

THE
NGAI TAHU REPORT
1991

THREE VOLUMES • VOLUME ONE

SUMMARY OF GRIEVANCES,
FINDINGS AND RECOMMENDATIONS

WAI 27

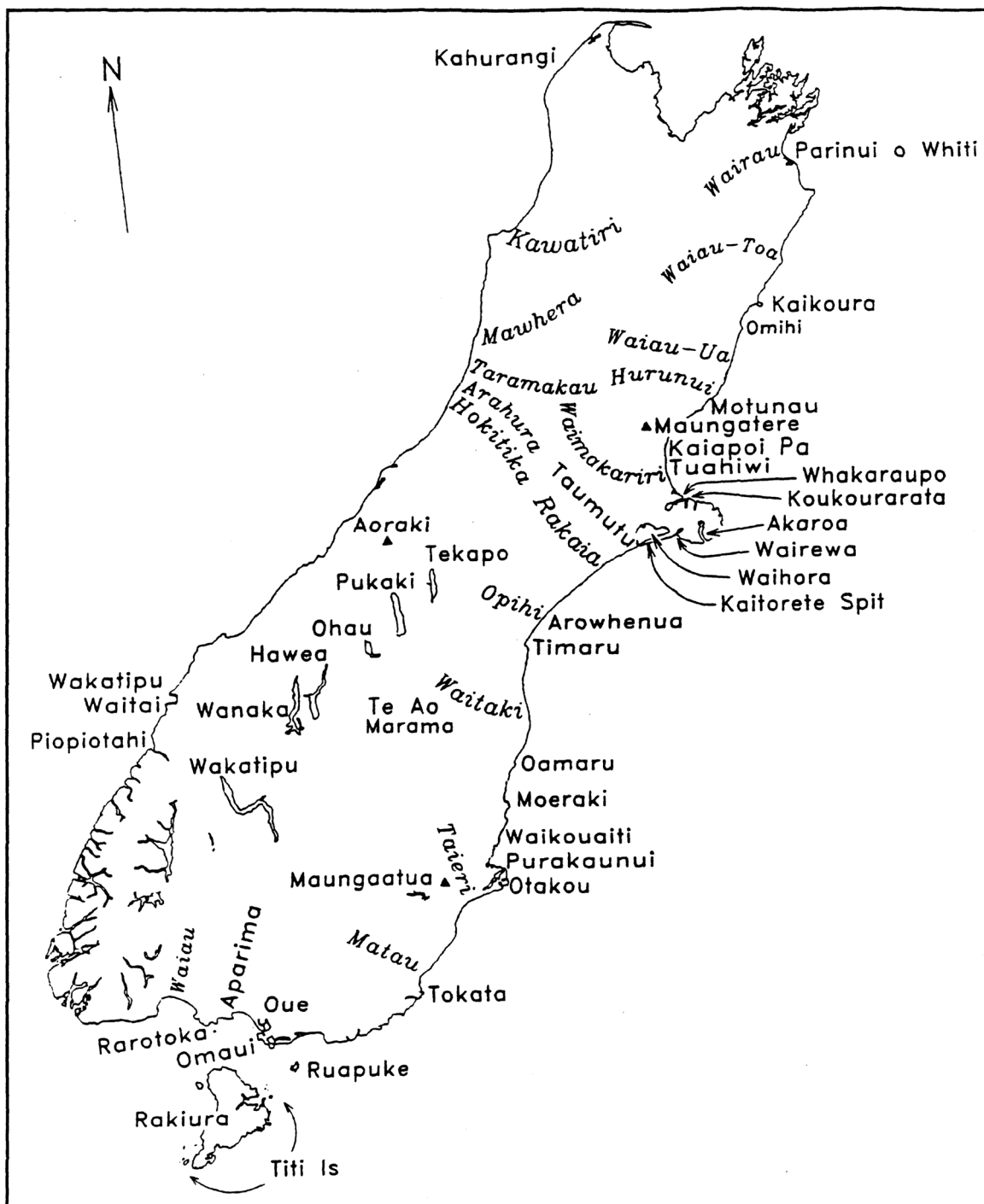
WAITANGI TRIBUNAL REPORT 1991



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

A Waitangi Tribunal report
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Te Wai Pounamu

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List of Abbreviations

AJHR	Appendices to the Journals of the House of Representatives
ATL	Alexander Turnbull Library
BPP/CNZ (IUP)	British Parliamentary Papers/Colonies New Zealand (Irish University Press)
<i>Compendium</i>	<i>A Mackay A Compendium of Official Documents Relating to Native Affairs in the South Island (Nelson, 1872)</i>
DOSLI	Department of Survey and land Information
JPS	Journal of the Polynesian Society
MAFFish	Ministry of Agriculture and Fisheries, Fisheries Division
NA	National Archives
NZC	New Zealand Company
NZLR	New Zealand Law Reports
NZFIA	New Zealand Fishing Industry Association
NZFIB	New Zealand Fishing Industry Board
NZPD	New Zealand Parliamentary Debates
NZS	New Zealand Statutes

References in brackets refer to documents produced in evidence during the hearing of the claim, eg (C1:12) refers to page 12 of document C1.

A complete record of documents is set out in appendix 6.

**The Honourable Minister of Maori Affairs
Parliament Buildings
WELLINGTON**

Te Rangatira Winston

Te Minita Maori

Tena koe, kua eke atu nei hei piki i nga taimahatanga o te iwi i pehi tonu nei.

Ka tahi ano mai rano i a Apirana Ngata ka noho he roia Maori hei Minita Maori. Nui rawa atu nga mihi kia koe. Me te mohio iho ko koe te Matua o te iwi.

Tenei ka tangi atu ki te hunga kua riro kua ngaro ki te po. Ratou katoa, te totara, hae mala, te tawatawa titi a Turirangi Te Kani ka riro. Nga mate mai te Rerenga Wairua, ki Murihiku whiti atu ki Wharekauri. Haere! Haere! Haere ra! Toia mai! Te Waka! Ki te urunga! Te Waka! Ki te moenga! Te Waka! Ki te takotoranga! I takoto ai Te Waka-o-Maui! "Te Tina Rangatiratanga a Ngaitahu."

We place before you the tribunal's report on the Ngai Tahu claim.

The report does not contain recommendations to give full effect to the findings of the tribunal on the major grievances. We have made recommendations pursuant to section 6(3) of the Treaty of Waitangi Act 1975 on only five matters. The claimants and the Crown requested the tribunal to issue its findings on the principal issues and then leave the parties to negotiate a settlement. We agreed to that course and will review the progress made in negotiations at the end of 12 months. We shall report to you on that question in due course.

The report is also incomplete in that it does not include the sea fisheries claim nor does it address the further 108 ancillary claims which were raised during the hearing. Both those matters will be dealt with in two later reports. We propose to report on the sea fisheries claim next as the High Court has indicated that our report may be helpful to it in several fishery actions now adjourned sine die.

Further evidence is to be placed before the tribunal on sea fisheries. Overview reports on that evidence as well as submissions from the parties and the fishing industry will be presented at hearings set down to commence on 18 March 1991.

This report examines grievances arising from the Crown purchases of Ngai Tahu lands commencing in 1844. Most of those grievances are long-standing. Many are continuing grievances. Some are of recent origin.

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This claim has traversed a time-span of 142 years since Ngai Tahu first voiced protest in 1848. It has been no easy task.

The tribunal hopes that this report will provide a sufficiently definitive base to enable settlement negotiations to proceed. We are conscious that most New Zealanders, like the tribunal itself at the outset of this inquiry, know very little about the nature and extent of Ngai Tahu's grievances.

The sheer volume of evidence and submission has unavoidably resulted in a lengthy report. Because of this, and in an endeavour to create a climate of informed understanding, we have encapsulated the major grievances and findings in the first part of the report. This also has been no easy task.

The tribunal believes that with goodwill it should be possible for the parties to settle their grievances sensibly and honourably.

We believe that in the conduct of this inquiry the tribunal, with the help of the parties, has done everything possible to establish a strong goodwill base for negotiations to succeed.

May we respectfully urge however that a successful settlement will only be achieved if a responsive and far-sighted approach is adopted by both parties as an acceptable compromise is sought. We also feel that the negotiations should take place at a high level once explanatory discussions and research are complete.

We trust, sir, that you will find this report of value and that the recommendations which are contained herein, particularly those relating to the funding and reimbursement of the Ngai Tahu Maori Trust Board, can be implemented speedily.

Preface

Thou hast it now! land, rents, and favouring aid
From sublunary powers; and should heaven grant
That no historic eye shall spy the matter,
The Maori wrongs shall vanish in the past,
As Maori lives in present. They depart
Like mist-wreaths of the morning; but a book
Which graves the stubborn facts on winged leaves;
Guard thou 'gainst that! for it shall tell the tale
To countless generations, and 'twere better
To do no wrong than let the wrong be proved
In the eternal blazon of the truth
(G N Rusden, *Aurere-tanga*, 1888)

The report which we here preface not only sets out the grievances of Ngai Tahu and the tribunal's findings on these grievances, it also explores Ngai Tahu's background and the tribe's relationship with its vast territory and its rich and diverse resources. It examines in detail the circumstances surrounding the Crown purchases, the impact of settlement and the consequences that flowed therefrom. It is the story of Ngai Tahu's search for redress, of their grievances over the past 150 years and how the Crown has responded, or more often, failed to respond.

The narrative that follows will not lie comfortably on the conscience of this nation, just as the outstanding grievances of Ngai Tahu have for so long troubled that tribe and compelled them time and again to seek justice. The noble principle of justice, and close companion honour, are very much subject to question as this inquiry proceeds. Likewise, the other important equities of trust and good faith are called into account and as a result of their breach sadly give rise to well grounded iwi protestations about dishonour and injustice and their companions, high-handedness and arrogance.

The claim is brought by Rakiihia Tau and the Ngai Tahu Maori Trust Board. They are the claimants. But the claim is really from and about Ngai Tahu, an amalgam formed from three main lines of descent which flowed together to make the modern tribe. The earliest of the three tribes was described as Waitaha, this being also a collective name given to a number of ancient tribal groups which occupied Te Waka o Aoraki (South Island). The claimant Rakiihia Tau referred to the founding ancestor as Rakaihautu o te Uruao canoe.

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Archaeological evidence indicates that Maori people were in the South Island about 1000 years ago. The second tribe, known as Ngati Mamoe came from the Heretaunga (Napier) area, moved to the South Island area about the sixteenth century and gradually filtered down through the South Island to intermarry with Waitaha and to assume control. The third tribe, known as Ngai Tahu, also migrated from the eastern region of the North Island. From the seventeenth century Ngati Mamoe and Ngai Tahu tribes gradually united. We shall look at Ngai Tahu tribal structure in chapter 3 of this report.

In the opening chapter we explain the nature of the Ngai Tahu claim. In all, about 200 grievances were placed before the tribunal over the approximate two and a quarter years it took to hear the evidence. The hearings are not yet finished. There remains the task of hearing further sea-fisheries evidence before the tribunal can report on that important area of claim. It will be presented as a separate report in due course. The tribunal also proposes to issue a third report on a large number of ancillary claims. This first report concerns Ngai Tahu grievances arising from eight regional land sale transactions between the Crown and Ngai Tahu over the period 1844 to 1864 and a ninth claim in respect of the loss of Ngai Tahu mahinga kai, their food resources. These nine general headings of claim were presented to us by counsel as the "Nine Tall Trees of Ngai Tahu".

On 31 July 1844, the Crown entered into an agreement with Ngai Tahu to purchase over half a million acres of land in Otago for the sum of £2400. Over the next 20 years the Crown completed further purchases from Ngai Tahu ending with the Rakiura (Stewart Island) purchase comprising 420,000 acres for £6000 on 29 June 1864.

In total, 34.5 million acres of land passed from Ngai Tahu to the Crown for the sum of £14,750. The total area of New Zealand is a little over 66 million acres so it can readily be seen that the land area involved in these transactions was most of the South Island and more than half of New Zealand. If we ignore the last sale in respect of Rakiura, which was quite disproportionate in price to the other seven regional sales, we see that some 34 million acres of land were purchased by the Crown for £8750. In effect the Crown paid six one hundredths of one penny for each acre it purchased. In North Canterbury, two years prior to concluding the purchase of 1,140,000 acres from Ngai Tahu for £500, the government actually sold a block of land containing 30,000 acres for £15,000 which on a per acre equivalent was 1142 times more than Ngai Tahu was paid two years later. It was also more than the Crown paid for all Ngai Tahu's 34.5 million acres.

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This claim is not primarily about the inadequacy of price that Ngai Tahu was paid, although as we will see in respect of the North Canterbury, Kaikoura and Arahura purchases, the claimants strongly criticised the arbitrary imposition and unfavourable terms of the purchase price. Ngai Tahu have certainly a sense of grievance about the paucity of payment they received for their land but then Ngai Tahu have always regarded the purchase price not as a properly assessed market value consideration in the European concept but rather as a deposit; a token, a gratuity. Ngai Tahu understanding and the substance of their expectations was that they agreed to share their resources with the settler. Each would learn from the other. There was an expectation that Ngai Tahu would participate in and enjoy the benefits that would flow from the settlement of their land. As part of that expectation they wished to retain sufficient land to protect their food resources. They expected to be provided with, or to have excluded from the sale, adequate endowments that would enable them to engage in the new developing pastoral and commercial economy.

This claim and this story is about that expectation. Ngai Tahu grievances therefore are directed at the Crown's failure to keep its promises, its failure to provide the reserves, the food resources and the health, educational and land endowments that were needed to give Ngai Tahu a stake in the new economy. This claim is also about Ngai Tahu's comprehension of those areas of land they considered they did not sell to the Crown despite what the written agreements might have said. And of course, this claim is about Ngai Tahu expectations of their rights under the Treaty of Waitangi and how those rights were disregarded by the Crown in its dealings with the tribe.

In opening his claim, Rakiihia Tau spoke about his claim and the Treaty:

I hereby claim upon the principles of justice, truth, peace and goodwill for and on behalf of my peoples within the principles of the Treaty of Waitangi. (A17:5)

He later said:

It has been stated to me on many occasions by our Pu Korero that the European had offered the Maori a world free of conflict, free of barbaric practices, where all men would be equal. This was but one of the attractions advanced to encourage our ancestors to sign the Treaty and the Southern Deeds of sale. These noble thoughts were agreed to by our people in faith and trust, in expectation of the agreements made with our Treaty partner, that further lands would be allocated to our ancestors.

. . . On the other hand much discussion has taken place since the signing of the Treaty and the Southern deeds as to the material needs that

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people require for survival. This Marae, this whareniui has heard the echoes of these complaints, the non fulfilment of the contractual agreements between the Maori and the Crown, within the Treaty of Waitangi and the Southern Deeds. That is why we appear before you so that the liabilities can be assessed as to what was intended, and to address the remedies so that we can truly say Justice has been done. (J10:2-3)

As the narrative unfolds two important features will emerge. The first is that Ngai Tahu have, throughout their active attempts to seek redress, always abided by the rule of law and used constitutional avenues to pursue their claims. The tribe has displayed restraint and dignity before this tribunal. Secondly, Ngai Tahu have always demonstrated their loyalty to the Crown and their affection for the sovereign. The head stones of two Ngai Tahu rangatira, Hone Karetai and Matenga Taiaroa, spell out that loyalty. In 1860 Taiaroa represented Ngai Tahu at the Kohimarama conference called by the governor to sound the loyalty of the tribes to the Crown. He said:

I will speak about my own Island. My Island is with the Queen. There is no person to say, Turn to one side. (F11:7)

We will see in chapter 18 several references to statements of loyalty made by Ngai Tahu leaders (18.2.3). The evidence of an historian, Bill Dacker (F11) enumerated many declarations of Ngai Tahu loyalty to the sovereign and of their acceptance of the Queen's laws. During the late part of the last century, as Ngai Tahu parliamentarians and leaders pressed for recognition of their land grievances they constantly acknowledged allegiance to the Crown. In 1903 Tame Parata said this:

the Ngaitahu tribes, the residents of the South Island, have always been loyal, and continue to be loyal and faithful to their allegiance. (F11:12)

After referring to the continuing loyalty of Ngai Tahu, Dacker concluded:

It is a sad commentary on the history of New Zealand that their loyalty was rewarded with no substantial recognition of their grievances despite nearly 150 years of effort on their part to obtain justice. (F11:12)

Ngai Tahu's attitude to the Treaty is also explained in this statement by Rakiihia Tau of his inherited understanding of the Treaty.

Article Three of the Treaty offered fellowship and brotherhood, a world where all men would be free, that we may be one people (kotahitanga) for these were the rights of all British citizens.

Article Two of the Treaty would give protection to the Maori and this was to include the protection of Maori property rights, i.e. Rangatiranga over our mahinga kai that we desired to retain.

Articles Two and *Three* were our Treaty partner's commitment that would earn them the right to *Kawanatanga*, the right to Govern under *Article One* of the Treaty.

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From a Ngai Tahu perspective this meant that our social order had to change from that of the rule by an Arikitunga under the old order to equality of all mankind under British justice under the new order.

By attaching their signatures to the Treaty and Southern purchase deeds, our Ancestors bound our people to the fulfilment of these undertakings. As in our view, so did the representatives of the Crown bind the Crown with their signatures. Maori custom was such that the word was our bond. The Southern Maori, as well as I think all Maoridom, were required to implement a social order recognising their commitment to the Treaty of Waitangi.

It is for this reason that Ngai Tahu Whanui had to improvise what we know as the Runanga structure. The Arikitunga of inherited rights was replaced by free elections of persons to represent their people who by the 1850s were confined to small and scattered reserves awaiting our Treaty partner to honour his word to Article Two and Three of the Treaty, to the contracts within the Southern purchase deeds, being the return of our lands, our mahinga kai.

The function of the Runanga Officers elected evolved according to Maori commitment to the principles of democracy, the equality and mutual respect of all mankind. The function of Runanga Officers was one of advising and assisting our people to those principles, being the voice of our people, to pursue and assist our Treaty partner to retain his commitment and his dignity, according to the Treaty.

Power over people was suspended voluntarily, which included abandoning the power of tohungaism. Such was the Maori understanding and commitment to the Treaty.

Our people expected that our Treaty partner would proceed in the spirit of the Treaty to protect and support our Rangatiratanga over our property rights, but instead, these rights were removed. (J10:37–38)

As we discuss the events surrounding the relationships between the Crown and Ngai Tahu at the time of signing the Treaty and as land purchases proceeded, we shall see how that history started honourably. In chapter 4 of this report we shall examine in detail events surrounding the Treaty and the directions of Colonial Secretary Lord Normanby to Governor Hobson. The instructions were explicit. Hobson was required to secure fair and equal contracts which were to be negotiated through an official protector appointed to watch over the interests of the aborigines. The duty of the protector was to prevent Maori from entering into any contracts which might be injurious to them, and no land was to be bought from them that was essential or highly conducive to their comfort, safety, or subsistence. These instructions clearly heralded the need to protect Maori from the highly adverse effects of settlement.

In chapter 5 of the report the tribunal will look in detail at the background to the purchases and the Crown's policy which directed the actions of the Crown's representatives and negotiators during the various sales. We shall see how Governor Grey and his agents in-

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geniously used the Crown's right of pre-emption to extinguish Maori rights to vast tracts of land in the South Island for nominal sums and pave the way for settlement. In the following 10 chapters the tribunal examines the principal grievances of Ngai Tahu arising from the respective purchase deeds. It is here that the tribunal looks very closely indeed at each of the purchases. It is here that the tribunal reaches its conclusion that the Crown failed time and time again to honour the principles of the Treaty of Waitangi. And it is here that the honour of the Crown is impeached by the actions of a few men. Instead of ensuring that Ngai Tahu were left with ample land for continued access to food resources and for developing agricultural and pastoral farming alongside the new settlers, they were confined to very small reserves barely capable of providing a subsistence living. Land which they sought to retain was denied them. Access to their mahinga kai was largely cut off.

In chapter 16 we overview the 20 years of land negotiations and how those events related to Treaty principles earlier enunciated by the tribunal in chapter 4.

In various chapters of the report as the tribunal looks at Ngai Tahu's social and economic situation both before and after the Treaty and the land purchases, we will examine the tribe's relationship with its resources. More particularly in chapter 17 we look at the impact of settlement after 1840 on mahinga kai, which as you will see, is defined by the tribunal as "those places where food was procured or produced" by the tribe.

Tipene O'Regan writes about the Ngai Tahu claim in *Waitangi: Maori and Pakeha perspectives of the Treaty* (1989). In his essay he states that the Ngai Tahu claim involving mahinga kai is one of the most emotionally charged elements of the tribe's grievances and further explains how commercial exploitation and use of natural resources both for tribal consumption and trade was basic to the Maori economy and to the whole social fabric of tribal and intertribal life. Although the tribunal has had to sever the sea-fisheries from this present report, nevertheless, it heard comprehensive evidence from tangata whenua and a host of professional witnesses with a wide spectrum of skills. This section of the report is really all about the conflict that arose from the tribe's need to retain its resources and the settlers' need to develop the land. We will look at the compatibility of those respective needs and the consequences of the clash.

Following the purchases and the growing Ngai Tahu discontent with their lack of land and loss of resources including pounamu (greenstone), a series of parliamentary committees and Royal com-

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missions investigated Ngai Tahu's complaints. From 1872 through to 1920 at least 17 separate inquiries took place. The tribunal examines the work of these various select committees and commissions of inquiry in chapter 21. It also plots the consequences of Ngai Tahu landlessness on the social and economic conditions of the tribe. The tribunal also looks at promises made in respect of schools and hospitals and at events both leading up to and emerging from the "landless natives" grants. At the end of this survey the tribunal overviews the Crown response to Ngai Tahu grievances and in a short, concluding passage, gives its finding that Ngai Tahu have established that they have major land and associated grievances. In that brief conclusion the tribunal encompasses all the findings that emerge from the detailed studies in chapters 6–21 inclusive and which are also encapsulated in chapter 2. It then remains for the tribunal to give some indication of how it sees the Crown and claimants should approach the question of redress which primarily involves the restoration of rangatiratanga. As the tribunal sees this question, the honour of the Crown can only be restored if first the honour of Ngai Tahu is restored. That is the issue which chapter 24 of this report addresses.

On 3 June 1987 the tribunal to hear the Ngai Tahu claim was constituted and it commenced its proceedings with a pre-hearing conference of counsel on 20 July 1987. The first hearing took place on 17 August 1987 and the final hearing on 9 October 1989. It can fairly be said that at the outset the seven-person tribunal, drawn from a range of professional, academic, commercial and people related backgrounds, had little knowledge of the claims and grievances they were charged to investigate. Most of the tribunal members also had scant knowledge of the constitutional history and background surrounding the land purchases of the South Island. Over the past three and a half years, as a result of the diligence of counsel and their researchers, the tribunal has received 900 submissions, has heard from 262 witnesses and 25 corporate bodies. It has been no easy task to sift and analyse the mountain of evidence. Although no tribunal conducting any historical investigation spreading back over 150 years can say with certainty that every material fact has been discovered, there is no doubt that the present inquiry has been a much more extensive and searching investigation than any earlier inquiry. But having said that, it is interesting to note the similarity of the principal findings of this tribunal and those of some earlier commissions, especially those conducted by Commissioner Alexander Mackay in 1887 and 1891.

The tribunal has been very much aware of the need to look at the situation as at the time and in light of the circumstances in which

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events occurred. We look at the explanations and excuses that may have justified or influenced the actions of those administrators who are now subject to serious criticism. In the end the tribunal has to apply the test provided by section 6 of the Treaty of Waitangi Act 1975. That is the function of this tribunal and by which it must be directed.

The facts related in this narrative must at least correct the widely held public view that this claim only arose because of the 1985 statutory amendment opening up claims back to 1840. That of course is not so. It has been in the hearts and minds of Ngai Tahu since 1848 and repeatedly advanced since that time by one generation after another. It is a claim that could have been avoided and should have been settled before the turn of the century. It still can be settled. The final chapter giving effect to that settlement is yet to be written.

This tribunal came to the claim with much to learn but we leave it in no doubt and in accord. We are relatively certain that, like us at the outset, the people of this nation do not understand the Ngai Tahu claim. In chapter 2 we have attempted to summarise the main grievances and the tribunal's findings on these grievances in this large claim including the eight separate purchases and mahinga kai. Our summary includes our main findings as to breaches of the Treaty and Treaty principles and on other aspects of the claim. An in-depth discussion follows in the remainder of the report. We hope our fellow New Zealanders will find time to read on.

Chapter 1

The Claim and the Proceedings

1.1. Introduction

We open this introductory portion of the report by asking six straightforward questions:

- 1 Who brought the claim?
- 2 What is the claim about?
- 3 Who was heard by the tribunal?
- 4 Who were the tribunal members hearing the claim?
- 5 How and where was the claim conducted?
- 6 What are the findings and recommendations of the tribunal?

We now proceed to answer those questions and as we do so, the answers lay bare the complexities of this huge claim. In opening, Mr Paul Temm, counsel for the claimants, referred to the scope of the claim by saying:

There is little doubt that the Ngai Tahu claim will be the biggest that this tribunal is ever likely to have to face. It involves almost the whole of the South Island and covers events that occurred during the course of over a hundred years. (A26:5)

The claim has indeed proved to be large. Apart from the eight very substantial claims affecting extensive areas of Ngai Tahu territory and the claim to mahinga kai, including sea fisheries, we received in total some two hundred claims concerning more specific and distinct matters. The late introduction of a substantial claim by other tribes challenging Ngai Tahu rangatiratanga over areas included in their claim and the representation of the fishing industry on fishery issues added to the variety of interlocutory issues which arose during the hearing of the claim.

That it was able to complete this inquiry is due in no small measure to the procedures the tribunal adopted. They will be explained shortly. The tribunal was also helped by the patience, tolerance and dignified attitude of the parties and their counsel. It was certainly helped by the commitment of the dedicated researchers.

The tribunal makes no apology for the length of this report. Nor does it regret that the size and number of claims have required it to adopt

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a markedly more clinical approach in exposition than in previous reports.

It is not only the size and number of issues that dictate the format. The tribunal has very much in mind that there should be finality of reporting on Ngai Tahu's long standing grievances. If, therefore, this account of our proceedings is somewhat detailed it is because of the need for posterity, as well as those presently concerned, to understand how this inquiry was conducted.

1.2. **Who Brought the Claim?**

The jurisdiction of the Waitangi Tribunal

1.2.1 The jurisdiction of the Waitangi Tribunal to consider grievance claims is contained in section 6 of the Treaty of Waitangi Act 1975 (herein referred to as "the Act") which reads as follows:

6 (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 by any policy or practice proposed to be adopted by or on behalf of the Crown; or

(d) By any act done or omitted at any time on or after the 6th day of February 1840, or proposed to be done or omitted, by or on behalf of the Crown, and that the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, 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.

As the law presently stands, a claim must be brought by a Maori and the claim is against the Crown.

Requirements of the tribunal

1.2.2 The general duty of the tribunal is spelt out in section 6 subsections (3) and (4) of the Act which read:

6 (3) If the tribunal finds that any claim submitted to it under this section is well-founded it may, if it thinks fit having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.

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(4) A recommendation under subsection (3) of this section may be in general terms or may indicate in specific terms the action which, in the opinion of the tribunal, the Crown should take.

The tribunal is required under the Act to present its findings and recommendations to the claimant, to the Minister of Maori Affairs and other ministers with an interest in the claim, and such other persons as the tribunal thinks fit. The tribunal is also given certain powers in respect of land transferred to a state-owned enterprise by section 8A of the Act.

The claimants

- 1.2.3 The present claim is brought by Henare Rakiihia Tau supported by the Ngai Tahu Maori Trust Board (herein referred to as “the claimants”). The former is Maori of Ngai Tahu and deputy chairperson of the claimant trust board. The latter is a body corporate constituted under the Maori Trust Boards Act 1955.

Claimants’ counsel

- 1.2.4 The claimants applied for and were granted legal assistance under section 7A(2) of the Act. Mr P B Temm QC of Auckland was appointed as senior counsel and with him as assisting counsel, Mr D M Palmer of Christchurch. Mr M Knowles, a barrister of Christchurch, appeared with other counsel at the first hearing only.

1.3. What Is The Claim All About?

- 1.3.1 The original Ngai Tahu claim dated 26 August 1986 was filed on 28 August 1986. It was followed by seven amending claims over the next two years. It is not surprising there were a large number of amending claims. The actual hearing of the claim took over two years. During that time there was a need for revision. This was not due to any omission of the claimants but rather to the necessity to define the parameters of the claim, as Parliament, the High Court and the Court of Appeal during the hearing of the Ngai Tahu claim were dealing with matters such as state-owned enterprise legislation, Maori fishing rights and Treaty of Waitangi legislation, all of which had bearing on the Ngai Tahu claim.

During this period also, negotiations were proceeding between the Crown and Maori on land and fishing rights. Ngai Tahu were very much a part of this total scene. In particular the nature and extent of the Ngai Tahu sea fisheries claim required further definition.

List of Ngai Tahu claims

- 1.3.2 The following is a list of Ngai Tahu claims with brief particulars of each document. The details of the claims are in appendix 3. The content of the claims will be examined shortly.

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(a) *General claim of 26 August 1986*

This is a short document challenging the Crown's move to transfer Crown pastoral leases and Crown land generally out of Crown ownership. The claimants alleged this action was contrary to the Treaty of Waitangi. The claim did not give specific details of any other grievances. It essentially attacked government's announced proposal to transfer land interests to state-owned enterprises.

(b) *Amended claim of 24 November 1986 as altered by the insertion of paragraph 4 and schedule*

This amendment reiterated Ngai Tahu opposition to the transfer of land interests under the State-Owned Enterprises Bill, but it also included general complaint about actions of Crown officials in the acquisition of Ngai Tahu lands from 1844. There were specific complaints about the Crown failing to honour allocation of tenths in respect of the Otago (Otago) purchase as well as reference to improper alienation of reserves. The claimants further sought remedies specified in a petition to Parliament dated 7 December 1979.

(c) *Amended claim of 16 December 1986*

In this short document the claimants specified and identified the Crown freehold and leasehold interests to which it laid claim. A lengthy schedule of these lands was attached to the claim.

(d) *Amended claim of 2 June 1987*

On 24 April 1987, the tribunal by memorandum of directions, required the claimants to file a more particular statement of grievances, with specific details of the acts and omissions of the Crown of which the claimants complained. This amendment set out those particulars. It referred not only to grievances arising from land purchases by the Crown but also to Ngai Tahu's loss of their mahinga kai, including sea and inland fisheries.

(e) *Amended claim of 5 September 1987*

In this amendment the claimants set out their grievances in respect of Crown action granting perpetual leases of Maori lands reserved from the Arahura purchase and administered under the Maori Reserved Land Act 1955.

(f) *Amended claim of 25 September 1987*

This document detailed the Ngai Tahu claim to sea fisheries and the terms upon which Ngai Tahu would settle with the Crown.

(g) *Amended claim in respect of inland waters, 13 April 1988*

This claim asserted Ngai Tahu rights to inland waters comprising lakes, rivers and streams which are within the area of the Kemp purchase. Ngai Tahu deny these inland waters were sold to the Crown

The Claim and the Proceedings

and say the Crown failed in its duty to protect te tino rangatiratanga of Ngai Tahu in these inland waters.

(h) *Amended claim in respect of sea fisheries, 25 June 1988*

In this final amendment Ngai Tahu reformulated their marine fishing claim. The claim details the nature and extent of Ngai Tahu fishing rights and deals also with management and conservation matters. It is a comprehensive statement of the Ngai Tahu sea fisheries claim.

The “Nine Tall Trees”

1.3.3 When Mr Temm opened for the claimants at the first hearing on 17 August 1987, he explained that the claim would be presented in nine parts which he called the “Nine Tall Trees of Ngai Tahu” (A26:5). Eight of these represented the different areas of land purchased from Ngai Tahu, whilst the ninth part would deal with mahinga kai or the food resources of Ngai Tahu. The “Nine Tall Trees” are grouped below in the chronological order in which the deeds of purchase were entered into between the Crown and Ngai Tahu:

- 1 Otakou (Otago), 31 July 1844
- 2 Canterbury, 12 June 1848
- 3 Banks Peninsula
 - (a) French purchases
 - (b) Port Cooper purchase, 10 August 1849
 - (c) Port Levy purchase, 25 September 1849
 - (d) Akaroa purchase, 10 December 1856
- 4 Murihiku (Southland), 17 August 1853
- 5 North Canterbury, 5 February 1857
- 6 Kaikoura, 29 March 1859
- 7 Arahura, 21 May 1860
- 8 Rakiura (Stewart Island), 29 June 1864
- 9 Mahinga kai

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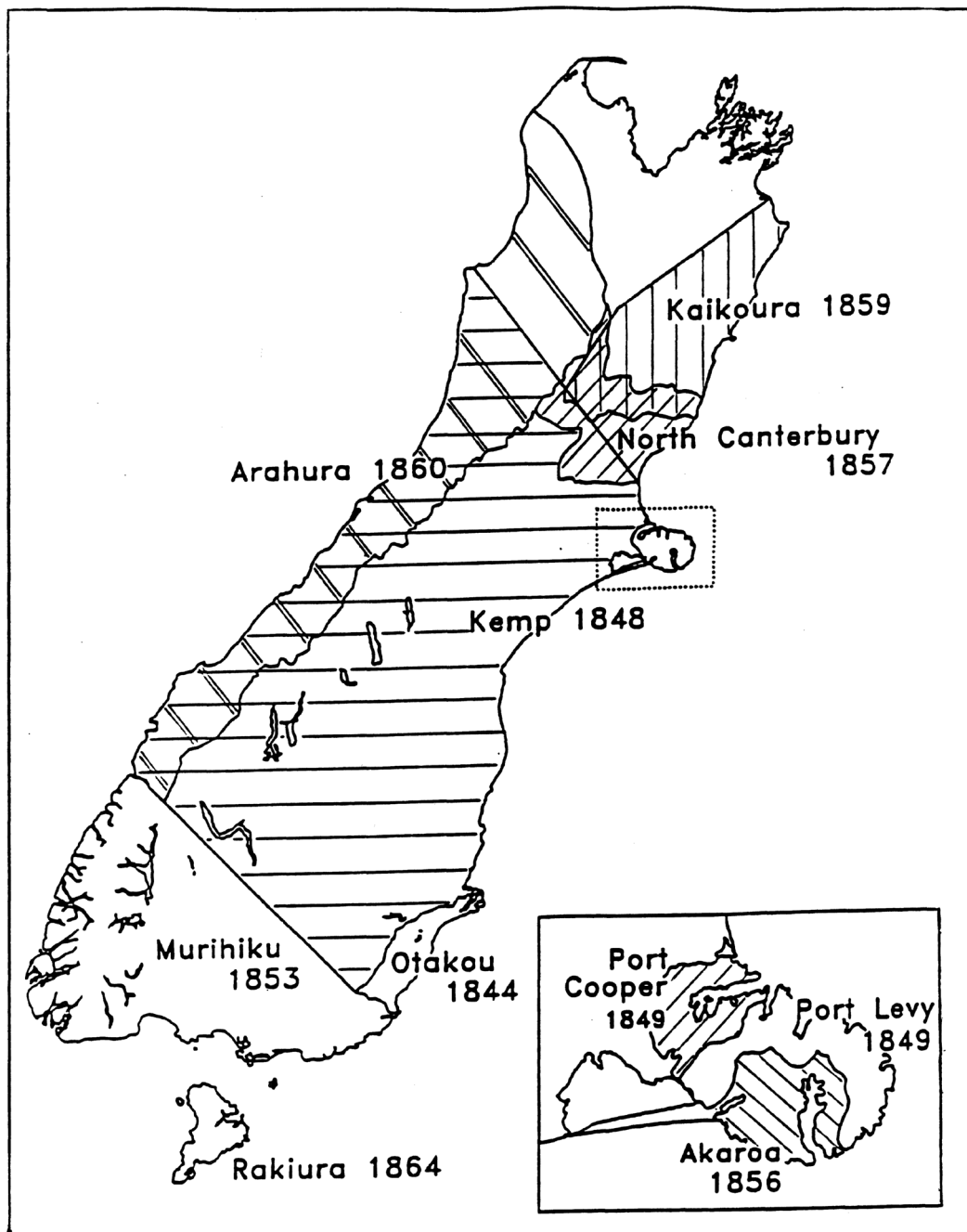


Figure 1.1: The Ngai Tahu purchases according to the deeds and deed maps. Many of these purchases overlapped each other. The Kemp purchase overlapped with the Kaikoura, North Canterbury and Arahura purchases, while the North Canterbury purchase also overlapped with Kaikoura.

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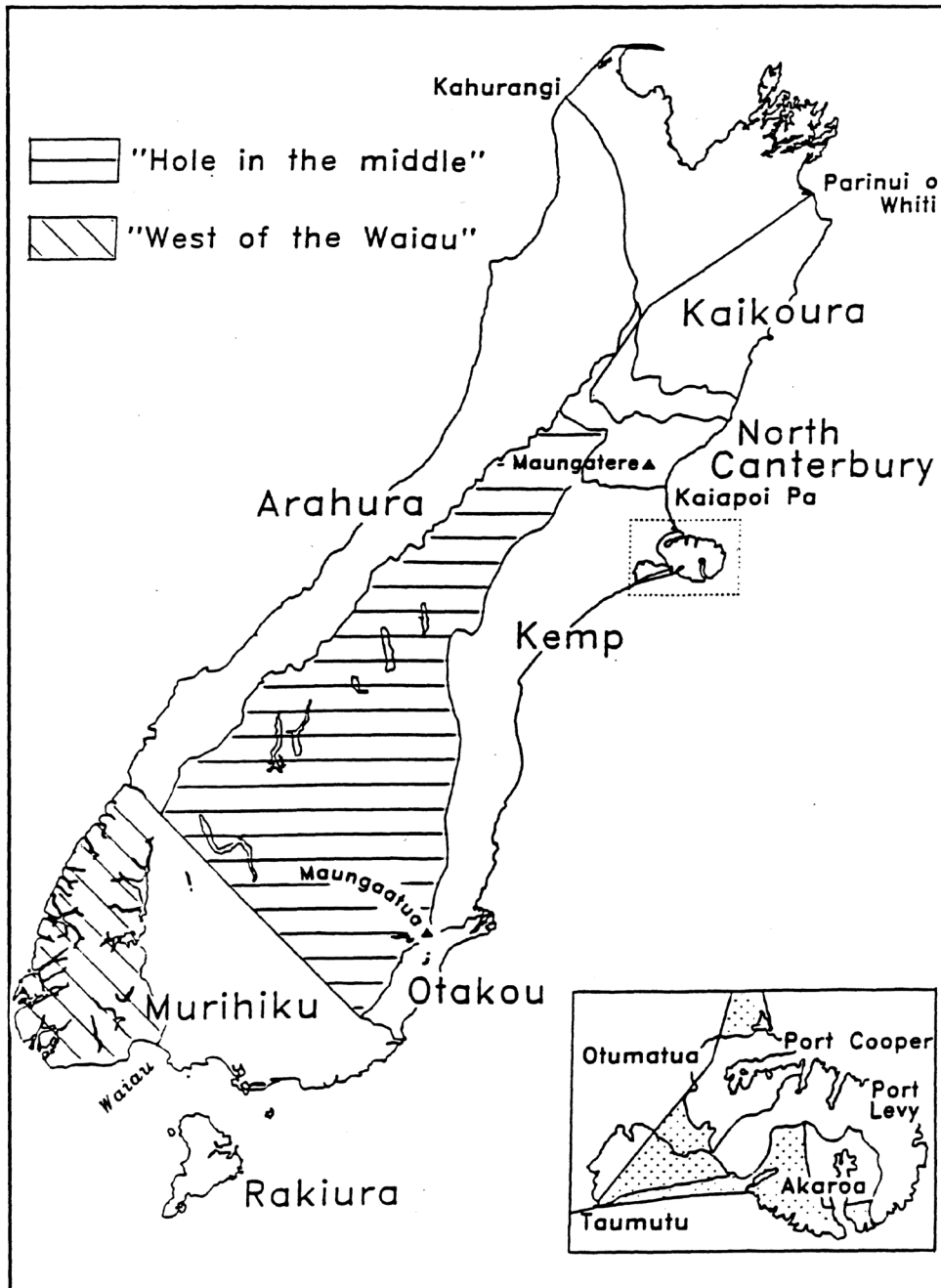


Figure 1.2: The Ngai Tahu purchases, showing the areas which the claimants maintained were not included by the tribe in the original agreements. The claimants maintained that substantial areas – the “hole in the middle”, the land west of the Waiiau River in Southland and parts of Waihora and Banks Peninsula – have never been purchased by the Crown.

*The Ngai Tahu Report 1991****The “branches of the Nine Tall Trees”***

- 1.3.4 At the first hearing counsel for the claimants stated he would be presenting a number of grievances attached to each of the “Nine Tall Trees”. During the hearings the detailed grievances came to be known as “branches of the Nine Tall Trees”. Mr Temm also indicated that a number of smaller claims which could be described as “under-growth claims” would also come to notice.

As the hearing proceeded it became evident to the tribunal that it was facing a very large number of claims. Near the end of the hearings and at the tribunal’s request the claimants were asked to file a list of grievances grouped under each of the “Nine Tall Trees”. Counsel presented the tribunal with particulars of these grievances: in all, a total of 73 alleged wrongful acts or omissions of the Crown said to be inconsistent with the principles of the Treaty of Waitangi (see appendix 4). We shall now look at some of the major issues.

It is not an easy matter to select a sampling of the major issues as each of the 73 claims in its own way is important to the whanau, hapu or iwi of Ngai Tahu who are affected by that claim. There were however some issues which were argued more extensively than others. In the following summary therefore, the tribunal has selected some of those issues which will be examined, along with all the other issues, in the remainder of this report.

These are as follows:

1 *Otakou*

The claimants said that when 400,000 acres of land were sold to the Crown on 31 July 1844 for the sum of £2400 the Crown failed to set aside one tenth of the 400,000 acre block as provided by the Crown’s general waiver of pre-emption. The proclamation provided that of all land sold, one tenth was to be kept for “public purposes especially for the future benefit of the aborigines”.

2 *Kemp*

The claimants said that Ngai Tahu did not sell to the Crown as part of Kemp’s purchase, any land west of the foothill ranges in an approximate line from Maungatere in the north, to Maungaatua in the south, nor did they sell Kaitorete Spit, or most of Waihora (Lake Ellesmere) and its northeastern shoreline with the adjoining wetlands. The claimants’ argument on boundaries, if upheld, would mean that Ngai Tahu did not sell that land in the South Island from the Canterbury foothills up to the centre line of the alps. This large area of land, during the claim described as the “Hole in the Middle”, now

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contains considerable hydroelectric and drainage works and includes major lakes, rivers and mountains.

The claimants also complained that the Crown failed to set aside ample reserves for their present and future needs and that their mahinga kai were not set aside and protected for their use as provided for under the purchase deed.

3 Banks Peninsula

The claimants said that they were not compensated for 30,000 acres of Ngai Tahu land awarded to the French, and further, that Ngai Tahu were denied a fair price for their land, adequate reserves and other resources for their continued sustenance and prosperity.

4 Murihiku (Southland)

The claimants said that the land west of the Waiau River (this land is now known as Southern Fiordland) was wrongfully included in the Murihiku purchase deed and was never sold. The claimants also said the Crown failed to reserve adequate land from the sale and failed to provide schools and hospitals as agreed upon.

5 North Canterbury

The claimants said that the Crown sold or leased lands to settlers before the Crown had purchased it from Ngai Tahu; the purchase was without adequate compensation and without any provision for reserves.

6 Kaikoura

The claimants said that the earlier Crown purchase of Kaikoura and Kaiapoi from Ngati Toa exerted unfair pressure on Ngai Tahu to sell on unfavourable terms. Further, that inadequate provision was made for reserves.

7 Arabura (West Coast)

The claimants said the Crown failed to permit Ngai Tahu to exclude such lands as they wished to exclude from the sale; failed to protect the right of Ngai Tahu to retain possession of pounamu (greenstone) and failed to protect Ngai Tahu by imposing perpetual leases containing unreasonable provisions over their reserve lands.

8 Rakiura (Stewart Island)

The claimants said they have been deprived of the full administration of the Titi Islands and that Whenua Hou (Codfish Island) was included in the purchase against the wishes of owners.

9 Mahinga kai

The claimants said that they have been denied access to and protection of mahinga kai and further, that the Crown has administered Ngai

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Tahu sea fisheries without reference to the tribe and without payment of any kind.

As stated, the foregoing grievances are a sampling only of the total of 73 grievances presented by the claimants, all of which will be dealt with in this report. The grievances we have mentioned are probably the major issues or branches of the "Nine Tall Trees" but the remainder of the 73 grievances are also important. Each grievance has been researched, presented and argued before the tribunal. Each grievance, large or small, requires the tribunal to determine whether the act or omission, policy or practice of the Crown was inconsistent with the principles of the Treaty of Waitangi. And so the "Nine Tall Trees" have 73 branches, but that is not all: as Mr Temm succinctly said at the first hearing, the "Nine Tall Trees" have also, beneath them, considerable undergrowth to which we shall now refer.

Ancillary or "undergrowth" claims

- 1.3.5 Counsel for the claimants explained at the outset that he would principally be concerned with the presentation of grievances in the nine groupings. But he added that at the commencement of each hearing kaumatua and other Ngai Tahu with grievances affecting their regions would present their claims under the general umbrella of the main claim. This procedure was followed and over a number of sittings throughout the various regions the tribunal heard a large number of grievances. Many of these claims concerned individuals and whanau and in some cases dealt with specific matters covered by the "Nine Tall Trees". These claims are scheduled in appendix 5. They will be dealt with in a later volume of this report.

A total of 108 claims made under this category have been received and will be reported on later. These claims cover not only a wide variety of land issues but also deal with legislation and Crown procedures. They also relate to matters such as loss of language, lack of recognition of Maori values such as place names, and various general issues such as the taking of too much land for roads and allocation of poor quality land in reserves. In addition to these 108 ancillary claims there are about 20 claims which will be dealt with in the sea fisheries report.

The number and content of the grievances as set out above will give some indication of the complex and wide ranging issues covered by the approximate total of the 200 grievances. As was said by several Ngai Tahu kaumatua at the poroporoaki following the final sitting on 10 October 1989, full opportunity was given to and taken by Ngai Tahu to tangi their grievances after a long wait of almost 150 years.

*The Claim and the Proceedings***1.4. Who Was Heard By the Tribunal?**

- 1.4.1 The primary duty of the Waitangi Tribunal is to inquire into the claims before it, and then report its findings and recommendations. The parties to a claim are the claimants and the Crown. The Waitangi Tribunal is deemed to be a commission of inquiry under the Commission of Inquiry Act 1908. Section 4A of that Act entitles any person, who is a party to the inquiry or satisfies the tribunal that he or she has an interest in the inquiry apart from any interest in common with the public, to appear and be heard at the inquiry.

At the commencement of this inquiry several government departments and state-owned enterprise corporations, as well as other corporate bodies, farming interests and Maori organisations, sought and were granted leave to appear and be heard. In most cases counsel represented these persons and by arrangement with the tribunal, appropriate fixtures were made to allow those interests to be present before the tribunal when any particular matters affecting them were to be dealt with. On 30 June 1988 the Treaty of Waitangi (State Enterprises) Act was passed and section 4 of that Act inserted into the Treaty of Waitangi Act a new section 8C.

This provision limits the right of appearance and hearing only in respect of claims affecting land or interest in land transferred to state-owned enterprises. Persons entitled to appear under section 8C are limited to:

- (a) The claimant;
- (b) The Minister of Maori Affairs;
- (c) Any other Minister of the Crown;
- (d) Any Maori who satisfies the tribunal that he or she, or any group of Maori of which he or she is a member, has an interest in the inquiry apart from any interest in common with the public.

This particular amendment was enacted to give effect to an agreement reached between the New Zealand Maori Council and the Crown following the Court of Appeal decision of 29 June 1987. The preamble to the Treaty of Waitangi (State Enterprises) Act 1988 sets out the broad terms of that agreement. No doubt the reason for precluding state-owned enterprises and their successors in title from being heard on claims affecting land vested in them, was to limit representation and thereby avoid delays and additional legal costs.

The tribunal did not find that statutory restriction to be an impediment to ensuring that any evidence, statement, document, information or submission which any state-owned enterprise or any other

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person desired to place before the tribunal was in fact brought to notice. The tribunal considered that clause 6 of the second schedule to the Treaty of Waitangi Act 1975 gave sufficient power to receive all relevant material. The tribunal also had the fullest cooperation of counsel for the claimants and counsel for the Crown to allow the tribunal to receive all relevant submissions and evidence. As a result of the procedures adopted by the tribunal which will be later detailed, every possible piece of evidence affecting every type of claim which could be obtained from every source was presented. No government department, state-owned enterprise or any other corporate body or person was denied the opportunity to be heard.

Hearing of the parties

- 1.4.2 The claim hearings opened on 17 August 1987 and closed two and a quarter years later on 10 October 1989. The following were heard.

The claimants

- 1.4.3 The hearings commenced at Tuahiwi marae on 17 August 1987. Over the next ten-month period the claimants presented evidence to the tribunal at nine sittings spread over approximately ten weeks of hearings.

The tribunal generally sat in the district in which the various claims arose so that sittings took place in Kaikoura, Kaiapoi, Christchurch, Taumutu, Arowhenua, Otakou, Dunedin, Bluff, Hokitika and Greymouth.

During the presentation of the claimants' evidence, the tribunal inspected areas subject to grievance claims. An aerial inspection was made of some of the mahinga kai inland trail routes of Ngai Tahu to the west coast. Ground inspection took place of Waihora (Lake Ellesmere) and Wairewa (Lake Forsyth), areas next to Taumutu, Arowhenua, the inland lake areas including the hydro lakes and dams, Aomarama and the Wainono area. The Arahura river valley was also visited. The tribunal also went up from Invercargill to Lakes Wanaka and Hawea. At many of these places the tribunal met local farmers and heard their views.

The tribunal also visited the Canterbury and Otago museums to inspect evidentiary material and to hear expert evidence. Hearings generally opened with submissions and evidence from the local people.

By the time the claimants had completed their case on 30 June 1988 the tribunal had been given a clear indication of the substantial nature of the claim and grievances. In addition to the investigative hearings,

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two further sittings were held on 14 August 1989 and 9–10 October 1989 to allow Mr Temm to make final submissions and close his case.

The Crown

- 1.4.4 The Crown were represented throughout the whole inquiry by Mrs S E Kenderdine, senior counsel from the Crown Law Office and Mr P Blanchard of Auckland—a senior partner in a private legal firm. Mr A Hearn QC appeared at four sittings of the tribunal and made some legal submissions. Ms A Kerr of the Crown Law Office also appeared at a hearing in Wellington on 2 August 1989.

At the opening of the Crown’s response on 30 June 1988 counsel Mr Hearn started with the following quotation from the Right Honourable Mr Justice Richardson in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 682:

Honesty of purpose calls for an honest effort to ascertain the facts and to reach an honest conclusion. (K1:1)

Mr Hearn saw that comment as a guiding standard on the way the Crown should undertake its painstaking research and conduct the Crown’s response. Crown counsel went on to say that the instruction given to the large number of researchers and experts engaged in the inquiry was “to find out the truth about the matters which are in issue here and neither to hinder nor blur that truth” (K1:7). Clearly then the Crown saw its role in this claim as presenting to the tribunal every relevant fact uncovered by its researchers.

