TE TAU IHU

O TE WAKA A MAUI

TE TAU IHU

O TE WAKA A MAUI

Report on Northern South Island Claims

VOLUME I

WAI 785

WAITANGI TRIBUNAL REPORT 2008

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

National Library of New Zealand Cataloguing-in-Publication Data

New Zealand. Waitangi Tribunal.
Te Tau Ihu o te Waka a Māui: report on Northern South Island claims.
(Waitangi Tribunal report)
Includes bibliographical references.
ISBN 978-1-86956-294-6
1. Maori (New Zealand people)—New Zealand—
Nelson–Marlborough—Claims. 2. Maori (New Zealand people)—
Legal status, laws, etc.—New Zealand—Nelson–Marlborough.
3. Land tenure—New Zealand—Nelson–Marlborough.
4. Customary law—New Zealand—Nelson–Marlborough.
[1. Mana whenua. 2. Kaitiakitanga. 3. Tiriti o Waitangi.] I. Title.
II. Series.
333.20899944209375—dc 22
www.waitangitribunal.govt.nz
Typeset by the Waitangi Tribunal
Chapter 2 previously appeared as chapter 2 of *Te Tau Ihu o te Waka a Maui: Preliminary Report on Customary Rights in the Northern South Island*,
chapters 3 and 13 previously appeared as chapters 2 and 4 of
Te Tau Ihu o te Waka a Maui: Preliminary Report on Te Tau Ihu Customary Rights in the Statutory Ngai Tahu Takiwa and
chapters 1 to 10 and 12 to 14 previously appeared in *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims (Pre-publication Edition)*
Chapters reprinted with amendments
Published 2008 by Legislation Direct, Wellington, New Zealand
Printed by SecuraCopy, Wellington, New Zealand
12 11 10 09 08 5 4 3 2 1
Set in Adobe Minion Pro and Cronos Pro Opticals

JOHN RANGITIHI RANGIWAIATA TAHUPARAE MNZM

22 MARCH 1939 – 2 OCTOBER 2008

Taku mate, taku mate ki te rōpu tāngata ka ngaro
Pai tō mate, Ka ripitia iho
Hutia ko te punga o te waka
Hapainga ko te hoe; Tupua-horo-nuku, Tupua-horo-rangi
E ai tō mate
Kei waho, kei te moana
Whakangaro atu ai
Hue ha!
Hue ha!

Haere ra e te pūkōrero, kia takahia ai koe ki te ara pōrehurehu
Whakaaokapua tō rere ki te whare o te pō e kāpui ai ō tātou matua.
Inā hoki, piki ake rā ki te tūmahoehoe,
Ki te kahu tāniko o Ranginui.

Kei te māngai, te raukura o te kāhu kōrako, te kiokio o te ihorei
Ko te motu tēnei kei te tangi apakura atu ki a koe.
Ko koe tēnā kua pua ake ki te kōtihitihi o te ngākau tangata, māna te kai auraki.

Whāia te Waha-ā-tai o ngā kāunga, o nga kāhika o tuawhakarere,
Kua whakawhiti atu kōutou ki te ahurewa a Hinengaro
Ki te pae whakairo o ngā tūpuna.

Uhia mai koe e te ao kapua
Puawai ake ki te pua o te rangi.

Tēnei te tangi maioha atu ki a koe, e Koro.

Mātū atu
Tē hoki mata mai

E moe!

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18 September 2008

E te Minita Māori

Tēnā koe e te rangatira

Kei roto i tēnei rīpoata ko te katoa me te whakamutunga o a mātou kōrero mo ngā take e pa ana ki ngā iwi o te Tau Ihu o te Waka a Maui. He kōrero whakautu i ngā tono o ngā uri o te waka Kurahaupō ara i a Rāngitane, a Ngāti Apa me Ngāti Kuia tae atu ki ngā iwi i heke ngātahi ai mai i ngā rohe o Kawhia me Taranaki ara i a Ngāti Toa Rangatira, Ngāti Rārua, Ngāti Koata, Ngāti Tama me Te Ātiawa. He maumahara hoki ki a rātou mā, na rātou i kōkiri te kaupapa nei mai i tērā rau tau neke atu ki muri. Tēnei te tangi mihi ake ki a rātou mā o ngā whare tapu, ngā whare whakairo ngā whare maire ngā whare kōrero tae atu ki ngā uri whakaheke e kawe nei i ngā moemoeā a rātou mā.

Tēnei te honore nui kei a mātou e tuku atu nei i tēnei rīpoata ki a koe.

We have the honour of presenting to you our final report on the claims of the iwi and hapu of Te Tau Ihu o te Waka a Maui (the northern South Island). This published version of our final report replaces our earlier preliminary reports and the pre-publication report, which were released in stages to assist negotiations.

In our report, we find that all eight iwi of Te Tau Ihu – Ngati Apa, Rangitane, Ngati Kuia, Ngati Toa Rangatira, Ngati Rarua, Ngati Tama, Te Atiawa, and Ngati Koata – had valid customary rights when the Treaty was signed in 1840. Those rights, and the customary law from which they were derived, were protected and guaranteed by the Treaty. This was acknowledged by the British Government of the day. Despite that acknowledgement, the Crown acquired the great bulk of Te Tau Ihu lands and resources very quickly, without finding out the correct right holders or obtaining their full and free consent. Partly as a result, the Crown's massive purchases of millions of acres were invalid in both British and Maori law, and inconsistent with the Treaty.

In 1847, the Government purchased the Wairau block (around three million acres) from just three Porirua chiefs, chosen by itself, disenfranchising all the other Ngati Toa, Ngati Rarua, and Rangitane people. Also, in 1853, the Government extorted a cession of all Ngati

Toa's interests in the South Island by an unfair manipulation. It then used this cession (the Waipounamu purchase) to obtain the interests of all the other tribes between 1854 and 1856, without their free and full consent. These actions were in plain breach of the Treaty and its principles. As a result, Te Tau Ihu Maori lost almost all of their land by 1860. That loss included a contraction of their customary rights to gather resources and access mahinga kai, which they had never agreed to in any of the purchase arrangements.

We draw your particular attention to the point that one tribe – Ngati Apa – never gave even belated consent to these purchases, nor was it paid or allocated reserves, although the Government was aware of its claims in Te Tau Ihu. It received a tiny reserve much later from the Native Land Court. This tribe has a unique grievance.

The Crown also granted land in Tasman and Golden Bays to the New Zealand Company and its settlers in the 1840s, the Maori title to which had not been extinguished. This was in breach of the Treaty. It happened as a result of the Government's failure to inquire properly into the company's alleged title, a failure which the Crown admitted in our inquiry.

In addition, the Crown paid negligible prices for the vast lands that it claimed to have purchased. Iwi and hapu of Te Tau Ihu were left with insufficient land or resources for either their customary economy or for development in the Western economy. This was a breach of Treaty principles, as was admitted by the Crown. Further, title to the only three large surviving pieces of land – Taitapu, Wakapuaka, and Rangitoto – was individualised by the Native Land Court in the 1880s and then alienated from iwi and from the majority of individual right-holders. Te Tau Ihu Maori were left with tiny, scattered reserves, many in locations or of a quality unsuitable for farming. Even those reserves were eroded, often purchased or taken by the Crown for scenic purposes. Having failed to reserve sufficient land in the first instance, the Crown further failed to protect the reserves from attrition.

For some iwi, financial assistance was available from the Nelson tenths. The tenths' usefulness was reduced, however, because far fewer were created (or retained) than was envisaged. Some of the proceeds were used to pay for services that should have been funded by the State. Perpetual leases limited their income in the twentieth century, with ongoing effects today. Te Tau Ihu Maori had no voice or authority in their management. Also, many individuals lost their shares as a result of compulsory purchase of uneconomic interests. Even so, a substantial estate was returned to the Wakatu Incorporation in the 1970s, and remains a useful cultural and economic asset for Te Tau Ihu Maori today.

We also found that six Te Tau Ihu iwi held customary interests south of the takiwa defined by the Te Runanga o Ngai Tahu Act 1996. On the east coast, Ngati Toa and Rangitane interests overlapped with those of Ngai Tahu. Ngati Toa rights in this area were inadequately inquired into and acknowledged, and Rangitane interests were entirely ignored. Ngati Toa, Ngati Rarua, Ngati Tama, and Te Atiawa interests on the West Coast were inadequately

recognised in the Waipounamu purchase and were not reconsidered during negotiations in respect of the 1860 Arahura purchase. Ngati Apa interests were only belatedly considered during the Arahura negotiations and were never fully inquired into or adequately acknowledged. These historical breaches against Te Tau Ihu iwi continued into the twentieth century when the Crown chose to deal exclusively with Ngai Tahu within the takiwa, at the expense of Te Tau Ihu iwi that also had legitimate rights in the area. We noted that there is nothing in the Ngai Tahu settlement legislation that prevents the Government from considering Te Tau Ihu iwi interests within the takiwa. The legislation is not in itself in breach of the Treaty, rather the breach lies in the way in which the Government has interpreted it. Te Tau Ihu iwi interests were ignored during the negotiation and settlement of the Ngai Tahu claim. The Crown failed to consult adequately with Te Tau Ihu iwi during this process and assets that could potentially have been included in future settlement with Te Tau Ihu iwi were vested in the sole ownership of Ngai Tahu.

All the iwi of Te Tau Ihu suffered prejudice as a result of Treaty breaches. By the end of the nineteenth century, Government officials and commissions of inquiry acknowledged a state of landlessness and poverty in Te Tau Ihu, exacerbated by environmental modification and a loss of access to natural resources. The Government's remedy was the landless natives reserves, rightly called a 'cruel hoax'. In its failure to provide a fair or effective remedy, the Crown breached the Treaty principles of redress and active protection. In the twentieth century, Te Tau Ihu Maori continued to suffer social, economic, and cultural harm from landlessness, poverty, loss of culturally significant resources, loss of language, and loss of opportunities.

In addition to making findings on the historical issues affecting all Te Tau Ihu iwi, we considered a number of specific and contemporary issues. These included the operations of the Resource Management Act 1991, the depletion of customary fisheries and other customary resources, the taking of land for public works, the Crown–Ngati Koata agreement concerning Takapourewa, and others.

We have made a number of recommendations to assist in the removal of prejudice. Those recommendations are summarised in chapter 14 of our report. They include suggested amendments to public works and resource management legislation and policies. We also recommended that the total quantum of financial and commercial redress be divided equally between the eight iwi of Te Tau Ihu.

Finally, we were assisted by a number of key admissions by the Crown. In particular, it conceded that it had failed to inquire properly into customary rights before buying land or confirming the New Zealand Company's title. It also admitted that its governors and officials had acted with a ruthless pragmatism that sidelined the Treaty and deliberately advantaged settlers over Maori. Crown counsel conceded that its purchases of the 1840s and 1850s left Te

Tau Ihu Maori with insufficient land either to farm or to use their customary resources. This foreclosed their options for developing in the new economy, maintaining their customary way of life, or a combination of the two, in breach of the Treaty. The Crown also conceded problems in the implementation of the Resource Management Act 1991, including problems in local body practice and inadequate funding for iwi participation. These and other admissions were helpful in our deliberations.

We are aware that negotiations are now well advanced, and hope that you can finalise an appropriate settlement with Te Tau Ihu Maori, in order to mitigate the prejudice and restore a proper Treaty relationship.

Heoi ano, naku na

W W Isaac
Presiding Officer

ABBREVIATIONS

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

PUBLICATIONS

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

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

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

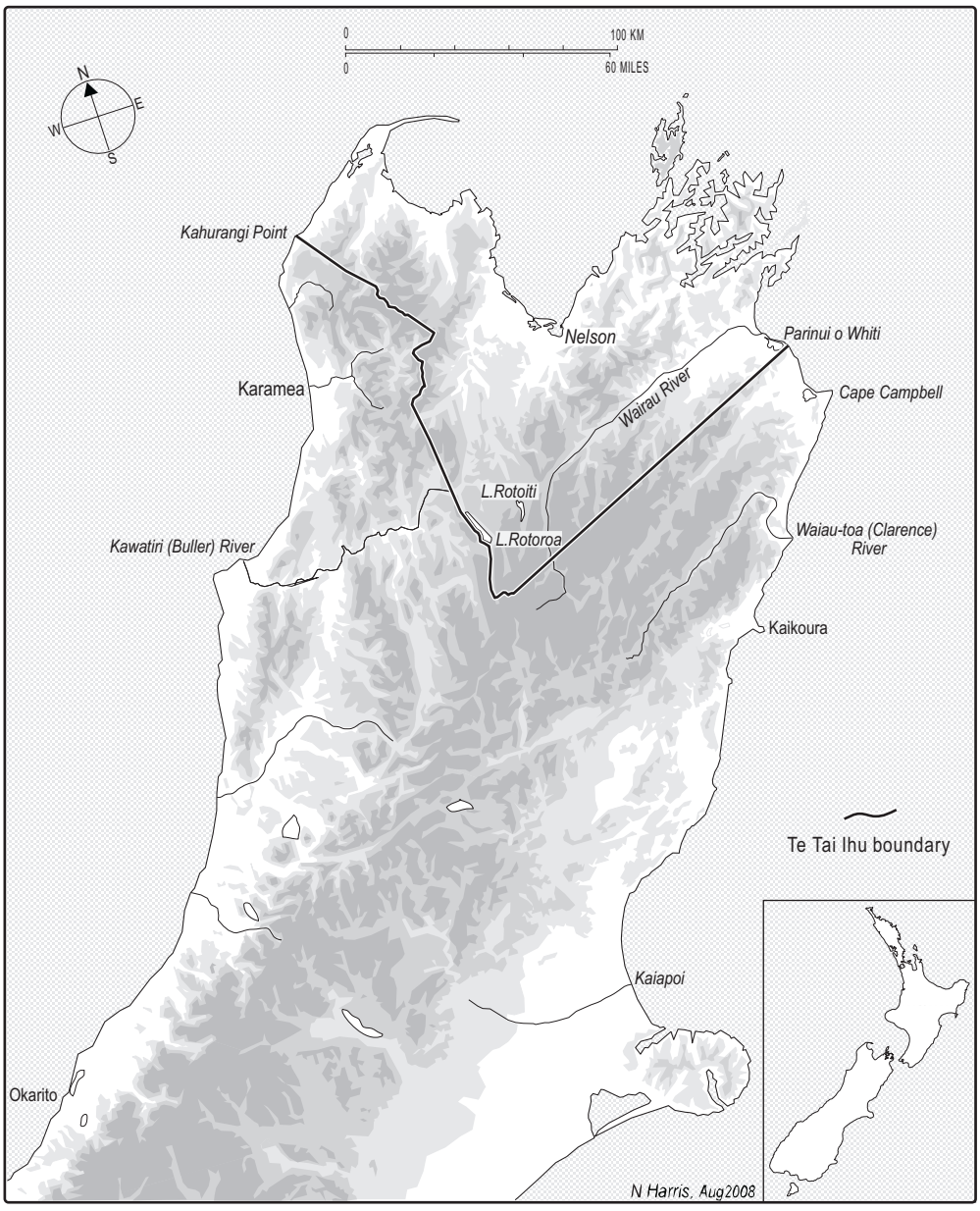

Figure 1: Location map

CHAPTER 1

INTRODUCTION

The iwi, hapu, and whanau of Te Tau Ihu o te Waka a Maui (the northern South Island) have filed some 31 claims with the Waitangi Tribunal alleging that the Crown has breached the Treaty of Waitangi by its actions (or its failure to act) in their rohe, with consequent prejudicial effects. We heard those claims from 2000 to 2004, with interruptions for litigation over our jurisdiction. Settlement negotiations began after our final hearing and, in order to assist those negotiations, we issued two preliminary reports in 2007 on the Crown's actions with regard to the claimants' customary rights.[1] In June 2008, we issued an incomplete pre-publication version of this, our final report, in order to help with negotiations. It dealt with the principal historical claims raised in our inquiry, covering all issues except for those related to natural resources and the environment, but had not been fully edited. This new and final edition of our report replaces the pre-publication version, which should no longer be relied on by parties.

From 1839 to 1842, the New Zealand Company negotiated with certain Maori right holders for the establishment of the Nelson settlement in Tasman and Golden Bays. The Crown's investigation of the company's title and its eventual award of land to the company were major issues for our inquiry. Similarly, the company's scheme of native reserves, the Nelson tenths, generated significant grievances, which were raised in the claims before us. Perhaps most important of all was the Crown's purchase of almost the entire lands of the claimants between 1847 and 1856, which left many in a state of virtual landlessness and enduring poverty, unable to take advantage of the benefits promised by settlement. We also investigated claims about the few pieces of land that survived these vast purchases. There was a further question as to whether customary rights to natural resources had been alienated as part of these 1850s transactions. We addressed that question, and associated claims about customary fisheries, mahinga kai, and other resources. This chapter sets out the process followed in our inquiry and describes the claims that were made to us and the Treaty principles on which we have relied.

1. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Preliminary Report on Customary Rights in the Northern South Island* (Wellington: Legislation Direct, 2007); Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Preliminary Report on Te Tau Ihu Customary Rights in the Statutory Ngai Tahu Takiwa* (Wellington: Legislation Direct, 2007)

1.1

1.1 The Te Tau Ihu Inquiry

The tangata whenua call the northern South Island by the name of Te Tau Ihu o te Waka a Maui. This name commemorates the fishing up of the North Island by Maui from his canoe (the South Island) and refers to the prow (te tau ihu) of the canoe (o te waka) of Maui (a Maui).[2] In this report, we have used the name 'Te Tau Ihu' for our northern South Island inquiry district, which constitutes the region north of the statutorily defined Ngai Tahu takiwa (see fig 1). Maori iwi, hapu, whanau, and individuals of that district have filed 31 claims, which overlap with each other in terms of geography, common actions of the Crown and their effects, and iwi rohe. These claims were grouped together for concurrent inquiry by the Tribunal.

Under the Treaty of Waitangi Act 1975 and its amendments, we have the task of conducting an inquisitorial process to ascertain whether certain acts or omissions of the Crown have breached the principles of the Treaty of Waitangi. If we find that Treaty breaches have taken place, we must then determine whether the claimants have suffered prejudice. If we find the claims to be well founded and the claimants to have been prejudiced, we may then make recommendations for the removal of the prejudice and the prevention of its recurrence. This process is dedicated to healing the nation's past and restoring the Treaty relationship between the Crown and Maori.

The Crown acknowledged in our inquiry that it had breached the Treaty in respect of some of the claims made by the Te Tau Ihu tribes, and that appropriate redress should be negotiated in those cases. In particular, the Crown conceded that it had failed to inquire properly into customary rights before buying land or confirming the New Zealand Company's title. It also admitted that its governors and officials had acted with a ruthless pragmatism that sidelined the Treaty and deliberately advantaged settlers over Maori. As a result, the Crown's purchases left Te Tau Ihu Maori in poverty, with insufficient land for them to farm or to use their customary resources, thus foreclosing their options either to develop in the new economy or to maintain their customary way of life. These admissions were helpful in our deliberations.

1.2 Treaty Principles

The Waitangi Tribunal evaluates claims in light of both the plain meaning of the terms of the Treaty and the overarching principles which arise from the Treaty relationship forged between the Crown and Maori in 1840. The articles and principles of the Treaty have been

2. Hilary Mitchell and Maui John Mitchell, 'A History of Maori of Nelson and Marlborough', 2 vols, report commissioned by Te Runanganui o te Tau Ihu o te Waka a Maui, 1992 (doc A9), vol 1, pp 1-4–1-6

explained in detail in previous reports of this Tribunal and, without duplicating their detailed explanations here, we rely on those reports.

For our Te Tau Ihu inquiry, we note that many of the key actions of the Crown that are now the subject of claims took place very close in time to the signing of the Treaty. The contemporary instructions of Lord Normanby and other British secretaries of state, the public statements and promises of governors and Crown officials, and the public statements of New Zealand Company directors and officials are all relevant to how we have interpreted the principles of the Treaty. We assess these early, publicly promulgated standards of official behaviour, and how they relate to our understanding of the Treaty, in later chapters.

It would, however, be a mistake to assume that those early statements and promises were forgotten in later times. In chapter 11, we note that commissions of inquiry reminded Parliament in the 1880s and 1890s of the undertakings of Normanby, Earl Grey, and Governor Grey. The historical memory and significance of these things persisted into the twentieth century. As the central North Island Tribunal notes, Sir James Carroll made the following statement to Parliament in 1913:

> All Governments saw the wisdom – though the present Government fail to see any – of reserving Native Lands for their present and future maintenance. It was a cardinal policy, and, furthermore, it was an obligation cast upon all Governments, on an understanding with the Imperial authorities when the Constitution was granted to this country, that the Maori should be protected against the utter deprivation of his lands. The Imperial authorities had the administration of Native affairs before we got our Constitution, and would not hand them over until it was thoroughly recognized that every care would be taken of the Natives, and their affairs and their interests, by the Government of the country.[3]

In this introductory section, we give a brief description of the Treaty principles that will be further explained and relied upon in our report.

1.2.1 Partnership

In the words of the president of the Court of Appeal, 'the Treaty signified a partnership between the races' and each partner had to act towards the other 'with the utmost good faith which is the characteristic obligation of partnership'.[4] The obligations of partnership included the duty to consult Maori and to obtain the full, free, and informed consent of the correct right holders in any transaction for their land.

3. Sir James Carroll, 28 November 1913, NZPD, 1913, vol 167, p 428 (Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 2, p 430)
4. *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, 665 (CA)

1.2.2 Reciprocity

Above all, the partnership is a reciprocal one, involving fundamental exchanges for mutual advantage and benefits. Maori ceded to the Crown the kawanatanga (governance) of the country in return for a guarantee that their tino rangatiratanga (full authority) over their land, people, and taonga would be protected. Maori also ceded the right of pre-emption over their lands on the basis that this would be exercised in a protective manner and in their own interests, so that the settlement of the country could proceed in a fair and mutually advantageous manner.[5]

1.2.3 Autonomy

As part of the mutual recognition of kawanatanga and tino rangatiratanga, the Crown guaranteed to protect Maori autonomy, which the Turanga Tribunal defined as 'the ability of tribal communities to govern themselves as they had for centuries, to determine their own internal political, economic, and social rights and objectives, and to act collectively in accordance with those determinants'.[6] Inherent in Maori autonomy and tino rangatiratanga is the right to retain their own customary law and institutions and the right to determine their own decision makers and land entitlements.

1.2.4 Active protection

The Crown's duty to protect Maori rights and interests arises from the plain meaning of the Treaty, the promises that were made at the time (and since) to secure the Treaty's acceptance, and the principles of partnership and reciprocity. The duty is, in the view of the Court of Appeal, 'not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable', and the Crown's responsibilities are 'analagous to fiduciary duties'.[7] Active protection requires honourable conduct by, and fair processes from, the Crown, and full consultation with – and, where appropriate, decision-making by – those whose interests are to be protected.

1.2.5 Options

The Treaty envisaged a place in New Zealand for two peoples with their own laws and customs, in which the interface was governed by partnership and mutual respect. Inherent in the Treaty relationship was that Maori, whose laws and autonomy were guaranteed and

5. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 2, pp 238–245

6. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, p 113

7. *New Zealand Maori Council*, p 665

protected, would have options when settlement and the new society developed. They could choose to continue their tikanga and way of life largely as it was, to assimilate to the new society and economy, or to combine elements of both and walk in two worlds. Their choices were to be free and unconstrained.[8]

1.2.6 Mutual benefit

When the Treaty was signed, both settlers and Maori were expected to obtain or retain the resources necessary for them to develop and prosper in the new, shared nation state. As we shall see, Lord Normanby's instructions (and those of the New Zealand Company to its agent) stated that the true payment for Maori who parted with land would be the rise in value of what they retained, which would enable them to participate fully in the benefits of settlement. The colonisation of New Zealand was thus to be for the mutual benefit of both Maori and settlers, and the retention of sufficient Maori land and resources was acknowledged as a critical factor in achieving that.[9]

1.2.7 Equity

The obligations arising from kawanatanga, partnership, reciprocity, and active protection required the Crown to act fairly to both settlers and Maori – the interests of settlers could not be prioritised to the disadvantage of Maori.[10] Where Maori have been disadvantaged, the principle of equity – in conjunction with the principles of active protection and redress – requires that active measures be taken to restore the balance.

1.2.8 Equal treatment

The principles of partnership, reciprocity, autonomy, and active protection required the Crown to act fairly as between Maori groups – it could not unfairly advantage one group over another if their circumstances, rights, and interests were broadly the same.[11]

1.2.9 Redress

The Tribunal, in its *Report on the Crown's Foreshore and Seabed Policy*, found:

8. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 195

9. Waitangi Tribunal, *He Maunga Rongo*, vol 3, pp 891–899, 909–914. For Lord Normanby's instructions to Hobson and the company directors' instructions to Colonel Wakefield, see chapters 4, 5, and 9.

10. Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), pp 61–64

11. Waitangi Tribunal, *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wellington: Legislation Direct, 2004), pp 24–25

> Where the Crown has acted in breach of the principles of the Treaty, and Maori have suffered prejudice as a result, we consider that the Crown has a clear duty to set matters right. This is the principle of redress, where the Crown is required to act so as to 'restore the honour and integrity of the Crown and the mana and status of Maori'. Generally, the principle of redress has been considered in connection with historical claims. It is not an 'eye for an eye' approach, but one in which the Crown needs to restore a tribal base and tribal mana, and provide sufficient remedy to resolve the grievance. It will involve compromise on both sides, and, as the Tarawera Forest Tribunal noted, it should not create fresh injustices for others.[12]

We note that, where well-founded grievances have been drawn to the Crown's attention in the past, and it has acknowledged those grievances and attempted remedies – as in the case of 'landless natives reserves', addressed in chapter 7 – we will assess such remedies in light of the principle of redress. In the view of the Privy Council, where the Crown's own actions have contributed to the precarious state of a taonga, there is an even greater obligation for it the Crown to provide generous redress as circumstances permit.[13]

1.3 The Te Tau Ihu Inquiry Process

1.3.1 Background to the inquiry

In August 1987, the interim committee of the Kurahaupo Waka Trust submitted a claim to the Waitangi Tribunal on behalf of Rangitane and other Kurahaupo iwi (Wai 44). This claim was filed as a cross-claim to the Ngai Tahu claim (Wai 27), which was then being heard by the Tribunal.[14] The Tribunal decided in June 1988 that Wai 44 would be treated 'as a claim in its own right' and would be heard 'in due course on its own, after resolution of any boundary issues'.[15]

Discussions were also taking place at this time between Rangitane, Ngati Kuia, Ngati Koata, Ngati Rarua, Ngati Tama, Te Atiawa, Ngati Apa, Ngati Toa, and Ngati Waikauri, which led to the formation of Te Runanganui o te Tau Ihu o te Waka a Maui. In April 1989, the runanganui submitted a claim (Wai 102) to the Tribunal concerning historical issues involving land in Te Tau Ihu. In accordance with the runanganui's intention that its

12. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004), pp 134–135

13. Waitangi Tribunal, *The Radio Spectrum Management and Development Final Report* (Wellington: GP Publications, 1999), pp 32, 44, 68; see also Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, p 29

14. Waitangi Tribunal, direction registering claim Wai 44, 11 August 1987 (paper 2.3); Waitangi Tribunal, memorandum concerning filing of cross-claims in respect of Arahura blocks, 11 August 1987 (paper 2.4); Waitangi Tribunal, memorandum concerning hearing of cross-claims, 25 August 1987 (paper 2.5)

15. Waitangi Tribunal, direction concerning interim decision on Kurahaupo claim, 26 November 1987 (paper 2.7); Waitangi Tribunal, direction concerning Kurahaupo claimants seeking submissions on procedural questions, 23 June 1988 (paper 2.8)

constituent iwi would 'in due course identify specific claims for their own iwi', all but Ngati Waikauri eventually submitted discrete claims.[16]

In July 1991, Judge James Rota was appointed as the presiding officer to hear these claims.[17] At his first conference in September 1991, Judge Rota drew upon the Maori Appellate Court's 1990 definition of Ngai Tahu's takiwa to establish a southern boundary for the inquiry. The appellate court's ruling was subject to a judicial review by some of the Te Tau Ihu claimants, and Judge Rota directed that the Tribunal would focus on claims north of this line while that litigation was underway.[18]

Some research was commissioned following the 1991 conference, but a full programme, largely commissioned by the Crown Forestry Rental Trust, did not begin until 1996. A casebook of research was completed to the level necessary for hearing by 2000.

In 1993, Judge Rota was appointed to the District Court and could not continue as presiding officer. With the casebook nearing completion, Judge Wilson Isaac was appointed presiding officer on 12 May 1999. On 27 August 1999, Roger Maaka, Pamela Ringwood, Professor Keith Sorrenson, and Rangitihi Tahuparae were appointed to the Te Tau Ihu Tribunal.[19] Mr Maaka subsequently stepped down from the inquiry on 24 May 2003, at which date John Clarke was appointed to the panel.[20]

1.3.2 Procedure

The 31 claims relating to Te Tau Ihu o te Waka were consolidated under the administrative claim number Wai 785. This regional grouping of claims followed the Tribunal's 'casebook' method of inquiry, under which claims within a geographic district are heard concurrently. Relevant research reports are compiled in a casebook, and hearings commence once the casebook is assessed to form a sufficient basis for an inquiry.

Professor Sorrenson approved the Te Tau Ihu casebook on 3 July 2000, following which plans were formulated for hearing the claims.[21] The claimants indicated that they wished

16. Waitangi Tribunal, direction concerning interim decision on Kurahaupo claim, p 4; Frank McDonald and others, claim Wai 102 concerning Te Runanganui te Tau Ihu o te Waka a Maui, 27 April 1989 (claim 1.3). Ngati Waikauri descend from Waikauri, daughter of Toa Rangatira, who married Koata's son, Kawharu Te Kihi: Te Utauta Hau, brief of evidence on behalf of Ngati Toa, 9 June 2003 (doc P16), p 14.

17. The claims submitted by this date were the overarching claim (Wai 102), Rangitane's claim (Wai 44), and Ngati Toa's claim (Wai 207). The latter was included only in so far as it related to South Island interests: Waitangi Tribunal, direction appointing Judge James Rota presiding officer for claim Wai 102, 11 July 1991 (paper 2.27).

18. Waitangi Tribunal, direction appointing Judge Rota; Waitangi Tribunal, memorandum following 20 September 1991 preliminary conference, 14 November 1991 (paper 2.31)

19. Waitangi Tribunal, directions appointing Judge Wilson Isaac presiding officer, consolidating claims, and establishing combined record of inquiry for northern South Island claims, 12 May 1999 (paper 2.1); Waitangi Tribunal, direction constituting northern South Island Tribunal, 27 August 1999 (paper 2.89)

20. Waitangi Tribunal, direction removing Roger Maaka from, and appointing John Clarke to, northern South Island Tribunal, 24 May 2003 (paper 2.599)

21. Waitangi Tribunal, memorandum following 27 June 2000 telephone conference, 3 July 2000 (paper 2.120); counsel for Wai 594, memorandum concerning venue and timetabling, 28 July (paper 2.125)

to proceed under separate iwi banners, although the umbrella claim, Wai 102, remained as part of the Te Tau Ihu inquiry.[22] On the basis of their readiness to proceed, Ngati Rarua were allocated the first two weeks of hearing, proposed for August and October 2000.[23]

To facilitate an efficient hearing process, the Te Tau Ihu Tribunal required claimants to submit particularised statements of claim and the Crown to submit statements in response at set dates prior to hearing.[24] It was intended that this would provide the Tribunal with a detailed account of the issues pertinent to each claim and the Crown's view on those issues. This would enable all the parties and the Tribunal to focus on key issues during the hearings and to identify those that were in dispute.

This procedure was only moderately successful because the Crown would not provide a full statement of response to the individual iwi, preferring to file a broad statement of 'issues of relevance for the Crown in respect of the entire inquiry'.[25] The Crown also stated its preference not to give a full exposition of its position until all claimant evidence had been heard.

Another significant issue that we faced was Ngai Tahu's role in the inquiry and their challenge to the Tribunal's jurisdiction to hear claims south of the (by this time) statutorily defined boundary. This issue is covered in chapters 3 and 13, and we elaborate no further on it here.

1.3.3 The hearing process

Set out in table 1 is a schedule of the hearings undertaken in this inquiry.

1.4 The Inquiry District

The hearings focused on issues pertaining to land within Te Tau Ihu, but the inquiry was not exclusively contained within these boundaries. The hearings also considered the claims of a

22. Pene Ruruku, letter concerning status of claim Wai 102, 10 June 1999 (paper 2.79); John Mitchell, letter concerning status of claim Wai 102, 10 June 1999 (paper 2.80); Waitangi Tribunal, direction following 17 June 1999 conference, 23 June 1999 (paper 2.85); chairperson of Ngati Rarua Iwi Trust, letter clarifying Ngati Rarua's representation and status of claim Wai 102, 29 June 1999 (paper 2.86); chairperson of Te Atiawa Manawhenua ki te Tau Ihu Trust, letter requesting claim Wai 102 be retained, 28 August 1999 (paper 2.90); counsel for the Ngati Tama Manawhenua ki te Tau Ihu Trust, memorandum requesting claim Wai 201 be retained and giving notice of intention to file amendment to claim, 30 August 1999 (paper 2.91); counsel for Wai 723, memorandum concerning casebook deadline, report confidentiality, and claim Wai 102, 18 February 2002 (paper 2.102); counsel for Wai 207, memorandum concerning Wai 207 position in relation to claim Wai 102, 20 March 2000 (paper 2.105A)

23. Waitangi Tribunal, memorandum following 27 June 2000 telephone conference; counsel for Wai 594, memorandum concerning venue and timetabling, 28 July (paper 2.125)

24. Waitangi Tribunal, memorandum following 27 April 2000 pre-hearing conference, 4 May 2000 (paper 2.117)

25. Crown counsel, memorandum in response to amendment to claim Wai 594, 28 July 2000 (paper 2.124)

Hearing		Venue	Date
1.	Ngati Rarua	Wesley Centre, Blenheim	21–25 August 2000
	Six-month gap following Ngai Tahu's challenge to the Waitangi Tribunal's jurisdiction		
2.	Ngati Rarua	Motueka War Memorial	12–16 February 2001
3.	Ngati Koata	Whakatu Marae, Nelson	26 February – 2 March 2001
	A gap of 15 months for litigation to resolve the question of the Tribunal's jurisdiction, after which the Tribunal decided to hear generic issues of relevance to all iwi before resuming its iwi-specific hearings		
4.	Generic hearing	Nelson	10–14 June 2002
		West Plaza, Wellington	25–26 July 2002
5.	Generic hearing	Nelson	24 September 2002
6.	Te Atiawa	St Thomas Church, Motueka	9–13 December 2002
7.	Te Atiawa	Te Atiawa Marae, Picton	27–31 January 2003
8.	Generic issues and whanau claims	Seifrieds Winery, Nelson	17–19 February 2003
9.	Ngati Tama	Pohiaka Hall, Takaka	16–21 March 2003
10.	Ngati Kuia–Ngati Tutepourangi	Seifrieds Winery, Nelson	6–11 April 2003
11.	Rangitane	Rangitane Runanga, Grovetown	5–9 May 2003
12.	Ngati Apa	Omaka Marae, Blenheim	26–29 May 2003
13.	Wakatu Incorporation	Seifrieds Winery, Nelson	11–13 June 2003
14.	Ngati Toa Rangatira	Takapuwahia Marae, Porirua	23–27 June 2003
			22 July 2003
15.	Te Tau Ihu claims inside the statutory Ngai Tahu takiwa	Brancott Winery, Blenheim	5–8 August 2003
16.	Ngati Awa and whanau claims	Seifrieds Winery, Nelson	25–26 August 2003
17.	Ngai Tahu	Omaka Marae, Blenheim	13–17 October 2003
18.	Crown	Whakatu Marae, Nelson	17–20 November 2003
19.	Closing submissions	Rutherford Hotel, Nelson	23–26 February 2004
		West Plaza, Wellington	1–3 March 2004
			4 March 2004

Table 1: Schedule of hearings

number of the iwi of Te Tau Ihu within the Ngai Tahu stautory takiwa (see fig 1). Events in the lower North Island, particularly those involving Ngati Toa, significantly affected developments in Te Tau Ihu in the 1840s and 1850s, and it was therefore important for the Tribunal to develop an understanding of this context. Such an understanding was especially relevant for the inquiry into the New Zealand Company transactions and mid-nineteenth century Crown purchases. Lower North Island issues, however, were not the focus of this inquiry

and have been, or will be, considered in other inquiries. The Tribunal's *Te Whanganui a Tara me ona Takiwa* report addressed claims relating to the Wellington district.[26]

A number of the iwi with claims in Te Tau Ihu have also lodged claims with respect to interests in the North Island. With the exception of Ngati Toa, these claims are distinct and separate from claims within the South Island.

1.5 The Claims

1.5.1 The pan-iwi claim, Wai 102

As outlined at section 1.3.1, Te Runanganui o te Tau Ihu o te Waka a Maui represented the collective claim on behalf of iwi with interests in the northern South Island and coordinated the various iwi claims in anticipation of iwi setting up their own discrete claims.

This overarching claim concerns the Crown's investigation of customary interests, Crown purchasing, the retention of sufficient land and resources, and the impact of legislation (most particularly that relating to the Native Land Court).[27]

1.5.2 Iwi claims

The Maori iwi and hapu of Te Tau Ihu have described their identity in the following terms:

- Rangitane, Ngati Apa, and Ngati Kuia are descendants of the captain and crew of the Kurahaupo waka. They were the tangata whenua of Te Tau Ihu in the 1820s and 1830s, when the Kawhia–Taranaki tribes migrated to the district.
- Ngati Toa Rangatira, Ngati Rarua, Ngati Koata, Ngati Tama, and Te Atiawa migrated to Te Tau Ihu in the 1820s and 1830s from their original rohe in the Kawhia and Taranaki districts. Some have affiliations to the Tainui waka, others to the Tokomaru waka. Ngati Koata settled as a result of a tuku from Tutepourangi, an ariki of the Kurahaupo tribes. The other northern iwi migrated after a series of battles and victories, and settled alongside Ngati Koata and the defeated Kurahaupo peoples.

There has been intermarriage between all eight iwi, and they are bound together by whakapapa, co-residence, and overlapping customary rights. One registered claim, Wai 102, was presented on behalf of all of them to ensure that all descendants of the eight tribes were included in the claims process. In addition, relationships are complex and there is some competition between the iwi, each of which has filed its own overarching claim.

26. Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District* (Wellington: Legislation Direct, 2003)

27. Frank McDonald and others, claim Wai 102

(1) *Rangitane, Wai 44*

With interests that centre on the Wairau and the Marlborough region, Te Runanga a Rangitane o Wairau (Wai 44) claim that the Spain commission's inquiry was inadequate and failed to acknowledge their interests, faults that were replicated in the Crown's Wairau (1847) and Waipounamu (1853–56) purchases. Rangitane state that they were left with inadequate reserves, most notably at the Wairau, which they were not able to manage and control as a tribe and which were not protected from further alienation. Their claim also relates to the Crown's alleged failure to uphold a promise of collateral benefits (such as schools and hospitals), and the loss of customary fisheries and other taonga. They also have specific grievances about the impact of the Native Land Court, the South Island Landless Natives Act 1906, and the Maori Appellate Court decision of 1990.[28]

(2) *Ngati Apa, Wai 521*

The Ngati Apa ki te Waipounamu Trust (Wai 521) claims interests throughout the northern South Island, particularly in the west. Ngati Apa state that the recognition of their interests in the Arahura purchase was inadequate and that their interests were disregarded both by the Spain commission and during the Waipounamu purchase. The claim also concerns the processes of the Native (later, Maori) Land Court and the Maori Appellate Court and the Crown's settlement process with Ngai Tahu. Ngati Apa assert that they were left with inadequate reserves by the Crown's purchasing process and the South Island Landless Natives Act 1906. The claim also encompasses social, health, and economic issues and issues surrounding the seabed and marine farming.[29]

(3) *Ngati Kuia, Wai 561*

Ngati Kuia claim interests over much of Te Tau Ihu, with a primary sphere of influence centring on Tasman Bay and the Marlborough Sounds. Their claim, Wai 561, relates to the alienation of land and other resources by the New Zealand Company and the Spain commission; their exclusion from the Nelson tenths; Crown purchases in the Wairau, Kaikoura, and Arahura; and the Waipounamu purchase. Ngati Kuia claim that they were left with inadequate land and resources. The claim concerns landless natives reserves; the Native Land Court; issues surrounding natural resources and the environment; marine and customary fisheries; and socio-economic and health issues. It also alleges a lack of consultation by the Crown prior to alienating land to overseas investors.[30]

Ngati Tutepourangi, a hapu of Ngati Kuia, submitted a separate but related claim, Wai 829, concerning a lack of sufficient local reserves and the landless native reserves policy,

28. Mervyn Sadd and others, fifth amendment to claim Wai 44, 6 August 1987 (claim 1.1(f))
29. Kathleen Hemi, amendment to claim Wai 521, 9 June 1995 (claim 1.10(a))
30. Peter Hemi and others, second amendment to claim Wai 561, 13 March 2003 (claim 1.11(b))

under which Ngati Tutepourangi were allocated land in Rakiura (Stewart Island). The claim also alleges that the Native Land Court failed to recognise Ngati Tutepourangi's interests in Wakapuaka, Tasman Bay.[31] Wai 829 was heard by the Tribunal alongside Wai 561 in April 2003.

(4) *Ngati Toa, Wai 207*

The Ngati Toa Rangatira claim, Wai 207, extends over both the lower North Island and the northern South Island, including sites of occupation in Cloudy Bay and the Wairau, which Ngati Toa state was their domain in 1840. Ngati Toa claim that the Crown deliberately undermined their authority through the New Zealand Company purchases and the Spain commission, the 1843 Wairau conflict, military action during the 1840s, and Crown purchases in Porirua, the Wairau, and Waipounamu. Other issues encompassed in the claim include the 1880 investigation into the Ngati Toa Trust, the imposition of the Native Land Court, the allocation of interests in the Wellington and Nelson tenths, reserves policy in the Wairau and elsewhere, coastal management and fisheries, environmental issues, public works takings, and socio-economic impacts.[32]

We have not inquired into Ngati Toa's claim outside Te Tau Ihu, and we discuss North Island issues only to the extent that they impacted on Ngati Toa's claim in Te Waipounamu.

(5) *Ngati Koata, Wai 566*

The Ngati Koata Trust claim, Wai 566, is based on a tuku by the Ngati Kuia rangatira Tutepourangi. Ngati Koata's interests focus on Rangitoto ki te Tonga (D'Urville Island) and its islands and land to the south and west of Rangitoto but extend throughout Te Tau Ihu. Ngati Koata claim that they were excluded both from developments in Nelson and from the benefits of settlement. The claim relates to deficiencies in the Spain commission's inquiry, the 'blanket' Waipounamu purchase, and the inadequacy of reserves, which were not protected from alienation. In particular, Ngati Koata point to the loss of Wakapuaka and Rangitoto lands. Their claim also relates to the compulsory taking of Takapourewa (Stephens Island); the loss of access to fisheries; the administration of the tenths estate; and social, economic, and political impacts.[33]

(6) *Ngati Rarua, Wai 594*

Ngati Rarua claim interests in the Wairau, Nelson province, and the West Coast. The Ngati Rarua Trust's claim, Wai 594, concerns the New Zealand Company transactions, the Spain commission, the Crown's Wairau and Waipounamu purchases, and the inadequacy of reserves for development or subsistence. Specific reserves issues involve Taitapu,

31. Te Kenehi Teira and another, amendment to claim Wai 829, 13 March 2003 (claim 1.18(b))
32. Akuhata Wineera and others, fourth amendment to claim Wai 207, 21 May 2003 (claim 1.7(d))
33. James Elkington and others, amendment to claim Wai 566, 10 November 2000 (claim 1.12(a))

Whakarewa, and other Motueka reserves, the Wairau, and the Crown's administration of, and Native Land Court adjudication on, the tenths. The claim also concerns the Wairau development scheme, protective works at the Wairau Valley, and the exclusion of interests on the West Coast through the 1990 Maori Appellate Court decision on the boundary and the Crown's subsequent settlement with Ngai Tahu.[34]

(7) *Ngati Tama, Wai 723*

The Ngati Tama ki te Tau Ihu claim, Wai 723, encompasses the central and western areas of Te Tau Ihu. Ngati Tama's claim is principally founded on developments in the 1840–56 period, including the New Zealand Company transaction, the Spain commission, the alienation and administration of the tenths reserves, Whakarewa, and Crown purchases in the Wairau and Waipounamu. The claim also relates to public works takings; Crown policy on gold and other minerals; the imposition of the Native Land Court; and the losses of customary rights, land, forests, waterways, mahinga kai, te reo, and tikanga. Ngati Tama claim that the Crown failed to ensure the retention of sufficient land. The claim also concerns contemporary resource management and conservation issues and relations with local authorities.[35]

(8) *Te Atiawa, Wai 607*

Te Atiawa claim interests in western Te Tau Ihu and Totaranui (Queen Charlotte Sound). The Te Atiawa Manawhenua ki te Tau Ihu Trust claim, Wai 607, relates to the loss of land and authority through the New Zealand Company transactions and the Spain commission, the tenths, the Nelson settlement, and Crown purchasing. Te Atiawa allege that they were left with insufficient reserves, which were then processed by the Native Land Court, and that public works takings, such as for the Waikawa rifle range, adversely affected them. The claim encompasses contemporary environmental, marine resource, and customary fisheries and socio-economic issues.[36] As we shall see shortly, a number of whanau and specific claims were associated with the Te Atiawa claim.[37]

1.5.3 The Wakatu Incorporation claim, Wai 56

The Wakatu Incorporation claim, Wai 56, was lodged on behalf of 'the descendants of the original owners of the Nelson Tenths Estate'.[38] The claim relates to the alleged failure to fulfil

34. Barry Mason and others, second amendment to claim Wai 594, 7 March 2003 (claim 1.13(b))

35. Janice Manson and others, amendment to claim Wai 723, 13 March 2003 (claim 1.16(a))

36. Jane Du Feu and others, first amendment to claim Wai 607, 8 November 2001 (claim 1.14(a)); Jane Du Feu and others, second amendment to claim Wai 607, 8 November 2001 ((claim 1.14(b)); Jane Du Feu and others, third amendment to claim Wai 607, 14 February 2003 (claim 1.14(c))

37. Specifically, Wai 124, Wai 379, Wai 920, Wai 924, Wai 925, Wai 926, and Wai 927: see Ralph Ngatata Love, Neville Gilmore, and others, amendment to claim Wai 379, 24 January 2002 (claim 1.29(a)).

38. The 1892 definition of ownership awarded beneficial interests to members of Ngati Rarua, Te Atiawa, Ngati Koata, and Ngati Tama.

promises respecting the extent of the tenths reserves, the subsequent erosion of the tenths estate through public works takings and sales, and the failure of legislation to ensure the fulfilment of trusteeship obligations. The Wakatu claim also points to the impact of the perpetual leasing regime and the failure to implement the 1975 royal commission's recommendations for regular rent reviews.[39]

1.5.4 Whanau and specific claims

Wai 104 was filed by the Reverend Harvey Whakaruru. This claim relates to the 1853 endowment of native reserve sections to the Anglican Church for Whakarewa School, allegedly against the wishes of Motueka Maori. The claim also concerns recent activities of the Whakarewa School Trust Board.[40]

The Georgeson whanau, members of Te Atiawa ki Motueka Trust, also submitted a claim relating to Whakarewa School. Wai 1002 concerns the original endowment, the failure to return the land when the school closed in 1881, and the extent of interests divested to Ngati Rarua when land was returned in 1993.[41]

The Ngawhatu Hospital claim (Wai 822), filed by Sharon Gemmell and others, alleges that the Crown's contemporary policy of protecting and recognising sites of significance is flawed and that it was not followed correctly in the sale of the hospital.[42]

The sale was due to become unconditional on 9 November 2001, prior to which the Waitangi Tribunal agreed to convene an urgent hearing to consider whether the sites of significance policy had been correctly implemented.[43] On 30 October 2001, Judge Isaac, Mr Maaka, and Professor Sorrenson were appointed to the Wai 822 Tribunal.[44] Following a teleconference amongst parties, the Crown acknowledged the distress that had been caused to Te Atiawa through the sale of the hospital site and agreed to facilitate discussion between parties. Leave was reserved for claimants to return to the Tribunal if an agreement could not be reached. This did not prove necessary. On 23 October 2002, Crown counsel informed counsel for the Wai 822 claimants about the terms of an acceptable settlement.[45]

The Wai 822 Tribunal did not consider the substantive claim that the sites of significance policy was inherently flawed, and this allegation forms part of our inquiry.[46]

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39. Rore Stafford and another, amendment to claim Wai 56, 17 February 2003 (claim 1.2(a))
40. Reverend Harvey Ruru, claim Wai 104 concerning Whakarewa School, 2 August 1988 (claim 1.4)
41. Gloria Georgeson, amendment to claim Wai 1002, 7 January 2003 (claim 1.31(a))
42. Sharon Gemmell and others, claim Wai 822 concerning Ngawhatu Hospital, 16 November 1999 (claim 1.17)
43. Deputy chairperson, memorandum granting urgency for hearing of claim Wai 822 on papers only, 13 October 2001 (paper 2.278)
44. Deputy chairperson, memorandum appointing members to Wai 822 Tribunal, 30 October 2001 (paper 2.286)
45. Michael Doogan to Kathy Ertel, 23 October 2002 (Wai 822 ROI, paper 2.43)
46. Waitangi Tribunal, memorandum following 1 November 2001 telephone conference, 6 November 2001 (paper 2.289)

Barbara Duggan's claim, Wai 184, concerns the Crown's purchase of Whangarae 1C in 1973.[47]

Wai 220, filed by Robert Hippolite, relates to a public works taking in Whangamoa in 1964.[48]

The Te Kotua Whanau Trust claim, Wai 648, concerns the Spain commission's inquiry into a pre-Treaty transaction between Nohorua of Ngati Toa and Joseph Toms, the ensuing Crown grants and the Crown's alleged failure to recognise Toms' sons as beneficiaries to his estate.[49]

The Stafford whanau claim, Wai 1043, relates to a Maori Land Court decision in 1920 in respect of succession to interests in Wainui sections 13 and 14.[50]

1.5.5 Te Atiawa whanau and specific claims

Wai 379, filed by Ralph Love, Neville Gilmore, and others, is a Te Atiawa claim relating specifically to the Marlborough Sounds and associated area. Wai 379 concerns Crown purchasing, public works and scenic reserves takings, and the loss of access to land and sea resources.[51]

The Tahuaroa whanau claim, Wai 124, concerns a foreshore reserve at Onauku, which the claimants allege is not being properly maintained and protected by the Department of Conservation (DOC).[52]

The Parana whanau claim, Wai 830, concerns occupational reserves at Sandy Bay and Motueka. It relates to the perpetual lease of Sandy Bay section 27 and its subsequent transfer into the Wakatu Incorporation and the alienation of Motueka section 157 through the Maori Trustee.[53]

The Love whanau claim, Wai 851, relates to the Crown's purchase of Waitohi, its alleged failure to protect marine resources, and issues surrounding Waikawa.[54]

Public works takings in Waikawa are the subject of claims filed by Rita Powick (Wai 920), Ngaire Noble (Wai 921), and Laura Bowdler (Wai 927).[55] Wai 924, filed by Victor Keenan,

47. Barbara Duggan, claim Wai 184 concerning Whangarae 1C, 12 December 1990 (claim 1.6)
48. Robert Hippolite, claim Wai 220 concerning Cape Soucis land, 31 March 1987 (claim 1.8)
49. Grace Saxton, amendment to claim Wai 648, 23 July 2002 (claim 1.15(a))
50. Wiremu Tapata Stafford, claim Wai 1043 concerning loss of ancestral land, 12 February 2003 (claim 1.32)
51. Ralph Love, Neville Gilmore, and others, claim Wai 379 concerning Marlborough Sounds and Picton, 24 August 1993 (claim 1.29)
52. Neville Tahuaroa, claim Wai 124 concerning Waikawa lands, 8 February 1990 (claim 1.5)
53. Ngawaina Shorrock, amendment to claim Wai 830, 8 October 2002 (claim 1.19(a))
54. Matthew Love and others, amendment to claim Wai 851, 14 February 2003 (claim 1.20(a))
55. Rita Powick, claim Wai 920 concerning Waikawa block, [2000] (claim 1.21); Ngaire Noble, claim Wai 921 concerning Waikawa 1 block, [2000] (claim 1.22); Laura Bowdler, claim Wai 927 concerning Waikawa Village block, [2000] (claim 1.28)

also concerns public works takings at Waikawa and other places and the Crown's acquisition of scenic reserves.[56]

The Grennell whanau claim, Wai 922, relates to the Maori Trustee's sale of Kuini Watson's land and her enforced separation from her daughters, who were placed with Pakeha families.[57]

The claim by Patrick David Takarangi Park, Wai 923, concerns tenths reserves in Motueka, the impact of rating policies and local government takings, and the return of Whakarewa School land.[58]

Mary Barcello's claim, Wai 925, relates to the Crown's purchase of islands in Anatohia Bay, scenic reserves at Ngaturu and Torea, and the public works taking for the Waikawa rifle range.[59]

Sharon Gemmell's claim, Wai 926, concerns the Maori Land Court's 2000 order concerning Anatohia 90B2.[60]

Wai 956, submitted on behalf of the descendants of the Warren Pahia and Joyce Te Tio Stephens Whanau Trust, relates to succession to shares in the Wakatu Incorporation and in Parinihinihi ki Waitotara (Taranaki).[61]

1.5.5 Claims not reported on here

In February 1995, Edward Chambers submitted a claim on behalf of Ngati Awa (Wai 469), and we heard evidence for it in August 2003. The claim was subsequently removed from the Wai 785 record and the register of claims because we found that the kin group and claim represented in Wai 469 were identical to those represented by the Te Atiawa Manawhenua ki te Tau Ihu Trust. As we stated in our decision of 17 October 2003, 'Our view on Mr Chambers' claim is that there is no distinction between Ngati Awa and Te Atiawa in terms of kin'.

Under section 7 of the Treaty of Waitangi Act 1975, the Tribunal is authorised not to inquire further into a claim if, in its opinion, the subject matter of the claim is trivial; the claim is frivolous, vexatious, or not made in good faith; or an adequate remedy already exists. In our opinion, Wai 469 was trivial and the only difference between Ngati Awa and Te Atiawa was the name. We also considered that there was an existing avenue for an adequate remedy: namely, working 'under the auspices of the claim of the great majority of the

56. Victor Keenan, claim Wai 924 concerning Kinana Waikawa Village, [2000] (claim 1.25)
57. Mabel Grennell, claim Wai 922 concerning taking of land from Kuini Watson and social policy, not dated (claim 1.23)
58. Patrick David Takarangi Park, claim Wai 923 concerning Motueka reserves, 29 September 1999 (claim 1.24)
59. Mary Barcello, claim Wai 925 concerning Anatohia Bay, [2000] (claim 1.26)
60. Sharon Gemmell, claim Wai 926 concerning the Maori Land Court, [2000] (claim 1.27)
61. Mariana Ikin, claim Wai 956 concerning section 38(1) of the Maori Affairs Amendment Act 1967 and section 77 of the Administration Act 1969, 20 July 2001 (claim 1.30)

kin group, Wai 607'.[62] In June 2004, Mr Chambers sought a judicial review of our decision, but this application was dismissed by Justice Wild in his judgment of 30 March 2005.[63]

On 13 March 2003, the Tribunal registered the claim of Te Runanga a Rangitane o Kaituna Incorporation.[64] The Wai 1047 claimants applied to be included in the Te Tau Ihu inquiry, but we declined this application on 20 August 2003, believing that the Tribunal was not the appropriate forum for what we assessed to be an internal mandating dispute. Further, we did not accept that the Wai 1047 claimants had a distinct whakapapa from Rangitane o Wairau (Wai 44).[65] On 3 October 2003, Judge Isaac instructed the registrar to remove the Wai 1047 claim from the register of claims pursuant to section 7(b) and (c) of the Treaty of Waitangi Act 1975.[66]

1.6 The Contents of the Report

We open our report with an examination of the issues surrounding customary rights. In chapters 2 and 3, we provide our interpretation of the customary history and rights of the claimants, as described to us in the evidence of their tangata whenua experts, their historians, and other historians. We outline both our view of customary law as it relates to the rights of conquerors and of still-occupant defeated peoples and our findings as to the nature and distribution of customary rights amongst the claimant iwi. Chapter 2 focuses on rights within the Te Tau Ihu district and chapter 3 considers rights within the statutory Ngai Tahu takiwa.

Chapter 4 considers the New Zealand Company's transaction in Te Tau Ihu and the Crown's response to it. After setting the scene with a discussion of the relations between local Maori and the first Pakeha explorers and settlers, we examine the impact of the arrival of company and Crown representatives in the district. The chapter focuses on the Spain commission's investigation into the company's 1844 transaction.

Chapters 5 and 6 address the issues surrounding the Crown's purchases and its assertion of authority over the region. Chapter 5 looks at the relationship between the Crown and Ngati Toa during the 1840s, the Wairau transaction of 1847, and the Crown grant to the New

62. Waitangi Tribunal, memorandum concerning status of claim Wai 469, 17 October 2003 (paper 2.736); Waitangi Tribunal, memorandum amending 17 October 2003 memorandum, 21 November 2003 (paper 2.736(a))

63. *Chambers v Waitangi Tribunal* unreported, 30 March 2005, Wild J, High Court, Wellington, CIV2004-485-1170

64. Waitangi Tribunal, memorandum directing registration of claim Wai 1047, 13 March 2003 (paper 2.552)

65. Counsel for Wai 1047, memorandum concerning application for hearing time, 28 March 2003 (paper 2.557); Waitangi Tribunal, direction concerning Te Runanga a Rangitane o Kaituna, 20 August 2003 (paper 2.685)

66. Waitangi Tribunal, memorandum directing removal of claim Wai 1047 from register, 3 October 2003 (paper 2.731)

Zealand Company in 1848. Chapter 6 then examines the Crown's purchasing programme in Te Tau Ihu over the following decade.

By 1860, there was little land in Te Tau Ihu still in Maori hands. Chapters 7, 8, and 9 focus on the subsequent history of this land. There were effectively three categories of land in which Te Tau Ihu Maori retained an interest from this date: the 'occupation reserves' (that is, the land which Maori retained as reserves during the Crown purchases of the 1840s and 1850s); land which was not included in the blanket Crown purchases, title to which was defined by the Native Land Court; and the tenths reserve, which originated with the New Zealand Company transaction and which the Crown held in trust for those who had dealt with the company.

Chapter 7 focuses on the occupation reserves, considering their adequacy and their alienation. The chapter discusses the efficacy of the solution to landlessness proposed by the South Island Landless Natives Act 1906. Chapter 8 examines the fate of the land excluded from the blanket purchases and the impact of the Native Land Court on these blocks. In chapter 9, we discuss the tenths reserves, considering the establishment of the tenths trust and the administration of the estate by a succession of authorities, including the Maori Trustee. Chapter 9 also addresses issues surrounding the 1892 Native Land Court case to define beneficiaries to the tenths reserves and the eventual creation of the Wakatu Incorporation.

In chapter 10, we discuss the socio-economic circumstances of iwi in Te Tau Ihu and the Crown's response to these through the late nineteenth and twentieth centuries. Chapter 11 addresses natural resource and environmental issues, while chapter 12 concerns whanau and specific claims not discussed in previous chapters.

Chapter 13 considers the Crown's treatment of Te Tau Ihu Maori's customary rights in the Ngai Tahu takiwa during the Treaty settlement process with Ngai Tahu. We examine the Crown's role in the Maori Appellate Court's definition of the boundary between Te Tau Ihu iwi and Ngai Tahu in 1990, and we consider the Crown's subsequent reliance on this decision in its negotiations and settlement with Ngai Tahu and in the associated legislation, the Te Runanga o Ngai Tahu Act 1996 and the Ngai Tahu Settlement Act 1998.

The concluding chapter, chapter 14, summarises our key findings and outlines our recommendations for the settlement of the claims.

CHAPTER 2

MAORI CUSTOMARY OCCUPATION IN TE TAU IHU

2.1 Introduction

This chapter examines Maori occupation of, and customary rights to Te Tau Ihu. It provides a narrative of the movement of Maori groups into and out of the region and of the interaction between these different peoples (for Maori place names, see figure 2). We discuss different views on the nature of customary title, more especially with reference to the relative importance of ancestral association and conquest. Finally, we reach general conclusions on the rights held by different groups within the inquiry area. Sometimes, 1840 has been taken as the date at which to assess rights in the land. We disagree with that approach and have extended our discussion of custom into the next decade because settlement patterns and rights in the land continued to evolve, and because our knowledge of the district is reliant in part on the records of European observers and officials. Sorting out what was universally accepted custom and what had been modified by the introduction of Western technology, ideas, and laws, after 1840, is one of the purposes of the discussion that follows. The question then arises whether the Crown rightly or wrongly took account of those changes in its dealings with the different groups of Maori living at Te Tau Ihu.

The Tribunal is not, primarily, an arbiter of custom and customary rights, and the various claimant groups were encouraged to come to an agreement amongst themselves as to who held lands in the Te Tau Ihu district and where their rights were situated. In some instances, these issues proved intractable, and they could not be resolved in the customary domain by discussion and agreement of all the parties involved. As a result, the claimants themselves requested the Tribunal to make findings as to the rights held by each different group in the inquiry district. All parties agreed that it was important for the Tribunal to make a clear finding on what customary principles applied and who held rights according to those principles in order to provide certainty in future negotiations with the Crown.[1]

While the Tribunal is not a judge of customary rights per se, it is expected to judge what the Crown's duties were with reference to issues of customary usage and ownership and whether it fulfilled them under the Treaty of Waitangi. We will consider that question in some detail in the following chapters. An understanding of customary issues is, therefore,

1. See counsel for Ngati Rarua, memorandum in response to opening submissions of Crown counsel and Tribunal directions, 19 December 2003 (paper 2.755)

2.1

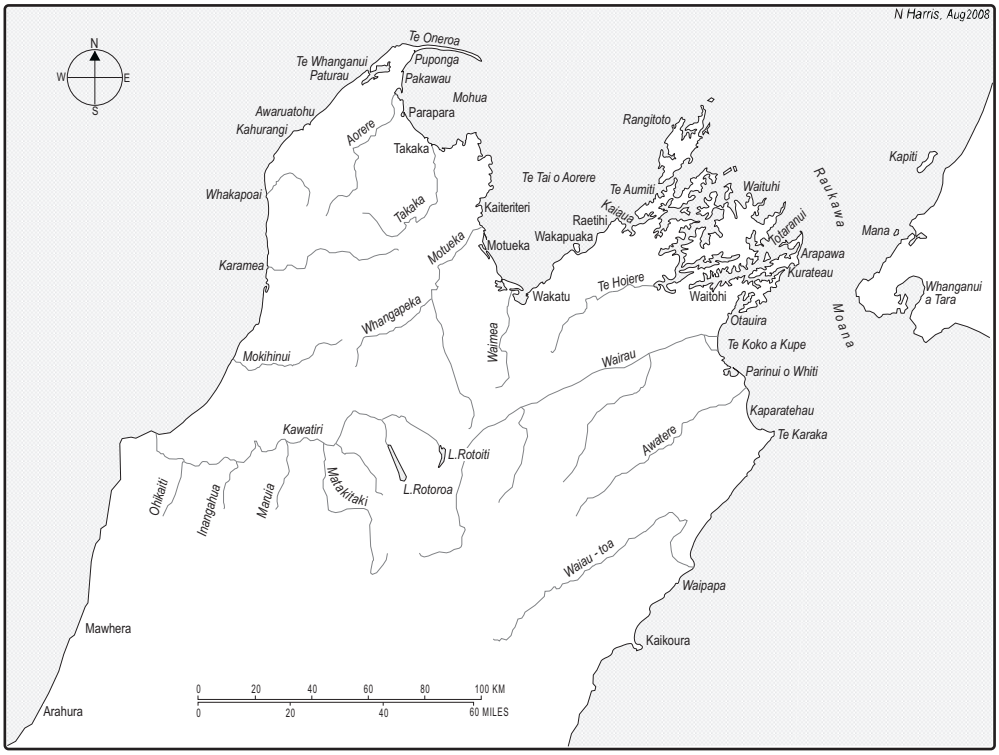

Figure 2: Maori place names

integral to our assessment of Crown actions and the Tribunal is obliged to form an opinion on who held rights in which places at any given time. Our responsibility in this regard is to look at the different evidence and arguments, weigh their merits and their application in the circumstances of our inquiry area, and attempt to describe its customary patterns with as much precision as that evidence permits. Our decisions are informed by evidence of custom; however, they are not bound by that alone. It may be that the Tribunal will decide that the Crown should not have endorsed all aspects of customary usage and that other Treaty principles should have superseded.

Eight different iwi have brought claims within our inquiry district; Ngati Apa, Ngati Kuia, Rangitane, Ngati Koata, Ngati Rarua, Ngati Tama, Ngati Toa, and Te Atiawa.[2] These iwi may be very broadly classified as falling into two different descent categories. The first three iwi mentioned – Ngati Apa, Ngati Kuia, and Rangitane – are, in this report, often described as descendants from the crew of the Kurahaupo waka. This description serves as a kind of short-hand for a complex genealogical history which includes 'original peoples' whom these three iwi had found on their first arrival in Te Tau Ihu in the seventeenth century.

2. The name 'Ngati Awa' was commonly used in the historical record. 'Te Atiawa' became more commonly used in the documentary record from the 1860s onwards. It is the name Te Atiawa call themselves today and for this reason is the one we use in this report. However, some sources quoted in this report do use 'Ngati Awa'.

Their control of the wider Cook Strait (Raukawa Moana) region was disturbed by migrations from the north of Ngati Koata, Ngati Toa, Ngati Rarua, Ngati Tama, and Te Atiawa, who arrived in Te Tau Ihu from the mid-1820s onwards, but more intensively after 1832. These peoples were originally based at Kawhia and Taranaki, and are associated with the Tainui and Tokomaru waka.

In each of these major descent categories, the constituent iwi were closely linked to each other and the inclusive nature of whakapapa does not permit precise, taxonomic definition between the three different Kurahaupo iwi, or the five tribes from Kawhia and Taranaki. It is not always possible to classify rangatira or their people as 'ngati this' or 'ngati that', with exclusivity or any certainty, in the early to mid-nineteenth century.

This is perhaps more particularly the case for the peoples we have loosely described as 'Kurahaupo', whose whakapapa and interests had intertwined over the preceding generations of relatively stable occupation, and who were rendered largely 'voiceless' by their defeat by the northern tribes. That merging of identities (or identification of) Ngati Apa, Rangitane, and Ngati Kuia was further promoted by the need to consolidate their whakapapa lines after their losses during the invasion of their territory in the 1830s, and by subsequent defeats in the Native Land Court in the 1880s. Dismissal of claims under one whakapapa line promoted the use of different iwi descriptions in later cases.[3] All claimant groups emphasise that they have distinct hapu or iwi identities, notwithstanding the close links to others within their respective genealogical lines. Nonetheless, close whakapapa connections, the mobility of population, and the tendency of outsiders to use generic tribal ascriptions of 'Rangitane' or 'Ngati Toa' for people who might more readily identify themselves as 'Ngati Kuia' or 'Ngati Rarua' respectively, often precludes absolute precision when it comes to identification of historical areas of tribal dominance. Indeed, for some claimant groups this is an aspect of their complaint against the Crown – that its failure to properly inquire into and identify who people were, ascribing other tribal names to them, meant that their customary rights were lost to others in particular areas.

Questions of occupation and customary right are particularly important to this inquiry because of the impact of migrations into the district in the 20 years preceding the signing of the Treaty of Waitangi. The story of the migration from the north, resulting in the displacement of the peoples who had been living there at 1820, is inextricably tied to questions of who held rights in the land. This is because of the argument that such rights can only accrue with time and, in the case of this district, that insufficient time had elapsed for these late arrivals to have acquired such rights by 1840. We heard in counter-argument, however, that this is a misrepresentation of the real customary understanding; that rights in the land could exist from the moment of conquest, and thereafter, were only strengthened by occupation. This leads us, in turn, to questions of what constituted a 'conquest', or 'occupation'.

3. See Kath Hemi, brief of evidence on behalf of Ngati Apa, 25 March 2003 (doc N9), p14

Was it necessary to show complete extermination of a people to demonstrate conquest? What acts were required to show occupation and how many years, planting seasons, or even generations had to pass before a migrant people's rights were considered fully established?

The recent migrations to the inquiry district, the impact on occupation patterns, and the questions raised relative to customary practice in such circumstances, create a further series of issues for the Tribunal's consideration. These relate to the use of the year 1840, by a variety of Crown agents and Crown-created bodies, as a date from which to judge rights in the land. We must decide whether the Crown should have adhered to that date as one at which ownership was fairly fixed. In some parts of the country, where settlement patterns had been relatively stable for a number of generations, the idea that the people in possession at 1840 were the 'real owners' is not problematic. But this was not the case at Te Tau Ihu.

The decade prior to the Crown's acquisition of sovereignty was characterised by the displacement (but not entire extinguishment) of one set of tribes by another. The very next decade, however, saw the revival of rights of groups that had been defeated in the battles that had established the *starting point* of the claims of the newcomers. The tribal balance shifted, partly because of the impact of Christianity and Crown policies, and partly because customary rights continued to be worked out on the ground. The passage of time and the conditions of greater peace, which Maori themselves sought to achieve through the acceptance of Christianity and the Treaty, enabled defeated peoples to reassert their rights and the primacy of their ancestral association in lands which they had perforce given over, or shared with, those who had gained control through raupatu. Slaves were released, those who had fled returned, lands were resettled, and some of the migrants departed again. Also, Europeans began to bring their own perceptions and interests to bear upon the customary mix further complicating the picture (of who were the leading rangatira and who was resident in the district, their names and their numbers, what was their status, and what was the nature of their rights).

Part of the problem faced by this Tribunal is deciding at what date we judge custom to apply to our decisions regarding Crown treatment of various Te Tau Ihu iwi. In general, both the Crown and the Native Land Court have set 1840 as the date by which to judge who held rights in the land and thus, the people to whom the Crown held responsibility. Although allowance was made for the peaceful recovery, or creation of rights after the founding of the colony, the bottom line was that the dominant owners at 1840 had to give their consent to any such change. We are not, however, bound by that dictum and may choose to judge customary ownership in wider terms, contemplate the possibility that rights have revived in the face of the opposition of those who were dominant at 1840, and use that date as a marker only. We follow the reasoning of the Rekohu Tribunal in this regard: that to freeze rights at that point prevented the natural emergence of rights as they would have otherwise evolved and was in itself uncustomary. In that Tribunal's view, a more flexible approach,

which looked at competing claims and how their balance had changed over time, would be a closer approximation of what custom was about; that is, an evolving community understanding of what was acceptable and right.[4]

In allowing, however, for the possibility that defeated people retained rights under custom (and that perceptions that all rights were lost on conquest were incorrect), we must make sure that we do not undervalue the rights of newer arrivals to whom raupatu had given the opportunity to develop their own rights and interests in the land. The support of the Rekohu Tribunal for the rights of a 'conquered people' did not extend to a denial of the right of 'conquerors' who had only just arrived before 1840, but remained in occupation thereafter. Their rights also had to be assessed as they had evolved over time.

First, let us turn briefly to the nature of the evidence on which we must base our assessment. The following account of the occupation, taua, and subsequent settlement of Te Tau Ihu is intended to provide a background on which to base an analysis of customary issues. It is drawn from the evidence presented by claimant and independently commissioned witnesses. (The Crown declined to offer evidence on the customary history of the area on the grounds that it did not have the relevant expertise, that rights were in an 'evolving state of flux' at 1840, and that this issue was best dealt with by the claimants themselves.[5]) The evidence presented to us, in turn, represents the oral traditions and assessments of customary rights of different iwi, hapu, and whanau, and has been drawn from a variety of sources:

- the korero of claimants who appeared before us;
- the notes of Crown purchase officers;
- letters from rangatira;
- the testimony of witnesses before the Native Land Court;
- nineteenth-century accounts by European ethnographers, explorers, and scholars (in particular, Stephenson Percy Smith, Alexander Mackay, and Thomas Brunner);
- work by early twentieth-century authors, such as J D Peart and W Elvy, who collected Maori local traditions; and
- research specifically commissioned for this inquiry.

Often there is considerable agreement between sources, but it is also possible for traditions held by different tribal groups to be in disagreement with each other, each sincerely held and yet not always reconcilable. It is not always possible, necessary, or even appropriate to decide which version is right and which is wrong. An important element to consider in the circumstances of our inquiry district is the relative voicelessness of defeated tribes in the early years of the colony. It was only as Europeans began to engage more fully with the local people that their names began to emerge in the written record, where they were

4. Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wellington: Legislation Direct, 2001), pp 131–135

5. See Crown counsel, closing submissions, 19 February 2004 (doc T16), pp 8–16

invariably described as 'slaves', 'vassals', or 'fugitives'. This raises important questions for us to consider. Were those European observations, on which we must now partly rely, distorted by their views about Maori society, that it operated solely on the precept of 'might is right'? Was there a failure to ascertain the views of those considered to be conquered and did this have an impact on our subsequent views on who held ownership? If, in fact, the Kurahaupo people were too frightened to assert their claims in the early years of the colony does this mean that they had lost all rights to their former lands? Conversely, is it possible that the willingness of both Crown officials and former conquerors to make provision for a resurgent people, even though they were thought to be without rights at 1840, has left a false impression as to the reality of their situation under customary law?

A particularly problematic feature of the Te Tau Ihu case is the long delay before detailed evidence on the customary history of the region was heard in the 1880s and 1890s, in the context of the investigation into the ownership of reserves and Maori land left from earlier New Zealand Company and Crown purchases. We note the usual cautions about the integrity of evidence distanced in time from the events under examination, and about Native Land Court testimony (that it distorted customary evidence to conform with European perceptions of what gave rights). In addition, Dr Angela Ballara alleges that one of the most influential commentators on the traditional history of the region – a key Crown officer who appeared as a Native Land Court witness and was eventually himself appointed as a judge – deliberately suppressed evidence in favour of certain tribal groups.[6] We discuss these allegations in our final report. Here, it is important merely to note that in considering the evidence, we should bear in mind that both Maori and Pakeha brought their own prejudices and interests to interpretations of custom and ownership in the land, and that even within Maori society there was not necessarily a universally accepted view as to exactly what customary principles applied.

We may ourselves be accused of 'reading back into history', of bringing our own prejudices and passions to our assessment of the evidence, and of creating 'new orthodoxies' and new entrenched divisions. Overlapping and competing claims, involving as they do, issues of mana and territorial rights, must be handled with care; all legitimate interests should be identified and any redress for the loss of those interests delivered in such a way as not to prejudice the rights of others. It is with considerable caution, therefore, that we embark upon the following discussion.

6. See Dr Angela Ballara, 'Customary Maori Land Tenure in Te Tau Ihu (The Northern South Island), 1820–1860: An Overview Report on Te Tau Ihu (Wai 785)', report commissioned by the Crown Forestry Rental Trust, 2001 (doc D1), pp 286–287

2.2 Customary Rights in Te Tau Ihu

One of the key questions to be determined by the Tribunal is where the balance lay between the rights of the Kurahaupo people and those who had defeated them and had taken control of much of their territory.

Maori customary rights to land, and to associated waterways, sea, and foreshore, were multi-faceted and complex. We find the concept of a 'bundle of rights' a useful one when thinking about the nature of customary tenure. Although there was wide agreement in the Maori world about what elements might be contained in that bundle, there was far more room for dispute about how important each of those elements was in any particular case. Physical occupation and cultivation constituted a key element of that bundle, but other sorts of actions could also create rights in the land. Included here were tangible acts of resource use, such as birding, gathering berries, collecting flax and firewood, taking trees for waka, digging ochre for dyes, or collecting plants for rongoa (medicines). Evidence of rights in the ownership of the land could also be of a more spiritual nature – the birth and death of kin there – and less tangible, as in the naming of particular features, or an ancient association through long historical occupation even though those people had since departed. Ancestral association was an element that could never be removed; as the Tribunal has pointed out in its Rekohu inquiry, 'Maori regarded the right of recovery of ancestral lands as good as a right by possession'.[7]

The 'ancestral rights' of a group could, however, be pushed to one side, in a practical sense, by those who had arrived more recently and who occupied by 'take raupatu', or by 'right of conquest'. What importance was attached to raupatu depended greatly on the timing; the nearer to the date of conquest, the greater was its importance in the perceptions of that people. In our view, raupatu provided the opportunity for rights to be developed until that group could also claim ancestral association by reason of long-term occupation.

Much depended on the circumstances of the case. This is demonstrated by the different emphases that Tribunals have placed on different aspects of customary rights. In examining the case of Rekohu, where Moriori had been defeated and killed or enslaved by tribes from the mainland but had also survived and endured, the Tribunal has stressed the primacy of ancestral association and rejected claims based in conquest except in so far as this was followed by permanent occupation. In its view, the invasion of Rekohu was uncustomary, influenced by ideas of 'blackfellas' brought by Europeans, facilitated by muskets, and not followed by the usual practice of intermarriage.[8] Even so, the conquerors who stayed eventually developed their own set of rights. At Te Whanganui a Tara, where the Tribunal looked at a district from which almost all the former inhabitants had been driven, more weight was

7. Waitangi Tribunal, *Rekohu*, p 143
8. Ibid, p 45

placed upon rights derived from conquest in its assessment of what custom meant. There, the Tribunal concluded that:

> The ability to defend one's territory was fundamental to the possession of rights to land, for without this ability, all other rights were lost. Conversely, the ability to take another's rights or lands was also fundamental, for by this action, rights were won. Conquest gave mana and take raupatu to conquering chiefs and tribes.[9]

Still, for newcomers to sustain their rights to lands gained by conquest they had to create 'other layers of rights, such as use-rights, kin links, and physical occupation'. Only by such actions could they be said to have ahi ka, or to have lit the fires of occupation. As time passed, those other layers of right – the other sticks in the bundle – became increasingly important and, ultimately, would replace those based on conquest. Thus, rights based on conquest were regarded as less satisfactory than ancestral rights created over several generations, but they took precedence in the circumstances described in the Whanganui a Tara case.

The situation at Te Tau Ihu was different from both Te Whanganui a Tara and Rekohu. The balance of rights was more evenly distributed between those who had been defeated but had lived on the land for many generations, and those who had defeated them and were clearly in control but were recent arrivals. In our inquiry area, similar conquests had taken place as at Te Whanganui a Tara, but far more of the earlier inhabitants remained on the ground, and the argument for the precedence of ancestral rights over those of conquest was that much stronger. Nor was there an exact parallel with Rekohu. Much of the Tribunal's criticism in the Rekohu case was for the disproportionate weighting given in 1870 to the rights of conquerors who had been completely dominant at 1840, but had since departed the island and had no apparent intention of returning. In Te Tau Ihu, however, the conquerors (or many of them) had stayed, had allowed tributary communities to remain, and had married into them in the customary way. They had not long been in occupation (at 1840), but their rights were accumulating as the years passed.

Thus, we are faced with two opposing views:

- 'conquered groups' argue that ancestral rights always remained unless a people were utterly exterminated, or entirely enslaved and removed from the land, never to return; and
- 'conquering groups' argue that the total annihilation of their enemy was not required for the latter's utter subjugation and complete loss of independent rights. In the

9. Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District* (Wellington: Legislation Direct, 2003), p 33

conquerors' view, the 'fires' maintained by the people they had defeated were not of a nature to prove an ongoing right on their part.[10]

We explore these ideas further, later in the chapter, but first we turn to a description of the settlement pattern of the region and discuss how it was affected by successive waves of taua and heke in the 20 years prior to the signing of the Treaty.

2.3 Occupation of Te Tau Ihu at 1820

Fragmented traditional narratives of the Kurahaupo iwi and their predecessors with whom they merged (Ngati Tumatakokiri, Ngati Wairangi, Ngai Tara), difficulties in ascribing tribal affiliations to individuals in the late eighteenth and early nineteenth centuries, the differing perspectives of the northern migrants on their settlement histories, and the competing interests of neighbouring iwi Ngai Tahu; all preclude any single account of the traditional history of the region from gaining universal acceptance. We are conscious of the dangers of trying to create one seamless narrative out of different versions of events. Still, it is necessary to provide an account of that sequence of conflict and accommodation if our later discussion of customary right-holding is to be fully understood. The following narrative represents our general understanding of the history of the occupation of the region, but we identify instances in which differences in account, and in interpretation, affect our perception of the state of customary tenure.

We start by decribing the occupation of the region in the early nineteenth century from the perspective of the Kurahaupo claimants. The choice of that starting date obscures their viewpoint, which looks back further to the intermarriage between 'original peoples' and the peoples of the Kurahaupo waka, who had slowly migrated from the Mahia Peninsula, and a connection with the land that extends to the seventeenth and eighteenth centuries. The traditional memories of these people were to be fractured by taua from the north in the 1820s and 1830s and, as a result, were rarely recorded other than in the testimony of descendants in the Native Land Court, which focused on the events of that later period. The knowledge of an earlier history that has survived was voiced in the names of ancestors that were fixed to the land, such as Te Hoiere (the waka of Ngati Kuia ancestor, Matuahautere), Moeawhiti, Puhikeru, Hinepopo, and Tarakaipa. There were also whakapapa and waiata remembered by the handful of rangatira who had escaped the war parties that overwhelmed their people. Mr Ngata, who compiled a traditional historical report for Ngati Kuia, referred us to the

10. See, for example, Ngarongo Nicholson, brief of evidence on behalf of Ngati Toa, 9 June 2003 (doc P4), pp 22–24

whakapapa recorded in the 1860s and 1870s by Tahuariki Meihana and Pirimona Pokihi, amongst others, and brought to our particular attention a series of karakia that had been related to Stephenson Percy Smith by E W Pahauwera in the 1890s.[11] Claimant witnesses such as Mark Moses of Ngati Kuia spoke of his own continuing schooling in whakapapa and knowledge of nga karangatanga maha (the many relationships).[12]

For a narrative of the early settlement of Te Tau Ihu, however, we turn to the evidence given by John and Hilary Mitchell, who have made the tribal history of the region their particular study. Their account relates how Ngati Mamoe, Ngai Tara, Ngati Tumatakokiri, and Ngati Kuia had established themselves in the northern South Island in the seventeenth century. In the mid to late seventeenth century, elements of both Rangitane and Ngai Tahu (with whom they had close whakapapa relationships) also crossed to the Sounds. Rangitane occupied Te Whanganui (Port Underwood) and fought with Ngati Mamoe for the control of the Wairau, while Ngati Kuri fought with Ngai Tara in Te Hoiere (Pelorus Sound). Both Rangitane and Ngati Kuri sought to expand into the Wairau and a period of intermittent fighting followed. Ngati Mamoe were pushed further southwards to the Kaikoura Coast and were ultimately displaced by Ngati Kuri. A similar process took place on the western side of the island in the late eighteenth and early nineteenth centuries. Dr and Mrs Mitchell describe how Ngati Tumatakokiri, who had been in control of the Tasman and Golden Bay area and down the west coast (in their view) as far south as Mawhera, were largely displaced by Ngati Apa, and were also under attack from Ngati Kuia and Rangitane from the east, and Ngai Tahu from the south.[13]

The linking of whakapapa was an essential element in this narrative of settlement. The successive migrations, boundary adjustments between different hapu, proximity to each other, and marriage over several generations had intertwined the descent lines. Mr Moses told us that intermarriage 'between Ngati Tumatakokiri, Ngai Tara, Ngati Mamoe, Ngati Wairangi, Ngati Apa and Te Aitanga a Matua Hautere (the descendants of Matuahautere) created a number of separate hapu', and the 'descendants of these hapu can be seen in the whakapapa of all our Ngati Kuia witnesses'. Important marriages had also been made with Rangitane dating back to their migrations through the Wairarapa and weaving together their shared Ngai Tara whakapapa.[14]

Certain parts of the region were shared along with whakapapa. Thus, peoples tracing different descent lines lived together in some locations, and settlements belonging to one group could be found interspersed within a general locality dominated by another. Still, by 1820,

11. Eruera Wirihana Pakauwera, 'Ko Hinepopo: The Story of Hinepopo', translated by Stephenson Percy Smith, *Journal of the Polynesian Society*, vol 3, no 2 (June 1894), pp 98–104; Wayne Ngata, 'Nga Korero mo Ngati Kuia', report commissioned by the Crown Forestry Rental Trust, not dated (doc L8), pp 65–66

12. Mark Moses, brief of evidence on behalf of Ngati Kuia, 25 March 2003 (doc L5), pp 5, 24–26

13. Hilary Mitchell and Maui John Mitchell, 'A History of Maori of Nelson and Marlborough', 2 vols, report commissioned by Te Runanganui o te Tau Ihu o te Waka a Maui, 1992 (doc A9), vol 1

14. Moses, pp 6, 8–10

certain rangatira had become identified with particular areas, and the people living there with particular iwi. Thus, Rangitane were associated with Totaranui, the Wairau, Cloudy Bay and the east coast, possibly as far south as Waiautoa (Clarence River). They shared the Kaituna River Valley with Ngati Kuia, who dominated elsewhere, in Te Hoiere through to Rangitoto (d'Urville Island) and adjacent areas on the mainland. Ngati Apa interests dominated from Wakatu (Nelson) westwards, and possibly as far south as Kawatiri (Buller).[15] (We do not consider the southern 'boundary' of Ngati Apa in this report.) Their migration into this region was relatively recent and Ngati Tumatakokiri remained as an identifiable people at that time; although that descent line was not often claimed, it was – and is – still remembered.[16]

In summary then, and by Dr and Mrs Mitchell's account, in the decade prior to the invasions from the north, the occupation of the region was as follows:

> Rangitane on the northern Kaikoura coast, Wairau and eastern Sounds, with well-established greenstone trails through the Upper Wairau (the 'Hundred Rivers'), Awatere, Waiau-Toa and other river systems: Ngati Kuia occupied much of the Kaituna, Te Hora, Hoiere, Rangitoto, Whangarae, Wakapuaka and Whakatu districts; and Ngati Apa sharing Whakatu and occupying westwards from Waimea and Moutere and inland to Kawatiri (Buller). There were major pa in numerous localities spread across the Te Tau Ihu region, from Te Karaka (Cape Campbell) and Matariki (at the mouth of the Waiau-toa) on the northern Kaikoura Coast to Kawatiri (Buller) on the northern West Coast.[17]

We are not called upon to decide where boundaries lay between the various Kurahaupo tribes before the invasions from the north, which we discuss in the next section.

2.4 The Southward Migrations of the Kawhia and Taranaki Iwi: A Background

The settlement pattern just described had been relatively stable for a number of decades, despite the usual internal conflicts and adjustments between neighbours, but in the 1820s and 1830s, the tribal landscape was disturbed by migrations from the north. These tangata heke (migrant people) were from the Kawhia and Taranaki area and included hapu of Ngati Toa, Ngati Rarua, Ngati Tama, Te Atiawa, and Ngati Koata. Intermarriage between these different descent lines – especially between those who were direct neighbours – had been as common a practice amongst these peoples as it had been among the Kurahaupo tribes. Indeed, Ngati Toa, Ngati Koata, and Ngati Rarua were often referred to as one (Ngati Toa)

15. Ballara, 'Customary Maori Land Tenure', p 18
16. See Moses, pp 6–7
17. Mitchell and Mitchell, 'History of Maori', vol 1, pp 3-2–3-3

tribe in the nineteenth century. But such was not the reality. They, too, followed distinct descent lines, developing and increasing in numbers, in neighbouring districts at Kawhia and Taranaki, at about the same time as each other.[18]

In the early nineteenth century, the Kawhia and Taranaki peoples found themselves under increasing pressure from the Waikato–Maniapoto, who were themselves being squeezed from the north, and by the escalating conflict exacerbated by the introduction of muskets into the traditional pattern of tribal warfare. Dr Ballara sums up the situation:

> Ngati Toa, Ngati Rarua, Ngati Koata and Ngati Awa had close kin links that resulted in their alliances with each other against the Waikato–Maniapoto peoples in a series of wars resulting from the expansion of each people and a search for domination of food sources, especially coastal resources. These wars were expressed in cultural terms as a series of *take* resulting from the deaths of people of rank requiring resolution through battle to restore group mana, and the escalating cycle of warfare in the early 19th century as the pressure for land and resources mounted led these peoples to seek another homeland, far removed from a seemingly endless and hopeless situation in the north.[19]

The migration that followed took place in stages over a period of some 20 years.[20] At first, the destination was the Kapiti Coast. The Ngati Toa chief, Te Rauparaha, had seen the potential of this area as a new home for his people when he accompanied an exploratory Ngapuhi-led taua south in 1819. Te Rauparaha has become a figure of renown and some notoriety in New Zealand – chief, warrior, general, and composer of the haka *Ka Mate* – but the Tribunal is required to look behind that legacy (and legend) because his position is pivotal to aspects of the claim before us. It is argued by the Ngati Toa claimants that Te Rauparaha's mana, and his capacity as a leader, was such that he – and his people – enjoyed rights to lands other than those based in a physical occupation. Other iwi are of the view that no leader in customary Maori society could exercise the degree of control that this interpretation would require. Their leaders and their people, they argue, were allied to but always independent of Te Rauparaha, whose rights did not extend to territory that had been settled as a result of a conquest in which he had taken no direct part. These counter-arguments will be explored more fully through the course of this chapter, but what is clear

18. See Professor Richard Boast, 'Ngati Toa and the Upper South Island: A Report to the Waitangi Tribunal', revised ed, 2 vols, report commissioned by the Crown Forestry Rental Trust, 2000 (doc A56), vol 1, p 17; Ballara, 'Customary Maori Land Tenure', pp 20–21

19. Ballara, 'Customary Maori Land Tenure', p 24

20. The circumstances of these migrations have been the subject of Tribunal inquiries at Te Whanganui a Tara and at Rekohu, to which we refer the reader. The migrations are also described in a number of the reports filed with the Tribunal: see Ngati Rarua Claims Committee, 'Ngati Rarua Traditional History', report commissioned by the Ngati Rarua Iwi Trust in association with the Crown Forestry Rental Trust, 1999 (doc A51), pp 11–15; Alan Riwaka, 'Nga Hekenga o Te Atiawa', revised ed, report commissioned by the Te Atiawa Manawhenua ki te Tau Ihu Trust in association with the Crown Forestry Rental Trust, 2003 (doc A55), pp 14–64; Ballara, 'Customary Maori Land Tenure', pp 87–94.

is that Te Rauparaha was the prime initiator of the heke that followed, establishing a new homeland for the Kawhia and northern Taranaki peoples on both sides of Raukawa Moana.

Permanent migration started in about 1820 as the first groups began to move south under their respective leaders in heke, each of which bore its own name: Te Heke Mai-i-raro, Tataramoa, Nihoputa, Tama Te Uaua, and Paukena, amongst others.[21] Typically, the pattern of migration involved more than a single journey as members of the heke moved back and forth between their place of origin and their new homeland; at first between Taranaki and the Kapiti Coast–Wellington area and subsequently between the Kapiti Coast and Te Tau Ihu. Included in the first movement southwards were Ngati Toa and their close kin (Ngati Koata and Ngati Rarua) as well as a large party from the Taranaki area where the Kawhia tribes had paused for a planting season. These people were from Ngati Mutunga, Ngati Tama, and Te Atiawa.

The heke was attacked both there, by Waikato, and on the Kapiti Coast, by Muaupoko, despite a marriage-based alliance with Ngati Apa (Muaupoko's close kin and neighbours). One of those attacks, which resulted in the death of Te Rauparaha's children at Ohau, was to initiate a round of reprisals and the expansion of warfare into Te Waipounamu. These deaths provided the first of several take (causes of war), which compounded with the death of the senior Ngati Toa chief, Te Peehi, the uttering of kanga (curses), and alleged insults made with regard to Te Peehi's bones. Those offences upset the spiritual balance, impaired Ngati Toa's mana, and triggered successive taua in the search for redress. That imperative – to restore the equilibrium – was paramount in the Maori world, imbued as it was, with wehi and ihi (fear and awe), but there was a more immediate 'political' need, too: namely, to ease the pressures caused by the arrival of increasing numbers from the north.[22] Most of the Taranaki group who had accompanied Te Rauparaha south, returned home, but were to migrate more permanently in their own heke several years later (after the Battle of Waiorua, discussed below).

In the meantime, Ngati Toa and their closest kin remained, capturing Kapiti Island for their own stronghold in about 1823. They were subsequently joined in adjacent areas by their Taranaki allies as well as by various heke of Ngati Raukawa, to whom Te Rauparaha's branch of Ngati Toa (Kimihia) was closely related.[23] Each group settled a particular area, eventually driving out most of the former inhabitants of the region, south from the Manawatu River to Te Whanganui a Tara. Pressure on resources as later heke arrived was also to cause instability between the northern allies with further repercussions for settlement patterns in Wellington and eventually Te Tau Ihu.

21. The following account is based on that provided in Waitangi Tribunal, *Whanganui a Tara*, pp 19–32.

22. See Angela Ballara, *Taua: 'Musket Wars', 'Land Wars', or Tikanga?* (Auckland: Penguin Books, 2003), p 163; Ballara, 'Customary Maori Land Tenure', pp 24–25

23. Riwaka, 'Nga Hekenga o te Atiawa', pp 53–64

The first stage of the movement across the strait to Te Tau Ihu took place in the mid-1820s. Inexorably, the Kurahaupo people, based in the northern South Island, had been drawn into the events taking place across the Raukawa Moana (Cook Strait). Te Rato (also known as Te Ratu and Te Kotuku), the high-ranking chief of 'Ngati Apa' (and of Rangitane and Ngati Kuia), had been forced out of Kapiti by Te Rauparaha and was subsequently involved in the resistance of local Muaupoko people at Lake Horowhenua (the conflict which had resulted in the death of Te Rauparaha's children). Te Rato was captured and enslaved, but subsequently escaped to his kin at Te Tau Ihu, led by Tutepourangi, who is generally identified as his brother. From there, Te Rato launched a counter-attack, drawn from the Kurahaupo peoples from both sides of the straits, attempting to regain Kapiti Island and eject the northern newcomers from the region. The resulting battle was called Waiorua.[24] From this engagement – the first between the peoples of the South Island and those from Kawhia and Taranaki – flowed many of the events that were to alter so greatly the tribal landscape of Te Tau Ihu over the next 15 years.

Waiorua (named after the site of the conflict) was a serious defeat for the Kurahaupo forces (variously estimated at between 600 and 2000 people) and while a single engagement could not wholly decide the fate of the Cook Strait region – or its entire 'ownership' – it still had important consequences for patterns of power and settlement. The most important of these was the loss of mana for the Kurahaupo tribes.[25] The ascendancy of the incoming tribes was established, enabling them to undertake further migrations from the Kapiti Coast to settle the Whanganui a Tara (Wellington) and Te Tau Ihu lands. While Ngati Koata and Te Atiawa were involved in Waiorua, alongside Ngati Toa, it was the mana of Te Rauparaha and Ngati Toa that was most enhanced. Te Rauparaha's personal role in the battle was largely irrelevant; the credit went to him as the prime mover of the heke and the main war leader of the Kawhia–Taranaki forces.[26]

2.5 Tutepourangi's Tuku Whenua, circa 1825–27

One of the first consequences to flow out of Waiorua was the settlement of Ngati Koata and a smaller group of Ngati Toa in Te Tau Ihu. However, that occupation was based not on raupatu but on the 'tuku whenua' (gift or allotment of land) by the high-ranking rangatira, Tutepourangi, who had been captured during the battle and whose life had been spared. The tuku formed an important theme in the evidence heard by the Tribunal, with implications

24. Ballara, 'Customary Maori Land Tenure', p 90; Riwaka, 'Nga Hekenga o te Atiawa', pp 47–50
25. Ballara, 'Customary Maori Land Tenure', p 92
26. See Angela Ballara, 'Te Whanganui-a-Tara: Phases of Maori Occupation of Wellington Harbour, c 1800–1840', in *The Making of Wellington, 1840–1914*, ed David Hamer and Roberta Nicholls (Wellington: Victoria University Press, 1990), p 17; Waitangi Tribunal, *Whanganui a Tara*, p 21

for our understanding of customary tenure generally, as well as the particular course of settlement in the region. It is significant that Ngati Koata, as one of the victorious parties at Waiorua, should have preferred tuku to raupatu as a take, or basis of claim, at Rangitoto and adjoining lands during later Native Land Court hearings. The tuku was also advanced by Ngati Kuia as proof of their continuing connection with lands at Wakatu and Wakapuaka, and their place within Te Tau Ihu. Both peoples recognised the importance of the tuku but had different interpretations of its meaning in terms of 'ownership' of land and their respective rights.

The major issues argued before us concerned the nature of the tuku, the rights enjoyed by Ngati Koata as a consequence of it, and the status of Ngati Kuia's interests thereafter. Related issues also arose for the Tribunal's consideration:

- What were the boundaries of the tuku?
- What obligations did this entail upon Ngati Koata as recipients of the land and were those obligations fulfilled?
- What was the effect on the tuku of the later taua conducted by Ngati Koata's allies which resulted in the death of Tutepourangi?

Different kinds of evidence were brought to our attention with reference to these questions; descriptions of the specific actions of Tutepourangi, Tekateka, Te Putu, and the other rangatira involved in the tuku, as given (and interpreted) in the land court and tribal account; evidence as to the current understandings of the gift as handed down by elders; and general matauranga and scholarship regarding the nature of tuku.

These issues are discussed in some detail later in this chapter, but first it is necessary to outline the circumstances leading to the tuku whenua itself and its physical parameters. Although the narratives differ in emphasis and in some specific detail (especially as to exact timing and who had been present), the picture that emerged from the land court minutes was of a tuku arising initially out of battle. The senior rangatira, Tutepourangi of Ngati Kuia–Ngati Apa, had been captured at Waiorua by Te Putu of Ngati Koata, who spared his life. According to one account, Tawhe, a child who was closely related to Te Putu and the other senior rangatira of Ngati Koata – Mauriri II, Whakatari, and Te Whetu – had also been captured. The boy had been taken to Rangitoto. Ngati Koata pursued in two waka and, accompanied by Ngati Toa and Kaitangata of Te Atiawa, landed at Opua.[27] The intention appears to have been to retrieve the boy safely, not further warfare. Tutepourangi was released and, on discovering that Tawhe was still alive and residing with Ngati Kuia at Te Hoiere, Tutepourangi had him brought back to his people. Peace was made and most of

27. This is a summary of the account given by Ihaka Tekateka and Meihana Kereopa in Native Land Court, Nelson, minute book 2, fols 253–255, 308–309 (Tony Walzl, 'Information Audit on the Minutes of the 1892 Native Land Court Hearing to Determine Beneficial Ownership in Respect of the Nelson Tenths Reserves', report commissioned by the Ngati Rarua Claims Committee in association with the Crown Forestry Rental Trust, 2003 (doc B22), pp 11–12, 16–17).

Ngati Toa and Te Atiawa returned to Kapiti, while Ngati Koata and a small contingent of Ngati Toa remained. Te Patete and some of the Ngati Koata party settled with Tawhe and Ngati Kuia at Te Hoiere. Tekateka, Te Putu, and the rest of Ngati Koata and the remaining Ngati Toa went on to Rangitoto where Tutepourangi, who had accompanied them, made a tuku of all his people's lands.[28]

According to the accounts in the Native Land Court given by descendants from both sides (Meihana Kereopa of Ngati Kuia–Apa and Ihaka Tekateka of Ngati Koata), the tuku commenced at Anatoto at the mouth of the Pelorus Estuary, including the sound and around the coast from Kaiaua (Croisilles Harbour) to Cape Soucis, Whangamoa, Wakapuaka, Wakatu, Waimea, Motueka, and on to Te Matau (Separation Point).[29] Thereafter, Tekateka and Ngati Koata had conducted a 'takahia te whenua' of the tuku, setting their feet on the land and making peace with the local chiefs: Te Kakaho at Whitikareao, Te Waka at Te Raiti, Kihiro at Whangamoa, Te Kahawai and Te Aukomiro at Wakapuaka, and Tamatau at Wakatu.[30] Most importantly, high-ranking marriages were arranged between the senior rangatira of Ngati Koata and the female relatives of Tutepourangi and the other senior Ngati Kuia leaders. Nukuhoro and Keiha were married to Tekateka and Te Putu respectively, while Oriwa, the daughter of Kereopa Ngarangi and Kerenapu, was chosen for Turi Te Patete.[31]

By this means – the joining of whakapapa – the tuku was confirmed, the rights of Ngati Koata, as newcomers without prior connection to the land were validated, and the continuation of Ngati Kuia rights also ensured. Some in their party returned to the North Island under the leadership of Matiu Te Mako, but the rest of Ngati Koata settled with Ngati Kuia at Rangitoto and Te Hoiere, gathering food and resources at Wakapuaka, Wakatu, and Waimea. This pattern of accommodation and settlement was soon to be disturbed by the taua of the northern tribes. Although the rights of Ngati Koata were thereafter largely confined to Rangitoto and adjacent lands, while Ngati Kuia settled at Te Hora (Canvastown), the tuku continued to be acknowledged by both donor and donee, and was seen as sustaining the ongoing rights of both peoples.

There is wide agreement on the meaning of 'tuku whenua' in pre-contact society, in terms of the creation of a reciprocal relationship between the parties concerned; that is, the donors of rights to land expected benefits to flow back to them over time. There is, perhaps, more debate about whether the donor (kaituku) continued to enjoy undiminished rights in the land or taonga handed over, if it were done from a position of weakness in order to redress a serious loss of face or defeat in battle. Other questions arise. Did such land revert

28. Native Land Court, Nelson, minute book 2, fols 256–257, 266 (Walzl, 'Information Audit', pp 14–15)
29. Ibid, fols 255–256, 308 (pp 13–14, 16–17)
30. Ibid, fol 255 (p 13); see also Josephine Paul, brief of evidence on behalf of Ngati Koata, 2001 (doc B29), paras 36–38
31. Puhanga Patricia Tupaea, brief of evidence on behalf of Ngati Koata, not dated (doc B15), para 21; J Paul, brief of evidence, paras 40–43; Ballara, 'Customary Maori Land Tenure', pp 96–97; Ngata, 'Nga Korero mo Ngati Kuia', pp 130, 136–137

to the original owners if the recipient failed to fulfil those obligations? In our case, we also have to consider whether Ngati Koata held rights to the whole of the gifted area, or whether the tuku was overset by the subsequent taua. The picture was complicated by a later tuku by Ngati Koata of lands at Wakapuaka to persons within Ngati Tama, the significance of which was to be hotly debated. Much depended on the circumstances of the case and the mana of the rangatira involved.

Both Ngati Koata and Ngati Kuia were to rely, in part, on Tutepourangi's tuku as their take in Wakapuaka in 1883 and, again, in the 1892 hearings for the Nelson tenths. For Ngati Koata, the tuku primarily defined their rights against those of subsequent arrivals rather than against Ngati Kuia, with whom they had intermarried. For Ngati Kuia, however, the respect accorded to the tuku of their ancestor was continuing proof of their own ongoing presence and rights in the land. We shall see that both Ngati Koata and Ngati Kuia–Ngati Apa argued that Tutepourangi's tuku had a wider compass and significance than the other iwi (and the Native Land Court) were to accord it.

In the hearings for the Nelson tenths in 1892, Ihaka Tekateka, speaking on behalf of Ngati Koata, Ngati Toa, and a section of Ngati Tama and Te Atiawa, emphasised that the tuku had precedence over the later conquest and that it encompassed more than just the lands at Rangitoto. It had not been negated by later taua, nor had it been superseded by the settlement of the western Te Tau Ihu by Ngati Koata's northern kin and allies. Tekateka told the court that he had two claims to the land: first through the gift of Tutepourangi to Ngati Koata and Ngati Toa; and, secondly, through conquest.[32] Ngati Koata's places of occupation since that time were listed by Tekateka as comprising the gift area: 'Nelson, Waimea, Moutere, Motueka and on to Separation Point (Te Matau)', as well as Rangitoto.[33] He argued that the rights deriving from the tuku had not been disturbed except in so far as Ngati Koata rangatira made allocations to the newcomers. Thus, Mauriri had gifted the area from Motueka to Te Matau, and Te Whetu the land at Wakapuaka to Ngati Tama.[34] According to Tekateka, Ngati Kuia had at first fled but then rallied around Wharehia at Wakatu.[35] And despite the intervening years of taua, the two peoples were still living there together, cultivating and dressing flax at Waimea, when the New Zealand Company arrived in 1841.[36]

Ngati Kuia and the other Kurahaupo tribes supported Tekateka in most points of his narrative. Their representative, Meihana Kereopa, told the court that the tuku 'was not trodden under foot' and that Ngati Kuia had continued to live with Ngati Koata after the wave of taua from the north. Kereopa did not see Ngati Kuia's rights as ended either by tuku or

32. Native Land Court, Nelson, minute book 2, fol 253 (Heather Bassett and Richard Kay, 'Nga Ture Kaupapa o Ngati Koata ki te Tonga, c1820–1950', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A76), p172)
33. Ibid, fol 254 (p172)
34. Ibid, fol 259 (pp173–174)
35. Ibid, fol 276 (p174)
36. Ibid, fol 266 (p173)

by conquest.[37] That Ngati Koata still recognised the tuku made to them, and that the two peoples continued to live together, were seen as proof that Ngati Kuia interests endured, that they had not all been enslaved and that their occupation continued.

There were, however, important points of difference in the testimony and cross-examination of the two witnesses. The first concerned the implications for Ngati Kuia's rights when the area under tuku was subsequently invaded. Under cross-examination by the conductor of the Ngati Koata case, Kereopa could not say how much rangatiratanga had been left to him 'after the land became possessed by the northern tribes' and he acknowledged that his people had had to bury their dead secretly and that the northern tribes had acquired rights in the land by reason of raupatu.[38] Tekateka also argued that the gift was not overturned by the subsequent taua, that 'There was no raupatu in the Nelson or the Waimea Districts. The reason for that was that the land was in the possession of Ngatikoata through the gift by Tutepourangi. This was the "take" that limited the occupation of Ngatikoata to the eastward of Moutere.'[39]

But questioning of Kereopa by Ngati Koata suggests that they did not accept that Ngati Kuia's authority had been unimpaired by the conquest in which they had been participants.

The other significant point of difference lay in Tekateka's suggestion that the initial act of tuku had included Te Rauparaha and Ngati Toa.[40] According to Heather Bassett and Richard Kay in their report on Ngati Koata rights, Tekateka had chosen to emphasise this point because 'at the time of the conquest, they needed to ensure that the tuku was recognised by the invading parties'. They suggest that Tekateka was attempting to give the tuku greater mana and to show that it had been accepted by Te Rauparaha.[41] Kereopa maintained, however, that the tuku was to Ngati Koata only, although he conceded under cross-examination that Ngati Toa might have a right too: 'I consider the gift by Tutepourangi is confined to Ngatikoata but perhaps Ngatitoa ought also to participate as that hapu assisted to save his life.'[42] On the other hand, under cross-examination by Paramena Haereiti (Ngati Tama), Tekateka conceded that any gift to Te Rauparaha could not stand because 'it was not competent for Te Rauparaha to effect a conquest over land that had been given to him under the gift of Tutepourangi supposing that Gift was an effective one'.[43]

Witnesses from other iwi claimed to know nothing about the tuku and were suspicious of Ngati Koata's motivations as trying to prove a superior right, and Ngati Kuia's as trying

37. Native Land Court, Nelson, minute book 2, fol 314 (Susan Kiri Leah Campbell, '"A Living People": Ngati Kuia and the Crown, 1840–1856', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A77), p 25)

38. Native Land Court, Nelson, minute book 2, fols 314–315 (Walzl, 'Information Audit', pp 39–40). For the secret burials, see Native Land Court, Nelson, minute book 2, fol 317 (Ballara, 'Customary Maori Land Tenure', p 51).

39. Native Land Court, Nelson, minute book 2, fols 262–263; Bassett and Kay, 'Nga Ture Kaupapa', p 174

40. Native Land Court, Nelson, minute book 2, fols 262–263; Bassett and Kay, 'Nga Ture Kaupapa', p 174

41. Bassett and Kay, 'Nga Ture Kaupapa', p 174

42. Native Land Court, Nelson, minute book 2, fol 316 (Walzl, 'Information Audit', p 18)

43. Native Land Court, Nelson, minute book 2, fol 276 (Bassett and Kay, 'Nga Ture Kaupapa', p 174)

to show a surviving one in territory long lost.[44] The court also rejected the interpretation of custom argued by Tekateka and Kereopa. The judge regarded the rights of Ngati Koata as deriving only from conquest, the allocation of territory by Te Rauparaha, and subsequent occupation. That occupation was judged to extend as far as Rangitoto and no further; to the south at Wakapuaka and Wakatu, Ngati Koata were seen as 'just passing through'. At the same time, the rights of Ngati Kuia and the Kurahaupo tribes were considered to have been completely extinguished.[45]

This is to take the story well beyond our current narrative, but before returning to the events of the 1830s and the effect on settlement patterns and rights in Te Tau Ihu, we note the evidence of Ngati Koata today and what they say about the meaning of Tutepourangi's tuku. Puhanga Patricia Tupaea spoke on Ngati Koata's behalf, but claimed Ngati Kuia descent also. She told us how the tuku was still remembered by her people and how she first learned of it as a child, 'when we would sit by the fire and have koorero purakau as a child. Most of the stories were told at the Big House at Rangitoto.'[46] These stories were related by Wetekia, her brother, and Hemi Waka, who was tuturu Ngati Kuia. Mrs Tupaea gave evidence that:

> The Korero about Tutepourangi's tuku that I heard from them was that the Tuku is in the region from Clay Point to Farewell Spit. Hemi Waaka submitted to that koorero and never denied it. There was sadness in the telling of the tale, but he never denied it.
>
> Tutepourangi's tuku was to bring about several things for Ngati Koata, including keeping peace and reassuring Ngati Kuia they would be safe by allowing Tutepourangi to live. Tuku is something sacred. Here, because it was sealed with the promise of not spilling Tutepourangi's blood, and it is even more sacred.
>
> I understood that the giving . . . was a giving of mana and manawhenua, the giving of the right to make decisions that needed to be made about harvesting or homesteads, for example.[47]

But a tuku, she also told us, is essentially about give and take. As in the weaving of a tukutuku panel, the thread is passed back and forth, 'tuku atu, tuku mai'.[48] Marriages had interwoven the two peoples, fixing the relationship through whakapapa and honouring and keeping the tuku alive and viable. Mrs Tupaea told us of one such marriage in a tale containing strands of politics and romance. The story was told of how Hinewaka had been pledged among Ngati Kuia to marry Te Putu, but that she had refused, and Keiha, Hinewaka's close relative – herself only a teenager – had been chosen to take her place. Then Te Putu came

44. See the evidence of Herewine Ngapiko, Ramari Herewine, Tuaha Matenga, and Paramena Haereiti in Native Land Court, Nelson, minute book 2, fols 194–195, 224–225, 234, 282. See also Walzl, 'Information Audit', pp 18–20.

45. Native Land Court, Nelson, minute book 1, fol 25 (Bassett and Kay, 'Nga Ture Kaupapa', p 130); Ballara, 'Customary Maori Land Tenure', p 287

46. Tupaea, brief of evidence, para 16

47. Ibid, paras 17–19

48. Ibid, para 15

himself, disguised as the kaihoe of the waka that collected Keiha. Te Putu, a 'good man', had befriended the girl on the journey back to his kainga. The anxious Keiha had expressed a wish that her husband would be just like her new companion, after which he revealed his true identity to her before all his tribe.[49]

There were many permutations in the circumstances and practice of tuku, generally, as in the narratives, but certain features may still be identified as applying in the case of Tutepourangi, that had wide acceptance in customary Maori society. This was a tuku undertaken by a senior rangatira in gratitude for the sparing of his life. According to the Ngati Koata narrative, as related to us by Josephine Mary Paul and, as told to her by Turi Elkington: 'Tutepourangi was required to recover his patu Kauwae Hurihia from the waters in which he had thrown it, to avoid being killed by his own weapon. In exchange for his life Tutepourangi offered land to Ngati Koata.'[50] But Tutepourangi was also seen as leaving with his mana intact as demonstrated by his subsequent treatment, and by the developing relationship between the two tribes, at least until this accommodation was disturbed by the wave of taua that followed. Even so, the relationship between the two peoples continued and was acknowledged by them.

Often, as in this instance, tuku whenua were also agreements of peace and alliance forged for protection from warfare, or to create buffer zones. An element of force might underlie this type of arrangement. Mrs Paul also told us that it was believed that Tutepourangi had been impressed by the musket power and fighting strength of the tribes based at Kapiti and that from 'concern for the safety of his people, and faced with all these pressures, Tutepourangi ceded land to Ngati Koata, which Te Putu accepted'.[51] Dr Ballara points out that it was common for people, defeated in battle and faced with the arrival of the victors, to propitiate them with gifts of land, or valuable taonga. Tutepourangi was making the gift from a position of weakness, as the strength and mana of the Kurahaupo people had been much depleted by their loss at Waiorua. Their status was now subordinate militarily to that of Ngati Koata, who had settled on their lands and which they had perforce to share or give over, along with their prized possessions, such as the canoe Te Awatea.[52] Those lands were, however, 'given' rather than 'seized' by force of arms; in Dr Ballara's view, this was different from the acquisition of land by raupatu, where the mana of the former occupants was ceded as a result of direct force.[53]

Most importantly, marriages followed between Ngati Koata rangatira and high-ranking Ngati Kuia women. In a sense, the question of whether Tutepourangi's people were now

49. Tupaea, brief of evidence, para 21
50. J Paul, brief of evidence, para 21
51. Ibid, para 26
52. Native Land Court, Nelson, minute book 2, fol 256; Ballara, 'Customary Maori Land Tenure', pp 83–84
53. Ballara, 'Customary Maori Land Tenure', pp 80–82, 96–97

subordinate was relatively meaningless when it came to questions of 'ownership'. Important tuku of this nature created a powerful relationship where none had previously existed and tightly bound the two groups. When the tuku was made to a people – as in the case of Ngati Koata – that did not have rights already validated by whakapapa, the donor (or kaituku) chose women from amongst their senior lines for them. These marriages uplifted the standing of both communities. Thus, Nukuhoro, Keiha, and Oriwa were married to Tekateka, Te Putu, and Te Patete. The children of those unions would enjoy undisputed right in the land, and over the course of time, a new community would be created, the members of which could claim through both sides of descent, even though it is likely that the Ngati Koata side would come to be seen as senior. Generations would pass before the transfer was complete and the land would never be totally alienated because the linkages always existed. This was so, even though the original 'owners' might now look to Ngati Koata's senior men for protection and in decisions affecting the whole community, especially after the death of Tutepourangi at the hands of Ngati Tama. Both groups continued to live together as a community and share resources at Rangitoto, Wakapuaka, Wakatu, and Waimea.[54]

The Tribunal accepts the interpretation of the Ngati Koata and Ngati Kuia claimants, and of Dr Ballara that Tutepourangi's life had been spared because he was a chief of tremendous mana. Subsequent interaction, communal residence, and intermarriage between the families of Tekateka and Tutepourangi show that he was not regarded as a slave. Nor did Tutepourangi lose all authority over the land through this gift. Dr Ballara notes that 'The expected result of such a gift in the time of customary land tenure before contact was that both groups, the donor's and the donee's, would utilize the land and its resources together.'[55] This interpretation is supported by the evidence – in particular, the acceptance by Ngati Koata as well as Ngati Kuia of the tuku as an enduring basis of their rights in Rangitoto and adjacent lands. The question of whether that tuku was in part overturned by conquest and how these issues played out in the Native Land Court, we leave for the moment.

2.6 Taua and Conquest of Te Tau Ihu, circa 1827–32

This situation of peaceful accommodation between potential enemies, created by means of tuku and high-ranking marriage, was disrupted by a series of taua conducted by Ngati Koata's northern kin and allies, followed by heke from the Taranaki and Kapiti Coast to

54. See Native Land Court, Nelson, minute book 2, fols 253, 309 (Ballara, 'Customary Maori Land Tenure', p 81); see also Tupaea, brief of evidence, paras 9–12

55. Ballara, 'Customary Maori Land Tenure', p 80

Wellington region to lands throughout Te Tau Ihu.[56] A variety of issues arise for the Tribunal's consideration, falling into four general categories:

- What were the causes of the migrations and were they 'tika' or 'proper' in the Maori customary view?
- What was the impact of the taua and subsequent heke on the rights of the Kurahaupo tribes; were these people completely displaced, or did they retain rights in Te Tau Ihu; what was the nature and extent of those rights, if any?
- What was the relationship of the various participants of the migrations to each other and what was the nature and extent of the rights acquired by these different groups? How were the rights of Ngati Koata affected? How far west did Ngati Toa's rights extend?
- What was the effect of occupation after conquest, by the conquerors or the defeated peoples (or both)?

Underlying these issues of entitlement are broad questions relating to customary usage. What was required to show conquest? Was occupation necessary to give rights in the land? What acts constituted occupation and how long did such occupation need to exist for such rights to be created? Were there other sorts of rights to be considered in terms of the mana exercised by and obligations owed to a pivotal leader such as Te Rauparaha? In addition, there are many matters relating to the occurrence and meaning of events and actions that, it was argued before the Tribunal, had significance in customary terms and which were disputed in detail, or in interpretation. Included here were questions as to the composition and timing of particular taua and heke and the significance of battles that were fought and of allocations or gifts of land, taonga, and slaves.

Various accounts suggest different starting dates and sequence of events, as well as motivations for the various stages of the taua. Dr Ballara's conclusion is that it will never be possible to settle the exact timing and sequence of events in the prolonged campaign that took place in these years. Accounts from the Northern South Island tend to favour a sequence that puts the conquest of Te Tau Ihu as beginning in 1831. The campaign was part of a two-pronged attack that merged into the main, sustained siege of Kaiapoi and Onawe pa, by Ngati Toa and elements within Te Atiawa, Ngati Rarua, Ngati Koata, and Ngati Tama in 1832.[57]

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56. A number of the historical reports filed in this inquiry dealt with these events in some detail. Included here are: Dr Grant Phillipson, *The Northern South Island: Part 1*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1995) (doc A24); Miriam Clark, 'Ngati Tama Manawhenua ki te Tau Ihu (The Manawhenua Report)', report commissioned by the Ngati Tama Manawhenua ki te Tau Ihu Trust in association with the Crown Forestry Rental Trust, 1999 (doc A47); Tony Walzl, *Ngati Rarua Land Issues, 1839–1860* (Wellington: Ngati Rarua Iwi Trust, 2000) (doc A50(1)); Riwaka, 'Nga Hekenga o te Atiawa'; Boast, 'Ngati Toa and the Upper South Island', vol 1; Hilary Mitchell and Maui John Mitchell, 'Te Tau Ihu o te Waka: A History of Maori of Nelson and Marlborough', revised ed, report commissioned by Te Runanganui o te Tau Ihu o te Waka a Maui, 1999 (doc A63); Basset and Kay; and Ballara, 'Customary Maori Land Tenure'.

57. Ballara, 'Customary Maori Land Tenure', pp 104–105

The taua was triggered by a combination of events and imperatives, and a number of causes for the invasion were cited as take:

- the escape to the South Island, of Te Kekerengu (from Whanganui a Tara) and the two Ngati Apa chiefs (Te Rato and Mahuika), held to be complicit in the death of Te Rauparaha's children;
- the need to respond to a succession of kanga – the 'tukituki-aruhe' and 'nihomanga' curses;
- the subsequent obligation to avenge the deaths of Ngati Toa ariki Te Peehi Kupe and senior rangatira Pokaitara and Te Aratangata, who had been killed during the Kaiapoi campaign; and
- the purported desecration of Te Peehi's bones.[58]

It seems likely that the first stage of the taua passed through Te Tau Ihu deep into Ngai Tahu territory, but returned to Kapiti Island. The more sustained invasion of the northern part of the island was undertaken in response to reports that Te Peehi's bones had been taken by Ngai Tahu chief, Tuhawaiki, to Ngati Kuia and Rangitane at Pelorus Sounds. It was rumoured that they had been made into fishhooks to dishonour Te Peehi's memory, and also that Te Rato was in the district. This party comprised Ngati Toa, led by Te Rauparaha and Te Hiko (son of Te Peehi), Te Whetu's branch of Ngati Koata, Ngati Tama led by Te Puoho and his stepson, Te Wahapiro, Pohepohe, and Ngapuru, Ngati Turangapeke and Ngati Pareteata hapu of Ngati Rarua, and various hapu from Te Atiawa, each one of which had their own leaders also. Te Atiawa hapu associated with the campaign were Mitiwai, Kaitangata, Puketapu (including Ngati Komako), Ngati Rahiri, and Ngati Hinetuhi. Named leaders recorded in this context included Te Koihua, Te Manu Toheroa, Tuterangiwakataka, and Matangi in the case of Te Atiawa, and Te Iti, Pikiwhara, and Pukekohatu in that of Ngati Rarua.[59]

As the force moved southward, they split to travel along the two coasts. Each of the different waka in the two parties contained crews of mixed descent under their different leaders. Most Ngati Rarua and Ngati Tama went in the western taua, accompanied by Te Atiawa, and some Ngati Toa individuals. The major battle as the taua moved through Te Tau Ihu was fought at Hikapu, at the junction of Te Hoiere and Kenepuru. In some accounts, the taua split in two before the battle; in others, shortly thereafter. Te Rauparaha then led his party eastwards, conquering Totaranui (Queen Charlotte Sound), Karauripe (Cloudy Bay), and the Wairau, before travelling on to besiege and capture Kaiapoi and Onawe.[60]

58. Phillipson, *Northern South Island: Part 1*, pp 22–23, David Armstrong, 'Ngati Apa ki te Ra To', report commissioned by the Ngati Apa ki te Waipounamu Trust Claims Committee, 1997 (doc A29), p 25; Riwaka, 'Nga Hekenga o te Atiawa', pp 65–71; Campbell, 'A Living People', pp 19–22; Ballara, 'Customary Maori Land Tenure', pp 105–107

59. Native Land Court, Nelson, minute book 2, fols 210–211; Ballara, 'Customary Maori Land Tenure', pp 107–109

60. Phillipson, *Northern South Island: Part 1*, pp 21–24; Walzl, *Land Issues*, p 5; Ballara, 'Customary Maori Land Tenure', pp 109–110

The Kurahaupo tribes living on the eastern side of the island (Rangitane and Ngati Apa) were severely harried in the course of the taua. A force of Ngati Toa and Te Atiawa drove them up Queen Charlotte Sound as far as Waitohi (Picton) while Ngati Rarua 'took possession' of Karauripe (Cloudy Bay) before moving on to join Te Rauparaha in the siege at Kaiapoi. The taua then returned north to Te Awaiti where Te Tau Ihu lands were divided between them. As was usual practice, some sections of the taua remained on the new territory, while others went back to the North Island, but returned later, either on a seasonal basis to collect resources, for trade or recreation, or to settle on a more permanent basis in the years that followed. Thus, while most of the taua travelled on to Kapiti Island, some of the Ngati Toa–Ngati Rarua party settled at Cloudy Bay to grow food for the whaling stations and a group of Te Atiawa remained at Te Awaiti. Shortly thereafter (around 1833) there was a general dispersal from Kapiti Island throughout the Cook Strait region, including to Te Hoiere and to lands close to those already occupied by Ngati Koata – and by Ngati Kuia who had survived the western taua (described below) and continued to look to Koata for protection.[61]

The western taua (after the split of forces) included Ngati Rarua, Te Atiawa, and Ngati Tama, accompanied by some Ngati Koata and possibly some Ngati Toa. Ngati Toa accounts suggests that they participated, but these sources did not record Ngati Toa names among the leaders (except in the case of Tamihana Te Rauparaha who claimed that his father was there).[62] This is an important point to note because of dispute among the tangata heke as to whether Ngati Toa had acquired rights in western Te Tau Ihu (as discussed below). This party moved from Te Hoiere to Kareao-nui attacking the local people and killing their chief, Te Kakaho. At Kaiaua (Croisilles Harbour), the people had fled into the hills. Further battles were fought near Whangarae – where, again, the local chief, Te Waihaere, escaped – and Wakapuaka. There, Tutepourangi was killed, reputedly by Te Wahapiro of Ngati Tama (Te Puoho's nephew and stepson) who, in turn, took Hinewaka, a local woman of high rank, as his wife. According to the evidence of Meihana Kereopa before the Native Land Court, Hinewaka was the daughter of Tutepourangi. In the evidence of Tekateka, she was the daughter of local chief, Te Kahawai, whose death some accounts also attributed to Te Wahapiro.[63]

Ngati Koata who had settled at Wakapuaka took no part in this stage of the taua. The assault on the pa clearly caught Tekateka by surprise; he was forced to climb out onto the

61. Phillipson, *Northern South Island: Part 1*, pp 21–23; David Armstrong, '"The Right of Deciding": Rangitane ki Wairau and the Crown, 1840–1900', report commissioned by Te Runanga o Rangitane o Wairau in association with the Crown Forestry Rental Trust, not dated (doc A80), pp 14–22; Ballara, 'Customary Maori Land Tenure', pp 110–111

62. For a discussion of Ngati Toa evidence, see Boast, 'Ngati Toa and the Upper South Island', vol 1, pp 22–37, and Ballara, 'Customary Maori Land Tenure', pp 110, 116.

63. Ballara, 'Customary Maori Land Tenure', p 116

roof of a whare and identify himself to the attacking party, which included Ngati Koata but had thought him to be on Rangitoto.[64] Both Ihaia Tekateka and Meihana Kereopa consistently argued in later hearings, that the peace between their two peoples had been respected; that Tekateka's people had taken no part in the fighting to this stage. Neither of these later rangatira regarded that earlier accommodation through tuku to have been compromised by an attack by other elements within Ngati Koata, nor by Tekateka's branch of the tribe joining their kin as they moved southwards into the territory dominated by Ngati Apa and the remaining Ngati Tumatakokiri.[65]

From Wakapuaka, the taua moved on to Wakatu, from which the inhabitants had again fled, but the local people fought at Waimea where their chief, Te Pipiha, was killed. Te Puoho claimed the land by placing his head-dress as a rahui there. Another party of the northern tribes – a section of Te Atiawa, led by Te Manu Toheroa – met up with the taua and they moved on to Tasman Bay, where again the local people fought and were defeated. It would seem that at some point, as the taua moved on, its leaders quarrelled and Te Puoho and the bulk of Ngati Tama turned back for the North Island, as did some of the Te Atiawa party. The party that continued on comprised Ngati Rarua, Toheroa's people within Te Atiawa, and Te Puoho's younger brother, Rahui. They marauded into the Whanganui Inlet and Te Taitapu to its south. At some point, this group defeated and killed Te Rato, the senior Ngati Apa–Kuia chief whose involvement in the death of Te Rauparaha's children had helped spark the wider conflagration, drawing in the Kurahaupo people based at Te Tau Ihu.[66]

One section of the taua – Ngati Koata, led by Te Mako, and assisted by a party of Ngati Kuia and Rangitane from the Pelorus area – then raided through Maungatawai (Tophouse Pass) where Ngati Apa–Ngati Tumatakokiri seems to have maintained a community, and went on to join Te Rauparaha at Kaiapoi. In the meantime, the Ngati Rarua party, led by Te Iti, Pikiwhara, Pukekohatu, and Te Arama, proceeded to west Wanganui and Karamea, where they again defeated the local Ngati Tumatakokiri. They returned to Te Awaiti (c 1832), where they came across Te Rauparaha and the eastern taua similarly returning from their incursion into Ngai Tahu territory at Kaiapoi.[67] A meeting was held and an allocation of land – described both as a 'tuku' and a 'roherohetanga' – was made between the various tribes involved in the taua. This division of territory may be broadly described as follows: the Wairau and Te Hoiere (Pelorus Sounds) went to Ngati Toa, while Totaranui and Arapaoa went to Te Atiawa. According to Ngapiko, the recipients of these lands within Te Atiawa

64. Native Land Court, Nelson, minute book 2, fol 258; Walzl, *Land Issues*, p 7; see also Ballara, 'Customary Maori Land Tenure', p 116

65. Ballara, 'Customary Maori Land Tenure', p 116

66. Riwaka, 'Nga Hekenga o te Atiawa', pp 75–79; Walzl, *Land Issues*, pp 7–9; Ballara, 'Customary Maori Land Tenure', pp 117–119

67. This event was variously dated at 1828, 1832, and 1834–35; 1832 seems the more likely date as the time when the taua returned from its first expedition to Kaiapoi.

were Te Manu Toheroa (Puketapu), Reretawhangawhanga (Manu Korihi), Tamati Ngarewa (Ngati Hinetuhi), and Huriwhenua (Ngati Rahiri).[68] It would appear that the distribution of lands did not extend to rights in the western region, and we will return to this question and its customary implications later in our discussion of Ngati Toa's rights in relation to those asserted by Te Atiawa, Ngati Tama, and Ngati Rarua.

2.7 Migration after the Battle of Haowhenua, circa 1834–36

In the mid-1830s, a deteriorating situation in Taranaki resulting in the fall of Pukerangiora (1832), and friction on the Kapiti coast caused by competition for land and resources, resulted in a wave of migration southwards. Fighting flared in 1834 between Ngati Raukawa and Te Atiawa peoples. The battle of Haowhenua was followed by a general withdrawal from the vicinity of each other's rohe.[69] Ngati Raukawa went north of the Manawatu into Ngati Apa's territory, while large numbers of Te Atiawa moved across the Strait, settling at Totaranui where they augmented those who had established themselves after the initial taua and Te Rauparaha's roherohetanga.[70] Dr Ballara argues that Ngati Toa who had kainga at Te Awaiti and Arapaoa, withdrew from the area, as Te Atiawa numbers expanded. It is her conclusion that Ngati Toa's 'history of occupation was made more complex' after Haowhenua. The tribe had split kin allegiances; Te Hiko and his branch within Ngati Toa had fought alongside Te Atiawa, while Te Rauparaha had sided with his Ngati Raukawa kin.[71] That pattern of discord between Te Atiawa and Te Rauparaha arising from the relationship with Ngati Raukawa was to be repeated five years later at another conflict (Kuititanga), and was pointed to by Te Atiawa as evidence of their growing independence from the Ngati Toa leader.[72] In that year, 1839, Ngati Toa at Karauripe gladly received into their midst, a contingent of Ngati Rarua from the western side of Te Tau Ihu, to augment their position against both Ngai Tahu to the south and Te Atiawa to the north.[73]

The western side of Te Tau Ihu from Wakapuaka to Mawhero (Greymouth) was also resettled after Haowhenua. Ngati Rarua and Ngati Tama, accompanied by a number of Ngati Koata and Te Atiawa, returned to the area through which they had marauded in the earlier taua, and found it wholly deserted. Here, too, competition for territory was now between the various incoming groups rather than with the earlier inhabitants. Again, allegiances

68. Native Land Court, Nelson, minute book 2, fols 173–174; Walzl, 'Information Audit', pp 45–48; see also Phillipson, *Northern South Island: Part 1*, pp 38–39

69. Riwaka, 'Nga Hekenga o te Atiawa', pp 105–106, 113–114; Ballara, 'Customary Maori Land Tenure', pp 128–134

70. Riwaka, 'Nga Hekenga o te Atiawa', pp 113–114

71. Ballara, 'Customary Maori Land Tenure', p 54

72. Counsel for Te Atiawa, closing submissions, 10 February 2004 (doc T10), pp 29–32

73. See Ballara, 'Customary Maori Land Tenure', pp 137–138; Phillipson, *Northern South Island: Part 1*, pp 29–30, 34–36

within descent groups were to be divided by the subsequent arrival of parties related more closely to one branch of the tribe than the other. No iwi group migrated in a single heke but in successive waves, and there was movement, also, within the Te Tau Ihu region between different kainga. As a result, any description of the conduct of this migration must be simplified to some degree. We rely largely on the detailed analysis offered by Dr Ballara to provide a coherent narrative out of the different tribal perspectives offered on a complex pattern of arrivals, acts of tuku and occupation, while noting points of conflicting evidence and interpretation that have arisen.[74]

Dr Ballara herself has drawn from the testimony given before the Native Land Court in Te Tau Ihu, most especially that given in relation to New Zealand Company tenths in 1892. Notable in this context is the evidence of Paramena Haereiti of Ngati Tama, whose account of their migration was particularly detailed. Haereiti's account suggests a race by the various parties involved in the heke to secure key sites as they travelled along the coast. According to Haereiti, Ngati Tama set sail from Ohariu in a fleet of 13 waka, including one belonging to Te Whetu of Ngati Koata (who had perhaps returned to the north again) and a double-hulled canoe crewed by Ngati Rarua, under their leaders, Turangapeke, Te Poa Karoro, Wi Takira, and Takerei Pairata. They met with no one other than the community of Ngati Koata and Ngati Kuia based at Rangitoto. At Te Haumiti (French Pass), Te Whetu gathered food (probably from Ngati Koata) and it would seem, some discussion took place regarding the rights of different parties. Te Whetu addressed the heke while Te Puoho sang a waiata in reply 'relative to the occupation of the land'.[75] From there, they travelled through Tasman and Golden Bays on to Whanganui Inlet and Te Taitapu, as the different rangatira of each party made claim to different sites.

Ngati Koata later claimed to have given the lands at Motueka to Ngati Rarua out of the gift of Tutepourangi. Tekateka referred to the tuku during the tenths hearings in 1892, stating that the land was given to Niho and that the donor (Mauriri), who was married to a Ngati Rarua woman, had settled with them there.[76] The status of the gift was not accepted by the representatives from the other northern tribes: Ngati Rarua, who had already given evidence, could not comment on the claim of tuku directly; but those from Ngati Tama and Te Atiawa recorded their disagreement with the claim.[77] This contrasts with the agreement that existed between Ngati Koata and Ngati Kuia as to the importance of Tutepourangi's tuku. There is, moreover, little evidence to show that Ngati Koata had themselves occupied that area other than intermittently. We broadly accept Dr Ballara's conclusion: 'Motueka was deserted when Ngati Rarua came, and if any gift was made, it was more a matter of

74. See also Clark, 'Ngati Tama Manawhenua', pp 19–49; Walzl, *Land Issues*, pp 9–12; Ngati Rarua Claims Committee, pp 21–26; Walzl, 'Information Audit', pp 56–64; Riwaka, 'Nga Hekenga o te Atiawa', pp 173–184

75. Native Land Court, Nelson, minute book 2, fols 291–292 (Ballara, 'Customary Maori Land Tenure', p 131)

76. Native Land Court, Nelson, minute book 2, fols 259, 263–266 (Walzl, 'Information Audit', pp 53–54); Riwaka, 'Nga Hekenga o te Atiawa', p 182

77. See Walzl, 'Information Audit', pp 54–55

withdrawing a residual Ngati Koata claim than conferring a gift.'[78] This is not to say that Ngati Koata had no interests at all, but rather that the rights of Ngati Rarua, Ngati Tama, and Te Atiawa were rooted from the first in raupatu and their subsequent occupation; they did not recognise the tuku from one of their allies as the source from which those subsequent rights of occupation were developed.

Some of the party (Niho, Te Iti, Pikiwhara, Te Whawharua, and Pukekohatu of Ngati Rarua) remained at Anaru for a time, while the others moved onto Wakatu where they plundered the crew of a European ship before travelling on to Te Mamaku in the Moutere area, which Te Puoho claimed by planting taro. Ngati Rarua travelled on ahead and had made claim to the area around the Wainui Inlet and Pariwhakaoho before the main party of Ngati Tama arrived. Some of Ngati Tama joined them at Takapu on lands gifted to them by Te Iti in exchange for canoes and other gifts, while Te Puoho's people moved on to Golden Bay, settling at Parapara and Pakawau, under Te Wahapiro, Haereiti (the father of the witness), and Te Kohu-uaro. When Te Puoho's party later travelled on to Te Taitapu, they again found Ngati Rarua already in place under Niho. Te Puoho settled at Patarau, south of Whanganui Inlet, and before embarking on his ill-fated taua into the heart of Ngai Tahu territory in about 1836 (discussed below), divided his time between these two areas (that is, Golden Bay and Te Taitapu).[79]

Te Niho, with Takarei, led another party of Ngati Rarua down the west coast beyond Hokitika, to attack Poutini Ngai Tahu. Thomas Brunner later recorded that this taua captured and killed many Ngai Tahu. Included amongst the captives was Tuhuru who was taken to Paturau where he presented the chief, Matenga Te Aupouri, with the greenstone mere, Kai Kanohi. That gift and the marriage of Niho to Tuhuru's daughter were the first steps in establishing a relationship between the two peoples: Niho and his people settled from Mawhera (Greymouth) to Hokitika, taking charge of the greenstone trade, but reliant on the skills and knowledge of Poutini Ngai Tahu to do so. Ngati Rarua remained in the district, protecting local Ngai Tahu from attack by Ngati Tama, led by Te Puoho on his further taua. When Ngai Tahu based in the Foveaux Straits region, retaliated against the taua and succeeded in killing Te Puoho as well as taking Wahapiro prisoner, Ngati Rarua abandoned their southernmost kainga and withdrew north to West Whanganui.[80] Whether they continued, nonetheless, to demonstrate rights in the region, visiting the Mawhera area for its resources, is not a matter for this report.

78. Ballara, 'Customary Maori Land Tenure', p 248

79. Clark, 'Ngati Tama Manawhenua', pp 36–41; Walzl, *Land Issues*, p 10; Ngati Rarua Claims Committee, pp 23–24; Riwaka, 'Nga Hekenga o te Atiawa', pp 178–180; Ballara, 'Customary Maori Land Tenure', p 112

80. Clark, 'Ngati Tama Manawhenua', pp 39–40; Tony Walzl, 'Ngati Rarua and the West Coast, 1827–1940', report commissioned by the Ngati Rarua Iwi Trust in association with the Crown Forestry Rental Trust, 2000 (doc B5), pp 5–20; Ballara, 'Customary Maori Land Tenure', pp 121–123

Te Atiawa also had been prominent in the conquest of the western side of Te Tau Ihu and gained considerable mana by having killed one of the Ngati Apa chiefs held accountable for the death of Te Rauparaha's children and who had initially escaped retribution. Taka Herewine Ngapiko of Ngati Rarua acknowledged this at the 1892 hearings: 'It was Puketapu who conquered the original owners – we occupied the ashes of their fires. It was Puketapu who killed Kotuku [ie, Te Rato].'[81] The Puketapu hapu, Ngati Komako, is thought to have joined Ngati Rarua in their migration to the region (settling with them at Riwaka) while a party of Ngati Hinetuhi also accompanied Te Puoho (whose senior wife was of that line), but the bulk of Te Atiawa numbers arrived later, upon their more permanent removal from Taranaki. They were led by rangatira who had participated in the taua and could not be denied, but their arrival required a series of territorial adjustments (again in the form of tuku) and added another element to an already complex situation as the migrants settled into their new rohe. The hapu involved in this later wave of migration were Puketapu, Kaitangata, Mitiwai, and Ngati Rahiri. The main focus of their interest in the region was at Motueka, Aorere, Pakawau, West Whanganui Inlet, and Turimawiwi. Kaitangata, and Mitiwai were concentrated in the western Golden Bay and Te Taitapu area, and Puketapu at Motueka.[82]

Dr Grant Phillipson has concluded that a 'mobile community of [Te] Atiawa, Rarua and Tama from all over Te Tau Ihu had interests and rights in the Golden Bay region'.[83] While certain descent groups dominated in particular parts of that district, and particular settlements were associated with particular hapu, nowhere did they occupy extensive territory, exclusively. Thus, Ngati Rarua considered the lands at Motueka, Riwaka, Marahau (Sandy Bay), and Motupipi to belong to them by right of conquest and occupation, held under the authority of their rangatira, Ngapiko, Te Iti, Te Panakenake, and Te Poa Karoro. Ngati Tama, under the leadership of Te Puoho, Te Wahapiro, Haereiti, and Te Kohu-uaro similarly dominated in Golden Bay. Hapu from the two different descent categories shared in the Takaka area, and seem to have sometimes cultivated in common at Te Taitapu.[84] However, interspersed within those rohe were settlements of each other's people and of Te Atiawa on various types of tuku.

Thus, Te Wharerangi, Te Whitu and others of Ngati Tama occupied land at Wainui-Taupo as a result of a tuku to them by Pikiwhara and Te Iti (Ngati Rarua).[85] At Motupipi, Ngati Rarua gifted land to a party of Te Atiawa who had first settled at Te Taitapu, and another area further north at Takaka (in southern Golden Bay) to a party of Ngati Tama.[86] Mitiwai

81. Native Land Court, Nelson, minute book 2, fol 196 (counsel for Te Atiawa, closing submissions, p 12)
82. Ballara, 'Customary Maori Land Tenure', p 129; Riwaka, 'Nga Hekenga o te Atiawa', pp 177–180
83. Phillipson, *Northern South Island: Part 1*, pp 27–28
84. Ibid, p 27
85. Ballara, 'Customary Maori Land Tenure', pp 254–255
86. Ibid, pp 258–260

and Ngati Tama shared the Aorere district. Those accommodations in the division of territory were supported by a loose network of intermarriage between the different descent groups; for example, between Ngati Rarua and Te Atiawa at Marahau where the latter had received a tuku of land from Te Whawharua.[87] At Motueka, too, Merenako, a woman of Te Atiawa who was married to Te Ahimanawa of Ngati Rarua, seems to have invited a party of her people to join them. Merenako's prestige was such that she was able to make a tuku of land in her own right.[88]

Dr Ballara's description of settlement at Motueka, over the next few years, supports the conclusion that the population remained very mobile in this period. The party invited by Merenako were Ngati Rahiri and Puketapu, formerly residing at Arapaoa, but not all stayed, some returning to the Sounds. The area known as Te Matu was given to Ngati Komako. Some witnesses before the land court said the gift was by Ngati Rarua chiefs such as Te Poa Karoro who were already settled in the region; others that it was an independent exercise of rights deriving from Te Atiawa's role in the original conquest, being a gift made by Te Manu Toheroa and Horoatua, chiefs of Puketapu, during the taua, for the 'hokowhitu' (the war party) of Ngati Komako. Ngati Komako also appear to have returned to Arapaoa, although Merenako's people remained. In the meantime, a party of Ngati Rarua, who had been living with Ngati Toa at Cloudy Bay (as described below) returned to Motueka to take up their rights.[89]

The resulting picture of customary rights was one that was still developing in the late 1830s and was particularly intricate in this region to the west of Rangitoto. The pattern of interaction in these years of recent migration included a variety of acts designed to bolster the authority of different rangatira in the area. Such acts include the placing of the land under tapu to prevent its occupation; the regulation of settlement by numerous tuku, which as Dr Phillipson notes, were to give rise to 'lengthy debate about the rights of givers and recipients'; and what he characterises as 'complex political manoeuvres for power within hapu and whanau groups which led to strange alliances and unexpected migrations'.[90] Furthermore, inland resources of the mountainous, forested country behind Tasman and Golden Bays were relatively unknown to the new occupants who based themselves in the coastal areas – probably, as Dr Ballara notes, 'quite sparsely in comparison to the older-established communities in the North Island from which they had come'.[91] Groups seem to have ranged extensively in each other's districts in search of mahinga kai and some rangatira moved about, enjoying rights at a number of places, including, in some instances, on both

87. Ballara, 'Customary Maori Land Tenure', p 251
88. Riwaka, 'Nga Hekenga o te Atiawa', pp 180–181
89. Ballara, 'Customary Maori Land Tenure', pp 248–249
90. Phillipson, *Northern South Island: Part 1*, p 28
91. Ballara, 'Customary Maori Land Tenure', p 240

sides of the region. On the eastern side, too, communities moved about, the thin nature of the soils requiring that they do so.

It may be that spheres of exclusive influences are unable to be established between such recently settled groups. The major general question remains, however, whether the predominance of Ngati Rarua in the early stages of the settlement of the region and the fact that they were in a position to make tuku of the land to later arrivals, suggests a pre-eminence on their part. It is Ngati Rarua's view that this was the case; that:

> Having established themselves, Ngati Rarua fixed a rohe which commenced at Horoirangi and extended to Takaka . . . From a Ngati Rarua viewpoint, the iwi controlled the arrival of new entrants into the land not only by keeping ahead of the travelling party and preventing new claims being made to land, but also through the allocation of land to the groups at different points within southern Golden Bay.

Takapu had been given to Te Pouwhero, Ngararahuarau and Takaka to Moko, and Taupo to Te Whareangi.[92]

As Mr Riwaka has pointed out on behalf of Te Atiawa, they do not dispute that these tuku were made; but not all the lands that they (and Ngati Tama) occupied had been gifted to them. A celebrated leader such as Te Koihua, needed no permission to settle lands which he had helped to conquer, and he settled the area between Aorere and Te Rai without a prior tuku. As Riwaka argues: 'The likes of Merenako, Rangiauru, Wi Parana, and Rawiri Putaputa, each had land that was obtained in their own right.'[93] And they, too, made their own dispositions of places within the lands they had taken up; for example, Merenako was said to have given land to Pukekohatu at Te Maatu (a much disputed area) and another later tuku (in the 1840s) to her Te Atiawa kin.[94]

In our view, when the heke of 1834 began arriving in the western side of Te Tau Ihu, each of the tribes held an equal right to a share in the lands that they had helped to conquer. Ngati Rarua could not exclude the others, nor did they attempt to do so at the time. Even in the later Native Land Court hearings for the tenths, when each party sought to demonstrate their claim, all were in basic agreement that credit for the conquest was shared. Each had an equal right to take up rights and to develop them in accordance with custom. This included the ability to make further dispositions – perhaps to newly arrived relatives – and the capacity to return after a period of absence. However, that right was one of opportunity only and was constrained as time moved on and particular places became more strongly identified with one hapu, or one whanau, or one rangatira.

92. Ngati Rarua Claims Committee, pp 21, 23
93. Riwaka, 'Nga Hekenga o te Atiawa', p 181
94. Native Land Court, Nelson, minute book 5, fols 71–72; Riwaka, 'Nga Hekenga o te Atiawa', p 181

2.8 The 'Overlordship' of Te Rauparaha and Ngati Toa Interests on the Eastern and Western Sides of Te Tau Ihu

At some point during this settlement of the western side of Te Tau Ihu by Ngati Tama, Ngati Rarua, and Te Atiawa, Te Rauparaha also visited the area. According to the account of Tamihana, Te Rauparaha had wished to assess the land between Te Taitapu and Onetahua (Cape Farewell) for his possible use. It was during this expedition that Tamihana and his brother, Te Matatu, received severe burns when cartridges exploded by accident as they camped at Wakatu. This was the first recorded evidence of any remaining resistance among the Kurahaupo peoples: Te Rauparaha ordered the ammunition to be prepared, on the warning by his slaves of an intended attack by those who had fled into the interior, purportedly under the leadership of Te Roto. Te Rauparaha later informed Governor Grey that Wakatu was unoccupied, and was available for European settlement as a result of the tapu he had placed on the land after the accident to his sons. Local leaders challenged this assertion that the tapu showed any rights of ownership. Leaving Tamihana and Te Matatu to recover, the main party had gone onto Onetahua and overland to Te Whanganui where they were met by Niho and 20 chiefs of Ngati Rarua and Ngati Tama (but whom Tamihana described as Ngati Toa), as well as a large group of Ngati Apa slaves. Twenty-five of these men and women were given to Te Rauparaha who departed with them for Kapiti. In all, this heke took some seven months.[95]

What was the significance of these events in terms of the relationship between Te Rauparaha, Ngati Toa, and their allies?

We referred earlier to Te Rauparaha's tuku or roherohetanga. Historically, the distribution of new territory among the incoming northern iwi, here, as earlier at the Kapiti Coast, has been represented as an action under the control of Te Rauparaha as the main leader of the taua. Included amongst those who talked of the sharing out of land in these terms, were non-Ngati Toa witnesses before the land court. Some leaders, such as Ngapiko of Ngati Rarua, stated in the tenths hearings that 'the land was divided up amongst the hapus by Te Rauparaha'.[96] This sort of statement could be interpreted as suggesting that the division of land at Te Awaiti was a demonstration of Te Rauparaha's authority over all the groups who had participated in the taua. It is probably more accurate, however, to see this allocation as a formalisation of claims that had already been made, and as an arrangement by mutual agreement. Ngapiko, himself, stated later in the case, that 'Rauparaha was the tino Rangatira who led the people to Kapiti, but I don't admit that he was the Rangatira who was paramount over the affairs of the hapus who conquered the district'. While Te Rauparaha was the one who 'divided the land', Ngapiko's testimony suggests that the underlying authority remained with the wider community. Te Rauparaha had been 'elected as the leader' because he had

95. Ballara, 'Customary Maori Land Tenure', pp 133–134

96. Native Land Court, Nelson, minute book 2, fols 173–174 (Alan Ward, 'Te Atiawa in Te Tau Ihu', report commissioned by the Crown Forestry Rental Trust, 2000 (doc D4), p 37)

instigated the migration from Kawhia–Taranaki. His role in the allocation of territory was a 'reward for their bravery' rather than an exercise of an overarching chiefly right.[97]

Professor Alan Ward, in his evidence regarding Te Atiawa interests in Te Tau Ihu, characterises the situation thus:

> Beyond Ngati Toa, many iwi, including Te Atiawa in 1832, would (like Ngapiko) have acknowledged Te Rauparaha's leading role in the whole process of conquest that had begun in 1820 and was reaching its zenith in 1832. He may well have been the dominant personality at the hui, with a kind of 'casting vote', and entitled to sum up the conclusions of what was probably a considerable korero. But given their role in the conquest thus far Ngati Awa certainly would have had a large role in the decisions about subsequent control of territory. The division in fact by and large reflected the actual occupation already effected by the tribes.[98]

In our view, this interpretation accords more closely with customary practice and the relationship that existed between rangatira, and between rangatira and their people, than does the Western-influenced view of important war leaders, such as Te Rauparaha, as exercising untrammelled control over client iwi and subjects. As Professor Ward points out: 'Given the jealousy of each senior chief for his mana, and their history of independent action . . . it is scarcely conceivable that they would have passively accepted a divying-up of the spoils by Te Rauparaha alone.'[99]

Furthermore, as the dominance of the Taranaki–Kawhia peoples over Kurahaupo in the general Cook Strait region became more secure, the importance of Te Rauparaha's role was likely to decline. Acts of occupation – the planting of crops and births and deaths on the land – began to create rights in themselves, and the authority of Te Rauparaha as the leader of the taua and the instigator of the migration waned accordingly. Nor was the power balance between incoming northern tribes static. Of particular significance in this context was the growing conflict on the Kapiti Coast between Te Atiawa and Ngati Raukawa. Allegiances other than those of shared participation in the taua became important and Te Rauparaha's kinship with, and support for the latter (as discussed below) underwrote Te Atiawa's increasing rejection of his leadership, although their relationship with other sections of Ngati Toa remained strong.

It is significant that the allocation did not extend west of Wakapuaka, where the conquest had been conducted largely independently of Ngati Toa leadership and participation. Ngapiko testified under cross-examination that, while Te Rauparaha had assisted in conquering the Wakatu area, he had not acquired any mana over it and had not apportioned it.[100] According to the son of Matenga Te Aupouri of Ngati Rarua, the division extended

97. Ibid, fol 177 (p 37); see also Phillipson, *Northern South Island: Part 1*, p 39
98. Ward, 'Te Atiawa in Te Tau Ihu', pp 37–38
99. Ibid, p 37
100. Native Land Court, Nelson, minute book 2, fols 180–181; Walzl, 'Information Audit', p 46

only to the 'locality allotted to Ngatikoata at D'Urville's Island'.[101] Hohaia Rangiauru of Te Atiawa also acknowledged Te Rauparaha's role in the allocation of Arapaoa to that tribe, but not at Blind (Tasman) Bay.[102]

The division of the territory to the west of Rangitoto came *after* Te Rauparaha's roherohetanga, when further events in the North Island prompted a new wave of migration. The groups who had participated in the western taua returned and lit fires of occupation. The first arrivals then made tuku of portions of the land to those of their allies who came to settle a little later.

As we noted earlier, there was some debate regarding Ngati Toa's participation in the conquest of the western side of Te Tau Ihu and what rights might have been acquired there. Certainly, Ngati Toa were to argue, in subsequent years, that they shared in the ownership of these lands by reason of their participation in the conquest, even though their actual physical occupation did not extend so far. Ngati Toa chiefs included Wakatu and Te Taitapu in their dealings with the New Zealand Company in 1839. In the early 1850s, they insisted on their right to be included in any arrangements for lands in the western Te Tau Ihu region generally. When the Crown began negotiating with Ngati Toa's allies for the Pakawau area, Rawiri Puaha and other leading Ngati Toa rangatira informed Governor Grey of their 'great concern at being encircled' by Ngati Rarua at Wakatu, at Waimea and all the places on the coast down to Arahura.[103]

The letter, dated 11 December 1851, described the initial taua and migration from Kawhia, Te Rauparaha's sighting of a sailing ship in the Cook Strait, and his decision to migrate south 'to get in touch with these people' and become a 'chiefly tribe'. An account of the western campaign followed; the deaths of Kurahaupo chiefs were listed; the decision of some of the taua to remain on the land described; and reference made also to the burning of Tamihana Te Rauparaha at Wakatu. The focus was, however, on Te Rauparaha's strategic role rather than on a specific attribution of victories on the part of Ngati Toa leaders. Only Niho, Takarei, Maaka Huematamata, and Hikaka were mentioned and, of these, three are generally identified as Ngati Rarua.[104] A second letter, written the following year, similarly asserted a kind of pre-eminence based on Ngati Toa's role in organising and leading the conquest of the region, which did not depend on actual physical occupation.[105]

These claims were not thoroughly investigated at the time and we will never know the exact composition of the taua, or what the understanding of Te Rauparaha's role and rights

101. Native Land Court, Nelson, minute book 2, fol 229 (Ballara, 'Customary Maori Land Tenure', p 59)

102. Native Land Court, Nelson, minute book 2, fols 299–300; see Ward, 'Te Atiawa in Te Tau Ihu', pp 38–39

103. Bruce Biggs, trans, 'Two Letters from Ngaati-Toa to Sir George Grey', *Journal of the Polynesian Society*, vol 68, no 4 (December 1959), pp 263–276 (Boast, 'Ngati Toa and the Upper South Island', vol 1, p 28); see also Nicholson, brief of evidence, attachment 1

104. Ballara, 'Customary Maori Land Tenure', p 110

105. See Boast, 'Ngati Toa and the Upper South Island', vol 1, pp 28, 32

was, or if such a consensus even existed.[106] We find it difficult, however, to see how Ngati Toa could lay a claim through a conquest in which, by most accounts, they did not play a direct part except, perhaps, for the presence of one or two individuals. More importantly, even if they did participate in the western conquest, they had not followed through on the opportunity to occupy and create a root title.

The question still remains, however, whether Te Rauparaha was owed something by the other leaders because they would not have succeeded to the extent that they did without him. It may be that, if Te Rauparaha had sought to occupy lands on the western side, he would have been accommodated. He certainly visited the area, when he demanded and received slaves and placed a tapu on land at Wakatu.[107] The evidence is, however, that his tapu at Wakatu was not respected by his northern allies.

There is some support also, in the Tribunal's report on Te Whanganui a Tara, for the idea of Te Rauparaha having interests beyond those based in actual physical occupation, although the Tribunal's findings fall well short of an endorsement of any notion of his 'paramountcy'. There, the Tribunal discussed a kind of notional or potential right: 'ahi ka rights were not confined to the area of day-to-day living . . . but extended to other areas of association or influence . . . In addition, Ngati Toa's take raupatu put them in a position to further establish ahi ka over those lands . . . where no other group had ahi ka.'[108]

The question for us, however, is whether such a potential to settle and develop ahi ka was dependent on actual participation in the conquest (that is, in the western taua). Without that, we see little support in custom for any Ngati Toa claim to have established actual rights in western Te Tau Ihu by 1840. We distinguish between the establishment of such rights and the continuing leadership of Ngati Toa's great war leader, Te Rauparaha, who could still call upon his various allies for support from time to time. We also note that in 1839, the year of Te Rauparaha's transaction with the company, it was probably too early for any potential or latent right to have expired, in terms of moving in and settling on conquered land. The significance of this point is discussed in section 2.15.

According to the account of Tamihana, his father had visited the western side to see if there was land worth settling but had accepted the gift of slaves and three pounamu mere instead.[109] Dr Ballara suggests that this act of tuku was an acknowledgement of the obligations of these leaders to Te Rauparaha for his role as a leader of the venture; 'these valuable gifts having been made, the duties of the givers to make some reciprocal gesture towards Te Rauparaha were completed'.[110] Thus, ahi kaa had been lit by Ngati Toa as far west as Te Hoiere. To the west of there, at Whangarae (Croisilles), their influence shaded into that

106. See Phillipson, *Northern South Island: Part 1*, pp 38–39
107. See Phillipson, *Northern South Island: Part 1*, p 29; Ballara, 'Customary Maori Land Tenure', p 133
108. Waitangi Tribunal, *Whanganui a Tara*, p 41
109. 'Undated, Unsigned, Draft (?) Memorandum', NZC231/14/5 (Ballara, 'Customary Maori Land Tenure', p 133)
110. Ballara, 'Customary Maori Land Tenure', pp 133–134

held by Ngati Koata. Close whakapapa ties existed between these two groups and a number of Ngati Toa witnesses gave evidence of their ongoing connections with the Whangarae and Rangitoto area.[111] This relationship, and the presence of Ngati Toa at Rangitoto, was indicated by Ihaka Tekateka's appearance on their behalf in the 1892 hearings of the tenths, but Tekateka also stressed that it was Ngati Koata who had taken up occupation of that territory.[112] Ngati Koata's authority over Rangitoto was never challenged by Ngati Toa, nor did Ngati Toa ever seek to join with them in the tuku to which they traced their rights to that land.

2.9 The Consequences of the Death of Te Puoho, circa 1837–39

In about 1836, the ariki, Te Puoho led a party of Ngati Tama down the west coast, accompanied for part of the way by a small group of Te Atiawa. Niho and Takerei, who were living at Mawhera, warned Te Puoho against taking the expedition further south, but the party moved on to Awarua River (Haast) where they turned inland, and travelled via Lake Wanaka and Lake Hawea to the Waikaia Plains and to Tuturau.[113] This was a gruelling journey that lasted for several months and the motivations for which are unclear. Dr Ballara has pointed out that Ngati Tama had a history of being squeezed out of new territories by their former allies and it may be that Te Puoho saw this as happening again in Te Tau Ihu.[114] This explanation would seem to be supported by evidence before the Native Land Court. According to Haereiti, Te Puoho had quarrelled with Ngati Rarua, ostensibly because their chiefs had refused to hand over their Ngati Apa captive, Mahuika, for punishment for his role in the killing of Te Rauparaha's children at Ohau; but really, he thought, because they had quarrelled over Te Iti's occupation of land at Takaka.[115] Haereiti later suggested that Te Puoho intended to acquire an anchorage favoured by European ships.[116] In the one view, he was forced out; in the other, he was acting much as Te Rauparaha was seen to have, pursuing a grand scheme of conquest and securing strategic control of the south. He is said to

111. Hori Turi Elkington, brief of evidence on behalf of Ngati Toa, 9 June 2003 (doc P6), p 11; Randall Hippolite, brief of evidence on behalf of Ngati Toa, 9 June 2003 (doc P8), pp 2–3; Selwyn Katene, brief of evidence on behalf of Ngati Toa, 9 June 2003 (doc P12), pp 3–5; Oriwa Solomon, brief of evidence on behalf of Ngati Toa, 9 June 2003 (doc P17), pp 3–6

112. Bassett and Kay, 'Nga Ture Kaupapa', p 174

113. The standard published account is that of Atholl Anderson, *Te Puoho's Last Raid: The March from Golden Bay to Southland in 1836 and Defeat at Tuturau* (Dunedin: Otago Heritage Books, 1986). See also Walzl, 'Ngati Rarua and the West Coast', pp 15–20; Walzl, 'Information Audit', pp 67–69, Ballara, 'Customary Maori Land Tenure', pp 134–137; and James McAloon, 'Te Runanga o Ngai Tahu: Professional Evidence', revised ed, report commissioned by Te Runanga o Ngai Tahu, [2003] (doc Q4(a)), pp 23–25.

114. Ballara, 'Customary Maori Land Tenure', p 134

115. Native Land Court, Nelson, minute book 2, fols 278, 286; Walzl, 'Information Audit', pp 67–68

116. Native Land Court, Nelson, minute book 2, fols 278, 286; Ballara, 'Customary Maori Land Tenure', p 135

have described his plan as 'scaling a fish', picking off individual Ngai Tahu settlements from one end of their territory to the other.[117]

Both explanations remain grounded in Ngati Tama's desire to find a secure home base in the south. Nor does this necessarily imply that Ngati Tama's rights in Te Tau Ihu were of a lesser nature than those of Ngati Rarua, although this is implicit in Ngati Rarua claims that they held pre-eminent rights at Tasman and southern Golden Bays. Argument to this effect is based in Ngati Rarua's belief that they were the first to conquer the district in the taua of circa 1828, but this assertion was hotly disputed by both Ngati Tama and Te Atiawa. They argued that the taua were a shared effort, the benefits of which were distributed on a mutually agreed basis (a view with which we agree),[118]

Te Puoho's taua deep into Ngai Tahu territory was an ambitious and ill-fated venture. Along the way, he and his party attacked, killed, or captured a number of local Ngai Tahu people, or found settlements deserted. Some of those who had fled carried news of the raid to their kin based at Ruapuke Island in the Foveaux Strait. A Ngai Tahu war party, led by Tuhawaiki and Taiaroa, successfully retaliated at Tuturau. Te Puoho and many of his companions were killed. Te Wahapiro was captured and only one of the party – Ngawhakawa of Muaupoko – managed to escape to carry news of these events to Kauhoe, Te Puoho's senior widow, who was living at Te Parapara.[119]

The death of an ariki like Te Puoho resulted in an adjustment in the political balance of the region. It made the position of Ngati Tama and their allies more precarious and demanded utu (payment) to restore the spiritual and political equilibrium. We have suggested that Ngati Tama was in some competition with Ngati Rarua for control of Te Taitapu, but this did not preclude a strong relationship between the two descent groups and with sections of Te Atiawa also. Te Puoho was closely related to Ngati Rarua hapu, Ngati Turangapeke, through his mother's line, while Kauhoe (his wife) was of Ngati Hinetuhi, a party of whom had accompanied them on the migration.[120] It was Ngati Turangapeke, with Te Rahui (Te Puoho's brother), that set out to avenge his death, while the other branch of Ngati Rarua, Ngati Pareteata remained behind. The taua only got as far as Maungatawai (Tophouse Pass) before turning back in fear of attack.[121] At about this time, Niho and Takerei abandoned their settlements at Mawhera (Greymouth) to consolidate the Ngati Rarua position at Te Taitapu, although it is possible that they left people on the ground to keep their interests alive. We do not consider that question in detail in this report.

117. Ballara, 'Customary Maori Land Tenure', p 135

118. For a discussion of taua, see Walzl, 'Information Audit', pp 25–27, 104–109. For a different perspective, see Riwaka, 'Nga Hekenga o te Atiawa', pp 180–182.

119. Clark, 'Ngati Tama Manawhenua', pp 71–72; Riwaka, 'Nga Hekenga o te Atiawa', pp 187–188; Walzl, 'Information Audit', pp 67–71; Ballara, 'Customary Maori Land Tenure', p 136

120. Ballara, 'Customary Maori Land Tenure', pp 136–137

121. Native Land Court, Nelson, minute book 2, fols 215–217; Walzl, *Land Issues*, p 11

A second taua of Ngati Rarua was initiated the following year and was to result in the permanent migration of some of that party to the eastern side of the district. An influx of Te Atiawa to join one of their hapu (Ngati Komako) who had settled at Riwaka, at the same time as Ngati Rarua, had initiated a series of internal adjustments and land allocations. It also upset the power balance within Ngati Rarua. According to Pamariki Paaka, in Native Land Court testimony, Ngati Rarua split along descent lines, one more closely related to Te Atiawa, and the other to Ngati Toa.[122] By the late 1830s the situation had resulted in a complex series of tuku in which the Ngati Rarua rangatira manoeuvred for position against each other. Dr Phillipson notes that Te Tana Pukekohatu had been angry when Te Poa Karoro made a tuku of land, that he (Pukekohatu) claimed, to Te Manu Toheroa of Puketapu (Te Atiawa). Serious insults were exchanged and settlement south of Motueka came to a halt because Te Pukekohatu had placed a tapu on the river.[123] When Te Pukekohatu's party reached Cloudy Bay they were 'detained by their Ngati Toa relatives' who had occupied the area since the raids on Kaiapoi. While some of the war party turned back for Te Taitapu and Golden Bay, Te Pukekohatu's hapu decided to settle there. He was then persuaded to lift the tapu at Motueka and settlement progressed on the south side of the river.[124]

In the meantime, Te Puoho's people who had initially remained at Parapara with Kauhoe and their son, Wi Katene, decided to relocate. There were different accounts and interpretations of that event in the Native Land Court and elsewhere. According to one version, Kauhoe's community had been left in a vulnerable position and needed a more secure place to live; in another Kauhoe had been insulted by the failure to avenge Te Puoho's death. She had appealed to Te Whetu and Ngati Koata for other land on which to live, and again the versions differ. In some accounts, Te Whetu and the various rangatira of Ngati Koata agreed that Kauhoe and Wi Katene might live at Wakapuaka, but had not expected them to be accompanied by other members of Ngati Tama.[125] According to Haereiti, Ngati Tama set out in seven waka for this new home and were protected in that occupation by Kauhoe's people, Ngati Hinetuhi of Te Atiawa–Ngati Mutunga. On arrival they explored the land as far as Tauwhare and Horoirangi, looking for suitable parts to cultivate. Some of the party departed back for Taitapu, but other leaders (Hori Te Karamu and Wi Ngaparu) remained with Kauhoe and Wi Katene, as did Ngati Hinetuhi. Te Wahipiro joined them there on his release by his Ngai Tahu captors in 1842.[126]

A specific issue raised for the Tribunal's consideration was the status of this tuku to Kauhoe and Wi Katene and, in particular, whether Ngati Koata retained any rights in those lands. At the time, many Ngati Koata had moved to Rangitoto and Kaiaua. But we also heard evidence that they continued to exercise rights at Wakapuaka, and further, that this

122. Native Land Court, Nelson, minute book 2, fol 223; Phillipson, *Northern South Island: Part 1*, p 30
123. Phillipson, *Northern South Island: Part 1*, p 30
124. Ibid
125. Native Land Court, Nelson, minute book 2, fols 263–265; Walzl, 'Information Audit', p 71
126. Native Land Court, Nelson, minute book 2, fols 280–282; Walzl, 'Information Audit', pp 70–71

was a 'tuku kaokao' or 'tuku whakanoho', according occupation rights just to Kauhoe and Wi Katene. It was to be argued before a subsequent inquiry into ownership of the area, that the land should have reverted to Ngati Koata on the death of the two donees.[127] Despite these various objections, however, Ngati Koata had made no attempt to eject Ngati Tama.[128]

For their part, Ngati Tama do not acknowledge the tuku whenua from Ngati Koata to Kauhoe and Wi Katene Te Puoho as the sole source of Ngati Tama rights, arguing that it was not raised before 1883 and, since then, had not been upheld despite repeated investigations of interests at Wakapuaka.[129] The basic take argued by Ngati Tama – including for Wakapuaka, by the daughter of Wi Katene – was one of raupatu. Ngati Tama also contend that the Ngati Koata who continued to reside in the area did not form an independent community; such residence, in their view, derived from individual marriages into Ngati Tama, or was maintained purely for cash income in a variety of employments rather than as a customary exercise of ownership in the land.[130]

Our understanding of the significance of the gift in customary terms is immensely complicated by the particular circumstances of the Native Land Court hearing into Wakapuaka in 1883; by the conduct of the claims, the evidence of Alexander Mackay, and the finding of the court. The claim was brought by Wi Katene's daughter alone and not by Ngati Tama as a community, and on the grounds of conquest not of gift. Alexander Mackay supported her claims and has been condemned by Dr Ballara as 'distort[ing] the truth', most glaringly, by representing Ngati Koata as a 'conquered party' when his own prior dealings and writings showed that he knew that they were not.[131] The court award of the whole of Wakapuaka to one individual (with a 100-acre reserve for Ngati Koata) was to be bitterly protested by Ngati Koata and Ngati Tama alike, as well as by Ngati Kuia. We will deal with this issue in the final report.

We are faced once more by an immensely complicated customary situation. The fact of the gift is not under dispute, but again its meaning is. Ngati Tama see their rights as predating the tuku and deriving from Te Puoho's leadership within the taua. That rangatira had made the area one of his Te Tau Ihu residences and it seems likely that Kauhoe sought only to strengthen the position of her people by obtaining Ngati Koata recogntion of rights that already had another source. Ngati Koata no longer had a permanent residence at Wakapuaka, but had residual rights; we shall see in our later discussion, that they could show that they had buried their dead there and to have continued to visit the area to gather food. Our conclusions on what this meant when it came to deciding ownership in the Native Land Court will be explored in the final report.

127. Alexander Mackay, 'In the Matter of Whakapuaka Native Block and the Title of Huria Matenga', 13 February 1905, AJHR, 1936, G-6B, pp 49–52; Ballara, 'Customary Maori Land Tenure', pp 242–243

128. Ballara, 'Customary Maori Land Tenure', p 243

129. Counsel for Ngati Tama, closing submissions, [2004] (doc T11), p 18

130. Ibid, pp 18–19

131. Ballara, 'Customary Maori Land Tenure', pp 286–287

The death of Te Puoho at the hands of Ngai Tahu and the subsequent departure of Te Niho from Mawhera, north to Te Taitapu, also raise issues regarding how far south the control of Ngati Rarua and the other migrant tribes really extended in the 1830s. In other words, where did the boundary lie between Ngai Tahu and Ngati Rarua and their northern allies? This question and, in particular, the significance of evidence of Te Niho's ongoing relationship with the West Coast area, is not discussed in this report. We note that there was a Ngai Tahu military response to the northern taua in the late 1830s, especially in the wake of the defeat of Te Puoho. While the crucible of this action was Totaranui and the eastern side of the island, it had consequences for the whole region.

2.10 Settlement Patterns at Te Tau Ihu at 1840

The above description of events briefly summarises the movement of the northern iwi into Te Tau Ihu over the 20 years prior to the New Zealand Company's arrival and the Crown's subsequent acquisition of sovereignty, and traverses some of the more important issues raised for the Tribunal's consideration. As noted earlier, it is not possible now to be certain on many points of detail. Nonetheless, a general picture emerges. In summary, the pattern of settlement may be described as follows.

Ngati Toa were the main conquerors of the Wairau, Karauripe (Cloudy Bay), and Kaituna to Te Hoiere area. Although their occupation, which they took up in circa 1828–30, concentrated more fully around Karauripe, that arrangement reflected their interest in the whaling stations, not their lack of control and exercise of rights further inland. Residence was on the coast, but inland areas were visited for birds, pigs, and other resources. The Wairau was under the authority of Te Rauparaha's elder brother, Mahurenga, while his half-brother, Nohorua, and his nephews, Te Kanae, Rawiri Puaha, and Hohepa Tamaihengia, were living at Cloudy Bay, and periodically visited other Ngati Toa settlements at Te Hoiere, where they were regarded as the chiefs.[132]

Ngati Toa occupation included regular visits by Te Rauparaha and others of the tribe who more usually resided at Kapiti and Porirua. Te Rauparaha had a domicile at Otauira (Robin Hood's Bay) and, in the 1830s, spent long periods there each whaling season. He did not himself cultivate at the Wairau, except briefly in 1843, but it is clear that he regularly visited the area.[133] Dr Phillipson notes that Te Rauparaha's visits were shorter in duration after the decline of whaling in the late 1830s, but this did not mean an abandonment of his rights. After the deaths during the conflict at the Wairau in 1843, a tapu was placed on the land and all occupation of the area ceased for the meantime. Ngati Toa withdrew to their North

132. Phillipson, *Northern South Island: Part 1*, pp 33–34; Ballara, 'Customary Maori Land Tenure', p 215
133. Phillipson, *Northern South Island: Part 1*, p 33; Ballara, 'Customary Maori Land Tenure', p 215

Island bases, and although they were to return to the district in the late 1840s, they did so in much reduced numbers.[134]

Ngati Toa shared occupation of the Wairau and Karauripe district with a branch of Ngati Rarua, some of whom had settled in the general district for about two years during the first stages of occupation. One branch of Ngati Rarua, led by Tana Pukekohatu, departed for the western side of Te Tau Ihu and settled with their kin at Motueka. They returned to the Wairau area in 1837, when the taua to avenge Te Puoho was abandoned. The bulk of the party turned back for the western side but Pukekohatu's people stayed on.[135] Although there was some suggestion before the land court in the 1880s and 1890s that this group were late-comers, there on sufferance of Ngati Toa and without independent rights, the more likely scenario is that Nohorua and the community at Cloudy Bay and the Wairau welcomed their arrival. Positioned between Te Atiawa, with whom relationships had deteriorated, and a resurgent Ngai Tahu, Nohorua persuaded Pukekohatu to settle with his people rather than venturing further south. Given the close kinship between Ngati Toa and Ngati Rarua, their shared participation in the earlier taua, and the fact that Ngati Rarua remained for a sustained period, this arrangement was one of mutual alliance rather than of squatting without rights, or on a client basis.

We accept Dr Phillipson's summation: 'As close relatives and as equals, the two groups shared land and resources, remaining distinct but evolving identical rights.'[136] Ngati Rarua who had returned to Motueka and Taitapu did not share in the rights of their kin in the Wairau, but the reverse was not true; a handful of the Wairau people retained interests in the Motueka and Te Taitapu region.[137] A distinct community of Rangitane also remained at the Wairau, Kaituna, and Te Hoiere (Pelorus Sound). As discussed below, they were in a tributary but entrenched position by1840.

Te Hoiere had been also claimed by Ngati Toa at the Te Awaiti meeting, but where the boundary met with Ngati Koata who maintained settlements at Whangarae (Croisilles Harbour) and Te Aumiti (French Pass) is not entirely clear. Nor is it clear whether Ngati Toa maintained an all-year occupation or visited seasonally instead. In the early 1850s, McLean identified Te Kanae as the principal man of the area, as well as of Kaituna and the Wairau, but the enumeration undertaken by Jenkins, as the Crown tried to organise reserves a few years later, suggested that Ngati Kuia outnumbered Ngati Toa (at a count of 57 to 19). Jenkins also recorded 11 Ngati Apa at Gore Harbour, where they lived alongside the dominant Ngati Hinetuhi (Te Atiawa), estimated to number 65 men, women, and children.[138]

134. Phillipson, *Northern South Island: Part 1*, pp 33–34
135. Walzl, *Land Issues*, p 11; Phillipson, *Northern South Island: Part 1*, p 35
136. Phillipson, *Northern South Island: Part 1*, pp 35–36
137. Native Land Court, Nelson, minute book 2, fols 215–218, 226, 271–272, 278, 292–294; see Phillipson, *Northern South Island: Part 1*, p 36
138. 'Interpreter's Report of Information Obtained during a Visit to Kaiaua, Pelorus, Kaituna, Wairau and Queen Charlotte Sound &c, 1854–55', *Compendium*, vol 1, pp 297–300

These mixed communities looked to Ngati Toa leaders (Te Kanae and Rawiri Puaha) as the principal rangatira of the region, but the numerical strength of the Kurahaupo groups ensured the survival of their distinct identity at 1840 even though it is probable that they would have been eventually subsumed by the dominant newcomers and developed into a joint community.[139]

The extent to which Ngati Toa's control extended southwards down the east coast was also unclear and actively disputed at 1840. Neither Ngati Toa nor Ngai Tahu were in effective occupation of the Kaikoura coast. Ngai Tahu had certainly regained the initiative on the military front by this stage. They had carried out successful raids on the Wairau and Totaranui in 1832, and the northern tribes had been unable to avenge Te Puoho's death; but Ngai Tahu had not regained control to the extent that they were able to resettle the area and would not resume occupation of their old sites at the mouth of the Kaikoura River until the late 1850s.[140] This state of affairs – the stand-off between the two iwi and the need to find accommodation between them – was eased by the intermarriages that took place. We draw no conclusions here about who held territorial control, as this is not a matter for our preliminary report.

