1892 he made this petition yet again. Although a rehearing was granted soon afterwards, through the Native Lands Claims and Boundaries Adjustment and Titles Empowering Act 1894, the Native Appellate Court in September 1895 merely upheld the previous judgment, apparently without hearing further evidence. Final subdivision arrangements were not made until 1899.<sup>63</sup>

Judge Mackay had noted in 1892 that it would be difficult to partition the reserve into three discrete iwi blocks. This was so 'due to the uneven character of the soil which renders a large Portion of the Reserve unsuitable for cultivation and in addition to this it will probably be found difficult to obtain the consent of those who have the scattered cultivations to shift them to another locality'.<sup>64</sup> In 1899, complicated exchanges were necessary, as well as the relocating of houses and other improvements. All of the land was partitioned, except for a 'drain reserve' of 27 acres, and 'commonages' held in trust for communal purposes by three named trustees. The 'commonages' were totalling about 50 acres and described as 'the wet parts' by the Native Land Court in 1889. They were scattered areas along the riverbank. Later, in 1927, the interests in these blocks were allocated by the court to individual owners, amidst disputes with the Crown over accretions caused by changes in the course of the river, and whether the drain reserve was Crown land or Maori land. The Native Appellate Court decided against the Crown in respect of the drain reserve, and it is still Maori freehold land.

The Wairau reserve remained largely intact in Maori ownership until well into the twentieth century. A few small river board and other public works purchases and takings for drainage and flood protection purposes occurred between 1918 and 1932. A little over 20 acres was lost in this way. The largest alienation was the purchase of one of the 'commonages', the 12-acre Wairau D, by the river board in 1922. The first significant sale to a private buyer was of 12 acres in 1927. Although the Wairau owners had retained most of the land up to this point, they found it was difficult to make profitable economic use of it. Serious flooding occurred regularly in the late nineteenth century, and continued and even worsened in

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62. 'Petition No 24/1889 of Teoti Makitonore and 10 Others (No 1)', 22 August 1889, AJHR, 1889, 1-3, p 7; 'Petition No 25/1889 of Teoti Makitonore and 10 Others (No 2)', 22 August 1889, AJHR, 1889, 1-3, p 7

63. Armstrong, 'Right of Deciding', pp 175-180

64. Alexander Mackay, memorandum, 5 July 1892 (Boast, 'Ngati Toa and the Upper South Island', vol 2, p 295)

the twentieth century.<sup>65</sup> In 1898, in a letter from Ngati Rarua and Rangitane requesting the Governor for help in arranging flood protection, the petitioners described their plight. The floods:

overwhelm us every year[,] very often when we have just put in our crops . . . [the river floods] and washes all the grains out of the ground and very often the crops are just ready to gather in when a fresh comes over the land and destroys the grains completely thereby causing great distress among our families.<sup>66</sup>

‘One thing is certain’, wrote an official at this time, ‘that the Maoris cannot obtain a living on this reserve if they continue to suffer the losses they have met with for the last few years.’<sup>67</sup> The problem of recurring inundation was one of the reasons for the request of the owners for inclusion in the Government’s native land development scheme, which operated in the Wairau reserve from 1931 until its dismantling began in the 1950s (we discuss this in chapter 10). During this period of partnership with the Crown, however, flood protection measures were ineffective, and the land development scheme was not a success.<sup>68</sup>

It was only after the termination of the development scheme in the 1950s that alienation increased. More than 130 acres were sold between 1955 and 1963, and there were further sales in the 1980s and 1990s, but most of the land has been retained. Mr Alexander’s figures show that altogether 225 acres (22.1 per cent of the reserve) have been alienated, leaving 794 acres (77.9%) still in Maori ownership.<sup>69</sup>

### (3) *Pukatea reserve*

Situated just north of the Wairau delta in the hills that rise abruptly on the edge of the river flats, the Pukatea reserve was comparatively large (2161 acres). It was mostly steep land, however, and covered with bush and scrub. Unlike the Wairau flats, it was thus almost completely unsuitable for cultivation. It extended inland and along the rugged coast from a small sandy bay (White’s Bay), where there were a few acres of flat land (see fig18). The Crown bought two acres in the bay in the 1860s for a cable station; this land is now part of the recreation reserve mentioned below.<sup>70</sup> Pakeha farmers from as early as the 1860s leased the remainder of 2159 acres, although it was clearly of limited value even for pastoral purposes. Alexander Mackay noted in 1887 that Pukatea was ‘of inferior quality and unfit for cultivation.’<sup>71</sup>

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65. Armstrong, ‘Right of Deciding’, pp 143–154; David Armstrong, “‘Living in Uncertainty’: Rangitane in the Twentieth Century”, report commissioned by Te Runanga a Rangitane o Wairau, 2002 (doc M14), pp 16–40

66. Petition from Ngati Rarua and Rangitane, 1898 (Armstrong, ‘Right of Deciding’, p 151)

67. Armstrong, ‘Right of Deciding’, p 152

68. Armstrong, ‘Living in Uncertainty’, pp 41–92; Walzl, *Land and Socio-Economic Issues*, pp 283–315, 321–365, 376–381, 383–384

69. Alexander, ‘Reserves of Te Tau Ihu’, vol 1, pp 7–8

70. *Ibid*, pp 115–116

71. Alexander Mackay, ‘Native Land Claims in Marlborough’, 2 December 1887, AJHR, 1888, G-1A, p 1

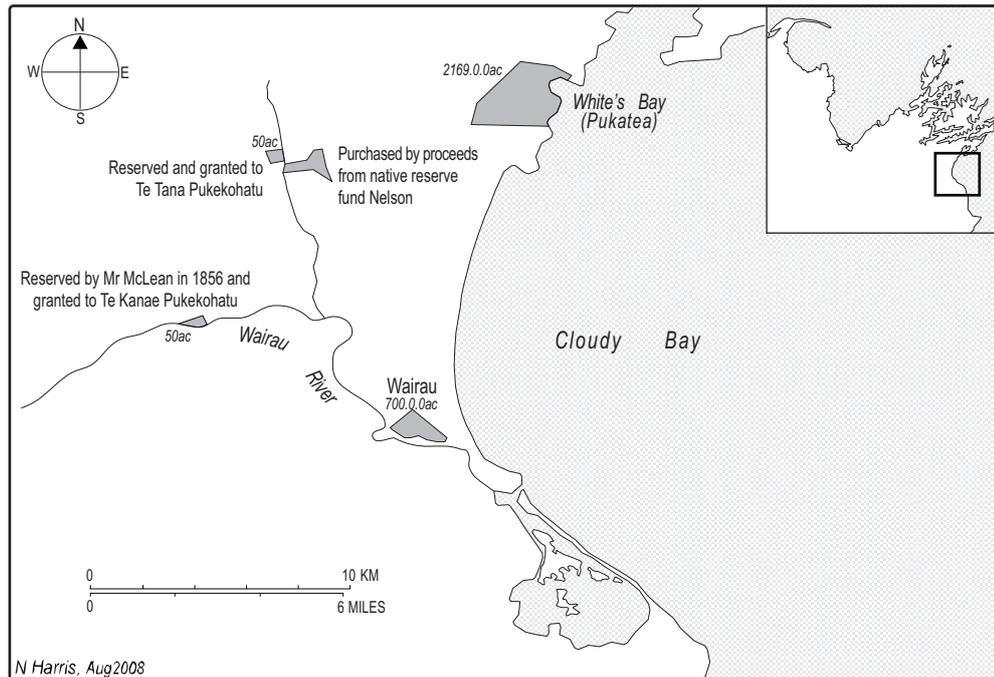


Figure 18: Pukatea–Wairau reserves

Source: AAFV997, NR19

The reserve went through the Native Land Court in 1889, shares being awarded to members of the three iwi in the same proportions as they had been for the Wairau reserve, and to the same 117 owners. The land was partitioned in 1899 into two large blocks and a third very small one at the bay. At this time Rangitane chose the western side of the reserve (Pukatea 1), and Ngati Rarua and Ngati Toa took the rest (Pukatea 2), with the small fishing reserve in the bay awarded to two trustees from each of the three iwi. As time passed, the number of shareholders grew and their interests became very small.<sup>72</sup>

A certain income was received from the leaseholders, although there were instances of non-payment. In other respects, the block was of very little economic value to its owners. In 1898, some of the Ngati Rarua owners asked for the lease not to be renewed, as their land on the Wairau flats was flood-prone and they wanted to run their stock on Pukatea. It is not known, whether the owners did occupy the land for a while after this, but by 1913 there were again Pakeha leaseholders running sheep and cattle there. In 1929, the lessee of Pukatea 2 offered to purchase that part of the reserve. ‘The land is very steep and much of it covered with fern, scrub and bush’, he wrote, ‘it is too steep to plough or improve by cultivation, but I have improved the land considerably by burning and sowing seed, and subdivision. The

72. The following account of Pukatea history from the 1860s is based on Alexander, ‘Reserves of Te Tau Ihu’, pp 114–137; Tony Walzl, ‘Pukatea Reserve (1860–1970)’, report commissioned by the Ngati Rarua Iwi Trust in association with the Crown Forestry Rental Trust, 2000 (doc B7), pp 4–42; David Armstrong, ‘Rangitane and the Pukatea Reserve’, report commissioned by Rangitane ki Wairau, 2002 (doc D3), pp 1–35.

land is now wintering 650 sheep.<sup>73</sup> At that time, there were 154 listed owners (many of them living in other districts), of whom one refused to sell his share. Largely owing to financial difficulties experienced by the intending purchaser, the proposed sale eventually fell through. By 1940, the large number of people with interests in the land made it difficult to arrange a formal lease, and the annual grazing licence was generating very little income for the owners, some of whom were receiving nothing.

Since the 1930s, there had been suggestions that White's Bay and the surrounding land should be acquired for recreational purposes, and the poor potential of the land for producing rental income encouraged its owners to consider selling. Along with the use of large parts of the reserve by Pakeha farmers for grazing, the Pukaka Valley was used by the owners for cutting firewood, and some commercial fishing boats were being operated by Maori from White's Bay. There was no road access, however, and most of the land was producing very little of economic value. After lengthy negotiations the Crown succeeded in the early 1950s in overcoming the reluctance of the owners to sell the small piece they valued most, the White's Bay 'fishing reserve' (Pukatea 3). This was also the site most desired by Blenheim people clamouring for access to the attractive sandy beach there. Payments were made to all three iwi for their shares in the three subdivisions (Pukatea 2 and 3 being sold in their entirety). In exchange for their interest in Pukatea 3, Rangitane agreed to accept three acres at Waikawa and a very small section of surplus railway land at Grovetown, between the Wairau reserve and Blenheim.<sup>74</sup> The Waikawa transaction became a grievance for Te Atiawa, as we will mention later. Ngati Rarua accepted one acre near the Wairau reserve: this land was purchased for the iwi by the Crown from the heirs of Rore Pukekohatu who in 1862 had bought a 38-acre block of which this section was a part (see below). One of the Pukatea blocks (1C1), of about 80 acres in the Pukaka Valley near Rarangi, remained in Maori ownership (it was acquired by an individual Rangitane member in 1972), and another tiny parcel (1A) is similarly individually owned. As we have explained, however, the other blocks and the remainder of Pukatea 1 were purchased by the Crown between 1952 and 1955, for a total of £332.4, as a recreation reserve.

#### **(4) Other Wairau lands**

The Wairau and Pukatea reserves were for a time not the only lands owned by members of Ngati Toa, Ngati Rarua, and Rangitane in the Wairau district. As we mentioned in chapter 6, two 50-acre blocks were made available as Crown grants, in accordance with the promise made by McLean in 1856 to individual chiefs.<sup>75</sup> One for Wiremu Naera Te Kanae (Ngati Toa) was situated on the north bank of the Wairau River, west of Tuamarina. The owner leased it

73. T Heberd to Native Land Court, 4 April 1932 (Walzl, 'Pukatea Reserve', p16)

74. The Tribunal held one of its hearings at the marae that was later built there.

75. McLean to Colonial Secretary, 7 April 1856, *Compendium*, p 302; see also Alexander, 'Reserves of Te Tau Ihu', vol 1, pp 138–139

7.5.1(5)

out in 1868, and sold it in 1883.<sup>76</sup> The other such block was for Te Tana Pukekohatu (Ngati Rarua). Situated in the Tuamarina Valley, it was sold in 1892.<sup>77</sup>

Also recorded are a number of blocks purchased by Maori. In 1858, members of Rangitane purchased 100 acres at Ruakanakana on the north bank of the Wairau, opposite Rapaura. The land was Crown granted in 1865. Part of it was sold in 1876, and it had all been sold by 1919.<sup>78</sup> Nearby, in the Waikakaho Valley, seven sections, mostly small but including one of 72 acres and one of 80 acres, were acquired by Maori purchasers between 1856 and 1870. The first sale of this land occurred in 1867, and all of it had been sold by 1912.<sup>79</sup> Adjoining the Wairau reserve, a number of blocks (including 220 acres in 1859, 100 acres in 1859, and 38 acres in 1862) were purchased, most of them by Te Tana Pukekohatu and Te Rori Pukekohatu. Much of this land was later included in the development scheme, and some of it is still in Maori ownership. Finally, an area in excess of 100 acres in the Tuamarina Valley were purchased in 1865 by the commissioner of native reserves (Mackay), using the proceeds of the sale of native reserves and Nelson.<sup>80</sup> He designated the land a firewood reserve for Nelson tenths beneficiaries resident in the Wairau district. It was thus not accessible to those Wairau Maori who were not recognised as tenths beneficiaries after the Native Land Court hearing of 1892; as endowment land the block was transferred to the Wakatu Incorporation in 1977.<sup>81</sup>

It is clear that very little of this land was available to supplement the other meagre holdings of the Wairau Maori for more than a few years.

### (5) Conclusion

The comparatively small tract of land reserved (in two portions) for the resident iwi of the Wairau area was eventually reduced by alienations to a total area of less than 900 acres. This was less than a third of the original reserved area (not including the two small blocks granted to Te Kanae and Pukekohatu). As Mr Armstrong observes (and his comment is also applicable to the other two iwi concerned), 'possession of these lands [the Wairau and Pukatea] has not allowed Rangitane to participate in the economic and social life of Marlborough in the way clearly envisaged by their ancestors.'<sup>82</sup> While Pukatea offered the traditional resources of forest and shore, it was inaccessible and unproductive as far as agriculture was concerned, and was eventually almost entirely lost. The main Wairau reserve, on the other hand, was located on the plains and situated very close to the prosperous town

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76. Alexander, 'Reserves of Te Tau Ihu', vol 1, p 139

77. Ibid, p 138

78. Ibid, pp 140-141

79. Ibid, pp 142-145

80. AAFV997/NR19, ArchivesNZ

81. Ibid, pp 157-158. After a title investigation in 1931, the block was awarded to 16 owners (three Ngati Toa, nine Ngati Rarua, four Rangitane), but the decision was challenged by the Native Trustee, who successfully argued that the Native Land Court had no jurisdiction over land vested in him for the benefit of Maori with tenths interests.

82. Armstrong, 'Rangitane and the Pukatea Reserve', p 35

of Blenheim. Most of it was retained, but it was not easy to farm and could not assure its owners more than a tiny share in the developing wealth of the district. Members of all the three iwi involved were affected by the deficiencies of this land base, particularly in view of the non-fulfilment of McLean's promise that a large area would be reserved. The inadequacy of the land reserved for them would later be recognised by the inclusion of Rangitane and Ngati Rarua in the landless natives scheme instituted in the 1890s.

### **7.5.2 Eastern Marlborough Sounds**

#### **(1) Introduction**

The reserves created in this part of Te Tau Ihu were the outcome of several agreements with Te Atiawa. The earliest was the Waitohi purchase of 1850 (see ch 5). Te Atiawa agreed to the sale of their land at the head of the Waitohi arm of Queen Charlotte Sound, where the port town of Picton was later built, and the relocation of their settlement to nearby Waikawa Bay. Later, as part of the Waipounamu purchase (see ch 6), there was first an agreement with two chiefs of Ngati Hinetuhi, a hapu of Te Atiawa, in 1854, and then a more comprehensive agreement with a larger number of Te Atiawa chiefs in 1856. As a result of these transactions, more than 18,000 acres were reserved: 3050 acres at Waikawa, 8192 acres in other parts of Queen Charlotte Sound, 5957 acres on Arapawa Island and on the shores of Tory Channel, and 1568 acres at Port Gore. The reserves discussed in this section are separate from those later set up in the eastern Sounds under the landless natives scheme.

#### **(2) Waikawa reserve**

As shown by a map attached to the Waitohi deed of 1850, the shore boundary of the Waikawa reserve created by this agreement extended right around Waikawa Bay from Karaka Point on the eastern side to Te Pahoahoa (later called 'the Snout') on the western side.<sup>83</sup> The reserve was originally estimated at approximately 2500 acres. It extended inland up to the ridge on the eastern side of the valley, ran further inland some way up the Waikawa Stream valley, and cut across the flat adjacent to the Waitohi land and up to the ridge on the western side of Waikawa Bay.

Neville Gilmore of Te Atiawa summarised his people's grievance about Waikawa as follows:

Before the Waitohi Purchase, in January 1849, Governor Grey stated in a memorandum that the reserve at Waikawa was to both compensate the ousted Waitohi residents and to incorporate 'sufficient room for the future operations of the Natives'. Yet this large reserve of 2,500 acres followed the path of others in the Sound; progressive alienation over the

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83. The map is reproduced in *Compendium*, vol 1, facing p 266.

years effectively ensured that the expanse Grey confidently believed would safeguard future generations of Maori shrank to a fraction of its former size.<sup>84</sup>

Waikawa was a comparatively large reserve (and when it was surveyed was found to consist of about 3050 acres rather than 2500).<sup>85</sup> Only part of it was suitable for cultivation, however. An area of about 300 acres was relatively flat, but the remainder consisted of the bush-clad hill country on both sides of the bay. It was reported that Te Atiawa had requested the inclusion of bush country and other land on which they could run their cattle.<sup>86</sup> Grey stipulated in 1849 that the reserve should give 'sufficient room for the future operations of the Natives' who were to be relocated from Waitohi.<sup>87</sup> Richmond confirmed that it was indeed 'ample . . . for their future operations and wants.'<sup>88</sup> Yet, the land at Waikawa was clearly less desirable for cultivation purposes than that at Waitohi. The official Francis Jollie reported that much of the flat land was 'of inferior value and such as the Natives would not willingly cultivate.'<sup>89</sup> The community that was expected to support itself on this land numbered 89 persons, according to a census taken at the time.<sup>90</sup> Dr Donald Loveridge points out that this meant less than 30 acres per person, of which only three acres was level land (and only two acres suitable for cultivation).<sup>91</sup>

In the longer term, as we explained in chapter 5, after relinquishing their Waitohi land Te Atiawa were unable to share in the rise in land values at that locality after it developed as a town and port. In the words of the claimants' historian Dr Loveridge, the Waitohi transaction deprived Te Atiawa of 'some of the best farming lands in the Sound, and removed them completely from the future locus of commercial activity in the district'. The Waikawa reserve 'was no substitute for what had been sold'.<sup>92</sup> It has been suggested, however, that this inadequacy was not evident for a few years, because Te Atiawa still had the use of cultivation sites in the rest of Queen Charlotte Sound.<sup>93</sup> At this stage, Waikawa was probably seen by the iwi as a focal point for their life in the wider Sounds area, and not just as a replacement for Waitohi.<sup>94</sup>

A block of 139 acres on the flat land at the head of the bay was identified as the site

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84. Neville Gilmore, brief of evidence on behalf of Te Atiawa, not dated (doc 121), p 2

85. Acreage from Alexander, 'Reserves of Te Tau Ihu', vol 1, p 159

86. Richmond to Grey, 27 March 1849 (Dr Donald Loveridge, "Let the White Men Come Here": The Alienation of Ngati Awa/Te Atiawa Lands in Queen Charlotte Sound, 1839–1856, report commissioned by the Crown Forestry Trust, 1999 (doc A53), p 118)

87. Grey, memorandum, 8 January 1849 (Loveridge, 'Let the White Men Come Here', p 94)

88. Richmond to Grey, 26 June 1849, *Compendium*, vol 1, p 265

89. F Jollie to W Fox, 24 March 1849 (Loveridge, 'Let the White Men Come Here', p 106)

90. Alexander Mackay, 'Census of the Native Population at Waitohi, Queen Charlotte's Sound, Taken on the 5th day of March, 1849', *Compendium*, vol 1, p 266

91. Loveridge, 'Let the White Men Come Here', p 120

92. *Ibid*, p 239

93. Phillipson, *Northern South Island: Part 1*, p 99

94. Loveridge, 'Let the White Men Come Here', p 138

for Waikawa Village, and this became a residential settlement for Te Atiawa. Adjacent to this, a public landing place of nine acres, known later as the 'government reserve', was excluded from the Maori reserve.<sup>95</sup> In 1862 and 1865, two portions of the wider reserve, of unspecified area, were leased (to Courtenay Kenny, later the local member of the House of Representatives). In 1889, the whole reserve passed through the Native Land Court. The village area was divided into 39 small sections (mostly of four acres) awarded to various named owners, and the rest of the reserve was similarly divided into five large blocks and two small ones. The first partitioning of the original blocks occurred in 1904, and by 1919 every block except the smaller ones had been partitioned, with most of them being further subdivided as the years passed.<sup>96</sup>

Some of the land was leased, but no sales occurred until 1909, when James Todd purchased one of the four-acre village sections. Other sales of village sections followed, but after 1914 there were only a few sales until 1963. From that date, many sales were made, pointing to the development of the bay as a desirable housing area for holidaymakers and permanent residents. The result was that by 1999 almost two-thirds (88 acres) of the village block had been alienated, leaving less than 50 acres (including three of the original four-acre blocks, one of them a burial reserve) still in Maori ownership.<sup>97</sup> Alienation of the land outside the village block began in 1910, when Julia Kenny began buying small sections adjacent to the village. In 1911–12, three large blocks (224, 238, and 180 acres) were sold, as well as several smaller ones. From 1920 until the 1980s, it was mostly small sections that were sold, although a block of 305 acres above the settlement was taken for water supply purposes in 1957. Other large blocks in the steep part of the reserve were sold in 1982, 1985, 1991, and 1993. Most of the remaining Maori blocks are small, except for three of 104, 94, and 173 acres. Of the original reserve (excluding the village block), an area of only 443 acres, or about 15 per cent, remains in Maori ownership.<sup>98</sup> If the whole Waikawa reserve is considered, more than 80 per cent of the original acreage has been alienated since sales began in the first decade of the twentieth century, with much of the land being lost only in the 1980s.

The Waikawa reserve was less affected than some other parts of the eastern Sounds by large Crown purchases or takings for public purposes. A total of 440 acres (14%) was lost in this way, although some was later returned. In 1912, land totalling 133 acres was taken from six sections for an army rifle range; the land was compulsorily acquired, and the owners were paid compensation. In 1951, the army area was declared Crown land, and part of it became a scenic reserve. Other small pieces of this land that were lost included three acres transferred to another iwi (Rangitane) in 1956 in connection with the Crown purchase of Pukatea reserve land at White's Bay in the Wairau area for scenic purposes. Most of the rifle

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95. *Ibid.*, p 121

96. Alexander, 'Reserves of Te Tau Ihu', vol 1, pp 159–274

97. *Ibid.*, pp 11–15, 198–274

98. *Ibid.*, pp 10–11, 159–197

range land was returned to the owners in 1990–92.<sup>99</sup> We will look more closely at the grievances of Te Atiawa concerning the rifle range land in chapter 11, along with claims arising from another alienation for public purposes: the taking of 305 acres for a water catchment reserve in 1957. This land (the bulk of Waikawa 2C2) was taken under the Public Works Act in order to remedy a longstanding water supply problem.<sup>100</sup> Our detailed consideration later in the report of these two substantial takings and other smaller takings of Waikawa reserve land results in findings about the particular cases and about Public Works takings in general.

### (3) *Queen Charlotte Sound reserves*

Among the reserves created for Te Atiawa under the terms of the agreement of 1856, which was one of the Waipounamu deeds, were nine blocks scattered along the shores of Queen Charlotte Sound. (These reserves were distinct from others set up later in this area under the landless natives scheme.) Whenuanui and Ngakuta were on the south side of the sound not far west of Waitohi (Picton), five others (Iwituaroa, Toreamoua, Kumutoto, Tunoamai, Tahuahua, and Ruakaka) were on the north side, and the small Whatamango block was in the first bay east of Waikawa. These reserves (and those on Arapawa Island and in Tory Channel, which we consider separately) were marked on a map attached to the deed of 1856.<sup>101</sup> Originally estimated to consist of about 5300 acres, they were found in later surveys to have a total area of more than 8000 acres. Five were more than 1000 acres each, two were between 200 and 300 acres, and the others were 30 acres and four acres. The smallest, Whatamango, was on flat land at the head of a bay, but the others all had little flat land and ran quickly up from the shore into the steep bushclad hills behind (see fig 19).

It would be difficult to state what proportion of this and the adjoining eastern Sounds areas these reserves represented. Dr Loveridge's suggestion is between 10 and 15 per cent, which was fairly high in comparison with allocations in other areas at the time.<sup>102</sup> McLean explained that, as part of the agreement of 1856, he had arranged for Te Atiawa to be allocated a comparatively large area of reserved land. The 'unsettled state' of the tribe, 'and the disposition manifested by them to return to their former possessions in Taranaki (when their presence could only increase the troubles that already beset the land question in that Province)', led him to 'assent to reserves of considerable extent being assigned to them in the various bays they were then inhabiting, with which they appeared to be fully satisfied'. He understood that Te Atiawa valued the district for its historic associations and its plentiful fish supplies.<sup>103</sup> The political consideration he had explained, however, meant that the

99. Alexander, 'Reserves of Te Tau Ihu', vol 1, pp 129–130, 137, 187–188, 194–197

100. Ibid, p 177; Morrow, 'Legacy of Loss', pp 94–95; Rita Powick, brief of evidence on behalf of Te Atiawa, 10 January 2003 (doc 130)

101. *Compendium*, vol 1, facing p 4

102. Loveridge, 'Let the White Men Come Here', p 207

103. McLean to Colonial Secretary, 7 April 1856, *Compendium*, vol 1, p 302

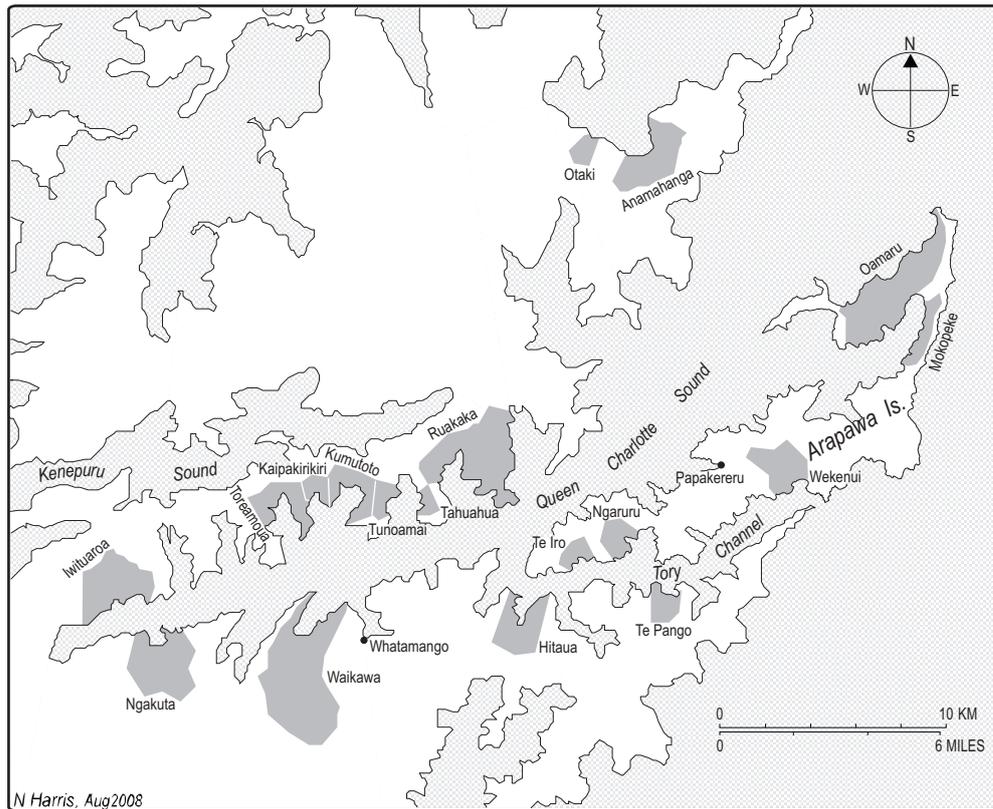


Figure 19: Queen Charlotte Sound reserves

Source: AAFV997, NR19

amount of land reserved was determined not only by what Te Atiawa valued in 1856 or what they would need in the future but by other factors also. The iwi's close connections with Taranaki, which we discussed in an earlier chapter, were among these other factors. Moreover, even if a considerable amount of land was reserved in this area, the allocation was not necessarily generous except in quantity, as Alexander Mackay pointed out a few years later. 'The Natives resident in Queen Charlotte's Sound have large reserves,' he wrote in 1865, 'but, with the exception of a block at Waikawa, near Picton, the rest is of a very indifferent character, chiefly steep hillsides, with small patches, suitable for Native cultivation, scattered here and there on the shores of the Sound.'<sup>104</sup> McLean himself had told the chiefs of Te Atiawa in 1856 that the land they were selling was 'very poor and hilly country' but that the reserves included some of the best parts.<sup>105</sup>

The manner in which the reserves in this area were allocated and defined is characterised by Dr Loveridge as 'slipshod'. The amount of land included in them was not known until estimates were made, probably by James Mackay in 1861, and even these figures proved to

104. Alexander Mackay to Native Minister, 6 December 1865, *Compendium*, vol 2, p 312

105. McLean, journal, 8 February 1856 (Phillipson, *Northern South Island: Part 1*, p 178)

be very inaccurate when surveys were finally made in the 1890s.<sup>106</sup> Their boundaries were not properly described and recorded until Mackay's work in 1861, by which time 'several very troublesome questions had arisen concerning them.'<sup>107</sup> There is evidence that in several instances reserves were promised, or at least discussed, but never eventuated.<sup>108</sup> Overall, says Dr Loveridge, 'the procedures used for identifying the lands to be reserved, and for recording what was to be reserved, can only be described as inadequate in every respect.'<sup>109</sup>

During the 150 years since they were created, eight of these nine reserves have been alienated in their entirety. It is recorded that Iwituaroa was leased from 1862, and Ngakuta from 1865.<sup>110</sup> The first permanent alienation was in 1880, when 638 acres of the Toreamoua reserve were purchased by Courtenay Kenny. The evidence relating to this purchase is sparse, but it seems that Alexander Mackay, in his capacity as a native reserves official, facilitated an agreement signed by the owners, and a Crown grant was issued to Kenny.<sup>111</sup> This was the only sale before the Queen Charlotte Sound reserves passed through the Native Land Court in 1889. Apart from Kenny's purchase, the first private sale was in 1910, when the whole of Ngakuta was purchased. This reserve was one of the few in this area that had been vested in the Crown (in 1874) under the Native Reserves Act. In the Sounds area, vesting under the Act did not give full protection from the buying surge that began at this time. Many other sales occurred, of both vested and non-vested land, and continued into the 1920s. All were to private buyers, except for the 1623-acre Iwituaroa reserve, which the Crown purchased in 1916 and immediately sold to the lessees. It was the family leasing the land that had initiated the purchase by approaching a group of owners who lived in Taranaki, but the Crown's involvement clearly assisted the lessees to acquire the block. As Dr Morrow points out, there was apparently no concern about 'the wisdom of the sale or its future repercussions for the original reserve owners.'<sup>112</sup> There were further sales in the late 1940s and in the 1960s. Most of them were of blocks larger than 50 acres, the last purchase of significant size being a Toreamoua block of 190 acres in 1968.<sup>113</sup>

Even before private purchasing began in earnest, however, parts of the reserves were being taken for roads (from 1905), and in 1908 there was the first instance of what was to become a significant element in the loss of Te Atiawa's reserved land: acquisition by the Crown for scenic reserves. Under the Scenery Preservation Act of 1903, land (including Maori land) could be recommended by a commission (later a board) for acquisition under the Public Works legislation and proclamation as a scenic reserve, with compensation paid to the

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106. Loveridge, 'Let the White Men Come Here', pp 203–204

107. James Mackay to Native Secretary, 21 April 1861 (Loveridge, 'Let the White Men Come Here', p 204)

108. Loveridge, 'Let the White Men Come Here', pp 209–212

109. *Ibid*, p 216

110. Alexander Mackay, 'Schedule of Leases of Native Reserves, Marlborough', not dated, *Compendium*, vol 2, p 331

111. Alexander, 'Reserves of Te Tau Ihu', vol 1, pp 299–300

112. *Ibid*, pp 275–282; Morrow, 'Legacy of Loss', pp 65, 71–73

113. Alexander, 'Reserves of Te Tau Ihu', vol 1, pp 275–324

owners. (An amendment Act in 1906 removed Maori land from this provision, but in 1910 the Scenery Preservation Amendment Act replaced it and validated past acquisitions.<sup>114</sup>) In Marlborough, the sale of large parts of the Toreamoua–Kumutoto reserve to the Crown as a scenic reserve was initiated in 1906 when it became known that the owners were about to let the land and allow felling of the bush on it. In due course, 885 acres of the reserve were taken under the Public Works Act (in 1908–09). The owners were compensated, but were otherwise minimally involved in the transaction.<sup>115</sup> The value of Pakeha-owned land was determined by a tribunal consisting of two assessors, one appointed by the landowner, the other by the Government, and presided over by a magistrate or Supreme Court judge. However, the Native Land Court alone assessed Maori-owned land for compensation. Maori representatives in Parliament objected to this difference in procedure, and suggested that it resulted in a lower level of compensation.<sup>116</sup> With regard to the Toreamoua–Kumutoto reserve, the commissioner of Crown lands did not believe that the economic value of the land was high ('the nature of the soil being poor'), but argued strongly for the acquisition of:

this most beautiful spot. I do not think that it is possible to exaggerate its beauty, or the inestimable boon which will be conferred upon the county by the preservation of this area in its natural state . . . If the opportunity is now lost, nothing can replace it, and its loss would be a national calamity.<sup>117</sup>

Nearly 60 years later, in 1967, the owners of one of the partitions of Ruakaka reserve, most of whom lived in Taranaki, sold 503 acres to the Crown as a scenic reserve. The land (Ruakaka 1E2) had been leased, but was not regarded as economic for farming purposes. When the lease expiry date approached, efforts were made to acquire it for scenic purposes.<sup>118</sup> Earlier, in 1958, under the provisions of the Maori Reserved Land Act, the Maori Trustee had compulsorily purchased the interests deemed to be uneconomic, which were those of 68 of the owners. Dr John Mitchell gave evidence that these shares amounted to a third of the total, and that they conferred on the Crown a decisive voice in the owners' meetings held in 1967.<sup>119</sup> The decision was made to sell the land. Unlike the Toreamoua–Kumutoto reserve, this block was acquired at a time when existing legislation (first enacted in 1933) might have enabled Maori land to be reserved for scenic purposes without passing out of private ownership. This is a matter that we will discuss later in the chapter. The mid-century

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114. Cathy Marr, Robin Hodge, and Ben White, *Crown Laws, Policies, and Practices in Relation to Flora and Fauna, 1840–1912* (Wellington: Waitangi Tribunal, 2001), pp 282–290

115. Alexander, 'Reserves of Te Tau Ihu', vol 1, pp 305–312

116. Marr, Hodge, and White, pp 287–288, 290

117. Commissioner of Crown lands, Blenheim, to Under-Secretary for Lands, 10 October 1907 (Alexander, 'Reserves of Te Tau Ihu', vol 1, pp 306–307)

118. Alexander, 'Reserves of Te Tau Ihu', vol 1, pp 324–332

119. Maui John Mitchell, brief of evidence on behalf of the Te Puke-Mitchell whanau, December 2002 (doc 115), pp 6–10

period saw much other private land adjacent to Te Atiawa's reserves on the northern side of the sound become scenic reserves, including the large former Maori reserve at Iwituaroa, which had been sold in 1916 and was purchased from its Pakeha owners by the Government in 1945.<sup>120</sup>

Another Crown action that reduced the amount and value of the land available for Maori use in this part of Te Tau Ihu was the exclusion of a strip of land, a chain in width, along the shore frontages of the reserves. Coastal reservation of this kind was practised in the whole of the Marlborough Sounds area, from Port Underwood to the Whangamoia River west of the Croisilles, but for convenience we mention it here in relation to one of the most affected districts. This discussion is also relevant to Wai 124, a Te Tau Ihu claim which partly concerns the foreshore reserve affecting the Oamaru occupation reserve on Arapawa Island. We discuss this claim in chapter 12.

Until the late nineteenth century, no national policy required the reserving of such strips along waterways, lakes, and coasts, although it occurred in some circumstances throughout the country. The Land Act 1892, however, made it a statutory requirement for strips to be reserved on lakefronts, riverbanks, and seashores when Crown land was sold or otherwise disposed of. With regard to Maori land that had gone through the Native Land Court, it was already possible for public roads to be laid out on small areas (not exceeding 5 per cent of such land) taken for the purpose. This provision was included in the Native Land Court Act 1886, for instance, and dated back to 1865. No consultation or compensation was required. In the Sounds, the coastal strip was taken from Maori reserves at the time of the surveys made in the 1890s in connection with the land court hearings, with the intention that future road construction would be safeguarded.<sup>121</sup> In Mr Alexander's words, this action 'had the effect of divorcing the land reserve from the foreshore and seabed adjoining it, and so splitting up a holistic pattern, in Maori terms, of settlement, garden, canoe landing place and kaimoana gathering site.'<sup>122</sup> It also removed many of the few flat places suitable for dwellings and cultivations, as well as permitting public access to adjoining Maori land and lowering the monetary value of such land.<sup>123</sup> It seems that the initiative for the taking of Maori land in the Sounds for roading purposes without the payment of compensation came from within the department responsible for its execution, the Lands and Survey Department. At least one Maori protest about the taking of a coastal strip, referring to the Ruakaka reserve in the

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120. Alexander, 'Reserves of Te Tau Ihu', p 276

121. Ibid, pp 40–42; Cathy Marr, 'Crown–Maori Relations in Te Tau Ihu: Foreshores, Inland Waterways and Associated Mahinga Kai', report commissioned by the Treaty of Waitangi Research Unit on behalf of the Crown Forestry Rental Trust, 1999 (doc A61), pp 153–156; Mitchell, brief of evidence on behalf of the Te Puke-Mitchell whanau, pp 3–6, 11. It is estimated that the Sounds foreshore reserve (including the parts adjoining Maori-owned land) extends along 600 kilometres of coastline and covers about 3500 acres: David Alexander, 'Reserved Lands of Te Hoiere and Surrounding Districts', addendum to brief of evidence, not dated (doc L2(b)), p 2.

122. Alexander, 'Reserves of Te Tau Ihu', p 40

123. Hilary Mitchell and Maui John Mitchell, *Te Tau Ihu o te Waka: A History of Maori of Nelson and Marlborough*, 2 vols (Wellington: Huia Publishers, 2004), vol 1, p 414

1890s, has been located. Alexander Mackay (by then a Native Land Court judge) was also critical of the practice.<sup>124</sup> In September 1891, he stated that ‘Natives are entitled [to ownership] to high water mark . . . there being no authority to take roads through these lands without compensation.’<sup>125</sup> Clearly, a large number of occupation reserves in the eastern and western Marlborough Sounds, including Rangitoto and the smaller islands, were affected in this way. The coastal strips in area probably amounted to hundreds of acres. Apparently, very little of this land was ever used for roads, but none of it was returned.<sup>126</sup> When the Reserves and Other Lands Disposal Act was passed in 1955, the strips became public reserves, known collectively as the Sounds foreshore reserve. Licences were required if the land was to be occupied, which provoked a number of protests by owners of adjoining Maori land.<sup>127</sup> DOC now administers the coastal reserve.

In the eastern Sounds area, after the sale of the Ngakuta reserve in 1910, the other occupation reserves were gradually eroded by alienation. The small Whenuanui reserve was sold in 1913 and the last of Tunoamai and Tahuahua went in 1920 and 1922. The Crown purchased Whatamango as a recreation reserve in 1966. It consisted of only four acres and had never gone through the land court. The last few remaining acres of Toreamoua–Kumutoto were sold in 1972. Of a total of 8000 acres or more in Queen Charlotte Sound, only about 60 acres in the Ruakaka reserve (which had been the largest in the area, consisting of 2135 acres before alienations began), remain in Maori ownership.<sup>128</sup>

#### **(4) Tory Channel and Arapawa Island reserves**

In this outlying part of the Marlborough Sounds, Te Atiawa were allocated seven reserves, originally estimated to consist of 4430 acres altogether (although when they were eventually surveyed they were found to consist of about 6000 acres). They ranged in size from 283 to 2687 acres. Five of them, including the largest (Onamaru, later Oamaru), were on Arapawa Island, and two (Hitaua and Te Pangu) were on the southern shore of Tory Channel, an area that is still inaccessible by road.

Several of the blocks were leased from an early date. As in other parts of Te Tau Ihu, the reserves in this area went through the Native Land Court in 1889. Private purchasing began in 1910, when the whole of Te Iro reserve on Arapawa Island was sold. Another reserve on the island, Wekenui, was sold by 1920. Sizeable parts of the two mainland reserves were also alienated by 1920, as well as a large portion of Ngaruru (on the island), which became a scenic reserve. After 1920 there were no further sales until 1945, when another part of

124. Alexander, ‘Reserves of Te Tau Ihu’, vol 1, p 41; Mitchell, brief of evidence on behalf of the Te Puke-Mitchell whanau, p 4

125. Mackay to commissioner of Crown lands, Blenheim, 1 September 1891 (Alexander, ‘Reserves of Te Tau Ihu’, vol 1, p 41)

126. Alexander, ‘Reserves of Te Tau Ihu’, vol 1, p 41

127. Marr, ‘Crown-Maori Relations’, p 155

128. Alexander, ‘Reserves of Te Tau Ihu’, vol 1, pp 283–324

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Hitaua was sold. The large Oamaru block remained wholly in Maori ownership until the next purchases began, in 1970, and none of Mokoapeke was sold until 1981. Purchases continued into the 1990s, and today about 1700 acres (approximately 28 per cent of the land originally reserved in this area) remain in Maori ownership, mostly at Hitaua, Te Pangu, Ngaruru, Mokoapeke, and Oamaru. More than 1000 acres of this remaining land is in the last-named reserve.<sup>129</sup>

Much of the land in this part of the Sounds is hilly, but it was seen as having potential for sheepfarming. Arapawa Island was extensively farmed, but the reserve at Ngaruru Bay on the island was of little value for this purpose. It was described in 1912 as 'about the last fair-sized portion of the original forest now left in Tory Channel', and also as a 'very poor' prospect 'from the farming point of view, the soil being of the poorest and the ground steep and broken.'<sup>130</sup> Even such unpromising land was of some value to its owners, however. When steps were taken in 1920 to take the land for a scenic reserve under the Public Works Act, the owners objected. They pointed out that the land was useful to them:

The portions in question are used by us as camping grounds during the fishing seasons, and they are the only portion of Native land that is left for us to gather our wood from and earn a few shillings to keep us going. Take this privilege from us and you deprive us Natives of a living, and also wood required by us. We would respectfully point out to you, Sir, that practically all the Native land of any value to us has now been taken for Scenic or other purposes . . . We would point out that no matter what monetary value you gave us in exchange, you cannot adequately reimburse us for the loss that we will suffer.<sup>131</sup>

These representations were considered, but the acquisition went ahead. In 1922, however, the owners were successful in asking for part of the land to be excepted so that they could retain it for their use: 88 acres were duly excluded from the 515 acres originally taken, and are still in Maori ownership.<sup>132</sup>

**(5) Port Gore reserves**

Two reserves (distinct from others set up in this area later under the landless natives scheme) were created in this large bay north of Queen Charlotte Sound, where in 1855 a population count enumerated 65 Ngati Hinetuhi (a hapu of Te Atiawa) and 11 Ngati Apa.<sup>133</sup> Originally estimated to contain 270 and 50 acres respectively, the reserves were later surveyed at 1270

129. Alexander, 'Reserves of Te Tau Ihu', vol 1, pp 343–355

130. Under-Secretary for Lands to Minister in Charge of Scenery Preservation, 15 August 1912 (Alexander, 'Reserves of Te Tau Ihu', p 347); commissioner of Crown lands to Under-Secretary for Lands, 16 December 1912 (Alexander, 'Reserves of Te Tau Ihu', pp 347–348)

131. Riwai Love and 14 others, to Minister of Public Works, 24 May 1920 (Alexander, 'Reserves of Te Tau Ihu', vol 1, pp 350–351)

132. Alexander, 'Reserves of Te Tau Ihu', vol 1, pp 351–355

133. Alexander Mackay, 'Natives Residing in the Several Districts', 1855, *Compendium*, vol 1, p 300

and 298 acres. From small flat areas on the coast, the land rose steeply up to a high ridge encircling the bay. The reserves were created for Ngati Hinetuhi, who, however, left them in 1860 when they moved to Taranaki. The Native Land Court heard in 1889 that Ngati Hinetuhi allowed Ngati Apa to share the land for the first few years, and to use it exclusively after they departed. The court was told that Ngati Hinetuhi were willing to relinquish the smaller reserve (Otaki), and it was awarded to a group of five Ngati Apa.

The larger reserve, Anamahanga, where Ngati Apa grew potatoes and wheat on part of the land, was awarded by the court to Ngati Hinetuhi, except for five acres awarded to Kereopa Pura of Ngati Apa.<sup>134</sup> This was the outcome of a contest between Ngati Hinetuhi and Pura. Ngati Hinetuhi claimed that the reserve had been made for them alone, and denied Pura's assertion that there had been a *tuku* to Ngati Apa when Ngati Hinetuhi left the area.<sup>135</sup> The court decided that the land belonged to Ngati Hinetuhi, but awarded five acres to Pura and his son, on the grounds that he had occupied the block for a long time without any attempt to disturb him.<sup>136</sup>

The first sale of partitions of the Anamahanga block took place in 1912, and the last in 1922. One partition (365 acres) is still Maori-owned, together with the five-acre Ngati Apa section. The owners of Otaki sold the whole of that reserve in 1929.<sup>137</sup>

#### **(6) Other lands in the eastern Sounds**

As well as the reserves created as an outcome of the agreements of the 1850s, a certain amount of land in this area came into Maori possession in the form of small town reserves, blocks purchased by Maori, and blocks inherited from Pakeha fathers. These categories amounted to less than 10 per cent of the total area owned by Maori after 1856 in the eastern Marlborough Sounds.

At Waitohi two half-acre town sections were reserved for 'the half-caste children of John McDonnell'.<sup>138</sup> A Crown grant was issued in 1869 for this land, which was later sold (probably about 1905).<sup>139</sup> Also in Picton, a very small section near the waterfront was reserved in 1864 as a place where visiting Maori could sell fish or vegetables. In the 1880s, a native hostelry was built there. The building was in disrepair in the 1920s, but there were Maori requests for the land to be retained as a reserve and as the site for a new hostel. Much later,

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134. David Armstrong, 'Ngati Apa ki te Ra To', report commissioned by the Ngati Apa ki Te Waipounamu Trust Claims Committee, 1997 (doc A29), pp 123–125

135. Dr Angela Ballara, 'Customary Maori Land Tenure in Te Tau Ihu (The Northern South Island), 1820–1860: An Overview Report on Te Tau Ihu (Wai 785)', report commissioned by the Crown Forestry Rental Trust, 2001 (doc D1), pp 290–292; Native Land Court, Nelson, minute book 1, 9 March 1889, fols 117–121

136. Native Land Court, Nelson, minute book 1, 12 March 1889, fols 123–124; see also Ballara, 'Customary Maori Land Tenure', p 290

137. Alexander, 'Reserves of Te Tau Ihu', vol 1, pp 379–382

138. Marlborough Land Registry, Crown grants book (Alexander, 'Reserves of Te Tau Ihu', vol 1, p 383)

139. Alexander, 'Reserves of Te Tau Ihu', vol 1, p 383

in 1952, the section was exchanged for another, which was sold in 1974. The proceeds went to the Waikawa Marae project, which we will examine more closely in chapter 11.<sup>140</sup>

In addition, as happened elsewhere in Te Tau Ihu also, Maori made several purchases of land in the 1850s, 1860s, and 1870s. These blocks were dotted around Queen Charlotte Sound, and ranged from 10 to 80 acres in area, amounting to a total area of about 250 acres. Another such block, on Arapawa Island, was larger (314 acres). The purchasers were issued with Crown grants. All of this land was sold between 1872 and 1922, except for the land at Anatholia Bay on Arapawa Island.<sup>141</sup> Maori purchased seven small town sections in Picton in 1856 and 1857, but all were soon sold.<sup>142</sup> From Mr Alexander's data, we can also see that in the later nineteenth century a certain amount of land, mainly on Arapawa Island and along the shores of Tory Channel, was in the possession of Maori descendants of Pakeha fathers. Much of this land, too, was later sold, but some (less than 500 acres) is still Maori owned.

### (7) Conclusion

More than 18,000 acres was reserved for Te Atiawa in the eastern Marlborough Sounds. This land had been important in many ways to the iwi in the past. While it was coastal and thus continued to provide good access to marine resources, only parts of it proved to be useful for farming in the nineteenth and twentieth centuries. In the 1880s, Alexander Mackay referred forcefully to its poor quality. Writing of the reserves in Marlborough as a whole, he stated that a few blocks had been let, some were 'in the occupation of the Natives for cultivation and pastoral purposes, and for fishing-places, but a large proportion consists of hilly and worthless land, not likely to be utilised.'<sup>143</sup> Only in much more recent years has land in this area been found to be useful for the development of exotic forests for the timber industry. In the nineteenth century, the ability of Te Atiawa to participate in the important agricultural sector of the new economy of the Sounds was thus limited. Dr Morrow writes of the inadequacy of the reserves:

Within a short time, it was clear that they could not address present, let alone future needs. Unable to grow more than a bare sufficiency and finding it increasingly difficult to maintain elements of their traditional lifestyle, Ngati Awa quickly became both impoverished and marginalised.<sup>144</sup>

The land available for Maori use in this area not only was of often doubtful quality but was also reduced in quantity over the years. Dr Morrow's analysis of Mr Alexander's data shows that alienations were few at first, but increased markedly from about 1910 to 1920.

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140. Alexander, 'Reserves of Te Tau Ihu', vol 1, pp 414–417; Loveridge, 'Let the White Men Come Here', p 168; Marr, 'Crown-Maori Relations', pp 99–103

141. Alexander, 'Reserves of Te Tau Ihu', vol 1, pp 384–391, 404–407

142. Ibid, pp 392–394

143. Alexander Mackay, 'Native Reserves in the Colony', 18 May 1883, AJHR, 1883, G-7, p 3

144. Morrow, 'Legacy of Loss', p 3

More than 60 per cent of the reserve lands had gone by 1929, and there was another surge of alienations in the 1960s, 1970s, and 1980s.<sup>145</sup> More than a quarter of the reserve land on Arapawa Island and the shores of Tory Channel was retained in Maori ownership, and nearly as much in Port Gore, but the land in Queen Charlotte Sound was almost entirely lost. Closer to the town of Picton, less than a fifth of the Waikawa reserve was retained. Overall, about 86 per cent of the reserved land in this part of Te Tau Ihu is no longer in Maori ownership.

There was one large Crown purchase for other than scenic reserve purposes (Iwituaroa), but the largest proportion of alienations (77 per cent according to Dr Morrow) consisted of sales to private individuals.<sup>146</sup> A proportion of the total loss by alienation is accounted for by the Crown's acquisition of Maori land for scenic reserves – more than 1800 acres through takings and purchase. While few modern observers would want to deny the long term benefit of putting the land under a conservation regime, it is clear that the owners were given little choice in the matter, or even little warning that acquisition was being contemplated, and received what Dr Morrow calls 'only meagre compensation'.<sup>147</sup> She found 'little or no documented evidence of debate or deliberation on the part of government officials about the present and future needs of Ngati Awa when takings for scenic or recreational reserves were under discussion'. Rather, the main concern was usually not the welfare of the Maori owners but how to acquire the land for the least possible outlay, with its low commercial value being used to beat the price down.<sup>148</sup> Furthermore, as we will argue further shortly, consideration could have been given to protecting the scenic and environmental value of the land without actually purchasing it.

### **7.5.3 Pelorus and Kaituna**

#### **(1) Introduction**

The reserves situated in this compact district at the head of Pelorus Sound were the outcome of the deed signed there, as part of the Waipounamu purchase, by Ngati Kuia and Rangitane in February 1856. We discussed the signing of the deed in chapter 6.

#### **(2) The reserves of 1856**

Nine reserves, with a total acreage of about 980 acres, were created in this district. Six of them, ranging from 27 to 230 acres in area, were situated on the river flats in the Pelorus Valley, from the mouth of the Pelorus River up as far as its confluence with the Wakamarina River (the site of the future Canvastown), a distance of about eight kilometres. Two other

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145. Ibid, pp 45–46, 65–73, 197

146. Ibid, p 49

147. Ibid, p 4

148. Ibid, p 47

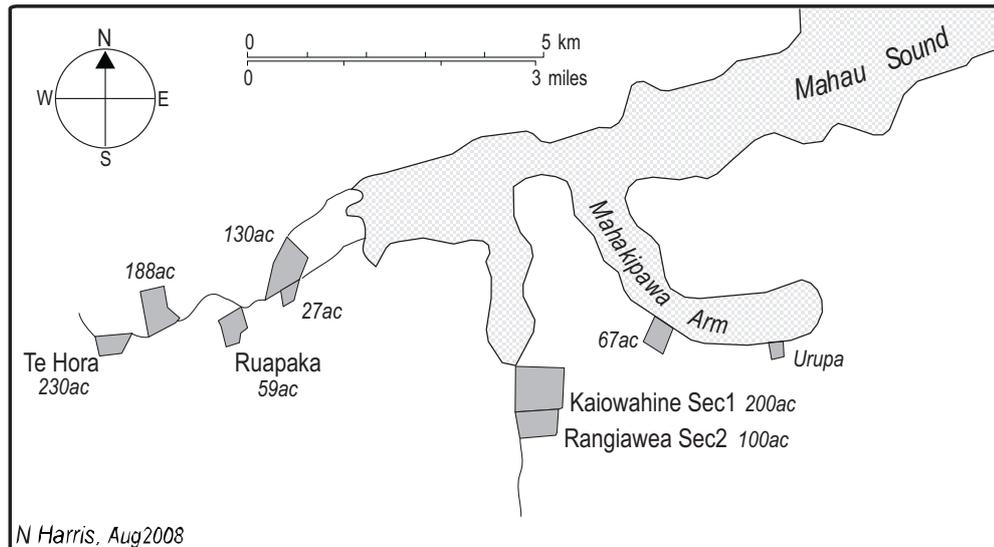


Figure 20: Pelorus reserves

Source: AAFV997, NR19

reserves, of 100 and 200 acres, were in the lower part of the nearby Kaituna Valley, near the site of the future town of Havelock. One more block, the Oruapuputa reserve of 68 acres, was not far away, on the southern shore of the Mahakipawa Arm of Pelorus Sound (see fig 20).<sup>149</sup>

In addition, several town sections were allocated. McLean arranged with Ngati Kuia in 1856 that their village site lying between the mouths of the Pelorus and Kaituna Rivers would be a reserve unless it was required as the site of a new town, in which case four town sections would be designated for two named persons. The town (Havelock) did eventuate, but there was some confusion in the allocation of the sections promised to Maori, so that in the end six sections were allocated.<sup>150</sup> McLean also reported that 'a landing place for canoes, at a place called Pareuka', had been requested as a reserve. His report implies that the request would be granted, and states that the reserve would not exceed 10 acres in area.<sup>151</sup> It has not been possible to identify a reserve of this name or description, but Mr Alexander suggests that it is one or other of two sections near the Kaituna River mouth that were set aside as Government reserves for landing-places; that is, for the use of both Maori and Pakeha. In his evidence for Ngati Kuia, Mr Meihana told us that this place, which was of particular importance in the traditional history of the iwi, indeed became a public reserve and was later greatly modified by reclamation.<sup>152</sup>

149. The map attached to the deed of 1856 is reproduced in *Compendium*, vol1, facing page 316.

150. Alexander, 'Reserves of Te Tau Ihu', vol 2, pp 456-459

151. McLean to Colonial Secretary, 7 April 1856, *Compendium*, vol1, p 302

152. Alexander, 'Reserves of Te Tau Ihu', vol 2, p 455; Peter Meihana, brief of evidence on behalf of Ngati Kuia, 21 March 2003 (doc L15), pp 2-4

McLean described the district made available by the deed as 'rich agricultural land, with fine timber'.<sup>153</sup> Within this area, the reserves were located on potentially valuable agricultural land, described by Alexander Mackay in 1865 as being 'of very good quality on the whole', though he also noted that it was 'liable to be flooded'.<sup>154</sup> The total area of reserved land, however, amounted to less than 1000 acres. Dr Locke suggests that the small acreage granted, consisting of cultivation land only and not including much land that could be used for traditional hunting or gathering activities, led the occupants to make several purchases of lands that they had been using but which had not been reserved.<sup>155</sup> When the Wakamarina gold rush occurred in 1864, there was a sudden influx of miners, many of whom stayed in the district to engage in farming or milling. The economic activities of Ngati Kuia and Rangitane were increasingly confined to their reserves, and it became more and more apparent how little land they owned.<sup>156</sup> Four of the reserves (526 acres, or just over half of the reserved area) were vested in the Crown under the Native Reserves Act in 1867 and 1869. This made the land available for leasing to Pakeha for activities that were becoming very important from the 1860s – timber milling in the Kaituna Valley and flax growing and milling in the Pelorus Valley. However, it also meant that Maori who were still ostensibly its owners could not use the land.<sup>157</sup>

The Native Land Court investigated titles in this area in 1889. Alienations of the reserves in the Kaituna and Pelorus areas soon began, and Maori land here was much depleted by sales over the years. In the township of Havelock, all the sections were sold by 1900. In the rural areas, the only early sale was Kaituna 2, a reserve that was unique in this area for having had a Crown grant issued (in 1862). This 100-acre block was sold in 1877. No further permanent alienations occurred until the other Kaituna block (200 acres) was sold in 1910–12, leaving only a tiny urupa reserve in the Kaituna part of the district. Substantial purchases in the Pelorus Valley began in 1911,<sup>158</sup> with more than 180 acres sold by 1930.<sup>159</sup> The two decades after 1910 were the peak period of land loss in both the Kaituna and Pelorus Valleys, although another spate of sales in 1959–64 saw a further 87 acres lost from the Pelorus Valley reserves. The Oruapuputa reserve on the Mahakipawa Arm survived until 1971. The eventual outcome of this series of alienations was the total loss of the Havelock town sections, the Kaituna and Mahakipawa reserves, and one of the Pelorus Valley reserves (Otipua), as

153. 'Extract from Return of Native Land Purchases Laid before Parliament 18th June 1856', AJHR, 1874, G-6, p 4

154. Alexander Mackay to Native Minister, 6 December 1865, *Compendium*, vol 2, p 312

155. Dr Cybele Locke, "'The Poorest Tribe under the Heavens": Ngati Kuia's Socio-Economic Circumstances, 1856–1950', report commissioned by the Crown Forestry Rental Trust, 2002 (doc L1), pp 21–22

156. *Ibid*, pp 26–29

157. Alexander, 'Reserves of Te Tau Ihu', vol 2, pp 423, 425, 432, 452; Locke, 'Poorest Tribe under the Heavens', pp 30–31

158. The purchases began with the Takapauwharaunga 14A2 block of almost 57 acres. Small parts of Takapauwharaunga (4.5 acres and another acre for roading) had already been taken in 1895 and another large part of the block (almost 50 acres) was taken in 1912: see Alexander, 'Reserves of Te Tau Ihu', vol 1, pp 20, 33, 420–421.

159. Alexander, 'Reserves of Te Tau Ihu', vol 1, pp 20–21, vol 2, 420–459

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well as the loss of substantial portions of most of the other reserves. In the district as a whole, only an area of about 274 acres remains, including three of the smaller reserves that are still intact or largely so. All of this remaining land is in the Pelorus Valley, but only eight of the remaining partitions have an area of 10 acres or more.<sup>160</sup> The land still remaining of the original reserve land that was set aside in the Pelorus and Kaituna area in 1856 is less than 25 per cent.

**(3) Land purchased by Maori**

Records show that rural land with a total area of more than 700 acres, in 13 separate blocks ranging from 10 to 143 acres in size, was purchased by Maori in this district. Most of the purchases were made in the late 1850s, and Crown grants were issued to the buyers. Dr Locke identifies three of these blocks as sites of Ngati Kuia activity that had been omitted from the reserves created in 1856.<sup>161</sup> Nine of the blocks purchased, consisting of about 330 acres, were in the Pelorus Valley, thus increasing the amount of Maori-owned land there by more than half. A 70-acre block was purchased on the shores of Mahakipawa Arm, adjacent to the existing reserve, and three others were further away on the northern side of Kenepuru Sound (at Waitaria and Nopera). Very little of this purchased rural land is still in Maori ownership, most of it having been sold by 1915. Several Havelock town sections purchased by Maori between 1859 and 1863 had also been sold by that date.<sup>162</sup>

**(4) Conclusion**

A comparatively small area was reserved for the Maori residing in this district. Within a few years sales began to erode their holdings, and, as we will explain further later in the chapter, the inadequacy of the Maori land base in this area became clearly evident in the 1880s. The purchase of additional land, amounting to nearly as much as had been reserved in 1856, is a significant feature of Maori land holding here. Even with this supplementation, however, and before many sales had occurred, a shortage of land was evident. The landless natives issue, as it affected the Maori of the Pelorus district, was publicly discussed in the 1880s, as we will demonstrate shortly.

**7.5.4 Western Marlborough Sounds****(1) Introduction**

In the north-western part of the Marlborough Sounds, and accessible from Tasman Bay, were five reserves allocated to Ngati Koata when they signed a deed in March 1856 as part of the Waipounamu purchase. Ngati Koata also resided on nearby Rangitoto, the large island

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160. Alexander, 'Reserves of Te Tau Ihu', vol 2, pp 420–459

161. Ibid, pp 460–478

162. Ibid, pp 460–480

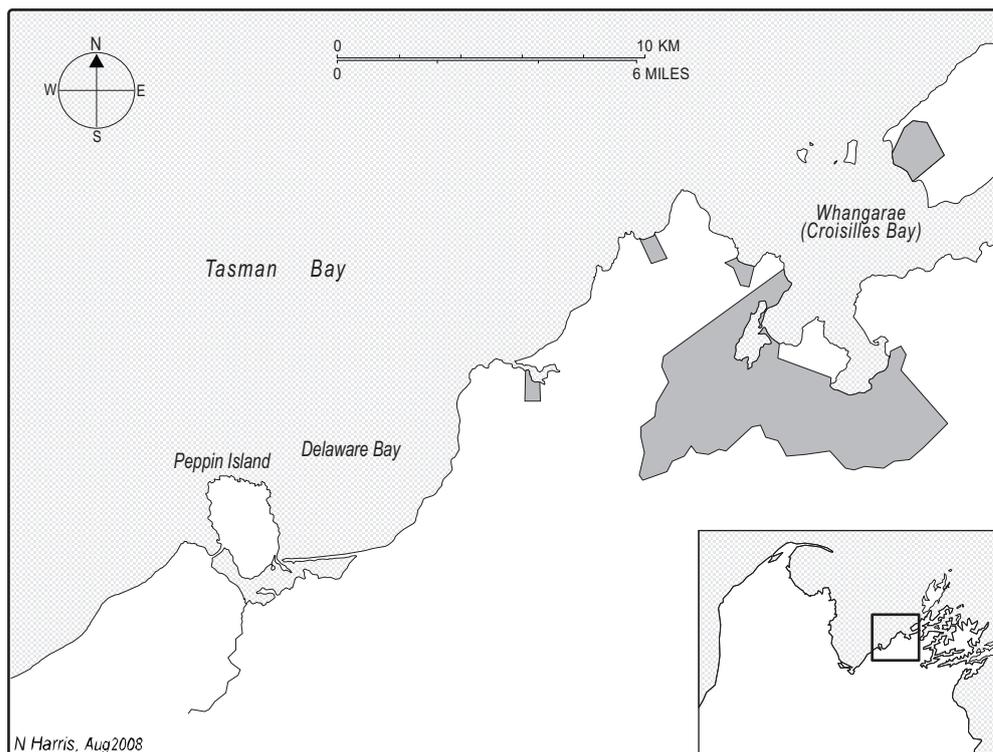


Figure 21: Croisilles–Whangamoia reserves

Source: AAFV997, NR19

(D'Urville) that was not included in the Waipounamu or any Crown purchase. The iwi also claimed an interest in the extensive unsold Wakapuaka lands a little further south down the coast of Tasman Bay, but they were allocated only a small reserve there. It was situated on the northern edge of Wakapuaka, at Whangamoia, and we will make mention of it in chapter 8 when discussing disputes between Ngati Koata and Ngati Tama. The other four reserves created were listed in the deed and shown on the map attached to it.<sup>163</sup> They were situated between Wakapuaka and Rangitoto, on the shores of Croisilles Harbour, an inlet of considerable size on the north coast of a large tract of rugged hill country. These reserves were distinct from another category of reserves in this area, created in the 1890s under the landless natives scheme, which we will discuss later in the chapter.

### (2) *The reserves of 1856*

The five reserves were originally estimated to contain 1140 acres in all. A survey later took two of the blocks, Whangarae and Okiwi, inland to the high ridges behind the bays on which they were situated in the southern part of the inlet. This greatly increased their area, to 4022 and 3295 acres respectively, and, together with a revised area for Kaiaua, brought the

163. The map is reproduced in *Compendium*, vol 1, facing page 321.

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total area of the reserves in this district to 7913 acres. The other three reserves were much smaller: Kaiaua (476 acres) on the north-eastern shore of the inlet, Onetea (20 acres) on the north-western shore, and Whangamoia (101 acres) at the mouth of the Whangamoia River some distance south-west of Croisilles Harbour and adjoining the unsold Wakapuaka block (see fig 21).

All five reserves were situated on the coast, giving access to marine resources. The lake (Otarawao) and wetlands at Kaiaua were a valued source of eels and swans' eggs.<sup>164</sup> Flat land for cultivation, however, was limited in this hilly region, as Alexander Mackay bluntly stated in the report he wrote in 1865: the reserves in this district, 'though large, are very useless, consisting chiefly of rough hillsides. The land is very poor.'<sup>165</sup>

A Crown grant was issued in 1866 for one of the reserves, Kaiaua. This block appears to have been sold in 1871, although the records are defective. Ngati Koata had used the lake as a valuable food resource, which makes it surprising that a member of the iwi sold it, if in fact he did.<sup>166</sup>

All the other reserves passed through the Native Land Court in 1892. It appears that the court left Ngati Koata a free hand to draw up and adjust and readjust lists of owners for each block. In the view of Heather Bassett and Richard Kay, however, the petition of Rewi Maaka in 1901, relating to three of the reserves, throws doubt on whether the court's proceedings accurately reflected the owners' wishes and intentions. The petitioner had not included the names of various whanau members because his agent, Hohepa Horomona, had told him that this was unnecessary. Maaka regarded himself as 'the principal owner', and did not realise that the court was making all listed owners entitled to equal shares. Consequently, he and his family received less than their appropriate share. Ms Bassett and Mr Kay consider that this shows the conflict between the court's system of listing individual owners and the customary system, under which Maaka's rights as a rangatira would have been recognised. Of course the law relating to Maori land made no provision for a community title in which rangatira and community could carry out their respective functions. In this particular case it appears that, although the chief judge made some comments on how the petition could be handled, only a very limited inquiry into the merits of Maaka's case was made.<sup>167</sup>

The two largest reserves, Okiwi and Whangarae, were vested in the Crown under the Native Reserves Act in 1875. Except for Kaiaua, no sales took place in any of the blocks until 1910. In that year, a large purchase initiated the alienation of almost the whole of the Okiwi reserve by 1919 (except for a seven-acre section and another block of 59 acres

164. Heather Bassett and Richard Kay, 'Nga Ture Kaupapa o Ngati Koata ki te Tonga, c1820-1950', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A76), pp195-196

165. Alexander Mackay to Native Minister, 6 December 1865, *Compendium*, vol 2, p 312

166. Alexander, 'Reserves of Te Tau Ihu', p 502; Bassett and Kay, 'Nga Ture Kaupapa', pp 194-197; James Elkington, brief of evidence on behalf of Ngati Koata, not dated (doc B34), paras 47-52

167. Bassett and Kay, 'Nga Ture Kaupapa', pp188-189

transferred to Maori owners in exchange for part of the original reserve).<sup>168</sup> The 100-acre Whangamoia reserve was sold at this time too, in 1914 and 1916, except for one small section (two acres).<sup>169</sup> The other two reserves, however, were not affected by purchasing to the same degree. Indeed, the small Onetea block (20 acres) is still Maori-owned.<sup>170</sup> The largest of the reserves, Whangarae, long remained intact too, apart from road takings, the purchase of a school site, and in 1973 the purchase by the Crown of one of the subdivisions (1c, consisting of 308.5 acres) for a scenic reserve. A large proportion (more than 87 per cent, or 3505 acres) of this reserve is still in Maori ownership.<sup>171</sup>

The purchase of Whangarae 1c for a scenic reserve in 1974 is the subject of a claim (Wai 184) by the descendants of one of the owners at the time of the sale, Ngaroimata Waaka. They state that the late Mrs Waaka, who had shares amounting to 23.3 per cent of the block, 'used and enjoyed' the land and was opposed to its sale. Evidence presented to the Tribunal shows that the Department of Lands and Survey, anxious at this time to forestall the purchase of scenic coastal land by private interests, initiated and controlled the process by which the Crown would purchase the block from its owners. It is clear that the meeting of owners (attended by seven of them, holding 78.67 per cent of the shares) had the required quorum, and that a majority (the holders of 55.3 per cent of the shares) voted for the sale, Mrs Waaka being the only opponent. Her wish to retain her interest and her intention to apply for it to be partitioned out were known. However, it is claimed that the complicated administrative procedures required, or at least the possibility that she was not properly informed about them, were responsible for her failure to complete the process necessary for partitioning. In any case, the wheels of officialdom turned and the sale went ahead without any partitioning.<sup>172</sup>

It is not evident that Government officials broke any law in force at the time. Yet, the case raises important issues about the Crown's engagement with the tenure of Maori land. We will return to these issues later in the chapter, but make a few comments here in relation to this particular series of events. Preserving community control of land would have been the most appropriate way to give expression to the Treaty guarantee of *tino rangatiratanga*, although this would no doubt have meant that the wishes of minorities or individuals were sometimes overridden. Having instead created individual legal interests in land, however, the Crown was obliged to ensure that those who held such interests were in fact empowered to deal with them in a fair and proper manner, like all other landowners under British or New Zealand law. In this instance, there was a well-attended meeting of owners (with

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168. Alexander, 'Reserves of Te Tau Ihu', vol 2, pp 481-487, 488-501

169. *Ibid*, pp 504-505

170. *Ibid*, p 503

171. *Ibid*, pp 488-501

172. Suzanne Woodley, 'Whangarae 1c', report commissioned by the Waitangi Tribunal, 1992 (doc A20); Alexander, 'Reserves of Te Tau Ihu', pp 496-501

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nearly 80 per cent of shares represented), and a decision by a majority of people representing also a majority of shares. As an individual, Mrs Waaka had a legal protection – the law permitted her to have her interest partitioned out. Unfortunately in this case the prescribed administrative procedures did not work properly, giving the impression that an individual owner was being prevented from exercising control over her interests. While we acknowledge the frustrations experienced by Mrs Waaka during her efforts to stop the sale or later to retain her own interests, we do not believe that this grievance can be upheld, at least in its particulars.

There is another aspect to the issue. This sale and the attendant circumstances lead us to point out once again that this acquisition by the Crown was made at a time when legislation had already made it possible for land to be designated as a scenic reserve land without passing out of Maori ownership. If this approach had been taken, the outcome might well have satisfied all parties – the owners, both selling and non-selling, and the Crown.

Despite this sale of a sizeable portion as a scenic reserve, most of Whangarae reserve was retained in Maori ownership. This was an exception, and distorts the figures for this group of reserves as a whole: nearly half (about 44 per cent) of the reserved land in this district was retained, but if Whangarae is excluded the proportion decreases to about one per cent. It should be noted, however, that a considerable area of other land in this district was allocated in the 1890s as part of the landless natives scheme, as we will explain later, and this land remains in Maori ownership still. Of the original reserves, Onetea and Whangarae remained intact or substantially so, but two others were reduced to 65 acres and two acres and a third was lost entirely. Even if all of the land in the reserves (and on Rangitoto) had been retained, however, its adequacy for the support of its Ngati Koata owners is doubtful. Writing for the iwi, Ms Bassett and Mr Kay conclude, ‘the acreage of land left in Ngati Koata ownership may have seemed large, but the reality was that the very poor nature of the land meant that it was to be impossible for Ngati Koata to sustain themselves in their traditional area.’<sup>173</sup>

### (3) *Land purchased by Maori*

In the years 1862 to 1864, individual Maori purchased three blocks in this district from the provincial authorities. All were less than 100 acres on area. Crown grants were issued to the new owners. Mackay wrote at the time that the reason for these purchases was the poor quality of the reserves and the need for cultivation land.<sup>174</sup> One of the blocks, at Whakitenga in an eastern arm of Croisilles Harbour (where its Ngati Kuia purchaser built a flax mill), is still Maori-owned, but another, section 13, which adjoined the existing Onetea reserve, was

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173. Bassett and Kay, ‘Nga Ture Kaupapa’, p 183

174. Mackay to Native Minister, 6 December 1865, *Compendium*, vol 2, p 312

sold in 1897. The third, at Oananga (between Croisilles Harbour and Whangamoā), was sold in 1925.<sup>175</sup>

Also of note is the fact that in 1917, in order to regain ownership of an urupa, members of Ngāti Koata bought back three acres that had mistakenly been included in the sale of section 13 at Onetea 20 years earlier.<sup>176</sup>

#### **(4) Conclusion**

Nearly 8000 acres were reserved in this district, although the quality of the land was soon acknowledged as inferior. Some was eventually sold to private purchasers, and some became a scenic reserve, but nearly half of the land has been retained in Maori ownership – an unusually high proportion for Nelson and Marlborough. This situation, however, masks the fact that the land retained is nearly all located in a single reserve, and very little remains of the other four.

### **7.5.5 The Abel Tasman coast and Golden Bay**

#### **(1) Introduction**

This large district extends north from near Motueka along the north-west coast of Tasman Bay and westwards around Separation Point (a stretch now known as the Abel Tasman coast), continuing around the long Golden Bay coastline and finally reaching the north-western tip of the South Island. It also includes a stretch of the northern West Coast. As we explained earlier in this chapter, the reserves history of this district is complex. There were three phases in the process by which reserves were created. First, there were the actions of the New Zealand Company and the Crown between 1842 and 1847 in the large area obtained by the company during those years. This was followed by the allocation of reserves in an additional area acquired by means of the Pakawau purchase of 1852. Finally, as part of the Waipounamu agreements of the mid-1850s, a number of changes were made to the reserves created in 1847. In this section, we will first describe these three phases of the reserve-making process, and then examine the nature of the reserves thus created in each geographical sub-district (moving this time from west to east within the district, since this matches the chronological order of events better).

#### **(2) The process of reserve creation**

When Donald Sinclair was sent to lay out the reserves in Golden Bay in 1847, he was not starting the task from scratch, since the New Zealand Company had begun identifying reserves before the Spain commission intervened. As we mentioned in chapter 4, reserves had been

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175. Alexander, 'Reserves of Te Tau Ihu', vol 2, pp 520–523. The information about Whakitenga is from Meihana, brief of evidence, p 8.

176. Alexander, 'Reserves of Te Tau Ihu', vol 2, p 522

promised during the company's early dealings with the Golden Bay iwi (in September and December 1842).<sup>177</sup> Surveys for the creation of the company's rural sections in Golden Bay started soon afterwards, and by August 1844 had been completed for the districts from Aorere to a point east of Motupipi. During the course of the work the company promised to exclude villages and cultivations and to reserve other land for Maori use.<sup>178</sup> After the Spain award of 1845 the Government had ordered a survey of the scattered lands said to have been reserved, and reserves amounting to 461 acres in area had been identified within the already surveyed district from Aorere to east of Motupipi.<sup>179</sup>

We return now to Sinclair's visit to Golden Bay in 1847. Sinclair's understanding at this time, when the Spain award was no longer being taken seriously, was that in his review of the existing reserves situation in this area he was to 'select for the Natives of that district as much land, in addition to their present cultivations, &c, as I should consider sufficient for their present and future wants.'<sup>180</sup> Superintendent Richmond had authorised the allocation of about 2000 acres, which was much less than the 4500 acres stipulated by Spain for the tenths alone in Golden Bay.<sup>181</sup> Mary Gillingham cites documents demonstrating Sinclair's understanding that he could at his discretion augment the existing reserves but did not need to feel bound by the Spain award and to find at least 4500 acres to set apart as a tenths estate.<sup>182</sup> It is apparent that the obligation to set aside tenths had been rejected, and the issue now was simply how much occupation land to identify. Sinclair was to be advised by Charles Heaphy, who accompanied him to watch over the New Zealand Company's interests and inform him of any particular land he should not reserve, including the coal districts or 'any other part that is particularly valuable to Europeans.'<sup>183</sup> Heaphy had been instructed by the company 'to see that no excessive quantity of land is reserved.'<sup>184</sup> Clearly, under the terms of the Spain award a tenth (4500 acres) of the land in Golden Bay, as well as the occupation reserves should have been selected as reserves. This lacked the support of the new Governor, however, and did not happen. Not only did the tenths not eventuate, but also there was pressure to restrict the amount of occupation land to be reserved.

Sinclair's report on his reserve-making in Golden Bay in 1847 describes how he took a census at each place and inspected the reserves already made by the company, before deciding whether to add to them or tidy up their boundaries.<sup>185</sup> He always thought it better, he wrote, 'to fix upon suitable quantities of good and available land, than to listen to the

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177. See Walzl, *Land Issues*, pp 70–71, 84–85

178. Gillingham, 'Ngatiawa/Te Atiawa Lands', pp 63–65

179. Sinclair to Colonial Secretary, 19 October 1847, *Compendium*, vol 2, p 271; Gillingham, 'Ngatiawa/Te Atiawa Lands', p 87

180. Sinclair to Colonial Secretary, 19 October 1847, *Compendium*, vol 2, p 270

181. W Fox to W Wakefield, 22 July 1847 (Phillipson, *Northern South Island: Part 1*, p 118)

182. Gillingham, 'Ngatiawa/Te Atiawa Lands', pp 88–89

183. *Ibid*, p 89

184. Fox to Heaphy, not dated (Mitchell and Mitchell, *Te Tau Ihu*, p 341)

185. Sinclair to Colonial Secretary, 19 October 1847, *Compendium*, vol 2, pp 270–272

importunities of the Natives for large blocks, which with their present numbers (and it does not seem to me that they are on the increase, but the contrary), they never will or can cultivate, and the giving of which to them would seriously interfere with any attempt of locating European settlers among them.<sup>186</sup> According to Heaphy, Sinclair believed that 10 acres per adult male would be a sufficient quantity of land to allocate.<sup>187</sup> Such a small area is in stark contrast with the larger tracts that Grey (at about the same time) said were needed by Maori in the Wairau. Sinclair's report includes some details of how he adjusted the reserves he found at Aorere and Takaka. A table lists the reserves he investigated in the whole area between Aorere and Tata Bay (east of Motupipi), showing that 'Old Reserves' amounted to 461 acres, and that he straightened the boundaries of some of them, thus adding another 116 acres. He also added four new reserves at Aorere and Takaka, making a new total of 1087 acres.<sup>188</sup> In the eastern districts that had not yet been surveyed for settlement, Sinclair confirmed 276 acres of 'Old Reserves' and added a new one of 200 acres.<sup>189</sup> Occupation reserves of more than 1500 acres were thus now in existence in the Golden Bay and Abel Tasman coast areas.

The reserves identified by Sinclair in 1847 were recognised in the new Crown grant of 1848 for Nelson and the Wairau. Clearly, they did not amount to a generous allocation, even for subsistence purposes, and as we will shortly demonstrate, they did not possess much potential for their owners' successful participation in the coming agricultural economy. In the words of Dr and Mrs Mitchell: 'It seems clear that that the Occupation Reserves were made grudgingly, that they were restricted to less valuable land, that the chiefs' wishes were often ignored or overridden, and that the company's desires were of far greater importance to the Government representative than either Spain's stipulations or the needs of current or future generations of Maori.'<sup>190</sup> There would be another opportunity to provide what was required, however, as the reserves of 1847 were later revised in connection with the Waipounamu agreements.

In the meantime, in a new phase of the process as far as reserves were concerned, the Pakawau purchase of 1852 (discussed in chapter 6) added a considerable area to the land available for Pakeha settlement, but not much to the amount reserved for Maori. The new land lay to the north of the existing settlement district, beyond the Aorere River and extending west to the ocean at Whanganui Inlet. The acreage reserved from this block, however, constituted only a very small proportion of the area acquired. The resident Maori population was not large, and land was reserved only for a few permanent occupants. A number of absentee right holders were included in the payments but not in the allocation of reserves.

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186. Ibid, p 270

187. Gillingham, 'Ngatiawa/Te Atiawa Lands', p 89

188. Sinclair to Colonial Secretary, 19 October 1847, *Compendium*, vol 2, p 271

189. Ibid, p 272

190. Mitchell and Mitchell, *Te Tau Ihu*, p 342

Alexander Mackay later claimed that the small extent of the reserves created in the Pakawau purchase area was justified because most of those with interests in it held land elsewhere.<sup>191</sup> But Ms Gillingham gives two examples of Golden Bay Te Atiawa for whom this was not so, and points out that some of the lands in which Te Atiawa had interests were in the problematic Motueka reserves.<sup>192</sup> The policy also excluded claimants who did not normally reside on the land but used it for particular purposes such as hunting, fishing, or gathering. There is evidence that even some of those who did reside in the area were not given reserves: while preparing for the purchase Richmond noticed a number of small settlements and tried to persuade the occupants to leave and congregate in bigger places.<sup>193</sup> No reserve was created for Ngati Tama living at the Tomatea settlement near the Pakawau Inlet.<sup>194</sup> Similarly, Ngati Raru's occupation of Waikato, a little further south of Tomatea, was not recognised in the making of reserves in this area.<sup>195</sup> It should be noted that in this purchase the reserves were not identified, but were to be arranged later.

With regard to the rest of Golden Bay and the Abel Tasman coast, grievances about the existing reserves were among the matters addressed in negotiations with the iwi of the district in 1855–56 as part of the Waipounamu series of transactions. Visiting Golden Bay in 1855 in the course of these dealings, Tinline noted 'a universal complaint' that the reserves were too small, and heard from several Maori that they wanted to buy more land from the Government.<sup>196</sup> In connection with agreements signed at that time and mainly in an effort to extinguish remaining claims in the area, Crown officials revised some of the arrangements previously made for reserves and arranged for additional land to be granted to individual chiefs.<sup>197</sup> This constituted the third phase of the reserve-making process.

Having set the making of reserves within their chronological context and shown that the process of creating them had three distinct phases, we now proceed to examine the reserves in each of the four districts we have identified in this north-western part of Te Tau Ihu.

### **(3) Whanganui Inlet and north-west Golden Bay reserves**

In this sizeable area in the extreme north-west of the South Island, only two reserves were created. After the Pakawau purchase was made in 1852 the Government surveyor was instructed to lay out reserves for the Maori occupants of the newly acquired block. One would be located at Te Rae, on the Golden Bay coast, and the other at Whanganui Inlet on the west coast. The reserves were 'to comprise about 10 acres each, for the use of the two

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191. Alexander Mackay, 'Narrative', *Compendium*, vol 1, p 14

192. Gillingham, 'Ngatiawa/Te Atiawa Lands', p 174

193. Richmond to Colonial Secretary, 5 January 1852, *Compendium*, vol 1, pp 289–290

194. Mitchell and Mitchell, *Te Tau Ihu*, p 369

195. *Ibid*, p 370

196. Tinline to Richmond, 18 December 1855, *Compendium*, vol 1, p 296

197. Phillipson, *Northern South Island: Part 1*, pp 165–168

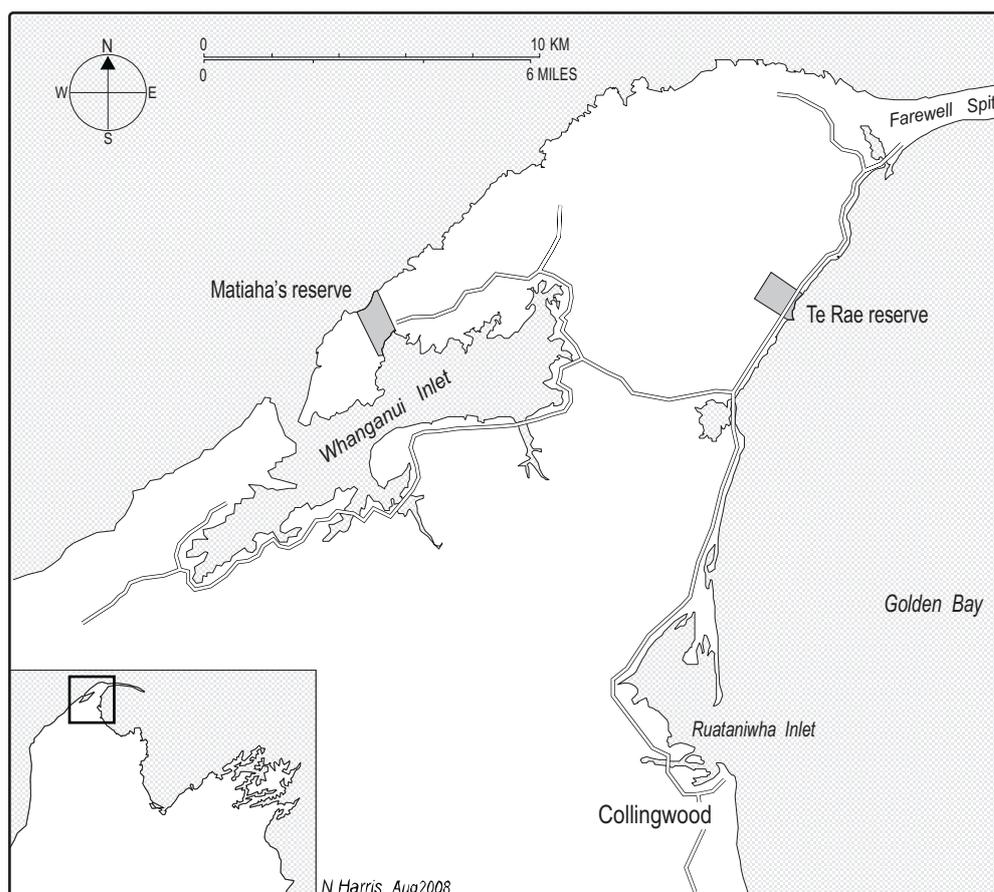


Figure 22: Whanganui–Pakawau reserves

Source: Moira Jackson and Associates Ltd, 'Te Atiawa: Western Te Tau Ihu Map Book', map book commissioned by the Crown Forestry Rental Trust, 2002 (doc G23)

families of Natives at present living on the purchased block.<sup>198</sup> Both reserves were found several decades later to be considerably larger than 10 acres (see fig 22).

The reserve at Te Rae was for Wiremu Kingi Te Koihua, a chief of Te Atiawa, and his son.<sup>199</sup> Te Koihua asked for a Crown grant in 1864, but did not obtain one. He maintained at this time that he had also been promised a section in the Pakawau township (Seaford), but had not received it. Although he had the support of James Mackay in this, nothing was done to rectify the situation.<sup>200</sup> When the Te Rae reserve was surveyed in 1892 at the time of the Native Land Court hearing it was found to be 115 acres in area. In 1876, some years after Te Koihua's death, it had become subject to the Native Reserves Act, although as usual little

198. Tinline to Brunner, 31 August 1852, *Compendium*, vol 1, p 291

199. Ibid

200. Te Koihua to Governor, 15 September 1864, *Compendium*, vol 1, p 291; J Mackay, memorandum, 16 September 1864, *Compendium*, vol 1, pp 291–292

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is known of the circumstances. Its Crown administrators made the land available for leasing. Three acres were taken for roading in 1921, but the remainder stayed in Maori ownership, and the reserve (now known as Onetaua) was transferred to the Wakatu Incorporation in 1977.<sup>201</sup> It is thus still not directly controlled by those with interests in it.

The reserve on the Whanganui Inlet was for Matiaha and his family. Matiaha was permitted to choose between two locations, either near Toiere village on the south side of the harbour, where he was currently living, or on the north side, where he had cultivations.<sup>202</sup> He chose the cultivation land (Kaihoka), which extended from the inlet across a low peninsula to the ocean, and when surveyed in 1892 was found to be 200 acres in area. The block came under the Native Reserves Act in 1875. It was leased but never sold, and like the other Pakawau reserve was transferred to the Wakatu Incorporation in 1977. It is now known as Taura.<sup>203</sup>

Five years after the Pakawau purchase, in 1857, another section on the south shore of the Whanganui Inlet (perhaps the Toiere land that Matiaha had not chosen), 50 acres in area, was gazetted as a village reserve. It was never used for that purpose, and at some point was substituted for a reserve near Separation Point that had been promised, as part of the agreement of 1856, to Riwai Turangapeke of Ngati Rarua. The land was awarded to Riwai's descendants by the land court in 1892, and has never been sold.<sup>204</sup>

Of the 365 acres reserved in this district, the entire area (apart from a few acres taken for roading) has been retained in Maori ownership, although from 1875 much of it was not under Maori control.

#### **(4) Reserves between the Aorere and Takaka Rivers**

The allocation of reserve land in this south-western part of Golden Bay (the Aorere Valley and the coastal strip between that valley and the Takaka Valley) was based upon what Sinclair arranged in 1847. Most of the 26 reserves he confirmed and adjusted (and labelled A to Z) in various parts of the district were very small, consisting of a few acres each or even less than an acre. Nine of these reserves, covering about 65 acres and described later by Mackay as mainly 'old cultivations in use at the time of the company's purchase', were scattered along the lower reaches of the Aorere River and at its mouth. Ten others, covering not much more than 20 acres in all, were situated around the Parapara Inlet. Other small reserves were at Tukurua, where the land was later described by Alexander Mackay as 'chiefly hilly, a portion of it being quite precipitous', and Pariwhakaoho. However, two of the blocks were larger. Reserve J was a 90-acre block on the coast from Collingwood south

201. Alexander, 'Reserves of Te Tau Ihu', vol 2, p 525; 'Report of Commission of Inquiry into Maori Reserved Land', AJHR, 1975, H-3, pp 348-352

202. Tinline to Brunner, 31 August 1852, *Compendium*, vol 1, p 291

203. Alexander, 'Reserves of Te Tau Ihu', p 526; 'Report of Commission of Inquiry into Maori Reserved Land', AJHR, 1975, H-3, p 352

204. Alexander, 'Reserves of Te Tau Ihu', pp 526-527

to the Parapara Inlet and reserve z was another coastal strip at Pariwhakaoho comprising 59 acres. The latter was later described by Mackay as being mostly 'of a very worthless character, a great proportion of it consisting of steep hillsides'. Sinclair also substantially expanded two other reserves a little further up the Aorere Valley, creating adjacent blocks of 150 acres allocated to Ngati Tama (section 13) and 'the Mitiwai', a hapu of Te Atiawa (section 34). The new total area was about 560 acres.<sup>205</sup>

Significant additions and other changes were made in 1855–56 in connection with the Waipounamu agreements. In the Aorere Valley, a new block of 150 acres (section 14) was awarded to Tamati Pirimona, a man who already had interests in the adjacent section 13 and was regarded by McLean as 'a well-disposed chief'.<sup>206</sup> The owners of section 34 in this district had found it to be 'wet land', and successfully asked for it to be exchanged for section 16 on the other side of the river.<sup>207</sup> Also in the valley, and apparently in settlement of grievances, a block of 100 acres (section 5) was awarded to Pirika Tanganui, who purchased an additional 50 acres.<sup>208</sup> Mackay noted that this land was 'heavily timbered, and liable to be flooded'.<sup>209</sup> Another addition to the reserves in the valley was an area of more than 200 acres in seven contiguous sections, allocated to Hori Te Karamu and others.<sup>210</sup> Down the coast at Parapara two of the existing small reserves were abolished, together with another group of seven small reserves (with a total area of about 20 acres) that were incorporated in two new blocks of 150 and 100 acres. Two other new reserves (of 30 and 50 acres) were created.<sup>211</sup> An official described the 100-acre block as 'only suitable for Native purposes. The land generally is of a very inferior description'.<sup>212</sup> At Pariwhakaoho, three existing small riverside reserves were incorporated in a new block of 150 acres granted to Te Keha, who had protested about the inadequacy of the earlier award and whom McLean wanted to keep away from Taranaki. The quality of the reserve here was indeed 'very indifferent', wrote Mackay; 'in fact there is barely sufficient arable land on it to maintain the resident population'.<sup>213</sup> In the 1860s, an additional block of 154 acres was allocated, after Te Keha's family again complained that the land was inferior.<sup>214</sup>

The ultimate outcome of the Crown's reserve-making activity in this part of Golden Bay was thus the creation of more than 30 reserves, although some of them were very small and

205. Sinclair to Colonial Secretary, 19 October 1847, *Compendium*, vol 2, pp 270–271; Alexander Mackay to Native Minister, 6 December 1865, *Compendium*, vol 2, pp 310–313

206. McLean, memorandum, 24 April 1856, *Compendium*, vol 1, p 305; Alexander Mackay to Native Minister, 6 December 1865, *Compendium*, vol 2, p 313

207. Tinline to Richmond, 18 December 1855, *Compendium*, vol 1, p 297

208. Gillingham, 'Ngatiawa/Te Atiawa Lands', p 190

209. Alexander Mackay to Native Minister, 6 December 1865, *Compendium*, vol 2, p 311

210. *Ibid*, p 313; Alexander, 'Reserves of Te Tau Ihu', vol 2, p 529; Native Land Court, Nelson, minute book 2, 12 November 1892, fol 248

211. Alexander, 'Reserves of Te Tau Ihu', vol 2, pp 548–551

212. Tinline to Richmond, 18 December 1855, *Compendium*, vol 1, p 296

213. Alexander Mackay to Native Minister, 6 December 1865, *Compendium*, vol 2, p 310

214. Gillingham, 'Ngatiawa/Te Atiawa Lands', pp 191–193

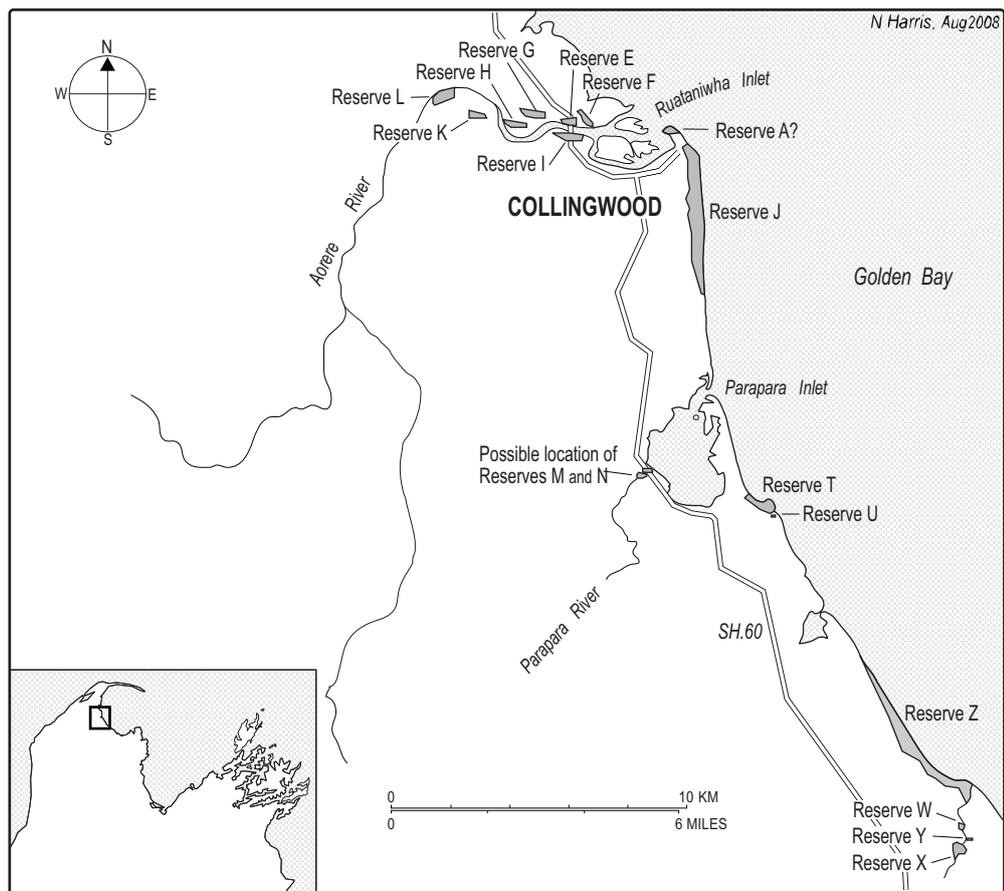


Figure 23: Aorere-Parapara reserves

Source: AAFV997, NR10-12

a number of them were described at the time as being of inferior quality. The total acreage was about 1630 acres (see fig 23).

In the years following the creation of the reserves in this district, many of the owners were issued with Crown grants for their land. Two 150-acre blocks, both in the Aorere Valley, were Crown granted at the outset, in 1856 and 1857. Eight more, scattered throughout the district and with a total area of 726 acres, followed in 1866 and 1867. One of these, the 90-acre reserve J near Collingwood, was partitioned into nine blocks before the grants were issued. In 1872, the five-acre reserve F at the Aorere mouth was the last of the 11 in this district to be Crown granted. In the 1860s and 1870s, although the dates are not always known, many of the reserves not Crown granted (as well as reserve F, which was later issued with a grant) were vested in the Crown under the Native Reserves Act. As in most of these cases, we do not know the circumstances in which this was done. There appear to have been 11 in this category, with a total area of 291 acres. Most of them were small (up to 15 acres), though they included the 150-acre section 192 at Parapara, which was leased soon afterwards for mineral extraction, and the 59-acre reserve Z at Pariwhakaoho. Only a few

reserves, totalling 356 acres in area, were neither Crown granted nor vested under the native reserves legislation.

Reserves in this district were put through the Native Land Court in 1892, and we note some of the decisions made. In the investigations of reserves G and H, for instance, the court put only representative successors on the title, in order to facilitate the completion of sales said to have been arranged by the late Tamati Pirimona Marino, a former part owner of both blocks. He had apparently been partly paid for the sales before his death.<sup>215</sup> We note also that Huria Matenga gained further interests in land in Golden Bay. She was awarded the relatively small reserves K and L, which were vested in the Public Trustee, and was also made the owner of sections 74 to 78 and 85, which had not been vested. Hemi Matenga represented her in this latter case. In all these cases, Huria had inherited the land as nearest surviving kin to Hori Te Karamu and Herewini Te Roha, who were children of Te Puoho, but by an earlier wife rather than by Huria's grandmother Kauhoe.<sup>216</sup> Reserves K and L were never sold, but Huria sold sections 74 to 78 and 85 a few years later for £420. On her application, the court lifted the restriction on the alienation of these blocks after it was satisfied that she had sufficient land elsewhere for her use and occupation. Huria had already sold section 16, a Crown-granted block she had inherited from the same original grantees, for £400 in 1886.<sup>217</sup> It may be that Huria, not being resident in this area, was more willing to sell the Aorere land, although it is true that she did alienate portions of Wakapuaka despite her residence there.

The court's decisions concerning reserves T and U at Tukurua are also of interest. Cherie Hazel Byrne, in her brief of evidence, stated that she is a descendant of Te Ranginohokau of Ngati Tama and Te Atiawa, who occupied Tukurua after the raupatu. Kataraina, daughter of Te Ranginohokau and his wife Meira Meira, married Pirika Tanganui, a Ngati Tama rangatira.<sup>218</sup> In 1847, Sinclair confirmed the two 'old reserves' at Tukurua, which had a total area of 15 acres. Ms Byrne presented evidence from the diaries of Elizabeth Caldwell, an early European settler at Tukurua, demonstrating that Maori of high status, Kataraina and Pirika Tanganui and Meira Meira, were resident there in the mid-nineteenth century. Despite the challenge to her family's right to settle on what the whanau asserted was still their land, Mrs Caldwell seemed less inclined to question the whanau's claim than Tinline, who reported on the dispute at Tukurua in December 1855. Nevertheless, Tinline conceded that there were indeed 'some very old cultivations upon the land now held by Mr Caldwell, which were neglected to have been surveyed and reserved by Mr Heaphy'.<sup>219</sup> When the land court

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215. Walzl, *Land and Socio-Economic Issues*, pp 162–163

216. Native Land Court, Nelson, minute book 2, 12, 18 November 1892, fols 248, 341 (David Alexander, comp, supporting documents to 'Reserves of Te Tau Ihu', 10 pts, various dates, pt 6 (doc A60(h)), pp 5450, 5458)

217. Clark, 'Land Alienation', p 22; Native Land Court, Nelson, minute book 2, 12 November 1892, fol 248

218. Cherie Byrne, brief of evidence on behalf of Ngati Tama, 12 January 2003 (doc K13), p 2, app 1

219. Tinline to commissioner of Crown lands, Nelson, 18 December 1855, *Compendium*, vol 2, p 306; Byrne, brief of evidence, pp 3–4

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investigated the title to the Tukurua land in 1892, Inia Te Hunahuna gave evidence that part of reserve T belonged to Te Ranginohokau, who was buried there, but that the rest belonged to Wi Katene. He stated that Pirika and his people who subsequently lived at Tukurua had no right to it, but that Kauhoe had given the land to Te Ranginohokau, whose daughter subsequently married Pirika. Hemi Hemi Matenga said that Pirika had lived there around 1856, and that after Wi Katene had given his permission a house was built on the land. The court awarded 15 acres of reserve T to Huria Matenga and less than an acre to members of the Pirika whanau. Inia Te Hunahuna also gave evidence that reserve U belonged to Pirika, who had lived there, so this tiny area was also awarded to members of the Pirika whanau. Some were minors, aged eight, 12, 16, and 17.<sup>220</sup>

Ms Byrne commented that there was no indication that any of the Pirika whanau were present at the land court hearing in 1892, and that it is certain that none gave evidence. Given the weight of evidence that the Pirika whanau occupied the area in mid-century, Ms Byrne challenged the truth of the evidence given by Te Hunahuna and Hemi Matenga. Byrne observed that the court should have protected the interests of the absent, especially vulnerable minors, who may not have known the hearing was taking place. She also claimed that even if there had been a gift from Kauhoe, which the Pirika whanau dispute, the length of occupation by the Pirika whanau ‘would have superseded the power of gift.’<sup>221</sup> This raises the issue of the relationship between Alexander Mackay, the judge in this case, and Hemi and Huria Matenga, which we will explore in chapter 8. We point here to the possibility of bias in Judge Mackay, who appears in this instance to have awarded most of the Tukurua reserve land to a family friend in the absence of those who had occupied the land for many decades. As was also the case with Wakapuaka, it is difficult to see that the judge was wholly ignorant of the facts of the situation. We might add that the sections granted to the Pirika whanau remain in Maori ownership today, while the land granted to Huria Matenga was sold in the early twentieth century.<sup>222</sup>

As for the fate of this district’s reserves generally, some of the land in both the Crown-granted and vested categories was retained in Maori ownership until the present day. This includes 91 acres of a Crown-granted 150-acre block, and about 250 acres of vested land (including most of the two larger reserves mentioned above). Today about three-quarters of this Maori land is held by the Wakatu Incorporation. Most of the reserved land, however, was sold. The first land to be alienated was section 14, one of the 150-acre blocks in the Aorere Valley, which was Crown granted in 1858 and sold in 1862. Most of the partitioned and Crown-granted coastal block south of Collingwood (reserve J) followed in 1866–68.

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220. Native Land Court, Nelson, minute book 2, 12 November 1892, fol 250 (Alexander, supporting documents to ‘Reserves of Te Tau Ihu’, pt 6, p 5452)

221. Byrne, brief of evidence, pp 6–8

222. Alexander, ‘Reserves of Te Tau Ihu’, vol 2, pp 552–553

Smaller reserves were sold from time to time from the 1870s onwards, along with larger blocks in 1878, 1886, 1898, and 1917. The sale of 1917 saw the last large Aorere Valley reserve sold, and in the valley today only three small blocks near the river mouth (with a total area of 23 acres) remain; two of them are held by Wakatu. At Parapara, the smaller blocks have been alienated, but the bulk of the two larger blocks are still Maori-owned (by Wakatu). One of these had been vested under the Native Reserves Act in 1875. The other had been Crown granted in 1866, and in 1985 was purchased by Wakatu from the Maori Trustee, to whom it had passed in 1971. At Tukurua, as we have said, only tiny fragments remain in Maori ownership. In the district as a whole, only small areas were sold after 1917, most of them in the 1920s, but sales of large areas of Pariwhakaoho land in 1965 and 1981 meant that only about 80 acres in that locality remain in Maori ownership. Overall, of the 1630 acres of reserves created in 1842–56 in this part of Golden Bay, about 340 acres (about 20 per cent) are still Maori-owned.<sup>223</sup>

Finally, we note that Maori purchased some land in the district in the 1850s, although it was not retained for long. As mentioned above, a purchase of 50 acres was made in 1857 to add to a block of 100 acres that had been awarded in the Aorere Valley. This land was sold in the 1870s. Another block of 150 acres in the Aorere Valley, acquired in 1859, was sold in 1875. At Pariwhakaoho, 20 acres purchased in 1859 was sold in 1880.<sup>224</sup>

#### **(5) Lower Takaka Valley reserves**

The reserves in this district were all situated at the localities known as Takaka and Motupipi, in the lower part of the broad alluvial valley that carried the long Takaka River and the shorter Motupipi River into Golden Bay near its base. In 1847, Sinclair dealt with the reserves he found there by confirming and tidying up those already existing, and, at Takaka, adding 60 acres for Ngati Rarua and 150 acres for Ngati Tama. The 11 reserves were labelled A to K, and consisted of a total of more than 500 acres. Individually they ranged in size from one acre to 150 acres, including five of between 30 and 100 acres. Mackay described the largest (reserve G, which lay adjacent to the site of the present-day Takaka township) as ‘heavily timbered and of good quality.’<sup>225</sup>

The Waipounamu agreements of 1855–56 saw additional reserve land allocated to satisfy a number of grievances. The complicated nature of some of the situations being resolved meant that the changes were not finalised in some cases until 1870. The eventual outcome,

223. Ibid, pp 529–560. We also note the sale in 1965 of the 154-acre section 101 at Pariwhakaoho, one of the reserves that was neither Crown granted nor vested. Although conferring on it the status of ‘general land’, the sale was to descendants of the original Maori grantee, whose family had farmed it throughout the twentieth century: see Alexander, ‘Reserves of Te Tau Ihu’, vol 2, pp 559–560; Ward-Holmes and Little, brief of evidence.

224. Alexander, ‘Reserves of Te Tau Ihu’, vol 2, pp 561, 563

225. Sinclair to Colonial Secretary, 19 October 1847, *Compendium*, vol 2, p 271; Alexander Mackay to Native Minister, 6 December 1865, *Compendium*, vol 2, pp 311–314

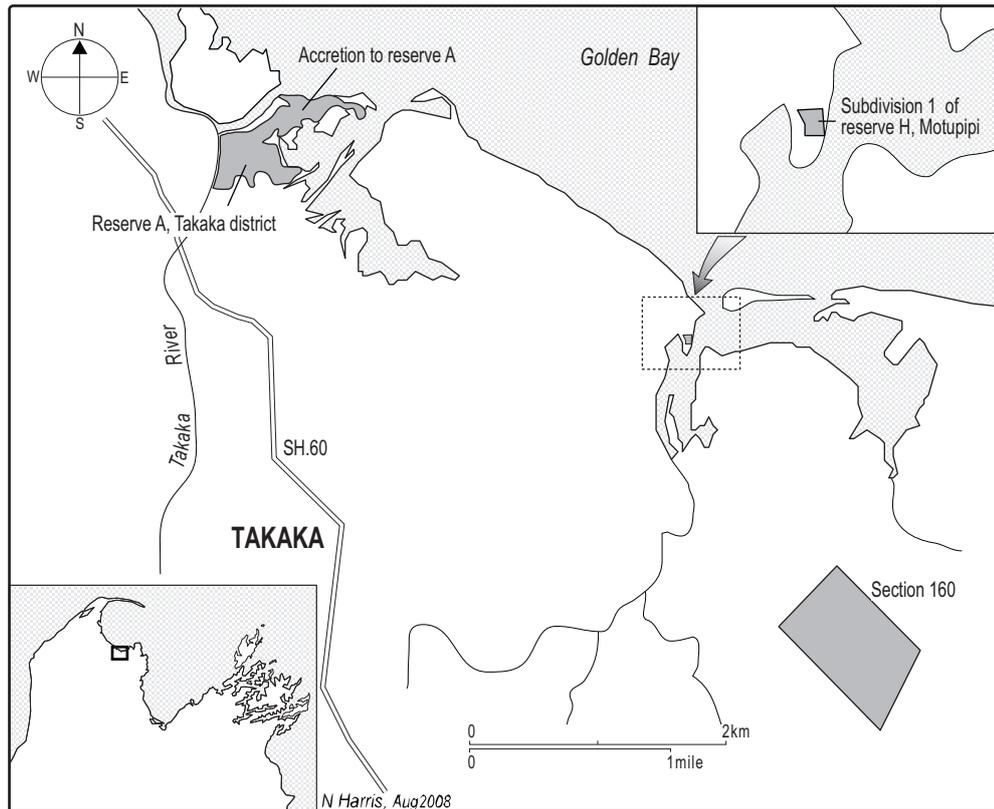


Figure 24: Takaka–Motupipi reserves

Source: AAFV997, NR18

however, was that about 800 acres were added.<sup>226</sup> This made a total of about 1300 acres in this district (see fig 24).

The land in the lower Takaka Valley was perceived to be of higher value than that in other parts of western Te Tau Ihu. Referring to Maori-owned land in the Golden Bay–Abel Tasman coast area as a whole, Mackay wrote in 1865: ‘Although the area [of Maori land] appears numerically large, the land on the whole is of such indifferent character as would leave little or none beyond what is required by the resident Natives for their own use and occupation.’ The situation in the lower Takaka Valley was different, however. Reserve G and the neighbouring blocks were, according to Mackay, ‘really the only good land the Natives resident in Massacre [Golden] Bay possess.’ He believed it could easily be let to Pakeha for a pound an acre.<sup>227</sup> It is perhaps not surprising that the vast majority of the reserve land in the lower Takaka Valley has been alienated.

In this district, Crown grants were issued for most of the reserves, including two that were partitioned and Crown granted at the time of their creation. In 1866–67, three reserves were entirely partitioned before being Crown granted, and parts of two others were partitioned

226. Alexander, ‘Reserves of Te Tau Ihu’, vol 2, pp 592–630; Gillingham, ‘Ngatiawa/Te Atiawa Lands’, pp 194–199

227. Alexander Mackay to Native Minister, 6 December 1865, *Compendium*, vol 2, p 311

and Crown granted. Two other reserves went through the process in 1872 and 1875. The total area of Crown-granted land was more than 1100 acres, leaving only about 170 acres not held under this arrangement. Some of the blocks that had not been Crown granted, as well as several blocks that had, were at some stage (the dates are not always known) put under the natives reserves legislation. About 150 acres were neither Crown granted nor vested.

Sales began early in this district: the first alienation was in 1858, when one of the 20-acre subdivisions of section 22 (Crown granted a year earlier) was sold for a pound an acre. The sale of the land proceeded steadily from the 1860s until recent times, in a very piecemeal fashion, most of the alienations being of small partitions. Until the 1950s, none of the individual sales exceeded 30 acres, apart from a 100-acre section that had been neither Crown granted nor vested and was sold in 1894 soon after it passed through the Native Land Court. There were two larger sales (49 and 60 acres) in 1953 and 1968, and the loss of smaller blocks continued into the 1990s. Many of the subdivisions of reserve G near the township remained in Maori ownership until recent years, about half of the original reserved area being sold in 1990. Some of the holdings remaining in the district as a whole are very small, the largest being an 11-acre block – one of the original reserves of 1847, and vested at some point in the Crown under the Native Reserves Act – at the Takaka River mouth. Only about 40 acres remain (about 0.3 per cent of the original reserved land), in 10 holdings.<sup>228</sup>

Edwin Pearson, in his evidence for Ngati Tama, gave us an example of one Crown-granted piece of land at Motupipi – a 19-acre block granted to his ancestor Wi Kiriwha in 1875:

This land was clearly inadequate to support all the descendants. Even if those people had all wanted to use the block simply for subsistence – running a few cows, supporting a number of horses, growing vegetables and building homes – the land would not have been able to sustain all of the families who might claim an hereditary interest in it. To undertake any sort of farming on a commercial basis (ie, to acquire income) was simply out of the question given the number of descendants at that time. The same thing had happened at Pariwhakaoho and Puramahoi among the same families who also descended from a Te Atiawa ancestor, Henare Tatana Te Keha, who was the original owner of those blocks.<sup>229</sup>

In the 1930s, Mr Pearson's father bought out the interests of other owners, a process that was long and painful for all concerned, and fraught with consequences for those who agreed to alienate their small interests. He concluded:

The point I am trying to make is that the area of land reserved for Wi Kiriwha was never adequate even for his own generation's needs, and was completely inadequate as time went by. Our parents and our family were only able to continue to maintain ahi kaa on this land because 35 of our mother's relatives were willing to give up their rights to the land, and

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228. Alexander, 'Reserves of Te Tau Ihu', vol 2, pp 564–630

229. Edwin Pearson, brief of evidence on behalf of Ngati Tama, 13 January 2003 (doc K18), p 3

consequently their turangawaewae. The other awful thing about this situation is that most of those who gave up their interests in the Maori Reserve lands also left the district. Some of the holders of those interests that Mum and Dad bought out had left Golden Bay a generation or two earlier because similar decisions in their parents' or grandparents' time had forced some family members to seek their livelihoods elsewhere.<sup>230</sup>

Mr Pearson ended his evidence with a plea to the Tribunal:

We would like the Tribunal to consider redress for all the Ngati Tama of Te Tau Ihu who found themselves in this position, whether they are those who were forced to buy out their relatives' interests in order to maintain ahi kaa, or those who out of generosity to individual whanaunga were prepared to give up their mana whenua to allow at least one whanau to continue to live and work on their ancestral land. The re-establishment of land interests for such whanau, or even Ngati Tama as an iwi, would assist in mitigating the ongoing loss and dislocation that many Ngati Tama people now feel.<sup>231</sup>

The reserves were supplemented in the 1850s and 1860s by several blocks of land in this district, which were purchased by Maori. There were two 150-acre blocks in the lower valley, and three blocks of approximately 50 acres further up the valley at East Takaka. Most of this land had been sold by 1880, and the last piece went in 1928.<sup>232</sup>

#### **(6) Eastern Golden Bay and Abel Tasman coast reserves**

The coastline in this area – eastwards from Pohara in eastern Golden Bay, around Separation Point, and down the western side of Tasman Bay to the district just north of Motueka – fringed a large tract of hilly bushclad country. There were very few areas of flat land, and in 1847 Sinclair commented that apart from the flats at Wainui Inlet there was little land that would be attractive to Pakeha farmers.<sup>233</sup> His review of the reserved land in this district resulted in the creation of more than 20 reserves, based on what already existed and with the addition of 200 acres at Wainui. Sinclair's report indicated that he did not work beyond Anapai, just south of Separation Point, but from Mackay's list in 1865 it seems there were also reserves south of Anapai and far as Kaka Island at Kaiteriteri. From Sinclair we understand that he created reserves amounting to about 495 acres, but it is not clear whether this figure included reserves south of Anapai.<sup>234</sup>

The agreements of 1855–56 brought several changes to the reserves of this district too. The small reserve at Pohara remained unaltered, but two other small areas at Ligar Bay (10 acres in total) were increased, on McLean's instructions, to a 100-acre section along the Ligar

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230. Pearson, brief of evidence, p12

231. Ibid, pp12–13

232. Alexander, 'Reserves of Te Tau Ihu', vol 2, pp 658–662

233. Sinclair to Colonial Secretary, 19 October 1847, *Compendium*, vol 2, p 271

234. Ibid, pp 271–272; Alexander Mackay to Native Minister, 6 December 1865, *Compendium*, vol 2, p 314

Bay shore as a fishing reserve for Matenga Te Aupouri of Motupipi and his family. Mackay commented that 'the land on the whole is very useless and swampy'. Two small reserves at Tata Bay were abolished, but a third remained. Minor adjustments were made to the smaller reserves at Wainui, land that according to Mackay included 'the site of the old pah, cultivations and burial grounds; it is of very little worth, a great portion of it being bare sand hills'. Paramena Haereiti was awarded a new 100-acre reserve on flat land on the eastern side of the inlet. The largest reserve in this part of Golden Bay (200 acres) was already in existence, situated at the head of Wainui Inlet. In 1865, Paramena and about 20 of his relatives were living on this land, most of which was in bush, although parts were used for crops and sheep; other parts, reported Mackay, were 'very low and swampy'.<sup>235</sup>

Changes arising from discussions and agreements in 1855–56 were also made in the area from Wainui Bay to Sandy Bay, a tract of land that now constitutes the Abel Tasman National Park. A small reserve at Taupo Point remained, but the much larger reserve U (157 acres) near here was 'abolished'. (Mackay wrote that 'other land has been substituted', but it is not known where the replacement land was located.) A reserve at Whariwharangi was increased to about 40 acres. Between Separation Point and Totaranui, there were several small reserves and one at Anatakapau Bay that was later surveyed at 50 acres. It was agreed with the owners in 1856 that two of the small reserves in this area would be replaced with a new 100-acre block (section 5, known as Waiharakeke, and later found to be 110 acres in area) south of Totaranui. An area of 50 acres at Awarua was promised to two named persons, but it seems that this decision was never acted upon. Further south, between Bark Bay and Kaiteriteri, there were six other small reserves (we have no further information for three of them). Finally, McLean asked for an 80-acre reserve at Marahau (in Sandy Bay) to be granted to Wi Parana.<sup>236</sup> Parana had been occupying New Zealand Company sections there and McLean was willing to have a reserve allocated to him as a means of persuading him to stay away from Taranaki.<sup>237</sup>

The outcome of the reserve creation process in this part of the district was the setting up of reserves with a total area of about 730 acres (see fig 25).

The 100-acre section at Ligar Bay was Crown granted before long, in 1863, along with the 100-acre block at Wainui. Only four other blocks (111 acres in area) were Crown granted, all in 1886 and 1887. Two of these had earlier been vested under the native reserves legislation. Four other reserves were put under the native reserves legislation in this district, all of them small except the 200-acre block at Wainui. Only the 100-acre Waiharakeke reserve and the 80-acre Marahau block were neither Crown granted nor vested in the Crown. In

235. Alexander Mackay to Native Minister, 6 December 1865, *Compendium*, vol 2, pp 310–313

236. *Ibid*, pp 311, 313–314. The promised reserve at Awarua is mentioned by Mackay in his report 'Land Purchases, Middle Island', AJHR, 1874, G-6, p 3. The same source refers to the 50-acre section promised to Riwai Turangapeke, who later received a reserve at Whanganui Inlet, as mentioned earlier in the chapter.

237. McLean, memorandum, 24 April 1856, *Compendium*, vol 1, p 306; Gillingham, 'Ngatiawa/Te Atiawa Lands', pp 199–200

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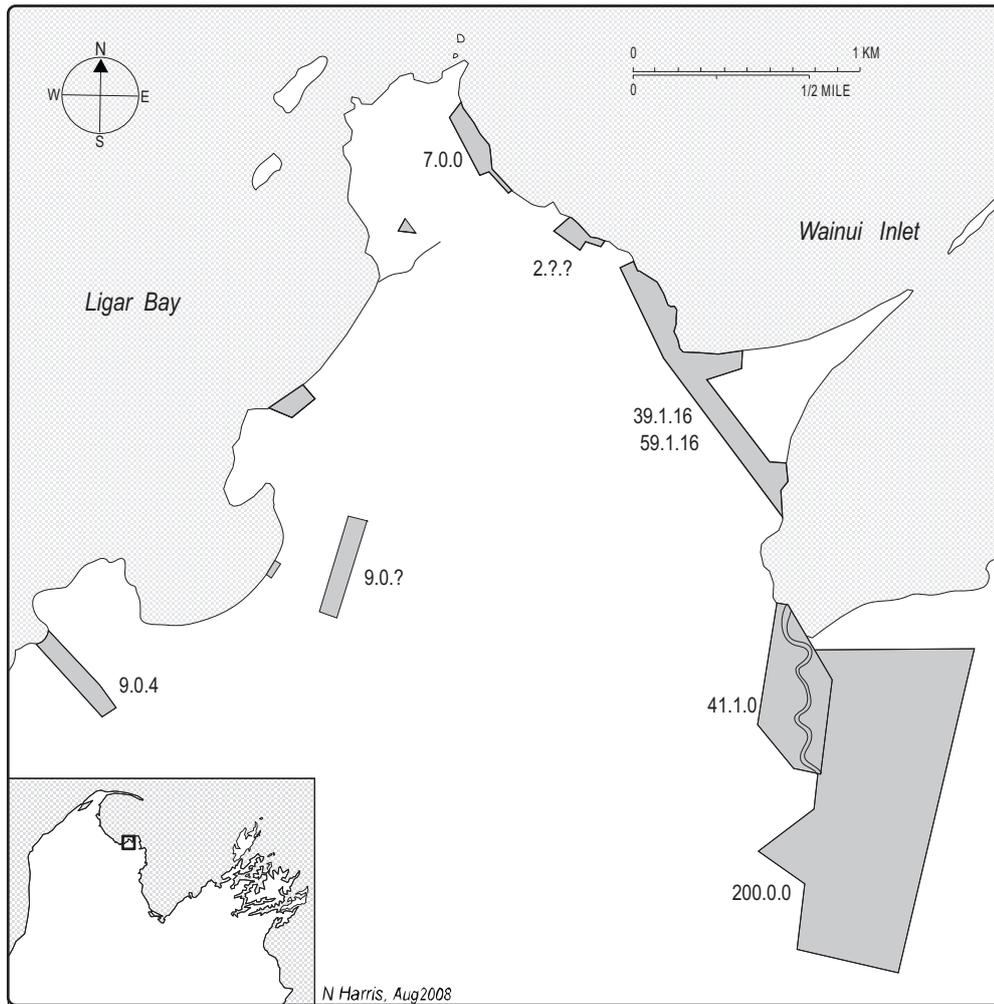


Figure 25: Marahau-Ligar Bay reserves

Source: AAFV997, NR18

1899, however, the Public Trustee took control of the Marahau block because it was said to be abandoned and overgrown.<sup>238</sup>

The first reserves to be alienated were two of the larger blocks allocated in 1856 and Crown granted soon afterwards: Paramena's 100 acres at Wainui were sold in 1865, and Matenga's 100 acres at Ligar Bay at some point in the 1870s. Three other reserves (67 acres in all) were sold in the 1880s (leaving only one more Crown-granted block to be sold, in 1914). Another large part of Paramena's Wainui land followed in 1909 (at the same time and to the same purchaser as the adjacent 200-acre block that Paramena had bought in 1884). There were a few more sales in the years up to 1926, another in 1953, and in 1965 the Crown acquired the reserve at Waiharakeke (110 acres) to add to the national park that had been established in

238. Gillingham, 'Ngatiawa/Te Atiawa Lands', p 200

1942. The Waiharakeke block was mostly steep and unworkable, with more than half of its area in bush and the rest in fern and scrub, and it lacked good access by land. The Crown was aware that it could be privately purchased and subdivided, and, anxious not to see it lost for national park purposes, purchased it for £1000 (the adjacent block that Maori purchasers had acquired in 1897 was bought by the Crown at the same time). Also as part of the efforts of Government agencies in the 1960s to extend the boundaries of the national park by purchasing private land, the Crown purchased the small reserve J on Fisherman Island near Sandy Bay in 1965 for £50. This transaction was with the Maori Trustee, without the involvement of any of the beneficial owners, and this was also the case with the tiny reserve E on the coast south of Frenchman Bay, which was bought by the Crown in 1967 for £375.<sup>239</sup>

Alienations of reserve land in this district were so widespread that there was hardly any left even when the Crown made its purchases for the national park. All the Crown-granted land and almost all of the blocks vested in the Crown had been sold by then. Only the 83-acre Marahau block remains. (It had been leased out by the Public Trustee and his successors, and was transferred to the Wakatu Incorporation in 1977 along with a single small reserve in the far south of the district – Kaka Island at Kaiteriteri.<sup>240</sup>) The Marahau block was the subject of a claim, Wai 830, which we discuss in chapter 9. The proportion of reserve land remaining unalienated is thus not much more than 11 per cent.

As we have already noted, some land was purchased by Maori in this district. Paramena Haereiti bought 487 acres adjacent to his 200-acre block at the head of Wainui Inlet in 1862, and in 1884 added another 200-acre section inland of his original block. These parcels of purchased land were sold, both to the same buyer, in 1907 and 1909.<sup>241</sup> In 1897, in another part of the district, a block of 194 acres (section 9) on the Abel Tasman coast, inland of section 5 (Waiharakeke), was purchased by Kerei Pukekohatu. It remained in Maori ownership until it was purchased by the Crown in 1966 and added to the national park. At about the same time two other small sections and two larger ones in this vicinity, with a total area of more than 250 acres, were purchased by Maori. In 1914, they appear to have reverted to Crown ownership because the conditions of purchase had not been met, and they were set apart as a scenic reserve in 1918.<sup>242</sup>

### (7) Conclusion

We have shown that in the four districts of the region we have identified as the Abel Tasman coast and Golden Bay a total of approximately 4025 acres was allocated to the members of

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239. Alexander, 'Reserves of Te Tau Ihu', vol 2, pp 631–657, 664

240. Ibid, pp 642–643

241. Ibid, pp 663–664. The block purchased by Paramena in 1862 is the subject of the claim discussed below in section 12.5. Another tiny piece of land on the shores of Wainui Inlet contained an urupa and was retained in Maori ownership when the surrounding land, the block purchased by Paramena in 1862, was sold in 1907. It is the subject of the claim discussed below in section 12.6.

242. Alexander, 'Reserves of Te Tau Ihu', vol 2, pp 665–666

the various resident iwi as reserves. Some of this land, in the Aorere Valley and especially in the lower Takaka Valley, was recognised as agriculturally valuable, but most of it was situated in hilly coastal areas that offered less potential for successful farming. Although valued for their historical associations and the residential, cultivation, and burial sites they contained, as well as for their easy access to marine food resources and travel routes, most of the reserves eventually proved to be incapable of sustaining their owners economically. In any case, by the end of the twentieth century only about 830 acres had been retained – about 80 per cent had been alienated.

### 7.5.6 The West Coast

#### (1) Introduction

As part of the arrangements he made for the Arahura purchase in 1860 (discussed in the previous chapter), James Mackay engaged in the making of reserves. In accordance with his instructions he selected 58 reserves on the western coast between the Heaphy River in the north and the Arawhata River in present-day south Westland. These lands consisted of 47 occupation reserves for resident Maori ('schedule A' reserves, 6724 acres in total), and 11 endowment reserves 'for religious, social and moral purposes' ('schedule B' reserves, with a total area of 3500 acres). Reserves in the second category were to be conveyed to the Crown and administered under the Native Reserves Act of 1856 for the benefit of their owners.<sup>243</sup> It is with the reserves (in both categories) situated in the northern area that we are mainly concerned with here.

#### (2) Occupation reserves

Schedule A reserves were to be allocated to named individuals as owners, and a list of those situated in Nelson province – that is, north of the Mawhera (Grey) River – was published in 1862. In this area, from Kararoa north to Karamea, there were 14 such reserves, listed with details of their location and acreage and the names of the persons to whom they were allocated.<sup>244</sup> A later published list covered the whole purchase, again attaching names to the schedule A reserves.<sup>245</sup> There were also six town sections in Westport, with a total area of four acres, that were allocated to certain named individual Maori, including Tamati Pirimona Marino, Puaha Te Rangi, and Hoani Mahuika, all of whom had strong affiliations to the non-Ngai Tahu iwi.<sup>246</sup>

As we mentioned in chapter 6, Puaha Te Rangi 'and a few other Ngatihapa Natives' were

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243. For the Arahura deed and its attached schedules (lists of A and B reserves), see Alexander Mackay, 'Deed of Sale . . . Land at Arahua', 21 May 1860, *Compendium*, vol 2, pp 385–389.

244. AJHR, 1862, E-10, p 17. The same list (republished in 1865) is in *Compendium*, vol 2, p 314.

245. *Compendium*, vol 2, pp 337–339

246. Alexander, 'Reserves of Te Tau Ihu', vol 2, pp 694–697

allocated 'some reserves' at Kawatiri, although no figure was specified. It is not easy to determine precisely how much land and which of the 11 scattered reserves in that locality (totalling 674 acres in all) were those allocated to the people identified as Ngati Apa. They also received a reserve near Karamea. The *Ngai Tahu Report 1991* gives a figure of 424 acres of land reserved for Ngati Apa – a figure arrived at in the 1980s by Dr Loveridge, who added up the area of five reserves he identified from the original list.<sup>247</sup> Claimant analysis of the identity of the people stated to be owners in the list of reserves published in 1865, however, suggests that persons with direct links to Ngati Apa held only 254 acres.<sup>248</sup> It is probably impossible to be sure exactly how much land can be regarded as designated for the Ngati Apa community.

Shortly we will discuss the question of whether the West Coast occupation reserves were adequate and what happened to them in later years. Before that, however, we will consider questions of title, especially the significance of the inclusion of non-Ngai Tahu people in the ownership lists. This does not apply to Ngati Apa only, since people of three other iwi (Ngati Tama, Ngati Rarua and Te Atiawa) also featured in the ownership lists of reserves in many parts of the Arahura purchase area.<sup>249</sup> Dr and Mrs Mitchell stated that at least 22 of the 50-odd occupation reserves created in 1860 had ownership lists that included (as part or sole owners) people who were of Ngati Apa, Ngati Rarua, Ngati Tama, or Te Atiawa descent.<sup>250</sup> In the area north of the Mawhera River, only five of the 15 occupation reserves were allocated to Ngai Tahu owners (and one of these was transferred to a Ngati Rarua owner soon afterwards when its Ngai Tahu owner died). The Kararoa reserve was allocated to Poharama Hotu of Te Atiawa. Seven of the 11 Kawatiri reserves went to people associated with iwi other than Ngai Tahu, four to Ngati Apa, one to Ngati Tama, two, later three, to Ngati Rarua. One of the reserves further up the Kawatiri River was allocated to a Ngati Rarua owner, and the other to Ngai Tahu. The Karamea reserve was awarded to Ngati Apa persons. The six individually awarded town sections in Westport were allocated to Tamati Pirimona Marino of Ngati Tama; Mata Nohinohi, Puaha Te Rangi, and Hoani Mahuika of Ngati Apa; and a Ngai Tahu owner.<sup>251</sup> Ever since the reserves were created, the rights of

247. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 3, pp 702, 714. At another point, however, the figure given is 472 acres (vol 1, p 124), and it is later said to be 524 acres (vol 3, p 691). See the discussion in Armstrong, 'Ngati Apa ki te Ra To', pp 75–76. It is possible that the figure of 424 acres was obtained simply by totalling the area of the nine reserves that were described in the 1862 and 1865 lists just as 'Kawatiri', thereby ignoring the tribal identity of the listed owners (only some of whom were Ngati Apa) and omitting the other Kawatiri reserves appearing in the list under other designations.

248. Armstrong, 'Ngati Apa ki te Ra To', p 76

249. Claimant historians have studied these entitlements in detail. For all non-Ngai Tahu owners of schedule A reserves, see Hilary Mitchell and Maui John Mitchell, 'West Coast of the South Island', report commissioned by the Ngati Tama Manawhenua ki te Tau Ihu Trust and the Te Atiawa Manawhenua ki te Tau Trust, 2002 (doc K4), tbl 9.21, p 70. For Ngati Rarua, see the list in Tony Walzl, 'Ngati Rarua and West Coast, 1827–1940', report commissioned by the Ngati Rarua Iwi Trust in association with the Crown Forestry Rental Trust, 2000 (doc B5), p 48.

250. Mitchell and Mitchell, 'West Coast', p 74

251. Alexander, 'Reserves of Te Tau Ihu', vol 2, pp 694–697

individual iwi members in particular reserves in this district have been much disputed (see fig 26).

#### 7.5.7 The Young commission

The Arahura transaction conducted with Ngai Tahu in 1860 had to some extent recognised the rights of other tribes and individuals on the West Coast. This was done especially by including non-Ngai Tahu people as sole or part owners of occupation reserves situated in many parts of the region. However, this recognition was modified when the reserve ownership lists were put under scrutiny in 1879. In evidence and submissions from the Te Tau Ihu iwi, it has been alleged that the Crown did not protect the rights of these tribes in respect of their reserve entitlements.

In 1878, the Ngai Tahu owners of the Grey River reserve requested the Government to issue Crown grants for their land, as a way of protecting it from alienation. The Native Minister therefore appointed Thomas E Young as a commissioner to investigate the ownership of all the West Coast occupation (schedule A) reserves. He was asked to ascertain the names of all 'individual Natives beneficially entitled' to the reserves, and to determine their respective shares. In the style of the Native Land Court, Young conducted hearings at Greymouth in January 1879, receiving evidence from claimants and witnesses. Alexander Mackay (commissioner of native reserves) was also present, contributing his opinions on several cases and otherwise taking an active part in the proceedings. The Young commission presented its report in February 1879. It stated that it had identified 'as nearly as possible the different interests of the persons found to be owners', and 'ascertained by careful enquiry' the persons entitled to succeed to the interests of owners who had died. The decisions made and reported were in effect an adjustment of the entitlements that had been determined previously.<sup>252</sup>

Evidence presented by the non-Ngai Tahu claimant iwi states that the outcome of this inquiry was the unfair exclusion of some of their ancestors from interests in the reserves. According to Dr and Mrs Mitchell, the decisions made by the Young commission sometimes confirmed the interests of people who were not of Ngai Tahu affiliation but also sometimes removed such people from the entitlements altogether, or diluted their interests by the insertion of Ngai Tahu people into the lists of owners. The Mitchells' detailed research indicated to them that the commission's procedure was very defective in several ways, including its acceptance of what they regard as the dubious evidence of prominent Ngai Tahu participants. They conclude that the Crown-appointed commissioner failed to protect the rights of non-Ngai Tahu owners, and that Mackay was implicated in this questionable outcome.<sup>253</sup>

252. Alexander Mackay, 'Native Reserves, Nelson and Greymouth', AJHR, 1879, sess 2, G-3, p 1; T E Young, 'Native Reserves on the West Coast, Middle Island', AJHR, 1879, sess 2, G-3B, pp 1-22

253. Mitchell and Mitchell, 'West Coast', pp 59-75, 87

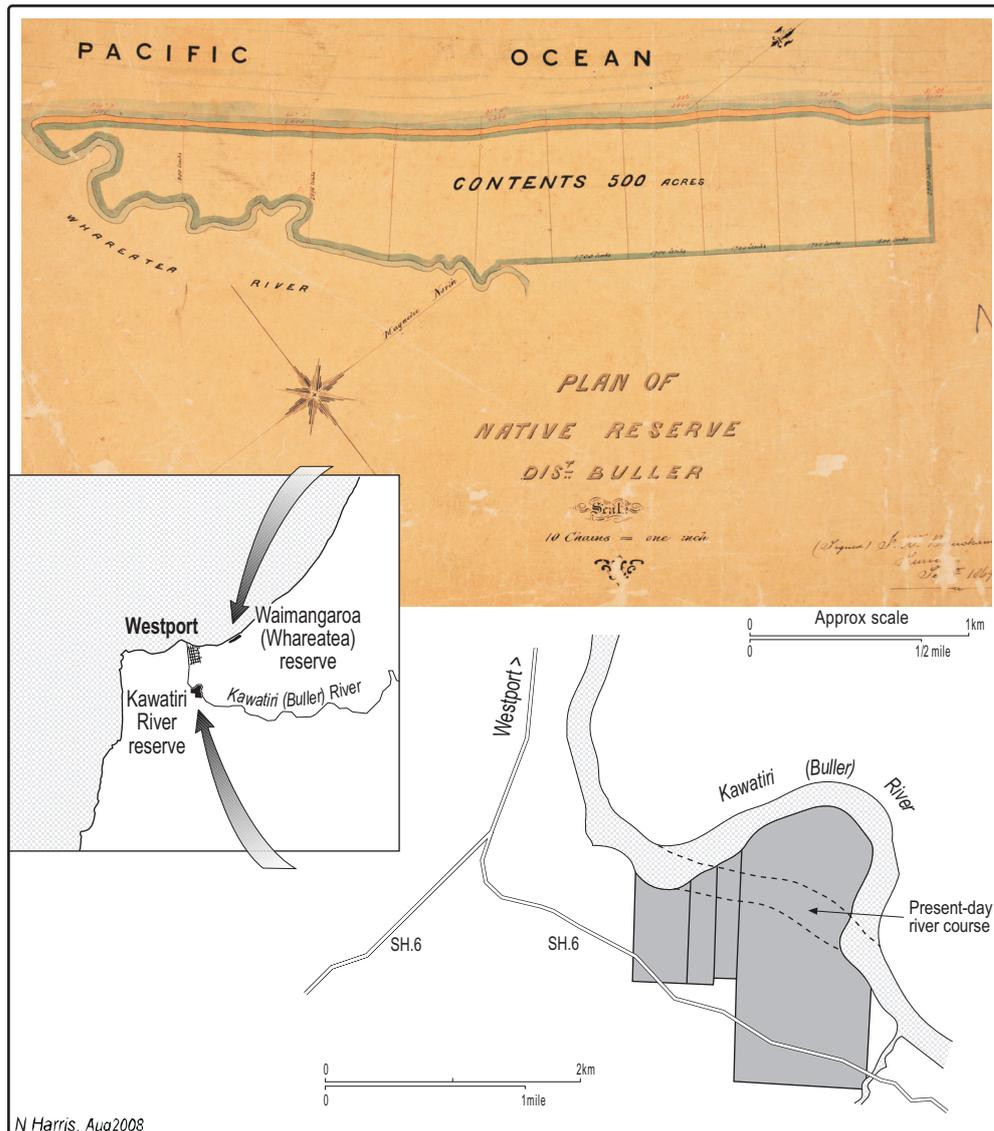


Figure 26: Kawatiri reserves

Source: AAFV997, NR27, ND36

In their report, Dr and Mrs Mitchell give particular attention to what the commission decided about the interests of Wikitoria Te Piki, who was the daughter of Riria Te Piki (Ngati Rarua) and Rawiri Koka. They identify Koka as Ngati Apa, the son of Te Rato and thus nephew of Ramari, the wife of Rangi Te Puaha.<sup>254</sup> Riria and her children Wikitoria and Hakaraia between them originally had interests in four reserves. The Young commission permitted Wikitoria to succeed to five reserves originally owned by her father's brother Karitopira, three originally owned by her mother or her brother (or both), two originally

254. Ibid, pp 60-61

partly or wholly owned by her great-aunt on her father's side, Puaha's wife Ramari, and one originally solely owned by Mata Nohinohi. Ngai Tahu at the time and also Dr and Mrs Mitchell describe the latter as Puaha's sister, though a whakapapa provided by them shows Puaha and Mata as cousins.<sup>255</sup> In all of these interests, as well as in a reserve of which Wikitoria was sole owner, the name of Ihaia Tainui (son of Wereta Tainui and grandson of Tuhuru, chiefs of Ngai Tahu) was inserted as joint owner. The Mitchells describe the way in which Tainui and Teoti Mutu (his brother-in-law) persuaded Young to make these decisions as 'subterfuge', and 'blatant deceptions', since they had no authority over Wikitoria's interests.<sup>256</sup> It seems that none of the Te Piki whanau or their close relatives were present at the hearings. Alexander Mackay explained to Young that Tainui was 'a near relative' of Wikitoria, but Dr and Mrs Mitchell say there is no evidence for this, and that such a relationship was a 'fiction.'<sup>257</sup> Ripini Waipapa claimed that Mutu was the 'nearest relative' of Koka's brother Karitopira (Wikitoria's uncle).<sup>258</sup>

This situation is examined by Mr Walzl also. He too says that the Young commission 'drastically curtailed' the interests of the Te Piki whanau by accepting Tainui as spokesman for Wikitoria Te Piki on the grounds of relationship – asserted but not demonstrated – and inserting him as a joint tenant in Wikitoria's interests.<sup>259</sup> Mr Walzl goes on to trace the long history of Tamihana Te Huirau's protests against this outcome. Wikitoria died soon after the commission hearings. Her husband Te Huirau, who was also her cousin on her Ngati Rarua side, was told by Alexander Mackay that her next of kin were Ngai Tahu. Later, the Native Land Court confirmed that Wikitoria's interests had reverted to Tainui on her death, and had now passed to Tainui's heirs. Te Huirau's further efforts in the 1890s were met with an official unwillingness to revisit the Young commission's determinations, but he continued his attempt to be recognised as heir. His letters and his petition to Parliament in 1920 were of no avail, and when he died in 1922 the case lapsed.<sup>260</sup> Mr Walzl does not explore the genealogical uncertainties of the Te Piki case, though he does record the information given by Te Huirau in 1920 that Riria Te Piki's husband Koka, the father of Hakaraia and Wikitoria, was Ngai Tahu.<sup>261</sup> Evidence given by Tuirirangi Martin of Ngati Rarua also tells the story of the 'crusade' mounted over so many years by Te Huirau (to whom this witness is related), and

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255. 'Minutes of Proceedings and Evidence', 23–24 January 1879, AJHR, 1879, sess 2, G-3B, p 12; Mitchell and Mitchell, 'West Coast', p 72; accompanying supporting documents, p 123

256. Mitchell and Mitchell, 'West Coast', pp 62–63, 67

257. 'Minutes of Proceedings and Evidence', 23 January 1879, AJHR, 1879, sess 2, G-3B, p 11; Mitchell and Mitchell, 'West Coast', pp 63, 66

258. 'Minutes of Proceedings and Evidence', 20 January 1879, AJHR, 1879, sess 2, G-3B, p 4

259. Walzl, 'Ngati Rarua and West Coast', pp 50–54, 67–68

260. *Ibid.*, pp 54–64, 68

261. *Ibid.*, p 29

asserts that the Crown did not protect his legitimate interests.<sup>262</sup> In a whakapapa attached to Mr Martin's evidence, Wikitoria Te Piki's father Koka is identified as Ngati Tumatakokiri.<sup>263</sup>

In a later paper, Dr and Mrs Mitchell refer again to the Young commission. This time they include Ngai Tahu in the ancestry of Wikitoria and Hakaraia Te Piki's father Rawiri Koka, whom they describe as Ngati Apa–Ngai Tahu, or 'Ngai Tahu (possibly also Ngati Apa).'<sup>264</sup> At our hearings they referred to him as 'probably Tumatakokiri and Ngai Tahu'.<sup>265</sup>

Other iwi feature in the commission's decisions also. Interests in two reserves had been allocated to Poharama Hotu, a chief of Te Atiawa. In one of these, at Kararoa (between Kawatiri and Mawhera), he was listed as the sole owner. The Young commission heard from Mackay that it had not been intended for Hotu and his family to own the reserve permanently. Hotu had been allowed to have it by Ngai Tahu as 'an act of grace'. Therefore, the commission decided that now that he was dead it should go to Ngai Tahu rather than to Hotu's heirs. His name was also removed from the list of owners of the other reserve (on the Mawhera River).<sup>266</sup>

In the case of Hone Kaiaia of Ngati Tama, however, his ownership of one of the Kawatiri reserves was confirmed (with his granddaughter added, at his request, as joint tenant), even though he lived at Collingwood. This may have been the only case in which a non-Ngai Tahu owner was consulted.<sup>267</sup> Six reserves in south Westland originally allocated to Wi Te Naihi of Ngati Rarua, who married a Ngai Tahu woman, were confirmed in the ownership of that whanau.<sup>268</sup>

Ngati Apa interests were treated in a variety of ways, as Dr and Mrs Mitchell show. Mr Armstrong's report for Ngati Apa mentions these findings but does not extend them. Henare Mahuika was confirmed as the owner of one reserve, and in another he and his brother Hoani were named as successors to their late uncle Puaha Te Rangi. But a reserve originally in the name of Puaha's widow, Ramari, went to Wikitoria Te Piki and Ihaia Tainui, and Ramari's share in the Karamea reserve also went to them, although it was not demonstrated to the commission how they could be Ramari's closest relatives. The other owner of the Karamea reserve was Mata Nohinohi, whose sons (the Mahuika brothers) were named as her successors, but Mata had been sole owner of another reserve to which Wikitoria and Tainui now succeeded. The Mitchells find these decisions inconsistent and sometimes

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262. Tuirirangi Martin, brief of evidence on behalf of Ngati Rarua, 30 June 2003 (doc Q12), pp 3–12

263. *Ibid*, app 2

264. Hilary Mitchell and Maui John Mitchell, 'Ngati Tama Response to Ngai Tahu Evidence to Te Tau Ihu Inquiry', statement of response to evidence of Ngai Tahu, September 2003 (doc Q21), p 18 and attached whakapapa and biographical notes

265. Hilary Mitchell, under cross-examination, seventeenth hearing, 13–17 October 2003 (transcript 4.17, p 390)

266. Mitchell and Mitchell, 'West Coast', pp 64–65

267. *Ibid*, p 67

268. *Ibid*, p 62

'baffling'. Tainui's name had been inserted into several reserves to which he had no obvious entitlement, and into some to which neither he nor Wikitoria Te Piki seemed to be entitled. In this way, some of the Kawatiri and Karamea reserve interests that had originally been allocated to Ngati Apa people (Puaha Te Rangi, his wife Ramari, and Mata Nohinohi) were 'alienated from the Mahuika family'.<sup>269</sup>

In the view of Dr and Mrs Mitchell, the tribes affected negatively by the Young commission (Ngati Rarua, Te Atiawa, and Ngati Apa) deserve to have these events investigated. Many of its decisions were 'inappropriate', especially the insertion of Tainui into so many titles. They say it was a failure of the Crown when its officers Young and Mackay failed to protect the rights of non-Ngai Tahu owners. In their opinion this failure occurred when Young and Mackay did not ensure that the original owners or their descendants were present at the hearings or were consulted on the transfer of their interests. Young and Mackay also did not question the submissions of Tainui and Mutu, gave approval of Tainui's insertion into the reserves without whakapapa evidence and, in some cases, with an original sole owner still living, and allocated interests outside clear succession lines on little or no whakapapa evidence.<sup>270</sup> At the heart of Dr and Mrs Mitchell's case is their contention that customary rights were disregarded and whakapapa relationships misrepresented. In particular, they say, many 'Ngai Tahu' seemed to have claims which were 'more attributable to their Ngati Apa connections than their Ngai Tahu roots'.<sup>271</sup> In this way, much of the evidence presented to the Young commission 'distorted the relationships' that 'probably' existed before (and during the negotiations surrounding) the Arahura purchase.<sup>272</sup>

In evidence presented for Ngai Tahu, however, Dr James McAloon does not criticise the Young commission's decisions. In his view, they were consistent with the situation pertaining at the time of the Arahura purchase, when Ngai Tahu had been willing to allow residence rights to individuals who belonged to other tribal groups and usually also had ancestral or marriage connections with Ngai Tahu.<sup>273</sup> Dr McAloon suggests that Young did not give Poharama Hotu's reserves to his heirs because the land had been a *tuku* to him personally. He also suggests that Wikitoria Te Piki's interests passed eventually to Ngai Tahu because her father was Ngai Tahu, and that the claims of the Mahuika whanau were based on the Ngai Tahu rights of their mother Mata Nohinohi.<sup>274</sup> In the report by Dr Te Maire Tau, too, the West Coast claims of the Mahuika whanau are explained as being through Mata Nohinohi

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269. Mitchell and Mitchell, 'West Coast', pp 66-73

270. Ibid, pp 74-75

271. Ibid, p 59

272. Mitchell and Mitchell, 'Ngati Tama Response', p 25

273. Jim McAloon, 'Professional Evidence', report commissioned by Te Runanga o Ngai Tahu, not dated (doc Q4(a)), p 140

274. Ibid, pp 87-90

and her Ngati Wairangi–Ngai Tahu ancestry. Dr Tau refers to the acknowledgement of this ancestry by Mahuika representatives in the Native Land Court in 1926.<sup>275</sup>

We will discuss the Young commission later in the chapter (in section 7.5.6). At this point, however, we comment that this Crown-appointed inquiry, like the Native Land Court, reached conclusions on issues concerning customary land rights, and, like those of its more formally established counterpart, these conclusions have been questioned by the people whose interests they affected. This raises issues of the kind we discuss in chapter 8 when we deal with the determinations of the Native Land Court.

#### **(1) *The fate of the occupation reserves***

Our focus now moves away from tribal rights in the occupation reserves to the question of whether enough land was reserved, and to its subsequent history. The area of land allocated at Kawatiri (mostly near the site of the present town of Westport) was by no means large – fewer than 700 acres. It may well have been insufficient for the needs of the Maori residents at the time and in later years, although the number of Ngati Apa and other Maori living on the West Coast was small. In respect of the West Coast occupation reserves as a whole, the Ngai Tahu Tribunal found that they were ‘little more than nominal’ and that the Crown failed to ensure that Ngai Tahu retained sufficient land for an economic base.<sup>276</sup> With regard to Ngati Apa, the only non-Ngai Tahu iwi specifically mentioned in the arrangements of 1860, their historian Mr Armstrong points out that they had been allocated no other reserves anywhere else (although their interests at Port Gore in Marlborough were later recognised by the Native Land Court).<sup>277</sup>

Information about the subsequent fate of the West Coast occupation reserves is available for those in the northern part of the district, from Karamea to the Buller River (which is the only part of the West Coast covered by Mr Alexander’s report). In this brief review, we make no attempt to single out the reserves owned or partly owned by members of the non-Ngai Tahu iwi. A total of 710 acres was allocated for reserves in this northern part of the West Coast area, mostly along the lower reaches of the Buller but also including two reserves further up the Buller and one near Karamea. None of these reserves was Crown granted, but in the 1860s some were vested in the Crown under the Native Reserves Act. They and many of the other reserves were made available for leasing. The owners of at least one of the vested reserves, section 45 near Westport, complained about the Crown’s administration. In contrast with the situation in most districts we have looked at, a comparatively small proportion of the reserved land in this area was sold. However, an equal area was

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275. Dr Te Maire Tau, ‘The Oral Traditions Concerning the Areas in Dispute [Ngai Tahu]’, revised ed, report commissioned by Te Runanga o Ngai Tahu, [2003] (doc Q5(a)), pp 146–149

276. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 3, p 715

277. Armstrong, ‘Ngati Apa ki te Ra To’, p 78

taken for roading and other public purposes, including 111 acres taken in 1881 from three reserves for channel works on the Buller River. A 50-acre reserve far up the Buller River at its confluence with the Blackwater River was taken and added to the surrounding scenic reserve in 1937. No sales occurred until four of the Buller reserves and the one at Kongahu (near Karamea) were sold in the 1950s and 1960s, three of them by the Maori Trustee. Four more, with a total area of 260 acres, were transferred to the Mawhera Incorporation (of Greymouth) in 1976, and so are still in Maori ownership, though not in a form that recognises the iwi of Te Tau Ihu. June Robinson's evidence for Ngati Apa mentioned the shock experienced by her whanau when they found out that the land in which they had interests now belonged to Mawhera. Two other reserves with a total area of 60 acres are now Maori freehold land, and the status of one other 50-acre reserve is not known.<sup>278</sup> The six Westport town sections were washed away in the flood of 1872. One of the sections had been sold to a Pakeha before this, but the remaining Maori owners were compensated with new sections in another part of the town. Over the years all of this land has been alienated, by being sold or (in the case of two sections obtained for State housing in 1961) by being taken under the Public Works Act.<sup>279</sup>

Of the original 710 acres, about 160 acres were taken for public works and a scenic reserve, and about 170 acres sold to private purchasers. At least 320 acres (about 45 per cent) are still in Maori ownership.

## (2) *Endowment reserves*

Of the 3500 acres set aside in 1860 between the Heaphy and Arawhata Rivers as schedule B (endowment) reserves, 1780 acres were located in the northern part of the area (from the Kawatiri River north towards Kahurangi).<sup>280</sup> This land consisted of six separate reserves. One was just south of the mouth of the Heaphy River (not to be confused with another reserve that was later created in this vicinity under the landless natives scheme). The others were a large and a small block at Karamea, a block at Mokihinui, another at Waimangaroa north of the Buller River, and one on the river itself. There were also 40 town sections at Westport, with a total area of 10 acres. As endowment reserves these blocks were all put under the Native Reserves Act from the beginning, and made available for leasing. Consideration was given in the 1950s and 1970s to Crown acquisition of the reserve near the Heaphy River for scenic purposes, but this did not happen. 270 acres were taken from the Buller River reserve for river works in 1881, a small area was sold at Karamea, and four of the Westport

278. Alexander, 'Reserves of Te Tau Ihu', pp 677–678, 682–688, 704–710, 712–716; David Armstrong, 'The Fate of Ngati Apa Reserves and Ancillary Matters', report commissioned by the Ngati Apa ki te Waipounamu Trust in association with the Crown Forestry Rental Trust, 2000 (doc A78), pp 19–26; June Robinson, brief of evidence on behalf of Ngati Apa, 8 March 2003 (doc N8), pp 30–31, 42

279. Alexander, 'Reserves of Te Tau Ihu', pp 694–703; Mitchell and Mitchell, 'West Coast', pp 78–80

280. Alexander Mackay, 'Land Reserved from Sale for the Arahua Natives . . . Schedule B', *Compendium*, vol 2, p 387

township sections sold at different times. Thus most of the endowment land in this area is still in Maori ownership (since 1976 under the Mawhera Incorporation).<sup>281</sup> By law, the administration of the endowment reserves by the Maori Trustee and his predecessors was to have been for the benefit of those who held interests in the land. However, we are aware of dissatisfaction about the extent to which this obligation has been fulfilled.<sup>282</sup> We will consider the administration of this estate by the Public Trustee and Native (later Maori) Trustee shortly, but here we are concerned with beneficial rights in the reserves.

It was not until 60 years after the Arahura purchase that the determination of beneficial rights in the West Coast endowment reserves (schedule B) began. The iwi of Te Tau Ihu have not claimed that the decisions of the Native Land Court on this matter breached the principles of the Treaty, and so we will not be making findings on the matter. It is necessary, however, for us to review what happened in order to demonstrate the evolving Ngai Tahu view of tribal rights on the northern West Coast and to provide a background for some of the late-twentieth-century events we deal with in chapter 13.

The process of determining ownership rights began in 1914 with an application by Ngai Tahu people to the Native Land Court in respect of the reserve at Cobden (on the Mawhera River). The case was completed in 1920, when the interests were awarded to the descendants of Tuhuru.<sup>283</sup> In 1921, the process was extended to the other endowment reserves. The Native Land Court began hearings in relation to all the remaining schedule B reserves (except the Westport town sections), with Ngai Tahu's JHW Uru asking that they all be awarded to Tuhuru's descendants as had been done for the Cobden block. The outcome of this case was that in 1923 the court awarded two-thirds of the interests to the Tuhuru family and the remaining third to other Ngai Tahu claimants.<sup>284</sup>

In his account of the case, Mr Armstrong states that Uru mentioned the demand made in 1860 by Puaha Te Rangi for reserves at Kawatiri and said that Ngati Apa people there should get lands as compensation. Mr Armstrong regards this as a Ngai Tahu acknowledgement that the Kawatiri lands were more closely associated with Ngati Apa and, in effect, a Ngai Tahu recognition of Ngati Apa rights there.<sup>285</sup> This view is expressed in Ngati Apa's closing submissions.<sup>286</sup> Dr McAloon, however, disputes this interpretation of what Uru said. In his view the statement about Puaha was no more than a repetition of the published record of what Mackay had written on this matter in the 1860s, and cannot be seen as a Ngai Tahu

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281. Alexander, 'Reserves of Te Tau Ihu', vol 2, pp 667-767, 679-682, 689-693, 710-712; Armstrong, 'Fate of Ngati Apa Reserves', pp 26-43. The proposal to take the Heaphy reserve for scenic purposes is covered by Armstrong: pp 27-30. See also Waitangi Tribunal, *The Ngai Tahu Ancillary Claims Report 1995* (Wellington: Brooker's Ltd, 1995), pp 149-150.

282. See Armstrong, 'Ngati Apa ki te Ra To', pp 110-111; Armstrong, 'Fate of Ngati Apa Reserves', p 45

283. Armstrong, 'Ngati Apa ki te Ra To', p 84

284. *Ibid*, pp 85-88

285. *Ibid*, pp 85-86

286. Counsel for Ngati Apa, closing submissions, 2004 (doc T3), p 32

admission of Ngati Apa rights at Kawatiri.<sup>287</sup> We tend to agree. Uru certainly referred to the acknowledgement in 1860 of Ngati Apa rights at Kawatiri, but his words should not be taken as unquestionably a Ngai Tahu recognition in the 1920s of those rights.