At the conclusion of the final hearing of the claim in Christchurch on 10 October 1989 the presiding officer made these observations which we incorporate in this report as they apply not only to the Crown but to researchers engaged by the claimants and also by the tribunal:

In my respectful view, Crown counsel have acted in every way to protect the Crown’s position yet more importantly to uphold the honour of the Crown. The Crown did not see itself in an adversarial role, though it did not hesitate to challenge disputed grounds; it rather saw itself almost in an amicus curiae role which required it to bring to the tribunal’s notice all discovered material and opinion whether against or for the claim. The background researching by Crown officers and professional consultants has covered every facet, every nook and cranny of not only the nine tall trees and the related claims but also the large number of small claims. The result is that the record before this tribunal contains a most comprehensive and valuable taonga that will provide future generations with a priceless data base. This has resulted from the combined efforts of the claimants, the Crown and the tribunal’s research teams. They are all to be thanked and congratulated for their diligence and scholarship. Before passing from the subject of the Crown’s participation in this inquiry may I venture to suggest that if those Crown officials attending the South Island land sales 140 years ago had regarded the Crown’s honour in the

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way these proceedings have been conducted by Crown officers this tribunal would not have been here today. (Y2:10)

The Crown made very extensive submissions and called a large number of witnesses during the nine weeks of sittings spread over the twelve months needed to complete the Crown research and response to the claim. In addition, counsel Mrs Kenderdine required a further week's hearing from 11–15 September 1989 to make her final address to the tribunal.

Fishing interests

- 1.4.5 At the seventh hearing of the tribunal on 11 April 1988 counsel for the New Zealand Fishing Industry Board (NZFIB), Mr J L Marshall and Ms C Wainwright, and counsel for the New Zealand Fishing Industry Association (NZFIA), Mr T J Castle and Mr R B Scott, requested the board and association be joined as parties to the Ngai Tahu claim. The tribunal ruled that neither body could be accorded the status of a party to the claim but the tribunal would allow them to appear and be heard on matters relating to sea and eel fisheries. Both the NZFIB and the NZFIA took a full part in the hearing of matters relative to fisheries and at the appropriate times made submissions and called evidence in support.

Other interested bodies

- 1.4.6 A large number of government departments, state-owned enterprises and other organisations made written and oral submissions to the tribunal either through counsel or directly. The record of documents appended to this report as appendix 6 gives details of these matters. Reference to appendix 7 will also provide details of the hearings of the tribunal, as well as representation thereat and the names of witnesses and persons attending each respective hearing.

At the first hearing several northern South Island tribes appeared and claimed rights that raised an issue of tribal boundaries. We shall refer more fully to these claims later.

- 1.4.7 In all, the tribunal received a total of over 900 submissions and exhibits, some containing as many as 700 pages each. The tribunal heard, in addition to submissions from counsel, submissions and evidence from 262 individual witnesses and 26 bodies such as government departments, state-owned enterprises, local bodies, farming groups, Maori authorities and community groups. Perusal of appendix 6 will give a fuller picture of the huge volume of material which came to the tribunal in 23 weeks of hearing spread over the two and a quarter years it took to complete the inquiry.

The Claim and the Proceedings

1.5. **Who Were the Tribunal Members Hearing the Claim?**

As this is a public report we have taken the slightly unusual step of appending fuller particulars and background details of the seven members in appendix 9. These details are extracted from an official brochure published by the tribunal.

The following members of the Waitangi Tribunal sat on this inquiry:

Deputy Chief Judge Ashley McHugh
Bishop Manuhuia Bennett
Sir Monita Delamere
Mrs Georgina Te Heuheu
Professor Sir Hugh Kawharu
Professor Gordon Orr
Sir Desmond Sullivan

1.6. **How and Where was the Claim Conducted?**

1.6.1 The powers and duties of the Waitangi Tribunal in relation to the conduct of proceedings before it, including admission of evidence, are set out in clauses 5–8 of the second schedule to the Treaty of Waitangi Act 1975. Although the tribunal generally may regulate its procedure in such manner as it thinks fit, it is bound to conduct its inquiry in a fair and just manner, and to ensure that parties and persons entitled to appear before it are properly notified and given full opportunity to be heard. This section deals with the actual procedures followed by the tribunal and of some modifications made to usual court procedures. Generally hearings followed the usual form in that the claimants first presented their claim and called evidence and the Crown responded and called its witnesses, followed by final addresses.

Two innovative measures were introduced by the tribunal however, in order to cope with the huge volume of evidence and number of claims and also to demarcate the principal issues. Both these steps were taken with the full assistance of counsel for both parties. There can be no doubt that not only did the procedure succeed in crystallising matters in issue, but more importantly it saved considerable time, effort and consequential cost. The first measure was the decision to formulate a list of the principal questions which appeared to need an answer at the end of the claimants' evidence. A schedule of issues was prepared by the tribunal, circulated to counsel and at a special hearing in Wellington those issues were debated and settled. The Crown then had a more formal basis on which to prepare its response and evidence.

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The second measure was the appointment by the tribunal of two experts, in the persons of Professor Alan Ward and Dr George Habib, to prepare overview reports on the evidence presented on historical and fishing matters respectively. These reports were given by these two experts at the conclusion of all other evidence and were subject to examination and submission from the parties, including fishing interests. The reports provided not only valuable assessment criteria for analysis by those appearing before the tribunal, but also provided very useful appraisals for consideration by the tribunal. It is no easy matter for those engaged in a marathon hearing over 27 months, and involving a huge number of disparate claims to keep track of the principal issues. The technique employed was acceptable to all involved in this long hearing.

Pre-hearing conference

- 1.6.2 A pre-hearing conference was held in Wellington on 20 July 1987. Approximately 20 persons attended including 13 counsel representing the claimants, the Crown, government departments, state-owned enterprises and Federated Farmers. A number of important matters were settled including representation, categorisation of claims, hearing dates, venue, procedure, appointment of overview researchers, notice to persons affected and public reporting of hearings.

Notice of claim

- 1.6.3 The tribunal, by public newspaper advertisements on 8 June and 13 June 1987, gave preliminary notification of the claim, inquiry and first sitting date, and invited all persons interested in or affected by the application to notify that interest or of any desire to be heard.

Following directions from the chairperson, written notice dated 30 June 1989 was served on the following persons advising the preliminary conference fixture, date and agenda:

- 1 Minister of Lands
- 2 Minister of Forests
- 3 Minister of Fisheries and Agriculture
- 4 Minister of Conservation
- 5 Minister of the Environment
- 6 Minister of Maori Affairs
- 7 Minister of Agriculture
- 8 Director-General, Land Corporation, Head Office, Wellington
- 9 District solicitor, Land Corporation – Mr C D Mouat, Christchurch
- 10 Weston Ward and Lascelles – Mr Palmer, Christchurch
- 11 Crown solicitor, Crown Law Office – Mrs S E Kenderdine, Wellington

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- 12 Mr A Hearn OBE QC, Christchurch
- 13 Ngai Tahu Maori Trust Board, Christchurch
- 14 Federated Farmers of New Zealand – Mr E Chapman, Wellington
- 15 Mr P B Temm QC, Auckland
- 16 Mr Michael Knowles, Christchurch
- 17 Office solicitor, Royal Forest and Bird Protection Society, Wellington
- 18 Office solicitor, Ministry for the Environment, Wellington
- 19 Office solicitor, Residual Department of Lands, Wellington
- 20 Office solicitor, Ministry of Agriculture and Fisheries, Wellington
- 21 Office solicitor, Federated Mountain Clubs of New Zealand, Wellington
- 22 Office solicitor, Ministry of Conservation, Wellington
- 23 Maori Trustee, Maori Affairs Department, Wellington
- 24 Such other respondents as had notified representation
- 25 All members of the tribunal

On 7 August 1987 a press release giving details of the claim and hearing date was distributed to NZPA, *The Evening Post*, *The Dominion*, TVNZ–Christchurch, Radio Avon, Radio Ashburton, Radio 3ZB, *The Press* and other South Island papers. Copies of the claim were also sent to those on schedule A and B appended hereto (see appendix 7). Newspaper advertisements notifying hearings were also widely published prior to hearings.

Further notification

- 1.6.4 The tribunal circulated to all listed interests, a timetable of hearings so that all persons were aware of future hearing dates and matters set down thereat approximately three months in advance. Fixtures were arranged to suit the convenience of persons requiring a hearing. The general interest created by the inquiry also gave rise to considerable media coverage.

The tribunal took every step possible to notify the claim. No objections have been received from any person or organisation about inadequate or insufficient notice.

First and subsequent hearings

- 1.6.5 The first hearing of the claim took place at Tuahiwi marae on 17 August 1987. A full list of hearings, representation thereat and names of witnesses is set out in appendix 7.

There was a large attendance of people at the opening of the claim, so many in fact that it was necessary to move to the assembly hall at Rangiora High School after the formal opening of proceedings on Tuahiwi marae. The commencement of the hearing was delayed as the result of the unexpected arrival of a party claiming interest in the

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proceedings for the Interim Committee of the Kurahaupo Waka Trust (Kurahaupo–Rangitane). Matters concerning the claim of this group will be dealt with a little later in this chapter.

The chairperson of the tribunal, after the opening karakia, made the following short introductory comments:

He ra tino nui tenei ki a Ngai Tahu. Te Roopu Whakamana i Te Tiriti kua eke nei ki te whakarongo ki a koe Ngai Tahu mo nga mahi ki a koutou i mua noa atu. I ahatia i era wa, a, me pewheatia inaianei. Kua tae mai ki te whakarongo ki o auetanga. Inatata nei whakatatutia e te Kooti Piira, te tumuaki ko Ta Rapene Kuki, i ki ia ko nga taonga o Te Tiriti o Waitangi i mea; Te Maori me Te Pakeha i runga i te Tiriti kia kotahi, kia ngawari me te tino whakaponu. Koia nei nga korero a Ta Rapene Kuki:

Tera whakahau ehara i te mahi iti, tino nui rawa atu te uaua. Ki te taka ki raro o nga whakahaere, ahakoa he aha te wa, te whakahau ma te Kooti kia whakahonoretia.

Na ena kupu i whakatakoto te nohotanga.

The English translation says:

This is a very important day for Ngai Tahu. This tribunal is about to hear from Ngai Tahu what has happened in the past, what was done about it and what must be done now. We are ready to listen to your grievances. Recently in the Court of Appeal decision, the president, Sir Robin Cooke, stated that the principles of the Treaty of Waitangi required the Maori and Pakeha Treaty partners to act towards each other reasonably and with the utmost good faith. Sir Robin Cooke said:

That duty is no light one. It is infinitely more than a formality. If a breach of the duty is demonstrated at any time, the duty of the court will be to insist that it be honoured.

Those words set the scene.

- 1.6.6 The record shows that the tribunal conducted 23 hearings spread over approximately 24 weeks. During the course of hearing, 22 memoranda of directions on interlocutory matters were issued by the tribunal and responded to by counsel. The hearings were well attended, particularly by tangata whenua. There was a sprinkling of community and church leaders attending to listen, but a significant absence of those persons and bodies who have since 1985 tended to be critical of Treaty issues, and in some cases, of the tribunal.

The tribunal held its hearings on marae and in other public conference facilities. In all, the tribunal visited and sat on seven different South Island marae. When hearing the Crown case it held hearings at a university hall in Christchurch, in the conference rooms of the Canterbury Manufacturers Association, in a secondary school assembly hall, in an Otago University common room, in conference rooms attached to motor hotels, in meeting rooms of the Department of Justice and in a rugby club hall.

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The tribunal received no complaints from the public nor from any participating party or witness about the choice of hearing venue or facilities. The tribunal consulted with counsel and bodies involved to make sure all matters were in order. Proper recording and interpreting facilities were in place at all times.

Seating for all was positioned on one level in such a way that people attending formed part of the proceedings and consequently had a sense of participation in the hearings. The courteous and dignified response of all who took part or attended may have been due to this sense of involvement and informality. Considerable credit is also due to the warm hospitality the tangata whenua at the various marae extended to all their visitors. It was no easy task to provide for the long sittings and varying numbers of visitors.

Staff of the Ngai Tahu Maori Trust Board and the tribunal also performed admirable feats in setting up the hearing facilities including recording and public address systems and audio visual facilities.

At every sitting of the tribunal opportunity was provided for any person who wished to speak or make a written submission to do so. No person was denied a chance to be heard.

Procedure at hearings

Kaumatua evidence

- 1.6.7 During the course of the claimants' case, and by agreement with counsel, the tribunal heard the evidence of tangata whenua, including kaumatua. This evidence was generally taken on marae. By agreement with counsel, the evidence from these people was not subject to cross-examination although questions necessary to clarify matters were allowed to be put through the chairperson. It was during the hearing of this evidence that the tribunal received details of the ancillary claims set out in appendix 5. The evidence of kaumatua and other tangata whenua was sometimes oral and recorded, sometimes in written form.

Submissions and evidence in written form

- 1.6.8 At the preliminary conference on 20 July 1987 it was agreed that submissions and evidence would be presented in written form. This procedure ensured that the tribunal had before it comprehensive and carefully prepared and detailed statements. The tribunal planned its sittings, and the gaps in between, to allow the parties to prepare written material. This procedure meant a great deal of pressure on counsel but they responded admirably. As a result, not only did the tribunal have the necessary written evidence of researchers and experts to allow the tribunal to work methodically through it at each

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hearing, but it allowed instant copies of the material to be available for all those interested persons in attendance at the inquiry. The tribunal required the presenting witness to read through the evidence so that all in attendance were able to follow and quietly absorb it. In many cases the evidence was accompanied by video presentation or explained by maps, overlays and photographs. In one case an actual demonstration was mounted to illustrate how Maori fishermen used “mark-books” to plot location of fishing grounds. The tribunal also had on display a huge map of Te Wai Pounamu with boundaries of the regions sold in the various deeds. The procedures adopted required additional time for preparation of written material, but this resulted in better opportunity for the tribunal and counsel to examine the evidence. Counsel for the parties deserve the highest praise for the most efficient way in which they marshalled and presented the evidence and submissions to the tribunal.

As stated at the conclusion of the hearing there now exists as a result of the endeavours of counsel assisted by all those experts in many varied fields, a most valuable collection of taonga that will provide a priceless data base for future generations.

Examination of witnesses and evidence

- 1.6.9 The tribunal decided at the outset to limit adversarial examination of witnesses, and to apply marae kawa to proceedings where desirable and as provided in clause 5(6) of the second schedule to the Act to avoid lengthy cross-examination of witnesses.

Consistent with that, but in a desire to allow some measure of flexibility in testing evidence, the tribunal allowed counsel to ask questions directed to clarify a witness’ evidence. Early in the hearing it was decided to introduce another rather innovative procedure. The length and expert content of much of the evidence from historians, marine biologists, archaeologists, geographers and other experts, not to mention lawyers, presented two difficulties in cross-examination. First, the process of questioning witnesses would have taken incalculable time. Secondly, the complex nature of much of the evidence did not readily lend itself to a process of immediate questions and answers.

Mr Temm however, proposed a logical and effective solution. He suggested a procedure whereby the opposing counsel be entitled to question a witness to clarify the evidence, and in addition be also permitted to file a written memorandum commenting on the evidence and expressing any contrary view. By this method, which was agreed to by the tribunal and other counsel, the tribunal not only avoided unnecessary and often time-wasting oral cross-examination

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and the unpleasanties sometimes arising therefrom, but allowed both the Crown and the claimants the necessary time for their respective researchers to give considered and researched responses. If necessary, further opportunity was given to counsel leading the evidence to respond by a short memorandum. In essence, oral cross-examination and re-examination were replaced by a written commentary and memorandum of response. The procedures worked excellently and were ideal for the circumstances attending this extensive inquiry.

In the judgment of the Court of Appeal dated 22 February 1990 in *Te Runanga o Muriwhenua Incorporated v The Attorney-General* (CA 88/89), Cooke P, at page 31 made this comment when referring to some of the difficulties in using material from the *Muriwhenua Report* (1988) for evidentiary purposes in the High Court:

We also agree with the High Court that different portions of the work may warrant different weighting and *that due allowance will be appropriate for absence of cross-examination and features making it impossible to test adequately some of base material.* (emphasis added)

We have already explained the procedures taken in these Ngai Tahu proceedings to replace adversarial cross-examination with a system of evidence clarification coupled with examining written commentaries. While acknowledging that the well-trying system of cross-examination has strong merit, we respectfully consider that the procedures used in this claim, to provide opportunity for researched response, resulted in a closer and more effective examination of the lengthy and complex evidence.

We also make it clear the two overview experts, Professor Ward and Dr Habib, were cross-examined on their reports by counsel for the claimants and the Crown. In addition, the parties were able to file written commentaries on both reports.

Ward and Habib reports

- 1.6.10 As earlier reported, with the agreement of counsel for the claimants and Crown, the tribunal commissioned two researchers pursuant to powers given it by clause 5A of the second schedule to the Treaty of Waitangi Act 1975. Professor Alan Ward and Dr George Habib were asked to prepare overview reports on respectively, the historical and fishery evidence presented to the tribunal on the Ngai Tahu claim. They were asked:

to attend hearings, when possible, of the respective areas of study; to comment on the reliability and completeness of the evidence; to draw attention to deficiencies and omission, to draw attention to alternative

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interpretation, and to assist the tribunal to summarise and evaluate the data.

Alan Ward is a professor of history at the University of Newcastle, New South Wales, where he teaches Pacific history. He has carried out extensive research on the interaction between Maori and settlers in New Zealand which is reflected in his book entitled *A Show of Justice*. He is a leading authority in the field of nineteenth century New Zealand history.

Dr George Habib holds a Doctor of Philosophy (zoology) degree from the University of Canterbury, New Zealand. Dr Habib's doctoral thesis was on the biology of red cod, one of the major marine species in the south. Dr Habib had previously been consulted by the tribunal, in particular on the Muriwhenua claim. He has worked as a scientist with the fisheries research division of MAF. He has managed an offshore fishing company and since 1984 has been running his own fisheries consultancy service.

The tribunal was indeed very well served by both these persons. Their reports were extremely helpful to the tribunal, to the claimants and Crown and to the fishing industry. The nature of their commentaries in the specialist fields meant they acted in the role of assessors, providing expertise in areas not covered by the tribunal's membership.

Counsel were given and took the opportunity to present written commentaries on matters where they disagreed, in some cases quite strongly, with the reports. The amalgam of all the material thus presented has given the tribunal a comprehensive assessment of complex factual data. We deal more specifically with the Ward and Habib reports as follows:

(a) Ward Report

This is a 427 page report in which the author looks firstly at Ngai Tahu prior to 1840 and then proceeds to examine all the Crown purchases and the aftermath of these purchases. It includes a short study of mahinga kai and a review of the Westland leases. (T1)

(b) Habib Report

The report is presented in four parts.

Part One: A report on Ngai Tahu fisheries evidence – 362 pages of report and references

Part Two: A report on Ngai Tahu 1880 mahinga kai and settlements – an examination of the H K Taiaroa papers – 16 pages

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Part Three: An assessment of Crown evidence on mahinga kai fisheries aspects – 116 pages

Part Four: A report on Crown and fishing industry evidence relative to sealing and whaling – 45 pages (T4)

One indication of the value of the decision to engage independent over-viewers has been the numerous references to their respective works in the final submissions of the claimants and the Crown.

Privacy of certain evidence

- 1.6.11 The tribunal proceedings were conducted in public. All submissions and evidence were presented openly to the tribunal apart from a small number of mahinga kai sites, fishing mark books and privately owned charts of fishing grounds. This latter evidence was available for perusal by Crown counsel and by counsel acting for the New Zealand Fishing Industry Association and New Zealand Fisheries Board but by direction of the tribunal remains as confidential material in the record and not available for perusal by the public.

Claims by Kurahaupo–Rangitane

- 1.6.12 Just prior to the first hearing of the claim at Tuahiwi on 17 August 1987, the tribunal received notice that a claim was to be filed by Kurahaupo–Rangitane claiming interest in a portion of the same lands covered in the Ngai Tahu claim on the northeastern and northwestern areas of the claim. The following chronology sets out the details of that claim, the procedural steps taken by the tribunal and the outcome. Needless to say this intervening claim and others which also followed have caused considerable difficulty for the tribunal. As the following facts will show, the effect of the cross-claim was to raise dispute as to the tribal boundaries of the respective tribal groups. We now deal with the position.

(a) On 6 August 1987 Kurahaupo–Rangitane filed their claim and sought appointment of counsel. The claim referred to that part of the Kaikoura purchase deed of 29 March 1859, which lay to the north and east of the Clarence River and included the Awatere river valley from the coast to the headwaters, the inland Kaikoura range, and the coastline from White Bluffs to Cape Campbell to the Clarence river-mouth, and all forests and fisheries adjacent thereto. Kurahaupo–Rangitane stated that they occupied and enjoyed these lands, rights, and benefits on 6 February 1840, and that the Crown had wrongly deprived them of possession by purchasing from Ngai Tahu without the consent or agreement of the chiefs or people of Kurahaupo–Rangitane.

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(b) By further claim dated 10 August 1987, Kurahaupo–Rangitane extended their interest to the Arahura deed of purchase dated 21 May 1860, again alleging wrongful sale of part of their land by Ngai Tahu to the Crown without their consent or agreement. The area of land claimed by Kurahaupo–Rangitane in the Arahura sale was all that portion north of the Arahura River and all forests and fisheries adjacent thereto.

(c) On 11 August 1987, the deputy chairperson issued directions referring to the two claims and seeking pre-hearing discussions between counsel for the claimants, Kurahaupo–Rangitane and Crown with a view to settling procedural differences.

(d) On 20 August 1987 Kurahaupo–Rangitane attended the first tribunal hearing. Despite opportunities given by the tribunal prior to the commencement and during the hearing at Rangiora, to see if a compromise could be reached, it was evident that the claimants and Kurahaupo–Rangitane were at issue. It was made very clear to the tribunal that the claimants strongly objected to the presence and any participation of Kurahaupo–Rangitane in the Ngai Tahu claim and its proceedings.

(e) On 25 August 1987 the deputy chairperson issued further directions setting out the issues between the claimants and Kurahaupo–Rangitane and requesting the latter to file an affidavit setting out the grounds upon which entitlement to claim was based. Mr Stevens was appointed by the tribunal as counsel for Kurahaupo–Rangitane, by way of limited appointment, to argue the jurisdictional matters arising out of their claim up to 21 September 1987, when the position was to be reviewed.

(f) On 21 September 1987 at Tuahiwi, Mr Stevens presented comprehensive written submissions which were strongly opposed by Mr Temm who said Ngai Tahu rejected the Kurahaupo–Rangitane claim.

(g) A special fixture was made for the claimants to respond at Tuahiwi on 5 November 1987. They did so. Crown counsel also made submission to the effect that it was important to have the boundary dispute resolved as it might place the Crown in double jeopardy.

(h) On 26 November 1987 the tribunal issued its decision which:

- found that Kurahaupo–Rangitane had filed a proper claim which must be heard;
- found there was a need for resolution of boundaries;
- determined for reasons set out in its decision that the Maori Land Court was a more qualified body than the Waitangi Tribunal to resolve tribal boundaries;

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- recommended legislative changes to allow the tribunal to state a case to the Maori Appellate Court for a certificate from that court on the respective tribal boundaries similar to existing procedures for the High Court under section 50 of the Maori Affairs Act 1953;
 - decided to continue with the Ngai Tahu claim pending outcome of any legislative change; and
 - allowed Kurahaupo–Rangitane to attend and be heard until further decision of the tribunal but directed them to file an amended claim giving details of grievances alleged against the Crown.
- (i) On 18 March 1988 Kurahaupo–Rangitane filed an amended claim. These amended proceedings extended their claim further south in the land subject to the claimants’ application.
- (j) On 23 June 1988 at Greymouth, the tribunal issued directions inviting the claimants and the Crown to make submissions on procedural questions raised in Kurahaupo–Rangitane’s amended claim. They did so.
- (k) On 19 September 1988 the tribunal issued its decision to proceed with the hearing.
- (l) On 1 January 1989, by virtue of section 4 of the Treaty of Waitangi Act 1988, the tribunal was empowered to refer to the Maori Appellate Court by way of case stated, any question of fact relating to rights of ownership of any land or fisheries and also any question requiring determination of Maori tribal boundaries.
- (m) On 17 March 1989, a case stated was filed in the Maori Appellate Court and included in it were details of all the claims filed or anticipated.
- (n) The questions put to the Maori Appellate Court required the court to determine in respect of the two areas of land purchased by the Crown from Ngai Tahu in the Arahura deed of purchase dated 21 May 1860 and the Kaikoura deed of purchase dated 29 March 1859:
- 1 Which Maori tribe or tribes according to customary law principles of “take” and occupation or use, had rights of ownership in respect of all or any portion of the land contained in those respective deeds at the dates of these deeds;
 - 2 If more than one tribe held ownership rights, what area of land was subject to those rights and what were the tribal boundaries?
- (o) The Maori Appellate Court has now heard the iwi and persons affected and gave its decision on 15 November 1990 as follows:
- The Ngai Tahu tribe according to customary law principles of “take” and occupation or use has had the sole rights of ownership in respect of the

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lands comprised in both the Arahura and Kaikoura Deeds of Purchase at the respective dates of those deeds.

Having decided that Ngai Tahu only is entitled question two above does not require an answer.

(p) The decision of the Maori Appellate Court is binding on the tribunal by virtue of section 6A(6) of the Treaty of Waitangi Act 1975.

(q) The tribunal observes however that the grievance claims already filed with the tribunal from Kurahaupo–Rangitane, Mr Mervyn N Sadd, Messers R P Stafford and H M Solomon together with any other grievances affecting lands in the northern South Island beyond the determined rohe of Ngai Tahu will in due course be dealt with by the tribunal.

Sea fisheries claim

1.6.13 This portion of Ngai Tahu’s “mahinga kai” grievance is one of the major claims made by the tribe and as the record shows, several amending claims were filed at various times so as to define the parameters of that claim. As indicated earlier in this chapter (1.4.5), the New Zealand Fishing Industry Board (NZFIB) and the New Zealand Fishing Industry Association (NZFIA) were actively involved in the sea fishing claim and were represented by counsel at hearings commencing 11 April 1988, 27 June 1988, 7 February 1989, 10 April 1989, 29 May 1989, 2 August 1989, and 15 September 1989 when fisheries were under inquiry.

1.6.14 On 10 November 1988 the tribunal issued a memorandum referring to the various proceedings on Maori fishing rights before the High Court. The tribunal expressed its concern not only with the question of propriety of continuing to hear evidence, but also the broader questions of costs and convenience in having two jurisdictions contemporaneously dealing with the same, or portion of the same, issues. In this connection the tribunal noted that the High Court was being asked to look at not only the meaning and extent of section 88(2) of the Fisheries Act 1983 but also Treaty rights which formed the essential ingredient of the tribunal’s jurisdiction. The High Court also had to deal with customary fishing rights and common law rights under the doctrine of aboriginal title. The tribunal invited written submissions from the parties and fishing interests as to whether the tribunal should defer further hearings on the sea fisheries claim until the High Court actions were completed.

On 16 March 1989 the tribunal directed it would continue to hear evidence and timetabled future hearing dates. Subject to later adjustments to hearing dates, the tribunal continued to hear evidence and submissions.

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The Court of Appeal have adjourned the Ngai Tahu High Court action in *Ngai Tahu Maori Trust Board v Attorney General & Others* to await the report of this tribunal.

The tribunal has also noted that other actions in the High Court have been adjourned to enable the effect of measures in the Maori Fisheries Act 1989 to be determined by Maori after a settling down period.

- 1.6.15 The tribunal completed its formal hearings on the Ngai Tahu claim on 10 October 1989 and was in the course of preparing its report on all matters raised before it, including the sea fisheries claim, when it received an application dated 22 May 1990 from the NZFIB and the NZFIA to adduce further evidence.

Following the issue of directions from the chairperson dated 29 May 1990 a hearing was held in Wellington on 28 June 1990. On 2 July 1990 an interlocutory determination was promulgated by the tribunal with the consent of the parties and also the NZFIB and NZFIA. The tribunal has decided to reopen the inquiry into the sea fisheries claim and has notified parties that the additional hearings required will take place in due course upon completion of the tribunal's report on the main land claims of Ngai Tahu. The tribunal decided it would also defer its report on the 108 ancillary claims until it had completed the sea fisheries report. It is not expected that the additional sea fisheries evidence will be heard before February 1991. Claimants and Crown as well as the NZFIB and NZFIA have been requested to file written material with the tribunal as soon as possible. Upon receipt of the additional evidence and supporting submissions the tribunal will commission an overview research report and will thereafter proceed to complete its inquiry and report to the minister.

The tribunal considers that the procedures followed have worked well and that, notwithstanding major interlocutory matters in the form of the conflicting claims and fisheries issues, the tribunal has been able to inquire into the major grievances in a logical and time-efficient way.

1.7. **Remedies and Recommendations**

The principal purpose of this report is to issue its findings on each of the grievances. At the beginning of the inquiry counsel for the claimants and Crown agreed that the question of remedies should be dealt with at a later stage. The role of the tribunal is to determine whether, and to what extent, the Crown has acted in breach of Treaty principles and the extent to which the claimants have been detrimentally affected by any such breaches. It is then left to the parties to negotiate a settlement of any proven grievance. This procedure was

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followed in the Muriwhenua fisheries claim. It leaves the way open for negotiation between the tribe and the Crown and for an overall settlement by agreement between the parties based on the findings of the tribunal. It also avoids the need for the tribunal and the parties to be involved in lengthy debate on quantum of remedies before any findings are made on the existence and extent of grievances.

We do not propose therefore to deal with remedies on the major grievances in this report. However, there will be some matters upon which the tribunal should propose recommendation. These relate principally to the grievances concerning pounamu (greenstone), the West Coast perpetual leases, Waihora (Lake Ellesmere) and Wairewa (Lake Forsyth). Our findings will be made as each grievance is examined and in those cases just mentioned will be accompanied by appropriate recommendations.

Summaries of the principal grievances and the tribunal's findings are set out in the next chapter. These summaries deal with the 73 grievances or "branches" pleaded by the claimants under the "Nine Tall Trees". From chapter 6 we commence the more detailed examination of these grievances.

As stated before, the tribunal has divided its reporting process on the Ngai Tahu claim into three parts. This present report deals with the "Nine Tall Trees" or principal grievances arising out of eight South Island purchases and also includes mahinga kai. A second report will deal with the sea fisheries claim and a third report will cover the 108 ancillary claims. At the end of the hearings on 10 October 1989 a closing statement was made by the presiding officer. It forms part of this report as appendix 8. We now pass to the summaries of the main claims.

Chapter 2

Summary of the Grievances, Findings and Recommendations

2.1. Introduction

This report is lengthy. The detail of the nineteenth century land purchases is complex, as is the history of the grievances which emerged from them. Ngai Tahu claims relating to the tribe's traditional food resources, their mahinga kai, has also necessitated a wide-ranging examination of Ngai Tahu's use of a territory over half the size of New Zealand. The gravity of these claims and their long history has demanded an extensive review of all the historical and other evidence which has been made available to the tribunal. We have also had to consider the interpretations placed on this evidence by the expert witnesses and the submissions of the parties and other persons who appeared before the tribunal. The tribunal is conscious that this inquiry is not the first to consider many of these claims. In the hope that long standing grievances can finally be put to rest, we have felt it necessary to deal with the issues in considerable detail. However to ensure that the story of each of these claims can be more readily understood, we have made summaries of each of the major claims and the tribunal's findings on the claimants' grievances associated with them.

It is essential that these summaries be read in the light of the full discussion of the evidence and the tribunal's reasoning and findings in the later substantive chapters of the report. Should there be any disparity between any aspect of a summary and the full discussion in a later chapter, the latter is to be taken as the tribunal's considered view.

The grievances in each section have been numbered as they were filed, and these numbers are used throughout the summaries. The index of grievances, at the end of this report, shows where each finding on these grievances is set out in the main report.

The report also contains several chapters discussing issues which are not summarised here. Chapter 3 examines Ngai Tahu before the Treaty. The tribe's history and its relationship with the land and the

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resources of Te Wai Pounamu is explored. Chapter 4 discusses Ngai Tahu's relationship with the Treaty. In June 1840, Major Bunbury brought the Treaty to Te Wai Pounamu, and it was signed at Akaroa, at Otakou and at Ruapuke. Six Ngai Tahu rangatira signed the Treaty: Tuhawaiki, Kaikoura, Tikao, Karetai, Iwikau and Taiaroa, although this last chief does not appear to have been the rangatira of the same name who played an important part in the much of this story. The tribunal also reviews in this chapter the Crown's responsibilities under the Treaty of Waitangi and the Treaty principles as they apply in this claim. Chapter 5 provides a discussion of the Crown's policy in dealing with Maori at the time when the first purchases were made from Ngai Tahu in the 1840s and 1850s. We start the summary here at chapter 6 in the report, the Otakou purchase.

2.2. **The Otakou Purchase Summary**

Introduction

In early 1844 the New Zealand Company was looking for more land to settle Scottish immigrants as part of the New Edinburgh scheme, the brainchild of a George Rennie. The governor of the day, Captain Robert FitzRoy, waived pre-emption to allow the company to purchase a block directly, but appointed an officer to supervise the negotiations, and ensured that a protector of aborigines would also be present when the deed was signed. Soon after giving his approval for the purchase, FitzRoy by proclamation waived pre-emption more generally, allowing settlers to purchase land directly from Maori on certain conditions. The Otakou purchase followed several weeks of discussions and the agreement recorded in the deed, signed on 31 July 1844, transferred a clearly defined block to the New Zealand Company for the sum of £2400. At the time the area of the block was estimated at 400,000 acres, although it was expected that the company would only be granted 150,000 acres of this. The tribunal has only recently discovered that the total area was as much as 534,000 acres. There were three pieces of land within the boundaries of the purchase which were specifically excluded from the sale, and these were later found to total 9600 acres.

Unbeknown to the Ngai Tahu and company negotiators, the New Edinburgh scheme had already been abandoned in England before the deed was signed. Uncertainty about land titles and the peace of the colony following the Wairau affair the previous year had made potential investors and colonists wary. It was not until 1847 that the Otago Association, the inheritor of Rennie's scheme, was able to send colonists to what had become known as the settlement of Otago. In the meantime, Governor Grey, FitzRoy's successor, had granted the

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whole 534,000 acres to the company and re-imposed Crown pre-emption.

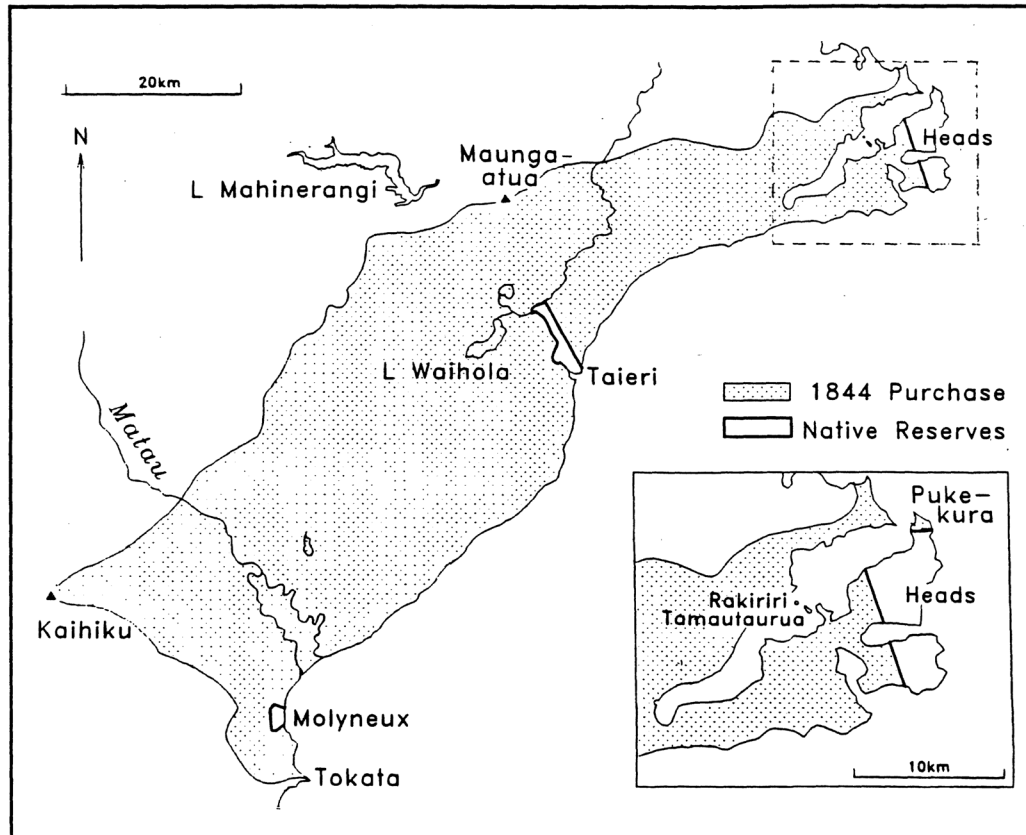


Figure 2.1: The Otakou purchase as defined by DOSLI and estimated at 533,700 acres, showing the reserves at the Otakou Heads, Taieri, and Molyneux (O45)

Claimants' grievances

The claimants' grievances concerned the question of whether Ngai Tahu should have been awarded tenths. On numerous occasions over more than 120 years, various Ngai Tahu have argued that their tupuna were promised that a tenth of the land purchased would be returned to them. The policy of reserving for Maori a tenth of the land purchased, was part of the company scheme and was applied, at least to some extent, in Wellington and in Nelson. The claimants alleged that Symonds, as protector, failed to discharge his responsibilities (no 1). They claimed that the Crown failed to ensure that sufficient land was set aside to provide an economic base for Ngai Tahu which would preserve their tribal estate (no 2). They also complained that under FitzRoy's general waiver of pre-emption the Crown had an obligation

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to set aside a tenth of the whole block which it failed to do (no 3). They claimed that the Crown failed to establish an administrative policy under the waiver proclamation, which would have protected Ngai Tahu (no 4). Finally, they alleged that Grey signed the Crown grant without setting aside tenths, as required by the waiver proclamation (no 5).

Background to the purchase: tenths policy

By the middle of 1844, Edward Gibbon Wakefield's tenths' policy had already undergone several transformations. Wakefield's original idea had been to acquire title to large areas of the country by purchase from Maori. The company would then sell the land at a very considerable profit to settlers and British speculators. When the land was surveyed it would be distributed to the company's investors by ballot. The company would select every tenth or eleventh section for Maori. However the title would still remain with the company who would manage this estate in trust. It was assumed that Maori would shift off their existing pa and cultivations and resettle on these tenths blocks, scattered randomly throughout the whole settlement. This would include a tenth of all land in the towns, in the suburbs and in the country areas. Although Maori would be paid very little for the land initially, they would benefit from the dramatic increase in the value of their tenths reserves as settlement developed.

The reality of the tenths scheme in New Zealand bore little relationship to Wakefield's theory. The company successfully obtained deeds of sale from Ngati Toa, Te Atiawa and other Cook Strait rangatira, and using these claimed title to some 20 million acres. Even before news of these negotiations had been relayed to Britain, the settlers were on their way. On the basis of these deeds, Lord John Russel, the colonial secretary, reached an agreement with the New Zealand Company in November 1840, with the Crown undertaking to grant four acres for every pound spent by the company on colonisation. However, when the company's purchase deeds were investigated by the lands claims commissioner, William Spain, he concluded that very few of the company's claims were justified. The company was eventually forced to pay compensation to Maori to allow its settlers to occupy the land which it had sold to them. Maori were voicing concern that they had not sold the land claimed by the company and they were also resisting attempts to move them off their kainga and cultivations. Although tenths had been allocated, Maori were receiving little benefit from them.

At the time of the Otakou negotiations, then, the tenths policy was in some difficulty. Maori in Port Nicholson were resisting the scheme. They were understandably reluctant to abandon their homes and to

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shift off their villages onto land which they did not own or control. Attempts by settlers to occupy land they claimed in defiance of Maori ownership had led to the killings at Wairau in 1843. The Crown was concerned to ensure that company action did not provoke other incidents of violence. It was in these uncertain and difficult times that the Otakou purchase took place.

The terms of the purchase and the way they were negotiated were largely influenced by earlier agreements between the Crown and the New Zealand Company over the other company purchases. In November 1840, the Crown agreed to take over responsibility for providing Maori reserves as stipulated in the purchase deeds. For any new purchases the Crown would decide what arrangements would seem “just and expedient for the benefit” of Maori (C2: 4:3). These arrangements may or may not have involved tenths, that was up to the Crown to decide. The Crown was only obliged to allocate tenths if these had been specified in the pre-Treaty deeds. The same agreement limited the company to land within the area of the original deeds, and this did not include Otakou. When this provision was modified in April 1841, the company was able to select land outside of the 1839 boundaries, provided that this land was not near Auckland, and provided that all other provisions of the 1840 agreement were met. The tribunal considered that this did not impose any legal obligation on the Crown to provide tenths in the Otakou purchase.

The Crown did have the responsibility to provide reserves for Maori from any further company settlement, and this was acknowledged by the New Zealand Company’s prospectus, the June 1843 “Terms of Purchase for the New Edinburgh Settlement”. When the directors of the New Zealand Company gave instructions to Wakefield to acquire land for this settlement, he was also told to heed Governor FitzRoy’s directions in relation to Maori and public reserves.

Wakefield discussed the company’s situation including the proposed South Island settlement with FitzRoy, at the end of January 1840, just over a month after the new governor’s arrival in New Zealand. On 27 February FitzRoy issued instructions to John Jermyn Symonds, a Wellington police magistrate, to supervise the negotiations and informed Wakefield of the pre-conditions to the Crown’s waiver of pre-emption. Symonds was told that pre-emption would be waived once he reported that these conditions had been met. He was to report to Mathew Richmond, recently appointed superintendent of the Southern Division. Wakefield was told that the company would have to provide the money, that the 1840 agreement would have to be fulfilled and that the land would be regarded as an exchange for land it was already entitled to elsewhere. Neither of these letters

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mentions tenths, nor do they make any comments about Maori reserves.

In fact, there is no evidence in any of the written communications between the various company and Crown participants, Wakefield, FitzRoy, Symonds or Richmond, that any specific instructions were given on reserves for the purchase, either in written or oral form. While, as the Crown's historian, Dr Loveridge, suggested, there were good reasons why Wakefield, Symonds and Richmond should have sought clarification from FitzRoy on this issue, there is no evidence that this was done.

A despatch of 23 May 1844 from Richmond to FitzRoy suggests that Richmond was still awaiting advice from the governor on what Maori reserves would be required:

In relation to the New Settlement, when the choice of Sections are being made, it will be necessary to have an Officer on the spot to select Reserves for the Government and Natives; for this duty (should I not be previously instructed by Your Excellency) it is my intention to appoint Mr Symonds . . . I shall endeavour to furnish him with a list of what is required, in the event of my not learning in time what Reserves Your Excellency may consider necessary. (C2:9:4-5)

A week later Richmond sent a schedule of the required public reserves to Symonds, but remained silent on provisions for Maori. On 12 June Richmond again wrote to FitzRoy. He appeared concerned about the arrangements for Maori reserves, and informed FitzRoy of the actions he intended to take unless the governor informed him otherwise. Through misreading the Terms of Purchase for the New Edinburgh settlement, Richmond appears to have mistakenly believed that the Crown was obliged to set aside tenths, as in the earlier purchases. He informed FitzRoy of his intention to demand the allocation of tenths from the company, should the settlers arrive before he had received instructions from the governor.

I shall therefore demand on their [Ngai Tahu] behalf one-tenth of each description of Allotments i.e. Town, Suburban and Rural, and arrange with the Principal Agent of the Company, or the Agent for the New Settlement on the mode to be adopted for their selection, should I not receive Your Excellency's instructions on the subject previous to the arrival of the latter with the Emigrants. (C2:9:14)

Richmond appears to have made no attempt to notify Symonds or Wakefield of these intentions, and they were never carried out since the settlers did not arrive.

The tribunal concluded that in all the communications between FitzRoy and Richmond, Symonds, Wakefield and George Clarke Jr (the protector present at the signing of the deed), no instructions were given to provide tenths as part of the Otakou purchase. Rich-

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mond did signal his intent to have tenths selected should the settlers arrive, but this was based on a misunderstanding of the Terms of Purchase as they applied to provisions for Maori. Richmond's intentions were also based on a lack of instructions from FitzRoy.

This does not mean that tenths were not a possibility. The November 1840 agreement gave the Crown the right to determine what arrangements for Maori should be made in any subsequent purchase. In giving his consent to waive pre-emption, FitzRoy made it clear that his decision was conditional on his being satisfied that Maori had been fairly dealt with and adequately provided for. He retained, on behalf of the Crown, the right to review any sale agreement, and to make further provisions for the sellers, should this be considered just. It would appear that most of the Europeans involved were aware that this could include the reservation of tenths. It was up to the governor.

The March 1844 Waiver proclamation

The claimants, in their grievances, did not argue that the obligation to make tenths arose from the particular circumstances of the Otakou purchase. On 26 March 1844, a month after FitzRoy agreed to a specific and conditional waiver of pre-emption for the New Edinburgh settlement, he issued a proclamation, which allowed Maori to sell land directly. Each purchase had to be approved by the governor. Pa and urupa could not be sold, and the governor could refuse any application if he considered it not in the Maori or public interest. The proclamation also provided that a tenth of the land "of fair average value as to position and quality" was to be conveyed to the Crown for "public purposes, especially the future benefit of the aborigines". The claimants saw this proclamation as applying in Otakou. They argued that the company policy of tenths applied to all purchases where pre-emption was waived. They did however acknowledge that such reserves would have been vested in the Crown, and Maori would not have owned or administered them directly.

FitzRoy's decision to waive pre-emption was a response to pressure from Maori and settlers alike, particularly from around Auckland. The Crown had no funds available for land purchase, and was unable to buy all the land being offered by Maori for sale, nor was it able to supply the settler demand for land. FitzRoy had sought Lord Stanley's guidance on the issue before he left England, and received a cautious reply. The colonial secretary preferred to defer any decision until he had been briefed from New Zealand. The governor did not wait for any such approval before issuing his March proclamation.

On 15 April, FitzRoy outlined to Stanley his reasons for approving the New Zealand Company's plans to directly purchase land from Ngai

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Tahu, and expressed his intention to repeat the waiver to allow the company to purchase further lands. He also, quite separately, gave his reasons for the more general waiver proclamation. Lord Stanley also treated the waiver provisions for the New Edinburgh purchase as being discrete actions unrelated to the general waiver proclamation. He wholeheartedly approved the measure for the company, but was only able to give a grudging and somewhat qualified approval to the general waiver.

Governor FitzRoy's instructions to Symonds were given a full month before the decision was made to issue the March proclamation. There is nothing in the proclamation which suggests it was to act retrospectively. No attempt was made by FitzRoy to review the terms by which the company was to be allowed to purchase from Ngai Tahu. Under the proclamation, the company would have been required to make a specific application to have pre-emption waived. It did not do so nor was it required to do so. The tribunal considered that the only reasonable conclusion was that the March waiver proclamation did not, and was not intended to apply to the New Edinburgh purchase. Accordingly the tribunal considered that there was no obligation on the Crown to comply with the March proclamation in respect of the Otakou purchase. For these reasons, the three grievances which extend from this premise (nos 3,4 and 5) have not been made out.

The purchase

In early April, Frederick Tuckett, the company's agent for the negotiations and principal surveyor in Nelson, left Wellington to select the site and negotiate a purchase. With him went John Symonds to supervise the proceedings on behalf of the Crown. Relations between the two men were strained, and twice in the weeks that followed Symonds returned to Wellington to clarify his instructions and complain about Tuckett's conduct. Symonds had been told not to allow surveying, an action which could be seen as provocative in Maori eyes. Tuckett found this imposition extremely difficult to comply with. How was he to select 150,000 acres without surveying? The only solution appeared to be to purchase a much larger area from which the company block could later be selected and this was the option agreed to by Symonds. Concerned by Tuckett's activities, Symonds returned to Wellington at the end of April, where he obtained strong support from Richmond to keep the company agent within the confines of Richmond's restrictive regime.

The initial preference for the settlement was Port Cooper (Lyttelton) but this was rejected in favour of the site of present day Dunedin. A long narrow block, running down the coast from the Otakou harbour to the Molyneaux (Clutha) River was chosen, estimated to contain up

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to 400,000 acres. By 10 June word had circulated among Ngai Tahu that the company wished to negotiate a purchase and many Maori were arriving to begin the discussions. These did not begin until 18 June and the major meetings were held over the following two days. While there were wide differences over price and the areas to be reserved on 19 June, the following day Ngai Tahu rangatira and Tuckett came to an agreement. Professor Ward argued that Ngai Tahu agreed to commit themselves to a purchase largely because the company had agreed to raise the price to £2400 and had abandoned its demand to control the whole of the western side of the harbour. Tuckett feared that Ngai Tahu and the Europeans who inhabited this area would be able to establish an independent town which could rival the company's own settlement. While Symonds had withdrawn from the proceedings when this agreement was reached, it still required the Crown's approval before it could be implemented by the signing of a deed.

Colonel Wakefield decided to be present at the signing of the deed and travelled down to Otakou, with Symonds, George Clarke Jr, sub-protector of aborigines, and the land commissioner, William Spain. On their arrival, a party including six Ngai Tahu set out to verify the boundaries, and following their return eight days later, all was ready for the formalities of signing the agreement and handing over the money. Three areas were to be specifically reserved from the sale; a large block on the western side of the Otakou Heads, a reserve at Taieri and another at Molyneaux. Together they were eventually found to contain 9615 acres. When the agreement was finalised on 31 July 1844, George Clarke explained to Ngai Tahu that they had in disposing of their land:

surrendered their interest and title to such land; that their consent to sell it was binding on their children, as well as themselves, that they should remove from any portion then occupied by them, and confine themselves exclusively to their reserves. (C2:7:2)

The deed was read over in Maori and in English and the purchase money divided among the various families under Tuhawaiki's direction. Finally Tuhawaiki lifted a tapu on a burial site within the purchase and took the bones away for reburial.

There is nothing in the agreement or in the contemporary record of the negotiations to suggest that the company or Crown agents promised to ensure that tenths would be provided. As Professor Ward pointed out, the parties seem to have been at pains to carefully divide the lands which would remain in Maori hands and those which would go to the settlers. Ngai Tahu insisted, against the company's wishes, on having a considerable area of land under their own ownership and

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control. Symonds made this clear in his report to Richmond on 2 September, where he explained why he had made these reserves, rather than provide any specific provision for tenths.

I pursued this course as regards native reserves, from the conviction that the system heretofore adopted in other purchases of large tracts, was beyond the comprehension of the aborigines, and at the suggestion of Colonel Wakefield I left the further choice of reserves, namely, the tenth part of all land sold by the New Zealand Company, to be decided by his Excellency the Governor, without making any express stipulation with the natives on the subject. (C2:7:1-2)

Colonel Wakefield also reported on the sale, commenting that two further aspects were left to the governor. The first concerned the remaining area of the block not promised to the company, and the second involved:

the special native reserves, as in the other settlements; not contemplated in the Company's New Edinburgh scheme, which cannot be made till the surveys are completed and selections made. (C2:11:55)

Like Symonds, Wakefield believed that there was no commitment made to provide tenths, the special native reserves in other company purchases, but the governor still had the discretion to impose these reserves when surveys had been made and the company's sections selected.

