

THE
HAURAKI REPORT

THE
HAURAKI REPORT

VOLUME I

WAI 686

WAITANGI TRIBUNAL REPORT 2006



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.
The Hauraki report / Waitangi Tribunal.
(Waitangi Tribunal report)
Includes bibliographical references.

ISBN 1-86956-285-2

1. Treaty of Waitangi (1840) 2. Maori (New Zealand people)—New Zealand—Hauraki District—Claims. 3. Maori (New Zealand people)—Land tenure—New Zealand—Hauraki District—History. 4. Hauraki District (N.Z.)—History. I. Title.

II. Series

333.33099327—dc 22

www.waitangitribunal.govt.nz

Typeset by the Waitangi Tribunal

Published 2006 by Legislation Direct, Wellington, New Zealand

Printed by SecuraCopy, Wellington, New Zealand

10 09 08 07 06 5 4 3 2 1

Set in Adobe Minion Pro and Cronos Pro typefaces



Photo courtesy Waikato Times

DAME EVELYN STOKES

1936 – 2005

The members of the Hauraki Tribunal wish to pay tribute to the late Dame Evelyn Stokes for her great contribution to the Hauraki claims process and for her insight, vast knowledge, advice, wise counsel, and understanding and appreciation of claimant sensitivities and issues. Her participation in the completion of this report was particularly significant and invaluable. She enjoyed an earned respect from fellow Tribunal members, the legal community, and other professionals, as well as from claimants, as a person of high integrity and intellect.

Dame Evelyn was contributing material for this report right up to a brief period before her death. Despite suffering from ill health for many years, her dedication to her tasks was entire. We of the Hauraki Tribunal are profoundly appreciative of her service and collegial sense and for her companionship. She will sadly not share her accomplishments in providing further to the history and reshaping of our nation.

Auē e te mamae kai hea tāu whakamahutanga

Auē e te kino kai hea tōu pai

Aue e te pōuri kai hea tōu māramatanga

Auē e te mate kai hea tāu wero

Auē e te rēinga kai hea tōu wikitōria

Haere e te kahurangi

Kua okioki koe ki te kōpū o Papatūānuku

Ko tō wairua kai mua tonu i a mātau e āritarita ana

Tōiriiri tonu mai i ō takahanga i te motu nei

Kai te pāorooro tonu o tapuwae ki tai ki tuawhenua

Nā reira noho tonu mai i te whenua

E kiia nei he whenua tauri kura he whenua houkura

Otiia ki te awa o te āke āke

Moa mai i te hāmarietanga o te pō

E te kahurangi nā te tini nā te mano

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ACKNOWLEDGEMENTS

The Tribunal would like to thank Max Oulton of the University of Waikato for producing the maps for this report. We also wish to acknowledge the contribution of a number of Waitangi Tribunal staff, past and present, who assisted us both during the hearing of the claims and in the writing of this report. They included Lisa Hippolite, Charlene Radovanovich, and Midge Te Kani (claims administration); Dougal Ellis, Grant Phillipson, and Matthew Russell (research and claims facilitation); Ewan Johnston, Kate Riddell, Alan Ward, and Mathew Ward (report writing); Margot Fry, Andrew Gregg, and Tony Nightingale (report-writing assistance); Angela Ballara (editing); Lissa Chong and Wendy Hart (reference checking); and Dominic Hurley (production).

The Honourable Parekura Horomia
Minister of Māori Affairs
Parliament Buildings
WELLINGTON



The Waitangi Tribunal
141 The Terrace
WELLINGTON

6 June 2006

E muri ahiahi ka totoko te aroha
Wairua o te hanga ka wehe i ahau
' Wai te teretere e rere i waho rā?
Nōu e te iwi Hauraki!
E hoki koutou
Ripa ki te whenua ki Tōtara rā ia
Tēnei mātou kei runga i te toka
Mē rauhi mai te wairua kau
Te waka rā e i tātaia mai
Toroa i te wai kia paia atu koe
Hāere ki raro rā ki Hauraki rā ia
Hei mātakitaki mai mā 'ati Maru
Nei ka pae noa ki Tikapa Moana

Ki te Hōnore Te Minita,

Tēnei ka mihi ake ki o tātau tio kua takoto ki te onematua i whiua ai ngā kai utu a te tangata nei a Aituā a hūpē rāua ko roimata, ngā kupu hoki e rite ana mo te taonga a te anu a te mātao, arā, o tātau mate tūātini i horaina ki runga i ngā pū harakeke, i ngā takapau o te mamae o te pōuri o te aroha. He mate tūturu e kore e hoki mai ēngari te mate marama he hoki mai ki a tātau. Ka ngaro te maru o te tangata ko tā tātau he haku he tangi he haku he tangi. Nā reira, haere e ngā nui e ngā rahi e ngā mana, taukapokapo mai koutou ngā tini whetū ki te ake ake o te rangi.

He tāpaetanga atu tēnei nā mātau, nā Te Taraipiunara o Waitangi ki mua i tōu aroaro i ngā kaupapa whakapae a ngā iwi o Hauraki o Tikapa Moana hoki, me a mātau whakataunga, a mātau whakahaunga anō hoki kia whakapapapounamutia ngā ngaru pukepuke e tukituki nei i a rātau. Kia āta whakamoea ngā patu ki roto i ngā whare, kia tahitahi ngā papa o te riri kia papa mānia ai. Ko te tūmanako ka kitea te huarahi e unuhia ai o rātau anipā, e whakaiia

ai o rātau pīere nuku, me te whakawātea atu i ngā taunahua kia tipu ai te rongomau me te rangimārie ki te whenua o o rātau mātua tīpuna.

Nō konei e te Minita, kua whakapototia te tauwhāinga kia whānau ko te tūhauora ko te huhuatanga.

Owhiti, tūturu whakamaua kia tīnā, tīnā!

We present to you our report on claims submitted under the Treaty of Waitangi Act 1975 in respect of the Hauraki inquiry district. This district comprises the southern part of Tikapa Moana (the Hauraki Gulf) and its islands, the Coromandel Peninsula, and the Waihou and Piako Valleys inland to Ohinemuri and Te Aroha.

The report covers the claims of the Hauraki Maori Trust Board (HMTB), established by the Hauraki Maori Trust Board Act 1988 to research and present the claims of 12 iwi listed in the Act and their descendants, together with 55 additional claims from the various iwi, hapu, and whanau affiliated to HMTB, and some other groups not separately named in the 1988 Act. We have also considered the intersecting claims of HMTB and the Tainui Maori Trust Board to the Maramarua Crown Forest lands. The various claims have been consolidated under the designation Wai 686 in the Tribunal's registration system.

Central issues of the claims include the various modes of alienation of Maori land in the inquiry district since 1840, war and raupatu in the 1860s, gold mining and the extraction of kauri and other timber, the protection of wahi tapu and of movable taonga, foreshore and seabed issues, public works takings, the rating of Maori land, the law relating to succession to Maori land, damage to the environment, and the socio-economic impacts of colonisation on Hauraki Maori.

Our findings are located at the end of each chapter in the report, and salient features of those findings are drawn together in the executive summary at the beginning of the report.

To our great regret and sorrow, one of our members, Dame Evelyn Stokes, died in August 2005. Fortunately, our report, to which she made an invaluable contribution, was close to completion by that time.



Dame Augusta Wallace
Presiding officer

ABBREVIATIONS

a, ac	acre
AJHR	<i>Appendix to the Journals of the House of Representatives</i>
ALR	<i>Australian Law Reports</i>
app	appendix
App Cas	<i>Law Reports, Appeal Cases</i>
ARA	Auckland Regional Authority
Atk	<i>Atkyn's Reports</i>
ATL	Alexander Turnbull Library
BPP	<i>British Parliamentary Papers</i>
CA	Court of Appeal
CD	compact disc
ch	chapter
CJ	chief justice (when used after a surname)
cl	clause
cmmd	command
CMS	Church Missionary Society
DNZB	<i>The Dictionary of New Zealand Biography</i> (5 vols, Wellington: Department of Internal Affairs, 1990–2000)
doc	document
ed	edition, editor
ER	<i>English Reports</i>
GBPP	<i>Great Britain Parliamentary Papers</i>
ha	hectare
HCA	High Court of Australia
J	justice (when used after a surname)
KTC	Kauri Timber Company
LINZ	Land Information New Zealand
ltd	limited
LR Eq	<i>Law Reports, Equity Cases</i>
MA	master of arts and Maori Affairs file series
MD	Mines Department file
MA-MLP	Maori Affairs head office file
MS	manuscript
n	note
NMO	native medical officer
no	number
NO	Maori Affairs head office file
NT	Northern Territory
NZ Jur (NS)	<i>New Zealand Jurist, New Series</i>
NZJH	<i>New Zealand Journal of History</i>
NZLR	<i>New Zealand Law Reports</i>
P	perch

ABBREVIATIONS

p, pp	page, pages
para	paragraph
PC	Privy Council
Plowd	<i>Plowden's Reports</i>
r	rood
RDB	<i>Raupatu Document Bank</i> (139 vols, Wellington: Waitangi Tribunal, 1990)
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
SC	Supreme Court
sec	section (of this report, a book, etc)
sess	session
US	<i>Reports of Cases in the Supreme Court of the United States of America</i>
USSC	Union Steam Saw Moulding Sash and Door Company
v	and
vers	version
Ves	<i>Vesey Jun's Reports</i>
vol	volume
VUWLR	<i>Victoria University of Wellington Law Review</i>
WA	Western Australia

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

Unless otherwise stated, footnote references to claims, statements, papers, and documents are to the record of inquiry, the index to which is reproduced in the appendix.

Unless otherwise stated, footnote references to Archives NZ are to the Wellington branch.

EXECUTIVE SUMMARY

ES.1 THE DISTRICT, THE PEOPLE, AND THEIR CLAIMS

The Hauraki inquiry district comprises the southern part of Tikapa Moana – the Hauraki Gulf – and its islands, the Coromandel Peninsula and the lower Waihou and Piako Valleys. It is the home of many iwi. Some, such as Ngati Hako, Ngai Tai, and Patukirikiri, trace their origins in part from before the arrival of the famous waka. Others trace their origins from those waka, including Ngati Huarere and Ngati Hei from Te Arawa and Ngati Rahiri Tumutumu from Mataatua. From about the late sixteenth century, however, traditional history is dominated by the invasion and settlement of the district by iwi of Tainui origin, collectively known as the Marutuahu tribes. They include Ngati Maru, Ngati Tamatera, Ngati Whanaunga, and Ngati Rongo-u. During the course of the Marutuahu conquests, Ngati Paoa also entered the district, as did a smaller tribe, Ngati Tara (or Ngati Koi). By the early nineteenth century, Hauraki was occupied by an intricate patchwork of groups, predominantly of Marutuahu descent, intermingled with groups of earlier occupants, and all having many connections through intermarriage and shifting alliances. In the mid-nineteenth century, tuku of land were made to three hapu of Ngati Porou at Harataunga and Mataora, and to a section of Ngati Pukenga at Manaia.

The first Treaty claims were lodged by the Hauraki Maori Trust Board, constituted by Act of Parliament in 1988 as a body corporate representing most of the above tribes. As research proceeded, many of the groups named in the 1988 Act (or sections of them), and others not named but connected with the named tribes, lodged separate claims. The Marutuahu tribes also lodged a claim, bringing additional evidence about their collective interests and those of the constituent iwi. There were 56 claims in all, including eight that lapsed or were withdrawn, or that related mainly to lands outside the inquiry district where Hauraki tribes also have customary interests.

Details of these claims can be found in the main body of the report. All relate to the process of colonisation under the British Crown, the extraction of the resources of the region (notably gold and kauri) and the purchase of all but 2.6 per cent of the land in the inquiry district. Our report traces the history of colonisation as a connected narrative, while discussing chapter by chapter the Treaty issues arising in each phase of the Crown's interaction with Hauraki iwi and giving our findings on claims of breach of Treaty principles. In this summary, we present only our findings on the most important issues, or those most common to the various claimant groups. For findings on matters particular to only one or few claims, we refer readers to the main body of the report.

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ES.2 PRE-1840 TRANSACTIONS AND PRE-EMPTION WAIVER PURCHASES

Pre-1840 transactions between settlers and Maori, and direct purchases by settlers from Maori under Governor FitzRoy's waiver of Crown pre-emption in 1844 to 1846, were investigated by a sequence of land claims commissioners. The investigations resulted in some 42,000 acres of 'old land claims' and about 3400 acres of waiver purchases in Hauraki being awarded to settlers. The Crown retained some 5700 acres as 'surplus land' – that is, land where the transaction was considered to have extinguished native title (creating a title in the Crown, which had assumed sovereignty in 1840) – and in the interests of curtailing 'land sharking' and promoting closer settlement, the land was not granted by the Crown to the initial purchaser.

This was a relatively small percentage of the claim area, compared with old land claims in Tai Tokerau, or in South Auckland where Hauraki tribes were among the customary right-owners. It stands to the Crown's credit that its requirement that the claims be investigated at all, and alienations affirmed by Maori witnesses, caused some hundreds of thousands of acres of speculative claims in Hauraki to lapse or be withdrawn. Even so, Maori claimants to the Tribunal have submitted that the inquiries by the land claims commissioners were inadequate and that most transactions were not intended to be sales in the European sense but grants of occupation wherein the tribes retained underlying rights.

In our view, the evidence shows that the investigations were indeed flawed and many, though not all, of the initial transactions did not extinguish all the interests of all the customary right-owners. However, we have also noted that many of the transactions were effectively renegotiated during or soon after investigations by the land claims commissioners, Maori frequently accepting the transfer of areas much reduced from those originally claimed by settlers. Some disputed areas, notably in Piako and on Waiheke Island, were overlaid by subsequent Crown purchases.

The Crown acknowledges that the investigations into McCaskill and Martin's purchase at Hikutaia were inadequate, and were 'a failure of process and good faith'. It accepts also that the land later awarded to Ngati Pu hapu was inadequate compensation. We agree, and note also that other hapu besides Ngati Pu (particularly Ngati Karaua) may have been prejudiced. We also consider Bell's award to Willis of 1797 acres at Tairua to have been based on flimsy evidence.

Some claimants have focused particularly upon the Crown's retention of land as 'surplus' to be the most prejudicial aspect of these matters. However, we do not consider that the land retained as 'surplus' was in a fundamentally different category from that awarded to the initial settler transactors: in respect of both categories Maori were prejudiced by the inadequate, protracted, and confused nature of the Crown's investigation of the initial transactions or by the failure, in some cases, to make adequate and prompt adjustments to remedy defects.

ES.3 CROWN PURCHASES, PRE-1865

Between 48,000 and 60,000 acres in the inquiry district were purchased by the Crown between 1840 and 1865, under the Crown's pre-emptive (monopoly) right. The claimants submit that the land purchase agents were manipulative, that Maori were paid less than potential market value for their land, and that virtually no reserves were made for the vendors. The Crown contends that genuine bargaining occurred, that Hauraki Maori were not pressured into selling, and that, although very little land was formally reserved, no more than 6 per cent of the inquiry district was purchased, leaving iwi with ample land.

In our view, the main prejudice to Maori in this period was that from 1847 the Crown reimposed a monopoly right of purchase. Governor Grey and his advisers considered, but did not develop, a system of licensed direct dealing, including leasing, between Maori and settlers. It has not been shown that the Crown paid only derisory prices for the land it purchased: in the instances where evidence is available the prices appear to have averaged between two shillings and four shillings an acre – much higher than the prices paid in the South Island, Hawke's Bay, and Wairarapa. However, the absence of an open market, including the option of leasing, denied Maori a range of commercial opportunities.

While Hauraki Maori in 1865 still possessed over 80 per cent of the inquiry district, and no tribe was absolutely bereft of land, the Crown's purchases, together with pre-emption waiver purchases, resulted in the acquisition of almost all the commercially strategic gulf islands and mainland harbours. This contributed to the sharp decline in the fortunes of some tribes which had initially benefited from the trading advantage of proximity to Auckland. When chief land purchase officer Donald McLean purchased eastern Waiheke in 1858, he suggested that land would be made available there for various tribes wishing to continue trade with Auckland, but this was not done.

ES.4 WAR AND RAUPATU**ES.4.1 General issues**

In the mounting tensions of late June 1863, following the resumption of fighting in Taranaki on 4 May, Grey explained to his Ministers that, should military action against the Kingitanga also be considered necessary, his forces would need to take control of South Auckland and Hauraki lands eastward to Pukorokoro because of their strategic importance in relation to Auckland and the British lines of supply into Waikato. Although they had committed no acts of aggression against the Crown, Hauraki were thus caught up in the tensions between the Crown and the Kingitanga. Following General Cameron's advance across the Mangatawhiri on 12 July, some sections of the Hauraki tribes took up arms in what they saw as legitimate

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defense of their lands and people. They lost many lives in the fighting which followed and great social dislocation was caused to so-called ‘rebels’ and ‘loyalists’ alike.

The confiscations of land which accompanied the British military advance included the East Wairoa block of at least 51,000 acres (owned by Hauraki tribes), and over a million acres in central and eastern Waikato in which Hauraki tribes owned significant interests. Only a few thousand pounds and 3000 or 4000 acres of land have ever been awarded to Hauraki Maori in compensation for these losses, even to those deemed ‘loyal’. Further reserves were promised under the Waikato Confiscated Lands Act 1880, but the Crown acknowledges that ‘These arrangements were not formalised at the time leading to confusion and problems . . . 15 years later when they were eventually formalised.’¹

The Crown has further conceded that:

- ▶ ‘In general terms that the application of the confiscation policy in respect of land in East Wairoa and central Waikato (Maramarua) was unjust and was in breach of the principles of the Treaty.’
- ▶ ‘The East Wairoa confiscation [was] . . . from groups that were, for the most part, considered loyal.’
- ▶ ‘Unlike the Waikato confiscations, very limited land within the East Wairoa confiscation was returned to Maori.’
- ▶ ‘Many of the claimants find the use of the term rebel perjorative . . . It is further acknowledged that this has had a detrimental effect.’
- ▶ ‘The stark evidence of the dislocation caused by the period of war and confiscation, and the effects of this on Maori communities, weighs heavily with the Crown.’
- ▶ ‘The legislative authority to take the land was never perfected and the practical machinery required to implement it never really existed in New Zealand.’
- ▶ ‘Given the very real potential for injustice arising from the inherently draconian nature of the powers and having abrogated the Article 2 guarantee of protection, the Crown was under a Treaty duty to take particular care in implementing the legislation. However, it clearly failed to do so.’²

We welcome the Crown’s concessions because of the seriousness of the injuries to Hauraki tribes, and because the particular interests of Hauraki have not been taken account of in earlier attempts at redress. The Sim commission of 1928 did not consider the East Wairoa confiscation apart from the Waikato confiscations generally, nor the extent to which Hauraki tribes were affected by the central Waikato confiscation. Hauraki iwi, as such, were not included amongst the beneficiaries of the Waikato Raupatu Claims Settlement Act 1995 and the boundary of the Waikato Tainui raupatu claim area excluded the East Wairoa confiscation.

1. Paper 2.550, p 22

2. Document AA1, pp 78–79, 106–107

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While making the above concessions, the Crown offered evidence, apparently in mitigation, about the origins of the conflict between the Crown and Waikato – evidence not considered by the Waitangi Tribunal prior to the negotiation of the 1995 Waikato raupatu settlement. Essentially, the Crown argued that Governor Grey’s policy from late 1861 was peaceable, but that he felt obliged to assert military authority over Waikato following the attack on British troops in Taranaki in May 1863 (apparently instigated by the Kingitanga leader Rewi Maniapoto), and indications of a possible attack on Auckland by elements of the Kingitanga. We have considered this and other historical evidence and find that, while there were genuine fears in Auckland of an attack, the prospect of some kind of general conspiracy or rising was exaggerated by Grey and his Ministers. The roots of the conflict in 1863 lay rather in the Crown’s failure to negotiate a genuine settlement in Taranaki, the bellicose attitude of Ministers towards the Kingitanga, and Grey’s failure to reach an accord with that body.

ES.4.2 Maramarua Forest

The map attached to the Waikato deed of settlement 1995 included the area of the Maramarua Crown Forest, but under clause 17.3 of the deed, the Crown and Waikato acknowledged ‘that the Maramarua lands were the subject of competing claims by the Hauraki Māori Trust Board’. That matter was to be resolved by an appropriate authority or by agreement before any assets relating to Maramarua Forest were transferred. The Maramarua lands are within the Hauraki inquiry district of the Tribunal.

Hauraki claimants and Waikato Tainui did not reach agreement regarding the Maramarua lands and forest but made various submissions to us regarding them. Having examined the evidence, we find that:

- ▶ There is no need to determine a ‘boundary’ between Hauraki and Waikato as both had customary interests within the Maramarua district and share kin links and overlapping and intersecting rights along a border zone between the Waikato and Hauraki sections of Tainui waka descendants. Waikato and Hauraki retain their ancestral connections with the Maramarua district.
- ▶ If Maramarua Forest is not transferred to Hauraki in settlement of their claims, then Waikato retain only the right of first refusal to purchase, having already been paid \$12.25 million as the value of the forest land by the Crown in final settlement.
- ▶ We consider that the Crown has met all its obligations in the Waikato Raupatu Claims Settlement Act 1995 and deed of settlement by the payment of money in settlement of Waikato Tainui claims to Maramarua lands.
- ▶ The Maramarua Forest and other Crown lands in the district may therefore be considered by Hauraki claimants and the Crown, through the Office of Treaty Settlements,

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free of other claims and potentially the subject of negotiations in settlement of Hauraki claims.

ES.5 GOLD

Issues relating to gold have been a central feature of the Hauraki claims. A gold-mining agreement was first negotiated over land at Coromandel in 1852, whereby Maori owners ceded to the Crown the management of the goldfield in return for payment to the Maori landowners of revenues based largely upon the number of miners holding licences. Further cession agreements were negotiated in respect of various parts of the inquiry district until the 1890s, the most important being at Coromandel, Thames, Ohinemuri, and Te Aroha.

The claimants have submitted that they received inadequate payments for opening their lands to gold-mining and that the Crown used undue pressure and manipulation to secure some of the agreements. Moreover, in the later nineteenth century, the Crown arbitrarily reduced the agreed scale of payments and mismanaged the collection and distribution of revenues due. When the Crown systematically purchased the freehold of land subject to cession agreements, Maori lost the mining revenues they had previously received. The claimants further submit that they would have received much fairer returns had the Crown renounced the royal prerogative over gold and recognised Maori ownership of it. As it was, by the early twentieth century Hauraki Maori had lost most of the mining revenue and the land.

The Crown denies almost all of these claims. It has submitted that, although the royal prerogative was preserved in mining legislation, it was not applied. The key issue was not ownership of gold but control of access to mine it, and policy and law upheld the right of Maori to permit or forbid mining on their land throughout the nineteenth century. Only in respect of the Ohinemuri agreement of 1875 and the Te Aroha agreement of 1880 does the Crown concede that undue pressure or manipulation occurred. It concedes also that legislation in the late nineteenth century which unilaterally diminished the scale of payments due to Maori and allowed certain reserves within goldfields to be mined without explicit Maori consent was inconsistent with the principles of the Treaty. In mitigation, it submits that the changes were required by the downturn in mining and the economics of the industry at the time. The Crown further submits that the claimants' assumption that the retention of ownership of gold by Maori would have resulted in a fairer return to Maori is highly speculative, and takes no account of the very high capital costs of quartz mining. The Crown adds, however, that the question of the extent to which the presence or suspected presence of gold was the primary motivation for the extensive acquisition of the freehold of Maori land in Hauraki is 'important'.

Our findings on these and related matters follow.

ES.5.1 Context

We consider that:

- ▶ Gold, apart from land, was not considered a taonga in Maori culture. On the other hand, land and control of access to land were highly valued, and the importance of gold and other minerals in the commercial economy was quickly understood.
- ▶ The first significant discoveries of gold at Coromandel came only three years after the great California rush and a year after the first Australian rush. Crown officials and Maori alike were genuinely concerned about the likely influx of a large, itinerant, and turbulent mining population and how best to manage it.
- ▶ In contrast to the South Island fields, however, there was little alluvial gold in Hauraki. Individual miners had very short-lived success. Gold had to be extracted from a quartz matrix, by companies able to make large and long-term capital investments, and (apart from a few 'bonanza' reefs at Thames) to process large quantities of low-grade ore.
- ▶ Consequently, the mining population in Hauraki was not as transient as on an alluvial field. It consisted largely of wage labourers working on company mining leases and then settling in the district. Hauraki Maori were not only demographically overwhelmed by the mining population but also displaced by it in local industries.

ES.5.2 Coromandel: the first gold-mining agreement

We consider that:

- ▶ The agreement negotiated between Crown officials and Hauraki rangatira at Patapata in 1852 was a provisional attempt to deal with a situation that was new to both sides. It was limited to three years or whenever payable gold ran out. Although the Crown could not in good faith abrogate the terms lightly, it was inevitable that the basis and scale of payments would be reviewed. They had been based upon the precedent of alluvial mining in Australia and the mining licence fees charged there; it was recognised from the outset that the terms for mining matrix gold had yet to be negotiated. (Moreover, the fee for a miner's licence in Australia was drastically reduced following the Eureka Stockade rising of 1854.) Claimant submissions to the effect that the Patapata agreement was a 'treaty', a 'blueprint' or 'template' therefore overstate its significance. In any case, the Crown is correct in pointing out that two of its fundamental principles were in general maintained: namely, that gold-mining on Maori land would occur only with the landowners' consent; and that rent or revenue payable to Maori would be pegged to the number of miners working the field.
- ▶ The claimants have submitted that the Crown was negotiating in bad faith in 1852. It really would have preferred to acquire the freehold and soon set about doing so. The Crown has submitted that the Patapata agreement, or any other mining cession

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agreement, did not preclude it from subsequently negotiating for the freehold, and that the negotiation of the cession agreement was neither in bad faith nor involved a Treaty breach. We concur with the Crown view of the cession negotiations, but consider that many of the negotiations for the freehold involved breaches of Treaty principles (see below).

ES.5.3 Subsequent agreements in Coromandel

We consider that:

- ▶ Donald McLean negotiated a prospecting agreement with several Coromandel hapu in 1861. The claimants have suggested that undue pressure was used in that the Maori leaders were 'threatened with the consequences of disorder if they did not let the Government control the situation.' This is misleading. Following the gold rushes in the South Island, there was a real likelihood of a rush on Coromandel. It was reasonable for the Government to seek the right to control prospecting and mining. The rangatira who concluded the agreement were not opposed to having their land prospected.
- ▶ The claimants have submitted that the Crown subsequently secured the opening of the Tokatea block for mining against the wishes of the leading Ngati Tamatera right-owner, Te Hira Te Tuiri, by dealing with other right-owners, notably Riria Karepe. The Crown submits that it is unrealistic to expect complete unanimity from right-owners before concluding an agreement. We consider that the overriding of the wishes of a significant group of right-owners, even if they were in a minority, breached the article 2 requirement of informed consent to alienation of land rights. However, we note that Te Hira, though angry at being out-manoeuvred in the negotiations, accepted part of the payment and did not wish the miners to leave Tokatea.
- ▶ When mining was under way in Coromandel a further agreement was negotiated in July 1862. The claimants have submitted that this failed to take account of important matters such as payments for residence sites or for cutting timber, or to set a date from which the payments for each miner on the field would be payable. We consider these criticisms to be valid but note that, in October 1864, payments due up to that date were agreed and the respective rights of Maori and miners clarified.

ES.5.4 Thames

From the early 1860s, some Hauraki rangatira, such as W H Taipari, actively supported prospecting on their land, with the intention of opening it to mining. A general hui of Ngati Maru in July 1867 agreed that, while not all were willing to admit miners, those whanau who wished might do so. From then until mid-1868, the Civil Commissioner, James Mackay, negotiated a sequence of mining cession agreements, broadly on a hapu-by-hapu basis. The

Thames gold rush followed, bringing a flush of wealth to some miners and some Maori. The claimants have submitted that Mackay pursued ‘divide and rule’ tactics and brought undue pressure to bear to secure these agreements. The Crown contends that there were inevitable divisions of opinion among Maori about the extent and pace of opening their lands to mining, and that no land was opened without the consent of the rangatira and hapu concerned. The agreements included payments to Maori landowners for ‘all claim holders and their servants’, for residential and business site licences, and for the cutting of kauri and other timber.

On these matters, we note the following:

- ▶ In general, we concur with the Crown’s view. Mackay firmly policed the boundaries of Maori land not opened to mining and awaited the agreement of principal rangatira to mining on the land they controlled.
- ▶ The allegation of undue pressure relates mainly to Waiotahi, on the northern side of Thames, which Aperahama Te Reiroa had kept closed. We accept that Mackay did bring some undue pressure to bear on Te Reiroa but also that minimal prejudice was involved because many owners in Waiotahi were already in favour of mining the land.
- ▶ In several instances, rangatira asked for advance payments as part of the terms of mining agreements. Mackay declined in some instances and agreed in others. We consider it unwise for the rangatira to have asked, and unwise but not improper for Mackay to have acceded. The advances were against an assured stream of mining revenue, not a debt on the land, and were part of a general agreement among the principal owners, not a buying off of one group to get a foothold against known opposition (as was to occur in Ohinemuri).

ES.5.5 Ohinemuri

The Crown has accepted that there were ‘elements of pressure and coercion’ in the pursuit of a mining cession in Ohinemuri, then the freehold of it, and that Ohinemuri was ‘a particularly regrettable transaction.’³ The Crown nevertheless submits in mitigation that Maori right-owners in Ohinemuri were always divided on the question, and that the Crown did not confront or overrule the opposition to mining (led by Te Hira) but kept miners off the land pending the withdrawal of opposition. We have received many submissions relating to the propriety or otherwise of the Crown’s advances to individual right-owners or sections of them, for their interests in Ohinemuri, Waikawau, and Moehau blocks (including £3000 advanced by Mackay for tangi expenses); also on the practice of ‘raihana’ – the acceptance by Mackay of orders many Maori owners made with storekeepers for day-to-day needs, also charged against the land. In late 1874, Mackay and McLean confronted the assembled

3. Document AA1, p181

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rangatira with the huge cumulative debt from the hundreds of individual advances. The freehold of Waikawau and Moehau was not considered by the Crown to be of sufficient value to redeem the debt, and £16,000 was charged against Ohinemuri. Te Hira then reluctantly accepted a mining cession agreement in order to save the freehold of the land. But within three years the Crown had resumed the purchase of the freehold. The Native Land Court awarded it some 66,000 acres of Ohinemuri in 1882 and the Crown purchased over 20,000 acres more by 1900.

In light of these events, we consider the Crown's concession regarding Ohinemuri to be grudging and inadequate. The Crown behaved deviously, manipulatively and in very bad faith over Ohinemuri, with little or no regard to its protective obligations towards a people who had virtually no experience in the management of debt. In particular, we consider that:

- ▶ The practice of making advances to individuals charged against land still in customary tribal title was divisive and destructive of the traditional relationship between rangatira and their communities.
- ▶ Although Mackay did make some effort to stop storekeepers and Maori from charging store orders against the land, he also specifically indicated to his superiors that he considered the advances for tangi expenses and raihana to be a way of overcoming the resistance of Te Hira and others. This contradicts the Crown's claim that it did not deliberately foster debt.
- ▶ Not until late 1874 did Crown officials begin to discuss with Maori a price per acre for the land against which the advances were accumulating. Consequently, none of the right-owners had any idea of the vast amount of land the debt represented, in the Crown's view.
- ▶ The Ohinemuri mining cession agreement of February 1875, charged the £16,000 debt not only against anticipated gold-mining revenue but also against all minerals, kauri gum, residence and business site rentals, and agricultural leases. The Crown made reasonable efforts to explain the terms, in Maori, to those actually attending the relevant meetings but did not provide a written translation of the deed in Maori nor circulate the document in advance. Consequently, many right-owners, including the many who had never received advances, belatedly discovered they had lost virtually all control of the district and its resources as well as any entitlement to revenues from them.
- ▶ Arguably, this might have been justified if it meant that the debt against Ohinemuri was all the more quickly redeemed and Maori retained the freehold. But the Crown did not wait for that outcome. Instead, it began buying the freehold again in 1877 and eventually waived about half the debt. The basic agreement between the Crown and Te Hira in December 1874, expressed in Mackay's words 'You are to have the land and I am to have the gold', was repudiated by the Crown.

ES.5.6 Te Aroha

Gold was discovered at Te Aroha in 1880 by the Maori prospector Te Hone Warehiko. The reefs lay partly in Crown land and partly in the Ngati Rahiri Tumutumu reserves at Omahu and Wairakau. The Crown negotiators, George Wilkinson and Harry Kenrick, negotiated a mining agreement with Te Mokena Hou and W H Taipari over a portion of the land in which they had dominant interests, but others of Ngati Rahiri held out for better terms. Relying on the part-agreement, and the fact that some of the gold was on Crown land, the Crown officials declared the field open anyway. Although most of the former dissentients then took out licences and began mining (as well as receiving a share of lease revenue) the Crown accepts that the officials' action in forcing the agreement on them 'did not accord with the policy of the [1868?] legislation requiring consent before [Maori] land was open to goldmining, and is inconsistent with the principles of the Treaty'.⁴

ES.5.7 East Coast goldfields and Manaia

A sequence of mining cession agreements was negotiated in respect of Harataunga, Cape Colville, Pakirarahi, Whangapoua, Kuaotunu, and Manaia. There are indications of some haste by Crown officials in declaring fields open, but generally the evidence shows that consent was obtained. Many of the gold workings were short-lived, and burdened by high costs of extraction. Claims that some Maori were deprived of rights to some mining revenues is confused by boundary issues which were not resolved then and are not readily resolvable today – and by the purchase of the freehold of the land. The owners of Pakirarahi signed deeds of sale, but also signed a further agreement indicating that they wished to sell only the timber on the land and to retain both the freehold and the mining revenue. The district registrar of titles registered the deeds of sale but also registered a caveat noting the subsequent agreement. In the confused legal proceedings which followed, Pakirarahi 1 came under the control of the Kauri Timber Company, and the owners – unfairly we believe – lost access to the mining revenues. However, because the registrar had also registered the caveat, they were ultimately able to recover the land itself. Mining cession revenues continued to be paid by the Crown in respect of Pakirarahi 2 until the late nineteenth century, after which the record becomes obscure and mining petered out.

ES.5.8 General issues**(1) *The basis of payment***

Claimant evidence indicates that Hauraki Maori received under the cession agreements payments totalling in the order of £62,000 for the period 1867 to 1880 and £27,000 for the

4. Paper 2.550, p14

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ES.5.8(2)

period 1881 to 1897. The value of gold exported was worth some £7.8 million over the same period. This has led claimants to submit that the payments to Maori were far too low, and should have been based upon royalties on the quantity of gold extracted rather than upon the scales of fees (essentially rentals for rights of access) agreed in the cession agreements. It is not conceivable, in our view that either the Crown or the mining industry would have agreed both to royalties and to lease rentals, and it has not been shown to our satisfaction that the former would have been more advantageous to Maori than the latter, especially if the net rather than the gross value of gold were to be the basis of payment. As the Crown has submitted, no payment system would have been agreed that did not take into account the huge capital costs involved in mining matrix gold: demands for royalties that did not do so would soon have depressed investment. As it was, in a situation of high risk, Maori were paid in the order of £6 per acre per year in miner's rights fees, plus other agreed fees, as long as miners were working the field, regardless of whether they were making profits. We have seen no evidence of Maori complaint at the time about the system as such, and various hapu continued to sign cession agreements under it throughout the nineteenth century.

(2) *Erosion of the agreed levels of payment*

The claimants have submitted that the Crown allowed the level of fees negotiated in the cession agreements to be eroded. Certainly, when the Auckland provincial government in 1868 introduced provisions for company leaseholds rather than annual individual miner's rights, Maori owners' entitlements were greatly reduced. However, the general government acknowledged the legitimacy of protests by Thames Maori and took steps to restore the mining revenues to the previously agreed levels. In 1886–87, though, the governments of the day succumbed to pressure from the flagging mining industry and reduced the fees payable to Maori by as much as 75 per cent (against the protest of Wilkinson, who had negotiated the Te Aroha agreement). We believe that the Crown should rather have renegotiated the terms with Hauraki Maori. Reducing the fees unilaterally breached the Crown's Treaty duty to deal in good faith with Maori at all times.

(3) *The Crown's role in collecting and distributing agreed entitlements*

The claimants have submitted that the Crown's administration of the cession agreements was flawed and that officials did not collect and distribute all the revenues due to Hauraki Maori. We have noted the inherent difficulties of the task and are not persuaded that there was serious negligence by the Crown, at least before the 1890s. By that time, the growing complexity of Maori rights to land due to succession and absentee ownership led to entitlements become increasingly fractionated, and uneconomic. However, rather than negotiate a better system with the Maori beneficiaries, Ministers and officials of various Government departments shuffled the responsibility between them, letting the records fall into confusion and payments into arrears.

(4) *Crown purchase of land subject to mining cession agreements*

For most of the 1860s, the Crown showed no wish to purchase the freehold of goldbearing land rather than negotiate mining cession agreements. By 1870, however, some Hauraki Maori had begun to put land through the court and either to let or to sell it to private parties. Successive Ministers, and Crown officials in Hauraki, then began to urge that, in the public interest, the Crown should buy auriferous land. There is also evidence of growing resentment by miners, mining companies, and local bodies to paying licence fees and rentals that flowed to Maori owners. By the early 1880s, when the Crown bought Maori land already subject to mining cession agreements, it paid the mining revenues to local authorities, not to the former Maori owners. From 1876 to 1882, there was uncertainty among officials about the effect on mining revenues of Maori selling their land to private parties, though this uncertainty was as much about whether the revenues were payable to the Crown rather than the private owners as whether it was still payable to Maori. In 1882, however, the Attorney-General, Frederick Whitaker, gave a definitive ruling that such entitlements passed along with all other lesser rights to the new owner of the fee simple. This spurred Crown Ministers and officials to new efforts to purchase auriferous land.

(5) *The MacCormick commission*

In the late 1930s, Judge MacCormick of the Maori Land Court was appointed commissioner to investigate the arrears of payments of goldfields revenue still due to Maori. His report was highly critical of the Crown's administration of those revenues. In the course of his inquiry, MacCormick also examined the way in which lands such as Ohinemuri had passed into the Crown's ownership, and he concluded that Maori were not fully advised of the fact that, when they sold the freehold, they lost their entitlement to continue to receive mining revenue. MacCormick considered that consequently they may have made bad bargains. Although he did not believe the Crown had done anything illegal, he recommended that the Crown make an ex gratia payment to Hauraki Maori of £30,000 to £40,000:

in view of the very large sums of money received by the Crown by reason of its purchase of the freehold previously ceded to it for mining purposes, and the doubt whether the Natives fully appreciated the effect of their sales, and the further doubt as to the proper distribution to the Natives of the money they were entitled to.

The Second World War intervened, and MacCormick's recommendation has never been implemented.

(6) *Implementation of the MacCormick recommendation*

In opening submissions to this Tribunal on gold issues, Crown counsel stated that the Crown ought to have acted on the recommendation of the MacCormick commission. We note, however, that in closing submissions Crown counsel also stated that the concession was made

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in the light of MacCormick's observation that the purchases of ceded land were made when the goldmining industry was in decline and that, 'if considered at the time they were entered into, [they] would not appear such bad bargains as they appear in the light of after events' (when the industry recovered). Moreover, the Crown does not accept that the calculation by Michael Copeland (consulting economist for the claimants) of the present-day value of the MacCormick recommendation provides some sort of benchmark for redress: 'Factors to be taken into account when determining the nature and extent of redress provided in settlement [are] more appropriately addressed in settlement negotiations'.⁵ On this matter:

- ▶ we consider that, in view of the long delay in implementing the MacCormick recommendation, the Crown's concession is welcome;
- ▶ we agree that the nature and extent of the redress should be addressed in settlement negotiations; and
- ▶ we note that in its purchases of auriferous land the Crown did pay a premium as against the generality of land (in the order of five shillings an acre, as against two shillings to three shillings an acre in the 1870s, and between 10 shillings and £3 an acre, as against five shillings an acre by 1900).

However, we also believe that the occasions when Maori vendors made informed and considered choices between selling the freehold (and thereby losing the mining revenue) or retaining the land and the mining revenue were rare, and mostly came late in the nineteenth century. Many of the purchases resulted from dealings by Crown agents with individuals for their undivided interests in land titles, followed by application to the court for a partition of the land and an award to the Crown of its proportionate interest in the title. The community as a whole often had little or no opportunity to make a considered decision as between leasing and selling. Maori owners were not well advised, if they were advised at all, and undoubtedly made many bad bargains. In view of this, we believe that the MacCormick recommendation should be implemented fully and in a generous spirit.

(7) Other twentieth-century developments

The Mining Act 1971 declared gold and silver to be the property of the Crown. The Crown at last relinquished its rights over any remaining land still subject to nineteenth century mining cessions, but maintained a right to authorise access for mining on private land as if it were Crown land, and maintained a right to authorise access for mining on private land as if it were Crown land. The Crown Minerals Act 1991 qualified that right, generally requiring the consent of owners for mining on their land. The claimants have been critical of the formulation of both Acts, but we consider that there was reasonable consultation by the

5. Document AA1, p 28

Crown in the shaping of the 1991 Act. There was undoubtedly a prejudicial effect to Hauraki Maori from the fact that fees for residence site licences, granted from as early as the 1860s, were not revised to reflect market values. Following protest and litigation by Hauraki Maori, a settlement was negotiated with the Crown in 1980. We have received submissions that the compensation provided was inadequate but the evidence does not, in our view, provide grounds for reopening the 1980 settlement.

ES.6 TIMBER

‘Timber leases’, that is, the purchase of cutting rights, were made between Maori and timber millers, mainly in respect of kauri, notably from the late 1850s. These were technically illegal, or at least extra-legal, but were condoned or assisted by Crown officials. After 1865, fresh agreements were negotiated under the Native Land Acts, to formalise the previous ones, and some new agreements were also reached. Then, in the 1870s, the Government commissioned James Mackay to buy large areas systematically on the Coromandel Peninsula. Mackay was in many cases already acting for the timber millers in their lease negotiations and suggested that the Crown purchases be subject to the timber leases, in which the millers had invested heavily. Ministers agreed. The claimants have submitted that Mackay and the Government colluded to ‘drive down’ the price paid for the land. We do not consider that this case is made out. It is normal commercial practice to discount the price for land when the resource that constituted much of its value has already been sold. The fact that Mackay was acting both for the Crown and the millers certainly suggests a conflict of roles, but such multiple roles were not unusual in the nineteenth century. Crown land purchase agents were generally directed to pay low prices to Maori and it is not self-evident that Maori would have got better prices for the land had a different agent been employed. In our view, the low prices paid were more a consequence of the fact that the Crown was buying under proclamations of pre-emption.

There is insufficient evidence available to judge the fairness of prices paid to Maori for the timber. In addition to the prices recorded during the formalisation of the agreements in the 1870s, there were also payments during the period of informal agreements, not systematically recorded. Timber merchants also usually paid for the cost of surveys. The Native Lands Act 1867 allowed them to secure what was effectively a lien over the land for their advances, which commonly led to private purchases of the land, especially at Whangapoua and Mercury Bay, as Maori struggled to redeem the debt. We accept the Crown’s view that the prejudicial effects of this system are best seen, along with survey costs generally, as arising from the Native Land Acts rather than relating particularly to timber.

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ES.7 LAND LAW AND LAND PURCHASE

We have received a great deal of evidence relating to the law affecting Maori land – the Native Land Acts – and land purchase policies which have left Hauraki iwi today with only 2.6 per cent of their customary land. The claimants submit that this was a consequence of deliberate Crown policies designed to acquire their land at low prices and make it available for Pakeha settlement. We have received many detailed block histories illustrating how these policies affected particular whanau lands.

The Crown has argued in defence that Maori could not escape all the pressures of the monetary economy and that the Crown policies aimed to strike a balance between giving some protection to Maori landowners while allowing them to participate in new economic opportunities. The Crown concedes that, in retrospect, more retention of Maori collective institutions would have been desirable, but that this perception owes a good deal to hindsight. Moreover, Maori society was not wholly collective traditionally but allowed considerable place for individual and family rights, and much land alienation occurred because individual Maori chose to transact land in order to seek higher living standards:

Having said that, the Crown does accept that the particular feature of the Hauraki inquiry, and a factor contributing to eventual outcome[s], is the combined effect of the facilitation of alienation created by the native land laws, and a vigorous Crown land purchasing policy.⁶

We welcome the Crown's concession because in our view the evidence submitted clearly supports the claimants' view that the alienation of nearly the totality of Hauraki land was the result of deliberate Crown policies, pursued – against widespread Maori protest – until well into the twentieth century. Moreover, it does not require hindsight to show that the empowerment of individuals to alienate their share of the tribal patrimony was deliberately favoured by Crown policies (rather than any 'balance' being sought). Indeed, this was pointed out by various settler politicians and officials from 1866 onwards, but any legislative changes in favour of stonger collective control were soon swept away if they resulted in a slowing of the rate of purchase of Maori land. In short, although the Crown arguments and evidence have refined our understanding of some matters, they have not modified in any significant way the interpretation of the Native Land Acts and Crown land purchase policies provided by successive commissions of inquiry since the 1870s, by a succession of academic historians in the last 40 years, and most recently by the Tribunal's 2004 report *Turanga Tangata Turanga Whenua*. Indeed, we believe that the dislocation to Hauraki Maori society and the loss of control over their land arising from the land law had more damaging consequences even than war and raupatu.

In particular, we find that:

6. Document AA1, p113

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- ▶ It was appropriate for the Crown in the early 1860s to establish some form of commission or tribunal to clarify customary land rights rather than leave this to land purchase officials, but there was very little consultation with Maori or regard for Maori opinion as to the form and the practice of that tribunal, either at the outset or during the next 100 years.
- ▶ It was not unreasonable that customary tenure should be modified to meet the needs of the commercial economy, including the aspirations of Maori to farm their own land. But the extent and nature of that modification was far too drastic and owed little to Maori wishes. The titles created facilitated alienation of the land by sequential purchase of undivided individual interests in titles, followed by a succession of partitions. The system destroyed the traditional balance between individual and community rights, fostered factional division and frustrated rather than assisted Maori aspirations for commercial farming, either by individuals or groups. Instead, it created a sense of fatalism among Maori as to the land's passing and a pauperising opportunity to obtain money for day-to-day needs by selling individual interests.
- ▶ As Crown witnesses have conceded, the Native Land Act 1873 (under which most Hauraki land was alienated) did not include an adequate mechanism for community control over either alienation or development of the land. The memorial of ownership created by that Act empowered title-holders to alienate the land and little else.
- ▶ About 70 per cent of Hauraki land was acquired by the Crown between 1870 and 1914, most of it under Crown monopoly through proclamations of Crown pre-emption in 1872 and 1874 and under the Government Native Land Purchases Act 1877, which meant that Maori were prevented from selling or leasing on an open market.
- ▶ The cost of securing land court titles (survey costs and court costs) commonly drew Maori communities into debt and eroded any potential advantage in securing the titles in the first place.
- ▶ The Native Land Act 1909 attempted to deal with the increasing fractionation of Maori land titles by allowing decisions to be made at 'meetings of assembled owners'. This resulted in considerable areas being alienated by majorities on the night, even though they might not hold a majority of all interests in the blocks concerned.
- ▶ When the Stout–Ngata commission of 1906 to 1907 examined the situation in Hauraki, only about 15 per cent of the claim area remained in Maori ownership. The commissioners recommended that Hauraki iwi required virtually all remaining land for their own needs. The Crown nevertheless continued to purchase systematically in the district (including the compulsory acquisition of land in the Hauraki Plains drainage scheme) and facilitated a spate of private purchases in the period 1910 to 1929. There is no evidence of any attempt to reciprocate by reserving land for Maori dairy farming in the Hauraki Plains.

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- When the State eventually sought to assist Maori farming through the Maori land development schemes from 1930 to 1970 there was very little suitable Hauraki land still in Maori ownership on which viable farms could be created.

The claimants have submitted that prejudicial effects arose from the law relating to succession to Maori land. We have examined the relevant law and practice from 1865 to 1993. The provision that, on intestate succession, the land is divided among all natural heirs has been blamed for the fractionation of Maori land titles. We find, nevertheless, that this succession principle was generally in conformity with Maori wishes: it was the passing of land outside the bloodline by means of written wills that caused most dissatisfaction and injured some whanau. The problem with intestate succession lay rather in the nature of land titles and the alienability of individual interests, rather than the succession rule as such. The question has been addressed in the Te Ture Whenua Maori Act 1993.

ES.8 TE AROHA MOUNTAIN, THE HOT SPRINGS, AND THE TOWNSHIP

The Crown acquired the Te Aroha block, including the western side of the mountain and the hot springs at its base, by purchase in 1878. The eastern portion lay inside the Tauranga confiscation line and was acquired by the Crown in 1864. Te Aroha mountain nevertheless remained a maunga tapu in the minds of Ngati Rahiri Tumutumu and Hauraki people generally. Yet, they have had little participation in its management or the management of the hot springs in Te Aroha Domain.

Despite some oral traditions to the contrary, the Ngati Rahiri Tumutumu rangatira Te Mokena Hou and his whanau did not, in legal terms, 'give' to the Crown the hot springs reserve in section 16 of the Te Aroha purchase (while retaining sections 15 and 17 where the township was built). Rather, Crown control of the springs was asserted through the Te Aroha purchase, the proclamation of the Te Aroha goldfield in 1880, and the Public Domains Act 1881, under which the reserve was gazetted. We accept therefore that another Ngati Rahiri Tumutumu oral tradition that the springs were 'taken' by the Crown has some validity. In general, we find that the Crown has failed to protect the traditional values and kaitiakitanga of the tribe in Te Aroha mountain and hot springs.

Similarly, although no specific documentation has been provided of any agreement between local Maori and the Crown for continued free use of the springs by Maori, there is documentary evidence from as early as 1885 that this was their understanding.

The claimants have been critical of the Crown for purchasing most of the interests of the Mokena Hou and Lipsey families in Te Aroha township in the early twentieth century. We note, however, that those families had previously benefited significantly, relative to other Ngati Rahiri Tumutumu whanau, from their cooperation with the Crown in development

of the township. We note also that Crown officials resisted the removal of restrictions on sale of the town sections and purchased many of them in the public interest, only when it appeared that the family might sell to private parties to whom they had become indebted. Given article 3 rights and responsibilities, we consider that there are limits to the protection that the Crown can accord to individual Maori owners of property which is no longer undivided tribal property. As discussed earlier, the prejudice arises initially from the system of land law which divided community land into individual interests alienable without further involvement of the community.

ES.9 TAONGA AND WAHI TAPU

We have considered the claims of several Hauraki groups that their wahi tapu were not protected by the Crown when blocks of land were sold. In many cases the evidence available has not enabled us to make findings on particular cases, especially where land was sold to private purchasers. But there is a more general issue. The Crown has acknowledged that where Maori requested reserves to be set aside for urupa or wahi tapu, its fiduciary obligations required the Crown to do so. Moreover, because many of the early Crown purchase deeds did refer to reservation of wahi tapu, and some oral agreements to that effect were made after that time, it is likely that Maori vendors commonly assumed that sales of land to the Crown did not necessarily mean loss of control over wahi tapu. In practice, however, the nature of freehold titles, especially when held by private parties, meant that only where wahi tapu were pointed out and specific requests made for their reservation did the Crown offer active protection – and not always then. The losses of wahi tapu were therefore part and parcel of the alienation of the great bulk of Hauraki land.

We consider that real prejudice has resulted over the past 150 years from the desecration and destruction of wahi tapu sites and from the taking of movable taonga for private collections and for export, in breach of the clear article 2 guarantee to Maori that they would be protected. Maori spiritual sites and moveable taonga were usually treated as less important than the rights of private property owners. We consider that compensation is due for these breaches and the resulting prejudice, to enable Maori to reclaim lost taonga where possible, to foster skills to assist in the creation of new taonga through a vibrant arts culture, and to assist Maori with consultation procedures for the better protection of taonga and wahi tapu. We recommend that the Resource Management Act 1991 be made more consistently effective for the protection of wahi tapu and taonga (which the Crown has conceded is not always the case), and that the Government, local authorities, and Maori should work together to publicise the protection measures available under it and ensure their use to the fullest extent possible. In this context, we note the difference between archaeological sites and ‘living’ wahi

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tapu, known and valued by claimants today. One possible way forward would be for working groups of tangata whenua, Crown officials, and local authorities, formed under the Resource Management Act, to locate those living wahi tapu most in need of protection.

ES.10 RATING OF MAORI LAND

The Crown has acknowledged that the burden of local body rates might not always have been applied equitably in Hauraki. Our report discusses particular cases. We also note that the titles created under the Native Land Acts, and the partitioning of land into uneconomic parcels, made it difficult for Maori to meet rating obligations. Provided that the Crown acknowledges this, and the considerable contributions in land which Maori have made, both voluntarily and compulsorily, for local and national infrastructure, we see no problem in Treaty terms with the concept of rating Maori land. We note that, although current legislation allows for negotiation and adjustment of the rating burden, earlier generations lost land to compulsory charging orders and find that the Crown should take this into account in negotiating the quantum of settlement for Hauraki claims.

ES.11 THE FORESHORE AND SEABED

Many claimant groups raised with us the issue of proprietary rights over the foreshore and seabed, or at least rights of rangatiratanga and kaitiakitanga. The 'ownership' issue has taken on particular prominence since the Court of Appeal decision in the *Ngati Apa* case, and the subsequent legislation, both of which occurred after the Hauraki Tribunal completed its hearings. We are of the view that the issue has been addressed by another Tribunal in the 2004 *Report on the Crown's Foreshore and Seabed Policy* and is now a matter for the courts rather than for this Tribunal.

We do, however, note that in purchasing Maori interests in the Thames foreshore the Crown denied Thames Maori the opportunity or right to lease the foreshore for the purpose of mining, which contemporary evidence shows to have been their preference. Furthermore, following Fenton's judgment in the *Kauaeranga* case (1870), and faced by the prospect of the Native Land Court recognising Maori interests in other Hauraki foreshores, the Crown shut down the jurisdiction of the court to inquire into such claims, and further strengthened its control via the Harbour's Act 1878. We consider this to have been prejudicial to Maori, though we are not in a position to determine the extent of the prejudice.

ES.12 PUBLIC WORKS TAKINGS

Hauraki claimants have made extensive submissions concerning the legislative regime under which Maori land was taken for public works, and numerous instances of particular land takings, including those relating to the improvement schemes for the Waihou and Ohinemuri Rivers (following the use of those rivers as mining-sludge channels), the Hauraki Plains drainage scheme of the early twentieth century, and the taking of Ohinau Island for a lighthouse and a number of school sites. We note that, in addition to the specific takings of Maori land for public purposes, the Native Land Acts and Public Works Acts generally provided for the taking of 5 per cent of Maori land for roading purposes, without compensation, within 10 (or 15) years of its passing the court. The claimants submit that both in the particular cases and in general they were prejudiced by the further diminution of their already depleted estate, with inadequate compensation or countervailing betterment. We have given our findings on the particular cases in our report where the evidence allows (which is not always the case), and have recommended that land be returned where appropriate or the issues taken up further in negotiations.

Crown counsel have submitted that in considering whether Maori land should be taken for public works a balance has to be found between the Crown's kawanatanga rights under article 1 and the rangatiratanga guaranteed by article 2, and accepted that in general Maori land should be taken for public works only where there are no other practicable options and after appropriate consultation with those affected. Counsel acknowledges that 'the Crown must consider whether Maori are left with sufficient land for their present and foreseeable requirements'.⁷ In the light of these principles, the Crown has conceded that, in respect of the Hauraki drainage scheme, 'There is some evidence that lands taken were required, but there is also evidence that more land than was required was taken, possibly with insufficient consultation'.⁸ Moreover, although Maori did have the opportunity to ballot for dairy farms in the scheme, 'there is no indication whether this occurred'. There is no indication either that farms in the scheme were set aside for Hauraki Maori, even though the Stout–Ngata commission had not long previously reported that they could afford to lose no more of their land. We agree that Hauraki Maori must have received some indirect benefit from the scheme in terms of public roads and bridges, and potentially could have had better access to markets and dairy co-operatives. But (as the Crown also acknowledges) the benefit of such market access only accrues where sufficient suitable land was retained by Maori, which was patently not the case in Hauraki.

We note that the river improvement scheme led to some unfair outcomes for Maori in that compensation was not paid in the first instance because of alleged betterment to Maori as well as settlers. Investigations into Maori petitions subsequently disclosed that Maori

7. Document AA1, p 255

8. Ibid, pp 254, 255

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communities had received little benefit from the improvement schemes and lost the use and enjoyment of valued riparian lands. Compensation of £1605 was paid, and further proposed takings of Maori land were not proceeded with. We are not able to gauge the adequacy of the compensation on the information available, a matter partly attributable to the lack of record as to precisely which of the land affected was Maori land and which was non-Maori land.

In general, we find that the official notification procedures for the taking of Maori land were inadequate and disadvantaged Maori owners. This is partly the consequence of the creation, by the Crown, of a complex system of multiple ownership and the vesting of control of fractionated interests in the Maori Trustee, a Crown official, rather than in Maori tribal authorities. Relative to the weight and resources of the Crown compared to the limited resources of multiple private owners, we consider that Maori were disadvantaged in the matter of public works takings, and their remaining lands an easy target for development purposes.

ES.13 IMPACTS ON MAORI USES OF LANDS AND WATERWAYS

We have received a great deal of evidence from claimants about the impacts upon customary usages of coastlines, rivers, swamps, and forests of modern industries, supported by Crown policies which owed little or nothing to consultation with Maori. The declaration of the Waihou and Ohinemuri Rivers as sludge channels under the Mining Act 1891, following the introduction of the cyanide process for extracting gold from ore, is the classic case. The felling of forests and use of streams for rafting timber, the drainage of swamps (especially the Piako Swamp), and the overfishing of foreshores and harbours are other examples of material damage to Maori food resources and disregard for Maori customary values and kaitiakitanga.

The Crown has acknowledged the validity of elements of these claims.⁹ In particular, Maori had been left with 'some expectation' that their lands and waters outside the goldfield cession areas would not be affected by mining, and they were 'less likely [than non-Maori] to be able to utilise the few protections that existed within the system'. Maori interests were 'more likely to be considered of little account' by the mining industry. There were attempts by the Crown to mitigate the impacts of mining but these 'did not address the issue of food supplies, waahi tapu and spiritual concerns'. While it would have been preferable to consult and negotiate sooner, the needs and demands of the mining industry were such that 'to some extent the government was forced into a reactive mode'. We welcome the Crown's concessions on these matters.

9. Document AA1, pp 220–221

In relation to the Timber Floating Act 1873, and timber cutting generally, Crown counsel have submitted that the Crown was in a dilemma over the conflict between the rights of private landowners, 'and the goals of State resource development', and that it sought to balance those rights. Crown witnesses have submitted that it would be anachronistic to expect modern ideas about conservation to operate in the nineteenth century.

We accept that these arguments have some validity. We also acknowledge that some Maori were themselves active in advancing the mining and timber industries. But such arguments should not be taken too far. There was in fact an active forest conservation movement in New Zealand from at least the 1860s but its proposals either did not become law or if they did the law was poorly enforced. There is also evidence that the discharge of mining wastes was subject to much stronger controls in California and Victoria than it was in New Zealand, where mining law was more concerned to promote and encourage the industry than to regulate or restrain it.

While some Maori benefited in the short term from some aspects of the mining and timber industries there is also overwhelming evidence of damage, in both the short and the long term to their traditional resources, with very limited compensation. Nor, until very recently, was provision made for ongoing Maori involvement in resource management or their inclusion in the benefits of land development. Notwithstanding the article 2 guarantees, Maori concerns about damage to their resources, expressed consistently in petitions and in parliamentary inquiries, were almost always the Crown's last priority. We therefore find that the Crown's duty of active protection of Maori rangatiratanga over valued resources was often not honoured in Hauraki.

ES.14 SOCIO-ECONOMIC IMPACTS

We have studied the demographic evidence submitted by claimant witnesses and note that, according to that evidence, of the 10,000 Maori who reported affiliation to Hauraki iwi in 2001, only 19 per cent live in the inquiry district. Moreover, Hauraki iwi members make up only about 15 per cent of the Maori population resident in the inquiry district, and several socio-economic indices show them still to be disadvantaged relative to Maori of other iwi and non-Maori. The evidence supports the claimants' view that many Hauraki Maori moved out of the district early – from the early twentieth century as well as after the Second World War – and settled in the Waikato and Auckland districts where 67 per cent now reside. We believe their out-migration was largely a consequence of their having insufficient usable land and employment opportunities in Hauraki. Competition for employment from non-Maori was evident since the gold rushes. The evidence relating to Maori health and housing from the late nineteenth century till after 1945 shows that Hauraki Maori were among the most

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disadvantaged and needy people in New Zealand. The fact that many claimant witnesses testified to the satisfying community life they lived in that time, including harvesting the bounty of the bush and sea, cannot disguise the shocking impact of epidemic and endemic disease, closely related to poor housing.

Consideration of these matters is connected to the fact that Hauraki Maori have lost more of their customary land than most iwi. The Crown has argued that there is no necessary connection between land loss and poverty – that a community can possess a great deal of land and still be poor and that much depends on the quality of the land and its resources, and on the acquisition of skills to manage land productively. We accept that this theoretical position has a degree of validity. We accept also that much of Hauraki is too steep to cultivate or carry stock. Nevertheless, there are also rich river valleys and rolling hill country in the south of the district; harbours and islands, which brought early trade and settlement; and a coastline, which today has great value. Why have not Hauraki Maori been enabled to have a greater share of the opportunities that these provide?

We accept the argument of the claimants that the State did too little to assist Hauraki Maori and also created conditions which worked against them. We refer particularly to the system of land law which facilitated sale, did not include good management structures for land in multiple ownership, and divided communities in a perennial sequence of deals over individual or sectional interests in what was traditionally community land. It was not only that Hauraki Maori lost nearly all their land; it was the manner of losing it that divided and pauperised them. Subsequent owners of the land have benefited significantly from it since. The gold rushes and timber milling brought only temporary, and ill-distributed, prosperity. In many respects, gold proved a curse rather than a benefit, particularly in the way it led to auriferous land being targeted for purchase, with Maori then losing access to mining revenue.

Much of this is not due to geographical accident but to failings in Crown policy. As Professor Oliver has put it:

The loss, to such an extreme degree, of this economic base [the land] was not accompanied by the opening of reliable additional economic opportunities. The proceeds from land cessions, leases and sales, proved to be transitory and delusive. Even at the lower end of the socio-economic scale, in such activities as gum digging and road and rail construction, Maori workers suffered from unreliable returns, crippling competition and discriminatory practices.¹⁰

Land loss does not necessarily lead to poverty, but for Hauraki Maori that became the case. History confirms for us that the transfer of asset value from land to any other form of asset is fraught with risk, and more often than not fails to preserve equivalent value. For centuries,

10. Document A11, p 58

land has been mankind's preferred and most durable form of wealth storage. The authors of the Treaty would have been very conscious of this widely accepted belief, for they identified the possession by Maori of land as their foremost tangible asset.

Subsequent Crown actions, however, from the adoption of land identification systems through to the provision of infrastructure and services, favoured the individualisation of land ownership and individual reward for human endeavour on the land. These developments, integral to the functioning of a commercial consumer society, were in stark contradiction to the cultural imperatives of traditional Maori society. The ease with which Maori land, including specific reserves, could be converted into individual interests and thence into cash to enable participation by Maori in this new and seductive consumer society, precipitated a downward spiral of asset loss and eventual tribal poverty. The subsequent alienation of such a high proportion of traditional Hauraki lands has deprived Hauraki Maori of their share of the ever increasing community-created land value, which the region enjoys. This consequence is in direct contradiction of the objectives and purpose of the Treaty, and the aspirations of those who signed it.

ES.15 OVERALL FINDING

We conclude that Hauraki Maori have been marginalised in their own rohe by the transfer of land and resources to others, including Maori of other iwi. Moreover, we find that this outcome, particularly the wholesale purchasing of Hauraki lands, was the consequence of policies and laws deliberately introduced and sustained well into the twentieth century, and that this falls short of the Treaty requirement that land and other taonga be acquired through informed consent. In this context, we note particularly that:

- ▶ the Crown has conceded that Hauraki iwi lost large areas of land during the raupatu of the 1860s and have received very little compensation, either in land or money;
- ▶ the Crown has also conceded that the MacCormick commission of 1939 to 1940 found that Maori who sold the freehold of land already subject to gold-mining cessions were not well advised and that a substantial sum should be paid in redress, which sum has not been paid; and
- ▶ most Hauraki land was acquired by the Crown under pre-emptive (monopoly) right, and Hauraki Maori generally did not have the option to lease their land or to sell it on an open market, nor to make well-advised community decisions on the terms and conditions of sale.

In these matters, and other matters discussed in our report, we find that Treaty principles of dealing fairly and with utmost good faith have been breached, that substantial restitution is due, and that the quantum should be settled by prompt negotiation.

PART I

THE DISTRICT, THE PEOPLE, AND THEIR CLAIMS

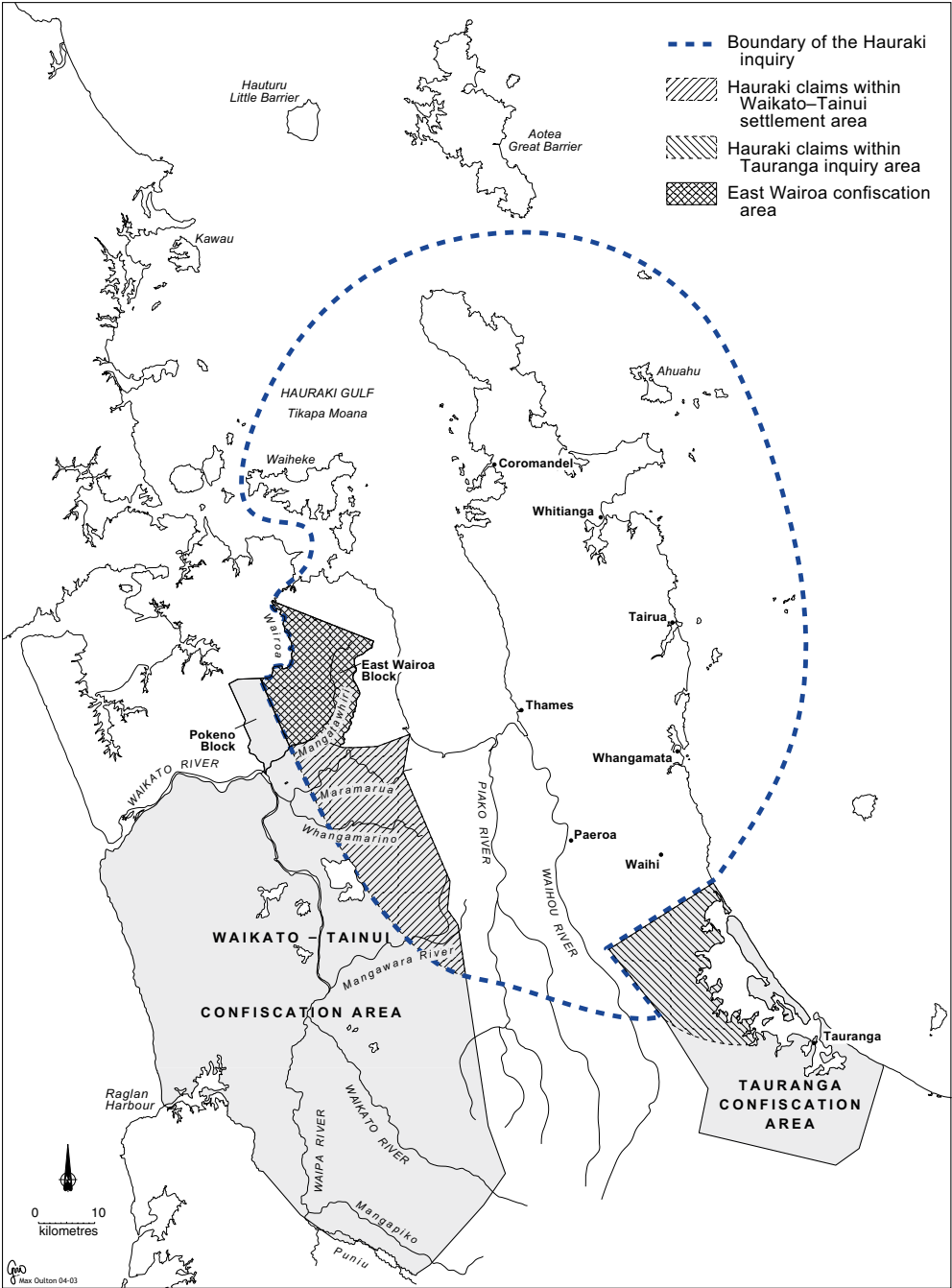


Figure 1: The Hauraki inquiry area

CHAPTER 1

PARE HAURAKI CLAIMS : THE BACKGROUND TO THE INQUIRY

In 1987, the Hauraki Maori Trust Board (hereafter, the HMTB) was constituted under the Hauraki Maori Trust Board Act 1988 expressly for the purpose of preparing and submitting a consolidated claim for all the iwi and hapu of the Hauraki inquiry district. With Huhurere Tukukino as the named claimant, the HMTB lodged several claims with the Waitangi Tribunal, including the substantial Wai 100 claim. Subsequently, 55 other claims were lodged, some by groups that joined with the HMTB, and others by groups that did not wish to do so. In late 2001, the Marutuahu Claims Committee, comprising the Marutuahu groups within the HMTB, also lodged claims.

In this chapter, we give a brief history of the inquiry and a description of the claimant groups as they defined themselves to us. We then summarise the 10 key issues of Wai 100, followed by those of the 'non' HMTB claims. Lastly, we outline the structure of the report into the original 56 claims of Hauraki Maori.

Under the Treaty of Waitangi Act 1975 (as amended in 1985), the Tribunal is required to investigate and report on claims made by Maori that the Crown has prejudicially affected them, by act of either omission or commission, through breaching the principles of the Treaty of Waitangi.