The 1923 decision drew a response from Hoani Mahuika and seven others, describing themselves as ‘Natives of the Maori Race living as Natives in the Land District of Kawatiri.’<sup>288</sup> They petitioned Parliament that the Native Land Court’s award, made in favour of the descendents of ‘Kaiapoi Maoris’ and without the knowledge of the petitioners, had seriously disadvantaged the petitioners in respect of six of the eight blocks in question (those in Kawatiri and up to the Heaphy). Mahuika and the others mentioned that their ancestors had made use of the resources of this district for generations.<sup>289</sup> Dr McAloon points out that the petition is phrased in terms of rights deriving from long residence, and that it mentions the descent of the petitioners from Ngati Wairangi, an older line than Tuhuru’s. In his view, their complaint is against the Native Land Court’s award in favour of the descendents of Tuhuru.<sup>290</sup> Hoani Mahuika died the following year, aged 89, but his daughter Hinemoa McDonnell continued to protest. In 1926, the Native Appellate Court ruled that the matter should be referred back to the Native Land Court, where the case of those who were petitioning had never been heard.<sup>291</sup>

The Mahuika family’s case was heard by the Native Land Court in 1926. Hinemoa McDonnell and her brother Hone Mahuika acknowledged their Ngai Tahu connections and that Tuhuru’s people also had rights at Kawatiri. Mahuika stated that they were claiming through both Ngai Tahu and Ngati Apa.<sup>292</sup> Mr Armstrong argues that their emphasis on their Ngai Tahu connections probably sprang from a feeling that ‘the exigencies of the situation required this’, in view of Ngai Tahu’s dominance on the West Coast as a whole and the appellants’ own previous claims elsewhere in the South Island through their Ngai Tahu connections.<sup>293</sup> Dr McAloon rejects this explanation, however, arguing that the Ngai Tahu affiliations being mentioned were through Mata Nohinohi (Ngati Wairangi and Huirapa); that is, not Tuhuru.<sup>294</sup> Much evidence from traditional history was given during the hearings, and we have referred to this in chapter 3. The claimants spoke of their Ngati Apa roots and the history of that tribe’s presence in Karamea and Kawatiri. Their rights under Ngati Apa, they said, ‘extend from Kawatiri to Heaphy’. They stated that ‘Old Mahuika got his right from Ngati Apa . . . through conquest and continuous occupation’. On the other hand, Hone Mahuika said that his father and uncle (descendants of ‘Old Mahuika’) ‘got

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287. McAloon, ‘Professional Evidence’, p105

288. ААМК869/РКК, pt1, ArchivesNZ (David Armstrong, comp, supporting documents to ‘Ngati Apa ki te Ra To’, various dates (doc A29(a)), p167)

289. Armstrong, ‘Ngati Apa ki te Ra To’, pp 88–89

290. McAloon, ‘Professional Evidence’, pp 108–109

291. Armstrong, ‘Ngati Apa ki te Ra To’, pp 89–91

292. *Ibid*, p 91

293. *Ibid*

294. McAloon, ‘Professional Evidence’, p 111

into Westland land through [their mother] Mata Nohinohi'. The counter-claimants asserted that the Mahuika whanau had 'no original rights' in the area and that they had merely been allowed to live there on sufferance.<sup>295</sup>

The Native Land Court found that the applicants had 'some sort of right from the Ngati Apa side', as well as a claim through Mata Nohinohi to Ngati Wairangi. In the Judge's view of the evidence, 'the Ngai Tahu were the main occupants but not the sole owners' of the West Coast. As descendants of the Ngati Apa participants in the 1860 sale the applicants had 'some rights' in the schedule B reserves. Accordingly, he awarded them a one-tenth interest in each of the six reserves in question.<sup>296</sup> Mr Armstrong sees this as 'less than a generous acknowledgement of Ngati Apa rights', but emphasises that the Native Land Court had acknowledged that Ngai Tahu did not have sole rights to the Kawatiri and other northern West Coast reserves.<sup>297</sup>

A few years later, the focus moved to the 40 Westport town sections. Evidently, this case was initiated by members of Ngai Tahu, in 1930, but nothing came of it until after a petition was submitted in 1933 by Parata Pita Kere and others, who asked for a determination of the beneficial rights in the land. A series of letters also came from Hinemoa McDonnell, all of this eventually leading to a Native Land Court hearing in 1937. No representatives of the Mahuika whanau were present. Counsel for the Ngai Tahu claimants asked for an award on the same basis, as had been made for the Cobden reserve in 1920 and the other schedule B reserves in 1923. They ignored the fact that in respect of the six northern reserves there had been a successful appeal against the 1923 award. The Native Land Court decided accordingly, awarding a two-thirds interest to the descendants of Tuhuru and the rest to the non-Tuhuru claimants.<sup>298</sup>

Very soon a petition was sent to Parliament, drawn up by members of the Mahuika whanau and disaffected sections of Ngai Tahu. The petitioners argued against 'the principle of ascertaining the ancestral rights of the Maoris to the territory as a whole', in entire disregard of 'the rights by occupation and residential qualifications of particular sections or families to the reserves in their particular localities'. They sought and eventually obtained a hearing in the Native Appellate Court. Their claim was that the descendants of all those who signed in 1860 (not just the descendants of Tuhuru, who was only one of the signatories) should be given awards. Ngai Tahu submitted that Puaha Te Rangi had been included in the 1860 payment and reserve allocation through aroha and not because he possessed customary rights.<sup>299</sup> The rehearing took place at Kaiapoi in 1939. For the appellants it was argued that Ngati Apa rights derived from unbroken occupation since at least the mid-1840s, and

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295. Armstrong, 'Ngati Apa ki te Ra To', pp 91–93; McAloon, 'Professional Evidence', pp 110–124

296. Armstrong, 'Ngati Apa ki te Ra To', pp 93–94; McAloon, 'Professional Evidence', pp 124–125

297. Armstrong, 'Ngati Apa ki te Ra To', p 94

298. *Ibid*, pp 95–100

299. *Ibid*, pp 101–103; McAloon, 'Professional Evidence', pp 127–130

had been recognised in 1860. Mahuika had not claimed at Kawatiri through his Ngai Tahu connections. Counsel for the Tuhuru claimants said that Arahura was a Ngai Tahu sale and that the Mahuika whanau's rights at Kawatiri were 'only through aroha', since they were 'strangers living there by permission of Tuhuru and his people the real owners'. The 1926 ruling was thus incorrect.<sup>300</sup>

The judgment in 1939 stated that this had not been an investigation of customary interests based on conquest and occupation, but of the reason why the reserves had been created – for the benefit of those residing in the vicinity. The decision was that nine-tenths of the interests should be awarded to the descendants of the Ngati Apa and other Maori who lived at Kawatiri in 1860, and one-tenth to the Tuhuru people.<sup>301</sup> This, says Mr Armstrong, was a correct verdict, although unfortunately it was based on criteria connected to residence in 1860 rather than on the usual land court criteria of occupation or conquest. In his opinion, however, the result would probably not have differed, since Ngati Apa rights went back to the very early nineteenth century.<sup>302</sup>

In 1948, the Native Land Court's judgment on the Westport town section was the subject of an appeal by Ihaia Weepu and other Tuhuru descendants. In the now-renamed Maori Appellate Court, the appellants stated that the occupation pattern of 1860 was a wrong basis for decision, since Ngai Tahu under Tuhuru owned and occupied the whole Arahura purchase area, and, in fact, Tuhuru was particularly associated with the northern part of the area.<sup>303</sup> In their decision the judges reiterated that their task had not been to investigate customary title but to determine who had been intended in 1860 to benefit from the reserves. Nevertheless, they reviewed the historical record and cast doubt on the claims that Tuhuru had enjoyed uninterrupted and exclusive rights. Tuhuru's rights had been disturbed by Niho's invasion and his own capture by the northern tribes, and the situation was very unsettled in 1840. In any case it was 'an undisputed fact that there were others besides N'Tahu who had remained in occupation in the area covered by the Deed of Sale and [were there] presumably as of right, permissive and or otherwise'. The judges found it hard to see why Puaha Te Rangi and the 10 non-Tuhuru Ngai Tahu who signed the deed would have been permitted to do so if they had possessed no legitimate customary rights. The finding was that the appellants had failed to establish either that Tuhuru had paramount rights or that 'the Ng[ati] Apa group represented by Puaha Te Rangi' had no customary rights. The appeal was dismissed.<sup>304</sup>

Mr Armstrong regards this as 'an excellent result' for Ngati Apa, but Dr McAloon remarks that in essence the dispute of which this was the culmination had not been between 'Ngai

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300. Armstrong, 'Ngati Apa ki te Ra To', pp 103–104; McAloon, 'Professional Evidence', pp 131–132

301. Armstrong, 'Ngati Apa ki te Ra To', pp 104–105

302. Ibid, pp 105–106

303. Ibid, pp 107–108

304. Maori Appellate Court, 19 May 1948 (Mitchell and Mitchell, 'West Coast', accompanying documents, pp 169, 171); Armstrong, 'Ngati Apa ki te Ra To', pp 108–109

Tahu' and 'Ngati Apa'. Instead, it had been 'between the descendants of Tuhuru on the one hand and [on the other] all other descendants of those who had rights in the West Coast reserves, whether they called themselves Ngai Tahu or Ngati Apa'.<sup>305</sup> This is the position taken in Ngai Tahu's closing submissions, in which counsel emphasised the close relationship between the Kawatiri reserve owners and Ngai Tahu. It was submitted that the rights of those who had been allocated reserves, including 'people who whakapapa to various groups including Ngati Apa', were based on residence, not on any other rights.<sup>306</sup> In Ngati Apa's closing submissions, however, it was stated that the Ngai Tahu claim to exclusive rights up to Kahurangi Point, which they see expressed in the case put to the Maori Appellate Court in 1948 by the Tuhuru section of Ngai Tahu, was 'utterly undermined' by the court's decision.<sup>307</sup> Our consideration of West Coast customary rights in chapter 3 leads us to the view that this decision and that of 1926 rightly recognised the existence of rights (in Kawatiri and the northern districts) that were distinct from Ngai Tahu rights. They were possessed by people who certainly had whakapapa connections with Ngai Tahu but also drew on long-held Ngati Apa rights in the area.

#### 7.5.8 The Mawhera Incorporation

The issue of iwi rights was to be raised again in the Maori Appellate Court case of 1990, which we will discuss in chapter 13. A development that occurred before that, however, should be briefly noted. Following the 1975 report of the Sheehan commission's national inquiry into Maori reserved land, the 'schedule B' endowment reserves on the West Coast, together with those occupation reserves that had been under the administration of the Maori Trustee, were transferred in 1976 to the new Mawhera Incorporation. They have been administered by it ever since.

Ngati Apa view this body as effectively a Ngai Tahu entity, and one that takes no account of non-Ngai Tahu rights to the land concerned. Ngati Apa's Amended Statement of Claim alleged that in allowing this vesting in the Mawhera Incorporation and thus the removal of the reserve interests from Ngati Apa, the Crown had failed to protect Ngati Apa interests. The Crown had done so despite the Sheehan commission's identification of the Ngati Apa interests as being separate from those of Ngai Tahu.<sup>308</sup> In their closing submissions, Ngati Apa repeated these claims and asserted that the vesting of the reserves in 'an Incorporation owned by Ngai Tahu people' meant the loss of their 'ownership rights as Ngati Apa'.<sup>309</sup> Kath Hemi, giving evidence for Ngati Apa, told us of the distress caused by this loss, 'because with

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305. Armstrong, 'Ngati Apa ki te Ra To', p 110; McAloon, 'Professional Evidence', p 141

306. Counsel for Ngai Tahu, closing submissions, 16 February 2004 (doc T13), pp 67–68

307. Counsel for Ngati Apa, closing submissions, pp 32–33

308. Kathleen Hemi, amendment to claim Wai 521, 9 June 1995 (claim 1.10(a)), p 10

309. Counsel for Ngati Apa, closing submissions, p 45

## 7.5.8(1)

the land goes the mana.<sup>310</sup> Another witness for Ngati Apa said that his family still retained their shares in the Westport reserves now administered by the Mawhera Incorporation. However, Ngai Tahu dominated that body and ‘we feel as though it [the land] was taken away from us, . . . it went to Mawhera, instead of staying with us Ngati Apa people.’<sup>311</sup> Counsel for Ngai Tahu rejected this claim on the grounds that, although some people with interests in these lands had whakapapa links with other tribes, Ngati Apa as an iwi did not have customary rights on the West Coast. Counsel submitted also that at the time of the transfer to the Mawhera Incorporation no one with interests in the lands concerned sought to have them excluded from the incorporation.<sup>312</sup>

It was also Ngati Apa’s contention that control of the reserves by the Mawhera Incorporation had implications when the perpetual leases under which they were rented out were reviewed as an outcome of the Maori Reserved Land Amendment Act 1997. In 2002, the Crown reached a settlement with the legal owners of Maori reserved land throughout the country. Ngati Apa submitted that beneficial owners who were Ngati Apa were excluded from this settlement, which included an ex gratia payment of \$8,199,925 to the proprietors of the Mawhera Incorporation (see ch 9).<sup>313</sup> This matter, together with the whole issue of Ngati Apa’s role in the Ngai Tahu-controlled Mawhera Incorporation, were raised in our hearings, but we did not receive enough information for us to make findings on the subject.

**(1) Administration of the reserves**

Besides the various investigations into customary ownership of the reserves, and the vesting of those that remained in the Mawhera Incorporation in the 1970s, there is also a further set of issues we need to consider pertaining to the administration of the endowment reserves, along with some occupation reserves, by the Public Trustee and later the Native or Maori Trustee. As we noted previously, all schedule B (endowment) reserves were subject to the provisions of the Native Reserves Act 1856 and some schedule A (occupation) reserves were also placed under this regime. We discussed in section 7.4.3 the circumstances under which occupation reserves generally could be made subject to the 1856 legislation. In brief, the Native Reserves Act provided for any reserved land over which customary title had not been extinguished to be formally conveyed to the Crown. A ‘competent person’ was to be appointed to confirm the consent of the owners to the application of the Act to their lands, which would thereafter be administered by commissioners of native reserves as if customary title had been extinguished. The Act provided no protection from outright alienation of reserves, allowing the commissioners to lease these for up to 21 years and merely stipulating

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310. Kath Hemi, under cross-examination, twelfth hearing, 26–29 May 2003 (transcript 4.12, p 95)

311. Albert McLaren, under cross-examination, twelfth hearing, 26–29 May 2003 (transcript 4.12, pp 111, 112)

312. Counsel for Ngai Tahu, closing submissions, p 68

313. *The Owners of Maori Reserved Land and the Crown Deed of Settlement*, July 2002; counsel for Ngati Apa, closing submissions, p 49

that the consent of the Governor was required for longer leases or for any sale of such land. There was, as we noted, no formal requirement or provision for owners' input into the management, alienation, or allocation of revenue from the reserves to be taken into account.

The Native Reserves Amendment Act 1862 abolished the independent role of the commissioners and instead placed the reserves under the immediate control of the Governor, who in practice delegated day to day administration to Native Department officials. James Mackay junior was appointed in November 1863 to administer the West Coast and northern South Island reserves, and was succeeded by his cousin Alexander Mackay in January 1866. Alexander Mackay retained responsibility for the management of these reserves until a short while after the passage of the Native Reserves Act 1882, which legally transferred full control over the reserves from commissioners attached to the Native Department to the Public Trust Office. In 1920, the Public Trustee in turn handed over full powers of administration to the newly created Native Trustee (renamed the Maori Trustee after 1947), which managed those that remained until their transfer to the Mawhera Incorporation in 1976.

Although the legal chain of responsibility for management of the reserves is therefore clear, the same cannot always be said with respect to the details of the actual administration of individual reserves. As with other occupation reserves elsewhere vested under the Native Reserves Act, there is little information available relating to the circumstances under which some of the schedule A reserves were placed under this regime from the 1860s onwards, including the circumstances under which such vestings were decided upon and the extent to which the owners were actively involved in this process or were consulted thereafter concerning the management of such lands. As we saw in section 7.4.3, the 1856 legislation stipulated that a 'competent person' was to be appointed to confirm the agreement of the owners to any such vesting. The 1862 amendment Act included an important change in the wording of the requirement to obtain the owners' consent but did not do away with the need for this to be secured. As we shall see below, when we consider the individual occupation reserves administered through the various offices, there is often little evidence on whether or how such consent was secured.

We consider firstly those schedule A reserves vested under the Native Reserves Act or later statutory provisions. As we noted previously, ignoring the tribal affiliations of their owners, in total some 710 acres of occupation reserves were allocated in the northern part of the West Coast area. Of this area, up to four sections, comprising 300 acres in total, are described in various sources as having been vested under the Native Reserves Act in the 1860s. However, there is a great deal of confusion surrounding this: three sections, containing 250 acres in total, are said to have been vested in November 1867, but the relevant *Gazette* notice refers to just one 100-acre block 'situate at Westport' as being so vested.<sup>314</sup> The latter information is also repeated in an official schedule of reserves brought under the

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314. *New Zealand Gazette*, 1867, no 64, 29 November 1867, p 460

operation of the Native Reserves Act.<sup>315</sup> We thus have no information at all as to if, when, or how the remaining 150 acres was vested.

The first of the reserves said to have been vested in November 1867 was a 100-acre reserve at Orowaiti, on the east bank of the Buller River.<sup>316</sup> There appears to be no record of this vesting.<sup>317</sup> A nearby 50-acre reserve, also at Orowaiti, was, it can be stated with more certainty, vested in 1869 and ‘Let for building allotments.’<sup>318</sup> Ngati Apa historian Mr Armstrong notes the lack of further information concerning the circumstances under which these lands were vested and the extent of any consultation with the owners. However, citing an 1870 report from Alexander Mackay, he speculates that the vesting of these lands may have been linked to the recent discovery of gold on the West Coast.<sup>319</sup> Mackay noted that the owners of a number of the occupation reserves ‘on the discovery of gold in this district, were induced by the large demand that arose for the occupation of their lands for building and other purposes, to place them under the control of the Government, subject to the provisions of the Native Reserves Act, 1856.’<sup>320</sup>

Mackay’s reference to the owners being ‘induced’ to vest their lands under the Native Reserves Act suggests both that there was some kind of consultation on the question and that the initiative for the vestings came from Crown officials rather than Maori. Beyond that, little further is known about the vesting process, though there is some indication that by the time of the 1869 vesting at Orowaiti the matter was subject to discussion with owners of reserves.<sup>321</sup> The *Gazette* notice announcing this vesting was accompanied by a statement from Alexander Mackay certifying and reporting that he had ‘ascertained that the aboriginal inhabitants entitled to the piece or parcel of land [at Orowaiti] have assented that the said piece or parcel’ should be subject to the provisions of the Native Reserves Act. Beneath this was appended a statement from two Maori declaring that ‘We, the undersigned, the owners of the above-described piece of land at Westport . . . have agreed that the same shall be brought under the provisions of “The Native Reserves Act, 1856.”’<sup>322</sup> Given that title to the schedule A reserves had yet to be investigated, it is not apparent how these ‘owners’ were identified.<sup>323</sup> The basis of their agreement also remains unrecorded, except for this short

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315. Alexander Mackay, ‘Return of Native Reserves Brought under the Operation of the “Native Reserves Act 1856”’, *Compendium*, vol 2, p 317

316. Alexander, ‘Reserves of Te Tau Ihu’, vol 2, p 683

317. See *New Zealand Gazette*, 1867, no 64, 29 November 1867, p 460

318. Alexander Mackay, ‘Return of Native Reserves Brought under the Operation of the “Native Reserves Act 1856”’, *Compendium*, vol 2, p 317; *New Zealand Gazette*, 1869, no 31, 3 June 1869, p 269

319. Armstrong, ‘Fate of Ngati Apa Reserves’, p 20

320. Charles Heaphy (citing Mackay) to Native Minister, 11 July 1870, AJHR, 1870, D-16, p 34 (Armstrong, ‘Fate of Ngati Apa Reserves’, p 193)

321. Armstrong, ‘Fate of Ngati Apa Reserves’, p 20

322. *New Zealand Gazette*, 1869, no 31, 3 June 1869, p 269

323. However, it seems likely that Hakaraia Te Piki, one of the two Maori who had signed the declaration, was the same Hakaraia for whom the reserve had been set aside, according to one 1865 return: Alexander Mackay, ‘Return of Native Reserves in the Provinces of Nelson and Marlborough’, *Compendium*, vol 2, p 314.

District	Original area (acres)	Reserved area retained (acres)	Approximate percentage retained in Maori ownership
Wairau	3194	875	27
East Marlborough Sounds	18,767	2622	14
Pelorus–Kaituna	980	215	22
West Marlborough Sounds	7913	3506	44
AT Coast–GB	4025	831	20
West Coast*	710	320	45
Total	35,589	8369	23

\* From Karamea to Kawatiri (Buller) River only, and schedule A reserves only

Table 2: Alienation of land reserved for Maori in Te Tau Ihu

declaration, and there is some suggestion that the owners may not always have shared the same understanding of what had been agreed to as those charged with administering the reserves.<sup>324</sup> In 1877, for example, the Ngai Tahu rangatira Ihaia Tainui petitioned against the administration of the West Coast reserves by officials. The Native Affairs Committee noted in its report that the chief:

objects to the Governor assuming the management of the reserves, and the events rents accruing from them, alleging that the natives understood that the arrangement was only to last for a term of twenty-one years, and he further asserts that the administration of the rents is objectionable.<sup>325</sup>

A portion of the 50-acre reserve at Orowaiti was taken for roading in the 1940s, and according to Mr Armstrong a further unspecified area was also taken for railway purposes in the 1880s. Otherwise, the full extent of both blocks, some 146 acres in total, was subject to perpetual leases by the time of the transfer of these to the Mawhera Incorporation in 1976.<sup>326</sup> A decline in the economic fortunes of Orowaiti by the late nineteenth century resulted in repeated complaints from at least one owner concerning the non-receipt of any rental income for more than four years. It is not clear how these complaints were dealt with, and Mr Armstrong concludes that it is difficult to directly assign any blame to the Public Trustee in this instance, in consequence both of the paucity of documentary records and the difficult economic conditions which prevailed.<sup>327</sup>

324. It should also be noted that there was no similar notice accompanying the November 1867 vesting.

325. Native Affairs Committee, 'Report on Tahaia Tainui Petition', 19 November 1877 (Crown Forestry Rental Trust, comp, 'Te Tau Ihu Document Bank', supporting documents, various dates (doc A44), p 10); Armstrong, 'Fate of Ngati Apa Reserves', p 20

326. Armstrong, 'Fate of Ngati Apa Reserves', p 21; Alexander, 'Reserves of Te Tau Ihu', vol 2, p 683; 'Report of the Commission of Inquiry into Maori Reserved Land', AJHR, 1975, H-3, pp 382–383

327. Armstrong, 'Fate of Ngati Apa Reserves', pp 22–23

The 100-acre section 46, square 141 reserve is also described as having been vested under the Native Reserves Act in November 1867 and ‘Let for agricultural purposes.’<sup>328</sup> This is the sole reserve in the West Coast area listed in an 1870 return of lands vested under the Native Reserves Act in November 1867.<sup>329</sup> In 1888, the Westport Harbour Board purchased a 12-acre portion from the Public Trustee. Some further portions of the block were taken for railway purposes, an area of just over 10 acres was freeholded in 1973, and the balance of just over 76 acres transferred to the Mawhera Incorporation in 1976.<sup>330</sup> Again, few details concerning the vesting process are available to us.

According to the evidence of David Alexander, a fourth block containing just over 50 acres known as Oweka (and referred to as the ‘Inangahua Reserve’ by the Sheehan commission) was also vested under the Native Reserves Act in November 1867.<sup>331</sup> However, it is not included in the 1870 return and does not appear in the *Gazette* in which its vesting was said to have been declared.<sup>332</sup> It was being administered by the Public Trustee by 1914 and was subject to a perpetually renewable lease by the time of the block’s transfer to the Mawhera Incorporation in 1976.<sup>333</sup> We received little further information about the administration of the block between its vesting some time prior to 1914 and its eventual transfer to Mawhera.

There were also several much later vestings of occupation reserves in the Maori Trustee. These included the 10-acre section 50, square 141 reserve vested under section 438 of the Maori Affairs Act 1953 in the Maori Trustee in 1984 and subsequently leased, and an adjacent 50-acre reserve (section 51) which followed the same process.<sup>334</sup> section 52, square 141 was originally a 100-acre reserve but following a large taking for the Buller River relief channel was reduced to just over 55 acres by 1881. The balance was vested in the Maori Trustee in 1967 and sold the following year.<sup>335</sup> Two adjacent sections (sections 53 and 54) were also subject to takings for the river control, reducing their extent from 100 acres in total to just under 36 acres, the balance of which was again transferred to the Maori Trustee in 1967 and sold soon after.<sup>336</sup>

Beyond the basic block histories of each of these reserves we received little further information concerning their administration or the circumstances in which these were vested in the Crown. In the case of the endowment reserves these were considered subject to the Native Reserves Act from the outset, and although there remains a paucity of material on

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328. Alexander Mackay, ‘Return of Native Reserves Brought under the Operation of the “Native Reserves Act 1856”’, *Compendium*, vol 2, p 317

329. Ibid

330. Alexander, ‘Reserves of Te Tau Ihu’, vol 2, pp 704–707

331. Ibid, pp 712–713

332. Alexander Mackay, ‘Return of Native Reserves Brought under the Operation of the “Native Reserves Act 1856”’, *Compendium*, vol 2, pp 317–318; *New Zealand Gazette*, 1867, no 64, 29 November 1867, p 460

333. AJHR, 1975, H-3, pp 397–398

334. Alexander, ‘Reserves of Te Tau Ihu’, vol 2, pp 685–688

335. Ibid, pp 707–708

336. Ibid, pp 708–710

their subsequent history, it is clear that by the early twentieth century even the administrators of these lands readily conceded that the full extent of benefits that might have been expected to derive from these were not being delivered.

As we noted previously, with the exception of 270 acres taken for river control purposes at Buller in the early 1880s, a small area sold at Karamea, and four township sections at Westport also sold at different times, all of the endowment lands remained unalienated at the time of their transfer to the Mawhera Incorporation in 1976. In some cases, the lands were rugged, isolated, unsuitable for farming or in one instance subject to dramatic sea erosion. In these circumstances there appears to have been little real effort on the part of administrators to actively generate a revenue from some of the endowment reserves for several decades after their establishment. The Native Reserves Act 1882, besides transferring the management of all existing reserves to the Public Trustee, also extended the period for which leases could be negotiated to 30 years for agricultural and mining purposes and 63 years in three 21-year terms for building purposes.<sup>337</sup> In practice, agents operating on behalf of the Public Trustee were responsible for collection of rentals, and although initially permitted to retain 10 per cent of the gross sum collected as their fee, this was soon halved following complaint from Alexander Mackay.<sup>338</sup> He noted that he could see 'no good reason why a profit should be made in that way by the Public Trust Department for merely acting as a custodian of the money confided to its care.'<sup>339</sup>

Pressure from leaseholders meanwhile resulted in a series of measures intended to improve the terms on which they rented the reserves. The South Island Native Reserves Act 1883 provided for compensation to be paid to tenants for improvements upon the expiry of leases. Further agitation from local members of Parliament and other interested parties for the right of renewal to be granted existing lessees saw a royal commission appointed in 1885 to inquire into the condition of European tenants on the West Coast. It stopped short of recommending the freeholding of the reserves, citing the unanimous opposition of the beneficial owners to such a course of action and their support for 63-year leases with a compensation clause for improvements.<sup>340</sup> The Westland and Nelson Native Reserves Act 1887 adopted a different system, providing for 21-year leases with a perpetual right of renewal and rent reviewed at the end of the lease. The Ngai Tahu Tribunal found the introduction of a perpetual right of renewal, along with a 1967 provision allowing for the freeholding of the reserves, to be contrary to the principles of the Treaty of Waitangi, concluding that:

It cannot be said that the Crown, in legislating to take away forever from Maori their future rights of use and enjoyment in respect of Mawhera lands was discharging its guarantee to

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337. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 3, p 743

338. Ralph Johnson, *The Trust Administration of Maori Reserves, 1840-1913*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997) (doc A72), p 114

339. MA-MT1 1886/65, ArchivesNZ (Armstrong, 'Fate of Ngati Apa Reserves', p 16)

340. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 3, p 744

protect rangatiratanga under article 2. Nor can the Crown's unilateral action in respect of these perpetual leases, and their imposed unreasonable statutory terms, be seen to be dealing with Maori on the basis of sincerity, justice and the good faith of a Treaty partner.<sup>341</sup>

In section 9.3, we discuss the impact of the perpetual leasing regime on the tenths estate, making findings on Treaty breaches. This discussion is applicable to the West Coast reserves that were subject to perpetual lease. Also of direct relevance, section 9.6 traverses efforts by Maori in the late twentieth century to seek redress for the impact of the perpetual leasing regime, the changes effected through the Maori Reserved Land Amendment Act 1997 and the ex-gratia payments of compensation made in 2002.<sup>342</sup>

Nearly all of the endowment reserves were subject to leases with a perpetual right of renewal by the time of their transfer to the Mawhera Incorporation in 1976. This included all of the Karamea reserve, originally 510 acres in extent but evidently reduced to 464 acres as a consequence of the prolonged effect of flooding and soil erosion.<sup>343</sup> It also included the 229-acre balance of the Ohika reserve, also originally 500 acres, but the majority of which had been taken for river control purposes in the early 1880s.<sup>344</sup> The 500-acre Kawatiri reserve, also known as Whareatea, was found upon resurvey in 1925 to contain just over 397 acres, in consequence of heavy sea erosion which had resulted in 'acres . . . disappearing annually'.<sup>345</sup> It subsequently stabilised but was also subject to a perpetually renewable lease, as was the 160-acre Mokihinui reserve. Leasing of the latter reserve was postponed as a result of interest in the coal deposits upon the land, in consequence of which it was deemed inappropriate to lease the block for farming purposes. It was leased to the Mokihinui Coal Mining Company in 1898, but the company went into liquidation before the lease could be executed, and it was later instead let on perpetually renewable terms prior to the transfer to Mawhera Incorporation.<sup>346</sup>

The 100-acre Heaphy reserve, also known as Whakapoai, was also made subject to a perpetually renewable lease. Located near the mouth of the Heaphy River, at the western end of what is today known as the Heaphy Track, the reserve is partly covered in non-millable native timber such as rata and kamahi. Grazing was restricted to about 30 acres, and access to the land difficult.<sup>347</sup> There appears to have been no lease on the land prior to 1911, when a 21-year renewable lease was let at an annual rental of £4 15s.<sup>348</sup> However, within four years

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341. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 3, pp 788–789

342. The Mawhera Incorporation was one of the recipients of these payments, receiving \$8,199,925: *The Owners of Maori Reserved Land and the Crown Deed of Settlement*, July 2002, sch 1, p 15

343. AJHR, 1975, H-3, pp 372–373

344. *Ibid*, pp 394–395; Armstrong, 'Fate of Ngati Apa Reserves', p 26; Alexander, 'Reserves of Te Tau Ihu', vol 2, pp 710–712

345. AJHR, 1975, H-3, p 379

346. *Ibid*, pp 376–377; Armstrong, 'Fate of Ngati Apa Reserves', pp 30–31

347. Waitangi Tribunal, *Ngai Tahu Ancillary Claims*, p 149

348. AJHR, 1975, H-3, p 369

of this the lessees had lost their lease of a large area of adjacent Crown land, rendering the Whakapoai lease 'quite useless', in the words of Ngati Apa historian Mr Armstrong.<sup>349</sup> No rent was paid for a number of years and by the mid-1950s a 'large number' of owners were said to have received less than £2 each from the first distribution of rental income in 25 years.<sup>350</sup> Prior to this the lease had been further assigned, before lapsing altogether following the death of the lessee.<sup>351</sup> By 1956, the Department of Lands and Survey had become interested in the potential of the reserve for scenic reserve purposes, and it was proposed to purchase the land at its 1949 valuation of £175. A meeting of owners held at Kaiapoi strongly opposed the proposed alienation, in consequence of which the Maori Trustee's representative stated that the land would instead be re-vested in them.<sup>352</sup> For reasons that remain unclear, that did not follow, however, and instead in 1958 the Maori Trustee negotiated a further perpetually renewable lease of the block. In 1971, the lessee offered to purchase the reserve at its unimproved value of \$180. This was approved by the Maori Trustee's Christchurch office, seemingly on the basis that all of the owners held 'uneconomic shares' in the reserve. The Christchurch office failed to communicate the purchase offer to the owners, on the grounds that the 'cost of this including printing and stationery would be greater than the commission we would receive on the sale.'<sup>353</sup> The sale did not go ahead and the land was instead vested in the Mawhera Incorporation in 1976.

As we noted earlier, in addition to these larger reserves, there were also 40 township sections covering a total area of 10 acres reserved for endowment purposes at Westport. There appears to have been little demand for these in the 1860s, and in 1867 just six out of the 40 sections were under lease.<sup>354</sup> Three sections were washed away in a major flood in 1872, and were subject to compensatory awards from the Nelson Provincial Government.<sup>355</sup> In the year to June 1873, just over £106 was collected from the Westport township leases, and this had risen to £152 by 1875, before falling back to just £81 by 1881.<sup>356</sup> Mackay reported in 1883 that, although a few of the town sections at Westport were let, 'the bulk of the land is at present lying unproductive, owing to the want of demand.'<sup>357</sup> He identified the decline of the gold-mining industry, and the failure of coal mining to generate the expected demand for property, as the main factors behind the stagnation. In a further indication of the economic downturn, the Public Trustee's Westport agent reported increasing difficulty in collecting

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349. Armstrong, 'Fate of Ngati Apa Reserves', p 28

350. Waitangi Tribunal, *Ngai Tahu Ancillary Claims*, p 149

351. AJHR, 1975, H-3, p 369

352. Waitangi Tribunal, *Ngai Tahu Ancillary Claims*, p 149

353. *Ibid*, p 150

354. AJHR, 1975, H-3, p 387

355. Alexander, 'Reserves of Te Tau Ihu', vol 2, pp 689, 697–703

356. AJHR, 1873, G-2A, p 5; AJHR, 1875, G-5D, p 2; AJHR, 1881, G-4, p 2; David Armstrong, comp, supporting documents to 'The Fate of Ngati Apa Reserves and Ancillary Matters', various dates (doc A78(a)), pp 200, 206, 222

357. AJHR, 1883, G-7, p 3 (Armstrong, supporting documents to 'Fate of Ngati Apa Reserves', p 228)

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rental income, with a number of lessees in arrears. Attempts to lease the vacant sections also met with limited success.<sup>358</sup>

Fortunes had reversed by 1921, when the Westport sections were described as ‘the most valuable part’ of the West Coast reserves administered by the Native Trustee.<sup>359</sup> Yet, questions remained concerning the benefit derived by local Maori from these reserves. In 1934, a royal commission on native affairs heard, amongst other issues, various complaints levelled against the Native Trustee, including one specifically relating to the Westport township reserves. According to the commission’s report, it was alleged that:

for over seventy years this land has been held in trust for this special purpose, and nothing has been done to carry out the trust, that since 1891 rent has been received therefrom, and that the rentals have accumulated and now form part of the Common Fund of the Native Trustee.<sup>360</sup>

Perhaps more surprising than the complaint was the response it generated from the office of the Native Trustee. The commission noted the frank admission of the Deputy Native Trustee that ‘the trust has failed, but until it is definitely cancelled by legislation, the Trustee must hold the land under the existing trusts.’ It was further added that the Deputy Native Trustee:

also stated that some four or five years ago the Native Trustee had advised a firm of solicitors in the South Island that special legislation was necessary to have the trust cancelled and to enable the Native Land Court to investigate the ownership of the land. The view of the Deputy Native Trustee was that when these matters had been determined the Native Trustee could then pay out to the owners the rents that had been collected and accumulated. The Deputy Native Trustee also stated that he understood that a petition to Parliament for the necessary special legislation was in course of preparation.<sup>361</sup>

The commission noted its own support for such legislative authority as was found necessary to be obtained and for the matter to be investigated. For reasons which remain unclear, no such legislation was forthcoming, and by 1937 accumulated rentals on the township sections had reached more than £4000.<sup>362</sup> Two sections were sold by the Maori Trustee to the Westport Borough Council in the late 1960s. The *Ngai Tahu Ancillary Claims Report* found the absence of any attempt to ascertain the views of the owners, and the lack of any legal requirement for the Maori Trustee to consult with them, to be contrary to the principles of the Treaty of Waitangi.<sup>363</sup> According to the Sheehan commission, two other sections had

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358. Armstrong, ‘Fate of Ngati Apa Reserves’, pp 36–38

359. Armstrong, ‘Ngati Apa ki te Ra To’, p 86

360. AJHR, 1934–35, G-11, p 153 (Armstrong, supporting documents to ‘Fate of Ngati Apa Reserves’, p 245)

361. Ibid

362. Armstrong, ‘Ngati Apa ki te Ra To’, p 99

363. Waitangi Tribunal, *Ngai Tahu Ancillary Claims*, p 152

been sold in the 1890s.<sup>364</sup> No further information is available concerning these earlier transactions, though the loss of four out of the 40 sections is consistent with the area of just over nine acres transferred to the Mawhera Incorporation in 1976. The remainder of the sections were under lease at this time, though there is little information available concerning the distribution of such income following the Deputy Native Trustee's frank admission in 1934. The Sheehan commission recorded the largest owner in the township sections as being entitled to an annual payment of just under \$70 in 1970, with the smallest receiving a mere three cents.<sup>365</sup>

### **(2) Other West Coast lands**

It is also of note that in the 1860s Maori purchasers obtained nearly 700 acres of land (in 28 blocks) at Karamea. All the new owners, who were mainly Ngati Tama but also included members of the other three Te Tau Ihu iwi with interests in the West Coast districts, were issued with Crown grants. Most of this land had been sold again by 1900, and the rest followed in later years.<sup>366</sup>

### **(3) Conclusion**

In this western district, where the rights of other iwi are disputed by Ngai Tahu, members of four Te Tau Ihu iwi claim interests in many of the reserves created in 1860. It is difficult to quantify the land made available to members of Ngati Apa (the only iwi specifically identified as being allocated reserves in 1860) and the other iwi, but it was not a great amount. A large proportion of it (much of the occupation land, and almost all of the endowment land) is still in Maori ownership. The greater part of this Maori-owned land, however, is vested in the Mawhera Incorporation, and the iwi of Te Tau Ihu claim that their control over it is limited.

## **7.5.9 The reserves of Te Tau Ihu: summary and conclusion**

In the six geographical divisions we have identified in the northern part of the South Island, a total of more than 35,500 acres was set aside as Maori occupation reserves when the land was acquired for Pakeha settlement. This included 710 acres in the northern part of the West Coast region. (See table 2, which does not include land purchased by Maori.) About 100 such reserves were created. The figures quoted are often approximations only, but we believe they are indicative of the true situation. We have commented on the quality of the land that was reserved, and will discuss this further in section 7.7.2.

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364. AJHR, 1975, H-3, p 389

365. Ibid, p 390

366. Alexander, 'Reserves of Te Tau Ihu', pp 717-724; Mitchell and Mitchell, 'West Coast', pp 81-82

Crown granting of reserved land was a prominent feature in only one district, the Abel Tasman coast and Golden Bay, where about two-thirds of the reserve land was given this status. The part of that district where the highest proportion (more than four-fifths) of land was held under Crown grant was the lower Takaka Valley, but the proportion was also high between the Aorere and Takaka Rivers. One of the greatest rates of land alienation in Te Tau Ihu was recorded for the Golden Bay reserves, which indicates the significance of Crown granting for the fate of the reserves. An even greater alienation rate, however, was recorded for the eastern Marlborough Sounds, where there was no Crown granting.

Vesting of land under the native reserves legislation was common throughout the region, although we cannot be sure exactly how many occupation reserves received this treatment. It appears, however, that more than 30 blocks, including a few on the West Coast, came under the Native Reserves Acts. The uncertainty of the documentation does not permit more than an estimate of the total area of this land: our figure is about 11,500 acres (roughly a third of the total area of the reserves), but this is possibly too low. We do not discern any overall pattern in the relationship between vesting and alienation. Sales were made of land that was vested in the Crown or Crown granted, or neither. Crown granting certainly resulted in earlier alienations, with much (but by no means all) of this land being sold before the 1890s. It was after the Native Land Court hearings in 1889 and 1892, however, that alienation of reserve land gathered speed, and in this period, especially after 1909, many sales took place, whether the land had been vested under the native reserves legislation or not. Our estimate of the amount of vested land that was sold is about 6800 acres, which is approximately 58 per cent of the total area of land placed under the native reserves regime (and nearly 20 per cent of the total area of reserved land). The native reserves land sold constitutes roughly 25 per cent of the total amount of Maori reserve land alienated (see fig 27).

The management by officials of reserve lands that were vested but not sold raises issues of another kind, and we will discuss these in chapter 9.

Our figures indicate that the Crown acquired about 5250 acres of occupation reserve land for public purposes. The land was either taken under the Public Works Act or obtained by negotiated purchase. This land included more than 900 acres acquired for roading, drainage, flood protection, water supply reserves, school sites and so on, and more than 4300 acres acquired for conservation purposes (scenic and recreation reserves and for incorporation in national parks). The figure of 5250 acres is about 15 per cent of the total area of reserved land, and nearly 20 per cent of the reserved land that was alienated. It does not include, however, an unknown area of land constituting what is now known as the Sounds foreshore reserve. Nor does it include the anomalous case of the Iwituaroa reserve (1623 acres) in Queen Charlotte Sound, which was purchased by the Crown in 1916 to assist the lessees to obtain the freehold, and not for public purposes (see sec 7.5.2).

The claimants expressed their concern at the acquisition of land from their tiny remaining

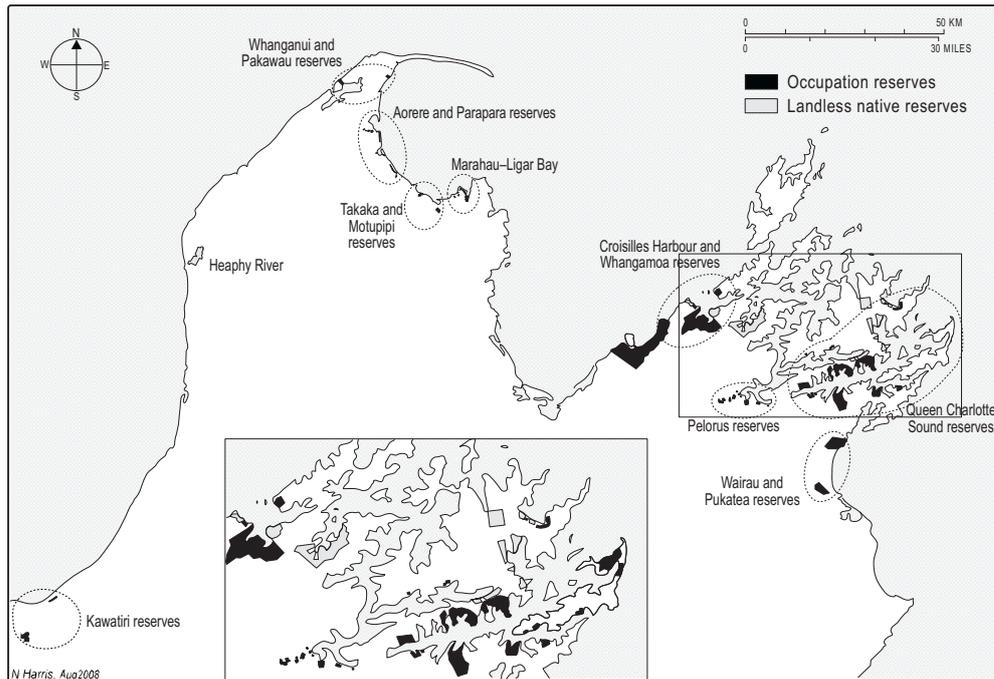


Figure 27: Te Tau Ihu occupation reserves

Source: Moira Jackson, Crown Forestry Rental Trust, and Terralink NZ Ltd, 'Te Tau Ihu o Te Waka a Maui Overview Maps', map book, 2000 (doc A81), map 13

land base for amenities like schools. Mairangi Reiher, giving evidence for Ngati Tama, spoke of the serious inroads made on reserve G for the Takaka School. She put to us:

This sorry chronology serves to emphasise the lip-service which was paid to the concept of Native Reserves as an asset for the perpetual benefit of those in whom such lands were vested. We believe that the progressive alienation of these blocks by the Crown through the Department of Education shows how flimsy were the promises and rhetoric about reserving sufficient land for the present and future needs of the vendor chiefs and their successors.<sup>367</sup>

Of the total area of land reserved for Maori in Te Tau Ihu, a large proportion (varying from district to district, as table 2 shows) was alienated over the years. In no district was more than half retained. Across the region, approximately 23 per cent remains today (the figure is only very slightly decreased if the West Coast is omitted). As will be clear from our discussion above, more than one-third of Maori reserved land in Te Tau Ihu (39.5%) was alienated by direct action of the Crown – by selling reserves vested in trust (20%), by acquiring reserves for public purposes (15%), or by facilitating freeholding for the lessees

367. Mairangi Reiher, brief of evidence on behalf of Ngati Tama, 11 February 2003 (doc K15), p 6

(4.5%). Given that the concept of ‘reserves’ was one of a permanent land base for the Maori people, the Crown’s direct role in the alienation of more than a third of that land base was clearly significant.

In this part, we examined in detail the process of reserve-making, the legislative and administrative arrangements under which reserves existed, and the location, character, and history of the reserves themselves. We now proceed to a presentation of submissions about these matters by claimants and the Crown, followed by our views on the issues raised, and finally our findings.

## 7.6 THE OCCUPATION RESERVES: LEGAL SUBMISSIONS

### 7.6.1 Claimant submissions

We received submissions on the reserves from all eight claimant iwi. Most of them focused on the question of whether the reserves were adequate for the support of their owners at the time they were created and in the years following. The submissions also addressed such issues as whether the Crown administered the reserves effectively and managed them for the benefit of their owners, whether there was sufficient protection against alienation, and whether the inadequacy of the reserved land had serious socio-economic consequences for the owners.

#### *(1) Issues concerning the creation of reserves*

With regard to the Golden Bay reserves created in the late 1840s, counsel for Te Atiawa submitted that it was a breach of Treaty principles for the Crown to allow Governor Grey to disregard Spain’s award and the Crown grant of 1845. Following instructions that the amount of land to be reserved should be limited, and that areas considered ‘particularly valuable to Europeans’ were to be excluded, officials created reserves that amounted to much less than the area stipulated by Spain for tenths and occupation areas.<sup>368</sup> Ngati Tama’s submissions similarly referred to the Crown’s failure to create tenths or reserve all residential, cultivation, and burial sites.<sup>369</sup>

Counsel for Te Atiawa also submitted that in the Pakawau purchase of 1852 the Crown failed to properly record the township reserve promised to the chief Te Koihua, with the result that it was not created.<sup>370</sup> She referred similarly to the failure of the Crown to create a reserve promised at Awaroa (on the Abel Tasman coast) in 1856.<sup>371</sup>

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368. Counsel for Te Atiawa, closing submissions, 10 February 2004 (doc T10), pp 99, 127, 135

369. Counsel for Ngati Tama, closing submissions, [2004] (doc T11), pp 69–70

370. Counsel for Te Atiawa, closing submissions, pp 133, 136

371. Ibid, pp 171, 179

Ngati Kua's submission included the charge that the Crown omitted to ensure that Pareuku (near the present town of Havelock) was retained as a landing place, food source, and historically significant site, even though it had been set aside as a landing place reserve in the deed of 1856. Instead, it became public land vested in a local authority.<sup>372</sup> Ngati Koata submitted that the procedures for identifying reserves, including consultation with the recipients, were inadequate.<sup>373</sup>

Three submissions referred to the circumstances in which the Wairau reserves were created and the deleterious effect of these on the claimant iwi. Counsel for Ngati Toa reminded us that the substantial reserve created by the Wairau deed of 1847 was replaced by the much smaller reserves (shared with two other iwi) of 1856.<sup>374</sup> Counsel for Rangitane submitted that in 1856 McLean promised this iwi a much larger area of reserved land in the Wairau area than they eventually obtained. This was despite the fact that the size and location of the intended reserve, which included land suitable for both gathering and cultivation, had been made known in detail to the iwi at the time of the purchase negotiations. Counsel maintained that the Crown had 'unilaterally reduced the size of the reserve.'<sup>375</sup> He also argued that, if the Crown's promise of a large reserve had been kept, Rangitane would have been able to participate fully in the Marlborough economy.<sup>376</sup> Rangitane also submitted that the reserves they believed were to be exclusively theirs, on lands historically significant to them, had in fact to be shared with two other iwi. Counsel reviewed the historical evidence to show that McLean negotiated only with Rangitane and that Rangitane were the sole signatories of the document resulting from the agreement.<sup>377</sup> Counsel for Ngati Rarua, while disputing the claim that McLean had promised the Wairau reserves to Rangitane exclusively, argued that Ngati Rarua were similarly disadvantaged by the breach of McLean's promise that a large area of land would be reserved for the resident Maori of the Wairau area.<sup>378</sup>

## **(2) *The size and quality of reserves***

Beyond the specific cases in which reserves turned out to be smaller than what was believed had been promised, claimant submissions referred repeatedly to the inadequacy, in both size and quality, of the reserves in general. Here, we mention only the submissions referring to the reserves created in the period up to 1860 (our consideration of the landless natives reserves will be found later in the chapter).

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372. Counsel for Ngati Kua, closing submissions, 17 February 2004 (doc T14), pp 54, 55, 59

373. Counsel for Ngati Koata, closing submissions, 9 February 2004 (doc T7), pp 79–80

374. Counsel for Ngati Toa Rangatira, closing submissions, 5 February 2004 (doc T9), pp 101, 104, 113

375. Counsel for Rangitane, closing submissions, 5 February 2004 (doc T4), pp 27–30

376. *Ibid*, p 39

377. *Ibid*, pp 29, 30–34

378. Counsel for Ngati Rarua, closing submissions, 5 February 2004 (doc T6), pp 80–93, 164

## 7.6.1(2)(a)

**(a) Rangitane:** After submitting that the Crown's promise of large reserves was not kept, Rangitane further claimed that the reserves they were given in the Wairau and Pelorus areas were inadequate in respect of both size and quality. Pukatea was steep and barely suitable for farming, and did not produce a reliable rental income. The Wairau was only partly cultivable, and prone to severe recurrent flooding problems that the Crown failed to resolve. Counsel for Rangitane argued that the Crown failed in its duty to ensure that the reserves were sufficient to sustain the iwi.<sup>379</sup>

**(b) Ngati Toa:** Counsel for Ngati Toa similarly pointed to the 'grossly inadequate' size of the Wairau reserves that this iwi shared with Rangitane and Ngati Rarua after 1856. In her submission, no proper provision for reserves was made in the Waipounamu agreements and the lands reserved for Ngati Toa were barely able to provide a livelihood and insufficient in quantity and quality for the future needs and development of the iwi.<sup>380</sup>

**(c) Ngati Rarua:** Ngati Rarua, too, submitted that the land reserved for them at the Wairau was of poor quality, especially in its susceptibility to flooding, and that its inadequacy was a factor in the disruptive competition that developed between the three iwi living on it.<sup>381</sup> Counsel maintained that the reserves for Ngati Rarua at Golden Bay were also 'marginal in quality and insufficient in size', which led the iwi to sell much of their land in that district.<sup>382</sup> In Te Tau Ihu as a whole, Ngati Rarua, like other iwi, lost the opportunity to participate in the new economy that was growing around them and began to decline economically, socially, and culturally.<sup>383</sup>

**(d) Te Atiawa:** Counsel for Te Atiawa submitted that the reserves created for this iwi were insufficient for its needs at the time and in later years. In the eastern Sounds the reserves were 'without exception' of poor quality (although she did note that a small portion of Waikawa was regarded as cultivable). She suggested that, if there were about 350 people in the district, the allocation would be a little over 54 acres per person, which was hardly generous in view of the inferior nature of the land. In Golden Bay, even after additional reserves were made in 1856 (partly in acknowledgement that the earlier allocations were inadequate), the iwi was left with insufficient land to meet its needs, and the reserves were scattered, isolated, and of poor quality. Counsel argued that this removed the capacity of

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379. Counsel for Rangitane, closing submissions, pp 36–42

380. Counsel for Ngati Toa Rangatira, closing submissions, pp 51, 104–105, 112

381. Counsel for Ngati Rarua, closing submissions, pp 93, 171–172, 174–175

382. Ibid, pp 168–169

383. Ibid, p 7

Te Atiawa to maintain their traditional lifestyle and economy or to participate in the new economy (or to do both). It also resulted in migration from the district.<sup>384</sup>

**(e) Ngati Kuia:** Counsel for Ngati Kuia submitted that the Crown failed to allocate adequate reserves for their present and future needs. The meagre extent of the reserves created for members of the iwi did not recognise their needs in respect of resource gathering, and also made their participation in the agricultural economy of the region difficult. Counsel quoted the statement made in 1887 by Alexander Mackay about the tiny acreage that had been allocated per head of population in the Pelorus area in 1856. (This statement was made in his report on landless natives, which we will consider later in the chapter.) She compared this amount to the figure of 50 acres per head stipulated by the Native Land Act of 1873. She also noted that much of the reserved land in the Pelorus area was soon vested in the Crown under the Native Reserves Act, thus making it unavailable for direct use by Ngati Kuia members themselves. Finally, counsel pointed to the purchase of land by Ngati Kuia soon after 1856 as a clear indication that insufficient land had been reserved. She emphasised that the inclusion of Ngati Kuia in the landless natives policy instituted in the 1890s was an acknowledgement of the inadequacy of the 1856 allocations.<sup>385</sup>

**(f) Ngati Koata:** For Ngati Koata, counsel submitted that the Crown failed to provide suitable and adequate reserves, leaving the iwi with a land base that was inadequate even if their retention of the large island of Rangitoto is taken into consideration. The reserves allocated were steep and difficult of access. It was argued that the Crown failed to consult adequately with Ngati Koata as to their preferences and requirements or to ensure that the iwi retained enough land of a productive nature or that had potential for development.<sup>386</sup>

**(g) Ngati Tama:** Counsel for Ngati Tama submitted that the official policy for purchases of the 1850s was to limit Maori landholding as much as possible. As a result, the Crown left the iwi with reserves that were insufficient, both in quantity and quality, for its foreseen needs, either for maintaining the traditional economy or for participating in the new economy. An extremely limited economic and natural resources base was left, and there is no evidence that the Crown took steps to ascertain the quantity of land needed for Ngati Tama to progress as a tribe. It was thus made very difficult for the iwi to achieve economic prosperity or retain social and cultural cohesiveness.<sup>387</sup>

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384. Counsel for Te Atiawa, closing submissions, pp 170, 178–179, 186–187, 189, 258, 260, 262–263; counsel for Te Atiawa, supplementary closing submissions, 18 February 2004 (doc T10(a)), pp 5–6, 16

385. Counsel for Ngati Kuia, closing submissions, pp 44, 46, 55–59

386. Counsel for Ngati Koata, closing submissions, pp 79–88, 92–96

387. Counsel for Ngati Tama, closing submissions, pp 61–66

## 7.6.1(2)(h)

**(h) Ngati Apa:** In the submissions for Ngati Apa, counsel asserted that a very inadequate amount of reserve land was awarded to the iwi. They were left out of all the mid-century allocations except at the very end, when a little land was set aside for them on the West Coast as an outcome of the Arahura purchase in 1860. The reserves made then, in the Buller area, were not accurately defined – they were ‘uncertain and unquantified’. Other than this small area at Kawatiri, the only other Ngati Apa reserves were the small pieces of land at Port Gore awarded by the Native Land Court in 1889. For an iwi with customary rights in many parts of Te Tau Ihu, this meagre provision was devastating: it led to dispersal and the loss of a tribal base, thus almost destroying normal iwi relationships, cohesion, and pride.<sup>388</sup>

**(i) West Coast issues:** Three other claimant submissions also referred to rights on the West Coast. In the case of Ngati Rarua, it was submitted that the rights of residents belonging to that iwi were recognised – in a manner described as one of the rare moments of Crown conduct consistent with the Treaty principles – by their inclusion in some of the reserves created in 1860. In 1879, the Young commission however diluted these rights and they eventually passed to members of Ngai Tahu. It was alleged that Crown officials refused to consider that an injustice had occurred, or even to investigate matters, with the result that Ngati Rarua’s reserve ownership on the West Coast ‘was brought to an end by Crown action’. Counsel asserted that this amounted to a failure by the Crown to protect the Ngati Rarua interests it had previously recognised.<sup>389</sup> In their amended statement of claim, Te Atiawa mentioned the Young commission’s removal of Poharama Hotu from the ownership of two reserves, and asserted that the commission’s failure to investigate Te Atiawa interests was a Treaty breach. This claim was not referred to in the iwi’s closing submissions.<sup>390</sup> In their closing submissions, however, Te Atiawa asserted that they, along with Ngati Rarua and Ngati Tama, had rights on the West Coast, but that they were not reflected in the creation of an adequate land base in the district. Te Atiawa interests were hard to quantify with precision, and since there had not been an opportunity to develop its case fully, the iwi suggested that a proper investigation of its rights and interests on the West Coast be made.<sup>391</sup> Ngati Tama’s submissions about the West Coast stated that in that district (as elsewhere) inadequate provision was made for Ngati Tama people. Reserves amounted only to a 40-acre block on the Buller River and two small town sections. Moreover, most of this land was later taken under the Public Works Act – much of the larger block for river channel works in 1881 and the town sections for State housing in 1961.<sup>392</sup>

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388. Counsel for Ngati Apa, closing submissions, pp 3, 21, 22, 28–30, 46–48, 49–50

389. Counsel for Ngati Rarua, closing submissions, pp 122, 163, 171, 174; counsel for Ngati Rarua, submissions in response to closing submissions of counsel for the Crown and Ngai Tahu, 12 August 2004 (paper 2.796), pp 14–17

390. Jane Du Feu and others, third amendment to claim Wai 607, 14 February 2003 (claim 1.14(c)), pp 8–10, 12

391. Counsel for Te Atiawa, closing submissions, pp 42–44

392. Counsel for Ngati Tama, closing submissions, pp 103–105. The size of the larger block was actually 50 acres: see Alexander, ‘Reserves of Te Tau Ihu’, p 708.

We note here that, with regard to iwi interests in the West Coast reserves, a matter that, as we have seen, was mentioned in several of the claimant submissions, Ngai Tahu also made submissions (although not on the Young commission). Emphasising that these submissions did not present a complete picture and were no more than a response to what was put forward by Te Tau Ihu iwi, counsel argued that the rights of those iwi in the West Coast reserves did not amount to more than residential rights of particular individuals or groups in particular areas. The small group that lived at Kawatiri and described itself as Ngati Apa were closely related to Ngai Tahu. Their residence there entitled them to reserve allocations (the alleged inadequacy of which was a matter for the Crown to answer), but this did not mean that they had customary rights or manawhenua on the West Coast as a hapu or iwi. The same could be said of other non-Ngai Tahu people in the West Coast districts.<sup>393</sup>

**(j) Socio-economic impact:** As far as the claimant iwi are concerned, all agreed that the inadequacy of the reserves in Te Tau Ihu, and the gradual loss of much of the reserve estate, had serious negative effects on the socio-economic status of the Maori of the region.<sup>394</sup> The submissions made to this effect will be discussed in more detail in chapter 10, along with our findings on this issue.

### **(3) The administration of reserves by the Crown**

The submissions of almost all the iwi raised issues concerning the Crown's administration and management of the reserves. Specifically, it was argued that the administration and leasing of the reserves vested in the Crown under the Native Reserves Act (1856) and subsequent legislation was not always carried out in the best interests of the owners, and that reserves administered in that system were removed from the owners' control. As counsel for Ngati Toa put it, the owners were denied 'the right to manage and develop their own land'.<sup>395</sup> Te Atiawa's submission about the Pakawau and Whanganui Inlet reserves asserted that their vesting under the Act had the effect of severing the links between the owners' descendants and their ancestral land. Counsel declared that the fact that the land eventually 'went to a Trust whose beneficiaries are Maori does not mitigate this act of confiscation'.<sup>396</sup> With regard to vested reserves in general, Te Atiawa submitted that their management, including their

393. Counsel for Ngai Tahu, closing submissions, pp 55–56, 59–60, 62–65, 67–68, 72

394. Ibid, pp 50–51; counsel for Ngati Rarua, closing submissions, pp 96–97, 164–165; counsel for Ngati Koata, closing submissions, pp 82–83, 116, 118–125; counsel for Ngati Toa Rangatira, closing submissions, pp 116–120; counsel for Te Atiawa, closing submissions, p 260; counsel for Ngati Tama, closing submissions, pp 113–114, 116; counsel for Ngati Kuia, closing submissions, pp 62, 73–76

395. Counsel for Rangitane, closing submissions, p 7; counsel for Ngati Koata, closing submissions, pp 60–62; counsel for Ngati Toa Rangatira, closing submissions, p 106; counsel for Te Atiawa, closing submissions, p 262; counsel for Ngati Tama, closing submissions, pp 72–73, 77–79, 82–85; counsel for Ngati Kuia, closing submissions, pp 58, 59

396. Counsel for Te Atiawa, closing submissions, pp 135, 136

## 7.6.1(4)

perpetual leasing, was not of such a kind as to obtain the best return for the beneficiaries, and that this was a breach of Treaty principles.<sup>397</sup>

Counsel for Ngati Apa submitted that the Crown failed to protect the interests of the iwi, by administering the West Coast reserves in which Ngati Apa were interested in such a way that the iwi did not benefit, and by eventually vesting these reserves in the Mawhera Incorporation owned by Ngai Tahu.<sup>398</sup> Counsel for Ngai Tahu rejected this on the grounds that, although some people with interests in these lands had whakapapa links with other tribes, Ngati Apa as an iwi did not have customary rights on the West Coast. He submitted also that at the time of the transfer to the Mawhera Incorporation no one with interests in the lands concerned sought to have them excluded from the incorporation.<sup>399</sup>

**(4) Protection against alienation**

A theme of several of the submissions was the failure of the Crown to protect the reserves from being sold or otherwise alienated. Counsel pointed out that much of the land reserved by 1860 was subsequently lost, one reason for this being the weakness of the provisions for inalienability.<sup>400</sup> The Native Land Court was said to have been responsible for much of the alienation that occurred. Counsel for Ngati Kuia, Ngati Koata, Ngati Toa and Ngati Apa, for example, all submitted that the court's award of individual titles, as well as being contrary to tikanga, promoted fragmentation and eventually alienation.<sup>401</sup> Counsel for Rangitane, Ngati Tama and Te Atiawa made submissions along the same lines, with additional reference to Crown actions under the Maori Reserved Land Act 1955. That Act empowered the Maori Trustee to compulsorily acquire interests deemed to be uneconomic, and the Maori Affairs Amendment Act 1967, which allowed the Maori Trustee to offer lessees the opportunity to purchase the freehold of leased reserve land. Te Atiawa submitted that the passing of the 1955 Act constituted a Treaty breach. Ruakaka 1E2, the block of reserve land in which the Maori Trustee acquired a substantial interest by this means and which was soon afterwards sold to the Crown as a scenic reserve, was put forward in Te Atiawa's submissions as an illustration.<sup>402</sup> The argument of the submissions on protection against alienation is perhaps best summed up in Ngati Tama's assertion that the Crown's policies and legislation that set up the Native Land Court and its powers of determining title and regulating succession

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397. Counsel for Te Atiawa, closing submissions, pp 203, 262

398. Counsel for Ngati Apa, closing submissions, pp 45, 49–50, 51

399. Counsel for Ngai Tahu, closing submissions, p 68

400. Counsel for Ngati Koata, closing submissions, pp 83–84; counsel for Ngati Toa Rangatira, closing submissions, p 105; counsel for Ngati Tama, closing submissions, p 24

401. Counsel for Ngati Kuia, closing submissions, pp 66–67; counsel for Ngati Apa, closing submissions, pp 25, 48; counsel for Ngati Koata, closing submissions, pp 93, 98–101; counsel for Ngati Toa Rangatira, closing submissions, pp 15, 106–107

402. Counsel for Rangitane, closing submissions, p 49; counsel for Te Atiawa, supplementary closing submissions, pp 8–10, 16; counsel for Ngati Tama, closing submissions, pp 82–83, 87–88, 92–95

were a major contribution to the breakdown of tribal rangatiratanga, the loss of economic value of Maori land interests, and the alienation of remaining Maori lands.<sup>403</sup>

The submission for Te Atiawa also contended, using the Toreamoua–Kumutoto reserve as an example, that it was a Treaty breach for the Crown to compulsorily acquire reserve land for scenic purposes. In this submission, it was argued that the only circumstances in which the Crown should have overridden the property rights of Maori by taking the land were a failure of negotiation to produce agreement, the absence of any other option, or a threat to the nation or community if the acquisition was not made. Quoting the reports of the Ngai Tahu and Turangi Township Tribunals, counsel declared that the desire to create a scenic reserve did not constitute ‘exceptional circumstances and a last resort in the national interest’.<sup>404</sup> A related issue was raised by Te Atiawa’s submission that the iwi did not consent to the taking of foreshore reserves from its land; indeed it was never consulted about this action, or compensated for the loss, which in some instances affected the bulk of the usable iwi-owned land.<sup>405</sup> A submission by Ngati Kuia, specifically about land on the Kenepuru Sound, also condemned the taking of a coastal strip for the foreshore reserve.<sup>406</sup> With regard to Public Works takings in general, and referring to previous Tribunal findings on such matters, Ngati Tama submitted that in cases in which the iwi lost land in this way, the Crown did not explore alternatives to compulsory acquisition of the freehold, make inquiry into the importance of the land for the present and future needs of the iwi, or balance these considerations against national considerations.<sup>407</sup>

A specific grievance relating to the alienation of the Kaiua reserve was included in the submissions of Ngati Koata. Counsel submitted that the Crown failed to ensure that the sale of the reserve was properly documented, a failure that is all the more significant because of the value placed on this land by the iwi as a food resource that they were unlikely to have willingly alienated.<sup>408</sup>

## 7.6.2 Crown submissions

### (1) *The creation of reserves*

As part of the Crown’s response to claims about tenths and occupation reserves in the 1840s, counsel accepted that there was a failure to implement the terms of Spain’s award as far as Golden Bay was concerned. As well as not setting aside any tenths there, the Crown created insufficient occupation reserves.<sup>409</sup> Crown submissions noted in respect of the Pakawau

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403. Counsel for Ngati Tama, closing submissions, p 92

404. Counsel for Te Atiawa, supplementary closing submissions, pp 14–16

405. *Ibid*, pp 18–19

406. Counsel for Ngati Kuia, closing submissions, pp 62–63

407. Counsel for Ngati Tama, closing submissions, pp 105–110

408. Counsel for Ngati Koata, closing submissions, pp 85–86

409. Crown counsel, closing submissions, 19 February 2004 (doc T16), pp 69, 71

## 7.6.2(2)

purchase, that it was ‘not clear’ whether or not a promise was made to Te Koihua that he would receive an additional reserve at the township of Seaford. Otherwise the Crown submissions did not address any of the other specific claims about the creation of reserves.<sup>410</sup>

**(2) West Coast issues**

With regard to the West Coast Crown counsel stated that notwithstanding the fact that a settlement had been made with Ngai Tahu, the Crown was willing to consider the grievances of other iwi concerning their rights and interests in West Coast districts if they were shown to be well founded. The Crown did not accept Te Atiawa’s submission that it had not had the opportunity to develop its case. Counsel submitted that the evidence concerning the rights of Ngati Tama, Ngati Rarua and Te Atiawa on the West Coast, and thus their right to reserves there, was indeterminate and inconclusive. With regard to the one iwi (Ngati Apa) that did receive reserves in the district, the allocation may have been inadequate if the needs of the iwi in the whole of Te Tau Ihu are considered. However, it was probably not insufficient for the Kawatiri community for whom it was specifically intended.<sup>411</sup> The Crown made no submission on the Young commission.

**(3) The adequacy of reserves**

In regard to Maori landholding in Te Tau Ihu generally, Crown counsel agreed at an early stage (in the submissions on generic issues) that the alleged failure of the Crown to ensure the retention by Maori of sufficient land for their present or future needs was a ‘compelling’ claim. He accepted that this was one of the most important issues in the inquiry, and that there was a serious case to answer. The Crown argued, however, that judgements about the quantity of land required for future needs were not easy to make. Historical context, including existent and changing economic patterns, must be considered, and it should be remembered that the Maori population in the region was small and mobile. Nevertheless it was accepted that the cumulative effect of a number of Crown acts and omissions contributed to the virtual landlessness of many Te Tau Ihu Maori by 1900. In this initial phase of the Crown’s response it was argued that at the time of the purchases both Crown officials and Maori generally believed that sufficient land had been reserved for present and foreseen future Maori needs. It was the subsequent failure to survey reserves or in some cases the subsequent purchase of reserves that eventually left many Maori without sufficient or suitable land for maintaining their traditional economy or participating successfully in the new economy.<sup>412</sup>

Later, in his opening submissions, Crown counsel acknowledged again that a Treaty breach arises from the failure of the Crown to ensure that there was sufficient land retained

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410. Crown counsel, closing submissions, p111

411. Ibid, pp 122–130

412. Crown counsel, submissions on generic issues, 20 September 2002 (paper 2.371), pp 5–6, 34–38, 54

by Maori in Te Tau Ihu.<sup>413</sup> He now admitted that some Crown policies, acts, and omissions in respect of reserves demonstrated a tendency to ‘sideline’ the Treaty or make it secondary to the needs of settlers.<sup>414</sup>

In its final form, the Crown’s position was that failure to ensure retention of sufficient land was demonstrated during the purchasing and reserve-making process itself. This admission represented an abandonment of the Crown’s earlier argument that the failure occurred only after the creation of reserves. The Crown’s concession was now that there had been a failure to ensure that the reserves laid off during the purchases of this time were adequate in size, character, or location for the present and future needs of many of the Maori of Te Tau Ihu. Moreover, subsequent alienations left many without enough land for subsistence or farming development – a state of virtual landlessness. Counsel agreed that in its programme of land acquisition and its less than generous approach to reserve-making the Crown had failed to look far enough into the future where Maori were concerned. This was also not unknown to officials only a few years after the purchases (eg, by Alexander Mackay in the 1870s). Counsel stated that it would be ‘reasonable to suppose’ that Crown policies for purchasing and reserving land had the effect of limiting the range of options opened to Maori by the Treaty. These options included the maintenance of a tribal or collective way of life on tribally owned lands, the abandonment of the tribal model, and a middle course between these two extremes, but the Crown’s actions restricted the choice. The Crown accepted that the acts and omissions of the Crown in regard to land purchase and the creation of reserves were ‘critical failures’. They were in breach of the Treaty and its principles, and the Crown conceded that ‘and all were prejudiced as a result’.<sup>415</sup>

The Crown did not make these concessions without qualification, however. In his final submissions, counsel again emphasised that proper consideration must be given to historical context, and also that today’s understanding of the Treaty should not be applied uncritically to the actions of people in the past, whether Pakeha or Maori.<sup>416</sup> He pointed out that the Maori population of the region was small, and suggested that in terms of acreage alone the amount of land reserved was not inadequate. The Crown cited the report of Dr Robinson, which was commissioned for the present inquiry and is included in our discussion later in this chapter. The report states that other considerations, such as the quality of the land, the extent of Maori control, and the level of Maori access to capital were relevant issues. Crown counsel accepted that the quality of much of the reserved land was inferior, but argued that judgements about the quantity of land required for future needs were not easy to make, and that such judgements could later be proved wrong by changing patterns of land use. He argued that it is also necessary to take into account Maori preferences for

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413. Crown counsel, opening submissions, 14 November 2003 (paper 2.748), p 16

414. *Ibid*, p 4

415. Crown counsel, closing submissions, pp 3–4, 12, 15, 116, 120

416. *Ibid*, pp 2, 4–5

## 7.6.2(4)

particular locations, as well as the prevailing mid-century patterns of residence and use. Many of those interested in the reserves moved out of the region and had no further use for their land, but he suggested, not because the reserves were inadequate. Counsel also drew attention to unforeseeable changes in land use and economic development. In this regard he mentioned forestry, the meat trade and the dairy industry, although he conceded that possible Maori involvement in sheepfarming in the Wairau district, an industry that had already begun, does not seem to have been considered at the time. He argued that too much weight should not be put on scientific analyses that demonstrated the poor quality of soils within particular reserves. Despite these points made by counsel, however, it is important to note that the Crown did acknowledge that its purchasing policies and practices contributed to the overall landlessness of Te Tau Ihu Maori, and that this failure to ensure that enough land was retained was a Treaty breach.<sup>417</sup>

**(4) *The administration of reserves***

Crown counsel, in the submissions on generic issues, also commented on the question of the Crown's administration and management of the Maori reserves that were put under its control. Counsel suggested that it is a complex and difficult matter to decide whether this administration was carried out in the best interests of the beneficiaries. The Crown did not accept that there had been general maladministration, and submitted that on the available evidence, the subjective intention of the administrators appears to have been honourable and consistent with the objectives of the scheme.<sup>418</sup> The Crown accepted, however, that there was little or no consultation with the beneficiaries.<sup>419</sup>

**(5) *Protection against alienation***

On the subject of the protection of reserved lands against alienation, the Crown referred in its submissions on generic issues to the role of the Native Land Court. Counsel argued that the court was established to consider and determine title succession and beneficial ownership. Transferable rights in land were created, but it did not necessarily follow that Crown policy and legislation were defective in Treaty terms, since Maori still had the right to retain their land or to alienate it if they chose to do so.<sup>420</sup> The Crown did accept, however, that the operations of the Native Land Court contributed, over time, to the alienation of the remaining Maori land in Te Tau Ihu.<sup>421</sup> The matter was not addressed in the Crown's closing submissions.

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417. Crown counsel, closing submissions, pp 116–119

418. Crown counsel, submissions on generic issues, pp 39–41, 55–56

419. *Ibid*, p 48

420. *Ibid*, p 42

421. *Ibid*, p 48

## 7.7 OCCUPATION RESERVES: TRIBUNAL CONCLUSIONS

### 7.7.1 The process of creating and allocating reserves

#### (1) *Background*

At the beginning of this chapter, we outlined the circumstances in which the reserves were created, and earlier chapters included detailed discussions of the various purchases and transactions of which the reserves were an outcome. Here we confine ourselves to considering how the agreements made at the time of purchase between the Crown and the iwi were carried out, at least as far as reserves were concerned.

What happened in 1853–56 to the reserve previously created in the Wairau area as part of the 1847 agreement with Ngati Toa was a special case. The Waipounamu purchase overrode the Wairau arrangements of 1847, with the result that the original substantial reserve was replaced by two much smaller (shared) blocks.

In a number of other cases the original agreement was never formally modified but was followed up in such a way that there were discrepancies between what was promised during the negotiations and what later actually eventuated. For example, it seems clear to us that Rangitane are justified in their claim that, when negotiating with their ancestors in 1856, McLean promised the iwi a larger area of reserved land in the Wairau area than they eventually obtained. The other resident Maori of the Wairau area were similarly disadvantaged by the failure to create reserves of the size that had been talked about. However, it is difficult now to be sure about the timing of McLean's decision that the reserves in that area were to be shared by the three resident iwi. It does not seem reasonable to suppose that he made provision for one resident group only, although this is apparently what Rangitane believed at the time and it is unlikely they would have acquiesced in any other arrangement. Certainly, however, the three iwi had to make do with a land base that was not as large as expected and proved not to be of much assistance in fulfilling their hopes for full participation in the emerging new economy of Marlborough. As well as being disappointingly small, the reserves were defined and finite spaces, whereas their owners had previously been accustomed to migratory resource use and regular relocations to new areas for cultivation. This is true for all parts of Te Tau Ihu and we will discuss it further in the next section. Nonetheless, in the Wairau case the reserves were made even less viable by the fact that the three iwi found themselves compelled to find ways of living together on such a small and finite base of shared land.

In Golden Bay, the reserve-making of 1847 failed to comply with the requirements of the Spain award and the Crown grant of 1845. Crown counsel conceded that this failure had occurred. As well as failing to set aside a tenth of the land as endowment reserves (a matter we will discuss further in chapter 9), the Crown also accepted a process in which pressure to minimise the area reserved was exerted. The outcome of this was the designation of a mere 1500 acres as occupation reserves. The amount of reserved land was increased in 1856, and

some other complaints attended to, but the changes modified the situation only to a very limited extent.

In other districts, too, the vagueness of some of the agreements (at least in their written form) opened the way for later claims that the reserves as actually laid out did not coincide with what had been negotiated. We are handicapped here by a shortage of documentary evidence for what was discussed and agreed at the time of the deeds. In Mr Walzl's words, the evidence for such discussions and agreements is 'comparatively sketchy'; in the deeds themselves, specific details of the reserves were usually omitted, and 'the intention seemed to be that these matters would be settled afterwards'.<sup>422</sup> In our discussion of the eastern Marlborough Sounds reserves, we referred to the 'slipshod' manner in which they were laid out. In the Pelorus-Kaituna area, a reserve (Pareuku) promised by McLean was not created, and there was another such case at Awaroa on the Abel Tasman coast. Earlier, a reserve which the chief Te Koihua said he had been promised at Seaford (Pakawau) did not eventuate. (We note the comments of Crown counsel that it is 'not clear' whether or not this promise was made, but the fact that James Mackay supported Te Koihua's claim gives it considerable credence in our view.) We have referred to evidence suggesting that in the Pelorus Valley area certain sites of Ngati Kuia activity were omitted from the reserves created in 1856, leading to the purchase by members of that iwi of three blocks of land encompassing the desired land. Overall, we are not surprised that failure to define the reserves clearly before setting them out often resulted not only in disappointment about their size, and in claims of unfulfilled promises, but also in tensions and disputes among the owners in later years. At the same time, it is true that the size of a reserve as estimated at the time of its creation often increased, sometimes substantially, when it was surveyed some years later. Increases usually reflected the inclusion of the steep hills behind the small coastal flats originally selected.<sup>423</sup> We do not alter our view, however, that the reserves, individually and collectively, were inadequate – a matter we will take up in the next section.

## (2) *Finding*

The process of creating reserves, which was largely driven by Crown officials and usually took little account of Maori understanding of what had been promised or 'agreed', was often defective. In the locating and laying out of the reserves, the intended recipients did have some say, but in the end the Government alone had the power to interpret the promises and agreements and impose its decisions on resident Maori.

- ▶ With regard to the Golden Bay districts acquired by the New Zealand Company, the area of land reserved there in 1847 did not amount to what was stipulated by the Spain

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422. Walzl, *Land Issues*, p 311

423. Alexander, 'Reserves of Te Tau Ihu', vol 1, pp 38–40

award and the Crown grant of 1845. We will consider this, as far as tenths are concerned, in chapter 9. As for occupation reserves, we find that too small an area was set aside, and that the additions made in 1856 did not remedy the deficiency.

- ▶ With regard to the Wairau, the reserves created were smaller than what appears to have been promised by the Crown official McLean during the negotiations in 1856. This injustice was compounded by the fact that the land reserved had to be shared by members of three iwi. It seems highly likely that one of these iwi (Rangitane) had been led to believe that the Wairau reserves would be theirs alone
- ▶ With regard to all districts, the methods used when laying out the reserves were often defective and resulted in outcomes that did not always match what the Maori signatories believed they had agreed to. A reserve that was probably promised at Pakawau in 1852 was not created, and the same may be said of one at Awaroa promised in 1856 and one at Kaituna promised the same year. There is at least one instance (in the Pelorus area) of failure to include all cultivation sites used by Maori. Since the reserves were an integral part of the purchase transactions, their full nature and extent should have been marked by the walking of boundaries and then fully recorded in the signed deeds. To omit such a practice, and instead to leave unrecorded and (it would appear) incomplete arrangements to later officials, who had not necessarily been present, compounded this failure to properly record and obtain mutual agreement to the reserves at the time of signing the deeds.

In these ways, that is by ignoring the terms of Spain's award and the 1845 Crown grant, and, in several instances, by setting aside the promises that had been made to Maori, the officers of the Crown did not always act in good faith, and the acts and omissions of the Crown breached the principles of partnership, reciprocity, and active protection. In particular, we note that the Maori cession of the power of pre-emption to the Crown gave it a monopoly over the purchasing of their land. This enjoined upon it a particular responsibility to ensure that the making of purchase reserves was scrupulously fair, mutually understood, and entered into with knowing and meaningful consent. The failure to record, let alone keep, all (or sometimes any) of the reserve arrangements was in flagrant breach of Treaty principles. Various iwi, hapu, whanau, and individuals suffered prejudice thereby.

### **7.7.2 The adequacy of the reserves for the economic support (both subsistence and development) of the Maori of Te Tau Ihu**

#### **(1) Background**

In the process of reserve creation, blocks of land were allocated not to 'Maori' in general but to particular groups of people belonging to particular iwi. In fact, however, the iwi identity of reserve recipients was not always specifically recorded when the reserves were created

and allocated. For this reason, Mr Alexander explains, in compiling his reserve title histories he made no attempt to establish the iwi identity of the owners of the blocks he listed.<sup>424</sup> Mr Walzl, too, in writing about Ngati Rarua, pointed out that except in the Wairau district the interests of particular iwi in a reserve were usually not clearly identified at the time of its creation. Residence was the main criterion, and the nuances of tenure rights were obscure until the Native Land Court investigated them many years later (which is not to say that the court succeeded in clarifying them and making appropriate determinations). 'It is not possible', states Mr Walzl, 'from any consideration of the reserves as granted, to really assess whether Ngati Rarua had adequate reserves in 1856.' Adequacy would be based not only on size, but also on 'whether Ngati Rarua felt their land tenure rights were properly reflected by the reserves which had been allocated'.<sup>425</sup> Another dimension in the question of whether Te Tau Ihu iwi were left with adequate land interests, one that is as yet little explored, is the close connection between the Nelson and Marlborough iwi and their North Island relatives. This meant that many South Island residents were able to move to tribal lands in the north (and vice versa), and as Dr Phillipson points out, it is possible that many Te Tau Ihu residents were awarded shares in North Island land by the Native Land Court.<sup>426</sup>

During the hearings, each counsel submitted that the reserves made available for his or her claimants were inadequate. This is a grievance held by every claimant iwi, and it is difficult if not impossible to identify the iwi affiliation of every person or group to whom reserves were allocated. Therefore we do not attempt to make a full assessment of whether the reserves created for each iwi were adequate. While commenting on the allocations made to particular iwi groups when this is possible, we discuss this issue here mainly with reference to Te Tau Ihu Maori generally rather than to particular groups.

It is hard to escape the conclusion that reserves were allocated on an ad hoc basis, with Crown agents endeavouring to balance the needs and requests of the iwi against an official pressure, usually unarticulated, to keep the extent of reserved lands to a minimum. The phrase commonly used in the making of reserves for Maori in the 1840s and 1850s was 'sufficient for their present and future needs', but as Dr Phillipson notes, there do not seem to have been any formal guidelines as to how much land was 'sufficient'.<sup>427</sup> Professor Ward confirms that there was no accepted standard for this, or, apparently, even any consideration of the matter until 1873, by which time the making of reserves in this part of the country had been completed.<sup>428</sup> It would not be correct to suppose that precedents and guidelines were entirely lacking, however. In the first place, the New Zealand Company thought it appropriate that Maori should retain at least one-tenth of their land. This set something of

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424. Alexander, 'Reserves of Te Tau Ihu', vol 1, p 2

425. Walzl, *Land Issues*, pp 345–346

426. Phillipson, *Northern South Island: Part 2*, p 10

427. *Ibid*, p 2

428. Ward, *National Overview*, vol 1, p 76

a standard in the 1840s, when Governor FitzRoy followed it in his pre-emption waiver legislation requiring endowment reserves of one-tenth. The Spain award (1844) and FitzRoy's grant (1845) continued to follow this standard, requiring a one-tenth endowment plus occupation reserves. Governor Grey, explicitly departed from the one-tenth standard in completing the company's arrangements. Nonetheless, in an official dispatch we quoted earlier in this chapter he also explained why large reserves were needed in the Wairau in 1847, and why it would be unjust to restrict Maori to their residences and immediate cultivations. All of this provides a context in which to judge the sufficiency of the quantity set aside in the reserve-making of 1847 to 1856.

Certainly, there was an understanding that after selling their land Maori would still need some land on which to continue to live and conduct their economic activities. As we explained earlier, such documents as the Nelson Crown grant of 1845 required the reservation of 'all the pas, or burial-places, and grounds actually in cultivation by the natives' situated within the area granted. We affirm the justice of this. In the spirit of Lord Normanby's instructions to Hobson in 1839, as protector of the Maori the Crown's representative should not permit the alienation of:

any territory, the retention of which by them would be essential, or highly conducive, to their own comfort, safety or subsistence. The acquisition of land by the Crown for the future settlement of British subjects must be confined to such districts as the natives can alienate, without distress or serious inconvenience to themselves.<sup>429</sup>

This protective duty of the Crown became a Treaty obligation in 1840, and continued to be recognised in official reserve policies. The duty to protect Maori from landlessness lay behind the making of reserves, but while this sense of responsibility was not entirely lost in later years it was subjected to great strain by an ever-growing pressure to obtain large quantities of land for Pakeha settlement.

We emphasise, however, that in reserving residential, burial, and cultivation sites as part of the Crown's responsibility to prevent Maori landlessness and satisfy the foreseen needs of the Maori population, officials did not go far enough in their protective duty. Pakeha commonly assumed that Maori economic activity would consist mainly of continued cultivation of the land that they currently actually 'used'. It was often part of contemporary thinking about the future of Maori that they would take up Pakeha-style farming, and encouragement was often given to Maori farming aspirations. On the other hand, not enough thought was given to the fact that the taking-up of these new farming activities would require greater areas of land than the small-scale subsistence production traditionally practised. Even where only customary utilisation was concerned, acknowledgement of Maori needs was incomplete. Confining Maori to small cultivation sites ended the flexibility with which

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429. Normanby to Hobson, 14 August 1839, BPP, vol 3, p 87 (Murray, *Crown Policy*, p 3)

cultivators could move from soil that was exhausted or sites that were flooded, and did not take account of 'unused' land on which Maori could continue their traditional wide-ranging hunting and gathering practices if they wished. Maori should not have had to defend their understanding that they were 'using' the land on a seasonal or migratory basis for access to resources and depended on such use. Indeed, as we mentioned above, Grey's comments in 1847 showed that he was aware of this need for hunting and gathering areas, and the large Wairau reserve created that year reflected that awareness. The Wairau reserve of 1847 was anomalous, however (and it soon disappeared anyway). It was far more generous than the reserves created in Golden Bay by the New Zealand Company and later confirmed, without much augmentation, by the Government. The reserves created in the 1850s were much smaller than the Wairau reserve of 1847, reflecting a policy shift towards the reservation of 'occupied' land only. Obviously this could not accommodate the traditional practices spoken of by Grey, and represented a denial of customary resource-use rights.

Even more important, and here we return to the need for land for new farming activities, the smallness of the reserves also made it difficult for Maori to participate in the emerging settler economy if they chose to do that. In the South Island in the mid-nineteenth century, the key to farming prosperity seemed to be extensive land holdings for sheep farming. However, those creating the reserves seldom made allocations of land suitable for this purpose. The obstacle this posed to the development of Maori farming was not something that officials could have missed, but they nevertheless failed to take steps to prevent this hindrance to Maori prosperity. They could see the need, but did not meet it. They knew the reserves were small (although there were for many years no precise guidelines as to satisfactory acreage), but they did not create bigger ones. We do not accept that this failure arose from any kind of deliberate plan to reduce the Maori population to a landless labour force that would be available to settler employers. Rather it seems to demonstrate simply a failure to take into account what Maori needed for customary resource use, and a lack of foresight or careful planning for the Maori future. It reflected the priorities of this time of massive Pakeha settlement and development. Reserves that were too small and poor to support their occupants at the time were later even less able to support the descendants of the original owners. Many would have to leave or find other support. Of course this applied to many settler families too, but in the case of Maori the inadequate land base was all they had as a launching pad for entry into other sectors.

Throughout this chapter we have noted the many instances of land purchasing by Maori, in most parts of Te Tau Ihu. The total amount of land bought appears to have been between 4500 and 5000 acres. It is significant that almost of these purchases were made well before the end of the nineteenth century; that is, in the days when at least some Maori in Te Tau Ihu had enough money for such spending. Some of these transactions were probably investments by well-off chiefs, but it is likely that most of them constituted attempts to supplement the meagre reserves that had been allocated. Indeed, a Crown official, in a statement

we quoted earlier in the chapter, acknowledged at the time that the reason for purchases made in one area (the western Sounds) was the poor quality of the allocated reserves and the need for cultivation land. We have referred already to a particular situation in which it seems that certain blocks purchased by Ngati Kuia consisted of land that had been omitted from the reserves as originally created. Across the region, however, the extra land did not provide a long-term answer to landlessness. Whatever the reason for Maori purchases, the pressure to sell experienced by all Maori landowners was felt equally by purchasers of this kind too, or by their heirs, and by about 1920 most of the additional land had been lost.

Purchases of supplementary land would have been unnecessary if adequate reserves had been made in the first place and the Maori economy based on them had thereby been enabled to develop with the rest of the economy. This resultant prosperity would thus have constituted, as Lord Normanby intended, the real payment for the land. Normanby had envisaged that the rise in land values brought about by settlement and development would gradually be shared by Maori. It was pointed out nearly 20 years ago by the Tribunal in its *Report on the Orakei Claim* that this expectation was based on the assumption that Maori would 'be left in possession of sufficient land for them to benefit from the predicted increase in land values resulting from progressive colonisation. If the Maori were not to be left with an adequate endowment then the anticipated benefit occurring to them would be illusory'.<sup>430</sup> As it was, the outcome of the reserves situation was that the Maori population of the region was put under an enormous handicap if it wished to enter successfully into the new economy and society ushered in by the advent of the colony. We will explore the implications of this in more detail in chapter 10.

We do not believe that Maori were consigned to isolated coastal locations entirely against their will. Maori preferences for the siting of their reserves were taken into account, and were determined by many considerations, including traditional historical associations, current patterns of residence and cultivation, and desire for access to the resources of forest, river, and ocean. In this regard, hilly bush land, while making Pakeha-style farming difficult, might be valuable for hunting and gathering. Coastal sites, while possibly isolated and inaccessible by Pakeha land transport, would be good sources of fish and other kai moana and could continue to be accessed by waka. In many cases the limitations of the reserved land were fully evident only later. It is probable that for a while many Maori communities were not entirely dissatisfied with the reserves they had been given. This was especially so in the years immediately after the purchases, when much of the alienated land was unoccupied and undeveloped and thus still available for use by Maori in the traditional way. At the same time, it is clear that even at this time many Maori were desirous of engaging in pastoral and agricultural activities (a matter we will discuss further in chapter 10), and needed suitable

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430. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 2nd ed (Wellington: Brooker and Friend Ltd, 1991), p 201

land and easy access to Pakeha settlements to do so. This kind of land was wanted by Pakeha too, and the number of reserves that were situated on poor quality land in isolated places cannot be explained solely by a Maori preference for traditional locations. The outcome, however, was the concentration of most of the Maori population on land that was not the most desirable as far as economic potential and easy accessibility were concerned. Some of this land was held in blocks that were too small for profitable use, especially in Golden Bay, but even the larger blocks there and elsewhere were often characterised by poor agricultural quality and difficult access.

Although we will discuss population issues further in chapter 10, it is necessary to make a few points here. As part of an assessment of the adequacy of the reserves, it is useful to know how many people they were intended to support. As far as the position in the 1850s was concerned, the number of Maori residing in the region was small, as Crown counsel pointed out, although the exact size of the population was not known. Enumerations and estimates were made, and population figures were available, but, as Dr Robinson explains, to us today they seem questionable because of the poor quality of the data collection methods used and because there was considerable movement between Te Tau Ihu and the North Island.<sup>431</sup> Taking the figures at their face value, however, we note that the Nelson provincial census of 1855 enumerated only 1120 Maori in Te Tau Ihu.<sup>432</sup> Much smaller figures (fewer than 500) were recorded later in the century.

As we pointed out above, no formula for determining the quantity of land to be allocated to each person was consistently applied. It is not easy to decide how much land would have been enough in the conditions of the time, but we note Alexander Mackay's view in 1881 that even Pakeha farmers found holdings of 100 acres only marginally viable.<sup>433</sup> Clearly, the amount of land reserved for even the small mid-century Maori population of Te Tau Ihu was less than this, and, whether measured in terms of traditional requirements or the demands of the new agricultural economy, was far from sufficient.

From time to time, officials in the nineteenth century made informal comments on Maori needs in Te Tau Ihu. They also sometimes made observations and assessments of whether these needs had been met. It is clear that the figures used took no account of the quality of the land allocated. They are thus, in the words of Mr Armstrong, the historian for the Rangitane claimants, 'highly misleading'. We take as an example the statement of Charles Heaphy in 1870 that there had been a 'very ample reservation' of land in Marlborough. Mr Armstrong cites this assessment, and points out that it was based on a simple division of the number of acres reserved by the total number of people in the area, disregarding the fact

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431. Dr John Robinson, 'Demographic Analysis of Maori Population Trends in the Northern South Island/Te Tau Ihu from 1840', report commissioned by the Crown Forestry Rental Trust, 1999 (doc A58), pp 8–9

432. Dr John Robinson, 'Maori Reserves and Population in Te Tau Ihu (Northern South Island)', report commissioned by the Crown Forestry Rental Trust, 2000 (doc B10), pp 40–41

433. Alexander Mackay to under-secretary, Native Department, 6 May 1881, AJHR, 1881, G-8, p 16

that much of the land reserved was of inferior quality.<sup>434</sup> In a detailed study made for our inquiry, Dr Robinson related figures for the area of Maori-owned land to those for Maori population. Although his analysis is not directly applicable to our purpose in this chapter, since he included not only the reserves created in 1842–60 and the landless natives reserves but also the three big blocks remaining unsold in 1880, we will refer to it here. Dr Robinson finds that this Maori-owned area constituted ‘a substantial land base’, but goes on to explain that this is true only if the land was of suitable quality and was in effective Maori control and use, which was demonstrably not the case.<sup>435</sup> Using a wider definition of reserves than we do, he concludes that ‘the land available to Maori belonging to each of the northern South Island iwi after the alienation of their tribal estate and the creation of reserves was inadequate.’<sup>436</sup>

As we have said, we have seen no evidence that the Crown gave careful thought to the task of ensuring that sufficient lands were reserved for Maori in this region. It is sometimes suggested that officials did not take care to set aside an adequate tribal land base because they believed that the Maori population was dying out and would eventually need very little land, or none at all. It is true that Maori population decline, largely caused by exposure to imported infections, was occurring in New Zealand as a whole during most of the nineteenth century, and that Pakeha were widely aware of this. Many thought that Maori might eventually die out altogether. These ideas were current until after the turn of the century (in the later nineteenth century, they acquired a social Darwinist tinge that we are not concerned with here, since the lands were lost long before then). In *Te Tau Ihu*, Alexander Mackay recorded his opinion on Maori depopulation in 1874. ‘The fact cannot be disguised’, he wrote, ‘that the Natives are gradually passing away; and even if no cause should arise to accelerate their decrease, the rate at which they are now disappearing points to their extinction in an exceedingly brief period.’<sup>437</sup> During our inquiry, we asked several historians whether the Crown, in conducting massive land purchases and reserving only small areas of land, was acting on the assumption that Maori were ‘a dying race.’<sup>438</sup> We were told that Maori depopulation was indeed occurring, at least at the time of the mid-century purchases, and that this was widely known. None of the historians was prepared to state categorically, however, that Crown policy was determined or even influenced by this knowledge. In fact, it was pointed out that in the decades around 1840 the colonial authorities in Britain were greatly concerned by the negative impact of colonisation on indigenous peoples around the world and were attempting to follow policies that would prevent such an impact. Aware of

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434. Armstrong, ‘Right of Deciding’, p 133

435. Robinson, ‘Maori Reserves and Population’, p 2

436. *Ibid*, p 74

437. Alexander Mackay to under-secretary, Native Department, 24 June 1874, AJHR, 1874, G-2C, p 7

438. Evidence and cross-examination of Dr Grant Phillipson, Dr Donald Loveridge, David Armstrong, Leah Campbell, Professor Richard Boast (transcript 4.4, pp 15–16, 192–193, 227, 279, 347); June Robinson, under cross-examination, fourth hearing, 25–26 July 2002 (transcript 4.5, pp 114, 117, 127, 132, 143)

the risks posed to Maori by colonisation, the Crown and its agents in New Zealand hoped to prevent a negative outcome for Maori. Hopes were often expressed that the trend to extinction could be halted (as indeed it eventually was).

Admittedly, as we can see now when we look more critically at the assimilationist policies of the nineteenth century, Maori physical survival would be achieved at the cost of their survival as a culturally distinctive group. It was thought desirable that Maori should over time move away from their traditional communal mode of life towards a Western way of living based on individually owned property. Grey's large Wairau reserve was based on the understanding that such a time was still a long way off and that Maori would need to continue to rely upon their customary resources while they made the hoped-for transition to Europeanised lifestyles no longer centred around communal activity and ownership. But, while officials widely believed (or hoped) that the preservation of large areas of traditionally utilised land would at some point in the future no longer be necessary, this was by no means part of official thinking at the time reserves were being allocated within Te Tau Ihu. Alexander Mackay himself was prominent among officials who advised Governments that the Maori reserves were inadequate in size and quality for their nineteenth-century population. As we will see in chapter 10, he carefully described the process by which Maori were forced to continue using the lands they had alienated, until even that was denied them by the intensification of settlement. From the 1870s he reported this to the Government, not as the expected and acceptable outcome of a considered policy of making provision for the remnant of a disappearing group, but as a serious problem for a sizeable number of Maori residents of Te Tau Ihu. Yet, official actions took place within a climate of opinion in which a strongly persisting and distinctly Maori identity in the region did not figure prominently. Combined with the influence of the waste lands theory after 1847, the effect, as we saw in earlier chapters, was a discernable shift in the actual approach towards setting aside reserves following the Wairau transaction. This harder-edged approach, most fully evident during the Waipounamu negotiations, frequently saw reserves kept to an absolute minimum as much as possible, notwithstanding the clear pronouncements of Grey and other officials regarding the need for extensive reserves in order to accommodate shifting Maori agricultural practices. Policy and practice thus diverged significantly, and the Crown's Treaty obligations to Te Tau Ihu Maori were ignored in the process.

The Crown made some pertinent submissions about the quantity and location of the land reserved. For example:

- ▶ that the Maori population of the region was small;
- ▶ that, in terms of acreage alone, the amount of land reserved was not inadequate;
- ▶ that it is necessary to take into account Maori preferences for particular locations;
- ▶ that the migration of many of those interested in the reserves out of the region was not caused solely by the marginal economic viability of the reserves; and

- ▶ that not all changes in the patterns of land use and economic profitability could have been foreseen.

Our opinion is that, although these points are relevant and have been included in our discussion above, they cannot be accepted without modification as arguments for the adequacy of the reserves. It is difficult to avoid a firm conclusion that land of insufficient quantity and quality was reserved.

Furthermore, it is clear that officials were very soon aware of the inadequacy of the reserves. It would be a mistake to think of the 'landless Maori' problem as a new development of the mid-1880s, or that it came as a surprise to the Government at that time. As early as the 1860s James Mackay reported on the increasing inability of Maori farmers to run pigs, sheep, or cattle or to keep their crops safe from trespass by Pakeha-owned animals.<sup>439</sup> Not long afterwards, Alexander Mackay confirmed this analysis, and in 1872 and 1874 he wrote further reports on the difficulties of Maori farming. He expressed doubts that Maori would ever be able to engage in successful pastoral farming on their reserves.<sup>440</sup> We will review this evidence in more detail in our investigation of economic conditions (see ch 10), but here we emphasise that only a few years after the reserves were created Crown officials were pointing out their inadequacy for Maori needs. We will show later in the chapter that nothing was done about this problem until the 1890s.

Before proceeding to our findings on the issue of adequacy, we point out again that our comments apply to the effects of the Crown's actions on Te Tau Ihu Maori as a whole group. We have included the West Coast reserves in this discussion, since it is clear that they were small even when the small number of resident Maori is taken into consideration. A contentious aspect of the West Coast situation is the determination of interests in the reserves, but we do not deal with that here, except in the matter of the Young commission below. We choose to do so because this aspect is not relevant to the question of the adequacy of the reserves for the West Coast Maori population as a whole and is part of the wider issue of customary rights in the region – a matter we address elsewhere in this report. Whatever the nature of their rights on the West Coast, people living there and possessing Ngati Apa, Ngati Tama, Ngati Rarua, and Te Atiawa ancestry (and who usually also had whakapapa connections with Ngai Tahu) were included in the transaction of 1860 and allocated reserves there. Putting aside the question of iwi identity and customary rights on the West Coast, which we discussed in detail in chapter 3, the issue for us here is whether the reserves created in the northern part of that district were sufficient for the support of the people to whom they were allocated.

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439. J Mackay to Native Secretary, 3 October 1863, *Compendium*, vol 2, p 138

440. Alexander Mackay, 'Report on the Condition of the Natives in the Provinces of Nelson and Marlborough and the County of Westland', AJHR, 1872, F-3, pp 17–18

To sum up our conclusions on the adequacy of the reserves, we acknowledge the Crown's submissions on this matter, but believe the concessions made are too limited. Crown counsel stated that it would be 'reasonable to suppose' that official purchase and reserve policies had the effect of limiting the range of options opened to Maori by the Treaty. To us this proposition seems beyond doubt, not just in closing off the possibility of a continuing tribal way of life but also in making it difficult to attain economic prosperity or even viability in the new environment. In any case, the Crown did accept that its purchasing policies and practices contributed to the overall landlessness of Te Tau Ihu Maori. It also accepted that it had failed to ensure that the reserves laid off during the purchases were adequate for the present and future needs of many of the Maori resident in the region. The Crown admitted that this failure to ensure that enough land was retained was a breach of Treaty principles.

**(2) Finding**

Overall, the quantity of land reserved was inadequate to ensure that the present and future needs of the people were met. Even at the time the reserves were created, they were often not extensive enough to permit the maintenance of traditional cultivation practices or customary access to natural resources, thus denying Maori their right to follow a way of life many of them valued. More often than not, they were too small to be developed for agricultural and pastoral farming, thus denying Maori a reasonable chance of prospering in the new economy. In later years, this became abundantly evident. In some cases Maori themselves sought to remedy this situation by purchasing additional lands from the Crown, but that did not provide a long-term solution to the widespread landlessness which resulted from inadequate reserves set aside from the Crown purchases. For one thing, not all Maori were in a position to purchase lands, and those who did buy experienced precisely the same pressure to sell that all Maori landowners later felt.

Moreover, the quality of the land reserved usually left much to be desired, and this was known at the time, or very soon afterwards. The reserves were barely adequate for subsistence, and usually uneconomic for farming use. The progress of Pakeha farming development reduced access to and affected the quality and quantity of natural resources. The Crown has accepted that it failed to ensure that the reserves laid off during the purchases were adequate for the present and future needs of many of the Maori resident in the region.

The principles of active protection, good faith and partnership were breached, in that the obligation of the Crown to ensure the welfare of Maori was lost sight of. In a more specific way, the principle of active protection was breached by the Crown's disregard of its obligation to ensure that a sufficient endowment of land and other resources was retained, and that an opportunity for Maori to develop these resources and share in the benefits of colonisation was provided. This was accentuated by the Crown's enjoyment of the exclusive right to purchase Maori land. The denial of this opportunity represented a breach of the principle of options, in that Maori communities were deprived of a real choice between continuing

their traditional lifestyle, entering fully into the new society and economy, or combining elements of both ways of living. The fact that Maori interests were given a lower priority than settler interests constituted a breach of the principle of equity. As a community and as iwi groups, Maori of Te Tau Ihu suffered enormous prejudice by these breaches.

### **7.7.3 The ability of reserve owners to manage and control reserves and retain ownership**

#### **(1) Background**

In Te Tau Ihu, occupation reserves (and the three large areas of land unsold after 1860) constituted all the land left after the great bulk of iwi territory that had been held in 1840 was alienated during the next two decades. Occupation reserves were originally conceived as places where the Maori who had participated in transactions concerning this land could live and support themselves. As we have demonstrated, many of the reserves were subsequently sold, but even when ownership was retained, not all of them remained under Maori control and management. A large number were vested in the Crown under the Native Reserves Act of 1856 and its successor Acts. Very little evidence, if any, exists to show how these vestings came about – whether they sprang from the initiative of the owners, and if so what motivation was at work, or whether the owners were unable to resist the initiatives of officials. There were provisions for ascertaining the owners' assent to having their land vested in this way, but the procedures were controlled by officials and seem to have left room for them to apply pressure on the owners to agree to what was desired by the officials. Although vesting opened the way for the reserves to provide an income for the beneficiaries, it removed the land from the owners' control. The Native Reserves Acts provided no voice for the owners in the management of their land, which was put under reserves officials and (from 1882) the Public Trustee and later the Native (or Maori) Trustee. The owners were often dissatisfied with the Crown's administration and management of the reserves, especially the arrangements made for leasing the land, which was often on the basis of perpetually renewable leases after 1887, and distributing the rental income. We reserve our main discussion of these issues, including the matter of perpetually renewable leases, until we consider the tenths in chapter 9. However, we emphasise that much of what we will say on the matter there is also relevant to the many occupation reserves that came under the native reserves legislation. Also, even when some of these reserves in Golden Bay were eventually returned to Maori control (in the form of the Wakatu Incorporation), they were still under only the indirect control of the descendants of the people who originally owned them. The same may be said about the West Coast reserves (both occupation and endowment reserves) in which members of Ngati Apa and other iwi were interested. That land, too, when it was put under the native reserves legislation, was administered by the Crown and trustees in such a way that its owners did not always benefit. Also, eventually, it was vested in the Mawhera Incorporation operated by Ngai Tahu.

It is clear too that the reserves, whether they were under the native reserves legislation or still controlled by their owners, were inadequately protected against alienation. It might have been expected that the Crown would show a greater determination to ensure that the iwi retained the tiny proportion of land reserved for them after the big purchases. Guaranteed inalienability would not have been an unreasonable principle to follow in the making of laws about reserves, especially since they amounted to such a small total area. Mechanisms for preventing alienation existed, but, as we have seen, they were often weak and were made progressively weaker as governments increased their resolution to make land available for settlement. Restrictions and safeguards were never entirely abandoned, but, as J E Murray says:

the intention to preserve Maori self-sufficiency was balanced uneasily against pressure to use land productively. At the end of the period [in the 1890s], the Liberal government pressed ahead with measures to promote the development and prosperity of the wider constituency while weakening the measures restricting the alienation of Maori land.<sup>441</sup>

Of course, it could be argued that reserve owners had no less right than the owners of land that had never been alienated to sell their land if they wished, and that to stop them would have been an infringement of their Treaty rights as citizens. The many sales of blocks for which the owners had requested and obtained Crown grants illustrate that a willingness to sell did exist, although in these and other cases we rarely know exactly why the vendors wanted to sell or how willing they were. On the other hand, there is evidence that leads us to conclude that pressures on owners could lead them to sell against their better judgement, and for meagre returns. Kororia Jordan, for example, explained her mother's decision to sell interests (as late as 1972) as follows:

She was caught between a rock and a hard place, she thought about her father telling her not to sell the land. She prayed many times for guidance. She thought about the hardship her and her whanau had to endure. She threw caution to the wind. WHY!!! Because she was SICK of being destitute. The first thing she did was book airfares to visit her children, within 4 months of selling part of her inheritance she passed away.<sup>442</sup>

Active protection of Maori landholding, backed by an appropriate title system and assistance with land development, would have ensured that no alienations were brought about simply by the lack of other options.

We agree with the claimants that the provisions for inalienability were not strong. The Crown did not institute an effective or consistently implemented system for monitoring sales, or ascertaining whether enough land was being kept. Certainly, the restrictions did

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441. Murray, *Crown Policy*, p vii

442. Kororia Jordan, brief of evidence on behalf of Te Atiawa, not dated (doc G20), p 5

not amount to active protection of landownership. Furthermore, in many ways Crown policy and action contributed positively to alienation. We particularly note that the vesting of reserved land in the Crown or Public Trustee did not effectively shield it from the risk of alienation. As we have already said, it is not usually clear how and why these lands were put under the Native Reserves Act, but it is a fact that, while many blocks in this category are still Maori-owned (some by incorporations), many were sold. Our figures showed that more than half of this vested land was sold, and that this category of alienated land constituted about a quarter of the total amount of alienated reserve land. We emphasise that this land was held by the Crown in trust for its owners, which should have led to a much stronger official commitment to preserve it in Maori ownership.

We point out too that the Crown granting of certain reserves to one or a few owners was at variance with traditional ways of managing land rights. We do not deny that Maori often saw Crown grants as highly desirable, but the bypassing of customary collective decision-making processes in this situation was in conflict with the Treaty guarantee of *tino rangatiratanga*. There was no formal procedure for deciding which individual(s) would be named on the grants, and Crown grants to Maori did not state that the land was held in trust by hapu heads for members of their group. Although Crown grants conflicted with the collective basis of Maori landholding, since they could be made only to individuals (one or more), they fitted in well with the individualist ethos of the Pakeha and the common assumption that the future of Maori lay in individualised farming. As we have explained, Crown-granted reserves were usually the first to be alienated, and, as we have also demonstrated, officials were aware that this was likely. Land held under Crown grant was not necessarily subject to alienation restrictions, and most was not. It was in Golden Bay and on the Abel Tasman coast that Crown granting of reserved land was most common, and there is a clear relationship between Crown granting and land alienation in that part of the region. Alienation did not depend on Crown granting, of course, but it is clear that much of the Crown-granted land was sold in the first phase of alienations, before the 1890s. The willingness of Crown officials to facilitate the issuing of Crown grants, despite their awareness that such land could easily be sold, was surely a strand in the web of Crown responsibility for the loss of the reserves in *Te Tau Ihu*.

Furthermore, under the Maori land law developed by the Crown and imposed on Maori, interests even in the reserves that were not Crown granted were individualised and made disposable. Individualisation had not been requested or desired by (most) Maori – it was an imposition. The new system, which was set in place by the Crown, replaced the authority of chiefs and hapu over land and its use, rather than protecting such *rangatiratanga*. It took inherited property rights away from the group by bestowing it on individuals who could sell their interests without regard for traditional custom or group welfare; it encouraged competition and fomented discord, and undermined traditional order and authority. Other Tribunal reports (such as those concerning the *Turanganui a Kiwa*, *Hauraki*, and central

North Island claims) have discussed this aspect in detail, and we need not review it further here. We simply point to its now well-understood role in the decline of Maori landholding and social cohesion.

The advent of the Native Land Court system, with its individualised basis and its novel rules of succession, meant that interests in the reserves became so fragmented that sale often seemed the only viable option, especially in view of the small size and poor quality of most of the blocks. This had enormous impact on the extent of Maori landholding in Te Tau Ihu, in respect not just of the reserves but also of the lands withheld from purchase in mid-century (we return to this issue in chapter 8 when we discuss those lands). As well as making economic use of the reserves more difficult, then, the system made alienations more likely. Also, at a time when the Crown was beginning to assist Pakeha farmers to develop their land (the Government Advances to Settlers Act 1894 was a landmark), no comparable help was available to the owners of Maori land, including reserves. Not until the twentieth century did the Crown accept a role as facilitator of Maori land development, and only in one instance (the Wairau) was a development scheme instituted in Te Tau Ihu. With regard to the claim that the Crown's legislative framework hastened the sale of reserved land, it is hard to accept the Crown's contention that the system that was created in the later nineteenth century (and which we described earlier in this chapter) did not lessen the right of Maori to choose between selling and not selling. In any case, the Crown did accept the proposition that the operations of the Native Land Court contributed, over time, to the alienation of the remaining Maori land in Te Tau Ihu.

On occasions, the Crown itself was a participant in the purchasing of reserves, usually endeavouring to pay the lowest price possible. Crown purchasing was involved in the acquisition of reserve land for purposes such as roading, flood protection, and the like. This concerned more than 900 acres in Te Tau Ihu, including in Buller. It was particularly noticeable in the setting-up of more than 4300 acres of scenic reserves and so on in the Marlborough Sounds and on the Abel Tasman coast. Together these acquisitions for public purposes accounted for about 15 per cent of the total area of reserved land, and nearly 20 per cent of the reserved land that was alienated. Maori reserves affected by the Crown's acquisition policies for conservation purposes, which began in the early twentieth century, were those that had been retained in Maori ownership up to that time partly because they were not of great value for farming. The owners had little say in acquisitions under the Public Works Act. Also, because the Native Land Court determined the compensation paid, the owners had little say in the compensation level. The criterion used in valuing the land was farming potential, which meant that Maori property of this sort was assessed at that time as having low economic value. Consequently only small sums were paid as compensation.

The central North Island Tribunal has summarised a number of general principles, which have emerged from earlier inquiries concerning public works takings:

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.<sup>443</sup>

Earlier Tribunals have found that the only circumstance in which the Crown might be justified in overriding its Treaty obligations to Maori was an exceptional one. As the *Turangi Township Report 1995* stated:

if the Crown is ever 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.<sup>444</sup>

In practice, this meant that all other practicable alternatives short of compulsory Crown acquisition should first have been exhausted before a public works taking was decided upon. Moreover, it meant that Maori should have been fully consulted on the reasons why it had been deemed necessary to pursue such a course before the taking was implemented and that fair and reasonable compensation consistent with the loss endured should have been negotiated. Finally, it also meant that the land in question should be returned to the owners at the earliest opportunity and with the least inconvenience and cost once it was no longer required for the purpose for which it had originally been taken.<sup>445</sup>

The Crown has also recognised that there must be a balance between its Treaty obligations to Maori and its power to acquire land in the public interest, a recognition articulated in its 1996 policy statement on Treaty claims involving public works acquisitions.<sup>446</sup> While the negotiated or compulsory acquisition of Maori land for scenic or national park purposes had the laudable aim of promoting environmental conservation, the effect for Maori, especially in Te Tau Ihu, was a considerable diminution of their remaining reserves. It is clear that alternatives were not considered, but a greater recognition of the need to protect Maori landholding might have suggested to officials that completely removing this land from Maori ownership and control was not the only way in which preservation of the environment could be ensured.

From 1933, the possibility has existed of protecting the scenic and environmental value of tracts of land without having them removed from private ownership. In Te Tau Ihu, as

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443. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 2, p 891

444. Waitangi Tribunal, *The Turangi Township Report 1995* (Wellington: Brooker's Ltd, 1995), p 285

445. *Ibid*, pp 359–366, 373; Waitangi Tribunal, *Ngai Tahu Ancillary Claims*, pp 362–366

446. Office of Treaty Settlements, *The Crown's Policy on Treaty Claims Involving Public Works Acquisitions* (Wellington: Office of Treaty Settlements, 1996)

we have demonstrated, considerable areas of Maori reserve land were acquired for scenic purposes before this date, and the idea of protecting them in other ways does not appear to have been considered. We draw attention to the fact that after 1933, however, Crown acquisitions of this kind continued (including some in Te Tau Ihu, as we have seen), despite the existence of a legislative basis for taking a different course that would have reduced the extent of Maori land alienation. Section 6 of the Scenery Preservation Amendment Act 1933 provided for the owner of any private land to apply for this to be declared to be a private reserve, subject to the same restrictions as Crown land under the legislation (except for any exemptions negotiated between the owner and the Minister). Similar provisions were included in the Reserves and Domains Act 1953, section 58 of which enabled the owner of any private land to apply for it to be declared a private scenic reserve, and this provision was carried on into the Reserves Act 1977, which is still in force. In its current form, the Act refers to 'protected private land' and 'conservation covenants', and includes provision (section 77A, added by the Reserves Amendment Act in 1993) for the Government to 'treat and agree' with the owners of Maori land for a 'Nga Whenua Rahui kawenata'. Under this arrangement, which may be in perpetuity or for any specific term, and has some official funding, land can 'be managed so as to preserve and protect the natural environment, landscape amenity, wildlife or freshwater-life or marine-life habitat, or historical value of the land; or the spiritual and cultural values which Maori associate with the land'. The criteria and mechanisms are directed towards Maori retention of ownership and control, and are sensitive to Maori values. Continued cultural use and rangatiratanga can coexist with environmental protection and wider public access. A considerable total area has been placed under kawenata since the enactment of the legislation. The Nga Whenua Rahui fund was established in 1991 to provide a source of funds for the protection of indigenous ecosystems on Maori land. It enables the owners of lands placed under covenant to apply for funding for items such as fencing, but is not intended to provide financial compensation for those who thus effectively agree to make their lands into private reserves. However, the legislation clearly envisages that payments will be negotiated as part of the initial covenant between the owners and the Crown, since section 77A(f) provides that 'any money payable as consideration for a Nga Whenua Rahui kawenata shall be paid out of money appropriated by Parliament'. Other arrangements with respect to private land are also available, including management agreements pursuant to section 29 of the Conservation Act 1987. For smaller areas there is now also the option of formal protection as 'Maori reservations' under sections 338 and 340 of the Te Ture Whenua Maori Act 1993.

A number of quite simple ways of respecting the Crown's Treaty obligations in respect of the retention of Maori reserve land have thus been available for over seven decades. Yet, for some years after 1933, as we have pointed out, the new approach made possible by legislation was not comprehensively applied. In the 1980s, in contrast to the thinking of former years, the Director-General of Conservation was able to tell the Tribunal hearing the Ngai

Tahu claims that there was no incompatibility between his Department's responsibility to manage land and waters for conservation purposes and the retention of such areas in Maori ownership. As the Tribunal commented in its report, this 'enlightened approach' was a substantial move forward from the old viewpoint in which Crown ownership of resources was considered to be essential.<sup>447</sup> Our own view is that the Treaty principles of partnership and active protection should have led, even a hundred years ago, to a fundamentally different approach that gave consideration to alternatives such as what has emerged since 1933.

The Crown used 1890s Native Land Court and Public Works legislation to acquire a considerable area of Maori coastal land in the Marlborough Sounds as a foreshore reserve, ostensibly for roading purposes. While we were not given much evidence on this issue, and therefore cannot discuss it fully, we agree with the two submissions we received on it. We agree with the submissions of Te Atiawa and Ngati Kuia, that no opportunity was given for the owners of reserves in the Sounds to give or withhold consent to such an action. (Te Atiawa's submission referred to land reserved from the Waipounamu purchase. Ngati Kuia's submission referred to a particular strip of landless natives reserve land: that is, to a coastal strip taken from Crown land surveyed in 1894 for allocation to members of that iwi, rather than from Maori reserve land set aside in the 1850s.) Evidence given to us by Tom Wilson of Ngati Kuia told of his shocked discovery in 2002 that the foreshore reserve existed adjacent to his land at Kenepuru.<sup>448</sup> We also received evidence about the impact of the foreshore reserve on the Tahuaroa whanau, whose interests on Arapawa Island were affected by the taking. We consider this evidence in chapter 12, where we discuss the specific claim submitted by Neville Tahuaroa (Wai 124).

It is not clear how the decision to use the available legislation for this purpose was made, or whether there was any justification for making it, but relevant laws did exist, and made the taking possible. It is clear that in most cases there was no need for a road, or any intention to build one, and the resultant foreshore reserve is still in the ownership and under the control of the Crown. Although the coastal strip was only a chain (about 20 metres) wide, it amounted overall to a considerable area. Moreover, it interfered with the direct access of its former owners to the sea, took away many of the scarce flat areas on which they could live and cultivate, and decreased the monetary value of their adjoining land. The creation of the coastal strip occurred when the Maori reserves went through the Native Land Court in the 1890s, after many of the Pakeha landowners in the area had taken up their holdings. It was based on legislation that applied only to Crown land, and to Maori land under titles determined by the land court. This appeared to be discriminatory against Maori. Section 93 of the Native Land Court Act 1886 allowed the Crown to take Maori land for roads without compensation. The Tribunal made a finding some years ago in its *Ngati Rangiteaorere Claim*

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447. Waitangi Tribunal, *Ngai Tahu Ancillary Claims*, p 366

448. Tom Wilson, brief of evidence on behalf of Ngati Kuia, 21 March 2003 (doc L11), pp 2-4

## 7.7.3(2)

*Report* that that section and the use of it by the Crown was ‘discriminatory and in breach of article 3 of the Treaty which allowed Maori the rights and privileges of British subjects’.<sup>449</sup> We can agree that in this sense it did discriminate, as well as violating the property rights of the reserve owners, and was thus a breach of Treaty principles.

Returning to the overall situation in which the owners of reserves in Te Tau Ihu found themselves in the period after the Crown purchases, we draw attention to legislation of a comparatively recent period. The Maori Reserved Land Act 1955 empowered the Maori Trustee to compulsorily acquire interests deemed to be uneconomic, and the Maori Affairs Amendment Act 1967 authorised the Maori Trustee to sell reserves to lessees. These further threats to the already much diminished Maori reserve estate resulted in yet more loss, although the cessation of these sales followed not long afterwards (with the Maori Purposes Act of 1975).

Overall, we emphasise that over the long period up to the 1970s it was the Crown that was responsible for creating the conditions that made alienation of the reserved land likely and its retention near-impossible.

**(2) Finding**

Our findings are as follows:

- ▶ Much, but by no means all, of the land reserved was soon removed from the control of its owners, by means of its vesting in the Crown under the native reserves legislation of 1856 and later years. The circumstances surrounding these transfers to Crown control are little known, but the procedures for vesting were directed by officials and did not give much opportunity for the owners’ viewpoint to be heard. Once vested, the lands produced an income for those with beneficial interests in them, but the ‘owners’ had no control over how this income was obtained or expended. This impacted on their mana, cultural identity and community stability. They were no longer able to exercise rangatiratanga over the resources they owned. Again, the rights of Maori under the reciprocal principles of the Treaty were being disregarded. We will be making more detailed findings on these matters when we discuss the tenths in chapter 9.
- ▶ Inadequate means were devised by the Crown to ensure that the reserves were not alienated against the wishes of their owners or contrary to their long term interests. Restrictions and safeguards did exist, and were never entirely abandoned, but pressure to increase the productivity of the land by transferring it to Pakeha control led to a progressive weakening of the protective mechanisms. We particularly note that the vesting of reserved land in the Crown or Public Trustee did not shield it completely from the risk of alienation. We reiterate that this land was held by the Crown in trust for its

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449. Waitangi Tribunal, *The Ngati Rangiteaorere Claim Report* (Wellington: Brooker and Friend Ltd, 1990), p48

owners, which should have led to a much stronger official commitment to preserve it in Maori ownership. We point also to the practice of issuing Crown grants to one or a few owners of reserves – a procedure that conflicted with traditional ways of managing land rights and often resulted in early alienation. The bypassing of customary collective decision-making processes in this situation not only was in conflict with the Treaty guarantee of *tino rangatiratanga* but also contributed to the loss of the land.

- ▶ The procedures of the Native Land Court by which individual titles were awarded both diminished the authority of chiefs and hapu over the land and promoted fragmentation (and eventually alienation). Fragmentation of interests in the reserves became so extreme that it often seemed that sale was the only viable option. In *Te Tau Ihu* fragmentation thus not only made economic use of the reserves more difficult (at a time when development assistance was available to Pakeha landowners but not to Maori) but also reduced the extent of Maori landholding. Later, as recently as the 1950s and 1960s, legislation (the Maori Reserved Land Act of 1955 and the Maori Affairs Act of 1967) made it possible, for a few years in which considerable damage was done, for the Crown to take action that further reduced the Maori land base.
- ▶ Public works takings or Crown purchases for conservation purposes, and the creation of the foreshore reserve in the Marlborough Sounds, overrode the property rights of Maori in circumstances that were not sufficiently exceptional to justify these procedures. Land in these categories was acquired by the Crown with inadequate owner participation, without compensation (or sufficient compensation), and without consideration of alternatives that would have made Maori retention of ownership and control possible while still ensuring environmental protection and wider public access. In respect of the foreshore reserve, we find that its creation by the Crown was discriminatory and in breach of article 3 of the Treaty which allowed Maori the rights and privileges of British subjects.

Our overall conclusion was that the mechanisms devised by the Crown for restricting alienation of the reserved land in *Te Tau Ihu* did not amount to active protection of Maori landownership. Moreover, we concluded that the policies and actions of the Crown in many ways contributed positively to alienation of the land. The failure to protect *rangatiratanga* over land was in breach of the principle of active protection of Maori resources, and great prejudice was suffered thereby. Our finding is that over the long period up to the 1970s it was the Crown that was responsible for creating the conditions that made alienation of the reserved land likely and its retention near-impossible, and that the Crown had an active role itself in the alienation process. These acts and omissions of the Crown were a breach of the Treaty principle of active protection.

**7.7.4 West Coast issues****(1) Background**

We have included the West Coast in our discussion of the various generic reserve issues covered in sections 7.7.1, 7.7.2, and 7.7.3, but it is also necessary for us to address the additional matter of iwi rights in the reserves, since this featured very prominently in the claims presented to us. We have already discussed some aspects of this in our consideration of the Arahura purchase (in chapter 6), but here we give consideration to the Young commission.

We are concerned here with the extent to which the Crown-appointed Young commission carried out a fair and proper inquiry into reserve titles on the West Coast. It appears to us that the way in which the commission hearings were conducted was somewhat defective. In particular, it seems that not all those with interests in the reserves had representatives present. Many people did attend and made submissions, but nothing was heard from the Te Piki or Mahuika families. Great reliance was placed on the representations of Ihaia Tainui, which were often accepted without question. Commissioner Young did not inquire into Tainui's authority to speak for the Te Piki whanau, and put confidence in Mackay's assertion that such authority existed. The relationships hinted at were not explored, or at least were not recorded as publicly presented evidence. Later, the Crown declined to revisit the commission's decisions, or to make a proper investigation of claims that they were unfair.

Te Atiawa allege that the heirs of Poharama Hotu were disadvantaged by his exclusion from the two reserves he had been allocated in the 1860s. It might well be, however, that he had indeed been allowed them originally as a tuku from Ngai Tahu, as the commission was told. We do not have enough evidence about this to come to a firm conclusion.

In the case of the Ngati Rarua and Ngati Apa whanau whose interests were diluted or terminated by the commission, it appears on the face of it that they did indeed lose their rights in some of the reserves as a result of the Crown's actions. This looks like a failure to protect their rights. The whakapapa of the Te Piki whanau is still somewhat obscure, however. Clearly, they were Ngati Rarua on their mother Riria's side, but the tribal identity and family history of Riria's husband Koka have not been clearly explained to us. He has been variously described as Ngati Apa, Ngati Tumatakokiri, and Ngai Tahu. We have not been given enough information to be sure about the complex whakapapa relationships that appear to have underlain the commission's decisions about the rights of this whanau. The identity of Puaha Te Rangi, his wife Ramari, and the Mahuika brothers is more clearly Ngati Apa, as they themselves asserted. We have already discussed the way in which a distinct Ngati Apa community was accepted in the Arahura negotiations of 1860 as having rights at Kawatiri, and we believe these rights were customary ones based on traditional use of the area along with Ngai Tahu. We accept, however, that there were whakapapa relationships between Ngai Tahu and the Ngati Apa people we are concerned with here, and again we do not have enough information to be able to say confidently that the decisions of the Young commission distorted these relationships.

**(2) Finding**

Our finding, therefore, is that the Crown breached the Treaty principles of partnership and active protection by carrying out an inquiry that purported to be an investigation of ownership rights in the West Coast occupation reserves but was not conducted in an appropriately transparent manner. Not everyone with interests in the reserves was represented, and it was not publicly demonstrated why so much reliance was placed on the evidence of prominent Ngai Tahu witnesses. This failure was compounded later when the Crown declined to entertain complaints that the commission's decisions were unfair.

Whether the rights of certain people of Ngati Rarua and Ngati Apa were wrongly removed from them as a result of the commission's activities depends on fuller information than we have been given, and we do not make a finding on that particular issue.

**7.7.5 The socio-economic situation of Maori in Te Tau Ihu after the reserves were created, and whether the negative aspects were due to the inadequacy of the reserves**

It perhaps hardly needs saying that it was not impossible to prosper in nineteenth- and twentieth-century New Zealand without owning rural land – even in the farm-dominated economy that prevailed during much of this country's history. From an early date there were many Pakeha New Zealanders who made a satisfactory living without owning land. Nevertheless, we agree with the many submissions stating that the insufficiency of the reserves has had a deleterious impact on the socio-economic situation of Maori in this region in the period since the middle of the nineteenth century. Their inadequate land base made entry into the modern economy difficult, and the opportunities offered by profitable land utilisation were cut off. This was a major factor in the economic and social marginalisation that will be discussed in chapter 10.

**7.8 RESERVES CREATED FOR 'LANDLESS NATIVES'**

**7.8.1 Introduction**

After the creation of reserves for Maori in Te Tau Ihu in the period up to 1860, not many years passed before the inadequacy of the area of land allocated for this purpose became a matter of public Maori concern and Crown action. In the words of Dr Phillipson, the situation facing the occupants of reserves across the region in the 1880s 'was an indictment on the reserve making of the 1840s and 1850s.'<sup>450</sup>

In the 1880s, it was acknowledged by the Crown that some Maori in particular, mainly Ngati Kuia and Rangitane living in Marlborough (Pelorus and the Wairau) were suffering

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450. Phillipson, *Northern South Island: Part 2*, p 30

from a shortage of land on which to support themselves. The remedy adopted was the landless natives scheme that eventually created additional reserves for the people affected (who were mostly from the Kurahaupo tribes). Another smaller project was an attempt to meet the needs of landless natives on the West Coast. In this section, we will explain how these schemes originated and were administered, before examining the nature of the reserves created as a remedy for the problem that had been perceived, and what happened to the blocks concerned.

### 7.8.2 The landless natives scheme

The events that resulted in a Government scheme to alleviate landlessness in Marlborough were set in motion by a petition sent to Parliament by Teone Hiporaiti of Ngati Kuia in 1884. ‘This is a petition from us suffering people’, wrote Hiporaiti and his 20 co-petitioners, ‘regarding the very small portion of land reserved to us . . . We pray for an extra portion of land to be given us, that we and our descendants might be enabled to live . . . We are the poorest tribe under the Heavens.’<sup>451</sup> Kim Hippolite told the Tribunal how his great-great grandfather had written this petition, how the latter had described Ngati Kuia as the ‘The Poorest People Under the Heavens’, and explained the sense of grievance felt by his people because not all the promised lands were actually provided.<sup>452</sup>

Alexander Mackay (by now a judge of the Native Land Court) was asked to comment on the petition. He confirmed that the grievance expressed was a real one. Indeed, as we will demonstrate in more detail in chapter 10, since 1865 he had been telling the Government that the reserves were insufficient for their owners to support themselves by pastoral farming. Even earlier (in 1863), as we will show, James Mackay had given the Government the same advice. In 1884, Alexander Mackay’s comment on the petition was that the amount of land reserved in the Pelorus area, ‘considering the number of people to be provided for, was very inadequate, and had they not supplemented it by purchasing Crown land, they would have been very badly off’. He estimated that in 1856 the quantity of land allocated would have been between six and eight acres per person. Mackay pointed out that ‘their requirements are much greater than in former days, and the possibility of gaining a livelihood being much less, owing to their food supplies being cut off, or considerably interfered with by the occupation of the surrounding lands by the Europeans’. He concluded that ‘it would be a considerate act towards these people if an additional area could be allotted them’. It seems that he had in mind at this time land that was quite close to the Pelorus Valley.<sup>453</sup> Ngati Kuia’s

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451. ‘Petition of Teone Hiporaiti and 20 Others’, 7 July 1884 (David Alexander, ‘Landless Natives Reserves in Nelson and Marlborough’, report commissioned by the Crown Forestry Rental Trust, 1999 (doc A54), p14)

452. Kim Hippolite, brief of evidence on behalf of Ngati Kuia, 2 March 2003 (doc L12), p9

453. Mackay to under-secretary, Native Department, 20 September 1884 (Alexander, ‘Landless Natives Reserves’, pp14–15)

petition and Mackay's comments were received favourably by Parliament's Native Affairs Committee, which recommended that 'a moderate provision for them should be made.'<sup>454</sup> Delays ensued, but eventually the matter was brought together with similar grievances from other parts of the South Island and a commission was set up by the Government to investigate the claims and suggest remedies.<sup>455</sup>

The report of the commissioner (Mackay himself) was completed in 1887 and was included in the published parliamentary papers of 1888. The inadequacy of the original reserves was clearly recognised. Mackay had worked out that the amount of land allotted to the 219 Maori resident in the Wairau and Pelorus areas in 1856 was about seven acres per person (although it should be noted that he was using old figures that underestimated the size of the Wairau reserves). He reported that there were 245 people requiring additional land, and appended a list of their names and iwi affiliations: 74 Ngati Kuia, 57 Rangitane, 48 Ngati Rarua, 22 'Ngatitooa and Ngatikoata belonging to the Pelorus and Wairau', 33 'half-castes belonging to the Rangitane, Ngatikua, and other tribes [including Ngati Rarua, Ngati Toa, Ngati Koata, Ngati Tama, 'Ngatiawa' and 'Ngatihinetu']', and 11 'Ngaitahu natives living in the Pelorus and elsewhere [ie, 2 on Rangitoto]'. If these people were given 20 acres each, 5000 acres would be required. Even at this early stage, Mackay warned that it might be difficult to find enough suitable land, though he listed a number of places suggested to him by the Maori for whom he was advocating. Among the unoccupied areas nominated by the Pelorus people were localities within the Wakamarina Goldfields, which he gathered were 'unavailable', and nearby lands around the confluence of the Rai and Ronga Rivers, which he found had been 'proclaimed under the State Forests Act.'<sup>456</sup>

On the basis of Mackay's report, the Crown accepted the obligation to provide further land for the people described as landless. Making a start on remedying the problem, however, was a slow process. The search for suitable land took a long time and was subject to a number of constraints. The under-secretary of the Native Department supposed that the State Forest reserve land in the Rai Valley area was 'not so absolutely locked up that the purpose cannot be changed if it is found desirable to do so', but this proved not to be true. There was also some land in that area earmarked for settlement, but while it was being considered for Maori occupation in the 1890s, it was released to the general public and quickly taken up by Pakeha. The forestry reserve was unavailable, and farming land in this area was keenly sought after. In the end no land in the Rai or Ronga areas was obtained. The Lands Department in Blenheim had reported in 1887 that in Marlborough, north of the Wairau River, there were only a few other areas of land that had not already been taken up and were 'fairly level and suitable for occupation by Natives for purposes of cultivation'; all of it was in bush and most of it was inaccessible by road. All land suitable for farming in the unforested

454. 'Report on Petition 32/1884', AJHR, 1884, 1-2, pp 11-12

455. Alexander, 'Landless Natives Reserves', pp 15-17

456. Alexander Mackay, 'Native Land Claims in Marlborough', 2 December 1887, AJHR, 1888, G-1A, pp 1-7

area south of the Wairau River was already 'freehold, leasehold or reserved'. One of the few suitable areas identified in Marlborough was leasehold land at the head of Kenepuru Sound, but the Government was unwilling to compensate the runholders for the early surrender of their leases, or remove them after the leases expired, so only a portion of this land became available.<sup>457</sup>

In Mr Alexander's view, as he expressed it in the summary of his evidence, many opportunities for providing land close to the existing settlements of the landless natives were lost, but could have been taken if Crown officials had been determined to meet the need.<sup>458</sup> The priority of the Lands Department seemed to be the provision of land for settlement of Pakeha, not Maori. The possibilities were confined to Crown land not yet taken up by settlers or being used for other purposes, and there seems to have been no consideration given to buying private land for the landless natives. In striking contrast, as the Ngai Tahu Tribunal pointed out, the Crown did follow this course for Pakeha settlers when at this very time and at considerable expense it broke up many large estates in the South Island under the Land for Settlements Act of 1894 and made large blocks of good land available to settlers.<sup>459</sup> Indeed, the member for Southern Maori, Tame Parata, made this contrast in the House of Representatives when the Landless Natives Bill was being debated in 1906.<sup>460</sup> It might be noted that 22 of the large estates broken up by the Government at this time were in southern Marlborough; they comprised 224,090 acres and were acquired at a cost of £735,482.<sup>461</sup>

Eventually, however, a certain amount of land that was acceptable both to the intended Maori recipients (often with misgivings) and to the Crown was identified and, after further delays, surveyed.<sup>462</sup> The blocks made available were in Marlborough, though they were in the Sounds and far from where most of the people were living, and were recognised even at the time as not being of the highest quality. Many claimant witnesses referred to both of these problems in their evidence. Sharyn Smith, for Ngati Kuia, explained how her family received lands at Okaha:

We should have had lands around the Te Hora area because this is where our main pa was but there were not enough lands set aside for our family [at Te Hora]. This has meant that Te Hora has not been a second home to me as it should have been and I have had to re-establish those links. When I first came to Te Hora pa the people here asked me, 'who are you?' because of the forced isolation and Ngati Kuia having been placed all over the sounds

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457. Alexander, 'Landless Natives Reserves', pp 21–22, 26–31, 65

458. David Alexander, under cross-examination, tenth hearing, 6–11 April 2003 (transcript 4.10, pp 247–248)

459. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, pp 665–666; vol 3, p 999

460. T Parata, 4 September 1906, NZPD, 1906, vol 137, p 323

461. A D McIntosh, ed, *Marlborough: A Provincial History* (Blenheim: Marlborough Provincial Historical Committee, 1940), p 292

462. Alexander, 'Landless Natives Reserves', pp 21–45, 52–57

in Whangarae as a result of the landless natives policies. We as an iwi are displaced and have been estranged from each other.<sup>463</sup>

Further, she described her whanau's new land at Okoha as uneconomic, landlocked, and on steep hillsides prone to slips.<sup>464</sup> We will consider other claimant evidence about the quality of their whanau lands below.

In identifying the people who would take up the land, considerable reliance was placed on Mackay's list of 1887, although other names were added until 1896, which became the cut-off date (anyone born after that date would not be eligible). By that time there were 681 people to accommodate.<sup>465</sup>

Allocating people to the new reserves began in 1894, when 198 cases were taken care of. It was decided quite early that the basis for allocation would be 40 acres for each adult and 20 acres for each child under 14, less any land that they held elsewhere. This is more than Mackay had originally suggested, but it contrasted with the figure thought sufficient in the Native Land Act of 1873, which was 50 acres per head for every man, woman, and child. Another figure had recently been used in the Native Land Purchase and Acquisition Act 1893, where 'sufficient land' was defined as at least 25 acres of first class land per head, 50 acres of second class land per head, or 100 acres of third class land per head. As we have seen, this formula was later repeated in the Maori Land Settlement Act 1905. With regard to the landless natives scheme in Te Tau Ihu, we point out that the amount of land allocated was much less than any of these figures. It might be noted too that the amount was less than the 50-acre individual sections being allocated at the same time to Ngai Tahu adults, or at least those living south of the Marlborough–Canterbury boundary. Mackay's explanation for the differentiation between northern (ie, Kaikoura) and southern Ngai Tahu was that those in the south 'had a special claim to consideration in fulfilment of promises made at the cession of their territory, whereas those to the north had no such rights, and are indebted solely to the generosity of the Crown for the increased area.'<sup>466</sup> He did not explain why the non-Ngai Tahu landless natives of Marlborough received only 40 acres per adult. Probably the figure was arrived at quite arbitrarily.

In most cases in Marlborough, each person was allotted an individual three-acre home-  
stead section, clustered together in family groups, with the rest of his or her allocation  
included in a larger communal section. This system was devised by the Surveyor General,  
and there is no evidence of prior consultation about it with the intended owners. We  
observe, however, that the provision of communal land was a noteworthy innovation, as it

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463. Sharyn Smith, brief of evidence on behalf of Ngati Kuia, 21 March 2003 (doc L9), p 6

464. *Ibid*, pp 9–10, 12

465. Alexander, 'Landless Natives Reserves', pp 5, 62–63

466. Stephenson Percy Smith and Alexander Mackay, 'Landless Natives in the Middle Island', 28 September 1905, AJHR, 1905, G-2, p 2

ran against the individualising trend that had been so prominent in Maori land legislation. Occupation of the new reserves began in 1894.<sup>467</sup>

About 1896, the Marlborough landlessness issue, along with another landless natives scheme that in 1895 had been initiated in the Buller area (where the 50-acre allocation was also operative), was (informally) included in the work of the Landless Natives Commission set up in 1893 for Ngai Tahu.<sup>468</sup> In Marlborough, allocations to a reserve that had been identified at Tennyson Inlet accommodated another 175 names in 1897, but as we will explain shortly, this project did not go ahead. There were still 308 people to place. In 1899, the allocation of lands at Port Adventure on the East Coast of distant Stewart Island (Rakiura) was approved in principle. Allocations were made in 1905, and although this did not ever result in a reserve either, it seemed in 1905 that the task of alleviating landlessness was nearing completion.<sup>469</sup>

Debate on the South Island Landless Natives Bill of 1906 included admissions by the Government that the Crown had been slow to settle the legitimate grievances of landless Maori. The Native Minister, Carroll, stated that 'it has been a blot on our colonial reputation to have allowed these claims to remain unsettled and undetermined for so many years'. He conceded that what was being done fell short of the ideal, but argued that it was the best that could be achieved in the circumstances. Tame Parata (the member for Southern Maori), however, declared that 'of the lands which are referred to in this bill, fifty acres will not comfortably support any family, because the lands are mainly composed of bush, hills, and poor and broken country, and are situated long distances from townships'. The view of the Premier (Joseph Ward) was that 'we are now doing what ought to have been done thirty years ago'.<sup>470</sup>

The South Island Landless Natives Act of 1906 provided for the formal reserving of the new blocks and the granting of individual titles. The lack of titles and the accompanying uncertainty of ownership obviously complicated any dealings engaged in by the owners. Nevertheless, even after 1906 no action was taken in this regard until agitation by the proposed owners resulted in the issuing of titles in 1910–11. (However, it was not until 1968 that they were issued for the Croisilles blocks.<sup>471</sup>) Efforts were made to devise leasing systems for owners, but none of them were entirely successful.<sup>472</sup> There were dissatisfactions about eligibility for being allocated land, and a judicial inquiry in 1917 recommended that another 135 names be added, and that if these persons could not be given land they should be compensated with cash. The idea of monetary compensation appealed also at this time

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467. Stephenson Percy Smith and Alexander Mackay, 'Landless Natives in the Middle Island', 28 September 1905, AJHR, 1905, G-2, pp 6, 10, 43–44

468. *Ibid.*, p 52

469. *Ibid.*, pp 6–7

470. 4 September 1906, NZPD, 1906, vol 137, pp 318, 323–325

471. Alexander, 'Landless Natives Reserves', pp 7–10

472. *Ibid.*, pp 10–11, 120–122

as an answer to the unresolved question of the people who had been allocated land at Tennyson Inlet.<sup>473</sup>

The land identified for a reserve at Tennyson Inlet was on the southern and eastern shores of this large bay in the Sounds. As early as 1890, Mackay had commented that apart from a small area of flat land the rest of the large reserve suggested for this area 'would be useless for the purpose the land is needed for, viz to increase the available area now held by the Pelorus Natives so as to augment their means of obtaining a livelihood.'<sup>474</sup> Planning went ahead in the late 1890s, however, with a revised list of 179 names made in 1899, and the proposed reserve was surveyed. Officials expressed doubts that the land was suitable for settlement, and pointed to its potential as a scenic reserve. Although the obligation to provide land for landless Maori was continually mentioned, a strongly worded protest by Marlborough's commissioner of Crown lands in 1908 eventually put a stop to the proposals. In the words of this official, 'it would be stupendous folly to allot this land to Landless Natives.'<sup>475</sup> By 1914, the intended owners, recognising that the land would be useless to them, were asking for an area of equivalent value in the Wairau area, 'where a small piece of arable land would be of some benefit to them.'<sup>476</sup> Several alternative areas were considered, but in the end no land was provided for this group of intended owners. Instead, and without consultation with those who had been promised allocations, compensation at 13 shillings threepence an acre was paid in 1921. This gave them a few pounds each but left them in their landless state. In 1923, the Tennyson Inlet land was made a scenic reserve.<sup>477</sup>

Officials were unwilling to give priority to the task of finding land for all the landless natives identified in various parts of the South Island (including Te Tau Ihu), or to consider taking bold action such as acquiring privately owned land for them. Instead, they very seriously looked at very remote and unsuitable locations for the proposed reserves. Tennyson Inlet was an example. Rakiura, where an area of nearly 10,000 acres at Port Adventure was designated for about 300 Maori of Marlborough in 1905, was an even more striking instance. The land there was reserved for these people in 1908, but the scheme went no further than that. Much later, consideration was given to compensating those who had been promised land on Rakiura but had never received it, but this came to nothing. The 308 people concerned were neither given land nor compensated.<sup>478</sup>

This was a matter of particular grievance to the claimant witnesses in our inquiry. Richard Bradley, in his evidence for Rangitane, described it as 'perhaps one of the greatest con trick

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473. Ibid, pp 11, 99–120

474. Alexander Mackay to under-secretary, Native Department, 8 November 1890 (Alexander, 'Landless Natives Reserves', p 376)

475. Commissioner of Crown lands, Blenheim, to Under-Secretary for Lands, 21 July 1908 (Alexander, 'Landless Natives Reserves', p 386)

476. Michael Gilfedder and HD Morpeth Haszard, 'Reserves for Landless Natives', AJHR, 1914, G-2, p 6

477. Alexander, 'Landless Natives Reserves', pp 64–67, 376–396

478. Ibid, pp 397–413

[sic] that the Crown has ever pulled on any Maori in the country.<sup>479</sup> Kahurangi Hippolite submitted on behalf of Ngati Kuia and her hapu, Ngati Tutepourangi:

Allocation of land on Stewart Island was of no assistance to my tupuna. Not only had they never been there, but it was land that belonged, from their point of view, to another iwi (even though we whakapapa to Ngati Mamoe). Any attempts to live at Stewart Island would have taken them away from their traditional home and isolated them from the rest of their iwi, their wahi tapu and their mahinga kai. The reserves which were allocated on paper to those on the list, however, were never surveyed. Our grievance is twofold: not only was the land that we were promised in an area that was alien to us and outside our customary area, but also transfer of the land to us never actually eventuated. Ngati Tutepourangi have been left without land in their customary territory and the Crown has never compensated our people for that original loss or for the subsequent inadequate SILNA lands at Stewart Island.<sup>480</sup>

Enoka Macdonald described the unsuccessful efforts of his uncle, Peter Macdonald, to either obtain an equivalence of land in Marlborough or monetary compensation for Rangitane.<sup>481</sup> He concluded:

From my hearing our family stories of the SILNA land it is difficult for me to understand why our people were allocated land at Stewart Island so far from their ancestral [sic] homes. Those who received the land regarded it as completely useless. It was mountainous and remote. It was inaccessible to them. In contrast our whanau could see that pakeha farmers were receiving fertile and often flat land. I have seen the description of the SILNA lands as a 'cruel hoax'. I think that is an accurate description. Despite my Uncle Peters efforts to try and have the land allocated on Stewart Island exchanged for an equivalent area closer to Marlborough his efforts failed. There appeared to be no willingness by Government agencies to address the issue. Similarly he proposed that Government pay monetary compensation for the land in accordance with the Native Land Claims Adjustment Act 1923. Again my Uncle failed.<sup>482</sup>

In addition to land never actually allocated at Stewart Island, some land (1671 acres in all) in the various Sounds blocks had not been allocated when the reserves were set up. Some of this was leased by the Crown to settlers or made into scenic or other reserves, but only in a few cases was it made available to the Maori for whom it was originally reserved.<sup>483</sup> As

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479. Richard Bradley, brief of evidence on behalf of Rangitane, 22 April 2003 (doc M2), p 6

480. Kahurangi Hippolite, amended brief of evidence on behalf of Ngati Kuia, 28 March 2003 (doc L18), p 8

481. Enoka Macdonald, brief of evidence on behalf of Rangitane, 10 March 2003 (doc M11), pp 8–10

482. Ibid, p 12

483. Alexander, 'Landless Natives Reserves', pp 414–432

Kim Hippolite noted, this has left Te One Hiporaiti's descendants with a lasting sense of grievance.<sup>484</sup>

### 7.8.3 The landless natives reserves

Reserves were created for landless natives in eight Marlborough locations (as well as the West Coast reserve created in a separate initiative that we outline below). It should be noted that very little of this land was subsequently alienated. We will point out the few instances in which alienation occurred. The reserves were as follows:

#### (1) *Te Mapou and Te Raetihi*

The Te Mapou and Te Raetihi reserves were laid out on the shores of the Croisilles Harbour, on land suggested by Ngati Kuia and close to the reserves created in the 1850s. With the allotted portions covering an area of nearly 1000 acres, the land was in two separate blocks on opposite sides of the harbour. There were three-acre homestead sections for 23 named individuals (almost all identified as Ngati Kuia), as well as communal land, as in most of the Sounds reserves. The Croisilles blocks were taken up and farmed, but not formally reserved until 1911. Only in 1968 were titles issued.<sup>485</sup>

Three parcels of land in this area are the subject of a claim (Wai 220) made by Robert Hippolite, a descendant of the original grantees, who asked for the return of the three sections by the Crown to his family.<sup>486</sup> His claim was made in 1987 after his application to lease the land for grazing was declined on the grounds of its demonstrated unsuitability for farming and the probable adverse environmental impact if grazing was allowed. One of the blocks in question was Crown land at Cape Soucis, which was adjacent to the Raetihi reserve but had never been part of it, having been retained as a lighthouse reserve. The other two blocks (121 acres at Raetihi and 572 acres at Te Mapou) originated as land set aside in the setting up of the landless natives reserves but not required when the allocations were made. In the 1960s, a neighbouring Pakeha farmer had wanted to lease or buy the lighthouse reserve and the unallocated Raetihi land, which led the Lands and Survey Department to address the fact that the granting of the reserves had never been completed. Steps were taken to have the original reservation of both the Croisilles blocks for landless natives reserves revoked and the entire area made Crown land again, so that the land held by the descendants of the grantees could be vested in them and the unallocated land considered for disposal. It seems that no consideration was given at this time to reallocating the

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484. Kim Hippolite, brief of evidence, p 9

485. Alexander, 'Landless Natives Reserves', pp 168–195

486. The historical background is covered in Joy Hippolite, 'Croisilles Harbour', report commissioned by the Waitangi Tribunal, 1998 (doc A36). See also Alexander, 'Landless Natives Reserves', pp 186–195.

**7.8.3(2)**

surplus land to the holders of the original reserve blocks. In 1968, the Maori Land Court awarded titles to 11 owners at Raetihi and 48 owners at Te Mapou. The lighthouse reserve and unallocated land at Raetihi was leased for a time to the farmer who had asked for it, but it was recognised that both this land and the unallocated Te Mapou land was marginal for farming. The Crown's action in declining Mr Hippolite's application in 1985 to lease the land was based mainly on environmental considerations. It also reflected the fact that, although a certain area had been set aside in the 1890s for landless natives reserves, the amount of land actually required (under the regulations applying at the time) for the people identified as entitled to grants was less than what was reserved for the purpose. In our view the award of 40 acres per adult and 20 per child was far from generous, but that was the figure employed in the making of all the landless natives reserves in Marlborough. There was no thought of varying it in particular cases, either in the 1890s or in the 1960s.

**(2) Port Gore**

Two blocks were established at Port Gore, on either side of the existing Otaki reserve. There was a little flat land on the shores of the bay, but the reserves then ran steeply up into the hills. The 18 named owners, members of Rangitane, were allocated 518 acres, and, as with the other reserves in the eastern Marlborough Sounds, the names were duly gazetted and titles issued.<sup>487</sup>

**(3) Okoha**

Okoha was the name given to a reserve located in a steep-sided valley at the head of Anakoha Bay, an inlet in the outer Sounds some distance west of Port Gore. This land, consisting of nearly 2000 acres, was allocated to named individuals who were mainly of Ngati Kuia, although some were Rangitane. The reserve was partly cleared and put to use as a sheep farm, and also produced an income from timber milling.<sup>488</sup> As noted above, Sharyn Smith's evidence for Ngati Kuia was that her whanau found the land to be inaccessible and of a very poor quality, and therefore uneconomic for farming.<sup>489</sup>

**(4) Kenepuru**

Another reserve, 1138 acres in area, was located on hilly land on the southern shore of Kenepuru Sound. The people to whom it was allocated were mainly of Ngati Kuia.<sup>490</sup>

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487. Alexander, 'Landless Natives Reserves', pp 243–260

488. Ibid, pp 196–242

489. Sharyn Smith, brief of evidence, pp 9–10, 12

490. Alexander, 'Landless Natives Reserves', pp 261–288

**(5) Endeavour Inlet**

The reserve at Endeavour Inlet, consisting of 843 acres, was located on hilly land on the western side of the innermost part of the inlet. Most of the named owners were Rangitane.<sup>491</sup> The commissioners who visited them in 1914 found that they were ‘improving their holdings and seem to be satisfied with their prospects of success.’<sup>492</sup> James Macdonald, however, in his evidence for Rangitane, shared his whanau’s history of trying to farm this land:

When my Grandad Hohua and his whanau first arrived in Endeavour Inlet they cleared the land by bush felling and then started milking cows. We only started with a minimal number of cows, I think from memory about ten because the area was inferior farming land and it was mostly hills covered in bush and prone to slips. A lot of bush plant called ‘toot’ (tutu) also grew in abundance. The cows were prone to eating this and some became very sick and died. It was very hard to be a successful farmer on this land. Because of the terrain and weather an enormous land slip wiped 50% of the farming area out twice during their lifetime. The last slip went right through the house. All that is left today is a concrete chimney and a landslip area that is not suitable for cultivation or farming. After this major landslip they decided they could not cope anymore with the lack of resources and building materials as well as the transport difficulties . . . It was just too much for them to cope with so they moved to Picton.<sup>493</sup>

**(6) Big Bay**

The Big Bay land was situated in an arm of Endeavour Inlet. Allocations totalling 949 acres were made to 28 people, mainly Rangitane. One of the owners sold her interests in 1912. The rest of the land was leased, but proved hard to farm. An officer of the Lands and Survey Department reported in 1953 that the cleared areas had reverted to fern, scrub, and second growth, and recommended that they be allowed to regenerate. His superior wrote that the department was ‘desirous of resuming areas in the Sounds which are considered unsuitable for farming purposes, and this property doubtless comes within that category.’<sup>494</sup> In 1957, the Crown was successful in purchasing one of the sections (161 acres), but the owners of another declined to sell until 1973. Both sections were added to the adjacent scenic reserve, while the remaining land stayed in Maori ownership.<sup>495</sup>

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491. Ibid, pp 289–310

492. Michael Gilfedder and HD Morpeth Haszard, ‘Reserves for Landless Natives’, AJHR, 1914, G-2, p 7

493. James Macdonald, brief of evidence on behalf of Rangitane, 10 March 2003 (doc M10), p 5

494. Commissioner of Crown lands, Blenheim, to district officer, Wellington, Department of Maori Affairs, 6 October 1953 (Alexander, ‘Landless Natives Reserves’, p 331)

495. Alexander, ‘Landless Natives Reserves’, pp 311–346

7.8.3(7)

**(7) Edgecombe**

The Edgecombe reserve consisted of two separate blocks (Mint Bay–Bakers Bay and Deep Bay) near the western entrance (Edgecombe Point) of Endeavour Inlet. The land, consisting of 520 acres, was allocated to 14 persons, mainly of Ngati Kuia. The surveyor reported that ‘generally this block is steep and rugged, the land rising abruptly from the water’s edge.’<sup>496</sup>

**(8) Miritu**

The Miritu reserve was a block of hilly land at Aratawa Bay, at the head of Miritu Bay (Bay of Many Coves), a large inlet off Queen Charlotte Sound. Consisting of 360 acres, it was adjacent to the existing Ruakaka reserve. It was granted to the nine children of Kura Huruata and Aylmer Kenny, whose descendants sold it to the lessee in 1952.<sup>497</sup>

Although almost completely separate from the main strand, there is another component of the landless natives story in Te Tau Ihu. That component is the provision of land along the Heaphy River for Maori residing in the Buller district and apparently belonging to all four of the non-Ngai Tahu iwi of the West Coast. (Only one of these persons is described as having an affiliation to Ngai Tahu, or rather to Ngati Waewae, a hapu of that iwi.) Hoani Mahuika of Westport made the first approach on behalf of these people in 1895. The Government accepted that they had a case for being regarded as landless, and 28 adults and 10 children were identified as eligible. The Heaphy River site was selected and requested by the applicants themselves. Officials laid out 38 sections, with a total area of 1600 acres, on both sides of the lower reaches of the river, from near its mouth to a point about nine kilometres upstream. This was not done until 1909, however, and the land was never formally reserved or provided with titles. Described in 1920 as consisting of flood-prone flats and rough hillsides, the block was remote and inaccessible. As time passed it was not thought that the owners were likely to take it up, and the Crown never took steps to finalise the allocations. When the land became attractive for conservation purposes in the 1970s, officials concluded that it was not required for the landless natives scheme, and in 1974 it was declared to be State Forest Park land.<sup>498</sup>

This has affected many claimants in our inquiry. In describing how his mother’s varied land interests were lost, Richard Bradley noted (for Rangitane): ‘My mother’s entitlement to lands in the Whakapoai (Heaphy) Block never eventuated as the government of the day never got around to partitioning them off and they have now become a part of the DOC estate called Kahurangi National Park.’<sup>499</sup> June Robinson, in her evidence for Ngati Apa, told

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496. Alexander, ‘Landless Natives Reserves’, pp 347–363

497. *Ibid.*, pp 364–375

498. *Ibid.*, pp 130–167; Armstrong, ‘Fate of Ngati Apa Reserves’, pp 52–56; Mitchell and Mitchell, ‘West Coast’, pp 83–85, 87

499. Bradley, brief of evidence, p 5

us: 'Hoani Mahuika and many of the family were named in the Landless Natives Reserves at Whakapoai. After sixty years of frustration no lands were ever received.'<sup>500</sup>

But the Heaphy River story is unfinished, as the Tribunal recognised in 1995 when reporting on the Ngai Tahu ancillary claims. At that time, the Tribunal gave consideration to the landless natives reserve on the Heaphy River as part of its discussion of the reserves created under the scheme for Ngai Tahu in other parts of the South Island. In respect of the Heaphy River reserve, findings were made that the designation of this unsuitable land as a remedy for landlessness was a breach of the Treaty principle requiring the Crown to act in good faith. Additionally, it was found that 'the Crown's failure to permanently reserve and grant title to the land allocated to specific landless Maori' was a further breach of that principle. The Tribunal recommended in 1995 that title to the Heaphy River block be vested in the descendants of those to whom it was originally allocated, although it recognised that in view of the poor quality of the land its return might not satisfy their needs.<sup>501</sup> Provision was subsequently made in the Ngai Tahu Claims Settlement Act 1998 for a final resolution of the matter. Under this legislation, the land may be vested in the successors of the original grantees, and compensation paid to them, subject to its being leased back to the Crown and managed as part of the Kahurangi National Park. Alternatively, if the successors choose these options, substitute land may be vested in them, or some other form of redress may be provided, in which case the land may be added to the national park. At the time of writing, however, these provisions have not yet been made operative.