Te Atiawa settled at Arapaoa and Totaranui, claiming that area as its primary conquerors, and by right of occupation by representatives of their hapu from 1832 onwards.[141] This part of their rohe in Te Tau Ihu comprised their allocation within the division of territory on the eastern side overseen by Te Rauparaha after the first taua. These lands went to Te Manu Toheroa (Puketapu), Reretawhangawhanga (Manu Korihi), Tamati Ngarewa (Ngati Hinetuhi), and Huriwhenua (Ngati Rahiri).[142] While some Te Atiawa took up immediate residence, the majority of those in occupation by 1840 had probably settled later, as a consequence of events in the North Island; namely, the fall of their Taranaki stronghold at Pukerangiora and the outbreak of fighting at Haowhenua and Kuititanga. In 1856, the Crown was to identify 51 hapu and whanau groups in the area, but Ngati Rahiri and Puketapu dominated, accounting for two-thirds of the population, while Ngati Hinetuhi, who were based at Port Gore, formed a third large party. To the south, at Te Awaiti (Tory Channel) Te Atiawa at first shared occupation with Ngati Toa, but the latter began to lose interest in the area as a result of the decline of whaling at Cloudy Bay in the late 1830s. The death of Nohorua, who had maintained shared use of the channel with Huriwhenua of Ngati Rahiri, and the further withdrawal after the conflict at the Wairau, resulted in Ngati Toa largely abandoning their claims to Te Awaiti and Totaranui in the early 1840s.[143]

139. Ballara, 'Customary Maori Land Tenure', pp 225–226

140. Phillipson, *Northern South Island: Part 1*, p 34

141. Riwaka, 'Nga Hekenga o te Atiawa', pp 12–13, 107–108, 113–116; Phillipson, *Northern South Island: Part 1*, pp 31–32; Ballara, 'Customary Maori Land Tenure', pp 194–196

142. Native Land Court, Nelson, minute book 2, fols 173–174, 229, 300; Phillipson, *Northern South Island: Part 1*, p 31

143. Phillipson, *Northern South Island: Part 1*, pp 32–33

Te Atiawa also had papakainga on the western side of Te Tau Ihu – at Pakawau, Te Taitapu, Mouteka, Marahau, Aorere, and Motupipi – where they shared rights with the other northern iwi who had taken an active role in that part of the invasion.[144] Dr Phillipson has pointed out that the mobility of Te Atiawa had resulted in a very complex pattern of rights in their rohe:

> Many of the hapu were so intermingled that it was impossible to allot distinct territories, and important chiefs such as Witikau were considered to have rights extending throughout the Sound . . . The Te Atiawa population in the Sound seems to have been very mobile, and possibly no particular hapu could claim exclusive rights in any of the small bays scattered around its shores.
>
> This mobility and fluidity of rights extended to North Island Atiawa in 1840. The take of those members of the tribe living in the land was often identical to those living elsewhere – and in some cases was inferior . . . relatives living at Waikanae might suddenly arrive and expect to live in the Sound, or people living in both places might decide to leave for Taranaki and never return. The migratory habits of Te Atiawa were not close to settling down by 1840, and were considered just as volatile in the late 1850s. Removal to Taranaki, however, seems to have been considered as an extinction of rights.[145]

The allocations of territory that had taken place after the initial taua into Te Tau Ihu and southwards to Kaiapoi did not extend beyond Wakapuaka. That area – Tasman and Golden Bays, and Te Taitapu – was settled by Ngati Rarua, Te Atiawa, and Ngati Tama in the aftermath of the battle of Haowhenua. Ngati Rarua made their main base in the Motueka and Riwaka River areas, where they were joined by Te Atiawa. Ngati Tama were based at Wainui, Wakapuaka, Parapara, and Tukurua. Ngati Rarua with their Te Atiawa allies controlled the western Tasman Bay; Ngati Tama and their allies, the eastern part. A border area – centred on the rich Waimea River valley – was disputed between the two groups. Resources at Wakatu were shared amongst the tribes resident in the general area, and although Ngati Tama controlled the eastern bay, they also claimed rights along with Ngati Rarua and Te Atiawa at Motueka, Whanawharangi, Anatakapua, Motupipi, Takaka, Aorere, and Te Taitapu. The same was true of Ngati Rarua, who had control of Motueka and its environs, but shared territory elsewhere at Taitapu.[146]

Despite the conquest and settlement of Te Tau Ihu by their allies, Ngati Koata continued to base their rights in the region on Tutepourangi's tuku, and despite the death of their senior rangatira, Ngati Kuia continued to live with them at Rangitoto and the adjoining coast to Whangamoa Bay, where the river became a disputed boundary with Ngati Tama. Ngati Koata also had kainga at Te Hoiere, where their interests intersected with those

144. Riwaka, 'Nga Hekenga o te Atiawa', pp 170–171, 173–180
145. Phillipson, *Northern South Island: Part 1*, p 32
146. Ibid, pp 25–30; Ballara, 'Customary Maori Land Tenure', pp 240–264

held by Ngati Toa and, again, a Ngati Kuia community also lived there and was to voice their rights with increasing confidence.[147] The two peoples gathered resources at Wakatu, Wakapuaka, and Waimea, and both maintained that their continuing rights in Wakapuaka had been respected by Ngati Tama after the gift to Kauhoe and her son Wi Katene and the relocation of her community to the area.[148]

The Tribunal rejects the claim of any single group within the tangata heke to have primary rights in the Te Tau Ihu region, even though they may have had the most numbers on the ground at 1840. We find the more inclusive interpretation persuasive in terms both of custom and history. There is wide agreement that new territories were divided between the different parties involved in a raupatu on a communally agreed basis as to who deserved what.

This did not preclude competition and dispute, especially in a migration which took place in different stages over a number of years after the initial invasion and conquest. New arrivals demanded adjustments between different rangatira and hapu, and in the allocation of rights. Nor is there any certainty in the traditional evidence about the conduct of the taua, that any one party played a greater role than the others. Te Rauparaha's leadership was widely acknowledged, but he had not participated directly in the conquest of the western side. Neither can Ngati Rarua demonstrate, without challenge, that they played a special role as the instigator of that part of the venture, that might give them any primary right over the whole of the western region. Rights based in raupatu (followed by occupation) were shared by Te Atiawa and Ngati Tama, as well as accommodating those based in the different take of Ngati Koata and Ngati Kuia. Of course, as particular sites were settled and time passed, core territories and spheres of interest began to develop, as described above.

2.11 The Impact of the Taua on the Rights of Kurahaupo Peoples

The accounts of the heke and taua are centered on the actions and rights established by the victors, but what of the Kurahaupo peoples who had formerly controlled the district? It is clear that they had been soundly defeated in a series of engagements from Waiorua onwards; many of their rangatira had been killed and acts of retaliation for those losses were few. Those who survived had been either captured or forced to flee into the interior. But it is equally clear that they retained a presence in the district and that the northern migrants had not displaced them entirely. They had been defeated, but not all had been enslaved. The degree and scale of the invasion did not equal that of some others in the so-called 'musket wars', and Ngati Toa could never entirely control such far-flung and difficult territory. In the customary world, entry into strange lands required the spritual protection

147. See Armstrong, 'Ngati Apa ki te Ra To', p 59; Phillipson, *Northern South Island: Part 1*, pp 29–30, 34–36
148. Campbell, 'A Living People', pp 34–44

of tangata whenua. It was best to have the assistance of those who 'knew' and it was not in the interests of the tangata heke to remove all people from the ground. Nor did they do so. Communities such as that led by Tutepourangi survived even after his death in battle, as did Ihaia Kaikoura's at the Wairau and that of Hura Kopapa at Kaituna.

The Tribunal heard evidence about two different groups of Kurahaupo still present at Te Tau Ihu in the 1830s and into the 1840s. One theme of evidence referred to the Kurahaupo people who had escaped into the interior and who lived independently from the invaders; the other, to tributary communities who lived in vassalage to their victors but still retained a coherent identity as 'Rangitane', 'Ngati Kuia', or 'Ngati Apa'. These people remained on a portion of their former lands and, it was argued, maintained rights alongside those exercised by their 'conquerors'.[149] It is not always clear into which category particular communities or groups noted by early European observers fell; nor was there agreement amongst witnesses before us as to what rights they might possess. This picture was complicated by changes in the years immediately after 1840, as the tribal balance shifted, and the tribes, who had been defeated in the taua some 10 or 15 years earlier, were able to reassert their voice and their claims to portions of their former territory. One possible interpretation of this development is that it was a true expression of customary law which allowed for the recovery of mana and in which entitlement continued to evolve after, as before, 1840. On the other hand, it has also been suggested that, in giving recognition to those claims to the extent that they did, Crown officials did not follow custom as it really existed at 1840: that the Kurahaupo people had been utterly subjugated and had lost all rights to the land.

To deal first with the issue of 'fugitive' bands of Kurahaupo: the size of the territory, the concentration of Ngati Toa and the northern tribes on the coast, plus the seasonal nature of much of that occupation, meant that numbers of tangata heke were relatively thin on the ground, especially in the interior. As a result, it was possible for small groups of local people, who had escaped into the margins of their rohe, to maintain an autonomous if precarious existence. Tamerangi and Pakauwera (also known as Pakihure) were brought to our attention as examples of rangatira living outside the authority of the senior northern rangatira.[150]

The northern tribes were in clear control of the region in the 1830s, but it is apparent that they remained alive to the possibility of raids on isolated parties and on their newly secured resources. The example was given of the rumoured threat of a Rangitane attack on Te Rauparaha's party during his visit to the western side of Te Tau Ihu, when two of his sons sustained accidental burns as they prepared cartridges for their defence. The name of Pakauwera was also recorded on a number of occasions as posing a threat to unwary travellers, both Maori and Pakeha, in the upper Pelorus Sound and the Wairau Valley.[151] While the

149. Armstrong, 'Ngati Apa ki te Ra To', pp 30–39; Campbell, 'A Living People', pp 33–34; Armstrong, 'Right of Deciding', pp 15, 17–24

150. Armstrong, 'Ngati Apa ki te Ra To', pp 27, 29–31; Campbell, 'A Living People', p 35; Armstrong, 'Right of Deciding', p 27

151. Armstrong, 'Ngati Apa ki te Ra To', pp 30–31

senior chief of the area had been killed at Te Hikapu, his son Wirihana Kaipara, and grandson Eruera Wirihana Pakauwera (a young boy) both escaped the battle.[152]

E J Wakefield, who was accompanied by Ngati Toa guides in his visit to the Pelorus River, in September 1840, made several colourful references to the state of the district in his subsequent account, *Adventure In New Zealand*. He noted the 'fear and trembling' of a party of 'Rangitane' found collecting flax for Te Rauparaha when confronted with the presence of Maori of the 'victorious tribe'. On the other hand, those same northern Maori also warned Wakefield of the threat posed by 'Pakihure':

> Our attendant natives begged us to examine our fire-arms and hatchets, and to keep them close at our hands, ready for use. On enquiry into the reason for this precaution, they told us that Pakihure, the great chief of the Rangitane, had managed to escape into the hills with some few of his followers from the general slaughter by [Te] Rauparaha, and that the report of our guns [Wakefield and his friends had been shooting pigeons] might attract him, and lead to an attack on our party, for the sake of vengeance and plunder . . .[153]

The Spain commission (the first Crown inquiry into customary rights in the Cook Strait region) also referred to the presence of Pakauwera, as does Elvy in his later, mid-twentieth-century, account.[154]

Tamerangi and a band of Ngati Apa–Rangitane were also said to have intermittently occupied a pa site on the Avon River (at the back of Blenheim) during the 1830s. Maori residents in Cloudy Bay blamed an attack on a party of Europeans based at Port Underwood, on the 'fugitives' living in the interior.[155] Signs of small bands, probably of displaced Ngati Apa who had fled after the first taua, were also noted by Heaphy and Brunner in 1846 as they explored the headwaters of the Kawatiri River with the assistance of Ngati Apa–Ngati Tumatakokiri tohunga Kehu or Hone Mokehakeha.[156] Again, the possible presence of a band of 'bush natives' living independently of the coastal settlements seems to have been the cause of some anxiety amongst the northern Maori in the party.[157]

Our knowledge of these groups is attenuated; a matter of traces left in the bush and in the historical record, but remembered by Kurahaupo claimants as keeping their ahi ka alight. There is no doubt that their existence was precarious. Nor was there any likelihood of these groups on the periphery being able to oust the northern migrants from the region in the 1830s. Ngati Toa saw these people as pakaurere (a species of locusts), roving bands always

152. MS1187, item 162, pt 1 (Ngata, 'Nga Korero mo Ngati Kuia', p 66); Armstrong, 'Right of Deciding', p 14

153. Edward Jerningham Wakefield, *Adventure in New Zealand, from 1839 to 1844: With Some Account of the Beginning of the British Colonisation of the Islands*, 2 vols (London: John Murray, 1845), vol 2, pp 58–59 (Armstrong, 'Ngati Apa ki te Ra To', pp 30–31)

154. Armstrong, 'Ngati Apa ki te Ra To', p 31; see Phillipson, *Northern South Island: Part 1*, pp 41–44

155. Armstrong, 'Ngati Apa ki te Ra To', pp 27, 29–31

156. *Nelson Examiner*, 19 September 1846; Armstrong, 'Ngati Apa ki te Ra To', pp 46–52

157. Armstrong, 'Ngati Apa ki te Ra To', pp 50–51

at risk of attack who could not be said to have maintained ahi kaa but only he ahi mawhiti-whiti or he ahi maueue (the fires of fugitives).[158] Occasionally, the harassment worked the other way. These bands maintained an existence outside the permission of Ngati Toa and their allies and, on occasion at least, posed sufficient threat to put them on their guard. They did not acknowledge the authority of the northern rangatira and it is highly doubtful whether they would accept that their ahi ka had been extinguished for all time. Kurahaupo leaders in the 1840s and 1850s admitted their earlier defeat at the hands of the northern tribes, but consistently emphasised that they had never been fully enslaved and that some of their number retained a completely independent if marginal existence on parts of their ancestral lands.

The existence of these roving bands was not absolutely necessary to the Kurahaupo claim, but does suggest that the concept of 'conquest' is more nuanced than is often allowed. We consider the strength of their claim to lie, however, in the evidence about other sections of those tribes; people who had been captured, but spared, or with whom a peace had been made and who had been left as tributary communities, growing food and collecting resources for Ngati Toa and the other northern tribes. Names slowly emerged as Pakeha officials began dealing more fully with Maori resident at Te Tau Ihu. These included Ihaia Kaikoura at Port Underwood, Hura Kopapa at Kaituna, and Puaha Te Rangi on the West Coast. Pa were recorded as still standing at Kaituna and Waikakaho, and those same officials began to encounter Kurahaupo communities which demanded recognition of their rights in the Crown's negotiations.

To the west, Ngati Kuia continued to live at Rangitoto and its environs. Examples were given of parties found cutting flax and gathering resources when the New Zealand Company first arrived in the district. As we noted earlier, when Wakefield encountered such a party at Pelorus River, he recorded that they were in fear of the Ngati Toa in his party.[159] But they were present when Spain inquired into the company's title in 1844.[160] By 1854, they were assessed as outnumbering Ngati Toa–Ngati Koata at Te Hoiere, and at the time of the negotiation of the Waipounamu deeds in 1856, they were the second most numerous group of signatories. The enumeration of 1854 also recorded a small group of Ngati Apa living with the more numerous Ngati Hinetuhi at Gore Harbour.[161] Later testimony before the Native Land Court tended to confirm that they retained a presence at Te Taitapu as well.[162]

The key issue is: what sorts of rights did these groups have? This question was hotly debated before us, as it has been in the past before the Native Land Court. At the time, acts

158. Nicholson, brief of evidence, p 22

159. Wakefield, *Adventure in New Zealand*, vol 2, pp 58, 63 (Armstrong, 'Ngati Apa ki te Ra To', pp 30–31)

160. Campbell, 'A Living People', p 133; Armstrong, 'Ngati Apa ki te Ra To', pp 127–128

161. 'Interpreter's Report', *Compendium*, vol 1, pp 297–300; Campbell, 'A Living People', pp 160–163

162. Native Land Court, Nelson, minute book 1, pp 4–7, 8, Hilary Mitchell and Maui John Mitchell, comps, 'Documents Cited in Report No 13A', supporting documents to 'Te Tai Tapu', various dates (doc A25(a)), doc 11.1a, pp 4–7, 8

of occupation in defiance of Pakeha, most notably at the Wairau in the early 1840s, were attributed to the schemes and interests of the principal rangatira of 'Ngati Toa' rather than to the exercise of legitimate local Kurahaupo rights. Pakeha accounts uniformly represented these people as 'enslaved' and acting solely on the orders of their conquerors. The few of the tribe who were living in the interior were seen only as 'fugitives' without rights because their people had been totally subjugated.

The question of whether these groups might still have rights was not considered properly until some years later, with important implications for the conduct of purchases in the district. Thus, Commissioner Spain, in his inquiry into the ownership of the northern South Island, called no witnesses from the Kuruhaupo people (or, indeed, more than one Maori at all), and noted in his report of 1845 that the original occupants were 'reduced to a mere remnant, living . . . without dwelling-places, and even now hunted down by [Te] Rauparaha and his retainers'.[163] The rest were in a position of vassalage. We shall see in chapter 4 that Spain believed that captives who had been living on 'sufferance' of their conquerors were nonetheless resident, and therefore had the power to alienate those lands, but he dismissed the claims of Rangitane because he mistakenly believed that they were all fugitives.[164] When C W Ligar visited the Wairau district in 1847, he also discounted the possibility that Rangitane chiefs might still retain rights to the land even though he noted, in one instance, the continuation of their local authority. Dr Ballara considers that he misread the situation, while Michael Macky's view is that Ligar simply wrote what he was told by the local Maori residents.[165] Ligar's perception was that:

> the Rangitane tribe was conquered and taken captive from it by Rauparaha and his people the Ngatitoa, except a party of fugitives, consisting of nine individuals of the conquered tribe. These concealed themselves after the fight, but have gradually emerged from their hiding-places, and scattered themselves over the country.[166]

Ligar recorded that another group of Rangitane lived at Port Underwood, where their rangatira, Kaikoura, was regarded as the principal man resident within the mixed community of Rangitane and Ngati Toa. But in Ligar's view, like that of Spain, Ihaia's people were 'slaves' nonetheless. In any case, Governor Grey made no attempt to include them in the Crown's purchase of the area, except in the subsequent provision of reserves.[167] This was left to the Waipounamu deeds, which belatedly acknowledged their existence, describing

163. William Spain, 'Mr Commissioner Spain's Report to Governor FitzRoy, on the New Zealand Company's Claim to the Nelson District', 31 March 1845, *Compendium*, vol 1, p 59 (Ballara, 'Customary Maori Land Tenure', p 219)

164. See Armstrong, 'Right of Deciding', pp 52–55

165. See Ballara, 'Customary Maori Land Tenure', pp 218–222; Michael Macky, 'Crown Purchases in Te Tau Ihu between 1847 and 1856', report commissioned by the Crown Law Office, 2003 (doc s2), pp 33–36

166. C W Ligar, Surveyor-General, to Lieutenant-Governor, 8 March 1847, *Compendium*, vol 1, p 202 (Ballara, 'Customary Maori Land Tenure', p 219)

167. Ballara, 'Customary Maori Land Tenure', pp 220–222

them as having 'co-equal rights' with Ngati Toa. That recognition came from members of the northern tribes as well as the Crown, suggesting that custom had continued to unfold. Kurahaupo people continued to live on the land, their survival had to be acknowledged, and there is evidence that opinion was changing. Rangatira from conquering tribes were coming to accept that a defeated people could retain rights in the land although they were no longer in control of it.

In particular, we note the relationship between the Ngati Toa leader Te Kanae and Rangitane. This rangatira had married into Rangitane, supported their occupation of 'settler' sections in 1850, was a leader of both tribes, and supported Rangitane's right to sign a deed and receive payment in 1856. There was rivalry between Te Kanae and his brother Puaha, whose mana had been enhanced while Te Kanae was held prisoner by the Crown. McLean noted that, while Te Kanae acknowledged Rangitane's surviving rights (the commissioner described him as 'put[ting] them forward' after Te Kanae had received his own payment), Puaha's attitude was less certain. On that key occasion in 1856, Te Kanae clearly prevailed and Rangitane's rights were acknowledged and endorsed by Ngati Toa and Ngati Rarua.[168]

Much depended on the status of 'vassals' as followers of leading 'conquest' chiefs, living as distinct groups within a wider community, which came together from time to time for common enterprises at the direction of those chiefs. Ngati Toa, Ngati Rarua, and Rangitane formed one such community in the Wairau district. Like the wider concept of 'conquest', that of 'vassalage' was a shaded term. Professor Ward was in no doubt that the Kurahaupo tribes had been 'thoroughly subjugated', but he, along with other witnesses, agreed that tributary communities could continue to live peacefully on part of their former territory so long as they acknowledged the authority of the principal leaders amongst the migrant conquerors:

> provided the vanquished tribes contributed on demand by their conquerors the produce of gardens they cultivated, or the fish and birds they caught and preserved, provided they felled trees and made canoes when required, they could live more or less in peace on portions of their former lands. There was a gradation of degrees of autonomy which included the more lowly and powerless of the allied tribes as well as the conquered tribes, all of whom were tributary to the most powerful chiefs in some degree.[169]

Some individuals, although captured and living in one of these tributary communities, were able to maintain or recover mana. Their whakapapa links to the land and their spiritual power were still recognised still by those in military and strategic control. An example was Hohua, the tohunga who accompanied Te Rauparaha to Kaiapoi.[170] Kaikoura, whose

168. For McLean's account of the views of Te Kanae and Puaha, see Armstrong, 'Right of Deciding', p 104. See also Ballara, 'Customary Maori Land Tenure', pp 222–231.

169. Ward, 'Te Atiawa in Te Tau Ihu', p 31

170. W J Elvy, *Kei Puta Te Wairau: A History of Marlborough in Maori Times* (Christchurch: Whitcombe and Tombs, 1957), pp 70–71; Armstrong, 'Right of Deciding', pp 17, 25

people were based at the mouth of the Wairau River, also exercised a considerable degree of autonomy at 1840. He was the leader, noted by Ligar, at Port Underwood and, most notably, had signed the Treaty of Waitangi.[171]

Instances could also be cited of marriages between the rangatira of the invading northern tribes and high-ranking women of Kurahaupo whose male relatives had been defeated in battle, or had been supplanted as the most powerful chiefs in the district. The first examples at Te Tau Ihu were those between Ngati Koata and Ngati Kuia and were accompanied by a tuku rather than a conquest of the land. The tuku, as we have seen, was made to prevent fighting, reflecting a shift in the military balance of the wider Cook Strait region as a consequence of the victory of the northern tribes at the battle of Waiorua. Tekateka took Nukuhoro (a close relative of Tutepourangi) as his wife, while Te Patete married another high-ranking local woman (Oriwa, daughter of Kereopa Ngarangi and Kerenapu).

When Ngati Tama subsequently invaded the district, killing Tutepourangi and others among the rangatira, they also married important local women. Thus, Te Wahapiro (Te Puoho's nephew and stepson) took Hinewaka as his wife. According to the evidence of Meihana Kereopa, Hinewaka was the daughter of Tutepourangi; in that of Tekateka, she was identified as the daughter of local chief, Te Kahawai, whose death some accounts also attributed to Te Wahapiro. Ngati Koata chief, Te Putu, married the daughter of Pou-whakarewarewa in the course of the first taua into the district. Pou-whakarewarewa had eluded the war party that had so harried his kin, ensconcing himself on Kauaeroa in Te Hoiere. Te Rauparaha was said to have suggested the peacemaking, and that section of the tribe was permitted to remain at Te Hora (Canvastown).[172] The daughter of Tupou is said to have been adopted by Merenako of Te Atiawa, was married into that tribe, and some of her descendants lived 'at various places in the land'.[173] The tangata heke also formed marriages with their enemies to the south. Niho, who was endeavouring to establish an outpost of Ngati Rarua power and to control the greenstone trade at Mawhera, married the daughter of the local chief, Tuhuru (of Poutini Ngai Tahu), who had been captured in battle.

It was doubtless difficult for Victorian – and, indeed, early twentieth-century – Pakeha commentators to see these arrangements as anything other than the taking of the spoils of war, but a greater understanding of the customary world has shown that there was no loss of status for the women involved. It was by this means that fighting could be prevented, a peace made, and a new whakapapa line established between the two tribes, even though they might keep largely to their separate and autonomous existences. Those links would project into the future generations, while recent arrivals deepened their connection to the

171. *Nelson Examiner*, 27 February 1847 (Armstrong, 'Right of Deciding', pp 45–46); see also Phillipson, *Northern South Island: Part 1*, p 43

172. Campbell, 'A Living People', p 22; Ballara, 'Customary Maori Land Tenure', p 81

173. J D Peart, *Old Tasman Bay: A Story of the Early Maori of the Nelson District, and its Association with Europeans prior to 1842* (Nelson: R Lucas and Son, 1937), pp 59–60 (Riwaka, 'Nga Hekenga o te Atiawa', p 180)

land and the loyalty of the local community was secured to them. The Tribunal at Rekohu, discussing the importance of ancestral association within Maori customary thinking, has pointed out that the best (but not the only) way for migrants to obtain the same degree of legitimacy and make safe their possession of a new homeland was to marry into the local people: 'Then in terms of what was right, one's children could never be turned off.'[174]

Ngati Toa kaumatua, Ngarongo Iwikatea Nicholson, gave particularly helpful evidence about the practice of matching marriages to provide mediation between two different iwi. He explained how:

> Marriages between male and female captives with their captors was for the purpose of providing takawaenga between tribes, who may have been at war, or intending to engage in such activity . . . The aforementioned marriage practices created what our customs describe as 'Takawaenga'. They and their offspring became just that (the mediators or buffer states or go-betweens) in times of stress between their tribes. They had an important role of responsibility toward maintaining inter-tribal stability through this, and had special status of varying degrees, dependent on the circumstances that created them, and of course their own personal status . . . Bloodline relationships often provided stability between tribes, although the actual link could be several generations removed. The need to maintain these bloodlines were often the reason for other marriages to reunite those blood lines and secure the relationship link for future generations.[175]

It was a responsibility handed down from generation to generation. The offspring of matched marriages were the 'people who walk between'(takawaenga) and would create and maintain a bond between the 'conquered' and the 'conqueror'.[176]

Mr Nicholson described how Ngati Toa constructed a network of takawaenga links with both enemies and allies. One example came from the taua against Ngai Tahu at Kaiapoi, which had resulted in the death of Ngati Toa ariki, Te Peehi. When a woman prisoner, Te Ipinga, was found to be the daughter of Tukaimaka, a high-ranking Ngai Tahu chief, she was married to Matenga Te Rapa of Ngati Toa. Matenga was chosen for that role because of his relationship to Te Peehi (his cousin) and the others killed during the taua. One of the children of that union, Riria Paeamu, was married at a young age to Te Toko of Ngati Rarua to create another takawaenga within those tribes allied to Te Rauparaha, and who had taken up occupation at Te Tau Ihu. Another takawaenga was created between Ngati Toa and Rangitane. Te Rauparaha's nephew, Te Kanae, was given a Rangitane wife, Mere Terapu, who according to Rangitane evidence, was the daughter of their chief, Ihaia Kaikoura. Their two peoples then lived together at the Wairau. Te Kanae, by his first wife, Karoraina Tutari,

174. Waitangi Tribunal, *Rekohu*, p 143
175. Nicholson, brief of evidence, pp 26–27
176. Waitangi Tribunal, *Rekohu*, p 141

a daughter of Te Rauparaha, had a daughter who was married by arrangement to Peneta Tanoa of Ngai Tahu, and a daughter of that union was then married into Rangitane.[177]

All the Kurahaupo tribes at Te Tau Ihu acknowledged defeat by Ngati Toa and their allies. Former lands had been vacated or taken by force, many of their leading men had been killed or taken captive, and numbers of their people had been enslaved. Yet, sections of these tribes retained a degree of independence, which was to be strengthened, in the very early years of the colony, by Christianity and the theory (if not the reality on the ground) of British law. They had survived as an identifiable people at 1840. A sufficient population remained at Cloudy Bay and the Wairau, Te Hoiere, and Port Gore to form communities known by the names of 'Rangitane', 'Ngati Kuia', or 'Ngati Apa', they retained adequate numbers of their chiefs, their traditions were still identified with the land, and their whakapapa was remembered. As former slaves were released and as Ngati Toa's fortunes declined (most especially after the imprisonment of Te Rauparaha, Te Kanae, and other senior leaders in 1846), the position of the Kurahaupo tribes strengthened, even though any hope of being able to drive the migrants off their territory was also lessened with the interposition of British rule. Later Native Land Court evidence suggests that, by the 1850s, these groups were largely free of any effective overlordship; although considered of lesser status, they were living separately and independently. Thus, Irihapeti Rare thought that Rangitane at the Wairau were 'slaves' but agreed that Ngati Toa did not interfere with them, and that they grew food for themselves but not their Ngati Toa neighbours.[178]

Dr Ballara notes the 'curious mixture of independence and subservience' that Rangitane in this district showed to Ngati Toa in the early years of the colony.[179] The followers of local Ngati Toa chief, Rawiri Puaha, who was cultivating the Wairau independently of Te Rauparaha and Rangihaeata at 1843, included Rangitane. This party may have been former slaves released since Te Puaha had converted to Christianity two years earlier. But when the tapu placed on the valley was lifted, Rangitane from Cloudy Bay (Enoka and Wi Te Kekeu) were again included in the party intending to resettle the area.[180]

Certainly, at first, neither Ngati Toa nor the Crown considered Rangitane in the negotiations for the Wairau area (1847–50), which were based in the North Island. There is, however, strong evidence of Rangitane's increasing independence of action in their subsequent opposition to this and other Crown purchases which had not included recognition of their interests. They continued to defer to the Ngati Toa chiefs, but they also told officials of their own rights. A group of Rangitane refused to leave their cultivations after the Crown had purchased the valley from Ngati Toa. Dr Ballara points out that officials ascribed different motives to the Rangitane party. According to H Tacy Kemp, they had been deployed by Te

177. Nicholson, brief of evidence, pp 27–30
178. Native Land Court, Nelson, minute book 4, fols 85–90; Phillipson, *Northern South Island: Part 1*, pp 41–42
179. Ballara, 'Customary Maori Land Tenure', p 224
180. Ibid, p 218

Kanae in his power struggle with both the Crown and his younger brother, Te Puaha. Te Kanae had been sidelined by his imprisonment in 1846, along with Te Rauparaha, as a consequence of which he had also missed out on the first payments for the Wairau Valley. On his release, he had gathered a body of Rangitane about him and, in Kemp's view, intended to oppose the Pakeha settlement of the valley in order to force the Government to give him the major share of the next instalment of the payment.[181]

John Tinline, who visited the Rangitane party, also reported that they acknowledged the leadership of Te Kanae; they claimed to be there by his permission, but only until the Pakeha settlers actually arrived to take up their farms. Notwithstanding their deference to Ngati Toa leadership, Tinline also thought that they were there to support their own claim for a share of the payment. In his view, being 'subject to the Ngati Toa, they are afraid to openly assert their claim to any part of the money – & I daresay – they may have had some idea that by retaining possession of the land itself, they will entitle themselves to a separate consideration from the Government or the New Zealand Company'.[182] They remained on the land until May of that year but eventually harvested their crop of potatoes and departed.

The following year, when the Government attempted to survey the road through the valley, they were confronted once more by a Ngati Kuia–Rangitane presence. This time, the party was stopped by the people based at Kaituna, who again acknowledged a Ngati Toa rangatira (Te Puaha) as the principal man of the region; but, at the same time, they drew the attention of officials to the existence of their own interests in the land. Tinline recorded that he had tried to persuade them that the road was for the benefit of all but that:

> On this late occasion they gave as their reasons for their objections their having not heard anything from Rawiri Puaha to whom and his Tribe all these natives of the Rangitane Family are in subjection on the subject[,] that the cutting of the present line was only a preliminary step to wresting the land from them[, and] that they claimed a right in the land and that therefore they should be consulted respecting its sale and receive a portion of the payment. Whatever their own claims might be however they over and over again expressed their submissiveness to the will of Puaha and whatever he did they would abide by.[183]

The superintendent of the Nelson province, Major Richmond, appealed to Hura Kopapa, the local Rangitane–Ngati Kuia chief at Kaituna, assuring him that the road would be beneficial and that the land would not be taken. Kopapa replied that he and two other local Rangitane–Ngati Kuia leaders (Wirihana Kaipara and Hui) favoured settlement, although not all people of the area were of the same mind. Again, it was for Rawiri Puaha to decide.[184]

181. H Tacy Kemp to Colonial Secretary, 15 March 1850 (Ballara, 'Customary Maori Land Tenure', p 223)

182. Tinline to superintendent, Nelson, 18 February 1850 (Ballara, 'Customary Maori Land Tenure', pp 223–224)

183. Tinline to superintendent, Nelson, 26 April 1851, p 2 (Crown Forestry Rental Trust, comp, 'Te Tau Ihu Document Bank', supporting documents, various dates (doc A44), p 3059)

184. Te Retimana (Richmond) to Te Hura, 17 April 1851 (Armstrong, 'Right of Deciding', p 74); Hura Kopapa to Te Retimana, 21 April 1851 (Armstrong, 'Right of Deciding', p 74); Ballara, 'Customary Maori Land Tenure', p 224

Nonetheless, their own voice was unsilenced and, ultimately, their rights had to be dealt with by the Crown (see ch 5).

There was evidence of some local Ngati Toa accommodation with Ngati Kuia–Rangitane at the time. Kaikoura told Thomas Brunner that the whole of the Kaituna pass had been given to him instead of his share of the purchase money for the Wairau.[185] Whether this claim was true or not, it again indicates that the local Kurahaupo people continued to assert their rights in the land. There were to be similar tentative indications of acknowledgement by the 'conquering party' of the rights of local occupiers of the land in 1853–54, when the Crown again negotiated with Ngati Toa and a handful of allied rangatira, supposedly for all unsold lands in Te Tau Ihu (this was known as the Waipounamu purchase). As we will see in chapter 5, the Governor and McLean dealt only with the groups based at Kapiti–Porirua and met with opposition from many of the local peoples resident in the northern South Island. This included not only rangatira from other northern tribes who had settled more permanently there but Ngati Kuia and Rangitane as well.

In Dr Ballara's opinion:

> In Kaituna, Kenepuru and the Pelorus the tensions between Ngati Kuia and Rangitane on the one hand and Ngati Toa and Ngati Koata on the other were relieved in this respect that they all looked to the brothers Rawiri Puaha and Te Kanae as their highest chiefs, and were developing into one community under their authority. Intermarriage was gradually relieving the tensions. In Kaituna and Pelorus, Ngati Kuia and Rangitane were the overwhelming majority of residents in the 1840s and 1850s and later, so that in these districts Ngati Toa were less inclined to take a dominant role, and were protective of their own rights together with those of Ngati Kuia.[186]

Thus, when Jenkins and Brunner visited the district in December 1854, the resident Ngati Toa argued that Rawiri Puaha had not intended to include Kenepuru and Mahakipawa in his transactions but to keep them for his own use and that of the permanent residents, most of whom were, in fact, Ngati Kuia–Rangitane. Jenkins refused, however, to acknowledge any such arrangement because the land was 'some of the best in the district'.[187] Similar claims were made at Otauira (Robin Hood's Bay) and Arapaoa.[188] A further acknowledgement of the continuation of rights was made by Te Atiawa rangatira, Ropoama Te One, who paid Ngati Apa part of the purchase price at Port Gore. Two rangatira from the conquest – Hori Te Karamu of Ngati Tama and Tamati Pirimona Marino of Te Atiawa and Ngati Rarua – were also to approve the provisions made for Puaha Te Rangi's community at Kawatiri

185. Brunner to Richmond, 26 March 1851 (Armstrong, 'Right of Deciding', pp 71–72); Ballara, 'Customary Maori Land Tenure', p 225

186. Ballara, 'Customary Maori Land Tenure', pp 225–226

187. 'Interpreter's Report', *Compendium*, vol 1, pp 297–298 (Campbell, 'A Living People', p 162); Ballara, 'Customary Maori Land Tenure', p 226

188. Ballara, 'Customary Maori Land Tenure', p 226

in 1860.[189] Similarly, northern chiefs witnessed the 1856 deeds signed by Rangitane and Ngati Kuia, in which those peoples relinquished their independent claims to the Crown and received the purchase money directly from officials. As will be seen in chapter 3, we think this witnessing of deeds to have been equal parts acknowledgement of Kurahaupo rights and intimidation of residents on behalf of the Crown – what matters here is that the northern chiefs were effectively conceding that the defeated peoples still had rights, which had to be extinguished before a valid transfer could be said to have taken place.

Of course, it may be that the assertion of Kurahaupo groups of a right to be included within arrangements for the land – even one that seems to have been supported by those Ngati Toa and Te Atiawa still living amongst them – reflected changes that had occurred after 1840. This was the view of Professor Ward. He argued that under customary usage, and if 1840 is the date from which entitlement was absolutely fixed, these people had no – or only the most limited – rights in their former lands. He warned that 'attempts to diminish the customary significance of raupatu can be overstated, and have been used, wrongly in some cases to revive claims to large areas by groups that were wholly subjugated as at 1839, but who survived and re-emerged in consequence of new influences such as Christianity'. Hitherto dominant parties often tacitly acknowledged those adjustments in the balance of power and accepted that rights existed, but 'post 1840 changes widely accepted by Maori should not be confused with the state of affairs as at 1839, or "read back" in such a way as to modify the pre-1840 customary principles'.[190]

Thus, in Professor Ward's view, 'under the British, the conquered groups gained a degree of recognition greater than they would have in a wholly traditional Maori world'.[191] It was especially unjust if Christian or law-abiding tribes were penalised for not resorting to force and contesting revived claims, only to have the Crown or Native Land Court take that as acceptance of the claims.[192]

Our view differs for two reasons. First, we are not so concerned with what custom may have been at 1840, except as a marker in an evolving situation. Nor do we consider that Christianity or British law inhibited Maori in the northern South Island from asserting their rights after 1840, quite forcefully on occasion. Professor Richard Boast, Professor Alan Ward, and Iwi Nicholson argue that Ngati Toa's 'hands were tied by the Gospel', and they therefore took no action against tribes who became 'whakahi' (cheeky).[193] The example cited is from the Rangitikei district, and we have not heard evidence on that area. In our own inquiry district, claimant and Crown historians noted several examples where Maori took action after 1840 that stopped short of physical violence but nonetheless disputed claims to

189. See Phillipson, *Northern South Island: Part 1*, p 42
190. Ward, 'Te Atiawa in Te Tau Ihu', p 7
191. Ibid, p 32
192. Professor Alan Ward, brief of evidence on behalf of Ngati Toa, 9 June 2003 (doc P9), pp 14–15
193. Richard Boast, 'Part One: Aspects of Tradtitional History', brief of evidence on behalf of Ngati Toa, 9 June 2003 (doc P20), pp 2–3; see also Nicholson, brief of evidence; Ward, brief of evidence

land – both settler and Maori – by traditional means. These included the burning of whare, the removal of materials, destruction of cultivations, and even the driving out of parties of people.[194] This kind of thing was still happening as late as the 1890s, when Hemi Matenga killed stock and burned houses of Ngati Tama living at Wakapuaka.[195]

Nor was British law necessarily inhibiting so long as Maori stopped short of serious violence. The Government itself asked Ngati Toa to remove Rangitane from 'sold' land in the Wairau in 1850 – without success, because the Ngati Toa leaders did not have to take action, but the Government hoped that they would do so, and expected them to be free to do so if they chose. The Government tried to bring in the Ngati Toa chiefs rather than their other option – the 'Armed Police' – but the Rangitane people later moved off the land in accordance with an agreement between themselves, Te Kanae, and the Government.[196] The historical record is sketchy but all the examples that we know of in Te Tau Ihu, where claims were contested by customary acts after 1840, involve northern tribes disputing with each other or with settlers. They had the means, in our view, to have contested the rights of Kurahaupo peoples in a similar manner, when these were asserted from the late 1840s, had they thought it necessary or tika (right). Instead, the process of peaceful joint occupation and intermarriage continued, and Kurahaupo rights were recognised and allowed by the northern chiefs in various ways. The weight of authority rested more with the newcomers, but Kurahaupo peoples had retained rights in their ancestral lands.

Secondly, we do not, in any case, see rights deriving from conquest as precluding the continuation of rights based in ancestry. Although some Maori thought that any form of vassalage meant loss of all rights, an alternative opinion existed and was advocated by iwi such as Te Atiawa returning to Taranaki, and Ngai Tahu reclaiming Kaikoura and the West Coast, as well as by Kurahaupo at Te Tau Ihu.[197] We place more weight in our reading of the likely Maori view on the question of Kurahaupo rights, on:

- early instances of recognition by 'conquerors' of the continuing status of a handful of Rangitane–Ngati Kuia rangatira;
- the importance of the custom of matching marriages as creating a connection respected by the conquering people;
- the survival of intangible links to the land (of their names, stories, and knowledge of local atua); and
- the importance of ancestry as a source of right.

We do not discount instances of conquerors recognising that such rights continued and had revived by the 1850s simply because the context was changing, nor do we see it as an

194. See, for example, Clark, 'Ngati Tama Manawhenua', pp 109–113, 120–121; Macky, 'Crown Purchases', p 31

195. Dr Grant Phillipson, *The Northern South Island: Part 2*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1996) (doc A27), p 39

196. Macky, 'Crown Purchases', pp 58–61. Macky's argument that the Ngati Toa chiefs did not actually remove the 'trespassers' is substantiated by the available evidence.

197. See Phillipson, *Northern South Island: Part 1*, p 42

alien development. Although the issue was hotly debated at the time of both purchase negotiations and Native Land Court hearings, the evidence suggests that custom was continuing to unfold; in our view, such recognition of the rights of defeated peoples cannot be considered uncustomary even if it had been brought about, in part, by ideas and circumstances introduced by Europeans.

We are guided towards that opinion by the prior findings of the Tribunal in the Rekohu case. There, the Tribunal considered how Maori custom operated not from pragmatic acceptance (that 'conquerors' were likely to, and did, assert rights in lands acquired only a few years earlier) but from its moral standpoint. In their view, the 'might is right' interpretation of traditional land tenure is a reductionist reading of a particularly complex situation. Strength of arm was not necessarily equated with strength of right in customary Maori society, which, at the least, was capable of holding a range of attitudes to the propriety of claims made on the basis of 'raupatu':

> We think it reasonably clear from Maori history that naked conquest was seen as less than tika (proper). This is commonly evident in numerous (but feeble) attempts to camouflage aggression by some trumped up claim of prior offence. The point is that, had aggression been seen as proper, such fictions would not have been required . . . On the other hand, some conquests were seen as legitimate, even though they might not have been thought of as such in European eyes. For example, it was legitimate to go to war on no other pretext than that a slight or, worse, a curse had been made. The distinction between right and wrong in Maori aggression is not always abundantly clear to the untrained eye, but still it was necessary to adduce evidence of just cause.[198]

It is a misinterpretation of Maori custom to elevate the importance of 'mana' over 'tika', 'conquest' over 'ancestry', and male over female. In the opinion of the Rekohu Tribunal:

> From the father, the children had mana (power). But from the mother, they had right. Through her, they came in on the ancestral line to the land. Maori society traced rights through both men and women, and often men were associated with power and women with what was just.[199]

This was the reason that marriage into the local people, especially to the wife or daughter of a conquered chief, was an important means of legitimating claims to new land. The father might remain an outsider – not one of the tangata whenua, or the people of the land – but not so the issue of that union.[200]

Dr Ballara predicted the likely outcome in Te Tau Ihu, had matters continued to evolve in a pre-contact manner:

198. Waitangi Tribunal, *Rekohu*, p 140
199. Ibid, p 141
200. Ibid

2.11

> In pre-contact times however, this rigid orthodoxy [about exclusive ownership inside Western-style linear boundaries] was absent, relations between groups and their lands being marked by a relatively inclusive, flexible system. What would have happened earlier is that the conquerors including their allies, and the conquered, would have made peace and put into place a formal relationship built on intermarriage, particularly in chiefly families. Many such marriages between the conquering migrants and the early tangata whenua actually took place, both at the time of conquest, and in the 1830s and later as part of a network of peacemaking. Over time the children of such marriages would have inherited land rights from the conquered and mana toa from the conquerors, and in two generations the distinctions between the two groups would have been fading, not in terms of their existence as separate groups, but in terms of the status of those groups and their status in relation to the land.[201]

To some extent, this prediction is counter-factual, but it is an extrapolation based on evidence of earlier, pre-contact conquests and their results. The Tribunal has found many examples of it throughout the country, where the passage of time had allowed such an evolution to take place before the Treaty. We refer, in particular, to the findings of the Tribunal in its report *Te Raupatu o Tauranga Moana* with regard to the relationships, authority, and types of claims put forward by 'conquerors' and 'conquered'.[202]

Ngati Kuia, Rangitane, and Ngati Apa had little opportunity to make known their views on whether they held rights until after the bulk of the district had been sold by non-residents, and the Crown began to negotiate the provision of reserves for the local population. They deferred to Ngati Toa chiefs but considered themselves to have retained rights in the land of their ancestors. Thus, when Thomas Brunner and William Jenkins came to Te Hoiere, Ngati Kuia emphasised that conquest had not utterly extinguished their links to the land and that they had a right to be considered amongst its owners:

> Although we were once conquered by Ngatitoa and Ngatiawa, we have never been driven from the land of our fathers. We consider that we are yet a people, a living people, and have a right to speak when our land is being sold without our consent, and no payment is received by us. Our conquerors did as they pleased before we became British subjects, but now we think we ought to have half of the talking about it, and half of the payment for it; and therefore we now positively say that unless the Government pay into our hands a fair share of the payment, we will not give it up, neither will we allow it to be surveyed; but if we are dealt fairly with by the Government, we shall be glad to see the white men come and cultivate the ground.[203]

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201. Ballara, 'Customary Maori Land Tenure', p 65

202. Waitangi Tribunal, *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wellington: Legislation Direct, 2004), pp 43–47

203. 'Interpreter's Report', *Compendium*, vol 1, p 297 (Phillipson, *Northern South Island: Part 1*, p 158); Ballara, 'Customary Maori Land Tenure', p 226

2.12 Balancing Rights: Tribunal Comment and Analysis

Questions pertaining to traditional customary rights present some of the most difficult issues for this inquiry. We can state with certainty that all eight descent groups in Te Tau Ihu had customary rights and interests in that area. We can also state with certainty that in some cases particular rangatira or hapu were associated with, and had rights in, particular areas. In other cases, however, rights were contested or understandings were to change over time.

The knowledge of the tikanga associated with customary rights in the early to mid-nineteenth century has been much reduced for groups that had been defeated and we are now reliant, to a large extent, on scant early European – and even more scarce Maori – sources for a description of their presence and traditions. Furthermore, the detailed recording that does exist of what Maori thought about relative customary interests came at least one and, more usually, two or three generations after the events that were the subject of discussion. The initial investigation by Spain was cursory, and we must perforce patch together the hints provided by Crown negotiations as its officers sought the extinguishment of all interests, whatever their nature, in the 1850s. Such a source must be approached with caution. The testimony given before the Native Land Court is equally suspect because of the lapse of time that had occurred and the distortions in tikanga that the court process often generated, as claimants stressed one aspect or other of their claim as required to win the case. It is impossible in these circumstances of fragmentary sources, conflicting stories, and differing viewpoints, to come to a definitive and mutually agreed history of the customary tenure of Te Tau Ihu, and there is a risk, noted by a number of witnesses and counsel, that in arbitrating between competing views, the Tribunal will oversimplify complexities and entrench past errors. Thus, our intention has been to identify the certainties where we are confident that they existed and the principles which we believe to have operated, but to acknowledge, too, the ambiguities where the evidence does not permit clear adjudication between competing points of view.

2.12.1 The rights of conquerors

In our view, the crux of the issue lies in the short time that had elapsed between the arrival of the northern tribes and the British Government into the area, which meant that customary rights were still evolving when sovereignty was declared. That must be the case unless one accepts the proposition that rights in land derived merely from presence on it, no matter how short-term or how recent. This is clearly antithetical to the fundamental concept of whenua as taonga tuku iho, inherited by ancestral descent, and of the importance of whakapapa and korero embedded into the land. For the Kurahaupo tribes, the question was whether such rights had been lost and if sufficient time had lapsed that their rights were practically extinguished and the identity of those who remained on the ground absorbed

into that of their conquerors. For the newcomers, the question was whether the rights that they had taken up after conquest were fully matured and unassailable.

Contemporary Europeans tended to see rights by conquest as complete once the conquest was over, but anthropological studies have now established that a good title came only after the passage of time. We look to the authority of the Waitangi Tribunal at Rekohu, which, in turn, relied on Te Rangi Hiroa (Sir Peter Buck) as enunciating the established principle of customary law that the functioning title was an ancestral one. Conquest, while not in itself valid, could be legitimated by time.[204] A number of planting seasons and then a number of generations passed; and, eventually, the importance of those further acts of occupation and, ultimately, of successive tupuna born on the land, would supplant conquest as the basis of claim. Even in the case of a tuku whenua, where the land was gifted by those with ancestral association, occupation by the recipient was required to give any meaning to the take. It was integral to the tuku of land that the recipient would remain.

Still, the reality of conquest at Te Tau Ihu, as demonstrated in the defeat of the local people by the tangata heke, followed by occupation and the exercise of tino rangatiratanga, cannot be denied. Clearly, all the 'later arrivals' in Te Tau Ihu in the 20 years prior to the Crown's acquisition of sovereignty, who stayed or visited regularly for local resources, held rights in the region at 1840. They were acknowledged as the principal rangatira of the area by those Ngati Kuia, Rangitane, and Ngati Apa who had survived, and they dominated the historical record.

We regard these taua, which created the occasion for the development of rights, as legitimate under custom. Although armed with new technology, the northern iwi followed traditional practices in their conduct of the taua and subsequent heke. Muskets bestowed military advantages on those who possessed them and resulted in significant losses for those who did not, but war had not changed its function, or its rules of behaviour. It continued to be the final and accepted recourse for the resolution of dispute in Maori society until the wide acceptance of Christianity and British–Christian justice in the mid-1840s. We accept Professor Mead's evidence on this point, and Dr Ballara's interpretation of the state of Maori society:

> Warfare remained permeated with tikanga (rules), and constrained and limited by ritual, especially between kin. Taua muru (punishing raids) were used as lesser sanctions, and ritualised forms of war remained as systematic substitutes for fighting. Universally recognised peace-making techniques helped to contain violence. The introduction of European weapons, especially muskets, had its effects on the technology of warfare . . . and, for a relatively brief period, on numbers killed. The introduction of new methods of diplomacy . . .

204. Waitangi Tribunal, *Rekohu*, p 143

had their effects . . . In spite of these accretions, however, the nature of Maori warfare in this period remained essentially the same in 1845 as it had been in 1800.[205]

In distinction to the Ngati Tama–Ngati Mutunga raids on Te Rekohu, there were sound reasons in both tikanga and socio-political terms for the invasion. These included the need for new territory, which it was the newcomers' intention to occupy, either seasonally or on a year-round basis, and the take provided by deaths of ranking individuals and by the uttering of curses and insults. Furthermore, the tangata heke operated according to tikanga in respect of the raupatu. They followed the usual course of marrying a number of ranking women, taking slaves but also leaving tributary communities on site, and permitting individual rangatira to exercise some local autonomy, or respecting the spiritual power of tohunga while they themselves held political and military control of the wider region.[206] We cannot put aside the rights of the conquering iwi on the grounds that their actions had been uncustomary or improper, as was suggested by some Kurahaupo witnesses to the Native Land Court in the 1880s.[207]

2.12.2 The 'overlordship' of Te Rauparaha and the rights of Ngati Toa: eastern Te Tau Ihu

Rights of newcomers could derive from the moment of conquest or of tuku, but in both cases were given real meaning only by subsequent acts of occupation. We heard evidence that put a different slant on this rule: effective occupation rested ultimately on the ability to defend one's territory and strategic control of a wider rohe. A physical presence was unnecessary to have such control over constituent parts of that territory.[208] In its transactions, in evidence to the Spain commission regarding customary ownership at Wellington, and, later, in the Native Land Court in a variety of cases, Ngati Toa claimed to have an overriding mana within the whole of the Cook Strait region. They argued that they exercised authority over not only the Kurahaupo groups, which had survived and were living upon portions of their old territory, but also the other participants in the taua and heke. As stated to Crown officials, the conquered had been enslaved or left in possession to provide labour and resources for them, and in the case of Ngati Toa's allies, had been allocated lands. Neither group, so it was argued, could sell without Ngati Toa sanction. The evidence of historians and kaumatua all agree that this has been a constant and sincere claim advanced by Ngati Toa from at least 1839 to the present day.[209]

205. Ballara, *Taua*, p 163; Professor Hirini Moko Mead, brief of evidence on behalf of Ngati Toa, 9 June 2003 (doc P5), pp 3–4

206. See Nicholson, brief of evidence

207. See Ballara, 'Customary Maori Land Tenure', p 283

208. Matiu Nohorua Te Rei, brief of evidence (no 1) on behalf of Te Runanga o Toa Rangatira Incorporated, 9 June 2003 (doc P1), pp 12, 22; Nicholson, brief of evidence, pp 17–18; Mead, brief of evidence, pp 3–5, 8–9; Ward, brief of evidence, pp 6–7

209. See Nicholson, brief of evidence; Ballara, 'Customary Maori Land Tenure', p 62

2.12.2

Some support for these claims may be found in the acknowledgement of the roherohetanga undertaken by Te Rauparaha. There was no occasion on which the understanding of Te Atiawa, the major beneficiaries other than the various Ngati Toa rangatira of the allocation made at Te Awaiti, was sought. In more recent times, however, they, and expert witnesses on their behalf, have argued that this sort of territorial division was a due acknowledgement by all parties involved of their role in the conquest of the eastern side of Te Tau Ihu. It did not imply subordination and they acted independently of Te Rauparaha's leadership with increasing frequency as time passed.[210]

Te Rauparaha's territorial division, they argue, did not negate the take already present from their own independent conquest. Nor did it extend into western Te Tau Ihu. In the evidence of Dr Ballara, such a division should not be confused with a tuku (gift) of one's own ancestral land – the custom has a different significance here.[211]

As indicated earlier in this chapter, we agree with Te Atiawa's interpretation of the significance of Te Rauparaha's tuku or roherohetanga. We consider the idea of a sustained 'overlordship' to have little basis in Maori customary thinking. Taua were conducted as a collective effort and to the extent that Te Atiawa – and the other allied tribes – acknowledged Te Rauparaha's capacity to make decisions on their behalf, this occurred at a time of transition, of warfare and migration. Once the conquest and heke were relatively complete, and conditions became more stable, and as their independent claims were strengthened through sustained occupation, these groups became less inclined to acknowledge the leadership of Te Rauparaha. By 1840, Te Atiawa had already fought two battles against forces that had included Te Rauparaha, but in the North Island. At Te Tau Ihu, Te Rauparaha had clashed with local Te Atiawa chief, Te Tupe-o-Tu, over the violation of a tapu at Kaparatehau (c 1838–39) but the two peoples had settled into their respective rohe.[212] Ngati Toa withdrew from Te Awaiti as increasing numbers of Te Atiawa arrived from the North Island, but their departure seems to have reflected their own declining interest in the area with the fall-off in whaling, as much as it did the apparent deterioration of relationships between the two tribes.[213] Te Atiawa intrusion into the Wairau, on the other hand, was met with a firm and decisive response in the mid-1840s.[214]

Both Ngati Toa and Te Atiawa were a mobile people, maintaining rights on both sides of Cook Strait. As we have seen, Te Atiawa were extremely migratory in their habits. They joined with Ngati Tama and Ngati Rarua in their occupation of the western side of the region in the late 1830s, as well as having territory at Te Whanganui a Tara, Waikanae, and in Taranaki.[215] They moved freely between their pa and resource areas in the Cook Strait

210. Riwaka, 'Nga Hekenga o te Atiawa', pp 115–116, 183–184; Phillipson, *Northern South Island: Part 1*, pp 39–40
211. Ballara, 'Customary Maori Land Tenure', pp 150–151
212. Ibid, pp 61, 139–140
213. Phillipson, *Northern South Island: Part 1*, pp 32–33
214. Macky, 'Crown Purchases', p 31
215. Phillipson, *Northern South Island: Part 1*, p 32; Riwaka, 'Nga Hekenga o te Atiawa', pp 152–156

region, and rights were often recognised in all of them. Te Atiawa loyalties, allegiances, and interests were far more diversely based than those provided by an alliance with Ngati Toa alone. It is equally difficult to see Ngati Toa as a coherent political entity, all their leaders deferring to the overriding authority of Te Rauparaha. Indeed, the allegiances of the tribe divided over the issue of Ngati Raukawa and Te Atiawa.[216]

Ngati Toa's initial control over the eastern side of Te Tau Ihu had been predicated on their alliance with Te Atiawa, but as relations between the two groups deteriorated, their strength was bolstered by the arrival of their Ngati Rarua kin and solidified by the takawaenga created with Kaikoura's people. Some amongst Ngati Rarua took the opportunity generated by their participation in the conquest of the region and their kinship with Ngati Toa and settled in the Wairau. From that point, they developed their own rights, living in their separate communities but sharing resources with Ngati Toa. Communities of Kurahaupo peoples also formed around the leadership of Ihaia Kaikoura at Port Underwood and Hura Kopapa at Kaituna, surviving defeat at the hands of Ngati Toa and their allies, whom it proved increasingly difficult to control as Ngati Toa's power was undermined (as discussed in chapter 5).

2.12.3 The 'overlordship' of Te Rauparaha and the rights of Ngati Toa: western Te Tau Ihu

Ngati Tama and Ngati Rarua witnesses in the nineteenth-century Native Land Court drew a distinction between people holding lands through the allocation at Te Awaiti and their own occupation of lands further west, which they had conquered for themselves, and where Te Rauparaha's role had been notional only. Te Rauparaha had enormous mana but the idea of an overlordship is now seen as the legacy of an imperial rhetoric which, in European writings, exaggerated his power and control. Our rejection of that argument in the case of western Te Tau Ihu is founded, in large part, on the emphasis we place on occupation as integral to development of rights in the land. The weight of evidence from land court witnesses in the case of both the northern South Island and conquered areas elsewhere in New Zealand is that conquerors had to actually live on, or exercise other direct acts of 'ownership' over, lands to properly make claim to them. A claim might ultimately trace back to raupatu, but recognised rights of ownership came only with sustained occupation. While we agree that occupation need not be based on actual residence to have effect, it did need to be of a more tangible character than that provided by a strategic control based in the North Island.

Te Rauparaha's visit to the western side after the taua, the gifting to him of slaves, the placing of tapu on land at Wakatu, and the history of subsequent dealings with the New Zealand Company and Crown, indicate that Te Rauparaha might have been able to develop such rights if he had chosen to do so, but he did not. Instead, he let that opportunity go.

216. 'Interpreter's Report', *Compendium*, vol 1, pp 297, 300; Phillipson, *Northern South Island: Part 1*, p 31

2.12.3

According to Dr Ballara, any obligations on the part of Ngati Toa's allies in the west were satisfied by the generous gifts presented to him on his visit to the district.[217] Regardless of whether that is so, Te Rauparaha and his people evinced no real interest in settling or using resources in western Te Tau Ihu. Other than the immensely important pounamu, captured by Niho, there were no ships or settlers or traders to attract Ngati Toa's attention. This was why it was easy for Kapiti chiefs to 'let go' (tuku) parts of western Te Tau Ihu to the company in 1839. But governments of the 1840s and 1850s felt that, in order to ensure that any and all possible Maori rights in an area were extinguished, great leaders like Te Wherowhero and Te Rauparaha had to be paid, even for land which they had not conquered or settled. There is also the point that, according to some evidence, Tutepourangi's tuku was in part to Ngati Toa as well as Ngati Koata, and two hapu of Ngati Toa briefly settled on Tutepourangi's lands (but did not stay).

Had Te Rauparaha chosen to contest the company's claim to western Te Tau Ihu as he did to the Wairau in 1843, or had he visited the area seeking to settle close to the new company town but on land conquered by Ngati Toa's allies, what would have happened? Given the evidence of how other latecomers were treated, we suspect that the resident iwi would have had little choice but to make him a tuku of land. We will never know, as Ngati Toa's only concrete assertions of rights were not made in this way but rather to land purchasers (the company and then the Crown).

Even then, when face to face with the resident Maori, Ngati Toa leaders claimed the mana of accepting payment and distributing it to others, but not the kind of right-holding that entitled them to keep it. It was mainly out of the district and in the absence of most resident right holders, that the Ngati Toa leaders sought to keep the lion's share of payment for western Te Tau Ihu lands. We will explore these points further in chapters 3 and 5, where we will consider how the Crown dealt with customary right holders in the Pakawau and Waipounamu purchases. Here, we note that, while the Ngati Toa claim to overlordship and primary rights in western Te Tau Ihu was accepted by the company and Crown, it was rejected later by the land court, and does not appear to us to be sound in custom.

We do not go so far as Dr Ballara, however, and reject it entirely. As we have noted throughout this chapter, custom was evolving with infusions of Christian and other European ideas. The absolute alienation of land in Maori custom required the total and permanent removal of people from the land – either voluntarily, as in the case of a migration in which nobody was left behind to keep fires alight and nobody intended to return, or involuntarily, when defeated peoples were entirely exiled from their lands without ability or hope of ever returning. The proof of either was, of course, the function of time. The company and Crown policy of reserves, in which 'vendors' remained on the land they were alienating but were nonetheless supposed to be giving up all rights to it forever, was alien to custom. Also,

217. Ballara, 'Customary Maori Land Tenure', pp 133–134

an absolute transfer that had immediate permanency, in which no residual rights remained that could be recovered later, was also alien to custom. In these circumstances, the Crown had to ensure that all possible rights – both the primary rights of residents and any rights that were still recoverable under custom – were satisfied.

How much of a right Ngati Toa might have been able to establish in western Te Tau Ihu had they sought to settle there, we will never know. But we think that Te Rauparaha's overall leadership of the taua and heke, the very close whakapapa links with Ngati Rarua and Ngati Koata, and a possible share in the tuku of Tutepourangi, alongside the military power of the Ngati Toa tribe; all gave potential rights in the area that persisted in the 1840s. In other words, not enough time had elapsed to cancel the recoverable rights of either the Kurahaupo peoples or the conquerors who had not (yet) lit fires of occupation on the land. Although Ngati Toa had only one stick in the bundle of rights, which we discussed above, it was nonetheless the basis of a claim. It would have been stronger had they actually participated in the western taua, rather than relying on Te Rauparaha's overall leadership and the view that the taua were 'his braves'. It would have been stronger still had they carried out any of the tangible or intangible acts which marked authority and occupation in an area. But there was a latent right, strongest for the leading chiefs of Ngati Toa, and they succeeded in convincing the Crown that no transaction could stand without their concurrence. In the circumstances of the early 1840s, this was certainly correct. After the imprisonment of Te Rauparaha and the military contest of the mid-1840s, it was no longer as true – but that made it only the more convenient for the Crown, as we shall see in chapter 5.

There was still, therefore, a latent, residual right available to Ngati Toa in the 1840s. Had they turned up, custom would have dictated their inclusion, probably by means of a tuku from one or more of their allies. Such a tuku would have been more in the nature of an adjustment to the division of conquered lands than an incorporation of strangers by gifting rights where they had had none, with significant rights then persisting for the kaituku (donors). This latent right was foreclosed, along with all others, when the Crown purchased the land. While it was far from the primary rights claimed by Ngati Toa (and for Ngati Toa, by the Crown), it was nonetheless a right that Ngati Toa possessed, and for which they were rightly paid in 1839 and 1852–54 (along with other non-resident right holders) (see chs 4, 5).

2.12.4 Equal claims for the conquerors (at first) as they settled

We do not accept that any one of the groups that migrated and settled on the western side had a greater right to exercise rights over the land than others, by reason of tuku, their role in the taua, or the subsequent sequence of their arrival. Of course, as occupation developed from being exploratory to more settled in character, particular rangatira and hapu became more closely associated with certain areas, or they came into conflict with each other over the use of them. However, the basis of their right to settle in the area remained the same as

each other's and none took precedence. All the iwi involved in these later migrations began to add to the rights acquired by reason of raupatu, with or without an intervening tuku; by cultivation, resource use, further tuku to later arrivals, placing of tapu, marriages with local people, and eventually, by the birth of children, deaths, and burials.

2.12.5 The special circumstance of Tutepourangi's tuku

Special circumstances arose for Ngati Koata and the Kurahaupo tribes in Rangitoto and the adjacent coastal lands, and extending into Pelorus Sound and Tasman Bay. The rights of Ngati Koata predated the conquest and were based on a tuku of ancestral land by the leading Kurahaupo rangatira of his day, Tutepourangi. This tuku initiated a reciprocal relationship, reinforced by intermarriage and co-residence, in which Ngati Koata had to protect and look after Tutepourangi's people in return for the right to settle, use resources, and exercise authority throughout their tribal lands. Both parties had rights and exercised tino rangatiratanga, although the balance of authority over people clearly lay with the protecting tribe. Ngati Koata and the Kurahaupo peoples (more particularly Ngati Kuia, but Ngati Apa and Rangitane also) have consistently confirmed, relied on, and lived out this tuku ever since. We accept their evidence that it is the basis of their reciprocal rights and duties in parts of Te Tau Ihu, and that its effect remains.

2.12.6 The rights of defeated peoples

The idea that time and acts of occupation were normally required to establish rights of conquest has important implications because the corollary is that time was also required 'before the interests of those who had left the land . . . could be said to have been abandoned or extinguished'.[218] As we noted in our earlier discussion, Tribunals who have looked at this question in different regions have placed different emphases in their interpretation of customary law. At Te Whanganui a Tara, Ngati Toa and Te Atiawa rangatira who appeared at the inquiry into the New Zealand Company purchase in Port Nicholson, where Spain had undertaken a more thorough investigation of Maori views than at Te Tau Ihu, were in no doubt that they owned those lands by reason of their own conquest, even though a generation had not yet passed. Nor had the incorporation of earlier groups with long-standing ancestral associations been demonstrated to be a prerequisite of 'ownership' of lands there.[219]

There were, however, significant differences between the two districts. The situation at Te Tau Ihu was, in a sense, more akin to that of Rekohu where the defeated people also remained on the ground, even though there were differences here, too, in terms of the

218. Waitangi Tribunal, *Rekohu*, p 139
219. Waitangi Tribunal, *Whanganui a Tara*, pp 32–34

tikanga followed by the conquerors, whether the venture was 'tika', and the status accorded those who survived. The Rekohu Tribunal did not dismiss the claims of conquerors who had remained in occupation and had thus developed an independent set of rights, but it did support the idea that the rights of those who had been defeated might survive conquest and even a very harsh enslavement.

At 1840, if the migrant accounts dominated the historical evidence at Te Tau Ihu, the naming of the land and the spiritual associations remained, for the meantime at least, with Kurahaupo. The Kurahaupo tribes remained with the land and it is our understanding that where that is so – where land continued to be occupied by an identifiable community, even if on 'sufferance' of new, more militarily powerful arrivals – ancestral rights survived. While we agree with the proposition that a total extermination of the people in situ was not required for a conquest to be complete, we do not accept the argument that iwi who suffered defeat, but who were left on the ground in a tributary condition, had lost all ahi ka, and that the principle of ringa kaha superceded. Even if this concept – control of territory and subjugation of its inhabitants by force of arms – has validity in custom amongst some tribes, it is difficult to see that it could encompass the whole of Te Tau Ihu with its multiple bays and rugged interior. Certainly, the northen allies held control of the wider region, but the alliance was too far flung and the territory too extensive and too difficult of control to be under their complete and absolute authority. The historical evidence rather is that free Kurahaupo groups survived in the interior and occasionally struck back (with no notable successes), and that these fugitives later rejoined the settled, tributary communities that had survived under their own chiefs – no longer with exclusive rights, but with valid customary rights nonetheless.

Rights based in ancestry could not be sundered in so short a time as had elapsed in the case of Te Tau Ihu. The Treaty came so soon after these events that the rights of conquerors had not had sufficient time to fully develop so that they were grounded in ancestral association, nor those of the defeated to be fully submerged. The Kurahaupo iwi retained a separate identity and a number of their own rangatira, even though the migrant leaders were now recognised as the principal men of the district. Ihaia Kaikoura, in particular, had enough status to have signed the Treaty of Waitangi, and was recognised as a rangatira locally. There was no occasion for further dispossessing the local Ngati Kuia, Rangitane, and Ngati Apa who proved useful informants and a bulwark against Ngai Tahu. It is clear that the leaders of those communities were permitted to regain a large measure of autonomy as the years passed, and as the tangata heke set their own roots ever deeper into the land.

It is our opinion, therefore, that, while the northern iwi dominated the region at 1840, they did not have exclusive rights to it in custom. We recognise that with defeat came loss of territory and loss of complete independence of action, but it did not entail loss of ancestral connections with the land, or of rights in areas in which they retained a presence. Nor do we accept that a tributary condition – or any sort of 'slavery' or 'vassalage' – resulted in the

loss of all rights forever. There was room for recovery of status and for the revived exercise of rights.[220]

We also recognise that the capacity of defeated peoples to insist on the recognition of such rights increased with the interposition of British sovereignty and the more peaceful conditions that resulted. We do not, however, see this development as uncustomary; it was possible for custom to go on evolving, even with infusions from the Treaty, Christianity, and European law. Even so, it was still practicable, as the historical evidence shows, for the northern iwi to contest Maori or settler claims of which they did not approve by means of a range of customary practices, from destroying property to removing people altogether. It is notable that Kurahaupo claims, when they came in the late 1840s and early 1850s, were not actively contested by these means. While Maori expressed a range of opinion about the impact of conquest on the rights of the defeated, even some of the conquering party accepted that such rights endured and that the surviving communities of Kurahaupo, though they might defer to the senior northern rangatira, were effectively independent by the late 1840s.

It was not until the Native Land Court era, when all Te Tau Ihu Maori were forced to fight each other for the insufficient land remaining, that the northern conquerors insisted on an exclusive definition of their rights. Hitherto, their practice had been inclusive so long as their mana was also recognised. This was no longer possible in the extreme circumstances of the 1880s and 1890s. The Crown has recognised and conceded that its insufficient reserves contributed to this result.[221]

220. On this point, see Mead, brief of evidence, pp 6–7, and Nicholson, brief of evidence, pp 19–20.
221. Crown counsel, opening submissions, 14 November 2003 (paper 2.748), pp 7, 13

CHAPTER 3

TE TAU IHU IWI CUSTOMARY RIGHTS IN THE NGAI TAHU STATUTORY TAKIWA

3.1 Introduction

This chapter addresses the claim that around 1840 Te Tau Ihu iwi had customary rights in the Ngai Tahu takiwa, as defined in the Te Runanga o Ngai Tahu Act 1996. Chapter 3 addresses the issue of whether such rights were properly considered by the Crown in its Wairau, Waipounamu, Kaikoura, and Arahura purchases in 1847, 1853–56, 1859, and 1860. It was the last two purchases that established boundaries on both coasts that were accepted by the Maori Appellate Court in 1990 as the northern boundaries of the Ngai Tahu takiwa.

Our discussion of customary rights in this chapter follows the approach that we used in our first preliminary report. Material from that report is repeated only where it is necessary to background the situation we are dealing with here. The Te Tau Ihu iwi claimants do not deny that Ngai Tahu had rights in the takiwa, but assert that they also had customary rights in the takiwa. It is those Te Tau Ihu claims that we are concerned with in this report.

As we explained in our first preliminary report, customary rights in land were seldom derived from one source, such as take raupatu, but usually from several, including takawaenga marriages between invading chiefs and local women (which we discuss further below). Although a claim might ultimately trace back to raupatu, it was sustained occupation that gave recognised rights of ownership. Therefore, 'conquerors' had to actually live upon the land or exercise other acts of 'ownership' to develop rights in it. This was why they also married into the local people: it was the fastest, although not the only, way for migrants to secure the same degree of legitimacy and make safe their possession of a new homeland. In terms of what was right, one's children could never be turned off.

Thus, the rights of an incoming group frequently overlaid those of others who remained on the ground or had temporarily withdrawn to areas of greater safety. Such groups still held associations with the land. They might challenge the rights of the newcomers, or they reached an accommodation with them (through intermarriage or tuku). Accordingly, in the discussion that follows, we sometimes refer to bundles of rights and overlapping rights.

Rights accrued over time and, consequently, the importance of different elements within the bundle also changed. Part of the problem faced by this Tribunal has been deciding at what date we judge who held rights in the takiwa and therefore the people to whom the

Crown held responsibility. In our view, a flexible approach, which looks at competing claims and how their balance changed over time, is required. This allows for a closer approximation of what custom was about – an evolving community understanding of what rights were held – than is provided for by concentrating on any one date (the usual approach of the Crown and the Native Land Court) or on 1860 (as in the crucial decision of the Maori Appellate Court discussed in chapter 4).

The competing claims before us have been supported by a number of research reports. These include, on the side of the Te Tau Ihu claimants, reports from historians David Armstrong (for Ngati Apa and Rangitane), Tony Walzl (for Ngati Rarua), Dr Bryan Gilling (for Ngati Toa), and Hilary and Dr Maui John Mitchell (relating generally to Te Tau Ihu). On the Ngai Tahu side, we received reports from Professor Atholl Anderson, Dr James McAloon, Dr Te Maire Tau, and Harry Evison. In addition, we received a Rangahaua Whanui overview report and a statement of response (to the Ngai Tahu submissions) by Dr Grant Phillipson (commissioned by the Tribunal), and a report on customary Maori land tenure in Te Tau Ihu by Dr Angela Ballara (commissioned by the Crown Forestry Rental Trust). Though most of our discussion is based on these papers, we have, wherever necessary, gone back to the original documents on which they were based. We have also taken into account numerous submissions from claimant kaumatua and kuia on customary rights in the takiwa.

In the discussion that follows, we look in more detail at the situation on the eastern and western sides of the takiwa. There is very little evidence on the extensive inland area, though it is sometimes mentioned in relation to expeditions across the island or from Te Tau Ihu to one or other of the coasts. Though the takiwa excludes Rotoiti and Rotoroa (the Nelson lakes), it does contain much of the inland area claimed by Rangitane and Ngati Apa. Some mention of traditional occupation of the interior is made in the statements of claim of Rangitane and Ngati Apa. Also, the closing submissions of both Rangitane and Ngati Apa refer to the continued occupation of the interior by fugitives belonging to those tribes after the northern invasion, which did not extend to the hinterland at all.[1] Nevertheless, the most important areas of the rohe of both tribes were coastal, and most of the evidence refers to those areas. We therefore centre our attention on the customary rights being claimed on the coasts.

On the east coast, the Kurahaupo iwi, Rangitane, claimed long-standing rights that were said to have survived recent invasions by Ngati Toa and Ngai Tahu. Ngati Toa claimed rights by conquest against Ngai Tahu, and vice versa. On the West Coast, we consider the rights of the Kurahaupo iwi, Ngati Apa, and those of Ngati Toa and their northern allies, Ngati Rarua, Ngati Tama, and Te Atiawa, as against the rights of Poutini Ngai Tahu.

Before proceeding with our examination, we need to make some caveats. The great bulk of the oral evidence that has been recorded over the years consists of narratives of warfare,

1. Counsel for Rangitane, closing submissions, 5 February 2004 (doc T4), pp 7–8, 10; counsel for Ngati Apa, closing submissions, 2004 (doc T3), pp 11–12, 47

as if to say that life consisted of nothing but attack and counter-attack, perpetually renewed by a never-ending quest for mana and utu. In fact, even in the era of heightened warfare encouraged by the musket, there were lengthy periods of peace and social and economic interaction between various groups. Though the musket heightened casualties, even the most stunning victories were usually accompanied by peacemaking and were cemented by marriages of the victorious rangatira with local women. There is little written record of this activity, although a number of instances were remembered and brought to our attention within Te Tau Ihu traditions. We also received a valuable submission on this practice from the Ngati Toa kaumatua, Ngarongo Iwikatea Nicholson. As he explained it:

> Marriages between male and female captives with their captors [were] for the purpose of providing takawaenga between tribes who may have been at war, or intending to engage in such activity . . . The aforementioned marriage practices created what our customs describe as 'Takawaenga'. They and their offspring became just that (the mediators or buffer states or go-betweens) in times of stress between their tribes. They had an important role of responsibility towards maintaining inter-tribal stability through this, and had a special status of varying degrees, dependent on the circumstances that created them, and of course their own personal status . . . Bloodline relationships often provided stability between tribes, although the actual link could be several generations removed. The need to maintain these bloodlines [was] often the reason for other marriages to reunite those blood lines and secure the relationship link for future generations.[2]

It was a responsibility handed down from generation to generation. The offspring of matched marriages were the 'people who walk[ed] between' people from different descent lines and different regions, who would create a bond between the 'conquered' and the 'conqueror'.[3]

Mr Nicholson described how Ngati Toa constructed a network of takawaenga links with both enemies and allies. One example given was created during the taua against Ngai Tahu at Kaiapohia, which had resulted in the death of Ngati Toa ariki Te Pehi Kupe in 1829 or 1830. When a woman prisoner, Te Ipinga, was found to be the daughter of Tukaimaka, a high-ranking Ngai Tahu chief, it was arranged that she would marry Matenga Te Rapa of Ngati Toa. Matenga was chosen for that role because of his relationship to Te Pehi (his cousin) and the others killed during the taua.

We believe that takawaenga were equally important on the West Coast and included marriages between Poutini Ngai Tahu and Ngati Apa, Ngati Rarua, Ngati Tama, and Te Atiawa. A notable example is the marriage of the daughter of Niho of Ngati Rarua to the principal chief of Poutini Ngai Tahu, Tuhuru. Sometimes, these people and their offspring maintained a distinct community identity, as, for instance, Ngati Apa; at other times, they

2. Ngarongo Nicholson, brief of evidence on behalf of Ngati Toa, 9 June 2003 (doc P4), pp 26–27
3. Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wellington: Legislation Direct, 2001), p 141

aligned themselves with Ngai Tahu, according to the then prevailing circumstances. We shall examine such alignments in detail in this and the next chapter.

There are also problems relating to the use of oral traditions to support one side or the other. As Dr Ballara has written, oral traditions 'have a way of growing, even if only by the wish of the narrator to make a fine story'. She quotes the anthropologist Jeffrey Sissons that, 'rather than reflecting historical "truth", oral traditions can be political constructs, giving meaning to a contemporary political order'.[4] Perhaps there were elements of this in the submissions we received, but more important to us was the entanglement of those traditions with land purchase activity. It would not be surprising that, when important rangatira were recounting their traditions to Europeans, especially Crown land purchase officials, they chose the most expansive versions and the most useful historical incidents. Thus, on the east coast, Ngati Toa insisted that their southern conquests and take to land extended as far as Kaiapohia, the site of their victory over Ngai Tahu but where they also lost important rangatira such as Te Pehi. Ngai Tahu claimed the same coast as far north as Parinui o Whiti, on the strength of successful counter-attacks against Ngati Toa and their losses of rangatira at Oraumoa near Port Underwood. As we shall see in chapter 3, the Crown accepted both claims in later purchases of much of the same territory from Ngati Toa and Ngai Tahu. On the West Coast, the northern allies even claimed as far south as Tuturau (near Mataura in Murihiku, or Southland), where, during their defeat by Ngai Tahu, their leader, Te Puoho, was killed. This time, however, the Crown did not accept the northerners' claim to Murihiku, dealing only with Ngai Tahu for that area, but did accept both the northerners' claim and that of Ngai Tahu to the West Coast proper.

There is also the question of the ownership of historical traditions. This is always a problem when the victors gather the traditions and write the history, or allow a sympathetic soul to do so. We have some examples from both sides that we shall discuss below, including some cases discussed by Dr Tau, who argues that Pakeha collectors and historians such as William Elvy wrongly attributed and interpreted oral traditions. We discuss Dr Tau's arguments and criticisms below.

3.2 The Issue of Boundaries in Maori Custom

Much of the argument from the two sides relates to the question of whether, under their customary arrangements, Maori iwi or hapu were divided from one another by strictly defined and rigidly observed territorial boundaries, within which they had exclusive rights. Put briefly, Ngai Tahu submissions argued that they had such customary boundaries and that the Maori Appellate Court in its 1990 decision, the Ngai Tahu Tribunal, and the Crown

4. Angela Ballara, *Taua: 'Musket Wars, 'Land Wars' or Tikanga? Warfare in Maori Society in the Early Nineteenth Century* (Auckland: Penguin Books, 2003), pp 36, 40

were correct in recognising them for their statutory takiwa. The Te Tau Ihu claimants were more intent on asserting that, while iwi and hapu had 'core territories', they were divided from one another by broad zones in which they had overlapping rights. We need to consider this issue before examining whether Te Tau Ihu iwi possessed customary rights within the Ngai Tahu takiwa.

We concentrate our discussion on the two main submissions on the boundary issue provided by Professor Atholl Anderson and Dr Grant Phillipson. The Ngai Tahu case was anchored by Professor Anderson, an archaeologist, who considered the suitability for New Zealand of various models based on anthropological work on Polynesian societies of the eastern Pacific. He eventually selected a model 'based on the idea of the island as a captured fish, which was divided into portions according to status'.[5] He applied this model by describing how the canoe commanders asserted claims to lands as they approached the shores of Aotearoa, and how, in a second phase of exploration, the chiefs appropriated parts of the interior. However, Professor Anderson admits that the historical evidence on boundaries is contradictory. He says that there were 'no references to precise boundaries and the principal method of claim seems to have been by setting up altars (tuahu) in preferred places'.[6] He also notes that the British army historian A S Thomson, writing in 1859, and later others, were aware that there was a lack of clear references to boundaries.[7] Indeed, Professor Anderson himself admits that 'not all tribal territories were well-defined. The existence of unoccupied ground, some miles wide, was commonly noted.' He adds that 'multiple levels of territoriality tended to concentrate around the main settlements and towards the centre of tribal territory, declining towards the periphery'.[8] This is virtually to admit the argument of Professor Anderson's adversaries, who maintain that tribes had core territories that were edged by zones of overlapping occupation. But, elsewhere, Professor Anderson sticks to his main thesis: that tribal boundaries were necessarily exclusive and that shared zones of influence or overlapping rights were 'inimical to traditional concepts'.[9]

Professor Anderson's information on foundation narratives relates mainly to the North Island and he admits that not much is known for the South Island. He also acknowledges that the Pacific islands model hardly fits, since New Zealand is 'vastly different from East Polynesia' in terms of its much greater size, its cooler climate, and its different environment. Land 'was effectively limitless during the colonization phase and even up to the point of European contact large areas were seldom visited'. These differences were especially accentuated in the South Island, with its small Maori population and expansive plains and

5. Atholl Anderson, 'Kin and Border: Traditional Land Boundaries in East Polynesia and New Zealand with Particular Reference to the Northern Boundary of Ngai Tahu', revised ed, report commissioned by Te Runanga o Ngai Tahu, [2003] (doc Q2(a)), p 144
6. Ibid, p 51
7. Ibid, p 53
8. Ibid, pp 74–75
9. Ibid, p 72

mountains. 'Nevertheless,' Professor Anderson continues, 'given the relationship of mana to territory, we can be sure that from an early point all land was claimed by somebody, and that it had notional boundaries, although these might often have been imprecise.'[10] He admits that the situation massively changed with European contact, which in turn, by providing Maori with new weapons to pursue traditional warfare, led to further upheavals in Maori settlement patterns. Finally, with the coming of British rule and European settlement, there was (and here Professor Anderson quotes the anthropologist M D Lieber) an 'ossifying [of] ethnic and tribal boundaries [which] . . . served indeed as integral to colonial structures'.[11] We agree with this statement and examine the role of the Crown in 'ossifying' boundaries in chapter 3.

Professor Anderson notes that prevailing views about Maori territoriality and boundaries have been much discussed in the last 15 years. He quotes several authorities who differ from him. These include Professor Alan Ward, who questions whether a Maori right-holding group would ever have claimed exclusive rights to a given area of land, and he argues that their interests intersected and overlapped. As Professor Anderson also notes, several other scholars who have presented submissions to our inquiry, including Dr Angela Ballara, Professor David Williams, and David Armstrong, have presented similar arguments to Professor Ward's, as has the Tribunal in some of its previous reports, such as the *Ngati Awa Raupatu Report*.

We turn, however, to Dr Phillipson as representing the alternative explanation on boundaries. We refer mainly to his statement of response to the submissions of the Ngai Tahu professional witnesses, where he starts with the alternative model, presented by the Tribunal in its *Ngati Awa Raupatu Report*, that hapu and iwi:

> had no settled political boundaries of the kind associated with Western states. The hapu were more concerned with the maintenance of connections with other groups, mainly through whakapapa, or genealogy than with establishing areas of exclusivity. They had also been mobile over the years. The result today is that many hapu may have customary interests in a particular area or, at least, have ancestral associations with it.[12]

The pattern of occupation described by the Tribunal in the eastern Bay of Plenty was one of core territories, combined with migratory use of resources sometimes located beyond that area, and overlapping interests in boundary zones. There was an emphasis on whakapapa and marriage with other groups, rather than the maintenance of fixed political boundaries between different hapu or iwi. Dr Phillipson also cites examples of multiple or overlapping claims that have been investigated by the Tribunal from the Hauraki area, Tauranga,

10. Anderson, 'Kin and Border', pp 146–147
11. Ibid, p 154
12. Waitangi Tribunal, *The Ngati Awa Raupatu Report* (Wellington: Legislation Direct, 1999), p 3 (Dr Grant Phillipson, statement of response to evidence of Ngai Tahu, 22 September 2003 (doc Q19), p 6)

the Mokau-Mohakatino blocks, and Waikaremoana. In the case of Hauraki, the different tribes of Ngati Paoa, Ngati Maru, Ngati Tamatera, and Ngati Whanaunga had established core areas but held 'kainga pockets' in each other's territories.[13] While these were allies, and the boundaries were internal to a confederation of tribes, the principle held true for lands situated between peoples in conflict. The Mokau block was one such example that was long debated between Ngati Maniapoto and Ngati Tama. While the extent of influence changed over time, both tribes had valid customary interests throughout the boundary region.[14]

To establish exclusive rights within a rohe and an uncontested territorial boundary at 1840, one side or the other needed to have demonstrated a final and lasting military victory, confirmed by occupation that remained in effect. Leaving aside the question of ancestral association and ongoing connections through whakapapa and memory of tapu sites and tupuna buried, the losers of that conflict also had to have desisted in their periodic exercise of use rights in the lands formerly disputed. Dr Phillipson appeals to Professor Anderson's own evidence to demonstrate that this was not the case along the north-east coast of Te Tau Ihu. Professor Anderson admits that the Kaparatehau district was not one that was particularly suitable for permanent occupation and that, by the 1820s, 'it may be, [that it] . . . was used only for seasonal hunting and fishing by either or both Ngai Tahu and Rangitane'.[15] It is difficult, in these circumstances, to see either side as having permanently won the area from the other, or as exercising exclusive control over it. We discuss this issue in more detail in section 2.4.1.

It is appropriate at this stage to sum up our response to the arguments on the boundary issue, since it will inform our approach to the remaining issues discussed in this chapter. We accept Dr Phillipson's general thesis, based on previous Tribunal reports, that, instead of rigid boundaries between tribes, there were overlapping or contestable zones in which two or more iwi had interests. Though we have rejected Professor Anderson's main argument, we appreciate the scholarship and earnest endeavour that lies behind his report. If he appears contradictory at times, this is largely because of the contradictory evidence that he honestly supplied, even where it went against his main argument. Contradiction is to be expected when a large number of reports from European observers are quoted. That might in turn reflect the fact that the observers were generalising from contradictory facts from different areas and different groups. However, we should not presume that Maori custom in relation to tribal ownership of land and boundaries would remain unchanged over the years. Customary rights evolved over time, not least when they came under European influence. Hapu, the primary unit of social organisation in Maori society, were forever enlarging, fragmenting, and migrating, often as a consequence of warfare but perhaps just as often

13. Taimoana Turoa, *Nga Iwi o Hauraki – The Iwi of Hauraki* (Paeroa: Hauraki Maori Trust Board, 1997), p 4 (Phillipson, statement of response, pp 9–11)

14. Phillipson, statement of response, p 103

15. Anderson, 'Kin and Border', p 109

following internal, domestic disputes. Some groups stayed in their historical territories; other splinter groups went off to acquire new territories; but no group was necessarily fixed in one location for all time. On the eve of British annexation and European colonisation, Maori became embroiled in what was probably an unprecedented period of warfare in which some hapu populations were decimated, enslaved, or displaced. At the other extreme, new and enlarged hapu and iwi alliances went on conquering rampages, particularly in the thinly populated South Island. This further blurred the divisions of peoples and territories, as did the takawaenga marriages that we have mentioned, which served to make peace between warring factions. In the circumstances, it is difficult for us to accept the notion of fixed tribal or hapu territories within which one group possessed exclusive rights. We do not think Maori society operated like that, either before or after European contact.

We do, however, believe that the notion of fixed tribal boundaries was introduced to Maori by officials who dealt with them for land. Boundaries were fixed particularly by New Zealand Company purchases and then by subsequent Crown purchases of tribal land. Initially, land under negotiation was described with reference to prominent landed features such as a range of hills, as for instance in Colonel Wakefield's deed with Te Atiawa chiefs for the company's purchase of Wellington. Subsequently, however, in the company's Kapiti and Queen Charlotte Sound deeds, the huge area ostensibly purchased (including the northern third of the South Island) was based on boundaries described by degrees of latitude – a concept the Maori signatories could hardly have understood. Purchase deeds commonly had maps of the territory being purchased attached, and sometimes European purchasers encouraged Maori to sketch maps of their lands. In one example, Ihaia Kaikoura sketched a map in the sand of Rangitane's rohe and this was copied on paper by the Surveyor-General, Charles Ligar. Mr Armstrong reproduced it on the front cover of his historical report for Rangitane.[16] What that sketch meant to Kaikoura and Ligar were probably quite different things – for instance, Kaikoura merely sketched in the coastal limits of his rohe and simply refused to name an internal boundary, though Rangitane clearly had claims to land in the interior. Maori were more inclined to name and locate places that were important to them, often in relation to distant events, but it was the European negotiators who linked those places together with boundary lines. Crown officials dealt with those groups most susceptible to selling land, flattered them by accepting the full extent of their claims, and purchased the total area enclosed. If those initial purchases provoked complaints from others of importance who had been left out, the Crown accepted those claims to their fullest extent, even where they overlapped with those of the previous sellers, and simply purchased the land again. We discuss instances of this practice in our next chapter. It was a clear recognition that there were overlapping claims to some rather large contested territories. But,

16. David Armstrong, '"The Right of Deciding": Rangitane ki Wairau and the Crown, 1840–1900', report commissioned by Te Runanga o Rangitane o Wairau in association with the Crown Forestry Rental Trust, not dated (doc A80)

as we shall also note, some with valid claims could be left out because Crown officials misunderstood or ignored the claimants' legitimate customary rights. Two significant examples were Rangitane and Ngati Apa, who were said to have been conquered or enslaved, even though it was no longer possible, under the Treaty, to treat them in that way after 1840. Moreover, they were entitled to peacefully recover their customary rights over land under both British and Maori law.

3.3 Customary Rights in the Statutory Takiwa to circa 1820

We begin by discussing customary rights within the Ngai Tahu takiwa before they were disturbed by the northern invasions in the 1820s and 1830s. In this discussion, we concentrate on the claims submitted by Te Tau Ihu iwi and the criticisms of them by Ngai Tahu witnesses.

3.3.1 The east coast

According to the evidence of Dr and Mrs Mitchell, Rangitane interests had extended down to the Waiau-toa (Clarence River) before their occupation was disturbed by invasions from the north. This view was supported by Rangitane historian David Armstrong and by claimant witnesses Richard Bradley and Graham Norton. Bradley stressed the importance of mahinga kai and the cultural significance of this area to his people and listed a number of Rangitane mahinga kai sites, including Matariki, on the north side of the Waiau-toa River mouth (see fig 3).[17] Norton listed a number of pa occupied by Rangitane and said that Matariki Pa was occupied until the late 1820s.[18] Mr Armstrong presented the main account of Rangitane's traditional history.[19] He explained that most Rangitane in the Wairau traced their ancestry back to Te Huataki, who migrated to the region from the North Island in the mid-seventeenth century. Huataki was said to have established a pa called Mokinui at the southern end of Mataroa (inland of Parinui o Whiti), and another at the mouth of the Waiharakeke (Flaxmere) River. Mr Armstrong cites Edward Shortland in support of Rangitane's claim to their early ancestral control of the region. In 1843, Shortland was told by the Ngai Tahu rangatira Tuhawaiki that Te Huataki had controlled the territory north of Waipapa from 10 generations earlier.[20] Waipapa is some eight kilometres south of the Waiau-toa. However, Ngai Tahu witness Dr Tau has challenged this use of Shortland. We discuss his interpretation below.

17. Richard Bradley, brief of evidence on behalf of Rangitane, 22 April 2003 (doc M2), pp 15–16
18. Graeme Norton, brief of evidence on behalf of Rangitane, 10 March 2003 (doc M1), pp 20–28
19. Armstrong, 'Right of Deciding', pp 4–11
20. Edward Shortland, *The Southern Districts of New Zealand: A Journal, with Passing Notices of the Customs of the Aborigines*, 2nd ed (Christchurch: Capper Press, 1974), p 98 (Armstrong, 'Right of Deciding', pp 4–5)

3.3.1

Subsequent heke from the lower North Island augmented the Rangitane position in Te Tau Ihu. These later migrants are said to have arrived at Totaranui and then migrated into Te Hoiere (Pelorus Sound) and the Kaituna Valley, intermarrying with Ngati Mamoe. By about 1800, Rangitane were said to be in secure occupation of the lands around the head of Te Hoiere, in the Kaituna, Wairau, and Awatere Valleys, and at Kaparatehau (Lake Grassmere). According to Elvy, Rangitane consolidated their control of the eastern Te Tau Ihu region and their boundary at Waiau-toa after a period of warfare with Ngai Tahu. A key event was a battle at Matariki Pa, in which, Elvy states, Rangitane and Ngati Mamoe overcame Ngati Kuri, a hapu of Ngai Tahu. The battle was named Kai-karoro because seagulls feasted on the flesh of dead Ngati Kuri.[21]

The Rangitane perspective of the course of the conflict, migration, and eventual distribution of power in the region was summarised by Dr and Mrs Mitchell as follows:

> The shift of attention to the Kaikoura coast saw Ngati Kuri abandon their Wairau holdings, 'encouraged' on their way by contingents of Rangitane assisted by the remnants of Ngati Mamoe who were still surviving in that district, and from parties of Ngai Tara and Ngati Kuia. In the Wairau Valley itself Rangitane defeated Ngati Kuri at Ruataniwha . . . and at Hikurangi . . . One of the final battles . . . was at 'Matariki' pa at the mouth of the Waiau-toa (Clarence River) where Rangitane, with assistance from residual Ngati Mamoe, forced Ngati Kuri to the south of the river, which thereafter became the boundary between these tribes for several generations.[22]

The Mitchells see this boundary as persisting into the early nineteenth century. They argue that, in the years prior to the northern taua, Rangitane and their allied kin held 'major pa and kainga in numerous localities' which, in the south-eastern part of their rohe, ran 'from Te Karaka (Cape Campbell) and Matariki (Clarence River mouth)'.[23] Dr Phillipson is a little more cautious. He says that by 1820 'Rangitane were pre-eminent in Totaranui, the Wairau, and the Kaikoura coast, possibly as far south as Waiau-toa'.[24]

Ngai Tahu witnesses disputed this version of events. They questioned the extent of control exercised by Rangitane, the location of the 'traditional boundary' between the two peoples, the significance of the battle at Matariki, and the weight that can be placed on the evidence in support of the narrative as outlined above.

For instance, Professor Anderson makes some important qualifications for the use of oral traditions. In explaining the divergence between the Rangitane and Ngai Tahu historical

21. William John Elvy, *Kaikoura Coast: The History, Traditions and Maori Place Names of Kaikoura* (Christchurch: Whitcombs and Tombs, 1949), pp 21–22

22. Hilary Mitchell and Maui John Mitchell, 'Te Tau Ihu o te Waka: A History of Maori of Nelson and Marlborough', 2 vols, revised ed, report commissioned by Te Runanganui o te Tau Ihu o te Waka a Maui, 1999 (doc A63), pp 98–99

23. Ibid, p 119

24. Dr Grant Phillipson, *The Northern South Island: Part 1*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1995 (doc A24), p 19

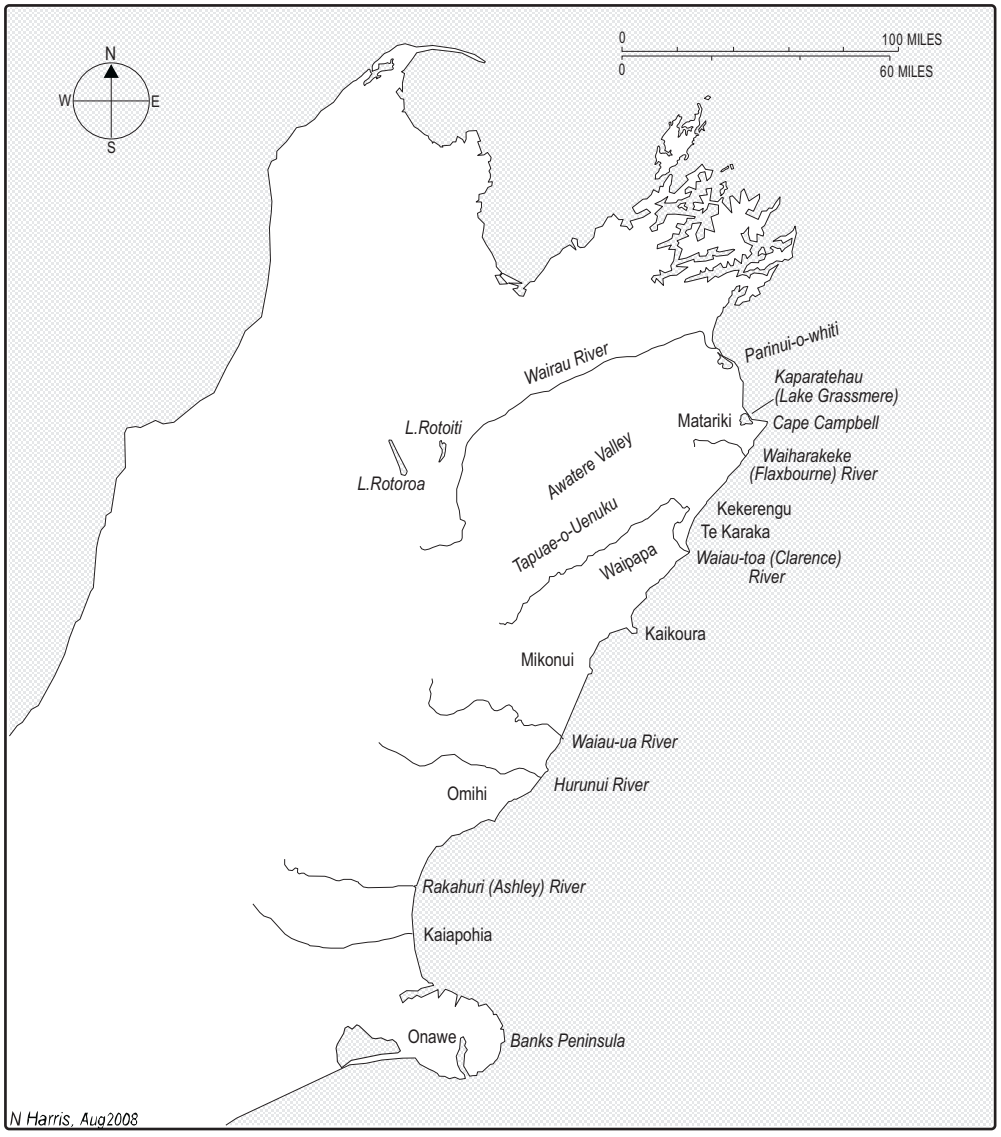

Figure 3: East coast place names

narratives, he suggests that the narratives 'take on a lineal or radial form in which we trail after invasion, victory or disaster like war correspondents, and traditional histories are constructed accordingly (including in my own work, I have to admit)'.[25] Professor Anderson argues persuasively for 'more complex activity on the northeast coast than is allowed in most historical constructions'. He challenges the simple model of Ngati Kuri being forced peremptorily out of Tory Channel and the Wairau to beyond the Waiau-toa. Alternatively, he suggests a three-way tussle between Rangitane and Ngai Tahu, with Ngati Mamoe sometimes siding with one and sometimes the other. There was, he suggests, a significant period

25. Anderson, 'Kin and Border', pp 86–87

of competition between the various iwi, which moved to and fro over the north-east coast region from Tory Channel to Waipapa.[26]

There was also, Professor Anderson argues, some agreement between them, with 'some kind of border established, if only temporarily, between Ngati Mamoe and Ngai Tahu at about Waipapa'. Professor Anderson even suggests that 'Ngai Tahu and Rangitane had been in [a] recent alliance', which allowed some Ngati Kuri settlements in the Sounds and the Wairau, since 'there was probably no fixed boundary between the two iwi at this time'.[27] That is a rather revealing admission and one which runs counter to Professor Anderson's central thesis of fixed boundaries with exclusive rights within them. Instead, there seems to be a pattern of overlapping intra-iwi interests. Professor Anderson says that there is evidence for Ngati Kuri and Ngai Tahu occupation in the Wairau in manuscripts from the Beaton–Morell (Pitini–Morere) family of Oaro, Kaikoura. While there may have been greater early Ngati Kuri settlement in the Wairau and Sounds than has previously been thought, Professor Anderson does not claim a boundary for Ngai Tahu quite so far north.[28] He does, however, argue that there was an implicit boundary between the two peoples at Parinui o Whiti. But, later, when he argues that there is 'no evidence' of a Ngati Kuri–Rangitane boundary at Waiau-toa, he admits that, 'Equally, it is not possible to show that there was a boundary at Paranuiowhiti.'[29] Since the historical documentary evidence is inconclusive, Professor Anderson falls back on a hypothetical view that the territorial boundary at Parinui o Whiti was suggested by the pattern of resource use. From a Ngai Tahu perspective, Kaparatehau was an outflung resource area, separated by shingle beaches from the resource-rich rocky outcrops of Kaikoura.[30]

We accept much of Professor Anderson's argument, including his view that Ngai Tahu had strong traditions linking them with Kaparatehau. They may have continued to use resources at least that far north in the early nineteenth century. Professor Anderson's account of the complexities of tribal interaction, with their frequently shifting allegiances, is in our view preferable to the neater, standard, and generally accepted accounts of the migration patterns of this period. However, we are not persuaded by the contention that the boundary at Parinui o Whiti was somehow natural; attractive resources are not in themselves proof that Ngai Tahu controlled them. Others were just as likely to do so, or to at least contest Ngai Tahu's right to exclusive use. We have already discussed Professor Anderson's model of territorial division with no overlap of rights in the land, and we do not accept it. However, as we also noted above, he sometimes admits that rights were shared in places of overlapping settlement, and with this we agree.

26. Anderson, 'Kin and Border', p 110
27. Ibid, p 100
28. Ibid, pp 92–105
29. Ibid, p 110
30. Ibid, p 94

The key question for us remains whether Professor Anderson's account precludes a legitimate claim by Rangitane to shared customary rights in the area south of Parinui o Whiti. Though we sympathise with Professor Anderson's argument that Ngai Tahu had rights of occupation and resource use as far north as the Sounds and the Wairau, we are not persuaded by his refusal to concede that Rangitane might have had similar rights to the south and a boundary as far south as Waiau-toa. Professor Anderson claims that the traditional account of the battle of Matariki, which comes mainly from Elvy, is in error. Elvy had written that it was 'a battle between the Ngati-Mamoe and their Rangitane allies against Ngai Tahu'. But Professor Anderson and Dr Tau claim that Elvy himself had admitted in a private letter that Matariki was merely a battle between Ngati Mamoe and Ngai Tahu and that no Rangitane were involved.[31]

The battle of Matariki has thus become of vital significance for both sides, and battle continues to be waged over historical documentation and interpretation. We must examine this history war in more detail, as best we can. Before we do so, however, we note a parting remark from Professor Anderson that the historical traditions that were to be the subject of so much argument extended only to the mid to late eighteenth century. He notes that there is 'a scarcity of evidence relating to the boundary districts extending from the late 18th century to the 1820s'.[32] Since there are apparently no reports of warfare, the very stuff of traditional narratives, we are tempted to conclude that Rangitane, Ngati Mamoe, and Ngati Kuri were getting along amicably, sometimes living side by side, sometimes apart, and always sharing the seasonal gathering of resources. These peaceful relations appear to have lasted until the irruption of Ngati Toa and their allies into the South Island around 1820.

Since the main authority on Ngai Tahu traditions is Dr Tau, we must now turn to him. Dr Tau argues that Rangitane traditions are a modern invention or are corrupted versions of sources that originally go back to Ngai Tahu. He challenges whether Waiau-toa can be shown as a traditional marker between the two iwi or that the battle at Matariki had involved Rangitane at all.[33] Dr Tau is critical of Mr Armstrong's use of Shortland. Mr Armstrong relies on a statement from the Ngai Tahu rangatira, Tuhawaiki, that Te Huataki and his Rangitane people controlled the east coast as far south as Waipapa. Dr Tau contends that Mr Armstrong has misconstrued the quotation. Tuhawaiki, Dr Tau says, had been referring to the period when Ngati Mamoe held sway over the South Island, and before Ngai Tahu arrived from the North Island. We accept that that may have been the case, although Tuhawaiki had told Shortland that Ngati Mamoe had possessed all of the territory down the east coast from 'Waipapa . . . to "Rakiura" or Stewart's Island', and much of the West Coast as well. However, Shortland, still quoting Tuhawaiki, then wrote that 'Bordering

31. Ibid, p 100
32. Ibid, p 155
33. Dr Te Maire Tau, 'The Oral Traditions Concerning the Areas in Dispute [Ngai Tahu]', revised ed, report commissioned by Te Runanga o Ngai Tahu, [2003] (doc Q5(a)), p 12

on them, to the north [of Waipapa], was a tribe called Te Huataki, whose ancestors had crossed over from the North Island'.[34] If we take the 'tribe of Te Huataki' to be Rangitane, as we think we must, then Tuhawaiki is locating them as far south as Waipapa, and Mr Armstrong is not misrepresenting him at all. Elsewhere, Dr Tau says that Ngai Tahu tradition claims Te Huataki as 'of Ngai Tahu origin', but Dr Tau himself admits that Te Huataki 'married into the people of Rangitane and became accepted as one of them'.[35] Whatever his origins, we consider that Te Huataki was generally regarded as Rangitane. We conclude that, when Tuhawaiki was speaking of the 'tribe of Te Huataki', he was referring to Rangitane and acknowledging their occupation of the east coast as far south as Waipapa, just south of Waiau-toa.

In Dr Tau's view, the Rangitane assertion that Ngai Tahu had been driven south of Waiau-toa after the battle at Matariki is based on the unreliable scholarship of two mid-twentieth-century amateur historians, William Elvy and W A Taylor, whose sources, Dr Tau claims, were all Ngai Tahu.[36] We do not entirely accept this. Although Elvy and Taylor relied considerably on the Ngai Tahu kuia Hariata Beaton of Oaro, Elvy in particular also had Rangitane contacts, including kaumatua Peter Macdonald and Haani Makitanara.[37] Dr Tau regards a third Pakeha historian, Arthur Carrington, as the more dependable. Carrington was also in touch with Mrs Beaton and, through her, had access to a tribal history written by Tapiha Te Winikau. In 1934, Carrington completed a draft of 'Ngaitahu: The Story of the Invasion of the South Island of New Zealand'.[38] Though Dr Tau appears to regard this as an authoritative source, we have a different view of it. The typescript is untidy and incomplete. It does not cite sources and makes little reference to Mrs Beaton, Te Winikau, or any other Ngai Tahu elders. Yet, it repeats, in quotation marks, speeches allegedly made by Ngai Tahu rangatira hundreds of years ago. It is romance, not history. On one occasion, after a Ngai Tahu victory, we are told that 'As is only proper the prince married the princess and was given half the kingdom'.[39] Earlier, we quoted a timely admission from Professor Anderson that the historians of oral tradition are 'like war correspondents' who trail after 'invasion, victory or disaster', and that their traditional histories are constructed accordingly. Carrington, who was a journalist, was one such correspondent who imagined and romanticised a Ngai Tahu past that could hardly have existed. In so far as his history has shape at all, it comes from Stephenson Percy Smith and other elders of the Polynesian Society, not Mrs Beaton. They had constructed a narrative of successive waves of tribal migration from the North Island

34. Shortland, *Southern Districts*, p 98
35. Tau, 'Oral Traditions', pp 34, 40, 63
36. Ibid, pp 10, 63
37. William John Elvy, *Kei Puta te Wairau: A History of Marlborough in Maori Times* (Christchurch: Whitcombe and Tombs, 1957), pp 41, 45, 54–55, 68, 78
38. We have examined the photocopy version reprinted in Dr Te Maire Tau, comp, supporting documents to 'The Oral Traditions Concerning the Areas in Dispute [Ngai Tahu]', various dates (doc Q5(b), vol 1(8)).
39. Arthur Carrington, 'Ngaitahu: The Story of the Invasion of the South Island of New Zealand', unpublished manuscript, 1934 (doc Q5(b), vol 1(8)), p 60

to the South Island, whereby the more 'primitive' inhabitants, such as Ngati Mamoe, were eliminated or pushed to the far reaches of the island. In accepting this, Carrington was no different from Elvy and Taylor, whom Dr Tau condemns.

Yet, Dr Tau relies on Carrington for some of his most important conclusions: for instance, that it was Ngai Tahu, not Rangitane (who were not there) who were the victors at Matariki. In fact, Carrington has only one brief paragraph on the matter, and he portrays Matariki as a victory for Ngai Tahu over Ngati Mamoe, and one which followed a previous victory at Waipapa.[40] Carrington quotes a slightly different version of the birds feasting on the remains of the slaughtered, who he says were Ngati Mamoe, not Ngai Tahu. Elvy was later to tell the story from a Rangitane perspective and had Rangitane and Ngati Mamoe the victors and the birds feasting off the remains of the vanquished Ngai Tahu. Though Dr Tau says that 'We should not privilege Elvy, Taylor or Carrington' and that they were merely 'shuffling metaphors' about the same event, he does in fact elevate Carrington's account over those of Elvy and Taylor. Dr Tau quotes a letter from Elvy to Carrington of 25 June 1934 (when Carrington was writing his history) in which Elvy admits that Matariki was a battle between Ngai Tahu and Ngati Mamoe. This seems to contradict Elvy's view in his 1948 book *Kaikoura Coast* that it was a battle between Ngai Tahu and Rangitane. We can only presume that he had changed his mind by 1948. In *Kaikoura Coast*, Elvy admits that he had obtained his account of the battle of Matariki from 'a Rangitane source,' perhaps Peter Macdonald.[41] However, Dr Tau also eventually admitted, on the basis of Te Winikau's version of the oral traditions, that there could have been a Rangitane presence at Matariki 'as a contingency to the Ngai Tahu war party'.[42]

According to Te Winikau's account, Ngati Mamoe gifted land at Waiau-toa for the return of their chieftainess, Hine-rongo. She had been captured originally by Rangitane in an attack on Matariki Pa, and from them, in turn, by Ngati Kuri, in a subsequent conflict called Te Wai-kotero a Tu-te-urutira. Ngati Mamoe and Tu-te-urutira's people lived together peacefully at first, but Ngati Kuri subsequently attacked Ngati Mamoe at Waipapa and Matariki. According to this account, Rangitane assisted Ngati Kuri in their taua before returning to the Wairau.[43]

To sum up on the conflicting versions of the battle of Matariki, we have Rangitane not being there at all or fighting on one side or on the other. By Rangitane tradition, they fought with Ngati Mamoe against the Ngai Tahu hapu, Ngati Kuri. According to Dr Tau, they were not present in a battle fought by Ngati Kuri against Ngati Mamoe, though he subsequently quotes a tradition that has them fighting with Ngati Kuri in that battle against Ngati Mamoe. These apparent contradictions are not surprising, since it is only to be expected that different

40. Ibid, p 65
41. Elvy, *Kaikoura Coast*, p 21
42. Tau, 'Oral Traditions', p 72
43. Ibid, pp 67–72

kaumatua will recount different versions of a battle fought in distant times. Indeed, they may well have been talking about different battles that have been conflated into one crucial battle for Matariki. Though neither Dr Tau nor anyone else has estimated a date for Matariki, we presume it was fought in the mid to late eighteenth century. Matariki Pa was located at the Waiau-toa River mouth and was a gateway from the resource-poor coast to the north to the richer resources further south towards Kaikoura. We therefore think that it is highly likely that there was more than one battle for Matariki Pa. But we remain puzzled as to why, if there was so much rivalry for Matariki in the mid to late eighteenth century, there was so little competition for it in the two or three decades between then and the Ngati Toa invasions.

It is difficult for us to come to any definite conclusion about the conflicting interpretations of traditional accounts that have been recycled through several generations of kaumatua and European scholars. Nevertheless, we think that Rangitane were involved, in one way or another, in conflict over Matariki and that the Waiau-toa represented not so much a boundary between Rangitane and Ngai Tahu as an overlapping zone in which both had customary rights, on both sides of the river. We think it is highly likely and not at all strange that Rangitane may have fought against Ngai Tahu on one occasion and with them on another. Such shifting allegiances were not uncommon in Maori history. Though we cannot be sure that Waiau-toa was permanently occupied and, if so, by whom, it was evident from our site visit that there are still archaeological remains, in the form of pa sites and hill side terraces, of frequent occupation. But we accept Professor Anderson's reminder that it is usually impossible to tell the hapu or iwi identity of the occupants from the archaeological remains. We note, however, that Rangitane did claim the sites as theirs. Whether or not it was permanently occupied, the Waiau-toa was clearly an important staging post for expeditions along the coast, or inland up the valley. There were well-known tracks to the bird-snaring places in the mountains and lakes of the interior and down the Awatere Valley to the rich resources of Kaparatehau. It is likely that they were used by Rangitane and Ngai Tahu.

Dr Tau also questions whether the mountain Tapuae-o-Uenuku could be sacred to Rangitane, because in his view the traditions about it lie with Ngai Tahu. However, Dr Tau's interpretation seems contrary to that argued by Ngai Tahu kaumatua Tipene O'Regan in the Maori Appellate Court in 1990, when the customary ownership of lands contained in the Arahura and Kaikoura deeds was examined. According to the judgment of that court, O'Regan did not challenge, or seek to discredit, Rangitane's association with Tapuae-o-Uenuku:

> Mr O'Regan stated that historically the real issue to them always had been the Awatere Valley and the control of the route right into the heartland of the Ngai Tahu. He said Ngai Tahu have never argued the Rangitane right to look upon Tapuae-o-[U]enuku. He thought

two peoples can look at different sides of the same mountain. What they differed with is where it stands.[44]

The court made the same point when it recognised the 'special significance' of the Waiau-toa in Rangitane's traditional history, even though it rejected (on the ground of insufficient evidence) their claim to the river as the boundary with Ngai Tahu at the time of Te Rauparaha's incursions.[45]

In summing up on the value of the oral traditions, we would expect those of the Kurahaupo tribes to be more fragmentary and less detailed than those of Ngai Tahu, because of the Kurahaupo tribes' greater losses after 1820. As James Stack notes in his 1898 study *South Island Maoris*, 'little of their history worth recording has been preserved by the remnant of their descendants who escaped destruction at the hands of Te Rauparaha'.[46] This has proved to be the case. But it is a long step from this to the conclusion that where traditions were shared they must belong only to Ngai Tahu. Elvy supports the Rangitane association with the Kaparatehau area, attributing to them a narrative regarding the rock pools found there. We should not be surprised if traditions such the naming of these rock pools (in a story involving Kupe) should be held by a number of different groups with an association with that area. Kupe stories were widely shared and were not the preserve of any one iwi. We are reluctant on the grounds of either custom or natural justice to penalise the descendants of those whose traditions have been disrupted by calamity, whether through tribal warfare in the early nineteenth century, or the social disruption of colonisation in the years that followed.

Dr Phillipson examines the allegations that witnesses had borrowed Ngai Tahu traditions from twentieth-century Pakeha ethno-historians such as Elvy to demonstrate interests at Waiau-toa, Matariki, and Kaparatehau. Dr Phillipson finds that Elvy's sources extended beyond Ngai Tahu. In his recording of the traditions of Arai-te-uru canoe, from which the origins and naming of Tapuae-o-Uenuku arise, Elvy names only one of his sources (J H Beattie) but refers to having gathered his stories from different tribes. While Elvy's informants included Hariata Beaton and other Ngai Tahu authorities, he also consulted Rangitane–Kurahaupo repositories of tribal knowledge such as Eruera Hemi and Frank MacDonald (who was the successor to many such noted authorities in the MacDonald family). Dr Phillipson notes that the Rangitane and Ngati Kuia witnesses cited those same tribal authorities as the source of their stories about the mountain and the rock pools.[47]

44. *Ngai Tahu Trust Board and Another v Her Majesty the Queen*, 15 November 1990, South Island Appellate Court, minute book 4, fol 681

45. Ibid

46. James Stack, *South Island Maoris: A Sketch of their History and Legendary Lore* (Christchurch: Whitcombe and Tombs, 1898), p 32

47. Phillipson, statement of response, pp 24–28

We are not persuaded by Dr Tau's argument that witnesses for the Kurahaupo iwi borrowed and misused Ngai Tahu narratives and had none of their own showing ancestral connection and rights. We do not accept the Ngai Tahu claim that these stories are their exclusive preserve, even though more of their recorded traditions have survived. But, equally, we do not accept that Rangitane can use their traditions to claim exclusive rights along the Kaikoura coast to Waiau-toa. Neither group can show exclusive ownership of traditions concerning the area, nor establish the dominance of one narrative over the other, nor demonstrate exclusive control of the sources. This outcome is as one would expect in the case of border lands utilised jointly by tribes whose core lands lay elsewhere. In one sense, these were debatable lands, but the lack of recorded incidents over the area in the late eighteenth and early nineteenth centuries – no conflicts are remembered by either side as having taken place – suggests that the overlap of use rights was accepted.

3.3.2 The West Coast

We turn now to the western side of the South Island. Here too the reconstruction of traditional history is a difficult task. The narratives of Kurahaupo about their early history in the northern part of the West Coast region, including their relations with other tribal groups there, are fragmentary, mainly because of the disruption caused by the arrival in Te Tau Ihu of iwi from the north in the 1820s and 1830s. Furthermore, as in the east coast region we have just discussed, Ngai Tahu (as the iwi controlling the long stretch of coast to the south of the districts that are the focus of our consideration here) have a different understanding of the historical situation on the northern West Coast before 1820.

The focus of our consideration in this part of the chapter is the stretch of coast running south nearly 150 kilometres from Kahurangi Point to an area of flat land in the vicinity of Cape Foulwind and the mouth of the Kawatiri (Buller River), together with large tracts of land extending east from the coast into the mountainous interior (see fig 4). The historical geographer Murray McCaskill comments on the remoteness of the West Coast as a whole: 'It is quite probable that the shores of Westland, the first part of New Zealand to be seen by European eyes [in 1642], were among the last parts of the country to be occupied by Polynesian settlers.'[48] Ngati Apa claim that their interests in this area date back to the eighteenth century and that they have a long history of resource use and occupation there. In their amended statement of claim, Ngati Apa defined the extent of their rohe on the West Coast. They asserted that they had customary interests in 'the whole block of country from the southern bank lands of the Kawatiri (including Tauranga Bay) north to Kahurangi Point and inland of that coastline in an easterly direction to the Nelson Lakes area'.[49] In

48. Murray McCaskill, 'The Poutini Coast: A Geography of Maori Settlement in Westland', *New Zealand Geographer*, vol 10, no 2 (1954), p 134

49. Kathleen Hemi, amendment to claim Wai 521, 9 June 1995 (claim 1.10(a)), p 5

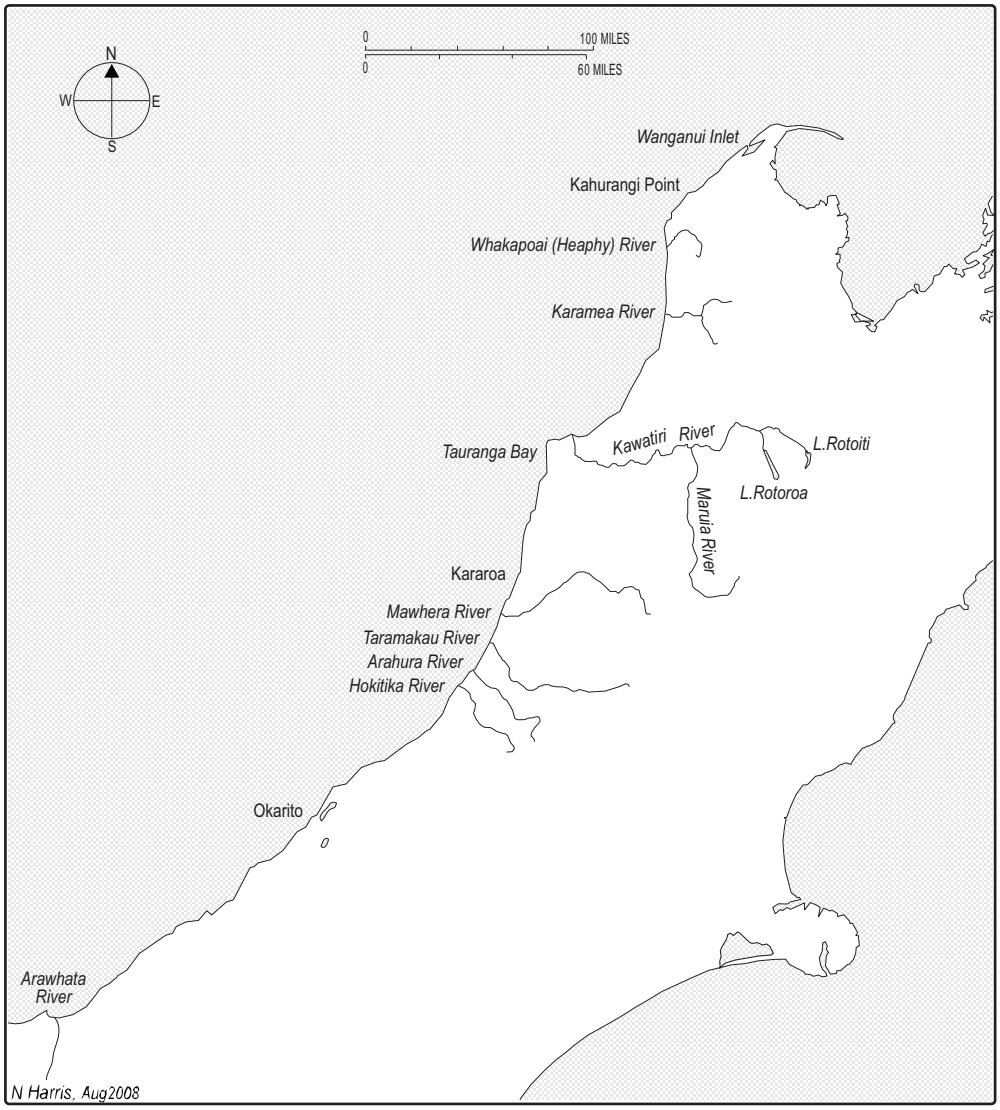

Figure 4: West Coast place names

their closing submissions, the iwi maintained that the customary rights they unquestionably possessed in this area – rights that existed before the northern conquest and were not extinguished by it – were entirely ignored by the Crown in its purchasing activities, except for the very limited recognition given in the Arahura transaction of 1860.[50] They accepted that Ngai Tahu also had a history of activity in the area, but vigorously denied that the southern iwi had exclusive rights there – a claim that they rejected as a 'myth'.[51] Ngati Apa regard the 1990 decision of the Maori Appellate Court, which ruled that Ngai Tahu has sole

50. Counsel for Ngati Apa, closing submissions, pp 2, 7, 9
51. Ibid, pp 34–35

customary rights of ownership as far north as Kahurangi, as incorrect and unjust.[52] We will examine Ngati Apa's submissions in more detail later in the chapter.

To begin our consideration of the early Maori settlement of the West Coast, we turn to the account given by Te Tau Ihu claimant historians Maui John and Hilary Mitchell as part of their Maori history of the northern South Island. Referring to Te Tau Ihu as a whole, these authors admit that it is difficult to be confident in reconstructing the sequence of tribal occupation, and point out that the occupation of particular areas by particular groups often coincided with the presence of quite different groups in adjacent areas.[53] They have commented on the difficulties posed by the nature of the available evidence (which is affected by questions about its authenticity) acknowledging that it is difficult to date, contains contradictions about particular events, and nearly always has 'a particular iwi or hapu gloss'. Nevertheless, they have been able to provide an account based on primary sources such as oral traditions and unpublished whakapapa (much of this material is not available in the public arena) as well as on a number of secondary sources.[54]

In Dr and Mrs Mitchell's account, there is mention of Ngati Wairangi, who are said to have resided in the western districts of Te Tau Ihu at one time. Certainly they were living further south, in the middle part of the West Coast (Te Tai Poutini), in the seventeenth century, when Ngai Tahu first came to that district. Later, they were conquered by Ngai Tahu and incorporated into that iwi.[55] A more substantial presence in Te Tau Ihu was that of Ngati Tumatakokiri, who are seen as having Kurahaupo origins and are thought to have migrated to the region in the late sixteenth century. Later, they established themselves strongly in the western districts, from which they displaced Ngati Wairangi southwards. Eventually, they also moved south to the Nelson Lakes district (Rotoiti and Rotoroa) and from Te Tai Tapu to the Kawatiri (Buller) and Mawhera (Grey) districts on the West Coast – vast areas that remained 'under their domination for several generations'.[56]

One of the early written sources for this account is Alexander Mackay's 'Traditionary History' of 1873, which outlined the history of Ngati Wairangi and Ngati Tumatakokiri.[57] Mackay states that Ngati Tumatakokiri settled on the West Coast 'as far south as the River Karamea', and he suggests that for over a century they 'held undisturbed possession of the country to the north of the Buller'.[58] This account is based almost entirely on the unpublished 'Sketch of the History of the Aboriginal Native Tribes of the Middle Island', which

52. Counsel for Ngati Apa, closing submissions, p 43

53. Hilary Mitchell and Maui John Mitchell, 'A History of Maori of Nelson and Marlborough', 2 vols, report commissioned by Te Runanganui o te Tau Ihu o te Waka a Maui, 1992 (doc A9), vol 1, p 2-1

54. Hilary Mitchell and Maui John Mitchell, 'Ngati Tama Response to Ngai Tahu Evidence to Te Tau Ihu Inquiry', statement of response to evidence of Ngai Tahu, September 2003 (doc Q21), pp 26–27

55. Mitchell and Mitchell, 'History of Maori', vol 1, p 2-38

56. Ibid, pp 2-43–2-45, 2-70–2-71, 2-83

57. Alexander Mackay, 'The Traditionary History of the Natives of the South Island up to the Time of their Conquest by the Northern Tribes under Te Rauparaha', *Compendium*, vol 1, intro, pt 3, pp 37–53

58. Ibid, pp 39, 45

was written by Alexander Mackay's cousin James in 1859. As Dr McAloon shows, in a report commissioned by Ngai Tahu, James Mackay gathered his information from Ngai Tahu informants on the West Coast while he was negotiating the Crown's purchase of the area.[59] Clearly, Mackay's account of West Coast history is likely to be oriented towards a Ngai Tahu perspective.

The power of Ngati Tumatakokiri in western Te Tau Ihu was severely challenged on several fronts in the eighteenth century. One of their enemies was Ngati Apa, a Kurahaupo iwi that had come to Te Tau Ihu from the North Island.[60] In the south, Ngati Tumatakokiri were assailed by the Ngai Tahu communities established on the West Coast (who were known as Poutini Ngai Tahu), and by other Ngai Tahu parties travelling across the mountains from the east. According to Dr and Mrs Mitchell, in the 1760s and 1770s Ngati Tumatakokiri still 'traversed and occupied much of the hinterland to as far south as Lake Brunner and coastal districts of Te Tai Poutini' and shared the coast with Ngai Tahu. Eventually, however, they suffered serious defeats at the hands of the southern tribe, including one inflicted by a taua that penetrated right into their Te Tai Tapu heartland. Remnants living in Mawhera and its hinterland were soon afterwards dealt with by the Poutini Ngai Tahu leader Tuhuru, a recent arrival from the east, and the final defeat of Ngati Tumatakokiri was accomplished. One of the men killed in the last battle with Ngai Tahu in the Paparoa Ranges near the Mawhera Valley was Tamane, the father of a boy (Kehu) who was taken prisoner by Ngai Tahu and later became a source of evidence relevant to the claims we are considering. At the same time as Ngati Tumatakokiri were being routed in the south, Ngati Apa were attacking them from the north. Their longstanding mana in the northern South Island was virtually at an end by about 1810 (a date that comes from Mackay). Most were absorbed by the incoming tribes, and Ngati Tumatakokiri survived as an identifiable entity only in a few isolated areas.[61] On their several visits to the inland lakes Rotoiti and Rotoroa in the 1840s, Heaphy and Brunner found this district completely uninhabited, although they understood from their guide, Kehu, that Ngati Tumatakokiri had lived there in the past.[62]

We were told that after the defeat of Ngati Tumatakokiri, Ngati Apa intermarried with them and established themselves in their former territories; on the West Coast they had important settlements at Karamea and Kawatiri and perhaps further south.[63] In the words of Alexander Mackay, writing in 1873, Ngati Apa enjoyed 'entire possession of the country formerly occupied by the Ngatitumatakokiri'.[64] Ngai Tahu were similarly well established in

59. James McAloon, 'The Position of Ngai Tahu on the West Coast during the 19th Century', revised ed, report commissioned by Te Runanga o Ngai Tahu, [2003] (doc Q4(a)), pp 73–78

60. Mitchell and Mitchell, 'History of Maori', vol 1, pp 2-57–2-58, 2-83–2-84, 2-89

61. Ibid, pp 2-71–2-72, 2-83, 2-86–2-90; *Compendium*, vol 1, intro, pt 3, p 45

62. Nancy Taylor, ed, *Early Travellers in New Zealand* (Oxford: Clarendon Press, 1959), pp 191–192

63. Mitchell and Mitchell, 'History of Maori', vol 1, pp 3-1–3-3; Hilary Mitchell and Maui John Mitchell, 'Boundary Issues: West Coast of the South Island', report commissioned by Te Runanganui o te Tau Ihu o te Waka a Maui, 1990 (doc A82), p 5

64. *Compendium*, vol 1, intro, pt 3, p 45

Te Tai Poutini. The Mitchells acknowledge that links were created between Ngati Apa and Ngai Tahu at this time, although they are uncertain about their extent. They point, however, to the many Kurahaupo whanau with whakapapa links to Ngai Tahu, giving the notable nineteenth-century example of Mata Nohinohi (Kehu's mother), a woman descended from both Ngati Apa and Ngai Tahu and married first to the Tamane mentioned above.[65]

Except for Dr and Mrs Mitchell, historians have given little attention to the question of how far south Ngati Apa's influence on the West Coast extended in the years after Ngati Tumatakokiri were vanquished. In a report prepared in 1988 for the Tribunal's Ngai Tahu inquiry, Dr Donald Loveridge writes that it was 'unclear' how far north the Ngai Tahu mandate ever ran, and he suggests that the fact that Ngati Apa were later recognised in the Arahura purchase 'may indicate that the Poutini Ngai Tahu did not exercise exclusive control over the area north of the Grey River before the 1830s'.[66] The issue of pre-1820 'boundaries' was not addressed in the *Ngai Tahu Report 1991* itself, which was released in 1991 and relied on the Maori Appellate Court's decision the previous year that Ngai Tahu had exclusive rights up to Kahurangi Point – a matter to which we will return in chapter 4. In the early stages of the Tribunal's present inquiry, Dr Phillipson's 1995 overview report simply accepts Dr and Mrs Mitchell's account and again states that by 1820 Ngati Apa were dominant in western Te Tau Ihu and on the West Coast, 'possibly as far south as the Mawhera Valley'.[67]

Dr Ballara's investigation of customary land rights in Te Tau Ihu does not attempt to extend Dr and Mrs Mitchell's study of the pre-1800 West Coast. In her 2001 report, Dr Ballara accepts that Ngati Apa were associated with the area from Whakatu 'westwards and inland as far south as Buller'.[68] She does, however, state that in 1820, on the eve of the northern invasion, the boundaries between Ngati Apa and Poutini Ngai Tahu on the West Coast were 'still fluid and unsettled'.[69]

In the first report written from Ngati Apa's perspective, Mr Armstrong argues that, by defeating Ngati Tumatakokiri, Ngati Apa acquired customary rights in the northern part of the West Coast. He asserts, as earlier writers had done, that the area controlled by Ngati Apa after about 1800 included the coast north of Mawhera. He adds that they had been 'in the habit of visiting the district to harvest its resources from a much earlier date, perhaps as early as the mid-fifteenth century'.[70] Mr Armstrong accepts that the occupation of the West Coast involved relatively small numbers of people. In this connection, he refers to

65. Mitchell and Mitchell, 'History of Maori', vol 1, pp 2-89, 3-4

66. Donald Loveridge, 'The Arahura Purchase of 1860', report commissioned by the Crown Law Office, 1988 (doc Q1), pp 4–5

67. Phillipson, *Northern South Island: Part 1*, p 19

68. Dr Angela Ballara, 'Customary Maori Land Tenure in Te Tau Ihu (The Northern South Island), 1820–1860: An Overview Report on Te Tau Ihu (Wai 785)', report commissioned by the Crown Forestry Rental Trust, 2001 (doc D1), p 18

69. Ibid, p 20

70. David Armstrong, 'Ngati Apa ki te Ra To', report commissioned by the Ngati Apa ki te Waipounamu Trust Claims Committee, 1997, p 2

McCaskill's conclusion that the region could not have supported a population of more than a few hundred in this period, and that the occupants were largely migratory food-gatherers with only a few semi-permanent settlements and cultivations (such as those at Kawatiri and a few inland valleys).[71] Indeed, McCaskill wrote that the physical features of the West Coast made it 'one of the least promising environments' for Maori in the whole country.[72] Mr Armstrong's findings on the extent of Ngati Apa's rohe do not go beyond those of earlier writers, but he makes the suggestion that the site of Ngai Tahu's final victory over Ngati Tumatakokiri (in the Paparoa Range between the Mawhera and Kawatiri Valleys) may have represented 'a rough "boundary" thereafter adopted between Ngati Apa and Ngai Tahu'.[73] In a later report, he refers to additional evidence, contained in a letter written in 1852 to Donald McLean by a group of North Island Ngati Apa chiefs. The letter lists some of the north-western South Island districts formerly controlled by Ngati Tumatakokiri, including places from Te Tai Tapu down to Karamea and Kawatiri, and appears to say that Ngati Apa claimed these areas in the customary way through defeat of and intermarriage with Ngati Tumatakokiri.[74]

Mr Armstrong also points us to a petition sent to Parliament in 1923 by Hoani Mahuika and other Kawatiri residents, in which they referred to the use of the resources of that area by many generations of their ancestors.[75] The petitioners did not specify the iwi to which they belonged, but when the Mahuika family's case came to the Native Land Court in 1926 they said that their claim was through Ngai Tahu, Ngati Tama, and Ngati Apa. Tuiti Makitanara spoke for the applicants, mentioning their Ngati Apa, Ngati Tumatakokiri, and Ngati Wairangi connections but emphasising the first. He referred to the Ngati Apa conquest down to Kawatiri and said that, while the applicants had Ngai Tahu rights to all the West Coast lands, their rights 'under Ngati Apa' were particularly strong between the Heaphy and the Kawatiri. He stated that:

> Kawatiri was the main pa of the Mahuikas and their elders. They also lived at Karamea. Old Mahuika got his right from Ngati Apa. He came with the Ngati Apa taua about 1800 . . . Mahuika got his right through conquest [of Ngati Wairangi] and continuous occupation . . . Puaha Te Rangi got a right through [his grandfather] Te Ao of Ngati Apa.[76]

71. Ibid, p 12; see also McCaskill, 'The Poutini Coast', pp 137–141
72. McCaskill, 'The Poutini Coast', p 135
73. Armstrong, 'Ngati Apa ki te Ra To', p 65
74. Kawana Hunia and others to McLean, 15 March 1852, translated by Takirangi Smith, McLean papers, copy-micro-0535, ATL (David Armstrong, comp, supporting documents to 'The Fate of Ngati Apa Reserves and Ancillary Matters', various dates (doc A78(a)), p 188); David Armstrong, 'The Fate of Ngati Apa Reserves and Ancillary Matters', report commissioned by the Ngati Apa ki te Waipounamu Trust in association with the Crown Forestry Rental Trust, 2000 (doc A78), p 2
75. Armstrong, 'Ngati Apa ki te Ra To', p 88
76. Ibid, pp 91–92

3.3.2

At this point, we can say that undoubtedly there is traditional and historical evidence for a Ngati Apa presence south of Kahurangi Point but it is not extensive or conclusive. It seems that very little is known about the history of Ngati Apa's occupation of the region, the precise nature of that occupation, or its geographical extent. Evidently, the population was small and the occupants were more mobile than those living in more well-endowed districts. It is also clear that Ngai Tahu had a history here too, and it is to their understanding of the situation that we now turn.

Concerning this side of the South Island, too, Ngai Tahu witnesses questioned the Kurahaupo representation of the pattern of tribal occupation in the period before the coming of the North Island taua.

We begin with Professor Anderson's comments on the sources for this topic. Describing traditional group relationships in the northern South Island as 'murky waters', Professor Anderson emphasises the difficulty of arriving at an agreed narrative of traditional history in this region. Since there is no way of describing the pre-European socio-political landscape without relying on the relevant traditional histories, the disorder brought to the Kurahaupo iwi and their transmission of traditional knowledge when they were invaded greatly reduced what can be known of the region's past. Concerning the early nineteenth century in Te Tau Ihu, there is, in Professor Anderson's view, a shortage of 'historical traditions of reasonable quality'.[77] He is critical of the sources used in the accounts of West Coast history put forward by the Te Tau Ihu claimants, saying they are not 'based sufficiently on explicit and defensible historical traditions'.[78]

On the basis of the probable birth dates of the Ngai Tahu named as taua leaders, Professor Anderson argues that the defeat of Ngati Tumatakokiri in Te Tai Tapu was much later than the 1780s date given by Mackay and Dr and Mrs Mitchell. In his view it probably occurred between 1810 and 1815, and the defeat in the Paparoa ranges was probably later too (perhaps closer to 1820 than 1810). He points out that this revision of the chronology lengthens the period of Ngati Tumatakokiri presence in the area, which means that neither Ngati Apa nor Ngai Tahu had been in effective control of their territories on the western side of the island until very shortly before the northern invasion.[79]

Professor Anderson also argues that Ngati Tumatakokiri did not occupy lands further south than Kahurangi Point, declaring that evidence to the contrary 'is elusive, to say the least'. While Alexander Mackay's history tells of Ngai Tahu attacks on Ngati Tumatakokiri in Te Tai Tapu, there are no records of clashes between the two iwi further south, in the Buller area. There is no explicit mention of a Ngati Tumatakokiri invasion of the Kawatiri area. Rather, the battles between the two tribes are recorded as being in inland areas south and south-west of the Nelson lakes. Professor Anderson is aware of the information given

77. Anderson, 'Kin and Border', pp 80–82
78. Ibid, pp 82–83
79. Ibid, pp 88–90

by Kehu to the Heaphy expedition in 1846, to the effect that the Ngati Tumatakokiri rohe included 'the western coast', but indicates that this did not specifically include Kawatiri and probably meant Te Tai Tapu.[80] He points out that Mackay, whom he identifies as the most influential source for what has been written about the pre-1820 occupation of the area, has Ngati Tumatakokiri occupation extending no further south than Karamea, this reference in Mackay being the only mention of settlement in the area by that iwi. Mackay's statement in 1873 was that Ngati Tumatakokiri had possession of the district 'north of the Buller', by which Professor Anderson thinks he meant 'north of the Buller district'; that is, north of Kahurangi, which was where the Buller district adjoined Te Tai Tapu. (It was Stephenson Percy Smith who later added 'River', which has often been followed by others.) In Professor Anderson's view, it is unlikely that Mackay meant north of the Buller River, since he had already said that Ngati Tumatakokiri influence extended only as far south as Karamea, and his account of the fighting north of Karamea 'suggests that there were no Ngati Tumatakokiri settlements in Buller, at least south of Karamea, and perhaps south of Kahurangi Point.'[81]

In Professor Anderson's opinion, accounts that have Ngati Apa expanding into Buller and Westland are similarly 'very much open to question.'[82] He cites Mackay's statement (to Parliament's Native Affairs Committee in 1896, when he was providing background for the Wakapuaka dispute) that at the time of the northerners' invasion Ngati Apa was in possession of 'the country extending as far as the West Wanganui'.[83] He rejects Makitanara's testimony to the Native Land Court in 1926, which asserted that Ngati Apa conquered the Kawatiri area about 1800: to Professor Anderson this is 'implausible' and unsupported by any other evidence.[84] He has seen no specific evidence of battles between Ngati Apa and Ngai Tahu south of Te Tai Tapu, nor of any Ngati Apa settlement in Buller and Westland at this time. In contrast with this lack of evidence for Ngati Apa occupation of the area, however, there is much evidence for Ngai Tahu's main settlements and activities further down the coast. As for the inland districts, Professor Anderson believes that the Ngati Apa evidence is 'slim indeed' and not able to tell us much about who occupied which area. He does not doubt that Ngati Tumatakokiri occupied some parts of the interior districts and competed there with Ngai Tahu, but with the demise of Ngati Tumatakokiri about 1820, Ngai Tahu 'became essentially the exclusive users of the inland valleys up to about 1840'. The defeat of Ngati Tumatakokiri 'had the result of freeing access to the borderlands by Ngai Tahu'. Ngai Tahu were a strong tribe militarily, especially when they had the support of their kin from the eastern side of the island. Other tribes 'could nibble at the edges, but

80. Taylor, *Early Travellers in New Zealand*, p 191

81. Anderson, 'Kin and Border', pp 111–120. For Kehu's statement to Heaphy, see Taylor, *Early Travellers in New Zealand*, p 191.

82. Anderson, 'Kin and Border', p 90

83. Mackay to chairman, Native Affairs Committee, 24 August 1896, AJHR, 1936, G-6B, p 29 (Anderson, 'Kin and Border', p 121)

84. Anderson, 'Kin and Border', pp 119, 121

they stood no chance of making any significant inroad on territory which Ngai Tahu were determined to defend'.[85]

In a detailed analysis of sources relating to the invasion of the West Coast by Ngati Rarua and other northern tribes at the end of this period, Professor Anderson finds only Ngai Tahu occupying the area south of Kahurangi. Referring to persons named in the Ngati Toa narrative sent to Grey in 1851 and 1852, he agrees that the well-known chief Te Rato, who was killed in Te Tai Tapu, was Ngati Apa, but identifies the other chiefs named in this source, and encountered south of Kahurangi by the taua, as Ngai Tahu. To him the indications are that 'Poutini Ngai Tahu had managed to establish the Kahurangi point area as their northern border by the late 1820s'.[86] Against this, we mention the evidence given to the Native Land Court in 1892 by Ngapiko, who stated that his Ngati Rarua forbears had proceeded down the coast past Kahurangi and 'fought with the Ngatitumatakokiri at Karamea'.[87]

In summary then, Professor Anderson's contention is that the Kurahaupo reconstruction of events 'pays too little attention to the role of Ngai Tahu, while promoting views about the distribution of other iwi in districts south of the Ngai Tahu boundary on evidence which leaves much to be desired'. The evidence relating to the boundary districts from the late eighteenth century until the 1820s is scarce, but it is unlikely that either Ngati Tumatakokiri or Ngati Apa settled permanently south of Te Tai Tapu or west of the Nelson lakes, at least 'in separate communities'. In fact, scarcity of resources meant that the area between Karamea and Kawatiri 'seems to have been avoided as an area of long-term settlement by all iwi until the 1840s'. Professor Anderson admits that Ngai Tahu 'are similarly invisible in the Buller', at least as far as occupation is concerned. Although he does not use the word 'boundary', Professor Anderson believes that there was a 'distinction' between, on the one hand, the Ngati Tumatakokiri–Ngati Apa rohe in Te Tai Tapu and, on the other, the West Coast below about Kahurangi Point. He suggests that Ngati Apa, like Ngati Tumatakokiri before them, 'might have regarded the broad area between West Whanganui and Karamea as a borderland between themselves and Poutini Ngai Tahu, but they established no known settlements in the Buller'.[88] Under cross-examination, Professor Anderson admitted that the evidence 'just isn't very clear on this at all' and said that, 'to some extent', he would agree that his case was 'a supposition' based on pieces of traditional information describing the history of occupation in the districts to the north of Te Tai Tapu and to the south of Kawatiri. While agreeing that the evidence could point in favour of either Ngati Apa or Ngai Tahu, Professor Anderson still maintained that there was a great deal more evidence on the Ngai Tahu side

85. Anderson, 'Kin and Border', pp 120–123, 142, 155–156, 158–160
86. Ibid, pp 128–134, 159
87. Native Land Court, Nelson, minute book 2, fol 173 (Tony Walzl, 'Ngati Rarua and West Coast, 1827–1940', report commissioned by the Ngati Rarua Iwi Trust in association with the Crown Forestry Rental Trust, 2000 (doc B5), p 7)
88. Anderson, 'Kin and Border', pp 124, 135–137, 141, 155–156, 158–159

than there was on the Ngati Apa side. Nevertheless, 'possibly the whole area was a zone of contention.'[89]

Dr Tau also casts doubt on the quality of the traditional evidence used by the Te Tau Ihu claimants.[90] He places considerable importance on Ngati Wairangi, to whom Ngai Tahu were closely related. Indeed, in Dr Tau's view, Ngai Tahu is the only tribe able to demonstrate a customary claim to the northern West Coast and its hinterland, by conquest and by way of descent from the former occupiers (Ngati Wairangi).[91] Dr Tau quotes Alexander Mackay's mention of a limited Ngati Tumatakokiri presence south of Kahurangi Point and points to a lack of traditional evidence that this former Ngati Wairangi area ever came under Ngati Apa authority.[92]

Using more recent evidence, Dr McAloon points out that in 1923 the Mahuika whanau mentioned their descent from Ngati Wairangi in their petition to Parliament, as they did when their claims were heard in the Native Land Court in 1926. Hone Mahuika did indeed tell the court that the Mahuika claim was through both Ngai Tahu and Ngati Apa, writes Dr McAloon, but he also stated that they 'got into Westland land through Mata Nohinohi'. Mata was the wife of their Ngati Apa forebear Mahuika but of Ngati Wairangi and Ngai Tahu descent herself.[93]

On these grounds, Ngai Tahu asserted in their closing submissions (which we will discuss in greater detail later in the chapter) that all the evidence supported their claims to customary rights in the disputed area. They did not accept that there was any traditional evidence for a claim by Ngati Apa to customary title based on conquest, discovery, or ancestral rights.[94]

Some of these matters will be relevant later, when we look at how the contending parties have explained the presence at Kawatiri of a community that, at the time of the Arahura purchase in 1860, called themselves and were identified by Ngai Tahu as Ngati Apa. First, however, we state our understanding of the history of tribal occupation of the region between Kahurangi and Mawhera in the early nineteenth century, before the arrival of the northern invaders.

At the outset, we agree with contentions, made principally by Professor Anderson but also by Dr Tau, that the evidential basis offered by traditional accounts of this history is not strong. Dr and Mrs Mitchell, who provided the main Kurahaupo account, were well aware of the difficulties posed by the nature of the evidence, and it will be widely understood that

89. Atholl Anderson, under cross-examination, seventeenth hearing, 13–17 October 2003 (transcript 4.17, pp 23–24)
90. Tau, 'Oral Traditions', pp 27–28
91. Ibid, pp 28, 78–119
92. Ibid, pp 147–150
93. McAloon, 'Position of Ngai Tahu', pp 107–118
94. Counsel for Ngai Tahu, closing submissions, 16 February 2004 (doc T13), p 54

the disruption brought to the Kurahaupo occupants of western Te Tau Ihu by the destructive invasion by northern tribes in the early nineteenth century made it difficult to pass on any substantial record of the traditional history of this area, just as on the east coast. It is understandable, too, that the traditions of various iwi often conflict with each other. Such differences are not easy to resolve, and it is probably misguided to attempt a resolution, certainly when the divergences concern a disputed area. One of the main written narratives, the compilation of traditional information gathered soon after mid-century by Alexander Mackay, does not strongly support the Ngati Apa case. It should be remembered, however, that Mackay's source for most of his statements about the traditional history of this region was in fact the information gathered from Ngai Tahu by his cousin James.

Ngati Apa's claim, backed up by historical accounts such as those of Dr and Mrs Mitchell and Mr Armstrong, that after their attacks on Ngati Tumatakokiri they occupied the West Coast districts down to Kawatiri (though not exclusively), is rejected strongly by Ngai Tahu. With support from Professor Anderson and Dr Tau, Ngai Tahu assert that before 1820 they held exclusive rights on the West Coast as far north as Kahurangi Point. We accept the extremes of neither side. In our view it is not possible to deny altogether that Ngati Apa had a presence south of Kahurangi Point, but it was probably small and mobile and challenged from time to time by a similarly itinerant and insubstantial Ngai Tahu presence.

We accept the major import of Professor Anderson's argument that the narrative was more complex than is often allowed, and that Ngati Tumatakokiri's and Ngati Apa's influence may not have extended south to Kawatiri, at least in the form of permanent occupation. We also note Dr Tau's arguments for the occupation of the area by Ngati Wairangi and his statement that it was Ngai Tahu who inherited their rights in this district, one that was never settled by either Ngati Tumatakokiri or Ngati Apa. We do not accept, however, that people who traced their descent to Ngati Wairangi must necessarily be Ngai Tahu. Overall, we can do no more than agree with Professor Anderson that the historical evidence about the occupation of the district in the period before 1820 is 'ambiguous'.

We also accept, again following Professor Anderson, that the previously understood chronology of traditional history needs revision: the main victories of Ngati Apa and Ngai Tahu over Ngati Tumatakokiri could well have come significantly later than the 1780s and even as late as 1820, meaning that whatever rights were held in the region by the two expanding tribes after the eclipse of Ngati Tumatakokiri were relatively new when the northern invaders arrived.

Finally, we acknowledge the validity of Professor Anderson's view that the district was probably an area of migratory resource use rather than permanent occupation. This perception of the area is in agreement with that of Ngati Apa's historian, Mr Armstrong, who draws on the conclusions of the historical geographer McCaskill that at this time the West Coast supported only a small population of migratory people relying on only a few semi-permanent settlements and cultivations. Some places were unsuitable even for that. The

people killed some distance south of Kahurangi Point during the Ngati Rarua invasion (identified by Professor Anderson as Ngai Tahu), for instance, were unlikely to have been living there. When Heaphy struggled through this district in 1846 he commented that it was 'far too mountainous for cultivation, even in the native method'.[95] As Dr Gilling suggests, a Ngai Tahu settlement in that locality would also have been extremely isolated, and cut off from the main tribal area further south by the almost impassable coastline north of the Whakapoai River. Perhaps, says Dr Gilling, these Ngai Tahu were 'a hunting party' or an 'exploratory/reconnaissance group attempting to determine the threat from the north'.[96]

What we do not accept is an argument that Ngai Tahu enjoyed exclusive rights in the northern area between Kahurangi and Kawatiri. In our view, neither side can demonstrate that. In reaching this conclusion, we are persuaded less by the evidence of Ngati Apa's ancestral association, although we do not discount it entirely, than by Ngai Tahu's own historical acknowledgement (in 1860) of a community at Kawatiri, identified as Ngati Apa, whose rights should be respected by the Crown when purchasing the district. We note that the senior men of that community claimed descent from both Ngati Apa and Ngai Tahu – a whakapapa that, to our mind, supports an argument of long-standing association rather than otherwise – but we do not accept that it was through the Ngai Tahu line alone that rights were claimed. Indeed, it was as 'Ngati Apa' rather than as 'Ngai Tahu' that they identified themselves, and this was accepted by the local Ngai Tahu leadership at the time. We will return to this matter in section 2.5.2 and in chapter 3.

3.4 The Impact of the Northern Invasions on Customary Rights in the Takiwa to 1840

The northern invasions and migrations that occurred in the 1820s and 1830s have been described in detail in our first preliminary report and need only be summarised here. During this period, when the tribal landscape of Te Tau Ihu was severely disrupted by the coming of tribes originating from Kawhia and Taranaki, several taua went far into Ngai Tahu territory on both coasts of the South Island and were to have significant consequences for customary rights in the Ngai Tahu takiwa. On the east coast between 1829 and 1832, Te Rauparaha led a series of expeditions of Ngati Toa and their allies to Kaiapoi and Banks Peninsula. Ngai Tahu were defeated but not obliterated. Ngati Toa also suffered some important casualties, including the chief Te Pehi Kupe, whose death was to have important consequences that we detail below. On the West Coast, following early raids and later the defeat of Poutini Ngai Tahu and the migration of northern settlers to the area, another expedition travelled south about 1836. Led by Te Puoho of Ngati Tama, the taua went through Haast Pass and

95. Taylor, *Early Travellers in New Zealand*, p 216
96. Bryan Gilling, brief of evidence on behalf of Ngati Toa, 25 September 2003 (doc Q20), p 18

on to Tuturau in Murihiku, where it was confronted by a Ngai Tahu force led by Tuhawaiki and Taiaroa. Te Puoho and many of his taua were killed. Most of the Ngati Tama and Ngati Rarua who had settled on the West Coast withdrew to Te Tau Ihu. On the east coast, Ngai Tahu were emboldened by their success against Te Puoho's expedition to counter-attack against Ngati Toa, even to the extent of threatening their hold on the Wairau.

These expeditions and counter-attacks were to have a very significant impact on existing customary land rights in the takiwa on both coasts.

3.4.1 The east coast

Ngati Toa's expeditions against Ngai Tahu followed their campaigns against Rangitane in retaliation for their involvement in the 1824 battle of Waiorua at Kapiti. Te Rauparaha had a personal mission: to get revenge against the Rangitane rangatira, Ruaoneone, who had threatened to pulp Te Rauparaha's head with a fern pounder.[97] Rangitane were comprehensively attacked by Ngati Toa, Ngati Rarua, and Te Atiawa in the Sounds and at the Wairau in 1827 and 1828. Although the precise chronology of the battles that took place is uncertain and sometimes disputed, the general outline of events is reasonably clear. Te Rauparaha attacked Rangitane at Totaranui. Then there were further attacks, sometimes also involving Ngati Rarua and Te Atiawa, on Rangitane Pa at Endeavour Inlet, Karaka Point, and Hikapu, and near Waitohi. Without muskets, Rangitane were heavily defeated. Ruaoneone was killed. According to a probably exaggerated estimate by Te Rauparaha's son, Tamihana, some 500 men and 1000 women and children were killed.[98] But, according to Mr Armstrong, there were 'many survivors' who escaped into the interior or were taken as slaves.[99] Ngati Toa and Ngati Rarua settled mainly around the whaling stations on the western shore of Cloudy Bay, where they carried out a lucrative trade with the whalers, selling food and flax that was provided as tribute by Rangitane.[100] Some of the Rangitane who fled inland went in the direction of the Nelson lakes; others went up the Awatere Valley. In the 1830s, a pa in the Avon Valley south of Blenheim was periodically occupied by the Rangitane–Ngati Apa chief Tamaherangi. This was connected by a track to the Awatere Valley.[101] Such groups maintained a precarious independence and were familiar with the inland tracks that followed the river valleys, such as Waiau-toa, to the east coast or the mountain passes through to Canterbury.

In the whaling off-season, the rangatira, including Te Rauparaha, enjoyed seasonal activities such as hunting ducks in moult at Kaparatehau. According to Elvy, Te Rauparaha,

97. Ballara, *Taua*, p 94
98. Armstrong, 'Right of Deciding', p 16; Ballara, *Taua*, p 363
99. Armstrong, 'Right of Deciding', p 17
100. Ibid, p 21
101. Ibid, pp 17–18

having reduced the Rangitane settlements at the Wairau, 'then "mopped up" the small villages along the coast, the principal one at Te Karaka, near Cape Campbell, being taken and burnt to the ground'.[102] Mr Evison says that Te Rauparaha's force then sailed around the coast to Kaikoura 'where [the Ngai Tahu hapu] Ngati Kuri mistook their visitors for friends and greeted them on the beach, only to be set upon with musket fire. All were massacred or captured, except those who escaped to the mountains'.[103]

This sortie can be regarded as a preliminary to a series of mainly sea-borne assaults on Ngai Tahu that were organised over the next three summers. It was during the first Ngati Toa assault on Ngai Tahu, in the summer of 1829–30, that Te Pehi Kupe and several other northern chiefs were killed. Te Rauparaha's retaliatory raid in December 1830 was facilitated by Captain Stewart, who, for a cargo of flax, transported the invading force from Kapiti to Akaroa. There, they launched attacks on several settlements and lured the rangatira Tamaiharanui on board, before returning to Kapiti, where Tamaiharanui was tortured and executed.[104]

The final assault, in the summer of 1831–32, was the most elaborately organised of all. Two parties set off by separate routes. The main party of Ngati Toa under Te Rauparaha proceeded by a flotilla of waka to Waipara on the Canterbury coast, where they met with another party that had come through the inland passes, carrying supplies. Though there are various accounts of the composition of this party, we think the one by Ron Crosby is the most reliable. By his account, the party was led by Ngati Rarua, but it was joined at Waipara by a Rangitane contingent, who carried the supplies.[105] The two parties then proceeded overland to lay siege to the main Ngai Tahu pa at Kaiapohia. Although the siege lasted some time, Ngati Toa and their allies were eventually successful when they managed to set fire to the pa and slaughtered many of the Ngai Tahu defenders. Dr Ballara puts the Ngai Tahu casualties at between 300 and 400.[106] The Rangitane party assisted Ngati Toa in the assault, and one of their tohunga provided incantations to ensure the success of the fight. Because of this assistance to Ngati Toa, Ngai Tahu retaliated against Rangitane when they launched counter-attacks against Ngati Toa and their allies in Te Tau Ihu.[107]

After the capture of Kaiapohia, Ngati Toa and their allies attacked and overwhelmed Onawe on Banks Peninsula, where again there was considerable slaughter but some Ngai Tahu escaped. After several further skirmishes, including an unsuccessful attack on Taumutu, Ngati Toa and their allies withdrew. Despite many threats to return, this was the last of their expeditions into Ngai Tahu country on the east coast.

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102. Elvy, *Kei Puta te Wairau*, p 74
103. Harry Evison, *The Long Dispute: Maori Land Rights and European Colonisation in Southern New Zealand* (Christchurch: Canterbury University Press, 1997), pp 48–49
104. Ron Crosby, *The Musket Wars: A History of Inter-Iwi Conflict, 1806–45* (Auckland: Reed, 1999), pp 227–228
105. Ibid, p 237
106. Ballara, *Taua*, p 372
107. Armstrong, 'Right of Deciding', p 25

3.4.1

Yet, Ngai Tahu were far from finished. They armed themselves heavily after Te Rauparaha's first taua. One rangatira, Te Whakataupua, obtained 60 muskets and 450 kilograms each of powder and ball as payment for the sale of land at Preservation Point in late 1832. Ngai Tahu reoccupied Kaiapohia within six months, although they were slower to reoccupy settlements along the coast towards Kaikoura. After the defeat of Te Puoho's expedition, Ngai Tahu rallied forces from the deep south, collected reinforcements in Canterbury and began a series of counter-attacks against Ngati Toa and their allies in Te Tau Ihu.[108] On the way, they took revenge on Rangitane for assisting Ngati Toa in the assault on Kaiapohia. The Ngai Tahu force that Tuhawaiki led up the east coast in early 1833 came ashore and attacked Ngati Toa and Rangitane wherever they were found in occupation. They:

- attacked and killed some Ngati Toa who had remained at Kaikoura;[109]
- landed at Waipapa, where Rangitane 'refugees' were found and 'many' of them were killed;[110]
- assaulted the Rangitane pa, Kaitutae, at Kekerengu;[111] and
- attacked a settlement at Waiharakeke that was variously described as Ngati Toa and Rangitane.[112]

All of this is significant evidence that Rangitane and Ngati Toa were living at various places along the coast in the early 1830s. Although some were killed by Ngai Tahu, others who escaped may have resumed their occupation, though by the 1840s it seems that few, if any, people were left there. We discuss this matter below.

Tuhawaiki's Ngai Tahu flotilla proceeded around Cape Campbell and surprised Te Rauparaha's party at Kaparatehau where they were collecting paradise ducks during the moulting season. Though many of the Ngati Toa party were killed, Te Rauparaha escaped by hiding in kelp and swimming to a canoe that was still afloat. There are differing versions of what followed. According to Alexander Mackay, the Ngati Toa who escaped made their way to Cloudy Bay where they obtained reinforcements and set out in pursuit of Ngai Tahu. Ngati Toa caught up with them at Waiharakeke near Cape Campbell, where there was a fight, with Ngai Tahu 'getting worsted'.[113] Ngai Tahu denied this and said that they retaliated with a successful attack on Ngati Toa at Port Underwood. In any event, Mackay probably truncated several events that occurred over some time.

Other accounts that do not mention the Waiharakeke fight say that, after the attack on Te Rauparaha at Kaparatehau, Ngai Tahu pursued the fleeing Ngati Toa survivors to Cloudy Bay. Te Rauparaha's party then fled over the hills to Opua, on the eastern side of Tory

108. Anderson, 'Kin and Border', pp 108–109
109. Evison, *The Long Dispute*, p 61
110. Tau, 'Oral Traditions', p 125
111. Counsel for Rangitane, closing submissions, p 13
112. Evison, *The Long Dispute*, p 63; John Moorfield, 'The Natanahira Waruwarutu Manuscript and Letters by Ngai Tahu', report commissioned by Te Runanga o Ngai Tahu, 2003 (doc Q5(b), vol 1(1)), p 32
113. *Compendium*, vol 1, intro, pt 3, p 50

Channel, where another battle was fought. They were saved by the intervention of Te Manu Toheroa of Te Atiawa who drove off the Ngai Tahu war party.[114] Meanwhile, Te Rauparaha had recruited Ngati Mutunga, Ngati Raukawa, and Ngati Rarua reinforcements from Kapiti. When they arrived, Ngati Mutunga went into action on their own but lost heavily. The main encounter that followed was indecisive. Ngai Tahu had to retreat when they ran out of ammunition, though the northern tribes claimed victory.[115]

Ngai Tahu sent another large expedition north in the summer of 1833–34. This force sailed along the Kaikoura coast, killing some Ngati Toa along the way. In Cloudy Bay, they discovered that most of Ngati Toa and their allies had left. Ngai Tahu had to be content with attacking Guard's whaling station at Oraumoa (Fighting Bay) to the east of Port Underwood.[116] The northern tribes had evacuated the area, not through fear of Ngai Tahu but because they were engaged across Cook Strait, where, Dr Ballara points out, a conflict was then brewing between Te Atiawa and Ngati Raukawa in the Otaki area. This split Ngati Toa allegiances and resulted in the major battle of Haowhenua in 1834. It was after this event that much of the settlement of Te Tau Ihu was to take place.[117] The Ngai Tahu taua plundered whaling stations at Port Underwood and waited two months in vain for the northern tribes to reappear before they departed for home. Taiaroa attacked a Rangitane settlement at the Wairau on the way, while Haereroa waited for five months at Omihi, near Kaikoura, in case Te Rauparaha should return, but he failed to appear.[118] According to Edward Jerningham Wakefield, some whaling stations were sacked by Ngai Tahu taua four times before peace was finally made with Ngati Toa and the northerners.[119]

After these Ngai Tahu campaigns in Te Tau Ihu, there was no more armed warfare between the two groups. Though Ngati Toa planned several retaliatory expeditions, these were abandoned for various reasons. One in 1836 was abandoned because of an outbreak of measles. Another, which got as far as the Wairau, was abandoned when Te Rauparaha discovered that some of his Te Atiawa allies had desecrated the graves of Ngati Toa who had been killed at Kaparatehau. There can be no doubt that Ngai Tahu had recovered much of their strength after their military defeats at Kaiapohia and Banks Peninsula. Successful raids had been made into territory occupied by Ngati Toa and their allies, though Ngai Tahu had not remained in Te Tau Ihu. Likewise, Ngati Toa had shown no real interest in

114. Alan Riwaka, 'Nga Hekenga o te Atiawa', revised ed, report commissioned by the Te Atiawa Manawhenua ki te Tau Ihu Trust in association with the Crown Forestry Rental Trust, 2003 (doc A55), pp 113–115; Evison, *The Long Dispute*, pp 63–64

115. Evison, *The Long Dispute*, pp 63–65; Ballara, 'Customary Maori Land Tenure', pp 124–125; McAloon, 'Position of Ngai Tahu', p 12

116. McAloon, 'Position of Ngai Tahu', pp 12–13

117. Ballara, 'Customary Maori Land Tenure', p 125

118. Ibid, pp 125–126

119. Edward Jerningham Wakefield, *Adventure in New Zealand, from 1839 to 1844: With Some Account of the Beginning of the British Colonization of the Islands*, 2 vols (London: John Murray, 1845), vol 1, p 47 (Ballara, 'Customary Maori Land Tenure', p 126); see also McAloon, 'Position of Ngai Tahu', pp 18–20

following through on their victories over Ngai Tahu with further raids into their territory, or any significant occupation of their lands. By the late 1830s, a stalemate had been reached and Ngati Toa and Ngai Tahu were more intent on making peace than war. Though there was debate over which side initiated the peace, there is no doubt that a peace settlement was made because both sides needed it.[120] According to Mr Evison, Te Rauparaha sent a peace embassy to the Ngai Tahu hapu, Ngai Tuahuriri, at Port Levy in 1836. Three Ngati Tuahuriri prisoners were released. The peace offering was accepted and formalised by marriages.[121] Though Tuhawaiki led an expedition north in 1839, it returned without having engaged in fighting.[122] By this time, Colonel Wakefield had arrived and was negotiating with Ngati Toa for what became, in his Kapiti deed, the alleged purchase of much of the lower North Island, and the South Island as far as 43 degrees south. At the same time, Tuhawaiki was about to embark for Sydney, where he ostensibly sold all of the South Island to Sydney speculators. A new form of 'warfare', selling land by rival deeds, was about to replace the old fashioned wars of the tribes. Te Rauparaha also threatened to send another expedition to the far south in 1839, but Ngai Tahu sent one of their chiefs to Te Rauparaha and asked him not to come. He apparently responded by saying that the 'words were good' and predicted there would be no more fighting against Ngai Tahu. Though there is some doubt whether Te Rauparaha intended to keep his word, the arrival of the gospel of peace preached by the missionaries was having an effect. In 1839, Ngati Toa released their Ngai Tahu slaves, who returned home. And, in 1843, Te Rauparaha's son, Tamihana, and Matene Te Whiwhi led a peacemaking expedition into Ngai Tahu territory.[123] As part of those peacemaking endeavours, takawaenga marriages were carried out, as we were told by Ngati Toa kaumatua Iwi Nicholson.[124] This custom of arranging marriages, moreover, was long continued and included an arranged marriage of Ria Moheko Taiaroa, great granddaughter of Te Matenga Taiaroa, to Te Rauparaha Wineera, great-grandson of Te Rauparaha, as a peace gesture in 1921.[125] It seems from these various accounts that there was not just one peace settlement, but several, carried out over a number of years. The peace arrangements involved, as Dr Tau put it, a 'swapping of names, children and tribal heirlooms'.[126]

To sum up on the situation that had been reached by 1840, we note that, although Ngati Toa had made successful attacks on Ngai Tahu at Kaiapohia and Banks Peninsula, and Ngai Tahu in retaliation had raided as far north as Port Underwood, neither side had attempted to occupy the lands that had been over-run. They had not even made a significant attempt to

120. Tau, 'Oral Traditions', pp 133–134
121. Evison, *The Long Dispute*, p 70
122. Ibid, pp 88–89
123. Bryan Gilling, '"We Say that We Have the Authority": Ngati Toa's Claim to Customary Rights in Relation to the "Ngai Tahu Takiwa"', report commissioned by the Waitangi Tribunal, 2003 (doc p29), pp 35–36
124. Nicholson, pp 27–30
125. Tau, 'Oral Traditions', p 139
126. Ibid

reoccupy the disputed Kaikoura coast. It became virtually a no-man's land. As Dr Phillipson puts it, 'The Kaikoura coast was basically empty by 1833, with Ngai Tahu driven south to Canterbury and the newcomers settling further north in Cloudy Bay.'[127] For Ngai Tahu, Professor Anderson concludes that there is no evidence that Ngati Toa were in occupation of land further south than the Wairau.[128] We accept that this is probably correct if Professor Anderson is thinking of a distinct community. However, as we noted above, some Ngati Toa individuals continued to live in Kaikoura as a result of takawaenga marriages. It is likely that Ngati Toa continued to use various resources on a seasonal basis, as for instance in continuing to harvest ducks at Kaparatehau during the moulting season. But when they claimed territory as far south as Kaiapoi during the negotiation of the Wairau purchase in 1847, they did so on the basis of conquest, and as utu for the loss there of their rangatira, Te Pehi Kupe, not on grounds of occupation.

Nor is there any evidence that Ngai Tahu remained behind and occupied land north of Waiau-toa following their counter-attacks at Kaparatehau and Cloudy Bay in the 1830s. They reoccupied Kaikoura and some places as far north as Waipapa in the 1850s, but apparently no places north of there or Waiau-toa. Dr McAloon, one of Ngai Tahu's witnesses, admitted during questioning that it 'is generally accepted that Ngai Tahu vacated the coast north of there [Waiau-toa] for some years as a consequence of Te Rauparaha's raids.'[129] Nevertheless, Ngai Tahu, in their subsequent negotiations with the Crown in connection with the Kaikoura purchase, were also to found claims as far north as Parinui o Whiti based on 'conquest'- if that is what we can call their largely indecisive conflicts with Ngati Toa. We return to this issue in our conclusions below.

There is still the question of Rangitane. We cannot be sure of the extent of their settlement along the coast after the Ngai Tahu raids that we listed above, but we think that some survived those raids and, by 1840, may have resumed occupation of the coast or at least made seasonal use of its rather slim resources. It is also likely that Rangitane who fled to the interior during the northern raids continued to use the inland resources and passes, as they had, for instance, when taking supplies to Ngati Toa and their allies for the attack on Kaiapohia. At 1840, some Rangitane were in occupation of land at the Wairau and the Kaituna Valley through to Hoiere, and were in a tributary relationship to Ngati Toa. Others were at large in the interior and regarded as a danger by the northern iwi that occupied the coast. While these independent Rangitane certainly frequented the Nelson Lakes, they probably also ranged over the Awatere and Waiau-toa Valleys and perhaps the coast. We address this question further in section 2.5.1. As we explain in more detail in chapter 3,

127. Phillipson, *Northern South Island: Part 1*, p 23
128. Anderson, 'Kin and Border', p 109
129. James McAloon, under cross-examination, seventeenth hearing, 13–17 October 2003 (transcript 4.17, p 109) (Crown counsel, closing submissions, 19 February 2004 (doc T16), p 127)

Rangitane's claims to the East Cast were ignored when the Crown dealt first with Ngati Toa and then with Ngai Tahu.

3.4.2 The West Coast

It is difficult to establish a precise sequence of events for the invasion of the West Coast by the northern tribes, but for our purpose the chronology is less important than the results. In an early raid, probably occurring before 1830, Ngati Rarua pushed westwards into Te Tai Tapu and down as far as Karamea, defeating the inhabitants before leaving the area. A few years later, Ngati Rarua, Ngati Tama, Te Atiawa, and possibly some members of other northern tribes came back to the western districts of Te Tau Ihu, where Ngati Apa had been overwhelmed, and began to settle the whole area west of Wakapuaka. At some point in the early 1830s Te Tai Poutini was invaded. From Te Tai Tapu, Niho Te Hamu and Takerei Te Whareaitu of Ngati Rarua and Ngati Tama led a taua, which also included some Te Atiawa, down the West Coast past Hokitika, attacking and defeating Poutini Ngai Tahu as far south as Okarito. Many Ngai Tahu were killed, and the chief Tuhuru was captured. He was taken to Paturau in Te Tai Tapu, where he presented the Ngati Rarua chief Matenga Te Aupouri with the pounamu (greenstone) mere Kai Kanohi. According to Alexander Mackay, 'Tuhuru and some of his people, as an act of submission, went to visit Te Rauparaha and the Ngatitoa, at Rangitoto'. (We note that here this author was using material obtained from Ngai Tahu by James Mackay, though he added the phrase 'as an act of submission'.) Tuhuru's gift to Ngati Rarua and the marriage of his daughter to Niho were the first steps in establishing a relationship on the West Coast between Ngai Tahu and the northern tribes, and Tuhuru was eventually allowed to return home. Niho and Takerei and their followers established settlements in the central part of the West Coast, in the Mawhera–Arahura–Hokitika district, although the two chiefs apparently continued to live part of the time in Te Tai Tapu. On the West Coast, they controlled the pounamu trade with the help of their Ngai Tahu vassals. Some of the new arrivals from the north married into Poutini Ngai Tahu.[130] A later Ngati Toa source adds that the Poutini people 'were kept as slaves to grow food' for the victors.[131]

The situation on the West Coast changed substantially only a few years after this conquest. In 1836, Te Puoho of Ngati Tama led a taua from Golden Bay down the coast, passing through Mawhera where Niho and Takerei protected the remaining Poutini Ngai Tahu

130. Mitchell and Mitchell, 'History of Maori', vol 1, pp 3-4, 3-40; Walzl, 'Ngati Rarua and the West Coast', pp 6–15, 19–20; Riwaka, 'Nga Hekenga o te Atiawa', p 82; Ballara, 'Customary Maori Land Tenure', pp 115–123, 129–132. The visit to Te Rauparaha is mentioned in the *Compendium*, vol 1, intro, pt 3, pp 46–47, and see McAloon, 'Position of Ngai Tahu', p 77, for James Mackay's original wording.

131. Wiremu Naera Te Kanae, 'The History of the Tribes Ngati-Toa-Rangatira Ngati-Awa-o-Runga-o-te-Rangi and Ngati-Raukawa, Having Special Reference to the Doings of Te Rauparaha', translated by George Graham, 20 August 1888 (reprinted 20 April 1928), ATL (Professor Richard Boast, 'Ngati Toa and the Upper South Island: A Report to the Waitangi Tribunal', revised ed, 2 vols, report commissioned by the Crown Forestry Rental Trust, 2000 (doc A56), vol 1, p 36)

from attack. Dr and Mrs Mitchell say that the two chiefs were protecting their 'investments' there – the pounamu resource, their Ngai Tahu vassal workforce, and their own settlements. It might also be said that they were following a traditional means of intensifying their connection with the tangata whenua by fulfilling obligations contingent upon settling and intermarrying with them. After a long and arduous journey down the coast and through the mountains to Murihiku, deep in Ngai Tahu territory, Te Puoho was attacked and killed by the southern Ngai Tahu at Tuturau (on the Mataura River) early in 1837. Many of his followers died with him.[132] On hearing the news, the Ngati Rarua and others living on the West Coast left their settlements and withdrew north to Te Tai Tapu.[133]

This narrative is not in dispute, at least in its outlines. It is clear that a northern raupatu of the West Coast (including the parts now recognised as the Ngai Tahu takiwa) did occur, and that during the 1830s the northern tribes did exercise control over that region and its defeated inhabitants (although there is not much information about the nature of the occupation). It is not asserted that Ngai Tahu lost their West Coast rights altogether, although the position of the tribe in the northern area towards Kahurangi may have been permanently affected. Other questions arise, however, and there is no agreement as to whether the invasion and occupation of the West Coast extinguished the rights (if any) of Ngati Apa or was of sufficient extent and duration to establish continuing rights for the northern tribes in the region.

As we have seen, Ngai Tahu do not accept that there is any traditional evidence for a claim by Ngati Apa to customary title based on conquest, discovery, or ancestral rights in this part of the West Coast.[134] In the Ngai Tahu perspective, then, the northern invasion had no implications for Ngati Apa because there was historically no Kurahaupo presence in the area. Ngati Apa, however, maintain that they did possess customary rights, established before the northern conquest, on the West Coast south of Kahurangi Point. They assert that these rights were not extinguished by the coming of the northern tribes.[135] Although Ngai Tahu reject these claims altogether, they are supported by the northern tribes.

Throughout the northern South Island, the Kurahaupo peoples were defeated by the invaders, but they were not completely obliterated. Some were enslaved and some fled into remote places, while others survived as tributary or vassal groups living among the newcomers.[136] Hoani Mahuika, a Ngati Apa resident of Kawatiri, gave evidence in the Native Land Court in 1883 concerning Te Tai Tapu at the time of the Ngati Rarua invasion. 'The

132. Atholl Anderson's book *Te Puoho's Last Raid: The March from Golden Bay to Southland in 1836 and Defeat at Tuturau* (Dunedin: Otago Heritage Books, 1986) is the most detailed account. See also Hilary Mitchell and Maui John Mitchell, 'West Coast of the South Island', report commissioned by the Ngati Tama Manawhenua ki te Tau Ihu Trust and the Te Atiawa Manawhenua ki te Tau Trust, 2002 (doc K4), pp 11–13.

133. Anderson, *Te Puoho's Last Raid*, p 62

134. Counsel for Ngai Tahu, closing submissions, p 54

135. Counsel for Ngati Apa, closing submissions, pp 2, 7, 9

136. Mitchell and Mitchell, 'History of Maori', vol 1, p 3-5; Phillipson, *Northern South Island: Part 1*, pp 41–42

conquerors allowed some of the conquered to live, of whom I am the representative. If they had killed them all, they would now be able to have undisputed possession.'[137] As we noted in our first preliminary report, the annihilation of defeated tribes was not the invariable or even the most usual outcome of a victorious campaign. Potentially, the mana of these surviving groups could be recovered, and Ngati Apa see the community that existed at Kawatiri in 1860 in this light. The Mitchells say that the Ngati Apa chief Puaha Te Rangi, whose wife was the sister of the slain chief Te Rato, 'appeared to have complete freedom of movement throughout the conquest and early years of occupation of the West Coast and north-west Nelson'. According to these authors, Puaha Te Rangi reached an accord with the conquerors.[138] Certainly, as we will see, he later successfully claimed rights at Kawatiri. Ngai Tahu do not regard this as evidence of historical Ngati Apa rights in the area, however, and Professor Anderson says that there is no evidence at all that Ngati Apa refugees were present on the West Coast after the northern invasion.[139] We will return to this matter in section 2.5.2.