1.1 THE HISTORY OF THE INQUIRY

In April 1998, Dame Augusta Wallace was appointed presiding officer for the Hauraki inquiry, and in May 1998 John Kneebone, Professor Wharehuia Milroy, and Dame Evelyn Stokes were appointed members. Preparation for the inquiry had begun many years earlier, with the receipt of the first claims relating to the Hauraki district. All claims, both trust board and non-trust board, were consolidated into the Wai 686 inquiry in January 1998.

Hearings for the inquiry began on September 1998 at Ngahutoitoi Marae, with the opening submissions of the HMTB (Wai 100); those for non-HMTB claims began in October 1998. Hearings ran for over four years until November 2002, making this the longest running inquiry heard by the Waitangi Tribunal. There were 27 hearings in total, at many different venues, from the Thames Racecourse to many of the marae in the Hauraki district.

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1.2

1.2 THE CLAIMANTS

1.2.1 The HMTB

The HMTB was constituted by an Act of Parliament in December 1988 as a body corporate under the terms and for the purposes of the Maori Trust Boards Act 1955. Section 4(2) of the Hauraki Maori Trust Board Act 1988 states:

The beneficiaries of the Board shall be the descendants of Ngati Hako, Ngati Hei, Ngati Maru, Ngati Paoa, Patukirikiri, Ngati Porou ki Harataunga ki Mataora, Ngati Pukenga ki Waiau, Ngati Rahiri-Tumutumu, Ngai Tai, Ngati Tamatera, Ngati Tara Tokanui, and Ngati Whanaunga.

In 1998, 3600 Hauraki Maori were registered as beneficiaries of the HMTB, out of 6995 Maori nationwide who identified as being of Hauraki descent.¹ In the Act, provision was made for the establishment of a management board representing the 12 groups, a roll of adult beneficiaries, and an annual hui.

In April 1987, a set of claims were lodged with the Waitangi Tribunal on behalf of the incipient trust board in the name of Huhurere Tukukino (now deceased). These were registered as Wai 100 (incorporating also Wai 373, Wai 374, and Wai 650). Extensive research was commissioned for the associated casebook, which ran to 11 volumes in length, plus over 40,000 pages of associated supporting documents.² We support the description of this valuable body of evidence given by HMTB member and tribal leader Toko Renata Te Taniwha, as ‘a legacy to our children and the Hauraki tribal nation’.³

Counsel for Wai 100 described the Wai 100 and associated claims as presented:

on behalf of all the tribes of Hauraki in respect of all the lands and resources of those tribes, covering all of the Treaty breaches perpetrated by the Crown against them. It is one of the largest and most complex claims yet to be heard by a Waitangi Tribunal. It covers territory which is familiar to the Tribunal – old land claims; raupatu and the like. And it covers issues that are either complete[ly] novel or have not been comprehensively dealt with by the Tribunal in the past. Foremost among these is the Crown treatment of Maori rights in Hauraki mineral resources, for they are in many ways the linch pin of this claim.⁴

The Wai 100 claimants say that Hauraki Maori are left with 2.6 per cent, or 38,500 acres, of their original land area, which they say runs from Matakana in the south to Mahurangi

1. Document A74, para 30. The board expected the number of beneficiaries to grow following the Tribunal's inquiry.

2. Document A52, p 7

3. Document A5, p vi

4. Document A51, p 1

in the north and incorporates an area of 1.8 million acres.⁵ They claim that 80 per cent of the area lost was lost due to direct Crown action, including 14 per cent, or 205,000 acres, as a result of confiscation. Twenty per cent of the loss is alleged to be the result of private land purchases in the period 1865 to 1997.⁶

The Wai 100 claimants described the 10 key issues of their claim as: first, the confiscation of land in the East Wairoa block (western Firth of Thames), near Katikati (western Bay of Plenty), as well as at Maramarua, in the Piako district, and near Te Aroha. Secondly, prejudicial Crown policies towards Maori land through pre-1865 Crown purchasing, through the post-1865 operation of the Native Land Court, and through various other practices, including the Public Works Act. Thirdly, the Crown assumption of the ownership of all minerals (and its failure to fulfil the terms of the original gold-mining agreements), and takings of geothermal resources and hot springs. Fourthly, the Crown assumption of the ownership and management of the foreshore. Fifthly, the Crown failure to prevent the destruction of natural resource habitat (eg, streams, rivers, and wetlands) resulting in the loss of traditional food sources. Sixthly, the taking of (and looked-for return of) specific parcels of land through Crown legislation such as the Public Works Act or the Hauraki Plains Drainage Act, and for roading, reclamation works, and other infrastructure services, especially where no longer used for the purpose for which they were taken. Seventhly, the Crown failure to prevent the destruction of sacred places (wahi tapu) and the loss of cultural heritage (taonga). Eighthly, for the Crown's failure to prevent cultural breakdown and social deprivation resulting in poor socio-economic outcomes for Hauraki Maori. Ninthly, the official imposition on Maori of economic disadvantages, including the loss of land in lieu of rates payments. Finally, the tenth key issue was defined as the failure by the Crown to ensure adequate, inalienable land reserves to meet Hauraki Maori needs.⁷

In addition to these 10 key issues, the HMTB claim also identifies pre-Treaty and pre-emption waiver transactions, the Crown's acquisition of the Ohinemuri, Piako, and Hauraki Plains blocks, and timber leases as sources of grievance.⁸

The HMTB also submitted claims relating to three specific issues: Wai 373 relates to the Waikato raupatu and, in particular, to Hauraki interests in the Maramarua State Forest; Wai 374 relates to central Auckland railway lands, but these are outside the Hauraki inquiry district; and Wai 650 was filed in relation to the Athenree State Forest and the Te Puna–Katikati (also called Katitkati Te Puna block) purchase. The Tribunal has commented on the overlap

5. Document A5, p 7; doc A51, p 3; doc A52, pp 8–11; doc A74, para 37. It should be noted that neither Mahurangi nor Matakana is included in the Hauraki district inquiry area: see fig 1. The Katikati raupatu area was included and dealt with in the Tauranga inquiry district.

6. Document A5, p 7

7. Ibid, pp 2–3

8. Claim 1.3(b), pp 20–21, 35–44

THE HAURAKI REPORT

1.2.1

between the Hauraki claims and the claims of Tauranga Moana in our Tauranga raupatu report.⁹ The Wai 100 claimants state that these three claims are ‘for all material purposes to be treated as if they are part of the comprehensive Wai 100 Hauraki claim’.¹⁰

In 1998, the HMTB lodged a further claim with the Tribunal in respect of the proposal to turn Tikapa Moana into a national marine park (Wai 728). That proposal became a reality in 2000 with the passing of the Hauraki Gulf Marine Park Act. In 2001, the claim went to urgency before the Waitangi Tribunal, which found that no prejudice had been established from the passing of the 2000 Act.¹¹

In addition to the Wai 100 and associated claims, counsel for Wai 100 said that the following claimant groups had given the HMTB a mandate to prosecute Wai 100 on their behalf, in addition to their specific claims: Ngeungeu Te Irirangi Zister concerning the Wairoa and Otau blocks (Wai 96); Rebecca Fleet concerning Ngati Hei lands (Wai 110); Ngaruna Ronald Mikaere concerning the Manaia school site (Wai 148); Patricia Bailey concerning Nga Whanau o Omahu claim (Wai 174); Shane Ashby and others concerning the Manaia block claims (Wai 285); Rikiriki Rakena and others concerning the Waikawau purchase claim (Wai 418); Gavin Kaird and others concerning the Pakirarahi 1 block (Wai 464); Shane Ashby and others concerning the Wharekawa East 2 block (Wai 661); and Denis Tanengapuia Te Rangiawhina Mokena concerning Te Aroha lands (Wai 663).¹²

In her opening evidence at the first hearing of the Hauraki claims in September 1998, the then chief executive officer of the HMTB, Josephine Marama Anderson, commented on the ‘rich diversity amongst the ensemble of Hauraki tribes’. She continued:

The various waves of occupation of Hauraki whenua, and associated political alliances, wars, deprivations and triumphs have produced this diversity, and out of this landscape have emerged autonomous entities, every one of them unique in terms of their world view, yet inextricably bound to the other by the land and by whakapapa. Ko tenei te kupenga nui o Hauraki, this is the great net of Hauraki.¹³

Later in her submission, Ms Anderson added that the trust board ‘sits at the feet of the Hauraki tribes’.¹⁴ We take this to mean that, despite the fact that some Hauraki hapu and iwi chose to put in claims separately from the HMTB, and despite the tension that might have arisen as a result, the trust board is anxious to serve the whole district by promoting unity

9. Waitangi Tribunal, *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wellington: Legislation Direct, 2004), pp 2, 16–17; doc A51, pp 4–5

10. Claim 1.3; doc A5, p 24

11. Waitangi Tribunal, *The Hauraki Gulf Marine Park Report* (Wellington: Legislation Direct, 2001), p 44

12. Document A51, pp 5–6

13. Document A74, para 9

14. Ibid, para 29

amongst all Hauraki Maori and to work for a shared outcome. We support and endorse this aim.

1.2.2 Other claimant groups

As research proceeded, many of the groups named in the 1988 Act, and others not named but connected with one or more of the tribes named there, lodged separate claims. This brought the number of claims associated with the Hauraki inquiry district to 56 in total (though a number of these were not prosecuted before this inquiry owing to a lack of information or because they were resolved or because the claimants did not follow up their specific claim). The specific claims were from Ngati Hei, Ngati Pukenga, Ngati Pu, Ngati Tamatera, Ngati Huarere, Ngati Rahiri Tumutumu, Ngati Koi/Tara, and Ngati Tokanui, the three Ngati Porou hapu (Te Aitanga-a-Mate, Te Aowera, and Te Whanau-a-Rakairoa), Ngati Karaua, Te Patukirikiri, Ngati Paoa ki Waiheke, Ngati Kotinga/Ngati Hauauru, and various hapu and whanau of Ngati Maru.

These claimants agree that they are closely connected by intermarriage and whakapapa with people of the 12 groups named in the Act, particularly the large Marutuahu tribes. This being so (and since the Act provides that the beneficiaries of the HMTB shall be ‘the descendants of the 12 named groups’), it was not strictly necessary that each and every hapu be listed separately in the Act or that they lodge a separate claim with the Tribunal. But clearly they wished to reassert their identity and lodge claims relating to their particular interests. Several of the iwi or hapu which were named in the Act also considered it appropriate to lodge distinct claims, and secured funding to research and present them. Many of these claimant groups ‘adopt the claims’ of the HMTB but go on to specify the particular blocks of land to which the claims apply (and in some cases raise matters additional to those mentioned in the Wai 100 claims).

Where non-HMTB claims support the general submissions and evidence of the HMTB, we have investigated and reported in a generic manner, and made findings that cover all relevant claims. An example is the section on the native land legislation – almost every claim in the Hauraki inquiry refers to aspects of the Native Land Court process. Therefore, instead of repeating our main investigation and findings for every individual claimant group, we have considered all claims relating to the land court in our general findings in that section. However, we have used some non-HMTB claims as case studies of the workings of the court where the evidence has supported such an approach. Where non-HMTB claimant groups have raised unique issues, we have covered the claims separately. Finally, in our closing chapter, we return to each of the claims described below to indicate where we have considered their general and specific issues.

The following claims were lodged separately from the HMTB.

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1.2.2(1)

(1) Wai 72: Ngati Paoa

Wai 72 was lodged in October 1987 by Hariata Gordon on behalf of Ngati Paoa kaumatua and descendants of Paoa and Tukutuku.¹⁵ Part of the Ngati Paoa rohe was the subject of a settlement with the Crown in respect of the *Report on the Waiheke Island Claim* (Wai 10). Another large part is included in the Wai 100 claims relating to the East Wairoa confiscation and the alienation of lands on the western Firth. Other issues including the large Fairburn purchase have been included in the South Auckland consolidation, Wai 406. According to Wai 72 claimant counsel's closing submissions:

This is a claim by Ngati Paoa concerning Wairoa East. The land was confiscated without justifiable authority in 1865. The Crown purported to pay compensation but the compensation hearings were fraught. The outstanding claim against the Crown is that Ngati Paoa were wrongly described as rebels so far as the East Wairoa lands were concerned, their interest was not properly recognised in the compensation hearings, and that in the event inadequate compensation was paid.¹⁶

Claimant witnesses spoke of Ngati Paoa holding ahi ka over parts of East Wairoa, stressing the importance of the Hunua Ranges for their inland food resources, wahi tapu, and places of healing, and of the demise of Ngati Paoa's position on the Tamaki isthmus through intertribal war, the impact of whalers, timber cutters, and others, of land purchase, and the confiscation – and the loss of resources through confiscation – of East Wairoa.¹⁷ It is claimed that Wi Hoete's submissions with regard to the confiscation of Ngati Paoa interests 'were not given proper consideration by the Crown', that the Compensation Court 'had the effect of dividing Maori', and that 'Maori were also mislead [sic] into believing that if they declared that they were loyal that they would retain their land'.¹⁸

(2) Wai 96 and Wai 423: Ngai Tai ki Tamaki

Wai 96 was filed in September 1989 by Rachael Ngeungeu Te Irirangi Zister.¹⁹ Mrs Zister died in 1997 at the age of 103, and the claim was continued by her great-nephew, Stephen Zister.²⁰ Wai 96, as described by claimant counsel in his opening submissions, focuses solely on the allegation that 'the Crown breached the Treaty by confiscating the East Wairoa block and subsequently failed to adequately compensate Ngai Tai'.²¹ This claim has been brought under the umbrella of Wai 100, to which Ngai Tai (as represented by the Wai 96 claimants)

15. Claim 1.2

16. Document Y9, p 4. The relevant submissions and evidence in relation to the Wai 72 claim include documents H6, T3, T12, T13–T16, T38, T39, and Y9.

17. Documents T38, T39; doc T15, p1

18. Document T15, p1; doc T13, p1

19. Claim 1.2(a)

20. Document A68, pp 1, 2

21. Document A41, p 4

is an affiliate (as well as to the former Tainui Trust Board).²² As such, the Wai 96 claimants have not lodged separate closing submissions, relying instead on those of the Wai 100 claimants.²³ But we discuss the Wai 96 claim here because of its relationship with the other Ngai Tai claim, Wai 423.

Wai 423 was filed in December 1993 by Te Warena Taua and Emily Karaka on behalf of themselves, the Ngai Tai Ki Tamaki iwi, and the Ngai Tai Ki Tamaki Tribal Trust.²⁴ According to claimant counsel, 'At its core the claim is about the loss of [ownership,] possession, authority and access to Ngai Tai lands and resources'. A natural flow-on effect of that loss has been a 'diminution of Ngai Tai rangatiratanga and mana'.²⁵ Counsel submitted that 'Today Ngai Tai own a remnant of their former lands. What remains in tribal title consists only of a few acres set aside for an urupa and Maori reservation'.²⁶

While Wai 96 focuses almost solely on issues of war and raupatu, the Wai 423 claimants also raise a number of issues discussed elsewhere in the report. They assert that the following events and processes contributed to Ngai Tai's state of landlessness: pre-Treaty and pre-emption waiver transactions; Crown purchases to 1865; war and raupatu; Native Land Court title investigations and subsequent alienations; and public works takings.

(3) *Wai 110: Ngati Hei*

Wai 110 was lodged in 1987 by Patricia McDonald and Ripeka Fleet on behalf of Ngati Hei and is described as 'a comprehensive tribal claim that covers land, water and other matters of significance to the iwi'.²⁷ It also covers 'taonga, namely land, rivers, foreshores, the Whitianga and Tairua Harbours and the sea within the Claimants' rohe, together with 'wahi tapu, te reo Maori and the kaitiakitanga of hunting and fishing . . . resource management, conservation, rating and local government'. The claim also concerns 'the Claimants' tino rangatiratanga over and, where relevant, their ownership concerning their taonga'.²⁸ According to the statement of evidence of Peter Johnston, 'Ngati Hei's rohe in general terms runs from Matarangi south of Kennedy's Bay to Tairua, and from the eastern Coromandel coast to the Coromandel divide, and out to the Mercury Islands'.²⁹ Mr Johnston stressed that the Kuaotunu 6 block, 'a fraction of its original 621 acres', is the last remnant of the Ngati Hei tribal estate.

22. Ibid, pp 3–4

23. Documents Y1, AA14

24. Claim 1.19; doc T20, p 3

25. Document T20, p 3; doc Y15, p 3

26. Document Y15, p 4, para 2.6 The relevant submissions and evidence in relation to the Wai 96 claim include documents A36–A40, A41, and A68, together with the closing submissions for the Wai 100 claim (doc Y1). The relevant submissions and evidence in relation to the Wai 423 claim include documents T20, T24, Y15, and AA10. Documents A46, C2, C5, T2, and T3 are relevant to both claims.

27. Claims 1.4, 1.4(c); doc Y9, p 4

28. Claim 1.4(c), p 2

29. Document N3, p 3

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1.2.2(4)

The main issues of claim with regard to the alienation of Ngati Hei lands include old land claims, the implementation of the Native Land Acts, and their results: the undermining of Ngati Hei rangatiratanga; the breaking down of communal title; and the destruction of traditional ways of life, leading, it was submitted, to landlessness, survey liens, Crown purchase methods, timber leases, the loss of the Tairua and other reserves, gold, land taken for public works (including Ohinau Island for a lighthouse), the failure to protect wahi tapu, cultural taonga, and issues pertaining to the environmental degradation of rivers, the fore-shore, and the seabed.³⁰

(4) Wai 148 and Wai 285: Ngati Pukenga

The Ngati Pukenga claims relate to the lands at Manaia on the western side of the Coromandel Peninsula, given to Ngati Pukenga (who are of Mataatua origins) by Ngati Maru. It was submitted that 'Ngati Pukenga forms a distinctive Maori community at Manaia, a community described as 'probably the largest in Hauraki and . . . deserving of the Crown's active protection, consistent with the Treaty of Waitangi'.³¹

A September 1999 amended statement of claim combines the claims made by Ngaruna Ronald Mikaere on behalf of himself and Ngati Pukenga (Wai 148) and those of Shane Ashby on behalf of himself and Ngati Pukenga ki Manaia Incorporated Society, Ngati Pukenga, and Te Tawera (Wai 285).³² In their 'Historical Background Report' for Wai 285, Buddy Mikaere and Shane Ashby note that 'The historical documentation in respect of Ngati Pukenga often uses the appellation, Te Tawera. Ngati Pukenga and Te Tawera are one and the same people.'³³

The Ngati Pukenga claims relate to the exercise of Ngati Pukenga rangatiratanga over their lands at Manaia derived from *tuku whenua*. Counsel for the claimants submitted that the Crown, 'in breach of the Treaty of Waitangi, acted to destabilise and destroy the functioning of Ngati Pukenga as a tribe particularly through the Crown promotion of individual over tribal rights' and 'failed to actively protect the special Maori community at Manaia, including Ngati Pukenga'.³⁴ The claims refer specifically to the loss of tribal control (*rangatiratanga*) under the Native Land Court and the subsequent alienation of much of the Manaia lands through Crown purchasing (including the purchasing of largely non-resident individual interests), land taken in lieu of payment for survey charges, and the conversion of uneconomic interests. The claim also refers to the loss of the Manaia 1C block, which was given for a school in 1897 and then sold by the Maori Trustee following the school's relocation in 1962. Further aspects of the claim relate to the claimants' relationship with local and

30. Documents N9, N12, Y9. The relevant submissions and evidence in relation to the Wai 110 claim include documents A15, G2, K4, M25, N1, N2, N3, N4, N5–N10, N12–N15, N22, Y9, and AA12.

31. Document Y7, p 2

32. Claim 1.8(c)

33. Document 12, p 4

34. Document Y7, p 3

central government, the loss of language and culture, health issues, lack of infrastructure, the difficulties of providing for housing and community facilities, and building and sustaining an economic base, particularly in the face of a heavy and mounting rates burden.³⁵ We note that counsel for the claimants submitted that 'Ngati Pukenga as an iwi of Hauraki were also prejudiced overall by the Crown's policies and practices in respect of rivers, gold, and timber, and by its non-recognition of Ngati Pukenga rights in respect of the foreshore and seabed'.³⁶

(5) Wai 174: Ngati Kotinga and Nga Whanau o Omahu

Wai 174 was lodged by Ata Patricia Bailey in October 1990.³⁷ In Native Land Court minute books, Ngati Kotinga were most frequently identified as being a hapu of Ngati Whanaunga or Ngati Maru, with links also to Ngati Paoa.³⁸ The blocks identified in the Wai 174 statement of claim were claimed under the mana of one or more of those iwi, rather than under Ngati Kotinga specifically. Nor was the hapu affiliation given for each of the owners listed on the court titles. However, the hapu name, Ngati Kotinga, was mentioned, along with those of other Ngati Maru and Ngati Whanaunga hapu in the court's investigation of other blocks. In the word of their counsel in closing submissions:

The Claimants claim that they have been prejudicially affected and/or dispossessed from a number of blocks that they either wholly owned or had an interest in. The processes of the Native Land Court, the public works regime and the Crown's purchase policy all played a part in dispossessing the claimants of their ancestral lands. These processes are detailed in the Wai 100 closing submissions.³⁹

The claimants cite as causes of action the following block studies which 'equate, albeit with more detail', the allegations made by the Wai 100 claimants (the HMTB claimants): Te Hotere 1 and 2, Papakitatahi A, Kuaotunu 1, Wharekawa East 1 to 5, Opu 3, and Hohia Opou 5A.⁴⁰

(6) Wai 177: The Gregory–Mare whanau

Wai 177 was lodged in February 1991 by Selwyn Tukumana Gregory and Sharon Gregory.⁴¹ The claimants are descendants of Wikitoria Te Ngahue (born circa 1860, died 1932) principally of Ngati Maru, and her husband, Mare Teretiu. The claim relates to some 19 blocks

35. The relevant submissions and evidence in relation to the Wai 148 and Wai 285 claims include documents 14–16, 110–118, 120–123, Y7, and AA14. The relevant research reports include documents A16, A17, A34, D19, and I2.

36. Document Y7, p 4

37. Claim 1.6

38. See doc H1, pp 9–14

39. Document Y2, p 2

40. The relevant submissions and evidence in relation to the Wai 174 claim include documents F18, F20, H1, J3, J14, J15, and Y2. The relevant research reports include documents A10 (pts 1, 2), F3, G11, H3, J6, and J4.

41. Claims 1.7, 1.7(c)

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distributed through three widely separate districts within the claim area, in which those tupuna held interests. The important ancestors of the whanau include: Hohepa Paraone (d1878); Eruera Te Ngahue (d1872), father of Wikitoria; Pahau Ngatawa (d1872); and Raika Whakarongotai, who adopted Mare Teretiu. Through these tupuna, the Gregory–Mare whanau are connected to a number of prominent Hauraki hapu: Ngati Tauaiwi, Ngati Naunau, Ngati Pu, Ngati Matau, and Ngati Karaua. Extensive whakapapa evidence has been submitted to show these connections and the relationship of the hapu with the various land blocks upon which the claim focuses. In some cases, the tipuna of the whanau were awarded by the Native Land Court much the greatest interest (if not the totality) of the block concerned, but in other cases the claimants acknowledge that many other whanau and hapu had customary rights in the land.⁴²

The main issues of claim relate to the loss of tribal tino rangatiratanga, self-determination, and control or ownership of land (including the foreshore and seabed) and other property as a result of the Native Land Court and its attendant legislation. The issues are, for the most part, the same as those cited by the Wai 100 claimants and the Marutuahu iwi, of which the Gregory–Mare whanau are a constituent group. We have been assisted by the specific block histories written for the Wai 177 claimants.⁴³

(7) Wai 289, Wai 792, Wai 866, and Wai 968: The Harataunga claims

There are several closely interrelated or overlapping claims regarding Harataunga. Three claims are brought by various representatives of the three hapu of Ngati Porou – Te Aitanga-a-Mate, Te Aowera, and Te Whanau-a-Rakairoa – which gained possession of lands at Harataunga through a *tuku whenua* from the Ngati Tamatara rangatira Paora Te Putu in 1852.

Wai 289 was brought by Sam (Hamiora) Moeke in May 1992, on behalf of himself, the descendants of Ropata Ngatai, Tapiata Kiwi, Paratene Pahau, Hirini Kouta, Matiu Paeora, Haratiera Humare, and Hakopa Ihaka, and Ngati Porou ki Harataunga. Mr Moeke passed away on 28 September 2000, and Sue Te Huinga Wiremu Nikora has become the new representative for the claimants.⁴⁴ The claim focuses largely on the non-payment by the Crown of the *ex gratia* payment recommended by the McCormick commission.⁴⁵

Wai 792 was made by Parekura Tamati White in October 1999 on behalf of Te Aitanga-a-Mate, Te Aowera, and Te Whanau-a-Rakairoa, and concerns ‘the land, waters and natural

42. Document D1, pp 3–42

43. The relevant submissions and evidence in relation to the Wai 177 claim include documents D1–D3, R21, R24–R29, Y9, and AA12. The relevant block histories include documents D4–D14 and R14. John Hutton makes the point that in this claim ‘the research focus was on the Crown Forest blocks that related more directly to the Gregory–Mare whanau’: doc D7, p 3.

44. Document Y17, paras 1–2

45. The relevant submissions and evidence in relation to the Wai 289 claim include documents D15, M11–M13, M37–M39, M41, Y17, and AA6.

resources of Harataunga'. The Wai 792 claimants were particularly concerned with providing 'detail about the traditional history of how the hapu members of Te Aitanga a Mate, Te Aowera and Te Whanau a Rakairoa acquired their rights and interests in Harataunga [Kennedy Bay]', and 'how those members of three hapu lost their rights and interests'.⁴⁶

Wai 866 was made by Pakiriki Harrison in June 2000 on behalf of members of Te Aitanga-a-Mate, Te Aowera, and Te Whanau-a-Rakairoa. The Wai 866 claimants describe themselves as '*tangata hau kainga* and keepers of *ahi ka* at Harataunga and Mataora'.⁴⁷ Counsel for the Wai 866 claimants has described them as being of:

the Ngati Porou of te [T]airawhiti, but have permanently occupied Harataunga and Mataora for over two centuries within the bosom of Hauraki. They have emerged as a unique band of Ngati Porou. They retain both the advantages of their connections to Hauraki and to Hikurangi, while maintaining the special identity that such a geographical isolation engenders.⁴⁸

Counsel also described them as 'a tight knit community who occupy a geographically discrete location'.⁴⁹

A fourth claim relating to Harataunga was brought by Korohere Ngapo on behalf of Nga Uri a Maata Ngapo and descendants of Marutuahu ki Harataunga (Wai 968). The Wai 968 claimants are of Ngati Tamatera and Ngati Paoa, and their claim deals with the effects of the marriage of Te Rakahurumai of Ngati Porou and Te Paea, the birth of Maata Ngapo, the tuku of Harataunga, and the alleged failure of the Native Land Court to note the residual rights of Marutuahu in Harataunga.⁵⁰

The Harataunga claims relate to gold mining and timber licence revenue; the findings of the MacCormick commission; the reform of customary land tenure; the operation of the Native Land Court and the impact of survey liens; the taking of land for public works; the taking of land at Mataora as a result of boundary changes; the Crown's acquisition of land under the Native Townships Act 1895, including Rangiriri (the Harataunga 2 block), the effects of rating and alleged omissions of the Maori Trustee, and foreshore and seabed issues. We have been greatly assisted in our consideration of these issues by the well-researched and detailed evidence submitted by and for the Wai 792 claimants in particular, notably the series of research reports presented by Parekura White.

46. Document Y18, p 3. The relevant submissions and evidence in relation to the Wai 792 claim include documents R16, R16(a), R33, S8(a)-(d), S9, S17-S20, Y18, and AA10.

47. Document Y19, p 3

48. Ibid, pp 3-4

49. Ibid, p 6. The relevant submissions and evidence in relation to the Wai 866 claim include documents M41, R16, R16(a), R33, S8(a)-(d), S9, S17, S21-S27, S35, Y19, and Y19(a).

50. The relevant submissions and evidence in relation to the Wai 968 claim include documents X2, X4-X10, X28, Z5, and AA9.

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(8) Wai 349, Wai 720, and Wai 778: Ngati Tamatera

Wai 349 was lodged by Te Wiremu Mataia Nicholls in March 1993; Wai 720 by Tamatehura Mataia Nicholls in December 1997; and Wai 778 by Te Wiremu Mataia Nicholls and Te Runanga o Ngati Tamatera Incorporated in November 1998.⁵¹ In July 2002, a combined amended statement of claim for the three claims asked that they be treated as consolidated for the purpose of hearing. The consolidated claim was made on behalf of ‘all the descendant whanau and hapu and the constituent whanau and hapu of the Ngati Tamatera of the Marutuahu Tribal Confederation’. Wai 339 and Wai 778 – which had originally joined the Marutuahu group (discussed below) – elected to be heard separately (together with Wai 720).⁵² The claim, broad in scope, was described by claimant counsel:

While the claim also relates to the areas of land, lakes, rivers, seabeds, islands, minerals – in particular gold, traditional fishing grounds and reefs onshore and off shore; the indigenous flora and fauna and other species; waahi tapu and other sites of cultural, spiritual and historic significance; and other taonga tuku iho both tangible and intangible in the traditional mana whenua areas which the descendant whanau and hapu of Ngati Tamatera occupied continuously, the primary focus of the claim is the impact of acts and omissions of the Crown that were and remain in breach of the principles of the Treaty of Waitangi on the cultural, spiritual, social and economic way of life of the peoples of Ngati Tamatera specifically protected and guaranteed by the Treaty of Waitangi.⁵³

The claimants assert that pre-Treaty transactions, Crown purchases to 1865, war and rau-patu, the operation of the Native Land Court and public works policy contributed to the state of landlessness which Ngati Tamatera found themselves in. Further issues of claim concern the acquisition of the Ohinemuri block and the environmental degradation of resources which Ngati Tamatera have interests in.⁵⁴

In his opening submissions, counsel for the claimants acknowledged the evidence and submissions relating to Ngati Tamatera, and to Hauraki Maori generally, made by and for the Wai 100 and Marutuahu group claims (as well as by and for Wai 418), stating that the presentation of the combined Wai 349, Wai 720, and Wai 778 claims provided ‘an opportunity to this proud division of the Hauraki peoples to echo the grievances that have befallen other Maori of the District and which have been placed before this Tribunal in voluminous evidence’.⁵⁵

51. Claims 1.13, 1.32A, 1.35

52. Claims 1.13(b), 1.32A(c), 1.35(b)

53. Claim 1.35(b), p 4

54. Ibid, pp 14–23

55. Document w1, pp 2, 7–8. The relevant submissions and evidence in relation to the Wai 349, Wai 720, and Wai 778 claims include documents v1–v10, w1–w13, z3, and AA7.

(9) Wai 355 and Wai 704: Hikutaia and Whangamata lands

Wai 355 was lodged by Ropata Rare and Ani Wells in April 1993 on behalf of Ngati Pu, concerning the alienation of Hikutaia and Whangamata lands.⁵⁶ The 'core grievance' as identified by counsel for the claimants relates to the McCaskill transactions and old land claim, which, it was submitted, has 'been the subject of relentless complaint, protest and petition by Ngati Pu since the 1850s'.⁵⁷ Other issues of claim relate to the alienation of this and other lands and to the operations of the Native Land Court in particular. Related issues include Crown purchase, survey and other costs, reserves, timber issues, the laws of succession, and public works takings. Other claims relate to rating, gold, the foreshore and rivers, environmental impact, wahi tapu and taonga, and socio-economic factors. Counsel stressed that 'today the land held by Ngati Pu amounts to approximately 35 hectares' and that Ngati Pu have suffered social, economic and cultural dislocation and a loss of status.⁵⁸

Wai 704 was lodged by Dianne Chalmers in February 1998 on behalf of her whanau, the descendants of Haki Pene Hura, and his daughter Poihaere Haki-pene Hura. The claimants are a whanau of Ngati Pu (numbering over 300 people) and their claim relates to the interests of their tipuna in Ngati Pu land, particularly at Hikutaia and Whangamata, of which 'All but a miniscule remnant . . . have now been alienated'.⁵⁹ Counsel for the claimants submitted that the whanau were dislocated from their ancestral lands and, in addition to any economic loss, 'have experienced an erosion of traditional values and beliefs and have lost their te reo and tikanga', and are marginalised as a whanau.⁶⁰ The particular issues of claim relate to the sale of Poihaere's interests in part of these lands while still a minor, and the later alienation of her remaining lands.⁶¹

(10) Wai 418: The Waikawau purchase claim

Wai 418 was lodged by Rikiriki Rakena and others in October 1993 on behalf of members of Ngati Tamatera, with regard to the Waikawau block, including its reserves and wahi tapu.⁶² The claim relies on the submissions of Wai 100 and is described by claimant counsel as forming a discreet case study within the framework presented by the HMTB claim, and as a subset of the wider Ngati Tamatera claims.⁶³ The main issues relate to the Crown purchase

56. Claim 1.14

57. Document Y8, p 2

58. Ibid, pp 46–48. The relevant submissions and evidence in relation to the Wai 355 claim include documents J8, J9, K5–K19, L21–L24, Y8, AA11.

59. Claim 1.30(a),(b); doc Y12, p 2

60. Document Y12, pp 2–3

61. The relevant submissions and evidence in relation to the Wai 704 claim include documents I1, S15, S16, S31, S32, S34, Y12, and AA10.

62. Claim 1.18(a); doc Y3, p 2

63. Document Y3, pp 2, 22. The relevant submissions and evidence in relation to the Wai 418 claim include documents J10–J13, Y3, and AA14. The relevant research reports include documents A8, A10, A13, and J2.

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of the Waikawau block, the alienation of the Waikawau reserves, the alienation and failure to protect Wairotoroto, Waipatukahu and Omawhiti wahi tapu, and the alienation of the Tapu reserve.

(11) Wai 464 and Wai 661: Ngati Hikairo

Wai 464 was lodged by Gavin Caird and others in April 1994 on behalf of Ngati Hikairo (a hapu of Ngati Maru) and the owners and trustees of the Pakirarahi 1C block, with regard to the alienation of this block.⁶⁴ This land was returned to the control of Ngati Hikairo in 1991, without compensation for the period of alienation and the loss of mineral and timber resources.⁶⁵ Wai 661 was lodged by Shane Ashby and Philip Hikairo in November 1996 on behalf of Ngati Hikairo, with regard to the Wharekawa East and other blocks. Wai 464 and Wai 661 are set out in a combined amended statement of claim (September 1999).⁶⁶ The claimants rely upon the evidence presented during the hearing of Wai 100 and on the Wai 100 closing submissions.⁶⁷ The Ngati Hikairo claim also refers to taonga and wahi tapu, timber, public works policy, the operation of the Native Land Court and the alienation of Te Waitotara 1 and 2 blocks, Te Whakataha 3 and 4 blocks and the Parawaha block (collectively referred to, by the claimants, as 'the Manaia blocks').⁶⁸ Counsel for the claimants submitted that 'The almost total disappearance of Ngati Hikairo as a separate entity was a direct result of this land loss.'⁶⁹

(12) Wai 475: The Mangakahia whanau

Wai 475 was lodged in October 1994 by Remehio Te Maunga Mangakahia and others.⁷⁰ The claimants have stressed that they claim as a whanau, 'not on behalf of any wider group, whether Ngati Pare or Ngati Huarere'.⁷¹ The main issues of claim relate to the loss of ownership, kaitiakitanga, and rangatiratanga over customary lands, rivers, foreshores, and seas, including Whangapoua Harbour, and lost taonga, including te reo Maori. This loss, it is claimed, was in consequence of the processes created by the Native Land Acts, which, among other things, allowed for Crown and private land purchases without the creation of sufficient inalienable reserves of land. Other issues of claim relate to timber, environmental degradation, the succession principles introduced by the Crown that caused land to pass outside the bloodline, the erosion of Maori rights and interests with regard to the ownership and control of foreshores and harbours, and the effects of the Harataunga development

64. Claim 1.21(a)

65. Claim 1.21(b), pp 4–5; doc Y4, p 10

66. Claim 1.21(b)

67. Document Y4, p 2

68. Claim 1.21(b), p 2; doc Y4, p 3

69. Document Y4, p 3. The relevant submissions and evidence in relation to the Wai 464 and Wai 661 claims include documents H3, 17–19, 124–135, Y4, and AA14.

70. Claim 1.22

71. Document A28, p 40

scheme on Te Pungapunga blocks which the Mangakahia whanau had kept for their use and occupation. We have been greatly assisted in our consideration of those issues by the well-researched and detailed evidence submitted by and for the Wai 475 claimants.⁷²

(13) Wai 663: Ngati Rahiri Tumutumu

Wai 663 was lodged in January 1997 by Tanengapuia Te Rangiawhina Mokena on behalf of themselves and for Ngati Rahiri Tumutumu.⁷³ According to claimant counsel's submissions, the claim 'concerns the alienation of Ngati Rahiri-Tumutumu lands and other taonga'. The focus of the claim 'is upon the lack of Crown protection of Ngati Rahiri-Tumutumu authority over their ancestral lands and taonga, as required under the principles of the Treaty of Waitangi and in particular the Mokena whanau claims regarding Te Aroha Township'.⁷⁴ In closing submissions, claimant counsel also stated that "This claim serves as evidence of the process of individualisation of title introduced by the Native Land Court and the way in which Ngati Rahiri-Tumutumu's tribal estate was eroded as a result of that individualisation process".⁷⁵

The Wai 663 claimants rely on the evidence and submissions of the Wai 100 claimants with regard to 'the general policies and practices of the Crown . . . concerning Crown purchases, the Native Land Court and the Crown's treatment of taonga'.⁷⁶ The specific matters claimed by the Wai 663 claimants relate to the Crown purchase of the Te Aroha block in 1878, the proclamation of the Te Aroha goldfield in 1880, and the creation of Te Aroha as a township serving the goldfield, including the acquisition of land for public works projects, and Te Aroha mountain and the hot springs at its base.⁷⁷ A further claimant issue concerns the alleged failure of the Crown to return land in the Te Aroha township that was gifted for the purpose of creating schools and churches but, ultimately, not used for those purposes.⁷⁸

(14) Wai 693: The Matamata–Harakeke block claim

Wai 693 was lodged in November 1997 by Whaitiri Mikaere on behalf of the descendants of Ngati Raukauri (of Ngati Huarere), and concerns the alienation of the Matamata–Harakeke block.⁷⁹ The issues of claim include the bringing of the block before the Native Land Court by one owner against the wishes of the majority and the naming of that individual in the title as sole owner (others were added later); the sale of most of the block by

72. The relevant submissions and evidence in relation to the Wai 475 claim include documents A28–A31, L1–L6, L7–L11, L12–L14, L15–L18, L19, L20, K1, K3, K4, M2, Y9, and AA12.

73. Claim 1.26; doc J17, p 1

74. Document J17, p 2

75. Document Y5, p 2

76. Ibid, p 2

77. The relevant submissions and evidence in relation to the Wai 663 claim include documents A10 (pt 3), G1, J5, J17–J20, Y5, and AA14.

78. Claim 1.26(b), pp 5–6

79. Claim 1.27; docs M5, M35

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the named owners; the alienation by will of a 240-acre reserve to a non-resident spouse, whose descendants subsequently sold the land to a Pakeha, and the sale of reserve land by the Maori Trustee.⁸⁰ According to the evidence of Whaitiri Mikaere:

For Ngati Raukatauri the common theme – one that is common for all Hauraki Maori – of the landlessness and economic and social decay are the same. The impact for Ngati Raukatauri can be assessed in the following way. Firstly, the immediate effect of alienation of Matamataharakeke and other lands brought loss of income from economic activity and access to natural and cultural resources. Secondly, the loss of future economic opportunity through timber milling, gold and mineral extraction employed during alienation. Ngati Raukatauri were left with lands depleted of its natural resources.⁸¹

(15) Wai 694: The Tairua block and Te Karo 1 block claim

Wai 694 was lodged by Reremoana Jones in November 1997 on behalf of her whanau (the descendants of Hori Kerei Tuokioki) with regard to the investigation and alienation of the Tairua block and Te Karo 1 block. Hori Kerei Tuokioki was one of the original five grantees in the two blocks.⁸² Claimant counsel submitted that 'Mrs Jones and her whanau do not represent all the descendants of Hori Kerei Tuokioki, nor do they represent all of the descendants of the original five grantees in those blocks.'⁸³ According to claimant evidence, despite the alienation of these blocks, the whanau has continued to maintain their ahi ka in Tairua.⁸⁴ The main issues relate to the Crown purchase of the Tairua block, the creation of reserves and their later private purchase. A further issue of claim relates to the protection of wahi tapu, notably at Green Point and Te Karaka. A related contemporary issue concerns the realignment of State Highway 25 and the exchange of part of the Oturu reserve for land at Green Point.

(16) Wai 705: The whanau of Peneamene Tanui

Wai 705 was lodged in February 1998 by Barbara Francis on behalf of the whanau of Peneamene Tanui of Whitianga, by virtue of her descent from that tupuna.⁸⁵ Although Ms Francis identifies as Ngati Hei and there are some shared interests between the claimant and Ngati Hei in some of the lands which are the focus of Wai 705, the claim is not brought as

80. Document A35; doc Y9, pp 17–18, 26–29. The relevant submissions and evidence in relation to the Wai 693 claim include documents M7–M9, M14–M16, M35, Y9, and AA12. The relevant research reports include documents A35 and M4–M6.

81. Document M16, pp 3–4; doc Y9, pp 28–29

82. Claim 1.28; doc M36, p 3

83. Document Y11, p 2

84. Ibid, p 3. The relevant submissions and evidence in relation to the Wai 694 claim include documents J6, M17, M18–M24, M36, Y11, and AA10. The relevant research reports include documents A8, A10, D21, and G11.

85. Claim 1.31; doc Y14, p 5

part of the wider Ngati Hei claim (Wai 110).⁸⁶ At the time he was advancing claims in the Native Land Court, Peneamene Tanui identified with the hapu Te Rapupo, as did his uncle Kaitu (also known as Pungehuka). Counsel for the claimants states that:

The name Te Rapupo came about from a connection with the iwi Ngati Whanaunga and Ngati Piri [of Ngati Huarere], and indeed Maori at Whitianga included in these blocks identified also as being Ngati Piri, Ngati Whanaunga along with Ngati Paoa and Ngati Koheru.⁸⁷

The claim, as set out in the opening submissions of claimant counsel, relates principally to five blocks on the western borders of Whitianga Harbour – Te Weiti, Whakau, Karamuramu, Wharetangata, and Puahape – in which the land court found Peneamene Tanui, among others, to have interests. Claimant counsel submitted that Crown policies and legislation, including the operation of the Native Land Court, and the action of Crown agents ‘led to the claimant’s whanau being landless soon after the turn of the century.’⁸⁸ Other issues of claim include foreshore and seabed, social and economic deprivation, taonga and wahi tapu, and environmental degradation.⁸⁹

(17) Wai 714: Ngati Koi, Ngati Tara, and Ngati Tokanui

Wai 714 was lodged in March 1998 by Hone Tiwaewae Williams representing Ngati Koi, Ngati Tara, Ngati Tokanui, and Ngati Tawhaki ki Ngahutoitoi.⁹⁰ In claimant counsel’s opening submissions, Ngati Koi are described as ‘the same people as Ngati Tara, and . . . through alliances and intermarriage over many years, the same people as Ngati Tokanui.’⁹¹ The claimants’ rohe was described as being ‘within the area bordered by the Waihou River to the west, Waihi beach to the east, and otherwise generally defined by the catchment of the Ohinemuri River.’⁹² It was claimed that:

Today, as a consequence of the policies and practices of the Crown . . . which have been described in the Hauraki [Maori] Trust Board claim, only the land at Ngahutoitoi marae is identified as remaining in the ownership of Ngati Koi/Tara/Tokanui, and only a very small amount remains in the ownership of individual Ngati Koi/Tara/Tokanui.⁹³

86. Document R5, p 5; doc Y14, p 5

87. Document S29, p 1

88. Ibid, p 2. The relevant submissions and evidence in relation to the Wai 705 claim include documents A10, K2, R5, S10–S14, S29, Y14, and AA2. The evidence submitted in respect of the Ngati Hei and Mangakahia whanau claims (Wai 110 and Wai 475 respectively) is also relevant to this claim.

89. Claim 1.31(a), pp 2–5

90. Claim 1.32

91. Document R30, p 5

92. Ibid, p 5

93. Claim 1.32(a), p 3

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The claim is described as being ‘complementary to that presented by the Hauraki Maori Trust Board’, in that it ‘provides the opportunity for Ngati Koi to tell their story, which has not been covered in the evidence so far’.⁹⁴ Counsel for the Wai 714 claimants adopt the Wai 100 submissions. The particular issues of claim raised by the Ngati Koi, Ngati Tara, and Ngati Tokanui claimants relate to the operations of the Native Land Court, gold mining and Crown purchase, the allocation, and loss, of reserves, the Crown’s acquisition of the Ohinemuri block, the pollution of the Ohinemuri River, the protection of wahi tapu, and the issue of the stigma associated with Ngati Koi being labelled as ‘rahi’ within the Native Land Court process.⁹⁵

(18) Wai 806: The Kuaotunu and Tikouma blocks

Wai 806 was lodged in August 1999 by Maraea Rihi Blomfield on behalf of the descendants of Anaru Pahapaha, Ripeka Titiparu, and Hohepa Mataitaua, with regard to the Kuaotunu and Tikouma blocks.⁹⁶ The claimants and the named tipuna are ‘principally of Ngati Karaua . . . a hapu of Ngati Whanaunga’, and the claim is described as ‘seek[ing] to complement the Ngati Whanaunga me ona hapu claims and the wider Marutuahu claims’.⁹⁷ The claim relates, for the most part, to the Native Land Court investigations and subsequent partitions and alienation of the two blocks (including by Crown purchase and in lieu of survey charges). Other issues of claim include the contemporary rating of land at Tikouma, in particular the Tikouma 3B2 block. A further issue referred to by Maraea Blomfield in her brief of evidence is the inability of the claimants to exercise kaitiakitanga over the foreshore and harbour adjacent to the Tikouma blocks. She spoke, in particular, of the inability to control the actions of boat-users ‘who burn our native timber, leave rubbish and broken glass on our foreshores and simply disrespect this land’.⁹⁸

(19) Wai 808: Ngati Horowhenua

Wai 808 was lodged in January 2000 by David James Peka, and Raumiria Te Mihiao Katipa later submitted an amended claim on behalf of Ngati Horowhenua, a hapu of Ngati Paoa. The claim concerns the ‘loss of tupuna whaea lands [of Ngati Horowhenua] within the Hauraki rohe’.⁹⁹ The claimants allege that Ngati Horowhenua ‘have become virtually landless and are unable to properly exercise their rangatiratanga’, and that ‘the acts and omissions of

94. Document R30, p 4

95. The relevant submissions and evidence in relation to the Wai 714 claim include documents R7, R8–R13, R30, R31, R33, and Y20.

96. Claim 1.37(c)

97. Document x25, p 3

98. Document x26, pp 7, 9–11; doc Z2, p 12. The relevant submissions and evidence in relation to the Wai 806 claim include documents A10, J7, X3, X25–X27, Z2, and AA15.

99. Claim 1.38

the Crown, in breach of the principles of the Treaty of Waitangi, are the primary cause of the prejudice that has resulted from these key grievances.¹⁰⁰

Issues of claim relate to pre-Treaty and pre-emption waiver transactions, Crown purchases to 1865, war and raupatu, and the operation of native land legislation. The claimants also highlight environmental degradation of their resources and inadequate protection of Ngati Horowhenua customs, relating to the naming of individuals, as sources of grievance.¹⁰¹

In closing submissions, counsel for the Wai 808 claimants stated that the claimants 'have brought this claim as a hapu of Ngati Paoa within Hauraki', and that their claims in Hauraki 'focus upon the whakapapa from the union of Paoa and Tukutuku, and, in particular, Tukutuku's lineage from Ngati Hako and Ngati Tamatera'. This whakapapa, counsel states, 'is vital to their claims and has been set out in the evidence of Tomo Baggs and from representatives of Ngati Hako'.¹⁰² The Wai 808 claimants also acknowledge 'the evidence on Ngati Horowhenua by Tipa Compain on behalf of the Wai 345 claim that illustrated the whakapapa from Marutuahu to Horowhenua'.¹⁰³

According to the evidence of Raumiria Te Mihiao Katipa:

Our claim is for Nga Uri o Horowhenua. This hapu is a tangata whenua in the Hauraki region. Ngati Horowhenua has interests in lands along the Western side of Tikapa Moana, around the islands of the Hauraki Gulf, and to the South towards the Waikato to Te Hoe o Tainui. Our people would never be so bold as to say we are the only hapu with rights over this area. We know there are heaps of other hapu, many of whom are our whanaunga. All we say is that Ngati Horowhenua has rights in this area.¹⁰⁴

The Wai 808 claimants have drawn upon evidence presented by Ngati Horowhenua witnesses in the course of Wai 100,¹⁰⁵ and have adopted in full the closing submissions of Wai 100.¹⁰⁶

(20) Wai 810: Waiheke Island lands

Wai 810 was lodged in December 1999 by Moana Te Aria Te Uri Karaka Te Waero of Ngati Paoa.¹⁰⁷ As stated by counsel for the claimants, the claim concerns lands at Ostend and Tawaipareira on Waiheke Island and runs 'parallel and in harmony' with the Wai 72 (Ngati

100. Document Y6, p 2

101. Claim 1.38(b), pp 2–5

102. Document Y6, p 2

103. Ibid; doc X24, p 24

104. Document T31, p 2

105. Documents A66, A67, E7

106. Document Y6, p 2. The relevant submissions and evidence in relation to the Wai 808 claim include documents A8, A9, A10, C2, C5, T30–T32, and Y6.

107. Claim 1.41

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Paoa) claim.¹⁰⁸ It is claimed that the land in question at Ostend Domain, which, according to claimants, has historical significance to Ngati Paoa, in addition to its being leased to the Waiheke Sports Club (of which many of its members are Ngati Paoa), was reclassified as a reserve and vested in the Auckland City Council in August 1999, thus removing the future opportunity of this land being made available as part of a Treaty of Waitangi settlement.¹⁰⁹ Another issue of claim relates to the protection of urupa on Te Huruhi block and elsewhere on the island, and the diminution of land reserved for a church.

(21) Wai 865: Waihou railway land claim

Wai 865 was lodged in April 2000 by Richard Murray and others on behalf of ‘all the descendants of the original owners’ of land defined by the claimants as ‘section 2A and 2B block XII of the Waihou survey district, currently a railway corridor made up of 8719 square metres and situated at Komata North’. According to the claimants, this is Crown land and, at the time of hearing, leased to Tranz Rail Limited under a head lease arrangement.¹¹⁰ Counsel for the claimants (relying solely on instructions in the absence of evidence to advance the claim) submitted that ‘the claimants allege that land taken for railway use should have been returned once that usage became redundant, whereupon the Crown should have been responsible for that land’s return.’¹¹¹

(22) Wai 949: Ngati Koheriki

Wai 949 was lodged in October 2001 by Taka o Te Rangi Taka on behalf of the Wi Taka whanau of Ngati Koheriki ‘and such others of Ngati Koheriki who may elect to join the application’. The claim concerns lands of Ngati Koheriki contained within the East Wairoa confiscation block.¹¹² According to counsel for the claimants:

As a people Ngati Koheriki have collectively lost much of their group memory of their ancestry and their traditional links with East Wairoa. Accordingly Ngati Koheriki has had to rely on Tribunal appointed historians to tell them much of their own history.¹¹³

It was submitted, based upon the evidence presented, that Ngati Koheriki ‘are among the oldest tangata whenua of the Hunua/Wairoa region’ and that they have ‘exercised their mana whenua and rangatiratanga over their lands and resources independently of any relationships with associated descent groups’. Central to Wai 949 is the assertion that, while the Ngati Koheriki rohe had extended beyond the East Wairoa region, this was where their ‘core

108. Document Y9, pp 6–7; claim 1.41

109. Claim 1.41; doc T19, pp 5–19. The relevant submissions and evidence in relation to the Wai 810 claim include paper 2.596 and documents R18, T5, T6, T7, T8, T9, T10, T17, T18, T19, T33–T37, Y9, Y10, and AA12.

110. Document Y9, p 33

111. Ibid, p 32

112. Claims 1.46, 1.46(a); doc Y16, p 5; doc T25

113. Document Y16, pp 12–13

lands' were located at the time of the military activity and raupatu of the 1860s.¹¹⁴ Counsel submitted that 'the impact of invasion and raupatu on Ngati Koheriki has been devastating.'¹¹⁵ Other issues of claim include the alienation of their lands, notably the actions of the Native Land Court, under which, it is claimed, 'the traditional lands of Ngati Koheriki bordering on the East Wairoa Block were awarded to "loyal" Maori'. It is also claimed that the reserve eventually granted to Ngati Koheriki at Waikarakia was insufficient, and that 'by a series of actions the Crown reduced that already small area by over two thirds.'¹¹⁶

(23) Wai 969: The Harrison whanau claim

Wai 969 was lodged in August 2001 by Reece David Harrison for and on behalf of descendants of Arama Whakatau.¹¹⁷ The Harrison whanau is of Ngati Hei and their claim relates to the alienation of 11 blocks situated in the Mercury Bay area through the operation of the Native Land Court, Crown purchase and public works legislation: the Te Kapowai, Taumatawahine, Kahuwera, Rautawhiri-o-Te-Ao, Te Hoho, Te Pepe, Huhurahi, and Oteao 1, 2, 3, 4, and 4A blocks.¹¹⁸ According to counsel for the claimants, 'Reece Harrison and his whanau do not claim that they represent all descendants of Arama Whakatau and Mita Arama Whakatau or all of the interests in the blocks.'¹¹⁹ Counsel submitted that this claim provides a 'specific example of how particular members of a whanau have suffered', describing the claim as 'an intimate portrait of a whanau' and a contrast to the larger claims in this inquiry.¹²⁰ It was submitted that 'At the heart of this claim is the failure on the part of the Crown to prevent wholesale alienation of these lands. The result has been the dislocation and disassociation of this whanau from their whenua.'¹²¹ No new technical or historical evidence was presented to support this claim, the claimants instead relying on existing evidence before the Tribunal.¹²²

(24) Wai 970: Ngati Tamatepo–Ngati Rongo-u

Wai 970 was lodged in August 2001 by Florence Te Paea Watene Gurnick and others on behalf of the descendants of Tamatepo of Marutuahu.¹²³ In opening submissions, counsel for the claimants described the claim, stating that 'the descendent whanau hapu and iwi of

114. Ibid, pp 13–14

115. Ibid, p 18

116. Ibid, pp 26–27. The relevant submissions and evidence in relation to the Wai 949 claim include documents T3, T4, T25–T29, and Y16.

117. Claims 1.49, 1.49(a)

118. Document Y13, pp 2–3

119. Ibid, p 2

120. Document U3, p 12

121. Document Y13, p 10

122. The relevant submissions and evidence in relation to the Wai 969 claim include documents A8, A10, M2, N1–N4, U3–U5, and Y13.

123. Claims 1.50, 150(a)

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1.2.2(25)

Tamatepo, the eldest son of Marutuahu have suffered hugely as a result of the loss and decay of their taonga tuku iho, and that their intrinsic and specific Tikanga have been likewise affected.¹²⁴

Counsel for the claimants acknowledged the themes associated with the Wai 970 claims 'In many ways . . . share relevance with those of Hauraki iwi as a whole, and so these submissions draw liberally on the WAI 100 submissions' to emphasise 'distinctly Tamatepo experiences' and, in so doing, represent the claims of 'those iwi and hapu which constitute the descendants of Tamatepo, namely Ngati Rongo-U, Patutatahi and Uringahau'.¹²⁵ Counsel argued that 'Owing to the almost complete diminution of Tamatepo's mana through his submergence into Hauraki iwi and Marutuahu, further loss has been sustained by his descendants, who are now unable to draw upon the substantial resources and archives kept by the Maori Land Court in order to uncover information specific to Tamatepo'.¹²⁶ Counsel submitted that:

While the claim also relates to the areas of land, lakes, rivers, sea beds, islands, traditional fishing grounds and reefs onshore and off shore; the indigenous flora and fauna and other species; waahi tapu and other sites of cultural, spiritual and historic significance; and other taonga tuku iho in the traditional mana whenua areas which the descendant whanau and hapu of Tamatepo occupied continuously, the principal focus of the claim is around the rights to self determination that have been undermined in the past 170 years.¹²⁷

The loss and environmental degradation of taonga tuku iho relates to Hauraki Maori generally, and there are issues peculiar to the Tamatepo claimants.¹²⁸ The claimants assert that pre-Treaty transactions, Crown purchases to 1865, war and raupatu, the operation of the Native Land Court, and public works policy contributed to the Tamatepo claimants' state of landlessness and social and economic deprivation.¹²⁹

(25) Wai 997: The Papaaroha block claim

Wai 997 was lodged in May 2002 by Daniel Hitchcock on behalf of the descendants of Hera Maraea Tauteka of Ngati Rongo-u.¹³⁰ According to counsel for the claimants' closing submissions:

The claim concerns tribal lands from Papaaroha northwards to the southern boundaries of Aotea, and including Moehau. The Papaaroha 1 block of land was the papakainga of

124. Document Z4, p 2

125. Ibid, p 3

126. Ibid

127. Ibid, p 4

128. The relevant submissions and evidence in relation to the Wai 970 claim include documents U2, U6, U7, U8, U9, U10–U15, U16, U17, Z4, and AA5.

129. Claim 1.50(a), pp 13–19, 22

130. Claim 1.51

Hohepa Kapene, who sought before his death to have Ngati Rongo U's connection with the land maintained and protected.¹³¹

The focus of the claim is on the alienation of the Papaaroha block via the operation of native land legislation, and includes the common themes of disputed boundaries, the sale of lands to cover debts from surveys and other charges, succession outside the tangata whenua line and subsequent sale of land to non-resident non-Hauraki owners. Other issues include the failure to protect wahi tapu and the loss of tino rangatiratanga and kaitiakitanga over taonga.¹³² A further issue relates to the alienation of areas of land for which, it was claimed, only the rights to extract shingle below the high-water mark had been sold, and the grant by the Crown of an exclusive right of extraction without considering the rights of the owners of the block.¹³³ According to claimant counsel:

Today the claimants find themselves in a position where their iwi has had no recognition of its existence by the Crown, and are struggling to maintain a sense of autonomy in relation to other iwi. Ngati Rongo U is an iwi that as a result of Crown policies and legislation have been estranged from their lands, their papakainga, their wahi tapu and each other.¹³⁴

(26) The Marutuahu claims

A number of claimant groups (most already represented by the HMTB claim, and in some cases with existing individual hapu or whanau claims) came together as 'the Marutuahu claims', with shared legal counsel and additional research funded by the Crown Forestry Rental Trust under the supervision of Dr Michael Belgrave.¹³⁵ In his closing submissions, counsel for the Marutuahu claims, Paul Majurey, stated that each of the claimants he represented has widespread Marutuahu whakapapa and hapu and iwi affiliations, and that 'the principal affiliations in these claims are: Ngati Maru, Ngati Whanaunga, Ngati Tamatera, Ngati Paoa, Te Patukirikiri, and Ngati Tumutumu'.¹³⁶ In closing submissions, counsel for the Marutuahu claims acknowledged that in their submissions, 'Counsel for the Hauraki Maori Trust Board have, along with other claimant counsel, detailed various aspects of the claims', and that rather than repeating this approach would instead take a complementary approach in addressing the "big picture".¹³⁷

¹³¹. Document v9, p 7

¹³². Claim 1.51; doc v9, pp 34–38

¹³³. Document v9, pp 65–67

¹³⁴. Ibid, pp 38–39. The relevant submissions and evidence in relation to the Wai 997 claim include documents F2, F7, F8, X1, and v9.

¹³⁵. The Marutuahu Treaty claims research reports comprise documents v1 to v10 and various supplementary statements of evidence and amendments to these reports (docs v12(a)–(f)). The relevant submissions in relation to the Marutuahu claims include documents v11 and z6. In addition, many of the members of the Marutuahu claim group presented individual submissions and evidence.

¹³⁶. Document z6, p 4

¹³⁷. Ibid, p 5

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1.2.2(26)(a)

The Marutuahu claims for the most part reiterate and provide additional evidence on the claims brought by the HMTB, though the constituent groups in the Marutuahu cluster focus upon their various traditional lands. The following claims were identified in closing submissions as being in support of the Marutuahu claims:

(a) Wai 345 (Ngati Tipa hapu of Ngati Paoa) and Wai 346 (Ngati Whanaunga): The Fairburn purchase: Wai 345 was lodged in January 1993 by Maude Moengarangi Rawiri and Turiakotahi Julia Susan Rawiri on behalf of herself and Ngati Tipa, Te Runanganui o Ngati Paoa and the descendants of Marutuahu.¹³⁸ Wai 346 was lodged in February 1993 by Walter Tamahou Rawiri and Dinah Moengarangi Steele (née Rawiri) on behalf of the descendants of Ngati Whanaunga.¹³⁹ Both claims are concerned with the Fairburn purchase (which falls outside the boundaries of the Hauraki inquiry district) and are therefore not specifically addressed in this report. However, Tipa Compain's statement of evidence in support of Wai 345 does provide useful details of Ngati Paoa origins and hapu relevant to this inquiry.¹⁴⁰ Wai 346 was heard (along with Wai 754) under Wai 809 as 'Ngati Whanaunga me ona hapu' generic issues.

(b) Wai 349 and Wai 778: Ngati Tamatera: Wai 349 and Wai 778 (together with Wai 720) were elected to be heard separately from the Marutuahu group. See above.

(c) Wai 454, Wai 812, and Wai 867: Marutuahu lands and taonga claims: Walter Taipari and Adrian Taipari lodged Wai 454 in April 1994 on behalf of the descendants of Hoterene Taipari and his son, Wirope Hoterene Taipare, of Ngati Maru.¹⁴¹ Clive John Majurey lodged Wai 812 in January 2000 on behalf of the descendants of Hoani Nahe, rangatira of Ngati Kotinga, Ngati Hauauru, and other hapu of Ngati Maru and the Marutuahu iwi, in respect of land and other taonga in the Marutuahu rohe.¹⁴² In the hearing, the two claims were presented together as generic issue Ngati Maru claims, along with Wai 867 (lodged by Amy Cooper and Waimanuka Meremana in July 2000, on behalf of the descendants of Meremana Konui, a chief of Ngati Maru).¹⁴³ The Wai 454 and Wai 812 claimants are described as descendants of Hotunui, Marutuahu and his five sons. The claims span the Marutuahu rohe as represented in the pepeha 'Mai Matakana ki Matakana' (encompassing the entire inquiry district), thus forming a comprehensive claim on behalf of Marutuahu, under the following heads: issues of tino rangatiratanga; social, cultural, and economic deprivation; war and

138. Claim 1.11; claim 1.11(a), p 2

139. Claim 1.12

140. Document x24. Mr Compain notes that Wai 345 presented documents A66, A67, and A67(a) under the Wai 100 claim.

141. Claims 1.20, 1.20(a)

142. Claim 1.42

143. Claim 1.47

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1.2.2(26)(f)

raupatu; pre- and post-Treaty transactions; gold and minerals; the Compensation Court and Native Land Court; loss of reserves; public works; rates; the foreshore and seabed, waters and riverbeds; customary fishing; timber leases; geothermal resources; environmental degradation; and taonga.¹⁴⁴ Wai 867 also relates to the loss of lands and resources 'within the Marutuahu Tribal Region'.¹⁴⁵

(d) Wai 495: Te Moananui-Tawhaki claim: Mahuta Pitau Williams lodged Wai 495 in March 1993 on behalf of Tote and Hirawa Meha Te Moananui, the children of Tanumeha Te Moananui, the chief of the Tawhaki-Hura hapu of Ngati Tamatera, and relating to interests at Moehau, Thames Coast, Ohinemuri and Katikati.¹⁴⁶

(e) Wai 563: Wharekawa-Pingao Estate Trust claim: Wai 563 was lodged by Andrew Anaru Andrews of Ngati Paoa and others in November 1995 on behalf of the Pingao Estate Trust Wharekawa 9 block.¹⁴⁷ The claim relates to the acquisition of three acres of land from the Wharekawa 5B (Pingao) block for the relocation of Kaiaua School, taken under the Public Works Act 1928 in May 1934, and the taking of a further two acres in 1959.¹⁴⁸

(f) Wai 695: Te Wharau whanau and Ngati Tumutumu: Peter William Tutuki Te Wharau lodged Wai 695 in November 1997, with regard to Te Aroha lands and mountain.¹⁴⁹ According to the Wai 695 statement of claim, Mr Te Wharau's 'claim to Te Aroha is through being the direct descendant to Tumu Tumu, first paramount chief of Te Aroha'.¹⁵⁰ In his statement of evidence, Mr Te Wharau states that, having defeated Ngati Hako at the base of the mountain, 'Tumu Tumu climbed to the summit of Te Aroha and claimed mana whenua of Te Aroha'. Following Tumu Tumu's death, and burial in a cave on Te Aroha mountain, 'Te Ruinga was the new chief of Ngati Tumu Tumu and the Tutuki Te Wharau whanau were to become the senior line from Te Ruinga'.¹⁵¹ The primary focus of Wai 695 is the Crown purchase of Te Aroha, and in particular the role of James Mackay.¹⁵²

144. Claims 1.20(a), 1.42(a)

145. Claim 1.47. In addition to the general Marutuahu submissions and overview reports, the relevant evidence in relation to the Wai 454 claim are documents x37, x38, and x39. Clive Majury gave evidence in support of the Wai 812 claim (doc x41). The relevant evidence in relation to the Wai 867 claim are documents x29 to x32. The statements in documents x33 to x36 were made in support of the Wai 454, Wai 812, and Wai 867 claims.

146. Claims 1.23, 1.23(a). In addition to the general Marutuahu submissions and overview reports, the relevant evidence in relation to the Wai 495 claim is document w15.

147. Claim 1.24

148. In addition to the general Marutuahu closing submissions (doc z6), the relevant evidence in relation to the Wai 563 claim includes documents C4, A9 (pp 191–250), F4, and x21–x23.

149. Claim 1.29

150. Ibid, p 1

151. Document w17, p 2

152. In addition to the general Marutuahu submissions and overview reports, the relevant evidence in relation to the Wai 695 claim includes documents w16, w17, w18, and w19.

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1.2.2(26)(g)

(g) Wai 754: Purangataua Whanau Trust claim: Garrick Cooper lodged Wai 754 in September 1998 on behalf of the Purangataua Whanau Trust (descendants of Purangataua Taiporutu) of Ngati Whanaunga.¹⁵³ The claim relates to 11 specific blocks, mostly located on the eastern coast of the Coromandel Peninsula: Kahuwera; Rautawhiri-o-te-ao; Whenuakite; Te Pepe; Whangamata 2 and 5 (eastern Coromandel); Onepu; and Waipatukahu (western Coromandel).¹⁵⁴ The Wai 754 statement of claim also listed the Tairua block, but research undertaken by Dr Tracy Tulloch for the Wai 754 scoping report failed to uncover any information linking the named tipuna or their successors to this block.¹⁵⁵ Wai 754 was heard (along with Wai 346) under Wai 809 as Ngati Whanaunga me ona hapu generic issues.

(h) Wai 809: Ngati Whanaunga (Hauraki) claim: Toko Renata Te Taniwha lodged Wai 809 in January 2000 on behalf of himself and Ngati Whanaunga me ona hapu.¹⁵⁶ The Wai 809 claimants adopt the claims of the Wai 100 claimants as well as those of the Marutuahu group.¹⁵⁷ The claim was heard alongside Wai 346 (Ngati Whanaunga Fairburn purchase) and Wai 754 (Purangataua Whanau) as Ngati Whanaunga me ona hapu generic issues. Counsel stated that Wai 809 had ‘in a sense . . . become the umbrella claim for those who derive their existence and mana from Whanaunga the ancestor’, and that the claim was ‘designed to emphasise and highlight within the Hauraki context the tino rangatiratanga of Ngati Whanaunga me ona hapu.’¹⁵⁸ The Wai 809 claims were summarised in closing submissions (separate to those of the Marutuahu group) in terms of the following themes: landlessness and ‘the corresponding demise and damage to [the claimants’] *tino rangatiratanga* as a result of the loss of land.’¹⁵⁹ Evidence was presented separately for Ngati Whanaunga me ona hapu.¹⁶⁰

(i) Wai 811: Te Patukirikiri lands and taonga claim: William Kapanga Peters and Te Warana Rehi Williams lodged Wai 811 in January 2000 on behalf of Te Patukirikiri Iwi Incorporated Society.¹⁶¹ In the hearing, Mr Peters stressed to us that, while the claim was administered by Te Patukirikiri Iwi Incorporated Society, this was not a Patukirikiri iwi claim, but rather a ‘Marutuahu whanau’ claim.¹⁶² The claim relates, in general terms, to the alienation of a number of blocks of land (as listed in the Wai 811 statement of claim).

153. Claim 1.34, doc x18, p 2

154. Claim 1.34, doc m2, p 8

155. Document j1; doc m2, p 8. In addition to the general Marutuahu submissions and overview reports, the relevant evidence in relation to the Wai 754 claim includes documents j1 and m2.

156. Claims 1.39, 1.39(a)

157. Claim 1.39(a), pp 3–5; doc z1, pp 5–6

158. Document z1, pp 2–3

159. Ibid, p 4

160. In addition to the general Marutuahu overview reports, the relevant submissions and evidence in relation to the Wai 809 claim include documents x3, x11, x12, x13–x20, x43–x45, z1, and AA8.

161. Claim 1.40

162. Document w20, pp 1–5. In addition to the general Marutuahu submissions and overview reports, the relevant evidence in relation to the Wai 811 claim includes documents w20–w22.

(j) **Wai 968: Nga Uri a Maata Ngapo and descendants of Marutuahu ki Harataunga:** For Wai 968, see section 1.2.2(7).

(27) Other claims

A number of other claims were included in the Hauraki inquiry district. While several claims were withdrawn or found to lie outside the boundaries of the district, the remaining claims were considered by the Tribunal to a greater or lesser extent depending upon the submissions and evidence heard. We consider that most of these claims fall within the scope of the general issues covered in this report.