#### 7.8.4 Conclusion

Some of the land designated for use as reserves for landless natives of Marlborough and the West Coast was never made available for occupation, but under the scheme a total of 7188 acres was allocated to 198 Marlborough Maori and taken up by them.<sup>502</sup> The grantees were mainly of Ngati Kuia and Rangitane, the two iwi most affected by landlessness. (However, although the names of Ngati Rarua residents of the Wairau were also prominent among those recognised as landless in 1887, people of this iwi received no allocations until the Stewart Island lists were made, and so never received even partial redress of their grievance.<sup>503</sup>)

The commissioners who investigated the South Island landless natives reserves in 1914 reported that on the whole they were not suitable for cultivation or closer settlement; the Marlborough blocks, however, appeared to be 'well adapted for selection in fairly large areas

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500. June Robinson, brief of evidence, p 28

501. Waitangi Tribunal, *Ngai Tahu Ancillary Claims*, p 131

502. Alexander, 'Landless Natives Reserves', p 9

503. Walzl, *Land and Socio-Economic Issues*, p 255

by sheep-farmers with moderate means.<sup>504</sup> It was commonly acknowledged at the time that most of the land reserved under this scheme was of inferior quality and likely to be costly to develop. For that reason much of it was never put to profitable use. Nevertheless, the bulk of the land actually reserved and allocated has been retained in Maori ownership, with only one block (Miritu) sold in its entirety and sections of another (Big Bay) sold to the Crown for scenic reserve purposes.

### 7.8.5 Legal submissions on the landless natives remedy

Most of the claimant iwi made submissions about the landless natives project devised and executed by the Crown at the end of the nineteenth century. Counsel for Rangitane, Ngati Kuia, Ngati Koata, Ngati Rarua, Te Atiawa, and Ngati Apa noted that the landlessness and social distress of the iwi was acknowledged by the Crown in the 1880s, but all argued that the remedy arranged was inadequate. It was pointed out that even when apprised of the situation the Crown was slow to act, and chose to make available only land that was still in its possession and not earmarked for purposes such as forestry, with the consequence that land with economic potential was not offered. The reserves allocated in the Marlborough Sounds were hilly, bushclad, and isolated, and those on the Heaphy River and distant Stewart Island were even more unsatisfactory. In Marlborough, only 40 acres per adult was allowed, and the poor quality of the reserves made farming them a struggle. The isolated locations meant that access to health care, education, and employment was difficult. The submissions made it clear that very few members of the affected iwi derived any benefit from the 'remedy' arranged by the Crown, and that some of the promised reserves never eventuated at all.<sup>505</sup>

In respect of the Heaphy River reserve, counsel for Te Atiawa sought findings that the Crown breached the principles of the Treaty by allocating land that it knew would be of little use, failing to put the people entitled to the land in possession of it, eventually taking the land over for its own purposes, and including the reserve in the Ngai Tahu deed of settlement although no Ngai Tahu had been awarded interests in the land concerned.<sup>506</sup> Concerning Stewart Island and the 55 members of Te Atiawa descent who were awarded land there, counsel submitted that the Crown was similarly in breach by allocating land that was so distant that it would have been no use to those entitled to it and by not putting the owners into possession of the land.<sup>507</sup>

In its submissions on the landless natives scheme, the Crown acknowledged that it did not in the end solve the landlessness problem, and so was of limited effectiveness. This

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504. Michael Gilfedder and HD Morpeth Haszard, 'Reserves for Landless Natives', AJHR, 1914, G-2, p 6

505. Counsel for Ngati Apa, closing submissions, pp 22, 50; counsel for Rangitane, closing submissions, pp 45-49; counsel for Ngati Rarua, closing submissions, pp 171-172; counsel for Ngati Koata, closing submissions, p 84; counsel for Te Atiawa, closing submissions, pp 204-214; counsel for Ngati Kuia, closing submissions, pp 60-64

506. Counsel for Te Atiawa, closing submissions, pp 208-213

507. Ibid, pp 213-214

was mainly because of the dubious quality of the land allocated, and its isolated location. Counsel agreed that officials could not find suitable land from the Crown's own stock and did not attempt to find any in the private market. He argued, however, that the scheme was an attempt to alleviate distress arising from landlessness, and thus essentially a 'charitable' project for the relief of poverty, rather than an effort to settle grievances. For this statement he drew support from the Tribunal's *Ngai Tahu Report 1991*, which said that neither Ngai Tahu nor initially the Government saw the scheme as anything but a compassionate gesture. His contention was that it was 'a reasonable initiative in the context of the times'.<sup>508</sup> The accuracy of this description of the 'landless natives' scheme was specifically denied by Ngati Kuia in its response to the Crown's submissions.<sup>509</sup>

### **7.8.6 Tribunal comment on the landless natives scheme as a remedy for the inadequacy of the original reserves**

#### **(1) Background**

We acknowledge that the landless natives scheme, originating in the 1880s, represented the Crown's recognition (albeit belated) of the deficiencies of the mid-century reserve-making process in Marlborough. We note that the scheme did not address the inadequacy of the reserves in more western parts of Te Tau Ihu (apart from the Buller district). Moreover, for the eastern districts it was, in the perception of the Crown and in the words of an official summing up Crown policy in the 1890s, 'a tardy act of justice'.<sup>510</sup> We have already quoted the similar words used by the Native Minister in Parliament in 1906. The scheme was certainly an attempt to alleviate distress, but we cannot agree with the submission of Crown counsel that it was no more than this. In the Marlborough context at least, it was undoubtedly a response to what the Crown accepted in the late nineteenth century as a legitimate grievance originating in the inadequacy of the reserves created in the 1850s.

It would be hard to argue, however, that the Crown's response to the problem of landlessness amounted to an 'act of justice', 'tardy' or otherwise. It cannot be denied that after deciding upon the project the Government was slow to implement it, and that many of the persons identified as 'landless' did not in the end ever receive any land (though some were compensated monetarily for this failure). It is clear, too, that the quality of the land provided was often not high, and that the amount allocated, 40 acres per adult for the Marlborough grantees, was not great (and less than what was considered fair elsewhere in the South Island). Furthermore, much of the scheme was forced upon those chosen to participate in it – they had little option but to accept inadequate land situated in areas selected by officials.

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508. Crown counsel, closing submissions, pp 119–120

509. Counsel for Ngati Kuia, supplementary closing submissions, 23 April 2004 (paper 2.786), p 7

510. Commissioner of Crown lands, Blenheim, to mayor, Picton, 9 December 1893 (Alexander, 'Landless Natives Reserves', p 58)

## 7.8.6(2)

Nevertheless, by means of the scheme a certain amount of extra land was found and made available to some of the Maori who needed it. It was quite an expectation of the landless Maori to ask them to relocate to the new reserves, but a number of the recipients did benefit by farming or milling their land or by leasing it to Pakeha for these purposes. Many others, however, found their reserve land to be of limited value, since almost all of it was steep and bushclad. All of it was relatively remote, and even the reserves in Marlborough itself were in most cases a considerable distance from where the new owners normally lived. The reserve found for the Marlborough people outside their own province was ridiculously distant, and outside their tribal area. It was physically unsuitable also, and we are willing to apply the oft-quoted description of the landless natives reserves made at this time for Ngai Tahu – ‘a cruel hoax’ – to the allocation of the Stewart Island land (and perhaps also that at Tennyson Inlet and the Heaphy River) as a reserve.<sup>511</sup> It would be going too far to refer to the creation of the other reserves for landless Maori in Te Tau Ihu in this way, however, although they were certainly not of the highest quality. As for the Stewart Island and Heaphy River allocations, the process of making them available was never completed, leaving the plight of their intended recipients completely unresolved.

Whether or not the landless natives scheme was a reasonable initiative in the context of the time, it did not in the end turn out to be an adequate remedy. We note the Crown’s acknowledgement that the scheme had limited efficacy and did not in the end solve the problem of landlessness. We agree that one of the explanations for the failure was that in searching for suitable blocks for designation as landless natives reserves the Crown was not prepared to look outside its own stock of land. The actions of officials and politicians indicate that they gave priority to Pakeha settlers and State forests. At about this time the Government began to spend money on the acquisition of private land in Marlborough for scenic reserves. It was not willing, however, to purchase such land for Maori resettlement. The Government was also ready to spend large sums on the purchase of farmland for Pakeha settlers. Admittedly the Land for Settlements Act 1894 did not actually specify that applicants for such land must be Pakeha, but Maori were clearly not perceived as aspiring settlers in the same way. If the Government had been willing to do the same for Maori as it did for Pakeha in the Land for Settlements Act, the landless natives scheme might have been an effective answer to the problem it had acknowledged and attempted to resolve. The severely limited success of the scheme leads us to express regret that this chance to put right the wrongs of earlier decades was lost.

**(2) Finding**

Even when the inadequacy of the land base in Te Tau Ihu (or at least in Marlborough and Buller) was officially recognised in the 1880s, the remedy devised by the Crown (the landless

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511. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 3, p 1000

natives scheme) fell far short of what was necessary. Too little land was allocated – even less than the Crown itself regarded as sufficient in legislative formulations – and much of it was inferior. Most of it was in remote locations. A grievance had been acknowledged, and this was an important opportunity to put things right. In inadequately resolving it, the Crown breached the principle of redress. In addition, the efforts of the Crown to implement the scheme fell short of the standards demanded by the principle of partnership, and disregarded the duty to act in good faith. Some of the land allocated was never made available. In that the provision made for ‘landless Maori’ contrasted unfavourably with that made for ‘landless Pakeha’, and even for other Maori in the South Island, the principle of equity was breached. These breaches undoubtedly meant that prejudicial effects were experienced by the people affected by the landless natives scheme – to say nothing of those whose needs were disregarded altogether.

### 7.9 SUMMARY AND CONCLUSION

In this chapter, we have reviewed the history of the occupation reserves set aside by the Crown in connection with the land purchases made in Te Tau Ihu up to 1860. We have also made an examination of the additional reserves created for landless natives around the turn of the century. We looked at the contentious issues concerning iwi rights in the West Coast reserves. Our principal aim, however, has been to assess the extent to which the Crown carried out its Treaty obligation to ensure that Maori kept sufficient land, both to use in the traditional way and also to use in new commercial ways, and on which they could survive as communities.

Occupation reserves were created as part of all the purchase agreements by which most of the land in Te Tau Ihu was acquired by the Crown between the 1840s and 1860. After the purchases only three blocks remained in customary Maori ownership, and we will be discussing these in the next chapter. Apart from these blocks, and the tenths lands that were set apart as an endowment estate (to be discussed in chapter 9), the only lands still in Maori hands after 1860 were the occupation reserves dotted around the coasts of Te Tau Ihu. This estate amounted to just over 35,000 acres in total.

The process of establishing the reserves was itself often flawed, and we have identified a number of instances in which the intended recipients of reserves did not receive what the Crown said they would be allocated. In Golden Bay the area of land reserved in 1847 did not amount to what was stipulated by the Spain award and the Crown grant of 1845, and the additions made in 1856 did not remedy the deficiency. In the Wairau district, the reserves created were smaller than what was promised by the Crown agent Donald McLean during the negotiations of 1856. In addition it turned out that the land reserved had to be shared by members of three iwi. With regard to other districts, the methods used when laying out

the reserves were often defective and resulted in outcomes that did not always match what the Maori signatories believed they had agreed to. A reserve that was probably promised at Pakawau in 1852 was not created, and the same may be said of one at Awaroa promised in 1856 and one at Kaituna promised the same year.

In implementing the reserves in this imperfect way, the officers of the Crown did not act in good faith and the acts and omissions of the Crown breached the principle of partnership. Prejudice was suffered by the iwi, hapu, whanau, and individuals affected.

Beyond these specific cases, we have found that in Te Tau Ihu as a whole the quantity of land reserved was inadequate to ensure that the present and future needs of the people were met. Even at the time the reserves were created, they were often not large enough to allow traditional cultivation practices or access to natural resources, and more often than not they were too small to be developed for agricultural and pastoral farming. Moreover, the quality of the land reserved usually left much to be desired, and this was known at the time, or very soon afterwards. The reserves were barely adequate for subsistence, and usually uneconomic for farming use. The progress of Pakeha farming development reduced access to and affected the quality and quantity of natural resources.

We are in no doubt that the Crown failed to ensure that the reserves laid off during the purchases were adequate for the present and future needs of many of the Maori resident in the region, and this was accepted by Crown counsel during our hearings. Our finding was that the principle of active protection was breached, in that the obligation of the Crown to ensure the welfare of Maori was lost sight of. The principle of active protection was also breached by the Crown's disregard of its obligation (accentuated by its enjoyment of the exclusive right to purchase Maori land) to ensure that a sufficient endowment of land and other resources was retained and that an opportunity for Maori to develop these resources and share in the benefits of colonisation was provided. It is clear that as a community and as iwi groups, Maori of Te Tau Ihu suffered enormous prejudice by these breaches.

As for the reserve estate itself, not only was it inadequate for its purpose but it was also soon reduced in size when considerable parts of it were alienated from Maori ownership. This is a process that began soon after the reserves were created, and continued throughout the nineteenth and twentieth centuries. Of course, Maori had the right to alienate their property if they wished, but we have shown that their freedom of choice was often reduced or removed by the policies and actions of the Crown. The eventual outcome was the reduction of the reserve estate to about 8300 acres, less than a quarter of its original size.

Before summarising what we have found about alienation, we mention the native reserves legislation (a series of Acts beginning in 1856) that had the effect of removing some of the reserves, though not all of them, from the control of their owners even when ownership was retained. Vesting reserves in the Crown under this legislation did produce an income for those with beneficial interests in the lands, but it took away their control over how the income was obtained or expended. They were no longer able to exercise rangatiratanga over

the resources they owned. This led us to find that the rights of Maori under the reciprocal principles of the Treaty had been disregarded.

With regard to the alienation of reserved land, we found that inadequate means were devised by the Crown to ensure that reserves were not alienated against the wishes of their owners or contrary to their long-term interests. The procedures of the Native Land Court, set up by legislative action, were deficient in this regard, and by its award of individual titles the court diminished the authority of chiefs and hapu over the land and promoted fragmentation (and eventually alienation). The mechanisms established by the Crown for restricting alienation did not amount to active protection of Maori landownership, and in many ways its own policies and actions contributed positively to alienation. This failure to protect rangatiratanga over land was in breach of the principle of active protection of Maori resources, and great prejudice was suffered thereby.

Finally, we have shown that, even at the end of the nineteenth century, when the insufficiency of the land base in Te Tau Ihu (or at least in Marlborough and Buller) was officially recognised, the remedy devised by the Crown (the landless natives scheme) was inadequate. With respect to quantity, quality, and location the land identified and allocated to those affected earlier by unsatisfactory reserve-making did not sufficiently resolve the situation. This inadequate attempt to rectify the previous wrong meant that the principle of redress was breached. In addition, the efforts of the Crown to implement the scheme did not meet the standards demanded by the principle of partnership, and also did not meet the obligation to act in good faith. Some of the land allocated was never made available. Insofar as the provision made for 'landless Maori' was less extensive than that made for 'landless Pakeha' at the same time, the principle of equity was not observed. The effect of these breaches was that the people involved in the landless natives scheme undoubtedly suffered prejudice.

The Crown acts and omissions we have outlined were clearly in breach of the Treaty of Waitangi. The Crown officers who in the various ways we have described acted or failed to act in their dealings with the Maori of Te Tau Ihu did so in contravention of the standards proclaimed by the Crown in the early colonial period and enshrined in the Treaty. In their disregard of Treaty principles they were motivated by an overriding concern to promote the development of the New Zealand colony. The interests of Maori were sacrificed to those of the colonists: the colonising project was given priority. The outcome severely prejudiced the interests of the Maori residing in Te Tau Ihu and seriously threatened their future as viable communities in this region.

We turn now to consider whether the situation brought about by the inadequacy of the occupation reserves was in any material way alleviated by the exclusion of three 'large' blocks from sale in the 1850s (ch 8), or by the reservation of the Nelson tenths (ch 9). Having considered those issues, we will explore in chapter 10 the overall prejudice suffered by Te Tau Ihu Maori as a result of the Treaty breaches identified so far in our report.



## CHAPTER 8

### TE TAITAPU, RANGITOTO, WAKAPUAKA, AND THE NATIVE LAND COURT

#### 8.1 INTRODUCTION

In the previous chapter, we examined the occupation reserves specifically set aside for Te Tau Ihu Maori from the Crown purchases of the 1840s and 1850s, and found these to be entirely inadequate for the present and future needs of Maori communities in the district. The ability of such reserves to support Te Tau Ihu iwi was, we concluded, further eroded through the subsequent alienation of more than 77 per cent of the 35,500 acres supposedly granted Maori specifically for their occupation under this heading. Crown officials had long argued that the 'real payment' for Maori lands transacted with the Crown prior to 1865 would come through the gradually increasing value of the reserves and other lands retained, as increasing numbers of Pakeha settled in the district, creating a steady market for Maori produce and providing improved infrastructure. But this 'real payment' could only be fully realised if Maori were actually allowed to retain their remaining lands, and that was not the case with the occupation reserves.

Yet, that was only part of the story. As was seen in chapter 6, in many instances Te Tau Ihu Maori fought long and hard to exclude various lands from the pre-1865 transactions, despite the determined efforts of Crown purchase agents such as Donald McLean to convince them otherwise. In this chapter, we look at the three large areas of land which Te Tau Ihu iwi did manage to successfully exclude from the blanket Crown purchasing of the 1840s and 1850s. Might these have provided the 'real payment' for the vast bulk of Te Tau Ihu previously alienated at nominal rates per acre and often under the most dubious of circumstances?

Consideration of this question requires us to examine the subsequent fate of those lands, with a particular focus on the way in which the lands were dealt with by the Native Land Court. We briefly consider the overall impact of the Native Land Court on Te Tau Ihu in terms of the amount of land affected, the attitude of Te Tau Ihu Maori to use of the court, and the legislation in place before 1883, when it began its first sittings in the district. Next we look, in turn, at each of the three cases – Te Taitapu, Rangitoto (D'Urville Island) and nearby smaller islands, and Wakapuaka – in the order in which the court investigated them and the process by which these last remaining areas of customary Maori land in Te Tau Ihu were converted into titles derived from the Crown. Our treatment of Te Taitapu also deals

with the involvement of the Crown in the administration of gold mining on the block, from the discovery of gold in 1862 through to 1884 when the block was sold. We conclude our examination of each block with a discussion of the way in which some or all of the land was alienated after it had gone through the court. Again, a crucial question for us to consider in this context is the extent to which such land sales undermined the ability of Te Tau Ihu Maori to reap the benefits of the new economy earlier held out to them at the time of the Crown's large-scale purchases.

We finish our treatment of each block with a review of legal submissions by claimant and Crown counsel, and our comment and findings. The main issues examined with respect to individual blocks include:

- ▶ whether the court carried out an adequate inquiry as to who held customary rights and, indeed, whether it was the appropriate forum within which to undertake such an inquiry
- ▶ whether the court gave due consideration and weight to the evidence presented before it in making determinations and whether a Crown official appearing as a witness before the court was unaffected by conflict of interest
- ▶ whether the court's determination of title, including individualisation, and its treatment of succession contributed to the alienation of land remaining in Maori hands after 1865
- ▶ whether the Crown responded in a timely manner if Maori were adversely affected by the operations of the court

We then review general submissions on the Native Land Court from claimant and Crown counsel, including issues such as the impact of the court on Te Tau Ihu, its impartiality and independence from the Crown, and the effect of the 1840 rule. We conclude with our comments and findings relating to these wider issues.

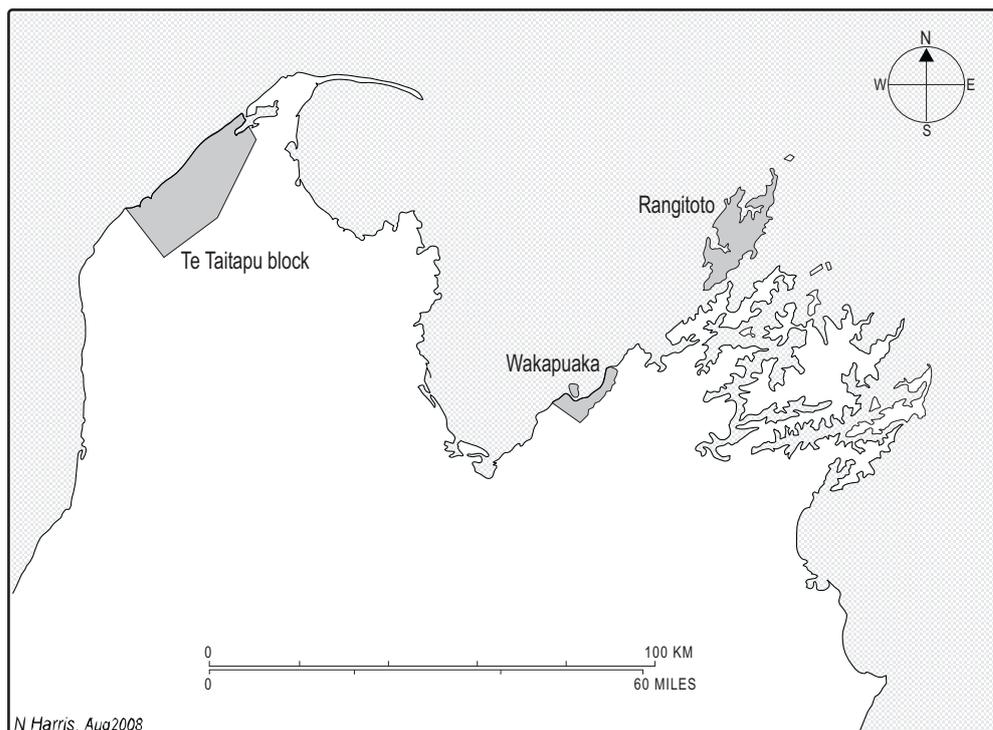
### **8.1.1 The first sitting of the Native Land Court in Te Tau Ihu**

The estimated total land area of the Te Tau Ihu inquiry district is 3,359,886 acres.<sup>1</sup> In 1883, when the Native Land Court finally arrived in Te Tau Ihu, the only customary Maori land left in the district were the Te Taitapu, Rangitoto, and Wakapuaka blocks. The total area of these blocks was 146,391 acres, or about 4.35 per cent of the Rangahaua Whanui district (see fig 28).

Given the very small amount of land remaining in customary ownership and other reserves for Maori in Te Tau Ihu, the court played a far less significant role there than on the other side of Cook Strait. Nevertheless, as Professor David Williams, historian for Ngati Tama, points out, the very paucity of land remaining by 1883 made the way in which the

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1. Alan Ward, *National Overview*, 3 vols (Wellington: GP Publications, 1997), vol 3, p 247



**Figure 28: Te Taitapu, Rangitoto, and Wakapuaka**

Source: Moira Jackson and Associates Ltd, 'The Rangitane ki Wairau Map Book', map book commissioned by the Crown Forestry Rental Trust, 2002 (doc M15), Moira Jackson, Crown Forestry Rental Trust, and Terralink NZ Ltd, 'Te Tau Ihu o Te Waka a Maui Overview Maps', map book, 2000 (doc A81), map 13

court dealt with each of the remaining three large blocks a matter of some importance.<sup>2</sup> In the wake of these court cases, Te Tau Ihu Maori were left with no lands held under customary title. Their remaining lands were entirely held under titles derived from the Crown. Consequently, we discuss in some detail the court's handling of each of these cases and the nature of the titles issued.

By the time the court opened its first sitting in Te Tau Ihu in 1883, 98 applications for investigation of title had been received, suggesting that numerous Maori were keen to use the court.<sup>3</sup> However, Alexander Mackay, who had been appointed native reserves commissioner for New Zealand in 1882, appeared for the Crown and successfully opposed the hearing of all but three of the applications for investigation of title, on the grounds that, in almost every case, either the Crown had bought the land or it was reserve land of a type not subject to the court's jurisdiction. Mackay gave evidence about Crown purchases and successfully opposed, for example, an attempt by Atanatiu Te Kairangi of Ngati Toa to argue

2. Dr David Williams, 'The Crown and Ngati Tama ki te Tau Ihu: An Historical Overview Report', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A70), p 134

3. Susan Kiri Leah Campbell, "'A Living People': Ngati Kuia and the Crown, 1840-1856", report commissioned by the Crown Forestry Rental Trust, 2000 (doc A77), p 210

that Paruparu Island was not included in the sale.<sup>4</sup> The island, which had long been used by Ngati Toa for fishing, even after the 1853 deed of cession, was the subject of ongoing Maori assertions that it had been specifically excluded from the transaction by way of oral promise – a view endorsed by Sir George Grey when giving evidence before the Native Affairs Committee in 1884.<sup>5</sup>

The numerous applications for land that the Crown considered that it had purchased suggests that a number of Maori did not share the Crown's view as to which areas of land Maori had wholly alienated. Leah Campbell, the historian for Ngati Kuia, and Tony Walzl, the Ngati Rarua historian, both suggest various possible explanations for the Maori 'misunderstanding' or discontent that led to these applications. There may have been confusion over the boundaries of sales, or their exact terms, or (as appears to have been the case with Paruparu Island) oral promises which were later overlooked by Crown officials. It may be that at least some Maori still held a traditional view of land allocation, under which those transferring land to another group would continue to see the land as theirs. There was perhaps an understanding that, if an expected relationship with newcomers did not develop, the land transferred to those newcomers could be reclaimed later. In the latter case, an attempt to put such land through the court in 1883 could be seen as effectively a repudiation of the original arrangement, to allow a new relationship to be formed.<sup>6</sup> At the very least, however, it indicated that many Te Tau Ihu Maori did not share the Crown's understanding as to the extinguishment of their rights over much of the district.

Ngati Kuia claimed at least 10 areas, including Paruparu.<sup>7</sup> Rangitane put in applications for at least 10 areas, also apparently including Paruparu Island, plus two areas for which Meihana Kereopa of Ngati Apa, Rangitane, and Ngati Kuia applied on behalf of his people. These two areas are also included in Ms Campbell's Ngati Kuia list, and in David Armstrong's Ngati Apa report.<sup>8</sup> While the precise balance of applicants' iwi affiliations is unclear, it seems that there were some applications associated with all the Kurahaupo iwi. On the other hand, Mr Walzl puts the number of blocks sought by Ngati Rarua at 31, relating to land stretching from Nelson 'through Tasman Bay and into and through Golden Bay'.<sup>9</sup> Clearly, a large part

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4. 'Alexander Mackay', DNZB, vol 2, p 289; Native Land Court, Nelson, minute book 1, 15 November 1883, fols 1–2; Dr Grant Phillipson, *The Northern South Island: Part 1*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1995) (doc A24), p 173

5. Dr Grant Phillipson, *The Northern South Island: Part 2*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1996) (doc A27), pp 5–6

6. Campbell, 'A Living People', p 197; Tony Walzl, *Ngati Rarua Land and Socio-Economic Issues, 1860–1960* (Wellington: Ngati Rarua Iwi Trust, 2000) (doc A50(2)), p 140

7. Campbell, 'A Living People', p 197, map 10

8. David Armstrong, "'The Right of Deciding': Rangitane ki Wairau and the Crown, 1840–1900", report commissioned by Te Runanga o Rangitane o Wairau in association with the Crown Forestry Rental Trust, not dated (doc A80), pp 156–158; David Armstrong, 'Ngati Apa ki te Ra To', report commissioned by the Ngati Apa ki te Waipounamu Trust Claims Committee, 1997 (doc A29), pp 112–113. Mr Armstrong is a historian for both Rangitane and Ngati Apa.

9. Walzl, *Land and Socio-Economic Issues*, p 140

of the area purportedly purchased by the Crown prior to 1865 was by 1883 being claimed as their own by Te Tau Ihu Maori. Yet, rather than inquire into the reasons for this large number of claims, the Native Land Court was content to accept the Crown's title at face value, on the word of the Crown agent present, dismissing all but the claims to the three 'excluded' blocks.

### 8.1.2 Legislation affecting land under customary tenure

The operations of the Native Land Court and the legislation under which it was established has been the subject of detailed scrutiny in a number of recent district inquiries. We refer in particular to the reports of the Rekohu, Turanganui a Kiwa, and Hauraki Tribunals. We see no need to repeat much of the detailed evidence and findings from those inquiries here, but merely note for the record that we concur with their findings.

Some brief discussion of the most pertinent points with respect to Te Tau Ihu nevertheless remains necessary by way of introduction. Here we are less concerned with the early history of the Native Land Court, from the first Native Lands Act of 1862, the 1865 Act which replaced it, and other developments in the period before 1873, for the simple reason that the court was not introduced to Te Tau Ihu before 1883. We do, however, endorse the findings of the previous Tribunals noted above that the failure of the Crown to meaningfully consult with Maori over the introduction of a system bearing upon their customary lands constituted a serious breach of the Treaty.

Whereas the system in place between 1865 and 1873 limited the number of owners who could be legally recognised on certificates of titles issued after Native Land Court hearings to 10 (with some less than satisfactory provision made for those excluded from the titles after 1867), the new regime ushered in by the Native Land Act 1873 required all owners to be listed on the titles. Although this was no doubt a welcome development for those Maori previously excluded from the lists of owners for their customary lands, in reality the 1873 Act took the whole process of individualisation of title one step further, though only for the purposes of alienation. Indeed, as the Turanga Tribunal observed, the new law 'did not individualise title in the true sense of that term, but rather 'provided only a kind of virtual individual title' solely for the purposes of alienation.<sup>10</sup> For all other purposes, blocks which had passed through the court remained customary Maori land outside English law and commerce, while owners who wished to obtain settled titles in order to farm or develop their entitlement were confronted with a costly, complicated, and, in practice, extremely rare process for doing so.

The 1865 Act had at least allowed for the theoretical possibility that titles could be awarded to hapu or tribes, but even this was removed after 1873. Meanwhile, ongoing communal

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10. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vol (Wellington: Legislation Direct, 2004), vol 2, p 441

control seemingly provided for in the section of the Act which required the unanimous consent of all owners to any proposed alienation was greatly undermined by other provisions allowing for blocks to be partitioned with majority support. Even the majority requirement had been dropped by the time the court first sat in Te Tau Ihu in 1883. Any Maori wishing to sell their interests could simply apply to the court for these to be partitioned out of the remainder of the block.<sup>11</sup>

As the Turanga Tribunal concluded, the 1873 Act facilitated Maori involvement in the colonial economy only through the alienation of individual interests in formerly communally owned lands and was heavily weighted towards making it easier to sell land than it was to retain and utilise the same.<sup>12</sup> In a district such as Te Tau Ihu, where Maori had already been left with an entirely inadequate land base to begin with, such a regime threatened to leave the tribes practically landless. And despite subsequent tinkering with various aspects of the system, and an overwhelming flow of amending legislation designed to correct technical deficiencies, the basic principles of the 1873 Act remained firmly in place by the time the Native Land Court finally arrived in Te Tau Ihu in 1883.

## 8.2 TE TAITAPU

In this section, we consider the block known as Te Taitapu at the first Native Land Court hearing held in Nelson in 1883. The Taitapu block was excluded by Ngati Rarua and Ngati Tama from the Waipounamu deed signed on 10 and 13 November 1855.<sup>13</sup> Crown historian Michael Macky observed in his report that there was every suggestion that there had been ‘quite an argument’ before Donald McLean, the chief land purchase commissioner, eventually consented to allow the land to be excluded from the 1855 sale.<sup>14</sup> This was land which the owners evidently had every intention of retaining for their own requirements.

Casual and sloppy identification of the area almost proved costly to this ambition from an early date. McLean included only a rough sketch of Te Taitapu on the deed.<sup>15</sup> In 1862, James Mackay, who was then Assistant Native Secretary in the Nelson goldfields district, realised that McLean’s map omitted nearly half the area delineated in the deed, and the Crown, to its credit, accepted a sketch map Mackay sent to rectify the error. However, there was still no survey, and the area of the block was recorded by Alexander Mackay as about 44,000 acres

11. David Williams, ‘Te Kooti Tango Whenua’: *The Native Land Court, 1864–1909* (Wellington: Huia Publishers, 1999), pp 285–295, app 8

12. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 446

13. ‘Translation of Deed of Sale by the Ngati Rarua and Ngatitama Tribes’, 10, 13 November 1855, *Compendium*, vol 1, pp 312–313; see also Mary Gillingham, ‘Ngatiawa/Te Atiawa Lands in the West of Te Tau Ihu: Alienation and Reserves Issues, 1839–1901’, report commissioned by the Crown Forestry Rental Trust, 2000 (doc A74), pp 186–187

14. Michael Macky, ‘Crown Purchases in Te Tau Ihu between 1847 and 1856’, report commissioned by the Crown Law Office, 2003 (doc s2), p 204

15. Phillipson, *Northern South Island: Part 1*, pp 200–201

in 1865, but as about 105,000 acres in 1878. A survey at the time of the 1883 court hearing, however, gave an area of 88,350 acres.<sup>16</sup>

Mackay noted that the block was ‘very indifferent, consisting chiefly of high hills covered with black birch, portions of it being very rocky and precipitous’, though he considered that a small portion might be made available for a cattle run.<sup>17</sup> Substantial timber and mineral resources added greatly to the value of the block, which, in any event, had (as we heard in evidence from Paora Mokena of Ngati Rarua) long been considered an important hunting and fishing spot by Maori.<sup>18</sup> Its value as a source of traditional food resources was only heightened in the wake of the Crown purchases of the 1850s, as Maori were gradually denied the opportunity to hunt and fish over much of the remainder of Golden Bay. Indeed, as Dr Grant Phillipson has noted, the combination of traditional resources and commodities of increasing value in the new colonial economy was in many respects a unique one.<sup>19</sup>

### 8.2.1 Maori and gold mining

The case of Te Taitapu raised particular issues for us because gold was discovered there in 1862. One issue concerns questions of ownership of gold; the other, the negotiation of agreements with Maori for the right to mine and related questions pertaining to how well the Government protected Maori interests when it took over the administration of the goldfield. In addition, title investigation procedures and the ultimate alienation of Te Taitapu were, according to claimant submissions, linked to the presence of the gold and the earlier Crown assumption of authority over the Taitapu goldfield.

Gold had been first discovered on land still under native title 10 years earlier, at Coromandel, in 1852. This raised immediate questions about the ownership of, and how to facilitate access to, gold found in Maori land. Officials immediately recognised that they would be unable to assert the Crown’s ownership of gold by reason of the royal prerogative – a right developed in combination with the English common law since the *Case of Mines* in 1568 – without being seen to break its obligations under the Treaty of Waitangi. On the other hand, they were not prepared to hand over control to Maori in case they should in some way impede European access to gold and other precious metals in their land. As the Executive Council of New Ulster, which met soon after the first discovery to discuss how to handle the question of ownership, concluded:

Although the Crown is entitled to all gold wherever found in its natural state the Council is unanimously of the opinion that it would be inexpedient to fully enforce Her Majesty’s Prerogative Rights in the case of gold found on Native land because it would be impossible

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16. Ibid, pp 203–204

17. Walzl, *Land and Socio-Economic Issues*, p 7

18. Paora Mokena, oral evidence, second hearing, 12–16 February 2001 (transcript 4.2, pp 13, 46)

19. Phillipson, *Northern South Island: Part 2*, pp 26–27

to satisfy the owners of the particular land in question – or the Natives of New Zealand generally, that such a proceeding on the part of the Government is consistent with the terms of the Treaty of Waitangi which guarantees to them the undisturbed possession of their lands, estates &c, and because in the opinion of the Council, no proceeding could be taken by the Government which the Natives might deem to be an infringement of the spirit of the Treaty (however insignificant might be the tribe or party concerned) without exciting the suspicion of the whole Native People and without danger to the Peace of the Colony.<sup>20</sup>

Thus, the Executive Council of the time decided to negotiate an agreement with Maori whereby they would be paid a fee per miner. This basic method of proceeding was to be emulated at Te Taitapu, and later in the Thames and Ohinemuri fields, and although details varied from case to case – sometimes significantly – the core arrangement was that Maori, the ‘native owners of the land’, would allow mining of their land in exchange for the revenues generated by miners’ rights at one pound per annum per miner on the goldfield. Such agreements – invariably cast in terms of access to the goldfields, rather than the ownership of the gold itself – allowed Crown officials to neatly sidestep the inherent contradictions between the royal prerogative and the provisions of the Treaty until much later in the nineteenth century, when the emphasis would very much be placed on the former.<sup>21</sup>

Once the consent of the ‘native owners’ had been won, the land was usually proclaimed as a goldfield and brought within an increasingly complex statutory and administrative regime dealing with different aspects of gold mining. Mining (especially for quartz) and the presence of miners entailed many uses of the land, ranging from the cutting of firewood to the diversion of water-courses and even long-term agricultural lease. There was plenty of room here for misunderstanding and dispute between Maori and miners, and between miner and miner. As the goldfields developed the Crown’s capacity to respond to such problems also grew. An increasingly intricate set of regulations permitting or prohibiting different activities, along with schedules of fees and rents, and the machinery for their collection and for upholding law and order, were consequently put into place over time.

The legislation remained ambiguous, however, on the question of who actually owned the gold in Maori land. Statutory control, like the agreements negotiated between Maori and the Crown, remained structured around issues of access not ownership of the mineral. Although various gold-mining statutes passed between 1858 and 1877 had expressly reserved the royal prerogative to gold, the Gold Fields Act Amendment Act 1868, which empowered the Governor to declare ‘native land’ a goldfield once the consent of the owners had been won, said nothing about ownership or Crown claims to precious metals.<sup>22</sup> The Gold Fields Act 1866, which the 1868 amendment was to be read in conjunction with did,

20. Executive Council, minutes, 24 November 1852, extract, in dispatch 121, G8/8, ArchivesNZ (Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006), vol 1, pp 291–292)

21. Waitangi Tribunal, *Hauraki Report*, vol 2, pp 523–550

22. *Ibid*, p 525

however, declare that nothing in the Act should be deemed to ‘abridge’ the royal right to gold. In any event, the capacity of Maori communities to withhold their lands from mining, or to control the terms under which they were brought within the Government’s management structure, was to steadily diminish in the following years and more especially from the late 1880s onwards. Although the Taitapu block had already been alienated by this time, as we detail later in the chapter, the increasing Crown tendency to assert its claims to ownership of the gold nevertheless remains of relevance if it is accepted that Maori possessed a legitimate interest in gold arising out of the terms of the Treaty. The Hauraki Tribunal has considered the complex issues raised in relation to this matter at length. We merely note one or two points pertinent to the case of Te Taitapu below.

The Mining Act 1887 empowered the Governor to unilaterally change the agreements negotiated with Maori by which their lands had been opened to mining. Other legislation, including the Mining Act 1891 and further amendments in 1892 and 1896, also expanded the Government’s power to bring Maori-owned lands under its authority even when those areas, as in the case of cultivations, residences, and burial grounds, had been specifically withheld from goldfield arrangements. It was not until this stage, by which time the interests of settlers and common law interpretations of ownership were clearly dominant and the Treaty had been denigrated to a ‘nullity’ without legal significance, that the question of the royal prerogative and whether it applied over customary lands was debated in Parliament. The Government’s view, articulated by Seddon, in 1896, was that the prerogative had been silent, but never abandoned, and that it was ‘for the Crown to assert these rights in such a manner as [would] best conserve the interests of the colony.’<sup>23</sup> If the Treaty had any significance it lay in the transfer of sovereignty, which carried with it the right to royal metals. It was not necessary to ‘buy’ gold from Maori because the Crown already owned it. Sir Robert Stout led the opposition to the Bill, questioning whether the prerogative should apply to the New Zealand situation.<sup>24</sup> Although the focus of debate was on the Crown’s capacity to resume lands which had been on-sold, for the northern Maori member, Hone Heke the Treaty was still ‘alive’. He argued that Maori could have no idea that they had conveyed gold, silver, and other minerals to the Crown by reason of the Treaty; rather article 2 ‘show[ed] completely that the landed property and every other property contained thereon . . . belonged to the Natives.’<sup>25</sup>

By this stage, the freehold of Te Taitapu had already been sold, but a crucial aspect of the case argued in 1896 for continuing Maori ownership of gold was that ‘Whether from motives of expediency or sentiment, the colony has at various times not deemed it necessary to declare what was implied.’<sup>26</sup> This was true of the statutory code and the negotiations

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23. 29 September 1896, NZPD, 1896, vol 96, p 307

24. Ibid, pp 285–289

25. Ibid, pp 312–313

26. Ibid, p 290

with Maori, not only at the time of the signing of the Treaty but also at the time the owners of Te Taitapu were persuaded to open their lands to mining in exchange for revenues based on the number of miners' licences issued and uses of the surface, but not for royalties based on the value of the metals extracted. We shall explore this issue further below.

**(1) James Mackay and gold mining at Te Taitapu**

In 1856, gold was discovered in the Aorere River valley, in lands already within the control of the Crown as a result of the Waipounamu purchase, and where, even if land had been on-sold by the Government to settlers, the right to royal metals would under English common law revert to the Crown by reason of the prerogative. Te Tau Ihu Maori responded with enthusiasm to the prospects opened up by gold mining. Their ability to participate in this new activity was greatly facilitated by the alluvial character of the mining, meaning labour rather than technical knowledge and costly equipment was the primary requirement.<sup>27</sup> By 1858, approximately 600 Maori and 1300 Pakeha were prospecting in the Aorere, Collingwood, and Parapara River valleys.<sup>28</sup>

Te Tau Ihu Maori were also eager to find and make arrangements for the working of this resource on their own land. A Maori prospecting party eventually discovered gold at Te Taitapu, at Ngatuihi (Slaty Creek), in January 1862, and began to make an arrangement for miners to pay directly to them an annual licence fee of one pound.<sup>29</sup> James Mackay, the Assistant Native Secretary based at Collingwood, acted immediately to take charge of the situation. Claiming that he feared 'a rush' on the land, and conflict between Maori and miners, he threatened Europeans occupying Maori land with heavy fines.<sup>30</sup> He then travelled to West Whanganui for talks with Ngati Rarua, led by the rangatira Riwai Turangapeke and Pirimona Matenga Te Aupouri, and some others of their iwi. Mackay refused to approve the agreement they had drawn up, reporting subsequently to the Acting Native Secretary, that 'I answered that I did not approve of entering into any such arrangement without orders and instructions from His Excellency the Administrator of the Government and also that some of their terms appeared objectionable.' The two rangatira were subsequently persuaded to travel to Collingwood with Mackay so that he could make an arrangement with them on behalf of Ngati Rarua if he found that Europeans still intended to go to Te Taitapu to mine.<sup>31</sup>

Mackay later justified the steps he had taken, without prior permission, on the grounds

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27. Phillipson, *Northern South Island: Part 1*, pp 207–208

28. Williams, 'Crown and Ngati Tama', p 170

29. JH Barne, 'History of Taitapu Estate', New Zealand Forest Service, December 1986 (doc A2), pp 29–30

30. James Mackay to Native Secretary, Collingwood, 12 February 1862, *Compendium*, vol 1, pp 321–322; James Mackay, public notice, 5 February 1862, James Mackay, outward letterbook, fol 335, MA-MTN2/1, ArchivesNZ (Hilary Anne Mitchell and Maui John Mitchell, 'Wai-102, Report No 13A: Te Tai Tapu', report commissioned by Ngati Rarua, Ngati Tama, and Te Atiawa, 1995 (doc A25), pp 23–24)

31. Phillipson, *Northern South Island: Part 1*, p 202; Walzl, *Land and Socio-Economic Issues*, p 4

that these had averted ‘serious evils’, and his arrangements were approved retrospectively by the Native Secretary.<sup>32</sup> At no point did Mackay elaborate upon the nature of the supposed ‘serious evils’, but presumably they involved both the danger of dispute if miners should enter upon Maori land without their permission and also, of Maori taking control of the goldfield for themselves, by-passing Crown authority over the land market and challenging the royal prerogative to the gold itself. Professor Williams notes that Mackay’s responsibility to enforce the Native Land Purchase Ordinance 1846 gave his action a legal basis. However, Professor Williams considers that Mackay acted as he did not to protect the interests of the owners but to warn off Pakeha until the Crown could control the situation. In his view, Maori autonomy in the administration of their own customary lands and in dealing directly with Pakeha miners for the right to work these ‘was not acceptable to the Crown.’<sup>33</sup>

On 10 February 1862, the two Ngati Rarua rangatira and Mackay signed a deed giving the Queen and her successors ‘for ever . . . the right to permit all or any persons of the European or Native race to mine for gold on all that piece of our land . . . named Taitapu.’ The deed also provided that any Maori or European desiring to mine for gold, reside, or fell timber for gold-mining purposes at Te Taitapu should hold a licence costing one pound per annum. An officer appointed by the Governor would issue the licences and hold the fees until demanded by the rangatira. The rangatira would then be paid the whole amount and arrange the division of it among their relatives, children, or any other persons owning the Te Taitapu lands. Under the terms of the agreement the rangatira also vowed to protect all Europeans and Maori mining at Te Taitapu and to help the European magistrates if any offence occurred, leaving the magistrates to then deal with the case. They agreed to accept the Aorere goldfields regulations, which laid down how that goldfield was to be administered, as applicable to the ‘Taitapu Gold Fields.’ The two rangatira also agreed that the Governor, or those appointed by him, should have power to make further new rules and regulations for the goldfield in the future.<sup>34</sup> There was no requirement to seek the consent of the signatories to the agreement or any other owners to any future regulations.<sup>35</sup>

The Crown’s arrangements of 1862 have raised issues about the fairness of its terms, whether all proper parties were consulted, and the subsequent administration of the block. Certainly, the 1862 agreement has received widely varying interpretations. The Mitchells see Maori as experienced in alluvial mining by this time and well able to manage the Te Taitapu goldfield. They view the various powers given to the Crown as excessive under the circumstances and suggest that the two Ngati Rarua rangatira may have been deliberately isolated from the remainder of their people by Mackay in order to more easily impose

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32. Mackay to Native Secretary, 12 February 1862, *Compendium*, vol 1, pp 321–322; Walzl, *Land and Socio-Economic Issues*, p 5

33. Williams, ‘Crown and Ngati Tama’, pp 175–176

34. ‘Agreement with the Natives to Permit Mining on the Reserve at West Whanganui’, no 1, encl, *Compendium*, vol 1, pp 322–323

35. Phillipson, *Northern South Island: Part 1*, p 203

terms favourable to the Crown upon them.<sup>36</sup> Mr Walzl, on the other hand, sees the agreement as ‘from a Ngati Rarua viewpoint, . . . a most favourable document’. He considers the provisions relating to protection of miners and the aiding magistrates, to which Dr and Mrs Mitchell object, as due acknowledgement of a legitimate role for the Ngati Rarua rangatira in managing the area.<sup>37</sup>

Yet, leaving aside for the moment the question as to whether the agreement was favourable to the interests of the owners, serious doubts arise as to the extent to which two rangatira acting alone could legitimately bind the remainder of Ngati Rarua to the terms of the agreement. In Maori society major decisions were normally required to be made in the clear light of day, before the assembled people, and with an obvious consensus in favour of an agreed course of action. That being achieved, rangatira might then be expected to implement the wishes of their tribe. By these standards, the 1862 agreement clearly failed in that Ngati Rarua as a whole had not been given the opportunity to consider and discuss the proposals, and in that respect Mackay was, at the very least, in dereliction of his duty in not taking reasonable steps to ensure genuine consent to the agreement was obtained.

Then there are the broader issues of customary entitlement to consider. Mackay had negotiated his agreement with Ngati Rarua alone, despite having previously admitted that at least some Te Atiawa had rights in the area. In 1858, Mackay referred to ‘Henri’ Te Keha having a pa in the block at Turimawiji, and indicated that Te Atiawa claimed the whole area, but that the deeds reserved it ‘for the Ngatiawas and Ngatitama tribes.’<sup>38</sup> Ngati Rarua are not mentioned here. However, in February 1862, he held that Ngati Rarua and Ngati Tama had conquered the earlier occupants, Ngati Tumatakokiri and Ngati Apa, and that thereafter, the lands concerned had been divided between these two iwi and Te Atiawa, with Ngati Rarua ‘retaining the largest portion’. Mackay stated that since the ‘reservation’ of Te Taitapu, the area had been ‘generally considered to be held by Riwai Turangapeke for himself’ and other Ngati Rarua. He thought that the Ngati Tama claim had been given up in exchange for Ngati Rarua agreeing to waive their rights at Wakapuaka. Mackay acknowledged, however, the continuing presence of a small number of Te Atiawa, residing at Motupipi and Pariwhakaoho, and whom he considered entitled to the valley of the River Turimawiji.<sup>39</sup> Although Mackay evidently took it for granted that the earlier ‘conquest’ of Ngati Apa had entirely extinguished their interests at Te Taitapu, Kurahaupo groups would, as we shall see, also later claim interests in the block.

In September 1862, Mackay belatedly called a hui to discuss the question of respective rights to the gold mining revenue. His proposals for resolving the inevitable disputes which had arisen owing to his earlier failure to consult with all interested parties met with strong

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36. Mitchell and Mitchell, ‘Te Tai Tapu’, p 26

37. Walzl, *Land and Socio-Economic Issues*, pp 5–6

38. Mitchell and Mitchell, ‘Te Tai Tapu’, pp 85–86

39. Mackay to Native Secretary, 12 February 1862, *Compendium*, vol 1, pp 321–322

opposition. But there were already about 35 miners on the land, and Mackay now refused to pay over any of the revenue he had collected unless Maori agreed to his plan. Dr Phillipson suggests that local Maori found themselves 'powerless to force his hand' given the existence of the earlier agreement with the two rangatira.<sup>40</sup>

The notoriously stubborn and inflexible Mackay (who later became popularly known as 'The Thames Autocrat' for his iron-handed administration of the Hauraki goldfields) remained confident that it was only a matter of time before the tribes would eventually be forced to fall in with his proposals.<sup>41</sup> In this, he was duly proven correct. By April 1863, Mackay had collected £93 in licence fees, but had paid over just £19 10s to the two Ngati Rarua rangatira. He reported with respect to the outstanding balance that he had:

not considered it prudent to hand it over to Riwai Turangapeke and Pirimona Matenga in accordance with the agreement entered into with them . . . as they are disposed to act unfairly towards the other claimants to the Taitapu Reserve, especially those of the Ngatitama and Ngatiawa Tribes.<sup>42</sup>

A further hui, attended (according to Mackay) by 'the whole of the influential men of the Ngatirarua' and with Ngati Tama and Te Atiawa 'well represented', was held at Collingwood in July 1863. After two days of 'many stormy arguments', both Ngati Tama and Te Atiawa reluctantly agreed to give up any claim to money from mining licences, and to all Te Taitapu land, with limited exceptions. Ngati Tama were to have their 'old cultivations' along the coast from Kaukauawai to Te Wahi Ngaki, and the country for one mile inland from the landward boundary of these cultivations. Ngati Tama chiefs Wiremu Katene Te Manu and Paramena Haereiti were to have land near Paturau that they had previously cultivated together with Ngati Rarua. Lastly, Te Atiawa of Pariwhakaoho were to receive their 'old cultivations' along the coast from Turimawiwi to Taumaro, together with the land for one mile inland from the back boundary of these cultivations.<sup>43</sup>

While Mackay congratulated himself on the success of these arrangements in face of Ngati Rarua determination not to admit the others onto the block, Dr and Mrs Mitchell blame his previous failure to take account of such rights for the creation of serious disagreement among Maori.<sup>44</sup> Mr Walzl also describes this as 'forced' mediation. He argues that Mackay had pushed for the inclusion of Ngati Tama rights, despite having earlier recorded that they had given them up. However, Ngati Rarua refused to admit that any other iwi had any right whatsoever to gold revenue. They acknowledged some Ngati Tama and Te Atiawa rights but, from their viewpoint, those rights came through Ngati Rarua, which retained

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40. Phillipson, *Northern South Island: Part 1*, p 205

41. 'James Mackay', DNZB, vol 1, p 253

42. James Mackay to Native Secretary, 16 April 1863, *Compendium*, vol 1, p 324. He also paid £9 10s to the receiver of land revenue and one pound for printing expenses, deducting this from the sum payable to the two rangatira.

43. James Mackay to Native Secretary, 9 July 1863, *Compendium*, vol 1, pp 324–325

44. Mitchell and Mitchell, 'Te Tai Tapu', p 35

## 8.2.1(2)

its rangatiratanga. This may well be why, when Mackay produced a list of 18 people whom Riwai Turangapeke admitted were ‘Members of the Ngati Rarua Tribe’ who could share in Te Taitapu, the list included the names of both Ngati Tama rangatira involved in the ‘pan-iwi hui’ arrangements. Mr Walzl notes, however, that from Mackay’s perspective, the process of recording Ngati Tama and Te Atiawa rights was ‘tantamount to the first step of declaring individual interests.’<sup>45</sup> Despite the effort, Mackay had put into defining the rights of Ngati Tama and Te Atiawa, Dr Phillipson notes that he did not follow up this up by obtaining Crown grants for the signatories. This left the Native Land Court free to overturn the 1863 land arrangements ‘by omission rather than commission’ in 1883.<sup>46</sup> The extent to which the agreements entered into in 1863 could be seen as an expression of tino rangatiratanga remains, in any event, a moot point given the coercive element employed by Mackay to bring the parties to this point.

Nor was Mackay’s opening of Te Taitapu followed by a formal proclamation of the goldfield until some 10 years later. In the first year, Mackay administered the area as part of his duties as native reserves commissioner, a role which his cousin, Alexander Mackay, took over in 1865, along with the office of warden of the West Whanganui goldfield. But, as we explore below, it was really Riwai Turangapeke who stepped into the vacuum left by James Mackay’s departure and by the Crown’s failure to institute a system for the issue of licences and collection of fees.

**(2) Gold mining and revenue at Te Taitapu, 1864–73**

In 1869, Alexander Mackay reported that licence fees had been paid willingly by miners in the first year, but that since then ‘considerable difficulty had been found to induce persons who have been attracted there from time to time to comply with the conditions of the original agreement.’<sup>47</sup> He later commented that Riwai Turangapeke had ‘taken it upon himself’ to issue licences and collect the fees after James Mackay had departed. It is clear, however, that Turangapeke saw himself as acting well within his rights, appealing to Alexander Mackay to deal with miners who were evading payment. Mackay responded by travelling to Te Taitapu, where Turangapeke identified 20 out of the 40 men they found at the workings as having failed to pay their licence fee. Mackay warned them to leave the area, or face the fines of between £5 and £50 set by section 5 of the Gold Fields Act Amendment Act 1868 for unlicensed mining on native land outside a goldfield and issued a public notice to the same effect.<sup>48</sup> Responsibility was, however, left largely in the hands of Riwai, despite Mackay’s urgings that the Crown take greater responsibility. And, despite his threats of action under

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45. Walzl, *Land and Socio-Economic Issues*, pp 56–58; Phillipson, *Northern South Island: Part 1*, p 206

46. Phillipson, *Northern South Island: Part 1*, p 206

47. Mackay to under-secretary, Native Department, 14 July 1869, NS69/849, in MD1 1883/985 (Walzl, *Land and Socio-Economic Issues*, p 8)

48. Walzl, *Land and Socio-Economic Issues*, pp 7–8, 58–59

the 1868 Act, the Taitapu field had still not been officially proclaimed, although rumours of a rich new find of gold in the Turimawivi River area, which had reportedly attracted up to 300 miners to the district, prompted officials to give the matter serious consideration for a time.<sup>49</sup>

In May 1868, the Nelson provincial administration had moved to include the Te Taitapu district within the previously proclaimed Golden Bay goldfield.<sup>50</sup> Although Alexander Mackay argued a decade later that the actions of the Nelson superintendent had been *ultra vires*, legal historian Professor Williams considers this a moot point.<sup>51</sup> But as Dr Phillipson pointed out, it is not apparent that the provincial proclamation had any practical effect on the actual administration of the Taitapu goldfield.<sup>52</sup> In practice Turangapeke continued with his efforts to persuade miners as best he could to pay him their licence fee.

By late 1872, Turangapeke was estimated to have collected about £136 – the precise amount was unknown because he did not keep accounts – but this, according to Mackay, had resulted in dissatisfaction among the other owners as the rangatira had allegedly appropriated all the money and was refusing to account for it. Consequently, a meeting of owners had resolved that the matter should be placed entirely in the hands of Mackay. Other factors were in play. There were continuing problems in enforcing payment and Mackay reported that the miners who did pay their fee greatly resented the significant numbers of those who did not. The discovery of an ‘exceedingly rich’ quartz reef meant that mining was ‘now assuming a more permanent appearance’ and Mackay claimed that local Maori were ‘desirous that the matter should be taken out of their hands and have consented to allow a commission of 10 per cent on the amount collected to any person who may be authorised to undertake the duty.’<sup>53</sup> Although Mackay did not stress the point, quartz mining had also generated pressure for longer term arrangements than those provided by an annual licence, if sufficient capital was to be invested.

Mackay again urged the Government to take control of the field to allow proper regulation of mining at Te Taitapu, but the Nelson superintendent was reluctant to incur expense on what he saw as a relatively unimportant goldfield where revenue was to go to the Maori owners.<sup>54</sup> An 1873 petition from 67 miners provided the spur to action and in October 1873 the West Whanganui goldfield was officially proclaimed under the Gold Fields Act Amendment Act 1868.<sup>55</sup> That Act allowed the Governor to proclaim customary Maori land as a goldfield

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49. Ibid, p 9

50. Mitchell and Mitchell, ‘Te Tai Tapu’, p 45

51. Williams, ‘Crown and Ngati Tama’, p 179

52. Phillipson, *Northern South Island: Part 1*, p 208

53. Mackay to under-secretary, Native Department, 12 June 1872, NZ72/1008, in MD1 1883/985, ArchivesNZ (Walzl, *Land and Socio-Economic Issues*, p 81)

54. Tony Walzl, comp, *Ngati Rarua Land and Socio-Economic Issues, 1860–1960, Supporting Papers* (Wellington: Ngati Rarua Iwi Trust, 2000) (doc A50(2)(a)), pp 36, 43–57, 63–64 (first page sequence); 57–79 (second page sequence)

55. Walzl, *Land and Socio-Economic Issues*, p 83

subject to the consent of the Maori owners being first obtained for 'entry on such lands for mining for gold'. Mackay must surely have known that the 1862 agreement was inadequate; that only two rangatira from Ngati Rarua had been parties to it at the time, and that other iwi also had rights in the area. Yet, other than reported Maori requests for Mackay's intervention in 1869 and 1872, there is no indication of any formal procedure to confirm the consent of all the Maori owners to the bringing of the field under the Government's authority beyond the 1862 agreement of over 10 years earlier.<sup>56</sup> Certainly, none of the historians to have examined this issue could find any evidence of anything other than the 1862 agreement having been relied on as a basis for the proclamation which now ended any control Te Tau Ihu Maori formerly had over the Te Taitapu block.<sup>57</sup>

Between 1864 and 1872, Riwai Turangapeke had exercised considerable power over gold mining in the area, but the resistance of European miners to paying the licence fees had reduced the benefits that flowed even to him. Mackay produced figures showing average receipts from 1 February 1862 to 31 December 1873 for miners' rights, business licences, and income related to coal mining at slightly over £33 per annum; a figure that was well below Mackay's own reported estimate of 150 men on the field in the proceeding year.<sup>58</sup> Apart from a balance of £13 16s, the sum received was apparently paid to Turangapeke with the exception of £2 in commission for issuing 20 miner's rights and £84 9d expended on exploring and clearing tracks.<sup>59</sup> Other Maori missed out altogether, although we do not discount the possibility that the rangatira may have distributed some of this to other owners in accordance with customary expectations. Regardless, opening the field to mining had not produced the profits hoped for, or anticipated by, Maori.

### (3) *Gold mining at Te Taitapu, 1873–84*

Bringing Te Taitapu under the authority of the Crown in terms of the Gold Fields Act Amendment Act 1868 may have ensured a wider distribution of fees, but it also resulted in a loss of control on the part of Turangapeke, who no longer had any direct role in the issuing and supervision of licences, and the gathering of revenues. There were other long-term implications. Under section 8 of the Act, the Governor in Council could make, revoke, or alter regulations for gold mining on customary Maori lands provided the consent of the owners to this becoming a goldfield had first been gained. The Governor could also lease the

56. Mitchell and Mitchell, 'Te Tai Tapu', pp 49–50; 'Proclamation of West-Whanganui Gold Field', 14 October 1873 (Walzl, *Supporting Papers*, p 40)

57. Phillipson, *Northern South Island: Part 1*, p 210; Mitchell and Mitchell, 'Te Tai Tapu', p 50; Gillingham, 'Ngatiawa/Te Atiawa Lands', pp 207–208

58. Figure based on receipts, excluding balance, in Alexander Mackay to under-secretary, Native Department, Wellington, 4 December 1875, MD1 1883/985, ArchivesNZ (Walzl, *Supporting Papers*, pp 25–26). Mackay refers to an average figure of £38 over 13 years to 1875, but we are not clear how this figure has been arrived at: Mackay to under-secretary, Native Department, 4 December 1875, MS1 1883/985, ArchivesNZ (Walzl, *Supporting Papers*, pp 21–24).

59. Walzl, *Supporting Papers*, p 25. Walzl does not explain how these figures can be reconciled with the £10 10s said by James Mackay to have been paid to the receiver of land revenue and for the printing of licences.

surface for agricultural purposes, although Mackay and others realised that the right of lessees to ultimately purchase was one from which Te Taitapu would need to be exempted, as the right of purchase was 'a privilege the Native owners would not be inclined to concede.'<sup>60</sup>

Did Maori gain a financial benefit to set against the loss of what control they were able to exercise over the Te Taitapu goldfield prior to its proclamation? On the basis of figures published in the *Appendix to the Journals of the House of Representatives*, the average receipts from leases and licence fees between 1875 and 1882 inclusive seems to be not much more than £33 per annum.<sup>61</sup> This is close to the figure for the earlier period. Dr Phillipson notes that the lease arrangements and royalty payments of a coal mining company, which was also operating in the area, are not included in the *Appendix* goldfield reports, so receipts on a comparable basis to those for the period from 1862 to 1873 may have been somewhat higher. Against this, there were apparently no receipts or payments in 1874.<sup>62</sup> It seems, therefore, that whether the field was under a high degree of Maori control or incorporated within a legally proclaimed goldfield, it was not very profitable, at least during the initial phase of mining. Dr Phillipson concludes that 'West Wanganui produced significantly less revenue than other gold fields in the South Island or Hauraki.'<sup>63</sup>

Dr and Mrs Mitchell express considerable concern about the expenditure of licence fees on roading.<sup>64</sup> Were the meagre receipts from mining activity significantly eroded by public works expenditure? As noted, Mackay recorded that £84 9d was spent on exploring and clearing tracks during the earlier period. In March 1873, Mackay claimed that Te Taitapu Maori had consented to have revenue from miners' licences spent on provision of roading for the area. The following year, a request by miners for a road was denied by the Nelson Provincial Council, on the grounds that Maori retained control over the revenue. Eventually, in 1877, the Government provided £500 for roading after Mackay argued that the gold duty from the area had added up to £1000. It appears, therefore, that the major expenditure on roading in the area did not come directly from miners' licence fees, but that the amount spent by the Government in this way was still significantly less than the revenue it had derived from the area. Moreover, the Government apparently drew significantly more revenue from the block than Maori succeeded in obtaining. By November 1879, £1500 of gold duty had been paid.<sup>65</sup>

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60. Walzl, *Land and Socio-Economic Issues*, p 84

61. Based on completed pounds in table 2 (Phillipson, *Northern South Island: Part 1*, p 211). Note that, according to Mackay's 1875 abstract B, receipts for fees and licences between 1 January and 30 September 1875 were £103 11s, whereas the 1875 figure in table 2 is £32 2s. This indicates there is an issue about the accuracy of figures used here: see Mackay, 'Abstract 3', 3 December 1875 (Walzl, *Supporting Papers*, p 26).

62. On 1874, see Mackay to under-secretary, Native Department, 4 December 1875, MS1 1883/985, ArchivesNZ (Walzl, *Supporting Papers*, p 21).

63. Phillipson, *Northern South Island: Part 1*, p 210

64. Mitchell and Mitchell, 'Te Tai Tapu', pp 60–71

65. Walzl, *Land and Socio-Economic Issues*, pp 83–87

Did its new status put the block at significantly higher risk of purchase? The idea of the purchase of the block arose several times before the land went through the Native Land Court. In June 1874, the Crown considered buying the block after pressure from the provincial government. There was further local pressure to acquire the land in 1877, 1879, and 1882. Alexander Mackay, however, repeatedly opposed the idea of the block being bought by the Crown. In 1874, he noted that:

the owners are averse to the sale, and in the second place if this difficulty did not exist the price they would be inclined to accept in consequence of it containing minerals would be far beyond the intensive value of the land for settlement, as the whole of it with the exception of a few hundred acres is entirely useless for other than mining purposes.<sup>66</sup>

Mr Walzl suggests two additional reasons for Mackay's stance. According to Mr Walzl, Mackay thought that the supposed difficulties in developing a field still in Maori ownership were 'imaginary' as the legislation gave sufficient powers to the Crown to make purchase unnecessary. He also opposed proposals that lands should be given in exchange, arguing:

The disposition that prevails with many persons in the Colony to shunt the Maori off their land as soon as it proves valuable cannot be too strongly deprecated by all who have the interests of the Natives at heart and in the case under consideration no good reason exists why an attempt should be made to do so.<sup>67</sup>

In 1879, Mackay again opposed renewed proposals to purchase the block, attributing such to 'the feeling that seems to activate persons in various parts of the colony, namely a desire to crowd the Natives out of everything that proves valuable'.<sup>68</sup> Mackay instead advocated further Government expenditure to connect the road built in 1877 with the quartz mines and to encourage more miners onto the block, pointing to the fact that the Government had received £1500 in income from the mine and spent just £500.<sup>69</sup>

Although Mackay's will prevailed in the short-term, this was a tide that he was unable to hold back. Dr Phillipson notes that an 1881 return of 'reserves' listed Te Taitapu as the only block in the South Island not classified as inalienable. As he comments, the Government had thus 'singled out the only Maori gold field in the South Island, and the only really large reserve in terms of area, as available for sale'.<sup>70</sup>

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66. Walzl, *Land and Socio-Economic Issues*, p 85

67. Mackay to Clarke, 31 August 1874, NS74/4645, in MD1 1883/985 (Walzl, *Land and Socio-Economic Issues*, p 85)

68. Mackay, memorandum, 21 November 1879, NS82/2064, in MD1 1883/985 (Walzl, *Land and Socio-Economic Issues*, p 87)

69. *Ibid* (p 86)

70. Phillipson, *Northern South Island: Part 1*, pp 212–213

### 8.2.2 The Te Taitapu hearing before the Native Land Court

The Te Taitapu block was the subject of the first hearing of the Native Land Court in Te Tau Ihu. The judge during this 1883 sitting of the court, which opened at Nelson on 15 November, was William Gilbert Mair. He had served as a major commanding a Te Arawa contingent during the New Zealand Wars and as a magistrate in Waikato, before being appointed to the bench of the Native Land Court in 1882. Like many of those who sat on the Native Land Court in the nineteenth century, he had no formal legal training. The assessor was Hoani Paraone Tunuiarangi, a Ngati Kahungunu and Rangitane leader from the Wairarapa.<sup>71</sup>

The first claim for the block was submitted in the names of 13 Ngati Rarua, one Te Atiawa (Henare Tatana), and two Ngati Tama (Huria Matenga and Paramena Haereiti). Ngati Rarua claimed the block on the basis of conquest followed by undisputed occupation. Henare Wiremu gave evidence that Ngati Rarua remained in occupation from the time of the conquest onwards, and noted whare, pa sites, cultivations, and urupa as evidence of their ongoing residence.<sup>72</sup>

When counter-claims were called for, the elderly Meihana Kereopa, who described himself as of Rangitane, Ngati Kuia, and Ngati Apa, claimed the whole area through ancestry, on the ground that his ancestors lived at Whanganui permanently. His witnesses saw the arrival of their Ngati Rarua conquerors as having happened without provocation or warning.<sup>73</sup> Hoani Mahuika, who also described himself as of the three Kurahaupo iwi, said that the conquerors 'allowed some of the conquered to live . . . If they had killed them all, they would now be able to have undisputed possession'. Some, but not all, had become slaves as a result of the conquest. They did not claim continuing occupation, even though their opponent Henare Wiremu of Ngati Rarua acknowledged that 'remains of the 3 tribes Ngatiapa, NgatiKuia & Rangitane are here'.<sup>74</sup>

Rawiri Watino of Te Atiawa from Motupipi then gave evidence of involvement in the conquest and of occupation. He declared that Te Atiawa had 'lived on the land permanently', but under cross-examination admitted that there were 'no houses on the land of ours The land belonged to Ngati Rarua'. Rihari Tahumaroa of the Puketapu hapu of Te Atiawa claimed involvement in the conquest, but said that there 'were no houses. We had to leave the land to go to war, when you took possession We never had occupation'.<sup>75</sup> Henare Wiremu denied

71. Native Land Court, Nelson, minute book 1, 15 November 1883; 'William Mair', DNZB, vol 2, pp 46–47; 'Hoani Tunuiarangi', DNZB, vol 3, p 540

72. Native Land Court, Nelson, minute book 1, 15, 16 November 1883, fols 3–4, 8–10 (Hilary Mitchell and Maui John Mitchell, comps, 'Documents Cited in Report No 13A', supporting documents to 'Te Tai Tapu', various dates (doc A25(a)), doc MS11.1a, pp 3–4, 8–10)

73. Ibid, fols 4–7, 8 (Mitchell and Mitchell, 'Documents Cited in Report No 13A', doc MS11.1a, pp 4–7, 8)

74. Ibid, fols 5, 8 (pp 5, 8)

75. Ibid, fol 7 (p 7)

that there had been Te Atiawa cultivations on the land, and asserted that a copper ore lease given by Ngati Rarua had not involved Te Atiawa in any way.<sup>76</sup>

The last witness was described in the minutes as ‘Mr Mackay, Commissioner of Native Reserves’. Alexander Mackay had witnessed the gold-related agreements with the iwi from 1862 onwards and included copies of them in his *Compendium*. In 1865, he told the Native Minister that, on the grounds that it had been reserved from general sale by Nelson hapu, Te Taitapu was ‘a reserve set aside for *all* the Natives of the Ngatirarua, Ngatiawa and Ngatitama tribes, residing in Blind and Massacre Bays’ (emphasis added).<sup>77</sup> However, when he gave evidence at the Te Taitapu hearing in 1883, he ignored the existence of the agreements that suggested a more complex distribution of rights:

Ngatitua, Ngati Rarua came here. Ngati Rarua then took possession and have held it ever since. They were in possession in 1840 & have exercised every authority since. They were also there at the time of the signing of the treaty of Waitangi. It was the Ngati Rarua who exempted this land from sale. About 1862 arrangements were made with Ngati Rarua to permit the occupation of the land for gold mining purposes. The rents have always been paid to them, together with a few of Ngatiawa.<sup>78</sup>

The judgment of the court held that it had ‘no power to reinstate’ the ‘conquered’ Ngati Apa and Rangitane. Te Atiawa ‘may have taken some part in the conquest of this particular piece of land’, it was added, although the court was ‘not quite clear’ on this point, and since Te Atiawa did not appear to have occupied Te Taitapu, and Ngati Rarua seemed to have had undisputed possession, the block was awarded in its entirety to Ngati Rarua.<sup>79</sup> The minutes state that Maori had agreed that there should be three names in the grant, ‘in trust for others’ named in a list handed in to the court. It was accordingly ordered that Henare Wiremu, Rore Pukekohatu, and Tapata Harepeka should be put into the certificate of title once an approved survey had been produced.<sup>80</sup> The certificate subsequently issued simply listed the three names, with no mention of a trust, presumably because the Native Land Court Act 1880 made no provision for land to be held in trust.<sup>81</sup>

Under section 47 of the Native Land Act 1873, the names of all persons found to be the customary owners of land were to be recorded in a memorial of ownership. The Native

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76. Native Land Court, Nelson, minute book 1, 15, 16 November 1883, fols 8–9 (Mitchell and Mitchell, ‘Documents Cited in Report No 13A’, doc MS11.1a, pp 8–9)

77. Alexander Mackay to Native Minister, 6 December 1865 (Phillipson, *Northern South Island: Part 1*, pp 204–205)

78. Native Land Court, Nelson, minute book 1, 16 November 1883, fols 10–11 (Mitchell and Mitchell, ‘Documents Cited in Report No 13A’, doc MS11.1a, pp 10–11)

79. Native Land Court, Nelson, minute book 1, 24 November 1883, fol 67 (Mitchell and Mitchell, ‘Documents Cited in Report No 13A’, doc MS12.1c, p 1)

80. *Ibid*, fol 68 (p 2)

81. Native Land Court, certificate of title for Te Taitapu, 24 November 1883 (David Alexander, comp, supporting documents to ‘Reserves of Te Tau Ihu’, 10 pts, various dates, pt 8 (doc A60(h)), pp 5513–5516)

Land Court Act 1880 resulted in a change of nomenclature, with certificates of title now being used to record the names of all those determined by the court to be entitled to be registered as owners. However, under section 70 it was to have the same force and effect as a memorial of ownership. Those on the list handed in to the court clearly should have been included on the certificate of title in the absence of any trust mechanism. Instead, they were effectively disinherited of their interests, in a manner not too dissimilar to the way that many Maori had fallen victim to the '10-owner rule' under the system in place prior to 1873.

The successful claimants did not ask for restrictions on the alienability of the land, perhaps because they needed to sell it. Nor is there any indication from the minutes that Judge Mair sought to determine if restrictions were necessary, even though section 36 of the 1880 Act required the court to inquire into the propriety of restrictions on alienability in every case, and even though the most cursory of inquiries would have confirmed the pressing need to impose such restrictions in this instance, given the paucity of other lands remaining to the owners of Taitapu.<sup>82</sup>

### 8.2.3 The sale of Te Taitapu

As indicated in section 8.2.1, the difficulties in overseeing the licence revenues, the transfer of real authority over the land to the Government in 1873 and the failure of the field to generate much in the way of revenue in the absence of interest of miners or miner's companies made it understandable that some Maori chose to take an immediate profit in place of what Dr Phillipson describes as 'a pitiful amount of rent' from leases.<sup>83</sup> By 1879, gold to the value of £10,000 had been taken from Taitapu, reaping some £1500 in duty for the Government (of which only a third was reinvested in providing facilities for the area). Meanwhile, income to the owners (or at least some of them) was lucky to break £30 some years. Judged in this light, there is perhaps a sad sense of inevitability about the subsequent sale of Taitapu. While there is some evidence of settler hostility to continued Maori occupation of the block, we agree, however, with Mary Gillingham that there is some difficulty in accepting Dr and Mrs Mitchell's position that this was a 'forced sale', except perhaps in an economic sense.<sup>84</sup> Nonetheless, we note Dr and Mrs Mitchell's view that the goldfield arrangements had 'effectively alienated Te Tai Tapu from Maori ownership long before the formality of the 1884 sale.'<sup>85</sup>

The 1896 reminiscences of Henry Moffat, a storekeeper at Anatori (near the mouth of the Anatori River) around the time of the court case, suggest that the offer to purchase that

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82. Phillipson, *Northern South Island: Part 1*, p 215

83. *Ibid*

84. Gillingham, 'Ngatiawa/Te Atiawa Lands', pp 209–210

85. Hilary Mitchell and Maui John Mitchell, 'Comments on Ballara Report', brief of evidence on behalf of Ngati Tama, 28 February 2003 (doc K33), p 27

resulted in the sale of the Taitapu block soon after the Native Land Court sitting may have occurred prior to the investigation of title, although the evidence on this point is far from overwhelming. There are suggestions, for instance, that the block might first have been offered to the Government soon after the hearing, upon the urging of the Collingwood County Council.<sup>86</sup> The point is not an unimportant one, however, given that section 8 of the Native Land Laws Amendment Act 1883, which came into force in September of that year, made negotiations to buy land a criminal offence for parties other than the Crown until 40 days after the title had been ascertained. Yet, despite such legal niceties, the April 1883 report of the warden of the goldfields at Collingwood appears to take it for granted that the 'West Wanganui' area would 'pass into the hands of private individuals', so it is difficult to know at what point the successful negotiations did occur.<sup>87</sup>

Te Taitapu was bought by a syndicate of prominent Wellington businessmen in the name of the solicitor Alfred De Bathe Brandon junior after the time available for a rehearing application had passed. The certificate of title for the block notes that the Native Land Court inquired into the transfer and found that it was a bona fide transaction on 9 June 1884, confirming the sale a few months later. A purchase price of £10,000 was paid to the owners, though whether this was to be shared with those for whom they were acting as informal 'trustees' does not appear to have concerned the court. JH Barne considers that the purchase was purely an investment, as Brandon did not get a report made on the potential of Te Taitapu until 1888, and quartz mining seems to have been unaffected by the change of ownership.<sup>88</sup>

How much of a loss was Te Taitapu to Maori? Clearly, Maori lost potential income from the goldfield, although this had proved fairly minimal for two decades. Dr Phillipson considers that, although the Government had a legal right to lease land in the goldfield to Pakeha farmers, most of Te Taitapu was still available before the sale to provide Maori with traditional food sources. He notes that by the 1880s new ways of exploiting the resources of Te Taitapu were emerging for those with the requisite capital and ability. Te Taitapu was, in the estimation of Dr Phillipson, the only area of Maori land in Te Tau Ihu large enough for its timber to be exploited on a sustainable basis. This, together with its mineral resources, made its sale a significant blow to efforts to develop a modern economic base, over and above the loss of traditional economic resources. Some of this blow might have been cushioned had reserves been set aside within the block. But none ever were, nor were any required at the

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86. Mitchell and Mitchell, 'Documents Cited in Report No 13A', doc MS9.16, p 2; Mitchell and Mitchell, 'Te Taitapu', p 79; Barne, 'History of Taitapu Estate', p 49

87. Warden Gibbs to Under-Secretary for Gold Fields, 16 April 1883, AJHR, 1883, H-5, p 26 (Mitchell and Mitchell, 'Documents Cited in Report No 13A', doc MS13.1(b), p 2)

88. Barne, 'History of Taitapu Estate', pp 49-50; David Alexander, 'Reserves of Te Tau Ihu (Northern South Island)', 2 vols, report commissioned by the Crown Forestry Rental Trust, 2000 (doc A60), vol 2, p 528; Alexander, supporting documents to 'Reserves of Te Tau Ihu', pt 8, p 5516

time of alienation under the Native Land Act 1873, under which Alexander Mackay, a newly appointed judge of the court, confirmed the sale.<sup>89</sup> Given that officials had acknowledged since the early 1860s the inadequacy of the remaining Maori land base in Te Tau Ihu, the casual manner in which Te Taitapu was allowed to slip out of Maori ownership suggests a reckless disregard for the welfare of Maori at best. This stands in stark contrast to the determined manner in which local Maori had successfully opposed the sale of the block in the 1850s and again during much of the period in which it remained under Crown control as a proclaimed goldfield after 1873.

Against this, Dr Phillipson sets the £10,000 that Maori received for the block, although he notes that as the block was sold again 10 years later for £25,000 with no significant improvements, the price Maori received was ‘probably a lot less than it was worth.’<sup>90</sup> We would also note Premier Seddon’s comments to the House of Representatives in 1896, when he observed with respect to the Taitapu block that:

More recently, owing to the mining revival, and gold and payable quartz being found on the lands, it was sold, I believe, for £100,000; and, taking the latest quotations, its value is estimated, on the value of the shares, at about £300,000, and by some at nearly half a million.<sup>91</sup>

However, JH Barne, in a report completed for the New Zealand Forest Service in 1986, cited one 1942 Lands and Survey Department report that suggested the block had been sold in 1895 for £25,000, along which a much earlier (1911) statement from the lawyer acting on behalf of the company which had bought the block giving a figure of £110,000.<sup>92</sup> We are not in a position to establish the correct amount. Clearly, however, it was substantially more than Maori received for the same land a decade previously. Moreover, the payment made to Maori in 1884 may have benefited only the small number of owners, excluding a large proportion of Ngati Rarua, as well as those from other iwi not included in the title.<sup>93</sup> Janice Mason’s evidence for Ngati Tama, made available to the Tribunal by her daughter, was that there was no involvement of other iwi. Taitapu, she believed, ‘was sold without consultation by Ngati Rarua.’<sup>94</sup> We note, of course, that the iwi of Ngati Rarua was equally disempowered – the sale was made by the three individuals empowered by the court.

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89. Phillipson, *Northern South Island: Part 1*, p 216. The 1880 Act dealt with investigation of title, not alienation of land. The 1873 Act provided a general system of reserves for Maori that was very rarely implemented, but it imposed no requirement for judges to investigate the need for reserves at the point of sale in the part of the Act relating to sale of land (ss 59–61). The interests of owners not wishing to sell could be partitioned out (s 65), although no such owners were involved here.

90. Phillipson, *Northern South Island: Part 2*, pp 26–27

91. Richard Seddon, 29 September 1896, NZPD, 1896, vol 96, p 308

92. Barne, ‘History of Taitapu Estate’, pp 53–54

93. Walzl, *Land and Socio-Economic Issues*, p 143

94. Leanne Manson, brief of evidence on behalf of Ngati Tama, 28 February 2003 (doc K39), p 3

**8.2.4 Legal submissions on Te Taitapu**

We look first at claimant submissions relating to both gold mining and land court issues, before turning to the Crown's submissions.

**(1) Claimant submissions**

Claimant submissions include concern about ownership of gold; issues surrounding the 1862 agreement; the subsequent administration of the goldfield at Te Taitapu; the way in which customary rights in the block were treated by the Native Land Court in 1883, with particular reference to the 1840 rule; and the alienation of the block so quickly afterwards.

Counsel for Ngati Rarua referred to the agreement made between the Crown and Ngati Rarua when gold was first discovered and the formal bringing of Te Taitapu under gold-mining regulations during the 1870s as matters that were in accordance with Ngati Rarua's wishes. However, counsel submitted that after the initial agreement, Crown administration in the 1860s was contrary to Ngati Rarua wishes and financially inefficient, and that in the 1870s, the Crown failed to provide roads 'in a timely and efficient manner'.<sup>95</sup> He further submitted that, after the initial agreement with the two rangatira in 1862, James Mackay insisted on formal recognition of other iwi interests despite the protest of Ngati Rarua, who saw the land as theirs and considered it their right to distribute the money to other right holders as they saw fit. In all, counsel submitted that the administration of gold-mining regulations at Te Taitapu provided little benefit for Ngati Rarua owners, and that this made alienating the land the 'only practical choice at a time when economic conditions had generally deteriorated for all Te Tau Ihu Maori'.<sup>96</sup>

Counsel for Ngati Tama included Te Taitapu in the list of blocks about which Ngati Tama witnesses have concerns, such as individualisation of title, in the context of counsel's more general discussion of the operations of the Native Land Court.<sup>97</sup> In terms of gold and minerals, counsel highlighted a number of key concerns, including:

- ▶ the Crown appropriation of the ownership of gold (and other minerals) in western Te Tau Ihu, especially at Motupipi, Pakawau, West Whanganui (Te Taitapu), and Parapara, and an associated failure to recognise Maori ownership;
- ▶ the process behind and the terms of cession agreements that were used to open up goldfields;
- ▶ the subsequent Crown administration of goldfields, including the failure of the Crown to investigate complaints; and
- ▶ Crown acquisition of the freehold underlying goldfields.<sup>98</sup>

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95. Counsel for Ngati Rarua, closing submissions, 5 February 2004 (doc T6), pp 169–170

96. Ibid, p 173

97. Counsel for Ngati Tama, closing submissions, [2004] (doc T11), pp 86–88

98. Ibid, p 102

In closing submissions, counsel for Te Atiawa summarised the history of the goldfield at Te Taitapu and the 1883 judgment, and stated that ‘Te Keha’s claims to Turimawiwi were recognised through the court’s upholding of Ngati Rarua’s claim.’<sup>99</sup> This is presumably because a member of the Te Keha family was included on the original Ngati Rarua list. Nevertheless, counsel for Te Atiawa has asked for findings that the iwi had mana whenua interests in Te Taitapu and that the Crown breached the principles of the Treaty by:

- ▶ not directly acknowledging the interests of Te Atiawa in Taitapu;
- ▶ forcing them to abandon their claim to Taitapu block by withholding payments due to the owners;
- ▶ seizing ownership of the block in 1883; and
- ▶ failing to correct the omission of Te Atiawa as owners of part of the Taitapu block after the Native Land Court excluded Te Atiawa.<sup>100</sup>

Counsel for Ngati Kuia included Te Taitapu in the list of areas about which there is concern over the investigation into customary title. It was submitted that the Te Taitapu judgment ‘applied the 1840 Rule and Ngati Kuia’s claims were denied’, and that immediately thereafter the whole block was sold.<sup>101</sup> Counsel also submitted that the alienation of Te Taitapu was part of the prejudice suffered by Ngati Kuia as a result of various Treaty breaches linked to the Native Land Court.<sup>102</sup>

Counsel for Ngati Apa submitted that in the Te Taitapu case, Judge Mair adopted ‘the so-called 1840 Rule that whoever was in control through conquest at 1840 was the sole customary owner’. Counsel further submitted that this is contrary to what is now accepted as the true nature of customary rights as between conquering and conquered iwi in the initial period after raupatu, and that this denied Ngati Apa a proper recognition of their Treaty entitlements in this area.<sup>103</sup> It was further submitted that the blunt dismissal of Ngati Apa’s claim to Te Taitapu in 1883 led iwi leaders to downplay their Ngati Apa connections when the Nelson tenths case was considered in 1892, producing ‘disastrous’ results for the iwi, including their exclusion from their proper entitlement to a share of the tenths reserves.<sup>104</sup>

## (2) *Crown submissions*

The Crown made no specific submissions on Te Taitapu with respect to either gold mining or the Native Land Court. However, the Crown does state that, between 1840 and 1860, there appear to have been Ngati Rarua and Te Atiawa interests in Te Taitapu.<sup>105</sup>

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99. Counsel for Te Atiawa, closing submissions, 10 February 2004 (doc T10), p182

100. Ibid, pp182–183

101. Counsel for Ngati Kuia, closing submissions, 17 February 2004 (doc T14), pp 65–66

102. Ibid, p 67

103. Counsel for Ngati Apa, closing submissions, 2004 (doc T3), pp 23–24

104. Ibid, pp 24–25

105. Crown counsel, closing submissions, 19 February 2004 (doc T16), pp 26–27

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The Crown also made a generic submission that the policy and legislation governing the court's operation were not deficient in terms of the ability the court had to inquire adequately into customary rights, and that the actual operation of the court was a different issue, generally not within the jurisdiction of the Tribunal.<sup>106</sup> In terms of the issues of individualisation of title, there was a further Crown generic submission that the fact that the court issued title to Maori individuals does not mean that its policy and legislation prevented the court from inquiring into customary rights and tino rangatiratanga. The Crown also submitted that Crown policy and legislation enabled the court to determine 'title succession and beneficial ownership', and that one of the outcomes of its operations was to create transferable rights in land. However, the Crown submitted that this does not necessarily reveal a Treaty defect in its policy or legislation, because on the one hand, Treaty guarantees and the duty of active protection can apply while Maori wanted to retain their land and valued possessions while, on the other hand, Maori as British subjects were entitled under article 3 to alienate their land interests if they so chose.<sup>107</sup>

**(3) Tribunal comment on gold mining at Te Taitapu**

The first main set of issues arises from the interaction between Maori and the Crown over gold mining at Te Taitapu. These issues include the question of who owned the gold, the appropriateness of the 1862 agreement, the subsequent administration of the goldfield, and the extent to which Maori were enabled to benefit from it. Although counsel for Ngati Rarua and Ngati Tama touched on Golden Bay more generally in their closing submissions, we confine our comments to the arrangements made specifically with respect to Te Taitapu.

Counsel for Ngati Tama has complained about Crown appropriation of ownership of gold (and other minerals), but, in practice, the Crown did not actively assert its prerogative during this period. That right was read back into earlier actions, back into the Treaty as having been carried with kawanatanga, into the separation of mining revenues and gold duties, and between access and ownership. It was not discussed with Maori at the time, was never explicitly stated with reference to Maori lands; nor was it ever renounced. To the contrary, mining statutes on occasion made the general statement that it was preserved, but it was not until the twentieth century that legislation was passed explicitly stating that gold, silver, and other precious metals were the property of the Crown wherever they might be found.

Nor did the requirement to pay gold duty constitute an assertion of ownership on the part of the Crown. The Gold Duty Act 1858, which introduced a levy of two shillings sixpence per ounce of gold exported from New Zealand, made no reference to the royal prerogative or to ownership of gold, and merely declared in its preamble that it was deemed 'expedient to levy a Duty upon Gold exported from New Zealand'. The Colonial Secretary,

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106. Crown counsel, submissions concerning generic issues, 20 September 2002 (paper 2.371), p 42

107. *Ibid*, pp 42, 81

Edward Stafford, noted in introducing the Bill to the House of Representatives that it had been prompted by the need to meet ‘additional expenses . . . incurred for the protection and management of the goldfields.’<sup>108</sup> It was, in other words, merely another form of taxation, though one in which the revenue was intended to be channelled more or less directly back into the administration and development of the goldfields.

Even though the Crown did not directly assert its right to gold, its officers took steps to ensure that it was not impinged upon. The Native Land Purchase Ordinance 1846 was seen (among other things) as preventing Maori from dealing directly with Pakeha to allow mining on their customary lands, and this arguably made it significantly more difficult for Maori to benefit from the discovery of this new resource, as well as allowing the Crown to interpose itself in the relationship between landowner and miner. James Mackay organised the Te Taitapu mining agreement of 1862 in great haste, without involving either a wider Ngati Rarua group or any other iwi that considered that it had rights in the land. He then resorted to breaking the terms of the agreement in order to get Ngati Rarua to negotiate with other iwi, provoking tensions that might have been avoided had he taken care in his initial negotiations. We consider this process to have been deeply flawed, and even though the agreement was shored up by the pan-tribal hui of the following year, there is no evidence of further negotiation before the field was brought formally into the Crown’s control some 10 years later.

Figures for receipts from gold mining at Te Taitapu are problematic. However, despite the fact that Maori effectively had an opportunity to try to administer the goldfield in the later 1860s and early 1870s, they never drew significant income from it either then or after the 1873 Crown proclamation that brought a much higher level of Crown control. The reasons for this remain unclear, although the large number of miners who simply refused to pay the fee were undoubtedly encouraged in their stance by the absence of any authorised Crown agent in the district. In this respect, the Government does not seem to have seriously supported the efforts of local Maori to administer the Taitapu goldfield by granting them the appropriate powers to do so. We note, too, that the Crown appears to have been reluctant to spend money on the goldfield whilst it remained in Maori ownership. Significantly less was spent on roading infrastructure than was received in gold duty. Moreover, it appears that the Crown was drawing significantly more revenue in gold duty from the area than Maori were gaining from income such as miners’ licences. These factors, along with the almost total loss of control of Taitapu after its formal proclamation as a goldfield in 1873, are likely to have contributed to the willingness of Maori to alienate the block soon after the 1883 hearing, notwithstanding their earlier determined efforts to retain the land.

Yet, even after the sale of Taitapu to private interests in 1884 the right of the former owners to any gold or other minerals found in the land might have continued unless these had

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108. Legislative Council, 27 July 1858, NZPD, 1858–60, p 53

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also specifically been included in the deed of cession. Premier Seddon admitted as much in 1896, informing Parliament specifically that:

If the Natives who previously owned Taitapu, and other Natives, have the same prerogative right as is contended for them, and those rights did not pass to Her Majesty at any time notwithstanding the Treaty of Waitangi, then I say, if this contention be sound, these Royal minerals still vest in the Natives, because on their sale of land they were not specially mentioned, and, not being specially mentioned, did not pass to the purchasers of the land.<sup>109</sup>

Seddon strongly opposed any notion that Maori had retained such rights – and indeed his comments here, as the Hauraki Tribunal explained, were largely intended to silence those who argued that the private purchasers of Maori lands acquired any rights to gold formerly held by Maori.<sup>110</sup> Nevertheless, the comments do bring into sharp relief the complex issues pertaining to the actual ownership of the gold. Those issues were fully traversed in the *Hauraki Report*, and we see no need to revisit them here. Suffice it to state that the Hauraki Tribunal concluded that the assertion of the royal prerogative over gold and silver was not, of itself, in breach of the Treaty, taking into account the balance between article 1 and 2 rights. The Hauraki Tribunal found itself ‘sympathetic’ to the Crown’s argument that there are good reasons why precious resources should be under public ownership or control, whilst noting that this sympathy was tempered somewhat by the preferential regime applying to the management of goldfields on private non-Maori land as against Maori land. On the other hand, it noted that Maori claims to ownership were undermined by the fact that ‘gold was manifestly not a traditional taonga’ as at 1840.<sup>111</sup>

In our view, however, the particular circumstances of Te Tau Ihu at the time of the discovery of gold, combined with the right of development inherent in the Treaty, both warrant a different conclusion in this case. For one thing, the whole concept that the ‘real payment’ for the alienation of much of Te Tau Ihu prior to 1862 would come from the enhanced value of the lands and resources retained was only capable of fruition if Maori were permitted to reap the benefits of their retention of such resources. Nor is it apparent that in agreeing to transact their lands with the Crown Te Tau Ihu Maori had confined their claims to a share of the future prosperity held out to them only to those items valued as traditional taonga as at 1840. Indeed, as we have seen in previous chapters, although there were certainly other factors behind the large-scale purchases of the 1850s, one of the foremost incentives for Maori to enter into these was their desire to engage with the new colonial economy and to benefit from its introduction to their rohe.

That hope or expectation has received support now from a number of different Tribunal reports, where a right of development has been recognised. Maori Treaty rights, it was

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109. Richard Seddon, 29 September 1896, NZPD, 1896, vol 96, p 309

110. Waitangi Tribunal, *Hauraki Report*, vol 2, pp 542–543

111. *Ibid*, pp 549–550

noted in the *Ngai Tahu Sea Fisheries Report 1992*, 'are not frozen as at 1840'. The Treaty was all about the future and 'there would be developments that could not have been foreseen or predicted at that time'.<sup>112</sup> A similar viewpoint was recently expressed by Judge Kirby of the High Court of Australia, when he ruled in favour of a broad definition of Aboriginal mineral rights on the basis that 'it would be a mistake to ignore the possibility of new aspects of traditional rights and interests developing as part of Aboriginal customs not envisaged, or even imagined, in the times preceding settlement'.<sup>113</sup> Support for such a viewpoint is also apparent in North America, including the United States, where the royal prerogative is not asserted and Native American rights to mineral resources have long been accepted, and Canada, where increasing acceptance of indigenous rights to sub-surface resources has been shown in recent decades, notwithstanding the earlier application of the prerogative right of the Crown.<sup>114</sup>

Perhaps the most well-known local expression of this argument came in 1937, when Sir Apirana Ngata famously observed during the debate on the Petroleum Bill then before Parliament:

Did the Maori know there was oil under their lands when they signed the Treaty of Waitangi in 1840? No. Nor did they know there was gold or coal under their land, or that the timber which grew on their lands had a greater value than for making canoes and carvings for their houses, and so on. Is the argument now, that, because the poor savage was ignorant in 1840 of the things that have been made possible by the pakeha, he is to have no benefit or advantage for them today? If so, it will not hold water.<sup>115</sup>

We also have some sympathy for the argument that precious metals should be regulated by the Crown, but it does not automatically follow that such regulation necessarily required Crown ownership of the metals concerned. Although gold duty was not, strictly speaking, premised on Crown ownership, we consider that an equitable sharing of any such sums earned from the Taitapu goldfield but not reinvested in local infrastructure with the owners of the block might have provided an appropriate level of recognition of Maori interest in the gold itself. In the case of Taitapu, where some £1500 in gold duty had been reportedly collected by 1879, but just £500 reinvested in local roading, we consider the customary owners of the block were entitled to receive at least half of the £1000 balance remaining. That payment should, in our view, have continued after the licence fees intended to cover

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112. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992* (Wellington: Brooker and Friend Ltd, 1992), p253. These comments were endorsed in the *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (Wellington: Brooker and Friend Ltd, 1993), p22.

113. *State of Western Australia v Ward, Attorney-General of the Northern Territory v Ward, Ningarmara v Northern Territory, Ward v Crosswalk Pty Ltd* [2002] HCA 28, para 574 (Waitangi Tribunal, *Hauraki Report*, vol1, pp265–266)

114. Ward, *National Overview*, vol2, pp287–288

115. Sir Apirana Ngata, 6 December 1937, NZPD, vol249, p1044

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access ceased to be paid to Maori after 1884, when the block passed into non-Maori private ownership.

Nor do we consider this an unrealistic expectation. As the debate over the provision of roading revealed, officials knew only too well how much revenue the Crown had derived from the Taitapu goldfield and how much of this had been reinvested in the district. Alexander Mackay had noted in 1879 that the owners of Te Taitapu received a minimal income from the presence of the goldfield on their land. Taking into account surrounding circumstances, including the paucity of other lands remaining in Maori ownership in the district and the absence of alternative economic opportunities available to the owners of Te Taitapu, it would not have required a great leap of imagination to have devised a system whereby surplus gold duty was shared with Maori. That something along these lines did not happen suggests that Crown officials remained more concerned with the development of the goldfield than they did the delivery of the economic opportunities held out to Te Tau Ihu Maori at the time of the earlier Crown purchase programme.

**(4) *Tribunal comment on the Native Land Court Te Taitapu judgment***

Issues related to the Te Taitapu judgment include the court's interpretation of customary tenure, particularly the exclusion of Kurahaupo iwi from the title and the question of individualisation of title; the court's heavy reliance on the questionable testimony of Alexander Mackay, along with its failure to ensure that other steps to safeguard owners were followed; and the failure of Ngati Tama to put forward a specific case.

One major issue raised by this judgment is the complete exclusion of Kurahaupo iwi from the land. The 1840 rule is discussed further in section 8.6. Here, we touch on specific matters related to Te Taitapu. The court clearly relied heavily on raupatu in finding that it had no power to 'reinstate' Rangitane and Ngati Apa (and, although not directly mentioned in the judgment, by implication Ngati Kuia). Mr Armstrong is critical of the court for ignoring evidence questioning the extent of the conquest in terms of Maori customary law, and other evidence that some people from these tribes had remained on the land. He suggests that a more generous acknowledgement of the rights of so-called conquered Maori would have been more in accordance with tikanga, but also inexpedient, in terms of making purchasing the land more difficult.<sup>116</sup> Miriam Clark, although writing for Ngati Tama, observes that at Te Taitapu Ngati Apa 'lived alongside the newcomers with a degree of freedom and autonomy', and specifically links Puaha Te Rangi of Ngati Apa with Te Taitapu in this context for the period of the conquest and the early occupation period.<sup>117</sup> Dr Angela Ballara considers that the documentary evidence is 'insufficient' and the number of Ngati Apa survivors at

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<sup>116</sup>. Armstrong, 'Right of Deciding', pp 159–160

<sup>117</sup>. Miriam Clark, 'Ngati Tama Manawhenua ki te Tau Ihu (The Manawhenua Report)', report commissioned by the Ngati Tama Manawhenua ki te Tau Ihu Trust in association with the Crown Forestry Rental Trust, 1999 (doc A47), p 41

Te Whanganui too low to allow a ‘positive judgement’ to be made today, but she considers that it is a ‘likely scenario’ that there may have been a residual Ngati Apa presence in the area that could have been seen as conferring customary rights.<sup>118</sup> Henare Wiremu of Ngati Rarua’s statement in the Te Taitapu case that remnants of the three Kurahaupo iwi ‘are here’ supports this position.

As regards the issue of individualisation of title by the court, the Turanganui a Kiwa Tribunal has described the creation of a system of individually tradable rights in customary Maori land as a breach of the guarantee of tino rangatiratanga in article 2 of the Maori text of the Treaty. This promised tino rangatiratanga with respect to whenua (land) to all three levels of right holders in Maori society: ‘ki nga rangatira, ki nga hapu, ki nga tangata katoa’ (‘to the chiefs, hapu, and all the people’). The Turanganui a Kiwa Tribunal argued that the individualisation system took away the rights of the first two groups.<sup>119</sup> This argument seems applicable to Te Taitapu, where three people were put on the certificate of title and were able to alienate the land. This is especially the case since there was specific mention of a trust for a larger number of people. Issues relating to the principle of equity also arise. Although the law allowed a consortium of Pakeha business men to purchase the Taitapu block, it did not sanction similar corporate ownership by Maori in the shape of tribal titles. The absence of such a title, along with the fact of Taitapu being vested in a small handful of owners and the prior Crown claims to control of the goldfield, all made the rapid alienation of the block once it had passed through the Native Land Court all the more likely.

A further significant issue is the role played by Alexander Mackay as a witness in this case. Dr Phillipson states that the court ‘seems to have relied largely on his testimony’. We have previously noted a number of instances in which Mackay witnessed documents referring to, or himself referred to, the rights of iwi other than Ngati Rarua only in this land. Dr Phillipson concludes with respect to Mackay’s failure to acknowledge the existence of interests held by Ngati Tama and Te Atiawa, that this ‘may have amounted to suppression of evidence.’<sup>120</sup>

It is true that Mackay did conclude his evidence by saying that rents had been paid to Ngati Rarua ‘together with a few of Ngatiawa’. The judge, although expressing lack of clarity about Te Atiawa’s role in the initial conquest, did not explore Mackay’s passing reference further, and subsequently dismissed a claim from Henare Tatana, whose family had occupied some of Te Taitapu, without hearing him. He does not seem to have inquired as to why Ngati Rarua had included one Te Atiawa and two Ngati Tama on their original list. However, Dr and Mrs Mitchell demonstrate at length that those named on the Ngati Rarua list were

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118. Dr Angela Ballara, ‘Customary Maori Land Tenure in Te Tau Ihu (The Northern South Island), 1820–1860: An Overview Report on Te Tau Ihu (Wai 785)’, report commissioned by the Crown Forestry Rental Trust, 2001 (doc D1), p 284

119. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 446

120. Phillipson, *Northern South Island: Part 1*, p 214

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either party to the 1863 agreement regarding respective rights at Taitapu or the children of a person named in James Mackay's July 1863 letter relating to the settlement.<sup>121</sup> Yet, given the inability of the Native Land Court to establish the trust mechanism requested by the successful claimants, and the subsequent issuing of a certificate of title for the block to three Ngati Rarua rangatira, the inclusion of Te Atiawa and Ngati Tama persons in the longer list of those for whom the block was to be held in trust proved nugatory.

Dr Ballara attributes the lack of a specific Ngati Tama case to the alleged agreement by Ngati Tama to leave Te Taitapu for Ngati Rarua in return for Ngati Rarua similarly agreeing to forgo any claims to Wakapuaka. This was the agreement referred to by James Mackay in 1862. However, Dr Phillipson states that this agreement was made between unknown Ngati Tama at Wakapuaka and Ngati Rarua, and he suggests that the status of those Ngati Tama who were actually resident at Te Taitapu, and who were very close relatives of Ngati Rarua, may not have been affected.<sup>122</sup> In any event, as Dr Phillipson adds, any such agreement required the issuing of Crown grants if it was to have any serious effect. The failure of the Crown to issue these allowed the matter to be reopened in the Native Land Court, where (as we shall see in section 8.4) the claims of Ngati Tama as an iwi to Wakapuaka were rejected. If they had indeed refrained from claiming a share of Te Taitapu in return for a clear title to Wakapuaka then they had gained nothing by doing so. It hardly needs to be pointed out, on the other hand, that such customary arrangements stood more chance of being recognised had Maori been left to determine land titles themselves, with the support of the Crown, as ought to have been the case under a system of land-title adjudication taking cognisance of the Treaty.

The apparent victors in the Te Taitapu hearing were Ngati Rarua. Yet, Dr and Mrs Mitchell claim that none of the three names finally selected for inclusion in the certificate of title were of the influential Turangapeke line, and that none of these three Ngati Rarua had resided for a long period at Te Taitapu. This may have facilitated sale of the block.<sup>123</sup>

All in all, Dr Phillipson considers that the Te Taitapu judgment both interpreted custom in a narrow way, and also operated on a basis of the situation at 1840 and at 1883, without looking at the significant transactions in relationship to the land in the intervening period.<sup>124</sup> Dr Ballara considers that on the basis of the evidence given in court, the court evaluated the case correctly, 'in accordance with customary tenure', because only Ngati Rarua were able to show continued occupation after 1840, as well as a prolonged history of interacting with Crown officials, during which they were acknowledged as owners of Te Taitapu. On the other hand, she is also critical of what she sees as an 'attenuated and insufficiently

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121. Mitchell and Mitchell, 'Te Tai Tapu', pp 85–90, 92–93

122. Phillipson, *Northern South Island: Part 1*, p 26

123. Mitchell and Mitchell, 'Te Tai Tapu', p 94

124. Phillipson, *Northern South Island: Part 1*, p 214

thorough process, with too little cross-examination of, and too few witnesses for, the counter-claimants.<sup>125</sup> The Te Taitapu hearing thus involved both questionable testimony from a representative of the Crown and a lack of thoroughness on the part of the judge. Judge Mair apparently failed to obtain sufficient evidence before arriving at his judgment, failed to ensure that all relevant names were placed on the certificate of title, and failed to investigate the need for restrictions on alienation.

Was it in fact open to Judge Mair to cast his net more widely than he did in 1883 in search of the evidence necessary for him to make an adequate decision into 'Native custom and usage'? Did Crown policy and legislation provide the court with sufficient powers and procedures to gather the evidence necessary to establish who held customary rights and tino rangatiratanga in any given area? And was the court itself the appropriate body to do so?

The 1880 Act gave the court latitude to inquire more widely than an ordinary court, since section 23 provided that the court was to establish the facts 'by such evidence as it shall think fit (whether admissible in a court of ordinary jurisdiction or not)'. Furthermore, under section 15 of the 1880 Act, the court had power to compel both the attendance of witnesses and the production of documents. Moreover, the court under section 24 of the 1880 Act was not compelled to decide upon the title to land. It also had the option of dismissing cases, or making 'any other order'. In the case of Te Taitapu, the court in its judgment indicated that it was not wholly clear about the status of Te Atiawa. It could, in such a case, presumably have chosen to inquire into it further and, if it still remained unclear, to dismiss it. Instead, Judge Mair opted to give a judgment in a situation of what he knew to be less than perfect information. It would therefore appear that the failure of the court to consider all relevant evidence was to a considerable extent the responsibility of the judge rather than of the legislation itself.

Nevertheless, the court allowed itself to be unduly influenced by the questionable testimony of Crown agent Alexander Mackay, who was at best less than forthcoming in his evidence and at worst actively suppressed information highly pertinent to the case. Te Atiawa and Ngati Tama interests were therefore minimised and the claims of the Kurahaupo tribes dismissed entirely, notwithstanding some acknowledgement of their ongoing presence in the district on the part of Ngati Rarua. Whilst we are of the opinion that Ngati Rarua were entitled to the largest share of Taitapu, we also consider it more than likely that all of these other groups would have been acknowledged to some extent in any system operating according to tikanga (subject to whatever arrangements Ngati Tama and Ngati Rarua may or may not have come to regarding respective rights at Te Taitapu and Wakapuaka). The absence of such a forum, and the imposition of the Native Land Court in its place, is a matter which rests squarely with the Crown.

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125. Ballara, 'Customary Maori Land Tenure', pp 282–284

**(5) Tribunal findings**

We find with reference to gold resources that the Crown breached the Treaty and its duty to act in good faith by the means it employed to gain access to the gold resources at Te Taitapu and by its subsequent taking of complete control of those resources in 1873.

At that date, the Crown relied upon the deed of cession negotiated by James Mackay in 1862 as giving it authority to proclaim the land as a goldfield under the Gold Fields Act Amendment Act 1868. Yet, that initial agreement was seriously flawed in terms of the consent gained and by Mackay's means of proceeding.

In the first instance, the agreement had involved only two Ngati Rarua rangatira, even though Mackay knew that others also claimed rights in the area. In the following year, Mackay withheld the fees due to the two signatory chiefs for their distribution, arguing that this step was necessary to prevent tensions developing with Te Atiawa and Ngati Tama. We agree with claimant submissions that Mackay's failure to properly secure the consent of the resident hapu of the district had promoted those tensions. Mackay was able to pressure Riwai Turangapeke and Pirimona Matenga Te Aupouri into reaching an accommodation with Te Atiawa and Ngati Tama. Te Atiawa and Ngati Tama agreed to allow the licence fees to go to Ngati Rarua if specific areas were exempted from the arrangement. But no further investigation of title had taken place, nor had there been further negotiations in the interim. This fell well short of standards of informed consent and is more especially problematic when the arrangements were not reflected in the later Native Land Court determination.

Since the Crown made no assertion at the time of its right to 'gold, silver and precious metals' under the law, either by means of the royal prerogative or under statute, we do not find in favour of the allegation that the Crown appropriated the ownership of gold in these particular lands. By the time that the Crown did make that claim and enacted wider powers to control the development of precious minerals, the entire freehold of Te Taitapu had already passed out of Maori ownership. We note, however, that a subsequent process of statutory assertion of Crown's ownership of gold wherever it was found in the lands of New Zealand has been without any prior negotiation of consent with Maori.

We agree with the Hauraki Tribunal that a reasonable case can be made for the need for Crown regulation of gold mining, but see no reason why that necessarily required Crown ownership of the resource. Although the Crown took no steps to actively assert the royal prerogative in gold prior to the alienation of Te Taitapu, nor did it provide for Maori to earn a reasonable share of the income derived from the resource in their land. Although gold duty was essentially a form of taxation intended to fund Crown investment in the development of the goldfields, rather than an assertion of the royal prerogative, we consider that, in the circumstances of Te Tau Ihu at the time, there was a strong case for any gold duty not reinvested in the provision of infrastructure at Te Taitapu to be shared equitably with Maori. Instead, Crown officials remained more concerned with the development of the goldfield than with facilitating the economic opportunities held out to Te Tau Ihu Maori at the time

of the earlier Crown purchase programme. As we noted previously, we do not consider that Te Tau Ihu signatories to the earlier Crown purchases had agreed to limit their claims to a share of the future economic prosperity held out to them at that time solely to those items considered traditional taonga as at 1840. For these reasons we find the Crown's failure to ensure the Te Taitapu owners received an equitable share of surplus gold duty deriving from their district in breach of the Treaty.

We consider the terms of the cession negotiated in 1862 as inequitable and in breach of the principle of partnership. An annual fee of one pound permitted a great deal: entry onto the land, residence, cutting of firewood and the capacity to take out gold. It also handed over almost entire control of the field to the Crown; the capacity to issue licences, to collect fees, and to make regulations as well as the authority to settle all disputes. All that remained to the two rangatira, other than the right to moneys based on the number of miners on the land rather than a portion of the value of the resources extracted, was the capacity to distribute those fees and to 'assist' the magistrate in keeping the peace. Turangapeke's 'taking upon himself' the role of collecting fees from miners, after the failure of the Crown to put an officer in place, gave the arrangements an appearance of preserving rangatiratanga which its actual provisions belie. As we noted above, we do consider there were reasonable grounds for the Crown to regulate gold mining, but we fail to see why this could not have been done in a manner which acknowledged and upheld rangatiratanga in an instance such as Te Taitapu, where the goldfield happened to be located upon customary Maori land. In this respect the actions of Turangapeke indicated every intention of cooperating with Crown officials to ensure the smooth and efficient administration of the Taitapu field. But the rangatira's desire to manage the field in partnership was not reciprocated by the Crown.

We also consider that the Crown failed to uphold its side of the agreement, which it had insisted that Maori negotiate before mining could legally take place on their lands. European access had been ensured, the Governor's right to regulate all forms of dealing on land under native title preserved, and incidentally, any potential conflict between the Crown's claim to gold and obligations under the Treaty to protect Maori in their ownership of the land and its resources avoided. But no officer was appointed to oversee the issue of licences, the collection of fees, or to ensure that their distribution was properly undertaken. We consider this to be a breach of the Crown's duty to negotiate in good faith and its duty of active protection.

Mackay maintained that abuses of the 1862 and 1863 arrangements prompted requests for Government intervention and the formal proclamation of the goldfield in 1873, but it was the discovery of a quartz reef, requiring greater infrastructure and security of tenure than a one-year licence, which undoubtedly prompted the move to strengthen the Crown's control of the field. The block was brought within the ambit of the Gold Fields Act Amendment Act 1868 without further reference, or explanation to the Maori concerned. Yet, the powers involved were extensive in terms of the regulation of the goldfield and the uses to which the

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land could be put. We consider this means of proceeding to be a breach of the duty to act in good faith.

It is impossible to determine how much actual prejudice was suffered as a result of these acts and omissions. In the absence of any system of supervision, there was no reliable record of numbers of miners, or fees collected. As a consequence, we are not in a position to find on the question of whether the return provided (the one pound annual licence fee) was fair in terms of the actual numbers of miners utilising the field. We do note, however, that the Crown had received a total of £1500 in gold duty by 1879, whereas official figures suggest that the average receipts from fees amounted to only £33 per annum in the years between 1875 and 1882.

We also find that the Crown was negligent in its administration of its agreement with Maori right holders. It did not, as promised, oversee the collection of licence fees and it is more than likely that the returns did not reflect the actual numbers of miners on the land. This was suggested by Mackay's observations, and hence, the repeated requests for his active intervention. Although the sums involved were probably relatively small given that the field did not attract large numbers of miners and remained only marginally profitable, given the socio-economic status of Te Tau Ihu Maori by the early 1880s (discussed in chapter 10), the loss of such revenue, combined with the loss of control over the field after 1873 especially, may have been decisive factors in the subsequent decision to sell the block.

With regard to the Native Land Court we make no specific findings at this point on how the Native Land Court dealt with customary title at Te Taitapu, since we intend to deal with this matter in the final section of this chapter. We do indicate our concern at the role played by Alexander Mackay and the divergence between his recorded understanding of the customary ownership of the area and the evidence that he gave in court. Judge Mair was clearly influenced by that evidence and relied on its correctness without making further inquiry. We note that the court's determination solely in favour of Ngati Rarua did not reflect the on-the-spot arrangements made by James Mackay when the block was first opened to gold mining, in which the interests of Te Atiawa and Ngati Tama had been acknowledged belatedly. We also note that the judgment of the court failed to take into account the clear acknowledgement of at least one Ngati Rarua witness of an ongoing, if small, Kurahaupo presence on the block. And to the extent that any agreement was made between Ngati Rarua and Ngati Tama concerning the waiving of respective rights at Wakapuaka and Te Taitapu respectively, the judgment of the court in both cases clearly failed to uphold this customary arrangement.

While we have serious concerns about the adequacy of the Native Land Court as a vehicle for deciding on issues of custom, our findings at this point relate to whether the Native Land Court, as it was constituted, met its statutory obligations in this case. We find that it did not. Under the Native Land Act 1873, the court had a statutory requirement to enter all

owners on the memorial of ownership. Instead, the block was granted to three individuals and the list of owners was unrecorded and unprotected. It is clear, however, that the underlying community of owners had not intended that the whole of the ownership should pass into the hands of those three grantees; they had specifically requested the land be held by the three rangatira named in the grant 'in trust' for them. We consider that the Native Land Court's failure to give any effect to this underlying intention, even in so far as legislation was available to ensure, at the least, that all owners were named, was in breach of a duty of protection.

We also hold the Crown responsible for its failure to create a means by which the sort of hapu trust that this request implied could have legal effect. This is an issue on which Tribunal opinion is well-established;<sup>126</sup> but in Te Taitapu, and as we shall see, at Wakapuaka too, the Crown's failure to provide such protections for hapu ownership was underscored by a particular Native Land Court judge who acted as though the obligation under the 1873 legislation to enter all names in a memorial of ownership did not exist. And, in the case of Te Taitapu, purchased by a syndicate of Pakeha businessmen, the disparity between laws which allowed and even encouraged Europeans to act as corporate entities yet actively sought to eliminate similar bodies within Maori society is highlighted all too well. We consider this contrary to the principle of equity and in stark contrast to the clear undertakings made in article 3 of the Treaty.

There is also the issue of the sale of Te Taitapu for us to consider. Although it was one of the few large areas of land remaining to Maori anywhere in Te Tau Ihu, no restrictions were placed on the alienation of the Taitapu block at the time that title was issued by the Native Land Court, even though it ought to have been patently obvious that there was a pressing need for such protection. The alienation of the block soon after title had been awarded deprived Maori in the area of 88,350 acres of land they could not afford to lose. No reserves were set aside for ongoing occupation, and not only did the sale deprive local Maori of an area previously regarded as of great importance for food gathering and fishing purposes but it also served to further marginalise them from the new colonial economy. The Crown's purchasing programme of the 1840s and 1850s had justified the low price paid Maori for extensive tracts of their land on the basis that this would be more than offset by the increased value of those areas retained in Maori ownership. But such a trade-off was dependent upon ongoing retention of the unsold lands and that was not the case with respect to Te Taitapu, the largest of the unsold lands following the blanket Crown purchasing programme within Te Tau Ihu prior to 1860. We find this to be in breach of the principle of active protection and prejudicial to Maori interests.

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126. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 430–439

**8.3 RANGITOTO**

Rangitoto ki te tonga (red- or blood-coloured sky to the south), also known as D'Urville Island, has an area of about 40,466 acres. Despite its isolated location and rugged terrain, it provided Maori with sheltered harbours, all the kinds of food resources to be found in the Marlborough Sounds area, and valuable argillite quarries.<sup>127</sup> According to James Elkington of Ngati Koata the islands surrounding Rangitoto were also regarded as sites of 'special mahinga kai', from which titi were gathered and fish were caught in the surrounding sea.<sup>128</sup>

Rangitoto was a key area within Tutepourangi's tuku. Ngati Koata's rights were never seriously challenged by any iwi, including Ngati Kuia, who accepted that they had shared their customary rights with Ngati Koata. In 1853, Ngati Toa chiefs refused to include Rangitoto in their sale of South Island land to the Crown, Donald McLean later reporting that the transaction had taken place on the basis that it was 'distinctly understood that Rangitoto, or D'Urville Island, was excepted from the sale'.<sup>129</sup> Heather Bassett and Richard Kay, historians for Ngati Koata, have suggested that this was presumably an acknowledgement that it was a Ngati Koata area, while Crown historian Michael Macky has speculated that the decisive factor may have been the presence of a Ngati Koata chief at the negotiations.<sup>130</sup>

Three years later, Ngati Koata did not include the island in land that they sold to the Crown under their Waipounamu deed.<sup>131</sup> Dr Phillipson notes that Rangitoto does not appear to have been discussed with either Ngati Koata or Ngati Kuia when these arrangements were being made to purchase their interests on the mainland. He observes that the reasons for this are unclear, especially given strong provincial government interest in acquiring the island, but speculates that Governor Gore Browne may have felt some hesitation about authorising the purchase of a large piece of land set aside for Maori use just three years earlier.<sup>132</sup> But if the block was not purchased, nor was it secured to its owners through the issuing of a Crown grant. The island instead remained under customary Maori tenure, although Ms Bassett and Mr Kay note that the existence of Rangitoto in Ngati Koata hands was often used by Crown officials as an argument against the tribe's need for further lands for cultivations.<sup>133</sup>

During the 1860s and 1870s, Ngati Koata used southern Rangitoto for market gardening, but some of the island seems to have been leased for farming and mineral prospecting and

127. Anthony Patete, 'D'Urville Island (Rangitoto ki te Tonga) in the Northern South Island', report commissioned by the Waitangi Tribunal, 1997 (doc A32), pp 1, 3

128. James Elkington, brief of evidence on behalf of Ngati Koata, not dated (doc B34), para 67

129. McLean to Colonial Secretary, 7 April 1856, *Compendium*, vol 1, p 300

130. Heather Bassett and Richard Kay, 'Nga Ture Kaupapa o Ngati Koata ki te Tonga, c1820-1950', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A76), pp 74-75; Macky, p 256

131. Bassett and Kay, 'Nga Ture Kaupapa', pp 78-80

132. Phillipson, *Northern South Island: Part 1*, p 216. Phillipson, citing Olive Balwin, further notes that several abortive attempts to purchase the island were subsequently made. No further evidence with respect to these purchase efforts was presented to us.

133. Bassett and Kay, 'Nga Ture Kaupapa', p 87

some Ngati Koata moved away, thus creating potential absentee owners when the ownership came to be legally determined. However, given that the Native Land Court had yet to make a decision as to who held title to the land on the island, early leases of Rangitoto had no legal status, and the amount of land leased during this period is unclear.<sup>134</sup>

### 8.3.1 The 1883 Native Land Court title investigation of Rangitoto

Judge Mair presided over the title investigation of Rangitoto held at Nelson in November 1883.<sup>135</sup> The claim submitted was in the name of Hapiata and unspecified others. They provided a list of 78 names on 16 November 1883. The minutes state that the list 'is of Ngati Koata hapu'. Ihaka Tekateka, who then lived at the Wairau, identified 'the large island and the small one included in the reserve made' on a map, and informed the court that the 'original tribe' had given it to Ngati Koata. They had reserved it 'for themselves. It was reserved at the time of the sale of land in N & Middle Island'. He said that Ngati Koata had 'lived on it ever since'. Nobody objected to the Ngati Koata claim. Consequently, the court awarded title for Rangitoto and the small islands surrounding it to Ngati Koata.

There was then an objection, unspecified in nature, to Paipai being on the list. The court refused to strike her out, as 'she was born & bred on the land'.<sup>136</sup> Anthony Patete, in a report commissioned by the Waitangi Tribunal, notes that Paipai Rangiriri was of Ngati Kuia and Ngati Apa descent, a child of the Ngati Kuia leader Kereopa Ngarangi.<sup>137</sup> She does not seem, then, to be partly of Ngati Koata, unlike Ihaka Tekateka himself. His father belonged to Ngati Koata, but his mother was of Ngati Kuia, Rangitane, and Ngati Apa.<sup>138</sup> It may be that Ngati Koata had decided to acknowledge the place of Ngati Kuia at Rangitoto by including them in their final ownership lists, but that some Ngati Koata wished to confine this process to those connected to them by marriage.

At the 1892 hearing relating to the Nelson tenths, there was mention of a proposal that Ngati Koata give 100 acres of Rangitoto to Ngati Kuia. In the English version of the minutes, Meihana Kereopa is recorded as stating that he did not know of this proposed gift. In the Maori form of the minutes, however, Kereopa is said to state clearly that he did know of this gift; to lament that Ngati Koata 'did not agree with this tuku'; and to question the good relationship between Ngati Koata and Ngati Kuia, 'which to him seems to have gone sour'. 'Clearly', as Wayne Ngata comments in his traditional history report for Ngati Kuia, 'there

134. Ibid; Patete, 'D'Urville Island', pp 22–24

135. Phillipson, *Northern South Island: Part 1*, p 217

136. Native Land Court, Nelson, minute book 1, 16 November 1883, fol 12 (Anthony Patete, comp, supporting documents to 'D'Urville Island', various dates (doc A32(a)), doc SP1)

137. Patete, 'D'Urville Island', p 28

138. Native Land Court, Nelson, minute book 2, 14 November 1892, fol 253 (Patete, supporting documents, doc SQ21)

has been some misinterpretation of this particular minute one way or another.<sup>139</sup> Mr Patete in his very detailed study of Rangitoto uncovered no further evidence about this proposal; he suggests that Ngati Koata may eventually have decided to do the 'gifting' by including some Ngati Kuia people in the lists.<sup>140</sup>

Mr Ngata names seven Ngati Kuia as 'resident' on Rangitoto in 1883 or 1888. He is one of those who cites an 1862 statement of Hohepa Te Kiaka, distinguished rangatira of Ngati Kuia and Ngati Tumatakokiri, as proof that Ngati Koata lived on Rangitoto under the sanction of Hohepa. Ngati Kuia were not subservient to Ngati Koata on Rangitoto, according to Ngata, but had a 'settled status' with Ngati Koata there. He claims that the Native Land Court's title investigation process 'effectively shut Ngati Kuia out of Rangitoto'.<sup>141</sup> Ms Campbell concludes that, at the time of the 1883 hearing, 'it seems that the relationship with regard to Rangitoto at least was substantially equal'.<sup>142</sup> Under cross-examination, it appeared that she based this conclusion on the 1862 statement. Ms Campbell said that she did not know why Ngati Koata were the only claimants in 1883, but considered that it was probably because Ngati Kuia had reached some kind of agreement similar to the one she also presumed to have been made at Wakapuaka.<sup>143</sup>

At any rate, after upholding the right of Paipai to be in the title, the court adjourned so that a new list could be produced. This was provided to the court the following day, but there were objections that some names had been omitted. The court told Maori to 'settle the matter outside' and return later.<sup>144</sup>

On 20 November, the court approved a list of 60 names provided to it. It then 'called for any one who claimed to come in, but was not included in the list'. This led to the provision of a further list of 19 names to the court, apparently also Ngati Koata. The court subsequently ordered that a certificate of title for Rangitoto and the small islands around it be issued to 79 people 'in unequal shares' once an approved survey had been produced. Paipai Rangiriri was on this final list. So there was at least one person on the list who was of Ngati Kuia but not of Ngati Koata descent.<sup>145</sup>

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139. Wayne Ngata, 'Nga Korero mo Ngati Kuia', report commissioned by the Crown Forestry Rental Trust, not dated (doc L8), pp 111–112

140. Patete, 'D'Urville Island', p 28; see also Native Land Court, Nelson, minute book 2, fol 315

141. Ngata, 'Nga Korero', pp 112–113; see also Campbell, 'A Living People', pp 18–19. The relevant phrase is where Hohepa says, after mentioning Rangitoto, '[there] dwelt that tribe Ngati Koata upon my back so I could be a source for them'. This is explained as meaning that Ngati Koata came under the protection of Hohepa's main line of descent.

142. Campbell, 'A Living People', p 19

143. Susan Kiri Leah Campbell, under cross-examination, tenth hearing, 6–11 April 2003 (transcript 4.10, p 59)

144. Native Land Court, Nelson, minute book 1, 17 November 1883, fol 13 (Patete, supporting documents, doc SP2)

145. Native Land Court, Nelson, minute book 1, 20 November 1883, fols 28–29 (Patete, supporting documents, docs SP4–SP5). Paipai is 34 on folio 29. The 'unequal shares' were unspecified.

**(1) Discontent over the Rangitoto title**

Discontent over the Rangitoto title related primarily to two issues. One was the fact that the 1883 judgment left the shares of the owners undefined. The second was the omission from the title of a prominent Ngati Koata rangatira.

The 1883 court judgment gave no certainty to any of the owners as to where their rights lay. In 1889, Rewi Maaka and 18 others sent a petition to the House of Representatives, asking that the Native Land Court settle Maori claims to Rangitoto, Whangarae, Okiwi, and Whangamoā. They considered that ‘great difficulties beset us with regard to those lands which we wish to settle down upon in peace.’<sup>146</sup> The Native Affairs Committee recommended the petition to the Government for consideration.<sup>147</sup> Mackay told the Native Minister that those petitioning ought to apply for a subdivision to get the court to look at the title issue.<sup>148</sup>

The court dealt with numerous Rangitoto succession applications the following year. There was also apparently an application for partition of the block before the court. However, Atauatiu Te Kairanga told the court that the various applicants had been unable to arrive at an agreed partition, and that one of the main applicants was ill and could not attend the court. He therefore requested the court to strike out the case, saying that it would be ‘brought on again at a future Court’. Consequently, the case was dismissed.<sup>149</sup> As the next section indicates, the question of relative interests and partitioning of the island was only to be settled in 1895.

In addition to the uncertainty over where the rights of owners lay, the court’s decision about whom to include on the title to Rangitoto had not proved universally popular. Olive Baldwin, the author of a substantial three-volume history of the island, claims that some of those who attended the court succeeded in being put on the list merely because they were present at the hearing, even though they had no actual rights to the land. Others, according to Baldwin, were omitted from the list because they were then away in the North Island or at the goldfields on the West Coast.<sup>150</sup> We are not in a position to assess the accuracy of such claims. However, we do note that it was common practice in many land court cases for names to be included on the lists of owners ‘out of aroha’. Such a mode of proceeding, especially between closely related groups, was often intended to cement ongoing reciprocal ties between the parties. Meanwhile, the exclusion from titles of customary owners absent from

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146. ‘Petition 47/1889 of Rewi Maaka and 18 Others’, not dated, MA1, 5/13/218, ArchivesNZ (Patete, supporting documents, doc 1S1)

147. Patete, ‘D’Urville Island’, p 29

148. Mackay to under-secretary, Native Department, 20 October 1889; file note to Native Minister, 31 October 1889, MA1, 5/13/218 (Patete, ‘D’Urville Island’, p 29)

149. For partition case, see Native Land Court, Nelson, minute book 3, 24 June 1890, fol 77 (Patete, supporting documents, doc 5Q11). Mr Patete’s statement that the court sat in the northern South Island in 1890 ‘only to settle succession orders’ needs to be read in the light of the request to the court to dismiss the partition application: Patete, ‘D’Urville Island’, p 29.

150. Olive Baldwin, *Story of New Zealand’s French Pass and d’Urville Island*, 3 vols (Plimmerton: Fields Publishing House, 1979–83), vol 1, p 96, vol 2, p 8 (Phillipson, *Northern South Island: Part 1*, p 218)

hearings was also frequent – and it was for this very reason that entire communities often moved en masse to attend land court hearings for months at a stretch.

In 1890, Karepa Tengī and 12 others sent a petition to Parliament, asking for legislation to include the petitioners in the Rangitoto list of owners. Karepa stated that he was a descendant of Aperahama Tengī, one of the Ngati Koata chiefs who reserved Rangitoto ‘for themselves and their descendants’, and that Mackay, the commissioner of native reserves, was aware of the existence of a list of names of the Ngati Koata leaders who had done this.<sup>151</sup> The petitioner added that, at the time of the 1883 decision, the petitioners were living at Waitara, but that the day after the decision, his eldest brother had:

appeared before the Court and the people of the Ngati Koata tribe but he did not say a word to the Court because the people of the Ngati Koata tribe told him that the award had been made and that he had better wait until another Court sat and then have our names inserted as part owners in the above mentioned Island.<sup>152</sup>

According to what Karepa Te Whetu later told the Native Land Court, the older relative concerned, Te Waka, returned to Taranaki and subsequently sent a letter dated 1 July 1885 to the court, but he had died before there was an inquiry into the matter. Karepa Te Whetu stated that he went to Nelson himself to attend the court in relationship to Te Waka’s application, but the judge told him that he was unable to insert Te Whetu’s name into the title, and that the only available course of action was to petition.<sup>153</sup>

The 1890 petition refers to the application to the court appearing ‘amongst the list of deceased owners that was presented to the Court which sat on the 19th of June 1890’, and consequently becoming null and void. There is indeed an application from Waaka Tengī to succeed to Aperahama Tengī in the minutes for that date. It was dismissed because Aperahama Tengī’s name was ‘not in the certificate’, and the judge’s advice to Karepa Te Whetu to petition is not recorded.<sup>154</sup> However, Karepa Tengī also claimed the support and assistance of Ngati Koata for the subsequent petition.<sup>155</sup>

The Native Affairs Committee recommended that the petitioners apply to be admitted to the title under section 13 of the Native Land Court Acts Amendment Act 1889. This enabled

151. ‘Petition 138/1890 of Karepa Tengī and 12 Others’, 10 July 1890, MA1, 5/13/218, ArchivesNZ (Patete, supporting documents, docs IT1–IT3)

152. Ibid (doc IT2)

153. The 1889 and 1901 petitions concerning Rangitoto and the 1895 hearing concerning the petition of the block and the inclusion of other names relate to complaints by both Karepa Te Whetu and Karepa Tengī virtually interchangeably. On several occasions, these names appear consecutively on lists of people omitted, so it would appear that these were probably two different but closely related people. On the 1901 petition, see below. For an example of a list with both names, see Native Land Court, Nelson, minute book 3, 3 July 1895, fol 202 (Patete, supporting documents, doc SR54).

154. Native Land Court, Nelson, minute book 2, 19 June 1890, fol 62 (Patete, supporting documents, doc SQ3)

155. 3 July 1895, fol 202 (Patete, supporting documents, doc SR54); ‘Petition 138/1890 of Karepa Tengī and 12 Others’, 10 July 1890, MA1, 5/13/218, ArchivesNZ (Patete, supporting documents, doc IT2)

people who had been ‘inadvertently omitted’ to be included in titles.<sup>156</sup> However, according to Mr Patete, for reasons which remain unclear, no further action was taken at this time.<sup>157</sup>

**(2) *The partitioning of Rangitoto and amendment of the title***

The court finally heard an application by Renata Te Pau and others for the partition of Rangitoto at Porirua in June and July 1895. The location may reflect the fact that by this stage many owners lived in the North Island. The biggest concentration of owners outside Rangitoto was at Porirua.<sup>158</sup> On the other hand, a witness at this hearing mentioned Ngati Koata leaving Rangitoto and settling at Kaiarau ‘to be nearer to Nelson’. Clearly, some owners would have had to travel significant distances wherever the hearing was held.<sup>159</sup>

The first step in the process of deciding how much land would be allotted to each owner was undertaken by Ngati Koata outside the court, working for three days through their runanga and several prominent chiefs. Ngati Koata were divided into four categories of owners, reflecting the time of their arrival on the island, their relationship to the first heke, and their descent from different categories of right holders.<sup>160</sup> Almost all parties accepted the list read out by Hohepa Horomona on 29 June.<sup>161</sup> Notably, the 29 June list included a total of 3288 acres allocated to Aperahama Tengi’s family, even though he was not on the list of owners. In this matter, the court seems to have allowed a great deal of flexibility to Ngati Koata, even if this did need further confirmation later on.<sup>162</sup>

A few days later, the court heard an application under the 1889 legislation mentioned by the Native Affairs Committee in 1890. This indicated that Karepa Te Whetu himself did not blame the court for the omission of the names of Te Waka and his relatives, attributing it rather to Te Waka’s absence and ‘the want of knowledge of the person who conducted the case’.

The evidence of Renata Te Pau suggests that the two lists finally adopted in 1883 were provided, on the one hand, by the Ngatiteika hapu, and on the other hand, by himself, as a result of his desire to include some to whom Ngatiteika objected.<sup>163</sup> Renata attributed the omission of Te Waka and his relatives to his having been under the false impression, until it was too late, that Ngatiteika had these names on their list. Ihaka Tekateka indicated that he had told Judge Mair about their omission, but too late for the court to rectify the matter

156. Native Affairs Committee, ‘Petition of Karepa Tengi and 12 Others’, 9 September 1890, AJHR, 1890, I-3, p 11

157. Patete, ‘D’Urville Island’, p 28

158. Ibid, p 29

159. Native Land Court, Nelson, minute book 3, 2 July 1895, fol 195 (Patete, supporting documents, doc SR47)

160. On the criteria, see Phillipson, *Northern South Island: Part 1*, p 219.

161. For key aspects of the process, see Native Land Court, Nelson, minute book 3, fols 159, 161, 167–168, 175, 177, 193, 195.

162. The Tengi land is recorded in Native Land Court, Nelson, minute book 3, folio 164.

163. Native Land Court, Nelson, minute book 3, 2 July 1895, fol 196

at that time. The evidence of these witnesses took for granted the right of Te Waka and the others to be included, and did not blame the court for the problem.<sup>164</sup>

Hohepa Horomona, however, while supporting the inclusion of Te Waka and others, was less charitable about the performance of the court in 1883:

It might be fairly argued that as the Court had the Deed of Sale before it, that it ought to have questioned the people as to who the persons were who were attached to the Deed of Sale and whether they had descendants alive and also whether they had any right to the land.<sup>165</sup>

Judge Mackay rejected these objections in favour of the original list, on the basis that he was unable to alter the 1883 decision of the court, but at the same time noted that he would report the situation to the chief judge. Effectively, though, the court sanctioned the desire of Ngati Koata to include the family by alternative means. A further list of distributions in the minute book, apparently entered on the day of the investigation under the 1889 legislation, includes allocations of 548 acres each to six family members. The following day the court allowed these six to join other Ngati Koata who were officially on the Rangitoto list in recording their desire to allot some of their shares to relatives not in the title. Although there are marginal notes indicating the land for the family was being vested in others for them, their inclusion as donors in this proposed redistribution indicates that the court took the right of the Tengi family to land in Rangitoto very seriously.<sup>166</sup>

On 31 July, the court ordered a division of Rangitoto into 11 blocks, and made both Rangitoto itself and the smaller adjacent islands inalienable except by lease for a period of 21 years.<sup>167</sup> The minutes record no discussion of the subdivision, although Dr Phillipson considers that the task would have been difficult to accomplish without consulting owners.<sup>168</sup>

In 1901, Karepa Te Whetu and five others petitioned the House of Representatives, on the grounds that the chief judge was unable to give effect to the arrangement made in 1895 without special legislation.<sup>169</sup> Section 34 of the Native Land Claims Adjustment and Laws Amendment Act 1901 gave the court the power, after making necessary inquiries, to amend

164. Native Land Court, Nelson, minute book 3, 3 July 1895, fol 203

165. Ibid, fols 203–204 (Patete, supporting documents, docs SR55–SR56). Hohepa did not specify the deed in question, but it was probably the Ngati Koata deed of sale that excluded Rangitoto from sale.

166. Native Land Court, Nelson, minute book 3, 4 July 1895, fols 212–213 (where other parties are also shown as benefiting from the proposed arrangements); Native Land Court, Nelson, minute book 3, 31 July 1895, fol 246 (Patete, supporting documents, docs SR64–SR65, SR86). Dr Phillipson considers that this part of the minutes indicates that Karepa Te Whetu received only two acres through this process. In fact, he allocated two acres to others through it, which is why in 1901, when these allocations were formalised by the court, he received a final allocation in Rangitoto of 546 acres. Other Tengi relatives who allocated larger sums to other people on 3 July 1895 received correspondingly less in 1901: Phillipson, *Northern South Island: Part 1*, p 220.

167. Native Land Court, Nelson, minute book 3, 31 July 1895, fol 267 (Patete, supporting documents, doc SR95)

168. Phillipson, *Northern South Island: Part 1*, p 220

169. 'Petition No 955/1901 of Karepa Te Whetu and Five Others', 15 September 1901, MA1, 5/13/218, ArchivesNZ (Patete, supporting documents, docs IU1–IU2)

the partition orders to include ‘the names of the beneficiaries as owners of the shares or interests intended . . . to be transferred to them.’ Subsequently, the court allocated 3855 acres 2 roods of Rangitoto to Karepa Tengī, Karepa Te Whetu, and 12 others. This amount represents the areas set aside in 1895 by Ngati Koata for the family of Aperahama Tengī, minus the amounts they had allocated to other people on 4 July 1895, along with some (but not all) of the allocations that other Ngati Koata had committed themselves to making to relatives omitted from the 1883 title on 4 July 1895.<sup>170</sup>

**(3) Alienation of Rangitoto and neighbouring islands**

Today, most of Rangitoto is no longer in Maori ownership, with only about 6303 acres, or about 15 per cent of the total area, remaining as Maori freehold land.<sup>171</sup> While a number of factors have contributed to this, we consider that the legislative framework associated with the Native Land Court and the way in which it was put into practice on Rangitoto was a major contributing factor. Undefined interests made it much more difficult for Maori to utilise their land, thus encouraging migration, while the Native Land Act 1909 removed all existing restrictions on the alienation of Maori land.

The 1886 Maori census had listed 38 Maori resident on Rangitoto. They owned 150 sheep, 70 pigs and 24 cattle. Their cultivations, however, were entirely on their small reserves on the mainland.<sup>172</sup> According to some reports there was a large-scale migration away from Rangitoto to the North Island, Nelson, and elsewhere in the Marlborough Sounds in about 1890. Mr Patete suggests that a number of factors contributed to this migration:

- ▶ the failure of timber and mining ventures on the island;
- ▶ serious problems with sheep farming following an 1885 scab outbreak;
- ▶ crop failure, inadequate water supply, and illnesses introduced by European settlers and the adoption of Pakeha lifestyles;
- ▶ closure of the native school on the island in 1889; and
- ▶ the time taken by the Native Land Court to partition Rangitoto, resulting in Maori being unable to use effectively land to which they did not have a clear title, and their inability to use the land as collateral to obtain development finance.

The impact of the Native Land Court’s failure to issue title for the island was, according to Patete, the most significant problem.<sup>173</sup> Certainly, the court did not sit between 1883 and 1889. Then, as we note above, there was no partition in 1890 because the parties concerned had not finished their arrangements. In any event, the 1895 list of Rangitoto owners showed 23 out of 77 as resident on Rangitoto, 10 living at Porirua, eight at both Whangarae and

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170. Native Land Court, Wellington, minute book 10A, 10 March 1902, fols 19–20 (Patete, supporting documents, docs TZ1–TZ2)

171. Bassett and Kay, ‘Nga Ture Kaupapa’, p123. Note that this 1997 figure includes some smaller offshore islands discussed later in this chapter.

172. ‘Summary of Maori Census, 1886’, AJHR, 1886, G-12, p18 (Bassett and Kay, ‘Nga Ture Kaupapa’, p87)

173. Patete, ‘D’Urville Island’, pp16–18

## 8.3.1(3)

Havelock, nine at Raglan, six at Taranaki, three at Nelson–Wakapuaka–Motueka, three in Gisborne, three in the Waikato, and four at other unspecified locations.<sup>174</sup> With owners this scattered, it would have been difficult to assemble a large group, and most owners were clearly absentees. These factors subsequently helped to make the block vulnerable when opportunities to alienate the land occurred.

As noted in section 8.3.2, in 1895 the court made Rangitoto inalienable except by way of lease for a period not exceeding 21 years. Despite this, section 52 of the Native Land Court Act 1894 permitted the court to remove restrictions on alienation if at least one-third of the owners agreed, and as long as every owner had sufficient other land for their support. Section 53 permitted the court to confirm a sale under various conditions that also included each owner having sufficient land for his or her support.<sup>175</sup>

The Native Land Act 1909 took the more radical step of replacing restrictions on the alienation of Maori land with a new regime to oversee and confirm sales. Part XVIII of the Act provided for meetings of owners to be called to vote on proposed land sales for any block where there were more than 10 owners. Such meetings had a quorum of only five owners, regardless of the total number of owners or the proportion of the shares owned by those present at a meeting of owners. Particularly in cases where owners were widely scattered, a decision to sell land might be taken by owners who were a small minority in terms of the number of owners or the proportion of shares that they held. The next step was for the Native Land Court to confirm a sale.<sup>176</sup> Again, one of the conditions required for confirmation was for the court to ensure that no Maori would be rendered landless as a result of the sale. From 1914 to 1952, responsibility for confirmation of sales of Rangitoto land passed to the South Island District Maori Land Board, presided over by the land court judge for the district.<sup>177</sup>

Later legislation provided compulsory powers concerning supposedly ‘uneconomic’ interests in Maori land. Under section 137(1) of the Maori Affairs Act 1953, the Maori Land Court, with very limited exceptions, was not to vest in any beneficiary other than the Maori Trustee any interest in land that was held to constitute an uneconomic interest. Section 137(3) defined an uneconomic interest as a freehold interest ‘the value of which . . . does not exceed the sum of twenty-five pounds’. Provision for the Maori Trustee compulsorily to acquire ‘uneconomic interests’ remained until 1974.<sup>178</sup>

A further factor to be borne in mind in relationship to the issue of alienation is the way in which the Native Land Court treated succession. Before the land court system came into

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174. Bassett and Kay, ‘Nga Ture Kaupapa’, p 91

175. *Ibid*, p 93

176. Under section 358(1), the Native Land Court, rather than a Maori land board, exercised this power in the South Island.

177. Bassett and Kay, ‘Nga Ture Kaupapa’, p 95

178. Ward, *National Overview*, vol 2, p 402

operation, Maori were able to succeed to rights to use land from either parent, but such a right ‘might lie dormant’, in the sense of the land not being occupied, ‘for no more than three generations before being extinguished.’<sup>179</sup>

The court, however, following the precedent set by Chief Judge Fenton in the Papakura case of 1867, operated a system where, if a Maori died intestate, all children inherited equally, without regard for occupation. Subsequently further rules supposedly in accord with Maori custom evolved to deal with situations where there were no living children. While the court operating under the 1865 Act under which this system first came into being was meant to reconcile its actions with ‘Native custom’, its primary duty was to operate ‘according to law’. Professor Williams argues that this was taken always to be English law. In applying the so-called Papakura rule of succession, the court evolved a system that resulted in extreme fragmentation of Maori land. When land was both held largely by absentees and held in very small shares, as was increasingly the case over time, owners became ever more vulnerable to offers to purchase their interests.<sup>180</sup>

#### **(4) *The alienation of land in subdivisions of Rangitoto***

On 16 September 1895, the court set aside seven reserves on Rangitoto: four urupa, one village settlement, and two fishery easement reserves.<sup>181</sup> Section 7 of the Native Trusts and Claims Definition and Registration Act 1893, under which these reserves were made, required that a majority of the owners signify their assent to the setting aside in writing, but there is no indication in the minutes as to who initiated the process. The reserves were to be inalienable unless a judge decided that the land was no longer needed for the designated purpose. All of these reserves, totalling 64 acres in extent, were still owned by Ngati Koata in 1997.<sup>182</sup> Nevertheless, specific grievances remain with respect to some of these reserves, most notably the problem over access to the Moawhiti fishing easement reserve. That is a matter discussed further in chapter 11.

Other than the reserve areas, the court created 11 main subdivisions on Rangitoto in 1895. In 1997, the percentage of land remaining in Maori ownership in these subdivisions ranged from none to 54 per cent of the area as surveyed in 1907. Taking these non-reserve areas together, of the area as surveyed in 1907, only 15 per cent was in Maori ownership in 1997.<sup>183</sup> Thus, this second-to-largest area of land remaining to Te Tau Ihu Maori in 1883 (and much the largest after the sale of Te Taitapu in 1884) had been very largely lost to the owners by the end of the twentieth century.

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179. Williams, ‘Crown and Ngati Tama’, pp 158–159

180. Ibid, pp 155–160. For an example of multiple successors to Rangitoto 2 owners and subsequent sales, see Patete, ‘D’Urville Island’, pp 43–47.

181. Native Land Court, Nelson, minute book 3, 16 September 1895, fol 254 (Patete, supporting documents, doc SR94)

182. Patete, ‘D’Urville Island’, pp 184–186; Bassett and Kay, ‘Nga Ture Kaupapa’, p 123

183. Bassett and Kay, ‘Nga Ture Kaupapa’, p 123

Various factors, including the legislative framework, leasing of land, migration resulting in absentee owners, lack of productivity of the land, and the reluctance of the court to safeguard owners by blocking sales have driven the alienations that have occurred. In 1895, the court confirmed four leases signed two years earlier, reducing the acreage by about a third to exclude land now allotted to owners who had not signed the leases. Overall, the leases as confirmed by the court covered just over half of the island. But even for Pakeha farmers conditions were tough on Rangitoto: all but one of the lessees soon gave up their attempts to farm the land.<sup>184</sup>

Between 1904 and 1907, all the Rangitoto blocks were leased again. The rental for most of the leases was about three or four pence per acre. Where there were many owners, this led to a small return, and according to Ms Bassett and Mr Kay, this was one of the factors leading to the sale of shares by individual owners from around 1907.<sup>185</sup> Leases facilitated contact with owners, with lessees often subsequently negotiating to buy the land.<sup>186</sup> Mr Patete provides a list of land sales, not necessarily complete, that gives the first sales of land in Rangitoto subdivisions as occurring in 1908 and 1909, after the various subdivisions were leased between 1904 and 1907. An area of 2488 acres, or just over 6 per cent of Rangitoto, was sold in 1908 and 1909, before the 1909 Act came into force on 31 March 1910.

In the 1910s, more than 19,296 acres of Rangitoto was sold. Mr Patete does not give areas for some sales during that period, but it appears likely that about half the island was alienated by Maori during that decade. This indicates that the 1909 Act was very significant in encouraging alienation of land on the island. The figures for later sales suggest more sporadic later land dealings: 457 acres sold in 1929; at least 893 acres in the 1950s; 860 acres in the 1960s; and 420 acres during the 1980s.<sup>187</sup>

Many of these sales were to European farmers, but the Crown has on several occasions purchased, or attempted to purchase, land for scenic reserves.<sup>188</sup> Sometimes shares classed as uneconomic interests were lost to the Maori Trustee, but these were also sometimes subsequently bought by another Maori owner.<sup>189</sup>

Some owners were reluctant to sell, but realised that the land involved was not very productive.<sup>190</sup> As already indicated, the high level of absentee owners was a factor in the willingness of some owners to sell. Such owners often wished to use the proceeds of sale for purposes related to their life elsewhere, such as the purchase or repair of housing, the purchase of furniture and whiteware, or the purchase of dairy cows to begin a herd.<sup>191</sup> Rangitoto, on

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184. Bassett and Kay, 'Nga Ture Kaupapa', p 92

185. *Ibid*

186. *Ibid*, pp 92, 99, 101, 102, 104

187. Patete, supporting documents, pp 313–322

188. Bassett and Kay, 'Nga Ture Kaupapa', pp 98, 99, 101

189. *Ibid*, pp 100, 104

190. Statement of proceedings of meeting of assembled owners, 9 August 1967, CH 270 15/2/2021 (Patete, supporting documents, docs D01–D03)

191. Patete, 'D'Urville Island', pp 122, 130, 145

the other hand, was seen as difficult to farm, and as requiring significant amounts of capital to develop. One lawyer acting for a group of owners seeking to sell their interests in 1908 put it bluntly when declaring that ‘D’Urville Island is not suitable for native occupation as it requires capital to develop and improve it.’<sup>192</sup> Apparently, it was taken as a given that the owners of Rangitoto neither possessed the requisite capital to finance the necessary development nor had any realistic prospect of obtaining funding from any other party towards this end. These interlocking factors, along with the increasingly fractionated state of titles as a consequence of the Native Land Court’s approach to succession, all encouraged sales.<sup>193</sup>

Usually, where sales or leases were being confirmed, a list of other lands held by those alienating their interests was supplied to the court or land board. Ms Bassett and Mr Kay are critical of the information supplied to the court on the grounds that this did not take into account either the nature of the land involved or the form of ownership under which it was held. The availability of other land was no guarantee that it would adequately maintain the vendors if, for example, it was a small undivided share of land in a larger area, or if land was leased and therefore unavailable for the owner to settle and farm.<sup>194</sup> This suggests that the protection provided by legal requirements to reject any proposed transaction if any vendor would thereby be rendered landless were inadequate and perfunctory at best. Mr Patete records several cases in which, at least the first time there was an attempt to alienate land, sales were stopped because of concerns about landlessness. Nevertheless, the alienation was usually eventually permitted.<sup>195</sup>

The resultant claim of Ngati Koata was summed up for us in the evidence of Nohorua Kotua, a descendant of the rangatira Nohorua, who gave evidence about the subdivision, leasing, and attrition of his whanau’s interests in Rangitoto block III. We quote his words in detail:

My grandfather was left with land in name only [via a 60-year lease] until 1963. These things didn’t just happen with our block, this is just one example of the sweeping losses that were sustained by our iwi. There were generations that lost out on opportunities resulting from the loss of the land permanently through sale, or for a long period, through lease . . .

Today, there are Ngati Koata who have no whenua to return to because of the earlier sales and alienations. By the completion of the sixty year lease, only our two blocks and the two Ruruku blocks remain. I am one of the lucky few. The rest have been sold or acquired by other owners, or confiscated for being ‘uneconomic’. Two families share in our two blocks – my mother’s seven surviving children and Auntie Kata’s son Uncle Tony Waaka’s three children. Both families have put their shares into family trusts.

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192. Bassett and Kay, ‘Nga Ture Kaupapa’, p 94

193. Patete, ‘D’Urville Island’, pp 99, 141; Bassett and Kay, ‘Nga Ture Kaupapa’, pp 93–94

194. Bassett and Kay, ‘Nga Ture Kaupapa’, p 94

195. Patete, ‘D’Urville Island’, pp 50–51, 83, 117–118, 120–121

So many things flow from the loss of our land. We couldn't participate in the new economy because our economic base had been taken away from us by pressures from the Pakeha world. The chance to purchase desirable commodities, coupled with Pakeha court systems, made the alienation of the land a relatively simple process. There was a lack of understanding about what purchases really meant, considerations about 'value' of property and money were outside of our tikanga. Once we have lost access to our economic base, we couldn't compete on an equal footing. The only economic base we retained was our fishing resources – we were good fishermen, but you can't produce enough fish to feed your family and trade the excess unless you have the money to purchase fishing equipment in the first place . . . and the only way you could get money was by selling or leasing your land. Furthermore, the sale money and rentals realised in our attempts to become equals were insufficient to enable us to participate fully in that fashion.

Land was our only realisable asset – where else could our iwi get money from? Our resources were few – we had lost our land in Nelson to the New Zealand Company, we had lost our land at Wakapuaka [see below], and now there was nothing left for Ngati Koata. We had no tribal lands that we could use, save for land at Rangitoto that could only be utilised at a subsistence level.

These losses would never have been sustained if Ngati Koata had been left with adequate resources. The continual process of fragmentation of the land by Native Land Court partition left blocks in the hands of a few readily identifiable owners. This ran in the face of Ngati Koata tikanga, but it was the only way that the Pakeha understood.

It is shocking that this partition leading to permanent loss was allowed to happen, especially at Rangitoto, the spiritual heart of Ngati Koata in Te Tau Ihu.

Rangitoto as a whole is a waahi tapu of Ngati Koata. There is a great sense of loss by members of the iwi, because they identify in their minds that they are the tangata whenua of Rangitoto, but when they go there, all they see is developments, Pakeha farms, and it is owned by tauiwi [non-Maori]. It is so difficult nowadays to identify your turangawaewae – I should be at Rangitoto as part of Ngati Koata iwi, but because the iwi owns no land there, I feel I am there as an individual only, and not a member of what was once a thriving iwi that existed prior to the alienation following the introduction of European customs, standards and values.<sup>196</sup>

#### **(5) *The alienation of islands in the vicinity of Rangitoto***

Takapourewa (Stephens Island) is the largest island in the vicinity of Rangitoto, with an area of 370 acres.<sup>197</sup> The taking of this land under the Public Works Act 1894, the setting of compensation by the Native Land Court, and subsequent developments with respect to the island are discussed in chapter 12.

<sup>196</sup> Nohorua Te Kotua, brief of evidence on behalf of Ngati Koata, 1 February 2001 (doc B14), paras 57–64

<sup>197</sup> Bassett and Kay, 'Nga Ture Kaupapa', p 113

The remaining smaller islands range from fishing banks and small rocks up to Tinui Island, with an area of 220 acres. The 1895 sitting of the Native Land Court that partitioned Rangitoto allocated 14 named island areas, described as ‘the residue of the lands’ in the 1883 certificate of title, to the ‘survivors’ and ‘successors’ of the original 79 owners.<sup>198</sup> In 1912, the court decided on the relative interests of the owners, and in 1927 each of the larger islands – Tinui, Puangiangi, Whakaterepapanui, and Kurupongi (the Trios Islands) – were distributed to separate family groups of owners. The remaining smaller islands were allocated to all owners.<sup>199</sup>

Most of these islands still have Ngati Koata owners. Despite long-standing Crown concern about the preservation of tuatara on the islands, owners smarting from the loss of their rights to take muttonbirds on Takapourewa have been reluctant to relinquish their ownership, even where a wildlife sanctuary has been created in conjunction with Maori ownership.<sup>200</sup>

Two islands, however, have passed out of the ownership of Ngati Koata individuals: Puangiangi, with an area of 95 acres, and Whakaterepapanui, with an area of 150 acres. Puangiangi was sold to a farmer whom we assume was a Pakeha, in 1929, after Maori Land Board officials were unable to arrange a mortgage within the required timeframe in order to allow a Ngati Koata individual to buy the island in 1928.<sup>201</sup> Whakaterepapanui was sold to Pakeha farmers in 1927 after a meeting that was held in Wellington, despite the protests of three owners about this location for the gathering. Three owners attended, one of whom was also a trustee for another owner, and there were five proxy votes. In all, the owners in attendance held about 11 out of a total of 123 shares. Judge Gilfedder refused the request of an owner dissenting from the sale to have his interest cut out, possibly because of the impact of this on the cost of surveying the island.<sup>202</sup>

### 8.3.2 Legal submissions on Rangitoto

In this section, we look specifically at legal submissions relating to Rangitoto.

#### (1) *Claimant submissions*

The submissions of Ngati Koata concern questions of the general impact of Native Land Court legislation. There are specific issues in the case of Rangitoto about delays in the title process, the difficulty facing the owners in using the land, uneconomic interests and the

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198. Native Land Court, Nelson, minute book 3, 31 July 1895, fol 250 (Patete, supporting documents, doc SR90)

199. Native Land Court, Nelson, minute book 9, 23 March 1927, fols 102–104 (Bassett and Kay, ‘Nga Ture Kaupapa’, p 112). For a complete list of the remaining islets or rocks allocated to all the Rangitoto owners, see Patete, ‘D’Urville Island’, pp 173–174.