If tenths had been discussed, Professor Ward has concluded that given events in Wellington and Ngai Tahu's clear determination to retain ownership and control of the land reserved to them, there were good reasons for them rejecting such a proposal. Tenths would not, it must be remembered, have been owned or controlled by Ngai Tahu themselves. Symonds' report of the purchase explained his actions in supervising the transaction, and acknowledged that further provisions could be made by the governor for Ngai Tahu. In Symonds' view these could amount to tenths but FitzRoy had the power to make whatever further provision for Ngai Tahu he thought necessary.

Ngai Tahu raise their claim to the tenth

Ngai Tahu do not appear to have raised the issue of tenths with the Crown until much later in the century. In 1867 when Topi Patuki petitioned Parliament over the Princes Street reserve, his petition made no reference to any promise made in 1844, but to the "arrangement then existing" between the government and the New Zealand Company. Lands reserved for tenths in Wellington were at the time being placed directly in Maori control by the Native Land Court. In 1872 H K Tairaoa produced a statement to the Committee on Middle Island Native Affairs, said to have been made by his father in 1862, shortly before his death:

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Secondly. After that land purchase commenced in this Island, the first land we sold was Otago; it was sold to Colonel Wakefield. We pointed out all the boundaries, and all stipulations were mentioned to Colonel Wakefield, as follows:—We said the first payment for this land would be £100,000. Colonel Wakefield said, “That is too much, £2,400 will be ample, and that is all the cash consideration; it had better be arranged in this manner, viz., that one acre in every ten shall be reserved for you.” We agreed to this, and said, “You can have the land according to these terms.” We do not know whether these words were written down or not, but all the people present heard these words.

These are the places about which we spoke, and stated that we desired to retain—Otakori, Taiari, Maranuku, Te Karoro, and other places. (C2:21:9)

Mantell told the same inquiry that he had discussed tenths with a number of Ngai Tahu rangatira, including Tuhawaiki who had drowned in 1844. The tribunal agreed with Professor Ward that this statement must be discounted. Despite active involvement in Ngai Tahu affairs between 1848 and 1872, Mantell never once raised the issue on their behalf, although he was twice minister of native affairs. Tare Wetere Te Kahu and Hoani Wetere Korako also gave evidence to the same inquiry, although only Te Kahu was a signatory to the deed. Neither mentioned anything resembling tenths. They both considered that Ngai Tahu were entitled to some small and specific pieces of land within the block.

The Smith–Nairn commission heard evidence from four Ngai Tahu present at various times during the negotiations. Hone Kahu simply said that Maori portions were to be chosen, “Ko nga whenua Maori hei nga Papatupu”, from the land occupied by their ancestors, and he named four places. Wiremu Potiki maintained that Maori were refusing to accept Wakefield’s offer of £2400 until Wakefield promised that the land would be “divided”. His recollection was that Wakefield “mentioned that the land was to be divided into sections and that was the reason why they agreed to take £2,400” (P2:107). Horomona Pohio was confused about some of the details of the June and July meetings, but he too maintained that Wakefield had promised to have the land “divided into sections” for Ngai Tahu (P2:108). Rawiri Te Maire, like Pohio, had forgotten that agreement had been reached in the earlier June meeting, but he also maintained that Ngai Tahu had agreed to accept the money offered, after they had been promised that the land would be divided into sections for Maori and settlers. Te Maire said that George Clarke had explained that this would happen after the land had been surveyed. All the Maori witnesses used the term “wakawaka” to describe these sections. Wakawaka were Ngai Tahu’s traditional means of dividing resources among hapu and whanau.

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This testimony is difficult to reconcile with the contemporary evidence of the negotiations and with the whole tenths policy as it applied in 1844. While Tuhawaiki, Karetai and Taiaroa all agreed to the terms of the sale on 20 June, the witnesses' recollections had these chiefs refusing to agree to the £2400 until the end of July when the deed was finally signed. Wakefield's and Symonds' reports are also completely inconsistent with any promise of tenths having been made. The tribunal considered it likely that in the intervening years, Maori recollections of the discussions which led to the reservations of the Otakou heads had become confused with the issue of tenths.

Some of the European participants also made statements about the negotiations later in the century. In 1880 Symonds denied having discussed tenths at all, although he did not know if Ngai Tahu had discussed them with Colonel Wakefield. George Clarke sent an affidavit to the Smith–Nairn inquiry in April 1880. He was more forthright, saying that after his experience of the confusion in Wellington, he had been determined that the “whole terms of the purchase should be expressed in the Deed of Conveyance” (T1:106). He thought it possible that tenths may have been discussed by Colonel Wakefield, but concluded that Ngai Tahu had rejected any proposal where they could not choose the lands to be reserved to them. He emphasised that he was “almost certain, that *nothing whatever beyond the contents of the deed was promised as a condition of the sale*” (T1:107). (emphasis in original)

Conclusions and findings

The claimants pointed out that tenths were very much in the air in 1844. Although the policy had run into difficulties, the March proclamation revitalised it, by ensuring that Maori retained their pa and cultivations, as well as vesting tenths in the Crown. Dr Ann Parsonson suggested that Ngai Tahu were well aware of these measures, and that Tuhawaiki had been informed of the governor's intentions when he met him in Wellington on 27 February 1844. This can only be speculation. We agreed with Professor Ward, that Ngai Tahu much preferred to have land they wished to retain set aside as excepted from the sale and that there is no good contemporary evidence that Ngai Tahu expected the company or the government to provide tenths on their behalf. Nor were we persuaded by any later evidence that such was the case.

The claimants were critical of Symonds' role in the negotiations, claiming that he failed to discharge his responsibilities as protector (grievance no 1). They concluded that his journeys to Wellington left the negotiations unsupervised. They also alleged, that along with Wakefield, Richmond and FitzRoy, he expected tenths would be

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provided, and yet made no attempt to implement this. Finally they suggested that he remained distant from the negotiations, and therefore made no attempt to protect Ngai Tahu's interests. The tribunal did not find this grievance to be made out. Symonds' responsibility was to look after Crown and Maori interests, and in supervising the negotiations he may have been over cautious, but this did not disadvantage Ngai Tahu. Although Tuckett's negotiations of 20 June 1844 were conducted in Symonds' absence, the resultant agreement still required his approval. In fact, it was Clarke, and not Symonds who had the role of protector in this purchase. Clarke appears to have gone to considerable lengths to ensure that Ngai Tahu understood and accepted the terms of the agreement. Nor was Symonds' own role passive: he ensured that the boundaries were inspected and insisted that Ngai Tahu's demand to retain the large area at the heads be respected.

While we concluded that Symonds conscientiously followed his instructions, the tribunal was bound to say that these instructions were defective. FitzRoy failed to give any instructions to ensure that the Maori retained sufficient land for their present and future needs. The fault lay not with Symonds but with FitzRoy.

There had been no commitment by the company or by the Crown to provide any additional "special reserves". However, the governor still had to approve the purchase, and still had the option of making additional reserves for Ngai Tahu. The Europeans concerned expected that this would involve lands vested in the Crown and selected by ballot when the land was surveyed and selected. However there was nothing to stop FitzRoy from reserving lands directly to Ngai Tahu under the terms of the Crown's agreement with the company of November 1840.

At the end of the purchase, it was still expected that the settlers' arrival at Otakou was imminent. However, by the time Symonds' report reached FitzRoy in early September, news had reached Wellington that plans to send the settlers had been suspended. With urgency gone, FitzRoy delayed reporting to Lord Stanley until December 1844. He praised Symonds' role in the negotiations and forwarded a copy of the deed to London, but did not mention his obligation to consider the need for additional reserves. We have assumed from this that FitzRoy entirely approved of the transaction, including the provision of reserves in the deed, and that he did not propose to take any further action as to the provision of tenths. Lord Stanley appears to have accepted the reserve provisions contained in the deed as adequate for Ngai Tahu, and the company certainly believed that tenths were unnecessary in the block. Nonetheless, although not

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instructed to do so, Governor Grey, like FitzRoy before him, still had the discretion to provide additional reserves if he considered them necessary. He made no move to do so. On 13 April 1846 he issued a Crown grant for the New Zealand Company not just for the 150,000 acres originally intended for the company but for the whole of the Otakou block, then thought to be of 400,000 acres but now known to contain as many as 534,000 acres. Maori reserves were specifically excepted-those identified in the deed. When the settlers arrived in 1848 and had their surveyed lands balloted to them, Grey issued no instructions to have further reserves selected for Maori.

In considering whether FitzRoy or Grey should have vested a substantial endowment of land in the Crown for Maori purposes we noted Professor Ward's comments that to be consistent with his own undertakings, FitzRoy should have provided tenths at least for the residual 250,000 acres. The professor considered that the large reserve at the heads was intended to balance the 150,000 acres to be selected for the company settlement. The tribunal considered this argument consistent with the often stated policy of the Crown to provide resources from Crown purchases for Maori welfare. Dr Parsonson also demonstrated that FitzRoy believed that as a general rule tenths should be reserved for Maori vendors, in addition to lands for their occupation:

With respect to the interests of their descendants they [the Maori] are indifferent, and require the provision of at least a tenth of all lands sold, besides extensive reserves in addition (R36(b):2:374)

The tribunal was at a loss to understand why having so clearly stated this policy to the colonial secretary, FitzRoy made no attempt to provide tenths in the Otakou situation.

The tribunal had to consider whether the failure on the part of FitzRoy and Grey to set aside additional reserves constitutes a breach of the Treaty of Waitangi. After the sale, Ngai Tahu were left with 9615 acres. Was this sufficient for their present and future needs and an adequate endowment? In considering this issue, the tribunal has rejected the suggestion of claimants' counsel that these 9615 acres should not be taken into account as they had been excluded from the sale. The exclusion from the sale of lands required for the comfort and subsistence of Ngai Tahu was consistent with the Treaty principle that they were to be left with a sufficient endowment for their own needs, both present and future. However, if these reserves were insufficient to provide an adequate provision for their present and future requirements, then the Crown was under an obligation to ensure this by way of further reserves.

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How much then was adequate? The 9615 acres left Ngai Tahu can be contrasted with the 8650 acres FitzRoy awarded John Jones of Waikouaiti in December 1844. Following a prolonged dispute with officials, Jones was eventually awarded 8500 acres by special legislation in 1867, in addition to the 2560 granted him in 1849. This 11,060 acres comprises over 1000 acres per member of his family, including his wife and nine children. In contrast, Ngai Tahu were left with less than 30 acres per head, based on an estimate of 335 people who may have had rights in the block.

In a study of Ngai Tahu's social and economic position in the period after the purchase, Mr Bill Dacker, a claimant historian, argued that the tribe was seriously under endowed with land in their attempts to realise the benefits which European settlement promised. As a result, he argued that the tribe was marginalised in the European world and their tribal identity was eroded. The Crown responded with the evidence of Mr Tony Walzl, who while agreeing with Mr Dacker's general conclusions, did not see the reserves as being under pressure during the 1850s. Professor Pool, for the Crown, placed Ngai Tahu's needs in a demographic framework. He presented figures which suggested that by the estimates of the day for European needs, and considering the quality of the reserves, Otakou Maori had sufficient land for their 1844 needs. However he also demonstrated that European estimates of what was necessary increased dramatically as pastoralism took a hold on the New Zealand economy. As for Ngai Tahu's future needs, Professor Pool had no doubt that the provision made for them was inadequate, citing Alexander Mackay's 1891 figures which show only 12.8 per cent of Maori in Otago as having sufficient lands for their needs. To some extent the responsibility for this goes beyond the Otakou purchase and was a consequence of the Crown's subsequent dealings with Ngai Tahu over land.

Discussing present and future needs in terms of population per acreage was helpful, but presented the danger that the outcome was distorted. The Crown was under a duty to Otakou Maori to ensure that ample land was set aside to provide an economic base for the future. In fact it left Ngai Tahu only sufficient land for bare subsistence, with no opportunity to turn, as European settlers soon did, to pastoral farming. The tribunal, therefore, had no hesitation in finding that the claimants' grievance that the Crown failed to provide an economic base was made out. In short, the Crown acted in breach of Treaty principles in failing to ensure that Ngai Tahu retained or were allowed sufficient land for their present and future needs.

In 1844 Governor FitzRoy was committed to a policy that tenths should be provided when Maori sold land, in addition to their retain-

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ing adequate reserves. The tribunal considered that the Crown was under a residual obligation to make further provision for the Otakou Ngai Tahu which might have been met by the provision of tenths vested in the Crown for Maori purposes. The tribunal had in mind that, as later occurred elsewhere, some tenths might have become vested in Ngai Tahu as owners. The failure on the part of the Crown either to make such provision for tenths or to make other adequate provision, constituted a breach of Treaty principle. It was clear that Ngai Tahu had been prejudicially affected by such failure on the part of the Crown.

2.3. The Princes Street Reserve Summary***Introduction***

Compared with the millions of acres involved in a number of Ngai Tahu's other grievances the 1 acre 2 roods 34 perches of the Princes Street reserve may appear relatively insignificant. Nonetheless the history of the reserve and the claim associated with it have been a major concern to Ngai Tahu of Otakou for many generations. The Princes Street claim has created a considerable file of archives and the tribunal was presented with detailed evidence supported by over 1000 pages of documents.

The reserve, intended to provide Ngai Tahu with a landing place at Dunedin, was made in 1853, by Governor George Grey on Walter Mantell's recommendation. A few years later the status of the reserve was challenged by the Otago provincial government, which claimed the land had previously been reserved for wharves and quays. Eventually a Crown grant was issued by Grey in favour of the province. Ngai Tahu challenged this, beginning a process of litigation which eventually led to an out of court settlement, whereby the tribe accepted £5000 to abandon an appeal to the Privy Council. After a further petition to the House of Representatives an additional £5000 in back rents was also paid. The £10,000 was considerably less than the value of the reserve, by that time extensively developed through the city's rapid gold-fed growth during the 1860s. Ngai Tahu's legal case was not strong but they have continued to regard their claim for the reserve as unfinished business.

Claimants' grievances

Three of the claimants' Otakou grievances related to the Princes Street reserve. They alleged that the Crown failed to set aside the Otepoti (Dunedin) reserves promised at the time of the sale (no 6) and that it failed to create the Princes Street reserve in 1853, prejudicing Ngai Tahu's later litigation and negotiation (no 7). Finally it was claimed that the Crown failed to protect Ngai Tahu by not providing

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a permanent hostel for their personal use and occupation and as a base for their commercial activity (no 8).

The Otakou purchase

There is no mention of a reserve at Dunedin in the Otakou purchase deed of 1844 or in any other documentation of the time of the purchase. The suggestion that the reserve was promised in 1844 was first raised in 1867, when Ngai Tahu began their campaign to have their rights to the reserve recognised. Topi Patuki, in a petition to the Queen, claimed that some small additional pieces of land had been excluded from the purchase. These included a place near the Toitoi stream which crossed Princes Street and another in the location of the 1853 reserve and the neighbouring manse. Patuki maintained that Ngai Tahu chiefs had withdrawn from the negotiations when these requests were refused by the New Zealand Company and Crown representatives, and that they had only returned and come to an agreement on the promise that these pieces would be reserved.

These claims were supported in 1867 by John Jones, also an eye-witness to some of the events of 1844. According to Jones, when these reserves were denied, the Maori returned to Waikouaiti on Tuhawaiki's boat for 10 days, until summoned back by Daniel Wakefield. Daniel Wakefield then agreed, so Jones claimed, to Ngai Tahu demands to reserve these pieces.

There is no contemporary record of any such discussion or agreement. Jones was advancing his own interests in 1844. He attempted to influence the negotiations to secure a water front section in the lower harbour. However there is no evidence of a request for a reserve at the site of Dunedin in the upper harbour. Symonds, a Crown agent supervising the conduct of the New Zealand Company in the purchase, remembered no such request when he gave evidence to the Smith–Nairn commission in 1880. Given the meticulous care he took in carrying out his duties, it was difficult to accept that so dramatic an event as a Maori withdrawal from the negotiations for 10 days over the issue would not have been recorded.

Having regard to these circumstances, the tribunal was not satisfied that Symonds and Wakefield or Tuckett promised Ngai Tahu the two reserves in the upper harbour.

Events after the purchase: Mantell makes a reserve

The Princes Street reserve had its origin, then, in Mantell's attempts to set aside a place for Ngai Tahu to land their canoes and trade their produce in the early 1850s. Towards the end of 1852 Mantell informed the colonial secretary of persistent requests by Maori from Moeraki to Otakou to have a piece of land in Dunedin set aside to

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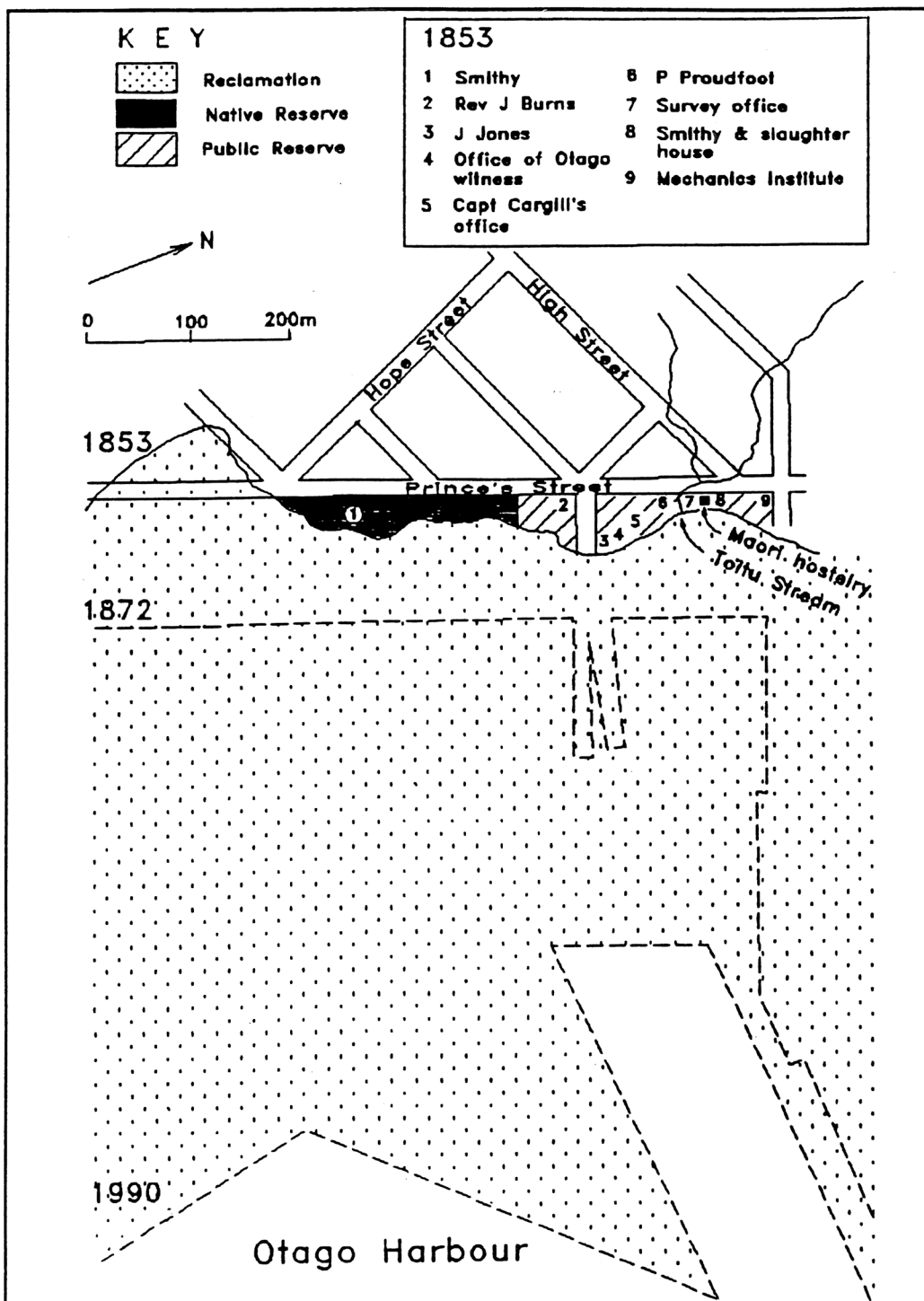


Figure 2.2: The Princes Street reserve from Mantell's 1853 sketch, showing the location of the hostel near the mouth of the Toitu Stream and the extent of reclamation since 1853.

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build houses for them. In April 1853, Mantell sent Domett tracings for a reserve at Port Chalmers and another at Dunedin between Princes Street and the harbour. This was some distance south of the site at the Toitoi, at the time being used by Ngai Tahu. The land was steep and not entirely suitable, but justified by Mantell as the only piece available. We could only speculate why he did not propose land at the Toitoi, although there was a suggestion that Mantell, an Anglican, chose to locate the Maori reserve next to the manse to spite his Presbyterian critics.

Although Grey approved the reserve according to the plan sent by Mantell, this in itself was not sufficient to legally set aside the reserve for Ngai Tahu. For the reserve to have been properly set aside it would have been necessary to have taken the proposal before the Executive Council and gained its approval. This Grey did not do. Although the reserve had been agreed to by Grey, Mantell appears not to have informed Ngai Tahu of the fact, as over a year later they petitioned Captain Cargill to approve a shelter for them somewhere on the beach or in Dunedin.

A hostel for Ngai Tahu

If Ngai Tahu were unaware of the setting aside of a reserve for them until 1858 so was the Otago Provincial Council. In the meantime, the province had agreed to erect a lodging house. However this proposal languished until central government became involved in 1858. The 1853 reserve site was dismissed as unsuitable by the commissioner of Crown lands, and in choosing another site for the hostel, the matter became embroiled in a political wrangle between central and provincial government. Eventually a hostel was built by the central government on a site provided by the province in exchange for Crown land. This was near the Toitoi stream, already being used by Ngai Tahu, and not on the site selected by Mantell in 1853. Title was in the province, not in Ngai Tahu, and there was no security of tenure. By 1863 the building had greatly deteriorated and it was removed in 1865. There was a proposal to rebuild the hostel on another site, but this was never done. Ngai Tahu's use of the hostel appears to have declined considerably by this time.

Mantell's reserve is granted to the province

Provincial politicians complained in 1858, when they first heard of the reserve set aside by Mantell, that the land had already been allocated for wharves and quays by the New Zealand Company. The matter remained unresolved until 1862, when the town was experiencing rapid expansion. Parts of the reserve were leased to local businesses. However, because the status of the land was still unclear,

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the rents were banked in a separate account. By 1864 this account had a balance of about £5000.

When Mantell again became native minister in 1865, he attempted to have title to the reserve vested in Ngai Tahu. Although the reserve was brought under the New Zealand Native Reserves Act 1856, this did not give Ngai Tahu title. At the same time provincial interests were advancing the province's claims to the land, arguing that the land had not been properly constituted as a native reserve. The Otago Association had originally set the block aside as a reserve for wharves and quays, and clearly had the right to do so. Whether the Crown had the power to override this reservation in 1853 is uncertain. The question is complicated by some debate over what powers the Crown had granted the governor in dealing with the association's lands, once they had reverted to the Crown after 23 November 1852.

The provincial officials took their case to the House of Representatives, which on 13 September 1865 passed a resolution that the reserve should be vested in trust in the superintendent of Otago. As Professor Alan Ward pointed out, Auckland politicians lent their support to the resolution, in return for their Otago colleagues' support in burying a proposal to establish semi-autonomous Maori provinces in the north.

On 11 January 1866 Grey signed a Crown grant for the reserve in favour of the superintendent of Otago for wharves, quays and other public purposes. It was later argued that the grant was signed in error along with a number of other grants, but Dr Parsonson has shown that this was the only grant signed by Grey on that day. It strains the tribunal's credulity that the signing of the grant was "inadvertent", and Professor Ward's conclusion that the grant was signed to ensure the government's continued support from Dunedin members is a more likely explanation. The decision to sign the grant was a political one, done without consultation with Ngai Tahu and with no apparent regard for their interests.

Ngai Tahu raise their claim to the reserve

Although the grant was signed, the central government still refused to hand over the accrued rents to the province. In August 1866, H K Taiaroa protested to the governor, claiming the reserve had been taken from Ngai Tahu. This was followed by Topi Patuki's 1867 petition, drawn up with Mantell's assistance.

In response to the petition, the government agreed that a writ of *scire facias* could be taken in the Crown's name against the superintendent to test the validity of the grant, providing, after some wrangling, the guarantee of legal costs. An attempt to have Parliament hand the

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accrued rents to the province was forestalled. The province sought a compromise by offering Ngai Tahu a site at Pelichet Bay and £1000 or more for the building of a hostel, but no agreement was reached.

The Supreme Court decided that the governor did not have the power to make the reserve under section 17 of chapter 13 of the 1846 Royal instructions. The Court of Appeal rejected this, but found that in failing to show that the reservation had been approved by the Executive Council, as required by the instructions, the reserve was not properly made out. The court did not decide whether the 1846 instructions were in fact operative in 1853, when Grey approved the reserve.

With their case rejected by the Court of Appeal, Ngai Tahu decided to appeal to the Privy Council and in 1872 the Crown agreed to grant £500 for legal costs. Soon after, Izard, Ngai Tahu's lawyer, recommended to Patuki, that given the chances of success, he should accept an offer from the premier, Julius Vogel, of £5000 as a settlement. Mantell too counselled acceptance of the offer. Given the likelihood of success in the Privy Council, Izard's advice was sensible and the wisest course for Ngai Tahu.

There still remained the accrued rents, now increased to over £6000. Eventually, in 1877, following a Native Affairs Committee recommendation, the government agreed to pay £5000 of this to Ngai Tahu. The committee had recommended that all the money be paid. Taiaroa refused to accept the final £4000 of this, holding out for the full sum, until 1880 when the native minister threatened to have the funds returned to the public account.

As far as the Crown was concerned the matter was then settled. Taiaroa made a further attempt to gain the interest which had accumulated on the £4000 over the period he had refused to accept the amount. In 1939 Ngai Tahu took the matter unsuccessfully to the Native Land Court.

Conclusions and findings

Ngai Tahu were not consulted about the establishment of the reserve, nor were they even told it had been made until several years after its creation. They appear to have continued to use the more practical landing place at the Toitoi and it was there that a hostel was eventually built for them. The reserve set aside by Mantell was not suitable for the purpose, and appears to have been only used intermittently.

Ngai Tahu accepted a settlement, although reluctantly, and received £10,000. Although this fell well short of the value of the land by that time, their claim to the reserve was legally doubtful, and they had

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little chance of success before the Privy Council. Despite this, the issuing of the Crown grant reflects no credit on the Crown. The grant was most likely the result of a deal between Auckland and Otago politicians, not an “inadvertent” action.

Although Ngai Tahu accepted a settlement in 1880, the tribunal did not consider that this precluded a claim under the Treaty of Waitangi Act 1975. The reasons for this are similar to those discussed in the tribunal’s consideration of the Ngai Tahu Settlement Act 1944. There was no opportunity for Ngai Tahu to claim relief for a breach of the Treaty at the time. While the settlement must be taken into account, the tribunal considered that it was still able to determine whether any act or omission of the Crown in relation to the Princes Street reserve constituted a breach of one or more principles of the Treaty.

The tribunal was not satisfied that the company or Crown representatives, at the time of the sale, promised two reserves in the upper harbour, at the site of Dunedin. It followed that the claimants did not establish any breach of the Treaty in this respect (grievance no 6).

In making submissions on the next grievance, that the Crown failed to properly set the reserve aside in 1853, Mr Temm argued that Ngai Tahu had been prejudiced by some administrative bungling by the Crown. However, it is difficult, at this point in time, to determine if the governor actually did have the power to make the reserve. Justice Richmond’s comments in *Regina v Macandrew* (1869) 1 CA 172 suggest that the governor may not have had this power, and we were left with very real doubts that such power did exist. Mrs Kenderdine submitted that the Crown would only have had a Treaty obligation to set aside the reserve if such a promise had been part of the purchase agreement in 1844.

The tribunal was unable to sustain the claimants’ grievance no 6 that they were prejudiced by the failure of the Crown to formally reserve the Princes Street reserve in 1853. First the grievance assumed that it was competent, as a matter of law, for the governor to create the reserve, when it would appear that this is problematical. Secondly, the tribunal found it somewhat incongruous to be asked to hold that it was a breach of the Treaty by the Crown, to fail to effectively create a reserve which was not suitable for the purpose for which it was needed.

Mrs Kenderdine was also concerned with the implications which could be taken from Professor Ward’s comments on this part of the claim. Professor Ward suggested that although the Princes Street claim was “not especially” strong, it demonstrated how Ngai Tahu’s aspirations to participate in the new economy could be dashed by

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the failure of colonial officialdom (T1 :25–6). While accepting that the Crown had a responsibility under article 2 to ensure that Maori were left sufficient land for their maintenance and livelihood, Mrs Kenderdine did not agree, as she saw Professor Ward implying, that the Crown’s failure to ensure that a permanent hostel was provided was a breach of Treaty principles.

The claim that Ngai Tahu were entitled to a permanent hostel in Dunedin has wide implications. It suggests that when the Crown purchased land from Maori to facilitate Pakeha settlement, it was obliged under the Treaty to ensure that, in any town that resulted from that settlement, accommodation was provided for Maori visiting the town. The tribunal was unable to find that the Treaty imposed any obligation on the Crown to provide permanent accommodation for Ngai Tahu to meet a temporary need.

The tribunal accepted that the Princes Street claim could not be divorced from the purchase, and the obligations of the Crown. In considering that claim we concluded that if the Crown had provided tenths, in addition to the 9600 acres reserved from the sale, this would have provided Ngai Tahu with an adequate endowment. Obviously if the Crown secured a suitable reserve on Princes Street for use by Ngai Tahu, this would have served to meet part of its wider obligation. Having said this the tribunal had difficulty in concluding that the Crown had an obligation to provide in perpetuity a specific piece of land in the new town of Dunedin for the purposes of a Maori hostelry and trade. The failure to meet the Crown’s Treaty obligations was found to have rested more on the failure to ensure that Ngai Tahu retained sufficient land for their present and future needs and thereby denying Ngai Tahu the opportunity of participating in the commercial development of the town and the benefits that would have flowed from this. The tribunal considered that if Ngai Tahu are compensated for that breach of the Treaty, as they should be, such compensation should more than encompass any perceived loss by Ngai Tahu of “their” Princes Street reserve.

2.4. **The Kemp Purchase Summary**

Introduction

Kemp’s purchase was the largest block of land ever bought by the Crown. Its 20 million acres made up almost a third of the country’s land area, although some of this overlapped with later purchases. The purchase must also be one of the most controversial. Maori complaints began within months of the deed being signed. In the last 142 years the agreement has been the subject of numerous petitions, parliamentary inquiries, Royal commissions and court proceedings.

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In 1906, 1944 and 1973 Parliament enacted a number of measures to provide some form of relief or settlement. Despite the many inquiries, this is the first opportunity the tribe has had of having the Kemp purchase examined in terms of the Crown's Treaty obligations by a tribunal constituted for that purchase.

The purchase was negotiated by Henry Tacy Kemp on 12 June 1848, following earlier discussions between Ngai Tahu rangatira and Governor Grey in February. However the agreement was not implemented by Kemp, but by a second Crown commissioner, Walter Mantell. Kemp had been instructed to identify and survey all the land reserved from the sale, before the sellers signed a deed. He did not do this. Instead he made several promises about various kinds of lands which would be reserved to Ngai Tahu. These lands were described in the deed as:

Ko o matou kainga nohoanga ko a matou mahinga kai, me waiho marie mo matou, mo a matou e tamariki, mo muri iho i a matou; a ma ta Kawana whakarite mai hoki tetahi wahi mo matou a mua ake nei a te wahi e ata ruritia ai te whenua nga Kai Ruri (L9:17) (see appendix 2.2)

This was translated at the time by Kemp as:

our places of residence & plantations are to [be] left for our own use, for the use of our Children, & to those who may follow after us when the lands shall be properly surveyed hereafter, we leave to the Government the power & discretion of making us additional Reserves of land . . . (L9:416-418)

The Maori understanding of the agreement, as recorded in the original Maori deed, goes beyond Kemp's translation. From this and other evidence of the time, it is clear that Ngai Tahu agreed to sell much of their land to the Crown on their understanding that their villages and homes, their gardens and their natural food resources would be retained by them, as well as substantial additional lands.

Mantell was not present when Ngai Tahu consented to the purchase, but in implementing the agreement, he insisted on a narrow and parsimonious definition of its terms despite protracted Ngai Tahu protest. He substantially reduced the areas of land for Ngai Tahu from the large areas they considered they were entitled to have had reserved. He refused to recognise their reservation of lands for mahinga kai, the natural resources of their hunting and gathering economy. At the end of his mission, Mantell had allowed the setting aside of only 6359 acres out of 20 million. Kemp's failure to secure to Ngai Tahu the lands they reserved from the sale prior to finalising the agreement, compounded by Mantell's high handed conduct, reduced Ngai Tahu's remaining lands to a pitiful remnant of their previous vast territory.

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Not only was the outcome approved by his superiors, Lieutenant-Governor Eyre and Governor Grey, but Mantell was rewarded with further commissions to purchase land from Ngai Tahu.

Claimants' grievances

The claimants filed 11 grievances on this purchase. The first concerned the impact of the Wairau purchase, negotiated by Grey with Ngati Toa the previous year. It was claimed that by including Kaiapoi in this purchase, Ngai Tahu were forced to part with Kemp's block on unfavourable terms (no 1). The next grievance alleged that the Crown failed to provide ample reserves for their present and future needs and that their mahinga kai were not reserved (no 2). They complained that a block between the Waimakariri and Kowhai Rivers was not reserved to them (no 3). The Crown, they alleged, imposed an interpretation of the boundaries of the block which went well beyond what Ngai Tahu are said to have agreed to (no 4). The claimants argued that Ngai Tahu agreed to sell only the plains to the foothills, and not over to the west coast. They also claimed that the eastern boundary of the block excluded Kaitorete and much of Waihora (Lake Ellesmere). Several ordinances or enactments were also the subject of complaint. These included the New Zealand Company Land Claims Ordinance (1851) (no 5), the Canterbury Association Amendment Act 1851 (no 6), the Native Land Act 1865 (no 7) and the Ngaitahu Reference Validation Act 1868 (no 8). They also complained that while Europeans were granted lands under the Lands for Settlements Acts, the Crown failed to do the same for Ngai Tahu (no 10) and finally, that when the Crown provided lands for Ngai Tahu under the South Island Landless Natives Act 1906, these were not in Kemp's block and were much inferior to those provided to Europeans (no 11). This last grievance is dealt with in a later section of the report (20.7.1–3).

Background to the purchase

Much had changed in the Crown's relationship with Maori between 1844 and 1848. At the time of the Otakou purchase, the Crown had been in a defensive position, facing financial crisis, and with the country on the brink of war. Four years later a new governor, with better resources at his disposal, was in a much stronger position in his relationship with Maori tribes. Grey had dismissed the protectors, and was able in their absence to appoint a single officer to negotiate a purchase from Maori and look after their interests. Although Grey had been instructed to "honourably and scrupulously fulfil the conditions of the Treaty of Waitangi", he was also instructed to register Maori land and to secure to the Crown what was believed in England to be an extensive area of land unowned by Maori. This provided Grey

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with a dilemma. He was well aware that Maori claimed ownership to all the land of the colony, as had been every previous governor, but such concepts were difficult to explain to his superiors in London. Earl Grey, the colonial secretary at the time of the Kemp purchase, held a very narrow view of Maori property rights; acknowledging only Maori ownership of villages and land in actual cultivation. The governor was therefore under clear instructions to find an extensive estate for the Crown, and yet, contrary to the expectations of his superiors, this could only be achieved by fair purchases, if it was to be done in a manner consistent with the Treaty.

Grey also inherited some of the problems of the New Zealand Company's colonisation schemes in New Zealand. The company claimed title to 20 million acres of land on the basis of a number of deeds negotiated with Maori prior to the Treaty. The company sent out immigrants, sold large areas of land to colonists and investors and was promised four acres by the Crown for every pound it had spent on colonisation. When the company's deeds on which its claims were based were found to be largely worthless, the Crown was faced with a considerable problem. The settlers were here with titles given them by the company to land still owned and occupied by Maori. Maori understandably refused to abandon land they insisted had not been sold. A land claims commissioner, William Spain, determined that in the South Island, despite its claims to the Wairau valley and land as far south as the 43rd parallel (below the Hurunui River), the company had only gained title to a limited area around Nelson.

In 1847, during Te Rauparaha's forced exile in Auckland, Grey negotiated the Wairau purchase, conveying the disputed Wairau valley from Ngati Toa to the Crown. Almost as an afterthought, the southern boundary of this purchase was set at "Kaiapoi". There can be little doubt that Ngati Toa had Ngai Tahu's pa near the mouth of the Ashley River in mind. It was here that Te Pehi and other Ngati Toa rangatira had been killed. Although Grey and his officials may also have thought that the southern boundary was the pa, they had a different location in mind. This was at about the 43rd parallel, the southernmost point of the New Zealand Company's 1839 deeds, and a place identified by Grey as 100 miles south of the Wairau, a point that became associated with the mouth of the Hurunui. Although this was the place recorded as Kaiapoi on a number of contemporary maps, the pa site is about 40 miles further south. This confusion would continue into the Kemp negotiations (see figure 2.3).

Grey argued that he had successfully purchased from Ngati Toa all the land down as far as the 43rd parallel, relying on Spain's determination of who owned the Wairau. He made no investigation of his own

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as to the rights of any other tribes who may have had rights to that land. He set about having a Crown grant prepared for the New Zealand Company to include all the area purchased from Ngati Toa in 1847 and the land already acknowledged as purchased by the company near Nelson. It was while he was arranging this grant that he visited Ngai Tahu, and the preliminary negotiations for the Kemp purchase took place.

Grey's negotiations in 1848

Grey and Colonel Wakefield met Ngai Tahu rangatira at Akaroa and Otakou, where they talked about a possible purchase. Details of their discussions are sketchy. Matiaha Tiramorehu provided the clearest explanation for what occurred at Akaroa.

. . . Ngaituahuriri spoke to the Governor concerning the payment for Kaikoura and Kaiapoi [the Wairau purchase]; he (the Governor) told the Ngaitahu Tribe that (the payment for) Kaiapoi should not be given to the Ngaitoas, but that for Kaikoura was already gone to them. Upon which Te Uki said to the Governor, Do not hide from us what you may have wrongly done with our place or country, but tell us that we may all know what you have done. After which conversation Governor Grey asked Ngaituahuriri if he would part with some of his land; upon which the Ngaitahu Tribe hearing, gave their consent that Kaiapoi should be given up to the Governor. (L9:23)

Wakefield recorded that Grey had been offered the land between the Wairau and Otakou purchase and the “level country back to the central range of mountains” (L9:57). Grey’s own account was written after the purchase had been completed. He emphasised Ngai Tahu’s willingness to sell and to relinquish all their other claims to land between the Wairau and Otakou blocks in return for “reserves for their present and reasonable future wants” set aside “for themselves and their descendants”. No agreement was made as to price.

It was suggested by the Crown’s historian, Dr Donald Loveridge, that Wakefield’s account indicates that Ngai Tahu offered a coastal strip to the Crown, consisting largely of the Canterbury plains. While this is a possible interpretation of Wakefield’s report of Grey’s discussions with Ngai Tuahuriri, it is difficult to know whether this block consisted just of the plains or went back to the main divide. Ngai Tuahuriri’s rights only went to the alps and Poutini Ngai Tahu would have had to have been consulted on any suggested sale to the west coast. While we were able to say that Grey acted as if he had consent to purchase all of Ngai Tahu’s land between the two earlier purchases, we were unable to form a firm conclusion on Ngai Tahu’s state of mind at the time.

*The Ngai Tahu Report 1991****Kemp's instructions***

On returning to Auckland, Grey set about making arrangements for the purchase. He instructed Edward Eyre, the lieutenant-governor of New Munster, in Wellington, to organise the purchase. On Grey's suggestion, Eyre selected his native secretary, H T Kemp, for the commission. Kemp was the 30 year old son of a Kerikeri missionary. He was told that his responsibilities were:

the extinguishment of any title which may, upon inquiry, be found to be vested in the native inhabitants to the tracts of country lying between the districts purchased from the Ngatitua tribe and that purchased by the New Zealand Company at Otakou.(L9:68)

He was to "reserve to the natives ample portions of land for their present and prospective wants" and to mark off these reserves. After this had been done, he was to purchase all the sellers' rights to land within the remainder of the block.

Kemp's appointment; the requisitioning of the government's vessel, the *Fly*, discussions with Colonel Wakefield who was to provide the money for the purchase on behalf of the New Zealand Company and the preparation of a draft deed: these were all crammed into five days before the *Fly* was scheduled to sail on 29 April 1848. As a result of this haste, the draft deed, prepared by the Crown solicitor, Daniel Wakefield, was inadequate. Instead of specifying a cession to the Crown, the draft named the purchaser as William Wakefield, the principal agent of the New Zealand Company of London. Kemp took no maps, but arrangements had been made for these to be supplied by Charles Kettle, the surveyor of the Otakou block. Kettle was at the time the company's senior representative at Dunedin, and the *Fly* was to pick him up from there, to act as surveyor for the purchase.

The purchase

The *Fly* arrived at Akaroa on 2 May 1848, and was forced by bad weather to extend the expected four day stay to a fortnight. Arrangements were made for Ngai Tahu to meet with the commissioner when he returned. The *Fly* was unable to land Kemp at Otakou and he was forced to accompany the ship to the Auckland Islands. After finally reaching Dunedin on 23 May, Kemp met with Otakou rangatira over three to four days, and on 4 June the commissioner and about twelve rangatira from Otakou and neighbouring settlements left for Akaroa, arriving there three days later.

By the time the deliberations began Kemp had had considerable opportunity to discuss his intentions with a number of the tribe's leading rangatira. About 500 Ngai Tahu were assembled at Akaroa when the discussions began on 10 June. Kettle's journal, and his

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report to the New Zealand Company, give some of the details of their deliberations:

the “correro” commenced by the chiefs coming forward and calling the names of the lands to be sold—Commencing from Kaikora one chief went down to the peninsula—Then Taiaroa called the lands from the Peninsula to Waitake—Then Solomon from Waitake to Moeraki—Portiki and others southward from thence to the Heads of Otakou—(L9:390)

According to Kettle, Tikao, from Ngai Tuahuriri, explained that all were not “fully agreed as to the sale of the land”. He was also said to have confirmed that the whole of Banks Peninsula had been “sold” to the French.

Ngai Tahu had originally sought £10,000 for the land but had recently lowered their request to around £5000. They were therefore surprised and disappointed that the sum offered was so small, since Grey had led them to believe that they would be able to purchase cattle and sheep. Tikao was vociferous in his criticisms of the amount of money being offered and was later said to have asked £5 million for the land. The day’s discussions appear to have ended in deadlock over price and the scheduling of payments, but it would seem that the boundaries of the purchase, the rights of the various owners and other terms of the purchase had been discussed in detail.

There was no further public discussion the following day, however Taiaroa visited Kemp in the evening offering to give up his portion of the first payment and receive it in the next. Kemp informed him that they would be going aboard the *Fly* the next day and if Ngai Tahu wanted to receive the money they were to follow him on board.

Kettle described the meeting which took place on the *Fly* the following day:

we went on board the “Fly”, and were followed by the principal chiefs. Mr Kemp drew out the deed in the Maori language, in which it was stated [that] the northern boundary was to be from Kaiapoi, adjoining the Nelson Crown grant, across the island to the west coast; the southern boundary, a line from the Kaihiku range, south of the Molyneaux, to Milford Haven, on the west coast. I executed a map of the boundaries, which was attached to the deed. (L9:70)

Although Kemp claimed to have obtained about 40 signatures to the deed, including the proxies, Harry Evison, the claimants’ historian, pointed out that many of the names were written in Kemp’s hand and are not accompanied by any tohu or mark. According to Mr Evison the deed was signed by ten chiefs and had the marks of six others, leaving a vast majority of names written only in Kemp’s hand. These figures differ a little from Mantell’s, and it may be impossible to finally determine who signed, who put a mark on the deed and whose names

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were only recorded by Kemp. While Mr Evison speculated to some extent on the circumstances which led to this, there has never been any previous suggestion in the 142 years since that the signatories' names were wrongfully attached to the deed. With the possible exception of Karetai, leading rangatira such as Taiaroa, Tikao, Horomona Pohio, Tiramorehu, Paora Tau and Wiremu Potiki either signed or placed their marks on the deed. Given that the deed was witnessed by reputable men and that the signatures and marks are interspersed on the sheet, it can only be concluded that those who were named but did not sign still gave their consent to the agreement.

It was also suggested by Mr Evison that the failure to identify the boundaries of the lands sold on the receipts could result in the signatories not having a clear understanding of what lands had been included in the transaction. This suggestion does not take into account all the discussions over who had rights in which areas, and what proportions of the payment should be given to the interests of any individual chief before payments were eventually made. The receipts, like the deeds, were merely the minutes of what had often been long and drawn out discussions. We know that Mantell, partly to overcome deficiencies he perceived in Kemp's handling of the purchase, went to considerable lengths to identify the major hapu and chiefs within the block. His census and his notebooks show the names of major chiefs with their given hapu, and the receipts demonstrate that those being paid were being paid for their rights in specific areas including in some cases land on the west coast.

Kemp's instructions had been clear that he was to select and mark off the reserves before the deed was signed. However he did not do this, blaming the winter weather. He instead promised that Ngai Tahu would have reserved to them substantial lands for their present and future needs. According to Kemp, these reserves were to consist of Ngai Tahu's villages and cultivations, and additional land which would be reserved at the governor's discretion when the block was surveyed.

The boundaries of the purchase

Establishing the exact nature of Ngai Tahu's understanding of their agreement with Kemp was not easy for the tribunal. From the time Mantell arrived to complete Kemp's task of marking off the reserves, we have evidence of a major divergence over the terms of the agreement between Crown agents and Ngai Tahu. In the months following the purchase, Ngai Tahu were to dispute the northern boundary of the block, the amount of land which would be reserved to the tribe, their rights to their mahinga kai (their natural food resources) and the Crown's right to determine which lands would be

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reserved. Some decades after the purchase many Ngai Tahu rangatira were also to complain that the block they sold to Kemp was much smaller than that identified on the deed map, and that the deed had only been signed under threats that otherwise soldiers would come and dispossess them.

The official record of the agreement, the deed and the deed map, has contributed to this legacy of uncertainty. Drawn up in haste, and not specifically identifying the actual lands which Ngai Tahu reserved from the sale, the wording of the deed and map allowed disputes over interpretation, which made it very difficult for Ngai Tahu to force the Crown to acknowledge and implement the tribe's understanding of the agreement.

In 1879 and 1880, Ngai Tahu rangatira explained to the Smith–Nairn Royal commission the boundaries of the block as they remembered them. They argued that the block was defined by Maungatere (Mount Grey) in the north and Maungaatua in the south. Eye witnesses to the sale gave evidence in 1879 that the lands sold extended back only as far as the first line of foothills on the western edge of the Canterbury plains.

The northern boundary

The deed, as translated by Kemp, referred to the lands situated on:

the line of Coast commencing at “Kaiapoi” recently sold by the “Ngatitua” & the boundary of the Nelson Block continuing from thence until it reaches Otakou, joining & following up the boundary line of the land sold to Mr Symonds; striking inland from this (The East Coast) until it reaches the range of mountains called “Kaihiku” & from thence in a straight line until it terminates in a point on the West Coast called “Wakatipu-Waitai” or Milford Haven . . . (L9:416–418)

The plan gave the size and boundaries of the block more particularly. The northern boundary shown on the map runs in a north westerly direction across from the mouth of an unnamed river near a place labelled “Kaiapoe”, just north of the 43rd parallel, to another river mouth on the west coast. Although this would seem to be the Kawatiri (Buller), the caption “Buller R” appears to have been added in pencil at a later date. The southern boundary runs along the edge of the Otakou purchase boundary and then runs in a straight line to a place marked Milford Haven or Wakatipu-Waitai. It can be noted that no other places are named on the west coast, although both coasts are boarded with a heavy blue band. Wakatipu-Waitai is not in fact Milford Sound, but Lake McKerrow, about 30 kilometres north of the sound. The Maori name for Milford Sound is Piopiotahi.

When Mantell came he identified the north-western corner of the block at Kaiapoi pa, near the mouth of the Ashley River, against

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repeated protests by Ngai Tahu. Ihaia Tainui's account of Mantell's fixing the boundary, although presented 30 years later, accords well with Mantell's own diary record:

we and Mantell went to the Kaiapoi pa. When we got there Mantell went right in the centre of the pa. Then Mantell said—"This is the boundary of Ngatitōa, from here to the north side of Mangatere." Then the Maoris said—"No; we shift the line further to Oteruawhare [near the Clarence River], further north from Kaiapoi pa" . . . Paoro Tau said—"I don't want the boundary to be left at Oteruawhare; I want the Ngatitōa boundary to be put right back to Te Parinuiowhiti". (G2:773)

Kettle's deed map has Kaiapoi above the 43rd parallel. Dr Loveridge argued that Ngai Tahu agreed with Grey and then with Kemp that the location of the northern boundary of the purchase was at the mouth of the Hurunui and not at Kaiapoi pa. This, it was argued, was particularly important to Ngati Tahu since the northern boundary of the block was also the southern boundary of the Wairau purchase. If Kemp was purchasing only to Kaiapoi pa, then Ngai Toa were being acknowledged as having rights down as far as the pa, something Ngai Tahu would not countenance. For Kemp, locating Kaiapoi at the Hurunui was simply consistent with the assumptions made by Grey in his Wairau negotiations and with the southern limits of the Nelson Crown grant.

The claimants argued that their tupuna's understanding of the northern boundary was that given to the Smith–Nairn commission, a line from Kaiapoi pa to Maungatere. However it was the tribunal's impression that the witnesses in 1879, who put forward this view, were remembering the boundary fixed by Mantell rather than that of their original agreement with Kemp. The numerous Maori complaints about the northern boundary, including appeals to Grey and Eyre in Wellington in 1848 make it clear that Ngai Tahu did not agree to a Kaiapoi–Maungatere boundary. Tiramorehu's 1849 accusation that Grey had reneged on his promise to pay Ngai Tahu for Kaiapoi also suggests that in 1848 Ngai Tahu's understanding of the northern boundary was that it went beyond Kaiapoi pa. We considered it inconceivable that Ngai Tahu would willingly agree with Grey or with Kemp that Ngati Toa had the rights to land as far south as Kaiapoi pa. We have concluded that Ngai Tuahuriri's offer to sell Kaiapoi included land to the north which was associated with the hapu's rights to Kaiapoi pa.

The looseness of the wording of the deed and the imprecision of the map allowed Mantell to impose an arbitrary and incorrect interpretation of the northern boundary of the block. Once imposed, Eyre and Grey allowed the boundary to stand, despite complaints by Ngai Tahu in Kemp's presence. It took years of persistent protest before Ngai

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Tahu's rights north of Kaiapoi were recognised in the North Canterbury purchase of 1857 and the Kaikoura purchase of 1859.