(a) **Wai 30: Tainui land claim:** Robert Mahuta lodged Wai 30 in March 1987. Within the Hauraki inquiry district, the claim was limited to the issue of raupatu with respect to the Maramarua State Forest.¹⁶³

(b) **Wai 236: Early land transactions, South Auckland:** Te Kani Kingi (deceased) lodged Wai 236 in August 1991 with regard to South Auckland lands, particularly early land transactions.¹⁶⁴ The claim was found to concern issues largely outside the boundaries of the Hauraki inquiry district and was not pursued in this inquiry.

(c) **Wai 326: Cathedral Cove–Mercury Bay marine reserve:** William Alexander Ngawati lodged Wai 326 in December 1992 with regard to an alleged lack of consultation with respect to the creation of the Cathedral Cove–Mercury Bay marine reserve.¹⁶⁵ The claimant was not of Hauraki and this matter was not pursued in this inquiry.

(d) **Wai 330: Auckland and South Auckland lands:** Ngarau Te Paea and others lodged Wai 330 in November 1992 with regard to Auckland and South Auckland lands.¹⁶⁶ The claim lies largely outside the Hauraki inquiry district and was not pursued in this inquiry.

(e) **Wai 364: Tamaki Hauraki (Tooke) claim:** Rawiri Tooke lodged Wai 364 in May 1993.¹⁶⁷ Mr Tooke declined to be heard by this Tribunal and the claim was withdrawn.¹⁶⁸

¹⁶³ Claim 1.1. The relevant submissions and evidence in relation to the Wai 30 claim include documents A1, A2, and z7 and paper 2.75.

¹⁶⁴ Claim 1.7(a)

¹⁶⁵ Claim 1.10. Document A19 was taken as read. No request was made for hearing time.

¹⁶⁶ Claim 1.10(a)

¹⁶⁷ Claim 1.15

¹⁶⁸ Papers 2.524, 2553

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1.2.2(27)(f)

(f) **Wai 369: Waiheke Island lands:** Horimatua Evans lodged Wai 369 in August 1993, with regard to Waiheke Island lands.¹⁶⁹ In August 2003, the presiding officer instructed the registrar to note that the Crown had informed the Tribunal that Wai 369 had been settled.¹⁷⁰

(g) **Wai 508: Ngati Te Ata claim:** Whititera Kaihau lodged Wai 508 in May 1995, with regard to Ngati Te Ata interests in South Auckland lands.¹⁷¹ Brief submissions were filed which in part concerned Ngati Te Ata interests in the Waitakaruru block (Piako area) but little evidence was presented.¹⁷²

(h) **Wai 826: Te Kawakawa block claim:** Te Awanuiarangi Black lodged Wai 826 in May 1999 on behalf of the descendants of Titikawhena Oketopa/McMahon (née Hapi) with regard to the alienation of interests in the Te Kawakawa block.¹⁷³ While some evidence was filed, the claim was not pursued in the Hauraki inquiry.¹⁷⁴

1.3 OUR REPORT

An inquiry of such length and complexity has resulted in a long, detailed report, necessary if any justice is to be done to the history of relations between the Treaty parties in Hauraki. However, we have provided an executive summary of our principal analyses and findings at the beginning of this report.

Our report is made up of seven parts; the most substantial of which (parts II to IV) have a prologue introducing the major themes explored. The seven parts are divided into 28 detailed chapters on specific themes:

- Part I of this report defines the Hauraki inquiry district and the Hauraki iwi and hapu who live within it. We set out our understanding of the relationships between these groups, their history in Hauraki, and the areas they primarily associate with, as they themselves explained them to us. We define the boundaries of our Hauraki inquiry district, which, we recognise, do not incorporate all areas with which Hauraki people claim association.
- Part II outlines the land and other claims relating to the early period before and after the signing of the Treaty, from the first transactions between Pakeha and Maori through to the beginnings of Crown intrusions into Hauraki territory, and ending with the

169. Claim 1.16

170. Paper 2.598

171. Claim 1.23(a)

172. The relevant submissions and evidence in relation to the Wai 508 claim include documents AA4, Y21, Y22, and X42.

173. Claim 1.43

174. Documents P3, R4

break down in relationships between the Crown and Hauraki Maori as war broke out in Waikato territory in 1863.

- ▶ Part III investigates the complex issue of gold and other subsurface minerals, described by counsel for Wai 100 as ‘the linch pin’ of the Hauraki claims’. It also discusses timber issues.¹⁷⁵
- ▶ Part IV moves into Native Land Court issues, drawing in part on the recent findings of the Waitangi Tribunal’s report into the Gisborne claims,¹⁷⁶ but focusing more specifically on the background to the earliest land legislation, the 1862, 1865 and later Native Land Acts. Native land legislation is at the heart of land loss, and as such forms a very significant focus of our report.
- ▶ Part V moves into a discussion of several different but general themes, again common to most claimant groups: foreshore issues, the impact of colonisation and development on the environment, the rating of Maori land, public works takings, and the destruction or lack of protection for wahi tapu and taonga. In this part, we also discuss specific issues relating to Te Aroha township and the Te Aroha hotspots.
- ▶ In part VI, we give our overall comments on the accumulative impact of all the above issues on the socio-economic health and status of Hauraki Maori.
- ▶ Finally, in part VII, we set out our findings relating to the specific non-HMTB claims, not covered in the generic discussions in earlier parts. Otherwise, we refer the reader to where the non-HMTB claims are discussed throughout the report.

¹⁷⁵. Document A51, p 1

¹⁷⁶. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, ch 8



CHAPTER 2

THE DISTRICT AND ITS PEOPLES

2.1 THE HAURAKI DISTRICT

The Hauraki inquiry district as defined by the Tribunal comprises the southern part of Tikapa Moana – the Hauraki Gulf – and its islands, the Coromandel Peninsula, and the lower Waihou and Piako Valleys. In traditional Maori imagery, the Coromandel is the jagged barb of the great fish of Maui, Te Tara o te Ika, also called Te Paeroa o Toi. The peninsula is also seen by Tainui people as the ama (outrigger) of their waka, with the 900-metre high peaks of Te Aroha and Mount Moehau marking the prow and stern respectively.¹ The total land area is 5059 square kilometres (1.25 million acres), but there is an almost equal area of ocean and it should be recognised that the seas and tidal foreshores of Tikapa Moana north to Great Barrier (Aotea) and the Mahurangi coast were as important as the land to the tangata whenua of the region. Theirs was a maritime empire, based upon harvesting the seas and foreshores and traversing the sheltered waters for complex exchanges between tribes.

Geologically, the Hauraki district, like all of New Zealand, has been shaped by the abutting of two tectonic plates. The Pacific plate to the east is being pulled under the Indo-Australasian plate to the west at the rate of about 50 millimetres per year. The two plates are moving laterally as well. Consequently, the earth's crust has buckled along a series of fault lines. Mountain chains have formed along them, including the Hunua and Hapuakohe Ranges west and south-west of the Firth of Thames, and the Coromandel and Hunua Ranges to its east and south-east.² The period of 'old volcanism', with its upwelling of molten minerals and folding of layer upon layer as the earth's crust boiled, twisted, and cooled, left the Hauraki region embedded with deposits of hard minerals such as basalt, obsidian, chert, and argillite, important in Maori material culture. Louise Furey's archaeological work shows that the basalt at Tahanga (eastern Coromandel) was for many centuries the most important stone material in the North Island, being worked and traded throughout the country, though eventually partly supplanted by discoveries of argillite.³ The period of 'old

1. Document A6, p 3

2. Evelyn Stokes, *The Legacy of Ngatoroirangi: Maori Customary Use of Geothermal Resources* (Hamilton: Department of Geography, University of Waikato, 2000), pp 4–5

3. Document M25, pp 36–40

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2.2

volcanism' also caused veins of gold to be deposited in the igneous rocks, the exploitation of which by Europeans was to have profound effects on the region's history. Geothermal activity has continued to affect the region, notably in the form of numerous hot springs about Te Aroha, and about Miranda (Pukorokoro), on the western shore of the Firth.⁴

Many rivers flow from the mountains into the plains and sea, the most navigable being the Piako and the Waihou, which Cook named the Thames. Until drained in the early twentieth century, the Thames–Piako flood-plain formed one of the largest wetlands in New Zealand: 'In summer, it dried out into definable watercourses and ponding areas, while in winter it became a sprawling inland sea.'⁵ On the other side of the Coromandel Ranges, the largest rivers discharging on the eastern coast are the Whitianga and the Tairua. Whitianga Harbour (Te Whitianga-o-Kupe) is the best harbour in the region, but the Coromandel and Manaia Harbours also offered good shelter, as did the Waihou and Piako Rivers and many small bays and inlets.

Flat, well-drained, and easily cultivated land was limited in Hauraki, in comparison with other regions. 'Areas of alluvium at river mouths soon gave way to shallow clay-based soils on steep slopes.'⁶ But the area was temperate and the gulf islands frost-free, permitting the cultivation of kumara and (less readily) of taro and yam brought from central Polynesia. The broadleaf and podocarp forests included miro, hinau, tawa, and karaka, whose fruit could be harvested in season. The region abounded in bird life, including moa in the early decades of Maori settlement. There were many wetland bird species and thousands of migratory waders, which congregated on the coastal mudflats in season. The seas and foreshores teemed with fish and shellfish, the swamps and rivers with birds, eels, and other freshwater fish. Seals abounded on the eastern Coromandel coast.⁷ A rich region for human habitation, the people who traversed and harvested the seas and inland waters as readily as they traversed and harvested the land. Apart from the swamplands, most of the region was thickly forested, with the rivers and harbours giving access to great stands of kahikatea (on the flood-plains) and kauri (on the hillsides) which drew Pakeha to its shores.

2.2 PARE HAURAKI : THE PEOPLE

The term 'pare Hauraki' is attributed to Hotunui, who used it to welcome his son Marutuahu when he first arrived in Hauraki. While the name has clear Tainui origins, the late Taimoana Turoa, a kaumatua of Hauraki, proposed that it might be used for the peoples of the region.⁸

4. Stokes, pp 225–250

5. Paul Monin, *This Is My Place: Hauraki Contested, 1769–1875* (Wellington: Bridget Williams Books, 2001), p 8

6. Ibid, p 122

7. Document M25, pp 3–4

8. Taimoana Turoa, *Te Takoto o Te Whenua o Hauraki: Hauraki Landmarks*, edited by Te Ahukaramu Charles Royal (Auckland: Reed Books, 2000), pp 42–43

2.2.1 The earliest occupants

Hauraki – ‘winds from the north’ – was a point of entry for the Polynesian settlement of Aotearoa–New Zealand, and lay in the midst of the busy seaway from North Cape down the eastern seaboard of Te Ika a Maui, later traversed by the canoes of many iwi and hapu. Furthermore, it commanded the access to the isthmus of Tamaki-makau-rau, with its canoe portages to the Manuka (Manukau) Harbour and thence to the west coast and Waikato. The Waihou and Piako Rivers were also avenues to and from the Waikato heartland. The resource-rich and exposed Hauraki islands, rivers, and harbours were visited by many groups and periodically fought over.

The earliest occupants of the region are considered to be descendants of the explorer, Toi-te-huatahi (also called Toi-kai-rakau) who preceded the famous waka such as Tainui, Arawa, Mataatua, and Takitimu. These disparate early descent groups, often called ‘Te Tini-a-Toi’, intermarried with the peoples of the various waka as the latter arrived and settled the area.

Ngati Hako are widely acknowledged to be one of the oldest of the surviving Hauraki tangata whenua groups. The ancestral traditions of the tribe appear to have been lost in subsequent invasions.⁹ Heather Bassett and Richard Kay suggest that Ngati Hako, Ngati Tokanui, and Ngati Paeahi (or Paiahi) were hapu of Nga Marama, a pre-Tainui people.¹⁰ Taimoana Turoa, however, regards Nga Marama as the earliest of the Tainui tribes who lived in Hauraki.¹¹ Tauranga tradition suggests Nga Marama were the early people defeated by Ngati Ranginui and then Ngai Te Rangihouhiri.¹² Paul Monin also mentions another tradition, recounted in 1958 land court evidence, of Ngati Hako’s descent from Hako, son of Taha, left in Hauraki by the Tainui canoe.¹³ Among other early tribal names, Graeme Murdoch, a historian for the Auckland Regional Council, notes the names Tutumaio, Turehu, and Maewao attributed at different times to very early occupants of the inner Hauraki Gulf.¹⁴ Ngati Hako dominated southern Coromandel, the Hauraki Plains for many generations, but were often defeated and harried by the later-arriving Marutuahu people. Their survivors were eclipsed for a while and restricted to a much narrower land base. When Marutuahu called a halt to the fighting, Ngati Hako’s lands were reduced to an area about the junction of Hikutaia and Waihou Rivers. But they made peace with the invaders, intermarried with them, and were never totally subjugated.¹⁵

Ngai Tai (or Ngati Tai) traditions also contain reference both to pre-Tainui and Tainui origins. Stephen Zister told the Tribunal of a large pohutukawa tree on the foreshore east

9. Ibid, pp 44–47

10. Document R7, pp 14, 22

11. Turoa, p 55

12. Waitangi Tribunal, *Te Raupatu o Tauranga Moana* (Wellington: Legislation Direct, 2004), p 28

13. Document C5, p 14

14. Graeme Murdoch, *He Korero Tawhito mo Rangitoto: A Brief Outline of Maori Historical Associations with Rangitoto Island* (Auckland: Auckland Regional Council, 1991) (doc C5, p 11)

15. Their position was analagous to that of Ngati Ranginui at Tauranga after the Ngai Te Rangi invasion: see Waitangi Tribunal, *Te Raupatu o Tauranga Moana*, p 46.

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Figure 3: Hauraki tribes, circa 1840. Source: Taimoana Turoa, 1997.

of modern Howick named 'Te Tuhi a Manawatore'. Ngai Tai tradition says that Manawatore came from Hawaiki not by waka but on the back of a taniwha, to Maraetai and Cockle Bay, where he marked the pohutukawa with ochre as a guide to those following him.¹⁶ But Ngai Tai are also connected with the Tainui canoe, which came to the Tamaki area 25 generations ago and left people whose descendants still live there. The waka then voyaged to the eastern Bay of Plenty, where Torere, the daughter of its commander, Hoturoa, was left at the place named after her. Generations later, when bitter feuding broke out at Torere, the leaders there resolved to send three chiefly sisters, Te Raukohekohe, Motu-ki-tawhiti, and Te Kawenga, with others of their people, to find their kinsmen back in Hauraki and Tamaki. On arrival at the Maraetai–Wairoa area, they mingled and intermarried with Ngati Maru (who had meanwhile arrived in the district), with the Tamaki section of Ngai Tai (Ngati Tai), and with the older (pre-Tainui) Te Wai-o-Hua, an early people of Tamaki, later displaced or absorbed by Kaipara and Waikato peoples. More precisely, Te Whatataui of Ngati Tai of Tamaki married two of the chiefly sisters from Torere (Te Raukohekohe and Motu-ki-tawhiti), while the third sister (Te Kawenga), married Te Whiringa of Te Uri o Pou, kin to Te Wai-o-Hua.¹⁷ From this time the tribal name Ngai Tai seems to have been preferred over the earlier Ngati Tai. Zister states that, while the tribal name Ngai Tai is maintained at Torere, Tamaki, and the western shore of Hauraki alike, 'the people who lived between the Wairoa and Tamaki River [estuary] also use the name Ngati Te Raukohekohe'.¹⁸

Another hapu of the Wairoa and Hunua district, which features prominently in discussion of the East Wairoa land confiscation of 1864, is Ngati Kohua.¹⁹ This group is variously given as a hapu of Ngai Tai and of Te Wai-o-Hua.²⁰ It is also given as an alternative name for Te Koheriki, now known as Ngati Koheriki by the claimants associated with East Wairoa and the Waikarakia block of the Maramarua district.²¹

Ngati Huarere were an important, early Hauraki people whose ancestors arrived in Te Arawa waka. Huarere was the grandson of Tamatekapua, commander of the waka which made landfalls at Moehau and elsewhere in the Hauraki district. After settling in the Bay of Plenty, Tamatekapua quarrelled with his kin and returned northward to Moehau (northern Coromandel), where some descendants settled.²² Tradition suggests that Huarere ended his

16. Document A68, pp 2–3. Te Warena Taua, who discusses these marriages in some detail, states that 'Te Whatataui was the rangatira of the Tamaki–Maraetai section of Ngati Tai and Wai o Hua, while his wife belonged to the Ngati Maru of Papa Aroha': doc T24, p 12.

17. Document A68, pp 3–5; doc T24, pp 11–13; see also doc A40(b)

18. Document A68, p 5; doc T24, p 13

19. See whakapapa and associated discussion in document T24, pp 20–21, and document C3, pp 25–27.

20. Document T24, p 20

21. Claim 1.46(a), para 5

22. See Don Stafford, *Te Arawa: A History of the Te Arawa People* (Auckland: Reed, 1967); doc M4, p 6; see also Leslie G Kelly, *Tainui: The Story of Hoturoa and his Descendants* (Wellington: The Polynesian Society, 1949) p 174. Kelly regards Huarere as the son of Tamatekapua.

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days on Waiheke Island, and Paul Monin considers that most of the pa sites on that island were constructed by Ngati Huarere.²³ Ngati Huarere, together with Ngati Hei and Ngati Hako, dominated the Coromandel Peninsula for many generations. There were at least four hapu of this iwi, including Ngati Pare, Ngati Raukauri, Ngati Piri, and Ngati Koheru. These hapu responded variously to the Marutuahu arrival, discussed below. (The claimants have said that, after returning from the Waikato in the early 1830s, they tended to identify with Ngati Tamatera and Ngati Maru to 'distance themselves from the image of N Huarere as a conquered iwi'.²⁴)

Ngati Hei are also said to descend from the crew of Te Arawa, their eponymous ancestor, Hei being an uncle of Tamatekapua. Hei moved southwards to the central Bay of Plenty with his son, Waitaha or Waitaha-(nui)-a-Hei. The Bay of Plenty people known as Waitaha descend from them, as do Ngati Wai, now of Whangarei district but formerly also of the gulf islands, through the marriage of Waitaha-a-Hei with a high-ranking woman of Hauturu (Little Barrier Island).²⁵ In tradition, Hei had long-established connections with Whanganui-a-Hei (Mercury Bay), and in time Ngati Hei settled the east coast of Coromandel Peninsula from Whangapoua to Whangamata and the offshore islands.²⁶ Evidence given in the Native Land Court in the late nineteenth century complicates the tribal history in showing that 13 generations previously another Hei – Hei Turepe of Tainui ancestry – came to the Hauraki district from the Waikato, conquered land from the previous tangata whenua about Whitianga and Tairua, and intermarried with Ngati Huarere.²⁷ This is one of many examples of hapu with mixed origins identifiable in the nineteenth century.²⁸ Protected by the Coromandel Ranges, Ngati Hei were less exposed than Ngati Huarere to the Marutuahu invasions from the west.

The traditions of Ngati Rahiri date to the Mataatua canoe, which landed at Whakatane and later voyaged north to Te Tai Tokerau. In Hauraki tradition, Rahiri accompanied Puhi-kai-ariki, the ancestor of Nga Puhi, on this voyage. But, approaching old age, Rahiri wished to return to Whakatane and journeyed south with some of his people, via Tamaki isthmus and Hauraki, naming various land features as they went. On this journey, Rahiri and his granddaughter climbed a peak they named Te Aroha-a-uta; some kin stayed there as Rahiri journeyed on.²⁹ Later, they intermarried with other Hauraki hapu, including Ngati Tumutumu, who were living at Te Aroha before and after the battle of Taumatawiwi about 1830 (see below); these originally different peoples are now named Ngati Rahiri Tumutumu

23. Paul Monin, *Waiheke Island: A History* (Palmerston North: Dunmore Press, 1992) p 17; doc M4, p 11

24. Document M5, para 13.1

25. G Graham, 'Hauturu – The Wind's Resting Post', Auckland Institute and Museum, MS120 (doc C5, p 12)

26. Document N2, pp 11–21

27. Ibid, pp 17–20, 23–29

28. See Peter McBurney's discussion of the relationships between Ngati Huarere, Ngati Hei, Te Patukirikiri, and Ngati Rongo-u, as expressed in the whakapapa of Whangapoua chiefs: docs A28, L12.

29. Turoa, pp 50–51

in the Hauraki Maori Trust Board Act 1988. Their present claim is focused upon Te Aroha maunga and its environs. One hapu of Ngati Tumutumu was Ngati Kopirimau; Wiremu Hotereni Taipari, generally regarded as Ngati Maru, also belonged to this group.³⁰

Te Patukirikiri or Patukirikiri is a group which also seems to have preceded the Marutuahu invasion and retained their earlier identity together with newer connections. They are considered to have descended from Te Wai-o-Hua of Tamaki and Waiheke Island, through the marriages of their chief, Kapetaua. Wiremu Peters stated to the Tribunal that their tupuna arrived in the Hauraki district only a short time before the Marutuahu invaders and intermarried with them. Other statements suggest that Patukirikiri now regard themselves as a hapu of Ngati Tamatera or, alternatively, of Ngati Paoa.³¹ Taimoana Turoa states that Patukirikiri managed to avoid full-scale engagement in the conflicts between the Marutuahu tribes and the previous tangata whenua. He suggests that they gained their distinctive name in a conflict with earlier occupants of the Coromandel by hurling stones at them – the name ‘Patukirikiri’ being rendered as ‘killing with, or killing upon stones of the beach.’³²

Another important pre-Marutuahu group was Te Uri-o-Pou, descended from Poutekateka or Poutukeka, a chief of both Arawa and Tainui origins whose people occupied Whakatiwai and its environs on the western shore of Hauraki Gulf. Another early group, of Toi stock, was named Te Kahui-ariki.

2.2.2 The Marutuahu invasions

The traditional history of Hauraki is dominated by the invasion and settlement of much of the region by iwi of Tainui origin, collectively known as Marutuahu. Tribal traditions are revealed in the statements of witnesses before the Tribunal, in oral traditions collected and published by early Pakeha ethnographers such as George Graham, writing for early numbers of *The Journal of the Polynesian Society*, in the work of Bruce Biggs and Pei Jones entitled *Nga Iwi o Tainui*,³³ in Leslie Kelly’s book *Tainui* (based on traditions related by Pei Jones and published by the Polynesian Society in 1949), and in recent scholarly analysis of Maori evidence given in the Native Land Court and other Maori sources (notably the work of Angela Ballara).

An account by Tukumana Te Taniwha, collected and published by George Graham, states that about the late sixteenth century the Tainui chief Hotunui of Kawhia (not to be

30. Hauraki minute book 10, fols 405–406 (doc w17, pp 3–4)

31. Document A58, pp 4–6. For a reference to ‘the Patukirikiri hapu of Ngati Tamatera’, see document M4, p 38. An 1865 statement by a Pita Taurua links Patukirikiri with Ngati Paoa: doc c5, p 16.

32. Turoa, pp 51–52. In a somewhat parallel account, Finlay Phillips states that the name means ‘slain on the shingle’ and refers to a defeat at the hands of Ngati Huarere on Motutapere Islands, Coromandel Harbour, about 1805: Phillips, *Nga Tohu a Tainui: Landmarks of Tainui – A Geographical Record of Tainui Traditional History*, 2 vols (Otorohanga: Tohu Publishers, 1989), vol 1, p 114 (doc c5, p 16).

33. Pei Te Hurinui Jones, *Nga Iwi o Tainui: The Traditional History of the Tainui People*, edited by Bruce Biggs (Auckland: Auckland University Press, 1995)

confused with Hoturoa, captain of Tainui waka, who lived some eight to 11 generations earlier), falsely accused of stealing kumara seedlings, left Kawhia to live on the western shore of Tikapa Moana with Te Uri-o-Pou. Hotunui left behind his pregnant wife, Miharawhiti, with instructions that if the coming child was a boy he was to be named Marutuahu, 'maru' being the shelters for kumara seedlings and 'tuahu' the mounds for growing them.³⁴ In Hauraki, Hotunui married Waitapu, daughter of Te Whata³⁵, and lived with her at her father's pa, Te Tikiore, at Whakatiwai. Despite his high rank, Hotunui was treated with indignity. In time, Marutuahu, the son born at Kawhia after Hotunui's departure, found his father at Whakatiwai. He too stayed and married local women, first Hineurunga (or Hinerehua in some accounts) then her sister Paremoehau, daughters of Te Ruahiore in Tukumana Te Taniwha's account, and in Leslie Kelly's.³⁶ Pei Te Hurinui Jones and Bruce Biggs, however, state that Hotunui's wife was the daughter of Te Ruahiore and that the two sisters, Marutuahu's wives, were daughters of Te Whata.³⁷ The most recent published Maori account, *Te Takoto o Te Whenua o Hauraki: Hauraki Landmarks*, by Taimoana Turoa, regards Paremoehau as the elder of the two sisters, of Te Uri-o-Pou and Te Kahui-ariki descent.³⁸

By Hineurunga, Marutuahu had three sons, Tama-te-po, Tama-te-ra and Whanaunga.³⁹ From Marutuahu and his sons descend the Hauraki iwi, Ngati Maru, Ngati Tamatera, and Ngati Whanaunga. Ngati Rongo-u or Rongo-U, take their name from Rongomai, grandson of Tama-te-po, but this group seems to have eventually merged with the stronger sections of the confederation.⁴⁰ Despite the intermarriages with Te Uri-o-Pou, Marutuahu resolved to extract utu or satisfaction from them for their bad treatment of his father, and with his family and Te Kahui-ariki allies, attacked and drove them out of the district. The Marutuahu people then established their own ancestral kainga at Puwhenua, an area between Kaiaua and Orere.

The descendants of Marutuahu at first tried to live peaceably with Ngati Hako and Ngati Huarere with whom they had intermarried, but Waenganui, wife of Taura-kapakapa, youngest son of Marutuahu, was killed and her body desecrated by her own people. Taura-kakakapa took utu from Ngati Hako and Ngati Huarere, but was himself killed. The Marutuahu tribes then systematically overcame most of the previous tangata whenua and settled upon much of the lands they conquered. But they also made further strategic marriages with the earlier occupants to cement their conquests and re-establish peace.⁴¹ By the

34. Kelly, p 100

35. This is also spelt 'Te Whatu' in various historical texts: Jones, p 104.

36. Recorded by George Graham from Tukumana Te Taniwha in 1929 and published in *The Journal of the Polynesian Society*, vol 50 (1941), pp 120–133. See also Kelly, pp 99–115.

37. Jones, pp 102–106

38. Turoa, p 60

39. Jones implies that Paremoehau (Paremoehau) was their mother: Jones, p 104.

40. Turoa, p 62; Jones, pp 102–106; Angela Ballara, *Iwi: The Dynamics of Maori Tribal Organisation from c1769 to c1945* (Wellington: Victoria University Press, 1998), p 347 fn 113

41. Turoa, pp 60–61

eighteenth century, they were the most dominant groups in the Hauraki region, including the islands of the gulf.⁴²

Relations between the various Marutuahu factions as they developed were by no means always peaceful. Taimoana Turoa writes:

Upon the death of Marutuahu, Tamatera received the mana of his father. This was to cause trouble in the family as the custom was for the mana of the father to be passed to the eldest child, in this case, Tamatepo. As was also the custom, the wife of the deceased also becomes the wife of the person to whom the mana is passed. In this case it was Hineurunga, his mother's youngest sister, who became Tamatera's wife . . . The liaison invited the strong disapproval of Tamatera's people. Some Hauraki sources make an oblique reference to not only an adulterous relationship but also one bordering on incest which was considered despicable . . . matters came to a head when Tamatera's younger brother, Whanaunga, returned after some years of absence spent in Kawhia. He was the most belligerent of all the brothers and on learning of the marriage was so incensed that he vowed to kill him . . . Paremoehau . . . on learning of Whanaunga's intention sought out Tamatera and warned him to depart.⁴³

Tamatera left Whakatiwai and moved to Te Komata, near the present town of Paeroa, and thence to Katikati and Whakatane. He did not return.⁴⁴

During the course of the Marutuahu conquests, another iwi of Tainui derivation, Ngati Paoa, entered Hauraki. Paoa was a ranking Waikato River chief, the younger brother of Mahuta, eponymous ancestor of Ngati Mahuta, later the people of Potatau Te Wherowhero and his descendants. Tradition has it that, shamed by his wife's failure to provide adequate food during one of Mahuta's visits to his kainga, Paoa left Waikato and travelled to Hauraki. There he married Tukutuku, a granddaughter of Marutuahu, and eventually settled in the district. He and his children by Tukutuku were forebears of the Ngati Paoa people.⁴⁵ By the early nineteenth century, Ngati Paoa, along with the Marutuahu tribes, had established themselves in considerable numbers along the western side of the gulf, along parts of the Tamaki isthmus, in many of the gulf islands including Kawau and Great Barrier and along the Mahurangi coast. A struggle for dominance developed between them and Ngati Maru. Taimoana Turoa notes that whilst engaged in the struggle against Ngati Paoa, Ngati Huarere and Ngati Hako, Ngati Maru assessed their situation, and, as more land became available they took up station around Thames and Wharekawa (eastern Coromandel), leaving their former home to Ngati Whanaunga and the increasingly powerful Ngati Paoa.⁴⁶

42. George Graham, 'The Wars of Ngati-Huarere and Ngati-Maru-Tuahu, of Hauraki Gulf', *Journal of the Polynesian Society*, vol 29, no 113 (1920), pp 37-41

43. Turoa, p 63. In the version recounted by Kelly, the two brothers were sons of Hineurunga, which, if true, would make Tamatera's incest even more extreme: Kelly, pp 173-174.

44. Turoa, p 63; Graham, p 39

45. Document A67, p 1; see also Jones pp 162-168; Ballara, p 347 fn 113

46. Turoa, p 65

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According to evidence presented to us, another much smaller tribe, Ngati Tara, kin to Ngati Maru and Ngati Tamatera, but also to Ngati Raukawa, followed Marutuahu into the Hauraki district but apparently retained its own identity.⁴⁷ Taimoana Turoa's account and research by Bassett and Kay into Native Land Court records show that Marutuahu and Tara both descended from Hoturoa of Tainui through Whatihua.⁴⁸ Ngati Tara moved, perhaps in the seventeenth century, from Maungatautari to the Waihou River, where they fought and then intermarried with Ngati Hako. Eventually, they controlled land between Piraurohi near the Waihou River and Owaharoa near Ohinemuri, and had acquired the alternative name Ngati Koi in the process. Until the early nineteenth century, they continued to fight with Nga Marama groups around Waihi and Katikati, forming an alliance with Ngati Tamatera during these struggles. They also created ties by marriage with the Ngati Tokanui hapu of Nga Marama.⁴⁹ Bassett and Kay state:

By the late nineteenth century intermarriage had occurred to such an extent that descendants of Tara and the descendants of Tokanui were virtually the same people. Nevertheless they still acknowledged and maintained their separate ancestral land rights deriving from Ngati Tara and from Ngati Tokanui. This meant that in some Native Land Court cases Te Keepa [the leading rangatira of the group at the time] claimed blocks through Tara, and in other cases he claimed blocks through Tokanui.⁵⁰

Similarly, though closely related to Ngati Tamatera, Ngati Tara appeared as a claimant group contending with Ngati Tamatera in the Native Land Court in the 1870s.⁵¹ They are represented as Ngati Tara Tokanui in the Hauraki Maori Trust Board Act 1988. In the early nineteenth century, their customary interests were in the Ohinemuri–Waihi–Katikati district. A contemporary preference for much intermarried hapu such as these is to identify with a marae, such as Ngahutoitoi. Amelia Williams, for the Ngati Koi/Tara and Ngati Tokanui claimants, Wai 714, states:

When we first registered our claim we formed a committee that represented the four groupings on our Marae and we were mandated to research identity aspects of Ngati Koi,

47. Document A69, p 2

48. Turoa, pp 53–54; doc R7, p 27. At page 78, Turoa wrote:

Indeed, so much of their story is woven in with that of Ngati Tara that it is no surprise to find that Ngati Koi are referred to as a sub-tribe of Ngati Tara. However, genealogical recitals known today contradict such a view and confusion is compounded by a lack of information concerning generations preceding Koi himself. This does not necessarily cancel out a Tara affiliation as the name itself could refer to an incident ascribed to them . . .

49. Document R7, pp 9–32

50. Ibid, p 25

51. Native Land Court, *Important Judgments Delivered in the Compensation Court and Native Land Court, 1866–1879* (Auckland: General Steam Printer, 1879) pp 97–100

Ngati Tara, Ngati Tokanui and Ngati Tawhaki ki Ngahutoitōi. Ngahutoitōi enshrined our cultural and social identity.⁵²

The outcomes, for the previous tangata whenua groups and the Marutuahu peoples alike, were complex and not easy to state precisely. Te Uri-o-Pou and Te Kahui-ariki were mostly killed or driven beyond the borders of Hauraki. (Even while Captain Cook was visiting Hauraki, Ngati Paoa were in process of driving Te Uri-o-Pou from Tapapakanga and Orere.⁵³) Dr Ballara considers that among tangata whenua who survived the Marutuahu conquests were some Ngati Huarere.⁵⁴ Evidence presented in respect of Ngati Raukauri hapu of Ngati Huarere indicates that most hapu of Ngati Huarere were decimated by conflict with Ngati Rongo-u and other Marutuahu peoples, with Ngati Pukenga and amongst themselves, but that Ngati Raukauri survived by forming an alliance with Ngati Tamatera. Henceforth they were no longer aligned with other hapu of Ngati Huarere, but had taken on a new name, Te Mango, and were more closely aligned with their Marutuahu allies to whom they had gifted land and with whom they had intermarried. 'By the nineteenth century [some five generations later] this led to a situation where Ngati Raukauri identified themselves primarily as Ngati Tamatera, rather than Ngati Huarere' or at least 'could equally claim to be members of Ngati Tamatera'.⁵⁵

Thus, by the early nineteenth century, Hauraki was occupied by an intricate patchwork of groups, predominantly of Marutuahu descent, intermingled with groups of earlier occupants. Most of the tribes were intermarried and had complex linkages with each other. Some early hapu had lost their separate identity in the constant process of hapu formation and re-formation. Others retained their pre-Marutuahu identity and survived independently, even if in somewhat tenuous relationships with the Marutuahu tribes. Some eighteenth- and early nineteenth-century hapu derived their identity from more than one of the founding Marutuahu divisions; Ngati Kotinga are an example. They 'are most frequently identified as being a hapu of Ngati Whanaunga or Ngati Maru. The minute books also suggest, however, that Ngati Kotinga have close links with Ngati Paoa'.⁵⁶ Captain Cook's expedition, arriving in Whanganui-a-Hei (Mercury Bay) in November 1769, found that it was engaging with two distinct Maori groups. One, represented by the chief Toiwa, is generally regarded from land court evidence as Ngati Hei; the other, as revealed in the remarkable account of Horeta Te Taniwha, recorded probably in the 1840s, was Ngati Whanaunga. Relations between the two were tenuous, Toiwa explaining to Sir Joseph Banks that when the *Endeavour* sailed he would have to retire to his pa, because he anticipated that Ngati Whanaunga would seek

52. Document R12, para 6

53. Monin, *This Is My Place*, p 24

54. Ballara, pp 197–198; see also Kelly, pp 175–181

55. Document M4, pp 9–27

56. Document H1, pp 9–18

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retribution from his people for the loss of a Ngati Whanaunga man, killed during a theft and apparent defiance of the English a few days earlier.⁵⁷

The centuries of migration, warfare, and shifting alliances had produced a complex web of customary land rights throughout most of Hauraki, derived variously from ancestral occupation, raupatu (conquest), *tuku* ('gift' or permission to occupy) and *ahi ka* (continuous residence and cultivation). There were few extensive areas of cultivable land, capable of supporting large village clusters. Most hapu were obliged to establish rights to various resources and patches of cultivations scattered throughout the district, and interspersed with the rights of other hapu. Parts of the land were '*whenua tautohe*', debated or contested between two or more claimant groups.⁵⁸ Populations were dispersed; most lived and worked in mobile whanau, kin groups or small hapu of about 30 to 50 people, keeping their claims alive in a number of areas. In the smaller offshore islands, often rocky and waterless, a number of groups might visit for mutton-birding, shellfish gathering, or to establish temporary camps for seasonal sea-fishing. But some of these islands were unfit for continuous occupation and cultivation.⁵⁹

Although outside the Hauraki inquiry district, a complex of Ngati Paoa villages developed on the northern Tamaki shore, an area gifted to Ngati Paoa following intermarriage with an early people, Nga Oho, kin to Te Wai-o-Hua. Focused on the great kainga of Mauinaina and the pa called Mokoia, the complex, which developed extensive potato cultivations, was estimated to contain 4000 people, the largest Maori community observed by Europeans in pre-1840 New Zealand.⁶⁰

We note again that the Marutuahu 'empire' was largely maritime, based upon harvesting the foreshores and seas and upon a rohe-wide network of feasting and gift exchanges based on their produce. The people were well placed for fruitful interaction with Europeans, but also vulnerable to penetration by well-armed raiders from the north.

2.2.3 The 'Nga Puhi' raids

As the Marutuahu tribes (particularly Ngati Paoa and Ngati Maru) moved into the Tamaki isthmus and the northern Hauraki Gulf, they encountered local peoples such as Te Wai-o-Hua and Te Kawerau. They were increasingly challenged by Kaipara peoples including Ngati Whatua and Ngati Rongo, who were moving southward into the area in the latter half of the eighteenth century, and by invaders from Northland, collectively known to them as 'Nga Puhi'. Fishing parties of the various iwi shared the gulf waters, or even collaborated in great seasonal harvests such as the annual shark fishing off the Mahurangi coast. But competition

57. Document N9, pp 6–13. Te Taniwha's account was published in John White, *The Ancient History of the Maori, his Mythology and Traditions*, 7 vols (Wellington: Government Printer, 1887–91), vol 5, pp 121–133.

58. Monin, *This Is My Place*, p 13

59. Document C5, p 9

60. Monin, *This Is My Place*, pp 51–52

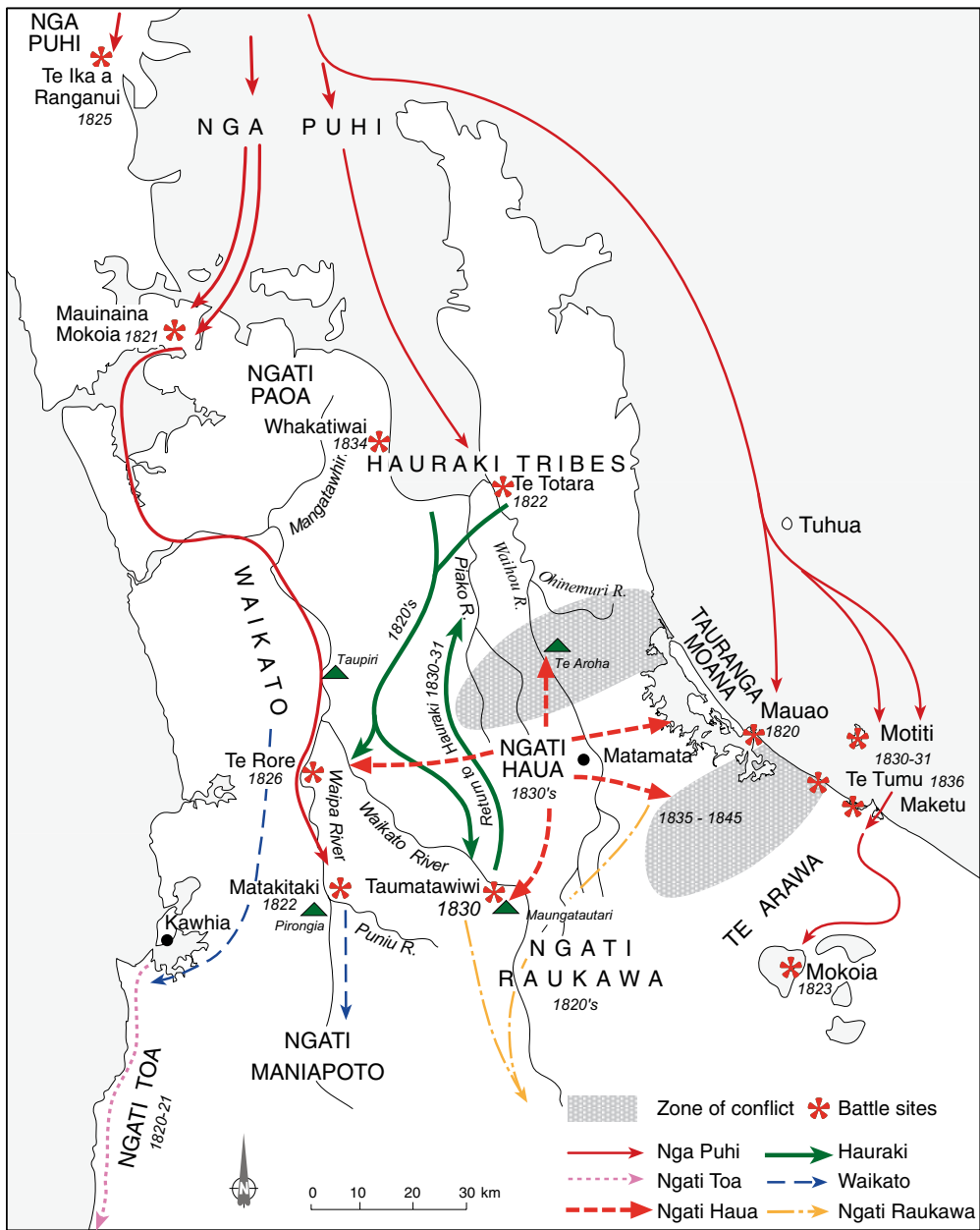


Figure 4: Tribal movements, 1820–40

for resources and offences to mana soon brought clashes at Mahurangi, Takapuna, and Waiheke. George Graham shows that northern iwi were concerned to avenge Ngati Huarere, some of whom had moved northward after their defeats by the Marutuahu peoples; and Ngati Paoa had again clashed with Te Uri-o-Pou at Papakura and Tamaki.⁶¹ Northern expeditions raided the coast near Taupo (modern Clevedon) about 1793; in return Ngati Maru,

61. George Graham, “‘Kahu-mau-roa and Te Kotuiti’: Two Famous War Canoes of Ngati-Paoa and their History’, *Journal of the Polynesian Society*, vol 33, no 130 (1924), pp 130–135

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Ngati Paoa and Ngati Whanaunga launched successful expeditions against the tribes at the Bay of Islands.⁶²

The Marutuahu groups also fought amongst themselves, jostling for Hauraki resources. About 1818 serious fighting broke out between Ngati Paoa and Ngati Maru. In these struggles, the former called on the assistance of Nga Puhi and Waikato, while Ngati Maru invited Ngati Pukenga – a Mataatua people – into Hauraki to assist them.⁶³ This internecine fighting is said to have left Marutuahu ill-prepared when Nga Puhi and others acquired significant numbers of muskets, and from 1818 commenced their devastating raids on the Hauraki islands and coast. The great Ngati Paoa settlements of Mauinaina and Mokoia were sacked in late 1821, then Te Totara Pa near modern Thames. The exposed Hauraki peoples withdrew inland to the Waikato, Ngati Paoa mostly to Horotiu and Ngati Maru to Maungatautari, where they dwelt in an uneasy relationship with Ngai Haua and Ngati Raukawa. Nga Puhi invaded the Waikato itself in pursuit of Ngati Paoa and Ngati Whatua. Hongi Hika achieved a major victory at Matakitaki in 1822 then made peace with Waikato. He observed that peace, and though the battle of Haere-awatea in 1825 was fought in Waikato territory, Hongi made it clear that his target was Ngati Whatua, not Ngati Paoa. Under the chief Te Rauroha, Ngati Paoa were able to stand aside, and later returned to the Hauraki Gulf. Later raids led by other northern alliances under Pomare in 1826 and Te Rangituke in 1827 were defeated by Waikato and Hauraki warriors. The Waikato ariki, Te Wherowhero then led a great expedition northward and defeated the northern alliance in a campaign culminating at Tawatawhiti, near Haowhenua on the Waikato River.⁶⁴

Meanwhile, serious conflict was brewing at Maungatautari. Even in refuge in the Waikato, Ngati Maru and Ngati Paoa had continued to fight with other tribes, including Ngati Raukawa. They obtained guns through traders and became demanding and aggressive towards their hosts. Ballara characterises the Hauraki groups as manene (strangers), occupying land by permission from Ngati Haua, and states that ‘their troubles leading to the great battle at Taumatawiwi began because they began to assert ownership in an area where they had none.’⁶⁵ Te Waharoa, the great Ngati Haua war leader, determined to rid his territory of them and enlisted the aid of Ngai Te Rangi. The battle was fought about 1830. Both sides suffered heavy losses, but the chiefs of Ngati Maru and the other Hauraki tribes accepted a proposal from Te Waharoa to leave the district under his protection. Probably early in 1831, they returned to Hauraki and the gulf islands.⁶⁶

62. Kelly, pp 271–275; Jones, pp 328–330

63. Monin, *This Is My Place*, pp 44, 50

64. Kelly, pp 368–380

65. Ballara, p 199

66. Kelly, pp 384–386; Phillips, pp 163–169; Monin, *This Is My Place*, pp 66–67

2.2.4 The situation about 1840

The situation remained volatile through the 1830s and beyond. Ngati Paoa and sections of Waikato clashed at Whakatiwai in 1834 and 1835. In 1836, Waikato and Marutuahū chiefs accepted a suggestion by the missionary Henry Williams to transfer the land between Tamaki and the Wairoa River, as yet not reoccupied, to the Church Missionary Society (CMS), subject to the right of named tribes to settle upon it, a transaction known as ‘the Fairburn purchase’. It was intended to create a buffer zone between the warring factions. But, in 1836, large forces under Te Waharoa with his Ngai Te Rangi allies attacked Te Arawa at Maketu. Consequently, while food-gathering parties of the Hauraki tribes ranged widely throughout their former rohe, the threat by Ngai Te Rangi, Ngati Haua, and Waikato meant that they did not immediately resettle inland border areas. But large pa and associated village clusters grew again at Whakatiwai, Kauaeranga, and the lower Waihou, and Taraia led Ngati Tamatera in evicting Ngati Haua from encroaching on Te Aroha.

We note that when occupation was resumed, rights to and control of land – already very complex before the northern attacks – became even more complicated, because not all groups returned to precisely the same areas they had left 10 or more years before, or stood in the same relationship with each other. We expand on this statement below.

For example, Ngati Maru, concerned to avoid a resumption of the damaging clashes with Ngati Paoa, did not resettle Waiheke Island in numbers. While not relinquishing their ancestral claims they left the way clear for Ngati Paoa to take stronger possession and control in Waiheke and the gulf islands generally. However, tensions persisted among Ngati Maru, Ngati Paoa, and Te Patukirikiri over Waiheke. Paul Monin states that in about 1840 a kanga (curse) by Mauhukuku of Ngati Maru against Kahukoti of Ngati Paoa led to mediation by Crown officials, involving the formal ceding of rights at Putiki Bay by Ngati Maru to Ngati Paoa.⁶⁷ The Ngati Paoa chief, Wiremu Hoete, gave a different version to land claims commissioner Bell. He stated that the land originally belonged to Te Wai-o-Hua and was then seized by Te Patukirikiri:

but afterwards they committed an offence against a chief of ours, named Kahukoti. The nature of that offence was that Tahungao Maro [sp?] had written a letter to Pomare [of Nga Puhi] desiring him to come and make war on the Ngatipaoa – and it was in consequence of that, that Putiki was taken away by us (Ngati Paoa).⁶⁸

Ranapia of Te Patukirikiri stated to Bell that, after these events, Ngati Paoa allegedly ‘seized the whole of Waiheke . . . We belonged to the Ngati Paoa ourselves, but since the affair of the curse they call us Ngatimaru’.⁶⁹ Such was the nature of shifting rights and relationships on Waiheke about 1840. In 1987, the Waitangi Tribunal, investigating Ngati Paoa

67. Monin, *Waiheke Island*, pp 51–52; doc C5, pp 24–25

68. Sworn statement of Wiremu Hoete, 20 December 1859, OLC 1/1164, box 61, Archives NZ

69. Sworn statement of Ranapia, 15 April 1859, OLC 1/1214–5, repro file 1670

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claims relating to Crown actions affecting the island, commented guardedly (and correctly) that 'Ngati Paoa maintained that before 1840 [Ngati Maru] were expelled to join their kin on the Coromandel Peninsula', but that Ngati Maru 'had a different opinion and clearly the position in 1840 was not certain'.⁷⁰

Monin's study of the gulf islands led him to the view that 'the predominant political factor at work in the inner gulf in the 1830s was Ngati Paoa expansionism, characterised by their seeking to replace rights formerly shared with other Hauraki iwi with more exclusive rights rather than the conquest of new territory'.⁷¹ We note that there was a strong movement of the Marutuahu tribes into the islands and shores of the gulf, to take advantage of trade with European flax and timber merchants, who were entering the region just as Marutuahu were returning after the battle of Taumatawiwi.

As a result of the northern incursions, some Hauraki groups had gained greater prominence while the position of others had weakened. For example, Ngati Hei, though having retained much territory in the east of the Coromandel Peninsula during the Marutuahu invasions, had been exposed to the full brunt of the northern raids and a great many were killed. The writer of their 'mana whenua' report goes so far as to state that 'Following the Ngapuhi raids of the early nineteenth century they virtually ceased to exist as a tribe', but that 'The remnant survivors of Ngati-Hei remained in the Whitianga district and eked out a solitary existence in small isolated pa and fortified rock stacks during this period'.⁷²

The heavy loss of life amongst Ngati Hei and other smaller tribes meant that much of their former lands were claimed by other, more numerous tribes returning to Hauraki after Taumatawiwi. On the other hand, some groups, formerly relatively weak, such as Ngati Hako, Ngati Koi, and Whakatohea, who had remained in the swampy middle reaches of the Waihou and Piako while their Marutuahu neighbours withdrew to the Waikato, seem to have strengthened their position at the expense of those who left.⁷³

Some Marutuahu hapu names enter the documentary historical record in the late 1830s and subsequently. A hapu named Ngati Pu, variously said to be of Ngati Rongo-u⁷⁴ or of Ngati Maru, occupied a rare area of flat land above the swamp-line, at the junction of the Hikutaia and Waihou Rivers; they feature strongly in post-1840 history. Taimoana Turoa recounts a tribal tradition that the name was given in 1864, when some of the hapu fought with the Waikato. One of their rangatira, Herewine Te Rangai, was responsible for the maintenance of the firearms; at the conclusion of the fighting he is said to have renamed his people Ngati Pu or 'The gun tribe'.⁷⁵ However, the group is referred to by that name in respect

70. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Waiheke Island Claim* (Wellington: Department of Justice, 1987), p 8

71. Document C5, pp 27-28

72. Document N2, pp 1, 53-54

73. Document R7, pp 46-48; doc A6, pp 15-16

74. Turoa, p 86

75. Ibid

of its movements and its land rights well before that date. Paul Monin's account, derived from the missionary Fairburn and from Maori Land Court evidence, states that they came to Hikutaia from the Waikato in December 1830, spent about two years there, moved to the Mahurangi coast to work on Gordon Browne's timber-cutting establishment, then assisted Ngati Paoa on Waiheke. Others went to Turua at this time.⁷⁶ Ngati Karaua (an established hapu of Ngati Whanaunga) were also active at Hikutaia and Whangamata in 1839 and later. Te Uri-karaka was an important Ngati Paoa hapu in the western shore of the gulf and adjacent islands. Te Koheriki or Ngati Koheriki, a hapu of mixed Waikato (Ngati Tamaoho) and Ngai Tai descent, occupied land in the upper Wairoa and upper Mangatawhiri Rivers and came into prominence when British forces entered Hauraki and the Waikato in 1863.

Some new communities entered the Hauraki district as well. They included Ngati Pukenga, a Mataatua people, alternatively known as Te Tawera, and Ngati Porou. Both are discussed in the next section.

2.2.5 Tuku whenua issues

We discuss different aspects of Maori customary land tenure in various parts of this report. We also discuss in the various appropriate chapters such aspects of social organisation as chiefly mana, the nature of iwi and hapu communities, the effects of intermarriage and other matters. We have not attempted a full outline of these subjects in any one section, but adopt the general findings on customary tenure and community rights in the Turanga report.⁷⁷ We report here on one aspect of customary tenure with particular relevance to Hauraki iwi: tuku whenua or the granting of rights to occupy land.

'Tuku whenua' is often correctly translated as a 'gift of land'. But the word 'tuku' also means to 'let' or 'allow'. In some circumstances, a more precise gloss might be 'permission to settle or occupy'. In pre-contact times, some 'tuku whenua' were intended as permanent gifts of land, although always with the proviso that if the gift was abandoned by the recipient's people, it reverted to the giver. In other words, the mana of great chiefs and their people making the gift continued to overlay the area gifted. What was gifted were carefully delineated lands for cultivation and residence, and often the use of certain resources. But the permissions given might vary from gift to gift, according to the circumstances at the time. We turn to a consideration of the tuku at Harataunga, Mataora, and Manaia.

(1) *The Harataunga tuku whenua*

In 1852, various hapu of Ngati Porou – including Te Aitanga-a-Mate, Te Aowera and Te Whanau-a-Rakairoa – were gifted lands at Harataunga by the Ngati Tamatera rangatira,

76. Document J8, pp 16–17

77. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, pp 14–19

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Paora Te Putu. Several reasons or *take* were given for the *tuku*, the most immediate being the request by the chief, Te Rakahurumai for a place to take shelter and rest on the trading voyages from the East Coast to Auckland. Earlier *take* included connections through whakapapa and tupuna, particularly through the deeds of the early ancestor of Ngati Porou, Paikea, who made landfall from Hawaiki at Ahuahu (Great Mercury Island) before continuing his journey to Whangara in Te Tai Rawhiti. When Paikea reached Ahuahu – which lies directly to seaward of Harataunga – he covered himself with sand (*ahu*) to get warm. The full name of the island is Te Ahuahutanga-o-Paikea.⁷⁸ At Ahuahu, Paikea is said to have cultivated the kumara. Some Ngati Porou traditions – including that recorded by John White in 1887 – refer to Paikea's marriage while at Ahuahu to Te Ahuru-mo-Wairaka, a granddaughter of Toi, with whom he had a number of children.⁷⁹ Upon leaving Ahuahu, Paikea is said to have visited Harataunga and, according to Dr Pakariki Harrison, 'a few of the families who live at Harataunga trace their ancestry to [this] marriage'.⁸⁰ In his evidence, Piriha Potae spoke of a freshwater spring in the rocks above sea level at Waipo at the southern end of the bay. Paikea is said to have come ashore at night looking for water and, finding none, struck the rock so that the spring appeared.⁸¹

Evidence has been submitted that groups of Ngati Porou called at Harataunga 'well before the 1820s', en route to trade at Te Tai Tokerau, and that over time the visits became more permanent.⁸² It was submitted that these Ngati Porou groups assisted Ngati Tamatera against Nga Puhi raids in the 1820s, and that the land at Harataunga and Mataora was given to Ngati Porou in exchange for this contribution.⁸³ According to Dr Harrison, the gifts of land were made under the custom of 'tapae toto'.⁸⁴ But this tradition of early nineteenth-century visits is not corroborated in Marutuahu sources.

In the 1840s and 1850s, Ngati Porou schooners began to call regularly at Harataunga on trading missions from Whareponga to Auckland. By the end of 1852, the people of Waiapu owned eight schooners.⁸⁵ According to Parekura White, 'Under the guidance of their arataki and entrepreneur . . . Te Rakahurumai, the three hapu of Te Aitanga a Mate, Te Aowera and Te Whanau Rakairoa . . . were heavily involved in the production and transportation of food produce to Auckland and the Hauraki region'.⁸⁶ Te Rakahurumai owned three schooners: *King Araeta*, *The Children*, and *The Committee*. They transported wheat, potatoes, kumara,

78. Document s8, pp 17–18

79. Ibid, pp 18–19; doc s27, p 2; White, vol 3, pp 31–32. Te Ahuru-mo-Wairaka is also referred to as Ahuru-moai-raka by White.

80. Document s27, p 2

81. Document s22, p 2

82. Claim 1.45(a), p 4

83. Ibid, p 5

84. Document s27, p 3

85. Document s8(a), p 21

86. Document s8, p 84

and corn to Auckland from the East Coast and from Harataunga itself.⁸⁷ Those Ngati Porou who died at Harataunga were taken back to the East Coast for final burial.

(a) *The tuku*: In 1852, Te Rakahurumai asked Paora Te Putu for land and a harbour at Harataunga to rest his crews and anchor his schooners. In 1878, Henare Nawaia told the Native Land Court that Te Rakahurumai was drowned before receiving the news of Paora Te Putu's consent.⁸⁸ Tamehana Kakano said in 1878 that nine months after Te Rakahurumai's death:

Makoare, Henare [Nawaia], Tamati [Tawhiri] and Te Mokena the chiefs of the Itenga A Mate [*sic*] asked Paora [Te Putu] to give them the land which he had promised to Te Rakahurumai. The hapu came on to Harataunga on the 'Committee' followed by the schooner *Children* . . . Paora gave Harataunga to the Te Itenga A Mate on this occasion.⁸⁹

Major Rapata (or Ropata) Wahawaha, while not present at the gifting, gave evidence at the Native Land Court hearing that "Te Waipara of Ngati Tamatera stood up and named the outer boundaries and a plan of the land was sketched on the sand. Raniera [Kawhia] wrote down the boundaries on paper. He also got the names of places inside the block and wrote them down."⁹⁰ In May 1854, a meeting was held there to confirm the gift.⁹¹ To seal the gift of Harataunga, it is claimed that Paora Te Putu told the people of Te Aitanga-a-Mate: 'He whenua tuturu tenei mo o uri ake tonu atu.'⁹² ("This land is permanently for your descendants for ever.") According to Rapata's later evidence, members of Ngati Porou then claimed particular pieces of Harataunga land.⁹³

According to the evidence of Korohere Ngapo before this Tribunal, the tuku came about as a result of the birth of his tupuna Maata Te Ao Whakatere Ngapo (or Maata Pokia), daughter of Te Rakahurumai and Te Paea, who 'generally lived at Harataunga'.⁹⁴ Mr Ngapo said that the agreement itself was cemented by the marriage of Maata to Paora Te Putu. Another marriage was made between Pita Te Hangi, Maata Ngapo's brother, and Riria Karepe, niece

87. Document s20, p 2; doc s8(a), p 22

88. Document s8, p 90

89. Ibid, p 91; Coromandel minute book 3, fols 86–87

90. Coromandel minute book 3, fols 97–101; doc s8, p 93. In May 1868, in response to Mackay's description of the boundary of Harataunga for the purpose of releasing the land for gold mining, Raniera Kawhia described the boundary in a letter to Mackay as follows: 'The commencement of the boundary is at Ohineperu (a spring of water), Piripirika (a fern hill), Taraingapoito, Te Pu (this is a hill) Tahatu, Te Ranga, Tau-O-Maroiri, Tokatea, Kaipaua, Waikoromiko, Pukeohiku, Hapapawera, Pukenui, Tapuae, Kakahiaroa, Pukeruru, Te Harakeke': Raniera Kawhia to James Mackay, 23 May 1868, AJHR, 1869, A-17, pp 28–29; doc s8, p 99.

91. Coromandel minute book 2, fols 389–390 (doc s8, p 89)

92. Ibid, fol 390 (p 96)

93. Ibid, fol 98 (p 93)

94. Document x4, pp 2, 4–5

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of Paora Te Putu. Mr Ngapo stated that ‘the purpose of these marriages was to unite and maintain rights to the whenua for the Maratuaahu iwi residing at Harataunga.’⁹⁵

According to Wiremu Kapanga Peters:

even though Ngati Tamatera are accredited with the gift of Harataunga to the hapu Te Aitanga a Mate of Ngati Porou, the Ngati Mango and Raukatauri sides of Te Patukirikiri played a major part in the gift . . . Paora [Te Putu] went to ask the people and other Rangatira of Tokatea if they’d agree to this. Many Rangatira did, and in fact gifted some of their lands to this cause.⁹⁶

In his evidence, Mr Haereroa spoke of the gifting of the Harataunga lands in terms of the concept of koha. He explained that the word ‘koha’ can be broken into two parts: ‘ko’ means to give emphasis; ‘ha’ means the breath of life; and that ‘what this means is to give life to the land which is being presented as a gift’. We heard from both Mr White and Mr Haereroa that ‘From the perspective of Ngati Tamatera and Ngati Patukirikiri the giving of the land and the harbour at Harataunga was to create a strategic alliance with the three hapu under the leadership of Te Rakahurumai.’ This alliance ‘was a signal to other hapu and iwi that if Ngati Tamatera and Ngati Patukirikiri were attacked our three hapu would support their alliance partners’. In return, ‘to Te Rakahurumai the land and the harbour at Harataunga was ideally placed and provided his schooners with shelter and a resting place for his people.’⁹⁷ According to Dr Harrison, Paora Te Putu ‘wished to learn the art of trade and he needed a protective screen from his enemies, as his own people had fled from the belligerent tribes of Ngapuhi to live at Horotiu.’⁹⁸ We discuss this tuku below as affected by the Native Land Court decisions regarding title to Harataunga.

When the gifting of Harataunga was formalised, the Ngati Porou hapu ‘laid before their hosts . . . a greenstone patu of great significance. This patu was called “Whaita”’.⁹⁹ Other gifts associated with the gift of land included a number of horses, a garment, and various sums of money which were apparently accepted specifically as payment for a burial place.¹⁰⁰

Tuta Nihoniho (Beau) Haereroa told us that, ‘in the view of our elders, it would have been an insult to the people of Ngati Tamatera and Ngati Patukirikiri not to occupy Harataunga following the gifting.’¹⁰¹ He stated that ‘it is said that the first people to establish ahi kaa or the fires of occupation were Mokena Te Horua, Kapo Whetu and Ihaka Ingoakore’, and that ‘our people have maintained mana whenua and mana moana until today’. The Harataunga

95. Document x4, pp 3, 5–6

96. Document A58, pp 16–18; doc s8, p 85

97. Document s8, p 84; doc s20, pp 3–4

98. Document s27, pp 2–3

99. Document s20, p 3

100. Document s8, p 98

101. Document s20, p 4

land, he continued, 'has now become a standing ground for our three hapu. For that reason our three hapu have united to be one through inter-weaving with each other'.¹⁰²

According to Mr White's evidence, following the *tuku*, and 'to meet the market demands of Auckland, the flat areas of Harataunga were transformed into a large commercial cultivation producing potatoes, wheat, maize, kumara, onions, cabbages, peaches, pigs, and fowls'.¹⁰³ However, the trading activities of Te Aitanga-a-Mate had already declined with the death of Te Rakahurumai in 1852, and were further set back by the loss of two schooners in the late 1850s, together with Auckland's developing self-sufficiency, before being curtailed completely with the conflict of the 1860s.¹⁰⁴

(b) Further gift of land at Mataora: In the latter half of the 1860s, a section of the Ngati Porou community was banished from Harataunga on account of their affiliations with Pai Marire. Ngati Tamatera of Paora Te Putu's whanau then granted these people land at Mataora, north-east of the township of Waihi.¹⁰⁵ Paul Monin has recounted the 'Pai Marire scare' centred on Harataunga in March and April 1865, shortly after the killing of Völkner at Opotiki on 2 March 1865. It was apparently rumoured that 'Hauhau fanatics' were to descend on Coromandel township, destroying Alexander McGregor's timber mill at Harataunga on the way. HMS *Eclipse* was dispatched to protect Coromandel before joining James Mackay – with 250 stands of arms and a delegation of local chiefs – at Kennedy Bay. Mackay delivered an ultimatum that the Pai Marire group must leave or face the use of force by the *Eclipse*. It was reported that 19 people – men, women, and children – left for Mataora.¹⁰⁶ But as Monin recounts, 'it transpired that the Pai Marire had simply wished to attend the horse races at Coromandel and that the European timber millers, who in any case greatly outnumbered them, had at no time been concerned for their safety'.¹⁰⁷

As with Harataunga, the gift of land at Mataora in the mid-1860s was later recognised by the Native Land Court. At the June 1880 hearing of the Ohinemuri block, witnesses stated that Mataora was gifted to the members of the various Ngati Porou hapu by Paora Te Putu, and that they continued to occupy it after Paora's death. A sum of £25 was given to Ngati Tamatera.¹⁰⁸

(c) Tuku and the effects on iwi and hapu of Native Land Court decisions: At the 1872 Native Land Court hearing on Harataunga, Rapata Wahawaha recalled having been requested by

102. Ibid, pp 3–4

103. Document s8(a), p 22. White cites G Barton, 'A Description of the Archaeological Landscape of Kennedy Bay, Coromandel Peninsula', *New Zealand Archaeological Association Newsletter*, vol 23, no 2 (1980), p 105.

104. Document s8(a), pp 27–28

105. Document s26, p 2; doc s27, pp 2–3

106. Monin, *This is My Place*, pp 208–209; *Daily Southern Cross*, 5 April 1865, p 4; 7 April 1865, p 4; April Summary 1865, p 6

107. Monin, *This is My Place*, p 209

108. Hauraki minute book 12, fol 347, Hauraki minute book 13, fols 5–7, 12, 15, 18–19, 23 (doc s8, pp 100–103)

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the Government to visit to persuade his people to ‘abandon Hauhauism’. While there he was informed that Paora Te Putu’s niece, Riria Karepe ‘and the Ngati Tamatera had taken back the place’. This was apparently in response to Henare Nawaia having reclaimed the patu pounamu, ‘Whaita’, from Ngati Tamatera. Wahawaha intervened, attempting unsuccessfully to persuade Riria to accept a greenstone of his own and money in place of ‘Whaita’. He then went to Mataora to demand the return of the weapon. Rapata informed the court that, having obtained Whaita:

I took it with me to Harataunga and showed it to the people there. I and 100 Ngati Porou took the weapon and a double barrelled gun in addition to Omaru. I laid the gun and greenstone before Riria and said ‘there is what you told me to bring you’. I have given you what is yours give me what is mine that is Harataunga. She gave me the land and said she would never reclaim it.¹⁰⁹

Rapata emphasised that it was this act ‘which got back this land’. ‘The gift of Paora Te Putu’, he claimed, ‘was made null by the act of Henare [Nawaia] in taking away his greenstone.’¹¹⁰ We note that Parekura White refers to Rapata as connected to Te Whanau-a-Rakairoa.¹¹¹

In June 1872, at Kapanga, Coromandel, the Native Land Court heard an application for a certificate of title for the Tokatea block within Harataunga. Following requests from the parties present, Judge Monro agreed to consider the title ownership of the whole of Harataunga. Evidence was presented regarding the gifting of Harataunga, and careful attention was paid to the question of whether it was gifted to particular hapu of Ngati Porou or to Ngati Porou generally. Rapata Wahawaha informed the court that ‘This land [Harataunga] was not given to the whole Ngati Porou tribe but to a hapu of it, Te Aitanga a Mate. The chief of the hapu was Te Rakahurumai. The owners of it now are Hiria Te Rakahurumai, Raniera Kawhia, Te Ruia Tuatai, Hanara Tangiawa, Tamati Tawhiri, Ropata Ngatai, Anaru Te Horua, Henare Nawaia, Ropata Wahawaha.’¹¹² He was supported by other witnesses.¹¹³ This was disputed by Pita Te Matatahi, who stated that he belonged ‘to the Ngati Porou to the Te Whanau a Ruataupare hapu and reside at Harataunga’. He claimed that ‘this land was given to the Ngati Porou, not to any one in particular but to the tribe, as an anchorage for their vessels.’¹¹⁴ Judge Monro accepted Rapata’s view, concluding that ‘the land had been given by Paora Te Putu to Te Rakahurumai and his hapu Te Aitanga a Mate not to Ngati Porou generally.’¹¹⁵

109. Hauraki minute book 3, fols 100–101 (doc s8, p 94)

110. Coromandel minute book 3, fols 97–101 (doc s8, pp 93–94)

111. We also note that *The Dictionary of New Zealand Biography* gives Rapata Wahawaha’s principal affiliation as Te Aowera: Steven Oliver, ‘Wahawaha, Rapata’, DNZB, vol 1, pp 567–570.

112. Coromandel minute book 2, fol 381 (doc s8, p 86)

113. Evidence of Ropata Ngatai (Te Aitanga-a-Mate), Riria Karepe (Ngati Tamatera), and Arama Karaka (Ngati Tamatera), Coromandel minute book 2, fols 389–394 (doc s8, pp 88–89)

114. Coromandel minute book 2, fols 381–382 (doc s8, p 87)

115. Ibid, fol 395 (p 95)

We note that certain members of Ngati Tamatera, including Riria Karepe, attended the 1872 hearing of Harataunga and made no objection to the granting of title to Ngati Porou. The Wai 968 claimants (Nga Uri a Maata Ngapo and the descendants of Marutuahu ki Harataunga) argue that Riria Karepe was present to affirm the *tuku*, and that she and those whom she represented ‘believed that their rights to the land of Harataunga were protected under the Maori customary law of *tuku whenua*’. These claimants submit that ‘it is unlikely that Ngati Tamatera understood what the true effect of the Native Land Court awarding title to the hapu of Te Aitanga-a-Mate was going to have in the future’, arguing that ‘if they knew that the true effect of the European freehold title system was to alienate absolutely then the transaction would not have proceeded’. Marutuahu, they state, ‘still had Urupa, Waahi tapu in Harataunga and they still maintained *tino rangatiratanga* over the land’.¹¹⁶

The Wai 968 claimants argue that in making its decision, the Native Land Court ‘destroyed the intended effect of the *tuku whenua*, which resulted in the claimants losing their *tangata whenua* rights to the land forever’. They assert that they have been ‘permanently alienated from their tribal lands’ and ‘prevented from exercising their *tino rangatiratanga* over the *whenua*’. They state that the loss of land (and loss of control of the land) has resulted in loss of leadership, customary traditions, language and identity, and that they ‘have been forced to endure the long-term effects of unemployment, low educational achievement, and other adverse social consequences relating to a general well-being due to the dislocation of the people from their *whenua*’.¹¹⁷ Korohere Ngapo spoke of the shame associated with the failure of the Native Land Court to recognise the claimants as *tangata whenua* at Harataunga, and their loss of *mana* over the land.¹¹⁸ Others spoke of the specific effects associated with landlessness and more particularly of their dislocation from their *turangawaewae*, and of the lack of consultation on environmental and natural resources matters due to the loss of perceived *tangata whenua* status.¹¹⁹ One point emphasised by the Wai 968 claimant witnesses was the need to re-establish a Marutuahu *marae* at Harataunga.¹²⁰

(d) Non-resident owners: All of the present claimants have stated that Harataunga was given to only three Ngati Porou hapu – Te Aitanga-a-Mate, Te Aowera, and Te Whanau-a-Rakairoa – not to the people of Ngati Porou generally. However, it is apparent that there remains some tension between the exercise of rights by the resident owners in Harataunga (and their close descendants) and those of the three hapu residing in Te Tai Rawhiti. Dr Harrison noted that several Harataunga families descend from Ngati Tamatera and women brought from the East Coast to marry three brothers from Hauraki.¹²¹ The Ngati Porou

116. Document z5, p 4

117. Ibid, p 5

118. Document x4, p 8; doc z5, p 7

119. Document x5, pp 3–6; doc x6, p 12; doc x7, pp 3–4; doc x8, pp 4–5; doc x9, pp 2–3; doc z5, pp 7–8

120. Document z5, p 9

121. Document M12, para 7

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people of Harataunga and Mataora obviously retained their connections with the East Coast. Piriha Potae, for example, spoke of his parents (neither of whom were born on the East Coast) keeping close contact with the Coast, and of them travelling from Harataunga to tangi at Hiruharama.¹²²

We note that running counter to these maintained links is a concept of Harataunga as an autonomous settlement, whose land the East Coast residents should not control. While in fact the hapu at Harataunga have retained more land than most, some was alienated against the wishes of residents because land agents in Gisborne purchased the interests of non-residents. It appears to us that largely as a result of closely intermarried families and descent from former residents, non-resident members of Te Aitanga-a-Mate, Te Aowera and Te Whanau-a-Rakairoa did, to some extent, have rights in Harataunga. While actual residence does not seem to have been regarded as crucial, it does appear that those members resident at Harataunga did have the greater right.