The other issue is whether the rights of the northern tribes survived more than a few years after the conquest. Did Niho and Takerei abandon any claims that they and their iwi might have developed on the West Coast when they moved their residence north to Te Tai Tapu in the late 1830s, apparently in response to the military resurgence of Ngai Tahu and their victory over Te Puoho and Ngati Tama? Or did they continue to demonstrate rights in the region, maintaining an ongoing relationship with the Mawhera area by visiting it for its resources and by leaving some of their people there to keep their interests alive? Ngati Rarua, Ngati Tama, and Te Atiawa all claim that they established rights in the takiwa by conquest, and that these rights continued after 1840 by virtue of ongoing settlement and resource use. The three iwi do not dispute that Ngai Tahu rights in the area also continued.[140] Ngai Tahu, however, deny that the northern tribes have any customary claim in the takiwa, since their occupation was for a limited time only and came to an end when Niho and Takerei departed before 1840.[141]

Again, we heard conflicting evidence on this question. On one side, Ngai Tahu witnesses brought forward evidence to show that Niho had withdrawn from his over-exposed position when Ngai Tahu defeated Te Puoho. This account of the northerners' 'abandonment' of the district is not new. Probably it was first explicitly stated by James Mackay in 1859 when he began negotiating with Ngai Tahu for their interests at Arahura. Mackay wrote:

> I find the Ngaitahu title to the West Coast to be good, although they were partially conquered by Ngatirarua, . . . under Niho and Takerei, and those Chiefs resided some time at

137. Native Land Court, Nelson, minute book 3 (Boast, 'Ngati Toa and the Upper South Island', vol 2, p 327)
138. Mitchell and Mitchell, 'History of Maori', vol 1, p 3-51; Mitchell and Mitchell, 'Boundary Issues', p 8
139. Anderson, 'Kin and Border', p 121
140. Counsel for Ngati Rarua, closing submissions, 5 February 2004 (doc T6), pp 3–4, 131, 138; counsel for Ngati Tama, closing submissions, [2004] (doc T11), pp 7, 103; counsel for Te Atiawa, closing submissions, 10 February 2004 (doc T10), pp 13, 44
141. Counsel for Ngai Tahu, closing submissions, pp 58–59

> Mawhera. As it appears the conquerors withdrew to Massacre Bay, after the death of Te Pohow [Te Puoho], chief of the Ngatitama, at Tuturau (Molyneux plains), being afraid of an attack from the Otakou Ngaitahu and although Takerei and Niho resided for many years after at Massacre Bay – they never resumed possession of the West Coast further South than Kaurangi (North of Rocks point).[142]

Alexander Mackay's 1873 account drew on this, stating that Takerei and Niho, fearing Ngai Tahu attacks, 'resolved on abandoning the country [Mawhera]'; they returned to Golden Bay 'with the remnant of their party, and never resumed possession of the West Coast farther south than Kahurangi Point'.[143] Other writers followed the same line, and it is accepted by Ngai Tahu's professional witnesses (Professor Anderson, Mr Evison, and Dr McAloon) in the present inquiry. Professor Anderson adds, however, that some of the northerners stayed because they had established family relationships.[144]

On the other side, witnesses for the Te Tau Ihu iwi argued that Te Puoho's death had a less drastic effect, since some northerners stayed and contact continued. For the Te Tau Ihu tribes, and contrary to what Mackay wrote, Dr and Mrs Mitchell argue that the withdrawal of Niho and Takerei in 1837 was not through fear of Ngai Tahu retaliation, but simply because after Te Puoho's defeat there was no longer any threat to the Ngati Rarua 'investments' on the West Coast: life could return to normal and the northern chiefs could resume their usual pattern of visits.[145] Be that as it may, the position taken by Dr and Mrs Mitchell and other Te Tau Ihu historians is that the interests of the northern tribes in the West Coast did not terminate in the aftermath of Ngai Tahu's victory over Te Puoho. Mr Walzl, for instance, challenges the view of Mackay and the Ngai Tahu historians by offering evidence from closer to the time – the 1840s – to show that Niho still thought then that he and Ngati Rarua had rights to the West Coast south of Kahurangi Point even after their move back to West Whanganui. He had left people in the central West Coast and maintained ongoing contact with the Mawhera pounamu districts.[146] Was the 'abandonment' of the coast by the allied northern tribes as complete as Mackay suggested? The evidence from the 1840s and 1850s is indeed crucial, and we will discuss it further in section 2.5.2.

Before concluding this section, we note here that, while the West Coast invasion was carried out by Ngati Rarua, Ngati Tama, and Te Atiawa, the claim is made by Ngati Toa that it took place under their overriding authority. In letters to Governor Grey in 1851 and 1852, Ngati Toa chiefs at Porirua set out their understanding that the raupatu was carried out under Ngati Toa control and established the rights of that iwi down the West Coast as

142. Mackay to McLean, Collingwood letterbook, 27 September 1859 (McAloon, 'Position of Ngai Tahu', p 71)
143. *Compendium*, vol 1, intro, pt 3, p 49
144. Anderson, 'Kin and Border', pp 135, 159; Harry Evison, 'Historical Report on the Ngai Tahu Takiwa, Particularly as Regards the Northern Ngai Tahu Boundary Question', revised ed, report commissioned by Te Runanga o Ngai Tahu, [2003] (doc Q3(a)), pp 11, 139; McAloon, 'Position of Ngai Tahu', p 138
145. Mitchell and Mitchell, 'Boundary Issues', pp 14–15
146. Walzl, 'Ngati Rarua and the West Coast', pp 18, 20

far as Arahura.[147] This is the position still taken by Ngati Toa. The iwi acknowledges that its rights were acquired 'in conjunction with its allies and relations', but asserts that the allied tribes have always been under the obligation to acknowledge Ngati Toa mana. With regard to Ngai Tahu, Ngati Toa do not deny that they have rights on the West Coast too. Ngati Toa declare, however, that their non-exclusive customary rights on the West Coast have never been displaced, except through Government purchase.[148] It is not claimed that these rights were based on any Ngati Toa participation in the western taua, or on subsequent occupation, but simply on the tribe's overriding mana and overall leadership of the South Island raupatu.

Ngati Toa's claims to a paramount role in the invasion of the South Island have a long history, and we take them seriously. With regard to the West Coast, we have taken note of the relevant studies by Ngati Toa's historians Professor Richard Boast and Dr Bryan Gilling.[149] We have already discussed Ngati Toa's claims, which were made with respect not just to the West Coast takiwa but to the whole western side of Te Tau Ihu, in our first preliminary report. We looked at the divergent perceptions of Ngati Toa's allies, who rejected the idea that the mana of Te Rauparaha and his iwi extended to territories that had been acquired through an offensive in which Ngati Toa had taken little or no direct part, and which were subsequently settled by allied tribes but not by Ngati Toa. Our view was that Ngati Toa's special role in the overall raupatu did give that tribe a kind of notional or potential right, but that in the case of the western side of the northern South Island it was not followed up by occupation and settlement and therefore did not result in the development of any ongoing rights there. We were of the view that occupation need not be based on permanent residence to have effect but that it did need to be of a more tangible character than a strategic control exercised from a stronghold in the North Island. In the present context, we reiterate our conclusion that Ngati Toa's failure to occupy lands on the western side of the island meant that their 'paramountcy' in the raupatu did not lead, in the long term, to any continuing customary right there.[150] The Maori Appellate Court came to a similar conclusion in 1990.[151] We believe that Ngati Toa's claims had an even more insubstantial basis on the West Coast than in western Te Tau Ihu generally, although the evidence that Te Rauparaha received the homage of Tuhuru should not be ignored. Insofar as the claims of their allies were not demonstrably extinct in 1840, the latent claim of Ngati Toa also still

147. Bruce Biggs, trans, 'Two Letters from Ngaati-Toa to Sir George Grey', *Journal of the Polynesian Society*, vol 68, no 4 (December 1959), pp 263–276

148. Counsel for Ngati Toa Rangatira, closing submissions, 5 February 2004 (doc T9), pp 10, 44–45, 49–50, 55–58

149. Boast, 'Ngati Toa and the Upper South Island', vol 1, p 27; Gilling, 'We Have the Authority', pp 5–20, 61–67, 84–90; Bryan Gilling, brief of evidence on behalf of Ngati Toa, 18 July 2003 (doc Q7), pp 2–3, 15–16, 20–23

150. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Preliminary Report on Customary Rights in the Northern South Island* (Wellington: Legislation Direct, 2007), pp 28, 48–51, 79–81

151. *In the Matter of a Claim to the Waitangi Tribunal by Henare Rakihia Tau and the Ngai Tahu Trust Board* unreported, 12 November 1990, Maori Appellate Court, Rotorua, 1/89 (doc A4), p 20

existed. Whether their potential interest was recognised in the short term, when the Crown purchases were made in the 1850s, will be considered in the next chapter.

3.5 Developing Customary Rights in the Statutory Takiwa, 1840–60

The coming of the Treaty and British annexation of New Zealand in 1840 meant that Maori could no longer settle their differences by warfare or acquire land through conquest. Otherwise, Maori custom continued to operate and iwi or hapu could peacefully transfer customary land, or occupy it by agreement. Takawaenga and tuku could still operate.

Also, with the beginning of British administration and the onset of systematic colonisation, particularly in Nelson, there was a great increase in the documentation of events and opinions. But most of this focused on the new settlements and their immediate environs, not on the remote corners of the east coast and West Coast. There should also have been a similar increase in the documentation of Maori customary rights to land, particularly as Crown officials and settlers sought new land for settlement. Though such sources remain our most important archive, we must note that they were often deficient because the writers accidentally or deliberately omitted material, or misinterpreted what they saw. As we shall demonstrate from time to time below, there was a tendency to exaggerate the effects of warfare in general and the conquests of Ngati Toa in particular – and the extent to which Kurahaupo people were annihilated or enslaved. Kurahaupo people had an opportunity to re-emerge and revive their customary rights after 1840, but the documentary record does not always give them full credit for doing so. Nevertheless, we have to work out, as best we can, what customary rights they had in the takiwa by 1860 (the year of the last Crown purchase in the South Island), as compared with those of Ngati Toa and their northern allies, and of Ngai Tahu.

3.5.1 The east coast

At 1840, the extent of Ngati Toa's control down the east coast was unclear. As we have already noted, neither Ngati Toa nor Ngai Tahu were in effective occupation of the coast. Though Ngai Tahu had regained the initiative with their raids into Te Tau Ihu in the 1830s, they had not gained sufficient control to resettle the area. Indeed, they had been slow to reoccupy territory north of Kaiapoi and would not resume occupation of their old sites at the mouth of the Kaikoura River and northwards to Waipapa until the late 1850s.[152] According to Dr Gilling, the Ngai Tahu group headed by Kaikoura Whakatau settled at Mikonui, two miles north of Amuri Bluff, but still south of Kaikoura.[153] As we note in chapter 3, when James

152. Phillipson, *Northern South Island: Part 1*, p 34
153. Gilling, 'We Have the Authority', pp 36–37

Mackay went to negotiate the Kaikoura purchase in 1859, several groups of Ngai Tahu were living as far north as Waipapa and went to Kaikoura to meet him.

Likewise, there is little evidence that Rangitane occupied or used the resources of the east coast down to Waiau-toa. Ernst Dieffenbach, the naturalist with Colonel Wakefield's land buying expedition, noted that many changes had taken place amongst the inhabitants of Cook Strait in the previous 30 years and that several tribes had either disappeared or migrated to distant places as a result of the wars. He added the intriguing comment: 'The tribes of the Rangitane and Nga-hei-tao [Ngai Tahu] in Queen Charlotte's Sound, have gone to the eastern coast of the Middle Island: some are held in slavery by the Nga-te-awa.'[154] Unfortunately, Dieffenbach did not say where on the eastern coast either group had gone, and he did not go there to find out. Rangitane were by then fairly numerous around the Wairau, Kaituna, and Te Hoiere. Mr Armstrong cites a census in 1845 that recorded Rangitane as about 10 per cent of the Maori population of Te Tau Ihu.[155] But there is no record of how many of them were living in the eastern part of the takiwa, though there were plenty of reports, and perhaps more rumours, of their presence in the interior. In the early 1840s, there was much interest from Nelson settlers in the Wairau Plains and Valley, and several expeditions inspected it, coming across small parties of Rangitane who were deemed to be fugitives from Ngati Toa. The New Zealand Company surveyor John Cotterell led an expedition from Nelson to the headwaters of the Wairau, down that river to the coast, along Cloudy Bay to Parinui o Whiti, across the Awatere Valley to the east coast and down that coast to Waiau-toa, before returning to Nelson. He did not once report any contact with Maori, though he had plenty to say about the splendid natural pastures he came across.[156] Soon afterwards, pastoralists began to take up this land, though they dealt with Ngati Toa, not Rangitane.

Charles Ligar, the Surveyor-General, who inspected the Wairau Plains for Grey in March 1847, came across what he called a 'fugitive' party of Rangitane, and concluded that no one had resided permanently there since Te Rauparaha had conquered Rangitane and taken them into captivity – apart from the fugitive band.[157] Ligar consulted the Rangitane chief Ihaia Kaikoura (who was no fugitive but rather the leading chief of the mainly Ngati Toa community at Port Underwood), and persuaded him to draw a map of the boundaries of the Wairau district. Though Kaikoura was reluctant to outline the interior, he did sketch in the coast from Port Underwood south to Tumutumu and Karaka. According to Mr Armstrong, who reproduces the map, Karaka is very near Waiau-toa. The map drew the coastal limits of

154. Armstrong, 'Right of Deciding', p 35
155. Ibid, p 36
156. John Sylvanus Cotterell, 'Diary of an Excursion Overland from Nelson to the East Coast, 1842', *Nelson Examiner and New Zealand Chronicle*, vol 1, 17 December 1842, p 163
157. Armstrong, 'Right of Deciding', pp 44–45

the Wairau district, 'the territory once controlled by his people,' as Mr Armstrong puts it.[158] But when he was asked for the owners of the district, Kaikoura listed only Ngati Toa rangatira, as if to say that Rangitane accepted a Ngati Toa paramountcy.

By the later 1840s, pastoralists from Nelson were occupying the east coast, though only one transaction was completed before the Crown acquired the area as part of the Wairau purchase. This was the 'lease' organised by Clifford and Weld in August 1847 with the Ngati Toa chief Rawiri Te Puaha. The block is said to have consisted of 'all the land from the White Bluff [Parinui o Whiti] down the east coast, round Cape Campbell to Kekerenga [*sic*]'.[159] Kekerengu is on the east coast, some 20 kilometres north of Waiau-toa. Obviously, Clifford and Weld, like Grey and his officials, who were soon to conclude the Wairau purchase, thought that Ngati Toa had an exclusive title to the district. In 1848, soon after he took up residence on the Flaxbourne or Waiharakeke River, Weld said that he did not have a neighbour, Maori or European, within 40 miles.[160]

Although Frederick Weld tried to find a route along the coast to Canterbury in 1850, it was found to be impassable for sheep. So he and others explored the inland valleys and passes. This meant that there were few further reports of journeys along the coast and little possibility of information on any Maori settlements. But there was one such report from W J M Hamilton, who was on the *Acheron* surveying expedition in 1849. He noticed four Maori women and two blacks, one Australian and one African, at Waipapa. Dr Gilling argues that the women were Ngati Toa.[161] The two black men were probably from Guard's whaling station that operated at Waipapa until 1846. Hamilton also called at Kaikoura and reported that the only Maori to use that district, the Ngati Kuri group headed by Kaikoura Whatatau, lived mainly at Amuri (Haumuri Bluffs), some 20 kilometres south of Kaikoura. On his journey up the coast in 1850, Weld came into contact with Kaikoura Whatatau at Amuri but did not report further contacts with Maori before he arrived back at his Flaxbourne station.[162]

Over the next two years, several other expeditions tried to find passes between the Awatere and Waiau-toa Valleys, and behind the Inland Kaikoura range to the Hanmer Plains. They sometimes had Maori guides or porters, but their tribal affiliations were not noted, though they were probably not Rangitane, who were more likely to have known the routes. Lieutenant Impey's expedition up the Awatere Valley in June 1850 came across a footpath and an old 'wari' (whare) and later 'tracks of wild dogs and Maories'. Two nights later, when they were disturbed by barking dogs, they thought it advisable to load their

158. Ibid, p 46
159. Gilling, 'We Have the Authority', p 37
160. Jeanine Williams, *Frederick Weld* (Auckland: Auckland University Press, 1983), p 23
161. Gilling, 'We Have the Authority', pp 36–37
162. Frederick Weld, 'Mr Weld's Journey by the Awatere Valley to the Canterbury Plains', *Nelson Examiner and New Zealand Chronicle*, vol 10, 15 March 1851, pp 13–14

guns.[163] In an expedition the previous month, Captain Michell's party came across some collected firewood and the remains of another 'warri' in the Acheron Valley.[164] In 1852, an expedition led by E J Lee found the remains of three old huts. Lee speculated that they had belonged to 'some of those unfortunates who used to inhabit the Wairau, and who were all but massacred in days gone by'. Mr Armstrong says he was probably referring to Rangitane who had escaped from the Ngati Toa attacks and who survived in the interior between the Awatere and Waiau-toa Valleys until the 1850s.[165] But we have seen no reports of expeditions along the coast after Weld's 1850 journey, through to 1860, so it is uncertain whether any Rangitane or Ngati Toa who survived the Ngai Tahu raids in the 1830s still remained on the coast.

By this time, there was little to keep Maori on the coast. As Professor Anderson points out, the sand and gravel beaches north of Waipapa to Cape Campbell provided few attractions, as evidenced by the few archaeological remains of settlement.[166] There was little new economic activity to attract them to any part of the coast north of Kaikoura and Waipapa, where there were whaling stations, though the one belonging to John Guard at Waipapa was abandoned in 1846. There were no other stations around the coast south of Port Underwood. In any case, shore-based whaling had been declining since about 1835. The new pastoral industry provided little employment for Maori. Apart from Weld and Clifford's run, which ran down to Kekerengu, the coast to the south was only slowly occupied by pastoralists. Like Weld, they preferred the richer pastures south and inland of Kaikoura. Dr Gilling points out that some Maori worked for Europeans who had established runs by the 1850s, but their tribal affiliations were not identified.[167] Though the coming of peace and the beginning of British rule allowed Rangitane to escape the tutelage of Ngati Toa and resume occupation of their land, it seems that most chose to remain in, or move to, the Wairau and Kaituna Valleys. Ngati Toa also congregated at the Wairau and Cloudy Bay, particularly at the whaling station at Port Underwood. But with the Crown's Wairau purchase from Ngati Toa in 1846 and the addition of that to the Nelson Crown grant in 1848, the east coast to Kaiapoi became Crown land and none of that was reserved for Ngati Toa, let alone Rangitane. With the land rapidly being taken up and granted to pastoralists, there was no land left for Ngati Toa, Rangitane, or Ngai Tahu, had they been inclined to reoccupy it (though, as we note in chapter 3, small reserves were granted to Ngai Tahu south of Waipapa as part of the Kaikoura purchase). If there were any Rangitane, Ngati Toa, or Ngai Tahu occupants of the coast, Crown officials were not disposed to notice or consult them when they came to purchase the land in 1846.

163. A Impey, 'Notes of a Trip to Discover a Pass from the Wairau to the Port Cooper Plains', *Nelson Examiner and New Zealand Chronicle*, vol 9, 29 June 1850, p 71

164. W M Mitchell, 'Memorandum of an Expedition into the Interior of the Southern Island of New Zealand', *Nelson Examiner and New Zealand Chronicle*, vol 9, 3 August 1850, pp 91–92

165. Armstrong, 'Right of Deciding', pp 48–50

166. Anderson, 'Kin and Border', p 94

167. Gilling, 'We Have the Authority', p 38

As we shall point out in our next chapter, that transaction was negotiated with but three Ngati Toa chiefs, behind closed doors at Government House in Wellington.

3.5.2 The West Coast

We turn now to what can be known about the exercise of customary rights on the West Coast in the two decades after 1840. There is, in fact, very little evidence for what was happening there in this period. No Pakeha lived in the region, and only a few sealers had visited. We must rely mainly on a handful of references. For a period of some years after 1837, no evidence at all has been located. There is a snippet of information from 1842: in that year the surveyor Tuckett heard of two 'principal men' (probably Ngati Rarua) who had moved, apparently recently, from Raukawa in Te Tai Tapu to the Arahura district.[168] We get more detailed information from the journals of the earliest Pakeha explorers, Charles Heaphy and Thomas Brunner, who made two overland journeys from Nelson in the mid-1840s, though it should be remembered that they were not specifically reporting on Maori rights and the information they give on that matter is incidental and not necessarily accurate. On the other hand, as Dr and Mrs Mitchell point out, the explorers were accompanied by Maori guides. These were identified as Kehu of Ngati Tumatakokiri and Ngati Apa (who had been captured by Ngai Tahu when a boy, and later taken over by Ngati Rarua and transferred to Motueka),[169] and a Ngai Tahu man who had been a slave of Te Atiawa in Golden Bay. The two guides possessed varied experience of all the tribes involved, which would probably have made them knowledgeable and impartial informants. Furthermore, the language barriers within the expeditionary group were probably less serious than has been alleged by some commentators.[170]

Heaphy and Brunner, accompanied by their guides, set off down the West Coast from the Whanganui Inlet in 1846. The two explorers knew very little about their destination, but had heard in Nelson that some Ngati Rarua were living at Arahura and occasionally travelled up the coast to Whanganui.[171] The party met Niho at his residence in the southern part of the Whanganui Inlet, and were told that they had no right to visit Kawatiri without his permission, since he was the chief of 'Wanganui and the whole of the coast beyond'. Threatening to keep the two Maori guides as slaves, the 'old fellow' demanded payment before he would allow them to proceed. This declaration of authority was treated with scepticism at the time by Heaphy, who regarded Niho's 'bluster' as merely an attempt at extortion.[172] Three years later, however, in another account, Heaphy did give some credence to Niho's claim, when he

168. 'Report of an Examination . . . by Mr Tuckett', *Nelson Examiner and New Zealand Chronicle*, 16 April 1842, p 24 (Ballara, 'Customary Maori Land Tenure', p 270)
169. Mitchell and Mitchell, 'History of Maori', vol 1, p 3-52
170. Mitchell and Mitchell, statement of response, pp 29–31
171. Taylor, *Early Travellers in New Zealand*, p 204
172. Ibid, p 208

wrote that the chief continued to demand tribute from the people at Arahura even after he no longer resided there:

> Te Niho retired after a time from the greenstone country to his own settlements at Wanganui and Massacre Bay, leaving several of his people behind, who became identified with the Ngahitau [*sic*]. Frequently, however, the Kawhia chief sent his slaves, and occasionally went himself to the Ara Hura for the presents of Poinamu [*sic*] which he claimed as tribute.[173]

After their encounter with Niho, Heaphy and his party managed to proceed on down the coast. They did not mention meeting anyone on their journey, at Paturau or Raukawa or anywhere along the Te Tai Tapu coast. Their understanding was that the inhabitants had moved south to the pounamu districts.[174] Since it was winter they did not expect to meet any travellers, but just north of Kawatiri they encountered Aperahama and his family travelling from Arahura to Nelson for baptism, and they later met a group of 15 people also travelling with this intention.[175] Aperahama has been identified by Dr and Mrs Mitchell as Ngati Tama and Ngati Rarua, and they quote a contemporary statement that he had earlier been 'on a visit in the [Golden Bay] district – up from the neighbourhood of the Green Stone'.[176] There was no one at Kawatiri itself, although they saw plantations. Soon afterwards, they met Kehu's brother Mahuika (the son of Kehu's mother Mata Nohinohi by her second husband), who was travelling north. Heaphy recorded that Mahuika and other people living at Arahura were establishing gardens at Kawatiri and intending to live there. He understood that their object was 'to obtain a title to Kawatiri by *occupation*' and then to sell it for Pakeha settlement (emphasis in original).[177] The explorers reached Kararoa, the northernmost Arahura settlement, and then other small settlements at the Mawhera, Taramakau, and Arahura Rivers.

Heaphy recorded what he heard about the history of the area – that Niho had invaded the West Coast and killed many Ngai Tahu at Karamea, before leaving some of his party at Arahura to obtain pounamu. He gathered that the northern arrivals had become 'amalgamated' with the 'subject natives' there, and that the total population was about 70.[178]

At the end of 1847, Heaphy's companion Brunner again travelled to the West Coast, accompanied and assisted by Kehu and Pikiwati (he too was identified as Ngati Tumatakokiri) and the wives of the two Maori. On arrival at Kawatiri (by an inland route this time), he saw a small potato garden, and recorded that it was the first year that Mahuika and the few

173. Charles Heaphy, 'Some Account of the Greenstone Country of the Middle Island', *The Maori Messenger*, vol 1, no 21 (11 October 1849) (Hilary Mitchell and Maui John Mitchell, 'West Coast of the South Island', pp 28–29)
174. Taylor, *Early Travellers in New Zealand*, p 210
175. Ibid, pp 223, 230
176. Hilary Mitchell and Maui John Mitchell, 'Southern Issues; Supplementary Material', typescript, not dated (doc Q9(a)), pp 1–3
177. Taylor, *Early Travellers in New Zealand*, pp 226, 229
178. Ibid, p 237

other residents had lived there after moving north through 'most difficult country' from Mawhera.[179] He was told (he does not say by whom) that the land from Whanganui to Kawatiri belonged to Niho by conquest, and from Kawatiri southward belonged to Poutini Ngai Tahu.[180] At Kararoa, the travellers found only a few people, the others having moved to Golden Bay. Brunner visited the Arahura settlements, and noted that at Hokitika there was formerly a large pa occupied by Niho and other people who were now living at Whanganui.[181] He learned that Okarito was where Niho captured and killed many Ngai Tahu and took Tuhuru prisoner, afterwards releasing him to return to Arahura and work pounamu for Ngati Rarua.[182] He stated that the population of the West Coast north of latitude 44 degrees south (the Arawhata area in present-day South Westland) was 97, including children.[183]

This evidence indicates that, in the observation of the explorers at least, in the mid-1840s the northern part of the West Coast was an empty land until the Kawatiri settlement was initiated. There appeared to be no permanent settlement (of Ngati Apa, Ngati Rarua, or Ngai Tahu) between the northernmost Arahura village (Kararoa) and the Whanganui Inlet. It is also clear that the main area of settlement (the middle coast, or 'Arahura') was only thinly populated, with Brunner giving a figure of fewer than 100 people for the whole region from Kararoa down to the Arawhata River.

The evidence also shows that there were still some members of the northern tribes resident in the Arahura area, and that there had been intermarriage with Ngai Tahu. It is not shown whether any of these people had lived there continuously since the invasion, but it seems that some at least had moved there in the early 1840s. From these accounts, it is also apparent that Niho continued to claim rights on the West Coast after moving back to Whanganui. At first, Heaphy was inclined to doubt the seriousness of Niho's claim, but he and Brunner later recorded details of the historical and continuing connection of the northerners with the pounamu districts. Brunner heard that Niho's claim was accepted for the area as far south as Kawatiri, but not for the districts beyond that. This part of the evidence is problematic for the Ngai Tahu witnesses: Professor Anderson is doubtful of its accuracy, while Dr McAloon, describing Brunner as 'apparently somewhat confused' here, corrects him with the suggestion that he meant Kahurangi rather than Kawatiri.[184] If Brunner's information is correct, it would also mean that Kawatiri was the northernmost limit of Ngai Tahu's rohe and that, even if Ngai Tahu had recovered after Te Puoho's defeat, their occupation did not extend far north of Mawhera by the mid-1840s.

The evidence of Heaphy and Brunner is also valuable for its information about what was happening at Kawatiri, where people of unstated tribal affiliation but coming from Mawhera

179. Ibid, p 280
180. Ibid
181. Ibid, pp 283, 286
182. Ibid, p 289
183. Ibid, p 291
184. Anderson, 'Kin and Border', p 125; McAloon, 'Position of Ngai Tahu', p 37

were in the process of establishing a new settlement. One of these settlers was identified as Mahuika, later shown to be the son of a Ngati Apa father and a mother with strong Ngai Tahu connections. Some of the people of this settlement, we will see, identified themselves as Ngati Apa in 1860.

Two other pieces of evidence from the 1840s and 1850s throw light on the matters we are considering here.

The first comes from the events surrounding the Canterbury purchase of 1848. During the purchase discussions at Akaroa (on the east coast) between the Government agent Henry Tacy Kemp and Ngai Tahu, certain chiefs of that tribe, including Tuhuru's son Wereta Tainui, appear to have identified Kawatiri as Ngai Tahu's northern boundary on the West Coast.[185] In the *Ngai Tahu Report 1991*, the Tribunal understood that Kawatiri was chosen for the northern boundary of the proposed purchase 'as a result of discussion with Wereta Tainui and possibly other Ngai Tahu who were familiar with the extent of reoccupation by Poutini Ngai Tahu of their lands on the west coast'.[186] Nearly 30 years after the Canterbury purchase, Wereta recounted that in 1849 he had told Walter Mantell that there were about 80 Ngai Tahu adult males on the West Coast, as well as 'another Maori settlement at Kawatiri inhabited mostly by members of the Ngatiapa hapu', numbering about 20 persons, including women and children.[187] We note that Dr McAloon interprets Wereta's statement as nothing more than a list of settlements, and certainly not a description of tribal rights. He supports this conclusion with additional evidence in the form of complaints by Wereta in 1852 that payments had been made for localities on the West Coast up to Kawatiri only, and not for other places up to Toropuhi (about 20 kilometres south of Kahurangi).[188]

We agree with Dr McAloon that Wereta was probably listing settlements rather than identifying all places where Ngai Tahu claimed associations and interests. We do not interpret this evidence as a recognition by Ngai Tahu that their rights on the West Coast did not extend beyond Kawatiri. On the other hand, we do see Wereta's statement in 1849 as a clear acknowledgement of the existence at Kawatiri of a community whose Ngati Apa composition made it distinct from other West Coast settlements further south.

There is also the census information given to Mantell by Ngai Tahu (including Wereta as mentioned above) and submitted to the Government in 1852. Of the 70 Maori listed for the West Coast between Mahitahi and Kararoa, a number were identified as Ngati Rarua or Ngati Koata, or as the children of people of those tribes. None was listed as Ngati Apa, but the census did not include Kawatiri.[189] This is further evidence that long after Niho's

185. Armstrong, 'Ngati Apa ki te Ra To', p 66
186. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 2, p 434
187. Petition of Wereta Tainui and others, 21 June 1878 (Armstrong, 'Ngati Apa ki te Ra To', p 67)
188. McAloon, 'Position of Ngai Tahu', pp 41–43, 93
189. Walzl, 'Ngati Rarua and the West Coast', pp 28–29

purported 'withdrawal' a proportion of the West Coast population was still identified by Ngai Tahu as being members of the northern tribes. It could also suggest that Ngai Tahu did not regard the Kawatiri settlement as being a Ngai Tahu one.

We are left with the question of whether the evidence from the 1840s and 1850s is enough to show that Ngati Rarua and the other northern tribes still occupied and had a continuing interest in the area south of Kahurangi Point. We need also to ascertain the significance of the new settlement at Kawatiri and the identity of the inhabitants: were they Ngati Apa reoccupying the area on the basis of traditional rights, or refugees living there only on the sufferance of Ngai Tahu (the 'real owners')?

At the end of this period, the Arahura purchase (of land extending north to Kahurangi Point) was carried out by James Mackay, whose transaction was with Ngai Tahu alone, albeit with some recognition of Ngati Apa at Kawatiri. For our understanding of which tribe or tribes had customary rights in the area by 1860, we must weigh the historical sources. On the one hand are the explorers' tentative but disinterested observations from 1846 to 1849, along with a few other pieces of relevant evidence from the 1840s and 1850s. On the other hand, there is Mackay's later and more assured exposition – a view that resulted from discussions with Ngai Tahu and saw the northerners' rights south of Te Tai Tapu as having come to an end with the 'withdrawal' of Niho and Takerei in 1837. An important element in the situation by 1860, however, was the earlier extinguishment of the interests of Ngati Toa, Ngati Rarua, and their allies in 'Arahura' as part of the Waipounamu purchases, which we discuss in the next chapter.

Ultimately, the question of customary rights is one that must be judged from within the Maori domain, and is more complex than is suggested by a simple picture of 'total conquest' or, on the other hand, 'complete withdrawal'. What factors would be weighed in the customary world in an assessment of the rights of Ngati Rarua and their allies south of Kahurangi Point, which was the southern limit of their core settlements in Golden Bay, West Whanganui, and Te Tai Tapu? They would include the seasons of Niho's presence at Mawhera and the marriage into Tuhuru's whanau; the northerners who were left in the area and how they were regarded by Poutini Ngai Tahu; Niho's protection of the Mawhera community against Te Puoho's taua; the failure of the northern tribes to avenge Te Puoho's death; the subsequent years of Niho's absence; the nature of the relationship after 1837 (whether tribute or ongoing trade exchange); and the assertions by Niho that his authority still extended to Arahura. Some of these factors we cannot now evaluate with any certainty. Undoubtedly, at its height, Niho's influence extended over Mawhera, but there was a rebalancing of mana and power in the late l830s, as we showed in the previous section. It may be that Niho continued to return, on occasion, but he never re-established a permanent presence. On the other hand, some of his people were still in the area in the 1840s and beyond, and, as we will see, were included in the arrangement for reserves after 1860. Was this a recognition, by all the parties involved, of their customary standing, or part of a Crown-imposed agreement

that had no significance in the customary world? We will discuss this latter aspect further in the next chapter, but here we focus on customary tribal rights.

Dr and Mrs Mitchell argue that the rights of the northern chiefs did not depend on continuous residence. They explain that Niho and Takerei, 'like most other chiefs, were not permanent residents of any one place, but were overlords of several, all of which had to be visited occasionally'. They did make such visits in the 1840s, and other northern chiefs were still visiting their West Coast interests in the 1850s. For example, James Mackay was accompanied in 1857 by Poharama Hotu of Golden Bay and Kararoa and by Te Koihua of Pakawau, who were travelling south to obtain pounamu, and in 1860 he was escorted by the northern chiefs Pirimona and Te Karamu, who were witnesses to the Arahura deed. Even in the 1860s, there were many northerners who travelled south when the gold rush started, which Dr and Mrs Mitchell say illustrates 'the ease with which the northern tribes traversed their territory whenever it suited them'. In their view, the journeys made by the northerners since the 1820s to get pounamu were considered a right gained by the conquests led by Niho and Takerei. They find no evidence that this pattern was ever broken, or was ever challenged by Ngai Tahu.[190] The Mitchells have also done considerable research into the 'large number' of northerners who remained on the West Coast as residents even after Niho and Takerei moved back to Te Tai Tapu. There were still many such residents in the 1840s (although from the 1850s some drifted north to rejoin their relatives, or participate in the Aorere gold rush, or take part in Taranaki affairs), and their descendents remained there.[191] The Mitchells point to the senior Ngati Tama chief Hori Te Karamu, who was buried at Kawatiri, and argue that it is 'inconceivable' that his whanau would have permitted burial there and not in Golden Bay or Wakapuaka, 'given his high lineage and standing as the eldest son of the paramount chief of Ngati Tama, Te Puoho o te Rangi, had he not had enormous mana/manawhenua in the district'.[192] For Te Atiawa, Alan Riwaka similarly argues that the tribe exercised rights on the West Coast, and that some members lived there. He describes the frequent journeys of the Atiawa chief Te Koihua to obtain pounamu as an exercise of customary rights.[193]

Ngai Tahu have a different view. Dr McAloon says the explorers' evidence offers no support for the northerners' claim that they still enjoyed rights on the West Coast in the 1840s. He comments that Heaphy shows no awareness of Te Puoho's raid and what happened after it.[194] In response to this, however, Mr Walzl (for Ngati Rarua) notes that Heaphy's evidence, which does not mention Te Puoho, predates the narrative presented by Mackay. It is in Mackay's account – which derived from information given to him by Ngai Tahu in the

190. Mitchell and Mitchell, 'Boundary Issues', pp 14–18
191. Ibid, pp 18–19
192. Ibid, p 54
193. Riwaka, 'Nga Hekenga o te Atiawa', p 239
194. McAloon, 'Position of Ngai Tahu', pp 6, 26, 34, 138

late 1850s when they were negotiating with the Crown for their West Coast interests – that Niho withdraws for fear of Ngai Tahu, and other accounts have been based on this. Mr Walzl argues that the Heaphy narrative thus offers an earlier and alternative understanding of Ngati Rarua's history on the West Coast.[195] We might also ask, as Dr Gilling does, why the settlement of Kawatiri from Mawhera in the mid-1840s occurred so long after Ngati Rarua's 'withdrawal', if not because the people at Mawhera were deterred by the continuing influence of the northern tribes in the region.[196] Indeed, there is no evidence at all for a Ngai Tahu reconquest or (re)occupation of the northern West Coast before the mixed Kawatiri settlement far to the south of Kahurangi began in 1846.

Dr Ballara agrees that there is nothing unusual about Niho's patterns of residence, since Maori often moved around their broader territory.[197] Her view at the time of writing her report, however, was that Ngati Rarua could not conclusively demonstrate that they had achieved a sustained occupation of the West Coast, or that Niho was still exercising authority over the Arahura area at 1840. The northerners could have all left with Niho and Takerei in the late 1830s, abandoning the opportunity to develop their rights; their later presence in the district could have arisen from a return to the area in 1842. A gap of a few years might be thought insignificant, but if this is what occurred, Ngati Rarua and their allies would have had no standing under British law, at least unless their rights were accepted by those deemed to be the 'real owners'. In this case, the 'owners' in 1840, the critical time (under British law but not Maori law) for determining such rights, were Ngai Tahu. While it is possible that some Ngati Rarua remained at Taramakau throughout the 'difficult years' after Te Puoho's death, Dr Ballara suggests that they were 'almost certainly absent' from Arahura in 1840.[198] As we have seen, the explorers' evidence does not directly address this question, but it does add weight to the argument that Ngati Rarua and their allies had maintained an association with the area in this crucial period. There is no conclusive evidence that they did all withdraw from the district. Under cross-examination, Dr Ballara modified her position, admitting the possibility of ongoing settlement.[199]

We are less concerned with the question of whether Ngati Rarua and their allies can demonstrate a physical presence at 1840 than with evidence of their ongoing assertion of rights. In our view, Ngati Rarua, Ngati Tama, and Te Atiawa still had an interest in the district and their case has more merit than has been generally afforded to it by earlier inquiries. The circumstances in which their interests were discussed around the time of the Arahura purchase were of such a nature as to obscure the existence of those interests, because the

195. Tony Walzl, statement of response to evidence of James McAloon, 22 September 2003 (doc Q18), p 3
196. Gilling, brief of evidence (25 September), pp 19, 20
197. Ballara, 'Customary Maori Land Tenure', p 152
198. Ibid, pp 277–278. We note that Phillipson, in his response to the Ngai Tahu evidence, did not have the opportunity to include a review of the evidence relevant to this issue: Phillipson, statement of response.
199. Dr Angela Ballara, under cross-examination, eighth hearing, 17–19 February 2003 (transcript 4.8, pp 35–36)

issue at the time was not to sort out who held authority over this stretch of the coast, but to extinguish Ngai Tahu rights. We have attached more significance to the inclusion of Ngati Rarua and other northern individuals in the Arahura purchase reserve arrangements than did the Maori Appellate Court, which found in 1990 that Ngai Tahu had 'sole rights' to the lands acquired under the Arahura deed. The court considered the northern allies to have left no one there and Niho to have abandoned his interests.[200] The court was aware that some non-Ngai Tahu had been included in the original reserve arrangements, but assessed the implications of this point only for Ngati Apa. We, however, see the reserve inclusions, and such significant customary arrangements as the marriage of Tuhuru's daughter to Niho, as well as the northern allies' ongoing contacts with the West Coast, including the long-term residence of some of their members and the periodic visits for obtaining pounamu, as sufficient support for maintenance of their claim there.

This brings us to the question of Ngati Apa. As noted earlier, Heaphy and Brunner encountered people who were involved in a Kawatiri settlement. They were subsequently (during the Crown's purchase negotiations with Ngai Tahu) identified as Ngati Apa. According to Mr Armstrong, the people establishing the Kawatiri settlement in the 1840s were Ngati Apa who had previously taken shelter with Ngai Tahu at Mawhera and were now intent on reoccupying an old tribal area, since Niho's control no longer ran that far south in an area that may have been a kind of 'border region' between the territories of Ngati Rarua and Ngai Tahu.[201] Dr Ballara says that Mahuika and his people were Ngati Apa who may have either taken refuge in the south at the time of the conquest or moved south from Te Tai Tapu with Ngati Rarua in the early 1840s.[202]

The significance of Ngai Tahu's historical recognition in 1860 of the Kawatiri people as Ngati Apa is now questioned by their descendants, and Ngai Tahu witnesses offered differing and ultimately irreconcilable views on the matter. Professor Anderson argues that the Ngati Apa involved in starting the new settlement could not have been reasserting an ancestral claim, since such a right had never existed. In his view, they had been living in Mawhera in dependence on Ngai Tahu, as captives, refugees, or spouses. As to why the settlement was being established, he sees no reason to question the explanation given to Heaphy at the time by the people moving north from Mawhera: 'here was a group, which included former refugees, that was taking steps to secure its future'. The new settlement, which was essentially an expansion of the Mawhera community, 'appears to represent the traditional process of a whanau or other small group making a claim to particular rights in the "common" land of the hapu'. Presumably, the action was made with the acquiescence of Ngai Tahu. Furthermore, Mahuika, who appears to have been the leader of the group, had both Ngati Apa and Ngai Tahu ancestry, and the majority of the Kawatiri people later given

200. *In the Matter of a Claim to the Waitangi Tribunal*, pp 22, 24
201. Armstrong, 'Ngati Apa ki te Ra To', pp 52, 56
202. Ballara, 'Customary Maori Land Tenure', p 276

reserves there were of at least part Ngai Tahu descent. Professor Anderson says that it was not unusual for small groups of one iwi to live in territory regarded as belonging to others, having originally been captives, refugees, or marriage connections. In this case, however, the settlement was by no means essentially 'Ngati Apa'.[203]

Dr Tau argues that Ngai Tahu was the only group that could show Ngati Wairangi ancestry and that it was for that genealogical descent alone, not any whakapapa to Ngati Apa, who never occupied the region, that the rights of the 'Ngati Apa' Mahuika whanau were recognised in 1860. Dr Tau refers, as we do also, to the testimony of the son of the Mahuika who helped found the Kawatiri settlement: he told the Native Land Court in 1926 that his West Coast claims went through his grandmother Mata Nohinohi, who was of Ngai Tahu and ultimately of Ngati Wairangi descent.[204]

Dr McAloon offers a further line of explanation: he suggests that the Ngati Apa came to Kawatiri not in accordance with any ancestral rights there but as the result of a recent tuku from Poutini Ngai Tahu at Mawhera. They thus had 'residence rights' only, not 'mana-whenua', in the land allocated to them by Ngai Tahu. He then shifts his line of argument to emphasise their part descent from Ngai Tahu and thus their move into another part of Ngai Tahu territory. He questions 'why these people called themselves Ngati Apa at all'.[205] We comment here that people are often able to draw on various lines in their whakapapa, and make decisions that seem to them appropriate in the circumstances. We are mindful of what Mr Armstrong calls 'the subtleties and adaptability of genealogy'.[206] But even when Henare Mahuika, a member of the Mahuika whanau of Kawatiri, was allocated land at Kaiapoi at about the same time as the Arahura purchase, he was still described as 'Ngatiapa' and was among the very few awardees not designated as Ngai Tahu.[207]

We note Dr Phillipson's response to the Ngai Tahu evidence. He does not accept that it satisfactorily explains the presence of the Ngati Apa people at Kawatiri and their rights there, partly because it has 'inherent contradictions'. He points out that Dr Tau's argument that the rights of the Mahuika family on the West Coast were through Ngai Tahu conflicts with Dr McAloon's view of a group living there without rights. Professor Anderson's explanation of the rights of the Kawatiri community of the 1840s is similarly contradictory: they were there with the permission of Ngai Tahu and were without rights, yet they were themselves essentially Ngai Tahu. Dr Phillipson also throws doubt on Dr McAloon's idea that there had been a tuku. He argues that tuku always conveyed rights of some kind, and that Ngai Tahu had not identified the rights that operated in this case. He regards Dr McAloon's evidence for a tuku to persons named in reserve ownership lists as inadequate – most likely

203. Anderson, 'Kin and Border', pp 138–141
204. Tau, 'Oral Traditions', pp 78, 147, 149
205. McAloon, 'Position of Ngai Tahu', pp 33, 37, 80–83
206. Armstrong, 'Ngati Apa ki te Ra To', p 133
207. W L Buller, 'Report on the Kaiapoi Reserve', *Compendium*, vol 2, p 98

a misinterpretation of evidence relating to Ngati Rarua, not to Ngati Apa. Dr Phillipson's conclusion is that Ngati Apa's residence at Kawatiri was on a basis of customary rights.[208]

In conclusion, we do not accept that the Ngati Apa occupying the Kawatiri district in 1860 were there on sufferance only. It will be seen in chapter 3 that their status as Ngati Apa was recognised by Ngai Tahu leaders in the mid-nineteenth century, and that, in particular, their right to participate in the Arahura negotiations was respected. There is strong documentary evidence for this point, which does not permit of any other conclusion than that they were a community identified as Ngati Apa, connected with but distinct from Ngai Tahu, who acknowledged their rights as legitimate. Nor do we accept Dr McAloon's argument that there had been a tuku. Not only is the evidence of the tuku slight, but we do not accept his view that such a basis of claim provided a lesser kind of interest that existed only on the sufferance of Ngai Tahu. While tuku took many different forms, there is extensive evidence available to show that under Maori custom it always conveyed rights and imposed obligations on both sides that continued unless deliberately abandoned. We have seen no evidence about the circumstances of the tuku or to suggest that any such tuku at Kawatiri involved rights that did not permit a say in how land was disposed of by recipients who remained resident.

We do not accept that Ngati Apa were at Kawatiri without a basis of customary rights. We give considerable weight to such evidence as Wereta's in 1849 and 1878 and the documents relating to the 1860 purchase. We see the Kawatiri community not as a group enjoying rights only through their part-Ngai Tahu ancestry, but as a group based on Ngati Apa who had been refugees under Ngai Tahu protection and recognised as having a customary right to the land. The key question is how the people at Kawatiri identified themselves at the time. In 1860, their spokesman, Puaha Te Rangi, identified himself and his people as Ngati Apa, and this was recognised by Ngai Tahu. Although the stance of Ngai Tahu has now changed, the standing of Ngati Apa as a separate community exercising autonomous rights was acknowledged by Ngai Tahu in the early years of the colony.

The Maori Appellate Court found in 1990, however, that in the case of Ngati Apa there was no 'customary take to support something more than a mere right of residence'. In the court's view, such occupation had been by permission of Ngai Tahu only, unsupported by an independent take, and thus did not alter Ngai Tahu's claim to sole ownership.[209] Our view is different. We do not accept that Ngati Apa could not demonstrate ancestral association with the area, or that such rights had been extinguished by their defeat at the hands of the northern allies (as the appellate court was to argue). We also place weight on evidence that points to Ngai Tahu's historical recognition of the existence of Ngati Apa rights at Kawatiri but that was not available to the court in 1990. We discuss this further in chapter 4.

208. Phillipson, statement of response, pp 19–23
209. *In the Matter of a Claim to the Waitangi Tribunal*, p 24

3.6 Claimant and Crown Submissions

As we have indicated, not all iwi who have lodged claims in relation to Te Tau Ihu also claimed rights within the takiwa. Ngati Koata made no claim and Ngati Kuia, who did lodge a claim, abandoned it in their closing submissions, though still maintaining that they had whakapapa links to places in the takiwa.[210] Six of the iwi did make claims in this regard, however. In dealing with their submissions, together with those of Ngai Tahu and the Crown, we once again divide our analysis into sections relating to the East and West Coasts.

3.6.1 Submissions on the east coast

(1) *Claimant submissions*

Only two of the claimant groups made submissions on the east coast portion of the takiwa: Rangitane and Ngati Toa. We discuss these in turn.

(a) *Rangitane:* Rangitane said in their amended statement of claim that their rohe extended northwards from the Waiau-toa towards the Wairau and inland all the way across the mountains through Maruia to Kawatiri, though they did not continue to assert a claim to the West Coast.[211] Their closing submissions:

- listed the evidence they had presented from Mr Armstrong, Norton, Bradley, and Judith Macdonald;
- referred to the Tribunal's site visit and the inspection of various Rangitane sites, including Matariki Pa; and
- specified their places named by signatories to Rangitane's Waipounamu deed.

The submissions also referred to evidence presented by Tuiti Macdonald to a 1926 Native Land Court case, which asserted that Rangitane had conquered the territory from Tory Channel to the Waiau-toa. The submissions even drew material from the Ngai Tahu evidence, including various manuscripts from Dr Tau's supporting documents. One of these, the Waruwarutu manuscript, described the Ngai Tahu attack on Rangitane at Waiharakeke that we listed above, though Dr Tau did not refer to that incident in his evidence. Finally, we note that Rangitane's closing submissions referred to the boundary issue. They argued that Ngai Tahu had begun to claim a boundary as far north as Parinui o Whiti only in 1848. This was in retaliation for Ngati Toa's claim to Kaiapoi during the negotiation of the Wairau purchase. Counsel quoted a statement from Professor Anderson (derived from Dr Ballara) that it was only as a result of Crown negotiations that boundaries had become 'clearly defined and exclusive . . . where no such definition had occurred before Pakeha

210. Peter Hemi and others, second amendment to claim Wai 561, 13 March 2003 (claim 1.11(b)); counsel for Ngati Kuia, closing submissions, 17 February 2004 (doc T14), p 7

211. Mervyn Sadd and others, fifth amendment to claim Wai 44, 6 August 1987 (claim 1.1(f)), p 8

intervention'.[212] Rangitane also made submissions on their treatment by the Crown during the Maori Appellate Court hearing and subsequent settlement with Ngai Tahu. We discuss these in chapter 4.

(b) ***Ngati Toa:*** Ngati Toa argued in their statement of claim that, 'as first conquerors', they had an 'overriding mana and authority' over all other descent groups in Te Tau Ihu. That authority, they said, extended 'at least to Kaikoura on the eastern coast' and Arahura on the west. However, Ngati Toa did not claim an exclusive title, having always recognised that their conquest was achieved in combination with 'allies and relations'. They also claimed that they had the right to 'control alienation'. Their conquest of Rangitane gave them rights 'at least to Waipapa or Waiau-toa' and their conquest of Ngai Tahu gave them some customary rights at least as far as Kaikoura and extending to Kaiapoi. They referred to Servantes' correspondence with Grey in 1850 (which we discuss in chapter 3) for explanation of the extension of their claim 'to a certain extent as far as Kaiapoi'.[213] Ngati Toa described their southern boundary as running from 'Kaikoura and west to Arahura',[214] though not from Kaiapoi to Arahura. The submissions also referred to the evidence of Matiu Rei, Dr Gilling, and Professor Richard Boast in support of Ngati Toa's customary rights on the eastern coast 'well to the south of the Wairau Valley'.[215]

The closing submissions argued that it was sufficient for Ngati Toa to 'take control of, and to hold an area whether by occupation *or* under the influence or mana of the conquering group [to] claim a valid raupatu' (emphasis in original). Occupation was not essential to maintain ahi ka; it was also about 'the maintenance of a political entity of a community'.[216] Ngati Toa's mana was demonstrated by the respect shown to their chiefs and the deference of allied and tributary tribes. Furthermore, Ngati Toa was 'able to hold and defend the lands that it had acquired in Te Tau Ihu, against all comers but the Crown'.[217] In their closing submissions, Ngati Toa backed up their raupatu claim by referring to their takawaenga marriages with Ngai Tahu, based on evidence from Nicholson and Rei. The authority in such marriages, the 'tahakaha', was with the conqueror. Otherwise, Ngati Toa did not claim that they had remained in occupation of land on the east coast. The east coast was not mentioned in the list of 'key areas' occupied by Ngati Toa at 1840, nor in the list of other places where Ngati Toa chiefs resided.[218] Accordingly, the submissions stressed that it was not necessary to occupy land to maintain ahi ka because 'all descent groups of the Cook Strait region were

212. Counsel for Rangitane, closing submissions, p 18
213. Akuhata Wineera and others, fourth amendment to claim Wai 207, 21 May 2003 (claim 1.7(d)), pp 14–15; counsel for Ngati Toa Rangatira, closing submissions, p 49
214. Counsel for Ngati Toa Rangatira, closing submissions, p 7
215. Ibid, p 50
216. Ibid, pp 45–46
217. Ibid, p 45
218. Ibid, p 49

subject to the overriding mana and authority of Ngati Toa,' though they did not assert an exclusive title outside the 'key areas'.[219]

Ngati Toa accepted that Ngai Tahu had rights within their takiwa, but argued that those rights also were not exclusive.[220] The Ngati Toa submissions described the Ngai Tahu counter-attacks in Te Tau Ihu, but argued that they were indecisive. The submissions argued that Ngai Tahu had not gained control of the area north of Kaikoura, much less 'exclusive' authority up to Cloudy Bay.[221] Ngati Toa counsel, like Rangitane counsel, argued that the Ngai Tahu assertion of a boundary at Parinui o Whiti was a response to the Crown's acceptance of a Ngati Toa boundary at Kaiapoi.[222] The Ngati Toa submissions then discussed the effects of Crown intervention on Ngati Toa, including the Crown purchases beginning with the Wairau. We examine these in our next chapter. Ngati Toa also made submissions on their treatment by the Crown during the Maori Appellate Court hearing and the subsequent settlement with Ngai Tahu. We discuss these in chapter 4.

(2) *Ngai Tahu submissions*

Ngai Tahu are not a party to this inquiry but were permitted to submit evidence in response to that of Te Tau Ihu iwi on their claims in the takiwa. Ngai Tahu's position was that the Maori Appellate Court decision of 1990 should be binding on this Tribunal, but if this was not accepted by us, then Ngai Tahu submitted that the court's decision is 'highly persuasive' and that its conclusions should be accepted as correct.[223] In their view, the Te Tau Ihu claimants had presented very little evidence to the Tribunal that had not already been presented to the Maori Appellate Court.[224]

Ngai Tahu's closing submissions expounded Professor Anderson's theory on boundaries, though they also noted, as we did above, some of the qualifications he made on the applicability of his Pacific model to New Zealand Maori. Counsel argued that the model was not as rigid as Dr Phillipson maintained. Rights in land and resources, in Professor Anderson's view, were 'exclusive *at the level at which they were held* and some groups, sometimes, maintained boundaries' (emphasis in original).[225] On the east coast, Ngai Tahu's boundaries were said to extend to Parinui o Whiti on the basis of 'a full matrix of customary title', including take taunaha, take tipuna, take tuku, and ahi ka. These boundaries were defended 'up to and during the wars with Ngati Toa'.

Ngai Tahu acknowledged Rangitane participation in the battle at Matariki but dismissed the notion that Rangitane defeated Ngai Tahu and then occupied Matariki. Ngai Tahu also

219. Ibid, p 50
220. Ibid, pp 57–59
221. Ibid, p 60
222. Ibid, p 61
223. Counsel for Ngai Tahu, closing submissions, p 33
224. Ibid, pp 37–38
225. Ibid, p 51

rejected the view that the tradition of Te Huataki indicates that Rangitane had rights to lands south of Parinui o Whiti.[226]

With respect to Ngati Toa, Ngai Tahu argued that the Ngati Toa attacks on Kaiapoi and Banks Peninsula did not constitute a take raupatu 'because they were not consolidated by occupation or by any other form of military or political suzerainty'.[227] Ngai Tahu's counter-attacks against Ngati Toa and its allies in Te Tau Ihu saw Ngai Tahu 'actively re-establishing their tribal boundaries and the military and political equilibrium that had existed before the Ngai Tahu–Ngati Toa wars'. The submissions argued that 'Ngati Toa did not manage to penetrate south of Te Parinui o Whiti following the battle'.[228] Finally, for the east coast, the submissions referred to the peace settlements between Ngai Tahu and Ngati Toa in the late 1830s and argued that these declared Parinui o Whiti as the Ngai Tahu tribal boundary.[229]

(3) *Crown submissions*

The Crown discussed the issue of claims in the Ngai Tahu takiwa in its closing submissions. We appreciate their headline quotation. It is from a 'Johnson', presumably the celebrated English lexicographer, Dr Samuel Johnson:

> To embarrass justice by a multiplicity of laws, or to hazard it by confidence in judges, are the opposite rocks on which all civil institutions have been wrecked, and between which legislative wisdom has never yet found an open passage.[230]

That is a timely warning for us, as indeed it is for the Crown. The Crown's introductory paragraph spelled out the two important issues that had arisen:

> The first is the Crown's interest in the integrity and durability of a settlement with Ngai Tahu. The second is the Crown's interest in seeing that the well-founded Treaty grievances of all Maori are inquired into and in due course settled.[231]

The Crown submissions noted that there was a paucity of evidence on 'the critical historical moments' for the northern portions of the takiwa on both coasts.[232] On the east coast, the submissions pointed out, evidence of Rangitane and Ngati Toa exercising rights appeared to be 'indeterminate' and the coast from Parinui o Whiti to Waiau-toa 'generally remained vacated'. It had 'few permanent occupations' but there were occasional excursions from the north and south for seasonal gathering. Nevertheless, the Crown argued, if subsequent Crown actions were to be deemed to impinge on the interests of Te Tau Ihu iwi in the

226. Counsel for Ngai Tahu, closing submissions, p 54
227. Ibid, p 56
228. Ibid, pp 56–57
229. Ibid, p 57
230. Crown counsel, closing submissions, p 121
231. Ibid, p 122
232. Ibid, p 124

takiwa, the existence of those interests had to be established.[233] The Crown did not go on to discuss whether any such interests were infringed by the subsequent Crown purchase since they had been discussed elsewhere in relation to Crown purchases. We shall return to the Crown's position in our discussion of the purchases in chapter 3. However, we note that the Crown did not take a position, one way or the other, in relation to the dispute between Te Tau Ihu iwi and Ngai Tahu over whether the former had rights in the latter's takiwa. As the submissions put it, 'The Crown does not usually participate in intra Maori disputes about contested customary rights.'[234] Nor did it assume expertise in such matters. The Crown had taken the decision to 'abide' the decision of the Maori Appellate Court on Ngai Tahu's northern boundaries.

3.6.2 Submissions on the West Coast

Five of the claimant groups made submissions on the West Coast portion of the takiwa: the Kurahaupo iwi Ngati Apa, and four of the northern iwi who entered the region in the early nineteenth century: Ngati Toa, Ngati Rarua, Ngati Tama, and Te Atiawa. We discuss each of these in turn, followed by the submissions of Ngai Tahu and finally those of the Crown.

(1) *Claimant submissions*

(a) ***Ngati Apa:*** Ngati Apa said in their amended statement of claim that the areas where they were living in 1840, and where they had customary rights, included 'the whole block of country from the southern bank lands of the Kawatiri (including Tauranga Bay) north to Kahurangi Point and inland of that coastline in an easterly direction to the Nelson Lakes area.'[235] They pointed out that the invasion of the northern tribes was relatively recent, and that in 1840 the customary process of conquest was 'incomplete and in a state of flux', with Ngati Apa rights subsisting in a latent form in coastal areas where Ngati Apa and the newcomers lived together. In the hinterland the northern tribes had not established rights of conquest or occupation at all.[236]

In their closing submissions, Ngati Apa repeated the claim that their customary interests included the area 'down to and including the Kawatiri Valley'. They asserted that the evidence proved 'beyond question' that before the conquest Ngati Apa had dominated coastal and inland areas of western Te Tau Ihu and the northern West Coast down to Kawatiri, and had intermarried with the previous occupiers Ngati Tumatakokiri.[237] In respect of the northern conquest, they again asserted that it was incomplete, leaving an 'inchoate state of affairs' in which Ngati Apa rights were not totally annihilated. The conquest was limited

233. Ibid, pp 126–127
234. Ibid, p 133
235. Ngati Apa, amendment to claim Wai 521, p 5
236. Ibid, p 3
237. Counsel for Ngati Apa, closing submissions, pp 3, 7–8

to coastal districts, where Ngati Apa tributary communities continued to live, and did not include interior districts, where survivors lived in freedom and retained their rangatiratanga. In support of their claims in respect of coastal areas, Ngati Apa quoted the findings of the *Rekohu* report to the effect that in certain circumstances ancestral rights might survive conquest and eventually fully revive. They relied also on the arguments of Dr Ballara in this regard.[238] Evidence was quoted to show that the conquest took place only a very short time before the Treaty was signed and that there had therefore not been enough time for the conquerors' rights to be converted into an absolute right, even in coastal areas and certainly in the hinterland. This was understandable in view of the huge areas involved, especially on the West Coast. The idea of an absolute conquest that stripped the Kurahaupo tribes of all rights was described as a 'myth'.[239]

Counsel also rejected the claims of Ngai Tahu that Ngati Apa had no rights south of Kahurangi. The statements of Wereta Tainui in 1849 and 1878 were quoted in support: this senior Ngai Tahu chief had spoken on both occasions of Ngai Tahu settlements from Mawhera southwards and a Ngati Apa one at Kawatiri. He had not claimed Kawatiri as a Ngai Tahu settlement, 'let alone Kahurangi as a northern boundary line'. The northernmost Ngai Tahu settlement he had mentioned was Mawhera. Counsel said that this was not disposed of by Ngai Tahu historians, except for a 'flippant suggestion' that Wereta was old and confused – it was nonsense to say he would have invented a separate Ngati Apa presence at Kawatiri, and the statement 'should be treated with the disdain it deserves'. The evidence of Heaphy and Brunner was put forward in support of Ngati Apa's independent presence. It was also argued that the recognition of Ngati Apa in the Arahura purchase of 1860 was a vindication of the tribe's claims in respect of their customary rights in Kawatiri. The evidence presented by Ngai Tahu to counter this interpretation was rejected as 'weak efforts to rewrite Maori customary history, ignoring whakapapa linkages from Ngati Apa and seeking to elevate Ngai Tahu linkages to a level which their forebears did not seek to do'.[240]

Specifically, Ngati Apa rejected Ngai Tahu's argument 'that somehow Puaha Te Rangi was Ngai Tahu, not Ngati Apa, despite the extraordinary fact that he personally asserted his own rights at the time as Ngati Apa', with the justice of his demand being agreed to by the contemporary Ngai Tahu present at the time.[241] Ngati Apa's submissions on what happened in the Arahura purchase will be discussed further in chapter 3. All in all, it was submitted that there was 'clear, objective evidence' to support the case put forward by Ngati Apa, 'that there was and is a separate Ngati Apa community at Kawatiri, enjoying the resources in and around the Kawatiri area and coastline'. The point was made that there were low numbers of people residing in the area between Mawhera and Kahurangi, and that the resources were

238. Counsel for Ngati Apa, closing submissions, pp 5–6, 8–9, 27
239. Ibid, pp 10–11, 16–17
240. Ibid, pp 30–31
241. Ibid, pp 37–38

shared by the northern iwi, Ngati Apa, and Ngai Tahu.[242] It was also pointed out that Ngai Tahu continued to recognise Ngati Apa interests until the 1920s.[243] The submissions laid emphasis on the geographical realities, including the difficulties of travel between Kararoa and Kahurangi, which made it unlikely that Ngai Tahu had an ongoing exclusive occupational presence in areas so far away from their nearest support in the Arahura district. Kahurangi, on the other hand, had easy coastal access from the north, where Ngati Rarua and the other northern iwi and the Ngati Apa tributaries resided. It thus 'defies logic in a Maori customary usage sense', especially in war conditions and in view of 'who had the force on the ground and where it was located', that Ngai Tahu exclusively 'owned' all the land south of Kahurangi.[244] Finally, counsel drew attention to Ngai Tahu's failure to call any witnesses who could claim descent from long-time occupants of the northern part of the takiwa. The idea that Ngai Tahu traditionally and exclusively occupied the region south of Kahurangi was described as another 'myth', but unfortunately one that was accepted by the Maori Appellate Court, in 'a travesty of justice', in 1990.[245]

(b) ***Ngati Toa:*** Ngati Toa asserted in their amended statement of claim that after the conquest 'all descent groups of the Cook Strait region and the Northern South Island extending at least to Kaikoura on the eastern coast and to Arahura on the West Coast were subject to the overriding mana and authority of Ngati Toa as first conquerors'.[246] They explained further, in their closing submissions, that tino rangatiratanga was exerted by Ngati Toa in this rohe in accordance with 'classic Maori law and custom', but acknowledged that in some areas other groups had rights too. 'In these cases, several layers of rights applied to the land and other resources of the area', varying in nature, depth, and scope. There were 'core areas of interest' but Ngati Toa had 'overriding mana and authority' over the whole region, including 'non-exclusive alienation rights'.[247] Counsel asserted that the tribe acquired its rights in Te Tau Ihu by raupatu, 'in conjunction with its allies and relations', and by 1840 'controlled a powerful domain based on both sides of Cook Strait and was the predominant iwi in Te Tau Ihu'. These customary rights had never been displaced by anyone in Te Tau Ihu other than the Crown.[248] The interests claimed were not exclusive, having been acquired in combination with others, but Ngati Toa do maintain that their allies and relations had an obligation to acknowledge Ngati Toa's mana in Te Tau Ihu and the ultimate right to control alienation of the land.[249] It was submitted that the rights claimed by the tribe were not

242. Ibid, p 32
243. Ibid
244. Ibid, pp 33–34
245. Ibid, p 35
246. Ngati Toa Rangatira, fourth amended statement of claim, p 15
247. Counsel for Ngati Toa Rangatira, closing submissions, pp 49–50
248. Ibid, p 10
249. Counsel for Ngati Toa Rangatira, closing submissions, pp 44–45

dependent on occupation.[250] In respect of the Ngai Tahu takiwa specifically, counsel submitted that Ngai Tahu had not proved that its rights there were exclusive; Ngati Toa itself did not claim exclusive rights there, but 'an original and ongoing interest'. The Ngati Toa claim to interests in this area was presented as a very longstanding one, 'based on traditional customary take, especially aspects of take raupatu'.[251] In general, the submissions did not give details of Ngati Toa's history on the West Coast, including its relations with Ngati Apa and Ngai Tahu; nor did it refer specifically to its claims there, except for a brief mention of some of the evidence that such claims had historically been made.[252]

(c) *Ngati Rarua:* Ngati Rarua said in their amended statement of claim that their interests on the West Coast derived from conquest and occupation as far south as Mawhera, Hokitika, and Okarito. They stated that they remained on the West Coast after Te Puoho's raid, maintaining their relationship with Poutini Ngai Tahu up to and beyond 1840.[253] All this was expanded in their closing submissions, which recounted the history of the invasion, the capture of Tuhuru, the marriage of his daughter to Niho, and Ngati Rarua's protection of Ngai Tahu against Te Puoho. The evidence for these events was reviewed. The submissions rejected the assertion that Ngati Rarua acted on the West Coast under the mana of Ngati Toa rather than independently. It was emphasised that Te Puoho's defeat did not result in the withdrawal of Ngati Rarua from the area, and that people of that tribe remained in the area, as evidenced later by the allocation of reserves to them.[254] Ngati Rarua itself did not assert exclusive authority on the West Coast, 'although there were clearly places where Ngati Rarua communities were strong both numerically and in an occupying/activity sense'.[255] It was argued that, for part of the conquest period (up to 1837), the tribe's mana and authority was indeed exclusive and that thereafter, up to 1840 and beyond, it persisted to a large degree even though Niho was not in continuous occupation. Ngai Tahu's case for its possession of exclusive authority in the western takiwa by 1840, as argued by Professor Anderson and Dr McAloon, was rejected. Criticism of the latter's report was based on Mr Walzl's statement of response to it, and counsel argued that Dr McAloon's case did not withstand scrutiny. Attention was drawn in particular to his low regard for the evidence of Heaphy and Brunner, which counsel described as 'the most valuable contemporary independent accounts of who held the mana and exercised authority and enjoyed occupation up and down the West Coast for the period say 1831 through to 1846'. To reject this source in favour

250. Counsel for Ngati Toa Rangatira, closing submissions, pp 46–47; see also counsel for Ngati Rangatira, submissions in response to closing submissions of Crown counsel, 19 April 2004 (paper 2.785), pp 6–7
251. Counsel for Ngati Toa Rangatira, closing submissions, p 58
252. Ibid, p 47
253. Barry Mason and others, second amendment to claim Wai 594, 7 March 2003 (claim 1.13(b)), pp 13, 29–30
254. Counsel for Ngati Rarua, closing submissions, pp 118–125, 149–150
255. Ibid, p 131

of James Mackay's much later evidence, gathered moreover in the context of negotiations for a land sale by Ngai Tahu, was 'illogical'.[256]

Ngati Rarua also made a submission in response to the closing submissions of the Crown. The view of the Crown that Ngati Toa acted 'in stewardship' of the other northern iwi was not accepted. Ngati Rarua maintained, and had always maintained, that they acted under their own mana in the raupatu, and had thereby acquired their own rights in Te Tau Ihu and on the West Coast.[257] The Crown's 'dismissive' portrayal of the northern tribes' rights on the West Coast as 'a possible overlay' contradicted the evidence, which indicated strongly that Ngati Rarua's rights there were 'prevailing and continuous'. Counsel rejected the Crown's submission that evidence of Ngati Rarua's interests on the West Coast was 'inconclusive', and referred to the considerable evidence that the tribe's customary rights persisted through to 1840 and beyond. It was emphasised that Ngati Rarua had no desire to deny the mana of Ngai Tahu in the takiwa, but only to assert Ngati Rarua's own mana there.[258] Ngati Rarua regretted that during the inquiry the Crown had deliberately not undertaken a full investigation into customary rights.[259]

(d) ***Ngati Tama:*** Ngati Tama stated in their amended statement of claim that they secured an interest in parts of the West Coast through conquest followed by settlement. This interest 'overlapped and was shared with Ngati Rarua, Te Atiawa, Ngati Apa and Ngai Tahu'.[260] In their closing submissions, Ngati Tama said that, while their interests and authority in some parts of the South Island were complete, in other places, such as the West Coast south of Kahurangi Point, they were shared with other iwi.[261] There was discussion of contested rights and overlapping claims, and the Tribunal was advised to give consideration to these in districts, such as the West Coast, where they existed.[262] Ngati Tama recognised that Ngati Apa have rights and interests on the West Coast, although since the conquest those rights no longer existed in other parts of western Te Tau Ihu.[263] They acknowledged the strong links with Ngati Rarua and Te Atiawa in western Te Tau Ihu, but did not accept any claim of Ngati Rarua to primacy in terms of either their role in the raupatu or their consequent interests.[264] They also rejected Ngati Toa's claims to paramountcy of interest, and did not accept that Ngati Toa was actively involved in the conquest of western Te Tau Ihu or maintained

256. Ibid, pp 129–138
257. Counsel for Ngati Rarua, submissions in response to closing submissions of counsel for the Crown and Ngai Tahu, 12 August 2004 (paper 2.796), p 5
258. Ibid, pp 6, 9, 15–17
259. Ibid, p 17
260. Janice Manson and others, amendment to claim Wai 723, 13 March 2003 (claim 1.16(a)), supplement, pp 4–5
261. Counsel for Ngati Tama, closing submissions, pp 8, 16, 103
262. Ibid, pp 14–16
263. Ibid, p 17
264. Ibid, p 19

any direct rights or interests there.[265] They did not accept that Ngai Tahu maintained exclusive rights on the West Coast after 1840.[266]

(e) ***Te Atiawa:*** Te Atiawa made only a brief statement of their interests on the West Coast in their closing submissions. They admitted that they had not had an opportunity to fully develop their case, but said that the research of Dr and Mrs Mitchell and Riwaka did establish a prima facie case for their customary rights in the region.[267] These rights were based on raupatu, a conquest in which they at various times in various combinations with Ngati Rarua and Ngati Tama had invaded the region and obtained land there. The history of the raupatu was summarised in the submissions, followed by an assertion that Te Atiawa's mana was distinct from and independent of Ngati Rarua's. The rights thus gained were 'conjoint' with those of Ngati Rarua and Ngati Tama, and they had 'over time matured into take tupuna'.[268] Regarding Ngati Toa's claim to hegemony or 'overlordship' over Te Atiawa in the northern South Island, it was submitted that 'the weight of evidence demonstrates that there is no customary or historical justification' for such claims.[269] Ngai Tahu's claim that there was a border between their territories and those of the northern tribes was rejected, but the submissions did not go beyond declaring that 'Ngai Tahu could not, and did not, prevent Te Atiawa and other Te Tau Ihu iwi from travelling into the West Coast and obtaining rights there'.[270]

(2) *Ngai Tahu submissions*

As noted earlier, Ngai Tahu were not a party to this inquiry but were permitted to submit evidence and make submissions in response to the evidence of Te Tau Ihu iwi on their claims in the takiwa. Their closing submissions denied that there was any reason to question the 1990 decision of the Maori Appellate Court that the Ngai Tahu takiwa extended as far north as Kahurangi Point, since no new evidence had been presented (except for the Wereta Tainui petition of 1878, but it was submitted that Dr McAloon had shown that this evidence did not prove that the people of Ngati Apa descent at Kawatiri had anything other than residence rights there).[271] The submissions then went on to make a response to the claims of each of the Te Tau Ihu tribes concerning the West Coast takiwa.

Concerning Ngati Apa, it was not accepted that they could demonstrate customary title before 1840, there being no traditional evidence for any claim based on conquest, discovery, or ancestral rights. The evidence (in particular, Dr Tau's evidence for Ngai Tahu's descent

265. Counsel for Ngati Tama, closing submissions, pp 19–20
266. Ibid, p 19
267. Counsel for Te Atiawa, closing submissions, pp 42–43
268. Ibid, pp 11–19, 44
269. Ibid, pp 24–41
270. Ibid, p 43
271. Counsel for Ngai Tahu, closing submissions, pp 4, 5, 37–38

from Ngati Tumatakokiri, Ngati Wairangi, and invading Ngai Tahu hapu) showed rather that it was Ngai Tahu who had rights based 'on the full matrix of customary claims'.[272] Ngati Apa's contention that it would have been difficult for Ngai Tahu to maintain an ongoing occupational presence as far north from Arahura as Kahurangi was dismissed as 'mere conjecture'[273] – there were many other South Island examples of occupancy in very isolated places. The submissions denied that there was any traditional evidence for the arrival or presence of an independent Ngati Apa community (ie, Ngati Apa who were not also of Ngai Tahu ancestry) on the West Coast before 1840. Because there was no evidence of ancestral rights, the Ngati Apa claim was regarded by Ngai Tahu as that of a whanau, not of an iwi.[274] Ngati Apa rights in Kawatiri were merely those of refugee groups who shifted south and were later allowed to settle there. That community included persons of Ngati Apa ancestry, who had a right of some kind to cultivate and live on the land.[275] In their earlier response to the statements of claim made by the iwi of Te Tau Ihu, Ngai Tahu had said that their concurrence with such occupation was the 'continuation of a tuku they had already entered into' with the refugees, and as we have seen, this was the explanation offered by Dr McAloon. In their closing submissions, however, Ngai Tahu said that the Kawatiri people were not living there with rights conferred by tuku, but 'for reasons of close kinship and manaakitanga'.[276] To some extent they were 'a Ngai Tahu whanau/hapu living there with rights through Ngai Tahu's claim to the land',[277] although some chose to identify as Ngati Apa. Overall, the rights of people with whakapapa connections to Ngati Apa or any other iwi were stated to be based on residence and relationship to Ngai Tahu, not on any tribal customary rights or manawhenua.[278]

Concerning the claims of the northern allied tribes to rights by conquest, Ngai Tahu submitted that it was clear that Ngati Rarua was forced to retreat from the West Coast after the defeat of Te Puoho at Tuturau in 1837.[279] They denied that there was any evidence that Niho or Takerei ever returned to the West Coast after 1837, or left any other chiefs as figures of authority in their stead. Importance was placed on James Mackay's report in 1859 that Ngati Rarua had abandoned the coast after Tuturau and had never resumed occupation south of Kahurangi. Ngai Tahu's position was that Ngati Rarua were forced to withdraw because Ngai Tahu had managed to re-establish themselves after the defeat of Te Puoho and Ngati Tama.[280] Ngati Rarua's claim was therefore based only on a limited period of occupation

272. Ibid, p 54
273. Ibid, p 65
274. Ibid, p 63
275. Ibid, pp 63–64
276. Ibid, p 55
277. Ibid, p 63
278. Counsel for Ngai Tahu, statement of response to Te Tau Ihu iwi claims concerning Ngai Tahu takiwa, 14 July 2003 (paper 2.634), p 13; counsel for Ngai Tahu, closing submissions, pp 54–55, 62–65, 68
279. Counsel for Ngai Tahu, closing submissions, p 58
280. Ibid, p 59

before their withdrawal prior to 1840. Furthermore, members of the three northern tribes who remained in the area did not constitute a separate community or hold any power over Ngai Tahu. It was argued that most of those who remained and married into Ngai Tahu would have been too young in 1837 and of insufficient mana to have been deputed to uphold northern claims of manawhenua. No political or community presence was maintained, as 'a few people left behind as marriage partners does not constitute such a presence'.[281] There was therefore no tribal mana of these iwi (or of Ngati Toa) on the West Coast by 1840.[282]

(3) *Crown submissions*

As we have seen, the Crown noted in its closing submissions that there was a shortage of evidence for what was happening in the northern portions of the takiwa on both coasts at 'the critical historical moments', thus making it difficult to arrive at definitive conclusions about the customary rights of the various tribes.[283] The Crown was not convinced that there was 'a sufficient evidential base from which contested views could now be adequately adjudicated', though there had been 'a genuine attempt on the part of the Crown to understand the complex overlapping claim issues in this inquiry'.[284] The reminder was made that, in the period 1840 to 1860, 'customary rights as between different groups of Maori in Te Tau Ihu were not fixed and were in an evolving state of flux'.[285]

It was nevertheless possible to identify, 'in approximate terms', the location of the various iwi in the Treaty period and, in 'tentative' and imprecise terms, the customary rights of those iwi.[286] The Crown's present understanding of the relevant evidence was briefly set out. It was noted that the northern conquest was incomplete, in that the Kurahaupo iwi were in varying degrees subjugated but retained a tributary or independent status. It was also understood that the northern iwi acquired and held land interests, especially in the early post-conquest phase, in a 'confederate' manner 'under the stewardship of Ngati Toa'.[287] With regard to the West Coast, it was stated that there were Ngati Apa interests there, with a 'possible overlay' of Ngati Toa, Ngati Rarua, Ngati Tama, and Te Atiawa interests.[288] The Crown's submissions briefly reviewed the evidence for Ngati Apa's rights on the West Coast, and identified the main issue as the nature of the interests of the Kawatiri community of the 1840s and 1850s. Whether there had been Ngati Apa occupation of the area before 1840 is difficult to know, but Ngai Tahu's acceptance of Ngati Apa's participation in the Arahura purchase in 1860 'lends weight to the possibility that there was a distinct Ngati Apa

281. Counsel for Ngai Tahu, closing submissions, p 73
282. Ibid, pp 58–60, 72–73, 76; counsel for Ngai Tahu, submissions in response to various submissions, 14 May 2004 (paper 2.794), pp 3–4
283. Crown counsel, closing submissions, p 124
284. Ibid, pp 9–10
285. Ibid, p 16
286. Ibid, p 24
287. Ibid, pp 24–25
288. Ibid, p 27

community there at that time'.[289] As for the customary rights of the northern iwi, the Crown noted that there had been much dispute over the extent of their interests after 1837, and that the evidence relating to it was limited. The only comment that the Crown made on the situation of the northern tribes vis-à-vis Ngai Tahu in this period was that it was 'something of an impasse'.[290] In the Crown's view, there was a similar lack of evidence for the rights of Ngati Toa. It was thus very difficult to establish how far beyond Te Tai Tapu any rights and interests of the northern allied groups may have extended. The evidence was described as 'indeterminate' and 'inconclusive'.[291] As we will discuss in chapter 4, the Crown argued further that it was entitled to rely on the Maori Appellate Court's decision that established the Ngai Tahu takiwa.[292]

3.7 Tribunal Conclusions on the Customary Rights of Te Tau Ihu Iwi in the Takiwa

In this section, we set out our conclusions on the rights of the Kurahaupo tribes and the northern allied tribes in the statutory takiwa, but make no findings on Treaty breaches. We make such findings in our next chapter when we consider how the Crown dealt with the customary rights of various iwi while negotiating purchases.

We have reached some conclusions already, as we considered evidence and submissions. Some of these are of a general nature and can be re-stated here.

- As we stated in section 2.2, we do not accept the submissions advanced by Ngai Tahu, and particularly Professor Anderson, to the effect that hapu and iwi were divided by rigid boundaries and had exclusive rights to land and resources within their respective territories. However, we noted in our discussion that Professor Anderson had considerably qualified his model and that Ngai Tahu, in their final submissions, had quoted him to the effect that rights were 'exclusive *at the level at which they were held* and some groups, sometimes, maintained boundaries' (emphasis in original).[293] That did not prevent Ngai Tahu from continuing to claim exclusive rights to northern boundaries at Parinui o Whiti and Kahurangi Point. We opted for an alternative arrangement, already supported in previous Tribunal reports such as the *Ngati Awa Raupatu Report*, to the effect that hapu and iwi had recognised 'core' territories but that the fringes of those territories were essentially zones of overlapping rights where resources were shared with neighbours. Although boundaries were sometimes mentioned, we believe that Ngai Tahu and various Te Tau Ihu iwi had overlapping rights in the statutory takiwa,

289. Ibid, p 125
290. Ibid, p 126
291. Ibid, pp 129, 130
292. Ibid, p 135
293. Counsel for Ngai Tahu, closing submissions, p 51

though to different degrees on the East and West Coasts. Rights did not depend on one factor alone, such as conquest or occupation, and could vary over time. We think it is more appropriate to think in terms of 'bundles' and 'layers' of rights. Rights recently established by conquest could be strengthened by continuing acts of use and occupation. Those who lost their rights by conquest and enslavement, could regain them later, though only by peaceful arrangements after 1840.

▶ Since there is no documentary evidence of occupation and use of resources by the various hapu and iwi before about 1820, and not a great deal that is relevant after that even as late as 1860, we have had to rely considerably on oral tradition, including much that was recorded from the mid-nineteenth century. Both Professor Anderson and Dr Tau are conscious of the limitations of oral traditions as history, and they are careful to list the various checks and balances that need to be applied in interpreting them. Those who recount oral traditions select the whakapapa and retell the historical incidents that suit their particular purposes; they own them and use them to tell their history. There is nothing particularly wrong with this kind of history so long as we appreciate its origin and purpose. It is not very different from the 'nationalist' histories that have been written the world over. It is only when an exclusive right to the history is asserted, when there are clearly two or more parties to it, that there is danger. So far as our inquiry was concerned, we need to remember that the survival and collection of oral traditions was uneven. They were recorded mainly from the winners, with few being recorded from those who were defeated. Some historians of an earlier generation, such as Elvy, did collect oral traditions from Rangitane, as he did from Ngai Tahu kaumatua and kuia. However, we do not accept Dr Tau's assertion that all the traditions that Elvy took from Rangitane derive ultimately from Ngai Tahu sources. As we have said, there is no exclusive right to the Kupe stories, which are shared by numerous iwi. Nor is there an exclusive right to the stories relating to Tapuae-o-Uenuku. As Tipene O'Regan acknowledged, two parties can gaze on the two sides of that mountain. Likewise, we think that two or more parties can view great events, and great battles of the past, such as Matariki, from their different perspectives, and use oral traditions from their side to describe them. We accept that Rangitane can use their oral traditions to assert historical rights as far south as Waiau-toa; just as Ngai Tahu can use their traditions to contradict the Rangitane version. The versions are so numerous and the alignments on one side or another so varied, that it is impossible, in our time, to be sure that one version is superior to the other or even that there was only one battle. Likewise, we can accept that, when land is under negotiation for sale to the Crown, the vendors will use a selection of historical facts and take that are most supportive of their claim. They will pick the most expansive boundaries, as we explain in our next chapter. In our view, all oral traditions are based on a selection of historical facts; their 'truths' are in the eyes of the beholders. At this distance in time we cannot select or privilege

one version of oral tradition at the expense of others. Nevertheless, there were some differences between the ways in which rights were asserted and justified on the two coasts, so we discuss these separately.

We now outline our conclusions on more particular issues, coast by coast, following the chronological framework used above.

3.7.1 The east coast

We begin with the period up to 1820. As we noted, much of the oral tradition used by both sides related to a claimed historical boundary between Rangitane and Ngai Tahu at Waiau-toa. Historians who supported that Rangitane claim, such as Dr and Mrs Mitchell and Mr Armstrong, relied considerably on the work of Elvy, who, as we noted, used Rangitane as well Ngai Tahu traditions. The historians for Rangitane say that they defeated Ngati Kuri, a hapu of Ngai Tahu, in the battle of Matariki, thereby establishing their claim to the Waiau-toa boundary. As we have noted, Dr Tau, for Ngai Tahu, using Ngai Tahu sources alone, argues that Rangitane were not even involved in the battle of Matariki. We do not think he has sustained this argument; indeed, some of the Ngai Tahu sources he used actually admit that Rangitane were involved, though not in the way that Elvy said they were. We think that Rangitane were sufficiently involved, in one way or another, to have established the basis for a claim. However, Matariki was so long ago (no one seems to be able to say more than that it was mid to late eighteenth century) and the accounts so contradictory, that a claim by Rangitane based on Matariki alone would not be sufficient to validate their claim. A successful battle, and a take raupatu based on it, has to be followed up by occupation or other kinds of use if it is to be effective against others. There is very little evidence on what happened after Matariki in the 20 to 50 years that elapsed before the Ngati Toa-led invasion. Since there are no accounts of continuing warfare between Rangitane and Ngai Tahu after Matariki, it seems that there was a peaceful accommodation between them. Certainly, there are archaeological signs of occupation on the north bank of the Waiau-toa. Rangitane told us during our field trip there that these were their sites. They may well have been, but we must remember Professor Anderson's caution that archaeological remains do not usually lend themselves to identification of the iwi responsible. Also, it is likely that the sites were occupied successively by several different iwi, probably including Rangitane. Though we believe that Rangitane have a historical claim to customary rights as far as Waiau-toa, we do not think they had an exclusive claim. Others, including Ngai Tahu, could also have had rights north of the Waiau-toa. Indeed, we regard Waiau-toa as not so much a boundary between Rangitane and Ngai Tahu as a buffer, or contestable zone in which both had rights. We need to look at the period after 1820 for further signs of the various iwi rights.

Following the Ngati Toa invasions from 1820, neither Ngati Toa nor Ngai Tahu showed any interest in establishing permanent communities in the east coast takiwa north of Waiau-toa,

though some Ngati Toa individuals with Ngai Tahu spouses appear to have remained as far south as Kaikoura. As we have noted above, Rangitane living at the Wairau and in the Sounds were attacked by Ngati Toa and their allies. Some Rangitane escaped to the interior, and some of these went to the Awatere Valley.[294] Others remained as dependants of Ngati Toa. As we also noted, some of those Rangitane carried supplies overland for Ngati Toa to use when they attacked Ngai Tahu at Kaiapohia, and some of them assisted Ngati Toa in that battle, as if to say that they were partners, albeit unequal partners, in the event. Whatever the nature of Rangitane's participation, Ngai Tahu saw it as cause to attack Rangitane when they came north to retaliate against Ngati Toa. We listed several places along the east coast, from Waipapa northwards, where Ngai Tahu attacked Rangitane kainga – a sure indication that Rangitane were then in occupation of parts of the coast. It is unlikely that all of the Rangitane occupants were killed and possible that some survivors resumed their occupation of the settlements and remained there until after 1840, thereby preserving their ahi ka. We do not accept the proposition that all Rangitane territorial rights, either in the Wairau and Pelorus Sound (where they were ultimately recognised) or on the east coast (where they were not), were extinguished by defeat at the hands of Ngati Toa or Ngai Tahu. In later years, and at our hearing of their claims, Rangitane could still demonstrate whakapapa links and memory of battle sites and other places of traditional significance in the east coast takiwa as far south as Waiau-toa. We conclude that ancestral associations can continue and must be respected as long as such memories are held. This conclusion applies equally to Ngati Toa and Ngai Tahu as well as to Rangitane.

We need to consider now whether the situation in the takiwa around 1840 was changed over the next 20 years. It was during this time that the Crown effected the Wairau and Kaikoura purchases. As we noted above, documentation increased as Europeans became more involved with the district, but there is very little, if any, comment in this material on Maori occupation of the Kaikoura coast. European settlement at Nelson and Canterbury altered the direction of economic development and Maori tended to gravitate towards those centres. It seems likely that Rangitane who survived the Ngai Tahu attacks along the coast in the 1830s gradually declined in number and perhaps disappeared by the 1850s. Although some Maori were employed on pastoral runs, their iwi identity was not recorded. But even if the east coast north of Waiau-toa was now vacant, Rangitane (and Ngati Toa and Ngai Tahu) had not necessarily lost their rights in it. In Maori custom there was no land without right holders and land that was temporarily vacant belonged to those who previously had rights in it.

In the 1840s, it was assumed by New Zealand Company and Crown officials that Rangitane, as a 'conquered' people who either were 'enslaved' by Ngati Toa or became fugitive bands in the interior, were without rights. Their status in Te Tau Ihu was carefully examined in

294. Armstrong, 'Right of Deciding', p 17

our first preliminary report, where we concluded that the result of 'conquest' for Rangitane and other Kurahaupo people was 'more nuanced than is often allowed'.[295] The preliminary report noted that the Tribunal's *Rekohu* report had argued that 'the rights of those who had been defeated might survive conquest and even in a very harsh environment'.[296] Applying that to Te Tau Ihu, the preliminary report stated that 'The Kurahaupo tribes remained with the land and . . . where that . . . land continued to be occupied by an identifiable community, even on the "sufferance" of new, more militarily powerful arrivals – ancestral rights survived.' Although the northern tribes controlled a wide region, this could not encompass 'the whole of Te Tau Ihu with its multiple bays and rugged interior'. The free Kurahaupo groups who survived in the interior and later rejoined the settled, tributary communities no longer had exclusive rights but 'valid customary rights nonetheless'.[297] Their ancestral rights could not be sundered in the short time between the northern conquests and the coming of British rule. Under customary arrangements, captured chiefs who proved their worth could regain mana, and this continued after 1840, when some such as Ihaia Kaikoura at Port Underwood were accepted as leaders of mixed communities that included Ngati Toa. Intermarriage with Ngati Toa chiefs also cemented relations and enhanced status (for instance, Te Kanae at the Wairau had a Rangitane wife). Such customary arrangements were further encouraged by British rule, when slavery was no longer permissible. By 1853, when the first Waipounamu deed was executed with Ngati Toa, Rangitane had so recovered their status that they were described, with others, as 'co-equal claimants' with Ngati Toa. In 1856, Rangitane signed one of the Waipounamu deeds on their own, and another with Ngati Kuia. By the 1850s, Rangitane and other Kurahaupo groups 'were largely free of any effective overlordship'.[298] What has been said in our first preliminary report for Rangitane in Te Tau Ihu applies equally to their rights in the statutory takiwa, and in relation to Ngai Tahu as well as Ngati Toa.

We conclude that Rangitane, Ngati Toa, and Ngai Tahu all had rights in the east coast takiwa, though those rights were based on different take. As we understand it, their rights were as follows.

(1) *Rangitane's rights*

Rangitane had rights that had been initiated by campaigns originally against Waitaha and subsequently against Ngati Kuri of Ngai Tahu. Those rights were developed by subsequent occupation and use of resources as far as Waiau-toa and Waipapa which persisted until the time of the Ngai Tahu attacks on them in the 1830s. Since Ngai Tahu did not follow those attacks by settlement in the area, Rangitane were free to resume their occupation or use

295. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, p 62
296. Ibid, p 82
297. Ibid, pp 82–83
298. Ibid, p 68

of the coast north of Waiau-toa. Even though Rangitane may not have been in occupation in any great number, or at all, by the time the Wairau and Kaikoura purchases were negotiated, they retained ancestral associations. The Crown was obliged to consult Rangitane who were still living at the Wairau and Pelorus (as they were eventually consulted for the Waipounamu purchase). But we make no findings on the issue here, since we do that in the nementhapter.

(2) *Ngati Toa's rights*

Ngati Toa had rights based on their successful invasion from the 1820s. So far as the east coast was concerned, Ngati Toa defeated Ngai Tahu, as we noted, in the campaigns to Kaikoura, Kaiapohia, and Akaroa, though their victories were not consolidated by occupation so far south. There was some hesitancy in expressing Ngati Toa's claim to the east coast takiwa, in that their counsel asserted a title as far as Kaikoura rather te). Kaiapoi. This contrasts with the assertiveness of their original claim while negotiating the Wairau purchase, when they asserted a claim as far as Kaiapohia, the site of their earlier defeat of Ngai Tahu. As we detail in chapter 3, it was that latter boundary that the Crown recognised in the Wairau purchase. Ngati Toa defeated Rangitane at the Wairau, the Sounds, and Cloudy Bay to Cape Campbell but did not, so far as we know, attack any Rangitane residing on the east coast. We presume it was Rangitane from the Wairau who were used by Ngati Toa to assist in the final attack on Kaiapohia. It was the Ngati Toa defeat of Ngai Tahu, not of Rangitane, that gave them the opportunity to develop rights to the east coast. Ngati Toa partially consolidated their defeat of Ngai Tahu by temporary occupation along the coast to Kaikoura in the later 1830s and more lastingly by takawaenga marriages with Ngai Tahu at Kaikoura. Nevertheless, Ngati Toa could still have more fully exercised their rights, based on their victories against Ngai Tahu, by sustained residence or further acts of occupation or both. The fact that Ngati Toa did not choose to exercise that right was due largely to their engagements elsewhere on both sides of Cook Strait, not, in our view, to a fear of attack by Ngai Tahu, who had withdrawn to Kaiapoi. In the late 1830s and early 1840s, Ngati Toa and Ngai Tahu negotiated a peace settlement that could have been implemented by further occupation, but their attention was directed elsewhere. However, the Crown awarded Ngati Toa an exclusive right to the east coast as far as Kaiapoi with the Wairau purchase, though it later over-rode that exclusivity when it purchased much of the east coast a second time from Ngai Tahu with the Kaikoura purchase. We make findings on these issues in our next chapter.

(3) *Ngai Tahu's rights*

In our view, Ngai Tahu also had rights in the east coast takiwa, based on their pre-1820 rights of occupation. Even though Ngai Tahu had withdrawn south, such rights survived the invasions from the north, as demonstrated by their campaigns against Ngati Toa in the 1830s. However, those fights against Ngati Toa and their allies in Te Tau Ihu were inconclusive. The

subsequent peace arrangements left neither side in ascendancy, with neither asserting an exclusive title to the east coast north of Waiau-toa. That was to come later – in negotiation with the Crown in the Wairau and Kaikoura purchases. It could be said that Ngai Tahu exercised a partial conquest of Rangitane in their attacks on them as they advanced up the coast, but this was also incomplete since Ngai Tahu did not occupy the coast north of Waiau-toa and did not prevent Rangitane from reoccupying it. Nevertheless, we consider that Ngai Tahu, like Ngati Toa, had a right to occupy that part of the coast, had they chosen to do so. But we do not consider that they had an exclusive right, since they did not occupy any land north of Waiau-toa and did not completely obliterate Rangitane, let alone Ngati Toa.

We are thus dealing with a situation in which all three iwi had rights in a district where none of them was in occupation in any force as a community, though it is probable that all three iwi were making seasonal use of resources in different parts of the takiwa. According to Weld, Kaikoura Whakatau of Ngai Tahu was familiar with hunting kakapo in the headwaters of the Awatere River.[299] Mr Armstrong cites evidence that we detailed above of Rangitane living in the same area. And it is likely Ngati Toa continued to hunt ducks seasonally at Kaparatehau after Te Rauparaha's narrow escape. The Tribunal, in its Whanganui a Tara inquiry, examined similar instances of seasonal use of otherwise unoccupied land at Ohariu (on the south-west fringes of the infant Wellington settlement) and in Heretaunga (the Hutt Valley). These were typical over-lapping zones between the Taranaki iwi, who occupied Wellington and the lower Hutt Valley, and Ngati Toa at Kapiti and Porirua. Neither side permanently occupied and cultivated the overlapping zones but both occasionally used the resources of the bush and the sea. In similar fashion to their claims in Te Tau Ihu, Ngati Toa claimed the land by virtue of their raupatu of the whole Wellington–Kapiti Coast district, and their leadership, through Te Rauparaha, of that conquest. They still occasionally exercised food-gathering rights at Ohariu and Heretaunga. The Tribunal accepted that both sides had ahi ka in these districts. It specifically concluded that by 1840 'Ngati Toa had ahi ka in the Porirua basin, parts of Ohariu (other parts of which were used or occupied by Ngati Tama), and parts of Heretaunga'. The Tribunal added that 'ahi ka rights were not confined to the area of day-to-day living . . . but extended to other areas of association or influence'.[300] We consider that this latter situation applied to the east coast takiwa and that it reinforces our conclusion that all three iwi had rights in the takiwa north of Waiau-toa.

Our overall conclusion is that all three peoples – Rangitane, Ngati Toa, and Ngai Tahu – had legitimate overlapping customary rights in the area between Parinui o Whiti and Waiau-toa and that none of these rights had been effectively extinguished before the Wairau purchase of 1847. But we make no findings on Treaty breach here. That has to be considered as we examine the Crown purchases from 1847 in our next chapter.

299. John Sherrard, *Kaikoura: A History of the District* (Kaikoura: Kaikoura County Council, 1966), pp 47–48

300. Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District* (Wellington: Legislation Direct, 2003), p 41

3.7.2 The West Coast

The period up to about 1820 is obscure. It appears to us that the key reality is the limited value of this part of the West Coast, from Kahurangi Point down to the Kawatiri district, to the various tribes occupying more favoured districts to the north and south. It was an inhospitable area in which there were few resources and travel was extremely difficult. The few people who occupied it were migratory and used the resources on a seasonal basis. It is not surprising, therefore, that the evidence for customary rights in the northern part of the takiwa at this time is fragmentary and ambiguous. It appears that Ngati Wairangi had associations with the area before they were displaced southwards by Ngati Tumatakokiri and eventually absorbed by Ngai Tahu when that tribe came to Te Tai Poutini. It is a matter of dispute how far south the power of Ngati Tumatakokiri extended – as far as Mawhera (according to Dr and Mrs Mitchell) or to Karamea or even just to Kahurangi (depending on how Alexander Mackay's brief statement is interpreted). In the wider Te Tau Ihu region, Ngati Tumatakokiri were later attacked by Ngati Apa in forays from the north, and on the West Coast they were assailed from the south by Ngai Tahu, so that by the second decade of the nineteenth century they had ceased to exist as an independent iwi. Individuals continued to identify themselves as Ngati Tumatakokiri, however, and some whakapapa of both Ngati Apa and Ngai Tahu included forebears from this defeated tribe. Again, it is disputed how far south Ngati Apa held sway on the West Coast after this – further south than Kawatiri (according to Dr and Mrs Mitchell) or no further than Kahurangi (according to Professor Anderson). It is significant that Professor Anderson, who argues against the presence of Ngati Apa south of Kahurangi, admits that Ngai Tahu were 'invisible' there too. He says that the area was probably a borderland, and we agree. This helps to explain why the claims of different iwi to the area are so much in conflict. It is also important that the victories over Ngati Tumatakokiri won by Ngati Apa and Ngai Tahu were very recent. The result was that in 1820 the rights of both these tribes in the area between Kahurangi and Kawatiri were still fluid and unsettled, with neither of them able to show that they had exclusive control.

The invasion of Te Tau Ihu by allied tribes from the North Island took place not long before the Treaty, in the 1820s and 1830s. It altered the situation considerably, though its comparatively recent occurrence meant that tribal rights were probably still not altogether settled in 1840. On the West Coast the incursions of the northerners, led by Ngati Rarua, culminated in the resounding victories of Niho and Takerei down the coast as far south as Okarito. Whether Ngati Toa's special role as the initiator and overall sponsor of the South Island raupatu gave them rights in the West Coast districts conquered by their allies is disputed among the northern tribes. All of them, except Ngati Toa themselves, deny that the rights claimed in this way were valid. As far as the interests of the defeated tribes are concerned, Ngati Apa's influence in western Te Tau Ihu, including any on the West Coast, was

severely affected by the northern invasion. The iwi was not completely wiped out, however, and some of its members emerged in the West Coast districts later. For Poutini Ngai Tahu, the invasion carried with it such indignities as the capture of the principal chief of the area, Tuhuru. The nature of the occupying presence of Ngati Rarua and their allies in the 1830s is not altogether clear, but it included settlement, intermarriage with Ngai Tahu, and control of the pounamu trade. The defeat of Ngai Tahu was thus fairly comprehensive, but the extent of the victors' control became somewhat more uncertain after 1837 when one of their important chiefs, Te Puoho, was himself defeated far to the south in Murihiku. Niho and Takerei had protected the Ngai Tahu community on the central coast as Te Puoho passed through on his way south, but now they reduced their presence on the West Coast south of Te Tai Tapu. It is disputed whether this amounted to a complete withdrawal, meaning that the northerners' interests were abandoned, or was merely a scaled down but continuing pattern of residence, visits, and influence that kept their rights alive. Whatever the case after 1837, it is clear that some members of the northern tribes were still living on the West Coast in the 1840s. Whether they had been there in 1840 or whether residence and other aspects of the northern presence had been resumed after that date is obscure, but we see no reason to doubt that the presence was continuous.

In many other parts of New Zealand, events moved fast in the two decades after the Treaty was signed in 1840, but until 1860 the West Coast remained a region largely unknown and unvisited by Pakeha. Consequently, it was still the case that there is comparatively little contemporary evidence about tribal rights there. The main documentary evidence available to us is the fairly insubstantial references contained in the journals of two explorers who visited the area in the mid-1840s. This evidence includes mention of the claims still being made by Niho in 1846, and indications that the residence and other activities of the northern tribes in the area had not ceased altogether. It is clear also that the region was still sparsely inhabited, especially between Kahurangi and the northernmost 'Arahura' settlement at Kararoa, and that there were no signs of any reassertion of Ngai Tahu influence north of that place. The evidence does include, however, a record of the establishment of a new settlement at Kawatiri and testimony that those involved had some kind of Ngati Apa identity. The significance of this identity is disputed, with Ngati Apa alleging that it pointed to a reoccupation of ancestral territory and Ngai Tahu arguing that the 'Ngati Apa' members of the Kawatiri community settled there with the permission of Ngai Tahu and were essentially Ngai Tahu people in any case. It is clear that the interests of the tribes had continued to evolve since 1840.

Our conclusion is that the various tribes with a historical presence in the West Coast part of the takiwa all had rights, although as on the east coast they varied considerably in character. Our understanding of their rights is as follows.

3.7.2(1)

(1) *Ngati Apa's rights*

Ngati Apa had rights deriving from their defeat of Ngati Tumatakokiri, who practically disappeared as an iwi, partly by absorption into the victorious tribe. For a comparatively short period after their displacement of the previous occupiers, Ngati Apa frequented the area south of Te Tai Tapu towards Te Tai Poutini, where a branch of Ngai Tahu was based who also successfully attacked Ngati Tumatakokiri. Both of the victorious iwi used the resources of the remote borderland area between Te Tai Tapu and Kawatiri, probably on a purely seasonal basis only. In the 1820s and 1830s, these shared and probably competing rights were dramatically brought to an end by the invasions of Ngati Rarua and their allies, though not permanently. We repeat the point we made in relation to Rangitane on the east coast (and which we discussed more fully in our first preliminary report) that the conquest of the Kurahaupo tribes in the South Island was less complete than Pakeha in the post-Treaty period assumed. In the case of Ngati Apa, members of the tribe survived and there was potential for their ancestral rights to be revived more fully. This becomes particularly relevant in a large and sparsely settled region like the northern West Coast below Kahurangi Point. When the hand of the northern invaders lightened not long before 1840, the rights of Ngati Apa, who had formerly used the area along with their southern neighbours Ngai Tahu, could revive somewhat, though there is no evidence that either tribe had resumed their former use of the area by the mid-1840s. This was the context, however, in which Ngati Apa could emerge very soon after that as part of a resettlement of the vacant Kawatiri area. The recognition by both Ngai Tahu and the Government land purchasers of their right to be there will be covered in our next chapter.

(2) *Ngati Toa's rights*

Ngati Toa did not participate directly in the invasion and settlement of the West Coast, but claimed rights there as the overriding authority in the South Island raupatu as a whole. If what Mackay called Tuhuru's 'act of submission' to Te Rauparaha occurred, it was presumably made in this context. Ngati Toa's claim did not deny the rights of their allies, but the expectation was that they would defer to Ngati Toa when it came to decisions about sale. This was a claim rejected by all three of the allied conquerors. We accept, however, that Ngati Toa's role in the wider raupatu did give them a notional or potential right on the West Coast, which had not lapsed by 1840, but it had not been followed up by occupation and settlement and never was, and so did not result in the development of any continuing customary rights in the area. Whether the Crown recognised any interest of Ngati Toa in this area during the purchase period will be considered in the next chapter.

(3) *Ngati Rarua's rights*

Ngati Rarua initially acquired rights through raupatu. In the western parts of the South Island down to Arahura and beyond, they were the unquestioned victors (or at least the

leaders of the victorious allies) over Ngati Apa and Ngai Tahu in the 1820s and 1830s. For some years, this achievement was plainly manifested in their dominance in the relationship with Ngai Tahu in Te Tai Poutini, but after Te Puoho's defeat in Murihiku in 1837 there was a lessening of Ngati Rarua's presence in the area. It did not cease altogether, however, and was maintained in several important ways, including the obtaining of pounamu and the residence of chiefs and others, into the 1840s and 1850s. Probably, it was slowly declining as iwi members moved away and the tribe increasingly focused its concerns elsewhere, but the right to occupy land (or at least the freedom to take up and exercise such a right) had not terminated by 1840 as Ngai Tahu claimed. Some Ngati Rarua remained in the area and were awarded interests in the reserves established under the Arahura purchase arrangements.

(4) *Ngati Tama's rights*

Ngati Tama derived their rights through their participation in the invasion and occupation led by Ngati Rarua (although they do not concede that Ngati Rarua had any primacy as far as rights are concerned). We believe that Ngati Tama's rights continued in the same way as Ngati Rarua's, as outlined above.

(5) *Te Atiawa's rights*

Te Atiawa similarly acquired and retained rights through participation in the invasion and occupation, although on a smaller scale.

(6) *Ngai Tahu's rights*

Ngai Tahu also had rights in the whole region up to Kahurangi Point. In the remote districts north of Kawatiri, they were based on a history of insubstantial seasonal resource use in a borderland formerly controlled by Ngati Tumatakokiri and subsequently used by Ngati Apa as well as Ngai Tahu. This area was temporarily lost to the northern invaders in the 1820s and 1830s, and Ngai Tahu's West Coast heartland of Te Tai Poutini had to be shared with them, but Ngai Tahu survived as a community there. With the slowly declining presence of Ngati Rarua and their allies after 1840, Ngai Tahu were in a position, along with Ngati Apa, to reclaim the rights that they had previously enjoyed in the northern districts. By 1860, there was little or no evidence that they had begun to do so, apart from their participation in the Kawatiri settlement, which they acknowledged in that year to be one in which a Ngati Apa interest existed.

Again, therefore, we are dealing not with exclusive rights, but with a situation in which all the tribes involved had rights to varying degrees. We are not concerned with the main part of Ngai Tahu's West Coast takiwa, Te Tai Poutini, but with the less settled, not well defined, and contested northern districts, especially Kawatiri and the long stretch of coastal land between there and Kahurangi Point. We conclude that all six tribes – Ngati Apa and Ngai Tahu from earlier times and Ngati Toa, Ngati Rarua, Ngati Tama, and Te Atiawa after the

3.7.2(6)

northern allies' invasion – had legitimate overlapping rights in the area between Kahurangi and Kawatiri and that none of these rights had been effectively extinguished before Crown purchasing began in the 1850s. The extent to which the Crown recognised or failed to recognise these interests during the purchase period will be considered in the next chapter.

CHAPTER 4

EARLY CROWN AND NEW ZEALAND COMPANY DEALINGS

4.1 Introduction

This chapter begins with a consideration of the relationship between Te Tau Ihu Maori and the first European visitors and settlers in the district. We open with a discussion of pre-1839 contact, from Tasman in 1642 through Cook in the 1770s to the impact of sealers, whalers, and traders in the 1820s and 1830s. We then discuss the New Zealand Company transactions of 1839 and the early relations between the Crown, the settlers, and Maori in the years immediately following the signing of the Treaty of Waitangi. Key developments during the early 1840s were the New Zealand Company's 'negotiations' with resident Maori in Te Tai o Aorere (also known as Blind Bay or Tasman Bay) and Mohua (Golden Bay), the establishment of the settlement at Nelson, and the escalating tensions between Maori and the company, which culminated in the conflict at the Wairau. In the wake of that incident, land claims commissioner William Spain investigated the company's Nelson purchase and subsequently recommended that it be awarded 151,000 acres for its Nelson settlement, which was confirmed by Governor FitzRoy's Crown grant of 29 July 1845.

The company's claim to Nelson was part of its massive purported 'purchase' of middle New Zealand, which was based on the Kapiti and Queen Charlotte Sound deeds negotiated by William Wakefield in 1839. These deeds are examined in this chapter, along with further payments for land, designated as 'presents', by the company in 1841–42. Spain's inquiry into the company's Wellington purchase, which preceded his Nelson inquiry, has been examined by the Tribunal's *Te Whanganui a Tara me ona Takiwa* report, and we rely on that to background the Nelson inquiry and award. We also examine Spain's hearing at Otaki in April 1843, when he interviewed Ngati Toa and Te Atiawa chiefs (including Te Rauparaha and Te Rangihaeata), and we discuss his brief aborted hearing at Nelson in August 1844. There, Spain took evidence from several company representatives and one Maori witness, Te Iti of Ngati Rarua, before adjourning the hearing. Spain then agreed to a proposal from Colonel Wakefield to suspend the hearing in favour of a negotiated settlement based on the company making further payments to local Maori claimants, as had already been done in Wellington. Although Spain told Maori present at Nelson that no further payment was strictly necessary, and though he sought to portray the £800 subsequently distributed as

merely a gratuity, his subsequent recommendation in favour of a 151,000-acre award to the company sat uncomfortably alongside his finding that the original Ngati Toa deed had been seriously deficient. That was especially the case considering that the 'presents' distributed by Captain Wakefield in the early 1840s could hardly be considered payments for land under either British or Maori law. Thus, Spain's recommendation in favour of the company was seriously flawed.

Spain's failure to complete the judicial inquiry required by the Land Claims Ordinance 1841, including his failure to examine the customary rights of all of the resident Maori iwi, is one of the major issues to be considered in this chapter. It was one of the issues examined in our hearing of generic issues, was raised frequently during our hearing of iwi claims, and was dealt with in closing submissions by claimant and Crown counsel.

We examine claimant and Crown legal submissions relating to this period, which are largely focused on the activities of the New Zealand Company and the Crown's relationship with the company and its activities, along with the Spain commission. The chapter concludes with our comments and findings on these issues.

4.2 First Contacts

4.2.1 Abel Tasman, 1642

The first known encounter between Maori and Europeans within Te Tau Ihu took place at Mohua on 18 December 1642, when the Dutch ships the *Zeehaen* and *Heemskerck*, under the overall command of Abel Tasman, were approached by two waka shortly after anchoring in the bay. The Maori group, who were most likely Ngati Tumatakokiri, called out to the visitors, and they replied in kind. The Maori party then blew on a shell trumpet and the Dutch responded with their own trumpet-blowing.[1] According to one account, the Dutch then fired a cannon, at which 'The Southlanders began to rage terribly, tooting on a horn, and returned to land'.[2]

The following day, a waka approached the Dutch ships, but the 13 people within would not board to view the knives and linen proffered by Tasman's crew. The waka was soon joined by seven others, at which stage the encounter turned violent – the Maori flotilla attacked the occupants of a cockboat, killing three and mortally wounding a fourth, before fleeing the ensuing gun shots with one of the bodies. By this point, 22 waka had gathered on shore, and half advanced toward the Dutch, who opened fire, killing a man holding a small white 'flag'. Tasman then left the district, dubbing it 'Moordenaers Baij', or 'Murderers Bay'.[3]

1. Anne Salmond, *Two Worlds: First Meetings between Maori and Europeans, 1642–1772* (Auckland: Penguin Books, 1991), pp 21–22, 77–79
2. Henrik Haelbos (Salmond, *Two Worlds*, pp 78–79)
3. Salmond, *Two Worlds*, pp 79–82

This brief and violent encounter was scarcely recalled in later Maori accounts; it was perhaps a memory that was largely lost with the demise of Ngati Tumatakokiri.[4] By contrast, James Cook's more sustained contact during the 1770s left a lasting impression on Te Tau Ihu Maori.

4.2.2 James Cook, 1770s

James Cook's ship, the *Endeavour*, stayed at Ship Cove for three weeks over January and February 1770. Cook returned to the cove on several occasions on subsequent expeditions, using it as a base to rest, maintain the ships, and procure fresh food and water supplies. Both ships on Cook's second expedition stayed at Ship Cove between May and June 1773, and Cook's ship, the *Resolution*, returned for several weeks in November of that same year. The other ship on the expedition, the *Adventure*, which was commanded by Captain Tobias Furneaux, arrived shortly after Cook had departed and also stayed approximately three weeks. Cook made a return visit in October and November 1774, and his final visit to the district was in early 1777.[5]

Anne Salmond suggests that Totaranui, which Cook named Queen Charlotte Sound, was dominated by Rangitane in the 1770s, with Ngati Apa controlling the outer reaches. The political situation in the district was volatile and skirmishes were common, as a consequence of which the population was correspondingly small and mobile.[6] Cook described a total population of between 300 and 400 people who 'live despers'd along the Shores' and relied on fish and fernroot for their sustenance.[7]

Sailing into Ship Cove on 15 January 1770, the *Endeavour* was greeted by a haka from a large crowd assembled at a pa on Motuara Island.[8] The visit was not a total surprise to the people of Totaranui, who had heard of Cook's journey around the North Island.[9] A party of four waka 'rowd round and round the ship defying and threatening us as usual', before 'a very old man' asked to come on board. The man, Topa (or Topea), was greeted by Tupaia, the Tahitian arioi (high priest) and navigator accompanying Cook. He was given some presents, after which he returned to the waka. The following day, a party of about 100 people approached the *Endeavour*, offering to exchange dried fish for European goods. This

4. Ibid, p 82. Ruth Allan notes an account given by Ngati Tumatakokiri survivors to James Mackay in about 1859. Mackay was informed that their ancestors had met a European party near Separation Point and had killed some of them: Ruth Allan, *Nelson: A History of Early Settlement* (Wellington: A H & A W Reed, 1965), p 9.

5. Hilary Mitchell and Maui John Mitchell, 'A History of Maori of Nelson and Marlborough', 2 vols, report commissioned by Te Runanganui o te Tau Ihu o te Waka a Maui, 1992 (doc A9), vol 1, p 4-19; Anne Salmond, *Between Worlds: Early Exchanges between Maori and Europeans, 1773–1815* (Auckland: Penguin Books, 1997), pp 89, 100, 105, 109, 113

6. Salmond, *Between Worlds*, pp 65, 141

7. Mitchell and Mitchell, 'History of Maori', vol 1, p 4-65

8. Salmond, *Two Worlds*, p 241

9. Salmond, *Between Worlds*, p 66

exchange had its moments of conflict, Cook at one point firing a musket loaded with duck shot at a man who attempted to come on board, but the meeting ended peacefully, with the visitors talking with Tupaia. They informed him that this was the first time that a ship had visited their coast. Cook, Tupaia, and Joseph Banks went ashore that afternoon.[10]

Over the next few weeks, Cook's party visited a number of places in the area, and trade developed between the Kurahaupo people and the European visitors, Maori exchanging dried fish for nails, cloth, paper, and other European goods. There was also a market for preserved heads and human bones. Although generally amicable, relations were punctuated by misunderstandings and occasional conflict. Notably, Jonathon Monkhouse's desecration of a tapu site led to a skirmish, during which the European party shot and killed one of the Maori.[11]

This pattern of relations was re-established on Cook's return in 1773. Local and visiting groups participated in a steady trade with the Europeans, exchanging fish, 'curiosities', and sexual favours in return for a variety of European goods, including nails, weapons, tools, and clothing. Cook attempted to introduce livestock and European crops to the district, but Tupaia had died of scurvy and malaria in Batavia in 1770, and communication between the two groups suffered without his interpretation skills.[12]

Minor conflict, generally associated with pilfering, remained a feature of relations and escalated during the *Adventure*'s second (and solo) stay at Ship Cove in December 1773. A dispute arose with a European party cutting grass at Grass Cove, apparently because one of the group took an adze and refused to pay for it. The local Maori snatched some bread in retaliation, a fight broke out and escalated, and 10 Europeans were killed and then eaten in a hakari.[13]

The *Adventure* left the next day. When Cook returned on the *Resolution* in October 1774, he was surprised that Captain Furneaux had not left a message for him and was confused by the initial caution of Maori in not visiting him on his arrival. This wariness was dispelled once it became clear that Cook did not know the reason for the *Adventure*'s abrupt departure, and when he left after several weeks, he was still none the wiser.[14] However, on his return in 1777, Cook did inquire into the incident at Grass Cove, but, to the surprise of Maori, he took no action against the man identified as the ringleader. Salmond remarks that this resulted in a loss of respect for Cook on both sides, Maori viewing his failure to take

10. Salmond, *Two Worlds*, pp 241–243. Once ashore, they found human bones, their first evidence supporting the rumours of cannibalism they had heard during their visit to Aotearoa. Banks was pleased to have proof, the crew were horrified, and the issue dominated their visit to Totaranui (pp 243–244).
11. Ibid, pp 246–250
12. Salmond, *Between Worlds*, pp 68–78
13. Ibid, p 143
14. Ibid, pp 105, 109–113

utu as detracting from his mana. Relations between the crew and Totaranui Maori during Cook's final visit were 'complicated and uneasy'.[15]

Interaction during the 1770s had given both the British expedition and Te Tau Ihu Maori an insight into one another's cultures. The mutual advantages of trade ensured that relations were largely amicable, but the tenuousness of this was suggested by the occasional outbreaks of violence, which peaked with the conflict at Grass Cove. That incident exposed a gulf of misunderstanding from which relations between Cook's party and Te Tau Ihu Maori did not fully recover.

4.3 Whalers and Traders

From the 1790s, European whalers, sealers, and flax traders visited Te Tau Ihu in increasing numbers.[16] Sealing peaked in the early 1820s and declined after 1826, while whaling became more significant. Whalers were the first resident Europeans in the district, John Guard leading the way by basing himself at Tory Channel in 1827. Others followed very shortly afterwards.[17] Whaling became an integral aspect of the regional economy, and the whalers were incorporated into the society. Most married local women, often the daughters of rangatira.[18] In this way, individuals such as Richard Barrett, Jackie Love, and James Heberley were involved with Te Atiawa communities, Joseph Toms and James Wynen with Ngati Toa, and Captain John Blenkinsopp with Ngati Rarua.[19]

By the late 1830s, there were two whaling bases in the district: one at Te Awaiti on Arapaoa Island and one at Port Underwood. Travelling through the region in 1839, the naturalist and explorer Ernst Dieffenbach found approximately 40 Europeans at the whaling settlement of Te Awaiti, all of whom lived with Maori women. When the whaling season closed for the summer, the whalers lived 'dispersed over the sound' with their wives' families.[20] Dieffenbach assessed the outcome of 15 to 20 years' interaction between Europeans and Maori living on both sides of Cook Strait:

15. Ibid, p 126. Salmond further elaborates on this in her recent publication *The Trial of the Cannibal Dog: Captain Cook in the South Seas* (London: Penguin Books, 2004).

16. Mitchell and Mitchell, 'History of Maori', vol 1, pp 5-3, 5-12–5-13

17. Tony Walzl, *Ngati Rarua Land Issues, 1839–1860* (Wellington: Ngati Rarua Iwi Trust, 2000) (doc A50(1)), p 17

18. Mitchell and Mitchell, 'History of Maori', vol 1, pp 5-4, 5-12, 5-13, 7-11, 8-2, 8-8

19. Ibid, p 3-47; Hilary Mitchell and Maui John Mitchell, 'Wai-56 and Wai-102, Report No 99-3: Land Purchases, Court Judgments, Iwi Manawhenua', revised ed, report commissioned by the Ngati Koata no Rangitoto ki te Tonga Trust, Ngati Tama Manawhenua ki te Tau Ihu Trust, Te Atiawa Manawhenua ki te Tau Ihu Trust, Wakatu Incorporation, and Ngati Rarua Atiawa Iwi Trust, 1999 (doc A64), pp 7–9; Walzl, *Land Issues*, p 18

20. Ernst Dieffenbach, *Travels in New Zealand: With Contributions to the Geography, Geology, Botany, and Natural History of that Country*, 2 vols (1843; reprinted Christchurch: Capper Press, 1974), vol 1, pp 38, 41, 63

> Mutual advantage, and the connection of almost all these Europeans with native women, from which connection a healthy and fine-looking half-caste race has sprung up (about 160 in number), kept the white men and natives in harmony with each other, and has cemented their union. Thus we find Europeans arrayed against Europeans in the combats of the different tribes amongst whom they lived, or emigrating with them to another locality, or following the hazardous chase of the whale with a crew of natives.[21]

Communities with their own Pakeha benefited from their direct access to European goods and from the economic opportunities offered by the whaling industry and through trading. Trading benefits extended to nearby communities not directly involved in whaling. For example, the whalers used Rangitoto Island as a resting point on their way to Te Awaiti, an opportunity that Ngati Koata took full advantage of by establishing market gardens and by raising pigs and poultry to be traded with visiting whalers. Trade was mediated through their resident whaler, James McLaren.[22] Trade was also significant for the Te Atiawa communities of Totaranui, who planted extensive taro and potato cultivations and raised large numbers of pigs.[23]

Alliances with Pakeha were also beneficial from a strategic perspective.[24] The advantages were summed up by the Te Atiawa rangatira Te Wharepouri of Ngauranga, who remarked on the importance of securing 'a White man to barter with the people and keep us well supplied with arms and clothing; and . . . I should be able to keep these White men under my hand and regulate their trade myself'.[25]

Surprisingly few of the early European residents pursued cases when the Crown opened its inquiry into private land claims after 1840. Although a number of claims were registered in the Queen Charlotte Sound and Cloudy Bay region, most were either abandoned or disallowed.[26] Of the four claims involving land in Totaranui, for example, two did not proceed beyond registration and a third was not investigated because the claimant, James Jackson, lacked the necessary documents (the claim was subsequently investigated in 1869, resulting

21. Dieffenbach, *Travels in New Zealand*, p 191

22. Heather Bassett and Richard Kay, 'Nga Ture Kaupapa o Ngati Koata ki te Tonga, c 1820–1950', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A76), pp 26–27

23. Dr Donald Loveridge, '"Let the White Men Come Here": The Alienation of Ngati Awa/Te Atiawa Lands in Queen Charlotte Sound, 1839–1856', report commissioned by the Crown Forestry Rental Trust, 1999 (doc A53), p 24

24. Professor Richard Boast, 'Ngati Toa and the Upper South Island: A Report to the Waitangi Tribunal', revised ed, 2 vols, report commissioned by the Crown Forestry Rental Trust, 2000 (doc A56), vol 1, p 58; Dr David Williams, 'The Crown and Ngati Tama ki te Tau Ihu: An Historical Overview Report', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A70), p 62

25. Edward Jerningham Wakefield, *Adventure in New Zealand, from 1839 to 1844: With Some Account of the Beginning of the British Colonization of the Islands*, 2 vols (1845; reprinted Auckland: Wilson and Horton, [1971]), vol 1, p 202 (Susan Kiri Leah Campbell, '"A Living People": Ngati Kuia and the Crown, 1840–1856', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A77), p 62)

26. Walzl, *Land Issues*, pp 18–19

in a Crown grant of 150 acres). Only Joseph Toms' claim was investigated by Spain, on the basis of which Toms received a Crown grant.[27] With the obvious exception of the New Zealand Company's claim, there do not appear to have been any other pre-Treaty transactions in Te Tau Ihu that resulted in Crown grants.[28]

Interaction between Pakeha and Maori was concentrated in the north-eastern coastal region, which was also the most populated area in Te Tau Ihu. In 1840, Dieffenbach estimated a Maori population for this region of 1500, of whom 400 lived at Cloudy Bay, 390 in Queen Charlotte Sound, 250 on Admiralty Islands and Pelorus Sound, and 60 on Rangitoto Island. Dieffenbach estimated the Golden Bay and Tasman Bay population at 400.[29]

Captain Frederick Moore was one of the few early European settlers in the north-west. Based with Ngati Rarua at West Whanganui from 1840, he established himself as a trader with the various groups around Mohua and Te Tai o Aorere.[30]

Prior to 1840, direct contact with Europeans was minimal for those who were not involved in whaling. On his arrival at Te Tai o Aorere in January 1827, the French naval explorer Dumont D'Urville met a group that appeared not to have had previous contact with Europeans. David Armstrong surmises that this was a Ngati Apa community. Relations between D'Urville and those he encountered followed the familiar pattern of mutual curiosity and an eagerness to trade. The day after his arrival, D'Urville was engaged in trading European goods for cloaks and native flax.[31]

As late as the mid-1840s, there were a few areas where direct contact with Europeans remained minimal. This is apparent from Charles Heaphy and Thomas Brunner's explorations of the inland Nelson region with their guide, Kehu (of Ngati Apa and Ngati Tumatakokiri). Travelling in the West Coast area in March 1846, Heaphy was informed by those living at Kararoa that this was the first time they had met a Pakeha.[32] However, this lack of contact was unusual by this date, as European settlement had increased in the wake of the establishment of the New Zealand Company settlement at Nelson.

27. Loveridge, 'Let the White Men Come Here', pp 31–33. The Toms case is the basis of the Te Kotua whanau claim (Wai 648), which is considered in depth in chapter 12.

28. 'Return of Land Claims in the Southern Island', not dated, *Compendium*, vol 1, pp 81–94. According to this return, the only other claim that was recommended was W Couper's claim to have acquired land in the Cook Strait region in 1839. Couper was granted £897 in compensation for this claim in 1851 (p 89).

29. Dieffenbach. As Maui John and Hilary Mitchell note, the numbers given by Dieffenbach and others during the 1840s should be regarded as approximations rather than exact censuses. The Mitchells outline other estimates of the Maori population of Te Tau Ihu in the 1840s, most of which accord with Dieffenbach's estimate, although one gives as high a total as 2650: Hilary Mitchell and Maui John Mitchell, 'History of Maori', vol 2, pp 11-26–11-30.

30. Walzl, *Land Issues*, pp 48–50

31. David Armstrong, 'Ngati Apa ki te Ra To', report commissioned by the Ngati Apa ki te Waipounamu Trust Claims Committee, 1997 (doc A29), pp 14–16

32. Ibid, pp 45–56

4.4 The Arrival of the New Zealand Company, 1839

The New Zealand Land Company, usually referred to simply as the New Zealand Company, was formally established in London on 2 May 1839. It had been reconstituted from the New Zealand Association formed two years earlier, and traced its origins back to the original New Zealand Company of 1825.[33] On 17 August 1839, the company ship, the *Tory* – which had been hurriedly dispatched to New Zealand on a land-buying expedition just over a week after the formation of the company – arrived at Totaranui. On the look-out for a site to implement its scheme of systematic colonisation, the company brought to Te Tau Ihu a new concept of large-scale land transactions.[34]

Aware that the British Government intended to annex New Zealand and impose Crown pre-emption on the purchasing of Maori land, the company was keen to finalise its arrangements as quickly as possible. As a result, the first of six ships of company emigrants left Britain on 15 September, before any transactions had been completed.[35]

Colonel William Wakefield, who took charge of the initial expedition, was expected to complete a purchase speedily and in accordance with the instructions of the company secretary, John Ward. Wakefield had been instructed to ensure that all owners of land under negotiation approved of the transaction, received their share of the purchase price, and were aware that large-scale European settlement would follow in the wake of their agreement to the deal. The boundaries of the transaction were to be clearly defined and the deed of cession witnessed. Wakefield was also instructed to explain the company's scheme for the provision of reserves, whereby one-tenth of the purchased block would be returned to Maori after survey.[36] Edward Gibbon Wakefield, the architect of the company's plans for the systematic colonisation of New Zealand, had devised the scheme of 'tenths' as a means of mollifying humanitarian critics of organised settlement. Under this plan, the reserves, which were to be allocated by lottery and intermixed with the lands of the settlers, would increase in value as settlement increased. Thus, their retention was seen as constituting the bulk of the payment for the remainder of the land, being (so Colonel Wakefield was informed) 'far more important to the natives than any thing which you will have to pay in the shape of purchase-money'.[37] Although 'a very naïve scheme', the proposed tenths allowed supporters of the New Zealand Company to argue that Maori would benefit rather than be hurt by the

33. On the New Zealand Company, see Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District* (Wellington: Legislation Direct, 2003); Patricia Burns, *Fatal Success: A History of the New Zealand Company* (Auckland: Heinemann Reed, 1989); John Miller, *Early Victorian New Zealand: A Study of Racial Tension and Social Attitudes, 1839–1852* (London: Oxford University Press, 1958); and Michael Turnbull, *The New Zealand Bubble: The Wakefield Theory in Practice* (Wellington: Price Milburn, 1959).

34. Loveridge, 'Let the White Men Come Here', p 34

35. Waitangi Tribunal, *Whanganui a Tara*, pp 48, 84

36. Ibid, pp 47–49

37. Instructions to Colonel Wakefield, May 1839 (Waitangi Tribunal, *Whanganui a Tara*, p 49)

colonisation of their country.[38] As the young Edward Jerningham Wakefield argued, the company's intention was to make 'just bargains'.[39]

The company representatives discounted Totaranui as a possible site for large-scale settlement, but they did make some inconclusive inquiries into local land tenure during their short stay between August and September of 1839.[40] On the basis of discussions with the Te Atiawa rangatira Ngarewa, and the Ngati Koata rangatira Te Whetu, Edward Jerningham Wakefield remarked that 'the vested rights appeared to us to be involved in much confusion'. The company representatives concluded that Te Rauparaha was 'the great chieftain to whom they were in a measure tributary' and that Ngati Toa's Te Hiko, the son of Te Pehi, 'had the best right to the land here', but that neither Te Rauparaha nor Te Hiko had 'an absolute right to dispose of land'.[41]

Accompanied by the whaler Dicky Barrett, the company representatives proceeded to Whanganui a Tara in mid-September, where they negotiated the Port Nicholson transaction.[42] They returned to Te Awaiti on 13 October to ask Barrett to act as translator for their next transaction, but he was not available and the sawyer John Brooks was employed in his stead.[43] The *Tory* then proceeded to Kapiti to 'effect an agreement with Rauparaha'.[44] Negotiations took place between 16 and 25 October 1839, culminating in the signing of the Kapiti deed, which became the basis of the company's claim to land in Te Tau Ihu.

The New Zealand Company's view of rights to Te Tau Ihu was summarised by Edward Jerningham Wakefield's evidence to the Spain commission. Asked whether Te Rauparaha had authority over the various resident groups, Wakefield replied 'Most assuredly'. From the perspective of the company, Ngati Toa and Ngatiawa had acquired their rights by being 'leaders of the conquest of Cooks Strait'.[45]

Wakefield, in discussing the negotiations for the Kapiti deed (carried out primarily with Te Rauparaha and Te Hiko), said that Ngati Toa were presented with a 'plan of those parts of the two islands over which their conquests extended'.[46] After that, Te Rauparaha dictated to him 'the native names of all places on both coasts to which they had any claim, whether by conquest or inheritance. . . . He then joined with the others in consenting to cede the whole of his rights whatsoever to land in those places.'[47] In this way, the company purchased

38. Waitangi Tribunal, *Whanganui a Tara*, p 47
39. Dr Grant Phillipson, *The Northern South Island: Part 1*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1995) (doc A24), p 46
40. Mary Gillingham, 'Ngatiawa/Te Atiawa Lands in the West of Te Tau Ihu: Alienation and Reserves Issues, 1839–1901', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A74), p 31
41. Wakefield, *Adventure in New Zealand*, vol 1, p 23
42. Waitangi Tribunal, *Whanganui a Tara*, p 52
43. Wakefield, *Adventure in New Zealand*, vol 1, pp 79–80
44. William Wakefield (Walzl, *Land Issues*, p 22)
45. Edward Jerningham Wakefield, 14 June 1842, OLC1/907, ArchivesNZ (Walzl, *Land Issues*, p 28)
46. Wakefield, *Adventure in New Zealand*, vol 1, p 127
47. Ibid, pp 127–128

some 20 million acres: 'the whole of their rights and claims of whatever sort to land on both sides of the Strait'.[48] This comment suggests that the boundaries of the deed, which extend from near Kawhia in the North Island to near Kaiapoi in the South Island, were drawn to coincide with the territory that Ngati Toa chiefs said they had conquered on both sides of the strait. As figure 5 shows, this included the whole of Te Tau Ihu.[49] The deed specified the payment (comprising arms, utensils, clothing, and the allocation of reserves), whereby:

> a portion of the land ceded by them, suitable and sufficient for the residence and proper maintenance of the said chiefs, their tribes, and families, will be reserved by the . . . New Zealand Land Company . . . and held in trust by them for the future benefit of the said chiefs, their families, tribes, and successors, for ever.[50]

The deed did not refer to the company's previously stated intention to reserve one-tenth of the transacted area for Maori.

Most of the 10 signatories were Ngati Toa rangatira, including Te Rangihaeata, who signed the deed when he arrived at Kapiti on 26 October. Edward Jerningham Wakefield stated that Te Rauparaha and 'Charley' represented the interests of those residing in Kauripe (Cloudy Bay).[51] Te Whetu, who was in Kapiti to attend a tangi, was said to represent Rangitoto Maori.[52]

The company representatives then proceeded to Totaranui to negotiate an equivalent agreement with Te Atiawa. Colonel Wakefield's initial attempt to negotiate with Te Atiawa in Waikanae had been unsuccessful because they were engaged in fighting with Raukawa, and when the agents arrived at Totaranui they found that the residents were preparing to go to support their Waikanae relatives.[53]

Some 300 people attended the hui with the New Zealand Company during the first week of November. The Queen Charlotte deed, which was almost identical to the Kapiti deed, was signed by 30 Te Atiawa rangatira on 8 November 1839. The proceedings were characterised by considerable debate, which the Wakefields attributed to the lack of strong leaders amongst the chiefs. This interpretation is dismissed by several of the claimant historians: Dr Donald Loveridge points to the lack of understanding of the nature of the deed as a contributing factor, and Tony Walzl suggests that the disputes 'might reflect the true complexity of land tenure issues'.[54]

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48. Wakefield, *Adventure in New Zealand*, pp 127–128
49. Phillipson, *Northern South Island: Part 1*, p 47
50. 'Copy of the New Zealand Company's Second Deed of Purchase, Including the Nelson District', 25 October 1839, *Compendium*, vol 1, pp 64–65
51. Tony Walzl suggests that 'Charley' may have been the Ngati Rarua chief Tana Te Pukekohatu: Walzl, *Land Issues*, p 26.
52. Wakefield, *Adventure in New Zealand*, p 97
53. Gillingham, 'Ngatiawa/Te Atiawa Lands', p 34
54. Walzl, *Land Issues*, pp 32–33, 39; Loveridge, 'Let the White Men Come Here', pp 38–43

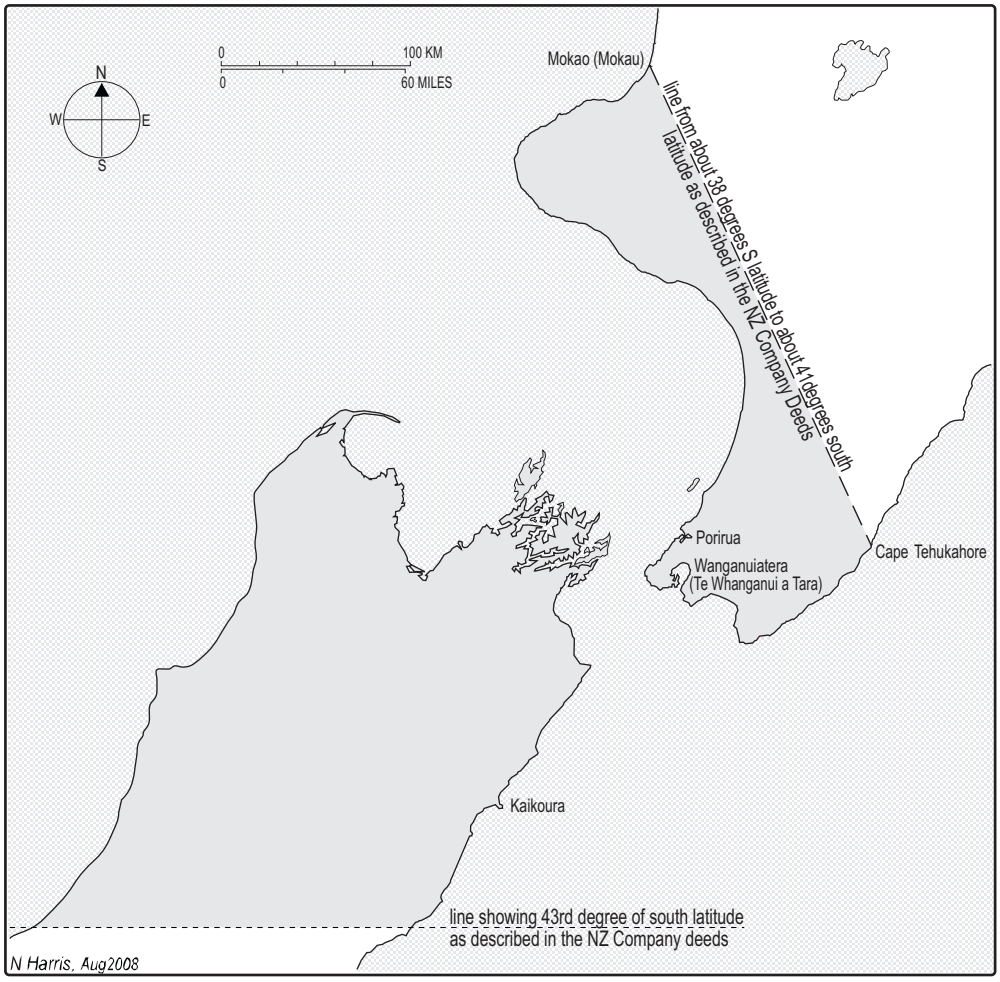

Figure 5: New Zealand Company Kapiti deed, 1839

Source: *Compendium*, vol 1, pp 64–65

Colonel Wakefield believed that the Kapiti and Queen Charlotte Sound deeds secured to the company the interests of the Kawhia people and the bulk of the interests of Te Atiawa.[55] The company representatives then proceeded on to Taranaki to pursue further negotiations. On the basis of this series of discussions, the New Zealand Company claimed to have secured a substantial area of the lower North Island and northern South Island. However, as the Te Whanganui a Tara Tribunal stated, the company deeds were 'flimsy transactions at best'.[56]

The Te Whanganui a Tara Tribunal outlined flaws inherent in the company's negotiations for Port Nicholson, commenting on the inadequate explanation of the nature and extent of the transaction and the proposed system of 'tenths' reserves, the foreign nature of the concepts of land sale and large-scale settlement, and the company's failure to deal with all

55. Gillingham, 'Ngatiawa/Te Atiawa Lands', p 38
56. Waitangi Tribunal, *Whanganui a Tara*, p 59

of those with interests in the area.[57] All these flaws were also apparent in the transactions at Kapiti and Totaranui.

Less than a month after signing the Kapiti deed, Te Rauparaha was repudiating the arrangement. On board the *Tory* on 18 November 1839, he asserted that he had transacted only Taitapu and Rangitoto, a claim that was roundly dismissed by Colonel Wakefield.[58] In his evidence to the Spain commission at Otaki on 26 April 1843 (see sec 4.11), Te Rauparaha stated that he had 'sold' only Taitapu and that he had not understood Brooks' explanation of the deed.

In his evidence on the same day, Te Rangihaeata informed the commission that Brooks had not discussed the contents of the deed with him, and he claimed that he had agreed to transact only Wakatu. Te Rangihaeata stated that 'the only place I had a claim to was Wakatu. Rauparaha sold him [Wakefield] Taitapu.' A third Ngati Toa witness to the commission, Rukoroa, agreed that the transaction was confined to Wakatu, 'the place where no people were'.[59]

Rukoroa informed the commission that neither the final nature of the transaction nor the tenths scheme had been explained to him. He understood Te Rauparaha's recitation of place names encompassed in the deed as a confirmation of 'the places he had conquered', and when Spain asked, 'Did he not give those as the places he had sold to Col Wakefield for the payment he was about to receive', Rukoroa replied, 'No, not at all.' Evidence given by Te Atiawa witnesses Reretawhangawhanga and Ngapuka on the same day suggested that they thought the Totaranui transaction was confined to Arapaoa Island.[60]

As we shall discuss more fully later in the chapter (sec 4.13), a further hearing into the deeds held at Nelson in August 1844 was abruptly halted after hearing from just one Maori witness as to his understanding of the transaction. The evidence of that witness, Te Iti, proved highly damaging to the company's claim, prompting the decision to abandon further hearings in favour of an arbitrated settlement. The lack of a full inquiry into the circumstances surrounding the Kapiti and Queen Charlotte Sound deeds means that there is little direct evidence from Maori about their understanding of the arrangements entered into with the New Zealand Company. However, it is highly unlikely that those who signed the deeds understood that they had conveyed the whole of their interests to the company. Te Tau Ihu Maori were completely unfamiliar with the concept of a permanent transfer of land through sale. Their experience of European settlement was limited to a small number of whalers, who had effectively been integrated into the local communities. The company's reserves scheme was also far outside their experience.

57. Waitangi Tribunal, *Whanganui a Tara*, pp xvii–xviii
58. Walzl, *Land Issues*, pp 33, 39
59. Ibid, pp 29–31. The establishment of Nelson at Wakatu by this date may have influenced this evidence: Phillipson, *Northern South Island: Part 1*, p 51.
60. Walzl, *Land Issues*, pp 31–33

The best translators in the world would have struggled to explain these alien concepts over the course of several weeks of negotiations. Neither Brooks nor Barrett (who was involved as an interpreter at Totaranui) was a capable translator. The limits to Barrett's abilities are highlighted by the translation back into English of his explanation of the tenths scheme: 'our [Pakeha] Side or part of this Land as a Seat for yourself, and all your Children, there is land enough for the whole of you and the White People'.[61] With reference to his translation of the Port Nicholson deed, the Te Whanganui a Tara Tribunal concluded that Barrett was 'quite incapable of conveying the meaning of the deed to the assembled Maori'.[62] There is nothing to suggest that the Totaranui experience was any different.

Brooks' abilities were similarly limited. Te Rauparaha's remark that he did not understand Brooks' translation of the Kapiti deed is borne out by the Spain commission's examination of his translation skills during the inquiry into the Whanganui transaction. Brooks was asked to translate the company deed for the commission and this was then reinterpreted into English by the protector of aborigines, George Clarke junior. Spain found that the interpretation:

> was little calculated to convey to the natives a correct notion of the contents of the deed they had signed, or of the boundaries of the land it purported to convey. Mr Clarke had considerable difficulty in translating it into English, so as to make it intelligible; and certainly many parts of it are very ambiguous.[63]

The New Zealand Company representatives failed to properly convey the nature and implications of the transactions they proposed. What, then, did those who were involved in the negotiations think they were agreeing to? Evidence to the Spain commission, developments in the period immediately following the negotiations, and reference to the tenets of customary Maori land tenure provide some indication of the Maori understanding of the transactions.

As noted above, both Ngati Toa and Te Atiawa witnesses to the Spain commission claimed that the negotiations related to distinct regions within Te Tau Ihu. The actual area encompassed in Te Rauparaha's 'Taitapu' and Te Rangihaeata's 'Wakatu' is not clear, but it was obviously considerably less than the New Zealand Company believed it had secured, and this is also true of Te Atiawa's evidence with respect to the Totaranui transaction.

Claimant historians argued that the signatories to the company deeds probably viewed the transaction in terms of the custom of tuku whenua.[64] As we saw in chapter 2, there are

61. Richard Barrett, 10 February 1843, f78, OLC1/46, 908, ArchivesNZ (Phillipson, *Northern South Island: Part 1*, pp 51–52)

62. Waitangi Tribunal, *Whanganui a Tara*, p 63

63. 'Mr Commissioner Spain's Report to Governor FitzRoy on the New Zealand Company's Claim to the Nelson District', 31 March 1845, *Compendium*, vol 1, pp 75–76; BPP, vol 5, pp 83–84

64. Walzl, *Land Issues*, pp 14–16; Williams, 'Crown and Ngati Tama', p 14; Gillingham, 'Ngatiawa/Te Atiawa Lands', p 45

a number of prominent examples of tuku whenua within the Te Tau Ihu district, including Tutepourangi's tuku to Ngati Koata in return for sparing his life after being captured in battle. We noted in our discussion of this issue that there is broad agreement that pre-contact tuku involved the establishment of a continuing reciprocal relationship between the parties in which the donors expected ongoing benefits to flow back to them over time. However, their ability to continue to claim undiminished rights to the land itself was the subject of more debate. Much depended, we concluded, on the circumstances of the case, including whether the gift was made from a position of relative strength or weakness (such as after being defeated in battle) and the mana of the rangatira involved.

Considered in these terms, the Ngati Toa and Te Atiawa signatories to the New Zealand Company deeds can safely be viewed as having signed from a position of considerable strength, whilst the mana of rangatira such as Te Rauparaha and Te Rangihaeata hardly needs to be pointed out. In summary, there is every indication that, viewed in terms of the sliding scale of relative donor and donee rights under customary tuku, the circumstances surrounding the transactions with the company involved an expectation of very strong ongoing donor rights to the lands in question. Historian Dr Angela Ballara suggests that goods intended by the New Zealand Company as the purchase payment could, in traditional terms, have been viewed as gifts, the acceptance of which enhanced the mana of the recipients over the land in question.[65]

None of this is to suggest that the transactions with the company were seen as merely temporary arrangements. Indeed, tuku were quite capable of being understood as permanent or long-term arrangements so long as the terms of the original agreement continued to be honoured and the mana of the donor upheld. But it does call into question the extent to which the signatories of the deeds considered themselves to be granting the company exclusive rights to use and enjoy the lands in question at the expense of the donors' own rights to share such resources. As Dr Ballara noted with respect to Tutepourangi's tuku, 'The expected result of such a gift in the time of customary land tenure before contact was that both groups, the donor's and the donee's, would utlitize the land and its resources together.'[66] We concluded that such an interpretation was supported by the evidence in the case of the gift to Ngati Koata, and we think that the same applies with respect to the New Zealand Company deeds. This is a matter upon which further evidence will be traversed in our coverage of the Spain commission hearings later in this chapter.

Not only did the New Zealand Company representatives fail to adequately convey the nature, extent, and implications of the transactions to those they negotiated with, but they also failed to consult with all those with rights in the region.[67] Their inquiries into

65. Dr Angela Ballara, 'Customary Maori Land Tenure in Te Tau Ihu (The Northern South Island), 1820–1860: An Overview Report on Te Tau Ihu (Wai 785)', report commissioned by the Crown Forestry Rental Trust, 2001 (doc D1), pp 143–144

66. Ibid, p 80

67. Phillipson, *Northern South Island: Part 1*, pp 48–49

customary interests in Te Tau Ihu were very restricted prior to entering into negotiations with Te Rauparaha and other Ngati Toa rangatira. Discussions with Ngarewa and Te Whetu had highlighted the complexity of right-holding, but the Wakefields concluded that Ngati Toa held primary rights over the district. This conclusion was hastily arrived at and derived from a European view of conquest, but it was no doubt a convenient one given the Wakefields' overriding objective to secure as much land as possible before impending British annexation brought an end to private land dealings. Dr Ballara states that the company's view of customary tenure patterns highly elevated the rights of those who were considered to be conquerors.[68]

The New Zealand Company representatives were aware that there were others with interests in Te Tau Ihu whom they had not consulted. For example, those at the hui at Totaranui informed Colonel Wakefield that they did not represent their Te Atiawa relatives based at Taitapu, who would need to give their consent independently. However, running short of time, Wakefield decided not to visit Taitapu to secure this consent.[69] The company considered the Kapiti and Queen Charlotte Sound deeds sufficient to secure its claim over the whole of Te Tau Ihu, notwithstanding that the resident hapu of large parts of the district had never been visited by company representatives, far less consulted over the transactions.

4.5 Signing the Treaty of Waitangi

The claims of the New Zealand Company and other private parties were the subject of one of three proclamations that Captain William Hobson brought with him when he arrived in New Zealand in January 1840. The first proclamation extended the jurisdiction of the New South Wales Governor, George Gipps, over New Zealand once it 'is or may be acquired in sovereignty', and the second declared Hobson Lieutenant-Governor of such parts of the country as might be acquired. The third stated that the Crown 'will not acknowledge as valid any title to land' that did not derive from a Crown grant and that pre-existing private transactions would be investigated by Crown-appointed commissioners.[70]

Following the signing of the Treaty at Waitangi on 6 February 1840, Hobson sent various missionaries and military officers to secure the agreement of rangatira in other parts of the country to the Treaty.[71] Major Thomas Bunbury was dispatched to the South Island and those areas in the North Island not covered by others. Hobson's instructions to Bunbury emphasised the desirability of securing Te Rauparaha's signature to ensure the Crown's 'undisputed right of Sovereignty over all the Southern districts'. In fact, Te Rauparaha was

68. Ballara, 'Customary Maori Land Tenure', pp 185–186
69. Phillipson, *Northern South Island: Part 1*, p 49
70. Loveridge, 'Let the White Men Come Here', p 47
71. Waitangi Tribunal, *Whanganui a Tara*, p 72

persuaded to sign twice – the first time by the missionary Henry Williams at Kapiti on 14 May and the second time at Bunbury's insistence. Along with Te Rangihaeata, Te Rauparaha agreed to sign Bunbury's copy of the Treaty on 19 June.[72]

The bulk of signatures from the Cook Strait area were secured by Henry Williams. At Port Nicholson on 29 April, 34 rangatira signed the Treaty, most from Ngati Toa and Te Atiawa. Williams proceeded next to Totaranui, where 27 resident rangatira signed on 4 and 5 May, and then to Rangitoto, where 13 signed. During mid-May and through to early June, Williams negotiated the agreement of rangatira in the lower North Island (at Kapiti, Otaki, Manawatu, Waikanae, Wanganui, and Motungarara).[73]

Williams singled out several of the signatories as the 'principals' of iwi in the Cook Strait area. Te Hiko was described as 'a Chief of the Island of Mana & Cloudy Bay', Te Rauparaha as the 'Principal chief of Kapiti and Cooks Straits', and Te Atiawa's Huriwhenua as the 'Principal Chief of Queen Charlotte's Sound'.[74] Aside from some initial opposition at Port Nicholson, Williams found that the chiefs that he negotiated with 'signed the treaty with much satisfaction, and appeared much gratified that a check was put to the importunities of the Europeans to the purchase of their lands; and that protection was now afforded to them in common with Her Majesty's subjects'.[75]

The reaction at Karauripe was somewhat more diffident. Arriving at 'Guard's Bay' on 16 June, Bunbury found that Ngati Toa's Nohorua and his nephews refused to sign, 'under the impression that if they did so their lands would be taken from them'. Bunbury attributed this to recent unsuccessful attempts by private speculators to acquire land in the district.

Discussions the following day with rangatira from the neighbouring cove were more successful, and Bunbury was assisted by one, Maui Pu, who attempted to explain the meaning of article 2 of the Treaty to his relatives. Nohorua agreed to sign on 17 June, on the condition that his son-in-law, the Pakeha whaler Joseph Toms, witness the signature, 'in order, as he said, should his grandchildren lose their land; their father might share the blame'. Nohorua's nephews still refused to sign, and Bunbury would not accept the signature of a woman who was married to one of the nephews and was the daughter of the rangatira Te Pehi Kupe.[76]

Karauripe was Bunbury's last stop in the South Island and, after securing the signatures of nine rangatira there, including that of Kurahaupo rangatira Ihaia Kaikoura, Bunbury proclaimed British sovereignty over the South Island.[77]

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72. Waitangi Tribunal, *Whanganui a Tara*, pp 72–73; Claudia Orange, *An Illustrated History of the Treaty of Waitangi* (Wellington: Bridget Williams Books, 2004), pp 308, 312

73. Orange, *Illustrated History*, pp 309–313

74. *Nga Wharangi o te Tiriti: A Facsimile of the Treaty of Waitangi* (Wellington: National Library of New Zealand, 1990), Te wharangi tuawha

75. Williams to Hobson, 11 June 1840, CO208/253, reel 108 (Crown Forestry Rental Trust, comp, 'Te Tau Ihu Document Bank', supporting documents, various dates (doc A44), p 549)

76. Bunbury to Hobson, 28 June 1840, CO208/253, reel 108 (Crown Forestry Rental Trust, 'Te Tau Ihu Document Bank', p 552)

77. Claudia Orange, *The Treaty of Waitangi* (Wellington: Bridget Williams Books, 1992), pp 79–80

4.6 The Crown and the New Zealand Company

A significant focus of discussion around the signing of the Treaty was the potential impact of land transactions. The most significant pre-Treaty transaction affecting Te Tau Ihu was the New Zealand Company claim, which was distinct from other private transactions in terms of the extensive area of land involved, the company's scheme for settlement, and the nature of the company's relationship with the Crown.

During the late 1830s, the Imperial Government had also been interested in the concept of organised colonisation, and a number of members of the Government were involved with the New Zealand Company and its predecessor, the New Zealand Association.[78] The association had been established in 1837 and had re-formed as a company in 1839 after the Secretary of State for the Colonies, Lord Glenelg, indicated the Crown would grant it a charter if it did so. However, Glenelg's successor, Lord Normanby, did not follow through on this suggestion and the company had proceeded with its scheme without official sanction.[79]

Crown pre-emption, introduced by a January 1840 proclamation and confirmed by the Treaty of Waitangi, put the New Zealand Company's claim in doubt, but the Crown was under pressure to facilitate the company's efforts to gain secure titles to land in the Cook Strait region. By June 1840, some 1500 settlers had arrived at Port Nicholson expecting to take possession of land acquired by the company.[80] Crown historian Dr Ashley Gould commented that:

> By possessing the land, however flimsily, and also transporting a few thousand settlers to Port Nicholson, the Company embroiled successive governors as well as the Imperial Government in a problem that was, in my view, almost beyond equitable management.[81]

However, the company's prospects improved with the appointment of Lord John Russell as Secretary of State. Russell was considerably more sympathetic to the company than Normanby had been, and in November 1840 he drafted an agreement between it and the Crown that, Professor Richard Boast states, gave the company 'a much more secure claim and committ[ed] the British and colonial New Zealand states to assisting the Company in realising its objectives'.[82] The agreement represented a high point in relations between the Crown and the company. A change to a Tory government in Britain in 1841 resulted in a waning of Crown support for the company, especially from its Colonial Secretary, Lord Stanley. The relationship was particularly acrimonious during the early Spain commission

78. The New Zealand Company's full title was the New Zealand Land Company: Dr Ashley Gould, 'The New Zealand Company and the Crown in Te Tau Ihu', report commissioned by the Crown Law Office, 2003 (doc s5), pp 12,18.
79. Allan, p 40
80. Waitangi Tribunal, *Whanganui a Tara*, p 84
81. Gould, 'New Zealand Company', p 13
82. Boast, 'Ngati Toa and the Upper South Island', vol 1, p 14

inquiries, and did not recover the same level of closeness until 1846, when a further Whig Ministry assumed office.[83]

Nevertheless, the November 1840 agreement remained the cornerstone of Crown and company relations. It defined the Crown's obligations to the company and determined the means for establishing the company's entitlement to a Crown grant. Accountant James Pennington was appointed to assess the amount that the company had spent, and it was agreed that the company's grant would equate to four acres for every pound sterling spent promoting the colonisation of New Zealand. As the Te Whanganui a Tara Tribunal pointed out, this arrangement assumed that the company's alleged purchases were valid transactions.[84] The agreement meant that the company would receive a Crown grant regardless of the Spain commission's findings with respect to the validity of the company's transactions. Effectively, the company agreed to waive its claims over the more than 20 million acres assumed to have been purchased from Maori in return for Crown grants based on the agreed formula. Professor Boast points out that the agreement 'disconnected the Company's entitlement from the deeds themselves and instead made it contingent on a grant derived in turn from how much *money* the Company had spent on the whole colonisation project' (emphasis in original).[85] Under this formula, up to 160,000 acres was to be selected by the company 'at or in the neighbourhood of' Port Nicholson and New Plymouth, with any additional entitlement to be chosen within the area to which the company laid claim, 'in virtue of contracts made by them with the natives' prior to the arrival of Hobson as Lieutenant-Governor of New Zealand. However, an April 1841 variation to the terms of the original agreement meant that there was no longer any obligation to limit this grant to the area encompassed by the Kapiti deed.[86] Nor, indeed, was there any requirement to award the company any lands within Te Tau Ihu, but as we shall see, after the establishment of a company settlement at Nelson in 1841, such an outcome was always likely.

Under the agreement, the Crown also undertook to implement the company's proposed reserves scheme, and the company was offered a charter of incorporation.[87] The charter, valid for a period of 40 years, stated that the objects of the incorporation were 'the purchase, sale, settlement and cultivation of lands in New Zealand'. In April 1841, the governor of the company, Joseph Somes, remarked that 'This Company is essentially the agent of the Government in disposing of waste land for the purposes of emigration and settlement.' Dr Gould concurred with Somes' assessment, remarking that 'This, I suggest, was self evident on the basis of the November 1840 agreement and the issuance of a charter.'[88]

83. Boast, 'Ngati Toa and the Upper South Island', vol 1, p 13; Gould, 'New Zealand Company', p 11
84. Waitangi Tribunal, *Whanganui a Tara*, p 92
85. Boast, 'Ngati Toa and the Upper South Island', vol 1, p 71
86. Ballara, 'Customary Maori Land Tenure', pp 155–156; Gould, 'New Zealand Company', pp 36–37
87. Waitangi Tribunal, *Whanganui a Tara*, p 93
88. Gould, 'New Zealand Company', pp 14–16

As Dr Gould observed, the undertaking in clause 13 of the agreement, by which the responsibility for setting aside reserves for Maori passed out of the company's realm, 'resulted in the assumption by the Crown of the moral and legal obligations attached to the reserves scheme as this emerged in haphazard practice in the Company settlements'.[89] In effect, the Crown became committed to the company's scheme of colonisation and, in Treaty terms, bore responsibility for ensuring that all the undertakings entered into with the company remained consistent with the Crown's own obligations to Maori. In this respect, it is pertinent to note that news of the Treaty of Waitangi had been received in London prior to the November 1840 agreement.[90] Later in this chapter, we shall examine the question of whether the November agreement was, as was put to us in some claimant submissions, itself in breach of the Treaty.

4.7 The Spain Commission

As we noted earlier, in January 1840 Governor Gipps had issued Hobson with proclamations intended to pave the way for the formal British annexation of New Zealand, including Hobson's appointment as Lieutenant-Governor of any territory acquired, which was to become part of the colony of New South Wales. These steps were publicly announced in Sydney following Hobson's departure for New Zealand on 18 January 1840, and they were also read before a gathering of settlers at Kororareka the day after his arrival at the Bay of Islands 11 days later. Dramatic though these measures were, many settlers remained more interested in the third proclamation, which was announced at the same time. It was this which declared that no title to land subsequently purchased in New Zealand would be recognised unless derived from the Crown and that future purchases from Maori would be illegal. The proclamation further stated that commissioners would be appointed to investigate past purchases. Besides numerous smaller claims from individuals, mostly concentrated in the northern part of the country, these included the three large purchases negotiated by the New Zealand Company under the Port Nicholson, Kapiti, and Queen Charlotte Sound deeds.

In August 1840, the New South Wales Legislature enacted the New Zealand Land Claims Act to provide for the appointment of commissioners to inquire into pre-1840 land purchases in New Zealand. The Act was, however, disallowed by the British Government because New Zealand had been severed from New South Wales and been declared a separate colony with its own legislature on 16 November 1840. On 9 June 1841, Hobson enacted a land claims ordinance that largely replicated the New South Wales Act by providing for

89. Ibid, p 103

90. Peter Adams, *Fatal Necessity: British Intervention in New Zealand, 1830–1847* (Auckland: Auckland University Press and Oxford University Press, 1977), p 161

the appointment of commissioners to examine and report on the manner in which land had been acquired prior to 1840 and the extent and locality of those land claims. Their inquiry was to be guided by 'the real justice and good conscience of the case, without regard for legal forms'. If satisfied that a claim was sound, the commissioners were to recommend that the Governor issue a Crown grant, though no grant was to exceed 2560 acres unless specially authorised by the Governor with the advice of his Executive Council.[91]

The Land Claims Ordinance 1840 did not fit easily with the New Zealand Company's ambitious purchases or with the arrangements that it had already made with the British Government for the settlement of its claims. The legislation provided for careful inquiry to be made into the validity of a purchase from Maori vendors and required payment for purchases made in 1839 to be equivalent to between four and eight shillings per acre (estimated at three times the Sydney prices for goods).[92] But, as was seen, the November 1840 agreement that the British Government had concluded with the company promised the latter that it would be awarded four acres for every pound that it spent on colonisation in New Zealand. Under the terms of Pennington's award, the expenses of colonisation were to include the costs of sending emigrants to New Zealand, preparing land for settlement, and purchasing land from Maori. As Professor David Williams pointed out, that last cost was 'only a fraction' of the company's total expenditure on colonisation, and nowhere near to the four to eight shillings an acre other pre-1840 land claimants were expected to have paid Maori.[93] The November agreement specified that the company's land was to be taken within the area enclosed by the 1839 deeds and was to include 160,000 acres at its Wellington and New Plymouth settlements. In April 1841, Pennington completed his initial audit, by which he found the company entitled to an award of 531,929 acres, based on an expenditure of £132,982. By January 1843, further company claims to an additional 180,664 acres had also been approved. But, even before Pennington's initial award, there had been an important change to the terms of the November agreement: in April 1841, Hobson was advised that the area which could be granted to the company was no longer limited to the area presumed to have been purchased by it but could be anywhere in New Zealand, save for the intended capital.[94]

In February 1842, Hobson passed a further land claims ordinance to apply to the company's land claims the formula specified in the November 1840 agreement of four acres per pound expenditure on colonisation. But, on 19 December 1842, this was disallowed by the Imperial Government because it applied the company formula to pre-1840 land claimants who were unconnected to the company and who, unlike the company, had not spent money on emigration and preparing land for colonisation.[95] When news of the disallowance

91. Waitangi Tribunal, *Whanganui a Tara*, pp 91–92
92. Phillipson, *Northern South Island: Part 1*, p 69
93. Williams, 'Crown and Ngati Tama', pp 70, 72
94. Waitangi Tribunal, *Whanganui a Tara*, p 94
95. Gould, 'New Zealand Company', p 46

reached New Zealand in September 1843, the commissioner appointed to hear the company claims, William Spain, had to fall back on the Land Claims Ordinance 1841.[96]

Spain was appointed special commissioner to consider the company claims on 20 January 1841, though he did not arrive in New Zealand until late that year and he did not receive instructions on how to conduct his inquiry until March 1842. Those instructions reminded him of the provision in Hobson's 1841 ordinance that commissioners were to be guided 'by the real justice and good conscience of the case, without regard to legal forms and solemnities'.[97] But, otherwise, Spain was instructed to follow the procedures in Hobson's amending ordinance of February 1842, which at that time was still in force. Accordingly, he was to ensure that a protector of aborigines was present at all hearings to act for and protect the rights of Maori. Also, he was to apply the four acres per pound of expenditure formula to company claims, as provided for in the November 1840 agreement.[98] (The subsequent disallowance of the 1842 ordinance and the revival of the 1841 ordinance meant that Spain was no longer bound by this last requirement.)

When Spain began his Wellington inquiry in May 1842, he was intent on requiring the company to prove its Port Nicholson purchase. Indeed, he wrote that any grant to the company based on the November 1840 agreement:

> without obliging it to prove the extinction of the native title, would have been in direct contravention of and in utter opposition to the spirit of the treaty of Waitangi, and in violation of all assurances of Her Majesty's Government to the aborigines, of affording them justice and protection.[99]

At least at this stage, Spain was aware of his responsibilities under the Treaty. But as his Wellington inquiry proceeded and Maori witnesses were examined, it became clear that they had little understanding of the Port Nicholson deed. As noted earlier, the interpreter, Richard Barrett, had been unable to translate it, let alone explain the company's proposal for tenths reserves. When he wrote a preliminary report on the inquiry in September 1843, Spain admitted that most of the Port Nicholson land had not been alienated by Wellington Maori. Had he gone on to make a decision under the Land Claims Ordinance, Spain said, 'it must have been most unfavourable generally to the Company's title, and left it . . . in possession of a very inconsiderable portion of the district'.[100]

From the beginning of the inquiry in Wellington, Wakefield was left in no doubt that Spain was intent on carrying out a thorough inquiry into the company's title, so he offered

96. Ibid, p 30. The 1841 ordinance required the appointment of two or more commissioners but an amendment of 1844 retrospectively validated 'all acts done by a single commissioner'.

97. Land Claims Ordinance 1841, s 6

98. Shortland to Spain, 26 March 1842, IA4/253, ArchivesNZ (Gould, 'New Zealand Company', pp 38–39)

99. 'Report of Mr Commissioner Spain', 12 September 1843, BPP, vol 2, p 294 (Waitangi Tribunal, *Whanganui a Tara*, p 114)

100. Ibid, p 295 (p 64)

further compensatory payments and called on Spain to act as an arbitrator. Historian Dr Grant Phillipson said that Spain 'took this proposal up with enthusiasm' as early as August 1842 and aided Wakefield in persuading the Government to accept it.[101] In January 1843, Wakefield and George Clarke junior, who had acted as protector for Wellington Maori, were appointed 'referees', while Spain was appointed an arbitrator or 'umpire' in case the two could not agree on the amount of compensation.

We need not describe the details of the long-running 'arbitration' over the company's Wellington purchase, which was not completed until February 1844, since they are spelled out in the Tribunal's *Te Whanganui a Tara me ona Takiwa* report.[102] But we do note the final arrangement because it set a precedent for Nelson. Wakefield agreed to pay the various Wellington Maori claimants a further £1500 compensation, and they in turn were required to sign 'deeds of release' renouncing further claims. In addition to the tenths reserves, Wellington Maori were promised that they would retain their pa, urupa, and cultivations. When the estimated area of these was deducted, the company was left with some 67,000 acres. This arrangement formed the basis for a Crown grant to the company issued by Governor FitzRoy on 29 July 1845, but because of the unknown extent of still unsurveyed pa, urupa, and cultivations, and some other still unsettled pre-1840 claims in the district, the company did not accept it.[103] As we shall see, the Wellington settlement was eventually replicated in Nelson with only minor alterations.

4.8 The Establishment of Nelson

In early 1841, before Spain had opened his inquiry, the New Zealand Company had formulated its plans for a second settlement, but the site was still the subject of debate between the company and the Crown. Hobson opposed the Wakefields' suggestion that it should be situated in Lyttelton and instead offered several North Island locations. Eventually, Te Tai o Aorere was settled on as a compromise solution.[104]

In October 1841, the New Zealand Company sent an exploratory party to Te Tai o Aorere headed by Captain Arthur Wakefield, William Wakefield's brother and the company's recently appointed resident agent for Nelson. Before setting off, Arthur Wakefield met Te Rauparaha and Te Hiko, who gave their assurance that they agreed to the establishment of a settlement in Te Tau Ihu. Arriving at Motueka on 8 October, the party spent several weeks exploring the district. A deputation of Ngati Rarua chiefs visited them on board their ship

101. Phillipson, *Northern South Island: Part 1*, p 73
102. Waitangi Tribunal, *Whanganui a Tara*, pp 114–132
103. Ibid, pp 145–173, 185–186
104. Boast, 'Ngati Toa and the Upper South Island', vol 1, pp 72–74

on 27 October, informing Wakefield that 'they were very anxious we should settle upon their land but wanted to know what they were to receive'.

In further discussions with Motueka chiefs on 29 October, Wakefield was informed that they had 'nothing to do with the sale' of Taitapu by Te Rauparaha and Te Hiko, and they denied Te Rauparaha's right to sell their interests. Those at the meeting accepted Wakefield's offer to 'give them a present equal to their proportion of what they ought to have received'. A larger hui was also held at Kaiteriteri with Te Tai o Aorere Maori at this time. According to evidence given to the Spain commission in 1844, the latter hui was attended by some 500 Maori from Wakapuaka, Motueka, and other Te Tai o Aorere locations.[105]

Over the following few months, while preparations for establishing the settlement at Wakatu were underway, further negotiations ensued. For example, a group of about 30 Ngati Tama from Wakapuaka met with Wakefield on 11 November. Wakefield recorded that 'Ekaro, an old man, spoke against Te Raupera [Te Rauparaha] for selling the land'. The party agreed to accept presents equivalent to the share they supposedly should have received, because 'they all wished us to settle on the land'. Wakefield also noted that, 'After some trouble, I think they understood the principle of the [company's] native reserves and pronounced it good.'[106]

The Ngati Tama, Ngati Rarua, and Te Atiawa rangatira who dealt with Arthur Wakefield welcomed the prospect of European settlement, but their understanding of what this entailed was somewhat different from the company's. The difficulties of cross-cultural communication were no less pronounced in these negotiations than they had been in 1839 and were in fact accentuated by the ban on private transactions. Restricted by Hobson's January 1840 proclamation from entering into new purchases, Arthur Wakefield characterised his dealings with resident Maori as gift-giving on taking possession of the land. There was no deed to define the parameters of the deal. As Dr Phillipson pointed out, Wakefield's insistence that he was not opening new negotiations, combined with the denial of local Maori that their rights had been extinguished by the 1839 deeds, means that 'it is hard to see how they could have understood the 1841 transactions as a permanent alienation of blocks of land.'[107]

Claimant historians agree that it is most likely that the residents of Te Tai o Aorere viewed the transaction as a tuku and the giving of gifts as the establishment of a reciprocal relationship with the New Zealand Company.[108] In his evidence to the Spain commission in 1844, the Ngati Rarua rangatira Te Iti maintained that he 'did consent for the Europeans to settle but not to take all the land'. Asked if he had understood that Maori would be allocated reserves, Te Iti replied:

105. Walzl, *Land Issues*, pp 51–54
106. Ibid, pp 59–62
107. Phillipson, *Northern South Island: Part 1*, pp 57–58
108. Gillingham, 'Ngatiawa/Te Atiawa Lands', p 45; Williams, 'Crown and Ngati Tama', pp 73–74; Walzl, *Land Issues*, pp 16, 95

Figure 6: New Zealand Company surveyors, Nelson, 1842. Lithograph by John Saxton. Reproduced courtesy of Alexander Turnbull Library.

> I did not understand it from Capt Wakefield there was to be one part reserved for us. I said I would point out to Capt Wakefield what part I would let them have. Mr Wakefield said 'don't be afraid this will not be the last payment you will have from me'. I still persisted in showing Wakefield the land he [should] have. I showed Him from Kaiteretere outwards to the Ocean. And when I had showed him it was done. Afterwards he encroached & came on this Side.[109]

Te Iti's statement reflects the lack of mutual understanding between the company and Te Tau Ihu Maori.

It seems probable that Maori expectations of the nature of the relationship with the company's proposed settlement would have been based on their experiences with the whalers and traders, who had provided new opportunities and had been relatively easily incorporated into customary life. Historian Leah Campbell points to comments by several Crown officials during the mid-1840s emphasising the desire for permanent European settlement as a means of increasing opportunities for trade. For example, George Clarke senior described the 'advantages of finding at all times a ready market for their produce with their white neighbours' as the 'primary object of a New Zealander parting with his land'.[110]

Maori throughout Te Tai o Aorere were involved in preparations for the establishment of Nelson, assisting with the construction of houses and cultivating surplus food with which to trade with settlers.[111] Four shiploads of settlers arrived at the new town in February 1842, and settlement expanded into the surrounding countryside over the following year as the New Zealand Company completed its survey of town and suburban sections (see fig 6). For the first couple of years, the European migrants were dependent on Maori supplies of food and firewood, and in this respect Maori expectations of the benefits of settlement were being met. Unfortunately, this state of affairs was neither enduring nor without its problems, even in this initial period.[112]

Problems were revealed as the company settlement expanded out from the township. Under the New Zealand Company scheme, Nelson was to be comprised of township, suburban, and rural sections. By April 1842, the town sections had been surveyed and allocated to settlers by ballot, after which the company's surveyors proceeded to survey suburban sections in Moutere and Motueka.[113] These surveys were proceeding illegally with the tacit acceptance of the Crown. The company was establishing its settlement on land which it claimed but which had not yet been inquired into by the Spain commission, and which was therefore still Maori customary land.

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109. Te Iti, 1844, OLC1/907, ArchivesNZ (Mary Gillingham, comp, supporting documents to 'Ngatiawa/Te Atiawa Lands in the West of Te Tau Ihu: Alienation and Reserves Issues, 1839–1901', various dates (doc A74(a)), p 88
110. Campbell, 'A Living People', p 64
111. Mitchell and Mitchell, 'History of Maori', vol 2, pp 10-2–10-5
112. Ibid, pp 10-7–10-15; Walzl, *Land Issues*, pp 86–88, 103–104
113. Mitchell and Mitchell, 'History of Maori', vol 2, pp 8-27, 8-33; Walzl, *Land Issues*, pp 73–74

Maori concerns about encroachments onto their land were observed by company surveyor Samuel Stephens with respect to Te Matu (Big Wood) in May 1842. Noting the desirability of this fertile land, Stephens remarked on the 'hundreds of tons of potatoes' cultivated annually by Maori within the forest. 'They [Maori] were very jealous of our coming to this part of the district.' Stephens assured Te Poa Karoro that 'their potatoe grounds would be left entirely to their own use – and that they would also have one tenth of all that we surveyed besides'.[114] Arthur Wakefield had also agreed to the exclusion of Te Matu during the Kaiteriteri hui. Despite these assurances, some of the potato cultivations were included in the company's survey and were then included in the land offered to settlers for selection.[115] From late 1842 through 1843, there were several instances where Maori obstructed attempts by settlers to occupy sections they had secured through the company ballot.[116]

Stephens' assurances were actually wrong on both counts. Te Matu was not reserved in its entirety for Maori and one-tenth of the land was not set aside as reserves. A change in New Zealand Company policy in October 1840, when Edmund Halswell was sent to administer the Wellington reserves armed with fresh instructions as to the basis upon which these were to be allocated, resulted in the reduction of the area intended to be reserved from one-tenth to one-eleventh. H A Thompson, the Nelson police magistrate and sub-protector of aborigines, was appointed agent responsible for administering the Nelson reserves when the Crown assumed responsibility for these under the terms of the November 1840 agreement. He too mirrored this shift in policy, and when he selected the town sections in Nelson in 1842, Maori received just 100 of the 1100 allotments as reserves (ie, one-eleventh), rather than 110.[117]

The New Zealand Company planned the settlement at Nelson to consist of 1100 sections. Each section was comprised of one acre of town land, 50 acres of suburban land, and 150 acres of rural land. Each 201-acre allocation was to be sold for £300, in accordance with Wakefield's theories about the need to preserve existing social hierarchies through the imposition of a 'sufficient price' to prevent the labouring classes from acquiring land immediately. A total of 1000 sections (201,000 acres) was intended for settlers (according to the February 1841 company prospectus), with a further 100 sections (20,100 acres) to be set aside for Maori in addition to the 1000 sections.[118] But these reserves were not to be vested in Maori. Instead, it was envisaged that they would be held in trust by the company on behalf of the principal chiefs and their families. As company supporter Charles Buller informed the House of Commons in 1845, 'We meant the reserves to be the hereditary property of the chiefs. The mass of the population, we hoped, would be engaged in the same occupations as

114. Mitchell and Mitchell, 'History of Maori', vol 2, p 8-339
115. Gillingham, 'Ngatiawa/Te Atiawa Lands', pp 59–60
116. Mitchell and Mitchell, 'History of Maori', vol 2, pp 8-42–8-46
117. Phillipson, *Northern South Island: Part 1*, pp 115–116
118. Ibid, p 115

our own labourers.'[119] The scheme was therefore intended not merely to provide the real payment for the lands (which were acquired at otherwise nominal rates) but also to facilitate the assimilation of Maori into colonial society through the destruction of their own tribal structures. Rangatira would become a kind of landed gentry while their people joined the labouring classes, and the bonds between the two would be broken for all time.

There was less clarity, however, around other aspects of the status of the intended reserves. As Dr Phillipson noted, Wakefield's original concept of pepper-potting suggested that Maori were supposed to live on the tenths, which would thus become the full extent of the lands secured to them. However, other company and Crown officials envisaged them as endowments that could be leased to settlers to provide an income for measures such as schools, hospitals, and religious instruction aimed at Maori.[120] A strong preference by the Crown for leasing the reserves for endowment purposes, along with promises it made to Te Tau Ihu iwi that their existing pa and cultivations would not be disturbed, seemed to indicate that such areas ought to be regarded as additional to the tenths (or elevenths), although the notion that the tenths should be used for occupation purposes also persisted in some quarters, ensuring further controversy and confusion as to their status. As noted above, Motueka Maori, for example, were informed that their cultivated land at Te Matu would be secured to them in addition to the tenths. Instead, the area was included in the surveyed company sections, and although some of the cultivations were returned to Maori as tenths, other areas were handed over to settlers, with no additional occupation reserves being set aside.[121]

Inquiring into ongoing issues with respect to the reserves in 1870, Crown official Thomas Brunner was very critical of Stephens' action at Te Matu:

> Mr Stephens, the surveyor of the New Zealand Company, when he first laid out the Motueka sections, found there was a long strip of Native cultivation along the border of the wood from Waipounamu to Wakarewa. Instead of leaving this in possession of the Maoris in accordance with the terms of the Treaty of Waitangi, he included these cultivations in his surveyed sections, so that they were afterwards chosen as Native [tenths] reserves, whereas they should have been altogether excluded, and the reserves chosen in addition for the benefit of the Natives.[122]

Chapter 9 discusses the establishment of the reserves in more detail and considers subsequent developments with respect to the tenths.