The inclusion of Kaiapoi in the Wairau purchase would have been a source of considerable anxiety to Ngai Tahu. The tribunal concluded however that this was substantially mitigated by Governor Grey's 1848 assurances and by the arrangements reached between Kemp

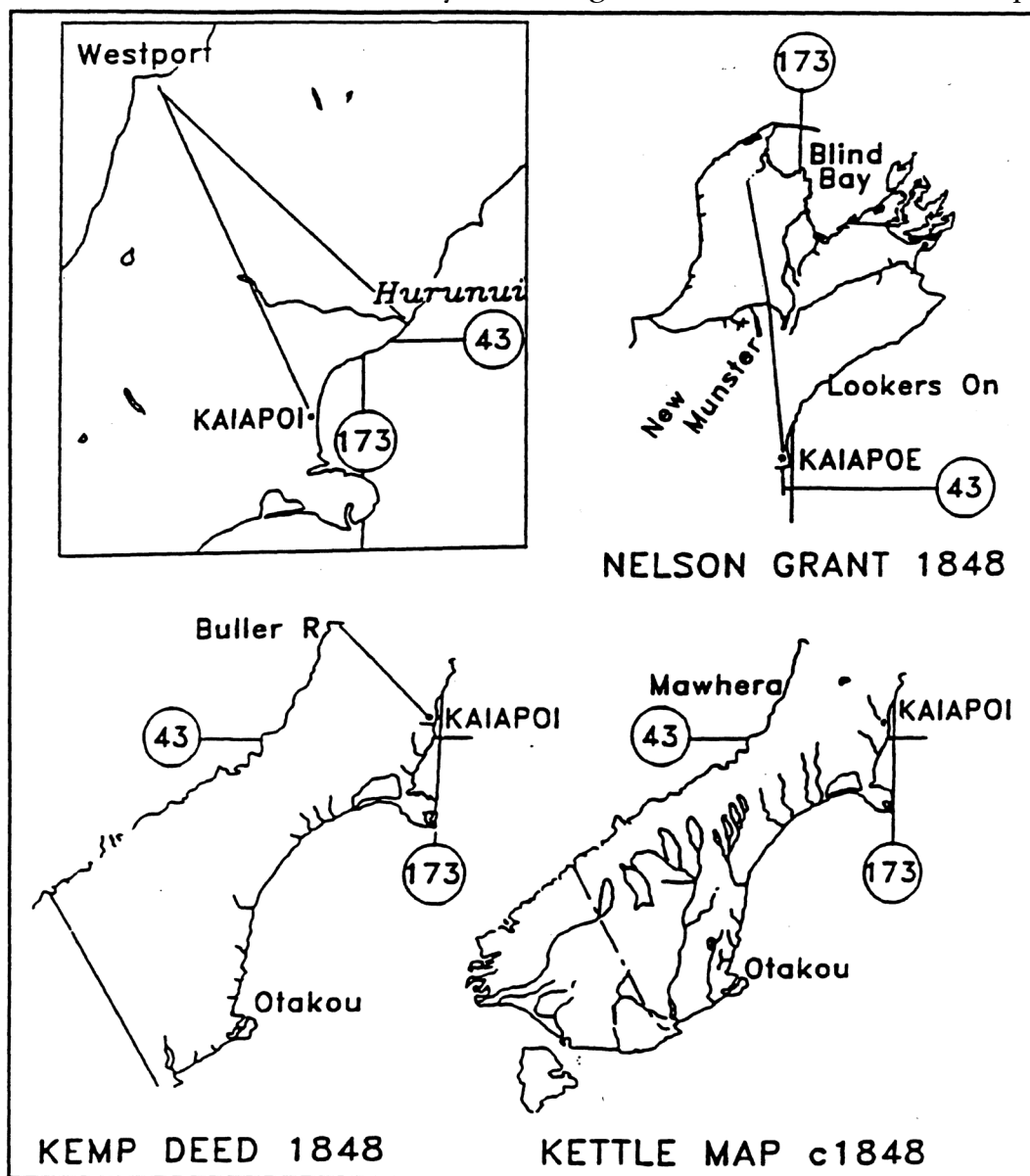


Figure 2.3: Comparing the location of Kaiapoi in relation to the 43rd parallel, as shown in three 1848 maps – the Nelson Crown grant map, the Kemp deed map and Charles Kettle's map. This shows the common but erroneous belief that Kaiapoi was located above the 43rd parallel, rather than further south at the mouth of the Rakahuri (Ashley) River.

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and Ngai Tahu at the time of the purchase in locating the boundary between the Kemp and Wairau purchases at or around the Hurunui. For this reason the tribunal was not able to find that the Crown's nominal inclusion of Kaiapoi pa in the Wairau purchase of 1847 exerted unfair pressure on Ngai Tahu to part with Kemp's block on unfavourable terms.

The western boundary

To determine Ngai Tahu's understanding of the western boundary of the purchase, the tribunal had to consider a number of issues:

- Kemp and Kettle's understanding of the purchase boundary, and the extent, if at all, that this differed from Mantell's;
- because rights to the west coast were held by Poutini Ngai Tahu, were they present when the Kemp purchase was negotiated, and if so, did they consent to the sale?
- while Ngai Tahu's impression in 1879 was that the interior and west coast had not been sold, we had to examine this contention in the light of Ngai Tahu actions and written comments at the time of the purchase itself; and
- had Ngai Tahu's rights to the interior been adequately discussed by Kemp and did Ngai Tahu positively include the interior in the area sold.

There is no doubt that the European participants believed that the purchase went to the west coast. Both Kemp and Kettle clearly stated this at the time. The deed and the deed map mention Wakatipu–Waitai mistakenly as Milford Haven.

However no other west coast place on the map is named. Professor Ward's report suggested that the deed and map do not show sufficient evidence that the detailed disposition of the interior was discussed with Ngai Tahu. The report considered that Kemp and Kettle may have been careless about Ngai Tahu's rights to the interior, since they may not have taken these rights seriously. If Kemp and Kettle did not discuss large areas of the interior with the tribe in June 1848, then were they adequately included in the sale?

The Crown refuted this argument, and Dr Loveridge argued that the absence of extensive detail on the deed map was not for want of knowledge on Kemp and Kettle's part nor was it evidence that the interior was not discussed. He discovered another Kettle map, created at the same time as the purchase, which contains considerably more detail about the west coast, about interior lakes and about Maori trails. In his view, the map shows that the European negotiators collected significant information about the lands they were purchas-

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ing, and that this was sufficient to show the breadth of the discussions about the boundaries and extent of the block. Given Kemp's later acknowledgement that he had accepted Ngai Tahu's claims to the whole of the block, and evidence that the lakes and mountains of the interior were discussed in 1848, we accepted the Crown's view that in the several days of discussions which preceded the actual signing of the deed, the interior was sufficiently discussed to have been included in the sale.

The first firm evidence we have that the interior and the west coast could have been excluded from the purchase comes from an 1867 petition handed to Grey while he was visiting Kaiapoi. This was followed by another in 1874 which outlined the argument presented to the Smith–Nairn commission five years later. However, earlier discussions by Ngai Tahu of the events of 1848 show quite different concerns. When Mantell arrived at Akaroa he was accompanied by Lieutenant-Governor Eyre. They were asked to reserve a block of land running from the Waimakariri River right across to the west coast. It was a request repeated on several occasions while Mantell was with Ngai Tuahuriri, and was the subject of much conflict as Mantell insisted the hapu make do with a reserve of only 2650 acres. We found it difficult to conclude that Ngai Tahu would have requested a coast to coast reservation, one that appears to be linked to their trails to Te Tai Poutini, where pounamu was obtained, if the purchase boundary only extended to the Canterbury foothills.

It was suggested in Ngai Tahu's 1874 petition and by the claimants that Ngai Tahu remained unaware that the Crown claimed title to lands west of the Canterbury foothills until some considerable time after the event. However, we have evidence that on two occasions soon after the purchase Ngai Tahu rangatira made direct references to the western boundaries of the purchase which were consistent with those on the deed map. In 1849 Topi Patuki offered to negotiate with the Crown over lands south of the Kemp purchase giving the boundaries of this purchase as joining the Otakou purchase boundaries as "hono tonu atu ki ta te Pa Kepa rohe ki tua ki Wakatipu" (joins Pa Kepa's [Kemp's] boundary over towards Wakatipu) (Q3:4,40).

Three years later, Werita Tainui, in a similar offer to sell lands north of the Kawatiri, mentioned the boundary of the land purchased by Mantell as:

ko te mutu tenei o ka utu a Matara, takoto haere ki Wangatipu.

[t]his is the end of Mantell's payments, lying along to Wangatipu. (Z10:8,9)

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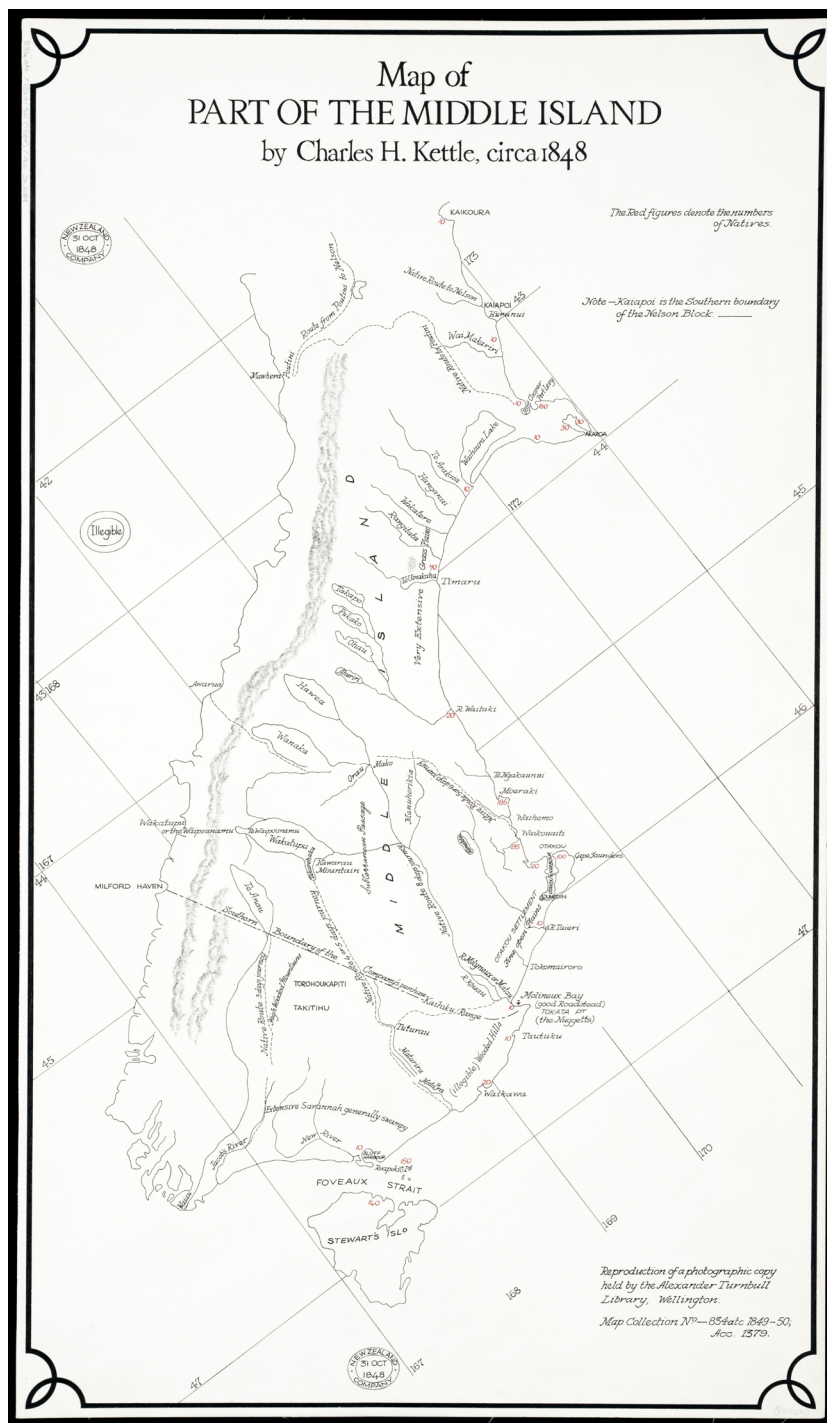


Figure 2.4: The Turnbull map as reproduced for Dr Loveridge and originally drawn by Charles Kettle, Kemp's surveyor, during the negotiations for the Kemp purchase in June 1848 (L21(b)). Alexander Turnbull Library, Wellington, New Zealand (MapColl-834atc/1849-50(1989)/Acc.21689).

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Werita Tainui was from Poutini Ngai Tahu, and a son of Tuhuru, the conquerer of the west coast. He lived at this time on the east coast not far from Kaiapoi.

Werita Tainui, and at least some others from the west coast, clearly considered that the lands from Kawatiri to Wakatipu had been sold. However we hesitated from concluding that Poutini Ngai Tahu were sufficiently represented at the sale for us to say that Kemp had their agreement to include their rights to the west coast in the purchase. Werita Tainui signed the Kemp deed and received some of the payment. Mantell tried to arrange for Poutini Ngai Tahu to be included in the second payment, but they arrived at Akaroa too late to receive the money.

Kemp and Kettle made no mention of a Poutini presence, but the Crown argued that Poutini Ngai Tahu were present at the Kemp negotiations. They based this conclusion largely on the Smith–Nairn evidence of Waruwarutu, who named a number of west coast chiefs and their wives as being present at Akaroa in June 1848. Dr Loveridge also suggested that the name Tuahuru on the deed was Tuhuru. Professor Ward was less certain of this, suggesting Huruhuru, a major Waitaki chief whose name is otherwise not on the deed as a possible alternative. We were unable to say for certain that Poutini Ngai Tahu were present at the Kemp purchase, however it is clear that some Poutini Ngai Tahu did see their lands on the west coast as being included. In 1859, largely because of the failure to pay Poutini Ngai Tahu and define their reserves, the Crown entered into new negotiations with them for the purchase of the west coast, culminating in the Arahura purchase a year later.

However, although all Poutini Ngai Tahu may not have included the west coast in the Kemp purchase, the tribunal came to the conclusion that the Ngai Tahu rangatira who were parties to the Kemp deed included all their rights between the Wairau purchase, starting probably at the Hurunui, down to the Otakou purchase and over to the west coast. The tribunal therefore did not uphold the claimants' grievance no 4(a) that on the matter of boundaries, the Crown enforced an interpretation which had not been agreed to by Ngai Tahu in respect of the western boundary.

Ngai Tahu may have been mistaken in 1879 about the detail of the land they had in 1848 seen as reserved from the sale, but they correctly remembered that substantial areas of the block the Crown claimed had been sold should have been left to the tribe. This part of their testimony before the Smith–Nairn commission is amply supported by both Maori and European evidence from the time of the sale. To determine just what was excluded or expected to be reserved

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the tribunal had to re-examine Ngai Tahu's own perspective of what they agreed to with Kemp in June 1848. Kemp's failure to clearly identify the land reserved from the sale makes it almost impossible to now locate all the lands which Ngai Tahu wished to have reserved. When Mantell came down he brushed aside these wishes and set about providing very limited reserves.

Mahinga kai

One of the major areas of conflict between Ngai Tahu's interpretation of their reserved lands and Mantell's was mahinga kai. The deed promised Ngai Tahu their dwellings, "kainga nohoanga", and their "mahinga kai". Kemp translated mahinga kai as plantations: other translations used the term cultivations. The claimants argued that this was far too limited an interpretation of this term, which they saw as applying to all Ngai Tahu's numerous food gathering activities. They argued that for them the word meant "a place where food is gathered" (W1:280). For Ngai Tahu, so dependent on a wide variety of food gathering, the reservation of mahinga kai would have meant much more than just the very limited reservation of their gardens. It would have included their right to harvest aruhe and ti. It would also have included hunting for weka and all other birds and animals, and the claim for eel-weirs, estuarine fisheries and other places inland and at sea where kai moana could be gathered. Waruwarutu described mahinga kai in 1879, in terms very similar to those used by the claimants:

"Mahinga Kai" is not exclusively confined to the cultivation. That is called a "Ngakinga Kai". "Mahinga Kai" is not confined to land cultivated, but it refers to places from which we obtain the natural products of the soil without cultivating, you know, the plants that grow without being cultivated by man. (L9:169)

Other witnesses mentioned eeling, the taking of birds and other hunting activities. Alexander Mackay echoed these conclusions in an 1887 Royal commission, where he acknowledged that Ngai Tahu's understanding of mahinga kai went well beyond the tightly prescribed definition until that time adopted by the Crown and by the Native Land Court.

Mackay also pointed out that Grey had very clear ideas in 1847 on the need to ensure that Maori had adequate lands provided for their hunting and gathering economy. In that year, Grey informed Earl Grey that:

To deprive them of their wild lands, and to limit them to lands for the purpose of cultivation, is, in fact, to cut off from them some of the most important means of subsistence. (B3:7/1:4)

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Despite all this, Mantell defined the term in its very limited sense as cultivations, and did not recognise Ngai Tahu rights to any other resources. Indeed he did not even include all their cultivations. In 1868 Chief Judge Fenton, when charged with interpreting the deed, determined that mahinga kai included only “local and fixed works and operations”, although he did recognise fisheries as “the most highly prized and valuable of all their possessions”. While he was then prepared to grant Ngai Tahu fisheries easements, he refused to acknowledge hunting grounds as mahinga kai. Fenton’s decision would seem to reflect European ideas about aboriginal property, rather than any understanding of Ngai Tahu’s traditional economy or definition of mahinga kai.

Mr Tony Walzl, a Crown historian, argued that Ngai Tahu’s use of the term may have been narrower in 1848, than it became in 1879, originally applying only to cultivations. Mr Walzl demonstrated that there is very little written record of the use of the word in 1848, particularly by Ngai Tahu. In response, Dr Raymond Harlow of the University of Otago, argued for the claimants that Ngai Tahu’s understanding was unlikely to have widened, particularly in a single generation. He also considered that it was doubtful, in the Ngai Tahu context, to have been used in a fashion which limited it to cultivations. A further Crown witness, Mr Patrick King, came to very similar conclusions as Dr Harlow. In the end, both witnesses added support to the claimants’ view that mahinga kai was best defined as “those places where food is produced or procured”.

If this was not sufficient, there was very clear evidence that Mantell was told by the tribe on repeated occasions that they were entitled to reserve lands for their natural food resources. He wrote in his sketchbook in 1848 that there was:

the absence among the natives of any perception in the inevitably appreciable change in their habits of life, foods etc.

Their wanting grounds reserved for Kauru & forests for cooking it – other forests for weka hunting – whole districts for pig runs. (X12(b))

The tribunal concluded that it is very likely that the expression meant two very different things to the respective parties to the deed.

Waihora and Kaitorete Spit

The Kemp agreement as it applied to Waihora shows a similar variation between what Ngai Tahu reserved and what Mantell and subsequent Crown agents determined they were entitled to. The claimants argued (grievance no 4 (b)) that the Crown enforced an interpretation of the eastern boundary of the Kemp purchase which did not accord with that agreed to by Ngai Tahu. The Crown has

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consistently assumed, on the basis of the Kemp map and the boundaries of the subsequent Banks Peninsula purchase, that Waihora and Kaitorete Spit were included in the Kemp agreement. The claimants argued that the actual boundary of the land they offered to Kemp ran from Taumutu to a spur on Mount Halswell, called Otumatua. In Mr Evison's evidence it was also argued that the line then went from Otumatua to Kaiapoi, which would have excluded from the sale a good deal of what is now Christchurch.

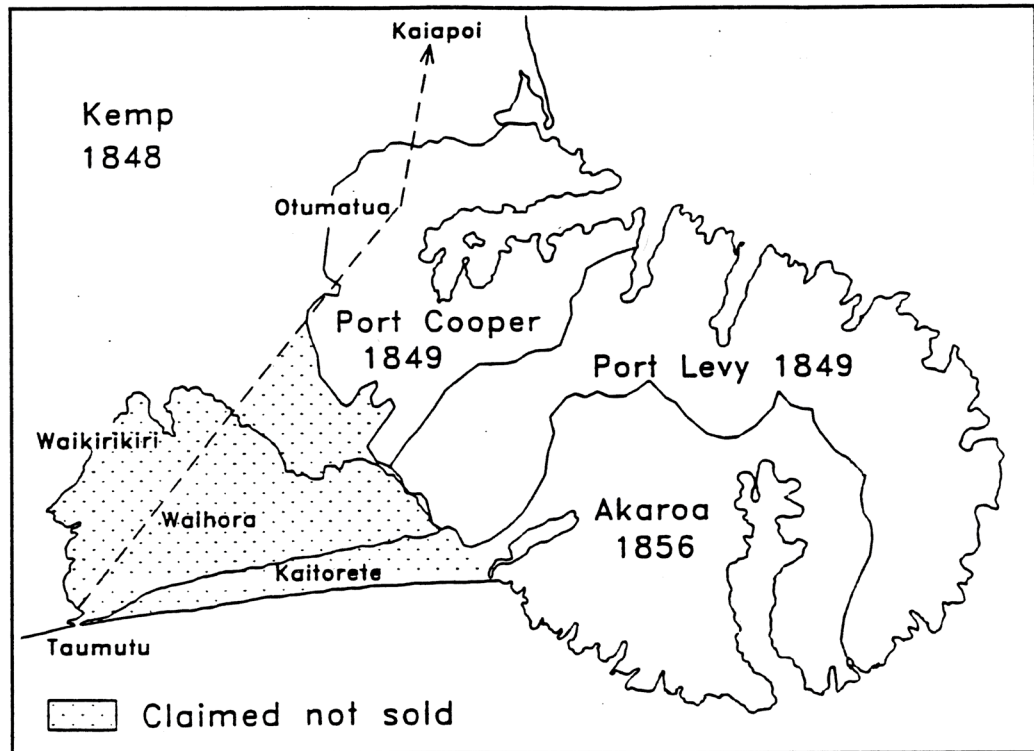


Figure 2.5: The boundary between Banks Peninsula and the Kemp purchase showing Waihora and the line between Taumutu and Otumatua, which the claimants maintained was not included in the Kemp purchase.

Such an understanding of the eastern boundary was derived largely from the evidence given the Smith–Nairn commission in 1879 – as was the claimants' evidence on the western boundary. Waruwarutu, who had also given evidence that the western boundary of the Kemp purchase ran from Maungatere to Maungaatua, said that the:

boundary runs through Lake Ellesmere; not through the centre of it exactly, but cutting off a good piece of it, and thence to Taumutu. (B3:3/11:195)

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Similar evidence was given by Pohau, who maintained that he had told Mantell that the boundary was a straight line from Otumatua to Taumutu, although he also suggests the line may have gone through Waikirikiri.

This evidence differs from that given some years earlier by Waruwarutu. In 1865 Waruwarutu requested payment for land he asserted was being reclaimed from Waihora by lowering the lake level. In this instance, it was the whole lake bed that he claimed had not been sold. Three years later Heremaia Mautai led a claim for Kaitorete Spit before Chief Judge Fenton's sitting of the Native Land Court in Christchurch. While the claimants suggested that the spit had not been sold, they did not present any evidence based on the external boundaries of Kemp's purchase.

An examination of a variety of contemporary maps associated with the Kemp and Banks Peninsula purchases appears to confirm that most, if not all, of the spit was included in the Kemp purchase. The Kemp deed map clearly includes the spit and the lake in the purchase. The head of the spit is given as the boundary between the Kemp purchase and Banks Peninsula on a number of maps from 1848 and 1849. Only in a brief notebook annotation by Mantell is there any suggestion that Kaitorete was not part of Kemp's block, and this is contradicted by his own maps of the spit.

All this evidence would suggest that the lake and the spit were included in the boundaries of the purchase. Despite this there was convincing evidence presented to the tribunal that Ngai Tahu did not intend to sell their rights to the valuable food resources of Waihora and Kaitorete Spit. While Walter Mantell was attempting to complete the purchase in late 1848 he wrote in his sketchbook under the heading eel runs:

Why not specially reserved
Waihora etc. – eventually disused
the existence of legal right inconveniences. (X12(a)):25)

He was later to confirm that Ngai Tahu had continually asserted their right to reserve eel weirs and make new weirs.

At almost every reserve the right to maintain the old and to make new eel-weirs was claimed, but I knew these weirs to be so great an impediment to the drainage of the country that in no way would I give way upon this point. (A8:I:242)

He specifically refused to allow Ngati Ruahikihiki the right to open and close the spit and so control the fishery.

At Lake Ellesmere (then called Waihora) I showed Maopo, Pohau, and others of the Kaiteruahikihiki interested at Taumutu that although years might elapse ere their old style of breaking the dam might be interfered

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with, the stoppage of the outlet must so seriously affect the drainage of so large an extent of country that the Government must be quite free to do as it pleased with regard to it. (A8:I:242)

In 1866, when Mantell admitted to this refusal to acknowledge any Maori fishing rights, he said he had acted with a “high hand”, as if he “possessed the unquestionable right to do so”. Kemp told the Smith–Nairn commission that he remembered promising Ngai Tahu that they would be able to reserve eel weirs, although he thought that these were to be shared with Pakeha.

Waihora was one of Ngai Tahu’s most valued fisheries, it was rich in tuna, patiki, piharau, aua, inanga and shellfish. The streams that fed the lake also provided kanakana, inanga, and fresh water koura. Putakitiaki were also caught on the lake in the moulting season.

The tribunal accepted that Ngai Tahu did not intend to part with this treasured fishery. It was satisfied that they intended to retain unimpeded access to both Waihora and the Kaitorete Spit. This they made abundantly clear to Mantell. He deliberately chose to disregard their rights. In doing so, the tribunal found that he failed to comply with the terms of the purchase which reserved to Ngai Tahu their mahinga kai: a serious breach of Treaty principles. Serious detriment has continued down to the present day.

It is clear from the way Ngai Tahu’s rights to mahinga kai and to Waihora and Kaitorete were disregarded by Mantell, and then by subsequent Crown action, that although Kemp and Ngai Tahu had come to a broad agreement in June 1848, this agreement allowed for divergent interpretations. As we saw in the case of mahinga kai, Ngai Tahu and the Crown had very different understandings of what was involved. Because Kemp failed to implement the instructions he was given, the potential ambiguity of the deed allowed Ngai Tahu’s rights to be very significantly reduced. However this need not have happened. If the Crown had sent a commissioner to consult with Ngai Tahu and to carefully and equitably mark out Ngai Tahu’s reserves according to Treaty guarantees, then the agreement made with Kemp could have been properly implemented. But this did not occur.

Completing the purchase

On Kemp’s return to Wellington he reported to Lieutenant-Governor Eyre, explaining the reasons for the various deviations from his original instructions, but seemingly well satisfied that he had negotiated an equitable and binding transaction. He was therefore surprised by Eyre’s strident criticism of his performance. Eyre blamed Kemp for Daniel Wakefield’s error in having the deed made out to the New Zealand Company. He was disturbed by recognition of Ngai

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Tahu's rights to the whole of the block, complaining that he had urged on Kemp:

the error of acknowledging a validity of title in the few resident Natives to vast tracts, the larger portion of which had probably never even been seen and certainly never been made use of by them. (L9:429)

Kemp responded by saying that Ngai Tahu claimed all of the land involved, and that "the mere fact of entering into a negotiation with the Natives for the purchase of the district in question, implies a recognition of their rights to the whole" (L9:439). In his view, Ngai Tahu had ceded "*all their lands*, that is to say, *their rights of ownership* in the lands" (L9:439) (emphasis in original). He implied that since Ngai Tahu had sold all their rights, it was unnecessary to argue with them over which particular rights the Crown recognised.

A much more serious complaint was Kemp's failure to identify and mark out the land reserved. Not only had Kemp failed to do this, he had not even set foot on the land he had purchased. Apart from the confusion over boundaries that this caused, on Kemp must rest the initial responsibility for the Crown's persistent failure to treat Ngai Tahu fairly and in good faith.

Eyre's rebuke of Kemp may well have been motivated by fears that the governor would hold his lieutenant responsible for a bungled and unsatisfactory mission. Grey, however, was not perturbed. He reported confidently to the colonial secretary that he entertained "no doubt that the transaction has been fairly and properly completed" (L9:16). He expressed confidence that another commissioner would tidy up any "informalities" in the proceedings, relying on his February agreement with the tribe.

Mantell's mission

Eyre's choice to complete Kemp's work was Walter Mantell, the son of a noted English geologist, and a resident of New Zealand since 1840. Mantell could speak Maori reasonably well, but was a less able writer of the language. He was instructed to travel from Akaroa to Otakou with a surveyor, marking off reserves as he went. The negotiations, "partially entered upon by Mr Kemp" were to be completed, and once the reserves had been marked, a new deed was to be signed, and a new map made showing the location of all the reserves. In establishing the land to be reserved Mantell was to be guided by the promises made by Kemp concerning villages and "plantations". However he was encouraged to use his influence to get Ngai Tahu to consolidate their holdings into as few locations as possible.

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As Mr Evison rightly pointed out, Mantell, rather than Ngai Tahu, was given the initial decision over reserves. Eyre exhorted Mantell to exercise:

the most untiring patience and indefatigable perseverance in all inquiries or discussions with the Natives . . . in winning them to acquiesce in such arrangements as *you my consider just & best*. (M3:101) (emphasis added)

Eyre accompanied Mantell and Alfred Wills, his surveyor, to Akaroa on 22 August 1848. Kemp's agreement was to be implemented by newcomers, none of whom were with Grey when he first discussed the purchase in February or with Kemp in June. At Akaroa Mantell received further instructions which confirmed Mantell's discretion in determining which reserves he "may consider necessary". He was also told not to make any reserves north of Kaiapoi, but to make a reserve as near to that point as possible. Ngai Tahu had made their intentions to settle at Tuahiwi clear to the lieutenant-governor.

These instructions further confirm Mantell's considerable discretion in determining Ngai Tahu's reserves. Wills had instructions from the New Zealand Company to impress on the commissioner the "evils" which could occur if Maori were allowed to reserve lands which would inconvenience the future settlers and the New Zealand Company.

The divergence between Mantell's impression of the size and nature of the reserves required by Ngai Tahu, and those which Ngai Tahu regarded as promised them by Kemp soon became very apparent. While Eyre and Mantell were in Akaroa they were told that Ngai Tuahuriri wished to reserve a large narrow strip of land running right across the island to the west coast from the Waimakariri River on the west coast. This request was repeated by the hapu on numerous occasions. The exact width of the strip was variously described in the years that followed. In 1887 Mantell told a parliamentary select committee that it could have included all the land between the Waikirikiri (Selwyn) and the Kowai. However, a careful perusal of the contemporary evidence suggests that the strip was to include land of a similar width from the Waimakariri to the Kawari, a stream not far from Kaiapoi pa. We would have expected, although there is no direct evidence, that this land would have followed the Waimakariri River over to the main divide and down the Taramakau or Grey Rivers and go down to include Arahura. Ngai Tahu can be seen as wishing to reserve lands which include their inland mahinga kai, and their route to the precious pounamu on the west coast.

Mantell treated this request with cavalier disregard. Having repeatedly denied this extensive reserve, he went with a number of rangatira

Summary of the Grievances, Findings and Recommendations

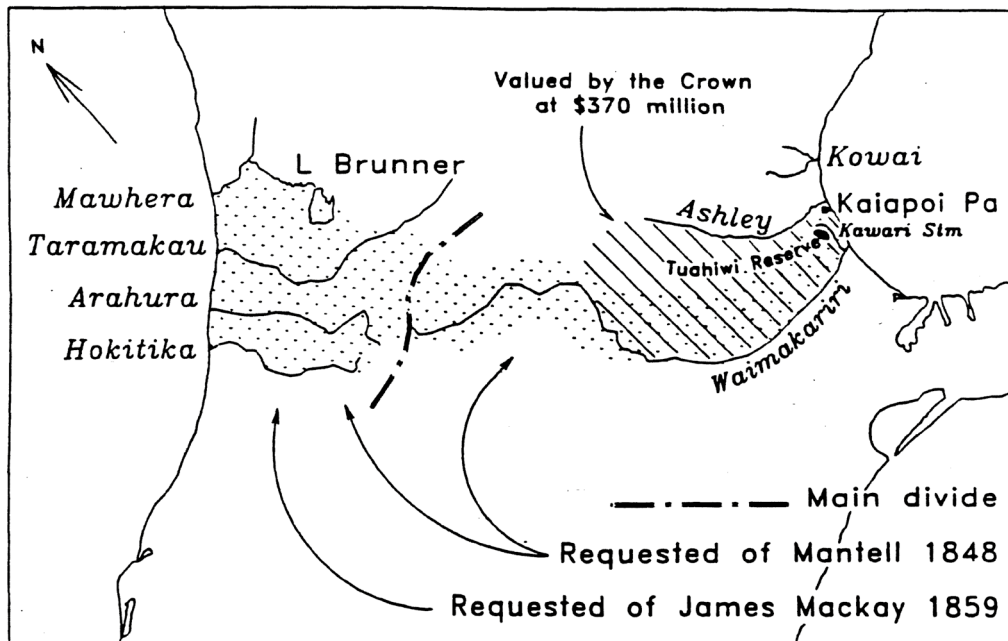


Figure 2.6: The possible area of the land Ngai Tuahuriri wished to exclude from the Kemp purchase. The boundaries are now impossible to determine, but the area appears to have crossed from coast to coast to preserve Ngai Tahu access to mahinga kai and pounamu. The reserve could have swung further south to include other important mahinga kai, such as Lake Coleridge.

to the sandhills at the coast, where he recorded the following discussions in his sketchbook:

About ½ past 10 set out for the sand hills. The natives demanded a block from K North to the Domett S to run right across the island and stated themselves [resolved] to take nothing less. [Arrived] on the sand hills they demanded from the Kawari to the Domett right across.

I took the party on until we reached a point SE from the point of the bush I then proposed to them to give from this point A by the sand hills to the Kaik [] thence by the N bank of the river to a point NW of the pa thence NW. From A again down NW a distance of 2 or 3 or so miles to the point where I should direct the surveyor to turn to meet the other boundary. Of the 3 bushes on the S bank of the river the first koau for a [?]

the second to Wera for them the S. Pa-Kiaka contains Maras-these for the maoris the [rest] of the bush for [him]

Great disputes on this point.

The dispute continued while Mantell determined what land he was prepared to allow, until he commented:

At last when I had called several times for noncontents to state their objections, I requested Wills to set to work which he did.

K to be also reserved.

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The reserve allowed by Mantell was only 2640 acres.

The Crown submitted evidence of the present value of an area between the Ashley and Waimakariri Rivers, totalling about 220,000 acres but still comprising only a portion of the land denied Ngai Tahu, although possibly wider than that requested. This land was soon divided between only 13 European run holders. Mr Donn Armstrong, a registered valuer, estimated that the prairie value, that is the land value in its natural state without any improvements of any kind such as clearing, grassing, fencing, subdivision and roading as well as other community provided assets, was £205,000 in 1848 and \$370 million today.

In the tribunal's view Ngai Tahu made it abundantly clear that they wished to maintain rangatiratanga over this land: they wished to retain it. Mantell, as the Crown's agent, was obliged to respect Ngai Tahu's wishes. But he failed to act in accordance with the Crown's obligations under the Treaty and his superiors Eyre and Grey, who endorsed his actions, failed likewise. The tribunal found that the claimants' grievance no 3 was well founded to the extent that it applied to a block bounded on the east coast by the Waimakariri River and the Kawari, north east of Tuahiwi. This reserve was not intended to extend to the Kowai as identified in the claimants' grievance. However the tribunal further found that it was intended that this reserve extend across to the west coast. Although the actual boundaries cannot now be identified, we thought it likely that the reserve was requested to preserve Ngai Tahu's access to mahinga kai and the pounamu on the west coast.

After confining Ngai Tuahuriri to a fraction of their lands, Mantell proceeded southwards to Otakou, setting aside reserves as he went. We know less of the arguments which resulted in his attempts to restrict other sections of the tribe to very limited plots, but we know that the same degree of blatant disregard of Ngai Tahu's wishes was applied. At Moeraki, Mantell even attempted to induce Ngai Tuahuriri there to vacate their kainga and take up land within the Tuahiwi reserve. The commissioner later admitted that in all his actions he had acted with a "high hand", determined to reduce Ngai Tahu's holdings as much as possible. In 1868 he stated that:

The reserves may be looked upon as the result of a struggle, in which I got the land reduced as much as possible. I used to tell the people that if they were dissatisfied they must appeal to the Governor. (A9:9:37)

He repeated this theme to the Smith-Nairn commission in 1879. Mantell made 15 different reserves, totalling 6356 acres, for 637 people by his own census. Averaging just under 10 acres per head,

Summary of the Grievances, Findings and Recommendations

the reserves ranged from half an acre a head at Kaikainui to nearly 15 acres per head at Waikouaiti. This from a block of 20 million acres.

After Eyre's and Grey's discussions with Tairaroa in September 1848, Eyre wrote to Mantell, informing him that there would no longer be any need to have a new deed signed, and modifying his instructions about reserves. Mantell was told he could refrain from marking out all Ngai Tahu's reserves, and instead leave the third class of reserves, those promised when survey was completed, to a later time. Although the letter was dated 4 October 1848, it did not reach the commissioner until two days before Christmas. By this time he had completed his tour of the east coast of the island, and the reserves had all been laid out. He reported to Eyre that there was no need for any further land to be reserved to Ngai Tahu:

. . . I trust that it will be found that I have in every case given such consideration to the present and prospective necessities of the Natives that the Lieutenant Governor will see little cause to regret that the reserves should have been finally arranged prior to my receipt of His Excellency's letter. (M3:32-33)

Mantell was deceiving the lieutenant-governor. In the light of his later admissions, he had not considered Ngai Tahu's future needs. He had reduced their lands to the barest minimum, and he had done so by making promises that the governor would provide them with further benefits, with land and with schools and hospitals.

Despite glossing over Ngai Tahu's acceptance of his reserves, and overstating the finality of his arrangements, Mantell made no secret of how much land he had permitted to be reserved. His final report, of 30 January 1849, tabulated the amount of land allocated and the population at each reserve. Eyre, while commending Mantell on the success of his mission, made no comment on the amount of land reserved in his report to Grey. Even before Grey received Eyre's report, he informed the colonial secretary that:

I think it will be a source of great satisfaction to your Lordship to find that so large a tract of country of the most fertile description is thus unrestrictedly open to British enterprise, without any possibility of any of those embarrassing questions arising in relation to it between the European and Native population, in reference to titles to land, which have been a source of such loss and embarrassment to the settlers in the North Island. (A8:I:212)

When Eyre's report arrived, Grey gave his wholehearted approval to all Mantell's actions. Both Grey and Eyre were aware of how little land had been left Ngai Tahu, and both approved the reservation of 6359 acres to the original owners of the land, out of 20 million acres.

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There were numerous early complaints about the size of the reserves. When Mantell returned to Wellington to report on his mission, he was accompanied by a deputation from Ngai Tahu seeking a ruling from Eyre on the distribution of the second payment. According to Tiramorehu, complaints were made at this time about the size of the reserves. In November 1849, Tiramorehu repeated his complaint that Mantell had ignored Maori concerns that the “part that should be reserved for the Maoris ought to be large” (L9:23). He asked for an extension of the Moeraki reserve for sheep and cattle to be run. On Mantell’s advice, this request was turned down, Eyre replying that the 500 acres reserved at Moeraki were “considerable for the very few Natives resident there” (A8:I:229). How Eyre could come to this conclusion when there were only 5.7 acres per head reserved at Moeraki has been beyond our comprehension. Further land at Waikouaiti was granted, largely because the request was agreed to before Mantell had the opportunity to counsel against it. Mantell’s refusal to reserve the coast to coast Kaiapoi reserve was also the subject of a number of complaints.

To some extent the social and economic consequences of Ngai Tahu’s limited reserves were disguised by the immediate impact of the arrival of the new settlers in Otago and Canterbury. While European settlement was small, and confinement on the reserves more nominal than real, Ngai Tahu had new markets for their agricultural products and for their mahinga kai. However this prosperity was short lived. Once settlers became self-sufficient in agricultural produce and their numbers increased, Ngai Tahu lost the advantage. They were overwhelmed by European settlers and unable to compete due to their tiny land holdings. Pastoralism which allowed individual European farmers to gain control of tens of thousands of acres at a time further accentuated Ngai Tahu’s disadvantage. The evidence of Mr Walzl and Professor Pool, presented by the Crown, made it clear that Ngai Tahu in the Kemp block were confined to a marginal subsistence by the 1860s. By 1891 Alexander Mackay concluded that only 12.8 per cent of Canterbury Ngai Tahu had sufficient land. It is manifestly evident that the reserves set aside by the Crown under Kemp’s deed were seriously inadequate for the present and future needs of Ngai Tahu.

Findings on reserves and mahinga kai

The tribunal upheld the claimants’ grievance that the Crown failed to fulfil the terms of the agreement between Kemp and Ngai Tahu. This included the failure to provide ample reserves for their present and future needs and to reserve and protect Ngai Tahu’s numerous mahinga kai for their use.

Summary of the Grievances, Findings and Recommendations

While Mantell did reserve most, if not all, of the Ngai Tahu places of residence, he refused to include all existing cultivations. In arbitrarily allowing an average of 10 acres per person to Ngai Tahu who were parties to the sale, Mantell made insufficient provision for their present needs, viewed on any basis other perhaps than that of bare subsistence. He failed to make any provision, as envisaged in the deed and as promised by Kemp, for additional reserves, so as to ensure that in total Ngai Tahu were left with generous areas of land fully sufficient to maintain access to mahinga kai and to develop alongside the European settlers, pastoral farming in addition to agriculture. He entirely failed to honour the obligation under Kemp's deed to reserve to Ngai Tahu their mahinga kai. It is not stating the position too strongly to say that the effect of the Crown's niggardly allocations was to "ghetto-ise" Ngai Tahu on small uneconomic units on which they could do little more than struggle to survive.

The tribunal did not believe that it would have been necessary for the Crown to reserve to Ngai Tahu unrestricted access on a permanent basis to all foraging and hunting, to all ti or fern-root, to all birds, to all inland fisheries, in the extensive areas which they sold. But had the Crown first ensured that in addition to their residences and existing cultivations adequate land was provided Ngai Tahu for future cultivations (as envisaged by Kemp); and secondly reserved all eel-weirs and other inland fisheries sought by Ngai Tahu; and thirdly in addition reserved extensive areas of good quality land in appropriate locations, which would remain as a plentiful source of mahinga kai and would enable Ngai Tahu to engage fully in both agricultural and pastoral farming pursuits, then the tribunal believed that the Crown's obligations under Kemp's deed would have been substantially met. More especially would this have been so had the Crown complied, as it should have, with Ngai Tahu's request for a very substantial reserve between the Waimakariri and Kawari.

The tribunal found that the Crown's failure to fulfil its contractual obligations under Kemp's deed in respect of reserves and mahinga kai was in breach of the Treaty principle which required the Crown to act with the utmost good faith towards Ngai Tahu. The Crown failed to so act.

The tribunal further found that the Crown failed to preserve and protect Ngai Tahu's rangatiratanga over their land and valued possessions in breach of article 2 of the Treaty. The cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga. In recognising the tino rangatiratanga over their lands the Crown was acknowledging the right of Maori, for as long as they wished, to hold their lands in accordance with

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longstanding custom, on a tribal and communal basis. It is clear that Ngai Tahu had no intention of surrendering their pa, their cultivations, their valued mahinga kai and that, in addition, they wished to retain extensive areas of land for their future well-being—all this on a tribal or communal basis. The Crown, through its agents, rode roughshod over Ngai Tahu's rangatiratanga, over their right to retain land they wished to keep, over their authority to maintain access to their mahinga kai. Instead of respecting, indeed protecting, Ngai Tahu's rangatiratanga, the Crown chose largely to ignore it. In so doing it acted in breach of an important Treaty obligation, and has continued so to act down to the present time.

The tribunal further found that the Crown acted in breach of the Treaty principle which requires that in exercising its right of pre-emption the Crown was obliged to ensure that Ngai Tahu were left with a sufficient endowment for their own needs, both present and future. This the Crown patently failed to do at the time of the purchase. Such failure has continued down to the present time.

As will be shown, Ngai Tahu suffered grievously as a result, while the Crown, for a nominal payment of £2000 obtained title to some 20 million acres of land. The outcome, while obviously highly satisfactory to the Crown and its senior officials, was nothing short of disastrous for Ngai Tahu who, when in good faith they negotiated with Kemp and listened to his assurances, could never have contemplated that they would in fact be rendered virtually landless. They would have expected, given the provisions in the deed, that they would be left with their homes, their mahinga kai and ample land on which to develop agricultural and pastoral activities alongside, and on an equal basis with, the new European settlers. The tribunal was convinced that had Ngai Tahu foreseen the actual outcome they would never have agreed to the sale.

We recall that Lord Normanby instructed Governor Hobson that the land should be bought extremely cheaply from the Maori – this would facilitate development and assist in bringing out more settlers. But the spin-off for Maori would be that the land they retained would, over time, increase greatly in value. But, as we have indicated, this would occur only if the Crown ensured that it left Maori with ample land. This the Crown failed to do. And so Ngai Tahu suffered severely in two ways. They were paid a mere £2000 for 20 million acres, a substantial part of the South Island. In no way were they compensated for receiving such a nominal payment, as they were left with only a few totally inadequate reserves.

The claimants argued that the Crown failed to lodge a claim to protect Ngai Tahu's interest under the New Zealand Company Land

Summary of the Grievances, Findings and Recommendations

Claimants Ordinance (1851). However in examining the ordinance it is clear that it applied not to Ngai Tahu as vendors of the land but to those people who had purchased land from the company and had not received titles. The tribunal accordingly could not sustain this grievance (no 5).

The sixth grievance involved the Canterbury Association Lands Settlement Amendment Act 1851. The claimants argued that this was passed without ensuring that Ngai Tahu's interests were protected. This was an amendment to an 1850 Act passed by the Imperial Parliament. The amendment allowed the company to engage in development works, including drainage, within the Canterbury settlement. The British Parliament assumed that Maori title had been extinguished and did not act in bad faith. However local Crown officials had failed to ensure that the provisions of Kemp's agreement were fully and faithfully implemented. Had this been done, then Ngai Tahu's lands and mahinga kai would not have been vested in the company. The passing of this legislation aggravated pre-existing breaches of the Treaty. The tribunal accordingly found this grievance to be substantiated.

The grievances after the purchase

So complete had been Mantell's re-interpretation of Ngai Tahu's agreement with Kemp, that the tribe found it difficult to articulate the extent of their grievances to other Crown officials. With Eyre and Grey applauding Mantell's interpretation of the Kemp deed, Ngai Tahu found it almost impossible to impress upon the Crown their belief that they had not agreed with Kemp to accept an inheritance of impoverished subsistence. Mantell's promises that the governor would look after Ngai Tahu's future provided some hope, and many rangatira continued to appeal to various governors in writing and in person during the 1850s and the 1860s. Their appeals met with very limited success. Ngai Tahu's complaint about Mantell's revision of the northern boundary of the block, and their demands for the recognition of Ngai Tahu's rights to Kaikoura were eventually acknowledged by the Crown in the North Canterbury and Kaikoura purchases. However few, if any, Europeans understood the extent Ngai Tahu's wishes to retain very substantial areas of land had been ignored by Mantell.

In 1867 Grey visited Tuahiwi and promised to have Ngai Tahu's grievances examined. The following year sittings of the Native Land Court were held in the Christchurch town hall. Complaints that Kemp's deed was invalid or that the Crown's obligations had not been fulfilled led to Chief Judge Fenton's examination of the deed under an order of reference. Once Mantell had given evidence that he had

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failed to fulfil the terms of the deed the court set about determining how much land was due Ngai Tahu. Fenton reserved a further 5000 acres in Canterbury and Otago, raising the allocation to 14 acres per head. He also went a little way to recognising Ngai Tahu's rights to mahinga kai, although this was strictly limited to fisheries, by setting aside a number of small fisheries easements. He did not carry out his own suggestion to reserve Kaitorete as a fishery.

The claimants argued that Ngai Tahu were not adequately protected in their proceedings before the Native Land Court. They relied on Mr Evison's contentions that while Alexander Mackay was appointed to assist the Crown, Mr Cowlshaw, Ngai Tahu's counsel, withdrew in protest at the order of reference being considered by the court with insufficient notice. If this were true, Ngai Tahu would have been left unrepresented in a European court setting, on a major issue affecting their future. However both contentions were incorrect. Mackay was made an agent for the Crown at the Otago sitting, but was appointed to appear "on behalf of the Natives" when the court was at Christchurch. Far from withdrawing, Mr Cowlshaw was present throughout the proceedings. Any defects in the court proceedings were the responsibility not of the Crown, but the court. It follows that the claimants' grievance (no 7), that the Crown failed to provide adequate protection for Ngai Tahu in the conduct of the Native Land Court, has not been upheld.

In a further grievance the claimants suggested that the Crown passed the Ngaitahu Reference Validation Act 1868 to the detriment of Ngai Tahu. This Act was passed to legalise an irregularity in the order of reference which allowed the Native Land Court to examine whether the terms of Kemp's deed had been fulfilled. It specified that the Native Land Court orders were "deemed to be in final extinguishment of the Native title within the boundaries" shown on the plan. While the tribunal agreed with Mr Evison that the Crown acted reprehensibly in passing legislation which denied Ngai Tahu any access to the courts to test the validity of Kemp's deed, we did not consider that this was a fraudulent act. The legislation was aimed primarily at correcting a technical deficiency in the order of reference. Instead of being signed by the governor, as required by the Native Land Act, the order had been signed by a member of the Executive Council, Sir John Hall. The tribunal was unable to find it proved that Ngai Tahu have been prejudicially affected by the passing of the Validation Act. We also noted that the Act provided that the Land Court orders would not apply to any promises made by any officer of the government for schools and hospitals or any other inducement made to Ngai Tahu to consent to the sale of their lands.

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With the finality of the Fenton awards pressed home to the tribe, Ngai Tahu's hopes that the court would deal with the wide scope of their claims were dashed. The Ward report commented on the increasing bitterness and discontent evident in the 1870s. The Tuahiwi missionary, James Stack, warned the government of the disillusionment and disaffection being experienced by Ngai Tuahuriri.

They now find themselves placed in a situation they never contemplated when disposing of their land for the purposes of colonisation and consider themselves the victims of deception and boldly charge the government with having purposely misled them. They are bequeathing to their children a legacy of wrongs for which they charge them to seek redress – this will serve to perpetuate the spirit of discontent which has for some time prevailed. (T1:357)

It was in this period from the late 1860s that Ngai Tahu began to perceive their claim to the large areas of land which had been denied them as a “hole in the middle”. Piecing together their reminiscences of the details of the agreement, those participants in the sale who were still alive were forced to explain why they had agreed to a transaction which had been so narrowly defined by Mantell, and then recently confirmed by Fenton. Given that they had dealt with Grey, then Kemp and then Mantell, and that Mantell had failed to acknowledge the extent of the lands they had reserved from the sale, it is not surprising that they looked back on the events of 1848 with some confusion. In their various runanga discussions in the 1870s, the tribe came to see Maungaatua and Maungatere as marking the limits of the purchase.