(e) Discussion: We note here that all of the Ngati Porou claimants have taken care not to claim tangata whenua status at Harataunga. Rather, it was submitted, ‘they assert rights, interests and obligations as a result of holding the mana whenua and mana moana over the land and resources of Harataunga.’¹²³ As already noted, the Wai 866 claimants have particularly identified themselves as ‘tangata hau kainga and keepers of ahi ka at Harataunga and Mataora.’¹²⁴ The term ‘tangata hau kainga’ was defined to us as conveying a literal meaning of ‘the people of the breezes of home’, and being used to describe ‘those people who have lived at the home base for some considerable time.’¹²⁵

We also heard that the claimants were generally agreed that the tuku of Harataunga was more complex than an absolute alienation of rights by Ngati Tamatera and others, but rather a conditional right of occupation, under which the donees should do nothing to diminish the mana of the donors. According to the evidence of Korohere Ngapo, ‘the donor’s ties to the whenua were never meant to be diminished.’¹²⁶ Both the Ngati Porou claimants and those from Ngati Tamatera agree that the Native Land Court failed to observe tikanga in awarding the land absolutely to the Ngati Porou hapu and making no mention of residual rights in the donors. The Wai 968 claimants allege that ‘in Harataunga the effect of the Native Land Court investigation was to permanently destroy the existing Maori land tenure, which at that time was based on the custom of tuku whenua.’¹²⁷ They argue that:

122. Document s22, p 3

123. Document y18, p 6

124. Document y19, p 3

125. Document s35, p 6

126. Document x4, p 7

127. Document z5, p 2

Tuku whenua gave a set of rights and obligations to the donee tribe but never ownership. Inherent in every tuku whenua was the mana of the tangata whenua (donor), in this case, Marutuahu, and this mana could never be relinquished. The concept of tuku whenua must be understood within a cultural context. It is not an act that extinguishes the tangata whenua rights; it is intertwined with Maori tikanga that includes manaakitanga, aroha and utu. A tuku whenua was a supreme example of Marutuahu kindness, not a permanent alienation of land in the European sense.¹²⁸

The Wai 968 claimants acknowledge that this has been recognised in part by the Wai 792 claimants, and quote Parekura White's statement that 'Under the concept of tuku whenua . . . land that is gifted, as was the case with Harataunga, could be definitely permanent but never absolute.'¹²⁹ They further claim that 'the rights of the tangata whenua, Marutuahu, were still paramount over the lands of Harataunga after the tuku whenua had occurred and up until 1872, the time of the Native Land Court investigation into Harataunga'. Marutuahu, they argue 'were still "owners" of the land, notwithstanding their lack of occupation'. They submit that the Native Land Court recognised the Ngati Porou hapu for two reasons: 'Firstly, they saw occupation as the primary indicator of ownership and secondly, the Native Land Court incorrectly interpreted tuku whenua as a "gift", an absolute term.'¹³⁰ According to the evidence of Korohere Ngapo, 'the recipients of the tuku had no right to sell or lease the land under tuku whenua terms. Should that occur then it is apparent that the recipients no longer need the land and it should revert back to the donors.'¹³¹

We note that following the presentation of the Wai 968 evidence, we accepted that to interpret the Maori word 'tuku' only as 'gift' is misleading, and instead suggested the phrase 'a licence to occupy' as a better translation that captures the essence of the phrase 'tuku whenua'. The Tribunal is of the view that under such an arrangement, the grantors would have retained some residual right with regard to the land in question and that in this case, the rights of Ngati Tamatera would not have been totally extinguished. We note that the negotiation and condition of such an arrangement would be unique to the particular circumstance and that it is difficult to generalise with regard to this matter. The parties involved would have been seeking to maintain a balance of relationships, militarily, economically and socially, and it would appear that a residual right would have remained with the group extending the privilege. It is apparent that some conditions of such an arrangement would have been assumed to be understood and not necessarily discussed during the course of the negotiations, and it is likely that this set of understandings would have included a reasonable

128. Ibid

129. Ibid; doc s8, p 109

130. Document z5, p 3

131. Document x4, p 7

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expectation that the land would not be alienated to a third party. Indeed, such an option, at the time of the *tuku*, may well have not even been considered: with the introduction of the Native Land Court, the world changed.

By 1868, however, Hauraki Maori were becoming aware that a Native Land Court decision would be likely to lead to alienation. One conclusion that might be made is that with the alienation of any such land, the compact or trust would be broken, and any proceeds should be shared among the original grantors as well as the selling grantees. While this may have been a reasonable possible expectation, the delicacy of the arrangement was not (and perhaps could not be) encapsulated in the Native Land Court process. We cannot say to what extent the court was made aware of the nature of the *tuku*.

The Tribunal is of the view that a customary *tuku* probably did not include a right of on-sale to a third party without the permission or participation of the donor – a right that was of course made legally possible by the grant of a certificate of title. It seems quite clear that the *tuku* made by Paora Te Putu was (despite the uncertain situation under Riria Karepe in the mid-1860s, but resolved by Rapata Wahawaha) effectively confirmed at subsequent stages, including Riria's silent consent at the Native Land Court hearings. There may be more to Riria's silence than acquiescence, but we have no additional information before us on this matter.

For the most part, the land sold at Harataunga was sold by non-residents. The 1899 sales were mainly sold by absentee owners who were sought out by Crown agents in Gisborne and the East Coast. This matter is discussed in section 12.2.3 and chapter 17.

(2) *The *tuku* of Manaia lands to Ngati Pukenga*

Ngati Pukenga are of Mataatua origin. We heard evidence that their main genealogical line descends from Toroa, the captain of the Mataatua waka to his daughter, Wairaka, and to her son, Tamatea-ki-te-huatahi. According to the evidence of Lawson Richards, Tamatea's son, Tanemoeahi, was the older brother of Tuhoe and the father of Pukenga, after whom the tribe was named.¹³² According to the evidence of Buddy Mikaere and Shane Ashby, 'The generally accepted version of Ngati Pukenga history is that they formerly lived in the Opotiki–Waimana–Whakatane districts centred mostly round Waiaua and Omarumutu.'¹³³ They state that, according to their traditions, 'Ngati Pukenga moved to the Tauranga district in a series of three heke'. They 'joined with Ngaiterangi in the invasion of Tauranga Moana . . . and proceeded on a military campaign to help subjugate the district.'¹³⁴ According to Mikaere and Ashby, towards the end of the eighteenth century, Ngati Pukenga, having fallen out with Ngai Te Rangi, 'began forming military alliances with the Hauraki tribes, Ngati Maru and Ngati Tamatera in particular, as a means of improving their military strength in

132. Document 111, p 2

133. Document 12, p 7

134. Ibid (also confirmed in Waitangi Tribunal, *Te Raupatu o Tauranga Moana*, p 29)

the ongoing conflict with Ngaiterangi.¹³⁵ Mikaere and Ashby state that about that time Ngati Pukenga were ‘participating with Hauraki iwi in raids into Te Arawa territory’, and that Ngati Pukenga were with Ngati Maru at Te Totara Pa when it was sacked by Nga Puhi in 1821 (although there is some evidence to suggest that some Ngati Pukenga were fighting on the same side as Nga Puhi).¹³⁶ Ngati Pukenga are said to have been invited to Hauraki at this time by Te Puhi of Ngati Maru to assist in the conflict with Ngati Paoa (in turn assisted by Nga Puhi).¹³⁷ In 1828, Ngati Pukenga joined Ngati Maru and Ngati Tamatera in the successful attack on the Ngai Te Rangi pa at Te Papa. Mikaere and Ashby assert that ‘the fortunes of Ngati Pukenga were firmly tied to the iwi of Hauraki . . . a number of them were living with Hauraki at Haowhenua near modern-day Cambridge’. They state that when Marutuahu returned to Hauraki following the battle of Taumatawiwi about 1830, Ngati Pukenga accompanied them.¹³⁸

The origins of the name Manaia are unknown to Mikaere and Ashby, but it is acknowledged that the name is very old and may derive from Hawaiki. They state that Manaia is said to have been a rich resource area as evidenced in the whakatauki ‘Ko Manaia, he pataka kai’ (Manaia the food store).¹³⁹ According to Mikaere and Ashby, Manaia was held by Ngati Huarere (an iwi we have discussed in section 2.2.1) prior to the arrival of Marutuahu in Hauraki. After their victories over Ngati Huarere, Ngati Maru and Ngati Whanaunga divided the Manaia lands between them, with Ngati Maru taking the southern side of the harbour and Ngati Whanaunga the northern.¹⁴⁰ Mikaere and Ashby state that ‘Today, families of Ngati Maru and Ngati Whanaunga descent still hold much of the land on the eastern (or northern) side of the Manaia River’.¹⁴¹

There are two accounts of how land at Manaia came to be a *tuku* to Ngati Pukenga. The first, by Mikaere and Ashby, ‘tells that the *tuku* was made as payment for assistance given by Ngati Pukenga in avenging the killing of two Ngati Maru chiefs, Pataua and Te Waha’ at the hands of Tuwharetoa and Ngati Raukawa in two separate skirmishes. In this version, in return for their assistance, Te Tapuru, who was Pataua’s daughter and Te Waha’s sister, ‘is said to have stood [at the celebrations following the victory] and said: ‘E Te Kou! Na te kore kai, engari ma koutou taku whenua i Manaia’ (Te Kou! Because there is no food (here), there can be a place for you at Manaia).¹⁴² Te Kou refers to Te Kou-o-Rehua, a chief of Ngati

135. Document 12, p 7

136. Ibid, p 8; Na Takaanui Tarakawa I Tuhituhi, ‘Nga Mahi a Te Wera me Nga-Puhi Hoki, Ki Te Tai Rawhiti’, *Journal of the Polynesian Society*, vol 8, no 32 (1899), p 179; Stephenson Percy Smith, ‘The Fall of Te Tumu Pa, Near Maketu, Bay of Plenty’, *Journal of the Polynesian Society*, vol 32, no 3 (1923), p 127

137. Monin, *This is My Place*, p 50

138. Document 12, p 9

139. Ibid, p 11

140. Ibid, p 12

141. Ibid, p 13

142. Ibid, pp 15–18. Mikaere and Ashby state (p 18) that there is an alternative view that ‘Te Tapuru gave her interests in the land to Ngati Pukenga out of aroha’: that ‘she felt sorry for Ngati Pukenga’s drifting from place to place’. But this version, they say, ‘was not widely supported at the time it was given’ in 1872.

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Pukenga. The second account attributes the *tuku* to Ngati Pukenga's support of Ngati Maru in a battle against a northern *taua* at Port Jackson in 1828. In this affair, Ngati Pukenga assisted Ngati Maru to achieve *utu* for those killed by Nga Puhi at Te Totara. Ngati Pukenga having successfully ambushed the northern raiders, a Ngati Maru chief, 'grateful for their help and mindful of the long journey ahead of them said: "kaua e hoki ki Tauranga. Kei Manaia he kainga mo koutou hei noho" [Do not return to Tauranga. At Manaia, there can be a place for you to live.]'.¹⁴³

While the majority of Ngati Pukenga accompanied the Hauraki *iwi* in their return to Hauraki in 1830 (with some returning to Maketu and Tauranga), it was not until some 20 years later (about 1852) that they took up the *tuku* of the Manaia lands. According to Mikaere and Ashby:

It was Kapakapa of Ngati Maru who called on Ngati Pukenga to take up the *tuku* and move to Manaia. Taiao was the first of Ngati Pukenga to go there. He was followed by Te Kou O Rehua and many others of Ngati Pukenga. As far as can be determined this occurred sometime around 1852.¹⁴⁴

According to the evidence of Lawson Richards:

Pukenga's great grandson was Kiorekino. Ngati Kiorekino is the name of my hapu. This hapu is made up of the descendants of Te Kou o Rehua or Rehua. Te Kou received the first *tuku* of the Manaia lands. He lived and died here. The *whakatauki* which shows this is 'Ko Hauturu hei kawhene mo Te Kou' – that is let Hauturu be the burial place for Te Kou. The Ngati Maru chiefs offered this *whakatauki* during the discussions about the Manaia lands . . . Our people have lived in the Manaia Valley since the times of Te Kou.¹⁴⁵

Mikaere and Ashby relate that several disputes arose over the Manaia lands. Two of the Ngati Maru chiefs living at Manaia, Rameka Te Tohirangi (also known as Rameka Te Tapuru) and Te Marau (a nephew of Te Tapuru), gave their interests in the Manaia lands to Te Kou-o-Rehua. The land given to Ngati Pukenga, some 5055 acres, was known as Te Ruahine. It lay on the southern (or western) side of the Manaia River. While Te Tapuru and Rameka had not physically set out the boundary of the land, they had named boundary markers. Some Ngati Maru and Ngati Tamatera argued that only the north-west corner of Te Ruahine had been given to Ngati Pukenga. According to Mikaere and Ashby, the boundaries were named again at a *hui* 'in the presence of all the people and the Ngati Maru chiefs'. Te Kou-o-Rehua is said to have tried to return the land to Ngati Maru on his deathbed, but the offer was refused.¹⁴⁶

¹⁴³. Document 12, p 19

¹⁴⁴. Ibid, p 20

¹⁴⁵. Document 111, p 2

¹⁴⁶. Document 12, pp 22–24

Unlike the situation with regard to the *tuku* of Harataunga land to the Ngati Porou hapu, we have not heard any issues of claim relating to the *tuku* of lands at Manaia to Ngati Pukenga. In this case, the details of the *tuku* are set out here (as they were presented to us) to provide a context for the Ngati Pukenga claims relating to Manaia.

2.2.6 Native Land Court awards and ‘mana whenua’

We note that considerable shifts in the pattern of inter-tribal rights and relationships were occurring both before and after 1840, when the Treaty was signed. These relationships were affected by such factors as the advent of European traders and Christian missions, the Crown's efforts to establish the *pax Britannica*, the politics and warfare of the 1860s and Crown and private negotiations for land. Inter-tribal rights and relationships were imprecise and shifting in many parts of Hauraki even as the Native Land Court began to hear applications for ‘title’ and ‘ownership’ of land after 1865. We shall return in due course to the procedures of the Native Land Court, but it should perhaps be noted here that in some cases at least the court recognised land rights as they had evolved *after* 1840. In other words, its awards were not simply a ‘snapshot’ of rights as they stood in 1840.

It was clearly no easy task to disentangle the land rights of the intermingled *iwi* and hapu, before or after 1840. Dr Ballara uses the evidence of Hauraki minute books to show that:

The lands of a major hapu were, typically, far from being one continuous territory. Cultivations for crops were only a small part of the total resources which might be used by any one hapu, and the areas they made use of might be widely separated and interspersed by the rights of other hapu. For example, about 1800, Ngati Naunau (or Ngaungau), a major hapu of Ngati Maru (often described as a tribe in the land court), lived and cultivated sometimes at Poihakena (Port Jackson) at the northern end of the Coromandel peninsula, sometimes at Tangiaro near Umangawha (Colville Bay) where they had a pa called Motukahakaha, and sometimes at Te Mata near Manaia, south of the Coromandel Harbour; part of Ngati Naunau had claims as far south as Te Puru and Taruru, a short distance north of Thames. They lived on Great Barrier Island for periods until threatened by Nga Puhi in the early 19th century; they went there at the season for catching tawatawa (mackerel). In between their settlements, cultivations and resource areas were those of the myriad of small and large hapu, some of Ngati Maru *iwi*, some of Ngati Tamatera, and others the surviving groups of earlier tangata whenua such as Ngati Mahanga and Ngati Huarere. By the 18th century, through generations of intermarriage, these interspersed hapu had lines of descent from all of these *iwi* sources.¹⁴⁷

¹⁴⁷ Ballara, pp197–198

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In virtually all of Maori society, the rights of hapu and iwi were dispersed in this way, within the area under the general control of the groups concerned. Rights were probably more than usually dispersed and intermingled in Hauraki, a relatively small area still being settled and fought over by many hapu as British settlers and officials began to penetrate the district. While certain natural features such as ridges, streams and prominent rock features were accepted by adjacent groups as boundary markers between them – perhaps after negotiation following a period of conflict – the concept of a continuous circumference neatly bounding all the land rights of a group and separating them from those of adjacent (and related) groups was virtually unknown before contact. Thus, we consider claims to ‘exclusive possession’, pre-1840, by particular hapu over wide areas, made before this Tribunal on several occasions, to be problematic. Rather, we consider that the creation of such boundaries was driven by the process of post-1840 land transactions or the determination of ownership of distinct ‘blocks’ by the Native Land Court.

Moreover, virtually all spokespersons for the various claimant groups told us that the various iwi and hapu in Hauraki were closely intermarried. Individuals commonly identified with more than one hapu, and in many parts of Hauraki it would not have been easy to distinguish one hapu sharply from another or clearly define the relationship between them, especially after the tumultuous events following the Nga Puhi incursions. Again Dr Ballara has cited a Hauraki example to show that communities comprising sections of two or more hapu commonly came together under the mana of a particular rangatira, and held together for a greater or lesser period of time: in this case, such a community had formed from two Marutuahu hapu about the late eighteenth century but did not stay together after the return from Waikato in 1830.¹⁴⁸ It is also clear from land court evidence that much land was ‘whenua tautohetohe’: it was being struggled over between various groups, and it was by no means always clear which party was dominant at the time of Native Land Court decisions. Moreover, some groups which some Marutuahu iwi had claimed were subordinate or ‘rahi’ to them had maintained rights to some land independently, and had, moreover, become resurgent in times of greater security before 1840. We note that they were recognised by the Native Land Court as ‘owners’ of land, in terms of the Native Lands Act 1862 and its successors.

Land court judges worked under policy and legislative imperatives which required them to identify groups which seemed under custom to have the dominant customary interests in a given area of land and declare them to be the owners of that land. This inevitably led to oversimplification of complex intersecting rights. Dr Ballara’s research into many Hauraki minute books has shown how the court process reinforced the tendency of nineteenth-century officials to define iwi as clearly demarcated ‘nations’, with judges becoming impatient or incredulous when Maori witnesses described the intricacies of the lived reality.

148. Ballara, p 207

The tendency is illustrated in the Te Aroha block of over 62,000 acres straddling the Waihou River. In 1869, the court first awarded the block to Ngati Haua alone, on the basis of their victory at Taumatawiwi. Ngati Rahiri (Ngati Tumutumu) – who had ancestral rights in the block before the Nga Puhi incursions, and had probably left kaitiaki there during those incursions and in any case returned soon after Taumatawiwi – appealed the 1869 decision. Following a rehearing in 1871, the block was awarded to ‘the Marutuahu tribes’ (not Ngati Rahiri alone).¹⁴⁹ Crown and private land purchase agents found that in practice they had to recognise the claims of many Marutuahu groups in physical occupation and control of Te Aroha, and in 1877 the Native Affairs Committee of Parliament, in response to a Ngati Rahiri petition, stated that the subject ‘involves questions of Native title to land of a character much more intricate than appears on the surface’, and referred the matter back to the land court. The court in 1878 effectively upheld the 1871 decision. The judges noted that, at a meeting at Pukerahui, Ngati Paoa, Ngati Tamatera, Ngati Whanaunga, and Ngati Maru had all confirmed the sale of their interests to the Crown. Ngati Rahiri leaders had objected on the basis that the other Marutuahu tribes should not have taken part in the sale, but some Ngati Rahiri leaders had already taken money from the Crown agents on the basis of the Pukerahui agreement. Ngati Rahiri argued that they:

were the original possessors of a portion of this land, and were afterwards placed there by Marutuahu to guard it against Ngati Haua. They would not have held it unsupported by the confederation; in fact after the battle of Taumatawiwi they lived at Turua and returned to live on the Aroha after the land was awarded to Marutuahu.¹⁵⁰

The court then awarded 7500 acres of the block, at Omahu, to Ngati Rahiri. By this time, of course, the arrangements reflected not only the court’s interpretation of complex customary rights but transactions which had been in progress for some years.

Writing of this complicated story, Dr Ballara states:

Judges Frederick Maning and Henry A H Monro, for example, when summing up the Te Aroha case in 1871 [the first rehearing], decided that:

The question at issue . . . is, in fact, not between individuals, but between the great Marutuahu and Waikato tribes, of which parties the sectional tribes, Ngati Maru and Ngatu Tumutumu, of the Marutuahu confederation, and the Ngati Haua, of Waikato, seem to be the most particularly interested.

By this prescription the issue of 200,000 acres at Te Aroha was thus to be decided on the basis of a version of the relations between the peoples living all around the Hauraki Gulf as far as Tamaki, on the whole Coromandel Peninsula, and inland in the Thames region at least as far as Te Aroha on the one hand, and, on the other, the many peoples living from

149. Hauraki minute book 4, fols 257–258; Native Land Court, *Important Judgments*, pp 132–133

150. Hauraki minute book 11, fol 13

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Mangere and Manukau, up the 100-mile long Waikato River as far as the districts of Mokau and Taupo. In the event the issue came down to whose pigs were running on the banks of the Waihou, and which individuals out of two or three small hapu had the right to catch eels in a couple of streams on the block. But the mind-set was there. The format of evidence suggests that witnesses were usually asked to identify the 'large tribe' to which the descent groups they were discussing belonged. Failure to do so, perhaps because the hapu in question belonged genealogically to more than one iwi, or had split in sections living in different communities and localities, damaged their credibility.¹⁵¹

The judges were looking for groups to set up an ancestor with rights to a block whose descendants had retained occupation and control (or at least control) over the land, the more exclusively the better. This tendency married well with the competitive side of Maori culture, stimulating the pursuit of mana, and eventually the expanding concept of 'mana whenua'. This has come to mean something like 'exclusive ownership or control' in common law terms (but with other groups possibly having permissive or subsidiary rights). This tendency overlooks the flux of hapu formation and re-formation, the effects of peacemaking, marriage alliances, and gifts, and, we note, the consequent layering of different kinds of rights in the same land.

This is a tendency which continues to this day. The problem is evident even in submissions to this Tribunal. Bassett and Kay, discussing the intermarriages and tuku of land between Ngati Tara, Ngati Tokanui, Ngati Hako, and Ngati Tamatera, state appropriately:

As a result of such gifts, intermarriage, and whanaungatanga relationships, land occupation patterns cannot be strictly demarcated. Different whanau or hapu became interspersed, and whakapapa links meant that people of one hapu also had rights of some description [such as pockets of settlement] to areas of land more usually identified with other hapu.¹⁵²

On the other hand, they also observe (apparently approvingly) that the Ngati Tara chief Te Keepa stated in the Rotokohu case 'that Ngati Tara and Ngati Tokanui had always lived together, but pointed out that "N Tara have no right to N Tokanui lands"'.¹⁵³ As Ballara, Bassett and Kay, and others have pointed out, occupation alone is not of itself evidence of full ownership and control over land. Occupation rights may have come (for example) from a tuku granted when a political alliance and marriage tie was forged, with the donor chiefs still claiming overall authority over the land. This was what Te Keepa meant perhaps when he said that Ngati Tara had 'no right' to Ngati Tokanui lands. But of course Ngati Tara's occupation did give them some kind of right, a right which strengthened over time, as they planted and harvested crops, as their children were born on the land and their dead buried

151. Ballara, pp 89–90

152. Document 87, p 36

153. Ibid, p 25

in it, and as generations of intermarriage blurred the distinction between Ngati Tokanui and Ngati Tara. The sharpness of division between the two groups arose again in the land court because they were contending for 'ownership', and had to recall the origins of various rights.

In some cases, the court process resulted in the representatives of more than one hapu being included in the ownership lists of a block. In others, the court would aggregate the scattered interests of a hapu in one subdivision (to which they were given exclusive rights) and those of another, previously intermingled hapu, in an adjacent subdivision. Which group did best out of this process no doubt depended upon the force and skill of the advocates of the various parties, and the weight which the judges accorded to various take, each of which possibly had some validity.

Where judges did struggle to determine the nuances of Maori culture, their decisions sometimes attempted finely drawn interpretations of complex evidence. Among other published Hauraki decisions, for example, in 1870 Judge Monro found in favour of Ngati Tara against Ngati Tamatera in respect of the Owaharoa block. He wrote that 'Through a cloud of evidence, a vast deal of it irrelevant, and most of the rest of it absolutely contradictory, the Court clearly sees these facts'. Ngati Tara had conquered Owaharoa from Nga Marama and had since retained occupation of it. While counsel for Ngati Tamatera had shown 'some degree of subordination' of Ngati Tara to Ngati Tamatera, it was far short of 'absolute serfdom', and that even if Ngati Tara had become the 'rahi' of Ngati Tamatera (having secured the assistance of the latter against Nga Marama), that did not warrant the 'disherison' of Ngati Tara of their original lands and the vesting of them in the chiefs of the dominant tribe.¹⁵⁴ A few months later, Monro awarded the Waihi block to Ngati Tamatera against Ngati Tara claimants. In this case, Monro found that, although Ngati Tara had conquered the area from Nga Marama, that tribe had then defeated Ngati Tara and recovered possession of the land. The real and lasting conquest of Nga Marama at Waihi was subsequently achieved by Ngati Tamatera, not by Ngati Tara. Ngati Tara had occupied certain cultivations on the land, under the protection of Ngati Tamatera (including some post-1865 occupation), and the court awarded them those 15 acres.¹⁵⁵ Bassett and Kay have cited an 1893 comment by the Ngati Tamatera leader, Tareranui that his elders had been defeated in the Owaharoa case because they were unfamiliar with how to conduct a claim, but 'had become wiser & defeated Ngati Koe [Ngati Koi/Ngati Tara]' in the Waihi case six months later.¹⁵⁶ Clearly, Ngati Tamatera claimants were learning to present their evidence in such a way as to win the judges' nod in a 'winner takes all' situation.

We have quoted these examples at some length both to show the complexity of land rights in the Hauraki district and to caution claimant witnesses today against equating

154. Fenton, p 97

155. Fenton, pp 99-100

156. Document R7, p 63

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the outcome of land court processes as full expressions of customary rights and relationships. For example, evidence submitted to us by Mr McBurney on behalf of the whanau of Hamiora Mangakahia shows that, although the chief Ruamano and Ngati Pare hapu of Ngati Huarere were defeated by Marutuahu at Whangapoua they were not all killed by the conquerors, and ‘consolidated their occupancy’ through intermarriage with them. Some four generations later, a descendant of Ruamano, Mira, had become a prominent man at Whangapoua, and Te Mangapai of Ngati Maru and Ngati Tamatera, who was still engaged in conquests on the east coast of Coromandel Peninsula, married his daughter to Mira. Mr McBurney states:

This suggests an alliance, rather than subjugation into vassaldom. Indeed in the Native Land Court, witnesses from both Ngati Hei and Patukirikiri supported Mohi and Hamiora Mangakahia, and they acknowledged Mira as the key ancestor. At the Opitonui hearing some groups claimed the land through Te Mangapai, and others through ancestors affiliated to Ngati Maru. Despite their own connection to Te Mangapai, Mohi and Hamiora Mangakahia demonstrated an unbroken sequence of ancestry and occupation at Whangapoua deriving from their Huarere lineage, which set them apart from other claimants and *confirmed their mana whenua* over Whangapoua. [Emphasis added.]¹⁵⁷

Such statements are problematic, as indeed is the whole trend in the Treaty claims process to generate a stream of ‘mana whenua reports’, each written to emphasise the claims of a particular iwi, hapu or whanau, and (if only by omission) to diminish the claims of others. Any Maori can of course trace descent from a number of ancestral lines – the lines of four grandparents and beyond. In various social and political situations, including claims to land rights, it is appropriate to emphasise one or more of these. Unbroken occupancy of particular lands can also be demonstrated, though how much Hauraki land remained in unbroken occupancy during the Nga Puhi incursions is doubtful. What we are less comfortable with is the competition to claim ‘mana whenua’ and the use of the judgments of the colonial courts to ‘confirm’ it. As previously mentioned, the term ‘mana whenua’ appears to have gained expanded currency as a result of the land court’s pursuit of finite groups of ‘owners’ of land. Maori found themselves in an adversarial environment and began to select evidence with a view to winning the court’s awards. Eventually, land around Whangapoua (as elsewhere) was awarded as a series of surveyed subdivisions of blocks to various clusters of people, who were closely inter-related but chose to emphasise one aspect or other of their lineage and history. This system tended to yield ‘owners’ and ‘non-owners’ in situations where, as we have noted, rights were often complex and multi-layered. Whatever the merits or demerits of this system it is scarcely appropriate in our view, to in effect reverse the

157. Document L12, pp14–15. McBurney provides the relevant whakapapa and states the whole situation at greater length in his mana whenua report.

land court process, and read court awards backwards (so to speak) as proof or confirmation of the late nineteenth century stretched interpretation of the customary concept of ‘mana whenua’.

Some claimant submissions have taken the other tack and used the evidence of the land court minute books to argue that the court’s final decision was inconsistent with that evidence – that it should have awarded certain land to *their* tupuna or in the name of a hapu other than that favoured in the court’s judgment. This is an implicit invitation to the Tribunal to review the decisions of the court.¹⁵⁸ But it is hardly feasible now to review the findings of the court in particular cases. Although the Native Land Court may well have erred in some cases in its effort to find the dominant owners of particular lands, it also wrestled with a great deal of evidence given by the very people who had lived on and fought over the land, evidence much more voluminous and immediate than is available to the Tribunal today. Consequently, while the Tribunal will comment on Native Land Court processes, it is not in a position to review the decisions of the court in relation to the particular claims of one hapu or iwi as against another. We might wonder at the confident way in which Native Land Court judges sifted the evidence and came up with their precise judgments. We might note and criticise the tendencies of some judges on some occasions to recognise occupation of the land at the expense of the ancestral claimants who had placed the occupiers on the land in the first place, and vice versa. We will also have occasion to observe that there were numerous occasions on which the judges did *not* feel so confident about the correct balance between competing claims of right and sent the contending parties outside the court to come to an agreement – commonly a sharing of the land – which the court would then ratify. No doubt this often resulted in rough justice, and to awards which some groups to this day feel were unfair. But no minutes of evidence were kept of out-of-court discussions, nor has the surviving evidence of proceedings in court been canvassed so exhaustively and dispassionately as to permit a review of particular decisions.

2.3 POPULATION NUMBERS

We turn to a brief consideration of the total numbers of Maori in Hauraki in the period we have been discussing, and the relative numerical strengths of the various iwi and hapu. Hauraki archaeologist Caroline Phillips estimates that there were some 5500 people in 1770 and about 6500 in 1800 in the region, including Tamaki and the Mahurangi coast.¹⁵⁹ The introduction of the white potato fostered larger village communities but newly introduced

¹⁵⁸. Document M6, pp 1–3

¹⁵⁹. Caroline Phillips, *Waihou Journeys: The Archaeology of 400 years of Maori Settlement* (Auckland: Auckland University Press, 2000) fig 5.12, p 102

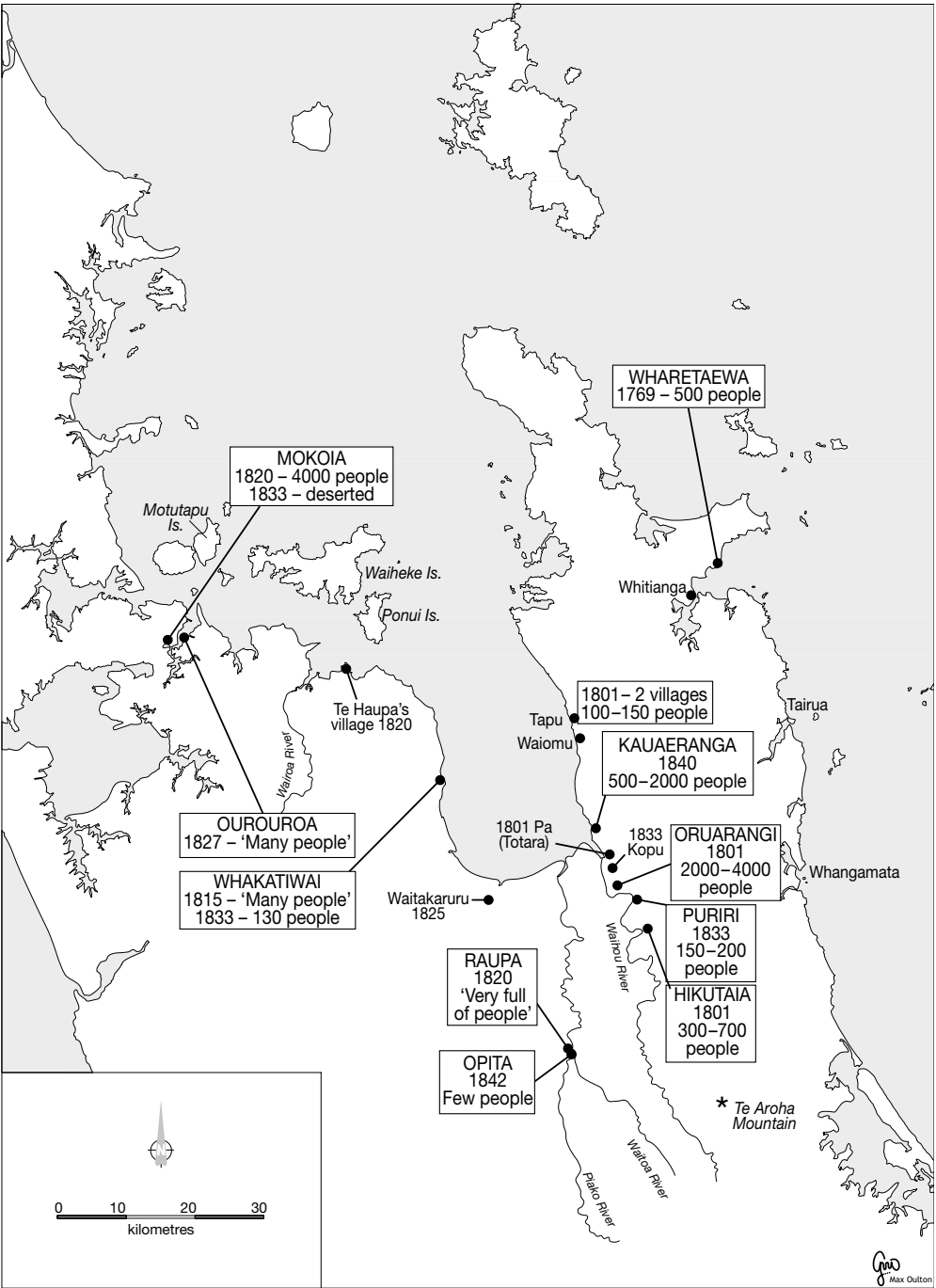


Figure 5: Maori settlements recorded by European visitors pre-1840. Source: document A7.

diseases were also having their impact. Venereal diseases, dysentery, and 'rewharewha' (a respiratory disease) were evident from the 1790s. Early population estimates are necessarily largely conjectural, yet European ships staying for lengthy periods to collect timber from the Waihou found concentrations of several hundreds of people.¹⁶⁰ The spectacular growth of the Ngati Paoa complex of villages at Mokoia–Mauinaina on the Tamaki Peninsular between 1815 and 1820 – in one estimate, 4000 people lived there in apparent security rather than being scattered in villages on the Whakatiwai coast – suggests a burgeoning population, living well on potato cultivation and pigs as well as traditional foods. But in tribal fighting in 1821 Mokoia–Mauinaina was destroyed, the people killed or dispersed.¹⁶¹ The Ngati Maru pa Te Totara was also destroyed with much loss of local population. The Marutuahu iwi and their allies were involved in many wars outside Hauraki in the 'musket war' period – in Taupo and Whanganui and along the Bay of Plenty and east coasts – all of which must have contributed to attrition, directly or indirectly.

Missionary records and one official's estimate in 1846–47 suggest a likely population of around 4000 in Hauraki in the early 1840s.¹⁶² By the time British officials began attempting formal censuses, Maori numbers had declined drastically, though by how much depends upon much-debated estimates of the population at 1769. New epidemic diseases continued to take a heavy toll. F D Fenton's 1858 official census of the Maori population gives only 2279 for Hauraki, though the resident missionary James Preece considered that many significant local areas had been left out.¹⁶³

Further population decline is evident in the more careful official censuses after in the wars of the 1860s: 1860 persons in 1870, 1664 in 1874, 1451 in 1878, and 1582 in 1881. Although the methods of taking these early censuses were idiosyncratic, and they cannot be relied upon for precise numbers, they give some idea of the relative sizes of the total Hauraki population we are discussing.

As far as relative tribal strength is concerned, the shifting categorisation of various groups as separate 'tribes', 'sub-tribes' or 'hapu' of larger 'tribes' was clearly a subjective matter, no doubt reflecting the census-taker's perceptions and perhaps the contemporary, politicised claims of the groups concerned. Such categorisations are not precise guides to the identity of Maori social groups or the relations between them. Nevertheless, taken overall the four censuses broadly show the relative size of the groups concerned, the very small numbers in

160. Monin, *This Is My Place*, p 32

161. Ibid, pp 49–52, 57–61

162. R Maunsell, letters, 25 October 1846, CMS Archives CN/O64, ATL; 'Returns of the Native Population', GBPP, 1846–47, p 47 (Monin, *This Is My Place*, p 166)

163. Preece, report, AJHR, 1862, E-7, p 15 (Monin, *This Is My Place*, p 165). The demographer Professor Ian Pool considers that many Maori had moved from Hauraki to the Waikato at the time of Fenton's census: Pool, *Te Iwi Maori: A New Zealand Population Past, Present and Future* (Auckland, Auckland University Press, 1991), p 51. But there is stronger historical evidence that many Hauraki Maori had moved into the coastal areas of their own rohe for trade and timber cutting in the 1850s.

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some of them, the persistence (or re-emergence) of certain group identities, and the disappearance of others from official view.

In 1870, much the largest of the Marutuahu tribes were – in the following order – Ngati Paoa (600), Ngati Tamatera (450), Ngati Maru (310), and Ngati Whanaunga (165). But in that census Ngati Paoa was deemed to include Ngai Tai and Te Patukirikiri, Ngati Tamatera included Ngati Hei, Ngati Koi, and Te Whakatohea, and Ngati Maru included Ngati Rahiri and Ngati Pu. Te Tawera/Ngati Pukenga at Manaia (85) were listed separately, as were Ngati Porou at Harataunga (250). The later censuses varied these figures considerably. In 1874, Ngati Tamatera were deemed to include only 196 people. Patukirikiri (nine) were still included, but Ngati Hei were listed separately and Ngati Koi and Te Whakatohea were listed with other iwi. Ngati Maru had ‘increased’ to 409, still including Ngati Pu (36) but now also including Te Whakatohea (22). Te Whakatohea and Ngati Koi were also listed as hapu of Ngati ‘Hoko’ (Hako), numbered at 210.

The censuses continued in 1878 and 1881 with significant variations, the inclusion of ‘new’ hapu divisions each time together with the submergence or disappearance of others. In these censuses, of the pre-Marutuahu tribes Ngati Hako and Ngati Koi were the most numerous, while Ngati Hei and Patukirikiri were quite small. Of the two groups which had established themselves after 1840 – Ngati Pukenga and Ngati Porou – the former had remained relatively stable, while the latter had burgeoned, particularly after its Native Land Court award. Further census data and the modern socio-demographic profile of Hauraki Maori are discussed in sections 25.1.1 and 25.1.2.

2.4 HAPU, WHANAU, AND IWI INTERRELATIONSHIPS

Land court evidence has commonly been used selectively by claimant groups in these proceedings to advance their particular positions. Given the comprehensive evidence about the complexity of inter-tribal relationships in Hauraki, we have some concern about the renewed emphasis on the small group identity, based on land court records. Some groups have even claimed under names that have been found in the records of the Native Land Court and possibly not anywhere else, or at least not in living memory. For example, the hapu name Ngati Raukatauri was revived in respect of the Matamata-harakeke block.¹⁶⁴ Ngati Hikairo are another example. Shane Ashby, speaking for the Wai 661 claimants, told us he had not heard the name previously, nor had his mother or the koroua and kuia in the valley. The name had been found in Native Land Court evidence. Ashby recounted that Hikairo was a Ngati Maru chief said to have led the conquest of Pakirarahi and Wharekawa

164. Documents A35, M4, M5

West.¹⁶⁵ A somewhat different approach was taken by the Wai 705 claimants – the whanau of Peneamene Tanui of Whitianga. Te Rapupo claimed some 28,000 acres in the land court under this name. The land was subsequently purchased by the Crown. The claimants frankly state:

This hapu [Te Rapupo] can be said to no longer exist in that it is a name that has come into dis-use. . . . The name Te Rapupo came about from a connection with the iwi Ngati Whanaunga and Ngati Piri [from the Kawhia area], and indeed Maori at Whitianga included in these blocks identified also as being Ngati Piri [and] Ngati Whanaunga along with Ngati Paoa and Ngati Koheru . . . Ngati Piri and Ngati Hei came, conquered, then intermarried to settle in the region. Te Rapupo then could identify with the ancestor Piri, but intermarriage later (Te Hinaki's to Te Wawa) made for Paoa and Whanaunga identification too.

The Tribunal is asked to bear in mind this fluid history of intertribal marriage and settlement when considering the way in which the tangata whenua witnesses identify themselves as Ngati Hei rather than from the hapu Te Rapupo.¹⁶⁶

While old hapu names have been recovered from the records of the Native Land Court it is perhaps problematic whether they should be retained for future use, rather than allowed to fade in the normal customary process by which small hapu flourished at one time but then merged with larger hapu or iwi with whom they had intermarried, or through other political or social circumstances.

Many of the hapu and whanau claims refer to specific blocks awarded by the land court. We note that subsequent alienation histories of these blocks are the local application of grievances already adduced by the HMTB and the Wai 100 claim. The Tribunal is concerned at the time and expense involved in the duplication of research and additional hearings. However, experiences particular to the various claimant groups do require specific discussion in this report. Moreover, we recognise that a large part of the purpose of the Treaty of Waitangi Act is to enable Maori to express their felt grievances fully and freely, and that this sometimes means that they will be expressed by smaller groups as well as through overarching representative bodies.

Many of the claimants have emphasised the centrality of whakapapa in Maori culture, in respect of the extent and limits of rights to land, among other things. As Colt Gregory expressed it for the Wai 177 claimants, "The focus should be on the tupuna, and under them the whanau, the hapu and then the iwi."¹⁶⁷ Kevin Murray, another Wai 177 claimant, has stated:

165. Document 135, pp 2–3; see also doc H3, pt 2. A few individuals of Manaia and Thames identified themselves as Ngati Hikairo, as a hapu of Ngati Maru, in the 1908 and 1919 electoral rolls for Western Maori.

166. Document S29, p 1

167. Document R28, p 4

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The hapu representatives come from whanau. But the problem in Thames with Ngati Maru and Ngati Whanaunga is that a multitude of us belong to a multitude of hapu. It should really come back to tangata whenua and their relationship to the whenua. Where you have rights in the whenua you should get together to set up a forum to look after it.

However, we consider that Mr Murray overstates his case in saying, 'I believe that "iwi" is a Pakeha concept.'¹⁶⁸ So too does counsel for the Wai 177 claimants when he stated:

the concept of 'iwi' or other bodies such as Trust Boards claiming land contradicts the rights of whanau and hapu. The whanau claims these lands directly through whakapapa, and acknowledges that the claim can incorporate any who can also whakapapa into the same piece of land.¹⁶⁹

We see no basis whatever for suggesting that 'iwi' is a Pakeha concept. The functions and definitions of iwi have certainly evolved since European contact but traditionally the concept referred to groupings of related 'hapu' and 'whanau' with common descent from an early ancestor. Nor do we concur with claimant counsel's view that iwi-based organisations such as trust boards 'contradict' the rights of whanau and hapu. The claimants' own evidence and counsel's own submissions make it quite clear that all levels of Maori society, including new organisations such as trust boards, are mutually supportive. Whakapapa are no doubt central to this task now as they were traditionally, when Maori communities also had to collaborate at iwi or multi-iwi level to deal with the exigencies which faced them.

For the above reasons, we consider that the various hapu and whanau claims should be included in a single comprehensive negotiation and settlement for the inquiry district. We have considerable sympathy with the difficulties Maori communities face in trying to create the structures and mechanisms which link whanau and hapu in wider tribal structures needed to deal with many modern challenges. Claimants' comments about the expense of face-to-face meetings remind us of the importance to Maori of access to modern communications technology for dealing with modern exigencies. We would emphasise, however, that there is an evident need to ensure that proper delegations of authority are achieved, and periodically reviewed, to ensure that (on the one hand) overarching tribal organisations are adequately empowered to act on behalf of the wider community without undue fear of capricious withdrawals of mandate, and (on the other hand) that adequate mechanisms are in place to ensure regular accountability of the tribal authority to its constituent groups.

¹⁶⁸. Document R29, p 7

¹⁶⁹. Document R21, p 9

PART II

LAND ISSUES FROM TREATY TO WAR

PROLOGUE

We note that, in the early nineteenth century, the British Government was reluctant to take formal responsibility for New Zealand.¹ The appointment of James Busby as British Resident was an attempt to continue recognising Maori autonomy and avoiding the extension of British sovereignty. By 1837, however, Busby's presence and policies were deemed to be inadequate because of continued tribal fighting, because of the persistence of informal colonisation from New South Wales and because the New Zealand Association was planning organised colonisation from England. Lord Glenelg, the Secretary of State for the Colonies, concluded in December 1837 that, with colonisation 'to no small extent' already under way, 'The only question therefore is between a colonization, desultory, without law, and fatal to the natives, and a colonization organized and salutary [*sic*].'² This decision led to the appointment of Lieutenant-Governor designate William Hobson, with instructions from Normanby to negotiate with Maori for the cession of sovereignty and to assert it in any case over the South Island by right of discovery.³

The Crown's overall strategy was based on the assumption that European colonisation of New Zealand was irreversible. This is fundamental to an understanding of all that followed. By intervening, negotiating the Treaty, and asserting British sovereignty over New Zealand, the Crown had assumed the responsibility of ensuring land was available for that colonisation. Subject to that obligation, Maori were to be offered protection from the rapacity of unregulated colonisation, inclusion in the new jural order and participation in the new social and economic regime.

Lord John Russell's instructions to Hobson in December 1840 clearly show that it was assumed in London that the settlers in New Zealand would eventually be granted self-government, as in the settler colonies of Ontario and Quebec at this time. The transfer of Government functions to ministries chosen from elected parliaments became an axiomatic policy for the Australian colonies and New Zealand.⁴

1. Edwin Tapp, *Early New Zealand. A Dependency of New South Wales, 1788–1841* (Melbourne: Melbourne University Press, 1958); Claudia Orange, *The Treaty of Waitangi* (Wellington: Allen and Unwin, 1987), pp 6–18

2. Glenelg to Durham, 29 December 1837, CO209/2:423–32 (Peter Adams, *Fatal Necessity* (Auckland: Auckland University Press, 1977), pp 103–104)

3. Adams, pp 103–171; Orange, pp 19–31

4. For a discussion of the framing of New Zealand Constitution Acts of 1846 and 1852, and of the Maori franchise, see William Renwick, 'Self-government and Protection: A Study of Stephen's Two Cardinal Points of Policy in their Bearing upon Constitutional Development in New Zealand in the Years 1837–1867', MA thesis, Victoria University of Wellington, 1961. It should also be recalled that Durham (whose 1840 requests underlay the granting of self-government to Ontario and Quebec) was patron of the New Zealand Association.

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The 1839 instructions of the Secretary of State for the Colonies, Lord Normanby, to Hobson have been quoted frequently in claims before the Waitangi Tribunal, usually with emphasis on the protection to be extended to Maori and their lands. However, we believe that a fuller consideration of the instructions reveals contradictions within Crown policy – possibly inescapable contradictions – which explain why the protections proposed for Maori were often not applied, or applied only weakly. We also believe that closer attention should be paid to the royal instructions which superseded those of Normanby.

Protection of Maori was to be achieved partly by the Crown's assumption of the 'pre-emptive' right (in fact, monopoly right) to purchase Maori land. Hobson's instructions therefore required the issue of a proclamation that land purchases from Maori would be valid only if derived from or confirmed by the Crown, that commissioners would be appointed to investigate previous transactions, and that any further private transactions purporting to transfer interests in land would be null and void. This proclamation was issued by Governor Gipps in Sydney on 14 January 1840 and repeated by Hobson in the Bay of Islands on 30 January 1840. Normanby further instructed Hobson that, having negotiated a cession of sovereignty, he was to acquire 'by fair and equal contracts with the natives, the cession to the Crown of such waste [uncultivated] lands as may be progressively required for the occupation of settlers resorting to New Zealand'. But the Maori owners were not to be allowed 'to enter into any contracts in which they might be the ignorant and unintentional authors of injuries to themselves', nor was the Crown to purchase from them 'any territory, the retention of which by them would be essential, or highly conducive, to their own comfort, safety or subsistence'. These instructions have been regarded by claimants and by the Tribunal as a benchmark of the Crown's protective intentions towards Maori, a context in which the Treaty itself should be read, and a measure of the Crown's subsequent performance. Indeed, it may be presumed that Crown counsel's concession in these proceedings that the Crown purchased Maori land excessively in Hauraki also derives substantially from them.

There was, however, another purpose behind the introduction of Crown pre-emption. Administration of the colony and further land purchases had to be paid for. The resale of the first lands acquired by the Crown, Normanby continued, 'will provide the funds necessary for future acquisitions':

I thus assume that the price to be paid to the natives by the local government will bear an exceedingly small proportion to the price for which the land will be re-sold by the Government to the settlers. Nor is there any real injustice in this inequality. To the natives or their chiefs much of the land of the country is of no actual use and, in their hands, it possesses scarcely any exchangeable value. Much of it must long remain useless, even in the hands of the British Government also, but its value in exchange will be first created, then

progressively increased, by the introduction of capital and settlers from this country. In the benefits of this increase the natives themselves will gradually participate.⁵

The Secretary of State thus adopted unequivocally the policy of buying Maori land cheap and selling it for as much profit as the market would provide. His assertion that Maori customary land had little monetary value was repeated many times by land purchase agents to Maori in the Hauraki inquiry area.

The policy of buying Maori land cheaply sits awkwardly with Normanby's injunction that Hobson make 'fair and equal contracts' with Maori. Almost from the outset, Maori complained that they did not have the option to sell directly to private settlers, from whom they expected to get much better prices. There was an almost inescapable contradiction between the Crown's protective obligations under the Treaty and its land purchase policy. By Normanby's analysis, this contradiction was to have been resolved through the increase in value that would accrue to the remaining Maori land, as a result of capital and labour invested by colonists in the purchased land. Up to a point, the theory worked. The value of Maori land did, in a general way, rise over the next two centuries as the economy grew. For Maori to realise the full potential value of their land, the nature of their titles to it and the manner in which it was acquired would be crucial.

There were other flaws in Normanby's theory. He was incorrect to say that Maori customary land had little exchangeable value prior to its purchase by the Crown or settlers. This value was already being demonstrated by pre-1840 transactions, exchanges of purchase deeds among colonists (notably in Sydney) at escalating prices, and the payment of scrip by the Crown for such lands when they were not awarded to the initial purchaser. Part of this value was attributable to the security of title anticipated to follow from Crown grants, but part was simply site value. Many pre-1840 Maori transactions were more leases than sales (discussed in section 3.1.1), and Maori continued to transact with settlers after 1840 for cutting rights to timber or depasturing of stock. Such direct dealing threatened to undermine the Crown's planned control of land transactions, and the 'land fund' generated from the on-sale of purchased Maori land.

Officials had expected that considerable areas of land would be made available for settlement not only by new purchases by the Crown but also from the pre-1840 transactions. An early Crown aim was therefore to establish the land claims commissions which would examine the pre-1840 transactions (the old land claims) and grant titles to those settlers who had purchased validly. When neither the old land claims nor the new purchases yielded sufficient land to meet the anticipated flow of incoming settlers, the Governor waived the

5. Normanby to Hobson, 14 August 1839, BPP, vol 3, pp 87–93

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Crown's pre-emptive right of purchase and allowed private dealings with Maori. That policy was soon in difficulties and Crown pre-emption was reasserted in 1847. Until 1865, a vigorous programme of Crown purchases became the main vehicle for promoting settlement. In chapters 3 and 4, we examine these policies as they affected Hauraki. In chapter 5, we consider the growing Maori resistance to Crown purchases, which fostered impatience among settlers and officials, resulting in war and confiscation, including in Hauraki.

CHAPTER 3

PRE-1840 TRANSACTIONS AND PRE-EMPTION WAIVER PURCHASES

3.1 EVENTS IN HAURAKI AND THE CROWN'S INTERVENTION

3.1.1 Pre-1840 traders, settlers, and speculators

Horeta Te Taniwha's account of Cook's visit to Mercury Bay reveals that Hauraki Maori engaged eagerly with European visitors to their shores. Gift exchange and barter developed into more complex trade relations with Royal Navy and merchant vessels coming from 1794 on for kahikatea and kauri spars. Ships stayed for weeks or months, while their crews felled trees, and traded with local chiefs and tribes.¹ In the early 1830s, the Admiralty began to contract with private companies which employed local Maori to fell and square logs. From 1832, flax traders arrived, and Hauraki Maori laboured to supply them, in return for the guns now essential in tribal warfare. Both the timber and flax industries now involved locating small parties of Pakeha on shore, under the aegis of chiefs and hapu who were themselves resettling in the district after the battle of Taumatawiwi (c1830). In 1833, the CMS located missionaries at Puriri, some 15 kilometres up the Waihou River. Because the land was low-lying and considered unhealthy the mission was relocated in 1837 to Parawai (Kauaeranga) and Maraetai.²

At Pakeha shore establishments, including missions, chiefs and hapu made over land for settlers' houses, workshops, schoolrooms, and gardens. Settlers generally enjoyed the protection of their rangatira, and several traders cemented their relationship with their hosts by accepting local women as wives or partners. We note that they were living under Maori custom. For example, they could be protected from other Maori, subject to muru if they infringed Maori norms and assaulted or expelled if they became involved in inter-tribal conflict.³

1. Paul Monin discusses the differences between gift exchange, aimed primarily at establishing a social relationship, and commodity exchange (including barter), which is primarily a commercial transaction in goods valued for themselves. While accepting that gift exchange was the dominant practice in traditional Maori society, Monin suggests that elements of commodity exchange, trade, were not unknown in Maori culture and that features of both kinds of transaction were discernible in the exchanges between Hauraki Maori and the timber and flax traders: Monin, *This Is My Place: Hauraki Contested, 1769–1875* (Wellington: Bridget Williams Books, 2001), pp 25–33, 72–73, 89–93. See also doc N9, pp 14–16.

2. Monin, pp 77–78, 81, 86

3. Ibid, pp 25–44

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3.1.1

One plan for permanent settlement concerned Captain James Herd, who came to New Zealand in the *Rosanna* in 1826 as agent for the first New Zealand Company, with about 25 Scottish immigrants. After making some ‘purchases’ from chiefs from Southland, Herd sailed to the warmer climate of the Hauraki Gulf, and on 23 September 1826 he entered into transactions with mainly Ngai Tai chiefs for the purchase of Pakatoa, Rotoroa (also spelt Rataroa), Ponui, Pakihi, and Karamaramu Islands. The transactions included the timber and all other ‘privileges and appurtenances’, apparently with a view to working minerals. Pakihi was believed (wrongly) to contain iron ore. But, frightened by a passing taua (war party), Herd’s party moved north, and thence to New South Wales.⁴

Herd’s transactions resulted in an early example of trade amongst Europeans in so-called deeds of purchase of Maori lands. After his death, Herd’s widow sold the deeds to Edward Gibbon Wakefield, then in process of setting up his New Zealand Association (later to be the second ‘New Zealand Company’). Wakefield, however, appears to have based no claim on Herd’s deeds. The Crown, however, would give them more cognisance.

Considerable debate between claimants and the Crown in this inquiry as to the nature of these early transactions follows upon that in the Muriwhenua inquiry. There the Tribunal concluded that the pre-1840 transactions (and many post-1840 transactions) took place in a cultural order still Maori, and that therefore they were not ‘sales’ in the European sense but ‘tuku whenua’ or permission to settle. The claim against the Crown is that it wrongly concluded that many of the transactions were ‘sales’ and wrongly assumed title to the land, before awarding it to settlers. Alternatively, the Crown retained it as ‘surplus’ to the initial transactor’s entitlement and awarded it to other settlers if it decided that the initial transactor was accumulating too much land for the general good of the colony.

Other than Herd’s, the first transactions in Hauraki which were subsequently claimed by the settlers to be purchases of land were those entered into by Gordon Browne and William Moores in 1836 (on their own behalf and that of Ranulph Dacre), with respect to land near their timber-cutting enterprises at Mercury Bay and Kopu. In 1836 and 1837, William Webster undertook a number of ‘purchases’ of Whanganui Island (straddling Coromandel Harbour) and several other gulf islands. The trader and boat builder, Thomas Maxwell – married to Ngeungeu, daughter of Tara Te Irirangi, leading rangatira of Ngai Tai – followed suit, claiming land on Waiheke and some of the smaller gulf islands. So too did Thomas Graham and others. All of these transactions involved local chiefs from the major tribes signing or making their marks on purported deeds of sale and receiving payment in goods, sometimes including guns and ammunition.

In a scholarly analysis, Paul Monin shows that most Europeans involved in these early transactions were already in some form of trading and social relationship with Maori

4. Document C5, p 49; Harrison M Wright, *New Zealand, 1769–1840: Early Years of Western Conflict* (Cambridge, Massachusetts: Harvard University Press, 1967), pp 24–25

groups. Although their ‘purchases’ were stimulated by mounting expectations that Britain was likely to assume sovereignty over New Zealand, these men were already ‘settlers’, whose first objective was to consolidate possession of their residences and work stations. Soon however, Europeans who had no intention of settling in New Zealand began to undertake speculative transactions. This ‘land jobbing’ increased in 1838, with men such as William Webster assuming a new role as local agents for Sydney entrepreneurs or buying on their own account with a view to on-selling at great profit. But there were also some bona fide settlers among the new transactors – including Joshua Thorp who acquired land at Te Kouma, Coromandel Harbour and at Opukeko (on the Waihou River near present-day Paeroa), and Lachlan McCaskill, who acquired lands at Hikutaia and at Opukeko for himself and his partners (cousin Allan and Doctor SMD Martin).⁵ Most gulf islands were acquired, together with the main Coromandel harbours and favourable localities on the Waihou and Piako Rivers. Between 1836 and 1839, a series of transactions affecting some 80,000 acres of south Tamaki, from the Otahuhu portage to Maraetai, was undertaken under the aegis of Potatau Te Wherowhero and Henry Williams of the CMS – the so-called ‘Fairburn purchase’ mentioned in section 2.2.4 – arranged to check the sporadic fighting still occurring between Waikato and Hauraki hapu. Though outside the Hauraki inquiry district, this transaction affected the rights of Hauraki Maori.

The situation in Hauraki thus replicated that elsewhere in New Zealand. Unregulated settlement and the claims of settlers and entrepreneurs to huge tracts of land increasingly troubled humanitarian groups in England and missionaries in New Zealand. As noted, in late 1837, the British Government concluded that it had to intervene by assuming sovereignty, at least of the most settled areas, and regulating the purchase of land.

3.1.2 ‘Surplus lands’ and Lord Normanby’s instructions

Two of the principal matters to be determined by this Tribunal, as far as the evidence allows, focus upon the nature of the pre-1840 transactions, and whether the Crown was in breach of Treaty principles in failing to investigate them adequately before making its awards. A third matter is whether Treaty principles were breached by the Crown’s assumption of title over transactions deemed to be bona fide and its subsequent grant of parts of the land to settlers *other than* the original transactor, or retained for public purposes as ‘surplus lands’.

We have discussed in the prologue to part II the dual nature of Normanby’s instructions to Hobson, both the protective and colony-funding aspects. A third important aspect concerned the distribution of land once it had been acquired from Maori. It was assumed by British officials in London and Sydney that Maori had *already* parted with a great deal of land in the transactions of the 1830s, and there was concern that, as in New South Wales,

5. Monin, pp 94–97

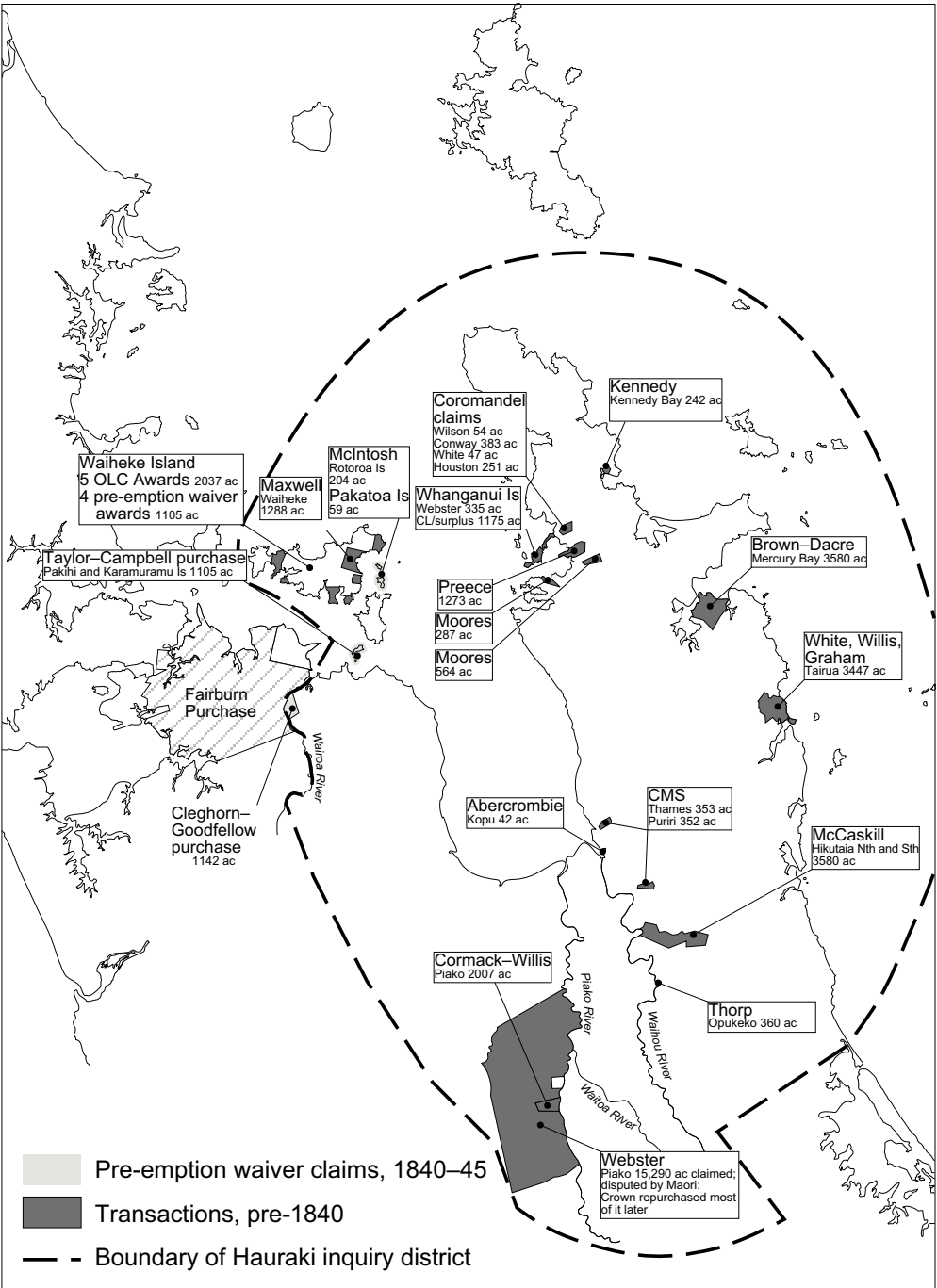


Figure 6: Alienation of Maori lands by 1845

settlers would sprawl across the colony to the detriment of sound economic development and security.⁶ Normanby's instructions therefore directed Hobson, immediately on his arrival to proclaim that the Crown would recognise no title to land 'which either has been, or shall hereafter be acquired' which was not derived from or confirmed by a grant from the Crown. He was to reassure settlers that they would not be dispossessed of any property which they had acquired 'on equitable conditions, *and which is not upon a scale which might be prejudicial to the latent interests of the community*' (emphasis added).⁷

This was the germ of the 'surplus lands' policy, which Hauraki claimants (like Muriwhenua claimants before them) consider to have breached Treaty principles. As Crown counsel pointed out in cross-examination of Dr Robyn Anderson, the policy was *not* introduced by Governors Gipps and Hobson without authority from Normanby.⁸ It was, however, *elaborated and conveyed to Maori* (if at all) only *after* the signing of the Treaty. This occurred when in June 1840 Gipps secured the enactment of the New Zealand Land Claims Ordinance, including a sliding scale of grants to settlers out of bona fide purchases, to a *maximum* of four square miles (2560 acres) each, as in the recently adopted New South Wales land regulations. The balance of the purchased land was to be Crown-granted to new immigrants or used for public purposes.

3.1.3 Crown undertakings to Maori in 1840

We note that Hobson was instructed by Normanby to emphasise to Maori the Crown's intention of protecting them through the acquisition of sovereignty. In the preamble of the Treaty itself, the Queen extended her royal protection to the Maori people and by article 2 explicitly undertook to safeguard Maori lands, forests, fisheries, and other valued possessions until such time as they wished to sell them to the Crown. On 30 January 1840, Hobson issued the proclamation establishing the Crown's pre-emptive right of purchase and foregrounding the review of previous land transactions. At Waitangi, he stressed the Crown's protective intentions towards Maori and assured the chiefs that 'all lands unjustly held would be returned'. In strong speeches prior to signing the Treaty, rangatira at Waitangi, Kaitaia, and elsewhere expressed great concern about the pre-1840 transactions and their fears that

6. It is relevant to note that Busby and the missionaries assumed that the deals made by settlers and speculators were 'sales' in the sense that they had the effect of taking the land out of Maori possession and control. Indeed, the officials in Sydney and London formed the impression that much of the country had been alienated. Furthermore, James Stephen, the permanent under-secretary in the Colonial Office, took the view that the peoples of tribal or pre-state societies did not observe the Roman and common law distinction between 'imperium' (sovereign authority) and 'dominium' (proprietary rights) and that, having supposedly alienated the latter over much of the country, 'it may be questioned whether strictly speaking the necessity exists for further negotiation with them on the subject': Stephen, draft instructions to Hobson, circa January 1839, CO209/4, p 239 (Alan Ward, *A Show of Justice: Racial Amalgamation in Nineteenth Century New Zealand* (Auckland: Auckland University Press, 1974), p 42).

7. Normanby to Hobson, 14 August 1839, BPP, vol 3, p 87

8. Crown counsel, fourth hearing, tape 1, side B

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they would become landless. As Dr Claudia Orange and other professional historians have shown, Hobson's assurances as regards their lands and their authority among their own people were crucial to the chiefs' agreement to the Treaty. Precisely what the chiefs expected is unclear, but undoubtedly they expected to get back much of the land claimed by traders and others, and that much of this land would remain in customary Maori tenure.⁹

There is no evidence that Hobson or his advisers explained the 'surplus lands' principle to Maori assembled for Treaty negotiations. At the time Crown officials considered it secondary to the all-important objective of securing sovereignty and investigating the pre-1840 transactions. Gipps and Hobson knew that there were huge claims pending from New South Wales speculators in respect of the South Island, from Wakefield's purchases on either side of Cook Strait, and from many transactions about the Bay of Islands and other northern ports. New South Wales officials were highly suspicious of the speculative purchases and almost certainly assumed that some land would be 'returned to Maori' as a result of the investigations, as indeed it was, to the tune of some 20 million acres of lapsed or disallowed claims. Notwithstanding that the Crown failed to explain that it would retain parts of bona fide purchases for wider distribution (the surplus lands), it would be going too far to suggest that there was an element of duplicity about this at Waitangi or other Treaty negotiations. The nature of the investigations eventually to be set up, and the planned surplus land policy had to make way for the all-important cession of sovereignty and other promises.

In hindsight, however, it would have been politic for Hobson and his advisers to have made some attempt to explain the policy – and the constructive purpose that underlay it – to the assembled chiefs. The Crown would have been less exposed to the allegations promptly made by settlers and entrepreneurs that the Crown had been devious and, under a guise of offering protection, was in fact grabbing land from Maori and settlers alike. This charge quickly aroused Maori suspicion in Northland, and by December 1840 George Clarke, the chief protector of aborigines in the new administration, was reporting Maori disquiet in Hauraki.¹⁰

Relatively small areas were claimed by the Crown as surplus in the Hauraki inquiry district, and the issue, though important, has not loomed nearly so large there as in Muriwhenua. Of more fundamental significance in Hauraki is the nature of the pre-1840 transactions and the adequacy of the Crown's investigation of them.