As it turned out, there was insufficient suitable land for the company's planned scheme at Wakatu, Moutere, or Motueka, so in 1842 the company turned its attention to Mohua. On 27 August of that year, Captain Wakefield proceeded there to 'arrange with the natives and

119. Gould, 'New Zealand Company', pp 110–111
120. Phillipson, *Northern South Island: Part 1*, p 112
121. Walzl, *Land Issues*, p 74; Gillingham, 'Ngatiawa/Te Atiawa Lands', p 62
122. Walzl, *Land Issues*, p 75

commence upon the surveys of the country lands'. An exploratory survey of the district by Frederick Tuckett in March had pointed to the quality of its land and coal resources, and Wakefield stated that 'I hope in that district to find 60,000 acres of good land'.[123] Wakefield was confident that the company's claim to the area would not generate significant protests, because he estimated the population at no more than 120, two-thirds of whom were 'anxious for our settling'.[124]

According to Alexander McDonald's evidence to the Spain commission in 1844, Captain Wakefield, interpreter John Brooks, and he were at Mohua for eight days in September, during which time approximately 110 local Maori gathered for a hui at Tata (suggesting perhaps that Wakefield had underestimated the population of the district). McDonald stated that 'All the parties present agreed to accept the payment and that they w[oul]d not obstruct the Europeans in taking coal but that the land was to be the property of the white man'. He added that the Maori agreed that the whole district would be included, except for pa and cultivations, 'and that Reserves were to be made for them'.[125]

As with the dealings with Te Tai o Aorere Maori the year before, Wakefield characterised the purpose of the visit as the presentation of gifts for land that had been acquired in 1839.[126] Our comments with respect to the Maori understanding of the negotiations at Te Tai o Aorere are equally applicable to the Mohua discussions. It is very unlikely that the Ngati Rarua, Te Atiawa, and Ngati Tama rangatira with whom Arthur Wakefield dealt viewed the agreement as signifying the permanent sale of their interests in Mohua.

Pointing to the site of the hui in southern Golden Bay, and the identity of many of the chiefs involved, Mr Walzl states that 'Much of the focus of the August 1842 negotiations was on Ngati Rarua'.[127] Mary Gillingham notes that prominent Te Atiawa rangatira Te Koihua and Tamati Pirimona attended the hui but were not amongst the chiefs who received the goods distributed by Wakefield. She also comments on the failure to ensure that the Taitapu chiefs, such as Te Atiawa's Te Kehu, were present.[128] Ngati Tama were involved in the hui, and researchers John and Hilary Mitchell identify several of the recipients of goods as Ngati Tama chiefs.[129]

Further gifts also appear to have been given to Ngati Tama rangatira in Mohua in December 1842. According to company surveyor Thomas Duffy, Wakefield had agreed to give 'the usual presents' to rangatira whose interests were centred on the area between the Takaka River and Aorere, and Mr Walzl suggests that these were Ngati Tama rangatira.

123. A Wakefield to W Wakefield, NZC104/2, no 12, pp 110–119, ArchivesNZ (Walzl, *Land Issues*, p 70)
124. Gillingham, 'Ngatiawa/Te Atiawa Lands', pp 50–51
125. Alexander McDonald, 20 August 1844, OLC1/907, ArchivesNZ (Walzl, *Land Issues*, p 71)
126. Walzl, *Land Issues*, pp 70–71
127. Ibid, p 98
128. Gillingham, 'Ngatiawa/Te Atiawa Lands', p 52
129. Hilary Mitchell and Maui John Mitchell, 'Ngati Tama Tipuna Listed on Deeds of Purchase and Other Official Documents', typescript, not dated (doc A70(a)), p 2

Duffy connected this arrangement with the then-recent settlement of the dispute between 'Ekawa' and the Europeans who were attempting to extract the coal and lime resources at Motupipi.[130]

Following the hui at Tata in September, the New Zealand Company initiated surveys at Takaka and elsewhere in Mohua in October.[131] That same month, a small group of Nelson settlers arrived in the district to access the coal and lime. These efforts were obstructed by local Maori, who objected to what they considered the unauthorised extraction of their resources, and a lime kiln was destroyed. In early November, Wakefield asked H A Thompson, the police magistrate, to intervene, but he initially refused to act, noting that the resistance 'has been of the most passive kind and exercised simply with the view of showing that they do not wish to abandon their rights to the coal'. Thompson added that the Europeans were basically squatting on land that had not yet been surveyed.[132]

However, in the face of further pleas from Captain Wakefield, Thompson revised his decision on 19 November. Some 25 settlers were sworn in as special constables, and the party, headed by Thompson and Wakefield, set out to Motupipi to charge Maori for the destruction of the lime kiln.[133] A chief called 'Ekawa' was charged with malicious destruction, but as Mr Armstrong notes, 'Because of his contrite attitude, and because he was ignorant of English law', he received the relatively light sentence of a 10-shilling fine and a warning.[134] As we shall see, this was not the end of resistance by Motupipi Maori to the New Zealand Company's claim.[135]

There was some debate in the evidence before us as to Ekawa's tribal affiliation. Mr Walzl contended that he was the Ngati Rarua rangatira Te Kawatiri, a conclusion shared by Dr Ballara.[136] Mr Armstrong, on the other hand, argued that he was Te Kawau, a Ngati Apa rangatira.[137] Evidence from Peter Meihana for Ngati Kuia suggested that Te Kawau was a Ngati Kuia tupuna, while Rangitane witness Graeme Norton said that he was a Rangitane tupuna.[138]

Mr Armstrong's contention was based on the evidence of Dr and Mrs Mitchell, who subsequently revised their view: on the basis of further research, they concluded that the

130. Duffie was a New Zealand Company surveyor who attended the December meeting along with Captain Wakefield and interpreter John Brooks. He gave this evidence to the Spain commission in August 1844: Walzl, *Land Issues*, p 84.

131. Boast, 'Ngati Toa and the Upper South Island', vol 1, p 77

132. Walzl, *Land Issues*, p 81

133. Ibid, pp 81–82

134. David Armstrong, '"The Right of Deciding": Rangitane ki Wairau and the Crown, 1840–1900', report commissioned by Te Runanga o Rangitane o Wairau in association with the Crown Forestry Rental Trust, not dated (doc A80), p 42

135. Phillipson, *Northern South Island: Part 1*, p 61

136. Walzl, *Land Issues*, p 80; Ballara, 'Customary Maori Land Tenure', pp 256–257

137. Armstrong, p 39

138. David Armstrong, under cross-examination, twelfth hearing, 26–29 May 2003 (transcript 4.12, p 73); Graeme Norton, brief of evidence on behalf of Rangitane, 10 March 2003 (doc M1), p 15

rangatira in question was in fact Kawatiri Tinirau of Ngati Rarua and not the Kurahaupo rangatira Te Kawau.[139] This revision was put to Mr Armstrong in cross-examination, but he maintained that it was Te Kawau, saying that he would need to examine the sources that Dr and Mrs Mitchell had identified before he could reconsider the question.[140]

A key source identified by Dr and Mrs Mitchell is Thompson's report of 17 November 1842, in which he detailed the 'trial' he held at Motupipi. Thompson named the defendant as 'Acowa Tinerou/Tinerou'.[141] This, along with other evidence identified by Dr and Mrs Mitchell in their revised report of 1999 and in their 2003 paper, strongly suggests that the chief in question was indeed Te Kawatiri Tinirau of Ngati Rarua.[142]

4.9 The Wairau Conflict

Mr Walzl describes the dispute at Motupipi as 'a dress rehearsal for Wairau', albeit one with a 'fatally different' outcome.[143] Faced with the ongoing problem of a lack of land to provide rural sections to settlers, the New Zealand Company began to investigate the Wairau Valley in December 1842. The Ngati Toa, Ngati Rarua, and Rangitane residents of the Wairau and Karauripe opposed this, and tensions between them and local representatives of the company escalated. Wakefield's attempts to mollify Ngati Toa through the presentation of gifts were unsuccessful. Ngati Toa, both those who were resident and those based in the North Island, remained firmly opposed to parting with the valley.[144]

The rape and murder of one Rangihaua Kuika and the murder of her child at Karauripe in December 1842 also contributed to tensions in the district.[145] Richard Cook, a European, was suspected of having committed the crime, but Wesleyan missionary Samuel Ironside persuaded local Maori not to exact utu on him. Instead, Cook was tried for murder in Wellington, where he was acquitted owing to a lack of evidence. However, Ironside and local Maori believed that he would have been found guilty if the prosecutor had been more diligent in ensuring that evidence was presented to the court. Looking back at the events around the Wairau many years later, Ironside recalled that this failure to punish Cook was one of the reasons that Te Rangihaeata gave him for his actions in the Wairau.[146]

139. Hilary Mitchell and Maui John Mitchell, 'Kawatiri Tineru (Te Kawau): Biographical Notes and Whakapapa', typescript, not dated (doc N15)
140. David Armstrong, under cross-examination, twelfth hearing, 26–29 May 2003 (transcript 4.12, pp 74–80)
141. 1A1/43/2072, ArchivesNZ (Crown Forestry Rental Trust, 'Te Tau Ihu Document Bank', pp 2069–2071)
142. Mitchell and Mitchell, 'Wai-56 and Wai-102', pp 92, 104; Mitchell and Mitchell, 'Kawatiri Tineru'
143. Walzl, *Land Issues*, p 146
144. Phillipson, *Northern South Island: Part 1*, pp 62–64
145. Kuika was a resident of Karauripe and was married to James Wynen. The Mitchells note that she was closely related to Te Rangihaeata: Hilary Mitchell and Maui John Mitchell, 'History of Maori', vol 2, p 8-53.
146. Boast, 'Ngati Toa and the Upper South Island', vol 1, pp 81–85

During early 1843, Captain Wakefield received several Ngati Toa deputations at his base in Nelson, all of which reiterated their refusal to allow the Wairau to be included in the company's land. Nohorua met Wakefield in January; Te Rauparaha, Te Rangihaeata, and Te Hiko met him in March; and Rawiri Puaha and Wiremu Te Kanae came to Nelson later that same month. Wakefield interpreted these deputations as attempts to extract further payment and did not take seriously threats to obstruct any attempted surveys or trespass.[147] He also dismissed Te Rauparaha's suggestion that the issue could be referred to Spain.[148]

Professor Boast remarks that, in deciding in April 1843 to start a full survey, 'the Company was throwing down a challenge not only to Ngati Toa but also to Commissioner Spain and to the government'. Captain Wakefield was well aware that Ngati Toa opposed the survey and that the Spain commission had not completed its inquiry into the company's claim.[149]

In May, Te Rangihaeata and Te Rauparaha asked Spain and George Clarke junior to intervene on their behalf. Spain replied that he would not come down to Nelson until he had finished his investigations in Port Nicholson in four weeks' time, and he urged them not to interfere with the surveys in the meantime. Clarke subsequently noted that Spain had advised him not to write to Wakefield on Ngati Toa's behalf, because 'it was out of my district, and the question was under his consideration'. This advice not to intervene was apparently on the basis that it was more properly the responsibility of the protector of aborigines resident at Nelson, H A Thompson. Professor Boast is critical of Spain's inaction, suggesting that this 'may have been at least partly responsible for the disaster'. He suggests that, since there was no other figure of authority in Wellington who could have pursued the issue, Spain should have taken responsibility for emphasising to Wakefield that the survey was illegal.[150]

Spain's attempt to discourage Te Rauparaha from intervening in the survey was in vain. On 28 May, Te Rauparaha and others left from Porirua, stopping at Mana to pick up Te Rangihaeata and others. The armed party of 25 arrived at the Wairau on 1 June, joining a party of about 75 resident Maori. Alongside Ngati Toa, Ngati Rarua and Rangitane were amongst those involved in the action against the company survey.[151] Since its commencement in late April, local Maori had disrupted but not stopped the survey, and by the end of

147. Walzl, *Land Issues*, pp 111–112. Boast notes that Rawiri Puaha was accompanied by his two brothers: Boast, 'Ngati Toa and the Upper South Island', vol 1, p 89.

148. Boast, 'Ngati Toa and the Upper South Island', vol 1, p 87

149. Ibid, p 90

150. Ibid, pp 91–93

151. Counsel for Ngati Rarua, closing submissions, 5 February 2004 (doc T6), p 149; Walzl, *Land Issues*, pp 113–115. Walzl details an account of the events of the Wairau given by Ngati Rarua's Rore Pukekohatu, who, as a young man of 16 or 17, witnessed the clash in 1843: Walzl, *Land Issues*, pp 114–115. Dr Ballara refers to the Rangitane followers of Rawiri Puaha, who joined in the fighting on Puaha's orders: Ballara, 'Customary Maori Land Tenure', p 217. She discusses Puaha's role in the events at the Wairau, emphasising his attempts at peacemaking and the relationship between his party and Te Rauparaha's (pp 214–217).

May it was almost complete – the survey party was preparing to leave as the Ngati Toa leaders gathered at the Wairau.

On Te Rauparaha's arrival, the Maori group told the surveyor John Cotterell and his party to leave, setting fire to his hut, the survey poles, and the wooden frames of his tent. Cotterell was escorted down to the mouth of the Wairau River. Then, on 3 June, they met with a party led by John Barnicoat, which they also escorted down the river. Both groups left with their possessions intact, with only the items on the land – the wooden sticks and poles – burnt. The third survey team was then apprehended and again escorted down river, though this process was less orderly than the previous two had been, and some of the surveyors' belongings were taken by the Ngati Toa party.[152] With the surveyors evicted from the land, the group of almost 100 Maori travelled upriver to start cultivations.[153]

In the meantime, the head company surveyor, Frederick Tuckett, had arrived at the Wairau, where Cotterell informed him of the developments. On Tuckett's instructions, Cotterell then headed to Nelson with a note for Captain Wakefield, arriving there on 11 June. The following day, he provided a sworn statement to the police magistrate, Thompson, who took the opportunity to seek a warrant of arrest for Te Rauparaha on the charge of arson. With the warrant granted, Thompson and Wakefield formed a party to execute Te Rauparaha's arrest. Professor Boast notes that the group included Nelson's police constables, the resident leading New Zealand Company officials, and 'anyone else who could be persuaded or who was interested in going'.[154]

Thompson and Wakefield did not expect to encounter resistance from Te Rauparaha and Te Rangihaeata, partly, it would seem, because of their prior experience at Motupipi. For their part, the Ngati Toa group initially thought that the Government brig that arrived on 15 June might contain Spain and Clarke, not an armed expedition.[155]

There are varying accounts of the altercation that ensued at Tuamarina on 17 June 1843, though they generally agree that matters got out of hand because Thompson lost his self-control.[156] With Te Rauparaha refusing to be taken on board the Government brig, the police magistrate threatened to open fire. The Maori party refused to concede, standing their ground when Thompson ordered those who were armed to advance on them. What happened next is disputed, but it seems that the first shot was fired from the European side. Most reports say that this was an accidental discharge, although Maori accounts maintain that it was deliberate. Ngati Toa counter-attacked and overwhelmed the Europeans, a few of whom ran away while the rest surrendered. Te Rangihaeata, whose wife had been shot dead,

152. Boast attributes this to the fact that Te Rauparaha and Te Rangihaeata were not in charge of this process and that Parkinson had agitated the situation by inadvertently touching the head of one of the Maori party: Boast, 'Ngati Toa and the Upper South Island', vol 1, pp 93–106.

153. Ibid, p 110

154. Ibid, pp 106, 108, 110

155. Ibid, pp 111–115

156. Boast cites a number of accounts from participants, witnesses, and official reports following inquiries subsequent to the event.

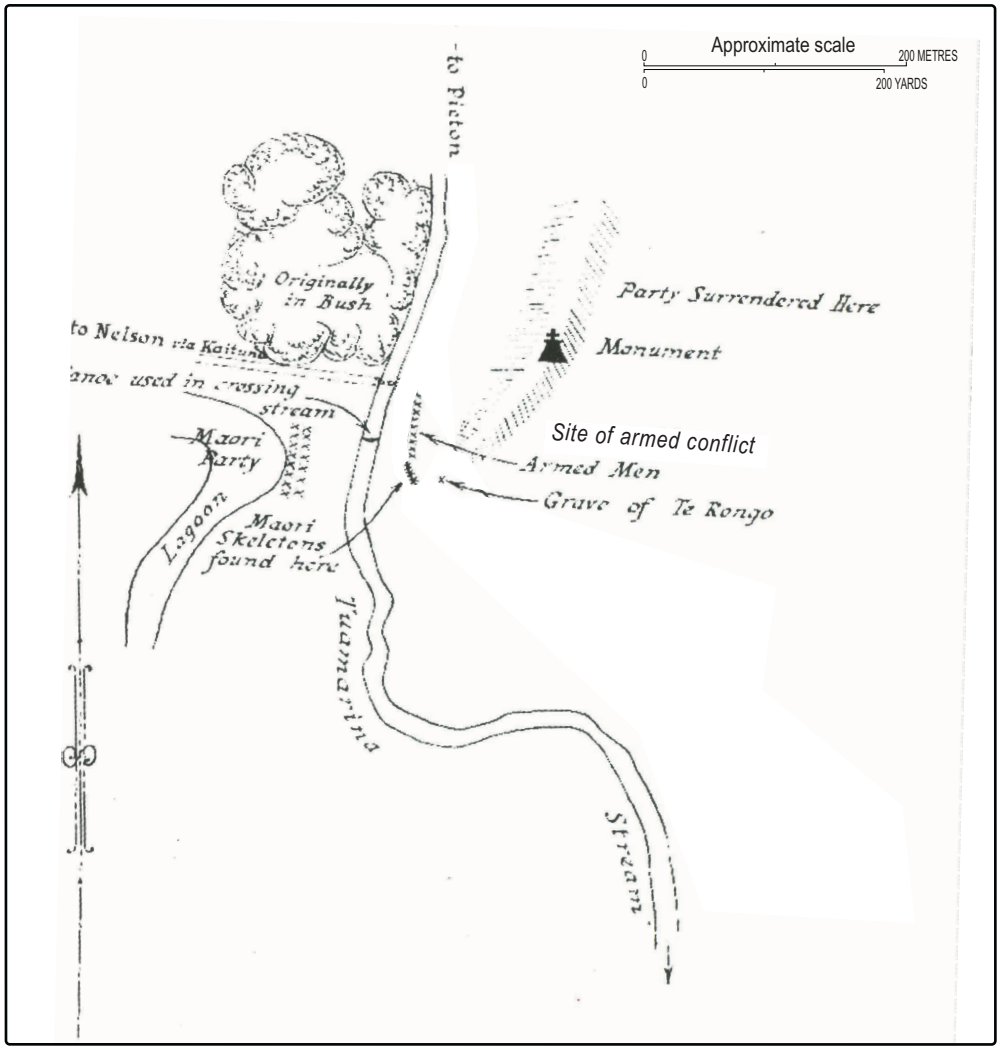

Figure 7: The Wairau conflict, 1843

Source: A D McIntosh, Marlborough Historical Society

and the son of Te Ahuta, who had also died, exacted utu on the surrendered party by killing them (see fig 7).[157] Between four and nine Maori and 10 Europeans died during the fight, with a further 12 Europeans being killed in the subsequent utu.[158]

4.10 The Aftermath of the Wairau Incident

Barnicoat, Tuckett, and the other survivors escaped to Port Nicholson, returning to Port Underwood on 21 June with Spain, Clarke, Edward Meurant (Spain's interpreter), and 50

157. Boast, 'Ngati Toa and the Upper South Island', vol 1, pp 124–139
158. Mitchell and Mitchell, 'History of Maori', vol 2, p 8-53; Allan, p 258

armed volunteers. The Government party discovered that the prisoners had been killed, that Ironside had buried them, and that Maori had left the area. Meurant and Spain stayed in the district for the next few weeks to investigate the affair.[159]

The Government's reaction was focused on keeping the peace. On 12 July, the Acting Governor, Willoughby Shortland, issued a proclamation to 'publicly warn' those whose claims were disputed by Maori against 'exercising acts of ownership' on the land they claimed before it had been investigated by the Land Claims Commission. The same *Gazette* contained a message from Clarke suggesting that both sides had been in the wrong and urging calmness in the wake of the Wairau incident.[160] In mid-August, the Colonial Government published a further statement, this one emphasising the Crown's recognition of Maori title and noting that the Crown had not investigated the New Zealand Company's claim to land in the Wairau. The statement reported that, though Government troops had been dispatched to Port Nicholson in response to a request from the settlers, the Government did not expect 'any unprovoked aggression from the native population.'[161]

The Nelson settlers were hopeful that the new Governor, Robert FitzRoy, would take strong action against Te Rauparaha and Te Rangihaeata. In this, they were to be disappointed. Shortly after his arrival in New Zealand, FitzRoy met with Ngati Toa and Government officials at Waikanae on 11 February 1844.[162] After hearing from Te Rauparaha, FitzRoy announced his conclusion that, while Ngati Toa had been in the wrong in killing the surrendered men:

> I know how difficult it is to restrain angry men when their passions are roused. I know that you repent of your conduct, and are now sorry that these men were killed. . . . As the Pakehas were very greatly to blame, and as they brought on and began the fight, and as you were hurried into crime by their misconduct, I will not avenge their deaths.[163]

This announcement, combined with FitzRoy's decision to dismiss the magistrates at Nelson for exceeding their authority in issuing warrants for Te Rauparaha's arrest for murder, outraged the New Zealand Company and the settlers at Nelson and Port Nicholson. Both decisions were endorsed by the British Government, which nevertheless did not, as Professor Boast points out, officially censure the New Zealand Company.[164]

The Wairau conflict had a traumatic impact on the settler community at Nelson, on Te Tau Ihu Maori, and on the relationship between the two. Many of the prominent residents of Nelson had been killed at the Wairau, and attitudes towards Maori hardened amongst

159. Boast, 'Ngati Toa and the Upper South Island', vol 1, p 144; Walzl, *Land Issues*, p 116

160. *New Zealand Government Gazette*, vol 3, no 28 (12 July 1843)

161. William Connell, Colonial Secretary's office, to D Monro and Alfred Domett, 9 August 1843, *New Zealand Government Gazette*, vol 3, no 33 (16 August 1843), pp 204–205

162. Boast, 'Ngati Toa and the Upper South Island', vol 1, pp 164–165

163. Minutes of the Proceedings at Waikanae, 12 February 1844, BPP, vol 4, p 186 (Boast, 'Ngati Toa and the Upper South Island', vol 1, p 166)

164. Boast, 'Ngati Toa and the Upper South Island', vol 1, pp 166–169

settlers at Nelson and Port Nicholson.[165] After the deaths of so many on both sides, the Wairau Valley was made tapu and remained unoccupied for several years.[166] Ngati Toa, the Ngati Rarua residents of the Wairau, and some of the Te Atiawa residents of Totaranui left for the North Island, and many did not return.[167] The conflict also generated divisions amongst Ngati Toa and within Ngati Rarua.[168]

Prior to the conflict at the Wairau, the Government had not actively dissuaded the New Zealand Company from surveying land that had not been inquired into by the Spain commission. However, the conflict forced the Crown to respond to the actions of the company in a way that clearly endorsed the Maori standpoint.

The ongoing repercussions of the Wairau conflict, particularly as they influenced both the relationship between the Crown and Ngati Toa and the Crown's Wairau purchase, are discussed in chapter 5.

4.11 Spain's Otaki Hearing, 26 April 1843

As we saw in the previous section, Commissioner Spain had refused to intervene to warn the New Zealand Company against occupying the Wairau lands in advance of his own investigations into the company's claims within Te Tau Ihu. Yet, even before the June 1843 conflict, evidence had been heard which cast significant doubt on the strength of those claims. At several of Spain's Wellington hearings, there was discussion of the company's claims based on its Kapiti deed. Colonel Wakefield produced a copy of the deed at a hearing on 29 June 1842. He said that the chiefs of the 'Kawhia tribe' had consented to sell all their lands on both sides of Cook Strait on the understanding that a tenth of the land would be reserved for them.[169] This was a curious claim, since Wakefield had failed to include this tenths promise in the deed. Also, Wakefield repeated several times that the boundary points had been described by Maori and not company officials – another curious claim when we remember that the boundary points were described by degrees of latitude, a concept the chiefs were unlikely to have known about.

Wakefield's nephew, Edward Jerningham Wakefield, who was present at the Kapiti signing, was also questioned by Spain. He said that the negotiation at Kapiti went on for six or seven days and that:

> during the course of these negotiations the nature of the Deed was fully explained to all the chiefs who afterwards signed it by Brook[s] who acted as interpreter, they were made fully

165. Ibid, pp 147–149
166. Ballara, 'Customary Maori Land Tenure', p 218
167. Phillipson, *Northern South Island: Part 1*, p 65
168. Walzl, *Land Issues*, p 146; Boast, 'Ngati Toa and the Upper South Island', vol 1, p 162
169. Walzl, *Land Issues*, p 24

> acquainted with the system of native reserves intended to be adhered to, and with the wish of Col Wakefield to purchase from them all the land to which they had any claim on both sides of Cooks Straits with the exception of Kapiti and Mana . . .[170]

Te Rauparaha and other chiefs were not examined about their understanding of the Kapiti transaction until Spain's Otaki hearing of 26 April 1843, which was some 10 months later and less than two months before escalating tensions over the company's attempt to survey the Wairau were to end in conflict. Te Rauparaha's view of the Kapiti transaction was somewhat different from those of the Wakefields:

> When the vessel was at Kapiti Col Wakefield sent for me Tungia and Rangihiroa and he said to me 'Friend to whom does Taitapu belong?' And I said 'It belongs to me.' He said 'Would not you consent for me to have it.' I answered 'are you much in want of it.' He said 'I am.' I asked 'what payment'. He said 'I will pay you in pipes, tobacco, knives, scissors spades, lead, Three casks of powder . . . '[and other items] This was for Taitapu alone, and I was dissatisfied with this payment and I was persisting to get more, but Col Wakefield would not give me any more. He then told me to collect Rangihaeata and others and he would make a request to purchase Wairau also and it dropped at that and I have never seen him since.[171]

Te Rauparaha admitted that he had signed the Kapiti deed when it was put before him, because 'I was told that if I signed it my name would be showed to the Queen of England and I should be known as the Great Chief of New Zealand'. Asked if the deed was read and interpreted to him and whether he understood the contents, Te Rauparaha replied that 'No one interpreted it.' He admitted that John Brooks had acted as an interpreter, but added that 'we did not understand him' and 'he did not interpret the deed to me'. Asked whether he understood that the deed 'purported to convey land to Col Wakefield,' Te Rauparaha replied, 'No I did not. Col Wakefield said at the time "give me a small piece of ground equal to the property that I have given you"'. When he was asked if he had told Wakefield the boundaries of the land claimed by him, Te Rauparaha replied, 'Yes in the west coast of the middle island from a little creek called Te Wanganui up to a Timber [?] mountain which I agreed to sell to Col Wakefield.' Te Rauparaha denied he had sold any other land to Wakefield. Asked if he had agreed to sell Taitapu to Wakefield, he replied, perhaps with a sense of relief and hope that he would be understood, 'Yes, that is it.' But when asked if he had agreed to sell the Wairau, he answered with a firm 'No'. Te Rauparaha also denied selling various places in the North Island that were included in the Kapiti deed. Then Te Rauparaha was asked whether he had kept a portion of the payment, but he replied that he had not, because he had distributed it among Ngati Toa and others on board the vessel. Spain tried one more time by asking Te Rauparaha what he considered the payment was for, and he replied 'For

170. Edward Jerningham Wakefield, 14 June 1842, OLC1/907, ArchivesNZ (Walzl, *Land Issues*, p 26)
171. Te Rauparaha, 26 April 1843, OLC1/907, ArchivesNZ

Taitapu.' Spain asked Te Rauparaha whether he quarrelled with Wakefield after he signed the deed, and Te Rauparaha replied, 'Yes. I told him he should not have Wairau and other places, and he threatened to tie me. I asked him why he should tie me? Those places that you want belong [to] Rangihaeata, Nohorua and Mahurenga.' After this, it is not surprising that Te Rauparaha was intransigent over the Wairau.

Subsequently, Te Rauparaha never varied in his declaration that he had sold only Taitapu. What precisely the rangatira meant by 'Taitapu' remains unclear. As we discuss in more detail later in the chapter, Spain certainly appears to have been confused by the term, variously describing it as a 'district' in Golden Bay, the whole of that bay, or even, at one point, as being located in Tasman Bay. His failure to sufficiently inquire into the boundaries of the purported purchase were thus well and truly revealed by his own confusion. Dr Ballara notes, however, that evidence from late nineteenth century Maori from Te Tau Ihu suggests that they usually applied the term to the area around West Whanganui and that they drew a distinction between Taitapu and other places in Golden Bay.[172] There is nothing to indicate that Te Rauparaha held a different understanding of the place name. But the reference to 'a little creek called Te Wanganui' cannot necessarily be assumed to mean West Whanganui: the description came in response to a question not as to the lands 'sold' by Te Rauparaha but as to those claimed by him, and might just as easily refer to Wanganui River, just to the south of the 43rd parallel. That would be consistent with later Ngati Toa claims on the West Coast (see ch 6).

Te Rangihaeata was also questioned by Spain at the Otaki hearing.[173] He was shown the deed and asked whether he had signed it, and he confirmed that he had. He was queried as to whether Brooks had interpreted the deed and whether he understood the contents, but he replied that all Brooks had asked him to do was to sign his name. Asked if he had known when he signed that the deed conveyed land to Colonel Wakefield, Te Rangihaeata replied that he had not. He denied that he told Wakefield the boundaries of the land he claimed. Asked what land he sold to Wakefield, Te Rangihaeata replied, 'Wakatu'. When questioned if he had also sold Taitapu, he replied that he had sold only Wakatu – Te Rauparaha had sold Taitapu.

Another Ngati Toa chief, Hiko, was questioned a few days later at Pukeroa, and he confirmed much that Te Rauparaha and Te Rangihaeata had said.[174] Like Te Rangihaeata, Hiko confirmed that he had sold only Wakatu. When Wakefield queried where his settlement was to be, he added, 'Wakatu, the place w[h]ere no people were.' Asked whether the places mentioned in the deed were read out to them before they signed, Hiko answered, 'Not at all.' Significantly, he added, 'The names were mentioned as conquered places but not for sale.' When it was put to him whether Captain Lewis, who had assisted with the interpretation,

172. Ballara, 'Customary Maori Land Tenure', pp 179–180
173. Te Rangihaeata, 26 April 1843, OLC1/907, ArchivesNZ
174. Hiko, 1 May 1843, OLC1/907, ArchivesNZ

had explained the contents of the deed, Hiko replied that he and Brooks had done so. But, when he was then questioned if he was told they were parting with the land for ever and would receive no further payment, he replied, 'No. I never heard any such thing. Mr Wynen and Col Wakefield had some words. He told Col Wakefield not to be foolish and steal the natives settlements. Col Wakefield ordered him on shore.'[175] When asked whether Lewis or Brooks explained the nature of the reserves, Hiko answered, 'No'. Then, when he was queried (again) as to why Te Rauparaha had repeated the names of places listed in the deed, Hiko replied, 'Yes, he was telling the places he had conquered (like Wellington and Blucher conquering all).' Tutahanga also gave evidence to similar effect at Pukeroa, reinforcing the testimony of Te Rauparaha and Te Rangihaeata.[176]

From this review of the Ngati Toa evidence at Otaki, it is evident that:

- There was a consistency in the statements of all of the five rangatira referred to above.
- The rangatira had firm ideas as to the limited nature of their 'sales' in Te Tau Ihu, essentially limiting them to Taitapu and Wakatu.
- The rangatira refused to alter their declarations, despite persistent questioning from Spain.[177]
- The translations by Brooks and Lewis were inadequate and in particular failed to convey that the chiefs were selling the huge territory claimed.
- It also seems from the exchange between Colonel Wakefield and Wynen that the company men were not fully disclosing the enormousness of their intended purchase.

We need make little comment on Spain's inquiry into the Queen Charlotte Sound deed. He held no hearing in the sound, though he did take some evidence from the interpreter John Brooks at a Wellington hearing on 29 June 1842. Brooks merely said that he had talked to Te Atiawa at Dicky Barrett's Te Awaiti whaling station at the entrance to the sound, and that they had agreed to sell their land.[178] At his Otaki hearing, Spain took evidence from several Te Atiawa chiefs. The Waikanae chief Reretawhangawhanga told Spain that he remembered his son, Wiremu Kingi te Rangitake, and Himiona returning from the sound after the deed was signed, but he believed that only Arapaoa, the large island near the entrance to the sound, had been sold. Another Te Atiawa witness, Ngapuka, also stated this belief.[179]

From this limited array of evidence, it does seem that Te Atiawa had envisaged a much more limited transaction than Wakefield wrote into the Queen Charlotte Sound deed, which

175. Wynen was a whaler who associated with Jackie Guard at Port Underwood. Edward Jerningham Wakefield claimed that the two of them incited the 'Kawhia natives' against Wakefield's expedition because they wanted to acquire Port Nicholson for themselves: Wakefield, *Adventure in New Zealand*, vol 1, p 105.

176. Tutahanga, 2 May 1843, OLC1/907, ArchivesNZ; 'Mr Commissioner Spain's Report to Governor FitzRoy on the New Zealand Company's Claim to the Nelson District', 31 March 1845, *Compendium*, vol 1, p 55

177. However, there were times when Te Rauparaha admitted that he had sold Rangitoto (D'Urville Island) as well as Taitapu, as Edward Jerningham Wakefield pointed out following a meeting with him in November 1839: Wakefield, *Adventure in New Zealand*, vol 1, p 143.

178. Walzl, *Land Issues*, p 32

179. Ibid, p 33

covered the same expanse of territory as the Kapiti deed. Nevertheless, the company later abandoned its claims to land in the sound.

When he finally reported on the company's Nelson claim on 31 March 1845, Spain regretted that Colonel Wakefield, the company's principal agent, was absent from the Otaki hearing and therefore did not hear the testimony of Te Rauparaha and Te Rangihaeata. For it was here that they denied that they had sold the Wairau.[180] Spain accepted this and also found that Ngati Toa had a sole right to the Wairau, through conquest and occupation, and he did not include it in his award to the company.

Spain's failure to proceed with his Nelson hearing immediately after the hearing at Otaki, despite pleas from Te Rauparaha for him to investigate the Wairau, contributed to the tragic conflict that occurred less than two months later. Moreover, after FitzRoy's decision not to avenge the deaths of the Nelson settlers, Spain would hardly have been welcome there to begin an inquiry into the proceedings of the Wakefield brothers, including Arthur, who was killed at the Wairau. Instead of proceeding to Nelson, Spain carried on with the Wellington negotiations. These were not completed until March 1844, but even then Spain did not go to Nelson. He went off instead to attend to company claims in Taranaki and land purchase matters in Otago. He did not get to Nelson until late in August 1844.

4.12 Meurant's Mission, July – August 1844

To pave the way for his Nelson hearing, Spain sent his interpreter, Edward Meurant, ahead to interview local Maori. Meurant's diary of his proceedings is available, though it is neither very informative nor literate.[181] In the quotations that follow, we have not corrected him. Meurant visited Motueka, where he met Te Iti, who was later to be the sole Maori witness at Spain's Nelson hearing.[182] Having been given a list of the Maori signatories of the deed by a company official, Meurant was instructed to find out their tribes and where they lived, though he provides no details of further action on this.[183] He did hand out a sheet of paper to 'a native of Motueka . . . to write me the names of the natives of that place'.[184] Meurant mentioned meeting Maori in town in Nelson and that different parties had arrived from Wakapuaka and Totaranui – all of them impatient for Spain to come and begin his inquiry.[185] On 8 August, Meurant showed a plan of the native reserves to Nga Piko and others from

180. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol 1, p 59
181. Edward Meurant, diary, MS-1635, ATL
182. Ibid, 13 July 1844
183. Ibid, 22 July 1844. Meurant does not say what company deed this was. If it was the Kapiti deed, he was unlikely to find signatories around Nelson, since all but one of the signatories were Ngati Toa who were living at Kapiti or Porirua.
184. Edward Meurant, diary, 6 August 1844, MS-1635, ATL
185. Ibid, 23, 25, 31 July, 6 August 1844

Motueka, 'saying they were well provided for'. But Nga Piko were not impressed, saying that all but two or three of the reserves were swamp or barren sand.[186] On 12 August, Meurant recorded that 'the natives of Motueka and Wakapuaka and Rangitoto assemled at Auckland Point (Nelson) where they had a long Koreor about there land. They acknowledged that the chief *Iti* was the principle chief there.'[187] Meurant may also have visited Croisilles – his diary mentions only stopping at a white bluff 'called by the natives te Papa' – though he does not record any discussion held with Maori there.[188]

4.13 Spain's Nelson Hearing, 19–21 August 1844

Although Spain's Nelson hearing is of considerable importance to our inquiry, we are hampered by what Dr Gould has called the 'absence of good quality historical data'.[189] We do have Spain's official report of 31 March 1845, with accompanying, though brief, minutes of proceedings, and the original old land claims file, with a record of the evidence given, including an English version of the evidence of the sole Maori witness, Te Iti. There is also a letter from George Clarke junior to his father, Meurant's diary, and some reports in the local Nelson newspaper. All of these are reports or records of evidence by European officials, company servants, or settlers. Apart from the translation of Te Iti's evidence, there is no record of the views of Nelson Maori, particularly of what they had to say in the important negotiations which took place out of court.

Spain finally arrived in Nelson on Friday 16 August, and the next day he was to address those Maori that Meurant had assembled at the courthouse. But he merely announced that he would begin his hearing on Monday. On that day, following some formal proceedings (including the swearing in of Meurant as interpreter), the court was adjourned because 'all the Natives had not arrived from Motueka'. Meurant asked the chief Paramata to speak to Nga Piko 'and settle there [*sic*] dispute before they were examined in court'.[190] Meurant does not explain what that dispute was about, nor does he give details of the negotiations or speeches that would have been made at the various gatherings he mentioned in his diary.

Spain's hearing resumed on Tuesday 20 August, but it was a wet day and 'the natives did not attend'. Wakefield called and examined four company witnesses, including the surveyor Thomas Duffy. The questions put to the witnesses mainly related to Captain Wakefield's distribution of 'presents' at Kaiteretere in 1841 and at Mohua in 1842. Though the company

186. Edward Meurant, diary, 8 August 1844, MS-1635, ATL
187. Ibid, 12 August 1844
188. Ibid, 18 July 1844. The closing submission for Ngati Apa says that the areas visited by 'Spain's assistants' were limited to Motueka and the 'immediate environs of Wakatu and Croisilles': counsel for Ngati Apa, closing submissions, 2004 (doc T3), p 18.
189. Gould, 'New Zealand Company', p 26
190. Meurant, 17, 19, 20 August 1844

witnesses provided some information about the numbers of Maori present at the various gatherings, they could not give tribal identifications.[191]

The next day, Ngati Rarua rangatira Te Iti was examined.[192] Te Iti was questioned initially by Colonel Wakefield about his recollections of Captain Wakefield's giving of 'presents' in 1841. He confirmed that he had been present at the meeting with Wakefield at Kaiteretere. Asked 'what passed on that occasion concerning the land in this district', Te Iti replied:

> I first began to talk to Capt Wakefield. I told Captain Wakefield I did not see the payment made to Rauparaha: that is all I said to him at that time. Capt Wakefield said he would give me some blankets, if I would receive them as a Present.

Te Iti described the blankets and other goods that he received, including a dozen double-barrelled guns and powder. He was then asked whether, on receiving the goods, he consented to 'allow the occupation of the land by the settlers when they arrived?' 'Yes', Te Iti replied, 'on that occasion I did consent for the Europeans to settle but not to take all the land.' Asked if it had been explained to him that 'there would be reserves for the Natives' and whether he understood that, Te Iti, as we noted earlier, replied that he did not understand this. He had pointed out to Wakefield the land that the latter might have but had been informed in response that he should not be afraid, because 'this will not be the last payment you will have from me'. Afterwards, Te Iti added, Wakefield 'encroached and came on this side'.

Te Iti was then questioned about his interests in Waimea. He confirmed that he was a chief of that district but said that he had not consented to the occupation of it. He admitted that his tribe had not occupied Waimea for 20 years or cultivated land there for six years. Asked why they had abandoned it, Te Iti said that they had a great deal of cultivations at Motueka. He denied that they were anxious to have a town at Motueka and that he had said that the land there 'would not grow anything'. He also denied that reserves for Ngati Rarua at Motueka, including the Big Wood, were pointed out and returned to them, though he admitted that they were cultivating land at the Big Wood. Te Iti admitted to Wakefield that his people had helped to build houses for European settlers at Motueka, adding that he was told the Europeans were 'to stop there for a short time' and were 'coming to live amongst us'.

Then Sub-Protector Clarke took up the questioning, covering much of the ground already covered by Colonel Wakefield. Asked whether he remembered the meeting at Kaiteretere, Te Iti replied, 'Yes. I caused that meeting.' But he denied that he had consented 'to let the Europeans take possession of land in this District'. Clarke followed this up by asking: 'Then what District did you consent to?' Te Iti replied, 'When I came over to Nelson I consented to let them have from Horoirangi [near Wakapuaka] to a stream called Moturoa.' He denied

191. Thomas Duffy, 20 August 1844, OLC1/907, ArchivesNZ
192. Te Iti, 21 August 1844, OLC1/907, ArchivesNZ, pp 87–84

that he had consented to Europeans taking possession of any other place or that other members of his tribe had done so. Te Iti was asked whether he remembered what the interpreter Brooks had said about reserving certain portions of the land, to which he replied that Brooks had 'told the Natives to keep from the stream Moturoa to Kuriwaka'. But when he was asked whether Brooks had informed them at Kaiteretere that 'the whole District would be surveyed and a certain proportion of the land would be set apart for the use of the Natives', Te Iti replied, 'No, I did not understand that. I thought the surveying was a mere form.' Clarke then asked Te Iti about a conversation that they had had that morning, when Te Iti had admitted that Brooks had told the Kaiteretere meeting that the land would be 'divided between the Natives and the Europeans'. Te Iti admitted that Brooks had said that. Clarke then asked Te Iti, 'How can you reconcile this answer with your last?' Te Iti replied, 'I did not exactly understand Brooks' meaning at that time but I have lately understood it.' Asked what land he had in 'this District', Te Iti replied, 'From Nelson to Massacre Bay.' Clarke then asked Te Iti whether Te Rauparaha had a right to dispose of this land without his consent. Te Iti replied that Te Rauparaha 'did wrong in selling it without informing us'.

The final recorded question came from the court, presumably from Spain, who asked:

> Did not Capt Wakefield at the meeting [which] you have alluded tell you the land had been previously sold by Rauparaha, Hiko and others to the NZ Company & that he only gave them the goods as presents but not as payment for the land but upon admitting the previous sale and allowing the Europeans to take possession?

Te Iti replied, 'Yes. I received the presents and consented to allow the Europeans to settle on the land.' It was at this stage that Te Iti's evidence was interrupted by Wakefield, and he was not recalled.

Professor Williams, who presented a report for Ngati Tama, called this exchange with Te Iti 'a classic instance of people talking past each other'. As he explained:

> The question, with an English law assumption about the importance of consideration being paid as the basis for a binding contract, is focussed on the receiving of goods and the 'obvious' conclusion that this was a regular disposal of land. The answer, with a tikanga Maori assumption about the importance of gifts to evidence a tuku whenua, is focussed on the welcoming of settlers and the 'obvious' conclusion that the settlers would settle alongside their Maori allies and share the use and resources of the ample land in the region.[193]

We agree with this approach and consider that most of Te Iti's answers were consistent with it.

There are several other comments on Te Iti's evidence that we should note. According to Meurant, Te Iti:

193. Williams, 'Crown and Ngati Tama', p 86

> got so confused as to contradict himself wich so anoid Mr Clark and the Commissioner that they purposed examining the others in the native custom wich was agreed to. Mr Clarke and myself went amongst them where we had no dificulty in giting them to state the affair in there manner with out any contradiction wich coroborated with the Pakeha's examined yesterday.[194]

Dr Phillipson considered that this out-of-court arrangement allowed the other chiefs to give evidence 'under a hui format' but admitted that it was 'without questions and answers or a verbatim recording'.[195]

The minutes of proceedings that Spain appended to his report are not very helpful: they say that 'Te Iti, Native witness, [was] then examined' but do not record anything he said. The minutes then note that:

> On the conclusion of the examination of this witness, Colonel Wakefield stated . . . that in consequence of the prevarication exhibited in the evidence of the last witness, he had no intention of calling any further Native witnesses that day, and that he must ask the Court for a further adjournment.

The minutes also note that Clarke, who was supposed to be representing the interests of Maori before the Spain commission, was 'convinced the last witness had not spoken the truth' and 'feared if any more Native witnesses were examined . . . they would only give similar testimony'. Clarke therefore supported Wakefield's application for adjournment, 'so that he might be allowed time to talk to the Natives personally, to point out to them the necessity for their telling the truth before the Court concerning the whole transaction'.[196]

Spain admitted that Te Iti was the only Maori witness called by Colonel Wakefield, but he did not say why he, as commissioner, had not called any other independent witnesses, as he had done in Wellington when he found that Wakefield was manipulating Maori witnessess in that inquiry.[197] Spain chose to believe that Te Iti was lying when he refused to accept the version of Captain Wakefield's 'presents' that Spain (and Clarke) preferred. As Spain put it, Te Iti 'endeavoured to throw discredit on the testimony already taken' (from the company's settler witnesses who had been called to verify Captain Wakefield's distribution of 'presents'). Spain even alleged that Te Iti was denying the receipt of the 'presents' to justify getting further goods. This was untrue. Indeed, as the quotations above from his evidence indicate, Te Iti admitted the receipt of 'presents' twice: once in reply to Wakefield and once in reply to Spain's own final question. As for Te Iti expecting more payments, it seems

194. Meurant, 21 August 1844
195. Phillipson, *Northern South Island: Part 1*, p 77
196. Minutes of proceedings, 21 August 1844, *Compendium*, vol 1, p 61
197. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol 1, p 56; Waitangi Tribunal, *Whanganui a Tara*, p 61

from what he said (see sec 4.13) that it was his belief that it was Captain Wakefield who had promised further payments.

Clarke was also disturbed that, although he had been with Te Iti before the court sitting, 'instructing him as the advocate of the Natives as to the real state of the case', he had on that occasion 'told a different story to his present statement'.[198] It looks as if Clarke had been coaching his witness and he (and Spain) then got upset that Te Iti had not followed the script.

The next morning, before Clarke could give local Maori a pep talk about telling the truth, Wakefield asked Spain to suspend the inquiry so that Clarke could negotiate with Maori for the company to provide a further payment. After that, as Spain described it, he, Clarke, and Meurant 'had much conversation with many of them [ie, Maori], the general tenor of which was favourable to the terms of the settlement we were anxious to accomplish'.[199] On the basis of this settlement, Spain chose not to make further inquiry into the validity of the company title in the Nelson districts.

Spain's minutes do not record what happened next, but Meurant says that he, Spain, and Clarke were in discussion with some of the chiefs about boundaries. The chief Nga Piko promised that everything would be settled by the following morning. But it was in fact the day after that, 23 August, that Spain held a court 'for the purpose of witnessing the payment of compensation which they had agreed with Mr Clarke to accept'. The compensation agreed by Wakefield, Clarke, and Spain provided for an additional payment of £800. Of this amount, £510 was to be divided among Tasman Bay Maori, with £200 for the chiefs of Motueka, £200 for the 'Natives of Wakatu, or Whakapuaka', £100 for Ngatiawa,[200] and £10 for Nga Piko for his part in persuading the others to accept the arrangement.[201] The remaining £290 was reserved for Maori in Golden Bay. When the compensation amount was agreed, Spain addressed those about to receive the money. With this speech, Spain abandoned his judicial responsibilities as commissioner under the Land Claims Ordinance and became an advocate for an arrangement he had contrived with Clarke and Wakefield. He reported his speech as follows:

> Were I called upon, in the execution of my duty as Her Majesty's Commissioner, to decide whether you were properly entitled to receive any payment, I could not have awarded you any further compensation now, and for this reason: these lands were purchased long ago by Colonel Wakefield, of Rauparaha and others at Kapiti. When Captain Wakefield afterwards

198. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol 1, p 56
199. Ibid, p 57
200. This was the rather odd naming of the recipients in Spain's minutes of proceedings in Mackay's *Compendium*, vol 1, p 62. Why Te Atiawa alone were mentioned by name when the other groups were identified by locality is not clear.
201. Phillipson, *Northern South Island: Part 1*, p 80; Meurant, 23, 24 August 1844

> came here, he went amongst you in the different districts, and made you large and liberal presents. The goods given in payment at Kapiti were very numerous, and those goods, added to what Captain Wakefield gave you and the money now offered, make the price of these lands higher than any that has ever been paid for in this country. The district which has been lately paid for at Otakou was purchased at a lower rate than this, though the land was nearly treble in the quantity. But the Queen and the Governor wish to do something more for you now, and therefore Mr Clarke has been sent to represent you in Court, and to advocate your interests. He has awarded you money which you have come this day to receive, not as payment, but for the sake of making friends of you and the white people; to put an end to all the quarrels about the land, so that both races in this settlement may live peaceably and happily together in the future.[202]

Given (as we discuss further in the next section) Spain's final report on the Nelson award actually rejected the notion of any kind of valid transaction in respect of those areas that the Ngati Toa signatories were not occupying or cultivating land in, his comments on this occasion were patently misleading. Although Spain had not conducted any kind of investigation into customary tenure in the district and was hardly in a position to comment on the matter, and though his report found the Kapiti deed deficient in many respects, resident Maori were informed that it constituted a valid purchase.

Spain's statement that more was paid for the Nelson land than recently for Otakou was substantially correct, though misleading. At the end of July 1844, the New Zealand Company had paid £2400 for what was ostensibly 400,000 acres but was in fact some 533,000 acres at Otakou – a payment of a little over a penny per acre if we use the latter area.[203] Though we do not know the value of the goods that Colonel Wakefield paid over at Kapiti (nor would it be appropriate to include their full cost just for the Nelson part of the area ostensibly purchased), the combined total of Captain Wakefield's 'presents' and Colonel Wakefield's compensation was £1780 15s.[204] For the 151,000 acres that Spain intended to award the company at Nelson, this amounted to 2.83 pence per acre. But we have to remember that the Otakou purchase included a great deal of rugged hill country, whereas for the Nelson award the surveyors had selected the best flat land. In terms of quality, the Nelson lands were probably a better buy. We comment further and make findings on Spain's Nelson negotiations and award below.

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202. Minutes of Proceedings, 24 August 1844, *Compendium*, vol 1, p 61

203. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 2, pp 310–311

204. See the *Compendium*, vol 1, p 63, for the value of Captain Wakefield's presents, to which we have added the £800 compensation to be paid by Colonel Wakefield.

4.14 The Compensation Payments and Deeds of Release

There were two phases to the New Zealand Company's payment of compensation to Maori. The first, as we have noted, concerned the three payments that were made at the end of Spain's hearing to different groups in Tasman Bay. The second, and much more prolonged, phase of payments related to Golden Bay. We deal with each in turn.

4.14.1 The Tasman Bay payments and deeds of release

We have little information about the signings of the three Tasman Bay deeds apart from that related above. The *Nelson Examiner* of 24 August 1844 reported that Tasman Bay Maori were reluctant to accept the amounts offered, which they considered too low, but that they did take them when informed by Clarke and Nga Piko that Spain would not pay more.[205] That same day, Meurant noted in his diary that, when the settlement money was paid to the different groups, 'only one native seemed discontented named Te Aimeanawa (Charley) or Tare'.[206] However, Meurant did not explain the cause of Tare's discontent and there is no other record of complaints about the distribution of the payments, though there were many problems relating to the protection of pa, urupa, ngakina (cultivations), and wahi rongoa (possibly used for tenths reserves) promised in the deeds of release. As Dr Phillipson pointed out, there were continuing issues over the establishment of reserves at Motueka, particularly at the Big Wood, where additional suburban reserves were awarded.[207] We discuss these problems in more detail in chapter 9.

Dr Phillipson also noted that there was trouble across Tasman Bay at Wakapuaka. This arose not so much over Wakapuaka, which the company did not claim, but in establishing a boundary between Ngati Tama land there and the land that was to go to the company as a result of Spain's award. Spain included Happy Valley and Horoirangi in his Nelson award, but Ngati Tama claimed them and maintained that the boundary should have been nearer to Nelson. Wi Katene and other Ngati Tama were furious at the loss of land they said they had not sold, though Dr Phillipson said that they successfully resisted attempts to move the boundary further north in 1848. We pick up this issue along with other matters relating to reserves in Tasman Bay in later chapters.

We now examine the Tasman Bay deeds of release, which provide some information about the nature of the transactions. First, they were intended as a comprehensive relinquishment of all the claims to the districts that Spain intended to award to the company, not just of those in Tasman Bay. The 'Motueka Natives', for instance, relinquished their claims to Wakatu, Waimea, Moutere, Motueka, Riwaka, and Taitapu (used here for the whole of

205. Phillipson, *Northern South Island: Part 1*, p 80
206. Meurant, 24 August 1844
207. Phillipson, *Northern South Island: Part 1*, pp 104–105

Mohua or Golden Bay).[208] The deeds of release signed by the 'Natives of Wakapuaka' and the 'Ngatiawa Natives' also relinquished claims to all of those districts except Motueka.[209]

Though the deeds were headed as being signed by the 'Natives of Motueka' or Wakapuaka or Ngatiawa, they were in fact signed by only a few persons. The Motueka deed was signed by five persons, including Nga Piko and Te Iti, who signed 'On behalf of the remainder of the Motueka Natives'. No tribal identifications were mentioned, but those involved were probably mainly Ngati Rarua. The Wakapuaka deed of release also had five signatories, headed by Paramata Te Kiore, who signed on behalf of 'the Natives of Wakapuaka'. Again, there were no tribal identifications, but we presume that the signatories were mainly Ngati Tama. However, Leah Campbell, who prepared a research report for Ngati Kuia, says that several Ngati Kuia representatives were present at the Spain hearing. Although the latter did not sign any of the deeds of release, at least two of the five signatories of the Wakapuaka deed were Ngati Koata, and Ngati Koata subsequently shared their compensation money with Ngati Kuia.[210]

In contrast to the Motueka and Wakapuaka deeds, the third was for the 'Ngatiawa Natives'. The deed was signed by four Te Atiawa, headed by Heremaia Te Matene, on behalf of 'the remaining Ngatiawa Natives'. We do not know where the signatories or the other Te Atiawa came from, but they were probably mainly from Motueka, though possibly some were from Queen Charlotte Sound. The three deeds did not record the names or number of the 'remaining Natives'.

The Maori texts of the three deeds are reproduced in Mackay's *Compendium*, along with an English translation of the Motueka deed.[211] Mackay said in a note that the translation of the other two was 'substantially the same' as this one.[212] The English headings for each of the deeds said that they excepted from the relinquished districts all 'Pas, Cultivations, and Burial Places.' However, in the Maori texts, the term 'wahi tapu' was used for the last category and, as the Te Whanganui a Tara Tribunal noted, this conveyed a much broader meaning than simply urupa, and in fact included any place considered tapu by Maori.[213]

The Maori texts of all three deeds also added 'wahi rongoa' to the exceptions for pa, cultivations, and burial places contained in the English headings. The English text of the Motueka deed simply repeated the words without translation, though Mackay added in a footnote, 'It is difficult to give a correct interpretation to the term "wahi rongoa," as there is nothing to indicate the meaning that it is intended to convey.'[214] The *Te Whanganui a Tara me ona Takiwa* report, which also noticed the use of wahi rongoa in the deeds of release

208. *Compendium*, vol 1, pp 67–68
209. Ibid
210. Campbell, 'A Living People', p 113
211. *Compendium*, vol 1, pp 67–68
212. Ibid
213. Waitangi Tribunal, *Whanganui a Tara*, p 177
214. *Compendium*, vol 1, p 67

used there, suggested that it may have been used for 'places reserved', particularly the tenths reserves. Herbert Williams' *Dictionary of the Maori Language* lists as one of the meanings of 'rongoa' to 'preserve, take care of'.[215] This gives some support to the notion of a reserve, though other meanings relate to medicinal uses. The *Te Whanganui a Tara me ona Takiwa* report considered that Wellington Maori were more likely to have understood the term to have meant 'places for gathering medicinal plants,' a meaning that would be commonly accepted today. It is likely that Nelson Maori also understood the term to mean such places. If so, this is another example of the mutual misunderstanding of deeds that occurred when Pakeha and Maori talked past one another. However, wahi rongoa were not included with pa, urupa, and ngakinga as reserved areas in Spain's award or in FitzRoy's Crown grant that implemented the award, though both did provide for the reservation of tenths.

The deeds of release were essentially receipts for the payment of a specified sum, such as £200 in the case of Motueka Maori, 'in final payment for the relinquishment of all our claims to the land mentioned in the deed'. This was rendered in the Maori text as 'he tino utunga he tino whakaritenga, he whakamahuetanga rawatanga i to matou papa katoa i o matou wahi katoa, i roto i o matou whenua katoa, kua tuhi tuhia ki roto i te pukapuka kua whakapiria ki tenei na'. The places relinquished were then listed. The expressions used in the English text are in our view a sufficient, though rather long-winded, expression of the permanency of the transaction. On the other hand, there is nothing to suggest that the deeds of release would have served to alter the impressions likely held by Te Tau Ihu Maori that the arrangements that they had previously entered into had been ones in which they had agreed to share their lands and resources with the newcomers. Indeed, the description of the further payments as being in the nature of a gift rather than as payment for the land, and Spain's comments that the compensation had been decided upon 'for the sake of making friends of you and the white people', along with assurances of ongoing access to pa, cultivations, and urupa, probably reinforced such an understanding. Dr Phillipson noted that local Maori 'did not want the settlers to leave' and suggested that this was a significant factor in their acceptance of the compensation.[216] This desire for the settlers to remain seems to have been based, as earlier, on the expectation of an ongoing reciprocal relationship between Maori and Pakeha of mutual benefit to both peoples, living together on the lands in question. We agree, therefore, with Professor Williams' conclusion that it would have been 'entirely reasonable to assume that non-exclusive co-habitation in the region was contemplated as the outcome of the visit by the Spain commission'.[217]

There remain, however, a number of further issues pertaining to the deeds of release which need to be considered. Crucial perhaps is the question of whether Te Tau Ihu Maori gave their full and free consent to the arrangements entered into. This is a point upon which

215. Herbert W Williams, *Dictionary of the Maori Language*, 7th ed (Wellington: GP Publications, 1997), p 346
216. Phillipson, *Northern South Island: Part 1*, p 79
217. Williams, 'Crown and Ngati Tama', p 89

we are hampered by the relative lack of evidence. However, the 24 August 1844 story from the *Nelson Examiner* (which reported that Tasman Bay Maori were dissatisfied with the amounts offered and accepted them only when informed Spain would not agree to any increase) certainly suggests that pressure was exerted to secure their agreement. In this respect, it is notable that Clarke was reportedly the official responsible for warning Maori that they would not receive any more money for their lands. If this report of his actions is correct, they would hardly seem compatible with his official responsibility as protector of aborigines to protect Maori interests. The small number of signatories to the deeds of release and the lack of full documentary evidence surrounding their signing casts further doubt on the extent to which all of those with customary interests in the lands had been consulted and had consented to the arrangements. Moreover, given that both Spain and Clarke had repeatedly emphasised in their statements to Maori that the lands had already been paid for and that the further money offered was merely in the form of a gift, the extent to which any consent could be considered informed must surely be in doubt. And, as we shall see below, even when there was a clear and explicit rejection of the compensation payments, this was not deemed sufficient to prevent Spain from awarding a substantial area of land to the company.

4.14.2 The Golden Bay payments and deeds of sale

We now examine the second phase of the compensation payments – that relating to Golden Bay. Again, consideration of these matters is hampered by the paucity of documentary evidence available to us. Our coverage of this issue draws mainly upon Dr Phillipson's research.[218]

As we noted, the £290 remaining from the £800 payment was reserved for Golden Bay Maori who had not attended Spain's hearing. Spain waited in vain for several days for Golden Bay rangatira to arrive in Nelson, before sending Clarke and Meurant to fetch them so that they could be paid in his presence. That mission was unsuccessful. The people at Motupipi flatly refused to accept the payment. On Clarke's recommendation, the £290 was lodged with a bank pending a settlement of the matter.[219] Nevertheless, Spain was satisfied that this problem need not prevent him from going ahead with his award of Nelson land, including some in Golden Bay, to the New Zealand Company.[220] The Golden Bay compensation was still unresolved and unpaid in July 1845 when FitzRoy issued a Crown grant to the company.

It seemed that the problem would be settled in October 1845, when leading chiefs from Golden Bay visited Nelson and signed an agreement to accept the £290. But no attempt was

218. Phillipson, *Northern South Island: Part 1*, pp 101–104
219. Clarke to Spain, 7 September 1844, *Compendium*, vol 1, p 63; Meurant, 2 September 1844
220. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol 1, p 57

made to release the money until the following March, and then the payment was withheld because the leading Ngati Rarua chief of Motupipi, Matenga Te Aupouri, was absent at a hahunga.[221] When company officials and two missionaries went to Motupipi in May 1846 to settle the question, they again found important chiefs were away. But this time the officials decided to pay out the money, hoping that the recipient chiefs would hand over some of it to the absentees. Two Aorere chiefs, Tamati Pirimona and Hori, were given £100 to distribute among their people. The remaining £190 was handed over to Matenga Te Aupouri of Ngati Rarua to share with his people and with some Ngati Tama living at Takaka, who complained in 1847 that they had not received their share. Eventually, £30 was handed over to Te Iti of Ngati Rarua, and he was told to share that small amount with Ngati Tama of Takaka. The latter group were unhappy with that decision and continued to appeal for a share of their own, apparently without success. Also, some Ngati Tama at Aorere complained that they had not received a share of the £100 that was paid to Pirimona and Hori.

As Dr Phillipson pointed out, the problems over compensation payments were exacerbated by the Government's failure to make the reserves for pa and cultivations that were promised in Spain's award and FitzRoy's Crown grant (see sec 4.16). A further problem arose at the Wainui–Separation Point district, where a mixed community of some 64 people had never received any of the 'presents' handed out by Captain Wakefield or any of the compensation money awarded by Spain, despite all of that district – more than 20,000 acres – being included in Spain's award to the company.

From Dr Phillipson's discussion, it would seem that those who received compensation in Golden Bay were not required to sign deeds of release in receipt for payment of compensation and instead signed deeds of sale, as if to say that the Crown was purchasing the land afresh. For instance, in May 1846, when it was decided to proceed with the payment of £290 to the chiefs Te Aupouri and Tamati Marino, Donald Sinclair, the police magistrate, required them to sign a deed of sale. Several other chiefs of Motupipi and Aorere also signed the deed, and the names of eight others, including Te Meihana of Takaka, were added without their signatures. This suggests that Sinclair was attempting to get comprehensive approval for the payment, though, as we noted above (sec 4.14.2), there were numerous disputes over the distribution of the money. The deed of sale had a different wording from the Tasman Bay deeds of release for setting aside pa and other reserves. In addition, the Golden Bay deed guaranteed that when 'the Lands are chosen by the white people there shall be left to the Maories, the pahs, the burial places and the cultivations as awarded by Mr Spain. There shall be also chosen for the Maories certain reserves from the lands surveyed by the Europeans.'[222] It is evident that there was some vagueness over the definition of reserves, and there was no specific mention of tenths reserves or of wahi rongoa. Not surprisingly,

221. A ceremony for the disinterment of a corpse prior to its final burial.

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

there were to be continuing problems over the definition, allocation, and preservation of reserves in Golden Bay. We discuss these issues in later chapters.

4.15 Spain's Nelson Award, 31 March 1845

Before discussing the details of Spain's Nelson award, we look briefly at his general approach to handling the New Zealand Company's claim. Spain began his report with an outline of the company's Kapiti and Queen Charlotte Sound transactions, noting that he had already commented on them in detail in earlier reports. He added, however, that had he:

> been compelled to inquire into the title of that body [the NZ Company] to but a moiety of this enormous territory, my labours at this moment would have been far from termination, but my investigation of its claim has been of course materially narrowed by the [November 1840] arrangement with Her Majesty's Government, which restricted the selection of land by the Agent in the Colony to certain quantities of land in certain localities.[223]

We note that, although the agreement stipulated that the company was to be granted 160,000 acres in Wellington and New Plymouth, it did not require any land to be granted at Nelson, which had not been envisaged as a company settlement at that time.

Spain then noted that at Otaki he had tried to ascertain from Te Rauparaha and Te Rangihaeata just what land they considered they had sold under the Kapiti deed. He accepted that Te Rauparaha denied that he had sold any more than Taitapu (which Spain described as a 'district' in Massacre Bay) and that Te Rangihaeata denied that he had sold more than Wakatu, or Nelson Haven. Spain also admitted that two other Ngati Toa chiefs, Hiko and Tutahanga, had given similar evidence.

Discussing his Nelson hearing, Spain said that he was 'perfectly willing to entertain the claim of the Ngatitoa chiefs . . . so far as I was assured of their actual residence on and cultivation of parts of the various portions of land of which they declared themselves owners'. In reference to this, the commisoner explained that he:

> had more than once laid down . . . that mere conquest, unsupported by actual and permanent occupation, and more particularly where the conquered parties still remain in occupation, or having left it for a short time return and occupy it for a series of years, bestows no title on the invaders.

Spain therefore concluded that it was his duty to 'receive the evidence, and listen to the statements of the Natives residing within the blocks surveyed by the Company . . . in order to ascertain who were the actual owners, according to what I found to be the Native custom'.[224]

223. 'Spain's Report to FitzRoy', *Compendium*, vol 1, p 55
224. Ibid

This suggests that Spain was ready to take evidence from a number of witnesses from the groups resident on land already surveyed around Nelson for company settlers, as the Land Claims Ordinance required him to do.

Spain next described Meurant's mission prior to the hearing and his subsequent advice to Spain that 'the Natives were anxiously waiting my coming amongst them, and that there existed a favourable disposition in the minds of those in the neighbourhood of Nelson, Motueka, and Massacre Bay'.[225] This 'favourable disposition', Spain believed, had arisen from the 'presents' that Captain Arthur Wakefield had distributed, though he admitted that further payments might be requested. Spain praised Captain Wakefield for 'this liberal and judicious policy' and regretted only that he had failed to describe his 'presents' as purchases and to obtain receipts for those payments. 'Had this been done,' Spain continued, 'I have little doubt that the resident Natives would have regarded the transaction as a regular sale and disposal of their lands.'[226] Later on in his report, Spain actually claimed that 'the Natives had always looked upon the transaction with Captain Wakefield as an alienation of their rights and interests in the land'.[227]

The land claims commissioner was speaking in two tongues here, since he knew full well that the company had used the fiction of making 'presents' because Hobson's proclamation of 30 January 1840 had declared purchases of Maori land since that date null and void. But Spain was now trying to regard the 'presents' as helping to validate Wakefield's original Kapiti deed with Ngati Toa. What Spain was overlooking was that Nelson Maori had accepted Wakefield's 'presents' at face value – that is, as a tuku whenua or a licence to occupy some of their land – and that they expected further presents from time to time to renew that arrangement.

Spain was so satisfied with the additional 'payments' made by Captain Wakefield that he was:

> inclined to conclude that the resident Natives had not only been amply renumerated for their land by presents in which, with scarcely an exception, they had all participated, but that they were aware at the time of the nature and satisfied with the termination of the transaction to which they had been parties.

As Spain announced in the speech of 24 August 1844 that we quoted above (sec 4.13), he would have been prepared to make an award to the company without further payment. Indeed, Colonel Wakefield's offer of an additional payment of £800 was regarded by Spain as a 'bonus' that had to be seized there and then:

> But when I found Colonel Wakefield ready, after examining but one Native witness, to negotiate for a further payment, and understood from Mr Clarke that he was prepared to

225. 'Spain's Report to FitzRoy', *Compendium*, vol 1, p 55
226. Ibid, p 56
227. Ibid

> arrange for a further payment of a few hundred pounds, which the Principal Agent was willing to advance, I was glad of an opportunity of so easily complying with the expectations without acknowledging the rights of the Natives, and by effecting an immediate adjustment, of leaving this settlement in quiet possession of the land, and on amicable terms with the resident aborigines.[228]

Spain also admitted that some Golden Bay Maori at Motupipi had refused to accept the compensation offered them, but, as we noted, he did not regard this as a reason to hold up his Nelson award or to resume the sitting of his court to examine witnesses from Golden Bay. 'I am thus enabled', he added, 'to report to your Excellency the quiet and satisfactory adjustment of the Native claims in all the districts (excepting Wairau) in the Nelson settlement.'[229]

Yet, there must have been something nagging at Spain's conscience, since he revisited his notions of Maori customary title, particularly his now strongly held view that mere conquest without subsequent occupation could not confer title and that the rights of the occupants prevailed:

> I have set it down as a principle in sales of land in this country by the aborigines, that the rights of the actual occupants must be acknowledged and extinguished before any title can be fairly obtained upon the strength . . . of the claims of the self-styled conquerors, who do not reside on nor cultivate the soil. In short, that possession confers upon the Natives of one tribe the only and real title to land as against any of their own countrymen; and that the residents, whether they be the original unsubdued proprietors, the conquerors who have retained their possession acquired in war, or captives who have been permitted to reoccupy their land on sufference – in all cases the residents, and they alone, have the power of alienating the land.[230]

In view of this principle, which Spain said was 'universally acknowledged', the very act of Captain Wakefield:

> paying over again (for such was the real state of the case) the actual residents whom he found in occupation and undisturbed possession for the very land which, two years before, had been pretended to be conveyed to the Company by two or three chiefs of another tribe, affords so convincing a proof, from a quarter where least expected, at once of the justice of my decisions, and the deficiency, and his conviction of the deficiency, of the original purchase, that I cannot pass over it without particular observation.[231]

Here, as elsewhere in his report, Spain's obsequious praise of the Wakefields leaves us in doubt of his objectivity and neutrality on issues between Maori and the company. He

228. Ibid, p 57
229. Ibid
230. Ibid, p 58
231. Ibid

was also illogical. He had said that mere conquest without occupation could not confer title, but he preferred to allow the company a Nelson purchase that began with the Kapiti deed (which he described as deficient yet refused to declare invalid) and was confirmed by Captain Wakefield's 'presents' and Colonel Wakefield's subsequent (though, in Spain's view, unnecessary) payments. His decision not to continue with his inquiry or to hear more Nelson Maori witnesses prevented him from discovering all of those who had customary interests in the land by right of occupation. These included various groups of northern iwi and remnants of the Kurahaupo people who had retained or regained their rights to land in Golden and Tasman Bays. In theory, at least, Spain recognised that sort of customary title. Moreover, as we noted earlier, his stated views on the inadequacy of the Kapiti deed stand in marked contrast to his comments to Te Tau Ihu Maori at the time that additional compensation was agreed. His assertions on that occasion that the land had been purchased from Te Rauparaha were clearly designed to pressure resident iwi into consenting to the deeds of release and, as such, were hardly made in good faith. We return to these issues in our findings.

Having dealt with the Nelson situation, Spain considered the title to the Wairau. He admitted that Te Rauparaha and Te Rangihaeata had said that they had not sold the Wairau, and he was surprised that Captain Wakefield had made no attempt to 'bargain with the resident proprietors', as he had done in Nelson. Spain noted that at neither his Wellington hearing nor his Nelson hearing had Colonel Wakefield attempted to produce any proof of purchase of the Wairau, and Spain therefore did not include it in his Nelson award. But, having said that, Spain did embark on a lengthy examination of Ngati Toa's rights in the South Island; he provided a history of their conquests and claimed that Rangitane, 'the original occupants', were 'reduced to a mere remnant, living in the interior without any fixed dwelling-places, and even now [were being] hunted down by Rauparaha and his retainers'.[232] Spain said that various, unnamed, groups that had been allies of Ngati Toa were in occupation of Nelson, Massacre Bay, and Queen Charlotte Sound, and had 'asserted and maintained their just and proper claims'.[233] Then, he listed the various districts 'in real and *bona fide* possession of the Ngatitoa Tribe'. In the South Island, these were 'Cloudy Bay, comprising the Wairau, [and] a part of Queen Charlotte's Sound'. In view of the vast area covered by the Kapiti deed, this might seem a modest area. But, although there were some Ngati Toa in residence at Cloudy Bay, and possibly in the outer part of Queen Charlotte Sound (or Pelorous Sound), there were none at the Wairau, since they had withdrawn after the 1843 conflict.

There were, however, other groups in residence, including some Rangitane, though Spain preferred to believe that they were mere fugitives, hiding in the interior. Since Spain did not conduct any inquiry into the Wairau, he was unaware of the status of Rangitane, or of Ngati Rarua living at Cloudy Bay, and his statement that the former were 'even now hunted down

232. 'Spain's Report to FitzRoy', *Compendium*, vol 1, p 59
233. Ibid

by Rauparaha' was demonstrably untrue, as was made plainly obvious by the high standing of Rangitane rangatira (and signatory to the Treaty in 1840) Ihaia Kaikoura. Nevertheless, Spain decided that Ngati Toa had an exclusive title to the Wairau, and this was soon to give Grey a good excuse to negotiate with them alone when he came to purchase it, as we relate in our next chapter.

At the end of his report, Spain made a formal award to the New Zealand Company, saying that it was entitled to a Crown grant for 151,000 acres in several districts in Nelson.[234] Most of the land was already surveyed, and the breakdown by region was as follows: Nelson, 11,000 acres; Waimea, 38,000 acres; Moutere, 15,000 acres; Motueka, 42,000 acres; and Massacre Bay, 45,000 acres. The award excepted all pa, burial places, and 'grounds actually in cultivation by the Natives' situated within those districts, all tenths reserves, and all land claimed by pre-1840 European purchasers whose claims were upheld by the commissioner of land claims. Spain attempted to define land to be included with pa and cultivations. The limits of pa, he said, were to be:

> the ground fenced in around their Native houses, including the ground in cultivation or occupation around the adjoining houses without the fence; and cultivations, as those tracts of country which are now used by the Natives for vegetable productions, or which have been so used by the aboriginal Natives of New Zealand since the establishment of the Colony . . .[235]

This rather cumbersome definition at least demonstrated that Spain was aware of the need to provide for the Maori system of shifting cultivation, but its vagueness was to be a cause of controversy with the company and with Te Tau Ihu Maori. The fomer was concerned that he was being overly generous in the various areas that were to be excepted from its award, and the latter were concerned that these promised areas were not in many instances reserved to them. The company was also concerned that Spain's 151,000-acre award left it 70,000 acres short of the 221,000 acres promised for settlement in its original prospectus, and further meant that it had insufficient land to complete its allocation of rural lots. As was the case before the 1843 conflict, the company turned again to the Wairau to make up the deficit.

4.16 Fitzroy's Crown Grant, 20 July 1845

Governor FitzRoy's Crown grant to the New Zealand Company of 20 July 1845 was issued in consequence of Spain's award and largely followed its wording, including Spain's breakdown of the areas awarded in each district and his cumbersome definition of reserved pa, burial places, and cultivated grounds referred to above (see fig 8). Though it did not reserve wahi

234. Phillipson, *Northern South Island: Part 1*, p 81
235. 'Spain's Report to FitzRoy', *Compendium*, vol 1, p 60

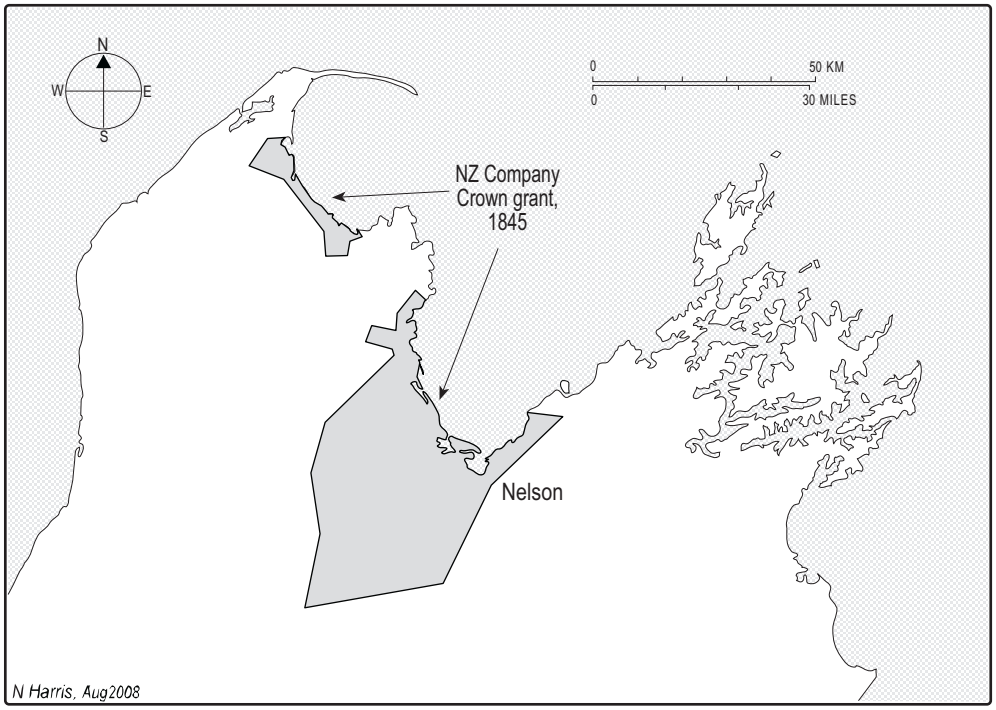

Figure 8: The New Zealand Company Nelson grant, 1845 **Source: AJHR, 1874, G-6**

rongoa, as had the Tasman Bay deeds of release, the grant did make an additional exception of land already set apart as tenths reserves. The grant also made provision for other pre-1840 land claims not yet dealt with and for Government reserves for public purposes. Plans already prepared by Spain of unsurveyed company lands and Maori reserves were attached. At the same time, FitzRoy issued a Crown grant to the company for 71,900 acres for its Port Nicholson claim. That grant made the same exceptions for Maori reserves, pa, burial places, cultivations, tenths, and land claimed by other private purchasers but not yet dealt with by the land claims commissioners.[236]

The directors of the company in London rejected both grants on the advice of Colonel Wakefield, who was concerned that claims by private purchasers in the two company districts and the areas to be reserved for Maori pa and cultivations (which were unsurveyed) could take away a considerable area of rural land and some valuable town lots.[237] The Imperial Government had recently appointed Colonel W A McCleverty to assist the new Governor, Captain George Grey, in settling problems relating to Maori reserves in the company settlements, and it decided to get him to handle the additional problems arising from FitzRoy's two Crown grants. But McCleverty also had military responsibilities relating to the warfare

236. Waitangi Tribunal, *Whanganui a Tara*, pp 185–186
237. T C Harrington to Secretary of State for the Colonies, 28 February 1846, *Compendium*, vol 1, pp 69–70

that had arisen in the northern and southern extremities of the North Island which had to take priority. Then he turned his attention to the company's land claims in Wellington, particularly a series of exchanges relating to reserves that are detailed in the Tribunal's *Te Whanganui a Tara me ona Takiwa* report.[238] McCleverty did not become involved with the Nelson reserves problem, which was instead handled by company officials in Nelson.

As it turned out, one aspect of the problem was submerged in a grander settlement. The company was unable to find sufficient suitable land in the districts awarded to it by Spain and included in FitzRoy's Crown grant. Once again, it turned its attention to the Wairau to find land for its remaining rural allotments. As we detail in our next chapter, Grey resolved that problem in one fell swoop with his huge Wairau purchase. He then included the Wairau block, along with the Spain–FitzRoy award and yet more land around that, in a new Nelson Crown grant of 1 August 1848. It could perhaps be said that this went a long way towards 'solving' the reserves problem, since native reserves, pa, and urupa were excepted from the grant. We presume that the native reserves were tenths reserves (including some known as 'occupation reserves' that had already been set aside), but cultivations outside these were no longer excepted from the company grant, as had been the case with the abortive FitzRoy grant. These issues are discussed in chapters 5 and 9.

4.17 Claimant and Crown Submissions

4.17.1 Claimant submissions

In this section, we summarise the submissions of claimant counsel, which focused on questions around the relationship between the New Zealand Company and the Crown, the validity of the company's transactions in Te Tau Ihu, and the adequacy of the Spain commission's inquiry into those dealings. Ngati Toa's submission also raised issues around the Crown's response to the Wairau conflict.

A major theme of the claimants' submissions was the extent to which the Crown's relationship with the New Zealand Company detracted from its fulfilment of its obligations to Te Tau Ihu Maori under the Treaty of Waitangi. Assessing the relationship throughout the 1840s, counsel for Ngati Toa described how Crown policy evolved, eventually coming to the point where 'the main commitment was to supporting the New Zealand Company'.[239] Counsel for Ngati Tama characterised the main aspects of the relationship as 'collusion and preferential treatment, with the object of achieving settlement in Te Tau Ihu "at any cost"'.[240] Counsel for Rangitane also referred to the Crown and company cooperating in

238. Waitangi Tribunal, *Whanganui a Tara*, pp 227–228
239. Counsel for Ngati Toa Rangatira, closing submissions, 5 February 2004 (doc T9), p 71
240. Counsel for Ngati Tama, closing submissions, [2004] (doc T11), p 43

order to 'achieve settlement', describing the company's position in the period prior to 1841 as 'privileged'.[241]

Claimant counsel identified the November 1840 agreement as the cornerstone of the Crown–company relationship, with several arguing that it was the source of the Crown's breach of the principles of the Treaty. Counsel for Ngati Kuia submitted that the Crown 'gave priority to honouring the 1840 Agreement over and above honouring its obligations to Maori under the Treaty', and that this had resulted in its failure to actively protect Ngati Kuia's land. Counsel also noted that there was no consultation with Maori prior to entering the agreement.[242] Similarly, counsel for Ngati Apa argued that the agreement was in clear breach of the Crown's Treaty obligation to actively protect Maori land and other taonga.[243]

Counsel for Te Atiawa agreed that the November 1840 agreement was in breach because the arrangement did not require compliance with the Treaty. Counsel argued that the Crown ought to have known that the company's deeds were 'unstable' and that the agreement should not have been entered into prior to the Crown's inquiry into the company's transactions. Counsel submitted that the Crown entered the agreement without considering its fiduciary duties to Maori and that the 'prudent and proper course would have been to await the outcome of the . . . judicial investigation by Spain'.[244]

Counsel for Ngati Koata took the argument further, contending that the November agreement 'effectively confirmed the Company as an agent of the Crown'.[245] Pointing to the evidence of Crown historians with respect to the close relationship between the Crown and the company, counsel argued that the company was acting on the Crown's behalf and should therefore have been instructed of its fiduciary duties to Maori, and that company activities that breached the Treaty were effectively Crown breaches. Counsel also noted the active role that the Crown took in transactions and that it had not only failed to discipline the company but permitted it to purchase land, in breach of the Treaty provision for Crown preemption. In concert with other claimant counsel, counsel for Ngati Koata asserted that the Crown's relationship with the company 'brought about conflict with its Treaty obligations'.[246] Counsel concluded that 'the Company and, by nature of its relationship, the Crown failed to provide sufficiently for Ngati Koata, their needs and their survival as a people'. Counsel also pointed to the company's lack of compliance with the Treaty and its principles.[247]

241. Counsel for Rangitane, submissions concerning generic issues, 23 August 2002 (paper 2.356), pp 6–7. The description of the relationship as collusive for the purposes of achieving settlement appears to have originated in Professor Williams' brief for the generic issues hearing (doc E10), p 5)

242. Counsel for Ngati Kuia, closing submissions, 17 February 2004 (doc T14), pp 39–40

243. Counsel for Ngati Apa, submissions concerning generic issues, 30 August 2002 (paper 2.357), p 11

244. Counsel for Te Atiawa, closing submissions, 10 February 2004 (doc T10), pp 56–57

245. Counsel for Ngati Koata, closing submissions, 9 February 2004 (doc T7), p 38

246. Ibid, pp 38–40

247. Ibid, p 47

A second theme of claimant submissions was the validity of the New Zealand Company's transactions, with counsel focusing attention on the status of the 1839 deeds and the nature of the negotiations in Mohua and Te Tai o Aorere in the early 1840s.

A number of submissions referred to the findings of the Te Whanganui a Tara Tribunal with respect to the Port Nicholson deed. Counsel for Te Atiawa cited that Tribunal's statement that the deed was 'invalid and conferred no rights under either English or Maori law on the Company or on those to whom the company subsequently purported to on-sell part of such land'. Pointing to the similar circumstances surrounding the Queen Charlotte Sound deed, counsel for Te Atiawa contended that these same comments applied and sought a finding that the 1839 deeds 'were of no legal effect and conveyed no rights whatsoever to the Company'.[248] Counsel for Ngati Kuia also recommended the findings of the Te Whanganui a Tara Tribunal, maintaining that the Kapiti and Totaranui deeds were invalid and conferred no rights. She further emphasised that Ngati Kuia were not represented in the 1839 deeds.[249]

Counsel for Ngati Rarua argued that the 1839 deeds were 'of no consequence' to them because they had not been involved in the negotiations.[250] Counsel for Ngati Koata pointed out that the Kapiti deed was signed by Te Whetu only because he happened to be in Kapiti at the time, and there was no subsequent effort to secure the agreement of Ngati Koata resident in Te Tau Ihu. Counsel sought a finding that 'the New Zealand Company transactions were a fraud and a nullity'.[251]

With respect to Captain Wakefield's arrangement with Te Tai o Aorere Maori, counsel for Ngati Rarua submitted that this 'could not be deemed a sale within either the paradigms of Pakeha or Maori land tenure'. Counsel remarked that there was no deed and that, even if there had been, it was unlikely that it would have been based on shared understandings.[252] Counsel for Te Atiawa sought findings that the gifts presented at Mohua and Te Tai o Aorere had no legal effect and did not confer rights to the company.

Counsel for Te Atiawa also asked the Tribunal to find that the Crown was in breach of the Treaty by allowing the New Zealand Company to choose a site for a township in Te Tau Ihu and to sell lots in this township before the outcome of Spain's inquiry was known. Counsel sought findings that Wakefield had given undertakings to Maori that the settlement would not encroach on pa, cultivations, or wahi tapu; that company policy by the time Nelson was established was that one-eleventh of the land would be set aside for Maori; and that the company had failed to explain the tenths scheme to Maori.[253]

248. Counsel for Te Atiawa, closing submissions, pp 50–52
249. Counsel for Ngati Kuia, closing submissions, pp 38, 40
250. Counsel for Ngati Rarua, closing submissions, p 139. It will be recalled that there was actually one Ngati Rarua signatory – 'Charley' (who was possibly Tana Te Pukekohatu).
251. Counsel for Ngati Koata, closing submissions, pp 46, 135
252. Counsel for Ngati Rarua, closing submissions, p 141
253. Counsel for Te Atiawa, closing submissions, p 69

4.17.1

Pointing to the prosecution of Kawatiri following the dispute at Motupipi, the Wairau incident, and the increasing economic independence of settlers, counsel for Ngati Rarua stated that the hoped-for benefits of settlement were not realised. He described the Motupipi dispute and the prosecution of Kawatiri as 'a major watershed in the relationship' between Ngati Rarua and the settlers, and argued that Ngati Rarua had hoped that the Spain commission would provide redress for that incident and the Wairau conflict.[254]

The submissions of counsel for Ngati Toa highlighted the significance of the Wairau conflict for the iwi. Counsel argued that the Crown breached the Treaty by not taking action against the New Zealand Company and submitted that the company should have been punished for its illegal survey and for its attempt, alongside the police magistrate, to use the law to coerce Ngati Toa, for which it did not have jurisdiction.

In closing submissions and submissions in reply to Crown closings, counsel for Ngati Toa emphasised that the Wairau was a key juncture and 'the catalyst of a change' in the relationship between the iwi and the Crown, and that it foreshadowed subsequent events of the 1840s. In their submissions in reply, counsel accepted that FitzRoy's response to the Wairau was 'measured and fair at the time' but stated that the incident was later used by the Crown 'to force Ngati Toa to part with their lands in the Wairau.'[255]

With respect to the Spain commission, in general, all of the claimants argued that the inquiry was predetermined by a desire to put the New Zealand Company's settlers in possession of their land. The November agreement and the presence of settlers on the ground made it impossible for Spain to hold a truly impartial inquiry. It was also politically unfeasible for him to find that the company transactions were invalid. As a result, Spain did not conduct an adequate inquiry into either the identity of those who held customary rights and tino rangatiratanga or the nature of the particular customary practices in Te Tau Ihu that regulated the transfer of property. Had he done so, he could not reasonably have found that an absolute alienation of rights or of land had taken place to the company. Most claimants argued that the transaction was a tuku in Maori customary terms and was governed by Maori law, whilst being void in British law (because it masqueraded as goodwill present-giving, something not cognisable as a purchase, even if pre-emption had been waived).

Everyone agrees that the inquiry was short and incomplete. European testimony was heard first and was followed by only one Maori witness, whose evidence – which suggested that the transaction had significant flaws – was so worrying to Spain, Clarke, and Wakefield that no other chiefs were called. Not even this much of a formal inquiry was held anywhere outside Nelson. The true explanation for this is that the comission's object was not to conduct an impartial inquiry into the validity of the company's transactions. As a result, it took no account of known issues with regard to the nature of Maori customary tenure. Edward

254. Counsel for Ngati Rarua, closing submissions, pp 142, 147–149

255. Counsel for Ngati Toa Rangatira, closing submissions, pp 71, 77–78; counsel for Ngati Rangatira, submissions in response to closing submissions of Crown counsel, 19 April 2004 (paper 2.785), pp 10–11

Meurant's prior informal investigation was also limited, and clearly inadequate. Dr Ballara's evidence is that Spain did in fact uncover some of the principles of customary tenure but that he did not put them into practice in his inquiry or decisions. The fact that Spain had such knowledge and did not apply it, the claimants argued, increased the seriousness of the Treaty breach caused when the Crown failed to inquire into customary rights in Te Tau Ihu. As a result, Spain's 1845 report contains a number of inconsistencies that were included in order to justify actions already taken. By 1844, Spain saw his role as cooperating with the company to complete arrangements for settlement, and thus he allowed his inquiry to be cut short and he arranged for compensation to be paid. This was not the hallmark of an independent commission.[256]

The claimants referred us to the findings of the Te Whanganui a Tara Tribunal on similar issues. Ngati Rarua submitted that, 'by the time of the Nelson hearing, Spain was oriented towards arbitration instead of just investigation'.[257] This process had already occurred at Wellington and was described in the *Te Whanganui a Tara me ona Takiwa* report as:

> irreconcilable with the Land Claims Ordinance 1841 under which Spain was authorised to hold an inquiry with full opportunity for the parties, Maori and company, to be heard. The inquiry was abandoned, and Spain's role was converted from that of a judicial officer into an umpire directing and, when required, deciding the outcome of negotiations between the company and the protector. Maori had no independent voice and were entirely in the hands of the protector, Clarke junior, who, in turn, was subject to pressure from Spain to reach an agreement with Wakefield.[258]

The claimants also cited the evidence of the Crown's historian, Dr Gould, in support of their case. Ngati Koata, for example, concluded that Spain was not truly independent, that there was no evidence that Maori had agreed to his arbitration–compensation process, and that Spain had not inquired sufficiently to have a grasp of the facts when he decided that a perfectible transaction had taken place. Based on Dr Gould's evidence, the Crown acknowledged that Spain was intent on a quick process and did not give the people of the Nelson district a sufficient opportunity to convey their understanding of what had happened.[259]

The claimants relied on Dr Gould's conclusion that Spain's inquiries:

> were really not inquiries at all but partly window dressing, and partly an adjunct to his real purpose which was to ensure that all Maori within the disputed districts or settlements received compensation in exchange for signing deeds of release, confirming the prior purchases of the Company. The model could not work in all of the Company settlements. His

256. Counsel for Ngati Tama, closing submissions, pp 49–50
257. Counsel for Ngati Rarua, closing submissions, p 35
258. Waitangi Tribunal, *Whanganui a Tara*, p 116; counsel for Ngati Rarua, closing submissions, p 35
259. Counsel for Ngati Koata, closing submissions, pp 50–53

task was really to perfect existing, flimsy, transactions and to ensure that they were fair. Just how Spain, or Clarke for that matter might have determined what was fair is a fraught question.[260]

Dr Gould agreed with the claimants that the customary rights of Maori appeared not to have been sufficiently investigated and that the manner in which Spain and Clarke negotiated settlement in 1844 did not appear 'fair or robust'.[261]

4.17.2 Particular viewpoints

Although the claimants broadly agreed on the nature of the relationship between the Crown and the New Zealand Company, they had particular and sometimes differing perspectives on aspects of Spain's inquiry.

(1) *Ngati Toa*

Ngati Toa argued that, since he incorrectly identified 'Taitapu' and 'Wakatu' with entire regions, Spain was wrong to consider the New Zealand Company entitled to its grant because of the Kapiti transaction. Ngati Toa did not intend 'to sell all of their rights to the whole of the Nelson, Waimea and Golden Bay areas'. Nonetheless, Spain's findings are favourable to Ngati Toa's case because he 'clearly accept[ed] that one of the reasons why the company was entitled to a grant at Nelson was because the land had been alienated from Ngati Toa'. Ngati Toa submitted that 'it must follow from this that Ngati Toa is entitled to share in the beneficial interests in the Nelson Tenths, as those interests formed part of the consideration for such land'. Ngati Toa accepted that the occupation, cultivation, and burial reserves were in a different category and that they had no right to them.[262]

If, argued Ngati Toa, one accepts the premise that the tenths were part-payment for the extinguishment of Maori title as at 1839–40, then beneficial interests in the tenths should have been fixed at that time, when the authority of Ngati Toa chiefs was still recognised over a wide region. According to Professor Boast, if this had been done when it should have been, rather than 50 years later, the result would have been very different. Thus, the Crown failed in its duty of active protection – it should have derived correct title through Maori custom at the time of the 'supposed purchases', not 50 years later in the Native Land Court.[263]

(2) *The northern allies*

Ngati Tama, Te Atiawa, Ngati Rarua, and Ngati Koata advanced similar claims, largely arguing the general case as outlined above. They had particular submissions about the process

260. Counsel for Ngati Koata, closing submissions, p 53
261. Ibid
262. Counsel for Ngati Toa Rangatira, closing submissions, p 100
263. Ibid, pp 108–109

of arriving at deeds of release, which affected them but not Ngati Toa or the Kurahaupo peoples. Ngati Rarua, for example, submitted that they were not consulted over the decision to move to arbitration, that they had no opportunity to select a representative or advocate, and that the representative selected, Protector Clarke junior, was unsatisfactory. Ngati Rarua also submitted that they were pressured by the Crown to settle quickly: they had 'initially rejected the terms of the settlement' and accepted them only after two days of 'pressurized negotiations', when it became apparent that 'if they resisted the settlement they would receive nothing'.[264]

In Ngati Tama's view, matters were predetermined not merely by the November agreement but also by Spain's prior investigation of the Ngati Toa chiefs for Port Nicholson. Questioning those chiefs hardly constituted the carrying out of an adequate inquiry into the nature of customary practices regulating the transfer of property, or who held such rights, in Te Tau Ihu. But, argued Ngati Tama, it may nonetheless have predetermined the outcome at Nelson because of Spain's improper reliance on the Kapiti deed to justify the outcomes he wanted to reach.[265]

Te Atiawa made the most technical of the claimants' submissions, relying particularly on whether or not Spain had acted in accordance with his empowering ordinance. If he had not, counsel argued, then, by basing its grant on an invalid commissioner's report concerning a wrongly validated transaction, the Crown had breached the Treaty principles relating to good government and active protection. On this reading, Spain's adjournment of his Nelson hearing was 'incompatible' with the Land Claims Ordinance 1841.[266] Had Spain completed his inquiry, counsel argued, he would have discovered that Te Rauparaha and Te Hiko did not have sole power to alienate the land. He would also have found that the local people had not sighted or signed the Kapiti deed, had no idea of its contents, and had not 'at law, received any payment whatsoever for their land'.[267] Spain's report nevertheless relied on Captain Wakefield's gift-giving, though it 'could not provide consideration at law'. Since the Crown and Spain were at all material times bound by the 1841 ordinance, and since Spain adjourned his investigation and took into account the 'gifts given to Maori in 1841 and 1842 when such gifts were unlawful and/or of no effect', he never conducted a 'proper or lawful inquiry into the Company's claims to the Tasman and Golden Bays'.[268]

Finally, we note that, in the submission of these claimants, the ownership of the tenths should have been determined in the 1840s, and that the long delay in doing so was in breach of the Treaty.[269]

264. Counsel for Ngati Rarua, closing submissions, p 36
265. Counsel for Ngati Tama, closing submissions, p 49
266. Counsel for Te Atiawa, closing submissions, p 88
267. Ibid, pp 88–89
268. Ibid, pp 97–98
269. Counsel for Ngati Tama, closing submissions, pp 71–72

4.17.2(3)

(3) *Kurahaupo tribes*

Like the northern allies, the Kurahaupo tribes shared many of the common issues concerning the adequacy of Spain's inquiry. They had their own perspective, however, about its outcome and its particular effects on them. Ngati Kuia argued that Spain improperly failed to recognise them, even though they were present at the inquiry and had participated in the payment of the money distributed after the signing of the deeds of release.[270] This lack of recognition was critical to their mana, and later to Judge Mackay's faulty decision not to acknowledge their claim in the Nelson tenths.

Ngati Apa submitted that one of the fundamental aspects of an inquiry into the validity of a transaction must surely be the identification of those iwi that had customary rights in the area supposedly purchased. Validity depended on the consent of all who had customary rights in the lands, forests, fisheries, and other taonga affected by the purchase. This required observing the process that McLean had followed in the Manawatu – that of literally walking the lands to meet all those occupying the areas sought to be purchased, so that the Crown was aware of all who claimed rights. Meurant and Clarke, however, spoke only to some northern iwi in the coastal Nelson area, and Spain heard but a single witness. These facts are not disputed. And, yet, surveyors had encountered at least two families of Ngati Apa in the Waimea area, and Kereopa gave evidence that 21 named men of Kurahaupo descent were present at Wakatu at the time that Spain was there. These 21 men were likely to have had their families with them, which, Ngati Apa argued, would have made for quite a large presence in Tasman Bay at that time. Nonetheless, the perfunctory inquiry carried out by Spain and his assistants did not identify those people.[271]

On the basis of Spain's unsatisfactory process, Ngati Apa alleged that they lost their rights forever to reoccupy the affected coastal lands in Tasman and Golden Bays. As they continued to regain their rights and status after 1840, they found that the Crown had granted their lands (both coastal and interior) to others. Spain validated the New Zealand Company's purchase without any regard for those people who were living on the land and in the coastal areas in a tributary state or in hinterland areas in a free state. This was an enormous breach of the Treaty's guarantees.[272]

4.18 The Crown's Case

The Crown's closing submissions addressed some, but not all, of the arguments raised by claimant counsel in their closings. With respect to the relationship between the Crown and the New Zealand Company, Crown counsel acknowledged the 'degree of unanimity

270. Counsel for Ngati Kuia, closing submissions, pp 42–43
271. Counsel for Ngati Apa, closing submission, pp 17–18
272. Ibid, p 19

between the Imperial Government and the Company proponents of systematic colonisation'. Counsel stated that the Crown was required to 'balance and reconcile two competing demands upon it': its obligations to Maori under the Treaty and its obligations to the company through the November 1840 agreement and 1841 charter. However, counsel did not agree that the 1840 agreement was in breach of the Treaty, arguing that there was nothing in the agreement per se that restricted the Crown from meeting its obligations under the Treaty.

Counsel suggested that 'the complaint appears to be that the November 1840 Agreement was premised on the assumption that the Company purchases were valid', an argument that the Crown challenged. Counsel pointed to the substantial difference between the company's claim and the eventual Crown grant, along with the need to 'perfect' the transaction with 'the payment of additional "presents" to resident Maori', as proof that Crown officials did not assume that the company transactions were valid. Counsel suggested that the real issue relating to the New Zealand Company was not the November 1840 agreement but the Crown's failure to set aside sufficient reserves for Maori:

> the issues for this Tribunal essentially become what obligations originating from the Company scheme did the Crown assume? Were such obligations met? Did the Treaty require more of the Crown in relation to the Company settlement? If so, were any further obligations met?[273]

Counsel contended that an assessment of these issues would involve a consideration of the way in which the Crown treated the company's transactions and the Spain commission, and its provision for both the tenths reserves and reserves in general.[274]

In response to Ngati Toa's submissions respecting the Wairau, Crown counsel contended that it is not clear that Thompson was exceeding his jurisdiction in attempting to arrest Te Rauparaha. With respect to the broader claim that the Crown breached the Treaty by not taking action against the New Zealand Company, counsel submitted that 'its response at the time was measured'. Noting that the Crown had decided at the time that the company was in the wrong, counsel suggested that it 'had already suffered the ultimate sanction' as a consequence of its actions.[275]

The Crown agreed with the claimants that Spain's inquiry was inadequate and that there were prejudicial affects for Maori. It did not, however, specifically concede that the Treaty had been breached. We set out the Crown's view of the Spain commission below.

In November 1842, the governor of the New Zealand Company protested to Lord Stanley about the Spain commission, objecting that there was nothing in the November agreement that made it conditional upon the company having acquired valid titles. If there was still

273. Crown counsel, closing submissions, 19 February 2004 (doc T16), pp 33–34
274. Ibid, p 35
275. Ibid, p 85

any extinguishment of Maori title required, that was the Crown's duty. The Colonial Office responded that the company's title had not been investigated by James Pennington and that its assumed validity was the basis of the promised grant; if the facts proved otherwise, the company would have to bear the results. As part of correspondence in 1843, in which the company suggested that the Treaty was unratified and of no legal effect, Stanley replied that it could not be set aside now that the Crown enjoyed the advantages that it guaranteed. The Crown had to honour its obligations, and Lord Stanley would 'not admit that any person, or any Government acting in the name of Her Majesty, can contract a legal, moral, or honorary obligation to despoil others of their lawful and equitable rights'.[276] On that basis, the Spain commission proceeded without interdiction from London.

Spain, the Crown argued, saw his duty in the same manner. In 1842, he wrote to Hobson saying that, if the Government had intended simply to admit the company's titles to be good and to grant it the land that it was entitled to under the Pennington award, then it would have made the company's claims exempt from the operation of the Land Claims Commission. But it did not. Such an approach would have been a:

> manifest injustice to the aboriginal inhabitants of this country, and so totally inconsistent and irreconcilable with the profession made to them, that Her Majesty would afford equal protection to all Her subjects, whether native or European, I confess I have not been able to believe that such an intention ever existed.[277]

In 1843, Spain commented further:

> It appears to me, that a consent on the part of the Government to grant to the Company the land which, according to Mr Pennington's award, they were found to be ultimately entitled to, without obliging them to prove the extinction of the native title, would have been a direct contravention of and in utter opposition to the spirit of the Treaty of Waitangi, and in violation of all the assurances of Her Majesty's Government to the aborigines, of affording them justice and protection.[278]

Dr Ballara details the gulf (at least on paper) between Spain and the company, stating the latter's belief that, even if the original agreements with Maori were defective, its 'settlers had a better right to land than sparse Maori populations who did not make proper use of it'. Spain and other officials, however, 'considered themselves bound by the Treaty and the British Government's instructions to protect Maori interests by a full investigation'.[279] Notwithstanding this, these standards, the Crown conceded, were not met. Spain acted with

276. Crown counsel, submissions concerning generic issues, 20 September 2002 (paper 2.371), p16
277. Ibid, p17
278. Ibid, pp17–18
279. Ibid, p18

a 'degree of ruthless pragmatism that saw the Treaty either sidelined or made secondary to the needs of the settlers and the New Zealand Company'.[280]

The Crown submitted that Spain had access to advice from those considered to possess knowledge of Maori customary concepts. In examining Spain's Nelson investigations, the Crown argued that Spain consistently held to the view that the 1840 agreement did not remove the need for a 'searching inquiry' into the company's extinction of native title.[281] But, having said that, the Crown examined Spain's behaviour in his Wellington inquiry. For instance, in February 1843, and already aware of the company's imperfect title, Spain instructed Wakefield to pay further compensation to Wellington Maori. This clearly pointed the way for a Nelson settlement. But, in contrast to the long-running Wellington inquiry, the Crown admitted that Spain's Nelson inquiry was adjourned as early as the second day and was replaced by a negotiation or an arbitration. As the Crown described it, 'by the time of the Nelson inquiry, Spain (and Clarke) appeared to have developed a modus operandi to ensure a relatively quick process'.[282]

The Crown's concessions of fact were based mainly on the evidence of its historian, Dr Gould. It admitted that Spain's Nelson hearing was very short and that it did not give the people of the district sufficient opportunity to relate their understanding of the events. Spain heard from only one Maori witness, Te Iti, a Ngati Rarua rangatira, and his evidence was interrupted by Protector Clarke junior, who suggested that he was not telling the truth. There were other Maori present from whom the commissioner could have extracted further evidence. Spain and Clarke should have been able to understand that the original tangata whenua of the area had a presence within the district defined by Spain's 1845 findings. Spain was clearly aware of the existence of one group, which he referred to as Rangitane. But, because of the speed of the inquiry, it is doubtful whether Clarke was able to inquire into or consider properly the status of the original tangata whenua people.[283]

In principle, however, the Crown argued that there was no Treaty breach and no illegality in a switch from an investigation of title to an arbitrated compensation. The Crown accepted the claimants' position – especially as outlined by Professor Williams – that Spain's appointment and legal authority were based on the Land Claims Ordinance 1841. Nonetheless, there was an issue as to how far the Governor and commissioner were in fact bound by some of the terms of that ordinance, as argued, for instance, by counsel for Te Atiawa. This was because its last clause provided that nothing in it was to affect the 'right or prerogative of Her Majesty'. Moreover, local ordinances did not fetter the Governor's prerogative powers to grant land. Thus, in the Crown's view, although the ordinance made no provision for commissioners such as Spain to abandon their judicial inquiries for an arbitrated settlement,

280. Crown counsel, closing submissions, p 2
281. Ibid, p 42
282. Ibid, p 47
283. Crown counsel, opening submissions, 14 November 2003 (paper 2.748), pp 13–14

any such move and any award resulting from it could be authorised and confirmed by the Governor under his prerogative power.[284]

There is, the Crown argued, evidence of some Maori support for the compensation option: namely, Meurant's report to Spain that Maori were willing to acknowledge a sale in return for further payments. The extent of any such willingness across all Te Tau Ihu Maori 'is not clear', but the only evidence of active objection came from Golden Bay, which Meurant had not visited.[285]

Under the heading 'Effect of Failure to Conduct Full Inquiry', the Crown acknowledged that Nelson Maori did not have a sufficient opportunity to relate their understanding of events. The evidence is inconclusive precisely because the inquiry was so abbreviated. Unlike the Wellington inquiry, where extensive evidence was heard and recorded, the Nelson inquiry was so short that there is very little contemporary record of what Maori thought about customary rights and the company's transactions. Similarly:

> it cannot be said with confidence that there is evidence of a reasonable degree of Maori engagement with and consent over the shift from inquiry to arbitration. There may have been, but it is also probable that Maori believed they had little or no choice in the matter. The evidence one way or the other is inconclusive. For the same reason it is therefore possible that some groups of Maori were unwilling to alienate their land, and there is a possibility that the Crown did not consult, negotiate and compensate all Maori with rights in the land affected.[286]

With regard to customary rights and the tenths, the Crown acknowledged the claim that it did not attempt to ensure that all iwi who sold land to the Nelson settlement obtained a proportionate share of the tenths, nor did it hold any investigation or consultation to determine what that proportionate share might be. This problem affected the creation of the suburban reserves, which were all selected in the Motueka and Moutere districts, and the rural tenths, which were effectively substituted by land set aside in the Wairau district alone. The Crown accepted that this claim is well founded.[287]

4.19 Agreement between the Parties

As is apparent from the previous sections, the Crown and the claimants agreed on some key issues with regard to Spain's inquiry, although the Crown confined itself to concessions of

284. Crown counsel, closing submissions, pp 40–42, 48
285. Ibid, pp 48–49
286. Ibid, pp 49–50
287. Ibid, pp 65, 71–72

fact rather than of Treaty breach and the claimants could not agree among themselves as to who the beneficiaries of the tenths should have been.

From our discussion of the parties' arguments, we consider that the following points are agreed:

- Spain's inquiry into customary rights and Maori's understanding of – and agreement to – the company's transaction was totally inadequate and resulted in prejudicial effects for Te Tau Ihu Maori.
- In regard to the inquiry, Meurant visited only some districts in Tasman Bay, Clarke did not have time to inquire informally, and Spain heard but one Maori witness, while many others were present who could and should have been heard. Even the evidence of that one Maori witness, Te Iti, was not given its due weight: Spain dismissed it on the basis of an accusation that it was untruthful – an accusation that was made by the company agent and the protector, who did not call any evidence to corroborate it. Tasman Bay tribes therefore did not have a proper opportunity to put their evidence on their understanding of what (if anything) had been agreed with Captain Wakefield, what rights (if any) Ngati Toa could or did alienate, whose rights were affected, and who had authority to decide such matters. Golden Bay communities had no opportunity to be heard at all, and they definitely did not consent in advance to an arbitrated settlement or to the amount of compensation determined for them to receive.
- The Crown should have inquired into and established how Maori's customary rights related to their share of the Nelson tenths at the time. To have left it for 50 years was wrong and unfair.
- The Crown's other concessions either did not go as far as the claimants' position or were not entirely agreed among the claimants. The Crown, for example, acknowledged that Spain and Clarke could (and should) have inquired into the rights of the Kurahaupo tribes, a point not necessarily accepted by the northern allies. It also agreed with the claimants that Spain had to operate according to the 1841 ordinance, but the parties, of course, did not agree on the legal or Treaty implications of that requirement. The Crown did think it 'probable' that Tasman Bay Maori were given no choice but to agree to arbitration and compensation, and even to the amount of that compensation, but it considered the evidence 'inconclusive'. Similarly, it was 'possible' that right holders who neither consented nor were compensated were left out. The claimants, on the other hand, considered the evidential foundation strong enough to take these conclusions further. They believed that the Tribunal could come to a definite view that Maori did not consent to a switch from investigation to arbitration–compensation and that the 'arbitration' was in fact a coercive process in which they were given no choice but to accept deeds of release and a dictated amount of compensation.

Significant issues remain in contention, and we address these in the following sections. We first consider the issues around the relationship between the New Zealand Company and

the Crown – upon which there was little agreement between the parties – before returning to our findings on the Spain commission and related matters.

4.20 Tribunal Conclusions and Findings

The issues raised in this chapter fall under two broad headings, the first involving the relationship between the Crown and the New Zealand Company generally and the second concentrating on the specific circumstances of the Spain commission. In the following sections, we report our conclusions and findings on both topics.

4.20.1 The relationship between the Crown and the New Zealand Company

With respect to the relationship between the Crown and the New Zealand Company, several broad questions arise out of the matters canvassed by legal submissions:

- What was the nature of the relationship?
- Was the company an agent of the Crown?
- Did the Crown prioritise its obligations to the company under the November 1840 agreement to the detriment of its obligations to Maori under the Treaty?
- Was the November 1840 agreement per se in breach of the Treaty?
- Should the Crown have intervened in the company's actions?

For the generic issues hearing, we asked historians commissioned by the Tribunal and Crown Forestry Rental Trust to provide their assessment of the fundamental nature of the relationship between the Crown and the New Zealand Company. The responses focused on the complexity of the interactions, which operated on several different levels and changed over time. Dr Phillipson described three of those levels: between the company directors and the British Government in London; between New Zealand officials and local company agents; and between Spain, Clarke, and William Wakefield. He noted that the November 1840 agreement was the beginning of the formal relationship between the Crown and the company, and he remarked on the Crown's intention to use the company as an 'agency for colonisation'.[288] In turn, Mr Walzl pointed out that the company was employed in this way for the establishment of the Otakou and Canterbury settlements.[289]

While noting the tensions within the relationship, Professor Williams emphasised that both parties shared the goal of settlement and contended that 'the Crown colluded with the Company' to secure this goal.[290] Dr Loveridge and Professor Boast traced the varying

288. Dr Grant Phillipson, summary of evidence, 5 June 2002 (doc E7), pp 2, 15
289. Tony Walzl, summary of evidence, May 2002 (doc E3), p 9
290. David Williams, summary of evidence, 5 June 2002 (doc E10), pp 4–5

degrees of closeness between the Crown and company over time, Professor Boast highlighting the significant influence of changes in government in Britain.[291]

These assessments point to a relationship that was at times very close, with the two parties sharing the goal of facilitating settlement, but they do not indicate that the New Zealand Company was an agent of the Crown in Te Tau Ihu in the sense that counsel for Ngati Koata contended. As noted above, counsel argued that the company was acting on the Crown's behalf to the extent that its actions and omissions could be viewed as the Crown's actions and omissions.

In support of this argument, counsel for Ngati Koata pointed to the evidence of Crown historians, particularly that of Dr Gould during cross-examination at the hearing of Crown evidence. In common with other witnesses, Dr Gould characterised the relationship as close at times but fraught at others.[292] Under cross-examination, he stated that 'the Company was not something quite as distinct as perhaps the secondary historiography may suggest. In fact, there's a little bit more closer inter-leaving of interest.'[293]

Asked by the presiding officer whether he thought the New Zealand Company was an agent of the Crown, Dr Gould referred to the company's survey in Mohua, which preceded the dispute at Motupipi. He pointed out that the Crown's failure to take action against this survey was 'a very good example of the Crown not fulfilling its obligations of protection.'[294] While this provides a good pointer to the extent of the Crown's culpability for the actions of the New Zealand Company, we do not think it lends itself to the conclusion that the company was a Crown agent in terms of our jurisdiction.

In section 4.6, we discussed Joseph Somes' April 1841 description of the New Zealand Company as an agent of the Government and Dr Gould's agreement with this assessment. The November 1840 agreement and the royal charter confirmed the company's role in the colonisation of New Zealand. In taking on this role, the company was fulfilling one of the functions of the Crown. It is in this sense that Dr Gould and other historians referred to the company's role as one of agency, an assessment with which we concur. However, it does not necessarily follow that the company could legally be defined as a Crown agent.

So, was the New Zealand Company an agent of the Crown in the sense in which counsel for Ngati Koata argued? Should we consider the actions of the company as Crown actions and assess them in accordance with the principles of the Treaty?

Section 6 of the Treaty of Waitangi Act 1975 empowers the Tribunal to determine whether any act or omission done by or on behalf of the Crown is in breach of the Treaty. This requires the Tribunal in turn to determine whether individuals or corporations were acting

291. Dr Donald Loveridge, summary of evidence, 31 May 2002 (doc E2), p 4; Professor Richard Boast, summary of evidence, 5 June 2002 (doc E11), p 4

292. Gould, 'New Zealand Company', pp 3–7, 12–22

293. Dr Gould, under cross-examination, eighteenth hearing, 17–20 November 2003 (transcript 4.18, p 10)

294. Ibid, p 137

on behalf of, or as agents of, the Crown. In our inquiry, the parties' substantive submissions on the legal tests for Crown agency were made with regard to the Public and Maori Trustees, not the New Zealand Company. For that reason, our full and detailed analysis of the issue is contained in chapter 9, where we address the question of whether the trustees were agents of the Crown within the meaning of the Treaty of Waitangi Act. Here, we summarise the arguments pertinent to determining the same question in respect of the New Zealand Company.

Earlier Tribunals have considered the definition of 'the Crown' and 'an agent of the Crown'. For example, the Manukau Tribunal did not accept submissions that the Auckland Harbour Board was an agent of the Crown, and the Orakei Tribunal was similarly dismissive of arguments that the Native Land Court was a Crown agent.[295] More recent Tribunals have also dismissed such arguments with respect to the committees and boards that operated Napier Hospital and with respect to the Maori Trustee.[296]

The *Whanganui a Tara* and *Napier Hospital* reports point to the definition of 'a Crown agent' as it has evolved in the courts. The Napier Hospital Tribunal stated that the 'control' test is the most important means of determining whether an entity could be considered an agent of the Crown. The New Zealand Court of Appeal adopted this method in 1999, endorsing the arguments of Paul Lordon QC of Toronto that a 'Crown component will be treated as part of the Crown if it may be said to be "controlled" by the Crown'.[297] The Whanganui a Tara Tribunal also agreed that the control test is 'the most relevant aspect', and it detailed the arguments of Canadian scholar Peter Hogg on which the test is based.[298]

Hogg states that a 'public corporation will be treated as an agent of the Crown if it satisfies the common law test of control or if it is expressly designated by statute to be an agent of the Crown'.[299] An entity that is headed by a Government Minister or that requires Government approval before making important transactions could be considered to be a Crown agent. Government powers over the appointment of directors or the supply of funding are other potential sources of Crown control. However, the courts test for agency on the basis of the extent of control that the Crown is legally entitled to, rather than the amount of control it actually exercises.[300]

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295. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed (Wellington: Waitangi Tribunal, 1989), p 73; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 2nd ed (Wellington, Brooker and Friend Ltd, 1991), p 192. The *Report on the Orakei Claim* stated that it was 'well recognised' that courts were independent of executive government (p 192).

296. Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), p 36; Waitangi Tribunal, *Whanganui a Tara*, p 377

297. Waitangi Tribunal, *The Napier Hospital and Health Services Report*, pp 33–34

298. Waitangi Tribunal, *Whanganui a Tara*, pp 351–352, 357–359; Peter W Hogg, *Liability of the Crown in Australia, New Zealand and the United Kingdom*, 2nd ed (Toronto: Law Book Company, 1989), pp 247–252

299. Peter W Hogg and Patrick J Monahan, *Liability of the Crown*, 3rd ed (Ontario: Thomson Canada Ltd, 2000), p 332

300. Ibid, pp 332, 337

In *Liability of the Crown*, Hogg and Patrick Monahan detail the evolution of the courts' practice, which has moved from a 'functions' test to a predominantly control test. In the mid-nineteenth century, the British courts based their decisions on Crown agency on whether or not the organisation was performing a function that 'properly belonged within the "province of government"'. This was possible given the relatively limited nature of government (although, as Hogg and Monahan note, the colonies were an exception to this, because 'the range of governmental activity was acknowledged to be much wider'). As the Government's role became increasingly broad and complex during the nineteenth century, the functions test became more difficult to apply and the courts shifted towards the control test as the most important factor, though with some ongoing reference to function to assist in the determination.[301] Hogg and Monahan note that the tendency has been 'to require a high degree of control', with the courts finding against Crown agency status in most cases.[302] Even a significant right of Crown intervention would not, for example, normally meet the test if it could also be proven that the body in question maintained a large degree of *de jure* discretion as to its activities.

It follows, then, that we can find that the New Zealand Company was an agent of the Crown only if we agree that the Crown was legally entitled to exercise a significant degree of control over the company (and the company retained little discretion). There might be a different outcome if we apply the functions test alone, without also considering the question of *de jure* control. With the November 1840 agreement and the royal charter, the company assumed responsibility for one of the functions of government in the new colony in that it acted on the Crown's behalf as an agent of colonisation. This was certainly how the company's governor saw matters in 1841; as noted above, he wrote: 'This Company is essentially the agent of the Government in disposing of waste land for the purposes of emigration and settlement.'[303] Given the Colonial Office's administration of emigration, recruitment of settlers, and organisation and funding of 'systematic colonisation', and given also the governors' colonising efforts on the ground, there is no question that the company was carrying out a function of the Government. Indeed, the November agreement itself pointed to the overlap or duplication of functions between the company and the commissioners of colonial lands and emigration.[304]

Colonisation, however, was not a 'function of government' per se, in the sense that it could also be the function of private parties unconnected to the Government.[305] It was on just such a basis that the New Zealand Company dispatched ships and settlers in 1839.

301. Ibid, pp 332–337
302. Ibid, p 335
303. Gould, 'New Zealand Company', pp 14–16
304. BPP, vol 3, p 209
305. In using the term 'colonisation', we do not mean the technical legal act of establishing a British colony, which was an act of State confined to the British Crown. We refer rather to the process of managing, financing, or facilitating the emigration of settlers from Britain to land purchased for them in New Zealand.

4.20.1

Hoggs and Monahan point out that, where the function was a commercial one with a private analogue, the corporation was less likely to be considered a Crown agent.[306] Thus, there needs to be more than the simple function of colonising to establish that the company was an agent acting on behalf of the Crown. The business of colonising did not make it a Crown agent at law in 1841 (when the Nelson settlement was established), any more than it had been in 1839. In other words, the question of Crown control of the company's activities is the crucial one here.

In terms of the situation for the Nelson settlement, the question of control revolves around the November agreement, the charter of incorporation, and any legislation (imperial or colonial) affecting the *de jure* independence of the company and its agents. The November agreement did not give the Crown any powers over the company that it did not already exercise in a general sense with regard to private companies and the processes of emigration. It was a different story, however, with the persons of the emigrants themselves; the Government felt it necessary to stipulate that all ships and settlers were under its own authority. The company's settlers were similarly to be incorporated to run their own affairs once they had arrived and taken up residence, but this did not amount to an attempt to take legal control of the company or its directors. In fact, when the Crown wanted an explicit proviso in the charter allowing it to resume the charter and purchase the company's property if required in the public interest, the directors were able to prevent it being included.[307]

In other respects, the charter did not give the Government the kind of legal control of the company or its affairs that would have made it a Crown agent. The court of proprietors was authorised to make by-laws for the company's business and the court of directors was empowered to run the business, but this did not entitle the Crown to any role or function other than those accorded to it in terms of all private companies under the law.[308] Any Crown control of the company's affairs, therefore, would be de facto (political) rather than *de jure* in nature. As far as we are aware, no local or imperial legislation at the time of the formation of the Nelson settlement changed this situation.

The sole exception was the native reserves to be created by the company. The November agreement explicitly gave the Crown control of both the reserves and, on the face of it, the process of making them. Clause 13 stipulated:

> It being also understood that the company have entered into engagements for the reservation of certain lands for the benefit of the natives, it is agreed that, in respect of all the lands so to be granted to the company as aforesaid, reservations of such lands shall be made for the benefit of the natives by Her Majesty's Government, in fulfilment of and according to the tenor of such stipulations; the Government reserving to themselves, in respect of all

306. Hogg and Monahan, *Liability of the Crown*, p 334
307. BPP, vol 3, pp 207–209, 211, 212–218
308. Ibid, pp 212–218

other lands, to make such arrangements as to them shall seem just and expedient for the benefit of the natives.[309]

In our view, this clause of the agreement, under which the Crown assumed responsibility for the company's reserves and gained an additional discretion to set aside further reserves as seemed to it 'just and expedient', meets the control test for Crown agency. As noted in the *Te Whanganui a Tara* report, an incorporation may be an agent of the Crown in some functions only.[310] From November 1840, any action taken by the company in the making of reserves was carried out as an agent of the Crown, which reserved to itself the ultimate legal control of that process.

This is particularly pertinent for the Nelson settlement, where company officials entered into arrangements with Maori for the establishment of reserves from 1841 onwards and continued to do so (sometimes alongside or in cooperation with Government officials) until land was finally granted to the company in 1848. We note, for example, Fox's statements that Grey had released the company from its obligation to make rural tenths in Golden Bay, and the 1847 decision to abolish almost half of the urban tenths, which was submitted for the Governor's approval (see ch 9). The Crown's attempts to carry out clause 13 may be seen in Spain's award, FitzRoy's 1845 Crown grant, and Grey's 1848 Crown grant, in all of which the Crown decided what the company's one-tenth–one-eleventh policy meant in practice, and made reserves from its grant of land to the company (see secs 4.15, 4.16, ch 5).

In the very important process of creating the tenths, the company was both legally and de facto an agent of the Crown, and it was also carrying out one of the Crown's primary protective functions. The November agreement was clearly intended to assert the Crown's control over this central aspect of its Treaty responsibilities – the protection of sufficient land for Maori to prosper alongside settlers. In our view, the making of reserves and the guarantee of a sufficient land base for Maori was, as Hogg and Monahan put it, 'a peculiarly governmental function'.[311] Thus, the New Zealand Company was the Crown's agent in this matter, according to both the functions test relevant at the time and the control test as it later developed.

In other respects, however, the company was not legally an agent of the Crown. Such a finding in no way mitigates against the need to consider the extent to which the Crown's relationship with the company was consistent with the principles of the Treaty. We take it from the Crown's submissions that it views the focus on the requirements of the November 1840 agreement as misplaced –counsel does not agree that the requirements of the agreement were such that the Crown was not able to meet its obligations to Te Tau Ihu Maori under the Treaty.

309. Ibid, p 209
310. Waitangi Tribunal, *Whanganui a Tara*, p 355
311. Hogg and Monahan, *Liability of the Crown*, p 334

4.20.1

This view is based on the contention that the November agreement did not assume that the company purchases were valid or, rather, that fulfilment of the terms of the agreement was not solely reliant on this being the case. We agree with this assessment up to a point. Clearly, at the time that the agreement was signed in November 1840, both Crown officials and company representatives in London assumed that the purchases were valid. But, as concerns began to be voiced regarding the validity of the transactions, Crown officials became more forthright in declaring that fulfilment of the terms of the agreement remained subject to the company proving its title. It all came to a head in October 1842, when company officials in London first heard that Spain was casting serious doubts on the validity of Colonel Wakefield's transactions.[312] The company thereafter argued that the November agreement had not made a Crown grant conditional upon the validity of the purchases being proven, and that it remained incumbent on the Crown to extinguish any remaining Maori title if necessary in order to honour the terms of the agreement.[313] Lord Stanley's January 1843 response to this argument was well summarised by the Whanganui a Tara Tribunal. Stanley informed the company that:

- The November 1840 agreement was founded on the assumed correctness of two allegations made by the company: that it had 'acquired by purchase from the natives a proprietary right to about 20,000,000 acres of land' and that it had expended large sums in the colonisation of parts of such land.
- It was in reliance on the accuracy of these statements that the Government had entered into an agreement with the company.
- 'Lord Stanley cannot now permit it to be maintained, either that the natives had no proprietary right in the face of the Company's declaration that they purchased those very rights, or that it is the duty of the Crown, either to extinguish those rights, or set them aside in favour of the Company.'
- 'The fact of the validity or invalidity of the purchase was known to the Company, and to them alone; the assumed validity was the basis of the promised grant.'
- If the facts were incorrectly stated at the time or could not be proved, it was for the company to bear the 'loss resulting from their own mis-statements'.
- Pennington's award had nothing to do with the title to the land but was simply a declaration that 'at the rate of 5s per acre, the previous expenditure by the Company was equivalent to a given number of acres', which the company was authorised to select only if the native title were found to have been validly purchased.
- The grant by the Crown of any land 'must be taken to be conditional upon the fact asserted by the Company'; that, by its previous arrangements, the Crown had the land in fact to grant. The investigation of that question was committed by law, with

312. Adams, *Fatal Necessity*, p 182
313. Crown counsel, closing submissions, p 31

which Stanley could not interfere, to a local and legally constituted tribunal and not to Pennington.[314]

Although Stanley's statement seemed to suggest that the Crown was prepared to prioritise its commitments to Maori under the Treaty ahead of the company's expectations, there were, as the Whanganui a Tara Tribunal noted, other factors at work. Stanley went on to note that he was 'fully alive to the great inconvenience resulting to a large body of Her Majesty's subjects, from the uncertainty now hanging over titles derived from the Company in the Wellington districts'. He was therefore prepared to offer the company a conditional grant subject to prior titles as duly investigated by the law. The presence of settlers on the ground therefore pointed to the need for further negotiations with those found, after due inquiry, to have ongoing customary interests in such areas. But, as we discuss in the next section, treating such negotiations as entirely fresh ones carried significant risks for the Crown, as a consequence of which 'compensation' was favoured over entirely new purchases of the company areas.

We find that the November 1840 agreement was premised on the assumption that the New Zealand Company had made a valid transaction. But that assumption was incorrect – the company's Kapiti and Queen Charlotte Sound deeds were invalid. Furthermore, negotiations at Mohua and Te Tai o Aorere in the early 1840s were similarly flawed and did not result in a valid company claim to land in Te Tau Ihu.

Spain's preliminary findings revealed that the assumption that a valid purchase had been completed was flawed. The evidence that Spain received, which was largely, but not exclusively, related to the New Zealand Company's transactions for land in the lower North Island, raised very serious doubts about the validity of the company's claim.

It is extremely doubtful that Maori involved in negotiations at Kapiti in October 1839 and at Totaranui in November of the same year shared the same understanding as to the nature of the transactions with the New Zealand Company that Europeans would have held. Maori living in the Cook Strait region had no prior experience of permanent alienation or of European settlement on the scale intended by the company, and the translators were ill-equipped to convey these concepts or to explain the proposed reserves scheme. The area that was purportedly conveyed to the company by the Ngati Toa rangatira was poorly defined. Negotiations failed to take account of the complexity of customary rights in Te Tau Ihu and were far from inclusive, a number of key groups with rights in the district having absolutely no involvement in the transaction.

Several claimant counsel recommended the findings of the Te Whanganui a Tara Tribunal. We agree that the findings with respect to the validity of the Port Nicholson deed are equally applicable to the Kapiti and Queen Charlotte Sound deeds. Those two deeds were therefore invalid and conferred no rights on the company.

314. Waitangi Tribunal, *Whanganui a Tara*, p 120

4.20.1

It was apparent to Arthur Wakefield that a settlement could not be established in Te Tau Ihu without consulting resident Maori. Those who met with Captain Wakefield at Te Tai o Aorere in 1841 refuted Ngati Toa's right to sell their interests. However, with Crown pre-emption then in place, Wakefield could not characterise his dealings with the residents of Te Tai o Aorere, or in Mohua the following year, as actual negotiations. This lack of clarity about the dealings contributed to the lack of Maori understanding of what the transaction with the company entailed. The fundamental problems with these dealings in 1841 and 1842 are the same as those outlined above with respect to the 1839 negotiations, including the company's failure to deal with all those who had interests in the district.

Crown counsel referred to the negotiations of the early 1840s as attempts to perfect the earlier transaction. This is a probably a reasonable assessment of how the New Zealand Company viewed the dealings, but it would not have been the understanding of those with whom the company negotiated.

As we see it, there are two ways of viewing the dealings with Te Tau Ihu Maori in the early 1840s. If, as Captain Wakefield claimed, these were not new negotiations but merely the presentation of gifts upon taking occupation of the land, then they cannot be considered to have increased the validity of the company's transaction. If, on the other hand, the company's dealings of the early 1840s are viewed as negotiations, then they contravene the Treaty provision for Crown pre-emption and the Crown should therefore not have allowed them to take place.

The Maori participants in the dealings at Te Tai o Aorere looked forward to the benefits that would accrue from increased European settlement in the district and supported the establishment of the Nelson township. The company's failure to properly explain what the transaction entailed became evident as it sought to extend its interests beyond Wakatu. As the surveys encroached on Te Matu, and then extended into Mohua, Maori opposition became apparent, reaching its zenith at the Wairau in 1843.

The company proceeded with its scheme for settlement in Te Tau Ihu before the Spain commission had inquired into its claim. It was engaged in effectively illegal surveys of land that had not actually been granted by the Crown, but the Crown took no action because it was also committed to facilitating settlement, and because the company's pre-Treaty activities, particularly in facilitating the arrival of settlers who purchased lots from the company, left it with few options.

The Crown's position was embodied in Spain's 1843 report on the company claim, as cited above. It will be recalled that Spain was interested in finding a solution that would be best for 'both races, and to enable the Government and the Company to carry into effect the agreement of November 1840'.

It was this perspective, we would suggest, that influenced Spain's response to Ngati Toa's requests to intervene in the Wairau surveys. We agree with Professor Boast that Spain's

failure to intervene contributed to the subsequent conflict at the Wairau. There were significant repercussions from the delayed Crown response to the developments at the Wairau, but the response, when it finally came, was unequivocal. We accept Crown counsel's argument that the Crown's response was appropriate. The other aspect of Ngati Toa's submissions relating to the Wairau conflict and its long-term impact is assessed in chapter 5.

We agree with Crown counsel that the Crown was required to balance the interests of Maori with the interests of the New Zealand Company (and its settlers). We also agree with those claimant counsel who contended that the Crown prioritised its obligations to the company at the expense of its obligations to Maori under the Treaty. This was apparent in the reaction to Maori opposition at Motupipi and in the lead-up to the Wairau, and it became increasingly apparent as the decade progressed. Accordingly, we find that, in failing to intervene in the New Zealand Company's activities on the ground in the early 1840s, the Crown was advancing the needs of settlers over those of Maori. The company proceeded with its surveys and settlement of Maori land, but the Crown failed to adequately respond to Maori protests about the surveys at Te Matu, Motupipi, and the Wairau. In the shorter term, this failure was particularly apparent in the case of the Wairau, where protests were clearly expressed over a period of time and where the consequences of the Crown's inaction was severe. The Crown's failure to intervene was in breach of article 3 of the Treaty and of its duty to actively protect Maori.

For Te Tau Ihu Maori, the prejudice arising as a consequence of the Treaty breaches described here was significant, the flawed New Zealand Company deeds kick-starting a process of land alienation that would eventually see local iwi left with an entirely inadequate land base.

4.20.2 The Crown's Treaty duty: investigation and arbitration

It will be clear from our discussion so far that the Crown had a Treaty duty to ensure that the New Zealand Company had made a valid purchase of land (and from the correct 'vendors') before confirming its title. The Crown thought so too, both then and now. In its submissions, the Crown relied on Normanby's instruction that there be an investigation, the Colonial Office's insistence to the company that it could not have title without such an inquiry, and Spain's own view that to award title without first investigating and confirming a purchase's validity would have been in breach of the Treaty. We accept the Crown's submissions – these are the standards against which its actions must be judged.

The Crown conceded that it did not meet these standards but suggested that the switch from inquiry to arbitration was not necessarily in breach of the Treaty – much depended on whether Maori supported such a switch and participated in (rather than were merely the objects of) the arbitration and, ultimately, whether they consented to the final arrangements.

Much depended also on the objective of the switch. Was it carried out with a view to properly balancing the Crown's obligations to its Maori and settler subjects and its commitments in the November agreement and the Treaty?

We are of the view that there was nothing inherently incompatible in the November agreement and the Treaty, so long as both were interpreted correctly. In Dr Gould's evidence, Hobson made the crucial failure of not intervening with or supervising Captain Wakefield's actions in 1841 and 1842, because he believed that the November agreement gave the company title wherever its officials chose to select land in 'their' district. Hobson's failure was a critical one, and in breach of Treaty principles.[315] That was clearly the case according to the Colonial Office and Spain, who maintained that the agreement did not give the company an inch of soil unless it could prove that a valid alienation had taken place from Maori. How, then, did Spain go from that perspective to arbitrating a perfection of invalid titles and imposing compensation awards on those who had not alienated their rights?

In the Crown's view, Spain rightly considered that Maori admitted an incomplete purchase and that they wanted the settlers to stay. Nor was it in the interests of Maori for the settlers to leave, which would probably have been the consequence if Maori had been allowed to insist on market prices to complete the purchase. Political motives predominated: the Government wanted to put the settlers in possession of the land that they had purchased in good faith from the New Zealand Company, and it had to be done cheaply, but the assumption was that this would benefit Maori as well.

It was Spain's responsibility, as a commissioner appointed under the 1841 ordinance, to investigate the validity of the company's purchases. Under that legislation, Spain had no obligation to award the company any land, no matter what the November agreement said. In our view, the agreement did not require a breach of the ordinance or force a finding in the company's favour. The Crown could still have met its four acres per one pound expenditure obligation to the company by purchasing the necessary land from Maori – indeed, the company had suggested just that as a solution. In London in 1842, the governor of the company, Joseph Somes, had asserted that 'The duty of extinguishing any Native title is the duty of Government alone', and Shortland suggested the same thing in New Zealand the following year.[316] FitzRoy waived pre-emption so that the company could purchase land itself, as it did in Otago, while Governor Grey purchased the Wairau to help the company fulfil its quota of rural sections.

Any fresh transaction, however, required the free and informed consent of Maori, which carried risks for the Crown. On the one hand, Maori might say 'No', although that was unlikely, since they wanted the settlers to stay. However, the Treaty had guaranteed them the opportunity to decide, according to their own decision-making mechanisms, which and

315. Gould, 'New Zealand Company', pp 20, 62–64
316. Crown counsel, submissions on generic issues, p 15; Gould, 'New Zealand Company', pp 74–75

how much land to transfer absolutely to the company. On the other hand, Spain feared that they might ask for what the land then appeared to be worth, rather than accepting pre-1840 prices. He therefore chose to allow the company to 'complete' its Nelson purchase by paying further 'compensation', at pre-1840 levels, as he had already done in Wellington.[317] In this choice, he had the permission and support of Shortland and FitzRoy.

The parties agreed that the context for Spain's Nelson decision was his earlier one to switch to arbitration in Wellington. Claimant counsel generally accepted the discussion of the Te Whanganui a Tara Tribunal on that choice, as do we. Spain had conducted a reasonably thorough inquiry into the Wellington claim and had come to the conclusion that, had he made a formal decision, the company would have been awarded very little land on the strength of its Port Nicholson deed. He viewed the Kapiti deed in much the same way. But, as early as August 1842, four months after beginning his inquiry in Wellington, Spain was willing to act as an arbitrator. This was approved by the Acting Governor in January 1843, although it was not until the end of January the following year that FitzRoy, Clarke, and Spain imposed the policy on reluctant Wellington Maori.[318] The Wellington Tribunal concluded that Spain's arbitration process was irreconcilable with the Land Claims Ordinance 1841. Maori had no independent voice and were entirely in the hands of the protector, Clarke junior, who, in turn, was being pressured by Spain to reach an agreement with Wakefield.[319]

We agree with the claimants that that conclusion also applies to the Nelson case, though perhaps with greater force, since Spain terminated that inquiry in favour of arbitration at a much earlier stage – indeed, before any Maori witnesses other than Te Iti had been heard. As in Wellington, Maori were not consulted over either the decision to change from an investigation to an arbitration or who would 'represent' them. We comment further on this issue below, when we discuss how the arbitration was conducted in Nelson and make a finding on whether Maori customary decision-making (tino rangatiratanga) was respected and protected in that process.

The termination of the Nelson hearing and the move to arbitration meant that Spain ceased his inquiry into the validity of the Kapiti and Queen Charlotte Sound deeds. Yet, the Kapiti deed at least was still regarded as providing a foundation for the Nelson award once the 1841–42 'presents' and the company's post-arbitration payments were taken into account. We will address the question of what validity such arrangements – and the company's transaction – had in Maori law, and whether that was discoverable by Spain upon reasonable inquiry in 1844. First, however, we must describe Spain's decision on customary rights and the validity of the company's purchase.

317. Ibid, pp 78–79; Phillipson, *Northern South Island: Part 1*, pp 74, 80
318. Crown counsel, closing submissions, p 41; Waitangi Tribunal, *Whanganui a Tara*, pp 113–144
319. Waitangi Tribunal, *Whanganui a Tara*, pp 116–117

4.20.3 Spain's decision on customary rights and the company's transactions

Spain's decision on customary rights and the validity of the company's transactions was delivered orally in August 1844, at the conclusion of the arbitration proceedings. We cited this in full earlier in this chapter (see sec 4.13), but Spain's main findings were that:

- Maori were not entitled to any further compensation and he would not have awarded them any if he had been called upon to decide the issue.
- The land had been 'purchased long ago by Colonel Wakefield' from Te Rauparaha and others at Kapiti.
- Resident Maori had received 'large and liberal presents' from Wakefield, and, combined with the goods received at Kapiti, the price paid for the lands was 'higher than any that has ever been paid for in this country'.
- Notwithstanding this, the Queen and the Governor wished to do something more for Maori and had appointed Clarke to advocate for their interests.
- Clarke had awarded Maori the money they had come to receive, but it was given 'not as a payment, but for the sake of making friends of you and the white people'.[320]

Essentially, the commissioner repeated this decision in his March 1845 formal report to Governor FitzRoy. In Dr Gould's view, this involved Spain in 'mental gymnastics' in order to 'at first confirm that Ngati Toa Rangatira had sold the region to the company, and at the same time deny Ngati Toa any lasting interest vis-à-vis the local inhabitants'.[321]

As we saw previously, the commissioner began by discussing his examination of Te Rauparaha and Te Rangihaeata at Otaki in 1843, which had focused on finding out what land they considered they had sold under the Kapiti deed. Te Rauparaha denied that he had 'sold' anything other than Taitapu, which Spain described as a 'district' in Golden Bay, and Te Rangihaeata denied that he had 'sold' more than Wakatu, or Nelson Haven. Two other Ngati Toa chiefs, Hiko and Tutahanga, gave similar evidence. Spain was 'perfectly willing to entertain the claim of the Ngatitoa chiefs . . . so far as I was assured of their actual residence on and cultivation of parts of the various portions of land of which they declared themselves owners'. He had, however:

> more than once laid down . . . that mere conquest, unsupported by actual and permanent occupation, and more particularly where the conquered parties still remain in occupation, or having left it for a short time return and occupy it for a series of years, bestows no title on the invaders.

Spain concluded that he therefore had a 'duty to receive the evidence, and listen to the statements of the Natives residing within the blocks surveyed by the company . . . in order to ascertain who were the actual owners, according to what I found to be the Native custom'.[322]

320. Minutes of proceedings, 24 August 1844, *Compendium*, vol 1, p 61
321. Gould, 'New Zealand Company', p 50
322. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol 1, p 55

Spain was thus apparently prepared, as we noted earlier, to hear a variety of witnesses from those groups occupying land around Nelson that had already been surveyed for the company settlers, as he was in any event obliged to do for the thorough inquiry into the company purchase that was required under the Land Claims Ordinance 1841. Before reporting his hearing of evidence, however, the commissioner noted the outcome of Meurant's preliminary visit and his subsequent advice to Spain that 'the Natives were anxiously waiting my coming amongst them, and that there existed a favourable disposition in the minds of those in the neighbourhood of Nelson, Motueka, and Massacre Bay'.[323] In Spain's view, this 'favourable disposition' was a consequence of the 'presents' that Captain Arthur Wakefield had distributed, though he admitted that further payments might be requested. Captain Wakefield was praised for 'this liberal and judicious policy', and Spain regretted only that Wakefield had failed to describe his 'presents' as purchases and to obtain receipts for those payments. 'Had this been done', Spain added, 'I have little doubt that the resident Natives would have regarded and acknowledged the transaction as a regular sale and disposal of their lands.'[324] Spain even claimed later in the same report that this was precisely how Maori viewed events, observing that 'the Natives had always looked upon the transaction with Captain Wakefield as an alienation of their rights and interests in the lands.'[325]

Spain was sufficiently satisfied with the additional 'payments' made by Wakefield to be:

> inclined to conclude that the resident Natives had not only been amply remunerated for their land by presents in which, with scarcely an exception, they had all participated, but that they were aware at the time of the nature and satisfied with the termination of the transaction to which they had been parties.

Spain, as we saw, would have been prepared to make an award to the company without further payment but instead seized upon Colonel Wakefield's offer of an additional payment of £800, being 'glad of an opportunity of so easily complying with the expectations without acknowledging the rights of the Natives'.[326]

On what evidence did the commissioner base his conclusion? It involved more 'mental gymnastics', because he had to argue that gifts which Wakefield specifically told Maori were presents upon settling (and not payments for their land) were in fact understood by Maori to be payments for the permanent alienation of their land. With no deeds and no agreed boundaries, as he found, there was nonetheless an understanding among Maori that they had sold all their lands, save their residences, cultivations, and tenths reserves. In Spain's view, this was because the distinction between a present and a payment was 'too fine-drawn' for Maori to make.[327] They must, therefore, have understood presents as payments. If they

323. Ibid
324. Ibid, p 56
325. Ibid
326. Ibid, p 57
327. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol 1, p 56

admitted receiving presents, then they admitted the permanent alienation of their land. This reasoning is so antithetical to Maori custom, as we will explain in the next section, that we have to stress the extremely thin (in fact, non-existent) evidential base on which Spain rested this conclusion.

Ultimately, it came down to Te Iti's evidence, even though that evidence was interrupted. In Dr Ballara's view, Spain had sufficient knowledge (with Clarke) to have uncovered the truth if and when he asked the right questions.[328] But neither the protector nor the commissioner questioned the witness about the meaning of presents in Maori custom. As we have seen in chapter 2, there was a rich lore – and law – about tuku in Te Tau Ihu, which is still known and practised today. Spain came to a decision that presents would have been understood as payment for a permanent alienation, but he had – and could recite – no evidence for this. Indeed, Te Iti's answers ought to have given the commissioner serious pause, suggesting as they did that Maori saw the transaction as a customary tuku, not an outright sale.

Spain's conclusion that Maori understood Wakefield's gift-giving as 'an alienation of their rights and interests in the lands treated of' was based on a single piece of evidence; namely, that the local people had 'stipulated for the retention' of the Big Wood at Motueka and their pa and cultivations. Had he inquired further (or at all), Spain would have discovered the shared resource-use arrangements at a place like Wakatu, where groups congregated at various times to fish, gather flax, and use other resources, and the more exclusive occupation of certain places on which the tribes would naturally have insisted. Te Iti's evidence was that local Maori had agreed to the settlers coming to live among them, and to sharing some lands with them, in return for ongoing gift-giving and other advantages. There is nothing inconsistent here with stipulations that certain places were for the exclusive occupation of one side or the other. Spain's reasoning on this point held up only because of his failure to inquire. Spain did note Te Iti's expectation of further 'payments', and his evidence that boundaries may not have been agreed, but he did not ask any questions about the nature of Maori custom or what such points – if proven – may have meant.

Rather, Spain reported:

> Under these circumstances I was inclined to conclude that the resident Natives had not only been amply remunerated for their land by presents in which, with scarcely an exception, they had all participated, but that they were aware at the time of the nature and satisfied with the termination of the transaction to which they had been parties. I also bore in mind that the lands included in the Company's surveys, with the exception of the Wairau, were those of which Rauparaha and Rangihaeata had admitted the sale to Colonel Wakefield at Kapiti, under the denominations of Wakatu and Taitapu. Thus, whatever might have been their right to or interest in these lands, by their own evidence it had been alienated and

328. Dr Angela Ballara, 'Summary of Selected Aspects of an Historical Overview Report Prepared in Response to Questions from the Waitangi Tribunal', typescript, 2002 (doc F1), pp 2, 4–6

> paid for. Unless, therefore, some much stronger evidence than I had yet heard could be given by the Natives in contravention of the statements made by the English witnesses, I was prepared to decide in favour of the Company, without allowing the resident Natives any further compensation.[329]

Yet, it was at this very point in the proceedings that Wakefield offered to pay compensation. Spain and Clarke agreed that the matter could be settled for a few hundred pounds but there was to be no acknowledgement that Maori still had outstanding unalienated rights to be settled. We will consider the further mental gymnastics involved in bringing this about, while still subsequently signing deeds of release.

Spain did not finish his report at the point at which he concluded that resident Maori had permanently alienated their land upon receiving Wakefield's presents; he still had to resolve the conundrum of how their rights related to those of Ngati Toa. He did so without any inquiry on this point at all, either of Ngati Toa or Golden Bay Maori (who were not present) or of resident Tasman Bay Maori (who were). He began by reiterating his by-then strongly held view that conquest without subsequent occupation could not confer title and that the rights of occupants (including defeated peoples) prevailed, asserting that 'in all cases the residents, and they alone, have the power of alienating any land'.[330] It followed from this 'universally acknowledged' principle, Spain claimed, that Captain Wakefield's actions in:

> paying over again (for such was the real state of the case) the actual residents whom he found in occupation and undisturbed possession for the very land which, two years before, had been pretended to be conveyed to the Company by two or three chiefs of another tribe, affords so convincing a proof, from a quarter where least expected, at once of the justice of my decisions, and the deficiency, and his conviction of the deficiency, of the original purchase, that I cannot pass over it without particular observation.[331]

Spain had based his oral judgment in part on the Kapiti deed, and he still relied on it in his final report. Yet, he concluded that this alleged purchase was 'as enormous in extent as the [company] claim which was advanced under it was preprosterous in principle'. Land thus 'sold' by Ngati Toa was land 'to which those who pretended to convey it had not in equity or by Native custom the shadow of a right', because they had not followed conquest with occupation.[332]

This statement does not sit well with his oral decision, nor with his prevarication about whether or not Ngati Toa actually had rights to sell. On the one hand, he argued that they had such rights only in the Wairau, Queen Charlotte Sound, and Cloudy Bay, but even if they did have rights in western Te Tau Ihu, those had by then admittedly been sold. Even

329. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol 1, p 57
330. Ibid, p 58
331. Ibid
332. Ibid, pp 57–58

so, there appears to have been no inquiry about what exactly was conveyed, if anything, in Ngati Toa's admission to have 'sold' Taitapu and Wakatu. At one point, Spain relied on Brook's evidence that Taitapu was in Tasman Bay.[333] (This mistake was based on Clarke's cross-examination of Brook.[334]) At other points, Spain considered Taitapu to be a district in Golden Bay, part of the Nelson settlement, or the whole of Golden Bay.[335] These three very different versions of what Te Rauparaha intended to convey, all contained in the same brief report, demonstrate the lack of specific or reliable evidence uncovered by Spain on this point. We will return to this issue below, when we examine Ngati Toa's claim.

We turn now to the specific question of whether Spain, having carried out an inadequate inquiry, was nonetheless correct or had proper grounds for his finding that the company transaction was valid.

4.20.4 Captain Wakefield's 'presents' and the question of whether an absolute alienation had taken place under Maori or British law

The Crown and claimants agreed that Spain's inquiry did not permit Maori to give their evidence of how they saw the 1841 arrangements with Captain Wakefield, and thus their understanding was not uncovered or taken into account by Spain. Despite not inquiring fully, Spain based his oral findings of 1844 and his report of 1845 on the following convictions:

- that there had been a purchase from Ngati Toa leaders at Kapiti, because – if invalid in so many other ways – they had at least testified to an intention to 'sell' 'Wakatu' and 'Taitapu';
- that there had been a purchase from resident Maori, because they accepted presents from Captain Wakefield and such presents must have been understood by them as payment for their land; and
- that these purchases amounted to an absolute alienation of land, after which the compensation arrangements were a 'gratuity' to mend relations and rectify any omissions.[336]

Spain based these conclusions on:

- his examination of Ngati Toa leaders in 1843;
- indirect evidence (reported by Meurant) that Maori resident in Tasman Bay acknowledged a sale but wanted a further payment;
- the evidence of the company witnesses heard in a day;

333. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol 1, p 58

334. Walzl, *Land Issues*, p 108

335. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol 1, pp 55, 59. The third definition made it into the 1844 deeds of release, where Golden Bay was described in both the Maori and the English versions as 'Te Taitapu (Massacre Bay)': copies of deeds of release, *Compendium*, vol 1, p 67.

336. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol 1, pp 54–60; minutes of proceedings, 24 August 1844, *Compendium*, vol 1, p 61

- the testimony of Te Iti that he had received Wakefield's presents; and
- Protector Clarke's stated intention not to contest the company's claim to Golden Bay.[337]

The historians in our inquiry agreed that this was, in the words of Dr Gould, a 'flimsy' basis for deciding that the company had absolute title to 151,000 acres of land, minus reserves.[338]

A key issue for the Tribunal is whether Captain Wakefield's gift-giving could be considered the basis of a purchase in British law, and what kind of signficance it had in Maori law. On the first issue, Spain took the view that Captain Wakefield disguised payments for land as presents, without deeds or recorded boundaries, because to do otherwise would have amounted to an admission that the Kapiti deed was insufficient.[339] We agree. But there was an even more compelling reason, not noted by Spain. Gipps and Hobson had issued proclamations forbidding private persons from buying land in New Zealand. Unless the Crown waived its right of pre-emption, Wakefield could not legally purchase Nelson lands. Dr Gould carried out a careful study to determine whether pre-emption was in fact waived in favour of the New Zealand Company in Tasman Bay and concluded that it was not.[340] Unlike the Colonial Office, however, Hobson took the view that the November agreement was an express or implied commitment that the company settlers should have their land. According to Dr Gould, Hobson felt unable to stop or to interfere in Wakefield's establishment of a new settlement at Nelson, despite advice from the Chief Protector of Aborigines, George Clarke senior, that Colonel Wakefield could not possibly have purchased the company 'district' from just a handful of chiefs, without the consent of its inhabitants.[341]

Thus, Captain Wakefield met with the assembled Nelson tribes and informed them that their land had been purchased from Ngati Toa at Kapiti but that he was nonetheless going to give them 'presents upon settling'. There appears to have been a discussion about where the settlers would be located and something approaching an attempt to explain the tenths system and to designate areas that Maori wanted to keep exclusively to themselves. Resident Maori maintained that Te Rauparaha could not transfer land without their consent, but they did want the settlers to stay.[342] In the absence of deeds or any of the legal accoutrements of a purchase, this transaction was an oral one, based on two different systems of law. Wakefield's view was that a British-style purchase had happened at Kapiti and that he was merely giving gifts to the residents before settling among them. The Maori view, as communicated by Te Iti in his evidence to Spain and as demonstrated by Maori actions outside of the restricted opportunity to be heard, was that they had made a customary tuku in which:

- the company settlers could take up residence;
- certain districts and resources would be shared;

337. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol 1, pp 54–60
338. See, for example, Gould, 'New Zealand Company', pp 20, 50
339. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol 1, p 56
340. Gould, 'New Zealand Company', pp 56–63
341. Ibid, pp 62–64
342. Walzl, *Land Issues*, pp 53–61, 92–96

- other places would be held exclusively by those making or those receiving the tuku; and
- the company would need to make further gifts to cement and maintain the arrangement.

The historical evidence is firmly in favour of this interpretation.[343] In particular, Professor Williams, Dr Phillipson, and Mr Walzl have carried out a detailed analysis of Te Iti's cross-examination, Maori's continued use of resources in 'shared' districts, and the contemporary view of Maori that they retained rights in 1844 (and, indeed, afterwards as well).[344]

The account of Ngati Rarua's spokesperson, Paul Morgan, is in agreement with the documents cited by these historians. He told us:

> From my point of view, the land on the [Motueka] Plain was never purchased. So to me and my whanau it is still Aboriginal Title. It was taken through the pen or the surveyor's line. Our Title was never extinguished, we never sold it. Dad believed in that and that's come down to me. Ngati Rarua saw all the land at Motueka as theirs and did not have an understanding of the processes which in theory had extinguished title. How the Government had got our land and gave the use of our property to pakehas for ever and with us only getting a small rent in return was not understood. There has, however, always been a feeling of injustice in the way the land was appropriated.[345]

In response to a question from Crown counsel, Mr Morgan clarified that he saw no distinction in this respect between the tenths and the rest of the land occupied by Ngati Rarua in the Motueka district:

> The complexity of what's happened here is that the Crown, well the New Zealand Company that time, but the Crown used our land in the New Zealand Company arrangement. The tenths land that was allocated as the beneficial interest of the iwi around here, actually came primarily out of Rarua interests and we got given our own land back, having not actually have sold it, or got rid of it. We lived on it. There was no exclusion of our papakainga.[346]

We discussed Te Iti's evidence in some detail earlier in the chapter. We summarise some of the key points below:

- Te Iti confirmed that he had been at the Kaiteretere meeting with Captain Wakefield in 1841 when 'presents' when distributed. He informed Spain that Wakefield had promised that 'he would give me some blankets, if I would receive them as a Present'.
- Asked whether, on receiving the goods, he consented to 'allow the occupation of the

343. See, for example, Campbell, 'A Living People', pp 53–87

344. Williams, 'Crown and Ngati Tama', pp 72–74, 83–90, 96–98; Phillipson, *Northern South Island: Part 1*, pp 49–62, 76–80; Walzl, *Land Issues*, pp 53–61, 92–96, 105–160, 225, 232

345. Paul Morgan, brief of evidence on behalf of Ngati Rarua, 1 February 2001 (doc B11), p 14

346. Paul Morgan, under cross-examination, second hearing, 12–16 February 2001 (transcript 4.2, p 32)

land by the settlers when they arrived', Te Iti replied, 'Yes – on that occasion I did consent for the Europeans to settle but not to take all the land.'

- Asked if it had been explained to him that 'there would be reserves for the Natives' and whether he understood that, Te Iti said that he did not understand this but that he had offered to point out the land he would let Wakefield occupy. According to Te Iti, Wakefield had replied, 'don't be afraid this will not be the last payment you will have from me'.
- Te Iti admitted that his people had helped to build houses for Europeans at Motueka, but he added that he had been told that 'the Europeans were to stop there for a short time. Were coming to live amongst us.'
- In response to further questioning from Clarke, Te Iti denied consenting to 'let the Europeans take possession of land' in the district; he had agreed only to allowing Europeans a small area of land near Wakapuaka.
- Asked whether he understood that the entire district would be surveyed and a certain portion set apart for the use of Maori, Te Iti replied, 'No, I did not understand that. I thought the surveying was a mere form.'
- After further questioning, Te Iti admitted that the Kaiteretere meeting had been told that the land would be 'divided between the Natives and the Europeans'. Asked how this could be reconciled with his evidence, Te Iti replied, 'I did not exactly understand Brook's meaning at that time but I have lately understood it.'
- Asked whether Te Rauparaha had a right to dispose of this land without his consent, Te Iti replied that Te Rauparaha 'did wrong in selling it without informing us.'[347]

Following a final question from Spain, Wakefield, with support from Clarke, interrupted proceedings to bring Te Iti's evidence to an end.

As we noted previously, Professor Williams described Te Iti's questioning as 'a classic instance of people talking past each other'.[348] But, while we agree that there was a large element of cross-cultural miscommunication apparent in this instance, this does not mean that the Maori understanding of the transaction was not discoverable upon due inquiry. Colonel Wakefield recorded in his diary that Maori sometimes 'betrayed a notion that the sale would not affect their interests, from an insufficiency of emigrants arriving to occupy so vast a place to prevent them retaining possession of any parts they chose or even reselling them at the expiration of a reasonable period'.[349] Dr Phillipson referred to a recently arrived Nelson missionary, Charles Reay, who wrote in 1845 that 'it is not consistent with their practice to alienate their lands in perpetuo; but only during the life-time or during the convenience or occupancy of the party to whom it may be conveyed'. It was impossible,

347. The summary and quotations are taken from the unpublished minutes of the Spain commission, August 1844, OLC1/907, ArchivesNZ, Wellington

348. Williams, 'Crown and Ngati Tama', p 86

349. Campbell, 'A Living People', p 82

Reay thought, for Maori to have 'ceded absolutely and without reservation' their rights in the land.[350] If a recently arrived missionary could uncover this aspect of Maori law in Te Tau Ihu, it was clearly not beyond the ability of Spain and Clarke to have discovered it upon reasonable inquiry.[351] As both Crown and claimants agree, however, there was no proper or adequate inquiry.

The Crown does not address the question directly of whether Wakefield's gifts were part of a customary tuku, though it acknowledges that Spain did not inquire adequately into customary rights, the understanding that Maori had of the transactions, and, in fact, the validity of the transactions themselves. Dr Gould did not comment either, other than to suggest that both Te Iti's evidence and continued Maori resource use on settler sections could be construed as references to reserves and confusion about their location.[352] In our view, they are explicable only in terms of the continued operation of Maori customary law and the belief of Maori that the arrangement with Captain Wakefield was an ongoing tuku relationship, in which some lands were shared while others were set aside for exclusive use. This is also consistent with the view of Ngati Rarua today, as explained by Mr Morgan. In Maori law, there was no basis for considering Wakefield's gifts as payments for an absolute alienation of land. There was, however, support for the fact that a customary transaction had taken place, conferring rights on the company's settlers.

We turn now to examine the situation according to British law. Here, we accept the submission of counsel for Te Atiawa. Wakefield gave 'presents' because, after the Gipps and Hobson proclamations and the signing of the Treaty, it was no longer possible to purchase land directly from Maori. There was nothing to prevent Wakefield from giving Maori presents, but they had no legal standing as payments for land and could not be used as the foundation of a purchase that could be validated by further payment. The available evidence is that those Te Tau Ihu Maori who accepted what Captain Wakefield deliberately described to them as presents did indeed regard them as such – that is, as a tuku whenua or a licence to occupy their land, albeit one that had to be renewed from time to time with further presents. We consider that there was some hypocrisy by company and Crown officials, including Spain, over this issue. They knew full well that the presents had no legal standing, but they gave them status as payments for a purchase that could then be completed by further 'compensation'. Indeed, Spain went so far as to say that no further payment was strictly required at all.

So, what was the prejudice for Maori? Put simply, their land was adjudged as belonging to others, and that judgment was given effect by Crown grant. Under British law, the presents could not confound pre-emption and were of no legal effect. But Maori recognised that a relationship had been created, and rights conferred, under their own law, and furthermore

350. Phillipson, *Northern South Island: Part 1*, p 58
351. Charles Reay of the Church Missionary Society arrived in New Zealand in 1842.
352. Gould, 'New Zealand Company', pp 81, 91, 95

they did not want the settlers to leave. To that extent, a negotiated solution would have been both fair and acceptable. But Spain judged that a transfer of absolute title to 151,000 acres had taken place, and he recommended that the land be granted to settlers. Governors FitzRoy and Grey accepted this recommendation – indeed, Grey took it much further, as we shall see in the next chapter. In the meantime, acting as an umpire, Spain proceeded to impose deeds of release and supposedly gratuitous compensation payments. An equitable outcome now depended on this being a fair and equal process, by which Maori consent to an absolute alienation (with proper reserves) might yet be obtained.

We will consider that issue below. Here, we find that the acceptance of the 1841–42 presents as payments for an absolute purchase of Nelson lands was in direct breach of the Crown's proclamations and of the pre-emption clause of the Treaty of Waitangi. In neither British nor Maori law could the payments be used as a basis for validating the purchase of the land. Further, the Crown's reliance on Spain's award as the basis for its grant of land to settlers was in breach of the Treaty principles of reciprocity, partnership, and active protection. It violated the tino rangatiratanga of Maori, set aside their law and customary arrangements, and took their land from them on the basis that in 1841 they had consented to an absolute sale. But they had not, and this was provable on the facts, had Spain inquired properly.

4.20.5 Tino rangatiratanga and the arbitration process

In our view, if the Crown was to honour its obligations under article 2 of the Treaty to respect tino rangatiratanga, there were certain minimum requirements it had to observe in any negotiations with Maori over land. Those requirements were not difficult to discern and simply involved ensuring that all potential right holders were fully informed and freely consented to any proposed arrangements and that all decisions were made in the clear light of day, preferably by means of inter-tribal hui at which all interested iwi and hapu could discuss, agree, and arrange the matter for themselves. We now ask the question: Was this standard met at the Nelson 'arbitration' hui of August 1844?

Spain's Nelson hearing had been widely anticipated, and a considerable number of people had arrived for it. Dr Gould noted, however, that the commissioner's arrival was delayed and that some people had given up and gone home by the time he opened his inquiry.[353] Nonetheless, a significant number of Tasman Bay hapu and their leaders were present. Although Meurant claimed that everyone approved of Te Iti representing them, it is doubtful whether he could speak for all of the northern iwi, let alone groups from the Kurahaupo iwi that may have been present. In the negotiation, Crown officials relied not on Te Iti but on Nga Piko, another Ngati Rarua chief, to try to push through the compensation deal, and, on his request, he was paid £10 for his trouble. Ngati Toa and Golden Bay hapu and leaders

353. Ibid, pp 80–81

were not present, although the outcome of the arbitration was held to be binding on them. (Ngati Toa got nothing, while Golden Bay Maori were presumed to agree to compensation of £290.[354])

Any civil proceedings may be resolved by an out-of-court settlement, but unusually Spain reported that the resultant payments were a gratuitous arrangement for political purposes and not a claims settlement. Spain then proceeded to make findings on the validity of the company's transaction as if he had conducted a full and proper inquiry. The arbitration was not, therefore, an out-of-court settlement. In other words, Spain stated that reaching a settlement on the company's initiative made no difference whatsoever to his finding that the company's purchase was valid or to his award to the company of 151,000 acres (minus reserves). In coming to this decision without a proper inquiry and without affording Maori the right to be heard, Spain was in serious breach of the principles of natural justice.

In our view, there is nothing wrong in principle with a settlement 'out of court', provided both parties agree to follow that procedure and participate fully in the negotiation or are represented by advisers of their choosing. We have no doubt that one of the parties, the New Zealand Company, approved the change to arbitration. Indeed, Colonel Wakefield asked Spain to suspend the inquiry and to authorise Clarke to negotiate with Maori to accept a further payment. Spain readily agreed and helped to facilitate the process, going with Clarke and Meurant to persuade Maori to accept 'the terms of the settlement we were anxious to accomplish'.[355] That was a telling admission, showing that the initiative came solely from the company and the Crown. Spain, Clarke, and Meurant were not asking the assembled Maori whether they preferred to negotiate rather than proceed with the hearing; they were merely asking them to accept a deal and an amount of compensation that they had already agreed with Wakefield. This was not even a true arbitration, since the arbitrator insisted that it made no difference to his findings, which were based upon his inquiry into the evidence. Spain announced that, had he been called on to decide whether Maori were entitled to receive any further payment, he would not have awarded them the compensation they were about to receive. They were getting it 'for the sake of making friends of you and the white people'. Payments were then made to chiefs from Motueka and Wakatu, and to chiefs of 'Ngatiawa', all of whom were required to sign deeds of release.[356]

We deal now with issues of process and consent. We note the Crown's concession, cited above:

> it cannot be said with confidence that there is evidence of a reasonable degree of Maori engagement with and consent over the shift from inquiry to arbitration. There may have been, but it is also probable that Maori believed they had little or no choice in the matter.

354. Walzl, *Land Issues*, pp 123–160
355. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol 1, p 56
356. Minutes of proceedings, 24 August 1844, *Compendium*, vol 1, pp 61–62

> The evidence one way or the other is inconclusive. For the same reason it is therefore possible that some groups of Maori were unwilling to alienate their land, and there is a possibility that the Crown did not consult, negotiate and compensate all Maori with rights in the land affected.[357]

In our view, the evidence is firmer than was admitted by the Crown. Despite the sketchy nature of the records, it is clear that the Nelson tribes were not permitted to exercise their tino rangatiratanga at the two-day hui. The so-called arbitration was initiated by Wakefield (with Clarke's acquiescence), approved by Spain, and foisted on those Maori who were present at the meetings in Nelson. There is no evidence whatsoever that any of them were consulted or approved the decision to move from inquiry to arbitration, or even that they had any real chance to improve the amount of compensation being offered. Meurant's diary shows that the participants were permitted only one real exercise of tino rangatiratanga: namely, the tribes were allowed to divide up the money according to a consensus reached on their relative entitlements. This was, as Meurant reported, debated between Ngati Tama of Wakapuaka and the others.[358] It also resulted in the inclusion of Kurahaupo people in part of the payment, according to the evidence of Leah Campbell for Ngati Kuia.[359] To that extent, tino rangatiratanga was respected and the arrangements of Maori confirmed by Spain and Clarke.

But such was not the case for Golden Bay hapu. The sum of £290 was allotted to them by the agreement of the company and protector referees without their input, consent, or even knowledge. One district and group (of the northern allies) was not even identified, because of the lack of inquiry. The Crown did not discover until much later that there were Ngati Tama living in the Wainui–Separation Point district who had received neither presents from Wakefield nor payment from Spain. Their existence and rights were simply overlooked.[360]

As for the communities in Golden Bay, Clarke visited the district and determined the answer to the commissioner's sole question: Did local Maori admit receiving presents from Wakefield? When Clarke answered this question in the affirmative and stated that he would not oppose the company's claim to Golden Bay, Spain did not renew his inquiry but enforced his award of compensation by banking the money and ruling that the land was purchased validly by the company.[361] Governor FitzRoy clearly had no qualms about this. He accepted Spain's award in the knowledge that Golden Bay Maori had had no inquiry, were not parties to the arbitration, and had not consented to its outcome. He granted their land to the company in 1845, after which some of them bowed to pressure and accepted the money. This was in serious breach of the plain meaning of article 2 of the Treaty, of the

357. Crown counsel, closing submissions, pp 49–50
358. Walzl, *Land Issues*, pp 128–131
359. Campbell, 'A Living People', p 113
360. Phillipson, *Northern South Island: Part 1*, pp 103–104
361. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol 1, p 57

Crown's stated intent in investigating the validity of the company's transactions, and of the Treaty principles of reciprocity, partnership, and active protection.

The arbitration process followed the lines of the Wellington 'settlement', where the amount of compensation was also agreed by Wakefield and Clarke, accepted by Spain, and foisted on local Maori (with the additional support of Governor FitzRoy). Was such a one-sided process in accord with the Land Claims Ordinance? In our view, this is unlikely, since Spain did not complete the inquiry specified in the ordinance before making what was ostensibly an award based on it, though in fact it was configured to equate with the districts already surveyed or partly surveyed for settlement. Spain did not complete his inquiry into the validity of the Kapiti purchase either in Wellington or in Nelson. Yet, when he addressed Nelson Maori at the conclusion of his 'arbitration', he had the audacity to say that 'these lands were purchased long ago by Colonel Wakefield, of Rauparaha and others, at Kapiti.'[362] And, in Spain's view, further payments were unnecessary because of the 'generous' presents given by Captain Wakefield.[363]

Spain may have complied with the ordinance in a technical sense by holding an inquiry and making findings that were based on that inquiry, not on the out-of-court arrangements. But, equally, Spain did not comply with the spirit of the Crown's intentions, as described in his own statements and in those of Lord Stanley. Thus, his incomplete and inadequate inquiry was, by his own standards, in violation of the Treaty.

This brings us to a further question: Did the arrangements that led to Spain's award and the award itself conform to the principles of the Treaty? The Crown submitted that the shift from inquiry to arbitration was not in principle inconsistent with the Treaty.[364] That may have been so, but the Tribunal always has to examine the practical actions or omissions of the Crown for compliance with the principles of the Treaty. Moreover, we have to try to understand what Maori understood of the Crown's offers and actions, and how they, as Treaty partners, responded. It is here that we have particular difficulty in view of what can be one-sided evidence from Crown officials of the time – which is virtually all we have in this instance – and the lack of reporting, or accurate reporting, of Maori views. In particular, it was essential under the Treaty for Maori to willingly consent to any alienation of their land. Yet, in Spain's formal judgment, they had no land to alienate.

(1) *The Tribunal's findings*

Like the Wellington Tribunal, we consider that, under article 2 of the Treaty, Maori needed to have more than a 'minimal input' into the negotiations – they had to be allowed to choose and instruct their own representative, rather than rely on an official (Clarke) who was answerable not to them but to Spain. Moreover, the Wellington Tribunal considered

362. Minutes of proceedings, 24 August 1844, *Compendium*, vol 1, p 61
363. Ibid
364. Crown counsel, closing submissions, p 48

that the arbitration process was 'irreconcilable with the Land Claims Ordinance' and that Maori had no independent voice, since Spain was pressuring Clarke to reach an agreement with Wakefield.[365] Similarly with the findings of the Te Whanganui a Tara Tribunal concerning the circumstances in Wellington, we find that the Crown acted in breach of Treaty principles in that:

- it failed adequately to consult with Maori having customary interests in Tasman Bay and Golden Bay before deciding to switch from an inquiry into the validity of the company's transactions to a form of arbitration;
- it proceeded to implement the arbitration process without the informed consent of those Maori;
- it failed to ensure that a fair process, acceptable to Maori, would be followed by the arbitrator, in that the arbitrator reserved the right to impose conditions and to set the amount of compensation without the willing consent of Maori, which was required by article 2 of the Treaty;
- it failed to respect, protect, and provide for tino rangatiratanga when it imposed an amount of compensation, and it restricted the decision-making of the intertribal hui to a single point (that being the proportionate distribution of the set compensation);
- it failed to permit even that exercise of tino rangatiratanga to Golden Bay hapu and leaders, whose refusal to accept or to divide up the compensation did nothing to prevent their land being awarded to the company or the compensation being given; and
- it accepted Spain's award as a legitimate basis for a Crown grant to settlers, even though that award was based on an inadequate inquiry and its decision was wrong on the facts.

As a consequence, all Maori with customary interests in Tasman and Golden Bays were prejudicially affected by the arbitration proceedings and award, with the expropriation of their title to 151,000 acres of land, without their meaningful consent, and to their social, cultural, and economic harm.

Later in this chapter, we consider a number of further issues pertaining to the compensation payments and deeds of release, such as whether undue pressure was placed on Maori, whether the price was adequate, and whether Spain and the Governor acted lawfully.

(2) *Were customary rights extinguished by the 1844 deeds of release?*

The question of whether customary rights were extinguished by the 1844 deeds of release is complicated by the lack of evidence available to the Tribunal about exactly what was said and done at the two-day hui in Nelson. We know that much of the time was spent on discussing reserved sections and on Maori deciding how the set compensation should be allocated among themselves. We know little, however, of how the deeds of release were

365. Waitangi Tribunal, *Whanganui a Tara*, pp 115–116

explained or how Maori understood them. Spain certainly told those present at the hui that the deeds and payments were an act of friendship from the Queen and Governor and were made to secure peace but were not a payment for their land. In the official minutes, it was recorded as follows:

> But the Queen and the Governor wish to do something more for you now, and therefore Mr Clarke has been sent to represent you in Court, and to advocate your interests. He has awarded you the money which you have come this day to receive, not as a payment, but for the sake of making friends of you and the white people; to put an end to all the quarrels and disputes about the land, so that both races in this settlement may live peaceably and happily together in future.[366]

A local newspaper recorded it thus:

> The Commissioner plainly intimated to the natives in open court through the interpreter that he considered they had been previously amply paid for the land claimed in this district . . . and that they must receive the sum about to be given them by Mr Clarke not as a matter of right but as an act of grace and good-will towards them on the part of the Europeans.[367]

In Maori law, the relationship with the settlers was thus strengthened, their rights to share the land cemented by a second lot of gifts, and the relationship extended to the Queen and Governor, whose friendship and protection for both peoples was now assured. But this time, after listening to Spain's remarks, they had to sign 'deeds of release' purportedly relinquishing all claims on listed districts. Both Professor Williams and Mr Walzl argue that Ngati Tama, Ngati Rarua, and others may not have realised the true nature of what actually happened in 1844 for some time.[368] We are frustrated by the lack of evidence of exactly what Spain and Clarke said to Maori in the short couple of days between moving to arbitration and the signing of the deeds of release.

According to Professor Williams, Spain was influenced by the waste lands theory, which held that Maori had genuine rights only to the land they lived on and cultivated. Nothing else, in his view, can explain why Spain thought such a low 'price' was appropriate for such a large amount of land.[369] Dr Gould considered that this was also the explanation for why so much of the interior of the island was included in the 1848 Crown grant (see fig 10), suggesting that it was based on the idea 'that the rights of occupiers – as defined by Spain – were not considered as extending into the hinterand'.[370] Dr Ballara noted that in this Spain was influenced by de Vattel, but considered missionary Octavius Hadfield to have been a much

366. Minutes of proceedings, 24 August 1844, *Compendium*, vol 1, p 61
367. Walzl, *Land Issues*, p 131
368. Williams, 'Crown and Ngati Tama', pp 86–101; Walzl, *Land Issues*, pp 133–134, 148–151, 224–225, 231–233
369. Williams, 'Crown and Ngati Tama', pp 95–96
370. Gould, 'New Zealand Company', p 151

stronger influence.[371] Finally, from sparse records of the time, we have glimpses of what Maori may have understood.

Mr Walzl has placed a lot of emphasis on an 1851 letter from Ngati Rarua to Grey, in which they stated:

> Mr Spain paid us the money[.] we asked him what land the money was for and he replied for Motueka only – We said – purchase also Nelson and Waimea. They said no – as there were no natives on that land – We therefore consider that if we are not paid for that land we will feel it a great grievance on account of our land being taken for nothing[.] we have accordingly been endeavouring for the last two years to be paid up to the time you arrived when you agreed to our request.[372]

It will be recalled that Te Iti was cross-examined about when his people had last cultivated land at Waimea, and he had replied that they had not done so for six years. In his award, Spain reserved only that land which had been cultivated from 1840 onwards.[373] If the evidence of Professor Williams and Mr Walzl is correct, then the arbitration proceedings may have been based on compensating Maori only for those districts where they lived year-round and which they cultivated (with them keeping the pa, cultivations, and tenths), but not for others.

We are not satisfied that the deeds of release, explained as a gratuitous payment rather than as an extinguishment of rights, can be shown to have changed the customary aspects of the tuku to the company to the certain knowledge of the Maori signatories. After all, they wanted the settlers to stay, and that was one outcome. Ngati Tama and Ngati Rarua continued acts of occupation on some 'settler sections' in the late 1840s, even cultivating the land (which is a strong assertion of rights under Maori law), until Government and settler pressure began to restrict their activities.

Ngati Rarua then wrote to the Government saying that their rights in certain places had never been acknowledged by Spain, nor had they been compensated for them.[374] Superintendent Richmond commented that this was an 'absurd claim', because those Maori involved had signed a deed – one that was in their own language and that had been fully explained to them – 'alienating to the New Zealand Company all their right in the lands in question'.[375] Alfred Domett, perhaps not realising the significance of his knowledge, advised Grey that the payment had been explained to Maori by Spain as a matter of 'grace and favour'.[376] Whatever the exact circumstances, Ngati Rarua considered themselves as still

371. Ballara, 'Summary of Selected Aspects of an Historical Overview Report', p 5
372. Walzl, *Land Issues*, p 232
373. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol 1, p 60
374. Walzl, *Land Issues*, pp 232–233
375. Ibid, p 233
376. Ibid. Alfred Domett was the Colonial Secretary of New Munster (and also Civil Secretary of the General Government).

possessing rights and entitled to further 'payments', but the Governor accepted his officials' recommendation that no such payments should be made.[377] Te Tau Ihu Maori continued to assert their claims until the time of the Waipounamu purchase of the mid-1850s, when further deeds and payments were arranged.

In the Maori view, there remained unalienated customary rights in the lands adjudicated by Spain and awarded to the New Zealand Company. In the Crown's view, all rights had been extinguished by purchase (as found by Spain), and the land, minus reserves, was then legitimately granted to settlers. As a result of Spain's failure to inquire properly and find the truth, and his explanation of the 1844 payments as gratuities, Maori and the Crown were still 'talking past each other' by the 1850s. The difference was that by then all unalienated customary rights had, at law, been expropriated and granted to others by Crown grant in 1845 and 1848. The issuing of these Crown grants, based on the faulty Spain inquiry and award, compounded the Treaty breaches enumerated above.