200. Bassett and Kay, ‘Nga Ture Kaupapa’, p 120

201. *Ibid*, pp 115–117, 122

202. *Ibid*, pp 117–120

## 8.3.2(2)

alienation of land. Ngati Kuia's and Ngati Apa's submissions indicate a general concern about the adequacy of the court's recognition of their rights and misconstruction of custom.

Counsel for Ngati Koata submitted that the Crown policy administered by the Native Land Court of partitioning of land followed by individualisation of title allowed for 'the effective disposal of land at Rangitoto'. Counsel submitted that the Crown 'failed to take appropriate action consistent with the Treaty to remedy the land alienation at Rangitoto caused by the Native Land Court. The land there must be returned to Ngati Koata and the rangatiratanga of the iwi recognised.'<sup>203</sup>

Counsel for Ngati Koata also notes that tribal members voiced concerns about the decision of the court with respect to the 1883 list of owners for Rangitoto at an early stage, including at the 1895 hearing.<sup>204</sup> Furthermore, counsel for Ngati Koata submitted that rather than protecting the lands of Ngati Koata, the Crown established policies and legislation concerning 'uneconomic' interests which effectively stripped Ngati Koata of the little land left to them. Counsel pointed to evidence given by tribal members that the land was taken compulsorily by the Crown without compensation on the grounds of its uneconomic size, and that this was the 'final blow' forcing many Ngati Koata to leave the island early in the twentieth century.<sup>205</sup>

Counsel for Ngati Kuia stated that the evidence was insufficiently detailed to allow findings or definitive conclusions as to why Ngati Kuia did not claim Rangitoto in the Native Land Court in 1883. However, Ngati Kuia submitted that the 1883 investigation into the customary title to Rangitoto is one of the court decisions that concerns them.<sup>206</sup>

Counsel for Ngati Apa during submissions on the Native Land Court mentions Rangitoto as one of the areas in which the iwi had customary rights on a shared basis.<sup>207</sup> However, counsel made no other specific mention of Rangitoto in connection with submissions on the court.

### (2) *Crown submissions*

The Crown appears to have made no specific submissions on Rangitoto in relationship to the Native Land Court in its closing submissions or submissions for the generic inquiry. However, the Crown does state that Ngati Koata interests established through the *tuku* of Tutepourangi centre on 'Rangitoto and surrounds', and that Ngati Kuia and Ngati Koata appear to have maintained respect for the integrity of the *tuku* both historically and today.<sup>208</sup> Subsequently, the Crown refers to 'Koata/Kuia/Toa interests on Rangitoto'.<sup>209</sup>

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203. Counsel for Ngati Koata, closing submissions, 9 February 2004 (doc T7), p 114

204. *Ibid*, p 114

205. *Ibid*, p 115

206. Counsel for Ngati Kuia, closing submissions, pp 17–18, 65

207. Counsel for Ngati Apa, closing submissions, p 28

208. Crown counsel, closing submissions, p 25

209. *Ibid*, p 27

The Crown's submission from the generic hearing in relation to both customary rights and individualisation of title mentioned previously is also relevant here. Furthermore, the Crown in its generic submission also conceded that 'the outcome of the court's operation and determination of title and succession did contribute to the alienation of land remaining in Maori hands, although in Te Tau Ihu this process was not necessarily rapid but occurred over a considerable period'.<sup>210</sup>

### 8.3.3 Tribunal comment

Issues related to the Native Land Court and Rangitoto include the adequacy of the hearing with reference to customary rights and the failure to take adequate account of the Kurahaupo iwi in its deliberations; the nature of the pressures leading to the alienation of most of Rangitoto, including individualisation of title by the court; and the degree of responsiveness of the Crown when Maori expressed concerns in relationship to Rangitoto.

As regards the adequacy of the 1883 Rangitoto hearing, Judge Mair supported the rights of Paipai, whose take seems essentially to have been occupation, and who was apparently of Ngati Kuia but not also Ngati Koata. Nevertheless, the judge is not recorded in the minutes as having inquired why there was no application from Ngati Kuia, who appeared to have occupied the land alongside Ngati Koata after the tuku of Tutepourangi. We do not know why Ngati Kuia did not put in an application for Rangitoto, although certainly the attitude adopted by Judge Mair over Te Taitapu would hardly have encouraged them to pursue the matter. It may have been because of the light in which they regarded the tuku and Ngati Koata's responsibilities with reference to it. It may be too, that in a region like this where the court began sitting only late, Maori were still willing to place their lands in the hands of a few leaders in the mistaken assumption that they would be able to act on behalf of the community living within their protection.

Dr Ballara, at the generic and whanau hearings, confirmed that she considered Ngati Kuia's interests to have remained in the tuku area, and that she did not think that those interests had been 'sufficiently acknowledged in the various judgments including the Rangitoto one'.<sup>211</sup> Despite the support of Judge Mair for Paipai, no specific recognition was given to the customary rights of Ngati Kuia in Rangitoto. A more thorough inquiry by the court might well have facilitated this and was permitted by the legislation under which the court was operating. We think it likely that Ngati Kuia interests would have been acknowledged had Maori been empowered to decide the ownership of Rangitoto themselves, as ought to have been the case if the principles of the Treaty had been taken into account in designing the process of title adjudication.

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210. Crown counsel, submissions concerning generic issues, p 48

211. Dr Angela Ballara, under cross-examination, eighth hearing, 17–19 February 2003 (transcript 4.8, p 44)

The comments about individualisation of title made by the Turanganui a Kiwa Tribunal cited earlier in this chapter also apply here. As we have seen, the Crown has conceded in general terms that the ‘outcome of the court’s operation and determination of title and succession did contribute to the alienation of land remaining in Maori hands.’ As regards uneconomic interests and the alienation of Rangitoto, it should be noted that legislation relating specifically to uneconomic interests was not passed until 1953, so such legislation was not responsible for early-twentieth-century land loss. However, figures available on the timing of alienation indicate that the 1909 Act that removed the restrictions put on alienation by the court in 1895, was followed by the rapid alienation of about half the island during the 1910s.

Furthermore, although the evidence indicates that there was sometimes delay in the process of approving land sales because of allegedly insufficient land interests of the Maori concerned elsewhere, it does not appear that the Native Land Court or the Maori Land Board looked closely at the quality of the land remaining in Maori ownership or the state of their titles, and where an alienation was initially rejected, it was usually eventually approved. The Crown appears to have taken no other steps to prevent land loss other than these fairly perfunctory checks against landlessness.

Certainly, the machinery introduced after 1909 for approval of sales by meetings of the assembled owners in the case of any block of land owned by more than 10 owners hardly appears to have been designed with either land retention or genuine community decision-making as a foremost focus. Under this regime, just five owners constituted a valid quorum, regardless of the total number of owners in the block or the respective number of total shares held by those present. In effect, a small minority of owners could sanction the sale of ancestral lands, as we saw was the case with respect to Whakaterepapanui Island. And, in the case of Rangitoto, this was made all the more likely by the dispersed nature of Ngati Koata settlement patterns after about 1890, allowing some blocks to be alienated with only minority support, both in terms of the number of owners and by value of the interests held. Nor were the rights of those who wished to retain their land interests necessarily respected. In one case, for example, an owner who opposed a proposed alienation had his application to have his own interests partitioned out of the area to be sold rejected by the Maori Land Board on the basis that this would be impracticable.

The sense of sadness which pervaded some sales is captured in the comments of one tribal spokesman after agreeing to accept the Crown’s offer to purchase the Rangitoto 4A block in 1967. James MacDonald noted that, ‘The Maoris are parting with their heritage piece by piece. We have had many big decisions to make. It is with great reluctance that we withdraw from D’Urville Island.’<sup>212</sup>

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212. ‘Statement of Proceedings of Meeting of Assembled Owners’, 9 August 1967, CH270 15/2/2021 (Patete, ‘D’Urville Island’, p 93)

One issue relating to Rangitoto that was brought to the attention of the Crown in an 1890 petition was the omission of descendants of Aperahama Tengi from the 1883 list of owners. This omission could have been prevented had Judge Mair conducted a more thorough investigation in 1883. It is possible that more rapid action would have occurred had the family requested a rehearing within the time-frame under the 1880 Act but this did not happen. When the matter was eventually brought to the attention of the court during the 1895 partition, Judge Mackay was apparently very willing to let Ngati Koata provide family members with allocations of land that were, in this particular case, as high as those allocated to other right holders seen as having the strongest rights. Ngati Koata and Alexander Mackay were evidently united in considering this a case of a prominent Ngati Koata family whose rights had been overlooked. The judge also allowed Tengi descendants and recognised owners provisionally to set aside some of this land for others who had not been awarded land through the 1883 judgment.

Nevertheless, despite the apparent creativity of Mackay and Ngati Koata in revisiting the original list of owners indirectly, it was hardly satisfactory that a more straightforward option for allowing the names of the overlooked owners to be included in the title was not available under the circumstances. Moreover, it required a further petition in 1901 before legislation was passed to allow these arrangements to be given a legal foundation. While the problem might have been rectified more quickly if a family member had requested a rehearing more rapidly, section 47 of the Native Land Court Act 1880 allowed aggrieved owners just three months from the date of the original decision to apply to the court for a further hearing. In cases where the owners were absent from the court and living in distant places for economic or other reasons it may have taken much longer than this before news of a hearing or judgment of the court reached those who had cause to feel dissatisfied.

In any event, as some of the witnesses to the 1895 hearing pointed out, the situation was partly attributable to the initial failure of the court to ensure it heard all relevant evidence. Despite the sympathetic approach subsequently adopted by the court to include those disenfranchised by the 1883 decision, the Crown subsequently failed to legislate in a timely manner to give effect to these decisions aimed at seeking appropriate remedies.

#### **8.3.4 Tribunal findings**

Again, we leave questions about the court's interpretation of custom in this particular instance to our general discussion on Native Land Court issues (sec 8.6), where we argue that the court was ill-suited to decide on them. We have particular concerns about the adequacy of information obtained by Mair and his failure to hold as full an inquiry into the block as he should have. Although the responsibility of the Crown was mitigated to some extent by the fact that the relevant legislation was in place to allow the judge to take more evidence had he chosen to do so, the broader point concerning the ability of a system

designed to facilitate land sales to provide a fair reflection of customary tenure nevertheless remains. Again, this issue is explored further in the final section of this chapter.

We consider that there was a Treaty breach in terms of the time taken (1883–1901) to sort out the Tengi case, and stress that this problem might not have arisen at all had a more thorough investigation been undertaken in the first place. Again, we note that the Crown's responsibility in this respect (provision of an effective remedy) was diminished by the particular circumstances of the case. Death had prevented the family from pursuing the matter immediately. The prejudice suffered by the Tengi whanau was diminished subsequently by the readiness of Judge Mackay to include them at the point of the 1895 partition, though the six-year delay in passing legislation to ratify these arrangements was scarcely justifiable.

Ngati Koata cite Rangitoto as a block where they have concerns regarding individualisation of title. They argue that individualised rights were one of several factors permitting the large-scale alienation of the island, particularly in the 1910s. We have previously noted the Crown's concession that the outcome of the court's operation and determination of title and succession contributed to the alienation of land remaining in Maori ownership. Rangitoto, in our view, provides a compelling example of the impact of Maori land laws and the operations of the Native Land Court upon the ability of Maori to retain their lands.

We note, in particular, the impact of the Native Land Act 1909, which removed all general restrictions on alienation and reduced the breadth of owner consent for an alienation to be approved. The effect of this on Rangitoto was obvious, with approximately half of the island alienated over the next decade. Such alienation was made easier by the inadequate and perfunctory nature of investigations designed to ensure no owners were rendered landless. Among other things, as we noted previously, such investigations failed to take into account the quality of the land remaining or the nature of the title under which it was held. In our opinion, this was a breach of the principle of active protection.

We also note that the existence of Rangitoto in Ngati Koata hands was often cited by Crown officials as sufficient reason for the tribe's inadequate reserves elsewhere not to be extended. That being the case, it was incumbent upon the Crown to ensure that the island remained in Ngati Koata ownership and that the owners received reasonable assistance to farm and develop the island to the best of their ability. Access to development finance was critical in this respect but largely beyond the reach of the owners. Instead, approximately 85 per cent of the island was allowed to be alienated, most of it to private parties, but including some Crown acquisitions, including one as recently as 1967. We find this in breach of the principle of active protection.

One legacy of the impact of several generations of Maori land legislation was the fractionation of titles to Rangitoto, leaving owners with increasingly smaller and worthless interests in the island, at least considered from a strictly economic perspective. But the Crown's response to the problem created by its own land legislation merely compounded the sense of grievance for many Maori. We consider the legislation introduced after 1953 allowing for

the compulsory purchase of 'uneconomic' interests in Maori land, though perhaps well-intentioned, in breach of the Treaty in that it ran contrary to the clear and unambiguous guarantee to Maori contained in article 2 that they should be allowed to retain their lands for so long as they wished.

Although Ngati Koata were already to some extent dispersed prior to the title investigation and subsequent leasing and sale of interests on Rangitoto, this process was solidified in the wake of such developments. The natural disadvantages which the island possessed in terms of allowing participation in the new colonial economy were greatly exacerbated by the nature of the titles received and the small economic returns generated. Today just a small handful of Maori families continue to reside on Rangitoto, Maori ownership of which has been reduced to approximately one-seventh of what it was prior to the advent of the Native Land Court in Te Tau Ihu.

#### 8.4 WAKAPUAKA

The Wakapuaka block, containing some 17,575 acres upon survey, was the third case dealt with by Judge Mair in Nelson in November 1883. The court's decision to make Huria Matenga the sole owner of the land has generated what Dr Phillipson has called 'the claimants' most enduring grievance in their petitions to Parliament.'<sup>213</sup> Between 1896 and 1948 alone, the Wakapuaka controversy was the subject of at least 23 petitions. It remains today a matter of great concern to a number of parties to our inquiry.

The land around which this turmoil swirled lies about 13 kilometres north-east of Nelson.<sup>214</sup> In our first preliminary report, it was noted that, after the tuku of Tutepourangi, Wakapuaka was among the places where Ngati Koata and Ngati Kuia lived together.<sup>215</sup> We noted also our acceptance of the interpretation advanced by the Ngati Koata and Ngati Kuia witnesses to appear before us, supported by the research of Dr Ballara, that Tutepourangi's life had been spared because he was a chief of great mana and that subsequent interaction between the families of Tekateka of Ngati Koata and Tutepourangi, along with shared residence and extensive intermarriage, indicated clearly that he had not lost all authority over the land as a result of the gift.<sup>216</sup>

Matters changed significantly with the conquest of Te Tau Ihu after about 1831. A taua made up of Ngati Tama and other iwi, including possibly some Ngati Toa, attacked Wakapuaka. Ngati Koata at Wakapuaka were taken by surprise, but did not join the fight, which

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213. Phillipson, *Northern South Island: Part 2*, p 49

214. Campbell, 'A Living People', p 213

215. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Preliminary Report on Customary Rights in the Northern South Island* (Wellington: Legislation Direct, 2007), p 32

216. *Ibid*, p 37

was not later seen by Ngati Koata and Ngati Kuia rangatira as having compromised the relationship between the iwi associated with the tuku. Tutepourangi was killed in the fight, apparently by Paremata Te Wahapiro of Ngati Tama, the nephew and stepson of the ariki Te Puoho. The latter married Te Wahapiro's mother Kauhoe after the death of her first husband, the younger brother of Te Puoho.

After the later death of Te Puoho, Kauhoe and her son from her marriage to Te Puoho, Wi Katene Te Puoho, also known as Wi Katene Te Manu, decided to move from Parapara. Why this happened and the status of the tuku through which Ngati Koata rangatira responded to Kauhoe's approach to them for other land on which to live are contested. In our first preliminary report, we concluded that Ngati Tama were firmly settled at Wakapuaka along with a number of other locations within Te Tau Ihu by 1840. However, the Tribunal also heard that Ngati Koata and Ngati Kuia–Rangitane maintained that they had on-going rights in Wakapuaka that were respected by Ngati Tama after the tuku to Kauhoe and the relocation of her people to that area. Three Ngati Koata as well as some Ngati Tama were party to the deed of release signed in 1844 by 'the Natives of Whakapuaka' with respect to their claims to land at Whakatu, Waimea, and elsewhere.<sup>217</sup>

Kauhoe died in 1843. Her surviving sons, Te Wahapiro and Wi Katene, were sometimes at odds. Te Wahapiro led an effort to stop the New Zealand Company extending the boundaries of Nelson into Wakapuaka during the 1840s. He signed the Ngati Toa deed of sale that included Wakapuaka in 1853, but his family argued from the 1890s that he did so as a Ngati Toa, and therefore had not alienated the family interest in Wakapuaka.<sup>218</sup> His brother, Wi Katene, had disputed the right of the signatories to the 1853 deed to sell Wakapuaka from as early as October of that same year.<sup>219</sup> Te Wahapiro died in the North Island in 1854, leaving four surviving children from his first marriage (Tipene Paremata, Ripene, Wi Katene, and Heni Tipu) and two from his second marriage (Atiraira and Ngawaina). In the later nineteenth century, some of these children resided at Wakapuaka with a Ngati Tama community. Wi Katene was acknowledged as the community leader, particularly after his brother's death.<sup>220</sup>

The Ngati Tama community at Wakapuaka refused to sell their land to the Crown in the Waipounamu purchase. Mr Macky outlines a series of tactics adopted by McLean in order to pressure Ngati Tama to abandon their opposition to the sale of Wakapuaka.<sup>221</sup> McLean was eventually forced to admit defeat, at least temporarily, but failed to record Wakapuaka as reserved from sale in any deed, even though it was clearly marked as such on one 1855

217. Deed of release, 14 August 1844, *Compendium*, vol 1, pp 67–68 (Ballara, 'Customary Maori Land Tenure', p 238)

218. Paul Goldstone, 'The Wakapuaka Block: A Summary of Evidence', report commissioned by the Crown Law Office, 2003 (doc s1), p 103

219. Macky, p 201

220. Phillipson, *Northern South Island: Part 2*, p 36

221. Macky, pp 200–205, 260–261

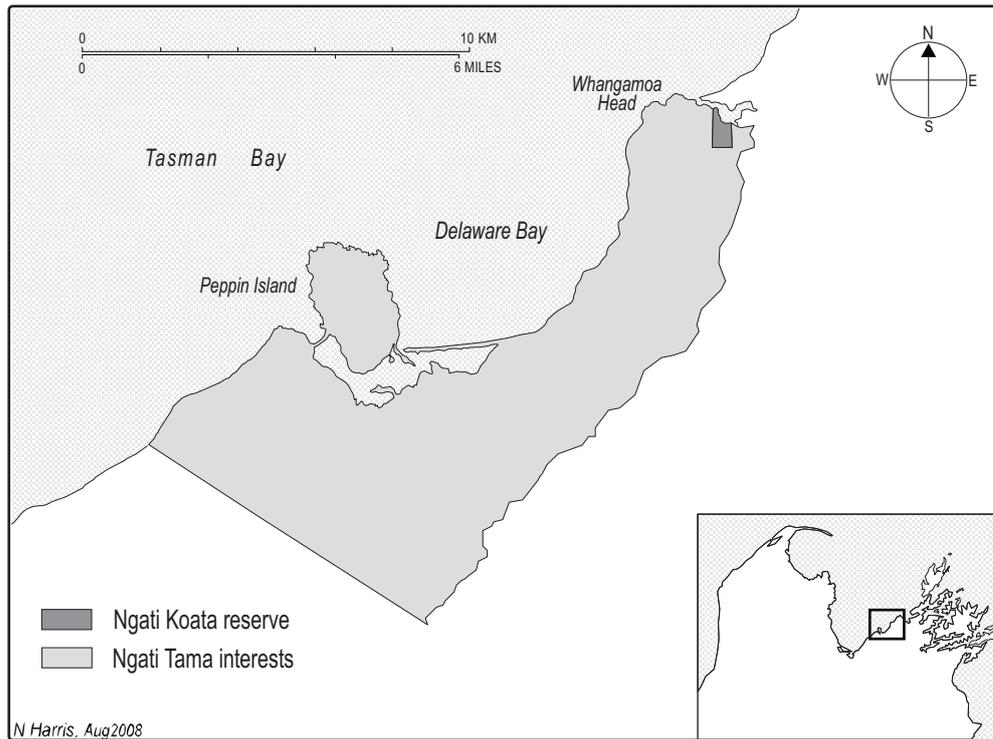


Figure 29: Wakapuaka–Whangamoā overlap

Source: Moira Jackson, Crown Forestry Rental Trust, and Terralink NZ Ltd, 'The Ngati Koata (Wai 566) GIS Map Book', map book, 2001 (doc c3)

map.<sup>222</sup> He also agreed to a 100 acre reservation for Ngati Koata near the Whangamoā River, with the map accompanying the 1856 Ngati Koata deed of sale showing this to be located south of the river. When James Mackay came to settle the boundaries of this reserve in 1862, Wi Katene said that land south of the river belonged to Ngati Tama. Maka Tarapiko of Ngati Koata, on the other hand, told Mackay that land between Maunganui, to the south of Whangamoā, and O Mokau, north of the river, 'belonged to both the Ngatikoata and Ngatitama Tribes', who had been disputing for many years about the boundary. The compromise that Mackay had finally negotiated was that the Whangamoā reserve for Ngati Koata was laid out south of the river to appease Ngati Koata, but the northern boundary of Wakapuaka was placed along the Whangamoā River to appease Ngati Tama (see fig 29).<sup>223</sup>

During the 1860s and 1870s, parts of the Wakapuaka block were leased. Two lessees were relatives of the ubiquitous Alexander Mackay, who witnessed the leases and was, according to Dr Phillipson, 'a personal friend of Wi Katene Te Puoho and his immediate family'. The wife of Wi Katene was Wikitoria Tatana Te Keha, daughter of Henare Te Keha, a Te Atiawa

222. Phillipson, *Northern South Island: Part 2*, p 36

223. Bassett and Kay, 'Nga Ture Kaupapa', pp 124–125

chief from Golden Bay. During the 1870s, the leading rangatira at Wakapuaka were Wi Katene and his daughter and son-in-law, Huria and Hemi Matenga. Hemi Matenga was of prominent Ngati Toa descent.<sup>224</sup> Both Huria Matenga and Hemi Matenga were also highly regarded in Pakeha society in the Nelson area.<sup>225</sup>

Wi Katene Te Puoho was strongly opposed to land sales, and consequently refused to take Wakapuaka to the Native Land Court. In the mid-1870s, the Crown wished to buy land at Wakapuaka for a telegraph station, and although Wi Katene reluctantly agreed that 10 acres could be alienated for this purpose, he refused to agree to the land being referred to the court. Alexander Mackay's report on his negotiations with him contains an apparent contradiction relating to rights to land in the area. On the one hand, he admitted that there were several sons of Te Wahapiro 'who may consider they have a right to share the land conjointly with Wi Katene'. He described them as having 'a subordinate position' and rights 'entirely of a secondary character'.<sup>226</sup> However, Dr Phillipson points out that 'Mackay must have known that such rights would have to be recognised by the court'.<sup>227</sup> On the other hand, Mackay concluded that 'there are no conflicting claims to the land at Rotokura'. As Dr Phillipson notes, it is possibly, but not clearly, the case that Mackay was referring merely to the 10 acres being acquired by the Crown. At any rate, the Crown dealt with the situation by passing the Wakapuaka Telegraph Station Site Act 1877. This stated that Wi Katene, Huria Matenga, and Hemi Matenga, because of his marriage to Huria, owned the land, although the court had not ascertained the title, and that the Governor was therefore authorised to buy the land from the three without referring it to the court.<sup>228</sup>

#### 8.4.1 The application for the Wakapuaka hearing

Wi Katene Te Puoho died in 1880. Two years later, in 1882, Huria Matenga applied for a hearing to determine the title of Wakapuaka. An immediate issue is raised regarding the level of consent required before land could be submitted to the court and the process set in train that would decide ownership. Huria Matenga's unsigned application was filled out in the handwriting of her husband Hemi Matenga and that of Alexander Mackay. Professor Williams notes Judge Harvey's 1936 observation that section 16 of the Native Land Court Act 1880 required three or more Maori applicants for the investigation of title. Professor

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224. Phillipson, *Northern South Island: Part 2*, pp 36–37

225. 'Huria Matenga', DNZB, vol 1, pp 281–282

226. 'The Native Purposes Act, 1934: Report and Recommendation . . . Regarding Wakapuaka Block', 18 May 1936, AJHR, 1936, G-6B, pp 20–21 (Hilary Mitchell and Maui John Mitchell, comps, supporting documents to 'Report No 13B', various dates (doc A26(a)), app 5B, pp 20–21)

227. Phillipson, *Northern South Island: Part 2*, p 37

228. Ibid; 'The Native Purposes Act, 1934: Report and Recommendation . . . Regarding Wakapuaka Block', 18 May 1936, AJHR, 1936, G-6B, pp 20–21 (Mitchell and Mitchell, supporting documents to 'Report No 13B', app 5B, pp 20–21)

Williams observes that the short period for which section 16 was in force was the sole and limited legislative acknowledgement of iwi concerns about how only one applicant was required to force an entire hapu to become part of the ‘debilitating processes of the Native Land Court system.’<sup>229</sup>

In this application, there was only one applicant. The *Gazette* notice setting the Wakapuaka application down for hearing at Nelson on 15 November 1883 and subsequent days was dated 22 August 1883. However, on 8 September 1883, the Native Land Laws Amendment Act 1883 came into force. Section 17 of this Act removed the need for three Maori applicants, instead restoring the position under the 1873 Act, under which any Maori could apply to the court. Given that the actual hearing and judgment happened after 8 September, Professor Williams concludes that ‘at the relevant time there was no legal impediment to hearing the application of a sole claimant.’<sup>230</sup> But the *Gazette* notice advertised the claim for hearing under the provisions of the Native Land Court Act 1880, and the certificate of title for the block was similarly under the provisions of that Act.<sup>231</sup> We can have little doubt, therefore, that it is to the provisions of the 1880 Act that we need to turn in considering whether the application for Wakapuaka complied with the law. Quite clearly, it did not. Section 16 required three or more claimants to make application for investigation of title and the application for Wakapuaka in Huria Matenga’s sole name did not comply with this. It ought not to have been accepted by the court. Moreover, Crown officials ought to have been alerted to this fact from at least the date that the application had been published in the *Gazette*.

In accordance with section 17(2) of the 1880 Act, Huria Matenga’s application listed Ngati Tama as the relevant tribe.<sup>232</sup> Nevertheless, the appearance of the iwi name on the application form did not necessarily mean that Ngati Tama assented to the application. Indeed, no Ngati Tama witnesses appeared at the Wakapuaka hearing. Professor Williams considers that subsequent ‘intra-tribal quarrels’ about Wakapuaka resulted from the legislature’s failure to require tribal assent before an individual could apply to the land court for investigation of title.<sup>233</sup> Such a requirement, he added, ‘would have been quite inconsistent with the Crown’s detribalisation policies – of which the Native Land Court was a cornerstone.’<sup>234</sup>

#### 8.4.2 The Wakapuaka hearing before the Native Land Court

The Wakapuaka case began on 17 November 1883 before Judge Mair. Huria Matenga was given permission to have Hemi Matenga appear on her behalf. Initially, Hemi Matenga said

229. Williams, ‘Crown and Ngati Tama’, pp 134–135; Phillipson, *Northern South Island: Part 2*, p 37

230. *Ibid*, p 135

231. Mitchell and Mitchell, supporting documents to ‘Report No 13B’, app 8B-1

232. Phillipson, *Northern South Island: Part 2*, p 37

233. Williams, ‘Crown and Ngati Tama’, pp 135–136

234. *Ibid*, p 136

that Huria Matenga claimed ‘through her father and grandmother Kauhoe.’<sup>235</sup> On her behalf, he claimed the whole block other than the 10 acres at Rotokura taken for a telegraph station and the 100 acres set apart for Ngati Koata.

The first counterclaim to Wakapuaka came from Meihana Kereopa and others on behalf of Rangitane, Ngati Kuia, and Ngati Apa, and the second from Tepine Te Ruruku through Ngati Koata.<sup>236</sup> When Meihana Kereopa presented his counterclaim, one of his witnesses, Hemi Whiro, who claimed through ancestry, said that ‘Tutepourangi my ancestor gave this land to Ngati Koata before the conquest’ and that ‘We were conquered and cleared out.’ However, he contradicted the last point by adding that ‘We did not move from the land until it was given to Wi Katene & his mother.’ The witness noted that he would not object to Huria retaining the land, but ‘I should object to her selling.’ He further asserted that Tutepourangi’s right to the land ‘has remained down to the present generation’ and that his ancestor’s gift to Ngati Koata ‘is still in force.’ Hemi Whiro further noted that some Ngati Koata had continued to reside on the land even after Wi Katene had taken possession.<sup>237</sup> Meihana Kereopa stated that he considered that ‘Huria is the rightful owner’ and that ‘Koata gave the land to Wi Katene, and we remained there in slavery.’ Nevertheless, he also claimed through ancestry, and said that he had lived on the land with Paremata and had buildings and cultivations on the block.<sup>238</sup>

The Ngati Koata counterclaim began later on 17 November. Before it recommenced on 19 November, Meihana Kereopa requested permission to withdraw his claim on behalf of the Kurahaupo iwi. Witnesses for Ngati Koata agreed that their rights were derived from the *tuku* of Tutepourangi. They also testified that they had occupied the block until they shifted to Rangitoto, and that some Ngati Koata had lived there after the *tuku* by Ngati Koata. Ihaka Tekateka testified that Ngati Koata had given ‘the land to Wi Katene for himself not for the tribe’, and that, when Wi Katene wanted to lease it, he had obtained the permission of Te Patete. However, he also said that Wi Katene had received all the rent and not allowed Ngati Koata any of it, but he had made several verbal promises to return some of the land to them. He said that ‘I now leave [it] to Huria to give us part of the land’.<sup>239</sup> Hoera Ruruku emphasised that Wi Katene had consulted Te Patete over not just leasing the land, but also the sale of the cable station site. He said that Wi Katene had given some money derived from the sale to them. He was clear that Ngati Koata ‘gave Wakapuaka to Wi Katene but we continued to have a right to it afterwards & exercised authority over [it]’.<sup>240</sup>

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235. Native Land Court, Nelson, minute book 1, 17 November 1883, fol 14 (David Alexander, comp, supporting documents to ‘Reserves of Te Tau Ihu’, 10 pts, various dates, pt 5 (doc A60(g)), p 4703)

236. *Ibid*

237. *Ibid*, fols 15–16 (pp 4704–4705)

238. *Ibid*, fol 16 (p 4705)

239. *Ibid*, fol 17 (p 4706)

240. *Ibid*, 19 November 1883, fols 18–19

A third witness, Ngamuka Kawharu, testified that Kauhoe was 'sent to Wakapuaka, but told not to take any others with her'. However, Dr Ballara points out that, regardless of the original intention of Ngati Koata respecting Kauhoe and Wi Katene, they did not object when seven canoe loads of Ngati Tama went to Wakapuaka with Kauhoe, with many of these becoming permanent residents.<sup>241</sup> Kawharu also agreed that Wi Katene had consulted Te Patete about leasing and said further that Wi Katene had given him part of the proceeds from leasing and the cable station sale.<sup>242</sup> Two further Ngati Koata witnesses agreed that Huria Matenga had promised to give land to Raniera Kawharu and other Ngati Koata, and that she had said she would put this in writing, but had failed to do so. In a comment evidently directed at Hemi Matenga, Ngamuka Kawharu said: 'You have prevented her.'<sup>243</sup>

The only witness called by Hemi Matenga was Alexander Mackay. Mackay testified that Tutepourangi's gift to Ngati Koata related only to Rangitoto; that in any event the subsequent 'invasion by the allied tribes' entirely did away with its effect; and that Wi Katene's half brother killed Tutepourangi. He said that Te Rauparaha distributed the land, with Ngati Koata taking possession of Rangitoto and Ngati Tama '& others' taking possession of Wakapuaka.<sup>244</sup> He said that Kauhoe's request for land on which to live was 'simply Maori ceremony', and he claimed that Ngati Koata 'formed part of the conquered party'.<sup>245</sup> Mackay's testimony therefore implied that Huria Matenga was claiming through conquest and occupation. Mackay did not explain why, if Te Wahapiro had killed Tutepourangi, only Wi Katene owned Wakapuaka. How it was possible for conquest to confer rights on only a small fraction of the conquering party was not at all clear. Nor did Mackay explain why, if the tuku to Kauhoe was 'simply Maori ceremony', the tuku of Tutepourangi or Te Rauparaha were matters of substance. Again, he did not explain why, if Te Rauparaha gave Wakapuaka to Ngati Tama, only Huria Matenga had a claim to it.

As regards the counterclaim to Wakapuaka from Ngati Koata, Mackay stated that he 'never heard of any Koata living at Wakapuaka'. Yet, he also admitted that some Ngati Koata had died at Wakapuaka and were buried there, although he claimed they 'were just passing through'.<sup>246</sup> Mackay's evidence therefore contained a number of significant internal contradictions which do not appear to have been the subject of further questioning or challenge by the court.

There were also contradictions between the evidence Mackay gave before the Native Land Court in 1883 and his earlier writings. In an 1873 publication, Mackay wrote that Ngati Apa had taken possession of the land that Ngati Tumatakokiri had previously owned. Yet, at the

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241. Ballara, 'Customary Maori Land Tenure', p 288

242. Native Land Court, Nelson, minute book 1, 19 November 1883, fol 21 (Alexander, supporting documents to 'Reserves of Te Tau Ihu', pt 5, p 4710)

243. Ibid, fol 22 (p 4711)

244. Ibid, fol 23 (p 4712)

245. Ibid, fol 24 (p 4713)

246. Ibid, fol 25 (p 4714)

Wakapuaka hearing, Mackay countered Meihana's claim by testifying that a tribe that was apparently Ngati Tumatakokiri was still occupying Wakapuaka up until Ngati Tama took possession of it following Te Rauparaha's distribution.<sup>247</sup> Furthermore, Dr Ballara demonstrates that Mackay's statements about lack of consultation of Ngati Koata chiefs, about Ngati Koata being 'part of the conquered party', and about never having 'heard any elder Koata say they had any claim to Wakapuaka' all contradicted earlier published material.<sup>248</sup> Hemi Matenga closed his case with evidence relating almost wholly to leasing of the land after 1840.<sup>249</sup> Although his evidence supports that of Mackay in most respects, Matenga conceded that Ngati Koata had continued to visit and take food from the land.<sup>250</sup>

The court delivered its very brief but sweeping judgment on 20 November 1883:

The evidence in this case has been perfectly clear. It appears that Wi Katene came into possession before the great sales. This land was reserved from sale at his instance. He & his heirs have enjoyed undisputed possession to the present time. Even Ngati Koata who set up a counter claim admit the mana of Wi Katene. They argue that Huria ought to admit them, not that they have any right. With that aspect the Court has nothing to do nor with any promise she may have made. When Huria gets her title, she is free to do with it as she will.

Therefore the Court makes an order in favour of Huria Matenga for the Wakapuaka block as shown in the map excepting the 100 acres set apart for Ngati Koata, and 10 acres for the Cable Station. A Certificate of Title to issue upon production of an approved survey.<sup>251</sup>

Dr Ballara notes that, even on the basis of the little evidence supplied, this was a very unusual judgment. Few other blocks in excess of 17,000 acres in extent were awarded to a single individual anywhere in the country. According to Dr Ballara, it was also unusual in that Huria Matenga's take to the land was never clearly stated to the court. Hemi Matenga's evidence focused on the post-1840 leasing of the land, while the closest indication of the basis of the claim was given by Mackay, who seemed to suggest that Huria's title was derived by virtue of conquest and occupation.<sup>252</sup> If that was the case, then as previously noted, there were a number of obvious problems with the court's judgment. It is little wonder, then, that the Wakapuaka decision later became one of the most contentious issues for Te Tau Ihu Maori.

247. Native Land Court, Nelson, minute book 1, 19 November 1883, fol 23 (Alexander, supporting documents to 'Reserves of Te Tau Ihu', pt 5, p 4712)

248. Ballara, 'Customary Maori Land Tenure', p 286; see also 'Copy of Deed of Release', 14 August 1844, *Compendium*, vol 1, pp 67–68

249. Native Land Court, Nelson, minute book 1, 19 November 1883, fols 25–26 (Alexander, supporting documents to 'Reserves of Te Tau Ihu', pt 5, pp 4714–4715)

250. Phillipson, *Northern South Island: Part 2*, p 38

251. Native Land Court, Nelson, minute book 1, 20 November 1883, fol 27 (Alexander, supporting documents to 'Reserves of Te Tau Ihu', pt 5, p 4716). The 100-acre section set apart for Ngati Koata was the area to the south of the Whangamoia River that James Mackay had arranged for them in 1862 as part of the settlement of their dispute with Ngati Tama.

252. Ballara, 'Customary Maori Land Tenure', p 285

**(1) Protests relating to the Wakapuaka judgment**

There were numerous protests about the court's award between the 1890s and an eventual reinvestigation of title in the 1930s. The reinvestigation, in turn, was followed by further protests. Paul Goldstone, a historian for the Crown, has described those claiming Wakapuaka since the 1883 Wakapuaka judgment as falling under five categories:

- ▶ Huria Matenga and her husband, Hemi Matenga, based on the gift of Ngati Koata to Wi Katene Te Puoho; on the recognition after that gift of Wi Katene as chief and sole owner of Wakapuaka; and on his continual occupation of the land;
- ▶ a broader group from the Paremata family, who claimed that the gift was not only to Wi Katene but also to Paremata Te Wahapiro and who also claimed shared occupation;
- ▶ Ngati Kuia and Rangitane, who had withdrawn their claim in 1883 (along with Ngati Apa);
- ▶ a group of Ngati Tama, who denied any gift by Ngati Koata to Kauhoe or Wi Katene, instead claiming the land on the basis of Ngati Tama conquest;
- ▶ Ngati Koata, who claimed that the land should have reverted to them after the death of Huria Matenga, as the gift to Wi Katene was not absolute.<sup>253</sup>

Given the complex and sometimes contradictory nature of the evidence available it is useful to bear these different categories of claimants and the distinctive nature of their cases in mind as we review the history of Wakapuaka after 1883.

**(2) Protest from descendants of Paremata Te Wahapiro, 1896–1912**

The most persistent protests about the decision made by the Native Land Court in 1883 came from descendants of Paremata Te Wahapiro. But these were not immediately forthcoming, for the simple reason that the consequences of the judgment were not apparent for some time. The 1883 court decision does not seem to have significantly affected the situation at Wakapuaka in so far as the various relatives of Huria Matenga continued to live and farm there for many years afterwards. Dr Phillipson considers that, as far as her relatives knew, they had been included in the certificate of title alongside Huria Matenga. In 1886, Huria made a will under which all her lands would pass to her husband, Hemi Matenga. Furthermore, under an unusual arrangement made in 1895, she leased the block to Hemi for the rest of his life for a rental of £100 per annum. Judge Alexander Mackay confirmed this lease in the Native Land Court on 29 May 1895. After this, Hemi began evicting other members of Huria's family from Wakapuaka. He not only killed their stock but even burnt down the house of Te Wahapiro's daughter, Atiraira Nopera.<sup>254</sup>

Many claimant witnesses gave evidence of their families' eviction from Wakapuaka. These include Hinekehu (Dawn) McConnell, Te Mataa Mokena-Gilbert, Margaret Little, Margaret

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253. Goldstone, 'The Wakapuaka Block', p 6

254. Phillipson, *Northern South Island: Part 2*, p 39

## 8.4.2(2)

(Makere) Te Korako, and Maraea Ropata for Ngati Tama, and Ariana Rene for Ngati Koata.<sup>255</sup> For some whanau, they had no other surviving interests in Te Tau Ihu and had to move to the North Island.<sup>256</sup> Makere Te Korako summed up their sense of loss:

And our mokopuna the uri whakatipu kei te heke mai have no mana whenua, no mana atua, no mana reo, nothing left despite the fact that their whakapapa goes back to the lands, mountains waterways of this land. They will be the outsiders and indeed we already are . . . And we weep.<sup>257</sup>

By the time of the evictions, the short period provided for applications for rehearing had expired years earlier. Consequently, Hemi Matenga's actions sparked off the first petition to Parliament calling for a rehearing relating to Wakapuaka. In 1896, Wi Katene Paremata, a son of Te Wahapiro, and therefore a grandson of Kauhoe, asked Parliament to grant a rehearing for the block. Paremata argued that he and Te Wahapiro's other descendants should have been awarded shares in Wakapuaka. They had stayed away from the court, he added, because they had an arrangement with Huria that she would see that their names went into the title, but she had not kept her promise, as a result of which they had been 'shut out of the same'.<sup>258</sup>

In 1904, Atiraira's counsel claimed that the Native Affairs Committee had agreed to allow a rehearing, but that the day after it took this decision, Judge Alexander Mackay had made a statement to it that had led to the committee altering its report to one that was unfavourable to the petitioners.<sup>259</sup> Mackay, who had been a judge of the Native Land Court for many years by the time of the 1896 petition, certainly did report to the committee opposing the position of the petitioners. It is particularly notable that, whereas in his evidence to the 1883 Wakapuaka hearing, he had described the gift to Kauhoe as merely 'Maori ceremony', in his 1896 statement to the Native Affairs Committee, he represented the gift as a significant factor in Wi Katene's allegedly exclusive right to Wakapuaka. In one place, he described it as a gift 'to Kauhoe for her son Wi Katene te Puoho', and in another as a 'gift to Wi Katene te Puoho'. Thus, he remained unchanging in his support for Huria Matenga's sole claim to Wakapuaka, but the grounds he used to justify this position had shifted markedly.<sup>260</sup> Mackay

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255. Margaret Ward-Holmes Little, brief of evidence on behalf of Ngati Tama, 17 February 2003 (doc K35); Margaret (Makere) Te Korako, brief of evidence on behalf of Ngati Tama, 13 February 2003 (doc K34); Maraea Ropata, brief of evidence on behalf of Ngati Tama, 21 February 2003 (doc K27); Te Mataa Mokena-Gilbert, brief of evidence on behalf of Ngati Tama, 21 February 2003 (doc K28); Hinekehu Ngaki Dawn McConnell, brief of evidence on behalf of Ngati Tama, 17 February 2003 (doc K29); Ariana Rene, brief of evidence on behalf of Ngati Koata, not dated (doc B18)

256. See, for example, Little, brief of evidence, p 5

257. Te Korako, brief of evidence on behalf of Ngati Tama, p 8

258. Native Affairs Committee, 'Report on the Petition of Wi Katene and One Other', 27 August 1896, no 60, AJHR, 1896, 1-3, pp 10-11 (Goldstone, 'The Wakapuaka Block', p 106); Phillipson, *Northern South Island: Part 2*, p 39

259. 'The Native Purposes Act, 1934 . . .', 18 May 1936, AJHR, 1936, G-6B, p 43

260. Goldstone, 'The Wakapuaka Block', pp 24-25

also argued that the petitioners' statement that Atiraira Mohi 'agreed that Huria Matenga, her superior in rank, should be allowed to prefer a claim to her own property seems rather preposterous and incapable of belief'. Furthermore, he said he was 'inclined to believe that all the Paremata family were aware from the outset that their names were not in the title, as the decision of the court was widely known'. Mackay also accused Te Wahapiro of a 'spoliative action' against his brother Wi Katene, because Te Wahapiro had signed the 1853 Ngati Toa deed. He said that without the strong opposition of Wi Katene, the greater part of Wakapuaka would have passed to the Crown.<sup>261</sup>

The committee did express some scepticism about Mackay's suggestion that Kauhoe's rights were merely those of a trustee for Wi Katene, not in her own right. However, they also concluded that any rights Te Wahapiro had in the block had been shown to have been ceded to the Crown. Consequently, members of the committee considered that, if the petitioners, as his descendants, had made a case to the court for any part of Wakapuaka, the court would have had to award that part to the Crown. Furthermore, they noted that Huria denied making a promise to the petitioners. The committee saw the petitioners' absence from the court and their failure to claim the land for 13 years as confirmation that the petitioners had not thought that they had a claim to Wakapuaka.<sup>262</sup>

The decision of the committee was often reissued in response to later petitions. It was thus very influential. Yet, in 1935 Judge Harvey concluded that Mackay's views had been given too much weight, and had resulted in an incorrect finding by the committee.<sup>263</sup> It was to be the first of many petitions. Another 1896 petition from Wi Katene and one other regarding Wakapuaka was withdrawn by the petitioners until the following year, possibly in order allow more evidence to be marshalled in support of their position.<sup>264</sup>

In 1901, HK Taiaroa, the former member of Parliament for Southern Maori, in his capacity as a legislative councillor, stated that the Native Affairs Committee of the Legislative Council had favoured the granting of a rehearing when it considered the issue in 1897. For reasons that remain unclear, however, when the petitioners approached the Government they were wrongly informed that there was no power to grant a rehearing under section 14(10) of the Native Land Court Act 1894, which the committee had recommended the Government should look at utilising. This subsection permitted the court to investigate whether owners included on certificates of title were intended to be trustees for people not so included. If Taiaroa's account is to be believed then an early opportunity for the Wakapuaka title to be reopened had been missed.

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261. 'The Native Purposes Act, 1934 . . .', AJHR, 1936, G-6B, pp 29-31

262. Native Affairs Committee, 'Report on the Petition of Wi Katene and One Other', 27 August 1896, AJHR, 1896, I-3, pp10-11

263. Phillipson, *Northern South Island: Part 2*, p 40

264. Goldstone, 'The Wakapuaka Block', pp 106-107; Miriam Clark, 'Kaitiakitanga: Ngati Tama Manawhenua ki te Tau Ihu', report commissioned by the Ngati Tama Manawhenua ki te Tau Ihu Trust, 1999 (doc A48), p 12

The two daughters of Te Wahapiro by his second marriage, Ngawaina Hanekumu and Atiraira, presented another petition in 1897. Evidence was heard from the petitioners' husbands the following year. Judge Harvey later considered the evidence given as sound, but observed that the committee 'chose to believe the Mackay version of things'. Its preference for such 'half-truths', Harvey concluded, had led the committee to mistakenly reject the plea of the petitioners for a rehearing.<sup>265</sup> Certainly the notion that Paremata's family had essentially slept on their rights in failing to seek a rehearing earlier could no longer hold water: the lengthy and detailed petition the sisters had presented explicitly noted that they had not known that Huria Matenga alone was included in the title for Wakapuaka until 1895, when Hemi had first commenced his campaign of harassment against the other residents of the land, forcing them to flee from the block. Ngawaina and Atiraira pointed out that the first petitions had been sent to Parliament the following year.<sup>266</sup> Considering that Atiraira and her husband had been compelled to move to Porirua in the interim, that was hardly a lengthy or unreasonable delay.

Atiraira petitioned again in 1899, but both houses adjourned consideration of this petition. Alexander Mackay, still at this stage a judge of the Native Land Court, wrote a lengthy letter to the Native Affairs Committee in that year, opposing the arguments of the petitioners.<sup>267</sup> Again, this contained a number of inconsistencies and anomalies. Mackay claimed, for example, that the children of Paremata had lived at Wakapuaka 'without any right', and might have continued to do so had they not petitioned Parliament in 1896 for a rehearing into the title. Immediately this became known, according to Mackay, they had been 'turned off' the block. Yet, all other evidence indicates that Hemi Matenga had started killing the stock and burning down the houses of the Wakapuaka residents in 1895, prompting them to petition Parliament, and not the other way around. Was Mackay perhaps trying to obscure the clear sequence whereby the Paremata family became aware of their exclusion from the title and petitioned for a rehearing soon after? That is impossible to say with any certainty, though the suspicion nevertheless remains.

In 1901, Henare Tomoana moved in the Legislative Council that the Government be asked for an inquiry into Wakapuaka's ownership. He and HK Taiaroa, with assistance from a Pakeha member with some understanding of customary rights, convinced the council to pass the motion, but the Government does not appear to have acted on it. In 1903, the Native Affairs Committee of the House of Representatives finally reported, in relationship to the 1897 and 1899 petitions, that it saw no reason to change the 1896 decision. The council's committee, on the other hand, decided in that year to ask the Minister of Justice for an examination of Huria by a magistrate in Nelson regarding the issue of a possible

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265. Phillipson, *Northern South Island: Part 2*, p 41

266. Goldstone, 'The Wakapuaka Block', pp 107–113

267. Alexander MacKay, 9 September 1899, MS-papers 2089–04, ATL (Goldstone, 'The Wakapuaka Block', pp 25–29)

pre-hearing agreement between Huria and her family. Huria agreed to give evidence, in which she denied the existence of such an agreement, although Judge Harvey later noted that this evidence was unsworn.<sup>268</sup> Mr Goldstone cites evidence from 1902 that Huria, anxious that her will might be challenged, had instructed her lawyer to transfer the block at once to Hemi in order to secure him in the ownership before she died.<sup>269</sup> Nothing appears to have come of this, but it does indicate that the Matengas were by this time concerned as to the security of Huria's title to the block.

The Paremata family remained unwavering in their persistence, sending yet another petition to Parliament in 1903 following the rejection of their most recent one. They then took legal advice and in 1904 applied for an order in council under the Land Titles Protection Act 1902 that would authorise the Native Land Court to investigate the Wakapuaka title under section 14(10) of the Native Land Court Act 1894. Huria's solicitors produced affidavits from both Alexander and James Mackay in 1905. Alexander Mackay had been approached by Huria Matenga's lawyer the year before for such assistance and had replied that he 'shall be very pleased to make a declaration of the kind referred to or do anything else to protect Julia's interest.'<sup>270</sup> By this time retired as a judge of the Native Land Court, Mackay subsequently advised the lawyer on the 'main line of defence' against the Paremata family claims.<sup>271</sup> His evidence and that of his cousin were used to combat both the order in council application along with later petitions. Atiraira's solicitors went unheard in their argument that the testimony of Alexander Mackay was biased and untrustworthy in this particular matter. No order in council was issued.<sup>272</sup>

In 1904, the House committee responded unfavourably to the 1903 petition on the basis of its 1896 investigation. Nevertheless, the family continued with their efforts. They petitioned again in 1906, when the House committee made no recommendation 'because the petitioner has not exhausted his legal remedies'. In 1909, Huria Matenga died and Hemi inherited Wakapuaka. Wi Katene Tipu (also known as Wi Katene Te Puoho), son of Heni Tipu and grandson of Te Wahapiro, petitioned for a rehearing that year, but the House committee simply made 'no recommendation' on this in 1910.<sup>273</sup> Hemi was unsuccessful in persuading the Maori Appellate Court to reclassify Wakapuaka as European land, which would have freed him from the possibility of a rehearing. It is possible the judge thought that Huria's sole ownership might have actually involved a trust. At any rate, in 1912, Hemi Matenga himself died without legitimate children, and his will entrusted the land to two Pakeha trustees. In 1912, Wi Katene Te Puoho petitioned again, but got the same response

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268. Phillipson, *Northern South Island: Part 2*, pp 40–42

269. Goldstone, 'The Wakapuaka Block', p 30

270. *Ibid*, p 32

271. *Ibid*, p 33

272. Phillipson, *Northern South Island: Part 2*, p 42

273. 'The Native Purposes Act, 1934 . . .', AJHR, 1936, G-6B, pp 45, 56

## 8.4.2(3)

as in 1910. Not surprisingly, by this point, the family had exhausted its energy for further protest.<sup>274</sup>

**(3) Protest relating to Wakapuaka, 1928–35**

From 1928, the descendants of Paremata showed renewed determination over the Wakapuaka issue, and others eventually joined the protest. Wi Katene Te Puoho, representing the descendants of Kauhoe, petitioned again in 1928 and in 1929. There was a further petition in 1928 from Reuben Stephens, the son of Mamae, daughter of Hemi Matenga and Huriā's cousin Ngawaina. Reuben Stephens had by this stage received some land left by his father, but had nothing through his mother. The House committee issued its by now usual one-sentence response to these various petitions in 1928 and 1929. In 1933, Wi Katene's 1929 petition was also rejected, prompting a further petition from Hari Wi Katene asking for the matter to be reconsidered.<sup>275</sup> This petition was held over for consideration until 1934, when there was for the first time a petition from Waka Rawiri and Hoani Meihana on behalf of other Ngāti Tama who had lived at Wakapuaka, and who argued that Wakapuaka had been set apart for them 'long before 1862'.

The under-secretary of the Native Department told the Native Affairs Committee that he had 'nothing to add' to his comments on earlier petitions. It would therefore seem that the committee's decision to change its stance and recommend an inquiry into Wakapuaka was the result of several days of inquiry into the two petitions, at which Mr Sim represented Hari Wi Katene, the son of Wi Katene Tipō.<sup>276</sup> Consequently, these two petitions were put in the schedule of the Native Purposes Act 1934 for referral to the Native Land Court for inquiry, with the chief judge being empowered to take any remedial action necessary once the court had reported.<sup>277</sup>

It seems likely that Ngāti Koata were aware of this startling development. J A Elkington and others petitioned Parliament early in 1935. They contended that Ngāti Koata had given the land to Kauhoe for Wi Katene Te Puoho; that they had continued to occupy the land with him; and that as his line had died out, the gift reverted to Ngāti Koata as the sole owners.<sup>278</sup> After Mr Sim had accompanied the petitioners to a meeting of the Native Affairs

274. Phillipson, *Northern South Island: Part 2*, pp 42–43. For Paremata Te Wahapiro's descendants, see Selwyn Katene, brief of evidence on behalf of Ngāti Tama, 12 February 2003 (doc K24); 'Whakapapa of the Descendants of Kauhoe', in 'Petition of Hari Wi Katene and Four Others', 22 November 1933, Le 1/1933/14, ArchivesNZ (Crown Forestry Rental Trust, comp, 'Te Tau Ihu Document Bank', supporting documents, various dates (doc A44), p 698).

275. 'Petition of Hari Wi Katene and Four Others', 22 November 1933, Le 1/1933/14, ArchivesNZ (Crown Forestry Rental Trust, 'Te Tau Ihu Document Bank', pp 693–696); for whakapapa, see Katene, brief of evidence on behalf of Ngāti Tama, app 1

276. Under-secretary, Native Department, to chairman, Native Affairs Committee, 27 December 1933, with petition 262/1933, Le 1/1933/14, ArchivesNZ; Native Affairs Committee, minute book, 11, 16, 25 October 1934, Le 1/1934/15, ArchivesNZ (Crown Forestry Rental Trust, 'Te Tau Ihu Document Bank', pp 692, 712–715)

277. Phillipson, *Northern South Island: Part 2*, pp 43–44

278. 'Petition of J A Elkington and Six Others', 329/1934–35, Le 1/1934/15, ArchivesNZ (Crown Forestry Rental Trust, 'Te Tau Ihu Document Bank', pp 722–724)

Committee, the latter changed its position that the matter was sub judice, and the Ngati Koata petition was added to the schedule of the Native Purposes Act 1934 so that it could also be referred to the land court for inquiry.<sup>279</sup>

#### (4) Judge Harvey's 1935 inquiry into Wakapuaka

Judge Harvey was appointed by Chief Judge Jones to carry out the investigation into the three Wakapuaka petitions. His inquiry, which commenced in December 1934 and lasted several months, analysed the evidence very thoroughly, at least with respect to the petition of Hari Wi Katene. In July 1935, Judge Harvey reported to the chief judge that, on the evidence before it in 1883, 'the court could come to no other decision' than the original judgment. Despite this, Judge Harvey described the investigation of title as 'abnormal'. He emphasised the need for the claimant to have a clear take, understood thus:

It may be under ancestry or conquest or a gift, but in any case it must be coupled with permanent occupation under the enabling right. Mere ancestry, conquest, or gift, without occupation, confers no title. This is Native custom as recognized by the Courts for close upon a century.<sup>280</sup>

Harvey interpreted Huria Matenga's take to be conquest and occupation, as Hemi Matenga had not relied upon a gift to her as the basis of her claims to the land. Wakapuaka had been awarded to Huria Matenga, he concluded, 'not so much upon the strength of her case as upon the utter impossibility from the Court's point of view of finding any one else to give it to.'<sup>281</sup> In a detailed analysis of Alexander Mackay's evidence in relationship to various documents, some of which were in Mackay's *Compendium* and some of which were reports written by Mackay himself prior to 1883, Judge Harvey rejected Mackay's claims that it was Wi Katene alone who had prevented the sale of Wakapuaka. In his view, a group of Ngati Tama living at Wakapuaka had also been involved and were still living there in 1856.<sup>282</sup> He emphasised the importance of Te Wahapiro at Wakapuaka as shown in an 1844 deed of release.<sup>283</sup>

Judge Harvey also pointed to the evidence related to the Crown purchase of the telegraph station site. This showed that Mackay knew in 1877 that there were other Ngati Tama who would probably be claimants when the land came before the court 'as they may possess proprietary rights of a secondary nature over parts of the estate other than Rotokura', and that

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279. Phillipson, *Northern South Island: Part 2*, p 44; 'Petition of JA Elkington and Others', enclosed in under-secretary, Native Department, to chairman, Native Affairs Committee, 20 February 1935, Le 1/1934/15, ArchivesNZ (Crown Forestry Rental Trust, 'Te Tau Ihu Document Bank', pp 722-724); Native Affairs Committee, minute book, 27 February, 14 March 1935 (Crown Forestry Rental Trust, 'Te Tau Ihu Document Bank', pp 718-719); 'The Native Purposes Act, 1934 . . .', AJHR, 1936, G-6B, pp 1-2

280. 'The Native Purposes Act, 1934 . . .', AJHR, 1936, G-6B, p 13

281. Ibid

282. Ibid, pp 12-17

283. Ibid, pp 19-20

## 8.4.2(4)

Mackay failed to indicate the existence of any Ngati Tama claimants other than Wi Katene to the court in 1883.<sup>284</sup>

The judge noted that Ngati Koata were not, as Mackay had told the court in 1883, ‘part of the conquered party’, and that there were Ngati Koata people living permanently at Wakapuaka in Wi Katene’s time, and permanent Ngati Koata residents buried at Haua, the Wakapuaka cemetery. Despite pointing to such evidence of ongoing occupation of Wakapuaka, Judge Harvey observed that this ‘would not necessarily confer title upon these Ngati Koata people.’<sup>285</sup> It is unclear as to the basis upon which he reached such a conclusion.

In reviewing Hemi Matenga’s evidence, Judge Harvey commented that there was a problem in producing Huria’s take for Wakapuaka, because it was impossible to ‘set up a conquest by an old woman and a young lad of exceptionally placid and serene nature’, and it was impossible to set up the gift without conceding Ngati Koata had once had title to the land. Consequently, Hemi had relied much on evidence about post-1840 leases. However, the judge pointed out that one of the two leases produced before him excluded ‘all of the “food workings” of Te Meihana’, and suggested that this person conceivably therefore had rights in the land. He thought that Te Meihana was probably a Ngati Tama involved in the conquest, rather than Meihana Kereopa, since ‘he went away in 1854’. The judge further noted that both leases were to members of the Mackay family and suggested that the fact that they were witnessed by ‘Alexander Mackay, Native Commissioner’, made it unlikely that Wi Katene’s fellow inhabitants at Wakapuaka would venture to question them.<sup>286</sup>

Judge Harvey considered that the evidence given in the 1892 Nelson tenths case showed that Wi Katene did not have sole occupation of Wakapuaka. He also deemed it significant that the court, in the person of Judge Alexander Mackay, found in 1892 that Ngati Koata should share in the benefits of the tenths, as it ‘makes one think that perhaps Alexander Mackay was wrong when in his evidence at the Wakapuaka hearing he stated that Ngati Koata had no rights beyond Rangitoto Island’. He thought that the evidence in the 1892 case was ‘the evidence that was not given and should have been given when the title to Whakapuaka was investigated.’<sup>287</sup>

Besides the tenths case, Harvey also reviewed the evidence given by Alexander Mackay to the Native Affairs Committee of the House of Representatives in 1896 and by Alexander and James Mackay in their 1905 affidavits. He was deeply critical of the accuracy of many of these statements.<sup>288</sup> Contrary to the view expressed by Alexander Mackay, for example, Harvey found that there was ‘abundant evidence that Wahapiro assumed the mantle of Chief of the Whakapuaka Ngatitama Tribe on his return from the South, as was his right

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284. ‘The Native Purposes Act, 1934 . . .’, AJHR, 1936, G-6B, p 24

285. Ibid

286. Ibid

287. Ibid, pp 27–28

288. Ibid, pp 31–32, 34–37, 52–56

from all points of view – age, birth, experience, and prowess in war’, and that there was a Maori community living at Wakapuaka in the later nineteenth century that had ‘common interests and a common purse.’<sup>289</sup>

The judge also found convincing testimony given to his inquiry by Mere Paaka of Te Atiawa, who said that she had been present when Huria Matenga made an agreement with other whanau members to represent their interests before the court in 1883.<sup>290</sup> He considered that Huria Matenga had acted fraudulently in failing to have the names of her relations included in the title to Wakapuaka. All in all, in light of his examination of all the ‘varying and contradicting statements’ of Alexander Mackay, Judge Harvey stated that there was ‘considerable justification’ for the comments of Mr Sim, counsel for Hari Wi Katene, to the effect that:

I am amazed at the deadly persistency with which Alexander Mackay pursued these unfortunate people. Whenever and wherever they sought a way of relief they saw the massive figure of Alexander Mackay blocking the path. I am amazed at the tremendous efforts he made to establish Huria Matenga in the sole ownership of this land. I am amazed at his devotion to her cause and at the way he wrestled with the truth and sometimes overcame it. It is no wonder from his frequent appearances in this case the Maoris got the idea the decision again them was given by Judge Mackay. It was he certainly who killed every attempt they made to get a rehearing.

Yet, despite his concurrence with this extraordinarily forceful attack on Alexander Mackay, Judge Harvey nevertheless went straight on to echo Sim’s statement that ‘he was far from wishing to assail the high character’ possessed by both James Mackay junior and Alexander Mackay. Indeed, Judge Harvey went on to point out that no official or judicial act of the late Judge Mackay had been the subject of unfavourable comment before his own inquiry.<sup>291</sup>

Harvey admitted that it was possible that Ngati Koata had been entitled with others to rights in the northern part of Wakapuaka, but concluded that the long delay between 1883 and their sole petition in 1935 prejudicially affected any rights they may have once possessed. He also concluded that those involved in the petition of Waka Rawiri and another for Ngati Tama had neither shown a strong claim to the block nor given a satisfactory reason as to why they had not claimed the land in 1883, or petitioned earlier. Judge Harvey’s primary focus and attention was, however, very much directed at the claim of the descendants of Te Wahapiro. On this matter, he concluded that Kauhoe was inextricably linked to Wakapuaka, and that all her descendants must have had some interest in the block, as a result of which the original decision ‘must be wrong in principle and unjust in effect.’<sup>292</sup>

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289. Ibid, pp 31, 37

290. Ibid, p 40

291. Ibid, p 56

292. Ibid, p 57

We note that various references to Ngati Koata have arisen in reviewing the history of the block and Judge Harvey's report. A number of Ngati Koata people gave evidence in 1935. For instance, Joseph Hibblewhaite of Ngati Kuia and Ngati Koata, born in 1868, said that they had always expected to get the land back, but did not know 'the power of a petition to Parliament'. He listed 13 Ngati Koata whom he said had been driven from Wakapuaka in 1885.<sup>293</sup> At least in some cases, however, resident Ngati Koata were linked with Ngati Tama by marriage.<sup>294</sup> Ms Bassett and Mr Kay argue that the conclusion reached by Judge Harvey with respect to Ngati Koata is inconsistent with the evidence on their interests in the block that is to be found in the judge's report. They raise the question of whether Harvey was more concerned with protecting the reputation of the Mackay family than with providing Ngati Koata with justice. Judge Harvey did indeed, as we have seen, admit that Ngati Koata might have a case, but saw it as highly flawed by their failure to petition earlier. Ms Bassett and Mr Kay argue that Ngati Koata's timing was quite understandable, first, given the Ngati Koata argument that it was after Huria's death that the status of the block had become an issue for them and, secondly, that by the time of Huria's death, Ngati Koata were well aware that the frequent petitions of Te Wahapiro's family had been proving quite unavailing.<sup>295</sup> The report of the Crown's historian revealed, however, that some Ngati Koata witnesses told the Harvey inquiry they were unaware of these petitions and had not lodged an appeal against the 1883 decision because they did not know such a course of action was open to them.<sup>296</sup>

**(5) *The Wakapuaka rehearing and petitions to 1948***

In the light of Judge Harvey's report, the chief judge recommended a rehearing of the title to those sections of Wakapuaka still owned by Maori. This recommendation, forwarded to it in May 1936, was subsequently accepted by the Government. Section 9 of the Native Purposes Act 1936 empowered the Native Appellate Court to investigate the title to any unalienated portions of Wakapuaka with reference to the petitions of 1933 to 1935. The presiding officer was Judge McCormick, assisted by Judges Browne and Carr. Their judgment was a brief one. They mentioned their indebtedness to the 'very full and careful report prepared by Judge Harvey', although they carefully stipulated that they were not committing themselves to 'all the conclusions and inferences contained in it'. Nevertheless, they essentially upheld all of Harvey's findings, except that they placed considerably greater emphasis than Harvey on

293. Native Land Court, Wellington, minute book 29, 4 July 1935, fols 32–38 (Goldstone, 'The Wakapuaka Block', pp 64–66). Several other Ngati Koata witnesses also referred to leaving Wakapuaka in 1885, a decade before Hemi Matenga commenced his efforts to drive the descendants of Paremata Te Wahapiro from the land.

294. For example, see Native Land Court, Wellington, minute book 29, 3, 4 July 1935, fols 18–32 (Goldstone, 'The Wakapuaka Block', pp 58–64) This witness, Ihaka Te Rei, was born in 1863 at the home of his Ngati Koata grandparents in Wakapuaka, and he grew up there. However, his father, Te Rei, was one of the Ngati Tama living permanently at Wakapuaka. Ihaka left in 1885.

295. Bassett and Kay, 'Nga Ture Kaupapa', pp 147–148

296. Goldstone, 'The Wakapuaka Block', pp 62, 65



Figure 30: Wakapuaka Native Land Court hearing, 1937. Reproduced courtesy of Ngati Toa collection.

Wi Katene as having ‘by far the strongest and most continuous occupation’. By contrast, they saw the occupation of Te Wahapiro’s family as more ‘intermittent’. This was their reason for allowing the heirs of Hemi Matenga to retain fully 75 per cent of the remaining land, while they assigned only 25 per cent to descendants of Te Wahapiro, leaving nothing for the Ngati Koata petitioners or the broader Ngati Tama claimants (see fig 30).<sup>297</sup>

Selwyn Katene, a descendant of Te Wahapiro, gave detailed evidence on his whanau’s grievances about Wakapuaka. He acknowledged that the ‘whanau of Paremata Te Wahapiro were not the only group who had interests’, and that there were several layers of rights in the land and other resources of the area.<sup>298</sup> Nonetheless, he argued that their receipt of only a quarter share – and that, only of the land remaining – was inadequate and ‘prejudicially affected the whanau of Paremata Te Wahapiro.’<sup>299</sup> He also spoke of a strong commitment to ensure that this land is retained, contributing as it does to the sustenance, identity, and well-being of both the whanau and (through it) the wider iwi of Ngati Tama.<sup>300</sup>

297. Phillipson, *Northern South Island: Part 2*, pp 46–47

298. Katene, brief of evidence on behalf of Ngati Tama, p 52

299. *Ibid*, p 53

300. *Ibid*, pp 52–54

## 8.4.2(6)

Although the discontent of Te Wahapiro's family had at last been addressed (whether satisfactorily or not, we leave for our findings), others who considered that they had an interest in the land were far from happy with the results of the rehearing. In 1938, there were four more petitions from Maori wanting some further reconsideration of the case. Two petitions did not record the iwi affiliation, although at least one of these may have been Ngati Koata; a third petition was from Hoani Meihana and 16 others, representing the wider Ngati Tama claim; and the last one was from Hoani Meihana alone. The Second World War damped petitioning ardour, but in 1945 Pauline Selwyn and 16 others petitioned again to further the Ngati Koata case. And in a new development, Ngati Kuia also petitioned in 1945, with the petition coming from F Sciascia and 24 others of Porangahau. Hoani Meihana and others sent in two further petitions in 1946 and one more in 1948. There was also another Ngati Koata petition from Pauline Selwyn and others in the latter year, along with a further petition from JDT and GC Sciascia.

The Native Affairs Committee, however, resolutely refused to recommend action on these petitions, with one exception. They recommended that the first Ngati Kuia petition receive 'favourable consideration' from the Government, but no concrete action actually seems to have followed this, prompting a further petition in 1948. Although this specifically asked why, despite the earlier favourable recommendation, there had been no further investigation into their claims, the Maori Affairs Committee (as it now was called) this time declined to make any recommendation. It appears, therefore, that the committee basically took the position that the case had been thoroughly reinvestigated by the Native Land Court in 1935 and 1937, and that it consequently required no further attention.<sup>301</sup>

**(6) Continuing discontent and the Wakapuaka mudflats**

The repeated rejection of the claims of Ngati Tama, Ngati Koata, and Ngati Kuia at Wakapuaka has led to lingering discontent over this highly contentious case. Ngati Koata kuia Ariana Rene, who had attended the appellate court case as a young woman in 1937, told us of ongoing grievances among Ngati Koata over matters such as the fact that they were not represented by a barrister but by one of their own people before Judge Harvey, and were therefore disadvantaged in putting their case; and that they had expected that Harry Wi Katene was going to represent Ngati Koata as well as Ngati Tama interests, but that he allegedly misled them and used his knowledge of the land court system to his own advantage.<sup>302</sup> Some Ngati Koata also remain distressed about their inability to access the urupa at Wakapuaka that they see as a traditional Ngati Koata wahi tapu. In the case of eeling, however, some Ngati Koata continued to exercise what they saw as their traditional rights in Wakapuaka

301. Phillipson, *Northern South Island: Part 2*, pp 47–48; Campbell, 'A Living People', p 215

302. Rene, brief of evidence on behalf of Ngati Koata; see also Bassett and Kay, 'Nga Ture Kaupapa', pp 149–158. In 1939, for example, Hari Wi Katene was an interpreter in the Native Land Court: Native Land Court, Nelson, minute book 10, 20 December 1939, fol 24 (Alexander, supporting documents to 'Reserves of Te Tau Ihu', pt 5, p 4783).

up to the 1940s, which indicates that they felt very strongly about them, despite the efforts of Hemi Matenga to drive them away earlier.<sup>303</sup> Ngati Tama witnesses also expressed significant concerns over the loss of access to mahinga kai, fisheries, and other customary resources at Wakapuaka. They spoke, too, of the deep pain felt at the loss of access to Haua, an urupa where, according to the evidence of Te Maunu Paul Stephens, hundreds of Ngati Tama people and some of other tribes had been buried over the years.<sup>304</sup>

According to Dr and Mrs Mitchell, in recent years attention has also focused on the status of the tidal mudflats at Wakapuaka, given that tangata whenua considered that the mudflats were within the 1883 boundaries and that, despite alienations elsewhere, the Maori ownership of this part of Wakapuaka was unaffected.<sup>305</sup> In the mid-1980s, when coastal policy proposals of the Nelson Bays United Council were under discussion, Ngati Tama raised concerns with the Nelson Maori Committee about the proposals with respect to Wakapuaka, and other iwi supported these. In April 1986, the Nelson Maori Committee elected investigatory trustees to act as interim trustees. Two of these, James Elkington and Ratapu Hippolite, were of Ngati Koata.<sup>306</sup> Mr Elkington applied on behalf of the interim committee to the Maori Land Court, and on 7 May 1986, Judge KB Cull granted an order vesting the Whakapuaka block (mudflats) in these four people as an investigatory trust for five years under section 438 of the Maori Affairs Act 1953 in order to investigate and determine the rightful owners of the land, and to provide the best possible way of administering it. This trust appears to have been relatively inactive.<sup>307</sup> On 21 July 1992, Deputy Chief Judge McHugh extended the investigatory trust to 1 May 2001.<sup>308</sup>

The Mitchells state that on 7 July 1997, at a judicial conference, Mr Elkington 'declared that Ngati Koata had no objection to the case being taken by Ngati Tama, and that there was no cross-claim to the Estuary'.<sup>309</sup> However, Mr Elkington later told the Tribunal, with respect to the mudflats, that for Ngati Koata what is essential is that Wakapuaka 'remains in Maori ownership' but that the iwi 'has not given up any claim to Whakapuaka'.<sup>310</sup> In 1998, the court held that the mudflats were included in the Native Land Court's 1883 certificate of title for Wakapuaka. The court, under section 216 of the Te Ture Whenua Maori Act 1993, vested the mudflats in a whenua topu trust to be called 'Te Huria Matenga Parumoana Trust'.<sup>311</sup>

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303. Bassett and Kay, 'Nga Ture Kaupapa', pp 158–160

304. Te Maunu Paul Stephens, brief of evidence on behalf of Ngati Tama, 13 February 2003 (doc K31), p 6

305. Maui John Mitchell, 'Summary of Report of Hilary and John Mitchell, Whakapuaka Mudflats Report (Wai 785, A26)', brief of evidence on behalf of Ngati Tama, 10 February 2003 (doc A26(b)), pp 2–3

306. James Elkington, oral evidence, third hearing, 26 February – 2 March 2001 (transcript 4.3, p 137)

307. Hilary Mitchell and Maui John Mitchell, 'Wai-102, Report No 13B: Whakapuaka', report commissioned by the Ngati Tama Manawhenua ki te Tau Ihu Trust and Wakapuaka 1B Incorporation, 1995 (doc A26), app 4, pp 2–3

308. Trust order, Maori Affairs Act 1953, s 438(3)(b), Maori Land Court, Nelson, minute book 20, 21 July 1992, fol 50

309. Mitchell, 'Summary of Report', p 4

310. James Elkington, oral evidence, third hearing, 26 February – 2 March 2001 (transcript 4.3, p 137)

311. Mitchell, 'Summary of Report', p 4

## 8.4.2(7)

The Crown did not appeal this decision but instead applied under section 45 of the Te Ture Whenua Act 1993 to the chief judge for an investigation of the issue and a correction of the court's records. In a report to the chief judge, Judge Carter considered that the Crown's application was inappropriate because the status of the mudflats had never been the subject of a formal inquiry or investigation in the lower court. He therefore suggested that the Crown apply under section 18(1)(h) or section 131 of the 1993 Act (or under both) for a determination as to the status of the mudflats. However, the Crown instead advised the land court that it intended to take judicial review proceedings to the High Court with respect to the 1883, 1986, and 1998 decisions.<sup>312</sup> In December 2006, the Crown's application for judicial review failed in the High Court. Counsel for Ngati Tama did not seek findings on the Wakapuaka mudflats and we have no further comment to make on the subject.

**(7) *The alienation of parts of Wakapuaka***

Ongoing grievances in relation to the title determination process in respect of Wakapuaka have to a large extent overshadowed the fact that this substantial area of land – one of only three pieces of customary land left in the entire Te Tau Ihu district in the wake of the Crown's purchasing programme of the 1850s – has in itself been progressively lost to Maori ownership after 1883. That, in turn, partly reflected the nature of the title issued, the lack of restrictions against alienation and the ability of the sole owner recognised under law to leave the entire block to someone with no rights to it under customary Maori rules of succession.

The certificate of title for Wakapuaka awarded to Huria Matenga following the 1883 judgment was for 17,575 acres after survey. After making a couple of small sales earlier, Huria Matenga sold William Rayner 1296 acres from the block for £800 in 1904. The sale, completed at the same time that efforts to overturn Huria's sole ownership of the block were intensifying, included Pepin Island and land on the southern side of Cable Bay. A substantial public works taking covering an area of 262 acres followed in 1906, and by the time of Huria Matenga's death in 1909 about 15,500 acres of Wakapuaka remained in Maori ownership.<sup>313</sup>

After Wakapuaka had been through the court, Huria Matenga was free to bequeath her property by will so long as this met any restrictions imposed by the Native Land Acts. Under the Native Land Court Act 1894, if she had left her land to someone other than her 'successor', as the court understood that term, then the court had jurisdiction to award part of the land to that 'successor', or all of it if it was considered necessary for the support of the successor.<sup>314</sup>

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312. *In the Matter of an Application under Section 45 . . . in Respect of the Wakapuaka Mudflats* unreported, 23 March 2000, Maori Land Court, Te Waipounamu, C1999/25; *Minister of Conservation v The Maori Land Court and Trustees of Te Huria Matenga Wakapuaka Trust* unreported, 26 March 2002, CP287/01, *Maori Law Review*, March 2002, p 8. The review refers to section 44, not section 45, of the 1993 Act.

313. Miriam Clark, 'Land Alienation of Ngati Tama Manawhenua ki te Tau Ihu, 1855–1999', report commissioned by the Ngati Tama Manawhenua ki te Tau Ihu Trust, 1999 (doc A49), p 3; Alexander, 'Reserves of Te Tau Ihu', vol 2, pp 508–510

314. Williams, 'Crown and Ngati Tama', p 165

Professor Williams stated that, by the time Huria Matenga died, the relevant legislation was the Native Land Act 1909, which allowed a Maori testator to leave native freehold land to any other Maori, or to a European spouse, child (whether legitimate or illegitimate), to numerous types of relatives, or to a charitable trust. But Huria Matenga had died in April 1909, and the new Native Land Act did not come into force until 24 December 1909. In the interim, Huria's will had been probated by the Native Land Court on 1 September 1909 – that is, effectively under the 1894 regime allowing the court to award part of the estate to the successors according to custom.

In fact, the hearing to consider the will, presided over by Chief Judge Jackson Palmer, saw a number of parties present to register their objections. Hanikamu Te Hiku, the husband of Ngawaina Te Hiku, the youngest daughter of Te Wahapiro Paremata, told the court that Huria had promised his wife that she and others would be admitted to the title for Wakapuaka after Ngati Koata had been defeated in their claim to the block. But they remained excluded from the title, and Hanikamu stated that 'These relations of Huria are landless.'<sup>315</sup> The court confined its probate to Huria Matenga's personal property, along with the Wakapuaka block, and ordered that all other property should go to the nearest of kin. Effectively, that meant that, while the descendants of Wahapiro remained excluded from the Wakapuaka title, they succeeded to her interests in various other Te Tau Ihu lands, including a 150-acre reserve at Takaka and Huria's 4755 shares in the Nelson tenths. Meanwhile, the descendants of Wikitoria (wife of Wi Katene) from an earlier marriage to a European received her interests in a Taranaki reserve. In an indication that this arrangement may not have been fully accepted by the descendants of Wahapiro, their lawyer noted that his clients 'may still wish to petition Parliament', whilst adding that an undertaking had been received that Wakapuaka would not be sold before the end of the coming session of Parliament.<sup>316</sup>

Huria Matenga was, therefore, able to leave all of Wakapuaka to her husband, and he was subsequently able to leave it as he wished. In early 1912, two further areas of Wakapuaka, amounting to just over 3553 acres, were sold to private parties.<sup>317</sup> Hemi Matenga died that year, and his will left most of the remaining land to the descendants of his brother, Wi Parata Kakakura. However, in view of Huria Matenga's inability to have children, Hemi Matenga had had a daughter with Ngawaina, Huria Matenga's cousin. This daughter, Mamae, had been raised by Huria Matenga and Hemi Matenga as their child in a customary Maori adoption arrangement. Hemi Matenga's will made some small provision for Mamae, but she had died before Hemi, leaving two children. The executors of Hemi Matenga's estate then refused to acknowledge that Mamae's children had any inheritance rights. They refused to recognise

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315. Native Land Court, Wellington, minute book 16, fols 326–327, enclosed in registrar, Native Land Court, Ikaroa, to under-secretary, Native Department, 2 August 1928, MA1928/322, ArchivesNZ (Crown Forestry Rental Trust, 'Te Tau Ihu Document Bank', p 671)

316. *Ibid* (pp 671–674)

317. Alexander, 'Reserves of Te Tau Ihu', vol 2, p 511

## 8.4.3

Mamae, either as the biological child of Hemi or as the adopted child of Hemi Matenga and Huria Matenga.<sup>318</sup> At a Native Land Court hearing held in 1914, however, Ngawaina gave evidence of the circumstances of Mamae's birth.<sup>319</sup> The court consequently ordered the executors to pay £100 per annum to the children until they reached the age of 21. In 1925, an area of just over 338 acres at Delaware Bay originally bequeathed to Mamae was transferred to her children (Reuben Stephens and Konehu Bailey) under Hemi Matenga's will, and this was subdivided between the brother and sister in 1929. They sold these sections between 1933 and 1968.<sup>320</sup> Te Maunu Paul Stephens, Reuben Stephens' son, told us how horrified his father was when he discovered, after selling his land, that the Haua urupa, in which many Ngati Tama and some from other iwi were buried, had been included because, contrary to his father's understanding, the urupa did not have a separate title.<sup>321</sup>

By the time that the Native Appellate Court carried out its rehearing of the Wakapuaka case in 1937, just over 11,376 acres of the block had not been alienated.<sup>322</sup> The beneficiaries under the will of Hemi Matenga who received 75 per cent of the remaining land were mainly descendants of his brother. They belonged to Ngati Toa and Te Atiawa and lacked customary ties with the land. By 1955, all of the lands awarded to the estate of Hemi Matenga had been sold.<sup>323</sup> In marked contrast, the other 25 per cent that was conveyed to 19 descendants of Paremata Te Wahapiro still remains in Ngati Tama ownership, under the administration of a committee of management.<sup>324</sup> In all, some 3641 acres – or just over one-fifth of the original Wakapuaka block – remains in Maori ownership today.

#### 8.4.3 Claimant submissions

Claimant submissions about Wakapuaka relate primarily to the adequacy of the court's investigation in terms of customary rights; the role of Alexander Mackay; individualisation and subsequent alienation of a large part of the block; and the appropriateness of the Crown's response to serious Maori concerns with respect to Wakapuaka.

Counsel for Ngati Tama described the land and waters of Wakapuaka as being of central importance to the iwi. Problems over fragmentation of land resulting from the Papakura rule of succession were referred to and counsel submitted that the loss of Wakapuaka as a

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318. Clark, 'Manawhenua Report', p 102

319. T Stephens, brief of evidence, p 3

320. Clark, 'Land Alienation', p 4; Alexander, 'Reserves of Te Tau Ihu', vol 2, pp 511–513

321. T Stephens, brief of evidence, p 6

322. Alexander, 'Reserves of Te Tau Ihu', vol 2, p 512

323. Ibid, pp 515–516

324. Katene, brief of evidence on behalf of Ngati Tama, pp 48–49; Mitchell and Mitchell, 'Whakapuaka Mudflats', app 7A, p 3. It should be noted that the 3641-acre figure cited as being the 25 per cent share awarded by the Native Appellate Court is significantly higher than one-quarter of the lands remaining in Maori ownership. Alexander notes that the final partition of interests in 1944 was 'based on a land value approach', which would appear to explain this apparent anomaly: Alexander, 'Reserves of Te Tau Ihu', vol 2, p 512.

tribal estate of Ngati Tama was 'due entirely to the individualisation of title and systems of succession enshrined in the statutes on which the Native Land Court was founded'.<sup>325</sup> The sole exception to this loss of tribal estate was Te Parumoana ki Wakapuaka (the Wakapuaka Mudflats), where a whenua topu trust was established in 1998 to hold ownership on behalf of all Ngati Tama descendants with connections to Wakapuaka.<sup>326</sup> Counsel submitted that this iwi has exclusive rights to Wakapuaka, arising from conquest prior to 1840 and subsequent occupation.<sup>327</sup> Counsel also submitted that the judgment of the Native Land Court had serious effects on families who lived on the land and who were ultimately dislocated.<sup>328</sup> Counsel noted a particular concern about the loss of the Haua urupa to Maori ownership, which counsel attributes to a significant extent to the court's failure to exclude the urupa from a transfer of the land around it.<sup>329</sup>

Counsel for Ngati Koata submitted that Wakapuaka was a vital Ngati Koata papakainga over which the iwi exercised rangatiratanga and mana whenua as at 1840. It was further noted that Ngati Koata also acknowledge the significance of Wakapuaka for other Te Tau Ihu iwi, particularly Ngati Tama and Ngati Kuia, and accept that these iwi also resided at Wakapuaka.<sup>330</sup> Wakapuaka was a 'mixed settlement', with at least three iwi residing there, and any allegations of exclusivity must therefore be rejected outright, it was further submitted.<sup>331</sup> Counsel also expressed concern over three main aspects of the treatment of the block by the Native Land Court. First, counsel submitted that 'the Court failed to recognise and protect Ngati Koata customary rights and interests at Whakapuaka'.<sup>332</sup> More specifically, counsel considered that the evidence showed that:

the Whakapuaka land should never have been granted to one person, as this disenfranchised all others with customary interests at Whakapuaka. Ngati Koata acknowledges that many iwi had customary interests at Whakapuaka that were based on and maintained by tikanga. The issue is that the Native Land Court did not recognise and adequately protect these differing rights and interests.<sup>333</sup>

Counsel also submitted that the failure of the Crown to allow for and use tikanga-based processes was a Treaty breach, since Ngati Koata were denied adequate control of the processes affecting the legal status of their customary interests.<sup>334</sup>

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325. Counsel for Ngati Tama, closing submissions, pp 92–95

326. *Ibid*, pp 100–101

327. *Ibid*, pp 95–97, 98–100

328. *Ibid*, p 98

329. *Ibid*

330. Counsel for Ngati Koata, closing submissions, p 24

331. *Ibid*, p 25

332. *Ibid*, p 101

333. *Ibid*, p 102

334. *Ibid*, p 103

**8.4.4**

Secondly, counsel for Ngati Koata submitted that the Wakapuaka judgment was ‘made on the basis of questionable and internally inconsistent evidence.’<sup>335</sup> This complaint relates particularly to problems with the evidence given by Alexander Mackay.<sup>336</sup>

Thirdly, counsel for Ngati Koata submitted that the Crown failed to act appropriately and consistently with the Treaty to remedy the alienation of land at Wakapuaka resulting from the actions of the Native Land Court, despite consistent and vigorous assertions by Ngati Koata of their customary rights there.<sup>337</sup>

Counsel for Ngati Kuia considered that the evidence was insufficiently detailed to allow findings or definitive conclusions as to why Ngati Kuia withdrew their claim to Wakapuaka in the Native Land Court in 1883.<sup>338</sup> However, counsel submitted that the land court decisions that are of concern to Ngati Kuia include the 1883 Wakapuaka judgment.<sup>339</sup> Counsel also submitted that the failure of the Crown to investigate the 1945 Ngati Kuia petition relating to Wakapuaka was a breach of the duty of good faith.<sup>340</sup>

**8.4.4 Crown submissions**

In its opening submissions, the Crown submitted that it had:

commissioned research on . . . the Wakapuaka block in order to consider what insights might be gained into the issues of customary rights. What emerges, particularly from a consideration of the Wakapuaka case study, is the conclusion that it is now almost impossible to determine with any confidence who was right and who was wrong.<sup>341</sup>

In introducing the report of Paul Goldstone, Crown counsel described this as ‘a review and audit of the primary documentary sources relating to the title investigation of the Wakapuaka block’. It was further noted that Wakapuaka had been selected as a case study because of the unusually large quantity of documentary material relating to customary interests, as well this being ‘a block of great significance to many of the iwi of Te Tau Ihu’. Again it was observed that ‘The Wakapuaka case demonstrates the complexity of the contested customary rights and the difficulty the Tribunal and all parties to this inquiry must face if one is now asked to determine who was right and who was wrong.’<sup>342</sup>

The Crown appears to have made no specific submissions on Wakapuaka in relation to the Native Land Court in its closing submissions or submissions for the generic inquiry.

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335. Counsel for Ngati Koata, closing submissions, p 103

336. Ibid, pp 103–104

337. Ibid, pp 104–106

338. Counsel for Ngati Kuia, closing submissions, pp 17–18

339. Ibid, p 65

340. Ibid, pp 66, 67

341. Crown counsel, opening submissions, 14 November 2003 (paper 2.748), pp 7–8

342. Ibid, p 11

However, the Crown generic submissions previously mentioned in relation to customary rights, individualisation of title and succession are also relevant here. In particular, the Crown accepted in its generic submissions that the outcome of the court's operations, including the process of title determination and succession, did contribute to the alienation of land remaining in Maori ownership, while also noting that in Te Tau Ihu this process was not necessarily a rapid one but occurred over a considerable period of time.<sup>343</sup>

#### 8.4.5 Tribunal comment

The first main area of claimant concerns relating to Wakapuaka is the extent to which the 1883 judgment failed to reflect customary rights. Within this area, there are a number of issues that raise questions about the judgment. In this case, issues regarding rights of different iwi, between the various tangata heke, between 'conquerors' and the 'conquered', or between donor and donee, took second place to the court's extraordinary decision to award the block to a single individual. Over New Zealand as a whole, it was very uncommon for the court to award such a large block to one person. In effect, the judgment individualised completely the title to the land. Dr Ballara asks whether Judge Mair knew how many people were living on the land, and whether he believed that Huria Matenga was really acting as Ngati Tama's representative, and would look after their interests, regardless of his statement that she could 'do with it as she will'.<sup>344</sup>

A related point concerns the court's decision to investigate the title to Wakapuaka on the basis of an application made solely in the name of Huria Matenga. As we noted earlier, the title investigation was gazetted under the provisions of the Native Land Court Act 1880 and a certificate of title for the block subsequently issued under the provisions of that legislation. Section 16 of the 1880 Act required at least three applicants to be named for any block. The Wakapuaka application for investigation of title did not, therefore, comply with the law and ought not to have been proceeded with by the court. Moreover, although it was the court, and not the Crown, which proceeded to hear the application despite its non-compliance with the law, Crown officials ought to have known of its existence since at least the time that the investigation of title was advertised in the *Gazette*. That was in August 1883, some three months before the actual hearing, and ample time to inform Native Land Court officials of their error. There was, however, to be no such intervention on the part of the Crown.

A second unusual aspect of the situation was that Huria Matenga's take to Wakapuaka was not clearly explained during the hearing. Dr Ballara points out that a claim through conquest and occupation needed to be based on what her descent group had achieved.<sup>345</sup> That was also a point that Judge Harvey had highlighted in his 1935 inquiry, when he noted that it

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343. Crown counsel, submissions concerning generic issues, p 48

344. Ballara, 'Customary Maori Land Tenure', p 285

345. Ibid

was scarcely possible for a claim based on conquest to be established by ‘an old woman and a young lad of exceptionally placid and serene nature’. On the other hand, any claim based on a *tuku* would have required some acknowledgment of the rights of the party which had gifted the land. Faced with this predicament, the basis of Huria’s claim to sole and exclusive ownership of Wakapuaka was never clearly enunciated, with Hemi Matenga instead placing considering emphasis on Wi Katene’s sole management of the land and its leasing after 1840.

Thirdly, there is the way in which the court treated Ngati Koata. Ms Bassett and Mr Kay suggest that the Ngati Koata evidence presented a strong argument that this *iwi* had ‘continued to share occupation rights in the block, even if that had been under the public leadership of Wi Katene.’<sup>346</sup> Dr Ballara supports Ngati Koata’s position that it kept some *mana* in gifted areas, such as Wakapuaka, as in accord with the way customary tenure was usually practised, given that Ngati Koata also had a history of occupation of this land.<sup>347</sup> She considers that the Crown has failed to adequately investigate the Ngati Koata claim to Wakapuaka.<sup>348</sup>

Fourthly, as to the question of whether the court fully considered the case of the rights of Kurahaupo *iwi* in Wakapuaka, Dr Ballara, while asserting that the rights of the Kurahaupo *iwi* should have been recognised elsewhere, commented during cross-examination ‘I don’t know about [Wakapuaka], no perhaps not Wakapuaka.’<sup>349</sup> Dr Ballara suggested that the Ngati Kuia, Ngati Apa and Rangitane witnesses in the Native Land Court gave statements that were exaggerated or insufficiently qualified, often to the detriment of their own interests. According to Dr Ballara, they claimed through ancestry rather than occupation, while declaring ‘We were conquered and cleared out’ and ‘all the people here were destroyed.’<sup>350</sup> A large part of the explanation for such statements may lay in the unfamiliarity of the Kurahaupo witnesses with the processes of the Native Land Court: tailoring cases to best appeal to the prejudices of the Pakeha judges had become something of a specialised art form within many Maori communities in the North Island by this time. It was not something which most of the Kurahaupo people would have been well-versed in, however, while the connection between actual custom and the interpretations of it made by the court were frequently stretched. But it may also be the case that some of the apparently almost contradictory statements made by Kurahaupo witnesses arose from the way in which the court understood and recorded the term *raupatu*. Ms Campbell has challenged the translation of *raupatu* as conquest, suggesting that it could in some instances be more appropriately translated as being subjugated, dispossessed, overpowered, or overcome, terms which might

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346. Bassett and Kay, ‘Nga Ture Kaupapa’, pp 131–132

347. Ballara, ‘Customary Maori Land Tenure’, p 238

348. *Ibid*, p 240

349. Dr Angela Ballara, under cross-examination, eighth hearing, 17–19 February 2003 (transcript 4.8, p 42)

350. Ballara, ‘Customary Maori Land Tenure’, p 287

encompass more short-term reversals of fortune than is implied by the word ‘conquest’.<sup>351</sup> However, Ms Campbell says that, while we cannot conclusively establish what Ngati Kuia witnesses said, the real problem lies not so much in the particular words used, as ‘in the different understanding or misunderstanding of them by Europeans’.<sup>352</sup>

Mr Armstrong claims that, as at Te Taitapu, the incompleteness of the conquest and the continuing occupation of tributary communities on the land were not taken into account by the court.<sup>353</sup> Dr Ballara observes that Kereopa ‘fatally weakened his own case by withdrawing it’, but that the inquiry made by Judge Harvey revealed that he did this after Huria and Hemi Matenga gave an enormous hakari to Ngati Kuia and Rangitane. Dr Ballara considers that the only conceivable purpose of this event would have been to persuade them to withdraw.<sup>354</sup> We heard various views on this matter. Ms Campbell considers that the hakari given by Huria and Hemi Matenga showed that the submissions of the Kurahaupo claimants ‘clearly carried some weight’ with the pair. She thinks that it served the dual purpose of acknowledging the Kurahaupo interests in the block at the same time as giving an opportunity to discuss the competing claims of the guests and their hosts.<sup>355</sup> Mr Armstrong argues that after the Te Taitapu case Kereopa ‘must have seen the writing on the wall, particularly given Mackay’s attitude’. He suggests that the hakari can instead be seen as the sealing of an arrangement under which Kereopa withdrew in return for concessions such as access to land, resources, or money from a later sale of some land, but was unable to point to specific evidence of such concessions having been made.<sup>356</sup>

A legitimate question arises, where we see Maori customs and institutions operating behind the scenes as they appear to have done in this case, as to what might have happened if Maori had been empowered to decide their own land entitlements. The case for Kurahaupo inclusion, it appears, would have been taken seriously and would have had some traction here. In this respect we agree with the Turanga Tribunal that it was a fundamental breach of the Treaty that the Crown continuously refused to give Maori institutions legal powers to decide these matters.

We suggest that, despite the encouragement that Huria Matenga and Hemi Matenga may have received from the court’s Te Taitapu judgment, the lengths to which the couple went with their hospitality suggest that they considered that the claims of their guests had some substance from a Maori perspective. More broadly, the decades that elapsed before a rehearing of Wakapuaka was granted make an assessment of customary rights in Wakapuaka much more difficult than it might otherwise have been had this occurred when the matter of a rehearing was first raised in the 1890s. Nevertheless, we consider that the court, in

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351. Campbell, ‘A Living People’, pp 21–28

352. Ibid, p 28

353. Armstrong, ‘Right of Deciding’, p 165

354. Ballara, ‘Customary Maori Land Tenure’, p 288

355. Campbell, ‘A Living People’, p 214

356. Armstrong, ‘Right of Deciding’, p 164

awarding Wakapuaka to a single person was clearly in contravention of customary rights. The omission of the family of Te Wahapiro from the list of owners was the most glaring example of the court's failure in this area.

The second major issue of concern relates to Mackay's evidence and the court's treatment of it. Mackay began his evidence in the Wakapuaka case by stating his employment with the Crown.<sup>357</sup> Dr Ballara describes Mackay's evidence as containing both 'glaring contradictions' and 'glaring lies'.<sup>358</sup> As regards Mackay's position, both Dr Ballara and also Ms Bassett and Mr Kay mention a suggested conflict of interest arising from leases that members of the Mackay family held in the Wakapuaka block. Long-standing friendship between Alexander Mackay and the Matengas and Wi Katene may also have been influential. Mr Goldstone considers that material he reviewed emphasised the closeness of Alexander Mackay's relationship with Huria Matenga and her husband.<sup>359</sup> Dr Ballara also mentions, as possible motivations, injured authorial pride because the tuku of Tutepourangi was not mentioned in Mackay's 'Traditional History', and Mackay's persistence with the official line about Ngati Toa overall hegemony over Te Tau Ihu.<sup>360</sup> While these latter factors may have had some weight with Mackay, the financial interest of Mackay family members in the Wakapuaka land, together with the years of friendship that linked Alexander Mackay with Hemi and Huria Matenga make it difficult to regard Mackay as anything other than a partisan witness, prepared to tamper with the truth to achieve his ends. Given the exclusive leasing arrangements entered into by Wi Katene that Hemi Matenga had placed so much emphasis on in his evidence in 1883, the bottom line remained that, if anyone other than Huria Matenga was admitted into the title to Wakapuaka, then the occupation of parts of the block by members of Mackay's own family would have been significantly jeopardised. That in itself ought to have been sufficient to cast significant doubt as to the weight that ought to have been accorded Mackay's evidence, if indeed it was appropriate for Mackay to testify at all under the circumstances.

In terms of Mair's assessment of the evidence given by Mackay, Dr Ballara comments that the judge could presumably have looked at the *Compendium*, and that he 'must have seen and heard the contradictions'. Nevertheless, both Dr Ballara along with Ms Bassett and Mr Kay consider that it would have been difficult for any Pakeha to ignore the testimony of an official of such importance and who had had such a blanket involvement in land matters in Te Tau Ihu. Dr Ballara raises the further possibility that, knowing that James Mackay senior, uncle of Alexander Mackay, had leased part of the block, Mair was trying to avoid bringing the family into disrepute.<sup>361</sup> It appears, therefore, that Mackay, a Crown official holding an

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357. Native Land Court, Nelson, minute book 1, 19 November 1883, fol 22 (Alexander, supporting documents to 'Reserves of Te Tau Ihu', pt 5, p 4711)

358. Ballara, 'Customary Maori Land Tenure', p 286

359. Paul Goldstone, under cross-examination, eighteenth hearing, 17–20 November 2003 (transcript 4.18, pp 287, 290); see also Bassett and Kay, 'Nga Ture Kaupapa', pp 125–126

360. Ballara, 'Customary Maori Land Tenure', p 287

361. Ibid, pp 287, 289; Bassett and Kay, 'Nga Ture Kaupapa', p 132

influential position, gave singularly unsatisfactory evidence relating to the block, and that the court allowed itself to be inappropriately swayed by this. In this respect, we agree with the statement of Ms Bassett and Mr Kay that:

There are a number of problems with Mackay's evidence, not the least that as a Pakeha witness with no ancestral connection with the land in question he was able to sway the court, not because of the strength of his hearsay evidence, but more by the fact that he was Commissioner of Native Reserves and Civil Commissioner for the South Island. In this case he was acting in a personal capacity as a friend of the Martins, but it was his public role which gave his evidence credibility.<sup>362</sup>

Taken together, these first two main areas of concern leave little doubt that the 1883 judgment was highly problematic. Dr Ballara concludes her discussion of the Wakapuaka hearing with the damning statement that:

For whatever reason, Mair ignored the evidence on the history and customary tenure of Wakapuaka he had been given from two competing tribal groups and awarded the huge block to a single individual, a decision that was barely legal . . . but contrary to every rule of customary tenure.<sup>363</sup>

It is hardly surprising, therefore, that the Wakapuaka case was to be followed by vociferous protests that spanned several decades.

The third main area that concerns claimants was the failure of the Crown for decades to take action to remedy the situation. Once more, Alexander Mackay played a very significant role. In 1896, 1899, and 1905, he apparently actively sought to prevent a rehearing of the Wakapuaka case. In doing so, we have seen that he changed his position markedly, without any explanation, on the issue of the significance of the *tuku* to *Kauhoe*, allegedly solely for *Wi Katene Te Puoho*, as a take for Wakapuaka.

When, in 1905, Alexander Mackay advised *Huria Matenga's* lawyer on the best way to oppose a *Paremata* family petition and supplied an affidavit to support his old friend's position, he had retired as a judge of the court.<sup>364</sup> Nevertheless, Mackay's long history of involvement with the Wakapuaka case again proved to be prejudicial to the interests of those excluded from the title, as officials and members of the Native Affairs Committee tasked with deciding the merits of the various claims for inclusion allowed themselves to be influenced by his testimony.

In 1904, a lawyer retained by *Atiraira Mohi* and *Ngawaina Hanikamu* wrote to the Native Minister that he considered that there was some foundation to the allegation made by his

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362. Bassett and Kay, 'Nga Ture Kaupapa', p 132

363. Ballara, 'Customary Maori Land Tenure', p 289

364. Goldstone, 'The Wakapuaka Block', pp 29, 32-34; 'Affidavit Declared at Wellington by Alexander Mackay', 13 February 1905, AJHR, 1936, G-6B, pp 49-52

clients that Mackay was ‘a prejudiced and biased person’ and ‘an interested person’ to be involving himself in this case.<sup>365</sup> This would have been a serious accusation if there was any evidence that Mackay had been involved in the Wakapuaka case in an official capacity. Clearly, however, Mackay’s involvement was as a witness and known Pakeha ‘expert’ on Te Tau Ihu customary tenure, and however partisan he may have been in that role, the failure was in properly testing his evidence, and in placing undue weight on it as against that of the many Maori witnesses to the various inquiries who offered contradictory testimony. In our view, it ought to have been reasonably obvious by the late nineteenth century that Mackay had long since ceased to be a disinterested or impartial witness in the Wakapuaka case – if, indeed, he had ever been one. But, regardless of this, his influence appears to have been decisive in preventing an early reopening of the title investigation for Wakapuaka, thus helping to ensure that the much fuller inquiry into this which commenced under Judge Harvey in 1935 would involve fewer first-hand witnesses to the events described than might have been the case three or four decades earlier.

A last main area of concern is the issue of succession to land that arose following the individualisation process. Professor Williams observes that Huria Matenga was a ‘rangatira of great importance in Ngati Tama’, and considers that, if any rangatira was going to be made sole owner of Ngati Tama tribal land, it would be her. However, he notes that it was obvious in such a case that ownership would clearly be premised on the assumption that the ‘owner’ was not the only person with continuing customary entitlements in the area, but instead was holding the land in trust for others. Instead, as Professor Williams further pointed out, the Pakeha judges of the Native Land Court remained adamantly opposed to any such notions of trusteeship.<sup>366</sup> But, even by contemporary standards, Wakapuaka represented ‘an extreme example of the willingness of colonial law to impose the policies of detribalisation and individualisation.’<sup>367</sup> The alienation of much of Wakapuaka was greatly facilitated by the fact that legislation permitted Huria Matenga to leave the land (wrongly granted to her sole ownership) to her husband, who lacked traditional associations with the area, and who subsequently left it almost entirely to other relatives who also had no such associations.

It certainly appears that there were more people in residence at Wakapuaka than simply Wi Katene, his immediate family, and Te Wahapiro’s descendants. In 1845, the population at Wakapuaka was recorded as 90. Just over two decades later, in 1868, it was recorded as 62, and in 1878, not long before the court hearing, it remained at that number. In the latter case, these people were described as Ngati Tama.<sup>368</sup> However, it is clear from witnesses who appeared before Judge Harvey that there were also people of Ngati Koata living on the

365. Findlay, Dalziell, and Company, application to Native Minister, 9 September 1904, in ‘The Native Purposes Act, 1934 . . .’, AJHR, 1936, G-6B, p 43

366. Williams, ‘Crown and Ngati Tama’, pp 164–167

367. Ibid, p166

368. Campbell, ‘A Living People’, pp 227–228; ‘Papers Relating to the Census of the Maori Population, 1878’, 17 January 1878, AJHR, 1878, G-2, p 25

block at the time of the 1883 case. The consequences of allowing the Native Land Court to determine title and award Wakapuaka to one person alone, rather than relying on processes reflecting more accurately tikanga Maori, are described in this way by Selwyn Katene, a great-grandson of Wi Katene Tipō, grandson of Te Wahapiro:

You had a situation at Wakapuaka where you had a large number . . . living on Wakapuaka lands in relative harmony, whether you were te whanau of Paremata, whether you were Ngati Tama. We had other visitors there, we had other iwi there, other hapu, and they were managing the land and being sustained by the land. . . . There was only one source of that total amazement and that was the court. . . . it was a major convulsion to not only the whanau's viability and outlook but [those] of other whanau, of other hapu, of other iwi.<sup>369</sup>

As we noted above, Mr Katene also told us that there were several layers of rights applied to the land and resources of Wakapuaka. Those rights were able to be accommodated, and disputes resolved in accordance with traditional Maori values and customs, prior to 1883. But with the intervention of the Native Land Court in that year a tikanga-based approach was supplanted by one more concerned with facilitating the alienation of the land and the assimilation of its former customary owners. As Mr Katene observed, the net effect of this change was to undermine traditional leadership, disrupting traditional balances of power in the area and resulting in the dislocation of social relationships between whanau, hapu, and iwi.<sup>370</sup>

#### 8.4.6 Tribunal findings

The Wakapuaka case typified, in our view, the very worst failings of the Native Land Court regime introduced to Te Tau Ihu in 1883. While the generic issues which arise from the Wakapuaka example are discussed in greater detail in the next section, some specific issues do arise. Accordingly, we find with respect to Wakapuaka:

That the award by the Native Land Court of the entire block to a single grantee was grossly at variance with custom. Even though the Crown may not be responsible for decisions of a court, the Tribunal can consider whether the latter's actions were consistent with the principles of the Treaty and, in the event of such inconsistency being found, it can then determine whether the Crown omitted to take appropriate action to remedy the situation to the extent that was practicable. Again, we are of the opinion that this argument applies to Wakapuaka. More broadly, we find that a legislative regime which allowed such a large block of land, in occupation by a substantial number of people, many of whom had valid claims to the area according to custom, to be awarded to a sole owner without any trusteeship provisions in respect of the many other claimants was in breach of the principle of equal treatment. The

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369. Selwyn Katene, under cross-examination, ninth hearing, 16–21 March 2003 (transcript 4.9, p147)

370. Katene, brief of evidence on behalf of Ngati Tama, pp 49–53

Treaty required the Crown to act fairly as between different groups of Maori in a broadly similar situation, but that clearly did not occur in the case of Wakapuaka.

We also find the Crown to be in breach of the principle of active protection for its failure to intervene when the Native Land Court proceeded to investigate the title to Wakapuaka on the basis of an application which did not comply with the provisions of the Native Land Court Act 1880. That Act, as we noted, required at least three named applicants to any block. But the Wakapuaka investigation was held on the basis of an application lodged solely in Huria Matenga's name. While it was the court which was responsible for this mistake, Crown officials had at least three months notice of the court's intention to hear the claim once it had been notified in the *Gazette* in August 1883 with just one applicant named. That was more than enough time to alert the court to its mistake, as indeed the Crown ought to have done if it was concerned to protect Maori interests. It did not do so, however, as a consequence of which even the meagre and short-lived safeguards of the 1880 Act – supposedly intended to prevent individuals from taking blocks to the court without wider support – were entirely ignored.

One of the key issues for us to decide was whether an abuse of power had occurred by reason of the actions of Crown agent Alexander Mackay appearing as a Native Land Court witness. In our view Mackay gave evidence at the 1883 hearing that he knew to be false. But Mackay's appearance at the Wakapuaka hearing was as a supposed authority on land rights in the area and not, to judge by the evidence available to us, as a representative of the Crown. Nor is it apparent that Mackay's evidence was of any particular benefit to the Crown. Partial, biased, and self-interested though they may have been, especially in the light of the Mackay family lease of part of the block, but there is nothing to suggest that Mackay's statements to the court were of any real interest to the Crown.

On the other hand, it is obvious that Mackay's standing as a prominent Crown official based in the district lent a certain weight to his testimony that it patently did not deserve. Again this comes back to some of the broader issues to be covered subsequently. But it does need to be said that the Native Land Court's decision to privilege the evidence of a single Pakeha 'expert' over that of the many Maori witnesses to appear in 1883 served to ensure that a serious injustice would be done when it came to deciding the title to Wakapuaka. Clearly, that would never have been allowed to occur had Te Tau Ihu Maori and their own institutions been permitted to have a substantial role in the process of determining the title themselves.

Nor do we accept the Crown's submission that the Wakapuaka case only serves to show how it is almost impossible to determine who is right and who is wrong. There is little doubt that much of the evidence presented to Mair was incomplete or at least on the face of it inconsistent. Yet, Mair failed to follow up obvious lines of inquiry that in many cases may have explained some of these apparent contradictions, and he failed to even clearly establish the basis of Huria Matenga's claim to the land. Even the binary notion of right and wrong

claimants to the land fails, in our view, to appreciate the true nature of customary tenure, which in a circumstance such as Wakapuaka prior to 1883, appears to have been based on an inclusive model in which a wide range of rights could be accommodated. That stood in marked contrast to the Native Land Court's 1883 decision to exclude all but one customary owner from the title to the land.

That there were problems with the 1883 judgment was clearly indicated from the first (at the least, it had been established that more than one whanau had been living on the block), but no reinvestigation took place until over 50 years later. The failure of the Crown to respond to protests about the court's finding at Wakapuaka in a timely manner is very clear, particularly with respect to the repeated failure to address the concerns of Te Wahapiro's family. Other Maori with interests in the block were also left feeling aggrieved by the Crown's inaction even after the rehearing in the 1930s. We consider this tardiness of action to be a breach of the principle of redress.

Furthermore, by the time the case was heard, a very complicated situation was even less likely capable of resolution. Justice delayed ultimately meant justice denied, most especially in the case of Ngati Koata, while in the case of the Te Wahapiro whanau a substantial area of land had already been alienated by the time they were eventually admitted into the title to Wakapuaka. Although the lengthy delay in reopening the title investigation now makes it difficult to assess the extent to which the claims of the Te Wahapiro whanau were adequately addressed by the award of a one-quarter share, one thing the 1939 decision of the Native Appellate Court could not achieve was to undo what had gone before and in this respect the decision could never entirely deliver appropriate relief for the whanau. Following in the footsteps of Judge Mair, officials and members of the Native Affairs Committee had long opted to believe the evidence of Mackay over that of Maori who had been wrongfully excluded from the title, even when it ought to have been obvious by the time of the first petitions in the late 1890s that there were ample grounds for considering him at best a partial and biased witness. Instead, these initial rejections of the various petitions for a rehearing were used as precedent for denying later appeals along the same lines, thus compounding the grievance.

Legislation regarding succession, especially from 1909, had also greatly exacerbated the prejudice caused by the court's extraordinary decision to award title to a sole grantee. The law permitted firstly, Huria Matenga to leave all the remaining land to her husband who had no customary rights, and, secondly, for Hemi Matenga (the husband) to leave virtually all of it to other family members without any links whatsoever with the land. This completed the dispossession of the Te Wahapiro whanau and other Ngati Tama, Ngati Koata and Kurahaupo claimants to Wakapuaka. We consider this to be a further breach of the principle of active protection.

As we noted earlier, the 1883 judgment and its aftermath have to a large extent overshadowed the subsequent history of the block. Yet, the cumulative impact of individualisation

and succession laws and the failure to impose alienation restrictions on the title, even though one of just three areas of customary Maori land remaining to Te Tau Ihu Maori in 1883, has seen nearly 80 per cent of the block pass out of Maori ownership since that time. We find this to be in breach of the principle of active protection.

At the same time it strikes us as a remarkable indication of the importance of Wakapuaka to its customary owners that all of the one-quarter share awarded by the Native Appellate Court in 1939 to those with connections to the land remains in Maori ownership today. That award came, however, more than 40 years too late to prevent the dispersal of the formerly substantial Maori community at Wakapuaka as a direct consequence of the 1883 judgment. The burning and destruction of homes, killing of livestock and other actions aimed at the forcible removal of the Maori community at Wakapuaka must surely have resulted in substantial hardship for those effectively evicted from the land, given the already impoverished circumstances of many Te Tau Ihu Maori by this time. That is likely to have been compounded further by the loss of access to mahinga kai, fisheries, and other resources formerly obtained at Wakapuaka.

Just as serious in the longer term perhaps was the damage done to relationships within and between whanau, hapu, and iwi as a consequence of the 1883 judgment and its aftermath. That was an outcome that might easily have been avoided had Maori been permitted to play a decisive role in the process of determining title to Wakapuaka, as they were clearly entitled to expect under the Treaty. This is a matter to which we devote more attention in the next section.

## **8.5 WIDER NATIVE LAND COURT ISSUES**

In this section, we look at the broader issues relating to the Native Land Court that have been raised in submissions. Included here is the question of the overall significance of the court for Te Tau Ihu, its appropriateness or otherwise as a mechanism for deciding title to Te Tau Ihu lands, and the effects of the 1840 rule. Consideration of these issues encompasses not just the history of the three blocks considered earlier in the chapter, but also takes into account the occupation reserves discussed in the previous chapter, along with the Nelson tenths to follow in the next chapter.

### **8.5.1 Claimant submissions on the impact of the Native Land Court in Te Tau Ihu**

Counsel for Ngati Toa argued that the Native Land Court had a 'fairly inconsequential role' in Te Tau Ihu.<sup>371</sup> This view was shared by counsel for Te Atiawa, who commented on the

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<sup>371</sup> Counsel for Ngati Toa Rangatira, submissions concerning generic issues, 3 September 2002 (paper 2.362), p31

way in which most Te Tau Ihu land had been alienated before the inception of the court.<sup>372</sup> Counsel for Ngati Tama, however, noted the point made by Professor Williams that the very paucity of land and resources remaining in Maori hands in Te Tau Ihu by 1883 made the impact of the court's processes important.<sup>373</sup> This was a point further developed in the submissions of counsel for Ngati Koata, in which the effects of the Native Land Court were seen as the culmination of a series of Treaty breaches by which it became impossible for Maori to retain even those lands reserved or excluded from previous transactions that had been in themselves achieved through conduct contrary to and in breach of the Treaty.<sup>374</sup> Although not expressed in precisely these terms, such a viewpoint seemed to suggest that the impact of the Native Land Court could not be considered in isolation, but needed to be considered as part of the broader picture of cumulative land loss in Te Tau Ihu. Indeed, counsel for Ngati Apa submitted that the outcome of the court's operations was so devastating that it resulted in the complete dispersal of the iwi.<sup>375</sup> Ngati Apa had, of course, been shut out entirely during the Crown's purchasing programme of the 1850s within the Te Tau Ihu inquiry district and were only marginally more successful in their later bid for recognition through the Native Land Court.<sup>376</sup>

**(1) Claimant submissions on the Native Land Court as an arbiter of custom**

Counsel for Ngati Kuia submitted that the creation of the Native Land Court was in itself contrary to the principle of rangatiratanga, citing the findings of the Rekohu Tribunal that the Treaty envisaged that Maori should be entitled to control the resolution of their own disputes. It was further submitted that the Crown should have ensured that judges appointed to the Native Land Court were free from actual or perceived bias and conflict of interest. In this respect counsel for Ngati Kuia focused on the background of Judge Mackay, in particular, as something that makes it hard to separate the Crown from the court.<sup>377</sup>

Counsel for Ngati Apa submitted that the whole of the approach behind Crown policy with respect to Native Land Court legislation was to achieve acquisition by the Crown of Maori land for settlement. It was also submitted that Judge William Gilbert Mair came from a background of active involvement in making decisions as to who should receive individual customary title in order to restrict the number of iwi who would need to be dealt with in Crown purchase negotiations.<sup>378</sup> In this respect, counsel alleged that the Crown had deliberately followed a policy of avoiding the collective aspect of Maori customary rights by providing for the Native Land Court to only make declarations of individual title.

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372. Counsel for Te Atiawa, submissions concerning generic issues, 2 September 2002 (paper 2.360), p 8

373. Counsel for Ngati Tama, submissions concerning generic issues, [2002] (paper 2.366), p 48

374. Counsel for Ngati Koata, closing submissions, p 101

375. Counsel for Ngati Apa, closing submissions, p 28

376. *Ibid*, pp 23–29. Ngati Apa achieved some recognition in the case of the occupation reserve at Port Gore and some of the West Coast reserves set aside subsequent to the Arahura purchase of 1860. See chapter 7 for details.

377. Counsel for Ngati Kuia, closing submissions, pp 65–66

378. Counsel for Ngati Apa, closing submissions, pp 23–24

Counsel for Ngati Koata submitted that Crown policy and legislation prevented the Native Land Court from carrying out an adequate inquiry into who held customary rights and tino rangatiratanga in Te Tau Ihu prior to determining titles to remaining Maori land. The court's inquiries, it was submitted, were in the first instance directed at the issue of individual titles, rather than the full and comprehensive acknowledgement and protection of customary rights. It was further submitted that the judges lacked the necessary ability to analyse the competing interests, and that they put more weight on the evidence of prominent European witnesses than that of tangata whenua or iwi witnesses. Counsel submitted that Crown historian Mr Goldstone accepted that there was no evidence that judges informed themselves specifically about customary land tenure in Te Tau Ihu.<sup>379</sup> It was further submitted that the Native Land Court legislation, along with the operations of the court, in requiring transformation of customary title into individual ownership was a fundamental breach of the article 2 obligation to recognise and protect tino rangatiratanga over lands, resources, and other taonga.

Counsel for Ngati Tama submitted that the nature of the Native Land Court system that was imposed upon Ngati Tama and other Maori was completely inconsistent with the guarantees contained in article 2 of the Treaty. In particular, it was submitted that Crown policy and legislation did not enable the court to carry out an adequate inquiry into who held customary rights and tino rangatiratanga in Te Tau Ihu. It was further submitted that Crown policies and legislation with respect to individualisation and succession contributed to the breakdown of tribal rangatiratanga and ultimately led to the alienation of land.<sup>380</sup>

Counsel for Rangitane submitted that in determining who was entitled to various parcels of land the Native Land Court was inclined to individualise title rather than accept the proposition that land should have been retained in tribal control. The effect of this, it was further submitted, was to overturn rangatiratanga, while the impact of succession laws meant once land was individualised it very quickly fragmented, leaving it open to later provisions concerning the compulsory acquisition of uneconomic interests.<sup>381</sup>

Counsel for Ngati Toa submitted that the Native Land Acts imposed a restrictive and inaccurate definition of Maori customary law which was disadvantageous to Ngati Toa and in breach of the provisions and principles of the Treaty of Waitangi. In particular, it was submitted that the system of individualisation of title imposed by the Native Land Acts was contrary to customary Maori law and damaging to Ngati Toa economically and socially.<sup>382</sup>

Counsel for Te Atiawa did not make any specific submissions on the Native Land Court

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379. Counsel for Ngati Koata, closing submissions, pp 97–98

380. Counsel for Ngati Tama, closing submissions, pp 86–95

381. Counsel for Rangitane, closing submissions, 5 February 2004 (doc T4), p 49

382. Counsel for Ngati Toa Rangatira, closing submissions, 5 February 2004 (doc T9), pp 106–107

as part of their closing submissions, but in earlier generic submissions cited Dr Phillipson's characterisation of the court's inquiries in Te Tau Ihu as 'inconsistent and muddled'.<sup>383</sup>

Counsel for the Wakatu Incorporation, in relationship to the questions for the generic part of the inquiry, quoted Professor Williams's publication *Te Kooti Tango Whenua* with respect to the lack of independence of the court from the executive, ending with his remark that 'I am sure that [the judges] would have been most surprised to be thought of as quite independent of government'.<sup>384</sup>

Counsel for Ngati Rarua, whilst not making detailed submissions on the Native Land Court as part of their closings, did note that the legislation introduced from 1865 onwards had contributed to significant tenure reform, whereby communal ownership was transformed into individualised ownership with title deriving from the Crown.<sup>385</sup>

## (2) Claimant submissions on the '1840 rule'

There is division among claimant counsel as to the issue of the customary rights of Kurahaupo iwi and whether the 1840 rule was applied with prejudicial effect. Other than Ngati Apa interests on the West Coast, counsel for Ngati Tama submitted that that iwi 'does not consider that the Kurahaupo iwi maintained interests in western Te Tau Ihu following the conquest by the Taranaki/Kawhia iwi'.<sup>386</sup> Counsel for Ngati Toa has attacked Dr Ballara's position on customary tenure, partly on the grounds that it makes extensive use of what counsel describes as 'immensely problematic' land court records. Counsel quotes Professor Alan Ward's warning relating to a backlash against the 1840 rule and the emphasis placed by the Native Land Court on rights acquired by take raupatu.<sup>387</sup>

By contrast, counsel for Rangitane takes the position that the heavy emphasis placed by the court on raupatu, as opposed to customary occupation and tuku whenua, was incorrect, resulting in 'fundamentally wrong' decision-making.<sup>388</sup> Similarly, counsel for Ngati Apa strongly attacked the court's use of the 'so-called 1840 Rule that whoever was in control through conquest at 1840 was the sole customary owner'. Counsel saw this as flying in the face of what is now accepted as the 'true nature of customary tenure'. Counsel criticised the Crown for failing to react when the Native Land Court process led to decision-making based on this flawed understanding. In their view, the Crown ought to have passed legislation to ensure that such decisions were not given effect, or their prejudicial effects mitigated.<sup>389</sup>

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383. Counsel for Te Atiawa, submissions concerning generic issues, p 8

384. Williams, '*Te Kooti Tango Whenua*', p 238 (counsel for Wakatu claimants, submissions concerning generic issues, 30 August 2002 (paper 2.361), pp 26–27)

385. Counsel for Ngati Rarua, closing submissions, p 94

386. Counsel for Ngati Tama, closing submissions, p 17

387. Counsel for Ngati Toa Rangatira, closing submissions, pp 25–30

388. Counsel for Rangitane, closing submissions, p 44

389. Counsel for Ngati Apa, closing submissions, pp 23–29

## 8.5.1(3)

Counsel for Ngati Kuia also objected to the 1840 rule. It was submitted that this had been applied with respect to both Te Taitapu and the 1892 Nelson tenths case. Ngati Kuia had therefore been wrongly denied their customary interests and excluded from a share in the tenths estate.<sup>390</sup>

The court's development of the 1840 rule is also referred to in the submissions of Ngai Tahu, which look in detail at the various forms of the 1840 rule that evolved in the court, as set out by the Rekohu Tribunal. That Tribunal held that the '1840 rule' was 'inimical to custom', as it froze the natural emergence of customary rights as they would otherwise have developed.<sup>391</sup> Counsel for Ngai Tahu submitted that the 1840 rule *as applied* was 'inimical to custom', and that had it been interpreted correctly, allowance could have been made for the realities of customary tenure.<sup>392</sup>

**(3) Submissions by the Crown**

The Crown made very limited closing submissions with respect to the Native Land Court. We have incorporated the Crown's submissions on generic issues relating to the court into our previous discussion of the three large blocks at relevant points. To briefly recap, in its generic submissions the Crown stated, in response to the question as to whether Crown policy and legislation enabled the Native Land Court to carry out an adequate inquiry into who held customary rights and tino rangatiranga in Te Tau Ihu prior to determining title that:

The Crown submits that the policy and legislation governing the operation of the Native Land Court was not deficient in terms of the ability of the Court to carry out an 'adequate inquiry' into customary rights. The actual operation of the Court is a different issue and generally does not come within the Tribunal's jurisdiction.<sup>393</sup>

On the issue of whether Crown policy and legislation with respect to the determination of title and succession contributed towards the rapid alienation of the land remaining in Maori hands after 1865, the Crown submitted that:

Crown policy and legislation enabled the Native Land Court to consider and determine title succession and beneficial ownership. One of the outcomes of the Court's operations was the creation of transferable rights in land. It does not necessarily follow, however, that Crown policy or legislation was necessarily defective in Treaty terms. The Treaty guarantees and the Crown's duty of active protection can apply so long as Maori wished to retain their

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390. Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wellington: Legislation Direct, 2001), p 144. Ngati Kuia's submission relating to the 1840 rule is in their closing submissions, pp 66–67.

391. Waitangi Tribunal, *Rekohu*, pp, 132, 144

392. Counsel for Ngai Tahu, closing submissions, 16 February 2004 (doc T13), pp 42–43

393. Crown counsel, submissions concerning generic issues, p 42

land and valued possessions. Maori are entitled pursuant to their rights and privileges as British subjects under Article 3, to alienate interests in land should they choose to do so.<sup>394</sup>

Elsewhere in the same submission, however, the Crown ‘accepted that the outcome of the Court’s operation and determination of title and succession did contribute to the alienation of land remaining in Maori hands, although in Te Tau Ihu this process was not necessarily rapid but occurred over a considerable period’.<sup>395</sup>

In relation to the question of the ‘1840 rule’, the Crown submitted that, although the 1840 rule as developed by the court provides a useful framework within which to assess the different claims of customary rights, the Crown ‘is not convinced that this Tribunal is required to, or should apply it (assuming that was possible on the available evidence)’.<sup>396</sup> The Crown also noted that the application of the 1840 rule as developed by the Native Land Court allowed for ‘the fact that dominant occupiers at 1840 could, voluntarily, dispose of their rights or admit other persons to ownership’.<sup>397</sup>

### 8.5.2 Tribunal comments on wider Native Land Court issues

We comment here on the impact of the court on Te Tau Ihu, on the question of the Tribunal’s jurisdiction in relationship to the court, the appropriateness or otherwise of the court as an arbiter of customary tenure in Te Tau Ihu, and on the ‘1840 rule’ in relation to the inquiry district. The latter issue is also discussed in the following chapter, in the more specific context of the court’s 1892 determination of the beneficial owners of the Nelson tenths.

#### (1) *The impact of the Native Land Court on Te Tau Ihu*

The figures given in section 8.1.1 indicate clearly that the Native Land Court in Te Tai Ihu affected a relatively small area, with the three blocks remaining in customary tenure as at 1883 constituting just 4.35 per cent of the hearing district. Land loss prior to the creation of the court had a much more significant effect on Te Tau Ihu Maori than did the operations of the court. Nevertheless, in a situation where Maori retained very little land, the fate of that little was necessarily of considerable significance. This applies both to the three relatively large blocks which the court adjudicated upon in 1883, and to the numerous reserves of different sorts with which the court was involved in later years. In this respect we consider that the impact of the court on Te Tau Ihu needs to be seen in cumulative terms, and not merely in isolation. Viewed in this context, the court’s effects were considerable, as individualisation, succession, and other aspects of the legislative regime under which the court operated

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394. Ibid

395. Ibid, p 48

396. Crown counsel, closing submissions, p 27

397. Crown counsel, submissions concerning generic issues, pp 55–56

## 8.5.2(2)

saw the small area of land retained by Maori following the massive Crown purchasing programme of the 1850s itself eroded to just a fraction of what it was at 1883.

Nor can we entirely agree with the Crown submission that the alienation of land in Te Tau Ihu as a consequence of the introduction of the Native Land Court was not rapid but extended over a considerable period of time. It is true that alienations have continued through until relatively recent times, and in that respect the Crown is correct. But it also bears remembering that the 88,350-acre Te Taitapu block was lost to Maori ownership within a year of the Native Land Court determining title to the land, while Wakapuaka effectively passed out of the ownership of all but one customary owner from the time the certificate of title was awarded solely to Huria Matenga in 1883. Meanwhile, more than half of Rangitoto had been alienated by 1920, most of it over the previous decade. Under the circumstances, and especially considering the already inadequate landholdings of Te Tau Ihu Maori prior to 1883, we consider this rapid enough.

**(2) *The appropriateness of the court as an arbiter of custom***

We have referred to Alexander Mackay frequently in the course of this chapter. In summary, Mackay served as a resident magistrate and commissioner of native reserves in the South Island from 1864 to 1882, and as commissioner of native reserves nationally from 1882 to 1884 and as a judge of the Native Land Court from 1884 to 1902. For nearly four decades at the end of the nineteenth century, he was probably the primary figure through whom Te Tau Ihu Maori would have felt that they were interacting with the Crown. However, his knowledge of and involvement with Te Tau Ihu did not begin in 1864. Mackay had arrived in New Zealand in 1845, when he landed at Nelson with his uncle, James Mackay, and his cousin, James Mackay junior. James Mackay senior farmed in the Wakapuaka area for many years. For his first 19 years in New Zealand, Alexander Mackay farmed in the Nelson province, and he clearly gained considerable knowledge of Maori language and culture.<sup>398</sup>

A consideration of the role of Alexander Mackay leads to the question of what responsibility, if any, the Crown has for the role that he played in the 1883 cases and in subsequent court sittings and inquiries into the operations of the court. In assessing this, it is important to bear in mind that the Turanganui a Kiwa Tribunal has commented that having a judge and an assessor from outside a district could lead to unsafe awards. Parliament had, in fact, effectively acknowledged this by the provision it made for the appointment of district officers in the 1873 Act, even if the measure was subsequently implemented in an entirely inadequate manner.<sup>399</sup> From this point of view, we need to acknowledge that there were advantages to the fact that Alexander Mackay's knowledge of and links with Te Tau Ihu went back

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398. 'Alexander Mackay', DNZB, vol 2, p 289; 'James Mackay', DNZB, vol 1, p 252; Ralph Johnson, *The Trust Administration of Maori Reserves, 1840-1913*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997) (doc A72), pp 111-113

399. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 449

nearly 40 years. Nevertheless, with local knowledge also goes the possibility of bias and conflict of interest. In 1883, Mackay initially appeared on behalf of the Crown, and successfully asked for the dismissal of almost all the applications before the court. He then went on to display bias in his evidence in both the Te Taitapu and Wakapuaka cases, and there is a strong argument that he had a conflict of interest in the latter case, even though there is no firm indication that he appeared for the Crown or was furthering any particular Crown agenda in that instance. Even so, as a judge of the Native Land Court Mackay subsequently acted in several further cases in which Hemi Matenga was involved, which leaves him open to further questions about possible bias given his links with his old friend.

That the Native Land Court opted in favour of the evidence of a single Pakeha ‘expert’ in Te Tau Ihu customary tenure over that of the many Maori witnesses to appear in the 1883 cases indicates the extent to which the court was dominated by Europeans and operated in a manner inconsistent with tikanga. In this respect, we again refer to the findings of previous Tribunals that the court was introduced without prior consultation with Maori and in a manner which breached the principles of the Treaty by removing the right of Maori to substantially determine titles to customary lands themselves. In the case of Te Tau Ihu, the effect of the introduction of the Native Land Court was, in our view, to impose a simplistic winner-takes-all process for determining titles, where previously there had been a situation in which many different and sometimes competing layers of rights were able to be accommodated. In this respect, we concur with the Turanga, Hauraki, and Rekohu Tribunals in finding the Native Land Court an entirely inappropriate arbiter of custom.

### (3) *The ‘1840 rule’ and custom*

The legislation which created the Native Land Court system by which Maori ownership of lands was decided stated that such determination was to be according to native custom. In practice, however, it was left to judges of the land court to develop an understanding of what that custom was and the ‘rules’ under which it operated. A large body of precedent to guide the court had emerged by 1883, when the court first adjudicated upon Te Tau Ihu lands. One key part of this development was the ‘1840 rule’, although, as the Rekohu Tribunal has pointed out, there were, in fact, several 1840 rules, ‘all based on the thought that customary rights were to be settled at 1840, or that 1840 provided a starting point for determining Maori freehold title.’<sup>400</sup> The key rule was that, ‘from 1840 onwards, no land rights could be acquired by force.’ The Tribunal saw no essential conflict between that understanding and the court’s obligations under the Treaty, but commented that different judges proved to have different assumptions on what the court should do with respect to peaceful changes after 1840. ‘Some did not move beyond the 1840 position. Others did.’<sup>401</sup>

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400. Waitangi Tribunal, *Rekohu*, p 131

401. *Ibid*, p 132

Judge Mair fell within the former category, as did Alexander Mackay. Mair chose to put a very heavy emphasis on raupatu followed by occupation. He did not consider that defeated but still occupant people had any remaining rights to land and claimed to have no power to 'reinstate' the Kurahaupo iwi in the case of the Taitapu block. Similarly, in the Wakapuaka case, his judgment did not acknowledge the rights of intact but militarily subordinate peoples (as at 1840, at least) who had gifted land. In such circumstances, the lack of clear principles setting out the nature of 'Native custom and usage' and the predisposition of the court to accept the testimony of Crown servants without query, meant that it was open to manipulation by a powerful Crown official who seems to have acted in a manner that was less than scrupulously honest. And in the case of Rangitoto, meanwhile, the inclusion of at least one Ngati Kuia individual on the list of owners, despite their exclusion by name from the title, ought to have raised important and serious questions of principle and custom pertaining to the relative rights of the different iwi to the island, but clearly did not.

We held in our first preliminary report that where the Kurahaupo tribes remained with the land ancestral rights survived but were no longer exclusive. They could point to the existence of leaders, such as Kaikoura on the east coast and Puaha Te Rangi on the west, who were in control of independent if subordinate communities after 1840. Meihana Kereopa could name tupuna who had been present at the time of the negotiations with the New Zealand Company and they were later prominent in the signing of the Waipounamu deeds. In our opinion, there was sufficient evidence to show that the Kurahaupo people had not been entirely enslaved and had retained rights in the land. Our reading of custom is that it continued to grow, embracing Christianity, abandoning slavery and, in much of the country, warfare. European forms of organisation were also adopted and modified to customary purposes. As we noted in the first preliminary report we are – with one important exception noted below – less concerned with what custom may have been as at 1840, other than as a marker in an evolving situation. And as we further noted, the unfolding and evolving nature of custom meant that recognition of the rights of conquered groups could hardly be considered uncustomary even if it had been brought about in part by concepts and circumstances imported from European society.

We emphasise 'in part' because, as we saw in chapter 2, there were other aspects of pre-existing custom which also tended to support a view of ongoing Kurahaupo rights. For one thing, as we noted, by the time of the Treaty the rights of conquerors had yet to fully develop by way of established ancestral associations with the land, while those of the Kurahaupo groups had yet to be fully submerged and still remained capable of further recovery. Even some members of the conquering iwi later accepted the persistence of legitimate Kurahaupo claims on the land – including in circumstances in which it was not in their own interests to do so, such as the Native Land Court hearings staged in Te Tau Ihu from 1883 onwards. On the whole, however, witnesses from the northern iwi to appear before the land court learned to emphasise conquest over the Kurahaupo tribes at the expense of intermarriage

with them – even though it was by the latter means that whakapapa associations with the land were forged and strengthened under tikanga. In this way, custom became distorted as a consequence of the court's operations while the application of the 1840 rule nearly two generations later, when the titles to Te Tau Ihu lands first came to be considered, inevitably resulted in further distortions given the length of time which had elapsed since the period under consideration.

In our view, there was considerable justification for the injunction against recognising titles obtained by force after 1840, in that Maori custom was already to some extent evolving in that direction. But as we noted in our first preliminary report, we cannot agree with the opinion expressed by historians for some of the 'conquering' tribes that Christianity and other developments after 1840 had inhibited the ability of such groups to continue to assert their rights over those of the Kurahaupo tribes. As we noted, there was no shortage of examples of such assertions of rights in Te Tau Ihu in the period after 1840. Nor, with the exception of the sanction against violence, do we see any grounds for the freezing of custom as at 1840. There was nothing in the legislation under which the Native Land Court was established which required such an approach and, indeed, as noted above, it was not one applied universally by judges of the court. It follows that the outcome of the Te Tau Ihu hearings may have been entirely different if a judge who allowed for peaceful developments after 1840 to be recognised in weighing up ownership had been appointed to decide on cases in the district. That in itself surely highlights the inappropriateness of the court as an arbiter of custom, given vital decisions impacting on entire Maori communities could be decided largely on the personal whims and prejudices of the European official appointed to hear the case.

### **8.5.3 Tribunal findings on wider Native Land Court issues**

With reference to the issue of whether the Native Land Court carried out an adequate inquiry as to who held customary rights in these three blocks, we are of the opinion that it did not. Further, we are of the view that it could not do so under the legislative regime in place. Crown officials openly admitted in the late nineteenth century that Maori would have much fairer occupation of their lands according to their own customs and usages. But, as a number of previous Tribunals have clearly found, the primary objective in establishing the Native Land Court was not to provide a fair and just mechanism for deciding titles, but rather to facilitate the alienation of Maori land to the Crown and private settlers. Any other objective would necessarily have required extensive consultation with Maori prior to designing an appropriate title-adjudication mechanism and would have substantially left Maori in control of the process of deciding customary ownership of their own lands, most likely through runanga or komiti-based bodies operating under the sanction and with the active cooperation of the Crown. We find ourselves in agreement with the Turanga and

other Tribunals that the failure to provide such a mechanism, and the imposition of the Native Land Court on Maori without prior consultation, constitutes a breach of the Treaty. The Treaty envisaged that customary interests would be respected and protected, but the court was not an adequate instrument for this task, and was especially ill-equipped and inappropriate in a district such as Te Tau Ihu, where customary tenure was continuing to evolve and many layers of rights were to be found.

Accordingly, we follow the reasoning of the Rekohu Tribunal that:

The creation of the court was itself contrary to the Treaty principle to respect the rangatiratanga of the Maori people. An aspect of that 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.<sup>402</sup>

It also needs to be stated that the court, by its own rules and practice, further weakened its capacity to ensure that rights would be protected, customary tenure respected and the dispossession of those entitled to recognition as owners avoided. Its overly simple frame of reference and elevation of conquest to an ‘uncustomary degree at the expense of ancestral right-holders’ had the opposite effect.<sup>403</sup> This meant that the discretion of the court to accommodate change and, in particular, the recovery of defeated tribes, did not find voice in its findings in the Te Tau Ihu region, with prejudicial effect on the excluded groups. As we shall see in the case of the Nelson tenths (to be examined in the next chapter), Kurahaupo representatives made it clear to Crown officials that they viewed the court’s conclusion that they were a conquered people without any rights in Te Tau Ihu as entirely unjustified according to Maori custom. Even some of the descendants of the ‘conquerors’ had, by their various actions at different times, including the provision of a hakari for the Kurahaupo tribes during the Wakapuaka hearing in 1883 and earlier actions including the distribution of leasing income, acknowledged ongoing Kurahaupo rights to some degree. That was a development of which Crown officials were aware. Yet, despite this, despite Kurahaupo complaints against their exclusion, and despite the fact that Native Land Court applications of the 1840 rule differed (sometimes significantly) depending on the judge involved in any particular case, the Crown took no steps to remedy the prejudice caused to the Kurahaupo tribes. We find this to be a breach of the principle of active protection.

We have questioned the actions of Alexander Mackay as a witness calling on his experience as a Crown officer before the Native Land Court. In the case of both Rangitoto and Wakapuaka, Mackay’s views were accepted without question. Much of our criticism has been framed in terms of the exclusion of Kurahaupo, but in the case of Wakapuaka, we are equally concerned with the treatment of Ngati Koata and Ngati Tama whanui. Mackay’s description of Ngati Koata as ‘conquered’ was made in the knowledge that such was not the

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402. Waitangi Tribunal, *Rekohu*, p144

403. *Ibid*

case. His bias in favour of his friends Hemi and Huria Matenga was a conflict of interest and a breach of good faith on the part of one of the most important officers of the Crown in this region. That said, no clear or compelling evidence was presented to us that Mackay was representing the Crown in presenting his evidence in the case of Wakapuaka, or even pursuing a particular agenda favourable to the Crown. On the other hand, as stated previously, the ready acceptance of Mackay's testimony palpably demonstrated the fatal flaws with the Native Land Court system as any kind of fair or accurate arbiter of customary tenure. Further, we find it remarkable that Mackay's later representations on behalf of Huria and Hemi Matenga continued to carry so much weight with Crown officials and members of the Native Affairs Committee after 1896, when it ought to have been plainly obvious that he was far from an impartial or disinterested witness in the matter. We find the Crown to have been in breach of the principle of redress in its ongoing failure to promptly and fully investigate and provide remedy in relation to these matters.

Although the Crown cannot be held responsible for the individual decisions of its judiciary, it can be held responsible for failing to remedy well-founded grievances about those decisions, and for creating a system which placed ultimate authority in the hands of an outsider rather than a runanga. We agree with the Rekohu Tribunal that one of the 'first constraints on the ability of the Native Land Court to manage Maori custom was that judges were outsiders looking in.'<sup>404</sup> The potential impact of the transfer of the power to decide on the meaning of custom was deepened when the recipient – as in the case of Mair – failed to thoroughly test and examine the evidence presented to them or to question obvious inconsistencies, to the point where, as was seen, in the Wakapuaka case the take of the successful claimant was never clearly enunciated and there was no explanation as to which part of Maori custom sanctioned the ownership of more than 27 square miles of land by a solitary individual. We find the Crown to have been in breach of the principle of active protection through the establishment of a system in which such an extraordinary judgment could be given, contrary to all principles of Maori customary tenure.

Thus, the fundamental principle is, as we have also discussed in earlier chapters, that Maori should have been empowered to decide their own land titles. This is the first and abiding principle. Such was the finding of the Tribunal in *Rekohu, Turanga Tangata Turanga Whenua*, and *He Maunga Rongo: Report on Central North Island Claims*. As Native Minister Donald McLean put it to Parliament in 1872:

They [Maori] were themselves the best judges of questions of dispute existing among them. No English lawyer or Judge could so fully understand those questions as the Natives themselves, and they believed that they could arrive at an adjustment of the differences connected with their land in their own Council or Committee, very much better than it would be possible for Europeans to do. He [McLean] hoped honorable members would accord

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404. Ibid, p146

to the Native race this amount of local self-government which they desired. He believed it would result in much good, and whatever Government might be in existence would find that such Committees, with Presidents at their head, would be a very great assistance in maintaining the peace of the country.<sup>405</sup>

As a matter of first principles, therefore, it was known that fairer, more just decisions could be arrived at by Maori bodies interpreting and applying their own customary law. Parliament, however, chose not to adopt the approach suggested above by McLean. The imposition of the Native Land Court to make these decisions was a fundamental breach of the Treaty. It inevitably resulted, as we have discussed in this chapter and elsewhere, in court-created entitlements which distorted or mistook custom.

Nonetheless, the Crown had established a court of law to determine customary entitlements and transform them into titles derived from the Crown. As a matter of law, the courts are not the Crown nor agents of the Crown, within the meaning of the Treaty of Waitangi Act 1975. We agree with the Rekohu Tribunal on that point. In determining whether the Tribunal could investigate judge-made law such as the 1840 rule, however, and the court decision that resulted from it, the Rekohu Tribunal relied on the view of Justice Heron that its proper inquiry could not avoid a consideration of what the Native Land Court did, the results of the court's actions in respect of Maori Treaty grievances, and the scope and nature of such grievances. The Tribunal found that investigation of Moriori claims required it to determine whether the Native Land Court had acted consistently with the principles of the Treaty, and whether the alleged injustices of its decisions were inconsistent with the Treaty. This was a necessary step before the Tribunal could determine whether or not any omission of the Crown to intervene was in breach of the Treaty.<sup>406</sup>

We agree with the Rekohu Tribunal's conclusion that the Waitangi Tribunal 'may properly give consideration to whether the Native Land Court has acted inconsistently with Treaty principles and, if it so finds, to determine whether the Crown has omitted to take appropriate action to remedy the situation to the extent that such action was practicable.'<sup>407</sup> In doing so, we do not question or impugn the legality of the court's decisions. Those decisions stand unless altered by a duly empowered court or by legislative action. The Waitangi Tribunal is not an appellate court.

It is part of the essence of good governance and of the rights of British citizens that the courts be independent of the executive government. As the Tribunal put it in its *Rekohu* report, action 'modifying the findings of a court is a serious matter' and 'is usually confined

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405. Donald McLean, 22 October 1872, NZPD, 1872, vol 13, p 895 (Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 1, p 310)

406. Waitangi Tribunal, finding on jurisdiction with respect to the Native Land Court, 5 October 1994 (Wai 64 ro1, paper 2.67), pp 18–21

407. *Ibid*, p 22

to changing legal principles rather than particular decisions.<sup>408</sup> To give one example, the Native Lands Act 1865 created the ‘10-owner rule’, by which land was vested absolutely in 10 or fewer individuals, disenfranchising the great majority of hapu members.<sup>409</sup> This part of the law was changed in 1867 and 1873, as a result of Maori protest and Government admission that the 10-owner rule had been wrong.<sup>410</sup> Individual decisions based on that rule were not corrected by these changes in the law. In 1886, however, Parliament reopened such decisions for inquiry and amendment by the court.<sup>411</sup>

This approach differed from that taken in respect of the many complaints received by the Crown that the court’s decisions were unsafe in custom and unfair to those who had been excluded from titles as a consequence. In our view, the legal principles underlying the system could and should have been changed as a result of such complaints. Instead, the Government chose to have Maori complaints and petitions about decisions investigated on a case by case basis, usually by the Native Affairs Committee in the first instance, and then by royal commission or the Native Land Court.

The result was clear. In the nineteenth and early twentieth centuries, the Government ‘had no qualms’ in asking Parliament to intervene ‘on Native Land Court decisions, as is its right.’<sup>412</sup> The usual process was for the House or Legislative Council’s Native Affairs Committee to hear evidence on petitions and then recommend them to the Government either for its favourable consideration or for no action. If persuaded that an injustice had occurred, the Government usually followed the committee’s recommendation by including the case in legislation, empowering the Native Land Court or Native Appellate Court or a royal commission to reinvestigate the case. Sometimes, decisions were simply modified by legislation. Accordingly, as the Rekohu Tribunal concluded, ‘there was scope for the Crown to intervene’ and correct unjust decisions.<sup>413</sup>

It would not have had to do so, of course, had it corrected the fundamental principle involved and empowered Maori bodies to decide their own customary entitlements. Given that the Crown chose not to make this fundamental change, what other recourse was there for its aggrieved Maori citizens? One necessary safeguard was the right of British subjects to petition the Sovereign and Parliament. It is a principle of good government that there be a means to override the courts where very clear miscarriages of justice have occurred. Because of its particular approach to unsafe Native Land Court decisions, the Government – in practical terms – restricted its Treaty obligation of active protection to intervening in particular decisions which had come to its attention, whether directly by Maori complaint or indirectly from the reports of officials. The Crown appears to have accepted this proposition

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408. Waitangi Tribunal, *Rekohu*, p 147

409. Native Lands Act 1865, s 23

410. See Native Lands Act 1867, s 17; Native Lands Act 1873

411. Native Equitable Owners Act 1886

412. Waitangi Tribunal, *Rekohu*, p 147

413. *Ibid*

in our inquiry, but argued that there had to be an error ‘in substance or process of such an obvious kind as to raise a serious question that the Crown could or should have intervened’ following the release of a decision.<sup>414</sup>

For the blocks discussed in this chapter, the Government was clearly made aware of a situation requiring intervention in the case of Wakapuaka. The sale of Te Taitapu, however, followed swiftly upon the granting of title. Officials’ reports did not, as far as we are aware, alert the Government to the unjust aspects of that decision. The Crown officer involved was Alexander Mackay, whose evidence was influential in the Taitapu decision (and which contradicted his own earlier reports to the Government, and also those of James Mackay). It is not surprising, perhaps, that he did not draw the deficiencies of the Taitapu decision to the attention of his superiors. There were no Maori petitions at the time about the Taitapu decision (perhaps because of the speed of the sale). Nor were there petitions about the Rangitoto decision. The Government could not reasonably have known about the unsafe aspects of those decisions. There was also a fourth important decision in the nineteenth century, the allocation of the Nelson tenths (see ch 9). In that instance, as we shall see, there was an application for rehearing and a petition of protest to the Crown, neither of which secured corrective action.

The evidence before us, therefore, is that the Government’s ability to exercise its obligation of active protection was haphazard at best. It depended on Maori protest of a particular kind, which then had to gain both its attention and its approbation, before it asked Parliament to act. In the case of Wakapuaka, several decades of petitions and investigations were required before the Government acted to have the case reheard. The remedy was inherently deficient anyway, as it involved referring the matter back to the body fundamentally unsuitable to deal with it.

Broadly speaking, the Crown’s Treaty obligation was to fix the fundamental systemic problems of the Native Land Court system, which was known to be producing unsafe decisions every year on matters of custom. The legislation should have been changed to empower Maori bodies to decide their own titles, as sought by Maori of the time. The Crown’s failure to do so was a breach of the Treaty that affected all Maori right holders in Te Tau Ihu. It was no real substitute to fix things partially and only for some, by asking Parliament to intervene in particular decisions.

Nonetheless, we note that governments chose to do so as a matter of course for Native Land Court decisions in the nineteenth and early twentieth centuries. That was their chosen policy. We are required to review that policy for its consistency with the Treaty. In our view, it must be remembered that Maori citizens had the right to petition against decisions of the courts, and that the Crown could rightly ask Parliament to intervene where clear miscarriages of justice had occurred. This would have been so, even where Maori bodies decided

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414. Crown counsel, closing submissions, p 83

titles for themselves. But to intervene on just a selection of cases where the underlying problem was fundamental and recurring, leaving some miscarriages of justice extant and doing nothing to prevent future ones, was a policy clearly inadequate in Treaty terms. Nor, as we have demonstrated in detail in this chapter, did this policy enable the Crown to actually protect the interests of iwi and hapu who had customary rights and tino rangatiratanga in respect of the Wakapuaka, Taitapu, and Rangitoto blocks. The Crown's policy and actions were therefore inconsistent with the Treaty, to the prejudice of those omitted unfairly from the titles.

The individualised (or 'pseudo-individualised') nature of the titles issued by the court was also a matter upon which we heard considerable evidence. This is also an issue upon which a number of Tribunals have now deliberated. A related question concerns legislative provisions which allowed any individual Maori to apply for investigation of title, without reference to the wider community of owners. Token tinkering with this provision, such as the requirement between 1880 and 1883 that at least three claimants were required to initiate an investigation of title, could not alter or hide the inescapable fact that the intention was to circumvent and undermine communal control of lands, including the decision to take a block before the Native Land Court for title determination. The same objective lay behind the titles issued pursuant to the Native Land Act 1873 and subsequent amendments. In this respect, we concur with the Turanga Tribunal that the intention and effect of the titles issued – good enough to enable each individual to alienate their interests piecemeal without reference to the wider community of owners but practically worthless for any other purposes – was 'to create individually tradable interests in land where none had existed in Maori custom.'<sup>415</sup> As that Tribunal further observed, a system which 'constrained choice and removed community decision making in this way was unquestionably designed to force sales.'<sup>416</sup>

It was submitted to us by the Crown that Maori were entitled to all of the rights and privileges of British subjects under article 3, including the right to alienate their interests in land should they choose to do so. We agree, although we note that, under the particular circumstances of Te Tau Ihu after 1865, it is likely that very little land would have been sold outright had communities been permitted to make considered decisions about the management of their lands. The extent to which tribal leaders fought to exclude the three blocks from sale in the 1850s, arguing that they were essential to the needs of their people, is indication enough of that. Instead, if the history of some of the lands prior to the arrival of the court is any guide, it is likely that parts of these may have been leased to settlers to generate an income for their owners. In any event, given that Te Tau Ihu Maori were not able to manage and administer such lands on a communal basis as a consequence of the titles issued after 1883,

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415. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 443

416. *Ibid*, p 528

the likely fate of the blocks under a fairer system of ownership can only be speculated. That in itself highlights the fundamental flaw in the Crown's submission. The Treaty may have permitted Maori to alienate lands if they wished, but it also guaranteed ongoing ownership without qualification or equivocation for however long this was desired. A title system profoundly weighted towards making it easier to sell lands than to retain them can hardly be considered anything other than a serious breach of the Treaty. In this respect, we again concur with the findings of the Turanga, Hauraki, and various other Tribunals which have considered such issues at great length.

We also consider that the Crown's submission ignores the important principle of active protection. The instructions of Lord Normanby to Captain Hobson are all too clear on this point. Hobson was informed that:

All dealings with the Aborigines for their Lands must be conducted on the same principles of sincerity, justice, and good faith as must govern your transactions with them for the recognition of Her Majesty's Sovereignty in the Islands. Nor is this all. They must not be permitted to enter into any Contracts in which they might be ignorant and unintentional authors of injuries to themselves. You will not, for example, purchase from them any Territory the retention of which by them would be essential, or highly conducive, to their own comfort, safety, or subsistence.<sup>417</sup>

Those obligations persisted even after the Crown abandoned its pre-emptive right to purchase Maori land in 1863.<sup>418</sup> In the case of Te Tau Ihu, the duty of active protection, if properly observed and implemented, must surely have suggested serious restrictions preventing the outright sale of the small area of land remaining in Maori ownership. Instead, in two out of three cases no restrictions at all were imposed on the titles, while in the case of Rangitoto the restriction against alienation except by way of leasing was effectively removed by the provisions of the Native Land Act 1909, leading to the rapid alienation of approximately half the island over the following decade. We find this to be a serious breach of the principle of active protection.

## 8.6 SUMMARY AND CONCLUSION

Of the 146,391 acres contained in the three blocks examined in this chapter, today no more than 9944 acres approximately remains in Maori ownership. That equates to some 6.79 per cent or one-fourteenth of the area in customary Maori tenure prior to the introduction of the Native Land Court in 1883. We noted in section 8.1.1 that the three blocks represented

417. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim* (Wellington: Brooker and Friend Ltd, 1991), p 196

418. Williams, 'Te Kooti Tango Whenua', p 133

approximately 4.35 per cent of the inquiry district. That was, even taking into account the tenths and occupation reserves, entirely inadequate in our view to allow Te Tau Ihu Maori to participate in the new colonial economy on equal terms with local Pakeha. But at least it allowed for some form of participation. By contrast, the area remaining in Maori ownership from the three blocks today – some 0.29 per cent or  $\frac{1}{345}$  of the total district – represents a state of virtual landlessness.

Considered in these terms, the question posited in the introduction to this chapter can have only one answer. Te Tau Ihu Maori were not able to reap even a fraction of the ‘real payment’ for the vast bulk of their lands acquired by the Crown prior to 1865 through retention of the Te Taitapu, Rangitoto, and Wakapuaka blocks because, quite simply, they were not protected in the ownership of such lands. We have noted throughout this chapter serious Crown failings with respect to the duty of active protection. That duty was even greater in a situation where only a tiny fraction of the original Maori estate remained, but was one discharged in at best an entirely inadequate manner with respect to Te Tau Ihu after 1883.

In our first preliminary report, we noted that it was in the Native Land Court era that Te Tau Ihu Maori were forced to fight one another for the insufficient lands remaining available to them. It was at this point that the northern conquering tribes, whose practice had hitherto been inclusive in relation to the Kurahaupo iwi so long as their own mana was recognised, began to assert exclusive rights. We hold the Crown in large part responsible for this development, and not just because of its role in divesting Te Tau Ihu Maori of so much of their estate. As we have stressed throughout this chapter, the Native Land Court – imposed upon Maori communities without prior consultation – was in our view an entirely inadequate mechanism for deciding customary title. An adversarial, winner-takes-all court, dominated by European officials applying a simplified and simplistic understanding of Maori land tenure, was entirely inappropriate in the context of Te Tau Ihu and, indeed, was destructive of relations within and between whanau, hapu, and iwi.

Furthermore, as the chapter noted, the Crown not only failed to protect Te Tau Ihu Maori from the alienation of the small area of customary land remaining to them after the Crown purchases of the 1850s but in various respects positively encouraged further sales. The individualised titles issued by the Native Land Court allowed each owner to sell his or her share of the tribal estate without reference to the remainder of the owners, but made any kind of considered communal management of the land virtually impossible. Meanwhile succession laws which resulted in increasing fractionation of interests with each passing generation further encouraged alienation – as well as prompting a number of Crown measures starting in 1953 which provided for the compulsory acquisition of ‘uneconomic’ interests in Maori land. Such well-meaning, if paternalistic, responses to the problem resulted in some cases in the last remaining links to former ancestral lands being severed for all time.

We suggested in this chapter that, although the area of land adjudicated upon by the Native Land Court within Te Tau Ihu was small in relation to the district as a whole, it

remained of vital importance to local iwi for that very reason. Further indication of this is apparent not just from the way in which Te Tau Ihu Maori had fought so hard to have the three blocks excluded from the Crown purchases of the 1850s, but also by the numerous petitions and appeals sent to Parliament and elsewhere after 1883 in relation to these lands. It was seen that in a number of instances redress was both belated and partial in relation to a number of important grievances raised and that in some cases groups with valid grounds for complaint never had their issues adequately investigated. Such a tendency was further compounded by an obvious bias on the part of many of those charged with investigating the grievances, who preferred to rely on the testimony of one or two other (sometimes self-interested) Pakeha officials over that of kaumatua, kuia, and other representatives of the Te Tau Ihu iwi.

The impact of the loss of the three large blocks was compounded, as we saw in chapter 7, by the concurrent alienation of many of the occupation reserves, and further reinforced by the increasing exclusion of Te Tau Ihu Maori from formerly alienated lands that in many cases had continued to remain available for customary purposes until European settlement made this all but impossible by the 1870s. With a land base increasingly inadequate even for subsistence purposes, let alone more ambitious engagement with the colonial economy, outwards migration in search of better opportunities elsewhere remained the only realistic option for many Te Tau Ihu Maori. Tribal communities were thus in some cases entirely dispersed. The socio-economic consequences of an entirely inadequate land base for those who remained forms a key focus of chapter 10. First, however, in the next chapter we consider the Nelson tenths set aside as endowment reserves for at least some of the iwi of Te Tau Ihu.