3.1.4 Applicability of the Treaty to Hauraki Maori

When Major Bunbury proffered the Treaty to the chiefs at Coromandel on 4 May 1840, at Mercury Island on 7 May and at Tamaki on 9 July, two (Piko and another, probably Taraia) refused to sign. Hauraki claimants have not, however, sought to argue that because some

9. Claudia Orange, *The Treaty of Waitangi* (Wellington: Allen and Unwin, 1987), pp 46–48

10. Clarke's report in Gipps to Russell, 7 March 1841, BPP, 1842, cmmd 569, pp 94–98 (Orange, pp 94, 96)

Hauraki rangatira did not sign the Treaty the Crown had no jurisdiction over them, or that Treaty rights and obligations did not apply in their case.

Historically, the issue emerged in 1842 when Taraia attacked Ngai Te Rangi in continuance of a long-standing struggle. The Crown did not have the forces to arrest him, and dealt with the problem by negotiation. Subsequently, the argument was raised by Attorney-General William Swainson that British sovereignty did not extend to chiefs who had not signed the Treaty. This argument was swiftly rejected by other law officers of the Crown and the Secretary of State for Colonies. In their view, Britain had assumed sovereignty over New Zealand by virtue of Hobson's proclamations of 21 May 1840. From that time, everyone within its boundaries was legally subject to the authority of the Crown (although how that authority was actually applied must obviously have regard to local circumstances).¹¹ Whether or not particular chiefs signed the Treaty did not affect this status.

Consistently with this view, the Tribunal has stated in the *Report on the Orakei Claim* that, although those Maori who did sign the Treaty ceded 'kawanatanga' in the Maori text, this is 'less than the sovereignty ceded in the English text . . . The cession of sovereignty however is implicit from surrounding circumstances'.¹² Professor Jock Brookfield has drawn a distinction between the 'legality' of the British assumption of sovereignty and its 'legitimacy'. From their standpoint, Taraia and the other non-signatories had ceded neither kawanatanga nor sovereignty in 1840. Subsequently a number of them resisted the extension of British law, at least in so far as matters between Maori were concerned. Brookfield states that, consequently, any consensus among Maori to accept the 'overriding power' of the Crown 'must have been reached very much later and that, if and to the extent that it was reached, it was part of the process of legitimisation'.¹³

In terms of Brookfield's analysis, Maori acceptance of the Crown's intervention in the pre-1840 purchases by their participation in the hearings of the Land Claims Commission, is thus one early step in the gradual legitimisation of the Crown's authority. Dr Anderson has pointed out, however, that not all Maori were equally aware of the importance of the Land Claims Commission and were willing to accept its authority. This weakened the Commission, since it failed to hear from all Maori customary right-owners or their representatives, especially in the early hearings.

In our view, regardless of exactly at which point or whether Maori accepted the Crown's kawanatanga or sovereignty, from the outset the undertakings given in the Treaty were binding on the good faith of the Crown. From its provisions derives the Crown's duty of active protection of Maori interests, amply established in New Zealand jurisprudence by the findings of the Tribunal and of the higher courts. Maori were and are entitled to expect

11. Peter Adams, *Fatal Necessity* (Auckland: Auckland University Press, 1977), pp 220–221

12. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim* (Wellington: Department of Justice, Waitangi Tribunal, 1987) p 149

13. FM Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland: Auckland University Press, 1999), p 107

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the Crown to have discharged those undertakings carefully and conscientiously. In the light of this principle, we now turn to an examination of the pre-1840 purchases or ‘old land claims’.

3.2 THE NATURE OF PRE-TREATY TRANSACTIONS

Most scholars now agree that at least until the late 1830s it is unimaginable that Maori, in signing or marking crude deeds – often in English – intended to relinquish all rights in the land within the loose general boundaries stated, and convey exclusive possession to the ‘purchaser’. Rather, they intended to invite Pakeha into their territory, with the right to occupy and use certain lands, with on-going reciprocal obligations anticipated for both parties. More debatable are transactions *after* the late 1830s, including some in Hauraki, by which time Maori might have gained an understanding of European notions of property transfer.

Crown counsel has observed that, particularly in respect of the Muriwhenua claims, the debate has focused largely on trying to decide whether a transaction was a ‘tuku whenua’ or a ‘sale’, this to be determined on the basis of ‘whether the participants were acting within a purely European or a purely Maori frame of reference’ (tuku whenua are discussed in section 2.2.5). She continues:

It is submitted that this all or nothing choice is a flawed approach to the evidence. There is good evidence of Maori operating competently in more than one cultural setting. It goes without saying that Europeans coming to New Zealand before 1840 also had to operate competently in another cultural setting. It is clear that trading was a point of intersection between cultures . . . Both parties have an interest in forging a relationship that is mutually understood and mutually acceptable . . . The point is that such terms of trade can[not] quickly be arrived at without either party shedding some of their cultural complexion. Obviously things will go more smoothly if the trading partners acquire a knowledge of the customs and language of the other and so it was in New Zealand in the 1830s. But there is no suggestion that things must be done exclusively in terms of one party or the other.¹⁴

Crown counsel then cites witnesses for the Marutuahu claimants, Drs Michael Belgrave, Tracy Tulloch, and Grant Young, whose comments (the Crown suggests) are ‘not so very different’ from the Crown’s own position. Belgrave et al state:

[The Muriwhenua claimants’] argument was opposed by the Crown historical witnesses who provide a very substantial amount of evidence to show that Maori understandings

14. Document AA1, pp 40–41

of the transfer[s] or sales were very much closer to European understandings than the claimants had argued in Muriwhenua. The evidence of Crown witnesses pointed to a large number of instances where Maori understandings of transfer appear to have allowed, for instance, the transfer of title to other Europeans [ie, third parties] without interference by the tribe and where Maori attitudes to the land that had been sold to Europeans illustrate a degree of loss and finality that would not have been appropriate where *tuku whenua* transactions had taken place.

This is an area of considerable complexity and it is perhaps unfortunate that the Tribunal in its Muriwhenua decision did not explore these issues in greater depth before coming to its decision.

Having examined many of these transactions over a long period of time one of the authors of this report considers that it is inappropriate to generalise about Old Land Claims to the extent that either position does. It is important to regard each Old Land Claim in terms of its own context in order to understand the nature of the rights that were transferred. In saying this it is accepted that it was possible for Maori to transfer substantial rights to Europeans – rights that would have gone beyond those understood in the narrower *tuku whenua* position.¹⁵

Crown counsel continues:

It is submitted that the situation was generally one in which the parties were indeed able to arrive at mutually comprehensible terms. This is a generalisation which requires qualification according to the circumstances. Some transactions were shoddily arranged and the meeting of minds may not have been present. Those who bought and then left were taking a chance in the climate of the time.

Presumably, this refers to the likelihood that if the Pakeha transactor did not take up residence the Maori concerned felt free to offer the land to others, evidence that the European concept of purchase had not fully taken hold, and that Maori did not consider that the transaction had extinguished all their previous interests.

Crown counsel accepts that:

The key transactions were not conducted in a British legal and political framework. But at the same time settlers in many cases managed a degree of political autonomy from the Maori socio-political context in which they lived . . . the timber merchants, traders, and whalers . . . held a position of some importance to the Maori group with whom they were living or trading. There were constraints on Maori action that were not likely to have existed

15. Document v1, pp103, 104; doc AA1, pp41–42. Crown counsel goes on to itemise a range of evidence in Muriwhenua that is inconsistent with the ‘*tuku whenua*’ interpretation of land transactions and for which ‘the *Muriwhenua Land Report* provides no satisfactory explanation’: doc AA1, pp 44–45.

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had they been members of the iwi, hapu or whanau. In our submission, the correct interpretation of these transactions is to infer that the participants identified an area of ‘middle ground’.¹⁶

The Crown also cites evidence that the context of the transactions and Maori understanding of them were changing rapidly in the late 1830s. Paul Monin, a witness for the Ngati Pu claimants, regards the transaction between that hapu and Lachlan McCaskill and his associates as a conditional agreement governed by Maori values.¹⁷ However, he also suggests that Maori involved in other transactions of 1838–39 – particularly the Ngati Paoa chiefs Te Ruinga and Wiremu Hoete, and the Ngati Maru chief Ngatai – had apprehended the European concept of sale and were starting to transact land as a commodity. While generally supporting the view that Maori did not consider land to be alienable in the same way as movable property, he remarks that:

the transactions with Foster and Simpson [on Waiheke Island] seem to display some of the characteristics of purely commercial or even opportunistic dealings, since neither man was known to the ‘vendors’ in advance, nor did either show any intention of actually occupying the land he had purchased.¹⁸

However, Mr Monin also suggests (following the arguments of Professor Ann Parsonson), that Maori involvement in the many transactions may have been ‘a new manifestation of competition in Maori society’, with different chiefs signing agreements with Pakeha in order to pre-empt rivals.¹⁹ In Hauraki, where customary interests were very complex and intermingled, and where various hapu were still resettling after their sojourn in Waikato, agreements with wealthy Pakeha resident traders were one means by which groups could re-establish themselves. It was in the interests of chiefs and their kin to ensure *their* mana was recognised and paid for by purchasing agents, not that of rivals.

We note that it remains unclear, however, what land rights Maori actually intended to convey. In the Waiheke example cited by Mr Monin, it would appear that they intended to convey very little at all, and Simpson’s claim lapsed. In contrast to Muriwhenua, however, most Hauraki settlers actually took up occupation of the purchased land. Where they did so reasonably promptly, their right to be there was not usually challenged, though there were numerous examples of demands for completion of payment, or payments for those right-owners who had not originally participated in the distribution, with more precise definition of boundaries. In the gulf islands old land claims, Monin found only one instance (that of Ngati Paoa’s transaction over Motutapu) of the alienors wanting additional payment over

16. Document AA1, pp 41–42

17. Document J8, p 175 (but see qualification in doc K21)

18. Document C2, pp 3–4

19. Monin, p 95

and above the agreed price. He believes, reasonably in our view, that Maori expected an on-going reciprocal exchange of benefits, with the settlers employing the Maori ‘vendors’ on their properties or buying their produce. He stops short of generalising that Maori regarded the settlers as actually *obligated* as part of their tenure to provide them with such benefits. But he does cite the case of the Waiheke settler Graham who began to farm in competition with the Ngati Paoa vendors (rather than maintaining exchanges with them), and was harassed and bullied in consequence.²⁰ The ‘vendors’ had not, apparently, relinquished their expectation of controlling the situation.

There is evidence of wider Maori anxiety that they were losing control. In the Bay of Islands, some Maori had expressed concern to missionaries that chiefs were entering into deals with settlers or speculators without the agreement of their people, and that the land would pass from their possession.²¹ Hauraki Maori agreed to the ‘Fairburn purchase’ at Tamaki as land in trust for future Maori use. Maori anxieties were made evident to Hobson before signing the Treaty. The Crown asks, ‘If the Maori chiefs present at Waitangi were unable to grasp the concept of the permanent alienation, why then did they welcome the Crown’s promise of protection against improper dealings?’²² But this tells us that Maori were increasingly concerned at how land transactions were likely to be interpreted by the settlers and speculators, rather than how *Maori* had intended them to be interpreted. The chiefs’ appeals at Waitangi were largely in the nature of eloquent pleas to the governor to preserve their lands for them and *prevent* the colonists’ view from prevailing.

We agree that much was changing in Hauraki in the 1830s. Mr Monin and others have pointed out that Maori customary rights in the area had recently been disturbed by the flight of Hauraki iwi to Waikato which ‘was almost total. As a result, Hauraki, the Tamaki isthmus and the islands of the Gulf were all but deserted from 1821 to 1831.’²³ As we have noted in chapter 2, when they returned, their residence patterns and relationships were not quite as before. Ngati Paoa, for example, did not return to the area of modern Panmure but assumed a stronger presence in the gulf islands. The new residence patterns were influenced by (among other things) a wish to be close to the stations of the European traders. New concepts had been introduced such as thinking of resources as commodities.

What chiefs had in mind when they signed deeds and took payments in respect of land is difficult to determine. Crown counsel and some claimant witnesses have suggested that a mix of the traditional and the new was possible, and that perceptions shifted over time. We are inclined to accept the Crown’s view that Hauraki in the late 1830s was not a *wholly* traditional world.

20. Document C5, pp 46–47

21. Fergus Sinclair, ‘Issues Arising from Pre-Treaty Land Transactions’, research report commissioned by Crown Law Office, 1995 (Wai 45 ROI, doc 13)

22. Document AA1, p 44

23. Document C5, p 22

But, even if land transactions were not wholly traditional or customary, they were not wholly ‘modern’ either, in the sense of being understood by Maori as a complete extinguishment of their former rights. There was almost certainly a growing realisation among Maori that Pakeha who came to their shores were representatives of a wealthy and powerful culture that had come into Maori territory to stay. Hence there was probably a growing sense of the *permanency* of transactions with them. But whether that meant that Maori saw themselves as having alienated *all* their rights and interests in the land is quite another matter. While Belgrave et al note (and Crown counsel concur) that it was possible that Maori saw themselves as having transferred more rights than ‘the narrower *tuku whenua* position allows’, they also speculate that pre-Treaty transfers ‘could not have extinguished the overall tribal authority for the land being transferred’, and that ‘Maori custom, in terms of the land, would still have continued.’²⁴ Counsel for the Marutuahū claimants suggests that these ongoing rights, ‘may fall short of the kinds of interest suggested by the *tuku whenua* argument, but they are interests nonetheless.’²⁵ Counsel for the Wai 968 claimants paraphrases the above in stating that ‘The claimants agree that in some instances, particularly in regard to land sales it “was possible for Maori to transfer substantial [but not all] rights to Europeans”’.²⁶

For their part, the Wai 100 claimants have cited examples of continued Hauraki assertions of control over land allegedly ‘sold.’²⁷ For example, Mr Monin notes that only months after ‘selling’ Great Barrier Island to Webster in 1838, Hauraki warriors went there to expel a marauding Ngati Porou and Ngati Kahungunu *taua*, some giving their lives in the process.²⁸ Even if (as Crown counsel suggested in cross-examination), the Hauraki tribes’ purpose was partly to protect Webster’s newly acquired rights, protection was one function of the exercise of *mana*, and its use demonstrated its perceived continuance. Ngati Paoa and others resided upon, cultivated and fished from the Fairburn purchase in south Tamaki.²⁹ Both these territories lie outside the boundaries of the Hauraki inquiry area but involve Hauraki groups, and examples can also be cited from Waiheke Island: Te Urikaraka hapu of Ngati Paoa continued to live on land they had ‘sold’ to Thomas Maxwell at Man-o’-War Bay (along with Maxwell, his Ngai Tai wife and their six children); and groups of Ngati Paoa and Ngati Maru continued to occupy Foster’s claim.³⁰

Thus, there appears to be a consensus amongst the claimants – in which the Crown (by quoting Belgrave et al with apparent approval) concurs – that pre-Treaty land transactions should not be interpreted according to a narrow choice between a rigid ‘*tuku whenua*’ model on the one hand and ‘sales’ on the other. Rather, that there was some cultural

24. Document v1, p 104; doc Y1, pp 68–69; doc AA14, pp 21–22

25. Document AA13, p 43

26. Wai 968 ROI, doc AA9, p 3

27. Document Y1, p 68

28. Monin, pp 88, 97

29. Ibid, pp 82–84, 86–88

30. Document C2, p 3

interchange, and Maori could transfer substantial rights to Europeans but had not relinquished *all* interests. Even the Crown notes that Maori debating the intent of the Treaty with Hobson expressed concern that tribal control of land would be permanently lost, and that this concern implies that Maori did not *wish or intend* that to be so. Crown counsel has also conceded that, while there was likely to have been a meeting of minds between Maori and European transactors in some cases, it was not so in all.

We consider further attempts to generalise about what Maori intended in pre-1840 transactions to be speculative and unrewarding. There is indeed likely to have been considerable variation in what the Maori transactors understood by and intended in their dealings. Even if a customary ‘tuku whenua’ was intended, there could be considerable variations in the pattern. There are indications in Maori evidence about customary society, still largely unexplored in scholarly literature, which suggest that the rights of the grantor and grantee varied considerably from case to case, and changed over time. We do, however, note Dr Angela Ballara’s careful analysis.³¹ Among her key points are that gifts (tuku) were the prerogative of rangatira with mana. Normally, when a powerful chief gifted land ‘he was not alienating it; the expected result of such a gift in the time of customary tenure before contact was that both groups, the donor’s and the donee’s, would utilise the land and its resources together.’³² The subsequent relationship between donor and donee depended, among other things, upon their relative mana – whether for example the donee was an ally of almost equal status with the donor, or a conquered group which the conqueror allowed to remain on the land. The donor did not normally expect to retain mana over conquered land if it had been granted to allies of equal status, but in ancestral lands ‘the giver would have retained mana over the land.’³³ Finally, over time, the distinctions between conqueror and conquered, donor and donee, became blurred through descent from and intermarriage between both sides, although the origins of rights was usually able to be recalled with considerable precision.³⁴ Any or all of these considerations could have governed relationships between Maori and settler at least the late 1830s, for Maori were then in physical control and dominated the relationship with Pakeha in their territory.

We have noted that in the late 1830s, Hauraki – though still predominantly Maori – was changing. Maori patterns of rights were in flux and some of the European participants were (as the Crown notes) becoming more powerful and autonomous. Maori who valued an ongoing relationship with men like Webster may well have had increasing regard for their wishes. We are sceptical of using post-1840 statements for clear indications of what Maori intended *before* 1840, for by the time the evidence was generated the circumstances

31. Dr Angela Ballara, ‘Customary Maori Land Tenure in Te Tau Ihu (the Northern South Island), 1820–1860’, research report, 2001 (Wai 785 RO1, doc D1)

32. Ibid, p 80

33. Ibid, p 151

34. Ibid, pp 74–85

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and understandings of the parties had further evolved. We explore this possibility below in examining the processes of the Land Claims Commissions.

3.3 THE LAND CLAIMS COMMISSIONS

3.3.1 The claimants' view

All the main claimant groups assert that the Crown's investigations of pre-Treaty transactions were inadequate and failed to disclose Maori understandings of them. In response to the Crown's closing submissions, Ngati Pu claimants state their position as follows:

Although the Crown concedes that pre-Treaty transactions reflected a middle ground, it then fails to address the obvious issue of what that middle ground amounted to for Maori . . . [This] mirrors the Crown's failure to address that issue through the Old Land Claims Commissions. The Commissioners never considered that issue with the result that pre-Treaty transactions were confirmed as absolute alienations.

The issue for the Tribunal is not so much whether the transactions were *tuku whenua* at one end of the scale or absolute alienations at the other, or indeed, somewhere in between. Rather the issue is the failure of the Crown to make any, or any proper, inquiry into the nature of the transactions.³⁵

3.3.2 The three commissions

The three Land Claims Commissions relating to Hauraki lands considered pre-Treaty transactions, then transactions under FitzRoy's waiver of Crown pre-emption in 1844–46:

- ▶ The first was established under a New South Wales ordinance of 1840, re-enacted in New Zealand in 1841. Commissioners Edward Godfrey and Matthew Richmond convened hearings in Auckland in 1841–42, and at Kauaeranga (Thames) and Coromandel Harbour between June 1843 and July 1844. The recommendations of Godfrey and Richmond were reviewed by Governor FitzRoy and in some cases referred to an additional commissioner, Robert Fitzgerald, with a view to their being increased beyond the 2560-acre maximum normally allowed under the Land Claims Ordinance.
- ▶ Major Henry Matson was appointed commissioner by Governor Grey, under the Land Claims Compensation Ordinance 1846, to review purchases under Governor FitzRoy's waiver of Crown pre-emption between 1844 and 1846.
- ▶ In 1856, the Land Claims Settlement Act was enacted to resolve many outstanding problems in respect of both old land claims and pre-emption waiver purchases, mostly

35. Document AA11, p 2

arising from the fact that survey of the land had not been a strict requirement of previous inquiries. The first commissioner under this act, Francis Dillon Bell, worked from 1856 to 1862, and was succeeded by Alfred Domett.

3.3.3 Numerous claims succeed, many more lapse or fail

By the time Bell's commission reported in 1862, settlers and entrepreneurs (including the New Zealand Company) had lodged claims estimated at some 66 million acres, more than the total area of New Zealand. Leaving aside the claims expressed in vague terms like 'as far as a cannon shot will reach', Bell estimated that 1050 remaining claims still totalled 10.3 million acres throughout New Zealand. Of these, about 500,000 acres were granted by the Crown.

Dr Anderson has calculated that 113 of these claims (including both old land claims and pre-emption waiver claims) related to about 1.2 million acres of lands in which Hauraki iwi had interests. This calculation relates to the greater Hauraki region (including Great Barrier Island and Fairburn's purchase). Dr Anderson's table shows that the first commission found in favour of about 30 old land claims (some of which overlap) resulting in 67,892 acres being granted to settlers under Governor FitzRoy, a figure later raised to 80,649 acres under Commissioner Bell. If we subtract from Dr Anderson's table the awards made on Great Barrier Island and in Fairburn's purchase, some 38,000 acres was awarded to settlers in the Hauraki inquiry area proper by Governor FitzRoy following the hearings of the first commission, a figure raised to nearly 42,000 acres under Commissioner Bell.³⁶

The very fact of establishing a land claims commission – which would investigate early transactions and consult Maori witnesses – caused most of the phony claims to collapse. Either they were not pursued or they were radically reduced. The Crown's undertakings at Waitangi were thus fulfilled in large measure: the vast bulk of the land unjustly claimed was 'returned to Maori' in the sense that it was considered never to have left their customary

36. Document A8, pp 49–51, 52. Dr Anderson has compiled her table from appendix 1 of Duncan Moore, Dr Barry Rigby, and Matthew Russell, *Old Land Claims*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997). That appendix in turn was compiled from two main databases, namely the return compiled by Bell in 1862 and published as the appendix to the 'Report of the Land Claims Commission', AJHR, 1863, D-14, and the unpublished tables in the records of the 1948 commission into 'surplus lands' (the Myers commission). The Myers–Russell table gives 40,245 acres alienated as old land claims in the inquiry district rather than Bell's 41,863. This is mainly to be accounted for by 1448 acres of the Maxwell claim at Huruhe, East Waiheke, listed by Bell but not included by Myers, presumably because it had been overlaid by a Crown purchase before 1288 acres of it were granted to Maxwell's children and the balance retained by the Crown. It is notoriously difficult to achieve accurate statistics because very different boundaries have been used for Hauraki by the various commissioners, for the Rangahaua Whanui programme, and for the inquiry district of these proceedings and because the first commission gave only estimates (the land as yet being unsurveyed), there are discrepancies between the grants recommended and the land actually surveyed and granted, and some of the recommended awards were overlaid by subsequent Crown purchases, notably at Piako and eastern Waiheke. Anderson has endeavoured to reconcile these differences, and we note that the Crown accepts her figures in their closing submissions.

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ownership. Whatever the inadequacies of the Crown's investigations, we believe that this outcome should be held to its credit.

A glance at Bell's consolidated return of claims shows how vast the lapsed or disallowed claims were: for example, 15,360 acres at Piako by George Beadon, 4000 acres at Piako and Thames by G Gibbs, 15,360 acres at Piako by CM Gordon, some 1950 acres at Coromandel by Hansen and Fisher, 30,000 acres at Coromandel by G Houston, 4000 acres at Piako by George Cooper, 22,000 acres at Piako by Gordon Sandeman, and 100,000 acres at Thames by AB Spark.³⁷ Most of these men and their vague and overlapping claims disappear from New Zealand history. But without a firm stand by the British Government, they might not have. The history of the Pacific islands generally shows that, where there was no land claims commission or where the imperial power supported the settlers' claims – Hawai'i, New Caledonia, Vanuatu, Samoa – a large proportion of the land fell immediately into hands of the colonists.

It is true, as Mr Monin pointed out for the Ngati Pu claimants in cross-examination, that settlers would not have been able to occupy *all* of their so-called purchases because Maori would not have let them. But as the Wairau affair of 1843 demonstrates, the settlers and colonising companies showed themselves to be quite belligerent about pursuing their alleged purchases, willing to use force and capable of setting tribe against tribe to gain their ends. The British Government's determination to investigate the pre-1840 transactions, maintained against the bitter and determined opposition of powerful men like WC Wentworth and his colleagues in New South Wales, or Wakefield's group in England, ensured a period of relative harmony in New Zealand. Maori in several districts, Hauraki included, enjoyed the benefits of peace for some two decades.

However, nearly 42,000 acres of old land claims *were* regarded by the Land Claims Commission as bona fide purchases and awarded to settlers. Within the Hauraki inquiry district proper, these included, for example (besides the very large awards to McCaskill, Martin, and Webster discussed below): 2062 more acres to Webster on Whanganui Island, Waiheke, and Coromandel; a further 2400 acres on Waiheke Island (claims by Maxwell, Thomas Graham, and John Foster); 3580 acres at Mercury Bay (Browne, for Dacre); approximately 3000 acres at Coromandel (Moore, White, Webster, Thorp, Houston); 2009 acres at Piako (Cormack); 564 acres at Pukuhau (Moore); 332 acres at Puriri, near Thames (the CMS); and 353 acres at Matapara, near Thames (the CMS).³⁸

37. 'Appendix to the Report of the Land Claims Commissioner', 8 July 1862, AJHR, 1863, D-14, pp 1–23

38. These figures have been taken from Dr Robyn Anderson's report (doc A8, p 52) and Mr Monin's reports (doc C2, p 12; doc C5, p 44). Dr Anderson's and Mr Monin's figures are not identical: the largest difference between them is that Dr Anderson lists some 6987 acres on Waiheke as granted to settlers, but her figures seem to include some grants (eg, Halls) awarded but immediately compensated by scrip and taken as Crown surplus, and some areas (notably, Maxwell's at Huruhe), overlaid by subsequent Crown purchases.

In addition to land awarded to settlers, Dr Anderson has also calculated from primary sources that within the Hauraki inquiry area, the Crown retained as 'surplus land' 2123 acres from five claims on Waiheke Island, 1173 acres on Whanganui Island, 815 acres at Coromandel Harbour and Cape Colville, the 290-acre Pakihi Island, and 209 acres on Big Mercury Island – some 4610 acres in all. Plus, the 1142-acre Cleghorn–Goodfellow purchase which Dr Anderson has not included in her tally. It is not clear how much of this derived from old land claims and how much from pre-emption waiver purchases under Governor FitzRoy.³⁹ An amended estimate of surplus land retained by the Crown, submitted by the Wai 100 claimants, shows 4610 acres within the inquiry district, plus much larger acreages on Great Barrier Island (18,082 acres) and in the Fairburn purchase (75,415 acres).⁴⁰ The Hauraki customary interests in these latter areas will no doubt be considered in the context of the Auckland inquiry.

3.3.4 The commission's terms of reference and mode of proceeding

The Crown has submitted that the Land Claims Commission had the dual objectives 'of maintaining control over colonisation and at the same time it sought to protect Maori from fraudulent or inequitable transactions [*sic*]'. Crown counsel have acknowledged that:

The Colonial Office was aware that indigenous peoples and British subjects might have had different concepts of property ownership. The possibility of misunderstanding between Maori and European was recognised by the Crown . . .

The Commissions of 1843 [Godfrey and Richmond] and 1856 [Bell] in the Hauraki claim inquiry area did, for the most part, pay sufficient regard to Maori objections and protests in respect of boundaries, sufficiency or failure of payment, and failure to reserve areas promised for reservation.

Further investigation of land transactions was undertaken by the Crown in instances where there was significant Maori opposition to surveys or issues raised as to the terms of the transaction between Maori and land claimant.⁴¹

However, 'In certain specific instances, Crown recognises there were problems arising from these transactions and their investigation.'⁴²

We agree that officials in 1840 knew that Maori and Pakeha could have had different understandings of the transactions up to that point. This is apparent in the wording of the Land Claims Ordinances themselves. The New South Wales ordinance of 1840 required the

39. Document A8, p 63

40. Document D22, amended table 3

41. Paper 2.227, pp 2–3

42. Ibid

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commissioners to make strict inquiry into the purchases, gifts, conveyances or 'other titles' that settlers claimed to have acquired from Maori and 'all the circumstances upon which such claims may be founded'.⁴³

The New Zealand ordinance of 1841 repeated the terms of the New South Wales ordinance with few significant changes except that 'leases' was added to the kinds of title that were null and void until investigated and approved by the Crown. It also used the expression 'grant or lease' (emphasis added) in reference to the recommendation the commissioners could make in favour of a settler they considered so entitled.⁴⁴ This addition was probably a reflection of Hobson's desire to control the informal transactions occurring in or near harbours and inlets, often being transactions for timber rather than land. (Timber leases are discussed in chapter 13.) But the inclusion of 'leases' in the 1841 ordinance added to the ways in which the commissioners could have interpreted pre-1840 dealings. The 1840 and 1841 ordinances also stated that in making their inquiries the commissioners were to 'be guided by the real justice and good conscience of the case . . . and shall direct themselves to the best evidence they can procure or that is laid before them'. Where settler titles were found to be 'valid', 'equitable' or 'obtained on equitable terms', the Queen was disposed to recognise them.

Thus, the ordinances in principle opened the way for Maori to present evidence of their perceptions of the transactions. Aspects of Governor Gipps' instructions to the commissioners also held open that possibility. A formal deed of alienation was not necessary: 'proof of conveyance according to the custom of the country and in the manner deemed valid by the inhabitants is all that is required'.⁴⁵ However, this official recognition of 'the custom of the country' was overlaid by a later instruction from Gipps that when at least two chiefs 'admit the sale', it should be deemed valid. The New South Wales Governor also instructed that where Maori seemed to be dispossessing themselves of their whole patrimony the commissioners were to recommend that reserves should be set aside; or where the land had been obtained for insufficient consideration, 'some further compensation' could be awarded.⁴⁶

In 1849, Attorney-General William Swainson thought the Land Claims Ordinances inadequate. They led to flawed titles, in that they 'did not require that the Commissioners should ascertain that the land had been purchased from the true native owners' but 'only that the claimants made a bona fide purchase from certain native chiefs'. Consequently, when the Crown later made grants in conformity with the commissioners' recommendations, it was not granting 'an absolute title as against all the world but only against the Crown itself'.⁴⁷ The problem, in Swainson's view, lay in Gipps's instructions, which had loosened rather than

43. David Armstrong, 'The Land Claims Commission: Practice and Procedure, 1840–1845', research report commissioned by Crown Law Office, 1992 (Wai 45 ROI, doc 14), pp 7–10

44. Land Claims Ordinance 1841, s 6

45. Armstrong, p 17

46. Gipps to Hobson, 30 November 1840 (Armstrong, pp 20–21)

47. BPP, 1849, cmmd 1280, pp 68–70; Moore, Rigby, and Russell, pp 39–40

tightened the commissioners' obligation to determine the right and entitlement of Maori vendors to convey the land.

Other instructions from Sydney placed considerable responsibility upon the Protectors of Aborigines to ensure that all Maori with interests in the land were aware of the commissioners' hearings and had opportunity to give evidence.⁴⁸ The minutes of the commissioners' inquiries usually indicate that, in practice, two or three senior rangatira affirmed or denied each sale. They were asked to confirm that the deeds had been explained to them, that they understood and were fully satisfied with them and that they were aware that they were parting with the land forever. There is no indication in the documentary record that they were pressed as to their customary rights over the land, whether they really grasped the implications of the questions, or whether they considered that they had retained some rights in the land. But as Crown counsel elicited in her cross-examination of claimant witnesses, the Hauraki minutes usually contain only a pro forma summary, in English, of the proceedings: there is no verbatim record in English and Maori of actual question and answers (as there is in the investigations in Wellington and Otaki of the New Zealand Company's claims). We cannot know what other questioning took place in Hauraki. However, the hearings were relatively brief, with several claims commonly being dealt with in a single day. Given that no evidence has been put before us of discussion in the Land Claims Commission about leases, conditional rights of occupation, joint occupancy, or any other title that might have disclosed Maori intentions other than sale, we are inclined to share the Hauraki claimants' doubts that there was any such discussion.

3.3.5 Still room for misunderstanding?

The claimants and the Crown differ as to the commissioners' response to Maori objections. Crown counsel notes that 'In two-thirds of the claims there was no protest' and that 'Great reliance was placed on the testimony of the Maori witnesses – it seems to have been very rare for a claim to be sanctioned [ie, approved] in the face of Maori opposition.'⁴⁹ These assertions are somewhat exaggerated. The two-thirds proportion refers to Mr Monin's evidence about *islands* and not to mainland claims. Monin shows that, of the four islands claims disallowed, the outcome followed from Maori testimony in three cases and, in the fourth, because the settler claimant had already been granted the maximum allowed. Monin adds, 'Yet there are many instances of Maori protest that [were] discounted by the Commissioner because the issues were less clearcut.' He cites examples of demands for payment by Maori who had not received payment, yet claimed rights in the land, and continues:

48. Moore, Rigby, and Russell, pp 17–19

49. Document AA1, p 46

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Therefore, on the basis of the limited extant written record of Maori testimony and the response of Commissioners to it, it seems that Maori protest was likely to be effective only if the protestor had been a participant in the transaction and his complaint was without complication.⁵⁰

Dr Anderson's research also indicates that Maori objections continued in respect of nearly half of the first commission's awards, although some of those problems arose from delays in occupying the land and over boundaries.⁵¹

On the other hand, Maori leaders often declined to agree that they had sold the vast areas claimed, but were willing to admit the sale ('hoko') of a much smaller area. For example, Dacre's agent, Browne claimed about 25,000 acres at Mercury Bay, based on transactions in 1836 and 1837. In 1844, local rangatira, content to have Dacre's enterprise in their district, were willing to admit the sale of some land. The commission recommended grants to Browne of 1200 and 1875 acres. (Browne having died, Bell later awarded Dacre 3580 acres, including the two grants plus a survey allowance.⁵²)

Thus, the practical outcome of the first commission's proceedings was that where two or more rangatira affirmed that they had agreed to a conveyance, the commissioners treated that conveyance as a sale, but commonly acceded to Maori objections about boundaries or payments by cutting out disputed areas, wahi tapu and cultivations, or by requiring that outstanding payments be completed.

The Crown takes the view that this meant that the commissioners were entitled to come to the conclusion that, subject to the adjustments noted, Maori had made a complete alienation of the land, and could therefore issue Crown titles to settlers without any restrictions on them to recognise the remaining interests of the Maori transactors.

The claimants, however, take the view that a complete alienation cannot be assumed. Thus, the Wai 100 claimants state:

The fact that Maori witnesses supported the old land claimants does not of itself necessarily suggest that they understood that an absolute alienation of their land took place, but rather just that they had transferred lands to the claimant involved, a point that is not generally in dispute.

(We assume that in this context 'transfer land' means the transferring of rights to occupy and use land, subject to some ongoing tribal over-right.) Crown counsel has suggested that the commissioners sought 'the best advice' on the customs of the country applying to these transactions. The Wai 100 claimants respond:

50. Document C5, p 45

51. Document A8, pp 307-308

52. Document N9, pp 29-32, 41-43

With respect there is no evidence that any such ‘best advice’ was sought. In such circumstances there can be no surprise if there were misunderstandings about the nature of the transaction, given that both parties agreed that a transfer had taken place and given that any dispute on the fundamental nature of that transaction would take a long time to surface . . . There is simply no evidence that the Commissioners even considered the possibility of that the transactions were conducted in terms of tikanga Maori or Maori customary law, and were otherwise than absolute alienations. As a result it is submitted that nothing in the process of the Commission would have led Maori to believe that their understandings of the transactions were not being affirmed.⁵³

This want of evidence is largely true as far as the bare minutes of the commissioners’ proceedings are concerned. However, being asked whether they were alienating the land ‘for-ever’ probably implied to the rangatira something beyond tikanga Maori, especially given that, by the time the question was being asked, the town of Auckland was being built and Maori in its vicinity could have had little doubt that Pakeha were there to stay. This being said, we agree that there was still room for misunderstanding about whether or not the transfers were absolute and unconditional.

3.3.6 The doctrines of tenure and consideration

There is evidence of a firming of Crown attitudes by the time of FitzRoy’s governorship in relation to Pakihi and Karakaramu Islands which, as recorded in section 3.1.1, were ‘purchased’ by Captain James Herd in 1826.⁵⁴ Crown officials became aware of this early transaction in mid-1843 when Henry Tayler applied for a lease of Pakihi to mine manganese and other minerals. Taking the view that Maori title had been at least partly extinguished by Herd’s transaction, officials granted the lease. In May 1844, however, Brown and Campbell applied to purchase Pakihi and Karakaramu under Governor FitzRoy’s waiver of Crown pre-emption (see below). FitzRoy made inquiries and minuted the application as follows:

Herd made a *partial* purchase – he never took *possession* – he has *never* brought forward his claim – I cannot therefore acknowledge his title. If his title is *defective* – any claim *resting on it* must vanish. But goods *were* given in payment by Captain Herd – in exchange for which these islands were *partly* sold – and a *partial extinction* of native title was effected – by which the Crown – *pro tanto* is a gainer. Should my view of this subject be proved *erroneous* at any future time, provisions for issue of a Crown Grant . . . (plus a *small* payment to the Natives in addition to that already given will be the only loss). [Emphasis in original.]⁵⁵

53. Document AA14, pp 23–24

54. George Clarke, investigating rights to Pakihi in 1843 and 1844, reported that the Ngati Paoa chiefs told him that the island had been sold ‘some considerable time ago’ by ‘Rauroa’, who was ‘the father of the present chief Wiremu Oka’ of Ngai Tai: Clarke to Colonial Secretary, 14 June 1844, OLC 1/1126, Archives NZ (doc T2, p 25).

55. FitzRoy to Colonial Secretary, 17 June 1844, OLC 1/1126, Archives NZ (doc T2, p 26)

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The Crown officials' belief that they could grant a lease to Tayler or a Crown grant to other purchasers was a remarkable illustration of two English common law doctrines which affected their approach to all pre-1840 transactions:

- ▶ First, by the feudal 'doctrine of tenure', it was held that all common law titles were held to flow from the sovereign. Consequently the Colonial Office and officials in New South Wales and New Zealand asserted that the establishment of British sovereignty meant that all purchases by private individuals prior to 1840 served to create a title in the Crown *retrospectively*.
- ▶ Secondly, by the 'doctrine of consideration', the fact that previous owners (in this case Maori) had accepted valuable consideration (arms and gunpowder) for the island, its title had in fact transferred, at least as far as the rights of those particular chiefs were concerned. As Commissioner Bell later put it:

It is a principle of English Law (Equity) that when a valid contract is made for the purchase of a piece of Land that ipso facto the contracting parties change positions, the vendor's [interest] is a personal one in the money & the vendee's [interest] is in the Land.⁵⁶

But, as the *Muriwhenua Report* has noted, there are certain requirements for a contract to be valid. Of central importance is that there should be some common understanding as to what exactly was being transacted.

The retrospective effect of the doctrine of tenure seemed strange enough to Maori and Pakeha transactors alike, but it was absurd to claim that the Herd transactions of 1826 brought into effect the doctrine of consideration. Herd's presentation of a few guns to Maori chiefs for an island he immediately abandoned cannot be construed as having extinguished the chiefs' interests in the land: such a construction flies in the face of all Maori custom. In Maori eyes, Herd's brief presence was virtually a non-event. Only later Crown actions gave it significance.

Although officials in Auckland in 1843 took very seriously indeed the Crown's rights in pre-1840 transactions, in fact they did not press them home in respect of Pakihi. Chief protector George Clarke had already given FitzRoy a list of 17 Maori who claimed the island on the basis that Herd's transaction had taken place while they were minors. Pakihi was eventually purchased from Maori claimants again – twice – by Brown and Campbell.⁵⁷ But the case illustrates a mindset that seems to have affected the Land Claims Commission: wherever chiefs admitted to having accepted valuable consideration for land, their interests were considered to have been 'extinguished' or sold.

56. Note on Thorp to Bell, 9 March 1857, OLC 1/831–2, Archives NZ

57. Document T2, pp 26–30

The end result in the case of transactions deemed to be bona fide by the Land Claims Commission was the assumption of an absolute title by the Crown, for an area still only described by general boundaries and a sketch-map, followed by an award of land to the settler claimant of up to 2560 acres, or scrip in lieu to be redeemed in Crown land elsewhere.

The Crown usually retained the balance of the purchased land as 'surplus' But no significant pool of land was available to the Crown from this source to sustain future immigration or contribute to colonial revenue. There can be little doubt that the Crown's need to acquire such a pool of land helped drive Gipps to issue his advice that where two chiefs 'admit[ed] the sale' of land, the Land Claims Commission should recognise it as such. 'Sales' which extinguished Maori title were preferred over any other form of transfer such as leases which would leave underlying Maori title in place. No other explanation offered to us explains the strange discrepancy between the Land Claims Ordinances (which recognised the possibility of a wide range of tenures resulting from pre-1840 transactions) and the commissioners' recommendations (which focused almost exclusively on sales). Whatever Maori customarily understood by the term 'hoko' – commonly used in deeds and in the commerce of the period – in the terminology of the Land Claims Commission it came to mean 'sale' in the English sense.

3.3.7 Were all Maori rightowners consulted?

Hauraki claimants generally regard the Land Claims Commissions' investigations as inadequate, and specific claimant groups refer to the impact of this on their lands. For example, the Wai 423 claimants, Ngai Tai ki Tamaki, submit that the Crown 'failed to carry out a searching investigation of the competing rights of all concerned', and that Ngai Tai did not receive payment proportionate to their customary interests in the gulf islands, despite Ngati Paoa admissions that Ngai Tai did have interests there.⁵⁸

However, the protectors (usually, George Clarke snr for the gulf islands and Edward Shortland for the mainland) seem to have gone to some effort to give due notice of commission hearings in Hauraki to the parties they believed to have rights in the land. In the course of their general duties, they themselves also sought to gain an understanding of customary tenure; their published and private writings suggest that they did so in large measure. But there is no evidence of systematic, rigorous inquiry informing each decision of the Land Claims Commission. The commission was ultimately dependent upon all customary owners appearing – or being represented – before it, and they could not have learnt of objections if opponents of transactions (or opponents of the Crown's authority such as Taraia) did not

58. Document Y15, pp 8–9

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learn of the relevant sitting of the commission, or simply chose to stay away.⁵⁹ Moreover, there was no requirement for survey or for walking of boundaries, which (except in the case of islands) alone could reveal to Maori exactly what land was being alienated.

Where Maori witnesses maintained a clear, uncomplicated denial of a transaction the commissioners generally accepted that evidence: Mr Monin cites the disallowance of Thomas Graham's claim at Orapiu, Waiheke, when Te Ruinga asserted that he intended only to grant a house site, and the disallowance of part of the claims on Great Barrier Island and eastern Waiheke.⁶⁰ On the other hand, Lachlan McCaskill's claim at Hikutaia was granted over the objections of some present, and Dr Anderson's research shows that in six Hauraki claims, Maori protested to later investigations that they had not been represented at the first hearings. In two cases, they had been unaware of the investigation of the claims.⁶¹

As to the authority of those Maori rangatira who affirmed transactions, there is strong evidence from Maori sources that a chief's kin normally accepted that he *could* speak on their behalf, and that indeed it was difficult for them to deny the actions of a high-ranking rangatira of their own line. But most chiefs could not make binding decisions concerning the land rights of those *not* of their line. Thus, when the Native Land Court eventually investigated McCaskill and Martin's claim at Hikutaia, Ruihana Kawhero, son of the Ngati Karaua chief who transacted with Lachlan McCaskill in 1839, stated:

My father was a principal chief; on that account *he had the power to sell the land of others*. He was a chief of his own tribe, the Ngatikaraua . . . The sale of the land was spoken about at that time among the Maoris. The boundaries were spoken about . . . I do not object to what my father sold to Mr McCaskill. I consent to the part he sold. Had my father sold the whole of it, I would have been unable to object to the sale. [Emphasis added.]⁶²

But Te Kati Pani Paura of Ngati Tamatera stated:

Kawhero was a great chief of his people. Had he been also a chief of Ngati Tamatera the sale of his own particular piece would have been consented to. I cannot state certainly whether if he had been a chief of Ngati Tamatera, his sale to McCaskill at that time would have been objected to.⁶³

Tamati Paetai of Ngati Pu stated that his hapu would not have objected to Kawhero's sale of 'his own piece', but that his people and Kawhero's descend from different ancestors: 'Had we and Kawhero descended from the same ancestor we should have consented to the sale of the whole land, if he had sold the land.'⁶⁴

59. Document A8, p 49

60. Document C5, pp 40–41, 44–45

61. Document A8, p 49

62. Hauraki minute book 12, 23 January 1879, fols 47–48, 60

63. Ibid, fol 57

64. Ibid, fol 79

These men were clearly thinking more in terms of whakapapa and chiefly mana, of the origin of property rights and the authority to control them, than in terms of precisely demarcated landed properties in the English sense. But there was some uncertainty about whether a chief could transact only his particular share (ie, his family's cultivations), or the land of the wider lineage and community which normally accepted his mana. This doubt or uncertainty was to permeate the new, final, and absolute transfers of land introduced by British colonists.

The weight of evidence presented to us is that the Land Claims Commission accepted the word of chiefs who 'admitted the sale' rather than probe these subtleties. Significant doubts remain as to whether the chiefs spoke with the full understanding and consent of the other right-owners in the land, or fully understood the implications of 'sale' in the European sense. In respect of McCaskill's purchase, the Land Claims Commission over-estimated both the authority of the Ngati Karaua chiefs, and the boundaries of what they had allegedly sold (see sec 3.10.1).

3.3.8 'Perversion of the course of justice'?

There has been some suggestion that the commissioners' inquiries and findings were improperly influenced by settler claimants. Edward Shortland, the sub-protector assisting the commissioners in Hauraki, reported to chief protector Clarke in June 1844 that 'promises of future payment have in many cases been made to natives intended to prevent their opposition, or to give favourable evidence' and that the practice 'prevailed to a certain extent generally'.⁶⁵ Mr Monin, for the Wai 100 claimants, has suggested that this was an attempt to 'pervert the course of justice'.⁶⁶ Crown counsel has cited evidence that Maori, not unreasonably, were reluctant to leave their work and pay the costs of travelling, unless they received a fee for their time and expenses, and suggested that 'This does not affect the integrity of the testimony once attendance at the hearing had been procured'.⁶⁷ Indeed, the old land claims files suggest that payment of Maori witnesses' expenses became a standard practice in the Commission. But Shortland clearly felt that these payments tempted witnesses 'to threaten unjust opposition, or to give untrue evidence, to the injury of native absentee proprietors'.⁶⁸ For want of other evidence we are unable to say more about the integrity or otherwise of the witnesses, but Shortland's statements do add to our doubts about how representative witnesses were of the customary right-owners.

65. New Zealand Company, *The Twelfth Report of the Directors of the New Zealand Company* (London: Palmer and Colyton, 1844), app E, p 110

66. Document C5, p 44

67. GBPP, vol 4, p 488, D23; GBPP, vol 2, p 40, D40 (doc AA1, pp 45-46 fn 152)

68. Edward Shortland, *Traditions and Superstitions of the New Zealanders* (London: Longman, Brown, Green, and Longmans, 1854), p 308

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3.3.9 Adequacy of consideration

There has been little discussion of this issue in these proceedings. Mr Monin notes that part of the problem is getting clear evidence of the value of goods paid at the time, but considers the payments ‘paltry’ in relation to the value of the land in the contemporary Maori economy. He cites the payment by Webster of goods worth £284 (in New Zealand) for the 500 acres of Whanganui Island, and £120 for the 148 acres of Motukorea, compared to much lower per acre prices for larger areas.⁶⁹ But such raw figures give little indication of the actual economic worth of either the goods or the land. Mr Monin’s use of ‘paltry’ perhaps derives from chief protector George Clarke’s statement that:

the primary object of a New Zealander in parting with his land is not only to obtain the paltry consideration which in many cases is given to them for their land, but to secure to them the more important advantages of finding at all times a ready market for their produce with their white neighbours.⁷⁰

The question of price was thus tied closely by officials themselves to expected economic development generally, and to the participation of Maori in that development. Prices were often low in relation to the on-sale prices realised by settlers, or by the Crown, on land not long purchased from Maori and still without significant improvements. The issue here is how much the value of land is increased by being put within a registered deeds system backed by the State’s enforcement of contracts or its guarantee of registered titles.⁷¹ That guarantee was largely the reason why settlers and speculators paid so much more for land derived through Crown grant than land under Maori customary tenure. The Crown could have ensured that Maori too had access to this increased value, by issuing Crown grants over lands reserved or withheld from sale, as in the Wellington tenths scheme. We observe that official statements of the time showed an official awareness that prices paid to Maori were ‘paltry’. Given this awareness, it became indubitably the Crown’s responsibility to ensure that Maori secured the increased value of their remaining lands and could participate in the growing economy in a sustainable way.

3.4 EVOLVING MAORI UNDERSTANDINGS AFTER 1840

However inadequate the Land Claims Commissions’ exploration of pre-1840 Maori intentions the question remains whether *in the context of the hearings themselves*, Maori owners might yet have given willing and witting consent to the sales of limited areas. In this context,

69. Document C5, pp 46–47

70. New Zealand Company, app E, pp 97–100; Armstrong, p 70

71. The Torrens system of deed registration was not introduced in New Zealand until 1870.

we note Dr Anderson's conclusion that, because the intentions of Maori were, after all, to locate one or more Pakeha among them for the purpose of trade:

the transactions which underwrote the formation of nodes of white settlement and commercial enterprise at the northern bays and near the coast at Thames appeared relatively uncontentious, and gave rise to little complaint from Maori in following years. Questions of boundary or completion of payment might be disputed, but not the fact that a transaction had taken place.⁷²

In this context, Dr Ballara's remarks on transactions in northern South Island are also relevant to Hauraki:

Whether or not a real understanding was established between early purchasers and sellers, in the first few years the temporary euphoria of having Pakeha to trade with and access to attractive new goods overrode any initial difficulties; as Hohaia Rangiauru had said, once they did understand the meaning of the words 'the land was sold', Maori 'did not attempt to repudiate the disposal of it'.⁷³

In this regard, Dr Anderson has shown that in slightly less than half of the 23 cases where Maori raised objections in the commissions of 1843 and 1844, matters were resolved, then or soon after, by boundary adjustments or further payments.⁷⁴ However, in the remaining awards (discussed below), Maori objections persisted.

We agree with Dr Anderson and Mr Monin that our best guides to Maori understandings of their land deals are their subsequent *actions*. But *post*-1840 actions are also reflective of an evolving situation, no longer a purely customary one. We believe the evidence shows that some convergence of customary and new understandings was continuing to take place, with varied results in different parts of Hauraki.

Full appreciation of the concept of sale required that Maori understood that should the Pakeha settler or his heirs depart the scene, the land would not return to them, but could be transferred to a third party or remain with the Crown. It seems to us that such complete understanding could only grow over a number of years, and patchily. Maori living

72. Document A8, p 37. Professor Ward has discussed a case in point that is outside the claim area but that touches upon the interests of Ngati Paoa and Ngai Tai. In 1836, one Thomas Mitchell, with the aid of the Wesleyan Methodist missionary William White, claimed to have purchased from Te Kawau and other Ngati Whatua chiefs the entire Tamaki-makau-rau isthmus. Following Mitchell's death, his widow sold the deed to the Scotland-based Manukau and Waitemata Land Company, which sent out emigrants. The claim by-passed the Land Claims Commission but, at Lord Stanley's insistence, it was investigated by Governor FitzRoy's Executive Council. Not surprisingly, Te Kawau denied any intention of selling the isthmus but did agree to cede a limited area at Karangahape, which eventually became the village of Cornwallis. There, the Scottish immigrants huddled on the foreshore under his protection: Alan Ward, 'Supplementary Historical Report on Central Auckland Lands', preliminary discussion draft prepared for Crown-Congress Joint Working Party, 1992, pp 20-22.

73. Ballara, p 11

74. Document A8, app 1, pp 307-308

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near Auckland, witnessing its rapid growth after 1840 would surely have concluded that any group alienating land to the Pakeha there would be unlikely to recover control of it (though they may have hoped to exercise some rights still). Outside Auckland, however, Pakeha settlers were few and scattered. There the prospect of shared usage of the land must still have seemed very real to Maori for a decade or more after 1840. Strong groups under powerful chiefs may well have retained a sense of their ultimate control.

We note, however, Dr Anderson's concurrence with Crown counsel's suggestion that Maori had a growing acceptance of land alienation being *permanent* if not *exclusive*; it had passed to the settler with whom Maori had transacted, and to his heirs.⁷⁵ We see many references in the evidence to 'derivative' Pakeha claimants, that is, those who purchased rights from the original pre-1840 purchasers, sometimes with two or three transfers involved. We have not seen any evidence, in the Hauraki old land claims discussed, of Maori objections to a derivative claimant *as such* (though if they had objections to the *original* transaction, as in the McCaskill case, those objections would very likely continue). Maori seem to have increasingly accepted that their land transactions could confer on Pakeha purchasers the right to transfer to a third party without their involvement.

3.5 THE END OF THE GODFREY-RICHMOND COMMISSION

After the first Land Claims Commission, there were still very large questions outstanding as to exactly what land Maori had alienated, particularly on the Piako and Hikutaia Rivers and parts of Waiheke Island, and whether all right-owners had been identified and their claims extinguished. In April 1843, senior Crown officials were so concerned about this that they proposed surveys of the land (including reports whether surveys had been interrupted and that no new Maori claims had been preferred), plus a report from a protector that he was 'satisfied of the alienation of the lands by the former owners.'⁷⁶ Commissioner Godfrey himself advised Governor FitzRoy that no grants should be confirmed without prior survey of the land, particularly because derivative purchasers, buying land in good faith from the initial purchasers or the Crown, would inherit problems left outstanding in the initial purchase.⁷⁷ In 1845, chief protector George Clarke expressed his deep concern:

Another pregnant evil is, in the absence of any competent authority knowing well the language, habits and usages (ritenga) of the natives, for determining upon disputed titles to land; for, notwithstanding the time, labour and expense which has been bestowed upon the Land Commission, the result of this inquiry has been far from satisfactory; all that has

75. Dr Anderson, third hearing, tape 10, side A

76. Shortland to Clarke snr, 21 April 1843, IA4/271, p 166 (Armstrong, p175)

77. Godfrey to Colonial Secretary, 8 June 1844 (Armstrong, pp187-188)

been ascertained is, that various Europeans have made purchases from certain natives; but whether these natives have a right to sell, or how that was acquired, is still in the majority of cases quite a matter of doubt.⁷⁸

With senior Crown officials themselves expressing such dissatisfaction with the first commission, subsequent investigations and adjustments of disputed claims become very important measures of the Crown's fulfilment of its obligations.

Yet, before any further investigation had taken place, FitzRoy began not only to issue Crown grants to settler claimants but to increase many of the awards made by the Godfrey–Richmond commission.⁷⁹

3.6 FITZROY'S POLICIES

3.6.1 The colony in economic difficulty

Governor FitzRoy arrived in Auckland in December 1843 to find the colony stagnating economically. Many settlers found they were unable to take up land they understood to have been purchased before 1839 (including the New Zealand Company purchases), and after the initial flurry of Crown purchases in and near Auckland in 1840–41, the Crown had acquired little land to make available to them. FitzRoy resolved to stimulate settlement and land development by two strategies: to waive Crown pre-emption and permit direct purchase (see sec 3.7); and to increase many of the Godfrey–Richmond awards (see below).

3.6.2 Fitzgerald and FitzRoy increase the awards

Because he believed strongly that private investment and land development needed to be encouraged FitzRoy decided to increase grants in certain cases beyond the 2560-acre maximum allowed by the Land Claims Ordinances of 1840 and 1841. For the same purpose, Hobson in 1842 had passed a new Land Claims Ordinance giving him authority to apply to all pre-1840 transactors the formula allowed by London for the New Zealand Company: four acres for each pound sterling spent on colonisation in New Zealand. This ordinance was disallowed in London, but Godfrey and Richmond had in fact begun to apply the four-acres-per-pound formula from 1842, for example recommending that William Webster receive 7541 acres of his Hauraki claims, before having to revise their recommendations downwards drastically when news of the disallowance reached Auckland in September 1843.⁸⁰ FitzRoy, however, believing he had some discretionary power, continued to award

78. Clarke to Colonial Secretary, 1 July 1845 (doc A8, p 51)

79. Alan Ward, *National Overview*, 3 vols (Wellington: GP Publications, 1997), vol 2, pp 43–46

80. Moore, Rigby, and Russell, pp 101–103, 106. Lord Stanley took the view that the formula for the New Zealand Company was a special case, which should not apply to individuals.

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grants over and above the 2560-acre limit of the 1840–41 ordinances.⁸¹ He referred many of the cases of those he considered deserving to a new commissioner, Robert Fitzgerald, with recommendations of increased grants of land.⁸²

The policy impacted upon Hauraki particularly in respect of the scattered claims of William Webster, and of the McCaskill brothers and SMD Martin at Hikutaia. These cases are outlined in sections 3.10.1 and 3.10.2. One reason for the massive increases granted in them was that Fitzgerald accepted, seemingly without question, Webster's own estimates of what he had expended. Secondly, because Webster had on-sold to derivative purchasers lands which were recommended by Godfrey and Richmond while the abortive 1842 ordinance was believed to be in force, Fitzgerald apparently felt that Crown grants should be made to these people. Matthew Russell has pointed out that the Crown could hardly be said to have any responsibility towards people who were speculating in the commissioners' paper recommendations before any Crown grants had issued, and secondly, even if it did, the grant of 12,674 acres at Piako was far more than the four-acres-per-pound proposed in the 1842 formula. This 'considerable overcorrection', as Russell calls it, was proposed without survey of the Piako land, and attempted possession soon ran into Maori opposition.⁸³

Webster was American, and his awards led to very complex litigation between Britain and the United States.⁸⁴ The details of this need not concern us here. As far as the Crown's responsibilities are concerned, we are of the view that Russell's detailed study shows that Godfrey and Richmond had not checked that all Maori right-owners had consented to the transactions, especially at Piako, and that the very large increases recommended by Fitzgerald and FitzRoy, without prior survey, were irresponsible. (The purchases of Fairburn at Tamaki and of Abercrombie and Nagle on Great Barrier Island outside the inquiry area were also among those greatly increased by Fitzgerald but will not be further discussed in this report.)

3.6.3 FitzRoy issues Crown grants without prior survey

One of the main reasons for later Maori objections (as Dr Anderson has shown) was that much of the land concerned in Fitzgerald and FitzRoy's awards was often not surveyed

81. Moore, Rigby, and Russell, pp 21–22, 33–34. The issue of FitzRoy's discretionary power came before the New Zealand courts in 1849 in connection with George Clarke's 4000-acre grant at Whakanekeneke. Governor Grey contended that FitzRoy had no discretion to go beyond the 2560-acre limit, but Chief Justice Martin upheld the validity of FitzRoy's award. Two years later, the Privy Council overturned this judgment on the basis that the 1842 ordinance 'never had the effect of law' and the 1841 ordinance required the Governor to base his grants on the Land Claims Commission and Executive Council recommendations: Moore, Rigby, and Russell, p 39.

82. Moore, Rigby, and Russell consider that Fitzgerald altered 99 out of 655 original reports, New Zealand-wide, on the basis of claims by settlers and speculators as to their expenditure but without taking new evidence as to the areas Maori agreed they had alienated: Moore, Rigby, and Russell, p 33.

83. Moore, Rigby, and Russell, pp 106–112

84. Sir Robert Stout, 'Webster's Land Claims', 26 January 1887, AJHR, 1887, sess II, A-4, pp 29–30

until the 1850s and in some cases not occupied by the erstwhile purchaser until then. The paper decisions of commissioners and awards of governors might have appeared substantial to Europeans, but would have little meaning for Maori until occupation occurred on the ground. Settlers' attempts to occupy land years after it was awarded often prompted fresh disputes.

While appreciating the pressures upon FitzRoy to get the economy moving, and appreciating also the desperate shortage of surveyors in the colony, we consider FitzRoy's issuance of grants without survey, and in many cases without the walking of boundaries and physical marking of them, to have been reckless. Queried, in anticipation, by Godfrey and by Clarke, FitzRoy gave the bland reply:

That for those who have made valid purchases, and have fairly satisfied the native claimants – such grants are sufficient. For [those] who have *not* done so – it is neither *intended nor desired* that they should be sufficient . . . the Crown cannot grant that which it does not possess . . . if a valid and complete purchase has *not* been made – the Crown cannot give a title to the land. [Emphasis in original].⁸⁵

Some of the resulting problems were dealt with on an ad hoc basis. Maori objections to one Lewington trying to reoccupy land at Thames after seven years' absence led to Governor Grey revoking his grant and giving him scrip instead. At Coromandel in 1853–54, Maori objected to Wilson surveying his award after five years' absence; he had to accept narrowed boundaries and pay £5 more. Similar problems at Piako are discussed in section 3.10.2.

Eventually, most of the disputed or unresolved claims approved by the Land Claims Commission and Crown granted by FitzRoy would eventually come before Commissioner Dillon Bell, appointed in 1856. Before then, however, a further group of disputes arose from some of the transactions under Governor FitzRoy's waiver of Crown pre-emption.

3.7 THE WAIVER OF CROWN PRE-EMPTION

3.7.1 The situation in New Zealand

Most settlers and investors in New Zealand bitterly resented the imposition of the Crown's pre-emptive right or monopoly to purchase Maori land. They lobbied against the first New Zealand Land Claims Ordinance in New Zealand and London, and sought to arouse Maori support by telling the chiefs that they were being denied their rights as British subjects to deal with their land as they saw fit. By 1844, there was also growing sympathy for direct purchase in official circles. Contrary to official expectations in 1839 and 1840, no pool of surplus land existed from which the Crown could grant or sell to new settlers and earn revenue

85. FitzRoy to Colonial Secretary, 17 June 1844, IA1/1844/1370 (Armstrong, pp 189–190)

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for the general needs of government. Nor did the funds provided to Governor Hobson and Acting-Governor Shortland allow for extensive Crown purchases of Maori land. The colony was in fiscal crisis, and direct purchase of Maori land by settlers seemed to offer a way out.⁸⁶ Meanwhile, many Maori became resentful of Crown interventions and pre-emption. Much of their irritation arose from their discovery that the Crown intended to keep the 'surplus' of pre-1840 transactions deemed to be bona fide rather than return it to them.

Before leaving London, FitzRoy had suggested to the Secretary of State for Colonies, Lord Stanley, that the waiving of Crown pre-emption would be beneficial to all parties concerned. Stanley indicated that he was willing to consider it, but wished first to be advised by FitzRoy of the situation in New Zealand. However, in January–February 1844, without waiting for prior approval, FitzRoy negotiated with Colonel Wakefield of the New Zealand Company a waiver of Crown pre-emption for the Otakou purchase. A month later, on 26 March 1844, he issued a general proclamation allowing Maori, under certain conditions, to sell limited areas of land directly to settlers.

3.7.2 Pre-emption waivers and Treaty principles

This was clearly a departure from one of the *terms* of the Treaty of Waitangi. But we must consider whether it was also a breach of the *principles* of the Treaty. Wai 686 claimants have included the pre-emption waiver purchases as one of the three processes which led to excessive land alienation in Hauraki by 1862 rather than to suggest that the waiver of pre-emption was *of itself* a breach of Treaty principles. They have, however, suggested that the Crown's failure to introduce and adequately administer the protection mechanisms which were intended to *accompany* the waiver, contributed to excessive land loss.⁸⁷ A relatively small area of Hauraki land was involved (compared with old land claims and Crown purchases). But the debate concerning pre-emption waivers amongst Crown officials in 1844, and between officials and Maori, is important in the light of Treaty principles, and because the issues involved were to arise again in 1862, when pre-emption was next abandoned.

The Treaty was intended to reflect the protective principles in Lord Normanby's instructions to Hobson, outlined above in the prologue to part II. While these principles were to apply to purchase under Crown pre-emption, 'There is no reason to assume that they should not equally be applied to any purchases the Crown allowed under a waiver of that right'. That was certainly the view of the land and emigration commissioners in the Colonial Office when FitzRoy suggested in May 1843 that pre-emption might be waived. They considered that far from relinquishing its responsibilities thereby, the Crown would become 'mixed-up' with the purchases undertaken by private individuals; any deviation from pre-

86. Rose Daamen, *The Crown's Right of Pre-Emption and FitzRoy's Waiver Purchases*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1998), pp 54–55

87. Document Y1, p 75

emption ‘must greatly enhance the responsibility of Govt for any unforeseen consequences to the Natives.’⁸⁸

FitzRoy did show concern for Maori rights and wishes, engaging in consultation with them about the new policy. Soon after his arrival in Auckland, he was met by assembled Ngati Whatua and Waikato chiefs and informed them that he wished them to enjoy ‘all the rights and privileges of British subjects’, that he thought it could be beneficial to them if they leased land to settlers for short terms, and that he would inquire further among them with a view to permitting direct sale.⁸⁹ About the same time (according to the *Southern Cross* report of 30 December 1843), he ‘allayed the fears of the natives’ as regards the ‘surplus’ land: he ‘most unequivocally and with the utmost sincerity disown[ed] any and every intention on the part of the government to appropriate . . . the surplus lands of the original settlers, they are to revert to the original owners.’⁹⁰ But on both issues, pre-emption waivers and surplus lands, FitzRoy’s enthusiasm was taking him further than the intentions of his masters in the Colonial Office.

FitzRoy informed a delegation of settlers (who urged that Maori had a right to sell directly under article 3) that Crown pre-emption was there to protect Maori, but that they should enjoy the full rights of British subjects ‘*as soon as they are sufficiently advanced in civilization*’ (emphasis added). This caveat was not a written condition of article 3 rights, nor was it discussed at the signing of the Treaty.

FitzRoy’s allusions to Maori rights under article 3, and its implied contradiction with article 2, suggest, rightly in our view, that strict compliance with the actual terms of the Treaty might not always be possible, and that (as the Court of Appeal found in the *Lands* case of 1987) the document must be read in terms of its spirit and principles, and in the light of current circumstances.⁹¹ In principle, then, FitzRoy’s general statements can be regarded as showing a reasonable sense of the Crown’s Treaty obligations, both to include Maori in economic opportunities, as they perceived them, and to protect them from excessive and inequitable land alienation.

3.7.3 The first and second waiver proclamations: lands purchased

The terms of the 26 March proclamation (the ‘10 shillings an acre’ proclamation) also seemed to tread that narrow path between protection and economic opportunity. The Governor was prepared to waive Crown pre-emption where settlers wished to acquire ‘a limited portion of land’ directly from Maori owners; applications could be made by settlers in respect

88. Unsigned report of colonial land and emigration commissioners, attached to FitzRoy to Stanley, 16 May 1843, CO209/24, pp 137–138B, Archives NZ (Daamen, p 80)

89. Daamen, pp 63–64

90. *Daily Southern Cross*, 30 December 1843; Waitangi Tribunal, *Muriwhenua Land Report* (Wellington: GP Publications, 1997), p 176

91. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) (the *Lands* case)

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of a particular number of acres defined 'as accurately as may be practicable'; the protector of aborigines would be consulted 'in any case'; no title would be given for any pa or urupa, nor for land required by Maori for their present use, 'although they themselves may now be desirous that it should be alienated'; of all land purchased under a waiver, 'one-tenth part, of fair average value, as to position and quality' was to be conveyed to the Queen 'for public purposes, especially the future benefit of the aborigines'; in addition to the purchase price, 10 shillings an acre was to be paid to the Government as a contribution to the land fund and for the general purposes of government; deeds of transfer were to be lodged at the Surveyor-General's office 'in order that the necessary inquiries may be made, and notice given in the Maori as well as in the English Gazette that a Crown title will be issued, unless sufficient cause should be shown for its being withheld for a time, or altogether refused'.⁹²

FitzRoy explained the proclamation to assembled Maori on the day it was released. He stated (with George Clarke translating):

The chief reason why the Government interfered in your selling land [in 1840], was to prevent Europeans from buying great quantities at once from you, before you knew the value of it, and that a consequence of your selling so much land would have been that you would have none left to cultivate for raising food for yourselves and your children.⁹³

He said that he was now willing to permit their selling to settlers small portions of land which they could well spare, after he and the protectors had inquired into each case. He advised them to be cautious in bargaining and not just accept the first offer, and explained the Government 'tenths' which would be 'set apart for, and chiefly applied to, your future use, or for the special benefit of yourselves, your children, and your children's children', through provision of schools, hospitals and other benefits. The chiefs in attendance expressed approval of these proposals. It is not known whether any Hauraki leaders were there, or how many of them received the official Maori gazette, *Te Karere*, containing the proclamation, but some Ngati Paoa chiefs could well have been present, and in any case news of the governor's proposals would have spread quickly.⁹⁴

Although almost all of the waiver certificates issued under the March proclamation related to the Auckland isthmus, several were for gulf islands: Charles McIntosh's purchases included Pakatoa Island, and Tayler, Brown, and Campbell purchased Pakihi and Karakaramu, in both cases from Ngati Paoa chiefs.⁹⁵

92. Daamen, p 75

93. 'Copy of Minutes of a Meeting of Native Chiefs at Government House on 24 March 1844', enclosed in FitzRoy to Stanley, 15 April 1844, BPP, vol 4, pp 197-198

94. Daamen, pp 76-77

95. Document c5, pp 47-50. Certificates were also issued in favour of Whitaker and du Moulin in respect of Great Barrier Island, resulting eventually in the alienation of some 6500 acres there.