All Maori in Tasman and Golden Bay were prejudicially affected by these breaches of the Treaty. There were, however, some differences in the way in which groups were treated, leading to the particular claims described above. We turn now to our additional conclusions and findings on these claims.

4.20.6 The rights of Ngati Toa

Ngati Toa were not signatories to the Port Nicholson deed, the basis for the company's claim to Wellington. Though Port Nicholson was also covered by the Kapiti deed, this was disregarded as a basis for the Wellington purchase. On the other hand, the Kapiti deed was regarded as the primary basis for the Nelson purchase. Spain considered that the payment Ngati Toa received for the Kapiti purchase sufficiently covered their interests in the districts that he awarded to the New Zealand Company, and they received no further payment for these. In response to intense questioning as to what he had 'sold', Te Rauparaha was adamant that he had intended Wakefield and the settlers to have Taitapu, and Te Rangihaeata made the same admission regarding Wakatu. Spain appears to have accepted this for the most part, though he variously equated Taitapu with a part of Golden Bay, the whole of Golden Bay, and even Tasman Bay, and Wakatu with all of Tasman Bay. Nevertheless, he still relied on the Kapiti deed as a basis for the purchase of the districts he subsequently awarded the company, as, for instance, in his speech at the end of the Nelson hearing.

We have previously noted the consistency in the statements of all four Ngati Toa rangatira examined by Spain, their firm ideas as to the limited nature of the transactions which took place, and their refusal to buckle under persistent questioning from Spain.

We find that the leaders of Ngati Toa intended that Wakefield's people should settle and

377. Walzl, *Land Issues*, pp 232–233

have land at Taitapu and Wakatu, but they did not intend to transfer any of their other interests to the company. We accept counsel's submission that Ngati Toa received neither payment for the additional area granted to the company (beyond Taitapu and Wakatu, as they defined them) nor a share in the company tenths that were awarded to others, but we find it difficult to assess the extent of their loss. As Spain was aware, they were not, at the time of his inquiry, in occupation of any of the districts he awarded to the company. As we discussed in chapter 2, they claimed a kind of a suzerain right, deriving from their earlier leadership in the conquest of Te Tau Ihu and their wider strategic control. In Maori terms, this could be described as a take raupatu. After 1840, previous conquests could still be used as a basis for landownership, though normally they needed to be confirmed by occupation. Raupatu could no longer be exercised, but there was nothing in the Treaty to prevent Maori groups from peacefully occupying land. There was a similar situation in the district covered by the Tribunal's Wellington inquiry, since Ngati Toa were not occupying any of that district, though they periodically utilised resources in Heretaunga and Ohariu. Nevertheless, the Wellington Tribunal concluded that Ngati Toa had take raupatu and ahi ka rights in the district.[378]

We discussed Ngati Toa's rights in western Te Tau Ihu in chapter 2, where we considered that they had take raupatu and latent ahi ka rights in the specific districts that Spain awarded to the company. These rights were similar to those that the Wellington Tribunal recognised in the Port Nicholson block. It is quite clear from the recorded evidence of the 1840s that resident right holders did not accept Te Rauparaha's claim to primary authority, nor did they consider that he could alienate land without their consent. From 1840, Ngati Toa were free to reoccupy land in the conquered districts, so long as they did it peacefully. Had they done so, it is unlikely that they would have been resisted by either their former northern allies or remnants of the Kurahaupo iwi, who were also now free to reoccupy their former land. Ngati Toa were occupying districts like the Wairau in varying strength, and moving about for resource use and to trade with Pakeha, in the area outside Spain's award. As the Crown rightly reminded us, the situation in the early 1840s was fairly fluid. Ngati Toa and their northern allies were forever coming and going across Cook Strait and did not suddenly freeze their customary landownership when the Treaty of Waitangi was signed.

We acknowledge that Ngati Toa had inchoate rights in the land that Spain awarded to the company, even when they were not physically occupying it. Spain should have acknowledged those rights, and he was wrong to conclude that they had been wholly extinguished by the Kapiti deed. While we cannot quantify the amount, we consider that Ngati Toa should have been given some compensation for their take raupatu and latent ahi ka rights in that land, in addition to the original payment they received at Kapiti.

We find that in relation to Ngati Toa the Crown breached article 2 of the Treaty by

378. Waitangi Tribunal, *Whanganui a Tara*, pp 39–41, 44

including in Spain's Nelson award far more than the limited areas at Taitapu and Wakatu that the iwi admitted intending for the settlers in the Kapiti deed. Ngati Toa needed to consent to this alienation, and to be compensated for it and for the loss of their continuing rights based on their former take raupatu and an inchoate right to develop ahi ka. The Crown's actions were in breach of the principles of partnership and active protection. As for Ngati Toa's claim that they were wrongfully excluded from the Nelson tenths, we discuss this in chapter 9.

4.20.7 The rights of the Kurahaupo iwi

In contrast to the situation in Wellington, where there were no defeated peoples in occupation in 1839–40, surviving communities of the Kurahaupo iwi were still occupying land in Te Tau Ihu. As we found in chapter 2, they retained and were recovering rights in the land alongside the northern iwi (whose mana they acknowledged). Some were present at Spain's Nelson hearing, but he made no attempt to hear them or to consider their rights. They had apparently received none of Captain Wakefield's 'presents', Spain made no provision for them in his award, and they were not part of Colonel Wakefield's compensation arrangements. When matters were left to Maori to arrange, however, as with the apportionment of compensation at Nelson, they were included in Spain's payments.[379]

Dr Ballara and Dr Gould were particularly critical of Spain and his inquiry on this matter. Dr Ballara noted that Spain had recognised the rights of defeated peoples where they occupied land on the 'sufferance' of their conquerors, and that their concurrence was necessary for any absolute alienation of all rights in the land. She criticised his failure to actually apply this understanding of custom in his Te Tau Ihu findings and to inquire properly about the status of those who he believed were fugitives without settled communities ('Rangitane').[380]

Spain's understanding of Maori customary rights to land and how he applied it in his award was not in fact an outcome of his abbreviated Nelson hearing: as we have already noted, the claimants and Crown agree that Spain's early termination of the hearing precluded him from gaining a full understanding of those rights.[381] Counsel for Ngati Apa was the most critical of Spain – which is not surprising, since Spain ignored the rights of Ngati Apa altogether. Counsel submitted that:

> one of the fundamental aims of a process of inquiry as to whether or not a purchase from Maori had validity must have required a process of identification of iwi who had customary rights in the area purportedly being purchased. That was vital so as to ensure that any

379. Campbell, 'A Living People', p 113; Armstrong, pp 127–128
380. Ballara, 'Customary Maori Land Tenure', pp 151, 154, 160–161
381. For instance, counsel for Ngati Tama, closing submissions, pp 48–49; counsel for Ngati Koata, closing submissions, pp 49–50

> purchase arrangement was occurring by consent of those Maori having customary rights in all the lands, forests, fisheries and other taonga affected by the purchase proposal.[382]

Counsel then said that the Crown officials should literally have walked the land concerned to meet those occupying it, as officials had done just one month earlier, in July 1844, in connection with the Otakou purchase.[383] But, in the Nelson case, Spain's assistants had limited their visits to Wakatu, Motueka, and the Croisilles, and had approached people from the northern iwi only, just one of whom, Te Iti, was called as a witness at the hearing. Furthermore, counsel argued, two Ngati Apa families had been encountered by surveyors on the Waimea Plains, though Meurant did not go there. According to evidence presented to the Native Land Court in 1892, 21 named men of Kurahaupo descent had been in Nelson at the time of Spain's hearing. It was not so much that these people were unknown. Rather, it was because of a 'mindset' of officials, who believed that only conquests mattered, that Ngati Apa and other Kurahaupo iwi were not considered by Spain. Counsel was also critical of the failure of officials to inquire into who occupied the interior of Nelson.

It was argued by the Crown that such matters must be viewed not with hindsight but in light of what could reasonably have been known and done at the time, bearing in mind the limited resources that the Crown had at its disposal. The Crown argued that rights were unsettled in Te Tau Ihu and that the 'postulation of some form of idealised inquiry whereby Crown officials would have traversed the entire region consulting with all Maori communities, prior to negotiating or completing any major transaction simply ignores the actual historical context'.[384] Nonetheless, counsel submitted that:

> The Crown consistently proceeded on the basis that there must be a valid extinguishment of Maori claims before it could legitimately acquire land or confer, or recognise the title of Europeans seeking land. This applied to both the Crown's own dealings and the pre-1840 claims.[385]

This remains a fundamental point, in our view.

There is much that we agree with in the submissions of counsel for Ngati Apa and counsel for the Crown. In particular, both were essentially agreed on what must, in Treaty terms, be regarded as a given – that, before the Crown could validly purchase and extinguish Maori title, it had to have the agreement of all who had customary rights to the land in question. We accept that the Crown could not be expected to do more than was practicable at the time, but in view of its Treaty obligations and what was practicable, there was still a high standard to be met. We consider that customary rights were not too unsettled to be

382. Counsel for Ngati Apa, closing submission, p 17
383. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, pp 309–310
384. Crown counsel, submissions on generic issues, pp 7–8
385. Ibid, p 8

discoverable upon reasonable inquiry. This is an issue which we consider at greater length in a later chapter within the specific context of the Crown's own purchasing programme (see sec 6.8).

Here, we must consider what was reasonably practicable for Spain and his officials to have done. Spain's award was confined to the area already mostly surveyed for settlement: 151,000 acres in Nelson, Waimea, Moutere, Motueka, and Golden Bay. According to counsel for Ngati Apa, Meurant visited only Wakatu, Motueka, and Croisilles prior to Spain's arrival, but company surveyors clearly had knowledge of all of the districts on that list and, presumably, the people in occupation of them. Though Spain called one company surveyor, Thomas Duffy, as a witness, he was questioned solely on Captain Wakefield's distribution of 'presents' in Golden Bay. Spain could have called other company surveyors and questioned them on the identity of Maori groups in occupation of the districts he intended to award to the company, as, indeed, he could have called representatives of the Maori occupants, many of whom were present at his hearing.[386] For Golden Bay, however, he needed to move his inquiry to that district to afford the hapu and their leaders an opportunity to be heard. This was entirely practicable, as he noted in his report. He decided not to do so, however, when Clarke, who visited the district after its inhabitants had been awarded compensation without their input, said that he would not contest the company's claim there.[387]

It would have been possible, as it was indeed necessary under the Treaty and the Land Claims Ordinance, for Spain to have conducted a full inquiry into the customary ownership of the districts he intended to award to the company. Moreover, he needed to satisfy himself that the occupants (whom he believed to have prime rights of ownership) were willing to alienate their rights.

Commenting on the knowledge of Crown officials on Maori custom, the Crown submitted that the evidence did not show 'culpable ignorance of Maori customary concepts on the part of Crown officials'. On the contrary, officials such Spain, Clarke, Meurant, McLean, and Governor Grey all appeared to have a 'reasonable understanding and knowledge'.[388] The Crown added that Spain's earlier experiences in Wellington and New Plymouth, and his contacts with missionaries such as John Whiteley, meant that he was well informed on Maori custom by the time he arrived in Nelson. We agree that officials such as Spain had a reasonable understanding for their time of Maori customary rights. Indeed, in some respects, Spain had a better understanding than other officials, in that he did not rely on conquest alone as providing rights to land but insisted that a conquest had to be followed up by occupation. We largely agree with that view, though recognising, as we have found, that Ngati Toa's ability to develop ahi ka was not thereby foreclosed in the circumstances of the 1840s.

386. Walzl, *Land Issues*, pp 51–73, 79–104, 125–130
387. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol 1, p 57
388. Crown counsel, submissions on generic issues, p 9

Spain, though clearly aware of the presence of defeated peoples, called them all 'Rangitane' and assumed that they were fugitives without settled communities under their own chiefs. In the South Island, he wrote, 'the tribe Rangitane, the original occupants, is reduced to a mere remnant, living in the interior without any fixed dwelling places, and even now [1845] hunted down by Rauparaha and his retainers'.[389] He came to this conclusion without inquiry, and, as we found in chapter 2, he was demonstrably wrong as to the facts. In both evidence to the Native Land Court in the 1890s and later documents, the Kurahaupo people claimed to have had a presence at Wakatu at the time of Wakefield and Spain, and to have participated in Spain's compensation money (as apportioned by the 1844 hui).[390] The northern allies, such as Ngati Tama, dispute this claim and note that this evidence comes long after the event.[391] We see no grounds for disputing the oral history of the Kurahaupo peoples, as recorded in the 1890s, that they had at least a presence and were recognised to have some kind of rights by their participation in the payment. Exactly what those rights were or how far they extended from Tasman Bay into Golden Bay, and on what basis, it is not now possible for us to say.

We find that Spain, though reasonably informed on Maori custom, did not investigate properly or apply that knowledge in seeking out all who had customary rights in the districts included in his Nelson award, nor did he gain their assent to the alienation of the land to the company. This applies particularly to the Kurahaupo iwi, who had rights in the district. It also applies to the Wairau, where Spain ignored the rights of Ngati Rarua and Rangitane, but we take up that issue when we examine the Wairau purchase in our next chapter.

The matter did not end with Spain, whose report was a recommendation to the Governor. We are particularly mindful of the interface here between custom, with layers of rights and authority in the land and over its resources and people, and the British need to extinguish all rights before the Crown could grant Maori land to others. Clarke put it like this in 1843:

> Rauparaha, who conquered and took possession of parts of this country, would, in connexion with his followers in the vicinity of Cook's Straits, have large claims; but his title would no doubt be disputed by the original proprietors, so soon as they were in a position to maintain their claims. A tribe never ceases to maintain their title to the lands of their fathers, nor could a purchase be considered complete and valid without the concurrence of the original proprietors. If a conqueror spares the lives of the conquered, and they thenceforth become amalgamated with his own tribe, he infallibly secures his own title by uniting the claims of the original possessors with his own.[392]

389. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol 1, p 59
390. Campbell, 'A Living People', p 113; Armstrong, pp 127–128
391. Counsel for Ngati Tama, closing submissions, pp 17–18
392. G Clarke to Colonial Secretary, 17 October 1843, BPP, vol 2, appendices to 1844 committee, p 359; see also pp 356, 358

4.20.7

Our attention was drawn to Clarke's views both by counsel for Ngati Toa and by Mr Armstrong, the historian for Ngati Apa.[393] In Mr Armstrong's evidence, this understanding of custom required the extinguishment of all rights in order to achieve a clear title. This inevitably required the Crown to deal with defeated peoples still in occupation, as in Te Tau Ihu.[394] We agree. If the Crown indeed sought the free, fair, and informed acquisition of a clear title to land, it had to ensure that the interests of all right holders were voluntarily relinquished.

Dr Gould argues that there was an inconsistency in that FitzRoy and Clarke intervened in Spain's Taranaki award but not in his Te Tau Ihu award. In Dr Gould's view, the concern for the rights of formerly defeated peoples evident in Taranaki was not shown in Te Tau Ihu. The reason for the inconsistency was the speed and inadequacy of Spain's inquiry, which gave the commissioner and protector little opportunity to 'inquire or consider properly the status of the original tangata whenua living within the area covered by the 1844 Deeds of Release'.[395]

Clarke's advice to the Government about the rights of conquerors and defeated peoples, and his particular statements about the Cook Strait region, indicate that FitzRoy and Clarke knew enough to have at least queried Spain's findings, as they did in Taranaki. Given the inadequacy of Spain's inquiry, justice required their intervention, as it had in Taranaki. Crown historian Dr Gould agrees with claimant historians Mr Armstrong and Ms Campbell, and with Dr Ballara, on this point.

Further, the Government ought to have inquired as to whether Spain was correct when he reported that 'Rangitane' were fugitives being 'hunted' by Te Rauparaha. Had that been true, then, being the Queen's subjects, they would have required immediate and substantial protection. On the evidence, it was not true in 1845, but the Government could not have known that without inquiry, and Spain clearly did not know it. Any follow-up inquiry by the Government or protectorate, which was surely required on the basis of Spain's report, could have uncovered the status and surviving rights of the defeated peoples in the company districts (and elsewhere).

Either way – given Clarke's knowledge that a layer of rights survived in tributary communities of defeated peoples and Spain's report that the defeated peoples were hunted fugitives still – the Crown had a Treaty duty to have inquired further and taken appropriate action. Its failure to do so had serious consequences for Ngati Apa, Ngati Kuia, and Rangitane in Te Tau Ihu.

We find that Spain breached article 2 of the Treaty by his failures to investigate the rights of the Kurahaupo iwi and to consult or include them in his arrangements for deeds of

393. Counsel for Ngati Toa Rangatira, submissions in response to closing submissions of counsel for Ngai Tahu and the Crown concerning 1840 rule, 19 April 2004 (paper 2.784), pp 10–11; Armstrong, pp 35–36. Armstrong refers to H T Clarke, but Chief Protector George Clarke is in fact the author.

394. Armstrong, pp 28–44

395. Gould, 'New Zealand Company', p 89

release and compensation. The more general Treaty breaches described previously apply equally to the Kurahaupo iwi. We find further that the Crown's failure to intervene, despite Clarke's knowledge of the situation, was in breach of the Treaty principle of active protection. Given FitzRoy's intervention in Taranaki to supply justice to more powerful tribes that were a greater threat to European settlement, the Crown was also in breach of the Treaty principle of equal treatment. It did not give Te Tau Ihu Maori the active protection it gave to other Maori in broadly comparable circumstances. Finally, the Crown was in breach of the Treaty principle of equity, which required it to act fairly as between Maori and settlers. Several company witnesses were examined and its senior official represented it in the arbitration, whereas not a single Kurahaupo witness was heard, and they had no status or representation in the arbitration. As far as we know, Clarke did not mention them and had not ascertained their presence or rights.

As is often the case, Maori ameliorated this somewhat among themselves by including the Kurahaupo iwi in the compensation payment. That does not, however, excuse or rectify the Crown's failure to ensure the three iwi's free and willing consent, either to Wakefield's original arrangements or to its own supposed extinguishment of their rights, prior to granting the districts awarded by Spain to the company.

4.20.8 Compensation payments and deeds of release

There are several issues in relation to the New Zealand Company's compensation payments and deeds of release beyond the question of customary rights that we also need to consider.

(1) *Undue pressure*

We begin with the issue of whether undue pressure was placed upon Maori to agree to the deeds of release. We have already considered whether Nelson Maori were consulted over, and approved of, Spain's decision to move from inquiry to arbitration and whether they were properly consulted over the 'sale' of their Nelson lands, and we found that, in both instances, they were not. We now consider whether in the negotiation they were able to secure what they regarded as an adequate price. The process of securing agreement to the payments was in two parts. The first was the negotiation that was concluded at Nelson and that resulted in the payment of £200 to the 'Natives of Motueka', £200 to the 'Natives of Wakapuaka', and £100 to the 'Ngatiawa Natives'. There is some circumstantial evidence to the effect that these three groups were subject to significant pressure to accept those amounts. As we have noted, the total sum to be paid was agreed by Wakefield, Clarke, and Spain and was put to the Maori groups at Nelson as a non-negotiable option. The *Nelson Examiner* report that we have quoted above (sec 4.14.1) also says that Nelson Maori were told to accept the offer or go without.

The position was even worse for Golden Bay Maori, since they were not present at the

Nelson hearing and negotiation and had merely to accept the £290 that was allocated for them, which ended up being divided between diverse and scattered communities.

We find that the Crown, through Spain, Clarke, and other officials, put undue pressure on Maori at Tasman and Golden Bays to sign deeds of release or sale, under the non-negotiable terms and at the prices proffered to them. This was in breach of article 2 of the Treaty and the Treaty principles of active protection and partnership. This finding reinforces our general finding above.

(2) *Entitlement*

The second issue that we have to consider is whether those named in the deeds included all who had rights. Here, we are concerned less with the rights of Kurahaupo and Ngati Toa than with those of other iwi involved in the compensation payments. The deeds of release in Tasman Bay and the deeds of sale in Golden Bay were concluded largely with three of Ngati Toa's northern allies – Ngati Rarua, Ngati Tama, and Te Atiawa – though the first two iwi were not acknowledged by name in the Motueka and Wakapuaka deeds. It is likely that iwi identifications were muddled at times in Golden Bay, and we have to bear in mind not only that iwi were probably not as sharply defined in the 1840s as they are today but that at the time there were a number of tribally mixed communities living at various places in Te Tau Ihu. It also seems that the terms used in the three Tasman Bay deeds were meant to be broadly applied. The term 'Motueka Natives' probably included several communities (or kainga) spread over an area wider than the district of Motueka (as it is now known) and, besides Ngati Rarua, it encompassed people from several iwi, particularly Te Atiawa. It possibly even covered some Kurahaupo people who were not included in Spain's reckoning. Likewise, the term 'Wakapuaka Natives' probably encompassed several communities besides that at Wakapuaka; it certainly included some Ngati Koata as well as Ngati Tama. In his description of the signing of the three Tasman Bay deeds of release, Spain referred to the deed for 'Whakatu, or Whakapuaka', which suggests that it included Maori all the way from the new town of Nelson to Wakapuaka.[396] Though Maori did not permanently occupy Wakatu when the town of Nelson was established, they began to move into town to take advantage of trading opportunities and were allocated tenths sections. It is possible that the 'Whakatu, or Whakapuaka' deed was meant to cover such people. On the other hand, the deed for the 'Ngatiawa Natives' was not specific to any places occupied by Te Atiawa, so we have to presume that it included Te Atiawa wherever they lived. But it is unclear whether Te Atiawa at Motueka were included with the 'Motueka Natives' in that deed or in the 'Ngatiawa' deed.

Whatever the precise situation of each of the three deeds, the naming practices adopted did not make it easy for the distribution of the money – or for the allocation of the reserves

396. *Compendium*, vol 1, p 62

that were promised. We noted above that the Golden Bay deeds of sale had a slightly different wording concerning reserved places, but it is not clear whether the signatories relinquished claims just to the Golden Bay district awarded by Spain or to Tasman Bay districts as well.

Finally, we note that the deeds of release extinguished the rights of the three groups (apart from the reserved places) not merely to their places of residence but also in all of the districts that Spain intended to award to the company. (There was one exception to this in that Motueka was not included in the Wakapuaka and Ngatiawa deeds.) Spain was making sure that he extinguished rights wherever they may have existed in the awarded districts. This sort of blanket extinguishment of rights was to become common practice with Crown purchases later, as for instance with the Waipounamu purchases, which we examine in chapter 6.

In the end, we are left with insufficient information to decide whether the deeds of release or sale (in the case of Golden Bay) properly covered the rights of those who were so vaguely described or named. Although there were some later disputes over reserves and boundary lines (see sec 4.14.2), in Tasman Bay at least there appear to have been no complaints that members of the three northern iwi were left out of the compensation. Thus, we make no finding on the matter.

The situation was different in Golden Bay, however, with well authenticated claims that some Maori, notably Ngati Tama at Takaka and Aorere, were left out altogether or did not receive their full compensation payment, in breach of article 2 of the Treaty and the principles of active protection and equal treatment.

(3) *Adequacy of payment*

The next issue that we have to consider concerns the adequacy of the payment for the land that was relinquished. Although several counsel were critical of the compensation arrangements, only counsel for Ngati Rarua made a direct submission. He argued that the compensation payment was 'miserly' and 'disadvantageous as to value', though he provided no comparative figures to assist us in reaching a conclusion. We have to bear in mind that the compensation payments were considered to be in addition to Captain Wakefield's 'presents' to various parties in Tasman and Golden Bays in 1841 and 1842. Since we have already dismissed those 'presents' as a valid payment for the land, we think it appropriate to consider only the company's £800 compensation payment for the 151,000 acres that Spain awarded the company. This amounted to 1.27 pence per acre – not a high price for the quality land that the company surveyors had selected and considerably lower than the four to eight shillings required under the Land Claims Ordinance 1841 for land purchased from Maori in 1839. In that respect, the Crown favoured the company at the expense of Nelson Maori.

It might be argued that the price paid by the company was comparable with other prices being paid by the Crown for Maori land at that time (and, as we noted, Spain claimed that it

was better than the price paid by the company for the Otakou block). We do not accept this as a valid comparison – especially since other Tribunals have been critical of the low prices paid by the Crown for other Maori land. Two wrongs do not make a right.

Bearing in mind the finding above that the amount paid was forced on Nelson Maori in a coercive manner, we find that the £800 compensation paid to Nelson Maori was inadequate consideration for their interests in the land awarded to the New Zealand Company and represented an expropriation of their interests in favour of the company. These actions of the Crown were in breach of article 2 of the Treaty and the principles of active protection and partnership.

4.20.9 Spain's award

Spain's award of 31 March 1845 followed the completion of his hearing-cum-arbitration and the payment of some but not all of the compensation that he had agreed on with Colonel Wakefield. There are a number of issues on the award that have not been fully dealt with so far that need to be further discussed.

Significant questions were raised surrounding the legality of Spain's inquiry and subsequent award. Counsel debated a number of questions associated with these aspects of his work: What was the legal basis for Spain's investigation and award? Was Spain restricted to recommending a maximum of 2560 acres? Was the Governor required to consult the Executive Council before extending such awards? These are all issues which go to questions of good government. Under the Treaty, the Crown ought to keep its own laws and enactments so that British subjects may be assured that their Government is acting legally and governing properly.

Our consideration of these issues is hampered by gaps in the documentary record, including, crucially, the commission under which Spain was appointed. Nevertheless, counsel for Te Atiawa, in particular, advanced lengthy submissions on the legality of Spain's inquiry and award, which the Crown responded to fully in its closing submissions. We set out our understanding of the position below.

We have previously discussed the relevant legislation with respect to the investigation of land transactions announced by Lieutenant-Governor Hobson upon his arrival in New Zealand in January 1840. To summarise the position, in August 1840 the New South Wales Government passed the New Zealand Land Claims Act, which provided for commissioners to investigate pre-Treaty land transactions and recommend the award of up to 2560 acres in the case of those purchases found to have been valid. The Act was disallowed by the Imperial Government in April 1841 on the basis that New Zealand had been proclaimed a separate colony in the interim. Meanwhile, Hobson, anticipating the need for further legislation, had in June 1841 secured the passage of the Land Claims Ordinance through the New Zealand Legislative Council. Its provisions were very similar to those of the New South Wales Act.

News of the November 1840 agreement between the New Zealand Company and the Crown in London subsequently persuaded Hobson to introduce a second Land Claims Ordinance in February 1842. This allowed claimants to receive grants of land at the rate of four acres for pound expended upon the promotion of colonisation, but it was also disallowed by the British Government on the basis that Hobson had wrongly extended the Pennington formula to all old land claimants, not just the New Zealand Company. According to Professor Williams, as a matter of law the second ordinance was in force from the date of its introduction on 25 February 1842 through to 6 September 1843, when its disallowance was gazetted and the earlier legislative regime was formally revived.[397]

William Spain was appointed land claims commissioner in January 1841. Before Spain sailed for New Zealand in April of the same year, the newly appointed chief justice, Sir William Martin, had inquired on his behalf as to the instructions which should guide his work. Martin was informed in reply that, 'as Mr Spain is about to execute a Judicial Commission & to act as Arbiter between the Crown and HM Subjects on various questions of property', the only instructions it was considered appropriate to issue were that Spain should carry out the New Zealand law from which his authority derived, 'or any other Local Act which may be passed in substitution for it, or in amendment for it'. It was further noted that the Secretary of State for the Colonies wished to convey that 'Mr Spain will be called upon to execute the Law rather with a view to prevent future injustice than with the expectation of being able to redress satisfactorily past wrongs'. Dr Phillipson pointed out that an earlier draft of this letter was even more explicit as to the meaning behind this passage, observing that 'the redress of past injustice to the Natives is less the object of this Commission than the prevention of future wrongs'.[398]

Spain arrived in Auckland in December 1841 and received his formal commission from Hobson in March of the following year. Instructions issued to him by the Colonial Secretary required him to:

- be guided 'by the real justice and good conscience of the case without regard for legal solemnities';
- ensure that a protector of aborigines be present at all hearings to represent and protect the interests of Maori and to act on their behalf; and
- make recommendations as to any award consistent with the provisions of the 1842 ordinance.

However, with the disallowal of the 1842 ordinance, Spain's inquiry became subject to the provisions of the Land Claims Ordinance 1841, and it was under this legislation that the commissioner's Nelson hearing in August 1844 took place.[399]

397. Williams, 'Crown and Ngati Tama', p 79
398. Phillipson, *Northern South Island: Part 1*, p 70
399. Crown counsel, closing submissions, p 38

4.20.9

Was Spain acting within the provisions of the 1841 ordinance when he recommended that the New Zealand Company receive a grant for some 151,000 acres, despite the stipulated upper limit of 2560 acres? Crown counsel drew our attention to clause 6 of the ordinance, in particular to that phrase which stated that 'no grant of land shall be recommended by the said Commissioners which shall exceed in extent two thousand five hundred and sixty acres, unless specially authorized thereto by the Governor with the advice of the Executive Council'.[400] It was submitted that, despite the absence of direct evidence that the Governor, with the advice of the Executive Council, had authorised Spain to recommend grants in excess of 2560 acres in favour of the company, when viewed in the light of the November 1840 agreement it was more than likely that such authority had been granted. We agree, and though the absence of firm evidence remains a matter of concern, we are unable to take this matter further. Dr Gould noted that a number of key files pertaining to Spain's appointment and commission have been missing from Archives New Zealand since 1982.[401] In the absence of such crucial material, the issue must remain in the realm of speculation.

It was submitted to us by counsel for Te Atiawa that Spain failed to conduct a proper and lawful inquiry into the New Zealand Company's claims to Tasman and Golden Bays.[402] Such an argument appeared to be premised on the view that there was no lawful basis for the switch from investigation to arbitration and that the latter was not consistent with the terms of the Land Claims Ordinance 1841. This submission was rejected by Crown counsel, who argued that 'Spain's authority to adopt the arbitration/compensation model' appeared to be 'extraneous to the ordinances'.[403] We have previously indicated our support for the Te Whanganui a Tara Tribunal's finding that the arbitration process was irreconcilable with the 1841 ordinance. Even Crown counsel seemed to implicitly agree with this viewpoint, since it was argued that Spain's authority stemmed not solely from the ordinance but also from additional instructions pertaining to arbitration consistent with the prerogative powers of the Governor.[404] Ultimately, however, the Crown submitted to us that the more substantive Treaty issue to be considered arises not from the issue as to the legality of Spain's actions 'but from the actual nature and extent of the inquiry itself'.[405] We have already found the Spain commission seriously flawed and in breach of the Treaty in that respect. As counsel for Te Atiawa noted, the fact that Crown counsel could not point to an alternative legal basis for Spain's inquiry and report or to his formal appointment as arbiter must also cast doubt on the legality of his proceedings. Again, however, in the absence of crucial information pertaining to the terms of Spain's appointment, we are unable to take this matter further and make no findings on the legality of the commission.

400. Crown counsel, closing submissions, p 39
401. Gould, 'New Zealand Company', p 40
402. Counsel for Te Atiawa, closing submissions, pp 97–98
403. Crown counsel, closing submissions, p 42
404. Ibid, pp 41–42
405. Ibid, p 42

4.20.10 FitzRoy's Crown grant, 29 July 1845

Although claimant and Crown counsel have noted FitzRoy's Crown grant, they have made no submissions on it, apart from counsel for Ngati Tama, who said, without elaborating, that it and Grey's replacement grant of 1848 were 'unlawful and in breach of the Treaty of Waitangi'.[406] We comment on the legality of FitzRoy's grant below and on Grey's grant in our next chapter.

FitzRoy's grant followed the terms of Spain's award in specifying the areas of land in the various districts that were being granted to the New Zealand Company. It also followed the terms of Spain's reservation of 'All the pas, or burial-places, and grounds actually in cultivation by the Natives', as well as one-tenth of the 151,000 acres being granted to the company. The grant begins with the statement that:

> Whereas one of our Commissioners appointed to hear, examine, and report upon the claims to land obtained by purchase from the aboriginal inhabitants of the Colony of New Zealand, has reported that the New Zealand Company are entitled to receive a grant of 151,000 acres of land . . . at and near Nelson.[407]

This implies that the land was being granted under the Land Claims Ordinance 1841, though that ordinance is not mentioned. The next sentence suggests that the land was granted under the royal prerogative: 'Now know ye, that we, of our special grace, for us, our heirs and successors, do hereby grant unto the said New Zealand Company'.[408]

Against this, however, it should be noted that precisely the same language was employed in grants issued to other old land claimants at the time. The basis upon which such grants had been issued was in fact a critical point in *Queen v Clarke*, an 1848 test case before the Supreme Court in which Grey sought to challenge the legality of the Crown grants issued in favour of various missionaries. Much to Grey's surprise and disappointment, the court ruled that any imperfections or illegality in the process by which the land claims commissioners made their recommendations (such as exceeding the 2560-acre maximum figure set out in the 1841 ordinance) did not invalidate a grant made by the Governor in the exercise of the royal prerogative.[409] This decision was subsequently overturned two years later upon appeal to the Privy Council.[410]

FitzRoy's powers as Governor were set out on his appointment by letters patent issued under the Great Seal. These included authority to grant land under the Public Seal pursuant to prevailing legislation (such as the Land Claims Ordinance 1841) or by exercise of the royal prerogative. The Governor's authority was further defined by instructions issued by

406. Counsel for Ngati Tama, closing submissions, p 44
407. *Compendium*, vol 1, p 68
408. Ibid, p 69
409. J Rutherford, *Sir George Grey KCB, 1812–1898: A Study in Colonial Government* (London: Cassell, 1961), pp 138–139
410. Ibid, p 139 fn 92

the Secretary of State at the time of his appointment and subsequently. Unfortunately, we have not located copies of these instructions or the letters patent. A colonial governor's use of the royal prerogative, unlike the monarch's or a viceroy's, was not unconstrained. His authority was governed by the powers expressly or impliedly entrusted to him by his commission.[411] As the Tribunal pointed out in its *Ngati Rangiteaorere Report* of 1990, which examined a Crown grant issued to the Church Missionary Society on the basis of a pre-1840 transaction at Te Ngae, the prerogative could have been used as the basis for a grant only if it was issued in accordance with the letters patent and instructions to the Governor.[412] That report discussed a Crown grant issued in 1854 and subject to letters patent and instructions to the Governor of 1846 and 1848, though on the basis of an earlier recommendation of FitzRoy's. We think the same principle applies to FitzRoy's Crown grant for Nelson, though any use of the prerogative there needed to be conditioned by FitzRoy's letters patent and instructions.

Whether or not the prerogative was legally used in the case of the Nelson grant, it was not necessarily in conformity with the principles of the Treaty, since it validated a transaction that breached the Treaty in various ways. Although FitzRoy's grant was subsequently rejected by the New Zealand Company, this in itself highlights a notable difference between the Crown's treatment of the company and its treatment of Te Tau Ihu iwi. Company representatives were evidently free to reject the grant as contrary to what they perceived to be the company's best interests. The customary owners of the lands (or at least those of them party to the transaction), on the other hand, were pressured into accepting Spain's award and compensation, and did not seriously have the same option open to them to reject the arrangements already made by Spain, Clarke, and Wakefield. We find this to be in breach of the principle of equity. Moreover, the ability of the company to simply reject the Crown grant offered it was ultimately to have further serious repercussions for local Maori, since the alternative grant eventually accepted by the company in 1848 was one in which full tenths and cultivation reserves were no longer secured to iwi of the region. The 1848 Crown grant thus not only validated an invalid transaction but was in some respects even more prejudicial to Maori interests than the 1845 grant. We consider Grey's grant in more detail in the next chapter.

Finally, we comment briefly on the matter of wahi rongoa, which, as we noted above, were reserved for Maori signatories of deeds of release, along with pa, urupa, and ngakinga. The term 'wahi rongoa' was not specifically carried through to FitzRoy's Crown grant, though it did reserve tenths. As we also noted, the Wellington Tribunal considered this issue for the deeds of release signed in Wellington and suggested that the term may have meant 'places reserved'. We think this interpretation may have been applied in Nelson, but

411. J Hight and H D Bamford, *The Constitutional History and Law of New Zealand* (Christchurch: Whitcombe and Tombs, 1914), p 312

412. Waitangi Tribunal, *The Ngati Rangiteaorere Claim Report 1990*, p 25

wahi rongoa did not need to be used once FitzRoy's grant had promised to reserve tenths. Though Nelson Maori may well have regarded wahi rongoa as places where they gathered medicinal plants, we have no evidence that they continued to regard the deeds of release as protecting such places in the land awarded to the company. We have no submissions on the matter and make no finding.

4.21 Summary and Conclusion

The fleeting visits of Tasman and Cook to the Te Tau Ihu region constituted little real threat to its established social order. Sealers, whalers, and traders stayed longer, often becoming incorporated into local society, but the small scale and ad hoc European settlement of the region from the 1820s onwards hardly prepared local Maori for the challenge posed by the New Zealand Company after 1839. Its deed signed with Ngati Toa chief Te Rauparaha and others at Kapiti in October 1839 purported to purchase some 20 million acres, including all of the Te Tau Ihu district. Following the arrival of Captain William Hobson in January 1840, all prior land dealings by private parties were subject to investigation by Crown-appointed commissioners. Hobson issued a proclamation to this effect soon after his arrival that month, and after the signing of the Treaty at Waitangi, various missionaries and military officers were sent to secure the agreement of rangatira in other parts of the country to the Treaty. Henry Williams and Thomas Bunbury between them gained the agreement of a number of rangatira in the Cook Strait area.

William Spain was appointed as a special commissioner to investigate the claims of the New Zealand Company in January 1841, though he did not arrive in the country until later that year. He was to be guided 'by the real justice and good conscience of the case without regard to legal forms and solemnities'. Initially, Spain showed that he was aware of his responsibilities under the Treaty. But an influx of company settlers in advance of his inquiry, along with the political machinations of the company's representatives in London, made it increasingly difficult for the Crown to avoid granting land to the company. Thus, despite the flimsy nature of the Kapiti deed, it would eventually provide the partial basis for the company to receive a Crown grant for some 151,000 acres within the Te Tau Ihu district.

In a pattern which would later be followed by the Crown in its own transactions, company representatives had undertaken limited inquiries into customary land rights within Te Tau Ihu prior to conducting their purchase. Even this cursory investigation was enough to highlight the complex and intersecting nature of rights in the area. Yet, anxious to complete a speedy purchase prior to the arrival of the first settlers (and before formal British annexation put an end to private land dealings), the company found it convenient to conclude that Ngati Toa held primary rights over the district. Large numbers of resident hapu were thus never even visited by company representatives, far less consulted over the transaction.

4.21

Later inquiries revealed that even those few rangatira who were party to the deal held an entirely different understanding from that of the company as to the nature of the transaction. During a hearing into the company's claims held at Otaki in April 1843, the Ngati Toa rangatira Te Rauparaha told Commissioner William Spain that he had not understood the attempted explanation of the deed and had only ever agreed to convey a small area of land at Taitapu to the company. Other Maori witnesses to appear before Spain during his North Island hearings told a similar story. None appeared to have comprehended the company's convoluted scheme, whereby one-tenth of the transacted area was to be reserved for the benefit of the Maori vendors. The rising value of these 'tenths' as settlement increased was intended in large part to compensate Maori for the otherwise low prices paid for their lands, ensuring that the company's intention to make 'just bargains' with Maori was fulfilled. Company representatives failed to adequately convey the full implications of the transaction, leaving Maori who had no prior experience of European land sales to believe they had merely agreed to share part of their land and resources with the newcomers.

Meanwhile, the November 1840 agreement negotiated in London between the British Government and the company promised the latter outright title on the basis of four acres for every pound expended upon the colonisation of New Zealand, including up to 160,000 acres at or near Port Nicholson and New Plymouth. Effectively, the company agreed to waive its claims over the more than 20 million acres it had claimed to purchase in return for Crown grants based on this new formula. The agreement meant that the company would receive a grant regardless of the Spain commission's findings, but following an April 1841 variation to the terms of the agreement, there was no obligation to limit this grant to the area included in the Kapiti deed. Nor was there any requirement for the company to receive title to any lands within Te Tau Ihu on the basis of the deeply flawed Kapiti deed. But, with the establishment of the settlement of Nelson in 1841, such an outcome became much more likely.

Spain commenced his inquiries into the Port Nicholson deed under the provisions of Hobson's Land Claims Ordinance of 1842, which had been specifically designed with the company's claims in mind. Its subsequent disallowance meant that Spain was no longer bound by the requirement of the November 1840 agreement to award the company four acres for every pound expenditure. But, although initially intent on requiring the company to prove its title, Spain quickly moved to an 'arbitration' model as the shakiness of the company's claims became all too apparent during early hearings at Wellington and Otaki.

At Nelson, local company agent Arthur Wakefield, hoping to secure support from resident Maori for the legitimacy of the Kapiti deed, distributed 'presents' in order to prevent any difficulties standing in the way of the establishment of a new settlement at Wakatu. Since private land deals were no longer recognised, these could hardly be classified as payments for land. Resident Maori told Wakefield that they had nothing to do with the deed signed by Te Rauparaha and denied his right to sell their interests. Wakefield's offer to 'give

them a present' equal to what they ought to have received was accepted by local rangatira, who welcomed the prospect of European settlement of Te Tau Ihu and saw the giving of gifts to them as being intended to cement an ongoing reciprocal relationship with the New Zealand Company and its settlers. The company thus decided to proceed with surveying and settling lands that it claimed but for which it had yet to receive title – with the tacit consent of the Crown. This caused few problems at Nelson itself, but at Motupipipi local Maori in 1842 sought to block efforts to extract resources from lands that they had never surrendered. And, the following year, the company's unauthorised survey of the Wairau district, combined with Spain's refusal to investigate title to the area (as requested by Ngati Toa), resulted in the tragic conflict at Tuamarina and the loss of many Maori and Pakeha lives. In the wake of the Wairau conflict, Governor Robert FitzRoy's inquiry concluded that, although Ngati Toa had been wrong to kill prisoners, primary blame for the whole affair sat with the New Zealand Company and its supporters. However, the Crown's earlier failure to actively discourage the company from surveying land which had not yet been inquired into had also been a crucial factor behind the events at Tuamarina.

Following several weeks of preliminary inquiries conducted by his semi-literate interpreter, Edward Meurant, Spain finally convened a hearing at Nelson in August 1844. But, after hearing from a handful of company witnesses, the inquiry was brought to a sudden and abrupt halt after just one Maori witness was examined. The evidence of Ngati Rarua rangatira Te Iti exposed fatal flaws in the company's claim, despite the best efforts of Spain, protector of aborigines George Clarke junior, and Colonel Wakefield to elicit responses more favourable to its position. Asked what had transpired concering the land during Captain Wakefield's visit to the area in 1841, Te Iti stated that Wakefield had promised 'he would give me some blankets, if I would receive them as a Present'. Te Iti confirmed that he had intended to allow settlers to occupy the area, 'but not to take all the land'. Further, Wakefield had assured him that the gifts received on that occasion would 'not be the last payment you will have from me'. Colonel Wakefield sought an adjournment as a consequence of Te Iti's 'prevarication', and Clarke supported this, declaring that 'he was convinced [Te Iti] had not spoken the truth'. Spain duly suspended the hearing in order to allow an arbitrated settlement of the outstanding claims between the company and Clarke, who was supposedly representing the interests of Maori.

Under the terms of the agreement reached between them, Wakefield agreed to pay an additional £800 in compensation for those Maori with outstanding claims, who in turn would be required to sign deeds of release. At the same time, Spain informed the Maori assembled at Nelson for his hearing that, had he been required to make a formal ruling on the company's claim, he would not have awarded any additional compensation. In Spain's view, the Kapiti deed, combined with Captain Wakefield's subsequent 'liberal presents', had constituted a valid extinguishment of the Maori claims, notwithstanding that he had himself found the Kapiti deed wanting in many respects and that the 'presents' distributed by

Wakefield could not be considered payment for the land under either English law or Maori custom. The £800 to be distributed on this occasion, Spain said, was not a payment for the land but a gratuity, given 'for the sake of making friends of you and the white people'.

The limited information available to us suggests that Tasman Bay Maori proved reluctant to sign the deeds of release, because they objected to the small sum offered them. It was reportedly only after being informed that Spain was not prepared to allow them any more compensation for their interests that they consented to sign, though doubtless their strong desire for the settlers to remain (in order that both peoples could prosper together), also contributed to the decision. In this respect, Spain's description of the further payments as a gift intended to cement friendly relations between Maori and Pakeha is likely to have reinforced earlier impressions among Te Tau Ihu Maori that they had merely agreed to share some of their lands with the settlers in the expectation of forging an ongoing relationship of mutual benefit.

It was a different story at Golden Bay. Maori there had not been present at Spain's Nelson hearing and certainly had not been party to the arrangements with respect to the additional compensation. Instead, of the total additional compensation agreed between Wakefield and Clarke, the sum of £290 had been arbitrarily allocated to them in their absence. This was at first flatly refused, but it was eventually accepted amidst ongoing complaints that the money had not been fairly distributed. In this case, local Maori were required to sign not 'deeds of release' but what appeared to be deeds of sale, as if to suggest that the land was being purchased afresh.

The initial refusal of Golden Bay Maori to accept the money was not deemed sufficient cause to prevent Spain formally reporting the 'quiet and satisfactory' adjustment of all claims in the Te Tau Ihu region (with the exception of the Wairau, with respect to which even the New Zealand Company had not attempted to prove valid purchase). Spain's March 1845 recommendation that the company receive a grant to 151,000 acres in several districts in and around Nelson was notable for its many internal inconsistencies and contradictions, or its 'mental gymnastics', as one witness described it to us. Spain stated, for example, that he saw it as his duty to receive the evidence of Maori resident within the area surveyed and claimed by the company, but he had aborted the Nelson hearing after hearing from just one Maori witness. While describing the Kapiti deed as a 'pretended' conveyance of the land, he then sought to depict it, in conjunction with Captain Wakefield's later presents to some resident Maori, as a valid alienation. Although full of praise for the 'liberal and judicial policy' adopted in the distribution of these gifts, Spain lamented the fact that Wakefield had failed to describe these 'presents' as payments for the land and to obtain receipts for the payments. Later in the same report, he actually claimed that 'the Natives had always looked upon the transaction with Captain Wakefield as an alienation of their rights and interests in the land'. But private payments for land after Hobson's January 1840 proclamation were

actually null and void, as Spain well knew. Little wonder his report was such a hideous muddle of contradictions.

Although his award raised more questions than it answered, Spain's recommendation that the New Zealand Company receive title to 151,000 acres was upheld by Governor FitzRoy, who in July 1845 issued a Crown grant in favour of the company for the land. However, FitzRoy's grant reserved one-tenth of the area for Maori, in addition to pa sites, urupa, and cultivations, along with Government reserves for public purposes and other old land claims not yet investigated. As a result, the company rejected the grant, preferring to wait for an award more favourable to its interests, while at the same time encouraging the Crown to speedily acquire the Wairau district in order to overcome the shortage of rural allotments within the Nelson settlement.

A common theme in claimant submissions was the extent to which the Crown's relationship with the New Zealand Company detracted from its fulfilment of its Treaty obligations to Te Tau Ihu Maori. A second major issue was the validity of the company's transaction as an absolute alienation, it supposedly being based on the company's 1839 Kapti deed and the later gift-giving of Captain Wakefield, along with Spain's inquiry into these dealings. The claimants argued that Spain had conducted an inadequate inquiry into the nature of customary rights within Te Tau Ihu and that he had failed to adquately investigate the nature of the particular customary practices governing the transfer of property at the time of these transactions.

We noted broad agreement between all the parties as to the inadequacy of Spain's inquiry into customary rights within Te Tau Ihu, although other Crown concessions were either more limited than the claimants' position or the subject of differing viewpoints between Kurahaupo, Ngati Toa, and other northern iwi. With respect to the argument advanced generally by the claimants that the company was effectively acting on the Crown's behalf to such an extent that its acts and omissions could be viewed as those of the Crown itself, we concluded that, although the relationship between the company and the Crown was at times very close, the company could not be considered an agent of the Crown in any legal sense. The sole exception to this, we concluded, was with respect to the setting aside of sufficient reserves for Maori. In this matter, we found that the New Zealand Company was the Crown's agent, according to both the functions test relevant at the time and the control test as it later developed. It was the November 1840 agreement that gave the Crown control over the reserves, after which time any action of the company in the making of reserves was as an agent of the Crown. We also concluded, however, that the November agreement could not be deemed in itself to have been in breach of the Treaty, as was submitted to us by a number of claimant counsel. That agreement did not guarantee the company title to any lands within Te Tau Ihu, nor did it impose any obligation on Spain to find in favour of the company's claim within the district. Although the presence of settlers on the ground

in advance of the company's title being duly investigated had greatly complicated matters, local Maori expressed a desire for them to remain and, given that, there was no reason why the Crown could not have negotiated a fresh transaction that would have been just and fair to all parties. However, an entirely new purchase would have carried the risk that Maori might either reject the deal outright or demand a price considered unacceptably high. Hence, Crown officials and company representatives found it preferable to rely on the Kapiti deed and subsequent gift-giving as having extinguished customary title, while maintaining that the compensation made following Spain's Nelson hearing was given as a gratuity rather than in recognition of any unextinguished rights. In this way, we concluded, the Crown prioritised the interests of settlers over its obligations to Maori under the Treaty. The tragedy is that such an outcome was neither inevitable nor necessary under the circumstances.

Despite concluding in his written report that the Kapiti deed was 'as enormous in extent as the claim which was advanced under it was preposterous in principle', Spain nevertheless sought to depict it as a valid purchase in his oral decision given at Nelson. His further acceptance of the gifts distributed by Captain Wakefield as payments for land which validated and completed the Kapiti transaction was, we found, in direct breach of the preemption clause contained in the Treaty. Under neither British nor Maori law could these payments be considered as validating the purchase of Nelson lands. We found the Crown's reliance upon Spain's award as a basis for its later grant in favour of the company to be in breach of the Treaty principles of reciprocity, partnership, and active protection.

Spain's abrupt termination of the Nelson hearing and his move to arbitration was, we concluded, undertaken without consultation with Maori, whose supposed representative, Clarke, was under pressure from Spain to reach an agreement with Wakefield. We found that the Crown failed both to adequately consult Te Tau Ihu Maori on the switch to arbitration and to respect or provide for their tino rangatiratanga in imposing compensation upon them. Not only were these failures contrary to Treaty principles, but they were prejudicial to all Maori with interests in the area, in that 151,000 acres of land was expropriated without the meaningful consent of the owners and with consequent social, cultural, and economic harm. The undue pressure placed upon Maori at Tasman and Golden Bays to sign the deeds of release was also, we found, contrary to the Treaty principles of active protection and partnership. We further concluded that the £800 compensation was inadequate consideration and that some groups at Golden Bay – groups that had not been party to the original discussions and that had initially sought to refuse the £290 share arbitrarily awarded them in their absence – did not receive their full share of the compensation payment, contrary to the principles of partnership and active protection.

Although we concluded that all Maori in Tasman and Golden Bays were prejudicially affected by the various Treaty breaches described, we also found that there were some differences in the way in which different groups were treated. We found the Crown in breach of article 2 of the Treaty in that Spain's Nelson award included far more land than the more

limited areas at Taitapu and Wakatu which Ngati Toa rangatira had acknowledged selling. We further found the Crown in breach of the Treaty as a consequence of Spain's failure to investigate the rights of the Kurahaupo iwi and to consult with or include them in the subsequent deeds of release and compensation. The Crown failed to actively protect the rights of the Kurahaupo iwi, despite being sufficiently aware of the respective rights of conquerors and defeated peoples to have been in a position to intervene on behalf of the latter. Although Te Tau Ihu Maori ameliorated this somewhat on their own initiative by giving some of the compensation money to the Kurahaupo people, that hardly excused or rectified the Crown's failure to ensure their free and willing consent to the various arrangements entered into, which ultimately led to the alienation of 151,000 acres of land.

In furtherance of the overriding objective of securing the company in its lands, Spain had relied on the Kapiti deed as a partial extinguishment of rights, even while concluding that it was deeply flawed, and had also relied on Wakefield's subsequent payments, despite these clearly being explained merely as 'presents'. Spain was thus able to characterise the additional payments made in 1844 not as an out-of-court settlement of the company's claim but as merely a generous and gratuitous gesture on Wakefield's part. For Maori who had been told the lands had already been alienated and the compensation offered was final, there was little real choice in the matter, and there was none at all for those such as the Kurahaupo iwi who were entirely excluded from the arrangements. Given that the further payments were explained merely as a matter of 'grace and favour', however, they did little to alter the Maori view of ongoing rights in the lands awarded the company. But FitzRoy's 1845 Crown grant in favour of the company, and Grey's replacement grant in 1848, effectively ratified Spain's proceedings, validating an invalid transaction and compounding the Treaty breach. We take up the matter of the 1848 grant and the Crown's efforts to secure even more land for the company at the Wairau and Waitohi in our next chapter.

CHAPTER 5

GREY ASSERTS CONTROL

5.1 Introduction

This chapter begins with a general discussion of the obligations incumbent upon the Crown in purchasing land from Maori, including the evolving understanding of such requirements among Crown officials after 1840. This is closely tied up with changes in Crown land purchase policy introduced by the new colonial Governor, Captain George Grey after 1846, which forms the next focus of the chapter.[1] Following these more general sections, the remainder of the chapter deals at greater length with application of that policy in two connected Crown purchases in Te Tau Ihu that Grey initiated: the huge Wairau purchase and the smaller Waitohi transaction.

Grey dealt decisively with the resistance in the Cook Strait area led by factions of Ngati Toa following the 1843 Wairau conflict and culminating in the detention of Te Rauparaha and a military campaign against Te Rangihaeata and his allies in Heretaunga (the Hutt Valley) and the Kapiti coast in 1846. The new Governor dealt with equal vigour with the land problems arising from the New Zealand Company's attempted purchases on both sides of Cook Strait. As we noted in the previous chapter, FitzRoy had in July 1845 issued a Crown grant for the company's Nelson claims, for a total of 151,000 acres. The grant was not accepted by the company. It had not included the Wairau, though the company wanted to use this district for some 700 rural lots.[2] Grey resolved this problem in one fell swoop with his Wairau purchase of 1847. It covered far more than the lower Wairau Valley, the scene of the conflict. Indeed, it spanned most of the future Marlborough province and on the east coast went all the way down to Kaiapoi, not far north of Christchurch. Grey then included most of that area, along with the land previously granted to the company by FitzRoy, in a new Crown grant to the New Zealand Company, vastly extending the previous Spain award. Considerable areas of Te Tau Ihu still remained in Maori ownership, including Wakapuaka, Rangitoto (D'Urville Island) and the western coast known as Taitapu. Though these areas were not purchased by the Crown in the period covered in this chapter, the Crown did

1. The authoritative biography of Grey is James Rutherford's *Sir George Grey KCB, 1812–1898: A Study in Colonial Government* (London: Cassell, 1961). For a more recent study, see Edmund Bohan, *To be a Hero: A Biography of Sir George Grey* (Auckland: HarperCollins, 1998).

2. Tony Walzl, *Ngati Rarua Land Issues, 1839–1860* (Wellington: Ngati Rarua Iwi Trust, 2000) (doc A50(1)), p167

purchase Waitohi (Picton) in Queen Charlotte Sound, to provide the Wairau with an effective port. We discuss this purchase below.

The Crown purchases of the Wairau and Waitohi changed the balance of power in Te Tau Ihu for ever. They allowed the company settlers, previously huddled in Nelson, to expand into the hinterland, while the Maori who remained in Te Tau Ihu were compacted into reserves on the fringe of settlements or left in isolation in the outer Sounds. Grey put the company settlers in command of the situation and made Maori into supplicants subject to his or the settlers' whims.

Counsel for Ngati Toa Rangatira, Ngati Rarua, and Rangitane have raised various issues in relation to adequacy of the Wairau purchase and counsel for Te Atiawa in relation to the Waitohi purchase. We discuss counsels' submissions on these purchases and the Crown's responses, before making our findings on Treaty breaches at the end of our narratives on the Wairau and Waitohi purchases.

5.2 The Crown's Treaty Duty

We set out the Treaty principles by which the Crown's conduct towards Maori should, in our view, be judged in our introduction. Here our focus is on the contemporary understanding of acceptable standards. The parties agreed in this inquiry that the Crown had to purchase land from the correct 'owners', and to ascertain that pre-1840 purchasers had done so before confirming their titles. The Crown acknowledged its obligation to act honourably and in good faith towards its Treaty partner, to 'act in an informed manner when it forms policy or acts in ways that affect Maori interests', and its duty of 'active protection in relation to Maori rights and interests guaranteed pursuant to article 11'.[3] In our view, these points inform the Crown's duty to identify correct (and all the correct) right holders in making or confirming land transactions. This was a fundamental requirement if the Crown was to act honourably and in good faith, to make informed decisions, and actively to protect the rights guaranteed to Maori by article 2. This was clearly understood at the time. Maori customary rights to land were guaranteed by the Treaty and had to be recognised and dealt with according to, and in terms of, their own law and customs. This view was communicated by secretaries of state and governors at various points in the 1840s. Countervailing views on the part of the 1844 House of Commons committee and its chair, the later Secretary of State, Earl Grey, did not become accepted theory in New Zealand, but were nonetheless influential.

In 1839, the New Zealand Company instructed its agent: 'Above all, you will be especially careful that all the owners of any tract of land which you may purchase shall be approving parties to the bargain, and that each of them receives his due share of the purchase money.'[4]

3. Crown counsel, closing submissions, 19 February 2004 (doc t16), p 5
4. Instructions to Colonel Wakefield, May 1839, *Compendium*, vol 1, p 51

It was a fundamental principle of British justice (then and now) that valid purchases of land required the correct identification of vendors, and the duly witnessed recording of their consent. What was required in the New Zealand context, where this principle was guaranteed by articles 2 and 3 of the Treaty, was the identification of the customary law relating to rights in land, the identification of all customary right holders, and, in Normanby's words, the recording of the 'free and intelligent consent of the Natives, expressed according to their established usages'.[5] Unless all three requirements were fulfilled, there would be no valid transaction and the Treaty rights of the 'vendors' would be violated.

But this conclusion was not inevitable at the time. There was a vigorous debate about whether Maori rights of ownership should be defined according to Maori law or to European theories (not law) about what indigenous peoples owned. Under some European theorising, aboriginal title was restricted to land that they had improved by labour, either by building on it or cultivating it. The New Zealand Company adopted this view, as did a select committee of the House of Commons in 1844, and Earl Grey in 1846. Variants of it can be seen in the thinking of key officials such as Governor Grey and Donald McLean. There was a battle for control of Crown policy in the 1840s, the nature and outcome of which was critical to Crown breaches of the Treaty in the northern South Island. For that reason, we have set out the debate in some detail in the following sections.

In order to reach a view on exactly what the Crown's Treaty duty was, in the circumstances of the time, we have posed the following questions:

- Did the Crown have a Treaty duty to inquire and to properly identify customary right holders before transacting for land?
- Or was it sufficient if, as the Crown put it to us, it had identified and paid most or all right holders by the end of a serial purchase or by the end of some later transaction?
- Were right holders and the nature of their rights governed by Maori customary law? What was the impact of the countervailing theory that the Crown owned the 'waste lands' by virtue of its sovereignty, and that it only had to transact with Maori for improved land?

We address these questions at a generic level below, as this establishes whether Crown policies were in breach of Treaty principles. We then consider the particular instances of Crown actions and their consequences in the remainder of this and the following chapter before returning to some of the generic themes arising from the Crown purchasing period.

5.2.1 Did the Crown have a Treaty duty to inquire and to properly identify customary right holders before transacting (or confirming transactions) for land?

We begin with a brief survey of the Government's promises and commitments in the 1840s. These provide the context from which to judge the Crown's actions against Treaty principles.

5. Normanby to Hobson, 14 August 1839, *Compendium*, vol 1, p 14

They also provide a very clear 'Yes' in answer to this question. In addressing these issues, we have relied extensively on a report by Dr Donald Loveridge for the Wairarapa inquiry, to which the Crown referred us in its closing submissions, because it deals in detail with the development of Crown policy from 1839 to 1852.

(1) *Normanby's instructions*

The Secretary of State's instructions to the first Governor have been considered many times by the Tribunal, and they provide the immediate lens through which to interpret the Treaty in the circumstances of the time. We see no need to repeat the detailed analysis already available in the *Report of the Waitangi Tribunal on the Orakei Claim* and others. We note the salient features, however, because these instructions remained the Crown's key statement of intent in the 1840s. In particular, Lord Stanley did not issue fresh instructions on the standards and ethics of Crown purchasing, but rather referred Governor Grey to Normanby's previous instructions.[6] All the governors responsible for Crown actions in New Zealand, therefore, were familiar with (and bound by) Normanby's instructions during the period in which almost the entire northern South Island was purchased by the Crown.

Normanby instructed Hobson to 'obtain, by fair and equal contracts with the Natives, the cession to the Crown of such waste lands as may be progressively required for the occupation of settlers'. All such contracts were to be made through a protector, and 'must be conducted on the same principles of sincerity, justice, and good faith, as must govern your transactions with them for the recognition of Her Majesty's sovereignty in the Islands'.[7] This meant that in purchasing land, he had to obtain 'the free and intelligent consent of the Natives, expressed according to their established usages'.[8] In purchasing the 'waste lands', the Secretary of State theorised that they were of no exchangeable value to Maori and could therefore be purchased for a low sum and resold at a large profit, in order to fund colonisation. There would be, in his view, no real injustice to Maori because their retained lands would thereby become a source of wealth and the real payment for giving up the rest.

In a very clear expression of the principle of active protection, Normanby added that Maori:

> must not be permitted to enter into any contracts in which they might be the ignorant and unintentional authors of injuries to themselves. You will not, for example, purchase from them any territory the retention of which by them would be essential or highly conducive to their own comfort, safety, or subsistence. The acquisition of land by the Crown for the

6. Dr Donald Loveridge, 'An Object of the First Importance: Land Rights, Land Claims and Colonization in New Zealand, 1839–1852', report commissioned by the Crown Law Office, 2004 (Wai 863 ROI, doc A81), pp 260–261
7. Normanby to Hobson, 14 August 1839, *Compendium*, vol 1, p 15
8. Ibid, p 14

future settlement of British subjects must be confined to such districts as the Natives can alienate without distress or serious inconvenience to themselves.[9]

Finally, we note his instruction that a commissioner be appointed to 'investigate and ascertain what are the lands in New Zealand held by British subjects under grants from the Natives, how far such grants were lawfully acquired, and ought to be respected'. The commissioner was not to have full authority but rather to make recommendations to the Governor.[10]

(2) *The Treaty of Waitangi*

Normanby's principle of active protection was carried over into the Treaty. Again, these matters have been well canvassed in previous Tribunal reports. We note in particular the discussion in the *Ngai Tahu Report 1991*, because the Crown purchasing covered in that report abuts our own inquiry district and has so many similarities. In particular, the Ngai Tahu Tribunal noted the principles of active protection and reciprocity arising from the Treaty.[11] In agreeing to guarantee the collectively owned lands, forests, and estates of Maori, and their tino rangatiratanga over their whenua and taonga, the Crown guaranteed its active protection of Maori customary rights to all land, resources, and taonga according to their own law. In return, Maori ceded kawanatanga (the right to govern) and pre-emption (the sole right to purchase Maori land). Both governments and courts of the time recognised the reciprocity and fiduciary-style obligations involved in Maori ceding the right of pre-emption. It required the Crown, stated under-secretary Merivale on behalf of Earl Grey, to act as 'trustee for the public good, and more particularly as guardian of the native races'.[12] The Supreme Court of the time also found that pre-emption 'contemplates the native race as under a species of guardianship'. It was possible, the court warned, to 'oppress and destroy under a show of justice'.[13]

The Treaty right of pre-emption stipulated that the Crown would purchase 'such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf'. We agree with counsel for Te Atiawa:

> These words are unambiguous, the Crown must determine who the proprietors are and negotiate an agreed price with those people for their land. Face to face interaction between

9. Ibid
10. Ibid, pp 14–15; Dr Ashley Gould, 'The New Zealand Company and the Crown in Te Tau Ihu', report commissioned by the Crown Law Office, 2003 (doc s5), p 28
11. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 2, pp 238–245
12. Loveridge, 'Object of the First Importance', p 327
13. Ibid

the Crown and the proprietors on land matters and agreement as to the price at which the land will be transacted is clearly requisite.[14]

We do not need here to address questions of sovereignty or whether pre-emption was understood as a 'first right of refusal', as they were not raised in our inquiry. Rather, matters hinged on the Queen's promise of protection and the explanation of pre-emption as a device for that purpose, and whether Maori rights according to Maori law were the object of that protection.

The historical evidence of Professor David Williams addressed the latter point. He noted the so-called fourth article read out at Waitangi and Hobson's promise to protect Maori custom (ritenga). Other oral and written promises were made to the effect that the Government would recognise Maori customary rights. Hobson issued a circular letter promising that he would 'ever strive to assure unto you the customs and all the possessions belonging to the Maoris'. He ordered Protector Clarke to assure Maori that their customs would be respected, except where opposed to principles of humanity and morals. At the Treaty signing in Kaitaia, Shortland promised: 'The Queen will not interfere with your native laws or customs.' Hobson himself reported to London that Tamati Waka Nene had stipulated in the debate at Waitangi: 'You must preserve our customs and never permit our land to be wrested from us.'[15]

In Professor Williams' view, therefore, the recorded promises in the Treaty debates clarified the meaning of article 2, and the Crown's intention to recognise Maori property rights (something it wanted to obtain) as defined and regulated by Maori law. We agree, and consider the evidence very clear that the principle of active protection applied to those things, tangible and intangible, over which Maori exercised tino rangatiratanga according to their own law. Officials did not explain to Maori that the Crown's endorsement of their law was intended to be temporary, in so far as it applied to customs regulating relations between peoples. Professor Williams notes that early ordinances recognising Maori custom were explicit about this, which was in accord with Normanby's assumption that British law would ultimately apply.[16] Such ordinances, however, applied to the administration of justice and other civil matters. There is no evidence that the guarantee of customary property rights was intended to be short-term in this way. That was why, in our view, the meaning of that guarantee was so hotly contested by various interest groups.

(3) *What was considered appropriate at the time?*

As we have noted, Normanby's instructions anticipated both an inquiry into pre-1840 transactions to determine whether they were valid, and the purchasing of 'waste land' on the

14. Counsel for Te Atiawa, closing submissions, 10 February 2004 (doc T10), p 163

15. Dr David Williams, 'The Crown and Ngati Tama ki te Tau Ihu: An Historical Overview Report', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A70), pp 16–17

16. Ibid, pp 16–17, 21–22

basis of fair and equal contracts. The latter required the free and informed consent of Maori according to their customs, under a principle of active protection. Legislation was soon passed in New South Wales to appoint land claims commissioners to determine whether land had been acquired before 1840 'on equitable terms' from Maori. Implicit in this Act was that the land had to have been acquired, and from the correct people. In December 1840, Lord John Russell advised the New Zealand Company of the Government's intention to hold this inquiry. The Crown wanted to assert its title to all lands '*granted by the Chiefs of those Islands, according to the Customs of the Country*, and in return for some adequate consideration' (emphasis added).[17] James Stephen, the key Colonial Office official at that time, was also of the view that Maori transactions with the company had to have been valid in Maori custom. The Crown, he wrote, could only grant land where it had been freely sold 'according to their Native customs'.[18]

Lord John Russell's instructions of December 1840 did not change Normanby's previous statements on the purchase of land. The new Secretary of State did note, however, that the protection of Maori interests was a sacred duty, and gave official recognition that Maori had their own customary law relating to land and property. Stephen was rightly concerned, however, about an ambiguity in the instructions in terms of 'waste lands'. On one level, Russell was anticipating the Crown's ownership of what was still thought would be large areas of land left over from pre-1840 claims, but the instructions could also be read as implying that the Crown planned to consider unsold Maori 'waste lands' as Crown lands. Stephen politely informed the Secretary of State that that could not possibly be his intention, but Russell's reply failed to clarify the matter. He simply stood by his instruction that all land be registered, Maori land be identified, and the Government investigate what parts Maori needed to retain. He did add, however, a new role for the land claims commissioners. Any disputes between or among Maori 'as to the right of any Land' should be brought before the commissioners, who would be given authority to determine the matter. Protectors would act as advocates and attorneys for Maori. This was the first official instruction that disputed Maori titles should be made the subject of a legal process.[19] We note, in this respect, Ngati Kuia's submission that some such legal process was essential to resolve disputed titles in the new era.[20]

Russell's instructions were not carried out. Dr Loveridge's view is that the apparent ambiguity was not actually an attempt to depart from Normanby's theories and assume Crown ownership of 'waste lands'.[21] In any case, a land purchase process of sorts was being developed in New Zealand by the protectorate. Typically, it was supposed to involve small, well-defined pieces of land, for which all owners could be identified, their consent obtained,

17. Loveridge, 'Object of the First Importance', p 44
18. Ibid, p 54
19. Ibid, pp 49–59
20. Counsel for Ngati Kuia, closing submissions, 17 February 2004 (doc T14), p 35
21. Loveridge, 'Object of the First Importance', pp 58–59

and payment distributed publicly to all. Chief Protector Clarke liked Russell's proposal for a register, and suggested a Domesday Book of his own, in which Maori land titles would be recorded. In his view, the investigation and registration of titles was essential prior to purchasing land.[22] 'I am aware', he wrote, 'that this would be an expensive procedure, but it would be a sure one for I cannot conceive how purchases can be made with satisfaction by the Government unless this is done.'[23] Disputes about tribal land would be resolved by district courts of Maori chiefs, chaired by a protector.[24] In Clarke's view, therefore, title needed to be ascertained prior to purchase on a grand scale, and with a Maori court recognised by the State to resolve disputes.

As we note further in the next chapter, despite broad agreement among officials in London and New Zealand as to the need for some kind of process or mechanism for registering titles, there was no attempt made to implement Clarke's proposals. Acting Governor Shortland instead established the following process:

- Having identified a piece of land wanted by the Crown, protectors would do a preliminary inquiry as to whether the Maori 'concerned' were disposed to sell.
- After that, if the answer was 'Yes', the Government would publish a notice in the *Maori Gazette*, calling for any other owners to make claims by a certain date.
- If there were no counter-claimants, or the counter-claims were not 'substantiated' (by an unspecified process of inquiry), the Crown would accept the gazetted people as the owners and proceed with the purchase.
- The Government agent would then 'treat with the owners of the soil on the spot', assisted by a surveyor, who would prepare a plan.
- At the end of negotiations, the agent would sign a deed with the owners containing the proposed price, and he would submit it to the Governor.
- If the Governor approved the purchase, it would go ahead.[25]

In Dr Loveridge's view (for the Crown), this was a sensible and practicable process. Clarke objected, however, because the Government planned to use it to buy blocks of more than 10,000 acres. He argued that there would be too many overlapping rights for the process to be safe in buying such 'big' blocks, and that it would cause hostilities between hapu; the Crown should restrict itself to buying small blocks gradually. This advice, according to Dr Loveridge, was impractical if colonisation was to happen at all.[26] Both Shortland's and Clarke's proposals provided for the prior determination of title, and the resolution of any disputes between co-claimants, either by agreement or by some kind of Maori court. These things had to happen before the Crown would buy land.

22. Loveridge, 'Object of the First Importance', pp 65, 68–69
23. Ibid, p 69
24. Clarke to Colonial Secretary, 31 July 1843, BPP, vol 2, app 9, no 4, encl 3, p 348
25. Loveridge, 'Object of the First Importance', pp 72–74
26. Ibid, pp 74–76

While the process of land purchase was being thus thought out in New Zealand, the New Zealand Company's affairs triggered a lengthy debate between its directors, the Colonial Office, and the supporters of each in the British Parliament. There is no space here for a full account of this debate, but we do need to note some salient standards advanced at the time, by which the subsequent conduct of the Crown may be judged. In its submissions, the Crown put much weight on the Colonial Office's staunch defence of the need to inquire and confirm that a valid transfer had taken place from Maori to the company.[27]

Dr Loveridge's report made similar points. He noted Lord Stanley's defence of the Government's actions, pointing out to the company that Normanby's instructions were public long before the November agreement, so the company must have known that its titles would be investigated. The Crown had to keep faith with Maori and its own public pledges to them. It had recognised Maori title to land, and had committed itself to obtaining it only by 'free cession'. The company must therefore prove that it had valid titles or bear the loss. Stanley himself believed that there were probably unowned 'waste lands' in New Zealand, but he took the position that that first needed to be established by an inquiry into Maori custom and 'native title' on the spot, by those duly and legislatively authorised to carry it out. Stanley maintained that the Treaty of Waitangi must be kept and the validity of the company's purchases proved, but he also instructed FitzRoy to help the company get enough land for its settlers.[28]

News of the 1843 Wairau conflict led to a company campaign that the Crown should not recognise any Maori title or property rights in so-called 'unused' lands. This contributed to the famous select committee debate of 1844, in which the committee considered that the Treaty was a mistake and that the Government and Commissioner Spain had so far interpreted article 2 incorrectly, taking it to mean Maori ownership of the whole country. The true position, in the committee's view, was that the Treaty had guaranteed only land in actual occupation (by residence and cultivation). Despite extensive evidence to this and earlier committees, its report revealed an ignorance of how Maori used their 'unused' land, arguing that they did not hunt or run herds but supported themselves entirely by cropping.[29]

The Government tried to head off an unfavourable report by proposing its own set of resolutions. Their underlying principle was that the Crown might end up with unclaimed 'waste lands', but that Maori had laws and customs of their own, and under such they owned more than just their pa and cultivations. The Treaty was a solemn act binding on the Crown and must be kept. The way forward, therefore, was to investigate Maori titles and register all of them, fairly and equitably, and then see if anything was left over for the Crown. The process of registration would also prevent the Crown or private settlers buying land from the

27. See, for example, Crown counsel, submissions concerning generic issues, 20 September 2002 (paper 2.371), pp 16–18

28. Loveridge, 'Object of the First Importance', pp 91–101

29. Ibid, pp 196–209

wrong people.[30] The Government knew that Maori 'clearly understand and fully rely upon the guarantee which the Treaty gives of their proprietary rights'. The question of the extent of those rights was no longer up to the Crown's prerogative or policies but could 'be tried and decided upon the true construction of the Treaty only'.[31]

The committee rejected these Government propositions, but they remained Colonial Office policy in any case. Stanley sent the committee's report to New Zealand, with a covering note to FitzRoy that it might be the case that the Crown could claim some waste lands. Nonetheless, the Governor was to uphold the Treaty and do nothing about 'unused' lands for the time being. Many private citizens, including the missionary societies, protested the content of the committee's report and its condemnation of the Treaty. The Government of New Zealand, by means of a resolution of the Governor and Legislative Council, affirmed officially that Maori owned or claimed the entire lands of New Zealand, apart from the small amount purchased by the Crown or pre-1840 settlers. Maori customary rights to land were, the Government stated, guaranteed by the Treaty and recognised by the Crown.[32]

The appointment of a new Governor did not change this position at first. Stanley instructed Grey to carry out Normanby's and Russell's instructions, and to 'honourably and scrupulously fulfil the conditions of the treaty of Waitangi'. Maori customs, unless incompatible with peace or morals, were to be respected. He also asked Grey to finally proceed with the delayed registration of Maori land titles. Almost all of the North Island was clearly claimed by the tribes, but the secretary hoped that there might be unclaimed land in the South Island. Nonetheless, Grey was to register titles and purchase large tracts of land 'on very moderate terms'.[33] Dr Loveridge concluded: 'As Crown purchase was, clearly, to *follow* registration, the implication appears to be [that] the Crown would only purchase from Maori who held a recognized and registered title' (emphasis in original).[34]

In terms of the company, Stanley secretly authorised the Governor to spend up to £10,000 'as a last resort . . . in the purpose of acquiring with the free consent of the Natives the lands required for the use of the Settlers of the New Zealand Company'.[35] The Crown's historian, Michael Macky, noted that there was a clear instruction from Stanley for the Governor to ensure that he purchased land from its correct owners. This instruction, alongside the renewal of Normanby's instructions, is critical in our view to the Crown's Treaty duty as understood at the time:

> in giving to the Company your best assistance . . . and in facilitating the negotiations with the natives, you will not fail to bear in mind the importance of endeavouring to ascertain,

30. Loveridge, 'Object of the First Importance', pp 209–213
31. Ibid, pp 212–213
32. Ibid, pp 213–218, 236–237
33. Ibid, pp 260–266
34. Ibid, p 266
35. Walzl, *Land Issues*, p 168

so far as circumstances will permit, that the natives by whom, or on whose behalf, the sales are made, are actually the parties who have the right and titles to the land, and not merely parties pretending such rights and titles. It is, of course, important both for the Government and New Zealand Company that in each case the native title should be effectively extinguished.[36]

Most important of all, Stanley made a key speech to Parliament in which he acknowledged that the Treaty compelled the Crown to protect Maori by its guarantee of their property, as owned according to their own law and custom. In his view, the Crown had agreed to be bound by Maori law when it guaranteed their property rights.

(a) *Stanley's speech in Parliament – Maori title can be decided only by Maori law, as guaranteed and protected by the Treaty of Waitangi*: Dr Loveridge has provided a detailed extract from Stanley's speech of July 1845, which was published in New Zealand in December of that year:

I am not prepared to say that there may not be some districts wholly waste and uncultivated – there are such in the northern island – but they are few in number; but I know that a large portion of the district in question is distributed among various tribes, all of whom have as perfect a knowledge of the boundaries and limits of their possessions – boundaries and limits in some places natural, in others artificial – as satisfactory and well defined, as were, one hundred years ago, the bounds and marches of districts occupied, by great proprietors and their clans, in the Highlands of Scotlands [*sic*]. (hear, hear.) With respect to the greater portion of New Zealand, I assert that the limits and rights of tribes are known and decided upon by native laws. I am not prepared to say what number of acres in New Zealand are so possessed; but that portion which is not so claimed and possessed by the natives, is, by the act of sovereignty, vested in the crown. But that is a question on which native law and custom have to be consulted. That law and that custom are well understood among the natives of the islands. By them we have agreed to be bound, and by them we must abide. These laws, these customs, and the right arising from them, on the part of the Crown, we have guaranteed when we accepted the sovereignty of the islands; and be the amount at stake, smaller or larger, so far as native title is proved, – be the land waste or occupied, barren or enjoyed, – these rights and titles the Crown of England is bound in honour to maintain, and the interpretation of the treaty of Waitangi, with regard to these rights is, that except in the case of the intelligent consent of the natives, the Crown has no right to take possession of land, and having no right to take possession of land itself, it has no right – and so long as I

36. Stanley to Grey, 15 August 1845, BPP, vol 5, p 253 (Michael Macky, 'Crown Purchases in Te Tau Ihu between 1847 and 1856', report commissioned by the Crown Law Office, 2003 (doc s2), pp 24–25)

am a minister of the Crown, I shall not advise it to exercise the power – of making over to another party [ie, by Crown grant] that which it does not possess itself. (cheers).[37]

This speech is self-explanatory, and we put great weight on it when determining the Crown's Treaty duties as they were understood and articulated at the time.

(b) ***The standards that the Crown required of others:*** We have taken note not only of officials' statements and instructions with regard to Crown purchases but also of the standards they required of private persons in the purchase of land. A waiver of pre-emption in favour of the New Zealand Company and private settlers was carried out in the early to mid-1840s. Shortland, FitzRoy, and their critics agreed that the protectorate should scrutinise any private land sales to ensure that the correct 'vendors' had been identified. There was also some agreement between these governors and their prominent critic, S M D Martin, in favour of investigating and registering Maori customary titles in advance of land purchases, though it was not done.[38] The Crown referred us to this statement from FitzRoy: 'I will never sign a Deed of Grant of Land to any person in New Zealand, if, I, in my conscience, believe that the owner of such land has not contracted to convey or sell it to the proposed grantee.'[39] Tony Walzl, for the claimants, also noted the terms of FitzRoy's instructions to Protector Symonds in the 1844 Otakou purchase, that he should be 'most careful not to countenance any, even the smallest, encroachment on, or infringement of existing rights or claims, whether native or other, unless clearly sanctioned by their legitimate possessor'.[40]

More particularly important for our inquiry, perhaps, are the standards that Governor Grey required of others. In June 1846, he was contemplating a system of direct private purchases in which the Government would act as an intermediary. In this instance, Maori would have to prove their title to the land they were selling before the Government would accept the sale.[41]

Nor was this a one-off standard. In November 1846, the Governor reported his intention to license the leasing of Maori land. This would enable the Government, he argued, to 'take care, that equitable arrangements are entered into with the true native owners'. European licensees would not be allowed to occupy any land 'until the question of Native title has been amicably arranged, amongst the Natives, and until the claims to such lands have been duly ascertained and registered'.[42]

In the same month, Grey introduced a Land Claims Bill to sort out the claims generated by FitzRoy's waiver of pre-emption. The preamble stated that no Crown grant could be

37. *New Zealander*, 13 December 1845 (Loveridge, 'Object of the First Importance', p 264 fn 645)
38. Loveridge, 'Object of the First Importance', pp 123, 138, 170
39. Crown counsel, submissions concerning generic issues, pp 10–11
40. Walzl, *Land Issues*, p 163
41. Ibid, p 173
42. Loveridge, 'Object of the First Importance', pp 303–304

safely issued 'until it shall be ascertained that such alleged purchases have been made from the true Native owners of such land, and that the rights of all persons thereto have been extinguished'.[43] This was only some four months before the Wairau purchase. As we shall see, the Governor's own actions in that purchase, followed by his issuing of a Crown grant to the New Zealand Company, certainly fell well below this standard.

We consider it important to note carefully the standard expected of private parties before the Crown would validate their transactions. There are no circumstances, in our view, in which the Crown could legitimately expect less of itself than its subjects, especially given the honour and good faith of the Crown that was pledged to Maori in the Treaty. It is not that the right standards for purchasing land were not known and articulated – the problem for Te Tau Ihu Maori was that they were not followed, resulting in serious infringements of Treaty principles.

To summarise, there was broad agreement amongst many officials and policy-makers up to 1846, that the correct Maori owners must be identified for consent and payment before the Crown could confirm that a valid alienation had taken place (to the company or private purchasers) or before the Crown itself could purchase land. In our reading of the evidence, the accepted standard for Crown purchasing up to 1846 was that there should be:

- a clearly delineated and relatively small block of land;
- a prior investigation of its title;
- identification of all right holders; and
- an agreement between them as to their relative distribution of rights or, in the event of a dispute, reference to a register or court.

As we will find below, the actions of Grey and McLean substantially departed from this standard after 1846.

What was not resolved, however, was whether the correct 'owners', and the nature of their rights, should be determined by Maori law or by British law and policy. We turn now to a more detailed consideration of the 'waste lands policy', which was critical to that issue and to the claims before us.

5.2.2 A countervailing principle: the impact of the 'waste land' theory

Critical breaches of the principles of the Treaty of Waitangi in Te Tau Ihu o te Waka arose from the conjunction of 'waste land' theory with the blanket purchase practices of Grey and McLean. Most claimant counsel and historians considered it a key issue, as did the Crown. There was broad agreement between the historians, including the evidence of Dr Loveridge for the Crown, and our analysis is drawn from a number of sources.

43. Ibid, p 293

5.2.2

At first, Grey may have been somewhat puzzled by his instructions from home. In 1845, Lord Stanley:

- sent him the papers of the 1844 committee;
- advised him to carry out the instructions of Normanby and Russell;
- asked him to reinstitute pre-emption;
- instructed him to identify the correct owners before buying land for the company;
- requested him to assist the company to put its settlers in possession of promised land;
- instructed him to scrupulously uphold and fulfil the Treaty; and
- advised him that there might be unclaimed 'waste lands' available, and requested him to register Maori claims to land within three years so that the property of Maori and the Crown could be delineated with certainty.[44]

One result of these many and varied instructions was the Wairau purchase of 1847. Other factors, such as the Crown's policy regarding Ngati Toa, were also instrumental. We will consider those further later in the chapter. Here, we are concerned with the effect of the 1844 committee report and Stanley's mixed instructions on the actions of Governor Grey.

In the Wairau purchase, Mr Walzl noted that Grey appeared to have acted in 'unwitting anticipation' of Earl Grey's December 1846 instructions, which reached New Zealand after the purchase.[45] In our view, this was no coincidence. Governor Grey's purchase of the Wairau was the result of the more generous approach to waste lands evinced by Stanley, as compared to that of the company, the 1844 committee and Earl Grey, in combination with the Governor's own views. Stanley, noted Dr Loveridge, believed that the Crown must act 'in accordance with "feelings and expectations founded . . . upon declarations and concessions made in the name of the Sovereign of England" in the Treaty, which he interpreted to mean that all Maori claims to land arising from their own customary rights had to be respected by the Crown'.[46] Yet, Stanley anticipated that there would be some unowned waste lands in the South Island, which could be declared the property of the Crown. It all depended on Maori law. If an inquiry and registration of titles showed that there were waste lands unowned according to Maori custom, then they belonged to the Crown.

But, without carrying out an inquiry into the facts of Maori customary law and claims and then creating a register of titles, as Stanley had anticipated, Governor Grey acted on his own beliefs. He was (or said he was) influenced by the company's theories, but he developed his own view that Maori overlapping claims were not valid outside their core kainga, which will be discussed below. One result was the nature and extent of the Wairau purchase, which for a number of reasons set aside the active protection enjoined by Normanby, Stanley, and the Treaty.

44. Loveridge, 'Object of the First Importance', pp 159–268, 333
45. Walzl, *Land Issues*, p 179
46. Loveridge, 'Object of the First Importance', p 371

Even though Earl Grey's 1846 instructions arrived after the first 'blanket purchase' (the Wairau), they were nonetheless influential, particularly on the Government's post-Wairau reserves policy and its Waipounamu purchase of 1853–56. In brief, Earl Grey had chaired the 1844 Commons committee that condemned the Treaty and the particular interpretation of article 2 that had been adopted by the British Government. As Secretary of State, he instructed his namesake to keep the Treaty and to honour any prior recognition of Maori title in particular places. But, where the Crown had not already recognised Maori title to any specific 'waste lands', the Governor was now to carry out the principles of the 1844 report. These principles were based on the views of Swiss jurist de Vattel, as popularised in Britain at the time by Dr Thomas Arnold, the headmaster of Rugby. Arnold theorised that aboriginal peoples had no law to speak of, and only owned land on which they had built residences or expended labour. In New Zealand, this did not include natural grasslands, unless used as runs for cattle, but it did include cultivated land. Thus, Earl Grey ordered the Governor to register Maori titles to the land 'in use', as narrowly defined by Arnold, and to assert the Crown's title to the remainder.[47]

These instructions produced a storm of protest from the missionary societies and prominent New Zealanders, such as Bishop Selwyn and Chief Justice Martin, as well as Maori memorials of protest. There is no need to recount the detailed history here. Suffice it to say that Earl Grey backed down, reaffirming the Treaty and that it guaranteed what Maori owned by their own customary law, including uncultivated land. In the meantime, Governor Grey appeared to do nothing to carry out his instructions, until he finally wrote to the Secretary of State in May 1848 to the effect that he had come up with a safer way of achieving the same ends.[48] Professor Alan Ward notes that it is 'to the credit of the Crown' that it finally and definitively recognised Maori title after what he characterised as 'some seven years of hesitation'.[49] But the price for this recognition was a high one in Treaty terms.

As we noted, Stanley's instructions had already influenced Governor Grey in a 'waste lands theory' direction. Although Stanley ordered him to fulfil the Treaty, the Secretary of State wanted a registration of titles to determine 'what portion of the unoccupied surface of New Zealand can justly, and without violation of previous engagements, be considered at the disposal of the Crown'.[50] This registration was to follow an inquiry as to titles, based on Maori law rather than British precepts, as Stanley explained to Parliament (cited above). Coming alongside Stanley's instruction to buy land for the company and to assist it to complete its engagements, the Secretary of State's expectations influenced Grey considerably.

47. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, pp 64–68; Dr Grant Phillipson, *The Northern South Island: Part 1*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1995) (doc A24), pp 128–132

48. Loveridge, 'Object of the First Importance', pp 306–332

49. Alan Ward, *National Overview*, 3 vols (Wellington: GP Publications, 1997), vol 2, p 163

50. Ibid, p 130

The primary influence was not Stanley or Earl Grey but the Governor's own conviction that 'Maori rights in [waste] land were so intersecting, confused or inchoate as not to be really "valid"'.[51] Mr Walzl agreed with Professor Ward on this point.[52] The result was the blanket purchase policy, trialled in the Wairau and extended in the Waipounamu purchases, 'purporting to extinguish Maori interests across vast areas' and confining them to tiny 'occupation' reserves.[53]

Ultimately, the parties and historians in our inquiry agreed that this purchase policy was, to a major extent, Earl Grey's waste lands policy under another name. This was submitted to us by counsel for Ngati Rarua and Ngati Tama, and by Crown counsel. Dr Grant Phillipson (for the Tribunal), Professor Daivd Williams, Tony Walzl, and Leah Campbell (for the claimants), and Dr David Loveridge (for the Crown) were all of that view. It was, in Governor Grey's words, a 'nearly allied principle': Maori could be persuaded to sell their waste lands for a nominal sum – maybe even for no payment at all, so long as their mana was acknowledged – and then their titles to land in actual occupation would be registered as reserves, just as if that had been all they had ever owned.[54] The primary difference, the Crown submitted, between this policy and the proposal to register land and refuse all Maori claims to 'unused' lands, was that the latter would not work and might result in war, while the former would work and be cheaper in the long run. Otherwise, the policies were the same and would reach the same end.[55] This is a key point for our inquiry and we agree with the parties on that conclusion.

There was, however, a significant difference between the early prototype (the Wairau) and the later purchases. Ngati Tama, for example, submitted that there was a drastic change in the size, nature, and purpose of reserves that appeared to be the result.[56] Professor Ward agreed, noting Rolleston's evidence to the Smith–Nairn commission that the 1848 Kemp purchase reserves 'represented all the land they [Ngai Tahu] had in cultivation – that is, that they bestowed labour upon, and really had any title to'. This attitude, argues Professor Ward, underlay the Waipounamu blanket purchase initiated by Grey and McLean in 1853, replacing the Governor's 'brief dalliance (in the Wairau purchase) with making large reserves for the continuance of the traditional Maori economy'.[57]

This is a critical issue for our inquiry for a number of reasons. Professor Ward, Mr Walzl, Dr Phillipson, Ms Campbell, and other historians stressed the theory underlying Grey's

51. Ward, *National Overview*, vol 2, p 163, see also pp 130–131, 135, 140
52. Walzl, *Land Issues*, p 183. These views were expressed in Governor Grey's letter to Earl Grey of 15 May 1848.
53. Ward, *National Overview*, vol 2, p 163
54. Walzl, *Land Issues*, pp 179–184, 188, 205–206
55. Crown counsel, closing submissions, pp 95–96
56. Counsel for Ngati Tama, closing submissions, [2004] (doc T11), pp 62–63
57. Ward, *National Overview*, vol 2, pp 133–134

making of a large, 117,000-acre reserve in the Wairau purchase.[58] Grey's explanation of his early variant to the waste lands policy is worth quoting in full:

> I should also observe that the position I understand to be adopted by the New Zealand Company's Agent, that if tracts of land are not in actual occupation and cultivation by natives, that we have, therefore, a right to take possession of them, *appears to me to require one important limitation*. The natives do not support themselves solely by cultivation, but from fern-root, – from fishing, – from eel ponds, – from taking ducks, – from hunting wild pigs, for which they require extensive runs, – and by such like pursuits. 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 their most important means of subsistence, and they cannot be readily and abruptly forced into becoming a solely agricultural people. Such an attempt would be unjust, and it must, for the present, fail, because the natives would not submit to it: indeed they could not do so, for they are not yet, to a sufficient extent, provided even with the most simple agricultural implements; nor have they been instructed in the use of these. To attempt to force suddenly such a system upon them must plunge the country again into distress and war; and there seems to be no sufficient reason why such an attempt should be made, as the natives are now generally very willing to sell to the Government their waste lands at a price, which, whilst it bears no proportion to the amount for which the Government can resell the land, affords the natives (if paid under a judicious system) the means of rendering their position permanently far more comfortable than it was previously, when they had the use of their waste lands, and thus renders them a useful and contented class of citizens, and one which will yearly become more attached to the Government. [Emphasis added.][59]

Such was the Governor's early theory in April 1847. Earl Grey himself conceded that it would be unjust not to reserve sufficient land for Maori to practise shifting agriculture, a key feature of their customary economy.[60] He also conceded that Maori used 'waste lands' for hunting and fishing but did not accept that they should keep any of them. Land capable of supporting a large population of settlers through farming should not, in the earl's view, be reserved for hunting and fishing in the way intended by the Governor. Yet, it could not be taken from those Maori who relied on such resources for survival. The Government had to come up with an alternative fully equal to the loss.[61]

In response to Governor Grey's comments of April 1847, therefore, Earl Grey stated:

58. Walzl, *Land Issues*, pp 179–181; Phillipson, *Northern South Island: Part 1*, pp 131–132; Susan Kiri Leah Campbell, '"A Living People": Ngati Kuia and the Crown, 1840–1856', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A77), pp 126–127

59. Grey to Earl Grey, 7 April 1847, BPP, vol 6, sess 892, pp 16–17

60. Phillipson, *Northern South Island: Part 1*, pp 129–130

61. Loveridge, 'Object of the First Importance', p 325

> and though it certainly would not have been held that the cultivation and appropriation of tracts of land capable of supporting a large population [of settlers] must be forborne, because an inconsiderable number of natives had been accustomed to derive some part of their subsistence from hunting and fishing on them, on the other hand the settlement of such lands would not have been allowed to deprive the natives even of these resources, without providing for them in some other way advantages fully equal to those which they might lose.[62]

The Crown, therefore, had either to reserve sufficient land for Maori to continue their customary resource use (Grey's Wairau policy) or to provide for them 'in some other way advantages fully equal to those which they might lose' (Earl Grey's response). We will return to these arguments in chapter 6, where we will consider the claims of Ngati Koata and others that they were deprived of their customary resource-use rights as a result of this policy, without their actual and explicit agreement to any such extinguishment, to their great prejudice.

Here, we note the shift in the New Zealand Government's views, in response to those of its imperial masters in London. Professor Ward argues that the new reserves policy reflected the harsher instructions of Earl Grey, along with the Governor's belief that Maori customary rights in the 'waste lands' were invalid anyway. Dr Loveridge refers to the Governor's dispatch of May 1848, in which he commented that reserving 'occupied' land from purchase, as opposed to registering it, was 'well suited to the present circumstances of the country, and to the probable future wants of an agricultural [crop-growing] population, such as the Maories are'.[63] The Crown notes, in reference to this statement, that the Governor had pointed out in 1847 (before he received Earl Grey's instructions) that Maori did not at present support themselves solely by cultivation. What he meant here then, the Crown argues, was just that the future of Maori lay in agricultural pursuits on the European model (not that reserves no longer needed to include waste lands for resource use).[64]

We disagree. This was clearly a shift in reserve-making philosophy, based on the new approach of the British Government. In 1853, Governor Grey wrote to the Secretary of State that the 'whole of the waste lands' in Te Tau Ihu had been acquired for settlers by his Waipounamu purchase.[65] This included not merely 'unsold' land but also the purchase of the large Wairau reserve set aside only a few short years earlier. In 1854, McLean wrote that

62. H Merivale (for Earl Grey) to the Reverend J Beecham, 13 April 1848, enclosed in Earl Grey to Grey, 3 May 1848, BPP, vol 6, sess 1002 (Loveridge, 'Object of the First Importance', p 325). Loveridge's view is that this was a response to Governor Grey's comments on the Porirua and Wairau purchases: see p 325 fn 778). The statements quoted here were made in April 1848 on behalf of Earl Grey by a Colonial Office under-secretary, H Merivale, and forwarded to Governor Grey as the Secretary of State's views in May 1848.

63. Loveridge, 'Object of the First Importance', p 319

64. Crown counsel, closing submissions, pp 95–96

65. Williams, 'Crown and Ngati Tama', p 100

reserves were generally to be land in actual cultivation and occupation.[66] The result was, as we shall see, a serious breach of Treaty principles. The underlying policy also was in breach of Treaty principles.

Earl Grey resiled officially from his original instructions in April 1848. He did so in a letter to the Wesleyan Missionary Society, which he then forwarded to Governor Grey as an explanation of his views on the Treaty and the waste lands instructions.[67] In that letter, the Wesleyans were informed that the Government 'intend, and have always intended, to recognize the Treaty of Waitangi'. The Government recognised the Treaty:

> in both its essential stipulations; the one, securing to those native tribes of which the chiefs have signed the treaty *a title to those lands which they possessed according to native usage (whether cultivated or not)* at the time of the treaty; the other, securing to the Crown the exclusive right of extinguishing such title by purchase. [Emphasis added.][68]

Thus died the waste lands theory, though not (as the Crown conceded) in practice. Maori law, as the source of Maori rights to land, was finally recognised and confirmed by both sides of the waste lands debate in Earl Grey's surrender of 1848. 'It is now admitted', wrote Chief Justice Martin, 'that a nation sustaining its civilization by law is not at liberty to disregard even the unwritten customary law of a less civilized people'.[69] This, then, was the undeniable standard by which to measure the actions of the Crown. In purchasing land, it had to identify the correct right holders under Maori law, and the nature of their rights under Maori law, and provide for their free and informed consent to the alienation of those rights to others. The standards developed from 1840 to 1846, as outlined above, were thus reaffirmed in 1848.

The Crown argued that this was nothing less than a return to Normanby's policy, in which it would pay artificially low prices (to Maori) and charge high prices (selling to settlers). The real payment for Maori was supposed to be their retention of sufficient and appropriate land so that they would prosper by settlement all around them, and, in the words of Earl Grey above, obtain 'advantages fully equal to those which they might lose'. The Crown agrees with the Orakei Tribunal that this ideology was honest only if Maori did in fact retain sufficient land for the anticipated benefits to occur. The policies of Earl Grey, as transmuted by George Grey in practice, were alleged to be the policies of Normanby.[70]

We do not accept the Crown's submission that there was no essential difference between Grey's practice and Normanby's theory. Rather, the evidence of Dr Angela Ballara and the other historians in this inquiry is that, while the Treaty's principle of active protection was

66. Campbell, 'A Living People', p 126
67. H Merivale (for Earl Grey) to the Reverend J Beecham, 13 April 1848, enclosed in Earl Grey to Grey, 3 May 1848, BPP, vol 6, sess 1002, pp 144–157
68. Ibid, p 154 (Loveridge, 'Object of the First Importance', p 323)
69. W Martin to Governor Grey, 20 October 1848, BPP, vol 6, sess 1120, pp 54–55
70. Crown counsel, closing submissions, pp 96–97

affirmed in theory, it was not carried out in practice. The blanket purchase policy did not consider what land Maori required for their safety, comfort, or subsistence, or what districts they could not alienate without serious or unintentional injury to themselves. Nor was it carried out with the requisite sincerity and good faith. These were, it will be remembered, fundamental parts of Normanby's instructions. Grey's purchasing policy was shorn of the active protection envisaged in those instructions and promised in the Treaty.[71]

Governor Grey's purchase policy was in fact, as he himself phrased it, so 'nearly allied' to the waste lands theory as to be virtually indistinguishable in its application and results. In the view of the claimants, it was irreconcilable with their tikanga.[72] Grey's view that overlapping or conflicting Maori titles to 'waste lands' were invalid is demonstrably wrong, even on his own admission. He acknowledged that such claims existed under customary law. He failed, however, to carry out his instructions to investigate their validity, choosing instead to extinguish them in a manner that would – rather than Maori exercising their tino rangatiratanga and making free and informed choices to sell particular sites – simply negate their rights as if they had never existed. As we shall see below, in our consideration of the particular transactions, the Wairau and Waipounamu purchases were in serious breach of Treaty principles. A policy so misguided as to extinguish all Maori claims whatever they might be, without the requisite specificity or mutuality, and with a predetermined outcome that Maori should only be allowed to keep land in 'occupation', whatever their wishes, was clearly in breach of Treaty principles. It follows from our analysis of the evidence above that this was clearly inappropriate in the circumstances and by the avowed standards of the time.

5.3 Grey's Military Campaigns

Captain George Grey was only 33 when he arrived in New Zealand in November 1845, but he had already won the applause of the colonial authorities for his successful governorship of South Australia. In New Zealand, he had to cope with Maori resistance on two fronts: a war in the North where Hone Heke and his allies had been getting the better of FitzRoy's slender and inept military forces; and an incipient rebellion in Heretaunga (the Hutt Valley) where Te Rangihaeata and perhaps the renowned Te Rauparaha himself were supporting opposition to the company settlers' occupation of disputed land. Grey had to give priority to the northern war, but the capture of Ruapekapeka in January 1846 allowed him to turn his attention to the problems of the company's Cook Strait settlements.

71. Dr Angela Ballara, 'Summary of Selected Aspects of an Historical Overview Report Prepared in Response to Questions from the Waitangi Tribunal', statement of response to Tribunal questions, 2002 (doc F1); Walzl, *Land Issues*, p 211

72. See, for example, the cross-examination of Matiu Rei (counsel for Ngati Toa Rangatira, closing submissions, 5 February 2004 (doc T9), p 47).

The claim for Ngati Toa in respect of what followed is set out in the evidence of Matiu Rei, who told us:

> It has always been part of Ngati Toa history that a military campaign was waged by the Crown against Ngati Toa during the 1840s. The Crown's singling out of Ngati Toa thus distinguishes its claim from that of the other iwi in Te Tau Ihu. Ngati Toa claim not only that the Crown took from Ngati Toa its land and other taonga in breach of the Treaty, but also that it took that land by force of arms. We say that it was Ngati Toa which was seen by the Crown as the iwi that had to be subjugated in order for the Crown to achieve its aim of domination of the Cook Strait region.[73]

We need to look closely at the military campaign in Heretaunga and on the Kapiti coast since this has a direct relevance to Grey's attempts to settle the company problems across Cook Strait. The Wellington campaign has been examined in detail by historians such as Ian Wards, whose account was used by the Tribunal in its *Te Whanganui a Tara* report. Our account that follows is based mainly on these sources.[74]

The Heretaunga problem was long standing and arose from competing occupation of the valley from 1839 by company settlers and Ngati Rangatahi and Ngati Tama. These Maori groups were supported by Ngati Toa, particularly by the section led by Te Rangihaeata, who also had claims in the valley. Although the Government offered Te Rauparaha and Te Rangihaeata compensation for Ngati Toa rights in Heretaunga, it did not compensate Ngati Tama and Ngati Rangatahi, who were the main occupants. From time to time, they chased settlers off the land. Late in 1844, they were reinforced by a party of Whanganui Maori who were related to Ngati Rangatahi. Through 1845, Ngati Rangatahi and Ngati Tama continued to cultivate the land they occupied, selling their produce in Wellington. The *Te Whanganui a Tara* report found that Ngati Tama and Ngati Rangatahi had legitimate customary rights in Heretaunga that were not adequately recognised or compensated by the Crown.[75]

In mid-February 1846, Grey arrived in Wellington, with some 300 troops released by the end of the northern campaign. Though the Governor promised Maori that they would be 'protected in all their properties and possessions,'[76] it soon became apparent that his promise did not extend to Ngati Tama or Ngati Rangatahi unless they agreed to leave. Although Ngati Tama left the valley a few days later, Ngati Rangatahi remained defiant but eventually agreed to depart following Grey's ultimatum that they would be attacked if they did not do so. Notwithstanding this agreement, Ngati Rangatahi houses were plundered, their chapel

73. Matiu Nohorua Te Rei, brief of evidence (no 1) on behalf of Te Runanga o Toa Rangatira Incorporated, 9 June 2003 (doc p1), p 5

74. Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District* (Wellington: Legislation Direct, 2003), pp 205–217

75. Ibid, pp 222–226

76. Grey to Ngati Toa, Ngati Awa, and Ngati Raukawa chiefs, 16 February 1846 (Waitangi Tribunal, *Whanganui a Tara*, p 210)

desecrated and their deserted pa destroyed. A declaration of martial law, the plundering of settler homes in retaliation, and skirmishing between Maori and the British troops at Boulcott's farm followed before Grey left the troops on the defensive and departed for Whanganui.

The conflict was reignited on 2 April when a settler and his son were killed, apparently by Whanganui Maori, near Boulcott's farm. Then, on 16 May, a military outpost was attacked by the Whanganui force, possibly with support from Te Rangihaeata. Though there were more skirmishes in Heretaunga, the conflict was moved to Porirua on the Kapiti coast. Assuming that Te Rauparaha was fomenting the conflict, Grey abducted him and several other Ngati Toa chiefs from Taupo pa at Porirua on 23 July 1846. The old chief was detained without trial for 18 months. We examine this event more fully below since it played a vital role in the Wairau purchase. Here we merely note that the remainder of the Wellington campaign was conducted against Te Rangihaeata and his supporters who entrenched themselves at Pauatahanui but were forced to abandon that and fight a rearguard action as they retreated up the Horokiwi Valley. Eventually they took refuge in the swamps of Poroutawhao in Manawatu, where they were left alone.[77]

Though Grey made much of his military success in Wellington,[78] we need to remember that his opposition was never a united force. Some of the Taranaki iwi such as Te Atiawa, who had supported Ngati Toa in their southern campaigns, no longer aided them and provided active or passive support for Grey. Even Ngati Toa were divided, with one section under Rawiri Puaha supporting Grey in the field, Te Rauparaha's section trying to appear neutral, and only those with Te Rangihaeata actually fighting against Grey's troops.[79]

There was further conflict at Wanganui in 1847, following the hanging of four men convicted of the murder of several members of the Gilfillan family. Te Mamaku, who had fought against the British troops in Heretaunga, was again involved. But after that there was peace until conflict once more broke out over the Waitara purchase in Taranaki in 1860 and there was more than a decade of war. In the interval, Grey had taken advantage of the peace to purchase large areas of Maori land.

In Grey's mind, land purchases from Maori were complementary to his military strategy. They would enable him to follow up military conquests with settlement on the ground and link the scattered settlements established by the New Zealand Company on both sides of Cook Strait. Two pivots for this strategy were Porirua on the Kapiti coast in the North Island and the Wairau in the South. Just as Ngati Toa had commanded both sides of Cook Strait before 1840, so Grey looked to the breaking of their power and the acquisition of

77. Professor Richard Boast, 'Ngati Toa and the Upper South Island: A Report to the Waitangi Tribunal', revised ed, 2 vols, report commissioned by the Crown Forestry Rental Trust, 2000 (doc A56), vol 2, pp 206–216

78. For instance, in Grey to Gladstone, 31 August 1846 (Boast, 'Ngati Toa and the Upper South Island', vol 2, pp 215–216)

79. Ian Wards, *The Shadow of the Land: A Study of British Policy and Racial Conflict in New Zealand, 1832–1852* (Wellington: Government Printer, 1968), p 270

'their' land in the mid-forties to anchor the colonisation of middle New Zealand. In April 1846, he advised Stanley that his first step was to secure 'military possession of the country around Port Nicholson, included by a line drawn from Porirua and the upper Hutt', 'as its extreme military posts'.[80] Grey hoped to secure this line with a road from Wellington to Porirua, extend that along the coast to Paraparaumu and to use the military to extend that to Horowhenua and beyond to Wanganui and New Plymouth. Grey explained to Stanley that:

> Efforts must at the same time be made to enforce British authority within the same limits; to strengthen our alliances along the coast in the direction of New Plymouth; to accustom the natives to, and inspire them with a respect for, British laws and usages; to choose proper sites along the coast for military and police stations: so that when at the commencement of next summer we break out into the open country beyond Wai-nui [Paraparaumu], we may be able at once to afford an efficient protection to the settlers inhabiting that tract of country.[81]

This was the direction of the military engagements we discussed above. Grey was well aware of the value of the military in subduing the Maori and holding country through roads and forts; a strategy that was as old as the Roman empire. But the troops could not be used to hold the country permanently; they needed to be followed up by policing and settlement of the land. It was the Porirua purchase, carried out in tandem with the Wairau purchase, which laid the foundation for settlement of the Kapiti coast. As Grey subsequently explained to Earl Grey, it had been essential to obtain the Porirua and Wairau districts to satisfy company claims to land there and to make the Wellington settlement safe.[82]

5.4 Grey's Maori Land Policy

We noted the main elements of Imperial policy on land in New Zealand above, including various instructions to Grey and his responses. Here, we briefly consider how the outcome of the policy debates discussed previously translated into purchase policy on the ground.

Running through Imperial policy from Normanby's instructions to Hobson of 1839 forwards was one consistent theme: that Maori land bought cheaply – 'a mere pittance' as it was often described – by the Crown should be re-sold to settlers at a high price. The surplus income would form a land fund that was to be used by the Crown to fund immigration and the infrastructure for land to be efficiently settled and developed. Remaining Maori land would rise in value as a consequence of the settlement and improvement of surrounding

80. Grey to Stanley, 22 April 1846 (Boast, 'Ngati Toa and the Upper South Island', vol 2, p 194)
81. Ibid (pp 194–195)
82. Grey to Earl Grey, 26 March 1847, *Compendium*, vol 1, pp 201–202

land and Maori themselves would gain markets for their produce and employment in the new economy. This was a variation of the Wakefield scheme which, as we have noted, was applied to the Nelson settlement. But it was also applied to non-New Zealand Company settlements such as Auckland by the Waste Lands Act of 1842, which imposed a standard price of one pound an acre for rural Crown land.

That system was never popular with the 'old' settlers at Auckland, many of whom had migrated from the Bay of Islands where they had engaged in land transactions directly with Maori, and expected to continue to do so despite the Treaty. They were behind the agitation that persuaded FitzRoy to waive Crown pre-emption in 1844. Grey was instructed to resume Crown pre-emption, and in November 1846 passed the Native Land Purchase Ordinance to that effect. In a dispatch to the Secretary of State, Grey argued that once the Crown resumed pre-emption, Maori who sold land would invest the proceeds in improved agriculture and 'rapidly advance in industry and civilisation'.[83] Grey was about to apply that policy to the Wairau, soon afterwards to Canterbury and, with the Waipounamu purchases, to Te Tau Ihu, in each instance purchasing large districts through the interests of a dominant iwi or rangatira, for the Crown.[84]

But we should note here that there was always some ambiguity over the exercise of Crown pre-emption, as Dr Loveridge pointed out. Grey himself did not totally rule out allowing some direct private acquisition of Maori land. Even the Native Land Purchase Ordinance, though prohibiting private purchase and leasing, allowed licences to occupy Maori land. Like FitzRoy, Grey had to accept that, whatever the law might have said, it was impossible to prevent settlers doing their own deals with willing Maori, especially in the more remote parts of the country. Even if they did not formally purchase land, settlers could still arrange informal agreements for grazing stock and cutting timber. The parties to the deals could bide their time, hoping that their transactions would eventually be recognised when the law had been amended to allow them Crown grants. Grey's Native Land Purchase Ordinance did not stem the tide, particularly on the fringes of the company settlements in both islands where pastoralists simply drove their sheep onto Maori land and arranged informal 'grass money' leases. These were a cheaper option for squatters and more profitable for Maori than selling land cheaply to the Crown.

The natural pastures of Te Tau Ihu were of interest to Nelson settlers who were starved of good land through the failure of the company scheme. If the Nelson settlers were to deal with Te Tau Ihu Maori for pastoral land in the hinterland from the company settlement, they could frustrate the final resolution of the company's Nelson settlement scheme. We take up this issue in relation to the Wairau below.

Though he soon disbanded the Protectorate Department and dismissed the Chief Protector, George Clarke senior, and some sub-protectors, Grey re-employed others as land

83. Grey to Earl Grey, 28 November 1846 (Walzl, *Land Issues*, p 173)
84. Walzl, *Land Issues*, p 181

purchase officials. These included the very able Donald McLean. Grey built up an efficient Land Purchase Department that was directly responsible to him and unencumbered by too many 'protective' responsibilities. Nevertheless, Grey played a prominent role himself, especially in initiating purchases with powerful chiefs, using the full authority of his office as Governor and the Queen's representative in New Zealand. He then left it to his officials to tidy up and complete the purchases he had initiated. Frequently Grey and his officials promised Maori that in addition to purchase money they would retain some land as reserves and receive schools, hospitals, agricultural implements and other benefits.[85] These, Grey explained, would constitute the 'real payment' for the land. It was a seductive message that was at this time difficult to refute or disbelieve.

Finally, in this section we note that Grey was amply supplied with Imperial funds and troops. In June 1845, he was secretly authorised by the Colonial Office to spend up to £10,000 on the purchase of Maori land for New Zealand Company settlers; a 'discretionary benefit' that he used to purchase the Wairau.[86] Grey had a golden opportunity to put his stamp on the colony. He was ambitious and imperious and did not hesitate to ignore instructions that he did not like, such as Earl Grey's waste land instructions, selectively implementing those aspects that suited his own purposes. He was a master at writing dispatches that justified whatever he had chosen to do; he was, to use the jargon of our day, a master of spin. And, at least in this first of his New Zealand governorships, he seemed to have a magic touch in dealing with Maori. He flattered and bribed those chiefs he was able to get on his side; and he used them against recalcitrant rivals – not a difficult matter in a fiercely competitive Maori society – and was thus able to operate that old imperial tactic of divide and rule. He learnt enough of Maori language and customs to be able to manage them. He was alive to the political consequences and indeed the land buying possibilities of military success. All of these things, as we shall see, were to be combined in Grey's abduction of Te Rauparaha and the use of that to facilitate the Wairau purchase.

5.5 The Abduction of Te Rauparaha

5.5.1 Background

Te Rauparaha was seized by a naval and military force from Taupo pa at Porirua at dawn on 23 July 1846.[87] Though an old man, he fought like a demon but was quickly overpowered.

85. Grey himself later admitted in evidence to the Smith–Nairn commission in 1879 that these were 'the instructions I always gave'. Grey's successor, Governor Gore Browne, said that such promises had been made 'from the date of the Treaty of Waitangi': see Waitangi Tribunal, *The Mohaki ki Ahuriri Report*, vol 1, p 93, and Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 3, pp 950–955.

86. Walzl, *Land Issues*, p 168

87. James Cowan, *The New Zealand Wars: A History of the Maori Campaigns and the Pioneering Period*, 2 vols (Wellington: Government Printer, 1983), vol 1, pp 117–122; Wards, *Shadow of the Land*, p 279; Boast, 'Ngati Toa and the Upper South Island', vol 2, pp 202–204

Four other Ngati Toa chiefs, including Wiremu Te Kanae and Hohepa Tamaihengia, were also taken. They were detained on the warship *Calliope*. While Te Rauparaha was still in detention, his son Tamihana and Matene Te Whiwhi, who had been studying at Bishop Selwyn's St John's College in Auckland, were allowed to visit him. Tamihana later recalled the visit as follows:

> When I returned to Wellington I went on board the ship, with Matene, to see my father. We all wept, and when we had finished he said to me: 'Both you and Matene go to our people and tell them not to have bad feeling with the Europeans on my account, for only by good will is the salvation of man, woman and child. Tell them I am not sad. Though I remain a slave aboard this warship, in my mind I live here as a chief. May our people live well and in peace.'[88]

It is possible that Tamihana and Matene discussed Grey's plans to purchase Porirua and the Wairau with Te Rauparaha during that visit, but Tamihana does not mention it in his autobiographical memoir. Indeed, he does not discuss either of those transactions at all.[89] According to Crown historian Michael Macky, Te Rauparaha was still on the *Calliope* at Wellington until some three months after the Wairau purchase. Mr Macky even suggests that 'the imprisoned Te Rauparaha and the hiding Te Rangihaeata may have been involved in the discussions' over the purchase. In support, he quotes a statement by Matene Te Whiwhi in 1879 that he remembered 'Rauparaha and Rangihaeata agreeing to the sale of this land'.[90]

Te Rauparaha was not released until January 1848. Though Te Rauparaha may have been treated kindly and, in his advice to his son, put the best complexion on his humiliating detention, historians have generally concluded that his mana, as the pre-eminent rangatira of Ngati Toa, was greatly diminished by his capture and detention.[91] He died a broken man in 1849. During his detention and Te Rangihaeata's rustication, the leadership of Ngati Toa 'devolved mainly to Rawiri Puaha . . . the most senior of a triumvirate made up of himself, Matene te Whiwhi, and Tamihana Te Rauparaha'.[92] The three chiefs now had to act in place of Te Rauparaha and Te Rangihaeata and perform functions for Ngati Toa that they would not have dared to perform had the older chiefs been free and available. Grey was in constant touch with Te Rauparaha but did not appear to have consulted him over the purchase and he refused to consult Te Rangihaeata. As Grey put it, 'he was a rebel and [he] would not treat with him'.[93] Moreover, the younger chiefs were unlikely to do anything but cooperate with

88. Peter Butler, ed, *Life and Times of Te Rauparaha by his Son, Tamihana Te Rauparaha* (Martinborough: Alister Taylor, 1980), p 79

89. Ibid

90. Macky, 'Crown Purchases in Te Tau Ihu', pp 41–43. According to Steven Oliver, who provides no reference, Te Rauparaha was in detention in Auckland when Tamihana and the others agreed to sell the Wairau: 'Te Rauparaha', DNZB, vol 1, p 507.

91. Wards, *Shadow of the Land*, p 280; 'Te Rauparaha', DNZB, vol 1, p 507

92. Boast, 'Ngati Toa and the Upper South Island', vol 2, p 218

93. George Clarke snr, 3 October 1848 (Rutherford, *Sir George Grey*, pp 165–166)

Grey lest they prejudice Te Rauparaha's chance of release. It was during this time that 'Ngati Toa's most prized possessions at the Wairau and Porirua' were sold to the Government.[94]

Ariana Rene, the daughter of Ihaka Te Rei, shared with us her traditional history of Te Rauparaha's imprisonment and its outcome:

> The Rene family are the kaitiaki of the greenstone Hineari, which once belonged to Te Raupara.
>
> The story that I know from that family about Te Rauparaha says that Governor Grey took Te Rauparaha captive. Governor Grey took all the land belonging to Ngati Toa in return for the release of Te Rauparaha, who he branded a rebel. The only part of the land that was returned is the Ngati Toa land around Porirua and where the Rangiatea Church stands.
>
> I was told the story of Te Rauparaha's release by Turei Heke. Turei Heke is the grandson of the great Nga Puhi chief Mangonui and he is related to my mother in law, NgaHuia. This story explains why the Rene family owns the greenstone Hineari.
>
> The story is that Mangonui was sitting at his place North of Auckland at the night when the wind was blowing a southerly and he heard a voice in the air that sounded like a man crying with a broken heart. Mangonui went to Governor Grey and asked him who was crying in such a way. Governor Grey replied that it was Te Rauparaha.
>
> Mangonui said to Governor Grey, 'That man crying is a man with a broken heart, give him to me and I will take him back to his people.' Governor Grey asked Mangonui what he would give him if he released Te Rauparaha. Mangonui replied that he would hand over his land as far as the eye could see [at Kororareka].
>
> So Grey agreed to release Te Rauparaha in return for the land of Mangonui. When he was released, Te Rauparaha stood on the beach and tangied. He said to Mangonui, 'I have no land left. I can give you nothing but the clothes on my back and my greenstone', and so saying he handed Hineari to Mangonui. And that is how the Rene family came to possess Hineari.
>
> The old people always felt a great wrong had been done to Ngati Toa due to the kidnap of Te Rauparaha. It is because of that that Ngati Toa lost all of their land in Te Tau Ihu.[95]

Grey talked of charging Te Rauparaha with treason, but no charges were ever laid against him. Historian Ian Wards says that Grey 'tried desperately hard to justify his capture of Te Rauparaha', writing, among much else:

> page after page to the Colonial Office to explain his action, reviving stories of atrocities, recalling with his customary exaggeration the parlous state of the whole colony, the anxiety of so many Europeans to promote strife, the conspiracy, with Te Rauparaha at the head of it, to overthrow the government and seize Grey's person.

94. Boast, 'Ngati Toa and the Upper South Island', vol 2, p 219
95. Ariana Rene, brief of evidence on behalf of Ngati Toa, 11 June 2003 (doc P19), pp 5–6

But, according to James Stephen in the Colonial Office, Grey's view that he had 'certain belligerent rights' was 'not sustainable as a mere point of law'. Mr Wards adds that Grey 'strained all the resources he had, without success, to gather evidence to convict Te Rauparaha.'[96] It is not surprising therefore that he was not brought to trial.

We discuss various issues relating to Te Rauparaha's detention and submissions by counsel below.

5.5.2 Submissions and findings on the detention of Te Rauparaha

Before discussing the Wairau purchase in detail, we briefly examine submissions on the detention of Te Rauparaha and make findings on the matter. Counsel for Ngati Toa pleaded in final submissions that Grey's detention of Te Rauparaha was:

> an illegal kidnapping of a British subject and chief whom they had a duty to protect, without just or lawful cause or any regard for legal process, undertaken without legal justification detaining him and others without charge, trial or redress for 18 months in breach of common law and the constitutional rights of British subjects.[97]

It was further submitted that the seizure of Te Rauparaha and other moves against Ngati Toa at this time were:

> part of a deliberate strategy to crush Ngati Toa resistance to land alienation and other Crown policies, to weaken the influence of Ngati Toa Rangatira and Te Rauparaha and Te Rangihaeata and cause division and disturbance within the iwi, and the acquisition of Ngati Toa lands and interests whilst Ngati Toa were under duress.[98]

These actions and omissions of the Crown, it was further argued:

> led to social and economic destabilisation of Ngati Toa Rangatira iwi and its rangatira. The Crown's deliberate policy of intervention had the effect and purpose of undermining of traditional leadership and rangatiratanga when required by the iwi, the disruption of traditional balances of power in the area, Ngati Toa's near-monopoly of Cook Strait trade and economy and the dislocation of social relationships between iwi.[99]

Counsel quoted the comments of Ngati Toa witness Te Waari Carkeek before our inquiry that 'Ngati Toa to this day retain a strong and profound sense of grievance, anger and great sadness stemming from these events.'[100]

96. Wards, *Shadow of the Land*, p 280
97. Counsel for Ngati Toa Rangatira, closing submissions, p 98
98. Ibid, p 96
99. Ibid, pp 96–97
100. Ibid, p 98

Crown counsel submitted that 'the alleged illegality of the initial seizure has not been made out on the evidence' and could not be sustained. We see no need to reach a finding on this point of law. Our task is instead to consider whether the seizure of Te Rauparaha and his subsequent lengthy detention without trial were consistent with the Treaty and its principles. In this respect, we accept the Crown's concession that 'the detention of Te Rauparaha without trial, for approximately 18 months, assumed the character of an indefinite detention without trial and was therefore a breach of the Treaty of Waitangi and its principles'.[101]

That concession, it should be noted, pertains solely to the indefinite detention without trial of Te Rauparaha and not to his initial seizure. Although the Crown disputed the illegality of the latter, it expressed no view as to whether this should be considered consistent or otherwise with the Treaty and its principles. Crown counsel did, however, submit that 'the military actions of the Crown were a reasonable response to the security situation and ought not to be characterised as simply part of a strategy to subjugate Ngati Toa and acquire their lands'.[102] We accept that the decision to seize Te Rauparaha was prompted by pressing military concerns. As he informed Gladstone, Grey did not feel confident enough to attack Te Rangihaeata's position at Pauatahanui 'until I can assemble a force sufficiently large to enable me to hold Te Rauparaha in check at the same time'.[103] But the falsity of Grey's suspicions that Te Rauparaha had been 'treacherously' aiding Te Rangihaeata's supposed 'rebellion' is fully apparent from his subsequent failure to press charges against the rangatira for want of evidence. As kaumatua Iwi Nicholson pointed out, it still amounted to 'imprisoning our chief for nothing'.[104] The Treaty principles of reciprocity, partnership, active protection, and good government required the Crown to be fully satisfied that there was a strong prima facie case to answer before taking such a drastic measure as to seize Ngati Toa's leading rangatira by armed force, under the cloak of martial law. That was clearly not the case, and we find the seizure of Te Rauparaha to have been contrary to the Treaty principles outlined above.

We further note that the short-term military concerns which partly prompted Grey's decision to seize the chief were not incompatible with broader strategic goals aimed at the subjugation of Ngati Toa and the acquisition of their lands. On the contrary, military subjugation was a prerequisite to such objectives. In our view, the ongoing detention of Te Rauparaha long after any immediate military fears had subsided pointed to Grey's underlying concern to impose substantive Crown control over the Cook Strait region. Land purchases were, as we explore further below, another plank in that policy.

We find that the Crown's detention of Te Rauparaha, and other Ngati Toa chiefs, without trial, was in breach of their article 3 rights as British subjects, including the right of freedom

101. Crown counsel, closing submissions, pp 99–100
102. Ibid, pp 100–101
103. Boast, 'Ngati Toa and the Upper South Island', vol 2, p 198
104. Iwi Nicholson, oral evidence, fourteenth hearing, 23–27 June 2003 (transcript 4.14, p 50)

from imprisonment without trial. Ngati Toa rangatira had repeatedly pleaded with Grey to allow Te Rauparaha to return home. But the Governor took little notice of such requests and released him from detention only when it suited him to do so. That happened to be after the Wairau district had been acquired by the Crown, as we explore in more detail below.

5.6 The Wairau Purchase, 1847

We noted above that Grey saw land purchases as a means of consolidating military conquest, and that the Wairau and Porirua were key pivots in that policy. Even before he had completed his military campaign on the Kapiti coast, Grey began to consider the unresolved land problems of the company's Nelson settlement. He visited Nelson in March 1846 and reappointed the magistrates who had signed the warrants for Te Rauparaha's arrest in 1843 and had resigned or been dismissed after the Wairau conflict. Colonel Wakefield noted with satisfaction that Grey 'took a different view of the question to his predecessor'.[105] FitzRoy had received an address from the Nelson settlers upon his arrival in New Zealand calling for a 'legal investigation' into the events at the Wairau.[106] But FitzRoy's announcement to Ngati Toa at Porirua in February 1844 that the settlers had been in the wrong and that no action would be taken against the tribe for the killing of the prisoners, was not the outcome Nelson's European population was anticipating. His subsequent actions in dismissing the magistrates responsible for issuing the arrest warrants further angered the Nelson settlers. According to Professor Richard Boast, FitzRoy had been enraged by the actions of the magistrates, 'seeing this – quite rightly – both as exceeding their authority and as provocative in the extreme'.[107] Grey's reinstatement of the magistrates, evidently without further inquiry, effectively amounted to endorsement of their handling of the Wairau affair.

Although Grey discussed his plans to acquire the Porirua and Wairau blocks with Wakefield in April 1846, he was too busy with military problems for the next few months to move on the two blocks. But other developments were beginning in the Wairau that made it desirable for Grey to hasten the Crown's purchase of the district. Pastoralists were starting to drive sheep into the district and taking up land that may have been required for the company's rural sections. In November 1846, Morse and Cooper occupied 'Top House' at the head of the Wairau Valley. According to the Surveyor-General, C W Ligar, they had about 1000 sheep there when he visited the Wairau at Grey's request in February 1847.[108] Following the Morse and Cooper occupation, Clifford, Vavasour, and Weld arranged a lease with Te Puaha 'of all the land from the White Bluff down the coast round Cape Campbell

105. Wakefield to New Zealand Company, 25 March 1847 (Phillipson, *Northern South Island: Part 1*, p 86)
106. Boast, 'Ngati Toa and the Upper South Island', vol 1, p 164
107. Ibid, p 167
108. Ligar to Grey, 8 March 1847, *Compendium*, vol 1, p 203

to Keheranga for £24 per annum.'[109] As in the Wairarapa, the pastoralists' dealing in Maori land, despite Grey's Land Purchase Ordinance, forced him to reassert pre-emption and purchase the land for the Crown. As David Armstrong put it:

> This informal leasing was anathema to Governor George Grey. The success of his land purchasing policy depended upon acquiring Maori land cheaply in advance of settlement, through the application of the Crown's pre-emptive right, and selling it dear to settlers . . . As Grey was about to find out . . . Maori who were obtaining annual rentals from leaseholders (and substantially retaining their mana over the land) were less eager to alienate vast areas to the Crown for . . . often less than the yearly rentals they were currently receiving.[110]

Mr Armstrong quotes an editorial in the *Nelson Examiner* for 18 October 1845 showing that the Nelson settlers were indeed aware of the possibilities. Should the Government and the company not come to an arrangement over the Wairau, the editorial argued, the Nelson settlers would 'not consider ourselves debarred from the district' and would effect similar arrangements as those of settlers and Maori in the Wairarapa.[111] Grey thus had to move quickly to acquire the district for the Crown.

In November, Grey informed Colonel McCleverty, the commissioner sent out by the Colonial Office to resolve the company's claims to land, that he was 'very anxious that the purchase of the Wairau District should be completed with as little delay as possible'. Grey told McCleverty that 'a favourable opportunity also now presents itself for arranging this affair in the return of "Martin" [Te Whiwhi] and "Thompson" [Tamihana Te Rauparaha] to Port Nicholson'. McCleverty was to take these two chiefs, and Puaha, to the Wairau to inspect the district and select reserves. These were the three who were later to be the only signatories for the Wairau purchase. Grey had earlier sent instructions to Bishop Selwyn to keep Te Whiwhi and Tamihana Te Rauparaha in custody at St John's College in Auckland until the Governor had brought the other prisoners north with him. On Selwyn's request, they had now been released and had returned to Wellington.[112] Grey clearly had uses for them. He hoped that McCleverty, in taking them to the Wairau, could 'gain an influence over these men and divert them from these dangerous intrigues'. But he was not to let the three have contact with Te Rauparaha, who was still held on board the *Calliope*.[113] Grey's

109. A D McIntosh, ed, *Marlborough: A Provincial History* (Blenheim: Marlborough Provincial Historical Committee, 1940), pp 91–92; Ruth Allan, *Nelson: A History of Early Settlement* (Wellington: A H & A W Reed, 1965), p 388; Jeanine Graham, *Frederick Weld* (Auckland: Auckland University Press, 1983), pp 19–20. None of these sources gives the date of the 'lease' with Puaha, but Graham says that Weld, having arranged the 'lease', went to Sydney to buy sheep for the run in March 1847.

110. David Armstrong, '"The Right of Deciding": Rangitane ki Wairau and the Crown, 1840–1900', report commissioned by Te Runanga o Rangitane o Wairau in association with the Crown Forestry Rental Trust, not dated (doc A80), p 57

111. *Nelson Examiner*, 18 October 1845 (Armstrong, 'Right of Deciding', p 58)

112. W Cotton to P Cotton, 21 November 1846 (Phillipson, *Northern South Island: Part 1*, p 87)

113. Grey to McCleverty, 20 November 1846 (Walzl, *Land Issues*, p 173)

instructions to McCleverty suggest that he was using his detention of Te Rauparaha to put pressure on the three chiefs to agree to cede the Wairau. But some time after writing his instruction to McCleverty, Grey must have relented since, according to Tamihana, he and Matene were allowed to visit Te Rauparaha, as we noted above. In any case, Grey's November 1846 instruction to McCleverty was not carried out – probably because McCleverty was otherwise engaged in dealing with company land claims and military affairs in Wellington.[114]

Then, in February 1847, Grey took advantage of his continuing detention of Te Rauparaha by taking up the Wairau question as part of a wider scheme to 'complete' New Zealand Company purchases at the Wairau, Porirua, Manawatu, and Wairarapa.[115] He met Wakefield on 17 February and promised to assist the company to complete its arrangements with its settlers. These arrangements included the Wairau, where the company had already awarded sections to settlers to make up for the shortfall of rural sections in Nelson.

Later in February, Grey sent Surveyor-General Ligar to the Wairau to identify the extent of the district, the number of Maori occupants, the area of their cultivations, and to sound out their readiness to sell. He toured the district and Kaiparatehau with the company's Nelson agent, William Fox. Ligar reported that after the Wairau conflict most of Ngati Toa had withdrawn from the district and Te Rauparaha had placed a tapu on it, though Puaha, acting for Te Rauparaha, agreed to lift the tapu. Ligar found a mixed community of some 40 Ngati Toa and 10 Rangitane living at the whaling settlement of Port Underwood. Though he referred to Rangitane as 'slaves' of Ngati Toa, Ligar admitted that 'one of their number, Kaikora [*sic*], has acquired much influence, and may now be considered the head man of the little settlement'.[116] A party from Port Underwood had recently returned to the Wairau and resumed cultivation. They had heard of European interest in the district and had started cultivating there to assert their title – just as Ngati Toa had done prior to the Wairau conflict. However, Ligar did not come across these cultivations or any occupants during his journey in the Wairau district, though he admitted that he might have discovered them had he been able to get a Maori guide from Port Underwood. Ligar compiled a list of chiefs who had a 'joint interest' in the Wairau and whose consent would be required for the purchase. He listed them as follows: 'Puka, Nohoroa, Martin [Matene Te Whiwhi], Thompson [Tamihana Te Rauparaha], Puaha, Rauparaha, Nohoroa (Waterhouse), Te Kanae, Rangihaeata, Tamaihangia, Pukeko, Pukekowhatu, and Pikiwau'. Ligar added that 'In addition to the above list there are many who have claims, but these are the chief.'[117]

Dr Phillipson identifies the 'principal resident chiefs' of the Port Underwood group as Wiremu Te Kanae of Ngati Toa, Tana Pukekohatu of Ngati Rarua, and Hikaraia Kaikoura

114. Waitangi Tribunal, *Whanganui a Tara*, p 235
115. Phillipson, *Northern South Island: Part 1*, p 88
116. Ligar to Lieutenant-Governor, 8 March 1847, *Compendium*, vol 1, p 203
117. Ibid, p 203

of Rangitane.[118] However, Ligar did not distinguish the residents in this way and he did not identify anyone as Ngati Rarua, though he did include Pukekohatu in his list. It is likely, as Mr Macky points out, that some of the 'many' others who had claims were also Ngati Rarua. Mr Macky adds that Ligar's report 'indicated that the ownership of the Wairau was far more widely spread than Grey would have liked to admit. Grey chose not to rely on it when justifying to London his decision to purchase the Wairau from Ngati Toa.'[119]

As we noted, Grey obtained the signatures of only three of the named chiefs – Rawiri Puaha, Tamihana Te Rauparaha, and Matene Te Whiwhi – for the purchase. He did not get or attempt to get the signature of Te Rauparaha or Te Rangihaeata. Nor did Grey attempt to get the signatures of two other Ngati Toa chiefs captured with Te Rauparaha and also named by Ligar, Tamaihengia, and Te Kanae. Dr Phillipson describes Te Kanae as the 'principal resident' Ngati Toa chief at the Wairau.[120]

Ligar reported to Grey that there were 80,000 acres of level land suitable for cropping in the Wairau district, plus 48,000 acres of level land and 240,000 acres of hill country suitable for pastoral farming; more than enough to satisfy the needs of the New Zealand Company. But Grey was not satisfied with this area and looked beyond Kaiparatehau to the east coast towards Kaikoura – a coastal strip some 100 miles long and containing some three million acres. Spain had concluded, somewhat simplistically, that Ngati Toa had possession of the Wairau but Grey now argued, without any evidence of occupation, that their claim to the Kaikoura coast was 'identical with their claim to the valley of the Wairau.'[121]

Grey visited Nelson early in March and promised a deputation of settlers that immediate steps would be taken to 'bring about the cession of the Wairau.'[122] He was as good as his word since on his return to Wellington the Wairau purchase was completed. It was signed on 18 March 1847 by the three Ngati Toa chiefs.[123] On 1 April, the Porirua purchase deed was completed, this time with the signatures of eight of the Ngati Toa chiefs.[124]

Our information on the Wairau purchase is largely second hand or subsequent recollection since much of the detailed correspondence generated by the sale has been lost or destroyed.[125] We have discovered only one contemporary account of the transaction. This was 'collected from different sources' and printed in the Wellington newspaper, the *New Zealand Spectator and Cook's Strait Guardian* on 20 March 1847. Although the report gives a fairly accurate description of the details of the purchase agreement, it says little about the

118. Phillipson, *Northern South Island: Part 1*, p 89
119. Macky, 'Crown Purchases in Te Tau Ihu', p 35
120. Phillipson, *Northern South Island: Part 1*, p 89
121. Grey to Earl Grey, 26 March 1847 (Phillipson, *Northern South Island: Part 1*, p 90)
122. Wakefield to secretary, New Zealand Company, 30 March 1846 (Macky, 'Crown Purchases in Te Tau Ihu', p 26)
123. Walzl says the transaction was completed at Porirua, though he does not cite a reference. Kemp, who is cited below (fn 132), says it was done at the Governor's residence, presumably in Wellington: Walzl, *Land Issues*, p 176.
124. Boast, 'Ngati Toa and the Upper South Island', vol 2, pp 229, 320
125. Armstrong, 'Right of Deciding', p 59

5.6

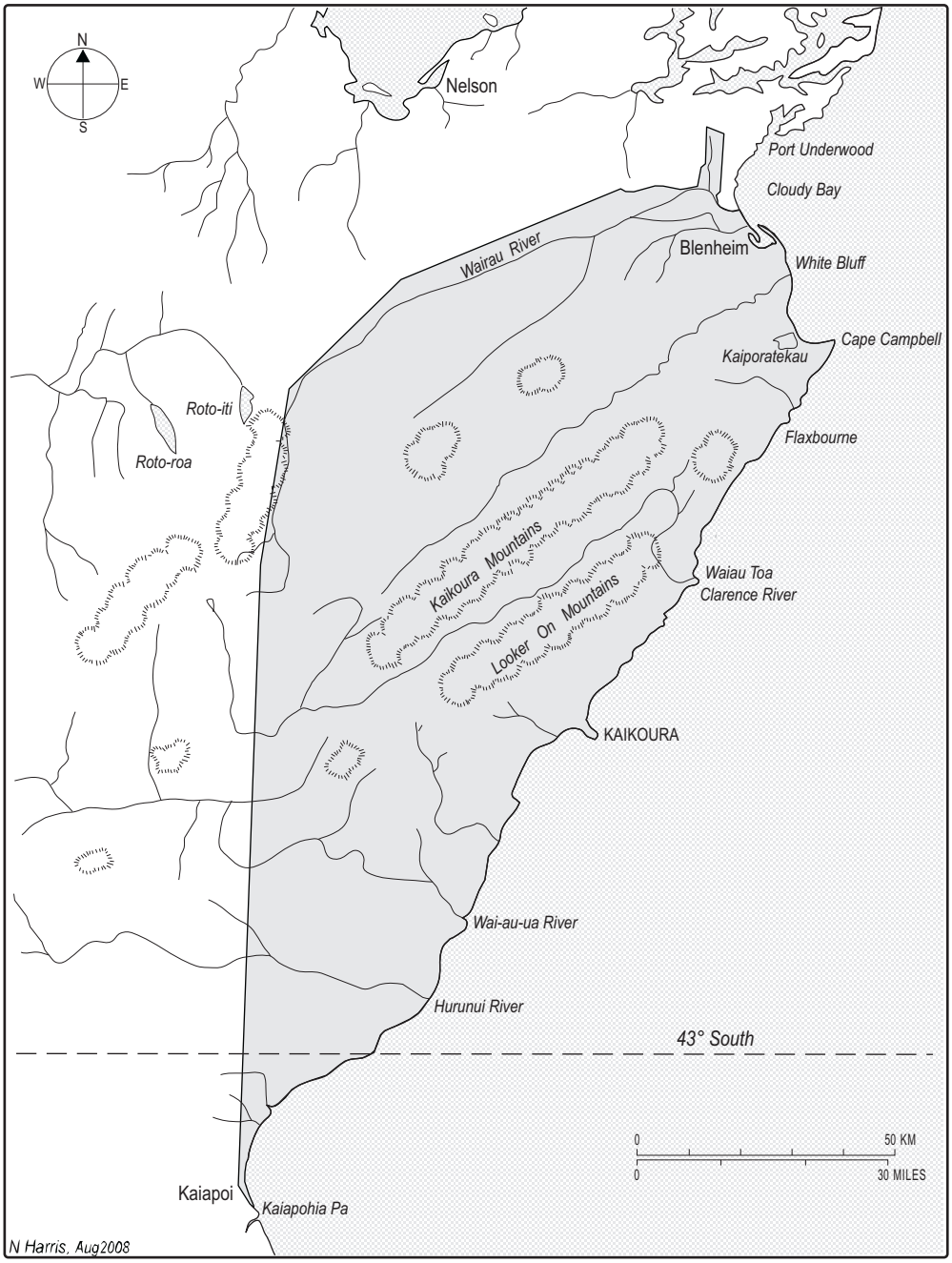

Figure 9: The Wairau purchase, 1847 **Source: AJHR, 1874, G-6**

proceedings – merely that 'after a good deal of negotiation, and two days' personal conference between his Excellency and the Natives, an arrangement has at length been made'. That arrangement referred to the purchase of both the Wairau and Porirua, although the two deeds were signed on different dates. The report also claimed that during the discussions 'the Natives evinced considerable anxiety for the release of Rauparaha, but they were given

distinctly to understand that for the present he would not be liberated'. The report does not say where the negotiation was conducted or who, apart from the Governor, was present. But it does claim that the arrangement had been made in 'a fair and liberal spirit', with substantial payments and reserves promised. The newspaper predicted that previous difficulties and failures to resolve land problems had finally 'given way before his Excellency's firmness'.[126]

Grey himself reported on the purchase to Earl Grey a fortnight afterwards, though his explanation is carefully manicured and is misleading on the negotiation and the deed. He said, 'The Ngatitoa Tribe, after considerable discussion, agreed to dispose of the required territory, still reserving their claims to that portion of the country which is shown in the accompanying map.' He added that he thought it advisable 'not only to purchase this [Wairau] district . . . but also to endeavour to purchase the whole tract of country claimed by the Ngatitoa Tribe, and extending about 100 miles southward of that valley' (see fig 9). The Ngati Toa chiefs wanted £5000 for the district, but Grey, after consultation with Colonel McCleverty, agreed to pay £3000, in five annual instalments of £600 each.[127] Grey conveyed the impression that he had made the agreement with and paid the first instalment to the whole of the Ngati Toa 'tribe', after 'considerable discussion'.

He gave a somewhat different, though still distorted, account of the transaction in evidence to the Smith–Nairn commission (on the Kemp purchase of Canterbury) in 1879. He now admitted that he had concluded the agreement with the three chiefs (who were lavishly praised) because:

> These three men were anxious to have a complete settlement made, to prevent disputes arising between their own race and the Europeans, and it was an act of entire good will on their part; the relinquishing of this land for the sum they took. The payment was very trifling compared with the extent of land.[128]

Colonel Wakefield, who may have been present at the negotiation, gave a somewhat different account. He told William Fox, the company's Nelson agent, that 'Great disinclination was at first shown by the natives to part with the district and it was only by means of a large payment in money and a reservation of land to the West of the Wairau river and of all of the Kaituna Valley that the purchase of it was effected.'[129] That admission of 'great disinclination' is certainly at variance with Grey's 1879 claim that the chiefs wanted to sell the land cheaply to heal relations with the Europeans. In fact, the 'large' sum referred to by Wakefield was only £3000, not the £5000 the chiefs had requested. Certainly the reserve seemed large – later it was calculated at 117,248 acres – but, as we shall detail in the next chapter, all but a

126. *New Zealand Spectator and Cook's Strait Guardian*, 20 March 1847

127. Grey to Earl Grey, 26 March 1847, *Compendium*, vol 1, p 202. According to the deed, the first payment was to be made on 18 March 1847, the date the deed was signed; the attached receipt has the same date.

128. Boast, 'Ngati Toa and the Upper South Island', vol 2, p 226

129. Wakefield to Fox, 26 March 1847 (Phillipson, *Northern South Island: Part 1*, p 90)

tiny portion was taken by the Waipounamu purchase. Queen Charlotte and Pelorus Sounds were excluded from the Wairau purchase but they too were swallowed up by later purchase.

There is a further explanation in a letter from George Clarke senior to Henry Williams, written in October 1848 after Clarke had heard from his son Henry who was present at the Wairau negotiation. Since this letter is of considerable significance we checked the original in the Auckland War Memorial Museum library and quote the relevant sections as follows:

> In the course of a conversation with my son Henry upon the letter I have just received; he remarked that the Govr had pursued a policy in possessing land for the Company, so completely in accordance with what he has accused the Northern settlers of having done, that I am obliged to record it now that it is fresh on my mind, You are aware that the whole of the Wairau district is said to have been purchased from the Natives for £2,000 [*sic*]. It has been *wrung* and *wrested* from them!!! by *Govr Grey* and the hard bargain which the Natives were obliged to come to being no less than the liberation of Rauparaha. The Governor refused to liberate Rauparaha unless the Natives would sell him Wairau. The regard which the two nephews [*sic*] of this chief had for their uncle's liberty induced them to consent thereto as they were told that his liberty could not be procured in any other way. Is not this wresting of the land with vengeance? and ought not the British govt to be made acquainted with this disgraceful procedure, Henry Kemp and Henry Clarke were witnesses to this disreputable bargain. The Natives complained bitterly of the transaction and can our countrymen expect to remain long at peace upon land thus torn [underlined twice] from the Natives. Thompson Rauparaha's nephew [*sic*] remonstrated against the proceedings but by threats to retain Rauparaha withdrew his remonstrance and when the Governor was told the bargain was incomplete without the consent of Rangihaeata the Gov said he was a rebel and would not treat with him. [Emphasis in original.][130]

Three and a half years after the transaction, W F G Servantes, the army officer who acted as Grey's interpreter, wrote an account on the extension of the eastern boundary of the purchase. We discuss this further below but note here that Servantes, like Grey in 1879, shifted the initiative from the Crown to Ngati Toa, at least in relation to the extension of 'Wairau' down the coast to Kaiapoi. He said that the Ngati Toa chiefs wanted Kaiapoi 'in consequence of several of their chiefs having been murdered there, and their having in revenge nearly exterminated the original tribe.'[131]

Henry Tacy Kemp, who also was present during the negotiations, wrote a retrospective account in 1901. According to Kemp:

130. George Clarke to Henry Williams, 3 October 1848, Williams family papers, 91/75, folder 28, Auckland War Memorial Museum Library. Tamihana Te Rauparaha was Te Rauparaha's son, not his nephew, and the purchase price for the Wairau was £3000, not £2000.

131. W Servantes, 'Memorandum Explaining Why the Nominal Boundary of the Wairau Purchase Was Placed at Kaiapoi', 4 September 1850, s/10, ArchivesNZ (Macky, 'Crown Purchases in Te Tau Ihu', pp 49–50)

> In 1845 [*sic*] the acquisition of the Wairau Plains took place. Sir George Grey had . . . made himself familiar with the facts connected with the Wairau massacre. Te Rauparaha, with his nephews – one of them Wi Te Kanae, a resident of Wairau – had been prisoners on board the Calliope, and the way seemed open for a reconciliation. His Excellency was anxious to throw a halo of peace over that disaster, and he thought that by extinguishing the native title it would be acceptable to all the parties concerned. Negotiations were entered upon with Rawiri Puaha, next of kin in succession to Rauparaha and Rangihaeata, . . . a member of the Wesleyan communion . . . and a highly intelligent and honourable man . . . I was instructed to proceed to Porirua, and explain to Puaha the Governor's wishes, giving him time to consider the terms of the proposal, and then to invite him to a personal interview at Government House. In a few days he appeared, with certain approved members of his tribe . . . and waited on the Governor, who expressed to him in felicitous language his desire to wipe out so sad an event, and in such a way as to make it acceptable to the feelings of both races; Rawiri at once complied, leaving it entirely to His Excellency's discretion as to the best way of accomplishing the matter.[132]

Kemp's recollection of the event stresses that it was a deal done behind closed doors at the Governor's residence, with only Puaha and a few other 'approved' Ngati Toa chiefs present. They must have included Tamihana Te Rauparaha and Matene Te Whiwhi, the two other signatories. This was a far cry from a public tribal hui, the normal way the Crown negotiated land purchases at this time. Kemp also admits that he was the one who had to explain 'the governor's wishes' – when he was sent to Porirua, before the meeting at the Governor's residence. This suggests that it was the Governor, not Ngati Toa, who initiated the purchase.

The Te Kanae manuscript, the main documentary source from the Ngati Toa side, tells a similar story. This says that Grey spoke to Rawiri Puaha, asked for Porirua, and also asked Rawiri:

> to give over Wairau, the place where Wakefield and his comrades died, to the Queen in compensation for her dead. This was the word of Sir George Grey: 'Give me the land where my dead died,' Rawiri Puaha and his tribe agreed and so passed the Wairau even unto Kaikoura on account of the dead who died in the conflict at Wairau.[133]

Tony Walzl cites two other Maori sources that tell a similar story. At a meeting of West Coast Poutini Ngai Tahu in 1859 it was said that 'Governor Grey got the Wairau for his dead'. Then, at a meeting at the Ngati Toa pa of Takapauwarenga in Pelorus Sound in 1860,

132. Henry Tacy Kemp, *Revised Narrative of Incidents and Events in the Early Colonizing History of New Zealand, from 1840 to 1880* (Auckland: Wilson and Horton, 1901), pp 8–9

133. Wiremu Naera Te Kanae, 'The History of the Tribes Ngati-Toa-Rangatira Ngati-Awa-O-Runga-O-Te-Rangi and Ngati-Raukawa, Having Special Reference to the Doings of Te Rauparaha,' translated by George Graham (20 August 1888; reprinted 20 April 1928), p 18, Auckland Public Library collection, ATL

Hakiaha said, 'Then he (Rauperaha [*sic*]) was taken in a vessel, I gave land for the dead so that he could come ashore.'[134]

This belief that the vast lands of the Wairau purchase were the price for Te Rauparaha's release, and for the deaths in the Wairau conflict of 1843, has been passed down in the histories of Ngati Toa. Evidence was presented to that effect by, among others, Iwi Nicholson, Te Waari Carkeek, and Matiu Rei.[135] It also became part of the history of Ngati Rarua, as explained by Vern Stafford (Tapata), who told us: 'What I heard about the big purchase of land at Wairau by the Crown was that it was because of the Wairau Incident. It was retaliation for what happened there.'[136]

We need have no doubt that Grey exploited the notion of Ngati Toa giving utu for the deaths of Wakefield and his men at the Wairau in 1843 to get the region – after all, a special Crown reserve covering the site of the battle was taken out of the larger Ngati Toa reserve. Governor FitzRoy, following due inquiry into the Wairau incident, had determined that no utu was required. Grey reversed that decision without any inquiry. But that does not explain why Ngati Toa needed to sell all the land down to Kaikoura (in fact to Kaiapoi). Whether that extension was suggested by Ngati Toa, as Servantes said, or by Grey himself, there was another utu – for Ngati Toa's dead in the battle with Ngai Tahu – to be exploited. We conclude that this reciprocal use of the Maori custom of utu was a cynical ploy by Grey to stretch the Wairau purchase to the limit of the New Zealand Company's original Kapiti deed. We return to this matter below.

Grey justified the large Wairau reserve on the ground that Maori still needed large areas of land beyond that required for cultivation for hunting and gathering,[137] but that notion counted for naught when the Waipounamu purchase was negotiated, a point we elaborate in our next chapter.

5.6.1 Claimant submissions on the Wairau purchase

We come now to submissions on the Wairau purchase. Ngati Toa's counsel argued in final submissions that the Wairau purchase was imposed on Ngati Toa under duress while their senior chiefs were in detention or hiding. The acquisition of the Wairau (and Porirua) was the last stage in the Crown's 'pre-determined', 'coercive programme' against Ngati Toa Rangatira.[138] Grey's actions were 'designed to put undue duress on Ngati Toa Rangatira, and

134. Walzl, *Land Issues*, p 178

135. See Ngarongo Nicholson, brief of evidence on behalf of Ngati Toa, 9 June 2003 (doc P4); Te Waari Carkeek, brief of evidence on behalf of Ngati Toa, 9 June 2003 (doc P10); Te Rei, brief of evidence (no 1). For additional information from these witnesses, provided at our hearing of Ngati Toa claims from 23 to 27 June 2003, see transcript 4.14.

136. Vern Stafford, brief of evidence on behalf of Ngati Rarua, 11 August 2000 (doc A84), p 6

137. Grey to Earl Grey, 7 April 1847 (Phillipson, *Northern South Island: Part 1*, p 91)

138. Counsel for Ngati Toa Rangatira, closing submissions, pp 81, 95

were part of a deliberate strategy to crush Ngati Toa resistance to land alienation and other Crown policies, to weaken the influence of Ngati Toa Rangatira and . . . cause division and disturbance within the iwi'. The Crown acquired Ngati Toa lands and interests 'whilst Ngati Toa were under duress'.[139] Ngati Toa saw Grey's actions 'as a direct attack on the mana of their chiefs, and therefore on the iwi as a whole'.[140] Counsel argued that 'the principal reason . . . for the illegal kidnapping and detention of Te Rauparaha was to force Ngati Toa to part with their lands at Wairau and Porirua'.[141]

Dealing with the actual Crown purchase of the Wairau, Ngati Toa counsel began by restating various 'concessions' made by Crown researcher Michael Macky: that the Ngati Toa chiefs who consented to the sale 'did so in a coercive context'; and that 'the detention of the chiefs, and the need to make peace with the Government, contributed to the ambience of the negotiations'.[142] Counsel also quoted the various statements from George Clarke senior that have been quoted above.[143] Then claimant counsel submitted that the Crown had breached the principles and provisions of the Treaty by depriving Ngati Toa of the advice and authority of Te Rauparaha and Te Rangihaeata, and falsely representing that the signing of the deed would lead to the release of Te Rauparaha. Other breaches raised by counsel were that the purchase was negotiated with only three of the Ngati Toa right holders; that the boundaries were not clearly defined; that the price was too low; and that the distribution of the annual payments was not adequately supervised.[144]

Counsel for Ngati Rarua's closing submission said that the Wairau transaction 'represented coercion on a major scale' and was a 'springboard for the Crown's relentless land acquisition programme which followed'.[145] It was argued that the Crown was 'resolved to simply extract the Wairau from Maori. Treaty obligations to Ngati Rarua [and others] . . . were not a consideration'.[146] Counsel used the Ligar report to establish a Ngati Rarua presence at Port Underwood and their rights to the Wairau, noting that two of Ligar's list of 13 'Ngati Toa' whose consent was needed for a sale, Pukekohatu and Pikiwau, were Ngati Rarua. Counsel then referred to various Crown concessions, in response to evidence from Dr Phillipson, Dr Ballara, and its own historian, Mr Macky, to the effect that the Crown in 1847 did not carry out adequate inquiries into customary rights. He also quoted from his cross-examination of Mr Macky to this effect. Counsel referred to Mr Macky's evidence as well as that of Dr Mitchell and Mr Walzl to document the presence of Ngati Rarua at Port Underwood before 1840, during the 1847 transaction and at the Wairau afterwards.

139. Ibid, pp 95–96
140. Ibid, p 98
141. Ibid, pp 99
142. Ibid, pp 100–102
143. Ibid, p 102
144. Ibid, pp 100–101
145. Counsel for Ngati Rarua, closing submissions, 5 February 2004 (doc T6), p 37
146. Ibid, p 41

He concluded that the Crown should have recognised the independent existence of Ngati Rarua and not subsumed them in Ngati Toa; and that it should have obtained their consent, as well as that of Ngati Toa and Rangitane residents at Port Underwood, for the Wairau purchase. The failure to obtain Ngati Rarua consent was a breach of the Crown's Treaty obligations.[147]

The Rangitane closing submission made no specific reference to their rights in relation to the Wairau purchase, though it did detail their assertion of claims afterwards. Rangitane occupied land that had been sold at the Wairau to protest that they had not been paid for their rights. In addition, the submission summarised the evidence presented to demonstrate a Rangitane presence around 1840 in the area later encompassed by the purchase, particularly their interests on the coast from Parinui o Whiti to Waiau-Toa.[148] Though the submission made no reference to Rangitane's claims in this area, it did discuss Ngai Tahu's subsequent assertions of a northern boundary at Parinui o Whiti. These were seen as a response to Ngati Toa's claims to a boundary at Kaiapoi. However, that did not involve Rangitane since they 'had already sold' their rights.[149] This was a reference to Rangitane's Waipounamu deed of 1856, discussed in our next chapter.

Although Ngai Tahu are not a party to this inquiry, they were permitted to make submissions on the takiwa issues. Their closing submission made no reference to Rangitane's position in relation to the Wairau purchase, and only one oblique reference to Ngati Toa's. This was selected from Servantes' 1850 letter to Grey, which said that 'doubts were entertained of the Ngati Toa tribe having an undisputed title to the land further south than Kaikoura.'[150]

5.6.2 Crown submissions on the Wairau purchase

We now summarise the closing submission by the Crown, beginning with its comments on Crown purchasing policy in general. This summarises Dr Loveridge's paper on the evolution of Crown purchasing policy that we referred to earlier in the chapter. The Crown's summary notes the advice of successive Secretaries of State, particularly their recommendation that the Governor prepare an inventory of Maori customary rights prior to the purchase of Maori land for settlement. It then describes Grey's sidestepping of that advice by the purchase of tribal rights over large territories – pioneered in the Wairau purchase – on the assumption that individual rights could be established in the (large) reserves that were set apart from the land sold to the Crown. This policy, Grey argued, was preferable to Earl Grey's view that land unoccupied and unused by Maori could simply be declared Crown

147. Counsel for Ngati Rarua, closing submissions, pp 50–51
148. Counsel for Rangitane, closing submissions, 5 February 2004 (doc T4), pp 12–13, 22
149. Ibid, pp 12–13, 18–20
150. Counsel for Ngai Tahu, closing submissions, 16 February 2004 (doc T13), p 75

land, free of Maori claims. Governor Grey held that any attempt so to seize 'waste' land would provoke fierce Maori resistance, whereas his alternative policy of buying large areas of Maori land, cheaply and ahead of the needs of settlement, would be 'cheerfully' accepted by Maori. The Wairau was to be a test case. As the Crown submission put it, 'Essentially, Grey was advocating a rebuilding or maintenance of the "Land Fund" system.'[151] This went all the way back to Normanby's instructions which justified a low price being paid to Maori on the ground that European settlement would greatly increase the value of their remaining reserved land. The Crown submission noted the Orakei Tribunal's comment on this – that it was essential for Maori to be left with *sufficient* land if any effective benefit from colonisation was to be realised. It was with this caution in mind that the Crown submission approached the Wairau purchase.

The Crown submission also argued that, in order to understand events in Te Tau Ihu, including the Wairau purchase, it was necessary to consider relevant events in Wellington. The Crown argued that Grey's military actions were 'a reasonable response to the security situation and ought not to be characterised as simply part of a strategy to subjugate Ngati Toa and acquire their lands'. The Wairau purchase was 'an important development for Crown policy generally' and needed to 'be viewed in its wider context and not just as a policy directed towards subjugation of Ngati Toa for the purposes of land acquisition'.[152]

The Crown also dealt with what has been called the issue of duress, though it did not use that term. However, it admitted that 'The captivity of Te Rauparaha hung in the background' and noted that Crown historian Mr Macky and Ngati Toa historian Professor Boast agreed that 'Grey applied moral pressure on Ngati Toa chiefs to agree to a cession of land to the Government'. And the Crown admitted that 'events in Wellington led Grey to conclude that he would have to obtain some influence or control over the Ngati Toa tribe'.[153]

The Crown submission then proceeded with a brief 'overview' of the Wairau transaction, touching on issues that had been raised in claimant submissions. It dealt first with the issue of whether the £3000 paid was a fair price, noting Grey's comment on the anticipated value of the instalment arrangements. The Crown admitted that 'In a market value sense the payment was very small in relation to the value the Government and Company could expect to sell it for', but added Mr Macky's comment that the low price was 'consistent with the British Government's policy from New Zealand's inception and illustrates elements of Grey's theology at play'. We assume that the reference to Grey's 'theology' (a term Mr Macky did not use) is probably a misprint for 'theory'.

On the distribution of the instalment payments, the Crown submission notes Mr Macky's admission that there was some evidence that the first instalment 'was not widely distributed'

151. Crown counsel, closing submissions, pp 94–96
152. Ibid, pp 100–101
153. Ibid, p 101

by the Ngati Toa chiefs but not enough to determine whether later instalments were distributed, though it was reasonable to assume that Rangitane received nothing.[154]

The Crown submission also addressed the issue of whether all right holders were considered in the Wairau purchase. It noted the Ligar report on resident right holders at Port Underwood and that Ihaia Kaikoura, the 'head man', did not feature on Ligar's list of 'Ngati Toa' owners. Though Ligar had noted the presence of certain groups in the Wairau, he 'did not explain overlapping interests, or the relative interests of Rangitane, Ngati Rarua and Ngati Toa'.[155] The Crown then admitted that 'Ultimately Grey transacted with only three chiefs for the sale of the Wairau despite Ligar's report of 12 [13, in fact] "owners" and the "many who had claims".'[156]

Finally, the Crown submission summed up the Wairau purchase. We quote the final paragraph in full:

> The Wairau purchase was not without its controversies such as whether all right-holders were identified, whether consideration was distributed widely, delays in surveying and the coercive context associated with the Ngati Toa chiefs. It does however illustrate a situation where resident Maori were keen to have Pakeha settle among them, Maori having originally offered to sell more land than [the] government wanted to buy. Further, the chiefs who signed the deed were also to negotiate the retention of large reserves and £3,000 of consideration for the purchase.[157]

We comment more fully on the Crown submission on the Wairau below but note here that it is for the most part descriptive of what happened, largely on the basis of Mr Macky's report. It does not take a firm position on the three issues discussed: the amount of the consideration, whether it was properly distributed, and whether all right holders were taken into consideration (though the answer to the last question is obvious from the Ligar information presented). The last paragraph mentions delays in surveying though this was not discussed. It also notes the 'coercive context associated with the Ngati Toa chiefs' whereas the word 'coercive' was not used in the earlier discussion. The Crown did not come to a conclusion on the issue of whether, when all the surrounding circumstances and the deed itself are taken into account, the Wairau should be regarded as a valid Crown purchase. We return to this issue below.

154. Crown counsel, closing submissions, p 102
155. Ibid, pp 103
156. Ibid, p 104
157. Ibid

5.6.3 Tribunal findings on the Wairau purchase

(1) *Were Ngati Toa subjected to duress?*

Counsel for Ngati Toa argued that they were subjected to duress in the Wairau purchase, in that it was carried out while their senior rangatira, Te Rauparaha, was in detention and the junior rangatira who signed the deed did so to guarantee his release. We examine the evidence of coercion that is available, noting once again that much of the evidence is circumstantial.

The main submission for Ngati Toa is the research report by Professor Boast. He examined the military operations in Heretaunga and the Kapiti Coast and the capture of Te Rauparaha as background to the Wairau purchase. In doing so, he makes specific claims of coercion.

Professor Boast begins by saying that, with the capture of Te Rauparaha, 'Grey's coercive programme against Ngati Toa began in earnest'.[158] The 'coercive' programme was continued militarily in the pursuit of Te Rangihaeata, legally by the trial of various captured prisoners, and politically by attempts to divide Ngati Toa by recruiting the faction led by Rawiri Puaha against Te Rangihaeata. The effects of these policies, Professor Boast argues, were 'to deprive Ngati Toa of its two great and powerful chiefs at a critical moment'.[159] Leadership of Ngati Toa devolved to Puaha, the most senior of the triumvirate that signed the Wairau deed. According to Professor Boast, Puaha wrote to Grey several times, asking him to release Te Rauparaha, but the originals of this correspondence have not survived and we do not know how Grey responded, if at all.[160] Professor Boast then quotes the passages from the Te Kanae manuscript and Kemp's reminiscences that we quoted above to show the extent to which Grey exploited the custom of utu – for the Europeans killed at the Wairau – to pressure Puaha into agreeing to sell the Wairau. 'There can be little doubt,' Professor Boast added, 'that Grey certainly did have the cunning and the insight into Maori customary practice to pitch the Crown's right to the Wairau on the basis of utu.'[161]

Professor Boast quotes historians Patricia Burns and James Rutherford in support of his argument that Ngati Toa were 'coerced' into selling the Wairau. Both quote from the letter by George Clarke senior to Henry Williams that we quoted above. Rutherford comments that, on Clarke's interpretation, 'the acquisition of the Wairau block partakes of the character of an act of confiscation in punishment for the 1843 massacre and the 1846 rebellion'.[162]

Professor Boast commented again on the issue in his brief of evidence for our Ngati Toa hearing, saying there was 'an obvious coercive context to the negotiations', but he presented

158. Boast, 'Ngati Toa and the Upper South Island', vol 2, p 202
159. Ibid, p 218
160. Ibid, p 219
161. Ibid, p 221
162. Rutherford, *Sir George Grey*, pp 165–166

no new evidence.[163] Other Ngati Toa witnesses, however, did do so. Kaumatua witnesses Iwi Nicholson, Te Waari Carkeek, Matiu Rei, and Te Ariki Wi Neera noted a long-running Ngati Toa understanding that the sale of the Wairau and Porirua were the price of freedom of Te Rauparaha and utu for the deaths of Europeans during the Wairau conflict.[164]

Dr Phillipson, whose Rangahaua Whanui survey of the northern South Island was used by Professor Boast, refers to the original sources quoted by Professor Boast, though he adds one other. This noted that two Ngati Toa chiefs, Karanama Kupukai and Wi Parata, told the Native Land Court that Grey had used coercive tactics similar to those described by Clarke.[165] It seems, therefore, that there has been a continuing Ngati Toa tradition, first recorded by Clarke and subsequently passed down through successive generations to the kaumatua who appeared before us, of coercive tactics employed by Grey to enforce the Wairau transaction.

We also need to consider evidence presented by the Crown on the issue; in this instance by researcher Michael Macky. His report has a section headed 'Signs of Coercion'. Mr Macky begins with Grey's accounts of the Wairau transaction that we noted above and suggests that these 'give little indication of coercion'.[166] Mr Macky noted also that Ligar had identified 12 principal right holders (in fact, Ligar had listed 13 names) and 'many others' with claims but that Grey had negotiated the deal with only three. 'It is clear,' Mr Macky admits, 'that many right-holders now found their interests being claimed by the Government without their having given consent.'[167] However, Mr Macky suggests that the chiefs may have discussed the proposed sale with Te Rauparaha and Te Rangihaeata, as we noted above. But he concedes that, 'even if Te Rauparaha and Te Rangihaeata did agree that Te Whiwhi, Puaha, and Tamihana should sell the Wairau, the circumstances in which they did so undoubtedly placed them at a severe disadvantage'.[168] Mr Macky then quoted the statements from Burns and Rutherford and the Clarke letter on which they were based. He quoted the Wairau Ngati Toa chief, Hakiaha, who 'later remembered that the land had been given up so that Te Rauparaha could be freed'.[169] And he quoted the statement from the Wellington newspaper that we referred to above that, during the negotiations, 'the natives evinced considerable anxiety for the release of Rauparaha, but they were given distinctly to understand that for the present he would not be liberated'.[170]

In the end, Mr Macky's conclusions were little different from Professor Boast's. Mr Macky says that:

163. Professor Richard Boast, 'Part Four: Land Transactions and the Native Land Court', brief of evidence on behalf of Ngati Toa, 11 June 2003 (doc P23), p 8
164. Counsel for Ngati Toa Rangatira, closing submissions, pp 99–148
165. Phillipson, *Northern South Island: Part 1*, p 94
166. Macky, 'Crown Purchases in Te Tau Ihu', p 41
167. Ibid
168. Ibid, p 42
169. Ibid. The reference is to a letter written on 17 January 1861.
170. Ibid, p 43

> whilst the Wairau purchase was probably not a direct ransom for the captive chiefs, it cannot be doubted that their detention hung over the negotiations and was certainly discussed . . . Grey applied what Boast reasonably describes as moral pressure on the Ngati Toa chiefs to agree to a cession of the land to the Government.[171]

Mr Macky concludes, 'It is undoubtedly the case that the detention of the chiefs, and the need to make peace with the Government, contributed to the ambience of the negotiations for the sale of the rest of the land.'[172]

Finally, in this section, we note that the instalment arrangement, with annual payments extended over five years, was a kind of coercion, as Grey freely admitted. He explained to Earl Grey that the arrangement would 'give us an unlimited influence over a powerful and, hitherto, a very treacherous and dangerous tribe.'[173]

We find that the Crown's coercive pressure on the three Ngati Toa chiefs to agree to the Wairau purchase amounted to duress and was in clear breach of its article 2 obligation to purchase only such land as Maori were willing to sell. The coercion exerted by the Crown was also in breach of the principle of partnership, which required the Crown to act with scrupulous honesty, fairness, and good faith towards its Treaty partner, and the Crown's duty actively to protect the interests and tino rangatiratanga of Ngati Toa. These breaches were compounded, in our view, by Grey's decision to reverse, evidently without due inquiry, the earlier findings of FitzRoy that Ngati Toa did not bear primary responsibility for the conflict at the Wairau and that no punishment would be inflicted upon them. Instead, the three rangatira were more or less blackmailed into signing the Wairau deed as the price of Te Rauparaha's freedom. Good faith was entirely lacking on the Crown's part in the methods employed to acquire the Wairau lands.

(2) *Was there an adequate inquiry into customary rights and their holders?*

There were two inquiries of relevance to the Wairau purchase. In 1845, Commissioner Spain reported on the ownership of the district on the basis of his limited inquiries at Otaki in 1843 and at Nelson in 1844. Governor Grey relied on Spain's report to justify his dealing with Ngati Toa. In 1847, the Government sent Surveyor-General Ligar to investigate the Wairau district and report on a number of things, including the Maori in occupation and their numbers, identity, and rights. We consider each inquiry in turn.

(a) *The Spain commission*

The New Zealand Company did not press its claim for the Wairau in front of Spain in 1844. No witnesses or evidence were produced about that district. Nonetheless, as we described

171. Ibid
172. Ibid, p 44
173. Grey to Earl Grey, 26 March 1847 (Macky, 'Crown Purchases in Te Tau Ihu', p 45)

in chapter 4, Spain and Clarke had questioned Ngati Toa leaders intensively at Otaki in 1843. In particular, they had questioned whether or not Te Rauparaha, Te Rangihaeata, Te Hiko, and others had intended to convey the Wairau to Colonel Wakefield. The answer was a resounding 'No', sufficient to convince the commissioner. Because the company was not at that time cooperating with the inquiry, this evidence was taken without its involvement and without considering any company witnesses (see ch 4).

By the time Spain made it to Nelson in 1844, this situation had changed. Wakefield and Clarke were cooperating with the commissioner and with each other in the arbitration–compensation approach. As we have seen, Spain heard evidence from only one Maori witness, the western Te Tau Ihu rangatira Te Iti of Ngati Rarua, and he was not questioned about the Wairau. Meurant's preliminary investigation did not include the Wairau. Likewise, neither Clarke nor Spain visited or inquired there. Ngati Toa were not present. We know from Meurant's diary, however, that one of the Wairau's leading rangatira, Tana Pukekohatu, arrived in time to take part in the two-day hui that decided how to divide the set compensation.[174]

Other than the commission's questioning of leading Ngati Toa chiefs in 1843, therefore, there was no actual inquiry of Maori about the Wairau. As we have seen in chapter 4, that questioning was confined to whether or not the chiefs would admit a 'sale'. There was no investigation of customary rights or how they were distributed, what kinds of layers and overlaps existed, and who was resident or exercising rights of ahi ka. Nor was there any investigation on the spot. Nonetheless, Spain concluded first that Rangitane (without ever meeting or questioning them) were 'reduced to a mere remnant, living in the interior without any fixed dwelling-places, and even now [1845] hunted down by Rauparaha and his retainers'.[175] This was a fanciful assertion, at great variance with the information discovered by Ligar in 1847. Spain was also unaware of the presence of Ngati Rarua at the Wairau. Yet, he argued that, from what he had learnt of Maori law, it was the residents who had the main right of alienation, be they Ngati Toa's allies or defeated peoples occupying on sufferance. Ngati Toa, in Spain's finding, had conquered the district, 'extirpated' or enslaved its original people, and established both residences and cultivations, and they were therefore its bona fide owners.[176]

This was clearly an inadequate inquiry to serve as the basis for reaching such a conclusion. Part of Spain's object was to show the difference between the Ngati Toa leaders' opposition to the company's claim to the Wairau and their lack of opposition (and admission of a conveyance) in the west. But he nonetheless made a finding about who owned the Wairau, on which Governor Grey claimed to rely in 1847.[177]

174. Walzl, *Land Issues*, p 130; see also William Spain, 'Mr Commissioner Spain's Report to Governor FitzRoy, on the New Zealand Company's Claim to the Nelson District', 31 March 1845, *Compendium*, vol 1, p 56
175. 'Spain's Report to FitzRoy', 31 March 1845, *Compendium*, vol 1, p 59
176. Ibid, pp 58–59
177. Grey to Earl Grey, 26 March 1847, *Compendium*, vol 1, p 201

(b) *The Surveyor-General's inquiry*

We discussed the inquiry into the Wairau conducted by Surveyor-General Ligar in 1847 earlier in the chapter. To briefly recap: Ligar informed Grey that most Ngati Toa had withdrawn from the Wairau in the wake of the 1843 conflict. However, a mixed settlement of some 40 Ngati Toa and 10 Rangitane were found living at the whaling settlement of Port Underwood, and although the Surveyor-General described the latter iwi as 'slaves' of Ngati Toa, he was forced to admit that the Rangitane rangatira 'Kaikora' had 'acquired much influence, and may now be considered the head man of the little settlement'.[178] Speculation as to growing European interest in the district had recently encouraged one group to return to the Wairau and resume cultivation in order to assert their claims to ownership of the area. Ligar had also been told about a small number of Rangitane living independently inland who had dispersed themselves across the district, but he did not find or interview them. Nor did he identify Ngati Rarua as having interests in the district, although his list of chiefs whose consent would be required in any purchase of the Wairau included their rangatira Pukekohatu.[179] In addition to those specifically named by him, Ligar also noted that 'there are many who have claims, but these are the chief'.[180] He failed to either name these other owners or describe their tribal affiliations. In the event, Grey chose to ignore Ligar's report and instead proceeded to acquire the Wairau district from just three Ngati Toa chiefs, while at the same time conveniently applying Spain's flawed conclusion of exclusive Ngati Toa rights in the area to a much broader district extending south to the Kaikoura coast.[181]

The claimants and the Crown agree on two fundamental criticisms of Ligar's report. First, they argue that it was incomplete and faulty – the 'many' unidentified right holders remained that way and tribal identities were not properly ascertained and explored. Secondly, they contend that the Government took no notice of the report in any case.

Both criticisms are justified in our view. The former problem might have been overcome if the Government had respected tino rangatiratanga and ensured that the right holders were properly informed of the planned purchase and had been given an opportunity to assemble, debate it, and reach a consensus on whether it should go ahead. Had the Governor relied on the Ligar report, he would have called a hui in the presence of his officials and the 13 identified leaders and left it to the people to make an informed decision. To do so, of course, the Government would have had to make peace with Te Rangihaeata and release the imprisoned chiefs from their captivity.

The Government would also have explored the rights of Rangitane, following up on the fact that Kaikoura was a leader (possibly the main leader) of the Port Underwood community, and the presence of independent Rangitane inland. The Governor needed to satisfy

178. Ligar to Lieutenant-Governor, 8 March 1847, *Compendium*, vol 1, p 203
179. Ibid
180. Ibid
181. Grey to Earl Grey, 26 March 1847 (Phillipson, *Northern South Island: Part 1*, pp 89–90)

himself as to whether a purchase could be valid without including them. He was, after all, on notice from earlier reports of Chief Protector Clarke and Commissioner Spain that the rights of defeated peoples needed to be extinguished in certain circumstances.

But this course was not followed. Ligar's incomplete inquiry was never followed up and was merely set aside.

(3) *Governor Grey's predetermined decision*

We rely on the evidence of the Crown's historian, Mr Macky, that Grey never intended to take any notice of Ligar's inquiry. Mr Macky's report shows that the main reason for the Ligar investigation was a clash between the Governor and the New Zealand Company's principal agent. In June 1846, William Fox's report for the company argued that Spain was incorrect in his assessment of who owned the Wairau. Spain had not investigated the company's claim, and yet he had laid out a guiding principle that the only Maori with a right to alienate land were those who resided on it. Spain had known that Te Rauparaha and Te Rangihaeata lived in the North Island. On Spain's principle, the Wairau belonged to residents, whom Fox claimed were living in one or two small pa, with only 10 acres cultivated in the entire district. This report was forwarded to Grey.[182]

The Governor, however, instructed Colonel McCleverty to go to the Wairau and find out how many Maori were living there, how much land they had under cultivation, and whether North Island Ngati Toa were likely to relocate there. He was then to secure them sufficient land for their future needs before carrying out a purchase. Mr Macky suggests, however, that Grey nonetheless accepted the findings of the Spain report and believed Ngati Toa to be the sole owners of the Wairau, because in November 1846 he instructed McCleverty to take three particular Ngati Toa chiefs there to make reserves. Further, Grey instructed McCleverty to purchase the Wairau from these three chiefs – Rawiri Puaha, Tamihana Te Rauparaha, and Matene Te Whiwhi. McCleverty, however, did not have time to carry out these instructions.[183] Ligar's brief was the same as McCleverty's, except that he was not accompanied by Grey's selected chiefs, nor was he entrusted with the actual purchase.

Colonel Wakefield, on the other hand, did not want to see a transaction made with Ngati Toa (in particular, with the North Island leaders), lest that be seen as confirming the legitimacy of Ngati Toa's actions in the Wairau conflict of 1843. Instead, he advocated that the rights of the (assumedly few) residents were what needed to be purchased. Between December 1846 and February 1847, Wakefield put pressure on Grey, which Mr Macky considers to have been successful. McCleverty's instructions were abandoned, and Grey agreed to send Government and New Zealand Company officials, in Wakefield's description, to 'report on the extent of that district: of what tribe are the natives who claim it, what numbers inhabit it: what cultivations it contains, and whether the owners will sell it'. But Wakefield

182. Macky, 'Crown Purchases in Te Tau Ihu', pp 26–27
183. Ibid, pp 28–29, 39; see also Walzl, *Land Issues*, p 173

also had to compromise – he had to agree that the company might have to make a second payment, 'to a portion of the natives who sold it to the company in 1839.'[184]

As Mr Macky notes, the Governor paid no heed whatsoever to Ligar's report of 13 leading right holders and 'many' unidentified ones. Rather, he summoned the same three chiefs he had always planned to transact with (from at least three months before the Ligar inquiry), and in March 1847 he obtained their signatures to a deed. As we discussed above, these three rangatira were selected not because of their particular status or rights in the Wairau, or their authority over that district, but to serve Grey's political, military, and strategic objectives.