We considered it inconceivable that Ngai Tahu, in agreeing to the purchase, would have agreed to forfeit their future access to important food resources. We were also convinced they entered into this deed in good faith and in reliance on Kemp's assurances that ample provision would be made for their needs. It was not in their minds that they would be confined to reservations so small as to be barely capable of sustaining them at subsistence level. They fully expected to retain extensive areas of land, which would provide them with continued access to mahinga kai and enable them to engage in the same farming practices as the Europeans. That their legitimate expectations were not realised and still remain largely unrealised is due to the failure of the Crown then and since to honour its Treaty obligations.

The Ngaitahu Claim Settlement Act 1944

In 1920 a Native Land Claims Commission, consisting of the then chief judge of the Maori Land Court, R N Jones, and J Strauchon and J Ormsby, reported on the 1909 petition of Tiemi Hipi and 916 other Ngai Tahu concerning the Kemp purchase. The commission does not

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appear to have received evidence. It merely examined Mackay's compendium and some but not all of the various reports of previous inquiries. The commission considered Ngai Tahu's claim that only the eastern seaboard had been included in the sale, and concluded that, whatever may have been intended, the deed covered all land from the east to the west coast. The commission determined that the only fair way of dealing with the problem would have been to put "the aggrieved party in the same position as if the contract had been fulfilled, by allotting proper reserves, ascertain what the present value of them would be, and measure [the] loss accordingly" (M17:II: doc 42:37). But this, the commission decided, could not be done. Instead it subtracted the Arahura block, the Banks Peninsula block, the reserves actually provided and land it regarded as worthless in 1848 from the total area to be considered to come up with a total of 12.5 million acres. This they assessed to be worth £76,125 in 1848. Adding 75 years interest at 5 per cent and an allowance for the tribe's costs, they arrived at a figure of £354,000, which they recommended as compensation. The tribunal noted that in arriving at this figure the commission took no account of the loss of mahinga kai, and it ignored the failure of the Crown to set aside land Ngai Tahu wished to keep. Nor did it make any reference to the Treaty or the Crown's responsibilities under the Treaty.

It took 24 years for the commission's report to be acted upon. In 1928 the Native Land Amendment and Native Claim Adjustment Act stated that a decision on the implementation of the commission's report had not yet been made, but nevertheless it constituted the Ngaitahu Trust Board "for the purpose of discussing and arranging the terms of any settlement of the claims for relief that may be come to". In March 1930 Treasury advised the Prime Minister that liability should not be acknowledged by the Crown but that given the "false hopes" raised by the 1920 commission recommendation, an ex-gratia payment of £15,000 should be made. In October 1935 Ngai Tahu rejected an offer of £100,000 made by the coalition government. There were further discussions in 1938, but it was not until 4 December 1944 that the native minister, H G R Mason, gave instructions for a Bill to be drawn up providing for 30 annual payments of £10,000. The Bill was quickly passed on 15 December 1944.

The long title of the Ngaitahu Claim Settlement Act 1944 is "An Act to effect a Final Settlement of the Ngaitahu Claim", and the preamble stated that the "persons now interested in the claims have agreed to accept the payment of the sum of three hundred thousand pounds in the manner hereinafter appearing in settlement" of their claims relating to the Kemp purchase. However there is very real doubt that Ngai Tahu were consulted on the measure at all before it was passed.

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In 1946 Mr Tirikatene told the House that the Bill was passed and the money handed over to the Native Trustee, and only then was he able to discuss the matter with Ngai Tahu. This sequence of events is confirmed by a 1971 affidavit of the secretary to the native minister at the time. Between 1944 and 1946 Mr Tirikatene did discuss the matter with Ngai Tahu, and they gave their acceptance to what was by that time a *fait accompli*.

In 1973, when the last of the 30 annual payments was imminent, the government introduced legislation to extend the payments into perpetuity. Mr Matiu Rata, the Minister of Maori Affairs, in introducing the amendment stated that it had “become obvious to members of the present Government that the so-called settlement of 1944 was by no means to be regarded as a fair and final settlement”.

Mr Tony Hearn QC, in making submissions to the Tribunal, argued that the events of the 1940s and 1970s acted as an estoppel, preventing Ngai Tahu from claiming from the Crown any further remedy for the Crown’s obligations under the Kemp purchase. The 1944 and 1973 Acts were seen by Mr Hearn as a full and final settlement to claims arising from that purchase. The tribunal rejected that argument. Not only did the 1944 “settlement” merely partially implement the recommendations of the 1920 commission, it did so after more than two decades of delay. Nor did the 1920 commission on which the settlement was based deal with all matters relating to the Kemp purchase—it was silent for instance on *mahinga kai*. Far from being openly negotiated with the tribe, a unilateral settlement was reached in 1944 which was later accepted as a *fait accompli*. Whatever happened in 1944, subsequent events and submissions of the Ngai Tahu people show that settlement to be inadequate.

The 1944 settlement made no mention of the Treaty. The statutory right to make a claim based on the Treaty did not exist at the time and in the tribunal’s view neither the 1944 legislation nor its 1973 amendment could be conclusive of claims made against the Crown under the Treaty of Waitangi Act 1975. The tribunal rejected the suggestion, seemingly implicit in counsel’s argument, that Ngai Tahu was barred from making their claim by a settlement made before the statutory right was conferred. Such a proposition, in the tribunal’s view, was not only untenable but difficult to reconcile with good faith on the part of the Crown.

2.5. **The Banks Peninsula Purchases Summary**

Introduction

When Kemp returned from Akaroa in June 1848, he had not purchased Banks Peninsula from Ngai Tahu. He said he had been told

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that the whole of the peninsula had already been sold to the French. Kemp was mistaken. The French were the Nanto-Bordelaise Company, which like the British New Zealand Company, attempted to acquire title to Maori land for commercial colonisation. The Nanto-Bordelaise Company's purchase deeds were no more valid than those of the New Zealand Company. Land Claims Commissioner Edward Godfrey found that no more than a few hundred acres on the peninsula had been properly bought from Ngai Tahu. An attempt to purchase more land in 1845 was incomplete and unlikely to have improved the company's title. The British government waived pre-emption to allow the company to purchase sufficient land to make up the 30,000 acres the Crown was prepared to award them. This was never done.

When the Crown came to purchase the peninsula in three separate blocks between 1849 and 1856, it was assumed that Ngai Tahu had already sold their rights to a good proportion of the land. Walter Mantell, fresh from reducing Ngai Tahu to the barest minimum of reserves in the Kemp block, managed to purchase the Port Cooper and Port Levy blocks in 1849. With instructions to act with a "high hand", Mantell treated Ngai Tahu as if they had already sold the land,

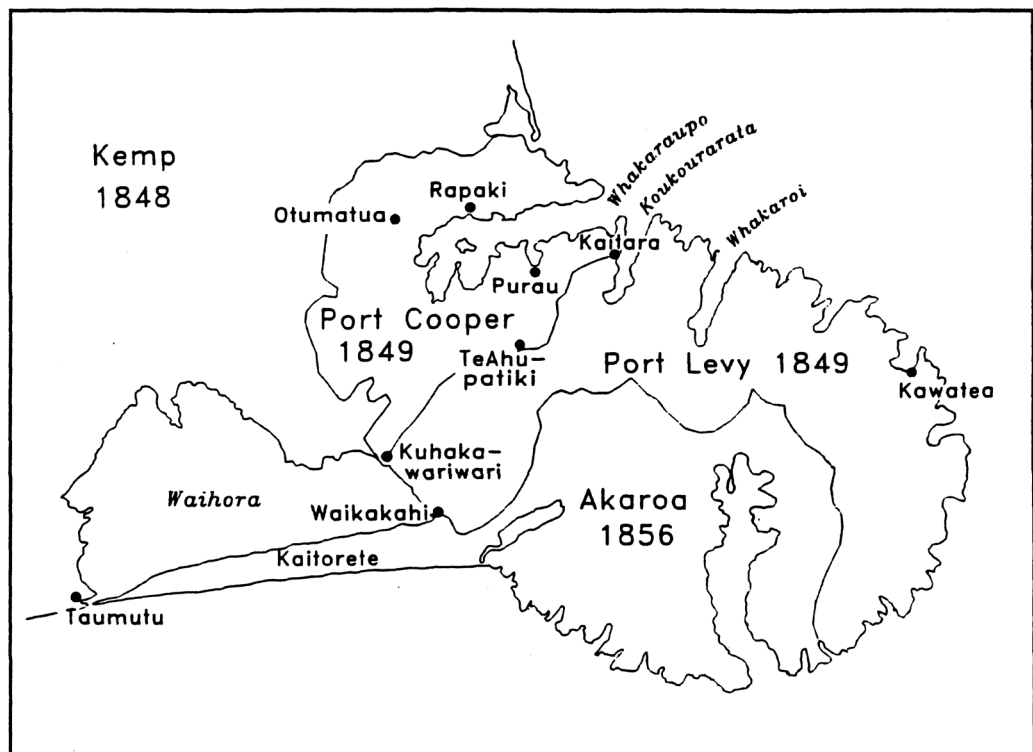


Figure 2.7: The Banks Peninsula Purchase 1849-1856

Summary of the Grievances, Findings and Recommendations

he allowed a minimum of reserves, and forced Ngai Tahu to accept what were no more than token payments for the land. Despite placing even more pressure on Ngai Tahu to part with their land he was unable to get agreement for the purchase of the Akaroa block and it was not until 1856 that this was purchased by W J W Hamilton, on the assumption that 30,000 acres had already been sold to the French. Here too Ngai Tahu received only a token payment and minimal reserves.

The claimants' grievances

There were 18 grievances filed on the Banks Peninsula claim. These related to the French purchases, the three Crown purchases, Crown actions after the purchases and mahinga kai.

The French purchases

The first four grievances concerned the French purchases. The claimants alleged that Lord Stanley awarded 30,000 acres to the French without consulting Ngai Tahu (no 1), and that Ngai Tahu received no compensation (no 2) or no reserves (no 3) from this award. They complained that the Crown failed to protect Ngai Tahu against the "land purchasing pretensions" of the French, and allowed Mantell and the Canterbury Association to use the 1845 French deeds to deny Ngai Tahu's traditional rights of occupation (no 4).

Port Cooper and Port Levy

Mantell's actions in the Port Cooper and Port Levy purchases were also the subject of complaint. The claimants alleged that Mantell was sent to "carry matters with a high hand", that he falsely asserted that the Crown already owned the peninsula, and that the Crown did nothing to rectify this (no 5). Mantell, they claimed, conducted his proceedings as an award. Price and reserves were non-negotiable, and as a consequence Ngai Tahu were denied a fair price and adequate reserves and resources for their continued sustenance and prosperity (no 6). This led them to abandon the Port Levy and Port Cooper blocks, apart from their inadequate Port Levy, Purau and Rapaki reserves (no 7). At Port Levy, so they said, Ngai Tahu's requests to reserve Okains Bay, the Kaituna valley and part of Pigeon Bay were denied (no 8). The Port Levy purchase was claimed to have been enforced, with Mantell not visiting all the settlements and gaining only minority agreement to the sale (no 9). The Canterbury Association Lands Settlement Act 1850 assigned the whole of the peninsula to the association although, the claimants alleged, it had not been properly purchased from Ngai Tahu (no 10) and that this led to European settlement over Ngai Tahu's lands before the tribe had been adequately paid (no 11).

*The Ngai Tahu Report 1991**The Akaroa purchase*

For the Akaroa block, it was claimed that Ngai Tahu's attempt to reserve a substantial area of around 30,000 acres, including the Wairewa basin, was denied both by Mantell in 1849 and Hamilton in 1856 (no 12). Although the deed specified only those "places (or areas) in dispute at Akaroa", the claimants maintained this was used to enforce the sale of the whole block, excluding only 1200 acres (no 13). Both these reserves and the £150 paid were claimed to be manifestly inadequate (no 14) and it was argued that the Crown unreasonably made the resident Ngai Tahu responsible for the interests of returning absentee owners, to the detriment of both (no 15). While under the Lands for Settlements Acts two substantial estates were resumed, it was claimed, for landless Europeans, peninsula Ngai Tahu were offered only inferior land elsewhere (no 16).

As a result of these acts, the claimants argued that Ngai Tahu of Banks Peninsula were driven off their land and lost their turangawaewae (no 17). The last grievance concerned mahinga kai and environmental despoliation of the peninsula. This was dealt with as part of the mahinga kai section of the report.

The French

French involvement in Banks Peninsula is a complicated story with an involved plot and extensive cast, set in New Zealand, France and Britain. The tribunal was grateful for the assistance of Dr Peter Tremewan, a senior lecturer in French at the University of Canterbury, for outlining much of this story. It all began in 1838, when Jean Francois Langlois, the captain of a French whaler, attempted to purchase the whole of Banks Peninsula from a number of Ngai Tahu chiefs. He paid a deposit of 150 francs (£6) of a total of 1000 francs (£40), to be paid on taking up possession. The sale was never acknowledged by Ngai Tahu in the terms of the deed written in French, and at most it could be said that some small areas of land at Port Cooper had been intended to be sold. Nonetheless, whatever the purchase signified, it had not been completed.

On his return to France Langlois sold his rights to Banks Peninsula to a group of French businessmen who formed the Nanto-Bordelaise Company, intent on settling French immigrants on the peninsula. The company identified weaknesses in Langlois' title and sought to have these removed by further deeds which it hoped would eventually give it ownership of the whole of the South Island. In March 1840 the *Compte de Paris* left Rochefort with 57 prospective colonists, unaware of course of the Treaty of Waitangi.

Summary of the Grievances, Findings and Recommendations

When they arrived in New Zealand they found the country a British territory, and private purchases from Maori banned. Hobson successfully pre-empted any attempt by the French to claim sovereignty over the South Island. Despite the proclamations of 14 and 30 January, which declared that only title to land derived from the Crown would be recognised, the French immediately entered into three additional agreements, designed at overcoming the deficiencies in the 1838 deed and further securing their claims to land on the peninsula and elsewhere. Maori and French views of the amount of land involved varied considerably. While the first deed signed on 11 August 1840 purported to convey the whole of Banks Peninsula and much of what is now North Canterbury to the company, the second deed specified a much greater area including all lands from the east to west coast of the island between Kaikoura and Temuka. In contrast, Maori understanding of the agreements were limited to a few places in Port Cooper, Port Levy, Pigeon Bay and Akaroa.

It appears that the Maori signed blank pieces of paper and Langlois later filled in the detail. Not only this, but he pre-dated these deeds to a time when he was unaware of British sovereignty and the prohibition on private land purchases. When Captain Lavaud and his French naval vessel arrived, he was soon made aware of the deficiencies of the company's deeds. He advised yet another backdated deed. As Dr Tremewan pointed out "negotiations were now being conducted to satisfy the British authorities rather than the Maori land-owners". This deed too involved from the Maori viewpoint (confirmed by some of the Europeans present) considerably less than the whole of the peninsula.

The advent of British sovereignty took the steam out of the company's scheme and no more colonists were sent out. The company began negotiations with the British government to secure its position at Akaroa and then later with the New Zealand Company to sell these rights and so recover some of its investment. The government in Britain agreed to award the company four acres for every pound spent, up to the 30,000 acres claimed. The French company was under the mistaken belief that this was the total area of the peninsula, when it actually comprised 250,000 acres. However the company's deeds still had to be placed before the Land Claims Commission.

When Commissioner Godfrey examined the company's claims in August 1843, he concluded from all the evidence that there was no indication of a sale in 1838. Ngai Tahu witnesses did admit sale to Langlois in August 1840 of small and discrete pieces of land; what Godfrey thought was about 400 acres at Akaroa. From the boundaries given, it would seem that this last piece may have been as much as

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1700 acres. All this fell far short of the 30,000 acres claimed, let alone the whole of the peninsula. Godfrey was aware that the Crown had promised the company an award, but on the basis of his investigation he could not have recommended a grant under the Land Claims Ordinance.

In 1845 the French made one last attempt to secure their title with Ngai Tahu. Two further deeds were signed, goods distributed valued at almost £1500 and further payments promised. While a map has survived the deeds have not. Some important Akaroa Maori refused to sign; a show of force by the French may have influenced the transaction; and it is not completely clear what the French intent was. Because the French warship the *Rhin* was about to depart, and threats had been made against the settlers, Dr Tremewan saw the events as a means to protect the French settlers once their military protection had gone.

After the British government had examined the accounts of the company, Lord Stanley accepted that it was entitled to the 30,000 acres claimed. He issued instructions that the amount of land sold to the French be confirmed and if this came to less than 30,000 acres, then the Crown would waive its right of pre-emption and allow the company to purchase the remainder directly from the Maori owners. Once this was completed a Crown grant would be prepared in favour of the company. None of this was ever done: the company was defunct and had no agent at Akaroa. In June 1849, the company's rights on the peninsula were conveyed to the New Zealand Company.

The tribunal concluded that all these French "agreements" of 1838 and 1840 were fatally flawed. The original 1838 deed was in French. There is no way of knowing the degree of Maori understanding of the deed, and the signatories do not appear to have included the major chiefs. The two August 1840 deeds, signed on blank paper and filled in later, cannot be relied on at all. The third 1840 deed, drawn up at Lavaud's recommendation, was a renegotiated version of the 1838 transaction, and backdated to deceive the British authorities. It was a forgery and cannot be invoked or relied on as in some way passing title away from Ngai Tahu.

Godfrey's investigation showed that Ngai Tahu admitted to the sale of what we have estimated to be no more than 3000 acres. He concluded when reviewing the documents in 1845, that only the last of these sales had any authenticity. Godfrey was unaware of the 1845 transactions. However these were incomplete: no deeds exist, major chiefs refused to sign and there was no waiver of pre-emption.

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The Crown submitted that although the 1840 and 1845 sales occurred after pre-emption had been imposed, Ngai Tahu could still lose their rights to land if they conveyed them to a third party. Pre-emption simply meant that instead of the rights going to the private purchaser, they went to the Crown. However, despite the considerable sums paid by the French, nothing in the evidence of these transactions is sufficient to modify the conclusions made by Godfrey as land commissioner in 1843 that only very small pieces of land had been sold.

The claimants' first grievance was clearly made out. Lord Stanley did award 30,000 acres to the French, and there was no evidence that Ngai Tahu were consulted. However, he provided that before a grant was made to the company, Ngai Tahu should be paid for any land they had not already sold. The tribunal estimated that about 1700 acres at Akaroa had been acknowledged by the Godfrey commission as sold to the French, leaving over 28,000 acres to be purchased. The next two grievances (nos 2,3) were also sustained in that, as we demonstrated in our discussion of the later Akaroa purchase, no reserves or payment were ever made for the remainder of the 30,000 acres.

In dealing with grievance no 4, the tribunal concluded that the Crown was not in a position to protect Ngai Tahu from Captain Langlois' 1838 purchase, nor given the circumstances could it have prevented the 1840 purchases. In 1845 the Crown's representative, Police Magistrate Robinson, warned Belligny that his attempt to purchase further land from Ngai Tahu would have little validity.

In imposing pre-emption and in setting up the Land Claims Commission, the Crown did take steps to protect Ngai Tahu in respect of the early French transactions. However the grievance was sustained in that the Crown allowed these transactions to be used against Ngai Tahu by Mantell and by the Canterbury Association.

In 1848, then, when Kemp came to negotiate his purchase, Ngai Tahu had only agreed to the sale of about 3000 acres on Banks Peninsula, despite the pretensions of the various French deeds. Ngai Tahu, however, gave Kemp and later Mantell the impression that the peninsula had been sold to the French. It is likely that Ngai Tahu, still expecting further payments from the French, were merely saying that the French had an option on the peninsula, pending payment in full from the French.

In April 1849, the New Zealand Company's agent, William Fox, informed Grey that there was some doubt as to whether Banks Peninsula had been purchased as Ngai Tahu were now maintaining that Ports Cooper and Levy were not owned by the Crown. Grey

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responded that it had been his intention to have the peninsula included in the Kemp purchase, but if this had not been the case then some further “compensation” should be paid. He however refused to admit that the land had not been sold by Ngai Tahu, describing it by some fiction as “native reserve”. Eyre too was at pains to avoid any suggestion that the Crown was actually *purchasing* lands Ngai Tahu had not sold.

Mantell’s purchases: Port Cooper and Port Levy

In being commissioned to finalise matters regarding the peninsula Mantell was well briefed, but the confusion about what he was actually doing, making an award or purchasing land, remained. It was certainly envisaged by Eyre that Mantell would be able to dictate the terms. When Mantell asked the lieutenant-governor what he was to do if Ngai Tahu rejected the price he offered, he noted in Greek script, “Let them leave it. I must carry matters with a high hand” (G2:322–323).

Port Cooper

It took five weeks of discussions with Ngai Tahu before he was able to induce them to agree to the Port Cooper purchase. In discussions over reserves Mantell was prepared to act unilaterally. At Purau he instructed the surveyor, Carrington, to mark out the reserve without Ngai Tahu consent, forcing them to abandon gardens not included in the reserve. Negotiations were difficult and intense: Ngai Tahu demanding that their title be recognised, and Mantell insisting that he had the right to determine the limited reserves and the payments he was prepared to offer. Ngai Tahu bargained vigorously and at length, but finally accepted Mantell’s proposals. The Port Cooper deed was signed on 10 August 1849, involving 59,000 acres for which the Crown paid £200.

Mantell moved on to Port Levy to negotiate the next purchase, but in the meantime received instructions from Eyre which allowed to him act even more arbitrarily and inflexibly in his dealings with Ngai Tahu. While Eyre increased the money at Mantell’s disposal, he insisted that the matter be settled quickly and on the basis that the French had already paid Ngai Tahu for the land, that it should have been included in the Kemp purchase, and that the imperial government had envisaged no further payments for the 30,000 acres awarded to the French. All of these assertions were incorrect. The French had not completed the purchase, Ngai Tahu had excluded the peninsula from the Kemp block and Stanley had allowed for the purchase of additional land to accommodate the Nanto-Bordelaise Company. Eyre also told Mantell to ignore any representations by Ngai Tahu that the

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purchase be delayed until they had been able to discuss their concerns with Grey.

Koukourarata (Port Levy)

Mantell's attitude was reflected in the proceedings at Koukourarata (Port Levy) which the Ward report described as "at least as acrimonious and even more divisive than at Port Cooper" (T1:187). Mantell offered £300, Ngai Tahu wanted £1000. Mantell insisted on small reserves, Ngai Tahu wanted substantial areas reserved from the sale. In his discussions Mantell again emphasised the French purchases. He insisted quite wrongly that the land was already owned by the government and it is difficult to construe Mantell's comments as other than intimidatory. When Apera Pukenui told Mantell that he would keep his land unless he was paid the sum he asked, Mantell told him that the land had already been paid for. Of the money he was offering he said:

I shall not increase it because it is what I think just so I see no reason for exceeding the amount of £300 on which I have decided. This money you can take or not the title to the land will none the less belong to the Governor. (G2:374)

Mantell's blustering and threatening conduct must have made it clear to Ngai Tahu that he was not willing to negotiate an agreement.

Rangatira from Ngai Tuahuriri, Ngati Irakehu and Ngati Moki left the negotiations, and although at least some of them had rights in the Port Levy block Mantell proceeded to finalise a deed with those who remained. Apera Pukenui expressed his disillusionment when he finally conceded to Mantell's terms.

I wanted the other 200 to distribute to those people to enable them to pay their debts but now I trouble myself no more about them. They say they will stop the survey. If they do theirs is the sin it can be surveyed at any time. We now care for no reserve at Pigeon Bay the grave can be combined with the churchyard or the bodies removed there when there is one there. I have no children to inherit from me nor have most of us. (G2:375)

The deed signed on 25 September 1849 involved 104,000 acres of which only 1361 acres were retained by Ngai Tahu in a single reserve at Port Levy. In 1880 only 300 acres of the reserve was described as good, arable land; the rest was rocky hillside.

Mantell's conduct of the 1849 negotiations

The claimants alleged in grievance no 5 that the Crown sent Mantell to Banks Peninsula to falsely assert that the peninsula was already the property of the Crown and to "carry matters with a high hand"; or alternatively that, Mantell having done these things, the Crown did nothing to rectify them. This grievance was sustained. There can be

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little doubt that not only was Mantell instructed to carry matters with a “high hand” he was also instructed to use the French purchases to argue that the Crown already owned the land. His actions showed that he took his instructions to heart.

Grievances 5 to 8 are interrelated and concern the adequacy of price and the reserves left Ngai Tahu.

It was complained that Ngai Tahu were denied a fair price or adequate reserves because Mantell treated the Port Cooper and Port Levy purchases as if they were awards. Despite Mantell increasing the price for Port Cooper from £160 to £200, the tribunal was not satisfied that the price was freely negotiated, and as a consequence the purchase bore the character of an award, as the claimants suggested. The situation was similar in Port Levy. The tribunal was left in no doubt that Mantell succeeded in beating Ngai Tahu down in respect of payment by unfair means, to the extent that they were given no real choice as to the price.

In the allocation of reserves in Port Cooper, Mantell acted with similar arbitrary disregard of Ngai Tahu wishes or needs. The Purau reserve comprised only nine acres, and Mantell insisted that gardens beyond the reserve be abandoned. Although the tribunal had no figures for the population of the Port Cooper block in 1849, the population given in a census eight years later shows that only 11.8 acres per head was reserved, and very little of this was good land. This was grossly inadequate, especially given the poor quality of most of this land.

The Crown did not dispute that at Port Levy Mantell denied Ngai Tahu requests for reserves at Pigeon Bay and Okains Bay. Nor did it deny that a single reserve of 1361 acres was in no way adequate for Ngai Tahu’s needs within the block. An 1880 survey found only three acres of arable land available per person in the Port Levy reserve.

The tribunal found that the claimants’ grievances nos 6, 7 and 8 were substantially made out.

Port Levy: consent to the sale

Grievance no 9 was that Mantell’s Port Levy deed was signed by only a minority of those chiefs present at the proceedings. Although seven of the nine rangatira identified by Mantell as representing the principal interests in the block signed the deed, others with lesser rights had previously withdrawn from the discussions. Clearly there was a divergence of opinion and in the end Apera Pukenui, the principal chief involved, felt under sufficient duress to agree to sign. The basic flaw in the Port Levy deed was that there was no true agreement between the Crown and Ngai Tahu. The tribunal found much force

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in the claimants' grievance that the Crown enforced the deed as a legal conveyance against the residents' wishes.

Mantell at Akaroa

At Akaroa, Mantell's demands were met with more strident and effective resistance. The deal he offered Ngai Tahu at Akaroa consisted of 1880 acres of reserves in four different locations, two at Akaroa and two at Wairewa, and £150. This was rejected by Ngai Tahu, who still expected that they could eventually do better from the French, and Mantell returned to Wellington, this part of his mission incomplete.

In 1850, even though Mantell had failed to purchase a large proportion of Banks Peninsula, the Imperial Parliament passed the Canterbury Association Lands Settlement Act. This empowered the association to sell an area of about 2.5 million acres in Canterbury including all of Banks Peninsula. The Act therefore gave the association control over land in Port Cooper and Port Levy which should have been reserved to Ngai Tahu, as well as all of the remaining Akaroa block. The Canterbury Association only became aware that Ngai Tahu still claimed much of the peninsula in 1851, nonetheless it went ahead granting licenses over some of the unsold land for stock runs. When Hamilton finally purchased the block in 1856 he commented that it had:

long been let by the Crown, and occupied by cattle and sheep runs, and part of it positively sold as freehold. (L3:III:64)

As a result the tribunal found the claimants' grievances no 10 and no 11 clearly made out in respect of the Akaroa block and partially made out in respect of the Ports Cooper and Levy blocks. Their complaint that Ngai Tahu had to suffer Europeans moving on such lands without any compensation to Ngai Tahu was also well founded.

The Akaroa purchase is completed

In 1854 Mantell still maintained that Ngai Tahu had no right to any land at Wairewa and Akaroa beyond that which he awarded to them in 1849, despite Ngai Tahu rejecting his terms. Nonetheless a year later he had done an about face, recognising that the Akaroa Maori were not bound by his award. In 1856 Governor Browne visited Akaroa and met with Ngai Tahu. He appears to have warned them that they would be dispossessed by force if necessary. J G Johnson, a Northland deputy native commissioner, was ordered by McLean to enforce the award, and was told that Ngai Tahu were entitled to only a hundred acre reserve at Onuku. Johnson soon discovered that the Crown had not acquired any title to the land being occupied by Ngai Tahu, and he in turn convinced McLean that the tribe had a just

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grievance. Nonetheless this recognition did not inspire any generosity on the part of the chief land purchase officer, for McLean recommended that 800 acres be reserved for Ngai Tahu, 1000 acres less than even that proposed by Mantell.

W J W Hamilton was commissioned to complete the purchase in August 1856. Johnson had prepared a map of the block identifying the French award, an area on both sides of the Akaroa heads labelled “the possession of which is disputed by the Natives” and the southern portion of the block, including Wairewa captioned, “Portion of the Peninsula over which the native claims were not extinguished by Mr Commr. Mantell”. Although we do not know if Hamilton had a copy of the map with him, the different areas described were important in the negotiations. Hamilton agreed to Ngai Tahu requests to make a further reserve at Wairewa, in addition to one on each side of Akaroa harbour. Together they totalled only 1200 acres. The deed appeared to have been signed without a great deal of discussion, and immediately afterwards Ngai Tahu applied to have an additional 400 acres for pasture at Wairewa. Hamilton regretted that this had not been raised before as he would have readily agreed to an additional reserve, but as the deed was signed there was nothing more he could do about it.

Akaroa: land not purchased?

At the Smith–Nairn commission the boundaries of the block became a matter of contention. According to a number of Ngai Tahu witnesses the land Hamilton purchased did not include the coastal part of the block, as illustrated on figure 2.8. Hamilton, when examined by the commission, could not remember any discussion over boundaries. However on the day the deed was signed he wrote to the Canterbury Association recording the boundaries as he understood them and these are also shown on figure 2.8. These boundaries could only have been given to him by Ngai Tahu.

Mr Evison went further to suggest that Wairewa and the Little River valley were also excluded from the sale, on the grounds that the area in dispute at Akaroa, as the block was defined in the deed, could not have included Wairewa. However, none of the Smith–Nairn witnesses suggested this. The setting aside of a reserve at Wairewa and the discussion about setting aside a further 400 acres confirmed that Wairewa had been included in the purchase boundaries.

There still remained the question of the 30,000 acres, identified on Johnson’s map as “acknowledged by them as sold to the French”. It was difficult to understand how Ngai Tahu could have made such an admission. After all the 30,000 acres was the Crown’s award, partially

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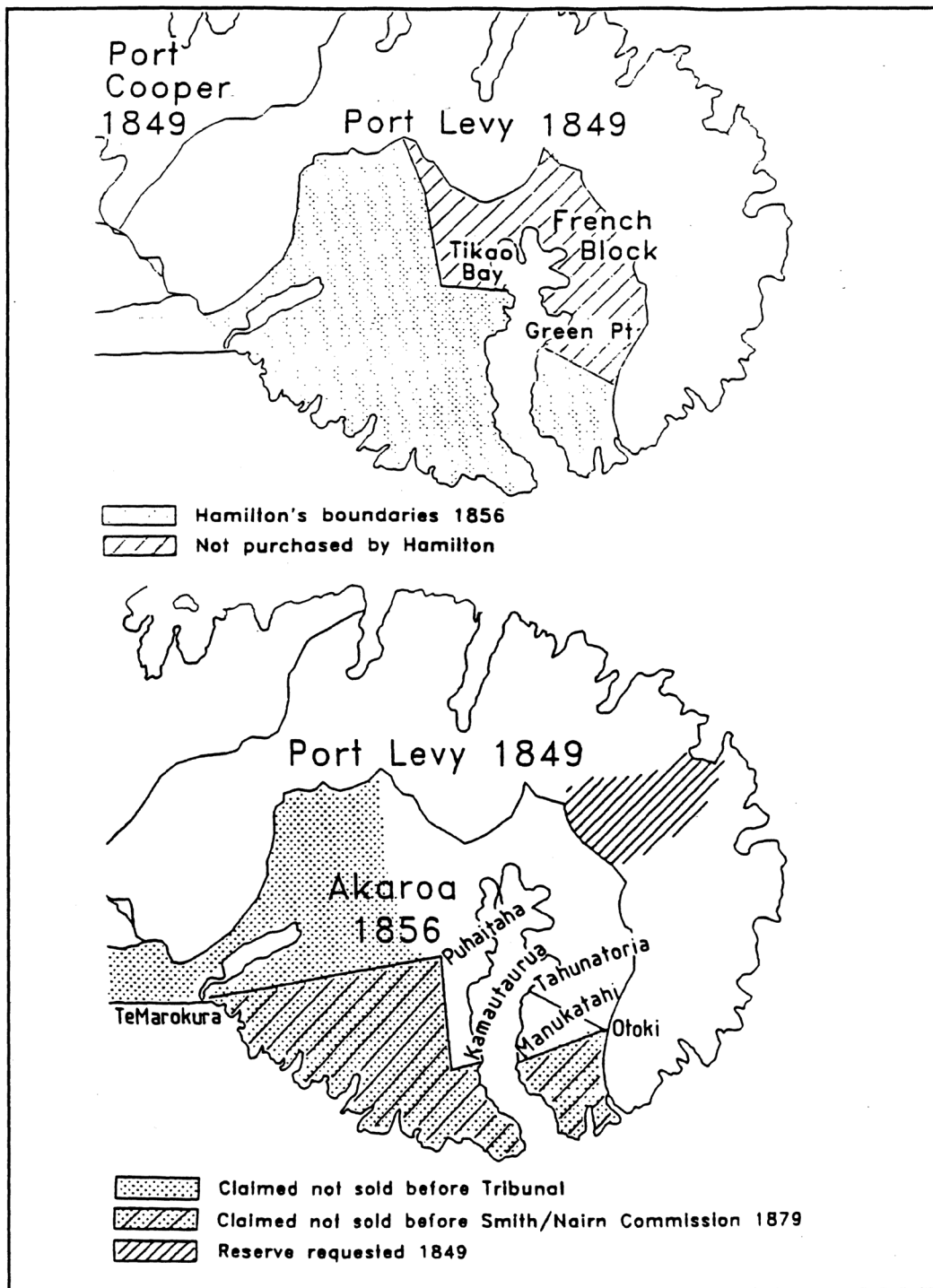


Figure 2.8: Hamilton's Akaroa purchase, 1856. The maps show the different boundaries as identified by Hamilton at the time of the purchase, in the evidence to the Smith-Nairn commission, and argued by the claimants before this tribunal.

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surveyed by Carrington in 1849, and its boundaries were never the subject of any agreement between Ngai Tahu and the French. The boundary of Hamilton's purchase, as he described it at the time, excluded this French block.

The claimants' grievance no 12 argued that Ngai Tahu wished to retain a block of some 30,000 acres, including the whole Wairewa (Little River) basin, and that this was wrongfully denied them. In 1849 Ngai Tahu were clearly intent on reserving such an area, and this appears to have been what was recalled by witnesses before the Smith–Nairn commission. However in 1856 the situation appears to have been different. Hamilton's understanding of the block he had just purchased, based on information he must have received from Ngai Tahu, indicates that all this land was included in the agreement. His provision for a reserve at Wairewa, at Ngai Tahu's request, also supports the view that the Wairewa basin was included in the sale. As a consequence, the tribunal found that the Hamilton 1856 purchase did include the southern part of the peninsula and the whole Wairewa (Little River) Basin. For the same reasons, the claimants' next grievance (no 13), was not upheld. Although the deed refers to "places in dispute at Akaroa", this was understood at the time to have included Wairewa.

Notwithstanding this, it is evident from Hamilton's definition of the block at the time of the sale, that he did not consider that he was purchasing the 30,000 acres awarded to the French. Apart from the 1700 acres, given up to the French, the tribunal found that at least 28,300 acres in the area shown in figure 2.8 was not acquired by the Crown and to this day, Ngai Tahu have not been paid for it.

Akaroa: adequacy of reserves

The Crown did not dispute, nor could it have, that the reserves of 1200 acres and the £150 purchase price were insufficient as an endowment for the future prosperity of the Ngai Tahu residents of the Akaroa block together with the absentees at the time of Hamilton's purchase. No sooner than the deed was signed Ngai Tahu were requesting a further 400 acres for grazing. Hamilton admitted the reserves were "barely sufficient". The tribunal found grievances nos 14 and 15 sustained.

"Landless natives" and lands for settlement

In the 1890s the Liberal government passed the Lands for Settlements Acts to allow for closer settlement by resuming title to large estates and subdividing them as smaller units. The claimants identified two of these on Banks Peninsula, the Morice and Kinloch estates. The cost of this policy was considerable. At roughly the same time the Liberal

Summary of the Grievances, Findings and Recommendations

government was engaged in a dilatory and half-hearted attempt to deal with the problems of Maori landlessness in the South Island. This resulted in the South Island Landless Natives Act 1906. Alexander Mackay and the surveyor general, S Percy Smith, worked in their spare time to allocate 142,465 acres for landless Maori. The maximum allocation was 50 acres per person and the land was often poor and isolated. None was on Banks Peninsula. Nonetheless the Lands for Settlement Acts were not specifically for the landless, nor was there anything in the legislation to exclude Maori. Although this grievance was not sustained for this reason, the contrast between the offers made by the government to provide land for general settlement on the one hand and for Maori on the other is glaringly obvious.

The tribunal agreed that the claimants did not exaggerate when they complained that as a result of Crown acts many Ngai Tahu were driven off their land and lost their turangawaewae. Had the Crown taken similar steps to re-establish Ngai Tahu on their own traditional homeland as they had to assist settlers the manifest injustice to Ngai Tahu would at least have been ameliorated.

Breaches of Treaty principles

In chapter 9 of the report the tribunal considers 17 of the grievances relating to the Crown's purchase of Banks Peninsula. Those 17 grievances are grouped under four main headings and considered in the light of relevant Treaty principles.

Stanley's award of 30,000 acres to the French

The tribunal found that Lord Stanley's award of 30,000 acres to the French was, in effect, a confiscation of Ngai Tahu land. The Crown's unilateral act in arbitrarily depriving Ngai Tahu of their rangatiratanga over the 30,000 acres, and in taking the land without consultation or ensuring that it was paid for, constituted a grave breach of the Treaty. Despite repeated efforts by Ngai Tahu no relief or remedy has ever been granted to them.

Mantell's conduct in the acquisition of the Port Cooper and Levy blocks

In the acquisition of the Port Cooper and Port Levy blocks the tribunal found that Mantell had acted in complete disregard of Ngai Tahu's rangatiratanga and was clearly in breach of article 2 of the Treaty. The breach was the graver because it resulted from a lack of good faith on the part of the governor and lieutenant-governor in the instructions given to and carried out by Mantell.

It was plain that Ngai Tahu did not wish to sell land at Okains Bay and at Pigeon Bay. But they were overborne by Mantell, in clear breach

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of article 2 which required the consent of Ngai Tahu to the sale of their land.

It was equally plain in relation to the Port Levy block that Ngai Tahu sought a substantially higher price – £1000 – for the block, but Mantell, using threats and an overbearing manner, refused to negotiate and awarded £300 only. Again he acted in breach of article 2 by acting without their consent and in the knowledge that a significant number of Ngai Tahu having an interest in the land had withdrawn from the negotiations prior to the completion of the deed.

The effect of the Canterbury Association Lands Settlement Act 1850

It was clear that this Act vested legal ownership of virtually all the land on Banks Peninsula in the Canterbury Association, notwithstanding that much of it had not been purchased from Ngai Tahu and despite the methods employed to acquire the Port Cooper and Port Levy blocks. As a result of the Act land was leased or even sold by the association and the Crown before it had been lawfully acquired from Ngai Tahu. The tribunal found that once again the Crown acted in breach of article 2 of the Treaty by failing to respect Ngai Tahu rangatiratanga over their land.

Failure of the Crown to set aside adequate reserves

It was abundantly clear that in setting aside 3540 acres out of 230,000 acquired from Ngai Tahu, the Crown failed to provide adequate reserves. There was insufficient land for Ngai Tahu's bare subsistence and nothing like enough for their long-term future needs. The tribunal found that Treaty principles requiring the Crown to ensure that an adequate endowment of land for present and future needs of Ngai Tahu on Banks Peninsula were plainly breached and that Ngai Tahu were very detrimentally affected. Equally significant was the failure of the Crown, in reducing Ngai Tahu to a near state of landlessness, to respect Ngai Tahu rangatiratanga in and over Banks Peninsula as article 2 required. This failure was a common thread to all major Crown dealings with Ngai Tahu on the peninsula and resulted in many having to abandon their turangawaewae. Instead of recognising this in subsequent years and taking action to make good the serious lack of land available to Ngai Tahu, the Crown chose to expend considerable sums on settling even more Europeans on the land. If those Ngai Tahu then made landless wished to have a portion of land it would be hundreds of miles away, often of poor quality, difficult of access and uneconomic.

The tribunal concluded its discussion of the Crown acquisition of Banks Peninsula by recording what had become obvious – that the

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Crown's actions brought no credit on those involved. The tribunal stated that a clear duty now rests on the Crown to repair, so far as may be possible, the grave harm done to Ngai Tahu by the serious and numerous breaches of the Treaty and its principles.

2.6. **The Murihiku Purchase Summary**

Introduction

When Walter Mantell arrived in Dunedin to take up his appointment as commissioner of Crown lands on 16 November 1851, he also had a commission to acquire for the Crown Ngai Tahu's remaining lands in the south of the island. He wasted little time opening the negotiations, for two days after his arrival he met with Topi Patuki, Te Au, Karetai, Taiaroa and a number of other Ngai Tahu rangatira, to discuss the purchase. Less than a month later he set off with Topi Patuki for Foveaux Strait. On this 10 week journey Mantell visited all Ngai Tahu's Murihiku settlements and returned by way of Ruapuke Island. During this expedition, which included a major meeting with about 60 Ngai Tahu at Oue on 22 December, Mantell gained broad agreement to the purchase. He also marked out a number of reserves, but he refused to discuss the price the Crown was prepared to pay for the block.

On his return in February 1852 he sent Charles Kettle down to survey the reserves he had marked out, and he expected the agreement would be completed in Dunedin the following May. But the Crown was in no hurry to complete the purchase and no money was provided. There the matter lay for 18 months until August 1853, when Mantell feared he could wait no longer. Ngai Tahu were showing signs of wanting more for the block than the Crown was prepared to pay. He took the opportunity to get their agreement to a deed at Koputai (Port Chalmers) on 17 August 1853. By juggling the land fund and borrowing on the security of his own house, he was able to pay £1000 as the first instalment the following month. A further £1000 was paid to Foveaux Strait rangatira at Awarua (Bluff) on 15 February 1854. Mantell persuaded the governor to pay a further £600, and this was eventually distributed at Dunedin.

For £2600 and the reservation of only 4875 acres in seven reserves, the Crown acquired title to over seven million acres of land. According to the deed and the plan, the block began at Tokata Point, followed the south eastern boundary of the Otakou purchase, ran to Kaihiku and from there in a straight line to Milford Sound. The purchase included all the land south of this line and the islands adjacent to the shore. Ruapuke, Rakiura and the Titi Islands were excluded.

*The Ngai Tahu Report 1991****The grievances***

The claimants filed 10 grievances in relation to this purchase. They claimed that Ngai Tahu should have had the benefit of a protector (no 1), and that the Crown limited the amount of land set aside for Ngai Tahu (nos 2, 3). They listed a number of specific pieces of land which they argued Mantell should have reserved (no 4). They maintained that the Crown failed to provide promised schools and hospitals (no 5). A large block of land west of the Waiiau River, including all of Fiordland, was claimed to have been wrongfully included in the sale (no 6), and it was alleged that not all of the Murihiku communities were adequately involved in the negotiations (no 7). The Crown was also charged with failing to ensure that Ngai Tahu were left with sufficient lands to preserve an economic base (no 8). A further grievance complained that the Crown provided insufficient remedies for the tribe's landlessness caused by the sale (no 9) and the final complaint was that the Crown failed to disclose the price at Awarua until after the deed had been signed at Port Chalmers (no 10).

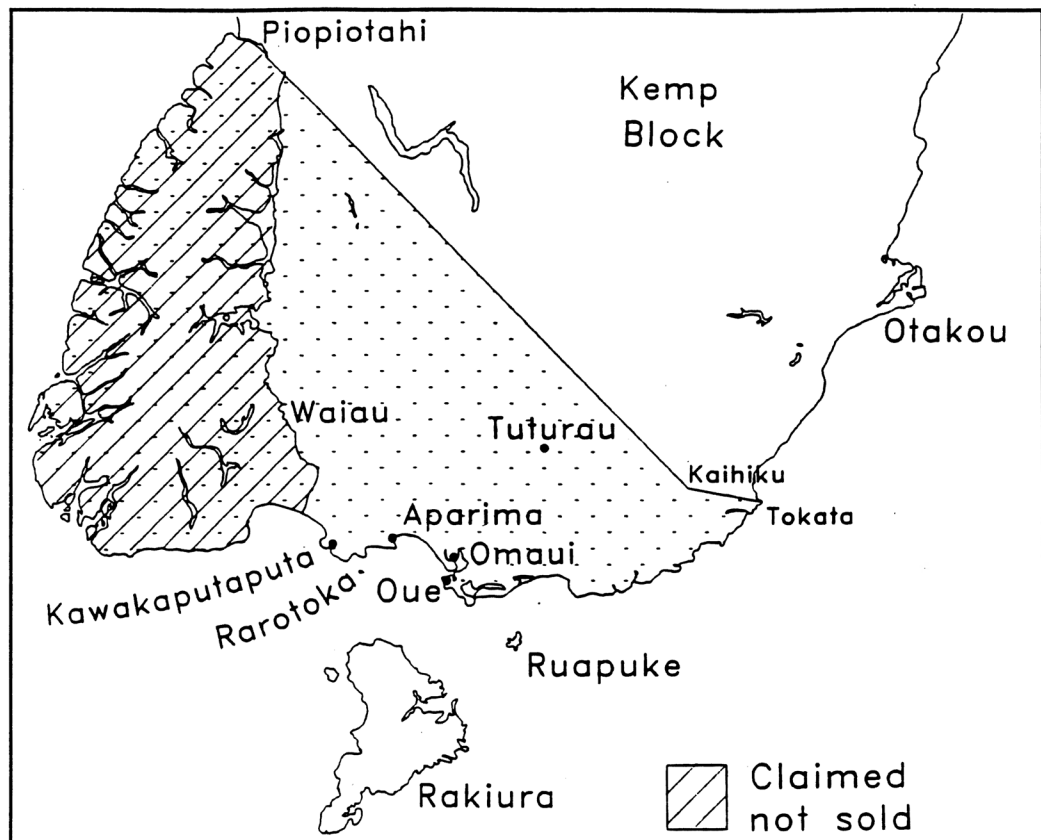


Figure 2.9: The Murihiku purchase, 1853, showing the land west of the Waiiau River which the claimants alleged had not been included in the sale to Mantell.

*Summary of the Grievances, Findings and Recommendations**The purchase*

Prior to the purchase, Ngai Tahu rangatira had given a number of indications that they were prepared to negotiate with the Crown over the sale of land in Murihiku. In February 1849, immediately following the second payment for the Kemp purchase, Topi Patuki invited Grey to come to Ruapuke to discuss the purchase of Ngai Tahu land south of the Kemp and Otakou blocks. He made it clear that “Ko te nuinga ano o nga wahi hei a matou ano hei nga tangata Maori” (“the larger area however must remain with us, the Maori people”) (Q3: 40,42). When the *Acheron* visited Murihiku in the summer of 1850–51, as part of its mission to chart the southern coastline, Ngai Tahu appeared anxious to enter into negotiations with the ship’s master, Captain Stokes. As a result Stokes prepared a list of reserves in 19 locations and Ngai Tahu expressed their willingness to sell the remainder of their land from Otago to the western coast. Stokes suggested that £2000 would be a sufficient price and that it should be divided equally between Ngai Tahu from Otago and Foveaux Strait. Topi and other Ngai Tahu also met with Grey following later purchase negotiations and confirmed their agreement to sell.

Mantell offered to undertake the purchase for the Crown in March 1851, making no secret of his intention to limit Ngai Tahu to small subsistence reserves. He told the colonial secretary, Alfred Domett, that in his Kemp purchase commission he had “carried out the spirit” of his instructions by allotting only 10 acres to each individual. He considered that this amount was adequate for their needs and would:

not enable the Natives, in the capacity of large landed proprietors, to continue to live in their old barbarism on the rents of an uselessly extensive domain. (E2:2)

Grey later claimed to the Smith–Nairn commission that he had never had any intention of limiting Ngai Tahu to the very small reserves they were left with after these purchases. However, at the time, the governor reappointed Mantell following his Kemp and Banks Peninsula commissions. Despite knowing how little had been reserved then, Mantell was still given final discretion over what lands were to be reserved. It would appear, as noted in the Ward report, that Grey’s later testimony was “no more than self-serving rhetoric” (T1:216).

Mantell was instructed to find out who were the leading chiefs of the block and how much each should be paid. He attempted to do just this. After his first meeting at Otakou on 18 November 1851, he prepared a sketch map showing the whole of the block and identifying the places where many of the major Ngai Tahu rangatira were said to have rights. The map showed the whole width of the island, from Otakou to Piopiotahi (Milford Sound), and included the names of Ngai

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Tahu rangatira on the west coast. Although this meeting was held in Otakou, Topi Patuki from Ruapuke and Te Au from Oraka were also present. The information was further refined during Mantell's journey south, when he and Topi were caught in the rain at Tukurau on 10 December. There, a list of claimants was drawn up and another sketch map prepared, based on the original, but including some additional information. The list and the maps could only have been prepared with Topi's assistance, as there was considerable information about people and places Mantell was yet to visit. Amendments to the list of claimants showed that it was referred to later in the negotiations. It was clear from the list and the accompanying maps that Mantell was discussing the whole of the Murihiku block, including the west coast.

Reserves

On this trip Mantell marked off reserves for Ngai Tahu at Tukurau, Oue, Omaui, Aparima, Kawakaputaputa, Oraka and Ouetoto. The tribunal examined in detail the evidence relating to a number of pieces of land which the claimants said should have been reserved to them (grievance no 4). The tribunal found that this grievance was not made out in relation to an additional reserve at Omaui, the Oue reserve, a 300 acre reserve on the Waiau River, and a waterfall at Te Aunui on the Mataura River. However, in relation to a number of other pieces of land, the tribunal upheld the claimants' grievance. These consisted of the failure to reserve additional land at Aparima and Kawakaputaputa, although the tribunal was unable to quantify the deficiency in both cases. The tribunal also accepted that Mantell failed to provide for a 200 acre reserve at Waimatuku as requested by the people there. Rarotoka Island (Centre Island) should also have been reserved for the tribe, as should have land at Opuaki, about six miles from Aparima (Riverton). In not respecting those wishes the tribunal found that Mantell failed to act in accordance with the Crown's obligations under article 2 of the Treaty. Ngai Tahu were clearly detrimentally affected by the loss of the land they wished to retain.