Meanwhile, settlers protested at the limitations in the proclamation, particularly the 10-shilling levy by the Crown (on top of the purchase price paid to Maori), arguing that only high-quality land in prime locations justified that level of cost. In October 1844, FitzRoy dropped to one penny an acre the levy settlers had to pay to the Crown for a waiver purchase. Executive Council discussion supporting the change shows clearly that concern about Maori discontent and incipient defiance of Crown authority underlay the decision.⁹⁶

Under the October proclamation, 192 certificates were issued, waiving pre-emption over some 99,528 acres, mostly around Auckland. Drawing upon Bell's 1862 returns, Paul Monin has estimated that about 8400 acres of land were alienated in the gulf islands under pre-emption waiver, although purchases amounting to some 5000 acres were disallowed or reduced (some of which was retained as Crown surplus), leaving some 3400 awarded to the settler purchasers. This compared with his estimate of some 16,000 acres of old land claims (10,500 acres of which were disallowed) and 16,800 acres of pre-1865 Crown purchases (some of which – notably Ponui Island and eastern Waiheke – overlaid previous old land claims or disallowed pre-emption waivers).⁹⁷ Dr Anderson provides comparable figures though she gives the figure of 2550 acres for Brigham's purchase on Waiheke rather than Monin's reduced figure of 950 acres). Among the waiver transactions on the islands:

- ▶ Charles McIntosh purchased Taratoroa (Rotoroa) and Kahakaha from Ngatai and Te Ruinga of Ngati Paoa and Te Whetuki and Honatana of Ngai Tai for £32 and various goods.
- ▶ Frederick Whitaker purchased 700 acres at Te Patu, north-east Waiheke, from Te Ruinga.
- ▶ Whitaker and John Halls purchased 700 acres at Pikau, eastern Waiheke, from Te Ruinga.
- ▶ John Logan Campbell and William Brown purchased a block of indeterminate size at Opako, eastern Waiheke, from Te Ruinga.
- ▶ Charles de Witte purchased an estimated 500 acres at Putiki, Waiheke, from Wiremu Hoete and other Ngati Paoa chiefs. Patukirikiri people also claimed Putiki, and tried to block the transaction. (Another attempted purchase by De Witte on western Waiheke was disallowed.)
- ▶ Thomas Crummer, George Owen, Thomas Stewart, and Isaac Merrick purchased an estimated 900 acres at Awaawaroa (Waiheke) from four Ngati Paoa chiefs for a whale-boat, £24 cash, and other goods.
- ▶ John Brigham purchased 999 acres at Okahuiti (Waiheke) from Tamati Te Waka of Ngati Maru and Te Ruinga of Ngati Paoa for a two-masted schooner and other goods.

96. Daamen, pp 123–128

97. Document c2, tables. In document c5, p 52, Monin gives a figure of 'about 10,000 acres of pre-emption waiver purchases' but includes Great Barrier Island in his total.

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- Adam Chisholm purchased 850 acres at Putiki (Waiheke) from chiefs of Patukirikiri for two horses and other goods. Ngati Paoa protested that their interests had been ignored.⁹⁸

Complete data are not available for pre-emption waiver purchases on the Hauraki mainland, but they were few. Two eventually came before Commissioner Bell after 1856: a purchase by MacGregor of 600 acres at Coromandel from Ngati Tamatera and one by Peppercorne of 800 acres at Coromandel from Patukirikiri. Both had been disallowed in 1848 but Bell awarded McGregor 93 acres and Peppercorne was subsequently awarded compensation of £125 which suggests that the Crown took at least some of his claim as surplus.⁹⁹ In addition, an estimated 5000 acres (actually 1142 acres) was purchased by the Cleghorn and Goodfellow families on the south-eastern bank of the Wairoa River, opposite modern Clevedon, mainly from Ngai Tai chiefs; it was disallowed and taken by the Crown as surplus, with subsequent compensation to the settler claimants.¹⁰⁰ Taken together these figures mean that between 10,000 and 11,000 acres were alienated under pre-emption waiver from Maori within the inquiry district, about 3400 acres eventually being granted to the settler purchasers and the balance retained by the Crown as surplus.

3.7.4 Were FitzRoy's safeguards adequate?**(1) Claimant views**

The Wai 100 claimants have asserted that the Crown breached Treaty principles in that it authorised waiver purchases:

without enacting any or any sufficient mechanism to ensure the proper discharge of the Crown's further Treaty obligation to ensure a proper understanding of the Maori intention in the transaction, sufficiency of terms and retention of sufficient remaining land.

They also claim that, as with old land claims, the Crown's subsequent investigations of the transactions were inadequate: they assumed that Maori intended to 'sell' in terms of common law (rather than 'in accordance with Maori customary law'); they also failed to investigate the sufficiency of payments, or to make promised reserves.¹⁰¹ We turn to an examination of these claims.

(2) The protectors' investigations in the gulf islands

Following FitzRoy's preliminary discussions, Maori and Pakeha began negotiations in anticipation of the waiver of Crown pre-emption. These deals constituted technical breaches

98. Document C5, pp 48–52

99. Document A8, p 44

100. See document C3, pp 5–14

101. Document A5, p 26

of the waiver proclamations, as did transactions made after the proclamation but before application had been made for waiver certificates. (Under Grey, these were grounds for the Crown taking the land as surplus rather than granting it to the initial purchaser.) It had been FitzRoy's intention that, where direct purchase of a particular piece was approved, Maori would be able to negotiate among *several* possible buyers, to get the best market or competitive price, but (as was also to be the case after 1862) this generally did not happen. Usually the settler who made the initial arrangement with Maori vendors became the purchaser.

Chief protector Clarke was also very concerned that settlers would attempt to purchase land disputed between iwi, with potentially serious consequences. To forestall this, Clarke and FitzRoy set up various inter-tribal negotiations, including, in April 1844, the dispatch of Donald McLean to Waiheke to seek an agreement between the hapu leaders as to their respective interests on the island. Following a meeting with Wi Hoete and Te Ruinga (Ngati Paoa) and other chiefs on the island, at which boundaries were pointed out, Te Ruinga convened a meeting with Ngati Maru and Patukirikiri chiefs 'at his Station on the Thames': 'it was there decided and unanimously agreed that a portion of the Island of Waiheke remain in the possession of the Ngatipaoas another portion to revert to the [N]gatimarus and a third portion of the Island be considered the property of the Patukirikiris'.¹⁰²

A written definition of their respective boundaries was prepared but a survey on the ground did not follow. It is clear from McLean's report of the meeting that the Maori right-owners present accepted the authority of the senior chiefs making this agreement. Because he felt able to rely on these prior agreements, Clarke's subsequent investigations of individual waiver applications relating to Waiheke appear to have been quite cursory, often made within a day or so of their being received. Thus, in respect of Whitaker's purchase at Te Patu, Clarke wrote, 'There are so many disputes about the Island of Waiheke that it would not be safe to buy from the Chief Ruinga only. It would in my opinion be necessary to get the consent of the Ngatimaru Tribe and the Patukirikiri'.¹⁰³

The following day, however, he recorded, 'I have seen the Chief Ruinga and his party and from him I learned that the land applied for belongs solely to him therefore I see no objection'. Mr Monin considers that Te Patu was indeed Ngati Paoa land, so no great difficulty arose on this occasion. Similarly, in respect of Brigham's purchase from both Ngati Maru and Ngati Paoa on Waiheke, and McIntosh's purchase of Pakatoa Island from both Ngai Tai and Ngati Paoa, Clarke took account of complex customary right-owning, and withheld his approval until the chiefs of all interested parties had consented.¹⁰⁴ At Putiki, however, an area of Waiheke where Maori rights were more complex, the Protectors' checks proved inadequate, for purchases from Ngati Paoa (ignoring claims from Te Patukirikiri), and from

102. McLean to Clarke, 11 May 1844, McLean papers, MS-copy-micro-535, reel 2, folders 1-3A, ATL (Daamen, p107)

103. OLC 1/1116-7, Archives NZ (doc c5, p 53)

104. Document c5, pp 53-54

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Te Patukirikiri (against the wishes of Ngati Paoa) caused long-running problems (see sec 3.9.2).

Gael Ferguson has discussed the complexities in the gulf islands from the Ngai Tai perspective. On Waiheke after 1838, and in regard to Rotoroa (Rataroa or Tarataroa), Ponui, Karamurumu, Pakatoa, and Pakihi, she sees them ‘scrambling to maintain a presence in the transactions that took place’. All these smaller islands had been transacted in 1826 between James Herd and Ngai Tai. Ngati Paoa chiefs in 1844 acknowledged that Ngai Tai had dealt with Herd in 1826, but did not consider them still the ‘owners’ in 1844, as Ferguson implies.¹⁰⁵ Much intertribal adjustment had taken place in the gulf islands between 1826 and 1840, including the increased presence and authority of Ngati Paoa. George Clarke noted that ‘A rising generation of Maori are putting in claims to them [the four small islands] upon the grounds that they were sold while they were minors so I would suggest that the competing claims should be investigated before any other steps be taken.’

Clarke appended a list of 17 people of mixed Ngati Paoa and Ngai Tai affiliation, including Te Irirangi, Anaru Makiwhara, and Te Ruinga.¹⁰⁶ Donald McLean’s inquiries showed the fragile and incomplete nature of the Herd transaction, and a new pre-emption waiver purchase of Pakihi and Karamaramu was completed between Tayler, Campbell, and Brown and chiefs of both Ngati Paoa and Ngai Tai.¹⁰⁷

Ferguson considers that the payments for Pakihi were excessively weighted towards Ngati Paoa chiefs, notwithstanding their connections with Ngai Tai, and that the pre-emption waiver purchase of Pakatoa by Charles McIntosh overlooked Ngai Tai interests, given that the chiefs who appeared before Matson’s inquiry (Taiko, Ruinga, and Ngakete) were all Ngati Paoa. In respect of Rotoroa Island, also purchased by McIntosh, Ngatai of Ngati Paoa apparently told Matson that ‘the island belongs to Ngai Tai’, but still got the bulk of the payment. In respect of the alleged purchase of Ponui by Regan and Dunne, the Crown officials did indeed consider the chief, Ngatai to be overactive in selling land to which he did not have the sole or dominant rights, and disallowed the purchase.¹⁰⁸

It is arguable that Crown officials should have had more regard to Ngai Tai’s island interests, but they do seem to have tried to grasp the customary right-owning pattern as they found it in 1843–44. The fact that Ngai Tai were not included by the chiefs of Ngati Paoa, Ngati Maru and Patukirikiri in the 1844 demarcation of Waiheke (conducted under Te Ruinga’s aegis) might have meant that they were being overlooked – by the dominant tribes as much as by the Crown. This would have left Crown officials in a difficult position. Ngai Tai were in the end recognised in four purchases on south-east Waiheke, in Pakihi, and in Rotoroa, but not on Ponui and Pakatoa. Little reliance can be placed on the 1826 Herd

105. Document T2, pp 28–29

106. Clarke, note, 30 May 1844, OLC 1/ 1126, Archives NZ (doc T2, pp 26–27)

107. Document T2, pp 27–28

108. Ibid, pp 31–33

transaction as evidence of customary rights on the ground as they were existing nearly two decades later. Thus, it is not clearly established that Ngati Paoa were given disproportionate recognition relative to Ngai Tai in the 1840s. What is clear, as Ferguson shows, is that it was the dominant Ngati Paoa chiefs who usually took the initiative in land transactions and that Ngai Tai were left 'having to scramble to make sure they were adequately involved in sales that were not of their initial making'.¹⁰⁹ This was in fact an early instance of a tendency which runs through the entire history of the alienation of Maori land in New Zealand. Arguably, Crown officials should have provided for Ngai Tai interests to be severed from the land being sold, but Ferguson's and other evidence shows that Ngai Tai and Ngati Paoa in the gulf islands were closely intermarried and it appears that the Ngai Tai chiefs were seeking inclusion in the payment, and hence recognition of their rights in the land and their mana, rather than to have their interests severed and reserved.

As with old land claims, survey was not a pre-condition of Crown grants for waiver purchases, but Mr Monin notes that, because most waiver purchases in the Hauraki islands were relatively small (and in some cases were whole islands), there was 'little room for misunderstanding between the vendors and the purchaser'.¹¹⁰

(3) *The Cleghorn–Goodfellow purchase*

Flexible application of the protections promised by FitzRoy is to be found in respect of the Cleghorn–Goodfellow purchase on the eastern bank of the Wairoa River. Thomas Cleghorn and William Goodfellow applied under the October 1844 waiver proclamation to purchase an estimated 5000 acres. Chief protector Clarke minuted that he had no objection, 'but submit that previous to more lands being disposed of in this district, it should be ascertained what it may be necessary to reserve for the tribe'. FitzRoy, however, declined to grant the waiver certificate 'on account of the locality, the extent of the demand, and there as yet being no reserve made in that quarter'.¹¹¹ Cleghorn wrote persuasively to the Governor:

The natives are now all in Auckland, and it will be a serious disappointment to them not to receive payment for land they were led to believe would be purchased without delay. As to the last point, 'the native reserves', you will find that very large tracts of land on the west side of the river have been already set aside for this purpose.¹¹²

This is a reference to the Fairburn purchase, supposed to be a reserve for the tribes who made that transaction between 1836 and 1839. FitzRoy still demurred, because of the size of the area sought, but the same day, 11 December 1844, six members of the Cleghorn and

109. Ibid, p31

110. Document c5, p 54

111. Clarke, file note, 2 November 1844, and FitzRoy to Colonial Secretary, 3 December 1844, on Goodfellow to Colonial Secretary, 1 November 1844 (doc c3, p7)

112. Cleghorn to Colonial Secretary, 9 December 1844 (doc c3, p8)

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Goodfellow families applied for 500 acres each, covering the same area as described in the October application. This time, FitzRoy consented and a deed of purchase was completed with four Maori, two of whom are identified by Gael Ferguson as Ngai Tai chiefs.¹¹³ The payment, to a total estimated value of £351 6s included 18 guns, plus powder and ammunition.

The Cleghorn–Goodfellow case shows that, in October 1844 at least, Clarke was not overly concerned about the size of the proposed purchase, provided reserves were made in the area. The Cleghorn–Goodfellow correspondence shows that Crown officials in 1844 tried to ensure that reserves were made in each area where purchases were approved.¹¹⁴ However, on 7 December 1844, FitzRoy had gazetted a statement explaining that by ‘a *limited* portion of land’ in his March waiver proclamation, he meant ‘not more than a *few hundred* acres’ (emphasis in original).¹¹⁵ The Cleghorn and Goodfellow reapplications were clearly intended to overcome that limit. David Alexander, a witness for the claimants, regards this as ‘sharp practice’, condoned or encouraged by Crown officials, a charge which the Crown rejects.¹¹⁶ It seems likely that the applicants were advised that if they split their original claim for 5000 acres into six claims for 500 acres each in the names of various family members they might well be approved. This could be considered ‘dummying’, a common but dishonest practice in Australia and New Zealand of naming as applicants several family members, including minors, to build up big pastoral estates. But the Cleghorns and Goodfellows intended to make family farms: it seems the applications were for bona fide settlement, not speculation. No evidence has been cited to indicate Ngai Tai objection at the time; rather the contrary, if Cleghorn’s description of their eagerness for the sale sent to FitzRoy is believed.

When he reviewed all pre-emption waiver purchases, Grey questioned the Cleghorn and Goodfellow claims on the grounds of ‘firstly, payment in arms and gunpowder, partly; secondly, extent is against the spirit of the [Waiver] Proclamation, thirdly, distance, fourthly, children and minors claimants.’¹¹⁷ When the claims were examined by Commissioner Matson, however, the claim was declined (like most other pre-emption waiver purchases in Hauraki), not on the grounds mentioned by Grey but on the Attorney-General’s formal advice that the purchase was not strictly in conformity with the procedural requirements of the pre-emption waiver proclamations. The Maori vendors were considered to have alienated their interests and the land concerned (found on survey to be 1142 acres) passed to the Crown as surplus land. Cleghorn and Goodfellow eventually received scrip equivalent to their outlay.¹¹⁸

113. Original deed of purchase attached to Cleghorn to Colonial Secretary, 7 August 1850, OLC 1/1167–72 (doc T2, p 22)

114. Cleghorn–Goodfellow correspondence, 9 December 1844, OLC 1/1167–72, Archives NZ

115. ‘Notice: Colonial Secretary’s Office’, *New Zealand Gazette*, 7 December 1844, vol 4, no 26, p 159

116. Document C3, p 14

117. Grey, file note, 3 December 1847, on Goodfellow to Colonial Secretary, 15 April 1847, OLC 1/1167–1172, Archives NZ (doc C3, pp 10–11)

118. Document C3, pp 5–13; doc T2, p 23

It is of concern that, as the Wai 423 claimants point out, no documentary evidence has been deposited to show that Grey's questions (which touched on Maori rights) were investigated, and there is nothing on the OLC file to show that Maori witnesses were heard, as they undoubtedly were in some other inquiries by Commissioner Matson.¹¹⁹ However, neither is there evidence of protest at the time. Little can be read either way into this absence of evidence, but it does not entirely justify Gael Ferguson's conclusion that 'There was no opportunity for Ngai Tai to indicate how they regarded the demise of their transaction with Cleghorn and Goodfellow'.¹²⁰ The Land Claims Ordinance 1846 did provide for Maori witnesses to be heard, Matson (assisted by the interpreter Meurant) did institute inquiries among Auckland chiefs at least, and as Ms Ferguson notes, Ngai Tai witnesses did appear before Matson in respect of Rotoroa Island. It is possible that they did not protest the East Wairoa transaction because they were satisfied to have received payment for the land, and what became of Cleghorn and Goodfellow's titles thereafter was of little concern to them.

(4) Prices paid for waiver purchases

On the matter of price for waiver purchases, Paul Monin considers that per acre prices in Hauraki were generally better than those paid in old land claims or early Crown purchases in Auckland, except for the large Whitaker–du Moulin purchase on Great Barrier. Campbell and Brown paid Maori £43 for 67 acres on Waiheke and £125 for the 290 acres comprising Pakihi and Karamuramu Islands. Monin notes that Hauraki Maori at this time greatly desired whaleboats and schooners, 'and on Waiheke it verged on mania'. Of the 14 waiver purchases in the gulf islands, seven included vessels in the payments.¹²¹ Most of these purchases were not subsequently contested, although Webster failed to deliver a vessel which was part-payment for his claim on northern Waiheke, and the Maori owners declined to give up the land.¹²²

Rose Daamen, viewing waiver purchases as a whole, found it difficult to give precise figures because much of the payment was in goods, and the values attached to those goods varied widely. She concluded, however, that prices under the March proclamation ranged from sixpence an acre to £2 an acre, with around half the purchases being between one shilling and 10 shillings an acre. Under the October proclamation, prices averaged two shillings an acre, with land at Coromandel ranging from 10 pence to five shillings fourpence an acre. Land on the islands near Auckland ranged from sevenpence to £1 2s 7d an acre.¹²³ These

119. Document Y15, pp 10–11

120. Document T2, p 23

121. Document C5, pp 46, 54–55

122. Donald McLean to Colonial Secretary, 10 July 1854 (Moore, Rigby, and Russell, p 108). Webster had nominally given them the vessel 'conditionally that they would admit the justice of his claims before the Commissioner's Court', but had taken it off to Coromandel, allegedly for repairs, and not returned it.

123. Daamen, pp 132–133

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were generally higher than the per acre prices paid in old land claims and the Crown's 1840 to 1841 purchases.

There is no clear evidence that Hauraki Maori saw their payments as inadequate at the time. Their complaints were either about customary boundaries (and therefore not being included in payments which went to other groups), or about failure to complete promised payments.¹²⁴ A price might have seemed satisfactory to Maori at the time, especially if it included much-needed vessels or horses. Dissatisfaction would increase as awareness grew of the resale prices and the rising value of land. As with old land claims, the rising prices reflect the appropriate increase for secure titles guaranteed by a Crown grant, and the issues include economic benefits gained over and above the purchase price.

(5) Maori understandings of waiver transactions

On the issue of Maori understandings of the waiver transactions, it is difficult to accept, in respect of transactions in or close to Auckland, that English notions of sale would not have been understood to a considerable extent by 1844–45. Local Maori, and those from further afield who traded regularly with the capital, had seen a substantial town grow under their eyes, with port facilities and military barracks. Many would also have become aware that Europeans transacted the purchased land amongst themselves without any further reference to the original Maori owners.

Paul Monin considers that about this time the spirit of individual entrepreneurship overtook many Maori rangatira:

a class of chiefs emerged whose actions clearly defied traditional norms of chiefly responsibility. Their names appear repeatedly in land transfer deeds and the correspondence of the (Maori) Protectorate in connection with land disputes. They had little compunction in selling the land of others. They took advantage of the *Pax Britannica*, the peace imposed by British rule, to evade the *utu* they might otherwise have feared. They capitalised upon the limited mechanisms and resources of the Protectorate to determine customary interests in land. They were enthusiastic about the new mana-enhancing possessions. Conspicuous among these chiefs were Wiremu Hoete, Hori Pokai Te Ruinga and Ngatai of Ngati Paoa and Tamati Te Waka of Ngati Maru. In Hoete's case, there does seem to have been an indigenous social dimension . . . [but] in an environment offering vast scope for individualistic behaviour, community responsibilities were perhaps understandably, but rather quickly, neglected.¹²⁵

This statement supports the Crown's view that the responsibility for excessive land alienation must be attributable in part to 'Maori agency' as well as to Crown action. Monin is no doubt correct in suggesting that customary understandings were being overlaid in some

124. For example, in Pakihi Island: see doc C5, p 49.

125. Monin, pp 133–134

individuals with non-traditional behaviour. The case should not be overstated, since rangatira were expected by their people to take initiatives and it is not clear that they were at this stage acting against the wishes of their communities. Evidence is lacking concerning any informal distribution of the proceeds by them, by way of hospitality, purchase of shared goods or other assistance to their people. Most Maori were pleased with the advent of the Pakeha settlements, for the commerce they were able to conduct with them. The appetite for whaleboats and schooners was widespread, and not confined to chiefs. Indeed, there is considerable evidence throughout New Zealand at this stage that schooners (and, a little later, flour mills), were seen as the prized possessions of hapu communities. To secure them the permanent alienation of relatively small areas may well have been seen as acceptable. Moreover, the evidence suggests that Maori and Pakeha transactors in many waiver purchases still saw themselves as entering into an on-going relationship, not just a commercial deal.¹²⁶

Paul Monin has also suggested that the entrepreneurial attitudes of leading rangatira were encouraged by the less-than-thorough prior investigations of customary ownership by officials. It is doubtful that their brief inquiries fully established whether hapu had given their informed consent to transactions undertaken by chiefs, whether they had an 'abundance or deficiency' of land available, whether they were alienating only that which they could 'really spare', whether the land contained pa or urupa which were supposed to be excepted from purchases, or whether other hapu had rights. Possibly, officials left it to chiefs to identify these or thought they would be excised upon eventual survey of the land. Similarly, the 'tenths' which the Crown intended to take for public (especially Maori) purposes may also have been left to be defined later.

3.7.5 Actual prejudice

The reasons for the Crown's loose application of promised safeguards – to get the economy moving and to allay Maori unrest (which in the north was leading to Hone Heke's uprising) did not absolve the Crown from their obligations to protect Maori vendors from causing injury to themselves through excessive alienations. As to whether actual injury was caused in Hauraki, we note Paul Monin's view that the 'total area of land alienated through the waiver purchases was insufficiently large to have much effect on the overall resource situation of the vendor Maori groups'. But the local and particular effects could be significant: Ngati Paoa lost the central-southern area of Waiheke, their first agricultural base for trade with Auckland, and the sale by Patukirikiri of land at Putiki obliged Wiremu Hoete of Ngati

126. This was certainly the case in respect of waiver purchases in South Auckland, where various hapu were interested in acquiring breeding stock to build their own flocks and herds: see Alan Ward, 'Historical Report on South Auckland Lands', preliminary discussion draft prepared for Crown–Congress Joint Working Party, 1992, pp 41–51.

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Paoa to move westward to Te Huruhi (the western end of Waiheke).¹²⁷ In a situation of intersecting tribal rights, there was a tendency for one group to initiate transactions and others to get caught up in them, and to seek inclusion in payment rather than block the transaction. Thus, Ngai Tai were caught up in transactions initiated by Ngati Paoa chiefs in the gulf islands.

We note again the loss of land by Ngai Tai in the Cleghorn–Goodfellow purchase in East Wairoa. Taken by itself, this was by no means disastrous to them. But it should also be seen in relation to the previous Fairburn purchase: as Gael Ferguson states, as long as Ngai Tai retained a significant area within that purchase, there ‘was no reason for Ngai Tai to suppose that this [Cleghorn–Goodfellow] agreement would have any significant impact on their overall resource’.¹²⁸ Though the Fairburn purchase (along with Great Barrier Island and the Mahurangi coast) is outside the Hauraki inquiry district proper, we note that it did impinge heavily upon Hauraki tribes. Ngai Tai benefited from the 6000-acre reserve eventually made at Maraetai. But these were indeed ‘shrunk borders’, to use Paul Monin’s term.

3.8 INQUIRIES AFTER PRE-EMPTION WAIVING**3.8.1 Grey’s policy and the 1846 ordinances**

In mid-1845, George Grey replaced FitzRoy and was soon instructed to terminate the penny-an-acre waivers. In November 1845, Grey stopped issuing waiver certificates, and within a month had suspended the scheme, until he ‘had time to inquire into the subject, and to determine what line of policy, in reference to the sale of lands, shall be adopted’.¹²⁹ On 16 June 1846, Colonial Secretary Andrew Sinclair (of the New Zealand administration) suggested that another means of purchasing Maori land might be made available.¹³⁰

In reporting his actions to the Secretary of State in England, Grey outlined his proposals for a different system of direct purchase which he thought would be necessary to ‘allay the excitement’ which he anticipated the curtailment of FitzRoy’s system would provoke among both Maori and settlers. In the light of the subsequent administration of the Native Land Acts, it is instructive to consider some of Grey’s objections to FitzRoy’s system. In particular, he believed that it denied both Maori and settlers the advantages of sale by public auction: for Maori, this meant the likelihood of getting full market price.¹³¹

In contrast to the Native Lands Act of 1862, Grey was contemplating an agency role the Crown would play in marketing the land on behalf of Maori, and that transaction costs

127. Document C5, p 55

128. Document T2, p 23

129. Grey to Stanley, 10 December 1845, BPP, vol 5, p 358

130. Colonial Secretary’s Office, *New Zealand Gazette*, 16 June 1846, vol 6, no 10, p 42

131. Grey to Gladstone, 21 June 1846, BPP, vol 5, p 575 (Daamen, pp 147–148)

would ultimately being borne by the purchaser rather than the Maori vendor. Maori were to apply to the Government if they wanted to sell land to settlers, stating the position and extent of the land and naming their upset (reserve) price. Maori would be required to prove their title to the land (before whom was not clear), and if the officials thought there was a probability of it being sold it would be *surveyed by the Government and offered at public auction*. In addition to the purchase price, purchasers were to pay a fee of 15 shillings per acre to the Crown, upon which the purchaser would receive his grant and the Maori vendor the price received at auction. The 15 shillings an acre fee was to pay for costs of determining title and surveying the land, then for roading and other public works (employing as many Maori as possible), and for immigration.¹³²

Grey did not yet make these proposals public, pending advice from London, and the scheme was not in fact implemented. Instead, in November 1846 Grey strengthened the Crown's control of land transactions by securing the agreement of his appointed Legislative Council to two further ordinances. The first, the Native Land Purchase Ordinance, reaffirmed and extended Crown pre-emption. Hobson's 1841 ordinance (by asserting that settlers' title depended upon a grant from the Crown) had made private purchases, gifts, and leases of Maori land *legally null and void*. Grey's 1846 ordinance made them *illegal* and extended the prohibition to cover the use and occupation of Maori land as well. The ordinance specified that persons who occupied Maori land, whether to depasture stock, reside on the land, erect buildings on it, cultivate the soil, extract minerals, or cut timber, would be liable to summary proceedings and fines *unless* they held a licence for the purpose from the Government. Grey wished to put the development of Maori land and resources by settlers under Crown control.¹³³

The other ordinance passed in November 1846 was officially short-titled the Land Claims Ordinance, like its predecessor of 1841. The preamble stated that no Crown grant could safely be issued until it was established that the alleged purchases had 'been made from the true Native owners of the such land, and that the rights of such persons . . . have been extinguished'. The ordinance provided for commissioners to make inquiries as to the purchase price paid and survey and other costs incurred in a waiver purchase. On the Governor's confirmation of the commissioners' report, the settler claimant would be entitled to a Government debenture equivalent to his outlay, but could use it to purchase from the Crown at £1 an acre, part or all of the land concerned. That which he did not purchase would become demesne land of the Crown 'saving always the rights which may hereafter be substantiated thereto by any person of the Native race'. Grey anticipated that inquiries into these rights would take time and cost the Crown money, but meanwhile the settlers' claims would be compensated for.

132. Daamen, p 149

133. The full title of the ordinance is 'An Ordinance to provide for the Prevention, by Summary Proceeding, of Unauthorized Purchases and Leases of Land'.

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FitzRoy's 'Crown tenths' scheme was written out of existence by the ordinance. It had never been popular with settlers because of the practical difficulty of selecting the tenths and administering them; now clause 14 granted purchasers the option of buying, also for £1 an acre, the tenths which FitzRoy had proposed to retain for 'public purposes' (FitzRoy's original emphasis on Maori purposes was not mentioned), on the basis that 'such reservations cannot in many cases be conveniently made'. No monetary equivalent was provided for to replace the reserve tenths, nor any equivalent endowment of Crown land. Moreover, Grey declined to gazette FitzRoy's Native Trust Ordinance which would have established the trust to administer such reserves, even though the ordinance had been approved in London, and tenths had been discussed by FitzRoy and other officials with assembled chiefs in New Zealand when he announced pre-emption waiver.¹³⁴ In shelving the tenths scheme in the waiver purchases without putting any alternative scheme in place, Grey contravened FitzRoy's public undertakings to Maori.

In the event, the purchasers usually took up the option to purchase the Crown tenths. In respect of the approximately 3400 acres of Hauraki land awarded to settlers under pre-emption waiver purchases, this effectively deprived the Crown of some 350 acres of prime Hauraki land which could have been included in a trust for Maori purposes, and much more in and around Auckland itself. There is no evidence that the Crown reserved for Maori purposes any of the 7500 acres it acquired from disallowed waiver purchases. A chance to endow a trust for the benefit of local Maori, similar to those existing in Wellington and Nelson, had been passed up.

3.8.2 *The Queen v Symonds*

In order to test the validity of FitzRoy's waiver proclamations, Grey also arranged for a test case, *The Queen v Symonds*, to be heard by the Supreme Court. The court was to determine whether the holder of a waiver certificate (one McIntosh) had a prior title to the holder of a Crown grant subsequently made to JJ Symonds for the same land. On 9 June 1847, the court held that a Crown grant was superior to a purchase made under a pre-emption waiver certificate. The decision was based on the principle that the Crown, the sovereign of New Zealand, was the sole source of legal title, and secondly, that the Crown had the sole right to extinguish native title. A second principle was that 'the Queen has the exclusive right of acquiring new territory, and that whatsoever the subject may acquire, vests at once . . . in the Queen.'¹³⁵

The decision clearly meant that waiver purchase claimants could not go to law to compel the Crown to recognise their certificates and their purchases. They had to rely upon the

134. Daamen, pp 152–153

135. 'Judgement of Mr Justice Chapman' enclosed in Grey to Earl Grey, 5 July 1847, BPP, vol 6, pp 64–65 (Daamen, p 154)

further procedures that the Crown provided for hearing and determining their claims, discussed below in section 3.8.3.

3.8.3 Commissioner Matson's inquiry

Henry Matson was appointed as the sole commissioner to appraise the applications of pre-emption waiver purchasers and pass his recommendations to the Attorney-General (William Swainson) and Governor Grey. As well as technical provisions for assessing claims, Earl Grey had required that the Attorney-General certify that 'the natives from whom the purchases may have been made were, according to native laws and customs, the real and sole owners of the land which they undertook to sell'.¹³⁶ But such inquiries were left to Commissioner Matson.

Daamen has assessed the thoroughness of Matson's inquiry in the light of FitzRoy's undertakings to oversee the pre-emption waiver process and protect Maori interests. Identifying information about the land, and whether the purchaser's possession was undisputed, as well as statements by various Maori and Pakeha witnesses and the Maori vendors were recorded on file. It seems that Matson did not rely wholly on the Protectors' prior inquiries but often made his own. But, like Commissioners Godfrey and Richmond before him, he relied heavily on statements by the chiefs who controlled the sale, and interpreters such as Edward Meurant and CO Davis, as to the Maori vendors' understanding of and consent to the transactions. The chiefs are commonly recorded as stating that they were the 'sole proprietors' of the land, although there are occasional references to the tribe being the owners and they the tribe's spokesmen.

No Maori was a sole proprietor of land under customary law and it is difficult to know what deeper inquiry lay behind the formulaic statements on file. Meurant's journal does show that he spent time with Matson, travelling around Auckland to interview chiefs and view land.¹³⁷ Gael Ferguson's evidence also shows that the Ngati Paoa chiefs testified in Matson's court as regards some of the gulf islands transactions.¹³⁸ There is little indication, however, of inquiries about the islands themselves, or about the two Coromandel purchases, or whether the land transacted included pa or urupa, or what other land the vendors had for their needs.

Because the Crown was still trying to acquire a pool of land for new settlement and public purposes, Matson was instructed to take a hard line on technical flaws in the waiver applications. In 1847–48, he disallowed many claims, including all those in the gulf islands, except for Charles McIntosh's purchase of Rotoroa and Pakatoa Islands from Ngati Paoa chiefs, and Brigham's purchase of 999 acres at Okahuaiti on Waiheke from Ngati Paoa and

¹³⁶ Earl Grey to Grey, 10 February 1847, BPP, vol 5, p 579 (Daamen, p 150)

¹³⁷ Edward Meurant, letters and diaries, 1842–47, MS1635, ATL, entries for January–March 1847

¹³⁸ Document T2, pp 30–31

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Ngati Maru (though Brigham then relinquished his claim to the Crown and took compensation).¹³⁹ In respect of McGregor's and Peppercorne's purchases at Coromandel, and Cleghorn and Goodfellow's at East Wairoa, the Crown acquired the land as surplus and awarded the settler applicants scrip for the value of their outlays. (McGregor was subsequently awarded 93 acres of his claim.¹⁴⁰)

The usual reasons for disallowance were not because of failure to purchase from the rightful Maori owners, but for technical reasons, such as failure to apply within the three months allowed (including submission of a survey report or adequate sketch plan), or because purchases had been negotiated before the pre-emption waiver certificate had been issued. Out of all pre-emption waiver purchases in the country under the March 1844 proclamation only 49 out of 62 resulted in land being awarded to the claimants, and 53 out of 189 claims under the October 1844 proclamation. A further 21 were relinquished to the Crown on payment of compensation in cash or scrip to the purchaser.¹⁴¹

In most of the disallowed claims, the land did not revert formally to Maori customary ownership. Unless settler claimants took scrip and abandoned their interests to the Crown, it fell into an ambiguous status and later came before Bell's commission, when it was either awarded to settler claimants or taken by the Crown as surplus land. Importantly for Hauraki, following Matson's disallowance of Regan and Duane's claim to have purchased Ponui Island (3000 acres) under pre-emption waiver, the Crown bought the island afresh in 1853–54. Eastern Waiheke was also repurchased by the Crown.

3.9 THE BELL COMMISSION, 1856–62**3.9.1 The procedure**

There was much complaint by settlers whose applications failed (whether based on pre-1840 or waiver transactions), about the Crown taking the surplus, and about the boundaries of the land actually granted. Grey attempted to resolve the situation with his Quieting Titles Ordinance 1849 (New Ulster). This ordinance sought to set aside legal defects in purchases, provided they were adequately surveyed and the 'full extinguishment' of native title was certified. The concern about Maori rights expressed in debate on this ordinance by Attorney-General Swainson, has been discussed above in section 3.3.4. In respect of Crown-granted land, he considered that, where 'it should subsequently be found that the natives . . . had not the right to sell it, the true owner would be entitled to the aid of the Crown for the purpose of recovering the land which the Crown, having no title to it, had wrongfully disposed of'.¹⁴²

139. Document C5, pp 48–52

140. Document A8, vol 4, p 44

141. Daamen, p 163

142. 'Crown Titles Bill Second Reading', BPP, 1849, ccmd 1280, pp 70–73 (Moore, Rigby, and Russell, p 40)

The Quieting Titles Ordinance was not compulsory and essentially inoperative, only 20 applications being brought under it throughout New Zealand. Nothing has been shown about their outcome, but since the ordinance placed the onus on Maori to prove their title in the Supreme Court, it availed them nothing, as Swainson later pointed out in a general comment about the impracticality of Maori access to the higher courts.¹⁴³

In 1856, Alfred Domett chaired a parliamentary committee to consider the settlers' complaints. The outcome was the Land Claims Settlement Act 1856, which authorised a further investigation of 'unresolved' claims. A new commissioner, Dillon Bell, was empowered to call in and annul the Crown grants issued by FitzRoy. New applications had to be accompanied by a certified survey, but an incentive was provided in that awards could be increased by one acre for every 10 shillings spent on survey (at the rate of one shilling sixpence per acre). Grants in respect of waiver purchases (which were supposed to be for limited areas) were not normally to exceed 500 acres but up to 500 acres more could be awarded for damage sustained as a result of non-settlement of the claim. Claimants were to pay the Crown between one guinea (£1 1s) per acre for the land granted, up to a total as close as possible to one-fourth the estimated value of the land. Maori were entitled to lay objections to the purchase, on payment of a fee. The Act provided that the balance of any land deemed to have been purchased but not awarded to settler claimants (the surplus) would be retained by the Crown.

There were far-reaching implications for Maori. Since the Matson inquiry, much of the land claimed but not awarded had been left in 'uncertainty of ownership'.¹⁴⁴ In many cases, including several in Hauraki, settlers with disallowed claims had continued to live on part of the land they considered they had purchased from Maori, while in many cases Maori also exercised rights over it.

The incentive scheme was effective. Bell wrote in his final report:

when the claimants were told they would receive an allowance in acreage [equal] to the extent of 15 per cent on the area surveyed, it became their interest to exert all their influence with the native sellers to give up the whole boundaries originally sold. The result has been not only to produce a large surplus of land which, under the operation of the existing Acts, goes to the Crown; but to connect the claims together, and lay them down on a map.¹⁴⁵

Bell's inquiry ranged more widely than the Legislature had initially intended. He saw it as incumbent upon him to inquire into each claim brought before him, including some deemed to have lapsed.¹⁴⁶ He secured statutory authority for this enlarged jurisdiction:

143. Ibid

144. 'Despatches from the Colonial Secretary to Superintendents of Provinces Relative to the Disallowance of Provincial Laws', 13 May 1858, AJHR, 1858, A-4, p 13 (Daamen, p 170)

145. Francis Dillon Bell, 'Land Claims Commission: Report of the Land Claims Commissioner', 8 July 1862, AJHR, 1862, D-10, p 5

146. Ibid, p 6

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section 15 of the Land Claims Settlement Extension Act 1858 authorised the commissioner to recommend grants to settlers where the provisions of the 1856 Act could not strictly apply, where their claims had failed but they had remained in possession, or where their claims had been disallowed for lack of evidence since supplied.

Bell's concern for this group of settlers had arisen out of Joshua Thorp's claim to land at Opukeko on the east bank of the Waihou, bordering McCaskill's claim at Hikutaia. In 1839, Thorp had transacted for land with Taipari (the father of WH Taipari) and Taraia. The latter later repudiated the deed and therefore Thorp did not prosecute his claim in the Land Claims Commission. In 1840, Thorp moved upriver and occupied about 360 acres at Opukeko, paying the chiefs, Hakaraia and Hauraki (later known as Tukukino), plus a succession of other right-owners in the area.¹⁴⁷ When the 1856 Act was passed, Thorp applied to the commission for a grant, stating that both Hakaraia and Hauraki would give evidence in support. Bell had been a guest in Thorp's home in 1843; in 1859 he found it unchanged and concluded it evident that the Maori right-owners had been paid and had allowed Thorp quiet possession. This prompted him to recommend section 15 of the 1858 Act. Despite the tenuous connection between Thorp's 1839 deal and the land at Opukeko, he approved a grant. (In fact, Thorp died in 1862 and the grant of 360 acres was made to his sons in 1863.) Many years later, in 1876, Tukukino (Hauraki), in the context of heightened tensions at Ohinemuri and Komata (discussed in chapters 10 and 17), petitioned Parliament about the award, but offered no new evidence. The Native Affairs Committee recommended further inquiry, but the matter seems to have lapsed.¹⁴⁸

Bell used section 15 to encourage other settlers in occupation to bring claims before him over as much land as Maori would allow to be surveyed, even when claims had been disallowed by the first commission. For example, following resolution of a boundary issue, he made an award to Dacre at Mercury Bay.¹⁴⁹ In addition, George White had negotiated on behalf of a syndicate with mainly Ngati Hei chiefs in 1839 for an extensive area along the Tairua and Hikuwai Rivers. He lodged without evidence a claim for 18,750 acres, opposed by 'Tupaia' (Hori Tupaea?) and others of Tauranga. Godfrey found that the land had 'not been bought from the rightful owners' and recommended no grant.¹⁵⁰ White, however, remained in occupation, and on-sold his interest to Arthur Willis. Bell then encouraged an application from Willis for the area the Maori right-owners would allow him to survey. The Tauranga claimants had dropped out, and the chief Tikaokao was said to have admitted the sale by his father, Hokianga, to White. Tikaokao had later retracted his statement (this was prevarication according to Bell in 1864), yet a grant was issued to Willis for 1797

147. Hauraki to Sir George Grey, 8 March 1848, OLC 1/831-2, Archives NZ

148. OLC 1/831-2, Archives NZ

149. Document N9, pp 41-43, 54

150. Ibid, p 28

acres at Tairua (along with 2009 acres at Piako based on another claim).¹⁵¹ In contrast to Thorp's quite limited claim discussed above, the belated reopening of White's claim, explicitly rejected by the first commission, followed by a substantial grant based on the qualified acceptance of his father's actions by one of the vendor's sons, some 20 years after the event, seems to us to be straining section 15 beyond reasonable limits.

Usually, land only reverted to Maori where claims were never referred to Bell, or lapsed through want of survey or non-appearance of the claimant. Bell suggested that in many of these cases bona fide purchases had been made, and he would have liked to 'recover' *for the Crown* as much of this land as Maori would agree to give up, but the disturbed state of the country prevented it.¹⁵² Bell's view of the transactions and his commitment to securing a surplus for the Crown are clear from his own words. The question remains, however, in respect of the claims that were brought before him, whether Bell's inquiries adequately disclosed whether purchases had indeed been made from the 'true native owners'.

In this context, we share the anxieties expressed by Dr Belgrave for the Marutuahū claimants, given that Bell's inquiries into the original transactions took place 20 years after those transactions were made. The drawn out Crown inquiries very likely involved some loss of knowledge (a suggestion which Crown counsel discounts).¹⁵³ Equally, they may have been affected by changed circumstances and understandings since the original transaction. But either effect could manifest as *either* greater resistance by Maori involved to acceptance of a sale, *or* to a greater willingness to accept complete alienation as a *fait accompli*, subject to certain adjustments. The evidence is rarely clear on this point, except (relatively speaking) in cases such as McCaskill's. We accept the claimants' point that 20 years after the event is very late to launch an inquiry.

3.9.2 Outcomes of Bell's commission

Bell's return shows that within the greater Hauraki district (including Great Barrier Island and the Fairburn purchase) some 34 old land claims and 13 pre-emption waiver claims were revived before him.¹⁵⁴ Largely in fulfilment of the land allowance for surveys offered in the 1856 Act, Bell increased the first land commission's awards for old land claims in greater Hauraki from a total of 67,892 acres to 80,649 acres, by Dr Anderson's figures. The increase awarded by Bell in the Hauraki inquiry area was in the order of some 3700 acres. Most claimants had their grants increased, including Taylor and Sparke (from 300 acres to 1037 acres on Waiheke), Webster (from 12,674 to 15,290 acres at Piako), and Brown and Dacre

151. Ibid, pp 43–47

152. Land Claims Commission, 'Report of the Land Claims Commissioner', 8 July 1862, AJHR, 1862, D-10, p 8

153. Document AA1, p 48; doc v1, p 84, see also pp 77–78

154. Document A8, vol 4, pp 44, 52

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(from 3075 to 3580 acres at Mercury Bay). (The grants of Abercrombie and his partners on Great Barrier Island and Fairburn at Tamaki were also substantially increased.) Six claimants who had received no grant from the first commission received awards from Bell. They were: the Maxwell family (two grants totalling 3630 acres on Waiheke); Wilson, derivative purchaser from Conway (54 acres at Coromandel); Conway (383 acres at Coromandel); Halls (885 acres on Waiheke); White (3447 acres at Tairua); Hodgkinson and Murrin (187 acres on Waiheke); and Thorp (409 acres at Thames and Coromandel). Four grants were reduced: McCaskill and Martin's at Ohinemuri and Hikutaia from a total of 12,560 acres recommended by Fitzgerald to a total of 4886 acres; Cormack's at Piako from 2560 acres to 2009 acres; Moore's at Coromandel and Pukuwhau from 400 to 287 acres and 978 to 564 acres respectively; and Preece's at Coromandel from 1450 to 1273.¹⁵⁵

It is difficult to be precise about all the old land claims and their adjustment by the various commissioners. For example:

- ▶ Research by Mathew Russell and Rose Daamen for the Tribunal's Rangahaua Whanui research suggests some variations on Dr Anderson's table, namely that only 2200 acres were awarded to the Maxwells on Waiheke and that Bell disallowed the award of 242 acres to Kennedy at Kennedy Bay following Maori protest.¹⁵⁶
- ▶ Frederic Hennken claimed to have purchased land at Coromandel Harbour on 12 December 1839. The file shows that the chiefs Kotihuia and Kohoropeta affirmed this and that Hennken was awarded 406 acres by Richmond but then exchanged the land with the Crown for Crown land elsewhere.¹⁵⁷ This grant is not noted in Anderson's return of grants or surplus land. Possibly, the Crown's interest was overlaid by a subsequent Crown purchase, as were other such grants or portions of grants, deriving from pre-1840 transactions.
- ▶ The Wai 970 claimants, Ngati Tamatepo/Rongo-u, refer to a purchase at Te Kopu at the mouth of the Waihou in 1831, by Samuel Ashmore, for gunpowder. The claimants state that Ashmore then on-sold his interests.¹⁵⁸ Bell's 1862 return, shows Ashmore's claims in the Coromandel district as 'disallowed'.¹⁵⁹ Anderson's evidence indicates that 150 acres at Te Kopu were awarded to Abercrombie by the first commission (reduced to 42 acres by Bell with no indication that the Crown took the surplus), and it is likely that Abercrombie purchased Ashmore's interest.¹⁶⁰

It is also unclear whether Bell's reductions were, in all cases, 'real' reductions, or differences between what the first commission *estimated* to have been purchased, and what the

155. 'Appendix to the Report of the Land Claims Commissioner', 8 July 1862, AJHR, 1863, D-14; doc A8, p 52

156. Rose Daamen, 'Table Comparing Old Land Claims Grants to Settlers', table prepared for Waitangi Tribunal

157. OLC 1/226, Archives NZ

158. Document U6, para 3.3

159. 'Appendix to the Report of the Land Claims Commissioner', 8 July 1862, AJHR, 1863, D14, p 3

160. Document A8, pp 52, 63, tables 2, 3

surveys actually showed to lie within the boundaries stated in purchase deeds. Complete resolution of these few discrepancies is precluded by want of time, but would not in any case alter our overall view of old land claims in Hauraki.

Of the 13 pre-emption waiver purchases disallowed by Matson (mainly for want of survey) and revived before Bell, seven were for land on Waiheke and resulted in six grants totalling 1805 acres. McGregor was awarded 600 acres at Coromandel, and Whitaker and Moulin 5463 acres on Great Barrier (where the Crown retained a surplus of some 18,000 acres). A claim by Peppercorne at Coromandel and Colville had been disallowed by Matson for non-appearance of the claimant but the Crown retained 715 acres as surplus land and Bell awarded Peppercorne compensation of £125.¹⁶¹

Scholars investigating surplus lands have had difficulty determining exactly how much land fell into this category. Bell's figures for greater Hauraki, for example, excluded some 75,000 acres in the Fairburn purchase, for which the Crown in the 1850s had made additional payments to Maori protestors to extinguish the Maori title, and thus classed the land as a Crown purchase. Dr Anderson has drawn from primary sources, including the records of the 1948 Myers commission, estimates of the surplus land retained by the Crown. Within the Hauraki inquiry area, she estimates that the Crown retained some 2200 acres from five claims on Waiheke, 1175 acres on Whanganui Island, 815 acres at Coromandel Harbour and Cape Colville, the 290-acre Pakihi Island, and 209 acres on Big Mercury Island, some 4610 acres in all. She appears to have overlooked the 1142 acres of the Cleghorn–Goodfellow purchase. (By far the largest areas retained were in greater Hauraki: 18,082 acres of Great Barrier, 500 acres of Tiritiri Matangi, and the 80-acre Motutapu Island, plus the 75,000 acres of the Fairburn purchase.¹⁶²) We return below to the Treaty principles raised by the surplus lands issue.

We have noted that Bell allowed claims to come forward which had been disallowed by previous commissions or were deemed to have lapsed. In these, he investigated the original transaction. But where a claim had been previously investigated, a bona fide purchase found and a grant recommended, he declined to go behind the decisions of previous commissioners. This approach threatened serious injustice to Maori, especially in cases where right-owners had not had an opportunity to appear before the earlier commissions, or where they had only later come to realise that the transactions were understood by the British to extinguish permanently all customary interests in the land. This growing understanding led, in some cases, to chiefs who had affirmed sales before Godfrey and Richmond, denying them before Bell, or to new and often younger witnesses stating to Bell that the chiefs who had affirmed sales in the earlier commissions did not have tribal consent to alienate the

161. Document A8, vol 4, tables 1, 3. Where the figures in these tables diverge, the figures on page 63 have been preferred.

162. Document A8, vol 4, p 63

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land permanently. The most notable example of this in Hauraki was McCaskill's claim (see sec 3.10.1). Bell, however, was not willing to allow a younger generation to overturn transactions acknowledged by rangatira in the Godfrey–Richmond commission: these were held to be sales, notwithstanding that the rangatira concerned might not have fully apprehended what that meant at the time.¹⁶³

Disputes between competing settler claimants and rival Maori groups were adjusted in some claims by Bell, as they had been by Godfrey and Richmond. Paul Monin has given evidence of the adjustment of complex old land claims on Motutapu (including an award to the children of the late Thomas Maxwell and Ngeungeu, his Ngai Tai wife), on Motuihe (concerning distribution of payment among Ngati Paoa and Ngai Tai owners), and at Poukaraka on Waiheke Island (claimed by Ngati Paoa as a gift from Ngati Maru but disputed, discussed above in section 2.2.4).¹⁶⁴ Dr Anderson's evidence regarding Bell's awards on Waiheke indicates that in most cases the grants were substantially less than the original claim, with the Crown taking a surplus in five of them (though compensating at least one claimant with scrip).¹⁶⁵ Monin's account suggests that the disputes between Ngati Paoa and Te Patukirikiri over waiver purchases at Putiki (de Witte's and Chisholm's purchases), were not fully addressed by Bell.¹⁶⁶ Yet, it seems that they were settled by additional payments. Wi Hoete (Ngati Paoa) had objected to the sale to Chisholm by Patukirikiri chiefs but told Bell, 'If at the time of the final payment originally made by Mr Chisholm to the other natives any payment had been made to me, I should have acknowledged Chisholm's title: but this not being done I retained my claim.'¹⁶⁷ He was seeking £20 which Chisholm had allegedly promised him. Additional payments may have been made in 1859 to settle the matter for there is no evidence that Bell's awards on Waiheke resulted in subsequent protests by Maori.

Dr Anderson gives a table of cases of contemporary Maori objections to the Land Claims Commissioners' awards. This includes a reference to McGregor's waiver purchase at Coromandel, disallowed by Matson, but allowed (to the extent of 93 acres) by Bell. Ngati Tamatera in 1862 demanded the return of this land: McGregor had been married to a local woman of rank who had since died.¹⁶⁸ There is no evidence to suggest that their request was granted, but it is a strong indication that in this instance, the hapu regarded the transaction as a settler marriage into their community, with a customary allocation of a life interest in a marriage portion, rather than a 'sale of land'. Bell's inquiries had clearly not disclosed this.

163. Later judicial officers held to that view too. In 1879, Judge Halse of the Native Land Court, reviewing McCaskill's claims at Opukeko on the Waihou, stated (Hauraki minute book 12, p 169): 'The court considers that the sworn testimony of chiefs of high rank, who possessed of great power and influence, and have since passed away, cannot be upset by the evidence of native claimants, who were youths and children at the time of the sale.'

164. Document C5, pp 32–44

165. Document A8, table 1, p 44, table 3, p 63; doc C2, table 2

166. Document C5, pp 50–52

167. Sworn statement of Wiremu Hoete, 20 December 1859, Bell's miscellaneous files, OLC 1/1164 (box 61), Archives NZ

168. Document A8, p 108

3.10 SPECIFIC CASES**3.10.1 Hikutaia****(1) *The McCaskill–Martin claims***

The most serious and substantially contested ‘old land claims’ in Hauraki were the transactions of McCaskill and Martin at Hikutaia. The Crown has conceded that the claim was badly handled by the land claims commissioners in respect of the boundaries of the purchase, that Maori were prejudicially affected as a result, and that they were inadequately compensated for their injury. The Crown has stopped short, however, of conceding that no bona fide purchase took place at all, whereas the Ngati Pu claimants consider that the initial transaction was a conditional agreement, not an absolute sale, and that the Land Claims Commissions failed to disclose this.

Dr Anderson’s historical report for the Wai 100 claimants has outlined the issues, Mr Monin has provided detailed reports for the Ngati Pu claimants (Wai 355) and Belgrave et al, the historians for the Marutuahu claimants, have made a careful summary of the case.¹⁶⁹

The claim relates to some 10,000 acres on both banks of the Hikutaia from its junction with the Waihou River extending several kilometres to the east. It is a relatively large expanse of cultivable land, the best of the Hikutaia River flats. It was also a cross-road for travellers. Evidence as to which hapu exercised rights before 1861 is in some conflict with the subsequent Native Land Court award of most of it to Ngati Pu. Paul Monin states that primary sources suggest that in 1839, ‘Four hapu possessed rights there – Ngati Pu, Ngati Karaua, Ngati Whanaunga and Ngati Tamatera – all of which took part in the 1839 transactions [with Lachlan McCaskill]: Ngati Paoa were resident at Kakaramaea (the north bank of Hikutaia Stream) in considerable numbers in 1801; they were found there by the crew of the *Royal Admiral*. Ngati Tamatera moved into the area in the 1830s, fortified Te Kari island in the Waihou, cultivated in the vicinity and cut flax for a European trader. But neither Ngati Paoa nor Ngati Tamatera claimed the area in the Native Land Court. Te Kari island was claimed by and awarded to Ngati Pu in 1869.

Monin further states that in 1839 ‘virtually no Maori’ were living at Hikutaia, save a few Ngati Pu. Most of that hapu were then living on Waiheke Island or at Turua at the mouth of the Waihou. When Lachlan McCaskill came to Hikutaia in mid-November 1839 to buy land, he was brought there not by Ngati Pu but by the Ngati Karaua rangatira, Kawhero, and other Ngati Karaua and members of other hapu. Kawhero pointed out the boundaries of the transaction. On 23 November 1839, at Webster’s station at Arapaoa beach, Whanganui Island, McCaskill (on behalf of himself, his cousin Allan, and SMD Martin) signed purchase deeds, drawn up by James Preece in English and Maori, for two blocks north and south of the Hikutaia, and two others at Opukeko and Ohinemuri further south on the Waihou. Monin states that the 25 signatories were mainly of Ngati Karaua, Ngati Tamatera

169. Document A8, pp 54–59; doc J8, pp 18–68; doc v1, pp 95–100

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and Ngati Whanaunga (including the venerable rangatira Horeta Te Taniwha). The Ngati Pu chief Hauwhenua (or Haowhenua), his daughter Rangituia and three other Ngati Pu signed. No one present objected. It would appear that anyone with a shadow of right was anxious to sign, thereby securing recognition and a share in the distribution of goods (which included 13 muskets).¹⁷⁰

Mr Monin has interpreted this transaction as a 'tuku whenua', in which the Maori negotiators (particularly Ngati Pu) took McCaskill into their community in return for on-going benefits, while retaining over-arching control themselves, with the implication that the land would revert to them if McCaskill failed to honour his obligations. However, we are sceptical of the tendency to read land court findings backwards, as clear and sufficient proof of customary rights and relationships, especially where they are in conflict with contemporary pre-land court evidence of rights actually being exercised on the ground (see chapters 15 and 16 for a discussion of the Native Land Court and its procedures). But, in any case, the classic form of tuku whenua assumes that there was a clear set of primary right-owners, under a chief or chiefs with the mana to make a tuku, granting conditional usage of the land concerned to people outside the primary lineage (see sec 2.2.5). Such an interpretation sits awkwardly with other aspects of Monin's evidence, which shows that three major hapu were active in the area in 1839. Given the confused and intersecting claims in the district in the 1830s, and the mobility of the various hapu, including Ngati Pu, the participating chiefs may have had a number of objectives in view in their transactions with McCaskill, including that of asserting their interests against those of rivals, ensuring they also took part in a process initiated by Kawhero and Horeta Te Taniwha.

The evidence as to Maori intentions at Hikutaia is obscure, especially over which lands were transacted. McCaskill's claim to south Hikutaia came before Commissioner Richmond on 1 July 1843, without a prior survey. The original deeds had been destroyed when McCaskill's house burned down, probably in March 1840, and the commission made copies at McCaskill's direction. An area of 8000 acres was mentioned in the *margin* of the reconstructed deed, apparently in reference to the estimated total area within the boundaries described, but the *body* of the deed mentions only 1000 acres. McCaskill said in 1879, 'It was perfectly immaterial as far the natives were concerned at that time what acreage was put in; acreage was only mentioned to comply with the form.'¹⁷¹ Thus, there was ambiguity at the outset. Webster, who was presumably present at the 1839 signing, testified in McCaskill's favour and three Ngati Pu, including Rangituia Hauwhenua affirmed the transaction. Rangituia stated that she had seen her late husband, Hauwhenua, and other chiefs sign the purchase deed. The commission's summary of their affirmation included the standard statements:

170. Document J8, pp 16–19

171. McCaskill testimony, Hauraki minutebook 12, p 102

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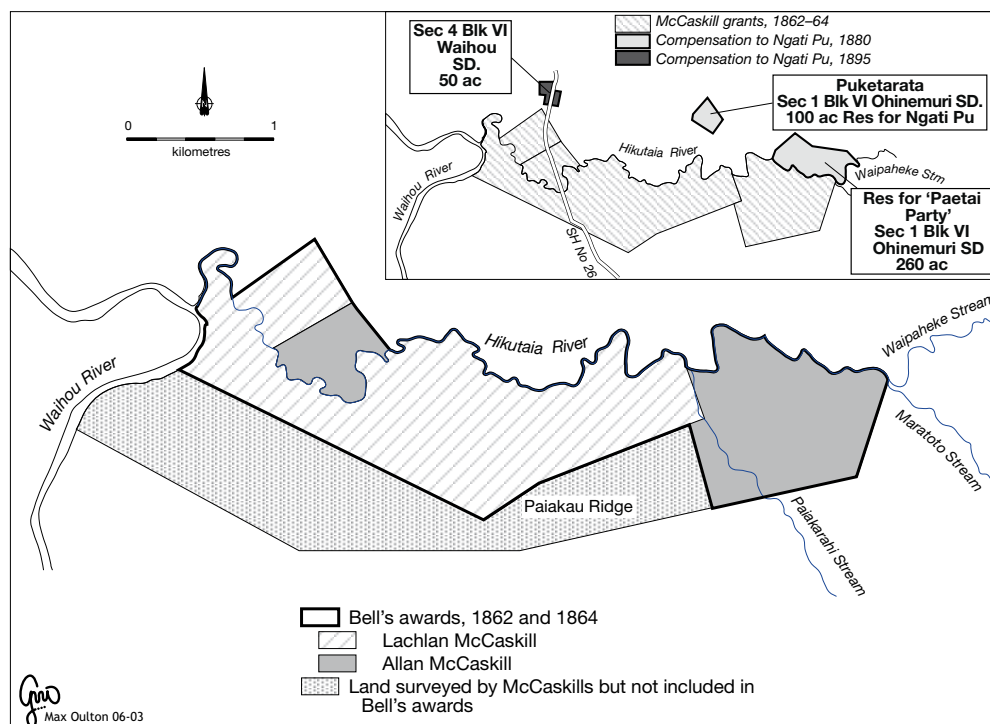


Figure 7: McCaskill claims at Hikutaia

We were aware that we were parting with our Land forever – it belonged to us and we had the right to dispose of it – We have not sold it to any other Person nor has it been disputed by other Natives[.] We received the Payment specified in the Deed – the boundaries are correctly described and I can point them out whenever I am required to do so.¹⁷²

Kawhero of Ngati Karaua was also present and gave evidence, presumably affirming the transaction.¹⁷³

The evidence in respect of Kakaramaea (northern Hikutaia), heard by Commissioner Godfrey in January 1844, is even more unclear. The original deed was also lost in the 1840 fire. McCaskill testified that Kahukoti of Ngati Paoa had received a substantial share of the payment. Kawhero and a Maori named 'Jonah' (hapu unknown) affirmed the sale but Godfrey noted objections to the sale by one 'Po' and Te Awhe of Ngati Tamatera. There is no clear indication of Ngati Pu participation, and their speakers later told the land court that they considered that Kawhero and Ngati Karaua had no right to deal in land Ngati Pu considered to be theirs. Godfrey nevertheless found that a bona fide purchase had been concluded but recommended no grant to McCaskill, who already had the statutory maximum.

Crown counsel closely paraphrases a statement concerning the evidence of Belgrave et al, historical witnesses for the Marutuahu claimants, to the effect that:

172. Richmond Report, 18 October 1843, OLC 1/287–291, pp 187–190, Archives NZ (doc J8, p 20)

173. Testimony of L.A. McCaskill, Hauraki minute book 12, p 102 (doc J8, p 20)

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although the record of this evidence was formulaic, it would appear on the face of it to show acceptance of McCaskill's claims to the area identified on the deeds, an area that a decade later would become particularly controversial.¹⁷⁴

Belgrave et al, however, go on to state:

The original purchase had been negotiated in Coromandel and there was no evidence that the boundaries had ever been walked and discussed in detail on the ground at the time. The points on ridges, that had been given to McCaskill when he had arrived to view the land after the transaction, were given, it was said [by Kawhero's son, in 1866, to James Mackay], as points of interest not boundaries. Just what Rangitua Hauwhenua and other witnesses thought they were agreeing to in Richmond's Court in 1843 remains a mystery.¹⁷⁵

(2) *Tuku whenua relations between Ngati Pu and McCaskill?*

Paul Monin considers that Rangitua, in affirming the 'sale' of south Hikutaia before Richmond, did consider herself to have ceded some rights to McCaskill, but not 'exclusive possession'. Certainly, SMD Martin recorded, 'The old chief [Hauwhenua] from whom we bought the land also settled near us with some of his tribe'. As Monin has explained, in 1840 Ngati Pu moved from Turua to Hikutaia to live alongside McCaskill, at Te Whati, a wahi tapu of Ngati Pu on the south bank of the Hikutaia, for which McCaskill made additional payment. But they insisted that he locate his mill on the north bank. Rangitua also gave her daughter, Ngahuia Ngakaho in marriage to McCaskill. This is certainly strong evidence of Ngati Pu developing ties with McCaskill, and of ongoing assertion of interests by Ngati Pu, but whether it means that Ngati Pu believed that McCaskill 'had been incorporated into the hapu' is more problematic. Ngahuia testified to the land court in 1872, 'I was given to McCaskill – for the principal reason – to prevent anyone selling the land'. This might mean, as Monin suggests, a strategy to keep McCaskill in place and prevent him from on-selling the land. It could also mean a strategy by Ngati Pu to ensure that no other *Maori* sold the land to any other Pakeha.

It appears to us that Ngati Pu saw themselves as having formed an alliance with a powerful entrepreneur. Whether or not Ngati Pu felt secure in their customary control of the land previously, their alliance with McCaskill would have helped consolidate it. However, other right-holders proceeded to make demands upon McCaskill for additional payments.¹⁷⁶ The customary ownership by Ngati Pu was not so clear-cut as to prevent this. It is clear that Ngati Karaua were present and actively in contention with Ngati Pu for land from Hikutaia to Whangamata. So too were Ngati Tamatera.

174. Document AA1, p 52 (a close approximation of doc v1, p 96)

175. Document v1, pp 98–99

176. Document J8, pp 24–25

This ambiguity in the evidence about customary right-owning at Hikutaia cautions us about aligning the McCaskill case wholeheartedly with the findings of the Muriwhenua Tribunal as regards pre-1840 transactions in their inquiry district.¹⁷⁷ Essentially, that Tribunal concluded that Maori and Europeans understood pre-Treaty transactions in quite different ways: Maori saw transactions as ‘tuku whenua’. Europeans, on the other hand saw them as property conveyances (tuku whenua and pre-treaty transactions are discussed in sections 2.2.5 and 3.2). But we consider the disputes between Maori and the McCaskill group focussed almost entirely on boundary issues and demands for additional payment, not on a challenge to the transaction as such.

However, that same evidence of intersecting customary rights in the Hikutaia area also makes very suspect Richmond and Godfrey’s swift conclusion that a valid sale had taken place – from all the legitimate right-owners – over the large area contained in McCaskill’s general boundary descriptions, an area assumed by Fitzgerald and FitzRoy in 1845 to contain 10,000 to 12,000 acres. While McCaskill may indeed have validly acquired some land from some of the right-owners, we are very sceptical that he could have obtained all the claimed land from all the right-owners.

If the commissioners had carefully examined other possibilities than sale, they might have noted the continuance of some former customary rights. Among such rights in the Hikutaia land would have been the right of traverse along the main east-west (coast to coast) and north-south trails through the region, which intersected on or near the land claimed by McCaskill and Martin.¹⁷⁸ It became very apparent by the 1850s that Maori had no intention of ceasing to use these trails. Unlike the Otahuhu portage in the Fairburn purchase, the commission clearly did not recognise the importance of the customary Maori trails in the McCaskill–Martin claims.

The potential for confusion was compounded in 1844 when Commissioner Fitzgerald recommended an increase in the McCaskill–Martin awards, in consideration of their having spent some £7000 on his sawmill and associated works. Fitzgerald recommended grants of 4000 acres north of the river and 8000 acres south of it, which were reduced by FitzRoy to 3000 and 7000 acres. Thus, McCaskill was awarded 1800 acres in north Hikutaia (where he had received no grant from Godfrey) and 4200 acres in south Hikutaia (where he had previously received an award of 1379 acres from Richmond). Martin was awarded 1200 acres in north Hikutaia and 2800 acres in south Hikutaia.¹⁷⁹

FitzRoy issued Crown grants for the enlarged awards on 19 July 1844, still without survey. As Belgrave et al point out, for want of survey, ‘The boundaries given for each of the grants to McCaskill and Martin contained the same boundaries as their overall deed. The

177. Waitangi Tribunal, *Muriwhenua Land Report* (Wellington: GP Publications, 1997), p 108

178. See the sketchmap prepared by the civil commissioner, James Mackay, in 1866: doc J8, p 43.

179. Document J8, p 31; Moore, Rigby, and Russell, p 148

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grantees were expected to select out the maximum areas they had been granted from within the overall area of purchase'. Lachlan McCaskill continued to run his mill while his cousin Allan worked land further east in the grant. Martin left the colony soon after FitzRoy's grant and died in 1848, his heirs thereafter pursuing his claims from England via agents in New Zealand. Not until 1864 (following Bell's awards to the McCaskills) was an effort made to locate Martin's grant. Crown counsel has commented:

At that point it became clear that the estimates of the overall area of the land had been overly optimistic and there was no land left. This [difficulty] was not resolved until a Native Land Court hearing in 1879 which provided for scrip for Crown land at the value of £1,445 to Martin's heirs.¹⁸⁰

Paul Monin describes the sequel. McCaskill had previously worked cooperatively with Ngati Pu in north Hikutaia *without* the benefit of a Crown grant (though with the benefit of the hearing before Richmond at which various Maori had affirmed the transaction). Between 1840 and 1842 Ngati Pu helped McCaskill construct his mill and cut timber on the north side of the Hikutaia. Then, as Te Rangai (Rangitua's son) later put it, they 'went home' to Puriri and Kauaeranga, a phrase which suggests that at that stage they saw Hikutaia as one of several domiciles.¹⁸¹ In Ngati Pu's absence, McCaskill shifted his sawmill to the Kopua Stream on the south side of the Hikutaia and eastward of the Paiakau Ridge, on land which he claimed to have purchased from Ngati Karaua but which Ngati Pu also claimed. Moreover, he began to cut kauri on the Waipaheke Stream, on the eastern side of his claim, on land which was disputed between Ngati Karaua and Ngati Pu and which Ngati Pu also considered they had not alienated. McCaskill then withheld payment of a horse promised to Rangitua, pending determination of ownership of the disputed land, a matter supposedly resolved before Richmond. Rangitua retaliated by instructing Te Rangai to seize the cut kauri timber. Following this altercation, about 1851, McCaskill effectively expelled Ngati Pu from their residence at Te Whati where, by Te Rangai's account, they had lived since 'the time of the 1st Governor'. About this time, Ngahua left McCaskill, who had apparently treated her badly. Whether the marital disagreement was a cause or a consequence of the land dispute is not clear. But at least one son by the marriage, Tangi, seems to have stayed with McCaskill. The Crown has commented:

Without the original deeds and the original participants we cannot at this point in time identify what caused the boundary issue to arise in this way; whether it was because of the breakdown in relationships, McCaskill misinterpreting the boundaries pointed out to him,

¹⁸⁰. Document AA1, p 53

¹⁸¹. Te Rangai, 'Statement of the Chiefs', 5 September 1866, OLC 1/287-291, vol 1, Archives NZ (doc 18, p 31). The phrase comes from Te Rangai's evidence in the land court in 1866.

or some other reason. However, Maori were very clear as to the solution – location of the boundary at Paiakau ridge.¹⁸²

There is substance in the Crown's suggestion. In 1851, McCaskill tried to clarify the extent of his rights by employing Drummond Hay to survey his south Hikutaia claim. As Dr Anderson has pointed out, such a move, coming a decade after the original transaction, revealed the ambiguities. Ngati Pu stopped the survey above the Kopua Stream towards Paiakarahi. Te Rangai stated in 1866, that when he saw Hay surveying there, 'I then thought that if I did not interfere he [McCaskill] would take that land the same as he did the site of the mill [on the Kopua]'. He later stated that Rangituia led the obstruction of the survey. However, Hay was allowed to complete the survey over the western part of McCaskill's south Hikutaia claim, found to contain 2176 acres.¹⁸³ Nor was there opposition in 1857 to McCaskill employing Hay to survey his north Hikutaia claim, found to contain 714 acres, in preparation for a hearing by Commissioner Bell.