(4) *The effects of the Governor's predetermined decision on Ngati Toa customary right holders*

As we noted previously, Grey informed the Secretary of State that the 'Ngatitoa Tribe, after considerable discussion, agreed to dispose of the required territory, still reserving their claims to that portion of the country which is shown in the accompanying map'.[185] He added that he thought it advisable 'not only to purchase this [Wairau] district . . . but also to endeavour to purchase the whole tract of country claimed by the Ngatitoa Tribe, and extending about 100 miles to the southward of that valley'. The Ngati Toa chiefs wanted £5000 for the district, but Grey, after consultation with Colonel McCleverty, agreed to pay £3000, in five annual instalments of £600 each.[186] Grey's misleading report implied that the agreement had been made with, and the first instalment paid to, the whole of the Ngati Toa 'Tribe', after 'considerable discussion'.

Kemp's account of the proceedings, cited earlier, provides an altogether different picture of the events, as we saw.[187] The Wairau purchase that emerges from his recollection was stitched up in Wellington with a handful of chiefs. It was anything other than the open, careful, and patient transaction the Crown's own proclaimed standards for Crown purchasing demanded.

The purchase was not conducted in public nor decided upon by a tribal or intertribal hui, and it did not take place at or near the district concerned. Did it nonetheless represent the considered views of the principal right holders identified by Ligar, and the 'many' others who had rights? Because Te Rauparaha was detained and Te Rangihaeata was in hiding, Professor Boast (for Ngati Toa) says that:

> Rawiri Puaha and the others seem to have taken it upon themselves to exercise a certain amount of leadership at this time, but it is elementary that they did not necessarily have the authority to commit Ngati Toa to the loss of the Wairau (or anything else for that matter).[188]

184. Macky, 'Crown Purchases in Te Tau Ihu', p 29
185. Grey to Earl Grey, 26 March 1847, *Compendium*, vol 1, p 202
186. Ibid. According to the deed, the first payment was to be made on 18 March 1847, the date the deed was signed; the attached receipt has the same date.
187. Kemp, *Revised Narrative*; see also Boast, 'Ngati Toa and the Upper South Island', vol 2, pp 221–222
188. Boast, 'Ngati Toa and the Upper South Island', vol 2, p 220

5.6.3(4)

Professor Boast adds that, while 'the iwi as a whole might have been willing to endorse anything that Te Rauparaha might have done (even that is subject to qualification) this cannot simply be assumed in the case of these three younger chiefs'.[189] He concludes that:

> The most obvious missing signature on the Wairau deed, of course, is that of Te Rauparaha himself. If the Wairau transaction was a bona fide and willing sale by Ngati Toa of their interests in the Wairau then one might expect Ngati Toa's great chief to head the list of signatories. He was, after all, in the government's custody: it was not that there would have been any difficulty in finding him. But there is nothing to indicate that the transaction was ever discussed with Te Rauparaha, and this raises real doubts about the transparency and fairness of the arrangement.[190]

Professor Boast also argued that the three chiefs who signed the deed 'may have been the spokesmen for the Ngati Kimihia–Ngati Huia kin network but possibly not at all for other sections of Ngati Toa'.[191] Since they were based in the Wellington–Kapiti region, they were also not necessarily representative of those Ngati Toa still resident in the Wairau, more specifically those at Port Underwood, who were led by the still detained Te Kanae (and, it seems, by the Rangitane chief Kaikoura). We note that, during the imprisonment of Te Rauparaha and Te Kanae, resident right holders looked to Puaha to lift the tapu before cultivating.[192] There was some rivalry between Puaha and Te Kanae after the latter's release. According to Mr Macky, Te Kanae was not released until June, some three months after the sale of the Wairau was completed.[193] We have seen no evidence that Te Kanae was consulted about the sale. Though he describes the sale in his memoir, and his release from detention in 1847, he does not mention having been consulted.[194]

After his release, Te Kanae returned to the Wairau and led a group of dissenters (mostly Rangitane) who occupied the 'sold' land in protest at their exclusion from the sale and from the payments. As part of this protest occupation in 1850, Te Kanae also claimed entitlement at Waitohi (which was sold by Te Atiawa). The protest of the resident right holders was eventually resolved by their agreement to move off the land after harvesting their crops, alongside a Government effort to get Rawiri Puaha and his fellow signatories to intervene and enforce 'their' sale. The Government took this approach despite Kemp's acknowledgement at the time that Te Kanae's 'capture and detention on board the *Calliope* prevented his being one of the Principal Sellers – otherwise I believe him to have had as great if not a greater claim than any of the young men who sold the land in that locality'.[195] The Government did

189. Boast, 'Ngati Toa and the Upper South Island', vol 2, p 228
190. Ibid, p 229
191. Ibid, p 228
192. Phillipson, *Northern South Island: Part 1*, p 89
193. Macky, 'Crown Purchases in Te Tau Ihu', p 43
194. Te Kanae, 'History of the Tribes', p 18
195. Kemp to Domett, 15 March 1850 (Walzl, *Land Issues*, p 187)

not investigate such claims but chose to enforce the deed as signed in March 1847. Eventually, Te Kanae and Kaikoura signed a plan to certify the reserve boundaries at Tua Marina in 1851 – it was the consent of these right holders that had to be obtained to arrangements on the ground, as the Government found.[196]

We noted above that Ligar had listed 13 'Ngati Toa' chiefs who had rights in the Wairau and whose consent was needed for any sale. These included Te Kanae and other Ngati Toa leaders who were resident at Port Underwood or whose people exercised resource use in the Wairau district. But Grey ignored Ligar's advice. Ten of the 13 chiefs listed by Ligar as 'owners' were not consulted over the sale of the Wairau, nor were the local residents or the many others whom Ligar mentioned as having claims. As Dr Phillipson concludes, the three signatories 'did not fully represent all the Ngati Toa right-holders, let alone the Ngati Rarua and Rangitane claimants'.[197]

That conclusion is uncontested by the Crown. Mr Macky, the Crown's historian, is largely in agreement with Professor Boast and Dr Phillipson. He argues that, if Te Rauparaha and Te Rangihaeata had agreed to a sale, 'it might well have been that the remaining Ngati Toa rights holders would have been persuaded to agree to a sale as well'.[198] Mr Macky admits that, as early as July 1846 (when Te Rauparaha was captured and Te Rangihaeata was resisting Grey's forces on the Kapiti coast), the two chiefs 'had been taken out of the equation for any negotiations over Wairau'.[199] At that time, Grey instructed his officials that, in any discussions over the Wairau, 'if Te Rangihaeata claimed it would be rejected on the grounds of his being in arms and a traitor'.[200] But Mr Macky makes no comment on Grey's refusal to negotiate with Te Rauparaha and two other Ngati Toa chiefs who were detained with him, Te Kanae and Tamaihengia. Since these three had not taken up arms against the Crown and were never charged with any offence, they could not have been regarded as rebels.

We find that the Crown purchased the Wairau behind closed doors and from just three Ngati Toa chiefs, knowingly violating the rights of other senior leaders and of the tribe. This was an absolute and deliberate breach of article 2 of the Treaty, and of the Treaty principles of reciprocity, partnership, active protection, and equal treatment. Had the Crown had regard to its partnership with Maori and its obligations under article 2, it would have given effect to their tino rangatiratanga by convening a public hui at or near the district under negotiation (as it was to do for Pakawau, discussed in our next chapter). It would have ensured that the tribe had a chance to consider the Crown's offer and come to a deliberate and informed decision by means of its own customary decision-making mechanisms. It would have ensured that the 13 principal leaders, as identified by its own inquiry, were

196. Walzl, *Land Issues*, pp 184–191; Armstrong, 'Right of Deciding', pp 64–80
197. Phillipson, *Northern South Island: Part 1*, p 95
198. Macky, 'Crown Purchases in Te Tau Ihu', p 37
199. Ibid, p 38
200. Saxton, diary, 29 July 1846; Macky, 'Crown Purchases in Te Tau Ihu', p 38

present and consented to the transaction. Above all, it would have given all legitimate right holders the opportunity for a genuine and informed choice. The Crown's purchase of the Wairau from Ngati Toa fails to meet a single one of its Treaty obligations, and is in very serious breach of Treaty principles.

(5) *The effects of the Governor's predetermined decision on Ngati Rarua right holders*

We turn now to the question of whether the rights of others besides Ngati Toa were properly considered in the Wairau purchase. We begin with Ngati Rarua, one of Ngati Toa's allies, who were so closely related to Ngati Toa that they were sometimes considered part of them. Their historian, Tony Walzl, examined the Wairau transaction at some length and could find little evidence of Ngati Rarua's involvement (and no evidence of their consent). Ligar's description of some 40 Ngati Toa and 10 Rangitane living at Port Underwood must, in Mr Walzl's evidence, have included Ngati Rarua.[201] Pukekohatu, who Ligar listed as a 'Ngati Toa' chief, was 'distinctly Ngati Rarua'.[202] In the claimants' evidence, two of the 13 principal right holders, as identified by Ligar, were Ngati Rarua: Pukekohatu and Pikiwau (Te Whawharua). On the validity of the purchase itself, Mr Walzl concludes that, although Grey negotiated with 'important Ngati Toa chiefs, they could not have represented all rightholders including resident Ngati Rarua'.[203]

Some of the 40 described by Ligar as 'Ngati Toa' at Port Underwood were Ngati Rarua, including the chief Pukekohatu. Though they may not have been a separate community at Port Underwood, this is immaterial since they were not consulted and their senior chief, Pukekohatu, did not sign the deed. Dr Ballara argues that Ligar filtered and misinterpreted what he was told and who he identified.[204] Mr Macky, on the other hand, suggested that Ligar identified these people as Ngati Toa because they must have told him that they were.[205] It is not necessary for the Tribunal to resolve the point, since Grey stuck with his predetermined plan to deal with three already chosen Porirua chiefs and ignored all other right holders, no matter what their tribal affiliations.

We agree with Ngati Rarua's submission that the Ligar report put the Governor on notice that the consent of 13 leading chiefs was required (including Pukekohatu) and that there were 'many' other right holders yet to be identified.[206] As with the wider community of Ngati Toa right holders and leaders, the Ngati Rarua people were entitled to participate in the decision-making and to give a free and informed consent (or refusal) to the purchase.

201. Walzl, *Land Issues*, p 184
202. Ibid, p 210
203. Ibid
204. Dr Angela Ballara, 'Customary Maori Land Tenure in Te Tau Ihu (The Northern South Island), 1820–1860: An Overview Report on Te Tau Ihu (Wai 785)', report commissioned by the Crown Forestry Rental Trust, 2001 (doc D1), p 220
205. Macky, 'Crown Purchases in Te Tau Ihu', pp 33–36
206. Counsel for Ngati Rarua, closing submissions, pp 41–44

We find that the Crown knowingly and deliberately purchased the Wairau without the consent of its resident right holders, including Ngati Rarua, in serious breach of article 2 of the Treaty. As we found above, this was a deliberate suppression of their tino rangatiratanga, and in violation of the principles of reciprocity, partnership, active protection, and equal treatment.

(6) *The effects of the Governor's predetermined decision on Rangitane right holders*

The evidence of Mr Armstrong and the Rangitane claimants, and the submission of their counsel, is to the effect that Rangitane clearly had customary rights at the time of the Wairau purchase. Relying on Mr Armstrong's evidence, counsel set out the various occasions on which Rangitane asserted their right to be consulted and paid, and their protest at being excluded, after the signing of the Wairau deed.

From our discussion in chapter 2, we have no firm information on whether defeated peoples asserted any rights in the early 1840s in negotiations for the alienation of land. Although they attended and witnessed the transaction with Wakefield in 1841, for example, Meihana Kereopa did not claim that they participated in making the decision. It is unknown whether Kurahaupo people were included in Wakefield's gifts. As we have found in chapter 4, they were present at the Nelson hui of 1844 to resolve the division of Spain's compensation, and Ngati Kuia later claimed to have participated in those payments. Finally, in 1847, Ligar's interviews with the Port Underwood community suggested that its Rangitane members were not advancing a claim of their own. He noted, however, Kaikoura's authority as a leader of the community and the existence of independent people living inland whose status and rights he did not explore.

We note also:

- Spain's finding in the 1840s that defeated peoples retained rights where they remained in occupation (a view also reported to the Government by the chief protector), thus requiring the Government to at least consider and investigate this as a possibility;
- that 'fugitives' who had never been defeated were coming in and joining settled 'tributary' communities;
- that tributary communities continued to exist on their ancestral land and under their own chiefs; and
- that the conquerors relied to some extent on the spiritual power and knowledge of the defeated peoples, their sacred sites and tohunga, and their naming of the land, and began to arrange marriages to create whakapapa and political links. Kaikoura, for example, played a leading role in explaining and identifying the rohe to Ligar, and he also joined Te Kanae as the two chiefs who signed the plan certifying the boundaries of the reserve.

From at least 1849, Rangitane in the Wairau disputed the 1847 purchase by occupying 'sold' land with the agreement of a similarly excluded Ngati Toa chief, and they also advanced a

claim of their own to payment by the Crown. The Government asked the three signatory chiefs to move these people off the disputed land and they agreed to do so, but the matter appears to have been resolved by Te Kanae and Rangitane agreeing with the Government that they would move after harvesting their crops. Further, the attempt to survey a road through the Kaituna district was met with resistance from Ngati Kuia and Rangitane inhabitants. By the early 1850s, the Kurahaupo people were asserting a clear and independent claim to land in the Kaituna and Pelorus areas, to some disapproval from Ngati Toa. Kaikoura, though supposedly having no rights according to the 1847 Ligar report, nonetheless witnessed and approved the boundaries of the Wairau reserve in 1851, alongside Te Kanae.[207] Te Kanae was a leader for both tribes and had made an important peace-making marriage with Mere Te Rapu of Rangitane.

In our view, the tribes residing in the Wairau were working together in the late 1840s and early 1850s to protest the sale of their land without their consent (or payment). A layer of legitimate Rangitane rights had survived their defeat, although those rights were no longer exclusive. The fact that Rangitane, in common with others at the Wairau, looked to Ngati Toa chiefs for leadership at this time, especially Te Kanae and Puaha, did not change the existence of their own customary rights. Those rights were guaranteed and protected by the Treaty and in our view extended at least as far south as Waiau-toa. The Governor's predetermined decision to buy the Wairau from his three chosen Ngati Toa chiefs meant that Ligar's failure to properly examine and identify Rangitane's rights was immaterial. The Crown's purchase of their land, without their participation or consent, was in serious breach of article 2 of the Treaty and of its principles. This breach was compounded by the Crown's failure to investigate Rangitane's post-sale protest or to uncover and satisfy their undoubted rights at that point. Instead, the Crown tried to enforce the sale by requesting its selected chiefs to enforce it. Although this was ultimately unnecessary and the protesters agreed to withdraw, both sides had made their point.

(7) *Was the Wairau deed valid?*

In this section, we discuss a number of issues relating to the Wairau deed, though once again we are hampered by a lack of evidence on important issues. As was commonly the case with early Crown purchases, there is little evidence on whether the deed, in its Maori and English texts, fully recorded what was being conveyed and whether the three signatories properly understood what they were conveying. This includes the adequacy of the description of the boundaries of the purchase and the promised reserves.

We begin with some remarks on the signing of the deed. Both texts list the three Ngati Toa signatories, one of whom, Puaha, attached his mark. The other two, who had recently been at Bishop Selwyn's St John's College, wrote their signatures. Four witnesses were listed on

207. Armstrong, 'Right of Deciding', pp 64–80; Walzl, *Land Issues*, pp 184–191

the Maori text: W F G Servantes, described as 'Lieut 6th Regt, Interpreter to Forces'; Robert Jenkins, the Wesleyan missionary who had assisted Ligar at Port Underwood; William F Christian, a Wellington merchant; and Lieutenant-Colonel W A McCleverty. We are unsure of Servantes' competence in Maori, though he did have a Ngati Toa wife. It is not clear why either Kemp or Henry Clarke was not used as the official interpreter, though Henry Clarke may have done some translation. They were sons of missionaries who had been brought up in New Zealand and were competent in Maori.[208] Kemp claimed to have personally drawn up the deed.[209] In addition to Servantes and McCleverty, Edward Last, a major in the 99th Regiment, was used as one of the witnesses for the payment of the first instalment, suggesting that there was a fairly heavy military presence at the signing.

We now discuss several issues related to the texts of the deed. The English text describes the boundaries of some of the lands that had been 'given up' to the Governor. 'Given up' is rendered as 'tukua ano' in the Maori text. Since the use of 'ano' affirms 'tukua', the action of giving up, we can assume that the signatories were affirming their giving up the land. This fits with the idea that we have discussed above – that the chiefs were giving it up to the Governor as utu for the deaths at the Wairau, and giving up land as far as Kaiapoi to get utu for their dead at that earlier engagement with Ngai Tahu. It is perhaps significant that the deed does not use the term 'tukua rawatia' (give up fully). Kemp used this when he drew up the Ngai Tahu deed in June 1848 and it was also used in the Waitohi deed of 4 May 1850 (which we discuss more fully below).[210] Kemp must have been conscious of the differences between the Maori texts of the Wairau and Canterbury deeds, if, as seems likely, he drafted both of them. The Wairau deed does not say that the land was to be surrendered 'for ever' (ake ake), a term that was also used in the Waitohi deed, nor does it use the term 'sell'. This could have been rendered as 'hoko' or 'hokonga', as in article 2 of the Treaty when granting the Queen a right of pre-emption to buy land that Maori wished to sell, or 'hokona' as it was rendered in the 1850 Waitohi deed.[211]

We now discuss the depiction of the boundaries of the Wairau purchase, noting Professor Boast's description of the deed as 'quite brief and vague to the point of incomprehensibility'.[212] The Wairau purchase initiated a new policy whereby the Crown 'purchased' all the rights of a particular iwi to a large vaguely defined district, rather than all rights of all iwi to a specifically defined block. As we noted earlier in the chapter, this first 'blanket' purchase, owing much as it did to the 'waste lands' theory, provided the original model for later transactions, including the Waipounamu purchase of 1853–56.

208. Phillipson says that George Clarke's son Henry was the interpreter at the sale, though other sources describe Servantes as taking that role: Phillipson, *Northern South Island: Part 1*, p 94.

209. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, p 402

210. *Compendium*, vol 1, p 210

211. Ibid, p 267

212. Boast, 'Ngati Toa and the Upper South Island', vol 2, p 232

5.6.3(7)

In discussing the territorial limits of the Wairau transaction, we need to bear in mind Maori attitudes to boundaries. Although it was common for Maori spokesmen to define their territory by way of significant tohu (marks or signs), these did not necessarily mean the finite boundary lines that were recorded after survey on European maps or plans, which Crown officials usually had in mind when buying Maori land. While Maori territory could include significant physical features, such as tribal mountains, these were not necessarily on boundaries and were often in the middle of their territories. Valued sites were often the locations of important historical events: where battles were fought and slain chiefs were buried, as we have noted above for the Ngati Toa claim to Kaiapoi, or even where more mundane things happened to important ancestors (such as the naming of Te Mimi o Kupe – where Kupe urinated – discussed below in relation to Waitohi). Chief Judge Durie, as he then was, observed during the Ngati Awa hearing that Maori 'boundaries' were always flexible and there was often a buffer or contestable zone between tribal territories. There were also overlapping claims, with several iwi or hapu having rights within an area. Furthermore, as *The Ngati Awa Raupatu Report* put it, 'Maori existence was founded not upon political boundaries, which serve to divide, but upon whakapapa or genealogical ties, which serve to unite or bind'. That report went on to say that the 'formulation of dividing lines was usually a matter of last resort', particularly in times of war or threats of war.[213]

Maori also had a flexible way of describing places, with a name such as the Wairau not necessarily being restricted to the narrow confines of the river or the adjoining valley but extending indefinitely. This notion could easily be misinterpreted by Pakeha officials. For instance, when Maori at Port Underwood refused to name an interior boundary for the Wairau, Ligar thought this meant that they had no interest in it.[214] It is more likely that they merely thought Ligar's question was irrelevant. And, on the coast, they stretched the meaning of the Wairau all the way to Kaiapoi, not because there was any physical connection but rather because of the all-important historical one relating to the deaths of the Ngati Toa chiefs in 1831. Moreover, the definition of Kaiapoi was flexible as well, and more likely referred to a considerable district and not just the site of the battle, as the Ngai Tahu Tribunal recognised. The trouble was that Crown officials took advantage of the vagueness, buying the interest of one iwi at a time and then putting that iwi's important sites as boundary markers on the land. It was probably not a coincidence that in this instance the boundary of the Wairau purchase was taken all the way to the New Zealand Company's old 43rd parallel line that was on the original Kapiti and Queen Charlotte Sound deeds. Then, when the Canterbury purchase was negotiated the following year, the northern boundary of that was stretched to the southern boundary of the Wairau purchase.[215]

213. Waitangi Tribunal, *The Ngati Awa Raupatu Report* (Wellington: Legislation Direct, 1999), p 133
214. Ligar to Grey, 8 March 1847 (Macky, 'Crown Purchases in Te Tau Ihu', p 50)
215. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, p 413

We return to the boundaries that were described in the Wairau deed. The coastal boundary apparently went all the way from the Wairau outlet, around Cape Campbell, on to Kaikoura, and finally to Kaiapoi, some 22 kilometres north of Christchurch. There is no description of a boundary for most of the interior. The western boundary is not at all clear, but it appears to have been defined by indistinct boundaries of the land that was to be reserved for Ngati Toa. It was described as 'running from the north [?bank] of the River Wairau until you come to Waikakaho' (a tributary five kilometres upstream from Tuamarina) and 'takes a straight course along that river', though adding that 'neither Kaituna [a river valley] nor Te Hoiere [Pelorus Sound] have been given up by us'. The deed gives a fuller, but by no means definitive, description of the boundaries of the one-mile strip running from the bank of the Wairau one mile along the Tuamarina Stream (thus including the site of the 1843 conflict) that was to be cut out of the reserve. That might be significant in that it indicates how much pressure Grey put on getting utu for the New Zealand Company men who were killed. As Mr Armstrong points out, maps that were subsequently produced showed the reserved areas more clearly, 'at least as far as the Crown understood them'.[216] Though some commentators from Mackay onwards referred to two reserves separated by a corridor of Crown land running up the Tuamarina Valley to Waitohi (Picton), the plan attached to the deed shows that the corridor did not reach Waitohi and thus did not quite bisect the reserve.[217]

Professor Boast says that the Crown took a further strip of land on the coast running north along Cloudy Bay from the Wairau Bar to Port Underwood.[218] This was outside the northern purchase boundary at the Wairau River. The taking of the coast to Port Underwood gave the Crown control of other possible harbours and roadsteads.[219]

There was some clarification of the reserve boundaries when these were surveyed by Charles Brunner in 1851. On 14 March 1851, Wi Kanae and Hakaraia Kaikoura wrote to Major Richmond saying that they had seen Brunner's survey and 'the boundary is quite correct, according to our idea, as it has been laid down on the plan; and we have signed our names to it. The part coloured red is that which is reserved for us; the white is that for the Pakehas; and the boundary is between.'[220] This letter seemed to indicate final approval of the Wairau purchase and the setting aside of the reserve promised, but there are some doubts as to the spontaneity of the approval. Mr Walzl points to a letter from Brunner to Richmond in which he admitted that after the survey he had had some difficulty getting signatures to the endorsement, which he put down to 'temerity to sign their names to a second Plan of the same District'. Mr Walzl notes the irony of the Government now having to get the signatures

216. Armstrong, 'Right of Deciding', p 60
217. *Compendium*, vol 1, p 265. The plan is reproduced in Phillipson, *Northern South Island: Part 1*, p 228
218. Boast, 'Ngati Toa and the Upper South Island', vol 2, p 234
219. Armstrong, 'Right of Deciding', pp 60–61
220. *Compendium*, vol 1, pp 205–206

of local people who had been ignored during the original Wairau purchase in order to now end their occupation of land that had been allocated to settlers.[221] Mr Macky admits that the letter signed by Te Kanae and others was 'a pro forma letter provided by Richmond'.[222] This is a useful reminder that the genesis of documents – and they are usually made by agents of the Crown – can be as important as their content.

In 1850, Servantes explained how the southern part of the eastern boundary had been fixed. As he put it, 'The natives were in the first place asked to dispose of the Wairau Valley only; but they themselves proposed to cede all their lands as far as Kaiapoi to which point they stated that the property to which they had a sole title extended.' The 'Kaiapoi' mentioned here was the old Kaiapohia Pa near the mouth of the Ashley River, some eight kilometres north of the present settlement of Kaiapoi. It was claimed by Ngati Toa because some of their chiefs had been killed there by Ngai Tahu in 1831. Though Servantes admitted that there were doubts whether the Ngati Toa title extended to 'Kaiapoi', he said:

> it was thought advisable to include the land in question from Kaikoura to Kaiapoi in the deed of sale, in order to extinguish whatever claims the Ngati Toas had to it, for if excluded, and the boundary fixed at Kaikoura, it was quite certain that they would dispute the right of any tribe or persons who might afterwards wish to dispose of it.[223]

As Servantes admitted, the Crown was buying 'whatever claims' Ngati Toa had as far as Kaiapoi. He also admitted that Ngai Tahu had a claim to Kaiapoi, though he doubted whether, in terms of custom, it was any better than Ngati Toa's claim. Grey at this stage was merely attempting to purchase Ngati Toa's rights, but when Kemp purchased the Canterbury block from Ngai Tahu in June 1848 the northern boundary of that was described as the southern boundary of the Wairau purchase. However, when the Crown grant that included the Wairau was issued to the New Zealand Company on 1 August 1848, the southern boundary was fixed at a 'Kaiapoi' at the mouth of the Hurunui River some 70 kilometres north of the Ashley River Kaiapoi. The matter was fully discussed in the Tribunal's *Ngai Tahu Report 1991* and we make further reference to it in our section 5.7.

Finally, on the question of boundaries, we note that there was no description or definition of an inland boundary in the Wairau deed, apart from the western boundary along the Wairau River and tributaries described above. Mr Macky suggests that this may have reflected the fact that Port Underwood Maori did not see the relevance of an inland boundary when Ligar tried to discuss it with them. As Ligar reported, 'I endeavoured to obtain the inland boundaries or limits; but the natives and Kaikoura seem never to have

221. Walzl, *Land Issues*, p 215
222. Macky, 'Crown Purchases in Te Tau Ihu', p 51
223. W F G Servantes, 'Memorandum Explaining Why the Nominal Boundary of the Wairau Purchase was Placed at Kaiapoi,' 4 September 1850 (Macky, 'Crown Purchases in Te Tau Ihu', p 40)

given them a thought, and looked upon my inquisitiveness on this point as useless and troublesome.'[224]

Since the Port Underwood Maori were not asked to sign the deed, their attitude to the inland boundary is scarcely relevant. Nor were any representatives of Ngati Apa asked to sign, though they do claim to have retained their rights in the interior. There is no evidence that their rights were the subject of due inquiry, and given the later exclusion of Ngati Apa from the Waipounamu purchase, that seems highly unlikely. We have seen no record of what the three Ngati Toa signatories may have thought of an inland boundary. But they too may have not been interested, since Ngati Toa did not conquer or occupy the interior during their pre-1840 expeditions to Te Tau Ihu. Mr Macky says that the failure to define the inland boundary 'does not seem to have been the occasion of great difficulty'.[225] He found no record of protest over it. Though other researchers also noted the failure to define the inland boundary, they made nothing of it. It is unlikely that this internal boundary was ever surveyed, but as often happened with such early purchases, a line was drawn on a map – in this case from the headwaters of the Wairau due south to 'Kaiapoi' on the coast near the 43rd parallel. We can conclude that much of the Wairau was thereby acquired for the Crown by an unknown cartographer without reference to, or the approval of, the three Ngati Toa vendors.

In our view, it was incumbent on the Crown, in purchasing Maori land under the Treaty, to spell out clearly and unambiguously the boundaries of the land involved. They needed to be marked clearly on a map or plan, pointed out to and discussed with the vendors, and preferably, as happened with Otakou and some later Crown purchases, the boundaries needed to be walked with the claimants. Ideally, it would have been preferable to survey the boundaries as well. Finally, we say that the purchase should have been discussed openly, at a hui, where all who had claims had the opportunity to promote them against rivals and to the Crown. None of these things happened with the Wairau purchase. It was, as we have said, a deal done in Wellington behind closed doors with three hardly representative chiefs. It is not surprising that the mix-up over the precise locality of Kaiapoi occurred.

We find that the Wairau deed did not in various respects measure up to the standard required for the Crown to make a valid purchase under the Treaty. The breaches included a failure to properly describe the boundaries of the land, including the boundaries of the reserve and the western or inland boundaries of the transaction as a whole, and the shifting of the southern 'Kaiapoi' boundary without the consent of the signatories and other right holders. These Crown actions were in direct breach of article 2 of the Treaty, which provided for the alienation of '*such lands* as the proprietors thereof may be disposed to alienate' (emphasis added), and the principles of active protection and partnership.

224. Ligar to Lieutenant-Governor, 8 March 1847, *Compendium*, vol 1, p 203; Macky, 'Crown Purchases in Te Tau Ihu', p 50

225. Macky, 'Crown Purchases in Te Tau Ihu', p 50

5.6.3(8)

(8) *Were the payments adequate and properly distributed to customary right holders?*

As we noted, the Wairau deed recorded a total purchase price of £3000 to be paid in five annual instalments of £600. We noted also that the chiefs' request for £5000 was reduced on McCleverty's recommendation. McCleverty had been sent to the colony to arbitrate New Zealand Company compensation payments to Maori in Wellington and Nelson. It is strange that he was now used to advise on what was, after all, a Crown purchase. Grey appears to have been using him to beat down the price. Though Wakefield complained that the final price was 'lavish', this was probably because he feared the company would have to reimburse the Government before it could use the land to meet its obligations to its Nelson settlers.[226] Grey's view on the price depended on whom he was talking to. He told Earl Grey that the price of £3000 was 'a reasonable and proper sum', and then he went on to say, with some exaggeration of Ligar's report, that the purchased district contained '80,000 acres of the finest agricultural land, and about 240,000 acres of the finest pastoral land'.[227] A fortnight later, he told Earl Grey that the district was 'so large that, in reference to its quantity and value, the payment for it cannot but be regarded as small'. Governor Grey was buying Maori land quickly – before Maori realised its full value. As he put it, they:

> are now generally willing to sell to the Government their waste lands at a price which, whilst it bears no proportion to the amount for which the Government can resell the land, affords the natives (if paid under a judicious system) the means of rendering their position permanently far more comfortable than previously, when they had the use of their waste lands.[228]

Giving evidence to the Smith–Nairn commission in 1879, Grey described the price paid for the Wairau as 'very trifling'.[229] By 1856, the bulk of the 117,428-acre Wairau reserve – which helped to justify the low price and clinch the deal – had been taken by the Waipounamu purchases and it could indeed now be said that the price for the Wairau had been 'very trifling'. The 'real payment' promised through the gradually increasing value of the reserve had been rendered null and void in less than a decade.

There was of course nothing new in Grey's policy of buying cheaply and selling dearly: as we have said, it goes all the way back to Lord Normanby's instructions to Hobson (though Normanby had qualified that policy by saying that Maori should receive a 'fair' price and not be required to sell land that was essential for their welfare). And selling dearly – for a 'sufficient price' – was necessary to provide funds for immigration and infrastructure, though no one appears to have been concerned that these two developments would fuel demands for yet more Maori land. But the high on-sale price was also intended to have direct benefits

226. Macky, 'Crown Purchases in Te Tau Ihu', p 46
227. Grey to Earl Grey, 26 March 1847, *Compendium*, vol 1, p 202
228. Grey to Earl Grey, 7 April 1847 (Phillipson, *Northern South Island: Part 1*, pp 90–91)
229. Sir George Grey, evidence, 5 December 1879, MA67/4, ArchivesNZ (Macky, 'Crown Purchases in Te Tau Ihu', p 47)

for Maori. In 1841, the Secretary of State for the Colonies, Lord Russell, had instructed that a sum amounting to no less than 15 per cent of the gross proceeds from land sales should be set aside for expenditure upon Maori purposes.[230] Yet, the costs of the protector of aborigines swallowed up most of this sum in the early years, and although there was an increase in direct expenditure upon Maori health and education after Grey's abolition of the protectorate in 1846, the specific requirement to set aside 15 per cent of the total land fund revenue for these purposes was later forgotten.[231] To the extent that funding for schools, hospitals, and other purposes out of the 15 per cent was also considered to be part of the payment for land, Te Tau Ihu Maori did not receive the benefits envisaged by Crown officials as an essential component of the land purchase system. We consider the provision of health care and education within Te Tau Ihu in chapter 10.

A second issue related to the payment for the Wairau was Grey's 'new' method of payment by instalments. Grey informed Earl Grey that this system would enable him to have:

> a powerful influence on the future advancement of the Natives in civilization. . . . They are already making rapid and unexpected strides in the arts of civilized life, and the funds thus supplied them will materially assist their advancement, whilst the experience of each year will render it probable that every successive annual payment will be more judiciously expended . . .

But, as we noted above, there was a rather more sinister aspect to the instalment policy – that it would give Grey 'an almost unlimited influence' over Ngati Toa.[232] This was no idle threat. Early in 1850 the three signatories of the Wairau deed were threatened by Grey that unless they personally stopped some local Ngati Toa and Rangitane from occupying land allotted to a Nelson settler, the Government would suspend the instalment that was due.[233] At a fundamental level, the dispute in question had arisen from the exclusion of resident Maori from the transaction. There were also more immediate factors at work, including the failure of the three chiefs to distribute a share of previous instalment payments to local residents and the failure of either the company or the Government to survey the boundaries of the reserves and rural lots intended for settlers.

There was nothing wrong in principle with payment by instalments, provided the recipient chiefs distributed the money fairly among other right holders, as would have been expected under customary rules. The dispute in 1850 was resolved and the instalment due was paid, as were the remaining two. All instalments were paid to the three signatories. But, from the evidence presented to us, it seems that the three chiefs retained most, if not all, of

230. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, p 273

231. Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), pp 84–86; Campbell, 'A Living People', pp 133–137; Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, pp 273–274

232. Grey to Earl Grey, 26 March 1847, *Compendium*, vol 1, p 202

233. Domett to Richmond, 6 March 1850 (Boast, 'Ngati Toa and the Upper South Island', vol 2, p 238); see also Macky, 'Crown Purchases in Te Tau Ihu', pp 58–59

the payments for their personal uses. Bishop Selwyn said in 1856 that the money paid for the Wairau was 'retained by the principal chiefs in large sums, who appropriated them to their own use, and part of the money was lodged in the bank by one of the young chiefs for his sole benefit'.[234] Following complaints that the three chiefs had not distributed the first instalment, Servantes was asked in March 1848 to make recommendations on how the next instalment could be most satisfactorily paid 'to the largest number of natives interested'.[235] Although Servantes did not make a detailed inquiry into the fate of the previous payment, he did confirm that right holders at Porirua and the Wairau had not received a share. Nevertheless, he claimed that the existing method of payment was 'satisfactory to the great body of the natives interested'. But he recommended that, when the next instalment was paid, the three chiefs should be directed to distribute the money to all right holders in the presence of the person overseeing the payment. Mr Macky says that there is no record after that of what happened to the remaining payments. However, he does record (from Bishop Hadfield) that in May 1848 Tamihana Te Rauparaha offered a £200 share to his father, who advised him to put it in the bank.[236]

There is only limited documentation on the fate of subsequent instalment payments, but there is some evidence that other right holders were not paid. Mr Macky quotes Tinline's explanation that 'the most important reason of all' why Rangitane were squatting on settler sections was their 'having never received a penny of the purchase money'.[237] Mr Macky thinks that Ngati Toa and Ngati Rarua were involved as well since their spokesman, Te Kanae, was as Kemp described it, 'being *instrumental* in raising an opposition' (emphasis in original). He hoped 'to obtain a full share of the payment now nearly due'. Kemp added that 'his capture and detention aboard the *Calliope* prevented his being one of the principal sellers – otherwise I believe him to have had as great if not a greater claim than any of the young men who sold the land in that locality'.[238] However, Mr Macky says that Te Kanae himself did not complain to officials at this stage that he had been excluded from the Wairau payments.[239] He may not have complained but he did, as Mr Macky later admits, tell Richmond in November 1850 that 'he had received none of the payment for the Wairau district'.[240] Mr Walzl, on the other hand, says Richmond reported Te Kanae's 'complaint' that he had not been paid.[241] However we interpret Richmond's letter, Te Kanae was certainly making it clear he had not been paid.

234. G A Selwyn, evidence to board of inquiry, 1856 (Phillipson, *Northern South Island: Part 1*, p 92)
235. Servantes to Domett, 27 March 1848 (Macky, 'Crown Purchases in Te Tau Ihu', p 53)
236. Macky, 'Crown Purchases in Te Tau Ihu', p 54
237. Tinline to Richmond, 18 February 1850 (Macky, 'Crown Purchases in Te Tau Ihu', p 57); also Boast, 'Ngati Toa and the Upper South Island', vol 2, pp 239–240
238. Kemp to Colonial Secretary, 15 March 1850 (Macky, 'Crown Purchases in Te Tau Ihu', p 58)
239. Macky, 'Crown Purchases in Te Tau Ihu', p 58
240. Richmond to Colonial Secretary, 15 November 1850 (Macky, 'Crown Purchases in Te Tau Ihu', p 61)
241. Walzl, *Land Issues*, p 214

Though the documentation is inconclusive, it appears that Rangitane did not receive any of the purchase money, as Mr Macky admits. It is also unlikely, in our view, that resident Ngati Toa and Ngati Rarua received any either. Some of the money might have been dispersed among Porirua Ngati Toa, however, though we have no documentary evidence of this. Mr Macky speculates, without providing evidence, that 'Other right holders may . . . have been appeased by the payment to them of some of the purchase money.' 'Even so,' he concludes, 'there are also doubts as to the distribution of this purchase money.' Mr Macky also admits that the Government could have followed up the Servantes inquiry of 1848 in respect to later instalment payments and that it did not 'appear to have done all it could to ensure that the distribution was as fair as possible'.[242] In view of Grey's expansive claims about the benefits of his new system of instalment payments, this was the least the Government should have done. Nor were the Wairau residents the only ones to complain at being excluded from the Wairau payments. In May 1856, nine years after the sale, Ngai Tahu at Kaiapoi were threatening to obstruct the resolution of claims at Banks Peninsula unless the Government paid them for their interests north of Kaiapoi.[243]

We find that the price paid in the Wairau transaction was inadequate, and that the Crown acted contrary to the Treaty principles of partnership and active protection in knowingly insisting upon such a small sum. Although the relatively large reserve set aside was consistent with arguments that the 'real payment' would come through the rising value of the lands retained by Maori as settlement increased around them, that was no longer the case after the reserve was included in the Waipounamu series of purchases just a few years later.

We further find that the Crown failed to ensure that the instalment payments for the Wairau were properly distributed to right holders, Ngati Toa or others. This failure was in breach of the principles of active protection and equal treatment. As a result, the great majority of Maori right holders were not consulted about the purchase, were deprived of their tino rangatiratanga, did not consent to the purchase, and were never paid as part of that purchase. Taken together, these Crown actions were in very serious breach of the Treaty of Waitangi and its principles.

(9) *Were the failures of the Wairau purchase mitigated by the inclusion of right holders in the Waipounamu purchase?*

In 1848, Governor Grey issued a Crown grant of land to the New Zealand Company (see fig 10). It included the entirety of the Te Tau Ihu land that he claimed to have purchased from Puaha, Te Whiwhi, and Tamihana Te Rauparaha. From that point on, the settlers had all legal rights to the land and Maori had none (save their reserve). In 1851, when the company's affairs were wound up, any unallocated land reverted to the Crown.[244] As we shall see,

242. Macky, 'Crown Purchases in Te Tau Ihu', p 63
243. Phillipson, *Northern South Island: Part 1*, p 93
244. Macky, 'Crown Purchases in Te Tau Ihu', p 52

5.6.3(9)

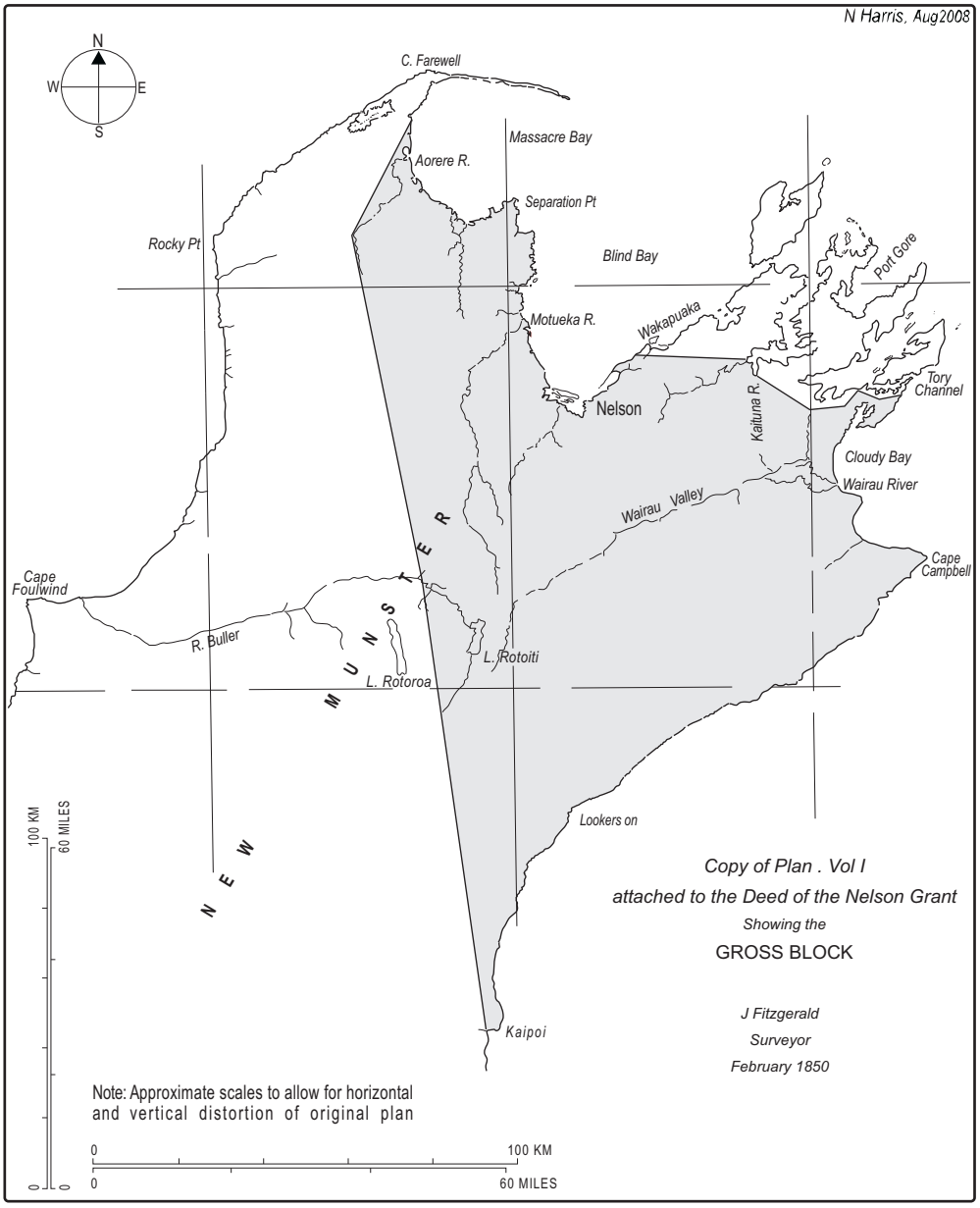

Figure 10: The New Zealand Company Nelson grant, 1848

Source: Nelson Crown grant

in the Waipounamu purchase of 1853–56, the three iwi with rights at the Wairau – Ngati Toa, Ngati Rarua, and Rangitane – signed deeds purporting to sell all their rights wherever they happened to be. The Rangitane deed specified: 'all the lands of the Rangitane from Wairau to Arahura, running inland as far as the claims of the tribe of the Rangitane extend.'[245]

245. 'Receipt for £100 paid to Rangitane', 1 February 1856, *Compendium*, vol 1, p 313

For reasons that will be explained in chapter 6, we do not consider this to have been a free and willing sale, even within the wider ambit of the Waipounamu negotiations. Regardless, it was certainly not a free and willing sale of rights in Wairau land already granted by the Crown to others. It is simply and clearly inconsistent with the Treaty guarantees for the Crown to grant settlers land with unextinguished customary rights. Whatever the Wairau purchase deed may have purported to do, it did not extinguish the customary rights of those Maori who were not a party to it. As we have found, that included the majority of Ngati Toa, and also the resident Ngati Rarua and Rangitane right holders. The action which extinguished their rights at British law was the Crown's grant of the land to others in fee simple. In theory, there was no going back from that point. In practice, the Crown resumed ownership of a very large territory in 1851 and could have returned land to Maori who had not sold their rights and did not wish to do so, without any injustice to settlers. Instead, it maintained and defended its title.

Thus, although the Crown may have paid some excluded right holders years later during the Waipounamu purchase, this could not mitigate the absolute suppression of their tino rangatiratanga in 1847 and 1848. We find that the Waipounamu purchase could not and did not make willing sellers of those whose rights had already been granted to others, in violation of the plain meaning of article 2 of the Treaty, and of the principles of reciprocity, partnership, and active protection.

Further, the Crown was in breach of the Treaty principle of equity by its action in granting the Wairau to the New Zealand Company (despite its knowledge from the Ligar report of unextinguished customary rights) and its maintaining of the grant (despite the protest occupations of Te Kanae and Rangitane). In 1845, FitzRoy had granted 151,000 acres to the company for its Nelson settlement, but the company was permitted to refuse the grant. As we discuss in more detail below, that grant was then replaced by a much more favourable one in 1848.[246] Te Tau Ihu Maori, on the other hand, were not permitted to repudiate the 1847 Wairau deed or to reject the 1848 grant. Maori and settlers were not treated equally. In 1847–48, the Government took determined steps to ensure that the company's commitments to its settlers were fulfilled. Settlers received their land not as a result of a free and informed Maori consent to the loss of theirs but rather in the knowledge that the foundation purchase deed rested on the signature of only three of 13 identified principal leaders whose consent was required. As the Crown acknowledged in its closing submission, the ruthless actions of Governor Grey set aside the Treaty promises and put the interests of settlers above those of Maori. We agree, and we find the Crown in serious breach of the Treaty principle of equity.

246. Mary Gillingham, 'Ngatiawa/Te Atiawa Lands in the West of Te Tau Ihu: Alienation and Reserves Issues, 1839–1901', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A74), pp 85–92

5.7 Grey's 1848 Crown Grant to the New Zealand Company

We can regard Grey's 1848 Crown grant to the New Zealand Company as the penultimate stage of the Wairau purchase (the 1851 reversion of the land to the Crown perhaps constituting the final stage). The Crown grant included most of the land enclosed in the Wairau deed plus Nelson land previously included in FitzRoy's 1845 Crown grant. Grey's grant resembled one he granted to the company for Wellington.

The background to Grey's somewhat high-handed actions is described by the Tribunal in its Wellington report and by a number of claimant historians within our inquiry, along with Dr Ashley Gould and Michael Macky for the Crown.[247] At the heart of Grey's actions is an attempt, not merely to settle the company's long standing land claims, but also to provide it with the landed resources to continue its colonising role in New Zealand.

The Wellington and Nelson Crown grants were a direct consequence of an arrangement in the Imperial Government's Loans Act 1847 whereby the demesne lands of the Crown in New Munster were to be vested in trust in the company for three years to promote its colonisation activities. The Treasury was to advance the company up to £136,000, in addition to £100,000 already advanced. At the end of the three-year term the company could withdraw from the operation. In that event the company would be wound up and its assets and liabilities would be transferred to the Crown – as in fact happened after the three-year term expired in 1850.[248] It was on the strength of the 1847 arrangement that Grey granted the company an estimated 209,247 acres at Wellington on 27 January 1848, even though, as the Whanganui a Tara Tribunal pointed out, some 120,626 acres of this area had never been sold by Maori.[249]

The arrangements for Nelson were completed in August 1848, after Grey had met Wakefield in Nelson to work out a final draft.[250] As Mr Macky points out, it was originally envisaged that the company would take from the Wairau purchase only enough land to complete its rural reserves promises, and that the rest would remain Crown land.[251] Under the Loans Act 1847, the demesne lands of the Crown in New Munster were to be transferred to the company once Grey had provided a register of the Crown's land holdings. However, according to Mr Macky, Grey was not prepared to do this, so the company's agent, William Fox, opted for all the land purchased by Grey, including the Wairau purchase, to be included in the Crown grant. As Fox admitted, 'This comprises a block very much larger than is required for the Nelson settlement and a great portion of it is of no use to the Company.'

247. Waitangi Tribunal, *Whanganui a Tara*, pp 249–251; Boast, 'Ngati Toa and the Upper South Island', vol 2, pp 244–275; Macky, 'Crown Purchases in Te Tau Ihu', p 52; Gould, 'New Zealand Company', pp 140–152

248. Boast, 'Ngati Toa and the Upper South Island', vol 2, p 244

249. Waitangi Tribunal, *Whanganui a Tara*, pp 253–254

250. *Nelson Examiner*, 11 March 1848 (Dr Donald Loveridge, '"Let the White Men Come Here"; The Alienation of Ngati Awa/Te Atiawa Lands in Queen Charlotte Sound, 1839–1856', report commissioned by the Crown Forestry Rental Trust, 1999 (doc A53), p 72)

251. Macky, 'Crown Purchases in Te Tau Ihu', pp 51–52

But, he added, 'the Company is not bound to retain more of the block than it may place, as a portion of the 1,300,000 acres due to it from the Government.'[252]

One consequence of the inclusion of the Wairau block in the company's lands was that pastoralists who had already 'leased' land from Maori before Grey's purchase, such as Clifford and Weld, now had to apply to the company for new leases.[253] But there were several disputes over the next few years between the pastoralists or their agents and local Maori because the boundaries between the reserve promised to Ngati Toa in the Wairau deed and the land allocated to company settlers was not surveyed until 1851.[254]

Grey's Nelson Crown grant was dated 1 August 1848 and included all of the Wairau purchase except that the southern boundary was moved some 70 kilometres north to a 'Kaiapoi' on the mouth of the Hurunui River (which became the northern boundary of the Kemp purchase). The boundaries of the Nelson Crown grant were described as follows:

> all that block of land situate at the northern end of the Island of New Munster, in New Zealand; bounded on the West by the limit of the New Zealand Company's surveys at the base of the mountains immediately beyond the Aorere River, in Massacre Bay, to the source of the said river; thence by a line drawn in a south-eastern direction to a certain place called the Devil's Grip; thence by a line drawn to the source of the principal tributary stream falling into the Roto Iti or Lake Arthur, at the southern end thereof; thence to the East Coast, terminating at a place called Kaiapoi or Lookers On; thence by the East Coast to Cape Campbell; thence by the sea in Cook's Strait, Cloudy Bay, Blind Bay and Massacre Bay (except in and about Queen Charlotte's Sound, the Pelorus estuary, and thence to Wakapuaka, where the boundary line is drawn inland of those places, they being or supposed to be in the actual occupation of the Natives.)[255]

This somewhat vague description was clarified by an accompanying plan which we reproduce (see fig 10). Various public reserves were excepted, 'And also excepting and reserving all the pahs, burial places, and Native reserves' which were also said to have been delineated in various annexed plans and schedules. Professor Williams quotes the comments of the Nelson police magistrate, Donald Sinclair, who claimed that there were 'no Native Burial Grounds within the boundaries of the Lands in the Nelson Settlement Awarded by Mr Spain to the New Zealand Company which can interfere with the issue of a Crown Grant to the Company'.[256] Professor Williams observes that 'One can only wonder at the audacity of the assumption that 151,000 acres of territory contained no urupa that would interfere with

252. Fox to secretary, New Zealand Company, 9 November 1848 (Macky, 'Crown Purchases in Te Tau Ihu', p 52)
253. Boast, 'Ngati Toa and the Upper South Island', p 237
254. Ibid, pp 237–243; Macky, 'Crown Purchases in Te Tau Ihu', pp 54–61; Armstrong, 'Right of Deciding', pp 64–79
255. *Compendium*, vol 2, p 374
256. Williams, 'Crown and Ngati Tama', p 99

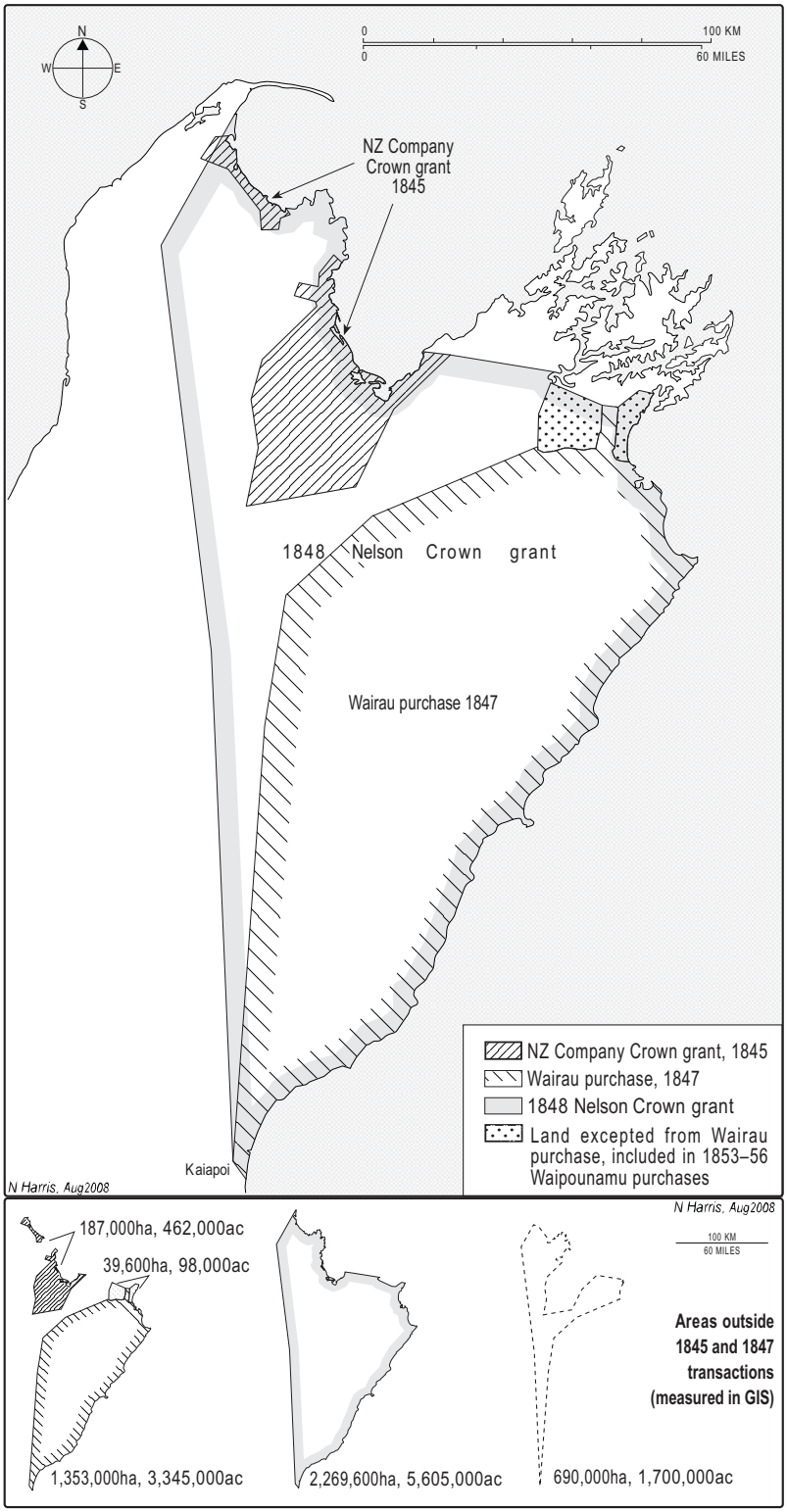

Figure 11: The 1845 and 1848 Nelson grants and the 1847 Wairau purchase

Source: AJHR, 1874, G-6; Nelson Crown grant

the issue of an exclusive right of ownership and control to the Company and its settlers.' We agree.

We noted above that Grey's Crown grant to the company at Wellington included a considerable area of land that it had not purchased. This could also have been said for his grant to the company for Te Tau Ihu, which amounted to more than the combined totals of the FitzRoy grant (151,000 acres) plus the Wairau purchase. Nor could the all-embracing, yet fatally flawed, Waipounamu purchase be considered adequate extinguishment of Maori rights to those additional areas encompassed by the grant, as we shall see more fully in the next chapter. To the extent that the 1848 grant in favour of the company included land which had never been purchased by either the company or the Crown, it was in breach of the plain meaning of article 2 of the Treaty. According to figure 11, the 1848 Crown grant to the company included approximately 1.7 million acres (690,000 ha) that had never been purchased by either the Crown or the company. The article 2 breach could have been to a large extent remedied by the Crown in 1851 when all of the lands not yet allocated to settlers reverted to Crown ownership upon the final dissolution of the company. Yet, there was no move to return land to Maori which they had never alienated, even though the Crown had had no basis for awarding this to the company in the first place. The failure to remedy this situation was, we find, in breach of the principles of active protection and redress.

Similar considerations apply with respect to the 151,000-acre Nelson award included in the grant, and to the Wairau purchase area. In effect, Grey's 1848 Crown grant in favour of the company, which included both of these areas, validated what we have already concluded were invalid transactions. We find that this was in breach of article 2 of the Treaty and its principles.

As Mary Gillingham noted in her report for Te Atiawa, the 1848 grant also clarified the status of the occupation and tenths reserves set aside for Maori. In 1849, the Colonial Secretary, Alfred Domett, informed the Nelson superintendent that:

> The Crown assumes that the Reserves vest in it, as no Title has been passed from it to any other party. In fact upon disposing of all the surrounding country by a Crown Grant to the New Zealand Company, the Native Reserves were specifically excepted, and therefore still vest in the Crown alone; as it never could be contemplated by the act of Parliament transferring the Crown's right over the Demesne land to the New Zealand Company, to include any but the Waste Lands.[257]

The 1848 grant was therefore deemed to have extinguished native title over all occupation and tenths reserves, including, as Ms Gillingham points out, lands which Maori had specifically stipulated should be excluded from the area alienated to the company.[258] The

257. Colonial Secretary to superintendent, Nelson, 11 August 1849, SSD1/2, ArchivesNZ (Gillingham, 'Ngatiawa/Te Atiawa Lands', p 93)

258. Gillingham, 'Ngatiawa/Te Atiawa Lands', p 92

effect of this was to render the reserves as effectively belonging to the Crown and subject to Crown control and management, with Maori deemed to possess beneficial interests only.[259] We consider the issues pertaining to the subsequent administration of the occupation and tenths reserves in later chapters. For now, we find the 1848 Crown grant contrary to the principle of active protection, in that customary title over the reserves was deemed extinguished by virtue of the grant, notwithstanding the failure to gain the prior consent of Maori to these arrangements.

The grant to the company did not end the efforts to extinguish remaining native title over Te Tau Ihu and in the remainder of this chapter we consider one subsequent Crown purchase within the district: Waitohi, in the upper reaches of Queen Charlotte Sound, which was needed to provide port access to the Wairau.

5.8 The Waitohi Purchase, 1848–50

The claims relating to the Waitohi purchase have been lodged by Te Atiawa, whose forbears were the original vendors of the land. Te Atiawa's claims refer particularly to the two agreements of 30 December 1848 and 8 January 1849, and the deed of 4 March 1850 that constituted the Crown purchase. In this section of the chapter, we examine the background, negotiation, terms, and implementation of the agreements and deed. We also outline Te Atiawa and Crown submissions and make findings on the purchase.

The main research report on the Waitohi purchase is by Dr Loveridge, historian for Te Atiawa.[260] The purchase is also discussed at some length by Crown researcher Mr Macky.[261] But there are not a lot of differences between the two and for the most part they use the same sources. Dr Loveridge's account was written first and Mr Macky sometimes refers to it with approval, sometimes in criticism. We rely mainly on these two sources for our narrative description of the purchase.

5.8.1 Background

The Waitohi purchase was a direct consequence of the Wairau transaction. Waitohi turned out to be the most desirable site for a port for company settlers located on the Wairau Plains. The Wairau River outlet was hindered by a bar, Port Underwood was cut off from the Wairau by difficult hills, and the overland route from Nelson through the Rai Saddle and the Pelorus and Kaituna River valleys was long and arduous.

259. Gould, 'New Zealand Company', p 123
260. Loveridge, 'Let the White Men Come Here', pp 1–253
261. Macky, 'Crown Purchases in Te Tau Ihu', pp 64–111

A company surveyor, J W Barnicoat, inspected Waitohi in 1843. He found a substantial village, 'very numerous' portions of land in cultivation, 'several thousand acres of level forest land of the most magnificent timber', and was told of valleys that connected with the Wairau through 'hills of moderate elevation'.[262] William Fox and Samuel Stephens made a fuller exploration in 1845. They were informed that there was 'an easy route from the South-Western extremity of the Sound to the Wairao [*sic*] Plain'. With the aid of local Te Atiawa guides, they followed 'a Native Road' some five miles up the Waitohi Stream to a totara grove where Te Atiawa cut logs for canoes, before going over the saddle into the Tuamarina Valley and following that tributary to the Wairau.[263] They too found evidence of considerable cultivations around Waitohi. Dr Loveridge suggests that in 1839–40 there were some 1200 Te Atiawa living around Queen Charlotte Sound.[264] The company's Queen Charlotte Sound deed of 8 November 1839, negotiated with Te Atiawa, named some 27 places of occupation, including Waitohi, around the sound.[265] Subsequently, however, the company abandoned its claim to the sound and it was not included in Spain's award or FitzRoy's Crown grant of 1845, the Wairau purchase of 1847, or Grey's Crown grant to the company of 1848. It remained unalienated Maori land, under Te Atiawa occupation.

But, as Dr Loveridge put it, 'No sooner had the Wairau purchase been completed . . . than some Nelson settlers were casting covetous eyes towards the Sound – specifically towards Waitohi.'[266] According to the editor of the *Nelson Examiner*, Te Atiawa were willing to sell, 'so we may soon hope to see the Sound also added to the Nelson District'.[267] Waitohi rangatira Ropoama Te One wrote to Wakefield on 26 June 1847 apparently offering to sell land at Waikawa, though the precise meaning of his letter has been disputed.[268] At a public meeting of Nelson settlers on 1 July 1847 two resolutions were passed calling for a town to be laid out as a 'Shipping-Port' to the Wairau with urban and suburban lots for settlers. But at this stage the settlers were unsure whether Waitohi was preferable to Port Underwood so a delegation was sent to inspect the two places. William Fox, the company's resident agent at Nelson, accompanied the delegation. Port Underwood was soon abandoned because the Cloudy Bay anchorage was exposed to winds, lacked sufficient adjoining flat land, and a road to the Wairau would have had to be constructed through steep hills.

Waitohi had none of these drawbacks and, through the Tuamarina Valley, easy access to the Wairau, as the delegation discovered by walking the route. There was also an alternative

262. Barnicoat, journal, 17–19 March 1843 (Loveridge, 'Let the White Men Come Here', pp 26–27)
263. Loveridge, 'Let the White Men Come Here', pp 27–28
264. Ibid, p 30
265. Ibid, pp 38–39
266. Ibid, p 60
267. Ibid
268. Ibid. Michael Macky, the Crown historian, says that the Crown Law Office got two separate translations of the letter from the University of Canterbury and one from Paul Meredith, though he admits that the most likely translation of it was to the effect that Te Atiawa were offering to sell Waikawa, as Loveridge's interpreter also said: Macky, 'Crown Purchases in Te Tau Ihu', p 67.

though shallower anchorage and additional flat land at nearby Waikawa Bay. The delegation opted for Waitohi and called on the company and the Governor to cooperate in the acquisition of it. Fox endorsed their views when reporting to Wakefield on the proposal. Though the delegation scarcely mentioned Te Atiawa inhabitants in their report, Fox noted that they numbered some 150, and had a pa on the waterfront and 50 to 70 acres of cultivations. Fox claimed that they professed 'great anxiety to have the white men residing there' and were willing to move to 'some other part of in the Sound'.[269] He also claimed that they thought Waitohi had been included in the Wairau purchase and all they expected was payment for their cultivations and goodwill.[270] Since Grey was expected in Nelson in the near future, Fox urged Wakefield to persuade him to take 'immediate steps towards procuring the district for us'.[271]

5.8.2 The purchase agreements and deed

Though Grey supported the company's plan to acquire Waitohi when he visited Nelson in early 1848, little progress was made until late in the year. Te Atiawa at Waitohi were said to have favoured a sale but were distracted by the death of a prominent rangatira in February. In May, Fox discovered that they preferred to sell Waikawa rather than Waitohi, though he thought they were bluffing and decided to postpone further negotiations. Fox also believed that there was a 'considerable probability' that Te Atiawa at Waitohi would return to Taranaki as some from elsewhere in the sound had done.[272]

Negotiations were resumed near the end of the year. In November some Waitohi rangatira visited Wellington and met Fox and Lieutenant-Governor E J Eyre. Mr Macky suggests that their purpose was to renew their offer to sell land, though at Waikawa rather than Waitohi.[273] But Fox proposed that Te Atiawa should move from Waitohi to Waikawa, where a 'Native town' would be established and land, equal in area to their Waitohi cultivations, would be cultivated for them (see fig 12). Bell said that he had confirmed this offer by letter.[274] Though the chiefs rejected this proposal, it provided the gist of a 'solution' that would eventually be foisted on them.

Grey was directly involved in the next move. He decided to visit Queen Charlotte Sound with Bell. It seems that he had already decided how to resolve the Waitohi 'problem'. He later reported to Earl Grey that:

269. Fox to Wakefield, 19 January 1848 (Macky, 'Crown Purchases in Te Tau Ihu', p 70)
270. Loveridge, 'Let the White Men Come Here', p 65
271. Ibid, p 67
272. Ibid, pp 73–74; Macky, 'Crown Purchases in Te Tau Ihu', p 74
273. Macky, 'Crown Purchases in Te Tau Ihu', p 76
274. Bell to secretary, New Zealand Company, 6 January 1849 (Loveridge, 'Let the White Men Come Here', pp 82–83)

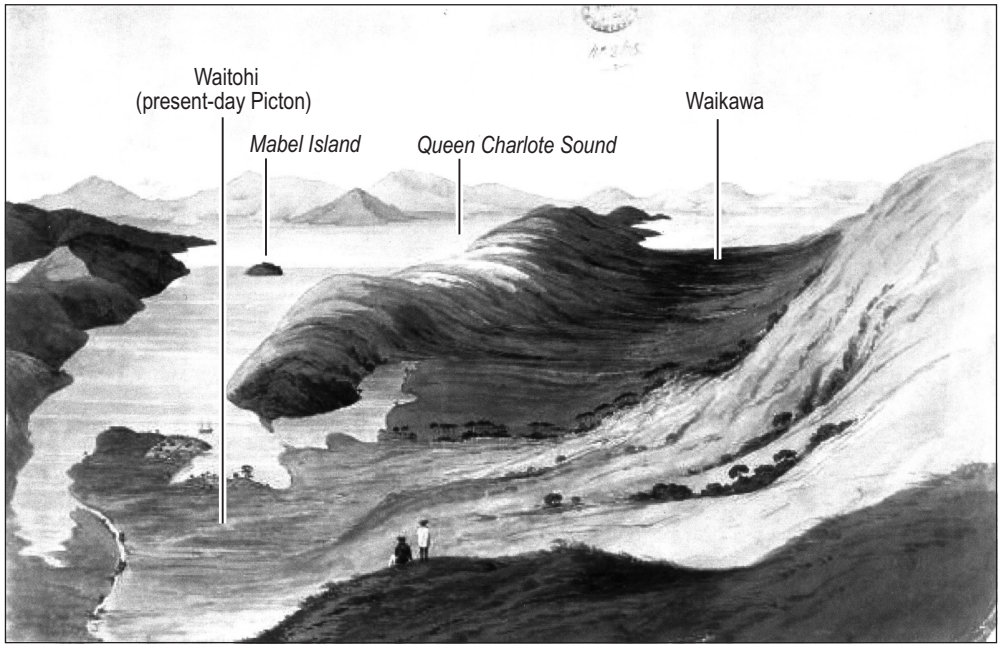

Figure 12: Waitohi, 1848. Bird's eye view of Waitoi, 1848.
Watercolour by William Fox. Reproduced courtesy of Alexander Turnbull Library.

> As the interest of the natives did not in any way require that they should retain Waitohi, and as there appeared no reasonable grounds for their pursuing such a course, which was clearly adverse to their own interests . . . I thought it my duty to proceed to the Waitohi, with a view of having an interview with the natives of that place, and of inducing them, if practicable, to complete an arrangement which promised to be so advantageous to both parties.[275]

He secured an agreement from Te Atiawa at Waitohi within 24 hours of leaving Wellington. Though Grey provided no details on the negotiation, Bell did so at some length. The expedition arrived late on 30 December. They were unexpected, but Bell said that 'As soon as the chief men had been made acquainted with the object of our visit, they said that they had received my letter and had at length determined to sell the land'.[276] Since the chiefs had already rejected the exchange offer twice, it is a little strange that they now accepted it, but, according to Bell, they had already resolved to accept it and the only issue unresolved was the price. Mr Macky suggests that Te Atiawa may now have been prepared to accept the move to Waikawa because of the promise of a village like Otaki. Frederick Weld, who was also present at the negotiation, even claimed that Grey or Bell promised to build new

275. Grey to Earl Grey, 1 February 1849 (Loveridge, 'Let the White Men Come Here', p 84)
276. Bell to secretary, New Zealand Company, 16 January 1849 (Loveridge, 'Let the White Men Come Here', p 85)

5.8.2

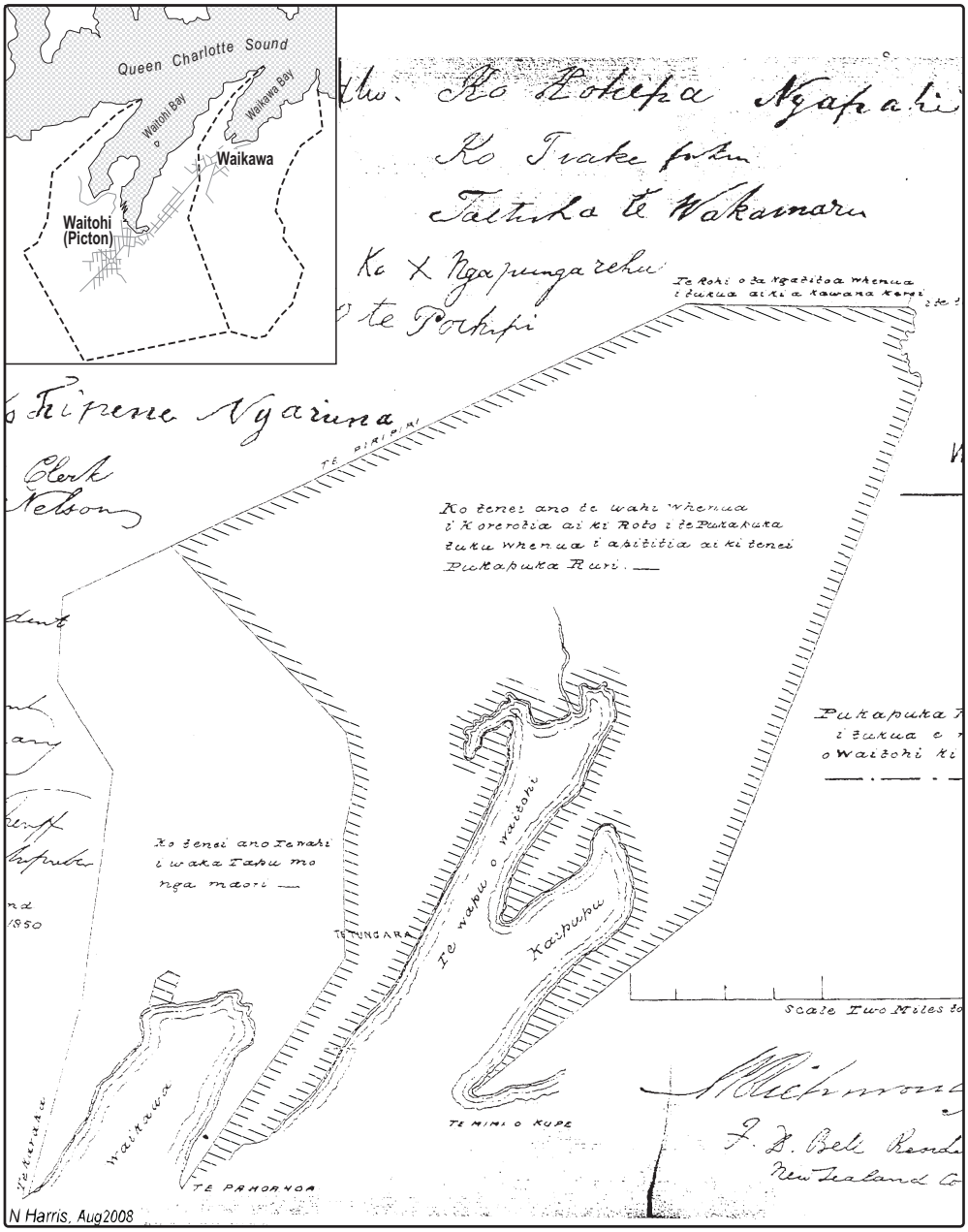

Figure 13: The Waitohi purchase, 1850 **Source: *Compendium*, vol 1, pp 317–318**

houses for them at Waikawa, though Mr Macky admits that it was not clear how much the Government contributed to new houses there.[277] Bell and Grey had already 'agreed that the sum of £100 would be sufficient' payment for Waitohi. Bell does not record any quibble over that price, which was included in the agreement that was signed.

277. Loveridge, 'Let the White Men Come Here', p 106; Macky, 'Crown Purchases in Te Tau Ihu', p 79

Bell gives the impression that the agreement was signed on the spot. So does Weld, who said that 'Buying the place was a work of very few minutes', but he admitted that the agreement was not signed until several hours after the meeting. Grey and his party had returned to their ship and were having an evening meal when, as Weld described it, 'the Natives came off in a large canoe singing & shouting. They were well fed and made at home and after dinner we went on deck to see them sign the deed of sale.'[278] In the interval between the afternoon meeting and the evening signing the agreement was drafted – in Maori and English – and at the evening meeting it appears to have been read out at least once before it was signed.

There is one recorded Te Atiawa version of the event, a letter from their principal chief, Ropoama Te One:

> From the beginning, when first the Governor and Mr Bell came here, I asked that the payment for our Land should be as high as the hills: then Mr Bell proposed that we should receive £100, but we did not consent. That talk being over the greater number of the people went on board the Ship (HMS *Fly*) when the Governor said to us 'Are you all agreed to dispose of your land to me?' and the people consented saying 'Ae.'[279]

That letter indicates that Te Atiawa resisted the price offered by Bell and Grey during the afternoon discussion, though they did accept it in the evening.

The original Maori text of the agreement was composed by Bell and still exists. Grey sent an English translation to the Colonial Office and this was also copied and printed in Alexander Mackay's *Compendium*. The agreement was signed for the Crown by Grey and Bell and on the Te Atiawa side signed or marked by 17 persons with the names of another 14, who were not present, written on the back of the sheet. As Dr Loveridge noted, the agreement merely involved chiefs living in the sound. There was no attempt to get the approval of absentee Te Atiawa until 1854, when McLean purchased rights to Waitohi and Waikawa from a number of Te Atiawa living in Taranaki (as part of the Waipounamu purchase).[280]

The agreement begins by saying that 'that place (Waitohi) has been given up [kua tukua mai] by the Natives to the Governor'. It does not say that Waitohi had been sold and does not in the Maori text use the word usually used at that time for sale (hokona), though this was used in the final deed of March 1850 (discussed below). The memorandum says that 'The pa, the harbour, the gardens and the cultivations have all been given up' (kua tukua mai te pa nei te wapu nei nga mare nei nga mahinga nei). In return, the Governor was to carry out the five things that were then listed.

The five conditions included:

278. Weld to his sister, 15 January 1849 (Loveridge, 'Let the White Men Come Here', p 87)
279. Ropoama Te One to Richmond, December 1849 (Loveridge, 'Let the White Men Come Here', pp 87–88)
280. Loveridge, 'Let the White Men Come Here', p 91

- the survey of lots for a new town at Waikawa (like those surveyed by the Governor at Otaki, where under missionary Octavius Hadfield's inspiration, wooden houses had been built);
- the construction of a wooden church (which Te Atiawa might have expected to be like Rangiatea at Otaki);
- outside the 'town', lots would be surveyed for gardens and cultivations;
- seed wheat would be provided; and
- there would be a £100 payment, after which Te Atiawa were to vacate Waitohi 'for ever'. The payment was 'for Waitohi, for the harbour, for the gardens and cultivations, and for the land'.

What was meant by the last phrase 'and for the land' is not clear, but in view of the context of the discussions – the need to obtain Waitohi for a port – it seems unlikely to have included land beyond the immediate vicinity of the pa and cultivations. It is unlikely that Te Atiawa envisaged surrendering their hunting and gathering rights, or the right to cut logs for canoes in the valley beyond their cultivations, or their fishing and shell-fish gathering rights in the upper part of the sound.[281]

In the agreement, there was no estimate of the area given up, no description of boundaries and no full plan was attached (see fig 13). Although the agreement specified what would be done to form a town at Waikawa, it said nothing about the status of this land. There was nothing in the agreement to say that Waikawa came within the unspecified area purchased at Waitohi. Waikawa was five kilometres away, in another bay, though it was linked by a valley with a low saddle to Waitohi. Dr Loveridge concludes that, with the December 1848 agreement, Te Atiawa 'had now agreed to sell Waitohi, and to keep Waikawa for themselves'. But he added that that was not how Grey saw it and nor was it 'how the Agreement was subsequently construed and implemented by the Crown and the Company'.[282]

Mr Macky, on the other hand, argues that the memorandum 'was not a final deed of sale' and that it left out 'a number of details to be worked out later'. He admits that no map was attached to it and that 'the boundaries of the purchase and the reserve were not tightly defined'.[283] He argues that the term 'Waitohi' could have been broadly defined to include Waikawa, at least in the minds of officials, though this did not mean that Te Atiawa 'thought of it that way'. He added that 'it should be remembered that this is not a carefully drafted statute, but a preliminary agreement that leaves many details unresolved'.[284] Mr Macky concludes that the agreement was subsequently acted on by both parties on the assumption that Waikawa was included in the purchase of Waitohi and that a reserve would be laid out there.[285] A question remains, however, as to whether the Government, in resolving unclear

281. Loveridge, 'Let the White Men Come Here', p 92 fn 240
282. Ibid, p 93
283. Macky, 'Crown Purchases in Te Tau Ihu', p 81
284. Ibid, pp 82–83
285. Ibid, p 84

details by later agreements, was justified in enlarging the words of the December 1848 agreement to include considerable additional areas of land.

The first enlargement followed from Grey's instructions to Major Richmond, the superintendent of Nelson, of 8 January 1849 that:

> The basis on which the purchase of the Waitohi has been completed is in point of fact, That the Natives should quit the whole valley of the Waitohi and relinquish all claims to land in the neighbourhood except such as the Government deeming sufficient for their wants may reserve them in the valley of the Waikawa . . .[286]

All Grey conceded was that Te Atiawa could choose the location of their village at Waikawa. Richmond or his deputy was to be present when the site was selected and was also to ascertain the area under cultivation at Waitohi and what reserves, with 'sufficient room for the[ir] future operations', should be made for them at Waikawa. Dr Loveridge says that 'in other words, Grey was asserting that the Agreement . . . actually signified the Crown's purchase of the whole of the two connected valleys behind the Bays at Waitohi and Waikawa,' though any land now reserved for Te Atiawa was to be confined to Waikawa.[287] We can only speculate about Grey's motives for linking and expanding the two areas. Dr Loveridge suggests that it was to get all of the land into Crown or company control and prevent speculation in land between the two bays.[288] Mr Macky argues that the possibility of speculation was not important and that 'if Grey did vary the agreement in January, it is truly remarkable that Maori never complained about it'.[289] In our view it would have been 'truly remarkable' if Te Atiawa at Waitohi knew what Grey had written to Richmond in January.

Though Grey and the others may genuinely have wanted to create another Otaki, it was clear, even then, that Waikawa did not have the necessary adjoining fertile land. Te Atiawa knew that, although, from their knowledge of Otaki, they may well have been tempted by the promise of a constructed village and church.[290] It is more likely, in our view, that the Otaki experiment was used as justification for shifting Te Atiawa from Waitohi, the more desirable of the two port options. But whatever the case, the important point is that Grey's orders were followed up and two more agreements were needed to expand the Waitohi purchase to meet his expectations and give the plans legal effect.

Once Grey had issued his orders for Waitohi, the company was able to engage surveyors to begin surveying the Waitohi town sections for Europeans, and the promised town lots and reserve at Waikawa for Te Atiawa. The surveyors, Ward and Goulter, were on site by 7 February. In early March Richmond went to Waitohi with a party of officials and interpreters to carry out Grey's orders. They inspected the pa and cultivations at Waitohi, and

286. Loveridge, 'Let the White Men Come Here', p 94
287. Ibid
288. Ibid, p 96
289. Macky, 'Crown Purchases in Te Tau Ihu', p 86
290. The Otaki option is discussed at some length by Loveridge in 'Let the White Men Come Here', pp 101–104.

estimated that there were 89 acres under cultivation but added another six acres to the area to allow for any cultivations they may have overlooked. John Tinline, the interpreter, conducted a 'census' and counted 89 people, in order to calculate how much land would be needed for Te Atiawa's future needs. Armed with this information they met Ropoama Te One and others to select the site for the Waikawa township and the reserve. Goulter and his assistants started to mark the boundary of the new reserve. The proposed reserve was to take in the whole of the lower basin of the Waikawa Valley and run up to the crests of the hills on the eastern and western sides. Richmond estimated that it contained some 280 acres of level land, of which 200 would be available for cultivation, while the surrounding hills were in bracken or bush. The internal boundary ran along the saddle separating the Waikawa and Waitohi Valleys and was marked by a row of stakes.

On the evening of 5 March, a second agreement was signed by Richmond and Jollie and 24 Te Atiawa. This described the boundaries of the Waikawa reserve that had just been pointed out and encompassed an estimated 2500 acres, with less than 300 acres of relatively flat land. Jollie reported to Fox that he had agreed to a larger reserve at Waikawa than was necessary under the December agreement. Mr Macky says that this 'generous' reserve was needed because the company had so much difficulty in persuading Te Atiawa to surrender Waitohi.[291] Jollie also considered that Te Atiawa had got some 300 acres of level land for their 90 acres of cultivations at Waitohi, but he admitted that about half of this flat land was unsuitable for cultivation (a much higher figure than Richmond had estimated). Te Atiawa were not so impressed and decided to cultivate elsewhere in the sound. Mr Macky, however, quotes Bell's statement that the Waikawa reserve included 'a large extent of land of the kind most liked by Natives for their potato gardens'.[292] How large is not disclosed. Mr Macky then quotes recent scientific evidence on soil quality at Waikawa and elsewhere in the sound. He concludes that this evidence did 'not reveal any great differences between the types of soil at Waitohi and Waikawa'.[293] In our view, it is not a question of what scientists today might make of the soils, but how Te Atiawa regarded them at the time, and they clearly had a preference for Waitohi or other parts of the sound.

The agreement of 5 March, confirming the arrangements we have just discussed, was drawn up by Richmond, who claimed that Te Atiawa were so pleased with the arrangements 'that they came in the evening to the house I occupied and willingly . . . affixed their signatures to the document that I had prepared'.[294] The text of the draft was translated into Maori by Tinline, and we make some general comments on it here.

The agreement was ostensibly a record of the arrangement on the boundaries of the reserve. But Dr Loveridge says that it had the effect of transforming the December agreement 'with

291. Macky, 'Crown Purchases in Te Tau Ihu', p 89
292. Ibid, p 90
293. Ibid, p 93
294. Richmond to Grey, 27 March 1849 (Loveridge, 'Let the White Men Come Here', p 121)

Ngati Awa's (perhaps unwitting) cooperation, into the sale of Waitohi and Waikawa, with all of the land around Waikawa Bay being placed in a reserve'.[295] The site for the Waikawa township had been selected and Te Atiawa had agreed to abandon their pa and cultivations at Waitohi as soon as their crops were harvested. But the interior boundary of the Waitohi purchase had not been defined. This, along with the completion of the surveys for town lots at Waitohi, was next on the surveyors' list. They also proposed to survey a route from Waitohi to the Wairau. There was no provision for this in either of the Waitohi agreements, though the Wairau purchase deed, signed by the three Ngati Toa rangatira, did provide for such an access road through the Wairau reserve. These surveys were given priority over the completion of the survey of Te Atiawa's town lots and their reserve boundaries at Waikawa.

The company had responsibility for implementing the promises of the December and March agreements. After this, Te Atiawa needed to move from Waitohi to Waikawa. Dr Loveridge says that the company made only slow progress with its tasks after March. The failure to plough land at Waikawa in the autumn meant that Te Atiawa were unable to plant new crops there in the following summer. Eventually, the company decided to pay Te Atiawa to plough the land, though the latter had already decided to cultivate better land elsewhere in the sound. The surveys were delayed by bad weather in the winter but in any case the surveyors continued to give preference to surveying sections for settlers. However, they did finish the survey of 280 acres of 'flat' land of Te Atiawa's reserve at Waikawa and the road to Waitohi by mid-June. Richmond reported this progress to Grey on 26 June and he, in turn, reported to the Colonial Office that the purchase of the Waitohi Valley had been 'satisfactorily and conclusively arranged upon the basis which had been previously agreed upon'.[296] In fact, none of the five promises made in the December agreement had been completely fulfilled and the promise of a reserve in the March agreement was only partially met.

Bell visited Waitohi at the end of October, accompanied by the Royal Engineer, Captain T B Collinson, who had previously laid out the Otaki township. Collinson prepared a design plan and surveyed Waitohi before he did the same for Waikawa in November. When he finished, the 'chief men', as the *Nelson Examiner* put it, selected their sections and started to construct houses,[297] though Mr Macky says that they started to build their houses before the survey was completed.[298] Bell had asked a local missionary to design the church and a Nelson firm to build it in kitset form. Bell now considered that the promises were sufficiently fulfilled for him to pay the £100 provided for in the December 1848 agreement. But Ropoama Te One refused to accept it, on the ground that this was merely a first instalment, though he did not intend to repudiate the Waitohi purchase altogether.[299] Bell suggested that Ropoama was trying to increase the price already agreed. Dr Loveridge concludes that

295. Loveridge, 'Let the White Men Come Here', p 123
296. Ibid, p 133
297. *Nelson Examiner*, 7 November 1849 (Loveridge, 'Let the White Men Come Here', pp 136–137)
298. Macky, 'Crown Purchases in Te Tau Ihu', p 95
299. Ibid, pp 95–98, 101

the dispute was really over the need to pay Te Atiawa for the company's failure to do the ploughing at Waikawa. Bell decided to pay Te Atiawa £200 to do it themselves. That payment was to be added to the £100 originally promised to Te Atiawa for the purchase of Waitohi, provided they went to Nelson to receive the payment.[300]

The Nelson meeting did not take place until 4 March 1850, when a new deed, recording the £300 payment and the 'fulfilment' of other conditions of the December 1848 agreement, was made. But, as Dr Loveridge points out, the March 1850 document was much more than a formal acknowledgement of the 'fulfilment' of those conditions. It was regarded as a deed of sale and, Dr Loveridge adds, 'has been treated as *the* Deed of sale of Waitohi ever since' (emphasis in original).[301] Indeed, it was called a 'conveyance' and was drafted by the Crown Solicitor at Nelson on Richmond's instructions. Tinline, who had translated the March 1849 agreement, also translated the deed signed in March 1850 into Maori. Mr Macky, in contrast to Dr Loveridge, sees nothing unusual in the new arrangements which, he says, were merely necessary to formalise details that were left 'undefined' in the original December 1848 agreement.[302]

Although, as Dr Loveridge says, the 1850 deed begins with a 'reasonably accurate summary of the purpose and terms of the December 1848 agreement,' several subtle changes were introduced. Whereas the 1848 agreement had said that Te Atiawa would give up the pa, the harbour, the gardens, and 'the land' at Waitohi, the 1850 deed says they would give up 'fully . . . all the land at Weranga o Waitohi'. The second paragraph of the 1850 deed says that in the 1848 agreement Ropoama and others had agreed with the Governor and Bell 'to sell to them Waitohi as a Settlement for the "pakeha"'. This introduces the term 'sell' ('hokona atu' in the Maori text) which was not in the 1848 agreement. As we noted above, this merely said that Waitohi had been 'given up by the Natives to the governor' ('kua tukua mai taua wahi e nga maori kia te Kawana'). This illustrates a process of what we might call legal accretion in the documents prepared by the Crown or its agents, whereby a vague agreement was converted into a formal conveyance. The deed, having noted what was promised in December 1848, then recorded what had been fulfilled: the surveying of the village at Waikawa 'completed'; the chapel 'now building agreeably to the expectations of the Natives'; the acceptance of the £200 in lieu of ploughing.

The next paragraph says that Ropoama and others, having accepted and acknowledged the full payment:

> Hereby agree to give up *fully* to Queen Victoria, and her heirs and people for ever and ever, all the land at the Weranga o Waitohi, the pa, the port, the Cultivations and all the land according to as it is described in the plan attached to this Deed. [Emphasis in original.]

300. Loveridge, 'Let the White Men Come Here', pp 139–145
301. Ibid, p 149
302. Macky, 'Crown Purchases in Te Tau Ihu', p 103

The term 'Weranga o Waitohi' is introduced without explanation or translation. Then, in return for the payment, the deed says that 'the Natives Agree to give up at once the Cultivations and pa and whole of the land at Waitohi'. Once again, there are signs of legal accretion. But the most revealing aspect of the March 1850 agreement was the plan attached. We reproduce this as figure 13 but note here that it shows two adjoining blocks. The one on the left labelled 'Ko tenei ano Te wahi i waka Tapu mo nga maori' (this is the land reserved for Maori) is in fact the reserve referred to in the March 1849 agreement (but not mentioned in the text of the March 1850 deed). The larger block on the right runs back from Waitohi and Waikuku Bays. The western inlet of the Waitohi–Waipupu Harbour is identified as 'Te Mimi o Kupe' (now Wedge Point). Across the top or back of the block is the statement 'Te Rohe o ta Ngatitoa whenua i tukua whenua i a tukua ai ki a Kawana Kerei i te tau 1847' – 'Boundary of Governor Grey's purchase in 1847', as the Crown copy of the deed puts it. This refers to the boundary of the Wairau purchase and was, presumably, the northern end of the strip of land running up the Tuamarina Valley that Grey had taken for the Crown as 'utu' for the company men killed in the Wairau conflict. It gave the Crown a complete strip of land, about a mile wide, from the Wairau River to the port of Waitohi.

As Dr Loveridge points out, the deed and plan were fairly thoroughly signed by Te Atiawa present at the Nelson meeting. The deed was signed by 20 individuals, at least 12 of whom had signed one or both of the agreements of December 1848 and March 1849. In total, 19 individuals signed the plan, including 16 who had signed the deed and three who had not. Dr Loveridge suggests that the signatures of the three who signed the plan but not the deed may have been added three days later. He also notes that it was rare for Maori vendors to sign plans as well as deeds, though he suggests that this was done because the earlier December 1848 agreement had not shown the full extent of the land the Government now intended to take. Though Te Atiawa may have understood the extent of the land being reserved for them at Waikawa when they signed the March 1849 agreement, they may not have known how much was being added to the Waitohi block by the March 1850 deed until they went to Nelson and the plan, drawn up that morning, was pointed out to them. Even then, the plan was so primitive and devoid of place names that would have been familiar to Te Atiawa, that it was unlikely that Te Atiawa signatories had a clear idea of what was being taken.[303]

Mr Macky, on the other hand, speculates that Te Atiawa may have previously discussed the inland boundaries with officials and therefore needed no further explanation at the Nelson meeting or in the deed itself.[304] Since Dr Loveridge's and Mr Macky's views are both somewhat speculative, we cannot come to a firm conclusion on Te Atiawa's understanding of the full extent of the purchase. The purchase had now been stretched from the original pa and surrounding cultivations of some 90 acres at Waitohi Bay to include the hinterland of both Waikawa Bay (though much of that was now designated a Te Atiawa reserve)

303. Loveridge, 'Let the White Men Come Here', pp 157–158
304. Macky, 'Crown Purchases in Te Tau Ihu', p 107

and Waitohi Bay, not much short of 7500 acres in Dr Loveridge's estimate, or approximately twice the area encompassed by the original agreement.[305] That looks like a very considerable annexation of Te Atiawa land that was not provided, or paid, for under the original agreement of December 1848, even if we exclude the Waikawa reserve of some 2500 acres.[306] A further point made by Dr Loveridge is that the plan marked red for the Waitohi block did not include the extensive tidal flats at the upper end of the Waitohi Harbour. These were a valuable source of shell fish and it is unlikely that Te Atiawa envisaged alienating these, though they were prepared to surrender the deep water anchorage.[307] Mr Macky admits that there was 'nothing in the deed that expressly indicates that the mudflats were given up,' though he adds that, since there was no attempt to stop them from using the mudflats, Te Atiawa 'suffered little immediate prejudice from this lack of clarity'. He does, however, note claimant information provided to Dr Loveridge that these were ultimately lost to pollution and reclamation.[308]

Finally, we note from Dr Loveridge that there was at least one complaint that the money paid to Te Atiawa signatories at Nelson was not fairly distributed to other Te Atiawa who had claims to it. We reach firmer conclusions and make findings on these matters after we have considered claimant and Crown submissions. And, as a brief epilogue, we note that the church was not finally constructed on the Waikawa site until 1860 and then only because the Crown stepped in and provided money to complete it.[309] Mr Macky describes the treatment of Te Atiawa by the company and the Government over the church as 'shabby' and says the Government ought to have insisted that it was at least under construction before allowing the final deed to be signed.[310] There were also delays in allocating the one-acre lots in Waikawa to Te Atiawa, though lots in Waitohi had been allocated to Nelson settlers in July 1850. These were granted as compensation for settlers who did not get town acres in Nelson, but this privilege was not extended to Nelson Maori who were entitled to tenths, let alone to Te Atiawa at Waikawa.[311] Of the 1100 lots surveyed, some 105 were retained by the company. Dr Loveridge surmises that these were probably the tenths share.[312] But these were never transferred to the tenths trust or to Te Atiawa and instead reverted to the Crown upon the winding up of the company soon after. Considering the prior failure to set aside occupation or cultivation reserves at Waitohi, an excellent opportunity was created to make some provision for Te Atiawa by means of the 105 lots. The low price paid for their lands

305. Loveridge, 'Let the White Men Come Here', p 151
306. The Waikawa reserve was later found upon survey to contain some 3050 acres: David Alexander, 'Reserves of Te Tau Ihu (Northern South Island)', 2 vols, report commissioned by the Crown Forestry Rental Trust, 1999 (doc A60), vol 1, p 159.
307. Loveridge, 'Let the White Men Come Here', pp 158–159
308. Macky, 'Crown Purchases in Te Tau Ihu', p 109
309. Loveridge, 'Let the White Men Come Here', p 166
310. Macky, 'Crown Purchases in Te Tau Ihu', pp 109–110
311. Loveridge, 'Let the White Men Come Here', p 168
312. Ibid, pp 167–168

combined with the circumstances surrounding their removal to Waikawa added to the case for Te Atiawa to receive such reserves at Waitohi. It was indicative of the extent to which Maori failed to feature in plans for the new township that no consideration appears to have been given to such an idea.

The Crown and the company, it seems, had never considered the possibility that the two peoples might share Waitohi and the prosperity it was supposed to gain from the colonisation of the Wairau Plains. The former owners of Waitohi were, in Dr Loveridge's words, 'totally excluded from the new town'.[313] The Treaty may have envisaged a form of partnership for the mutual benefit of both peoples, but when it came to the arrangements at Waitohi the interests of settlers were consistently favoured over those of Maori. According to Dr Loveridge, so complete was the exclusion of Te Atiawa from the new township that it was more than a decade before any thought was given to accommodating Maori visitors to the settlement. In 1860, Assistant Native Secretary James Mackay informed the Marlborough superintendent that 'no provision has been made for the wants of Natives visiting or temporarily residents at Picton, by reserving any block of land for them within that Town'. Mackay's request for one of the few unsold water front sections suitable for these purposes to be set aside appears to have been at once complied with, which as Dr Loveridge comments, 'tends to suggest that the need for a reserve was both obvious and pressing by the time Mackay stepped in'.[314]

5.8.3 Submissions

In final submissions, Te Atiawa counsel argues that Te Atiawa should not have been required to sell Waitohi to provide a port for the Wairau, though they were prepared to sell Waikawa. In discussing the agreement of 30 December 1848, counsel noted the restricted description of the land given up at Waitohi, and the way that description was expanded in Grey's memorandum of 8 January 1849 to include Waikawa. Counsel quoted from the agreement saying 'That place (Waitohi) has been given up . . . The pa, the harbour, the gardens and the cultivations have all been given up.' At Waitohi, counsel pointed out, the settlement was 'relatively discrete': there was one pa and one set of gardens and cultivations; sites that were visible and readily identifiable.[315]

Counsel also discussed the selection of the Waikawa reserve and the March 1849 agreement that was intended to give effect to it and the delays and eventual abandonment of the promise to plough land at Waikawa. She quotes at some length from her cross-examination of Crown historian Michael Macky, particularly over the issue of whether the land

313. Ibid, p168
314. Ibid
315. Counsel for Te Atiawa, closing submissions, 10 February 2004 (doc T10), pp114–115

at Waikawa was to be designated a reserve. Counsel concludes that the December 1848 agreement did not explicitly designate a Waikawa reserve.

In looking at the March 1850 deed and accompanying map, counsel argued that the map did not illustrate what was agreed in December 1848. She quoted from her cross-examination of Mr Macky and his admission that on a 'narrow interpretation' the word 'Waitohi' in the December 1848 agreement referred only to the pa, the cultivations, and the harbour.[316] Counsel argued that, if the 1850 deed and map were constructed on the morning of the transaction, then Te Atiawa had no prior opportunity to consider them. The 1850 transaction, counsel concluded, 'does not meet the Treaty standard and findings to that effect should issue'.[317] We discuss this below. Finally, counsel quoted Mr Macky's admissions that the Crown had been 'shabby' in its treatment of Te Atiawa over the church, and that the company failed to provide town lots at Waitohi for Te Atiawa.[318]

Counsel sought findings from the Tribunal that 'it was a breach of the principles of the Treaty' for the Crown to:

- fail to apply a needs based assessment to the company that only required 104,890 acres to fulfil its obligations;
- accept that Waitohi was 'required' by the settlers and to promise to confirm any purchase the company could make;
- determine that in 1848 the interest of Te Atiawa did not require that they should retain Waitohi;
- unilaterally alter the December 1848 agreement to the effect that 8000 acres was purchased by the Crown and 3050 acres reserved at Waikawa;[319]
- have Te Atiawa sign the 1850 deed and map 'when it knew or ought to have known' that Te Atiawa did not understand or consent to its terms; or
- not reserve any land for Te Atiawa at Waitohi.[320]

We consider these submissions after we have outlined the Crown's submissions.

The Crown's closing submission on the Waitohi purchase was relatively brief.[321] It noted the limited objectives of the purchase – to provide a port for the Wairau – compared with the blanket Wairau and Te Waipounamu purchases. In response to Te Atiawa's submission that the purchase had been expanded from the December 1848 agreement to the much wider area of the 1850 deed, the Crown relied on Mr Macky's argument that the 1848 agreement was 'open to several interpretations'. One interpretation was that the 1848 agreement allowed the inclusion of all the land adjoining both bays, Waitohi and Waikawa. The Crown

316. Counsel for Te Atiawa, closing submissions, pp 121–122
317. Ibid, p 123
318. Ibid
319. The closing submissions also note that the Waikawa reserve, assumed to be 2500 acres in extent, was found to contain 3050 acres upon survey. The basis of the 8000-acre figure for the purchase area as a whole is less clear: counsel for Te Atiawa, closing submissions, p 116.
320. Counsel for Te Atiawa, closing submissions, pp 124–126
321. Crown counsel, closing submissions, pp 105–110

argued that Te Atiawa after the 1848 agreement had acted as if this had 'provided for the sale of the area of land consistent with the body of land included in the 1850 sale'.[322] It was further submitted that, when Te Atiawa signed the March 1849 agreement (over the Waikawa reserve), they would have known that the company and Government were purchasing more than the immediate vicinity of Waitohi Pa. If not, Te Atiawa would have complained, and there is no record of such complaints.[323] The Crown argued that, although Te Atiawa counsel's submission conformed with the face of the 1848 memorandum, it did not 'explain the subsequent conduct of both parties'.[324] The Crown uses Ropoama Te One's demand for instalment payments as evidence of 'subsequent conduct' by Te Atiawa that indicated awareness of the extent of the purchase. Also, the Crown assumed that Te Atiawa had a sophisticated knowledge of land transactions at this time and therefore 'would not have been passive bystanders in 1850 while the Government unilaterally changed the terms of the 1848 memorandum.'[325]

The Crown submission deals briefly with Grey's role in the 1848 transaction, merely saying that he was keen to complete a transaction that promised so much to both parties and that, as Dr Loveridge admitted, was voluntarily accepted by their chiefs.[326] On the Waikawa reserve, the Crown noted that Te Atiawa wanted land beyond the flat areas for grazing cattle and claimed, as Mr Macky had done, that the flat land was as suitable for cultivation as that at Waitohi, quoting also an opinion of Alexander Mackay in 1865 to this effect.

The Crown submission admits that Te Atiawa had 'very little time' to consider the plan attached to the 1850 deed. Nevertheless, the Crown argued, the plan followed the ridge lines of the hills that enclosed Waikawa and Waitohi and, although some surveying was needed to define the southern boundary in the Tuamarina Valley, the boundary followed 'easily recognisable natural features which should have been easily understood'. The Crown submitted that 'the 1850 map and deed . . . reflected Te Atiawa's understanding of the Waitohi purchase'.[327] Finally, the Crown accepted that 'there was a delay in completing the chapel until 1860'.[328]

5.8.4 Tribunal conclusions and findings

In trying to reach conclusions and findings on the Waitohi purchase, we note that there has been a good deal of speculation, founded on the surmises of researchers or counsel, rather than hard documentary evidence. It is true and unfortunate that there is limited

322. Ibid, p 107
323. Ibid
324. Ibid
325. Ibid, p 108
326. Ibid
327. Ibid, p 110
328. Ibid

documentary evidence on some issues, and very little indeed from the Te Atiawa side. Nevertheless we have to make the best of what we have. We have to begin with what the documents said, before we consider what they might have meant to the various parties involved. But, having said that, we have to remember that virtually all of the documents are official documents and record what officials or company representatives understood of the transactions and sometimes wanted those in higher authority to believe. As we have noted previously, Grey was adept at writing dispatches that told his masters in the Colonial Office what he wanted them to believe, not what had necessarily happened. His description of the Waitohi purchase is no exception. If the official documents fail to record Te Atiawa dissent, that does not necessarily mean that Te Atiawa approved; perhaps only that the official recorder failed or did not want to record their dissent. As we noted above, Weld writing to his sister about the December 1848 negotiations, gave a rather different picture than Fox and Grey did in their official reports.

Bearing these cautions in mind, we look first at the three agreements and then more generally at the over-all arrangement.

(1) *The agreement of 30 December 1848*

There is some evidence of pressure by agents for the company and the Crown on Te Atiawa to sell Waitohi and move to Waikawa, which they were reluctant to do. But we think that they finally agreed once they were assured of assistance to create an Otaki-style village at Waikawa. However, we consider that the 30 December 1848 agreement was defective in that it failed to define the boundaries of the land the Crown was claiming to purchase around Te Atiawa's pa and cultivations at Waitohi. We think that Te Atiawa presumed that they were giving up a deep-water anchorage and their foreshore pa and cultivations at Waitohi, though no more. We make no finding on the failure to define boundaries since it could have been presumed, as Crown counsel and its historian, Mr Macky, argued, that the December 1848 agreement was not final and needed to be followed up by a further agreement.

(2) *The agreement of 5 March 1849*

The agreement of 5 March 1849 can be regarded as a partial completion of the December 1848 agreement in that it defined (and somewhat enlarged) the boundaries of what was now proposed as a Te Atiawa reserve at Waikawa, encompassing an area estimated at 2500 acres and extending to the top of the hills on both sides of Waikawa Valley. The agreement, with the larger reserve, was not an act of beneficence since it merely gave reserve status to what was already Te Atiawa customary land. Grey had instructed that the reserve should afford 'sufficient room for the future operations of the Natives'. Yet, as Dr Loveridge noted, most of the seemingly generous reserve was steep hillside, and the small area suitable for cultivation amounted to no more than a few acres per head, given a population of some 90 people at Waitohi for whom relocation to Waikawa in order to make way for settler interests at the

former location was intended. In no way could this be considered sufficient for the present and future needs of Te Atiawa. Accordingly, we find the Crown in breach of the principle of active protection in failing to ensure a sufficient area of land suitable for cultivation was set aside in substitution for Waitohi.

(3) *The deed of 4 March 1850*

The deed of 4 March 1850 can also be regarded as a further 'completion' of the December 1848 agreement but it was of a very different order than the two previous agreements. It was drawn up as a conveyance and, unlike the two agreements, accompanied by plans of the land to be ceded. But it unilaterally added a great deal more to the Waitohi purchase than the pa and adjoining cultivations at Waitohi that were specified in the December agreement – indeed, all the land up the Waitohi Valley to the edge of the Crown's Wairau purchase; nearly 3750 acres by Dr Loveridge's calculation.[329] Though Grey had in mind such an extension as early as January 1849, we believe that there was no warrant for such an extension in the December 1848 agreement. The Crown had a responsibility to clarify the inadequate agreement of December 1848 but it had no right to expand it unilaterally, without further payment. It is true that a considerable number of Te Atiawa signed the 1850 deed and plan, including some who had signed the previous agreements, but the whole thing appears to have been sprung on them in Nelson on the morning of the signing. Though the deed may well have been perfectly legal, it did not, in our opinion, measure up to the standard required by the Treaty, as we find below.

(4) *Finding*

We find that the Waitohi deed of 1850 was in breach of the principles of the Treaty in that it took in, without further payment, additional land not specifically included in the two previous agreements. Te Atiawa were prejudiced by the loss of that land and also the valuable stand of totara on part of it. While the £100 payment may have been sufficient, according to contemporary values, for the port and adjoining on-shore land, it was by no means sufficient for some 3750 acres added by the 1850 deed. Nor, in our view, should the £200 paid Te Atiawa in lieu of ploughing the land they were entitled to receive at Waikawa be considered as part of the consideration for the land. We agree with Dr Loveridge that seen in the context of the earlier 1848 agreement this was merely part of the trade-off for the decision not to set aside reserves at Waitohi. Furthermore, the Crown, by its unilateral redefinition of the extent of the purchase was in breach of its article 2 responsibility to purchase '*such lands* as the proprietors thereof may be disposed to alienate' (emphasis added). It was also in breach of the principles of partnership and active protection.

329. Dr Loveridge observes that this Waitohi block 'is approximately twice the size of the first'. He further notes that, although no acreage was given on either the deed or the plan, the whole of the area encompassed by the agreement 'cannot have been much short of 7,500 acres': Loveridge, 'Let the White Men Come Here', p151.

5.8.4(4)

We now make findings on more general issues:

- While there was nothing wrong in principle in the purchase of Waitohi as a port for the settlement that was forming at the Wairau, we accept Te Atiawa counsel's submission that the Crown's carrying out of the project was to the advantage of the company settlers and disadvantage of Te Atiawa. They were pressed into selling Waitohi and required to settle on their own land at Waikawa, when their preference had actually been the other way around. The loss of key cultivations at Waitohi contrary to the wishes of Te Atiawa could not be satisfactorily compensated for at Waikawa, which already belonged to them anyway. It was incumbent upon the Crown in making these arrangements to ensure that a proper equivalent was received (as per Normanby's instructions) for what the customary owners had to give up, in the form of a rise in value and ability to prosper from their remaining land as a result of settlement at Waitohi. Waikawa was never going to provide those benefits to the extent that reserves within the new settlement at Waitohi would have, and although land at Waitohi was used to fulfil promises to Nelson settlers, Te Atiawa did not receive any tenths lots there as could have been expected in fully carrying out the company's promises.
- We conclude that the 'exchange' of Waitohi for Waikawa, and the fitful implementation of the conditions of the December 1848 agreement, did not provide the advantages that Te Atiawa could have expected from a cloned Otaki village. All but a small portion of the reserved land was unsuitable for agriculture and was in any event too distant from the market. Jollie reported the concern of Te Atiawa at being 'removed so far from the White mans [*sic*] town'.[330] They had been effectively shut out of the township at Waitohi they had been so keen to see established. Moreover, since Te Atiawa did not receive land at Waitohi, apart from a fish market reserve at lot 132, they could not gain from the rise in land values that accompanied the development of it as a port for Marlborough. Such gains from colonisation had been explicitly stated in Normanby's instructions, and justified the payment of low prices, and were frequently reiterated in subsequent dispatches, including some of Grey's.
- We find that the failure to provide Te Atiawa with significant land in Waitohi, combined with the failure of the 'exchange' arrangements at Waikawa, meant that they lacked the opportunities for economic development that they could have expected. This too was in breach of the principles of partnership, reciprocity, active protection, and equity. We consider this issue further when we look at the fate of Te Atiawa reserved land at Waikawa in chapters 7 and 12.

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

5.9 Summary and Conclusion

We commenced this chapter by considering the obligations upon the Crown when purchasing Maori land. That discussion served not merely to introduce the Wairau and Waitohi transactions discussed later in the chapter, but also provides the broader context to the Waipounamu and other purchases discussed in the next chapter. As we noted, all of the parties to our inquiry were agreed that the Crown was required to purchase land from the correct customary owners. This fundamental and basic obligation was well understood and appreciated at the time, stemming not merely from Normanby's instructions to Hobson, but from the Treaty itself. It was widely appreciated that the right of pre-emption granted the Crown under article 2 established in return a fiduciary-style obligation to actively guard and protect Maori interests. Crown officials conceived of the obligation in similar terms, and indeed in their instructions and public utterances demanded a scrupulous attention to such requirements when purchasing land.

The obligation of active protection extended into the Crown's investigation of private land dealings, both pre-1840 and those completed during FitzRoy's short pre-emption waiver experiment, and was further reflected in various earlier proposals with respect to an appropriate purchasing framework. Chief Protector of Aborigines, George Clarke Senior, set out his views on this matter, proposing that the Crown should only purchase clearly delineated and quite small blocks of land, inquiring into and identifying all interested right holders prior to initiating any purchase and ensuring that all freely consented to a proposed transfer prior to this being commenced. Lord Stanley instructed the new Governor, George Grey, that he was to 'honourably and scrupulously fulfil the conditions of the treaty of Waitangi'.

The problem was not the policy prescription, but the failure to adhere to it. In this regard, as we saw, the enduring influence of the 'waste land' theory was of critical importance in undermining the Crown's commitment to recognising and protecting Maori interests, especially in the less densely populated South Island. The 1844 committee's report, along with Earl Grey's 1846 'waste land' instructions, were premised on a narrowly conceived and restricted notion of Maori land rights, based on areas occupied or cultivated solely in accordance with European notions. But while Governor Grey, fearing a calamitous showdown between settlers and Maori would otherwise result, skilfully evaded giving effect to these instructions, his land purchase policy was based on the 'nearly allied principle' that large areas of waste land might be acquired for merely nominal sums.

It was the Wairau purchase of 1847 that was to provide the early prototype for Governor Grey's alternative strategy. But while in this case Grey defended the need to set aside a reserve sufficiently large to account for shifting Maori agricultural practises, along with customary hunting and foraging, later purchases took a 'waste lands' approach to reserve requirements, to the extent that by 1853 the Waipounamu purchase had taken in the large Wairau reserve set aside just a few years earlier. This more miserly attitude towards reserves,

combined with a blanket purchase policy which purported to extinguish all of the interests of particular groups but failed to clearly delineate or define the extent of these, was to prove disastrous in the longer term for the iwi of Te Tau Ihu. The very nature of such sweeping purchases meant scant attention was devoted to considering which lands Maori required for their own comfort, safety, or subsistence. Normanby's instructions, for so long the professed cornerstone of Crown purchasing policy, were effectively overturned, along with the Treaty's land guarantee.

For Governor Grey land purchasing went hand in hand with his wider strategic goal of breaking Ngati Toa's dominance of the Cook Strait region. He disbanded the Protectorate Department soon after his arrival in New Zealand, re-employing key officials such as Donald McLean as land purchase agents. Meanwhile, Grey's Native Land Purchase Ordinance of 1846 was intended to signal a clear break with FitzRoy's pre-emption waiver scheme. But for company settlers starved of good rural land, the natural grasslands of the Wairau district remained tempting. Secretly authorised to spend up to £10,000 to secure land for company settlers, the Governor was quick to target the Wairau district.

It was in this context that Te Rauparaha was seized under orders from Grey in July 1846 and held without trial until January 1848. With Te Rangihaeata forced into hiding, leadership of Ngati Toa passed to younger chiefs, who in March 1847 were persuaded to sign a deed of cession for the Wairau district, containing an estimated three million acres. The Crown conceded that the detention of Te Rauparaha and other Ngati Toa chiefs without trial was in breach of their article 3 rights as British subjects, including the fundamental right of freedom from imprisonment without trial. We concluded that the three signatories of the Wairau deed were more or less blackmailed into signing this as the price of Te Rauparaha's freedom. The coercive pressure placed on the three Ngati Toa signatories amounted to duress and was in clear and serious breach of the Crown's obligation under article 2 to purchase only such land as Maori were freely and willingly prepared to alienate, as well as the principles of partnership and active protection.

There were numerous other problems with the transaction. Surveyor-General Ligar's report into customary rights at the Wairau had identified 13 principal chiefs whose consent would be required to any transaction, along with 'many' other un-named right holders. Yet, Grey chose to ignore this advice in order to push through the transaction with the three rangatira he had always planned to complete the deal with. The interests of the wider Ngati Toa iwi were therefore ignored and the purchase completed behind closed doors and from just three Ngati Toa rangatira, deliberately violating the rights of other senior rangatira and of the iwi as a whole. We found this to be an absolute and deliberate breach of article 2 of the Treaty and the principles of reciprocity, partnership, active protection, and equal treatment.

Not only did the deed violate the rights of other Ngati Toa customary owners, but it completely ignored the interests of Ngati Rarua and Rangitane. In part, this reflected the Crown's failure to carry out an adequate investigation into customary interests in the area prior to

the signing of the Wairau deed. William Spain did not investigate customary rights at the Wairau, in part because the New Zealand Company did not press its claim to the district at the Nelson hearing in 1844. Despite this, he concluded that Ngati Toa had an exclusive right to the district – a conclusion which Grey later found convenient in supporting his decision to purchase the area solely from three members of that iwi.

Ligar's report, incomplete and inadequate as it was, had put the Crown on notice that there were at least 13 principal chiefs whose consent was required to any Wairau transaction, along with an unspecified number of other right holders. Some of those identified by Ligar as 'Ngati Toa' were clearly Ngati Rarua rangatira. Yet, Grey remained committed to his predetermined plan to deal solely with the three Porirua chiefs, ignoring all other right holders, regardless of their tribal affiliations. The Crown thus knowingly and deliberately purchased the Wairau without the free and informed consent of the resident right holders, including Ngati Rarua. In doing so, it acted in clear breach of article 2 of the Treaty and the principles of reciprocity, partnership, active protection, and equal treatment.

Spain's 1845 report had concluded (without so much as ever having met or questioned them) that Rangitane were 'reduced to a mere remnant, living in the interior without any fixed dwelling-places, and even now hunted down by Rauparaha and his retainers'. This was at odds with Ligar's 1847 report and, as a basis for denying Rangitane interests at the Wairau, contrary to Spain's own stated views on the relative rights of conquerors and conquered in areas where the latter maintained a presence on the land. Nevertheless, Rangitane's ongoing, if no longer exclusive, interests were ignored in the purchase of their land, in serious breach of article 2 of the Treaty and its principles.

There were other less than savoury aspects to the transaction. Reversing FitzRoy's earlier finding that the company bore primary responsibility for the 1843 conflict, Grey pressured the three chiefs into giving up the land as utu for those slain at Tuamarina. Meanwhile, the Governor took advantage of Ngati Toa's desire for utu for their own warriors who had fallen in battle with Ngai Tahu to extend the southern boundary all the way to Kaiapoi. He further insisted on making the £3000 consideration payable by five annual instalments in order, as he informed Earl Grey, to 'give us an unlimited influence over a powerful and, hitherto, a very treacherous and dangerous tribe'. We found that the Crown had knowingly and unfairly paid an inadequate sum for the land, contrary to the Treaty principles of partnership and active protection. We also found that officials failed to ensure that the instalment payments were properly distributed to all rightholders in the land, in breach of the Treaty and its principles.

It was incumbent upon the Crown, when purchasing land from Maori, to clearly and unambiguously spell out the boundaries. That did not happen in the case of the Wairau transaction, and the unclear boundaries of the reserve, the failure to define the inland boundaries at all, and the decision to shift the southern 'Kaiapoi' boundary without the consent of the signatories or other rightholders, together meant that the deed did not meet

the standards required for a valid alienation under the Treaty. We found the Crown's reliance upon the deed as the basis for extinguishing title to the Wairau district despite these fatal defects to have been in clear breach of article 2 of the Treaty.

Nor, in our view, were the various failings of the Wairau transaction mitigated by inclusion of rightholders who had been ignored in 1847 in the later Waipounamu purchase. Besides the many failings of that latter purchase, discussed in the next chapter, we concluded that the series of deeds signed after 1853 could not and did not make willing sellers of those whose rights had already been granted to others, in breach of the clear meaning of article 2 of the Treaty.

Despite these many failings in the transaction, most of the area encompassed by the Wairau transaction was included in a new and more generous Crown grant issued to the New Zealand Company in 1848. This and a similar grant issued with respect to Wellington lands followed arrangements entered into between the Imperial Government and company representatives in London whereby substantial funds were advanced to the company, which was also to receive the demesne lands of the land within the province of New Munster in order to promote its colonisation activities. The 1848 grant included land outside the Wairau purchase boundaries and earlier FitzRoy grant, thus effectively awarding the company more land than had even been claimed to have been purchased from Maori. A further wave of blanket purchase deeds as part of the Waipounamu transaction could hardly alter the fact that customary Maori land had been handed to the company without the owners' prior consent or knowledge. We found the 1848 Crown grant to be in breach of the plain meaning of article 2 of the Treaty in thus disposing of customary Maori lands without first obtaining the full and free consent of all right holders to the extinguishment of their title.

The Waitohi purchase, encompassing an area estimated at 7500 acres, including a reserve of some 2500 acres, was a direct consequence of the earlier Wairau transaction. Once the former had been identified as the most suitable site for a port for company settlers on the Wairau Plains, the pressure went on for its acquisition, notwithstanding an existing Te Atiawa settlement and cultivations at Waitohi. Local Maori were reportedly anxious to reap the benefits of a new settlement and willing to make the nearby Waikawa Bay available for these purposes. But with company officials still pushing for Waitohi as a preferred port, Grey personally intervened in the matter, deciding that 'the interest of the natives did not in any way require that they should retain Waitohi', and visiting Queen Charlotte Sound in an effort to secure the site.

In December 1848, Te Atiawa chiefs signed an agreement giving up an unspecified area at Waitohi in return for a new township and cultivations at Waikawa to which they were expected to relocate. Given the context, we concluded that Te Atiawa likely presumed this agreement merely involved the giving up of a deep-water anchorage and their foreshore pa and cultivations at Waitohi. This was, however, merely a preliminary agreement, which left much to be subsequently arranged. Subsequent instructions from Grey effectively enlarged

the area subject to the agreement, which was as early as January 1849 redefined to encompass all of Waitohi and Waikawa.

A second agreement signed in March 1849 defined the area to be reserved for Te Atiawa at Waikawa. But, since this was already customary Maori land, this was hardly an act of great beneficence on the Crown's part, especially considering only a very small part of the estimated 2500 acres was suitable for cultivation. But the company's failure to plough land for Te Atiawa at Waikawa as stipulated in the original agreement meant local Maori were unable to plant new crops there the following summer. Meanwhile, a higher priority was accorded surveying lots in the new township at Waitohi and road access to it than was the case for the reserve and township at Waikawa. We found the Crown in breach of the principle of active protection for failing to find suitable land in substitution for that given up at Waitohi.

In March 1850, a new agreement was signed, in which Te Atiawa received £300 in total, including £200 compensation for the failure to provide the ploughed land at Waikawa. But unlike the earlier documents, this latest agreement was deemed by Crown officials to constitute a deed of sale. The wording of the deed introduced the language of sale for the first time, but purported to date the initial consent to an absolute alienation to the December 1848 agreement. The attached plan now stretched the area encompassed by the purchase from the original pa and cultivations at Waitohi to something in the order of 7500 acres. We concluded that, although the Crown had a responsibility to clarify the inadequate agreement of 1848, it had no right to unilaterally add a substantial area to that being given up, without further payment. Although there were a number of signatories to the 1850 deed and plan, the whole thing appears to have been sprung on them without prior explanation or warning. We found the Waitohi deed in breach of Treaty principles in that it encompassed significantly more land than was included in the earlier agreements without adequately obtaining the consent of all rightholders and with no additional compensation.

Ultimately, Te Atiawa were pressed into surrendering Waitohi and required to relocate to their own land at Waikawa. Te Atiawa consistently expressed a desire to have Pakeha come and settle nearby and were willing to share their lands for these purposes. But company and Crown officials evidently never considered the possibility that the two peoples might share Waitohi and the future prosperity it was expected to bring. No tenths reserves were set aside for the vendors, who were more or less totally shut out from the new township. Although the Treaty envisaged a form of partnership for the mutual benefit of both Maori and Pakeha, the interests of settlers were consistently prioritised in the arrangements at Waitohi. As a consequence, Te Atiawa found themselves excluded from the future economic development of the port. We found this to be contrary to the principles of partnership, reciprocity, active protection, and equity.

Thus, the Crown had obtained (and granted) an enormous amount of land in Te Tau Ihu by 1851, in breach of the Treaty and its principles, and to the serious prejudice of those

whose property was in many cases taken from them without their free and full consent – in some cases without any consent at all – and without (or with inadequate) compensation. These are serious matters indeed. This was not the end of large-scale land alienation, however, as the Crown sought to acquire almost all the remaining land within the next few years. It is to those further purchases that we turn in the next chapter.

CHAPTER 6

CROWN CONTROL CONSOLIDATED

6.1 Introduction

This chapter is mainly concerned with what could be called the final assertion of Crown control over the Maori lands of Te Tau Ihu through the Waipounamu purchase of 1853–56. That transaction, like the New Zealand Company's Nelson dealings and Grey's 1847 Wairau transaction, discussed in our two previous chapters, began with a deed of purchase with absentee Ngati Toa. It was completed with a series of other deeds and deed 'receipts' with resident Te Tau Ihu Maori in 'compensation' for their interests. But despite its all-embracing range – an estimated eight million acres[1] – the Waipounamu purchase did not quite complete the acquisition of Maori land in Te Tau Ihu and was never quite as comprehensive as Crown officials sometimes sought to portray it. Poorly defined boundaries and oral promises not included in the texts of the deeds led to confused and sometimes widely varying understandings as to the nature of the arrangements between Crown agents and local Maori. Meanwhile, small reserves and individual grants were awarded to the signatories of the deeds and three quite large areas of land remained in customary Maori ownership: Wakapuaka, Rangitoto (D'Urville Island), and Taitapu, which together totalled some 146,391 acres. We discuss the alienation of most of these three areas under Native Land Court processes in chapter 8, and the fate of reserves in chapter 7.

In this chapter, we also discuss the Crown's purchase of the Pakawau block in western Te Tau Ihu, which preceded the Waipounamu purchase. The Pakawau transaction, which was completed in 1852, in fact stood in marked contrast to the blanket Waipounamu purchase. In the former case a more discrete and carefully defined area of land was transacted and all potential right holders were identified and enabled to determine their own customary entitlements and their wish to transact the land prior to signing the deed. That approach was, however, seen as a risky one by Crown officials and consequently was rejected in the case of Waipounamu in favour of a harder-edged purchasing strategy.

That more aggressive approach was evident in a number of different respects over the period between 1853 and 1856, and we explore the many issues arising in respect of the Waipounamu purchase in some detail. Then, after we have completed our discussion of

1. McLean to commissioner of Crown lands, 15 December 1854 (Tony Walzl, *Ngati Rarua Land Issues, 1839–1860* (Wellington: Ngati Rarua Iwi Trust, 2000) (doc A50(1)), p 258)

Waipounamu, we examine some of the Crown purchases bearing upon Te Tau Ihu interests south of the takiwa, including on the West Coast the Arahura purchase of 1860. On the eastern seaboard the North Canterbury purchase of 1856, although intended to extinguish Ngai Tahu interests, was followed in 1860 by the Kaikoura purchase, both of which are also considered in the context of the impact of these transactions upon any Te Tau Ihu customary interests within the takiwa area.

Following our discussion of issues pertaining to Crown purchasing within the takiwa, we consider a generic issue of considerable significance to many claimants when we look at the impact of blanket Crown purchasing upon customary resource-use rights.

As in our previous chapters, we are concerned with the details of the Crown's involvement in the transactions and also whether the Crown's actions were in compliance with the Treaty. In this respect, we are particularly concerned with the behaviour of leading Crown agent, Chief Land Purchase Commissioner Donald McLean. We also discuss Maori understanding of and involvement in the transactions. Following our narrative discussion of each major Crown purchase, we consider claimant submissions and the Crown's submissions in reply and add our conclusions and findings. We finish the chapter with an overall summary and conclusion.

But we begin, as we did in the previous chapter, by briefly sketching in the contextual background to the transactions.

6.2 The Imperial and Colonial Context

The Waipounamu purchase was a continuation of Sir George Grey's large scale Crown purchases of Maori land that he initiated as an alternative to Earl Grey's instruction to declare all 'waste land' as Crown land and make it available for settlement. As we noted in the previous chapter, the Wairau purchase was the precursor of Governor Grey's new policy. It was soon followed by an even greater acquisition, the huge Canterbury purchase (which went across the Alps to the West Coast) of 1848. The Waipounamu purchase was another of these blanket purchases and regarded as a final mopping up of the land north and west of the Canterbury and Wairau purchases, bringing most of the South Island into Crown ownership. The striking success and extraordinary cheapness of Grey's purchases meant that Earl Grey's waste lands policy was being given effect anyway – except that the Crown was paying nominal prices for huge areas of 'waste land'. Moreover, Crown land was being sold expensively – at one pound an acre until it was reduced to 10 shillings in 1853 – and the income was used to fund immigration and infrastructure. In effect, Maori were subsidising the costs of colonisation. There may have been some basis to the scheme of buying cheaply and selling dear if Maori had been permitted to retain sufficient land for their own requirements and to profit from rising values from their surplus lands, and if instructions to set

aside not less than 15 per cent of the net proceeds from the resale of land to the settlers for Maori purposes had been fully and properly implemented. But as we have already seen, that was not the case. As more colonists arrived, more Maori land was required to settle them. Meanwhile, as Earl Grey had envisaged, Maori were being located on reserves confined to the land they occupied and cultivated but these were too small to enable them to practise the extensive pastoralism that was quickly becoming the major agrarian activity on the natural grasslands of eastern New Zealand.

From December 1848, the policy had the full approval of Earl Grey himself. He instructed Governor Grey to proceed with the purchase of 'waste lands' as quickly as possible before the expense became too great.[2] Moreover, Grey's purchase policy was ostensibly in conformity with the Treaty, since the Crown was purchasing land under the pre-emptive clause of article 2. By creating a large reservoir of Crown land, Grey was providing in advance for the needs of the company settlers and new immigrants, many of them pastoralists. As we noted in our previous chapter, pastoralists were already driving their sheep onto Maori land and negotiating 'grass money' leases with them, making it necessary for the Crown to get in quickly and purchase the land. Purchasing land in advance of the needs of settlement was also designed to keep the price down – before Maori became aware of its potential value. The prospect that much of the land would be rich in minerals, as we shall find for western Te Tau Ihu, was an added incentive to acquire it quickly.[3]

Grey's military successes, discussed in our previous chapter, brought a period of peaceful Anglo–Maori relations. His land purchase and settlement policies ushered in a new era of colonial prosperity. Maori were temporary beneficiaries of this since they produced much of the food required to feed the new settler immigrants. But it was doubtful whether their prosperity could continue when the Crown quickly acquired the best of their agricultural lands, and as immigrants poured into the country and soon replaced Maori as the principal agricultural producers. By December 1858, the European population was 59,413 and had passed that of the Maori whose population was estimated at 56,049 and was declining.

The Waipounamu purchase was initiated by Grey on the eve of his departure to take up the governorship of the Cape Colony. It was one of the final acts of what his colonial masters regarded as a stunningly successful first New Zealand governorship. But Grey could depart knowing that his able lieutenant, Donald McLean, would complete the purchase, as he was to do with other purchases initiated by Grey on the east coast of the North Island. McLean, at his own suggestion, became chief commissioner of the newly created Native Land Purchase Department in 1853. The new Governor after 1855, Colonel Thomas Gore Browne, who lacked Grey's cunning and finesse in dealing with Maori, became increasingly dependent on him. As historian Keith Sinclair put it:

2. Earl Grey to Governor Grey, 27 December 1848 (Michael Macky, 'Crown Purchases in Te Tau Ihu between 1847 and 1856', report commissioned by the Crown Law Office, 2003 (doc s2), p 132)
3. Macky, 'Crown Purchases in Te Tau Ihu', p 133

> Because of this uncontrolled power, the policy and personality of McLean assumed an importance without constitutional justification, and his domineering manners and shrewd intelligence bulk large in New Zealand history. . . .
>
> McLean . . . not only preserved much of Grey's policies and opinions, but the man seemed a new Grey in himself. As his master had been, so McLean was impatient of all control, ruthless towards opposition. Like Grey, he was an intriguer and opportunist, like him he had little respect for facts where equivocation was advantageous. He had Grey's courage, energy, endurance, and aggression, though more than Grey, he tended to procrastinate. Like Grey, he was wonderful at negotiating with Maoris but not with Europeans.[4]

In the course of this chapter, we shall encounter many of these McLean characteristics as he procrastinated but eventually completed the Waipounamu purchase some two and a half years after it was initiated by Grey.

As Sinclair further explained, McLean came into increasing conflict with the colonial politicians who gained greater influence under the 1852 constitution. This provided for a system of self-government with initially five provinces, capped by a central bicameral parliament. Before he left, Grey provided for the election of provincial councils and superintendents but not the central parliament, which was elected after his departure. Nelson was one of the five provinces formed under the Constitution Act, though a New Provinces Act of 1858 allowed the pastoralists in the east to break away and form the Marlborough province in 1859. The colonial politicians who operated at the provincial and national levels quickly demanded what was called responsible government, giving them effective control over the Legislature and Executive, and thus reducing the authority of the Governor. Although responsible government was conceded for most domestic matters from 1856, the Governor retained responsibility for native affairs until the end of the decade. Much to their dismay, the colonial politicians failed to control McLean, who retained the confidence of Browne and was, in virtually all Maori matters, a law unto himself.[5]

Despite this, we should not forget that McLean and the politicians had a common aim which they inherited from Grey: to acquire Maori land as quickly and cheaply as possible, well in advance of needs of settlement. Moreover, they could do so in the knowledge that there would be steadily diminishing imperial control over their actions and they could do virtually what they liked with the Treaty. The Treaty gradually receded into the background. Also, we should remember that despite McLean's eminence, it was the former company settlers and officials who became the new Nelson politicians and provincial officials and who did much of the leg-work. They were forever trying to conciliate local Maori and keep them

4. Keith Sinclair, *The Origins of the Maori Wars*, 2nd ed (Wellington: New Zealand University Press, 1961), pp 56–57
5. Ibid, pp 88–98

on track for alienating the land. This enabled McLean to close the Waipounamu transaction when he finally appeared in Nelson.

As we shall see, there was little doubt that McLean was procrastinating to soften up Maori to accept a lower price, but he did have to attend to land purchase matters in other districts. He was particularly involved in Taranaki where local Maori, including some who had returned from various settlements in Te Tau Ihu, were stubbornly resisting further sales to the Crown. McLean sometimes treated the returned expatriates generously. He paid them well for interests in various blocks in Taranaki, such as the Hua block, and he paid them for interests in Waipounamu before he paid those who remained behind: all because he wanted to literally buy support for further sales in Taranaki. For McLean, as for Maori, Cook Strait was a wide sea of interchange that extended from Taranaki to the Sounds and across Te Tau Ihu. It is no wonder that McLean considered both sides of the strait in his settlement of the Waipounamu purchase. We discuss his manoeuvres in detail below.

6.3 The Pakawau Purchase

The Crown's Pakawau purchase falls rather uneasily between Spain's mopping-up compensation payments in Golden Bay and the Waipounamu purchase. It was largely a forgotten purchase, though several of the historians who submitted reports for our inquiry have examined it.

6.3.1 The negotiation and purchase deed

As Dr Grant Phillipson points out, Grey wanted to 'complete the Nelson Block' by buying land in Golden Bay north of Aorere that was not included in Spain's award.[6] During a visit to Nelson in November 1851, Grey met a deputation of settlers who urged him to purchase the block. They wanted the coal that had been discovered at Pakawau to provide fuel for a proposed steamship company.[7] The Pakawau block extended from the Aorere River to West Whanganui on the West Coast and northwards to Cape Farewell. But there was also discussion at the time of acquiring more land on the West Coast from the south end of West Whanganui Harbour to Kahurangi, the northern boundary of the Canterbury purchase. The Pakawau district was occupied mainly by small groups of Te Atiawa, Ngati Rarua, Ngati Tama, and Ngati Apa.

6. Dr Grant Phillipson, *Northern South Island: Part 1*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1995) (doc A24), pp 106–109. The purchase is also discussed by Tony Walzl, Mary Gillingham, and Michael Macky: Walzl, *Land Issues*, pp 234–238; Mary Gillingham, 'Ngatiawa/Te Atiawa Lands in the West of Te Tau Ihu: Alienation and Reserves Issues, 1839–1901', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A74), pp 166–178; Macky, 'Crown Purchases in Te Tau Ihu', pp 119–130.

7. Macky, 'Crown Purchases in Te Tau Ihu', pp 119–120

The Nelson superintendent, Mathew Richmond, visited the district with an interpreter and several chiefs through December 1851 and early January 1852 and opened negotiations with the resident Te Atiawa chief Wiremu Kingi Te Koihua. He asked for £1000 but Richmond countered with an offer of £500.

As Richmond reported, 'the chief value of the district consists in the minerals, particularly the coal, which is in great abundance,' was accessible from the surface and could easily be transported down the Pakawau River. There were other mineral prospects in the district. Richmond justified the low price that he offered for Pakawau by saying that the land was unsuitable for agriculture. But he wanted to close the deal quickly because:

> the longer the purchase was delayed . . . the more difficult it would be of accomplishment, for I found the cupidity of the Natives had already been aroused by the reported value of the minerals upon their land, and if they were advised that it would be more to their interest to retain the ownership, the present opportunity might be lost of acquiring it.[8]

Though Richmond was a Crown official, with an obligation to deal fairly with Maori landowners, he was clearly intent on disguising what he believed to be the real value of the land in order to get it cheaply.

Richmond was also interested in the land on the West Coast south of Pakawau. Indeed, he attempted to purchase the land all the way down the West Coast from Te Whanganui Harbour to Ruapuke on the Southland coast. Richmond claimed that 'the Natives' had 'long been desirous' to sell this land to the Government but had placed such an 'exorbitant' price on it, ranging from £10,000 to £40,000, that he merely decided to report the matter to the Governor. He said that the 'Natives of Motupipi' were willing to accept £2000 but this was not acceptable to those residing in Tasman Bay.[9] The prospect that the West Coast south of West Whanganui might also be purchased, despite much of this area already having been included in Kemp's Canterbury purchase, continued to feature during negotiations for the more limited Pakawau block.

Richmond's offer to Te Koihua for Pakawau was objected to by others who claimed rights in the district. He was authorised to offer up to another £100 to conclude the purchase. When Ngati Toa at Porirua learnt of the proposed sale, they appealed to Grey for recognition of their 'pre-eminent rights' over Golden Bay. Crown historian Michael Macky suggests that Ngati Toa might also have been concerned by the plans of Nelson Ngati Rarua to sell West Coast land southwards to Arahura. Ngati Toa therefore wanted to assert their authority across the whole region.[10] The Reverend Samuel Ironside, who discussed the matter with the Ngati Toa chief Rawiri Puaha, said that the dispute was a question 'not . . . of

8. Richmond to Colonial Secretary, 5 January 1852, *Compendium*, vol 1, p 289
9. Ibid, p 290
10. Macky, 'Crown Purchases in Te Tau Ihu', pp 123–124

money, but of chieftainship'.[11] Rawiri demanded to be paid the money for Pakawau so that he could then hand all of it back to Te Koihua and others – as a way of asserting Ngati Toa's mana. Likewise, Te Koihua, who had initially dealt with Richmond, wanted to exercise the same right.[12] Grey instructed Richmond to satisfy every claimant.

Richmond called a general meeting at Nelson in May 1852 to discuss the Pakawau deal and proposals to sell more of the West Coast. Some 500 Maori claimants attended,[13] including several leading Ngati Toa chiefs who travelled to Nelson for the meeting, apparently at Grey's suggestion.[14] Richmond persuaded the hui to accept a total price of £550.[15] According to Dr Phillipson, promises of small reserves were not written into the deed. These may have included an additional urban reserve for Te Koihua in the proposed township of Pakawau that Mr Macky says was not honoured.[16] In the end, only two families were rewarded with reserves in the Pakawau block. Though there were others living there at the time of the Crown purchase, Richmond believed that they would be better off if they regrouped elsewhere in larger settlements.[17] He did not say where these might be.

At the conclusion of the Nelson hui the Pakawau deed was signed. Richmond's report on the transaction was very brief. He said that Grey's instructions had been carried out and:

> the purchase completed to the satisfaction of the Natives residing in the district, as well as others who we could learn had any interest in the land; indeed, the greatest pains have been taken, and every information sought, in order that no claimant, however small his interest, should be left out.[18]

Richmond referred to 'accompanying documents' to testify to the completion of the sale. We must turn to these for further information on the transaction.

It seems that Richmond had followed Grey's instruction to satisfy every claimant since the deed was signed by a fairly wide representation of chiefs. Signatories included Te Koihua, Tamati Pirimona Marino, Tepene te Rakaherea, Rawiri Watino, and Te Wirihana of Massacre Bay; Riwai Turangapeke of Tai Tapu; Henare Te Keha of Pariwakaoho; Te Iti of Motueka; Wi Katene Te Manu of Wakapuaka; the Ngati Koata chief Maka Tarapiko; Opukekowhatu of the Wairau; and three leading Ngati Toa chiefs Rawiri Puaha, Hohepa Tamaihengia, and Wiremu Te Kanae. Another 22 chiefs, who have not been identified for

11. Ironside to (?Richmond), 13 May 1852 (Professor Richard Boast, 'Ngati Toa and the Upper South Island: A Report to the Waitangi Tribunal', revised ed, 2 vols, report commissioned by the Crown Forestry Rental Trust, 2000 (doc A56), vol 1, p 249)
12. Macky, 'Crown Purchases in Te Tau Ihu', pp 124–125
13. Gillingham, 'Ngatiawa/Te Atiawa Lands', p 168
14. Macky, 'Crown Purchases in Te Tau Ihu', p 124
15. Gillingham, 'Ngatiawa/Te Atiawa Lands', p 168
16. Macky, 'Crown Purchases in Te Tau Ihu', pp 119, 129–130
17. Ibid, p 129
18. Richmond to Colonial Secretary, 21 May 1852, *Compendium*, vol 1, p 290

iwi affiliation or locality, also signed.[19] As we shall see, this process of involving Ngati Toa chiefs from Porirua in the transaction, thereby recognising their mana, was to be followed in the Waipounamu purchase transactions, though in the latter instance they took precedence over the resident chiefs.

Despite the apparently amicable proceedings at the hui, there was a flare-up over the distribution of the money. Eventually it was agreed that the money should be handed over to three of the chiefs for distribution to others. Then there was a row between two of them: Te Koihua, the resident chief at Pakawau, and Rawiri Puaha of Ngati Toa. This row was a revival of the dispute about tribal mana that we noted above, with Puaha asserting the Ngati Toa claim to overlordship, and therefore the right to receive and distribute the money. He was denying the right of resident Golden Bay Maori to sell land without Ngati Toa's permission. But Te Koihua held his ground, threatened Ngati Toa and even the Europeans with violence, and apparently won his point[20] Indeed, he received the largest of the three shares. The *Nelson Examiner* recognised this as a victory for a resident chief who was one of the few surviving representatives in Pakawau of the invading northern war party that had conquered the northern South Island.[21] Commissioner Spain would have approved. Governor Grey certainly did approve since he wrote to the Secretary of State saying, with his usual exaggeration, that the 'importance of this acquisition to the Nelson Settlement can scarcely be overrated' and that it had secured minerals that would contribute to the wealth and prosperity of the settlement.[22]

Although the signatories to the Pakawau deed were more fully representative of Maori owners than was usual in Crown purchase documents of this time, the purchase was not beyond criticism. Mary Gillingham, researcher for Te Atiawa, says the payment 'did not accurately reflect the value of the land because the government declined to pay for mineral value'.[23] We explore this issue further below.

Dr Phillipson suggests that these powerful chiefs from widely scattered places had not assembled in Nelson merely to obtain recognition of their rights to Pakawau. They had gone to Nelson expecting to sell the West Coast, possibly as far as Ruapuke, and certainly interests in the Kawatiri and Mawhera districts where some were still exploiting resources. However, Richmond found that they wanted what he regarded as an 'exorbitant' price and the purchase of the West Coast was postponed. The issue was revived when variously defined parts of the West Coast were included in some of the Waipounamu purchase deeds, as we will see in more detail later in the chapter.

19. *Compendium*, vol 2, p 378; Phillipson, *Northern South Island: Part 1*, p 108
20. Gillingham, 'Ngatiawa/Te Atiawa Lands', p 172
21. Macky, 'Crown Purchases in Te Tau Ihu', p 126
22. Grey to Earl Grey, 14 July 1852 (Gillingham, 'Ngatiawa/Te Atiawa Lands', p 170); also Macky, 'Crown Purchases in Te Tau Ihu', p 119
23. Gillingham, 'Ngatiawa/Te Atiawa Lands', p 170

The Pakawau purchase accordingly covered a somewhat more modest area, though it still included the northern part of the West Coast from the West Whanganui Harbour northwards to Farewell Spit. The boundaries were described as follows:

> bounded on the North by Cook's Strait; on the East by Massacre Bay; on the South partly by lands surveyed by the New Zealand Company in the Aorere River, which have since become the demesne Lands of the Crown, and partly by lands extending from thence to the West Coast, at or near Te Whanganui, still claimed by Aboriginal Natives; and on the west by the Pacific Ocean.[24]

The deed also listed places that were included, as follows: Opu, Whakamarama, Te Rua o te Taniwha, Waikato, Tamatea, Tongirere, Pakawau, Motukatoa, Motuporoporo, Te Rae, Mauku-uku, Taupata, Motukaroro, Pupongo, Te Reinga (or Cape Farewell), Onetahua (or the Sandspit), Te Wairariki, Te Angaanga, Te Nuroa, Kaihoka, Maturua, Manganuiawata, Mangarara, Te Poroporo, Onatauora, Te Papa, Meroiti, Toiere, and Te Whanganui. Some of these names may no longer be familiar, but we can rest assured that they were known to the signatories. A map was attached to the original deed and signed by Te Koihua, Tamati Pirimona, and Rawiri Watino. Dr Phillipson says that the deed, which merely defined the southern boundary as 'at or near Te Whanganui,' obscured part of the southern boundary at West Whanganui, though Mr Macky says that the final boundary took in half of the harbour (see fig 14).[25]

In contrast to the Wairau deed of 18 March 1847 and the final Waitohi deed of 4 May 1850 (discussed in the previous chapter), which both described land 'given up' to the Crown, the wording of the Pakawau deed was notably obscure. The English text spoke of the Crown's purchase of 'a block or parcel of land or ground'. It described the boundaries and the places included in the block that we listed above. Then it added, 'together with all and every the appurtenances to the said land or ground and premises belonging or appertaining or therewith held or enjoyed, to have and to hold the said block of land or ground, and all and singular other the premises unto Her said Majesty'.[26] That use of obscure conveyancing language looks suspiciously like an attempt by whoever drew up the deed for the Crown to obtain the minerals without specifically saying so. We note that the Crown was much more specific when it subsequently drew up the first of the Waipounamu deeds – the Ngati Toa deed of 10 August 1853. This conveyed to the Crown all land and 'trees, lakes, waters, stones, and all and everything either under or above the said land'.[27] Any Maori present at the signing of the Pakawau deed who had some knowledge of English would have been confounded by its legalese. But they were presented with a simpler version in the Maori text of the deed

24. *Compendium*, vol 2, p 379
25. Ibid; Phillipson, *Northern South Island: Part 1*, p 108; Macky, 'Crown Purchases in Te Tau Ihu', p 128
26. *Compendium*, vol 2, pp 378–379
27. Ibid, vol 1, p 308

6.3.1

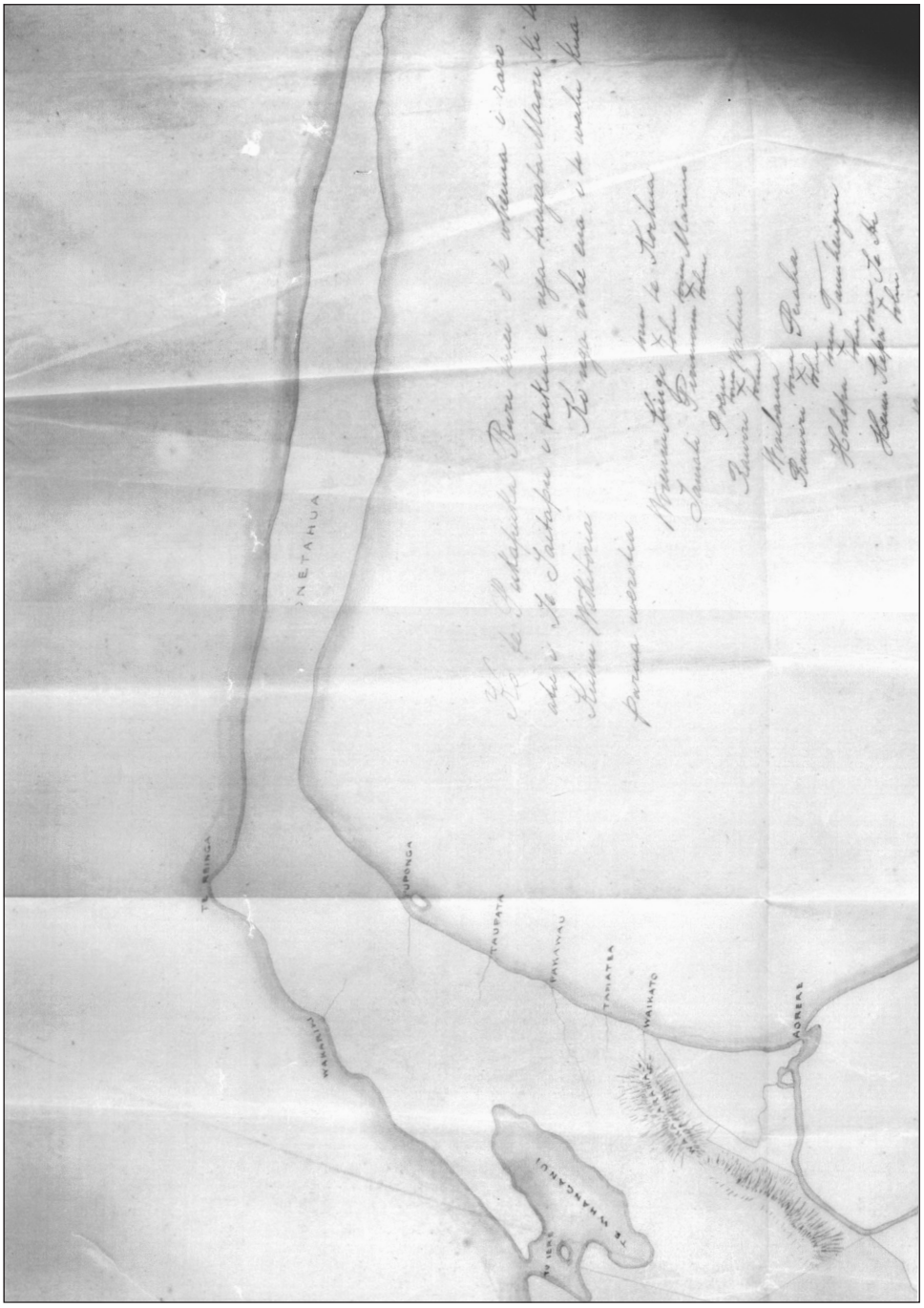

Figure 14: The Pakawau purchase, 1852

Source: CO209/104 colour plan

where they merely conveyed 'te mana o te whenua'[28] (the mana of the land) to the Crown. There was no mention of anything underneath. The English text of the deed said that it had been 'first read over and fully explained to them' in the presence of three witnesses, Thomas Tudor, clerk of Nelson, Samuel Ironside, Wesleyan Minister of Nelson, and John Tinline, native interpreter. We must wonder how Tinline managed to fully explain the meaning of the deed to the assembled Maori. Perhaps he was content to use the brief Maori text that we have just quoted. We comment further on this issue in our conclusions and findings below.

Richmond noted that reserves he had previously reported were to be made in two localities but these had not been included in the deed on the advice of the Crown solicitor. He thought it would be better to 'take a conveyance for the whole block, and then give orders for the reserves to the respective Natives, when the exact boundaries were ascertained'.[29] In August, surveyor Thomas Brunner was instructed to lay off two reserves of about 10 acres each at Te Rae (just north of Pakawau) for Wiremu Te Koihua and his son, and at Te Whanganui for Matiaha and his whanau.[30] This was an extremely limited area, given that the whole block was later estimated at 96,000 acres. The reserves finally surveyed off were somewhat larger than originally estimated, as we explain more fully in chapter 7.

At the end of his report on the Pakawau block, Richmond claimed that the purchase had completed the acquisition of the Nelson block. He also reported on discussions he had on the purchase of the West Coast. However, Maori at the Nelson meeting insisted on being paid £2000 for the coastal land but also wanted £1500 for the interior from Lake Rotoroa southwards. The interior portion was claimed by Te Iti and Ngapiko, Ngati Rarua chiefs of Motueka. Ngati Tama and Ngati Rarua, as well as Ngai Tahu resident on the land, claimed the coastline of the West Coast from Te Whanganui to the southernmost tip of the South Island. There were also some Ngati Apa living near Mawhera and further north extending into the Taitapu district but they did not come into anyone's reckoning at this time. Nevertheless Richmond did not attempt to proceed with this purchase since he was aware that Grey considered even £2000 was too much.[31]

6.3.2 Claimant and Crown submissions on the Pakawau purchase

Since we have treated the Pakawau purchase as separate from the Waipounamu purchase we consider counsels' submissions and make conclusions and findings here rather than later in the chapter.

As it turned out, there was very little in the way of claimant submissions on the Pakawau purchase. Only two claimant counsel made submissions. Ngati Rarua's closing submission

28. *Compendium*, vol 2, p 378
29. Richmond to Colonial Secretary, 21 May 1852 (Walzl, *Land Issues*, p 237)
30. Walzl, *Land Issues*, p 238
31. Richmond to Colonial Secretary, 31 May 1852 (Walzl, *Land Issues*, p 237)

dealt with the Pakawau purchase largely as 'a microcosm of the issues that potentially would have been present during the Waipounamu transaction'.[32] Counsel noted that one important reason for the Pakawau purchase was the presence of minerals, and the Crown's determination to purchase Pakawau before the value of the minerals became known[33] Counsel for Te Atiawa also raised the Pakawau purchase. Counsel said that the purchase price of £550 was inadequate, only 265 acres were set aside as reserves, and Richmond's proposal to re-group Te Atiawa who were not awarded reserves in a new village was 'cold comfort to those who were alienated from their ancestral lands'.[34]

The Crown provided an overview of the Pakawau purchase in its closing submission, based on the research report presented by Mr Macky. In this, the Crown submitted that the Government purchased the block to acquire the minerals, but admitted that it did not pay Maori for the value of the minerals. In the Crown's view, the purchase price reflected the agricultural value of the land only.[35] The Crown noted that Richmond agreed to two reserves but that it was not clear that he promised an additional township reserve for Te Koihua. Finally the Crown noted that Te Atiawa had sought findings that it had encouraged Te Atiawa to sever their links with ancestral lands but replied (with a quote from Richmond) that his motives were 'well-intentioned'. He had wanted to regroup Te Atiawa into larger villages where they might also have schools and places of worship.

6.3.3 Tribunal conclusions and findings

We begin by noting some creditable features of the Pakawau transaction. Having been made aware of the varied and widespread claims to the land, after the initial negotiation with Te Koihua, Crown officials summoned a hui in Nelson and got approval for the purchase from a wide, representative collection of rightholders. The boundaries of the block were reasonably well described, given the state of knowledge at the time, though there was subsequently some doubt as to how much, if any, of the West Whanganui Harbour was included. The boundary description was supplemented by a long list of place names (which would have been more meaningful to Maori).

However, there were several unsatisfactory aspects to the transaction. First, as set out in Te Atiawa's statement of claim, the price paid – £550 – was inadequate. Crown officials, including Grey and Major Richmond, hastened the purchase and disguised the anticipated value of minerals in order to purchase the land cheaply as poor quality agricultural land. This was admitted by the Crown in its closing submission. Under the deed, the Crown

32. Counsel for Ngati Rarua, closing submissions, 5 February 2004 (doc T6), p 62
33. Ibid, p 56
34. Counsel for Te Atiawa, closing submissions, 10 February 2004 (doc T10), p 132
35. Crown counsel, closing submissions, 19 February 2004 (doc T16), p 111

appears to have acquired sub-surface minerals, though this was not clearly spelled out in the English text and not mentioned in the Maori text of the deed. We make further observations and a finding on this issue below. We conclude that Maori were paid far less than the land was thought to be worth. For an estimated area of 96,000 acres the Crown paid £550 or 1.375 pence per acre. As we have already seen, it was a standard plank in Crown purchasing to suggest to Maori during negotiations that the 'real payment' for land was not the nominal monetary consideration received, but the enhanced value of the remaining reserves and other benefits which would accrue to them as a consequence of European settlement. But since, as we discuss further shortly, the reserves set aside out of the Pakawau block were extremely modest, in large part we must consider the money handed over as constituting the full extent of the payment received for the land. Seen from this perspective, not only was the payment seriously deficient but it was acknowledged as such, at least in the communications between Crown officials. Their actions demonstrated a lack of good faith towards the owners of Pakawau. Grey had authorised an advance of up to £600 for the purchase of Pakawau, but, as Mr Macky noted, by making this an advance to Nelson province to be repaid out of the first proceeds from the resale of the block, he also gave the Nelson superintendent an added incentive to keep the purchase price as low as possible.[36] Whether the anticipated mineral riches of Pakawau were realised after the alienation of the block was not the subject of detailed evidence presented to us, but that is of less relevance than the fact that the Crown proceeded on the basis that such would prove to be the case at the time of negotiating the purchase.

We find that the price paid for the Pakawau block was inadequate and in breach of the Crown's Treaty obligations under the principles of active protection and partnership. It was inappropriate for one Treaty partner to disguise from the other partner the anticipated mineral value of the land. The claimants have been prejudiced because their forbears did not get fair value for the land.

The second unsatisfactory feature of the Pakawau purchase was the failure of the Crown to provide sufficient reserves. Although the two reserves set aside turned out to be considerably more than the 10 acres each promised, the total area of some 315 acres finally awarded was inadequate in a block of some 96,000 acres.[37] Moreover, only two families were rewarded with reserves. We find that the Crown failed to set aside sufficient reserves in the Pakawau purchase, in breach of the principle of active protection. We also find the Crown's failure to make provision for those families denied reserves at Pakawau to be contrary to the same principle.

36. Macky, 'Crown Purchases in Te Tau Ihu', p 122

37. Counsel for Te Atiawa cited a figure of 265 acres, but this appears to have been based on a pre-survey estimate for one of the blocks. Both Alexander and Gillingham refer to a total area of just over 315 acres for the two reserves: David Alexander, 'Reserves of Te Tau Ihu (Northern South Island)', 2 vols, report commissioned by the Crown Forestry Rental Trust, 1999 (doc A60), vol 2, pp 524–526; Gillingham, 'Ngatiawa/Te Atiawa Lands', pp 177–178.

Finally, we comment on the wording of the Pakawau deed. The deed was particularly obscure in its description of what went with the land. It is not clear what was meant by 'land or ground', let alone all 'appurtenances to the said land or ground' and 'premises belonging or appertaining or therewith' but, as we suggested above, this seemed to be an attempt to acquire minerals without overtly saying so. The Maori text of this part of the deed went to the other extreme of including everything under that compendium term 'mana' of the land, which was now being transferred to the Queen. We also note that, just as there was no specific mention of the word 'minerals' in the English text of the Pakawau deed, nor was taonga, which was used for 'other properties' in the Treaty and could have been used for minerals, in the Pakawau deed. We conclude that the Pakawau deed was unnecessarily obscure and did not give a clear indication of what, besides the surface of the land, was being conveyed to the Crown.

We find that the Crown, in drafting the Pakawau deed, failed clearly to describe what was being conveyed to the Crown in a manner that would have been understood by all parties. This was in breach of the principles of active protection and partnership. Under those principles the Crown had a duty to fully describe to Maori what they were alienating and to ensure that they fully comprehended and agreed to such a transaction.

6.4 The Waipounamu Purchase

The name Te Wai Pounamu is used as the Maori name for the South Island, though it is sometimes connected with the West Coast or Te Tai Poutini, the source of pounamu or greenstone. Although the Waipounamu purchase was sometimes spoken of as if it applied to the whole of the South Island, it is usually regarded as extinguishing remaining Maori claims to land in Te Tau Ihu. It was another and grander example of the Crown's blanket purchases initiated by the Wairau purchase and recently continued with the Canterbury purchase. With Waipounamu the Crown extinguished the claims of particular iwi, one by one, starting again with Ngati Toa, to the whole territory. This strategy was an alternative to that lately employed for Pakawau where the claims of all iwi to a specific block were negotiated together. But, despite the success with Pakawau, this procedure was being regarded by Crown officials such as McLean as increasingly cumbersome. While he was attempting to complete the Waipounamu purchase, McLean was bogged down in and distracted by competing claims in Taranaki.

Although Waipounamu was regarded as a single purchase there were, by our count, 15 deeds or receipts, starting with the first of the Ngati Toa deeds of 10 August 1853. Subsequently there were deeds with their former northern allies, Te Atiawa, Ngati Tama, Ngati Rarua and Ngati Koata, and even, for the first time, deeds with two of the Kurahaupo iwi, Rangitane and Ngati Kuia, though not with Ngati Apa. The techniques used in the

Waipounamu purchase followed those previously employed in relation to the company and the Wairau purchases. Waipounamu commenced with a deal with absentee Ngati Toa chiefs, ostensibly recognising their overlordship rights to Te Tau Ihu. The deed acquired remaining Ngati Toa rights, wherever they may have been, over the whole of Te Waipounamu. As with the settlement of the company claims and the Wairau, Ngati Toa's northern allies, though in occupation of various parts of the area, were not parties to the original deal with Ngati Toa and could not repudiate it. Their only option was to accept payment for their interests. But there was a difference for Rangitane and Ngati Kuia who now gained some recognition of their rights. Ironically, recognition of mana over land could only be obtained by alienating the last remaining rights to it; by transferring that mana to the Queen. We explore the Treaty implications of this in our findings below.

We note here that, unlike for the Wairau purchase, the claimants did not present us with oral history of the several transactions that made up the Waipounamu purchase. There may be many reasons for this. To some extent, it appears to be because, as Jane Du Feu explained for Te Atiawa, many oral histories have been lost along with other cultural heritage (an issue which we examine more generally in chapter 10).[38] The same point was also made by other witnesses, such as Peter Kipa in his evidence for Ngati Tama.[39]

Nonetheless, we did receive important evidence from Puhanga Patricia Tupaea, which, in many ways, sums up the claim with regard to all the Te Tau Ihu purchases of the mid-nineteenth century:

> Aunty Maria Tuo Hippolite gave me the korero about the land we lost to the Crown. She had said that we had been promised free health, free education and jobs in return for letting those settlers come and live on our land, and that we would participate, not be excluded – that our mana would be respected.
>
> Aunty Tuo told me that when Queen Victoria in England heard what had happened to all her Maori subjects and saw the imbalance between Maori and Pakeha, she told those men who had made all the deals to go back to New Zealand and make things right. She said that they had taken so much, and asked what they would do to make it right.
>
> I feel great grief at the loss of our land and at the loss of our treaty relationship. We have always acknowledged that the Pakeha Europeans had great benefit to bring. We were and are willing to welcome them among us and share what we had, but not to have our mana customs and laws disregarded and our lands and resources taken. These must be restored and rangatiratanga recognised so that the partnership will resume on the right footing.
>
> Pakeha had a lot to offer us, but we didn't invite them amongst us to become our masters.[40]

38. Jane Lu Creita Du Feu, brief of evidence on behalf of Te Atiawa, [2003] (doc I29), p 18
39. Peter Kipa, brief of evidence on behalf of Ngati Tama, 12 February 2003 (doc K14), p 3
40. Puhanga Patricia Tupaea, brief of evidence on behalf of Ngati Koata, not dated (doc B15), paras 40–43

These Ngati Koata kuia believed that Queen Victoria shared their sense of injustice at what had happened to them, and had instructed that it be put right. While this may not reflect the literal truth of events in London, it nonetheless is an authentic representation of the tribe's history and perceptions as they have been passed down from Aunty Tuo Hippolite to Mrs Tupaea (and from her to us.) It is with these tribal understandings in mind that we now consider the evidence before us of the claims against the Crown in respect of the Waipounamu purchase.

Finally, by way of introduction, we note that the Waipounamu transactions were variously described as deeds or receipts. The term 'deed' was usually used for the initial transaction, such as the Ngati Toa deed of 10 August 1853, while 'receipt' was usually used for a follow-up payment, such as the Ngati Toa receipt of 13 December 1854, the 'unauthorised successor' deed, as Dr Phillipson described it.[41] This practice was not consistently followed with the later transactions, which were sometimes described as 'deeds', sometimes as 'receipts'. But, from the perspective of the Crown and particularly McLean, these were all follow-up transactions to the original Ngati Toa deed of 10 August 1853. We treat all of the 15 transactions as deeds, though they were variously drawn up, sometimes by McLean, but seldom, if at all, drawn up as formal conveyances by lawyers.

6.4.1 The Ngati Toa deeds

Since their sale of the Wairau, Ngati Toa had kept their claim to authority over Te Tau Ihu before the Governor. In 1851, for instance, they asserted this claim in a letter to Grey, following a large hui:

> According to our customs of old the authority over the lands on that side and this side [of the Strait] is with us . . . Consider our giving up lands to you. No tribe came forward to disagree with us, because it was correct. Moreover, if we give up to you the parts which remain even to Ara-hura, there is no one to disagree. Not one.[42]

Six months later, Puaha and several other Ngati Toa again raised the issue with Grey and now suggested that:

> this entire island be transferred over to you. Sir, why do you not come so that this land can be properly transferred over to you. I've been thinking about what you said to me in Port Nicholson, that you should quickly acquire the land lest we continue to have trouble. The terms will never be settled, however if this entire island be acquired by you for the Pakeha, and then perhaps it will be settled.[43]

41. Phillipson, *Northern South Island: Part 1*, p 136
42. Ngati Toa chiefs, Porirua, to Grey, 11 December 1851 (Phillipson, *Northern South Island: Part 1*, p 133)
43. Puaha and seven others to Grey, 29 May 1852 (Macky, 'Crown Purchases in Te Tau Ihu', p 136)

As this letter suggests, the idea of a blanket Crown purchase of remaining Maori interests in Waipounamu came from Grey. There was further Ngati Toa support for a wide-ranging sale when the aged Te Rangihaeata, amongst others, wrote to Grey in November 1852:

> Hitherto I have been a stranger to the system of selling land that is sales which have been made by Rawiri Puaha, Martin and Thompson [the three signatories of the Wairau deed] – now I proposed to adopt their system of selling land. Therefore I propose that you should have all that land at the 'Hoiere' to the westward, also the district of Arahura where my younger brother Te Puoho was killed, also Ruapuke where my child Te Horanganui was killed – also the whole of my island of Arapawa.[44]

By June of 1853, Tamihana Te Rauparaha was asking Grey 'to hasten your arrangements for the land over the other side [of Cook Strait] while you are [still] here'.[45] As Mr Macky suggested, this appears to be a request from Tamihana to Grey to hasten arrangements and complete the sale before he left New Zealand to take up his new appointment at the Cape Colony.[46] Tamihana wrote to Grey again in July now asking for payment for Arahura to be handed over to Ngati Toa, an indication that they had in mind a more limited sale of West Coast land.[47]

In light of this, it is hardly surprising that Grey seized the opportunity to pursue a broader Waipounamu purchase that would link Hoiere with Arahura in August 1853, when Ngati Toa assembled in Porirua to bid him farewell. At first, Ngati Toa were unwilling to discuss more than the sale of 'their less valuable land on the West Coast'. But Grey 'persuaded the chiefs to cede all their unsold land,' in what he described to his superior in London as 'as a gesture of homage and respect to their beloved Governor'. Nevertheless, Grey admitted that it took the assembled Ngati Toa two or three days to agree to his request.[48] In 1847, Grey had told William Fox that his just-completed Wairau purchase had extinguished all Ngati Toa rights in the South Island.[49] Now, Grey was reviving Ngati Toa suzerainty over the territory to the north and west of the Wairau purchase, in order to extinguish it again – by way of the Waipounamu purchase. That was pure expediency on Grey's part. As Mr Macky admitted, it was 'difficult to see how Grey could have truly been swung around from believing that all Ngati Toa rights had been extinguished by the Wairau purchase to a position where he supposedly believed that Ngati Toa exercised suzerainty over all of Te Tau Ihu'.[50] We discuss the issue more fully below.

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44. Rangihaeata, Topeora, and Rangiura to Grey, 20 November 1852 (Macky, 'Crown Purchases in Te Tau Ihu', p 137)
45. Tamihana Te Rauparaha, Otaki, to Grey, 25 June 1853 (Macky, 'Crown Purchases in Te Tau Ihu', p 137)
46. Macky, 'Crown Purchases in Te Tau Ihu', p 137
47. Tamihana Te Rauparaha to Grey, 4 July 1853 (Macky, 'Crown Purchases in Te Tau Ihu', p 138)
48. Grey to Earl Grey, 13 August 1853 (Phillipson, *Northern South Island: Part 1*, p 140)
49. Fox to Wakefield, 3 April 1847 (Macky, 'Crown Purchases in Te Tau Ihu', p 140)
50. Macky, 'Crown Purchases in Te Tau Ihu', p 140

6.4.1

Where Grey went, McLean was soon to follow. As he put it:

> The Ngati Toa Tribe of Porirua (with whom the first treaty [deed] was concluded) had unquestionably, as the earliest invaders, a prior right to the disposal of the district. This they never had relinquished; although, after the conquest, their leading chiefs partitioned out to the subordinate branches of their own tribe, as well as to the Ngatiawa, a few of whom took part with them in the conquest, the lands which these now occupy in the Nelson Province.[51]

Here, McLean was designating Ngati Rarua and Ngati Koata as subordinate branches of Ngati Toa, which we do not believe was a correct description of their status then, or now. Though the two iwi always acknowledged Ngati Toa's and particularly Te Rauparaha's leadership in the South Island campaigns and perhaps a role in the original allocation of land in Te Tau Ihu, the longer they occupied that land, the more they asserted an independent right to deal with it. However, McLean appeared to recognise Te Atiawa from Taranaki as having an independent status. He did not acknowledge Ngati Tama but might have regarded them as part of 'Ngatiawa' anyway. Crown historian Mr Macky admitted that it was 'doubtful whether McLean's assertions of the pre-eminence of Ngati Toa rights should be taken at face value'. Indeed, McLean 'was simultaneously arguing both that Ngati Toa had a general right of alienation that was accepted by most Maori in Te Tau Ihu, and that no valid title could be obtained without the consent of resident Maori'.[52] With McLean, as with Grey, expediency ruled in interpreting Maori custom for the purposes of land purchases.

McLean was well aware of the difficulties and complications of buying land in Te Tau Ihu from the occupants. Previous efforts to purchase land there had run into serious problems, McLean reported, 'owing to the numerous conflicting interests of different tribes inhabiting the bays and outlets at Queen Charlotte Sound, Cloudy Bay, the Pelorus, Wakapuaka, and other places'.[53] In Golden Bay, the Crown had recently had to 'repurchase' land previously included in Spain's award. McLean therefore decided to 'cut the Gordian knot', as Dr Phillipson put it, by dealing first with the absentee Ngati Toa living at Porirua who, he claimed, were generally acknowledged to 'have the principal claims to those districts'.[54] Dr Phillipson noted that McLean had formed this view without any formal inquiry into the rights of respective iwi and in defiance of Spain's recent view that the rights of occupiers were predominant. McLean dealt next with absentee Te Atiawa who had returned to Taranaki. Only at the end of the process did he go to Te Tau Ihu to deal with the residents who were not allowed to repudiate the sale and only allowed 'compensation' for their

51. McLean to Colonial Secretary, 7 April 1856, *Compendium*, vol 1, p 301 (Phillipson, *Northern South Island: Part 1*, p 134)

52. Macky, 'Crown Purchases in Te Tau Ihu', p 141

53. McLean to Civil Secretary, 11 August 1853, AJHR, 1881, G-2, p 12 (Phillipson, *Northern South Island: Part 1*, p 135)

54. Ibid

interests. Even then he pretended that this was a Ngati Toa initiative, refusing to go to Te Tau Ihu to arrange that 'compensation' until the leading Ngati Toa chiefs were ready to accompany him to enforce the sale.[55]

Once again, we have little information on the Maori side, though Crown historian Mr Macky used some Ngati Toa letters, translated by Paul Meredith, that were not used by claimant historians. But we are still lacking information on what made Ngati Toa shift from a possible sale of a limited area on the West Coast to alienating virtually all of their interests in land in the South Island. More generally, we have little information on Maori understandings of the negotiation and of the meaning of the various Waipounamu deeds. Professor Richard Boast, who presented an historical report for Ngati Toa, says that it is 'unclear' how Grey talked the chiefs of Ngati Toa, and other tribes, into the Waipounamu purchase. He does however note the 'inducements' in the form of scrip and personal reserves offered to the principal chiefs and considered that these 'seem to have been decisive'.[56] Mr Macky describes these as a 'special inducement' and found it difficult to see why they were not written into the deed.[57]

Dr Phillipson considered that 'some form of mutual recognition, or exercise in mana, was involved' though he was unsure of the details.[58] He examined Wiremu Te Kanae's discussion of Ngati Tama chief Te Wahapiro's proposal to sell the whole of the West Coast as far south as Tuturau – because Tuturau was the place where Te Wahapiro's uncle Te Puoho was killed in the late 1830s. By proposing to sell the West Coast, Te Wahapiro was asking payment for the death of Ngati Tama's ariki. Since the West Coast was Ngai Tahu territory, Te Wahapiro would be getting utu for Ngati Tama. Dr Phillipson suggests that this was like Grey asking for payment for 'his' dead at the Wairau and, we might add, Ngati Toa's offer to sell the east coast of the South Island as far as Kaiapoi, as part of the Wairau sale, as utu for the loss of their dead there in 1831. But if some others, such as Ngati Tama, were proposing to sell the West Coast, then as a matter of mana Ngati Toa had to be involved as well and assert their leadership over their erstwhile northern allies – as we found also with the proposals to sell Pakawau. Dr Phillipson takes another example from Te Kanae's history: a proposal by Ngati Toa chief Ropata Hurumutu to sell Te Hoiere (Pelorus Sound) as utu for the adultery of his wife with a local man. To the European mind, this might seem a trivial reason to sell a considerable territory. But we should note what Professor Alan Ward has written (though in relation to Ngai Tahu): that they 'understood their rights in terms of specific individual or group relationships, current and historic, with collections of places, not as an undifferentiated collective property right over the whole block'.[59] Thus, while various Maori chiefs

55. Phillipson, *Northern South Island: Part 1*, p 135
56. Boast, 'Ngati Toa and the Upper South Island', vol 2, p 255
57. Macky, 'Crown Purchases in Te Tau Ihu', pp 143–144
58. Phillipson, *Northern South Island: Part 1*, p 140
59. Ibid, p 131

offered to sell certain places to gain recognition or utu for significant past events, it was the Crown purchase agents, surveyors, and map-makers who joined those places together to acquire all the land in between – as we noted in our discussion of the Wairau purchase. Waipounamu was another, bigger example of the same process. We examine this matter further as the chapter progresses.

There is a further preliminary matter to be considered: that Ngati Toa understandings over land to be left out of the Waipounamu transaction, or set aside as reserves, differed considerably from the views of Crown agents such as Donald McLean. He believed that reserves would be confined to land required by the Maori signatories for their own cultivations and subsistence.[60] This was a far cry from the large reserve that Grey allowed Ngati Toa as part of the Wairau purchase. Grey justified that because Maori needed large areas for their shifting cultivations and hunting and gathering. Puaha, one of the leading Ngati Toa chiefs who signed the first Waipounamu deed, believed that he had not sold the large Wairau reserve, nor the bays at Port Underwood, nor even all of Te Hoiere;[61] all places where some Ngati Toa people were in occupation, along with others. But he was to find that the reserves that were finally allowed by the Government in these localities were very much smaller.

We now examine the details of the Ngati Toa deeds The first and most important deed, that of 10 August 1853, is a fairly short document of five paragraphs. The first says that it was 'a paper of the full and true consent of us the chiefs and people of Ngati Toa, on behalf of ourselves, our relatives and descendants' to transfer for ever their land 'at the Waipounamu' to the Queen. Ngati Toa land 'at the Waipounamu' was the nearest the deed came to a description of boundaries, though the third paragraph refers to 'the final sale or transfer of all our lands on the said Island'. This is saying in effect that Ngati Toa were selling their rights wherever they may have existed in the South Island, not just Te Tau Ihu.

The second paragraph describes the £5000 payment. Of this £2000 was to be paid on signing the deed with the remaining £3000 to be paid 'to us, and to the Ngatiawa, the Ngatikoata, the Ngatirarua, Rangitane, and Ngaitahu, who, conjointly with ourselves, claim the land'. We note that the deed did not name Ngati Tama, who may have been considered part of 'Ngatiawa', or Ngati Kuia, who may have been considered Rangitane, though both Ngati Tama and Ngati Kuia were – unlike Ngati Apa – subsequently included in deeds of sale. The provision committed the named iwi besides Ngati Toa to an uncertain portion of the remaining sale money, though they had not consented to the agreement. However, though 'Ngaitahu' were included as conjoint claimants, there was no attempt subsequently to make an agreement with and payment to them, though the Crown separately purchased from them the North Canterbury, Kaikoura, and Arahura blocks. McLean claimed that several influential chiefs from Ngati Rarua, Ngati Tama, Te Atiawa, and Rangitane were present

60. Phillipson, *Northern South Island: Part 1*, pp140–143
61. Ibid, p142

at the signing of the Ngati Toa deed and participated in the negotiation, but Dr Phillipson says that this was incorrect. He says that only one Ngati Tama chief (from Wakapuaka) was present, along with a few minor Te Atiawa chiefs from Queen Charlotte Sound, and possibly one Ngati Koata chief from Rangitoto. Most of the signatories were Ngati Toa from the Wellington–Kapiti coast region.[62] The delayed payments were to be spread in annual instalments of £500 over six years.

The third paragraph stated that the deed was 'assuredly . . . the final transfer or sale of all our lands on the said Island' including 'its trees, lakes, waters, stones, and all and everything under or above the said land and all and everything connected with the said land, to Victoria, Queen of England, for ever and ever'.[63] As we noted above, this was a more specific transfer of minerals (and other resources) than was used in the Pakawau deed. Alfred Domett explained that the districts of Wakapuaka and the Wairau were believed to be rich in minerals and some mining had already begun at Wakamarina.[64] There had also been a recent gold discovery in Golden Bay, though it was not until 1857 that a gold rush began at Aorere.[65] When he reported on the purchase McLean noted that Maori expectations of the value of the land 'would of course increase with their knowledge of the mineral wealth abounding in some of the land they have sold'.[66] As with Pakawau, the Government was moving quickly to acquire the widespread Waipounamu lands cheaply before Maori became aware of their mineral potential. The paragraph also took the unusual step of transferring lakes, waters, and forests to the Crown, though we have no information on why this was done or what was meant by 'waters'.