The western boundary: Smith–Nairn

The western boundary of the purchase was of particular concern to the claimants (grievance no 6). They pointed to the evidence given by a number of their tupuna to the Smith–Nairn commission in 1880, and suggested that Ngai Tahu may have had a different understanding of the purchase boundaries than those described in the deed and on the deed map. From this testimony the claimants concluded that a large portion of the block, lying west of the Waiau River, which DOSLI has estimated at over 2.8 million acres, was included in the purchase against Ngai Tahu wishes.

Summary of the Grievances, Findings and Recommendations

Because there was little evidence of this grievance being raised at any other time in the last 136 years, the tribunal had to examine the Smith–Nairn evidence in detail. Mr McAloon, in presenting the claimants' evidence on this matter, based his conclusions on the 1880 testimony of Topi Patuki, Horomona Patu, Horomona Pohio, Matiaha Tiramorehu and Wiremu Potiki. Of these five, Wiremu Potiki admitted to being unclear about the boundaries and he did not name the Waiau as the western boundary. Matiaha Tiramorehu was likewise unable to define the actual purchase boundary, and he was not present on the day the deed was signed, although he did suggest that the traditional boundary of Murihiku was the Waiau. Topi's evidence contained a number of inconsistencies, no doubt caused by difficulties in remembering events of nearly 30 years previously. Horomona Patu was also confused about some elements of the purchase, and like Tiramorehu, he was not present when the deed was signed. Horomona Pohio, the last of these witnesses, also had some difficulty remembering the different meetings which occurred during the negotiations from November 1851 to October 1853. Six other Ngai Tahu witnesses who had participated in the purchase gave no evidence at all on the boundaries issue.

It is unfortunate that the Smith–Nairn commission was wound up before Mantell was able to be questioned on his role in the purchase. It is clear from evidence at the time of the sale that he considered he had purchased the land west of the Waiau.

The absence of corroborative evidence, and inconsistencies in the testimony of Patuki, Pohio and Patu made it impossible for the tribunal to conclude that the land west of the Waiau was wrongfully included in the sale. On the contrary, other evidence from the time of the negotiations supported the view that the purchase included the whole of the block.

There was evidence from Ngai Tahu witnesses to the Smith–Nairn commission that the west coast had been discussed during the negotiations. Hoani Paororo and Horomona Patu both stated that Te Au had requested a reserve at Piopiotahi. H K Taiaroa also gave evidence that his father had been promised a reserve at Piopiotahi and supported this by tabling an 1874 letter from Mantell confirming such a reserve. The Taiaroa claim was later examined under an order of reference, by two judges of the Native Land Court and the Te Au claim by the Native Land Court in 1917. In the light of such requests we found it difficult to believe that the sale did not go beyond the Waiau.

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Boundaries in the deed

There was some indication during this inquiry that the translation of the deed boundaries included in Mackay's 1874 *Compendium*, misrepresented the Maori version of the original deed. The original deed stated the boundaries as:

Ka timata te rohe i Milford Haven (ko te ingoa o taua wahi ki to te Kepa pukapuka tuku whenua ko Wakatipu Waitai otira ki to te Maori ingoa ko Piopiotahi,) haere atu i reira ki Kaihiku a, i reira haere atu ki Tokata, ina kia piri rawa ki nga rohe tawhito o te Kepa raua ko Haimona, ma te moana no Milford Haven haere atu ki Tokata, ara ko Tauraka, Rarotoka, me Motupiu me nga motu katoa e takoto tata ana ki takutai (kauaka Ruapuke ma) me nga Whenua katoa ki roto ki aua rohe . . . (see appendix 2.5)

Which Mackay translated as:

The boundary commences at Milford Haven (the name given to that place in Mr Kemp's deed is Wakatipu, but by the Maoris it is called Piopiotahi), thence to Kaihiku; thence to Tokata, strictly following the old boundary line of Messrs. Kemp and Symonds, and by the coast from Milford Haven round to Tokata, with Tauraka, Rarotoka, Motupiu, and all the islands lying adjacent to the shore (excepting the Ruapuke group), and all the land within these boundaries . . . (see appendix 2.5)

The claimants suggested that the original Maori was confusing, and that Mackay's "and by the coast from Milford Haven round to Tokata, with Tauraka, Rarotoka, Motupiu, and all the islands lying adjacent to the shore", does not reflect the meaning of the deed. However, having considered this, the tribunal concluded that the translation was actually very close to the original meaning expressed. While Patuki and Pohio both suggested that the reading of the deed did not alter their belief that the land west of the Waiau had not been included, it was clear that this could not have been the case. If the deed was read out, and it appeared that it was, then the fact that Piopiotahi and the west coast were included would have been obvious.

The tribunal also rejected the suggestion by a witness for the claimants that the deed map was created to deceive. Despite Kettle's omission of the Waiau on the map and some other inaccuracies, the deed map, with its clearly defined coastal boundary should also have made it clear to the signatories of the deed that the purchase extended across to the west coast.

After weighing all the evidence the tribunal found that the land west of the Waiau was not wrongfully included in the sale. Accordingly the claimants' grievance no 6 was not sustained.

*Summary of the Grievances, Findings and Recommendations****Signatories***

The claimants argued that there was confusion over the terms of the purchase because the people of the western settlements in Murihiku were inadequately involved in the purchase negotiations and did not sign the deed (grievance no 7). Mantell's failure to discuss the price of the block in Murihiku itself was also a matter of concern (grievance no 10). However, apart from Pohio and Tiramorehu, the claimants did not name any other major Murihiku chief who was not present when the deed was signed at Koputai on 17 August 1853. Of the 41 names identifiable from the 56 on the deed, 26 came from south or west of Otakou. By examining the names on the deed, and comparing these with those on Mantell's rights list and on his census, the tribunal found that all the leading Murihiku chiefs, as well as an appreciable number of lesser rank were signatories or, being present, assented to the deed. The tribunal therefore concluded that it is incorrect to say that only the people of Otakou sold the land, although according to Mantell's rights charts and table, much of the west coast, from Piopiotahi to Dusky Sound, was theirs to sell.

Mr Evison pointed out that only a small minority of the names on the deed were in fact signatures. Most of the names had been written in by one or two people. However there has never been any suggestion that those named did not give their consent, only that there was confusion on the part of a few about the boundaries of the purchase. The deed was read out and the whole transaction accompanied throughout by discussion over the ownership of the whole block. Whether or not the deed was taken to Awarua, the actual boundaries must have been understood by those who were present when the deed was assented to and who received their portion of the payment.

Mantell's rights maps and claimant list provide strong evidence that the whole of the block was being discussed from the beginning of the negotiations in November 1851, and we have noted that at least 14 of the 20 chiefs identified as having rights on the west coast were signatories to the deed and to the first receipt. These included most of the principal chiefs as identified to the tribunal.

For these and other reasons explained in the report, the tribunal did not sustain the claimants' grievances nos 7 and 10.

The need for a protector

The tribunal upheld grievance no 1 and found that the failure of the Crown to appoint a protector to advise the tribe of their Treaty and other rights was a breach of the principle of the Treaty which requires the Crown to protect Maori Treaty rights. As a result of this failure Ngai Tahu were prejudiced in their negotiations with the Crown, they

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were denied the right to retain certain lands they wished to retain, and were left with insufficient land for their present and future needs. A protector would have ensured that such prized possessions as mahinga kai and pounamu would not have been lost to them.

Events after the purchase: “Half-caste” grants

Although there were many Ngai Tahu of mixed ancestry by 1853, they were not provided for at the time of the purchase. In 1864, when the Rakiura purchase was completed a provision was made for a reserve for “half-castes” on the island at the Neck. When this proved insufficient further land was made available under the Stewart Island Grants Act 1873, which allowed grants to landless “half-castes” of up to ten acres per male and eight acres per female. Following an 1869 report of the Public Petitions Committee of the Legislative Council, Alexander Mackay was asked to investigate the situation of those Maori of mixed descent in other purchases. His inquiry eventually led to the passing of the Middle Island Half-Caste Crown Grants Act 1877, which provided for grants of the same size as the 1873 Act to a named group of 53 persons living in Canterbury and 118 persons living in Otago. The Act made it clear that these grants were to be a final extinguishment of any claims in respect of promises made at the time the land was sold.

The tribunal upheld this grievance in that the provision of 18 acres per couple was insufficient to meet their need for land and was in breach of the Crown’s Treaty obligation to ensure that adequate provision was made for these people. The tribunal concluded once again it was our melancholy duty to report that the Crown failed to honor its obligation to many Ngai Tahu half-caste people, to their detriment and the detriment of successive generations.

Mantell’s prerogative to determine the reserves

Grievances no 2 and no 3 alleged that the Crown wrongfully instructed or permitted Mantell, rather than Ngai Tahu, to decide what lands would be retained by the tribe following the sale. Both these grievances were sustained, since it was clear from Mantell’s instructions that he alone was to be the arbiter of what constituted “ample provision” for Ngai Tahu’s present and future needs.

The retention of an economic base

Apart from the western boundary question this grievance was the claimants’ principal concern. As a result of the purchase the Crown acquired some seven million acres of land with high agricultural potential and heavily forested areas, of mountains, lakes and other features of great beauty. For the 273 Ngai Tahu recorded by Mantell as living in Murihiku and on Ruapuke, there were left only 4875 acres,

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or 17.8 acres per head. By any standard, this was a totally inadequate provision for the present, let alone future, needs of Ngai Tahu. The Crown conceded that although Mantell allowed Ngai Tahu to reserve most of the lands they asked for in the locations they sought, the total amount of land reserved did not “prove to be adequate in area or quality”. An 1891 survey of Ngai Tahu land holdings show that only 7.7 per cent of Southland Maori were seen as having sufficient land, while 41.7 per cent had no land at all. It is not surprising that Murihiku Ngai Tahu named a rocky place “Te Upoko a Matara” – the head of Mantell – an insulting reference to his hard-hearted obstinacy.

Mahinga kai

The lack of any provision for Ngai Tahu’s continuing access to mahinga kai in Murihiku was also an issue of concern to the tribunal. The deed makes it clear that Ngai Tahu were relinquishing all their:

anchorages and landing-places, with the rivers, the lakes, the woods, and the bush, with all things whatsoever within those places, and in all things lying thereupon. (appendix 2.5)

On the face of it therefore, Ngai Tahu had, at one stroke, alienated all their mahinga kai, save for a small quantity on the land reserved to them. The tribunal was unable to accept that Ngai Tahu could have contemplated that they were surrendering all future access to their traditional food resources or indeed their taonga, pounamu. The tribunal further considered it unlikely that had a protector been appointed to ensure that Ngai Tahu were independently advised of their rights, they would have agreed to surrender all their mahinga kai.

Schools and hospitals

The last of these Murihiku grievances to be dealt with, grievance no 5, concerning the provision of schools and hospitals, is considered later in the report in chapter 19.

Breaches of Treaty principles

Crown officials in New Zealand were aware that the various hapu maintained a system of shifting cultivations and engaged in seasonal foraging and hunting pursuits in different parts of the interior. It was incumbent on Crown officials seeking to purchase Ngai Tahu land to take all reasonable steps to ascertain the nature, location and extent of hapu hunting and food gathering rights over tribal territory as well as their more permanent kaika, so as to ensure, after consultation with their representatives, that appropriate provision was made for their present and likely future needs. Mantell clearly failed to take such steps. On the contrary, he provided in the deed for the surrender of virtually all such rights without first ensuring that adequate lands had

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been excepted from the sale or reserved to Ngai Tahu which would preserve reasonable access to traditional food resources.

Murihiku Ngai Tahu appear to have welcomed the prospect of more Europeans settling among them and sharing the land. For many years they had experience of European sealers and whalers living and intermarrying with them. They were aware that the Crown was purchasing land to facilitate settlement but they probably had only a shadowy notion of the likely magnitude and rate of settlement.

The tribunal found that pre-emption was not to extend to land needed by Maori. Article 2, read as a whole, imposed on the Crown a duty, first to ensure that Maori people in fact wished to sell; secondly that each tribe maintained a sufficient endowment for its foreseeable needs.

If, as they clearly desired, Murihiku Ngai Tahu were to fully and effectively engage in the new economy which would result from European settlement and the steady development of agricultural and pastoral farming, or, as later occurred, dairy farming, they needed to retain extensive areas of suitable land. It was the duty of the Crown's purchasing agent, Mantell, to ensure that this happened. But Mantell had no sympathy for such notions. Although instructed by the governor that he was to be responsible "for taking care that ample reserves are kept both for their present and future wants", Mantell paid no regard to this injunction. As a result, they were left with a mere 18 or so acres per person, and without any significant access to traditional mahinga kai resources. Had the Crown, through Mantell and ultimately, Governor Grey fulfilled its Treaty obligations it would have ensured that in addition to their kaika and cultivations, Ngai Tahu were left with very substantial areas of good quality land on which to develop side by side, and on at least an equal basis, with new settlers, in agricultural, pastoral or dairy farming. In addition, appropriate areas of considerable dimension would have been reserved to provide access to traditional resources, some of which might, as development occurred, be adapted to conventional farming. In short, generous provision in keeping with the spirit of the Treaty was called for. Instead, the Crown's approach virtually denied the rangatiratanga of Ngai Tahu over their land, treated them as supplicants and left them virtually landless.

The tribunal also found that the Crown failed to ensure that Ngai Tahu were left with sufficient land to preserve reasonable access to mahinga kai. The Crown's failure to ensure that Murihiku Ngai Tahu were left with sufficient land for an economic base, and to provide reasonable access to their mahinga kai, was found to be in breach of article 2 of the Treaty, which required the Crown to ensure that each

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tribe was left with a sufficient endowment for its present and future needs.

2.7. **The North Canterbury Purchase Summary**

Introduction

Mantell's decision to fix the northern boundary of the Kemp purchase at Kaiapoi pa effectively dispossessed Ngai Tahu of their territory in Kaikoura and North Canterbury. Not only did this have the consequence of acknowledging Ngati Toa's rights to land well within Ngai Tahu territory, it allowed European settlement to take place throughout the entire block before Ngai Tahu's rights were acknowledged by the Crown. Ngai Tahu had agreed with Grey and Kemp in 1848 that the northern boundary of the purchase would include all the territorial area of Ngai Tuahuriri, extending a good deal further to the north than Kaiapoi pa. It appears that Grey had not been prepared to acknowledge Ngai Tahu's rights to Kaikoura at that time. If the purchase had been adequately conducted by Kemp and Mantell then Ngai Tahu's exclusive rights would have been recognised as far north as the Hurunui, enabling the tribe to select sufficient reserves that far north. As it happened, by fixing the boundary at Kaiapoi pa, Ngai Tahu were forced to campaign for eight years to have their rights to North Canterbury acknowledged. In the meantime much of the area had been made over to the Canterbury Association and the whole block had become the exclusive preserve of European runholders.

Until the visit of Governor Browne to Canterbury in early 1856, the Crown either rejected or failed to act on repeated protests by Ngai Tahu over North Canterbury. Following Browne's visit, W J W Hamilton was appointed to negotiate a purchase, and this he did after he had finalised the Akaroa purchase at the end of 1856. He met with Ngai Tuahuriri on 4 February 1857, and a deed was signed the following day. In return for a block estimated to contain well over one million acres, Ngai Tahu were paid £500, but were granted no reserves. While Hamilton justified this to them on the basis of the value of their existing reserves, the real reason was that the block was already completely occupied by Europeans.

Claimants' grievances

The claimants provided a single list of grievances for both North Canterbury and Kaikoura portions of the claim. First they complained that the Crown's inclusion of North Canterbury in the Wairau purchase exerted unfair pressure on Ngai Tahu to part with the block on unfavourable terms (no 1). They then alleged that the Crown allowed the block to be settled by Europeans before purchase from Ngai Tahu and that the tribe have never been compensated for this (no 2). They

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also complained that the reserves requested by Ngai Tahu at Hurunui and Motunau were not allowed (no 3) and that the Crown failed to provide any reserves within the block (no 4). Finally they complained that while the Crown resumed a number of runs within the block for European settlement, it failed to do likewise for Ngai Tahu (no 6).

Background to the purchase

Only a few days after Mantell had set the boundary of the Kemp purchase at Kaiapoi pa, a delegation of Ngai Tahu went to Wellington to protest the limiting of the Kemp boundary to the pa. Their protests were ignored and Grey and Eyre decided to retain the boundary adopted by Mantell. Although Mantell was determined to keep Kaiapoi pa as the boundary of the Wairau and Kemp purchases, he did support Ngai Tahu's claims to rights to the east coast north of the pa against Ngati Toa. In 1849 Matiaha Tiramorehu complained that Grey had deceived the tribe, by going back on a promise to pay Ngai Tahu rather than Ngati Toa for Kaiapoi. After some inquiry it was decided that a further £50 could be paid to Ngai Tahu for their rights between Kaiapoi and Kaikoura, however there is no record that the money was ever distributed. Ngai Tahu approaches to the New Zealand Company also caused some discussion, but no positive action.

Grey again visited Canterbury in March 1852 when Ngai Tahu repeated their complaints. It is possible that £100 compensation was discussed, but again, there is no evidence that the Crown acted to make good the offer. Other direct approaches to government found similar responses, although one threat of violence was met with Grey's promise that "effectual means may be taken for at once crushing such acts of insubordination" (T2:85-86).

The Ward report summed up the situation:

Although the evidence is fragmented and somewhat confused, it does seem that during 1850-2 Ngai Tahu achieved limited government recognition of the fact that they had rights north of Kemp's purchase but this recognition did not improve their position with regard to the land. . . . the government does not seem to have perceived a need for an inquiry into the extent of these rights. Nor was the validity of the Nelson Crown grant and the later transfer of land claimed by the tribe to the Canterbury Association questioned. (T1:265)

The Crown's historian, Graham Sanders, suggested to us that the problem was that the Crown was just not buying any land at this time. The claimants vigorously opposed this suggestion, pointing out that the Crown negotiated purchases with almost every other tribe in the South Island over this period. This succession of purchases began

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with the agreement in 1853 to pay Ngati Toa an additional £5000 for their remaining rights in the South Island.

All through the period of government inactivity over the claim, Europeans were taking up large runs over the whole of the land. The first of these runs were established prior to 1848, and increased in number rapidly from the early 1850s until, as the accompanying map shows, by the middle of the decade the whole of the territory was covered with pastoralists. Although much of this land had been taken up under pasturage licenses, some had been freeholded. For example a single block, of 30,000 acres, was sold by the Crown for £15,000.

In January 1856, Governor Browne paid his first visit to Canterbury, and Ngai Tahu pressed upon him the justice of their claims and their frustration at the delays in settling them. Browne promised to refer the matter to Donald McLean, the chief land purchase officer, for investigation. After consulting with John Grant Johnson, McLean convinced Browne that the claim was a valid one, but recommended that it be settled by a payment of just £150. It was left to Hamilton to negotiate an agreement.

While Hamilton was allowed to reserve 800 acres for Ngai Tahu at Akaroa, no provision was made for any reserves in North Canterbury. As Professor Ward commented, this important aspect of the purchase was determined “by the Crown without reference to the wishes or interests of Ngai Tahu” (T1:272).

The purchase

In early 1847, Hamilton and his interpreter, the Reverend J Aldred, met with Ngai Tahu from Canterbury, Banks Peninsula and Kaikoura to discuss the Crown’s proposal. Hamilton began by offering £150 for the land north of Kaiapoi and telling Ngai Tahu he had no authority to make any reserves. Ngai Tahu rejected the offer outright, demanding either £500 or £150 with an “ample reserve”. Hamilton increased the offer by £50 on his own responsibility, but this too was rejected. The next day Hamilton reluctantly agreed to Ngai Tahu’s suggestion that he pay them £200 for the block and appeal to the governor for an additional £300.

The deed was signed by 20 Ngai Tahu rangatira, and the boundaries of the purchase were given as the sources of the Waiau-ua (Waiau), Hurunui and Rakahuri (Ashley) Rivers. There was no plan, except for a very stylised sketch which is now attached to the deed. Although no new reserves were made, Mantell’s 1848 promise to reserve the Kaiapoi pa site was finally implemented. Hamilton’s report explained that he had refrained from making any other reserves, because the land had been so occupied by Europeans that any Maori reserve

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would have had to be referred to the Land Office, an action which could further complicate and delay the purchase. Without this difficulty he would have agreed at once to a reserve. So frustrated were Ngai Tahu with the delays in settling their grievance that they accepted £200 and the hope of £300 more for their rights to a very substantial and increasingly valuable block of land.

McLean accepted and justified Hamilton's decision not to allocate any reserves on the grounds that the land wanted by Ngai Tahu was of "great value". The additional £300 was, however, paid.

Findings on grievances

While the tribunal found that Ngai Tahu had not been forced to part with the Kemp block on unfavourable terms because of the inclusion of Kaiapoi in the Wairau purchase in 1847, the situation was very different in North Canterbury. Mantell's exclusion of land north of Kaiapoi from the Kemp purchase meant that the Crown was in effect recognising Ngati Toa mana as extending to the pa. This caused enormous distress to Kaiapoi Ngai Tahu who did not rest until their mana was restored in February 1857. Such was their anxiety due to the pressure of European settlement that their just rights would never be recognised, they parted with their lands initially for £200, ultimately for £500, but with no reserves at all.

The tribunal had no doubt, given all the circumstances leading up to the 1857 purchase, that the Crown's nominal inclusion of Kaiapoi pa in the Wairau purchase and the Crown's acquiescence in recognising the boundary of Kemp's purchase at that point did exert unfair pressure on Ngai Tahu to part with the North Canterbury block on unfavourable terms. The first grievance was accordingly sustained.

It is clear that the Crown allowed the whole of the North Canterbury block to be occupied by European settlers before purchasing it from Ngai Tahu. As a result, by the time the Crown came to recognise the legitimacy of Ngai Tahu's claims to the land it had increased very considerably in value. Part of the block had been granted to the Canterbury Association, and this was being offered for sale at £3 per acre. Land north of the Waipara River was being sold at 10 shillings per acre or 5 shillings per acre for low quality land. Between 1 July 1853 and 31 December 1854, 1178 acres were sold at £3 per acre and 61,120 acres were sold at 10 shillings per acre. The stark difference in the price paid by the Crown, of £500 for an estimated 1.14 million acres, is only too apparent.

Professor Ward compared the situation with that in the Wairarapa where in the same period 1.5 million acres were purchased for £14,000 with large reserves and much of the best land withheld from

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sale. Ngai Tahu were denied the opportunity of developing land for pastoralism.

The tribunal found that the eight year delay in recognising and settling Ngai Tahu's claim to the North Canterbury block allowed their land to be completely occupied by European settlers. The Crown must accept responsibility for this. Ngai Tahu were placed in a greatly weakened bargaining position. For all they knew the Crown would continue to rely on the Wairau purchase as giving it title to the land.

The tribunal had no hesitation in finding that Ngai Tahu had never been adequately compensated for the sale of the North Canterbury block. Grievance no 2 was accordingly sustained.

The tribunal was unable to reconcile the Crown's action regarding the inclusion of Ngai Tahu land in the Wairau purchase from Ngati Toa with Ngai Tahu's rangatiratanga over such land. No investigations appear to have been made by the Crown as to Ngai Tahu rights in the North Canterbury block. While Grey in February 1848 recognised Ngai Tahu's rights at least up to the Hurunui River, this was revised by the Crown's subsequent acquiescence in Mantell fixing the boundary of Kemp's purchase at the Kaiapoi pa site. Despite persistent protests by Ngai Tahu from 1848 on, the Crown permitted all the land in the North Canterbury block to be occupied by European settlers and alienated substantial areas of the freehold to them. This was in blatant disregard of, or unconcern for, Ngai Tahu's rangatiratanga over this land. Far from consenting to this occupation of their land, Ngai Tahu vigorously objected. When very belatedly the Crown finally consented to recognise the rangatiratanga of Ngai Tahu over this land, they did so by agreeing to pay no more than a nominal price, far below the then value of the land. This was inconsistent with good faith and the obligation of the Crown to deal fairly and honourably with its Treaty partner. In so doing it clearly acted in breach of article 2 of the Treaty, as equally clearly it did in denying for so long and with such serious consequences the rangatiratanga of Ngai Tahu over the North Canterbury block. Ngai Tahu have not been compensated to this day for the very substantial loss which flowed from the Crown's breach of Treaty principles.

The failure of the Crown to allow Ngai Tahu reserves in the block (grievances nos 3 and 4) was not disputed by the Crown. Hamilton noted the request for reserves at Motunau and Hurunui. His ostensible reason for refusal, that there were already adequate reserves in Canterbury, we have already found to be far from the case. The real reason was that the land was already occupied, or as McLean inferred, the land requested by Ngai Tahu was of great value. The tribunal upheld both grievances nos 3 and 4.

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In no other purchase of Ngai Tahu land did the Crown fail completely to make any reserves for the tribe or wholly fail to meet their requests for reserves. Much of the North Canterbury block was very well suited to pastoral sheep farming. Ngai Tahu were anxious to participate in this activity alongside the new settlers. Instead they received a mere £500, and then only after years of protest. The Crown's breach of article 2 of the Treaty is self-evident. It was conceded by the Crown. In failing to meet the request for reserves at Hurunui and Motunau the Crown flew in the face of Ngai Tahu's rangatiratanga over the land preserved to them by article 2. There could be no conceivable justification for such arbitrary action so at variance with the Crown's Treaty obligation.

In failing to set aside any reserves anywhere in the block the Crown ignored its clear obligation under article 2 to ensure that Ngai Tahu were left with ample reserves for their present and future needs. The tribunal found it impossible to reconcile the Crown's conduct in this purchase with its Treaty obligation of good faith.

The final grievance was that the Crown provided lands for settlement within the block for landless Europeans under the Lands for Settlement Acts, but failed to do likewise for Ngai Tahu. No submissions were made by counsel but in considering this grievance the tribunal noted that there was nothing in the legislation which required that the applicant for land be either European or landless. Any person, except a married woman, could apply to take up land and so far as the tribunal was aware there was no legal impediment to eligible Maori applying under the Acts.

On the assumption then, that Maori enjoyed the same rights under the legislation as Europeans, the tribunal was unable to sustain this grievance. However the tribunal noted that the Crown was able to provide considerable funds to make available lands for settlement of up to 5000 acres for a first class run and up to 20,000 acres for second class runs. This contrasts with the lands later provided for Ngai Tahu under the South Island Landless Natives Act 1906 restricted to 50 acres per adult and 20 acres for those under 14 years of age. It takes little imagination to appreciate the sense of deprivation of Ngai Tuahuriri for whom the Crown refused to set aside a single acre. And yet the Crown was prepared to resume, at considerable cost, either by repurchase or compulsorily, land bought from Ngai Tahu for a pittance, to facilitate closer settlement predominantly by European settlers.

*Summary of the Grievances, Findings and Recommendations***2.8. The Kaikoura Purchase Summary*****Introduction***

Ngai Tuahuriri's lands north of Kaiapoi pa had been intended to be included in the Kemp purchase. Mantell's revision of the boundary, however, meant that it was not until 1857 that their rights to this land was acknowledged by the Crown, however inadequately. The land of Ngati Kuri, a Ngai Tahu hapu centred on Kaikoura, was never part of the Kemp arrangement. It would seem that in February 1848, Grey was not prepared to accept Ngati Kuri's rights to Kaikoura, and he continued with his plans to grant the land to the New Zealand Company. Kaikoura, like North Canterbury, had been largely overrun by pastoralists by the time Ngati Kuri's rights were acknowledged by the Crown. While Ngati Kuri were present at the negotiations over North Canterbury, their lands were not substantially involved. During the 1850s a number of tribes were paid for lands in the northern half of the island on the assumption that the Wairau purchase had not extinguished all their rights. Ngati Kuri were one of the last of these to be negotiated with by the Crown.

Following the Akaroa purchase in 1856, Hamilton reported to McLean that Kaikoura Whakatau, the principal chief of Ngati Kuri, was prepared to negotiate a settlement over their lands at Kaikoura, and that he vigorously denied Ngati Toa's right to have sold the block in 1847. However it was not until two years later that James Mackay Jr was appointed to negotiate the purchase. After several weeks of discussion in early 1859, a deed was signed which included a block of land from Parinui o Whiti, the northernmost point claimed by the tribe on the east coast, to the Hurunui, estimated by DOSLI to consist of 2.8 million acres. In return Ngati Kuri received £300 and 5558 acres of reserves. A request for a reserve of about 100,000 acres was refused.

Claimants' grievances

The claimants filed six grievances on this purchase, in some cases identical to those filed for the North Canterbury claim. First they complained that the Crown's inclusion of Kaikoura in the Wairau purchase exerted unfair pressure on Ngai Tahu to part with the block on unfavourable terms (no 1). They alleged that the Crown allowed the block to be settled by Europeans before purchasing it from Ngai Tahu and that the tribe has never been compensated for this (no 2). They also complained that the lands requested by Ngai Tahu between the Kahutara and Tutaeputaputa (Conway) Rivers in the Kaikoura block were not allowed (no 3). They claimed that the reserves which were made were inadequate for agricultural purposes and as an economic base and were encumbered with roading and railway rights

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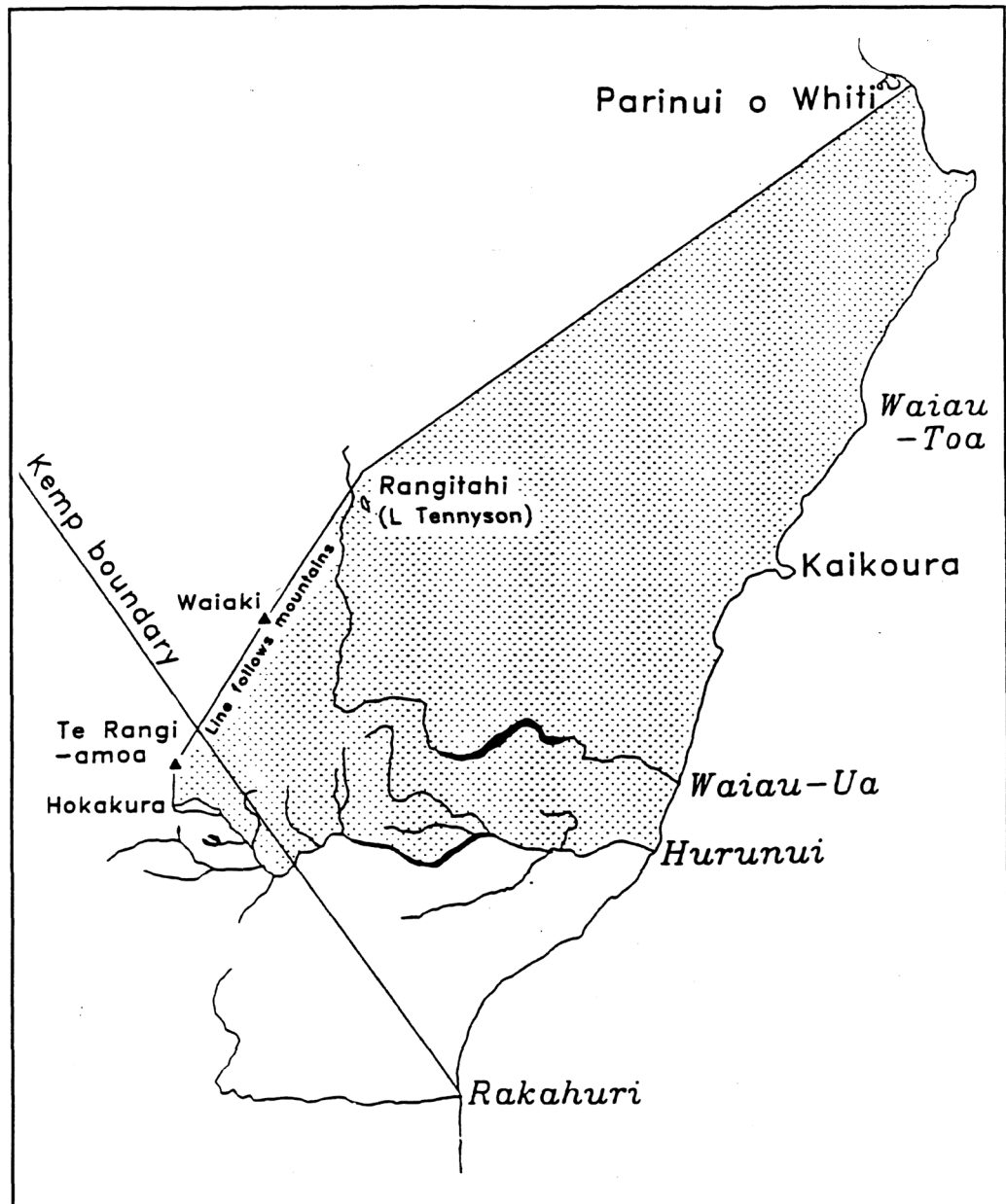


Figure 2.10: The Kaikoura purchase. The purchase overlapped with the North Canterbury purchase of 1857 which had its northern boundary at the Waiau-Ua.

(no 5). Finally they complained that while the Crown resumed a number of runs within the block for European settlement, it failed to do likewise for Ngai Tahu (no 6). Grievance no 4 related solely to the North Canterbury purchase.

*Summary of the Grievances, Findings and Recommendations****Background to the purchase***

When Ngai Tahu protested Mantell's decision to fix the Kemp and Wairau boundaries at Kaiapoi pa they suggested it be reset at Oteruawhare, near the Clarence River, or alternatively at Parinui o Whiti (White Bluffs). Mantell stood firm and in the 1850s Ngai Tahu complaints about North Canterbury often also applied to Kaikoura. Grey approved a proposal of the New Munster Executive Council to pay £50 to Ngai Tahu for their rights between Kaikoura and Kaiapoi, but this appears not to have been distributed. Kaikoura Whakatau was, however, paid £60 in October 1852 for his rights to "all claims in the vicinity of Kaikoura" (T2:66).

In the years immediately after the 1853 "Te Waipounamu" purchase, when McLean was actively purchasing the rights of other tribes in the northern South Island, Ngati Kuri's claims were given little if any attention. In the meantime the whole of the area was taken up in runs, with the exception of the land immediately around the Kaikoura peninsula.

Hamilton passed on Kaikoura Whakatau's complaints about the non-recognition of their rights as part of his 1856 report on the Akaroa purchase. According to this report, Whakatau was likely to accept terms similar to those being proposed for North Canterbury (£150) but with two reserves totalling 1000 acres. This is more likely to have been Hamilton's estimate, rather than a specific offer from Whakatau. The Crown did not move with any speed. In August 1857 Hamilton again reminded McLean of the problem, but nothing was done until November 1858, when McLean appointed James Mackay Jr to make the purchase.

Mackay was instructed to provide reserves of between 10 and 100 acres per individual or family head and to ensure that the village site at Kaikoura required for European settlement was not reserved to Ngai Tahu. It was thought that £150 would be sufficient payment, and Mackay was to follow the agreement with the purchase of Poutini Ngai Tahu's Arahura rights. For both purchases £300 was provided. Mackay was given great discretion over the negotiations, and over the extent of the reserves necessary.

The purchase

When James Mackay and his cousin, Alexander, arrived at Kaikoura, they found Ngati Kuri asking £5000–£10,000 for the land. The commissioner reported that he would do his best to gain Ngai Tahu's assent and in a private letter to McLean complained of a lack of any assistance from the Nelson provincial government. He also com-

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mented that Ngai Tahu were too “wideawake” about the value of the land and the runs established on it for him to be confident of success.

The negotiations took over a month, between 24 February and 29 March when the deed was signed, and were broken off more than once. During this time all the eventual reserves were identified. Ngai Tahu finally agreed to accept £300, but not without some protracted stonewalling and Mackay’s subterfuge of appearing to be willing to depart:

I set the fellows down so that none of them had anything to say, except that it was no use for them to talk to me as I was as hard as a stone and was Satan and Haukiora – and after all could not get them to take the money [£150 and then £200]. (M11:26)

Ngati Kuri demanded to reserve about 100,000 acres of land between the Kahutara and Tutaepuaputa (Conway) Rivers. This land was on pasturage lease to three runholders, Fyffe, Tinline and Keene, and some of the land had been freeholded.

They were also extremely reluctant to accept £300, knowing how inadequate such a price was, given the then well-established value of the land in the district. The price, although more than contemplated by Mackay, can only be regarded as nominal. It was grossly inadequate.

James Mackay allowed nine reserves ranging from three to 4800 acres. The reserves were situated on the coast both north and south of the Kaikoura peninsula, with some small reserves on the peninsula itself. Mackay even apologised to McLean for setting aside the largest, the 4800 acre reserve at Mangamaunu, justifying his action because the land was of the “most useless and worthless description” (A8:II:36).

Despite its lack of value for agriculture, the Mangamaunu reserve was greatly valued for its mahinga kai. Mackay noted the karaka trees, prized for their berries, and a later commentator explained that the land was chosen for the wide variety of kai moana and kai manu that could be obtained there.

Mackay openly admitted that it was:

questionable from the nature of the reserves whether they will be found more than barely sufficient for the wants of the Native population, and for the increase of their horses and cattle, of which they now possess considerable numbers, one of the best proofs of which is that they have applied to me to be allowed to purchase land from the Government, to the extent of about 400 acres within the block just ceded by them to the Crown. (A8:II:36)

While Ngai Tahu clearly wanted to reserve their mahinga kai resources, they were also intent on developing pastoral agriculture in the

Summary of the Grievances, Findings and Recommendations

manner of their European neighbours. In the tribunal's view there was a reprehensible attitude on the part of the Crown's agent, who, to prove how hard a bargain he has driven, virtually gloats over the fact that to obtain land they want and need Ngai Tahu are driven to seek permission to buy back 400 acres of their own land. We cannot condemn too strongly such a cynical disregard by the Crown's agent of the rights of its Treaty partner.

Findings on grievances

For the same reasons as in the North Canterbury situation, the tribunal found that the Crown did, by the Wairau purchase, exert unfair pressure on Ngai Tahu to part with the block on unfavourable terms both as to price and reserves. Crown delay and the prior recognition of Ngati Toa's rights to Kaikoura seriously reduced Ngati Kuri's negotiating position. The first grievance was accordingly sustained.

As North Canterbury was parcelled out to runholders prior to purchase from Ngai Tahu, so was Kaikoura. Land was sold in the Kaikoura block at 10 shillings or 5 shillings an acre prior to Ngai Tahu being induced, after a month of hard bargaining, to accept £300 for a block of 2.8 million acres. The tribunal concluded that Ngai Tahu have never been adequately compensated for the Kaikoura block purchase, and accordingly sustained the claimants' second grievance.

In almost the same manner as evident in North Canterbury, the Crown was in breach of article 2 of the Treaty in disregarding Ngai Tahu's rights, and in allowing the block to be occupied by settlers on the basis of the 1847 Ngati Toa purchase. The tribunal also found that to this day Kaikoura Ngai Tahu have not been compensated for the very substantial loss which flowed from the Crown's breach of Treaty principles.

Mackay's refusal to grant Ngai Tahu the 100,000 acre reserve, on the ground that it had already been handed over to European runholders, was not defended by the Crown. Mackay was limited to the 10–100 acres per head formula, provided by his superior, the chief land purchase officer, McLean. In laying down such a formula McLean completely overlooked that article 2 of the Maori version of the Treaty guaranteed to Ngai Tahu their rangatiratanga over their land. The English version of the same article confirmed and guaranteed to them the full, exclusive and undisturbed possession of their land so long as they wished to retain it. It is apparent that Ngai Tahu wished to retain a substantial area of land for pastoral purposes and no doubt for greater access to a variety of mahinga kai resources. Instead their wishes were ignored and they were induced to settle for a mere 5558 acres.

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By imposing on its agent Mackay a limit on the quantity of land he might agree to being reserved to Ngai Tahu, the Crown acted in clear breach of article 2 of the Treaty. This breach was exacerbated by the action of the Crown in facilitating the leasing and, in part, the sale of land to which Ngai Tahu's title had not been extinguished. The Crown's agent Mackay, as his correspondence to his superior McLean only too clearly revealed, was fully aware of this. Mackay was obliged by the Crown to deny Ngai Tahu's rangatiratanga over their land and to refuse to reserve to them land they wished and were entitled to retain. It was the Crown's responsibility to respect Ngai Tahu's title to their land and to restore it to them if, as was the case, they wished to retain it.

It follows that Ngai Tahu's grievance no 3 was sustained.

In grievance no 5 the claimants complained that the reserves allowed were insufficient for agricultural purposes and to provide an economic base for the prosperity of Ngai Tahu and were unreasonably encumbered with Crown roading and railway rights.

That the land was insufficient for Ngati Kuri's present and future needs was readily accepted by Mackay himself. Had the Crown agent been able to agree, as he should have, to Ngai Tahu's request to retain 100,000 acres, it is unlikely that there would have been any later complaint. While the Mangamaunu reserve was of some size, it was completely inadequate for agricultural purposes. In a later report on ancillary claims the tribunal will discuss how the reserve's size was seriously eroded for roading, rail and scenic reserve purposes.

The Crown, as the tribunal has said on numerous occasions, was under an obligation to ensure that Ngai Tahu retained generous areas of land, amply sufficient to secure a reasonable access to mahinga kai and to engage in agriculture and pastoral pursuits. Once again the Crown failed to meet its Treaty obligation. In the result, Ngai Tahu suffered, and have continued to suffer, substantial loss. As a consequence the tribunal found grievance no 5 sustained.

The tribunal further found that the Crown's failure to ensure that Ngati Kuri were left with sufficient land for an economic base and to provide reasonable access to their mahinga kai was in breach of article 2 of the Treaty, which required the Crown to ensure that each tribe was left with a sufficient endowment for its present and future needs. Ngai Tahu were detrimentally affected by such failure.

The last grievance concerning the provision of lands for landless Europeans while not providing similar measures for Ngai Tahu was identical in general form to that for the North Canterbury purchase, and was not sustained for the same reasons. The tribunal made the

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same observation that the considerable expense and effort applied to providing lands for settlement in blocks of up to 20,000 acres stood in stark contrast to the 50–100 acre limits in the Lands for Landless Natives legislation passed soon after. The tribunal again noted that while the Crown refused to set aside a single acre under this measure for Ngati Kuri in the Kaikoura block, it was prepared to resume, at considerable cost, land bought from Ngai Tahu for a pittance, to facilitate closer settlement, predominantly by Europeans.

2.9. **The Arahura Purchase Summary**

Introduction

Poutini Ngai Tahu had not suffered the indignity of having their lands occupied by Europeans prior to the Crown sending James Mackay Jr to Arahura to negotiate a purchase of the west coast in 1859. Few Europeans had ventured to this part of the South Island by the end of the 1850s. While settlers had not occupied the block as they had in North Canterbury or Kaikoura, the Crown already claimed to have extinguished the rights of several other tribes over the territory before it opened direct negotiations with Poutini Ngai Tahu. The tribunal found that the west coast was part of the Kemp negotiations in 1848, but there was not sufficient evidence to establish that Poutini Ngai Tahu had been present in sufficient numbers to convey their rights to the Crown. At any rate, they had not been paid their share of the purchase price, and no reserves had been allocated for them.

Mackay went to Arahura in 1859, with instructions to set aside no more than 500 acres and to pay no more than £200 for all Poutini Ngai Tahu rights to the land on the west coast. The offer was rejected with contempt; Werita Tainui dismissed the amount as no more than the price of a horse. Ngai Tahu said they wished to reserve about 200,000 acres of land to protect their rights to pounamu, but they did concede that if the price and reserves were increased, they would be prepared to sell the whole block. Mackay returned to Wellington, persuaded the government to increase the allocation of reserves to 12,000 acres and had the limit on the purchase price raised to £400.

When Mackay returned to the coast in 1860 he got Ngai Tahu agreement to a deed which transferred to the Crown Ngai Tahu's rights to seven million acres, at almost 100 acres per penny. Ngai Tahu remained anxious to protect their valuable pounamu resources and Mackay agreed to a number of measures which went some way to meeting their concerns, but which remained consistent with his instructions. He set aside 2000 acres along the banks of the Arahura River, guaranteed Ngai Tahu the ownership of the riverbed to its source, and gave the tribe the pre-emptive right to purchase addition-

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al land back to Mount Tuhua between the Arahura River and Lake Kaniere. Ngai Tahu had asked for land to be reserved along the banks of the river as far inland as Mount Tuhua, but to do so would have meant reserving about 8000 acres, taking the total reserved well above the limit set by his superiors. At 10 shillings an acre, Ngai Tahu were expected to pay (and in fact later did) 12,000 times the price they had received for the land.

In total 6724 acres were reserved for individual allotment and a further 3500 for educational and religious endowment. The reserves were spread right along the coast in 54 different blocks. Some, because of their location, would become very valuable, the most notable being the Mawhera reserve, on the site of what soon became the town of Greymouth.

Claimants' grievances

The claimants filed 11 grievances concerning this purchase. They complained that the Crown should have appointed a protector to independently advise Ngai Tahu of their Treaty and other rights (no 1). They suggested that the Crown used earlier sale agreements with other tribes to put pressure on Ngai Tahu (no 2). It was alleged that the Crown failed to exclude from the sale lands Ngai Tahu did not wish to sell (no 3), and failed to protect Ngai Tahu's possession and control of pounamu (no 5). They claimed that the Crown imposed a price on land the tribe wished to retain (no 4), and that all of this left Ngai Tahu without sufficient lands to provide an economic base and so to protect their tribal estate (no 6). The claimants also alleged that the Crown failed to protect Ngai Tahu by not revealing the value and importance of gold bearing land (no 8). The remaining grievances were all dealt with elsewhere in the report. Grievances no 7 and no 11 were concerned with reserves now in perpetual lease. The summary of the part of this report which deals with these issues follows this section on the actual purchase. Grievance no 9 concerned the reduction in the size of the reserves once they had been made, and will be dealt with in a subsequent report. The Landless Natives Acts are discussed as they relate to a number of purchases, and are also covered in chapter 20.

Background to the purchase

In 1853 the Crown entered into a new agreement with Ngati Toa rangatira to purchase all their remaining rights in the South Island. Known as the "Te Waipounamu" purchase, this opened the way for a number of other tribes to enter into negotiations for the purchase of their remaining rights in the island. Between 1853 and 1856 deeds were signed with Te Atiawa, Ngati Tama, Ngati Rarua and Rangitane. Many of these tribes purported to sell rights at least some way down

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the west coast. In April 1856 McLean reported on these purchases noting that there remained “a small remnant of the Ngaitaha [sic], about twenty-five in number, residing at Arahura”, whose rights remained unextinguished by the Crown. McLean believed that 300–400 acres and a “small amount of compensation” would be sufficient to deal with their claims (A8:I:303).

In 1857, aware that Ngati Toa had been paid for rights to the coast, Poutini Ngai Tahu sent a letter to McLean offering to sell the whole of the west coast, from West Wanganui to Milford for £2500. The letter was delivered by James Mackay Jr, a Collingwood settler who had travelled to Mawhera. Interest in the coast was increasing and in 1858 traces of gold were found.

Towards the end of 1858 Mackay was appointed by McLean to purchase Kaikoura and Arahura from Ngai Tahu. The instructions allowed only £150-£200 for the west coast purchase, less than a tenth of that requested by Ngai Tahu. It was not until July 1859 that Mackay met with assembled Poutini Ngai Tahu to discuss the purchase. It soon became clear that Ngai Tahu wished to reserve from the sale an estimated area of 200,000 acres bounded by the Mawhera (Grey), Kotukuwhakaoka (Arnold) and Hokitika Rivers. They were concerned to preserve their control over their prized taonga, pounamu. Mackay offered them £200 and reserves of 800 acres, 300 acres more than that recommended by McLean. The negotiations broke down: Mackay could go no further without exceeding his instructions and Ngai Tahu refused to accept the Crown’s offer. Mackay returned to Nelson, having been told that the Crown would have to pay four or five hundred pounds if it wanted to purchase the whole block.

The purchase

After discussions in Auckland with Governor Browne and McLean’s deputy, Mackay received new instructions increasing the maximum payment to £400 and the reserves to 12,000 acres. Although Ngai Tahu must have been aware that gold had been discovered, the Crown was still anxious to acquire the land with a nominal payment. Mackay arrived at Mawhera in March 1860 and proceeded down the coast as far as Mahitahi, marking off reserves on his return north. Once back at Mawhera the negotiations began, with Ngai Tahu requesting £300 for the whole of the block, and considerably larger reserves. After several days discussion, agreement was reached on 26 April, but the deed was not signed until 21 May 1860 after the Mawhera and other additional reserves had been finalised.

Mackay managed to get Ngai Tahu’s agreement to the purchase for £300, £100 less than the maximum he had been allowed. However

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the most significant element of the agreement was the provision for the 54 reserves specified in the deed. A total of 6724 acres was allocated for individual allotment with an additional 3500 acres set aside as a religious and educational endowment and 2000 acres for later sale to cover surveying costs. Ngati Apa were also allocated 472 acres.

The reserves included 500 acres at Mawhera, at a site already identified by Mackay as the possible location for a town. His attempts to get Ngai Tahu to choose a different location were met with determined resistance. Tuhuru and other tupuna were buried on the hill above and Poutini Ngai Tahu refused to part with their homes.

At Arahura, Mackay had allowed a reserve of 2000 acres, running along both sides of the Arahura River. Although not specified in the deed, Mackay made two additional promises recorded on maps drawn up at the time. On one of these, he noted that the river was to be reserved to Ngai Tahu to its source. On the other that if the Arahura reserve did not extend as far as Mount Tuhua, Ngai Tahu had the pre-emptive right to repurchase the land between the reserve and the mountain at 10 shillings per acre. This was 12,000 times the price paid for the land by the Crown. The map suggests that the reserve was likely to have extended as far as the mountain, although Mackay was apparently aware that for this to be so, the reserve would have needed to have been four times the size.

Ngai Tahu were determined to protect their access to pounamu, and Mackay acknowledged that settling this reserve was a major stumbling block in the negotiations. It would seem that in order to ensure both that the reserves he allocated remained within the limit specified by his superiors in Auckland, and to gain Ngai Tahu's agreement, Mackay led Ngai Tahu to believe that the Arahura reserve was likely to extend as far as Mount Tuhua.

Findings on grievances

The claimants argued that the Crown wrongfully used the Ngati Toa and other purchases to put pressure on Ngai Tahu to consent to the sale (grievance no 2). It is very clear that Ngai Tahu were treated as the last and least important of a number of Maori tribes with claims to the west coast. The £300 paid Ngai Tahu contrasts with the £5000 paid Ngati Toa, the £1000 paid Te Atiawa and the £600 paid Ngati Tama and Ngati Rarua for land which included parts of the west coast. Professor Ward's report commented that the relative size and power of each tribe appears to have been taken into account when determining the price to be paid. All these purchases took place before Poutini Ngai Tahu were even consulted over a possible sale of what

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was their land. The Crown made no attempt to determine who owned what before embarking on this series of purchases. During Mackay's 1859 negotiations he did attempt to use the Ngati Toa and other sales to gain Ngai Tahu acceptance of his terms. However, the fact remains that Ngai Tahu refused his offer and he was forced to return home empty-handed to gain new instructions, which included substantially increased reserves and an additional cash payment.

McLean's earlier dealings with other tribes do not appear to have been a strategy deliberately designed to pressure Ngai Tahu into selling, and selling cheaply. Rather he seems to have almost entirely disregarded them.