But when McCaskill engaged James Campbell in 1858 to complete the interrupted survey of his south Hikutaia claim, there was immediate objection from Taraia Ngakuti and Tukukino of Ngati Tamatera, and indignation amongst Ngati Pu when they heard of the survey from Tukukino.¹⁸⁴

(3) *Bell's proceedings*

Bell came to Hikutaia to resolve the disputed boundaries in McCaskill's claims, both there and at Opukeko, convening his hearing on 3 February 1859. The first claim, Opukeko, produced many objections from Ngati Tamatera. Bell ruled that 'it was impossible for me to entertain the claims of those who were children at the time of the sale to Mr McCaskill, or who had failed to bring forward these objections in a valid manner before the investigating Commissioner in 1843'.¹⁸⁵ Because Rangituia had affirmed the sale of Hikutaia south before Commissioner Richmond, Bell's ruling meant that the adverse testimony of Te Rangai, a child in 1839, could not prevail against Richmond's award.

However, there is no evidence from the 1859 discussions, that Ngati Pu, or any other group, wished to overturn McCaskill's claims entirely. The right-owners appear to have come to an acceptance that McCaskill should have possession of a limited area in the European sense. The sprawling nature of the claims had upset them, with surveys coming long after the original transaction, and involving land where both the customary ownership and the boundary of the 1839 transaction were contested and unclear.

182. Document AA1, pp 53–54

183. Document J8, p 34

184. Ibid, p 35

185. Bell, report, 23 June 1862, OLC 287–91, Archives NZ

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Because McCaskill had no witnesses ready to affirm his claim to Opukeko in 1859, he asked Bell to adjourn the hearing. Paul Monin has cited Te Rangai's 1866 account of the exchange:

Te Rangai was asked his opinion on it but he entreated Bell to proceed to the inquiry of Hikutaia south, the real concern of Ngati Pu.

I left Kakaramea to on side (evaded that question) – and my talk went to the south side of Hikutaia – I said – ‘At Paiakau – and thence [north] to Te Tutu, is the boundary for McCaskill’. Mr Bell said ‘speak of that at another time, that is for another investigation’

And:

McCaskill was not satisfied, he asked for an adjournment until he could procure evidence in support of his claim from Ngati Karaua . . . We understood Bell was to come back to finish Kakaramea [north Hikutaia] – There was nothing further said about the land on the south side of the Hikutaia Stream . . . I, and everyone else supposed it was to be investigated when McCaskill produced the evidence from Ngatikaraua and Mr Bell returned to hold a court.¹⁸⁶

But Bell did not return to Hikutaia. Because of the war in Taranaki and the mounting tension between the Crown and the Kingitanga, which affected Hauraki, Bell decided to complete his investigation in Auckland. By his own account McCaskill ‘repeatedly’ saw Bell at his Auckland office. Bell also saw other Pakeha witnesses, including Drummond Hay. Hay presented Bell with a memo, dated 14 May 1862, to the effect that remaining Maori opposition to McCaskill’s principal claims ‘could be disposed of by payment of a certain sum . . . I imagine that if they were informed that the matter was to be finally disposed of and no further reference to it permitted they would be willing to accept a sum of money in preference to persisting [with] their claims.’¹⁸⁷ Bell seems to have been persuaded by this argument. Paying off dissentients was by now a well-established technique in Crown land purchases.

On 23 June 1862, Bell issued Crown grants to L A McCaskill of 2176 acres at Hikutaia south and 285 acres at Hikutaia north; and to A McCaskill of 238 acres at Hikutaia north. As the survey of the McCaskills’ north Hikutaia claim had not been interrupted in 1857 and there had been some discussion and agreement with Ngati Pu in 1859, there was some basis for these two relatively small awards (though later objections by a section of Ngati Pu make it doubtful whether all right-owners has been consulted in 1839 or subsequently). But the 2176-acre grant in south Hikutaia stretched eastward of the Paiakau Ridge (which Ngati Pu had wanted as a boundary), and its southern fringe was contested by Ngati Tamatera.

186. Testimony of Te Rangai, ‘Native Statements re Hikutaia’, 1866, OLC1/OLC287–291, Archives NZ (doc J8, p 39)

187. Hay to Bell, 14 May 1862, MA13/36, pt 4 (doc J8, p 40)

There had been no further consultation by Bell with Ngati Pu and other claimants between the 1859 hearing and the 1862 grants. Hikutaia Maori were not informed about the proceedings in Auckland, and were waiting in vain for Bell to return.

Crown counsel has consequently acknowledged that ‘the failure of Commissioner Bell to return to Hikutaia, or at least to afford Ngati Pu a further hearing following his receipt of Drummond Hay’s evidence was prejudicial to Maori. It was a failure of process and good faith.’¹⁸⁸

Following Bell’s 1862 awards, there were some discussions between officials, the McCaskills, and John Logan Campbell, whose claims eastward of Paiakarahi Stream intersected those of the McCaskills, but no evidence of formal negotiation with Ngati Pu and other Maori claimants. The McCaskills moved to Auckland when war broke out in 1863, leaving Lachlan McCaskill’s farm in the charge of Tangi, his son by Ngahuaia, his former Ngati Pu spouse. Paul Monin has interpreted this as meaning that ‘the land remained with the hapu.’¹⁸⁹ This is overstating the case, given that the farm had been worked by the McCaskills for two decades, that surveys of much of it had been completed in 1851 and 1857, that the north Hikutaia blocks had been the subject of discussion between Bell, the McCaskills and Maori right-owners in 1859, and that Te Rangai was apparently prepared to accept (both then and in discussion with James Mackay in 1866) that some land on either side of the Hikutaia should go to McCaskill. But local hapu certainly considered they had unextinguished rights, especially in south Hikutaia, east of the Paiakau Ridge.

The problem was therefore greatly exacerbated by Bell’s decision on 31 March 1864 to issue *further* grants in the disputed land: namely 1272 acres to Allan McCaskill, 1254 acres to Donald Martin in Hikutaia south, and 191 acres to Martin Martin in Hikutaia north. (These were the heirs of SMD Martin, the McCaskills’ original partner.) The grants were dated 15 December 1864, though the certificate for the 1272-acre block had not been delivered by mid-1865. Effectively, the McCaskills now had grants for 3971 acres at Hikutaia and the Martins 1445 acres (although the Martins’ grants had not been located on the ground).

(4) Subsequent investigations

The McCaskills’ rights under the law now became very confused with on-going Maori occupancy. Ngati Pu’s uncontested reoccupation of the granted land while the McCaskills were away emboldened them to invite some Waikato refugees to Hikutaia to dig kauri gum, on payment of £100. But on his return Lachlan McCaskill asserted what he believed were his legal rights. His actions included the blocking of traffic along the old Maori east-west and north-south trails.¹⁹⁰ James Mackay, the powerful Civil Commissioner appointed to Hauraki in 1863, intervened. He was struggling with enormous responsibilities in respect of

188. Document AA1, p 54

189. Document J8, p 41

190. James Mackay’s sketchmap of September 1866 (doc J8, p 43)

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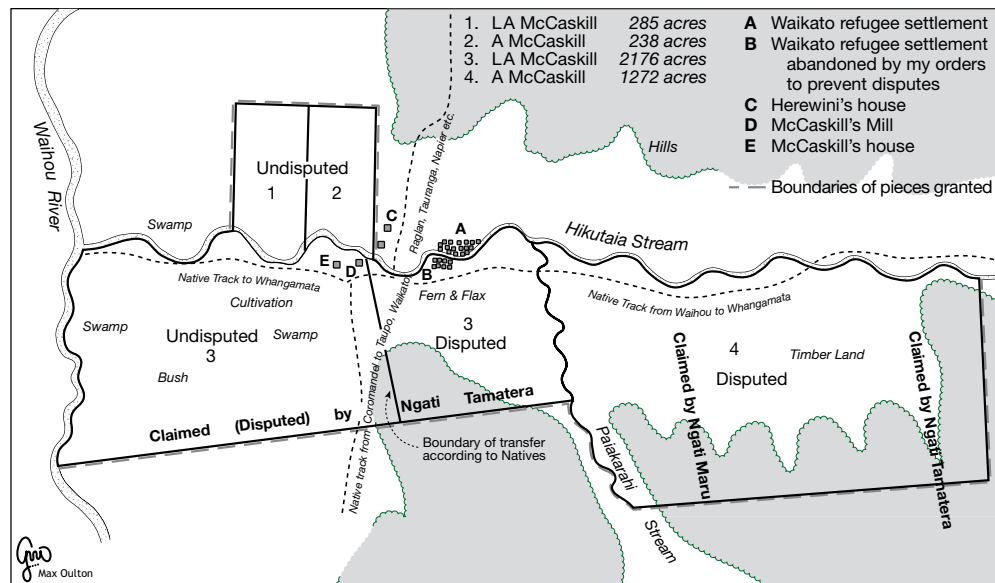


Figure 8: James Mackay's sketch plan of McCaskill awards, 1866 (redrawn)

newly discovered goldfields and endeavouring to maintain peace between the settlers and Hauraki adherents of the Kingitanga. Mackay's correspondence shows that he was troubled by Hay's 1862 advice to Bell that there was no serious Maori opposition to the McCaskill claims over the 1272-acre block in south Hikutaia. He sought official action to resolve the dispute, adding 'I fear an injustice has been done to the Natives', and offered to act on behalf of affected Maori, in the event of an arbitration.¹⁹¹ Mackay also advised Te Rangai to petition the General Assembly, which he did on 7 August 1866.

Mackay also met with Ngati Pu and Ngati Karaua on 5 September 1866. Ruihana Kawhero (Ngati Karaua), who had been present in 1839 when his father had pointed out the boundaries of the McCaskill purchase, explained that in his view the eastern boundary was the Paiakau Ridge, not the Kaiaroa (Kaiaroha) Ridge, as claimed by McCaskill. His father had simply named the latter landmark as it loomed through the mist, from where the party stood on the Paiakau Ridge. Te Rangai, Rangitui's son, also affirmed that the eastern boundary was the Paiakau.

Mackay's report and accompanying sketch-map, and the attached statements by Te Rangai and Ruihana Kawhero provide the best evidence available of what land Maori accepted, in 1866, that they had alienated. On Mackay's sketch Bell's two north Hikutaia grants (285 acres to Lachlan McCaskill and 238 acres to Allan McCaskill) were marked 'undisputed'; the 2176-acre grant to Lachlan McCaskill is marked 'undisputed' westward of the Paiakau Ridge but with the southern border disputed by Ngati Tamatera. The remainder of the granted land was marked 'disputed'.¹⁹²

191. Mackay, memorandum, July 1866; Mackay to Domett, 25 July 1866 (doc j8, p 47)

192. Document j8, p 43, map

Mathew Russell, a Tribunal researcher who has analysed the Hikutaia case, has pointed out that it is difficult to reconcile the Maori statements of 1866 with the boundaries in the reconstructed deed of sale (recorded from McCaskill's dictation at Richmond's 1843 inquiry and affirmed then by Rangituia Hauwhenua and others), which gives Kaiaroa as the eastern boundary.¹⁹³ But, as Mr Monin states, there was a possibility of 'grave misunderstanding' in the 1839 and 1843 discussions of boundaries. Their exercise of an on-going right of traverse along the traditional tracks across the McCaskill grants, shows that local hapu did not consider that all ancient rights within the land contained in the general boundaries had been relinquished.

Indeed, the whole case demonstrates a pattern very familiar in pre-1840 transactions: namely, that when Maori did grasp what Europeans meant by sale and purchase, they sought to redefine the arrangement, allowing the settler claim, but within narrower boundaries than those loosely described in the deeds, and with some specific reservations. That Hikutaia land was in contention amongst local hapu meant that the Maori negotiators in 1839 or 1843 may have been motivated to allow McCaskill some – though not exclusive – rights in the area in an effort to assert their mana.

There is no evidence that such matters were re-explored in 1843 or 1866. When the Assembly forwarded Te Rangai's petition to Domett, who had succeeded Bell in 1864 as Land Claims Commissioner, he advised that the Government had no power to overturn Bell's direction as it was the action of a judicial officer. Domett recommended that the second south Hikutaia grant of 1272 acres be delivered to the McCaskills, which was done in December 1867. Furthermore, Attorney-General James Prendergast ruled that the 1866 disclosures did not justify an action against McCaskill for perjury. There was no examination of Hay's advice to Bell in 1862 (about which Mackay had expressed serious reservations), nor Bell's failure to return to the Hikutaia to take further Maori evidence, nor McCaskill's failure to produce the Maori witnesses required by Bell when he adjourned the Hikutaia claims in 1859. Such was the rigidity of the Crown's procedures in 1866–67 that, as Mr Monin put it, 'Just as Bell had entrenched the findings of Richmond, Domett and Prendergast were now entrenching those of Bell', and an even greater onus of proof had been placed on Maori seeking to overturn the commissioners' awards.¹⁹⁴

The only legal recourse now available to Ngati Pu, Ngati Karaua, and others was an appeal to the Supreme Court, impracticable from want of funds. Instead, they responded with direct action. In 1868, Ngati Pu under Tamati Paetai moved onto the Hikutaia north grant (285 acres) at Kakarama. In an assertion of continued rights, they built houses, planted crops, and ran horses and pigs.

Several years of clashes followed, with McCaskill and Ngati Pu killing each others' stock. E W Puckey, who had succeeded Mackay as Civil Commissioner, became sympathetic to

193. Moore, Rigby, and Russell, pp 154–155

194. Document J8, p 50

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the Maori position, but was powerless to alter the McCaskills' grants. The situation culminated in Lachlan McCaskill seriously wounding Hoani Pahau on 1 June 1872, when confronted by some Ngati Pu who were seeking dogs that were worrying their pigs. After the ensuing trial by jury, McCaskill's swift acquittal on the grounds of self-defence was criticised by senior Native Department officers. It outraged Hauraki Maori, who had been trying (in vain it seemed to them) to cooperate with the law. A meeting of Ngati Pu asked that the McCaskill land be forfeited for Hoani Pahau's blood, and a large hui convened by WH Taipari at Shortland (Thames) urged that Lachlan McCaskill not be allowed to return to the district.¹⁹⁵

McCaskill's return was not prevented by Crown officials, but he did agree to a right of access along the traditional trails traversing the disputed land, and Donald McLean, now the Native Minister, sent H T Kemp to renew the investigation of the Hikutaia claims. Kemp, like Mackay and Puckey before him, developed considerable sympathy with the Maori position. Significantly, his report traced the root of the problem to the original transaction and, implicitly at least, to the limited 1843 investigations of it. '[O]wing probably to the imperfect translation afforded in those days by Europeans so employed', he wrote, 'a serious misconception has arisen between McCaskill and the Native sellers, as to the particular portions or holdings each section of the tribe was parting with to McCaskill'. Furthermore, since people of Ngati Pu had contested 'from a very early period' the blocks not sold (in their view), 'it would seem that the opinion expressed by W Drummond Hay as given in Mr Bell's Report has not been verified by the subsequent events which have taken place'.¹⁹⁶

Kemp recommended without effect that the Government buy out the McCaskills. Instead, they, indebted and pressed by their mortgagees, sold out in November 1872 to Henry Alley. Ngati Pu then contested Alley's occupation of the land, and Crown officials began efforts to satisfy their claims with limited monetary compensation. Ngati Pu declined, and Tamati Paetai and others petitioned the General Assembly in 1876, claiming that they had no knowledge of their parents' participation in the 1839 transactions and that their land, Kakaramaea, was thus taken without their authority. This petition, and the claims of the heirs of SMD Martin, finally led to a hearing before Judge Henry Halse of the Native Land Court in August 1879. Opportunistically, at this time Lachlan McCaskill claimed the 825-acre Kaiamanawa block on the grounds that it lay within the boundaries of his original purchase.

The court did not have the jurisdiction to overturn the Crown grants but Ngati Pu, Ngati Karaua, and Ngati Tamatera, as well as the settlers and officials involved, finally had an opportunity to put their arguments and evidence fully, as they had hoped to do before Bell in 1859. Halse's judgment seriously indicted the processes previously instituted by the Crown to review McCaskill's 1839 transaction:

195. Document J8, pp 49–57

196. Kemp to Pollen, 21 August 1872, MA13/36, Archives NZ (doc J8, p 58)

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LA McCaskill in evidence admits that the boundaries were not traversed, but simply pointed out by natives from elevated positions; that the names of the boundaries were finally put in the deed at his dictation; that he believes all the chiefs interested have not signed the deed; that many objections to his claim were made at Mr Comm Bell's Court held at Hikutaia; that the Court was adjourned owing to the opposition of the natives; that the original Maori deed was burnt along with the English version of it; that he did not think the original Maori deed was ever produced at any investigation; that he does not think Mr Comm Bell ever saw the English copy of the deed; that subsequent to the adjournment of the Court at Hikutaia, he asked Mr Comm Bell in Auckland to cause a Crown Grant to issue for 2,176 acres of land at Hikutaia and also another Crown Grant in the name of his relative, Allan McCaskill, for 1,272 acres of land, also at Hikutaia.

Evidence from the three objecting hapu indicated that the 'land sold by Kawhero' estimated to contain about 1100 acres, lay westward from the Paiakau Ridge. Halse said:

That the land outside of this was surveyed clandestinely by LA McCaskill during their absence . . .

That they attended a Court held by Mr Comm Bell at Hikutaia in February 1859 and strongly objected to LA McCaskill's claims.

That the Court was adjourned without any award being made.

That they never received notice of any other Commissioner's Court.

That LA McCaskill's claim to Hikutaia B [the two south Hukutaia blocks] was afterwards allowed in Auckland and a Crown Grant issued in his favour without further notice; and without their knowledge.

That this is their grievance, and their reason for offering continued opposition to the occupation to the inland portion of Hikutaia B by LA McCaskill or by Mr Alley.

That the piece of land called Kaiamanawa has never been sold, and is outside LA McCaskill's boundary line.

The above claim is the claim set up by the natives, and remarkably enough the deed under which LA McCaskill bases his original purchase from Kawhero November 1839 supports their statements.¹⁹⁷

This last statement by Halse is a reference to the fact that 1000 acres is stated in the text of the deed, though 8000 acres is mentioned in the margin of the version recorded in Turton's deeds. Halse declined to grant Kaimanawa to McCaskill, and awarded Angus Martin scrip for 1254 acres elsewhere in Auckland province in lieu of the land awarded him by Bell in 1864 but subsumed by McCaskill's awards.

Following the judgment (which could not overturn the grants), Tamati Paetai again

197. Hauraki minute book 12, fols 163–166 (doc J8, p 62)

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petitioned Parliament, claiming that Kakarama (north Hikutaia) had not been sold by his family. The Native Affairs Committee endorsed the action already undertaken by the Native Minister, namely the appointment of Frederick Whitaker to negotiate with Ngati Pu, and the order for a more definitive survey of the disputed land. The survey, undertaken by the Survey Department by May 1880, added further evidence that, at the very least, Bell's awards to the McCaskills had been based on highly misleading information. The department's report stated:

There is no doubt but that a large portion of the Survey for these Grants was made without the knowledge of the native owners and for the most part sketched in and that the plans on the Crown Grant do not represent the land intended to be granted. This has been conclusively proved by a survey made during the last few months . . . The discrepancies between the two surveys being so considerable as in some instances to extend to half a mile.¹⁹⁸

Because adjacent blocks had been surveyed and granted since the McCaskill awards there could be no going back to correct lines. The Crown was obliged to offer Ngati Pu other land elsewhere. Whitaker met with them on 7 and 9 October 1880 and Ngati Pu reluctantly agreed to accept some 360 acres of Crown land further up the valley, and to leave Kakarama to Henry Alley. The land was granted in two lots, one of 100 acres at Puketaratara as a reserve for the hapu, and 260 acres further up the northern side of the Hikutaia for 'the Paetai party'. A further grant of 50 acres was negotiated from 1891 to 1895 to resolve an ongoing boundary dispute between Ngati Pu and Henry Alley. All these lots were eventually sold by the heirs of the Maori grantees in the twentieth century.¹⁹⁹

It is not clear why Ngati Pu settled for such a small area, since the survey discrepancies alone could well have amounted to several hundred acres, leaving aside the question of Bell's anomalous award to McCaskill of some 3000 acres of disputed land. Nor is it clear why there was apparently no consideration given to the inclusion of Ngati Karaua and Ngati Tamatera in the compensation, although they too protested McCaskill's claims, on the ground in the 1850s, and before Bell in 1859, Mackay in 1866 and Halse in 1879.

(5) Conclusions

We come to the following conclusions:

- The Crown has made significant concessions regarding the McCaskill purchase:

The key issue is the failure to review the earlier transactions as Bell had agreed with the Maori protagonists . . . and it is submitted that the Tribunal should make findings accordingly, that the Crown breach occurred in the failure of Bell to fully reinvestigate

¹⁹⁸. Undated Survey Department memorandum for opinion of law officers, circa May 1880, MA13/36, Archives NZ (doc j8, p 67)

¹⁹⁹. Document j8, pp 63–68

the land claim, or to give the opportunity for Maori to respond to the new information provided to him . . . Although some land was returned to Ngati Pu in 1880 and 1895 in response to continuing protest, the Crown agrees that the compensation at this later stage was insufficient.

The Crown further suggests that the ‘breakdown in relationships’ between the McCaskills and local Maori is not good evidence of ‘a more fundamental difference in the transaction [*sic*]’ but rather that it arose because ‘the claim made by McCaskill was too large and it included areas which had not in fact been purchased’.²⁰⁰

- Given that Bell failed adequately to review the 1839 transaction it is virtually impossible to know exactly what Maori then intended. Certainly Halse’s 1879 inquiry casts very serious doubts upon Richmond and Godfrey’s investigations in 1843–44, given the loss by fire of the original deed, the commissioners’ reliance on a replacement dictated by McCaskill (the party with the strongest vested interest), and the discrepancy between the figure of 1000 acres mentioned in the text of the deed and the 8000 acres mentioned in figures in the margin. How Richmond and Godfrey could have awarded as much land as they did (and then Fitzgerald and FitzRoy enlarged upon it even beyond 8000 acres) is beyond understanding – unless Maori rights were being treated offhandedly. In the light of Halse’s findings, we accept the Ngati Pu claimants’ argument that the Crown’s concession ‘should not divert this Tribunal from also making an express finding that the Crown’s failure to inquire into and ascertain the true nature of the [1839] transaction was also a breach of the Treaty’.²⁰¹
- However, there is considerable evidence that the rangatira involved in 1839 did consider that they had alienated substantial rights to McCaskill, especially within the 1000 acres between the Waihou River and the Paiakau Ridge. In the course of the post-1840 inquiries, the Maori right-owners showed an acceptance that a limited area of land had passed to the settler, more or less in a European-style transaction. Given the testimony of Te Rangai to Bell in 1859 and of Te Rangai and Ruihana Kawhero to Mackay in 1866, that area was located around Kakarama in north Hikutaia (defined by Bell in the 1862 grants of 285 acres to Lachlan McCaskill and 238 acres to Allan McCaskill) and to the northwestern portion only of the Hikutaia south grant (about 700 acres) marked ‘undisputed’ on Mackay’s 1866 sketchmap. The rest of the McCaskill claim had either not been alienated by Maori at all, or at least substantial sections among the intersecting right-owners had not consented. It is in respect of those areas (some granted by Bell in the 2176-acre grant to Lachlan McCaskill in 1862 and some within Bell’s 1864 grant to Allan McCaskill) that the Crown owes further redress.

200. Document AA1, p 55

201. *Ibid*, p 3

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- The Crown refers in its closing submissions to ‘another Maori’ settling on Kakaramea after the failure of Te Rangai’s 1866 petition. We accept the Ngati Pu claimants’ identification of this man as Tamati Paetai, who (with others) had moved from Waiheke Island and occupied Kakaramea partly because he considered that his family’s interests had not been extinguished in the 1839 transaction or subsequently. To this extent we accept the Crown’s view that this was a bid to share in the payment for Hikutaia north, but the timing of Paetai’s move onto Kakaramea strongly suggests that it was also prompted by the Crown’s failure to afford Ngati Pu’s redress through formal legal channels, following Mackay’s intervention. Thus, Paetai was also keeping the basic Ngati Pu claim alive. But we do not believe that this late intervention by a previously non-resident group should be held to overturn the 1866 agreement of the resident Ngati Pu, led by Te Rangai, that the two north Hikutaia blocks should pass ‘undisputed’ to the McCaskills. The sequence of Ngati Pu protests had more to do with the ‘disputed’ land south of the Hikutaia.
- The Ngati Pu claimants have also drawn our attention to what they see as a ‘disturbing tendency’ to refer to problems with the McCaskill claims as disputes with Marutuahu or Ngati Maru. ‘They were not and are not disputes with either Marutuahu or Ngati Maru. As Monin’s report clearly demonstrates, the disputes were only with Ngati Pu.’²⁰² We do not accept this claim. Mr Monin’s report, including his summary of Mackay’s 1866 findings, shows that other hapu besides Ngati Pu were involved in the protests over south Hikutaia lands at least from 1851. The protestors then included Ngati Karaua (a hapu of Ngati Whanaunga) and Ngati Tamatera, the 1857 protestors included Tukukino and Taraia (both of Ngati Tamatera), and all these Marutuahu people made their claims known to Bell in 1859, Mackay in 1866, and Halse in 1879. From the late 1860s, it certainly appears that the most active protestors were Ngati Pu, buttressed by Tamati Paetai’s group. But many other Hauraki hapu and rangatira (including WH Taipari), supported them in protest over the shooting of Hoani Pahau in 1872. The fact that Ngati Pu alone were subsequently given limited compensation in land is difficult to explain, but probably owes much to Tamati Paetai’s determination and to the fact that when the Hikutaia–Whangamata blocks came before the land court in 1872 the previously intersecting interests of the various hapu were concentrated into discrete blocks, with Ngati Karaua and Ngati Tamatera taking their awards in the Whangamata blocks rather than the Hikutaia blocks.

202. Document AA11, p 4

3.10.2 The Piako claims

For the Piako claims, the claimants and the Crown rely on Mathew Russell's detailed study for the Tribunal's Rangahaua Whanui programme and Commissioner Bell's reports in the Cormack case file, cited by Dr Anderson.²⁰³ Webster claimed to have purchased an estimated 80,000 acres on the Piako's west bank on 31 December 1839 for £1176. Godfrey and Richmond found that a valid purchase had been made, but regretted – because the derivative purchasers from Webster had invested heavily – that they could recommend only the 2560-acre maximum allowed by the 1841 ordinance. FitzRoy referred the claim to Commissioner Fitzgerald, who awarded the derivative claimants a total of 17,655 acres, 12,674 of which fell within the Piako area. Mathew Russell concluded that, in attempting to satisfy the derivative claimants, the Crown officials had overlooked the vagueness of Webster's own estimates of price paid and acreage purchased, and shows that full Maori consent had not been obtained.²⁰⁴ Drawing on his report, Dr Anderson has commented:

The problems with the award were subsequently revealed on survey; it being found that Maori acknowledged the alienation of only 7,500 acres of the 18,000 eventually marked off. When Drummond Hay was instructed by the Government to survey the Webster claim at Piako in 1857, he found that Maori completely rejected the boundaries claimed and argued that they had not received full payment. In these circumstances, he was obliged to renegotiate the purchase of a portion of the claim on behalf of a Government anxious to make some progress in land acquisition in that region.²⁰⁵

WE Cormack's claims on the Piako River were also strongly disputed. Commissioner Godfrey considered that Cormack had proved purchases on both sides of the river and recommended the award maximum of 2560 acres. But because Maori protested that they had not intended any alienation of the east bank Godfrey recommended that the boundary on that side be pointed out to them before any grant was issued. Lands of the chief, Takapu were expressly excluded. In the event, no grant was issued and when George Graham, a derivative purchaser from Cormack, attempted to survey the land in the 1850s, he found Maori in occupation. Bell later found that Graham's survey lines did not conform with Cormack's claim and also intersected the claims of Webster and the Crown. Despite the confusion, Bell accepted that some purchase by Cormack had occurred and in 1861 proposed that the Government show the Maori owners the papers in Godfrey's award and put Graham in possession of unsurveyed land on the west bank, within Cormack's claim area. This course of action placed heavy reliance on the deed and the 1843 investigation.

²⁰³. OLC 1/143, vols 1, 2, Archives NZ

²⁰⁴. Moore, Rigby, and Russell, pp105–109

²⁰⁵. Document A8, vol 4, p 60

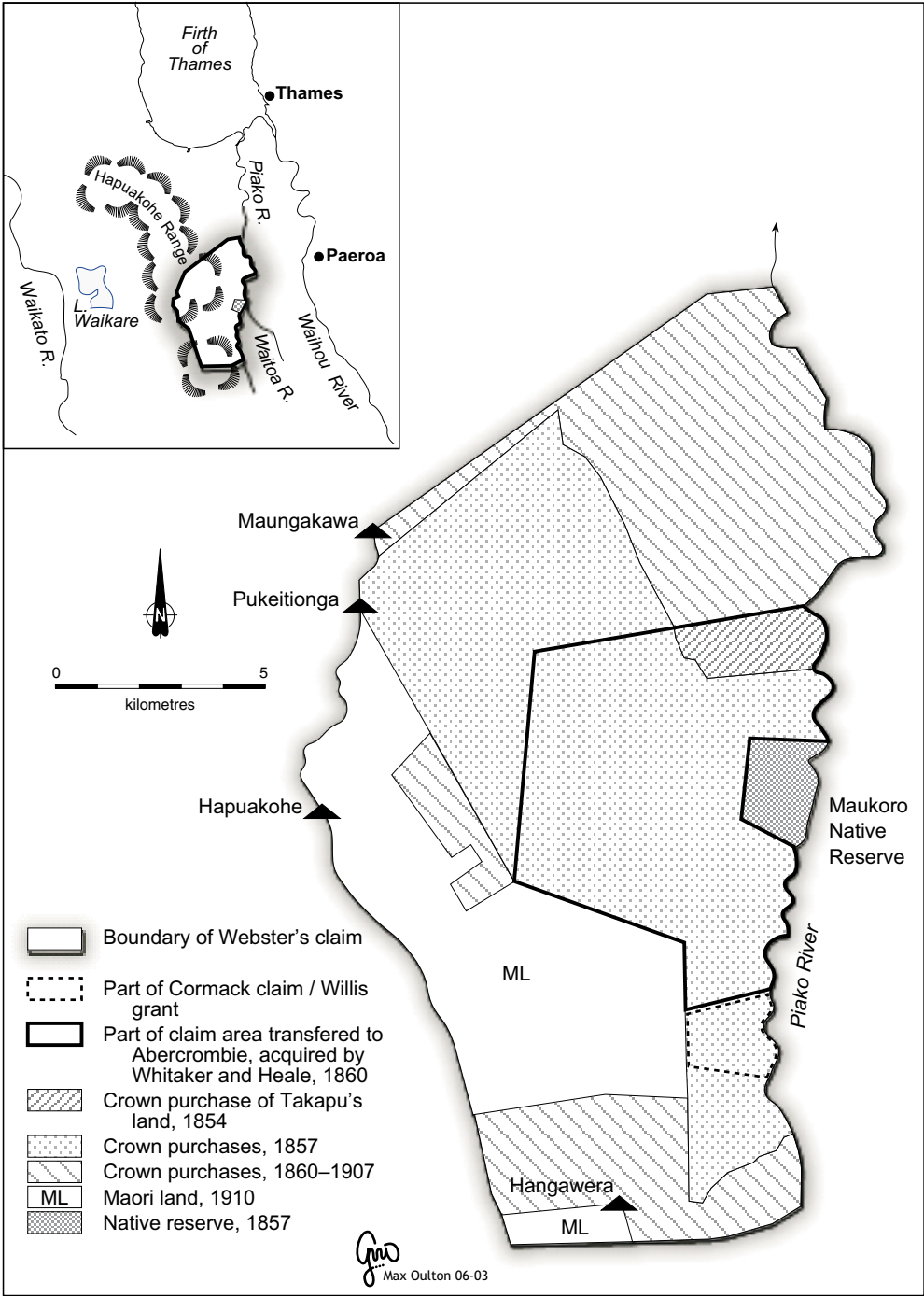


Figure 9: Webster's Piako claim

Bell reported in 1864 that Maori right-owners ‘openly admitted’ that they had received payment from Cormack and Webster for Piako lands but persistently disputed the boundaries. The Crown itself, unusually, surveyed the claims in an effort to find land to meet the awards under FitzRoy and perhaps to secure a surplus. ‘[E]ventually the Government accepted a cession of the unextinguished native title in both these claims [Webster’s and Cormack’s], within boundaries very much smaller in extent than was named in the original deeds.’²⁰⁶ Maori in fact agreed that 7500 acres had been alienated, far less than the 12,000 acres that the Crown had awarded to settlers and only a fraction of Webster’s bombastic claims. Because much of the granted land had been unsold, the province of Auckland, the recipient of Crown lands since 1853, had been obliged to pay large sums to Maori vendors to perfect the titles. The Crown also embarked upon new purchases on the Piako, incomplete until the 1880s (see ch 4).

The evidence (including Bell’s findings) shows that the pre-Treaty Piako ‘purchases’ ‘fell well short of standards of informed [Maori] consent’ as Dr Anderson puts it, and the awards both of the first commissioners and of Fitzgerald and FitzRoy, made without survey, were irresponsibly generous. In the face of strong Maori opposition, the Crown had to make substantial additional payments to perfect its titles even to the 7500 acres within the Webster–Cormack claims. Its own poor processes had thus landed the Crown with the obligation to renegotiate the purchase, despite its notion that a sale of some land had occurred in 1839 (see ch 4).

Dr Anderson has further remarked that ‘Bell’s comments suggest that the early transactions and findings of the first Commission were used as a bargaining tactic in the acquisition of land for settlement up the Waihou valley’. Dr Belgrave, in turn, suggests that there is an ‘ongoing question of what pressure was put on Maori owners to engage in subsequent sales’ to the Crown.²⁰⁷ But Bell’s report notes that the Land Purchase Department was ‘constantly pressed by the Piako natives to make purchases there’, and we accept the Crown’s view that the evidence does not clearly support a case ‘for Crown officials making any improper use of an earlier claim by a land claimant to coerce Maori into the purchase.’²⁰⁸ The evidence, such as it is, indicates competition amongst intersecting customary right-owners to sell their interests.

3.10.3 The Cleghorn–Goodfellow purchase (East Wairoa)

This purchase has been discussed in detail in section 3.7.4(3). Although we have some doubts about the adequacy of the investigation of the purchase by Commissioner Matson in 1847–48, the available evidence does not clearly establish that the principal Maori owners (Ngai

206. Bell, report, 31 March 1864; Cormack case file OLC 1/143, vol 2, Archives NZ (doc A8, p 61)

207. Document A8, p 61; doc v1, p 95

208. Document AA1, p 51

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Tai) felt aggrieved by it at the time or were materially prejudiced by the purchase in 1844 or the Crown's later acquisition of it as surplus land. The issue is closely linked to whether adequate reserves were made in the Fairburn purchase on the other side of the river, where it was assumed, in 1844 at least, that substantial reserves would be made for Ngai Tai. We recommend strongly that the Tribunal investigating that purchase also have regard to our discussion of the Cleghorn–Goodfellow purchase.

3.10.4 The gulf islands

(1) *Te Matuku (Waiheke)*

The Crown has accepted, from Mr Monin's evidence, that there is a significant problem with regard to the 1839 purchase at Te Matuku by W T Fairburn and Henry Tayler, mainly from Ngati Paoa chiefs. Maori witnesses before Godfrey and Richmond acknowledged the transaction and Tayler was awarded 300 acres in 1844. Subsequently, Bell increased the grant to 578 acres, almost double the area the Maori vendors had agreed to sell.²⁰⁹ The additional land was 'probably' taken from Crown surplus, but Crown counsel states 'The Crown acknowledges the failure in this investigation to ascertain the intentions of the parties.'²¹⁰ The Myers commission of 1948 awarded compensation for the discrepancy between the 1844 award and Bell's grant.

(2) *Other Waiheke purchases*

The discussion above in sections 2.2.4 and 3.7.4 shows that, as a result of movements of the Hauraki tribes from 1820 to 1840, the customary right-owning situation on Waiheke was complex. There were also complexities in the intersecting pre-1840 and pre-emption waiver purchases, despite efforts by the Protectors of Aborigines to resolve the issues by discussion with the leading chiefs. It is likely that the Ngati Paoa chiefs (active in initiating transactions) were somewhat favoured, relative to Ngai Tai and Ngati Maru. But the most serious outstanding grievances appear to have been substantially resolved following the Crown's purchases of eastern Waiheke, after which Thomas Maxwell's children were granted land and Ngati Maru were eventually paid for their interests.

(3) *Pakihi, Karamuramu, Pakatoa, and Rotoroa*

The complex customary right-owning and purchase history of Pakihi, Karamuramu, Pakatoa, and Rotoroa Islands has been discussed in section 3.7.4. It is possible that, here too, Ngati Paoa were favoured by the Crown to the disadvantage of Ngai Tai. But given the greater prominence of Ngati Paoa after the return from Waikato, the close inter-connections of the two groups and the distance of time from the events, we cannot now be certain of that.

209. Document c5, p 40

210. Document AA1, pp 49–50

3.11 OVERVIEW ASSESSMENT

In addition to findings on specific matters above, we make the following overall assessment of the Crown's handling of old land claims and pre-emption waiver purchases.

3.11.1 The adequacy of the Crown's inquiries**(1) *The nature of land transactions***

We have discussed in detail the Crown's handling of the old land claims and waiver purchases in terms of Treaty principles. In the light of the different circumstances of Hauraki, we take a modified view of these transactions from that of the Muriwhenua Tribunal for their district.²¹¹ On the basis of both claimant and Crown evidence, we consider that some of the pre-1840 and pre-emption waiver transactions in Hauraki did not take place in a wholly customary environment but one in which more modern concepts of commodity trade and entrepreneurship had some influence. By the late 1830s, there was an increase in entrepreneurial transactions, in which the rangatira involved did not necessarily expect to retain over-arching control. This trend was facilitated by the fact that in parts of Hauraki many hapu were in process of occupying or reoccupying land after their sojourn in Waikato, in modified settlement patterns in competition with one another. The evidence suggests a tendency to deal with Pakeha who were perceived as wealthy and powerful, making allies of them rather than mokai. Land transactions became a steady source of revenue, and some chiefs may have disregarded reciprocal customs. The frequency with which the signatures of Te Ruinga, Wi Hoete and Ngatai occur on Hauraki deeds is noteworthy. Eventually their willingness to trade in land where Ngati Paoa did not have exclusive or even dominant rights evoked a powerful reaction from other Hauraki Maori.

In these more commercial transactions, it is not clear that vendor chiefs had bound all the Pakeha entrepreneurs into their communities and would or could have evicted them for non-fulfilment of unwritten expectations. Challenges were more likely to come from other Maori right-owners who had not been consulted in the initial transaction, but their action commonly took the form of demands for payments, or reduction of the area transacted, rather than total repudiation or eviction of the Pakeha concerned. However, the willingness of transactors to continue to protect some of the transacted lands from other Maori suggests a continuation of customary attitudes.

Given these mixed attitudes, we accept the view (shared by claimant and Crown witnesses) that a sharp dichotomy between a classic 'tuku whenua' model and 'sale' in the European sense is not an adequate framework for analysing pre-Treaty transactions in Hauraki. We concur with the view expressed by Dr Belgrave, among others, that Maori alienors could well have intended to convey substantial and perhaps permanent rights to

211. Waitangi Tribunal, *Muriwhenua Land Report*, pp 122–129, 167–179

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Pakeha purchasers. But we are by no means persuaded that the rangatira and hapu concerned intended to relinquish *all* their interests in or connections with the land.

(2) *The first commission's inquiries*

We consider that the inquiries undertaken by the first Land Claims Commission were inadequate in many cases to afford the protection assured Maori in the Treaty and in public statements by officials in the early 1840s. As the Muriwhenua Tribunal has stated, an adequate investigation would need to have established certain fundamental matters, namely:

had the alienors sufficient right and title? was a sale in fact intended? would a sale be in breach of any trusts? had the affected hapu sufficient other lands . . . ? were the transactions otherwise contrary to the interests of the Maori alienors? was the consideration adequate? and had matters been honestly put without fraud or unfair inducement?²¹²

On the evidence presented, the investigations by the first Land Claims Commission were not thorough enough to establish these matters. Detailed evidence has not been put before us on every old land claim and pre-emption waiver purchase in Hauraki. But research submitted in earlier inquiries, and in the Rangahaua Whanui research programme, together with the detailed information on the McCaskill claims and on the Piako claims of Webster and Cormack in this inquiry, casts serious doubt on the adequacy of the investigation by the first Land Claims Commission, that of Godfrey and Richmond. These men were generally conscientious, and respectful of Maori denials that sales had occurred where the Maori witnesses were unanimous to that effect or nearly so.²¹³ But Governor Gipps had instructed that where two or more leading chiefs affirmed a sale, that was sufficient proof of a conveyance. In 1849, Attorney-General Swainson expressed his concern that the Land Claims Ordinances did not explicitly require an investigation that would establish customary ownership. In spite of evidence of dissent, the commissioners commonly made adjustments of boundaries and recommended additional payments while still concluding that a valid sale had occurred.

Neither of the two commissioners seem to have grasped the complexities of Maori customary tenure, including the extent to which the rights of several hapu commonly intersected in the same land. In a sense, those complexities were only being discovered in the commissioners' courts themselves. We agree with the Muriwhenua Tribunal and with the claimants that the Richmond–Godfrey inquiries were too limited, were overly dependent on Maori right-owners knowing of hearings, and knowing how to come forward and make objections in ways that the commissioners would respect. There is evidence that some

212. Waitangi Tribunal, *Muriwhenua Land Report*, p 126

213. In closing submissions, Crown counsel cites the reduction of Webster's claim to Ahuahu (Mercury Island) as a case in point: doc AA1, p 49.

right-owners were not consulted in early transactions. In 1844 and 1845, officials such as Commissioner Godfrey himself and chief protector George Clarke acknowledged the limitations of the Land Commissioners' inquiries. Crown grants based on their findings, without additional checks including surveys, were thus on shaky foundations. Their dubious quality was exacerbated by the enlarged awards under FitzRoy. In 1844 and 1845, officials called for further checks on transactions – in the form of an uninterrupted survey of the land and a certificate from a protector before Crown grants were issued – but FitzRoy issued grants without these checks.

(3) *Want of survey or boundary marking*

From the number of subsequent challenges listed by Dr Anderson, it is clear that a mere recital of place names and a sketch-plan on a deed did not adequately define for interested Maori groups exactly which land was being transferred, whatever some individuals may have affirmed in Richmond and Godfrey's commission.

We appreciate that the Crown had limited staffing and funds, and needed to resolve claims promptly, especially where the settlers were already on the ground and starting to develop the land. It is also fair to note that full survey of the land prior to a grant would probably have been impracticable in many cases, since it was very expensive, with the cost likely in many cases to exceed the value of the land. We therefore agree with Crown counsel that proper boundary marking would have sufficed in many cases.²¹⁴ Meetings on the land and a public traversing of the boundaries, accompanied by physical boundary marking at key points, by rangatira of the various hapu with interests in the land, together with the would-be purchaser, a protector, and a qualified interpreter, would have been practicable in and around Auckland and Hauraki. This approach was taken, with good effect, where the rights of several hapu intersected in Remuera–Mount St John, and in the Otakou purchase in 1844–45. It would not have occasioned serious delays for settlers, and it would have greatly clarified the extent and nature of the rights that Maori were prepared to convey, to the mutual benefit of all concerned.

The issuance of Crown grants without such action damaged Maori interests at Hikutaia, the Piako and elsewhere in Hauraki. FitzRoy considered that he was granting a provisional title, subject to survey, when he stated (in response to expressions of concern by officials) that he was aware that the Crown could not grant what it did not possess, and that only eventual survey would eventually disclose the actual limits of his grants on paper. But by issuing grants for a recommended number of acres he misled purchasers, and emboldened them to consider that they held title to much larger areas than Maori recognised as alienated.

²¹⁴. Document AA1, p 47

(4) *Bell's commission*

Much responsibility for the difficulties in Hauraki must be attributed to Commissioners Bell and Domett, and to the Land Claims Settlement Act 1856 and its 1858 amendment under which they worked. Some reinvestigation was necessary, because the situation was very confused after the first Land Claims Commission, the FitzRoy–Fitzgerald awards, and the spate of purchases under FitzRoy's waiver of Crown pre-emption. In many cases, the settlers had remained on the land, without definitive survey of their boundaries. The failure of Grey's Quieting Titles Ordinance added further delay and confusion, and to a fresh wave of protests by a younger generation of Maori when the land was eventually surveyed.

As we have noted, the 1856 Act contained a built-in incentive for settler claimants to survey the land and lodge claims to the maximum Maori would accept, by providing for an increase in the Crown grant proportionate to the area surveyed. In the last resort, the justice and equity of the process depended upon how thoroughly Bell's investigation disclosed Maori intentions in the original transactions: whether or not they intended to sell, and if so, what extent of land. But Bell failed to complete some of the most important investigations, for example, that in Hikutaia, discussed above in section 3.10.1. We note that Bell did not allow later Maori challenges to 'sales' (as they were always considered) that had been affirmed by Maori and were the subject of awards in previous commissions. He was prepared to recommend additional payments, or to modify a boundary, but not to rule that a transaction was void on the basis that not all owners had consented. The Hikutaia, Piako and other investigations, discussed above, exemplify the limitations inherent in Bell's commission.

(5) *The cumulative impact of the protracted inquiries*

By treating all bona fide transactions as sales the Crown's procedures took affected hapu firmly down the track of absolute alienation. Maori generally did not wish to repudiate the transactions altogether, and were therefore prone to 'affirm the sale' before the commissioners and argue for more sharply defined or narrowed boundaries, and for additional payments. Moreover, once one section of customary right-owners – via two or three rangatira – had affirmed a transaction, others (including the hapu of the affirming rangatira, and members of other hapu who may not previously have participated) were caught up in it. Years later would follow survey of the land and hearings by other commissioners. By this incremental process, often extending over two decades, considerable areas of land came to be sold absolutely. It is by no means clear, however, that Maori right-owners had intended an absolute alienation of the land in their pre-1840 transactions.

(6) *Adequacy of consideration*

Adequacy of consideration does not seem to have seriously questioned by the Land Claims Commission. Some of the payments were, using Clarke's term, 'paltry' for the valuable

sites involved, the Maori transactors being mainly interested in having a Pakeha trader and employer established among them. While they might be regarded as taking a normal commercial risk in making such bargains – including the risk that the anticipated trade might not develop – the obligations of protection accepted by the Crown, in our view, include some protection of inexperienced Maori from full exposure to commercial risk-taking in land transactions. If the Land Claims Commission was not going to examine land purchase prices closely, to ensure that realistic commercial prices were being paid, there is an implication that the Crown should have ensured that the real value Maori alienors received would be to participate in the general economic benefits of colonisation. This they mostly did while the timber trade and trade with the growing town at Auckland flourished. For how long and to what extent an obligation lay upon the Crown to ensure *continued* Maori prosperity is a more complex matter we consider further in relation to Crown purchasing and continued land alienation.

3.11.2 The extent of prejudicial effect

Notwithstanding the defects in the Crown's proceedings, it is evident that in many cases substantial agreement was obtained along the way with many of the customary owners. Dr Anderson's research shows that many disputes were resolved quickly by adjustment of boundaries or additional payments. We cannot know whether the absence of further protest indicated complete satisfaction among affected Maori. In many cases, their acceptance was probably pragmatic, aimed at getting the best possible terms from settlers and officials and ensuring that their hapu rather than rivals garnered the benefits of the transactions. The situation in Hauraki was different from that in Muriwhenua, for example, in that much smaller areas were generally involved and the settlers concerned usually did occupy them. For these reasons the prejudicial effect of old land claims and pre-emption waiver purchases was considerably less in Hauraki.

Within the Hauraki inquiry district proper, some 42,000 acres of old land claims and about 3400 acres of waiver purchases were eventually awarded to settlers. By Dr Anderson's figures, the Crown claimed about 4610 acres as surplus lands, plus the 1142-acre Cleghorn–Goodfellow purchase, although these figures have to be treated with some caution for the reasons given earlier. The total in all three categories amounts to approximately 51,000 acres. This is about 3.5 per cent of the total land area of the inquiry district, going by the total land area of the district (about 1.5 or 1.6 million acres), as estimated by the claimants' expert witnesses (see sec 18.6). An indeterminate area in Piako and eastern Waiheke was overlaid by subsequent Crown purchases.

Claimants have not argued that, of itself, the loss of this land necessarily caused serious injury. Initially, at least, there were considerable gains made from installing Pakeha traders and employers in the region. The prejudicial effects were localised, as in the loss of

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needed land on Waiheke (especially by Te Urikaraka hapu of Ngati Paoa), and the disputes of Hikutaia hapu with McCaskill and amongst themselves, preventing them from continuing to work in partnership with him or developing the land themselves.

We would observe again, however, that the impact of old land claims and waiver purchases on Hauraki iwi must be seen in the context of alienations of very large areas across the border of the Hauraki inquiry district – notably the Fairburn purchase and purchases on Great Barrier Island and the Mahurangi coast.

We have also noted that, for all their shortcomings, the first land claims commissions instituted in 1840–41 resulted in the lapse or disallowance of claims amounting to hundreds of thousands of acres. These claims were clearly unrealistic, with vague and overlapping boundaries. Europeans would have been at odds with each other as well as with Maori had they attempted to assert possession. But to its credit, and against very strong settler pressure, the Crown did provide a due process which ensured the peaceful resolution of most of the early problems within Hauraki. Most land claimed as pre-Treaty purchases remained (for the meantime) within Maori customary tenure.

As we note in the chapter following, the alienations resulting from old land claims and waiver purchases did not prevent further offers of land by Hauraki Maori to the Crown in the 1850s. But this fact has to be interpreted carefully. First, outcomes from the Bell commission did not become apparent until the late 1850s or early 1860s, so the various kinds of alienation were contemporaneous. Secondly, the cumulative effect of old land claims, waiver purchases and sales to the Crown raised increasing concern among Hauraki Maori and led to growing support for the Kingitanga by sections of some hapu: there was a gradual realisation that the on-going transactions of their rangatira with Pakeha were weakening their land base and social order, and had to be checked.

3.11.3 ‘Surplus land’

As discussed ‘surplus land’ was land considered by officials to have passed from Maori hands by virtue of a pre-1840 or pre-emption waiver transaction but retained by the Crown rather than awarded to the original purchasers. In Muriwhenua, where such takings were very serious, the Waitangi Tribunal found that the practice breached Treaty principles.

The issue is significant in Hauraki too, though to a much lesser extent. Dr Anderson has estimated that 100,000 acres of ‘surplus’ land were retained by the Crown in *greater* Hauraki, including 18,082 acres on Great Barrier Island and 75,415 acres in the Fairburn purchase. In the Hauraki inquiry district proper, over 5900 acres of surplus in all were taken, including 2123 acres on Waiheke, 1173 acres on Whanganui Island, 815 acres at Coromandel and Cape Colville, and 1142 at East Wairoa.²¹⁵

215. Land Claims Commission, ‘Report of the Land Claims Commissioner’, 8 July 1862 AJHR, 1862, D-10, pp 1–23 (doc A8, p 63)

The Muriwhenua Tribunal has discussed the Treaty issues involved in the surplus land question in considerable detail and again we do not see any need to repeat their arguments. In the main, we agree with that Tribunal's view that the matter was dealt with by successive governments 'in an inconsistent, obscure and irresolute manner'. The root of the policy was implicit in the Crown's assumptions that the establishment of its sovereignty in New Zealand would introduce the doctrine of tenure, with radical title being held by the Crown. In the Treaty debate, Hobson emphasised that the acquisition of sovereignty was essential to control Pakeha land purchasers, but not that the Crown expected to acquire some of the land held to have been validly sold by Maori. On the contrary, his statements that land 'unjustly' acquired would revert to Maori (though in fact referring to a different category of land) undoubtedly gave the impression that the Crown would cause land validly purchased but not granted to the settler concerned to be returned rather than that the Crown would acquire it. FitzRoy, aware by 1843 of Maori resentment about the Crown's control of the 'surplus', stated explicitly to Maori that the Crown would not retain it (see sec 3.7.2). But FitzRoy also noted in official correspondence that Maori had not 'comprehend[ed]' the Crown's 'strictly legal view' of the matter (that the effect of private settler purchases had been to extinguish native title and leave radical title with the Crown).²¹⁶

FitzRoy did not act consistently with his public statement to Maori. On the contrary, where the Land Claims Commissioners concluded that a valid purchase had been made he increased the awards to some settlers, well beyond the 2560-acre maximum allowed by the Land Claims Ordinances. Moreover, this was done not only in respect of the original purchaser (as in the case of McCaskill's claims at Hikutaia) but also for derivative purchasers (such as persons claiming to have purchased from Webster in Piako). In our view, having regard to FitzRoy's public assurances to assembled chiefs in 1844, the Crown was not acting in good faith towards Maori.

Under Grey, and following Commissioner Matson's inquiries, much of the land deemed to have been validly purchased from Maori (either by pre-1840 transactions or waiver purchases) but not awarded to settler claimants, was not returned to Maori but lay in somewhat obscure legal status. Then, after a decade of confusion, the Land Claims Settlement Act of 1856 vigorously reintroduced the Crown's goal of acquiring surplus land. As we have seen, Bell concluded that the large amount of land in that category was available either to increase the grants of original settler claimants, to grant to other settlers or to use for public purposes.

Counsel for the Crown has noted that some Maori complaint before Bell, 'was motivated by complaint about the surplus lands policy', and that the policy and its application have been criticised by the Wai 100 and other groups of claimants. Crown counsel continues:

216. FitzRoy to Stanley, 15 October 1844, 12 June 1845, BPP, vol 4, pp 408–409

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The reason for protest in many cases was the assumption that where the Crown retained [the] surplus it had not been equitably purchased from Maori. As can be seen from the analysis of the policy this was not the case. It must be remembered that in the Hauraki inquiry district many cases of surplus land taken by the Crown were not subject to protest, or the Crown did not retain [the] surplus, or the Crown later reallocated land to Maori out of the surplus.²¹⁷

No breakdown or specification of these various categories is provided, but we accept the general proposition that the impact of the surplus lands policy was mitigated in many of the transactions in the Hauraki inquiry district proper.

The essential justice of the surplus lands question hinges upon the nature of the original transactions, as understood by Maori: whether the land was purchased, not only 'equitably', as Crown counsel puts it, but completely, extinguishing all customary rights. If Maori had seen themselves as relinquishing all former interests in the land by signing deeds of sale and accepting payment, then in theory it should not have been of any great moment to them what Pakeha purchasers did with the land, or whether the Crown asserted its claim to radical title in the interests of fostering orderly settlement or for general public purposes. As discussed above, however, that *cannot* be assumed to be the case. The investigations sparked protest in many cases. It seems that Maori were some time in coming to the realisation that, as a result of their transactions, they had no further right or title in the land, and no formal relationship with the Pakeha who occupied it. The protracted way in which the Crown itself dealt with the pre-1840 transactions and waiver purchases was itself conducive to the Maori perception that they still held rights in the land: it was usually not until the 1850s or even later, that the land was surveyed and the Crown took its surplus.

Detailed evidence is not available for most of the purchases in the Hauraki inquiry district, except in the case of McCaskill's claims at Hikutaia and the Piako lands (see secs 3.10.1, 3.10.2). On Waiheke Island, there are also indications of unresolved Maori claims over two waiver purchases at Putiki (see sec 3.9.2).²¹⁸ Apart from unresolved issues with regard to specific purchases, it is also of concern to us that the Crown's taking of the surplus did not result in benefits directed specifically towards the former Maori owners. This failure was in spite of the concept being raised in Janaury 1841 by Lord John Russell, Secretary of State for Colonies. He instructed Hobson:

As often as any sale shall hereafter be effected in the colony of lands acquired by purchase from the aborigines, there must be carried to the credit of the department of the protector of aborigines a sum amounting to not less than 15 nor more than 20 per cent in the purchase-money, which sum will constitute a fund for defraying the charge of the protector's

217. Document AA1, p 48

218. Document C5, pp 51–54

establishment, and for defraying all other charges which, on the recommendation of the protector, the governor and executive council may have authorized for promoting the health, civilization, education and spiritual care of the natives.²¹⁹

This concept also underlay FitzRoy's proposal to reserve one-tenth of each pre-emption waiver purchase, mainly to provide for Maori needs. No specific fund was created to give effect to Russell's instructions and the cost of administration generally (including the Protectorate of Aborigines) absorbed any profits the Crown derived from on-selling land purchased from Maori. Grey, well aware of the unpopularity of the Protectorate among settlers, and hostile to the influence of CMS missionaries such as George Clarke, abolished the Protectorate in 1846–47. Grey claimed that direct spending on education for Maori and provision of agricultural equipment and other technical assistance would be of more benefit to them. Certainly the flour mills, boats and other assistance he provided were important. No doubt, too, the hostelry he built for Maori visiting Auckland was used by Hauraki Maori while trading with the capital. Moreover, they benefited, along with all citizens of the region, from the installation of public infrastructure such as roads, wharves, navigation beacons, and the like, and sometimes from the public hospital. But the want of an arm of government with specific funding to cater for Maori needs was to be strongly felt after Grey's departure.

3.11.4 Attempted redress: the Myers commission

A sense of grievance lingered among Maori over the old land claims, pre-emption waiver purchases and the surplus lands policy issue. Prior to the passing of the Treaty of Waitangi Act 1975, the most serious attempt to address Maori petitions and grievances arising about these matters was the Myers commission of 1948. In Muriwhenua, the Waitangi Tribunal has discussed this in detail.²²⁰ It has noted that the commission proceeded on relatively limited information and did not go behind the awards of Godfrey, Richmond and Bell, on the grounds that in 1948 they were so far removed in time from that period that they could make no better appraisal of the purchases. Nor did the commission examine pre-1840 purchases which were overlaid by subsequent Crown purchases. The Myers commission therefore did not recommend compensation for all the land acquired by the Crown as surplus. It concluded only that Maori had a claim in equity and good conscience to the discrepancy between the acreages estimated, and paid for, in the initial purchases and the acreages found on survey to have actually been included in the transactions.²²¹ The Government agreed to pay compensation for this area, calculated as 20,106 acres, at the rate of 14 shillings an acre, plus a solatium – a total of £47,150. The largest part of this payment related to surplus lands

219. Russell to Hobson, 28 January 1841, BPP, 1841, cmmd 311, pp 51–52

220. Waitangi Tribunal, *Muriwhenua Land Report*, pp 346–349

221. 'Report of Royal Commission to Enquire . . . Surplus Lands of the Crown', AJHR, 1948, G-8, pp 64–65

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in Northland. From her examination of the Myers commission files, Dr Anderson found that, of the approximately 4610 acres of surplus land acquired by the Crown in the Hauraki inquiry area proper, only very small areas were considered by the commission to warrant compensation, namely 48 acres of Beeson's claim (derived from Webster) on Whanganui Island, 22 acres of Prout's claim at Coromandel Harbour, 563 acres from Taylor (Tayler?) and Fairburn's claim on Waiheke – a mere 633 acres – plus 6705 acres on Great Barrier.²²² Dr Anderson has calculated that just over £5350 would have been paid to settle the Hauraki claims, under section 28 of the Native Purposes Act 1953. The Maori Land Court was to decide on the precise distribution, on application by the Maori Trustee. In 1957, a land court order appointed a 'Ngati Maru welfare trust' committee to make recommendations on the use of the money for social and economic advancement of Maori in the Hauraki region.²²³ Further details are not available.

The Wai 100 claimants have noted Dr Anderson's findings and added 'While it is hard at this stage to comment on the level of quantum paid, on the face of it there are a number of surplus transactions that were not covered and must now be accounted for by the Crown.'²²⁴ The claimants appear to be suggesting (as did the Muriwhenua Tribunal) that the basis of compensation adopted by the Myers commission was incorrect, and that *all* surplus land should be compensated for. The Wai 100 claimants continue:

If the [first land claims] Commission recommended that a settler should be awarded a grant, on the basis of the scale of values of goods contained within the schedule to the Land Claims Ordinance, then any surplus lands were not fairly purchased and should have been returned to Hauraki.²²⁵

We do not accept this reasoning. It is based on a monetary equivalent in goods for a certain number of acres (arbitrarily fixed by the Crown at four acres per pound spent). But, as we have discussed in section 3.3.9, the actual raw figures of the volume of goods paid are difficult to establish, and even where they are available, give little indication of the variable economic worth of the land or the goods at the time. Moreover, the adoption by the Crown of a scale of grants to settlers (to a maximum of 2560 acres) on the basis of how much value

222. Document A8, p 72. Crown counsel has referred to 70 acres of the Whanganui Island surplus and to 200 acres of Hall's surplus on Waiheke (doc AA1, p 49), but it is not clear whence these figures derive. Mr Monin has briefly discussed Fairburn's purchase at Te Matuku Bay, Waiheke. Fairburn had purchased an estimated 300 acres from Ngati Paoa chiefs in 1839. He went into partnership with Henry Tayler to work manganese subsequently discovered on the land. Tayler was granted 300 acres in 1844, but in the 1850s the land was on-sold to Brown and Campbell, thence to Robert McLeod: doc C5, p 40. In 1861, Bell granted McLeod 578 acres, largely by way of survey and fees allowance. Characteristically, the wider boundaries of the deed were surveyed for the Bell commission; effectively the difference between Tayler's 300 acres and the Bell award had been treated in law as Crown surplus, available for Bell to grant. It is for that difference that the Myers commission recommended compensation.

223. Document C1, p 21

224. Document Y1, p 78

225. Ibid, p 79

in goods had been paid for the land, had nothing to do with the commissioners' decisions about whether the land had been fairly purchased in the first place. It was simply a device adopted by the Crown to give greater weight to earlier (and presumably more genuine), settlers and investors, as against recent speculators; it was a matter between the Crown and settlers, not the Crown and Maori. The essential issue that Maori claimants have focused upon, both in the 1840s and since, is whether a 'sale' had been completed at all. To be consistent with this position, the claimants should be claiming compensation for *all* of the land within an alleged purchase, or *none* of it, depending upon whether a genuine transaction had been completed. In that regard, the 2560-acre maximum the Crown was prepared to offer to settler purchases is a red herring. Indeed, the whole issue of surplus land is irrelevant (or at least secondary) to the question of whether or not bona fide purchases had been completed at all.

3.11.5 Conclusion

The inconsistency of the Crown's policy towards old land claims and pre-emption waiver purchases causes us to concur in general with the findings of the Muriwhenua Tribunal. The basis of our concern is not the narrow question of surplus land but the protracted, inadequate and inconsistent manner in which the Crown dealt with the old land claims and pre-emption waiver purchases generally: a succession of inquiries and adjustments which, over some 20 years (longer in the case of McCaskill's purchase) resulted in some 50,000 acres of land being deemed absolutely alienated from Maori, when proper inquiry would have established that few (or any) Maori right-owners had consented to that in the first instance.

In so far as old land claims and pre-emption waiver purchases drew Maori into absolute alienations that they had not initially intended, Treaty principles were breached in our view and grounds exist for redress. However, we also believe that a considerable proportion of the alienations – probably about half – were adjusted in the commissions to the satisfaction of Maori concerned at the time and that the injury incurred from the loss of ownership and control of the lands was offset by some material benefits: first, many of the right-owners (probably not all) received payment for the land – sometimes in goods – such as schooners which they greatly valued; secondly, they also generally valued the presence of the settlers concerned and benefited from the trade and employment they offered; thirdly, some of the disputed old land claims were overlaid by subsequent Crown purchases, notably at Piako and eastern Waiheke; fourthly, the very fact of the establishment of a Land Claims Commission in which at least some Maori evidence was taken and respected, caused a great many inequitable claims to Hauraki land to lapse or be disallowed, and ensured that a great deal of land that might otherwise have been bitterly disputed between Maori and settlers remained in customary tenure.

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All in all, then, we consider that, although the Crown's faulty procedures breached Treaty principles, the prejudicial effects in the inquiry district were limited, relative to the impact of old land claims and pre-emption waiver purchases in other areas (including the *greater* Hauraki region), and relative to the massive losses of Hauraki land subsequently. The principal exception to this conclusion is that several hapu, notably Ngati Pu but also Ngati Karaua and Ngati Tamatera, suffered significant prejudicial consequences from the inadequate investigations at Hikutaia, prior to Bell's awards of 1862 and 1864, and that the subsequent award of land to Ngati Pu was inadequate redress.

CHAPTER 4

CROWN PURCHASES TO 1865

4.1 EVOLVING CROWN POLICY, 1846–53

4.1.1 Governor Grey's proposals versus the 'waste land' theory, 1846–47

Belgrave et al, historians for the Marutuahu claimants, have provided an able analysis of the Crown's general policy towards Maori land, showing the connections from the 1840s through to the 1860s.¹ They have shown that in 1840 there was very little land available for settlement, and because of their very limited budgets the first two governors were not able to buy large areas from Maori. One outcome, discussed in section 3.7, was FitzRoy's waiver of pre-emption resulting in private purchases, including some in Hauraki. Two other avenues were Governor Grey's proposals for new systems of direct lease and purchase (see sec 3.8.1), and the development of the 'waste land' theory in regard to Maori customary tenure.

A change of government in England in 1841 brought friends of the New Zealand Company to power, and the 'waste land' view of Maori tenure began to be officially supported. That is, the argument put forward by the New Zealand Company after 1842 that Maori had no valid claims except to land occupied by their kainga and cultivations. The 1844 parliamentary committee on New Zealand supported the company position and sought to limit the application of the Treaty. Two years later, Earl Grey, the Secretary of State for the Colonies, developed a charter and constitution for New Zealand, including a clause to the effect that Governor Grey was to demarcate the lands actually occupied by Maori, and register the rest as Crown domain, to be made available for settlement. In these proceedings, Crown counsel has quoted in mitigation Earl Grey's instruction that Maori were to be left 'ample space for shifting, as was their habit, their cultivation from one spot to another'.² The Marutuahu claimants, however, have cited Earl Grey's 1846 charter as evidence of Crown intentions from very early in the colony's history to acquire the great bulk of Maori land.³

Earl Grey's views were vigorously opposed in New Zealand by Chief Justice William Martin and other officials, who were aware that every inch of the country was claimed by Maori descent groups. From his experience in dealing with Hone Heke, Te Rauparaha, Te Rangihaeata, and others, Governor Grey knew that he could not implement Earl Grey's

1. Document v1, pp 110–18

2. Document AA1, p 65

3. Document AA13, p 6

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instructions. As claimant and Crown witnesses point out, Earl Grey's instructions regarding 'waste land' were not implemented. But the policy did cut across Governor Grey's own plans.

Grey told Auckland settlers in January 1847 that he was working on a system of regulations for the system of direct purchase he had foreshadowed in his despatch to Gladstone (the then Secretary of State) of 21 June 1846, and also on 'a regulated system of leasing for depasturing purposes'.⁴ Given other preoccupations with Maori in Porirua, Wairau, Wairarapa, and the Hutt, he had not promulgated the planned regulations, which would have authorised direct dealing between Maori and settlers for the use of Maori-owned resources such timber, flax, and grazing lands. It had been his intention to foster a system of leasing and licensing. In forwarding the Native Land Purchase Ordinance 1846 to London, Grey had explained to Gladstone that:

The Government do not propose, unless under some extraordinary circumstances, to attempt to dispossess any persons already in possession of depasturing or timber stations; but on the contrary, to secure to them all such advantages as it may be found expedient from the circumstances of this country to attach to a right arising from pre-occupancy. In the same manner, Government will afford every proper facility for the acquisition of new stations; and it will at the same time take care, that equitable agreements are entered into with the true native owners.⁵

By means of such a system, the Crown would:

acquire a great influence over the native population, from the fact of its regulating the mode under which the waste lands are to be leased, and by its power of refusing to permit any lands to be occupied by Europeans, until the question of Native title has been amicably arranged, amongst the Natives, and until such claims to such lands have been duly ascertained and registered.⁶

A *Gazette* return of October 1847 shows that, since the promulgation of the ordinance in November 1846, 57 applications had been made by settlers for licences to occupy and use land in the newly created province of New Ulster, mostly in and around Auckland but including at least two in the Hauraki inquiry district (Coromandel and Waiheke).⁷ Twenty-nine of the 57 relate to Maori land under customary title, including a number which had

4. Grey to deputation presenting address, 29 January 1847, BPP, vol 5, p 647; see also Grey to Gladstone, 21 June 1846, BPP, vol 5, p 575; Sinclair to Gladstone, 15 June 1846, BPP, vol 5, p 570

5. Grey to Gladstone, 28 November 1846 (Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, pp 69–70)

6. Ibid (Robert Hayes, 'Report on Early Crown Policy on Land', research report, June 1999 (Wai 201 RO1, doc w2) p 26; Donald Loveridge, 'An Object of the First Importance – Land Rights, Land Claims and Colonization in New Zealand, 1839–1852', research report, February 2004 (Wai 863 RO1, doc A81), p 304)

7. *New Zealand Gazette*, 1847, vol 7, no 23, p 125

been sold under pre-emption waivers but for which no Crown titles had yet been issued. Almost all were for the purpose of timber-cutting but three were for depasturing cattle and one for 'procuring lime and free stone'. Twelve applications were refused (two because of 'Objection on the part of Natives'), or decisions were still pending on them.

This licensing system was operating for at least a year. Thereafter, the *Gazette* is silent on the subject, and the system appears to have fallen into disuse. It does not appear that regulations were issued under the ordinance. In 1862, however, mining licences were issued under it when the Coromandel goldfield was proclaimed, on the same terms and conditions as provided in regulations issued under the Gold Fields Act 1858 (see pt III).