## CHAPTER 9

### THE NELSON AND MOTUEKA TENTHS

#### 9.1 INTRODUCTION

In 1975, the Sheehan commission observed:

The Commission believes that the mid-nineteenth-century vision of Colonel William Wakefield of a native race growing in stature alongside the European settlers and sharing in the development and prosperity that European settlement would bring is as relevant to the growth of New Zealand today, as it was then. This vision led Colonel William Wakefield to introduce to New Zealand a scheme for colonisation which in its time was unique and required the setting aside of certain areas of land which he envisaged would forever enure for the benefit of the Maori people.<sup>1</sup>

In the Kapiti and Queen Charlotte Sound transactions of 1839, the New Zealand Company undertook to hold 'suitable and sufficient reserves' in trust 'for the future benefit of the said chiefs, their families, tribes, and successors, for ever'.<sup>2</sup> The Crown assumed responsibility for these reserves as part of the agreement with the company in November 1840. Initially proposing that the reserves comprise one-tenth of the Nelson settlement, the New Zealand Company reduced this to an eleventh in January 1841. The Spain award of 1844 restored the proportion to one-tenth (see ch 4).

However self-serving they may appear to have been, the New Zealand Company's public statements about its one-tenth – alongside Lord Normanby's instructions to the first Governor – are part of the context of the Treaty in 1840. They inform the vision and principles of the Treaty, including the principle of mutual benefit – that both peoples would obtain or retain sufficient land and resources to prosper in the new circumstances of European settlement. They also inform the principle of active protection, under which the Crown (and, to an extent, the company) would actively protect the interests of the Maori people from whom land was purchased. What was less clear in the company's vision for its settlements was the role that Maori would play on their pepper potted reserves, or how much control they would have over them. They were expected to accumulate relative wealth (and

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1. 'Report of Commission of Inquiry into Maori Reserved Land', AJHR, 1975, H-3, p 54

2. 'Copy of the New Zealand Company's Second Deed of Purchase, Including the Nelson District', 25 October 1839, *Compendium*, vol 1, pp 64–65

therefore power) in the Nelson settlement. The chiefs were expected to remain leaders in the new society. There was much ambiguity, however, which remained a problem throughout the history of the tenths reserves, as we shall see. Also, Maori themselves would have their own view of what was appropriate, and it would not necessarily include aspects of the company's vision, such as the random distribution of 'their' sections among the settlers.

This chapter examines the company's reserves scheme as it evolved under Company, and then Crown, administration. The location, extent, and use of the reserves were gradually worked out over the 1840–48 period. Crown administration of the tenths, as the reserves at Motueka and Nelson were known, became more formalised following the enactment of the Native Reserves Act 1856. In 1882, responsibility for the tenths was devolved to the Public Trustee and then transferred to the Native Trustee in 1920, although the Native Land Court had determined the beneficial owners in the interim.

The determination of beneficial owners in 1893 changed the nature of the trust from what had become a general endowment for all Maori of the district to one for the specific benefit of the descendants of some of those who had been involved in the original arrangements with the company. Following the definition of ownership, a portion of the proceeds were directly distributed to those named as beneficial owners, members of Ngati Rarua, Ngati Tama, Ngati Koata and Te Atiawa. However, the Native or Maori Trustee retained control of the management of tenths reserves until the land that remained was transferred to the Wakatu Incorporation (representing the descendants of those beneficial owners) in 1977.

Most of the tenths estate was retained, with the notable exceptions of the reduction of urban reserves in 1847, the gift of land at Whakarewa to the Anglican Church for a school in 1853, alienations under the Maori Affairs Amendment Act 1967, and public works takings. The bulk of the remaining tenths reserve land was leased to Europeans, with the income distributed to Te Tau Ihu Maori who applied for assistance, or for medical purposes, hostel maintenance and administrative costs.

There was also a distinct category of land within the estate known as occupation reserves. These were the tenths at Motueka and Moutere that were set aside for resident Maori occupation. This type of occupation reserve is distinct from the reserves allocated in the course of Crown purchasing, which we have discussed in chapter 7.

Motueka Maori had relatively more control over these occupied tenths than other tenths reserves until the late 1890s when the Public Trustee exerted more authority over them. Beneficial ownership of the occupied tenths was determined by the Native Land Court in 1901 but this did not result in a direct grant of title to the occupants.

This chapter focuses on the question of the extent to which the tenths reserves scheme was 'suitable and sufficient' and of benefit to Te Tau Ihu Maori. This involves considering the adequacy of the estate and the way in which it was administered on the owners' behalf. We then consider the relationship between the Crown and the authorities involved in administering the reserves to assess whether, and to what extent, the Crown was liable for this

administration. Separate issues arise with respect to the Native Land Court's determination of ownership and the problems faced by the Wakatu Incorporation.

The chapter is structured around four topics:

- ▶ the establishment and administration of the tenths;
- ▶ the status of the Public Trustee and the Native or Maori Trustee;
- ▶ the Native Land Court's determination of ownership of the tenths; and
- ▶ the Wakatu Incorporation.

For each of these topics, we open with a chronological narrative before outlining the claimant and Crown submissions and then concluding with our discussion and findings. The final section of the chapter brings our conclusions on the key issues together in a summary of findings.

## 9.2 THE TENTHS: THE ISSUES

Many of the key issues for this chapter were put to us in the evidence of Rore Stafford for the Wakatu Incorporation, who summed up the claim as follows:

When we [the Wakatu Incorporation] got back these lands [in 1977] we were told that we should think ourselves very lucky to have got back an unimproved land value asset of \$11 million dollars, which had a capital value of well over \$20 million dollars. But they forgot about our people who lost their Tino Rangatiratanga.

The New Zealand Company told those original owners that though they wouldn't live on these reserves they would enjoy the rents, which would be real and substantial payment for their land. They said that the value of these lands would increase because of colonisation and settlement, and if properly administered would ultimately prove of greater value than the %oths lost by sale.

The District Officer from the Maori Trustee's office in Christchurch was quoted in a local paper after the hand over as saying: *'The Company's belief had been well founded.'*

- ▶ But they didn't tell anyone that the \$11 million dollar asset was only earning us 1.06% in revenue when they gave it back.
- ▶ No mention was made of the thousands of acres that didn't come back. Of the 151,000 acres that were taken we only got back 3,135 acres.
- ▶ They forgot to mention how they just took land that they had no right to. Occupation Reserves, roads, public places etc.
- ▶ The Crown took away our whenua and promised that we would enjoy the rents and that they would be real and substantial payment for our lands[.] But our Tupuna, their whanau and our whanau died from poverty related illnesses TB, Rheumatic Fever, and Typhoid.

## 9.2.1

- ▶ They forgot to say how they had mismanaged those monies that were set aside for our people. Spent it on every one else and left our people impoverished. (Nelson Tenth benefit funds).

Wakatu has every right to celebrate its success but it has certainly come at a price. [Emphasis in original.]<sup>3</sup>

In this section, we introduce the key issues with respect to the history of the tenths reserves, very broadly outlining the claimant and Crown arguments with respect to them. These issues are the focus of our inquiry. Ultimately, these are the areas in which we determine whether or not Crown actions or omissions breached the Treaty and its principles.

### 9.2.1 The provision and protection of a full tenth

A fundamental issue was the adequacy of the tenths estate. Both Crown and claimants agreed that, through the Spain award, the Crown undertook to reserve one-tenth of the land granted to the New Zealand Company as an endowment reserve. This estate was to be over and above any occupation reserves. The Crown conceded that the actual area reserved as the tenths ‘fell significantly short’ of that undertaking.

In the view of claimants, this shortfall was compounded by subsequent reductions in the estate. The Crown failed in its responsibility to protect the estate from alienations and these reductions took place without the consent of the beneficial owners. Crown counsel acknowledged the erosion of the estate but countered that at least some reductions were ‘not without justification’.

### 9.2.2 Clarifying the status and beneficial ownership of the tenths

The claimants were critical of the Crown’s tardiness in defining the status of the reserves and enabling the determination of ownership of the estate. The Crown conceded that the definition of beneficial ownership was not undertaken in a timely manner.

### 9.2.3 Management of the trust estate

The claimants were critical of the way in which the estate was managed on behalf of the beneficial owners. They submitted that the Crown failed to meet its responsibilities as trustee, both through tardy definition of the reserves and through poor administration of the estate. Underlying this inadequate administration was the failure to adequately consult with

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3. Rore Stafford, brief of evidence on behalf of the Wakatu Incorporation Trust, 30 May 2003 (doc 02), pp13–14

the beneficial owners and the lack of Maori involvement in and control over the estate. In contrast, Crown submissions highlighted the material benefits the trust provided Te Tau Ihu Maori and commented that those administering the estate appeared to have honourable intentions.

The claimants submitted that the failure to consult underlay the loss of land through the Maori Reserved Land Act 1955, the Maori Affairs Amendment Act 1967 and public works takings on the tenths. The perpetual leasing regime was a further focus of claimant submissions. In claimants' view, the poor administration was typified by the imposition of perpetual leases. Legislation facilitating leases in perpetuity, imposed without consultation or consent of Maori, had a serious impact on beneficial owners. The Crown countered that perpetual terms were common in leases at the time and that claimant grievances about perpetual leasing had been fully addressed by the Maori Reserved Land Amendment Act 1997 and consequent 2002 settlement.

#### **9.2.4 Expenditure and distribution of trust income**

The claimants also contended that the trust poorly managed the expenditure and distribution of the trust income, both in paying for services that should have been provided by the Government and in providing assistance for those who were not beneficial owners of the estate. The Crown, on the other hand, focused on the material assistance the fund provided Te Tau Ihu Maori. The Crown argued that the fund was an important source of health, education, and welfare assistance at a time when such assistance was otherwise relatively minimal.

#### **9.2.5 The inclusion and administration of the occupation reserves**

A fundamental theme in claimant submissions with respect to the Motueka occupation reserves was the lack of Maori involvement and control. The claimants maintained that these reserves were additional to and should not have been included in the tenths estate and added that they were inadequate for the needs of those residing at Motueka and Moutere. The Crown acknowledged that the failure to keep the occupation reserves separate from the endowment estate was a critical failure.

#### **9.2.6 The Whakarewa grant**

Claimant submissions on the 1853 Whakarewa grant focused on the extent of consultation and consent given for the grant and the impact of the loss of land for Maori at Motueka. Claimant allegations that the grant failed to meet the terms of the tenths trust were disputed

**9.2.7**

by the Crown. The Crown submitted that the school fitted with the purposes of the trust and the grant had the consent of at least some Motueka Maori. The key issue with respect to Whakarewa, in the Crown's view, was that the land was not returned to Maori after it was no longer used for the school.

**9.2.7 The Public Trustee and the Native or Maori Trustee – Crown agency**

The claimants maintained that the Public Trustee and its successor, the Native or Maori Trustee, was a Crown agent, and that actions by the trustees therefore come within the jurisdiction of the Tribunal. The Crown disagreed, maintaining that the Crown devolved its trustee responsibilities to the Public Trustee in 1882 and that the Tribunal's jurisdiction is confined to considering the legislative framework in which the trustees operated.

**9.2.8 The 1892 case**

Both the claimants and the Crown agreed that ownership of the tenths estate should have been defined much earlier than it was. Claimant submissions questioned the Native Land Court's definition of beneficial ownership, submitting that the court's inquiry into customary interests was inadequate. The claimants alleged faults in the court's hearing and decision-making processes, which arose from Judge Mackay having pre-judged the case. Those excluded from beneficial ownership argued that they had been wrongfully excluded and they pointed to subsequent failed attempts to seek a reinvestigation of the issue. The Crown maintained that there was nothing so obviously wrong with the court's processes to have warranted Crown intervention.

**9.2.9 The Wakatu Incorporation**

The main theme of submissions about the Wakatu Incorporation was the problematic leasing regime the incorporation had inherited in 1977. The claimants submitted that perpetual leases, many set at a prescribed low rental and all with long rental reviews, had caused significant difficulties for the incorporation. These problems were not fully remedied by the Maori Reserved Land Amendment Act 1997, and the settlement arising out of that Act did not represent full compensation. The Crown submitted that the 1997 Act and the resultant 2002 settlement had fully resolved and compensated for these problems.

With these issues in mind, we turn now to the first topic for consideration: the establishment and administration of the tenths estate.

### 9.3 THE ESTABLISHMENT AND ADMINISTRATION OF THE TENTHS

#### 9.3.1 Analytical narrative

##### (1) *The establishment of the tenths*

As discussed in chapter 4, the November 1840 agreement cemented the relationship between the New Zealand Company and the Crown. Under clause 13 of the agreement, the Crown assumed responsibility for the reserves promised by the New Zealand Company. The Crown undertook to fulfil the New Zealand Company's 'engagements for the reservation of certain lands' for Maori, 'the Government reserving to themselves . . . to make such arrangements as to them shall seem just and expedient for the benefit of the natives'.<sup>4</sup>

In mid-1840, the New Zealand Company had appointed Edmund Halswell to oversee the implementation of the reserves scheme, and the Crown also appointed Halswell as 'Government Commissioner for Native Reserves' in early 1841.<sup>5</sup> Halswell's role was replaced by a formal reserves trust in July 1842 when Governor Hobson appointed the chief justice, the Anglican bishop of New Zealand, and the chief protector of aborigines as trustees for the reserves in Port Nicholson and Nelson.<sup>6</sup> The chief justice resigned as trustee shortly afterwards and resident agents in the settlements represented the remaining trustees.<sup>7</sup> H A Thompson was the 'agent for the Bishop of New Zealand and his co-trustee, the Chief Protector of Aborigines', and Governor Hobson had appointed him to 'nearly all the Government offices in Nelson' in March 1842.<sup>8</sup>

As we noted in chapter 4, the provision of reserves for Maori was an integral part of the New Zealand Company's settlement scheme. Maori with whom the company dealt at Kapiti and Queen Charlotte Sound and then at Golden Bay and Tasman Bay were informed that a portion of the land would be set aside for their future benefit. We have commented there on the company's failure to properly convey their proposal for reserves during these negotiations with Te Tau Ihu Maori.

Even if there had been full and clear discussion about the nature of the reserves scheme, questions would have remained because the company's initial proposal was vague and its ideas about the scheme changed during the early 1840s. The New Zealand Company planned the settlement to consist of 1100 sections, each comprised of one town acre, 50 acres of suburban land and 150 acres of rural land. Initially, the company intended to reserve one-tenth of the land acquired for Maori, to be allocated by lottery in sections throughout the

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4. BPP, vol 3, p 209 (Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District* (Wellington: Legislation Direct, 2003), p 93)

5. Ralph Johnson, *The Trust Administration of Maori Reserves, 1840–1913*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997) (doc A72), pp 3, 5

6. *Ibid*, pp 8–9

7. Tony Walzl, *Ngati Rarua Land Issues, 1839–1860* (Wellington: Ngati Rarua Iwi Trust, 2000) (doc A50(1)), p 73

8. It will be recalled that Thompson was also the local police magistrate and the sub-protector of aborigines, among other appointments: Roland Jellicoe, 'Report on Native Reserves in Wellington and Nelson under the Control of the Native Trustee', 26 March 1929, AJHR, 1929, G-1, p 18.

settlement.<sup>9</sup> Tribunal historian, Dr Grant Phillipson, notes that this was intended to ensure that Maori would be an integral part of the settlement rather than on isolated reserves, as had occurred with the native reserves in the American colonies.<sup>10</sup> It would also ensure that the value of the reserve land would rise along with other sections in the settlement, in accordance with the company's view that the reserves would represent the real payment to Maori.<sup>11</sup>

By the time the company issued a prospectus for the settlement at Nelson in January 1841, the 'tenths' had been reduced to 'elevenths' and the company was proposing that these reserves would be leased for the benefit of the 'principal native families'. It was soon felt that the rental income should also be used to pay for schools, hospitals, and churches for Te Tau Ihu Maori.<sup>12</sup> Crown historian Dr Ashley Gould comments that the concept changed to an endowment fund because it was apparent from the experience in Port Nicholson that Maori would not relocate onto the reserves they were allocated.<sup>13</sup> Leasing was also the preferred policy of the Crown.<sup>14</sup> However, the concept of occupation reserves was not dropped altogether and the two views of how the reserves would be used co-existed uneasily. This confusion over the function of the reserves was to become an ongoing problem.<sup>15</sup>

Although the Native Trust established in 1842 favoured leasing the tenths reserves, it intended that some of the reserves in Nelson township should be set aside for Maori use. Bishop Selwyn, one of the three appointed trustees, proposed the establishment of a chapel, five hostels (one each for Maori 'of each district')<sup>16</sup>, a school, and a hospital in Nelson. Accordingly, in his selection of the reserves in April 1842, the trust's Nelson agent, Thompson, chose five township sections to be set aside for occupation, with the remaining 95 intended for lease (see fig 31).<sup>17</sup> Following consultation with Maori, Thompson selected Matangi Awhea, a traditional pa site and landing place used by various iwi, as the site of the occupation reserves.<sup>18</sup>

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9. Ruth Allan, *Nelson: A History of Early Settlement* (Wellington: AH&AW Reed, 1965), p 50

10. Dr Grant Phillipson, *The Northern South Island: Part 1*, Rangahaua Whanui series (Wellington: Waitangi Tribunal, 1995) (doc A24), p 112

11. Johnson, *Trust Administration*, p 2

12. Clementine Fraser, 'Nelson Tenths and Motueka Occupation Reserves, 1840s-1970s', report commissioned by the Waitangi Tribunal, 2000 (doc A79), pp 9-10

13. Dr Ashley Gould, 'The New Zealand Company and the Crown in Te Tau Ihu', report commissioned by the Crown Law Office, 2003 (doc s5), p 102

14. Waitangi Tribunal, *Whanganui a Tara*, p 282

15. Phillipson, *Northern South Island: Part 1*, pp 112-113

16. The Mitchells state that these districts were Rangitoto, Motueka, Tai Tapu, Wakapuaka, and Te Hoiere: Hilary Mitchell and Maui John Mitchell, 'A History of Maori of Nelson and Marlborough', 2 vols, report commissioned by Te Runanganui o te Tau Ihu o te Waka a Maui, 1992 (doc A9), vol 2, p 8-28.

17. Phillipson, *Northern South Island: Part 1*, p 116; Mary Gillingham, 'Ngatiawa/Te Atiawa Lands in the West of Te Tau Ihu: Alienation and Reserves Issues, 1839-1901', 2000 (doc A74), pp 56-57

18. Fraser, 'Nelson Tenths', p 17

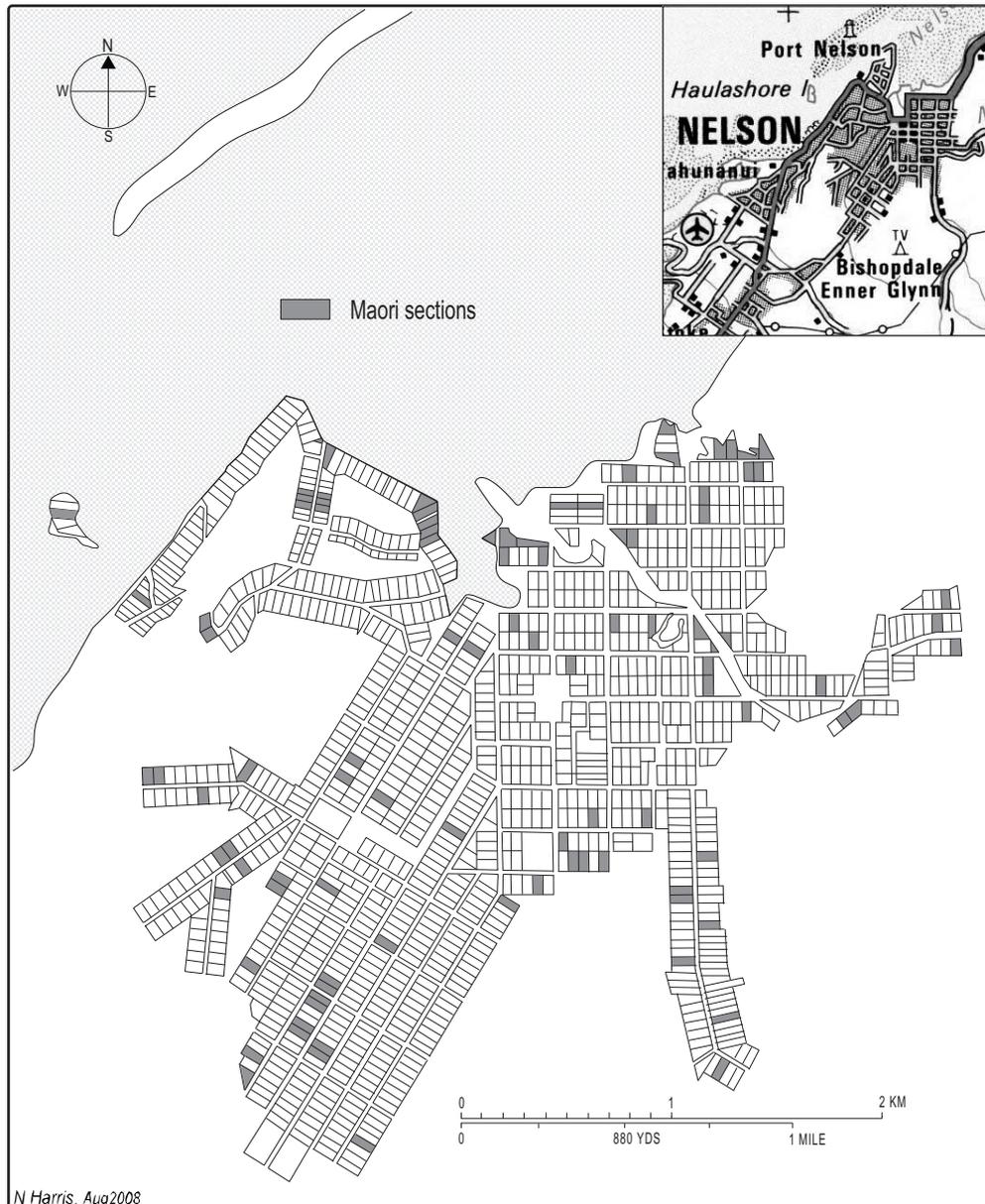


Figure 31: Nelson tenths

Source: Moira Jackson, Crown Forestry Rental Trust, and Terralink NZ Ltd,  
 'Te Tau Ihu o Te Waka a Maui Overview Maps', map book, 2000 (doc A81)

The selection of the suburban reserves in October 1842 was more problematic because the New Zealand Company's surveys at Motueka and Moutere had not excluded sites of Maori occupation. As discussed in chapter 4, the company surveys in Motueka had wrongfully included land that was occupied or being cultivated, notably at Te Maatu, which had been explicitly promised to Maori. Thompson chose to select occupied land as tenths reserves

9.3.1(1)

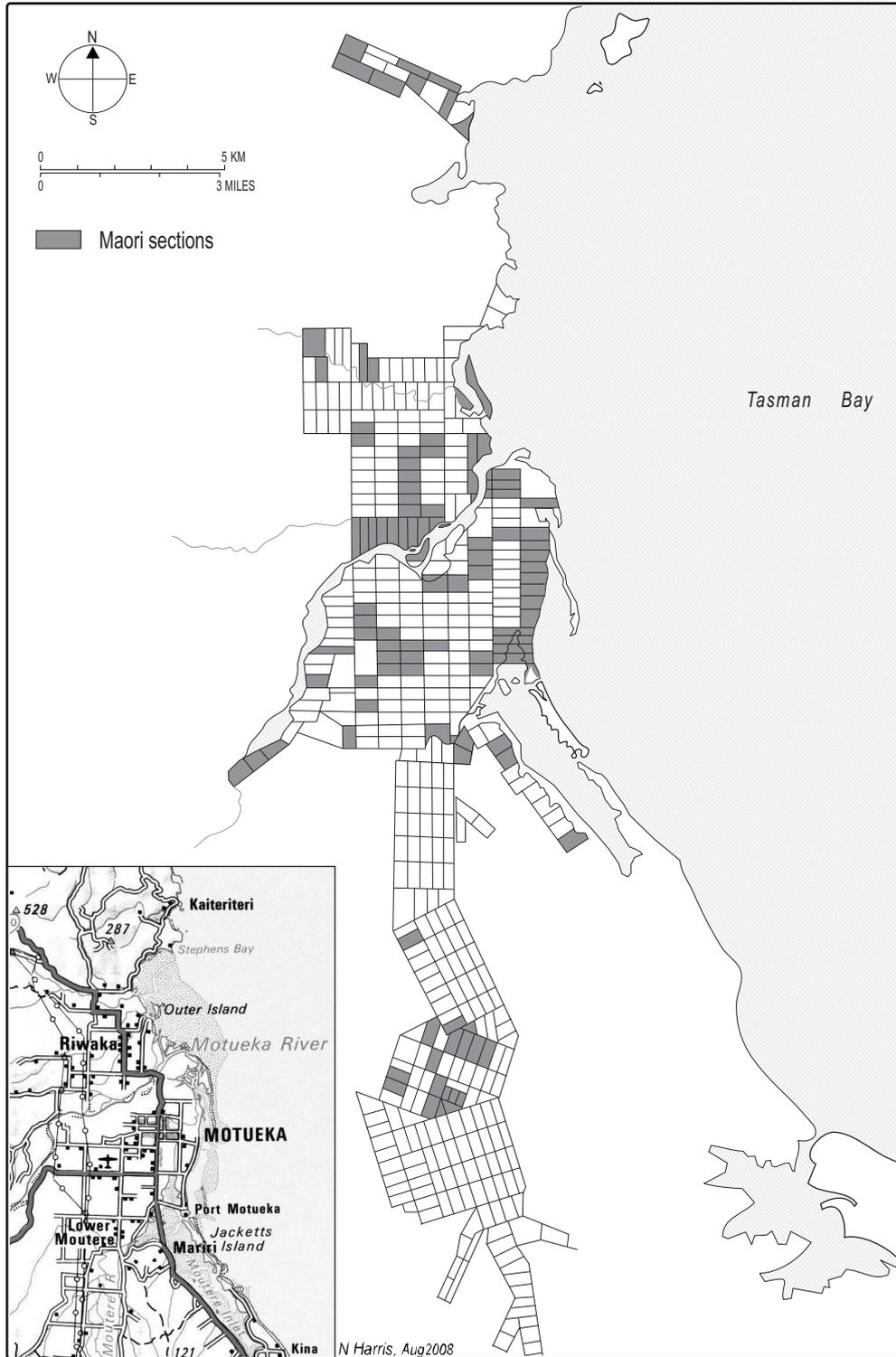


Figure 32: Motueka tenths

Source: Moira Jackson, Crown Forestry Rental Trust, and Terralink NZ Ltd, 'Te Tau Ihu o Te Waka a Maui Overview Maps', map book, 2000 (doc A81)

where possible, which ensured that settlers would not take them up. Thompson's selection of 81 reserves in Motueka in comparison with only 19 in Moutere reflected the larger Maori population in Motueka (see fig 32).<sup>19</sup>

The inclusion of occupied and cultivated areas in the tenths reserves created a dilemma for future administrators of the estate. If this land was kept as occupation reserves then there would be less land for the trust to lease to provide an endowment fund. This would disadvantage those Te Tau Ihu Maori who had taken part in the company transactions but did not have interests in Motueka. Conversely, using the occupied reserves as reserves to be leased would have had a serious impact on the Ngati Rarua, Te Atiawa, and Ngati Tama residents of Motueka because they would be physically dispossessed of their sites of actual residence and cultivation.<sup>20</sup>

Further, not all 'used' land in Motueka was reserved as tenths. Thus, the failure to separately reserve the occupation land also meant that the residents of Motueka lost out because some of their land was included in settler sections. The company's lottery system meant that some of the settlers selected their allotments before Thompson was able to secure all the occupation land in the Native Trust.<sup>21</sup> Historian for Te Atiawa, Mary Gillingham, sums up the impact of the inclusion of the occupied lands for Te Atiawa. She states that 'the Company not only failed to secure to Ngatiawa lands which they occupied, but also diminished the amount available for their present and future support'.<sup>22</sup>

This impact was not immediately apparent to the Te Atiawa, Ngati Rarua, and Ngati Tama communities in Motueka, largely because actual settlement was slow to take off. Clementine Fraser, in an overview report commissioned by the Tribunal, suggests that Motueka Maori probably thought that land not taken up by settlers was still theirs.<sup>23</sup> Ngati Rarua's historian, Tony Walzl, goes further, suggesting that Ngati Rarua, at this early stage of engagement with Pakeha modes of thinking, did not understand 'that the land was gone and there was a need for reserves'. He surmises that their understanding eventually evolved to a view that the reserves in Motueka were for their exclusive use.<sup>24</sup>

This was not so much a misunderstanding by Maori as a valid perception of the arrangements from their point of view, involving some miscommunication but also the fundamental point that there were two parties to the company's transaction. Just because the company had a particular understanding does not make it the 'right' or legal one. Further, the Crown did not consult properly with Te Tau Ihu Maori during the tenths-making process, with the

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19. Gillingham, 'Ngatiawa/Te Atiawa Lands', pp 58–60

This did not stop instances of settlers' sections encroaching on occupied land, and we have discussed the problems that arose out of the company's survey in the early 1840s with respect to sections at Te Maatu in chapter 4.

20. Phillipson, *Northern South Island: Part 1*, p 117

21. Fraser, 'Nelson Tenths', p 17

22. Gillingham, 'Ngatiawa/Te Atiawa Lands', p 62

23. Fraser, 'Nelson Tenths', p 18

24. Walzl, *Land Issues*, p 101

result that differences of understanding were not necessarily identified, let alone resolved. On the evidence available to us, it seems the Crown's establishment of the trust and the development of its plans for how the tenths reserves would be used were made without reference to Te Tau Ihu Maori. Consultation appears to have been limited to Thompson's discussions with Maori about where the occupation reserves should be located (which we do not have a record of).

With the township reserves selected, the trust borrowed money to implement Selwyn's proposal for hostels, a church, a school, and a hospital in the township. Some of the other town reserves had been rented to businesses by the end of 1842. However, only two hostels were built before the trust ran out of funds and the leases were either relinquished or unpaid as the township struggled to establish itself. There was no further construction or efforts to collect rent after Thompson's death at the Wairau in April 1843.<sup>25</sup>

The situation did not improve following Alexander McDonald's appointment to replace Thompson as the resident agent in Nelson in September 1843 and McDonald was not replaced when he resigned the position in January 1845. In February 1848, the superintendent of the southern division, Mathew Richmond, reported that administration of the reserves had been neglected since McDonald's resignation, with rents outstanding and the hostels in need of repair. The suburban reserves had also been neglected by the trust, and Motueka Maori had made their own informal leasing arrangements on some of the reserve land while continuing to cultivate other parts.<sup>26</sup> By this date, Maori were reported to be in occupation of some 1100 acres in Motueka 'of which they may have rather more than one third part under cultivation'.<sup>27</sup>

In the meantime, as the administration limped to a halt, Commissioner Spain attempted to resolve the problems surrounding the Motueka reserve land. In his award of 1844, he arranged the exchange of some of the settler sections for reserves and the reservation of 16 50-acre sections specifically for Maori occupation at Te Maatu. This solution was only partially successful. The 800-acre occupation reserve still did not incorporate all the remaining occupied and cultivated land in Motueka. Also, the quantity of land reserved was not increased; any additional occupation land was compensated by the relinquishment of a corresponding amount of land from the tenths.<sup>28</sup> Thus, the creation of this occupation reserve came at the expense of the tenths estate, reducing the extent of land available for the trust to lease to provide an endowment fund.

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25. Walzl, *Land Issues*, pp 78, 192–193; Fraser, 'Nelson Tenths', p 19

26. Hilary Mitchell and Maui John Mitchell, 'Wai-56 and Wai-102, Report 9D: Benefits to Owners and the South Island Benefit Fund', report commissioned by the Wakatu Incorporation, Ngati Koata no Rangitoto ki te Tonga Trust, Ngati Rarua Trust, Ngati Tama Manawhenua ki te Tau Ihu Trust, and Te Atiawa Manawhenua ki te Tau Ihu Trust, 1998 (doc A35), pp 9–10; Johnson, *Trust Administration*, p 16

27. JD Greenwood, January 1848 (Walzl, *Land Issues*, p 196)

28. Fraser, 'Nelson Tenths', pp 22–23. Spain awarded the following 16 sections as occupation reserves: sections 157, 159, 160, 161, 162, 163, 164, 182, 183, 187, 188, 212, 219, 220, 241, and 242: Jellicoe, 'Native Reserves', p 22.

Nonetheless, Spain's award attempted to restore the native reserves to one-tenth rather than one-eleventh of the New Zealand Company transaction. The Whanganui a Tara Tribunal quotes Lord Stanley's instruction to FitzRoy in 18 April 1844, which clearly states the requirement to reserve a tenth out of the New Zealand Company grant. Noting the company's instructions to its agent to reserve a tenth and the Crown's assumption of the responsibility for reserves under the November 1840 agreement, Stanley concluded that: 'It seems quite plain, therefore, that the Government is to reserve for this purpose one-tenth of the Company's lands.'<sup>29</sup>

As discussed in chapter 4, Spain awarded 151,000 acres to the New Zealand Company in Golden Bay and Tasman Bay. Spain ordered that one-tenth of this land should be reserved, and that land used for pa, cultivations, and wahi tapu should also be reserved on top of this 15,100 acres. This arrangement was confirmed, as far as the Crown was concerned, by the various deeds of release signed by Te Tau Ihu Maori, and Governor FitzRoy issued a Crown grant on this basis in 1845.

However, the New Zealand Company objected to the extent of reserves that they were required to provide and to the grant's provision that other European claims could also be settled out of the land awarded to it. The Company declined to take up the grant and Spain's award was thereafter disregarded by both the company and FitzRoy's successor, Grey, who completely ignored the responsibility earlier admitted by the Colonial Office. There was no attempt to ensure that Spain's undertaking of 15,100 acres would be fulfilled or to ensure that the company's intention to establish rural reserves was implemented. Grey's view was that the reserves need not be a true tenth of the company grant, providing that they were 'sufficient for the present and future' needs of Te Tau Ihu Maori.<sup>30</sup> In practice, this meant that the reserves were substantially less than the one-tenth that had been clearly promised, though Grey claimed that the Wairau reserve more than fulfilled this obligation.

This shortfall was apparent in the allocation of reserves in Golden Bay in 1847. As we discussed in chapter 7, the Crown allocated only 1087 acres as occupation reserves, substantially less than the 4500 acre 'tenth' recommended by Spain. In accordance with Grey's policy, the Crown official responsible for this allocation, Donald Sinclair, stated that the allocation was to be made 'without reference' to Spain's award. Instead, he was 'in addition to the present cultivations &c to choose so much additional land as I shall consider sufficient for the present and future wants of the Natives of the District.'<sup>31</sup>

Unlike the reserves at Motueka, the Golden Bay reserves were exclusively occupation reserves and they were not included in the tenths estate. We have discussed the fate of these reserves in chapter 7.

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29. Stanley to FitzRoy, 18 April 1844, BPP, vol 2, apps, p 77 (Waitangi Tribunal, *Whanganui a Tara*, p 307)

30. Gillingham, 'Ngatiawa/Te Atiawa Lands', pp 87–88

31. *Ibid*, pp 78, 86–88

In 1847, there was also a significant reduction in the number of reserves allocated to Maori in the Nelson township in response to a request from Nelson settlers. The poor uptake of sections by settlers in Nelson meant that a number of the better sections were unoccupied while some of the settlers were on land of poorer quality. The settlers proposed a reorganisation of the settlement, reducing the number of allotments from 1000 to 530. They also proposed a reduction in the tenths in proportion to this adjustment, from 100 to 53. There was no Trust administration at this date so the settlers took the proposal to Grey, who agreed to the reduction. Grey agreed that this would ensure the relative proportion of reserves was the same as had been originally intended.<sup>32</sup> There was no consultation with Te Tau Ihu Maori on this decision.<sup>33</sup>

The number of township sections reserved for Maori was thereby reduced from 100 to 53. In the event, this reduction was not extended to the suburban reserves (or to the rural reserves, which we consider below). Ms Gillingham characterises the surrender of the 47 township sections as a breach of ‘the founding philosophy of the tenths scheme’. Instead of treating the reserves as an inalienable trust, Ms Gillingham argues, the Crown agreed to the alienation of ‘a significant proportion of Maori entitlement in order to satisfy settler demands.’<sup>34</sup> As discussed below, we agree with this assessment. We note also that it involved treating the tenths as unallocated (and therefore unowned) land, since no sections actually owned by settlers were reduced.<sup>35</sup> Nor was a rationalisation of Nelson sections was incompatible with Maori retaining their full complement of reserves.

The exact extent and location of the ‘tenths’ reserves was finally established through the Crown grant to the New Zealand Company in 1848. As we noted in chapter 4, Grey’s grant to the company included the area incorporated by FitzRoy’s grant of 1845 and most of the land included in the recently completed Wairau purchase. The grant excepted certain Government reserves for public purposes ‘And also excepting and reserving all the pahs, burial places, and Native reserves’, the location of which were identified on attached plans.<sup>36</sup> Unlike FitzRoy’s grant, the grant did not provide for the protection of cultivations.

These plans identified reserves in Golden Bay, Nelson township, and Motueka–Moutere. The plan of the Motueka–Moutere reserves identified over 100 sections and did not differentiate between occupation reserves, reserves intended for lease, and reserves for pa and wahi tapu.<sup>37</sup>

None of the plans specified the acreages involved in the reserves. Presumably though, the reserves identified on the plan included the remaining 53 one-acre town sections, the reserves in Moutere and Motueka, and the 1087 acres reserved in Golden Bay. We presume

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32. Gillingham, ‘Ngatiawa/Te Atiawa Lands’, pp 146–149

33. Phillipson, *Northern South Island: Part 1*, p 125

34. Gillingham, ‘Ngatiawa/Te Atiawa Lands’, pp 147–148

35. Phillipson, *Northern South Island: Part 1*, p 124

36. ‘Copy of Deed of Grant to the New Zealand Company’, 1 August 1848, *Compendium*, vol 2, pp 374–375

37. C0700, case 29/2, case 22/8, case 30/3, case 11/2, Public Records Office, UK, Micro 26356, ArchivesNZ

that the reserves at Motueka and Moutere were the 100 50-acres sections that had been selected by Thompson in 1842 and included the 800 acres of 'occupation reserves' in Motueka as designated by Spain. This would suggest that, excepting pa and wahi tapu reserves, some 6140 acres were reserved for Maori. This figure was significantly less than one-tenth of the area granted to the New Zealand Company in 1845 (151,000 acres) and minuscule compared to that granted in 1848 (somewhere between four and five million acres).<sup>38</sup> This differential is even more marked if we exclude the occupation reserves at Golden Bay (1087 acres) from this category of reserve. On this basis, only 5053 acres were reserved as tenths, 800 acres of which were intended for occupation at Motueka–Moutere.

This accords with Alexander Mackay's statement in 1871 that the tenths estate had been comprised of 5053 acres. Mackay added that, following Spain's award, some pa and cultivation sites had also been reserved for Maori. Cultivation reserves were limited to 'those tracts of country which were in use by the Natives for vegetable productions, or which have so used . . . since the establishment of the Colony' and 'were chiefly situated in Massacre Bay'.<sup>39</sup> The plans accompanying the 1848 Crown grant indicate that some pa and cultivation sites in Motueka and Moutere had been surveyed as reserves on top of the 100 suburban reserves which became part of the tenths estate. Unfortunately, the plan is difficult to read so it is not possible to assess the total of reserves (or acreage encompassed). However, it appears to include over 120 reserves in Motueka and Moutere.<sup>40</sup>

At 5053 acres, the tenths estate was substantially lower than one-tenth of the total area encompassed in the 1848 Crown grant. It was also significantly less than one-tenth of either Spain's award (151,000 acres) or the land that the Nelson scheme eventually incorporated (approximately 172,000 acres, according to Dr Gould). As we noted in chapter 5, the 1848 grant included a much greater area of land than the company actually required for the settlement. The 'completed' Nelson scheme ended up being 'in the vicinity of 172,000 acres'. Dr Gould suggests this as one possible figure from which the one-tenth entitlement could be calculated.<sup>41</sup>

The 800 acres of 'occupation reserves' at Motueka and Moutere allocated by Spain were included in the reserves excepted from the grant to the company, but they were not separately granted to Motueka Maori and were instead part of the tenths. They were, in effect, occupied tenths. This contrasted with Spain's undertaking, confirmed in the deeds of release, that pa, wahi tapu, and *cultivations* would be reserved for Maori over and above the tenths. There appear to have been 'extra' pa and cultivation sites surveyed as reserves and included

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38. Wakatu Incorporation, 'Wai 56 Maps', map book, not dated (doc 018), p 2

39. Alexander Mackay, 'Memorandum on the Origination and Management of Native Reserves in the Southern Island', 15 May 1871, *Compendium*, vol 2, pp 263–267

40. C0700, case 30/3, Public Records Office, UK, Micro z6356, ArchivesNZ (Wellington)

41. Gould outlines several bases on which the entitlement could be calculated, two of which are Spain's award of 151,000 acres and the approximately 172,000 acres finally included in the company's settlement: Gould, 'New Zealand Company', pp 101, 136–139.

Date	Trustees	Resident agents
1841–July 1842	E Halswell	
July 1842 – c 1845	Chief Justice William Martin (till 1842), Bishop Selwyn, George Clarke snr	HA Thompson (March 1842–April 1843) Alexander McDonald (September 1843– June 1845)
c 1845–48	No appointed trustee/resident agent = Governor	
1848–July 1853	Board of management: Poynter, Carkeek, Tinline	
July 1853–56	No appointed trustee = Governor	Mathew Richmond

Table 3: Administration of the Nelson and Motueka reserves, 1840–56

in the plans accompanying the 1848 Crown grant. However, any such reserves at Motueka and Moutere do not appear to have survived beyond the Crown's Waipounamu purchase.

Furthermore, the rural reserves, an integral part of the New Zealand Company's original intention for the settlement, were never established. Allocation of rural sections could not proceed until there was enough land for the company scheme, by which stage it was decided that the reserves allocated to Maori in the 1847 Wairau purchase were a sufficient substitute for the rural tenths. In March 1847, Major Richmond informed the company that the Government had made ample reserves in the Wairau district (where the company was due to allot its rural sections). As a result, the Government 'do not think it is necessary to request the New Zealand Company to make any further Reserves in either district [the other district being Porirua]'.<sup>42</sup> William Fox interpreted this to mean that the Government had released the company from any requirement at all to make Nelson rural reserves, even if it ended up allocating land as rural sections in Golden Bay.<sup>43</sup> As Dr Gould reports, a committee of Nelson landowners noted further in July 1847: 'With respect to the rural sections, it is understood that the Governor, in making the large reserves he has for the natives at Wairau, has released the Company from laying out and choosing the 100 rural sections according to the original scheme'.<sup>44</sup>

This accords with Richmond's letter to Colonel Wakefield, and was widely publicised without contradiction by the Government. We need not doubt, therefore, that this decision originated with Governor Grey and that it resulted in the company's failure to make the promised rural tenths. Certainly, the Government did not step in and insist on the setting aside of rural tenths, which it could have done had its intentions been misunderstood by the company and its settlers.

42. Major Richmond to W Wakefield, 5 April 1847 (Phillipson, *Northern South Island: Part 1*, p 121)

43. Phillipson, *Northern South Island: Part 1*, p 121

44. Report of committee, 30 July 1847 (Gould, 'New Zealand Company', p 133)

Date	Endowment reserves		Occupation reserves	Total (acres)
	Township	Suburban tenths		
1842	100	5000	—	5100
1847	53	4200	800	5053
1849	53	3900	1100	5053
1856	53	3471	611	4135
1865	53	2871	1211	4135
1873	50-2-36	2806 (2946)	1294 (1217)	4150 (4212)
1883	49-2-36	788	1294	4131

Table 4: Nelson and Motueka reserves, 1842–83

Source: Hilary Mitchell and Maui John Mitchell, 'Nelson Native Reserves: A Summary of Deficits, Thefts and Land Losses, 1841–1977', revised ed, report commissioned by the Wakatu Incorporation, 1999 (doc A67), pp 12, 24, 28, 30; Alex Mackay, 'Native Reserves, Middle Island', 30 July 1873, AJHR, 1873, G-2A, p 1; the Native Reserves Act 1873; Alex Mackay, 'Report on State and Condition of Native Reserves in the Colony', 18 May 1883, AJHR, 1883, G-7, pp 3, 6

Dr Phillipson emphasises that the Wairau reserves were intended as an equivalent for the tenths reserves and not as part of them.<sup>45</sup> And of course, as we have seen in chapter 6, the bulk of the Wairau reserves were soon lost to Ngati Toa, Ngati Rarua, and Rangitane through their incorporation in the Waipounamu transaction. In 1877, Mackay advised the Government that the failure to set aside rural tenths represented lost income of at least £1500 per annum, and that the Crown should have set the land aside in 1853 when it purchased the Wairau reserve.<sup>46</sup>

Crown policy on Nelson reserves had shifted under Governor Grey. Grey was not concerned with ensuring that Maori reserves equated to one-tenth of the Nelson settlement and instead advocated a rather less specific 'sufficiency' for present and future needs. In effect, this meant substantially fewer reserves than 'one-tenth', as revealed by the allocation of occupation reserves at Golden Bay.<sup>47</sup>

45. Phillipson, *Northern South Island: Part 1*, pp 119–121

46. Ibid, p 122; A Mackay, 'Report on Nelson and Greymouth Native Reserves', 6 August 1877, AJHR, 1877, G-3A, p 1

47. Gillingham, 'Ngatiawa/Te Atiawa Lands', pp 86–87

In summary, the reserves scheme had undergone substantial modifications in the nine years since the signing of the company deeds at Kapiti and Queen Charlotte Sound. The tenths estate was substantially smaller than was originally envisaged, with fewer township and suburban reserves and no rural reserves. The notion of occupation reserves scattered through the settlement had been largely, but not entirely, subsumed by the notion of leasing the reserves to settlers. The trust had arranged few leases by 1848, however, and had only partly implemented plans for establishing facilities for Te Tau Ihu Maori.

Te Tau Ihu Maori had no involvement in the conception of the original scheme and were not consulted about the modifications that followed, except for agreeing to the deeds of release. Spain made some adjustment to the reserves following protests about the inclusion in settler sections of land used for cultivations at Te Maatu, but this adjustment was only a partial solution. Nor did it address the underlying problem: the New Zealand Company's inclusion of occupation lands in its survey of Nelson sections.

Nor were Maori consulted about the changes in the estate between 1845 and 1848. There was no redress for the reductions in the tenths estate over this period, through the reorganisation of township reserves, the non-implementation of this part of Spain's award, and Governor Grey's decision that rural tenths need not be made. Spain's award was implemented in respect to the New Zealand Company, which was granted an extensive tract of land, but provisions for reserves for Maori of one-tenth of the land plus other reserves were not implemented. The deeds of release signed by Maori and the Government had stipulated the Spain formula of one-tenth reserves as well as reserves for wahi tapu, cultivations, and pa. These stipulations were not included in the 1848 Crown grant, which conveyed millions of acres to the New Zealand Company, very little of which was reserved for Te Tau Ihu Maori. Furthermore, as would later become apparent, Maori control over the land that had been reserved on their behalf was severely circumscribed.

### **(2) Administration of the tenths estate, 1848–56**

There were further significant reductions in the tenths estate during Grey's tenure as Governor. In 1848–49, 300 acres of tenths reserves at Motueka were transferred into occupation reserves. Motueka occupation reserves now totalled 1100 acres, leaving 3953 acres as endowment reserves. Both categories of reserve were reduced in 1853 through Grey's grant to the Anglican Church for a school at Whakarewa, 918 acres of which came from the tenths estate.<sup>48</sup> We agree with Dr and Mrs Mitchell's assessment that 489 acres was derived from

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48. Walzl, *Land Issues*, pp 201–203, 245. The further occupation sections were sections 181, 184, 210, 211, 218, and 243; Gillingham, 'Ngatiawa/Te Atiawa Lands', p 96.

the occupation reserves and 429 acres from the endowment reserves.<sup>49</sup> This left 611 acres in the occupation reserve land and 3524 acres as endowment reserves.

Administration of the tenths was rejuvenated with the establishment in 1848 of a board of management, comprised of local settlers Poynter, Carkeek, and Tinline.<sup>50</sup> By this date, the trust had earned £82 but owed almost £500.<sup>51</sup> The board spent its first few years arranging new leases and organising the transfer of sections to the occupation reserves.<sup>52</sup>

Motueka Maori were under the impression that all the reserves in Motueka were their own property; an impression that had been encouraged by the lack of administration by the trust and their receipt of plans of the native reserves.<sup>53</sup> It is likely that Maori received a copy of Tuckett's survey of Motueka, which showed 100 sections of reserves as being 'for the Natives of Motueka'.<sup>54</sup> As noted above, Maori at Motueka were using the land during the 1840s, cultivating some parts and leasing others directly to settlers.

The trust's administrators took a pragmatic approach to the occupation of tenths sections and agreed that six more sections would be added to the occupation reserves at Motueka on the condition that they were exclusively for occupation and not lease. The exchange was confirmed in August 1849.<sup>55</sup>

Mr Walzl suggests that it was at this point that Ngati Rarua gained an understanding of the nature of the trust. He believes that discussions with the board during 1849 clarified the nature of the trust for Ngati Rarua, an understanding that was embodied in correspondence from Tamihana Ngapiko and other Motueka Maori in December 1853:

The lands that were given up by Te Tana and Ngapiko to the Government (Trustee of Native Reserves) at Nelson to be let from year to year . . . [in exchange for which] the proceeds were to go for the school, for the doctor and for other general purposes.

Mr Walzl argues that Ngati Rarua did not object to the authority that the exclusively Pakeha board had over reserves because they hoped that the board would be good at

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49. Hilary Mitchell and Maui John Mitchell, 'Nelson Native Reserves: A Summary of Deficits, Thefts and Land Losses, 1841–1977', revised ed, report commissioned by the Wakatu Incorporation, 1999 (doc A67), p 9. This is based on Alexander Mackay's record of the sections affected by the grant in 1870, which specifies the number of acres appropriated from each section. At 1853, the sections designated as occupation reserves were sections 157, 159, 160, 161, 162, 163, 164, 181, 182, 183, 184, 187, 188, 210, 211, 212, 218, 219, 220, 241, 242, and 243. According to Mackay, 189 acres were taken from sections 157, 159, 160, 161, 162, 163, 164, and 181 and 300 acres from sections 218, 219, 220, 241, 242, and 243: Alexander Mackay, evidence to Religious, Charitable, and Educational Trusts Commission, January 1870, *Compendium*, vol 2, p 303.

50. Fraser, 'Nelson Tenths', pp 24–26

51. Mitchell and Mitchell, 'Report No 9D', pp 13, 15

52. Walzl, *Land Issues*, pp 200–201

53. Fraser, 'Nelson Tenths', p 95

54. Walzl, *Land Issues*, p 75

55. Gillingham, 'Ngatiawa/Te Atiawa Lands', pp 95–96

managing the estate on their behalf. He suggests that Ngati Rarua agreed that the board would take over management of the leases and relieve them of the increasingly difficult task of managing European lessees.<sup>56</sup>

If there was such an acceptance, it was not unconditional, particularly with respect to the occupation land at Motueka. In March 1854, Ngapiko and Simeon Te Wehi sought clarification of the status of the land, stating that 'Not one of us understands any thing about the land on which we reside here. We wish to know to whom the power over these lands belongs; whether to us or to the Government'. Richmond, who was by this date solely responsible for administering the trust, stated that the underlying problem was a shortage of land available to Maori at Motueka. Forwarding the correspondence to the Colonial Secretary, Richmond explained that, with the increase in cattle ownership, the occupation reserves were now 'much too limited for their wants'.<sup>57</sup> Although this response recognised the difficulties faced by Motueka Maori, it did not address the broader question of control raised by Ngapiko and Te Wehi.

Grey had appointed Richmond as local agent in Nelson following the disbanding of the board in mid-1853. In December 1854, Richmond recommended the establishment of a new Board, suggesting that 'two of the most influential and intelligent Chiefs' could be appointed to this six-member Board to represent Maori interests. Richmond stated:

There are many reasons which suggest themselves for the appointment of the two . . . but what chiefly weighs with me is that it will make them the medium by which natives will become conversant with the affairs of the Trust. They will see how the funds are expended, will have a voice in that expenditure and will probably be able occasionally to point out the mode of outlay most conducive to the objects of the Trust as well as most satisfactory to the Natives.<sup>58</sup>

Neither Richmond's recommendations for leasing more land to Motueka Maori nor his recommendations for Maori representation in the trust's administration were implemented.

Richmond's report of December 1854 indicated that the trust was now receiving rent of £283 per annum and that this figure was expected to increase. The funds to date had been spent on the provision of housing improvements, farm implements, educational and medical expenses, and an interpreter's salary. Richmond argued that neither the medical nor the interpretation expenses should come out of the trust's fund. He also noted pressure from European lessees who wished to purchase the trust lands; pressure that Richmond thought should be resisted. Richmond repeated his suggestion that Maori needed more land to meet

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56. Walzl, *Land Issues*, pp 225–227

57. Fraser, 'Nelson Tenths', p 37

58. Richmond to Colonial Secretary, 7 December 1854, 1A 1/54/1149, pp 2486–2488 (Fraser, 'Nelson Tenths', p 39)

'their lately acquired habits of industry the quantity of stock in their possession and which is rapidly increasing'.<sup>59</sup>

The extent of land available for Motueka Maori to farm was in fact reduced rather than increased during this time through Grey's grant to the Anglican Church for the school at Whakarewa.<sup>60</sup> As noted above, the 1853 grant left only 611 acres as occupation reserves, which was clearly inadequate for the increasing farming activities of the Maori communities at Motueka. This shortfall became apparent in the later 1850s when the church asked Maori to leave the Whakarewa land.<sup>61</sup>

### (3) *The Whakarewa School grant*

In July and August 1853, Governor Grey granted 1078 acres at Whakarewa to the bishop of New Zealand, in trust for an industrial school for the religious, industrial, and English language training of New Zealand children 'of all races, and of children of other poor and destitute persons, being inhabitants of island[s] in the Pacific Ocean' (see fig 33).<sup>62</sup> Only 160 acres of this total was Crown land, the remaining 918 acres came out of the tenths estate held by the Crown in trust: the endowment and occupation reserves at Motueka.<sup>63</sup>

During the late 1840s and early 1850s, Grey was active in establishing schools for Maori children as a means of advancing Maori 'civilisation'. The 1847 Education Ordinance provided for Government assistance to schools run by Anglican, Catholic, and Wesleyan churches for children of both races, as well as for children from the Pacific Islands. In practice, attendance at these schools was generally exclusively Maori.<sup>64</sup> In 1849, the Colonial Office permitted Grey to provide gratuitous grants to religious groups for educational purposes.<sup>65</sup> Such Crown grants could, and did, involve either Crown or Maori land.

The idea of a school at Whakarewa originated with Maori participation in a school established by settlers in Motueka in the first half of 1851. Given this early success, a local clergyman, the Reverend T L Tudor, suggested that a block of 400 acres of the Native Reserves could be set apart for an industrial farm to be associated with the school. Richmond sent a report to central government officials endorsing the suggestion, which gained Grey's support in 1852.<sup>66</sup>

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59. Ibid, pp 2495–2497 (p 40)

60. Gillingham, 'Ngatiawa/Te Atiawa Lands', p148

61. Walzl, *Land Issues*, p 246

62. Counsel for Te Atiawa, closing submissions, 10 February 2004 (doc T10), p 149

63. This involved the whole or part of 24 sections (sections 6, 22, 137, 138, 145, 146, 147, 157, 159, 160, 161, 162, 163, 164, 181, 218, 219, 220, 221, 223, 240, 241, 242, and 243): Gillingham, 'Ngatiawa/Te Atiawa Lands', p 148.

64. Fraser, 'Nelson Tenths', p 30

65. Gillingham, 'Ngatiawa/Te Atiawa Lands', p 148

66. Walzl, *Land Issues*, pp 240, 283

9.3.1(3)

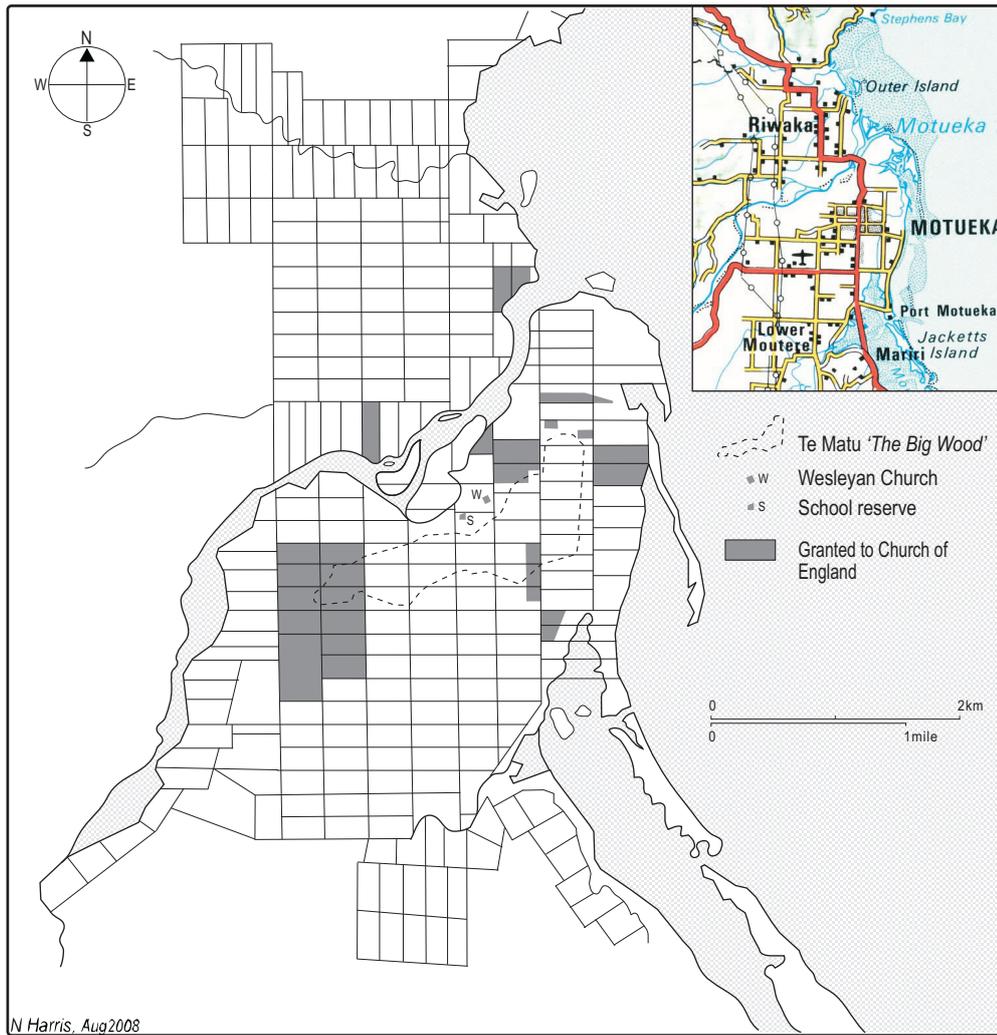


Figure 33: Whakarewa grants

Source: NM grant plans

Mr Walzl states that Bishop Selwyn met Maori in Motueka to discuss the proposed school and this appears to have been followed by a visit from Grey in early July 1853.<sup>67</sup> Land for the school was selected on the basis of its potential to derive an income. Surveyor Thomas Brunner was asked to select tenths reserves that would yield a rent of £100 per annum. He selected nearly all the lands that were currently being let by the Native Trust in Motueka and a piece of Crown land at the back of the Whakarewa land.<sup>68</sup>

Both Ms Gillingham and Ms Fraser were critical of the fact that the grant was largely comprised of tenths estate land rather than 'waste land' of the Crown. They suggested that this was a departure from Grey's proposal for such grants to churches, approved by the

67. Walzl, *Land Issues*, pp 244, 283

68. Ibid, p 284; Gillingham, 'Ngatiawa/Te Atiawa Lands', pp 152–153

Colonial Office in 1849. However, Dr Gould pointed out that Grey's proposal had indicated that grants might involve either Crown or Maori land and the Colonial Office had not objected to this.<sup>69</sup>

Dr Gould suggests that Grey would have viewed the school grant as a valid use of the tenths estate by the Crown on behalf of its beneficiaries. The vesting of the tenths reserve lands in the church, for the purposes of a school, was clearly intended for Maori purposes and appeared to be 'a legitimate use of the tenths trusts lands.'<sup>70</sup>

However, the area defined as 'occupation' sections required, in Dr Gould's view, greater and careful consideration, with the nub of the problem being the ownership of these reserve lands and the degree of independent action available to Maori who occupied them. Although the occupation reserves were also theoretically land in which Maori only held a beneficial interest, Grey appears to have perceived a distinction between the vesting of the endowment reserves and that of the occupation reserves, with the latter requiring local Maori input.<sup>71</sup> Mr Walzl's evidence is in accord with this view, concluding that Grey only sought Ngati Rarua consent in relation to the occupation reserves. Mr Walzl concludes that Ngati Rarua might not have been consulted about the first grant in July 1853, which he believes consists largely of endowment reserves and Crown land but that they would have been consulted about the second grant. He contends that Grey specifically sought their permission to include occupation land in the August 1853 grant.<sup>72</sup>

Dr Gould commented that there appeared to be some agreement on the vesting of land in the church for a school from at least three leading Ngati Rarua chiefs. However, he concluded that the Crown appears to have failed to ensure that the local people fully understood the implications of what had been agreed.<sup>73</sup> Claimant witnesses reached different conclusions about the extent to which Motueka Maori were consulted about this grant. Hilary and John Mitchell claimed that there was no 'proper consultation' with Motueka Maori and that had they been properly consulted, Motueka Maori would not have consented to the grant.<sup>74</sup> Mr Walzl suggested that Ngati Rarua were consulted whereas Ms Gillingham states that it is unclear how Te Atiawa understood the circumstances of the grant.<sup>75</sup>

Ms Fraser states that there is evidence of some consultation with Motueka Maori, although she emphasises that the sequence of events is 'not well documented'. She points to

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69. Gillingham 'Ngatiawa/Te Atiawa Lands', p 149; Fraser, 'Nelson Tenths', p 30; Gould, 'New Zealand Company', p 123

70. Gould, 'New Zealand Company', pp 122–123

71. Ibid, p 123

72. Walzl, *Land Issues*, pp 245, 284–285

73. Gould, 'New Zealand Company', pp 122–126. Gould brought it back to the failure on Wakefield's part to fulfil the assurance he gave to chiefs of the area in 1841 that Te Maatu would be reserved, rather than placed as it was into the company's settlement survey.

74. Hilary Mitchell and Maui John Mitchell, statement of response to Crown submissions, not dated (doc H6), p 40

75. Walzl, *Land Issues*, pp 244–245, 283–285; Gillingham, 'Ngatiawa/Te Atiawa Lands', pp 149–150

an 1863 memorandum from James Mackay junior which stated that ‘it appears on investigation that Ngapiko and Te Iti consented to the conveyance of these lands to the Bishop of New Zealand.’<sup>76</sup> Similarly, in 1869, JD Greenwood stated that ‘Te Iti, Metene, Nga-Piko, and others, had land there [at Whakarewa]. They all agreed to give up this land to the Bishop, as I understand.’<sup>77</sup> This indicates that Ngati Rarua, at least, were believed to have been consulted about the grant.

According to Ngati Rarua evidence before a 1905 commission of inquiry into Whakarewa, Bishop Selwyn visited Motueka to ask for land for the school. The Ngati Rarua witnesses to the commission stated that Selwyn had initially spoken with Te Atiawa, who told him to go to Ngati Rarua, as they were the landholders of the area. Ngati Rarua agreed to Selwyn’s proposal for the school and land for the children to cultivate to support the school. Ngati Rarua witnesses stated that they only agreed on the condition that the land would be returned to them when it was no longer required for this purpose. They also stated that they had asked for the school to be exclusively for Ngati Rarua.<sup>78</sup>

In his evidence to the 1905 inquiry, Te Atiawa’s Hohaia Rangaiuru stated that Grey had ‘asked the Maoris to give a piece of land to be reserved for a school for the children, and the Maoris had agreed to that. The tribes present when Sir George Grey made the request were Ngatirarua and Ngatiawa.’<sup>79</sup>

In our inquiry, Mrs Georgeson of Te Atiawa recalled that her mother had told her that Rangiauru had agreed to gift a piece of land at Te Maatu to the Crown to educate the Maori children in the area in the 1840s. However, the amount of land the Crown took was much greater than that originally agreed to be gifted, including land owned by the Rangiauru whanau, without any consultation or discussion with the whanau. Mrs Georgeson claimed that, when the family became aware of the actual amount taken, they protested, which included refusing to allow their children to attend the school and making formal petitions to Parliament.<sup>80</sup> Kuini Katene, who gave evidence for the Georgeson whanau, highlighted the impact of the loss of land. Mrs Katene stated that following the grant, Rangiauru’s whanau had insufficient land with which to forge a living. Some left the area; others had to lease land in order to grow produce to sell in Wellington.<sup>81</sup>

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76. Fraser, ‘Nelson Tenths’, p 30; James Mackay jnr, 21 February 1863, *Compendium*, vol 2, p 308

77. JD Greenwood, evidence to Religious, Charitable, and Educational Trusts Commission, 13 December 1869, *Compendium*, vol 2, p 292

78. Walzl, *Land Issues*, pp 241–242, 283–284

79. AJHR, 1905, G-5, p 110

80. Gloria Georgeson, brief of evidence on behalf of the Rangiauru whanau, not dated (doc R1), pp 6–8. The piece of land was the Hau block located on section 241 at Te Maatu, one of the 24 sections involved in the Whakarewa grant. Mrs Georgeson submitted a separate claim with respect to Whakarewa, which we consider in chapter 12.

81. Kuini Katene, brief of evidence on behalf of the Georgeson whanau, 8 August 2003 (doc R2), p 2

The first sign of Maori opposition to the grant appears to have been a letter of complaint to the Nelson Provincial Council in December 1853.<sup>82</sup> Further opposition from Motueka Maori arose after the church required them to leave the land. The church's intention was to lease the surplus land granted to it in order to provide a fund for the school. Initially, Maori were allowed to continue occupying the land and church officials utilised their presence to assist with breaking in the land. Once this was complete, the church asked Maori to leave to make way for European lessees.<sup>83</sup> The Ngati Tama residents of Motueka were amongst those who had to leave Whakarewa.<sup>84</sup>

Mr Walzl argues that it was from this point that Ngati Rarua expressed opposition to the grant. He states that this would have been before 1857, at which date Ngati Rarua sought payment for the land and withdrew their children from the school. The pupils were withdrawn because Ngati Rarua were concerned that receiving any benefit from the land might indicate an acknowledgement that they agreed with the grant.<sup>85</sup>

The withdrawal of students and a lack of funding resulted in the school closure in 1857. The school reopened from 1860 to 1864 and had a final period of operation from 1868 until 1881.<sup>86</sup> Motueka Maori continued to protest the Whakarewa grant and called for the return of the land following the closure of the school in 1881.<sup>87</sup> We pick up the story of ongoing attempts to secure the return of Whakarewa in chapter 12.

In summary, evidence surrounding the 1853 Whakarewa grant and Maori reaction to it is fragmentary. However, on balance, the evidence indicates that Grey did consult with Motueka Maori and that Ngati Rarua, at least, agreed to the grant of land for the school. However, the nature and extent of this consultation is not clear and the December 1853 correspondence to the Provincial Council indicates that at least some local Maori immediately objected to the grant. We have not seen this letter so cannot make any further conclusions on its significance.

Opposition became more widespread during the later 1850s, apparently coinciding with the church's requirement that Maori leave Whakarewa. A plausible explanation for this is that Motueka Maori had not previously been aware that the grant meant they would lose the right to occupy the land at Whakarewa. This, in turn, indicates that the consultation that had preceded the Crown grant had not been adequate.

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82. Hilary Mitchell and Maui John Mitchell, 'Wai-56 and Wai-102, Report 9E: Motueka Occupation Reserves', report commissioned by the Wakatu Incorporation, Ngati Koata no Rangitoto ki te Tonga Trust, Ngati Rarua Trust, Ngati Tama Manawhenua ki te Tau Ihu Trust, and Te Atiawa Manawhenua ki te Tau Ihu Trust, 1998 (doc A38), p 33. Provincial Council minutes refer to the receipt of a letter but do not identify the authors of the correspondence.

83. Walzl, *Land Issues*, pp 246–247, 285

84. Alexander Mackay, 'Memorandum on Native Reserves', 3 January 1870, *Compendium*, vol 2, p 302

85. Walzl, *Land Issues*, pp 246–247, 285

86. Tony Walzl, *Ngati Rarua Land and Socio-Economic Issues, 1860–1960* (Wellington: Ngati Rarua Iwi Trust, 2000) (doc A50(2)), p 114

87. *Ibid*, pp 113, 143–144, 150, 183, 197; Gillingham, 'Ngatiawa/Te Atiawa Lands', pp 153–157

**(4) Trust administration, 1856–82**

The Whakarewa grant had significantly reduced the extent of native reserves at Motueka. Management of the remaining trust lands became increasingly formalised from the mid-1850s. The Native Reserves Act 1856 gave belated legislative provision for the administration of the tenths at Nelson and Motueka and other reserves vested in the Crown. Under the Act, the Governor was empowered to appoint commissioners of native reserves to administer the vested land for the benefit 'of the said aboriginal inhabitants over which lands the Native title shall have been extinguished'. The commissioners were empowered to arrange sales and leases of up to 21 years. Thomas Brunner, Alfred Domett, and John Poynter were appointed the commissioners of native reserves in the Nelson district.<sup>88</sup>

As discussed in chapter 7, a number of other occupation reserves were also vested in the Crown under the Native Reserves Act 1856 and its amendments. This chapter, and the contemporary reports from commissioners, focus on the administration of the tenths estate but it should be borne in mind that the commissioners were also responsible for some thousands of acres of occupation reserves outside the tenths estate.

Over the 1856–82 period, rental income from the tenths increased and the income went towards the payment of medical and education expenses, small grants for clothes, rations, and farming implements and repairs to the hostels.<sup>89</sup> The hostels were in a dilapidated state by the late 1850s, and the trustees considered moving them to a new site before deciding to refurbish them.<sup>90</sup> The trust funded the construction of a hospital building for Maori next to Nelson Hospital in 1860. Trust funds were also spent on constructing a road in Motueka in 1859 and subsidising an interpreter's salary.<sup>91</sup>

Motueka Maori continued to seek authority over the occupied tenths, a position with which the Assistant Native Secretary, James Mackay junior, had some sympathy. As he noted in September 1861:

All the Native Reserves at Motueka and Riwaka were New Zealand Companys Reserves, and from all I can learn no lands were specifically set aside for the occupation and requirements of the resident Natives. The Commissioners of Native Reserves have allowed the Natives to occupy the most of the lands they were cultivating at the time of alienation to the New Zealand Company.<sup>92</sup>

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88. Johnson, *Trust Administration*, pp 25–26, 29

89. Fraser, 'Nelson Tenths', pp 45–47

90. Mitchell and Mitchell, 'Report No 9D', p 48

91. Hilary Mitchell and Maui John Mitchell, 'Wai-56 and Wai-102, Report 9c: Extinctions of Native Reserve Land Titles of the Nelson and Motueka Tenths and Occupation Reserves'. Report commissioned by the Wakatu Incorporation, Ngati Koata no Rangitoto ki te Tonga Trust, Ngati Rarua Trust, Ngati Tama Manawhenua ki te Tau Ihu Trust, and Te Atiawa Manawhenua ki te Tau Ihu Trust, 1997 (doc A31), p 16; Fraser, 'Nelson Tenths', p 47

92. James Mackay, 14 September 1861 (Hilary Mitchell and Maui John Mitchell, comps, supporting documents to 'Motueka Occupation Reserves', various dates (doc A38(a)), p 76)

In correspondence earlier in 1861, Mackay commented that it was 'a common saying with the Natives, that the Reserves are neither their property nor that of the Government'. He added that 'although the Reserves are nominally theirs they cannot exercise the right of property over them'.

The commissioners were similarly supportive of Motueka Maori desire to control the occupation land, suggesting that it could be granted to them to enable them to arrange their own leases. This suggestion was not implemented. The commissioners also responded to a request from Motueka Maori to arrange a subdivision of the occupation lands, a request that accorded with the Crown's developing policy of individualisation of title. The land was surveyed and mapped but the division was not carried out.<sup>93</sup>

James Mackay junior was very critical of the confusion surrounding the reserves, which had arisen 'owing to the manner in which the Reserves were originally made'. He described the New Zealand Company's failure to separate tenths from occupation reserves as a 'gross mistake'.<sup>94</sup> Inquiring into the 'considerable dissatisfaction' expressed by Motueka Maori about the Whakarewa grant in February 1863, Mackay added that the commissioners' proposed division had complicated matters. He recommended that 'a number of sections sufficient for the use of the resident Natives should be set aside and properly divided as soon as possible'.<sup>95</sup> Mackay recommended transferring 12 of the tenths reserves to occupation lands: four to Ngati Tama, four to Te Atiawa and Ngati Rarua, and four to Te Atiawa's Teira 'and his people' at Marahau (Sandy Bay). The Native Minister approved this recommendation and asked him to forward the proposal to the commissioners of native reserves.<sup>96</sup>

The commissioners' role was disestablished shortly afterwards, with full authority for the reserves restored to Governor Grey under the Native Reserves Amendment Act 1862.<sup>97</sup> James Mackay junior assumed responsibility for the Nelson and Motueka reserves in November 1863 and his cousin Alexander Mackay took over shortly afterwards.<sup>98</sup> Alexander Mackay completed the arrangements initiated by James for the addition of occupation reserves and the re-survey of partitions of the occupied land. In 1865, the occupation reserves (which we calculate now totalled 1211 acres) were divided into 95 whanau divisions.<sup>99</sup>

Alexander Mackay described the position of the occupied tenths at Motueka in his general report on reserves in December 1865. He stated:

There are also about 100 Natives residing on the Estate, who have been allowed to occupy some of the finest land; they have been in possession ever since Nelson became a settlement,

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93. Gillingham, 'Ngatiawa/Te Atiawa Lands', pp 100–105

94. James Mackay jnr, August 1862, December 1862 (Walzl, 'Ngati Rarua Land', pp 19–20)

95. James Mackay jnr, memorandum, 21 February 1863, *Compendium*, vol 2, p 308

96. James Mackay jnr, memorandum, not dated, *Compendium*, vol 2, pp 310

97. Johnson, *Trust Administration*, p 39

98. *Ibid*, p 46; Hilary Mitchell and Maui John Mitchell, 'Administration of the Nelson Native Reserves', brief of evidence on behalf of Wai 56 claimants, not dated (doc 06), pp 5–6

99. Gillingham, 'Ngatiawa/Te Atiawa Lands', pp 106–107

Date	Trustees	Resident agents
1856–62	Commissioners of native reserves: Brunner, Domett, Poynter	
1863–70	No appointed trustee = Governor	James Mackay jnr (November 1863–64?) Alexander Mackay (1864?–70)
1870–82	Commissioner of native reserves, Charles Heaphy	Alexander Mackay
1882–1920	Public Trustee	Alexander Mackay (–1884) J Catley (1884–96) A Scaife (1896–?) Mr Allen (1913–19)
1920–77	Native or Maori Trustee	Various local agents

Table 5: Trust administration, 1856–1977

no other land having been appropriated for their use, consequently they have been allowed to remain in possession by the Commissioners, and on the death or removal of any of the occupants to other localities, the land will revert to the Trust and become available to let on lease.<sup>100</sup>

As is evident from this description, these occupation reserves were not Crown granted to Maori, which meant that Mackay retained authority over them on behalf of the Crown. Mackay's intention was that this land would gradually be absorbed into the general Trust estate as occupation diminished.

In the meantime, the status of the occupied tenths land remained confused, and this was evident in the mix of leasing arrangements involving these reserves. Some leases were arranged directly by Motueka Maori and others were supervised by the commissioner.<sup>101</sup> In 1869, Mackay explained that he had permitted the direct lease of 140 acres on the basis that Maori would otherwise have 'done it illegally and surreptitiously'. Noting that 'they have been recognised as the legal occupants of the land, which they would construe as legal owners of the land', he added that 'I would say the rents were as necessary for their maintenance as the land itself was appropriated'.<sup>102</sup>

By 1870, the tenths estate was deriving annual rents of £370 from the Motueka sections and £600 for the township lots. Mackay reported that the trust had earned a total of £10,876 since 1857, of which £9674 had been spent.<sup>103</sup>

100. A Mackay to Native Minister, 6 December 1865, *Compendium*, vol 2, p 311

101. Gillingham, 'Ngatiawa/Te Atiawa Lands', p 110

102. Walzl, 'Ngati Rarua Land', p 77

103. *Ibid*, pp 87–88

From 1870 to 1882, Alexander Mackay remained the local agent in charge of the native reserves, reporting to the commissioner of native reserves, Charles Heaphy. With annual rentals that ranged from approximately £1200 to £2750 during the 1870s, the trust's expenditure in Te Tau Ihu continued to cover items such as rations and clothing, agricultural implements, road construction and school and medical expenses.<sup>104</sup> Floods and droughts over the 1872 to 1873 period had seriously affected crops in several areas and Mackay reported that the trust fund had supported most of the residents of Motueka for over six months. The following year, the trust paid for the construction of a road through Maori land at Wakapuaka.<sup>105</sup> The fund also covered administrative expenses, including a proportion of Mackay's salary and a salary for an interpreter. These costs represented a significant portion of total expenditure. Mr Walzl's tally of expenditure indicates that the proportion expended on these administrative expenses was almost 30 per cent over the 1873 to 1880 period.<sup>106</sup>

On several occasions, the Crown official responsible for the trust (Mackay) expressed criticism of the general government's reliance on it for matters more properly the responsibility of the Crown itself. In general, Government expenditure on Maori welfare was relatively minimal at this time but it seems that this was even more the case in Te Tau Ihu. During the 1870s, the Government generally paid expenses such as medical officers' salaries out of the £7000 per annum that had been set aside in the civil list for 'Native purposes'. In Te Tau Ihu, the tenths trust was meeting this cost. The trust was partly refunded the cost of these salaries in 1879, but only following a complaint from Mackay.<sup>107</sup>

Mr Walzl comments on the use of the fund as a substitute for Government funding, adding that the trust provided relief for all Te Tau Ihu Maori and not just those involved in the original transaction with the New Zealand Company. He remarks that 'from the Ngati Rarua viewpoint the revenue arising from leasing the Tenths was incorrectly being used to subsidise other local Maori.'<sup>108</sup> The Mitchells also point to expenditure throughout the nineteenth century that either was not for the exclusive benefit of beneficial owners or they believe should have been the responsibility of the Government.<sup>109</sup>

In terms of the trust being administered, there were no significant reductions in the estate during this period, the only notable adjustment being an exchange of 150 acres of reserve land for land in Motupipi in 1864. Dr and Mrs Mitchell comment that this entailed a loss to the estate because the Motupipi land was subsequently Crown granted to individual Maori owners.<sup>110</sup>

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104. Ibid, pp 88–89

105. Fraser, 'Nelson Tenths', pp 70–71

106. Walzl, 'Ngati Rarua Land', pp 88–89. We do not accept Mr Walzl's inclusion of medical salaries under the category of administrative expenses.

107. Fraser, 'Nelson Tenths', pp 70–75

108. Walzl, 'Ngati Rarua Land', p 149

109. Mitchell and Mitchell, 'Report No 9D', pp 71–145

110. Mitchell and Mitchell, 'Report 9C', p 24. The Mitchells also trace smaller adjustments during this period: pp 24–28.

In his report of June 1873, Mackay stated that the reserves in Nelson, Moutere, and Motueka were comprised of 52 town sections (50a 2r 36p) and 4100 acres 15 perches of suburban land, 1294 acres of which were being occupied by Maori.<sup>111</sup> There was little change to this estate for the duration of Mackay's tenure. In 1883, Mackay reported that township reserves totalled 49 acres 2 roods 36 perches, while the reserves at Motueka and Moutere comprised 4082 acres, of which 1294 acres were occupied by Maori.<sup>112</sup> Ms Fraser comments that, while Mackay successfully preserved this estate, he was more paternalistic than his predecessors had been. Mackay resisted any pressure from lessees to obtain the freehold of the reserves but he welcomed long-term leases on the basis that they would improve the value of the properties.<sup>113</sup> As Ms Fraser notes, the assumption underlying this was that Maori would never occupy these leased reserves. Mackay also resisted any suggestion that Maori should be involved in administering the estate. It will be recalled that Major Richmond had suggested the involvement of local rangatira in administration and decision-making back in 1854, but that his proposal had not been adopted at the time. During Mackay's tenure, the Native Reserves Act 1873 required the establishment of a board to administer reserves that would include Maori members. Mackay objected to this suggestion on the basis that Maori were 'inexperienced' and 'had no knowledge of the laws of property, and . . . were unable to appreciate equity'.<sup>114</sup>

Despite this comment, Maori assistant commissioners were employed for Nelson and Greymouth. According to an 1882 return, Hemi Matenga received an annual salary as assistant commissioner in Nelson. It is not clear how long he had been employed in this capacity. Ms Fraser notes an 1886 comment about a payment to Matenga from the reserves fund, which suggests that he had been in receipt of £100 per annum for nine years.<sup>115</sup> In response to a query about the employment of Maori assistant commissioners in March 1883, Mackay stated that 'their appointment was the result of the popular opinion then prevailing that the Natives should have a voice in the management of their own affairs'. However, he added that 'the practical value of the office has been nil'.<sup>116</sup>

We are not able to identify any actual involvement of assistant commissioners in the administration of the tenths in our inquiry district. In evidence to the Native Affairs Commission in 1883, Mackay stated that: 'The Maoris really have no voice in the management of these lands. They are held in trust for the most part. There is no necessity to consult the natives. They simply have beneficial interests in the funds: they have no voice whatever in the management of the property.'

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111. AJHR, 1873, G-2A, p 1

112. AJHR, 1883, G-7, pp 3, 6

113. Twenty-one-year leases could now be renewed by lessees.

114. Fraser, 'Nelson Tenths', pp 57, 60-61

115. Ibid, p 75. The Mitchells also point to a reference to the payment of Mackay's and Matenga's travel expenses 'while visiting the various districts on Native business': Mitchell and Mitchell, 'Report No 9D', pp 84-85.

116. Mackay to Hamerton, 20 March 1883, PT83/82 MA-MT1/1b (Johnson, *Trust Administration*, p 124)

In Mackay's view, the trust's aim of 'encourag[ing] the occupation of the land as well as the creation of a permanent and profitable estate' did not require consultation with the beneficiaries of that estate.<sup>117</sup>

The Native Reserves Act 1873, with its provision for Maori involvement in the administration of the reserves, was never implemented. As the Whanganui a Tara Report explains, the legislation had been partly motivated by the Court of Appeal's decision in *Regina v FitzHerbert*, which called into question the trust status of the tenths land at Nelson and Wellington, suggesting that they were demesne lands of the Crown. As well as reforming the administration of the land to involve Maori, the 1873 Act confirmed that the land was vested in the Crown in trust.<sup>118</sup>

The Whanganui a Tara Tribunal suggests that the Act was not implemented because it would have given Maori a measure of control over the reserves. In failing to implement the legislation, the Tribunal states, 'the Crown missed an opportunity to improve the administration of the reserves and to provide some recognition of Maori rangatiratanga over those reserves'. In common with the Ngai Tahu and Taranaki Tribunals, the Whanganui a Tara Tribunal concludes that subsequent changes in reserves legislation generally favoured European lessees and not the Maori beneficiaries of the trust.<sup>119</sup> As discussed further below, we agree that the Crown's failure to recognise Maori rangatiratanga over the reserves was a serious omission.

To summarise: the Crown's administration of the reserves was formalised over the 1856 to 1882 period. More of the reserves were leased, for periods of up to 21 years, and the rental income continued to provide a benefit fund for Te Tau Ihu Maori. The various administrators recognised the importance of the occupied tenths for Motueka Maori and the need to treat them differently from the other tenth reserves. At the same time, there were limits to the extent to which Maori controlled these reserves, and the notion of granting them to Motueka Maori was not implemented.

The administration became more paternalistic during Alexander Mackay's tenure. Mackay was instrumental in ensuring the financial success of the estate and he was critical of the general government's reliance on the benefit fund for welfare costs that he believed should be met from Government funds (as they were elsewhere). However, he did not believe that Te Tau Ihu Maori needed to be consulted, or involved, in the administration of the trust. This contrasted with the tenor of the Native Reserves Act 1873 but the Act was not implemented, apparently because of its provisions for Maori involvement. Mackay's approach accorded with Crown policy in the post-1873 period. This stance was accentuated with the transferral of authority to the Public Trustee in 1882.

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117. Gillingham, 'Ngatiawa/Te Atiawa Lands', pp 111–112

118. Waitangi Tribunal, *Whanganui a Tara*, pp 294–295, 298; Johnson, *Trust Administration*, p 76

119. Waitangi Tribunal, *Whanganui a Tara*, pp 298–299

**(5) Public Trustee administration, 1882–1920**

The Native Reserves Act 1882 ushered in a new era in administration of the reserves in Nelson and Motueka. The Act provided for the transfer of responsibility for the reserves to the Public Trust Office. All Maori members of Parliament were critical of this move towards a more centralised administration, which they believed would further distance Maori beneficiaries from the reserves. Hone Tawhai, for example, characterised the legislation as a ‘fish full of bones’. The paternalistic nature of the legislation was embodied by John Ballance’s statement in 1882 that ‘the Native is in many respects an infant needing a guardian.’<sup>120</sup>

During the parliamentary debates on this Bill, many members spoke about the need both to protect Maori and to provide for their rights as British citizens (which they felt were not easily reconciled). Much of the debate focused on the need to include Maori leaders on the board of the Public Trust, but this compromise did not go far enough to meet the wishes of the Maori members. The latter pointed out that the Maori owners had neither been consulted nor consented to the Bill, that the land could still be protected as inalienable while placed under the owners’ direct management, and that nothing short of those two things would satisfy Maori.<sup>121</sup> The Government was thus clearly on notice of how Maori members thought that Maori authority, protection of Maori interests, and the rights of British subjects should be provided for in this instance. Mr Taiaroa, the member for Southern Maori, introduced an amendment requiring the consent of a majority of owners before their land came under the Public Trustee. The amendment was defeated by 14 votes.<sup>122</sup>

We note that this Bill was passed during a ferment of Maori efforts to obtain the right to manage their own lands and affairs by their own legally empowered committees. A Maori committees Bill was defeated that same year (though one was enacted in 1883), and a new Government did provide for the possibility of block committees in 1886.<sup>123</sup> The Government made a deliberate choice in 1882 to disregard the representations of the Maori members of Parliament, and to place the reserved lands under the Public Trustee instead of committees of owners, and without seeking the consent of owners to do so.

The transferral of the reserves followed Heaphy’s death in 1881 and was part of a general reduction in Native Department expenditure. Responsibility for the reserves was added to the Public Trust’s role as the guardian for the estates of minors, the deceased and lunatics. Presided over by a board of management consisting of Government officials and receiving financial support from the Government, the office is described by Ralph Johnson as

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120. Ballance was the Minister of Lands from 1884 and later became Premier: Johnson, *Trust Administration*, pp 118–119.

121. NZPD, vol 41, pp 306–315, 518–529

122. NZPD, vol 43, p 532

123. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 1, pp 301–319, 333–356

‘inextricably attached to the Government.’<sup>124</sup> A later section summarises the submissions we received about the Public Trustee’s relationship with the Government and our assessment of whether it was an agent of the Crown.

Under the 1882 Act, the Public Trust was empowered to lease reserves for longer terms (up to three 21-year terms).<sup>125</sup> The rentals were to be used for the ‘physical, social, moral or pecuniary benefit’ of Maori, and the Public Trustee could apply to the Native Land Court for a definition of who these beneficiaries were. In response to opposition from the Maori members and the representations of several settler members, provision was made for the inclusion of two Maori representatives on the board of management of the Public Trust. However, Ms Fraser’s assessment of their involvement indicates that this was little more than token representation and she notes that they were not included in the board after 1894.<sup>126</sup> A 1913 commission of inquiry described the board as a ‘mere farce’. It seems that Maori membership had been reinstated by this time because there were two Maori members on the board, but they rarely attended board meetings. At any rate, board meetings were infrequent and the inquiry concluded that it had little influence over the activities of the Public Trust Office.<sup>127</sup> In any case, it was no real substitute for committees of owners managing their own inalienable estate, and distributing the income as they saw fit.

Alexander Mackay continued to play a key role in the administration of the Nelson and Motueka reserves for the first few years of Public Trust administration. He had taken on sole responsibility for the trust after Heaphy’s death and remained closely involved in the Te Tau Ihu reserves until his appointment as Judge of the Native Land Court in 1884. From 1884, administration was centralised in the Public Trust Office in Wellington, represented in Nelson by a local agent, J Catley.<sup>128</sup> Catley’s role was to implement the Public Trust’s policy and his time was largely spent on collecting rents and arranging and supervising leases.<sup>129</sup>

A new leasing regime was introduced from the late 1880s. The Westland and Nelson Native Reserves Act 1887 removed the restriction on the number of times the 21-year leases could be renewed. Leases could be renewed on expiry of the lease term, with the Public Trustee required to revalue the land prior to renewal. The rent was tied to the land valuation.<sup>130</sup>

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124. The board of management was comprised of the Colonial Treasurer, the Government Annuities Commissioner, the Attorney-General, the Commissioner of Audit, and the Public Trustee. Johnson also notes that the Government influenced the office’s constitution: Johnson, *Trust Administration*, pp 91, 101, 104, 110.

125. Lessees not intending to build on the reserve could lease for a maximum of 30 years, while those intending to build could lease for three 21-year terms (with automatic right of renewal). Leases were to be arranged through public auction.

126. Fraser, ‘Nelson Tenths’, pp 78–81

127. AJHR, 1913, B-9A, p 17

128. J Catley was the Nelson agent for the Public Trust office until 1896: Johnson, *Trust Administration*, p 123; Fraser, ‘Nelson Tenths’, pp 78–79.

129. Mitchell and Mitchell, ‘Motueka Occupation Reserves’, p 72

130. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 3, pp 746–747

Perpetual leases secured the occupants' rights over the reserves and confirmed the view that reserves were to be permanently leased. The Ngai Tahu Tribunal was critical of this legislation, which appears to have been introduced without consultation or the consent of Maori. Although the legislation might have been intended to encourage development of the land, which would increase rental revenue, 'it was nevertheless an action that was to deprive the owners of use and occupation as well as a property right'.<sup>131</sup>

Although there was no actual consultation, Parliament did not act in ignorance – the views of owners were reported by their representative, Tame Parata, who told the House: 'Many of the natives interested in the reserves in the South Island have petitioned the House, and have sent letters to me, asking that the lands shall revert to them at the expiration of the present leases.'<sup>132</sup> This wish was clearly antithetical to the proposed perpetual leases. The trustee, Parata said, had already promised renewals of various leases without the knowledge or consent of the owners. On their behalf, he demanded the right for them to be consulted and to consent to any new leases or renewals of leases. He also reported the view of Motueka Maori that they had insufficient land and wanted to resume leased land and farm it at the expiration of leases.<sup>133</sup> At the same time, Mr Stewart (the member for Dunedin West) told the House that he too had 'been communicated with on this matter by persons who pointed out that the time had arrived when the Natives of the South Island should have an independent power over their reserves.'<sup>134</sup> The premier promised to bring in a bill the following year, to give Maori authority to manage their own reserves 'wherever they are fit to exercise the power'.<sup>135</sup> However, no such legislation was enacted, and the perpetual leasing regime went ahead regardless of the owners' reported wishes.

In terms of the petitions, there had been one from Pamariki Paaka of Te Atiawa, which was considered the year before by the Native Affairs Committee.<sup>136</sup> There were two more in 1887, again one from Paaka and other Motueka Maori, and also one from Tapata Harepeka and Ngati Rarua owners. The petitions sought the power to manage their own lands free of the Public Trustee, and to take them over for farming when leases expired. Mr Parata presented these petitions on 3 November, before the substantive debate on the Bill.<sup>137</sup> There was no report on Paaka's petition in 1887, but the Native Affairs Committee did recommend for the Ngati Rarua petition that 'as the leases fall in, the Public Trustee should not re-lease

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131. Waitangi Tribunal, *Ngai Tahu Report*, pp 776–781

132. NZPD, vol 59, p 936

133. *Ibid*, pp 936–937

134. *Ibid*, p 937

135. *Ibid*

136. Phillipson, *Northern South Island: Part 2*, p 22

137. Hilary Mitchell and Maui John Mitchell, 'Legislative and Administrative Influences on the Nelson Native Reserves', revised ed, report commissioned by the Wakatu Incorporation, 1999 (doc A65), p 72

without the consent of the Native owners.<sup>138</sup> This recommendation was made in November 1887 but without influencing the principles in the Bill that passed Parliament in December of that year.

Although justified as a secure source of revenue, perpetual leases were associated with infrequent rent reviews and low rental returns. The Sheehan commission noted that Parliament was successful in resisting lessee pressure to freehold the land until 1967. But the price for holding firm on this, in the commission's view, was a corresponding failure to ensure a fair return for the owners.<sup>139</sup> The Crown has conceded that perpetual leases with long periods between rent reviews were 'less advantageous' to Maori during the 'rampant inflation' of the 1970s and 1980s.<sup>140</sup>

Ralph Johnson, however, points to much earlier evidence that European lessees were successful in pressuring the Public Trustee to maintain low rents. Rents were tied to the valuation of land, and in 1900 the Public Trustee's district agent sought to secure an independent valuation of the reserves because he believed they were significantly undervalued. The Public Trustee intervened and refused to allow it, stating that all that was required 'under the provisions of the Act is for you, my agent, to agree with the lessee to the upset rental for a new lease and the valuation improvements.'<sup>141</sup> The district agent responded that the trustee's reserves were the 'lightest rented' of any trust in the district, that 'considerably increased rentals could be obtained without in any way unduly pressing the tenants,' and that the rents in the business part of Motueka were 'so low as to be ridiculous.'<sup>142</sup> Nonetheless, Dr and Mrs Mitchell point to evidence in the mid to late 1920s which indicates that the trust estate was still undervalued at this date.<sup>143</sup> We did not receive sufficient contextual information to be able to say how long this had been the case and how enduring a problem it was.

In any case, rents lagged well behind new valuations, as the Public Trustee's solicitor admitted in 1919. When Motueka land was taken for a school in that year, it was valued at £460, but the Compensation Court refused to accept that valuation because of the low rent that had been charged for the previous 18 years. The trust's solicitor noted:

The rental of £5.7.6 for a period of nearly 18 years made the claim for £460 a very difficult one to sustain and the Judge was against us from the commencement for this reason. We

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138. Hilary Mitchell and Maui John Mitchell, comps, supporting documents to 'Legislative and Administrative Influences on the Nelson Native Reserves, various dates (doc A65(a)), pp 164–165. There was also a Ngai Tahu petition: see p 161.

139. 'Report of Commission of Inquiry into Maori Reserved Land', AJHR, 1975, H-3, p 61

140. Crown counsel, submissions concerning generic issues, 20 September 2002 (paper 2.371), p 41

141. Johnson, *Trust Administration*, p 140

142. Nelson agent to Public Trustee, July 1900 (Kieran Schmidt and Fiona Small, 'The Maori Trustee, 1913–1953', revised ed, report commissioned by the Crown Forestry Rental Trust, 1998 (Wai 1200 RO1, doc A61), p 15). Johnson notes that this letter is wrongly dated in the footnote.

143. Hilary Mitchell and Maui John Mitchell, 'Land Valuation Issues Relating to the Nelson and Motueka, Tenth and Occupation Reserves', report commissioned by the Wakatu Incorporation, 1997 (doc A30), pp 36–37

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tried hard to get the Judge to adopt the method laid down by Cripps on Compensation for arriving at Compensation of a reversion *subject to an inadequate rental* but without success. [Emphasis added.]<sup>144</sup>

Lessees were also overwhelmingly (if not exclusively) Europeans. Johnson cites the Public Trust's statement in 1912 that 'In the Trustee's view, a Maori was not as a rule . . . qualified to be a successful occupant of a highly improved farm.'<sup>145</sup> This point was not lost on the witnesses in our inquiry, who explained the resentment that it caused their people – although noting that land was also leased by various local bodies and Government departments. Paul Morgan, in his evidence for Ngati Rarua, submitted that:

there was a feeling of resentment against local pakeha from the point of view that they had our land for their commercial use, but they paid hardly any rent. If you look at a lot of those farms and if you ask the question how those farmers have done out of us, the answer would be that they've done very well. They've paid little rent, and we've lost a lot of money. It's not only farms but it was also Councils and other public and community bodies who utilised our lands.<sup>146</sup>

In the case of the occupation reserves, Motueka Maori continued to retain a degree of autonomy over their use of the reserves until the late 1890s, continuing to arrange their own informal, shorter-term leases of land they were not cultivating themselves, albeit without the approval of the Public Trust.<sup>147</sup> Dr and Mrs Mitchell trace their continuing efforts to secure full control over the occupation reserves during the late nineteenth century.<sup>148</sup> Not only were these attempts unsuccessful, but the Public Trustee assumed considerably more control over the occupied tenths at the turn of the century. Following an inspection that revealed a problem with noxious weeds on these unsupervised leases, the Public Trustee closed down the informal leases in 1899 and put the leases up for public tender.<sup>149</sup>

Representing the Public Trust Office, Thomas Ronaldson met with resident Maori in April 1899 to inform them that the Public Trust intended to assume control over leasing the land. Ronaldson thought that the trustee should arrange leases of all land not being cultivated by Motueka Maori. The Motueka Maori population had declined considerably by this date, leaving some of the reserves unoccupied. For example, Ms Gillingham notes that sections 126 and 127, which had previously been occupied by Te Atiawa, were now unoccupied

144. Fell and Atkinson to district agent, Public Trustee, 12 March 1920 (Mitchell and Mitchell, 'Report 9C', p138)

145. Johnson, *Trust Administration*, p140

146. Paul Morgan, brief of evidence on behalf of Ngati Rarua, 1 February 2001 (doc B11), p11

147. Walzl, 'Ngati Rarua Land', pp187–189, 198; Gillingham, 'Ngatiawa/Te Atiawa Lands', pp113–114

148. Mitchell and Mitchell, 'Motueka Occupation Reserves', pp74–78

149. Ibid, pp81–87; Walzl, 'Ngati Rarua Land', pp187–189, 198; Gillingham, 'Ngatiawa/Te Atiawa Lands', pp113–114

and ‘covered with gorse, shingle, and mud flats’. She attributes the decline in the Te Atiawa population to the high mortality rate and out-migration (to Taranaki).<sup>150</sup>

During the public tender process, the Public Trustee received four applications from Maori. The local agent, EP Watkis, declined these tenders on the basis that he did not think they would be able to afford the rent or be ‘desirable as tenants’ because they were ‘of the “loafing” fraternity’. The 15 leases arranged by the trustee in 1899, involving 270 acres, were made under the terms of the 1887 Act, meaning they were leased for perpetual terms. The Mitchells comment on the lack of control that Motueka Maori now had over occupation reserves they were not cultivating. They add that ‘There seemed to be no allowance made for descendants who may [have] need[ed] a home and a livelihood once the Public Trustee or his agents had decided the land was surplus.’<sup>151</sup>

Once these leases had been organised, the Deputy Public Trustee sought clarification from Alexander Mackay as to whom accumulated rents should be distributed. Mackay, now a Native Land Court judge, advised that the money should be paid to Maori ‘specially entitled to the usufruct of the lands.’<sup>152</sup> Attempts to determine who these people were revealed dissatisfaction with the system of distribution, but the Public Trustee’s attempts to devise a new one were not approved by Mackay. The only avenue was for the Public Trustee to apply for an investigation by the Native Land Court as provided for under section 16 of the Native Reserves Act 1882. This step was undertaken in 1901.<sup>153</sup>

The subsequent investigation significantly circumscribed the extent of land under the direct control of Motueka Maori. A total of 935 acres was identified as occupation reserves, while the court (presided over by Mackay) set aside only 222 acres for resident occupants, on ‘condition that they should not allow outsiders to rent, occupy or lease the area so set apart.’<sup>154</sup> The remaining 713 acres were leased under the same perpetual leasing terms as other reserves vested in the Public Trust with payments made to individual beneficiaries. Maori protests against the perpetual leases and requests for the return of these lands during the early 1900s were unsuccessful.<sup>155</sup>

In May 1905, for example, Pamariki Paaka enlisted the assistance of James Mackay junior to support their call for the return of land. In a memorandum to the Native Minister, James Mackay explained that on assuming responsibility for the tenths, the ‘first action I took was to set aside certain sections for the use and occupation of the Motueka Natives on the understanding that these were to be their permanent property’. Mackay stressed the distinction

150. Gillingham, ‘Ngatiawa/Te Atiawa Lands’, pp 114–117

151. Mitchell and Mitchell, ‘Motueka Occupation Reserves’, pp 87–88

152. Deputy Public Trustee to Judge Mackay, 21 September 1899; Judge Mackay to Deputy Public Trustee, 22 September 1899, AAMK869 156e 6/23 (Gillingham, ‘Ngatiawa/Te Atiawa Lands’, p 116)

153. Public Trustee to registrar, Native Land Court, Wellington, 4 February 1901, AAMK869 156e 6/23 (Gillingham, ‘Ngatiawa/Te Atiawa Lands’, pp 116–117)

154. Native Trustee to Minister for Native Affairs, 2 July 1928 (Mitchell and Mitchell, supporting documents, p 226)

155. Fraser, ‘Nelson Tenths’, pp 89–91, 98; Walzl, ‘Ngati Rarua Land’, pp 215–216, 248–251

between the occupation reserves and the endowment reserves held ‘in trust for the benefit of all Natives who had sold land to the New Zealand Land Company’. In Mackay’s opinion, his successors had no ‘right to deal with the lands which I by direction of the Government had specially set apart for Native use and occupation.’<sup>156</sup>

The Native Land Court had also identified the beneficiaries of the tenths reserves by this date. In 1892, the court, with Alexander Mackay presiding, had upheld the claims of Ngati Rarua, Ngati Koata, Ngati Tama, and Te Atiawa to the tenths estate, naming 285 individual beneficiaries and determining the relative shares of the different iwi to the funds that had accrued. We shall describe these findings in more detail in the next section of the chapter. What is important to note here is that the determination of title by the court demanded a change in the use of the trust, which had been operating for the benefit of all Maori in Te Tau Ihu. As Dr Gould remarks, the Native Land Court identified a ‘narrower class’ of beneficiaries ‘based upon those descending from some only of those living [in] the area when the trust was established.’<sup>157</sup>

A proportion of the rental income – 75 per cent of accumulated rent, and up to half the income thereafter – was now paid out directly to the beneficiaries named by the court, as authorised by the Native Reserves Amendment Act 1896. However, the management of the fund remained firmly in the hands of the Public Trustee. The portion of the fund not distributed to individual beneficiaries was to be expended on the ‘physical, social and moral benefit of the Natives, individually or collectively’, and for the relief of beneficiaries who were ‘poor or distressed’. The 1896 Act also confirmed the vesting of the tenths in the Public Trust by the principal Act of 1882 and validated the past transactions of the commissioner of native reserves.<sup>158</sup>

In 1897, the beneficiaries received a total of £8083, representing almost 14 years’ worth of rent. This accumulation of rent suggests that the Public Trustee had curtailed spending on general forms of assistance since about the time of Mackay’s departure from office. After this initial payout, payments to individuals were made every six months because there were ‘so many beneficiaries in these Tenths, and to pay out every quarter the amounts would be so small.’<sup>159</sup>

Funds not directly distributed to beneficiaries continued to be used as a general benefit fund, paying for medical, education, and welfare purposes. However, individual applicants could only receive grants if they were named beneficiaries (or a child of a beneficiary). In the early twentieth century, the fund was most commonly used for rations (generally of food or clothing), but again, only ‘in cases where Natives [were] interested in the Tenths

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156. Mitchell and Mitchell, supporting documents, pp 223–224

157. Gould, ‘New Zealand Company’, p 122

158. Native Reserves Act Amendment Act 1896, ss 2, 3

159. Public Trust Office, memorandum, 10 March 1897, MA1, box 147, 6/79, pt 6, South Island tenths general, 1887–1917 (Fraser, ‘Nelson Tenths’, p 101)

and [were] really in indigent circumstances.<sup>160</sup> The trust also paid the salaries of medical officers at Nelson and Motueka, covered the maintenance of the hostel, and contributed towards expenses at Wairau School. Thus, as Ms Fraser notes, a portion of the tenths continued to be used to cover costs that the Government considered its own responsibility in other regions.<sup>161</sup>

In summary: Centralised administration under the Public Trust Office had further restricted Te Tau Ihu Maori involvement in the reserves that had been set aside for their benefit. Consultation featured even less than before and the possibility of eventual occupation of the reserves became remote following the institution of the perpetual leasing regime. The changed environment was most apparent in the transformation of the use and management of the occupation reserves at Motueka. The Public Trustee's increased control over these reserves was consolidated with the identification of beneficiaries. This process, in both the occupation reserves and the tenths reserves, was the other significant development during the period of Public Trustee administration. Thereafter, the trust was tied to particular descendants of those with whom the New Zealand Company had originally dealt, and the distribution of benefits targeted towards these individuals rather than towards meeting the needs of Te Tau Ihu Maori as a whole.

#### **(6) *The Native or Maori Trustee, 1920–77***

The Native Trustee was established following the recommendation of a 1913 inquiry into the Public Trustee that an independent body (meaning one independent of the Public Trustee) should be responsible for native reserves. The Native Trustee Act 1920 was enacted 'to provide for the appointment of a Native Trustee and to make better provision for the administration of Native Reserves.'<sup>162</sup> The Native Trustee's name changed to Maori Trustee in 1947. Unlike the parliamentary debates in 1882, there was almost no consideration of the rights or interests of the Maori owners of reserved land. Two Maori members spoke on the Bill – Ngata in the House and Te Heuheu Tukino in the council – but both focused on the measure as (they hoped) an initiative in which finance would be loaned to Maori farmers. They concentrated on this aspect of the Bill, although Te Heuheu noted that two out of six members of the Native Trust's board would or could be Maori. With a quorum of four, he expressed the hope that this might mean equal representation (two Maori and two Pakeha members) at its meetings.<sup>163</sup>

The Te Whanganui a Tara Tribunal notes that the native reserves were vested in the Native Trustee 'upon the same trusts, with the same functions, powers, and duties, and with the

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160. Fraser, 'Nelson Tenths', pp 100–104; Walzl, 'Ngati Rarua Land', pp 237–239

161. Fraser, 'Nelson Tenths', pp 105–112

162. The seven-year gap between the commission and legislation was due to the First World War: 'Report of Commission of Inquiry into Maori Reserved Land', AJHR, 1975, H-3, pp 20, 32.

163. Apirana Ngata, NZPD, vol 187, pp 970–976, 1227–1229

same liabilities and engagements' as they had been with the Public Trustee.<sup>164</sup> The administration of the Native Trustee was also fundamentally similar to the Public Trust's. Reserves continued to be perpetually leased and a portion of the rental income was distributed to individual beneficiaries, leaving a residual benefit fund. The size of this fund varied over time between 25 per cent and 50 per cent of the total income. The fund continued to be used largely for medical and other welfare costs, with grants to individuals, which were generally means tested, restricted to shareholders and their children.<sup>165</sup> This situation can be compared with the arrangements made with Tuwharetoa and Te Arawa at the same time (the 1920s). The Government agreed that proceeds from negotiations over those tribes' lakes could be allocated by tribal trust boards and expended for collective purposes as the tribes saw fit.<sup>166</sup>

Under the Native Trustee Amendment Act 1924, the Native Trustee was authorised to sell reserves that could not be rented but there appear to have been no such sales in Te Tau Ihu. Over all the reserves managed by the trustee, there were very few alienations of land between 1920 and 1953, notwithstanding occasional pressure from lessees anxious to acquire freehold title, and those that were alienated were generally for public works.<sup>167</sup>

Dr and Mrs Mitchell outline the public works takings that impacted on the estate throughout the trust's existence, involving approximately 10 acres of township land and 74 acres in Motueka and Moutere.<sup>168</sup> Most of these takings took place during the Maori Trustee's administration. In Dr and Mrs Mitchell's evidence, the claimants do not quarrel with some of the takings:

Claimants accept that for a number of essential public works, especially those requiring the protection of land, improvements, livelihoods and lives, land had to be given up. Claimants accept that in many cases it was also a reasonable decision to forgo compensation as one means of contributing further to such essential projects as flood control and protection from erosion. Claimants also accept the arguments that such works not only have the immediate effect of protecting land in times of severe flooding, but that the valuations of the residual land retained can be significantly enhanced.<sup>169</sup>

Other takings, however, for schools, public toilets, recreation grounds, and other 'amenities' were not site-specific in the way that takings had to be for flood protection. Those amenities did not have to be on the particular pieces of Maori land selected. Nor, in the

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164. Waitangi Tribunal, *Whanganui a Tara*, p 365

165. Schmidt and Small, 'The Maori Trustee', pp 98, 124–128

166. Waitangi Tribunal, *He Maunga Rongo*, vol 3, p 991; vol 4, pp 1316–1320

167. Schmidt and Small, 'The Maori Trustee', p 95; Fraser, 'Nelson Tenth', p 121. During the 1920s, there was a proposal from Te Tau Ihu Maori to sell some of the reserves but this did not take place: Fraser, 'Nelson Tenth', pp 122–132.

168. Mitchell and Mitchell, 'Deficits, Thefts and Land Losses', pp 35–38; Mitchell and Mitchell, 'Report 9C', pp 130–165

169. Mitchell and Mitchell, 'Report 9C', pp 163–164

claimants' view, was the public purpose so pressing as to require a compulsory taking. Yet, for much of the period under review, the Public, Native, and Maori Trustees could not sell or gift the land in their trust, so the only way to obtain it for public purposes was by compulsory taking. This was not actually a protection for the owners, since, as the evidence shows, the trustees did not tend to resist the acquisitions. In their evidence, Dr and Mrs Mitchell particularly objected to such takings where the leasehold would have been sufficient for the Government (or local body's) purpose, and where the takings impacted on land of particular historical, cultural, or spiritual significance to iwi. After a thorough examination of the historical records by Dr and Mrs Mitchell, it was clear that the cultural value of the land to its owners was not taken into account by the trust's administrators. As a result, land of particular significance to the claimants – such as part of the Matangi Awhea site – has been taken.<sup>170</sup> On the other hand, the Government did sometimes limit itself to taking the leasehold – a practice which the claimants argue could have been followed more often in the circumstance of acquisitions from their supposedly inalienable reserves. The Wakatu Incorporation could then have inherited both ownership of the land and a rental income.<sup>171</sup>

The most fundamental problem of all was the failure to consult with beneficial owners, to seek their permission, or even to inform them of the proposed taking. They had no opportunity to object, to inform the taking authority of any particular significance of the land, or to exercise the rights generally available to other property owners when land was taken for public works. The Mitchells' examination of the relevant records points to a total lack of consultation about these takings, showing that there was only one case in which the Maori Trustee took account of the views of the owners, the proposal for a further taking for the Motueka High School in 1948. They argue that Maori were consulted in this case only because they 'made such vociferous challenges' to the proposal. Also, it appears that the owners of this particular tenths occupation land found out about the 1948 taking only because one of their own number was a lessee. Earlier takings had occurred without these people's knowledge (and therefore even the opportunity to object which, as Dr Mitchell suggested, they most likely would have done.)<sup>172</sup>

In the evidence of Bob Shore for the Wakatu Incorporation, takings have been negligible since the incorporation of owners took over:

we're pretty vigilant on what happens with the land and from time to time there are areas of land taken under the Public Works Act. Little bits of land for roading and that sort of thing but on the whole we wouldn't have had a lot taken since 1977. In fact I don't recall any to be quite honest.<sup>173</sup>

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170. Matangi Awhea was comprised of sections 62 to 66. The taking was 1 acre 2 roods 29 perches (pt 62–64): see Mitchell and Mitchell, 'Report 9C', pp 131, 140–141.

171. Ibid, pp 130–165

172. Ibid, pp 130–165

173. Robert Shore, oral evidence, thirteenth hearing, 11–13 June 2003 (transcript 4.13, p 80)

The trustees' failure to consult with owners was not a problem confined to public works takings. There continued to be no provision requiring that Maori be included or consulted in the operations of the trust. Ms Fraser notes that in the Native Trustee's first years of operation, under WE Rawson, there was increased consultation with beneficial owners but that this did not continue through the 1930s or beyond.<sup>174</sup> Even so, the Native Trustee had resisted lessees' pressure to freehold as a result of that consultation in the 1920s.<sup>175</sup>

Many claimant witnesses in our inquiry told us of their parents' and grandparents' extreme dissatisfaction at their lack of involvement and authority. Mairangi Reiher, for example, described her grandfather's unsuccessful efforts in the 1930s to get the medical subsidy paid to a doctor of their own choosing. 'I raise this matter with the Tribunal,' she explained, 'to point out how little say the beneficiaries of the Tenths Reserves Fund and the owners of the lands from which those funds were derived actually had in trying to obtain the best possible services from the expenditure of those funds.'<sup>176</sup>

Other witnesses were concerned about the entire system of perpetual leases, low rents, and exclusion of owners from any participation in decision-making. In his evidence for the Ngati Rarua Atiawa Iwi Trust (NRAIT), Paul Morgan explained that the Motueka hapu never consented to perpetual leases of their occupation reserves, and nor had the beneficial owners of the tenths ever consented to 'their lands being encumbered in this way'. The imposition of these leases without consent was, in his view, a breach of the Treaty.<sup>177</sup> Mr Morgan also told us, when appearing for Ngati Rarua, of the disempowerment of his father's generation:

Of course the administration of the Tenths was an ongoing problem. My Dad's first experience with attempting to become further involved with his interests in these lands was when he went to the Maori Trustee in Wellington in the mid-1940's and asked questions about how the asset was being managed. The officials said to him 'Well you get your cheque and that's all you need to know'. It was his land, which had belonged to his tupuna, and he just wanted to know what was going on.

My family and other owners were paid their rental on a regular basis but they were totally oblivious as to how their lands were being managed. What they did know was that they were only getting peanuts in rental. The cheques stayed the same year after year. They knew they were being hard done by. The rent only got reviewed every 21 years and even then the amount it could go up was controlled.<sup>178</sup>

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174. Fraser, 'Nelson Tenths', pp 172, 174

175. Mitchell and Mitchell, 'Legislative and Administrative Influences', pp 85-87

176. Mairangi Reiher, brief of evidence on behalf of Ngati Tama, 11 February 2003 (doc K15), p 10

177. Paul Morgan, 'The Ngati Rarua Atiawa Iwi Trust: Claims Issues', brief of evidence on behalf of Ngati Rarua, 30 May 2003 (doc O14), p 7

178. Morgan, brief of evidence, 1 February 2001, p 11

Vern Stafford explained the sense of concern and bewilderment that he saw as he was growing up: ‘The old people would talk about the Tenth. It was not often raised but when they did speak about it, it was in a bad way. They wondered where the money was going. It would often not show up on time.’<sup>179</sup>

At the same time that Ngati Rarua were concerned about the administration of the estate and its low income, the extent of the occupation reserves actually occupied by Motueka Maori continued to shrink over the period. A 1928 investigation into the occupation reserves revealed that the Public Trustee had leased a further 84 acres since title was determined in 1901, leaving an occupation area of 138 acres. Only a minority of owners were living on the block and they had arranged informal, short-term leases of the surplus area. The owners (both resident and non-resident) informed the inquiry that they did not want this surplus to be perpetually leased. The Mitchells and Mr Walzl trace ongoing requests to regain control over this land. By 1943, Motueka Maori were occupying only 70 acres and the balance was leased to Europeans, in most cases as perpetual leases. By 1956, five whanau occupied less than 50 acres on the reserves.<sup>180</sup>

Provision was finally made for the vesting of some of the occupation reserves in beneficial owners in 1955, although this was limited to land being occupied rather than leased. Section 14 of the Maori Reserved Land Act enabled beneficial owners to apply for vesting and there were four such awards in 1957 and 1963, involving 24 acres. In 1977, a further 12.5 acres of occupied tenths were awarded to Hare Rore Stafford. The bulk of the occupied tenths continued to be administered by the Maori Trustee, mostly as perpetual leases, with the rental income distributed to an increasingly large number of beneficiaries.<sup>181</sup> By 1956, there were 2173 beneficial owners of the Motueka occupation reserves.<sup>182</sup>

The list of beneficiaries for the tenths reserves had also expanded exponentially, rising to 1500 by 1956.<sup>183</sup> Rental income was stretched over an increasingly large pool of beneficiaries, which meant that the payments that most individuals received were insubstantial. A 1956 survey of beneficiaries revealed that only 10 individuals in Motueka received more than £20 per annum from rents while most received less than 20 shillings per annum.<sup>184</sup> For

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179. Vern Stafford, brief of evidence on behalf of Ngati Rarua, 11 August 2000 (doc A84), p 7

180. Mitchell and Mitchell, ‘Motueka Occupation Reserves’, pp 121–135; Walzl, ‘Ngati Rarua Land’, pp 274–283, 318–320, 366–368

181. Mitchell and Mitchell, ‘Motueka Occupation Reserves’, pp 146–156

182. Walzl, ‘Ngati Rarua Land’, p 368

183. Hilary Mitchell and Maui John Mitchell, ‘What Wakatu Incorporation Inherited’, brief of evidence on behalf of Wai 56 claimants, not dated (doc 010), pp 12–13

184. Fraser notes that 1417 individuals in Nelson alone were in the category of rental receipts of less than 10 shillings per six months: Fraser, ‘Nelson Tenths’, p 158. She also cites the September 1954 comments of the district solicitor, who remarked that less than 2 per cent of beneficiaries received more than eight shillings a week from any one reserve. He concluded that the reserve rents were ‘no longer a significant contribution to the income and financial support of the great majority of the beneficiaries’: Fraser, ‘Nelson Tenths’, p 150.

Date	Land	Area (acres)	Leases	Rent (per annum)
1967		4410*		
	Tenths	3467		
	Occupation	943		
1975		3102		
	Tenths	2208	335	\$40,282
	Motueka occupation	894	389	\$35,592

\* This total is greater than the figure we have for the estate in 1883 (4131 acres – see table 4). We are not sure of the reason for this discrepancy.

**Table 6: Nelson and Motueka reserves, 1967, 1975**

Source: AJHR, 1975, H-3, pp 16, 52

some, even a small tenths' cheque could make a significant difference in their precarious circumstances. Paul Morgan recalled his mother's life at Motueka at this time, living off a small piece of land, local mahinga kai, and a bare minimum of store-bought goods: 'The thing that kept them going was the rents my grandmother got from the Nelson tenths. The grocery bill would be paid when the cheque arrived.'<sup>185</sup> For others, the amounts were too low to make much difference. Anne Chapman, who was 88 years old at the time of giving evidence to us, recalled: 'I remember Mum or Dad receiving payment of 3 pence for their Nelson 10ths and the despair they expressed.'<sup>186</sup>

In the parlance of the time, many shares were 'uneconomic interests'. During the 1950s there were moves to consolidate these interests into the ownership of the Maori Trustee. The Maori Reserved Land Act 1955 empowered the Maori Trustee to compulsorily acquire shares deemed to be uneconomic.<sup>187</sup> Hoani Meihana and other beneficial owners with shares in the Wellington and Nelson tenths petitioned in protest about this provision, and demanded the return of the tenths to their own control. This petition was not acted upon.<sup>188</sup>

We note, however, that the Government's intention was to retain the uneconomic interests within the trust. That is, the Maori Trustee would become a beneficial owner alongside Te Tau Ihu individual beneficiaries, and was supposed to ensure that income from the uneconomic interests benefited those from whom they had been acquired. Maori who lost their interests without their own volition were thus supposed to remain beneficiaries of the

185. Paul Morgan, oral evidence, second hearing, 12–16 February 2001 (transcript 4.2, pp 17–18)

186. Anne Chapman, brief of evidence on behalf of Ngati Tama, 12 February 2003 (doc K11), p 8

187. Waitangi Tribunal, *Whanganui a Tara*, p 393

188. Mitchell and Mitchell, 'Report 9C', pp 52–57

Land	Area (acres)
Nelson township	14
Suburban tenths	1245
Occupied tenths	49
Total	1308

Table 7: Sales, 1967–75

trust.<sup>189</sup> This category of former owners, however, did not remain protected in the manner intended by the 1955 Act. In the Maori Affairs Amendment Act 1967, the Government authorised the Maori Trustee to sell such interests to lessees, alongside other new freeholding provisions.<sup>190</sup>

According to the research of Dr and Mrs Mitchell, the Maori Trustee acquired the interests of 348 beneficiaries in 1970. By this time, the trustee was acting under the 1967 Act rather than the 1955 one, and under its provisions he acquired these interests (uneconomic because worth less than \$50) compulsorily and on-sold them to lessees. None of these shares were still in the ownership of the Maori Trustee when land was transferred to the Wakatu Incorporation in 1977.<sup>191</sup> As we see it, the 1967 Act gave the Maori Trustee two choices: he could sell the uneconomic shares he had acquired to ‘any Maori or descendant of a Maori’ (s 128) or he could sell them to certain categories of lessee (ss 128, 152, 155–156). Given Dr and Mrs Mitchell’s analysis of the various ownership lists, we conclude that the Maori Trustee did indeed sell these compulsorily acquired interests outside of the community of beneficial owners, presumably to a lessee or lessees.

Dr and Mrs Mitchell also did research among those they identified as having lost their interests. They informed the Tribunal:

It appears that most of the people deprived of their interests in this way do not understand what happened to them (or to their parents). All they know is that up to the late 1960s – early 1970s they were receiving a rent cheque from the Maori Trustee, and then suddenly they weren’t; some had a vague recollection of receiving a final cheque somewhat larger than had been received previously, but then it all stopped.<sup>192</sup>

189. Waitangi Tribunal, *Whanganui a Tara*, pp 393–394; Maori Reserved Land Act 1955, ss 19–24

190. Maori Affairs Amendment Act 1967, ss 128, 155–156

191. Ibid; Mitchell and Mitchell, ‘What Wakatu’, pp 13–17, app G. Although the acquisitions were made under sections 41C to 41D of the Maori Trustee Act 1953, those sections had been inserted into that Act by section 128 of the Maori Affairs Act 1967.

192. Mitchell and Mitchell, ‘What Wakatu’, p 16

Legislation was passed in 1987 to return compulsorily acquired shares to those from whom they had been taken. This was too late for the 348 beneficiaries identified by the claimants' researchers, whose interests had already been on-sold. If there were other uneconomic interests among the shares still retained by the Maori Trustee, then all such shares were committed for sale to the incorporation by this time and thus could not be identified and returned. Those Te Tau Ihu Maori who had lost their rights through compulsory acquisition (and we may not know the full number) were thus prevented from sharing in a remedy made available to others.<sup>193</sup>

Rore Stafford gave evidence on the consequences of this policy (and of freeholding), from his experiences working with the Wakatu Incorporation:

We know from the complaints we have received over many years that there were many who were excluded. We believe that the Maori Trustee prior to the handover acquired several hundred thousand shares by designating them uneconomical and or [by] purchase. Many through no fault of their own were alienated from their heritage. Continual questioning from many of those previous owners and others as to why some of their whanau are there [in the incorporation] and they are not has been an ongoing problem for our staff.

... we also understand how emotionally distressing it has been to the Whanau who have been excluded.<sup>194</sup>

The Maori Reserved Land Act 1955 brought together various statutory provisions surrounding Maori reserves in what the Ngai Tahu Tribunal describes as 'an attempt to create a common code'. Alongside provisions aimed at preventing further fragmentation of shares, the Act was also intended to standardise leases by empowering the Maori Trustee to convert any remaining term leases into perpetually renewable leases.<sup>195</sup> The 1955 Act also limited the benefit fund to a maximum of 25 per cent of total income and empowered the Maori Trustee to disband the fund altogether. The fund was accordingly dissolved in 1956. Ms Fraser comments that the trustee does not appear to have consulted with beneficiaries about this decision.<sup>196</sup>

The next significant legislation affecting the reserves was the Maori Affairs Amendment Act 1967, through which the Maori Trustee was authorised to sell reserves to lessees. Ms Fraser traces several instances of such sales in Te Tau Ihu during 1968, noting that consultation with beneficiaries involved a circular letter asking individuals who were interested in selling to inform the trustee.<sup>197</sup> By the time that sales ceased in 1975, the Maori Trustee had

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193. Mitchell and Mitchell, 'Report 9C', p 62; see also Waitangi Tribunal, *Whanganui a Tara*, p 395

194. R Stafford, brief of evidence, p 2

195. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 3, pp 749-750

196. Fraser, 'Nelson Tenth's', pp 148-149

197. *Ibid*, pp 152-155

sold 1259 acres of tenths land and 49 acres of Motueka occupation reserves.<sup>198</sup> The sale of a significant proportion of the estate represented a major departure from the policy that had been in place since the mid-1850s.

Dr and Mrs Mitchell commented:

The Claimants seek redress for this extinction of their interests – the losses of their turangawaewae.

An obvious rejoinder to this claim is that the 237 individuals concerned had freedom of choice to accept or decline the Maori Trustee's offer to purchase, but that response still ignores the injustice of a system which allowed those 237 people to extinguish the interests of all other beneficial owners to certain lands which constituted part of the Tenths Reserves estate. Besides, that response also ignores the position which the beneficiaries concerned had been brought to by decades of changes in the terms and conditions of the leased lands which had reduced their rental incomes to peppercorn levels. Many of those who sold were owners of holdings of significant capital value, from which absolute pittances were being paid out in annual dividends . . . It is little wonder that many beneficiaries chose to accept the offer to purchase, especially if their financial position was not robust, or if money was required for the purchase of a home or farm land elsewhere, or for the education of their children, as was the case for several beneficiaries.

Many of those who made the choice to sell strongly resent having been put in a position where they felt it was necessary – 'Hobson's Choice' again. The descendants of some who sold their interests in the Tenths Reserves estate are highly resentful of a system which led their tupuna to such a decision – a decision which, moreover, served to alienate their uri from their taonga tuku iho, for all eternity.<sup>199</sup>

The sales of reserved land in this period led Maori to form committees to agitate for the repeal of the legislation and for the return of trust land to the control of its owners.<sup>200</sup> The resultant agitation helped lead to the appointment of a commission of inquiry in 1975, headed by Bartholomew Sheehan, to examine Maori reserved lands throughout New Zealand.<sup>201</sup> The inquiry concluded that there were a variety of reasons for Te Tau Ihu beneficiaries having agreed to sales. Beneficial owners were generally unaware of where the interests were located and had no involvement in the administration of their interests. They also received very little rent from them and were aware that their children would receive even less as their interests were split between them. The situation was summarised by one

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198. Sales of tenths reserves included 14 acres in Nelson township, 110 acres at Sandy Bay, 589 acres at Motueka, and 544 acres in Moutere: AJHR, 1975, H-3, p 52.

199. Mitchell and Mitchell, 'What Wakatu', p 18

200. Morgan, brief of evidence, 1 February 2001, p 12

201. Sheehan was a retired Maori Land Court judge. The other members of the commission were Rolland O'Regan and Georgina Te Heuheu.

owner's comment that 'because the rents were so low most of the members of the family felt the land was not worth keeping'.<sup>202</sup>

Rental income was low not only because of the increased number of beneficiaries but also because the rents were based on outdated valuations, which even the lessees acknowledged were too low. The Sheehan commission stated that the 'evidence of owners was that for too long the return on their interests had been inadequate, and when compared with the value of the lands was almost ridiculous'.<sup>203</sup> The commission recommended regular rent reviews, and blamed this situation on faults in the legislation surrounding the administration of the reserves.

Evidence from Te Tau Ihu beneficiaries to the Sheehan commission indicated a general desire for a return of the land. They were not involved in the Maori Trustee administration, found it difficult to get information from the trustee, and wanted control over the reserves vested in them rather than the Maori Trustee.<sup>204</sup> The commission agreed that the Nelson and Motueka reserves should be vested in the beneficiaries, recommending the establishment of a section 438 trust.<sup>205</sup> In the event, the reserves were vested in an incorporation rather than a trust, but the commission's recommendation was the genesis for this transferral of land. Other recommendations, such as regular rent reviews, were not implemented.

In its recommendations for Maori reserves in general, the Sheehan commission remarked that most beneficial owners wanted either complete or at least 'a voice in the control and administration of their lands'. The Maori Trustee administration was perceived as remote and impersonal and 'owners had never been consulted on any matters pertaining to the leasing of the lands'.<sup>206</sup> The commission laid a large part of the blame for these faults in administration on the 'restrictive legislation' in which the Maori Trustee operated. It was suggested that, because the unsatisfactory state of the leases had 'been created by the action of the Legislature', the Government should provide some financial assistance to any new Maori authorities established as a result of its recommendations.<sup>207</sup>

In summary, concerns about the lack of control over the reserves had been an enduring issue for Te Tau Ihu Maori. In the earlier period, concerns had focused in particular on the occupation reserves at Motueka and the land at Whakarewa. There had never been a significant Maori voice in the administration of the trust and this lack of involvement had been accentuated rather than diminished over time. The Maori Trustee inherited a trust that had no requirement for consultation with its beneficiaries. Ms Fraser states that consultation

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202. AJHR, 1975, H-3, p168

203. Ibid

204. Ibid, pp 166-168

205. Ibid, pp 39-40. The commission noted that only four of the 43 Maori families living in Motueka were 'indigenous' and that most of the beneficiaries lived in the North Island.

206. Ibid, p 23

207. Ibid, pp 31-32

was a feature of the activities of the first Native Trustee, WE Rawson, but had declined after the 1920s.<sup>208</sup>

Without this consultation, the trust evolved into an entity that was of decreasing worth to its beneficiaries. Perpetual leases meant there was no opportunity for Te Tau Ihu owners to regain authority over the reserves or even secure a fair rental. The legislation surrounding the leases did not change to reflect changes in the economy, which meant that rents continued to be paid on the basis of outdated valuations. The Native Land Court definition of beneficial interests, the requirement for payments to individual beneficiaries, and the Native Land Court rules of succession meant that the beneficiaries experienced the same problems faced by Maori landowners throughout New Zealand during the twentieth century. Individual interests were increasingly fragmented and uneconomic and beneficiaries had little connection with the land in which they were interested. As a result, many sold their interests under the Maori Affairs Amendment Act 1967. During the late 1960s and early 1970s, the trust estate was significantly reduced for the first time since the Whakarewa school grant.

### 9.3.2 Legal submissions

#### (1) Claimant submissions

We received submissions on the tenths' establishment and administration from Ngati Tama, Te Atiawa, Ngati Rarua, Ngati Koata, and the Wakatu Incorporation. Counsel for the Georgeson whanau also made submissions with respect to the Whakarewa grant. Submissions from Ngati Toa and the Kurahaupo iwi focused on their exclusion from beneficial ownership in the tenths, an issue we consider in more detail in section 9.5. These submissions also touched upon the question of how the tenths estate was established and administered.

The fundamental issue underlying submissions was the inadequacy of these reserves. All counsel pointed to the inadequacy of both the occupation and tenths reserves and the subsequent erosion of this estate. Another major theme was the management of the estate, with criticism levelled at the administration of the trust and the legislative context within which this administration operated.

The following allegations against the Crown arose from these submissions:

#### (2) *The failure to provide and then protect a full tenth*

Claimant counsel maintained that the tenths estate should have been a full tenth and that this estate should have been separate from land granted for occupation. The claimants view the tenths as payment for the New Zealand Company transaction. As Ngati Koata stated,

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208. Fraser, 'Nelson Tenths', pp 172, 174

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this payment was an inadequate endowment, poorly allocated and badly administered, that remained outside of Maori control.<sup>209</sup>

Counsel for the Wakatu Incorporation argued that the New Zealand Company intended the tenths to be ‘the true payment for the lands.’ The Crown assumed responsibility for this obligation but then failed to meet it, both in terms of the area reserved and the way in which the tenths were administered.

In assuming responsibility for the reserves in November 1840, the Crown was obliged to implement the New Zealand Company’s promised tenths. Spain’s award, which required a reserve of one-tenth of its 151,000 acres, confirmed this obligation. Counsel for Wakatu noted the ‘significant concession’ of the Crown’s historian, Dr Gould, that the Crown was obliged by the deeds of release to provide a full tenth. Claimant counsel’s view was that the 1844 deeds of release placed a contractual obligation on the Crown to reserve one-tenth for those whose land was involved in the grant to the New Zealand Company. Stanley’s comments to FitzRoy on 18 April 1844 also made it clear that the Government was obliged to reserve one-tenth of company lands for Maori. In failing to ensure this, the Crown breached its contractual obligations and failed to act in good faith.<sup>210</sup>

In submissions for our hearing on generic issues, a number of claimants argued that the Crown was also obliged to ensure that a full tenth would be reserved in the 1848 Crown grant to the New Zealand Company. Ngati Apa submitted that ‘in terms of its Treaty obligations and taking into account the recommendations of Commissioner Spain, the Crown was bound to ensure that a tenth of the entire area granted by it in 1848 should have been reserved.’<sup>211</sup> Ngati Koata agreed that the reservation of the tenths should have been the minimum requirement for all lands granted to the New Zealand Company, ‘including those purportedly granted in 1848.’<sup>212</sup>

Claimant views appear to have modified by the close of hearings, with many connecting the requirement for a full tenth to Spain’s award and the ensuing deeds of release rather than to the area covered by the 1848 Crown grant. Nevertheless, the Wakatu Incorporation contended that the tenths reserve should have extended beyond Spain’s award of 151,000 acres to the full area covered by the deeds of release, which they calculate encompassed 467,700 acres. A major shortfall was the Crown’s failure to allocate rural reserves, which Wakatu argued could and should have been arranged when rural sections were arranged for the company settlers. ‘There was’, they stated, ‘no practical reason why the Crown obligation to see the completion of the Tenths rural reserves allocated was not carried out.’<sup>213</sup>

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209. Counsel for Ngati Koata, closing submissions, 9 February 2004 (doc T7), pp 55–61

210. Counsel for the Wakatu Incorporation, closing submissions, 9 February 2004 (doc T8), pp 3, 20, 26, 77

211. Counsel for the Ngati Apa ki te Waipounamu Trust, submissions concerning generic issues hearing, 29 August 2002 (paper 2.357), p 13

212. Counsel for Ngati Koata, submissions concerning generic issues, 4 September 2002 (paper 2.364), p 8

213. Counsel for the Wakatu Incorporation, closing submissions, pp 15–17

Counsel for the Wakatu Incorporation submitted that the Crown fulfilled its legal obligations to settlers but chose not to do so for Maori. This was evident in the overall shortfall in the tenths and highlighted by the reorganisation of the scheme in 1847, in which settlers' allocations were sorted out at the expense of the loss of 47 town section reserves.<sup>214</sup> Not only did the Crown fail to provide the full tenths estate, but it also then reduced what had actually been allocated without the owners' consent. The Crown's reallocation of reserves as occupation reserves, the removal of the town sections, the Whakarewa School grant, the exchange of 150 acres of tenths land for an occupation reserve in Golden Bay in 1864, public works takings, and finally freeholding under the Maori Affairs Amendment Act 1967; all were alleged to be in breach of the Crown's contractual obligations and its duty to act in good faith.<sup>215</sup>

Ngati Tama also outlined these reductions in the tenths estate and remarked that the Crown 'actively reduced' the reserves. Ngati Tama agreed that fully one-tenth of the land acquired by the company under the deeds of release should have been reserved for Maori, and they noted that this was in accordance with the Whanganui a Tara Tribunal finding for Wellington. Rural tenths should have been established and Spain's recommendations for reserving 15,100 of the total 151,100-acre grant, plus all pa, cultivations, and burial grounds, should have been implemented. The Crown grant of 1848 made no such undertaking for the tenths.<sup>216</sup>

In Te Atiawa's view, the Crown's assumption of responsibility for the tenths in November 1840 entailed a responsibility to ensure that the tenths trust received its entire entitlement and that Maori would also retain possession of their pa, cultivations, and wahi tapu. Failing to ensure that land such as that at Te Maatu was reserved was in breach of the article 2 guarantee that Maori could retain their land for as long as they desired. The Crown's failure to ensure that the company surveys of the early 1840s excluded pa, cultivations, and wahi tapu was 'a gross breach of the Treaty and the fiduciary duties inherent therein.'<sup>217</sup>

Stanley's instructions to FitzRoy in April 1844 and Spain's award confirmed that one-tenth should be reserved for Te Tau Ihu Maori, over and above reserves for pa, cultivations, and wahi tapu. Te Atiawa counsel contended that, if the Crown had proceeded on that basis, then it 'would have prevented the on-set of most of the problems that followed.'<sup>218</sup>

### **(3) *The Crown's obligations as trustee***

The claimants submitted that the Crown failed in its responsibilities as a trustee through the prolonged uncertainty surrounding the status of the reserves, delays in determining the

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214. Ibid, pp 8, 14

215. Ibid, pp 70–71

216. Counsel for Ngati Tama, closing submissions, [2004] (doc T11), pp 23–24, 44, 69–70

217. Counsel for Te Atiawa, closing submissions, pp 69, 75–77, 136

218. Ibid, pp 99, 190

beneficial ownership, the lack of consultation with owners, and the lack of Maori involvement in and control over the estate. The Crown was also a poor administrator of the estate, both in its management of the leases and in the expenditure of the endowment fund.

Te Atiawa's view was that although there was no trust deed it is possible to piece together the purpose and terms of the tenths trust. The New Zealand Company's notion of a permanent trust for the benefit of Maori was adopted and developed by the Crown, which conceived the estate as an endowment fund for education, religious advancement, health care, and social and political advancement. The terms of the trust were that the Crown was responsible for obtaining and administering one-tenth of the land awarded to the New Zealand Company and expending the revenue for the benefit of Maori, as outlined above. As trustee, the Crown was legally obliged to know and obey the terms of the trust, ensure the property was properly vested in the trust and avoid any conflicts of interest. Under the Treaty, the Crown was also obliged to protect Maori owners' interests, to act in good faith, and to fulfil its fiduciary duties.

In Te Atiawa's view, the Crown failed to meet these obligations. In failing to ensure there was a 'true tenth', the Crown failed to acquaint itself with or to obey the terms of the trust. Uncertainty around the inclusion of occupation reserves and subsequently the status of these reserves signalled the Crown's failure to clarify the terms of the trust. The remodelling of the Nelson settlement in 1847, the failure to create rural reserves, the ongoing lack of clarity about the status of the reserves, even after the Native Reserves Act 1856, and the failure to identify the beneficiaries at the first opportunity, are all cited by Te Atiawa as further breaches of the Crown's obligations as trustee. Breaches were also incurred through the failure to manage and administer the trust in a way that secured the best return, in not distributing funds directly to beneficial owners, and in not maintaining the distinction between tenths and occupation land.<sup>219</sup> The failure to clarify the status of the reserves was also highlighted by Ngati Kuia, who contended that the trust was not formally vested in Crown ownership until the enactment of the Native Reserves Amendment Act 1862.

In common with other claimants, Ngati Kuia were critical of the Crown's failure to identify the trust's beneficiaries until 1892.<sup>220</sup> Ngati Toa submitted that the delayed inquiry into beneficial ownership breached the principle of active protection.<sup>221</sup> Not only was investigation into beneficial ownership delayed but also the system of distributing funds worked to the detriment of the beneficial owners. Ngati Koata stated that a payment to individuals, rather than to hapu and iwi, was consistent with the 'objective of fragmentation of Maori society' and 'effectively privatised hapu and iwi endowments.' This was, in their view, contrary to the Treaty.<sup>222</sup>

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219. Counsel for Te Atiawa, closing submissions, pp 190–196, 202–203

220. Counsel for Ngati Kuia, closing submissions, 17 February 2004 (doc T14), pp 46–48

221. Counsel for Ngati Toa Rangatira, closing submissions, 5 February 2004 (doc T9), p 109

222. Counsel for Ngati Koata, submissions concerning generic issues, pp 19–20

Decisions about the administration of the estate were generally made without consultation with beneficial owners, who were never allowed an active role in the management of the trust. Both Ngati Tama and Wakatu counsel detailed the lost opportunities for Maori involvement in the administration: Richmond's 1854 recommendation for Maori participation in the trust's decisions, and provisions in the Native Reserves Acts 1856, 1873, and 1882. Ngati Tama stated that the Crown's administration was 'authoritarian and failed to provide a partnership with Maori of the kind guaranteed through the principles of the Treaty.'<sup>223</sup> Although there was occasionally consultation, particularly prior to 1882, the administrators of the estate maintained 'absolute control' and beneficial owners were not able to occupy, lease, or use the reserves themselves. The administration from 1842 through till 1977 was 'largely paternalistic and authoritarian and not carried out in the best interests of the Maori beneficiaries.'<sup>224</sup> Ngati Koata expressed very similar sentiments. Mismanagement of the estate was exemplified by the delay in identifying beneficial owners and in distributing rental income, the 'inadequate and demeaning' payments to individuals, failing to ensure that the property was as productive and profitable as possible, arranging leases in perpetuity, and the lack of Maori control.<sup>225</sup>

the Wakatu Incorporation considered the administration of the trust from 1840 to 1882 as unsatisfactory, with 'ad hoc appointments of men who had other and conflicting roles'. The Crown failed to ensure the legislation surrounding the reserves protected Maori interests.<sup>226</sup> Te Atiawa characterised the regime in the 1840s as 'ad hoc and informal', with very little management in the mid-1840s and none at all between 1845 and mid-1848. More formalised administration after this date excluded Maori involvement.<sup>227</sup> The administrators of the trust buckled to the pressure from European lessees for advantageous lease terms, 'often to the detriment' of the beneficial owners. In Te Atiawa's view, alienations of the trust estate represent the 'most tangible demonstrations of the Crown's failure to manage and administer the Tenths and Occupation reserves in a manner which recognises the best interests of the Maori owners.'<sup>228</sup>

Tracing changes in administration in the first decades of the trust's existence, Ngati Tama stated that the 'constant changes' added to the 'confusing and ineffectual' management. Post-1882, the administration became more bureaucratic and remote, with even less engagement with beneficiaries and the introduction of perpetual leases. The Native or Maori Trustee was administering funds in the interests of the public and not in the best interests of Te Tau Ihu Maori. The administration pandered to Pakeha lessees, resisted the involvement of Maori

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223. Counsel for Wai 56, submissions concerning generic issues, 30 August 2002 (paper 2.361), p 20; counsel for Ngati Tama, submissions concerning generic issues, [2002] (paper 2.366), pp 40–41

224. Counsel for Ngati Tama, closing submissions, pp 72–73

225. Counsel for Ngati Koata, closing submissions, p 61

226. Counsel for the Wakatu Incorporation, closing submissions, pp 50–51

227. Counsel for Te Atiawa, closing submissions, pp 192–194

228. Counsel for Te Atiawa, submissions concerning generic issues, 2 September 2002 (paper 2.360), p 18

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and failed to uphold and protect the rights of beneficial owners. Ngati Tama concluded that the Crown's administration was 'authoritarian and failed to provide a partnership with the Maori of the kind guaranteed through the principles of the Treaty'.<sup>229</sup>

The way the administration chose to spend the trust income was of particular concern to claimants. In common with others, the Wakatu Incorporation argued that, in not applying the tenths' income for the exclusive benefit of beneficial owners, the Crown breached its contractual obligations and the duty to act in good faith. Prior to the definition of beneficial owners in 1892, the fund was used for the benefit of all Te Tau Ihu Maori. Beneficial owners also lost out on income because it was used to fund services that were properly the responsibility of the Government.<sup>230</sup> The claimants pointed to spending on health, education, and welfare that should have been covered by the general government.<sup>231</sup> Counsel for Wakatu stated:

Income was used for administration expenses, medical, welfare, education, law and order, hostels and road contracts. A significant amount also found its way for education for Maori children. These are expenses which more properly should have been charged to the Consolidated Fund.<sup>232</sup>

In Te Atiawa's view, the research of Dr and Mrs Mitchell and others demonstrated that not all funds were spent in accordance with what they considered to be the terms of the trust.<sup>233</sup> Ngati Tama submitted that the use of the fund for social services or charitable aid that the Government paid for elsewhere breached article 3 of the Treaty. It was also alleged that there was evidence that funds had been misappropriated.<sup>234</sup>

#### (4) *Occupation reserves*

The claimants' submissions on occupation reserves centred on the wrongful inclusion of the reserves in the tenths estate, the inadequacy of the reserves, and the beneficial owners' lack of control over them.

Counsel for Ngati Toa cited Professor Richard Boast's comment that 'the two categories of reserve are quite distinct and serve distinct purposes, one being an endowment and the other to protect local occupation rights'.<sup>235</sup> The failure to ensure this distinction created enduring problems for Motueka Maori. Te Atiawa consider the failure to exclude land being

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229. Counsel for Ngati Tama, closing submissions, pp 73, 76-79

230. Counsel for the Wakatu Incorporation, closing submissions, pp 73-74

231. Ibid, pp 52, 74; counsel for Ngati Koata, closing submissions, p 60; counsel for Ngati Tama, closing submissions, p 24

232. Counsel for Wai 56, submissions concerning generic issues, pp 22-23

233. Counsel for Te Atiawa, closing submissions, p 199

234. Counsel for Ngati Tama, submissions concerning generic issues, p 40; counsel for Ngati Tama, closing submissions, p 79

235. Professor Richard Boast, 'Part Four: Land Transactions and the Native Land Court', brief of evidence on behalf of Ngati Toa, 11 June 2003 (doc P23), p 5 (counsel for Ngati Toa Rangatira, closing submissions, p 100)

used by Maori from the sections made available to settlers as the ‘fundamental failure that was to curse the Nelson settlement for years to come’. Te Atiawa did not consent to either the company or the Crown interfering with their pa, cultivations, wahi tapu, and other land that they either used or was important to them, including Te Maatu. Occupation reserves should have been excluded from the company scheme and from inclusion in the tenths trust. Motueka Maori should have retained control over the occupation reserves.<sup>236</sup> Ngati Rarua contended that the Crown’s failure to protect their pa, cultivations, and wahi tapu breached the principle of active protection and the article 2 guarantee that Maori could retain their land and taonga for as long as they wished.<sup>237</sup>

Both Ngati Tama and Ngati Koata commented on their inability to occupy any of the tenths reserves, either in the township or suburban sections. They were thereby excluded from participation in the developing economy.<sup>238</sup> Ngati Rarua and Te Atiawa, on the other hand, stated that the occupation reserves at Motueka were inadequate and that this became increasingly apparent as Nelson expanded in the later 1840s. Both iwi acknowledged the increase in the occupation reserves at various points but emphasised that they ‘ought never to have been deprived of their occupied lands’ in the first place. Furthermore, these increases came at the expense of the endowment estate, which meant less endowment benefits.<sup>239</sup>

Ngati Rarua and Te Atiawa submitted that increases in occupation reserves were not sufficient to support the population. The Ngati Rarua population declined from several hundreds in the 1840s to approximately 100 people by the mid-1860s, largely because of out-migration to Kawhia. Ngati Rarua attributed this decline to the insufficiency of the reserves at Motueka.<sup>240</sup> Te Atiawa shared this view, citing the evidence of agricultural scientist, Richard Hunter, that the occupation land was ‘of second class standing . . . and could not have sustained the populations of Atiawa.’<sup>241</sup>

The claimants also argued that not only were the reserves inadequate in quality and quantity but Motueka Maori lacked control over them. Ngati Rarua’s closing submissions traced that tribe’s evolving understanding about the limits to their control over the occupation land at Motueka. Throughout the 1840s, Ngati Rarua continued to use the land there ‘as if it was still in their possession’. They would not have viewed the 1849 agreement with the Crown about the occupation reserves as a surrender of total control and management. An 1854 petition seeking clarification about the status of the reserves was the ‘beginning of a long process through which Ngati Rarua would come to realize the Crown’s viewpoint that the Tenths and even the Occupation Reserves at Motueka had been removed from Ngati

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236. Counsel for Te Atiawa, closing submissions, pp 74, 137, 148

237. Counsel for Ngati Rarua, closing submissions, 5 February 2004 (doc T6), pp 97–98

238. Counsel for Ngati Tama, closing submissions, pp 63, 70; Ngati Koata closings, pp 56–57

239. Counsel for Te Atiawa, closing submissions, pp 138, 140, 143; counsel for Ngati Rarua, closing submissions, pp 99, 157

240. Counsel for Ngati Rarua, closing submissions, pp 166–167

241. Counsel for Te Atiawa, closing submissions, pp 146–148

Rarua control. The Crown's management of the occupation reserves created confusion and undermined Ngati Rarua's pursuit of economic activities.<sup>242</sup>

Te Atiawa stated that in August 1849, 'the Crown gave itself ownership of the occupation lands, and with each administrative step wrested complete control from Maori of these lands'. Although Motueka residents maintained some autonomy over the reserves in the first decades of the trust's existence, the Crown retained ownership and control. This was exemplified by the commissioners' allocation of interests in 1858, which 'did not equate to beneficial ownership. The Commissioner's allocations were theatrical rather than real, the Governor retained ownership of the land'.<sup>243</sup>

Te Atiawa submitted that after the transfer of the trust to the Public Trustee, Motueka Maori were no longer treated as 'virtual owners'.<sup>244</sup> Their status changed to that of mere beneficiaries and their interests were then individualised as a result of the 1901 Native Land Court case.<sup>245</sup> Occupation reserves were leased in perpetuity and Motueka Maori applications for leases were declined because they were of the 'loafing fraternity'. The trustee's view was embodied in the Deputy Public Trustee's statement of June 1899: 'These Reserves are vested absolutely in the Public Trustee and he alone has the right to lease and otherwise deal with them. The Natives have only a life interest in the rents'.<sup>246</sup>

Te Atiawa submitted that the Crown's ownership and control over the reserves, the perpetual lease of the reserves, and the refusal to allow Te Atiawa to be lessees breached the Treaty and its principles.<sup>247</sup> Ngati Tama agreed that the eventual inclusion of most of the occupation land in the tenths estate meant that it was effectively alienated through perpetual leases.<sup>248</sup>

##### **(5) Whakarewa grant**

Submissions on the Whakarewa grant from Ngati Rarua, Te Atiawa, and the Georgeson whanau focused on the extent of consultation and consent given for the grant, and the impact of the loss of the land for those living at Motueka.

Ngati Rarua's view was that Grey had consulted with them and they had agreed to the establishment of a school but they had not agreed to a Crown grant, which entailed the land going out of their control. Ngati Rarua objections to the grant emerged when they were evicted from Whakarewa in the late 1850s and these protests were sustained thereafter, accelerating after the school finally closed in 1881.<sup>249</sup>

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242. Counsel for Ngati Rarua, closing submissions, pp 99, 156–160

243. Counsel for Te Atiawa, closing submissions, p 141

244. Ibid, pp 137, 140–145

245. Counsel for Te Atiawa, submissions concerning generic issues, p 18; counsel for Te Atiawa, closing submissions, p 146

246. Counsel for Te Atiawa, closing submissions, p 145

247. Ibid, pp 137, 140–145

248. Counsel for Ngati Tama, closing submissions, p 63

249. Counsel for Ngati Rarua, closing submissions, pp 158–161, 167–168

Te Atiawa maintained that they had not been consulted about the grant at all. They viewed the terms of the school trust as inconsistent with the tenths trust because the school was open to all and not just those who had beneficial interests in the land at Whakarewa. The land was taken before beneficial ownership of either the endowment estate or the occupation reserves had been ascertained and these owners were not compensated for their loss. Te Atiawa's closing submissions cited tangata whenua evidence to show that Te Atiawa had been living at Whakarewa and would therefore have been affected by the loss of land.<sup>250</sup>

The Georgeson whanau submitted that there was no 'proper consultation' about the transfer of Whakarewa to the school and that this transfer had 'devastating impacts upon the local owners', including Mrs Georgeson's grandfather, Te Atiawa's Hohaia Rangiauru. The loss of occupation land forced many to leave the district while the loss of the endowment estate reduced the trust's endowment fund. The whanau also stated that Rangiauru suffered hardship through paying twice for the education of his children: initially through the loss of the land and then through school fees.<sup>251</sup>

#### **(6) Perpetual leases**

Ngati Tama, Te Atiawa, and Wakatu were critical of the imposition of the perpetual leasing regime on the trust estate.<sup>252</sup> Wakatu considered the imposition of perpetual leases without consultation or consent as a failure to protect rangatiratanga or to act reasonably. Counsel recommended that we adopt the findings of the Ngai Tahu and Whanganui a Tara Tribunals that perpetual leases breached article 2 of the Treaty.<sup>253</sup> The perpetual leasing regime was 'substantially to the detriment of the Maori owners' of both tenths and occupation reserves, effectively alienating the beneficial owners of occupation reserves from their land.<sup>254</sup>

The claimants also highlighted the low rental rates of these leases in the post-war period and the Crown's failure to ensure that rents were reviewed more regularly.<sup>255</sup> The Crown failed to implement the recommendation of the Sheehan commission for more regular reviews. The Ngai Tahu Tribunal had repeated these recommendations, and provision for regular reviews was finally implemented in the Maori Reserved Land Amendment Act 1997.<sup>256</sup> Wakatu argued that the compensation paid under the 1997 Act for losses incurred through perpetual leases only compensated for the post-1977 period. The historic losses incurred through the perpetual leasing regime remained to be addressed.<sup>257</sup>

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250. Counsel for Te Atiawa, closing submissions, pp 149–152

251. Counsel for Wai 1002, closing submissions, 5 February 2004 (doc T5), pp 8–9

252. Counsel for the Wakatu Incorporation, closing submissions, pp 57–58, 74; counsel for Te Atiawa, closing submissions, p 202; counsel for Ngati Tama, closing submissions, pp 82–83

253. Counsel for the Wakatu Incorporation, closing submissions, pp 57–58, 74

254. Counsel for Wai 56, submissions concerning generic issues, p 23

255. Counsel for the Wakatu Incorporation, closing submissions, pp 66–67; counsel for Te Atiawa, closing submissions, p 202; counsel for Ngati Tama, closing submissions, p 82

256. Counsel for the Wakatu Incorporation, closing submissions, pp 66–67

257. *Ibid*, pp 74–75

**(7) Public works takings**

In their closings, Wakatu detailed the public works takings as outlined by Dr and Mrs Mitchell and concluded that there was rarely any consultation with the beneficiaries involved. Counsel pointed to instances where land of particular significance to Te Tau Ihu Maori was taken for public works, and reiterated Dr and Mrs Mitchell's argument that there was only one case where the beneficiaries' views had been taken into account (the proposal in 1948 to take land for Motueka High School). Contending that Maori land was targeted for takings, Wakatu counsel referred to findings of previous tribunals that public works takings of Maori land should only occur in exceptional circumstances, or as a last resort in the national interest. The takings were 'fundamentally inconsistent' with the guarantee under article 2 of the Treaty for Maori to retain land for as long as they wanted.<sup>258</sup>

**(8) Maori Reserved Land Act 1955**

Ngati Tama and Wakatu commented on the impact of the Maori Reserved Land Act 1955, which enabled the Maori Trustee to compulsorily acquire interests deemed uneconomical.<sup>259</sup> Wakatu counsel stated that the removal of individuals from the beneficiaries register through this process 'terminat[ed] the tangible link with their turangawaewae.'<sup>260</sup>

**(9) Maori Affairs Amendment Act 1967**

Counsel for Wakatu submitted that 1145 acres of tenths reserves and 162 acres of occupation reserves were alienated by the Maori Trustee under this legislation. Sales of tenths reserves involved lessees who wanted to acquire the freehold, who were 'matched' with owners 'who, probably because of the small size of their holdings or the infinitesimal return[s] they were receiving were willing to sell their shares.' Other beneficial owners were not given prior option to purchase these interests.<sup>261</sup> Wakatu submitted that the loss of land under the Maori Affairs Amendment Act 1967 breached Treaty obligations to consult and to act reasonably, and article 2 guarantees of rangatiratanga and possession of land interests for as long as Maori wished.<sup>262</sup>

Ngati Tama counsel argued that the 1967 Act 'took "individualisation of title" to a new plateau'. One beneficial owner's decision to sell their interests in the communal estate could trigger a sale involving several hundred other beneficiaries' interests.<sup>263</sup> Although the Maori Trustee did consult with beneficiaries prior to arranging sales under the 1967 Act, he was not legally obliged to do so. Pointing to the findings of the Whanganui a Tara Tribunal with

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258. Counsel for the Wakatu Incorporation, closing submissions, pp 21–22, 46–49

259. Ibid, pp 65–66; counsel for Ngati Tama, closing submissions, pp 82–83

260. Counsel for Wai 56, submissions concerning generic issues, p 21

261. Ibid, p 22

262. Counsel for the Wakatu Incorporation, closing submissions, pp 65, 72

263. Counsel for Ngati Tama, submissions concerning generic issues, p 46

respect to the legislative framework in which the Maori Trustee was operating, he called for 'similar, if not more wide-ranging, findings'.<sup>264</sup>

**(10) Crown submissions**

The Crown made some significant concessions with respect to the shortcomings of the tenths. Acknowledging that Spain's award represented an undertaking to provide a full tenth, the Crown stated that it 'accepts that the Tenths and occupation reserves provided to Te Tau Ihu Maori fell significantly short' of that undertaking. The Crown acknowledged that Spain's award was not implemented consistently between settler and Maori entitlements, and that not creating separate occupation reserves and providing an additional tenth was a 'critical failure'.<sup>265</sup>

The Crown also conceded there was no 'timely attempt' to ensure that all those involved in the New Zealand Company transaction 'obtained a proportionate share of the Tenths estate'. Nor was there 'timely investigation or consultation to determine what that proportionate share ought to be'.<sup>266</sup> And with respect to the Whakarewa grant, the Crown suggested that the land should have been returned when the land was no longer being used for 'Native purposes' – namely, when an orphanage was established at Whakarewa in 1888.<sup>267</sup>

Although there were major areas of agreement between the Crown and the claimants, the Crown differed on some significant points, did not address others, and maintained a distinct perspective on the tenths estate. The discussion in the Crown's closings on the tenths opened with reference to the Ngai Tahu Tribunal's favourable comment on the tenths as a means of providing an economic base for Maori. The endowment scheme ensured a source of income to provide benefits to Maori. The Crown also emphasised the context in which this scheme was being developed: the mid-1840s, at which time the Government was 'acutely short of funds'.<sup>268</sup>

In common with claimant submissions, the Crown agreed that its obligation for the reserves originated with the November 1840 agreement with the New Zealand Company. However, the Crown's view was that there was no 'obvious obligation' to provide tenths at this point. Neither the Kapiti nor Queen Charlotte Sound deeds had mentioned tenths and this was merely 'one possible way' in which reserves might be made.<sup>269</sup> In the Crown's view, the undertaking arose through Spain's report, which explicitly discussed tenths as well as the reservation of pa, urupa, and cultivations. In ensuing negotiations around the deeds of release, 'it appears the Crown assumed the obligations to reserve on[e] tenth of land for

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264. Counsel for Ngati Tama, closing submissions, p 85

265. Crown counsel, closing submissions, 19 February 2004 (doc T16), pp 55, 71

266. Ibid, p 72

267. Ibid, p 78

268. Ibid, pp 52, 58

269. Ibid, p 53

Maori'. Crown counsel interpreted this to be one-tenth of the 151,000-acre award, or 15,100 acres, on top of which pa, urupa, and cultivations were also supposed to be reserved.<sup>270</sup>

The Crown maintained that this obligation for a tenth did not extend to the larger area contained in the 1848 Crown grant. The 1846 agreement between the company and the Imperial Government effectively gave the company the task of administering colonisation in the New Munster province. The 1846 agreement made no arrangement for extending the tenths provision over the whole of the area to be granted to the New Zealand Company in 1848.<sup>271</sup>

Nevertheless, the reserves that were included in the 1848 Crown grant 'of course were not adequate to allow Maori to engage with the changing rural economy', particularly after they were reduced through the Whakarewa grant.<sup>272</sup> The failure to reserve some areas of occupation and use at the outset, in both the township and in the suburban areas, was an aspect of the Crown's failure to provide adequate reserves. Furthermore, the inclusion of Maori occupation land in the company's allocation of suburban reserves caused 'much confusion'. Rural tenths were never established and the reserves originally set aside in the Wairau, 'which may have been perhaps viewed by the Crown as in lieu of a rural reserves obligation' were 'substantially re-purchased' in the Crown's Waipounamu purchase.<sup>273</sup>

The Crown was more equivocal with respect to later 'adjustments and takings' from the tenths estate, arguing that some were 'not without justification'. The Crown pointed out that the 1847 remodelling of the settlement, which entailed the loss of township reserves, was rendered necessary by the failure of the Nelson settlement.<sup>274</sup> In its submissions for the generic issues hearing, the Crown submitted that this adjustment was 'reasonable and not necessarily inconsistent with the Crown's Treaty obligations'.<sup>275</sup>

The Crown also argued that the Whakarewa grant was 'in keeping with the purposes of the tenths' and that there was evidence of at least 'a degree' of Maori consent to the taking.<sup>276</sup> Although there are differing accounts of the events preceding the Whakarewa grant and it is not clear what agreement was reached, 'it seems likely that there was a general understanding amongst Maori that the land was to be used for the establishment of a school'. The evidence also indicated that Maori expected that this would be a school for their exclusive benefit and that the land would be returned to them when no longer required for the school. The Crown argued that, if it is accepted that there was 'a degree of consent' amongst Te

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270. Crown counsel, closing submissions, p 55

271. *Ibid*, p 58

272. Gould, 'New Zealand Company', p 118 (Crown counsel, closing submissions, p 59)

273. Crown counsel, closing submissions, pp 67, 71-72

274. *Ibid*, p 71

275. Crown counsel, submissions concerning generic issues, 20 September 2002 (paper 2.371), p 32

276. Crown counsel, closing submissions, p 71

Atiawa and Ngati Rarua for the school, then the 'critical issue' becomes the non-return of the land once it was no longer being used for 'Native purposes.'<sup>277</sup>

The Crown did not address many of the issues raised by claimants with respect to the administration of the estate. In submissions for the generic issues hearing, it stated that those administering the estate appeared to have had intentions that were both honourable and consistent with the scheme's objectives. Whether the actions of the administration were in the best interests of the beneficiaries was considered to be 'a more complex and difficult question.'<sup>278</sup>

The Crown defended the implementation of perpetual leasing, which was introduced to increase the security of the leases, making them more attractive to lessees and therefore able to incur higher rents. Perpetual leasing was common in New Zealand at the time and the Sheehan commission of 1975 had been of the view that a less secure tenure would probably have stymied rural development. The Crown concluded that perpetual leasing was a financially prudent decision and that 'Low risk, long term investment was considered appropriate for areas meant to endure as an endowment for Maori.'<sup>279</sup>

It was conceded that terms prescribed by the Maori Reserved Land Act 1955 were disadvantageous in the context of the rampant inflation of the 1970s and 1980s. However, the worst effects of this had been ameliorated by the Maori Reserve Land Amendment Act 1997, and the Act had also enabled the payment of 'substantial additional compensation for rental loss.'<sup>280</sup> The 1997 Act was characterised as a 'fair and reasonable reconciliation of the various rights and interests at issue'. Having received \$14,081,565 from total compensation to Maori of over \$47 million, Wakatu Incorporation had received the largest portion of the compensation agreed upon in 2002.<sup>281</sup>

### 9.3.3 Tribunal discussion and findings

#### (1) *Should there have been a trust?*

The Crown's view that reserves should be an inalienable endowment, and that they should be held in trust and administered by the Government, was consistent with the principles of the Treaty. In particular, it was a praiseworthy attempt to give effect to the Crown's obligation of active protection. Throughout the period under examination, the iwi of Te Tau Ihu were in broad agreement that their ancestral land should be protected and remain in their ownership. Some individuals wanted to sell their shares but this was never the view of the majority, as Dr Mitchell and other claimant witnesses showed. Under the administration

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277. Ibid, pp 73, 76-78

278. Crown submissions on generic issues, 2.371, pp 39-40

279. Ibid, p 41

280. Ibid

281. Crown counsel, closing submissions, p 62

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of the Wakatu Incorporation, there have been a few strategic sales but the great bulk of the estate has remained intact or even been extended.