The tribunal concluded that it was unable to sustain this grievance. When in 1859 Mackay did use threats, these proved of no avail. Poutini Ngai Tahu agreed to sell in 1860, because, while no doubt disappointed that the price was not higher, the Crown had increased both the price and the area of land to be retained as reserves.

The claimants alleged in grievance no 8 that the Crown failed to reveal the value and importance of gold bearing land and that this was a breach of the duty of good faith. Although Poutini Ngai Tahu were aware that gold did exist on the coast by 1860, there is no evidence that they appreciated the potential significance of a major gold find. While the Crown was at this time also unaware whether gold would be found in commercial quantities, Mackay was unlikely to have gone out of his way to explain the implications this may have had on the value of Ngai Tahu's land, something an independent protector would have done, if one had been appointed.

However, the adequacy of the price can be judged by other factors besides its gold yielding possibilities. The price was nominal compared with that paid to other tribes and with the £2600 earlier paid to Ngai Tahu for Murihiku, involving a similar area. The Crown's historian, Dr Loveridge, concluded that the Crown's final offer "cannot be described as a generous one" (N2:86). Crown officials were well aware of the potential value of the land, and Mackay even managed to avoid paying the full £400 authorised. The crowning insult was Mackay's promise, having purchased the land at a penny per 100 acres, to sell back to Ngai Tahu land they had strongly urged to be reserved from the sale, at 10 shillings per acre.

The tribunal found this grievance sustained. In offering to pay no more than a nominal price for land which had the potential for a very early substantial rise in value, the tribunal concluded that the Crown failed to act with the degree of good faith required of one Treaty partner to the other.

*The Ngai Tahu Report 1991****Land reserved***

The claimants filed two grievances concerning land Ngai Tahu wished to have reserved from sale (nos 3 and 4). These concerned the failure of the Crown to allow the full 8000 acres required to extend the Arahura reserve as far as Mount Tuhua, and the 200,000 acres Ngai Tahu wished to reserve from the sale in their first negotiations with Mackay in 1859.

Poutini Ngai Tahu wanted to preserve their rights to pounamu around the Arahura River, by reserving land on both sides of the river up as far as Mount Tuhua. This Mackay refused to do as it would mean an additional 4000 acres above the limits imposed by his instructions. He fobbed off Ngai Tahu with a promise that the riverbed would be reserved to them to its source and with giving them the pre-emptive right to repurchase any shortfall at 10 shillings per acre. The tribunal found that in imposing a maximum of 6000 acres for individual allotment for Ngai Tahu, Governor Browne and his officials were in clear breach of the Treaty. It is abundantly clear that Poutini Ngai Tahu wished to retain te tino rangatiratanga over the land on either side of the Arahura River, from the sea to Mount Tuhua and possibly to its source at Lake Browning. As it related to the failure to provide a reserve totalling at least 8000 acres, the claimants' grievance no 3 was sustained.

Ngai Tahu's request for 200,000 acres to be reserved from the sale is somewhat different. In 1859, when Mackay made his first official visit to Arahura, Ngai Tahu were adamant that given the inadequacy of Mackay's offer of £200 and 800 acres of reserves, they were not willing to part with this block of land. Chief among their concerns was the protection of their rights to pounamu around the Arahura River. Mackay gave assurances that Ngai Tahu would continue to be able to take pounamu, but given the very narrow limits of his instructions he was unable to agree to the Ngai Tahu proposal. However, apart from their concerns about pounamu, Ngai Tahu were not opposed to the sale of the block, they simply rejected the price offered by the Crown. On leaving the coast after the negotiations had broken down, Mackay was adamant that it was all a question of price. This view is supported by the comments made on his return in 1860:

I found the Natives still desirous as on the former occasion to retain all the land intervening the Rivers Mawhera and Kotukuwhakaho, and the River Hokitika . . . , *unless* they received £300 in compensation for their claims to the whole district extending from Kaurangi point to Piopiotai (Milford Haven) . . . (A8:II:40) (emphasis added)

As a consequence the tribunal was not satisfied that once offered £300 and larger reserves, Ngai Tahu remained unwilling to sell the

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block. Nor was the tribunal satisfied that the Crown imposed a price on the 200,000 acre block which Ngai Tahu wanted to exclude from the sale. For these reasons grievances nos 3 and 4 were not sustained by the tribunal as they applied to this 200,000 acre block.

Despite the tribunal rejecting these aspects of the claimants' grievances, there remained the question of whether the Crown kept enough land to preserve to Ngai Tahu their economic base (grievance no 6). Compared with other Ngai Tahu purchases, it may seem that Poutini Ngai Tahu were left considerably better off than their east coast relatives. The approximately 66 acres per head was much more than the 10 acres per head Mantell provided in the Kemp block, although the land was of poorer agricultural potential. There were also many more reserves and they were within the locations chosen by Ngai Tahu. Some of the land was to prove very valuable, most notably the 500 acre Mawhera reserve on which the town of Greymouth was soon to arise. Despite all this, the contrast between the 7.5 million acres purchased and the 12,224 acres of reserves remains. Dr Loveridge, the Crown's historian, concluded that while the lands reserved may have been sufficient for Ngai Tahu's needs at the time, they were the "bare minimum which the owners could be induced to accept" and that "scant consideration" had been given to their future needs.

The tribunal was satisfied, particularly having regard to the nature of the land and climatic conditions, that the reserves were quite inadequate to provide a sustainable economic base for the future. The tribunal was also concerned at the scant consideration given to the tribe's needs to maintain access to their mahinga kai.

The tribunal found this grievance to be sustained in that the Crown failed to ensure that Poutini Ngai Tahu were left with sufficient land for an economic base and to provide reasonable access to their mahinga kai and that this constituted a breach of article 2 of the Treaty. This required that the Crown ensure that each tribe was left with a sufficient endowment for its present and future needs. Ngai Tahu were detrimentally affected by such failure.

Pounamu

Ngai Tahu's grievance no 5, that the Crown failed to protect their right to retain possession and control of all pounamu, was considered in three parts; the first in relation to the Arahura River, the second in terms of Ngai Tahu's rights to pounamu elsewhere in the Arahura purchase block and thirdly, elsewhere in the South Island.

*The Ngai Tahu Report 1991****Pounamu in and adjacent to the Arahura River and its tributaries***

Retaining access to the pounamu of the Arahura River was one of Ngai Tahu's prime concerns throughout the negotiations. It would seem that Mackay was prevented from reserving all the land Ngai Tahu wanted reserved by limits placed on him by Governor Browne. In order to go some way to meet Ngai Tahu's demands Mackay promised them title to the river itself and allowed them to purchase, at a considerable profit to the Crown, the area between the land reserved and Mount Tuhua. As it happened, 1050 acres were bought by Werita Tainui and others in 1873 under this provision. The remaining land was vested in the Hokitika Harbour Board in 1876 and most is now owned by Tasman Forestry Limited. The riverbed was vested in the Mawhera Incorporation in 1976. However it would appear that any pounamu involved may still remain in Crown ownership.

Crown counsel accepted that in reserving the riverbed for Ngai Tahu, it was intended to include not just the river, but its tributaries together with their banks. It was made clear to the tribunal that accessible pounamu was found largely in the land adjacent to the river, rather than in the bed itself, where pounamu was more difficult to locate and to extract. Pounamu was and remains a precious taonga of Ngai Tahu. The Crown clearly acted in breach of its Treaty obligations in failing to meet the wishes of Ngai Tahu to retain ownership of the pounamu in the area adjacent to the Arahura and its tributaries. Although conscious of the fact that much of the adjacent land is no longer in Crown hands, the tribunal considered the Crown should accept responsibility and make every effort to redeem its long standing Treaty breach by negotiating for the repurchase of appropriate blocks of land adjacent to the Arahura and its tributaries, and if successful, settling such land on Ngai Tahu.

Pounamu elsewhere in the Arahura purchase block

While the Crown conceded that Ngai Tahu's rights to pounamu had not been extinguished in the Arahura River, its tributaries and their banks, it was argued that all other rights to pounamu elsewhere in the block had been given up by the terms of the 1860 Arahura purchase. The tribunal carefully examined the Maori text of the Arahura deed of purchase as signed by Poutini Ngai Tahu rangatira (appendix 2.9). Neither the Maori nor English version recognises the value attached by Poutini Ngai Tahu to pounamu. The Maori text refers to "kowhatu", or stones, translated in the English version as minerals. But there is no mention of pounamu as such in the deed. The tribunal was satisfied that there would have been a clear demarcation in Ngai Tahu thinking between ordinary stones and

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greenstone, so great were the spiritual and cultural values attached to its possession. Was not the island inhabited by Ngai Tahu known as Te Wai Pounamu? Since pounamu was not mentioned by name in the deed and since Ngai Tahu were so clearly concerned to retain it, there is every reason to believe that Ngai Tahu did not realise they might be thought to be assigning it to the Crown. The tribunal was satisfied that Poutini Ngai Tahu did not consciously agree to part with their pounamu and that the language of the deed was not sufficient to convey it to the Crown.

This was another instance where the presence of a protector to advise Ngai Tahu would have ensured that they were not put in the position where they might inadvertently part with their so greatly treasured possession. The tribunal found that Ngai Tahu did not sell or assign to the Crown their interest in pounamu within the Arahura purchase block. Had the Crown appointed a protector as it should have done, the tribunal considered this would have been discussed with the Crown's purchasing agent, Mackay, and specific provisions would have been made to make clear that Ngai Tahu retained ownership of all pounamu.

Pounamu elsewhere in the South Island

Mr Temm sought a recommendation that all pounamu in the South Island should be the property of Ngai Tahu. We have interpreted this as all those parts of the South Island formerly owned and occupied by Ngai Tahu. The tribunal has examined the Murihiku deed and all other deeds of sale between Ngai Tahu and the Crown. In none of these does pounamu appear in the Maori text signed by Ngai Tahu, nor in the respective English translations. Given the high intrinsic value of this taonga to all Ngai Tahu, the tribunal considered, for the reasons already discussed in the case of Poutini Ngai Tahu, that specific mention of pounamu in each deed would have been required to signify Ngai Tahu's intention to part with their pounamu. The tribunal found that in none of the deeds of sale did Ngai Tahu agree to part with any pounamu.

Conclusions on pounamu

The tribunal considered that the unique nature of pounamu and its deep spiritual significance in Maori life and culture is such that every effort should now be made to secure as much as possible to Ngai Tahu ownership and control.

The tribunal's understanding was that the greater part of the resource is on Crown owned land. This should present no problem. We believe all such pounamu and any other owned by the Crown should be returned by the Crown to Ngai Tahu. Any such action would of course

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have to be on the basis that current mining licences relating to pounamu should run their normal course, to ensure that those licence holders are not adversely affected. The same protection should be afforded any licensees of pounamu in the state forests which have been excepted from the provisions of the Mining Act 1971. The aim should be for the Crown as expeditiously as possible to return to Ngai Tahu ownership and control over all such pounamu within its traditional boundaries.

Some pounamu, so the tribunal was informed, is the property of proprietors of privately owned land. The tribunal considered that it would be appropriate for an order in council to be made in respect of such pounamu pursuant to section 7 of the Mining Act 1971, and an appropriate amendment be made to ensure that mining privileges should be granted only to Ngai Tahu under that section.

The tribunal found that the Crown failed to protect the right of Ngai Tahu to retain possession and control of all pounamu:

- in and adjacent to the Arahura River and its tributaries;
- in the remainder of the Arahura purchase block; and
- in the Murihiku and any other Ngai Tahu blocks purchased by the Crown where pounamu was to be found.

Finding regarding breach of Treaty principles

The tribunal found that although Ngai Tahu wished and intended to retain possession and control of all pounamu both throughout the remainder of the Arahura block and in all other blocks sold to the Crown, the Crown failed in breach of the Treaty principle requiring it to protect Ngai Tahu's right to retain this taonga and further failed to respect the tino rangatiratanga of Ngai Tahu over their taonga, contrary to article 2 of the Treaty.

Recommendations in respect of pounamu

The tribunal made the following recommendations:

- 1 That to remove doubts as to the ownership of the pounamu in or on the land described in section 27(6) of the Maori Purposes Act 1976 (13.5.20) the Crown take appropriate legislative action to vest all such pounamu in the Mawhera Incorporation or such other body or bodies as may be nominated by Ngai Tahu.
- 2 That section 27 of the Maori Purposes Act 1976 be amended so as to vest the beds of all tributaries of the Arahura River in the Mawhera Incorporation or such other body as may be nominated by Ngai Tahu.
- 3 (a) That the Crown, after consultation with Ngai Tahu, negotiate for the purchase of a reasonable amount of land on either side of

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the Arahura River and its tributaries to their respective sources. Such land to include the banks of the rivers and to be sufficient in area to include any changes in course of such rivers and to provide access to reasonable quantities of pounamu where such may exist in or on such adjacent land.

(b) That the Crown transfer ownership of all such land so acquired and any such land already owned by the Crown to the Mawhera Incorporation or such other body as may be nominated by Ngai Tahu.

4 That the Crown transfer ownership and control (including the right to mine) to Ngai Tahu or such other body as may be nominated by Ngai Tahu of:

(a) all pounamu owned by it in land within the boundaries described in the Arahura deed of purchase dated 26 May 1860, other than any pounamu already vested in Ngai Tahu or which is vested in Ngai Tahu pursuant to our recommendations numbered 1 to 3; and

(b) all other pounamu owned by it in the Murihiku and all other blocks purchased from Ngai Tahu by the Crown.

Such transfer to be subject to the condition that all existing mining or other licences should run their normal course, to ensure that the holders of such licences are not adversely affected.

5 (a) That the Crown pursuant to section 7 of the Mining Act 1971 by order in council declare in respect of all pounamu which is the property of proprietors of privately owned land on or under the land in the districts described in the preceding paragraphs 4(a) and (b), that pounamu on or under such land shall be prospected for or mined only pursuant to the said section 7.

(b) An appropriate amendment should be made to the Mining Act that no prospecting, exploration, mining or other licence relating to pounamu shall be granted under that or any other Act to any person or body other than Ngai Tahu or such other body or person as may be nominated by Ngai Tahu.

Grievance no 1: the need for a protector

The tribunal considered that the failure to appoint a protector was in breach of the Treaty principle which required the Crown actively to protect Maori Treaty rights. Ngai Tahu were seriously disadvantaged in their negotiations with the Crown's agent, James Mackay. In the tribunal's view a protector would surely have been able to ensure that they retained the right of ownership and control of all pounamu. A

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protector would surely have encouraged them to demand substantially greater resources and emphasised that they were entitled to retain any land they wished to reserve. As a result of the failure of the Crown to ensure that Ngai Tahu were independently advised of their Treaty rights, they were denied the right to retain certain lands they wished to retain and were left with insufficient land for their present and future needs.

2.10. **The Perpetual Leases of Ngai Tahu Reserves Summary**

Introduction

This grievance raised an issue that is well known to government. It concerns the action of the Crown in placing Maori reserved lands under perpetual lease, the terms of which provided for 21-yearly rent reviews, with rent later fixed at 4 per cent of the unimproved value of urban land, and 5 per cent in the case of rural land. In 1973 a commission of inquiry chaired by the late Judge Bartholomew Sheehan inquired into these leases and reported its findings in a comprehensive report published early in 1975. During the hearing of this grievance at Greymouth in September 1988 we were informed that an interdepartmental committee had been set up to complete proposals for legislation which would remedy the grievances, to be introduced in October of the same year. Legislation was apparently delayed to allow consultation with the lessees and Maori owners. On 18 January 1990 the Minister of Maori Affairs, by press statement, announced that legislation would be introduced in 1990. It is still awaited.

During the hearing several Maori incorporations and trusts from other parts of New Zealand such as Taranaki, Palmerston North, Wellington and Nelson, appeared to support the claimants. These Maori authorities administered Maori freehold land also subject to perpetual leases and have filed claims with the tribunal. They seek legislative changes similar to those asked for by Ngai Tahu. Because there are factual distinctions in the way the respective reserves were constituted, the tribunal determined it would have to hear each claim separately.

Two of the Arahura grievances applied to the issue of land in perpetual lease. In grievance no 7, the claimants alleged that the Crown imposed perpetual lease by legislation without the consent of the owners and failed to protect them from economic loss. Grievance no 11 claimed that the Crown had failed to implement the recommendations of the Commission of Inquiry into Maori Reserved Land, 1975.

Ngai Tahu also made a number of allegations concerning the failure of the Crown's appointed trustee to administer the reserved lands

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properly. These were directed to such matters as failing to consult with owners, failing to act as a prudent trustee, failing to take action to amalgamate land titles and develop lands, failing to prevent land being taken for public works, These complaints were almost all directed at the Maori Trustee.

The purchase

On 21 May 1860 Ngai Tahu sold seven million acres on the west coast to the Crown for £300. Of the 10,224 acres reserved from the sale, 6724 acres were reserved for individual allotments (in the deed classified as schedule A lands) and 3500 acres were reserved for religious, social and moral purposes (in the deed classified as schedule B lands). The schedule A lands were intended for occupation by the respective owners.

There were 39 blocks listed in this category, the largest being the Arahura no 30 block situated on the north and south banks of the Arahura River. As chapter 13 on the Arahura purchase relates, this reserve was made as a strip of land up each side of the river to protect rights to pounamu. Another schedule A block comprising 500 acres and listed as reserve no 31 was reserved on the south bank of the Mawhera or Grey River. This is the present day site of Greymouth.

The schedule B lands comprised 11 blocks. Unlike the schedule A lands which were clearly intended to be occupied and used by the owners, the schedule B lands, like the North Island and South Island tenths, were seen as being leased to provide income towards the general social, religious and moral benefit of the tribe. The Native Reserves Act 1856 created a system for the efficient management of lands set aside for the benefit of Maori. It provided for governor-appointed commissioners with extensive powers to deal with the reserves. These included powers to set aside lands for schools,

hospitals and charitable purposes for Maori, to lease up to 21 years and even to sell land or lease beyond 21 years with the governor's consent. The consent of the owners was needed to land being placed under the Act. All of the schedule B lands were brought under the Act as were the North and South Island tenths. It was never intended by the New Zealand Company that the Maori beneficial owners would take possession of the tenths but that trustees would be appointed to hold the land and apply the proceeds for the benefit of the owners. Regarding the Arahura lands however, seven of the schedule A blocks were brought under the 1865 Act—a total of 3498 acres out of the 6724 set aside for individual allotment. This was the first step towards the separation of the owners from their right of use. It was initially beneficial to them but resulted in their perpetual exclusion from use

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of their own land. How did it happen? We have used the Mawhera 31 block as a pilot study.

Events following the purchase

When James Mackay purchased the Arahura lands he was aware that the 500 acre reserve sought by Poutini Ngai Tahu would be needed as a town site, although interestingly he also knew of the flooding potential of the area. He was right about the prospects. In 1865 a new town, Greymouth, had sprung up due to the discovery of gold in the Mawhera River. Merchants were negotiating leases with Maori owners. The native minister saw problems arising from these arrangements affecting the orderly development of the town with roading and other service required. He sent Alexander Mackay, then resident magistrate at Nelson to investigate. Mackay's visit resulted in the Mawhera reserve being placed under the 1856 Act on 3 February 1866. He saw the need of both tenant and Maori owner for a better system. Mackay managed the lands conscientiously to the satisfaction of both the owners and tenants up until his departure in 1882.

During the 1870s and 1880s the government was subjected to intensive lobbying. Many leaseholders wished to buy Maori out, or for the government to do so and resell to them at fair value. The leaseholders kept up pressure, claiming a need to replace wooden buildings with brick and stone. In 1872 Commissioner Charles Heaphy was sent to inquire and reported that the owners were strongly opposed to sale. Heaphy favoured freeholding in certain situations that did not expose the Maori owners to pecuniary disadvantage. Parliament rejected sale unless all the owners agreed. Alexander Mackay was strongly opposed to sale but was in favour of leases being extended to a maximum term of 60 years to allow tenants to erect permanent buildings. This was legislated for in 1873. Throughout the 1870s pressure was maintained by the leaseholders on the government to acquire the freehold, but Mackay and the owners opposed sale. In 1882 a significant change occurred in administration. Management of the reserves was vested in the Public Trustee, who was empowered to lease for 30 years for agricultural or mining purposes and 63 years, in 21-year terms, for building purposes.

Legislation affecting the Mawhera reserves

The South Island Native Reserves Act 1883 was a significant statute affecting the Mawhera reserves. In the first place, section 3 authorised the governor to grant the 500-acre Mawhera reserve to 26 Maori, whose names and the acreage each took were set out in a schedule to the Act. At that date, 8 September 1883, the relative interests and those to whom title was to pass were named persons. In the second place, the Maori owners agreed to a system of compensation for

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improvements being introduced into the leases. Although the owners were prepared to grant leases up to 60 years the Act restricted Mawhera leases to a 21-year term. This short term coupled with dissatisfaction over the form of the compensation provisions led once again to tenant pressures and resulted in the 1885 commission chaired by Henry Kenrick. The commission found that the tenants, relying upon assurances given by Commissioner Mackay, were entitled to renewal of their leases. The commission noted that the Maori owners were unanimously and strongly opposed to sale but were agreeable to lease up to 63 years. In a letter sent by seven prominent Maori to the native minister in October 1885, these owners, although expressing opposition to the sale of their lands, were prepared to give a renewed 63-year term, making a total leasing period of 126 years.

Following the Kenrick commission, a special commissioner was appointed to resolve disputes between lessees and sublessees. The commissioner, Henry Bunny, interviewed 80 lessees. He recommended that government acquire the freehold even though the Maori owners had expressed "the strongest objection".

There is no doubt that the Kenrick commission report and the subsequent Bunny report led to the legislation which gave the lessees not the right to freehold but perhaps the closest equivalent in the form of perpetual rights to lease.

The Westland and Nelson Native Reserves Act 1887 repealed the 1883 Act and in place of the old 30 and 63-year terms, substituted a standard 21-year term. Section 14 of this Act provided that the holder of the lease was to "have the right of renewal for a like term upon the same conditions and covenants (including the right of renewal)". Thus not only did this 1887 Act create the perpetual lease but it also introduced a provision which imposed the same conditions and covenants in all future renewals. This latter requirement has also penalised the lessors in preventing the insertion of modern-day conditions of lease. It is this statutory provision that is the main subject of the claimants' grievances.

Following the report of a commission of inquiry in 1913, it was decided to transfer administration of Maori reserved lands from the Public Trust Office to a native reserves trustee. A Bill was introduced in 1914 but war intervened. In 1920 the Native Trustee Act was passed creating the office of Native Trustee as a corporation sole.

The next important statute was the Maori Reserved Land Act 1955. This Act effected a codification of 43 different statutes involving Maori reserved lands. It gave power to the Maori Trustee to convert

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all term leases into leases with a perpetual right of renewal. It imposed also a new statutory, prescribed rental for reserved lands. Section 34 fixed rentals at 4 per cent of unimproved value for urban land, and 5 per cent for rural land. These rates applied for the whole 21-year term.

A further legislative incursion into the reserved lands took place under sections 155 and 156 of this 1967 statute. The lessees had finally won out. Parliament, over the objections of Maori owners who had fought for 100 years to retain their freehold, allowed lessees the right to purchase the freehold from the Maori Trustee. This concession was not to last. It was strongly criticised in the report of the 1975 commission of inquiry which recommended repeal. The right to freehold was removed by section 9A and 9B of the Maori Purposes Act 1975 but between 1955 and 1975 a total of nearly 18,000 acres of reserved land in both islands had been sold by the Maori Trustee, including 35 sections at Greymouth.

Report of the Commission of Inquiry into Maori Reserved Land

The commission was constituted in 1973 and reported in 1975. Included in its seven terms of reference was the requirement to report whether the rights of renewal, frequency of rental review and methods of rent assessment were satisfactory. It recommended that the terms of the leases be changed to provide for five-yearly reviews of rent instead of 21; indexation of rental; and rents being fixed at a basic rent of 1 per cent above government stock instead of the respective 4 per cent (urban) and 5 per cent (rural) of unimproved value. None of these recommendations have been implemented. The commission considered it could not recommend breaking the perpetual term which it acknowledged "as having been arbitrarily imposed by legislation without the consent of the beneficial owners". Its reason against breaking the perpetual term was "such a change would be indefensible and would certainly involve the payment of very substantial compensation".

The commission however stated that a perpetual term was not satisfactory and any new leases should be for a limited term. In its report the commission commented that the United Kingdom had abolished perpetual leases in the Law of Property Act 1922.

One of the recommendations of the 1975 commission report advocated that administration of the Greymouth lessees be handed back from the Maori Trustee to the owners. This was done by the Mawhera Incorporation Order 1976. The incorporation in 1988 administered just over 900 leases of its reserved land.

*Summary of the Grievances, Findings and Recommendations****Effect on Ngai Tahu***

Several witnesses expressed strong feelings about the loss of use of their land and its effect on both capital and income resources of Poutini Ngai Tahu. Mr Tipene O'Regan, then chairperson of the Mawhera Incorporation, considered the unilateral imposition of perpetual leasehold, combined with Crown trusteeship, worse in some respects than direct confiscation, describing it as "confiscation on the cheap and by stealth".

Expert valuation evidence presented by the claimants identified 1960 as the start date from which the low rentals of 4 and 5 per cent resulted in monetary disadvantage to Ngai Tahu. A valuer calculated that the difference between the prescribed rents and rents fixed at a proper market rate would be a loss of \$750,000 over a term of 21 years without any review and a loss of \$2,250,000 if reviewed at 7 yearly intervals.

The Crown's response

Although the Crown acknowledged that for the past 15 years legislation had worked unfairly against the Maori owners, Crown counsel contended it would be wrong for the tribunal to conclude there had been any breach of Treaty principles. Crown counsel said the Crown was presently trying to improve the position. He argued that Ngai Tahu had favoured permanency of term for their leases in 1887 and did not object to the legislation. Further, that the objection to perpetual right of renewal was a modern development which arose from inflation. Comprehensive research evidence was presented in support of the Crown's case.

The lessees' response

Although several lessees appeared or made submissions, the principal submission was presented by the West Coast (South Island) Maori Leaseholders Association (Inc) represented by counsel, Dr Willie Young. The association raised two legal arguments challenging the claimants' right to seek protection under the Treaty. The other principal arguments were:

- that the Maori owners were consulted and consented to the leasing arrangements and in particular to the 1887 Act;
- that the Maori owners favoured commercial dealing;
- that the Maori owners were not prejudiced by the 1955 legislation; and
- that inflation was the cause of the problem.

The association called valuation evidence to show that up until 1955 Maori owners had not been financially disadvantaged and the rates

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fixed in 1955 were .25 per cent higher than actual rents then being received. Counsel concluded that it would be manifestly unjust to expect the tenants to fund any alteration in lease conditions and further urged the seriousness of interfering with land transfer titles. A valuer estimated that the lessees stood to lose 4.5 million dollars in the value of their land if the claimants succeeded.

Response of the Maori Trustee

The Maori Trustee, represented by counsel, denied the allegations of breach of trusteeship and mismanagement and said the claimants' allegations were not properly within the scope of a Treaty claim. Evidence was called to rebut the allegations. The deputy Trustee, Mr Richard Wickens, gave reasons why the criticism levelled at the Maori Trustee should have been directed to government.

Counsel informed the tribunal that the Maori owners were not alone in their concern, the Maori Trustee having expressed to government for some time the view that present legislation was iniquitous and should be changed.

The tribunal's examination of the evidence and findings

The tribunal examined three main questions arising from the evidence:

- Did the Maori owners consent to perpetual leases?
- Should government have implemented the recommendation of the 1975 commission which advocated change to the form of the leases?
- Were the Crown-appointed trustees negligent in the management of the reserved lands?

In the course of looking at the first matter the tribunal traversed the whole history of the Greymouth leases and in particular the Mawhera no 31 block. This inquiry included an examination of:

- all the statutes from 1856 to 1975;
- numerous reports by commissioners and government officials between 1866 and 1909;
- parliamentary debate and correspondence involving ministers and officers of the Crown; and
- Maori owners' attitudes and statements from 1866 to 1975.

It was evident to the tribunal that throughout the history of the reserved land Maori owners had strongly opposed its sale. They were prepared to lease their land and even to grant leases for two periods of 63 years each. Despite comprehensive argument addressed by counsel for the Crown and lessees respectively, the tribunal found

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that the Maori owners never gave their consent to perpetual leases in 1883 or 1887. The lessees kept constant pressure on government to freehold the land and sell it to the lessees. The tribunal considered that the 1885 Kenrick commission and the 1886 Bunny report had much to do with the insertion of perpetual lease provisions in the 1887 Act. The government was not prepared to accept Commissioner Bunny's recommendation that the freehold be purchased, but in order to appease tenants the alternative of perpetual leases was adopted.

The tribunal was satisfied that the Maori owners never consented to this provision either directly or indirectly through the Maori Members of Parliament or in any other way. In a few strokes of a pen, the legislature took away from the owners a valuable property right and gave it to the tenants. It was an action that deprived the owners of use and occupation as well as their property right. The Mawhera lands were reserved for individual occupation. The owners were known. They were entitled to have informed advice on the meaning and effect of such an important change to their title. They did not get it. The tribunal considered it rather ironic that a little over 100 years later, when Maori are seeking to reverse the position, the present day tenants urged the tribunal to respect their rights and their guaranteed land transfer title. The lessees indeed do have a valuable right and are entitled to be heard and be compensated for any loss.

As to the second question, the tribunal found that the Crown has failed to move in respect of recommendations contained in the 1975 commission report and should have done so. The tribunal commented that if government had acted in respect of rent review and rental, following the commission's recommendations, there would possibly have been no grievance to address.

The tribunal considered that the action of the Crown in the 1955 Act, when prescribed rents of 4 per cent (urban) and 5 per cent (rural) were fixed, may not have been disadvantageous to the Maori owners at that time but certainly became so. The rental rates should have been kept under review.

The 1975 commission found the method of prescribing a fixed rate was unsatisfactory and the rents, particularly 4 per cent for urban land, to be inadequate and unrealistically low. Despite some assurances given by the Crown that changes were intended there had been no change at the time of this report. Nor has any change been made to the review period of 21 years despite the commission's recommendation of 5 yearly review.

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As to the third question concerning allegations against the Maori Trustee, the tribunal found that primarily the action or omissions of the Crown have been responsible for the general complaints laid at the door of the statutory managers. From 1856 until 1975 the Crown persevered with a form of trust management in which the Crown made the rules and supervised the process.

The system adopted alienated Maori from any real consultation or knowledge about their interests in the reserved lands. Management has now been handed back to the owners. The tribunal made no specific findings against the statutory trustee:

- (a) by reason of the generality of the complaints;
- (b) because alternative remedies under trustee law are and were available to the owners; and
- (c) the Crown, rather than the statutory trustee, was responsible for at least some of the failings set out in the general complaints.

It should also be mentioned that the tribunal rejected Dr Young's legal argument and held that the tribunal had jurisdiction under the Act to determine whether any act or omission of the Crown infringed any Treaty principle.

Maori Affairs Amendment Act 1967

The tribunal also reviewed the action of the Crown in allowing lessees to purchase the freehold under sections 155 and 156 of the 1967 amendment which inserted new clauses 9A and 9B into the Maori Reserved Land Act 1955. This matter was not the subject of any grievance by the claimants possibly due to the subsequent repeal of the provisions in 1975.

However, the move by the Crown to allow sale of the reserved land was a unilateral act of the Crown, and the final step in allowing the Maori owners to be dispossessed of their land. This was not Crown land or land owned by a public corporation. It was private land. The owners have been separated from administration of their land since 1866. In 1887 they had 21-year perpetually renewable leases imposed on them without their proper consultation or consent. They had fixed rentals of 4 per cent and 5 per cent imposed on them in 1955. In 1967 they stood to lose their freehold. That they did not lose all their reserved lands was possibly due only to the fact that the tenants had perpetual leases at low rentals and did not quickly move to freehold. Nevertheless land was sold. The tribunal viewed this legislation as a breach of the Treaty.

Summary of the Grievances, Findings and Recommendations

Findings as to breach of Treaty principles

The tribunal found the following actions and omissions to have breached article 2 of the Treaty.

1 The insertion of the perpetual right of renewal in the leases of Maori Reserved Lands by section 14 of the Westland and Nelson Native Reserved Land Act 1887.

2 The insertion of sections 9A and 9B into the Maori Reserved Land Act 1955 by sections 155 and 156 of the Maori Affairs Amendment Act 1967.

3 The failure of the Crown to implement those recommendations of the 1975 commission of inquiry report into Maori reserved land relating to renewal of term and review of rent.

The tribunal found that the claimants had made out both their grievances (nos 7 and 11).

Remedies recommended by the tribunal

Although the question of remedies generally will be a matter for negotiations between the claimants and Crown, the tribunal in this matter considered that immediate action is necessary in respect of the lease provisions. This is a long outstanding matter and the continuing injustice must be ended and righted. There has been too long a delay. The tribunal has accepted that the lessees are justly entitled also to be compensated by the Crown for such loss they might suffer. This would be a matter between the Crown and those lessees.

For reasons set out in the report the tribunal did not address the question of compensation to the claimants for the loss suffered and deferred that question. It did however consider the claimants' request in respect of amendment to the leases and accepted their proposal as reasonable. Pursuant to section 6(3) of the Treaty of Waitangi Act 1975 the tribunal made the following recommendations.

1 That the Maori Reserved Land Act 1955 be amended so that the leases prescribed in that Act will:

- (a) over two 21-year lease periods convert to term leasehold those lands subject to the leases prescribed in the above Act;
- (b) immediately change from a fixed percentage rental basis to one of a freely negotiated rental subject to the Arbitration Act; and
- (c) immediately change from the present rental review period of 21 years to a rental review period of 5 years in respect of commercial and rural land and 7 years in respect of private residential land.

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2 That the lessees be reimbursed by the Crown for any provable loss suffered by them as a result of the legislative changes recommended above.

2.11. The Rakiura Purchase Summary***Introduction***

Rakiura (Stewart Island) was the last Ngai Tahu land mass to be purchased by the Crown. The purchase was completed by Henry Tacy Clarke in 1864 for a total of £6000. A third of the purchase price was paid in cash, a third allocated for a number of specific individuals, and the remaining £2000 was to be invested for educational and other purposes. Clarke was uncomfortable in combining his commission to purchase the land with his instructions to look after the interests of the Ngai Tahu vendors. Nonetheless, unlike earlier purchase officers, he appears to have taken particular care to protect the interests of Ngai Tahu, within the limits of his instructions. However, the purchase agreement was a complicated one, and the considerable delay in implementing the deed left Ngai Tahu seriously disadvantaged.

The Titi Islands are scattered along the coast of Rakiura. They were a valued food resource, not just for Rakiura Ngai Tahu but for the whole of the iwi. The agreement with Clarke ensured that Ngai Tahu retained access to the most favoured Titi Islands, however the remainder went to the Crown. Whenua Hou (Codfish Island) had been a place of significant Ngai Tahu settlement prior to the purchase, but was not specifically mentioned in the deed as being excluded from the purchase, and so also went to the Crown.

The claimants filed three grievances concerning Rakiura. First, they alleged that the Crown failed to appoint a protector to advise them on their Treaty and other rights at the time of the sale (no 1). Secondly they complained that Ngai Tahu have been deprived of the full administration of the Titi Islands (no 2). They claimed that according to their oral tradition, Whenua Hou had been excluded from the purchase (no 3). In addition the tribunal was asked to examine the situation regarding two reserves, Toitoti and Port Adventure, which had been allocated for “landless natives” soon after the turn of the century, but had never been formally vested in Ngai Tahu. The tribunal will be reporting on this aspect of the claim in its forthcoming report on ancillary claims.

Events prior to the purchase

There was no evidence to indicate Ngai Tahu were reluctant to sell Rakiura. Although many Europeans were squatting on the island, others had genuine claims to land on the basis of purchases from Ngai

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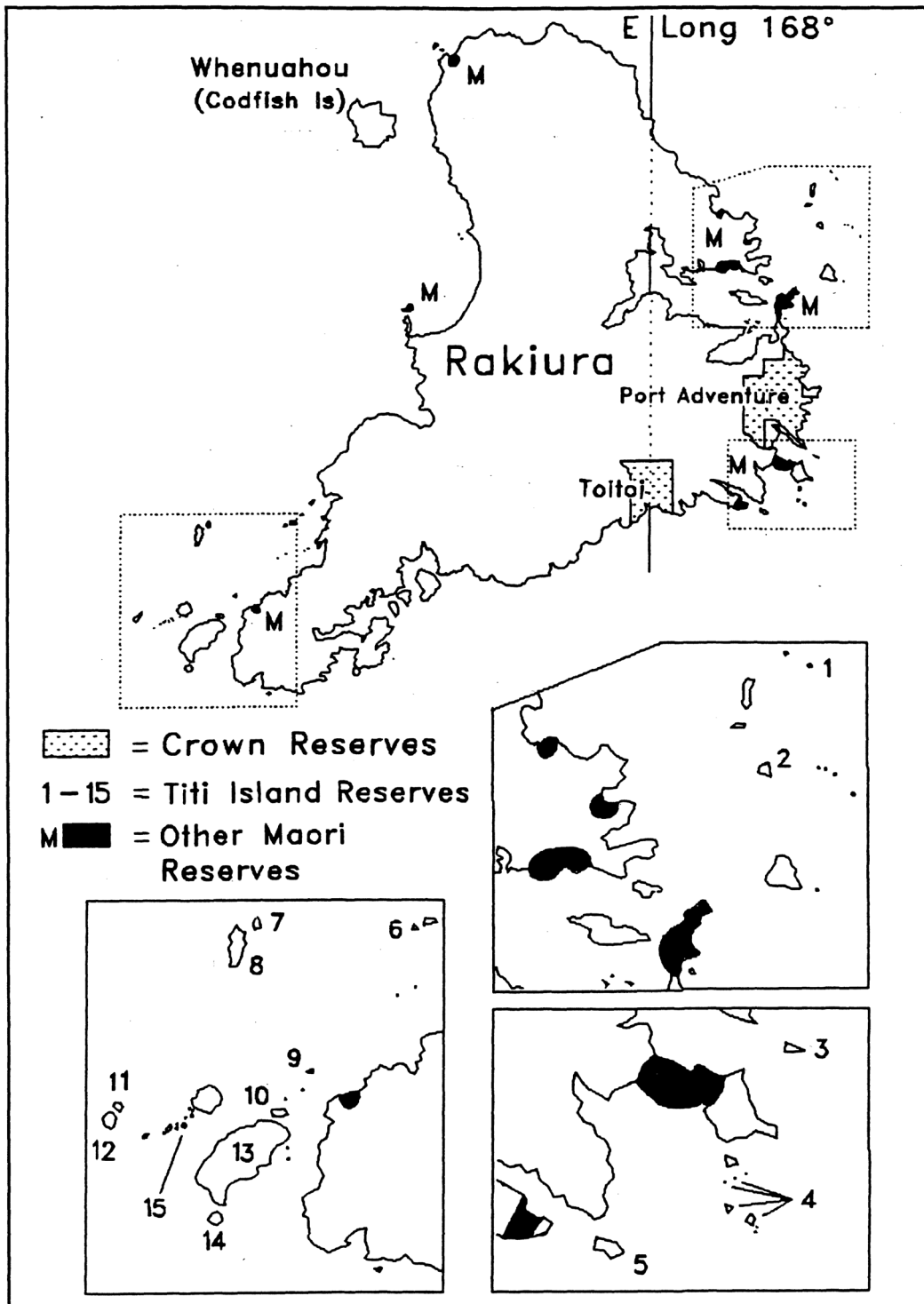


Figure 2.11: Rakiura showing Whenua Hou, the Titi Islands, Maori reserves and the Toitoti and Port Adventure blocks.

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Tahu. In August 1860 Topi Patuki, the principal representative of Rakiura Ngai Tahu, offered to sell to the Crown a portion of the island westward of the 168th degree of longitude. It was suggested that by 1860 the influx of Europeans had become too much for Ngai Tahu to cope with.

Nor was the Crown reluctant to buy Rakiura. The ownership of such a considerable land mass and valuable timber resource was an attractive prospect to colonial administrators. However, the increasing European encroachment on the island and all its attendant land title problems provided the biggest incentive to purchase the island and thus bring it under government control.

In November 1863, Patuki informed the government that he had entered into an agreement to sell a substantial portion of Rakiura privately. By this stage the government had already taken positive steps to arrange the sale. In September Theophilus Heale, chief surveyor of Southland, had been instructed to negotiate the purchase. He was to compile a list of those with interests in Rakiura and the extent of those interests. Heale's instructions show that the government had decided to attempt to purchase the whole of Stewart Island. They did not explicitly mention the Titi Islands. There was also a clear intention to provide an endowment for the vendors and not simply make a one-off payment. The following month, the Stewarts Island Annexation Act 1863 brought Rakiura under the wing of the Southland provincial government. This legislation did not affect Maori title to the area.

Heale was replaced in his commission by Henry Tacy Clarke in February 1864. Clarke was instructed to follow the guidelines given to Heale, as well as to adjudicate any land claims between Europeans and Ngai Tahu still outstanding. No specifics about the making of reserves were given, nor were the Titi Islands mentioned.

The purchase

Clarke arrived in Invercargill in March of 1864. He spent the next two months organising the purchase: informing Otakou Maori of the imminent agreement, arranging a payment schedule, ensuring funds were available and investigating direct sales of land which had taken place to Europeans.

In May, Rakiura Maori returned from their titi expeditions and all interested parties gathered at Aparima. The only account of the negotiations, which began on 23 May and extended over the next few days, is contained in Clarke's belated report to the colonial secretary on 24 October. Clarke satisfied himself that dissension arising over rights to the island between Ngati Mamoe and Ngai Tahu

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had indeed been resolved. He was resolute in his initial offer of £6000 although Ngai Tahu negotiated for a much higher sum. Clarke proposed that £2000 be paid to the tribe at the signing of the deed, £2000 be held by the government and the interest paid to certain named people and their descendants, and the remaining £2000 be invested in land in Murihiku as an education endowment for Rakiura Maori. Ngai Tahu eventually accepted the terms although they requested that the endowment monies be distributed at the signing of the deed. Ngai Tahu often repeated this request in the years following the purchase, to no avail.

The deed was signed at Awarua on 29 May 1864 and transferred to the Crown all of Rakiura and the adjacent islands. Nine reserves were specified, amounting to about 935 acres plus an unspecified amount on the Neck for those of mixed descent. Clarke appended to the deed a list of 28 “half-castes” living there but acknowledged that the list was probably incomplete. Twenty-one named Titi Islands were also reserved for Ngai Tahu/Ngati Mamoe but there was no indication of how this list was compiled. Most significant, however, was the exclusion of Whenua Hou (Codfish Island) and some of the smaller Titi Islands from the list of those reserved for the vendors.

Events after the purchase: the educational endowment

In 1870 suitable land was finally bought as an educational endowment and after some delay leased on a 21½ year term. Ngai Tahu were already complaining that they were receiving little benefit from the fund. After further delays over surveying, two trustees were appointed to administer the rents received from the endowment. This income only partially met the educational needs in the area.

Today the endowment monies are still used for educational purposes and administered by seven local advisory trustees. The land is vested in the Maori Trustee and leased on perpetually renewable 21-year terms, subject to the Maori Reserved Land Act 1955 and the Maori Trustee Act 1953. The money is used to assist Rakiura Ngai Tahu in their tertiary education. No representations were made to the tribunal regarding either the question of ownership or the terms of lease of the endowment lands. The tribunal pointed out various provisions of the Maori Reserved Lands Act 1955 should Rakiura Maori wish to change the ownership of the endowment. The tribunal also gave its endorsement should the advisory trustees wish to support the revision of the perpetually renewable lease under the umbrella of the Mawhera Incorporation.

*The Ngai Tahu Report 1991****The £2000 investment***

The interest on this endowment was duly paid out to those specified in the deed, and on their deaths, to their heirs. In 1932 the interest rate was reduced and by 1954 six of the fifteen beneficiaries were receiving only nominal amounts. To avoid further fragmentation, £3200 was distributed to the beneficiaries under section 7 of the Maori Purposes Act 1954.

Reserves

By 1868 the reserves stipulated in the deed had not been surveyed nor had many of the land claims been investigated. Mackay reported that the land reserved at the Neck was insufficient and recommended that more land be obtained. After an 1869 petition, Mackay was appointed to examine the situation and arrange the surveys. He compiled a list of 94 claimants recognised as landless “half-castes”. Under the Stewarts Island Grants Act 1873, Crown grants were given to some half-castes born on the island and a number of the old land claims relating to pre-1840 purchases were resolved. A further 1676 acres from the Foveaux Strait area were set aside for others equally entitled to land. In 1874 the surveys of land mentioned in the deed were completed. However it was some years before provision was made for those half-castes who were not provided for at the Neck.

Finding on the need for a protector

There was no doubt that the Crown should have provided Ngai Tahu with a protector, an independent advisor to explain their Treaty and other rights to them (no 1). Clarke himself was aware of the ambiguity of his position: acting as a Crown agent on the one hand and keeping the interests of Ngai Tahu in mind on the other. The evidence however suggests that Clarke did his utmost to ensure that there would be no subsequent complaints about the way the island was acquired. In comparison with his predecessors, Land Commissioner Clarke executed his duties diligently. There was no evidence that Ngai Tahu were substantially prejudiced by the lack of a protector during the negotiations, or that the negotiations were carried out in a manner inconsistent with the principles of the Treaty of Waitangi.

However, the implementation of the deed was greatly delayed, to the detriment of Ngai Tahu. Had a protector been available to ensure that the terms of the deed were abided, reserves and the endowment would have been more promptly put in place. It was 10 years after the sale before the survey of the reserves was completed, and many more before those of mixed parentage were given land. Such delays are inconsistent with the Crown’s duty actively to protect Maori interests. The tribunal was given no details as to any loss suffered by those living on the reserves and who eventually were given such land.

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For those half-castes who had to wait many years for an allocation of land there must have been loss, and this has been addressed in chapter 20.

The tribunal found that the claimants' grievance was sustained to the extent that it applied to the implementation of the agreement.

The Titi Islands

The Titi Islands lie off the south-west coast of Rakiura and are the seasonal home of the titi (mutton bird) on their annual migration from the northern hemisphere. Twenty-one of the islands were reserved for Ngai Tahu under the deed, and Ngai Tahu are now the beneficial owners of these islands. However, all islands were vested in the Crown under the Rakiura deed of purchase.

The islands are of vital importance both to Ngai Tahu, as a prestigious mahinga kai, and to the Crown, as sanctuaries for endangered species. Administration of the islands is regulated by the Titi (Mutton Bird) Regulations 1978 which distinguish between beneficial islands (those reserved in the deed to Ngai Tahu) and Crown islands (those not named in the deed, and in which Ngai Tahu have no beneficial interest). The regulations make specific provision for the protection of the mahinga kai from despoliation by people and animals. Beneficial owners do not require a permit to enter beneficial islands, but access to Crown islands is by written permit only. The claimants stated that the tribe has been deprived of the full administration of the Titi Islands. At present the Department of Conservation administers the regulations. Rakiura Maori and their spouses have supervisory powers through representation on a committee which can make recommendations on issues concerning the islands. One witness maintained that it was time the Ngai Tahu Maori Trust Board administered the regulations. However most witnesses, although resentful of any regulations which restrict their rights to take titi, were primarily concerned with the continued protection of the titi resource, the gathering of which is a prerogative unique to Ngai Tahu.

In response to the claim, the Crown contended that the current system is of benefit to both Ngai Tahu, involving them in decisions over the protection of their mahinga kai, and to the Crown, protecting the endangered species on the islands. It stated that no permit has ever been refused to any Ngai Tahu wishing to take titi on a Crown island. Crown counsel maintained that only the Crown has the skilled workforce to protect both the titi and species at risk. Ronald Tindal, district conservator of Rakiura, further claimed that the history of Crown administration of the titi resource upheld at least three identified Treaty principles and that the Titi Islands are one of the best

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protected Maori food resources in New Zealand. Claimants' witnesses themselves submitted that under the current system Ngai Tahu have a lot of input into the way the islands are administered.

Finding on grievance no 2

The tribunal was satisfied that under the present regime the islands on which the titi burrow are sufficiently protected. We agreed that the regulations provide a good compromise between access to titi for Ngai Tahu and the conservation of endangered species. We acknowledged that Ngai Tahu have input into the administration of the islands through the supervisory committee. The tribunal found that there was no breach of Treaty principles in the action of the Crown in issuing regulations governing the administration of these islands.

The Crown islands

A further claim became apparent to the tribunal regarding the Crown islands. A number of submissions stated that Ngai Tahu did not wish to include any of the islands in the purchase: that such inclusion was inadvertent or that Clarke overrode Ngai Tahu objections in the matter.

No record of the 1864 negotiations exists today. The tribunal therefore found it difficult to investigate the allegation that Clarke disregarded Ngai Tahu's objections and did not reserve to them all of the islands. However it seems unlikely that the sale to the Crown of the less popular islands was inadvertent. Before the negotiations had begun Clarke intended to reserve only three or four islands for Ngai Tahu. In fact 21 were reserved and each of these specifically named in the deed. Discussion about the islands must have taken place.

Witnesses who for various reasons have taken titi annually over a long period of time on specific Crown islands, stated that the beneficial ownership of the Crown islands should be vested in themselves on behalf of their families, on the same basis as the beneficial islands.

The tribunal agreed that the vesting of beneficial ownership of the Crown islands in the appropriate Ngai Tahu would do much to recognise Ngai Tahu rangatiratanga and reflect the actual situation that at present exists.

Whenua Hou

Whenua Hou (Codfish Island) is the largest of the Crown islands, lying three kilometres off the west coast of Rakiura. In the Rakiura deed of purchase it was not mentioned as one of the islands to be reserved. The claimants stated that the island is ancestral ground and of vital historical significance to them. They claimed that according to oral

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tradition the island was included in the purchase against the wishes of the people.

There was no evidence to indicate whether or not Ngai Tahu objected to the inclusion of Whenua Hou in the sale. It was either an oversight or a conscious decision to exclude it from the rest of the beneficial islands. It was clear that the island was traditionally a stopping-off place for Aparima Maori on their way to the Titi Islands. However three boat landings and Mitini Island were reserved for Aparima Maori in the deed. It seems unusual that a place of such historical importance was not reserved from sale. The tribunal concluded that because of the lack of evidence the claim was a matter of speculation and therefore could not uphold the grievance.

A further claim was presented relating to the designation of the island as a nature reserve in 1986. Because of its size and distance from the mainland, Whenua Hou was said to be an ideal sanctuary for the introduction of species at risk. The claimants however maintained that the change in status from a scenic reserve to a nature reserve virtually precludes access to the island by the local people and detracts from its historical importance to Ngai Tahu. They also wanted Ngai Tahu involvement in management decisions regarding the island.

In response, the Crown maintained that permits for access were given to anyone with a legitimate reason for entering the island. It claimed access needed to be so restricted to protect the endangered species on the island.

With regard to the importance of Whenua Hou to Ngai Tahu and the need to protect the wildlife on the island, the tribunal recommended that, subject to prior notification, free access should be given to Rakiura Maori, consistent with the security of the wildlife. The tribunal also supported the involvement of Ngai Tahu in the management of the island.