The fourth paragraph said that 'certain places are . . . to be reserved for our relations, residing on the said land . . . but the Governor . . . reserves to himself the right of deciding on the extent and position of the lands to be so reserved'. As McLean later explained, the reserves were to consist of the 'cultivations and lands required for the subsistence of the Natives resident in the District'.[67] Though none of the places set aside was named, McLean said later that it was always understood that Rangitoto was excluded from the sale. It was not set aside as a reserve but remained under customary title until the first Native Land Court hearing of 1883.[68] The position of other islands in the Sounds, including Arapawa, the large island at the entrance of Queen Charlotte Sound, was also unclear. In 1884, Grey testified to the Native Affairs Committee of the Legislative Council that he had not intended

62. Ibid, p 136
63. 'Ngatitoa Deed of Sale', *Compendium*, vol 1, p 308
64. Domett to Richmond, 12 August 1853 (Boast, 'Ngati Toa and the Upper South Island', vol 2, p 253); Mike Johnston, *Gold in a Tin Dish: The Search for Gold in the Marlborough and Eastern Nelson*, 2 vols (Nelson: Nikau Press, 1992), vol 1
65. W P Morrell, *The Gold Rushes* (London: A & C Black, 1940), p 260
66. McLean to Civil Secretary, 11 August 1853 (Walzl, *Land Issues*, p 250)
67. McLean to Gore Browne, 7 April 1856 (Boast, 'Ngati Toa and the Upper South Island', vol 2, p 257)
68. Heather Bassett and Richard Kay, 'Nga Ture Kaupapa o Ngati Koata ki te Tonga, c 1820–1950', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A76), p 74

to include islands in Pelorus Sound in the sale.[69] Since the Governor was about to depart when the first Ngati Toa deed was signed and it would be some time before his replacement arrived, it was left to McLean and other officials to begin to arrange the promised reserves. The paragraph concluded by saying that the Governor had agreed that 'certain other portions of land' would be 'granted to some of our chiefs'. Dr Phillipson says that this was 'an oblique reference to McLean's dealing with leading Toa chiefs for individual grants of scrip and 200-acre blocks'.[70] We discuss the allocation of these below.

The final paragraph of the deed says that it had been 'read aloud and explained to us by Donald McLean' who had signed the deed for the Governor. That was a sign that McLean had already taken over the implementation of the agreement.

The deed was witnessed by Alfred Domett, civil secretary; S Carkeek, a collector of customs; and Henry Tacy Kemp, the Native Secretary. Altogether, 73 Maori signed or marked the deed, a considerable number compared with other Crown purchase deeds and particularly the Wairau deed which was signed by only three Ngati Toa. But the Ngati Toa deed was signed at a large hui at Porirua to farewell the Governor that was probably attended by most Ngati Toa living in the Wellington region, as well as numerous other Maori. The signatories included Rawiri Puaha, Tamihana Te Rauparaha, and Matene Te Whiwhi, the three Ngati Toa who signed the Wairau deed, and numerous other Ngati Toa chiefs, including Hohepa Tamaihengia. Several prominent Ngati Toa kuia also signed, including Te Rangihaeata's daughter, Topeora, who had signed the Treaty of Waitangi. But, as Dr Phillipson reminds us, precise identification of all of the signatories is virtually impossible. Several signed with baptismal names only, such as 'Hone', 'Epiha', and 'Pita'.

There were also some who claimed to have signed but their names were not included in the version of the deed printed in Mackay's *Compendium*. For instance, Hoani Tuwhata, Heremaia Te Matenga and Aminarapa told the interpreter William Jenkins that they signed the deed but their names do not appear on the version printed by Mackay. Dr Donald Loveridge, who examined a photocopy of the original deed, says that there is no sign of their names on it either. He suggests that, in speaking to Jenkins, they may have considered that an offer they made the previous year to sell land in the sound to the Government may have 'somehow tied them into the 1853 sale'.[71]

The signatories were not identified by iwi or places of residence. It is likely that they included some who did not identify themselves as belonging solely to one iwi and did not live permanently in one place. The deed referred to Ngati Toa as having signed on behalf of 'ourselves, our relatives and descendants'. The term 'our relatives' ('o matou whanaunga' in

69. Macky, 'Crown Purchases in Te Tau Ihu', p 146
70. Phillipson, *Northern South Island: Part 1*, p 127
71. Dr Donald Loveridge, '"Let the White Men Come Here": The Alienation of Ngati Awa/Te Atiawa Lands in Queen Charlotte Sound, 1839–1856', report commissioned by the Crown Forestry Rental Trust, 1999 (doc A53), p 185

the original Maori text) would have included both Ngati Koata and Ngati Rarua who had been closely associated with Ngati Toa ever since their migration from Kawhia. It would also have included at least some members of Te Atiawa and Ngati Tama. As Professor Boast described it, the Ngati Toa deed:

> was not intended to be an extinguishment of only Ngati Toa rights; rather it was an extinguishment of all rights conducted via the medium of negotiations with Ngati Toa as having the 'principal claim', with representatives of other groups participating in the discussions and who would receive a portion of the money *from Ngati Toa*. [Emphasis in original.][72]

McLean claimed that Ngati Toa 'had unquestionably as the earliest invaders a prior right to the disposal of the district'; a right they had 'never relinquished'. But that right was challenged by residents of Te Tau Ihu, and McLean had to treat with them separately. Though Grey and McLean tried to imply that the deed was approved by chiefs from other tribes such as Ngati Rarua, Ngati Tama, Te Atiawa, and even Rangitane, and some of their chiefs may have been present, it seems that few of them signed the deed. Dr Angela Ballara identified two, Paremata Te Wahapiro of Ngati Tama and Te Whawharua of Ngati Rarua as signatories, but Mr Macky notes that both were 'willing to sign a deed that identified themselves as Ngati Toa'.[73] Ngati Koata rangatira Rawiri Te Ouenuku was also present at the 1853 deed signing, and may have been responsible for ensuring Rangitoto was excluded from the sale, but was not himself a signatory to the Ngati Toa deed.[74]

Nevertheless, several from other iwi did sign the deed, including Te Whawharua from Ngati Rarua (though he apparently lived in the North Island) and Te Wahapiro of Ngati Tama (who may have then been living permanently at Waikanae). But, as Dr Phillipson points out, these signatories were mainly living away from their home communities and may not have had their support for the transaction. Dr Phillipson also argues that it was only Ngati Toa and Ngati Rarua of the Wairau who considered themselves sufficiently represented and paid not to require a further deed and payment when McLean finally arrived to 'compensate' the South Island right holders.[75] Ngati Rarua historian Tony Walzl suggests that 'some time before 10 August 1853, Ngati Rarua and Ngati Toa settled their competitive claims of 1851 and 1852 with a mutual arrangement'.[76] In his view, some Ngati Rarua rangatira may have been present at the Porirua hui and agreed to Ngati Toa's actions, remaining unaware that the land they claimed on the West Coast had been included in the transaction. The deed itself merely stated that Ngati Toa had sold their land 'at the Waipounamu', with no boundaries specified.[77] But just a few days after the deed signing, Tana Pukekohatu and

72. Boast, 'Ngati Toa and the Upper South Island', vol 2, p 260
73. Macky, 'Crown Purchases in Te Tau Ihu', p 147
74. Ibid
75. Phillipson, *Northern South Island: Part 1*, p 137
76. Walzl, *Land Issues*, p 293
77. Ibid

several other Ngati Rarua rangatira wrote to Richmond to inform him that they accepted that Te Iti had settled with Rawiri Puaha for Pelorus and the remaining part of the Wairau. At the same time they made it plain that they did not accept that Ngati Toa could deal with Arahura and Rotoroa: 'It is for us to settle about those places . . . we only have to do with the West Coast and to take payment for the same . . . Let the £2000 they have already received suffice for the Ngatitoa.'[78] A short while later, the Ngati Tama rangatira Wiremu Te Puoho of Wakapuaka also repudiated the Ngati Toa agreement, saying:

> I will not give up Whakapuaka for the Queen. Those men agreed to sell it without my authority. Do not think I am of less importance than they are. No – we are equal. Do not say that I am endeavouring to exalt myself. However when these men meet here, then we will dispute the matter with each other for their act and deed is an intrusion.[79]

Ngati Koata from Rangitoto and the Croisilles coast insisted on a new agreement. All in all, Ngati Toa's agreement to the first deed had met with a chorus of disapproval from their erstwhile northern allies.

It had been agreed at the time of the first deed signing in August 1853 that a further hui would be held in Nelson in January 1854 to decide on the distribution of the remaining £3000 (to be paid in annual instalments), and to fix the boundaries of reserves. But this follow-up hui was not held, mainly because McLean pleaded pressing business elsewhere, especially in Taranaki where the Crown was facing acute land purchasing problems. At the same time, McLean clearly feared a full scale hui, involving all resident claimants, would involve so many overlapping and competing claims that no agreement could be reached.[80] Claimant groups assembled at Nelson at considerable cost on no less than three occasions, expecting McLean to arrive. Their expenses may well have created debts that had to be repaid from Waipounamu payments when these were ultimately received.[81] It was a further two years before McLean finally held a hui in Nelson to conclude transactions with some but not all of the resident iwi. During this time surveyor Thomas Brunner and interpreters William Jenkins and John Tinline were dispatched by McLean around Te Tau Ihu to make a unilateral selection of reserves, despite local Maori having yet to receive any of the payment specified in the first Waipounamu deed. The decision to press ahead with reserves regardless of Maori agreement hardly served to dampen widespread anger and alarm amongst local Maori about the lack of prior consultation with them and McLean's continuing failure to hold the promised Nelson hui.[82]

78. Te Tana and others to Richmond, 10 October 1853 (Walzl, *Land Issues*, p 252)
79. Wiremu Te Puoho and others to Richmond and Stafford, 19 October 1853 (Walzl, *Land Issues*, p 253)
80. Walzl, *Land Issues*, p 303
81. Ibid
82. Phillipson, *Northern South Island: Part 1*, pp 151–152

While McLean was in Taranaki he took advantage of the opportunity presented to him to sign several agreements with returned Te Atiawa for their Waipounamu interests. We discuss these below. McLean returned to Wellington in December 1854, but still found excuses not to go to Nelson. Instead, he opted to use a large assembly of Ngati Toa and others for a tangi to advance the Waipounamu purchase. McLean complied with a request from the assembled Ngati Toa chiefs to complete arrangements for the payment of the remaining £3000 owing on Waipounamu. He claimed that important chiefs from the South Island were present on this occasion, but it seems that they were mainly Ngati Toa from the Wairau and the Sounds. Yet again, the Crown and non-resident Ngati Toa were calling the tune, and the residents of Te Tau Ihu were required to follow their lead. Ngati Toa's request to receive £2000, leaving only £1000 to be paid to all others resident in Te Tau Ihu was agreed to by McLean, who argued that this arrangement was necessary because of 'the presence of the principal chiefs of so many different tribes (including those of the conquerors as well as those of the remnants of the conquered and original possessors of the soil)'. McLean was (as Dr Phillipson suggests) clearly 'stretching the truth' since the 'deed of receipt' signed in December 1854 included few names from principal right holders in Te Tau Ihu.[83]

The second Ngati Toa deed that was now signed is described in Mackay's *Compendium* as a 'Receipt for £2,000 paid to Ngatitoa Tribe'. It is written in the form of a receipt for the £2000 and refers back to the previous deed of 10 August 1853. But the deed was a little more specific than the first one on lands given up. These included 'all our claims to Wairau and Hoiere, and Wakapuaka, and Taitapu, and Arahura, and the Waipounamu'. Dr Phillipson suggests that the listing of these places was an attempt to overcome problems that had arisen in the interval between the two deeds. As we noted above, Puaha had understood that considerable reserves would be retained at the Wairau and perhaps the other places. The signatories asked that four years' instalments amounting to £2000 be paid to them in a lump sum 'because our aged chiefs are dying, and we are wishful that they should partake together with us of the money given to us for our land while they are still alive'.[84] Under the first Ngati Toa deed, the £3000 remaining after Ngati Toa had been paid their £2000 was supposed to be distributed to the various named groups resident in Te Tau Ihu. Now, under the second deed, a further £2000 was to be paid to Ngati Toa, though McLean gave Pukekohatu of Ngati Rarua, who was present at the tangi, a personal discretionary payment of £200. Later, he was given another £400 to distribute to Ngati Rarua and £100 to distribute to Ngati Tama at Wakapuaka. Dr Phillipson points out that the £400 was for Ngati Rarua wherever they lived in Te Tau Ihu, and it was doubtful whether Pukekohatu had authority over those who lived in Tasman and Golden Bays. He had even less authority to distrib-

83. Ibid, p 138
84. *Compendium*, vol 1, pp 311–312

ute money to Ngati Tama at Wakapuaka. Dr Phillipson could find no evidence that those payments ever got to the intended recipients.[85]

There were also some fairly vague undertakings included in the deed. It was declared that the signatories would give up the land when homesteads for them and their children were laid out. This appears to be a reference to the blocks of land and scrip that were promised to Ngati Toa chiefs as a reward for signing the 1853 deed. McLean later used these rewards to get the Ngati Toa chiefs to help him impose the transaction on local occupants. This was implied in the second promise: that the signatories would 'satisfy and prevent the demands of all Natives whatsoever who may hereafter claim the land' which they had made over to the Queen.[86] McLean did not fail to exploit whatever opportunities were available to him in these circumstances by, for example, rewarding the Ngati Toa chief, Te Kanae, and Pukekohatu, the Ngati Rarua chief from Cloudy Bay, with two 50-acre reserves each for their help in overawing resident Ngati Kuia and Rangitane of the Pelorus and Wairau districts. We discuss these personal awards more fully below.[87]

In total, 57 persons either signed or marked this second Ngati Toa deed. Once again, we have difficulty in ascertaining the full names, iwi affiliations and residences of many of the signatories, but the leading Ngati Toa chiefs who signed the first deed also signed this one. A notable addition to the list of signatories was the aged Te Rangihaeata who, according to McLean, had used his influence to bring the negotiation to 'a satisfactory conclusion'.[88] He was rewarded with a discretionary payment of £200 taken from the allocation for Ngati Toa.[89] Te Rangihaeata had also been given a scrip award of 50 acres and another 200 acres following the negotiation of the first deed, though he had not signed that.[90] We discuss this and other scrip awards below. There were some other non-Ngati Toa signatories besides Pukekohatu. These included the Ngati Koata chief Rawiri Te Ouenuku. Though Paremata Te Wahapiro, who signed the first deed, was now dead, his son Tipene signed the second one and also received payment.[91] Otherwise all or nearly all the signatories were Ngati Toa most of whom were resident in the North Island.

McLean reported after concluding the second Ngati Toa deed that there would be 'some questions to settle with a few minor tribes residing at Wakapuaka, Queen Charlotte Sound, and other portions of the island'. But he claimed to be satisfied these could 'be duly adjusted by the principal chiefs to this arrangement, who have undertaken to accompany me, when my duties here will admit of my going over to Nelson, to settle with their respective tribes

85. Phillipson, *Northern South Island: Part 1*, pp 138–139
86. *Compendium*, vol 1, p 312
87. McLean to Colonial Secretary, 7 April 1856, *Compendium*, vol 1, p 302
88. McLean to Colonial Secretary, 15 December 1854, *Compendium*, vol 1, p 304
89. Walzl, *Land Issues*, p 259
90. Macky, 'Crown Purchases in Te Tau Ihu', p 172
91. Ibid

and followers resident at the Middle Island'.[92] McLean was being unduly optimistic. As Dr Phillipson pointed out, the resident claimants were furious with this arrangement. He quotes three Te Atiawa who were present at the original 1853 hui when the first Ngati Toa deed was signed. They said, on hearing of the second deed, that McLean had:

> broken faith with us, and instead of paying the remaining instalments in Nelson, as was agreed upon when we signed the document . . . he has actually only a few days since paid into the hands of Ngatitoa the sum of £2,000, without asking our consent, or even acquainting us with his intention of doing so.[93]

As Dr Phillipson also points out, the remaining £1000 was paid to Te Atiawa, though mainly to absentees who had returned to Taranaki. There was nothing left for the various iwi who were actually resident in Te Tau Ihu.

6.4.2 Te Atiawa's deeds

The payments to Te Atiawa began in Taranaki and need to be considered in the light of the situation there. As Dr Phillipson put it, from this time the Waipounamu purchase 'became bound up with the internal politics of Te Atiawa, and more particularly with the government's problem of land purchase in Taranaki'.[94] McLean used payments to Te Atiawa at Wellington and in Taranaki for Waipounamu interests as a way of enticing them into selling land in Taranaki, and as a lever against other resident Te Atiawa at Taranaki who were opposing land sales there. He also tried to lure opponents of land sales into land selling by offering them higher prices and larger reserves.[95]

We need to look at each of the six Te Atiawa deeds because they say different things and, for the most part, convey specific places rather than Te Atiawa's interests in the whole of Waipounamu. Of the six deeds only three, those of 16 November 1855 and 9 February and 8 March 1856, were negotiated with Te Atiawa habitually living in Te Tau Ihu.

Under the first deed (of 2 March 1854) various hapu of Te Atiawa at Ngamotu in Taranaki surrendered to the Queen 'a portion of our land at Queen Charlotte Sound' for a payment of £200. The boundaries were described as commencing in the North at Te Karaka, proceeding inland to Piripiri, and from thence to Tokamaru, Iringatau, Waikawa, Ihumeone, Te Wera o Waitohi, Tukurehu, Kaipapu, Mimi o Kupe, and inland to Ta-rao Timarama, Otamau, Tuamarino, Pukakake, and finally to the Wairau. Significantly, this deed included land already acquired from resident Te Atiawa by the Waitohi purchase which we discussed in our previous chapter. This could be regarded as an affirmation of the Waitohi purchase

92. McLean to commissioner of Crown lands, 15 December 1854 (Walzl, *Land Issues*, p 257)
93. Phillipson, *Northern South Island: Part 1*, p 145
94. Ibid, p 152
95. Ibid, pp 152–155

by Taranaki based Te Atiawa since McLean had not previously gained their approval for that purchase.[96] The deed was signed by 11 Te Atiawa, headed by the former Waikanae chief Wiremu Kingi, who had recently led a hikoi of Te Atiawa back to Taranaki. But if McLean had hoped that the payment for the sound might have become addictive, he was mistaken in the case of Kingi who put himself at the head of the anti-land selling movement in Taranaki. It was his subsequent refusal to allow the sale of Waitara that was the occasion for the first Taranaki war in 1860.

The second deed was signed eight days later and was a rather more comprehensive transaction. The signatories were paid £500 for:

> the whole of the lands to which we lay claim in the Middle Island, or Wai Pounamu, that is to say, – The lands we occupied at Wairau, at Whanganui [on the Kaikoura coast], at Te Awaiti, Totaranui, Te Hoiere, Kaiaua, Whakapuaka, Whakatu, Waimea, Moutere, Motueka; from thence to Motupipi, to Aorere, to Pakawau, to [west] Whanganui, to Paturau, Te Awaruato, and from thence to Arahura.[97]

Dr Phillipson suggests that rather than mentioning places where Te Atiawa had particular rights, McLean this time appears to have simply listed the principal settlements of Te Tau Ihu, including some later excluded from sale by local residents.[98] The signatories promised 'never again to raise any claim to the above-mentioned lands' and for good measure threw in adjacent (but unnamed) islands. The signatories represented the Puketapu, Otarua, and Ngamotu sections of Te Atiawa and were said to be 'the whole of the tribes on this side of the Straits'. Whether or not this was so is uncertain, but at least the deed was numerously signed – by 46 Te Atiawa. The signatories were headed by Rawiri Waiaua who was killed in August 1854 when a feud erupted over his offer to sell land in Taranaki.[99] Another signatory, Ihaia, also became a land seller and it was his offer to sell Waitara, accepted by Governor Browne, that provoked the first Taranaki war. Wiremu Kingi, the leading non-seller, was also a signatory of the second Te Atiawa deed though he was well down the list, underneath Rawiri and Ihaia.

The two additional deeds that were signed on 16 and 24 November 1854 were rather more limited transactions.[100] The first was signed by just two persons, Tamati Kingi Ngarewa and Heaira Pikiwata of Ngati Hinetuhi, who were paid £100 for their claims at Gore Harbour, Arapawa Island and several bays on the north side of Queen Charlotte Sound. Dr Phillipson says that deed was arranged by McLean during a flying visit to Nelson, though Dr Loveridge suggests that the deed was probably finalised by officials after McLean left. He notes that

96. Loveridge, 'Let the White Men Come Here', p 188
97. *Compendium*, vol 1, pp 309–310
98. Phillipson, *Northern South Island: Part 1*, p 155
99. Sinclair, *Origins of the Maori Wars*, p 125; Phillipson, *Northern South Island: Part 1*, p 155
100. *Compendium*, vol 1, p 310

the deed was signed for the Crown by the interpreter William Jenkins, though, according to Brunner, McLean handed over the payment before he left Nelson.[101] But, as Jenkins and Brunner discovered when they visited the sound at the end of the year, neither this nor the earlier Waitohi sale could be regarded as having completed the sale of the sound. As Whitikau Ngawhenua from Tory Channel put it when informed that 'the whole of the sound was sold to the Government':

> My land is not sold, nor has any one but myself a right to sell it; and I have never been asked to do so by the Government. When I sell it I shall make my own bargain and receive the money for it into my own hand, or it shall never go.[102]

Nor did the second November deed do much to extinguish remaining rights of Te Atiawa resident in the Sounds. It was signed by five Te Atiawa at Waikanae, headed by Te Herewine Te Tupe, and specifically referred to their interests at Te Awaiti, at the entrance to Queen Charlotte Sound, though it also said it was 'for all our lands in the other Island'. As Dr Loveridge points out, this 'seems to imply that more than the whaling station at Te Awaiti was involved', though no map was attached to clarify just what was being sold.[103] The signatories were paid £200.

In October 1855, surveyor Henry Lewis and interpreter Jenkins were sent to the sound to lay off reserves for the various Te Atiawa groups in residence. McLean was keen to allow reserves 'of considerable extent' in the various bays of the sound to discourage Te Atiawa from returning to Taranaki and thereby increasing his difficulties of buying land there.[104] According to Dr Loveridge's estimates, some 3000 acres of reserves were set aside on the 17,570-acre Arapawa Island and some 10 to 15 per cent of the Te Atiawa's land along the sound, not an unduly large area considering that most of the land around the sound was steep hillsides.[105] But the reserve boundaries were not surveyed or individually mapped – though they were crudely drawn on a large map – and there was no exact record of their acreages. The reserves were not properly defined until 1861 and, in most cases, not properly surveyed until the 1890s (a matter we discuss in chapter 7).[106] Still, this was considered sufficient for McLean to negotiate a final purchase deed for the sound.

The four payments discussed above provided an overall payment of £1000 to Te Atiawa, though only £100 of this was paid to Te Atiawa resident in Te Tau Ihu. If we add that £1000 to the £4000 paid to Ngati Toa, the full £5000 provided for in the first Ngati Toa deed had now been paid. Fortunately, McLean was allowed an additional £2000 to complete the Waipounamu purchase.

101. Loveridge, 'Let the White Men Come Here', p 191
102. Ibid, p 192
103. Ibid, p 189
104. McLean to Colonial Secretary, 7 April 1856, *Compendium*, vol 1, p 302
105. Loveridge, 'Let the White Men Come Here', p 207
106. Ibid, p 236

6.4.2

McLean arrived at the sound at the end of January 1856, accompanied by a bevy of leading Ngati Toa chiefs. He subsequently explained his successful negotiation as follows:

> I sailed for Tory Channel and Queen Charlotte Sound, a portion of the country inhabited chiefly by the Ngatiawa. The people had assembled at Waikawa to meet me; when, after several debates, which last some days, I was enabled to effect a final settlement of their claims for a sum of £500, the receipt of which is acknowledged in the deed signed by them on the 9th February, 1856.[107]

The deed covered land running up the sound from the entrance to Tory Channel to Watiuru, near Anikawa at the head of the sound. In addition, the deed transferred 'all our lands on this Island to Queen Victoria'. The deed began with the statement that 'the Ngatiawa residing at Arapara [*sic*] . . . transfer all our lands on this Island to Queen Victoria'. It might be argued that this merely meant their lands on Arapawa Island and this could have been how the signatories understood it. But, since the deed went on to say that they were transferring land in the sound from Tory Channel to Watiuru, we think 'this Island' was intended by the Crown to mean the whole of Waipounamu, or the South Island, as was the case with other Waipounamu deeds. For this reason, we include the deed of 9 February 1856 as one of the last deeds in the Waipounamu transaction.

There is an unusual amount of information on this negotiation, mainly from McLean's journal, which throws a rather different complexion on the transaction than his official report. It is worth quoting some of it since it shows McLean in characteristic negotiating mode. When the meeting began at Waikawa reserve on 6 February there were some 300 Maori present from all over the sound. Since it was assumed that the land would go, discussion centred on the amount to be paid. Witikau, from Tory Channel, began by asking for £6600. Then some Puketapu chiefs who were also present asked for another £3800 (though in this instance for land running beyond the sound to Port Gore). The discussion proceeded for two days but McLean refused even to discuss these amounts. Then on the evening of 8 February he took the principal chiefs aside for private discussions. He told them they had already selected some of the best land for reserves and that the rest was 'poor & hilly'. He said that he would not give more than £500 for it – barely half of what McLean had already paid non-resident Te Atiawa in the North Island.[108] The chiefs were very disappointed with this offer and tried several times during the night to get McLean to raise it. McLean told them 'they were at liberty either to accept or reject the offer' but his mind was 'fully made up not to give more'. Next morning, the chiefs offered to accept £1000, but McLean still refused to budge. Witikau asked those at the hui four times if they would accept McLean's £500, and when there seemed to be general assent, he made a speech saying that the land was 'now launched into the sea'. After that, Ropoama Te One (who had been the principal seller of

107. McLean to Colonial Secretary, 7 April 1856 (Loveridge, 'Let the White Men Come Here', p 219)
108. Loveridge, 'Let the White Men Come Here', p 221

Waitohi) made a long, impassioned speech stressing the deep significance of the area for Te Atiawa and ending that by thrusting the toki, Paiwhenua, into the soil at McLean's feet. 'Money vanishes and disappears, but this greenstone will endure as durable a witness of our act as the land itself, which we have now, under the shining sun of this day, transferred to you for ever.' Paiwhenua was sacred because it had been captured from Ngai Tahu, who had used it to kill Te Peehi Kupe and Pokaitara during the wars of the 1820s.[109] The deed of sale which McLean had drafted was read out and 'numerously signed by all the principal chiefs and their followers before sunset'.[110]

The deed was signed or marked by 36 Te Atiawa on behalf of 130 others whose names are not listed in the version printed in Mackay's *Compendium*.[111] According to Mr Macky, who consulted the original deed, all signed it.[112] A notable feature of the deed was that it was witnessed, not only by several Europeans but also by the leading Ngati Toa chiefs Rawiri Puaha, Matene Te Whiwhi, Tamihana Te Rauparaha, and Wiremu Nera Te Kanae, and by the Ngati Rarua chief Te Tana Pukekohatu. Mr Macky commented that their presence may have been intended as 'a reminder to Ngati Awa of the context which the August 1853 deed provided to the negotiations', but considered it highly unlikely that McLean would have simply threatened to take their land if they would not sign, as Dr Loveridge suggested, since he would not have welcomed their return to Taranaki.[113] The map previously drawn by surveyor Lewis marking reserves was attached to the deed.[114] It did at least show the places named in the deed.

Although the deed was signed on 9 February, the payment was not made until the following Monday (11 February). There appears to have been some dissension as to how to divide the money but eventually it was decided that each 'Hapu or family' would get £10. The final division did not quite work like this since 51 'hapu' were paid £9 each and the remaining £49 was divided between several chiefs such as Witikau and Ropoama who had failed to provide complete lists of their 'hapu'. The use of 'hapu' for family groups instead of whanau, which would be used now, is interesting, though that practice may have been common at that time. Dr Loveridge says that the total Te Atiawa population of the sound at the time was between 300 and 350 suggesting that the average size of 'hapu' was six or seven.[115]

At the conclusion of proceedings McLean confided to his journal the pious hope that the future possessors of the land would treat the 'aboriginal remnant' kindly although this 'wild courageous race' was 'diminishing as fast as the snows of Kaikoura'.[116]

109. Phillipson, *Northern South Island: Part 1*, pp 178–179
110. McLean, journal (Loveridge, 'Let the White Men Come Here', p 224)
111. *Compendium*, vol 1, p 314
112. Macky, 'Crown Purchases in Te Tau Ihu', p 244
113. Ibid, p 266; Loveridge, 'Let the White Men Come Here', p 222
114. It is reproduced in Loveridge, 'Let the White Men Come Here', p 227.
115. Ibid, p 228
116. McLean, journal, 6–9 February 1856 (Phillipson, *Northern South Island: Part 1*, pp 178–180)

There was a final payment of £19 to Te Rei Nganiho of Te Atiawa on 8 March 1856 for his interests in Queen Charlotte Sound. The 'receipt' that Te Rei signed said the payment was for the whole of his lands at Anikawa, Te Awaiti and Totaranui.[117] He had moved from Queen Charlotte Sound to Motueka in 1844 and may have signed the second Ngati Toa deed.[118] The transaction was signed a day after the Ngati Rarua–Ngati Tama deed was signed in Nelson. Since Te Rei had not signed the Te Atiawa deed at Waikawa on 9 February, it could perhaps be regarded as payment for his interests in Queen Charlotte Sound that were covered by that deed.[119] The Te Rei transaction is usually regarded as the last of the Waipounamu deeds, despite being limited to places in Queen Charlotte Sound and being signed by a single person. The payment to Te Rei brought the total payment to Te Atiawa for their Waipounamu interests to £1519, though only £719 of this went to Te Atiawa residing in Te Tau Ihu. All of the Te Atiawa deeds were essentially for their interests in and around Queen Charlotte Sound, though two (the deeds of 10 March 1854, signed in Taranaki, and 9 February 1856, signed at Waikawa) added the catch-all phrase 'all our lands in this Island'. As we noted three of the deeds were signed by Te Atiawa residing in Taranaki or Waikanae. Two of the others were signed by Te Atiawa still living in Queen Charlotte Sound and the final one by Te Rei who had shifted from the sound to Motueka in 1844. Other Te Atiawa living in Tasman and Golden Bays were not included in any of the six deeds though they were sometimes included in the Ngati Rarua–Ngati Tama deeds for the districts that we discuss in the next section.

Finally, we note that McLean granted a number of reserves for individual Te Atiawa and others in 1856. These included reserves for Tamati Pirimona, Te Keha, Rawiri Watino and Wi Parana in Golden Bay. They were to settle grievances outstanding since the company award but McLean had an ulterior motive in making the grants: he wanted to discourage Te Tau Ihu Te Atiawa from returning to Taranaki and thus increasing resistance to Crown purchases in that province.[120] We discuss this issue more fully below and in chapter 7.

6.4.3 The Ngati Rarua and Ngati Tama deeds

Having dealt mainly so far with absentee Ngati Toa and Te Atiawa, McLean had still to come to grips with the main occupants of Te Tau Ihu. He had already been using local surveyors, such as Thomas Brunner, to start laying off reserves that he considered necessary for these local people. Dr Phillipson describes the strategy as follows:

117. *Compendium*, vol 1, p 319
118. Gillingham, 'Ngatiawa/Te Atiawa Lands', p 181
119. Loveridge, 'Let the White Men Come Here', p 231
120. Gillingham, 'Ngatiawa/Te Atiawa Lands', p 187

> McLean clearly planned to proceed with the [Waipounamu] purchase as a fait accompli and to make reserves as a unilateral government action, testing the mettle of the local iwi in that part of 'the purchase lately made' where Ngati Toa interests and power were strongest, and the locals might be more easily compelled to acquiesce.[121]

Brunner and the interpreter Jenkins were sent first to the Sounds and the Wairau, where resident Maori did not allow them to survey reserves. Then they went to the Kaiaua–French Pass district, where it was thought that Ngati Koata would be cooperative. They were not, telling Jenkins that they would only part with the 'whole of the land' if they got a fair share of the payment directly from the Government. Brunner made some tentative arrangements for reserves and continued on to Te Hoiere, where although resident Ngati Toa were cooperative, Ngati Kuia refused to allow Brunner to cut out the reserves he chose. They demanded that McLean come to hear their wishes and give them half of the payment that was due. But a small group of Rangitane at Kaituna did allow Brunner to mark off reserves. Then Brunner and Jenkins went on to the Wairau, where local Ngati Toa demanded the large reserve that Rawiri Puaha had promised and Rangitane asserted that they were entitled to be consulted and paid.

Brunner and Jenkins returned to Queen Charlotte Sound where they again struck opposition from Te Atiawa who had just got news of McLean's second deal with Ngati Toa. Now Te Atiawa accused the Government of bad faith. As Dr Phillipson put it, the news of the agreement 'created havoc in the top of the South Island'.[122] Instead of coming to consult them, as had been expected ever since the Nelson hui was promised on the signing of the first Ngati Toa deed, McLean had continued to deal with the absentee Ngati Toa (and Te Atiawa). In the process he had spent all of the £5000 that was supposed to be shared with the resident communities.

Through most of 1855, McLean ignored continuing pleas from Te Tau Ihu Maori, E W Stafford (the superintendent of Nelson), and Major Matthew Richmond (the commissioner of Crown lands at Nelson) to come and settle with the local iwi. In June 1855, Stafford complained to the Acting Governor that:

> Mr McLean has twice passed through Nelson . . . but merely on his way to other places and without effecting anything beyond exciting in the minds of the Natives hopes that a speedy settlement of a question, which is daily becoming more difficult to settle would take place.
>
> In consequence of the repeated promises of Mr McLean to come in a few weeks to Nelson on this matter numbers of Natives have from time to time arrived here from considerable

121. Phillipson, *Northern South Island: Part 1*, p 158; Walzl, *Land Issues*, pp 260–262
122. Phillipson, *Northern South Island: Part 1*, p 159

> distances, and after remaining, in some instances for many weeks, have gone away in great discontent, declaring that, owing to repeated disappointment and the circumstance that other Natives have long since received a share of the purchase money while they are still without any, they absolutely refuse to alienate their rights in the lands in question.[123]

Stafford suggested that Richmond be used to complete the settlement in McLean's absence. However, McLean considered that Richmond would 'be unable to arrange [it] satisfactorily' without his assistance and 'the presence of several chiefs from the Wellington Province, who ceded the land in the first instance'.[124] Stafford was so exasperated that, when the new Governor arrived, he wrote early in 1856 to complain of the delays in settling the Waipounamu purchase. He again pointed out the growing discontent of resident Maori that they had not received payment but had been put to considerable expense in their various fruitless visits to Nelson.[125] Nevertheless, Stafford's representations were not purely altruistic as far as local Maori were concerned. He wanted to ensure that, when the land was purchased for the Crown, reserves were strictly limited so that ample good quality land would be available for settlement.[126]

Despite Stafford's anguished appeals, McLean always had excuses for his continuing delay: he had to go to Wairarapa, Hawke's Bay, Auckland, and, invariably, troubled Taranaki. It is true that McLean was a busy man who had to prioritise his time but his continuing delay in dealing with the claims of residents to Waipounamu was probably more tactical than necessary. McLean's procrastination was a deliberate ploy he commonly used in negotiating with Maori. He did not mind how long it took to conclude a deal, because in the end McLean knew that the Maori claimants would eventually accept his price, as we noted in the negotiation of the Te Atiawa deed of 9 February 1856. McLean was always prepared to take his money-bags away. And when he did that, he did not mind how long it was before he went back. He could always deal with other Maori who were more amenable in the meantime. Though McLean had spent all of the Waipounamu purchase money, he had been promised another £2000. But he chose not to use this until the new Governor arrived late in 1855. Governor Browne was disturbed to find that, despite the glowing reports of his predecessor, there were unsettled land purchases all over the country. These included the 'Nelson purchase' which Browne was told was settled before he was appointed. Browne ordered McLean to accompany him when he officially visited Nelson at the end of October. McLean finally held his Nelson hui, at least for Tasman and Golden Bay Maori, early in November,

123. Stafford to officer administering the Government, 30 June 1855 (Susan Kiri Leah Campbell, '"A Living People": Ngati Kuia and the Crown, 1840–1856', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A77), p 157)

124. McLean to Colonial Secretary, 31 August 1855 (Campbell, 'A Living People', p 158)

125. Stafford to Gore Brown, 11 January 1856 (Campbell, 'A Living People', p 159)

126. Stafford to McLean, 31 January 1856 (Campbell, 'A Living People', p 159)

more than two years after it had been promised at the signing of the first Ngati Toa deed. It was here that the Ngati Rarua–Ngati Tama deed of 10 and 13 November 1855 was signed.

Although there is little direct record of the proceedings, it seems from Dr Phillipson's account that considerable dissension was expressed over past land transactions, somewhat to McLean's surprise.[127] The Golden Bay chiefs were full of criticism over the earlier company purchases and Spain award. Some groups had not received their share of the payments awarded by Spain; some rights remained unextinguished; and promised reserves had not been set aside. The chiefs maintained that some blocks, especially at Separation Point, had never been sold and they challenged the officials to prove otherwise. The records of the company and the Crown were searched to no avail so Tinline was sent to Golden Bay to make inquiries and, if necessary, to purchase the unsold land. For this reason the signing of the deed which had started on the 10th was suspended and it was not resumed until 13 November.

There was also dispute over Taitapu. The leading Ngati Rarua chief of that district, Riwai Turangapeke, denied the right of the Wellington tribes to sell it. As a result, the Taitapu block, initially estimated at some 44,000 acres, was handed back to him. Following survey in 1883 it was found to be 88,350 acres.[128] Turangapeke also insisted that McLean deal separately with a block of some 20,000 acres in extent located between Taitapu and the Pakawau and company blocks, though this was not recorded in the deed. In 1863, Turangapeke reminded the Governor of this arrangement, recalling that McLean had requested that he should 'Give some land for the Governor; let this be your love to the Governor.' Turangapeke added that he had agreed to give the land, in response to which McLean had declared that 'it would be for the Governor to remember'. Confirming that this had been an oral arrangement, the rangatira also noted that 'the whole of the Ngatirarua heard my word of consent to Mr McLean.'[129] James Mackay junior, who had been requested to report on the merits of Turangapeke's claim, subsequently reported that 'the Natives seem to be of opinion that he did not receive any compensation for his claim to the land in question.'[130] McLean also recalled the circumstances behind the original promise, and confirmed his belief that the rangatira was 'entitled to some consideration in this matter.'[131] Despite this support for the claim, Mackay noted that there was 'conclusive documentary evidence' that the land in question had been ceded to the Crown as part of the Ngati Rarua deed signed by Turangapeke and others on 10 November 1855.[132]

Turangapeke nevertheless received the cart, plough, pair of oxen and two cows he had requested in fulfilment of McLean's promise. Crown historian Mr Macky conceded that

127. Phillipson, *Northern South Island: Part 1*, pp 160–163; Walzl, *Land Issues*, pp 265–268
128. Gillingham, 'Ngatiawa/Te Atiawa Lands', pp 185–186
129. Riwai Turangapeke and another to Governor, 29 September 1863, *Compendium*, vol 1, p 326
130. James Mackay, memorandum, 9 December 1863, *Compendium*, vol 1, p 326
131. Donald McLean, memorandum, 5 December 1863, *Compendium*, vol 1, p 327
132. James Mackay jnr to Colonial Secretary, 10 December 1863, *Compendium*, vol 1, p 327

it was 'very poor of McLean not to have recorded this promise in writing'. As he pointed out, McLean's failure to do so had nearly resulted in the undertaking being 'forgotten, or possibly evaded' in consequence of the insistence of some Crown officials upon 'conclusive documentary evidence' to support the claim.[133] Mr Macky did, however, take issue with Dr Phillipson's suggestion that McLean had deliberately confined the arrangements to an oral contract, rather than drafting a separate deed for the land in question, in order to avoid undermining his supposed blanket purchase of all the vendors' interests via the Waipounamu deed.[134] In Mr Macky's view, McLean had simply promised Turangapeke additional consideration for including the piece of land in the wider purchase, as he had done elsewhere in his Waipounamu negotiations.[135] There is no doubt, however, that McLean came to an agreement with Turangapeke with respect to a specific piece of land. The verbal undertakings entered into in 1855 remained unfulfilled until 1863, and by the 1870s Crown officials were evidently in little doubt that the area should be regarded as a separate land block. Mr Macky himself refers to Alexander Mackay's 1873 map of Te Tau Ihu land purchases, in which the purchase was shown separately accompanied by his report in which he referred to the area as 'a block . . . said to have been included in the sale of the surrounding land to the Crown without payment, in consideration of which, Riwai Turangapeke, one of the principal men of the Ngatirarua tribe, subsequently received value from the Government to the amount of £100'.[136] Mr Macky's belief that the statement 'included in the sale of the surrounding land . . . without payment' referred not specifically to the 20,000 acres Turangapeke claimed but to the Government's tardiness in paying for the land as a whole is, in our view, unconvincing. There was clearly an acknowledgement in official circles by this time that the November 1855 deed, whatever it might have said about the extinguishment of all Ngati Rarua and Ngati Tama claims on the land, had not in fact fully achieved such an outcome.

Ngati Tama were also concerned about threats to their unsold land at Wakapuaka. This 18,000 acre block had been kept out of Spain's award but McLean argued that Ngati Tama were already committed to the sale of Wakapuaka because their chief Te Wahapiro had signed the 1853 Ngati Toa deed, although Ngati Tama were not mentioned in it. But Wiremu Te Puoho, the leading chief at Wakapuaka and a younger brother of Wahapiro, was adamant that Ngati Toa had no right to sell their land. 'It is for us to settle about those places,' he told Richmond and Stafford.[137] Wakapuaka was specifically named in the second Ngati Toa deed

133. Macky, 'Crown Purchases in Te Tau Ihu', pp 206–208
134. Phillipson, *Northern South Island: Part 1*, pp 164–165
135. Macky, 'Crown Purchases in Te Tau Ihu', pp 206–207
136. Alexander Mackay to Under-Secretary of Native Affairs, 31 October 1873, AJHR, 1874, G-6, p 2 (Macky, 'Crown Purchases in Te Tau Ihu', p 207)
137. Te Puoho to Richmond and Stafford, 19 October 1853 (Dr David Williams, 'The Crown and Ngati Tama ki te Tau Ihu: An Historical Overview Report', report commissioned by the Crown Forestry Rental Trust, 2000 (doc A70), p 111)

as one of the places given up to the Queen and Te Wahapiro's son received money for it. Ngati Tama from Wakapuaka would have nothing of this and McLean admitted, after briefly visiting there in March 1856, that they objected 'to its being sold, without their consent, by their relations in the North Island'.[138] Mackay reported that after 'a very lengthy argument' McLean withdrew his claim to the block and promised it would be reserved. But he failed to specifically exclude Wakapuaka in the Ngati Rarua–Ngati Tama deed and Ngati Tama of Wakapuaka refused to sign it or accept any of the purchase money. However, McLean did sketch in the reserve on an accompanying map which may have given it some recognition.

There was to be continuing friction since McLean did not give up trying to obtain the Wakapuaka block. In March 1856, he tried to buy it for £100 and promised a 100-acre reserve but his offer was refused.[139] McLean seemed to concede defeat by promising to reserve all of the Wakapuaka land but no official deed to this effect was signed and McLean continued to hope that he would get the land. We take up the issue below.

These ongoing issues made nonsense of the claim in the Ngati Rarua–Ngati Tama deed that all of their claims across Waipounamu had been extinguished. We now look at the details of the deed. Dr Phillipson says that it was drawn up by McLean who also drew an accompanying map.[140] It was yet another variation on the formula employed in the earlier Waipounamu deeds.[141] The signatories agreed 'for us and our relatives and descendants to sell . . . all our lands in this Island' to the Queen for £600. They agreed that this was to be 'the last payment we are to receive for these lands for ever'. The deed had a new and brief though all embracing description of the boundaries: 'The great boundaries of the land commence at Wairau, and thence to Arahura, continuing until it joins the land sold by Ngai Tahu.' However, one place was excluded from this area and reserved for the signatories' use; namely, 'the land beyond the Whanganui, commencing at Mangamangarakau; thence to the sea to the westward; thence inland to the first ridge of hills which look eastward to the sea'. We presume that this crude description refers to the Taitapu block which was to be reserved for the signatories' use. Such a rudimentary description was not surprising since McLean had not been there. The deed was signed or marked by 12 persons on 10 November and by another 27 three days later. Ngati Rarua historian Mr Walzl and Crown historian Mr Macky agree that all who signed the deed on 10 November were Ngati Rarua and those who signed on 13 November were a mixture of Ngati Rarua, Ngati Tama, and perhaps Te Atiawa. But Ngati Tama from Wakapuaka who were present at the negotiation did not sign at all 'lest it be construed later as payment for Wakapuaka'.[142] However, Wakapuaka was not mentioned as having been included or excluded.

138. McLean to Colonial Secretary, 7 April 1856, *Compendium*, vol 1, p 302
139. Williams, 'Crown and Ngati Tama', p 116
140. Phillipson, *Northern South Island: Part 1*, p 161
141. *Compendium*, vol 1, pp 312–313
142. Phillipson, *Northern South Island: Part 1*, pp 163–164

6.4.3

Having completed the Ngati Rarua–Ngati Tama deed, McLean and Browne sailed back to Wellington, leaving Tinline to deal with remaining problems. Despite the apparent blanket cession of land from the Wairau to Arahura, there were numerous unextinguished claims, particularly in Golden Bay. These included old claims resulting from the failure to properly fulfil the terms of Spain's award. Tinline investigated these in late November and through December. He found that Ngati Tama at Takaka had never been paid their share of the Spain compensation money (as we noted in chapter 4) and those with rights in the Separation Point–Wainui district had never been paid any money. He offered both groups a total of £150, which was based on the level of compensation set by the Spain award. The offer was rejected. Then Tinline went on to Te Papara and Tukurua where he found another group of Ngati Tama who claimed that they had not received a share of the Spain compensation money paid out for Aorere. He offered them £100 but they refused to accept it. The unsatisfied claimants asked for a meeting with McLean.

He finally returned in March 1856, after a short visit to deal with resident iwi at the Wairau and the Sounds. Having signed a 'blanket cession' just four months previously, McLean now negotiated a fresh set of cession deeds for the extinction of rights in Golden Bay. But, unlike Tinline, McLean dealt with a wider group of people including some from outside Golden Bay, such as Wi Katene of Wakapuaka and Tana Pukekohatu, who usually lived at the Wairau and probably came in McLean's entourage to support him. It was this wider group of people who joined with those from Golden Bay in signing two new deeds and sharing the proceeds at a hui McLean held in Nelson on 7 March 1856. We discuss these two deeds in turn.

The first of the deeds was described as a 'Deed of Sale by the Ngatitama Tribe', ceding claims to land in Massacre Bay. The text of the deed said that it was a 'final transfer of all our lands' to the Queen, adding, 'that is to say, all the places for which we did not receive payment in any former sale of land'. Professor David Williams notes that the Maori text of this agreement attempted to 'portray the English concept of sale in strong words, often using "oti" [finished, gone for ever] rather than "tuku" [let go, give up] to signify that the land had gone for ever'.[143] The deed then listed the places that had been transferred as follows: 'Anapu, Aorere, Papakohai, te Parapa, Tukurua, Anekaka, te Waikaha, and all our cultivations at Tukurua.' The deed recorded that McLean had paid £110 for these lands. It ended with a flourish: 'Now this is the full and sacred ending of all our words concerning the land, which is given up and transferred to the Europeans on this day on which the sun now shines, for ever and ever.' We find it strange that Ngati Tama's cultivations at Tukurua were being given up and not reserved, though Mr Macky says that the land had already been occupied by a European settler Caldwell who had purchased it from the Government though the Maori title had not been extinguished. McLean and Tinline maintained that the Maori claim had

143. Williams, 'Crown and Ngati Tama', p 119

little justification but thought it better to pay them out rather than have them continuing to disturb Caldwell.[144]

The deed was marked or signed by eight Ngati Tama, headed by Wiremu Katene Te Puoho. Although he lived at Wakapuaka and was most closely associated with it, rather than Golden Bay, Katene also held interests at Takaka, Karamea, and Te Taitapu, according to Ngati Tama historian Miriam Clark.[145] Dr Phillipson notes that 'Since Wiremu Katene signed this deed, it must have been understood that Wakapuaka was not included as one of "all the places for which we did not receive payment in any former sale of land".'[146] It seems likely that McLean held off from trying to acquire Wakapuaka as the price for getting Wiremu Katene's support for the Golden Bay deal. Mr Macky also discusses Katene's involvement in the context of Wakapuaka and says that 'Wakapuaka was plainly discussed in the negotiations leading up to the deed so there would have been no ambiguity in Maori minds over its status'. But the Tukurua deed used the usual formula of transferring 'all our lands in this Island' and by implication included Wakapuaka. Mr Macky, the Crown historian, said that it was 'unsatisfactory that McLean once again presented a deed that did not mean what it said'.[147] Professor Williams, in noting Katene's signature, suggests that 'the full extent of Ngati Tama manawhenua rights throughout Tasman and Golden Bays had now been recognised for the first time'.[148] We might add that they were being recognised in order to extinguish them – except for Wakapuaka. Though Dr Phillipson says there is no evidence on how the £110 was divided between the eight signatories,[149] it seems likely that Wiremu Katene got some of it. McLean allowed one of the signatories, Pirika Tanganui, who had been in dispute with Caldwell, a grant of 100 acres of Crown land.[150]

The second deed of 7 March was signed by 'Members of the Ngatitama and Ngatirarua Tribes' and ceded claims to their land towards Separation Point. The text of the deed said that it was a full and final transfer of 'all our lands at Whenuakura, thence to Matau, and continuing on to Powhara, and thence to Motupipi,' but it did not include the usual formula of ceding 'all our lands in this Island'. The signatories were paid £150 by McLean. Though the deed made no provision for reserves, McLean left instructions that 50 or 100-acre grants should be issued to individual signatories, including Te Aupouri, Ihaka Te Meri and Riwai.[151] The deed was signed by 36 Ngati Tama and Ngati Rarua. Wiremu Katene did not sign this deed. Nor did any of the others who signed the first deed. This suggests that two distinct

144. Macky, 'Crown Purchases in Te Tau Ihu', p 262
145. Miriam Clark, 'Ngati Tama Manawhenua ki te Tau Ihu (The Manawhenua Report)', report commissioned by the Ngati Tama Manawhenua ki te Tau Ihu Trust in association with the Crown Forestry Rental Trust, 1999 (doc A47), p 119
146. Phillipson, *Northern South Island: Part 1*, p 167
147. Macky, 'Crown Purchases in Te Tau Ihu', p 262
148. Williams, 'Crown and Ngati Tama', pp 119–120
149. Phillipson, *Northern South Island: Part 1*, p 167
150. Macky, 'Crown Purchases in Te Tau Ihu', pp 262–263
151. Ibid, pp 263–264

groups were involved in the two transactions. The Ngati Tama residents who signed the first deed were from various kainga along the western shore of Golden Bay, while the mixed Ngati Tama–Ngati Rarua group who signed the second deed were from the main settlements at Takaka and Motupipi in the eastern part of the Bay. However, Tana Pukekohatu, the ubiquitous Ngati Rarua chief from the Wairau, also signed the second deed.

There was a further deed signed by a different group of Ngati Tama on 10 March 1856.[152] This was not an original sale but a payment of £60 to a group who did not receive payment when the land was formerly sold by Te Aupouri for £190 in connection with the Spain award. The deed transferred their interests in land 'from Powharo; Motupipi, thence to Takaka and to Rangiata'. The deed was signed or marked by 17 Ngati Tama. It made no reference to reserves but McLean left instructions for these to be laid off and for Crown grants of 50 or 20 acres to be laid off for various individuals.[153] This deed, like the previous one, did not include 'all our lands in the Island' so it is a moot point whether they should be regarded as 'Waipounamu' deeds, though they were still Crown purchases designed to finally clear up the long delayed acquisition of Golden Bay. Nevertheless, the question of individual awards and reserves was far from resolved. We discuss the awards below and the reserves in chapter 7.

6.4.4 The Ngati Koata deed

We have little information about the Ngati Koata deed other than that on the deed itself. Dr Phillipson discusses it briefly as McLean's final negotiation for the eastern districts of Te Tau Ihu. Ngati Koata claimant historians Heather Bassett and Richard Kay discuss the transaction more fully, but they too were hampered by the lack of official information on the transaction.[154] Mr Macky also discusses it and notes, as the others do not, that the Ngati Koata chief, Rene Te Ouenuku, was present at the August 1853 negotiations with Ngati Toa, though he did not sign their deed. He was rewarded with a scrip grant of 200 acres of Crown land as a result of the 1856 negotiations. Although Mr Macky concluded that Te Ouenuku did not sign the second Ngati Toa deed in December 1854, we are of the view that the 'Rawiri Te Ouenuku' listed as a signatory was the same rangatira. The original Ngati Toa deed of 1853 acknowledged that Ngati Koata and others 'conjointly' claimed the land with Ngati Toa. Mr Macky suggests that McLean had allowed Rangitoto to be excepted from the Ngati Toa sale because Te Ouenuku was present at the Ngati Toa negotiation. He adds that Ngati Koata were willing to participate in the Waipounamu transaction provided their independent right to negotiate was recognised.[155] As we noted above, Brunner and Jenkins were

152. *Compendium*, vol 1, pp 317–318
153. Macky, 'Crown Purchases in Te Tau Ihu', pp 264–265
154. Bassett and Kay, 'Nga Ture Kaupapa', pp 75–83
155. Macky, 'Crown Purchases in Te Tau Ihu', pp 255–257

sent to discuss reserves with Ngati Koata. Although they pointed out various places they wanted reserved on the mainland – at Croisilles Harbour, Whangarae, Anakiwa (Okiwi), and Whangamoa Bay – Brunner and Jenkins considered it unnecessary to reserve some of these places because Ngati Koata retained Rangitoto.[156] But Ngati Koata refused to discuss the larger issue of payment for their interests in land that had been ostensibly alienated by Ngati Toa; they would only do this with McLean.

It seems that Ngati Koata made several trips to Nelson in the hope of meeting McLean. But when McLean finally arrived at Croisilles Harbour to negotiate with them in February 1856 he found that they had already gone to Nelson to meet him.[157] The Ngati Koata deed was signed there on 5 March 1856, just two days earlier than McLean's meeting with Ngati Rarua and Ngati Tama.

McLean reported only briefly on the meeting with Ngati Koata. He merely said that after finally meeting them at Nelson, he decided the reserves to be offered to an unnamed chief of Ngati Koata and his people and paid them £100 'for all of their claims'.[158] We have to turn to the deed for further details. It followed the usual format of other Waipounamu deeds in that it transferred 'all our lands in this Island' to Queen Victoria. It added (as other deeds did not) that 'The boundaries of our land are the same as those sold by our relatives the Ngatitoa'. These were then listed as 'at the Hoiere, Te Paparoa, Kaiaua, Titirangi, Tawhitinui, Whangarae, Onetea, Okiwi, Anunga, Omokau, Whangamoa, Maunganui, and all other places belonging to us'. As we noted above, the boundaries of the land sold by Ngati Toa were not in fact described in their first deed, which merely said 'our land in the Waipounamu'. But the places listed above as boundaries of Ngati Koata's land were describing a rather more limited, though still considerable district running from the mouth of Pelorus Sound and down the eastern coast of Tasman Bay towards Nelson. Mr Macky notes that the inclusion of Maunganui in the above list of Ngati Koata places caused problems with Ngati Tama, who also claimed it, but Mr Macky suggests that McLean was still hoping to buy that along with Wakapuaka from Ngati Tama.[159]

The Ngati Koata deed was unique in that it listed reserves, as follows: the lake at Kaiaua, with a small piece of adjoining land; Okiwi; Whangarae; Onatea (20 acres); and Whangamoa (100 acres). Two of the reserves, Okiwi and Whangarae, were described as having been surveyed by Brunner but in the negotiation with McLean Ngati Koata had got two additional reserves, the 100 acres at Whangamoa and the lake and adjoining land at Kaiaua. These two reserves had not been surveyed and, according to Dr Phillipson, the Whangamoa reserve subsequently became a bone of contention with Ngati Tama. The deed also excluded Ngati Koata's main area of settlement, Rangitoto, from the sale, as had previ-

156. Bassett and Kay, 'Nga Ture Kaupapa', p 77
157. Ibid, p 78
158. McLean to Colonial Secretary, 7 April 1856 (Bassett and Kay, 'Nga Ture Kaupapa', p 78)
159. Macky, 'Crown Purchases in Te Tau Ihu', p 259

ously been agreed verbally when the original Ngati Toa deed was negotiated. Though the Government did not give up on buying Rangitoto,[160] most of it was eventually sold to private buyers following the Native Land Court's determination of title. We discuss this matter in chapter 8. The deed made no reference to a map, though one showing the location of the reserves was attached to the deed.[161]

The Ngati Koata deed was signed or marked by 14 persons, headed by Rene Te Ouenuku. This was not a large number considering that Jenkins and Brunner had counted a population of 93 in the area in 1854, but it is unlikely that all of them would have travelled to Nelson for the negotiation.[162] Moreover, the signatories were not all Ngati Koata since they included the Ngati Kuia and Ngati Tumatakokiri chief, Hohepa Te Kiaka.[163] They were paid £100. Ngati Koata may not have got much for their land but at least by selling it while retaining Rangitoto and some mainland reserves, they had established their independent right to deal with it and with the Chief Land Purchase Commissioner himself.[164]

6.4.5 The Rangitane and Ngati Kuia deeds

Finally, we discuss the deeds signed by two of the Kurahaupo iwi who had been ignored in both the Spain award and the Crown's Wairau purchase (though Rangitane were admitted to a share of the reserves set aside from the latter). The two deeds were in several senses an aftermath of the Wairau purchase which had opened the way for an expansion of the pent-up Nelson settlement, providing rural land for unsatisfied company claimants. Company settlers and administrators were soon giving attention to linking the Nelson and Wairau settlements, partly through a port at Waitohi, which we discussed in our previous chapter, partly through an overland route through the Pelorus and Kaituna River valleys which was explored in the early 1850s. Attempts to cut a survey line through the valleys in the early months of 1851 were obstructed by Ngati Kuia, who insisted on the right to be consulted, though Ngati Toa gave permission for a survey in July 1851 without first seeking agreement with Ngati Kuia. It was because of problems of this kind that Nelson officials such as Matthew Richmond urged Grey to purchase land in the valleys to secure the proposed road from Nelson to the Wairau.[165] But, as was the case elsewhere, Grey took the opportunity to broaden the proposed purchase. In May 1851, he assured Nelson settlers that he would 'take instant measures to purchase the whole tract of country lying between Nelson and

160. Bassett and Kay, 'Nga Ture Kaupapa', pp 79–80
161. Macky, 'Crown Purchases in Te Tau Ihu', p 259
162. Ibid, p 260
163. Campbell, 'A Living People', p 171
164. Bassett and Kay, 'Nga Ture Kaupapa', p 82
165. Campbell, 'A Living People', p 146

the Wairau.'[166] And from here, it was but a short step for Grey to include that country in the Waipounamu purchase.

We discussed above McLean's continuing procrastination in returning to Nelson to deal with resident Maori and complete the Waipounamu purchase. In the interval surveyor Brunner and interpreter Jenkins were sent on ahead to try to arrange reserves. As we noted above, Jenkins found Ngati Kuia at Te Hoiere strongly opposed to selling their land. When Ngati Kuia at Te Hoiere heard of McLean's second transaction with Ngati Toa of 13 December 1854, which spoke of extinguishing Ngati Toa's claims 'to Wairau and Hoiere', they were incensed. They threatened to remove Brunner's survey pegs for reserves and refused to allow any more to be set off. Ngati Kuia and Rangitane at Te Hoiere, Kaituna, and the Wairau refused to have further truck with Brunner and Jenkins and insisted on dealing with McLean. He in turn had to accept that there could be no completed sale without their concurrence.[167] After the deed was signed McLean reported to the Colonial Secretary the 'favourable termination' of the Waipounamu negotiations begun with Grey's deal with Ngati Toa in August 1853.[168] It was not quite the end since several deeds were signed a few days later.

As we noted above, McLean was back in Te Tau Ihu early in 1856, accompanied by several of the leading Ngati Toa chiefs. On 9 February, he negotiated the Te Atiawa deed with those resident in Queen Charlotte Sound. He also took the opportunity of tidying up various matters with Ngati Toa and Ngati Rarua residents of the Wairau. In particular, he wanted to make sure they had assented to his earlier deeds negotiated with the Porirua Ngati Toa. As a reward, McLean offered the two leading resident chiefs, Te Kanae and Pukekohatu, individual reserves of 50 acres each.[169] McLean also had to consider Rangitane, who were pressing their rights. Indeed, he now admitted that he had to recognise their rights 'as they have hitherto been entirely overlooked in every arrangement'.[170] But when he began to negotiate with them they demanded £2000 for their rights since Ngati Toa had not given them a share of this initial payment. McLean countered with £100, 'under the watchful eye of their neighbours and the North Island chiefs', as Dr Phillipson put it.[171] Rangitane accepted the £100 offer but asked for 'good reserves for themselves'. The deal was then 'consummated with a feast of eel and potatoes'.[172] McLean understood initially that Rangitane wanted a reserve

166. *Nelson Examiner*, 3 May 1851 (Campbell, 'A Living People', p 150)
167. Campbell, 'A Living People', pp 164–166
168. McLean to Colonial Secretary, 7 April 1856 (Campbell, 'A Living People', p 172)
169. Phillipson, *Northern South Island: Part 1*, p 174
170. McLean, diaries and notebooks, 29 January 1856 (Campbell, 'A Living People', p 167)
171. Phillipson, *Northern South Island: Part 1*, p 175; David Armstrong, '"The Right of Deciding": Rangitane ki Wairau and the Crown, 1840–1900', report commissioned by Te Runanga o Rangitane o Wairau in association with the Crown Forestry Rental Trust, not dated (doc A80), pp 104–105
172. Armstrong, 'Right of Deciding', p 105

of some 12,800 acres. This was a strip of land running from the lower Wairau around the coast to Robin Hood and White Bays. However, the land along the Wairau was swamp and only about 4000 acres around the two bays was suitable for agriculture (and as a base for fishing).[173]

On 1 February, Rangitane signed what was called a 'receipt' for £100, paid by McLean, 'for all the lands of Rangitane from Wairau to Arahura, running inland as far as the claims of the tribe of Rangitane extend'.[174] That last phrase suggests that McLean had no idea what claims Rangitane might have had to the interior. He had not been there to find out. The deed added that the £100 was 'the payment to us, the survivors of the original claimants of the land exclusively of the places set apart for us by the Government as residences and cultivations'. Since this provision for reserves was so vague it is not surprising that there was subsequent dispute, but the Government held the whip hand because it was to set aside and define the reserves. The deed was signed or marked by 31 Rangitane, including Ihaia Kaikoura who was generally acknowledged as their main chief, and at the other extreme by George Macdonald, a three-year-old boy, and Hane, 'a young girl'.[175] The witnesses included 10 of McLean's helpers such as Wiremu Te Kanae and Pukekohatu, suggesting, once again, that he was using them to enforce the transaction. Te Kanae and Pukekohatu were rewarded with sections of 50 acres each. Historian for the Rangitane claimants, David Armstrong, notes that the document was in the form of a receipt rather than a deed. He described this as a 'deliberate stratagem to reinforce the point that the sale was a fait accompli (the land having already been "purchased" from Ngati Toa, the "bona fide" owners, in 1847, or 1853, or 1854) and a coercive device to justify a rejection of demands for a large payment'.[176] But, Mr Armstrong adds, it was not so much what was paid but what was promised in the way of increased value of their reserved lands and the economic opportunities that would flow from European settlement that was the important consideration. This notion was forever promoted by Grey and his officials.[177]

When he reported on the transaction officially McLean gave a very different description of the reserves from what Rangitane expected and as described above, possibly as a result of protests from Superintendent Stafford that the reserves being allowed for Rangitane and Ngati Kuia were too large.[178] McLean said that the reserves laid off consisted of 770 acres on the left bank of the Wairau, a small bay (some 200 acres at Whites Bay), and the two 50-acre sections for Te Kanae and Pukekohatu.[179] But McLean admitted that he did not have time

173. Armstrong, 'Right of Deciding', p 105
174. *Compendium*, vol 1, p 313
175. Ibid
176. Armstrong, 'Right of Deciding', p 107
177. Ibid, pp 108–109
178. Ibid, pp 110–111
179. Campbell, 'A Living People', p 169

to supervise the completion of the surveys.[180] The reserves that were finally awarded were based on an adjustment of McLean's arrangement with the Whites Bay or Pukatea reserve increased to 2169 acres, though not all of this was suitable for farming. Only about 50 acres of the 770-acre Wairau reserve were suitable for cultivation.[181] Moreover, Rangitane had to share these reserves with Ngati Toa and Ngati Rarua. The establishment of these reserves is discussed more fully in the next chapter.

Then McLean went on to Queen Charlotte Sound to negotiate the final major deed with Te Atiawa. From there, he went up the Kaituna Valley and started discussions with Rangitane and Ngati Kuia. McLean made little record of his discussions with them and seems to have been mainly concerned about setting aside reserves. For instance, he had discussions with Rangitane about a reserve at Mahakipaoa and he talked about a reserve for Ngati Kuia at Kaituna, though he proposed to take an individual grant out of this for Hura Kopapa.[182] Then he went on to Te Hoiere, where he negotiated a deed with Ngati Kuia. McLean reported that they were 'well satisfied' with the £100 he had paid them, 'it being the first time since the conquest that their claims had in any way been recognized'.[183] The deed that Ngati Kuia signed on 16 February 1856 provided for the final transfer of their lands 'in this Island, with all the places at the Kaituna, and the Hoiere and all other places to which we have any right', to Queen Victoria. Presumably, 'this Island' referred to Waipounamu as a whole, but the deed was silent on whether islands in Pelorus Sound were included. Ngati Kuia claimed that several of these islands, including Mokopeke, Te Pakeka, Te Kakaho, and Te Paruparu, were not included but this claim was dismissed by the Native Land Court in 1883.[184] The deed added that 'The reserves and cultivations for our own use having been defined and set apart for us.' But the deed did not specify the locality or size of those reserves. According to Dr Phillipson, these were the reserves McLean had talked about before signing the deed. They consisted of a reserve of 60 acres and two urupa at Mahakipawa, another 300 acres in the Kaituna Valley (though 50 acres of this was to be granted to the principal chief, Hura Kopapa), and another 340 acres scattered in small blocks around the Pelorus River. Mr Macky says that the reserves McLean promised were larger than those originally laid off by Brunner. The reserves promised did not include all Ngati Kuia's cultivations though they were allowed to use those on the right bank of the Kaituna River until the land was needed by settlers. Ngati Kuia were also promised four town sections and a landing site in Havelock.[185] The deed was witnessed by only one of McLean's Ngati Toa allies, Tamihana Te

180. Armstrong, 'Right of Deciding', p 114
181. Ibid, pp 128, 131
182. Campbell, 'A Living People', p 170. According to Armstrong, he was Rangitane: Armstrong, 'Right of Deciding', p 112.
183. McLean to Gore Browne, 7 April 1856 (Boast, 'Ngati Toa and the Upper South Island', vol 2, p 269)
184. Macky, 'Crown Purchases in Te Tau Ihu', pp 252–255
185. Ibid, pp 249–251

Rauparaha, which, Mr Macky suggests, may have indicated that McLean was not now so dependent on the 'influence of the Ngati Toa chiefs.'[186]

Though McLean had claimed that there were only about 50 Ngati Kuia survivors in the Pelorus and Kaituna district, 93 people signed or marked the Ngati Kuia deed. This meant it was the most numerously signed of all the Waipounamu deeds, apart from Te Atiawa's deed of 9 February 1856 which was signed by 163. According to claimant researcher Leah Campbell, who obtained information from Ngati Kuia claimant Mark Moses, 73 of the signatories were of Ngati Kuia descent.[187] The others were probably all Rangitane. The deed actually begins by saying 'We, the people of Ngatikuia and Rangitane, whose names are attached to this paper', but Dr Phillipson says it was written like this because McLean was 'not entirely sure whether there was a difference between these two groups'.[188] Mr Armstrong, however, considered that the Rangitane residing in the Kaituna–Mahakipawa–Hoiere district under the leadership of Te Hura Kopapa, were distinct from Ngati Kuia, and separate from the other Rangitane community led by Ihaia Kaikoura at the Wairau.[189] But the uncertainty is understandable since iwi identities were not as sharply defined then as they have become in recent years. Whatever this Kurahaupo tangata whenua group is called, it must be admitted that they were both numerous and assertive for a people who were usually regarded as being subservient to Ngati Toa and their northern allies. By 1856, they had certainly emerged from the shadows and McLean was right to recognise them. Ironically, they had to sell most of their interests in their land to gain recognition of their independent identity. But perhaps, as Ms Campbell suggests, they saw this as the beginning of an ongoing and mutually beneficial relationship with the Crown and settlers.[190]

The long running Waipounamu purchase had now been completed. Over a period of two-and-a-half years McLean and his assistants had drawn up 15 deeds and receipts and paid out a total of £6739 to Maori claimants, £1739 more than had been provided for in the original Ngati Toa deed, but including some £320 paid to resolve outstanding grievances pertaining to the company transaction and subsequent Spain award. But, despite the all-embracing claims of some of the Waipounamu deeds, the Crown had not negotiated with all who had rights in Waipounamu or, as it had been defined in some of the deeds, the territory running from the Wairau to Arahura on the West Coast. The Crown had not negotiated with Ngai Tahu, though they were named with Ngati Toa and others in the first Ngati Toa deed as having 'conjoint claims' and being entitled to a portion of the £5000 payment. They had rights

186. Macky, 'Crown Purchases in Te Tau Ihu', p 251; 'Deed of Sale by Ngatikuia Tribe', 16 February 1856, *Compendium*, vol 1, pp 315–316

187. Campbell, 'A Living People', p 172

188. Phillipson, *Northern South Island: Part 1*, p 181

189. Armstrong, 'Right of Deciding', p 112. We note that Ngati Kuia and their historian considered Kopapa to be their chief. The fact that he was claimed by both Ngati Kuia and Rangitane suggests that the two groups were not distinct.

190. Campbell, 'A Living People', pp 172–173

on the West Coast, as did Ngati Apa, who were not recognised in any of the Waipounamu deeds but had legitimate interests within Te Tau Ihu alongside their Kurahaupo relations. But the Crown did negotiate with these groups separately for the Arahura purchase on the West Coast and with Ngai Tahu alone for the North Canterbury and Kaikoura purchase on the east. We discuss these purchases below. As we have also noted in passing, three large blocks remained in customary ownership within the territory encompassed by the Waipounamu deeds: Te Taitapu, Rangitoto, and Wakapuaka. And numerous promised reserves, including the Nelson tenths, remained to be fully defined throughout the land alienated to the Crown and the company. We examine the fate of the three large blocks and the reserves in chapters 7, 8, and 9.

6.4.6 Individual awards and grants

From time to time in our discussion of the Waipounamu purchase we have referred to special awards to individuals, often as rewards for assisting McLean in the negotiations for the various Waipounamu deeds. In this section we attempt to gather this material together in a systematic way, in so far as the documentation allows this kind of treatment.

For a brief period in the early 1850s, it was Crown policy to 'pay' part of the price for Maori land by awarding individual chiefs scrip. They could exchange this for Crown land according to the prevailing Crown land regulations. Originally the price of rural Crown land was set at one pound an acre under the Australian Colonies Waste Lands Act 1842, passed by the British Parliament, but in 1853 Grey introduced regulations reducing the price of rural Crown land to 10 shillings an acre and, in the case of second class land, to five shillings an acre. The scrip that was awarded could be used to purchase Crown land anywhere in the country, though usually it was used to buy Crown land where the holders lived. Alternatively some chiefs were awarded Crown grants, usually of 20 to 200 acres, which they were entitled to select where they lived and cultivated. Most of these were taken from reserves that were set aside in connection with one or other of the Waipounamu deeds. They could also buy Crown land for cash and a considerable number did so. In 1856, the provinces gained control of the settlement of Crown land from the central government and gradually introduced their own land regulations. Nelson province and, after 1859, Marlborough continued to allow Maori to buy Crown land for 10 shillings an acre.

We have found it difficult to quantify the amount and value of land awarded or purchased under these various arrangements. Dr Phillipson says that, after the first Ngati Toa deed, the Government 'entered into several side bargains with individual chiefs and leaders, some of which breached the original conditions of sale, and others of which were never carried out'.[191] The promised awards were not explicitly written into the Waipounamu deeds, though

191. Phillipson, *Northern South Island: Part 1*, p 145

there was a reference to 'certain other portions of land' to be granted to some of the chiefs' in the first Ngati Toa deed.

Although the policy was promoted as part of the civilising mission – of helping to assimilate Maori – its operation was short-lived. There is some evidence that individual Maori who did try to use their scrip for Crown land met with opposition from local settlers and officials who did not want Maori living in their midst and made it impossible for them to secure their chosen sections of land. In evidence to the Smith–Nairn commission of 1879, Sir George Grey recalled that, after he returned to New Zealand as Governor in 1861, 'some of the natives came to me and complained that they had applied for portions of land and were not allowed to purchase; and the reason distinctly given was that the Europeans in the neighbourhood did not wish to have natives near them.'[192]

In 1863, James Mackay junior reported cases where two Ngati Rarua and Rangitane men in Marlborough, who had received scrip from McLean in part payment for their land, had been discriminated against when they attempted to exchange it for Crown land. The two men were unable to buy the Crown land they wanted because some of it was declared a public reserve and the remainder priced at £4 an acre. When Mackay 'expostulated' with the commissioner of Crown lands he was told that 'they did not want the Natives to form a settlement there'. Mackay added that he had been similarly frustrated on making several other applications for Maori to purchase Crown land. He complained that 'This is not pleasant for the Officer on whom devolves the duty of protecting Native interests'. Maori considered it 'a breach of faith' by the Government in permitting a regulation that allowed them to buy Crown land for 10 shillings an acre to be repealed. 'Their argument being, that they would not have sold their lands so cheaply, but for the Government fixing the price at which they could purchase from the Crown.'[193] But Mackay, as an agent for the central government, could no longer dictate to the provincial authorities since the provinces now controlled the sale and settlement of Crown lands. Even so, though Maori may have faced some discrimination in attempting to use their scrip or buy Crown land, as Mackay said, they were able to acquire small amounts of Crown land over the next decade or so, as we note further in chapter 7.

Turning to the specific circumstances in which the Te Tau Ihu awards were promised, we need to note some differences. There were two phases to the awards, associated firstly with the Ngati Toa deeds; and secondly, though in an intermittent fashion, with some of the other Waipounamu deeds. We discuss each in turn.

192. Phillipson, *Northern South Island: Part 1*, p 146
193. Mackay to Native Secretary, 3 October 1863, *Compendium*, vol 2, p 138

(1) *The Ngati Toa awards*

These were awarded in association with the first Ngati Toa deed of 10 August 1853, although they were not written into the deed.[194] They were of two kinds. First, there were 15 scrip awards, each worth £50, with an entitlement to use the scrip to purchase Crown land anywhere in New Zealand. Mr Macky says these were offered as a 'special inducement' to chiefs with interests in the Pelorus.[195] Secondly, there were 26 awards of 200-acre blocks of Crown land within the district encompassed by the Waipounamu purchase. According to Dr Phillipson, these went 'mainly to North Island Ngati Toa'. Twelve of the 15 who received scrip were also awarded 200-acre lots.[196] Professor Boast provides a list of the names of the recipients.[197] Most were Ngati Toa resident in the lower North Island though some may have been residing in Te Tau Ihu, particularly Cloudy Bay and Port Gore. It is doubtful if the North Island Ngati Toa who were the main recipients of the awards had any intention of selecting, occupying, and farming their promised sections, though once they had received Crown grants they would have been free to sell them. As Dr Phillipson pointed out, the combined value of the £50 scrip and 200-acre awards, using the standard price of Crown land of 10 shillings an acre, was £5950 – more than the £5000 promised Ngati Toa and others in the first Waipounamu deed.[198] Any assessment of the price paid for the land encompassed by the Waipounamu deeds has to include the value of the individual awards.

We discuss the fate of the awards more fully in chapter 7 but note here that, according to an 1873 report by Alexander Mackay, eight of the chiefs used their scrip to buy land in Nelson province. Scrip holders could also have purchased land in Marlborough when it became a separate province in 1859, if they could overcome the antagonism of the authorities that we noted above.

We can trace the fate of the 200-acre awards, thanks to a long-running dispute over them. This is summarised by Dr Phillipson.[199] He begins by noting from a statement by McLean in April 1856 that the Governor was meant to set the land apart 'at such times as the land might be required for their use'. At that time, however, the recipients had not 'evinced any desire to select this land, which they regard more as a provision for their future wants than as needed for immediate occupation'.[200] The land was still unallocated in 1873, according to Alexander Mackay. In 1874, the Native Department asked him to draw a map showing where it might be possible to 'select a sufficiency of fair average land'.[201] Mackay reported back that the

194. Macky, 'Crown Purchases in Te Tau Ihu', p 143
195. Ibid
196. Phillipson, *Northern South Island: Part 1*, pp 139, 146
197. Boast, 'Ngati Toa and the Upper South Island', vol 2, p 259
198. Phillipson, *Northern South Island: Part 1*, p 146
199. Ibid, pp 147–150
200. McLean to Colonial Secretary, 7 April 1856 (Phillipson, *Northern South Island: Part 1*, pp 146–147)
201. Phillipson, *Northern South Island: Part 1*, p 147

provincial governments would be unhappy if the Crown exercised its power to select the land and, in any case, there were no longer sufficient sizeable blocks which Maori could have without holding up settlement in those areas. This was the case with the Rai Valley and the Aorere River valley, which Mackay had suggested would be suitable. It was said that the only area left was the West Coast, though Mackay realised it was unsuitable for Ngati Toa.[202] Mackay advised the Government to select the land and sell it, creating a trust fund for the 26 chiefs, or to set aside £5200, equivalent to the value of the land when the awards were made. Four years later, Ngati Toa opted for a monetary settlement. Parliament voted £5200 in lieu of the 200-acre blocks and in August 1878 the Ngati Toa leaders agreed to accept this. At this time only seven of the original 26 were still alive.[203] Most of the original recipients had died intestate and many of their descendants had scattered. The Ngati Toa leaders wanted the Government to hand over the money for them to distribute, not necessarily to the original recipients or their descendents. The Government decided instead to put the money into a trust, administered by the Public Trustee, with the income going to the original recipients or their successors. In 1879, Charles Heaphy and Alexander Mackay were appointed as a royal commission to establish a list of the beneficiaries. Their report of 1881 and list of beneficiaries was adopted and the long-running dispute was regarded as concluded. The 26 who were awarded 200-acre lots never got their land and their descendants got a reduced income that was based on an 1850s price of one pound per acre which was not proofed against inflation or rising land prices. This was contrary to Normanby's concept that Maori would benefit from the increasing value of their retained lands (or other assets) that resulted from increased settlement.

(2) *The remaining awards*

We are unable to compile a complete a list of the remaining awards. These were promised or handed out in a piecemeal fashion, mainly by McLean, during negotiations leading to the signing of the various Waipounamu deeds. The deeds themselves did not specify reserves, apart from the Ngati Koata deed, though some of them promised that reserves would be set aside. None of the deeds that followed the two Ngati Toa deeds mentioned or listed individual awards. In Golden Bay some of the awards seem to have been a continuation of still unresolved Spain awards. Most of the awards were taken out of larger reserves promised to particular iwi groups as part of their Waipounamu transaction, though some awards to others besides Ngati Toa may have been made in scrip, as our discussion at the beginning of section 6.4.6 suggests.

In April 1856, McLean wrote a memorandum specifying instructions he had given for individual grants to be set aside.[204] We summarise the proposed awards as follows:

202. Boast, 'Ngati Toa and the Upper South Island', vol 2, pp 276–277
203. Phillipson, *Northern South Island: Part 1*, pp 147–148
204. *Compendium*, vol 1, pp 305–306

- In the Massacre Bay district, a 50-acre award to Meihana ('for relinquishing his claims and not receiving any share of the payment awarded by Mr Commissioner Spain for the Motupipi, Aorere, and Takaka Districts'), and 20-acre awards to Rameka Te Paea, Paramene Nganarangi, Henare Te Ranga, Pirimona Te Aupori, and Hamiora Pito.
- At Separation Point, 100 acres for Te Aupouri, 50 acres each for Riwai, Ihaka Te Meri, Pene Miti Kakau and Meri Ngako
- In the Pelorus and Queen Charlotte Sound districts, Hura Kopapa of Ngati Kuia was to have 50 acres at Kaituna, and he and Manihera were to have four town acres (in the future Havelock). Individual grants were also promised to unidentified persons for 'three small places at Queen Charlotte Sound'.
- At the Wairau, Tana Pukekohatu and Wiremu Te Kanae were to have 50 acres each.

We discuss the fate of these and other individual awards in our district by district discussion in the next chapter.

When McLean was negotiating with Ngati Tama and Ngati Rarua to close the Waipounamu deeds of 7 and 10 March 1856 he made 'private deals with various important chiefs for Crown granted individual reserves', according to Dr Phillipson.[205] We have no information on whether these grants were actually issued. It seems also that other individual awards were promised in the course of korero over other deeds. As Dr Phillipson notes, 'There was also some secret gift-giving behind the scenes, and McLean's usual practice was to host dinners, make gifts of food and even canoes, as a way of smoothing the path for negotiations and eventual consent.'[206] Whether we should regard such activities as a legitimate part of the consideration for the land, plain bribery, or necessary reciprocity for hospitality received is a moot point. Whatever the conclusion, promises of individual awards were an integral part of the Crown's land purchase business. Such individual awards – or rewards – for collaboration need to be further considered in our conclusions and findings below.

6.4.7 The identification of customary right holders in the Crown purchase era

Before we move on to consider claimant and Crown submissions and make findings on the Waipounamu purchase, there is an important preliminary point that first needs to be addressed. It is one that is wider than merely the Waipounamu transaction, but is appropriately addressed within this context, given that this was the last of the series of blanket transactions that extinguished customary rights over much of Te Tau Ihu. Here we refer to particular arguments advanced by the Crown as to the nature of customary rights within the inquiry district and the extent to which these could reasonably have been identified by Crown officials.

205. Phillipson, *Northern South Island: Part 1*, p 167
206. Ibid, p 175

6.4.7(1)

The Crown advanced two arguments in mitigation of its admitted failure to inquire into customary rights properly (or at all) before granting land to the company and conducting its own transactions. In brief, the Crown argued that many customary rights were so recent and unsettled in the district that it could not be 'assumed' that they were readily identifiable on reasonable inquiry. The blanket purchase approach, in which all possible claims were eventually settled, was therefore a quiet and peaceable way of purchasing land in that circumstance. Secondly, the Crown argued that even if tenure had been settled enough to ascertain upon inquiry, it had limited resources at its disposal and was not required to do more than was reasonable in the circumstances. We consider these arguments in turn.

(1) *Were customary rights unsettled, to the extent that the Crown could not have ascertained them upon reasonable inquiry?*

The Crown relied on the evidence of Dr Ballara, who argued that customary rights in an area of recent conquest were in a state of 'flux', until sufficient time had passed for the conquerors to have established their roots in the soil and for the status of any remaining defeated people to be settled by intermarriage and co-occupation, or, alternatively, by total removal or military resurgence. The claimants did not accept that their rights were too unsettled for discovery at the time. Counsel for Ngati Toa submitted that tangata whenua and historian witnesses showed that tikanga was clear and understood by Maori at the time, with universal principles common to most districts. Counsel for Ngati Kuia agreed with that position. It remained, therefore, for officials to do one of two things: inform themselves on tikanga and then inquire as to the facts of right-holding, authority, and occupation on the ground; or, in the submission of Ngati Tama, identify the correct leaders and communities with whom to deal, and leave it to them to decide what was appropriate.

We do not need to discuss this question in detail, because the Crown modified its position in the light of cross-examination. As we noted earlier, counsel accepted:

> Professor Ward is no doubt right when he says that some things were clearly established. Certain hapu occupied certain kainga and not others and certain relationships between rangatira were accepted, others fought over. The problem in Te Tau Ihu is that there was no due inquiry by the Crown into these matters in the 1840s so that now little reliable evidence remains.[207]

This modification of the Crown's view was a partial one. Although accepting that some things were settled, it agreed with Professor Ward that others were 'fought over'. The Crown's implication, as we understand it, was that this mitigated its blanket purchase policy and justified some of McLean's actions.

207. Crown counsel, closing submissions, p 20

We accept the evidence of Professor Ward, Dr Ballara, Iwi Nicholson, Matiu Rei, Dr and Mrs Mitchell, Puhanga Tupaea, Josephine Paul, Mark Moses, Alan Riwaka, and many others that there were principles of customary law that were known and understood by Maori of the time. Not everything was agreed, then as now. Ngati Toa and Ngati Kuia, for example, state that they have different tikanga for raupatu. Professor Ward and Dr Ballara, in cross-examination by the Crown, stated clearly that Maori law and the distribution of rights were not merely known but were discoverable upon inquiry. In their view, and also that of Dr Ashley Gould for the Crown, there was sufficient expertise among Maori, officials, and long-term settlers (like Hadfield) to have carried out an inquiry steeped in custom law and capable of ascertaining the correct right holders with authority to alienate land.[208] We agree. Governor Gore Browne, for example, inquired of Maori and settler experts on his arrival in 1856, appointing a special board for that purpose.

A serious challenge remained for the Governments of the time. As everyone agrees, things were changing on the ground. In part, these changes were facilitated or even caused by the Crown. Its attempts to suppress Ngati Toa's military power, for example, and to establish a strong influence over that tribe, had an effect on their ability to exercise rights in Te Tau Ihu. In the face of such change, Ngati Toa suggests that the Crown should have considered rights as frozen from 1840. That could not have fitted with even the 1840 rule, which, as Professor Ward pointed out, accommodated peaceful and agreed changes.[209] This was especially necessary, since groups among the conquerors and defeated peoples were moving around, sometimes relocating permanently. Kurahaupo refugees from the interior, for example, were returning to the coast and settling with their relatives, while leaders like Henare Te Keha were moving their people closer to the European settlements. Mary Gillingham and Alan Riwaka describe Te Keha's relocation to Pariwhakaoho in 1845, settling on Ngati Rarua claimed land, after Spain's deeds of release (1844).[210] An answer to the question 'who has rights at Pariwhakaoho', therefore, might not be the same in 1846 as it was in 1844. Tuku and their consequences were still being worked out, with the additional ingredient of European settlers on company lands. Finally, defeated peoples were recovering rights but were not visibly asserting them before around 1849, in so far as they had opportunity to be recorded (see our discussion in chapter 2).

Nonetheless, the Crown wanted to buy land from these people and it had no choice but to decide whether the company's title was valid. In those circumstances, the complexity of overlapping and changing rights was not an excuse not to inquire into them – quite the reverse. Trying to settle overlapping rights in the context of a purchase might well generate

208. The Crown cited Professor Ward and Dr Ballara in its closing submissions at pages 16 to 20. Dr Gould's cross-examination was cited by counsel for Ngati Toa Rangatira in her closing submissions at page 20.

209. Professor Alan Ward, brief of evidence on behalf of Ngati Toa, 9 June 2003 (doc P9), pp 13–16

210. Alan Riwaka, 'Nga Hekenga o te Atiawa', revised ed, report commissioned by the Te Atiawa Manawhenua ki te Tau Ihu Trust in association with the Crown Forestry Rental Trust, 2003 (doc A55), pp 231–234; Gillingham, 'Ngatiawa/Te Atiawa Lands', pp 24–26

conflict. It was incumbent upon the Crown to find a purchasing process that gave Maori the opportunity to debate and resolve their differences or, where that was not possible, to submit them to an agreed and Maori-controlled legal process. We consider some of the options available in this respect in the next section. The Crown submits that its intentions included abiding by the Treaty and trying to keep the peace between Maori and settlers, and between Maori.[211] In our view, avoiding a contested situation by picking winners without inquiry, and then settling with any after-claimants who were able to come forward, was no solution.

This was especially so where the Crown tried to extinguish undefined rights in under-defined districts. Mr Walzl's evidence, for example, shows the problems caused by the legacies of the Wairau purchase. In 1850, three years after the deed was signed, Richmond was trying to negotiate reserve boundaries with local leaders, Te Kanae and Kaikoura, who eventually signed a deed of certification. Te Kanae claimed some of the Waitohi land sold by Te Atiawa, but Richmond had to explain that the Wairau deed – to which Te Kanae had not been a party – had purchased all of Ngati Toa's rights until they met those of Te Atiawa. Anything belonging to Te Atiawa had been sold by the Waitohi deed, while anything belonging to Ngati Toa had been alienated in the Wairau deed.[212] Anything belonging to Rangitane had been overlooked. So the Crown's argument is clearly misplaced that blanket purchases obviated the need for conflict-causing definitions. Both Te Kanae and Te Rauparaha claimed that they had interests at Waitohi, but there was no investigation of such claims or their merits prior to the Waitohi purchase.

Blanket purchases might well obscure overlapping interests and thereby postpone conflict. They also had the effect of obscuring exactly what rights were involved and being alienated, exactly what sites were being given up or retained, exactly who had the authority to make the decisions, and who had the right to be involved and be compensated. In the view of the claimant and Crown historians, and of the claimant communities' experts on Maori law and customary rights, these questions were capable of being answered at the time upon due and diligent inquiry. The Crown mostly conceded the point.

Finally, we note that the Crown put a lot of emphasis on the mobility of the Te Tau Ihu population.[213] Was it too mobile for the Crown to be certain as to who had rights where? In this respect, we note Governor Grey's memorandum of 1846 in respect of the proposed Wairau purchase:

> It will be desirable, before entering into any negotiation upon the subject, to ascertain the exact number of Natives at present inhabiting the district, the extent of land they have under cultivation, and whether any portion of the Ngatitoa Tribe are likely to remove from

211. Crown counsel, submissions concerning generic issues, 20 September 2002 (paper 2.371), pp 43, 84
212. Walzl, *Land Issues*, pp 189–191
213. See, for example, Crown counsel, opening submissions, 14 November 2003 (paper 2.748), pp 5–6; Crown counsel, closing submissions, pp 3, 23–25

> Porirua to that district, and then take the necessary precautions for securing to the Native inhabitants blocks of land in continued localities of sufficient extent to provide for the wants of the probable Native population.[214]

Clearly, this was a sensible approach. If in doubt, the Crown could inquire.

(2) *What inquiry mechanisms were available or proposed at the time, and what kinds of inquiry were reasonable and practical in the circumstances?*

Prior to Grey, the Government was starved of revenue. It was in something of a catch-22 situation. The Colonial Office expected government and colonisation to be funded from customs revenue and the on-sale of land – the surplus land from that 'sold' by Maori but not granted to pre-1840 settlers, and land purchased cheap from Maori but sold dear to settlers. Yet, to obtain either category of land for on-sale, the Crown had first to establish title. This required some kind of inquiry process, by the standards of the time.

(a) *Formal inquiry by royal commission:* The earliest and most obvious inquiry mechanism was a formal one by royal commission. The Land Claims Ordinances appointed commissioners, with Maori represented indirectly by their 'protectors', to inquire into the validity of pre-1840 transactions. This model was used to inquire into the company's Nelson district claims in 1843 and 1844. Lord John Russell instructed in 1841 that all Maori, non-Maori, and Crown land should be registered. He also instructed the Governor to give the commissioners legal authority to investigate and resolve any titles disputed between Maori themselves (see ch 4). As noted earlier, neither instruction was carried out. Hobson dropped a proposed clause in the Land Claims Ordinance 1842 that would have authorised the commissioners and protectors to settle disputed Maori titles on the spot.[215] Nonetheless, this model of inquiry was clearly available to the Crown and endorsed by the Colonial Office. Dr Ballara concluded: 'Inadequate as it was, the Spain commission was nevertheless the only serious attempt at inquiry into these matters before 1860.'[216]

(b) *Informal inquiry by officials:* This was the most common type of inquiry carried out in Te Tau Ihu. Surveyors, purchase agents, or interpreters toured districts and met with the people of the land, inquiring as to their customary rights. In Dr Ballara's view, this was the least successful kind of inquiry, because of its objects and the manner in which it tended to be carried out.[217] She argued:

214. Sir George Grey, memorandum, 14 September 1846, *Compendium*, vol 1, p 72
215. Loveridge, 'An Object of the First Importance', p 93 fn 238
216. Dr Angela Ballara, 'Summary of Selected Aspects of an Historical Overview Report Prepared in Response to Questions from the Waitangi Tribunal', statement of response to Tribunal questions, 2002 (doc F1), p 7
217. Ibid, pp 6–8

6.4.7(2)(c)

> The need over time for extra reserves to be surveyed, compensation to be paid for groups whose rights had been ignored or overlooked, and the cynical determination to hold to Spain's award 'as it at least holds good against those parties who received money under it', prove in themselves the failure of the Crown adequately to inquire into customary land tenure, tino rangatiratanga and to find which Maori were the proper persons with whom to negotiate and who had the power to declare the interests and decisions of the community, and to receive payment on their behalf. Typical of the expedient attitude and actions of Crown officers was the statement of one who said: 'Without entering particularly into the merits of the claim of the Natives I offered to pay them £100 to settle the dispute'.[218]

The Crown conceded: 'It is also accepted that there is force in Dr Ballara's criticism that the Crown did not carry out adequate inquiries into customary rights in Te Tau Ihu even though there was expert advice on these matters available.'[219]

(c) ***Logistics and practicalities:*** In terms of practicability, the Crown asked us to take into account the difficulty of terrain, the enormous size of the region, and the shortage of officials, when judging the thoroughness of these kinds of inquiries. We did not receive evidence on this point, although several historians were asked to comment in cross-examination. Ngati Rarua submitted that the Ligar inquiry showed that it was by no means unfeasible for officials to tour a large district and inquire as to the distribution and possessors of rights. Ligar was hampered by his inability to find a local guide – he was not entirely trusted – rather than the nature or size of the district. Counsel for Ngati Apa pointed out that that tribe's loss of entitlements may have rested solely on officials' failure to visit or find them. The Crown acknowledged the point. Counsel for Ngati Kuia agreed that the Crown was not required to do more than was reasonable but cautioned us that the bar must be set very high, given what was at stake for Maori.

The Spain inquiry clearly did not come close to the limits of what was possible, as we saw in chapter 4, even taking into account any logistical constraints. Spain himself said that he would move his court to Golden Bay if necessary, but he did not do so. Neither Clarke nor Meurant visited Golden Bay. Maori themselves, and company witnesses who had been there, were available in Nelson to give evidence. Logistics and opportunity do not account for or mitigate the inadequacies of Spain's inquiry.[220] In conducting the Waipounamu purchase, McLean did not go west of Nelson. When he gave evidence to the Native Land Court in 1883, Meihana Kereopa of Ngati Apa stated that this was his first ever opportunity to claim

218. Ballara, 'Summary of Selected Aspects', p 8

219. Crown counsel, opening submissions, p 12

220. See Dr Ashley Gould, 'Summary of Report: The New Zealand Company and the Crown in Te Tau Ihu', report commissioned by the Crown Law Office, 2003 (doc s5(a))

rights in Taitapu (and, by implication, western Te Tau Ihu).[221] The exclusion of Taitapu from sale and the failure of, first, the Spain commission and, secondly, the lead purchase agent to go west of Nelson, may well account for this kind of 'late' claim. At the same time, Brunner and Jenkins could easily have toured eastern Te Tau Ihu before the first and second deeds were signed with Ngati Toa, instead of after. They could have inquired as to the nature and extent of people's rights, whether they wanted to alienate them, and who had the power to make that decision for the community, rather than telling people that their land was sold and that small, limited reserves now had to be made.[222]

Did officials need to visit every bay, valley, forest, and mountaintop? The answer is 'No'. Did they need to find out the location of every significant kainga and group of right holders in the block, and ensure that those people had a fair opportunity to participate? The answer is 'Yes'. Professor Ward suggests that it was a 'utopian hope' that all interests could be defined absolutely before beginning a purchase. In his view, the correct process was for Maori or the Crown to propose a certain piece of land for sale, to be followed by a period of discussion and the reaching of a consensus, after which the boundaries were publicly marked. This was not utopian, and was done in some instances.[223]

We agree. The correct right holders and their leaders had to be identified and consulted before the decision to sell was accepted by the Crown as having been made, and a deed signed. After all, the Crown had the option not to buy. All too often, as we have seen, Maori did not have the option not to sell if they were missed out. The Kurahaupo witnesses argued that guides and trails were available and that no place where Maori were living could be considered too inaccessible.[224] But the purchase process in the northern South Island became mired in the fact that the Government was no longer buying particular places, sites, or clusters of rights. Rather, it considered itself to be extinguishing 'claims' across whole regions; claims that it thought were barely valid. In that circumstance, neither Grey nor McLean inquired closely or anywhere near to the extent practicable and feasible.

We agree with Ngati Kuia's submission that, in light of the Treaty principle of active protection and the relative power imbalance between the Crown and, in particular, the Kurahaupo tribes, a high standard was required. To keep the standards it had mooted in the early 1840s, the Waipounamu purchase (with its undefined nature and unwalkable boundaries) would never have happened in the manner it did. Dr Ballara reminded us:

221. Dr Angela Ballara, 'Customary Maori Land Tenure in Te Tau Ihu (The Northern South Island), 1820–1860: An Overview Report on Te Tau Ihu (Wai 785)', report commissioned by the Crown Forestry Rental Trust, 2001 (doc D1), p 284

222. Ballara, 'Summary of Selected Aspects', p 8; *Compendium*, vol 1, pp 294, 297–300

223. Ward, *National Overview*, vol 2, pp 136–138

224. See, for example, June Robinson, brief of evidence on behalf of Ngati Apa, 8 March 2003 (doc N8); Albert (Sonny) McLaren, brief of evidence on behalf of Ngati Apa, [2003] (doc N5); Ngati Apa Claims Committee, *Ngati Apa ki te Ra To: The Footsteps and Gardens of Ngati Apa*, VHS videotape, 2001 (doc N12)

> If the Crown officers concerned were in fact being judged by today's standards, it would not be fair or appropriate. But rather than those of 2002, they are being judged by the proclaimed standards of 1840. Had there been no Treaty of Waitangi, and had not the Colonial Secretary at the time, early governors and other Crown representatives committed the Crown by frequent, recorded and public rhetoric to upholding the Treaty promises and to an honourable course of protecting Maori in their landed and other possessions, there would be no contemporary standards against which to measure their successors' performance. But the rhetoric was spoken and the promises were made . . . Contemporary senior Crown officers such as Grey and McLean had heard the vocabulary of just dealing and expressed it themselves at times; they had received expert advice as to the proper methods of treating with Maori for their land but chose to ignore it.[225]

In any case, the correct course of action for the Crown was neither expensive nor impractical. The best example in Te Tau Ihu was that of Richmond's purchase of Pakawau in 1851–52, which generated no Treaty claims in our inquiry.[226] He visited and toured the block he wanted to purchase, met with the resident chief and hapu, inquired widely and met with overlapping right holders, and, ultimately, left Maori to decide their own entitlements at a large, well-attended, intertribal hui. It is to that option – the giving of effect to tino rangatiratanga – that we now turn.

(d) ***Tino rangatiratanga:*** There were a number of options through which Maori could decide these questions for themselves but still provide the kind of finality that the Crown required for the transfer of title from Maori to itself. In the view of the Ngai Tahu Tribunal:

> the tribe retained control over alienation of resources through senior rangatira. Crown agents seeking to purchase land from Ngai Tahu would be expected to negotiate with the tribe through these principal chiefs. They had the power of veto and without their consent the sale was not valid. However, the rangatira as trustees for their people and their resources could only approve a sale if the necessary consensus was in place. The traditional way of ensuring this then, and now, would be to debate the purchase on the marae in the presence of those who had rights in the land, both those living and those passed on. This would represent a meaningful exercise of rangatiratanga.[227]

In Ngati Tama's submission, we should adopt the findings of the Taranaki Tribunal to the effect that it was not for the Government or British persons to decide who had the decision-making authority to transfer land. Rather, it was for the Crown to seek out Maori leaders,

225. Ballara, 'Summary of Selected Aspects', p 3

226. That is, it generated no claims with regard to how customary right holders were determined in the purchase process. There were claims about other aspects of the transaction, as we saw earlier in the chapter.

227. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 2, p 241

and for those leaders and their communities to decide who had rights where, and what rights (in what places) would be given up.[228]

There were various customary methods for hapu and iwi to resolve differences peacefully and legitimately, even after war was banned and muru became less acceptable. Counsel for Ngati Rarua and for Te Atiawa submitted that the Pakawau purchase was a good one in this respect (though not in others).[229] No iwi in our inquiry argued that the Pakawau purchase was deficient in terms of identifying customary right holders. Richmond's process was, at first, that of informal inquiry by a touring Crown agent, in which he identified those living on the land at the time of his visit (and whom he therefore considered to have the primary rights). When Te Koihua's right to decide was challenged by others, whom Richmond also met with, the outcome was a hui at a nearby centre (Nelson). The tribes assembled (about 500 people) and the rangatira debated their positions and agreed on whose authority would be encapsulated in signing the deed and distributing the purchase money. Not all those who claimed such rights also claimed a layer of rights sufficient to keep any of the purchase money. Te Koihua, as the leading resident rangatira, received the largest share for his people.[230]

Ms Gillingham concludes:

> To the government's credit, its inclusive stance of settling with claimants ensured that all Ngatiawa chiefs who pressed a claim to the land were consulted with. It also ensured that the leading resident right-holder received the greatest share of the purchase money, as well as a reserve. The purchase payment, however, did not accurately reflect the value of the land because the government declined to pay for mineral value. Thus, although the Crown treated with Ngatiawa and other claimants to ensure a full and final settlement, its failure to pay the full price of the land denied Ngatiawa the full value of it.[231]

We considered the mineral wealth of Pakawau and the purchase price earlier in the chapter. Here, we note that this kind of decision-making by Maori was entirely their right under the Treaty, and a valid process for the Crown to have accepted and relied upon in its Pakawau transaction. In terms of affordability, a hui like Pakawau cost the Crown little or nothing. Presents of food would have been appropriate and welcome, but Maori bore the cost otherwise.

(e) ***Why was this model not followed in 1853?*** Counsel for Ngati Rarua submitted that there was a major cost for the Crown from the Pakawau hui at Nelson. At the same time as he

228. Counsel for Ngati Tama, closing submissions, [2004] (doc T11), pp 56–58

229. Counsel for Ngati Rarua, closing submissions, pp 56–65; counsel for Te Atiawa, closing submissions, pp 35–41, 130–131, 162–164

230. Gillingham, 'Ngatiawa/Te Atiawa Lands', pp 166–170; Macky, 'Crown Purchases in Te Tau Ihu', pp 120–127

231. Gillingham, 'Ngatiawa/Te Atiawa Lands', p 170

was attempting to acquire the suspected mineral wealth of the Pakawau block, Richmond was also trying to arrange a blanket purchase of the entire west coast of the South Island. This had generated debate between tribes, and between tribes and officials, with both Ngati Rarua and Ngati Toa writing to the Governor to outline their claims. On this occasion, Grey advised Ngati Toa to go to Te Tau Ihu and sort it out on the spot with Richmond and the other tribes. For Richmond, the sticking point was the price – he could not get anyone to agree to the kind of low price that the Earl Grey–Governor Grey–Normanby approach required. The tribes' bottom line at the Nelson hui was £3500, to which the Government would not agree. The result was that neither side gave in and the negotiations had to be abandoned (until the very different processes of the Waipounamu purchase the following year).[232]

From this experience, Ngati Rarua argue that the Crown learnt the following lessons:

> Maori overlapping rights in Te Tau Ihu were very complex, the tribes were competitive, none would immediately accept the others' claims, but ultimately the issues could be resolved by community agreement;
> reaching such agreement required time – in this instance, a period of seven months;
> so many overlapping rights, when considered by the tribes meeting all in one place, was likely to raise prices; and
> an inter-iwi hui, with the tribes in a position of strength, might resolve matters in a way that led to no purchase – as happened with the west coast proposal.[233]

These lessons, argue the claimants, provide the context for the very different approach of Grey and McLean in the Waipounamu purchase the following year. We agree. Any recognition of tino rangatiratanga carried with it the possibility that Maori might say 'No'. The Treaty guaranteed them the retention of their land and resources for so long as they wished to keep them. Normanby instructed the Government to make fair and equal contracts with the free and informed consent of Maori. Implicit in such requirements was that Maori could say 'No'. The Crown, however, would brook no refusal. As Crown counsel submitted, the policies of Grey and McLean were characterised by a ruthlessness that sidelined the Treaty and its promises, and subordinated the interests of Maori to settlers. They did so by designing a purchase process in which Maori tino rangatiratanga was unfairly and unduly suppressed, enabling the Crown to force through a result that would not have been possible had the Treaty promises been honoured.

(f) ***Partnership:*** Finally, we note that there were alternatives and variants to the hui decision-making that resolved tribal differences over Pakawau, and which involved partnership between the Government and Maori leaders. The Governor, for example, as a person

232. Counsel for Ngati Rarua, closing submissions, pp 56–65
233. Ibid, pp 62–64

of great mana, could be entrusted with the kind of role that Te Rauparaha had played in the roherohetanga hui which divided up eastern Te Tau Ihu (see ch 2). According to the evidence of a Ngai Tahu rangatira, Wiremu Te Uki, Governor Grey proposed just such an arrangement to settle the overlapping claims of Ngati Toa and Ngai Tahu in 1848:

> He invited us to go and stand on one side and meet the Ngati Toa, who would stand on the other side, and he would judge between us; and if we were able to show that the land belonged to us, he would recognize it as so; and if the other party showed that the land belonged to them, he would recognize them.[234]

The proposed hui did not happen, but it shows the potential available for this kind of decision-making in partnership between the Crown and Maori.

Not all officials or missionaries had that kind of mana. Mr Macky, the Crown's historian, suggests that we do not know exactly how much Richmond, Tinline, and the missionaries were involved in the decisions reached at the Nelson hui, which they attended. The only point recorded was that they stepped between Puaha and Te Koihua when they thought things were getting too heated.[235] In our view, the attendance of European observers and advisers at hui made them part of the inclusiveness of Maori decision-making. Their views would have contributed to the consensus reached, and their influence would have depended on their mana. None of them had the mana of a Grey or a Te Rauparaha, able to sum up and speak (and possibly even decide) for the whole. As Ngati Rarua submitted, however, they had an entrée to the Maori world and were part of the partnership between tribes and the Crown.[236]

Sometimes, outside help was needed. Officials considered formalising a process of Maori-controlled dispute adjustment, with an official as president (rather than adjudicator). As we have seen, Lord John Russell preferred a commissioners' court to decide disputed titles. Chief Protector Clarke, on the other hand, proposed district courts of Maori chiefs with Maori juries and a protector as chair.[237] Counsel for Ngati Kuia submitted that the Crown was obliged to provide a legal mechanism for adjusting disputes, when these arose from the interface between customary rights, European custom and law, and the Crown. We agree. In our view, it was entirely possible to have provided one in the circumstances of the time. FitzRoy's Native Exemption Ordinance, Grey's resident magistrate arrangements, church komiti, and, finally, the formalisation of State runanga in the 1850s and 1860s, show how Maori autonomy could be given expression in official institutions, and in partnership with the Crown. Had this been done in Te Tau Ihu for the purpose of negotiating land purchases and deciding overlapping entitlements, Maori leaderships would have had official

234. Wiremu Te Uki, evidence to Smith–Nairn commission, 3 April 1880 (Phillipson, *Northern South Island: Part 1*, p 186)

235. Macky, 'Crown Purchases in Te Tau Ihu', pp 125–126

236. Counsel for Ngati Rarua, closing submissions, pp 5–6

237. Clarke to Colonial Secretary, 31 July 1843, BPP, vol 2, apps, p 348

mechanisms for the Crown to work with, and a Maori-controlled process for adjusting any disputed overlaps.

We agree with counsel for Ngati Tama and the findings of the Tribunal in its Taranaki Report, that the Crown was required to seek out the right leaders and, if necessary, formalise Maori bodies with whom to negotiate. It was not up to British persons to decide Maori land entitlements. Ultimately, the Crown and Maori had to work in partnership, but the Crown was not supposed to have an interest in which Maori did the negotiating.

(g) ***Registration of titles prior to transacting:*** Prior to 1846, it was commonly held that Maori title must be ascertained before purchase, so that the Crown could be sure of dealing with the right (and all the right) people, and thereby acquiring a valid title. In the evidence of Dr Loveridge, Lord John Russell, Lord Stanley, Earl Grey, Acting Governor Shortland, Governor FitzRoy, and Chief Protector Clarke all favoured a process of investigating and registering Maori titles to land, prior to purchasing. Russell wanted the land claims commissioners to investigate and resolve title disputes, Clarke preferred a Maori court to do that, and Earl Grey referred to a 'court' without being too specific about its composition. Courts in New Zealand at the time, as FitzRoy, Clarke, and Governor Grey agreed from their very different perspectives, had to have a Maori component and work according to Maori mores in Maori districts. They did not agree, however, on how formal the recognition of Maori law should be in these special arrangements, nor how quickly or to what extent British law should predominate.[238]

Despite broad agreement between secretaries of state and governors, no process of registration was ever attempted. There were a number of reasons. As Clarke pointed out, to do it for the whole country at once would be very expensive, yet nothing short of that could have kept ahead of Grey's purchase plans.[239] By the time the Government was better resourced, the proposed registration was tarred too much with Earl Grey's waste lands brush, and had been set aside as too dangerous to attempt. Concentrating attention on overlapping claims, and trying to achieve finality on them, would likely have generated conflict. As with the purchase process itself, much would depend on how far Maori were in control, whether they saw it as a needful or meaningful exercise, and whether there was sufficient incentive for them to adjust matters among themselves. We have no way of knowing how far a royal commission or Clarke's Maori courts could have resolved disputes.

In Professor Ward's view, a registration process would not have been the kind of permanent fix envisaged by Clarke and others. Customary law and rights continue to evolve and change with movements of mores and peoples. It would all have to be done again, he

238. Alan Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand* (Auckland: Auckland University Press, 1995), pp 42–91

239. Loveridge, 'An Object of the First Importance', p 69

argued, at the actual time of purchase.[240] The evidence in our inquiry certainly supports such a conclusion. Further, without an actual land transaction as a driving force, Maori would have seen no benefit and were unlikely to have participated. For our purposes, the proposed solution is less important than officials' acknowledgement of the problem. As Clarke put it, the advance registration of titles would be 'an expensive procedure, but it would be a sure one for I cannot conceive how purchases can be made with satisfaction by the Government unless this is done'.[241] As part of the standards of the time, some such exercise was considered essential prior to purchasing. Whether or not the particular solution of registering titles would have worked, it was necessary for the Crown to develop a process to ensure that it was dealing with the correct 'owners'.

(3) *The Tribunal's finding*

We find that the Crown, in the circumstances of the time, considered prior investigation of Maori customary rights, as determined by their own customary law, to be a vital prerequisite to its acceptance of any decision to sell. Yet, it failed to do so in an adequate manner. Its failure to abide by its own standards, more particularly during the transactions of 1844 to 1856, was in serious breach of Treaty principles. The Crown failed to actively protect Maori interests, by ensuring that their entitlements were fairly identified by themselves and according to their own laws, before commencing to buy them. It failed to act in partnership with Maori or to respect their autonomy, by establishing official mechanisms, the decisions of which would be binding on both sides, for the negotiation of purchases and the resolution of disputes. It failed to respect and provide for tino rangatiratanga: Maori were not permitted to debate and decide their own entitlements through their own institutions before the Crown obtained deeds and made payments. That it could have done all of these things is demonstrated above all by the Pakawau hui at Nelson and by proposals for advance title registration and dispute resolution by Maori courts.

(4) *Was the Crown's failure mitigated if it identified right holders after accepting a decision to sell or even by the end of a later transaction?*

It is clear from our preceding discussion that, by 1847, the Crown had accepted that it was bound by the Treaty and by the Maori law governing customary rights in property. It had also articulated the view, on many occasions, that it would not buy Maori land – or confirm the extinction of Maori title by Crown grant to others – unless there was proof that the correct right holders had been identified and paid. Further, it was the proposed practice of Governors Shortland, FitzRoy, and Grey that the correct Maori right holders must be identified before either purchasing land or (in the case of private purchasers) confirming

240. Ward, *National Overview*, vol 2, p 165
241. Loveridge, 'An Object of the First Importance', pp 65, 69

a purchase. We noted the proposed purchase processes of Shortland and Clarke, the registration instructions of Russell and Stanley, the purchase instructions of Normanby and Stanley, and the proposed confirmation processes of FitzRoy and Grey. All required the identification of Maori title prior to the Crown's acceptance of a decision to sell or, in the case of confirmations, its acceptance that a sale had taken place before a Crown grant to the purchaser could ensue (see ch 5).

The Crown and claimants agreed that this did not happen in Te Tau Ihu. At first, the Crown denied it but eventually conceded the point, particularly on the evidence of Dr Ballara. The evidence of its own witnesses, Dr Gould and Mr Macky, also confirmed the point. The Crown argued, however, that its failure was mitigated by identifying and paying all right holders by the end of the Waipounamu purchase. Clearly, it could not argue this for the Wairau purchase. But, the Crown urged us, its transactions should be considered as one continuous process. By the end of the Waipounamu deed-signings, it claimed to have identified and paid anyone who still had what it called 'remaining or residual rights' left over from its 1844–53 transactions.[242]

In our view, this is a problematic and troubling submission. The Crown, in Lord Stanley's words, had no right to grant lands that it did not itself possess.[243] The idea that its transactions could somehow be validly or fairly completed after Maori land had been granted away to settlers, or after it was judged as irrevocably sold, is incompatible with either the Treaty or British principles of justice as we understand them. We accept the submission of Ngati Tama: 'It is well settled in both Maori customary law and English law that a person cannot convey to another that which is not theirs.'[244] Anything less than the free and informed consent of Maori to the alienation of their land, before the Crown claimed to own it or to grant it to others, was in violation of articles 2 and 3 of the Treaty, the rights of all British subjects, and the tino rangatiratanga of Maori tribes. Compensation of 'after-claimants' subsequent to their land being counted as sold and with a non-negotiable sum, was in obvious violation of the Treaty principles of reciprocity (inherent in pre-emption), partnership, and active protection.

6.4.8 Claimant submissions on the Waipounamu purchase

The Ngati Toa Rangatira closing submission had little to say on the Waipounamu transaction.[245] It characterises the transaction as an attempt to extinguish remaining native title in Te Tau Ihu to facilitate mining, argues that Ngati Toa did not want to sell and only did so after considerable pressure, and says that, according to Ngati Toa sources, the full amount agreed

242. Crown counsel, submissions concerning generic issues, p 9
243. Loveridge, 'An Object of the First Importance', p 264 fn 645
244. Counsel for Ngati Tama, closing submissions, p 46
245. Counsel for Ngati Toa Rangatira, closing submissions, 5 February 2004 (doc T9), pp 103–106

was not paid. After the Wairau purchase, the most important 'core area' still remaining with Ngati Toa was Pelorus Sound and they were very reluctant to cede that. Two issues arose in the aftermath of the deed. The first concerned the promise that 26 individuals would each be granted 200 acres of Crown land. But, because there were no suitable lands available, Ngati Toa were promised that this would be commuted to cash but the money was paid to the Public Trustee and various individuals were paid interest annually. Ngati Toa petitioned unsuccessfully for the full amount to be paid in cash. The final issue raised related to the reserves promised in the Waipounamu deed, but the submission says the deed was 'very vague' on reserves and it was 'a mystery' how they were allocated.[246] The submission says that the substantial reserve of more than 117,000 acres promised in the Wairau purchase deed was reduced to just 1070 acres. The reserves were 'inadequate, insufficiently protected' and were, through various Crown actions, 'vested in individuals and made alienable'. The deed 'clearly reserved insufficient quantity and quality of lands for Ngati Toa Rangatira for their future needs and development, thus constituting a clear breach of Article 11 of the Treaty'.[247]

Ngati Rarua counsel began his closing submission on Waipounamu by arguing that Grey went to the farewell hui at Porirua with his mind already made up and that he placed great pressure on Ngati Toa to accede to his request to sell Waipounamu.[248] Counsel submitted that at that hui the Crown failed to consult and obtain the consent of Ngati Rarua to the transaction with Ngati Toa, though at least the deed acknowledged the rights of resident Te Tau Ihu Maori and an intention to deal with them.[249] Counsel admitted that Ngati Rarua chief Tana Pukekohatu was present at the negotiation of the second Ngati Toa deed of 13 December 1854 and that he signed it though he was 'presented with a fait accompli' and the hui 'did not represent true negotiations'.[250] Counsel was critical of McLean's continuing delay in going to Te Tau Ihu to complete the transaction, and said that he did so to avoid the difficulty of dealing with the owners together and their conflicting interests in the land.[251] When he did finally arrive and Ngati Rarua signed their deed on 10 November 1855, 'there were few choices left to them'.[252] Counsel also submitted that collateral benefits and a 'positive Treaty relationship' were promised but did not eventuate.[253] Finally, counsel dealt with the question of a reserve for Ngati Rarua at the Wairau. He said a large reserve was promised but not granted. Though reserves were discussed from time to time there was no attempt to settle them until McLean arrived at the Wairau in January 1856 and then he had to deal with

246. Ibid, p 104
247. Ibid, p 105
248. Counsel for Ngati Rarua, closing submissions, pp 65–66
249. Ibid, p 67
250. Ibid, p 70
251. Ibid, p 73
252. Ibid, p 71
253. Ibid, p 80

Rangitane and Ngati Toa as well as Ngati Rarua. But in the end the three iwi were granted a reserve of 'poor quality land' and which was 'wholly inadequate' as compensation for the land that was alienated to the Crown in their various Waipounamu deeds.[254]

Ngati Tama's closing submission makes no specific submissions on the Waipounamu purchase though it is mentioned in general submissions on 'Large-scale Crown Purchases'. The concern with these is that the Crown did not adequately inquire into customary rights before proceeding with the purchases – deliberately so, in counsel's submission, because 'Crown officials understood the complexity of customary right-holding issues in Te Tau Ihu and considered it too difficult to resolve the nature of such interests when seeking to acquire such lands'.[255] This difficulty was avoided 'due to reasons of political expediency and the desire to achieve settlement cheaply and quickly'. The Crown's failures in this respect were seen as breaches of the Treaty principle of active protection.[256] For details of the Crown's failings in purchasing Maori land in Te Tau Ihu, counsel referred the Tribunal to Dr Phillipson's Rangahaua Whanui report and to a further report by Dr and Mrs Mitchell, but none of the specific examples listed by counsel referred to the Waipounamu purchase.

Counsel for Te Atiawa's closing submission deals with the Waipounamu purchase mainly in relation to the effect of the first Ngati Toa deed on Te Atiawa. In the Crown's view, that deed 'resulted in the purchase of all interests of all Maori in Te Tau Ihu'. But the 14 subsequent deeds 'were acknowledgements of payments and reserves not fresh transactions'.[257] Counsel argued that the Ngati Toa deed was used by the Crown to dispense with Te Atiawa rights in western Te Tau Ihu, in contradiction to Spain's view that Ngati Toa rights there were subordinate to those of the occupants (including Te Atiawa). Counsel sought findings from the Tribunal that it was a breach of the principles of the Treaty for the Crown to attempt to purchase Te Atiawa land via the Ngati Toa deed; and for it to maintain that Te Atiawa had sold its land to the Crown on the strength of the deed.[258] Counsel made several other submissions in relation to reserves promised in the Waipounamu deeds and negotiations but these are better dealt with in our reserves chapters.

Counsel for Ngati Koata submitted that the Waipounamu deeds were attempts by the Crown to re-negotiate with Maori to extinguish customary rights not already extinguished by the 'ambiguous' transactions from 1839 to 1846. Ngati Koata were required 'to either accept payments to extinguish their remaining customary land rights or receive nothing'.[259] Counsel further submitted that the Crown did not properly explain the cumulative effect of its large scale purchases such as Waipounamu, nor did Ngati Koata consent to them. The process was flawed because they had no meaningful and independent participation in

254. Counsel for Ngati Rarua, closing submissions, p 93
255. Counsel for Ngati Tama, closing submissions, p 53
256. Ibid, p 54
257. Counsel for Te Atiawa, closing submissions, p 159
258. Ibid, pp 165–166
259. Counsel for Ngati Koata, closing submissions, 9 February 2004 (doc T7), p 63

them.[260] Ngati Koata were not fully aware of the finality of Crown purchases and of the extent to which they would lose control of their resources. Ngati Koata counsel also argued that Crown officials such as McLean had a considerable knowledge of Maori customary rights but he 'chose to subvert it' in order to promote the needs of settlement as cheaply as possible.[261] Counsel submitted that the Crown's payment of £100 to Ngati Koata on their signature of their Waipounamu deed failed adequately to compensate them and that the land reserved was inadequate to provide them with economic and social benefits 'that it used to entice Ngati Koata to sign the Deeds'.[262] The Crown failed to actively protect Ngati Koata or to ensure their full participation in the new society or to protect their rangatiratanga.[263]

In closing submissions for Ngati Kuia counsel argued that McLean failed to make 'any proper inquiry' into Ngati Kuia's customary rights while negotiating the Waipounamu purchase.[264] Ngati Kuia had been asserting their rights to Te Hora and Te Hoiere from as early as 1851 when they resisted attempts to survey the land for a road and asserted that they were to be considered in any alienation of it. Though Ngati Kuia were not listed in the 1853 Ngati Toa deed it was likely that they were included under Rangitane who were listed as conjoint claimants with Ngati Toa. But there was no evidence that Ngati Kuia were present at the signing of the 1853 deed. For them, the 1856 Te Hora deed (the Ngati Kuia–Rangitane deed of 5 March 1856) was their 'Treaty on the ground'. However, it was not to be regarded as a sale of land but an 'ongoing association with the land in that would provide the basis for the future growth and prosperity of both parties'.[265] Nevertheless, the deed was 'technically deficient': it failed to provide sufficient reserves and for the survey of those reserves that were promised, failed to record all the oral promises made at the time, failed to get the full and proper consent, and incorrectly apportioned the purchase money.[266] In addition, Ngati Kuia did not agree to the inclusion of the islands in Pelorus Sound. Finally, the Crown failed to investigate Ngati Kuia claims in a petition of 1878 that Ngati Toa had wrongly alienated their lands. These acts and omissions of the Crown were considered to be breaches of the principles of good faith, active protection, and fair process, and of its duty to consult Ngati Kuia.[267]

The closing submission for Rangitane discussed the 'Rangitane Land Sale' (Rangitane's Waipounamu deed of 1 February 1856), saying that the Crown 'maintained the fiction' that it was a 'completion' of the Ngati Toa sales of 1853. So far as the deed of February 1856 was concerned, it was 'exclusively Rangitane's' and the fact that it was witnessed by Ngati Toa

260. Ibid, p 66
261. Ibid, p 70
262. Ibid, p 73
263. Ibid, pp 75–77
264. Counsel for Ngati Kuia, closing submissions, 17 February 2004 (doc T14), p 48
265. Ibid, pp 51–52
266. Ibid, p 53
267. Ibid, p 55

chiefs was a recognition that Rangitane had the right to enter into a transaction on their own. The £100 'compensation' that was paid was 'clearly inadequate', especially as the Crown had reduced the £2000 requested on the promise that Rangitane would be receiving large reserves and collateral benefits such as housing, education, and medical aid.[268] The rest of the submission discusses the failure of the Crown to provide these reserves and benefits. Though the Crown promised a reserve of 13,000 acres at the Wairau, this was reduced to some 900 acres and Rangitane received only 307 acres of that. Other reserves at Kaituna, Pukatea, Waikakaho, and Ruakanakana were also inadequate. We discuss the issues relating to these reserves in our next chapter.

Counsel for Ngati Apa noted in his closing submission that Ngati Apa were given 'no consideration . . . in the whole of the purchase process by the Crown from 1847 through to 1860'.[269] They were not included in any of the Waipounamu deeds, though as counsel noted and we discuss below, they were included in the Arahura purchase arrangements. Counsel also noted that the small group of Ngati Apa at Port Gore were not included in the Waipounamu deed that was negotiated with Ngati Hinetuhi, a hapu of Te Atiawa, on 16 November 1854. (They were belatedly awarded a reserve there by the Native Land Court as we detail in chapter 7.) Counsel concluded by reiterating submissions he had made during the Tribunal's generics hearing to the effect that the Crown 'did not make *any* proper effort to ascertain their [Ngati Apa's] existence or their customary rights claims' (emphasis in original). Nor did the Crown properly explain the cumulative effect of its large-scale purchases or set aside sufficient lands for their exclusive occupation for the foreseeable future.[270]

6.4.9 Crown submissions

The Crown's case evolved and changed over time. At first, the Crown denied that it had failed to investigate customary rights properly and argued that Grey and McLean obtained a good knowledge of Maori law and the descent groups with rights in Te Tau Ihu.[271] Its final position, however, was to accept that it did not inquire properly as to customary rights during its major purchases.[272] Grey and McLean were possessed of a good general knowledge but, in the Crown's admission, exploited it to obtain land from Maori at the latter's expense. Counsel also admitted that Grey and McLean set aside Treaty promises when purchasing land and subordinated the interests of Maori to settlers.[273] Further, the Crown conceded

268. Counsel for Rangitane, closing submissions, 5 February 2004 (doc T4), pp 25–27
269. Counsel for Ngati Apa, closing submissions, 2004 (doc T3), p 21
270. Ibid, p 22
271. Crown counsel, submissions concerning generic issues, pp 5–9
272. Crown counsel, opening submissions, pp 12–13
273. Ibid, p 4

that occupation was discoverable on the ground, upon proper inquiry, and that, while some rights were contested, an inquiry had been feasible.[274]

However, the Crown did not accept Mr Armstrong's contention that it should have been able to reach a consensus resolution of competing claims. Rather, it relied on Professor Boast's view that McLean was right not to try to fix where everyone's rights were located, so long as adequate care was taken over making reserves.[275] To a large extent, the Crown did not depart from its submission that its treatment of people's rights began with the company purchases but carried on into the 1850s, at which point McLean resolved undealt with or residual rights by purchasing all of them. This was, in the Crown's view, a proper and satisfactory resolution.[276]

Nonetheless, the Crown argued that the legitimacy of its actions did in fact depend on finding out the identity of the correct right holders and purchasing their interests before transferring title to settlers. It 'consistently proceeded on the basis that there must be a valid extinguishment of Maori claims before it could legitimately acquire land or confer, or recognise the title of Europeans seeking land'.[277]

The Crown conceded:

> McLean did not approach Crown purchases with the idea of developing a clear understanding of the state of customary rights. McLean had a 'reasonable grasp' of who the main descent groups were. His objective was to rapidly acquire quiet possession of the area, by buying up rights of those present and asserting rights. While there was a degree of understandable pragmatism at work, the method and the result appear to have contributed to the situation where iwi were pitted against each other in competition for scarce resources. The method can be criticised for failure to properly inquire and the result was an early state of virtual landlessness due to the policy of purchasing entire districts.
>
> The relationships between the northern iwi and the original tangata whenua iwi (whether living amongst the northern iwi, or those fugitives who fled inland) were not given due consideration.[278]

Initially, the Crown argued that the help that McLean sought and obtained from Ngati Toa to assist in completing the Waipounamu transaction was brought about not by pressure on Ngati Toa nor as a result of a fiction that the land had already been sold by Ngati Toa. It was more likely, in the Crown's view, that Ngati Toa's involvement was necessary because McLean and Maori of other tribes recognised or acknowledged their interest. Having them present did not amount to duress on other iwi.[279]

274. Crown counsel, closing submissions, pp 16–17
275. Crown counsel, submissions concerning generic issues, p 9
276. Ibid
277. Ibid, p 8
278. Crown counsel, opening submissions, p 13
279. Crown counsel, submissions concerning generic issues, pp 43–46

6.4.9

After consideration of Mr Macky's evidence, the Crown changed this position. Its stance on the facts of the Waipounamu purchase (in terms of customary rights) differed ultimately from the resident claimants' in only one main respect. The historical evidence broadly showed that McLean improperly tried to use his transactions with non-residents to try to pressure resident right holders to agree to sales. In the Waipounamu purchase, he dealt with non-residents first and then sent in surveyors to lay off reserves, treating the alienation of the land as a fait accompli. He also brought senior chiefs with him to support him when he finally had to deal with the resident right holders in person. The Crown quotes its own witness, Mr Macky, to this effect. The difference between the Crown and the claimants is not that McLean tried to do this but how successful he was. Mr Macky argues that McLean's strategy failed in western Te Tau Ihu, where Maori did manage to keep Wakapuaka and Taitapu out (and presumably could have managed more, had that been their wish). In the east, Mr Macky acknowledged the role of the Ngati Toa deed and the 1853–54 signatories in pressuring residents but considered that some outcomes were nonetheless willing sales. The Crown adopted Mr Macky's position on the facts without drawing any conclusions about how those facts should be interpreted in respect of Treaty principles.[280]

In terms of Ngati Apa's claim to have been avoidably overlooked, the Crown did not at first accept that there were 'any significant numbers of Maori living in and deriving their livelihood from the hinterland areas who were deprived of their entitlements by reason of lack of proper inquiry as to Maori customary rights in the hinterland areas'.[281] Such groups were certainly small groups (as was the population of the Te Tau Ihu region generally). However, without having made an inquiry at the time, the Crown conceded that 'it cannot be asserted with confidence that such groups, however small, were not deprived of entitlements'. This was particularly pertinent to Ngati Apa, who were not recognised in any Crown deeds aside from the Arahura purchase.[282]

Beyond the issues associated with recognition of customary rights, the Crown's submissions on the Waipounamu purchase were brief and again reliant upon Mr Macky's report for the 'facts', though with little additional commentary. Counsel cited Mr Macky's statement that:

> Throughout all his negotiations McLean was inflexible on the issue of price. The prices paid in Te Tau Ihu to resident Maori were small. The Government had always intended that the real payment to Maori for the land they sold to the Government would be the economic benefit of the Pakeha settlement that such sales would facilitate. It seems highly likely that a belief there would be such benefits was important to Maori in Te Tau Ihu agreeing to sell

280. Crown counsel, closing submissions, pp 113–115; see also Macky, 'Crown Purchases in Te Tau Ihu', pp 204–205

281. Crown counsel, opening submissions, p 14

282. Ibid, pp 14–15

their land for such low prices. However, there is no evidence that McLean made any specific promises of collateral benefits to resident Maori.[283]

Mr Macky was again quoted with respect to the question of reserves. According to his evidence, McLean's approach to the creation of reserves was not uniform across the purchase. In the west the strength of Turangapeke and Katene saw Taitapu and Wakapuaka excluded from the sale, while in Queen Charlotte Sound Te Atiawa were treated 'generously' in order to try to persuade them against returning to Taranaki. Elsewhere, in Mr Macky's view:

> . . . McLean's approach was not overly generous. Indeed it may be said that by his own judgement McLean stinted Wairau Maori in their reserves. He seems to have been prepared to agree on the locations with Maori, but insisted on maintaining the Government's right to determine the extent of the reserves.[284]

Ultimately, the reserves issue was one of the few points upon which Crown counsel was willing to draw Treaty inferences from. The failure to ensure that many Te Tau Ihu Maori were left with sufficient land for their present and future needs was considered a 'compelling' aspect of the claims, as well as constituting a breach of Treaty principles.[285] As we discuss further in section 6.7.2, this was an issue upon which the Crown's position evolved considerably during the course of the hearings. In its earlier submissions the Crown suggested that at the time of the major Crown purchases officials and Maori both generally believed that Maori had sufficient land retained for their present and future needs and further that the inadequacy of these only became apparent later, partly as a consequence of the failure to survey some of the reserves, or in other instances resulting from the sale of reserve lands.[286] Crown closing submissions, on the other hand, conceded that there was 'a state of virtual landlessness by 1860 . . . primarily [arising] from the failure to implement the full extent and nature of reserves that were promised and from a failure to adopt a more generous approach to reserves in the Crown purchase era'.[287]

6.4.10 Tribunal conclusions and findings on the Waipounamu purchase

In this section, we reach conclusions and make findings on several general issues relating to the Waipounamu purchase, before considering issues relating to specific iwi and their Waipounamu deeds.

283. Crown counsel, closing submissions, p 115
284. Ibid
285. Ibid, p 120; Crown counsel, opening submissions, p 6
286. Crown counsel, submissions concerning generic issues, p 35
287. Crown counsel, closing submissions, p 4

6.4.10(1)

(1) *Was there an adequate inquiry into customary rights before or during the Waipounamu purchase?*

One of the most controversial aspects of the Waipounamu purchase was the Government's decision that 'the Ngatitoa Tribe of Porirua', in the words of McLean, 'had unquestionably, as the earliest invaders, a prior right to the disposal of the district'.[288] If that claim was correct (as Ngati Toa argues), then the Crown was right to commence the purchase with Ngati Toa, and perhaps even to sign a deed with them first, and Ngati Toa did claim to alienate the customary rights of those who 'conjointly' claimed the land. As their historian, Professor Boast, described it, the 1853 deed:

> was not intended to be an extinguishment of only Ngati Toa rights; rather it was an extinguishment of all rights conducted via the medium of negotiations with Ngati Toa as having the 'principal claim', with representatives of other groups participating in the discussions and who would receive a portion of the money *from Ngati Toa*. [Emphasis in original.][289]

We turn now, therefore, to the question of whether there was an adequate inquiry into customary rights before the Government made this decision. The parties in our inquiry agreed that the answer to this question was 'No'. The next questions are:

- Was the Crown on notice that Ngati Toa's claim was contested?
- Did the Crown fail to investigate a situation known to be controversial?

The clear answer to those questions, as Te Atiawa submitted, was 'Yes'. During the late 1840s and early 1850s, Ngati Toa's claim to primary rights in Te Tau Ihu was disputed by Te Atiawa in eastern Te Tau Ihu and by a number of tribes in the west. The claims of Te Rauparaha (from Kapiti) and Te Kanae (from the Wairau) to be included in the Waitohi purchase were neither investigated nor accepted by the Crown and were simply ignored. In Te Atiawa's submission, this was the correct response.[290] Ngati Toa did not make a submission on the point.

In western Te Tau Ihu, various iwi (including Ngati Rarua, Ngati Toa, and Ngati Apa) wrote to the Government to set out their claims, which related to the Crown's interest in purchasing the west coast of Te Waipounamu. More particularly, attention became focused on the Pakawau block in 1852.[291] In that instance, the Governor's response to Ngati Toa was to advise them to go to Nelson and sort it out with Superintendent Richmond and the other iwi. The result, as we discussed earlier in the chapter, was the Pakawau purchase, arrived at

288. McLean to Colonial Secretary, 7 April 1856, *Compendium*, vol 1, p 301

289. Boast, 'Ngati Toa and the Upper South Island', vol 2, p 260

290. Counsel for Te Atiawa, closing submissions, pp 35–40, 157–169. For Te Kanae's claim, see section 5.1.3 above.

291. For Ngati Toa Rangatira, see Ngarongo Nicholson, brief of evidence on behalf of Ngati Toa, 9 June 2003 (doc P4); for Ngati Rarua, see Walzl, *Land Issues*, pp 231–237; for Ngati Apa, see David Armstrong, 'The Fate of Ngati Apa Reserves and Ancillary Matters', report commissioned by the Ngati Apa ki te Waipounamu Trust in association with the Crown Forestry Rental Trust, 2000 (doc A78), p 2.

from a consensus reached at an intertribal hui in Nelson. The respective overlapping rights of Ngati Toa and the other iwi were resolved by the exercise of tino rangatiratanga through customary mechanisms and were respected by the Crown in the deed that followed. There was also, as Ngati Rarua submitted, a risk for the Crown: from a combined position of strength, the intertribal hui refused to alienate the west coast unless the Crown met its asking price.[292]

The claims of Ngati Toa had thus been dealt with variously in the 1840s and 1850s. In 1844–45, Spain recognised them to the extent of legitimating the company's purchase from them, so long as the residents (whom he decided had the primary authority) had also consented and been paid. This was in accord with the views of Chief Protector Clarke (which also were known to the Government). Further, in 1846 Clarke junior reported to Grey that resident Maori denied Te Rauparaha's right to alienate their lands and claimed rights greater than those of Ngati Toa. 'Thus', argues Dr Ballara, 'an alternative view had been available to the Governor and to the Chief Land Purchase Commissioner [McLean] and his officials from as early as 1846.'[293]

In 1847, three chiefs of Ngati Toa were recognised as having exclusive rights to sell the Wairau and east coast as far south as Kaiapoi, in defiance of the rights of residents (including other Ngati Toa). In 1848–52, on the other hand, the Crown refused to recognise any Ngati Toa rights north of the Wairau purchase (in the Waitohi block) and refused to accept Ngati Toa's claims to primacy at Pakawau and the west coast, leaving it to iwi to debate and resolve that matter themselves. The Governor was also aware of resident right holders' protest about the Wairau sale and of Rangitane's reported claims. Although continuing to enforce the purchase, the Government recognised residents' rights on the ground by getting Te Kanae and Kaikoura to certify the boundaries of the large reserve and permitting them to share it (see the previous chapter).

It must have come as something of a surprise, then, when in 1856 McLean recorded the Government's view that 'the Ngatitoa Tribe of Porirua . . . had unquestionably, as the earliest invaders, a prior right to the disposal of the district'.[294] In 1853, he reported that the Porirua chiefs were '*acknowledged by the Natives generally* to have the principal claim to those districts [Te Tau Ihu]' (emphasis added).[295] This was demonstrably untrue, and he must have known it.[296] Yet, in 1856 McLean reiterated that resident Maori:

> did not assume to themselves a power of sale except over the lands they actually occupied; yet some of them, when not confronted by the leading Ngatitoa chiefs, professed to have independent and exclusive rights, while the majority, and even the parties making

292. Counsel for Ngati Rarua, closing submissions, pp 63–64
293. Ballara, 'Customary Maori Land Tenure', p 190
294. McLean to Colonial Secretary, 7 April 1856, *Compendium*, vol 1, p 301
295. McLean to Civil Secretary, 11 August 1853 (Phillipson, *Northern South Island: Part 1*, p 135)
296. See also Ballara, 'Customary Maori Land Tenure', pp 187–188, 190

> such assertions, when closely examined, always acknowledged that the general right of alienation vested in the Ngatitoa chiefs of the Northern Island. In fact, their relative rights, through intermarriage, the declining influence of the chiefs, and other causes, had become so entangled, that, without the concurrence both of these occupants and of the remnants of the conquered Rangitane and Ngaitahu Tribes, no valid title could have been secured.[297]

The Crown's historian admits that this was pure expediency: 'it is doubtful whether McLean's assertions of the pre-eminence of Ngati Toa rights should be taken at face value'. McLean was 'simultaneously arguing both that Ngati Toa had a general right of alienation that was accepted by most Maori in Te Tau Ihu, and that no valid title could be obtained without the consent of resident Maori'.[298]

This view of Ngati Toa's customary rights was relied upon by Governor Grey at his farewell hui in 1853, when he broached the purchase of all Ngati Toa's rights in Te Tau Ihu and negotiated a deed with that tribe. McLean was aware, for example, of the roherohetanga carried out by Te Rauparaha (see ch 2) and interpreted it to mean that Ngati Toa retained primary rights to the land.[299] The meaning of this event was something that he needed to inquire about with all affected right holders before coming to a decision. Alternatively, he needed to give right holders the opportunity to resolve their entitlements themselves. As we have discussed previously, the correct standard of purchasing prior to 1847, and under the Treaty, was to ascertain the affected right holders and to give them an opportunity to debate and agree before signing a deed of purchase.

The next question for the Tribunal is whether, in signing two deeds with Ngati Toa in 1853 and 1854 and thereafter considering the land as 'sold', the Crown met that standard. As Mr Macky notes, McLean took the dual approach of asserting that the land had been sold by Ngati Toa while acknowledging that the consent of resident right holders (including defeated peoples) was necessary before the purchase could be considered complete or 'valid'.[300] The question, in Treaty terms, was whether consent after the event could truly be free and informed, and whether refusal was actually an option. But first we must consider McLean's claim that the so-called Ngati Toa deeds of 1853 and 1854 were in fact representative of almost all Te Tau Ihu right holders. He made this claim in 1854, and again in 1856, to throw (in our view) a veil of legitimacy over his dubious actions.

(2) *How representative were the 1853 and 1854 hui?*

First, we note McLean's claim, by which he tried to legitimise the 1853 and 1854 transactions as the foundation of the Waipounamu purchase. McLean described the 1853 deed as

297. McLean to Colonial Secretary, 7 April 1856, *Compendium*, vol 1, p 301
298. Macky, 'Crown Purchases in Te Tau Ihu', p 141
299. McLean to Colonial Secretary, 7 April 1856, *Compendium*, vol 1, p 301
300. Macky, 'Crown Purchases in Te Tau Ihu', p 141

concluded with both 'the Ngatitoa and Ngatitama Tribes'.[301] Then, he described the second (1854) deed as arising from 'a large concourse of Natives from different parts of the Nelson Province' that assembled at Porirua for a tangi. 'At this meeting', he argued in 1856, 'there were present so many influential representatives of the various tribes, that it afforded a favourable opportunity for discussing the merits of their respective claims'.[302] In 1854, he claimed to have agreed to deal with this hui at Porirua instead of calling one at Nelson because he could never have assembled such a representative hui at Nelson.[303] The 'presence of the principal chiefs of so many different tribes (including those of the conquerors as well as those of the remnants of the conquered and original possessors of the soil), might not again occur'.[304] Thus, in 1853–54, McLean claimed to have obtained the consent of the principal non-resident, resident, conquering, and defeated chiefs before he went to Te Tau Ihu. The validity of McLean's actions, therefore, hinged in large part on these two transactions. How accurate was his representation of events?

Dr Phillipson notes that only two groups – the Ngati Toa and Ngati Rarua right holders of the Wairau and Te Hoiere districts – did not need a fresh deed and payment in 1855–56. That in itself is compelling, in our view, as to the representativeness of the 1853 and 1854 hui. Nonetheless, McLean tried to exaggerate the number of other leaders present from Te Tau Ihu. He implied that the 1853 deed was approved by chiefs from other tribes such as Ngati Rarua, Ngati Tama, Te Atiawa, and even Rangitane. Some of their chiefs may have been present but, if so, it seems that few of them signed the deed. Dr Ballara identified two signatories, Paremata Te Wahapiro of Ngati Tama and Te Whawharua of Ngati Rarua, but Mr Macky suggests that they may have identified themselves as Ngati Toa for the occasion. It appears that both chiefs were living mainly in the North Island at the time.[305] The Ngati Koata chief Rawiri Te Ouenuku was present and, as we noted previously, may have been instrumental in getting Rangitoto excluded from the sale, although he did not sign the deed personally.[306]

Mr Walzl suggests that 'some time before [the signing of the Ngati Toa deed on] 10 August 1853, Ngati Rarua and Ngati Toa settled their competitive claims of 1851 and 1852 with a mutual arrangement'.[307] Mr Walzl thinks that some Ngati Rarua chiefs could have been present at the Porirua hui and agreed to Ngati Toa's signing without being fully aware that the land they claimed on the West Coast had been included. Although the deed said that Ngati Toa had sold their land 'at the Waipounamu', no boundaries were specified.[308] Just

301. McLean to Colonial Secretary, 7 April 1856, *Compendium*, vol 1, p 300
302. Ibid, p 301
303. McLean to commissioner of Crown lands, 15 December 1854, *Compendium*, vol 1, p 304
304. McLean to Colonial Secretary, 15 December 1854, *Compendium*, vol 1, p 303. We note that this letter is mistakenly attributed to 1857 in the *Compendium*.
305. Macky, 'Crown Purchases in Te Tau Ihu', p 147
306. Ibid
307. Walzl, *Land Issues*, p 293
308. Ibid; 'Ngatitoa Deed of Sale', *Compendium*, vol 1, p 308

a few days after the deed was signed, a group of Ngati Rarua headed by Tana Pukekohatu wrote to Richmond to say that they accepted that Te Iti had settled with Rawiri Puaha for Pelorus and the remaining part of the Wairau. But they did not accept that Ngati Toa could deal with Arahura and Rotoroa: 'It is for us to settle about those places . . . we only have to do with the West Coast and to take payment for the same . . . Let the £2,000 they have already received suffice for the Ngatitoa.'[309] The Ngati Tama chief, Wiremu Katene Te Puoho of Wakapuaka, also repudiated the Ngati Toa agreement, saying:

> I will not give up Whakapuaka for the Queen. Those men agreed to sell it without my authority. Do not think I am of less importance than they are. No – we are all equal. Do not say that I am endeavouring to exalt myself. However when these men meet here, then we will dispute the matter with each other for their act and deed is an intrusion.[310]

Ngati Koata from Rangitoto and the Croisilles coast also denied a sale, when Crown officials insisted that all that remained to do was to make reserves.

When the Ngati Toa deed was signed in August 1853, it was agreed that a further hui would be held in Nelson in January 1854 to apportion the remaining £3000 (to be paid in annual instalments) and to decide on the boundaries of any reserves. But this hui was not held, largely because McLean was otherwise engaged, particularly with land purchase problems in Taranaki. It is evident, however, that he feared that a full scale hui, involving all resident claimants, would allow them to state so many competing claims that no agreement might be reached. In the meantime, claimant groups assembled at Nelson at considerable cost on no fewer than three occasions, each time expecting McLean to arrive.[311] It was more than two years before McLean finally held a hui in Nelson to conclude transactions with some, but not all, of the resident iwi. In the meantime, McLean sent surveyor Thomas Brunner and interpreter William Jenkins around Te Tau Ihu to make a unilateral selection of reserves, though local Maori had received none of the payment specified in the first Waipounamu deed. Brunner's and Jenkins' actions did little to ameliorate the widespread anger and alarm of local Maori at the fact that they had not been consulted about the Ngati Toa deed and at McLean's continuing failure to hold the promised Nelson hui.[312]

As we saw, while McLean was in Taranaki, he took the opportunity to sign a series of agreements with returned Te Atiawa for their interests in Waipounamu. When McLean returned to Wellington in December 1854, he still refused to go to Nelson. He decided to take advantage of a large assembly of Ngati Toa and others for a tangi to advance the Waipounamu purchase. At the request of the assembled Ngati Toa, McLean completed the arrangements for the payment of the remaining £3000 owing on Waipounamu. Though

309. Te Tana and others to Richmond, 10 October 1853 (Walzl, *Land Issues*, p 252)
310. Wiremu Te Puoho and others to Richmond and Stafford, 19 October 1853 (Walzl, *Land Issues*, p 253)
311. Walzl, *Land Issues*, p 303
312. Phillipson, *Northern South Island: Part 1*, pp 151–152

McLean claimed that important chiefs from the South Island were present, it seems that they were mainly Ngati Toa from the Wairau and the Sounds. Once again, the Crown and Ngati Toa from the North Island were calling the tune, and the residents of Te Tau Ihu were required to follow their lead. McLean agreed to Ngati Toa's request to pay them £2000, leaving only £1000 to be paid to others resident in Te Tau Ihu. McLean argued that this arrangement was necessary because of 'the presence of the principal chiefs of so many different tribes (including those of the conquerors as well as those of the remnants of the conquered and original possessors of the soil)'. As Dr Phillipson suggests, McLean was 'stretching the truth', since the 'receipt' that was signed included few names from principal right holders in Te Tau Ihu.[313]

Under this second deed, as we noted above, a further £2000 was to be paid to Ngati Toa, though McLean gave Pukekohatu of Ngati Rarua (and Ngati Toa), who was present at the tangi, a personal discretionary payment of £200. Later, he was given another £400 to distribute to Ngati Rarua and £100 to distribute to Ngati Tama at Wakapuaka. Dr Phillipson points out that the £400 was for Ngati Rarua wherever they lived in Te Tau Ihu, but it was doubtful whether Pukekohatu had this kind of authority over those who lived in Tasman and Golden Bays. He had even less authority to accept money on behalf of Ngati Tama at Wakapuaka and Dr Phillipson could find no evidence that those payments ever got to the intended recipients.[314] Mr Walzl suggests that this money was not actually paid to Pukekohatu in 1854 and may in fact have formed most of the £600 paid to Ngati Rarua and Ngati Tama in November 1855. The Crown's historian thought that there was no way of knowing, owing to the failure to properly record either payment (if there were in fact two). This failure would have 'left the Government red faced if there had been a dispute later on.'[315]

The 1854 deed contained two somewhat obscure promises. First, the signatories would give up the land when homesteads for them and their children were laid out. This appears to be a reference to the blocks of land and scrip that were promised to Ngati Toa chiefs as a reward for their support for the first transaction. McLean subsequently used these rewards to get the Ngati Toa chiefs to help him impose the transaction on local occupants. This was implied in the second promise: that the signatories would 'satisfy and prevent the demands of all Natives whatsoever who may hereafter claim the land' which they had made over to the Queen.[316] For instance, McLean rewarded the Ngati Toa chief, Te Kanae, and Pukekohatu, the Ngati Rarua chief from Cloudy Bay, with a 50-acre reserve each for their help in obtaining the belated consent of resident Ngati Kuia and Rangitane of the Pelorus and Wairau districts.[317] We discuss these personal awards more fully in our iwi specific findings.

313. Ibid, p 138; McLean to commissioner of Crown lands, 15 December 1854, *Compendium*, vol 1, p 304
314. Phillipson, *Northern South Island: Part 1*, pp 138–139
315. Macky, 'Crown Purchases in Te Tau Ihu', pp 209–210
316. 'Receipt for £2000 Paid to Ngatitoa Tribe', 13 December 1854, *Compendium*, vol 1, p 312
317. Phillipson, *Northern South Island: Part 1*, pp 138–139

6.4.10(2)

The second Ngati Toa deed was signed or marked by 57 persons. There is some difficulty in ascertaining the full names, iwi affiliations, and residences of the signatories, but the leading Ngati Toa chiefs who signed the first deed also signed this one. A notable addition was the aged Te Rangihaeata, who, according to McLean, had used his influence 'to bring the negotiation to a satisfactory conclusion'.[318] Te Rangihaeata was rewarded with a discretionary payment of £200 taken from the allocation for Ngati Toa.[319] He had also been given a scrip award of 50 acres and another 200 acres following the negotiation of the first deed, though he had not signed that.[320]

Besides Pukekohatu, there were some other signatories whose primary affiliation was not to Ngati Toa. These included a Ngati Koata chief, Rawiri Te Ouenuku, who was also supposed to have been present in 1853. Though Paremata Te Wahapiro of Ngati Tama, who signed the first deed, was now dead, his son Tipene signed the second one and received payment.[321] Otherwise, all or nearly all the signatories were Ngati Toa, most of whom lived on the north side of Cook Strait. McLean had referred to a Ngai Tahu chief, Taiaroa, as the 'principal aboriginal chief of the Island' (by which he meant the main leader of defeated peoples in the South Island), but if he was in fact present, he did not sign the deed.[322] He was not, in any case, a leader or right holder in Te Tau Ihu. This ascription of authority to Taiaroa shows McLean's somewhat desperate need to add a gloss of legitimacy to his actions, and his failure to do so.

After concluding the transaction, McLean stated that, 'although the chiefs from the Middle Island have fully entered into this arrangement, there will be some questions to settle with a few minor tribes residing at Wakapuaka, Queen Charlotte Sound, and other portions of the island'. But he was satisfied that these could 'be duly adjusted by the principal chiefs to this arrangement, who have undertaken to accompany me, when my duties here will admit of my going over to Nelson, to settle with their respective tribes and followers resident at the Middle Island'.[323] In the meantime, the remaining £1000 had already been paid to Te Atiawa, though mainly to absentees who had returned to Taranaki. There was nothing left for the various iwi who were actually resident in Te Tau Ihu.

We find that the 1853–54 hui were adequately representative of the Ngati Toa tribe. They were not, however, representative of other iwi or communities resident in Te Tau Ihu. To proceed on the basis that the entire northern South Island was irrevocably sold as a result of these arrangements was a very serious breach of article 2 of the Treaty. McLean misrepresented the outcome to the Government. He pretended that the defeated peoples were

318. McLean to Colonial Secretary, 15 December 1854, *Compendium*, vol 1, p 304
319. Walzl, *Land Issues*, p 259
320. Macky, 'Crown Purchases in Te Tau Ihu', p 172
321. Ibid
322. McLean to commissioner of Crown lands, 15 December 1854, *Compendium*, vol 1, p 304; 'Receipt for £2000 Paid to Ngatitoa Tribe', 13 December 1854, *Compendium*, vol 1, p 311
323. McLean to commissioner of Crown lands, 15 December 1854, *Compendium*, vol 1, p 304

represented when they were not, and in any case their supposed leader (a southern Ngai Tahu chief) did not sign the deed. Nor did the signatures of three chiefs – Tana Pukekohatu, Tipene Paremata Te Wahapiro, and Rawiri Te Ouenuku – suffice for the consent of the resident northern iwi. At best, the arrangement was still what it had been in 1853 – an arrangement with Ngati Toa. Proceeding as if his misrepresentations were fact, McLean cast a veil of legitimacy over what was an invalid transaction in both Maori and British law of the time. In so doing, the Crown committed a breach of the Treaty, with serious consequences for Ngati Apa, Ngati Kuia, Rangitane, Ngati Rarua, Te Atiawa, Ngati Tama, and Ngati Koata.

(3) *Hobson's choice': Did the Crown act correctly in 'compensating' resident right holders after the event? Did officials exploit custom to the disadvantage of Maori?*

It follows from our discussion to date that the correct process for the Crown was to send officials:

- to investigate desired blocks and ascertain local kainga and chiefs; then
- to convene a tribal or intertribal hui at or near the places it wished to purchase; then
- to permit the tribes to decide their own entitlements and reach a consensus on the purchase at that (or at more than one) hui; and then
- to abide by the result; or, alternatively
- to provide a Maori-controlled legal process to determine disputes if they could not be resolved by customary means.

We accept both Mr Armstrong's and Dr Loveridge's evidence that this method of proceeding was known at the time and Ngati Rarua's submission that it was correctly followed in the case of Pakawau and the West Coast in 1852.[324] The Crown's failure to respect tino rangatiratanga in this way in 1853–56, and to purchase instead from non-resident chiefs and then enforce that purchase on residents, was a deliberate tactic employed by the Government to obtain the most land possible for as little money as possible.

The Crown conceded this point, with some qualifications, on the basis of Mr Macky's evidence. As this was a critical admission for our inquiry, we quote the salient points at length:

> The way that McLean set about completing the negotiations for the Waipounamu purchase was different from what had been originally planned. Rather than hold a general hui in Nelson of all the interested tribes in Te Tau Ihu, McLean travelled around the region and negotiated with most of the tribes on their own land. He only negotiated in Nelson with

324. Mr Armstrong's statements were recorded in cross-examination: David Armstrong, under cross-examination, fourth hearing, 10–14 June 2002 (transcript 4.4, pp 231–236). See also Dr Donald Loveridge, '"An Object of the First Importance": Land Rights, Land Claims and Colonization in New Zealand, 1839–1852', report commissioned by the Crown Law Office, 2004 (Wai 863 ROI, doc A81), pp 72–74; counsel for Ngati Rarua, closing submissions, pp 56–65.

western Te Tau Ihu Maori, and with Ngati Koata who had travelled to Nelson while McLean was on his way to see them.

This change of plan by the Government seems to have been a recognition that it needed to put more effort into securing the consent of resident Maori to the Waipounamu purchase than it had first anticipated. The Government had always recognised that it needed the consent of resident Maori to the Waipounamu purchase before it could take possession of the land subject to the purchase. However it still seems to have been hoping to manipulate the context of the negotiations with resident Maori so that it was assumed that the land had been sold, and that all that remained to be done was for resident Maori to negotiate a share of the purchase money that Ngati Toa had agreed to.

The change of plan was not necessarily an abandonment of this manipulative strategy. However it was probably a recognition that the Government could not be as effective in promoting the assumption that the land had already been sold as it had originally hoped . . . McLean's approach to negotiations seems to have varied in different places. The August 1853 deed was undoubtedly part of the context for all the negotiations McLean undertook, but in each negotiation that he conducted McLean was probably looking expediently for the line of least resistance in the particular circumstances of the negotiation.

He did not take any Ngati Toa chiefs with him to the negotiations in the west. Maori had previously offered land for sale in this district, but the Government had been unable to agree on price with them. It seems unlikely that his opening gambit in these western negotiations was that Maori should sell their land solely on the basis of the Ngati Toa contract. Indeed Turangapeke and Katene both made it clear that they were not prepared to sell land on this basis. Nevertheless the fact that these two chiefs made this point clear reflects the point that McLean did resort to the Ngati Toa sale once he was unable to persuade resident Maori to part with their land by other means of persuasion.

The exclusion of Taitapu and Wakapuaka from the sale indicates that there were limits on how far McLean was prepared to push in order to purchase all the land he wanted. Nevertheless, even if McLean was not prepared to resort to physical force to take the land, the bitter argument that McLean had with Katene over Wakapuaka shows that he was prepared to be very aggressive in his attempts to secure the consent he wanted to the purchase.

. . . . .

Much of the negotiating with the tribes in the east of Te Tau Ihu was done in the presence of the North Island Ngati Toa chiefs. The degree to which the sale by Ngati Toa in August 1853 set the tone for the negotiations that took place in the summer of 1855–56 was probably the strongest in the Wairau. Here McLean actually read out the original deed during an argument over the reserves to remind Maori of what had been agreed in August 1853. Wairau Rangitane were only asked to sign a receipt rather than a new deed of sale.[325]

325. Macky, 'Crown Purchases in Te Tau Ihu', pp 265–266

For the remainder of the eastern Te Tau Ihu negotiations, Mr Macky suggested that there was scant evidence but that Ngati Toa chiefs clearly participated in the negotiations and witnessed the Pelorus and Kaituna deed (with defeated Kurahaupo peoples) and the Queen Charlotte Sound deed with Te Atiawa. For the former, Mr Macky suggested that they had indicated their willingness to sell and McLean probably had (and had anticipated) no trouble with them. For the latter, he accepts that McLean may have used the Ngati Toa chiefs as a 'reminder to Ngati Awa of the context which the August 1853 deed provided to the negotiations', but thinks it unlikely that McLean would risk their return to Taranaki if, as Dr Loveridge argues, he threatened to simply take their land without consent.[326]

For Ngati Koata, there were no Ngati Toa witnesses, and Mr Macky suggests that McLean was confident of getting a sale, given the participation of Te Ouenuku in the 1853 negotiations, and a suggestion to Jenkins of a 'willingness to sell' in 1854.[327] In all cases, however, Mr Macky notes that McLean refused to budge on price. He does not consider what this implied for the question of how free these negotiations actually were.[328] The Crown repeats Mr Macky's conclusions verbatim in its closing submission, without further gloss.[329]

Broadly, the Crown accepts that the Government made the 1853 deed part of the context of all the negotiations in Te Tau Ihu, and particularly fell back on it wherever there was resistance. In the east, it used not only the deed but senior Ngati Toa chiefs as part of the negotiations, who then witnessed the resultant deeds (or receipts) with Rangitane, Te Atiawa, and Ngati Kuia. Our main concern with Mr Macky's analysis is that he uses evidence from 1854, from the process in which the Government was trying to enforce the sale on resident right holders, as indications that Ngati Koata and Ngati Kuia were willing sellers.[330] In our view, this analysis cannot stand. The language in which Brunner and Jenkins reported the views of these right holders was mainly negative; in other words, local iwi insisted on receiving part of the purchase money from the Crown before they would permit surveying or agree to the restricted reserves proposed by officials. There is little to suggest a genuinely free and willing desire to sell land in these circumstances. Things were mostly couched in terms of denial and of separate payment for land counted already sold by officials.[331]

Counsel for Ngati Tama, Ngati Koata, Ngati Kuia, and Ngati Apa made submissions on whether the Crown was properly informed of and took full account of Maori customary rights to land when proceeding with the Waipounamu purchase. Generally they concluded that the Crown, and particularly its leading agents such as Grey and McLean, were

326. Ibid, p 266
327. Ibid, p 267
328. Ibid
329. Crown counsel, closing submissions, pp 114–115
330. Macky, 'Crown Purchases in Te Tau Ihu', pp 266–267
331. Brunner to commissioner of Crown lands, 11 January 1855, *Compendium*, vol 1, p 294; 'Interpreter's Report of Information Obtained during a Visit to Kaiaua, Pelorus, Kaituna, Wairau and Queen Charlotte Sound &c, 1854–55', *Compendium*, vol 1, pp 297–299

reasonably well informed, but that they exploited that knowledge and distorted custom to facilitate the Crown's purchase of the land. The Crown did not contest this argument and nor do we. The parties agree that there was no failure of knowledge or understanding on the part of officials in 1853. Rather, there was a ruthless pragmatism (as accepted by the Crown) which led to improper purchasing strategies and the triumph of expedience over Treaty rights. Wellington missionary Hadfield summed this up in 1860, when he informed Parliament that the main qualification for the primary right of decision-making in McLean's eyes was a willingness to sell. Whether conquerors or conquered, residents or non-residents, McLean tended to first recognise and ascribe primacy to the rights of those who were willing to sell.[332]

We found in chapter 4 that Spain, though reasonably well informed on Maori custom, did not apply that knowledge fully and consistently in making his award. We also found in chapter 5 in relation to the Wairau purchase that the Crown accepted the claim of absentee Ngati Toa (indeed but three of their chiefs) to the east coast as far south as Kaiapoi, thus exploiting their quest for utu against Ngai Tahu for their earlier losses. At that time, the Crown ignored the rights of resident Ngati Toa, Ngati Rarua and Rangitane to participate in the negotiation, though it did allow them to share the Wairau reserve. We accept Ngati Tama's submission that there was a pattern here, in which history repeated itself, with Waitohi and Pakawau demonstrating that a different pattern was nonetheless possible had the Crown chosen to recognise and deal properly with right holders' tino rangatiratanga.

With the Waipounamu purchase, the Crown again exploited and built upon its recognition of a Ngati Toa paramountcy. It initiated the purchase with them and forced the resident iwi to accept compensatory payments, just as Spain had done to 'complete' the company purchase from Ngati Toa. The cumulative effect of this exploitation of Ngati Toa paramountcy in the 1840s and 1850s was to deliver nearly all of Te Tau Ihu to the Crown. This rewarded absentees at the expense of occupants, the very antithesis of Maori custom as Spain, Grey, and McLean understood it. A ruthless expediency had replaced the Crown's Treaty-based obligation to respect Maori customary rights to land and their rangatiratanga over it.

The situation might have been mitigated to some extent if McLean had abandoned the tactic after concluding the first deed in 1853. The majority of the purchase money remained to be allocated at a proposed intertribal hui at Nelson. At that point, although the resident iwi would have been at a disadvantage because of Ngati Toa's deed, they might still have been able to repudiate or renegotiate the sale. As the leading Ngati Tama rangatira put it in October of that year: 'when these men meet here then we will dispute the matter with each other – for their act and deed is an intrusion'.[333] Richmond reported the locals' view that they ought to have been consulted before any sale. He feared that, if McLean did not hold the

332. Phillipson, *Northern South Island: Part 1*, pp 134, 152

333. Wiremu Te Puoho to Richmond and Stafford, 19 October 1853 (Macky, 'Crown Purchases in Te Tau Ihu', p 152)

promised hui, the resident iwi might refuse the sale altogether.[334] Instead, the Government's leading purchase officer left the residents to wait for years while he paid the entirety of the remaining purchase money to non-residents (other than a small payment to Ngati Hinetuhi of Port Gore). At the same time, he sent officials to lay off reserves in Te Tau Ihu, explaining that their land was sold and all that remained was for the Government to make reserves. Resident right holders resisted this tactic, but put all their faith in McLean.[335] By the time he actually arrived to get the residents to sign deeds individually (more aptly called receipts), over two years had gone by since Ngati Toa 'sold' the land in 1853, and the purchase money was all gone. The Government agreed – reluctantly – to give McLean an extra £2000 so that he could compensate those whom he characterised as outstanding claimants. He did not spend all of it.

The exploitation of custom extended beyond that more specifically relating to rights in land and relationships between rangatira and their kin groups, and between Ngati Toa and the rest. In the Wairau purchase, as we saw, Grey exploited Maori customary concepts of utu. He got 'utu' for 'his dead' at the Wairau, while recognising Ngati Toa's right to utu at Kaiapoi, taking all the land in between. It is true that Ngai Tahu got some utu back again when the Government recognised their claims right up the east coast in the North Canterbury and Kaikoura purchases and on the West Coast as far as Kahurangi with the Arahura purchase (to be discussed later in the chapter). But such utu regained was merely reinforcing the Crown's title on both coasts.

With the initiation of the Waipounamu purchase, we find Grey exploiting other important Maori customs. At Porirua, as he prepared to leave for South Africa, Grey asked Ngati Toa for what amounted to a parting gesture of homage and respect. On the basis of a similar performance at Wairarapa a few days later, Mr Walzl cited Takirirangi Smith's characterisation of it 'as an ohaaki within the context of a poroporoaki'.[336]

It was in this context that Grey asked Ngati Toa to reward him with a present: the whole of Waipounamu. That was a big parting gift, we might say, and one that had equally wondrous effects when Grey played that card again in the Wairarapa. Although Ngati Toa had been pressing the Government to recognise their claims (by purchasing the West Coast), the evidence is clear that they did not wish to relinquish Te Hoiere and other valued districts in eastern Te Tau Ihu. Eventually, they gave in.[337] McLean noted:

> nothing but an anxious desire on the part of His Excellency to secure these advantages [the wealth of Te Tau Ihu] to the European inhabitants, and an equal desire on the part of the Natives to meet His Excellency's wishes, and take advantage of his presence before his

334. Macky, 'Crown Purchases in Te Tau Ihu', pp 151–154, 159
335. See, for example, Ballara, 'Customary Maori Land Tenure', pp 227–228
336. Walzl, *Land Issues*, p 302
337. Phillipson, *Northern South Island: Part 1*, pp 133–144

> departure for England, would have induced them to have ceded the more available and valuable parts of those districts, not even if they were hereafter offered a much higher remuneration . . .[338]

Valedictory statements at farewell ceremonies in both Maori and Pakeha cultures are naturally given to excesses of emotions but they should be left at that, and not used as the basis for a monumental land grab.

With the Waipounamu purchase, it was left to McLean to follow up Grey's grand gesture with Ngati Toa, firstly by completing and signing the Ngati Toa deed for Grey, and then by following it up with the remaining 'receipts' with Ngati Toa and the other claimant iwi. McLean was as adept as his master in exploiting Maori culture and custom and turning historical antipathies to the Crown's advantage. He did this by first dealing with absentee chiefs, Te Atiawa as well as Ngati Toa, sometimes rewarding them with grants or presents, and inflating their mana against local residents. He brought in the big guns, particularly from Ngati Toa, to intimidate the locals in eastern Te Tau Ihu. This was a key and deliberate aspect of his strategy. In part, these chiefs witnessed the deeds to maintain the fiction that they had already sold the rights being compensated, but in part it also served as recognition of the rights of resident tribes which they had already admitted as conjoint with theirs back in 1853.

We conclude that Grey and McLean exploited their not inconsiderable knowledge of Maori custom, culture, and language to facilitate the Waipounamu purchase. They exploited Ngati Toa's need to reassert their leadership and rights in the wake of their disastrous loss of mana to the Crown in 1846–47, and accepted Ngati Toa's claims to primary rights and authority without investigation, despite their certain knowledge that those claims were contested. This disadvantaged Ngati Toa's erstwhile northern allies as well as the defeated Kurahaupo peoples, who were in occupation and increasingly assertive of their rights. McLean well knew that, if he had followed up the first Ngati Toa transaction, as had been promised, and had gone to Nelson and quickly dealt with the rights of the occupant iwi, he would have run into vigorous assertions of their claims. Instead, he chose to whittle them away by dealing with the absentee Ngati Toa and Te Atiawa for over two years, keeping the locals waiting and then beating them down to what was left of the slightly increased purchase money.

In sum, we find that the Crown and particularly its agents, Grey and McLean, exploited their knowledge of Maori culture and custom, exaggerating the rights of Ngati Toa and diminishing those of the resident iwi of Te Tau Ihu in order to facilitate the Waipounamu purchase. They did so without due inquiry, despite their knowledge that Ngati Toa's claim was contested. In the circumstances, it was difficult for Ngati Toa to resist Grey's request

338. McLean to Civil Secretary, 11 August 1853, AJHR, 1881, G-2, p 12

that they sell Waipounamu and impossible for the resident iwi to do more than accept the 'compensation' finally offered for their interests, at rates determined by McLean. Neither Ngati Toa nor the resident iwi was in a position to freely sell land to the Crown, as envisaged by article 2 of the Treaty. The Crown's purchase procedures were also in breach of the principles of partnership (since both parties did not negotiate freely as equals), active protection, and equal treatment (since Ngati Toa and the resident iwi were not treated with equal fairness in terms of their respective customary rights).

These Crown actions compounded earlier Treaty breaches. The attachment of signatures to a deed or receipt, and the payment of non-negotiable compensation, was not a free, informed, and willing sale of land already granted to others by the Crown in 1848, any more than it was a free, informed, and willing sale of land treated as sold by Ngati Toa in 1853. We accept Ngati Tama's submission, citing the evidence of Professor Williams:

> the Waipounamu purchases involved the purchasing of customary title interests in respect of land much of which had already been Crown granted to the New Zealand Company in 1845 and then again in 1848. By 1853 there were numerous communities of Pakeha settlers living in all parts of the Nelson settlement. Their lands had been surveyed and subdivided . . . Pakeha applications of English tenure forms of exclusive ownership were considered unchallengeable and irreversible from the Crown's point of view. The choice for the resident Maori tribes, yet again, was a Hobson's choice. Accept payments to extinguish customary title or receive nothing. The 1848 Crown Grant was not renegotiable. The opening of the rest of the waste lands in New Munster to settlers was also not negotiable.[339]

(4) *Was there more freedom of choice in western Te Tau Ihu?*

As we understand the Crown's position, it accepted that McLean had acted improperly in trying to force the sale as a fait accompli upon resident right holders, but argued that this tactic failed in the west. In particular, the Crown relied on three instances where large reserves were successfully made – Rangitoto, Wakapuaka, and Taitapu – to argue that residents on the western side could have held out against McLean if they had chosen to do so. They were, therefore, willing sellers.[340]

In our view, there is no truth to this argument as far as Ngati Koata and Ngati Tama are concerned. First, Rangitoto was in fact left out of the 1853 transaction, although we have no evidence on why that was done.[341] It may have been, as Mr Macky suggests, because there was a Ngati Koata chief present who managed to get it excluded. The point here is that McLean could not use the 1853–54 transactions with Ngati Toa to pressure Ngati Koata

339. Counsel for Ngati Tama, closing submissions, pp 47–48
340. Crown counsel, closing submissions, pp 113–115; see also Macky, 'Crown Purchases in Te Tau Ihu', pp 204–205
341. Bassett and Kay, 'Nga Ture Kaupapa', p 74

on that matter. The evidence is that the tribe was successful in retaining their island, but 'agreed' to the blanket purchase of all their rights on the mainland for the paltry sum of £100, in comparison to the almost £10,000 paid to non-residents (in money, scrip, and individual reserves for chiefs). Wakapuaka, on the other hand, was quite a small block of land, and, in McLean's admission, no more than Ngati Tama really required as a reserve for their subsistence.[342] Even so, he put them under a lot of pressure to sell it for £100 and just 100 acres of reserve – pressure which they succeeded in resisting.[343] Their success compared favourably with the limited reserves permitted others, but was nothing more than that. In other words, this was a reserve, not a successful resistance to selling the land.

The only genuine exception, in our view, is the exclusion of Taitapu from the sale. McLean did not really know where it was, and nor, in the end, did he care much about it.[344] Riwai Turangapeke of Ngati Rarua was therefore allowed to deny 'the right of the Wellington tribes to sell the Taitapu Block, and it was finally handed back to him'.[345] One such successful exclusion is too slight a piece of evidence on its own for us to conclude that there was greater freedom of choice in western Te Tau Ihu. In Mr Macky's view, McLean only gave way where nothing short of physical force would be required to enforce 'the Ngati Toa sale'.[346]

On the other hand, we note that McLean did appear to apply more pressure in the east. No deeds were signed with local Ngati Toa or Ngati Rarua leaders or communities for eastern Te Tau Ihu lands. Further, the negotiations with Ngati Koata, Te Atiawa, Rangitane, and Ngati Kuia were preceded by an officials' tour, in which the surveyor and interpreter told them that their lands were already sold, and they had no choice but to accept reserves (the final say on which belonged to the Government). Although this was not all that successful in terms of results, it served to increase the climate of pressure on resident right holders, which explains their acceptance of almost any deed or price in 1856. In the end, what choice did they really have? McLean also brought the leading Ngati Toa chiefs to pressure the locals in the east and witness their deeds, but either he or they would not do the same in the west. As we have noted, our view of this action is mixed. In part, it represented an attempt to pressure the residents and claim authority over them, but, equally, it ended up as an admission of the validity of their claims. This was particularly so in the case of Rangitane, according to McLean's record of the views of Te Kanae and Puaha, as we described in chapter 2.

The historical evidence is clear that Te Tau Ihu Maori wanted settlers, economic development, a relationship with the Crown, and were prepared to sell some of their land to obtain these things.[347] The tragedy of the Waipounamu purchase is that they were denied their right to decide which pieces and how much land they would sell, and for what price, through

342. McLean to Colonial Secretary, 7 April 1856, *Compendium*, vol 1, pp 300, 302
343. Macky, 'Crown Purchases in Te Tau Ihu', pp 204–205, 260–262
344. Phillipson, *Northern South Island: Part 1*, p 162
345. AJHR, 1936, G-6B, p 48 (Phillipson, *Northern South Island: Part 1*, p 162)
346. Macky, 'Crown Purchases in Te Tau Ihu', pp 150, 266
347. Loveridge, 'Let the White Men Come Here', pp 177–179, 186, 221–222, 234–235

McLean's tactic of enforcing the 1853 transaction with Ngati Toa. McLean was willing to resort to anything short of physical force to obtain all their land. We rely on the evidence of the Crown's historian to that effect, and note that there is some agreement between Crown, claimant, and Tribunal historians on McLean's tactics and their effects. We find the Crown in serious breach of the plain meaning of article 2 of the Treaty, and of the Treaty principles of partnership, reciprocity, active protection, equity, and equal treatment. The prejudice for Te Tau Ihu Maori was the loss of their land and resources without their free and informed consent, and for grossly inadequate compensation. We consider the latter point in more detail later in this chapter.

(5) *How representative were the 1855–56 arrangements with resident right holders?*

As we noted above, the claimants have not argued that there were deficiencies in the negotiations with the resident right holders, in terms of the proper involvement of their respective leaders and the negotiation of wide and representative consent to the deeds. We accept this position, on the evidence, and conclude that the 1855–56 arrangements were not deficient in that respect.[348] We consider the representativeness of the 1853–56 arrangements as a whole later in this chapter, when we look at the overall validity of the various deeds signed as part of the Waipounamu purchase.

(6) *The Crown's treatment of defeated peoples: the unique claim of Ngati Apa*

It is to the Crown's credit that it recognised and negotiated with Ngati Kuia and Rangitane in 1856. As we have noted, however, it did not do so in such a way as to provide for their tino rangatiratanga, or to gain their free, informed, and willing consent to the alienation of their customary rights. The Crown's recognition of their mana was belated and came at the price of their lands. Nonetheless, it did enable them to get a small payment and reserves. Ngati Apa was not accorded even this minimal recognition in 1855–56.

Were Ngati Apa in particular disadvantaged by the Crown's admitted failure to properly investigate customary rights? It is quite clear from our hearings that Ngati Apa have, as they claim, survived intact as a people with mana.[349] Their perception is, as Kath Hemi put it, that the Crown has always thought them 'so small as to be able to be ignored', right through from 1840 to the 1990s.[350] The historical evidence identifies two distinct communities of Ngati Apa in the mid-nineteenth century, both clearly intact and living under their own leaders. There was a small group living at Port Gore, in eastern Te Tau Ihu. This community had its own chief, resided with Ngati Hinetuhi until the Waipounamu purchase, and then

348. See, for example, Macky, 'Crown Purchases in Te Tau Ihu', p188

349. Kath Hemi, brief of evidence on behalf of Ngati Apa, 25 March 2003 (doc N9); June Robinson, brief of evidence. See also the transcript of our hearing of the Ngati Apa claim at Omaka Marae, 26–29 May 2003 (transcript 4.12).

350. Hemi, brief of evidence, p31

continued to occupy the land after the latter tribe's departure for Taranaki. In the west, there was a community of Ngati Apa living in the Kawatiri region, led by its own chief (Puaha Te Rangi), and with rights extending into the hinterland (see chs 2, 3).

Further north, there were Ngati Apa living in western Te Tau Ihu. We know that some were living on the land later called the Taitapu block, with Ngati Rarua and others. There was also, according to Native Land Court records, a small community of mixed Kurahaupo descent living near Wakatu in the 1840s, but which appears to have departed soon after Commissioner Spain's award. In addition, there were survivors living in small numbers in the interior, continuing to use customary resources and living under their own authority, though now circumscribed in terms of their movements and rights (see ch 4).[351] In Mr Armstrong's report for Ngati Apa, the main historical evidence of that tribe's survival as a community with customary rights in western Te Tau Ihu was the size and apparent independence of Te Kawau's followers in Golden Bay.[352] It emerged in the course of our hearings, however, that there had been a mistake in identifying this chief, who was actually Ngati Rarua. In Dr Ballara's view, this reduced the evidence about Ngati Apa to possibilities; it was possible that those living at Taitapu and places north were communities with customary rights, but equally they may have lost their status and rights. It is no longer, in her view, possible to be sure.[353]

The Crown accepted in its submissions that it failed to inquire adequately as to customary rights before or during the Waipounamu purchase. Further, it admitted that by failing to investigate the hinterland, where free survivors of Ngati Apa were recorded as living, it may well have deprived Ngati Apa of their customary entitlements. Finally, the Crown conceded that it did not identify and deal adequately with the rights of defeated peoples.[354] Ultimately, however, the Crown did not make a submission on whether it should have signed a deed with Ngati Apa for their rights in Te Tau Ihu, or made reserves for them.