There is no real question, therefore, that a mechanism was needed to preserve this endowment for future generations, while it contributed also to the mana, the well-being, and the economic support of present generations. The Crown, however, had to actively protect the tino rangatiratanga of the iwi beneficiaries of the trust. It had to give effect to its guarantee of their autonomy, their authority, their rights over and relationship to their ancestral land. In our view, this meant actively protecting the interests of the iwi in partnership with them. The Crown's roles and responsibilities as trustee should never have been exercised without regard to the views and wishes of the owners. Major decisions affecting the basic nature or integrity of the trust ought never to have been made without the owners' consent.

There were some real tensions in reconciling the wishes of the owners with the trustees' aspirations for long-term stable returns for all beneficiaries. In 1887, when the Government imposed perpetual leasing, it knew that many owners wanted to resume leased land and farm it themselves. It also knew that they wanted the land kept inalienable but turned over to them for management. Similarly, in the 1920s, when the Government imposed a Native Trustee with no role for owners anywhere in its system, it was possible to have set up iwi trust boards (as elsewhere) to spend the proceeds and allocate them to tribal purposes as the owners saw fit. The Crown and Maori needed to act in partnership through whatever institutions were available at the time, reconciling any tensions between the long-term objectives of the trust and the wishes of the owners in any one generation.

The Crown's obligation actively to protect Maori interests did not cancel out its duty to give effect to its guarantee of tino rangatiratanga. These things were not impossible to reconcile. The dilemma was clearly seen in Parliament in the 1880s, and the Maori members suggested how protection (by keeping the land inalienable) could happen alongside tino rangatiratanga (Maori managing and, if they wished, farming their reserves themselves.) There was also a middle ground, in which the Government or its statutory trustees would lease the reserves but act in partnership with the owners. In our view, it was always possible for the Government to retain an active trustee role while involving the owners in a meaningful way in the administration and decision-making of the trust. The Nelson superintendent, Major Richmond, saw as much in 1854 (see sec 9.3.1).

With these points in mind, we turn next to the more particular question of the Crown's specific obligations as trustee for the tenths endowment estate.

**(2) *What were the Crown's obligations as trustee?***

This question of how well the Crown met its obligations to the Maori beneficial owners of the tenths estate underlies all the issues canvassed with respect to the tenths. In our view, the Crown's key responsibilities were:

- ▶ The provision of a full tenth, in addition to reserves for pa, wahi tapu and cultivation sites.
- ▶ A commitment to maintaining a full tenth, allowing alienations only after extensive consultation with (and the agreement of) beneficial owners.
- ▶ Timely and accurate clarification of the status of both the endowment and occupation reserves.
- ▶ Timely and accurate definition of the beneficial ownership of the reserves.
- ▶ Providing for the tino rangatiratanga of the beneficial owners by enabling their meaningful involvement in and consultation about decisions affecting the administration and status of the estate.
- ▶ Ensuring the effective administration of the trust's assets.
- ▶ Ensuring the trust funds were spent in accordance with the purpose of the trust: an endowment fund for education, health care, and the social, religious, and political advancement of the beneficial owners (but not in place of services provided from Government funds to other New Zealanders).
- ▶ Consulting owners and obtaining their consent to the basic purposes and functions of the trust, and any appropriate adjustments to that purpose and functions over time.

These are all obligations that the Crown could reasonably have been expected to ensure were met throughout the period of the trust's existence.

### **(3) *The provision and protection of a full tenth***

There was some debate about when the Crown's obligation to provide tenths originated but both claimant and Crown counsel agreed that this was the Crown's undertaking from at least 1844. The Crown's historical evidence supports the view that from 1844 the Crown was contractually obliged to ensure the reserves equated to one-tenth of the Nelson settlement.

In the context of the gradual working out of the reserves scheme, the question of whether or not the obligation for a full tenth arose prior to 1844 is largely immaterial. The essential point is that the Crown's obligation to ensure that the reserves estate comprised a full tenth had clearly been established before 1848, at which date the Crown grant to the New Zealand Company was finalised.

The claimants and the Crown agreed that Spain's award, confirmed by the deeds of release and FitzRoy's grant, signalled the Crown's obligation to secure one-tenth of the land granted to the New Zealand Company as reserves for Maori as an endowment on top of occupation and other reserves. In Te Tau Ihu, as in Wellington, the deeds of release 'clarified the Crown's responsibility' to ensure the active protection of Maori.<sup>282</sup>

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282. Waitangi Tribunal, *Whanganui a Tara*, p 312

It is clear that the Crown failed to meet this responsibility. The allocation in 1848 fell markedly short of what had been agreed upon in 1844–45. The 1848 Crown grant also failed to distinguish occupation land from the endowment estate. Spain and FitzRoy had intended the one-tenth reserve to be over and above allocations for pa, cultivations, and wahi tapu. This was also what Motueka Maori were told when the New Zealand Company sections were being surveyed. The failure to except occupation land was a serious omission. It was, the Crown conceded, a ‘critical failure’.

The 1848 Crown grant was arbitrarily imposed on Te Tau Ihu Maori, who were not consulted about the reduction in their estate. Spain’s provision for reserves had not been implemented because the New Zealand Company had refused to accept the 1845 Crown grant. As we noted in chapter 4, while the New Zealand Company was able to decline the 1845 grant, Maori were not given the choice with respect to either the 1845 grant or that of 1848. In 1848, the Crown granted the New Zealand Company a sizeable tract of land to enable the settlement scheme to be finalised. Only 5053 acres were set aside from this as tenths reserves. Thus, Spain’s award was implemented as far as the company settlers were concerned but the same cannot be said for Maori.

The Crown failed to meet its obligation because it had abandoned the policy of tenths by 1848. Under Governor Grey, tenths were no longer deemed necessary and instead the policy became reserves ‘sufficient for present and future needs.’ As was evident from the definition of reserves in Golden Bay in 1847, the Crown’s assessment of what was necessary for present and future needs fell considerably short of what would have been reserved under the tenths policy. This shortfall was also apparent in the 1848 allocation of tenths reserves.

As Crown counsel acknowledged, the reserves allocated in the 1848 grant were an inadequate endowment for the future needs of Te Tau Ihu Maori. Rural tenths were never established and the Wairau reserves, which could arguably have been viewed as a replacement for the rural tenths, were absorbed in the Crown’s Waipounamu purchase shortly thereafter. In any case, apart from crossover between Ngati Rarua communities, the Wairau reserves were intended for iwi which did not become beneficial owners in the tenths. Also, as we noted in chapter 5, all Nelson section-owners were allocated sections at Picton, but no corresponding tenths sections were set aside in that township.

Parties to this inquiry agree that the Crown failed to meet its obligation to provide a full tenth. It is less clear exactly how much land this should have entailed. One argument, advocated earlier in our inquiry, was that one-tenth of the entire area covered by the 1848 Crown grant should have been reserved for Maori, over and above pa, wahi tapu, and sites of actual cultivation. This position does not appear to have been advocated by the time of closing submissions, although Wakatu counsel argued that the tenths should have applied to the area encompassed by the deeds of release, which they calculated to be 467,000 acres. The Crown’s historian, Dr Gould, proposed several models: most notably, the amount of land included in the finalised New Zealand Company settlement (approximately 172,000 acres)

and the area covered by Spain's award (151,000 acres). This latter figure was the one adopted by Crown counsel in their closing submissions.

We view Dr Gould's proposed models as the most compelling alternatives. The specific obligation of a full tenth was explicitly tied to land incorporated into the New Zealand Company settlement. It did not extend to land included in the 1848 Crown grant that did not end up in the settlement. Such land was subsequently incorporated into the Waipounamu transaction and we have made findings about the inadequacy of the reserves excepted from that transaction in chapter 7.

We are not convinced that the deeds of release incorporated the large area suggested by Wakatu closing submissions. The deeds of release did not specify the acreage encompassed in the regions affected, which were named as Whakatu (Nelson), Waimea, Moutere, Motueka, Riwaka, and Taitapu (Massacre Bay).<sup>283</sup> An acreage was specified both in Spain's award and the subsequent Crown grant of 1845. FitzRoy's grant specifically stated that the settlement comprised 151,000 acres in the districts of Waimea, Moutere, Motueka, and Massacre Bay, of which one-tenth was to be reserved as well as 'All the pas, or burial places, and grounds actually in cultivation by the Natives.'<sup>284</sup> In our view, the tenths should have comprised either 15,100 or approximately 17,200 acres. Both options are substantially more than the 5053 acres that were actually set aside as 'tenths'. And, of course, there were to be pa, wahi tapu, cultivations, and wahi rongoa on top of the one-tenth.

On balance, we favour the larger figure of about 17,200 acres. Spain's award clearly identified the Crown's obligation for endowment reserves as one-tenth of the total New Zealand Company settlement. The figure was 15,100 in 1844 because this was one-tenth of the settlement at the time. It did not include rural reserves because rural sections had not been arranged. The final shape of the Nelson settlement had not yet been settled on. The best approximation we have for the final size of the settlement is about 172,000 acres.

Dr Gould's source for this approximation is a return in a July 1851 select committee report. The return shows that 132,000 acres had been sold or granted and that a further 40,000 acres would probably be required to meet the requirements of absentee proprietors. GS Cooper, writing for the commissioner of Crown lands, noted on the return that the 'probable total' of the Nelson settlement would be 'about 172,000 acres.'<sup>285</sup> As Dr Gould notes, it is not clear whether this figure includes the company's own estate and 'public lands of the Crown.'<sup>286</sup> So it might be that this total did not include the 5053 acres of 'Native Reserves', which would further increase the size of the settlement, and the accompanying obligation to the tenths estate.

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283. Deeds of release, *Compendium*, vol 1, pp 67–68

284. Crown grant, 29 July 1845, *Compendium*, vol 1, pp 68–69

285. Report to select committee, New Zealand Legislative Council, 23 July 1851, BPP, vol 8, pp 50–51

286. Gould, 'New Zealand Company', p 138

Not only was the 'tenths' estate substantially less than a full tenth, it was also not protected from subsequent alienations. In 1847, township allotments were reduced from 100 acres to 53 acres on the request of settlers for a reorganisation of the settlement. Grey agreed to this reduction without consulting or obtaining the consent of Te Tau Ihu Maori. The scheme was reorganised to meet the needs of settlers and this came at the expense of the interests of Maori. As Te Atiawa historian Mary Gillingham commented, this arbitrary reduction of township reserves 'breached the founding philosophy of the tenths scheme'.<sup>287</sup> While we accept that there was a need to rationalise the Nelson settlement sections, we do not accept that this required any reduction in the number of tenths reserves. We note also that the town sections might have been expected to become the most commercially valuable part of the estate in terms of likely rental income. The loss of practically half of these sections was a serious blow to the trust.

The endowment estate was further reduced by increases in the occupation reserves. These adjustments were rendered necessary by the 1848 Crown grant, which restricted Maori reserves to the 100 township and 100 suburban reserves originally selected by Thompson in 1842, minus the 47 township reserves that had been lost in the 1847 reorganisation. Thus, the estate was comprised of 53 one-acre township lots and 100 50-acre suburban lots. With no other land retained for Maori residents of Motueka and Moutere, the administrators of the scheme had little choice but to allocate some of the suburban lots as occupation reserves.

The readjustment in 1849 resulted in 22 of the 100 suburban sections being allocated as occupation reserves. The Whakarewa grant seriously depleted the occupation reserves but these were effectively restored through the adjustments of the early 1860s. From 1865 through to the end of the century, occupation reserves comprised approximately 30 per cent of the total tenths estate. The combined occupation and tenths reserves was reduced by almost 1000 acres in the first few decades of the trust's existence. In 1877, Alexander Mackay estimated that reductions in the estate through the loss of 47 town sections, transferral of suburban sections to occupation reserves and the Whakarewa grant had more than halved the trust's potential income.<sup>288</sup>

Adjustments to increase the extent of occupation reserves in the 1840s and then in the 1850s and 1860s were at the expense of the endowment reserves. Both types of reserves were also substantially reduced by the 1853 grant to the Anglican Church. In both these instances, there appears to have been some consultation with Motueka Maori about the changes. However, we are not aware of any wider consultation with beneficiaries of the estate about the transfers from tenths to occupation reserves, while subsequent protests with regard to Whakarewa indicate that consultation about the 1853 grant was not extensive.

Subsequently, the estate was reduced through the 1864 exchange of the Golden Bay reserve, public works takings, and the Maori Affairs Amendment Act 1967. As with earlier

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287. Gillingham, 'Ngatiawa/Te Atiawa Lands', pp 146–148

288. Phillipson, *Northern South Island: Part 1*, pp 125–126

alienations, these were effected without full consultation and are therefore further examples of the Crown's failure to protect the tenths estate. The claimants do not challenge public works takings where these clearly had to be from tenths land and were limited to the extent necessary for the protection of land and livelihood, such as some river protection works. Other compulsory takings, where the land did not have to come from the tenths, where the leasehold might have sufficed, and where consent was neither sought nor given, are of legitimate concern to the claimants. Similarly, while some individuals might have felt that they had no realistic option but to sell their interests under the freeholding clauses of the 1967 Act, the wider body of beneficial owners was not consulted nor did it consent.

In all these instances, there is nothing to suggest that the Crown considered replacing the land alienated from the reserves with Crown land. We note that this option was always available to the Crown. In 1877, for example, Alexander Mackay reported to Parliament that the surrender of the 47 town sections, the appropriation of 800 acres for occupation, and the alienation of 918 acres to the Anglican Church, were all costing the trust about £1500 per annum in lost revenue. Similarly, the failure to make rural tenths (or to replace the Wairau land supposedly set aside instead) had lost the trust another £1500 a year.<sup>289</sup> The Crown could have made up these losses. Even if it was not prepared to do so by remedying the loss of land with an equivalent number of acres and sites, there was also the option of an annual grant. As we saw in chapter 6, the Government was prepared to set up a fund in the 1880s to remedy its failure to make the promised Ngati Toa reserves. Mackay asked the Government in 1877 to subsidise the tenths trust by an annual vote, to take over permanent charges for education and health and 'in consideration of the loss the estate has suffered in various ways.'<sup>290</sup> The Government did not agree to this request. Its failure to ensure that the full tenths estate was retained was a fundamental breach of the Crown's fiduciary obligations. This was compounded by its failure to make up the losses by providing an equivalent in land or revenue.

The overall estate, however, was not appreciably reduced by the acquisition of uneconomic interests by the Maori Trustee under the 1967 legislation. This was because the number of shares was very small (just under 0.5 per cent of the total shares), but a significant number of beneficiaries thus lost their interests (24%).<sup>291</sup> The administration of ever-fragmenting and smaller interests was certainly a bureaucratic nightmare and the people concerned were receiving derisory returns. One positive aspect of the Government's solution in 1955 was that those individuals who lost their ownership rights would still benefit from the trust. Ultimately, however, this good intention was not carried out. The Maori Trustee disposed of

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289. *Ibid*, p 122; A Mackay, Report on Nelson and Greymouth Native Reserves, 6 August 1877, AJHR, 1877, G-3A, pp 1-2

290. A Mackay, 'Report on Nelson and Greymouth Native Reserves', 6 August 1877, AJHR, 1877, G-3A, p 2

291. Of 1441 owners, 348 were removed from the list of owners. They had owned 734,632 of 151,000 shares: Mitchell and Mitchell, 'What Wakatu', p 15.

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their interests under the 1967 Act and the rights of a quarter of the owners (as at 1970) were forever lost.

Even so, a relatively substantial estate was returned to the Wakatu Incorporation in the 1970s, which has had significant commercial success in recent decades. With a base of around 3000 acres, Mugwi McDonald explained that the incorporation has managed to turn an estate worth \$11 million in 1977 to one worth \$140 million in 2003.<sup>292</sup> Rore Stafford put to us, 'If this is what they have been able to do with a small portion of what they were entitled to what could they do with the all?'<sup>293</sup> Similarly, Nohorua Kotua suggested in his evidence for Ngati Koata:

When you live in a culture where you are very much the minority, you either blend or you hide. If we were living on Rangitoto with the rest of our iwi then there would not have been an issue. If we'd owned a Tenth part of Nelson, then it would not have been an issue either. It would have given us our economic base on which to support some sort of economic development for ourselves, and we would have been able to afford some of the things that others had, and participated and contributed more to society.<sup>294</sup>

The Crown's failure to reserve the promised full tenth or to deliver on the Treaty promise of mutual benefit has had lasting prejudicial effects.

We find that:

- ▶ The Spain award and associated deeds of release established a contractual obligation for the Crown to ensure that one-tenth of the total area comprised in the settlement was reserved for the endowment estate. In failing to secure approximately 17, 200 acres in tenths reserves, the Crown breached its fiduciary obligations and the duties of active protection and of acting in good faith. Further, the Crown breached the principles of reciprocity and mutual benefit, because its failure to reserve a full tenth (plus additional reserves) prevented it from fulfilling the company's and Normanby's intention – that reserves would be sufficient for long-term prosperity and thus the true payment for the rest of the land. All Te Tau Ihu iwi with interests in the company lands were prejudiced by these breaches.
- ▶ In implementing the Spain award for settlers but not for Maori, the Crown breached the Treaty principle of equity, which required it to act fairly as between Maori and settlers.
- ▶ The endowment estate as actually created was already insufficient for the needs of Te Tau Ihu Maori, and the Crown failed to ensure that this estate would not then be

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292. Mugwi MacDonald, brief of evidence on behalf of Wai 56 claimants, not dated (doc 01), p 8. According to the Mitchells, 2994 acres of tenths land was transferred to the incorporation, but there was also other land which had never been part of that trust: Mitchell and Mitchell, 'What Wakatu', p 20.

293. R Stafford, brief of evidence, p 15

294. Nohorua Te Kotua, brief of evidence on behalf of Ngati Koata, 1 February 2001 (doc B14), para 29

subject to alienation. The Crown approved the loss of almost half the township sections (47%), and failed to ensure adequate consultation or consent with respect to subsequent alienations:

- the 1853 grant at Whakarewa to the Anglican Church;
- the transferral of endowment reserves into the occupation reserves;
- the exchange of the Golden Bay reserve;
- public works takings; and
- alienations under the 1967 legislation.

This breached the article 2 guarantee that lands would be retained by Maori for as long as they wished to retain them, and the duty of active protection. The result was that the estate was reduced from 5100 acres to 2995 acres, and that even that remainder was no longer solely owned by Maori. All Te Tau Ihu iwi with interests in the tenths were prejudiced by this outcome.

- ▶ The arbitrary reduction of the township reserves in 1847, without consultation or obtaining the consent of Te Tau Ihu Maori, breached the article 2 guarantee, the duty of active protection, the duty to consult, and the principle of equity.
- ▶ In transferring endowment reserves into occupation reserves without adequate consultation, the Crown took from one group of Maori to meet obligations to another, and then failed to fully meet obligations to either group. This breached the Treaty principle of equal treatment and the Crown's duties of active protection and of acting with scrupulous fairness and good faith.
- ▶ In general, the taking of reserved land for public works was especially contrary to Treaty principles. Not only did it further reduce what was supposed to be an inalienable estate, but, from the evidence available to us, many of the takings were clearly not essential to the national interest. We agree with the claimants that in most cases, if there was a genuine and essential public need for a particular piece of land in the tenths estate, the Crown could have ensured that only the leasehold was acquired. The claimants do not challenge certain takings.<sup>295</sup> For the rest, we find the Crown to have breached the plain guarantees of article 2, as well as the principles of partnership and active protection. In particular, the failure to consult the beneficial owners about the land to be taken, to give them an opportunity to object, or to involve them in any way, was in breach of these principles. It was also in breach of the principle of equity, as the opportunity to be consulted and to make objections was accorded most other landowners. It is true that the Maori Trustee was consulted and had the opportunity to object, but the trustee did not then consult or inform the beneficial owners. As a result, taonga like Matangi Awhea, of great significance to the claimants in our inquiry, were taken. Owing to discrepancies in the information provided by the claimants, we

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295. See Mitchell and Mitchell, 'Report 9C', pp130–165

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are not in a position to arrive at a definitive list of all takings and the total acreage involved.<sup>296</sup>

- ▶ The process of acquiring uneconomic interests was originally intended to protect the interests of Maori owners, by providing a somewhat draconian solution to fragmentation while ensuring that those who lost their interests remained beneficiaries of the trust. This intention was not carried out and the interest of those who lost ownership rights was not properly protected, with the result that they ceased to have either ownership rights or benefit from the trust. The interests of a quarter of owners as at 1970 were effectively confiscated in this way. The compulsory acquisitions were in breach of the plain meaning of article 2 of the Treaty. The failure to follow through on the protection of those who lost their interests was in breach of the principle of active protection. Also, by the time legislation was passed to return surviving shares to their former owners (1987), all such Nelson shares had been sold. Those who had lost them could not be restored to a proportionate share of the estate. This compounded the original Treaty breach and the prejudice to those unfairly ousted from ownership of the estate. We are not in a position to say exactly how many beneficiaries were affected in total.
- ▶ Although some individuals agreed to sell their shares under the 1967 Act, we agree with the Sheehan commission that they had long been effectively alienated from their lands, were getting very inadequate returns, had no better options, and did so against the wishes of the majority. Such alienations were therefore in breach of article 2 guarantees and the principles of partnership, reciprocity, active protection, and equal treatment. The legislation that allowed this ancestral land to be alienated by individuals was enacted without consulting the owners or obtaining their consent. This also was in breach of Treaty principles.

**(4) Clarifying the status and beneficial ownership of the tenths estate**

The New Zealand Company's intentions and ideas about the purposes and extent of the tenths scheme were poorly formulated and subject to change. Assuming responsibility for the tenths in November 1840, the Crown's views of how the scheme would work evolved over the early 1840s. These views were informed by the needs of the New Zealand Company in its attempts to establish the settlement at Nelson. Thus, as we have discussed in chapter 4, the Crown did not intervene in the company survey at Motueka in which Te Maatu was included in the sections available for ballot. This inclusion, along with confusion around the distinction between reserves for occupation and reserves for endowment created enduring problems for scheme. As discussed above, the Crown also determined the size of the estate in the 1840s, reaching its final, restrictive allocation in 1848.

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296. There are unresolved discrepancies in the evidence of Hilary Mitchell and Maui John Mitchell ('Report 9C; 'Deficits, Thefts and Land Losses') and the closing submissions of the Wakatu Incorporation.

During the first years of administration, the trust's endowment policy was developed. Decisions to lease most of the reserves to fund the building of hostels, a church, a school, and a hospital appear to have been made with minimal consultation with Te Tau Ihu Maori.

As we noted in chapter 5, the 1848 Crown grant was deemed to have extinguished native title over all occupation and tenths reserves, which were vested in the Crown. The tenths estate was not actually legally vested in the Crown until the enactment of the Native Reserves Act 1856, under which native title was extinguished and the Governor empowered to appoint commissioners to administer the estate for the benefit of Maori. The Crown devolved its responsibility for the tenths to the Public Trust office via the Native Reserves Act 1882 and this Act also finally defined the means for identifying the beneficial owners of the reserves. These Acts also made various provisions for the lease and sale of reserves.

There was also a gradual evolution of the definition of the trust's role as distributor of benefits. Considering this question, the Sheehan commission concluded that the 1856 definition of benefit was 'too vague and too difficult to interpret'. The 1873 Act clarified the definition, and this was consolidated by the Native Reserves Act 1882, which defined the benefit as the 'physical, social, moral or pecuniary benefit of the beneficiaries', including medical expenses.<sup>297</sup>

There was very little consultation with Te Tau Ihu Maori throughout this lengthy period of clarifying the status of the reserves. The Crown assumed responsibility for the reserves in 1840 and thereafter it dictated how this responsibility would be met. In negotiations over the deeds of release, some Te Tau Ihu Maori had given their consent to Spain's award but this by no means equated to full discussion about the future of the reserves. The Crown assumed trustee status without full consultation and native title was extinguished without first determining who would be affected by this extinguishment. There was no provision for determining beneficial ownership of the estate until 1882, at which date the Crown decided that the Native Land Court was the best mechanism for defining ownership. This decision, along with the transferral of the estate to the Public Trustee, was made without consultation with Te Tau Ihu Maori. This would probably not have been the case if the 1873 Act's provisions for Maori involvement in the trust's administration had been implemented.

Prior to the 1970s, the beneficial owners were not consulted about the ongoing existence of the trust. As counsel for Ngati Rarua pointed out, the tenths reserves were vested in the trust of the Crown without the agreement of Te Tau Ihu Maori. This was a clear breach of the guarantee under the Treaty for Maori to retain their land for as long as they wished.

The beneficiaries of the estate were not even identified until 1892, some 50 years after the trust had been established. The claimants were roundly critical of this omission, and Crown counsel agreed that the beneficiaries of the tenths estate had not been identified in a 'timely' manner.

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297. AJHR, 1975, H-3, p 19

Prior to the definition of beneficiaries, the trust was ostensibly operating for the benefit of all Te Tau Ihu Maori, regardless of whether they, or their parents and grandparents, had been involved in the New Zealand Company transaction. It could be argued that this implies that the underlying assumption of the trust was that all Te Tau Ihu Maori were affected by the transaction and subsequent grant to the New Zealand Company. However, a more plausible explanation is that it was symptomatic of the Crown's failure to clarify the terms of the trust. We agree with Te Atiawa's submission that the Crown thereby failed in its obligations as trustee. This accords with the conclusion of the Whanganui a Tara Tribunal that the failure to ascertain beneficiaries was a 'significant breach of the Crown's trusteeship responsibility'.<sup>298</sup>

Leaving aside for now the question of whether or not the Native Land Court was correct in its definition of beneficiaries (or whether the Native Land Court was the appropriate body to make such a determination), the failure to attempt this identification prior to 1892 was an omission that fundamentally affected the way in which the trust operated. Effectively, the nature of the trust was not finalised until this definition of beneficial owners, half a century after the trust had been created. The Sheehan commission characterised this definition of beneficiaries as 'The final act necessary to complete the Trusts'.<sup>299</sup> As far as those who were identified as beneficiaries were concerned, they were prejudiced by this omission through not exclusively receiving the benefits of the trust prior to 1892.

We find that:

- ▶ The Crown failed to consult with the beneficial owners about the nature and status of the tenths trust. This breached the Treaty duties of acting in good faith and consultation, and the principles of partnership and active protection.
- ▶ The ongoing lack of clarity about the status of the reserves, which extended beyond the enactment of the Native Reserves Act 1856, was a breach of the Crown's fiduciary obligations as trustee.
- ▶ The failure to obtain full and free consent from beneficial owners for their land to be vested in the Crown was also in breach of the Crown's responsibilities under the Treaty. The article 2 guarantee of tino rangatiratanga was thus set aside, and the principles of partnership, active protection, and reciprocity were breached.
- ▶ The Crown failed to identify (or to provide for Maori to identify) the beneficiaries in a timely manner and thus ensure that the benefits of the trust went exclusively to them before 1892. The Crown thereby breached its fiduciary obligations as trustee and its responsibility under the Treaty to actively protect the interests of the beneficiaries.
- ▶ All Te Tau Ihu iwi with interests in the lands granted to the company were prejudiced by the loss of full ownership and control of the tenths estate.

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298. Waitangi Tribunal, *Whanganui a Tara*, pp 313–314

299. AJHR, 1975, H-3, p 338

**(5) Was the tenths estate mismanaged?**

During the first years of the trust's existence, there were a number of changes in the administration. Between 1845 and 1848, there was no resident agent in Te Tau Ihu, decisions resting with Governor Grey during this period. The initiatives of the early 1840s for leases and services for Maori in Nelson township stalled and suburban reserves remained unleased. Local administration of the trust was reinstated with the establishment of a board of management in 1848, which was comprised entirely of Europeans. From this date, the trust's finances improved as the number of leases increased.

The board and its successors during the 1850s and 1860s were sympathetic to requests from Motueka Maori for more occupation land and more control over that land. In 1854, Richmond also recommended that Maori should be represented on the board administering the trust. Richmond suggested this would be a means for the beneficiaries to find out what the trust was doing, to have a voice in how the funds were spent and to contribute to ideas about the objects of the trust. There was some increase in occupation land but the Crown resisted suggestions for a greater role for Maori in the administration of tenths and control over the occupation land, although this was clearly considered possible in the circumstances of the time.

Alexander Mackay appears to have been a diligent administrator of the trust's estate but he was more paternalistic than his predecessors, resisting Maori involvement in the administration of the trust. Mackay's tenure set the basic pattern for administration by the Public Trustee and the Native Trustee.

The record of trust administration indicates that there were periods of laxity, particularly prior to 1848, but we would not go so far as to characterise this as mismanagement. It was not unreasonable given the context in which the trust was operating at the time. The slow start to the trust's operations should be considered in the context of the slow start to the Nelson settlement in general.

In our view, the main issue with the trust's administration was the lack of consultation with, and involvement of, Maori. Te Tau Ihu Maori were not involved in the inception of the trust and had little input to its early establishment, barring the agreement that Matangi Awhea should be their occupation site in Nelson. They had little option but to agree to Spain's proposal for tenths but then were not consulted on the arbitrary reduction of them in the town and rural reserves, and through Grey's grant of 1848. Similarly, there was some consultation with respect to the Whakarewa grant but this consultation was neither extensive nor comprehensive.

Consultation was apparently more extensive from the late 1840s through to the 1860s but this did not result in any changes in the administration. In fact, recommendations for the transference of ownership of the Motueka occupation reserves and for Maori involvement in administration of the tenths estate were not acted upon. Richmond's suggestion in 1854 for Maori participation in the administration of the trust pointed to standards which the

Crown then failed to meet. The Crown's paternalistic approach was embodied in Mackay's attitude to Maori involvement and the non-implementation of the Native Reserves Act 1873.

It would be a mistake to assume that the repeal of this Act and the transfer of the reserves to the Public Trustee was the only alternative available to the Government in the 1880s. The Maori members of Parliament made it clear that active protection required the inalienability of the reserved lands, but that the Maori owners must consent to the new regime, and be fully involved in its decision-making. The Government's response in 1882 – token (non-elected) representation on the Public Trust board – was totally inadequate. Similarly, as we have noted, Maori owners' administration of their own funds according to their own priorities was permitted to iwi trust boards elsewhere in the 1920s, the decade in which the Native Trustee was set up. Even so, the Native and Maori Trustee legislation did not provide for the involvement of Maori owners in the management of their own lands and rental income. The Native Trustee did consult owners on some matters in the 1920s, and he resisted lessees' pressure to freehold as a result of that consultation, but the consultation was not made institutional and was discontinued after 1930.

We agree with Ms Fraser's conclusion that, although many who were involved in administering the reserves were well intentioned, their administration was never ideal and was sometimes not adequate. Ms Fraser identifies the lack of Maori control as the underlying problem, as was recognised by the Sheehan commission in 1975.<sup>300</sup> This also accords with the conclusion of previous Tribunals for Ngai Tahu, Taranaki, and Te Whanganui a Tara.<sup>301</sup> The Whanganui a Tara report states that the Crown was obliged under the Treaty of Waitangi to ensure that the administrators of the trust consulted with its Maori beneficiaries.<sup>302</sup> We fully endorse this position. In evidence for the Wakatu Incorporation, Paul Morgan emphasised the impact this lack of control has had on the beneficial owners of the tenths estate. Morgan stated that 'the fact that our people did not have control, use and occupation of those lands for more than 140 years, has had a dramatic impact on them and clearly has been a significant loss to them'.<sup>303</sup>

Consultation with Maori reached its nadir with the transfer of authority to the Public Trustee and it was during the Public Trustee's administration that perpetual leasing was introduced as the predominant form of leases of the reserves. Perpetual leasing permanently tied the land into leasing arrangements. Perpetual leasing may well have been a common arrangement at the time, and an arrangement that had a sound economic rationale, but the failure to consult with beneficiaries about such a fundamental change to the administration

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300. Fraser, 'Nelson Tenth's', pp174–175

301. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), pp 273–274; Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 3, p 789; Waitangi Tribunal, *Whanganui a Tara*, p 313

302. Waitangi Tribunal, *Whanganui a Tara*, p 311

303. Paul Morgan, oral evidence, thirteenth hearing, 11–13 June 2003 (transcript 4.13, p 113)

of their estate was a serious omission. Also, it is evident from the Sheehan commission's report that other kinds of long leases were possible which gave sufficient security for lessees; there was no true need to make them perpetually renewable. We agree with the commission's finding that:

(iii) Perpetually renewable leases may possibly be appropriate for the Crown or a municipal corporation to grant because these are immortal legal entities and the revenues received are a very minor part of their total income. This, however, is by no means true of the Maori beneficial owners of reserved land who endure the uncertainties of human life and whose revenues are derived in the main from the labour of their hands.

(iv) To secure the maximal use and development of lands, even rural lands, the security offered by the perpetual right of renewal is by no means necessary. It gives a degree of security curiously incongruous with our mortality and one that endures not only through the lessee's life but the lifetime of his descendants from generation to generation. While extending certain advantages to children yet unborn it imposes serious disadvantages on the living, namely the Maori beneficial owners whom the Maori Trustee represents.<sup>304</sup>

In Britain, perpetual leases were abolished in the 1920s because they were a contradiction in terms – a perpetual lease was not actually a lease any more. During its inquiry in 1975, the Sheehan commission noted a 'general feeling' among Maori witnesses that: 'these lands are forever removed from the control, use, or occupancy of the beneficial owners. For some beneficial owners this destroyed any concept of the lands being regarded as ancestral lands.'<sup>305</sup>

In 1913, a royal commission established to inquire into the workings of the Public Trust recommended that a native trust be established, with powers to assist Maori owners with farming and to have the reserves worked as farms instead of leasing them. The object was to give 'effect to a policy of helping the Native to advance.'<sup>306</sup> It was already too late for this, however, when the Native Trust was set up in the 1920s. Jellicoe reported in 1929 that apart from 138 acres of occupation land at Motueka, all the tenths lands were under perpetual leases.<sup>307</sup>

Decisions to enter into perpetually renewable leases were not ultimately the individual decisions of the Public or Maori Trustees. The decision to make leases perpetual, and the kinds of terms that the trustees were allowed to negotiate, was made and renewed by Parliament in various statutes from 1887. We note in this respect the Ngai Tahu Tribunal's comment that legislative provisions for perpetual leasing were imposed without consultation.

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304. AJHR, 1975, H-3, pp 64–65

305. *Ibid*, p 62

306. AJHR, 1913, B-9A, pp 18–19

307. RL Jellicoe, 'Report on Native Reserves in Wellington and Nelson under the Control of the Native Trustee', 26 March 1929, AJHR, 1929, G-1, p 42

We agree with that Tribunal that the Westland and Nelson Native Reserves Act 1887 was inconsistent with the Crown's Treaty obligations. The *Ngai Tahu Report* states that 'The Crown's simple duty to its Treaty partner was to protect the land until such time as effective management and control could be transferred back to Maori.'<sup>308</sup> Instead, the Crown acted as though this was Crown (and lessees') property in perpetuity. Also, as we discussed above, the Crown acted without consent but it did not act in ignorance. The owners' contrary wishes were clearly reported to Parliament, but their demands to resume lands at the expiration of leases, to consent to all renewals, and to have independent authority over their reserves, were rejected.

Then, in the post-Second World War period, the Crown failed to ensure that the perpetual leasing regime was resulting in the best possible return for the estate. Rents were based on hopelessly outdated valuations, a situation recognised by beneficial owners and lessees alike in their evidence to the Sheehan commission. We discuss the 2002 settlement that partly redressed this grievance in the final section of this chapter.

Both the Sheehan commission and the Ngai Tahu Tribunal felt that criticism of this regime should be targeted at the Crown and not the Maori Trustee. The problem, in the view of both the 1975 and 1991 inquiries, was the restrictive legislation in which the Maori Trustee operated. The Ngai Tahu Tribunal found that the Westland and Nelson Native Reserves Act 1887, the Maori Reserved Land Act 1955, and the Maori Affairs Amendment Act 1967 all clearly breached article 2 of the Treaty.<sup>309</sup> We also agree with the Te Whanganui a Tara Tribunal's finding with respect to the 1967 legislation. That Tribunal found that the failure to ensure consultation before enacting the legislation, the lack of a requirement for the trustee to consult with beneficial owners before selling, and the failure to give beneficiaries first priority to acquire any such land, breached the guarantee under article 2 for rangatiratanga and to hold onto their land as long as they wished.<sup>310</sup>

A lack of consultation and control also appears to have been associated with the public works takings involving Trust land, as we found above.

We find that:

- ▶ We agree with the Crown that many of the trust's administrators were conscientious and well-intentioned, that they did preserve a valuable asset which has since been returned to Maori control, and that Te Tau Ihu Maori did receive some benefits from the trust.
- ▶ Nonetheless, the Crown's failure to ensure adequate consultation with beneficiaries, or enable their involvement in the administration of the trust, was a significant omission. The Crown breached its obligations under the Treaty to provide for tino rangatiratanga, to act in partnership with Maori, to consult them on matters fundamental to

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308. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 3, p 782

309. *Ibid*, pp 788-789

310. Waitangi Tribunal, *Whanganui a Tara*, p 401

their interests, and to actively protect their interests. We agree with the claimants that the removal from them of any voice or authority in the management of their lands was a serious breach of the Treaty.

- ▶ The imposition of the perpetual leasing regime, without consultation or consent, effectively resulted in the permanent alienation of the reserves. The Westland and Nelson Native Reserves Act 1887 therefore breached the guarantee in article 2 for the retention of land for as long as Maori wished. The virtual permanent alienation of this land without the free, full, and informed (or indeed any) consent of its owners was a significant violation of the Crown's obligations to its Treaty partners, and to their obvious detriment. In our view, the rationale that such leases were supposedly a good long-term bet for managing this kind of trust was not an adequate justification, and does not excuse the Crown for permitting the virtual alienation of the estate without consent. Nor did the policy provide a fair return for the owners.
- ▶ Unduly low valuations and long-term persistence of inadequate rentals were a significant feature of the trust's administration after the imposition of perpetual leases. This resulted in sustained prejudice to the beneficiaries of the trust.

**(6) Was the expenditure and distribution of trust income mismanaged?**

Issues around the expenditure and distribution of income centred on inappropriate expenditure in the first decades of the trust's operation and the Native Land Court-facilitated system of payments to individual beneficiaries in the later period.

Before considering these issues, we acknowledge the point made by Crown counsel about the benefits of the endowment fund. We agree that the endowment was clearly of material benefit to Te Tau Ihu Maori, as highlighted by a report by Alexander Mackay in 1883. Mackay stated that the trust had earned approximately £33,000 between 1857 and 1882, which was

expended in various ways for improving the general condition of the Natives interested in the land, by assisting them in their industrial pursuits, providing them with medical attendance, also education for their children, as well as aiding them in all other matters conducive to their welfare.<sup>311</sup>

However, and as Mackay noted on several occasions, the fund was sometimes diverted on costs that would otherwise have been met by the Government. Mackay's predecessor, Richmond was also critical of the use of the endowment fund for medical and interpretation expenses, costs that he argued the Government should have met. Claimant counsel argued that trust funds were at times improperly used to meet Government responsibilities.

Although it is difficult to quantify or fully assess the extent to which the fund was used to pay for services that were more properly the responsibility of the general government, this

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<sup>311</sup>. AJHR, 1883, G-7, p 2

does seem to have been a feature of the trust's spending. The fund was a substantial boost to the minimal Government expenditure on Maori health, education, and welfare during this period and therefore welcome to Te Tau Ihu Maori. Nevertheless, it should not have been used to relieve the taxpayer and replace Government spending. We will return to this issue, and make more detailed findings on it, in the following chapter.

Mr Walz's assessment of spending during the 1870s also indicates that a significant proportion of the rental income was diverted into the costs of administering the estate. Counsel for Ngati Tama suggested that there was evidence of improper spending and mismanagement on the part of the trust's administration. We would need to have further information on relative spending throughout the history of the trust, and comparative information on the costs of administering such funds, to be in a position to reach conclusions or findings on this.

The evidence is clearer with respect to the individualised payment of benefits from the 1890s onwards. After the definition of beneficial ownership in 1892, a substantial portion of the endowment fund was disbursed directly to individual beneficiaries. Following Native Land Court practice, each individual on the list of beneficiaries received separate payments. There was no facility to arrange these interests in a corporate manner, with benefits going to iwi bodies. Succession followed the Native Land Court rules, whereby interests were divided amongst all the children. As a result, shareholding became increasingly fragmented over time. It is clear that, from at least the mid-twentieth century, the vast majority of individual shareholders were receiving insubstantial payments. This was accentuated in the post-war period by the 21-year time lag between valuations, which meant that rents were based on outdated valuations. Many claimants shared their experiences with us of how little use the 'minuscule' payments were to Te Tau Ihu whanau in often precarious circumstances.

Our discussion of the impact of the Native Land Court's system of determination of title and succession in chapters 7 and 8 is equally applicable to the tenths. Shares were individualised and became extremely fractional over time through succession. Interests became increasingly uneconomic and owners were more and more unconnected with their land. We agree with Dr Mitchell's criticism:

Those lands should have belonged to the collective of the tribe or tribes concerned. And therefore you would never be in a situation of uneconomic interests, because there would never have been that individualisation and then the partitioning and fragmentation that successive generations bring you to. It would have always been owned by the collective, who would have had responsibilities, as rangatira, to look after the people.<sup>312</sup>

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312. Dr Maui John Mitchell, under cross-examination, thirteenth hearing, 11-13 June 2003 (transcript 4.13, p 73)

As the Crown has conceded, the court's processes 'contribute[d] to the alienation of land remaining in Maori hands.'<sup>313</sup> In the case of the tenths, legislation of 1955 and 1967 paved the way for such alienations.

Under the Maori Affairs Act 1967, the Maori Trustee was empowered to acquire shares deemed 'uneconomic'. This was applied in the case of at least 348 individuals' interests in the tenths estate. The Act also enabled the trustee to arrange the sale of reserves to lessees. Beneficiaries receiving minimal income from an estate they no longer felt connected with were obviously more likely to agree to the sale of their interests and, thus, a total of 1308 acres were alienated through this provision over the 1967–75 period. We agree with Dr and Mrs Mitchell that there were aspects to this process which often made it one in which there was simply no better option, rather than free and willing sales. The resultant loss of interests is now puzzling and distressing to many Te Tau Ihu whanau. On the other hand, the Maori Trustee at first wanted to ensure that those owners whose interests were so small as to be uneconomic, receiving virtually no return from their land, would still benefit from the trust after they lost their ownership rights.<sup>314</sup> As found above, this intention was not carried out – and those who were receiving very little (but still had mana from owning ancestral land) lost out in both respects.

Our critique of the legislative basis underpinning individualisation and succession, expressed in chapter 8, also applies in the case of the tenths trust. In imposing this legislation and failing to protect the trust from the effects of this legislation the Crown failed to fulfil the terms of the Treaty. This failure was compounded by the Crown's failure to prevent the alienation of the interests of beneficial owners via the 1967 legislation, or to provide for a true and meaningful expression of their tino rangatiratanga in consenting to such alienations. We note also that in the very decade that the Native Trustee was established (the 1920s), the Government agreed to iwi trust boards elsewhere administering funds and making allocations of their own choosing on a collective basis. It was clearly not impossible, therefore, for the same to have been done for the beneficial owners of the tenths from at least that period.

We find that:

- ▶ As discussed in more detail in chapter 10, although the endowment fund was of material benefit for Te Tau Ihu Maori, some trust income was used as a replacement, rather than a supplement, to Government spending on health, education, and other welfare purposes. In response to a complaint about the use of the fund to pay for medical officer salaries, the Crown refunded some moneys in 1879, but this was not full recompense for the frequent use of the fund as a general government fund. The Crown

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313. Crown counsel, closing submissions, p 48

314. It was the Maori Trustee who recommended this policy, which was then enacted as part of the Maori Reserved Land Act 1955.

thereby failed to actively protect the interests of the beneficiaries, and breached the Treaty principle of equity (acting fairly as between its citizens), when it relieved its own purse at the expense of Te Tau Ihu Maori.

- ▶ In chapter 8, we concluded that the Native Land Court system of individualisation made any kind of communal management of the estate impossible and that the court's rules of succession resulted in increasing fractionation of interests with each passing generation. These factors also underlay the alienation of a significant portion of the tenths estate under the Maori Affairs Amendment Act 1967. Individuals should never have been put in the position of being able to alienate pieces of an inalienable trust made for the benefit of those bodies – iwi – which transacted with the company. The Crown's failure to prevent the Native Land Court system from having this impact on the tenths estate breached the principles of partnership and active protection, and clearly failed to provide for the tino rangatiratanga of the iwi concerned. Also, its failure to provide for iwi to manage the allocation of the funds, and to use the money for collective purposes instead of individual payments if they so wished, was a further breach of Treaty principles.

***(7) The inclusion and administration of the occupation reserves***

Claimant and Crown counsel agreed that the occupation reserves should not have been included in the tenths estate.

Maori with cultivations at Te Maatu were never compensated for the inclusion of their land in the New Zealand Company allocations in 1842. Spain allocated part of the trust estate to Maori residents of Motueka and Moutere, an allocation that was added to on several occasions over the next few decades, but this land remained part of the trust estate. In the early 1860s, the commissioners of native reserves suggested granting the occupation land to Motueka Maori, a recommendation supported by James Mackay, who remarked that the reserves were 'nominally theirs' and yet they could not 'exercise the right of property over them'. Clearly, this was a feasible option at the time but it was the opinion of James' cousin that prevailed. In 1865, Alexander Mackay stated that residents at Motueka had 'been allowed to occupy some of the finest land' in the trust's estate but that, when the residents either passed away or left the district, 'the land will revert to the Trust and become available to let'. Motueka Maori consistently sought full control and authority over these reserves but the Crown refused to release the land from the trust.

The population at Motueka did decrease over time, a decline that Ngati Rarua and Te Atiawa attributed to the inadequacy of the reserves. Various adjustments over the 1840s, 1850s, and 1860s increased the acreage to over 1200 acres. However, this was insufficient to sustain the Motueka Maori population. The claimants argued that the inadequacy of these

reserves contributed to the substantial decline in the Motueka population, both through out-migration and high mortality. We also note Hunter's evidence with respect to the poor quality of the land, and Motueka Maori efforts to secure the return of Whakarewa land, which were both sustained and fruitless until 1993. On these bases, it seems reasonable to accept Ngati Rarua and Te Atiawa submissions that the occupation reserves were inadequate.

Contrary to the wishes of Motueka Maori, the trust administration assumed greater control over the occupation land from the turn of the twentieth century. As with the endowment estate, the Native Land Court defined beneficial ownership of the occupation reserves. The Native Land Court's definition of ownership in 1901 significantly circumscribed the extent of land under direct control of Motueka Maori. Of the 935 acres identified as occupation reserves, only 222 acres were allocated for the use and occupation of residents. Residents were not permitted to lease this land to outsiders. The Public Trustee managed perpetual leases to Europeans of the rest of the estate. Te Atiawa counsel's claim that Maori were excluded from these leases is supported by the evidence.

The Public Trustee distributed the rental income from these leases to individuals in accordance with the Native Land Court's definition of beneficial ownership. The evidence we received on the Public Trustee's assumption of control indicates that Motueka Maori were informed of this change rather than consulted about its possibility. Dr and Mrs Mitchell and Mr Walzl trace unsuccessful efforts during the twentieth century to secure control over the occupied tenths and protests about the perpetual leases, which involved an increasing proportion of the estate. By 1956, the resident population of the occupied tenths was reduced to five whanau living on less than 50 acres.

This residual occupation land was finally vested in whanau from 1957 onwards. However, most of the occupation reserves remained vested in trust and perpetually leased to Europeans. As with the general trust estate, the Native Land Court system of succession resulted in an exponential increase in beneficial owners: 2173 individuals by 1956. Our earlier comments on the impact of this system also apply to the occupation reserves.

Submissions from Ngati Koata and Ngati Tama suggest that the wrongful inclusion of occupation land in the grant to the New Zealand Company and the failure to allocate them reserves within the estate meant they were excluded from participation in the developing Nelson–Motueka economy. We agree that they were only minimally involved in the allocation of occupation reserves but we do not agree that they were excluded altogether. Evidence with respect to Thompson's selection of occupation reserves in the township suggests that Ngati Koata and Ngati Tama's interests were taken into account in this instance.

Ngati Tama did in fact have interests in the occupation reserves. 200 acres of occupied tenths were specifically set aside for Ngati Tama in 1865 on the basis of James Mackay's recommendation that sections 144–147 should be given to Ngati Tama residents in Motueka.

In recommending the allocation, Mackay stated that these Ngati Tama people ‘though near relations of the late chief Ngapiko have no land in the District.’<sup>315</sup> The allocation was recompense for having lost land at Whakarewa. According to Alexander Mackay, the Ngati Tama residents at Motueka had lived at Whakarewa ‘and considerable dissatisfaction was manifested by them being compelled to move’ following the grant to the Bishop of New Zealand.<sup>316</sup>

We find that:

- ▶ The Crown’s inclusion of occupation reserves in the trust estate, the failure to restore ownership over the occupation reserves and the failure to prevent the Public Trustee’s increasing assumption of control over these reserves from the turn of the twentieth century, was in breach of the article 2 guarantee of rangatiratanga and the duty of active protection. Ngati Rarua, Te Atiawa, and Ngati Tama were prejudicially affected by this breach.
- ▶ The occupation reserves at Motueka and Moutere were inadequate to sustain the resident Maori population. The inadequate provision of occupation reserves breached the principle of active protection.
- ▶ The Native Land Court system of individualisation made any kind of communal management of the estate impossible and the court’s rules of succession resulted in increasing fractionation of interests with each passing generation. These factors also underlay the alienation of occupation reserves under the Maori Affairs Amendment Act 1967. The Crown’s failure to provide effectively for tino rangatiratanga and to prevent the Native Land Court system from having this impact on the occupation reserves breached the principles of partnership and of active protection.

#### **(8) The Whakarewa grant**

Consultation about the Whakarewa grant does appear to have taken place with Ngati Rarua and, to a lesser extent, Te Atiawa, but it is difficult to ascertain what was agreed or consented to by the iwi. However, it is clear that the terms of consent understood by Ngati Rarua were not consistent with the terms under which the grant was made. Crown officials do not appear to have adequately defined the extent of land to be taken and terms under which it would be taken. A sizeable area of valued, quality land was taken for the Whakarewa School.<sup>317</sup> The grant encompassed more than double the 400-acre block proposed by the Reverend Tudor to be set aside for an industrial farm associated with the school. Motueka Maori were prejudicially affected by the loss of this land and the lack of adequate definition of the terms of consent following initial consultation.

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315. Assistant Native Secretary, James Mackay jnr to commissioners of native reserves, Nelson, 17 December 1862 (Mitchell and Mitchell, supporting documents, p 79)

316. Alexander Mackay, memorandum on native reserves, 3 January 1870, *Compendium*, vol 2, p 302

317. Gould, ‘New Zealand Company’, pp 125–126

The Crown argued that the grant was in keeping with the purposes of the trust. However, this overlooks the fact that the terms of the school trust did not provide the school exclusively for the beneficiaries of the tenths estate. Furthermore, and arguably more importantly, the grant involved a considerable proportion of the occupation reserves. We agree with counsel for Te Atiawa and the Georgeson whanau that the terms of the school trust were inconsistent with the tenths trust endowment on behalf of Maori vendors. In particular, the granting of the occupation reserves, albeit with some agreement on the vesting of land in the church for a school from at least three leading Ngati Rarua chiefs, lacked sufficient consultation with the broader Motueka Maori community.

We find that:

- ▶ Beneficiaries were neither fully nor adequately consulted about the Whakarewa grant. The Crown took a sizeable area of quality land from tenths and occupation reserves, it failed to ensure that those occupying the land either retained the land or were properly consulted about the grant and that the terms of consent were clearly understood by all parties. The Crown failed to ensure that local Maori were left with sufficient land for their present and reasonably foreseeable future needs and did not provide compensation to those whose occupation lands were taken.
- ▶ This failure was compounded by the earlier failure to identify the owners of the trust lands. Although there was consultation with some Motueka leaders about the occupation land, there was none at all with the owners of the endowment sections (a much wider group than just the Motueka hapu). The taking of their land without consent was a virtual confiscation in breach of the plain meaning of article 2. The Governor's view that the school would be fulfilling an objective of the trust was no mitigation for the extinguishment of ownership rights without consent.
- ▶ The Crown failed to ensure that the terms of the school trust were actually consistent with the tenths trust and for the exclusive benefit of the beneficiaries of this trust. The Crown also failed to ensure the return of land after the closure of the school (as discussed in chapter 12).
- ▶ The Crown failed to pay for the land but nonetheless granted an absolute title to the church, without sufficient safeguard to ensure the land's permanent use for (what the Governor considered to be) an object of the trust.
- ▶ Thus, the owners of the occupation sections lost their land without payment or adequate consent. The owners of the endowment sections lost their land without payment or any consent.
- ▶ The Crown thereby failed to actively protect the interests of the beneficiaries, particularly those who were resident at Motueka – including Ngati Rarua, Te Atiawa, Ngati Tama and the Georgeson whanau – in breach of the Treaty and to their obvious prejudice.

**(9) Summary**

The Crown has breached the Treaty by:

- ▶ failing to honour its commitment to reserve a full tenth for endowment purposes and other reserves for occupation and sites of special significance;
- ▶ permitting (or even carrying out) alienations from even the small quantity of land that had been reserved, thus reducing a supposedly inalienable endowment even further;
- ▶ permitting the virtual permanent alienation of the estate from Maori ownership by vesting it in itself in trust, and by legislating for perpetual leases;
- ▶ failing to provide either sufficient occupation land for Motueka communities, or alternative endowments to replace sections designated for their occupation;
- ▶ failing to give effect to the guarantee of tino rangatiratanga when it established a series of trust administrations that either did not permit consultation or, where Maori involvement was allowed by legislation, did not give effect to it, thus excluding Maori from any voice in or authority over the trust estate;
- ▶ permitting or failing to correct the problem of unduly low valuations and persistently inadequate rentals;
- ▶ failing to identify (or empower Maori to identify) the beneficiaries of the estate in a timely fashion; and
- ▶ individualising beneficial title to the estate.

These Crown actions or inactions breached the plain terms of the Treaty and its principles, to the prejudice of all Te Tau Ihu iwi with interests in the estate.

**9.4 PUBLIC, NATIVE, AND MAORI TRUSTEES: AGENTS OF THE CROWN?**

In this section, we consider whether the bodies that administered the tenths estate after 1882 were agents of the Crown. The answer to this question is important because if the reserves were managed in the period by bodies that were not agents of the Crown, the Tribunal does not have jurisdiction to consider their actions.

Prior to 1882, the Crown administered the tenths reserves on behalf of the Maori beneficial owners and as such its actions fall to be considered by the Tribunal under section 6 of the Treaty of Waitangi Act 1975. As we noted in chapter 4, the Crown assumed this responsibility from very early in its relationship with the company, arising from their November Agreement of 1840. However, in 1882 responsibility for the reserves was handed to the Public Trust under the Native Reserves Act 1882. The reserves were administered under that Act until 1920, when control was passed to the Native Trustee under Acts in 1920 and 1930 and then, from 1953, to the Maori Trustee.

Claimant counsel argue that despite this change to the administration by a trustee, the Crown was effectively in charge of the reserves, with the trustee acting as its agent. Crown

counsel submit that the Public Trustee and its successor were not Crown agents. This was also the view of the Te Whanganui a Tara Tribunal, which considered the question with respect to the Wellington tents.

Section 6 of the Treaty of Waitangi Act 1975 states:

**6. Jurisdiction of Tribunal to consider claims**—(1) Where any Maori claims that he or she, or any group of Maoris of which he or she is a member, is or is likely to be prejudicially affected—

(a) By any ordinance of the General Legislative Council of New Zealand, or any ordinance of the Provincial Legislative Council of New Munster, or any provincial ordinance, or Any Act (whether or not still in force), passed at any time on or after the 6th day of February 1840; or

(b) By any regulations, order, proclamation, notice, or other statutory instrument made, issued, or given at any time on or after the 6th day of February 1840 under any ordinance or Act referred to in paragraph (a) of this subsection; or

(c) By any policy or practice (whether or not still in force) adopted by or on behalf of the Crown; or

(d) By any act done or omitted, by or on behalf of the Crown,-

And that the ordinance or Act, or the regulations, orders, proclamation, notice, or other statutory instruments, or the policy or practice, or the act or omission, was or is inconsistent with the principles of the Treaty, he or she may submit that claim to the Tribunal under this section.

No definition of the Crown is given. The Te Whanganui a Tara Tribunal noted the Crown's submission that 'the executive or government' is covered by the word.<sup>318</sup> This is consistent with the approach of the Tribunal in its Rekohu inquiry and of Crown submissions in our inquiry.<sup>319</sup>

After 1882, as will be seen below, the trustee was a corporation sole and consequently is a legal personality distinct from the Crown. That is not, however, determinative of the matter because Crown agency is still a possibility. Section 6 of the Treaty of Waitangi Act specifically refers to acting 'on behalf' of the Crown. We received detailed submissions on this issue from both claimant and Crown counsel.

It was the view of the Te Whanganui a Tara Tribunal that the Waitangi Tribunal's jurisdiction does not extend to making findings on the actions of the Public Trustee or the Native or Maori Trustee. In the opinion of that Tribunal, findings of Treaty breach could only be made with respect to the legislative context in which these trustees operated. Administrators

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318. Waitangi Tribunal, *Whanganui a Tara*, pp 348–349

319. Crown counsel, further closing submissions, 14 May 2004 (paper 2.795), p 17

of the estate prior to 1882 were agents of the Crown in terms of the Treaty of Waitangi Act 1975 but the same could not be said of the Public Trustee or the Native Trustee.<sup>320</sup>

We turn now to a detailed examination of the legal submissions we received on this issue. Before doing so, we note that, even though this issue has been considered and ruled upon by other Tribunals, we are not prevented from considering the issue afresh where claimants raise it, and reaching our own conclusions.

#### 9.4.1 Legal submissions

##### (1) Claimant submissions

Counsel for Ngati Tama acknowledged that the Public and Native Trustees were, ‘strictly at law’, trustees but argued that ‘they are in reality performing the Crown’s responsibilities of active protection under Article Two of the Treaty’. Counsel contended that this delegated responsibility ‘makes them Crown agents in Treaty terms’. Arguing that the Te Whanganui a Tara Tribunal’s finding was based on a strict legal analysis, counsel for Ngati Tama asked us to consider the broader context in which the trustee operated.<sup>321</sup>

We also received a joint claimant submission on this issue from counsel for Ngati Koata, Ngati Rarua, and Te Atiawa. This submission was supported and adopted by counsel for Rangitane and Wakatu Incorporation. Counsel submitted that the Public Trustee and the Native and Maori Trustees *were* legal agents of the Crown by virtue of a broad application of what have become known as the ‘control’ and ‘function’ tests.<sup>322</sup> The joint submission also argues that the Crown was not able to devolve its fiduciary or equitable obligations to Maori and that the trustees therefore ‘acted as the operative arm’ in meeting these responsibilities. The trustee fulfilled this role in addition to its responsibilities as trustee for its Maori beneficiaries.<sup>323</sup> It was counsel’s submission that the legislation surrounding the trustees reflected the Crown’s conflicting goals. The Crown intended the trustees to have ‘a level of independence’ so that they could fulfil their ‘administrative and private equitable duties to the Maori beneficiaries’. However, the Crown also intended to retain control in order to fulfil its own equitable duties to Maori and to ensure ‘the financial accountability of the Trustees and the integrity of the common fund’.<sup>324</sup>

The claimant submission took issue with the Te Whanganui a Tara Tribunal’s interpretation of how ‘control’ should be tested. The Tribunal in that report adopted the analysis of Peter Hogg and his authoritative work *Liability of the Crown*. The Tribunal concluded that it was the extent of control to which the Crown is legally entitled, rather than the amount

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320. Waitangi Tribunal, *Whanganui a Tara*, pp 347–361, 377–378

321. Counsel for Ngati Tama, closing submissions, pp 73–74

322. Counsel for Ngati Koata, Ngati Rarua, and Te Atiawa, joint submission concerning status and role of Maori Trustee in Te Tau Ihu, 30 April 2004 (paper 2.789), pp 2, 29

323. *Ibid*, p 2

324. *Ibid*, pp 3–4

of control it actually exercises, that is important. In other words, *de jure* control, rather than *de facto* control. Claimant counsel referred to *Bank voor Handel en Scheepvaart NV v Administrator of Hungarian property*, relied on by Hogg, and concluded that he had adopted a 'stricter *de jure* definition of "control" than the judges themselves appear to apply'.<sup>325</sup> They suggested that we should revisit the definition of the control test in light of this, specifically, to 'explore the *de facto* aspects of the control test'.<sup>326</sup>

Notwithstanding this potential to broaden the definition of the control test, counsel contended that the trustees did meet the *de jure* test anyway. They disagreed with the Tribunal's argument in its *Te Whanganui a Tara* report that the Public Trustee was independent from Crown control under the Native Reserves Act 1882.

The *Te Whanganui a Tara* report found that the commissioners established under the Native Reserves Act 1856 were agents of the Crown whereas the Public Trustee was not. Claimant counsel therefore compared the provisions of the 1856 Act and the Public Trust Office Act 1872 with the Native Reserves Act 1882 and concluded that there was 'substantive continuity in levels of control'. Indeed, they suggested that Crown control actually increased from 1882. Counsel argued that the trustees were Crown agents because 'Despite their supposed statutory independence the Trustees did not have a substantial measure of independent discretion'. Counsel also pointed to the debates in Parliament around the 1872 legislation that emphasised the public service role of the Public Trustee. The joint claimant submission contended that there was an 'unbroken line of Crown control' over the administration of the trust estate.<sup>327</sup>

Similarly, counsel argued that the Native Trustee Act 1920 did not break this 'line of Crown control'. Counsel quoted provisions in the Act and comments by the Native Minister and by Maori member of Parliament Apirana Ngata to illustrate the relationship between the trustee and the Crown. For example, in his discussion of the trustee's financial accountability to the Government, Ngata stated that 'The Native Trustee must be regarded as a State officer. He is not an officer appointed by the Maoris; he is appointed by the Government to administer these properties just as the Public Trustee is appointed'.<sup>328</sup>

Claimant counsel traversed subsequent legislation, the Native Trustee Act 1930 and the Maori Trustee Act 1953, concluding that they also 'maintained the agency'. The Tribunal's *Te Whanganui a Tara* report concludes that the section in the 1953 Act that outlined the trustee's role 'enabled rather than controlled the Trustees'. Counsel disagreed with this interpretation, pointing to speeches in Parliament which indicated that the legislation was intended to facilitate Crown control.<sup>329</sup>

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325. Ibid, pp 6–7

326. Ibid, p 7

327. Ibid, pp 7–12

328. Counsel for Ngati Koata, Ngati Rarua, and Te Atiawa, joint submission, pp 13–14

329. Ibid, pp 14–15

The joint submission then considered the question of *de facto* control, contending that in practice, the trustees ‘did not have a substantial measure of independent discretion.’ They contended that this was demonstrated by the relationship between the Native Trust Office and Native Department. Counsel concluded that *de facto* control was retained by including the Native Trust Office ‘as a part of Government machinery thereby compromising the supposed independence of the Trustees.’<sup>330</sup>

Counsel then discussed the ‘functions’ test, disagreeing with Hogg’s assessment of its declining importance. They contended that it ‘remains good law’, noting that it had ‘appeared in judicial dicta in the higher courts of Britain, Canada and Australia as recently as 1979’. Counsel also argued that as the functions test was ‘still the predominant test for determining Crown agency’ in 1882 then it may be ‘inappropriate’ to retrospectively apply the control test to the Public Trustee.<sup>331</sup> Counsel proceeded to outline the ways in which the trustee could be viewed as fulfilling a Government function.<sup>332</sup>

The joint submission concluded that: ‘This Tribunal is able to, and must revisit the question of the existence of a common law agency relationship between the Trustees and the Crown.’<sup>333</sup>

The second part of the submission focused on the question of equitable obligations. First, counsel considered the equitable relationship between the Crown and the trustees, exploring the ‘underdeveloped, but old concept’ of public trust, which holds that there is an underlying relationship of trusteeship between public officers and the public. They cited P Finn, who states that ‘The core idea of trusteeship – that government exists to serve the interests of the people and that this has a limiting effect on what is lawfully allowable to government – has remained an undertone, if not more, in common law doctrine itself.’<sup>334</sup>

Finn states that ‘The institutions of government, the officers and agencies of government exist for the people, to serve the interests of the people and, as such, are accountable to the people.’ He contends that public officers have a dual trusteeship role because they are trustees for both the public and for their employer, the Crown.<sup>335</sup>

Counsel submitted that the position of the Public and Native or Maori Trustees was analogous. They argue that the trustees had duties to three groups: Maori beneficiaries, the Crown (which had appointed them) and the public (through the relationship between public servants and the public). Counsel submitted that, as trustees to the Crown and the public,

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330. Counsel for Ngati Koata, Ngati Rarua, and Te Atiawa, joint submission, pp 15–18

331. Ibid, pp 19–20

332. Ibid, pp 20–22

333. Ibid, p 22

334. Paul D Finn, ‘A Sovereign People, a Public Trust’, in *Essays on Law and Government*, ed Paul D Finn (Sydney: Law Book Company, 1995), vol 1, p 11 (counsel for Ngati Koata, Ngati Rarua, and Te Atiawa, joint submission, p 23)

335. Ibid, pp 22–24

the Public and Native or Maori Trustees were agents of the Crown. Counsel added that in all three roles the trustees had obligations to Maori under the Treaty of Waitangi.<sup>336</sup>

The submission then reviewed the relevant legislation to demonstrate that the trustees were consistently responsible for ‘acting in a fiduciary capacity for the benefit of Maori’. Counsel also contended that the Maori Trustee’s responsibility for discharging the Crown’s fiduciary obligations was ‘reflected in the firm positioning of the Maori Trust Office and its predecessor in the Government bureaucracy’. As such, they were agents of the Crown in terms of the Waitangi Tribunal’s jurisdiction.<sup>337</sup>

Counsel submitted that the trustees were ‘clearly established to enable the Crown to fulfil its fiduciary and equitable obligations to Maori’, obligations that the Crown could not devolve ‘onto another independent, private body’. The trustees were therefore agents of the Crown in terms of section 6 of the Treaty of Waitangi Act 1975.

Finally, the joint submission argued that, if we do not agree that they were agents, then ‘their very appointment can be seen as a mechanism by which the Crown sought to avoid their Treaty obligations.’<sup>338</sup>

## **(2) Crown submissions**

With respect to the issue of Crown agency, the Crown submitted that neither the Public Trustee nor the Native or Maori Trustee should be considered an agent of the Crown for the purposes of the Tribunal’s jurisdiction. However, Crown counsel accepted that the legislative framework in which the trustees operated was ‘a proper matter for inquiry by the Tribunal’ and that consideration of the effect of the legislation might involve some examination of the trustees’ activities.<sup>339</sup>

Crown counsel did not depart from this position following the receipt of the joint claimant submission. In further closing submissions, the Crown reiterated its view that the trustees ‘are entities distinct and independent from the Crown’ and were therefore not agents of the Crown in terms of section 6 of the Treaty of Waitangi Act.<sup>340</sup>

The Crown outlined the way that previous Tribunals had assessed the agency of various entities, including the Maori Trustee, and reiterated the definition of the Crown and its agents as employed by the Te Whanganui a Tara and various other Tribunals.<sup>341</sup> Crown counsel adopted the same position as the Te Whanganui a Tara Tribunal, accepting that the activities of the commissioners of native reserves from 1856 to 1882 ‘can be said to be actions “by or on behalf of” the Crown for the purposes of s 6(1)’ of the Treaty of Waitangi

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336. Ibid, pp 24–25

337. Ibid, pp 25–28

338. Ibid, pp 28–29

339. Crown counsel, closing submissions, pp 82–83

340. Crown counsel, further closing submissions, pp 10–11

341. Ibid, pp 11–19

## 9.4.1(2)

Act. Crown counsel maintained that the Public and Maori Trustees were not agents of the Crown because they had been ‘established as a corporation sole with perpetual succession and a seal of office.’<sup>342</sup> This ‘can be read as conferring upon the Maori Trustee a status that is separate and distinct from the Crown.’

Counsel pointed to the definition of ‘public authority’ given by the Stamp and Cheque Duties Act 1971, which extended to corporations sole, such as the Public Trustee or Maori Trustee, if they were administering property on behalf of the Crown.<sup>343</sup> Other legislation makes a distinction between the Maori Trustee and the Maori Trust Office, which supports the functioning of the trustee. The Maori Trustee Act 1953 defines the Maori Trust Office as an office of the Public Service and all staff members of Te Puni Kokiri are automatically officers of the Maori Trust Office.<sup>344</sup>

Crown counsel notes that, in the Ombudsmen Act 1975, the Maori Trust Office is included in a schedule of ‘Government Departments’ while the Maori Trustee is ‘listed in another section which contains bodies which are generally not regarded as “the Crown”’. Similarly the Maori Trust Office is subject to the Official Information Act 1982 but the Maori Trustee and Public Trustee are not. Neither the Maori Trustee nor the Maori Trust Office is included in the list of Crown entities given by the Public Finance Act 1989 and the Act states that a ‘Department’ of the Government ‘does not include a body corporate or other legal entity that has the power to contract.’<sup>345</sup>

Counsel notes that the Maori Trustee Act 1953 states that the Maori Trustee and Deputy Maori Trustee ‘shall be officers of Te Puni Kokiri’ and are appointed by the chief executive of Te Puni Kokiri. Counsel submit that the fact that the Maori Trustee is a Crown appointment does not affect its independent status. The trustee, ‘although closely linked with Te Puni Kokiri . . . is not subject to formal control by a government department and is not subject to the direction of a Minister.’<sup>346</sup> Counsel cites Professor Rickett to support his conclusion that ‘the Maori Trustee does not cease to be independent of the Crown even if he is directly responsible to the government in another capacity’. The Crown submits that ‘there is no reason in law why the relationship between the function of these entities should compromise the independence of the Trustee.’<sup>347</sup>

In summary, Crown counsel reiterates his view that the ‘the correct approach is that taken by the Ngai Tahu and Wellington Tribunals where findings were restricted to the legislation and policy controlling the leasing regime.’<sup>348</sup>

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342. Crown counsel, further closing submissions, pp 19–20

343. *Ibid*, p 20

344. *Ibid*, pp 23–24

345. *Ibid*, pp 21–22

346. *Ibid*, p 22

347. *Ibid*, pp 23–24

348. *Ibid*, p 25

### 9.4.2 Tribunal discussion and findings

As we see it, the key issue is whether the bodies that administered the tenths estate after 1882 were agents of the Crown. To answer this question we must consider the tests used to determine what constitutes an agent of the Crown. This will involve consideration of the function and control tests and how the *de jure* and *de facto* tests apply. We then need to consider whether the agency test is satisfied for each of the bodies involved, namely: the Public Trustee from 1882 to 1920; the Native Trustee from 1920 to 1953; and the Maori Trustee from 1953.

If the test determines that the bodies administering the tenths estate are agents of the Crown, our jurisdiction applies and we can consider if the actions of those bodies amount to a breach of the Treaty. If they are not agents of the Crown, we are limited to the legislative framework within which the trustees operated, and also the responsibilities of the Crown in respect to the activities of the trustees when performing the Crown's work.

### 9.4.3 The tests for Crown agency

#### (1) Origin of the tests

As noted above, the standard authoritative reference work on Crown agency is P W Hogg's *Liability of the Crown*.<sup>349</sup> In chapter 12, Hogg states: 'In the nineteenth century, the test that developed to determine whether a public corporation was an agent of the Crown was the "functions" test.<sup>350</sup> He provides one reference, an article by J A G Griffith, 'Public Corporations as Crown Servants'.<sup>351</sup> We have found that article useful to understand the history behind the function and control tests.

According to Griffith, the origins of the function test are confused because the first cases which raised the issue of whether individuals or corporate bodies were the Crown concerned the liability to pay a poor rate levied under an Elizabethan statute. In 1788, it was established that possessions or premises of the Crown or the public were not liable to be rated for this purpose. As Griffith points out, this meant that in the early cases the focus was as much on whether some public work with general public benefits was being carried out in premises, as whether the Crown was directly involved: 'There was therefore a tendency to regard either Crown occupation or occupation for the public, or occupation which was not beneficial [ie, making a private profit], as a sufficient reason for exemption from liability.'<sup>352</sup> These exemptions became less and less tenable as more and more public authorities were

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349. Now in its third edition: Peter W Hogg and Patrick J Monahan, *Liability of the Crown*, 3rd ed (Ontario: Thomson Canada Ltd, 2000), p 332

350. Ibid

351. J A G Griffith, 'Public Corporations as Crown Servants' (1952) 9 U Toronto LJ 169

352. Ibid

## 9.4.3(1)

established which could claim exemptions by having a general public and not-for-profit purpose.

In an 1865 decision of the House of Lords, *Mersey Docks and Harbour Board v Cameron*, three classes of bodies with a ‘public purpose’ were identified. The first were bodies which were clearly part of government, such as Government departments. The second were bodies which were not ‘strictly speaking, servants of the Sovereign,’ ‘but the purposes are all public purposes, of that kind which, by the constitution of this country, fall within the province of Government, and are committed to the Sovereign,’ so that the occupiers of local police stations, courts, judges’ lodgings and jails were *consimili casu*, that is, like cases. These two classes were not rateable, but all other public bodies (the third class) were.<sup>353</sup>

In the House of Lords’ decision, the majority restated this as a Sovereign-only test, that is, that the Sovereign was not bound by the statute of Elizabeth to pay the rate, and the test of this was public services ‘as are required and created by the government of the country, and are therefore deemed to be part of the use and service of the Crown.’<sup>354</sup>

Accordingly, at the time of the 1882 Native Reserves Act, the ‘functions test’ in England covered both bodies directly administered by the Crown and also public services of a nature similar to that:

To summarise: the courts moved in this earlier period from a position where they were prepared to exempt bodies from liability to pay the poor rate because their purposes were broadly ‘public’ to a position where exemption was only granted if the purposes were both public and governmental. But where the purposes were public and governmental the bodies were not on that account invariably regarded as Crown servants: they might only be *in consimili casu*.<sup>355</sup>

However, no attempt was made in these cases to define what purposes and functions were governmental. The quote above – ‘of that kind which, by the constitution of this country, fall within the province of Government’ – was as close as the courts got to a definition.<sup>356</sup>

After analysing other cases (in which he finds tests for what is and is not the Crown unconvincing), Griffith concludes that:

The earlier cases suggested two tests. The first is whether the purposes of the corporation are ‘governmental’; the employment of public funds is sometimes held to indicate that they are. The second is whether the Incorporation is an historical emanation of the Crown; that is, whether it performs functions previously performed by the King or his ministers. ‘Governmental’ purposes are difficult to define but seem to have been related not

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353. *Mersey Docks and Harbour Board v Cameron* (1865) 11 HLC 443

354. JAG Griffith, ‘Public Corporations as Crown Servants’ (1952) 9 U Toronto LJ 169, 173

355. *Ibid*, p178

356. *Mersey Docks and Harbour Board v Cameron* (1865) 11 HLC 443

so much to functions of government as to functions of the government. The analogy was institutional. If the argument from history does not assist . . . reference to governmental purposes is equally inconclusive. Both these tests are based on the functions performed by the Incorporation. They do not turn primarily on the relationship between the Crown and the Incorporation.<sup>357</sup>

**(2) Function or control test?**

In his University of Toronto article, Griffith argued that the earlier function tests should be abandoned since they were devised when the functions of government were limited. In other words, the tests would actually prevent many current Government functions being recognised as within the province of the Crown. In his view, the control test is more relevant with a vastly expanded Crown. Griffith called this approach of analysing the relationship of incorporations with the Crown as the 'dependence' test.

Hogg endorses that approach:

The functions test developed in the United Kingdom in the middle of the nineteenth century. At that time, the functions of government were considered to include little more than the preservation of law and order. Therefore, it was not unreasonable for judges to assume the task of identifying which functions fell within the province of government. However, even in the nineteenth century, in the colonies the range of governmental activity was acknowledged to be much wider, as only the state could assemble the resources needed to build the canals, railways and other public works needed for the economic development of pioneer communities. And, in the twentieth century, collectivist political ideas have everywhere turned the state into a regulator of much economic and social activity and a supplier of many goods and services. The province of government is no longer clearly bounded but is, on the contrary, capable of indefinite expansion. The Courts have accordingly abandoned the impossible task of defining the functions that properly fall within the province of government. The scope of the province of government is rightly seen as a matter to be determined by Parliament or Legislature, not by the Courts.<sup>358</sup>

It is significant that the wide range of governmental activity undertaken in the colonies was one reason for preferring the control test approach. Looking at the cases cited by Hogg and Griffith, it is clear that, after the middle of the nineteenth century, the functions test did decline in importance. As Hogg points out, there are good logical reasons for this. The functions test 'makes assumptions about the proper spheres of government that are impossible to justify in any principled way'.<sup>359</sup> In the case of incorporations created by the Crown,

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357. JAG Griffith, 'Public Corporations as Crown Servants' (1952) 9 U Toronto LJ 169, 183-184

358. Hogg and Monahan, *Liability of the Crown*, p 333

359. *Ibid*, p 334

## 9.4.3(2)

it is obviously not entirely acting out of a profit motive, and a mix of private and public interests will arise. The executive will have determined that mix when drawing up the law to create the body. As Hogg puts it 'For the Courts, the only safe criterion to determine whether a particular function is governmental or not is whether the government has chosen to assume control of it. That, at bottom, is the rationale for the control test.'<sup>360</sup>

To put it another way, a strict functions test could see governments unable to step back from activities even if it were made extremely plain by legislation that they wished to do so.

To what extent is the functions test still relevant? No commentator suggests that it has no relevance at all. Hogg deals with its survival in the following passage:

Curiously, vestiges of the discredited functions test continue to surface in judicial dicta in modern times. Sometimes a Court will say that the functions of a public corporation are a relevant 'factor' in determining whether the corporation is an agent of the Crown. On this basis, a body exercising a commercial function with a private analogue (for example, the operation of a railway) would be less likely to be held to be an agent of the Crown than a body exercising a peculiarly governmental function (administering workers' compensation).<sup>361</sup>

We note that Hogg's reference for this point is no less than six cases, including a 1997 case, and his footnote indicates that there are others in recent times.<sup>362</sup> In addition, claimant submissions note a discussion of 'function' in *Bank voor Handel*.<sup>363</sup> This all suggests that the courts still regard the functions test as having a role to play in determining Crown agency.

In this regard, we also note that in the *Te Whanganui a Tara* report, and in Crown closing submissions on this issue, a book by a leading Queen's counsel, Paul Lordon, is quoted, which states that both the function and control tests are relevant:

if the status of an entity and whether it is the Crown is unclear, three criteria can be examined:

1. the nature of the functions that the entity performs, and for whose benefit it performs these functions;
2. the nature and extent of the powers entrusted to the entity;
3. *above all*, the nature and degree of control of the Crown or government over the entity.

The most important test to determine whether it should be treated as part of the Crown or not is the so-called 'control' test: a Crown component will be treated as a part of the Crown if it may be said to be 'controlled' by the Crown. [Emphasis in original.]<sup>364</sup>

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360. Hogg and Monahan, *Liability of the Crown*, p 334

361. *Ibid*, pp 333–334

362. *Ibid*, p 334 fn 7. The 1997 case is *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297.

363. *Bank voor Handel en Scheepvaart NV v Administrator of Hungarian Property* [1954] AC 584

364. Crown counsel, further closing submissions, p 18; Waitangi Tribunal, *Whanganui a Tara*, p 358

Accordingly, claimant submissions that the functions test ‘remains good law’ are correct. However, we must determine the function that is performed and who benefits from the function.

In the *Te Whanganui a Tara* report, the Tribunal did address and apply the functions test, noting that the function of trustee was not a traditional function of the Government in Britain.<sup>365</sup> The analysis was brief, as counsel for the claimants have contended. The Tribunal noted:

We note that the function of acting as a trustee was not a ‘traditional governmental function’ in Britain. The appointment of the Public Trustee to assume responsibility for Maori reserves in New Zealand occurred in 1882, only 30 years after representative government began in 1852. And, as the parliamentary debates to which we later refer indicate, the Public Trustee was appointed with a view to insulating his function from the Government.<sup>366</sup>

The claimants have argued that:

Despite that Wai 145 Tribunal’s statement that acting as a trustee was not considered a ‘traditional governmental function’ in Britain there was no substantive discussion as to whether the functions of the trustees could in fact be part of the province of government in 19th century colonial New Zealand. Rather, the functions test was briefly noted and set aside in favour of the ‘control test’, particularly the *de jure* aspect of the control test.<sup>367</sup>

Given our analysis above about the continuing, albeit limited, relevance of the functions test, we now consider its application in this inquiry.

The claimants in their joint submission point out that, in New Zealand:

the process of colonisation and annexation is a prerogative function of the Sovereign. The administration of Maori land reserves established to ensure the success of this Sovereign prerogative (colonisation/annexation), is a function intimately linked with the prerogative power of the Crown to colonise/annex another country.<sup>368</sup>

They cite this comment from the debates for the Native Reserves Act 1856:

The Hon Mr SEYMOUR . . . the Governor [owing to] the power given to him by the Constitution Act, [was] the sole disposer of Native questions. These were so intimately connected with peace and war that he who was responsible to the British Government should be altogether unfettered in his operations with the Natives.

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365. Waitangi Tribunal, *Whanganui a Tara*, p 351

366. Counsel for Ngati Koata, Ngati Rarua, and Te Atiawa, joint submission, p 20

367. *Ibid*

368. *Ibid*

They also point to the second reading of the Public Trust Office Bill in 1872, where Hall ‘discussed the distinction in the functions and roles of trustees in the new colony and the mother country’:

It must also be remembered that the management of colonial trust property would generally be found to be more troublesome than would a corresponding trust in the mother country . . . The management of trusts in an old country was generally more a matter of routine than it could be here, and in the absence of strict personal supervision, which private trustees could hardly be expected to exercise in a colony, trust property could scarcely be managed.<sup>369</sup>

We consider that, quite apart from the limited legal infrastructure or expertise in the colony (a matter which the second quote seems to be concerned with), dealing with Maori land, and ensuring that Maori retained some reserves, was a matter in which the Government was vitally interested, on humanitarian as well as (settler) security grounds. This is clear from the first of the quotes above, as well as Hobson’s instructions, and actions such as the appointment of a protector of aborigines and the Crown’s adoption of the New Zealand Company’s undertakings to set aside reserves for Maori. Indeed, as we found in chapter 4, the Crown assumed responsibility for the making of the company’s reserves from as early as November 1840.

It follows, then, that one factor we must bear in mind when we apply the Crown agency test is that the Crown was vitally interested in the regime for native reserves, in particular to fulfil its Treaty obligation to ensure that Maori retained sufficient land for their future needs. Acting as a trustee may not have been a traditional Government function in Britain, but the fiduciary obligations assumed by the Crown in New Zealand when it entered into the Treaty of Waitangi, and in particular its obligation actively to protect Maori, made it inevitable that trustee obligations would arise when the Government set aside land as Maori reserves. Hence, in our view, the Crown’s administration of native reserves from 1840 to 1882, which all parties agree was carried out by commissioners who were agents of the Crown. This function and responsibility of government, assumed by the Crown under the Treaty, did not suddenly cease to exist in 1882.

With that in mind, we now turn to the control test.

Hogg formulates the test as one of whether the corporation is ‘largely free of ministerial control’ or whether it is ‘fairly closely controlled by the executive’. He contends that ‘any substantial measure of independent discretion will suffice to deny the status of Crown agent to a public body that is subject to some degree of direct control’.<sup>370</sup>

The test was extensively discussed in the *Te Whanganui a Tara* report and the very

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369. Counsel for Ngati Koata, Ngati Rarua, and Te Atiawa, joint submission, p 20

370. Hogg and Monahan, *Liability of the Crown*, pp 334–336

thorough analysis of cases in that report need not be repeated here.<sup>371</sup> We have found the following expressions of the test useful, particularly where, as will be discussed below, a trustee operates under a board, which is in some periods headed by the Native Minister.

- ▶ A commission is not an agent of the Crown, even where its directors are appointed by a minister, who fixes their remuneration, and to whom information must be provided, and who can give binding directions of a general nature – *Tamlin v Hannaford*.<sup>372</sup>
- ▶ A board is not an agent of the Crown even when its members are appointed by the Crown, and the Crown can veto certain actions of the board, because wide discretionary powers remain without consulting direct representatives of the Crown – *Metropolitan Meat Industry Board v Sheedy*.<sup>373</sup> Viscount Haldane concluded:

They [the board] are a body with discretionary powers of their own. Even if a Minister of the Crown has power to interfere with them, there is nothing in the statute which makes the acts of the administration his as distinguished from theirs. That they were incorporated does not matter. It is also true that the Governor appoints their members and can veto certain of their actions. But these provisions, even when taken together, do not outweigh the fact that the Act of 1915 confers on the appellant Board wide powers which are given to it to be exercised at its own discretion and without consulting the direct representatives of the Crown.<sup>374</sup>

- ▶ A body will be an agent of the Crown where the statute refers to it as an ‘agency of the government’ over which a minister ‘shall preside’ – *Northern Pipeline v John Pehinec*.<sup>375</sup>
- ▶ A public corporation may be an agent of the Crown in some functions only but not in others.<sup>376</sup> This is a point most clearly made in the New Zealand context in the *Te Whanganui a Tara* report:

Mr Green also referred us to the New Zealand case of *Waitakere City Council v Housing Corporation of New Zealand*, where Master Gambrill in the High Court decided that the Housing Corporation was not an agent of the Crown and was therefore liable to pay local body rates given its commercial function and lack of direct Crown control. The decision is of interest in that the corporation was authorised to exercise certain powers under the Housing Act 1955. Section 39 of that Act specifically provided that, in respect of its functions under the Act, the corporation ‘shall be

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371. Waitangi Tribunal, *Whanganui a Tara*, pp 351–359

372. *Tamlin v Hannaford* [1950] 1 KB 18 (CA) (Waitangi Tribunal, *Whanganui a Tara*, p 352)

373. *Metropolitan Meat Industry Board v Sheedy* [1927] AC 899 (Waitangi Tribunal, *Whanganui a Tara*, p 354)

374. *Ibid*

375. *Northern Pipeline v John Pehinec* [1983] 2 SCR 513, 517–518 (doc G8(a), para 21); Waitangi Tribunal, *Whanganui a Tara*, p 354

376. Hogg and Monahan, *Liability of the Crown*, pp 332–336

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deemed to be and always to have been the agent of the Crown, and shall be entitled accordingly to all the privileges which the Crown enjoys.' Master Gambrill recognised that, in exercising functions under the Housing Act, the Housing Corporation was clearly an agent of the Crown. But in exercising its functions under the Housing Corporation Act 1974, it was not a Crown agent.<sup>377</sup>

Hogg contends that:

the tendency of decisions is to require a high degree of control; in other words, the tendency of the decisions is against the finding of Crown agency status. The reason, without doubt, is a justified reluctance of the part of the courts to extend the special privileges of the Crown any further than necessary.<sup>378</sup>

He makes this comment after discussing the *Sheedy* case, where there was considerable ministerial control (see above).

We find that the test is as Lordon has put it, with control being prominent and with the requirement for a reasonably high degree of control before Crown agency will be found. However, we also find that function has some place in the test, and the fact that native policy and reserves are involved is relevant in that respect.

**(3) *De jure or de facto test?***

In determining what level of control exists, the case law seems to consistently require that *de jure* rather than *de facto* control is relevant. As Hogg puts it: 'For the purpose of the control test, control means *de jure* control, not *de facto*. It is the degree of control that the Minister is legally entitled to exercise that is relevant, not the degree of control which is in fact exercised.'<sup>379</sup> Hogg cites the *Bank voor handel* and *R v Eldorado Nuclear* cases in support.<sup>380</sup>

This approach was accepted in the *Te Whanganui a Tara* report:

In determining whether or not the Public Trustee and the Native or Maori Trustee respectively were acting on behalf of the Crown in terms of section 6 of the Treaty of Waitangi Act 1975, we are required, for the purpose of the 'control test', to have regard to *de jure* control, not *de facto* control. This means that it is the degree of control that Ministers of the Crown are legally entitled to exercise over the respective trustees, not the control they in fact exercise, that is relevant.<sup>381</sup>

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377. Waitangi Tribunal, *Whanganui a Tara*, p 355. This point becomes important in relation to section 25 of the Native Trustee Act 1930, discussed at section 9.4.3(4)(b) below.

378. Hogg and Monahan, *Liability of the Crown*, p 335

379. *Ibid*, p 336

380. *Bank voor Handel en Scheepvaart NV v Administrator of Hungarian Property* [1954] AC 584; *R v Eldorado Nuclear* [1983] 2 SCR 551

381. Waitangi Tribunal, *Whanganui a Tara*, p 359

Counsel for Ngati Tama takes issue with that approach, arguing that the conclusions:

appear to be more directly a consequence of a strict legal analysis of the rule of the ‘Trustee’, rather than a consideration of the particular factual environment in which the Trustee operated in Wellington (or Te Tau Ihu) and the particular decisions made by the Trustee and their rationale (if any).<sup>382</sup>

Counsel also argued that the *Bank voor Handel* case includes a discussion of function.<sup>383</sup>

We do not see how any test other than a *de jure* test could be applied by this Tribunal, given the case law. Claimant submissions have noted the key comment of Lord Reid in *Bank voor Handel* that ‘The question is not how much independence the custodian in fact enjoys but how much he can assert and insist on by reason of the terms of his appointment or the nature of his office.’<sup>384</sup>

A key passage in the *R v Eldorado Nuclear Limited* case notes:

As with Uranium Canada, agreements relating to the sale and supply of uranium fall within Eldorado’s corporate objects. I note, however, that unlike Uranium Canada, Eldorado’s corporate objects do not restrict it to acting with the approval of the Minister or the Governor in Council. Whatever the *de facto* relationship between Eldorado and the government may be, the Company’s corporate objects clauses and the relevant statutes leave it free to operate without government direction.

. . . At common law the question whether a person is an agent or servant of the Crown depends on the degree of control which the Crown, through its ministers, can exercise over the performance of his or its duties. The greater the control, the more likely it is that the person will be recognized as a Crown agent. Where a person, human or corporate, exercises substantial discretion, independent of ministerial control, the common law denies Crown agency status. The question is not how much independence the person has in fact, but how much he can assert by reason of the terms of appointment and nature of the official: *Bank voor Handel en Scheepvaart NV v Administrator of Hungarian Property*, [1954] AC 584 at pp 616–17, and see Hogg, *Liability of the Crown*, 1971, p 207. While Uranium Canada would easily meet the common law test of Crown agency, since it needs approval of the Governor in Council for what it does, I think it is clear that the common law would not recognize Eldorado as a Crown agent since it does not meet the *de jure* control test.<sup>385</sup>

It seems logical to take a *de jure* approach, since practice cannot make statute law, but only provide assistance in understanding what Parliament’s intent has been in passing legislation. Practice going beyond the law may simply be *ultra vires*. Conversely, practice which

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382. Counsel for Ngati Tama, closing submissions, pp 73–74

383. Counsel for Ngati Koata, Ngati Rarua, and Te Atiawa, joint submission, pp 5–7

384. *Ibid*, p 6

385. *R v Eldorado Nuclear* [1983] 2 SCR 551, 573–574

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does not fully utilise the legal powers available under statute tells us relatively little about what the law intended. For example, if a law provides for the possibility of extensive control by the executive over the actions of a trustee, but the executive does not utilise that power, that should not be a reason for finding that there is no Crown agency, because the test is how much power the trustee can or might assert under legislation.

Just how difficult it would be to determine agency by a *de facto* test is illustrated by the following discussion in the report of Hilary and John Mitchell contrasting the differing approaches of the Native Trustee, the commissioner of native reserves, and the Public Trustee:

Regardless of Rawson's paternalism and penchant for control the short time that the administration of the Reserves was in the hands of the independent Native Trustee was a golden era for the Reserves owners. While the Native Trustee was rendered powerless to change the serious encumbrances on the leases – lessees' right to perpetual renewal and the 21-year rent review – he did make a serious effort to discuss matters with the owners, which was a wonderful relief after the bleak, inflexible and impersonal reign of the Public Trustee. Not since Alexander Mackay's days as Commissioner of Native Reserves prior to 1882 had the owners had the luxury of being able to converse with the administrator of their Reserves and be listened to.<sup>386</sup>

The fact that the Public Trustee took a 'bleak, inflexible and impersonal' approach does not assist in determining if, in law, the Crown retained control over the reserves in that period, since, when the Crown had control of them through Commissioner Mackay, he seems to have had no problem discussing issues directly with owners. Likewise, the 'independent' Native Trustee seems to have been as close to the owners as the 'dependent' commissioner. From all of the above, it seems that the following should apply when considering whether the trustee was or is an agent of the Crown in the relevant periods:

- ▶ Dependence on or control by the Crown being the key test, with some reference to function to assist.
- ▶ Substantial Crown control and a limited area of discretion for the incorporation. In some situations there may be extensive discretionary Crown ability to intervene alongside extensive discretion to the incorporation. In those cases it seems that the body is still not found to be an agent of the Crown (for example, the *Sheedy* case as discussed above).
- ▶ The *de jure* test.

**(4) Are those tests satisfied or not?**

**(a) The Public Trustee:** Section 8 of the Native Reserves Act 1882 provided that:

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386. Mitchell and Mitchell, 'Legislative and Administrative Influences', p 85

**8. Administration by Public Trustee**—All lands and personal estate now vested in the Governor or any Commissioner or public officer (as such) under any Act heretofore in force relating to Native Reserves shall, from the commencement of this Act, be deemed to be placed in the Public Trust Office, and shall vest in the Public Trustee, subject to the trusts attached thereto respectively.<sup>387</sup>

The Public Trustee had been in existence since 1872 and section 7 of the Native Reserves Act 1882 incorporated the Public Trust Office Act 1872 to administration of the reserves.

While the trustee was given fairly extensive powers in relation to reserves, he was subject to oversight of a board established under the 1872 Act. Section 2 of the Native Reserves Act 1882 provided that for the purposes of managing the native reserves, the Public Trust Office Board would include ‘two Natives to be from time to time appointed by the Governor to hold office during pleasure.’

The Governor could appoint a native reserves commissioner (s27), but they acted in the name of the Public Trustee and on his behalf (s28).

Of this development, Professor Alan Ward writes.

In 1882 responsibility for the reserves was placed in the hands of the Public Trustee. This was part of the strategy of John Bryce, the Native Minister, to break up the Native Department and transfer its functions to other branches of government. . . . In contrast with the 1873 Act, administration was to be centralized in Wellington. The Public Trustee was to be assisted by a board on which there would be two Maori representatives chosen by the Governor, the Auditor-General, the Commissioner of Annuities, the Colonial Treasurer and the Public Trustee himself. Considerable flexibility was lost by this change. The Public Trustee, in contrast with the Commissioner of Native Reserves, had little discretionary authority with regard to the management of reserves. Lessees were later to complain about the legalistic approach of the Trustee and the fact that the centralisation of administration frequently made it necessary to refer matters to Wellington creating extra expense and delays.<sup>388</sup>

Jellicoe wrote that ‘The great object of this measure was to take the reserves out of the control of the Government and vest them in the Public Trustee.’<sup>389</sup> As noted above, the *Te Whanganui a Tara* report found that the commissioners established under the Native Reserves Act 1856 were agents of the Crown whereas the Public Trustee was not. Claimant counsel compared the provisions of the 1856 Act and the Public Trust Office Act 1872 with the Native Reserves Act 1882 and concluded that there was ‘substantive continuity in levels

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<sup>387</sup> Native Reserves Act 1882, s8

<sup>388</sup> Alan Ward, ‘A Report on the Historical Evidence: The Ngai Tahu,’ report commissioned by the Waitangi Tribunal, 1988, pp 314–316 (Mitchell and Mitchell, ‘Legislative and Administrative Influences,’ p 67)

<sup>389</sup> Roland Jellicoe, *The New Zealand Company’s Native Reserves* (Wellington: Government Printer, 1930), p 79 (Mitchell and Mitchell, ‘Legislative and Administrative Influences,’ p 68)

## 9.4.3(4)(a)

of control. Indeed, they suggested that Crown control actually increased from 1882. Counsel argued that the trustees were Crown agents because despite their ‘supposed statutory independence the trustees did not have a substantial measure of independent discretion’. Counsel also pointed to the debates in Parliament around the 1872 legislation that emphasised the public service role of the Public Trustee. The joint claimant submission contended that there was an ‘unbroken line of Crown control’ over the administration of the trust estate.<sup>390</sup>

The claimant submissions seem in part to be saying that the *de facto* situation and the public service function of the trustee are important. As noted above, however, those are secondary factors to the tests of control or dependence on the Crown as seen in what *de jure* powers were conferred by the legislation.

The 1882 legislation was a definite break with the past. The Public Trust Office under the Public Trust Office Act 1872 was quite a different body from the commissioner of native reserves. There is a complexity in that the Public Trustee was answerable to a board on important matters, and the board could direct it on important matters. The legislation makes it clear that the board was meant to play an important role in the management of the reserves and that management was to be very conservative. It seems that day to day management was in the hands of the Public Trustee, but the board:

- ▶ Could sanction leases over portions of the reserves (s15). (Professor Ward also notes powers under the South Island Native Reserves Act 1883 regarding leasing.)<sup>391</sup>
- ▶ Could direct that native reserves and returns be directed to different but similar purposes where the original objects of the reserve became incapable of attainment (section 13 – the Governor in Council also had to consent to such a change).
- ▶ Under the Public Trust Office Act 1872, the board was empowered to determine the powers and duties of the Public Trustee where doubts arose in the administration of that Act (s14). Section 7 of the Native Reserves Act 1882 provided that that 1872 legislation for the Public Trust Office applied. Its provisions, ‘so far as the same may be . . . applicable, are hereby incorporated with this Act’.

As Professor Ward notes, the board seems to have consisted of the Colonial Treasurer, the Government Annuities Commissioner, the Attorney-General, the Commissioners of Audit, and the Public Trustee (s18).<sup>392</sup>

Centralisation, loss of flexibility and delay *on their own* are *de facto* rather than *de jure* issues. The mere fact of a governing board with Ministers on it with powers of control that made management very conservative is not determinative of Crown agency – as case law makes clear. In addition, the members of the executive sitting on the board had portfolios of a general financial and legal nature – not specific to native affairs.

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390. Counsel for Ngati Koata, Ngati Rarua, and Te Atiawa, joint submission, pp 7–12

391. Ward, ‘Report on the Historical Evidence’, pp 314–316

392. The word ‘seems’ is used because the legislation refers to a board in section 13, but no board is actually constituted until section 18.

In addition, the Public Trust Office Act 1872 provided in section 28 that, if any other person had concerns about the trustee's administration of property, their only recourse was a petition to the Supreme Court:

Upon petition in that behalf presented to the Supreme Court by any member of the Board, or by any person showing upon satisfaction of the Court that he has an interest in any property for the time being administered by the Public Trustee, the said Court or Judge thereof shall have power to summon the Public Trustee and require him to answer the allegations in the petition, and . . . may make such order in relation to the conduct of the Public Trustee . . . as the said Court shall think fit.

As can be seen, even the board was required to petition the Supreme Court. Consequently, the idea that the Crown somehow under these circumstances still retained direct legal control over the day to day running of the reserves does not stand scrutiny.

The Te Whanganui a Tara Tribunal records Government statements at the time confirming this desire to remove the reserves from Crown control. The Native Minister John Bryce rejected a suggestion that the reserves should be the responsibility of the waste lands boards because 'the management of the reserves would not be removed from a Minister of the Crown who has a seat in this House; and I think it is desirable to so remove it, because there is no doubt that pressure of a kind difficult to resist might occasionally be put upon that Minister'. Similarly, in moving the second reading of the Bill in the Legislative Council, Frederick Whitaker stated that that the object was 'to take the reserves out of the control of the Government'.<sup>393</sup>

It seems clear that the Government made a conscious choice in 1882 to make a break with the past approach to administration and place the native reserves outside of direct Government control, using the body that handled the affairs of the deceased, children, and lunatics.

**(b) The Native Trustee:** As was observed above, the Native Trustee was established following a recommendation of a 1913 inquiry that an independent body should be responsible for native reserves. The war intervened to delay implementation of that inquiry report. The Mitchells note that the Mackintosh–Hosking commission report was presented to Parliament in 1932.<sup>394</sup>

In terms of the tests for Crown agency, the Native Trustee Act 1920 presents something of a dilemma.

The Native Trustee was established as a corporation sole with perpetual succession (s6). The powers of the Native Trustee over the reserves were broadly similar to those of the former Public Trustee. As with the Public Trustee, the Native Trustee was answerable to a

393. Waitangi Tribunal, *Whanganui a Tara*, p363

394. Mitchell and Mitchell, 'Legislative and Administrative Influences', p 83

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board. The board was also meant to be the same in terms of functions as the board of the public trust office (section 14 provided that the new board would step into the shoes of the public trust office board).

However, the board seems to have been, on the face of the legislation at least, a more important feature of the regime for administering the reserves than the equivalent board of the Public Trustee. The Native Trust Office Board consisted of the Native Minister, a Maori or 'half caste' on the Executive Council, the Native Trustee, the Under-Secretary of Native Affairs, the Under-Secretary of Lands, and 'One other person to be appointed by the Governor-General'.<sup>395</sup>

In contrast to the board of the Public Trustee, these were all persons with tasks or interests specific to native lands (possibly apart from the 'other person' appointed by the Governor-General; the legislation does not specify what their expertise might be).

The Native Minister was the chair of the board.<sup>396</sup> The six-member board voted by majority, but the Native Minister held an extra casting vote in situations of deadlock.<sup>397</sup> Resolutions of the board bound the Native Trustee.<sup>398</sup>

In particular, persons appointed by the board had to counter-sign all cheques issued by the Native Trustee. Section 16(2) provided that: 'The Native Trustee's Account shall be operated on only by cheque signed by the Native Trustee or Deputy Native Trustee, and by such other persons as may be appointed in that behalf by the Board.' This was amended in 1921 to clarify that any two of the three persons could sign.<sup>399</sup> However, this control does not appear in the 1930 Act.

The board rather than the Native Trustee was responsible for the investment of money held in the Native Trustee's account (section 21 sets out a standard list of possible investments in land, bank deposits and other securities, but also including mortgages over the freehold or leasehold of any native freehold land).<sup>400</sup>

Section 25 provided that the Governor-General could make regulations 'prescribing the respective duties and functions of the Native Trustee, the Deputy Trustee and the Native Trust Office Board'. Regulations were made under this provision in April 1921 and replaced in October 1922. Confusingly, the 1921 regulations indicate that the former board continued alongside the Native Trust Office Board established under the 1920 Act, and refer to that Act amending the board.<sup>401</sup> The 1921 regulations refer to interaction between the Public Trustee

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395. Native Trustee Act 1920, s 10

396. *Ibid*, s 12(3)

397. *Ibid*, s 12(5),(6). The board in the same form continued under the Native Trustee Act 1930, except that the 'Financial Adviser to the Government' was added: ss 11–13.

398. *Ibid*, s 12(8). The section provided that 'A resolution of the Board shall bind the Native Trustee.'

399. Native Trustee Amendment Act 1921, s 3

400. Native Trustee Act 1920, s 21

401. See Regulations under the Native Trustee Act 1920, regs 1, 2 (as amended by the Native Trustee Act 1920), which provide that 'Native Board' means the board established pursuant to the Native Reserves Act 1882. The Native Trustee Office Board established under the 1920 Act was referred to as the 'Office Board'.

and the Native Trustee under section 18 of the Native Trustee Act 1920 – so the measure was presumably a transitional one as the old board handed over to the new. Beyond that, we cannot find any distinct amendment in the 1920 Act changing the nature of the old board, and we have no evidence about how or whether the boards operated in tandem, expect a statement in Dr and Mrs Mitchell's report, quoting the 1913 commission of inquiry, that the board met very infrequently even before 1920.<sup>402</sup> In any event, the 1921 regulations provided for what can only be described as very close monitoring of the Native Trustee. Regulation 16 specified that the Bank of New Zealand should hold the Native Trustee's account. Regulation 16(2) provided that:

The manager of the bank shall make up daily at the close of the business the pass-book of the Native Trustee, and at the same time send to the Controller and Auditor-General a statement showing the total receipts into and payments out of and the balance of such account at the close of each day.

In addition to the accounts required under the Native Trustee Act 1920, the Native Trustee was to keep 'such other accounts as the Minister directs or the Native Trustee thinks fit'.<sup>403</sup> Regulation 10 provided that the Native Trustee should keep a 'complaint-book' and that this should be 'laid before the Office Board at every meeting of that Board'.<sup>404</sup> The office board also approved all transfers of money and securities from the Public Trustee.<sup>405</sup>

The 1922 regulations repealed some of these measures, such as the complaint-book and the reference to the Minister directing what special accounts should be kept, but the requirement for a daily accounting of the Native Trustee's main bank account remained.<sup>406</sup>

In addition, while the 1920 Act provided that the Native Trust Office 'shall form part of such Department of State as may from time to time be lawfully determined in that behalf',<sup>407</sup> in 1921 that was altered to provide that the Native Trust Office 'shall be under the control of the Native Minister'. That is quite a change from the 1920 Act, both in the change from 'shall form part of' to 'under the control', and from a Department of State to the Native Minister directly.

The close financial control and the office being 'under the control' of the Minister, are features that stand out. This was not a matter of a board with discretion to intervene if it chose. Rather, it was a board which the legislation seems to have intended to have a regular oversight over, and the ability to approve or reject many actions of, the trustee. On one reading, the 1920 Act and regulations taken together suggest that the Native Trustee was little more

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402. Mitchell and Mitchell, 'Legislative and Administrative Influences,' pp 80–81

403. Regulations under the Native Trustee Act 1920, reg 19(1)(b)

404. *Ibid*, reg 11

405. *Ibid*, regs 12, 13

406. *Ibid*, reg 11

407. Native Trustee Act 1920, s 3

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than a bookkeeper for the reserves, managing money flows inwards and outwards for them, but without much discretion at all.

Looking more closely, however, we think that this initial impression of the 1920 Act arises because, unlike the succeeding statute, the Native Trustee Act 1930, there is no part or series of provisions setting out explicitly the powers of the Native Trustee.<sup>408</sup> Rather, section 13 of the 1920 Act simply provides that the reserves vested in the Public Trustee are transferred to the Native Trustee, ‘who shall hold the same for the same estate, upon the same trusts, *with the same functions, powers, and duties*, and with the same liabilities and engagements as in the case of the Public Trustee immediately prior to the coming into operation of this Act’ (emphasis added). The 1882 Act was not repealed by the 1920 Act. Consequently, the wide powers under section 15 of the 1882 Act over the basic administration of the reserves, managing lease renewals, collecting rents, enforcing covenants in leases, paying rates, and so forth, continued to be enjoyed by the Native Trustee. We note, for example, that the Crown and the Native Trustee could take different positions over rating of reserves and ask the courts to intervene as, for example, in *Minister of Lands v The Native Trustee & Another*.<sup>409</sup>

We find the situation to be similar to that in *Metropolitan Meat Industry Board v Sheedy*:

They are a body with discretionary powers of their own. Even if a Minister of the Crown has power to interfere with them, there is nothing in the statute which makes the acts of the administration his as distinguished from theirs. That they were incorporated does not matter. It is also true that the Governor appoints their members and can veto certain of their actions. But these provisions, even when taken together, do not outweigh the fact that the Act of 1915 confers on *the appellant Board wide powers which are given to it to be exercised at its own discretion and without consulting the direct representatives of the Crown*. [Emphasis added.]<sup>410</sup>

In terms of the 1920 Act, we find that there was a potential for considerable Government control of the board, and that there was a definite tightening of the regime from that under the Public Trustee and the 1882 Act, but, as the quote from *Sheedy* demonstrates, the test for Crown agency is a high one, and Crown agency does not automatically follow where there is a power, even a relatively broad and powerful one, for the Crown to intervene. There must be limited discretion for the trustee themselves to act independently.

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408. Native Trustee Act 1930, ss 14–24

409. *Minister of Lands v The Native Trustee and Another* [1941] NZLR 503. The case concerned Poukawa 13B and the application of the Rating Act 1925, which provided that rates due in respect of native land should be demanded from the Native Trustee ‘in the ordinary way’. Incidentally, section 33 of the Native Trustee Act 1930 provided that the Native Trustee could lease the Poukawa native reserve for up to 42 years on such terms and conditions ‘as he may in his discretion deem reasonable’.

410. *Metropolitan Meat Industry Board v Sheedy* [1927] AC 899, 905 (Waitangi Tribunal, *Whanganui a Tara*, p354)

Taking into account that the functions exercised by the Native Trustee were a means to ensure that the Crown fulfilled its Treaty obligations, as well as the smooth running of its land settlement and native affairs policy, we think that this situation comes close to one where the Native Trustee was an agent of the Crown. However, in the end, we cannot overlook the very clear intent of Parliament in removing the reserves from Crown control in 1882 which is not fundamentally altered by the 1920 Act. As noted above, all the functions and powers of the Public Trustee were transferred to Native Trustee, who was also a corporation sole, a legal body separate from the Crown, and able to sue and be sued, even by the Crown itself.

We find that, in terms of the general administration of the native reserves, the trustee continued to enjoy a reasonably wide discretion under the 1920 Act and certainly under the 1930 Act, and was not an agent of the Crown in that administration.

However, that is not the end of the story. The *Te Whanganui a Tara* report discussed farming operations carried out by the Native Trustee.<sup>411</sup> Those operations took place under section 25 of the Native Trustee Act 1930, which provided that the Native Minister could declare that land suitable for farming should vest in the Native Trustee to develop. The consent of the Native Minister was required for any borrowing or mortgage for farming operations.<sup>412</sup>

In respect of these operations where the Native Trustee was acting as a farm developer, we agree with the finding of the *Te Whanganui a Tara* report:

Accordingly, it may be that, in carrying on the farming activities required of him by section 25 of the 1930 Act, the trustee was not engaging in the duties of an ordinary trustee but, rather, implementing a Government policy considered to be in the wider interest of the Maori people. If this was the case, then it would appear that, in respect of his section 25 activities (but no others), he may well have been acting on behalf of the Crown in terms of section 6 of the Treaty of Waitangi Act 1975.<sup>413</sup>

The 1920s were a period of considerable activity in terms of farm developments on Maori land. Following a royal commission on native affairs and Sir Apirana Ngata's resignation, a further change occurred in 1934 when a board of Native Affairs was established by the Native Affairs Act of that year. The board was chaired by the Native Minister with the under-secretary of the Native Department as deputy chairman. The other members were: the Valuer-General, the Under-Secretary of Lands and Survey, the Director-General of Agriculture, the financial adviser to the Government, and up to three lay members.<sup>414</sup> In relation to this arrangement, Dr and Mrs Mitchell note Butterworth's assessment that:

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411. Waitangi Tribunal, *Whanganui a Tara*, pp 368–369

412. Native Trustee Act 1930, s 25(5)

413. Waitangi Tribunal, *Whanganui a Tara*, p 369

414. Mitchell and Mitchell, 'Legislative and Administrative Influences', pp 93–94

## 9.4.3(4)(b)

The other important element that stifled initiative was the political decision, embodied in the 1932 legislation, to put the control of the Native Trustee's investment decisions and expenditure on farming under the Native Land Settlement Board (1933–35) and then the Board of Native Affairs, a control that was to last until the abolition of the Department in 1989.

This was the direct result of the 1934 Royal Commission on Native affairs and Ngata's resignation. Although he was not personally disgraced, a feeling prevailed for more than 20 years that the Native Department had to be kept on a very tight rein. The board in this period was chaired by the Native Minister with the Under-Secretary Native Department as Deputy Chairman. The other members were: the Valuer-General, the Under-Secretary of Lands and Survey, the Director-General of Agriculture, the Financial Advisor to the Government and up to three lay members. Apart from the brief period when Ngata chaired the Native Land Settlement Board as Native Minister, no Maori served on the Boards between 1934 and 1948. These Boards controlled the land development schemes, the housing programme, the acquisition of land, the Maori Land Boards, the East Coast Trust Commissioner and the Native Trustee.

Though in theory the Boards were merely taking over the role of the Native Trust Board, in practice this group of senior public servants exercised rigorous control over the financial planning and expenditure of the bodies under their jurisdiction. They kept a very tight rein, delegating none of their powers. The fact that all major expenditure decisions had to be referred to them is shown by the high number of recommendations submitted to the Board of Native Affairs for its decision. From its beginning in April 1935 to September 1948 the Department made 7,432 recommendations to the Board, an average of 550 a year.

This high degree of control was applied from the beginning of the Native Trust Office by the Native Land Settlement Board which required the Native Trust Office not only to produce the 1932/33 accounts and the estimate of the 1933.34 financial year, but even 'statements covering transactions during the past year in respect of special estates being administered by the office together with the detailed estimated of receipts and expenditure for the coming year.' Though the Deputy Native Trustee supplied the Board with 51 pages of information this was still not enough and he had to supply the stock figures for all the farms under his administration.

HS King was a sharp determined man. He insisted on speaking to his reports and was able to get them accepted. Nevertheless, nothing could disguise the fact that the Native Trust Office's status and independence had been trimmed back sharply.<sup>415</sup>

While the quote contains references to what was 'practice', overall it is concerned with the tight statutory control exercised over farming operations, and the very limited discretion

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415. G V and SM Butterworth, *The Maori Trustee* (Wellington: Maori Trustee, 1991), pp 40–41 (Mitchell and Mitchell, 'Legislative and Administrative Influences', pp 93–94)

which remained to the trustee. This reinforces the conclusion of the *Te Whanganui a Tara* report that, with respect to farming operations, the trustee was subject to tight control and may well have been an agent of the Crown.

However, the reserve properties in the South Island were not developed as farms under these provisions and most remained under perpetual leases in the period. Even if we were to accept that there may have been indirect impacts on beneficiaries of those reserves because the Native Trustee's development costs 'sometimes impinged on the money he had available to pay beneficial owners',<sup>416</sup> the relatively wide discretion of the trustee in relation to them remained untouched.

#### 9.4.4 The Maori Trustee

The Maori Trustee Act 1953 continued the office of the former Native Trustee, who had been called the Maori Trustee since 1947.<sup>417</sup> The Maori Trustee Act 1953 contrasts with earlier legislation in that the trustee is even more closely 'related' to the executive, providing that the chief executive of the Ministry of Maori Development appoints an officer of the ministry as the Maori Trustee or even takes on the role personally. Section 4 of the 1953 Act states:

**4. Appointment of Maori Trustee and Deputy Maori Trustee**—(1) For the purposes of this Act, there shall be a Maori Trustee and a Deputy Maori Trustee, who shall be officers of the Ministry of Maori Development.

(2) The chief executive of the Ministry of Maori Development may from time to time, with the prior consent of the State Services Commissioner, confer on an officer of the Ministry of Maori Development the office of Maori Trustee or of Deputy Maori Trustee. The conferring of either such office pursuant to this subsection shall not be deemed to be an appointment for the purposes of the State Sector Act 1988.

(3) In the absence of any such conferment of office,—

- (a) The chief executive of the Ministry of Maori Development shall be the Maori Trustee:
- (b) The next most senior officer of the Ministry of Maori Development shall be the Deputy Maori Trustee.

As noted above, the Crown points to the opinion of Professor Rickett, published in the *New Zealand Law Journal*, and which is also quoted with approval in the *Te Whanganui a Tara* report, that the law does not prevent one person holding the role of chief executive of Te Puni Kokiri as well as Maori Trustee, provided that those roles remain distinct.<sup>418</sup>

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416. Mitchell and Mitchell, 'Legislative and Administrative Influences', p 87

417. Maori Puposos Act 1947, s 2

418. Waitangi Tribunal, *Whanganui a Tara*, p 371

Claimant counsel put that article in context, pointing out that Professor Rickett was in fact concerned about the unusual situation of the office of Maori Trustee being held by the chief executive of Te Puni Kokiri.<sup>419</sup> Counsel submitted that ‘while general trustee law allows for the carrying out of dual roles the independence of the Maori Trustee is indeed being compromised by the statute and by the actual operation of the office’. They cited Rickett’s concern that:<sup>420</sup>

the present statutory scheme is deficient. If the Maori Trustee is to remain independent of subtle (and perhaps not so subtle) political pressures, and importantly to be seen to be independent, it may be that the Trustee and the Maori Trust Office need to exist outside any minister of Maori Development . . . rather than be inextricably linked (however ill-defined) with a department of the Government charged with the implementation of relevant Government policy at any particular time. The present statutory scheme shows how difficult it is to try and achieve the Maori Trustee’s independence within a Government department.

In our view, that points to a situation of *de jure* independence, and a concern that the law may be breached or that people may perceive that it is being breached if the current arrangement continues.<sup>421</sup>

We note that a review of the Maori Trustee has resulted in the introduction to Parliament of the Maori Trustee and Maori Development Amendment Bill, which will result in the Maori Trustee being established as a stand-alone organisation. The reason for the review is apparently a concern to maintain the independence of the Maori Trustee, which it is perceived could be eroded by the ‘one person, two hats’ approach. The explanatory notes state that:

The Bill establishes the Maori Trustee as a stand-alone organisation, and able to appoint employees. This change will underline the independence of the Maori Trustee when exercising the Maori Trustee’s responsibilities.

Reflecting the stand-alone nature of the Maori Trustee, the Bill amends the way in which the Maori Trustee is appointed. The Minister of Maori Affairs will appoint the Maori Trustee for a renewable term of up to five years. The grounds for removal from office are specified in the Bill. The Maori Trustee’s remuneration will be determined by the Remuneration Authority. These provisions are consistent with the independence that the Maori Trustee needs to exercise his or her fiduciary responsibilities.<sup>422</sup>

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419. Counsel for Ngati Koata, Ngati Rarua, and Te Atiawa, joint submission, pp 16–18

420. Ibid, pp 16–17

421. Indeed, counsel head this part of their submissions ‘De Facto Control of the Maori Trustee Act’.

422. <http://www.brookers.co.nz/bills/current/bo71811.pdf>, accessed 20 June 2008

Again, we focus on the substantial discretion remaining to the Maori Trustee as a trustee despite any reporting requirements and possibilities for Government intervention.<sup>423</sup> We also note the reference by Acting Chief Justice Barker to the ‘extensive’ roles of the Maori Trustee and the limits on Government intervention in *Proprietors of Taharoa c v Maori Trustee*, referred to in the *Te Whanganui a Tara* report. He considered that:

One may argue about the wisdom of combining the two roles of chief executive of a Ministry of the Crown with that of a statutory trustee. However, Parliament presumably has had sufficient confidence in the person to be appointed to hold these dual roles with propriety. There is nothing in the Act and nothing in the evidence which indicates that in acting as Maori Trustee, the chief executive of the Ministry of Maori Development is bound to act on Government directive. Numerous principles of trustee law apply to him; if therefore he were to act in accordance with a Government directive not found in any statute to the detriment of any beneficiary, then the normal consequences of breach of trust would apply.<sup>424</sup>

That authoritative discussion was not directly addressed by claimant counsel.

Finally, while we accept that the trustees were established in whole or part ‘to enable the Crown to fulfil its fiduciary and equitable obligations to Maori’, we do not find any authority for the proposition advanced by counsel that ‘The Crown is unable to devolve these responsibilities onto another independent, private body.’<sup>425</sup> As the Tribunal has held in previous reports, devolution of Treaty responsibilities is possible provided that adequate safeguards exist to ensure that Treaty duties incumbent on the Crown are not breached. In the *Ngawha Geothermal Resource Report 1993*, the Tribunal found that:

the Crown cannot avoid its Treaty duty of active protection by delegation to local authorities or other bodies (whether under legislative provisions or otherwise) of responsibility for the control of natural resources in terms which do not require such authorities or bodies to afford the same degree of protection as is required by the Treaty to be afforded by the Crown. If the Crown chooses to so delegate it must do so in terms which ensure that its Treaty duty of protection is fulfilled.<sup>426</sup>

The Crown should not be prevented from considering whether market-led mechanisms with a high degree of independence (such as private company structures with carefully defined Crown oversight) might better fulfil its Treaty obligations.

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423. See, for example, sections referred to in counsel for Ngati Koata, Ngati Rarua, and Te Atiawa, joint submission, p 28.

424. *Proprietors of Taharoa c v Maori Trustee* (1993) 7 PRNZ 236, 237–238 (Waitangi Tribunal, *Whanganui a Tara*, p 356)

425. Counsel for Ngati Koata, Ngati Rarua, and Te Atiawa, joint submission, p 28

426. Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*, pp 100–101

Hapu	Area allotted to New Zealand Company (acres)	Locality of former abode	Proportionate share of funds (out of 151 shares)
Ngati Koata	20,000	D'Urville, Croiselles	13.25
Ngati Tama	20,000	Wakapuaka	13.25
Ngati Rarua	49,000	Motueka	32.5
Te Atiawa	12,000	Motueka	7.9
Ngati Rarua	20,000	Takaka, Motupipi	13.25
Ngati Tama	20,000	Takaka, Motupipi	13.25
Te Atiawa	10,000	Takaka, Motupipi	6.6
Total	151,000		100

**Table 8: Schedule of proposed apportionment of the 151,000 acres amongst the several hapu**

Source: Nelson minute book 3, 14 March 1893, p 154.

Consequently, we also disagree with the submission of counsel that the very appointment of the trustees 'can be seen as a mechanism by which the Crown sought to avoid their Treaty obligations.'<sup>427</sup>

## 9.5 CROWN RESPONSIBILITY NEVERTHELESS

### 9.5.1 Introduction

Despite our finding that the Public Trustee and the Native and Maori Trustee are not agents of the Crown, we agree with the Crown's submission that the legislative framework in which the trustees operated is 'a proper matter for inquiry by the Tribunal', and that consideration of the effect of the legislation might involve some examination of the trustees' activities.<sup>428</sup>

In this respect, we find the joint claimant submissions compelling, particularly with respect to the Crown's fiduciary or equitable obligations to Maori.

There is no question that the Government has maintained a very close interest in and involvement with the trustees over time. The fiduciary responsibilities of the Crown were referred to in parliamentary debates surrounding the Native Reserves Act 1882 and the Native Trustee Act 1930. The ongoing fiduciary aspects of the trustee's role were also maintained under various sections of the Maori Trustee Act 1953.<sup>429</sup> When reading these provisions we must bear in mind section 5(1) of the Interpretation Act 1999, which states that the meaning of an enactment must be ascertained from its text and in light of its purpose.

427. Counsel for Ngati Koata, Ngati Rarua, and Te Atiawa, joint submission, p 29

428. Crown counsel, closing submissions, pp 82–83

429. Counsel for Ngati Koata, Ngati Rarua, and Te Atiawa, joint submission, pp 27–28. Counsel pointed to provisions under sections 13, 17, 22, 23, 27, 32, 33, and 41 of the Maori Trustee Act 1953.

The provisions of the 1953 Act are a clear expression of the Crown's consistent understanding of its equitable and fiduciary duties to the Maori beneficiaries.

It is also clear from comments made by leading politicians such as Apirana Ngata about earlier trustee legislation that the trustee was carrying out the obligations of the Government. As we noted above, in 1920 Ngata explicitly stated that the Native Trustee 'must be regarded as a State officer.'<sup>430</sup> Ngata, a skilled lawyer, considered that the trustee was carrying out the Crown's duties. Such a view goes beyond a narrow legal interpretation of the trustee's status.

We view the trustees' status in a similar way. Although strictly at law the trustees were not agents of the Crown, in reality they were performing the responsibilities of the Crown. In our view, this meant that the Crown had a duty to ensure that the trustees did not breach the principles of the Treaty in carrying out these responsibilities.

This duty was and is particularly onerous because of the special characteristics of the native and Maori reserves regime, namely:

- ▶ ensuring that sufficient land remained for Maori was a matter central to the work of the colonial Government; and
- ▶ the reserves represented a significant proportion of the little remaining land that Maori had left in Te Tau Ihu – requiring close and cautious management to ensure the best outcomes for the beneficiaries consistent with Treaty requirements.

### 9.5.2 Finding

In this chapter, we have considered whether, in relation to the Nelson tenths (and other Te Tau Ihu land vested in trust under the native reserves regime), the trustee was an agent of the Crown whose actions may be considered direct actions of or on behalf of the Crown under section 6 of the Treaty of Waitangi Act 1975.

We have found that the trustee, existing in various forms since 1882, has not been and is not an agent of the Crown, but a body with wide discretion to undertake actions of its own initiative. In this respect, our finding is consistent with the findings of the *Te Whanganui a Tara* report.

However, in reaching this conclusion, we have in several respects differed in our focus from the *Te Whanganui a Tara* report, stemming from parties' submissions on this issue in our own inquiry. We consider that the function of the trustee under legislation is an element that should be considered in determining if the trustee is an agent of the Crown. We have also noted that there was a distinct change in 1920 to legislation relating to the trustee, causing the oversight and monitoring of the trustee to become more intense than under the preceding regime of the Public Trustee. In particular, we have endorsed the preliminary view of the *Te Whanganui a Tara* report that, in its farm development operations under

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430. Ibid, p13

section 25 of the Native Trustee Act 1920 and succeeding provisions, the trustee may very well have been an agent of the Crown.

The fact that management of native reserves was central to the responsibilities of the colonial Government (a point made when we considered the functions test) is nonetheless persuasive in determining that the trustees were carrying out the Crown's Treaty obligations to Te Tau Ihu Maori. The Crown – in thus delegating its responsibilities – had to ensure that the obligations were fulfilled and that the trustees did so in a manner consistent with the Treaty.

### 9.6 THE DETERMINATION OF TITLE TO THE TENTHS

In this section, we consider the Native Land Court's consideration of customary rights to the tenths estate. The issues raised here are more closely concerned with the role of the Native Land Court and its capacity to deal with issues of custom in the complex circumstances of the Nelson region than they are with the Crown's management of the reserves and its duty towards the beneficial owners. However, the two questions are intertwined, if only to ascertain to whom that duty was owed, and the possibility exists, of course, that some who should have been found to be entitled were wrongfully excluded by the court's finding.

By 1892, the Native Land Court's rules of customary ownership and how they pertained to the wider Te Tau Ihu region had been firmly established by its earlier judgments at Te Taitapu, Rangitoto, and Wakapuaka. As we have seen in chapter 8, these judgments were in favour of 'conquerors' who had remained in active occupation. The judge in both the 1892 and 1901 investigations was Alexander Mackay, a person who had considerable local experience from his role as native reserves commissioner and whose opinions as Crown officer and Native Land Court witness had already greatly influenced the perception of customary ownership in the district. As we noted in chapter 8, the Native Land Court judges responsible for adjudicating on title in Te Tau Ihu strictly applied the 1840 rule. Both Mair and Mackay emphasised the take of raupatu followed by occupation, which meant they found in favour of the 'northern allies' over the Kurahaupo iwi and Ngati Toa.

In chapter 8, we considered the court's processes and the legislative framework in which it operated. We also considered the Crown's responsibility to remedy any prejudices that might have arisen from the court's decisions. These questions are directly relevant to our discussion of the 1892 case. As we stated in that chapter, the Native Land Court was not an agent of the Crown. However, if the court's proceedings or decisions breached the Treaty, then the Crown was required under the Treaty to remedy them. In order to assess whether or not the Crown should have taken such action in the case of the tenths hearings, we first need to ascertain whether any remedial action was required. In so doing, we do not question

or impugn the legality of the court's decisions, which stand unless altered by a duly empowered court or by legislative action. The Waitangi Tribunal is not an appellate court.

### 9.6.1 The 1892 Native Land Court case

Prior to 1882, only Maori could apply to the Native Land Court for investigation of title. The Native Reserves Act 1882 was the first statutory exception to this, sections 16 and 20 of the 1882 Act empowering the Public Trustee to apply for investigation into the beneficial ownership of native reserves.<sup>431</sup> The 1882 Act and its successor, the Native Reserves Amendment Act 1895, confirmed the control the Public Trustee had over the reserves vested in the tenths estate. The Native Land Court was not able to allow any beneficiary to dispose of rights or interests, nor to make an order divesting the Public Trustee of native reserve land. The consent of the trustee was necessary before the court could make any order relating to native reserve land. Maori beneficial owners were not allowed to lease or sell their land, while the trustee could dispose of such land by lease or otherwise, without any provision being made for consent from the beneficial owners.<sup>432</sup>

Following the Public Trustee's application, the tenths hearing opened in Nelson on 7 November 1892. Judge Mackay asked those who wished to make a case to introduce themselves to the court. Those appearing were Mr Pitt, for Herewini Ngapiko and others of Ngati Rarua and Ngati Tama; Hohepa Horomona, for Ngati Koata and 'sections' of Ngati Toa, Ngati Tama and Te Atiawa; Peoti Makitonore, for Rangitane and Ngati Kuia; Hemi Matenga, for a section of Ngati Tama; Hohaia Rangiauru, for 'certain members' of Te Atiawa; and Hoani Tatana, for a section of Te Atiawa. The claimants were in various states of readiness for the hearing, and the court decided to start with Ngapiko's case, 'which it was understood was sufficiently advanced to be heard at once'.<sup>433</sup>

The court heard from the three witnesses in the Ngapiko case, Taka Herewini Ngapiko (of Ngati Rarua and Ngati Tama), Ramari Herewine (Ngati Rarua), and Tuhaha Matenga (Ngati Rarua) over the next five days.<sup>434</sup> Before Pitt closed the case for Ngapiko, Mackay stated that:

now the case of the Ngati-Rarua's was practically over, that it would be as well if an effort was made to consolidate the business before the Court and to that end that those concerned

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431. Dr David Williams, 'The Crown and Ngati Tama ki te Tau Ihu: An Historical Overview Report', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A70), p 160

432. Fraser, 'Nelson Tenths', p 84

433. Native Land Court, Nelson, minute book 2, fols 170-172

434. Tony Walzl, 'Information Audit on the Minutes of the 1892 Native Land Court Hearing to Determine Beneficial Ownership in Respect of the Nelson Tenths Reserves', report commissioned by the Ngati Rarua Claims Committee in association with the Crown Forestry Rental Trust, 2003 (doc B22), p 96

should prepare lists of the persons who are admitted to be entitled amongst the Ngatiruaras such lists to comprise the names of the Ngatiawa, Ngatitama and Ngatikoata who had any interest in the land comprised within the block ceded to the Company at the date of such cession.<sup>435</sup>

When the case resumed the following Monday, Ngati Tama and Ngati Koata representatives objected to lists being prepared before they had given evidence and Mackay agreed that this need not happen. Mackay explained that he had made the suggestion 'with a view to shorten the proceedings' and he now recommended that the remaining claimants 'limit their witnesses in each case to one'.<sup>436</sup> Accordingly, the court heard from one witness in each of the other claims: Ihaka Tekateka for Ngati Koata, Paramena Haereiti for Ngati Tama, Hohaia Rangiauru for Te Atiawa and Meihana Kereopa for Ngati Kuia and Rangitane.<sup>437</sup>

Over the course of two weeks, witnesses outlined the significant events in their tribal history as they reflected upon their connection with the wider district and with specific lands at Wakatu, Waimea, Moutere, and Motueka. In part, this evidence came in the form of the tribally driven, oral narrative of each witness and, in part, in the answers to cross-examination by those with whom they were in contention. Ngati Rarua, Te Atiawa, and Ngati Tama spoke of the taua and the subsequent arrangements between themselves as to the settlement of the lands from Waihi to Separation Point; Ngati Kuia of their survival and Tutepourangi's gift; and Ngati Koata of both the gift and their role in the conquest and occupation of the area.<sup>438</sup> Very little of the evidence given in the 1892 case related to the establishment or nature of the tenths. The focus was on claims of customary entitlement to the land encompassed in the tenths estate.<sup>439</sup>

The court presented its judgment on 21 November 1892. In Mackay's view, there were a number of issues to be determined, all centring on customary questions: the extent and significance of Tutepourangi's gift, the consequences of conquest and whether defeated peoples retained any rights; and as a subsidiary issue, whether rights were held by conquerors who had not been resident on the land in 1840.

Mackay concluded that the whole of the region had been effectively conquered and occupied and that any members of the Kurahaupo people who remained in the district were in complete subjugation and possessed no rights. In his view, Tutepourangi's gift had not extended westward to encompass the tenths land. At any rate, Mackay viewed the tuku as

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435. Native Land Court, Nelson, minute book 2, fol 236

436. Ibid, fols 252–253

437. Walzl, 'Information Audit', pp 96–97

In his summation of the case, Mackay described the claimants as Ngati Rarua; Ngati Koata, Ngati Toa, and a section of Ngati Tama and Ngati Awa; Ngati Tama; Ngati Awa; and Ngati Kuia and Rangitane: Native Land Court, Nelson, minute book 3, fols 3–5.

438. Ibid

439. Fraser, 'Nelson Tenths', p 87

irrelevant to the question of ownership of the tenths land, and Ngati Koata's claim on this basis was denied. Further, Ngati Toa had no rights because they had not followed conquest with occupation. In Mackay's view, the only valid claims came from those iwi who had followed conquest with residence and cultivation of the lands that were to make up the Nelson settlement. On this basis, he found that Ngati Rarua, Ngati Tama, Te Atiawa, and Ngati Koata were the only ones to have customary rights of ownership.<sup>440</sup>

Mackay judged that the region had been divided between those groups in the shared but discretely held territories reflected within Spain's awards. Waimea (38,000 acres) was the common property of all four conquering hapu; Wakatu (11,000 acres) was owned by Ngati Koata and Ngati Tama; Moutere and Motueka (37,000 acres) belonged to Ngati Rarua and Te Atiawa; and the 45,000 acres of Massacre (Golden) Bay to Ngati Rarua, Ngati Tama, and Te Atiawa. Mackay emphasised that, while the reserves were concentrated in the township, Motueka, and Moutere, the funds accruing from them were for the benefit of all the hapu who owned the territory encompassed by Spain's award. Thus, each iwi were deemed to have had an interest 'proportionate to the extent of land to which they had been entitled, at the time of the sale to the company'.<sup>441</sup>

Following Mackay's call for surviving owners and applications for succession to those who were deceased, Ngati Rarua put in 121 names, Ngati Koata 122 names, Ngati Tama 37, and Te Atiawa 23. In the ensuing adjustments and alterations, it is apparent that Mackay allowed names on the list of beneficiaries only if they could demonstrate both conquest and actual occupation. Names were deleted from Te Atiawa and Ngati Tama's lists, with Te Atiawa's list undergoing the biggest revision. Mackay rejected the claims of Ngati Hinetuhi, Ngati Rahiri, Puketapu, and Kaitangata. Ngati Hinetuhi he deemed had held no rights within the lands sold to the company. He also rejected the Ngati Rahiri list on the ground that the persons on it had a right only to a small parcel allocated to them for cultivation. Puketapu's claim was rejected, even though they had participated in the sale to the company, because, in Mackay's view, they had held no real right having never occupied the land permanently. In the case of Kaitangata, he would accept only five of the 12 names submitted. Ultimately, however, Herewine Ngapiko agreed to provide for another five persons from Ngati Hinetuhi and Ngati Rahiri 'out of his share'.<sup>442</sup>

Successors were declared where necessary and a total of 309 people were included in the court's order of March 1893. Although the record is incomplete, the owners appear to have been scattered, with almost as many living in the North Island as were in Nelson and Marlborough.<sup>443</sup> The court confirmed a final revised list on 31 July 1895, which by this

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440. Native Land Court, Nelson, minute book 3, fols 5-7

441. *Ibid*, fols 8-9

442. *Ibid*, fols 37-39, 57

443. Fraser, 'Nelson Tenths', p 88

date was comprised of 285 surviving owners and the descendants of those who had passed away.<sup>444</sup>

Mackay proceeded to a final apportionment of shares to the funds accrued by the tenths; a figure apparently based on his estimate of acreage occupied by the different iwi in the 151,000 acres assigned to the company. It is not clear how Mackay worked out the relative interests in different districts.<sup>445</sup>

As outlined in table 8, Ngati Rarua were judged to be the major right holders, entitled to 69 out of 151 shares; Ngati Tama were allocated 40 shares; Te Ati Awa, 22; and Ngati Koata 20.

Kurahaupo protested the finding. In December 1892, tribal representatives of Rangitane, Ngati Kuia and Ngati Apa sought a rehearing 'because the decision of the court was not just'. They argued that their rights had been protected by the *tuku* to Ngati Koata, that they had been in unbroken occupation of the land and that their rights were recognised in subsequent Crown negotiations.<sup>446</sup> Mackay wrote a 14-page memorandum on the application, concluding that:

the right of the former owners was entirely extinguished by the conquest of Te Rauparaha and his allies, and at the time the land comprised within the Nelson settlement was sold and the remnants of the original owners were living in a state of subjection to the conquerors and held no proprietary rights.

In Mackay's view, the *tuku* was not relevant; it had been overturned by the subsequent *taua* and by the time of the company's arrival the whole of the territory comprised in it had been overrun and occupied by the conquering tribes. He dismissed the claim that they had maintained unbroken occupation as 'pure fabrication'; they were 'conquered slaves' there only on 'sufferance, not independently'. Furthermore, any past recognition of the existence of their rights in the context of the Waipounamu negotiations of 1856 was confined to the Pelorus Sounds and did not extend to the lands at Nelson.<sup>447</sup> No rehearing took place.

Mackay also blocked a subsequent petition protesting the decision. In 1895–96, the member of the House of Representatives for the Wairau, Thomas Lindsay Buick, presented a petition from Te Tau Ihu Maori, 'who have agreed to have what money there is collected from

444. There were fewer than 285 individual owners. The list was arranged by district and some names appeared in more than one district: Hilary Mitchell and Maui John Mitchell, 'Mitchell Research Report 99-3, Chapter 19: "The Native Land Court, 1892–1893"', brief of evidence on behalf of the Wakatu Incorporation, Ngati Koata no Rangitoto ki te Tonga Trust, Ngati Rarua Trust, Ngati Tama Manawhenua ki te Tau Ihu Trust, and Te Atiawa Manawhenua ki te Tau Ihu Trust, not dated (doc 05), p 220.

445. Fraser, 'Nelson Tenths', p 89

446. Kipa Whiro and others to chief judge, Native Land Court, 6 December 1892 (Susan Kiri Leah Campbell, comp, supporting papers to 'A Living People', various dates (doc A77(a)), pp 11–13)

447. Native Land Court, Wellington, NLC1 1892/3946 (David Armstrong, "'The Right of Deciding": Rangitane ki Wairau and the Crown, 1840–1900', report commissioned by Te Runanga o Rangitane o Wairau in association with the Crown Forestry Rental Trust, not dated (doc A80), p 172)

the Tenths equally divided amongst the eight tribes which now reside on the South Island'. The petition was said to have been signed by seven South Island tribes. In January 1896, Tuiti Makitanara and others of the Rangitane Wairau Committee submitted another petition asking for an adjournment of the upcoming land court hearing at Nelson until their previous petition had been dealt with. The Government referred this to the chief judge of the Native Land Court, who sought Judge Mackay's views. Mackay was dismissive of the request for an adjournment and stated that the original petition was 'based on a misconception of the actual position of the matter'. He was particularly dismissive of the Rangitane committee's request for an adjournment, stating that they had 'no status in the matter, and have no more right to move therein than a stranger'. Accordingly, neither petition was successful.<sup>448</sup>

### 9.6.2 Legal submissions

#### (1) *Claimant submissions*

In their submissions to us, those iwi who Mackay found in favour of did not dispute his award in general, though some were critical of the relative apportionment of interests and the process through which the court's decision was reached.

Counsel for the Wakatu Incorporation and Ngati Tama maintained that Mackay had identified the correct iwi. In Wakatu's view, the tenths were payment for the alienation of interests, as per the arrangement reached through the 1844 deeds of release, and no other parties should have benefited from the tenths. Counsel emphasised the 'essential contractual nature' of the tenths obligation.<sup>449</sup>

Ngati Tama agreed that Mackay had recognised the correct iwi, and that the expenditure of the fund on non-beneficiaries prior to this recognition was in breach of the Crown's duty of active protection. Nevertheless, they were critical of the process through which this decision was reached, arguing that Mackay's 'scanty judgment' and his selection of only some of the issues that had been raised failed to reflect the complexity of the evidence. Ngati Tama also viewed the provision in the 1882 Act empowering the trustee to apply to the Native Land Court as a breach of article 2 rights of rangatiratanga.<sup>450</sup>

Ngati Koata agreed that Mackay's judgment did not represent an adequate consideration of Maori customary rights and interests. In deciding to hear from only one Ngati Koata witness, the court 'failed to respect and give due weight to Ngati Koata tikanga and custom'. Mackay failed to properly inquire or give sufficient regard for evidence about Tutepourangi's

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448. J1 1896/59 (David Armstrong, comp, 'Supporting Documents to the Evidence of David Anderson Armstrong, "The Right of Deciding": Rangitane ki Wairau and the Crown, 1840-1900', 2 vols, supporting documents, various dates, vol 2 (doc A80(b)), pp 188-215)

449. Counsel for the Wakatu Incorporation, closing submissions, p 77

450. Counsel for Ngati Tama, closing submissions, pp 80-81

tuku. He also did not explain how he had assessed the relative interests of the iwi so it could not be certain that he had fairly represented the rights and interests of Ngati Koata.<sup>451</sup>

Ngati Rarua stated that the court ‘materially interfered in the evidential process’. Ngati Rarua also felt that the allocation they received in the specific districts did not fully represent their interests, arguing that they had been wrongly excluded from Nelson township and that other iwi had been included in areas where they had not occupied.<sup>452</sup> As a result of the failure to hold an adequate inquiry, the allocation of relative interests was incorrect. Also, Ngati Koata pointed to reductions in their list of individuals and Ngati Tama argued that not all eligible individuals from the four recognised iwi were identified.<sup>453</sup>

All those who were excluded from beneficial ownership of the tenths submitted that they should have been included.

Ngati Toa pointed to faults in both the court’s processes and Mackay’s decision. Ngati Toa were not represented as a distinct iwi grouping at the 1892 hearing but rather as part of a Ngati Koata-Ngati Toa case. At the opening of the hearing, their representative, Hohepa Horomona, sought an adjournment to give them time to arrange their case but this request was presumably refused. Ngati Toa argued that this could well have impacted on their ability to present their case.

In closing submissions for Ngati Toa, counsel cited Matiu Rei’s view that Judge Mackay had pre-judged the case before hearing it. This impression was based on the failure to give sufficient notice of the hearing for Porirua-based Ngati Toa, Mackay’s instruction at the end of Ngati Rarua’s evidence to arrange lists of Ngati Rarua, Ngati Koata, Ngati Tama, and Te Atiawa, his decision to only allow only one witness from each of the other claimants, and alleged mistranslations of the evidence of Meihana Kereopa. Ngati Toa pointed to differences in English and Maori versions of the court minutes, in which key references to Ngati Toa were omitted. Counsel submitted that the frequency and significance of these omissions indicated that they were deliberate and intended to prejudice the Ngati Toa case.<sup>454</sup>

In Ngati Toa’s view, Mackay’s decision to base his judgment on occupation was not justified. The tenths were not established to reflect occupation in the region but rather as a general endowment for all Maori with interests in the region. In basing his award on the New Zealand Company’s transaction with Ngati Toa, Spain had acknowledged Ngati Toa’s entitlement to the land encompassed in the transaction. The tenths was supposed to be a separate endowment fund as part of the compensation for the extinguishment of title, as governed by Maori customary law at 1840. Quoting Professor Boast, counsel argued that an inquiry in the 1840s, when Ngati Toa were still ‘a powerful presence with the authority of the chiefs recognised over a wide region’, would have had to have included Ngati Toa in

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451. Counsel for Ngati Koata, closing submissions, pp 108–112

452. Counsel for Ngati Rarua, closing submissions, p 175

453. Counsel for Ngati Koata, closing submissions, p 111; counsel for Ngati Tama, closing submissions, p 81

454. Counsel for Ngati Toa Rangatira, closing submissions, pp 108, 110–111

the title. In delaying the inquiry until the 1890s, the Crown failed to meet its duty of active protection. The court's decision was 'faulty and flawed' and the Crown's reliance on this decision was in breach of the Treaty.<sup>455</sup>

Ngati Toa maintained that, as in the case of the Wellington tenths, they 'must be compensated' for their wrongful exclusion from the tenths and that the Wakatu Incorporation 'would not be the appropriate body to represent its interests, in negotiation or settlement, in respect of the tenths.'<sup>456</sup>

Ngati Kuia considered two possible approaches to entitlement to the tenths. The tenths estate could be viewed as an endowment for all Maori in the area of the New Zealand Company purchase (as Ngati Toa maintained) or it could be viewed as an endowment for those who had signed the deeds of release. Ngati Kuia suggested that this latter approach was 'possibly more compelling' if the tenths were viewed as the 'real payment' for the New Zealand Company transaction. However, if it was the approach to be adopted, then the Tribunal would also have to consider who had been excluded from the New Zealand Company transaction (and, by implication, Spain's award and deeds of release). Ngati Kuia had been wrongly excluded from these processes and this wrongful exclusion was perpetuated in the tenths case of 1892. The Crown's failure to recognise Ngati Kuia's entitlement breached the duties of active protection, of consultation, and of ensuring a fair process.<sup>457</sup>

Rangitane maintained that Mackay's decision was 'fundamentally wrong'. The decision disregarded evidence of ongoing customary occupation of areas including Wakatu, Waimea, and Motueka and was inconsistent with the acknowledgement of Rangitane's interests in the Wairau. They outlined subsequent efforts for a reconsideration of the 1892 decision, efforts that were stymied by Mackay's dismissal of them.<sup>458</sup>

In Ngati Apa's view, Meihana Kereopa's evidence to the 1892 case was influenced by the outcome of the 1883 hearing into Taitapu, where he had represented Ngati Apa. At the 1883 hearing, Mackay had 'bluntly argued successfully before Judge Mair that Ngati Apa were conquered and had no rights'. In this context, it was not surprising that at the 1892 hearing, Kereopa had emphasised the rights of Ngati Kuia and Rangitane but not Ngati Apa's.

The court's narrow interpretation of the 1840 rule meant that Ngati Apa were denied proper recognition and Kurahaupo iwi were shut out of benefits that arose out of the tenths reserves. The Crown failed to respond to the creation of the 1840 rule or to ensure that the legislation surrounding the Native Land Court ensured the protection of Maori customary rights. Ngati Apa argued that the Crown had a responsibility to intervene in cases like the 1892 one. The Crown was responsible for the legislation behind the court, it was aware

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455. Ibid, pp 100, 108–109, 113–114

456. Counsel for Ngati Rangatira, submissions in response to closing submissions of Crown counsel, 19 April 2004 (paper 2.785), p 10

457. Counsel for Ngati Kuia closing submissions, pp 46–47

458. Counsel for Rangitane closing submissions, pp 42–45

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that Kurahaupo were dispossessed on the basis of Native Land Court decisions like that of 1892, and that the 1840 rule, as applied by Mackay in 1892, disadvantaged and dispossessed some iwi. Ngati Apa submitted that the Crown should either have passed legislation to stop Mackay's decision from being put into effect or else to mitigate the prejudicial effect of that decision.<sup>459</sup>

**(2) Crown submissions**

The Crown acknowledged that 'an important issue in this inquiry' was whether the exclusion of Kurahaupo iwi from a beneficial interest in the tenths estate had involved a Crown breach of the Treaty. It also noted claims from those who were awarded interests with respect to their relative allocations.<sup>460</sup> But the Crown advanced no view on this claim. Rather, it suggested that there was nothing so faulty in substance or process as to have justified any Crown intervention after the Native Land Court tenths decision. Crown counsel argued that the Tribunal did not have the jurisdiction to consider decisions of the land court. The acts and omissions of that court, sitting as a court, are not act or omissions of the Crown in a Treaty context. The Crown submitted that: 'There does not appear to be any evidence of an error in substance or process of such an obvious kind as to raise a serious question that the Crown could or should have intervened following the release of Judge Mackay's decision.'<sup>461</sup>

If, however, the Tribunal concludes that a breach had arisen through the exclusion of some iwi, the Crown recommended that we follow the course taken by the Te Whanganui a Tara Tribunal, which found that Ngati Toa had been wrongfully excluded from the Wellington tenths. That Tribunal recommended that this breach should not be remedied by retrospectively deeming Ngati Toa to be beneficiaries of the Wellington tenths. The Crown argued that it would be inappropriate to introduce a new class of beneficiaries to a trust estate of such long standing. As in Wellington, a remedy in Te Tau Ihu would be best settled by negotiation between the Crown and affected claimants.<sup>462</sup>

**9.6.3 Tribunal discussion and findings****(1) The Native Land Court's processes and the 1892 case**

In chapter 8, we traversed the issues around the Native Land Court's operations in Te Tau Ihu and the extent of the Crown's responsibilities with regard to the Native Land Court. We agree with the distinction the Crown makes between the actions and omissions of the Native Land Court and those of the Crown. Although the court is not the Crown or an

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459. Counsel for Ngati Apa, closing submissions, 2004 (doc T3), pp 24–27

460. Crown counsel, closing submissions, p 60

461. Ibid, p 83

462. Ibid, p 84

agent of the Crown, the Tribunal can consider whether its actions were consistent with the principles of the Treaty. In the event of any inconsistency being found, the Tribunal can then determine whether the Crown omitted to take appropriate action to remedy the situation to the extent that was practicable.

Ngati Tama counsel considered the 1882 provision enabling the Public Trustee to make an application to the Native Land Court to be in breach of article 2 of the Treaty. In their view, only Maori should have been entitled to apply to the court for definition of title. As historian for Ngati Tama, Professor David Williams, noted, this was the first statutory exception to the requirement that applicants should be Maori. Professor Williams also commented that the Public Trustee played no formal role in the court's proceedings.<sup>463</sup>

In making this application, the Public Trustee was acting on behalf of its Maori beneficiaries. In our view the provision in the 1882 Act was necessary because of the context in which the tenths were administered and in the context of the system of title adjudication. It was these two systems that were at fault, rather than the particular provision in the Native Reserves Act. As we stated in chapter 8, Maori should have been empowered to decide their own land titles. The imposition of the Native Land Court to make such decisions was a fundamental breach of the Treaty and one that inevitably resulted in court-created entitlements which distorted or mistook custom. However, after the establishment of the Native Land Court there was no option but to refer questions of title to the tenths to that court. And, given the nature of the tenths trust, the Public Trustee was really the only one who could have made an application for investigation of title. As we have discussed throughout this chapter, the lack of control that beneficial owners had over their estate was a fundamental issue with regard to the tenths, and one that breached the Treaty and its principles.