2.12. **Mahinga Kai Summary**

Introduction

The claim involving mahinga kai is one of the most emotionally charged elements of the Ngai Tahu claim. The communal exploitation and use of natural resources both for tribal consumption and trade was basic to the Maori economy and hence to the whole social fabric of tribal and intertribal life. For generations, Ngai Tahu have petitioned Parliament over deprivation of their traditional mahinga kai. The tribe claims that the Crown guaranteed our people all our fisheries and other natural food resources under Article 2 of the Treaty and, in terms of the Kemp Purchase Deed, absolutely . . .

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Ngai Tahu claim compensation from the Crown for their lost mahinga kai and effective partnership with the Crown in the management and control of those few that remain—including the fisheries.

This brief description of the mahinga kai claim comes from Tipene O'Regan, chairperson of the Ngai Tahu Maori Trust Board, in his essay in *Waitangi: Maori & Pakeha Perspectives of the Treaty of Waitangi*. The following is a summary of chapter 17 of the report dealing with mahinga kai but it should be said here that it is difficult to further abbreviate this subject when chapter 17 itself is but a fragmentary account of a vast and integral part of Ngai Tahu society.

What is mahinga kai?

What is meant by the term “mahinga kai”? The tribunal found that to Ngai Tahu in 1848 and subsequently, this expression meant “those places where food was produced or procured”. Such a definition includes the tribal resources in and on the land, in the forests and in the rivers, lakes and sea and in the sky. It includes kai ika, kai moana, kai awa, kai manu, kai roto and kai rakau. Ngai Tahu see their mahinga kai in a holistic way, but for reasons given earlier, the tribunal had to sever sea fisheries and a number of ancillary claims from this study of the principal land claims. This summary is therefore not one of the total Ngai Tahu food resource but nevertheless it will give a general picture first of how dependent the tribe was on its mahinga kai, and secondly of how Ngai Tahu was adversely affected by land settlement and development. It concludes with the tribunal's findings on the tribe's grievances. It also offers some constructive ideas as to how changes can be made to ensure Maori have an effective future stake in environmental matters.

Claimants' grievances

The claimants alleged that Ngai Tahu had been dispossessed of their mahinga kai, in breach of article 2 of the Treaty and, in the case of the Kemp purchase, contrary to the terms of the Kemp deed. More particularly the claimants complained that the Crown failed to adequately protect Ngai Tahu's natural resources on Banks Peninsula including Wairewa and that as a result these resources have been destroyed or depleted (no 1); that in respect of the Kemp purchase the Crown failed to provide ample reserves and failed to reserve and protect Ngai Tahu mahinga kai (no 2). The claimants also claimed that the denial of access to mahinga kai had accentuated the effects of landlessness (no 3), that the agricultural use of land and introduction of acclimatised species had destroyed or reduced the value of mahinga kai (no 4) and that Ngai Tahu have been denied effective participation in resource management and conservation (no 5).

*Summary of the Grievances, Findings and Recommendations****Ngai Tahu and their mahinga kai resources after 1840***

Ngai Tahu was a highly mobile tribe. The people depended for their survival on hunting and gathering food over vast distances. A map produced to the tribunal located almost 4000 archaeological sites; the pin-pointed sites in fact traced out the shape of the South Island. Food gathering was also largely seasonal and evidence showed that Ngai Tahu would move to an area and there catch and preserve food to take back to their more permanent settlements. In autumn an annual migration took place to the Titi Islands to gather mutton bird. Even after the land purchases Ngai Tahu continued to gather their traditional food not only near their kainga but in long journeys across and down the island. These seasonal journeys also gave opportunity for hapu to barter with other hapu. The claimant, Rakihia Tau, gave a graphic account of how he accompanied his father to catch and gather eels, salmon, koura, shellfish, duck and geese eggs, kereru and other birds. These foods were used for subsistence in those days and food from the shops was bought only to supplement mahinga kai. Mr Tau commented on the disappearance of mahinga kai, his family's principal food source, and the apparent inevitability of this loss.

The tribunal visits the regions

The tribunal visited marae in Kaikoura, Kaiapoi, mid and south Canterbury, Dunedin, Southland and the west coast where many witnesses spoke of their past reliance on mahinga kai and commented sadly on how those resources had diminished and all but disappeared. The tribunal visited river sites, estuaries, sea shores, the inland lakes and viewed some of the traditional hunting, birding and fishing grounds of Ngai Tahu. Not only did the tribunal hear a vast amount of evidence from the tangata whenua but the parties presented an impressive array of professionals in fields of archaeology, history, zoology, biology, geography and languages. Visits were made to four museums where explanations and demonstrations were given of hunting and fishing implements including all kinds of gathering utensils. An unbroken 10 day period was spent exclusively on mahinga kai inspection and evidence. The evidence given by kaumatua demonstrated how by oral means traditional skills of gathering, preparing, storing and conserving mahinga kai had been handed down through generations to the present. We were frequently reminded of the spiritual aspect attached to the food gathering and distribution processes. Sensitive, personal evidence relating to the sites of certain food and medicinal herbs was given and the tribunal was told of the special place names given to particular types of mahinga kai. It was interesting to note the diverse resources of each region and in particular the special foods of some areas, such as the albatross of Otakou, which was once keenly sought for its meat and

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bone. Witnesses described the various fruits obtained from a number of native trees and how leaves from certain trees and plants were used to prepare medicines. Evidence given by Gordon McLaren, of Ngati Mamoe and Ngai Tahu, is typical of the evidence presented. It speaks both of the past and the present:

The whole of the land from Waitaha to Piopiotahi was clothed in Tane's forest, and few spots would have gone untrodden by our early hunting parties. Unlike other areas of Aotearoa, birds and fish were prolific everywhere. From the forests came the manu – kiwi, kaka, tui, kereru, kakapo, makomako and a host of others; and the hua rakau from the karaka, kotukutuku, miro, matai, rimu, kahikatea, koromiko, hinau, totara, ti, pikopiko, katoke, kurau, mamaku and others.

Other products gathered were kareao for hinaki, toetoe for tukutuku, pingao, harakeke, kie kie, raupo, kuta for weaving. With manu there was little waste—the flesh was eaten, feathers were used for decoration and the bones were fashioned into fish hooks and spear heads.

Some had dual uses, such as harakeke which also had a medicinal value and an edible nectar, and others were universal in their use, such as the ti—the dried leaves were ideal for paraerae, the fruit was eaten and the roots, when cooked in umu, were a principal source of sugar.

Then there was the puha and watercress – both still taken frequently – the aruhe.

The swamps, lakes and rivers writhed with fish life, especially tuna – once a staple diet and yielded other food sources such as weka, pukeko and whio . . . Tuna formed a big part of the diet of our tupuna, and hinaki were set all around the Makawhio-Maitahi area up until recent years. They are still taken, but no longer in great numbers.(H8:30–31)

Another witness Iris Climo explained her early life at Makawhio where there was no road access and supplies came by sea every three months. She said:

We learned how to gather our materials, practising Conservation (although we did not call it that at the time) in taking only as much as we required and returning our scrapes to the Source. The Moon was our calendar and we gathered food accordingly especially Kai Moana. We all knew how to kohikohi the birds and cook them in a variety of methods. We learnt how to cook in flax and hot ashes. Medicines using natural resources were also common. We lived as a Whanau looking after each other, taking only as much as we needed and bartering when necessary. Drying and smoking fish for out of season especially Inanga, gathering seagull eggs was also a Whanau event. Hand trawling involved the whole population. In fact fishing was a major occupation.

Living was almost communal, in that so much of what we did and learned were as a group rather than individual.

Everyone participated at Hui, held in the hall and I can remember being put on the mattresses to sleep.

My mother made flax cups to drink from, when we were near streams. (H8:39)

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This kind of evidence emerged as a pattern illustrating and explaining how the people continued to rely on their traditional skills and resources after 1840 and into this century.

Titi and the Titi Islands

Ngai Tahu's relationship with the Titi Islands is undoubtedly very important. The beneficial islands scattered off Rakiura (Stewart Island) and which provide the much prized titi (mutton bird), are beneficially owned by Maori and are collectively administered by those who have rights through whakapapa or genealogy. The individual rights of succession cannot be alienated by will or by gift or sale. The beneficial owners have unrestricted right of entry and they have regulatory protection from trespass or interference with their rights. Mutton birding has always been an integral part of Ngai Tahu society—an ancient tradition and mahinga kai right that is greatly valued and carefully guarded. The claimant told the tribunal that the relationship, management and administration of the islands, is perhaps the nearest living example of Ngai Tahu rangatiratanga over a natural resource. Decisions as to allocation of catching areas, protection and rules governing the environment are determined by those entitled through whakapapa to do so. The tribunal referred in some detail to the Titi Islands in the sections of the report dealing with Rakiura as well as mahinga kai. These sections set out details of the conservation measures and management procedures governing the islands. A committee of management is elected annually by the beneficial owners. The tribunal commented that the present arrangement whereby the Crown's role was to protect the resource in full consultation with the beneficial owners, reflected the principle of partnership under the Treaty. The tribunal further commented that the existence of this working relationship between Crown and Ngai Tahu on the Titi Islands illustrated how unfortunate it was that other mahinga kai such as tuna and kai moana could not have been safeguarded in a similar way.

The tribunal also looked at the ownership and the administration of the Crown islands. These islands are more widely distributed than the beneficial islands reserved for Rakiura Maori but they also contain titi and Rakiura Maori must first obtain permits before entering these islands.

The tribunal recommended that beneficial ownership of the Crown islands be vested in Ngai Tahu and that they be protected by regulation in similar way to the beneficial islands. The present joint management of the Titi Islands by Ngai Tahu and the Crown has resulted not only in the protection of the food resource but also in safeguarding a number of other endangered birds, plants, animals and insects which

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exist in these islands and which were described to the tribunal by Mr Ronald Tindal, district conservator for Rakiura as “the last arks of many endangered species”.

Waihora (Lake Ellesmere)

Waihora was once known by its more ancient name of Te Kete Ika o Rakaihautu, or at the Wairewa end as Te Kete Ika o Tukekawa. It is now more commonly referred to by Pakeha as Lake Ellesmere. Ngai Tahu know it as Waihora.

The lake itself was one of Ngai Tahu’s most precious mahinga kai, renowned for the quantity and variety of its fish, bird and other resources. The rights to these resources were shared by various hapu adjoining its shores but Ngai Tahu from more distant regions could also call on its resources through a complex network of tribal whakapapa. The lake was much larger in the mid-nineteenth century. Drainage, reclamation and opening the lake to the sea have lowered the water level and swampy wetlands have been turned into pasture.

Details were given of the lake’s past treasury of food resources and of its gradual deterioration from a much deeper, clearer lake with a shingly bottom to its now highly eutrophic and deteriorated state. The principal species of fish were tuna, patiki, piharau, aua, and inaka. It was also used for birding during the moulting season. Raupo, wiwi and harakeke grew in abundance in the swamps. Although in recent years licences have been granted for commercial eel fishing we were told that fish were depleted by over-fishing. We shall be looking at the commercial fishing of this lake in the later report on fisheries.

Waihora was part of the area sold under the Kemp purchase. Despite the importance of the lake to Ngai Tahu as a food resource, despite the reservation of mahinga kai from the sale, despite acknowledgment by the Maori Land Court in 1868 that the tribe had always regarded this place as a valuable fishery and as the tribe’s most highly prized and valuable of all their possessions, despite strong protests by Ngai Tahu over the years, no reserves of any kind were ever created over the lake to protect its use for Ngai Tahu.

The tribunal, in looking at the evidence, concluded that Ngai Tahu were the losers in a conflict between two economic systems with different priorities over natural resources. On the one hand Ngai Tahu relied on their traditional economy and expected that their rights to mahinga kai would be reserved to them. On the other hand the Crown saw that the Ngai Tahu economy must not prevent the needs and demands of land settlement. The agricultural and pastoral demands

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won the conflict. As a result Ngai Tahu interests in Waihora have been completely disregarded.

The tribunal found that the Crown acted in breach of the Treaty by failing to comply with the terms of the Kemp purchase which reserved to Ngai Tahu their mahinga kai (8.9.18–21). The Crown failed to protect Ngai Tahu in the retention of this treasured fishery. The tribunal has recommended the return of Waihora to Ngai Tahu ownership with full access to Kaitorete Spit. In considering the return of the lake the tribunal suggested there needs to be negotiation between the claimants and the Crown as to the exact area to be returned (17.2.23). Because of concerns about the present deteriorated condition of the lake, the tribunal also expressed the view that the Crown must take an active role in the provision of financial, technical, scientific and management resources to save Waihora (17.2.24). The lake may become a worthless mahinga kai resource without substantial financial and other input. The tribunal therefore suggested two options which Ngai Tahu may wish to consider. These involve first: that the Crown grant the full estate in fee simple to Ngai Tahu and at the same time enter into a joint management scheme with Ngai Tahu binding the Crown to provide resources to improve the lake or second: that the Crown grant beneficial ownership to Ngai Tahu and remain on the title as trustee. The Crown then in consultation with the beneficial owners, would make regulations to protect the lake's quality and its use.

The tribunal expressed the view that either alternative would reflect the partnership principle of the Treaty in manner similar to the Titi Islands regime. The tribunal expressed the hope that Ngai Tahu would, in any joint management exercise with the Crown, have regard to the inclusion of public facilities.

Kaitorete Spit

This is an isthmus of approximately 12,000 acres which separates Waihora from the sea and provides seaward access to the lake. It has significant historical and archaeological importance. It is of national importance also because it contains the largest pingao plantation in the country. Pingao is used for weaving kete, whariki and tuku panels. Because of the obvious importance of this land the tribunal has asked that the question of creating special reserves on it be brought to the notice of the Minister of Conservation. In a later section of the report the tribunal offers some alternatives for discussion between the tribe and Crown which may lead to the setting aside of special reserves under existing legislation.

*The Ngai Tahu Report 1991****Wairewa (Lake Forsyth)***

This lake is another important eel fishing resource of Ngati Irakehu. It is a coastal lake where access to the sea is blocked by a shingle bank. The lake is opened to the sea by digging a channel through this bank. During the autumn the eels congregate in the southern and outlet area. The tribunal visited the lake and inspected the eel trenches or wakawaka. Each of the wakawaka belongs to a particular hapu. Trevor Howse recounted his whakapapa which gave him rights to the wakawaka and produced a confidential map of the drains explaining the allocation. Dr Peter Todd, a fisheries scientist and a Crown witness, presented helpful evidence on the eel population and traditions still adhered to in the catching of the tuna. Both Dr Todd and Ronald Little spelt out the environmental problems facing Wairewa. The water is highly eutrophic and at certain times has toxic algae blooms that make it dangerous to swim in or for stock to drink. Mr Little outlined the similar deterioration that had occurred to Lake Tutira, just north of Napier, and the management plan successfully designed to arrest degradation in that lake. It required interception and diversion of nutrient-rich incoming waters, isolation of livestock, provision of vegetation buffers around the lake to soak up run-off and forest planting on all slopes leading directly to the lake. Similar action is needed for Wairewa.

Mr Little said that exclusive Maori eeling rights were granted over the lake following submissions by the late Joe Karetai in 1961. The tribunal was also informed that commercial fishing of the tributaries had stopped as a result of the decline in eel population.

The claimants' principal requests concerning Wairewa were:

- a fishing reserve adjacent to the eel drains;
- restriction of commercial eeling;
- consultation and representation on water management bodies;
- access to the lake bed where the eel trenches are located; and
- access to the shingle bank dividing the lake from the sea.

The tribunal deals with the need for consultation and representation on decision-making bodies such as regional water boards in chapter 17. The tribunal found that the failure of the Crown to set aside eeling reserves at the southern end of the lake where the eeling trenches were located was in breach of the Crown's duty to protect Ngai Tahu rangatiratanga under the Treaty. Although Maori have an exclusive eel fishing right on the lake, the tribunal considered this right should have been granted to Ngai Tahu. The tribunal therefore recommended that this error be rectified by amending the regulations so as to limit the use to Ngai Tahu. The tribunal also recommended that all

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commercial eel fishing be prohibited in the waters leading into the lake and the regulations reserving Ngai Tahu rights be amended so as to include those streams.

The tribunal concluded its report on Wairewa by urging that Ngai Tahu should be involved in the investigation and decision-making processes in respect of the water quality of this lake and considered that the Crown through its agencies should provide the resources to save this lake in the same way as recommended for Waihora.

Conservation

During the hearing of mahinga kai evidence the tribunal heard evidence about rules handed down orally over succeeding generations to conserve food resources. These measures were designed, not only to limit the taking and gathering of food, but also to create and develop the resource.

James Russell, one of a number of people who emphasised how the philosophy of conservation was ingrained from these handed-down rules said:

In a historically hand to mouth society, it is difficult to consider anything other than a conservation ethic. Wilful pollution or destruction of a waterway or a food resource would probably have an immediate and significantly detrimental effect on the community as a whole. Consequently, an elaborate set of rules, restrictions and guidelines were enforced, often by means of quasi-religious concepts such as “tapu”, “rahui”, “utu”, and “muru” to ensure that such resources were indeed maintained as appropriate for community needs, resource management, or “rakatirataka” or “kaitiakitaka”. (H8:51)

There is no doubt that Ngai Tahu adhered to strict rules of conduct in which tapu and rahui played an important role. The tribunal was impressed with the restraint shown by almost all of the witnesses as they spoke of their tupuna and of the trust reposed in them to cherish their taonga and to hand them on in good condition.

During the hearing evidence was given that measured the changes in our environment from as far back as 800 AD showing the gradual loss of our forests and the extinction of 40 bird species. The greatest loss had occurred over the past 150 years. The tribunal considered there were ominous signs we had not yet learned from history.

Impact of settlement

Under this heading the tribunal looked at the effect of land settlement of Te Wai Pounamu following the land purchases by the Crown. The tribunal looked in some detail at a number of areas such as deforestation, clearing and drainage of land, water use, the relationship be-

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tween Maori and settler on acclimatisation matters, lack of access to food resources and pollution.

As the evidence unfolded it became clear that the grievances of Ngai Tahu over the loss of their food resources were closely interwoven with, and a consequence of, the development of New Zealand after the arrival of the settlers. Several witnesses described how the loss of traditional food resources and lack of land had contributed to loss of culture.

For some time after settlement began and before pastoral farming got underway, Ngai Tahu continued with their pattern of tribal foraging. Gradually however, land was cleared and livestock introduced. Maori began to understand better the European concepts of property and ownership, as fences and gates were erected and trespass signs appeared. As the forest was cleared for grazing, the consequent run-off of water caused land erosion. The need to cope with resultant flooding led to the introduction of river control techniques with further resultant loss of wetlands, lagoons and waterways which previously provided fish and bird habitats. As the forest disappeared, and the report shows how this took place, so too did mahinga kai. A Crown witness answered a question he had posed himself as to why these things were allowed to happen by saying:

Perhaps the easy answer is that in any developing country with a struggling economy and a rapidly increasing population, an environmental conscience is a bit of a luxury. (P15a:4)

As development proceeded many of the new settlers denied access to Ngai Tahu. A kaumatua giving evidence to the 1891 commission said:

All former sources of food-supply were cut off. If they went fishing they were threatened to be put in jail, and if they went catching birds they were turned off. (H6:32)

Another said:

Some of us were nearly put in gaol for catching wekas on some of the runs . . . All our old mahinga kai are destroyed, and we are left without the means of obtaining the food we used formerly to depend on. (H6:32)

Several witnesses also referred to the restrictive laws and regulations passed by Parliament and spoke of being continually fined for catching salmon. There was direct conflict between Maori and settlers over the use of the rivers as the settlers introduced trout, perch, and salmon, accompanied by new acclimatisation and wildlife regulations.

The development of hydro dams has also resulted in flow diminution in rivers, as has the draw-off of water for domestic, industrial and

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irrigation use. The tribunal visited the central lakes and inspected the hydro schemes.

Electricorp made submissions explaining how the corporation was committed to strict observance of environmental principles and the provision of clean pure water after use for power generation. The corporation gave evidence of its interest in creating fishery and recreational facilities for the public and also gave firm assurances of its desire to have a better consultation process with Ngai Tahu.

It was in the area of pollution that Ngai Tahu grievances were strongly and widely expressed. Witness after witness recounted the sad effect of pollution on mahinga kai. Sewerage disposal, wool scour effluent, dairy factory discharge, aerial spraying and topdressing, farm waste, wastage from forest mills, gold mining rubbish dumps and all kinds of other industrial wastes have all had their effect. Here is what one witness said:

. . . I look at these areas which I have mentioned here in the lakes, the mountains, the rivers, wetland areas, the forests, the estuaries and the sea, with saddened heart and misty eyes, at the rape, pillage and destruction of the national assets of this beautiful land of ours.

Our rivers, lakes and wetlands or what is left of them, most of our wetlands have been drained, nearly all of our rivers have been interfered with, or would meddled with be a better phrase to use at this time. I see raw sewerage, dead livestock, and other obnoxious materials, pouring down our waterways out to the open sea, little wonder that these areas of mahi kai are no longer fit for human consumption.

Our forests, practically nonexistent, and our native timbers, that is the chips, piled up in mountains along the quay sides of our ports awaiting export to foreign parts. I wonder at the mentality of all this carnage.

Is this the heritage that we of this generation are going to bequeath to our future descendants? Who is responsible?

I ask, where is the legislation that should be protecting these environments, and how good is it? (H13:29)

The Crown contended that pollution was of modern occurrence and was a problem facing the whole population. We were told that programmes were being put in place to cope with pollution.

The tribunal did not agree that pollution is of recent origin as there was evidence of pollution from goldmining and sawmilling back in the early settlements. The tribunal agreed there is currently much more active interest in anti-pollution measures and maintenance of water quality. However, there is irrefutable evidence of the damage caused to mahinga kai resources by pollution. Furthermore, there was no doubt in the minds of tribunal members that pollution and all the other consequences of land settlement have impacted severely on Ngai Tahu's traditional food resources.

*The Ngai Tahu Report 1991****Ngai Tahu's grievances and the Crown's response***

The claimants' grievances were wide ranging. Mr Temm, counsel for the claimants, argued that Governor Grey was fully aware that the tribe hunted and gathered over a vast area and depended on mahinga kai for their survival. Counsel said that Grey, Eyre and Mantell applied a deliberate policy of leaving as little land as they could so that Ngai Tahu would be encouraged to work for the settlers. He emphasised that mahinga kai were essential, especially fresh water and sea fisheries, and Waihora and Wairewa were also significant areas that had become polluted and over-exploited. He said Ngai Tahu had never been consulted by central or local government and that decisions of those bodies lacked a Maori dimension.

Crown counsel, Shonagh Kenderdine, noted that the only deed in which any reservation of mahinga kai was made was Kemp's. Mrs Kenderdine advanced the following submissions:

- the Crown had no duty to protect mahinga kai because Ngai Tahu had varying definitions of mahinga kai;
- Ngai Tahu were increasingly affected by settlement and their complaints led to the creation of fishery easements in 1868 which fulfilled the Crown's duty under the Treaty;
- that mahinga kai as referred to in the Kemp deed meant "cultivations" and therefore the Crown's duty to reserve and protect related only to "cultivations";
- the claimants had not given full weight to the words "so long as it is their wish and desire to retain the same in their possession" in article 2 of the Treaty;
- Ngai Tahu habits changed after settlement. They had adopted some European foodstuffs and had abandoned or were abandoning mahinga kai;
- the Crown's obligation to preserve and protect applied only to those resources which Ngai Tahu used in years preceding purchase and which they wished to continue using; and
- the claimants had wrongfully sought to protect resources now discarded. This approach denied the dynamics of history and human intervention. Ngai Tahu had moved into European resources and technologies.

The thrust of the Crown's argument, apart from its reliance on the limited meaning of mahinga kai, was that Ngai Tahu had abandoned their traditional resources and had moved voluntarily into a changing society and economy with its new food resources.

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Crown counsel put to the tribunal that there was no ongoing responsibility or need on the Crown's part to protect old food resources and thus no Treaty breach. Counsel did agree however that in Kemp and other purchases Ngai Tahu did not receive sufficient reserves to provide an adequate resource base.

The Crown submitted that those negotiating for the Crown would have restricted the size of the reserves for three reasons:

- the small population size of the tribe;
- the belief that Ngai Tahu would soon be extinct; and
- the belief that Ngai Tahu wished to be, and should be, assimilated.

Counsel said these factors did not excuse the granting of inadequate reserves but they helped to explain it.

The tribunal's conclusions***Omission of mahinga kai from deeds of purchase***

The tribunal rejected the argument that in signing the various deeds of purchase Ngai Tahu were surrendering all future access to their traditional food resources. Lord Normanby issued a clear injunction that the Crown was not to purchase any lands that would be essential or highly conducive to Maori people's comfort, safety or subsistence. Crown officials were aware that Ngai Tahu needed access to these food resources and there was an obligation on them to make adequate provision for Ngai Tahu needs. The tribunal did not accept Ngai Tahu would have entered into the purchase agreements with the understanding they were thereby surrendering their food resources which they needed for subsistence and trade.

Abandonment of resources

The Crown argument was founded on the notion that Ngai Tahu, at the time of signing the deeds, could foresee the future and were prepared to relinquish all but their most important mahinga kai in anticipation of other benefits to come from European settlement. The tribunal found the evidence showed clearly that Ngai Tahu had no such perception or desire. They did not abandon their resources. They were shut out from them by land settlement.

Loss of rangatiratanga

In the report the tribunal found that the Crown had a duty under article 2 to ensure Ngai Tahu were left sufficient land for their present and future needs. It was incumbent on the Crown to set aside specific reserves to protect mahinga kai. It was not only necessary for the Crown to protect the principal food resource areas, it was also the

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duty of the Crown to provide the tribe with extensive land so that Ngai Tahu could adapt to the new pastoral and agricultural economy.

Governor Grey and his negotiators acted contrary to the policy laid down so clearly by Lord Normanby and expressed in article 2 of the Treaty. The lack of an adequate land base left Ngai Tahu a disintegrated tribe without power, without an effective voice, and unable to participate in the political economy of the nation. Ngai Tahu were victims of settlement because it appears it was not intended by the Crown's agents that they should ever have a stake in it.

The tribunal therefore found that the Crown has failed primarily in its duty to set aside a sufficient endowment for Ngai Tahu in the form of land so as to allow not only reasonable access to mahinga kai but also an economic base to meet the new and changing economy. This was a breach of article 2 of the Treaty and Ngai Tahu were detrimentally affected by that breach.

Argument on definition of mahinga kai

The tribunal rejected the Crown's argument that the meaning of mahinga kai was limited to "cultivations". The tribunal concluded that the term had the broader meaning of "places where food was produced or procured" (8.9.12). The Crown argued that if the tribunal accepted the wider definition of mahinga kai, Ngai Tahu had voluntarily abandoned their traditional resources. As already stated, this argument was also rejected by the tribunal as the evidence showed that Ngai Tahu had not chosen to relinquish their food resources. They were effectively excluded from them.

Protection of resources and resource management

Grievance nos 1, 3, 4 and 5 relate mainly to the Crown's failure to protect mahinga kai during the development of the economy after settlement. The tribunal analysed what took place as land development proceeded and concluded that Ngai Tahu were disadvantaged and suffered loss to their mahinga kai as a result of this development.

However the allegations made by the claimants were general in nature. The tribunal found that the acts or omissions of which the claimants complained may have been contributed to by a variety of groups such as farmers, foresters, fishers, miners, contractors as well as citizens, local authorities, commercial and industrial firms. The tribunal was not able to conclude that the Crown has been sufficiently responsible for this loss so as to be held liable for a breach of a Treaty principle, and was not prepared to sustain the grievances as a breach of the Treaty. The tribunal did however conclude that the matters covered in grievances nos 1, 3, 4 and 5 when taken together with the clear breach of article 2 in relation to grievance no 2, added more

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weight to the tribunal's finding that Ngai Tahu mana and rangatiratanga were disregarded by the Crown.

List of findings

In respect of mahinga kai the tribunal found as follows:

- (a) (i) that the Crown failed to make specific reserves to preserve and protect Ngai Tahu's mahinga kai; and
- (ii) that the Crown failed to provide sufficient reserves to allow Ngai Tahu to participate in the developing economy.

As a result Ngai Tahu were deprived of their rangatiratanga guaranteed to them by article 2 of the Treaty.

(b) that the findings in respect of grievance no 2, as given in 8.9.18–21, in relation to the Kemp purchase were confirmed.

(c) that the Crown failed to preserve Ngai Tahu rights to the food resources of Waihora, as required by the terms of the Kemp purchase, and thereby acted in breach of article 2, and the Treaty principle of good faith.

(d) that the Crown failed, as required under article 2, to set aside specific reserves so as to protect Ngai Tahu's right of access to their eel resources at Wairewa.

(e) that the Crown failed to protect Ngai Tahu rangatiratanga under article 2 in that it granted eeling rights at Wairewa to Maori instead of to Ngai Tahu.

(f) that grievances nos 1, and 3–5 (inclusive) as set out in this summary are not sustainable as breaches of the Treaty for reasons given in the main report on mahinga kai in 17.5.5.

List of tribunal recommendations

The tribunal made the following recommendations pursuant to section 6(3) of the Act.

Waihora (Lake Ellesmere)

At the option of the claimants:

EITHER

That the Crown vest Waihora for an estate in fee simple in Ngai Tahu and contemporaneously enter into a joint management scheme with Ngai Tahu which would include such matters as:

- (a) opening the lake to improve the fishery; and

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(b) improving water quality by controlling bird population and use of land margins around the lake, control of lake usage and control of sewage disposal. The joint management scheme binding the Crown to provide financial, technical, scientific and management resources.

OR

That the Crown, in manner similar to the Titi Islands, vest beneficial ownership of Waihora in Ngai Tahu but remain on the title as trustee. The Crown then, in consultation with the beneficial owners, to make regulations for the future control and management of the lake in manner similar to the Titi Islands regulations.

Wairewa (Lake Forsyth)

(a) That the existing fisheries regulations giving Maori exclusive eel fishing rights over Lake Wairewa be amended to substitute “Ngai Tahu” for “Maori” so as to return the rights to the tribe.

(b) That the same regulations be amended to give Ngai Tahu exclusive rights to fish waters leading into the lake and to cancel any other existing licences.

(c) That an area of land be reserved around the eel trenches at the southern outlet which will secure Ngai Tahu rights of access.

(d) That Ngai Tahu in consultation with the Crown and its agencies enter into a joint management scheme to improve the quality of Wairewa with the Crown providing the resources to do this work.

Other recommendations

- That beneficial ownership of the Crown Titi Islands be vested in such persons or bodies as may be nominated by Ngai Tahu and be subject to similar management regime as the beneficial Titi Islands.
- That the question of reserving the pingao plantation for Ngai Tahu on Kaitorete Spit be brought to the notice of the Minister of Conservation for consideration and action.

A Maori perspective in environmental matters

In chapter 17 the tribunal has given its views on four areas of action to improve Maori involvement in environmental matters. They are:

(a) amendment to statutes to ensure that Maori values are made part of the criteria of assessment before the tribunal or authority involved;

(b) proper and effective consultation with Maori before action is taken by legislation or decision by any tribunal or authority;

(c) representation of Maori on territorial authorities and national bodies; and

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(d) representation of Maori before tribunals and authorities making planning and environment changes.

The tribunal emphasised that the most significant area for change is in the field of consultation. In Maori terms consultation advances the well-being of the tribe and the tribunal commented that leaders in local and central government need to recognise that Maori expect to discuss proposals that affect them in their traditional way in a Maori context. The tribunal emphasised the importance of oral examination of issues in the presence of Maori on a marae.

The tribunal commented on several important matters and suggested that explanation, examination and discussion on tribal marae would be much more likely to lead to informed and acceptable decisions.

Future protection of Ngai Tahu mahinga kai: the doctrine of aboriginal title

In the concluding section of chapter 17, the tribunal looks at the need to protect what little of Ngai Tahu land-based mahinga kai as remains. In a later report the tribunal will address the other important area of sea fisheries. Ngai Tahu still continue to gather traditional foods such as puha and watercress, herbs and other flora such as pingao, kuta and harakeke. Trees from the forest such as totara are needed for carving.

The tribunal considers an article by Dr Paul McHugh on aboriginal servitudes in which it was suggested that amendment should be made to the Land Transfer Act 1952 so as to provide a means of protecting customary mahinga kai rights by registration of an interest following an investigation by the Maori Land Court. The tribunal made no recommendation to this effect but expressed interest in a matter which may be subject to later inquiry in the ordinary courts. The tribunal suggested that several existing statutes provide mechanisms for reserving rights and may well be worth investigation by iwi as a means of protecting reserves such as pingao.

The tribunal concluded its report on mahinga kai by expressing the hope that Crown agencies would meet with Ngai Tahu and evolve procedures not only in joint management but also in creating reserves.

2.13 Grievances on Matters After the Purchases

With the Rakiura purchase, Ngai Tahu lost their remaining substantial land mass. Only Ruapuke, Tuhawaiki's island fortress where the Treaty was signed in June 1840, remained untouched by the Crown's purchasing officers. In presenting their claim Ngai Tahu argued that very substantial areas of land, amounting to as much as seven million

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acres, were never purchased by the Crown. This land consists of the “hole in the middle”, the land between the Arahura purchase and the Canterbury plains which the claimants argued was not offered for sale to Kemp, and the area west of the Waiau River in Southland. A large portion of the much smaller Akaroa purchase was also seen as “kahore i hokona”: not sold.

Only in the case of the Akaroa purchase has the tribunal sustained the claim that significant areas of land were not included in the original purchase agreements. At Akaroa the tribunal found that just under 30,000 acres of land, known as the French block, has never been purchased from Ngai Tahu. However in the Kemp and Murihiku purchases, the tribunal, after very careful consideration of the evidence, agreed with the Crown, that the boundaries of these blocks were those defined by the wording of the deeds and the maps which accompanied them. In the Otakou purchase, too, the tribunal has not sustained the claimants’ grievance that tenths should have been provided for Ngai Tahu under the proclamation of March 1844, which generally waived pre-emption.

With the exception of the Kemp deed, where the tribunal has found that the terms of the deed remain substantially unfulfilled to the present day, the deeds generally reflect the agreements reached at the time they were signed. However, the tribunal’s task is not only to examine the terms of these agreements, but to investigate the Crown’s actions in relation to the principles of the Treaty of Waitangi. The reality was that Ngai Tahu’s position in 1864, at the end of the Crown’s purchasing campaign, was in no way compatible with the Treaty’s promise to protect te tino rangatiratanga of Ngai Tahu. Over half of New Zealand’s land area had been owned by Ngai Tahu in 1840, but by 1864, through the deliberate efforts of the Crown’s agents, this once vast territory had been reduced to only 37,492 acres. In the decades that followed their condition deteriorated.

Remaining grievances

Several of the claimants’ grievances referred to events which took place after the purchases and were not covered in the sections of the report which discuss the purchases themselves. These included a grievance relating to the provision of schools and hospitals as part of the Murihiku purchase. The claimants maintained that as part of the purchase price the Crown was obliged to provide a school and hospital in every Ngai Tahu settlement and that it failed to do this (Murihiku grievance no 5). There were several grievances involving land for “landless natives”. In the Kemp purchase the claimants argued that land was provided for Ngai Tahu which was inferior to that made available to Europeans under the Lands for Settlement Acts

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and that none of the land granted was in the Kemp block (Kemp grievance no 11). In the Murihiku and Arahura blocks it was argued that the land involved was insufficient to remedy the landlessness caused by both sales (Arahura grievance no 10 and Murihiku grievance no 9). The claimants also alleged that they were prejudiced by the Crown's premature halting of the work of the Smith–Nairn commission and by the suppression of its evidence (Kemp grievance no 9).

Schools and Hospitals

One of the major areas of concern for Ngai Tahu was the provision of schools and hospitals (Murihiku grievance no 5). This grievance was also applicable to the Kemp purchase. On numerous occasions Ngai Tahu rangatira argued that as they understood it, Crown purchase officers, and in particular Mantell, had promised them a school and a hospital in every kainga, at the time of the sale. They were also adamant that these promises had been crucially important in their finally consenting to these sales. There was no direct contemporary evidence of specific promises being made by Mantell or any other land purchase officer at the time of the Kemp and Murihiku sales. Despite this, the tribunal had little doubt that such promises were made. Mantell later claimed that he had oral instructions from Lieutenant-Governor Eyre to offer such inducement to Ngai Tahu in purchasing their lands. In 1855 Mantell explained that:

Now in making purchases from the natives I ever represented to them that though the money payment might be small, their chief recompense would lie in the kindness of the Govt. towards them, the erection & maintenance of schools & hospitals for their benefit & so on – you know it all. (G2:409)

In the mid-1850s Mantell directly appealed to the British government to have the promises fulfilled, over the heads of the colonial administration and much to the latter's embarrassment. Despite an attempt to play down Mantell's claims, on the part of Donald McLean, the chief land purchase officer, Governor Browne readily acknowledged the link between land sales and the provision of health and educational services:

I am satisfied 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. Nor does it appear to me that the obligation could be less imperative if no promise had ever been made. The difficulty is how to fulfil either the promise or the obligation. (O21:58)

In assessing the nature of these promises the tribunal did not consider it necessary to determine whether they were part of the contractual

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arrangements of the purchases, as argued by the claimants, or “merely general inducements for land selling, which became promises at a later date when the lack of government action in the South Island became apparent”, as argued by the Crown. The tribunal was convinced that given the minimal price paid for the land and the minuscule reserves allowed, that the promises were influential in persuading Ngai Tahu to part with the land.

The claim for schools and hospitals became an essential part of Ngai Tahu’s overall claim for recognition that the Crown had yet to fulfil the terms of the purchases. In 1881 Alexander Mackay was convinced that the Crown had failed to compensate Ngai Tahu for the non-fulfilment of these promises. From the 1840s on the government provided Maori people with some educational facilities, but little found its way to Ngai Tahu. As early as 1847 an education ordinance provided for the establishment of denominational schools for Maori, although these were also to be available for Europeans. However as Dr Barrington pointed out, Ngai Tahu received no benefit from this. From 1852 the provincial governments took control of education, but by 1868 they had provided nothing specifically for Ngai Tahu children. Only in the late 1860s were small portions of funding made available for schools.

In 1861 when Mantell joined the cabinet of William Fox, he did so only after obtaining the government’s agreement to provide some of these services for Ngai Tahu. However ministries in the 1860s were often of short duration and Fox was soon out of office. Mantell’s stint as native minister in 1864 was also short lived. But he was able to influence the terms of the Rakiura purchase in 1864, by ensuring that a third of the purchase price was allocated for schools and other similar purposes.

When in 1867 a Natives Schools Act was passed it allowed for a national system of Maori schools, but left the provision of the land and much of the funding to the Maori communities themselves. Alexander Mackay pointed out that small Ngai Tahu settlements were unable to pay the building, salary and other costs involved. Up until 1867, 20 years after the Kemp purchase, central government had, with the exception of Kaiapoi, failed completely to provide schooling for Ngai Tahu. All through this period and for many decades after, settlers resisted the admission of Maori students into their schools. By 1878 11 schools had been built throughout the South Island, the majority for Ngai Tahu. However the communities involved had been generally required to contribute substantial sums in building and maintenance costs. Ngai Tahu were still being required to pay for new

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buildings at a time when European schools were being provided completely by the government.

The tribunal considered that it was not possible to find the Crown's record in the provision of schools for Ngai Tahu in the three decades following the Kemp and Murihiku purchases as being consistent with good faith and honourable dealing with its Treaty partner.

In providing health services the government moved somewhat earlier with a hospital being built in Dunedin in the 1850s, apparently as a direct response to Ngai Tahu representations. Once taken over by the province in 1856, central government provided minimal financial assistance for Ngai Tahu patients, but Maori soon found themselves unwelcome there and sought their own hospital. From the 1860s a number of medical officers were appointed, largely at Mantell's prompting. Subsidies for doctors to attend Ngai Tahu patients came and went according to the economic circumstances and whims of the various ministries of the day. The Crown's historian, Mr Walzl, concluded that the government's record in the provision of medical care was "woefully inadequate", as it was for education.

Despite coming under the scrutiny of Parliament time and time again, little was done to ensure that the lack of educational and health facilities available to Ngai Tahu was rectified. In 1868 the Ngaitahu Validation Act left open the question of whether any promises of schools and hospitals had been fulfilled by the Crown. So began a long and fruitless series of committee hearings and commissions of inquiry. There were select committee hearings in 1872, Native Affairs Committee hearings in 1875, the Smith Nairn Royal commission in 1879–1880, followed by the 1886–87 Mackay Royal commission, then a joint committee of both Houses of Parliament in 1888 and another in 1889. The inquiries of the 1880s had the same melancholy outcome as those of the 1870s – producing the same sorry history of the failure of successive governments to face up to their obligations and to act in accordance with the principles of the Treaty of Waitangi and the partnership it represents.

The tribunal found that the Crown, in acquiring land from Ngai Tahu, was obliged by the Treaty of Waitangi to conduct its dealings on the basis of sincerity, justice and good faith. Promises made by the Crown's representatives to Ngai Tahu to induce them to sell their lands should have been fulfilled by the Crown, and fulfilled promptly. Good faith, fair dealing and the honour of the Crown required no less. But, as the tribunal believes the evidence overwhelmingly shows, the Crown failed to meet these tests. Intermittent and long-delayed efforts were made partially to meet the Crown's obligations. To this day Ngai Tahu have not been compensated for the failure of the

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Crown adequately to meet its Treaty obligations in respect to the promises of schools and hospitals. In those early years, when the provision of these amenities would have made a significant contribution to the advancement of Ngai Tahu, they were left, over a considerable period, largely neglected and forgotten, or ignored. The tribunal considered that it is not too late for this omission to be repaired. We believe that the remedy proposed as long ago as 1887 by Royal Commissioner Judge Mackay, that a substantial endowment of land be secured to Ngai Tahu, would go far to right so many years of neglect.

Landless natives grants

In 1886 Alexander Mackay was appointed to investigate the extent of landlessness among Maori living in the South Island. Mackay was to identify Maori inadequately provided with land and to recommend what quantities of land should be made available to them and where. Mackay produced a detailed and thorough report which concluded that:

the fundamental principles laid down were not adhered to in acquiring the land in the Middle Island, neither in the reservations of sufficient land for Native purposes, nor in compensating the Native owners for the loss of a large share of their means of subsistence through depriving them of their hunting and fishing rights. (M17:I:doc 1:6)

Mackay recommended that blocks of land be set aside as an endowment for social purposes and land development, free from the “ever-varying influence” of Parliament. Additional blocks of land were recommended to be set aside for individual use. In the Kemp and Murihiku blocks, including Banks Peninsula, Mackay recommended a total of 140,000 acres for endowment and 46,111 acres for individual use. A lack of time made it impossible for Mackay to select the land for specified Ngai Tahu.

The report was coolly received by Parliament. An 1889 joint committee brushed Mackay’s recommendations aside, concluding that further land might be required and called for yet another inquiry into the tribe’s condition. The 1890 joint committee which followed looked at the Otakou tenths claim. Although, unlike Mackay, they were not satisfied that tenths did apply to this purchase, they concluded that the existing reservation of land had been “by no means sufficient”. And again they recommended further inquiry.

In 1891 Alexander Mackay was appointed to identify those Ngai Tahu without sufficient land within the Kemp, Otakou and Murihiku blocks. Ngai Tahu complained to Mackay on numerous occasions that the terms of his commission were too narrow. They wanted to raise again the major issues of the size of the reserves granted and those

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refused at the time of the sale. Mackay reported that 50 per cent of Ngai Tahu had no land and, using 50 acres per head as a measure of sufficient land holdings, only 10 per cent of Ngai Tahu were found to have had sufficient land. He gave a depressing account of the poverty, listlessness and despair amongst Ngai Tahu at the time. Again Mackay reiterated the finding of his 1887 commission that blocks of land of a significant size should be put aside as an endowment and for the use of Ngai Tahu.

In 1893 government finally appointed Mackay and S Percy Smith, the surveyor-general, to complete a list of landless Maori and to assign blocks of land to them. The task of identifying the land holdings of all South Island Maori and allocating interests in the land set aside by the Crown took over a decade, as Smith and Mackay were required to do the work in their spare time. Many of the blocks made available by the Crown, especially those of any size, were remote, inaccessible and unsuitable for occupation or settlement. A total of 142,118 acres were allocated to 4064 people, not all of them Ngai Tahu. The bulk of the land was in Southland, much of it in Southern Fiordland. The South Island Landless Natives Act 1906 formalised Mackay and Smith's recommendations. While there was some suggestion on the part of the native minister, Sir James Carroll that the measure would "clear our consciences and rid the records of any stigma attachable to the reputation of the colony and the Government", he fell short of arguing that the measure was a full and final settlement of the tribe's claims in respect to the Kemp purchase. In 1909 a petition of Tiemi Hipi and 916 others was presented to the House of Representatives. It sought a settlement of its grievances arising from Kemp's purchase and was referred to the government for favourable consideration.

In 1914 Michael Gilfedder and Henry Morpeth Haszard were appointed commissioners to examine complaints that the land awarded under the Landless Natives Act was unsuitable for any practical use by Ngai Tahu. It is apparent from Gilfedder and Haszard's 1914 report that little of the land allocated under the 1906 Act was capable of being farmed, certainly not in sections of up to 50 acres as originally envisaged. Land west of the Waiau River in Southland was wet, inhospitable and inaccessible. Any development required capital, and this Ngai Tahu lacked. Even where land was suitable for farming, the commission recommended that blocks be at least 200 to 500 acres in size. It would have been impossible for anyone to make a living on many of the blocks.

In making findings on this aspect of the claim, the tribunal adopted the conclusions of the Crown's historian, Mr Armstrong. According to Mr Armstrong the Crown was extremely tardy in its attempts to

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“arrive at an almost totally unsatisfactory resolution” to the problem of Ngai Tahu landlessness, and it failed to provide Smith and Mackay with the resources needed for the task. He agreed with Mr Evison, the claimants’ witness, that there was much more suitable land available, noting that between 1893 and 1909, 66 estates were resumed for general settlement at a cost of around £2 million.

The contrast in Crown concern for Europeans with no land or insufficient land is startling. Whereas it was apparently thought impossible for the Crown to re-acquire substantial areas of good quality land adjacent to the places where Ngai Tahu lived on their meagre reserves, it was perfectly feasible for the Crown to purchase over 450,000 acres to facilitate European settlement.

The Crown was well aware by 1904, if not much earlier, that substantial parts of the land to be allocated in Otago and Southland were quite unsuitable for settlement by Ngai Tahu. The tribunal is unable to escape the conclusion that, to appease its conscience, the Crown wished to appear to be doing something when in fact it was perpetrating a cruel hoax. In the tribunal’s view the facts speak for themselves. The tribunal was unable to reconcile the Crown’s action with its duty to act in the utmost good faith towards its Treaty partner. The South Island Landless Natives Act 1906 and its implementation cannot be reconciled with the honour of the Crown. The tribunal found the Crown’s policy in relation to landless Ngai Tahu to have been a serious breach of the Treaty principle requiring it to act in good faith. The breach is yet to be remedied.

Parliamentary select committees, Royal commissions and commissions of inquiry

Between the 1870s and the 1920s Ngai Tahu’s various grievances were time and time again placed before numerous commissions of inquiry, Royal commissions or parliamentary inquiries. These consisted of:

- The Middle Island Native Affairs Committee 1872
- Chief Judge Fenton’s 1876 inquiry
- The Smith–Nairn Royal commission 1879–81
- The Native Affairs Committee 1882
- A parliamentary select committee 1884
- The Mackay Royal commission 1887
- The Joint Committee on the Middle Island Native Claims 1888
- The Joint Committee on the Middle Island Native Claims 1889
- The Joint Committee on the Middle Island Native Claims 1890
- The Mackay Royal commission 1890–91
- The Native Land Claims Commission 1920.

Summary of the Grievances, Findings and Recommendations

Some of these commissions dismissed Ngai Tahu's claims, often after only a cursory examination of the evidence. Others were detailed and comprehensive examinations of aspects of the tribe's grievances. Alexander Mackay's 1887 Royal commission report provided a particularly extensive and thorough investigation of the tribe's concerns. Mackay's recommendation that an additional 186,112 acres be awarded Ngai Tahu, reiterated in his 1891 Royal commission report, led after years of delay to the ill-fated landless natives legislation in 1906. In general however one inquiry simply led to another, and successive governments largely failed to deal with the issues involved.

The demise of the Smith–Nairn commission

The Smith–Nairn commission has featured extensively in this report. Unlike many other inquiries, the commission examined Ngai Tahu eye-witnesses to the land purchases in considerable depth. Although it provided a greatly abbreviated report, this was done only after its funding had been cut off, and before it had heard evidence on some of the matters before it. The claimants argued that the premature halting of the commission's work was to the detriment of Ngai Tahu, and that the evidence of the commission was suppressed. It is clear that the native minister, Bryce, was not well disposed to the commission and that its report virtually sank without trace. But the tribunal was unable to find from the very limited information placed before it that the evidence was suppressed by the Crown and was therefore not able to sustain this grievance.

2.14. Towards a Settlement

In this chapter we have summarised the grievances of Ngai Tahu and the findings of the tribunal on those grievances. In some five areas the tribunal has made recommendations but has deferred the important question of recommending the principal remedial measures until the parties have had an opportunity to study the determinations of the tribunal. The parties will then hopefully negotiate and conclude a final settlement. Where the tribunal has seen a need to recommend an immediate redress then such action is referred to in the section dealing with the grievances both in this summary and in the later detailed examination.

The tribunal in chapter 25 has provided a more convenient summary of the small number of recommendations presently proposed. Reference to that chapter will disclose two further recommendations not raised in this summary. These relate to the making of *ex gratia* payments by the Crown to the Ngai Tahu Maori Trust Board. The tribunal has no power to award costs. In the first recommendation

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the tribunal asks the Crown to grant the sum of \$1 million to the board to fund its negotiations for the claim settlement. In the second the tribunal considered that the Crown should reimburse Ngai Tahu for the \$399,168 costs incurred in the preparation and presentation of the claim.

Although this summary may have given a synopsis of the principal grievances and findings it is important for the reader, as earlier cautioned, to read on and examine not only the detailed report surrounding the actual claims but also the historical background both prior and subsequent to the purchases. The tribunal examines not only the principles which guide its inquiry but also analyses in detail the Crown's response to the Ngai Tahu claims over the long period of time from the purchases to the present day. In chapters 16 and 22 the tribunal provides two overviews which frankly and clearly assess the Crown's overall responsibility first for the purchases as a whole and secondly in responding to the tribe's many calls for redress. These chapters need to be read, as does chapter 23 in which the tribunal reviews evidence placed before it by a number of government departments, state-owned corporations, farming interests and other bodies.

The predominant theme that constantly arises in the findings of the tribunal and indeed almost as constantly conceded by the Crown, is the failure of the Crown to ensure Ngai Tahu were left with ample land for their present and future needs. This finding has required the tribunal in penultimate chapter 25 to postulate how it sees the Crown and Ngai Tahu should approach the question of remedies in the negotiations which will follow the issue of this report. The tribunal, although standing back as requested by the parties from recommendatory action, nevertheless suggests that a practical settlement is likely to be based on a mixed set of remedies and offers some suggestions.

What we are saying here is that although the length of this report may deter, it is necessary to go beyond the summaries in this chapter to gain a balanced view of all the relevant matters which guided the tribunal in making its findings. It should also be noted that the views of a number of persons making submissions will be relevant when remedies are being considered.