As we have found in chapter 2, defeated peoples living as tributary communities on their own lands, under their own chiefs, retained customary rights. This was clearly the case for Rangitane and Ngati Kuia in Marlborough and Tasman Bay. Further, Ngati Kuia and their relations rely on the tuku of Tutepourangi as sustaining their ongoing rights in Te Tau Ihu. There is no doubt that the Crown ought to have recognised and dealt with these people, and McLean noted from 1853 that their consent was necessary for a valid purchase. As Mr Macky notes, McLean was prepared to pay virtually anyone who asserted a right, so long as they put their hands up. Why were Ngati Apa not included in that process?

351. See also David Armstrong, 'Ngati Apa ki te Ra To', report commissioned by the Ngati Apa ki te Waipounamu Trust Claims Committee, 1997 (doc A29); Armstrong, 'Fate of Ngati Apa Reserves'

352. Armstrong, 'Ngati Apa ki te Ra To', pp 23–44

353. Ballara, 'Customary Maori Land Tenure', pp 255–257, 270–271, 283–284

354. Crown counsel, opening submissions, pp 12–13, 15

In eastern Te Tau Ihu, McLean purchased the rights of Ngati Hinetuhi at Nelson in 1854, signing a deed with just two of their chiefs.[355] This was his one exception to the two-year delay in dealing with residents. Interests at Port Gore, therefore, were not investigated or identified on the spot before they were purchased. This is the likeliest explanation for McLean's failure to identify and pay Ngati Apa for their customary rights. When Brunner and Jenkins visited there in January 1855, they discovered the existence of Ngati Apa and noted that the proposed reserve was for both tribes.[356] We know also that Ropoama Te One paid part of the Waipounamu purchase money for Queen Charlotte Sound to this Ngati Apa community.[357] In our view, this confirms their right to have been included and paid for the sale of their land. We find the Crown's failure to investigate and identify the customary rights of Ngati Apa in eastern Te Tau Ihu, to consult them and obtain their consent, or to pay them and make reserves for them (the Native Land Court granted the reserve almost entirely to Ngati Hinetuhi), to have been in serious breach of article 2 of the Treaty of Waitangi. These actions of the Crown also breached the Treaty principles of partnership, reciprocity, active protection, and equal treatment.

In western Te Tau Ihu, McLean did not investigate or identify customary interests west of Nelson. The closest to an on-the-ground inquiry came from John Tinline, who was sent to investigate claims that Spain's award included land which had not in fact been sold, and surviving customary rights that had been wrongly included in the Crown grant. Neither the claimants nor the Crown made any submissions about Tinline's investigations per se. The question for the Tribunal is: if Ngati Apa were present and had rights, ought not his inquiries (or Sinclair's in the 1840s) to have uncovered that fact? Here, we rely on the evidence of Dr Ballara. She argues that neither of these officials made a proper investigation into relative claims or customary rights, citing several examples from Golden Bay.[358] Her evidence on this point has not been disputed. It may well be, therefore, that Meihana Kereopa was correct in 1883 when he stated that the Native Land Court's inquiry into Taitapu was Ngati Apa's first opportunity of making a claim.[359]

We found in chapter 4 that the Spain commission failed to investigate the customary rights of iwi in the New Zealand Company's district, before recognising a valid purchase and awarding districts in Golden and Tasman Bays to the company. Now, in 1853–56, this failure was replicated by McLean, who did not visit any of the lands alienated to the Crown west of Nelson, and by Tinline (in 1855), who repeated Sinclair's failure and did not investigate claims to land or inquire into and identify customary rights.

355. 'Receipt for £100 Paid to Ngatiawa Tribe', 16 November 1854, *Compendium*, vol 1, p 310
356. 'Interpreter's Report', *Compendium*, vol 1, p 299
357. Phillipson, *Northern South Island: Part 1*, p 42
358. Ballara, 'Customary Maori Land Tenure', pp 261–266
359. Ibid, p 284

6.4.10(6)

We noted for eastern Te Tau Ihu that Brunner and Jenkins did identify the presence of Ngati Apa in Port Gore, and intended including them in the reserve. Was McLean similarly under notice of Ngati Apa's claims in the west? For an answer to this question, we note the evidence of Mr Armstrong, who located a letter from North Island Ngati Apa to McLean in 1852, setting out the southern branch of their tribe's claims to land on the West Coast of Te Waipounamu. This may have been in relation to the Crown's proposed purchase of the West Coast at that time, and the interests of Ngati Apa were identified as far north as Taitapu.[360] It is not clear to this Tribunal whether the authors of the letter considered Ngati Apa's interests as having expired north of Taitapu, nor do we know exactly how extensive a district they meant when they used that name.[361] As discussed above, Ngati Rarua chief Riwai Turangapeke succeeded in withdrawing Taitapu from the sale. Ngati Apa were not consulted, although McLean knew of their claim to interests in that area. He was, as we have seen, not very clear on exactly where it was or whether it was worth pressing the Crown's claim to it. Nonetheless, McLean had clearly been notified that Ngati Apa had an extensive claim on the West Coast, which required investigation.

How do we account, therefore, for McLean's statement in 1856 that only the interests of Ngai Tahu remained to be satisfied in the west?[362] It may be that Ngati Apa's claim had slipped his mind. The fact remains that there was never an adequate (or indeed any) inquiry into customary rights in western Te Tau Ihu in 1853–56. Ngati Apa were not recognised, paid, or given reserves. The effects of this are plainly seen in the 1880s and 1890s, when they alone were left out of the land court's awards. Rangitane and Ngati Kuia at least gained title to reserves set aside for them at the time of purchase, although they were excluded from the 'unsold' land still in customary title, and from the tenths. By the time evidence was recorded about Ngati Apa's claims and rights in the 1880s and 1890s, Dr Ballara suggested, it was too late to ascertain the truth of those claims.

From our discussion here and in earlier chapters, the following facts appear to have been established:

- Too little time had gone by since the conquest, for Ngati Apa's rights to have been entirely foreclosed as at the 1840s and 1850s.
- Ngati Apa survived as a people, and have maintained a consistent (if under-investigated) claim to customary rights in Te Tau Ihu in the nineteenth and twentieth centuries.
- A community of tributary Ngati Apa lived at Port Gore, were recognised as a distinct tribe by officials, were paid part of the purchase money by Ropoama Te One, and (when

360. Armstrong, 'Fate of Ngati Apa Reserves', p 2

361. See, for example, Armstrong, 'Fate of Ngati Apa Reserves', pp 4–5, where James Mackay (a key figure here) used the name Taitapu for 'Massacre [Golden] Bay'.

362. McLean to Colonial Secretary, 7 April 1856, *Compendium*, vol 1, p 303

stinted by the Native Land Court) were given more of the reserve by the departed Ngati Hinetuhi. Thus, they achieved greater recognition from their conquerors than from the Government.

- A community of Ngati Apa survived under its own chief (Puaha Te Rangi) on the West Coast of the South Island, with claims extending into western Te Tau Ihu.
- Unsubdued (though fugitive) Ngati Apa continued to reside and use resources in the interior of western Te Tau Ihu in the 1840s, and eventually joined their settled relatives on the coast.
- Ngati Apa people were living at Taitapu and elsewhere in coastal western Te Tau Ihu, but their numbers must have been small, their rights and status were not investigated in the 1840s and 1850s, and they were overlooked by officials.
- By the time Ngati Apa made claims to the Native Land Court for a share of western Te Tau Ihu lands, the recorded evidence was too slight to allow those claims to be fully evaluated today.

This Tribunal faces a difficult task in evaluating Ngati Apa's claim against the Crown. On the one hand, it is no longer possible to say exactly what rights Ngati Apa retained in western Te Tau Ihu, as these were not investigated or recognised at the time. On the other hand, Ngati Apa found themselves written out of history as a result. Apart from Port Gore, which will be considered in chapter 7, Ngati Apa individuals had to come in under other lines to establish any kind of claim to land in Te Tau Ihu after 1856. Theirs is indeed a unique claim in this respect, and their survival all the more remarkable for it.

We are not in a position to evaluate the relativity of Ngati Apa's claims and rights in western Te Tau Ihu, vis-à-vis the tribes that were recognised by the Crown. All we can say is that they did have surviving rights (of some degree), that McLean was on notice of their claim, and that the Crown failed to investigate their claim or ascertain their rights. This failure on the part of the Crown resulted in the extinguishment of Ngati Apa's customary rights during the Waipounamu purchase, without their consent and without paying them compensation or providing them with even the minimal reserves made for the subsistence of other tribes. This was a very serious breach of their article 2 rights, and of the Treaty principles of reciprocity, partnership, active protection, and equal treatment.

(7) *Were adequate reserves set aside?*

We examine the consequences of the minimalist reserves policy in later chapters. We make no findings on the issue at this point but signal them here because, after the Waipounamu purchase and reserves arrangements were completed, it was already evident that the prosperous future that Maori were frequently promised on alienating lands to the Crown was unlikely to come about. In their submissions, several of the claimant counsel referred to the collateral benefits expected to arise from the sale of the land and the settlement on it

of European colonists. We believe that the various iwi who signed the deeds expected such benefits, notwithstanding doubts as to how precisely these were spelled out during the negotiations. We address this issue in more detail below.

(8) *Was the price paid adequate?*

Consideration of the adequacy of the price paid in the Waipounamu purchase involves a number of factors. First, as we have already concluded, Crown agents exploited their knowledge of Maori custom to drive through the original deed with Ngati Toa and later used the knowledge of that deed to beat down the expectations of resident Maori. Their expectations as to price were consistently higher than McLean was prepared to countenance, and in the event he spent less than he was authorised to do so. His most telling argument in successfully achieving this was to claim that the land had already been purchased from Ngati Toa by virtue of the 1853 deed. Hence, it was merely a matter for other claimants to determine whether they wished to receive compensation for their interests. In these circumstances, as we noted, there could be no free and meaningful consent to the alienation of the interests of resident Maori, and this applied equally to their ability to negotiate what they considered a satisfactory price for their interests.

The second point that needs to be noted in considering the question of price may seem obvious but nevertheless remains crucial. There was no Waipounamu block as such but merely a series of blanket deeds which for the most part purported to extinguish all of the remaining interests of the vendors within the South Island. The extent of those interests clearly varied, and under the circumstances there could be no meaningful consideration of price per acre, especially given the lack of clarity in most of the deeds as to the specific interests which were purportedly being conveyed to the Crown. That was merely compounded by the complete absence of any kind of inquiry into customary interests prior to, or even during the course of, the Waipounamu negotiations.

In our view, the failure of Crown officials to even seriously contemplate calculating a price per acre based on a more carefully defined purchase area reflected the influence of the 'waste lands' theory. As we discussed in the previous chapter, although Governor Grey successfully argued against the implementation of Earl Grey's 'waste lands' instructions, he instead promoted a 'nearly allied principle' based on acquiring large tracts of land for no more than 'nominal' sums. Underlying this approach was the assumption that Maori claims to areas not under actual cultivation or occupation as understood from a European viewpoint were somehow dubious. In this sense, Grey (and later McLean) did not really see themselves as buying land so much as extinguishing invalid or at best inchoate claims, especially in the less densely populated South Island. Hence they could afford to fix on some arbitrary sum in compensation, whilst drip-feeding the payments by instalment as an added means of exerting some ongoing control over Maori. Yet, as we explore more fully in section 6.7, what were supposed 'waste lands' from a European perspective were frequently

valuable sources of mahinga kai, kai moana and other resources for Te Tau Ihu Maori. The Crown had pledged itself to recognise and protect Maori ownership according to their own customs under the terms of the Treaty of Waitangi and subsequent pronouncements. These customs were hardly unknown to Crown officials, as Grey's rationale for the large Wairau reserve (quoted previously) confirmed. The problem was not ignorance of customary ownership but reluctance to fully recognise it, especially in circumstances where to do so jeopardised land purchasing or threatened to push up the price that might have to be paid to extinguish Maori titles.

Thus, the Maori signatories to the various Waipounamu deeds were neither in a position to freely negotiate price nor to determine its adequacy relative to the area conveyed to the Crown. On the other hand, if we consider the issue more narrowly, then, as we have noted previously, any discussion of the consideration paid for Waipounamu needs to take into account not merely the actual money paid, but also the other undertakings entered into as part of McLean's effort to secure support from rangatira whose assistance he deemed vital. In terms of the monetary payment, it will be recalled that the original Ngati Toa deed of August 1853 had provided for a total sum of £5000, of which £2000 was distributed immediately following the signing ceremony, leaving a balance of £3000 to be paid in six annual instalments to the Ngati Toa vendors, along with 'the Ngatiawa, the Ngatikoata, the Ngatirarua, Rangitane, and Ngaitahu, who, conjointly with ourselves, claim the land'. As Mr Macky notes, the deed did not stipulate how the balance would be distributed between the various named claimants to the land, although McLean reported that Grey had agreed to the proposal of the chiefs for this to be decided at a general meeting of the tribes to be held in Nelson the following summer.[363] The fact that 40 per cent of the purchase money had already been paid to non-resident Ngati Toa had partly pre-determined the matter, but at least the other named groups would have their opportunity to publicly and openly debate the correct distribution of the balance in a hui forum.

As we saw earlier in the chapter, McLean delayed his return to Nelson for some two years, by which time the balance of the £5000 had already been distributed by the Crown. A further 40 per cent of this was paid to Ngati Toa in December 1854. According to McLean, their request for a lump sum payment rather than the annual instalments stipulated in the original deed had been prompted largely by concern on the part of the chiefs that 'a sum so small as £500 being divided once a year among such a number of claimants afforded so trifling an amount to each that there was every probability of the Natives becoming dissatisfied with their bargain before its conclusion'.[364] As Mr Macky noted, such a concern 'would certainly have been consistent with Ngati Toa's view in 1853 that the £5,000 consideration they

363. Macky, 'Crown Purchases in Te Tau Ihu', pp 142–143

364. McLean to Colonial Secretary, 15 December 1854, *Compendium*, vol 1, p 303. We note that this letter is mistakenly attributed to 1857 in the *Compendium*.

agreed to was a small price for a large area.'[365] But with four-fifths of the total consideration now paid to Ngati Toa and the remaining £1000 paid to mostly non-resident Te Atiawa, by December 1854, there was nothing left for the remaining resident claimants to the land. McLean therefore successfully sought permission to expend an additional £2000 to complete the purchase, along with an extra £300 to resolve a number of outstanding grievances relating to the New Zealand Company's transactions in the area. But, by the time the final payments had been made in March 1856, the Crown had expended an additional £1739, of which some £320 related to the company purchase. In total, therefore, the total monetary consideration in respect of the Waipounamu purchase amounted to £6419.[366] McLean's uncompromising negotiating strategy had saved the Crown some £561.

Though there was, as we mentioned, no clearly defined Waipounamu block, McLean himself had estimated the area covered by the series of payments at roughly 8,000,000 acres. Based on this ballpark figure, McLean's estimate in December 1854 that the purchase could be completed for less than one farthing (a quarter of a penny) per acre proved accurate, the actual figure amounting to just less than one-fifth of a penny per acre. To this, however, we need to add the 26 grants of 200 acres promised to Ngati Toa, along with scrip to the value of £750. Although neither were mentioned in any deed, the promise of these additional benefits had evidently played an important part in overcoming initial Ngati Toa reluctance to the purchase, based in part on the perceived inadequacy of the payment offered. Combined, they add an additional £5950 to the total consideration, bring this to £12,369. Again, relying on McLean's crude notion of acreage, this amounted to just over one-third of a penny per acre. That was actually somewhat better than the farthing or so per acre paid for the Wairau, and certainly much higher than the paltry payment made for the huge Canterbury block. But it was also significantly lower than prices being paid for North Island lands at this time.[367] Grey's alternative 'waste lands' strategy was thus apparent in the nominal prices paid in respect of the South Island.

Grey and McLean both acknowledged the price paid for Waipounamu to have been 'trifling', 'inconsiderable' and 'very small' in their correspondence with other officials, while predicting 'a considerable revenue' from the newly acquired lands.[368] But it was a different story when discussing the price with Maori, and as Dr Phillipson notes, McLean was especially grateful to have secured the land before its owners fully realised the value of its mineral and other resources.[369]

While Crown officials acknowledged the actual consideration as being small, it had been a consistent plank in negotiating strategy to argue that the 'real payment' would come from

365. Macky, 'Crown Purchases in Te Tau Ihu', p170
366. Ibid, p191
367. James Rutherford, *Sir George Grey KCB, 1812–1898: A Study in Colonial Government* (London: Cassell, 1961), p187
368. Phillipson, *Northern South Island: Part 1*, p144; Macky, 'Crown Purchases in Te Tau Ihu', p191
369. Phillipson, *Northern South Island: Part 1*, p144

the increased value of the remaining reserves and other benefits to accrue from European settlement of the area. But such a benefit was only capable of fruition if the reserves were sufficiently large to enable Maori to fully participate in the new colonial economy and, secondly, provided they remained in Maori ownership. We have already found the reserves to have been inadequate in extent, and shall see in later chapters that many of these were also alienated. In large measure, therefore, the so-called 'real payment' held out to Te Tau Ihu Maori was never received.

A further aspect of the price question concerns what has been termed the 'collateral benefits' offered. Claimant historians to consider this issue were unanimous in agreeing that it was probable, and even highly likely, that Crown officials made specific promises to Te Tau Ihu Maori of schools, hospitals, and other benefits arising from their agreement to the Waipounamu purchase. David Armstrong, the historian for Rangitane, noted Grey's evidence to the Smith–Nairn commission in 1879, which had been established partly to inquire into allegations that similar promises of schools, hospitals, and other collateral benefits had been promised Ngai Tahu as part of the consideration for their lands. Asked whether he had issued instructions along these lines at the time of the purchases, Grey replied unequivocally, 'those were the instructions I always gave. . . . I explained that the payment made to them in money was really not the true payment at all.'[370] His successor, Thomas Gore Browne, had made a similar statement in 1856, observing that he was satisfied that, since '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.'[371]

Against this, Mr Macky noted that no evidence had been unearthed of specific promises made by McLean during the course of his Te Tau Ihu negotiations. In his view, the argument that McLean made such promises within Te Tau Ihu appeared to rest on the assumption that 'if it happened elsewhere, it must have happened here.'[372] He further noted that the argument had not been supported by any evidence of complaints from Maori that the Government had broken its supposed promises. Yet, Mr Macky modified his views somewhat under cross-examination, agreeing that, although there was no evidence of a specific promise, McLean was 'aware, probably, that Rangitane and others expected to get the collateral advantage and he's most probably encouraged them in a general way and he certainly wouldn't have discouraged their expectation in that regard.'[373]

In our view, the words of Grey and Browne are too plain of meaning to leave any doubt on this issue. We consider that, notwithstanding the absence of any evidence of specific

370. Armstrong, 'Right of Deciding', p 109
371. Campbell, 'A Living People', pp 139–140
372. Macky, 'Crown Purchases in Te Tau Ihu', p 196
373. Michael Macky, under cross-examination, eighteenth hearing, 17–20 November 2003 (transcript 4.18, p 148)

undertakings, it is highly likely, as Mr Macky admitted, that Crown officials encouraged an expectation that collateral benefits such as schools, hospitals, and other perceived advantages of European settlement and enhanced Crown interest in (and protection of) the welfare of Te Tau Ihu Maori would follow the Waipounamu purchase. That created an obligation upon the Crown to take reasonable steps to ensure the delivery of such benefits and the promised active protection of Maori interests. But we would also note that, regardless of any promises made of collateral benefits, it was clearly incumbent upon the Crown to ensure that Maori shared equally with Pakeha in the benefits of expanding settlement, infrastructure, and social-service delivery under the provisions of article 3 of the Treaty. We examine its performance of such a duty in chapter 10.

In considering the adequacy of the price we also need to acknowledge that, since this was distributed unevenly, the question needs to be broken down further. While the £200 in total paid to Rangitane and Ngati Kuia combined was clearly inadequate, can the same be said with respect to the £4000 plus script and land grants promised Ngati Toa? In our view it can. McLean noted their dissatisfaction with the £5000 offered for such a large area of land, and found it necessary to make the additional offers of scrip and land grants in order to overcome opposition to the August 1853 deed. Yet, an indication of ongoing resentment at the price paid came in December 1854, when Ngati Toa chiefs successfully secured £2000 to go with the initial £2000 they had received at the time of the earlier deed signing. McLean noted their concern to avoid the original proposed process whereby the 'trifling' sum of £500 was divided annually amongst all the claimants to the land. But by failing to convene the promised hui in Nelson to decide the distribution of the balance of £3000 remaining after August 1853, McLean was instead able to unilaterally distribute most of it to non-residents, greatly angering those who had expected to receive appropriate recognition of their claims at the hui. In doing so he once again put expediency ahead of the Crown's Treaty obligations.

It also needs to be noted, however, that the £4000 plus scrip and promised grants with an additional value of £5950 paid to Ngati Toa was out of all proportion to the paltry sums received by resident Maori, who based on the Crown's own understanding of customary tenure principles were entitled to expect the lion's share. That they did not do so was yet another reflection of the 'ruthless pragmatism' which pervaded most aspects of the Crown's approach to the Waipounamu purchase. We find this to be contrary to the principle of equal treatment, which required the Crown to act fairly as between Maori groups.

We find the price paid in the Waipounamu purchase to have been inadequate. Crown officials who acknowledged this in correspondence amongst themselves, while expressing relief that the land had been acquired before Maori realised its value, acted contrary to the principles of good faith, partnership, and active protection. We also conclude that it was highly likely Te Tau Ihu Maori were led to expect various collateral benefits arising from their agreement to the Waipounamu purchase. We consider the extent to which such

benefits were delivered later in the report. Here, we find the price paid to have been in breach of the Treaty and its principles.

Finally, a more specific issue was raised by counsel for Ngati Toa. Counsel stated that, according to Ngati Toa sources, the full amount agreed as part of the consideration for Waipounamu was not paid. This statement was not elaborated and we do not recall specific evidence being given to this effect by Ngati Toa witnesses during our hearings, although Dr Phillipson notes an enduring Ngati Toa tradition that some of the money had disappeared altogether 'owing to the adept doings of Te Makarini [McLean]'.[374] It seems possible that this might have had its origins in the fact Ngati Toa did not receive the full £5000 referred to in the deed. We have no further information on the issue, however, and therefore make no findings with respect to this matter.

(9) *Were the deeds valid?*

We also need to consider the validity of the 15 deeds or receipts that together formed the Waipounamu purchase, in terms of their validity as instruments of alienation. Our focus here is on a number of key questions, including whether the signatories to the deeds were representative of their communities, whether the terms of the deeds were clear, unambiguous, and mutually understood by both parties, whether the texts of the deeds fully incorporated all undertakings entered into as part of the transactions, and whether the boundaries of the land supposedly being conveyed (and the boundaries of any reserves set aside) were clearly and fully described in the deeds and associated plans.

It is here, of course, that we immediately run into problems, since the deeds purported to be blanket ones extinguishing all remaining Maori claims in the South Island. Various exclusions and additional arrangements with specific iwi, most of them outside the written texts of the deeds, tended to undermine this view of the Waipounamu transaction, of course, but it nevertheless remains necessary to consider whether, as a general principle, a blanket purchase of interests without clearly defined boundaries could ever be considered a valid transfer of land (see fig 15). Or, to put it another way, could the purchase of undefined interests in respect of an undefined land area be conducted in a manner consistent with the Treaty and its principles and, further, with the clear standards laid down at the time for the conduct of Crown purchasing?

We considered these issues in some detail in section 6.4.7, where our focus was somewhat broader than simply the Waipounamu transaction. We note here that one minimum requirement for any valid land transfer was mutual understanding and acceptance of what it was that was being conveyed. In the absence of any agreed definition of the rights being alienated, that was quite simply impossible. Without such agreement, there was a real lack of clarity around what the deeds were actually conveying to the Crown. This was further

374. Phillipson, *Northern South Island: Part 1*, p 145

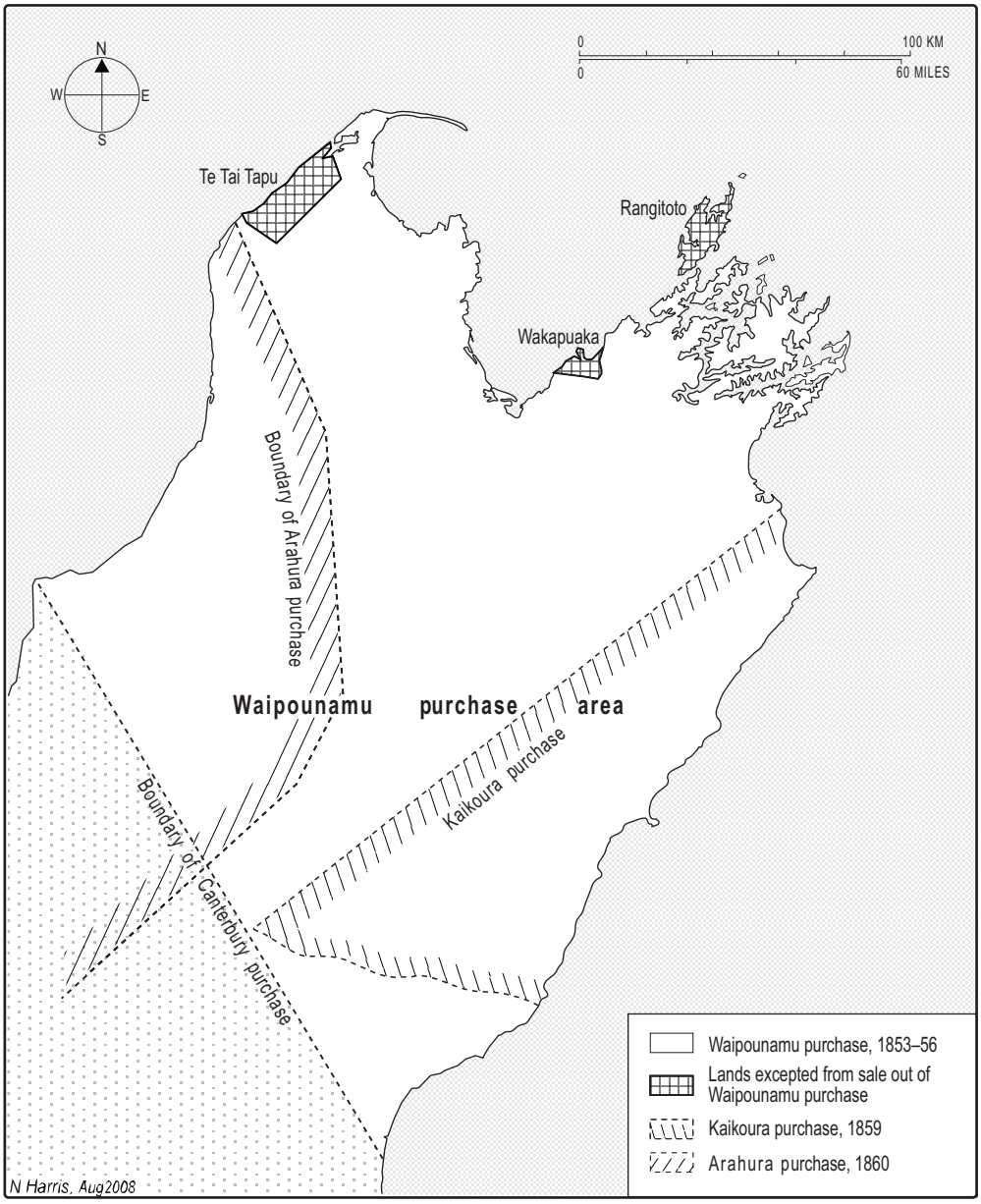

Figure 15: The Te Waipounamu purchase, 1853–56 **Source: AJHR, 1874, G-6**

amplified by verbal undertakings to particular groups that were not included in the text of the deeds.

This was precisely the situation which arose in the Waipounamu series of deeds. We received no submissions on whether the signatories of the various deeds were truly representative of their communities and heard no evidence to suggest that they were not. On the whole, it would seem, it was generally accepted that those rangatira who signed the various deeds between 1853 and 1856 on behalf of the seven iwi involved in this process

(the customary rights of Ngati Apa being entirely ignored by Crown officials) were the due and appropriate representatives of their people. On the other hand, it was argued by many claimant counsel that the blanket purchasing process, in tandem with the decision to purchase the land exclusively from Ngati Toa in the first place, denied other iwi any meaningful choice as to whether they wished to retain their lands.

Counsel argued that the pre-determined purchase from Ngati Toa combined with the failure to define the specific rights which were being transferred, the absence of clear boundaries of either the lands being transacted or those being reserved, and numerous verbal promises and undertakings not recorded in the deeds; together rendered the Waipounamu deeds invalid as instruments of alienation.[375] We agree with this analysis and would further note that, although the closing submissions from Ngati Toa merely quoted Professor Boast's description of the 1853 deed as being 'very vague' on reserves, that deed was also completely silent on many of the terms of the transaction.[376] This included not just the 26 grants of 200 acres each it was found necessary to offer in order to induce Ngati Toa to sign the deed, but also (according to George Grey's later evidence before one inquiry), the exclusion of a number of islands from the area transacted. As we note further in chapter 8 (and later in this chapter), Ngati Toa unsuccessfully sought title to Paruparu Island at the first Native Land Court investigation to be held in Te Tau Ihu in 1883, on the basis that it had not been included in the Waipounamu transaction. Although the claim was dismissed on the evidence of Alexander Mackay on that occasion, Sir George Grey told the Native Affairs Committee in 1884 that he had specifically (but verbally) agreed to exclude this and other adjacent islands from the Waipounamu sale, despite not making this clear in the deed.[377]

Given that Ngati Kuia had also applied for title to Paruparu and other islands, and that a large number of other claims were made in 1883 for lands which the Crown maintained had been purchased by virtue of the Waipounamu deeds but which Maori asserted had been excluded under oral promises, this was far from an isolated case. Indeed, as we noted earlier in the chapter, at least one of the signatories of the first deed maintained that he had not agreed to include the large 117,000-acre Wairau reserve in the area sold to the Crown. Yet, according to the Crown's understanding of the transaction, this large reserve had been replaced by a paltry one of just over 1070 acres. There was clearly little mutual agreement as to the terms of the deeds when even such a large area as this could be claimed by both parties. Such confusion was likely to have been further increased by the failure of most sketch maps produced at this time to show any interior boundaries to the purchase.

375. Counsel for Rangitane, closing submissions, pp 24–34; counsel for Ngati Koata, closing submissions, pp 63–78; counsel for Te Atiawa, closing submissions, pp 157–169; counsel for Ngati Tama, closing submissions, pp 52–59; counsel for Ngati Kuia, closing submissions, pp 48–56

376. Counsel for Ngati Toa Rangatira, closing submissions, p 104

377. Dr Grant Phillipson, *Northern South Island: Part 2*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1996) (doc A27), pp 5–6

6.4.10(9)

Although the Crown evidently assumed that this was an unimportant detail at the time of the purchases, the absence of any defined interior boundaries would be revisited in the 1870s, when a number of Te Tau Ihu iwi staked their claim to the 'hole in the middle'. We discuss this issue in section 6.7. Other ambiguous aspects of the various deeds would also create problems further down the track. Dr Phillipson, commenting on the Ngati Rarua–Ngati Tama deed of November 1855, concluded that aspects of both the deed and attached plan 'give rise to grave concerns about how the Maori could have understood the blanket cession of all their rights from coast to coast, or more particularly, from Wairau to Arahura'.[378] Besides the absence of any interior boundaries, he pointed to the fact that the Wairau River, the supposed eastern boundary of the transaction area, was not marked on the plan; the Wakapuaka block, which had supposedly been excluded from the sale and was not mentioned in the deed was nevertheless marked as a reserve on the plan but drawn in 'completely the wrong place'; and that the Taitapu block, which had also been excluded from sale, was depicted at about half its actual size and again with inaccurate boundaries.[379]

Mr Macky also observed that the deeds could not be taken as conclusive proof that the Maori signatories and McLean shared the same understanding of what the transactions meant. According to Mr Macky:

> Several deeds in the west did not really mean what they said. They purported to sell all the land Maori possessed in the Island, but clearly there were places excluded from the sale that were not mentioned in the deeds. Not all of the deeds had maps attached to them, and those maps that were attached to the deeds were not always accurate.

He concludes that there was 'a general air of carelessness about the documentation connected with the Waipounamu purchase'.[380] Although there were differing views on some of the specific aspects of the deeds among the historians to appear before us, there was nevertheless broad agreement around this point.

We conclude that, although the signatories to the various Waipounamu deeds appear to have been broadly representative, the deeds themselves were flawed in many other respects, including poorly defined boundaries and reserves, and numerous oral promises not formally included in the agreements. We find that the deeds could not be considered valid, and the Crown's reliance upon these invalid instruments of alienation as the basis for extinguishing customary rights in Te Tau Ihu was in serious breach of the Treaty and its principles, since resident iwi were denied the opportunity to give meaningful consent to the alienation of their lands. We further find the Crown's failure to fully document and implement all of the various verbal undertakings made as part of the Waipounamu negotiations in

378. Phillipson, *Northern South Island: Part 1*, p 169
379. Ibid, pp 169–170
380. Macky, 'Crown Purchases in Te Tau Ihu', p 267

breach of the principle of active protection. This resulted in serious prejudice for Te Tau Ihu Maori in many instances, where lands they believed they had retained ownership of under the 1853–56 agreements were later deemed to have been purchased by the Crown under these very same deeds.

(10) *Waipounamu and the western takiwa*

A large part of the West Coast was included within the first purchase boundaries affecting the South Island. The New Zealand Company's Kapiti and Queen Charlotte deeds of 1839 purported to cover the whole of the South Island down to the 43rd parallel, which intersects the West Coast about 45 kilometres south of the Hokitika River. The transaction recognised the rights of Ngati Toa and their allies Te Atiawa.[381] Te Rauparaha himself told Commissioner Spain in 1843 that the rights he claimed on the West Coast extended as far as 'a little Creek called Te Wanganui' (presumably the Wanganui River just south of the 43rd parallel).[382] Nothing came of this 'purchase', however, at least as far as the West Coast was concerned. The 1845 Crown grant allowed the company only a limited area in Tasman and Golden Bays. Nor did the new Crown grant of 1848 (made after the Wairau purchase) include any part of the West Coast, the Aorere River in Golden Bay being the north-western boundary.

The West Coast rights recognised by the next purchase attempt, the Canterbury transaction of 1848, were those of Ngai Tahu. Grey discussed with the chiefs of that tribe the relinquishment of all their claims to lands lying between the recently purchased Wairau block and the Otago block (purchased in 1844). Henry Tacy Kemp was sent to organise the transaction. He reported that on 12 June he had purchased the whole of this large district, 'extending over to the West Coast'.[383] The Canterbury deed does not specify how far north the purchase extended on the West Coast, but the accompanying map shows a boundary between the new Canterbury block and 'the Nelson Block' – a straight line running north-west from 'Kaiapoi' (at the mouth of an unnamed river, evidently the Hurunui, just north of the 43rd parallel) and meeting the West Coast at an unmarked point that appears to be the Kawatiri River mouth (about 30 kilometres north of the 42nd parallel).[384] In fact, however, neither the Wairau purchase nor the 1848 Crown grant extended as far south in the inland areas as the boundary line on the Canterbury map indicated, and neither included the northern West Coast at all. The significance of Kawatiri as the northernmost point of this first West Coast purchase from Ngai Tahu has been much debated – was this point defined arbitrarily by a north-west compass direction from 'Kaiapoi', or did it represent

381. *Compendium*, vol 1, pp 64–66
382. Boast, 'Ngati Toa and the Upper South Island', vol 1, p 69
383. Kemp to Gisborne, 19 June 1848, *Compendium*, vol 1, p 209
384. 'Translation of Kemp's Deed', *Compendium*, vol 1, pp 210–211

what the Crown's officers had heard about the northernmost extent of Ngai Tahu's rohe?[385] The Ngai Tahu Tribunal noted in its 1991 report that there was no detailed contemporary record of how the northern boundary was discussed or decided upon. The Tribunal found it 'difficult to accept' that the officials were acting 'arbitrarily or capriciously' when they fixed the boundary at Kawatiri: 'the most reasonable inference . . . is that that point was chosen as a result of discussion with Werita Tainui and possibly other Ngai Tahu who were familiar with the extent of re-occupation by Poutini Ngai Tahu of their lands on the west coast'.[386] In evidence presented to our own inquiry, Dr James McAloon doubts whether Werita played any part in the fixing of the boundary, but he agrees with the Ngai Tahu Tribunal that, at the time, Ngai Tahu regarded Kawatiri as simply the northern limit of Kemp's purchase, not as the northern limit of Ngai Tahu manawhenua on the West Coast.[387]

In any case, the Crown eventually found that the purchase of the West Coast portion of the Canterbury block was not effective, as far as Ngai Tahu were concerned. Poutini Ngai Tahu appear to have been represented at the Akaroa negotiations, but later they said that they had not received their share of the purchase payment and that no reserves had been created for them on the West Coast. In Dr Loveridge's words, 'they had every right to think that any agreement to sell their lands was null and void'.[388] The Ngai Tahu Tribunal agreed with this interpretation.[389] Certainly, the Crown later found it necessary to negotiate a new agreement with Poutini Ngai Tahu, in 1860.

Before dealing with Ngai Tahu again, the Crown had discussions with the northern tribes about the extinguishment of their claims on the West Coast. In Nelson, Superintendent Mathew Richmond heard from Te Keha (Te Atiawa) and others in 1849 that they were willing to sell their interests in 'Arahura'. No action was taken at this time.[390] Wahapiro Paremata of Ngati Tama wrote to Grey in December 1850 with an offer to sell the place in Murihiku where his uncle Te Puoho had died, and, it seems, the West Coast as well. Riwai Turangapeke of Ngati Rarua had apparently already heard about this desire to sell the West Coast claims, and had written to Grey six weeks earlier with an offer of Ngati Rarua's interests.[391] As we saw earlier in the chapter, in 1851, Grey instructed Richmond to acquire the western coast from the northern tribes – not just the northern tip from Cape Farewell to the Whanganui Inlet (which was duly bought as the Pakawau purchase in May 1852), but the whole West

385. Donald Loveridge, 'The Arahura Purchase of 1860', report commissioned by the Crown Law Office, 1988 (doc Q1), p 13; Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, pp 429–430, 434; James McAloon, 'The Position of Ngai Tahu on the West Coast during the 19th Century', revised ed, report commissioned by Te Runanga o Ngai Tahu, [2003] (doc Q4(a)), p 43

386. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, pp 434

387. Ibid, p 451; McAloon, 'Position of Ngai Tahu', pp 41, 43

388. Loveridge, 'Arahura Purchase', pp 12–13

389. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, pp 433–434

390. Loveridge, 'Arahura Purchase', p 15; Tony Walzl, 'Ngati Rarua and the West Coast, 1827–1940', report commissioned by the Ngati Rarua Iwi Trust in association with the Crown Forestry Rental Trust, 2000 (doc B5), p 32

391. McAloon, 'Position of Ngai Tahu', pp 46–47

Coast down to Murihiku. Richmond reported in January 1852 that he was attempting to obtain the West Coast proper but was finding the claimants wanted too high a price.[392]

These discussions with Ngati Rarua and Ngati Tama were the context for expressions of concern from both Ngati Toa and Ngai Tahu. Late in 1851, Grey received a letter from Ngati Toa chiefs indicating that the West Coast offers from Ngati Toa's allies were a defiance of the rights of the principal conqueror. The letter (and another in 1852) set out the history of the West Coast conquest and asserted Ngati Toa's pre-eminence in the northerners' claims there. 'We hold ourselves superior to these people and say that we have the authority', wrote the chiefs. 'The authority was taken by us', they continued, and they were offering the land 'even unto Ara-hura', though without denying their allies the opportunity to have their rights recognised too.[393]

Indications of anxiety about the Crown's intentions came from a Ngai Tahu quarter also. Information reached the Government that Ngai Tahu in Otago and Murihiku were alarmed by rumours that officials had purchased lands in Murihiku and on the West Coast from Wahapiro and other northerners, and that their own chief Taiaroa had acquiesced in this action.[394] McLean had indeed heard from Wahapiro and others, at a meeting in Wellington in June 1851, that they wanted to sell their claims on the West Coast and that Taiaroa had consented. Pakaki of Ngai Tahu, who was also present at the meeting, had confirmed that Taiaroa had agreed that Wahapiro should make the sale and that they should share the payments.[395] In 1852, in response to Ngai Tahu's complaint, McLean confirmed that Wahapiro had told him about Taiaroa's acquiescence in the proposed sale and was asking for a joint arrangement in which he (Wahapiro) would get the first payment and Ngai Tahu the next. McLean said that he had told Wahapiro that any purchase must have the consent of Ngai Tahu, and that he himself had written to Taiaroa to get his view on the matter and had suggested a meeting between the two parties (Ngai Tahu and the northerners). He hoped such a recognition of the northern tribes would 'clear up the difficulties' being experienced in the land purchases in Te Tau Ihu.[396] Dr Loveridge comments that, although the West Coast was isolated, little known, and not thought to have many resources, Crown officials did believe it was worth spending money on extinguishing the claims of the northern tribes to this area because those tribes were 'unwilling to sell their rights to land in the Nelson area unless their Arahura claims were recognised as well'.[397] At the time, Mantell pointed out that Ngai Tahu's title to the West Coast had been extinguished by the Canterbury purchase in

392. Richmond to Colonial Secretary, 5 January 1852, *Compendium*, vol 1, p 290

393. Ngati Toa to Grey, 11 December 1851, in 'Two Letters from Ngaati-Toa to Sir George Grey', translated by Bruce Biggs, *Journal of the Polynesian Society*, vol 68, no 4 (December 1959), pp 263–276

394. Ihaia to other Ngai Tahu, 12 January 1852, enclosed in Mantell to Colonial Secretary, 24 February 1852, *Compendium*, vol 1, p 273

395. McLean, notes of Wellington meeting, 25 June 1851, McLean papers, ATL (Loveridge, 'Arahura Purchase', pp 15–16). We agree with Loveridge that this document has been incorrectly dated at 1857 by the Turnbull Library.

396. McLean, memorandum, not dated, *Compendium*, vol 1, p 274

397. Loveridge, 'Arahura Purchase', pp 14–15

1848, and that even then Taiaroa 'would not have been the party to treat with for that part of the country'.[398] Richmond reported soon afterwards that Ngati Rarua and Ngati Tama in Te Tau Ihu were still wanting too much for their West Coast interests, and had assured him that the resident Ngai Tahu would be compensated for their claims with a share of the asking price.[399] Perhaps McLean was convinced by now that no further discussion with Ngai Tahu was necessary. There is no indication that the suggested meeting with Ngai Tahu took place, and soon afterwards the Government successfully included the West Coast in the Waipounamu transactions with Ngati Toa and other northern tribes.

Following the initial Ngati Toa deed signing at Porirua in August 1853, the West Coast was also included in the receipt signed in March 1854 in Taranaki by non-resident Te Atiawa.[400] The other tribes we are concerned with here, Ngati Tama and Ngati Rarua, signed a deed at Nelson in November 1855. This document similarly transferred 'all our lands in this Island', and mentioned a 'rohe' extending to Arahura and beyond to 'the land sold by the Ngaitahu' (the boundary being at Milford Sound). Some land on the northern part of the coast, south of the Pakawau block purchased in 1852, was 'excluded from this new sale and reserved for our use'. The southern boundary of the excepted land, which came to be known as Te Tai Tapu, was vaguely defined in the deed, but was clarified in 1862 as being at Kahurangi Point. West Coast place names on the attached map went down as far as Hokitika.[401]

McLean's report that he had successfully completed the Waipounamu purchase made no mention of Ngati Apa's rights on the West Coast or anywhere else. Unlike another of the Kurahaupo tribes, Rangitane, Ngati Apa had not been named as one of the 'conjoint' owners in the Ngati Toa deed of 1853. Nor were they given the opportunity to sign a Waipounamu deed, although Rangitane signed two such deeds (including one in which the West Coast was specifically mentioned). Ignoring Ngati Apa entirely, McLean noted that he had not been able to visit the only tribe still having claims on the purchase, which he described as 'a small remnant' of Ngai Tahu, about 25 in number, who lived at Arahura, 'a remote and as yet almost inaccessible part of the country'. McLean did not anticipate any difficulty in settling their claims in due course.[402]

It is therefore clear that the Government treated the various right-holding iwi differently. The original approach from the northern tribes in 1849 and 1850 had come from Ngati Rarua and Ngati Tama, and the refusal of those tribes in 1852 to sell at a low price was accepted by the Government. Soon, however, the protests of Ngati Toa that their pre-eminent rights on the West Coast were being challenged by their allies were heeded, although the Government was aware that Ngati Toa's claim was contested, and the eventual purchase was initiated with

398. Mantell to Colonial Secretary, 17 May 1852, *Compendium*, vol 1, p 280
399. Richmond to Colonial Secretary, 31 May 1852, *Compendium*, vol 1, pp 290–291
400. 'Receipt for £500 Paid to Ngatiawa Tribe', 10 March 1854, *Compendium*, vol 1, pp 309–310
401. 'Deed of Sale by the Ngatitama Tribe', 10 November 1855, *Compendium*, vol 1, pp 312–313
402. McLean to Colonial Secretary, 7 April 1856, *Compendium*, vol 1, p 303

Ngati Toa in 1853. There was no inquiry into the relative strength of the rights of Ngati Toa and the other northern raupatu tribes in the region, or of the resident right holders Ngai Tahu and Ngati Apa. As elsewhere in the area covered by the Waipounamu purchase, the Crown simply accepted the Ngati Toa claim and used it to elicit sales of the same district by other tribes (in this case Ngati Rarua, Ngati Tama, and Te Atiawa in the first instance). On the West Coast, although Ngati Toa's allies did make the first approaches to the Government for a possible sale, and in 1852 were able to decline a sale because the price was too low, the purchase was eventually made from Ngati Toa first and only later from Ngati Rarua, Ngati Tama, and Te Atiawa. Because of this, although their claims were given recognition, the right of the latter tribes to exercise choice in the transaction was restricted.

Priority was given to the claims of the northern tribes, Ngati Toa and their allies. Ngai Tahu, although more clearly a resident tribe on the West Coast and mentioned in 1853 as having 'conjoint' rights, were not dealt with at this stage. Although Taiaroa was present at the August 1853 deed signing in Porirua, and supposedly consented to the transaction, he was not a chief of Poutini Ngai Tahu, and did not have rights on the West Coast himself. His involvement in the issue aroused protest from some of his fellow Ngai Tahu.

There are also questions arising with respect to the western boundaries of the Waipounamu purchase, which in our view were not precisely defined. The West Coast districts in question were usually referred to at the time, by both the tribes and the Government, simply as 'the Arahura'. Strictly speaking, this label refers only to the district on the central West Coast around the mouth of the Arahura River – a district that had the greatest population and was near the valued pounamu resource. It seems to have been understood, however, that 'the Arahura' signified a more extensive West Coast stretching between Te Tai Tapu in the north and the fiord region in the far south.

Mentions of the region in the documents of the time are seldom more precise than this. In view of our earlier comments on the symbolic importance of historic battlegrounds on the east coast, we note that Wahapiro's offer of the West Coast in 1850 was couched as an invitation to purchase Tuturau in Murihiku, the place where his uncle Te Puoho was killed by Ngai Tahu, and that McLean recognised this as a desire to 'sell the Arahura district as payment for his uncle's death'.[403] No more was heard of the inclusion of Murihiku in 'Arahura', and from 1854 onwards the designation of Milford Sound as the north-western boundary of the Murihiku purchase served to mark the southern boundary of the West Coast. In the north, the Pakawau purchase of 1852 set the northern boundary of the unpurchased interests of Ngati Toa and their allies at the Wanganui Inlet. With regard to Ngai Tahu, the 1848 Canterbury purchase had used Kawatiri as a northern limit, but, as we have seen, it is uncertain what this signified about Ngai Tahu rights, and in any case the 'purchase' had ceased

403. Wahapiro to McLean (translated), 24 December 1850, with marginal note by McLean (McAloon, 'Position of Ngai Tahu', pp 46–47)

to be recognised as effective. The Waipounamu deeds signed by Ngati Toa and their allies in 1853 and 1854 continued to refer simply to 'Arahura', without further definition. In 1855, the Ngati Tama–Ngati Rarua deed mentioned the Murihiku purchase and the boundary it set up at Milford Sound, and also referred to the land excluded from sale at Te Tai Tapu (thus setting Kahurangi Point as the northern limit to 'Arahura'). While the Milford Sound boundary referred to Ngai Tahu interests, the Kahurangi boundary put a northern limit on the interests being sold by the northern tribes.

There appeared to be no misunderstanding of these boundaries by the Government or by the northern tribes whose claims were being extinguished. Ngai Tahu's claims were yet to be dealt with, and at this time no thought was given to a consideration of Ngati Apa's claims. The rights being transferred were understood to be located in coastal areas. The inland boundaries were not defined, but at the time this was apparently of no concern to the northern tribes since they had confined the exercise of their rights on the West Coast to places near the sea. Later, however, in 1873, they claimed that the area acquired under the Waipounamu purchase did not specifically include the mountainous interior of the northern sector (which includes a large part of the statutory takiwa). Of course, this area was almost entirely unexplored in the 1850s (as McLean noted at the time), but it is not known whether the interior was discussed with the tribes during the negotiations. It was left largely blank on the sketch map (which lacked an eastern boundary) attached to the 1855 deed. The Government dismissed the 1873 claim, reminding the tribes that according to the deeds they had sold 'all their lands in the South Island', and it remains uncertain whether the claim had any validity. Dr Phillipson's discussion of this matter concludes that it is doubtful that the signatories understood clearly that they were relinquishing all interests including those in the interior.[404]

6.4.11 Conclusions and findings on individual awards and reserves

Before discussing the individual awards and reserves we deal with two general issues relating to them.

The first concerns the Crown's use of the awards and reserves as 'inducements' to get the chiefs to sign, or to encourage others to sign the various deeds. Ngati Toa historian, Professor Boast, says that the 'inducements' – the offer of 15 scrip awards and 26 grants of 200 acres each – 'seem to have been decisive' in getting the chiefs to sign the first Ngati Toa deed. Probably he is correct. As we have noted Ngati Toa and some other chiefs were also given individual grants in reward for their role in facilitating the signing of some other Waipounamu deeds. However, we would not conclude that their influence here was 'decisive' since in most cases the local iwi regarded the signing of a Waipounamu deed of their own

404. Phillipson, *Northern South Island: Part 1*, pp 169–173

as a recognition of their mana, not of Ngati Toa overlordship, though they had no choice other than accepting the 'compensation' offered. Of course the awards – or rewards – could be characterised as Crown bribery. But none of the legal submissions on behalf of claimants has alleged this and nor do we.

The awards can however be regarded as part of the payments for Waipounamu. As we pointed out above, the scrip and individual 200-acre awards amounted in value to more than the £5000 payment that was offered in the first Ngati Toa deed. So far as we know, all of these awards went to Ngati Toa, though scrip was occasionally given to other chiefs, in association with other Waipounamu transactions. We noted above from Mackay's report how two Ngati Rarua and Rangitane chiefs were unable to use their scrip. The other individual grants that were awarded to others who were not Ngati Toa, as a result of the other Waipounamu transactions, were usually taken out of their iwi reserves and should not be regarded as additional payments for Waipounamu.

The second general issue relates to discrimination that was exercised by officials to prevent Maori from taking up their scrip. We have received no submissions on the issue from claimants or the Crown but historians commissioned by both sides (who used the same evidence from Grey and Mackay) were in no doubt that discrimination was at work. We agree and consider this discrimination by agents of the Crown was clearly in breach of the Treaty.

We find that the discrimination by officials that prevented Maori from exercising their scrip for Crown land of their choice was in breach of article 3 of the Treaty, which assured Maori of the rights of British subjects. It was also in breach of the principle of equity, which meant that the Crown was to act fairly as between settlers and Maori. Nevertheless, the evidence does not appear to point to widespread discrimination. In chapter 7, we cite instances where Te Tau Ihu Maori acquired Crown land, usually by purchase. Consequently, the extent of any prejudicial effect suffered was, in our view, limited.

We now discuss iwi specific submissions on individual awards and grants. In fact, there was only one: from counsel for Ngati Toa. Her concern was with the 26 individual awards that were promised in association with the first Ngati Toa deed. A lengthy delay in providing the promised awards meant that by 1875, it was said that there were no longer any suitable lands available for the purpose. Professor Boast notes that Alexander Mackay, who prepared a report on possible locations in 1875, was able to identify just three potential sites: the Rai Valley, the upper Aorere and an even more remote location on the West Coast. Of these, Mackay considered the Rai Valley likely to be required by the Marlborough Provincial Government because of its valuable timber supplies, while the upper Aorere location had been identified as the likely site of a special settlement. That left just the northern end of the West Coast, a location which, as Professor Boast notes, 'was still terra incognita even to a knowledgeable official such as Mackay'.[405] Although unfamiliar with much of the area,

405. Boast, 'Ngati Toa and the Upper South Island', vol 2, p 275

Mackay considered it unlikely that 5200 acres could be found in such a spot, but again pointed out that a portion of the Karamea district had also been set aside for a special settlement. In these circumstances, he recommended that the best option would be 'to commute the matter by a monied payment'.[406] That recommendation was, it would seem, based more on the low priority accorded the fulfilment of the Crown's undertakings to Ngati Toa relative to provincial and settler interests than on the non-availability of lands for these purposes.

Given that more than two decades had now passed and they had yet to receive anything, Ngati Toa leaders now not surprisingly also favoured a cash award in lieu of the lands which had been promised them. But despite petitions from the iwi, this was never allowed. As counsel for Ngati Toa noted, the Crown instead determined that the tribe's interests would be better served if the total sum was placed under the administration of the Public Trustee.[407] Additionally, as we noted earlier, this was based on an 1850s land value of one pound per acre (giving a total sum of £5200), and was not subject to any interest to compensate for the lengthy delay in receiving anything.

Although members of the tribe received interest payments from investment of the £5200 award, their requests for the return of the original capital sum were rejected. According to the evidence of Professor Boast, Ngati Toa greatly resented this paternalistic interference in their affairs. Further, they considered that the Government's decision that the 26 individuals or their descendants should be the sole beneficiaries was a departure from their own understanding that the money should be used as a capital fund for the entire iwi.[408] Mr Macky noted that the ongoing refusal to hand over the capital sum may have been the source for later complaints from Ngati Toa that they had not received the full purchase money from their Waipounamu deeds.[409] That seems quite possible. But while the Government's unwillingness to hand over the capital sum has clearly been a point of grievance for Ngati Toa, we do not think it contrary to the principles of the Treaty. Mr Macky cites the response of Native Minister John Bryce to a Ngati Toa deputation which had requested the money and declared that they 'themselves would be answerable for that if they chose to throw the money into the sea'. Bryce informed the group that:

> the Government could not divest itself of responsibility in a matter of that kind. If 20 or 50 years hence the Government of the day were reproached for allowing Maori to act in such a way it could not be any answer to say that Maori had offered to take the responsibility off his hands.[410]

406. Boast, 'Ngati Toa and the Upper South Island', vol 2, p 277
407. Counsel for Ngati Toa Rangatira, closing submissions, p 104
408. Boast, 'Ngati Toa and the Upper South Island', vol 2, p 280
409. Macky, 'Crown Purchases in Te Tau Ihu', p 183
410. Ibid, p 182

Clearly conscious of an obligation to actively protect Maori interests, Bryce had responded by taking measures to ensure the capital sum would remain as an endowment for the beneficiaries. It was the extensive alienation of Ngati Toa lands prior to this time, and in a manner contrary to the principles of the Treaty, at least in the case of Te Tau Ihu, which had generated a pressing demand for the capital sum by the 1870s. But if Bryce's decision to vest this in the Public Trustee was undoubtedly paternalistic, it was also probably realistic under the circumstances, given the self-described poverty of at least some of the petitioners. On the other hand, we agree with Professor Boast that the lengthy delay in giving effect to the original promise was unconscionable. We consider this contrary to the principle of equity, in that lands were found for settlers arriving in Te Tau Ihu but a much lower priority was evidently placed on finding the land promised to Ngati Toa.

Those entitled to receive the awards were prejudiced by the lengthy delay by being denied the use of such lands in the interim, by the use of 1850s land values to calculate their entitlement some two decades later, and ultimately by being required to accept monetary compensation instead of the land originally promised them. Also, the failure to protect the lump sum against inflation meant that it would effect the opposite of Normanby's intentions – as increased settlement led to growing prosperity and rising values, the fixed sum would become ever more relatively worthless.

We note also the evidence of Nohorua Te Kotua for Ngati Toa that his ancestor, Te Waaka Te Kotua, was one of those who received the promise of a grant but had died in the meantime. Mr Te Kotua told us: 'I am not aware of whether or not the interest that was supposed to be paid out by the Public Trustee was ever paid to my family, but as far as I am aware neither my family nor Ngati Toa has ever benefited from the promised grants in any real terms.'[411] We have no detailed evidence on the administration of the fund and so are unable to comment further on this aspect of it, although we think the overall conclusion is a fair one that Ngati Toa have not benefited as they should have in 'real terms'.

6.4.12 Further customary interests

In concluding this part of our chapter, we note that the Waipounamu purchase, despite its all-embracing nature and numerous deeds negotiated with most of the Te Tau Ihu iwi was not nearly as conclusive as it was supposed to be. As we have noted, Te Taitapu, Rangitoto, and Wakapuaka were not included. We discuss the Crown's role in the alienation of these three blocks in chapter 8.

As we noted earlier, in addition to these three areas excluded from the transaction, there were also later claims in respect of a number of islands. The 1853 deed with Ngati Toa had,

411. Nohorua Te Kotua, brief of evidence on behalf of Ngati Toa, 9 June 2003 (doc P3), p 8

in its English translation, purported to 'for ever transfer our land at the Waipounamu' to the Crown, and had further declared:

> Now this assuredly is the final transfer or sale of all our lands on the said Island, which we have hereby certainly and faithfully conveyed, with its trees, lakes, waters, stones and all and everything either under or above the said land and all and everything connected with the said land, to Victoria, the Queen of England, for ever and ever.[412]

In the original Maori text 'the said Island' was also rendered in the singular ('tera moutere') and there was no further mention of islands in the other resources listed as being included as part of the transaction. In neither the English nor the Maori versions of the deed, in other words, was there any suggestion that there was more than one island being transacted. That certainly appears to have been the understanding of Te Tau Ihu Maori. Both Ngati Kuia and Ngati Toa submitted claims for title over Paruparu Island to the Native Land Court when it sat for the first time in Te Tau Ihu at Nelson in 1883. As we discuss further in chapter 8, these claims were peremptorily dismissed on the basis of Alexander Mackay's advice to the court that the island had been included in the Waipounamu purchase. That, in turn, appears to have prompted Ngati Toa to petition both Houses of Parliament in 1884 for the return of Paruparu and adjacent islands. The Native Affairs Committee of the House of Representatives noted the failure of either the 1853 or 1854 Ngati Toa deeds to mention Paruparu Island, along with the clear evidence of Sir George Grey that he had come to an oral agreement with the tribe that the islands were excluded from sale, in support of its recommendation that 'the island Paruparu and those adjacent should be restored to the proper representatives of the Ngatitoa Tribe who owned those islands'.[413]

Grey's evidence was also influential in persuading the Legislative Council's Native Affairs Committee to report favourably on the claim. Although the Government argued that the offshore islands had been included in the blanket cession deeds under the umbrella term 'Waipounamu', it was held that since the deeds had omitted to refer to the islands, and given Ngati Toa's stance that they had never intended to cede these, they should have been reserved for their benefit. Grey had informed the committee that there was never any intention that the islands should be included in the sale, and in fact 'it was expressly agreed on both sides that they should not be included in the cession'. The committee described this as 'conclusive' evidence, and further noted that 'the claim has been maintained and revived on several previous occasions'. In 1860, for example, the chief Ihaka had travelled to Auckland to urge Grey's successor, Gore Browne, for title to Paruparu. When his mission failed, the rangatira sought title to the islands in the Native Land Court a few years later, in 1868. It declined to hear the case on the grounds that the court had no jurisdiction

412. 'Ngatitoa Deed of Sale', *Compendium*, vol 1, p 308
413. AJHR, 1884, I-2, pp 14–15

in the matter, and meanwhile the Crown assumed ownership of the islands and leased some of them out for pastoral farming. Despite this, the customary owners continued to regularly visit the islands for fishing purposes. But the committee's 1884 recommendation that the Government should confirm Ngati Toa's title to Paruparu, Kakapo, Nukuaiata, and Motungarara Islands by Crown grant 'to their proper representatives' was rejected, prompting at least one further petition in 1912.[414]

We have previously found that the Crown's failure to record and document the verbal undertakings made as part of the Waipounamu transaction was in breach of the principle of active protection. The case of Paruparu and the other islands claimed here is a stark reminder of the consequences of that failure. There is no doubt, in our view, in the light of the clear statements of Grey in 1884, and the wording of the deeds discussed above, that the offshore islands had been excluded from sale. The Crown's consequent assumption of ownership of the islands was in breach of the plain meaning of article 2 of the Treaty, since at no time did the customary owners consent to the alienation of these. We further find the Crown in breach of the principle of redress for its failure to return the islands to Maori ownership, notwithstanding a number of requests for it to do so starting as early as 1860. At the very least, Grey's unequivocal evidence in 1884, along with the recommendations of the Native Affairs Committees of both Houses of Parliament, ought to have prompted very serious reflection and inquiry into the merits of the claims advanced. Instead, the Crown conveniently chose to overlook challenges to its own title.

It was a similar story with the 'hole in the middle' claim advanced in the 1870s and rejected by the Crown after minimal inquiry.[415] We discuss this further in the following section and although we consider the evidence less clear cut in this case, as a result of which we are not in a position to make findings, it again highlights the general uncertainty concerning what had been alienated in the Waipounamu series of deeds.

There was also doubt as to how fully the Crown had extinguished Maori rights on the east and west flanks of Te Tau Ihu. After all, most of the Waipounamu deeds had only vague descriptions of the supposed boundaries of Waipounamu, particularly on the West Coast where, as we noted previously, the generic term 'Arahura' was sometimes used. Similar issues arise with respect to the east coast. Counsel for Rangitane argued that because the iwi had already sold their interests in this area, presumably by virtue of the February 1856 deed, 'it had no interest in being consulted over the Ngai Tahu transaction.'[416] We assume the latter reference is to the Kaikoura deed negotiated exclusively with Ngai Tahu in March 1859 (discussed in more detail later in the chapter). This suggests Rangitane accepted that their Waipounamu deed, whereby they had sold all their lands 'on this Island', had included the sale of their interests in the land on the east coast subsequently purchased by the Crown

414. AJLC, 1884, sess 2, no 5, pp 1–2; Phillipson, *Northern South Island: Part 2*, pp 5–6; AJHR, 1913, I-3, p 12
415. Phillipson, *Northern South Island: Part 1*, pp 172–173
416. Counsel for Rangitane, closing submissions, p 20

from Ngai Tahu in the Kaikoura purchase. Moreover, the boundary defined for the Kaikoura purchase that related to the east coast takiwa was used for other purposes when the Crown 'adopted the European concept of exclusivity'.[417]

We do not accept the implication of Rangitane's counsel that, under their Waipounamu deed of 1 February 1856, they sold their interests in the parts of the east coast subsequently covered by the Kaikoura purchase. In our understanding of the deed, the vague phrase 'all our claims on the Island' was qualified by the remainder of the sentence (and we emphasise the first two words): '*that is* for all the lands of Rangitane from Wairau to Arahura'. We think that meant Rangitane's claims 'on this Island' were for their lands from the left bank of the Wairau River to Arahura on the West Coast. There was no licence to include land on the right bank of the river and on the east coast. That land had been already included in the Wairau purchase deed without Rangitane's approval. However, it is possible that James Mackay did indeed believe that Rangitane interests in lands east of the Wairau had been included in their Waipounamu deed when he purchased the Kaikoura block from Ngai Tahu three years later. We discuss that possibility further in our more detailed consideration of the Kaikoura deed later in the chapter.

There was also the problem that Ngai Tahu had been listed in the first Ngati Toa deed as 'conjoint claimants' with Ngati Toa, but no Waipounamu deed had been negotiated with them. The subsequent Crown purchases of North Canterbury, Kaikoura, and Arahura could be described as substitutes for Waipounamu. Indeed, in these transactions, which recognised Ngai Tahu rights as far north as Cape Campbell on the east coast and Kahurangi on the West, we can see Ngai Tahu getting some utu for their previous losses at the hands of Ngati Toa and its northern allies that were enforced by the Wairau and Waipounamu purchases. Moreover, they held their ground through the Tribunal's Ngai Tahu inquiry and the Maori Appellate Court decision of 1990, as we consider in the penultimate chapter.

6.5 The Arahura Purchase, 1860

As we have already seen, the Waipounamu purchase did not represent the end of Crown efforts to extinguish customary interests on the West Coast, since officials eventually concluded that Poutini Ngai Tahu were entitled to further recognition. The process of extinguishing the remaining rights on the West Coast was given impetus by a report submitted to McLean by James Mackay in 1857, after he had returned to Nelson from a private journey to the region. At Mawhera, he had mentioned the sale of the West Coast by Ngati Toa and Ngati Rarua, but was told by Poutini Ngai Tahu that Ngati Toa had had no right to sell the

417. Counsel for Rangitane, closing submissions, p 20

area.[418] The chief Tarapuhi (the son of the late Tuhuru) and others wrote a letter to McLean to this effect, saying that Ngati Toa were 'thieves, as their feet have never trodden on this ground, they are equal to rats which when men are sleeping climb up to the storehouses and steal the food'. They told McLean that Ngai Tahu were willing to sell 'the whole of the land along the coast, from West Wanganui to Piopiotai [Piopiotahi, or Milford Sound]'. An inland boundary was described as well, extending north from Piopiotahi along the mountain chain and intersecting the Te Tai Tapu coast at Te Hapu (about 30 kilometres north of Kahurangi).[419]

McLean instructed Mackay in November 1858 to go to Arahura and deal with 'Tuhuru and the other Chiefs and people residing on the West Coast' to settle their claims, and to arrange reserves 'for the few Natives residing there'.[420] Mackay's reply, as well as pointing out that Tuhuru had been succeeded by Tarapuhi, asked if the whole of the West Coast was to be purchased, in accordance with Tarapuhi's offer, or just the 'Arahura and Mawhera districts'.[421] His letter made particular mention only of the southernmost districts, and did not refer to the northern reaches. McLean's reply similarly confined itself to the south: he left the matter to Mackay's discretion, since he did not know if the Ngai Tahu claims went as far south as Milford Sound. He added that 'the Arahura Natives' were 'the only section of the Natives that we know of in the Middle Island whose claims are as yet unextinguished'.[422]

Mackay arrived back on the West Coast in 1859, reaching Mawhera in May. He was now an official Crown negotiator with Poutini Ngai Tahu for the claims they had made in 1857. The mission was unsuccessful, largely because of a dispute over the size of the reserve to be created at the Arahura River and Ngai Tahu's rejection of the payment offer as insufficient. The sensitive fact that the Government had already made a purchase from the northern tribes was mentioned on more than one occasion. Ngai Tahu again rejected the claims of these tribes, and declared that they were not the slaves of Ngati Toa. Mackay insisted that the Waipounamu deeds relating to the West Coast were valid, and even hinted (as he had done during the Kaikoura negotiations) that Ngati Toa could be asked to help gain possession of the land. He advised Ngai Tahu to accept the offer being made, since it was the Crown's wish to act fairly by accepting their claims.[423] It is clear that Mackay regarded the northerners' claim as extinguished by the Waipounamu deeds but was also in no doubt that the Ngai Tahu claim to the West Coast was valid: he accepted that they had been 'partially conquered' by the northern tribes but understood that the latter had withdrawn from the

418. Loveridge, 'Arahura Purchase', p 26

419. Tarapuhi and others to McLean, 15 March 1857 (Loveridge, 'Arahura Purchase', p 27). It was Kahurangi Point itself that was later mentioned as the northern boundary of the Ngai Tahu offer, and Loveridge says that he can offer no explanation for the change: Loveridge, 'Arahura Purchase', p 67 fn 1.

420. McLean to Mackay, 3 November 1858, *Compendium*, vol 2, p 33

421. Mackay to McLean, 19 November 1858, *Compendium*, vol 2, p 34

422. McLean to Mackay, 15 January 1859 (Loveridge, 'Arahura Purchase', p 42)

423. Loveridge, 'Arahura Purchase', pp 47–57

region after the defeat of Te Puoho in 1837. In 1859, he wrote a long account of this history, clearly based on his detailed discussions with Ngai Tahu.[424] In this document, and in other records of his discussions on the West Coast, he did not, however, mention any dealings with non-Ngai Tahu informants or give consideration to any Ngati Apa understanding of rights in the region. As far as the northern limits of the Ngai Tahu rohe were concerned, he simply accepted that the proposed purchase of Ngai Tahu rights extended as far north as the tribe claimed, which was the same area as that in which the claims of the northern tribes had already been extinguished.

Mackay's instructions in October 1859 were to visit Arahura again in order to conclude 'negotiations with the Natives for the cession of their title' over the district referred to in the report of his earlier attempt, and to arrange reserves. He was authorised to make a payment to 'the Ngaitahu Natives . . . in full satisfaction of all their claims'.[425] Mackay eventually reported that his mission had been successfully accomplished. He had been accompanied on his journey, which began from Nelson in January 1860, by three Maori. Two of them were well known Golden Bay chiefs, Tamati Pirimona (Ngati Tama, Ngati Rarua, and Te Atiawa) and Hori Te Karamu (Ngati Tama); the third was Puaha Te Rangi, the Ngati Apa rangatira who was to figure significantly in the Arahura purchase.[426]

Mackay's account of the lengthy purchase negotiations was quite detailed, but our concern is mostly with what happened at Poerua on 21 April. During the discussions that day about reserves, Puaha Te Rangi 'demanded compensation for the claims of the Ngatihapa to lands at the Kawatiri or Buller districts'. Mackay reported that:

> as Tarapuhi Te Kauhiki, and the majority of the Natives admitted the justice of these claims, and pressed me to award compensation for them, it was deemed expedient to permit Puaha Te Rangi on behalf of himself and a few other Ngatihapa Natives to participate in the payment, and it was arranged that some reserves should be allotted to them in the neighbourhood of the River Buller.

Mackay hoped that the Governor would agree to this, 'on the ground that having thus compensated the Ngatihapa claimants, no after claim or future demand can be made by that tribe'. During the next few weeks, Mackay was busy with arrangements for the reserves, and the deed of sale was eventually signed at Mawhera on 21 May 1860.[427]

The Arahura deed recorded a transaction with 'the chiefs and people of the tribe Ngaitahu', and referred to the lands 'named Poutini or Arahura'. The boundaries along the coast from Milford Sound to Kahurangi Point and down the line of alpine peaks were described in the deed and shown on a detailed map drawn in the margin. The 14 signatories included

424. McAloon, 'Position of Ngai Tahu', pp 71–78
425. T H Smith (for McLean) to Mackay, 25 October 1859, *Compendium*, vol 2, p 39
426. Mackay to McLean, 21 September 1861, *Compendium*, vol 2, p 40
427. Ibid, p 41

Puaha Te Rangi (who also signed the payment receipt on the same day), and the witnesses included Mackay's northern associates Tamati Pirimona and Hori Te Karamu.[428]

Mackay stated that he had prepared a schedule of agreed occupation reserves, listing the individuals to whom they were awarded and showing the number of acres to which each individual was entitled. He actually selected and defined the reserves on the ground while he was still in the district, and later submitted maps.[429] In the long strip of West Coast land running from the Heaphy River in the north to the Arawhata River in present-day South Westland, there were 58 reserves altogether, identified in two lists attached to the deed. They consisted of 47 schedule A reserves (6724 acres in total), which were occupation reserves for resident Maori, as well as 11 schedule B reserves (3500 acres in total), which were endowment reserves 'for Religious, Social, and Moral purposes' and were conveyed to the Crown and administered under the Native Reserves Act 1856 for the benefit of their owners. Six of the reserves in this latter class were situated in the area from the Kawatiri (Buller) River north towards Kahurangi.[430] The occupation reserves (schedule A) were to be allocated to named individuals as owners, and a list of the 14 reserves situated in the Nelson province – that is, from Kararoa north to Karamea – was published in 1862, along with details of their location and acreage and the names of the persons to whom they were allocated.[431] A later published list covered the whole purchase, again attaching names to the schedule A reserves, and adding 40 town sections with a total area of 10 acres in Westport (Kawatiri) to the endowment lands.[432] There were also six town sections in Westport, with a total area of four acres, that were allocated to named individual Maori.[433]

A number of people with affiliations to tribes other than Ngai Tahu were awarded interests in the reserves created as part of the Arahura purchase. As we have seen, Puaha Te Rangi 'and a few other Ngatihapa Natives' were allocated 'some reserves' at Kawatiri, although it is not easy to determine precisely how much land and which of the 11 scattered reserves in that locality (totalling 674 acres in all) were allocated to the people identified as Ngati Apa; they also received a reserve near Karamea. We will discuss the question of whether the Kawatiri and Karamea occupation reserves were adequate and what happened to them in later years in chapter 7. In our discussion below, we consider the significance of the inclusion of non-Ngai Tahu people in the West Coast reserves. This does not apply to Ngati Apa

428. 'Deed of Sale [Arahura purchase]', 21 May 1860, *Compendium*, vol 2, pp 385–386. The map is reproduced in the same volume, facing page 42.

429. Mackay to McLean, 21 September 1861, *Compendium*, vol 2, pp 41–42; Loveridge, 'Arahura Purchase', pp 70, 78

430. 'Deed of Sale [Arahura purchase]', 21 May 1860, *Compendium*, vol 2, p 387

431. 'Return of General Reserves for Natives which Have Been Made in the Cessions of Territory to the Crown, Province of Nelson', AJHR, 1862, E-10, pp 14–17. The same list (republished in 1865) is in the *Compendium*, vol 2, pp 313–314.

432. 'General Return of Native Reserves in the South Island', not dated, *Compendium*, vol 2, pp 337–339

433. Alexander, 'Reserves of Te Tau Ihu', vol 2, pp 694–697; 'Schedules of Native Reserves in the Provinces of Nelson, Marlborough and County of Westland', *Compendium*, vol 2, p 337

only, since people of three other iwi (Ngati Tama, Ngati Rarua, and Te Atiawa) also featured in the ownership lists of reserves in many parts of the Arahura purchase area.[434] It has been stated by Dr and Mrs Mitchell that at least 22 of the occupation reserves created in 1860 had ownership lists that included (as part or sole owners) people who were of Ngati Apa, Ngati Rarua, or Ngati Tama descent.[435] In the area north of the Mawhera River, only five of the 15 occupation reserves were allocated to Ngai Tahu owners (and one of these was transferred to a Ngati Rarua owner soon afterwards when its Ngai Tahu owner died). The Kararoa reserve was allocated to Poharama Hotu of Te Atiawa; seven of the 11 Kawatiri reserves went to people associated with iwi other than Ngai Tahu (four to Ngati Apa; one to Ngati Tama; two, later three, to Ngati Rarua); one of the reserves further up the Kawatiri River was allocated to a Ngati Rarua owner, and the other to Ngai Tahu; and the Karamea reserve was awarded to Ngati Apa persons. The six individually awarded town sections in Westport were allocated to Tamati Pirimona Marino of Ngati Tama; Mata Nohinohi, Puaha Te Rangi, and Hoani Mahuika of Ngati Apa; and a Ngai Tahu owner.[436] Interests in the endowment reserves were not finally determined until later – 1926 in the case of the schedule B reserves and 1948 in the case of the Westport town sections – and were the subject of much dispute and litigation, which we will discuss in chapter 7.

6.5.1 Submissions

(1) *Claimant submissions*

(a) *Ngati Rarua, Ngati Tama, and Te Atiawa:* Ngati Toa did not make any submissions relating to the Arahura purchase, but the three other northern tribes involved in the West Coast claims made brief mention of it, mainly concerning the reserves created as part of the transaction.

In Ngati Rarua's submission, the Arahura purchase was a final stage in the buying out of claims to the West Coast, or a continuation of the Waipounamu purchase. The submission drew attention to the acceptance of this point by Crown historian Mr Macky under cross-examination. The creation of reserves was a normal feature of Crown purchases but had not been part of the Waipounamu phase of the transaction process. In 1860, it was attended to, and the reserves were thus not a Ngai Tahu matter only. The purchase included Ngati Rarua people among the resident right holders who were allocated reserves. In their submission Ngati Rarua used evidence from Mr Walzl to give the Te Piki whanau, who based their claim on Niho's raupatu, as an example of those who successfully presented Mackay with a

434. Claimant historians have studied these entitlements in detail. For all non-Ngai Tahu owners of schedule A reserves, see Hilary Mitchell and Maui John Mitchell, 'West Coast of the South Island', report commissioned by the Ngati Tama Manawhenua ki te Tau Ihu Trust and the Te Atiawa Manawhenua ki te Tau Trust, 2002 (doc K4), p 70, tbl 9.21. For Ngati Rarua, see Walzl, 'Ngati Rarua and West Coast', p 48.

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

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

case for being given reserves.[437] This allocation of reserves to Ngati Rarua was described as 'one of the rare moments of Crown conduct consistent with the Treaty principles' that protected the tribe's land rights on the West Coast.[438]

Ngati Tama submitted that the reserves set aside for them as part of the Arahura purchase did not adequately reflect the extent of the tribe's rights on the West Coast: there were only two grants, both in the Kawatiri area. The reserves were small and were granted to individuals rather than to Ngati Tama as an iwi.[439]

Te Atiawa mentioned several reserves in which they had interests, and alleged that the Crown failed to provide an adequate land base for them on the West Coast, but admitted that they had not been able to develop their case fully.[440]

(b) ***Ngati Apa:*** In their amended statement of claim, Ngati Apa said that the Crown had concluded the Arahura purchase with an inadequate and token recognition of the tribe's interests, a recognition made only when Puaha Te Rangi demanded it. The extent of the Ngati Apa resource use had not been determined. The purchase deed failed to define the interests being purchased from them, inadequate compensation was paid, and 'hopelessly inadequate' reserve provision was made.[441]

These assertions were greatly expanded in the tribe's closing submissions. The recognition given in Arahura was described as 'niggardly', and as a 'sidewind' at the very end of Crown purchasing in the northern South Island. Puaha Te Rangi's demand in 1860 was a 'last agonised cry' at the last moment of the purchase programme, and even then the outcome was not recorded on a separate deed, and the reserves promised were 'uncertain and unquantified' and 'inadequate'.[442]

The submissions on the Arahura purchase focused on the evidence relating to Puaha Te Rangi's demand and the response made to it. Counsel rejected as unconvincing what Ngai Tahu and the Crown said about this evidence and placed great weight on the succinct account provided at the time by James Mackay, who had no cause to misrepresent the exchange of views by Puaha and the senior Ngai Tahu speakers. His report could therefore be accepted as accurate. The words Mackay used were 'crucial': Puaha was 'demanding' provision for his people, and Poutini Ngai Tahu were 'agreeing to the justice' of his demand. In other words, Ngai Tahu at the time, speaking with authority and knowledge, recognised and agreed to:

- the 'existence of Ngati Apa as a separate iwi on the West Coast';

437. Counsel for Ngati Rarua, closing submissions, pp 162–163
438. Ibid, p 122
439. Counsel for Ngati Tama, closing submissions, p 104
440. Counsel for Te Atiawa, closing submissions, pp 42–43
441. Ngati Apa, amended statement of claim, 14 February 2003 (claim 1.10(a)), pp 4, 9
442. Counsel for Ngati Apa, closing submissions, pp 3, 22, 28

- a 'differentiation between Ngati Apa and Ngai Tahu people in the northern West Coast area';
- the 'justice of recognising a customary rights claim by Ngati Apa people in that area';
- the appropriateness of Puaha's receiving part of the purchase money; and
- the appropriateness of Puaha's involvement in the allocation of the occupation reserves, 'not for himself as an alleged Ngai Tahu, but as Ngati Apa and for Ngati Apa people'.

Counsel submitted that the counteracting Ngai Tahu evidence amounted only to 'weak efforts to rewrite Maori customary history, ignoring whakapapa linkages from Ngati Apa and seeking to elevate Ngai Tahu linkages to a level which their forebears did not seek to do'.[443] If Puaha had been Ngai Tahu, he would not have needed to make a claim, since the deed already provided for them, but the fact remains that he made his claim for Ngati Apa, and Ngai Tahu agreed at the time, with the result that a payment and reserves were arranged. Counsel argued that there would have been no need for Ngati Apa occupation reserves at Kawatiri if none of that iwi had an occupational presence there.[444]

The allegations made in respect of the Crown's Te Tau Ihu purchasing programme as a whole were partly applicable to the Arahura purchase specifically – that the Crown failed to conduct a full inquiry into customary rights before concluding its purchases. On the West Coast, this resulted in only a limited recognition of Ngati Apa interests, which were inadequately defined in the deed. Inadequate compensation was paid, and inadequate reserves created.[445]

The Crown is said to have imposed artificial boundary lines that did not relate to customary rights (but which assisted Ngai Tahu to claim a northern boundary that was wrongly upheld by the Maori Appellate Court in 1990). Counsel stated that Kahurangi featured in the Arahura deed not because it had anything to do with customary resource use but because it was the boundary of the land at Te Tai Tapu excepted from the Waipounamu purchase. The inland boundary ran inland from Kahurangi across high alpine catchment areas and again had nothing to do with customary resource use; it was always 'a European non-customary line and boundary'.[446]

(2) *Ngai Tahu submissions*

Ngai Tahu was limited by its particular role in this inquiry and did not make submissions about all the matters raised by the claimants, including many of those concerning the Arahura purchase. In their submissions concerning generic issues, however, Ngai Tahu said that, while the Crown did not carry out an adequate inquiry into customary rights before conducting its major purchases in Te Tau Ihu, it eventually did so in the Arahura

443. Counsel for Ngati Apa, closing submissions, pp 30–31
444. Ibid, p 38
445. Ibid, pp 46–48
446. Ibid, pp 37, 48

purchase.[447] The implication was that no injustice was done to any iwi by failing to recognise its interests in the West Coast transaction of 1860. Ngai Tahu made closing submissions about customary rights, denying that Ngati Apa had any such rights on the West Coast south of Kahurangi and asserting that the claims of the raupatu tribes were based only on a limited period of occupation before their withdrawal prior to 1840. We summarised these submissions in chapter 3.

Ngai Tahu did make a response to the claims of Ngati Apa in respect of the Arahura purchase. Ngai Tahu's view of the place of this tribe in the purchase is that they were not a group with rights based on a history of occupation, but 'a small group describing themselves as Ngati Apa' but closely related to Ngai Tahu, who had recently 'established themselves, with Ngai Tahu, in the Kawatiri area'.[448] The first direct self-identification of some of the people at Kawatiri as Ngati Apa was by Puaha Te Rangi during the Arahura negotiations of 1860. In the agreement reached by Ngai Tahu and the Crown (not Ngai Tahu, Ngati Apa, and the Crown), Ngai Tahu accepted that this 'Ngati Apa' group should receive some reserves at Kawatiri, as well as a share in the payment.[449]

With regard to the tribes whose claims were based on what Ngai Tahu saw as a limited period of occupation that came to an end before 1840, counsel submitted that there was no evidence that any members of the three northern tribes 'who remained in the region did so to maintain their tribal mana. There is no evidence that they constituted a separate community, held any power over Ngai Tahu, or had been deputed as representatives of their tribe'. Those who remained had married into Ngai Tahu. Consequently, there was no tribal mana of these iwi or of Ngati Toa on the West Coast by the time of the Arahura purchase.[450]

(3) *Crown submissions*

As we said earlier in this chapter, the Crown submitted that the evidence concerning customary rights on the West Coast was indeterminate and inconclusive, and that therefore it had difficulty in responding in any detail to allegations that it had not recognised the mana and interests of Te Tau Ihu iwi in the takiwa.[451] The only response made to Ngati Apa's allegations concerning the Arahura purchase was in regard to the adequacy of the Kawatiri reserves (see ch 7).[452] With regard to the complaints of Ngati Rarua, Ngati Tama, and Te Atiawa that there was a failure to provide for them adequately in reserves, the Crown argued that their right to inclusion depended on the existence of customary rights, for which the Crown considered the evidence to be 'indeterminate'. Counsel also pointed out that even if

447. Counsel for Ngai Tahu, memorandum concerning generic issues hearings, 30 August 2002 (paper 2.358), p 3
448. Counsel for Ngai Tahu, closing submissions, 16 February 2004 (doc T13), pp 64–65
449. Ibid, pp 55–56
450. Ibid, pp 59–60
451. Crown counsel, closing submissions, p 130
452. Ibid, pp 127–128

there were rights, full participation of these iwi in the Arahura purchase was not necessarily required, since the Waipounamu deeds could be seen as extinguishing their rights on the West Coast.[453]

6.5.2 Tribunal discussion and findings

(1) *Was there an adequate inquiry into Te Tau Ihu iwi rights in the western part of the takiwa prior to completing the Arahura purchase?*

Until the 1860s, the West Coast was only infrequently visited by Pakeha and was very little known. The Crown's inquiry into customary rights there in the period leading up to the Arahura purchase was limited to what was learned by James Mackay during his three visits to the region. From the perspective of the Crown there was no need to inquire extensively, since the rights of Ngati Toa, Ngati Rarua, Ngati Tama, and Te Atiawa had already been acquired (in the Waipounamu purchase), and there had long been an intention to extinguish what was regarded as the only other remaining claim, that of Poutini Ngai Tahu. Mackay was sent with instructions to accomplish this objective, but he did discuss recent West Coast history with Ngai Tahu (he was an accomplished Maori speaker), and satisfied himself that their claim was valid despite their defeat in what he called the 'partial conquest' occurring before 1840. He accepted that Ngai Tahu had the right to offer land up to Kahurangi, though of course he was thinking more about the boundary with Te Tai Tapu than the extent of customary rights. He accepted Ngai Tahu claims up to Kahurangi just as McLean had accepted the northerners' claims down past Arahura; that is, as claims to be extinguished.

In the eyes of Ngai Tahu, this was an adequate inquiry, since it validated their claim to ancestral rights along the whole stretch of coast and accepted that their interests had not been extinguished by the incursion of the northern tribes. It had the defect, however, of being based solely on discussions with Ngai Tahu. Mackay learned nothing from Ngai Tahu about the historical presence of Ngati Apa in the northern part of the region, and did not think of exploring this matter himself. We do not know whether Puaha Te Rangi talked to him about it during their many months of travel to and around the West Coast, but it was only when publicly faced with Puaha's intervention at Poerua in 1860 that he was compelled to make a decision on the issue. Even then, he did not 'inquire' further but simply accepted the legitimacy of his associate's demand for recognition and Ngai Tahu's recommendation that it be granted.

In our view, Ngati Apa have a strong case for their assertion that the Crown failed to conduct an adequate inquiry into customary rights on the West Coast before making its agreement with Ngai Tahu in 1860. We concluded in chapter 3 that Ngati Apa had, along

453. Crown counsel, closing submissions, p 129

with Ngai Tahu, made customary use of the border lands in Kawatiri and northwards, but, after the interests of the raupatu tribes had been acquired, the Crown made no attempt to ascertain whether Ngai Tahu were the only remaining right holders in the region. It was due solely to Puaha Te Rangi's demand that Mackay was forced to consider Ngati Apa's rights at all. As we said earlier in the chapter, the Crown did not claim that its inquiries in Te Tau Ihu had been adequate, but it submitted that the customary rights were not settled at the time and were thus not easily discerned. We do not reject this view altogether, but point out that no effort at all was made to find out what rights existed, other than to explore Ngai Tahu's view of the matter. It is not surprising in these circumstances that Ngati Apa's rights did not emerge until they were presented publicly by Ngati Apa themselves. We note also that, because no inquiry was made at the time, we cannot now be fully certain about the history of this iwi on the West Coast and whether it should have received more acknowledgement than was given in 1860.

(2) *Were the customary rights of Te Tau Ihu iwi fully considered in the Arahura purchase?*

With regard to the rights of the northern raupatu tribes, the Crown had already dealt with them before undertaking the purchase from Ngai Tahu. In the course of negotiating the Arahura transaction, the Crown did not accept the strongly worded protests of Ngai Tahu against the earlier recognition of the northerners' rights. In fact, the Waipounamu purchase was used to some extent as a bargaining tool, and the Crown did not depart from its view that the claims of Ngati Toa and associated tribes on the West Coast were valid and had been recognised. Its objective in 1859–60 – to recognise and extinguish Ngai Tahu rights – did not mean that recognition of the rights of the northern tribes had been withdrawn.

It is in this context that attention has been drawn to the presence of two prominent Golden Bay chiefs in Mackay's entourage in 1860. Dr and Mrs Mitchell say that Tamati Pirimona (Marino) (Ngati Tama, Ngati Rarua, and Te Atiawa) and Hori Te Karamu (Ngati Tama) were not just expeditionary guides and were present at the negotiations to watch over the northerners' interests and to see that the mana of their tribes was maintained – a mana that had already been acknowledged in the Waipounamu purchase and could now be displayed in the chiefs' role as witnesses sanctioning the sale by Ngai Tahu.[454] We believe, as we explained in chapter 3, that the northern tribes still had rights on the West Coast in the 1850s (although they were not as strong as they had been before 1837, and were probably continuing to weaken), and a role of this kind in the Arahura purchase is consistent with a continuing northern presence in the region.

454. Hilary Mitchell and Maui John Mitchell, 'Boundary Issues: West Coast of the South Island', report commissioned by Te Runanganui o te Tau Ihu o te Waka a Maui, 1990 (doc A82), p 37; Hilary Mitchell and Maui John Mitchell, 'Ngati Tama Response to Ngai Tahu Evidence to Te Tau Ihu Inquiry', statement of response to evidence of Ngai Tahu, September 2003 (doc Q21), pp 23–24

6.5.2(2)

Certainly, it is a fact that a number of Ngati Rarua, Ngati Tama, and Te Atiawa people were included in the ownership lists of the reserves created in connection with the Arahura purchase. As we noted earlier, according to Dr and Mrs Mitchell the lists for at least 22 of the 47 occupation reserves included the names of people descended from those tribes (and Ngati Apa). Precisely how this happened is not recorded (although Mr Walzl gives the example of the Te Piki whanau of Ngati Rarua, who successfully presented Mackay with their case for being given reserves at Kawatiri, where they were living in 1860).[455] The Mitchells suggest that Pirimona and Te Karamu were instrumental in seeing that their relatives on the West Coast were included in the reserves.[456] In the words of these authors, 'our clients argue that Ngai Tahu can scarcely claim exclusive manawhenua to as far north as Kahurangi Point, when from one end of the Purchase area to the other, northern Maoris have ownership rights on a very significant proportion of the reserves'.[457] It should be noted too, as further illustration of the northerners' presence and authority on the West Coast, that Pirimona, Te Karamu, and other chiefs of the northern tribes were leaders in the Kawatiri gold rushes in the years following 1861. Pirimona was prominent there for years (and owned land there), and Te Karamu died and was buried there.[458] Most of the Maori who purchased land at Karamea in the 1860s were Ngati Tama.[459]

It has been suggested that the inclusion of members of the northern tribes in the West Coast reserves was not merely an indication of their continuing assertion of rights in the region, but a final stage of the Waipounamu purchase. We have already mentioned the Ngati Rarua submission to this effect. Mr Macky accepted that the Arahura purchase was a continuation of the Waipounamu transactions.[460] It is true that no reserves had been created for the northern tribes on the West Coast when they relinquished their interests to the Crown in the 1850s. The Mitchells argue that the Waipounamu vendors now took the opportunity of obtaining the reserves they had not received before.[461] We accept that the Arahura purchase was a continuation of the Waipounamu purchase in the sense that it completed the extinguishment of claims on the West Coast, but we do not consider that this extended to the creation of reserves for tribes whose interests had already been bought. The northern tribes did still have rights in the region, but few members of these tribes resided there by 1860. It could hardly be said that there were communities of Ngati Rarua, Ngati Tama, and Te Atiawa on the West Coast by this time. People of these tribes were awarded interests in the reserves, which led to Ngati Rarua's submission that this was a 'rare moment' of Crown

455. Walzl, 'Ngati Rarua and West Coast', pp 47, 59, 61
456. Mitchell and Mitchell, 'Boundary Issues', p 35
457. Ibid, p 52
458. Mitchell and Mitchell, 'West Coast', pp 49–58
459. Ibid, pp 81–82, tbl 10.4
460. Michael Macky, under cross-examination, eighteenth hearing, 17–20 November 2003 (transcript 4.18, pp 216, 218–219)
461. Mitchell and Mitchell, 'Boundary Issues', pp 35, 52

adherence to the Treaty. The interests were usually not substantial, however, which led to the submissions of Ngati Tama and Te Atiawa that the reserves set aside for them did not adequately reflect the extent of their tribal rights on the West Coast. (The Crown followed its usual pattern here by arguing in its submission that the extent to which these tribes were entitled to be included in the reserves depended on the extent of their customary rights, for which the evidence was considered to be 'indeterminate'.)

We consider that the rights of the northerners included in the reserve ownership lists were not those of a Ngati Rarua, Ngati Tama, and Te Atiawa community operating independently of Ngai Tahu but those of individuals enjoying rights of residence by means of post-raupatu occupation and marriage into Ngai Tahu. The Crown had already dealt with Ngati Rarua and the other northern tribes as 'tribal' entities in the Waipounamu purchase. Over the years, northerners had established individual residential interests and married into the host community. Ngai Tahu was apparently willing to allow residence rights to individuals who belonged to other tribal groups and who usually also had ancestral or marriage connections with Ngai Tahu. Such people, perhaps especially when their rights were championed by the northern chiefs accompanying Mackay, were thus considered in the Arahura purchase and a good number of them found their way into the reserve allocations, but the question of iwi rights does not arise here.

The situation of Ngati Apa was rather different. We repeat that no inquiry had been made to ascertain the rights of this tribe, but that as a result of Puaha Te Rangi's 'demand' during the negotiations, a Ngati Apa claim had entered the public arena. Despite the lack of inquiry, then, their customary rights had been asserted and had, to some extent, been recognised in the form of participation in the signing of the deed, a share of the payment, and the granting of some reserves. The Crown recognised the existence of Ngati Apa as a separate iwi on the West Coast and acknowledged the claim of Ngati Apa people to customary rights in the region. Ngai Tahu also recognised Puaha's claim, and in fact recommended that the Crown accept it. This was the first and only time in which Ngati Apa rights were recognised in the Crown's nineteenth-century purchasing programme in the South Island, but it was a limited recognition. Ngati Apa were not mentioned in the deed. We agree with Ngati Apa's submissions that the acknowledgement was belated and was given only because Puaha demanded it, that it was not recorded on a deed separate from Ngai Tahu's, that it did not define the interests that were being recognised, and that the reserves resulting from it were 'uncertain and unquantified' and by no means generous.

Who was Puaha Te Rangi? He first enters the story as one of Mackay's travelling companions from Nelson to the West Coast in 1860. Unlike Pirimona and Te Karamu, the other two Maori associates on that journey, Puaha had not previously figured publicly in Te Tau Ihu affairs, although he was of chiefly rank. Dr and Mrs Mitchell explain that he was of Ngati Apa descent and married to the sister of the late Ngati Apa chief Te Rato (Te Kotuku). He was a brother (or maybe cousin) of Mata Nohinohi (Ngati Apa and Ngai Tahu), who was

the mother of Kehu (Heaphy's guide in the 1840s). By a later marriage to Mahuika (Ngati Apa), she was the mother of the Mahuika whom Heaphy encountered at Kawatiri.[462] The Mitchells and Mr Armstrong have written in their research reports that Puaha usually lived at Te Tai Tapu and, together with Mata and Mahuika, at Kawatiri, where Puaha had 'reached an accord' with the northern tribes, and that he often travelled between the two areas.[463] Puaha's Ngati Apa ancestry is undoubted, but we are not sure that the evidence for this account of his life history is strong. In later evidence, presented during our hearings, Dr and Mrs Mitchell state that Puaha appears on the 1857 electoral roll as a resident of Collingwood, but they admit that there is no documentary record of him until then. Perhaps, they suggest, he was living somewhere remote, such as Kawatiri or Karamea, before this time, but 'if that was the case it is surprising that Mackay made no reference to it on their 1860 journey'. Another possibility is that he had been a slave of the northerners at Aorere in Golden Bay.[464] Mr Armstrong suggests that Mackay brought Puaha with him in 1860, not because he needed a guide but because he then knew that Ngati Apa possessed rights at Kawatiri and realised that 'the presence of senior and representative Ngati Apa chiefs at the purchase negotiations was an essential prerequisite if the land was to be acquired'.[465] This is probably going too far, although it is true that we have no information about what Mackay knew or had been told about the Ngati Apa presence at Kawatiri. Whatever Puaha had been doing in the previous 20 or 30 years, and whatever the reason for his accompanying Mackay in 1860, it is clear that he belonged to the Ngati Apa tribe and asserted their Kawatiri claims during the Arahura negotiations, and that he and his wife Ramari, together with his sister or cousin Mata Nohinohi and her Mahuika sons, were named as owners of several occupation reserves and town sections at Kawatiri and an occupation reserve at Karamea.

We do not ignore Ngai Tahu's view of what happened – that the people represented by Puaha, far from being a group with traditional rights, were persons 'describing themselves as Ngati Apa' but actually close relations of Ngai Tahu and recent settlers in Kawatiri as part of a Ngai Tahu move there. During our inquiry, the present-day Ngai Tahu emphasised that the Arahura deed was between their Poutini ancestors and the Crown, and that the 'Ngati Apa' group received a payment share and some reserves because the Ngai Tahu of the time agreed that this should happen. We do not agree that Ngai Tahu's acceptance of Puaha's demand in 1860 is irrelevant to the existence or otherwise of customary rights (the view of Ngai Tahu now being that Ngati Apa had no rights on the West Coast other than those of residents there with the permission of Ngai Tahu). Indeed, we place a good deal of weight

462. Mitchell and Mitchell, 'Boundary Issues', p 34. In a later report, these authors describe Matanohinohi as Puaha's sister, though a whakapapa they attach shows them as being cousins: Mitchell and Mitchell, 'West Coast', p 72, and accompanying supporting documents, p 123.

463. Mitchell and Mitchell, 'Boundary Issues', pp 8, 32

464. Mitchell and Mitchell, 'Ngati Tama Response', pp 20–21

465. Armstrong, 'Ngati Apa ki te Ra To', p 71

on it, since it is one of a number of instances in which a separate Ngati Apa community was named and recognised by all parties at the time. We have already questioned the Ngai Tahu view of the identity of the Kawatiri people whose interests were being advocated by Puaha (see ch 3). Also, we place some weight on the fact that Puaha signed the deed and received payment as a Ngati Apa representative, and we think the actual words used by Mackay in his account are important. The Crown's official had not considered Ngati Apa's claims before, but now he described Puaha's intervention as a 'demand' (not a plea or a request, and made to him rather than to Ngai Tahu), and he could see that Tarapuhi and the other Ngai Tahu present 'admitted the justice of these claims' and 'pressed' him to 'award compensation for them'. He decided it would be 'expedient' to agree: that is, he accepted the claims as valid in order to avoid trouble that might arise later from allegations that Ngati Apa rights had not been recognised. Such a recognition of Ngati Apa had not been made elsewhere in Te Tau Ihu, though it might have been if Crown officials had ascertained the tribe's rights by inquiry and had deemed it 'expedient' to recognise them. On this occasion the existence of their rights did emerge, and the Crown found it useful to acknowledge them. It does not seem to us that Puaha would have asserted Ngati Apa identity and demanded the recognition of Ngati Apa claims if the interests of the Kawatiri people were going to be acknowledged anyway (as Ngai Tahu interests). We are mindful here too of the statement of the Ngai Tahu chief Wereta in 1849 that there was a 'settlement at Kawatiri inhabited mostly by members of the Ngatiapa hapu' (as discussed in chapter 3).

The recognition of Ngati Apa rights at Kawatiri, limited though it was, throws strong doubt on the idea that Ngai Tahu rights on the West Coast, especially in the northern area from Kawatiri to Kahurangi, were exclusive. The Crown did recognise Ngai Tahu rights in the area now described as the Ngai Tahu takiwa, but it also recognised that Ngati Apa had rights in this area too. In our view this belated and limited recognition accorded with the reality that rights in the northern part of the takiwa were shared.

(3) *To what extent were the boundaries of the takiwa portion of the Arahura purchase adequately explained?*

The boundaries of the Arahura purchase in 1860 were the same as those described in considerable detail by Ngai Tahu when they offered to sell in 1857, and the same as those used in the unsuccessful 1859 negotiations. The boundaries were used again in 1860, and were clearly shown on the map accompanying the deed. There are no grounds for saying that the Crown and Ngai Tahu differed in their understanding of what area was covered by the purchase. We do not disagree, however, with Ngati Apa's submission that the boundary running inland from Kahurangi Point was artificial, a Pakeha line drawn without reference to customary resource use. This raises the issue of whether the placing of the northern coastal boundary at Kahurangi was determined with reference to customary rights, as Ngai Tahu say, or simply because previous land transactions had established a boundary there,

as Ngati Apa say. Our understanding is that Ngati Apa customary rights extended south of Kahurangi into a zone where rights were shared with Ngai Tahu. Although Ngai Tahu did nominate Kahurangi as their northern border in the 1857–60 negotiations, the Arahura purchase boundary was placed there not because Ngai Tahu had exclusive rights up to that point but because the Te Tai Tapu land excepted from the Waipounamu purchase had its southern boundary there.

(4) *The 1990 Maori Appellate Court decision to award Ngai Tahu exclusive rights in the statutory takiwa on the basis of the Arahura purchase:*

The decision of the Maori Appellate Court in 1990 was to award Ngai Tahu sole rights on the West Coast up to Kahurangi Point. As on the east coast, this award was made on the ground that at the time of the final Crown purchase, Ngai Tahu was the only iwi that had valid customary rights in the territory defined by the deed of purchase. Our conclusions in chapter 3 about customary rights in the northern part of the West Coast region were quite different to this, in respect of both Ngati Apa and the northern tribes. The decision of the Maori Appellate Court mentioned Ngati Apa's claimed rights in the area, but did not discuss the issue of what rights existed before the northern invasion. The judgment focused on the nature of the rights possessed by Ngati Apa at Kawatiri after they were defeated throughout Te Tau Ihu by the northern tribes. Ngati Apa argued that their rights on the West Coast had been acknowledged by Ngai Tahu's acceptance of Puaha Te Rangi's participation in the Arahura purchase, and by the inclusion of Ngati Apa members in the Kawatiri reserves. Ngai Tahu argued that the Kawatiri people were 'remnants' who sought and were granted refuge with Poutini Ngai Tahu after their defeat by the northerners, and that they were 'a few individuals rather than a tribal entity'. They also argued that Puaha was Ngai Tahu as well as Ngati Apa. The court found no evidence to support any Ngati Apa rights greater than 'a mere right of residence'.[466] This decision was a rejection of the much greater rights claimed by Ngati Apa – a claim that we have found is valid. The decision was in favour of Ngai Tahu rights that we have found were not exclusive but which were the only ones being considered when the Crown set out to conduct the Arahura transaction. The Crown did not inquire into who had rights south of Kahurangi and did not base its purchase boundary on rights. In 1989, however, the Maori Appellate Court was asked to consider what rights existed within an area defined by the most recently created purchase boundary, one that was agreed with one tribe only in the final negotiations undertaken by the Crown (in 1860). The court thus focused on Ngai Tahu rights, the only ones considered to be unextinguished at that time.

466. *In the Matter of a Claim to the Waitangi Tribunal by Henare Rakihia Tau and the Ngai Tahu Trust Board* unreported, 12 November 1990, Maori Appellate Court, Rotorua, 1/89 (doc A4), pp 19–24

(5) *Tribunal findings on the Crown's consideration of Te Tau Ihu iwi rights in the takiwa during the Arahura purchase:*

Our review and discussion of the Crown's treatment of the rights of the iwi of Te Tau Ihu in its execution of the Arahura purchase lead us to several findings.

We find that the Crown did not conduct an adequate inquiry into customary rights on the West Coast before concluding the purchase. It was not regarded as necessary to make such inquiries, since the objective was simply to extinguish the claims of the only tribe thought still to have such claims in the region. The Crown official responsible for the purchase, James Mackay, did satisfy himself that Ngai Tahu's claims were valid, but he gave no consideration to the possibility that other tribes might also have rights in the area. Consequently, the rights of Ngati Apa did not emerge until a member of that tribe publicly claimed them. Even then, Mackay made no inquiry but simply accepted the claim along with Ngai Tahu's. This failure to inquire into and properly identify the customary rights of the tribes in the area amounted to a breach of the Treaty principles of active protection, partnership, and reciprocity. In so far as Ngai Tahu's rights were investigated but Ngati Apa's were not, a breach of the principle of equal treatment had occurred.

The recognition of Ngati Apa rights on the West Coast was a first for this tribe in the whole history of Crown dealings with Maori in Te Tau Ihu. We find, however, that the rights of Ngati Apa, though belatedly acknowledged, were recognised only to a limited degree. They had not been investigated, and while the tribe received a payment and some reserves, this was done not as a separate agreement but as part of a transaction with Ngai Tahu. The procedure followed by the Crown meant that Ngati Apa had no real option other than to acquiesce in the sale and to accept the reserves as the limit of their interests. The northern boundary of the purchase area was determined by previous Crown purchase arrangements rather than by the existence and extent of tribal rights, but, because it was set out in a deed with Ngai Tahu that made no reference to Ngati Apa, it permitted a later misapprehension that Ngai Tahu's rights up to the boundary had been recognised as exclusive. Again, these actions and omissions of the Crown breached the principles of active protection, partnership, and equal treatment.

We do not make specific findings in respect of the Crown's treatment of Ngati Toa, Ngati Rarua, Ngati Tama, and Te Atiawa in the Arahura purchase, since their rights had already been dealt with in the Waipounamu purchase. Members of these tribes were included in the reserves created in accordance with the Arahura purchase, but we see this as a recognition of individual residential rights rather than of tribal rights.

6.6 The North Canterbury and Kaikoura Purchases

6.6.1 The North Canterbury purchase

We received no submissions from Te Tau Ihu claimants on the North Canterbury purchase, but we describe it briefly here since it was the first of the Crown's purchases on the east coast north of Kaiapoi that overlapped part of the Wairau purchase. We take our detail from the Tribunal's *Ngai Tahu Report 1991*.

Despite the protests set off by Mantell's attempt to locate the boundary of the Canterbury purchase at Kaiapohia Pa, nothing was done to conciliate Ngai Tahu until 1856, when Governor Browne visited Lyttelton and asked McLean to investigate Ngai Tahu's case. In August, McLean instructed W J W Hamilton to negotiate a purchase with Ngai Tahu. Hamilton concluded what was called the North Canterbury purchase with the Kaiapohia-based Ngai Tahu on 5 February 1857. The deed provided for the sale to the Crown of some 1,140,000 acres running up the coast from the Rakahuri (Ashley) River, just north of the old Kaiapohia Pa, to the Waiau-ua River (north of the Hurunui), and inland to the sources of the Waiau-ua, Hurunui, and Rakahuri Rivers. There was no map or survey of the boundaries, but the approximate location of the purchase is set out in figure 16, taken from the Tribunal's *Ngai Tahu Report 1991*. The purchase price was stated at £200, but this was subsequently increased to £500 on Hamilton's recommendation.

Though Ngai Tahu requested reserves at Hurunui and Motunau, Hamilton refused to allow these, ostensibly because Ngai Tahu had been given sufficient reserves elsewhere, but actually because the land had already been taken up by European pastoralists. The old Kaiapohia Pa (which was technically inside the boundary of the Canterbury purchase) was expressly reserved, however, thus allowing Ngai Tahu to regain their mana over it, despite Ngati Toa's previous sale of it in 1847. During the Tribunal's Ngai Tahu hearing, the Crown conceded that it had breached the Treaty by failing to make reserves for Ngai Tahu in the North Canterbury block.[467] Ngai Tahu's other grievances were mainly upheld by the Ngai Tahu Tribunal, and its findings were taken into account in the Crown's final settlement with Ngai Tahu.[468]

6.6.2 The Kaikoura purchase

The North Canterbury purchase did not extinguish all Ngai Tahu claims to land north of Kaiapoi. As the Ngai Tahu Tribunal pointed out, Ngai Tahu from Kaiapohia and Kaikoura vigorously prosecuted claims north of the Waiau-ua to Kaikoura, and beyond that as far as the Wairau Valley.[469] Like Paora Tau in his confrontation with Mantell, Whakatau Kaikoura

467. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, pp 648, 658–661
468. Ibid, pp 661–666
469. Ibid, pp 669–675

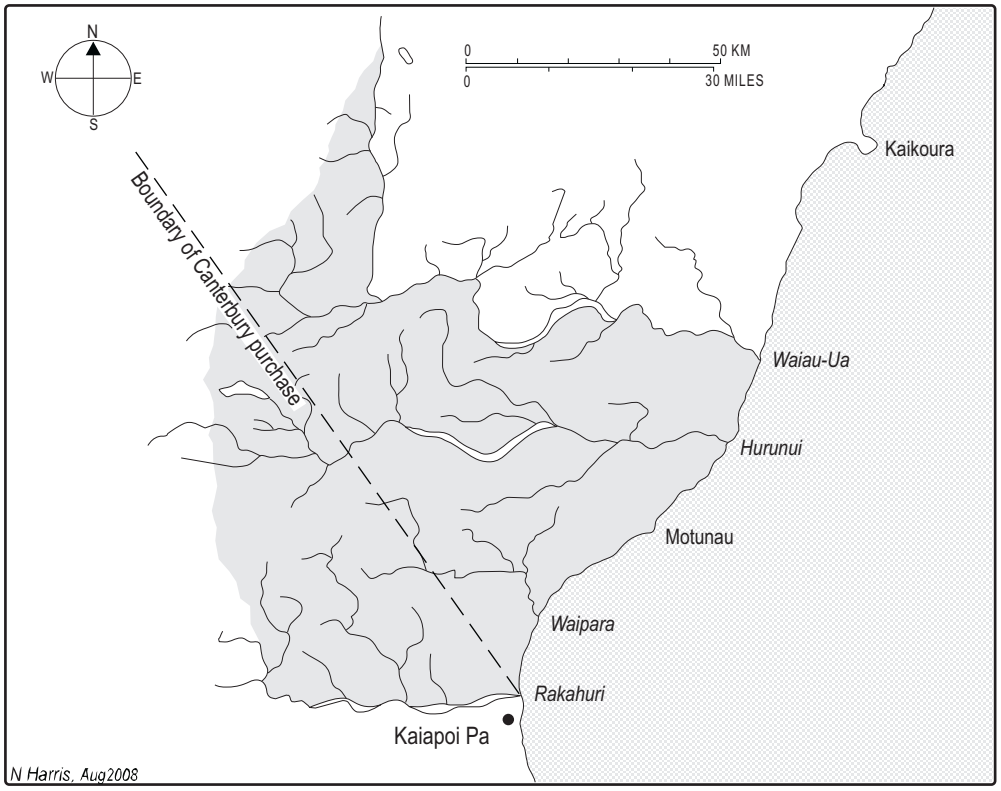

Figure 16: The North Canterbury purchase

Source: Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 2, p 649

wanted to push the Ngai Tahu boundary to Parinui o Whiti, though his people did not live further north than Waipapa. Since pastoralists from Nelson and Canterbury had already taken up most of this land, and Ngai Tahu were threatening to disrupt their occupation, the Governor and McLean decided to investigate Ngai Tahu's further claims. Between 1853 and 1856, McLean had been busy negotiating the blanket Waipounamu purchases in Te Tau Ihu. As we noted, the first of these deeds named Ngai Tahu with other Te Tau Ihu iwi as 'conjointly' claiming the land with Ngati Toa. But, as we also noted, no Waipounamu deed was ever signed with Ngai Tahu. We can, perhaps, regard the Kaikoura deed and, on the West Coast, the Arahura deed, as replacements. They were further blanket purchases, this time for Ngai Tahu's rights. As Dr Bryan Gilling put it, 'Once more the Crown intention was not to investigate ownership, but to "settle claims", which by virtue of their having been made, were presumed to have some degree of legitimacy.'[470]

470. Dr Bryan Gilling, 'Supplementary Material to Report "We Say that We Have the Authority": Ngati Toa's Claim to Customary Rights in Relation to the "Ngai Tahu Takiwa"', report commissioned by the Waitangi Tribunal, 2003 (doc P29(a)), p 20

6.6.2

The Kaikoura purchase was negotiated with some 80 Ngai Tahu living at and near Kaikoura under the leadership of Whakatau.[471] They had been ignored when the Crown concluded the Wairau purchase with Ngati Toa. However, Whakatau was paid £60 for his claims to land in the vicinity of Kaikoura (land that was occupied by Fyffe's whaling station) in 1852. Then, in December 1856, when he heard of Hamilton's proposed purchase of North Canterbury, Whakatau offered to sell land as far north as Parinui o Whiti. At this time, Hamilton concentrated on the North Canterbury purchase, though it only came as far north as Waiau-ua, some distance short of Kaikoura.

It was not until nearly two years later that McLean instructed James Mackay to purchase Kaikoura. Mackay negotiated the purchase during February and March 1859 with Whakatau and various Ngai Tahu claimants who had come into Kaikoura from settlements north and south of the peninsula, including Waipapa. During that period, Mackay was involved in 'protracted argument', as the Ngai Tahu Tribunal described it, with Kaikoura Ngai Tahu. On one occasion he reminded them that the land had already been purchased from Ngati Toa and Te Atiawa, who would, if necessary, give possession of it to the Government. The negotiations were broken off more than once. Mackay was instructed to pay £150, offered £200, but eventually found it necessary to pay Ngai Tahu £300 for the block. Some of them had been working on pastoral runs in the district and they were well aware that pastoralists were having to pay much higher prices to the Crown for their land. Mackay eventually negotiated a purchase agreement with Ngai Tahu on 29 March.[472] The Kaikoura block covered some 2,500,000 acres running from the Hurunui River up the coast to Cape Campbell, around that to Parinui o Whiti, and in a southerly direction to the source of the Waiau-toa, Lake Sumner, and the Hurunui River. The boundaries are shown in figure 17. We note that the southern boundary went beyond the Waiau-ua, the northern boundary of the North Canterbury purchase, to the Hurunui River, thus overlapping that part of the earlier purchase from Ngai Tahu. Mackay explained that he had included the overlapping land because Kaikoura Ngai Tahu had not been paid for their interest in it during the North Canterbury purchase. He did not explain why he had allowed the north-western boundary to go as far as Parinui o Whiti. The Ngai Tahu Tribunal did not comment on this boundary either, since it accepted the Maori Appellate Court's 1990 judgment that Ngai Tahu had an exclusive title as far north as that point.

During the protracted negotiations, Ngai Tahu asked for a reserve of 100,000 acres. Mackay made no provision for reserves in the deed. However, he did arrange a separate agreement that provided for several reserves. These amounted to a mere 5558 acres – from the remnants of land that had not been alienated to Europeans. The largest reserve was at Mangamaunu and Waipapa, and constituted 4800 acres. But even this land was, in Mackay's

471. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, pp 675–682
472. Mackay to McLean, 19 April 1859, *Compendium*, vol 2, pp 35–36

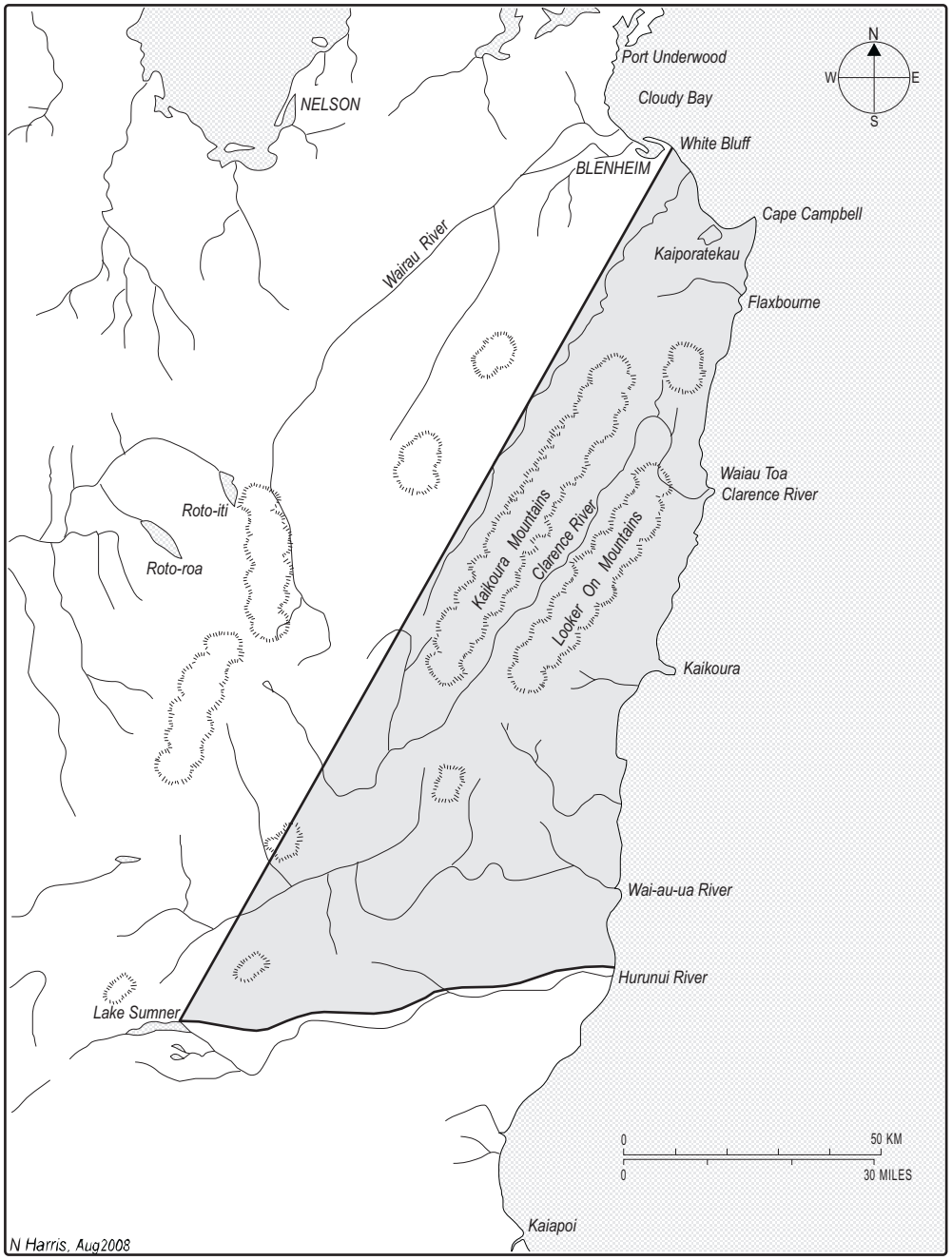

Figure 17: The Kaikoura purchase **Source: AJHR, 1874, G-6**

words, 'of the most useless and worthless description, (especially the block of 4800 acres)' making it necessary for Ngai Tahu to apply to him to purchase some of the land they had just sold.[473]

473. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, pp 669–671, 675–682

6.6.2(1)

Ngai Tahu's grievances over the Kaikoura transaction were submitted to the Ngai Tahu Tribunal and related mainly to the Crown's original Wairau transaction with Ngati Toa, its allowance of European settlement on the block, and the inadequacy of the reserves. The *Ngai Tahu Report 1991* was extremely critical of Mackay's behaviour as a Crown purchase agent, comparing it to the actions of another agent who conducted the purchase of Akaroa:

> This is the Akaroa purchase situation repeating itself. In the tribunal's view it reveals an appalling 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 seeking 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.[474]

The Tribunal's findings were taken into account in the final settlement with Ngai Tahu.[475]

(1) *Claimant submissions*

At our hearing on takiwa issues, the Te Tau Ihu iwi did not challenge Ngai Tahu's rights to the Kaikoura block, except on the issue of exclusivity. The only challenge so far as the east coast takiwa was concerned came from Ngati Toa, who complained that the Maori Appellate Court's decision was restricted to ownership as recorded in the Kaikoura deed.[476] We discuss that decision below.

(2) *Tribunal discussion and findings*

Before we discuss the Maori Appellate Court decision, we need to discuss the Crown's role in the Kaikoura purchase. We use and adapt the tests we used in relation to the Wairau purchase in our previous chapter.

(a) ***Was there an adequate inquiry into Te Tau Ihu iwi rights before completing the Kaikoura purchase?*** Here, we are concerned with the rights of Ngati Toa and Rangitane. Since the Crown had already purportedly purchased Ngati Toa rights (and indeed had, through Grey, regarded them as having exclusive rights) with the Wairau deed, it clearly considered that no further compensation was required. We have already made findings on Ngati Toa rights in relation to the Wairau purchase and need make no further comment here, though we do discuss the Maori Appellate Court award in relation to Ngati Toa's submission below, and in chapter 13.

As had been the case with the Wairau purchase, there was no inquiry into Rangitane rights before Mackay negotiated the Kaikoura purchase with Ngai Tahu. However, we note

474. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, p 682
475. Ibid, pp 682–687
476. Counsel for Ngati Toa Rangatira, closing submissions, p 124

that Hamilton, who purchased North Canterbury for the Crown and was involved in some of the preliminary discussions over the purchase of Kaikoura, thought that Rangitane, though 'now almost extinct', might 'possibly maintain some kind of claim as far south as Waipapa or Waiau Toa (Clarence River)'. Hamilton considered that Ngai Tahu's title south of Waipapa was 'incontrovertible' and admitted that Whakatau's title was 'good, at least as far north as Waipapa, where his people actually now have residence'.[477] Mr Armstrong has analysed the Hamilton report that we have just quoted. We agree with his conclusion that Ngai Tahu, 'by their own admission, were not permanently occupying land north of the Waiau-toa at this time [1859]'[478] Mr Armstrong also argues that the Hamilton report was relied on by the Maori Appellate Court in its 1990 decision that Ngai Tahu had exclusive rights as far north as Parinui o Whiti. But, while Hamilton certainly admitted that Ngai Tahu had told him their rights extended to Parinui o Whiti, he was, as Mr Armstrong points out, 'careful to note that only *south* of the Waiau-toa were Ngai Tahu rights "incontrovertible"' (emphasis in original).[479] We have examined the Hamilton report and agree with Mr Armstrong's reading of it.

(b) ***Were the rights of Te Tau Ihu iwi fully considered during the Kaikoura purchase?*** Since, for different reasons, Ngati Toa and Rangitane rights were not considered at all, we need not pursue very far the question of whether the rights of the Te Tau Ihu iwi were fully considered during the Kaikoura purchase. Mackay's official report on the Kaikoura purchase does not mention Rangitane.[480] Had he carried out the purchase, Hamilton may well have considered Rangitane's rights. Mackay, on the other hand, seems to have considered that he did not need to do so. As a Nelson resident of some standing, Mackay possibly regarded Rangitane as having no rights – on the assumption that they had been 'slaves' of Ngati Toa and were without rights in land. Nevertheless, he must have been familiar with the Waipounamu deeds and known that in the original Ngati Toa deed Rangitane were recognised as 'conjointly' claiming land with Ngati Toa. But he may also have considered that in their deed of 1 February 1856 Rangitane had ostensibly relinquished 'all' their claims 'on the Island'. Mr Armstrong observes that 'from the Crown's perspective' Rangitane's claims 'in their totality' had been extinguished by the Waipounamu deed and, 'from McLean's point of view Rangitane possessed no rights whatsoever outside their reserves and did not require any further consideration in this matter'.[481] This may well explain the Crown's failure to examine Rangitane rights in relation to the Kaikoura purchase, but it does not, in our view, excuse that failure. As we said above, we do not believe that Rangitane's Waipounamu deed

477. Hamilton to McLean, 8 January 1857, *Compendium*, vol 2, p 17
478. Armstrong, 'Right of Deciding', p 197
479. Ibid
480. Mackay to McLean, 19 April 1859, *Compendium*, vol 2, pp 35–36; Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, pp 676–679
481. Armstrong, 'Right of Deciding', p 197 fn 440

did extinguish their rights east of the Wairau River. They continued to exist in 1859 and the Crown should have recognised them in its negotiation for the Kaikoura block.

(c) ***The Maori Appellate Court's 1990 decision to award Ngai Tahu exclusive rights in the statutory takiwa on the basis of the Kaikoura purchase:*** The Maori Appellate Court's 1990 award to Ngai Tahu of exclusive rights in the statutory takiwa on the east coast has become a core issue for this inquiry. The award was made on the ground that, at the time of the Kaikoura purchase, Ngai Tahu was the only iwi that had valid customary ownership of the territory included in the deed of purchase. As the court put it:

> the weight of evidence presented to us was in favour of Ngai Tahu holding rangatiratanga over the east coast of Te Waipounamu from Parinui-O-Whiti south to Hurunui including all the land comprised in the Kaikoura Deed immediately prior to the northern invasion.[482]

Earlier, the court had admitted that there was 'a dearth of clear evidence of physical occupation either by the Northern Iwi, Rangitane or Ngai Tahu of the lands between Kaikoura and Parinui-O-Whiti post the northern invasion [from 1820]'.[483] But then it concluded that:

> notwithstanding the conquest of Ngai Tahu by Ngati Toa and their allies, the failure of the northern tribes to remain in occupation post the conquest and the return of Ngai Tahu thus reviving their ahi kaa meant that at the time of the signing of the [Kaikoura] Deed (1859) the right of ownership of the lands comprised in that Deed was according to customary law principles of take and occupation or use vested in Ngai Tahu.[484]

Our conclusions in chapter 3 on the history of inter-iwi interaction in the statutory takiwa and the consequential development of customary rights differ from those of the Maori Appellate Court. We concluded that all three iwi – Rangitane, Ngati Toa, and Ngai Tahu – had rights in the takiwa by 1859, based on historical claims. However, it seems that none of the three iwi was in occupation at that time, though all three probably made seasonal use of the resources, especially around the fringes of the takiwa. In our view, there had been no 'return of Ngai Tahu thus reviving their ahi kaa' at the time of the signing of the Kaikoura deed. If, by the 'return of Ngai Tahu', the court meant the retaliatory raids that Ngai Tahu did make against Ngati Toa in the 1830s, those did not in our view amount to a conquest, or take raupatu, since the fighting was inconclusive. Ngai Tahu did not remain anywhere in Te Tau Ihu, but went home – to Kaiapohia and places further south. Ngai Tahu did resume occupation of the coast to as far north as Waipapa by the 1850s. The court did not cite any evidence of Ngai Tahu occupation north of there or the Waiau-toa from the late 1830s; nor have we seen any. Though Ngati Toa resumed their occupation of Port Underwood and the

482. *In the Matter of a Claim to the Waitangi Tribunal*, p 19
483. Ibid, p 14
484. Ibid, p 19

Wairau, they did not occupy the east coast (other than four, probably Ngati Toa, women living at Waipapa in 1849 and others who, according to Ngati Toa kaumatua evidence, continued to live at Kaikoura). In our view, Ngai Tahu claims to the east coast north of Waiautoa and as far north as Parinui o Whiti were no stronger than those of Ngati Toa, since neither of them had permanently occupied the land, though after 1840 they had had every opportunity to do so. Instead, they competed against one another to sell it to the Crown.

Ngati Toa's customary title had been extinguished by the Wairau purchase and the inclusion of the block in the 1848 Nelson Crown grant. The purchase of the overlapping Kaikoura block from Ngai Tahu was essentially a form of compensation for their rights in a block that was already Crown land. We consider that it was appropriate for the Crown to compensate them for their historical rights. But we find it difficult to conceive how that 'compensation' could be regarded as confirming Ngai Tahu's exclusive title. It is only possible to accord exclusivity to the last seller if we impugn the title of the first seller, and we see no cause to do that. It is, in our view, preferable to regard the Kaikoura purchase as the last of the Crown's blanket purchases on the east coast, whereby overlapping interests were progressively extinguished. Because the Maori Appellate Court was constrained by the case stated, under which only the last of the Crown's purchases (with Ngai Tahu) were to be considered, it failed to comprehend the significance of the Crown's blanket purchasing policy, whereby, from the Wairau purchase onwards, the overlapping interests of one iwi after another, if not all of them, were extinguished.

But Rangitane rights were extinguished without their consent. They were ignored when the Crown dealt exclusively with Ngati Toa and then Ngai Tahu. We have already discussed the failure to recognise Rangitane with the Wairau purchase. It was no different with the Kaikoura purchase. Mackay was intent on getting a deal with the Kaikoura Ngai Tahu to stop them from interfering with pastoralists who had by that time occupied most of the east coast. As we noted above, Mackay appears not to have considered that Rangitane had rights in the area, or at least considered that they had no rights left after they had been extinguished by Rangitane's Waipounamu deed. As we have said, we do not believe their rights east and south of the Wairau River were extinguished by that deed. Their rights continued to exist and the Crown should have sought their consent to extinguish them before concluding the Kaikoura deed or, alternatively, it should have negotiated a separate transaction with Rangitane.

(d) ***Tribunal findings on the Crown's consideration of Te Tau Ihu iwi rights in the takiwa during the Kaikoura purchase:*** We find that the Crown's failure to consider and fairly extinguish Rangitane's rights during the Kaikoura purchase was in breach of article 2 of the Treaty and the principles of active protection, partnership, and equal treatment.

We consider and make findings in chapter 13 on the Crown's role during the Maori Appellate Court's hearing and in its subsequent legislation to give effect to the court's award.

6.7 The Impact of Blanket Purchasing on Customary Resource-Use Rights

As we discussed previously, the claimants argue that their customary resource-use rights across vast districts were alienated in the 1840s and 1850s as part of the Crown's purchase programme, without their full and informed consent. The resultant reserves were inadequate in size, location, and nature, to either preserve a sufficient base for the continued use of resources in the traditional manner, or for European-style farming. The Crown accepted these allegations in part, conceding that it had failed to ensure that sufficient land was reserved for these purposes, and that this was a breach of Treaty principles. The Crown was not prepared to concede all of the claimants' allegations, however, as to exactly how and why they had lost their customary rights.

6.7.1 The claimants' case

The claimants argued that the Crown had failed to inquire into both the identity of customary right holders, and the nature and extent of the rights at issue. At first, the Crown maintained that it did carry out such an inquiry, especially during the reserve-making process, but ultimately it conceded the point.

Building on that base, the claimants argue in particular that the Crown failed to identify the full range of customary resource-use rights, and to ensure iwi agreement to alienate or extinguish those rights in its purchases. Ngati Koata, for example, argue that their customary practice of travelling throughout the region, inter-dependently with other iwi, using a wide variety of places for harvesting, fishing, rongoa, and other things, was a customary right that should have been protected by the Treaty. It was not something that Ngati Koata and other tribes wanted to surrender (or knew they were surrendering) to the Crown in any of the blanket purchase transactions. As far as possible over time, citing the evidence of Puhanga Tupaea, Ngati Koata have continued to exercise this right in restricted circumstances. The Crown's interpretation of its transactions eventually compelled Maori to relinquish these rights absolutely some years later, without consent or compensation. Had the Crown carried out its Treaty duty and properly informed itself of customary rights in Te Tau Ihu, and of those rights which Ngati Koata wanted and indeed needed to retain for their physical, economic, spiritual, and cultural well-being, this outcome could have been prevented without any great harm to settlement.[485] As Rangitane submitted, many such sites were, in McLean's words, 'valueless to Europeans'.[486]

Ngati Rarua made similar allegations, citing governments' views of 'waste lands' as a major cause of the problem.[487] Ngati Koata relied on the evidence of historian Cathy Marr, who stated under cross-examination:

485. Counsel for Ngati Koata, closing submissions, pp 18–20, and passim
486. Counsel for Rangitane, closing submissions, pp 29–30
487. Counsel for Ngati Rarua, closing submissions, pp 6–9, 40–41

> The evidence seems to suggest in the early period that there was an idea of shared use [of natural resources] for mutual benefit in the sense that Maori didn't seem to mind settlers using the waterways as well but that didn't at that time seem to be a direct Crown assertion of rights as opposed to Maori rights. It seemed to be much more an idea of mutual benefit and there's nothing that I've found that suggests that Maori accepted that that meant the loss of all authority. In fact there's more evidence immediately post that early deed period [post-1856] where Maori seemed to regard their authority as remaining pretty well intact.[488]

Ngati Kuia made a similar submission, based in part on the findings of the *Ngai Tahu Report 1991*. In determining the foreseeable needs of Maori, the Crown needed to investigate and consider demographic factors, the lands being occupied or 'enjoyed', the principal sources of food and their location, and Maori dependence on fishing, seasonal hunting and migratory food-gathering. Any considerations of sufficiency, in the circumstances then prevailing, should have included guaranteed possession of, and access to, mahinga kai. McLean was well aware of Maori needs in this respect. In Ngati Kuia's view, it is 'inexplicable' that he should have taken such a harsh and ungenerous approach to reserve-making. The result was a virtual waste lands policy, in which the Crown only reserved land that was in actual, full-time occupation (and not even all of that), and did nothing to identify or reserve resource-use areas or needs, or other significant sites. The extent of Ngati Kuia's landlessness, for example, then became apparent when the progress of settlement hemmed them in on their actual reserves.[489]

Rangitane agreed, submitting that after the 1856 deed, they still believed that they could use their food-gathering sites throughout the region as before.[490] The large reserve allegedly promised by McLean, with its forests for birding, streams for eeling, land for cultivation, waka landing sites for sea access, and waterways and sheltered bays for fishing and shellfish gathering, would have guaranteed the continuation of some of their customary practices. McLean admitted that they could not with 'justice' be expected to do with less, but then reduced the area actually reserved to a mere pittance.[491]

6.7.2 The Crown's case

The Crown argued at first that its officials wanted to honour Treaty obligations, and were always aware that Maori must retain their pa, cultivations, burial grounds, and additional suitable reserves.[492] By the time its purchases were completed, both officials and Maori generally believed that enough land had been reserved for their foreseeable needs. Subsequent

488. Counsel for Ngati Koata, closing submissions, pp 131–132
489. Counsel for Ngati Kuia, closing submissions, pp 45, 57–58
490. Counsel for Rangitane, closing submissions, pp 26–27
491. Ibid, pp 28–30
492. Crown counsel, submissions concerning generic issues, p 43

failure to survey reserves, and in some cases the purchase of those reserves, meant that many Maori were eventually left with insufficient land, or access to land, either to maintain their traditional economy or to develop farming and other pursuits for the new economy. The Treaty promised that Maori could continue to act tribally, to abandon that way of life, or to steer a middle course. Although the Crown could not anticipate social and economic changes like the advent of forestry or the dairy industry, there was no lack of recognition of the known Maori needs for sustenance in terms of their customary lifestyle. But officials thought that the tenths, plus existing pa, burial grounds, and cultivations, should be sufficient for that.[493]

The Crown changed its position significantly in later submissions. In its closing submission, the Crown cautioned us against the dangers of hindsight, but conceded the evidence that its own actions in making reserves were improper and avoidable by the standards and in the circumstances of the time. In earlier submissions, counsel argued that the failure to ensure that Maori retained sufficient land was something that happened only after the purchasing process. Now, however, the Crown conceded that it arose also from 'a failure to adopt a more generous approach to reserves in the Crown purchase era'. In particular, the Crown made a key concession that has influenced our findings. It adopted completely Dr Ballara's criticisms of the process:

> It is accepted that Dr Ballara is justified when she criticises the Crown acquisition process in the following terms:
>
> > The most serious fault of all revealed in the Crown's process of land acquisition was the failure to think far enough into the future; the failure to create an estate of reserves to replace what Maori had lost through Crown action in pressuring sales. The estates of land lost by Maori should have been replaced with an alternative source of wealth and prosperity for their people that was capable of expansion according to need. It is worth repeating again the words of Alexander Mackay in 1874, because if he could think of the solution as early as then, it could have been thought of earlier (and in fact was present earlier, in the advice of Lord Normanby to Hobson in 1839, that 'the acquisition of land by the Crown for the future settlement of British subjects must be confined to such districts as the natives can alienate, without distress or serious inconvenience to themselves'). After describing the reasons why Maori in the South Island were impoverished by 1874 – because their small reserves meant that when their lands for cultivation lost their fertility there were none to replace them, and because they were cut off from their other traditional sources of supply by close settlement around them – Mackay wrote:
> >
> > > All this might have been obtained [*sic* – 'obviated' in original] in the case of the Southern Natives, had the precaution been taken to set apart land to provide for the

493. Crown counsel, submissions concerning generic issues, pp 35–36, 43

> wants of the Natives, in anticipation of the probable effect of colonization on their former habits. It would have been an easy matter for the Government to have imposed this tax on the landed estate, on (ie, at the time of) the acquisition of Native territory. Such reserves would have afforded easy relief to the people who [had] ceded their lands for a trifle, and formed the only possible way of paying them with justice.[494]

The Crown's acceptance of this argument is critical to the claimants' case, in particular whether customary rights of travel, harvest, hunting, fishing, migratory resource use, and shifting agriculture ought to have been reserved or provided for at the time of purchase.

The Crown conceded that it had a Treaty duty to ensure Maori retained sufficient land, or access to land, to continue their 'traditional economy' for as long as they wished. Counsel adopted the following statements from the *Report on the Muriwhenua Fishing Claim*:

> The Treaty envisaged the protection of tribal authority, culture and customs. It also conferred on individual Maori the same rights and privileges as British subjects. Neither text prevents individual Maori from pursuing a direction of personal choice. The Treaty provided an effective option to Maori to develop along customary lines and from a traditional base, or to assimilate into a new way. Inferentially, it offered a third alternative, to walk in two worlds. That same option is open to all people, is currently much in vogue and may represent the ultimate in partnership. But these are options, that is to say, it was not intended that the partners' choices could be forced.[495]

A key point in this Treaty principle of options, the Crown concluded, was that the partners' choices could not be forced. It seems reasonable to suppose that the speed and extent of the Crown's purchases in Te Tau Ihu did have this very effect of limiting the range of options open to Maori, 'particularly as this related to their ability to maintain a tribal or collective way of life on tribal lands'.[496] The size, location, and range of uses to which reserves could be put, did not allow of it. The Crown's 'failure to ensure that Te Tau Ihu Maori retained or were allowed [to retain] sufficient land for their present and future needs constituted a breach of the principles of the Treaty of Waitangi'.[497]

6.7.3 The Tribunal's view

The Crown's concessions on this point are such that we do not need to discuss it in detail. Nonetheless, it is a critical matter both with regard to Treaty breaches and the prejudicial effects of those breaches. The historical evidence is clear on the matter, thanks largely to

494. Crown counsel, closing submissions, p 4; Ballara, 'Customary Maori Land Tenure', pp 280, 281
495. Crown counsel, closing submissions, p 116
496. Ibid
497. Ibid, p 120

Alexander Mackay's reports on it to the governments of the day. He made a series of reports from 1865 to 1887, which stressed (among other things) that the reserves were too small or too unsuitable for Maori to continue their customary economy, run pigs, or develop pastoral farming. The immediate concern was mitigated, he reported, because Maori kept exercising their traditional resource-use rights far and wide on 'sold' land until closer occupation by settlers prevented them. Swamp drainage, destruction of waterways, and other environmental modification accompanying settlement, further restricted Te Tau Ihu Maori's ability to access and enjoy their customary food sources. In addition to his official reports to the Government, Mackay gave evidence on this matter to a select committee in 1884, and wrote a commission of inquiry report on Marlborough Maori landlessness in 1887. The Tribunal's and claimants' historians have emphasised the importance of Mackay's evidence.

The claimants themselves, in their oral submissions to the Tribunal, outlined the nature of their customary resource-use rights, the significance of those rights to Maori metaphysical and physical relationships with their world, and the degree to which they have attempted to maintain and protect those rights over the generations. Kim Hippolite explained, in his evidence for Ngati Kuia, that much of the practical part of his heritage, involving hunting and food gathering techniques, had been passed down through the generations, unlike te reo and other aspects of the culture.[498] Vern Stafford of Ngati Rarua pointed out too that customary resource use continued in a remote part of the Wairau until relatively recently: 'There were no fences and no one stopped us from travelling or food gathering. It has only been in the last 30 years that the land has been fenced up.'[499] The tenths reserves were also looked upon as Maori land for the purposes of gathering food, even though they had been leased to farmers. According to Paul Morgan's evidence for Ngati Rarua, local Maori continued to take puha, watercress, and eels from the leased land until the 1940s, without problems from the lessees.[500]

Today, it appears that some resource use is actually easier on private land, where permission can be obtained from farmers, than it is on DOC land, where permission is not forthcoming. Priscilla Paul gave us evidence to that effect. In either case, however, she told the Tribunal: 'we should not have to ask for permission to use our taonga.'[501] Ultimately, many claimants find themselves in the position of Luckie Macdonald, who explained how his whanau were gradually shut out from getting watercress in their 'many posses' at Tuamarino: 'Today, virtually all areas for watercress are on private land, sprayed and/or drained.'[502] We heard this kind of evidence about many food gathering sites and other resources.

498. Kim Hippolite, brief of evidence on behalf of Ngati Kuia, 2 March 2003 (doc L12)
499. Vern Stafford, brief of evidence on behalf of Ngati Rarua, 11 August 2000 (doc A84), p 7
500. Paul Morgan, brief of evidence on behalf of Ngati Rarua, 1 February 2001 (doc B11), pp 10–11
501. Priscilla Paul, brief of evidence for Wai 262 on behalf of Ngati Koata, not dated (doc B17(a)), p 20. See also the whole of this brief of evidence and Priscilla Paul, brief of evidence for Wai 566 on behalf of Ngati Koata, not dated (doc B17).
502. Luckie MacDonald, brief of evidence on behalf of Rangitane, 10 March 2003 (doc M8), p 18

Witnesses such as Jim Elkington and Puhanga Tupaea argued that the ability of iwi to exercise their rights over customary resources has been restricted by the Crown, first as a result of losing land and access, and then by a variety of legislative and policy restrictions even on the tiny fraction of land that they retained.[503] We consider the second of these points as it relates to environmental legislation in chapter 11.

First, we must address the question of whether Maori intended to alienate their customary resource-use rights across the entirety of the so-called blanket purchase regions. The Crown's concessions do not extend to this issue. We consider the question of how Maori and the Crown acted with regard to those customary rights after the blanket purchases, and the impact of the purchases on Maori tikanga and resource use. The Crown's historians did not address this issue in their reports. There was, however, broad agreement between the historical evidence of Dr Grant Phillipson (for the Tribunal), Heather Bassett and Richard Kay (for Ngati Koata), Tony Walzl (for Ngati Rarua), Leah Campbell (for Ngati Kuia), David Armstrong (for Rangitane), Anna Hewitt and Dr Diana Morrow (for Te Atiawa), and Dr Angela Ballara and Cathy Marr (for the claimants in general), all of which supports the claimants' allegations. These historians cite official evidence from the 1860s to the 1890s, that Maori continued to exercise customary rights on 'sold' land as if (in their view) they retained those rights, until settlement and changes to the environment forced them to stop. Denied access to or control of former customary resources, and with insufficient land to maintain their customary economy or develop European-style farming, the result for Maori was grinding poverty.[504] The Crown has accepted that evidence, reproducing one particular part of it from Dr Ballara's report.[505]

Along with ongoing utilisation and occupation of the land for so long as this continued to remain possible, Te Tau Ihu iwi also made their expectations of ongoing access clear in various other ways. As briefly noted earlier in the chapter, in 1873 a runanga representing Ngati Rarua, Ngati Tama, and Te Atiawa hapu forwarded a petition to the Government with respect to the interior boundaries of the Waipounamu purchase. They had, the petitioners observed:

503. James Elkington, brief of evidence on behalf of Ngati Koata, not dated (doc B34); James Elkington, brief of evidence for Wai 262 on behalf of Ngati Koata, [1999] (doc B34(A)); Tupaea, brief of evidence on behalf of Ngati Koata; Puhanga Patricia Tupaea, brief of evidence on behalf of Ngati Koata, [1999] (doc B15(a))

504. See Phillipson, *Northern South Island: Part 2*; Bassett and Kay, 'Nga Ture Kaupapa'; Walzl, *Land Issues*; Tony Walzl, *Ngati Rarua Land and Socio-Economic Issues, 1860–1960* (Wellington: Ngati Rarua Iwi Trust, 2000) (doc A50(2)); Campbell, 'A Living People'; Armstrong, 'Right of Deciding'; Anna Hewitt and Dr Diana Morrow, 'Te Atiawa and the Customary Use of Natural Resources in Te Tau Ihu, 1840–2000', report commissioned by the Te Atiawa Manawhenua ki te Tau Ihu Trust, 2000 (doc D5); Ballara, 'Customary Maori Land Tenure'; Cathy Marr, 'Crown–Maori Relations in Te Tau Ihu: Foreshores, Inland Waterways and Associated Mahinga Kai', report commissioned by the Treaty of Waitangi Research Unit on behalf of the Crown Forestry Rental Trust, 1999 (doc A61). Official evidence includes an 1863 report by James Mackay, in addition to the later reports of Alexander Mackay.

505. The material cited by Ballara and accepted by the Crown comes from Mackay, report to Under-Secretary of Native Affairs, 24 June 1874, AJHR, 1874, G-2C, p 2.

now ascertained that the government should not exercise any right to the mountains situated in this Island because when the people first sold the land to the New Zealand Company they pointed out the land as that along the Sea Coast. And in the second sale to the Government [as part of the Waipounamu purchase] such lands as were situated along the Sea Coast were again pointed out as the lands included in the sale. And those lands that were reserved for the Maoris were likewise pointed out by them.

Accordingly we the Maoris still own the Mountains Rivers and Plains which are lying adjacent to the Mountains.[506]

The approximate area under claim can be seen in figure 15, which shows that much of the interior of Te Tau Ihu was subject to the petition. But as Dr Phillipson notes, officials were quick to dismiss this 'hole in the middle' claim, describing it as 'a feeble attempt at repudiation which ought to be checked at once'.[507] Given the repudiation movement which had emerged at Hawke's Bay and increasingly gathered support from iwi in other parts of the country by this time, and a similar claim by Ngai Tahu to the interior of the Canterbury block, the Native Department was inclined to view this latest petition as merely another manifestation of a wider political development.[508] Alexander Mackay, who as commissioner of South Island native reserves after 1864, native reserves commissioner for New Zealand as a whole after 1882, and judge of the Native Land Court from 1884 until his retirement from the bench in the early twentieth century looms large in the later history of Te Tau Ihu, was also asked for his views on the petition. His rejection of the claim on the basis of the wording of the Waipounamu deeds ('all our lands in this Island' supposedly being included in the transaction) was adopted by the Government. Dr Phillipson, though, argues that sketch maps which marked the location of several coastal locations but left the interior largely blank, mistakes in the depiction of the excluded Taitapu block, and the ambiguous status of blocks such as Wakapuaka all point to the probability that the signatories to the Waipounamu deeds were unlikely to have understood these as ceding all their rights everywhere.[509]

Evidence that the iwi of Te Tau Ihu continued to hold a different understanding as to the nature or extent of the pre-1860 land transactions was further revealed in November 1883, when the Native Land Court held its first hearing in the district. As we discuss further in chapter 8, in all some 98 applications for investigation of title were received by the court

506. Pirimona Matenga and others to the Speaker, Donald McLean, Wi Parata, and the Native Minister, 29 August 1873, MA13/17, ArchivesNZ (Phillipson, *Northern South Island: Part 1*, p 168)

507. Clarke, minute for Under-Secretary of Native Affairs, 22 September 1873, MA13/17 (Phillipson, *Northern South Island: Part 1*, p 172)

508. Phillipson, *Northern South Island: Part 1*, p 172. On the repudiation movement, see Keith Sinclair, *Kinds of Peace: Maori People After the Wars, 1870–85* (Auckland: Auckland University Press, 1991), pp 112–120, and Vincent O'Malley, *Agents of Autonomy: Maori Committees in the Nineteenth Century* (Wellington: Huia Publishers, 1998), pp 69–74.

509. Phillipson, *Northern South Island: Part 1*, pp 169–172

at this time.[510] Yet, all but a handful of these claims (to the excluded Taitapu, Wakapuaka, and Rangitoto lands) were peremptorily refused hearing. It was Alexander Mackay who appeared on behalf of the Government to object to the court dealing with the remaining cases on the basis that these concerned lands either previously purchased by the Crown or which were 'native reserves' outside the court's jurisdiction.[511] Although Mackay evidently submitted some kind of map in support of the Crown's claims, and some evidence was heard with respect to one of the applications, the remainder were simply dismissed by the court without further inquiry and without the opportunity for the claimants to explain the basis of their applications for investigation of title.[512] The Crown's title was instead accepted at face value on the basis of the testimony of the Crown official present.

We comment in chapter 8 on the different interpretations placed on these events by various expert witnesses. In our view, however, the numerous applications for investigation of title to the supposedly alienated lands clearly indicate at the very least that many Maori did not share the Crown's understanding as to the extinguishment of all their rights over much of the Te Tau Ihu district. That ought to have prompted further inquiry or investigation into the basis of such a wide disparity between Crown and Maori views, but did not. Instead, by the 1880s it was the Crown's interpretation of an absolute sale to all but the previously defined reserves and excluded blocks as having taken place which prevailed over any alternative Maori perception of matters. Expanding European settlement – which was increasingly confining Te Tau Ihu iwi to their reserves by this time – not only served to highlight contrary views of the original transactions but brought into stark relief the inadequacy of the reserves Maori were expected to subsist upon. As we shall see in chapter 9, that prompted a further series of petitions and requests for additional reserves to be set aside, which were ultimately acknowledged as valid when the Government responded with the South Island Landless Natives Act 1906. We consider the adequacy of this response in chapter 9.

The inadequacy of the original reserves should hardly have come as a surprise, however, given what Crown officials knew of Maori requirements. We noted in the previous chapter that Governor Grey was fully aware of the need for Maori to have a significant land base, so that they could continue to shift their crops and exercise their hunting, fishing, and other resource-use rights. His justification for the large Wairau reserve of 1847 was that:

> The natives do not support themselves solely by cultivation, but from fern-root, – from fishing, – from eel ponds, – from taking ducks, – from hunting wild pigs, for which they require extensive runs, – and by such like pursuits. 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

510. *New Zealand Gazette*, 1883, no 83, pp 1183–1189

511. Walzl, *Land and Socio-Economic Issues*, p 105; Campbell, 'A Living People', p 210; Armstrong, 'Right of Deciding', p 156

512. Walzl, *Land and Socio-Economic Issues*, p 105

> their most important means of subsistence, and they cannot be readily and abruptly forced into becoming solely agricultural people. Such an attempt would be unjust, and it must, for the present, fail, because the natives would not submit to it: indeed they could not do so, for they are not yet, to a sufficient extent, provided even with the most simple agricultural implements; nor have they been instructed in the use of these.[513]

Nonetheless, McLean repurchased the Wairau reserve in 1853, by which time a virtual waste lands policy was firmly entrenched in Crown purchasing. Professor Ward noted that the Waipounamu purchase replaced the Government's 'brief dalliance (in the Wairau purchase) with making large reserves for the continuance of the traditional Maori economy'.[514] Maori (in the South Island at least) were no real threat to the Crown, and thus the Government's scruples on this point were set aside. As the Crown conceded in its closing submissions, the ruthless pragmatism of Crown purchasing in this period resulted in significant Treaty breaches. McLean did not act from ignorance. He was aware of the need for reserves for fishing spots and other forms of resource use, as well as to preserve wahi tapu and recognise ancestral association, but acted in such a way as to leave Maori with an impossibly small land base for such purposes.[515]

Without elaborating too much, we note the early evidence on this point from officials. From Grey's information (cited above), the results of restricting Maori to a land base inadequate for their customary economy were entirely predictable before the Waipounamu purchase. Alexander Mackay was soon reporting that predictable outcome, as Dr Ballara explained and the Crown accepted. From Mackay's evidence, inter alia, the governments of the day were aware that:

- Te Tau Ihu Maori wanted to preserve their tikanga, and they continued to exercise their customary rights over 'sold' land and waterways as before.
- Officials tolerated this exercise of customary rights, but resisted any assertion that 'sold' land or waterways remained in Maori ownership (in the Native Land Court and in response to petitions in the 1880s).
- As 'sold' land became occupied by settlers, Te Tau Ihu Maori's continued exercise of their customary rights was restricted until they were 'hemmed in' on their reserves, with insufficient land to maintain their customary economy or develop European-style farming.
- The spread of settlement resulted both in competition between Maori and settlers for traditional food supplies, and in a cultural clash between European and Maori over the purposes and species for hunting and fishing.

513. Grey to Earl Grey, 7 April 1847, BPP, vol 6, sess 892, pp 16–17
514. Alan Ward, *National Overview*, 3 vols (Wellington: GP Publications, 1997), vol 2, p 134
515. See, for example, Campbell, 'A Living People', pp 126–127; Phillipson, *Northern South Island: Part 1*, pp 130–132

- The spread of settlement also resulted in changes to the environment, including the stocking of waterways with new species of fish, the draining of swamps, and the alteration or draining of other waterways, all of which reduced the ability of Te Tau Ihu Maori to continue exercising their customary rights.
- The result for Te Tau Ihu Maori was 'impoverishment' and landlessness.[516]

Nineteenth-century governments did not deny this evidence, although they did little or nothing to redress these Treaty breaches. In 1884, for example, Mackay gave evidence to the Native Affairs Committee on a Ngati Kuia petition for extra land, testifying that their reserves were too small and their traditional food supplies had been cut off or interfered with as the surrounding lands became occupied by settlers.[517] The committee concluded that the reserves had been sufficient only for 'so long as the natives had the run of the neighbouring unoccupied lands. The lands are now hemmed in by European occupiers and they are thus confined absolutely to their own holdings.'[518] It advised the Government to provide extra land to the petitioners.

Although a number of nineteenth-century petitions and appeals highlighted divergent understandings of earlier land transactions that ought to have prompted further inquiry and investigation by Crown officials, the response to these was inadequate. Governments of the day appeared to be more concerned with defending the Crown's title than with seriously considering whether an injustice had occurred which might have required remedy. We find this response to be in breach of the principles of active protection and redress.

We further find, on the basis of broad agreement between the parties and our own review of the historical evidence, that the Crown acted in serious breach of Treaty principles. It did not allow Maori to retain sufficient land and access to land for the maintenance of their customary economy and resource-use rights, or indeed for their engagement in modern farming practices, thereby reducing their options to bare subsistence. This failure was entirely avoidable in the circumstances of the time, as the Crown accepts. It was a breach of Treaty principles in its own right, and a prejudicial effect of the officials' 'waste lands' approach to Maori land, and of the Crown's blanket purchase process (especially in the Waipounamu purchase). It was also a prejudicial effect of the Crown's failure to properly inquire into Maori customary rights, and to therefore identify those lands and resources which they wished or needed to retain for (in Normanby's words) their own comfort and subsistence.

516. These conclusions are drawn from Phillipson, *Northern South Island: Part 2*, pp 1–33; Bassett and Kay, 'Nga Ture Kaupapa', pp 184–186, 195–197, 200; Walzl, *Land Issues*, pp 346–347; Walzl, *Land and Socio-Economic Issues*, pp 47, 68, 74, 92, 95, 105–106, 129–130, 133–135, 138–140, 147–151; Campbell, 'A Living People', pp 184–190, 194–198, 200–206; Armstrong, 'Right of Deciding', pp 125–128, 134–135, 139–140, 149; Hewitt and Morrow, 'Te Atiawa and Customary Use', pp 59–61; Crown counsel, closing submissions, p 4 (citing Ballara); Marr, 'Crown–Maori Relations', pp 23–68, 72–75, esp pp 54–68.

517. Armstrong, 'Right of Deciding', pp 139–140

518. Ibid, p 140

The result was serious and avoidable poverty, as reported to governments of the day by their own officials.

We find that the Crown breached the Treaty principles of partnership, reciprocity, options, and active protection, to the very serious prejudice of all Te Tau Ihu Maori. This has, in effect, been conceded by the Crown. There was also, as explained in the claimants' evidence, a serious social and cultural prejudice in the prevention of Maori from exercising their tikanga – indeed, their way of life – as they preferred to live it. Again, this point was broadly conceded by the Crown.[519] We consider these breaches of Treaty principles, and the prejudice to Te Tau Ihu Maori, to have been very serious and to require large and culturally appropriate redress.

6.8 Summary and Conclusion

This chapter examined the process whereby remaining customary title to all but a small portion of Te Tau Ihu was extinguished by the Crown by 1860, along with the interests of Te Tau Ihu iwi south of the takiwa. The Crown purchases considered in this chapter constituted an extension of Grey's alternative 'waste land' strategy discussed in the previous chapter. But whereas the Waipounamu purchase of 1853–56 was, like the Wairau transaction before it, premised on the blanket extinguishment of undefined interests, the smaller and more carefully negotiated Pakawau purchase of 1852 was of an altogether different nature. Meanwhile, various blanket deeds covering the west and east coasts south of the takiwa were not nearly as comprehensive as they purported to be, while the later failure to see these as a series of inter-connected transactions was ultimately to prove prejudicial to the interests of Te Tau Ihu iwi seeking recognition of their interests within this area.

Throughout this period, the primary concern of Crown officials remained to acquire extensive tracts of Maori land as quickly and as cheaply as possible, and always well in advance of the needs of settlement. It was Grey who had initiated the significant expansion in Crown purchasing during this era, including kick-starting the Waipounamu purchase in 1853. His able lieutenant, Donald McLean, continued to pursue such policies following Grey's departure for South Africa at the end of that year, and even the devolution of many powers to provincial and general assemblies under the 1852 Constitution Act did little to stymie this effort. Settler politicians and officials, many of them (especially in the Nelson province) formerly linked to the New Zealand Company, remained just as concerned to secure Maori lands for a rapidly expanding Pakeha population, while steadily diminishing Imperial influence served to further push the Crown's Treaty obligations to the background.

519. Crown counsel, closing submissions, p 116

The 96,000 acre Pakawau block, located in the north-western corner of Golden Bay, was purchased for £550 in 1852. It had been the discovery of gold in the area (not included in Spain's award) which had prompted the purchase. The Nelson superintendent, Mathew Richmond, who had been asked to commence negotiations on behalf of the Crown, later reported that 'the longer the purchase was delayed . . . the more difficult it would be of accomplishment, for I found the cupidity of the Natives had already been aroused by the reported value of the minerals upon their land'. Henceforth Richmond sought to disguise the true value of the block, though his efforts to simultaneously secure the purchase of the West Coast south of Pakawau faltered as a consequence of the price demanded by the owners.

A wide and apparently representative collection of right holders signed the Pakawau deed in May 1852. Te Tau Ihu Maori were allowed to decide their own entitlements to the land in their own way, facilitated and aided by officials, and the Crown abided by the result. In effect, the Crown in this instance respected tino rangatiratanga, giving effect to the Treaty guarantee contained in article 2, and acting in accordance with its obligations to its Treaty partner with respect to the identification of right holders and their right to determine as a collective that they wished to transact the land. Though this stood in marked contrast to many other Te Tau Ihu transactions, there were other aspects of the Pakawau purchase which were less credit worthy. These included the low price paid for the block, and efforts to obscure its anticipated mineral wealth, along with the entirely inadequate reserves, totalling just a few hundred acres, set aside for the owners. The deed itself, we concluded, was unnecessarily obscure, and seemingly sought to ensure the transfer of minerals would be included without making this sufficiently explicit. Thus while the inclusive approach to recognition of customary rights in the block was admirable, in other respects we found the transaction to be contrary to the principles of active protection and partnership.

Whereas in the Pakawau purchase the Crown allowed Maori to decide their own entitlements in their own way and recognised the claims of various iwi to a specific block of land, Waipounamu was a rather more ambitious and grander example of the Crown's blanket purchase policy initiated by the Wairau transaction of 1847. Here the Crown, through Grey, took the initiative, commencing with the Ngati Toa deed of August 1853, and extinguished the claims of various iwi one by one. Although Pakawau was successful, it was also seen as cumbersome and potentially risky. The Ngati Toa deed thus marked the start of some 15 separate deeds or deed receipts signed with various iwi, most of which purported to extinguish all of their remaining claims within the South Island. But by once again assuming or assigning a primary right to Ngati Toa, the Crown was able to exert pressure on later groups, who were in no position to repudiate the transaction and could only hope at best to receive payment for their own interests.

Capitalising on a gathering of Ngati Toa at Porirua in August 1853 called to bid the Governor farewell from the colony, Grey successfully pressured the assembled rangatira into

extending their initial offer of their West Coast interests only into one which encompassed all their remaining rights in the South Island. Although it took at least two days before the chiefs agreed to his request, ultimately Grey was able to exploit his knowledge of Maori custom to secure such a parting gift. Some 73 Maori signed the deed on 10 August 1853, most of whom were Ngati Toa from the Wellington-Kapiti coast region. In return for the 'final transfer or sale of all our lands on the said Island', £5000 was to be paid 'to us, and to the Ngatiawa, the Ngatikoata, the Ngatirarua, Rangitane, and Ngaitahu, who, conjointly with ourselves, claim the land'. Of this sum, £2000 was immediately paid to those who signed the deed, with the balance to be distributed in five annual instalments of £500. But although it was the stated intention that the relative distribution of this balance amongst the different iwi would be decided at a hui to be held at Nelson the following summer, McLean failed to return to Te Tau Ihu for more than two years, by which time he had already distributed the remaining £3000 to mostly non-resident Ngati Toa and Te Atiawa in the North Island. Further deeds or receipts negotiated with resident iwi between November 1855 and March 1856 were therefore restricted to a total supplementary sum of up to the £2000 that McLean was authorised to spend to complete the purchase, although a ruthless and uncompromising negotiating stance on his part allowed him to complete the further deals with resident Te Atiawa, Ngati Tama, Ngati Rarua, Rangitane, Ngati Kuia, and Ngati Koata for just £1419. Ngai Tahu, although named as 'conjoint' owners, were not party to any of the follow-up Waipounamu transactions or payments. Ngati Tama and Ngati Kuia, on the other hand, were not named in the 1853 agreement but were later recognised in McLean's subsequent arrangements. Ngati Apa, meanwhile, were neither named in the Ngati Toa deed nor recognised by name as right holders in any later Waipounamu deed. We found the price paid for Waipounamu to be inadequate and in breach of the Treaty and its principles.

Important Ngati Toa and other chiefs were favoured with promises of 26 grants of 200 acres each, along with scrip with a value of £750 in order to overcome initial resistance to the low price offered and in return for their active cooperation in securing the later assent of resident Maori to the purchase. By the 1870s, no grants had been made and with potential sites earmarked for provincial or special settlement purposes, the undertaking was eventually extinguished by way of a cash payment of £5200, the money going to the Public Trustee to administer, rather than directly to the chiefs or their descendants. We found this to be contrary to the principle of equity, in that lands were found for settlers arriving in Te Tau Ihu but a much lower priority was evidently placed on finding the land promised to Ngati Toa.

McLean had initiated surveying of reserves prior to securing the agreement of resident Maori to the Waipounamu purchase, provoking active resistance from local iwi in some instances. This was all part of his broader strategy to remind and reinforce in the minds of the resident iwi that the land had already been purchased from Ngati Toa. McLean could therefore afford to be unbending when it came to negotiating price, and in many instances

adopted a similarly unyielding approach to the question of reserves. Despite this, the determination of particular groups saw the Wakapuaka, Rangitoto, and Taitapu lands excluded from the purchase, although this was not always made clear in the deeds or receipts, and the boundaries of such blocks remained equally vague in some cases.

A major issue for us to consider was whether the various flaws in the Waipounamu deeds were such that these should be considered invalid instruments of alienation. We concluded that this was the case. Although the signatories appeared representative of their communities, uncertainty and confusion over the lands being alienated and those being retained was greatly amplified by a general failure to document numerous verbal undertakings that had also formed part of the agreements. We found the Crown's reliance upon invalid deeds as the basis for its title to land to be in breach of the Treaty and its principles. We further found the failure to fully document the verbal undertakings entered into by Crown officials to be contrary to the principle of active protection. We also found the later failure to respond adequately to requests from Te Tau Ihu Maori for the terms of the agreements to be upheld (through, for example, returning the offshore islands the Crown had wrongly assumed ownership of by virtue of the deeds) to be contrary to the principle of redress.

We were also, however, required to consider the Crown's argument in mitigation that customary rights were so unsettled at the time of the transactions that it could not be assumed these were readily identifiable upon reasonable inquiry. Further to this point, it was also put to us that, even were this shown not to be the case, the Crown had limited resources at its disposal during this period with which to undertake such an inquiry. Both arguments raised issues which were wider than merely the Waipounamu purchase, but were appropriately addressed within this context given that the 1853–56 deeds constituted the final extinguishment of customary rights over most of Te Tau Ihu.

With respect to the former point, the Crown had modified its position somewhat by the time of closing submissions, accepting that some things were settled, but others remained 'fought over'. We accepted the evidence of a large number of tangata whenua witnesses and professional historians that there were principles of customary tenure that were known and understood by Maori at the time of the purchases, and that the Crown had sufficient expertise available to it in order to duly inquire into customary tenure in an adequate manner if it had chosen to do so. The Crown's preferred alternative strategy of acquiring undefined rights in poorly defined districts by virtue of blanket purchases, far from obviating the need for potentially conflict-causing processes to decide between competing or overlapping claims to the same area, in our view merely prolonged tensions.

There were, as we further found, no shortage of mechanisms available to the Crown by which customary title might reasonably have been inquired into at the time. These ranged from formal inquiry by royal commission (based on the Spain commission model), to informal inquiry upon the ground by officials, through to mechanisms more consistent with tribal rangatiratanga. The latter included decision-making via customary Maori processes

such as at open hui, to which all interested parties were invited. It was this model which was successfully employed (alongside initial informal inquiry by Richmond) during the Pakawau purchase of 1852 – a purchase, significantly, for which there were no claims before us with respect to customary rights having been wrongly ignored or insufficiently recognised. But this kind of approach, although cheap to implement, also carried risks for the Crown. A large number of iwi assembled together in such a way placed them in a position of strength, potentially increasing price demands or enabling them to reject Crown offers outright (as initially occurred at the time of the Pakawau purchase with respect to the purchase of the West Coast interests of the iwi concerned).

Hence Grey and McLean opted for an entirely different strategy during the Waipounamu purchase, sidelining an approach which gave heed to rangatiratanga in favour of one which left Te Tau Ihu iwi in a weak position relative to the Crown. Although the Crown acknowledged at the time that prior investigation of Maori customary rights was a vital prerequisite to its acceptance of any decision to sell, it failed to abide by its own standards. We found this to be in serious breach of Treaty principles. Nor, in our view, was this failure mitigated by the subsequent acknowledgement of excluded groups in later transactions, as frequently occurred in Te Tau Ihu. Anything less than the free and informed consent of right holders to a transaction was in serious breach of Treaty principles. By deeming the land to have been purchased and later offering 'compensation' to other customary owners, the Crown acted contrary to the principles of reciprocity, partnership, and active protection.

The parties to our inquiry agreed that there had not been adequate inquiry into customary interests prior to the decision to accord Ngati Toa primary rights within the Waipounamu purchase. Various resident iwi had previously alerted Crown officials to the fact that Ngati Toa's claim was contested. But for the reasons noted previously, the Government found it convenient to ignore this information along with the findings of earlier inquiries, such as that conducted by Commissioner Spain. Nor, in our view, did McLean's argument that the 1853–54 deeds with Ngati Toa were representative of most actual right holders have any validity. While these deeds were broadly representative of Ngati Toa, they were not, we found, representative of other iwi or communities resident in Te Tau Ihu. McLean misrepresented the true position to the Government, and proceeding on the basis of such misrepresentations, cast a veil of legitimacy over what was an invalid transaction under either British or Maori law at the time. By initiating the purchase with non-resident Ngati Toa and later forcing resident iwi to accept compensatory payments, not only had the Crown turned custom on its head but it had adopted a ruthless pragmatism which subverted its Treaty obligations with respect to customary Maori rights to land and their rangatiratanga over it. This was in serious breach of the Treaty and its principles.

Te Tau Ihu Maori sought the enhanced economic opportunities which greater settlement was expected to bring, along with a closer relationship with the Crown, but were denied the right to decide which pieces and how much land they would provide for these purposes as a

consequence of McLean's tactic in enforcing the 1853 deed with Ngati Toa against all comers. Moreover, although for Ngati Kuia and Rangitane belated acknowledgement of their rights was at least forthcoming, Ngati Apa was not accorded even this minimal recognition. The latter tribe's customary rights were deemed extinguished by virtue of the Waipounamu purchase without their consent, and without the minimal payment and reserves which other iwi of Te Tau Ihu at least received. We found this to be in clear breach of article 2 of the Treaty and its principles.

The minimalist subsistence reserves set aside in consequence of the Waipounamu purchase came very close, in our view, to fulfilling Earl Grey's expectation that Maori should be confined solely to their 'occupied' lands upon which capital or labour (or both) had been expended. These did not equip Te Tau Ihu Maori to participate fully in the new colonial economy they had sought. Furthermore, given that the anticipated increase in the value of the reserves was consistently explained to Maori as in large measure constituting the 'real payment' for the remainder of their lands, the inadequacy of those set aside within Te Tau Ihu (and the later alienation of most of these) meant that, in a very real sense, local iwi never fully received this promised consideration.

We concluded that, even with the additional promises of scrip and land grants included, the price paid in the Waipounamu purchase was inadequate. However, the customary owners concerned had little real choice in the matter in consequence of McLean's negotiating strategy, while the absence of a clearly defined block and general vagueness as to which lands precisely were being conveyed denied parties the opportunity for meaningful comparisons. But it was also put to us that Crown officials almost certainly made undertakings to Te Tau Ihu Maori of schools, hospitals, and other 'collateral benefits' which would follow from their consent to the Waipounamu transactions. Claimant historians pointed to the statements of Grey and Browne that this had been standard purchase procedure at the time. We agreed that it was highly likely that McLean and others encouraged such an expectation, but also noted that, regardless of any such undertakings, the Crown also had an obligation under article 3 to ensure that Maori shared equally with Pakeha in the benefits of expanding settlement, infrastructure, and social-service delivery. We examine its performance in this regard in chapter 10.

Although the Waipounamu purchase was intended to be all embracing, later transactions were also required in order to extinguish Ngai Tahu claims overlapping with those covered by the 1853–56 deeds. In this respect the Arahura, North Canterbury, and Kaikoura purchases could, we noted, be seen as substitutes for Waipounamu. On the West Coast, Ngai Tahu interests had supposedly been extinguished as far north as Kawatiri by virtue of the massive Canterbury (or Kemp) purchase of 1848. But Poutini Ngai Tahu later complained that they had received no share of the payment or had any reserves set aside for their own use and rejected any claim on their land by virtue of the deed.

Proposals to acquire the West Coast interests of various Te Tau Ihu iwi at the same time as

the Pakawau purchase foundered, as we saw, owing to what was considered to be the 'exorbitant' sum demanded by Maori. The West Coast interests of Ngati Toa initially, and later Ngati Rarua, Ngati Tama, and Te Atiawa, were extinguished by virtue of the Waipounamu deeds, which usually included reference to the inclusion of 'the Arahura' without further definition. Ngati Apa interests were once again ignored, and the transactions proceeded without any kind of proper inquiry into customary rights on the West Coast.

The Arahura purchase of 1860, intended to finally extinguish remaining Ngai Tahu interests on the West Coast, at the same time provided for the first time some recognition of legitimate Ngati Apa interests in the South Island. Two rangatira from the northern iwi, along with Puaha Te Rangi of Ngati Apa, accompanied James Mackay on his negotiations on the West Coast. Puaha Te Rangi's demand for compensation 'for the claims of the Ngatihapa to lands at the Kawatiri or Buller districts' was supported by resident Poutini Ngai Tahu, as a consequence of which Mackay deemed it expedient to allow the chief and a few other Ngati Apa representatives to participate in the payment and receive some reserves in the neighbourhood of the Buller River. Ultimately other iwi, including Ngati Tama, Ngati Rarua, and Te Atiawa, also featured in the ownership lists for reserves in the northern part of the Arahura block. It was submitted that the allocation of such reserves constituted proof of legitimate customary rights in the area. In Ngati Apa's view, however, the Arahura purchase had involved merely a token and inadequate recognition of their interests, while counsel for other iwi also alleged that the reserves had provided an insufficient land base for them on the West Coast. While Crown counsel considered the evidence on customary rights on the West Coast to be 'indeterminate', counsel for Ngai Tahu submitted that non-Ngai Tahu individuals had been admitted to the ownership of some of the reserves solely on the basis of their relationship with the tribe, and not as a consequence of any kind of independent tribal mana in the region.

As we noted in chapter 3, in our view the northern iwi continued to have rights on the West Coast in the 1850s, although these were weakening over time. There were no substantial communities of Ngati Rarua, Ngati Tama or Te Atiawa permanently residing in the district, and the later inclusion of individuals from these iwi in the lists of owners for some of the reserves reflected the reality of individuals enjoying rights of residence through post-raupatu occupation and intermarriage with Ngai Tahu, rather than constituting evidence of any kind of broader tribal right.

The situation of Ngati Apa was altogether different, although we agree that the recognition of their interests as part of the Arahura deed signed specifically with Ngai Tahu was limited. Once again, there had been no prior investigation of their rights, and the process followed by the Crown made it difficult for Ngai Apa to do anything other than agree to the sale and a few reserves in order to be acknowledged at all. Moreover, the decision to place the northern boundary of the purchase area at Kahurangi was solely determined by previous Crown purchase arrangements, this being the southern boundary of the Te Taitapu

reserve, but because it was set out in a deed with Ngai Tahu that made no reference to Ngati Apa, it made possible a later misapprehension that this constituted the northern boundary of Ngai Tahu's exclusive rights.

On the east coast, meanwhile, the North Canterbury purchase negotiated with Ngai Tahu in 1857 overlapped with part of the earlier Wairau purchase. But it did not extinguish all remaining Ngai Tahu claims north of Kaiapoi and a further deed was required two years later to do so. The Kaikoura purchase, again negotiated exclusively with Ngai Tahu, extended north as far as Parinui o Whiti. There was no inquiry into customary rights in the area prior to the purchase, and the interests of Ngati Toa were deemed to have been extinguished by virtue of the Wairau purchase. There was no mention of Rangitane, but officials may have presumed that their rights in the area had been acquired through the Waipounamu deed they had signed in 1856. Ngai Tahu had been specifically mentioned as 'conjoint' owners in the first Waipounamu deed of 1853, but received none of the payment from this. Just as the Arahura purchase on the West Coast could be regarded as an extension of the Waipounamu transaction so the same could be said for the Kaikoura purchase on the east. The Kaikoura purchase essentially involved compensating Ngai Tahu for land already deemed to belong to the Crown. But while it was, in our view, entirely appropriate for Ngai Tahu to receive recognition of their interests, it is more difficult to see how that compensation could be regarded as confirming Ngai Tahu's exclusive title. It is only possible to accord exclusivity to the last seller if the title of the first is impugned, and we see no need to do that. There is no evidence that either Ngai Tahu or Ngati Toa were in permanent occupation of the block after the 1830s. Nor do we believe that Rangitane rights east and south of the Waiau River were extinguished by the Waipounamu purchase. But because the Maori Appellate Court was constrained in its 1990 decision by consideration solely of the Kaikoura purchase, it failed to fully appreciate the connections between this and the earlier Wairau and Waipounamu transactions. That is a matter we explore in more detail in chapter 13.

Finally, the chapter addressed a generic issue of considerable importance for claimants when we examined the impact of blanket Crown purchasing upon customary resource-use rights. It was alleged by the claimants that the Crown had failed to identify the full range of customary resource-use rights, to ensure iwi agreement to alienate or extinguish those rights, or to ensure that Maori retained sufficient lands to allow the continued exercise of such rights. These included such sites as forests for birding, streams for eeling, land for cultivation (taking into allowance Maori rotational cropping practices), waka landing sites for sea access, and waterways and sheltered bays for fishing and shellfish gathering. It was submitted that Maori sought to ensure their own access to such sites and did not knowingly alienate them. In many instances Te Tau Ihu Maori continued to freely utilise and access such resources after their supposed alienation. But, eventually expanding European settlement, along with the Crown's assumption that such resource-use rights had been extinguished by virtue of the earlier purchases, brought a halt to such practices, and Maori

instead found themselves hemmed in on their entirely inadequate reserves. The Crown accepted in its closing submissions that the inadequacy of those reserves was avoidable and constituted a breach of Treaty principles.

In our view, McLean and other officials did not act out of ignorance in their approach to reserve making. Grey, McLean, and others were well aware of the need to set aside large reserves to allow Maori to continue their customary resource-use practices or to develop European-style farming as they chose. But the same ruthless pragmatism which had prevailed in other aspects of the Crown purchasing programme within Te Tau Ihu was also evident when it came to the question of reserves. The result for local Maori was impoverishment and landlessness. Officials were fully alive to these outcomes, but did little or nothing to alleviate the situation. The consequences of the extensive Crown purchases prior to 1860 were fully apparent in many different ways after that date, as we explore in the following chapters.

The Waipounamu purchase had reduced Te Tau Ihu Maori landholdings to inadequate levels at a stroke and was contrary to the Crown's obligation to actively protect Maori interests. It had done so, furthermore, without the meaningful consent of the vast majority of customary owners. Instead, the Crown made a pre-determined decision to accept the claims of – and push through the purchase with – a small group of non-residents, and to treat those on the ground as merely claimants to additional compensation, following a purchase which was already considered a fait accompli. This was in serious breach of the plain meaning of the Treaty and its principles. The nominal consideration paid, the failure to document and later observe the various verbal undertakings entered into, the failure to ensure that the boundaries of what was and was not included in the transaction were clearly understood, the provision of wholly inadequate reserves, and the complete failure to acknowledge Ngati Apa's customary interests; all were further serious failings in a purchase that fell far short of the Crown's Treaty obligations.

We turn next to examine the making of reserves in the Waipounamu purchase, and to address the question of whether they were, in the words of the time, adequate for the present and future needs of the Te Tau Ihu iwi.