Issues raised with respect to the court's hearing process in 1892 are more compelling. When the case first opened, the representative for Ngati Koata–Ngati Toa, Horomona, asked for an adjournment because 'only a short notice have been given of the intention to proceed with the case'. Several parties shared this concern, including representatives of Kurahaupo iwi and Te Atiawa, but the hearing nevertheless proceeded. Historian for Ngati Toa, Professor Boast, suggested that given the hearing was in Nelson and the application had been made by the Public Trustee, it was possible that Ngati Toa had not heard about it until too late. No separate Ngati Toa case was presented, although Professor Boast notes that Horomona was able to put together a case for Ngati Toa in the course of the hearing.<sup>464</sup>

Professor Boast remarked that as a leading authority on Maori affairs in Te Tau Ihu, Mackay was the obvious choice for the case but he added that Mackay's pre-existing views about local Maori customary history 'rightly or wrongly, had a significant impact on his approach to the evidence'. Matiu Rei took this further, arguing that 'the overall impression

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463. Williams, 'The Crown', p 160

464. Professor Richard Boast, 'Ngati Toa and the Upper South Island: A Report to the Waitangi Tribunal', revised ed, 2 vols, report commissioned by the Crown Forestry Rental Trust, 2000 (doc A56), vol 2, pp 286–288

that one gets from those minutes is that the case was a foregone conclusion in the Judge's mind prior to it even starting'. Several factors contributed to this impression: the way that Mackay's judgment interpreted the evidence, questions around the translation of the minutes, the lack of notice given to Ngati Toa, the restriction of witnesses to one per claimant, and Mackay's instruction to only some of the claimants to begin preparing lists of owners (and after he had heard from only one group).<sup>465</sup>

Mr Walzl stated that Mackay's suggestion that Ngati Rarua should draw up lists of owners in cooperation with other iwi before having heard from all parties 'materially interfered' in the hearing process. Then, after withdrawing the instruction because of objections, Mackay instead limited witnesses for the remaining cases.<sup>466</sup> Heather Bassett and Richard Kay expressed the view that Mackay's direction to limit witnesses to one per case to shorten proceedings 'may have prejudicially affected the claim of Ngati Koata and other claimants'. They argued that this resulted in contradictory evidence in the minutes with little to explain why Mackay chose to believe one version of events over another.<sup>467</sup> The historians were generally critical of the brevity of Mackay's judgment. As Professor Williams remarked, the judgment was typical of land court judges, who, after hearing weeks of tikanga evidence, reached judgments that neither covered all that had been heard nor provided their reasoning behind the decisions made.<sup>468</sup>

Ngati Toa also raised concerns about the official version of the minutes of the case. Researchers located an extract of the original Maori minutes in Mackay's papers (the evidence of Meihana Kereopa).<sup>469</sup> Matiu Rei argued that, while in most respects these did not differ from the English version, there were significant variations around certain points in the evidence where Ngati Toa's customary interests were discussed. Rei suggested that in translating the original minutes into English, Mackay had deliberately downplayed the position of Ngati Toa. As we have noted, this allegation was further discussed in Ngati Toa's closing submissions.<sup>470</sup>

The question of the veracity of Mackay's interpretation of the minutes was not one that was explored in great depth during our inquiry. Without this in-depth exploration and with only an extract of the original minutes, we are not in a position to reach a conclusion on Ngati Toa's allegations of deliberate mistranslation.

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465. Matiu Rei, oral evidence, fifteenth hearing, 5–8 August 2003 (transcript 4.15(a), pp 215–216)

466. Walzl, 'Ngati Rarua Land', p 191

467. Heather Bassett and Richard Kay, 'Nga Ture Kaupapa o Ngati Koata ki te Tonga, c1820–1950', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A76), p 171

468. Williams, 'The Crown', pp 161–162

469. Professor Richard Boast, under cross-examination, fourteenth hearing, 22 July 2003 (transcript 4.15, pp 25, 55, 58)

470. Counsel for Ngati Toa Rangatira, oral submissions, fifteenth hearing, 5–8 August 2003 (transcript 4.15(a), p 215); counsel for Ngati Toa Rangatira, closing submissions, pp 109–110

Criticisms of the way that the hearing was run were more fully traversed in our inquiry. Mackay proceeded with the hearing despite calls from several parties for an adjournment to enable them to prepare their case. As the applicant was the Public Trustee and not local Maori, it is quite possible that interested parties did not all have sufficient notice of the hearing, particularly those not based in Te Tau Ihu. Mackay's instructions following Ngati Rarua's evidence are also very revealing of his thinking at least part-way through the hearing. They strongly suggest that he had pre-judged the case, hence his keenness to 'shorten the proceedings'. Further support for this interpretation comes from Mackay's next suggestion, that other claimants present only one witness, which he also made on the basis that it would speed up the hearings.

The result of the court's process was that the hearing was not a full inquiry into the customary interests of Te Tau Ihu iwi in the area encompassed in the Nelson settlement. Not only was the inquiry approximately 50 years later than it should have been, it was also not comprehensive. The evidence also suggests that Mackay's preconceptions about customary interests in Te Tau Ihu influenced his decision.

Following the hearing, Kurahaupo iwi made several attempts to appeal or to get a reconsideration of Mackay's judgment. David Armstrong pointed out that both the application for rehearing immediately after the case and the petition that followed in 1895–96 failed following the advice of Judge Mackay.<sup>471</sup> This raises serious questions about the processes through which Maori could seek redress for court decisions that they believed to be wrong. The chief judge of the Native Land Court was content to rely on the advice of the judge who had made the order in the first place. This advice was also deemed good enough for the Government in considering the petition. The petition does not even appear to have been referred to the Native Affairs Committee.<sup>472</sup> This lack of inquiry was presumably on the basis of the land court's advice.

In chapter 8, we considered the Crown's responsibility for the imposition of the Native Land Court, the ongoing legislative framework within which the court operated, and the fulfilment of its obligations of active protection in considering protests about court decisions. Our findings there with respect to these issues are directly applicable to the 1892 case.

We find that there were questionable aspects to the court's process and sufficient grounds to warrant a Crown investigation, following calls for such an inquiry from Kurahaupo. We find the Government's failure to adequately respond to these requests to be in breach of the principles of active protection and redress.

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471. Armstrong, 'Right of Deciding', pp 171–173

472. The petition is not mentioned (either as dealt with or as not dealt with) in the Native Affairs Committee minutes of 1895, 1896, or 1897: AJHR, 1895, 1-3; AJHR, 1896, 1-3; AJHR, 1897, 1-3. It was also not mentioned among the petitions dealt with by the Native Affairs Committee of the Legislative Council in the years 1895 to 1897: see AJLC, 1895–97.

**(2) Our assessment of the rights of Kurahaupo and Ngati Toa**

We will consider the rights of Kurahaupo people and Ngati Toa in turn, starting with Kurahaupo.

**(a) The case for Kurahaupo:** Our general view on the question of raupatu and its place in custom, as well as the survival of Kurahaupo rights following their defeat, has been detailed in chapters 2 and 3. We considered there, and in passing in chapter 8, the different traditional accounts of the settlement of the region and, in particular, the different perspectives on whether the region had been ‘conquered’, and what that meant in terms of the rights held by the prior inhabitants if it had been.

Our discussion of the taua and the impact on the resident people was based, in large part, on work which drew extensively on the evidence given at the 1892 hearing. Our conclusion that Kurahaupo rights did survive in the region was also partly based on the testimony given on that occasion. The issue of Kurahaupo rights was discussed in various forms during the 1892 hearing, most fully in Meihana Kereopa’s evidence on behalf of Rangitane and Ngati Kuia but also in the context of Ngati Koata’s reliance on Tutepourangi’s tuku as giving them rights extending beyond their primary place of residence at Rangitoto in 1840.

Meihana Kereopa emphasised that the giving of land by Tutepourangi had not been an act of subjugation. Under cross-examination by the conductor of the Ngati Koata case, Kereopa stated that ‘I don’t know the extent of the Rangatiratanga that was left to me after the land became possessed by the northern tribes’. However, he later emphasised the point that, while Ngati Koata had derived the land through raupatu, and while he had become subordinate to them, his mana had remained: ‘I have never been enslaved. Consequently my status has not been diminished.’<sup>473</sup> For Kereopa, Ngati Koata’s acceptance of the tuku, his own survival, un-enslaved, during the taua that followed, his own exercise of leadership and continuing status, all showed that his people still had rights in the region. Ihaka Tekateka of Ngati Koata might not have accepted that Kereopa’s authority was unimpaired, but he also argued that the gift was not overturned by the subsequent taua, that: ‘There was no raupatu in the Nelson or the Waimea districts. The reason for this was that the land was in the possession of Ngatikoata through the gift by Tutepourangi. This was the take that limited the occupation of Ngatikoata to the eastward of Moutere.’<sup>474</sup>

The other northern groups who had settled the region as a result of those taua, either at the time, or in a later migration, successfully challenged any reliance on the tuku as giving Ngati Koata and Ngati Kuia on-going rights in the lands which they (the northern tribes) now occupied. Mackay returned twice to the question of the original effect of the gift in his cross-examination of Kereopa, clearly doubtful that Tutepourangi acted other than out

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473. Native Land Court, Nelson, minute book 2, fols 314–315

474. Ibid, fol 262

of compulsion.<sup>475</sup> He also dismissed the notion of any on-going rights on the part of Ngati Koata stemming from the tuku. Mackay had identified as one of the issues to be decided, the question of whether the tuku had included all the area from Waihi to Separation Point and if so, ‘whether the force of the tuku had been set aside by subsequent events.’ In his finding, however, he judged the matter to be largely irrelevant:

Touching upon the first point the Court is of the opinion that the evidence did not support the statement that all the lands from the southern boundary of the land now owned by Huria Matenga and extending to Separation Point was included in the Gift by Tutepourangi to the Ngati Koata.<sup>476</sup>

Although Mackay moved on to the question of conquest and did not expand upon this opinion, he clearly saw Ngati Koata’s rights as confined to Rangitoto and the coast opposite, and the same in nature as those held by other conquering iwi who had settled in the region.

The second issue identified by Mackay was whether the land comprised in the Nelson Settlement had been ‘fully acquired by conquest.’ Mackay largely assumed that this had been the case and, with an eye to the possible claims of Ngati Toa, stressed that occupation had been required as well. He stated: ‘The Court considers that the evidence discloses that the right to land was fully established in addition to the Conquest by the occupation of it by the several hapus who were found in possession on the arrival of the New Zealand Company.’<sup>477</sup> In fact, the evidence had also clearly shown that Kurahaupo were present with Ngati Koata when the New Zealand Company had first arrived, but Mackay dismissed the notion that their endurance, their on-going connections with the land, and their act of tuku to Ngati Koata meant that any rights equivalent to ownership had survived:

the Court is of the opinion that the right of the former owners were entirely extinguished by the Conquest by Te Rauparaha and his allies and that at the time the land was sold they were living in a state of subservience to their conquerors. Consequently the Court dismisses this claim.<sup>478</sup>

This is not in accord with our own view of how custom operated. As discussed in chapter 2, we follow the alternative line of tikanga as described in the *Rekohu* report, which emphasises ancestral connection, survival, unbroken occupation by tributary communities under their own chiefs, and intermarriage, alongside concepts of ‘conquest.’ We note too, Dr Angela Ballara’s assessment of this matter in her discussion of the tenths decision, that:

By the time of the sale to the Company, the early tangata whenua would have been a small minority, but nevertheless Meihana Kereopa was able to name eight leading men who were

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475. Walzl, ‘Information Audit’, p 40

476. Native Land Court, Nelson, minute book 3, fols 5–6

477. Ibid

478. Ibid, fol 6

## 9.6.3(2)(b)

present at the sale to the Company. Mackay's decision to exclude . . . Ngati Kuia, Rangitane, and Ngati Apa entirely from any beneficial interest in the trust funds resulting from the New Zealand Company was not correct.<sup>479</sup>

We agree that they were wrongly excluded both on grounds of custom at 1840 and also as the situation stood at 1892. Even if Kurahaupo had been subservient to the northern tribes at the time of the sale to the company, they had survived and remained on the land as ancestral communities, and by that survival some of their rights had also survived. It was within the compass of the Native Land Court to take this into account, particularly in the circumstances of the tenths case, and to assess beneficial entitlement in terms of the needs of all Maori from the region. Instead, Mackay judged the issue solely in terms of a specific obligation arising out of a transaction with the people who Spain had identified as the right holders, on the basis of a very inadequate inquiry (see ch 4). As we have seen in chapter 2, however, the assumptions underlying those arrangements were flawed and did not form a sound basis for the determination of title in these lands.

**(b) *The case for Ngati Toa:*** Mackay moved next to the question of Ngati Toa:

In the opinion of the Court the Members of the hapus who took part in the Conquest under Te Rauparaha who did not occupy the land comprised within the Nelson Settlement up to the year 1840 lost their right to it as no rights of ownership were exercised by such persons as would confer a proprietary right to the soil, it being a recognised principle of Native custom that conquest alone without occupation confers no right.<sup>480</sup>

Dr Ballara sees this judgment as proof that 'Mackay had at last accepted the position which evidence about customary tenure would suggest, which he had fought on many occasions, . . . that conquest alone without occupation confers no rights.' It was on this question, not on that of Kurahaupo rights, that Mackay's opinion had shifted. In Dr Ballara's view: 'Mackay's exclusion of Ngati Toa as beneficiaries of the Nelson Tenths was acceptable in terms of customary tenure.'<sup>481</sup> She suggested that, while they may have had a presence on Rangitoto with Ngati Koata, the nearest identifiable Ngati Toa community was based in the Pelorus Sounds and their future needs had supposedly been provided for in terms of the reserves at the Wairau and Porirua.

As we have indicated in chapter 2, we share the view that ownership required, ultimately, a presence on the land and that Ngati Toa had chosen not to exercise the acts of ownership which would have confirmed their rights after the taua. This begs the question,

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479. Dr Angela Ballara, 'Customary Maori Land Tenure in Te Tau Ihu (The Northern South Island), 1820–1860: An Overview Report on Te Tau Ihu (Wai 785)', report commissioned by the Crown Forestry Rental Trust, 2001 (doc D1), pp 299–300

480. Native Land Court, Nelson, minute book 3, fols 6–7

481. Ballara, 'Customary Maori Land Tenure', p 297

however, of whether Ngati Toa had other grounds for inclusion within the beneficial title. We have some sympathy with counsel's argument that Ngati Toa might have expected that they would be included in any arrangements deriving from the transaction with the New Zealand Company.

Ngati Toa (like Kurahaupo) should have been provided for in some way. In chapter 4, when discussing the Spain inquiry, we acknowledged that Ngati Toa had inchoate rights in the Nelson region, arising out of a very fluid situation. They had settlements nearby and, in our view, if they had chosen to join their Ngati Koata relatives, or to settle in the Nelson district, it is unlikely that they would or could have been refused. They had been still free to exercise that choice at 1840 and afterwards too, if they did so peacefully, and it was that capacity which they had lost as a result of the Crown's final grant of the Nelson settlement lands.

There is much to say, also, in favour of Ngati Toa's contention that since the tenths resulted ultimately from the transaction begun at Kapiti, they should have been considered in the arrangements that flowed from it. In the view of Professor Boast: "The consideration for the extinguishment of traditional title in the Nelson area was payment in cash and the right to share in the "Tenths", and there [could] be no reason for denying Ngati Toa for a share in the latter."<sup>482</sup> Professor Boast argues further that:

There is no reason why Ngati Toa should be excluded from a beneficial share in the Tenths because they received a separate payment from the Company, as other iwi also received separate payments with the various 'releases' as well as Wakefield's distribution of gifts and presents to the residents of the Blind Bay area in 1842.<sup>483</sup>

Ngati Toa acknowledged that they were not entitled to occupation reserves, just (endowment) tenths.

We are in general agreement with the logic of this reasoning. Having given recognition to Ngati Toa's rights in the area by accepting the deed as a legitimate if flawed basis of purchase, Spain should have given them further consideration in his subsequent adjustments. Instead, he judged their rights as wholly extinguished. It also follows that they might have legitimately expected to have some benefit from reserves set up as an endowment for vendors (rather than for their actual occupation) whereas they again found themselves excluded entirely.

**(c) Should interests in the tenths funds have reflected principles of endowment rather than occupation?** As Ngati Kuia noted, the tenths estate could be viewed as an endowment for all Maori in the area of the New Zealand Company purchase or it could be viewed as an

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482. Professor Richard Boast, oral evidence, fourteenth hearing, 22 July 2003 (transcript 4.15, p 393)

483. Ibid

## 9.6.3(2)(c)

endowment for those who had signed the deeds of release.<sup>484</sup> The Wakatu Incorporation was strongly of the view that the tenths reserves could only be seen as compensation or consideration for the right to occupy and control the lands acquired by the Crown through the 1844 deeds of release. Accordingly, the ‘reserves were not a general endowment fund, but consideration for alienation in the land affected [and] that consideration ought only flow to those original owners thereby displaced and dispossessed and not to others.’<sup>485</sup>

The grounds for our view on this matter have been set out at a number of different points in the report: in our earlier discussion of the traditional occupation of the district and of what was promised to different parties by Spain, Grey, and McLean; and in our examination of what the understandings were of those involved with the tenths fund, either as administrators, or as applicants seeking assistance.

The tenths had been specifically created for the benefit of those whose lands were involved in the New Zealand Company transaction. In utilising the fund for the welfare of all Maori resident in the district, the Crown had breached the Treaty. This distinction became increasingly pertinent as Maori migrated into the district from outside. By the time the question of beneficial title was referred to the Native Land Court, almost 20 per cent of Maori resident in the district came from outside iwi.<sup>486</sup> Clearly, neither side in the original negotiations had contemplated this situation.

We accept that the intention of the New Zealand Company and early Crown officials had been to create an endowment fund specifically for the land-selling chiefs, their people and their descendants, rather than a general endowment for all Maori who might end up living in the district. But the situation was confused because the legislation under which the tenths was administered was ambiguous and because actual use of the fund did not match what had been promised in negotiation. A crucial part of the problem was that arrangements had been made in Nelson on the assumption that provision of a like nature would be completed on the eastern side of the island for Maori living there. But, as we discussed in chapter 5, subsequent negotiations for the Wairau resulted in no endowment reserves for Ngati Toa, or for Ngati Rarua and Rangitane resident on the eastern side of the island. Major Richmond (the superintendent of Nelson) had informed the company in 1847 that these people were taken care of. The Government had made ‘ample reserves’ for them both there and in Porirua and, thus, it was not ‘necessary to request the New Zealand Company to make any further Reserves in either district.’<sup>487</sup> The immediate impact was upon the people based at Golden Bay. Fox, the company’s agent at Nelson, interpreted Richmond’s letter

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484. Counsel for Ngati Kuia, closing submissions, p 46

485. Counsel for the Wakatu Incorporation, closing submissions, p 77

486. Of the 463 Maori residents of Te Tau Ihu (excluding Kaikoura) counted in the 1896 census, 29 were described as Waikato, 22 as Ngati Kahungunu, 15 as Ngai Tahu, 12 as Ngati Ruanui, and six as various other iwi. ‘Te Tau Ihu’ iwi were denoted as Ngatiawa, 313, and Rangitane, 65: Robinson, ‘Demographic Analysis’, p 25 (adjusted to exclude Kaikoura).

487. Richmond to Wakefield, 23 March 1847, NZC3/7 (Phillipson, *Northern South Island: Part 1*, p 121)

to mean that the company did not need to give the full extent of rural reserves there, deciding that ‘in fairness the natives having got their full quantity in the Wairau [they] should have none elsewhere’. Fox defended the decision; the Golden Bay Maori ‘are I believe of the *same tribe* as those for whom the reserves are made in the Wairau’, referring here to Ngati Rarua (emphasis in original).<sup>488</sup> The impact on other parties – both those resident at Golden Bay and those in the Wairau – was not considered at all.

Grey had dropped the idea of a ‘tenth’ in favour of ‘sufficiency’. Nor was it his intention that these reserves be part of a native trust generating endowment funds; they had been excepted from the sale to the Crown and were for the occupation of resident Maori. The policy of endowments had been pursued by Hobson and FitzRoy but was discontinued by Grey. Even though the New Zealand Company was permitted to choose rural sections from within the Wairau, that area was seen as acquired as a result of a new purchase and the company was relieved of any further responsibility to set aside tenths. As a result, Ngati Toa (like Kurahaupo) missed out in all the tenths and endowment arrangements except in so far as they enjoyed the medical and school benefits provided for Maori, generally, out of the fund. The severe decline of Ngati Toa fortunes after Grey’s abduction of Te Rauparaha and the withdrawal of most of their numbers from the region meant that any residual claim could be set aside. At the time of the 1892 hearing, they did not even have a witness present, other than in the person of Ngati Koata rangatira, Ihaia Tekateka.

Mackay did not consider the question of whether beneficial ownership of the endowment funds should be conceived more widely; in his mind, there was no question but that the fund should be devoted to the beneficial owners, and that these owners were the conquerors who had established and maintained occupation of the lands awarded by Spain. We have endorsed the interpretation of the tenths as being intended for those whose lands were involved in the New Zealand Company transaction; the result of a specific engagement. We have found that the Crown breached the Treaty, in the first instance, by using the tenths fund to provide education and medical services for Maori when these benefits should have been financed directly by the Government and, secondly, by utilising the funds generated by the lands of those particular hapu groups for the benefit of all. We cannot then find that the Crown should also have ensured that these others (or those of them who traced their origins back to one of the Te Tau Ihu tribes) were included on these grounds in ownership of those particular funds and the reserves that generated them. Nor can we recommend the overturning of those past arrangements without causing prejudice to those who were found to be beneficiaries; indeed we are unable to interfere in any way with the title of privately owned land.

We remain critical, however, of Mackay’s narrow interpretation of custom – in particular, his elevation of conquest to the exclusion of ancestral association – and construction of the

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488. Fox to Wakefield, 5 April 1847, CO208/88 (Phillipson, *Northern South Island: Part 1*, p 121)

## 9.6.3(2)(d)

1840 rule as precluding any Kurahaupo rights, or indeed residual rights for Ngati Toa. As discussed in chapter 8, it is part of our criticism of the Native Land Court that its constrictive and static construction of custom rendered it incapable of reaching the sorts of accommodation that this type of situation required. The key issue in the context of this discussion lies, however, with the Crown's early failure to make adequate provision for all Maori in the district, not in the decision of the court to see the tenths in terms of particular promises made and to use its rules for customary occupation as its basic criteria in determining a beneficial right to the fund. We reach this conclusion notwithstanding our general criticism of the Native Land Court as a mechanism by which such questions were to be decided.

**(d) *The court's allocation of shares in the tenths amongst the four beneficiary iwi:*** As described above, Mackay determined the proportionate interests of the beneficiary iwi in the 151 shares he allocated for rights in the 151,000 acres awarded to the New Zealand Company as follows: 69 for Ngati Rarua, 40 for Ngati Tama; 22 shares for Te Atiawa, and 20 for Ngati Koata.

While counsel for these four iwi did not dispute Mackay's findings in general terms, some questioned the correctness of the allocation he made between them. They also argued that a number of beneficiaries had been left out; a result which is blamed on the long delay in establishing who the beneficiaries actually were.

There are two separate issues here: were some beneficiaries from entitled iwi wrongfully excluded, and was Mackay's determination between the different parties correct in custom?

The Crown's failure to undertake a proper determination of the beneficiaries of the tenths at the time of its overseeing of the company's engagements resulted in later problems in identifying the owners and increased the likelihood of whanau and individuals being left out in 1892. The mobility of Te Tau Ihu Maori increased the complexity of the issue and the possibility of mistakes being made. As we discuss below, Mackay demanded the excision of a number of names from the beneficiary lists on grounds that were not fully explained. However, in the absence of further information, we make no further comment on the matter.

With reference to the second issue: Mackay followed a three-stage process of allocation. He first divided the total area comprising Spain's award to the company into four districts, allocated an acreage to each of them, and determined without further inquiry which groups held rights where. Then he established the lists (rejecting some, calling for additional names in other instances) before proceeding to the final apportionment of the funds accrued upon the tenths. This was based not on the distribution of individual rights between the different hapu lists, but on what he judged to have been the extent of the acreage under their respective control at the time of the sale.

The basis of Mackay's final calculation is not clear and we heard different views on the matter. Dr Ballara approved Mackay's allocations in the four districts as 'relatively fair' even

though some parties might have missed out on the full extent of their share. In contrast to his inflexible approach to the question of Kurahaupo rights after 1840, Mackay seems to have made certain adjustments according to his views on the post-1840 situation and the future requirements of the hapu whom he deemed entitled. This involved a number of trade-offs. Dr Ballara notes that Ngati Rarua and Te Atiawa who were shown to have used the fishing ground at Fifeshire Rock and cultivations in the Maitai Valley 'should perhaps have received some recognition in the Nelson area.' However, Mackay may have 'traded this off against Ngati Koata's residual interest in Motueka.' She argues that, while the Moutere and Motueka areas were correctly awarded to Ngati Rarua and Te Atiawa, it is possible that the interests of Puketapu–Ngati Komako people should have been taken into account at least on customary terms. They seem to have abandoned the land they had been allocated as a result of the taua in order to return to Arapaoa, but had participated in the sale to the company. In her view, a question remains whether they had returned before the sale and had on ongoing relationship with the land that should have been recognised in Mackay's arrangements.

In the case of Golden Bay, Mackay may have awarded a lesser share to Te Atiawa, in part, because a number had returned to Taranaki after the sale, although this should not have affected the assessment of their customary interests. However, again, Dr Ballara's assessment is that 'probably the shares of 20/20/10 [at Golden Bay] were as fair as was possible given the various circumstances'.<sup>489</sup>

Dr Ballara speculates that Mackay may have factored in population numbers at the time of purchase as well as the extent of land occupied, but concludes that the two different approaches would probably have given 'very roughly, similar results'.<sup>490</sup> Ms Gillingham suggests that the nearest population figures available, those of Tinline and Sinclair in 1847, would indicate that Te Atiawa's interests were under-represented by fully two-thirds in Mackay's determination of their split with Ngati Rarua and Ngati Tama at Motueka and Golden Bay. Ms Gillingham concedes, however, that it is impossible to assess how accurately the Native Land Court decision reflected their proportional interests in the area.<sup>491</sup>

The figure for Ngati Koata also requires examination. Although the number of Ngati Koata owners at 1892 matched that for Ngati Rarua (at 122 persons each) Mackay allocated them a far lesser share. In Dr Ballara's view, 'Mackay probably discounted the Ngati Koata list by three quarters at least' since they also had interests on Rangitoto and in Kaiua and other reserves. However, the denial of an interest for Ngati Koata at Motueka on these grounds she sees as questionable and, at the least, inconsistent.<sup>492</sup>

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489. Ballara, 'Customary Maori Land Tenure', pp 297–298

490. Ibid, p 297

491. Gillingham, 'Ngatiawa/Te Atiawa Lands', p 144

492. Ballara, 'Customary Maori Land Tenure', p 296

## 9.6.3(2)(d)

Mr Walzl makes a special case for Ngati Rarua, arguing that the evidence given in the 1892 hearing went to show that Ngati Rarua had arrived in the district first. His analysis shows in the first instance, however, that Ngati Rarua, Te Atiawa, and Ngati Tama witnesses were in basic agreement that they all shared rights in the district, despite differences in detail about the exact course of the taua and subsequent occupation. Ngati Koata rights were similarly acknowledged although the *tuku* was rejected as giving them a special right.

Against this, we note that the predominant interests of Ngati Rarua were duly recognised within Mackay's arrangements. To the contrary, he may have under-estimated the extent of Te Atiawa interests at Motueka and Golden Bay, but the picture was complicated by their on-going mobility. Mackay's allocations for Te Atiawa imposed order on what had been a particularly fluid situation under custom and rather arbitrarily extinguished the residual rights of some hapu who were no longer regularly resident in the district. However, that arbitration seems to have been largely acceptable to Te Atiawa at the time. Ms Gillingham states that: 'In terms of names on the list, Ngatiawa were well-represented in relation to the members of the tribe known to have resided in Western Te Tau Ihu at the time of the arrival of the Company.'<sup>493</sup>

With respect to Motueka, Mackay appears to have overlooked Ngati Tama's interests in the region. As discussed above in section 9.3, Ngati Tama were occupying land at Whakarewa when the school was granted to the church and they were subsequently allocated other occupation reserves as recompense for this loss. However, we are not in a position to definitively conclude that Mackay's overall assessment of Ngati Tama's relative interests was incorrect.

Another possible exception to the relative fairness of the distribution lies with Mackay's failure to allocate Ngati Koata a share at Motueka. As we explored further in chapter 8, when he appeared as a witness before the Native Land Court in 1883, Mackay placed little credence in Ngati Koata's claim that they had rights in any lands other than those they were physically occupying at Rangitoto and Croiselles. He had even described them as 'conquered' when testifying as a witness in the Native Land Court. We expressed serious concerns about Mackay's impartiality in this matter in chapter 8. It is possible that this bias might have influenced the relative share that Ngati Koata received in the tenths. However, again, we are not in a position to reach a conclusion on this.

On balance, we are of the view that there is insufficient evidence of an overwhelming nature to permit us to conclude that Mackay's judgment so poorly reflected the real situation at 1840, or thereafter, that it resulted in prejudice to any of the beneficiary iwi.

However, we are critical of the individualisation of interests. Following the court's determination of individual beneficial ownership, payments were made to beneficiaries on an individual basis. There was no scope in this award for community control over the income of the tenths estate, because the legislation did not provide for or permit it. We have made

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493. Gillingham, 'Ngatiawa/Te Atiawa Lands', p 143

findings on this individualisation of ownership, and the subsequent fractionation of the shares (some of which were small to begin with) in section 9.3.3.

**(e) Findings:** As both Crown and claimants agree, the question of entitlement should have been determined as at 1844. It follows from our earlier discussion in chapters 2 to 4, that we consider that Ngati Rarua, Ngati Tama, Te Atiawa, and Ngati Koata had the strongest customary interests as at 1844. The rights of the first three tribes were based on take raupatu, followed by itinerant resource use, residence, and cultivation, and by the beginnings of intermarriage with the defeated peoples and the burial of placenta and the dead in the land. The rights of Ngati Koata were derived from take tuku, and from itinerant resource use, occasional residence in the company lands, intermarriage, and burial of the placenta and the dead in the land.

The Kurahaupo tribes had surviving rights despite their defeat, and the potential for them to recover and strengthen with every year. Their leader, Tutepourangi, had made a tuku to Ngati Koata which was still live at the time, and a source of relationship and rights for both. It is not clear how far they were still in occupation, especially in Golden Bay. According to the evidence of Meihana Kereopa, Kurahaupo peoples were still in occupation of part of Tasman Bay until after the Spain award (as a result of which, it appears, they had to leave the district). There were Ngati Apa families scattered around, some still in 'slavery', despite the Treaty promise that they had the rights of British subjects. Their right to continue peacefully recovering from the 'conquest' was, as with the Ngati Toa right to take up ahi ka, foreclosed by the Spain decision of 1844 and the Crown grants of 1845 and 1848.

Ngati Toa, as described above, had still in 1844 a latent right to visit for resource use or to take up residence and cultivation (which together or severally make up ahi ka). As we concluded in chapter 2, the evidence is that, had they chosen to take up this latent right in the 1840s, their former allies in western Te Tau Ihu, especially their close relatives among Ngati Rarua and Ngati Koata, would likely have accommodated them with a tuku. There would have been little choice, given the leading role of Te Rauparaha in the raupatu (even if not personally involved in the west), and the way it was considered tika to accommodate other conquest chiefs who came to settle after the first wave. We consider the movement of Te Keha to Pariwhakaoho in 1845 to be proof of that (see ch 2). But without taking up this latent right, Ngati Toa of the 1840s were too far away from western Te Tau Ihu to maintain any kind of authority over their relations or allies, nor could they claim primary or leading rights in the land.

It is not possible for this Tribunal, at this distance in time from the events of the 1840s, to comment on the proportionate share to which the uninvestigated rights of Ngati Toa and the Kurahaupo iwi would have entitled them. Suffice to say that we think the leading share in the tenths was indeed correctly decided in 1892, although we reach no conclusion on the proportion as between the four northern allies. But as the tenths were considered part-

payment for the company lands and an endowment for the ‘vendors’, we consider that Ngati Toa and the Kurahaupo iwi should also have had a share.

We find that Ngati Toa and the Kurahaupo iwi were wrongly denied a share in the tenths. We agree with the Crown’s submission that it would not be appropriate to reopen the question of ownership of the estate at this late stage, even if that were possible. The lands of the Wakatu Incorporation are privately owned within the meaning of the Treaty of Waitangi Act, and we have no jurisdiction to make such a recommendation in any case. We recommend that the Crown negotiate with Ngati Toa and the Kurahaupo tribes to agree on an equitable compensation separate from the current tenths estate.

#### 9.6.4 1901 judgment, Motueka occupation reserves

Judge Mackay also presided over the investigation into beneficial ownership of the occupation reserves at Motueka. Following an application from the Public Trustee in February 1901, the court opened its investigation on 22 April 1901. Five kaiwhakahaere were chosen to act in the case, and the court granted an adjournment to enable claimants to ‘arrange the mode of procedure.’<sup>494</sup> Over several weeks of hearings, lists of interested parties were brought forward for each Motueka section. The lists were then either accepted or objected to, with evidence being heard about persons alleged to be ineligible.

The subdivisions arranged in the 1850s and 1860s were a significant factor in Mackay’s decisions on ownership. In considering beneficial ownership of section 157, for example, Mackay concluded that Tamata Parana’s name on the 1863 survey plan of the block ‘was evidence of some right’ that would need to be disproved if Parana was to be excluded by the court. Similarly, with respect to Mio’s rights in sections 187 and 188, Mackay stated that the lack of objections when they were allocated in 1865 indicated that ‘the matter was then settled.’<sup>495</sup>

The mid-century allocations had been made on a whanau basis, a structure that was followed by the Native Land Court in 1901. Judge Mackay made no reference to the relative interests of each iwi or hapu but rather confirmed lists of individual beneficial owners for each section. This makes it difficult to assess the proportion of interests awarded to Ngati Rarua, Te Atiawa, and Ngati Tama but, as a rough guide, Ms Gillingham estimates that Te Atiawa received shares equating to at least 249 acres, Mr Walzl’s estimate for Ngati Rarua

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494. The kaiwhakahaere were Tuiti Makitonore, Wi Neera te Kanae, Kerei Roera, Rewi Maaka, and Pamariki Paaka: Native Land Court, Nelson, minute book 5, 22 April 1901, fol 41 (Tony Walzl, comp, *Ngati Rarua Land and Socio-Economic Issues, 1860–1960, Supporting Papers* (Wellington: Ngati Rarua Iwi Trust, 2000) (doc A50(2)(a)), p191).

495. Fraser, ‘Nelson Tenths’, pp 89–90

is 340 acres and Ngati Tama were originally allocated interests in four sections (up to 200 acres).<sup>496</sup>

**(1) Legal submissions**

We received submissions on the 1901 case from Ngati Rarua. Ngati Rarua emphasised the land court's individualisation of interests and the consequent undermining of iwi control over the Motueka reserves. Ngati Rarua was also critical of the reliance on the earlier investigations into ownership in the 1850s and 1860s. In Ngati Rarua's view, the commissioners and James Mackay had based their decisions on occupation at the time of inquiry rather than on customary entitlement at 1844. As a result, in some cases Ngati Rarua lost rights to sections in which they had formerly held interests.<sup>497</sup>

**(2) Tribunal discussion**

The allocation of 1858 and the 1860s were at least in part designed to meet the needs of the occupants at the time. In making changes to the 1858 arrangements in late 1862, James Mackay explained that this was necessary because about half those living on the reserves had not been included. He also stated that the subdivisions had not taken into account the different tribal constitution of the area. Mackay identified four resident iwi or hapu: Ngati Rarua, Te Atiawa, Puketapu (a hapu of Te Atiawa), and Ngati Tama. James Mackay's readjustment included additional allocations for Te Atiawa, Puketapu, and Ngati Rarua and an allocation for resident Ngati Tama, who had no other land in Motueka at this time.<sup>498</sup>

Mr Walzl argues that in relying on these earlier allocations the Native Land Court was not making its assessment purely on the grounds of customary entitlement in the 1840s. This might have come at the expense of Ngati Rarua. There were several instances where evidence from Ngati Rarua witnesses with respect to that tribe's entitlement at 1840 was overturned in favour of the decisions of the 1850s and 1860s. Another factor arguably indicating Ngati Rarua's dominance of the district in the 1840s is population: Ngati Rarua were the largest group at Motueka in 1839, with 94 people compared with 10 Te Atiawa people.<sup>499</sup>

Ms Gillingham makes no comment about the basis of Judge Mackay's decisions but she does note that Te Atiawa appear to have been 'reasonably satisfied' with the allocations of the 1850s and 1860s and that 'on the whole the Native Land Court inquiry reflected Te

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496. Gillingham, 'Ngatiawa/Te Atiawa Lands', pp120–122; Walzl, 'Ngati Rarua Land', p251; James Mackay jnr, Assistant Native Secretary, to commissioners of native reserves, Nelson, 17 December 1862 (Mitchell and Mitchell, supporting documents, p 79). Clearly, this does not account for all interests.

497. Counsel for Ngati Rarua, closing submissions, p 176

498. James Mackay jnr, Assistant Native Secretary, to commissioners of native reserves, Nelson, 17 December 1862 (Mitchell and Mitchell, supporting documents, pp79–80); James Mackay to Native Secretary, 2 January 1863 (Mitchell and Mitchell, supporting documents, p 87)

499. Walzl, 'Ngati Rarua Land', pp 249–251

Atiawa claims as represented by Hohāia Rangiauru.<sup>500</sup> We did not receive evidence from Ngati Tama on this question.

As with the 1892 case, we are of the view that there is insufficient evidence for us to conclude that Mackay's judgment so poorly reflected the real situation at 1840, or thereafter, that it resulted in prejudice to Ngati Rarua, or to any other of the local beneficiary iwi. We are not convinced that Judge Mackay was wrong to favour the decisions of earlier inquiries over evidence presented as late as 1901. We were not presented with any evidence of discontent following the Native Land Court hearing. Protests in the early twentieth century related to the Public Trustee's ongoing control over the occupation reserves and not on the court's decision on beneficial ownership.

Mr Walzl also highlighted the 'extreme individualisation' of ownership that resulted from the Native Land Court definition of title, a point that was also raised in Ngati Rarua's closing submissions.<sup>501</sup> The allocations of the 1850s and 1860s had been to whanau groups. As Ms Gillingham described it, both the commissioners and then James Mackay 'surveyed the population of Motueka, before making the allocation noting the relationship of men, women, and children to each other, and bunching them into family groups.'<sup>502</sup> In 1901, the court's decision transformed this situation into a fully individualised title. We have discussed the impact of individualised shares in an earlier section. We agree that the Native Land Court system of individualisation made any kind of communal management of the estate impossible, and the court's rules of succession resulted in increasing fractionation of interests with each passing generation. We have found the Crown's failure to prevent the Native Land Court system from having this impact on the occupation reserves to be in breach of the principle of active protection. For reserves that had been leased, this was particularly important when the Maori Trustee was given powers to acquire uneconomic interests compulsorily and to buy individual interests for lessees (see sec 9.3.1).

### 9.7 THE WAKATU INCORPORATION

In 1977, the tenths estate was finally returned to its beneficial owners, who agreed to establish an incorporation to manage the estate. The Wakatu Incorporation inherited an estate that was overwhelmingly being leased in perpetuity at rental rates that failed to reflect the value of the property. Efforts to resolve this and to reach a settlement with the Crown to compensate for the losses incurred through perpetual leasing were a major focus of the incorporation over the following decades. The Wakatu Incorporation submitted that the 1997 legislation enacted to resolve this grievance was only a partial solution.

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500. Gillingham, 'Ngatiawa/Te Atiawa Lands', pp 107–110, 120

501. Walzl, 'Ngati Rarua Land', p 248

502. Gillingham, 'Ngatiawa/Te Atiawa Lands', p 104

### 9.7.1 Analytical narrative

Beneficial owners held a series of hui in Blenheim, Picton, Porirua, and the Hutt Valley during 1976 and 1977 to consider the recommendations of the Sheehan commission. The owners considered three options: establishing a section 438 trust, as recommended by the commission, setting up an incorporation or remaining with the Maori Trustee. Discussing the hui at Porirua, Mugwai McDonald notes that most rejected the suggestion of staying with the Maori Trustee and preferred the incorporation option as a way of ensuring that owners would have more control over their representatives. Following the hui, owners decided by postal vote to establish the Wakatu Incorporation, which was duly established in August 1977.<sup>503</sup>

The Order in Council creating the incorporation identified 1668 owners. Shares were not equally held, and most shareholdings, now often further reduced by inheritance and transfers, are not large.<sup>504</sup> The Maori Trustee handed over 771 titles to the incorporation, encompassing 3444 acres. These included all of the tenths reserve land previously held by the Maori Trustee in Nelson City, Motueka, and Moutere and Tuamarina (which had been acquired by the commissioner of native reserves in 1865). It also included six of the occupation reserves, totalling approximately 560 acres, that had been vested and not alienated over the course of the trust's history.<sup>505</sup>

In chapter 7, we discussed the various vestings of occupation reserves, most of which took place during the 1860s and 1870s. Reserves encompassing thousands of acres were vested during this period but the Public Trustee and its successor subsequently sold many of the reserves from the 1890s onwards. By 1977, only seven of these reserves, encompassing some 650 acres, had not been sold. Although the beneficial owners of these reserves were different from the beneficial owners of the tenths reserves, all but one of the reserves were transferred into the Wakatu Incorporation and subsumed into its property in 1977. The incorporation purchased the remaining 91-acre block from the Maori Trustee in 1985.

We received a claim about this from the beneficial owners of one of these reserves. One of the issues raised by Wai 830, submitted by Ngawaina Joy Shorrock on behalf of the Parana Te Hunahuna Whanau Trust and others, was the transfer of section 27, Marahau, into the Wakatu Incorporation in 1977.<sup>506</sup> The claimants, who gave evidence during the first week of Te Atiawa hearings, stated that the reserve had been vested in the incorporation

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503. M Macdonald, brief of evidence, pp 3–4; Hilary Mitchell and Maui John Mitchell, 'Wai-56 and Wai-102: Land Purchases, Court Judgments, Iwi Manawhenua (Report No 99-3)'. Revised ed. Report commissioned by the Ngati Koata no Rangitoto ki te Tonga Trust, Ngati Tama Manawhenua ki te Tau Ihu Trust, Te Atiawa Manawhenua ki te Tau Ihu Trust, Wakatu Incorporation, and Ngati Rarua Atiawa Iwi Trust, 1999 (doc A64), pp 224–225

504. Robert Shore, brief of evidence on behalf of the Wakatu Incorporation Trust, 30 May 2003 (doc 011), pp 1–2

505. Mitchell and Mitchell, 'What Wakatu', pp 12–17, 19–21; Mitchell and Mitchell, 'Report 9C', pp 58–62, 67, 89, 92–93

506. Ngawaina Shorrock, amendment to claim Wai 830, 8 October 2002 (claim 1.19(a))

without consultation with the whanau.<sup>507</sup> Andrew Wilkie stated that not all landowners were consulted about the creation of the incorporation and that the organisation and structure were never made clear: ‘All we knew was that the lands were worth more than what we received as shareholders in Wakatu Incorporated. We couldn’t get our land out and we couldn’t sell our lands.’<sup>508</sup> In Te Waiho Taiki-Paratene’s view, it was wrong that the whanau was not managing its own papakainga land.<sup>509</sup> Ngawhakaara Coldwell outlined their request to the Wakatu Incorporation to build a house on the section. The incorporation informed her that this could only occur if it had the support of 75 per cent of all Wakatu shareholders, or if the whanau purchased the land back from the incorporation.<sup>510</sup>

The Wakatu Incorporation’s first committee of management was elected at a general meeting of shareholders at Toa Rangatira Meeting House in Porirua on 27 August 1977. On 12 October 1977, at the Maori Land Court in Picton, Judge Smith appointed the management committee as proprietors of the Wakatu Incorporation.<sup>511</sup> The committee was surprised to discover that the Maori Trustee owned 5.66 per cent of the incorporation’s shares. The Maori Trustee held 622,797.54 shares in the newly formed incorporation, valued at \$226,797. This was land that the trustee had acquired from beneficial owners but not on sold. According to Dr and Mrs Mitchell, the trustee had acquired most of these interests through the purchase of beneficiaries’ interests for freeholding to lessees under the Maori Affairs Amendment Act 1967, and through the purchase of shares from beneficiaries who needed the money for housing or estate debts under the Maori Affairs Amendment Act 1974. As we discussed above, the compulsory acquisition of ‘uneconomic interests’ under the 1967 Act may also have contributed to the trustee’s shares.<sup>512</sup>

The Wakatu Incorporation was keen to buy back these interests. As Mugwi MacDonald stated:

In the end the answer was really easy. We wanted to pursue our own autonomy without them on our backs so the decision was ‘Purchase’ the Maori Trustees [*sic*] shares. The committee members and shareholders expressed reluctance and resentment at finding themselves in the position of having to buy back what they believed they already owned.<sup>513</sup>

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507. Ropata Taylor, oral evidence, sixth hearing, 9–13 December 2002 (transcript 4.6, pp 281–295); Andrew Wilkie, oral evidence, sixth hearing, 9–13 December 2002 (transcript 4.6, pp 295–301)

508. Andrew Wilkie, brief of evidence on behalf of Te Atiawa, 2 December 2002 (doc G31), p 6

509. Te Waiho Taiki-Paratene, brief of evidence on behalf of Te Atiawa, not dated (doc G22), pp 7–8

510. Ngawhakaara Coldwell, brief of evidence on behalf of Te Atiawa, [2002] (doc G21), p 3

511. M Macdonald, brief of evidence, p 4

512. Mitchell and Mitchell, ‘What Wakatu’, pp 12–17, 19–21; Mitchell and Mitchell, ‘Report 9c’, pp 58–62, 67, 89, 92–93

513. M Macdonald, brief of evidence, p 6

Eventually, in 1981, the incorporation and the Maori Trustee arranged that the incorporation would buy the trustee's shares for \$314,186, including interest, over a 10-year period.<sup>514</sup> This purchase finally freed the incorporation from its link with the Maori Trustee.<sup>515</sup> Although it is not clear how the trustee spent this \$314,186, we received nothing to suggest that it was specifically directed towards the interests of Te Tau Ihu Maori.

The incorporation was keen to extend its activities beyond the management of leases but their initial application to the Native Land Court to this effect in 1978 was not approved. A second application to allow the incorporation to 'carry on with the addition of any other enterprise', subject to shareholder approval, and to alienate, mortgage, or otherwise deal with the incorporation's assets was successful. In 2003, Mr MacDonald described the activities of the incorporation as including 'Fishing, Forestry, Aquaculture, Mussel farming, Marketing, Commercial Property, Viticulture, Wine and other Commercial enterprises.'<sup>516</sup>

In order to increase their economic base, the owners have operated a policy of limited freeholding of residential land. This was done reluctantly, and was opposed by some shareholders. The policy was first implemented in 1980. The freeholding in that year of 27 residential properties, which had been producing a return of one per cent on capital, made possible investments in commercial properties that produced an average 10 per cent return.<sup>517</sup>

The most difficult obstacle the incorporation faced was the ongoing perpetual leasing system. All but one of the titles vested in the incorporation was being perpetually leased with 21 year rent review periods. The low valuations on which these leases were based meant that, while the unimproved value of the property of the incorporation was more than \$11 million, the gross rental return the committee could hope for in the incorporation's first year was \$118,030. This represented a mere 1.073 per cent of the unimproved value.<sup>518</sup>

At its first meeting in November 1977, the committee of management met with Tipene O'Regan, the chairman of the Mawhera Incorporation, to discuss their approach to this problem. Paul Morgan, a long-standing member of the committee of management and its chairman at the time of our 2003 hearing, described how Wakatu Incorporation then went on to join a group of organisations responsible for Maori reserve land. The incorporation played a significant role in lobbying about the injustice involved in the perpetually renewable lease system. Extensive activities on many levels took place over many years. In 1988, the incorporation lodged its claim to the Waitangi Tribunal and in September of that year,

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514. Ibid, p7

515. A remaining external control was the requirement that members elected to the committee of management, and the level of their fees, should be approved by the Maori Land Court. The Mitchells claim that the requirement for approval of the committee 'was felt to be . . . an utterly demeaning experience': Mitchell and Mitchell, 'What Wakatu', p 5.

516. M Macdonald, brief of evidence, pp 5, 8

517. Shore, brief of evidence, p7

518. Mitchell and Mitchell, 'What Wakatu', pp 2-3; Shore, brief of evidence, pp 1-2

Hohepa Solomon presented a submission on behalf of Wakatu Incorporation to the Ngai Tahu Tribunal. The submission related to the Mawhera Incorporation claim relating to leases on reserved land.<sup>519</sup>

Not only was the income available to the incorporation severely limited by the perpetual leasing system but the long period between reviews was also problematic. After 21 years, the unimproved value of the leaseholds increased dramatically. Lessees often refused to accept the independently assessed new rentals, forcing the incorporation into a slow and expensive arbitration process.

One such arbitration was the 1986 Penlington arbitration, which related to leases that expired in August 1983 and December 1984. Robert Shore, a chartered accountant who served as secretary of the incorporation from 1985, gave evidence at the Wakatu Incorporation hearing about this process of arbitration. The arbitration cost the incorporation more than \$72,000 in legal and valuation costs and arbitration fees, but they were only awarded \$20,000 in costs and had to take legal action to recover this. During the lengthy period leading up to the arbitration, the lessees paid no increase in rent. Even after the arbitration, lessees negotiated further, seeking lower than the arbitrated rental. In one case the incorporation was forced, contrary to its wishes, to buy the improvements and allow the surrender of the lease.<sup>520</sup>

Along with approximately half of the leases of Wakatu Incorporation land, the leases considered by the Penlington arbitration were 'prescribed leases'. Rent on prescribed leases was set at 4 per cent of unimproved valuation for urban land and 5 per cent of unimproved value in the case of rural land. Under the provisions of the Maori Reserved Land Act 1955, lessees renewing their leases had the option to renew them as prescribed leases. The low valuation benchmark of prescribed leases has resulted in what Shore describes as 'very substantial' losses to the incorporation.<sup>521</sup>

The leases arbitrated on in the Penlington decision were set at the higher rate of 7 per cent of the unimproved valuation. Another significant arbitration also set rent at this level. However, this only applied to those leases that had been arbitrated, and Wakatu Incorporation was involved in expensive legal action in 1989 to ensure the 7 per cent rate was maintained. The provisions for prescribed leases remained in place until the enactment of the Maori Reserved Land Amendment Act 1997, which moved all rents to a market basis.<sup>522</sup>

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519. Wakatu Incorporation, submission supporting claims of Ngaitahu and Mawhera Incorporation, 30 August 1988, pp 1–10 (Shore, brief of evidence, app); Hilary Mitchell and Maui John Mitchell, 'Wai-56, Report No 8B: The Lease Lobby', report commissioned by Te Runanganui o te Tau Ihu o te Waka a Maui and the Wakatu Incorporation, 1992 (doc A17), pp 5–30

520. Shore, brief of evidence, pp 2–5

521. Mitchell and Mitchell, 'What Wakatu', pp 2–3; Shore, brief of evidence, p 9

522. Shore, brief of evidence, pp 9–10

Vigorous lobbying against the perpetual leasing regime through into the 1990s met vehement opposition from groups representing lessee interests. Eventually, the efforts of Maori groups had some success in the Maori Reserved Land Amendment Act 1997.<sup>523</sup> The 1997 Act acknowledged the grievance around the perpetual leasing regime, schedule 5 stating that:

The present Government recognises that Maori for a number of years have not been obtaining fair market rents for their land. This is an issue that has to be addressed by the present Government in the future. It is an issue that will be dealt with by the present Government as part of its consideration of historical grievances.<sup>524</sup>

Subsequent negotiations between the Crown and various Maori authorities resulted in an agreement for the Crown to pay compensation for these losses. Under a deed of settlement between the owners of Maori reserved land and the Crown in July 2002, an ex gratia payment of over \$47 million was paid to the various Maori authorities. This included a \$14,081,565 payment to the Wakatu Incorporation.<sup>525</sup>

Mr Shore argued that compensation paid to the Wakatu Incorporation related only to the period beginning in 1977, when the incorporation was created. It was his contention that the compensation did not cover losses prior to 1977. He pointed to a consultants' report produced shortly after the 1997 Act was passed, which concluded that losses to all the Maori land lease groups amounted to about \$96 million in total. The sum agreed on in 2002 was therefore only 'approximately one half of what both Crown and Maori consultants had considered was fair compensation'.<sup>526</sup>

The 1997 Act did not result in an immediate cessation of the perpetual leases. The Act provides owners the right of first refusal and provided lessors with additional money with which to purchase those interests. This did not represent an end to perpetual leasing. As Paul Morgan remarked, Maori successfully lobbied for the inclusion of schedule 5: 'One of the key elements that we did achieve was the removal of perpetuity. But, of course, that got turned backwards once again, and . . . our leases are still perpetual'.<sup>527</sup>

Donald Knight, a registered valuer who served as principal valuer for the Wakatu Incorporation from 1986, commented that: 'The control, use and occupation of reserved lands by the owners remains elusive'.<sup>528</sup> Knight also noted that lessees often tried vigorously to obtain lower rent. He considered that the fact that the land was subject to these Crown-imposed leases reduces the interests of the owners to about two-thirds of the unimproved

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523. Paul Morgan, 'Lobbying to Remove Perpetual Leases', brief of evidence on behalf of the Wakatu Incorporation, not dated (doc 015), pp 3–12; Paul Morgan, oral evidence, thirteenth hearing, 11–13 June 2003 (transcript 4.13, pp 94–100); Mitchell and Mitchell, 'The Lease Lobby', pp 5–6

524. See also Maori Reserved Land Amendment Act 1997, s 28; sch 1, cls 3, 10–25

525. *The Owners of Maori Reserved Land and the Crown Deed of Settlement*, July 2002

526. Shore, brief of evidence, pp 6–7

527. Paul Morgan, under cross-examination, thirteenth hearing, 11–13 June 2003 (transcript 4.13, p 102)

528. Donald Knight, brief of evidence on behalf of the Wakatu Incorporation, not dated (doc 012), p 6

value. In addition to this cost, the perpetual nature of the leases has made it 'difficult if not impossible to develop some lands to their best potential.'<sup>529</sup>

The Maori Reserved Land Amendment Act 1997 also provided for rent reviews every seven years, which ensured that rents would be at more realistic levels. However, claimants contend that seven years is still a long review period for commercial properties. The claimants have also raised issues around the difficulty of defining 'unimproved value' and the lack of provision in the leases for a penalty for late payment of rent.

The 1997 Act reduced the rent review period from 21 to seven years, but failed to make any distinction between residential, rural, and urban land. Knight argued that the new rent review period is 'not unreasonable' for land used for residential purposes, but does not represent the market in other categories. Knight told the Tribunal that comparable Nelson City Council leases have a three-year rent review period, and Port Nelson leases have a five-year review period. Consequently, he stated that the Wakatu Incorporation considered a three-year review term to be the market rate.<sup>530</sup> This point was echoed by Shore.<sup>531</sup>

Knight also points to ongoing problems in the valuation system, which he argues results in undervalued leaseholds. Valuations are still based on the 'unimproved value' of the land. Knight has pointed out that there is 'no apparent market' in unimproved land anywhere. This, and the difficulties of defining the concept, have contributed to some disputes over valuation that have been costly for the owners.<sup>532</sup>

Knight argues, furthermore, that high inflation in the value of land has had the effect of making the level of compensation paid to lessees for changes in the lease system under the 1997 Act 'woefully inadequate'. Because of this, significant numbers of lessees have claimed that they cannot afford to pay what valuers regard as fair rents. This has led to increasing opposition from lessees to paying market rents to the incorporation.<sup>533</sup>

The 1997 Act permitted the incorporation to recover interest arrears for rent owing during the arbitration period following expiry of a lease. However, there is no provision for the imposition of penalty interest if lessees fail to pay subsequent rent instalments on time. Shore pointed out that this has been costly for the incorporation, given that average arrears of rent from May 2001 to April 2003 were \$131,000. The lack of a penalty results in a disincentive for lessees to pay on time. Shore had been advised that the cost of instituting court proceedings to recover penalty interest from individual lessees would be unjustified.<sup>534</sup>

Although the Maori Reserved Land Amendment Act 1997 represented a marked improvement in the leasing regime within which the incorporation's leaseholds are operating, some significant issues remain around this regime.

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529. Knight, brief of evidence, p 6

530. Ibid, pp 7-8

531. Shore, brief of evidence, p 12

532. Knight, brief of evidence, pp 1-2

533. Ibid, pp 2-6

534. Shore, brief of evidence, pp 11-12

Another issue raised during the Wakatu hearings was that the 1997 Act did not apply to the Ngati Rarua Atiawa Trust (NRAIT) lands. As we will discuss in chapter 12, these ex-Whakarewa lands were finally returned to Motueka Maori in 1993. Like the Wakatu Incorporation in 1977, NRAIT inherited lands that were leased in perpetuity. The rent reviews of these leases varied, ranging up to 21 years. Although NRAIT made submissions to the select committee considering the 1997 legislation, the properties owned by NRAIT were not included. Paul Morgan stated that this ‘was a substantial injustice’ in relation to these lands, which should have had the same treatment as other ex-tenths reserves in Motueka. He stated that ‘the Trustees believe NRAIT is entitled to justice and relief on exactly the same terms as have applied to Wakatu Incorporation’s leased lands, and other similarly encumbered Maori reserved lands.’<sup>535</sup> Morgan argued that the trust’s beneficiaries had never consented to their land being leased in perpetuity and that the Crown has a responsibility to remedy this unjust situation.<sup>536</sup>

Finally, we note that, although the incorporation has been very successful, it is not without problems from the legacies of the past, especially individualisation and previous Maori land laws. Robert Shore, the secretary of the incorporation, explained that over one-third of owners (1053 out of 3057) are unknown; they either have no known address or have died without successors to their shares. Also, over half of the owners (54%) have shares amounting to a maximum of 0.004 per cent each, which earned them an annual dividend of \$67.50 or less in 2003.<sup>537</sup> Such problems – large proportions of unknown owners and of owners with tiny, fractionated shares – are an issue for many Maori incorporations and trusts. Witnesses in our inquiry blamed the Crown’s initial failure to reserve a sufficient and appropriate asset base for the tenths. In their view, if the estate had been large enough, and if it had obtained fair rental returns, even small shares would still be valuable.<sup>538</sup> Many owners cling to their tiny shares as their last surviving link with their ancestral taonga.

## 9.7.2 Legal submissions

### (1) Claimant submissions

In its closing submissions, the Wakatu Incorporation raised both historical and ongoing issues. The perpetual leasing regime, prescribed leases, long rental review periods, conflict with lessees, and the need for arbitration, such as the Penlington arbitration, were all cited as difficulties that the incorporation had faced in the past.<sup>539</sup> These issues were only partly

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535. Morgan, ‘Claims Issues’, pp 3–4

536. *Ibid*, pp 7, 9–10

537. Shore, brief of evidence, p 1

538. Mitchell and Mitchell, ‘What Wakatu’, p 16

539. Counsel for the Wakatu Incorporation, closing submissions, pp 59–67

remedied by the 1997 amendment to the Maori Reserved Land Act, and the compensation paid as a result of this Act was not full recompense for them.

For example, the 1997 Act had considerably reduced the rent review period but it failed to distinguish between commercial and rural land, imposing a blanket seven-year review period. Counsel submitted that this was ‘somewhat arbitrary’ and did not reflect the current market rate of three years for commercial land.<sup>540</sup> Counsel submitted that the failure to enable Maori ‘complete freedom in negotiating lease terms’ was a breach of the Crown’s obligation to act in good faith towards them, because it denied them the right to achieve the best returns for their land.<sup>541</sup>

Nor had the 1997 Act closed down all perpetual leases. Under that Act, owners have the first right of refusal to purchase leases. However, before perpetual leases can be brought to an end in this way, lessees have to firstly wish to sell, and the incorporation has to be in a position to purchase the offered land.<sup>542</sup> Counsel for Wakatu cited the following defects in the perpetual lease terms:

- ▶ assessment of rentals on unimproved value;
- ▶ no penalty interest provisions for late payment of rent;
- ▶ unsatisfactory provisions for renewal of leases where lessees do not wish to renew; and
- ▶ use of archaic lease terms and language.

The Wakatu Incorporation submitted that these provisions breach the Crown’s duty to act in good faith and have adverse economic impacts on beneficial owners. It sought a recommendation that the Crown enter discussions with it, ‘with a view to drafting appropriate amending legislation.’<sup>543</sup>

The incorporation also submitted that the 1997 Act should have applied to the ex-Whakarewa lands, which are in the trust of NRAIT. The failure to include NRAIT in the 1997 amendment was deemed unjust and illogical. Counsel remarked that the ‘original taking was bad enough, the failure to include it in the 1997 amendment Act is, in this day, quite unbelievable’. The Crown was said to have thereby breached its obligation to act reasonably towards Maori.<sup>544</sup>

Te Atiawa raised concerns about the extent of consultation between the incorporation and its beneficiaries. In particular, counsel referred to the transference of interests to the incorporation in 1977 without consultation with the whanau.<sup>545</sup>

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540. Counsel for the Wakatu Incorporation, closing submissions, pp 67–68

541. *Ibid*, p 76

542. *Ibid*, p 58

543. *Ibid*, p 76

544. *Ibid*, pp 70, 76–77

545. Counsel for Te Atiawa, closing submissions, pp 201–202. The example cited in Te Atiawa’s closing submissions was actually evidence that the witness had later withdrawn. However, this submission also has relevance for the Wai 830 claim, which was presented during the Te Atiawa hearings.

Submissions from the other constituent iwi of the Wakatu Incorporation focused on the role of the incorporation in the Treaty claims and settlement process. Ngati Tama emphasised their support for the Wai 56 claim (filed by the incorporation on behalf of beneficiary iwi as well as the incorporation), particularly with respect to those grievances that have resulted in loss for the present beneficiaries of the incorporation. However, Ngati Tama also raised a more general issue relating to the status of the incorporation. Counsel argued that:

The original rights and interests upon which the Nelson Tenth Trust, and today Wakatu Incorporation, are built were tribal rights and interests. The breaches of the Treaty by the Crown therefore, first and foremost, caused loss to the four iwi of Ngati Tama, Te Atiawa, Ngati Rarua and Ngati Koata. Ngati Tama therefore considers that significant redress must be directed to those iwi in order that they may re-establish a tribal asset base and move forward . . . alongside, and in all likelihood in conjunction with, Wakatu Incorporation.<sup>546</sup>

Similarly, Ngati Koata argued that remedies in favour of the incorporation and its individual shareholders would not represent a remedy to the hapu and iwi and that the Crown should treat on a hapu or iwi basis. Counsel added that the land held by incorporations such as the Wakatu Incorporation ‘remains alienated from Ngati Koata. This is a direct consequence of the Crown’s Native Land policies and legislation to fragment and commodify the ancestral land of Ngati Koata.’<sup>547</sup>

## **(2) Crown submissions**

Crown counsel submitted that the Tribunal needs to carefully consider the proper scope of the incorporation’s claim vis-à-vis the claims of the four constituent iwi. Counsel endorsed the approach recommended by the Taranaki Tribunal, which stated that compensation should go to affected hapu and not the incorporation. The Crown had adopted this approach in Taranaki and counsel suggested that this should also be the approach taken in Te Tau Ihu.<sup>548</sup>

Secondly, Crown counsel submitted that the 1997 Act was ‘a fair and reasonable reconciliation of the various rights and interests at issue.’ Counsel contended that the historical losses in rental income had been settled by the 2002 settlement, under which Wakatu Incorporation had received over \$14 million in compensation.<sup>549</sup>

### **9.7.3 Tribunal discussion and findings**

The evidence and submissions relating to Wakatu Incorporation raise several issues:

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546. Counsel for Ngati Tama, closing submissions, p 85

547. Counsel for Ngati Koata, closing submissions, pp 62, 112

548. Crown counsel, closing submissions, pp 59–61

549. Ibid, pp 61–62

## 9.7.3(1)

- ▶ The position of the incorporation relative to its constituent iwi.
- ▶ The inclusion of more narrowly owned occupation reserves, unrelated to the endowment reserves of the tenths estate, in the land transferred to the incorporation or purchased by the incorporation.
- ▶ The relationship between the incorporation lands and those of NRAIT.
- ▶ The impact of the perpetual leasing regime and the extent to which the 1997 Act and 2002 settlement has redressed the grievances associated with the regime.

**(1) *The Wakatu Incorporation in relationship to constituent iwi***

We discuss here how the position of the Wakatu Incorporation should be assessed, relative to that of its constituent iwi, Ngati Rarua, Te Atiawa, Ngati Tama, and Ngati Koata. The Crown has centred its submissions on the Wakatu Incorporation almost entirely around the place of the incorporation in the Treaty process. It noted that, in the case of Taranaki, it has been following the clear recommendations of the Taranaki Tribunal in negotiating the settlement of the Treaty claims of the various Taranaki iwi directly with the iwi concerned. It has argued that this is also the correct approach in Te Tau Ihu.

We consider that there is indeed much force in the comment of the Taranaki Tribunal that:

Had things gone the Maori way from the beginning, nothing would have passed directly to the individual as of right, for by Maori law, the individual's benefit equates to the individual's value to the group. . . . To dissipate such moneys that may be available for the settlement of these claims by benefiting anonymous shareholders now scattered to the world would merely add to past injustice.<sup>550</sup>

We note, though, that the remarks of the Taranaki Tribunal were made in a context of heavy conflict between some members of Taranaki iwi and the Parininihi-ki-Waitotara Incorporation, and what the Taranaki Tribunal saw as a failure on the part of that incorporation to have a 'Maori policy' guiding its work.<sup>551</sup>

The relationship between the Wakatu Incorporation and the four iwi from whom its shareholders are drawn appears to be more harmonious and more attentive to tikanga. Mr Macdonald, an original committee member, emphasised that they 'are mindful of [their] cultural and social responsibility to [their] shareholders, community and others', and pointed out their expectation that all consultants working for the incorporation are aware of these responsibilities and 'take part in our various blessing ceremonies.'<sup>552</sup> Rore Stafford described his principal role as a committee member as 'Kaumatua'. He emphasised that the incorporation was mindful of the distress of those excluded by the various methods by

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550. Waitangi Tribunal, *The Taranaki Report*, p 276

551. *Ibid*, pp 270–271

552. M Macdonald, brief of evidence, pp 7, 8

which the Maori Trustee had acquired owners' shares, and that they were very careful, in dealing with matters such as gifts, bequests, or sale of shares, to check that the recipients have the appropriate whakapapa.<sup>553</sup>

Mr Stafford was also one of the two who lodged the initial Treaty claim. He emphasised that it 'was not lodged on behalf of the Wakatu Incorporation as such but on behalf of the descendants of all the original owners'. He stated that, initially, the incorporation was the 'only identifiable Maori Authority operating in the top of the South', and that shareholders had asked the incorporation to represent them in a claim. Stafford went on to say that within five years of the lodging of the incorporation's claim, various iwi managed to establish themselves and lodge their own iwi claims. He stated that there had been continuous consultation at various locations as to whether the whanau 'still wanted the Wakatu Incorporation to take the lead', and that the answer had been an affirmative one.<sup>554</sup>

Ngati Koata and Ngati Tama supported the incorporation's claim throughout, although they are primarily concerned about restoring the position of iwi. During our hearing of closing submissions, counsel for the Wakatu Incorporation agreed that this would be the best approach. In response to Judge Isaac's question asking whether settlement should be with the constituent iwi or with the incorporation, Graham Allan, counsel for Wakatu, replied that it should be with the iwi. In response to a separate question, Allan added that the incorporation should be compensated for its specific losses.<sup>555</sup>

We agree that there is a strong case for the Crown's desire to negotiate directly with iwi. Notwithstanding this, we wish to record here our recognition of the very important role that the Wakatu Incorporation has had in initiating and supporting claims to the Tribunal from Te Tau Ihu Maori. Furthermore, Crown actions that have directly affected the shareholders of the Wakatu Incorporation since 1977 would need to be, and would appropriately be, resolved between the Crown and the incorporation. Historical matters prior to the incorporation's inception would need to be resolved with iwi, especially since (as we noted above) many people have lost their interests in breach of the Treaty over the past 160 years, and are not now shareholders of the incorporation.

We note, however, Dr Mitchell's suggestion that the whanau who lost their interests in the 1970s could be restored to landownership in the tenths. The 5.6 per cent of shares purchased from the Maori Trustee by the incorporation have yet to be allocated, and, he suggested, could now be restored to former owners from that decade (on payment of appropriate compensation by the Crown).<sup>556</sup> This would be a matter for discussion between the Crown and the incorporation. In our view, it could go a long way towards restoring mana and healing

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553. R Stafford, brief of evidence, pp 1–2

554. *Ibid*, p 1

555. Counsel for the Wakatu Incorporation, oral submissions, nineteenth hearing, 23 February 2004 (transcript 4.3.36)

556. Dr Maui John Mitchell, under cross-examination, thirteenth hearing, 11–13 June 2003 (transcript 4.13, pp 66–67)

## 9.7.3(2)

some of the hurt reported to us by Mr Stafford and other witnesses. Such tiny shares, however, would only ever be a small component of restoring an appropriate land and resource base. Also, the incorporation already has a large number of small shareholders entitled only to a very small annual dividend, and a considerable number who can no longer be identified.<sup>557</sup> We leave this matter to the consideration of the parties.

**(2) *The Wakatu Incorporation in relation to non-tenths reserves***

The Wai 830 claim highlighted the anomalous position of non-tenths reserves which were included in the land vested in the Wakatu Incorporation. These six occupation reserves have a different history and ownership and it is possible that their interests may not be as well represented as the dominant group of beneficial owners. Evidence from the Wai 830 claimants suggests that they were not adequately consulted about the transfer of their reserves into the incorporation.

Although this might have been the case, we did not receive sufficient information about the consultation and decision-making process behind the decision to vest these reserves in Wakatu rather than return them directly to the beneficial owners. Nor do we have sufficient evidence on why the Maori Trustee sold the seventh reserve to Wakatu, or whether its beneficial owners were consulted or consented to that sale. We are not in a position to make a full finding on this issue. We do, however, note our view (as expressed throughout this chapter) that occupation reserves intended for particular hapu ought to have been kept separate from the endowment estate, which had a much wider purpose and constituency. This was no less true in 1977, when the Wakatu Incorporation was formed, than before.

In 1977, the decision to transfer the endowment estate to its beneficial owners was made in consultation with them, and their consent obtained by a postal ballot. In our view, a separate process was required for each of the specific occupation reserves for which the Native Land Court had also determined beneficial owners. These claimants ought not to have been treated as part-owners of a large estate (which they were not) thus removing from them any say over the land to which they had a particular title, as granted them by the Native Land Court. We make a preliminary finding that, in failing to actively protect their rights to their occupation reserves in 1977, the Crown breached the principles of the Treaty. It is clear that they feel that they have been prejudiced. We note, however, that they benefit from the inclusion of their lands in an incorporation with the size, means, and power to deal effectively with lessees and with the many challenges facing owners of such lands. It is surely possible for the incorporation to accommodate their relationship with these particular lands, and we suggest that it be mindful of the need to do so. Further, compensation might be appropriate as part of their iwi negotiations with the Crown. We make no recommendation about the land itself.

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557. Shore, brief of evidence, p 1

**(3) *The 1997 Act and NRAIT***

The ex-Whakarewa School lands were finally returned to Maori via NRAIT in 1993. This land had been leased under the same problematic conditions as the neighbouring land that had earlier been returned to the Wakatu Incorporation. NRAIT unsuccessfully sought the inclusion of their land in the schedule of leases covered by the 1997 Act.

Unlike the tenths estate, perpetual leasing of the land at Whakarewa was not imposed through legislation but rather because the church trustees had been under pressure to conform to existing lease conditions in Motueka. Mr Morgan conceded under cross-examination that the Crown had not imposed these leases.<sup>558</sup> The 1997 Act was enacted to meet the concerns of the owners of former 'Native Reserves' whose land had been perpetually leased by the Public Trustee in conformity with legislation such as the Westland and Nelson Native Reserves Act 1887. The Whakarewa land became private with the Crown grant to the Anglican Church in 1856 and it was not subject to the same legislation as the rest of the tenths estate. To that extent, it is reasonable that the 1997 Act did not apply to the ex-Whakarewa land.

There are, however, other considerations that make it reasonable to expect the Crown to intervene with legislation to put the NRAIT land on the same footing as the Wakatu land. This land was taken from Te Tau Ihu Maori in breach of the Treaty in 1853, with at best partial consent from some chiefs, and granted away to the church. Also, perpetual leasing was the norm in Motueka because the tenths lands was leased in perpetuity. The ex-school land was therefore indirectly affected by the Crown-imposed perpetual leasing regime. Mr Morgan's evidence to this effect was not challenged by the Crown, either in cross-examination or submissions.<sup>559</sup> Another factor for consideration is that Motueka Maori had been calling for Whakarewa's return almost since the time of the grant, especially after the school had finally closed in 1881. The Crown conceded in our inquiry that the land should have been returned at that point. We discuss this in chapter 12, and conclude there that the Crown's failure to ensure the return of the school land was in breach of the Treaty. If the land had been returned more expeditiously, then it would most likely have been vested in the Wakatu Incorporation alongside all other ex-tenths reserves. If that had been the case, then the provisions of the 1997 Act would have applied.

In our view, the Crown has a responsibility to remedy the defects of the NRAIT leases. There is a very long history of Treaty breach associated with this land, compounded by the Crown's long-term failure to remedy an acknowledged grievance. We recommend that the Crown enter into discussions with NRAIT about their concerns with a view to bringing the leases into line with current leasing practices.

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558. Paul Morgan, under cross-examination, thirteenth hearing, 11–13 June 2003 (transcript 4.13, p 109)

559. *Ibid* (pp 109–110); see also Crown counsel, closing submissions

**(4) *The Maori Reserved Land Amendment Act 1997***

As was acknowledged in the Maori Reserved Land Amendment Act 1997, ‘Maori for a number of years have not been obtaining fair market rents for their land’. The Act went some way towards remedying this but did not immediately revoke the perpetual leasing system, which was the recommendation of the Ngai Tahu Tribunal and the expectation of the Taranaki Tribunal.

Submissions to the Te Whanganui a Tara Tribunal suggested that it was technically possible that some leases could continue for at least another 100 years. Crown submissions to that Tribunal indicated that in most cases owners should have the opportunity to acquire the leases at the expiry of their next 21-year period. The Te Whanganui a Tara Tribunal was critical of the 1997 Act’s failure to immediately terminate the perpetual leases. However, acknowledging the considerable consultation and negotiations that had preceded the enactment of the 1997 Act, the Tribunal refrained from making a finding of Treaty breach.<sup>560</sup>

While we are similarly mindful of this, we also note that the Wakatu Incorporation has raised a number of significant issues with respect to the current leasing regime. These include the continuation of perpetual leases, rent review periods that do not reflect the market conditions, and rents based on unimproved value. A number of issues remain outstanding. We therefore suggest that the Crown enter into discussions with the incorporation about these concerns with a view to bringing the leases into line with current leasing practices.

**(4) *The 2002 settlement***

Crown counsel before us argued that ‘the 1997 . . . Act was a fair and reasonable reconciliation of the various rights and interests at issue’. Counsel also submitted that the 2002 settlement compensated for the past rental losses of various owners. This included a sum of \$14,081,565 for the Wakatu Incorporation and was negotiated in light of schedule 5 of the 1997 Act.<sup>561</sup> The implication of this submission is that the 2002 deed settled the issue of past losses.

In fact, the deed of settlement explicitly states that the compensation paid is an ‘ex gratia payment’. The settlement occurred in the context of legal action by the owners of Maori land. The ex gratia payments, including the \$14,081,565 payment to the Proprietors of Wakatu<sup>562</sup>, did not represent settlement of Wakatu’s claim against the Crown for alleged breaches of the Treaty of Waitangi.

There was a suggestion in claimant evidence that compensation under this settlement applied to conditions post-1977 and that the incorporation had only secured half the compensation they had wanted for losses over this period. The deed of settlement was negotiated in accordance with schedule 5 of the Maori Reserved Land Amendment Act 1997. This

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560. Waitangi Tribunal, *Whanganui a Tara*, pp 430–431, 435

561. Crown counsel, closing submissions, p 62

562. *The Owners of Maori Reserved Land and the Crown Deed of Settlement*, July 2002, sch 1, p 15

schedule did not specify a time period, instead noting that ‘The present Government recognises that Maori for a number of years have not been obtaining fair market rents for their land.’<sup>563</sup> Nor did the deed of settlement define a period that was being covered.

Section 1.3.2 of the deed stated that:

this Deed and the Ex Gratia Payments

- ▶ were not negotiated as part of the Crown’s process of settling claims against the Crown arising from historical breaches of the Treaty of Waitangi and/or its principles; and
- ▶ do not settle any claim made against the Crown arising from the Treaty of Waitangi and/or its principles.<sup>564</sup>

Clearly, the 2002 settlement does not restrict us from making a finding of Treaty breach with respect to the perpetual leasing regime, and we have done so in an earlier section. Nor does the settlement prevent iwi or the Wakatu Incorporation from seeking a remedy to the current problems, or compensation for past Treaty breaches. We have already explained our view of how negotiations could be conducted, in terms of which of these two constituencies (iwi or the shareholders of the Wakatu Incorporation) ‘own’ and were prejudiced by the breaches.

## 9.8 SUMMARY

We have found that the Crown breached the principles of the Treaty of Waitangi in failing to provide a full tenth and in failing to ensure that the responsibilities of trusteeship were met. The beneficiaries of the estate, Ngati Rarua, Ngati Tama, Te Atiawa, and Ngati Koata, were prejudiced thereby.

We have also found that the Crown breached the principles of the Treaty of Waitangi by failing to ensure that all iwi with rights in the lands comprising the Nelson settlement were similarly provided for.

In section 9.2.3, we outlined the Crown’s key responsibilities to the beneficial owners of the tenths estate:

- ▶ The provision of a full tenth, in addition to reserves for pa, wahi tapu, and cultivation sites.
- ▶ A commitment to maintaining a full tenth, allowing alienations only after extensive consultation with (and the agreement of) beneficial owners.
- ▶ Timely and accurate clarification of the status of both the endowment and occupation reserves.
- ▶ Timely and accurate definition of the beneficial ownership of the reserves.

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563. Maori Reserved Land Amendment Act 1997, sch 5

564. *The Owners of Maori Reserved Land and the Crown Deed of Settlement*, July 2002, p 4

## 9.8.1

- ▶ Providing for the tino rangatiratanga of the beneficial owners by enabling their meaningful involvement in and consultation about decisions affecting the administration and status of the estate.
- ▶ Ensuring the effective administration of the trust's assets.
- ▶ Ensuring the trust funds were spent in accordance with the purpose of the trust: an endowment fund for education, health care, and the social, religious, and political advancement of the beneficial owners.
- ▶ Consulting owners and obtaining their consent to the basic purposes and functions of the trust, and any appropriate adjustments to that purpose and functions over time.

We have found that the Crown's record in meeting these obligations was variable and fell substantially short in a number of areas.

### 9.8.1 The provision and protection of a full tenth

From at least 1844, the Crown undertook to provide a full tenth. The Crown then failed to meet this undertaking. The 1848 grant only allocated 5053 acres as tenths reserves, substantially less than the 15,100 acres awarded by Spain. Spain's award was implemented as far as the company settlers were concerned but the same cannot be said for Maori. As Crown counsel acknowledged, the reserves allocated in the 1848 grant were an inadequate endowment for the future needs of Te Tau Ihu Maori. In our view, the total tenth ought to have been 17,200 acres, from the final 172,000 acres included in the Nelson settlement, with sufficient occupation reserves in addition. We found the failure to secure a full tenth to be in breach of the Crown's fiduciary obligations and its duties of active protection and the duty to act in good faith. In implementing the Spain award for settlers but not for Maori, the Crown breached the Treaty principle of equity. The Crown also failed to deliver on the Treaty promise of mutual benefit, which required the retention of sufficient land for Maori to prosper alongside settlers in the new economy. In Company settlements, this was conceived as a tenth of all land, to form an inalienable endowment for all time. The failure to deliver on this was a critical Treaty breach.

Not only was the 'tenths' estate substantially less than a full tenth, it was also not protected from subsequent alienations. The Crown's failure to protect the estate breached the article 2 guarantee that lands would be retained by Maori for as long as they wished to retain them, and the duty of active protection. The reduction in the township reserves in 1847 was effected without consulting or obtaining the consent of Te Tau Ihu Maori, in breach of the article 2 guarantee, the duty of active protection, the duty to consult and the principle of equity. Transfers of endowment reserves into occupation reserves at Motueka were necessary because of the original small allocation of land but they came at the expense of the endowment estate. The Crown admits that this was a critical failure on its part. In transferring endowment reserves into occupation reserves without adequate consultation,

the Crown took from one group of Maori to meet obligations to another, and then failed to fully meet obligations to either group. This breached the Treaty principles of equal treatment and active protection and the Treaty duty to act in good faith.

There appears to have been some, albeit limited, consultation with Motueka Maori about the Whakarewa grant but not with the beneficiaries of the tenths estate. We found that the Whakarewa grant in 1853, made without the full, free, and informed consent of all right holders, and not resumed after the closure of the school, was a significant blow to the tenths trust and Motueka hapu, and was in breach of the Treaty. (We consider this further in chapter 12.) Subsequent alienations, including the 1864 exchange, public works takings, and the 1967 legislation, were also effected without full consultation and were further examples of the Crown's failure to protect the tenths estate.

In particular, the Crown took land from the estate for public works, in circumstances where it could have limited its taking to the leasehold, and quite frequently where the work was not essential in the national interest nor was it essential that trust land be used. Further, there was no legislative requirement that beneficial owners be consulted or even informed or be given an opportunity to object, so neither the Maori Trustee nor the taking authority did so. The compulsory taking of inalienable reserves in these various circumstances was in breach of the Treaty, to the prejudice of all the beneficial owners.

Similarly, the compulsory purchase of uneconomic interests under the Maori Affairs Amendment Act 1967 was in breach of the Treaty.<sup>565</sup> At least a quarter of the owners lost their interests in their ancestral lands by this means, in breach of the plain meaning of article 2, and of the principles of partnership, active protection, and equal treatment. Previously, the Maori Reserved Land Act 1955 had provided for those who lost their interests in this way to remain beneficiaries of the trust, but this was amended in 1967 and their interests on-sold. This was in breach of the principle of active protection, to their obvious detriment. While the Act provided for the Maori Trustee to sell these interests either to other Maori or lessees, there was nothing to confine their sale to other beneficial owners (which would have kept the interests in the trust). The evidence is that the uneconomic interests were disposed to a lessee or lessees, in breach of the Treaty rights of the majority of owners. Finally, some individuals sold their interests under the 1967 Act, in circumstances that we found breached their Treaty rights, and also the rights of the majority, parts of whose land was thus alienated without their consent.

### **9.8.2 Clarifying the status and beneficial ownership of the tenths**

The Crown's conception of how the tenths scheme would work slowly evolved during the first years of the trust's existence and the estate was not legally vested in the Crown until

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565. As noted above, these purchases were technically carried out under the Maori Trustee Act 1953 but through provisions inserted into that Act in 1967.

**9.8.3**

1856. Further clarification of the status of the trust estate was necessary and it was not until the end of the century, with the identification of beneficial owners, that it was finalised. The ongoing lack of clarity about the status of the reserves, which extended beyond the enactment of the Native Reserves Act 1856, was a breach of the Crown's fiduciary obligations as trustee.

There was very little consultation with Te Tau Ihu Maori throughout this lengthy process. This breached the Treaty duties of acting in good faith and consultation, and the principle of active protection. Prior to the 1970s, the beneficial owners were not consulted about the ongoing existence of the trust. The tenths reserves were vested in the trust of the Crown without the agreement of Te Tau Ihu Maori, and beneficiaries of the estate were not even identified until 1892, some 50 years after the trust had been established. The failure to obtain full and free consent from beneficial owners for their land to be vested in the Crown breached the plain meaning of article 2 and the Crown's Treaty responsibilities to act in good faith, to consult Maori on matters key to their interests, and to actively protect those interests and the tino rangatiratanga of the owners.

The failure to attempt this identification prior to 1892 was an omission that fundamentally affected the way in which the trust operated. In failing to identify the beneficiaries in a timely manner and thus ensure that the benefits of the trust went exclusively to them before 1892, the Crown breached its fiduciary obligations as trustee and its responsibility under the Treaty to actively protect the interests of the beneficiaries.

**9.8.3 Management of the trust estate**

The record of trust administration indicates that there were periods of laxity, particularly prior to 1848, but we would not go so far as to characterise this as mismanagement. In our view, the main issue with the trust's administration was the lack of consultation with, and involvement of, the Maori owners. The Crown's failure to ensure adequate consultation with beneficiaries, or enable their involvement in the administration of the trust, was a significant omission. The Crown breached its obligation under the Treaty to give effect to their tino rangatiratanga, and the principles of partnership and active protection. In our view, active protection required that the estate be held in trusts for all generations and that it be kept inalienable. But, as Maori members of Parliament argued in the 1880s, this was possible alongside the management of the trust by its beneficial owners. At the very least, they should have been given a sufficient voice in its management and, from time to time, their consent was required to significant changes. The appointment of a minority of Maori (non-owners) to the boards of the Public Trust and the Native Trust did nothing to meet this obligation.

Further Treaty breaches were incurred through legislation enabling the establishment of

the perpetual leasing regime, also imposed without consultation with (or consent of) the beneficial owners. Nonetheless, Parliament did not act in ignorance – the contrary wish of owners to resume their lands and farm them was reported to the House by their member of Parliament. Perpetual leasing may well have been a common arrangement at the time, and an arrangement that had a sound economic rationale for ‘immortal legal entities’ like the Crown and municipalities, but the failure to consult with beneficiaries or obtain their consent to such a fundamental change to the administration of their estate was a serious omission. It effectively resulted in the permanent alienation of the reserves. The Westland and Nelson Native Reserves Act 1887 breached the Crown’s obligations of active protection, consultation, and partnership, as well as the guarantee in article 2 for the retention of land for as long as Maori wished. Then, in the post-Second World War period, the Crown failed to ensure that the perpetual leasing regime was resulting in the best possible return for the estate. Rents were based on hopelessly outdated valuations.

#### **9.8.4 The expenditure and distribution of trust income**

The endowment fund was clearly of material benefit to Te Tau Ihu Maori. However, some trust income was used as a replacement, rather than a supplement, to Government spending on health, education, and other welfare purposes. The Crown thereby failed to actively protect the interests of the beneficiaries, and breached the Treaty principle of equity by using the trust to fund services provided to others by the taxpayer. It did so despite the protests of officials responsible for the trust (such as Alexander Mackay in 1877).

After the definition of beneficial ownership in 1892, a substantial portion of the endowment fund was disbursed directly to individual beneficiaries with no facility for community management of the income. Following Native Land Court rules of succession, shareholding became increasingly fragmented over time with the result that the vast majority of individual shareholders received insubstantial payments. Interests became increasingly uneconomic and owners were more and more unconnected with their land. These factors underlay the alienation of a significant portion of the tenths estate under the Maori Affairs Amendment Act 1967. The Crown’s failure to prevent the Native Land Court system from having this impact on the tenths estate breached the principle of active protection. Also, as we have noted, there were alternative models for distributing the trust’s income, such as the iwi trust boards provided to Rotorua and Taupo iwi in the 1920s (and to other iwi in the 1930s and 1940s.) In contrast, the Crown failed to provide for or protect the tino rangatira-tanga of Te Tau Ihu iwi in the allocation and distribution of the proceeds from their own land, in breach of article 2 and the Treaty principles of partnership, autonomy, and equal treatment.

**9.8.5 The inclusion and administration of the occupation reserves**

The Motueka and Moutere occupation reserves were wrongfully included in the tenths estate and the Crown's failure to return them to Maori, as recommended by trust administrators in the 1860s, was a serious omission. Motueka Maori consistently sought full control and authority over these reserves but the Crown refused to release the land from the trust.

Contrary to the wishes of Motueka Maori, the trust administration assumed greater control over the occupation land from the turn of the twentieth century. As with the endowment estate, the Native Land Court defined beneficial ownership of the occupation reserves. Alexander Mackay's definition of ownership in 1901 significantly circumscribed the extent of land under direct control of Motueka Maori with most under Public Trustee management, leased in perpetuity. The Public Trustee distributed the rental income from these leases to individuals in accordance with the Native Land Court's definition of beneficial ownership.

The Crown's inclusion of occupation reserves in the trust estate, the failure to restore ownership over the occupation reserves and the increasing assumption of control over these reserves, particularly from the turn of the twentieth century, was in breach of the article 2 guarantee of tino rangatiratanga. Ngati Rarua, Te Atiawa, and Ngati Tama were prejudicially affected by this breach. The Crown's failure to prevent the effects of the Native Land Court system breached the principle of active protection.

The occupation reserves were also insufficient to sustain the Motueka Maori population, even after additions from the late 1840s through to the 1860s. The inadequate provision of occupation reserves breached the principle of active protection.

**9.8.6 The Whakarewa grant**

Beneficiaries were neither fully nor adequately consulted about the Whakarewa grant. The Crown took a sizeable area of quality land from tenths and occupation reserves, it failed to ensure that those occupying the land either retained the land or were properly consulted about the grant and that the terms of consent were clearly understood by all parties. The Crown failed to ensure that local Maori were left with sufficient land for their present and reasonably foreseeable future needs and did not provide compensation to those whose occupation lands were taken. The Crown failed to ensure that the terms of the school trust were consistent with the tenths trust and for the exclusive benefit of the beneficiaries of this trust. The Crown also failed to ensure the return of land after the closure of the school (as discussed in chapter 12). The Crown thereby failed to actively protect the interests of the beneficiaries, particularly those who were resident at Motueka – including Ngati Rarua, Te Atiawa, Ngati Tama and the Georgeson whanau.

**9.8.7 The Public Trustee and the Native or Maori Trustee – Crown agency**

The Public Trustee and the Native or Maori Trustee, in respect of their actions within this inquiry district, are not agents of the Crown. We agreed with the Crown's submission that the legislative framework in which the trustees operated is 'a proper matter for inquiry by the Tribunal', and that consideration of the effect of the legislation involved some examination of the trustees' activities. Although strictly at law the trustees were not agents of the Crown, in reality they were performing the responsibilities of the Crown. In our view, this meant that the Crown had a duty to ensure that the trustees did not breach the principles of the Treaty in carrying out these responsibilities. This was particularly so because the function of actively protecting Maori in sufficient land for them to benefit from settlement, through the particular mechanism of reserves, was so integral to the Treaty in our Te Tau Ihu district

**(1) *The 1892 case***

As a result of faults in the court's process, the 1892 hearing was not a full inquiry into the customary interests of Te Tau Ihu iwi in the area encompassed in the Nelson settlement. The evidence also suggests that Judge Mackay's preconceptions about customary interests in Te Tau Ihu influenced his decision. Not only was the inquiry inadequate but the Native Land Court and then the Government failed to adequately respond to requests from Kurahaupo iwi for a reinvestigation. There were questionable aspects to the way that the court inquired into customary ownership of the tenths and sufficient grounds to warrant a Crown investigation. The Crown's failure to adequately respond to calls for such an inquiry breached the principle of active protection.

As both Crown and claimants agree, the question of entitlement should have been determined as at 1844. We consider that Ngati Rarua, Ngati Tama, Te Atiawa, and Ngati Koata had the strongest customary interests at that date. The Kurahaupo tribes had surviving rights despite their defeat, and the potential for them to recover and strengthen with every year. Ngati Toa had still in 1844 a latent right to visit for resource use or to take up residence and cultivation. It is not possible for this Tribunal, at this distance in time from the events of the 1840s, to comment on the proportionate share to which the uninvestigated rights of Ngati Toa and the Kurahaupo iwi would have entitled them. Suffice to say that we think the leading share in the tenths was indeed correctly decided in 1892, although we reach no conclusion on the proportion as between the four northern allies. But as the tenths were considered part-payment for the company lands and an endowment for the 'vendors,' we consider that Ngati Toa and the Kurahaupo iwi should also have had a share.

We find that Ngati Toa and the Kurahaupo iwi were wrongly denied a share in the tenths. We agree with the Crown's submission that it would not be appropriate to reopen the question of ownership of the estate at this late stage, even if that were possible. The lands of the

## 9.8.7(2)

Wakatu Incorporation are privately owned within the meaning of the Treaty of Waitangi Act, and we have no jurisdiction to make such a recommendation in any case. We recommend that the Crown negotiate with Ngati Toa and the Kurahaupo tribes to agree on an equitable compensation separate from the current tenths estate.

**(2) *Wakatu Incorporation***

There is a strong case for the Crown's desire to negotiate directly with iwi rather than with the Wakatu Incorporation. Notwithstanding this, we wish to record here our recognition of the very important role that the Wakatu Incorporation has had in initiating and supporting claims to the Tribunal from Te Tau Ihu Maori. Furthermore, Crown actions that have directly affected the shareholders of the Wakatu Incorporation since 1977 would need to be, and would appropriately be, resolved between the Crown and the incorporation. We note also Dr Mitchell's suggestion that the mana of the whanau who lost their interests in the 1970s could be restored from the 5.6 per cent of shares formerly belonging to the Maori Trustee, so long as the Crown compensates the incorporation. We note this suggestion without necessarily endorsing it, as a matter for discussion between the Crown and the incorporation.

The Wai 830 claim highlighted the anomalous position of non-tenths reserves which were included in the land vested in the Wakatu Incorporation in 1977. These six occupation reserves have a different history and ownership and it is possible that their interests may not have been as well represented as the dominant group of beneficial owners. We did not receive sufficient evidence to reach any conclusions on the particulars, but we reached a preliminary finding of Treaty breach. In our view, the different status and beneficial ownership of these reserves required a separate process, to obtain the full, free, and particular consent of the owners to the transfer of their reserves to the incorporation.

The Wakatu Incorporation inherited an estate that was overwhelmingly leased in perpetuity at rates that failed to reflect the value of the property. The Maori Reserved Land Amendment Act 1997 went some way towards remedying faults in the perpetual leasing system but did not immediately revoke the perpetual leases, which was the recommendation of the Ngai Tahu Tribunal and the expectation of the Taranaki Tribunal. The Wakatu Incorporation raised a number of significant issues with respect to the current leasing regime. These include the continuation of perpetual leases, rent review periods that do not reflect the market conditions, and rents based on unimproved value. A number of issues remain outstanding. We therefore suggest that the Crown enter into discussions with the incorporation about these concerns with a view to a fairer arrangement, bringing these leases into line with current leasing practices.

The 2002 settlement that followed the 1997 legislation went some way towards providing recompense for the grievances around perpetual leasing, but did not represent a full and final settlement of these grievances. The payments were ex-gratia and aimed at post-

1977 shortfalls. They were quite explicitly not intended to settle Treaty claims. The historical claims of the iwi concerned (and, it appears to us, the full claims of the incorporation) are yet to be settled.

The ex-Whakarewa School lands were leased under the same problematic conditions as the neighbouring land that had earlier been returned to the Wakatu Incorporation. NRAIT unsuccessfully sought the inclusion of their land in the schedule of leases covered by the 1997 Act. We found that it would have been reasonable to expect the Crown to intervene with legislation to put the NRAIT land on the same footing as the Wakatu land. Its failure to do so has compounded earlier Treaty breaches. The Crown has a responsibility to remedy the defects of the NRAIT leases. We make the same recommendation here as we have in the case of Wakatu: that the Crown enter into discussions with NRAIT about these concerns with a view to bringing the leases into line with current leasing practices.

Finally, although we have found significant Treaty breaches in the way the tenths policy was implemented, we would also comment that the concept of reserving one-tenth, as a minimum, was a good idea in the circumstances of the time. The creation of an inalienable endowment estate held in trust for present and future generations was consistent with the Crown's Treaty obligation of active protection. Furthermore, it should be noted that Te Tau Ihu Maori did get at least some benefit from the tenths. The administration was, as far as we can tell, honest and well-intentioned. As a result of all of these factors, a significant estate was returned to Maori ownership in the 1970s. Maori now have a significant asset, both in terms of commercial viability and ancestral land, that they might not have had if there had been no tenths policy.



## CHAPTER 10

### SOCIO-ECONOMIC ISSUES

#### 10.1 INTRODUCTION

A major strand of the evidence we received from claimants described the social and economic challenges faced by them and their parents and grandparents. We were told of the difficulties faced by communities subsisting on limited resources, often with insufficient access to health and education services. Others spoke of the need to leave their homes to find work opportunities and of the difficulties of maintaining connections with their turangawaewae. We were informed of the loss of te reo, tikanga, and the sense of cultural identity, and the impact that these losses had on the well-being of the Maori of Te Tau Ihu. Anne Chapman, for example, told us in her evidence for Ngati Tama:

Had the Crown honoured the Articles of the Treaty of Waitangi we would not need to be here today. That is my sadness. Our people suffered the indignity of land loss, and consequently, the loss of potential revenue to live full and productive lives. But even more important is the fact that our people have lost their spiritual connection to the whenua, to the sacred places of our ancestors. The very essence of our soul which is our language me ona tikanga. The language and our tikanga of a people holds the spiritual essence of a culture and therefore the people.

The colonisation process our people were subjected to denied us both. Therefore our people were not able to reach their full potential and this has carried on through the generations to this day.<sup>1</sup>

This chapter considers the socio-economic experience of Te Tau Ihu Maori in the period following the Crown purchases and throughout the twentieth century. It draws on the evidence from claimant historians and the claimants themselves to convey a picture of socio-economic conditions over time. It should be noted at the outset that this picture is incomplete, due in large part to the sketchy nature of the official sources and the anecdotal nature of much of the evidence that is available. The historical evidence is not extensive, and we were given only a little detailed material for the period after 1960. Particularly valuable evidence is available for the period 1860 to 1880, however, in the form of a series of official

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1. Anne Chapman, brief of evidence on behalf of Ngati Tama, 12 February 2003 (doc K11), p 11

published reports, and we will draw heavily on these, along with other sources from that time. For all periods, however, there are dangers in using hasty and value-laden Pakeha impressions. Source material of this kind lacks proper indicators of 'wealth' and 'poverty'. At no time was there systematic reporting of socio-economic matters. The small size of the Maori population of Te Tau Ihu meant that the Crown often overlooked them: they were often not investigated or written about.

It is not always possible to be precise about iwi affiliation, since official and other documents dealing with socio-economic matters do not usually specify this. We are therefore not able to give a comprehensive account of the experience of specific iwi or communities in the region. Even for Te Tau Ihu Maori as a whole group, the limitations of the evidence mean that we are not able to provide a definitive overview. Nevertheless, the evidence does give a definite impression of the difficult socio-economic conditions experienced by Te Tau Ihu Maori over the last half of the nineteenth century and through the twentieth century.

Dr Phillipson's examination of 'life on the reserves, 1860–1890' provides the framework for considering the socio-economic impact of inadequate reserves in that period and beyond. He argues in his report that after the land transactions of the mid-nineteenth century:

The future and social economic well-being of Maori communities now depended on the size, quality, and usefulness of their reserves, which would dictate whether or not they were able to maintain desired elements of their traditional lifestyle, and/or to engage with the Pakeha pastoral and agrarian economy.<sup>2</sup>

It is clear, as we showed in chapter 7, that the reserves were inadequate, and this inadequacy soon caused severe economic difficulties. As time went on, the iwi of Te Tau Ihu necessarily became less entirely dependent on their reserves and lived more and more like the non-Maori of the region, but their socio-economic experience continued for many years to be linked with what remained of their land base.

Many claimant witnesses drew such a link and spoke of their perception of its effects today. Lauralee Duff, for example, described her people's experience at Mohua in her evidence for Ngati Tama:

Because so few of the tangata whenua could remain on their whanau land in Mohua other very important things were lost – the support of whanaungatanga, knowledge of whakapapa, knowledge of history, knowledge of tikanga, and the very heart of our culture, te reo itself.

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2. Dr Grant Phillipson, *The Northern South Island: Part 2*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1996) (doc A27), p1

I believe this dislocation of our whanau and the consequent losses can be attributed to the inadequacy of the Native Reserves. It seems clear that promises to reserve sufficient land for 'the present and future needs' of the vendor iwi and their whanau were not kept.<sup>3</sup>

We begin this chapter with a summary of the issues covered in it. We then present an overview of population trends in the nineteenth and twentieth centuries, before turning to a more detailed examination of socio-economic conditions from 1860 to 1960. We divide our discussion into three periods, within which we consider general living conditions, economic opportunities, health, and education. In each section, we will assess socio-economic conditions and the Crown's response to problems. Because we did not receive much technical evidence on the post-1960 period, our discussion on more recent developments (contained in the 1920 to circa 1960 section) is brief. The chapter then details the legal submissions from claimant and Crown counsel before outlining our conclusions and findings as to the prejudice arising from Crown actions and omissions that breached the principles of the Treaty.

#### 10.2 SOCIO-ECONOMIC MATTERS: THE ISSUES

We have identified three major issues arising from the evidence and submissions relating to the socio-economic experience of Te Tau Ihu Maori:

- ▶ the socio-economic position of the Maori population of the region after the major land purchases of the mid-nineteenth century;
- ▶ the extent to which this socio-economic position was the result of the fact that the iwi of Te Tau Ihu were left with insufficient land; and
- ▶ the adequacy of the Crown's response to the socio-economic problems experienced since the mid-nineteenth century.

Claimant legal submissions highlighted the socio-economic problems faced by Te Tau Ihu Maori, pointing to issues such as limited economic opportunities, ill health, and poor access to education. Claimant counsel all contended that these difficulties were a consequence of landlessness and that they arose as a result of the Crown's failure to ensure that Te Tau Ihu Maori retained sufficient reserves at the time of the major land purchases. It was emphasised in some submissions that, in engaging with the Crown in land sales, the iwi anticipated that social and economic benefits would follow, and indeed that they were promised such advantages as an inducement to sign away their land. The tenor of the claimant submissions was that these 'collateral benefits' did not eventuate and that instead the iwi were reduced to a marginalised position in the economy and society of the region.

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3. Laurelee Duff, brief of evidence on behalf of Ngati Tama, 12 February 2003 (doc K17), pp 6–7

As we have seen, the Crown conceded that it failed to secure sufficient land for the present and future needs of Te Tau Ihu Maori. Crown counsel did not agree, however, that there was necessarily a connection between this insufficient land base and social and economic deprivation, instead pointing to other factors that may have impacted negatively on the well-being of the Maori population of the region. We accept that there is no simple correlation between land retention and socio-economic well-being and that many factors besides land loss, some of them unconnected with Crown activities, were at work in the history of Te Tau Ihu Maori since colonisation began. We will look at this socio-economic history in a suitably wide perspective, and in our conclusions we will address the disputed issue of whether the plight of the iwi in later times was the outcome of Crown actions and omissions in the mid-nineteenth century.

Another facet of the claimant submissions with respect to socio-economic conditions was the adequacy of the Crown's response to the problems experienced by Te Tau Ihu Maori. Claimant counsel argued that the Crown failed to properly address poverty, ill health, poor housing, and limited educational and employment opportunities. Counsel pointed to the inadequate Government response to these needs, some also noting the Crown's reliance on the income from the tenths reserves, which were a Maori endowment, to provide services that they argue were more properly a Government responsibility. Our main discussion of the tenths was in chapter 9, but we will look again at this particular issue in the present chapter. In our discussion of the Crown's provision of services to Maori in this region we will also give particular attention to the difficulties caused by isolation, since some residents of Te Tau Ihu, both Pakeha and Maori, lived in very remote and inaccessible locations. This constitutes an additional factor to be taken into account in assessing whether the Crown responded adequately to the situation facing Maori in the region.

### 10.3 POPULATION, 1840–2006

The difficulties with evidence associated with socio-economic issues are perhaps most apparent in the limitations of the available population statistics. As Dr John Robinson remarks in his report on the Maori population of Te Tau Ihu, 'the figures are only as accurate as collection and collation techniques, which were rough and ready in much of the nineteenth century'.<sup>4</sup> Inaccuracies and inconsistencies limit the extent to which we can rely on nineteenth-century census data, but it is still possible to draw a general picture.

The highly mobile nature of the Te Tau Ihu Maori population is a further complicating factor. Out-migration to the North Island was a common feature throughout the period.

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4. Dr John Robinson, 'Demographic Analysis of Maori Population Trends in the Northern South Island/Te Tau Ihu from 1840', report commissioned by the Crown Forestry Rental Trust, 1999 (doc A58), p7

SOCIO-ECONOMIC ISSUES

Iwi	Total	Tasman-Nelson-Marlborough	West Coast	Canterbury	Other South Island	North Island	Area outside region
Te Atiawa (Te Waipounamu)	2433	516	18	273	84	1530	12
Ngati Koata	1062	273	6	54	24	714	
Ngati Kuia	1551	618	18	138	42	741	
Rangitane (Te Waipounamu)	966	324	18	126	51	453	
Ngati Rarua	954	276	12	96	45	519	
Ngati Tama (Te Waipounamu)	381	81	3	48	12	237	6
Ngati Toa Rangitira (Te Waipounamu)	180	42	0	24	6	102	0
Ngati Apa ki te Waipounamu	741	171	60	114	15	381	
Total	8268	2301	135	873	279	4689	18

Table 9: Te Tau Ihu iwi, 2006. Data has been rounded in some instances to protect confidentiality, which means that the accumulated totals do not always equal the figure given in the total column.

TE TAU IHU O TE WAKA A MAUI

10.3

Year	Non-Maori	Maori
1843		1500*
1845	3248	2040*
1849	3314	
1855		1120
1858	9272	
1861	12,251	
1864	17,429	
1867	28,185	
1868		775
1871	27,836	
1874	28,703	852
1878	32,685	543
1881	35,375	476
1886	41,313	460
1891	47,537	472
1901	51,241	494
1906	56,890	424
1916	59,859	632
1926	59,363	513
1936	66,679	552
1945	66,539	700
1956	83,558	1143
1966	94,548	1918
1976	108,857	2540
1986	113,043	6204
1996	119,763	10,911

\* Estimated

Table 10: Maori and non-Maori Te Tau Ihu population, 1843–1996

For example, Alexander Mackay attributed 20 per cent of the population decline recorded from 1858 to 1878 to out-migration.<sup>5</sup> This was an ongoing feature of the experience of Te Tau Ihu Maori, most of whom – 61 per cent – were not living in the Te Tau Ihu region in 1996.<sup>6</sup>

5. Dr John Robinson, 'Maori Reserves and Population in Te Tau Ihu (Northern South Island)', report commissioned by the Crown Forestry Rental Trust, 2000 (doc B10), p 44

6. Ibid, p 57

In-migration also makes it difficult to extract information specific to Te Tau Ihu iwi. As early as 1896, about 18 per cent of the Maori population of the region was from non-Te Tau Ihu iwi.<sup>7</sup> By 1996, most of the Maori living in the district – 88 per cent – were not affiliated with the Te Tau Ihu tribes.<sup>8</sup> The number of people in New Zealand as a whole who identified themselves as members of Te Tau Ihu iwi, however, had increased significantly by the twenty-first century: in the 2006 census, there were 8268 reports of Te Tau Ihu Maori affiliation. People who reported more than one affiliation were counted more than once. Of these reported affiliations, 2301 were made by people living in Te Tau Ihu itself (the district encompassed by the Tasman District Council, Nelson City Council, and Marlborough District Council).<sup>9</sup> There were 10,953 Maori residents of this region in 2006, and the total population of Te Tau Ihu was 116,607.<sup>10</sup> Of Maori living in Te Tau Ihu, 21 per cent identify themselves as Te Tau Ihu iwi. Te Tau Ihu iwi are only 2 per cent of the total population of the Tasman, Nelson, and Marlborough regions.

Dr Robinson summarised Te Tau Ihu Maori population trends over the nineteenth and twentieth centuries. He compiled a table showing Maori population numbers in Te Tau Ihu from 1843 to 1996, with non-Maori population figures for comparison. We reproduce the table (slightly modified) on the facing page. It is based on various sources, including official censuses, for the pre-1871 period but solely on official censuses from 1871 on. Dr Robinson states that Maori numbers in the region declined from an estimated 1500 to 2000 in the 1840s to 1120 in 1855. By 1886, the population had declined to 460, and it hovered below 500 from then until 1906, in what he characterised as a period of ‘imminent recovery’. From the early years of the twentieth century, the Maori population of the region showed clear signs of recovery, with a considerable increase after the Second World War (a 60 per cent increase from 1945 to 1956). The population rise continued steadily over the next two decades, increasing 38 per cent in the 1956 to 1966 period and 22 per cent in the 1966 to 1976 period. The 1976 to 1996 period was a time of very rapid population growth, although it is likely that most of it was due to the arrival of Maori from other iwi. As we have noted, most

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7. Of the 463 Maori residents of Te Tau Ihu (excluding Kaikoura) counted in the 1896 census, 29 were described as Waikato, 22 as Ngati Kahungunu, 15 as Ngai Tahu, 12 as Ngati Ruanui, and six as various other iwi. Te Tau Ihu iwi were denoted as Ngatiawa (313) and Rangitane (65). Robinson, ‘Demographic Analysis’, p 25 (adjusted to exclude Kaikoura). Maori Population in Counties, *Results of a Census of the Colony of New Zealand, Taken for the Night of the 12th April, 1896* (Wellington: Government Printer, 1897), p lii

8. In 1996, Te Tau Ihu Maori comprised less than one per cent of the total Tasman, Nelson, and Marlborough population. The Maori population (all iwi) of the district was 8.3 per cent of the total: Robinson, ‘Demographic Analysis’, p 10.

9. 2006 Census, *Classification Counts*, <http://www.stats.govt.nz/census/2006-census-data/classification-counts/about-people/Iwi.htm>, accessed 21 November 2007; 2006 Census of Population and Dwellings, *Regional Summary Tables*, <http://www.stats.govt.nz/census/2006-census-data/regional-summary-tables.htm>, accessed 21 November 2007

10. 2006 Census of Population and Dwellings

Maori living in Te Tau Ihu at the end of the twentieth century were not affiliated with the iwi of the region.<sup>11</sup>

As table 10 shows, by 1845 Pakeha outnumbered Maori, and the rapid growth in the settler population during the 1850s and 1860s meant that Te Tau Ihu Maori very early became a very small proportion of the population. The disproportion did not lessen until Maori numbers increased markedly in the latter half of the twentieth century.

Robinson explains the pre-1855 decline in the Te Tau Ihu Maori population in terms of the impact of introduced diseases, exacerbated by warfare and out-migration. His analysis suggests that high mortality and a somewhat lowered fertility affected Te Tau Ihu Maori through to the 1860s, after which mortality was not as high and fertility also began to recover. Fertility rates were higher from the end of the nineteenth century, and the population expanded thereafter.<sup>12</sup> These trends are broadly compatible with the experience of Maori as a whole. In common with other iwi, Te Tau Ihu Maori experienced rapid depopulation in the first half of the nineteenth century, due largely to exposure to new diseases for which they had no immunity. Mortality rates peaked with the increase of the Pakeha population after 1840 and only gradually decreased from the later part of the century as immunity improved. Falling mortality rates, combined with high fertility rates from the 1870s, enabled the recovery of the population.<sup>13</sup>

Nineteenth-century census reports often commented on ill health and the high death rate amongst Te Tau Ihu Maori, and ill health continued to affect Maori communities throughout the twentieth century. These demographic realities are by no means unconnected with land issues. In his general study, Professor Ian Pool has considered the impact of the loss of land on the Maori population. He contends that the restriction of access to resources that resulted from land sales 'would have adversely affected the relationship between nutrition, health and population.' He suggests that the social and economic dislocation resulting from land alienation increased Maori vulnerability to malnutrition and ill health.<sup>14</sup>

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11. Robinson, 'Demographic Analysis', pp 10–11, 19; Robinson, 'Maori Reserves and Population', pp 44, 57; Results of Census, 1878–1986. Most of the Maori population figures in the text and the table have been adjusted to exclude the Kaikoura district, which was included in 'Marlborough' for many years and has a significant Maori population but which lies outside Te Tau Ihu. The statistics for 1874, however, cannot be broken down and apparently include Kaikoura. Similarly, it was not possible to modify the figures for 1976 and 1986. Except in the early estimates and the 1996 figure, Maori living in the Buller area (a very small number) are included. From 1886 to 1986, the figures are given by county (in 1991, the new district council areas were used for the first time). The non-Maori figures cover the Nelson and Marlborough provinces and thus include Kaikoura, Inangahua, and some other areas beyond the bounds of Te Tau Ihu. We have retained them here unmodified because their inclusion is intended simply to demonstrate how the Maori population was overwhelmed by Pakeha immigration. Kaikoura adjustments are based on the full census returns in the *Results of Census, 1886–1986*.

12. Robinson, 'Demographic Analysis', pp 19–20, 32–33; Robinson, 'Maori Reserves and Population', pp 37–38, 43

13. Ian Pool, *Te Iwi Maori: A New Zealand Population, Past, Present and Projected* (Auckland: Auckland University Press, 1991), pp 234–235

14. *Ibid*, pp 62–63

Date	District	Iwi	Population
1878	Wairau	Ngati Rarua, Ngati Toa, Rangitane	83
	Pelorus	Rangitane, Ngati Toa	63
	Queen Charlotte Sound	Ngati Awa	138
	Croisilles, D'Urville Island	Ngati Koata	48
	Wakapuaka	Ngati Tama	62
	Motueka	Ngati Rarua, Ngati Awa	42
	Golden Bay	Ngati Rarua, Ngati Awa	72
	Buller	Ngati Awa, Ngai Tahu	35
1881	Wairau	Ngati Toa, Ngati Rarua, Rangitane	83
	Pelorus	Ngati Toa, Rangitane	63
	Queen Charlotte Sound	Ngati Awa	127
	Croisilles, D'Urville Island	Ngati Koata	40
	Wakapuaka	Ngati Tama	47
	Motueka	Ngati Rarua, Ngati Awa	59
	Golden Bay	Ngati Awa	27
	Westport	Ngai Tahu	30

Table 11: 1878 and 1881 censuses

In a number of other inquiries, the Waitangi Tribunal has heard arguments that an insufficient land base has had an impact on Maori health. In a report for one of these earlier inquiries, JP Koning and WH Oliver contended that landlessness resulted in a lower standard of living, which impacted on nutrition and living conditions. These conditions result in a higher incidence of so-called 'diseases of poverty', as well as high rates of infant mortality and communicable diseases such as typhoid and tuberculosis.<sup>15</sup> The recent report of the Hauraki Tribunal concluded that 'the evidence shows that poverty did contribute significantly to the impact of these diseases'. That Tribunal pointed in particular to the 'very poor housing which was all many Maori could afford, until the 1950s or even later'.<sup>16</sup>

Population estimates and census data provide a certain amount of information about the distribution of Maori in Te Tau Ihu. In chapter 4, we quoted what Ernst Dieffenbach wrote about the location of Maori communities in the early 1840s. The count made by the Nelson Provincial Government in 1855 gave similar information.<sup>17</sup> In 1868, Alexander Mackay's census gave population figures for each locality.<sup>18</sup> The Government census of 1874 gave only

15. JP Koning and WH Oliver, 'Economic Decline and Social Deprivation in Muriwhenua, 1880-1940', report commissioned by the Crown Forestry Rental Trust, 1994 (Wai 45 R0D, doc L8), p 20

16. Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006), vol 3, pp 1229-1230

17. Robinson, 'Maori Reserves and Population', p 40

18. 'Census of the Native Population of the Southern Islands', *Compendium*, vol 2, p 344

County	Total Maori population (including 'half-castes')	'Half-castes living as members of Maori Tribes'
Waimea	96	5
Collingwood	25	2
Marlborough	87	4
Sounds	185	62
D'Urville Island	38	1
Buller	29	6
Total	460	84

Table 12: 1886 census

bald figures for 'Nelson' and 'Marlborough', but more detailed census data were presented from 1878. In table 11, we reproduce the locality and iwi data given in the censuses of 1878 and 1881, as recorded by the enumerators at the time.<sup>19</sup> From 1886, location details were arranged by county and borough. Iwi affiliations were not stated after 1901, though they have been restored in very recent censuses.

The later nineteenth-century censuses also indicated the extent of intermarriage between Maori and Pakeha and included 'half-castes', at least those 'living as members of Maori tribes', in the total Maori population. The 1874 census, for instance, recorded that 89 of the 452 Maori counted in Marlborough (apparently including Kaikoura) were 'half-castes', as were 28 of the 440 Maori in the Nelson province.<sup>20</sup>

From 1881, the census always counted 'half-castes' who lived as Maori in the total Maori population, while those who 'lived as Europeans' were included in the Pakeha figures. From these population counts, it can be established that 13 per cent of those living as Maori in Te Tau Ihu (including Kaikoura) in 1874 were 'half-castes'; the proportion in 1886 (this time with Kaikoura excluded) was 18 per cent (see table 12).<sup>21</sup> The number of 'half-castes living as Europeans' varied but was usually small. Obviously, it was a subjective judgement to determine which category best described people of mixed ancestry, and the practice was abandoned after 1921. Beginning with the 1926 census, persons of more than half Maori ancestry were all included in the Maori census. From 1986, the Maori figures included all who identified as Maori, regardless of degree of ancestry.

19. 'Census of the Maori Population, 1878', AJHR, 1878, G-2, p 25; 'Census of the Maori Population, 1881', AJHR, 1881, G-3, p 26

20. 'Approximate Census of the Maori Population', AJHR, 1874, G-7, p 18

21. The figure for 1886 is from 'Census of the Maori Population', AJHR, 1886, G-12, pp 17-18

The changes in census methodology mentioned above make it difficult to chart Maori population history, but we have referred to them in order to throw further light on the experience of the iwi of Te Tau Ihu since the 1840s. By the time the official census pattern was established in the 1870s and 1880s, the statistics collected were able to highlight how small the Te Tau Ihu Maori population had become (owing to several factors, including disease mortality and out-migration) and how it was distributed in relatively small communities scattered through the district. We turn now to an examination of the socio-economic circumstances of these communities during the 1860 to 1890 period.

#### 10.4 1860–90

##### 10.4.1 Economic experience

The sale of large quantities of land in the years to 1860 seemed at first to bring the benefits anticipated by Maori, an outcome they most probably had been assured would follow. As we mentioned in chapter 4, it is clear that for a few years after Pakeha settlement began in Te Tau Ihu the resident Maori took advantage of the new economic opportunities offered by the arrival of the settlers. As well as continuing to enjoy the almost unrestricted use of their traditional food resources from land, river, and sea, Maori communities developed a new and profitable provisioning trade with the newcomers. An account written in 1844 speaks of a 'fleet of canoes sixteen in number from Massacre [Golden] Bay, on a trading expedition to Nelson with pigs, potatoes, fish, etc.'<sup>22</sup> In Maori cultivations, potato growing was soon supplemented by other cropping activities, and in 1848 it was reported that Maori growers in Tasman Bay had 1137 acres in wheat, 211 in maize, 290 in potatoes, and 120 in other crops.<sup>23</sup> In Golden Bay at this time, Ngati Tama entrepreneurs were growing wheat and sailing every month to Nelson in their own vessels to sell flax, pigs, dye bark, and wheat to the settlers.<sup>24</sup>

As the Pakeha settlers became established and began farming themselves in the 1850s, however, this trade suffered a considerable decline, by which time too there was much less land available for Maori use.<sup>25</sup> In the 1860s, as a result of the extensive land sales of the 1840s and 1850s, Maori in Te Tau Ihu found themselves, in the words of Ngati Tama's historian Miriam Clark, 'on the fringes of a society which no longer needed them.'<sup>26</sup> As

22. Samuel Stephens, journal, 23 April 1844 (Hilary Mitchell and Maui John Mitchell, 'A History of Maori of Nelson and Marlborough', 2 vols, report commissioned by Te Runanganui o te Tau Ihu o te Waka a Maui, 1992 (doc A9), vol 2, pp 10-7–10-8)

23. *Nelson Examiner*, 27 January 1849 (Mitchell and Mitchell, 'History of Maori', vol 2, p 10-17); see also J McAloon, *Nelson: A Regional History* (Whatamango Bay: Cape Catley, 1997), pp 16, 39

24. Hazel Petrie, *Chiefs of Industry: Maori Tribal Enterprise in Early Colonial New Zealand* (Auckland: Auckland University Press, 2006), p 108

25. Miriam Clark, 'The Social and Economic Impact of Colonisation on Ngati Tama Manawhenua ki te Tau Ihu', report commissioned by the Ngati Tama Manawhenua ki te Tau Ihu Trust, 2000 (doc K1), p 7

26. *Ibid*, p 8

we demonstrated in chapter 7, they were largely confined to the small and sometimes isolated reserves created for them during the Crown purchases of the preceding years. Even this small land base was soon eroded. Our account of these reserves showed that alienation began before the end of the century and proceeded apace after 1900. Even the three larger tracts of land that had not been included in the mid-century purchases did not remain permanently in tribal possession, as we showed in chapter 8. The large Wakapuaka block had been withheld from sale during the 1840s and 1850s, but the Native Land Court's decision in 1883 left it under the control of a single person, Huria Matenga. As Ms Clark points out, the wealth of Hemi and Huria Matenga stood in contrast to the situation of almost all other Maori of Te Tau Ihu.<sup>27</sup> The even larger Te Taitapu block was sold in its entirety in 1884, soon after it went through the Native Land Court, and much of the land on the big island of Rangitoto was alienated in the years following the court hearing in 1883 and the partitioning in 1895.

Even so, it would not be true to say that the owners of the much reduced land base abandoned their efforts to participate in the new economy. James Mackay reported in 1861 that on the reserves of the Wairau and Pelorus there was much land under crop, and the people there owned many cattle and horses. 'The most industrious man among them,' he stated, 'is Te Rori son of the chief Te Tana Pukekohatu. He had what is generally considered to be the finest team of working oxen in the Wairau, and he is becoming wealthy by carting wool, timber and firewood for the European settlers.' At Wakapuaka, there was also much land in cultivation; the people owned working bullocks, carts, and many cattle and horses, and they derived a good income from the sale of timber and firewood. Motueka, 'formerly the most wealthy' Maori area in the province, had less cropping than before, but there were still many horses and some cattle, working bullocks, carts, and implements. Mackay commented that the energies of the people there had been dissipated by a developing drinking culture (it is evident that he regarded this as a cause rather than an effect of their socio-economic problems). Further west, Paramena Haereiti and his family had crops and sheep on their land at Wainui. 'For a Maori,' wrote Mackay, Paramena 'is a wealthy man.' The Takaka people had cattle and horses and good land, and Mackay felt that they could easily do very well if they made a greater effort. The Maori of the Aorere district, where gold had been discovered in 1856, had been attracted to mining, but they were still supplying produce for the Pakeha of the area.<sup>28</sup>

Maori farming was becoming increasingly difficult, however. Even in the 1860s, James Mackay was able to identify reasons for this, arising from the fact that Maori economic activity was now largely confined to small reserves and that Pakeha settlers were rapidly taking up and farming the land adjacent to that of the Maori reserve owners. 'One of the

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27. Clark, 'Social and Economic Impact', pp18–19

28. J Mackay to Native Secretary, 23 March 1861 (Tony Walzl, *Ngati Rarua Land and Socio-Economic Issues, 1860–1960* (Wellington: Ngati Rarua Iwi Trust, 2000) (doc A50(2)), pp 38–40)

consequences of this, and of being hemmed in by settlers', he wrote in 1863, 'is that they are now unable to breed or run the pigs which, at one time, formed a large item of their income, and a staple article of their food. The same reason will also prevent them from ever possessing any very large quantity of horned cattle, or sheep.' Their crops were also at risk: 'Their cultivations, especially those of old people, who are unable to erect substantial fences, are frequently trespassed on by the cattle of their European neighbours.'<sup>29</sup> Mackay mentioned the Queen Charlotte Sound reserves as suffering particularly from Pakeha stock trespass and thus a decline in cultivation. In the Pelorus and Wairau areas, where cropping was the main Pakeha farming activity, this was less of a problem.<sup>30</sup> The trespass difficulty was not confined to Queen Charlotte Sound, however, as we see from a warning notice inserted by Mackay in the local newspaper in 1861:

Whereas various persons have at various times annoyed the Natives residing at Queen Charlotte Sound and Pelorus Sound by burning houses, stealing fruit, and allowing their cattle to trespass on Native Reserves and cultivations there, . . . I hereby inform such persons that all such complaints made by the Natives will be strictly attended to and investigated.<sup>31</sup>

Later, Alexander Mackay confirmed his cousin's analysis and indicated that the problems had increased. In 1865, he drew attention to the poor quality of most of the reserves, as we noted in chapter 7. In 1872, he noted that the formerly flourishing agricultural market 'for pigs, grain, potatoes and other native produce' had declined steadily. 'Little attention is now paid by them to agricultural operations, further than to raise a bare sufficiency for their own wants.' Pakeha settlers were similarly abandoning agricultural production as uneconomic.<sup>32</sup> The decline of Maori farming also had other causes, however, arising from the increasing domination of the region by Pakeha farmers. Mackay stated that Maori across Te Tau Ihu now owned 'comparatively very few' horses and cattle and no longer bred pigs except in a few places, mainly because of 'their having no room to run them, owing to the gradual settlement of the country by the European population. The same reason will also prevent them from owning any number of sheep'. He pointed to other consequences of the spread of Pakeha settlement: in the past, Maori could hunt or gather without hindrance, but these wider areas were now closed off to them. Furthermore, Maori-owned stock now posed a trespass problem: 'they can hardly keep an animal about them, without its becoming a

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29. J Mackay to Native Secretary, 3 October 1863, *Compendium*, vol 2, p 138

30. Walzl, *Land and Socio-Economic Issues*, p 38

31. *Marlborough Press*, 16 March 1861 (Cathy Marr, 'Crown-Maori Relations in Te Tau Ihu: Foreshores, Inland Waterways and Associated Mahinga Kai', report commissioned by the Treaty of Waitangi Research Unit on behalf of the Crown Forestry Rental Trust, 1999 (doc A61), p 64)

32. A Mackay, 'Report on the Condition of the Natives in the Provinces of Nelson and Marlborough and the County of Westland', *AJHR*, 1872, F-3, pp 17-18

source of anxiety, lest it involve them in some trouble with their European neighbours.<sup>33</sup> As Mackay explained in another report:

Every year as the settlement of the country progresses the Natives are necessarily restricted to narrower and narrower limits, until they no longer possess the freedom adapted to their mode of life. The settlers hunt down, for pastime or other purposes, the birds which constituted their food, or, for purposes of improvement, drain the swamps and watercourses from which they obtained their supplies of fish; their ordinary subsistence failing them, and lacking the energy or ability to supplement their means of livelihood by labour, they lead a life of misery and semi-starvation.<sup>34</sup>

As we have noted earlier in the report, Crown officials were not ignorant of Maori needs. The reports quoted above show this, and we point again to Grey's statement in 1847 that Maori could not 'be readily and abruptly forced into becoming a solely agricultural people' reliant only on cultivated lands, since they also needed larger areas for 'some of their most important means of subsistence', such as gathering fern root, running pigs, catching eels and birds, and fishing.<sup>35</sup>

By 1886, the Pakeha population of Nelson and Marlborough provinces, which had been less than 10,000 in 1858, had reached 41,313.<sup>36</sup> Looking back in 1887, Mackay could see that the small size of the reserves had not been such a problem in the early days of settlement, when only a few Pakeha were occupying the land that had been purchased. With the passage of years, however, the Maori were 'now hemmed in on all sides', and since 'their requirements are much greater than in former times, owing to their food supplies being cut off or considerably interfered with, they now find that the land set apart for them, for the reasons stated as well as other causes, is inadequate to their wants.'<sup>37</sup> As Mackay pointed out, even Pakeha farmers found holdings of 100 acres only marginally viable.<sup>38</sup>

When national Maori cultivation and livestock statistics were compiled for the first time in 1886, they showed that despite all the odds the reserves in Te Tau Ihu were still being farmed. Across the region, there were 121 acres in potatoes, 66 acres in wheat, 19 acres in maize, and 985 acres (mostly in Marlborough County) in other crops: a total of 1193 acres in crops. Sown grasses accounted for 281 acres, more than half of them in Collingwood County. Maori owners ran 3289 sheep (mostly in Sounds County), 360 cattle, and 468 pigs.<sup>39</sup> In 1891, the area in potatoes had increased somewhat to 167 acres and much more land (227 acres,

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33. Ibid, p 18

34. A Mackay to under-secretary, Native Department, 24 June 1874, AJHR, 1874, G-2C, p 2

35. Grey to Earl Grey, 7 April 1847 (Dr Grant Phillipson, *The Northern South Island: Part 1*, Rangahau Whanui Series (Wellington: Waitangi Tribunal, 1995) (doc A24), pp 91, 132)

36. Robinson, 'Demographic Analysis', p 11

37. A Mackay, 'Native Land Claims in Marlborough', AJHR, 1888, G-1A, pp 1-2

38. A Mackay to under-secretary, Native Department, 6 May 1881, AJHR, 1881, G-8, p 16

39. 'Census of the Maori Population', AJHR, 1886, G-12, pp 17-18

mostly in Marlborough County) was in wheat, but the acreage in maize had not increased and the area in other crops had declined to 622 acres. Overall, the area in crops had declined slightly to 1037 acres. The area in sown grasses had vastly increased, to 2582 acres (mainly in Waimea County and, to a lesser extent, in Sounds County). The number of sheep had more than doubled (to 7523), most of the increase being in Waimea and Sounds Counties. There were a few more cattle (415) but fewer pigs (249).<sup>40</sup> The published annual sheep returns of this period show that the biggest Maori-owned flock was on Arapawa Island, though not on reserve land. Other Maori ran sheep on a smaller scale at the Wairau, at Waikawa, in the Pelorus Valley, at Wakapuaka, and on Rangitoto. Maori sheep farms in Te Tau Ihu constituted only a tiny part of the region's sheepfarming industry as a whole, however: in 1891, the number of sheep in those parts of Nelson and Marlborough provinces we are dealing with here was 784,601, so that Maori-owned sheep (as enumerated in the census statistics mentioned above) accounted for one per cent of the total regional flock.<sup>41</sup>

These figures suggest that, on the small areas of land available to them, Maori were engaged in farming, both for subsistence and for commercial production, but hardly on a scale likely to bring much return. Quite aside from whether the farmers were Maori or Pakeha, mixed crop and livestock farming was still the agricultural mainstay of the region as a whole, although cropping on its own had become largely uneconomic. Specialised dairy farming was still to come to this area, but sheep farming was being extended. Supplementing the long-established sheep industry on the extensive grazing runs located on the natural grasslands of the Wairau Valley and southern Marlborough, where Maori now owned no land, the expansion of the 1880s took place in smaller valleys and then in hill country as the forest was cleared and was given great impetus by the introduction of refrigeration at this time. It was difficult, however, to establish viable hill country sheep farms without capital and considerable acreage, and the land easily reverted to scrub. Maori landowners found it hard to establish themselves in this industry.

Other means of support for Maori were few. Permanent or seasonal labouring employment was not always available and could be obtained only in strong competition with the ever-increasing number of Pakeha. Gold discoveries in the Aorere Valley in the 1850s and in the Pelorus Valley area and Te Taitapu in the 1860s provided opportunities for a time.

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40. 'Census of the Maori Population', AJHR, 1891, G-2, p 11

41. Benjamin Bayly, 'The Annual Sheep Returns for the Year Ended 31st May, 1882', 31 July 1883, AJHR, 1883, H-19; Benjamin Bayly, 'The Annual Sheep Returns for the Year Ended 31st May, 1883', 6 June 1884, AJHR, 1884, H-3; Benjamin Bayly, 'The Annual Sheep Returns for the Year Ended 31st May, 1884', 26 May 1885, AJHR, 1885, H-11; Benjamin Bayly, 'The Annual Sheep Returns for the Year Ended 31st May, 1885', 14 May 1886, AJHR, 1886, H-8; Benjamin Bayly, 'The Annual Sheep Returns for the Year Ended 31st May, 1887', 23 May 1888, AJHR, 1888, H-13; 'The Annual Sheep Returns for the Year Ended 31st May, 1888', AJHR, 1889, H-15; 'The Annual Sheep Returns for the Year Ended 31st May, 1889', AJHR, 1890, H-13; 'The Annual Sheep Returns for the Year Ended 31st May, 1890', AJHR, 1891, H-15; 'The Annual Sheep Returns for the Year Ended 30th April, 1891', AJHR, 1891, H-15A; 'The Annual Sheep Returns for the Year Ended 30th April, 1892', AJHR, 1892, H-30. The total figure for 1891 is for the area covered by Collingwood, Waimea, and Sounds Counties, as well as the northern part of Marlborough County.

Alexander Mackay noted that goldmining had caused many Maori to abandon their farming pursuits; some had been very successful as miners, he reported, but ‘as a rule their earnings have been mostly squandered in a useless manner.’<sup>42</sup> The only other direct source of income in this period was rent received from the lessees of occupation reserve land (rental income was also received by those with interests in tenths land administered by the Public Trustee and Maori Trustee, but not until 1897). It is clear that in the period up to 1890 much occupation reserve land was leased to neighbouring Pakeha farmers wishing to supplement their own holdings.

Overall, economic opportunity was minimal, leaving subsistence, irregular employment, and rents as the main supports for the people living on the reserves. It is clear that Crown officials were aware of this situation and, as outlined above, had reported to the government of the day that Maori in the region had not been left with sufficient land for new ways of farming or for their traditional economic activities.

Historians writing for the claimant iwi have investigated the specific situations of the various groups, but all point to the adverse economic circumstances of Maori in Te Tau Ihu in this period.

Tony Walzl, for example, concludes that:

by the beginning of the 1870s, and continuing through to the end of the 1880s, it was well recognised by Crown officials that the land base left to Ngati Rarua and other Nelson and Marlborough Maori was inadequate. Over this period, matters had reached a crisis point as not only was there no land for economic development but increased European settlement had increasingly eroded away access to off-reserve food sources.

Referring to the Wairau and Motueka, and to the experience there of one particular iwi, Ngati Rarua, Mr Walzl points to another aspect of the shortage of land: ‘By the end of the 1880s extreme competition on reserves existed at an inter- and intra-iwi level denying a number of Ngati Rarua access to any land at all whilst unsettling others and undermining the productive use of reserve land.’<sup>43</sup> David Armstrong similarly characterises the situation of Rangitane at the Wairau as one of ‘increasing social and economic marginalisation’ by the late nineteenth century.<sup>44</sup> According to Dr Diana Morrow, the land loss experienced by Te Atiawa in the eastern Sounds, and the poor quality of reserves allocated to them, made them ‘disadvantaged dependents in the new economy’. They had to seek employment else-

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42. A Mackay, ‘Report on the Condition of the Natives in the Provinces of Nelson and Marlborough and the County of Westland’, AJHR, 1872, F-3, p 18

43. Walzl, *Land and Socio-Economic Issues*, p 148

44. David Armstrong, “‘The Right of Deciding’: Rangitane ki Wairau and the Crown, 1840–1900”, report commissioned by Te Runanga o Rangitane o Wairau in association with the Crown Forestry Rental Trust, not dated (doc A80), p 141

where or take up whatever seasonal or irregular employment was available and were soon enmeshed in a cycle of poverty that was hard to escape.<sup>45</sup>

For Ngati Kuia, Dr Locke shows that the iwi suffered socio-economically as a result of the inadequacy of the Pelorus–Kaituna lands reserved in 1856 and that this plight worsened as the reserves were progressively depleted. She mentions the effect of Pakeha farming and extractive industries on the iwi's traditional food resources: goldmining silted up the rivers, timber milling eroded the land, and flax milling damaged the resource areas. Some Ngati Kuia participated profitably in the short-lived gold rush, and some employment was available in public works and the flax and timber industries that were established on their land, but lack of capital prevented iwi members from engaging in these activities on their own account.<sup>46</sup> The wording of the petition sent to Parliament by Teone Hiporaiti of Ngati Kuia in 1884 graphically conveys the situation of the people in this area: it was a plea from a 'suffering people' describing themselves as 'the poorest tribe under the Heavens'.<sup>47</sup>

Ngati Koata had to depend on their customary land on Rangitoto and the reserves they had been given in the remote Croisilles Harbour area. From the reports of the school teacher who went to Rangitoto in 1885, we gain glimpses of what Mr Patete, in his commissioned history of the Rangitoto Maori, describes as 'economic despair'. Copper mining and timber milling ventures that offered hope for employment opportunities did not flourish, and hundreds of sheep had to be destroyed as part of a Government operation against scab. Failure of the potato crop at this time brought a severe food shortage. The teacher wrote of hungry children and of sickness and a number of deaths in the community. The end of the 1880s saw the migration of many people from Rangitoto to various parts of the North Island.<sup>48</sup> The research of Heather Bassett and Richard Kay confirms that it was very difficult to gain a living from the lands owned by Ngati Koata, forcing many to leave the region or to ask the Government for assistance. Rangitoto was hard to utilise, but the mainland reserves allocated to the iwi were scarcely a useful supplement: both areas 'consisted of steep, isolated, scrub-covered land which was mostly not suitable for an economic farming unit, and in many cases could not provide subsistence cultivations'. These authors give many illustrations of the economic and social difficulties faced by Ngati Koata in the nineteenth century as they attempted to support themselves on their reserves – a struggle that 'continued and increased' in the twentieth century and over the years forced many of the residents to move

45. Dr Diana Morrow, 'A Legacy of Loss: Ngati Awa/Te Atiawa Reserves in Queen Charlotte Sound, 1856–c1970', report commissioned by the Crown Forestry Rental Trust, 2000 (doc D6), pp 98, 149–150

46. Dr Cybele Locke, "'The Poorest Tribe under the Heavens": Ngati Kuia's Socio-Economic Circumstances, 1856–1950', report commissioned by the Crown Forestry Rental Trust, 2002 (doc L1), pp 25–33

47. 'Petition of Teone Hiporaiti and 20 Others', 7 July 1884 (David Alexander, 'Landless Natives Reserves in Nelson and Marlborough', report commissioned by the Crown Forestry Rental Trust, 1999 (doc A54), p 14)

48. Anthony Patete, 'D'Urville Island (Rangitoto ki te Tonga) in the Northern South Island', report commissioned by the Waitangi Tribunal, 1997 (doc A32), pp 188–190; Locke, 'Poorest Tribe under the Heavens', pp 43–44; Heather Bassett and Richard Kay, 'Nga Ture Kaupapa o Ngati Koata ki te Tonga, c1820–1950', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A76), p 206

away in search of the services and opportunities they required. Ms Bassett and Mr Kay state that ‘by the 1890s Ngati Koata were having difficulty sustaining themselves on their lands in the Sounds because of the inadequacy of their lands, isolation from services, poor water supply and ill health.’<sup>49</sup>

In Tasman and Golden Bays and on the West Coast, all the iwi suffered from the economic inadequacies of their land holdings. Ms Clark’s summary of the situation facing one of the iwi is applicable to all: ‘Ngati Tama rapidly became marginalised within their own rohe and experienced the full force of colonisation, from which they have yet to recover.’<sup>50</sup>

Very little was done by the Crown in this period to foster Maori economic development, although we will shortly note the assistance (in the form of farm implements) given by the administrators of the tenths income. It would be anachronistic to look for a comprehensive programme of State aid in the nineteenth century, but it is noticeable how Maori were simply expected to make their own way in the new economic world that they were confronted with. It was not inconceivable that the State would intervene to promote the prosperity of Maori, as shown, for example, by the mid-century grants made in several New Zealand districts for mills and schooners. Late-nineteenth-century governments were anxious to foster economic development, especially the progress of farming industries, and actively pursued this aim by means of major public works schemes and other interventions in the economy. Loans to individual settlers were made available from 1894. Generally speaking, however, and we will return to this later in the chapter, Maori were not given specific attention in these efforts to provide opportunities for economic advancement. It is true that the economic plight of Maori in some parts of Te Tau Ihu was recognised by the Crown at the end of the century, as we have shown in our discussion of the ‘landless natives’ scheme. The situation of the people acknowledged as landless, however, was scarcely alleviated by the unimpressive ‘remedy’ applied by the Crown, as we saw in chapter 7. They and the other Maori of Te Tau Ihu lived through the last years of the nineteenth century under a heavy burden of economic difficulty, and this was an important factor in the poor social conditions experienced from the 1890s.

#### 10.4.2 General living conditions and health

As in other parts of New Zealand, the Maori of Te Tau Ihu were dealt a severe blow by the arrival of hitherto unknown diseases when the country was connected with the outside world by explorers, traders, and other visitors. It is well known that nineteenth-century Maori, lacking immunity to the new infections, suffered much illness and that very high mortality occurred. Low levels of health, which persisted well into the twentieth century, were exacerbated by unfamiliarity with Western medical knowledge and practice, and

49. Bassett and Kay, ‘Nga Ture Kaupapa’, pp 183–184, 201–206, 252

50. Clark, ‘Social and Economic Impact’, p 4

especially by poor living conditions. Adequate housing and sanitation were hard to achieve when levels of income were low, and it is clear that the dislocation of the old social and economic environment and the difficulties of gaining a livelihood in the new conditions of life in Te Tau Ihu had a severe impact on the health of the Maori communities in the region.

There were no systematic surveys of Maori life in Te Tau Ihu in the nineteenth century. For our knowledge of living conditions in this period we are reliant on the snippets of information included in the reports of officials and other observers.

To take housing, for instance, it is evident that some Maori adopted European styles and materials in the early days of settlement. In the 1840s, the surveyor John Barnicoat noticed that Pakeha-style houses had begun to appear in the Maori settlements of Golden Bay.<sup>51</sup> As far as living conditions were concerned, the nineteenth century was a long transitional period for Maori. As Alexander Mackay wrote about the people of Te Tau Ihu in 1872, 'their domestic habits are gradually assimilating to the Europeans.' He went on to add detail about housing styles: 'their houses are fast assuming a respectable appearance, most of them are built of wood, and almost all have doors, windows and chimneys. At Wakapuaka and Takaka, several very neat boarded houses have been erected during the past two years.'<sup>52</sup> Officials were in no doubt that Pakeha-style houses were an improvement on the former simple dwellings built of traditional materials, and in the 1870s Mackay encouraged housing development by using native reserves funds to make grants of building materials.<sup>53</sup> As later reports would show, however, many houses were not of good quality or were overcrowded, and 'substandard housing' was a factor in poor health conditions well into the twentieth century.

Environmental factors in the prevalence of disease included inadequate sanitation, water supplies polluted by animal and human waste, and the damp low-lying sites on which some of the communities were living. Comment was made in 1868, for instance, on the very unhealthy location of the Pelorus Valley settlements.<sup>54</sup> It is not surprising that 'low fever' (probably typhoid fever) periodically broke out in this area. Several deaths from this waterborne infection, which is connected with poor sanitation and a lack of knowledge about how it is spread, occurred there in the summer of 1871. Respiratory diseases, including tuberculosis, were also common. Mackay's figure of 820 Maori cases treated by Government medical officers in the Nelson and Marlborough provinces in the three years from 1869 to 1871 included 336 'diseases of the chest' (the largest category).<sup>55</sup> In the summer of 1875, there were 12 'low fever' deaths in the Pelorus Valley and Queen Charlotte Sound areas, with most

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51. Clark, 'Social and Economic Impact', p 42

52. A Mackay, 'Report on the Condition of the Natives in the Provinces of Nelson and Marlborough and the County of Westland', AJHR, 1872, F-3, p 17

53. Ibid

54. Locke, 'Poorest Tribe under the Heavens', p 45

55. A Mackay, 'Report on the Condition of the Natives in the Provinces of Nelson and Marlborough and the County of Westland', AJHR, 1872, F-3, p 17; Locke, 'Poorest Tribe under the Heavens', pp 45-46

other sickness at that time being ‘of a bronchial nature.’<sup>56</sup> Of course, we lack full or systematic knowledge of Maori health conditions of the time, since observations were made haphazardly and were usually restricted to sickness and mortality of an epidemic nature.

We turn now to what was done to meet health needs in Te Tau Ihu. In nineteenth-century New Zealand generally, Maori were not always willing, for cultural reasons, to use Pakeha methods of medical treatment. Leaving that aside, however, it is a fact that health care was often not easily accessible for anyone, whether Maori or Pakeha, at this time. Beyond the towns, medical facilities were thinly spread and all treatment was costly. Rural settlements were usually distant from where doctors lived and, as in other parts of New Zealand at this time, the hospitals of the northern South Island (at Nelson from 1853, Picton from 1865, Westport from 1868, and Blenheim from 1878) were small and rudimentary.<sup>57</sup> Nevertheless, Maori did at times avail themselves of such Pakeha medical services as were available. In the 1840s, Dr Greenwood of Motueka had many Maori patients from various parts of Te Tau Ihu. In 1847, the resident magistrate at Nelson appointed a Dr MacShane to treat Maori and supply them with medicines for £6 5s a month.<sup>58</sup> The practice of appointing doctors to give free treatment to Maori dated from the early days of colonial government. From 1852, these subsidies paid to native medical officers, who were required to treat free of charge all Maori who could not pay, were financed from civil list funds annually set aside for ‘native purposes’. It has not been established from the records whether other such appointments were made in Te Tau Ihu after MacShane’s. In 1858, James Mackay asked the Government to pay a subsidy to a ‘Mr Clark’ who was treating Maori in northwest Golden Bay.<sup>59</sup> As it turned out, however, a different way of providing for Maori medical care in the northern South Island was to emerge.

During the 1850s, unspecified Maori ‘medical expenses’ were sometimes paid from the tenths rental income, but in the 1860s this category of payments was formalised. In 1863, the new commissioner of reserves, James Mackay, proposed that the income from the tenths be used (among other things) for ‘the payment of Medical Officers, and expenses incurred in the treatment of and relief of sick Natives.’<sup>60</sup> It fell to Alexander Mackay to implement this idea. In 1864, five doctors – at Takaka, Motueka, Nelson, the Wairau, and Queen Charlotte Sound – were appointed native medical officers, each to be paid an annual subsidy of £50 from the native reserves fund.<sup>61</sup> The Maori of the Pelorus Valley wanted a subsidised doctor

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56. A Mackay to under-secretary, Native Department, 27 May 1878, AJHR, 1878, G-2, p 8

57. List of foundation dates of New Zealand hospitals (Derek A Dow, *Maori Health and Government Policy, 1840–1940* (Wellington: Victoria University Press, 1999), p 70)

58. Dow, *Maori Health*, pp 36–38

59. J Mackay to McLean, 13 July 1858 (Tony Walzl, *Ngati Rarua Land Issues, 1839–1860* (Wellington: Ngati Rarua Iwi Trust, 2000) (doc A50(1)), p 321)

60. J Mackay to Native Secretary, 3 October 1863, *Compendium*, vol 2, pp 139–140

61. ‘Nominal Return of all Officers in the Employ of the Government’, AJHR, 1866, D-3, p 70; Dow, *Maori Health*, p 44

too, and Mackay suggested that they should vest some of their reserve land in the Crown to raise an income by leasing.<sup>62</sup> Although no doctor was appointed for that district until 1906, the other parts of Te Tau Ihu were thus provided with medical care from the 1860s. In the years 1869 to 1871, the native medical officers in Nelson–Marlborough treated 820 cases.<sup>63</sup> Because the doctors' appointments were funded from the reserves income rather than from the civil list, the coverage in this region was more comprehensive than in most other parts of the country, especially in view of the fact that the Maori communities in Te Tau Ihu were small and scattered. Many of these settlements were located in isolated places, however, and it was often too difficult or expensive to visit the appointed doctors. It is also clear that the subsidised appointments were not continuously in place for all parts of the region.

Medical care was not the only component of James Mackay's scheme of 1863. He proposed assistance with house construction, which as we have already mentioned was soon put into practice by Alexander Mackay. Also envisaged was the encouragement of schools, extending the educational assistance that was already being given to individuals by the reserves fund. We will discuss schools shortly. Another element was the provision of farming tools (it was explained in 1872 that recipients of carts and agricultural implements were expected to pay half the cost). Finally, and again this was not entirely new, there was the 'relief of indigent and infirm Natives'.<sup>64</sup> Like medical care, relief payments to poor and distressed Maori were financed in other regions from the civil list, but in Te Tau Ihu the funds often came from the reserves fund. Between 1873 and 1880, an average of nearly £300 was being spent each year on rations and clothing for sick, indigent, and destitute people.<sup>65</sup> Natural disasters could spell ruin for people living on the economic margins, and relief measures in such circumstances were necessary. In 1872, the people at Motueka suffered from the destruction of their crops by flooding, followed by a drought that caused their planting to fail. They were maintained by the reserves fund for six months (which cost more than £350) and given seed potatoes.<sup>66</sup> Mackay explained that they were 'entirely destitute, and would have starved if assistance had not been afforded them'.<sup>67</sup>

This kind of need, and the provision of relief from the reserves fund as well as the civil list, continued into the 1880s and beyond. In 1885, for example, six elderly women at the Wairau and Pelorus, all of whom were described as 'very poor' and one of whom was totally blind, were the subject of a request by concerned elders, and a small amount was granted to some

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62. A Mackay to Native Minister, 6 December 1865, *Compendium*, vol 2, pp 311–312

63. A Mackay, 'Report on the Condition of the Natives in the Provinces of Nelson and Marlborough and the County of Westland, for the period ended 30th June, 1872', AJHR, 1872, F-3, p 17

64. J Mackay to Native Secretary, 3 October 1863, *Compendium*, vol 2, p 140; A Mackay, 'Report on the Condition of the Natives in the Provinces of Nelson and Marlborough and the County of Westland', AJHR, 1872, F-3, p 17

65. Walzl, *Land and Socio-Economic Issues*, p 88

66. A Mackay to under-secretary, Native Department, 30 July 1873, AJHR, 1873, G-2A, p 1

67. A Mackay to Native Minister, 15 April 1873, AJHR, 1873, G-1, p 19

of them from the civil list via the Native Office.<sup>68</sup> Although in this case the civil list was used, there was a continuing tendency, as we will see, for the reserves fund to be used as a partial replacement for central government funds rather than as a supplement to them.

We draw particular attention, as we did in chapter 9 also, to the situation we have just mentioned – the fact that medical attendance and emergency relief provided for Maori in Te Tau Ihu (or, after 1892, for some of them) was paid for from the income of the tenths; that is, from funds owned by the beneficiaries themselves. Alexander Mackay pointed this out in 1877 in relation to the native medical officer salaries. He publicly reminded the Native Department that this expense, which was considerable and diverted money from the other purposes of the reserves fund, was ‘defrayed in other parts of the colony out of general revenue’, and he recommended that the practice in the northern South Island be brought into line with what happened elsewhere.<sup>69</sup> No immediate change was made, though it was known that in 1864 James Mackay had requested a central government contribution for this purpose and that it had been approved by the Native Minister of the time but never made.<sup>70</sup> In 1879, however, in partial repayment of the native medical officers’ salaries since 1864, the Government credited the reserves fund with £2000 (the only known instance of Government reimbursement, according to Dr and Mrs Mitchell).<sup>71</sup> Although this suggested that Mackay’s complaint had been well founded, the practice of using the reserves fund for medical services in Te Tau Ihu continued until universal free health care was introduced in the 1930s. This was not an age in which the Crown provided many social services, and the use of Maori endowment funds for the owners’ benefit and to protect them from dependence and penury was not out of line with the original purpose of the tenths. The practice in Te Tau Ihu was not what was being followed in the Crown’s relations with iwi in other parts of the country, however. Social services that were provided by the Crown for Maori elsewhere were in this region controlled (paternalistically and often parsimoniously) by the Crown but partly funded by a trust owned by the recipients themselves.

### 10.4.3 Education

‘Education’ in nineteenth-century New Zealand was a cultural institution valued by Pakeha and organised in Pakeha ways. Nevertheless, there is abundant evidence that it was also

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68. David Young, ‘Maori Society and the State in Colonial and Post-Colonial Te Tau Ihu, 1880–1960: A Survey of Official Archives’, report commissioned by the Crown Forestry Rental Trust, 1999 (doc A52), p 81; Locke, ‘Poorest Tribe under the Heavens’, pp 39–40

69. A Mackay, ‘Native Reserves, Nelson and Greymouth’, AJHR, 1877, G-3A, p 2

70. A Mackay, ‘Native Reserves, Nelson and Greymouth’, AJHR, 1878, G-6, p 1

71. ‘Native Reserves, Nelson and Marlborough’, AJHR, 1879, sess 2, G-3, p 2. For income and expenditures overview from the 1840s to the 1970s, see Hilary Mitchell and Maui John Mitchell, ‘Wai-56 and Wai-102, Report 9D: Benefits to Owners and the South Island Benefit Fund’, report commissioned by the Wakatu Incorporation, Ngati Koata no Rangitoto ki te Tonga Trust, Ngati Rarua Trust, Ngati Tama Manawhenua ki te Tau Ihu Trust, and Te Aitiawa Manawhenua ki te Tau Ihu Trust, 1998 (doc A35), pp 4, 15–39, esp p 19.

welcomed and sought after by many Maori. We now discuss the extent to which this need was met in Te Tau Ihu at this time.

There had been rudimentary mission schools for Maori children in earlier days, and in the early 1850s the reserves fund subsidised a settler school in Motueka attended by Maori pupils.<sup>72</sup> As discussed in chapter 9, the Anglican school at Whakarewa, Motueka, was open intermittently from 1853 to 1881. The school was established on land granted by the Crown, some of which was Crown land but most of which came from the tenths estate. The Government did not provide any educational facilities specifically for Maori communities until 1874. Of course, as in other parts of the country, Maori children were free to attend the growing network of ordinary State schools and some did. Eventually, however, there were moves to set up Government-run secular village schools (under the Native Schools Act 1867) in Maori localities where there were no State schools. As required by the legislation, the establishing of these schools sprang from local Maori initiatives and included an expectation that a certain level of community financial input would be needed then and in the future.

Three native schools were opened in Te Tau Ihu in the 1870s, the first in March 1874 on the Wairau reserve. The cost of the building was shared by the Government and the native reserves fund, and assistance from the fund for the teacher's salary continued into the twentieth century.<sup>73</sup> The building of a school at Wakapuaka, in Tasman Bay, which opened in September 1874, was also financed by the reserves fund, and again this assistance continued for some years, although the school soon closed, apparently in the 1880s.<sup>74</sup> Waikawa Native School (opened in August 1877) served the Maori communities of Queen Charlotte Sound. From 1885 to 1890, there was also a native school operating at Ohana, on Rangitoto. It closed when the first teacher left, partly because the people were unable to support him materially, and was not reopened.<sup>75</sup> Later, there were schools for Maori children at Whangarae (Croisilles) and Okoha (Outer Sounds) for a time, although they were established and operated by a church organisation.

In all other areas, however, Maori pupils wanting primary education attended Education Board schools. Those in the Pelorus Valley, for example, had access to a school at Havelock and, from 1877, one at Canvastown. Two-thirds of the pupils presented for examination at Canvastown School in 1877 were Maori.<sup>76</sup> In Motueka after the church school closed and in Golden Bay, State schools offered the only option. The number of Maori pupils in State schools in this region in the nineteenth century has not been researched, but Education

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72. Walzl, *Land Issues*, pp 240–242

73. Walzl, *Land and Socio-Economic Issues*, p 90; Locke, 'Poorest Tribe under the Heavens', p 54

74. Walzl, *Land and Socio-Economic Issues*, p 90; Young, 'Maori Society', pp 50–51; Clark, 'Social and Economic Impact', pp 51–55

75. Young, 'Maori Society', pp 54–55

76. Norman H Brayshaw, *Canvas and Gold: A History of the Wakamarina Goldfields and Lower Pelorus Valley* (Blenheim: N Brayshaw, 1964), p 167

Board statistics quoted as examples in Dr Barrington's report indicate that the number was very low in the 1880s. The figures may not be reliable, but they suggest that a considerable number of Maori children were not attending school in Te Tau Ihu at this time.<sup>77</sup>

The records of the native schools document the uncertainties of parental support in the 1870s and 1880s.<sup>78</sup> Writing about the Waikawa school, Dr Morrow links these problems with socio-economic conditions. She identifies two factors that repeatedly feature in contemporary accounts of schooling there:

the alarming, disruptive and devastating impact of ill-health and disease, and the ongoing problem of poor attendance. The latter was the inevitable result of a situation where parents, unable to make a living from their reserves, were forced to pursue whatever sources of income were available.

Seasonal and casual employment resulted in 'an itinerancy which did not allow for regular school attendance' and contributed to educational under-achievement.<sup>79</sup> Presumably, these factors often also operated in the case of the other native schools and where Maori children were attending State schools. Furthermore, it is well known that native schools were seen as agencies of assimilation and were particularly antipathetic to the use of te reo Maori. It is possible that these attitudes were another factor in the uncertain attachment of Maori to Government schooling, and we will discuss this further in later sections of this chapter.

We note that, like medical and relief costs, native school education for Maori in Te Tau Ihu was partly financed from the reserves fund rather than from general Government resources as in other areas. As we have seen, in 1877 Alexander Mackay questioned the use of tenths moneys for purposes usually financed by the Government. Although under the Government's native schools policy a certain level of financial support from the local community was expected, Mackay argued in 1875 that the Wakapuaka Native School should not be wholly funded in that way, and in 1888 he again queried the heavy reliance on Maori funds rather than the Education Department budget for this school.<sup>80</sup> Dr Barrington's report highlights the exceptional nature of the financing of Wakapuaka and Wairau Native Schools by the reserves fund in the 1870s and 1880s: whereas in New Zealand as a whole in the 1870s only a small proportion of the cost of native schools was being derived from the Maori communities they served, and in the 1880s Maori contributions of any significance were no longer expected, in Te Tau Ihu the reserves fund was being used extensively for native school expenses.<sup>81</sup>

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77. Dr John Barrington, supplementary brief of evidence on behalf of Ngati Koata, 1 February 2001 (doc B32(a)), pp 9–10

78. Phillipson, *Northern South Island: Part 2*, pp 22–24; Armstrong, 'Right of Deciding', pp 135–138

79. Morrow, 'Legacy of Loss', p 113

80. Clark, 'Social and Economic Impact', pp 53–54; A Mackay, 'Native Reserves, Nelson and Greymouth', AJHR, 1877, G-3A, p 2

81. Barrington, supplementary brief of evidence on behalf of Ngati Koata, pp 5–9

#### 10.4.4 Overview, 1860–90

While continuing to follow their traditional practices of hunting, harvesting, fishing, running pigs, and cultivating land, the small Maori population of Te Tau Ihu quickly participated in the new economy of their region in the 1840s. As the years passed, however, the impact of overwhelming levels of Pakeha immigration and land settlement began to be felt. By the 1880s, it was clear that in the new circumstances, which included an enormously diminished land base, the practice of both the customary and the modern economies was proving difficult for many Maori communities across the region.

Inevitably, economic hardship became an important additional factor in the low levels of health experienced since the arrival of hitherto unknown infections. In the period up to 1890, the Government made some effort to meet the medical and welfare needs of the Maori population, but much of the cost was met from funds that were owned by Maori themselves. In another sphere of social provision, the expanding State school system was available to Maori in the region, but many Maori communities were located in places where State schools did not exist. A few native schools were provided, but again these were partly funded by the Maori population itself (through the native reserves fund), evidently to a greater extent than was usual elsewhere.

### 10.5 1890–1920

#### 10.5.1 Living conditions

According to the census, there were 472 Maori living in Te Tau Ihu (including Kawatiri) in 1891. Most lived on the scattered reserves, where there was some agricultural activity. As we have already mentioned, they were cultivating over 3500 acres (although all of this except 1000 acres was in sown grasses), and they owned some stock.<sup>82</sup>

The vulnerability of this economic activity is evident from the frequent occurrence of crop failures and food shortages during the 1890s. Crops were destroyed by flooding at the Wairau in 1893 and 1895. There were crop failures at Te Hoiere in 1893, 1895, and 1898 and at Rangitoto and the Croisilles in 1898. The Public Trustee (who had taken over the administration of the native reserves fund in 1882) and the Government responded to calls for assistance in these instances, supplying rations and seed potatoes for planting.<sup>83</sup> Further food shortages followed for a number of Te Tau Ihu Maori communities during the nationwide potato blight in 1906.<sup>84</sup>

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82. 'Census of the Maori Population', AJHR, 1891, G-2, p 11

83. Walzl, *Land and Socio-Economic Issues*, pp 164–168; Young, 'Maori Society', pp 83–84; Locke, 'Poorest Tribe under the Heavens', pp 67–72

84. Locke, 'Poorest Tribe under the Heavens', p 74; Bassett and Kay, 'Nga Ture Kaupapa', pp 205–206

The resident school teacher at Waikawa commented on the shortage of money there in 1893. It seems that the community had previously relied on supplies of potatoes from North Island relatives. The teacher noted that such gifts were less regular than they had been in the past.<sup>85</sup>

Evidently, the situation at Waikawa did not improve over the next few decades. A medical inspection of Waikawa Native School in 1915 found that the people owned no dairy cows and lived on 'tea and bread'. The Education Department doctor was critical of their failure to fish or to grow potatoes and maize, attributing this to laziness and migratory habits. She commented that 'the Maoris in Waikawa Pa are there for a few weeks or months and then are away off down the Sounds to friends and relatives'. The Waikawa community had a tradition of mobility, often leaving on fishing expeditions or to find work. As the more sympathetic native school teacher commented in 1892, 'they generally have to do their work a long way from home . . . whaling, grass seeding, mustering or shearing'.<sup>86</sup>

Te Hoiere Maori were similarly poor. Rents were one stream of income, but the people were reportedly in debt, with their 'rents mortgaged for the next five years . . . they cannot get an ounce of credit from any of the Storekeepers'.<sup>87</sup> In 1893, flooding brought food shortages for the 10 families living there at the time, as well as the loss of 200 of their 250 sheep. With the local flax mill closed, there were no employment opportunities, other than sporadic goldmining work, in the neighbourhood. The people experienced great difficulty in convincing officials that they needed emergency relief supplies. The landless natives reserve set up in the 1890s at Okoha in the outer Sounds offered new possibilities, and many Ngati Kuia moved there (see fig 34).<sup>88</sup> In 1895, however, a correspondent told the Native Minister that this new land was 'useless' and inaccessible; there was no employment in its vicinity and the occupants were so poor that food had been donated to them.<sup>89</sup>

Ms Bassett and Mr Kay also point to the difficulty of farming the steep and isolated reserves at Okiwi and Whangarae. They note a (presumably unsuccessful) petition submitted in 1900 by Rewi Maaka and 16 others of Whangarae, who asked for assistance to purchase a vessel so they could transport their produce to markets. In 1898 and 1906, extreme food shortages were reported for the Croisilles and Rangitoto. Ms Bassett and Mr Kay note that the hardships of farm life on Rangitoto meant that many had left the island by the turn of the century and this contributed to the decision to sell much of the land on the island in the early twentieth century.<sup>90</sup>

On the east coast, the Ngati Rarua, Rangitane, and Ngati Toa residents struggled to farm the Wairau reserve in the face of frequent flooding. Crops were destroyed by inundations

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85. Young, 'Maori Society', p 93

86. Ibid, pp 63–65; Morrow, 'Legacy of Loss', pp 123–125

87. T H Walker to Mills, 7 August 1895 (Young, 'Maori Society', p 90)

88. Locke, 'Poorest Tribe under the Heavens', pp 67–78; Young, 'Maori Society', pp 86–93

89. J B Blaine to Native Minister, [1895] (Young, 'Maori Society', p 87)

90. Bassett and Kay, 'Nga Ture Kaupapa', pp 201–205

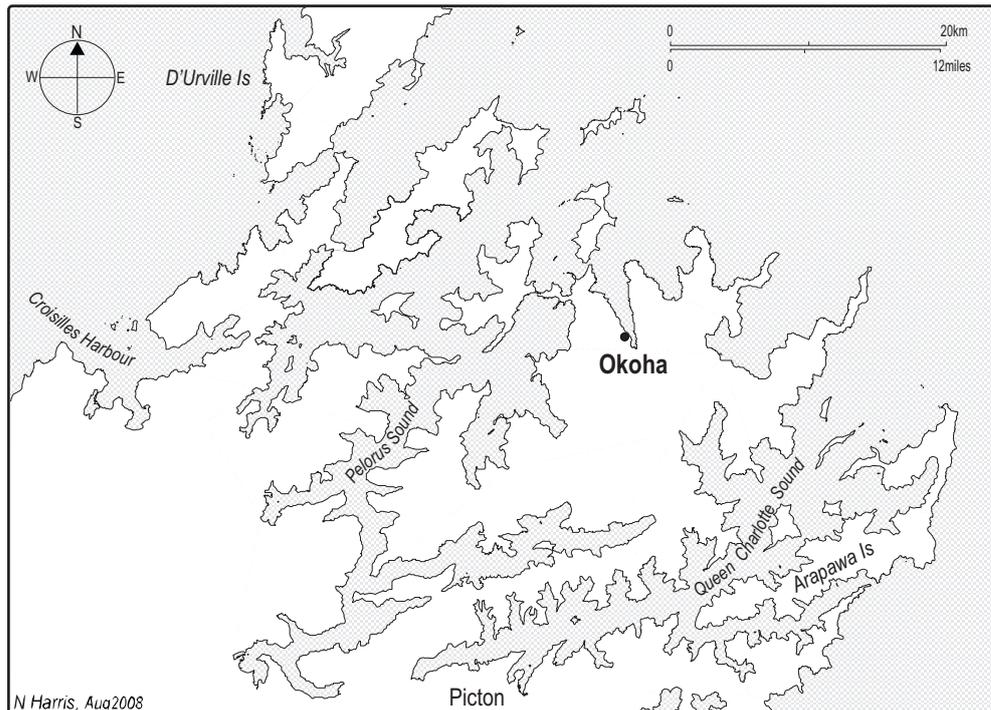


Figure 34: Okoha

Source: *Heinemann New Zealand Atlas* (Auckland: Heinemann, 1987), pl 60

in 1893, 1895, and 1897.<sup>91</sup> In 1898, a local official, Allen, noted that some Wairau Maori were renting land outside the reserve so that they could grow potatoes. He suggested, not for the first time, that there should be an exchange of land, commenting that the reserve would 'always be subject to floods unless very expensive banking and draining operations are carried out'.<sup>92</sup> During the 1890s, the occupants were themselves wanting to undertake flood protection works, and in the early 1900s the Government eventually responded to their calls for assistance with the construction of protective works (for which Wairau Maori paid). These were not effective, however, and crops were destroyed by flooding once more in 1904.<sup>93</sup> These floods left some 70 residents homeless, destroyed food supplies, and resulted in stock losses estimated to be £1488 in value.<sup>94</sup> Subsequent efforts at flood protection were no more successful. As Allen had predicted, without substantial expenditure on protection works, flooding remained a predicament for Wairau Maori in the new century. The Wairau people

91. Young, 'Maori Society', pp 113–114; Professor Richard Boast, 'Ngati Toa and the Upper South Island: A Report to the Waitangi Tribunal', revised ed, 2 vols, report commissioned by the Crown Forestry Rental Trust, 2000 (doc A56), vol 2, pp 294–297

92. Walzl, *Land and Socio-Economic Issues*, p 175

93. David Armstrong, "'Living in Uncertainty": Rangitane in the Twentieth Century', report commissioned by Te Runanga a Rangitane o Wairau, 2002 (doc M14), pp 16–19; Walzl, *Land and Socio-Economic Issues*, pp 167–168

94. Young, 'Maori Society', pp 116–117

went as far as forming the Wairau Maori Drainage Board, but it was unable to act while discussions about forming a district-wide river control authority were in progress. By 1921, when the Maori board was incorporated in the new Wairau River District Board, the flood problem was still unresolved.<sup>95</sup>

Overall, Te Tau Ihu Maori struggled to maintain a living on their inadequate reserves. Conditions were so bad that the Government felt obliged to take remedial action for some of those affected. In chapter 7, we discussed the Government's acknowledgement of South Island Maori landlessness and the attempt to address this with the allocation of further reserves in Marlborough and elsewhere around the turn of the century. As we noted, the inferior quality of these reserves did little to improve the ability of Te Tau Ihu Maori to sustain themselves, let alone prosper. The iwi most affected by landlessness, Ngati Apa, secured interests in some landless natives reserves in Marlborough through their connections with Ngati Kuia and other iwi. The landless natives reserve they were awarded at the Heaphy River on the West Coast, however, never materialised, as we saw in chapter 7. Many of the West Coast occupation and endowment reserves in which members of Ngati Apa had interests were administered by the Public Trustee and leased to Pakeha, but the rents received were not substantial. In particular, the income from the Westport township leases was low.<sup>96</sup>

The Public Trustee also administered leases of the Nelson and Motueka tenths estate (both the general tenths lands and the Motueka 'occupied tenths'), and after the beneficial entitlements were determined in 1892, his office regularly distributed rent to those identified as beneficial owners. The low level of these rental payments, however, is evident from the Public Trustee's first pay-out of accumulated rents from the general tenths estate (in 1897). As we noted in chapter 9, this payment disbursed 75 per cent of the rental income accumulated over the previous 14 years. The £8083 paid to the 309 individuals who had been identified as beneficiaries in 1892 equates to an average of £1 18s 2d per person per annum. Thereafter, the Public Trustee distributed a varying proportion of the rental income to beneficiaries on a six-monthly basis because the amounts payable on a three-monthly basis would have been very small.

Probably the trustee's most significant input into the lives of Te Tau Ihu Maori was the provision of welfare and health care assistance. Small emergency payments of food, clothing, and money could sometimes be obtained from the Government, as the records show, but tenths beneficiaries had access to an additional source in the South Island tenths benefit fund, which was made up of what remained of the tenths rental income after individual payments had been made to the beneficiaries. As the Native Trustee stated: 'Some get only a few pence in rent some only 1d. [It is the] most valuable penny in the world as it gives them

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95. Armstrong, 'Living in Uncertainty', pp 20–34; Young, 'Maori Society', p 117

96. David Armstrong, 'The Fate of Ngati Apa Reserves and Ancillary Matters', report commissioned by the Ngati Apa ki te Waipounamu Trust in association with the Crown Forestry Rental Trust, 2000 (doc A78), pp 32–38, 50–56

Drs attention hostelry & other assistance.<sup>97</sup> Welfare payments to ‘indigent’ Maori were an important aspect of this assistance. David Young notes that the Public Trustee was involved in about 25 individual cases of hardship between 1899 and 1905 and points out that this is a significant number given the small population of tenths beneficiaries and the strict criteria by which the trustee determined eligibility for assistance. Most of the people assisted were elderly.<sup>98</sup> Mr Walzl throws further light on the nature of this assistance:

The experience of Ngati Rarua as individual recipients of the South Island Benefit Fund . . . reflects again that they were at the mercy of bureaucratic decisionmaking which is often demonstrated to proceed in an ad hoc manner with the primary consideration being the detail of processes rather than being in tune with the human needs of the applicants.<sup>99</sup>

Mr Young discusses the difficulties faced by older Maori when attempting to access the Government’s non-contributory means-tested old-age pensions scheme, which was established in 1898. The success rate for Maori applications was lower than that for Pakeha applications, and landownership could be a restriction on eligibility, even if the land was providing little or no income.<sup>100</sup> This was the plight of a Ngati Koata widow whose case was presented in 1905. It was explained that ‘her lands are of no benefit to her. She receives nothing for her support. The said lands contain about 200 acres, but produce nothing for her support or benefit. She has no children (to help her), and the old woman is over 60 years of age.’<sup>101</sup> Bureaucratic requirements often made things difficult for Maori applicants, as an official admitted in 1905 when requesting assistance for an elderly bedridden person in the Croisilles district: ‘I think many of these natives should be in receipt of the [old-age] Pension’, he wrote, ‘but they all complain of the difficulties of obtaining it, as they are unable to state their cases to the Stipendiary Magistrate and cannot give the required information and particulars.’<sup>102</sup> Official inflexibility could also affect people who had been granted pensions, as in the case of an aged and penniless man on one of the Queen Charlotte Sound reserves: in 1921 his pension was stopped when incorrect paperwork in the past was discovered, and only the intervention of the Picton policeman brought about the restoration of his benefit.<sup>103</sup> Even the simple act of collecting a pension payment from town was onerous and prohibitively expensive for people living in remote areas. Elderly people who were beneficiaries of the tenths benefit fund, however, could sometimes obtain alternative assistance from that source.

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97. Clementine Fraser, ‘Nelson Tenths and Motueka Occupation Reserves 1840s–1970s’, report commissioned by the Waitangi Tribunal, 2000 (doc A79), p 135

98. Young, ‘Maori Society’, pp 97–98

99. Walzl, *Land and Socio-Economic Issues*, p 261

100. Young, ‘Maori Society’, pp 102–105

101. Rewi Maaka to Public Trustee, 6 May 1905 (Bassett and Kay, ‘Nga Ture Kaupapa’, p 211)

102. District agent, Nelson, to Public Trustee, 23 August 1905 (Morrow, ‘Legacy of Loss’, p 134)

103. Young, ‘Maori Society’, p 98

As Mr Young notes, discriminatory practices in the payment of Government benefits continued into the 1940s.<sup>104</sup> On a wider front, too, disparities in Government assistance for Maori were evident in the Liberal Government's policies of the 1890s. As we noted in chapter 7, the landless natives scheme compared poorly with the assistance that the Government provided for small-scale Pakeha farmers during the 1890s and afterwards by means of the Land for Settlements Act and the Advances to Settlers Act. The chairman of the Arapaoa Maori Council referred pointedly to this in 1910: 'Look at the disabilities under which he [the Maori] now labours in regard to his lands . . . Why does Govt not advance money to the Maori, yet lends it so readily to the Pakeha?'<sup>105</sup>

### 10.5.2 Health

The tenths benefit fund was also the main source of health care costs for Te Tau Ihu Maori. The fund subsidised native medical officers in the district, sometimes paid the hospital fees of beneficiaries, and maintained the town hostels in Nelson and (after 1906) Havelock.<sup>106</sup> This means that Te Tau Ihu Maori received more health services than Maori elsewhere but also that Crown provision of health services for Te Tau Ihu Maori was less than for other Maori.

The Government relied on the tenths fund and appears to have viewed it as a partial substitute for, rather than a supplement to, Government spending. This attitude was evident in the speeches of Seddon and Carroll during the parliamentary debate on the amendment to the Native Reserves Act in 1896. Carroll was critical of the Public Trustee's failure to provide assistance to indigent Maori in Nelson and Motueka, commenting that as a result these people were 'continually applying to the Government for assistance'. Seddon stated that, although the trustee had some £20,000 to £30,000 of accumulated funds, he did not meet their needs. As a result, 'the Government had actually come to their assistance and found them moneys out of the Civil List . . . that state of things should not exist any longer.'<sup>107</sup>

This reliance on the tenths fund continued in the twentieth century. Because of this source of funding, Te Tau Ihu Maori had a relatively large number of subsidised native medical officers. Mr Young states that this was the basis on which the Health Department reduced its spending in other areas of assistance for Te Tau Ihu Maori in the 1920s.<sup>108</sup> This attitude was evident also in the Native Department; for example, in its response to conditions at Okoha in 1926. Although there was much sickness at that isolated locality, the department

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104. Young, 'Maori Society', pp 106–108

105. Tahua Watson to superintendent, Maori councils, 20 January 1910 (Locke, 'Poorest Tribe under the Heavens', p 101)

106. Walzl, *Land and Socio-Economic Issues*, pp 242–245, 259–260; Locke, 'Poorest Tribe under the Heavens', p 85

107. J Carroll, R Seddon, 5 October 1896, NZPD, 1896, vol 96, pp 438–439

108. Young, 'Maori Society', pp 15–16

decided not to contribute to the costs of medical attention because 'the present expenditure in connection with the treatment of Natives in the South Island is much greater proportionally than in the North Island'. As Dr Locke points out, 'Of course, this was because South Island Maori were funding the majority of their own medical treatment.'<sup>109</sup> It seems that local health authorities did not always show an awareness that the tenths money was provided from a Maori source. When, for example, an application for assistance for a deaf child was submitted to the Picton Hospital and Charitable Aid Board in 1913, a board official suggested that this was 'a matter for Native Charitable Aid, which I understand is administered by the Public Trustee.'<sup>110</sup> This suggests that the trustee was viewed as an arm of the Government, a view that appears to have been shared at times also by Health Department officials. Hemi Matenga's complaint in 1895 is relevant to this. Protesting about being rated for 'Charitable Aid purposes,' he pointed out that Maori had their own relief fund and stated, 'I don't think we should be called upon to contribute to a fund from which we derive no benefit.'<sup>111</sup>

Demarcation of the respective responsibilities of the Health Department and Public Trustee was not always easy, and there is evidence of departmental attempts to control the level of assistance provided by the trustee. An example is found in the correspondence between the chief health officer and the Public Trustee in 1915 about which Maori in Te Tau Ihu should be eligible for free medical treatment.<sup>112</sup> Responsibility for Maori medical services was also sometimes unclear on the West Coast. In 1894, medical attendance for Maori was charged to the Public Trustee's Westport sections account. In 1905, the Westport doctor who was receiving a subsidy from the West Coast reserves fund to treat Maori attended 38 patients. The subsidy did not continue, however, apparently because the Native Department decided that the Maori population of Westport was too small to have a subsidised doctor.<sup>113</sup>

Two major Government Maori health initiatives, both dating from 1900, benefited the Maori of Te Tau Ihu only to a limited degree. The Maori Councils Act 1900 provided for the establishment of a nationwide network of tribal councils with powers to administer by-laws that covered health, sanitation, and other matters in Maori communities. The restricted powers and limited funding given to the councils, however, meant that the initial Maori enthusiasm for the new system soon diminished.<sup>114</sup> In Te Tau Ihu, this was evident in the experience of the Arapaoa Maori Council, established in 1903 for Marlborough, Nelson, and Buller. In 1910, the council chairman, Tahua Watson, commented on the difficulty of raising

109. Locke, 'Poorest Tribe under the Heavens', pp 118–119

110. Secretary, Picton Hospital and Charitable Aid Board, to Secretary for Education, 16 August 1913 (Fraser, 'Nelson Tenths', p 110)

111. Hemi Matenga to Native Minister, 4 February 1895 (Young, 'Maori Society', pp 118–119)

112. Jennifer Halder, 'Historical Documents Relating to Maori Social and Economic Issues in the Northern South Island', 10 vols, report commissioned by the Crown Forestry Rental Trust, 1998 (doc A43), vol 2, pp 541–551

113. Armstrong, 'Fate of Ngati Apa Reserves', pp 38–39

114. Raeburn Lange, *May the People Live: A History of Maori Health Development, 1900–1920* (Auckland: Auckland University Press, 1999), pp 189–197

finance for subsidised sanitation projects.<sup>115</sup> The general lack of interest in the council by this time, as well as the problems of serving a Maori population scattered over such a large district, were indicated in 1909 by the very low turn out for the Arapaoa Maori Council election. It is recorded that only 20 people made the trip to Blenheim to cast their votes.<sup>116</sup>

Linked with the Maori councils was the work of Dr Maui Pomare, who was appointed native health officer in 1901 by the newly established Department of Public Health. Pomare held this office from 1901 until 1911, assisted by Dr Te Rangihiroa (Peter Buck) from 1905 to 1909.<sup>117</sup> During this brief period, Pomare and Te Rangihiroa implemented what Ian Pool describes as a successful 'primary health care programme, 70 years before the World Health Organisation expounded this approach.'<sup>118</sup> Associated with the native health officers and Maori councils were the prominent Maori appointed in a number of districts as native sanitary inspectors. In Te Tau Ihu, Haimona Patete of Ngati Koata and Ngati Kuia received such an appointment in 1906.<sup>119</sup> Although the native health experiment was not sustained beyond the first decade of the twentieth century, the visits of Pomare and Te Rangihiroa to Maori settlements throughout New Zealand during those years resulted in improvements in housing and water supplies. The Native Department provided subsidies for water supply improvements but, as Pomare pointed out, housing improvements incurred 'not a single penny for compensation' from the Government.<sup>120</sup> Presumably, then, the housing improvements in the Croisilles area following Pomare's visit in 1905 were effected without Government assistance. When an approach for help was made by the occupant of one of the houses needing replacement, the Public Trustee declined to provide assistance from the tenths fund for fear that it would set a precedent. Outbreaks of typhoid fever in 1906 and 1910 were thought to be due to contamination of the water supply. The eventual installation of a new water supply, as recommended by Pomare and Te Rangihiroa during their visits, was facilitated by the Arapaoa Maori Council, through which the Government subsidised locally raised funds and a contribution from the tenths fund.<sup>121</sup>

As these events from the Croisilles show, the epidemics that struck the Maori communities of Te Tau Ihu were associated with poor housing and sanitation. Between 1892 and 1894, the Wairau people suffered from diphtheria, then measles, and finally typhoid, the latter killing two of the school pupils.<sup>122</sup> Seven people died at the Wairau during another typhoid

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115. Young, 'Maori Society', pp 125–126

116. Clark, 'Social and Economic Impact', p 61

117. Lange, pp 137, 139, 148, 184–185

118. Pool, p 242

119. Lange, pp 208, 212–213

120. M Pomare, report to chief health officer, 26 May 1908, AJHR, 1908, H-31, p 118

121. Young, 'Maori Society', pp 121, 127–128; Locke, 'Poorest Tribe under the Heavens', pp 81, 122; Bassett and Kay, 'Nga Ture Kaupapa', pp 221–222; acting chief health officer to under-secretary, Native Department, 15 September 1914 (Halder, 'Historical Documents', vol 5, p 2254)

122. Young, 'Maori Society', p 63

epidemic in 1896. The outbreak originated with the poor water supply but subsequent improvements to it were not sufficient to avoid a further epidemic in 1899.<sup>123</sup> At Waikawa, too, bouts of typhoid afflicted the community between October 1892 and May 1893. The teacher's reports throughout the mid-1890s were dominated by reports of ill health, such as influenza, whooping cough, skin diseases, and chicken pox. He attributed financial difficulties at the settlement in 1893 to the impact of recent measles and fever epidemics. In 1903, it was reported that whooping cough was 'very prevalent' at Waikawa.<sup>124</sup> Tuberculosis was another disease reported there. According to a school medical inspection report in 1915, the Waikawa settlement was 'full of' this disease; 'many of the children have it in a latent form'.<sup>125</sup> The impact of chronic illness on a family's livelihood is demonstrated by a case reported in 1905 of a Waikawa man suffering from tuberculosis and therefore unable to support his wife and seven children. With only a few shillings of rent to support them, the family relied on assistance from the Public Trustee.<sup>126</sup>

The number of subsidised native medical officers in the district varied at different times, but Te Tau Ihu Maori were relatively well served in this respect overall, thanks to the tenths fund. In this period, Havelock was added to the places where subsidised doctors were to be found. The efforts of Ngati Kuia to secure a doctor and hostel at Havelock eventually resulted in the appointment of a subsidised medical officer and the construction of a hostel in 1906. Pelorus Maori who could travel to the township had access to free medical care from this date, with those unable to make the journey having to rely on supplies of medicines from the native school teacher at Okoha.<sup>127</sup> The travel problems of this district were highlighted in 1915 by a petition from Morehu Ngaraiti and 105 others for medical assistance for those living in Okoha and other outlying districts. Although Okoha was only 47 miles away from Havelock, difficulties of access meant that it was a 12-hour journey.<sup>128</sup> Isolation was a feature of many Maori settlements in Te Tau Ihu and greatly hindered access to medical services based in the towns.

The Maori hostels that had been provided by the tenths fund at Nelson since the 1840s and at Havelock since 1906 were used by Maori to alleviate this problem.<sup>129</sup> In 1902, officials suggested that Maori hospital patients should be treated at the newly rebuilt Nelson hostel rather than at the hospital, which had recently refused to take a baby in as a patient. On this occasion, the Public Trustee opposed the use of the hostel as a medical care facility.<sup>130</sup>

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123. Walzl, *Land and Socio-Economic Issues*, pp 169–171; Armstrong, 'Right of Deciding', pp 147–148

124. Young, 'Maori Society', p 61; Morrow, 'Legacy of Loss', pp 119–120

125. Dr Eleanor Baker, 26 November 1915 (Young, 'Maori Society', p 64)

126. Young, 'Maori Society', p 95

127. *Ibid*, pp 137–139; Locke, 'Poorest Tribe under the Heavens', pp 81–87

128. Locke, 'Poorest Tribe under the Heavens', pp 115–116

129. Young, 'Maori Society', pp 136–138

130. Walzl, *Land and Socio-Economic Issues*, pp 240–241; Young, 'Maori Society', pp 136–140; Halder, 'Historical Documents', vol 10, pp 4329–4331

Whether or not the hospital deliberately excluded Maori patients in this or other instances, and despite the trustee's attitude, it is clear that the hostel continued to be used by sick Maori. The subsidised doctor stated in September 1905 that he had been 'attending the sick Natives who, for the last eighteen months or so, have been constantly demanding his services at the Hostelry which has not been empty for that period.'<sup>131</sup> The Public Trustee's provision of the hostel at Havelock in 1906 reduced overcrowding in the Nelson hostel, and both hostels continued to be used as a base for Maori patients.

It must be remembered that hospital treatment was not free in this period. In 1899, the Blenheim Hospital Board declined to admit patients from the Wairau reserve on the ground that they did not contribute to the board's finances by paying rates.<sup>132</sup>

### 10.5.3 Education

Very few Te Tau Ihu Maori settlements had native schools in this period. The Wairau and Waikawa had Government native schools, and the Government and Public Trustee provided some assistance to Anglican mission schools established at Whangarae and Okoha at the very end of the century. Other communities relied on State school education. Wakapuaka Native School and the Anglican Maori school at Whakarewa (Motueka) had closed in the 1880s, and the native school on Rangitoto closed after only a few years' operation in 1890. There were no native schools at all in Golden Bay.<sup>133</sup>

The closing of the school on Rangitoto was connected with economic realities. The community could not afford to financially support the school, accommodation for the teacher was substandard, and the lack of fresh milk and meat on the island was noted as another factor detracting from the attractiveness of the teaching position. In 1916, there was a move for a new native school for the 10 school-age Maori children on the island. The Department of Education responded that 'in the South Island, where the parents almost without exception speak English . . . the need for schools of a special character does not exist, and Native Schools are therefore no longer established in the South Island.'<sup>134</sup> This policy had been in place since at least 1901, when an application for a native school at Hitaua Bay, in Tory Channel, had been refused for the same reason. In the Hitaua Bay case, arrangements were made for the school children to attend a small State school in another Tory Channel bay.<sup>135</sup> On Rangitoto, some Maori children attended the tiny aided schools set up for settler

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131. District agent, Public Trustee, to Public Trustee, 3 September 1905 (Bassett and Kay, 'Nga Ture Kaupapa', p 220)

132. Armstrong, 'Right of Deciding', p 153

133. Young, 'Maori Society', pp 55-74; Clark, 'Social and Economic Impact', p 54

134. Young, 'Maori Society', p 56

135. Ibid, pp 55-56

families, and later had access to the Whareatea School established by the Education Board in 1917 (it was moved to Madsen in 1928 and closed in 1969).<sup>136</sup>

A school at Whangarae, established by the Anglican Church in 1898, was subsidised by the Public Trustee and also had some limited Government assistance. The Education Department had declined to establish a full native school in the Croisilles and had tried to pass the responsibility on to the Nelson Education Board. In the end, it was the Anglicans who met this hitherto unrecognised need. In supporting the establishment of a school in the district, the Public Trustee agent A A Scaife made the comment that 'nearly all the natives there, both young and old, are in a state of utter ignorance as far as education is concerned'. Of the estimated 14 potential pupils, seven were eligible for tenths funding and seven were not. The new school operated on a mix of funding from the church (which also found and appointed the teachers), the Public Trustee, and the Government.<sup>137</sup> It closed because of a low roll about 1917, but was open again for a while in the 1920s.<sup>138</sup>

At Okoha in the outer Sounds, another school was established by the Anglican Church in 1900. Again, the Education Department had declined to take responsibility, on the grounds that 'the people are hardly numerous enough to maintain an ordinary school'. Like Whangarae School, Okoha School was funded as a 'subsidised' or 'assisted' native school. An estimated 50 people were living on the landless natives reserve at Okoha at the time of the school's commencement, including 16 of school age, and numbers increased in the early 1900s as timber milling increased in the vicinity. The school roll rose to 30 students in 1903 but dropped to 10 in 1913, with attendance affected by the 'migratory habits' of Okoha Maori, who periodically moved away for fishing, bush felling and farm work. Both this school and that at Whangarae suffered from the link with a religious denomination, since the Government was unwilling to invest too much in 'church' schools, and was also unwilling to take them over completely. Education Department funding was withdrawn at the end of 1904 because the two schools had become 'beyond all doubt, denominational in character'. Nevertheless, Okoha School was included in the list of Education Board schools from 1906, and Whangarae from 1907, with trust funding continuing to supplement the officially paid salaries in both cases. Not all of the pupils were entitled to trust benefits, but the capitation grants received for those who had entitlement contributed to the expenses of each school as a whole. Okoha School closed in 1915 because of the low roll. Efforts to reopen it in 1921 failed because of a lack of Government support, although the Anglican mission operated it again in later years. In 1921, the Education Department claimed once more that

136. Olive Baldwin, *Story of New Zealand's French Pass and d'Urville Island*, 3 vols (Plimmerton: Fields Publishing House, 1979–83), vol 3, p 169

137. 'Education: Native Schools', *AJHR*, 1897, E-2, p 3; Young, 'Maori Society', pp 59–60; Locke, 'Poorest Tribe under the Heavens', pp 87–88

138. Young, 'Maori Society', pp 59–61; Locke, 'Poorest Tribe under the Heavens', p 125; Halder, 'Historical Documents', vol 8, p 3690

there was no need for native schools in places such as Okoha, 'since the Maoris of the South Island are more or less completely Europeanised'.<sup>139</sup>

In evidence before the Tribunal, education historian Dr John Barrington expressed his surprise at the continuing use of tenths benefit fund moneys for the schools at Whangarae and Okoha after they came under authority of the Marlborough Education Board in the early twentieth century. He found it 'extraordinary that disbursements from the Fund continued to be made for capitation and school medical supplies . . . The Board like all others was required, under the Education Act [1903] to provide free and compulsory education for all pupils of primary school age'. Dr Barrington noted that the tenths fund provided for capitation, medical supplies, and fencing at Okoha School in the twentieth century and also provided funding for the native school at the Wairau during this period.<sup>140</sup> He was also critical of the failure to provide schooling for some Maori children until the Okoha and Whangarae schools opened, noting that this was 'very late indeed [in] the history of New Zealand's provision of free primary education'. The rather passive approach followed by education officials in these localities was 'quite unacceptable and inappropriate in terms of prevailing legislation and, if a similar approach had been followed with Pakeha parents by this late in time, it would almost certainly have provoked a very strong protest indeed'.<sup>141</sup>

The Government-funded native schools at Waikawa and the Wairau stayed open during this period, although attendance was affected by illness and by the mobility necessitated by employment. We have already noted Waikawa School's record of epidemic sickness during the 1890s, with ill health continuing on through the first part of the twentieth century. The migratory lifestyle of the population, coming and going for employment opportunities and other reasons, such as fishing expeditions, has also been noted. An official inspection of Waikawa School in 1915 emphasised the itinerancy that was characteristic of the population.<sup>142</sup> In 1907, the school was handed over to the Marlborough Education Board and ceased to be a native school.<sup>143</sup>

At the Wairau, crop failures impacted on the native school throughout the 1890s, with attendance affected by malnourishment, poor health, a lack of clothing and employment-related mobility. The Inspector made a comment on the situation in 1894: 'The natives take some interest in the school, but they have a hard struggle for existence and cannot keep their children regularly at school'.<sup>144</sup> Some of the community moved to Havelock for flax-cutting in 1893, and the following year the children helped their parents to harvest wheat. As Tapata

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139. 'Education: Native Schools', AJHR, 1900, E-2, p 4; 'Education: Native Schools', AJHR, 1905, E-2, p 3; Young, 'Maori Society', pp 57–58; Locke, 'Poorest Tribe under the Heavens', pp 88–92, 123–126; HF Ault, *The Nelson Narrative: The Story of the Church of England in the Diocese of Nelson, New Zealand, 1858 to 1958* (Nelson: Diocese of Nelson, 1958), pp 219–221

140. Dr John Barrington, brief of evidence on behalf of Ngati Koata, 1 February 2001 (doc B32), paras 2–10, 35

141. Ibid, paras 8, 35, 41–42, 46

142. Young, 'Maori Society', pp 62–65

143. 'Education: Native Schools', AJHR, 1909, E-3, p 16

144. Inspector's report, November 1894 (Armstrong, 'Right of Deciding', p 145)

Harepeka explained, 'We wish to have our children to help us in getting in our wheat for the last two years our crops have been a failure, consequently we have been without means to pay workmen.'<sup>145</sup> Absences in 1900 were caused by the harvesting season, and some pupils moved away to the Sounds. As noted earlier, there were frequent epidemics of typhoid during the 1890s, during which some of the school pupils died.<sup>146</sup> Early in the twentieth century, this school too lost its native school status, being transferred to the Marlborough Education Board in 1907.<sup>147</sup> Officials considered closing the school in 1909 but decided against this because the pupils would need extra coaching in English and were poorer than their counterparts in the nearest Board school, 'so that a certain amount of segregation is desirable.'<sup>148</sup> In 1912, however, when the Wairau Maori petitioned the Public Trustee to fund a new school building, it appears that the Education Board was unwilling to pay for building improvements and wanted to close the school because the roll had dropped to eight pupils. The Public Trustee objected to this, noting that the tenths fund contributed half the teacher's salary and paid for maintenance costs. With assistance from the tenths fund, the building was improved and the school stayed open.<sup>149</sup> It seems that it received tenths funds until at least 1915.<sup>150</sup>

#### 10.5.4 Overview, 1890–1920

Throughout the 1890 to 1920 period, Te Tau Ihu Maori had imperfect access to the education and health services they needed. There were few schools tailored to their needs and within reach of their places of residence. Apart from a brief period in the first years of the twentieth century, when some benefit was gained from national Maori health initiatives, the Government's response to the health needs of Te Tau Ihu was minimal. This was justified by a belief that the tenths fund, administered by the Public Trustee, would meet the needs of the Maori community. The assistance rendered by the trustee did help, but it could hardly counter such diseases as tuberculosis and typhoid. The population decline caused by excessive mortality finally ceased, but endemic ill health helped to ensure that population figures rose very little.

Poor living conditions underlay this ill health. Struggling to sustain a living on inadequate occupation reserves, Te Tau Ihu Maori faced frequent crop failures and limited economic opportunities. The Crown recognised the problem in the 1890s but the landless natives

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145. Tapata Herepeka to Secretary for Native Schools, 17 December 1894, p 3562 (Locke, 'Poorest Tribe under the Heavens', p 93)

146. Young, 'Maori Society', p 67; Locke, 'Poorest Tribe under the Heavens', pp 92–94

147. BE Loveridge, *The Creek and the Pa: The Centennial History and Compilation of Records of the Spring Creek School (formerly Marlboroughtown) and the Wairau Pa School* (Blenheim: B Loveridge, 1973), p 74

148. Secretary, Marlborough Education Board, to Secretary for Education, not dated (Young, 'Maori Society', p 69)

149. Walzl, *Land and Socio-Economic Issues*, pp 245–246

150. Mitchell and Mitchell, 'Report No 9D', p 5

solution proved grossly inadequate. Nor did the endowment reserves provide an economic base, since the low rents on perpetually leased blocks brought only a small income to most families, and only to tenths beneficiaries. The Native Trustee acknowledged that the rents were usually trifling, but pointed out that the fund gave the people access to doctors, a hostel, and other welfare assistance.

### 10.6 1920–c1960

#### 10.6.1 Economic conditions

The reserves in Te Tau Ihu provided only marginal sustenance for the growing Maori population of the region in the twentieth century. Although there were pockets of Maori farming, the greatest income derived from Maori land in Te Tau Ihu came from sales and leases.

A considerable portion of the reserved land consisted of the tenths estate and other lands leased out by the Native and Maori Trustees throughout this period. Evidence given by Ngati Rarua's Paul Morgan highlighted the frustration experienced by beneficiaries who tried to take an interest in the way that the endowment reserves were administered:

Of course the administration of the Tenths was an ongoing problem. My Dad's first experience with attempting to become further involved with his interests in these lands was when he went to the Maori Trustee in Wellington in the mid-1940s and asked questions about how the asset was being managed. The officials said to him 'well you got your cheque and that's all you need to know'. It was his land, which had belonged to his tupuna, and he just wanted to know what was going on.

My family and other owners were paid their rental on a regular basis but they were totally oblivious as to how their lands were being managed. What they did know was that they were only getting peanuts in rentals. The cheques stayed the same year after year. They knew they were being hard done by. The rent only got reviewed every 21 years and even then the amount it could go up was controlled.<sup>151</sup>

Others missed out altogether on the negligible rental payments from the tenths or other endowment reserves. Ngati Apa's Albert McLaren described the perilous position of his great-great-grandparents:

In 1923, sixty-three years after the Arahura Purchase, Hoani Mahuika and his children, including my great-grandmother Heni McLaren, sent a petition to the Government stating that they were landless, had received no benefits from the Westport Reserves, were destitute

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151. Paul Morgan, brief of evidence on behalf of Ngati Rarua, 1 February 2001 (doc B11), p 11

and unable to support themselves or other petitioners who were old or infirm. My tipuna were in dire need and the Government did nothing to help.<sup>152</sup>

Sales and leases of occupation reserves through the first decades of the twentieth century meant that the Maori land base in Te Tau Ihu was further reduced during this period. Iwi populations tended to congregate on the remaining reserves. This is exemplified by the experience of Ngati Rarua, Rangitane, and Ngati Kuia.

Sales of Ngati Rarua's interests in Golden Bay, for example, reduced their land in that district, according to Mr Walzl, from 138 acres in 1920 to 55 acres in 1960. The extent of land occupied by iwi members in Motueka also continued to decline over this period, leaving the Wairau as the centre of the Ngati Rarua community.<sup>153</sup>

The Wairau was also the major centre for Rangitane, who were largely unable to develop and utilise the additional reserves they had been allocated as 'landless Maori'. Mr Armstrong comments on the poor quality and isolated nature of the Endeavour Inlet reserve, some of which was leased but most of which remained unused. The 10,000-acre Port Adventure block that iwi members were allocated on distant Rakiura (Stewart Island) was never made available for occupation. Rangitane unsuccessfully attempted to exchange it for less isolated land in Marlborough in the 1910s and 1920s. A proposal in the late 1920s for a land development scheme on the Port Adventure reserve was also unsuccessful and in 1964 it was suggested that the Government should resume the block and pay compensation to those to whom it had been allocated. To this day, however, Rangitane have not been able to make use of this land that had been reserved for them.<sup>154</sup>

Ngati Kuia found their new reserves of more use, but they also moved to one main centre of residence during this period. In 1913, the iwi members were fairly evenly distributed between the two communities, Te Hoiere and Okoha, but by 1930 most were living at the latter (a place that suffered the serious disadvantage, however, of being extremely difficult of access).<sup>155</sup> Sales and leases at Te Hoiere, and leases at Kenepuru, reduced the number of places available for occupation. Dr Locke calculates that Ngati Kuia sold 435 acres in the period between 1908 and 1930, for a total of £3869, the proceeds from sales thus averaging about £175 per annum. During the period between 1908 and 1935, Ngati Kuia received an average of £67 per annum in rental income.<sup>156</sup> Iwi members farmed at Okoha but there was not enough land there for the growing number of people, and their income was

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152. Albert (Sonny) McLaren, brief of evidence on behalf of Ngati Apa, [2003] (doc N5), p 10

153. Walzl, *Land and Socio-Economic Issues*, pp 381–382

154. Armstrong, 'Living in Uncertainty', pp 9–11

155. Locke gives figures of 48 at Okoha, 43 at Te Hoiere, and six at Kenepuru in 1913: Locke, 'Poorest Tribe under the Heavens', pp 114–115. By 1930, 69 people lived at Okoha.

156. Locke, 'Poorest Tribe under the Heavens', pp 100–115

supplemented by employment on Pakeha farms and by sporadic timber milling.<sup>157</sup> A survey made in 1938 showed that, of 13 households in Canvastown and Havelock, with an average of six people in each household, only three were persons in full-time work (all in farming); the others were casual labourers, unemployment relief workers, or pensioners.<sup>158</sup>

Dairy farming appears to have been a significant enterprise for the small Maori community in and near Takaka. Ms Clark's six case studies from a 1938 housing survey suggests that most whanau ran small dairy farms. Farming was supplemented by rents in the case of three of the families. This rental income was not substantial, each family receiving either £15 or £20 per year.<sup>159</sup> Margaret Little of Te Atiawa and Ngati Tama described the difficulties faced by three generations of her whanau in farming the Golden Bay land:

Our grandparents, our parents and now our generation have worked very hard to maintain what remains of the land of our tupuna as an economic farming unit, despite the actions and decisions of the Maori Affairs Department. To farm the land, we had to pay for it over and over again in leases, and then in purchase money, despite it being 'our land.' Block 101 [at Pariwhakaoho] was supposed to be granted for all the families, but the amount granted was so small that the economic reality was that the land wasn't even adequate enough to sustain one family, let alone the many families that now descend from the original owners. This was clearly illustrated in 1965 when lot 101 was sold, there were 156 owners to 154 acres.<sup>160</sup>

A member of this family, Anne Chapman, stated that shortly before the onset of the Depression she left school at the age of 12 to work as a housekeeper:

My story is similar to the stories of all my sisters and brothers. The farm on which we grew up could only support one family, and so all the rest of us were forced to leave Mohua in order to make our way in the world. My brother Tahana maintained the ahi kaa on the farm.<sup>161</sup>

Even so, the people at Takaka were relatively well off compared to many other Maori in Te Tau Ihu. The 1938 survey contrasted the Takaka community with Maori from Rangitoto, who were staying in the Nelson hostel at the time because of the lack of work on the island.<sup>162</sup> As discussed below, from the 1920s through to its closure in 1949, residence at the hostel was dominated by Ngati Koata visitors seeking work. In response to overcrowding there in the 1930s, the Native Trustee arranged for relief work to take place on Rangitoto so that

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157. Locke, 'Poorest Tribe under the Heavens', pp 128–133

158. JH Grace, 'Housing and Economic Survey', 1938, MS papers 85-173-4/5, ATL (Locke, 'Poorest Tribe under the Heavens', pp 146–147)

159. Clark, 'Social and Economic Impact', pp 44–47

160. John Ward-Holmes and Margaret Ward-Holmes Little, brief of evidence on behalf of Te Atiawa, [2002] (doc G8), p 4

161. Chapman, brief of evidence, p 8

162. Clark, 'Social and Economic Impact', p 44

the Ngati Koata residents would return to the island.<sup>163</sup> This work provided only a temporary reprieve, however. Ms Bassett and Mr Kay cite oral information given by Ngati Koata people recalling the difficult life on Rangitoto from the 1920s through to the 1950s. They remember hunger and the reliance on cabbage tree hearts, ponga, and fern root to supplement their kaimoana and boiled wheat.<sup>164</sup> Oriwa Solomon of Ngati Toa Rangatira and Ngati Koata described the factors that drove Maori away from Rangitoto and the Croisilles from the 1930s on:

Seasonal work had to be supplemented by fishing and hunting and if conditions were too adverse to pursue these activities then you may be faced with some pretty bleak winters. In the 1930s-40s people were having to live in raupo huts and catch possums to put food on the table. The families with adequate land on D'Urville were able to ride out lean times but for the majority of people it meant having to leave to pursue full time work. They were also forced to leave to find schooling for their children. And they needed to be near hospitals because D'Urville was a six hour boat journey by launch.<sup>165</sup>

Seasonal employment and labouring work attracted Te Tau Ihu Maori to the main urban centre, Nelson, from the 1930s onwards. An official was told by people from Rangitoto and the Croisilles that:

they would only starve if they had to remain and manage on their respective holdings; consequently they have come to Nelson to obtain work, many of whom find seasonal work at Kirkpatrick's Canning Factory; others obtain employment with the City Council, Public Works and on the Nelson wharf.<sup>166</sup>

The hostels at both Nelson and Havelock became permanent accommodation during the winter months – a pattern often tolerated by the trustee, who recognised the lack of alternative accommodation within the means of Maori.<sup>167</sup> Ms Bassett and Mr Kay note that the difficulty of finding affordable housing was a continual problem after the hostel closed.<sup>168</sup>

The vulnerable Maori communities of Te Tau Ihu were badly affected by the Depression. In 1936, an official report on conditions at Whangarae commented on the lack of employment or relief work in the vicinity, concluding that 'distress exists to a great extent'.<sup>169</sup> The Health Department condoned the long-term hostel residence of Maori women working at

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163. Bassett and Kay, 'Nga Ture Kaupapa', pp 222–224

164. Ibid, pp 213–214

165. Oriwa Solomon, brief of evidence on behalf of Ngati Toa, 9 June 2003 (doc P17), p 7

166. H Coltman, inspector of health, to medical officer of health, 17 July 1938 (Bassett and Kay, 'Nga Ture Kaupapa', p 232)

167. Locke, 'Poorest Tribe under the Heavens', pp 139–140, 164

168. Bassett and Kay, 'Nga Ture Kaupapa', p 244

169. Field Inspector, Nelson, to commissioner of Crown lands, Nelson, 7 March 1936 (Locke, 'Poorest Tribe under the Heavens', p 137)

the jam factory during the fruit season, recognising that it was 'about the only opportunity they have of getting any money to provide for clothing and to carry them through the winter'.<sup>170</sup> A Health Department inspection of the Wairau settlement in 1936 commented on the ragged clothing of the school children and noted that the community was reliant on relief work, supplemented by selling whitebait.<sup>171</sup> Similarly, a survey of the Waikawa community in 1936 noted the reliance on relief work, sale of whitebait and seasonal work at the freezing works.<sup>172</sup> Reporting in 1931 on the inadequate water supply at Madsen, on Rangitoto, which had resulted in two cases of typhoid, officials noted that the community was 'bordering on destitution'. The people were living on kaimoana, supplemented by Native Department supplies of flour, sugar, and potatoes.<sup>173</sup> A general report on Maori health in the district in 1940 commented on the poor housing and water supplies at Rangitoto and the Croisilles.<sup>174</sup> Mr Young notes that the Government did not finally fix the community's water supply until the 1940s. His assessment is that 'ultimately government would act, but often laggardly and with frugality, and without any will to fund longterm solutions'.<sup>175</sup>

The scope of Government welfare services gradually widened. Pensions for widows had been instituted in 1912. From 1926, there was a family allowance, although it was means-tested and very small. Where Maori were concerned, the old-age pension was still tightly controlled and usually paid at a reduced rate, until changes were made in 1936. Even then the supposed equity between Pakeha and Maori was often undermined by administrators in the Pensions Department.<sup>176</sup> Maori were initially excluded from the Government relief schemes established under the Unemployment Act 1930, and were thereafter paid lower rates than their Pakeha counterparts for relief work. As with lower rates in pensions, this discriminatory policy was based on the assumption that Maori required a smaller income because they could live off the land to a greater extent than Pakeha, and was not abandoned for some years.<sup>177</sup>

The first Labour Government's extension of welfare payments did, however, make a material difference to Maori life. The Social Security Act 1938 provided for a universal age benefit at age 60, unemployment and disability benefits, and free health care. Differential treatment for Maori lingered into the 1940s, however. The family benefit (10 shillings per child per week by 1944, and not means-tested after 1946) was a considerable boost to the income of

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170. Deputy Native Trustee, report, 16 November 1935 (Locke, 'Poorest Tribe under the Heavens', p 139)

171. Walzl, *Land and Socio-Economic Issues*, p 272

172. Young, 'Maori Society', pp 65–66

173. *Ibid*, p 122

174. Bassett and Kay, 'Nga Ture Kaupapa', p 236

175. Young, 'Maori Society', p 124

176. McClure, pp 44, 56, 66, 67, 79–80

177. Claudia Orange, 'A Kind of Equality: Labour and the Maori People, 1935–1949', MA thesis, University of Auckland, 1977, pp 63–69, 74, 'A Kind of Equality?'; Young, 'Maori Society', p 109

many Maori families.<sup>178</sup> As the Napier Hospital and health services Tribunal commented, Labour's policies 'had an immediate impact on Maori by removing the cost barriers to accessing health services, especially hospitals'. However, it would 'take another couple of generations' before housing problems were resolved, 'amidst growing economic prosperity and massive urbanisation'.<sup>179</sup>

Although opportunities for employment in urban centres were increasing, Te Tau Ihu Maori remained reliant on seasonal labouring work in the 1940s and 1950s. In 1945, a survey of work opportunities for Maori women found that employment was restricted to factory and domestic work and harvesting during the fruit and tobacco seasons. Men were similarly reliant on seasonal freezing works employment, shearing, and other labouring work.<sup>180</sup> Ten years later, it was reported that Te Tau Ihu Maori relied on picking work in the hops, fruit, and tobacco growing industries. According to one commentator on Waikawa in 1955, work was mostly 'seasonal and neither steady nor assured', with the result that indebtedness was a significant problem.<sup>181</sup> A survey of Maori housing in the Wairau in 1955 concluded that all Maori were labourers employed on farms, by the catchment board, or at factories in Blenheim.<sup>182</sup>

#### 10.6.2 The Wairau development scheme

The Wairau reserve was the only piece of land in Te Tau Ihu to be brought into the Government's national initiative for Maori land development. Conceived and implemented by Apirana Ngata when he was Native Minister in the late 1920s, and adopted and continued by the Labour Government after 1935, development schemes were a major component of Government assistance for Maori economic development in this period. In Te Tau Ihu, however, implementation of the programme was attempted in only one location.

Under the schemes, Government funds were provided for the development of unproductive multiply owned Maori land. The projects were initially envisaged to be of relatively short duration, enabling the land to be brought into production and the owners to develop their agricultural skills. In the event, the high costs of development meant that most schemes continued for decades, during which time their management remained largely outside the owners' control. The land was protected from alienation, but administrative control was in the hands of the Native Department. Development operations generally passed through several

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178. Margaret McClure, *A Civilised Community: A History of Social Security in New Zealand, 1898–1998* (Auckland: Auckland University Press, 1998), pp 80–86, 111–123; Young, 'Maori Society', pp 105–109

179. Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), p 159

180. Locke, 'Poorest Tribe under the Heavens', pp 161–162

181. Young, 'Maori Society', pp 147, 150

182. Walzl, *Land and Socio-Economic Issues*, pp 371–372

phases: from the initial clearing and breaking in of the land (usually by Maori workers on unemployment relief), to the establishment of a general farm supervised by Departmental officers, followed by the division of the estate into 'occupation units' (small farms worked by nominated Maori, usually the owners), and finally, once the scheme had recovered the debts that had been incurred, the return of the land to the control of the owners.<sup>183</sup>

The Wairau was first proposed as a development scheme in 1930, when the owners met Apirana Ngata at Picton. The land had been farmed for many years, but the owners were interested in participating in the scheme because they saw it as a means of funding flood protection and countering what was widely seen as the ineffectiveness of the district river control authority (see fig35).<sup>184</sup> As we have seen, there was a long history of floods in this locality, and of unsuccessful attempts to address the problem. In the 1920s, flooding was still a major obstacle to the successful farming of the reserve. The effects of a particularly severe flood in June 1923 were met with relief assistance supplied by the Native Trustee from the tenths fund.<sup>185</sup> According to the Marlborough Ratepayers Association, frequent floods meant that the reserve was 'almost worthless and does not adequately provide for the wants of the native settlers there – as intended at the time of the reservation.'<sup>186</sup> A report in 1930 stated that the land had excellent potential for crops and dairying but was plagued by flooding; almost a third of the land was reduced to a swamp in the wet season. The inspector was told that the flood problem had increased over the years because of river protection works that directed water from higher lands on to the reserve. He recommended drainage and flood protection as the first stage in any development scheme.<sup>187</sup>

Although the Wairau reserve was gazetted as a development scheme in March 1931, work on flood protection and drainage (apart from some preparatory scrub-clearing) and the enlistment of local relief workers was delayed for some time. At the end of 1933, Hoani McDonald was appointed supervisor of local unemployed workers under the supervision of the local river board, and the work began.<sup>188</sup> Vern Stafford of Ngati Rarua recalls that at the time there was much discussion about:

what they hoped they'd get out of the Scheme. As I was growing up, they were hoping for big things . . . Everyone thought it was going to be a better life for everybody and things won't be as tough as it had been. Every family was going to be able to help themselves and keep bread and butter on the table.<sup>189</sup>

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183. Ashley Gould, 'Maori Land Development, 1929–1954: An Introductory Overview with Representative Case Studies', report commissioned by the Crown Forestry Rental Trust, 1996 (Wai 674 ROI, doc D11)

184. Armstrong, 'Living in Uncertainty', pp 37–41

185. Walzl, *Land and Socio-Economic Issues*, pp 283–288; Armstrong, 'Living in Uncertainty', pp 34–36

186. Petition from Marlborough Ratepayers Association, 1927 (Armstrong, 'Living in Uncertainty', pp 35–36)

187. Walzl, *Land and Socio-Economic Issues*, pp 288–289

188. *Ibid*, pp 291–303; Armstrong, 'Living in Uncertainty', pp 43–52

189. Vern Stafford, brief of evidence on behalf of Ngati Rarua, 11 August 2000 (doc A84), p 8

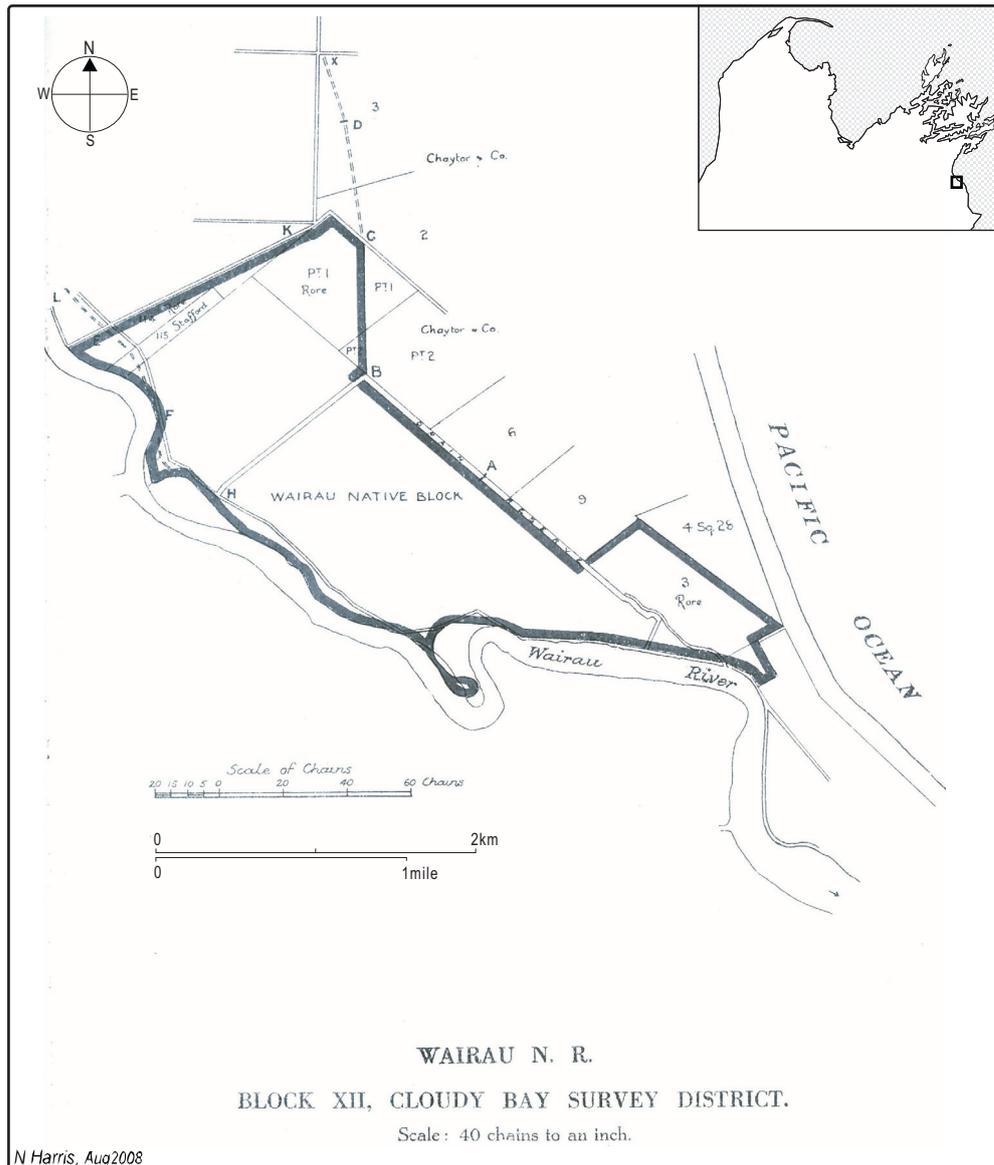


Figure 35: The Wairau development scheme Source: AJHR, 1931, G-10, plan 39

In his evidence, Wiremu Stafford described the establishment of the scheme, followed soon afterwards by the election of the first Labour Government, as ‘the beginning of a new era for the people of Wairau’:

The Native Development scheme was introduced to create much needed work for the young people of Wairau . . . Forty men from Wairau and Waikawa made up the labour force in 1935 to rid the land from swamp to flood-free pastures. Miles of ditches were hand dug, stopbanks built on either side of Roberts drain; seven huge suction pumps were used to

suck the water from the drains. Power lines were built to these pumps. New fences were built, swamp ploughs were used as the water receded; standby petrol motors were used in case of power failure.<sup>190</sup>

Despite the promise of the scheme, however, problems were apparent from a very early stage. Flood protection was welcomed as the priority, but there was concern about the lack of progress towards agricultural development. In March 1934, 17 Ngati Rarua residents complained that no steps had been taken towards development, that they were unable to 'exercise any right of ownership' in the meantime, and that the land was lying idle and unused. The intention of officials at this time was to crop the land for a while so as to prepare it for eventual subdivision into dairying units. From 1935, cropping activity was under way alongside the continuing flood protection works.<sup>191</sup> In 1936, however, the owners complained that they were not being given up-to-date information about the financial position of the scheme. While expressing their gratitude for the works being undertaken, they raised concerns about how long the land would remain under the control of the Native Department.<sup>192</sup> The Native Minister asked for continued cooperation from Wairau Maori to ensure the completion of the scheme, assuring them that they would be closely consulted about subdivision and the establishment of occupation units. He explained that it was necessary to:

determine the best means of settling the Reserve so that the maximum benefit of the improvements effected on the land will be made available to the owners and so place them in the position to obtain a living therefrom and at the same time to repay the Native Department the amount expended out of the loan funds on the land.<sup>193</sup>

In the late 1930s, officials considering the future of the scheme had no clear plan but were reluctant to release the land without developing it further and subdividing it into viable owner-occupied operational units.<sup>194</sup>

The payment of wages to Wairau Maori working on the development scheme under the unemployment relief programme was of benefit to the community in this time of economic depression. In 1936, however, a group of owners asked that the workers on the development scheme be paid at full-time rates. This was refused, since it conflicted with current Unemployment Board policy; it was also stated that, if the extra labour cost was allowed, the debt burden on the scheme would become unsustainable.<sup>195</sup> By 1943, over £18,000 had been paid from unemployment relief funds, mostly for Maori labour.<sup>196</sup> This debt was not

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190. Wiremu Tapata Stafford, brief of evidence on behalf of Ngati Rarua, 11 August 2000 (doc A85), p 14

191. Walzl, *Land and Socio-Economic Issues*, pp 303–305; Armstrong, 'Living in Uncertainty', pp 52–56

192. Walzl, *Land and Socio-Economic Issues*, pp 307–308

193. Native Minister to Tinirau Phillips, 15 July 1936 (Walzl, *Land and Socio-Economic Issues*, p 308)

194. Walzl, *Land and Socio-Economic Issues*, pp 309–311

195. *Ibid*, pp 306, 309

196. Armstrong, 'Living in Uncertainty', p 67

added to the amount owed by the scheme, and the income was a welcome injection into the economy of the reserve. Nevertheless, living conditions for the people there continued to be difficult, as is evident from Vern Stafford's description of growing up on the reserve in the 1930s and 1940s:

Sometimes there would be no kai available in the winter. When that happened we looked after each other. Those who had some to spare would help those who had none.

All of the families at Wairau had to run store accounts for food and clothing with store-keepers in Spring Creek and Blenheim . . . I never heard a case where anyone was threatened with court action, but sometimes, when some families did not have the money to pay the accounts, others would chip in to help them.<sup>197</sup>

The new stopbanks and pumps did not withstand a severe flood at the end of 1939, when serious pasture damage was incurred and crops were destroyed. Most of the houses were inundated, and while many of the people were able to take refuge in the church, others had to huddle on a stopbank and were nearly engulfed by the rising waters. As with the flood of 1923, much of the assistance provided came from the tenths fund and the Blenheim townspeople rather than from the Government. The question of whether non-beneficiaries of the tenths trust were entitled to assistance from the fund arose, and it was stated by the Native Trustee that they were not so entitled.<sup>198</sup>

In 1943, Wairau Maori sought the return of at least part of the reserve. They were informed that the land would not be released from the scheme until the debt had been extinguished. By this date, the indebtedness for capital expenditure on the scheme had reached almost £8000.<sup>199</sup> Serious floods in 1946 and 1948 were further setbacks, revealing that efforts to reduce the flooding problem had not been sufficient. 'The old people would get quite upset,' said Vern Stafford in his evidence; 'I heard them say that it was the improvement that was done further up the river around Blenheim [that] was causing us problems down there. We'd get the full force of any flood waters. The older people felt that no one cared. That was talked about quite a bit.'<sup>200</sup> At the end of the 1940s, the scheme was not making a profit, and it was in arrears for rates. In 1949, while stock numbers stood at almost 1000 sheep and just over 100 cattle, debt had increased to almost £20,000.<sup>201</sup>

During the lifetime of the scheme, there was little consultation with Wairau Maori as to which agricultural activities would be undertaken. In the early 1940s, linen flax crops were established as a contribution to the war effort. In the mid-1940s, the department tried to move the people from cropping to dairying and sheep farming. Vern Stafford described

197. V Stafford, brief of evidence on behalf of Ngati Rarua, pp 7–8

198. Walzl, *Land and Socio-Economic Issues*, pp 312–315; Young, 'Maori Society', p 119; Armstrong, 'Living in Uncertainty', pp 62–64

199. Armstrong, 'Living in Uncertainty', pp 65–68; Walzl, *Land and Socio-Economic Issues*, pp 329–336

200. V Stafford, brief of evidence on behalf of Ngati Rarua, p 12

201. Walzl, *Land and Socio-Economic Issues*, pp 342–345; Armstrong, 'Living in Uncertainty', pp 69–70

the difficult relationship that developed between the people of the Wairau and the Maori Affairs Department:

As things went on with the Development Scheme, there was nothing very good spoken about the Maori Affairs Department. The people weren't very happy about it at all. They were saying that the Maori Affairs Department got their land into debt and when they got involved, they'd promise the world, and nothing happened. And they laid the blame at the feet of the Maori Affairs for the mismanagement . . . There was always the impression that Maori Affairs didn't take the advice of the local people. They didn't so much blame the district people who worked with them, it was the Head Office people.

Mr Stafford stated that officials ignored the residents' advice about which crops should be planted where, with the result that crops were lost during the wet season. Nor did the people agree with the decision to put sheep on the reserve:

The majority of them weren't in favour of it. They could see it was just a waste of time, it was money being spent in the wrong way.

The sheep had problems with all this water. Foot-rot was very bad. They had Romney cross and they were big sheep, carried a lot of weight. They had a lot of wool, it would push them down into the soggy countryside. Some of them would get foot-rot bad. They were high stock losses with the sheep. If they ran out of dry feed, they had to buy dry feed in, and that would cost money and the feed that Maori Affairs would get was the wrong fodder. The best stuff was the good rye and clover or lucerne hay, for that sort of stock, but they seemed to get any old rubbish that they could get. The stock didn't recover too well off it.

According to Mr Stafford, when local Maori tried to inform the Maori Affairs Department of the problems arising from its decision making, the management would tell them 'we're running the place, you're just working there.'<sup>202</sup> The debt that was accumulating on the land was a worry to the people, too. Mr Stafford remembered the fear expressed by his father and the other owners that the land they had inherited would be taken from them to recover a debt that was not of their own making. 'They really believed they could have lost their land. They talked about it all the time.'<sup>203</sup>

Throughout the 1940s, the Wairau people were reluctant to move towards dairy farming and reiterated their desire for control over the scheme or at least a greater degree of involvement. Settlement on farming units as originally envisaged had still not occurred, and officials were beginning to see the problems as insoluble. In September 1949, there was a meeting with the Minister of Maori Affairs, Peter Fraser (who was also Prime Minister), and the member of Parliament for Southern Maori, Eruera Tirikatene, to discuss the future of the

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202. V Stafford, brief of evidence on behalf of Ngati Rarua, pp13-14

203. Ibid, p15

scheme. The owners called for the release of their lands, a reduction in debt, subdivision of the land 'along the lines of the pre-development occupation', the designation of sites for housing and a marae, and a district-wide drainage system. Mr Armstrong notes that by this time there was acknowledgment by officials that the scheme had been a failure and that the objective should be to terminate it as soon as the debt could be recovered.<sup>204</sup>

In 1950, the Department of Maori Affairs decided that the scheme would continue for another five years, though with little spent on it, to enable the land to be returned largely free of debt. By that time the debt totalled £21,000, with the stock valued at £7000. The owners resisted the department's plan to lease out most of the land, proposing instead to sell the two blocks that had been purchased to augment the scheme. Flooding was still a problem, and a particularly serious flood in 1954 meant that the people were once more in need of assistance. As in the past, relief came from the tenths fund and not Government sources. The flooding problem had not been solved by the scheme (respite finally came in the early 1960s when major river diversion works elsewhere were completed), and as a farming development project the scheme had also been a failure. Little documentation of the last years of the scheme was given to the Tribunal, but it appears that in the mid-1950s sales of stock and non-reserve land resulted in the extinguishment of most of the debt and the release of some of the land in 1955 and 1956. The remaining sections were finally returned to the owners in 1969 and 1970.<sup>205</sup>

Vern Stafford remembered that 'By the last few years of the Scheme Maori Affairs were doing nothing at all with the property. The property had gone down. There was no money there for upkeep and maintenance of the fences or anything else that had to be done.' He said that workers were laid off and people started to move away. His memory is that, when the land was finally released, the news was delivered not by an official from head office but in a letter. The people were upset, despite their jubilation at the return of the land. There had been high hopes in 1930, but 'in the finish, when the whole thing was dissolved, we were no better off than when it first started.'<sup>206</sup>

The eventual success of the flood control efforts and the return of the land came too late for many of those whose turangawaewae was at the Wairau, as Mr Stafford's evidence indicated:

When I think about it, I feel that a lot of the people still could be there, like the younger generation. They've moved into town, some of them have gone away up north. I'm not saying that they all should have to be living there, the migration only really started as the Development Scheme failed. It is my impression that there had the Development Scheme

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204. Walzl, *Land and Socio-Economic Issues*, pp 340–350; Armstrong, 'Living in Uncertainty', pp 68–76

205. Walzl, *Land and Socio-Economic Issues*, pp 350–365; Young, 'Maori Society', p 120; Armstrong, 'Living in Uncertainty', pp 77–89

206. V Stafford, brief of evidence on behalf of Ngati Rarua, pp 8, 15–17

## 10.6.3

worked, and had the area ended up a going economic concern more people would have stayed on. This was because the older ones, our old kaumatuas, told us this is your whenua and when we've gone, we want you to carry on. But when they saw that was no incentive for us to stay, the older ones said 'well you go, you know where your home is. Always come back.'<sup>207</sup>

The Wairau reserve remained largely intact until after the mid-century cessation of the development scheme, as we showed in chapter 7. Although there were sales soon afterwards, and again in the 1980s and 1990s, most of the land (nearly 80 per cent) is still in Maori ownership and being farmed in various ways. We were not given much information about the reserve in the period after the development project ended, and therefore cannot speak knowledgeably about such matters as how present-day utilisation of the land has been affected by what happened during the years of the scheme.

**10.6.3 Housing**

Under the Native Housing Act 1935, application could be made for State loans for housing, but few Maori qualified for the loans, which required a secure title to the land and an ability to make repayments at a certain level. Inalienable reserves, on which many Maori lived, could not be used as security. The Government soon established a special fund for 'indigent' Maori housing, which was of assistance to some Maori applicants.<sup>208</sup>

In 1938, Te Tau Ihu was included in the national survey of Maori housing needs. Few problems were found in Golden Bay.<sup>209</sup> The report on Havelock and Canvastown, however, stated:

The living conditions at both of these settlements are bad, and many of the houses are hardly habitable. The people are very poor and in receipt of very small rents, and in some cases they have no lands at all and are either renting old homes or living in other people's houses. The health of these people is a matter of concern as TB is prevalent on account of the bad living conditions; but it would appear that before any improvement can be made better houses must be provided.<sup>210</sup>

Six houses were assessed as overcrowded and dilapidated, with the occupants needing assistance for rehousing.<sup>211</sup> At Waikawa and the Wairau, living conditions were described as 'generally . . . bad': 'something must be done before the health of those who now appear

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207. V Stafford, brief of evidence on behalf of Ngati Rarua, pp 18–19

208. Orange, 'A Kind of Equality', pp 84–98

209. JH Grace, 'Housing and Economic Survey', 1938, MS papers 85-173-4/5, ATL

210. Ibid, pp 426–427 (Locke, 'Poorest Tribe under the Heavens', pp 145–146)

211. Ibid (pp 145–146, 152)

healthy and strong is undermined. There are too many houses that should have been demolished long ago still harbouring large families.’<sup>212</sup>

The first three houses provided under the scheme (two at the Wairau and one at Waikawa) were built about 1938.<sup>213</sup> By 1943, the Department of Maori Affairs had built six houses for Maori in the Nelson province (including two in Golden Bay) and 18 houses in Marlborough (mostly around Picton). A housing survey in 1949 noted the lack of suitable building sites on Maori land at the Wairau.<sup>214</sup> Another survey in 1955 concluded that Maori housing was generally satisfactory in Nelson–Motueka and Takaka, but improvements were needed in the Wairau and Waikawa.<sup>215</sup> In the years after the war, Maori in Te Tau Ihu participated in the nationwide Maori migration from rural to urban localities. Nationally, the proportion of Maori living in urban areas increased from 26 per cent in 1945 to 62 per cent in 1966. Much of this migration occurred during the 1950s, a transition period when there was a shortage of adequate housing. State rental houses began to be made available to the fast urbanising Maori population at the end of the 1940s, but State provision did not make a substantial impact on the unsatisfactory Maori housing situation until the late 1950s.<sup>216</sup>

Several claimant witnesses told us what it was like to live in sub-standard and overcrowded housing. Philip MacDonald of Rangitane, for example, described the house he lived in as a child at the Wairau:

The house we lived in was nearly at the end of its useful life with rotten floorboards and timber probably not helped by its history of being regularly flooded. Electricity was available but obviously not during the floods. The house had four bedrooms although it accommodated normally about five to six adults as well as twelve to thirteen children. It was not uncommon for up to seven kids to sleep in the one bedroom. We ‘topped and tailed’ with usually four in a double bed and two in a single bed. There was no heating and windows were broken and weather boards missing. This was normal housing in the area.<sup>217</sup>

Ngati Kuia’s Sharyn Smith told of her great-grandparents’ move from Okoha to a three-roomed house in Havelock in 1928:

Both were very elderly at the time. The old people were cared for by Aunty Ruth and Uncle Bill Moses, for the rest of their lifetime. They moved to Havelock to have access to medical care and because there was [an] opportunity to live in a proper house, not in a raupo hut. Mark’s grandparents lived in the three roomed house at Lawrence Street and

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212. Ibid (p147)

213. Young, ‘Maori Society’, p 129

214. Walzl, *Land and Socio-Economic Issues*, pp 370–371; Clark, ‘Social and Economic Impact’, p 47

215. Young, ‘Maori Society’, p 135

216. Orange, ‘A Kind of Equality’, pp 179–187, 207; James Belich, *Paradise Reforged: A History of the New Zealanders from the 1880s to the Year 2000* (Auckland: Allen Lane, The Penguin Press, 2001), p 471

217. Phillip MacDonald, brief of evidence on behalf of Rangitane, 22 April 2003 (doc M7), pp 6–7

raised nine children in that house. When we came out from Okoha we went and lived at the same house in Lawrence [*sic*] Street because that was the way we operated as a whanau. We had a tin bath, the only running water was a tap outside and the long drop was down by the creek. We boiled water, there were only three rooms in the house and we had to ferry the water in the basins.<sup>218</sup>

The Havelock hostel was still operating in the late 1930s.<sup>219</sup> Its Nelson counterpart, the 'Maori House', was still occasionally used by the sick and those attending Native Land Court hearings (such as the Wakapuaka hearing in 1938), but its main usefulness was as a base for those seeking work in the town. In a situation of limited housing availability, the hostel was valued as an accommodation facility. Rural Maori moving to Nelson stayed in the small building for extended periods, and overcrowding often occurred. Benjamin Turi Hippolite recalled that 'almost every Maori family coming from outside the city boundaries would go [to the hostel] and stay until they could find accommodation.'<sup>220</sup> Both Mr Hippolite and Ngati Koata's Priscilla Paul emphasised the difficulties faced by Maori when looking for accommodation. In Mrs Paul's words:

Those living permanently at the Maori House knew the conditions were unacceptable, and were always looking for other alternatives, other places to live and ways to do so. But there was so much prejudice – banks wouldn't loan money to us to help us buy houses of our own, and no landlords would rent their properties to us. We had nowhere to turn and no-one to help us.<sup>221</sup>

Mr Hippolite gave similar evidence:

The Maori House was only supposed to be a transitional place, but we stayed there for quite a while. You couldn't buy a house without a deposit. Where would you get the deposit from? You had very little labour options, very little money coming from outside the city, and consequently you had to work and save, scrimp and save.<sup>222</sup>

Describing conditions at the hostel, he mentioned the lack of toilet and rubbish facilities, and remembered the hundreds of flies that swarmed around the rubbish and the food supplies:

At any one time, there were probably six or seven families all crowded in at once, and I can remember us all living in one bedroom – my mother and my father and all my brothers and sisters and myself. Grandma Wetekia had a primus that she cooked our meals on in our

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218. Sharyn Smith, brief of evidence on behalf of Ngati Kuia, 21 March 2003 (doc L9), pp 5–6

219. Young, 'Maori Society', pp 139–140; Locke, 'Poorest Tribe under the Heavens', pp 142–145

220. Benjamin Turi Hippolite, brief of evidence on behalf of Ngati Toa, 11 June 2003 (doc P15), p 6

221. Priscilla Paul, brief of evidence for Wai 566 on behalf of Ngati Koata, not dated (doc B17), p 9

222. B Hippolite, brief of evidence on behalf of Ngati Toa, p 8

bedroom, because that was the only isolated area for the family. It was too crowded in any other area of the house. It was absolutely too crowded.<sup>223</sup>

Mrs Paul has similar recollections of overcrowded and insanitary conditions:

Even though I loved visiting my whanau [at the hostel], the state of the house was poor, the condition of the Maori House was blamed for many illnesses. It was very dark inside, and the kitchen was at the back of the house up against the hill so no light came in. Tuberculosis was rampant. There was only one bathroom and toilet, and there was a family living in each room! The wash house was always full of washing and clothes, the facilities were totally inadequate. One copper, two washtubs, five bedrooms, five families. The mothers washed their babies in a bowl in their room so they wouldn't have to queue for the bathroom, and used another bowl to wash their dishes.<sup>224</sup>

Nohorua Kotua of Ngati Koata and Ngati Toa spoke of the ill health associated with overcrowded conditions, ranging from lice to tuberculosis. He noted the occupants received 'very frequent visits from the health nurses' in response to this.<sup>225</sup> Ngati Koata's Puhanga Patricia Tupaea remembered visits by Health Department officers to unblock drains. She was very critical of the general lack of maintenance:

Our Tenth's money paid for the running of the House – there ought to have been enough to maintain it, but we had no control over the funds. There never was. The problem was that no-one took responsibility for maintaining the Maori House.<sup>226</sup>

Mr Kotua made similar comments:

The deficient conditions in the place were the responsibility of the Maori Trustee who administered the Tenth's. I cannot remember any maintenance happening in the first time that I was there, just continual broken taps, pipes and guttering. These were never fixed. We didn't have these resources to get them fixed ourselves.<sup>227</sup>

The procrastination of Government agencies responsible for providing assistance to the Maori people such as ourselves who found themselves unable to cope (Maori Trustee, Health Department) are well documented. Maori received little in the way of assistance despite the fact that the Tenth's reserves which were managed by the Maori Trustee were supposed to be used to alleviate such situations. Government departments were quick to condemn but provided little in the way of tangible assistance to remedy some appallingly unhealthy situations.<sup>228</sup>

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223. Ibid, para 48

224. P Paul, brief of evidence for Wai 566, para 42

225. Nohorua Te Kotua, brief of evidence on behalf of Ngati Koata, 1 February 2001 (doc B14), para 16

226. Puhanga Patricia Tupaea, brief of evidence on behalf of Ngati Koata, not dated (doc B15), p 458

227. N Te Kotua, brief of evidence on behalf of Ngati Koata, para 20

228. Nohorua Te Kotua, brief of evidence on behalf of Ngati Toa, 9 June 2003 (doc P3), pp 3–4

Concern about the insanitary and overcrowded state of the hostel came to a head in the 1940s.<sup>229</sup> It might have been expected that Trust funds would be used to improve or extend the facility to assist the beneficiaries. In September 1940, however, the Department of Health took legal steps to compel the Native Trustee to close the hostel. Despite a court order, however, it remained open. Officials remained concerned about the health risks of overcrowding. By 1949, there were 14 members of the Hippolite family living in the hostel; they refused to leave until finally forced to do so when the hostel was finally closed in October 1949.<sup>230</sup> Mr Hippolite's evidence shows that they did not move into a better situation:

We moved out of the Maori House in the end. My father's sister Aunty Rayhab had a house in Nelson and she had Tuberculosis (TB) so she had to move out to a warmer place in the country. On the very day that she moved out of her house, my father moved us in. He didn't care about the landlord or anything like that. He moved us all in there and the Health Inspector said, 'You can't move in here because it has to be fumigated'. My father said, 'We're not leaving, you fumigate the house and we'll still be in here' . . . We stayed for several years, until my father was able to save enough money for a deposit to buy a new home. And when we moved out, my Aunty Lou moved her family in there although the house was condemned. No one should ever been expected to live in those conditions, but this is what the government was doing to us.<sup>231</sup>

Even after the hostel closed, its problems continued. In 1956, there were 18 people living in a house used by Maori coming into Nelson from outlying areas, a situation ascribed by health officials to the difficulty of obtaining other accommodation in the town.<sup>232</sup>

#### 10.6.4 Health

The Government reinstated a specific health service for Maori after the First World War, reviving the Maori councils and appointing a native health officer in 1919 and setting up the Division of Maori Hygiene in the Health Department in 1920. The problems of insufficient funding and divided responsibility, however, continued to affect the delivery of health services to Maori in the 1920s and beyond.<sup>233</sup> Maori ill health was appraised and measured to a greater extent than before, and the disparity between Maori and Pakeha health was recognised as a significant problem, but the official response to this remained limited. Health inequalities and the poor living conditions that underlay them were highlighted in the Health Department's analysis of statistics for 1925 to 1934. The overall Maori death rate in 1934 was

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229. Young, 'Maori Society', pp 141–143

230. Bassett and Kay, 'Nga Ture Kaupapa', pp 241–243

231. B Hippolite, brief of evidence on behalf of Ngati Toa, pp 8–9

232. Young, 'Maori Society', p 135

233. Dow, *Maori Health*, pp 150–152

17.51 per 1000, twice the European death rate of 8.48 per 1000. The average Maori infant mortality rate over the 10-year period was 101 per 1000, while the European rate was 35 per 1000. As the department acknowledged, the largest cause of infant mortality was respiratory disease, 'a factor that is largely influenced by lack of adequate clothing and poor housing'. The report also indicated the high Maori death rates from tuberculosis, maternal mortality and typhoid. In 1934, the Maori typhoid death rate was 10 times higher than the Pakeha rate.<sup>234</sup>

In Te Tau Ihu, the Native Trustee continued to contribute substantially to Maori medical services. As in the earlier period, the Health Department attempted to control the trustee's expenditure and the lines of responsibility were sometimes unclear. In 1924, for instance, the Director-General of Health contended that a Takaka Maori applicant for free medical assistance should be refused because he was not indigent. On this occasion the Native Trustee was uncompromising in his reply, stating that the tenths fund derived from Maori interests and that beneficiaries should receive free treatment whether or not they were considered to be indigent. Referring to an earlier discussion in which the Director-General had recommended a cut to the subsidy paid to the doctor at Takaka, the Native Trustee stated: 'My view then was the same as now, namely that these subsidies could not be considered in the nature of Government payments and should not be reduced'. He was however willing to give consideration to the opinion of the Director-General, writing that he would make an increase in the subsidy 'so long as you are prepared to agree'. The Health Department did agree to the increase.<sup>235</sup> In the late 1920s there were six doctors receiving subsidies totalling £355 per annum to provide medical assistance to 80 beneficiaries and their children (an estimated 400 people). The trust also on occasion paid hospital fees for tenths beneficiaries.<sup>236</sup> In the 1930s, it also instituted a maternity benefit, available to every beneficial owner and to the wife or family member of every beneficial owner.<sup>237</sup>

In 1928, however, Health Department and trust officials agreed that the number of subsidised doctors in the district should be reviewed. Soon afterwards, in May 1929, the director of the Division of Maori Hygiene, Dr Ellison, surveyed health conditions and services in Te Tau Ihu. His recommendation was to replace the subsidised medical officers at Nelson, Havelock, and Takaka with district nurses. He also suggested converting the Havelock hostel into a cottage hospital, and relocating the people of Okoha, where tuberculosis was endemic, to Rangitoto. In Ellison's words, 'the death rate [in Okoha] from tuberculosis has been terrific within the last ten years'.<sup>238</sup> It was apparently assumed that the Native Trustee would implement Ellison's recommendations, and he soon reported that neither the Department

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234. Director-General of Health, 'Annual Report', AJHR, 1935, H-31, pp 6-7

235. Walzl, *Land and Socio-Economic Issues*, pp 263-264

236. *Ibid*, p 265

237. 'Income from the Nelson Tenths Reserves and Benefits to Owners' (Summary of Report No 9D), p 7; J and H Mitchell, E8

238. EP Ellison to Acting Director-General of Health, 4 May 1929 (Young, 'Maori Society', p 26)

of Health nor the local hospital boards were willing to assist.<sup>239</sup> None of Ellison's suggestions was implemented in the immediate term.<sup>240</sup>

When the doctor at Takaka resigned his appointment as native medical officer in 1930, the Health Department suggested permanently discontinuing this subsidy. Rawiri Meihana and others objected to this suggestion, noting that there were over 60 Maori living in the vicinity of Takaka, a population that was increasing, and pointing out that it was their beneficial funds that paid for the service.<sup>241</sup> A new native medical officer was appointed in 1931. Nelson's Medical Officer of Health was aware of Maori sensitivities to threats to the use of the tenths fund for medical purposes. In 1933, he commented that Maori in the region 'have always strenuously opposed any alteration, maintaining that the money is theirs for the employment of a doctor alone.'<sup>242</sup>

Another survey of conditions at Okoha, made in 1930 after Ellison's report, was more detailed, but no practical steps were taken as a result. The survey found that over the past 10 years there had been eight deaths from tuberculosis, a significant number in a community that totalled less than 100 residents. The nine other deaths over the period were as follows: three at birth; one at seven months; two from pneumonia; one from osteomyelitis; and two from old age. It was noted that few of these cases had been attended by a doctor.<sup>243</sup> As we have already noted, access to medical assistance was difficult in places where the additional factor of physical remoteness operated. In the case of Okoha, the doctor at Havelock observed that there had been 'a considerable sickness' at Okoha during the winter of 1926 and that the sick had not received medical attention because it was 'too costly to convey the patients to Havelock', which was stated to be a six-hour journey.<sup>244</sup>

Sharyn Smith's evidence for Ngati Kuia gave a picture of the serious health problems experienced at Okoha in the 1920s and beyond:

Our grandparents' home down at Okoha was on the eastern side of the river. Of their 11 children, 4 died through consumption (TB) and measles. Ours wasn't the only whanau to be affected from TB and there weren't only infants who died. Uncle Willie Whaka's daughter Ginny was 14 when she died from consumption. My cousin Hipa is the third Patihapi in her family, just as my mother was the third Ria. This pattern was repeated in most families as Okoha. Polio, dysentery and whooping cough also took a heavy toll on the families in the early days at Okoha.

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239. Walzl, *Land and Socio-Economic Issues*, p 266

240. Young, 'Maori Society', p 26

241. Walzl, *Land and Socio-Economic Issues*, p 269

242. Medical Officer of Health, Nelson, to Director-General of Health, 20 December 1933 (Clark, 'Social and Economic Impact', p 36)

243. Locke, 'Poorest Tribe under the Heavens', p 121; Halder, 'Historical Documents', vol 2, pp 893-906

244. Young, 'Maori Society', pp 24-25

There was a lack of medical assistance because of the isolation caused by not having any road ways out of the Bay until 1977 and access being only by boat to Havelock. It wasn't always possible for contact. Our nearest party line phones didn't get installed until the late 1950s and then not everyone could afford them.<sup>245</sup>

Okoha was not the only Te Tau Ihu settlement suffering from high rates of tuberculosis. Benjamin Hippolite of Ngati Toa and Ngati Koata stated that:

Tuberculosis was called the 'Maori disease' when I was growing up [in the 1930s and 1940s]. Nearly every family had someone who suffered from TB, and TB and other contagious diseases became more common after my family shifted away from D'Urville Island to Nelson. This involved a whole change of living and diet. Fresh food was harder to obtain and the cramped and unhealthy living conditions contributed to the spread of disease.<sup>246</sup>

Conditions were similarly difficult at the Wairau. Ngati Rarua's Wiremu Stafford highlighted the high mortality of young adults in the Wairau in the 1920s. He listed 12 deaths from his age group alone from 1921 to 1929.<sup>247</sup>

These memories are confirmed by the work of historians. Ms Bassett and Mr Kay comment on the prevalence of tuberculosis on Rangitoto and Mr Walzl points to its prevalence at the Wairau.<sup>248</sup> Official records show that there were 20 notifications of tuberculosis amongst Nelson–Marlborough Maori in the five years from 1925 to 1929, 14 of which resulted in hospital treatment.<sup>249</sup> A health official commented in 1937, however, that there had probably long been under-notification of Maori tuberculosis in the region, and a few months later another official stated that more tuberculosis had been found among Nelson–Marlborough Maori than was previously thought to exist.<sup>250</sup> Epidemics of typhoid also continued to hit Te Tau Ihu communities, with outbreaks at Madsen in 1931 and at Takaka in 1933. Like Okoha, Madsen was an isolated settlement and the transportation of the typhoid victims to Nelson Hospital proved difficult.<sup>251</sup> The difficulties of access to the hospital were not only physical but – until 1938 – also financial, at least for those who were not beneficiaries of the tenths fund.<sup>252</sup> It is not surprising that Maori on Rangitoto in the 1930s viewed the hospital as a last resort and relied on the nursing and midwifery skills of a member of their community, Aunty Lou, who used traditional remedies.<sup>253</sup> The financial aspect is illuminated by statistics

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245. Sharyn Smith, brief of evidence, p 7

246. B Hippolite, brief of evidence on behalf of Ngati Toa, p 9

247. W Stafford, brief of evidence, pp 19–20

248. Bassett and Kay, 'Nga Ture Kaupapa', p 215; Walzl, *Land and Socio-Economic Issues*, p 272

249. Young, 'Maori Society', p 30

250. Morrow, 'Legacy of Loss', p 111

251. Bassett and Kay, 'Nga Ture Kaupapa', pp 234–235; Clark, 'Social and Economic Impact', pp 28–29

252. Young, 'Maori Society', pp 34–35

253. Bassett and Kay, 'Nga Ture Kaupapa', pp 215–216

from around the region: during the two years 1927–29, Wairau Hospital treated 45 Maori, who paid 59 per cent of their fees, but the 14 Maori treated at Picton Hospital paid less than one per cent, and the same was true of the 44 treated at Nelson Hospital.<sup>254</sup>

In the late 1930s, however, access to medical assistance improved with the Government's provision of free hospital treatment (under the Social Security Act 1938), and the appointment of several district nurses. The long-established system of native medical officer subsidies was abolished at about this time. There was a move to a more preventive focus. By 1939, district nurses were making weekly visits to the Wairau and Waikawa, fortnightly visits to Havelock and Canvastown and less frequent visits to the isolated settlements in the Sounds. In 1940, J A Elkington offered his launch for transporting the district nurse to Rangitoto and carrying patients to hospital, but his offer was not accepted. A district nurse was eventually stationed at French Pass, in 1948. Four years later, she described working conditions as 'primitive', pointing to the long boat trips and the need to treat patients on board the boat, at times in total darkness.<sup>255</sup>

In the decade beginning in 1936, national Maori mortality rates from respiratory diseases, typhoid, and infant death decreased substantially, a decline attributed by James Belich to an improved Maori economic situation and resultant better standards of nutrition, as well as to the increased adoption of Western medical practices. He points to the initiatives of the district nurses, particularly those who took Maori medical practices into account.<sup>256</sup> Nevertheless, Maori in Te Tau Ihu were still disproportionately vulnerable to illness in the 1950s. After an influenza epidemic in 1954, the local doctor reported that Maori at Waikawa had 'been affected worse than any of the surrounding districts'. On a national level, there was a significant and successful effort towards reducing tuberculosis amongst Maori during the 1950s. That tuberculosis continued to be a significant problem, however, is shown by the high proportion of Maori cases (11 out of 41) among those notified in the Marlborough health district in 1953.<sup>257</sup>

While Maori continued to be a marginal socio-economic group they would continue to suffer disproportionately from ill health. The gap substantially narrowed over the twentieth century but disparities between Maori and non-Maori have continued until today. A recent study has found that Maori life expectancy at birth was eight to nine years lower than non-Maori life expectancy at the end of the twentieth century. This study, a joint University of Otago and Ministry of Health project, examined the ethnic disparity in life expectancy, the variation in trends depending on socio-economic position and the interactions between ethnicity and socio-economic position. The study found that variation in Maori mortality

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254. Young, 'Maori Society', pp 34–35

255. Ibid, pp 37–43

256. Belich, *Paradise Reforged*, pp 469–470

257. Young, 'Maori Society', pp 30, 66

rates for the 1981–99 period was not due solely to socio-economic factors and that ethnicity is also a significant contributing factor. It concludes that:

Socio-economic position and ethnicity exert both joint and independent effects on mortality through multiple pathways, and both must be addressed through health and social policy settings if health inequalities – between ethnic groups and social classes – are to be reduced and ultimately eliminated.<sup>258</sup>

This has implications for our consideration of the historical experience of Te Tau Ihu Maori. It suggests that Maori ill health is not attributable to socio-economic marginalisation alone, and that cultural marginalisation has had a detrimental impact too. Such a proposition is congruent with the evidence we received from claimants like Jane Du Feu of Te Atiawa, who pointed not only to the effects of socio-economic marginalisation but also to the impact of the loss of Maoritanga and te reo on the health of their community.<sup>259</sup>

#### 10.6.5 Migration and the break-up of community

The evidence of claimant witnesses gave a sense of the cultural losses suffered by the small Maori community of Te Tau Ihu. For example, Laurelee Duff of Ngati Tama and Te Atiawa described the ‘hidden costs’ associated with selling reserve land:

Those who relinquished their interests in these lands gave up much more than the land itself. For some it was a severance from their turangawaewae. Many joined the ‘urban drift’ to find education, training and employment, almost always in other districts of New Zealand or even overseas.

Within a generation or two the uri [descendants] of many of those out-migrants lost their connections to their papakainga tuturu [original home]. On the other hand we still have dozens of whanaunga [kin] who have returned at every opportunity, and this continues down to the present generation. . . .

Because so few of the tangata whenua could remain on their whanau land in Mohua other very important things were lost – the support of whanaungatanga, knowledge of whakapapa, knowledge of history, knowledge of tikanga, and the very heart of our culture, te reo itself.<sup>260</sup>

Members of Ngati Toa and Ngati Koata similarly described the emotional cost of the migration from Rangitoto and the Croisilles to urban centres. Oriwa Solomon explained

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258. Ministry of Health and University of Otago, *Decades of Disparity 111: Ethnic and Socioeconomic Inequalities in Mortality, New Zealand, 1981–1999*, Public Health Intelligence Occasional Bulletin 31 (Wellington: Ministry of Health, 2006), pp xi–xii

259. Jane Lu Creita Du Feu, brief of evidence on behalf of Te Atiawa, [2003] (doc 129), pp 18, 30

260. Duff, brief of evidence, pp 4–7

that 'from about the 1930s, onwards many families were more or less forced into town because of the difficulties of making a living on D'Urville and the Outer Sounds.'<sup>261</sup> In Ben Hippolite's words:

My whanau were deeply moved when we had to leave our ancestral land and move to Nelson. There was a lot of weeping and wailing. The worst part was when we left Madsen Bay by launch, leaving our cousins still at Madsen. There was a great big tangi because when you separate like that no one knows when you'll see each other again. It was quite heart wrenching.<sup>262</sup>

The break-up of the Motueka community has a long history, recounted for us by Paul Morgan of Ngati Rarua. The first migration from Motueka to the Wairau occurred after Whakarewa was granted to the Anglican Church for a school in the 1850s. There was a further wave of departures in the 1860s, which Mr Morgan said was 'due to increasing economic hardship':

Those who stayed kept the fires burning and they've acted as the kaitiaki for the people in terms of a Rarua presence. There are now only two Ngati Rarua families that maintain ahi kaa in Motueka from the time of the first occupation.<sup>263</sup>

As we explained in chapter 9, from the end of the nineteenth century the occupied tenths land at Motueka, as it ceased to be occupied, was progressively included in the estate leased by the Public or Native Trustee. According to Mr Morgan,

In 1905 there had been about 400 acres at Motueka in direct Maori occupation. By my parents' time there was about 100 acres left. This sinking lid occurred over a period of two World Wars, when family members went away to fight, and a Depression. So it created great hardship and pushed families off the land . . .

By the time of the Second World War . . . tangata whenua in Motueka were few and far between. There wasn't the same community of political hapu/iwi affairs. The reason for this in my view is that it is directly attributable to the Crown's tight management of the land. The land is always a driving force to bring people together. When other people manage your affairs for a hundred years you increasingly become like an absentee landlord on the one hand (because the land is still yours), and like a beneficiary on the other hand (because you had no control). You've got no reason to come together especially when you're dispersed. Everything had become quite formalised with perpetual leases. We had just become numbers essentially.<sup>264</sup>

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261. Solomon, brief of evidence, p 7

262. B Hippolite, brief of evidence on behalf of Ngati Toa, pp 5-6

263. Morgan, brief of evidence, pp 2-4

264. Ibid, pp 9-10

Eleanor Park of Te Atiawa mentioned the limited opportunities available in Motueka for Maori of the next generation:

Mum always wanted us to go to Nelson to get an education – Mum often said that the only thing she could see in our future for us if we stayed in Motueka would be working in the tobacco fields. She knew it would be better for us if we moved away. It was almost like she knew we'd have a limited future in Motueka.

Today I realise how much our Maori side was left behind in Motueka, as we adjusted to living in a Pakeha-dominated world after we left.<sup>265</sup>

Ngati Rarua's Lee Luke was a teenager in Motueka in the late 1980s and early 1990s:

The children of my generation all moved away from the Pa. There was no work there for those people. Few of these have sought tertiary education. Most have gotten jobs where there is little training or qualifications required. You learn on the job. Service type of jobs. This seems to be changing with the next generation coming up.<sup>266</sup>

Rima Stephens of Ngati Rarua also described the lack of opportunities at Motueka that followed the decline of the tobacco industry, but spoke optimistically about recent developments within the community:

Although there used to be an influx of Maori seasonal workers, this came to an end when the tobacco closed [d]own. In recent years, however, Maori families have come down here again for work and to settle here permanently. It has changed the nature of the community. There is a stronger Maori sense now.<sup>267</sup>

Migration out of the region exacerbated the difficulties long experienced by a small scattered Maori population. As Mr Young writes, 'These were a people spread so thinly on the ground after the settlement of the region by Pakeha that their resulting lack of tribal infrastructure meant that they were exceedingly vulnerable to adverse effects of colonisation.'<sup>268</sup>

### 10.6.6 Education

We received very little technical evidence relating to education after 1920, although a number of claimants described their experiences of schooling in the region. A significant theme that emerged from claimant evidence was the impact of the Pakeha-dominated education system on the retention of te reo. Most evidence related to the witnesses' experience in schools

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265. Athalie Eleanor Te Uira Park, brief of evidence on behalf of Te Atiawa, [2002] (doc G7), p 16

266. Lee Luke, brief of evidence on behalf of Ngati Rarua, 11 August 2000 (doc A88), p 5

267. Rima Stephens, brief of evidence on behalf of Ngati Rarua, not dated (doc B12), p 6

268. Young, 'Maori Society', p 159

provided for the general population, as there continued to be few schools specifically focused on Maori communities in Te Tau Ihu.

Waikawa School was an exception, since it was located in a mainly Maori community. Its 81 pupils in 1954 were predominantly Maori.<sup>269</sup> Wairau Pa School, too, was located on a Maori reserve and served a Maori community. Ngati Rarua's Wiremu Stafford described the Wairau in the 1920s:

I was born at a time when the country was in a depression. There was no work for the people of the Pa. The children were most time sitting in the classroom with damp clothes. The school attendance was always down. This must of caused concern with the education department. I found out later they were conspicuous by their absence; no-one ever came to check on the school's performance. The entire area – the swamp, the floods, cast a gloom over the place.<sup>270</sup>

The school continued to operate until it was closed in 1970, when the roll was eight.<sup>271</sup> The teacher at the school in the 1950s, RD Holdaway, was critical of the community and what he believed was their failure to support the school pupils in their education. He assessed the general academic standard as low and noted that few pupils spent more than a year at secondary school before returning to the Wairau to waste time until reaching adulthood.<sup>272</sup>

The schools in more remote localities suffered from the additional problems of isolation. These difficulties were not peculiar to Maori communities of course, since Pakeha settlers were scattered throughout the Marlborough Sounds and indeed in many other remote and inaccessible parts of New Zealand. The question arises whether Maori children in isolated parts of Te Tau Ihu were provided with educational opportunities equal to those made available for Pakeha children. Here the case of the school at Okoha is relevant. It was maintained independently by the church after Government funding was refused in 1921, being operated as an Anglican school until the late 1930s when the falling population led the church to close its mission.<sup>273</sup> According to Ngati Kua's Sharyn Smith, Okoha School did not receive support from the Government again until at least 1950:

Without the church, we would have been totally deprived of the right to education and ongoing support. Commitment by the Crown was substandard. Even in the late 1940s, the school was provided by whanau and the Redwoods, until the Crown accepted responsibility for this.

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269. Young, 'Maori Society', p 66

270. W Stafford, brief of evidence, p 19

271. Loveridge, p 90

272. Walzl, *Land and Socio-Economic Issues*, pp 373–375

273. Melanie McGregor, brief of evidence on behalf of Ngati Koata, 1 February 2001 (doc B26), p 1; Locke, 'Poorest Tribe under the Heavens', p 126; Ault, pp 220–221

Ms Smith stated that there were between 15 and 20 pupils at Okoha during the 1950s. She commented on the difficulties in finding teachers who were willing to work in such an isolated school:

Teachers were provided through the education system and were [*sic*] usually trainee teachers as it was hard to get skilled people to come into such an isolated area that at the time had only boat access.<sup>274</sup>

It is of relevance to our discussion here that Okoha and some other remote settlements had been established not solely at the wish of the Maori residents themselves, but as landless natives reserves chosen and set up by the Government. Greater educational opportunities were part of the reason for Maori migration to Nelson from Okoha and other outlying areas.<sup>275</sup>

Several witnesses spoke of subtle but pervasive racial distinctions experienced in the school system. For example, Andrew Stephens of Ngati Tama stated:

In my school days my father would say, we had to learn like these Pakeha fellows, if we didn't learn then these people are going to take us out, we were to strive to be as good as if not better than [them]. We had no Te Reo in the school, absolutely nothing. Our culture has died because of this. Our school teachers didn't even like Maoris. I remember Mum coming down to the school one-day and gave him (the teacher) a bit of a curry up. He had made some comments about us Maoris, so she gave him a bit of a sort out. When I was at school they called me Maori Boy, that was my name. It didn't worry me when I was a kid, so what I'm a Maori boy, it wasn't seen as an insult to me. I don't think there was any malice in them either. We bits of hard cases too you know.<sup>276</sup>

Ngati Kuia's Waihaere Mason attended Canvastown School from 1942 to 1955. He commented on the lack of effort made to integrate Maori perspectives into the syllabus, and mentioned the sense of shame that seemed to accompany the role of Maori in New Zealand history studies:

There was no te reo or tikanga content in the programme. It was not encouraged. Our history received scant attention. Any historical conflict between Maori and European tended to be misrepresented, eg the 'Wairau Massacre' or the now 'Wairau Incident' and of course the 'Maori Wars'. There was always the shame element attached to it.<sup>277</sup>

Ngati Toa's Nohorua Te Kotua described the atmosphere in a Nelson State school in the 1940s:

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274. Sharyn Smith, brief of evidence, pp 7–9

275. Bassett and Kay, 'Nga Ture Kaupapa', pp 244–245; Locke, 'Poorest Tribe under the Heavens', pp 140–141

276. Andrew Stephens, brief of evidence on behalf of Ngati Tama, 26 February 2003 (doc K37), p 7

277. Waihaere Joe Mason, brief of evidence on behalf of Ngati Kuia, 21 March 2003 (doc L10), p 16

The breaking down of our culture began at Auckland Point School. We were strapped for speaking Maori. The headmaster even came over to the house [the Maori hostel] to tell our parents not to speak Maori to us, and not to speak Maori at all. Our parents believed the headmaster, and stopped speaking te reo. A whole generation lost te reo. The Pakeha educational authorities had a deliberate policy of assimilation of Maori into the Pakeha culture, based on destroying the language, the base of our culture. They were very successful here in Nelson. The marginalising of Maori families into small groups through relocation continued and enforced the isolation from their culture. The desire to be a part of the group with which you were associating daily meant becoming 'more Pakeha' and 'less Maori'. It was for survival, Pakeha was the dominant culture.<sup>278</sup>

Dr Barrington quotes several Ngati Koata people who went through school in the 1930s and 1940s and remembered the suppression of te reo. For example, Pene Ruruku, who attended Whareatea School on Rangitoto, commented that 'a lot of (the students) were told not to speak the reo or they would get the strap . . . So the kids knocked off speaking the reo in school'. Similarly, Terewai Grace stated that 'I wasn't taught Maori at school, in fact I was discouraged from speaking it . . . My parents spoke Maori fluently, but they had been told by the teachers that children can only learn one language and that language is English.'<sup>279</sup>

Judith Billens of Te Atiawa and Ngati Tama described a similar situation in Takaka:

Te reo was forbidden at school. My mother understood the language but did not speak te reo. I use [*sic*] to hear my grandmother talking in Maori, especially if she didn't want us to know what they were talking about. My mother would understand what she was saying and used to just answer her, in just one or two words, but not speak fluently.<sup>280</sup>

Those who had gone through such experiences felt discouraged in passing on their Maori language skills to their children. Brian Norton, born in Picton in 1941 and descended from Te Atiawa and Ngai Tahu, explained:

Sadly, the language died with our old people. The attitude back then was that if you were to achieve in Te Ao Pakeha (The Pakeha World) you spoke Pakeha not Maori. To help their mokopuna achieve in this new world, Maori was almost never spoken to those young people, with the result that the language began to die and people became alienated from their culture<sup>281</sup>

The far-reaching impact of this language loss was mentioned by Barry Mason of Ngati Rarua:

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278. N Te Kotua, brief of evidence on behalf of Ngati Koata, para 30

279. Barrington, supplementary brief of evidence on behalf of Ngati Koata, paras 78–83

280. Judith Merenako Billens, brief of evidence on behalf of Te Atiawa, [2002] (doc G10), p 11

281. Brian Norton, brief of evidence on behalf of Te Atiawa, 1 January 2003 (doc 13), p 10

There is not one Ngati Rarua who was born in Te Tau Ihu who uses te reo as their first language including myself. And only a few who would claim fluency in te reo. With our loss has occurred an erosion of our knowledge of tikanga, waiata, karakia.<sup>282</sup>

Te Tau Ihu Maori educational standards were lower than those of the region's Pakeha. Dr Barrington cites the Education Department's 1917 report on Nelson, which stated that comparatively few Maori children were attending primary schools and 'few [were] reaching the higher standards.' This reflected national discrepancies. Although we do not have statistics for Te Tau Ihu, nationally in 1928 only 3.7 per cent of Maori attending native schools and 3.4 per cent attending board schools were in standard 6, compared with 10 per cent of Pakeha pupils. The gap had narrowed by 1948 (6.7 per cent compared with 9.2 per cent), but there was still a significant discrepancy.<sup>283</sup>

The difficulties of accessing secondary school education were highlighted by Anne Chapman of Ngati Tama, who began her primary schooling in the 1920s. She stated that neither she nor her 13 siblings went to secondary school because 'Takaka was too far away to go in daily, and there was no school bus service then.' Ironically, Ms Chapman's family lost some of their land to the Education Department. She described the insistent pressure placed on her mother by the department to sell five acres for the Golden Bay High School.<sup>284</sup>

We received evidence about schooling from a more recent generation of Te Tau Ihu Maori too. Rima and Una Stephens grew up in the by then predominantly Pakeha township of Motueka in the 1960s and 1970s. They described the cultural discrimination that they experienced at school and which contributed to their leaving prematurely. Although conditions had changed since their mother's childhood, when 'pupils were smacked by their school teachers for speaking Maori', both sisters felt alienated by an education system that continued to marginalise te reo and other aspects of Maori culture. Their mother was fluent in Maori but, according to Rima, 'didn't want to teach her children Maori because it wasn't used in the school.'<sup>285</sup> As a third former, Una argued for Maori to be included in the school curriculum. The women described a sense of disconnection from the school system, which Una says made her feel that she was being 'observed by Pakehas.'<sup>286</sup> Both left school at age 15 to take up employment, first on their family farm and then in seasonal and low paid work in their teens and early twenties. In 2001, it was with satisfaction that Una Stephens noted the presence of a 'whanau class at the Motueka [primary] schools, giving her children an environment to 'grow up knowing where they belong and who they are.'<sup>287</sup>

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282. Barry Mason, closing statement, [2004] (doc B20(a)), p 1

283. Barrington, brief of evidence on behalf of Ngati Koata, paras 91-102

284. Chapman, brief of evidence, p 8

285. Rima Stephens, brief of evidence, p 2

286. Una Stephens, brief of evidence on behalf of Ngati Rarua, 1 February 2001 (doc B13), p 4

287. Ibid, p 7

Another witness who spoke on this topic was Ngati Koata's Melanie McGregor. She described her own late development of fluency in te reo and the efforts of Te Tau Ihu Maori in recent times to bring about a resurgence in the language:

My experiences with te reo begin with my mother. My mother went to school at Haukawakawa on Rangitoto with Mr Burton. It must have been very difficult for her, as she was not encouraged to speak Maori at school, and reprimanded at home for speaking English.

As a result of our mother's experience, she did not teach te reo to anyone of our whanau. We knew the basic words, but had no real grasp of the language. My parents spoke te reo to each other often, but we didn't understand what they were saying.

I had always had an interest in the language, and I really wanted to know what my parents were talking about. But they either wouldn't or couldn't teach me because of the way they had been brought up. I couldn't learn te reo at school, because it wasn't taught at the primary and intermediate schools I attended here in Nelson. It was as though te reo didn't exist.

Ms McGregor learned Maori only when she left Nelson to attend Te Wai Pounamu College, a secondary school operated in Christchurch by the Anglican Church.<sup>288</sup> Referring to recent efforts by Te Tau Ihu Maori to reinstate te reo in the school system beyond kohanga reo, she said that schools initially failed to provide adequate support for their Maori-speaking students. Her own children faced problems because their teachers were not equipped to understand tikanga, and the secondary school was unable to provide teachers for the advanced children in their classes.<sup>289</sup>

#### 10.6.7 Overview, 1920–c1960

In the years between 1920 and 1960, Te Tau Ihu Maori communities struggled to sustain themselves on an inadequate land base. Land sales in this period further reduced the amount of Maori-owned land, and a substantial portion of Maori land was leased to non-Maori. Most whanau received very low rental income from these leases. There were pockets of land being farmed by Maori but this could sustain only a small minority of the population. Te Tau Ihu Maori were much more likely to be employed as farm labourers than farmers. These economic difficulties were instrumental in driving many people away from their ancestral land.

Government assistance with land development was finally available for some Maori in the region with the establishment of the Wairau development scheme in 1931. We did not

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<sup>288.</sup> McGregor, brief of evidence, p 1

<sup>289.</sup> Ibid, paras 15–17, 22, 27

receive specific evidence of why the provision of assistance in Te Tau Ihu was limited to a single scheme. From our review of reserves (see ch 7), it is clear that Maori land holdings in this region in the 1930s were mainly scattered, remote, and small in area (both individually and in total). The very point of development for the Crown, in one sense, was to bring just such remote, poor quality land into production if at all possible. Also, as Dame Evelyn Stokes pointed out, one problem with development schemes in Muriwhenua was that they were in fact attempted on too small and poor a land base to ever be viable.<sup>290</sup> We cannot conclude, therefore, that size, remote location, or poor quality were necessarily the reasons why Te Tau Ihu iwi did not receive greater development assistance from the Government.

For much Maori land in other parts of the country, however, development went hand in hand with consolidation – the swapping of scattered titles to consolidate Maori holdings into viable farms. Sometimes, Crown land was also swapped to help concentrate resources geographically, as well as to recombine the interests of whanau.<sup>291</sup> It may be that the Te Tau Ihu reserves were simply seen as too small, too poor in quality, and in particular too distant from one another to appear viable prospects either for consolidation or development. More likely, however, is that the lack of relatively large and concentrated populations was the key. Ngata's schemes needed titles that could be swapped and concentrated into blocks of reasonable size, but also a large population of under-employed Maori both to do the work of clearing and improving remote, poor land, and to benefit from the schemes. The small and scattered Maori population of Te Tau Ihu may well have been the primary factor in preventing the establishment of such schemes, especially in the few places like Rangitoto, where there might have been enough Maori land in the 1930s for attempts at consolidation and development. Even the Wairau reserve, where there was a concentrated population (supplemented by workers from Waikawa) on contiguous pieces of land, proved a difficult proposition for successful farming.

The evidence is not sufficient to allow of a finding on why additional development assistance was not provided to the Maori landowners of Te Tau Ihu, or whether this inaction on the part of the Crown was a breach of the Treaty. We do, however, note the fact that only one development scheme was set up in our inquiry district. It was clear to officials like James and Alexander Mackay that the reserves were too small to develop in any significant way for nineteenth-century pastoralism. In our view, this was still the case for the kinds of farming considered viable in the 1930s, especially after the loss of Taitapu, Wakapuaka, much of Rangitoto, and of the extra purchased land, not to mention attrition among the

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290. Dame Evelyn Stokes, *The Muriwhenua Land Claims Post-1865: Wai 45 and Others* (Wellington: Waitangi Tribunal, 2002), p 226

291. See Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), chs 11, 14, for a discussion of the principles and practice of consolidation and State-assisted farm development.

reserves (see chs 7, 8).<sup>292</sup> An insufficient base was left for the kind of development assistance available to others (both Maori and settlers) in the first half of the twentieth century. Only a significant injection of Crown land (or of land purchased from settlers) could have made Maori development schemes a reasonable prospect in Te Tau Ihu. In our view, this was one of the prejudicial effects of the Crown's actions as described in chapters 4 to 9.

As with the development schemes nationwide, progress on the Wairau scheme was slow and characterised by a lack of consultation with the owners. Flooding continued to be a major problem, with effects not only on farm development but also on the living conditions of the people. Limits to the Government's assistance for Wairau Maori may be seen in the lower pay rates received by Maori relief workers employed on the scheme. Limits are also apparent in the Crown's response to ill health and inadequate housing in the area, and the reliance on the Native Trustee to assist Wairau Maori after severe floods.

The tenths benefit fund remained a significant source of health, education, and welfare assistance until the establishment of the welfare State in the 1930s (the fund was eventually closed, in 1956, from which time the whole of the rental income was distributed to the beneficial owners). Maori throughout Te Tau Ihu benefited significantly from the health and welfare measures introduced by the first Labour Government, but they remained a vulnerable section of society, with limited economic opportunities and low standards of housing, health, and education.

The Government's response to Maori housing needs, including those of the growing urban Maori population, was tardy. This slow response was highlighted by the overcrowded, insanitary conditions at the Nelson 'Maori House' throughout the 1940s. With limited access to other housing in the town, those who moved from the rural areas had little choice but to live in sub-standard conditions at the hostel.

Inadequate and overcrowded living conditions increased the vulnerability of the Maori population to diseases such as tuberculosis. As long as Te Tau Ihu Maori remained concentrated in the lower socio-economic stratum they would continue to suffer from the ill health associated with poverty. Poverty also affected access to education, as the evidence of several claimants revealed, and claimants also pointed to the less tangible but nonetheless real effects of cultural marginalisation on their ability to succeed at school and on their wider ways of life. In some parts of Te Tau Ihu, Maori communities were further disadvantaged by living in places that were far from the services provided by the Government in more settled parts of the region.

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292. In referring to the 'loss' of Wakapuaka, we mean that it was lost to the community that had lived on it before the Native Land Court awarded sole ownership to Huriā Matenga (although one whānau was readmitted to a quarter of the remaining pieces in 1938). Thirty-five per cent of the block had been alienated by that time. With 11,376 acres remaining, it could presumably have been the site of a Maori land development scheme had its ownership not been so severely restricted and had its community not had to move away.

## 10.7 LEGAL SUBMISSIONS

We start this section with Crown submissions because most of the claimant submissions were framed in response to the Crown's position on socio-economic issues, a position expressed by Crown counsel in his opening submissions and maintained in his closing submission.

### 10.7.1 Crown submissions

In the Crown's submissions on generic issues, counsel cautioned against a tendency he detected in claimant evidence and submissions – a propensity to 'downplay or ignore social and economic trends which may have developed irrespective of Crown intervention, eg urbanisation, changes in traditional tribal structure and inter-iwi relationships, and outward migration', together with 'a tendency to oversimplify cause and effect by identifying Crown culpability as the single cause of all negative outcomes for Te Tau Ihu Maori'.<sup>293</sup>

In his opening submissions, Crown counsel stated that the Crown's failure to ensure that Te Tau Ihu Maori retained sufficient land for their present and future needs was 'the more compelling aspect of the claims.' This admission was qualified by the statement that:

Judgments about the quantity of land required for future needs are not easy to make and changing patterns of use over time may often reflect adversely on the wisdom of any such judgment. Neither is it a straightforward assumption to say that retention of land holdings necessarily produces social and economic well being.<sup>294</sup>

Counsel reiterated this position in his closing submissions. He accepted that in failing to ensure sufficient land the Crown had breached its duty of active protection, but emphasised the need to consider this matter in its proper historical context. He repeated the assertion that due regard must be paid to 'general social and economic trends which may have developed irrespective of Crown act or omission', and stated that 'not all negative outcomes for Te Tau Ihu Maori (economic or otherwise) can be attributed to Crown acts or omissions'.<sup>295</sup> People moved away from the region, for example to Taranaki, for reasons that were not connected with the inadequacy or unsuitability of their reserves. Counsel stated that 'land holding per se is not a guarantee of security or property [*sic* – prosperity]'.<sup>296</sup>

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293. Crown counsel, submissions on generic issues, 20 September 2002 (paper 2.371), p 6

294. Crown counsel, opening submissions, 14 November 2003 (paper 2.748), p 6

295. Crown counsel, closing submissions, 19 February 2004 (doc T16), pp 3-5

296. *Ibid*, p 118

**10.7.2 Claimant submissions**

Claimant counsel took issue with the Crown's position, which they viewed as an attempt to reduce the Crown's responsibility for the consequences of landlessness. They were agreed that the inadequacy of the reserves, and the gradual loss of much of the reserve estate, had serious negative effects on the socio-economic status of the iwi of Te Tau Ihu. In general, they emphasised the connection between landlessness and the loss of resources with poverty and ill health, resulting in economic, social, and cultural problems.

Counsel for Ngati Koata submitted that at the time of the purchases the Crown promised that land sales would bring social and economic benefits. These benefits did not eventuate, and instead the iwi was left bereft of most of its lands and resources and lacking control over its way of life, language, and cultural practices. This loss had 'disastrous consequences', including material poverty and sub-standard housing, as well as poor health and education. The spiritual link with the land was severed, and Ngati Koata could not 'participate with mana in the new society and economy'. Te reo was given no protection, but rather was 'deliberately oppressed in the education system', and this loss 'disadvantaged the education and career opportunities of subsequent generations of Ngati Koata'. With regard to the Nelson hostel, the Crown failed to involve Maori in management decisions concerning the institution or to respond to poor living conditions there. In failing to ensure that the iwi had sufficient land and resources and retained rangatiratanga, and in failing to provide sufficient health services and educational opportunities, the Crown failed in its duty under the Treaty, and Ngati Koata were prejudiced thereby.<sup>297</sup>

For Te Atiawa, counsel submitted that loss of land and resources had resulted in 'the destruction or erosion' of the iwi's economic base and social patterns, including language and culture. She pointed to the migration of many iwi members away from the region as a result of landlessness, noting that not all of them had subsequently been able to re-establish their connections with the whenua in Te Tau Ihu. Counsel took issue with the Crown's emphasis on the small and mobile nature of the Maori population in Te Tau Ihu, contending that this was no basis on which to consider Treaty rights. She also disputed the Crown's attempt to minimise the connection between landlessness and socio-economic problems, submitting that the Crown was required to ensure that Maori 'were and are provided with the means to develop, exploit and manage their resources in a manner consistent with cultural preferences'. As a result of the Treaty breaches committed, Te Atiawa had suffered prejudice. If the Treaty had been honoured by ensuring retention of resources and control over them, however, 'Te Atiawa would be a prosperous people'. Instead, the inadequacy of the land held 'made economic prosperity for Te Atiawa impossible'.<sup>298</sup>

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297. Counsel for Ngati Koata, closing submissions, 9 February 2004 (doc T7), pp 73–75, 116–125

298. Counsel for Te Atiawa, closing submissions, 10 February 2004 (doc T10), pp 177–178, 203, 257–260; counsel for Te Atiawa, supplementary closing submissions, 18 February 2004 (doc T10(a)), p 16

In supplementary closing submissions, Te Atiawa made further reference to ‘the socio-economic and emotional toll taken by the cumulative effects of Treaty breach’. Counsel admitted that the evidence was not comprehensive, and agreed that it was not possible to attribute poor socio-economic outcomes to Treaty breaches in a specific or precise way. She argued, however, that the evidence was ‘illustrative’ of the failure to achieve what the Treaty signatories envisaged – ‘two healthy prosperous peoples sharing a nation’. To support this conclusion she referred to evidence that ‘painted a dire and cheerless picture’ of health disparities between Pakeha and Maori in Nelson–Marlborough, correlating with lower Maori income, in the period since 1990. She also made reference to evidence that the number of Te Atiawa with cultural knowledge and Maori-speaking capability was small – a situation attributable to the historical exclusion of Maori culture from the educational system – and that Te Tau Ihu Maori were ill served by a justice system that was divorced from their community. She submitted that Te Atiawa had below-average and unacceptable health and education statistics and inadequate access to health, education, and justice services, and that it was a breach of Treaty principles for the Crown to fail to actively remedy this situation. Concluding, she argued that land loss had serious consequences for ‘the minds and bodies’ of those who suffered the loss: ‘inter-generational poverty of pocket and spirit is the result for Te Atiawa.’<sup>299</sup>

Counsel for Ngati Toa submitted that the departure of many members of the iwi from Te Tau Ihu after the middle of the nineteenth century was mainly due to the loss of land and other resources. Those remaining faced economic hardship, poor living conditions, low standards of health and education, and limited employment opportunities. It was the acts and omissions of the Crown that brought about the loss of traditional resources and prevented Ngati Toa from profitably utilising and developing the resources that remained. Counsel drew attention to the inadequacies of the Crown’s provision of services, with specific mention made of the poor conditions at the Nelson ‘Maori House’, the discriminatory old-age pensions policy, the poor management of health services, and the Pakeha-dominated education system.<sup>300</sup>

For Ngata Tama, it was submitted ‘that it is beyond reasonable question that the loss of land played a huge role in destroying any hope that Ngati Tama may have had of participating in the settler economy, achieving economic prosperity and retaining social and cultural cohesiveness as a tribe’. The effects on the health and prosperity of the iwi – effects that were ‘directly attributable to actions and omissions of the Crown – were only too clear, and the failure of the Crown to protect Maori from the ‘devastating’ effects of colonisation were a breach of the Treaty and its principle of active protection. As well as having adverse economic effects, Crown policies eroded Ngati Tama mana and rangatiratanga, left

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299. Counsel for Te Atiawa, supplementary closing submissions, pp 40–47

300. Counsel for Ngati Toa Rangatira, closing submissions, 5 February 2004 (doc T9), pp 51–55, 116–120, 122

language, culture, and tikanga ‘in a parlous state’, and in general reduced the tribe to ‘a state of profound dislocation, marginalisation and weakness.’<sup>301</sup> A specific grievance identified was the Government’s reliance on the tenths fund for social welfare services that should have been the Crown’s responsibility (a complaint included in the submissions of Wakatu Incorporation also).<sup>302</sup>

Counsel for Ngati Rarua emphasised Maori expectations at the time of Crown purchasing, contrasting these with Ngati Rarua’s subsequent experience of individual and collective economic decline and the tribe’s ‘cascading social and physical disintegration.’ Quoting Mr Walzl’s evidence that holding out such hopes was the usual practice of Crown land purchasers in this period, counsel noted that, while there was no specific evidence of promises of collateral benefits during purchasing in Te Tau Ihu, it is still highly likely that they were made. He criticised the Crown’s submissions for ‘trivialising’ the importance of land sufficiency and ‘brutally’ ignoring the deliberate nature of the Crown purchasing programme, which aimed to acquire as much land as possible and rendered Ngati Rarua effectively landless. Counsel detailed the socio-economic problems experienced by Ngati Rarua in the late nineteenth century and noted that the number of viable Ngati Rarua communities in Te Tau Ihu fell from four to one (at the Wairau) by 1920. He pointed to the inadequacy of the Wairau reserve, which was affected by floods and inter-iwi competition, and ascribed the failure of the land development scheme there (the community’s ‘last opportunity’ to achieve a viable economic base) to the unsolved flooding problem, a lack of long term planning by the Crown officials who took over the land, and poor relationships between officials and reserve owners.<sup>303</sup>

In supplementary closing submissions, counsel for Ngati Rarua endorsed and adopted the submissions of Te Atiawa that detailed the disparities between the health profiles of Pakeha and Maori in today’s Te Tau Ihu. He contended that the poor statistical picture of Maori health reflected a history of Crown omissions and breaches of Treaty principles and clearly indicated the prejudice suffered by the tribes of Te Tau Ihu, including Ngati Rarua. The consequence of being deprived of an adequate land estate was that Ngati Rarua and the other iwi were left with no place to stand, no economic base, no opportunity to contribute to the new economy, poor health, elusive educational opportunities, and language and culture loss.<sup>304</sup>

The matter of collateral benefits was also included in the submissions of Rangitane, and taken further than in Ngati Rarua’s submissions. Counsel for Rangitane asserted that not

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301. Counsel for Ngati Tama, closing submissions, [2004] (doc T11), pp 64, 67–68, 113–116

302. Ibid, pp 25, 72, 77; counsel for the Wakatu Incorporation, closing submissions, 9 February 2004 (doc T8), p 74

303. Counsel for Ngati Rarua, closing submissions, 5 February 2004 (doc T6), pp 7, 9, 76–80, 96–100, 177–178

304. Counsel for Ngati Rarua, submissions in response to closing submissions of counsel for the Crown and Ngai Tahu, 12 August 2004 (paper 2.796), pp 21–23

only was the Government land purchase official McLean aware of Rangitane's belief that collateral benefits (the availability of educational and medical services and the chance to be involved in the settler economy) would be forthcoming, but also that the Crown had in fact for some years been promising the benefits of settlement. Although Rangitane's statement of claim included mention of low health standards and inadequate medical and educational services, these matters were not addressed in the tribe's closing submissions. Counsel did however review the 'sorry saga' of the flood-prone Wairau reserve and the development scheme there. He submitted that the flooding problem was caused by river control works carried out by Pakeha authorities with the knowledge of the Crown. The Crown did not act to protect the Wairau people, although the effects of floods on the reserve were well known. The development scheme was accepted by the owners in the hope that Government-funded protection works would solve the flooding problem, but this created an enormous debt and removed the land from the owners' control for many years, without ending the floods.<sup>305</sup>

Counsel for Ngati Apa claimed that the almost complete lack of recognition of the tribe's customary interests had a 'devastating' outcome for these claimants, including dispersal of the iwi members and the loss of normal iwi life – that is, a tribal base (*turangawaewae*), *mana*, social unity, language, and traditional knowledge. He also pointed to the lack of Crown provision of health, housing, employment, and educational opportunities for the iwi. Specific mention was made of the Crown's failure to promote the Maori language among Ngati Apa, and indeed of its denigration of *te reo* over many years.<sup>306</sup>

Counsel for Ngati Kuia emphasised the link between insufficiency of land (in terms of both quantity and quality) and the tribe's inability to achieve economic prosperity. She argued that the Treaty required the Crown to ensure that Maori retained enough land for their foreseeable needs, and that this obligation threw doubt on the Crown's suggestion that the Treaty did not guarantee successful economic (and other) outcomes for Maori or other citizens. The Crown was aware of the extent of land required for farming in the nineteenth century, and the importance of land-based industries in the New Zealand economy both then and now needed to be recognised. Counsel maintained that Ngati Kuia's poor health status was directly attributable to the failure to ensure that the iwi retained sufficient lands, and also to the allocation of landless natives reserves in places that were remote from employment opportunities and medical and educational facilities. In supplementary submissions she stated that in such isolated places the Ngati Kuia settlers were 'all but forgotten about by the State'. In these circumstances the obligation to provide health care was necessarily greater than the duty owed to other citizens, and the Crown should have taken more action to ensure that Ngati Kuia did not suffer unduly from poverty and ill health.

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305. Counsel for Rangitane, closing submissions, 5 February 2004 (doc T4), pp 27, 39–42; Rangitane statement of claim (claim 1.1(f)), pp 58–59

306. Counsel for Ngati Apa, closing submissions, 2004 (doc T3), pp 5, 28–29, 46, 50

Counsel's conclusion was that Ngati Kuia suffered prejudice from the Crown's failure to actively protect the iwi from the adverse effects of settlement, both indirectly (by addressing economic, social, and environmental issues) and directly (by providing medical care). In addition, she argued that there was a direct correlation between these failures and the poor education of Ngati Kuia members. The Crown failed to provide adequate educational facilities and protect the taonga of te reo.<sup>307</sup>

### 10.8 TRIBUNAL CONCLUSIONS

Three major issues arise from the evidence and submissions relating to the socio-economic experience of Te Tau Ihu Maori:

- ▶ What was the socio-economic position of the Maori population of this region after the major land purchases of the mid-nineteenth century?
- ▶ To what extent was this socio-economic position the result of the fact that the iwi of Te Tau Ihu were left with insufficient land?
- ▶ Was there an adequate Crown response to the socio-economic problems experienced by Te Tau Ihu Maori since the mid-nineteenth century?

#### 10.8.1 Socio-economic deprivation

It is clear from the preceding narrative that Te Tau Ihu Maori have long experienced socio-economic difficulties. After the rapid alienation of the bulk of the land they held in 1840, the iwi of this region were reliant on an inadequate land base. As we have seen, this reality was by no means unknown to the Crown, since it was the subject of reports by Government officials as early as 1863. Life on the reserves from the 1860s onwards was difficult, as is evident from the marginal economic status of the resident Maori, the incidence of ill health among them and the slow recovery of their population numbers. Te Tau Ihu Maori were afflicted with typhoid, tuberculosis, infant mortality, and other health problems associated with inadequate living conditions. They struggled in the face of limited education and employment opportunities, difficulties that became increasingly apparent in the post-war period of urbanisation.

These troubles were epitomised in the situation observed at a particular settlement, the Wairau, in 1956. Commenting on the lack of educational achievement among Wairau school pupils, the local teacher stated that the hygiene and standard of living in the community was variable, and in some cases 'deplorable', but he also drew attention to the loss

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307. Counsel for Ngati Kuia, closing submissions, 17 February 2004 (doc T14), pp 44–45, 63, 64, 73–76; counsel for Ngati Kuia, supplementary closing submissions, 23 April 2004 (paper 2.788), p7

of tribal cohesion, language, and culture.<sup>308</sup> Writing for an iwi in another part of Te Tau Ihu, Ms Clark echoes the Wairau teacher's comments when she remarks on Ngati Tama's loss of Maoritanga and refers to the iwi as 'detrivalised'.<sup>309</sup> In reference to the situation at the Wairau, however, Mr Walzl's emphasis is somewhat different; he writes that, although the teacher:

is probably right in describing the cultural no-man's land into which Wairau Ngati Rarua had fallen, he is wrong, however, in his inferences as to why this had occurred. Furthermore, as the claim of Ngati Rarua before the Tribunal today has shown, he had overstated the loss of tribal identity.<sup>310</sup>

We agree with this last point. Notwithstanding the demoralising cultural, social, and economic problems that Te Tau Ihu Maori have experienced (and are often still experiencing), their courage and resilience was evident to us throughout the hearing process. The iwi of Te Tau Ihu have undoubtedly suffered social, economic, and cultural deprivation and been a marginal group in the region since at least 1860. In spite of this, they have retained their sense of identity, and this was expressed during the hearings. A renewal of confidence and redevelopment of iwi identity is also suggested by the dramatic increase in the number of people who affiliated with the iwi of Te Tau Ihu in the 2006 census.

Nevertheless, socio-economic problems remain. We make this statement in full awareness that despite the adverse circumstances facing them, many Te Tau Ihu families and individuals have achieved social and economic success. Overall, however, analyses of the 1996 census statistics such as that made by Ms Clark reveal significant disparities between Maori and non-Maori across the range of socio-economic indicators. Te Tau Ihu Maori had lower standards of education, lower income and higher rates of ill health and mortality (particularly in association with potentially preventable illnesses such as respiratory infections and the diseases responsible for infant mortality).<sup>311</sup> Because this statistical material is now 10 years old, we have not presented the details of the analyses. It is doubtful, however, whether the general pattern outlined has been reversed in the last decade.

Such an outcome is a tragic negation of the promise held out by the Treaty. Even if the Treaty did not guarantee successful socio-economic outcomes, as Crown counsel reminded us, it did commit the Crown to active protection of Maori from the unrestrained effects of colonisation. The Treaty suggested that both Maori and Pakeha would share in the prosperity of New Zealand. The preamble speaks of the Crown's desire to protect the just rights and property of Maori and to secure to Maori the enjoyment of peace and good order. As a whole the Treaty holds out the assurance that despite settlement, or rather because of it,

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308. Walzl, *Land and Socio-Economic Issues*, pp 373–374

309. Clark, 'Social and Economic Impact', p 65

310. Walzl, *Land and Socio-Economic Issues*, p 383

311. Clark, 'Social and Economic Impact', pp 39–40, 48–49, 55, 63

Maori would not only survive but also advance. The fulfilment of this promise depended not just on the Crown's protection of the resources Maori might wish to retain, but also on its care to ensure that a sufficient share was retained to enable survival and development. Maori would be participants in economic progress together with Pakeha. This is the Treaty principle of mutual benefit.

Later, when land transfers were negotiated, the Maori signatories anticipated that the coming of settlement and a new infrastructure would bring them considerable social and economic benefit. We accept, as was argued in several submissions, that it was highly likely that in Te Tau Ihu the Crown purchase officers followed the usual practice of assuring the iwi that they would benefit in many tangible ways from the admission of settlement and development into their midst. Specific evidence is lacking that such verbal assurances were made in the purchases we have described in earlier chapters, but we have no reason to think that that the purchasing officials in Te Tau Ihu did not do and say what they did elsewhere. Historians contributing to our inquiry, in particular Mr Walzl and Mr Armstrong, have provided compelling evidence that officials customarily endeavoured to persuade Maori landowners that sales would bring what have come to be called 'collateral benefits', and that these benefits were, as Governor Grey put it, 'the real payment' for the land. They have argued strongly that this is almost certainly what happened in Te Tau Ihu.<sup>312</sup> At the very time of the purchases in this region, Governor Gore Browne told the Colonial Office in London that 'from the date of the Treaty of Waitangi, promises of schools, hospitals, roads, constant solicitude for their welfare and general protection on the part of the Imperial Government have been held out to the natives to induce them to part with their land.'<sup>313</sup> This evidence of usual Crown practice was accepted by the Crown's historian Michael Macky, although he did not think it proved the use of such arguments in Te Tau Ihu.<sup>314</sup> We repeat, however, our view that it is very probable that land purchase agents in Te Tau Ihu did speak in these terms. On the Maori side, it appears that the iwi took these assurances seriously. It is probable that they saw the transactions less in legal and financial terms than as arrangements for establishing a new and continuing relationship with the Crown and enjoying the future benefits of that relationship. As Mr Armstrong put it during the hearings, they saw themselves as 'entering into a relationship with the British Empire . . . with the Queen, the Queen of a vast global trading empire, of enormous power, wealth and influence.'<sup>315</sup> This chapter has shown that the hopes held by the iwi of Te Tau Ihu in the 1840s and 1850s for social and economic prosperity were largely unfulfilled.

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312. Walzl, *Land Issues*, pp 307–309; Armstrong, 'Right of Deciding', pp 108–109; see also Dr David Williams, 'The Crown and Ngati Tama ki te Tau Ihu: An Historical Overview Report', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A70), p 121

313. Gore Browne to Colonial Secretary, 9 February 1857 (Walzl, *Land Issues*, p 308)

314. Michael Macky, 'Crown Purchases in Te Tau Ihu between 1847–1856', report commissioned by the Crown Law Office, 2003 (doc s2), pp 194–196

315. David Armstrong, under cross-examination, fourth hearing, 10–14 June 2002 (transcript 4.4, p 243)

### 10.8.2 The extent of Crown responsibility for socio-economic deprivation

The most recent Tribunal to consider how far the Crown was responsible for Maori socio-economic disadvantage was Hauraki, for which the report was published in 2006. The *Hauraki Report* identifies this issue as a 'fundamental question' that 'runs through all Treaty claims'. We agree with the Hauraki Tribunal that it is no simple matter to assess whether the marginal position of Maori is attributable to Crown actions and omissions or was 'the scarcely avoidable consequence of Maori engagement with the wider world since 1769'.<sup>316</sup> We cannot disagree, either, with Crown counsel's rejection, in our own Te Tau Ihu inquiry, of arguments that 'downplay or ignore' social and economic trends that might have developed regardless of Crown activities. Blaming the Crown as 'the single cause of all negative outcomes', he rightly suggested, was an oversimplification of cause and effect. It is certainly our view that to attribute social and economic developments entirely to the actions or inaction of governments would be to run against the grain of history. Governments were not principally responsible, for example, for the postwar drift to urban centres, which, furthermore, is a phenomenon not confined to New Zealand, or to Maori. The wider historical context is undoubtedly crucial, as the Crown argued. It would also be rash to leave no room for the unscrupulous actions of individual Pakeha, or for the consequences of any unwise decisions made by Maori themselves. Nevertheless, the claims made by the iwi of Te Tau Ihu assert strongly that it was the Crown, by bringing about the near landlessness that they have suffered since the nineteenth century, that was responsible for the poor socio-economic position in which they now find themselves. It is our task to assess whether this charge has any validity, and if so, to measure the extent of the Crown's responsibility.

The Hauraki inquiry considered the question of Crown responsibility extensively, and its report discusses it in more depth than we propose to do here. While explaining that it was 'not possible to be precise as to the relative impact of the Crown's actions and other factors', the Hauraki Tribunal found in regard to the Hauraki district that, although the Crown was not wholly responsible for social and economic outcomes, its land purchase policies 'undeniably affected Maori socio-economic circumstances'.<sup>317</sup> In the particular historical circumstances of Te Tau Ihu, too, we can unreservedly state that the rapid alienation of the greater proportion of the land, for which the Crown conceded it had considerable responsibility, left the iwi with a grossly inadequate land base. This was the enormously significant nineteenth-century event that set the scene for the downward spiral of Maori life in Te Tau Ihu. It was the fundamental reality that underlay the socio-economic problems they subsequently experienced. We therefore accept the submissions of the claimants on this matter.

The Crown argued that landownership in itself does not guarantee social and economic well-being. We agree that in principle there is no necessary correlation between landholding

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316. Waitangi Tribunal, *Hauraki Report*, vol 3, p 1200

317. *Ibid*, p 1230

and economic success, or between landlessness and poverty (though retention of land by Maori undoubtedly brings cultural benefits if nothing else). We cannot say with certainty that if more land had been retained by Maori in Te Tau Ihu they would have prospered. In the circumstances of nineteenth-century Te Tau Ihu, however, such retention would have made prosperity far more likely. Overshadowing all other reasons for the marginalisation of Maori in this region, is the plain fact that the Crown did not, as we explained in chapter 7, ensure the retention of an adequate land base for their present and future needs. We acknowledge that to flourish economically on this land would depend on its quality and location, whether tenure arrangements appropriate for modern needs could be worked out, and on the availability of farming skills and development capital, but none of these factors would be operative if the essential starting point, the retention of adequate land holdings, was absent.

As we have said, Maori expectations when entering into land sale transactions with the Crown contrasted sharply with the consequences of these transactions. In exchange for the alienation of vast tracts of land, Te Tau Ihu Maori secured small and often isolated reserves, which were themselves vulnerable to subsequent alienation, and which gave them a very insubstantial launching pad for economic development. The iwi had a poor start by being left with only a tiny share in land resources that eventually became very valuable for their agricultural, forestry, tourism, or subdivision potential. Few other opportunities for advancement were available. Aspirations fell and living standards declined.

Until well into the twentieth century, very little was done by successive governments to make sure that Maori were participating in the development of the region. It cannot be argued that Government intervention in such matters was too much to expect, for even in the nineteenth century the Crown often actively intervened in economic and social affairs to promote development. As we have seen, however, while this intervention was on occasion made on behalf of Maori, it was more often weighted towards the interests of the settlers and neglected or even harmed the interests of Maori. The provisions of the Advances to Settlers Act 1894, for example, did not expressly rule out Maori participation, but Maori land was effectively excluded by the nature of its title, which was regarded as inadequate security for loan finance. Beyond this was a pervasive belief that Maori were much less fitted than Pakeha settlers for transforming 'unproductive' land into prosperous farms.<sup>318</sup>

When land development assistance was finally made available to Maori in the 1930s, only one scheme was set up in Te Tau Ihu, at the Wairau. The Wairau land was difficult to farm and beset by tenure problems and inter-iwi tensions. Government officials overseeing the scheme never formed any clear idea of how the land should best be utilised or managed. Development was much slower than had been expected, and relief from flooding was even

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318. Tom Brooking, "Busting Up" the Greatest Estate of All: Liberal Maori Land Policy, 1891–1911, *New Zealand Journal of History*, vol 26, no 1 (April 1992), pp 92–93

slower and in the end came independently of the development scheme. Wairau Maori were often frustrated by the slow progress of development and by their lack of control over the land. The eventual return of the land came too late to halt the dispersal of many community members in the post-war period.

The Crown's failure to give active protection to Maori interests had another less tangible dimension. Mr Walzl contended in his report that the Crown failed not only to ensure an adequate land base but also to understand the relationship it had entered into with the iwi who sought and expected economic and social advancement through their agreements with the Crown. Mr Walzl asserts that as well as failing to provide 'effective kawanatanga', officials 'took away and undermined rangatiratanga'.<sup>319</sup> It was apparent from the claimants' submissions and evidence that they perceive this failure as indeed contributing to the cultural, social, and economic impoverishment of their iwi. The witnesses emphasised not only the difficult living conditions in their communities but also the sense of cultural alienation and marginalisation they experienced in growing up Maori in a Pakeha-dominated environment. Dispossession (which meant also that there was less land to support the succeeding generations, who often had to leave the region altogether) and the disempowerment that was closely linked with it clearly had a very negative long-term social, economic, and cultural impact.

In this sorry situation, the overwhelming reality was the loss of most of the land. The Crown had failed to prevent this in the first place, and subsequently failed to address the socio-economic problems it brought about.

### 10.8.3 The Crown's response to socio-economic deprivation

It is our conclusion that the Crown's response to the substantial socio-economic problems of Te Tau Ihu Maori, largely caused as they were by the history of land alienation, Pakeha settlement and economic development, fell short of the obligations imposed by the Treaty. Young aptly characterises the Crown's attitude to iwi communities as 'benign neglect'.<sup>320</sup> Of course it would be incorrect to say the Crown did nothing to address the plight of Maori in this region, but it appears to us that the Government's priority was almost always the Pakeha majority and a concern to keep costs down. This neglect was particularly injurious in view of the weakened state of Maori communities in this period, a time when it might have been expected that their needs would be given special attention.

Overall, Government social services may have been considerably less extensive in the nineteenth century, for Maori and Pakeha alike, but, as we pointed out earlier, it should not be thought that the Crown was at all times unwilling to intervene in economic and social

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319. Walzl, *Land and Socio-Economic Issues*, pp 383, 388

320. Young, 'Maori Society', p13

matters. Government intervention was of course evident at the outset in the purchase of land from Maori. In the late nineteenth century, the Government provided valuable financial assistance to Pakeha settlers, although at this same time its response to landlessness among Te Tau Ihu Maori was scarcely adequate. As we have demonstrated in this chapter, the connection between poverty, landlessness, and lack of resources for farm development was clear to officials from the 1860s to the early decades of the twentieth century. In chapter 7, we outlined the Crown's remedy for its failure to ensure the retention of a sufficient land base for Maori economic subsistence, let alone prosperity – the landless natives reserves. As we noted in 7.8, the failure of the landless natives reserves was directly ascribable to the Crown, and in thus failing to provide an adequate remedy, it breached the Treaty principle of redress. We repeat that finding here and add that, in view of the poverty of Te Tau Ihu iwi at the time and its connection to landlessness, this was a serious Treaty breach indeed. It was compounded by the failure to provide effective farm development assistance to Te Tau Ihu landowners in the twentieth century, when such assistance was being provided to settlers and later also to Maori who had retained land in other regions. We agree with the view of the Tribunal in its *Ngati Awa Raupatu Report* that those who lost the great bulk of their land early were not in a real position to benefit from Government assistance in the 1930s. Also, as with Ngati Awa, the people of Te Tau Ihu did not receive even the limited kind of settlement obtained by Ngai Tahu and others in the 1940s.<sup>321</sup>

Although the landless natives scheme and the later farm development schemes were critical missed opportunities for redress, they did show that the Government was prepared to contemplate taking active steps to improve the social situation of individuals and communities. The national system of subsidised basic medical care for Maori was made available in the region from an early date, and schools (some of them specifically for Maori) were open to Maori pupils who lived within reach. Emergency relief could be obtained, though not easily, from the civil list allocation for Maori purposes. When wider social welfare measures were gradually introduced, Maori were included, although the assistance was targeted at Pakeha and not Maori, as the discriminatory nature of pensions and relief payments in the early twentieth century demonstrates. Help for improving Maori housing was available from the 1930s, but the programmes were very slow to make an impression on the need. On the evidence available to us, there was a breach of the Treaty principle of equity in terms of the unequal assistance given to Maori in the early decades of social welfare. We lack sufficient evidence to judge its severity or the degree of prejudice suffered by the Maori people of Te Tau Ihu.

The deficiencies in the Crown's provision of health care, education, welfare, and housing for Te Tau Ihu Maori throughout the nineteenth and much of the twentieth century are highlighted in this region by a peculiarity of the situation there – the existence of the tents

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321. Waitangi Tribunal, *Ngati Awa Raupatu Report* (Wellington: Legislation Direct, 1999), pp 101, 130

fund and the Government's tendency to rely on it to help meet Maori needs. We were not given precise quantitative information about the extent of expenditure on Maori purposes by the Government or by the tenths benefit fund, or about the proportion contributed by each agency. It is clear, however, that the Crown often treated the fund as a partial replacement for Government spending and not as a supplement for such spending. Some of the expenditure funded in this way was undoubtedly of benefit to Te Tau Ihu Maori, and it may not have been made at all if trust money had not been available. For example, the town hostels filled a need that was not always recognised in ordinary Government budgets (although they were sometimes provided in other areas), and the provision of so many subsidised doctors may not have been made for such a small Maori population if the usual Government policies had been followed. The people of Te Tau Ihu valued the native medical officer system and on occasions defended it from threat.

In other areas of provision, such as education and emergency relief, however, benefit fund moneys cannot be seen as supplying services that would not have been available otherwise. Funds from this source should have been additional to normal Government spending rather than a replacement of it, and thus could have been used to help improve services, especially in remote areas. It was unfair to the beneficiaries that their money was being spent on services that in other places were provided from general Government funds. Furthermore, although the tenths money did not come from the coffers of the State, Government departments exerted considerable control over its use, little or no consultation being held with the beneficial owners as to how it was expended. If the owners had controlled the funds, they might well have used them to extend and improve the Crown-funded services to which they already had a right.

Overall, we find that the use of the tenths fund to pay for services more properly the responsibility of the Government was in breach of the Treaty principles of partnership, equity, and equal treatment. To the extent, however, that the fund was expended to provide assistance over and above that provided by the Government elsewhere, we do not make a finding of Treaty breach. We do, however, find that the failure to consult or act in partnership with the fund's owners in the making of such decisions was in breach of Treaty principles. It was a clear infringement of the tino rangatiratanga of the fund's owners.

It has been suggested that Crown action should have included protective measures in the area of Maori language and culture. In Te Tau Ihu, as elsewhere in New Zealand, many officials rejected or simply ignored any Maori claims that language and culture were important in the life of their communities. They gave no thought, for most of the period under consideration, to the protection of te reo or Maori culture in the education system or elsewhere. Such protective action was not part of predominant official thinking until recent years, although it is often argued now that it could and should have been, and that such disregard for the value found by Maori in taonga such as te reo and other cultural property is unacceptable.

We note, however, in agreement with the Hauraki Tribunal, that the State was not monolithic and that the Crown's actions may reasonably be measured against options proposed to it at the time. Alternative policies were canvassed with some limited success, such as Ngata's efforts to get te reo established as a university subject, which bore fruit after the Second World War.<sup>322</sup> State development schemes and State assistance for the building of marae and wharehau were, under Ngata as minister, aimed to promote, strengthen, and build on the foundations of Maori culture and tribal identity rather than destroy them. As the central North Island Tribunal also argued, Maori and others proposed alternatives to assimilation even at the height of its official predominance in the 1950s and 1960s.<sup>323</sup> We accept the evidence of the claimants in our inquiry that it was considered necessary for them to learn the English language and culture in order to survive and prosper. What was disputed at the time, by Ngata and others, was that it was also necessary to stop being Maori (or speaking Maori) in order to do so.

Language and culture were, in any case, particularly vulnerable in such an overwhelmingly Pakeha environment as Te Tau Ihu, and that they survived at all is remarkable. Even so, as we saw at several of our hearings, the local people had to bring in North Island relatives to whaikorero for them. The damage that has clearly been done to the culture and te reo in Te Tau Ihu is directly connected with the tremendous diminution of the land base and tribal turangawaewae. The erosion of language and culture was mentioned many times in claimant testimony and submissions, and we accept that this loss is keenly felt by the iwi of Te Tau Ihu. The role of the Crown in language and culture loss is a complex matter, however, and we were not given any detailed research from which we might have drawn solid conclusions about the situation obtaining in Te Tau Ihu specifically. The issue has been discussed in a wider nationwide context by the Tribunal in another report.<sup>324</sup> We encourage the Crown to maintain and extend its current efforts to support national language and cultural initiatives, and we commend the organisations endeavouring to preserve te reo and other cultural taonga in Te Tau Ihu. We recommend that the Crown constantly review the degree of support necessary for the retention and promotion of te reo in this region, in consultation and partnership with the iwi of Te Tau Ihu.

Supplying Government services to Maori in Te Tau Ihu was not easy. The Maori population was not large, and was scattered throughout the region in small settlements. Additionally, some Maori population centres were in isolated locations, making such services as health care and education difficult and expensive to provide. It is not surprising that in isolated localities these services were usually not provided to the same level as they were

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322. Waitangi Tribunal, *Hauraki Report*, vol 3, pp 1192–1194, 1207

323. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 757–761; see also Kiri Powick, summary of report regarding Te Reo Maori (doc 12), pp 14–15

324. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Reo Maori Claim* (Wellington: Government Printer, 1986)

for people in bigger or more accessible places. We heard from many witnesses about the hardships brought by this inferior provision of services, and we in no way discount this evidence. Given the difficulty and expense of extending full Government services to remote places, however, we cannot say that those Maori living in such places in Te Tau Ihu were provided with substantially inferior services than other people living in inaccessible parts of the region. With regard to education, however, we qualify this by pointing to the inadequate provision of schools for sizeable Maori communities in places such as Rangitoto, the Croisilles and Okoha.

While it was not just Maori who suffered from isolation, we consider that Maori in these places were on the whole worse equipped financially to meet the need from their own resources. Greater economic insufficiency meant that poorer Government services had a greater impact on Maori than on most of their Pakeha neighbours, and Government departments might have paid greater heed to this. It must also be remembered that the remote locations of some occupation reserves, including those on Arapawa Island, in the outer reaches of Queen Charlotte Sound and Tory Channel, at Port Gore, and in the Croisilles area, were the outcome of Crown decisions in the mid-nineteenth century. Although Maori had played a large part in the identification of these early reserve sites, and Rangitoto had never been a Crown-created reserve, the establishment of the landless natives reserves in the 1890s in remote places was largely an outcome of Government choice and was arranged at a time when these localities were already acknowledged as isolated and difficult to access. The problems associated with the isolated landless natives reserve at Okoha are the best example of this.

Leaving aside the special problem of isolated places, did the Crown fail to provide services that Maori in Te Tau Ihu might reasonably have expected as an outcome of Treaty obligations? Our conclusion is that, while the State did provide certain services, especially from the 1930s, the extent and manner of their provision fell short of what was required to protect Maori from ill health and destitution, equip them for advancement in the modern world, and reduce disparities between the socio-economic position of Maori and non-Maori.

#### **10.9 SUMMARY OF FINDINGS**

We find that:

- ▶ The socio-economic position of the Maori population of this region after the major land purchases of the mid-nineteenth century quickly became one characterised by marginal economic status, poor health and low educational attainment. This was still the case in the mid-twentieth century, but we did not have enough evidence to ascertain precisely to what extent the situation altered after 1960. There were signs, however, that in the late twentieth century the Maori population still registered poorly across

the range of social and economic indicators, and that the position of Maori culture and language was weak.

- ▶ To a considerable extent, and principally, this socio-economic position was the result of the fact that the iwi of Te Tau Ihu were left with insufficient land for their present and future needs. This situation can be attributed in large part to Crown actions.
- ▶ The Crown response to the socio-economic problems experienced by Te Tau Ihu Maori since the mid-nineteenth century was on the whole inadequate.
- ▶ These actions of the Crown were in breach of the Treaty principle of mutual benefit, which envisaged that both settlers and Maori would obtain or retain the resources necessary for them to develop and prosper in the new, shared nation state. These actions were also in breach of the Treaty principle of active protection, which required the Crown actively to protect the interests and tino rangatiratanga of Maori in the transactions that had resulted in such serious prejudice. The Crown's actions also breached the principle of redress, which required it to provide appropriate remedies to acknowledged grievances. In particular, where the Crown's own actions have contributed to the precarious state of a taonga – including the language and culture of Te Tau Ihu iwi – there is an even greater obligation for the Crown to provide generous redress as circumstances permit. The Crown's actions in the nineteenth century, and its substantive failure to remedy the consequences of those actions, have resulted in significant social, economic, and cultural harm to the iwi of Te Tau Ihu.

In earlier chapters, we identified important breaches of the Treaty in Crown acts and omissions that enormously diminished the land base of Te Tau Ihu iwi and left Maori in this region with inadequate reserves. These breaches were followed by the Crown's inadequate attempt, in the 'landless natives' scheme, to redress a grievance it had acknowledged. This was a missed opportunity to rectify the breaches of the land purchase period, and along with earlier acts and omissions, this failure had serious economic and social consequences. We have outlined these in the present chapter, and they must be recognised in any consideration of the Treaty breaches we have identified. To a large extent, the prejudice arising from the Treaty breaches described in chapters 4 to 9 has, therefore, been set out in this chapter.

When we assess the Crown response to the social and economic situation of Maori in Te Tau Ihu, which was due, as we have said, in large part to Crown actions, we find a further series of breaches. Whether or not specific promises were made in Te Tau Ihu to foster Maori development and provide medical, educational, and other social services, the Crown had an obligation under the Treaty principles of reciprocity and active protection to guard the interests of all iwi from the negative effects of colonisation, promote and maintain the well-being of Maori, and provide all the benefits due to British subjects. Insufficient provision of health and education services was a breach of the principle of equity. Where this was a result of the isolated location of Maori communities, however, it was not necessarily such a breach since Pakeha residents of remote places suffered from their isolation also, although

it should be noted that the Maori occupation of remote sites was sometimes itself the outcome of Crown action. The greater socio-economic need of Maori meant that greater efforts should have been made to reduce disparities between the Maori and non-Maori populations of the region and thus recognise all the rights of Maori as citizens.

Additionally, it was a breach of the principles of partnership, equity, and equal treatment for the Crown to rely on the tenths benefit fund to help provide health, welfare, and education services that should have been provided by the Government as they were elsewhere.

Discriminatory policies that made it harder for Maori than Pakeha to receive pensions and emergency relief were a breach of the principle of equity.

It is clear that the Crown gave Maori insufficient assistance with economic development. The unavailability to Maori of the loan assistance offered to Pakeha settlers by legislation in 1894 was a breach of the principle of equity. The most prominent example of State assistance, the Wairau development scheme, had limited success and was characterised by inadequate consultation and opportunities for owner involvement. The hopes of the owners when engaging with the Crown to protect and develop their land were not fulfilled, and the principle of partnership was very imperfectly observed by the Crown. In any case, the other iwi of Te Tau Ihu did not receive even the limited assistance provided to Wairau landowners and to iwi in other parts of the country from the 1930s onwards.

Te Tau Ihu Maori were prejudicially affected by these breaches of the Treaty and its principles. The economic and social situation in which most members of the Te Tau Ihu iwi found themselves as a consequence of the Crown land purchasing programme of the early colonial period was poor. Economic, health, housing, education, and other indicators have long been lower than those for the Pakeha of the region, and as a disadvantaged minority the Maori population has additionally experienced language and cultural loss.

#### **10.10 SUMMARY AND CONCLUSION**

The evidence we were given about the social and economic history of the Te Tau Ihu iwi in the years since 1840 convinced us that they were reduced to an unenviable socio-economic position after the major land purchases of the mid-nineteenth century. We explored the complex reasons for this situation, and found, as might be expected in a study of economic and social history, that many factors were at work. Some of them, including the isolation and inaccessibility of many parts of the region, were hardly traceable to the actions or omissions of the Crown. The starkly obvious principal cause of the plight of the Maori of this region, however, is the failure of the Crown to make sure the iwi were left with adequate holdings of land when the major transactions took place in the nineteenth century. The major opportunity to redress this failure – the landless natives reserves – was a further and compounding failure. Earlier chapters explained the circumstances of the land transfer,

including the creation of a small area of reserved land and the gradual erosion of even this, and the present chapter has demonstrated the results of land loss on the economic and social well-being of the iwi. We believe that the responsibility for this outcome lies principally with the Crown.

Although the Crown by no means ignored the needs of Maori citizens in Te Tau Ihu, we found that the extent and manner of this provision fell short at a number of points of what was required in terms of Treaty obligations. In this area, we identified a number of breaches of the principles of the Treaty.

Overall, we could not see that the record of the Crown in its relationship with the Maori of Te Tau Ihu fully lived up to the expectations of the latter when they entered into that relationship from 1840. The record is not wholly bad, of course, but in crucial areas it breached the provisions and principles of the Treaty, and it is our conclusion that in respect of social and economic outcomes the iwi of the region suffered prejudice to a considerable degree.