4.1.2 Crown pre-emption reasserted

By 1848, Governor Grey had turned his back on direct dealing and was focusing almost exclusively on Crown purchases. His shift of policy was driven by Earl Grey's 1846 instructions to register 'unused' Maori land as domain land of the Crown. The Secretary of State, reluctant to encourage a revived system of direct purchase, preferred to apply the waste land theory over uncultivated land, and restore Crown pre-emption over the purchase of such land as was recognised as being validly possessed by Maori. From the perspective of the British Government, this would restore to the Crown the control of settlement, prevent conflict with Maori (which, Governor Grey kept insisting, would be the occasioned by direct purchase), and yield to the Crown the land fund which had been anticipated in 1839 but which had so far proved elusive.

But Governor Grey could not simply register the 'waste lands' of New Zealand as Crown domain without evoking massive Maori resistance. He had first to win Maori consent to the extinguishment of their customary interests. Grey refrained until May 1848 from responding directly to Earl Grey's instructions to register the 'waste lands' as Crown domain but then he wrote as if he was, in essence, giving effect to Earl Grey's aims:

In opposition to the opinions which have been so generally expressed to your Lordship by such high authorities [probably including the Chief Justice] in the northern part of this island – that there is no waste land in this colony which can be appropriated to the Crown without purchase – I beg to state that it is my belief that even in the most densely inhabited portions of the northern part of this island there are very large tracts of land claimed by contending tribes to which neither of them have a strictly valid right; and that when these tracts of country come to be occupied by Europeans, the natives will cheerfully relinquish their conflicting and invalid claims in favour of the Government, merely stipulating that small portions of land, for the purposes of cultivation, shall be reserved for each tribe.⁸

8. Grey to Earl Grey, 15 May 1848, BPP, vol 6, cmmd 1120, p 24

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Moving ahead of white settlement Grey planned to purchase large areas for trifling per-acre prices, survey Maori cultivations, and provide what, in his view, was a generous allowance of additional lands so that Maori could continue in their hunting and gathering economy until ready to complete the transition to commercial agriculture.⁹ No coercion would be necessary, nor any expensive and protracted registration of title prior to the purchase.

Between 1847 and 1853, Grey applied his policy vigorously by means of huge purchases in the South Island, the Kapiti coast, Hawke's Bay, and the Wairarapa. Officials such as Donald McLean and H T Kemp advanced their careers as land purchase agents under Grey. In the early 1850s, the Native Land Purchase Department was reorganised, McLean being appointed chief land purchase commissioner in 1853. He was soon active in Hauraki.

4.1.3 Consequences for Maori

The land policy arrived at by Earl Grey and Governor Grey in 1848 represented a great narrowing of the options available to Maori from those being implemented or considered between 1844 and 1847. Apart from some limited possibilities for leasing reserves such as those in Wellington, Maori wishing to transact their land now had only one *legal* option, namely to sell to the Crown (although they could, with the Crown's indulgence, continue to make informal grazing, timber and flax-cutting arrangements with settlers). Not many settlers were willing to invest capital and labour without some kind of legal right, and consequently no open market in land emerged. (It is probably no accident that a spate of investment in steam-powered saw mills occurred in Hauraki only after 1862, when the Native Land Act had opened the prospect of securing legal titles by direct leases or purchases.) During the period of Crown pre-emption, Maori were denied the possibility of access to competitive pricing which a well-regulated open market would have offered. Perhaps more seriously, Maori were denied the opportunity for entering into transactions which offered them experience in commercial enterprises through leasing, while still retaining the beneficial ownership of their land. Earl Grey and Governor Grey had cast them into the very limited role of vendors of land to the Crown. Moreover, the Crown's monopoly right of purchase meant that Maori who wished to sell had to accept the Crown's prices.

The possibility of a well-regulated system of direct dealing, under the oversight of powerful British officials, was never to return. When direct dealing was eventually reintroduced (in 1862), the settlers themselves were substantially in control of government and Grey (in his second governorship) had limited influence over the framing of policy and law. Direct dealing (including sale by public auction or tender) would have ensured Maori full market value for land leased or sold, and could not have bypassed tribal authority in the way that later piecemeal transactions did. Grey's 1847 system would have included purchasers or the

9. Grey to Earl Grey, 7 April 1847, BPP, vol 6, cmmd 892, p16

Crown (or both) paying survey costs, but under direct dealing after 1862, contribution by the purchasers to the costs of survey and determining title would be limited and sporadic rather than part of a regular system.

4.1.4 Governor Browne's approach and increasing political considerations

Governor Gore Browne, Grey's successor appointed in 1855, did not legalise direct sales or leases from Maori to settlers during his tenure of office, nor was this encouraged from London. The reasons were in part the same as those which underlay the condemnation of FitzRoy's experiment with pre-emption waiver. To allow direct dealing would threaten the Crown's underlying financial strategy in New Zealand since 1839, namely the funding of immigration and Government services from the purchase of Maori land and its sale for a significant profit. Increasingly, however, officials' statements about direct dealing and leasing came to reflect another concern, one they shared with the colonists, namely to make British sovereignty effective throughout the colony. If Maori were to lease on their terms, they, not the British, could control colonisation of the North Island, the heartland of which was still firmly in their hands. Maori too were increasingly aware that their autonomy was linked with retaining possession of the land, and by the mid-1850s movements were under way to develop supra-tribal authorities – the Kingitanga and large district runanga or komiti – to control the land-selling propensities of individual rangatira. These developments are discussed in chapter 5.

Until 1853, the general government controlled the on-sale of land and the 'land fund' that resulted; after 1853 the control of subdivisions and resale was devolved to the provinces established under the New Zealand Constitution Act 1852. Hauraki lands were under the province of Auckland. But while many governmental functions were devolved, Native Affairs, including the purchase of Maori lands, was reserved to the Governor. In practice, much influence passed to Donald McLean, who in 1856 was also made Native Secretary. We now turn from policy to actual Crown purchases in Hauraki in this period.

4.2 THE EXTENT OF PRE-1865 CROWN PURCHASES IN HAURAKI

4.2.1 The extent of Crown purchasing, 1853–65

Claimant and Crown submissions concur that between 1853 and 1865 the Crown exercised its pre-emptive or monopoly right of purchase to acquire between 48,000 and 60,000 acres in the Hauraki inquiry district. Precise figures cannot be given because many purchase deeds do not give acreages, because some purchases overlaid old land claims, and because it is unclear whether the evidence submitted by claimant witnesses includes Kohimarama and Great Barrier Island, which lie outside the inquiry district, though within the takiwa

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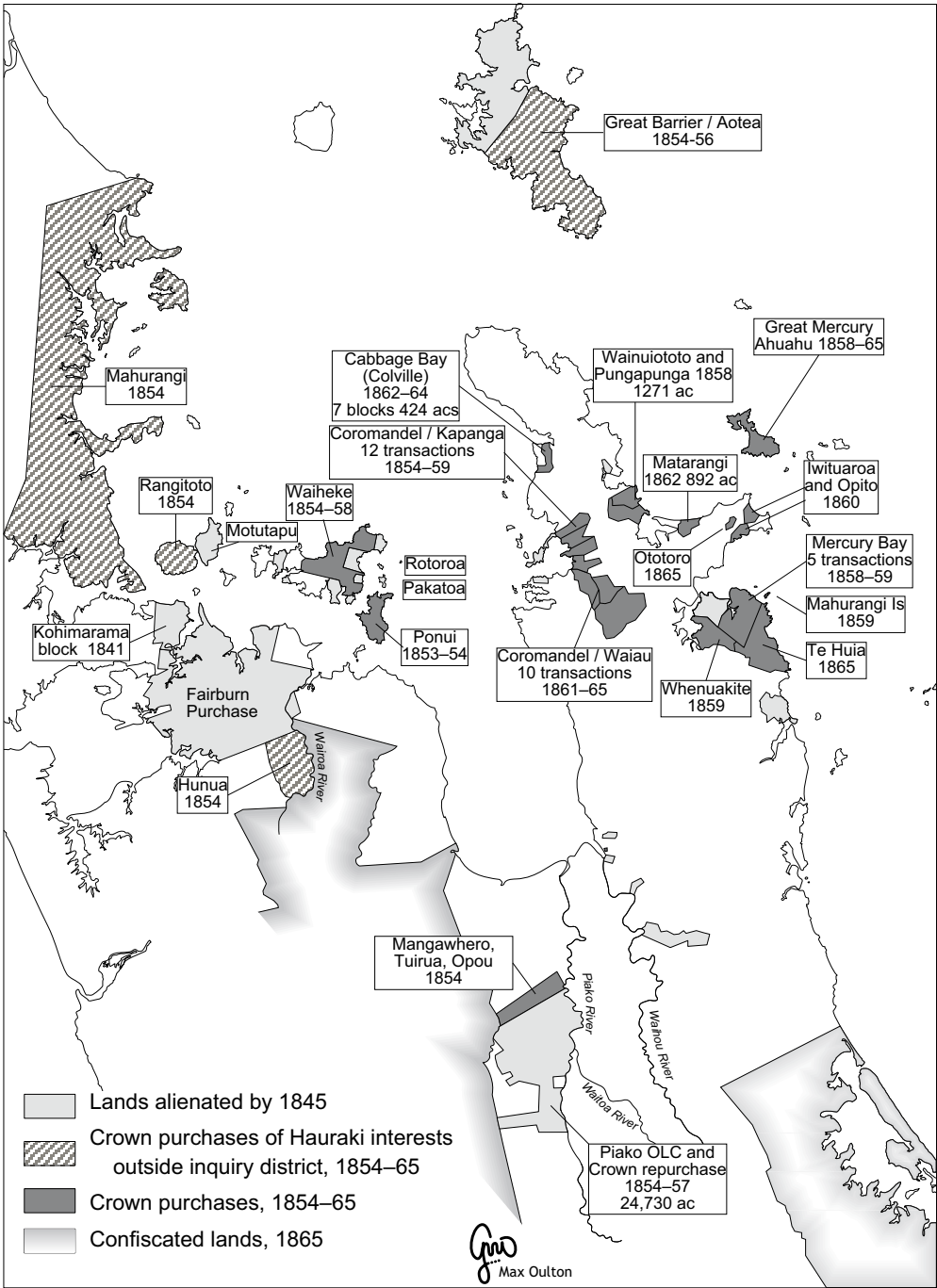


Figure 10: The alienation of Hauraki lands by 1865

of Hauraki tribes. Taking the larger figure of 60,000 acres, about 40,000 acres of this was on the mainland, notably in the Piako, Waiau (Coromandel), Waihou, Te Kouma, Mercury Bay, and Cabbage Bay districts, and about 20,000 acres in the islands, both in the gulf and east of the Coromandel Peninsula, including about 11,000 acres of Waiheke, 4000 acres on both Ponui and Great Mercury Islands and 1000 acres of smaller islands. These figures are based on Kate Riddell's study of Crown purchases for the Rangahaua Whanui research programme and Mr Monin's research on the islands.¹⁰

From want of surveys, Crown purchases sometimes overlapped old land claims. This occurred in Piako, for example; we have discussed Crown purchases in Piako (Webster's pre-1840 purchase) in section 3.10.2 and do so again below. In eastern Waiheke, the Ngati Hei claimants note that the Crown purchase of the Purangi and Whenuakite blocks overlapped the Brown–Dacre old land claim.¹¹ If some Maori were paid twice for the same land, that is hardly prejudicial. But prejudice was likely where one group of right-owners agreed to a sale, and others whose interests overlapped were drawn unwillingly into the transaction.

The claimants have also referred to the very large purchases of the land of Hauraki Maori outside the borders of the Hauraki district as determined for this inquiry. We have already mentioned the pre-1840 transactions in Great Barrier Island and the Fairburn purchase. In 1841, Crown officials negotiated with Ngati Paoa chiefs for the 'Kohimarama' purchase, a block which covers most of modern southeast Auckland. The vast 'Mahurangi' purchase, from Takapuna northwards, was commenced the same year with 'the united tribes of the Thames', led by Wiremu Hoete and other chiefs of Ngati Paoa.¹² To these must be added other Crown purchases in South Auckland and the very large Hunua purchase (15,000 acres) of 1854. Though these lie outside this present inquiry, it is obvious that they had a marked impact upon the overall landholdings of Hauraki iwi.¹³

4.2.2 The influence of gold discoveries

After 1848, the Crown's attention was initially focused on the huge South Island purchases, Cook Strait and Hawke's Bay. In 1853, however, the Native Land Purchase Department gave renewed attention to Hauraki, with McLean himself launching a series of purchases in the

10. See the Crown's summary statement in document AA1, p 63, and the Wai 100 claimants' summary in document V1, pp 80–81. The figures for the mainland are drawn from Kate Riddell's analysis of Turton's deeds in document A4, app 1 (upon which Dr Robyn Anderson has relied). Because the Turton documents commonly do not give acreages, Ms Riddell has calculated the areas and percentage of Hauraki land acquired using a computerised analysis of DOSLI map A98, a version of which is reproduced in document A8, p 96. The estimate of alienations of Hauraki islands is drawn from document C2, pp 6–7.

11. Document N9, pp 37–38

12. Document C5, p 56

13. Document V1, pp 119–122

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gulf islands. Following the discovery of gold at Patapata (Coromandel Harbour) in 1852, the focus of purchases shifted increasingly towards the Hauraki main land. (Crown dealings and eventually purchases in the district's auriferous lands are discussed in part III.) In 1856, the ex-missionary James Preece and the surveyor George Drummond Hay were appointed land purchase commissioners for the Coromandel district and Thames–Piako respectively, largely because of their local knowledge and influence with local hapu. In October 1857, McLean urged Preece, 'now a commencement is made, . . . you will use every endeavour to carry on the purchase of land in the Coromandel district as vigorously as possible, consistent with a due regard to the interests of the Natives and their various conflicting claims'.¹⁴

Land purchase officers in Hauraki were influenced by the British Government's tendency to regard uncultivated land as 'waste land', and Governor Grey's view that Maori lacked 'a strictly valid right' to the proprietorship of land where several groups had intersecting and ill-defined interests. For example, in 1858 Drummond Hay, who had been trying in vain to purchase Te Aroha from Ngati Maru, reported:

I told them that, though of course, their land was their own, I did not recognise their right to retain land which they do not, nor never will, cultivate, and part of which is debateable land, so that by selling their claims there they would do away with one source of dispute.¹⁵

But Ngati Maru, who were by now exchanging visits with the land-sale resisting Kingitanga, held firm. The Crown was unable to secure the purchase of many large blocks in Hauraki: most purchases were for relatively small areas, or were a series of part-purchases from various sections of right-owners. An offer from a section of one hapu was often countered by the refusal of others. Moreover, many Hauraki Maori communities were satisfied to participate in the money economy through the sale of kauri trees, which Preece reported were fetching 10 shillings to £1 per tree in 1858.¹⁶

However, some purchases continued to be made up until 1865. Ngati Whanaunga are recorded as selling 11 blocks between 1858 and 1864, two of the largest being the eastern Coromandel Ranges blocks, Mahakirau (8385 acres) for £1677 in August 1862 and Maumaupaki (2225 acres) for £556 in November 1862.¹⁷ In 1864, Te Patukirikiri sold to the Crown for a nominal sum 50 acres of Whakanekeneke, the site of the homestead of the saw-miller, Charles Ring, plus the 1147 acres of Whakanekeneke 2.¹⁸

14. McLean to Preece, 7 October 1857, in Henry Hanson Turton, *An Epitome of Official Documents Relative to Native Affairs and Land Purchases in the North Island of New Zealand* (Wellington: Government Printer, 1883), sec C, p 301; doc A4, p 34 fn 57

15. Hay to chief commissioner, 31 August 1858, AJHR, 1861, C-1, p 143

16. Preece to McLean, 6 May 1858, MS papers 0032–516, ATL (doc A4, p 22)

17. Document A4, pp 31–32, app 1, pp 3–6

18. Ibid, app 1, p 5

4.2.3 Contentious aspects of Crown purchases

It has been suggested by Dr Anderson for the Wai 100 claimants that the difficulties faced by land purchase officers in Hauraki led them into increasingly unscrupulous methods.¹⁹ The aspects of Crown policy which the claimants particularly identify as involving breaches of the Treaty principles are that:

- ▶ The commissioners consistently sought to pay as little as possible.
- ▶ In pursuit of this goal, they withheld from Maori vendors prior knowledge about minerals in the land.
- ▶ The commissioners deliberately pursued 'divide and rule' tactics, by accepting offers from and paying deposits to sections of right-owners with a view to pressuring non-sellers to join in the transaction. Related to this were instances of the purchase of interests before vendors' claims were substantiated.
- ▶ Surveys were inadequate.
- ▶ The commissioners failed to make reserves for the vendors.²⁰

These five allegations are discussed in turn:

(1) *The question of price*

As regards the first allegation of the payment of low prices, Crown counsel has submitted that:

No such pattern is apparent from a close analysis of the transactions. It is apparent there is a wide variation in the prices paid for land during this period, no doubt reflecting a range in the quality of the land. The alternative interpretation, and one the Crown submits is more appropriate on the facts available, is that the Crown was reluctant to pay more than the land was worth.²¹

With due respect to Crown counsel, this statement is unverifiable, for the reason that there was no open market in land under Crown pre-emption and we have no reliable measure of what Maori land was worth commercially. Also, the historical record shows that the Crown, as a matter of general policy, did try to obtain Maori land as cheaply as possible. This policy was clearly established by Normanby's 1839 instructions and sustained by Governor Grey in counter-proposals to Earl Grey when he advised that the Crown could not simply take the 'waste' lands without payment. The correspondence of the land purchase commissioners with Donald McLean is full of evidence of the application of this policy throughout New Zealand. Commissioners were enjoined to acquire land cheaply and reported exultantly when they did so. McLean generally supplied them with limited sums to acquire large areas.

^{19.} Document A8, p 89

^{20.} Document AA1, pp 63–70

^{21.} Ibid, p 67

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The usual reply of Crown officials to Maori who complained of the lack of access to an open market was that, while the cash price paid for land might be low, the real advantage to Maori would come in the increased value of their remaining land, and the schools, hospitals, roads, and general prosperity that would accompany European settlement. There can be little doubt that Maori vendors did expect to gain markets, employment opportunities and other advantages from the encouragement of sales of Pakeha settlement. The claimants are justified in regarding the Crown's wider promises and assurances as creating an *obligation* upon the Crown to ensure that they did in fact benefit: that benefit was, in effect, part of the price for the land.

As to the actual prices paid, only very limited information has been put before us. Dr Anderson asserts that 'payments for lands in the vicinity of Auckland were minimal in relation to the commercial potential of that area.'²² But no systematic comparison has been made with prices paid for the resale value of the land, nor with prices received after Crown pre-emption was again abandoned in 1862.

Ms Riddell's assessment (made with difficulty because of the lack of accurate data on acreage) tends to favour the Crown position. From the 28 out of 93 blocks for which an acreage is given, she shows that per-acre prices ranged from 0.23 pence per acre to 120 pence (10 shillings) per acre. The average was about four shillings an acre, a much higher per-acre price than was paid in the huge purchases in the South Island and Hawke's Bay, and high even by comparison with many Crown purchases in Hauraki in the 1870s.²³ However, higher prices were to be expected in the purchase of smaller, strategic or more desirable sites.

McLean, having commented that there was 'a general indisposition on the part of the Natives to alienate their lands at Coromandel Harbour', and expressed his hope that the few small blocks open for purchase would lead to more extensive sales, noted that price was not the bar to sales:

for if the Natives find an eagerness on the part of the Government to acquire their land, the opposition of the Natives to sell will increase in the same proportion as the eagerness of the Government to purchase is manifested. As far as I can ascertain, it is not so much a question of price that will weigh with them in this matter as a national feeling which prevails among many of the New Zealand tribes by which they enter into leagues and confederations against the sale of their country. Moreover, at Coromandel they are apprehensive that the discovery of gold in any quantity would lead to such an influx of disorderly Europeans as might annihilate or exterminate them.²⁴

McLean's 'leagues and confederations', discussed in chapter 5, were usually no more than tribal and inter-tribal runanga, and their decisions to resist land-selling were due to the

22. Document C1, p 32

23. Document A4, pp 15–18

24. McLean to Governor, 5 June 1857, in Turton, sec C, p 299; doc A4, pp 27–28

perceived threat to their autonomy. They did, however, present an obstacle to the Crown making large purchases.

In 1861, however, Preece and Hay were of the view that a sense of market value did matter, partly because Maori had become aware of the high resale prices secured for some land they had recently sold, and partly because they recognised the potential value of gold or coal discoveries on the land. Preece urged McLean to consider 'a more liberal scale' of payments, a proposal which suggests an appreciation that the Crown at that time was paying less than market value.²⁵

McLean remained cautious, however. Although in 1861 the rediscovery of gold at Coromandel had led to strong pressure on the general government from miners and provincial authorities to secure the land for mining, it opted instead to negotiate for prospecting agreements and the cession of mining rights (see pt III). McLean then saw no immediate urgency to acquire the freehold because the district 'except for its probable mineral wealth, is of very little value otherwise; the land is poor; there is no extent of it suited for agriculture; the price expected by the Natives is beyond its intrinsic value'.²⁶

Ms Riddell's conclusion, on the information available to her in 1994, stated that it is 'impossible to state categorically that Maori in Coromandel were or were not offered (or accepted) fair prices for their land, or prices which were reflective of the nature of the negotiations or the situation of the land'.²⁷

(2) *Withholding knowledge*

(a) Regarding minerals: Dr Anderson, for the Wai 100 claimants, has cited Preece's letter of 16 July 1861 to McLean indicating that a quick purchase of certain Coromandel land would be desirable because he believed it to contain coal deposits and was concerned to acquire it before the Maori right-owners became aware of the coal (and possibly gold) on the land.²⁸ Crown counsel submitted that:

there is no evidence to show these Crown actors were fraudulently suppressing actual knowledge of mineral wealth. Their information was, in fact, no better than that of the Maori owners. In most cases it was likely to be Maori who suspected minerals were available. On the other hand, in general terms *if there is actual evidence of behaviour amounting to fraud the Crown concedes that such conduct is not appropriate within the context of its Treaty duties.* [Emphasis added.]²⁹

25. Preece to chief commissioner, 16 July 1861, in Turton, sec C, p 310; doc A4, p 30

26. Chief commissioner to Preece, 3 September 1861, in Turton, sec C, p 311; doc A4, p 4

27. Document A4, p 32

28. Preece to chief commissioner, 16 July 1861, in Turton, sec C, p 311; doc A8, p 94

29. Document AA1, p 68. The footnote references given by the Crown in note 238 are not particularly helpful on the question in that they do not indicate a better awareness among Maori than Crown officials as to the likely presence of minerals.

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Of course, fraud is not appropriate under the Treaty. Indeed, it is not appropriate under the criminal law. But the Crown's Treaty obligations are wider than that, for they involve the obligation to deal with Maori in good faith. It is of course normal buyers' strategy in commercial transactions not to inform unsuspecting sellers of the suspected real worth of property. But land purchase commissioners were applying this competitive commercial practice to Maori, whom all Crown officials were bound by the Treaty to protect. The issue exemplifies the almost inescapable dilemma of Crown officials, who were also obliged to try to advance the interests of the colony as a whole, settlers included. This incompatibility of functions had caused the Protectorate of Aborigines to withdraw from direct involvement in land purchase in 1842. McLean, who held the office of Native Secretary as well as Chief Land Purchase Commissioner from 1856, saw no such contradiction. If any office should have offered protection to Maori it was that of Native Secretary, but McLean continued to drive hard bargains with Maori over land. In a sense, in committing itself to tough commercial bargaining, especially while it held a monopoly, the Crown had virtually precluded itself from operating with 'the utmost good faith', especially where officials had better knowledge than Maori of the likely value of land.

Specific examples of Crown officials suppressing evidence of minerals in land under negotiation are not clear. As the Crown submits, following the 1852 gold strike at Coromandel, it is difficult to distinguish between the widespread *expectations* among Maori and Pakeha alike that land was auriferous, from actual *knowledge* that it was. But as counsel for the Wai 100 claimants pointed out in response to the Crown's closing submissions, Preece's letter to McLean of 16 July 1861, 'clearly stated that the Awakanae block [at Coromandel] contained coal, that Maori were unaware of this, and that the purchase should be concluded before Maori became aware of this.'³⁰ If this was not actually 'fraudulent' it was certainly sharp commercial practice.

(b) Regarding resale value: Under pre-emption, it was inevitable that Crown officials would gain a much better knowledge of likely market value across a wide range of locations than any particular group of Maori vendors. However, Maori became increasingly aware of the sometimes huge discrepancy between prices paid to them and the resale value of land near Auckland or on harbours and river mouths.

In the 1850s, the Crown did sometimes attempt to deal with the situation by introducing clauses into purchase deeds to the effect that 10 per cent of the profits of resale would be made over to the vendors via payments for education and medical services, the construction of mills and the payment of annuities to chiefs. These efforts were sporadic, however, and inside the inquiry district only one deed, that for Piako land, signed with Ngati Paoa in November 1853, contained a 10 per cent clause. Dr Anderson notes that Ngati Paoa are

30. Document AA14, p 27

recorded as receiving only £50 from their share of resales before the system ended in 1874, in marked contrast to the payment of £2870 to South Auckland groups, though what factors led to this outcome are not clear.³¹ The Crown has pointed out that the 15,000-acre Hunua block, purchased from Hori Whetuki of Ngai Tai in 1854 for £900 (2.5 pence per acre), also had a 10 per cent clause, and that the requisite payments were made to the satisfaction of the Sim commission which later investigated the issue.³²

This is not strictly relevant information, since the Hunua block lies outside the inquiry district. It would have been more helpful to us to know why the 10 per cent clauses ceased to be included in Crown purchases. Had they been used systematically, there could well have been significant benefits to Hauraki Maori. We have no information as to whether the Crown's land purchase agents reduced prices when they included 10 per cent clauses.

(3) *'Divide and rule' tactics*

Perhaps the most serious charge brought by claimants against the Crown in relation to its purchases of Hauraki land is that land purchase commissioners entered into transactions with individuals or groups whose rights to the land had not been properly substantiated or were known to be disputed, or where other sections of the known right-owners did not wish to sell. By such means, it is suggested, Maori were being manipulated by Crown officials into selling more land than they actually wished or intended to sell.

The Crown's position is that it is not possible to generalise about this issue. Rather, 'It is necessary . . . to ascertain in each transaction whether genuine alienation has occurred, and whether unscrupulous methods were used . . . if problems arose in practice . . . did the Crown take steps to remedy them?'³³ But Crown counsel must be aware that not enough data has survived to make possible precise judgements in respect of every purchase. Given the limited information, we believe it is legitimate to consider what the evidence can tell us about the Crown's general approach to the complex intersecting interests of the Hauraki hapu.

The official correspondence in Turton's *Epitome* (analysed by Ms Riddell for the Ranga-haua Whanui programme and Dr Anderson for the Wai 100 claimants) shows that regional commissioners were pragmatic in their approach to their task. Sometimes they reported to McLean that they would have to wait until disputes were resolved before accepting offers of sale; on other occasions they made payments to groups they considered to be principal right-owners, knowing that there were other claimants with whom they must eventually settle. While McLean kept hoping for large purchases such as he had achieved elsewhere, Preece and Hay urged the purchase of small areas wherever they were offered, as the key to unlocking further lands or winning the acquiescence of those who were not keen to sell.

31. Document A8, pp 94–95

32. Document AA1, pp 72–73

33. Ibid, p 66

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By dealing with sections of owners the purchase agents certainly risked offending other groups with substantial or even greater interests. Crown and claimants both refer to the acrimonious letters from Drummond Hay to McLean in 1858. These concerned payments McLean made in Auckland to the Ngati Paoa chiefs, Wi Hoete and Te Ruinga for land at Whangamata and Katikati in which Ngati Tamatera claimed the dominant interests. The anger of the latter group spoiled any chances Hay might have had of negotiating with them at the time.³⁴ This example tends to support the claimants' position, indicating as it does that McLean was either careless or manipulative, while Hay's protest (focusing on the set-back to his negotiation with Ngati Tamatera) has more expediency about it than principle. The same year, McLean also pushed through a deal with Ngati Paoa in the Crown's purchase of eastern Waiheke, while neglecting to pay Ngati Maru and Ngai Tai for their interests in the land.³⁵ (Eventually, in 1867 and 1869, James Mackay did pay Ngati Maru because his negotiations with them on the mainland were being jeopardised by the rankling grievance over Waiheke.³⁶ Recognition of Ngai Tai interests was confined to a belated grant of 1452 acres to the children of Maxwell and his Ngai Tai wife, Ngeungeu, at Te Huruhe.) From Ngai Tai's perspective, this was land Ngati Paoa had no authority to sell.³⁷ Ponui Island, purchased by the Crown in 1853–54, was a similar case, discussed in section 4.3.1. McLean's purchase of Rotopiro (217 acres) in 1855 from Ngati Paoa chiefs also seems to have caused resentment amongst Ngai Tai.³⁸ These examples do not show McLean in a good light. Moreover, the Crown has acknowledged, on the basis of Dr Anderson's evidence concerning Ngati Whanaunga's interests being overlooked in the purchase of Moturoa, that 'there seem to have been instances in the Coromandel where [the] claims of those prepared to sell were not properly substantiated prior to interests being purchased'.³⁹

The land purchase commissioners tried to patch up such problems by additional payments (sometimes termed 'bonuses' to avoid recognition of other land claims). Their proceedings led to increasing anxiety among Hauraki iwi and contributed to their growing support for the Kingitanga (discussed in chapter 5).

(4) Inadequate surveys

The Wai 100 claimants have referred to the limitations of pre-1865 deeds, including the lack of accurate surveys (and therefore of exact areas alienated and price per acre paid). They have submitted that 'the Crown's failure to ensure that the transactions were properly

34. Document AA1, pp 71–73; doc v1, pp 130–131

35. Hay to chief commissioner, 13 June 1858 and 31 August 1858, in Turton, sec C, pp 331, 332; doc A8, pp 92–93; see also Waitangi Tribunal, *The Waiheke Island Report 1987* (Wellington: Brooker and Friend Ltd, 1987), p 11

36. Document AA1, pp 74–75

37. Document T24, pp 16–17; doc Y15, pp 9, 13. The figure of 1452 acres is from document T2, pp 37–38.

38. Document Y15, p 12; see also doc AA1, p 73; doc C3, pp 20–21. Mr Alexander considers that too little is known of the circumstances of the Rotopiro purchase to comment about it.

39. Document AA1, p 66

recorded and that accurate and full surveys were carried out was a breach of its duty to actively protect Hauraki interests.⁴⁰ Crown counsel have responded that the deeds are 'sufficiently clear' as to who was transacting and have referred to the difficulties faced by a poorly resourced administration struggling to deal with manifold tasks.

As we discussed in relation to old land claims and pre-emption waiver purchases (sec 3.11.1(3)), there were real difficulties in providing full surveys for purchases in this period. There was a serious shortage of qualified surveyors in the colony and full surveys in bush-covered land were expensive and time-consuming. Options included public walking of boundaries and physical marking of key points, with full survey to follow. The issue was discussed at length by the board convened in 1856 by Governor Browne to look into a range of issues relating to Maori land, and in 1857 Browne instructed that henceforth boundary lines were to be cut for Crown purchases. This was a belated acknowledgement of a need, and a reasonable interim step to indicate clearly to Maori precisely what land was being purchased. But later McLean advised Charles Heaphy, the Surveyor-General, possibly in reference to Hauraki, that 'His Excellency approves of these small and rugged blocks being made an exception from the rule which now obtains of cutting the whole external boundary of purchased blocks', and encouraging the purchase of adjacent blocks so that boundaries could be shared.⁴¹ Only 28 out of the 93 deeds for Hauraki blocks listed in Turton's *Epitome* give an acreage, probably indicating the absence of full survey in 65 others.⁴²

(5) *Paucity of reserves*

Almost no reserves were made within the Hauraki lands purchased by the Crown in this period. The settlers' perception at this time was that Hauraki Maori had enormous reserves of land, and that land purchase agents were still only getting a foothold in the district. In the case of the gulf Islands, as Mr Monin has pointed out, this was not so. Most of the islands, not already acquired under old land claims and pre-emption waiver purchases, passed into Crown ownership in this period, although the purchase in eastern Waiheke was not completed until 1869. (At this point, the Crown did create a reserve of some 2000 acres at Te Huruhi, at the western end of the island.)

4.2.4 The impact of commerce on Maori society

Debt has been raised as one reason why some chiefs were so willing to sell land. Maori advantages in cash cropping largely disappeared in 1857–58 with the collapse of the Australian market for grain and because Pakeha growers and Maori from further afield were competing for the Auckland market. Caught with outstanding debts for the purchase

40. Document Y1, p 83

41. Chief commissioner to Heaphy, 17 December 1857, in Turton, sec c, p 303; doc A4, pp 34–35 fn 59

42. Document A4, pp 15, 35–36

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of small schooners and flour mills, and pursued in the courts by creditors (with threats of possible imprisonment), Ngati Paoa chiefs in particular were impelled to persist with land sales. In Mr Monin's view, this pressure of debt underlay the sales on Waiheke.⁴³

The Crown did make some efforts to prevent Maori from being caught up in debts and harassed by creditors. In 1844, George Clarke observed that 'advantage had been taken of [the chiefs'] ignorance by disreputable Europeans'. Grey had responded by increasing the jurisdiction of the Resident Magistrate's Court to £100 in civil cases and appointing a Mr Donnelly to serve as counsel for Maori in or near Auckland. This enabled some Maori to defend actions brought against them and to win some on their own account over contracts to deliver schooners. Mr Monin argued that the Crown could have done more to protect Maori. In cross-examination, he cited an 1854 suggestion from the Acting Native Secretary Major Nugent that Maori should not be permitted to enter into contracts except in the presence of a magistrate or other competent person. This suggestion was not implemented. Crown Counsel have argued that it was an unrealistic proposal which Maori would have resented. There may be some truth in this but it is not a convincing argument for evading a duty to protect Maori, known to be inexperienced in contractual obligations enforceable in the courts, and open to exploitation by settlers willing and able to advance them credit.⁴⁴

Most Maori engaged eagerly with commerce, exposing themselves to its risks and pressures. Many tried to be conscientious in the repayment of loans from the Crown: McLean reported to the Surveyor-General, CW Ligar, in 1856 that Hauraki Maori had borrowed £4806 since 1851 for mills, vessels, horses, agricultural implements, and so forth, and had repaid thus far £2768.⁴⁵ But most were inexperienced in handling debt, and budgeting for repairs and depreciation of schooners or mills was beyond their experience and difficult to organise collectively. The collapse of grain prices in 1857–58 put many in serious difficulty. Land sales were an obvious way for Maori to redeem debts, but purchase payments could end up in the hands of a few, or dissipated in heavy consumption, leaving debts unreduced or even increased. An individualistic, industrialised money economy, plus epidemic diseases and morale problems through alcohol abuse, were impacting upon a hitherto subsistence-based and kinship-oriented society.

The Crown's early efforts through gifts or subsidies of ploughs, mills and other equipment to help Maori engage in commercial farming were genuine but limited. It is unfortunate that in the late 1850s, when they needed more far-reaching help with commercial difficulties, the only institution which might at least have analysed the problem and pressed for more systematic assistance, the Protectorate of Aborigines, had been abolished.

The emerging Kingitanga, a complex movement, not only resisted land-selling but also aimed at engaging more successfully with modernity, its leaders being hungry to learn new

43. Document c2, pp 8–9

44. Ibid, p 8A

45. Chief commissioner to Ligar, 19 May 1856, in Turton, sec A1, p 55

skills in farming, commerce, and social organisation.⁴⁶ But the official will to meet increasingly complex Maori needs was lacking. Rather, officials in the late 1850s revealed unsympathetic and derogatory attitudes towards Maori 'cupidity'. Preece even proposed to use the indebtedness of Paora Te Putu of Te Matewaru hapu of Ngati Tamatera as leverage to secure a purchase: 'I think he will not be able to get out of it without sale of land. He will I believe endeavour to get a loan from the Government but I strongly recommend that he should not receive any'.⁴⁷

4.2.5 Hauraki attitudes to land rights

(1) *Growing individualism and growing support for the Kingitanga*

Probably one of the most potent new influences on Maori in the 1840s and 1850s was commerce, and the opportunities it created for individual chiefs or small groups. In this context, individual rangatira became more inclined to act opportunistically when they realised that land had a commodity value, and to take less account of the views of other right-owners. This was despite the growing resistance to land selling led by the Kingitanga (discussed in the next chapter). Despite the anger of other Hauraki leaders at the tendency of individual right-owners to negotiate with Crown agents, they found such tendencies hard to control, while the temptation to take a fatalistic approach and join in the land trade was difficult to resist.

Thus, having bought 2000 to 3000 acres at Waiau from Maihi of Ngati Whanaunga, Preece reported in 1858:

I know that the natives as a body are convinced that the time is at hand when each individual Native will do as he pleases with his own land. The conduct of Maihi and Horopeta in selling the Waiau Block in spite of all opposition, has operated well. Taniwha told me lately that he was convinced that the Government would soon make a purchase of all the spare land, for he had found that he and the other chiefs could not prevent other Natives from parting with their own land.⁴⁸

In buying from particular right-owners against the known opposition of others, the Crown officials were already crossing a line in terms of their Treaty obligations to respect Maori customary property rights. Such a strategy could only have been justified on the basis that heads of whanau or hapu were *exclusive* owners of the land being purchased. For land purchase officials to deny or by-pass the right of senior rangatira such as Taniwha to

46. John Gorst, *The Maori King, or, The Story of Our Quarrel with the Natives of New Zealand* (1864; reprint, Auckland: Reed, 2001); Evelyn Stokes, *Wiremu Tamihana Tarapipi Te Waharoa* (Hamilton: University of Waikato, 1999)

47. Preece to McLean, 6 May 1858, MS papers 32, folder 516, ATL (doc A8, p 95)

48. Preece to chief commissioner, 6 May 1858, in Turton, sec C, p 304 (doc A8, pp 90–91)

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control alienation on behalf of their people was a major shift from previous Crown purchase strategies related to old land claims and pre-emption waiver purchases, in which chiefs were called upon to affirm sales of customarily held or tribal land (see secs 3.3.4 3.8.3, 3.9.1, 3.9.2).

(2) Crown attitudes to the concept of tribal or collective title

In 1859, Drummond Hay claimed that Hauraki Maori recognised a ‘tribal’ title only out of expediency:

Amongst the Ngati Maru there are a good many who are anxious to sell their claims but they are opposed by others, who maintain that no individual claims shall be sold without the consent of the whole tribe; *not that the tribe have any right to the land*, but because such sale may compel them eventually to sell their adjoining claims. [Emphasis added.]⁴⁹

Hay was clearly sympathetic to what he thought he had discerned. Two years later, he wrote:

the Natives were told distinctly that if any natives, however few, could prove a sound title to land that they wished to sell, the offer would be entertained; and that if opposed by the tribe on no better ground than that the land should not be sold, such opposition would carry no weight with it; also in the case of the whole tribe being concerned in the offer, some few individuals alone demurring, their title would be thoroughly investigated, and their rights respected, however much the tribe might insist otherwise.⁵⁰

Drs Anderson and Belgrave, for the claimants, both see this as evidence of a denial of a tribal right to veto sales by individuals, analogous to the Crown’s disastrous support of Teira’s offer to sell land at Waitara against the opposition voiced by Wiremu Kingi Te Rangitake on behalf of Te Ati Awa. The Wai 100 claimants have cited Hay’s statement in their closing submissions as indicative of Crown officials’ tendency to deny tribal over-right.⁵¹

Crown counsel has countered by suggesting, no doubt rightly, that Hay was speaking in the context of the war over Waitara, including debate about the conversion of customary tenure to Crown title, but has also argued that Hay’s statement merely indicates that anyone making a claim to land would have that claim investigated.⁵² In rebuttal, counsel for the Wai 100 claimants suggests that Hay’s statement shows quite plainly that the tribal veto would be given no weight by Crown officials if the tribal leadership’s only ground for objection was that the land should not be sold.⁵³

49. Hay to chief commissioner, 29 October 1859, in Turton, sec C, p 333 (doc A8, p 98)

50. Hay to chief commissioner, 4 July 1861, in Turton, sec C, p 338 (doc A8, p 97)

51. Document A8, p 97; doc V1, p 110; doc Y1, pp 85–86

52. Document AA1, p 69

53. Document AA14, p 27

In our view, the claimants' contention is correct. Hay was transmuting the Maori concept of different levels of rights (including an over-arching tribal or descent group right) into an aggregation of 'titles' held by individuals or whanau. These individuals or small groups of kin, in his plan, were entitled to sell or not sell as they saw fit, independently of the group controlling the land. This involved a distortion – an exaggeration – of the rights of occupation and use which individuals or whanau derived from their respective hapu. Ultimately, it was a departure from the military collective made up of hapu, or hapu clusters (iwi), able to defend extensive territory against outsiders. As Professor Sinclair showed many years ago (and other professional historians have agreed since), this was the doctrine pursued by McLean and Governor Browne at Waitara in 1859 and 1860, where Teira (also known as Taylor) offered land for sale and Wiremu Kingi (William King), a leading rangatira of Te Ati Awa, was asked to identify his garden lands for excision from the sale, but was *not* allowed the right to veto the entire sale on behalf of the tribe.⁵⁴ Maori from many parts of New Zealand fought with Kingi in defence of tribal right, and many of the kupapa chiefs who did not fight were nevertheless upset at the implied threat to their society, and critical of the Crown.⁵⁵

We consider that Hay's views, unchecked and undenied by his superiors, attacked one of the in-built protections of customary society. In the event, the Crown did not pursue its ideological view of Maori tenure in Hauraki, to the extent of militarily driving through a land purchase as it had in Waitara in Taranaki. By 1861, having blundered disastrously in Taranaki, and even after new gold strikes in Coromandel provided a renewed urgency to control the goldfields, the Crown proceeded with caution in Hauraki (see pt III).

4.3 ACTUAL PREJUDICE

The approximately 60,000 acres of Crown purchases before 1865 amounted to some 4 per cent of the land area of the inquiry district, calculated against the total land area of 1.5 to 1.6 million acres indicated by the claimants' expert witnesses (see sec 18.6). The Crown has asserted that this degree of alienation, of itself, did not put the Hauraki tribes under threat of land shortage. The claimants have accepted that this may be correct in an absolute sense, but argue that these Crown purchases were part of a continuum which included the pre-1840 and pre-emption waiver purchases, soon to be followed by massive purchasing under the Native Land Acts. Moreover, they have pointed to evidence which indicates

54. Keith Sinclair, *The Origins of the Maori Wars*, 2nd ed (Auckland: Auckland University Press, 1961) pp 136–180

55. Alan Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand* (Auckland: Auckland University Press, 1974), p 118

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that particular communities were already beginning to feel the pressure. Especially affected were Te Patukirikiri at Coromandel, Ngati Hei at Mercury Bay, and Ngai Tai and Ngai Paoa in the gulf islands.⁵⁶

The Crown has rejected generalised claims of Treaty breaches about its purchase policy and practice, and cites in defence specific examples (such as Ahuahu), where Preece identified separate interests carefully and purchased them in a series of separate transactions for a reasonable average price (by the standards of the day).⁵⁷ We turn therefore to specific cases.

4.3.1 Piako

Piako has been discussed above in section 3.10.2 in relation to the pre-1840 claims of Webster and Cormack. We now turn to Crown purchases in this area.

Crown counsel notes that McLean's approach to Piako 'seemed to accord with what was accepted as good practice for Crown purchases'. McLean reported to Browne on 5 June 1857:

I held a meeting with the whole of the [Ngati Paoa] claimants, who agreed to proceed with Mr Hay to point out the boundaries of their land and settle their conflicting claims and differences respecting such portions as were claimed by other tribes. This being completed, Mr Hay was instructed . . . to furnish a plan of the district about to be ceded – estimated at 140,000 acres – and a date was to be fixed on which all of the claimants should be assembled at Auckland to effect a final settlement of that long-pending question.⁵⁸

Crown and claimant counsel have drawn from Mr Alexander's detailed block histories a list of payments to sections of right-owners between 1854 and 1860. In 1854 and later, the Crown purchased the chief Takapu's land, excluded from the Richmond and Godfrey awards, plus Otamatoi (900 acres), and Te Hina (500 acres). Drummond Hay made a series of purchases of parts of Piako: in 1857, the Piako block (an estimated 18,000 acres), for £1590, and Te Ngae (1200 acres) for £110; in 1860, another 2000 acres were purchased in Piako, 3100 acres in Waitoa and 1660 acres at 'Waihou'.⁵⁹ In August 1860, McLean advanced £300 to Te Moananui of Ngati Tamatera 'on account' to enable him to buy a schooner. In relation to Piako, Crown counsel also state (drawing on David Alexander's evidence) that in the 1860s, James Mackay purchased 'a number of small blocks on the Hauraki plains' and made advances 'on account' for other blocks.⁶⁰

56. Document A8, p 8; doc C5, pp 61, 93–94

57. Document AA1, pp 73–74

58. Ibid, p 70

59. Document A10, pt 4, pp 209–218; doc AA1, p 71; doc A4, app 1. Matthew Russell gives slightly different figures for the 1957 purchases, totalling 22,150 acres: see Duncan Moore, Dr Barry Rigby, and Matthew Russell, *Old Land Claims*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), pp 114, 116.

60. Document AA1, pp 71–72

But Crown counsel also concedes that ‘a number of criticisms can be made’ of these Piako proceedings.⁶¹ These include McLean’s gross over-estimate of the area which the Crown had allegedly acquired through the surplus from Webster’s pre-1840 purchase, and an initial attempt to purchase a very large district (possibly on the model of his purchases in Hawke’s Bay and further south), within which the intersecting tribal rights were very complex.⁶²

Crown counsel rebuts the claim that in Piako McLean and his colleagues were deliberately taking advantage of Ngati Paoa’s debts, but asserts they paid fair prices according to the quality of the land. The evidence available to us does not clearly establish that improper pressure was brought to bear on Maori vendors; rather it appears that the officials were trying to sort out the intersecting claims and were prepared to make additional payments. On the other hand, payment to one lot of right-owners tended to set a purchase process in motion and other groups, initially unwilling to sell, became drawn in.⁶³

4.3.2 Ponui Island

The Crown began negotiations to purchase Ponui island in 1853 from the chiefs Te Karamu and Kupenga of Ngai Tai, and completed them in 1854, purchasing from Hori Te Whetuki of Ngai Tai, but also from the Ngati Paoa chief, Ngatai.⁶⁴ The Ngai Tai claimants (Wai 423) have claimed that this purchase contributed to the diminution of the Ngai Tai tribal estate, and secondly that Ngai Tai interests were not adequately recognised in the purchase. On the first point the Crown acknowledges that the purchase, like all purchases, of course contributed to the diminution of the tribal estate, ‘but there is nothing in the transactions to indicate a Treaty breach. The issues in respect of Ngai Tai landlessness arose in later decades.’⁶⁵ This is presumably a reference to the taking of Ngai Tai land in the East Wairoa confiscation of the 1860s. But Grey had already defined narrowly the reserves made in the Fairburn purchase (where Ngai Tai had important interests), so the purchase of Ponui did contribute to a significant diminution of their estate in the 1850s. However, Ms Ferguson’s evidence regarding the Crown’s alleged under-valuing of Ngai Tai interests in the purchase of Ponui is inconclusive, since Te Karamu and Kupenga of Ngai Tai were paid £100, but in 1854 Hori Te Whetuki of Ngai Tai and Ngatai of Ngati Paoa were paid £25 each. This also suggests that Ms Ferguson is incorrect in stating that the Crown had made no further inquiries after 1852 (when a file note suggested that Ngatai of Ngati Paoa might be the only proprietor). Notwithstanding Ngatai’s later statement in the land court that Ponui was Ngai Tai territory, it seems that in 1854 Ngati Paoa were also recognised as having some interests there.

61. Ibid, p 72

62. Ibid

63. Ibid

64. Document Y15, p 12; doc T2, pp 31–2

65. Document AA1, p 73

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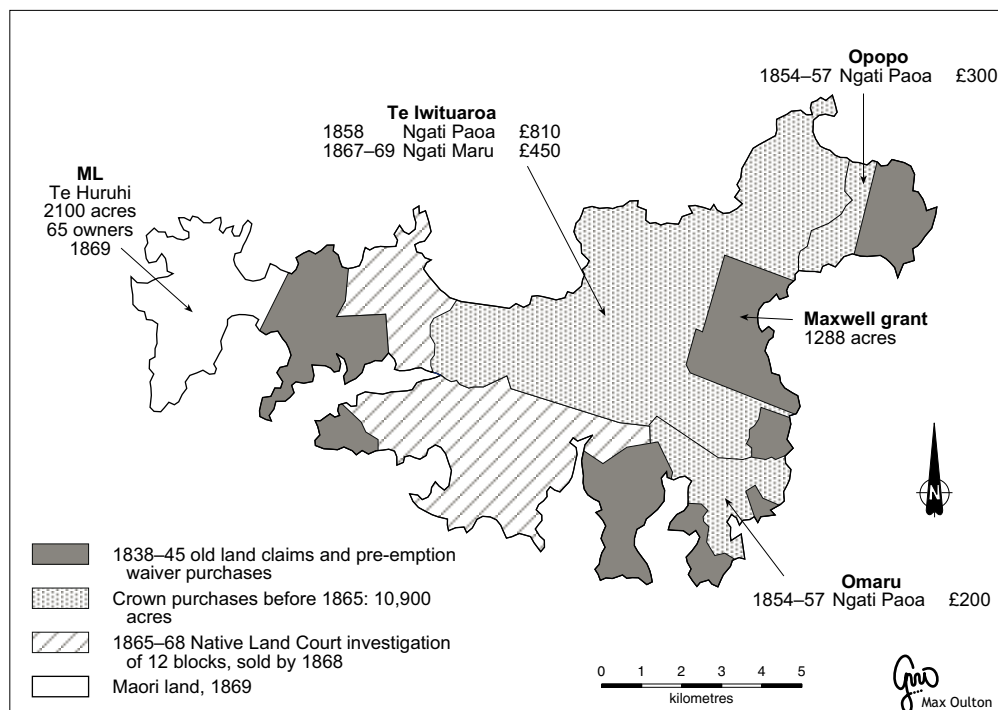


Figure 11: The alienation of land on Waiheke Island.

Source: Paul Monin, *Waiheke Island: A History* (Palmerston North: Dunmore Press, 1992).**4.3.3 Waiheke and the paucity of reserves**

The paucity of formal reserves is most sharply illustrated in respect of eastern Waiheke. Having made two relatively small purchases in 1857 (Omaru and Opopo, about 200 acres each, for £1 and £1 10s per acre respectively), in 1858 the Crown acquired from Ngati Paoa the whole of the eastern end on the island, 10,900 acres, for twopence per acre. The Crown acknowledges that McLean failed to pay Ngai Tai and Ngati Maru at that time (see sec 4.2.3(3)), although he had been alerted to their interests. At the time of the Crown purchase, McLean wrote as follows:

It is recommended that the Native title to Waiheke Island should be extinguished with a view to retaining the land as a permanent location for the natives as it is particularly well adapted for such a purpose, having numerous bays for fishing, plenty of firewood and convenient to the Auckland market.

It would be desirable as a place for locating natives of other tribes, in cases where the Government might find it necessary to provide them with land – the Native title being extinguished the Government might afterwards apportion the land to individual natives under Crown Grants subject to such an entail as would prevent alienation to Europeans.

The continued occupation of Waiheke Island by the Natives under a holding from the Crown would prevent many of them from occupying valuable tracts of the mainland which are much required for European settlement.⁶⁶

This statement reveals McLean's willingness to move Maori about to accommodate European settlement, but it also reveals some constructive ideas for Maori. However, the Crown did not carry McLean's suggestions into effect, and eastern Waiheke was sold to settlers. The Crown acknowledges that this sale was of 'significant concern': 'Given the sale and confiscation of Ngati Paoa and Ngai Tai land, by the time the Crown purchases [of eastern Waiheke] were concluded the reservation proposal became of significant concern to both of these groups.'⁶⁷

While the Crown can point to the fact that the great bulk of Hauraki land remained at this time in customary tenure, the concept of formal reserves, held by Maori under Crown grants, relates to the place of Maori in the new economy and society: in 1858 McLean had already envisaged the need for Waiheke reserves to support a mix of the traditional economy of Maori and their access to Auckland markets; he also envisaged the need for entailing individual Crown grants so that they remained with the Maori grantees' families in perpetuity. But these plans for the future of Hauraki Maori were not sustained.

In closing submissions, the Crown cites the Tribunal's *Report on the Waiheke Island Claim* to show that Ngati Paoa could not be considered 'landless' in 1863, but had access to nearly 6000 acres on Waiheke and 16,000 acres on the western firth 'around Kaiaua'.⁶⁸ In response, counsel for the Wai 100 claimants noted that 'landlessness' was not what had been alleged by the claimants, but rather that 'Ngati Paoa and Ngai Tai had lost the majority of their interests in the islands in the Hauraki Gulf so the tribes were forced to move their settlements to their remaining core lands in other areas'.⁶⁹ It is an oversimplification to say that Ngati Paoa had been forced by the Crown purchases to relocate. The claimants' own evidence shows that Ngati Paoa chiefs, notably Wi Hoete and Ngatai, were active land sellers, so the withdrawal to the mainland can be said to be partly of their making. But Mr Monin's evidence also refers to the failure of the Crown to make reserves in eastern Waiheke, not even 'the modest claim of the heirs of Hori Pokai Te Ruinga to about 80 acres at Man O War [Bay]'. The bulk of Ngati Paoa 'were forced to leave the island in the 1860s except for those who removed to Te Huruhi at the western end'.⁷⁰ The Wai 808 claimants (Ngati Horowhenua, a hapu of Ngati Paoa) point out that the Crown's purchases and failure to establish adequate

66. McLean, memorandum, 3 June 1858, OLC1/332 (doc c5, p 57)

67. Document AA1, p 75

68. Ibid, p 72; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Waiheke Island Claim* (Wellington: Department of Justice, 1987), p 11

69. Document AA14, p 28

70. Document c5, p 61

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reserves led to the marginalisation of Ngati Paoa, including their hapu, and their exclusion from their maritime rohe, no productive agricultural lands near Auckland remaining.⁷¹ This underscores the Crown's failure to implement McLean's 1858 plan to create substantial reserves on Waiheke for the various Hauraki and Auckland iwi.

Te Patukirikiri did little better than Ngati Paoa. In 1857, at Preece's urging, the Crown did reserve for them Motutapere, which was Crown surplus from Webster's purchase of Whanganui and adjacent islands. It was the last landing site to be reserved for them in the gulf, and was chosen as a reserve for Maori because it was unsuited for European settlement.⁷²

4.4 CONCLUSION AND FINDINGS

The main prejudicial effect upon Maori from the system of Crown purchases before 1865 was that the Crown was acquiring Maori land rights by purchase, not by lease or licence, and the Crown exercised a monopoly in acquiring them. The system of direct leasing and licensing which Governor Grey had begun to contemplate in 1846 was not put into effect, because the Crown wanted to pursue its land fund policy, buying cheaply from Maori and selling at a profit. The important exceptions to this pattern were the cessions of mining rights in Coromandel, Thames and other goldfields, and the timber leases or cutting rights agreements between Maori and millers. (These are discussed in part III.) But generally, Maori were not able to sell their land on an open market, nor legally let it. This greatly limited their opportunities to gain both a revenue flow and much-needed commercial experience, while retaining the security of title to their land. Crown land, on-sold to settlers, was sharply distinguished in law from Maori customary land, and Maori were cast in the role of suppliers of land to the Crown only, rather than developers of land. This had lasting consequences which are still being felt.

As monopoly buyers, the Crown could set its maximum price, and did so, relative to the quality and location of the land. But it has not been clearly shown that the Crown paid derisory prices in this period; the average of two shillings to four shillings an acre where the per-acre price can be assessed, suggests otherwise.⁷³ It would seem that most Hauraki Maori were relatively cautious vendors at this time, not prone to selling large acreages or accepting derisory prices. But in the absence of an open market it is impossible to say whether Maori did or did not receive fair value for their land before 1865.

71. Document v6, pp 7–8

72. Preece to chief commissioner, 5 October 1857; chief commissioner to Preece, 7 October 1857; Heaphy memorandum, 14 October 1857; Hay to chief commissioner, 4 July 1861, in Turton, sec C, pp 300–302, 337 (doc A8, p 94)

73. Document A4, pp 15–18; doc A41, pp 73–74

We have observed that political factors entered the situation. Part of the reason why the Crown would not lease Maori land or allow settlers to lease it was because it feared that this would inhibit the purchase of the freehold and leave settlers dependent upon Maori landowners, with the country not fully under Government control. From their viewpoint, rangatira saw the threat to Maori autonomy of continued land alienation. The Kingitanga won increasing sympathy in Hauraki from rangatira opposed to land-selling who needed the support of a supra-tribal authority. These developments are discussed in chapter 5.

The complexity of inter-tribal rights in Hauraki meant that the Crown could not easily acquire the rights to large areas. For their part, leading rangatira could not easily restrain the desire of hapu and whanau leaders to sell specific areas in which they had dominant rights. This latter tendency was increasing under the influence of the money economy, and the Crown's land purchase agents actively sought the pursuit of small blocks in the hope that this would lead to bigger purchases. Drummond Hay and Preece both actively fostered the notion that 'individuals' (individual family or hapu leaders) should be free to deal with their land as they saw fit, and denied the right of senior rangatira to veto alienation on behalf of their people. In Hauraki, however, in contrast to Taranaki, the Crown did not use force to secure purchases from individuals.

By the early 1860s, Crown purchases had stalled throughout most of the North Island. The relatively slow progress of Crown purchases in Hauraki, largely due to the intricacy of customary rights in the district, was seen by governments as contributing to the problem. Consequently (as Belgrave et al put it):

The complexities of determining title contributed to a Crown determination to divide those people who had a reasonable claim, in its eyes, from those people who were seen as having an unreasonable claim. The stalemate over Hauraki can be seen as having a major contribution to the establishment of the Native Land Court.⁷⁴

We will take up this theme of Hauraki contributions to the development of the Native Land Court in our discussion of the Native Lands Act 1862 and its successors in part IV.

As for the scale of Crown purchases in Hauraki, claimants have not distinguished sharply between pre-1865 Crown purchases and purchases under the Native Land Acts after 1865 as the cause of their ultimate near-landlessness. Rather, they consider that the early Crown purchases were the beginnings of systematic, full-scale acquisitions of their lands, a process which left Hauraki iwi with less land than most Maori. Although this perception relies to a considerable extent on hindsight, there is considerable evidence in support of it. There is no doubt that the Crown wanted the Hauraki islands and most of the mainland harbours and set about acquiring them systematically. Almost all the islands and much of the

⁷⁴. Document v1, p 134

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harbour lands had in fact been acquired by 1865. The Crown also hoped that control of the gold-bearing lands could be acquired, but, given the difficulties of purchase was not able to achieve that objective before 1865. These matters are pursued in part III.

Crown purchases before 1865 contributed to the economic marginalisation of Hauraki Maori largely because few reserves were made. In relation to eastern Waiheke, in 1858 McLean articulated a vision that the area, taken out of customary tenure and Crown-granted to various Maori groups, could be a base for ongoing Maori commerce with Auckland, much as the reserves near Wellington, Nelson, and New Plymouth were intended to be. But it did not happen. The fact that Hauraki Maori still possessed over 80 per cent of their rohe in 1865 does not wholly offset this failure to provide for the future the secure requirements needed for Maori to participate in the developing economy.

CHAPTER 5

WAR AND RAUPATU

5.1 INTRODUCTION

War between the Crown and Waikato Maori was precipitated when Governor Grey ordered General Cameron to cross the Mangatawhiri River on 12 July 1863, in accordance with proclamations of 9 and 11 July 1863. Within a week, Hauraki Maori were also involved in clashes with British troops. The conflict spread to much of western Hauraki over the next two years, while British warships patrolled the Hauraki Gulf. In 1864 and 1865, when hostilities had died down, large areas of Hauraki land were taken by the Crown in the East Wairoa and central Waikato confiscation districts. In respect of these events, Hauraki claimants have lodged considerable evidence and claims of major breaches of Treaty principles by the Crown, with serious prejudicial consequences to their iwi.

In this chapter, we review the background to the confiscation of Waikato lands, Hauraki and other claims in the East Wairoa block not included in the Tainui settlement in 1995, and Hauraki claims in the Maramarua district, overlapping the Waikato Tainui settlement area.

5.2 THE ORIGINS OF THE WAR (AND THE ADEQUACY OF EVIDENCE PRESENTED)

In the light of the Waikato settlement, ‘the Crown decided not to present any direct or new evidence on the wider context of the New Zealand Wars’.¹ It nevertheless submitted an extensive document bank concerning the onset of war in 1863.² Mainly, however, the Crown focussed (via Dr Battersby’s report³) on issues it considered of particular importance to Hauraki. Claimants offered evidence and arguments in response, some of which the Crown in turn challenged. The Crown has suggested that the evidence submitted in the Hauraki inquiry ‘allows for a more nuanced and refined judgement to be made’ about the wars relevant to Hauraki than was possible in the Waikato settlement, ‘in a way consistent with the political settlement entered into and its broad acknowledgement of injustice’.⁴ The Crown

1. Document AA1, p77

2. Document T11

3. Document O2

4. Document AA1, p78

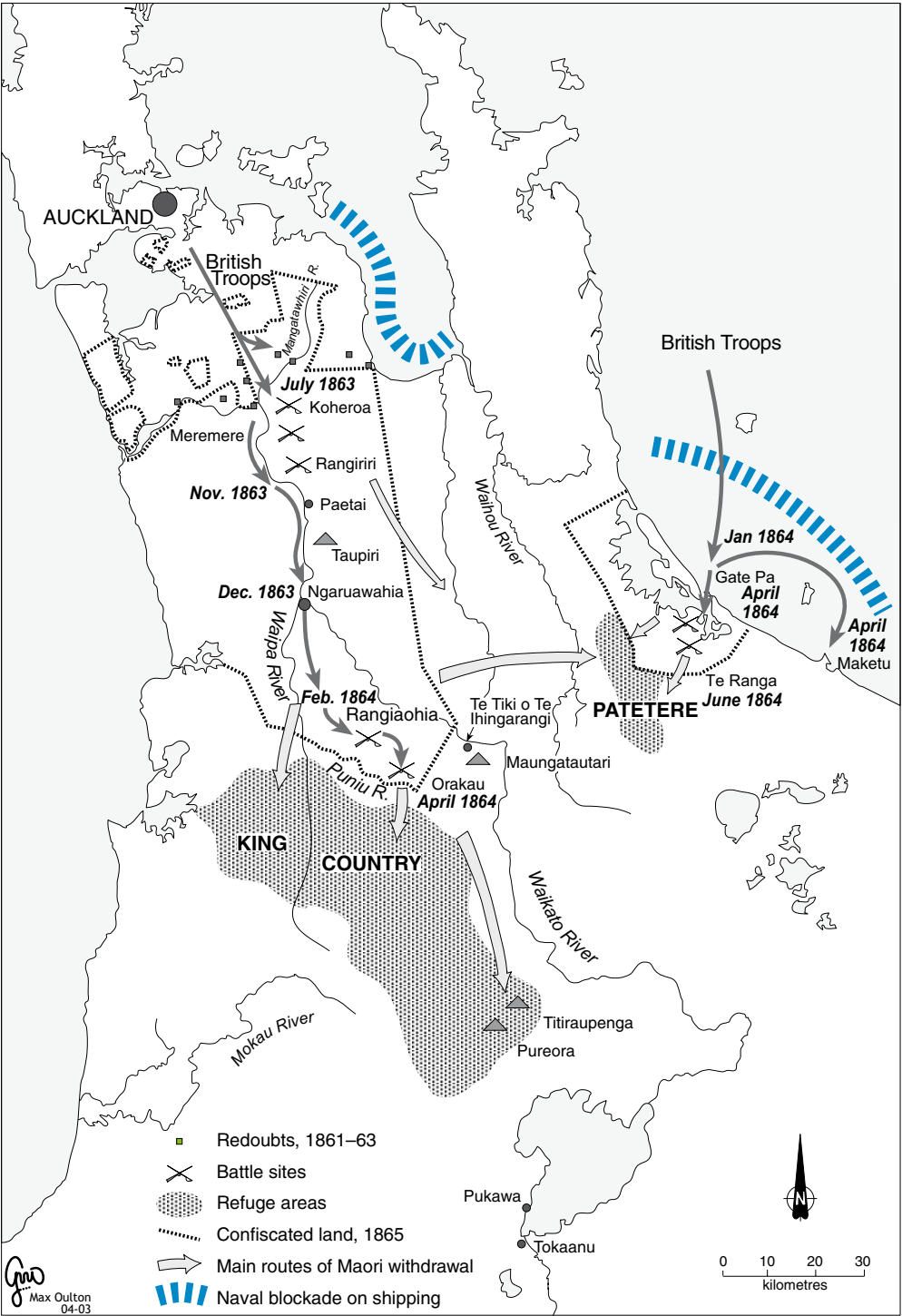


Figure 12: Waikato campaign, 1863-64

has further suggested that the Tribunal should deal with the issues of war and raupatu on the following basis:

- (a) Contextual material providing an impartial and comprehensive analysis of the events outside the inquiry district is relevant to the extent that it informs Crown and Maori actions within the inquiry district – and ought to be taken into account. The fact that fresh or direct evidence dealing with the wider context has not generally been presented in this inquiry, does not mean that such material cannot be considered.
- (b) It is not necessary to enquire in any detailed or comprehensive way into the events in Waikato – except to the extent that they affect Hauraki and there are specific points of difference between the parties.⁵

There are some difficulties with this approach. It is certainly within our competence as a commission of inquiry to initiate wide research, but we believe that over the four years of the inquiry there was ample opportunity for the Crown or claimants to put before us the evidence and argument on the subject that they considered relevant, so that any party to the inquiry could comment upon it.

We agree that the evidence put before us is incomplete. The origins and nature of the New Zealand wars, and the place of Hauraki in them, is a vast subject. But the bulk of evidence and argument presented to us focuses specifically on the crisis of mid-1863 leading to General Cameron's movement into the Waikato, on some (but not all) of the military encounters which involved Hauraki and on some (but not all) aspects of the raupatu which involved Hauraki.

This evidence indicates a considerable difference of opinion between Crown and claimants. To Hauraki claimants the British actions were aggressive, an 'invasion' of Waikato and Hauraki lands, which resulted in some Hauraki Maori resorting to arms in defence of their lands, homes and lives, but experiencing military assault and naval bombardment, and ultimately losing much of their land to confiscation.

The Crown, however, sees the Government's actions from Grey's second governorship commencing in late 1861 as essentially 'peaceable'. The first military encounter of 1863 was an attack by Ngati Ruanui on British troops near New Plymouth, instigated by Rewi Maniapoto. A mounting climate of mutual distrust and suspicion culminated in serious fear of attack on Auckland from Waikato. Grey issued proclamations (on 9 and 11 July 1863) calling for Maori to surrender arms and take an oath of allegiance to the Crown. On 12 July, troops were moved across the Mangatawhiri River. Arguably, the Crown implies, these were the kinds of action which, in July 1863, a prudent governor had to take:

5. Document AA1, p78

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Hostilities broke out 6 days later [at Koheroa, on 17 July], leaving a period of some days in which both sides could have, it has been argued, negotiated a settlement of the crisis and prevent war. It seems, however, that neither side perceived or acted on such possibility.⁶

In other words, in the Crown's view, Maori shared responsibility with the Crown for the commencement of fighting.

To give a more specific illustration of the different claims of Crown and claimants, counsel for Ngati Koheriki has stated, 'Without having committed any prior hostile act, Ngati Koheriki were branded as rebels, while defending their own lands and kainga from external attacks by Crown forces'.⁷ But the Crown considers that the governor's proclamations gave Ngati Koheriki the opportunity to take the oath of allegiance, surrender their arms and remain at peace. But they chose not to do so, remained in the vicinity of the Hunua ranges and took part in attacks on civilians. Then, of course, the Crown had to respond.⁸

Linked to this latter interpretation is the Crown's argument that the confiscation of land which then ensued was lawful, even though in breach of Treaty principles. The lawfulness of confiscation depends in turn upon the categorisation of Maori as 'rebels', and Crown counsel has embarked upon a discussion of the concept of rebellion, introducing eighteenth century definitions which could conceivably include the Kingitanga.⁹ Crown counsel rebutted the argument of counsel for Ngati Koheriki that the Crown had overstepped significantly its powers of kawanatanga. The Crown questions the argument that the principle of active protection be applied to those who had taken up arms against the State, therefore attacking the Sovereign that provides such protection.¹⁰ In Crown counsel's words, 'The better view is that when war is engaged between Treaty partners the standards required by the Treaty must necessarily be modified, and in special cases put to one side.'¹¹ But this argument can scarcely be credible if the Crown itself was the aggressor, and made war on its subjects.

These are very large questions. In order to determine who exactly was the aggressor and who was the defender, or whether or not some Maori were in rebellion or merely trying to safeguard their lands and liberties, or to make a 'more nuanced or refined judgement' about such matters, we need to look far wider than the immediate crisis of July 1863. Most professional historians writing on the subject have argued that the roots of the war lay in the mounting conflict of interest over land between colonists and Maori since 1840 or earlier, and in unsatisfactory constitutional arrangements which included the granting of responsible government to the settlers (at both provincial and national levels) but left Maori unfranchised and excluded from state power, even over their own affairs. Many see the emergence

6. Document AA1, p 84

7. Document Y16, p 19

8. Document AA1, pp 84–85

9. Ibid, pp 90–91

10. Document Y16, p 26

11. Document AA1, pp 88–89

of the Kingitanga in the 1850s as a response to these unresolved issues, with officials and settlers fearing that emerging Maori proto-nationalism would undermine the Queen's sovereignty and close much of the North Island to white settlement. Sir Keith Sinclair's classic work *The Origins of the Maori Wars* (University of New Zealand Press, 1959) considered that the struggles over land and over effective sovereignty were brought into focus by Crown purchases in Waitara, when Governor Browne, encouraged by settler Ministers, sent troops to force through the survey of the Pekapeka block, and thereby became the aggressor.¹² A deep concern was felt throughout Maori society that if Browne was allowed to coerce the Te Ati Awa chief, Wiremu Kingi Te Rangitake, no Maori and no Maori land anywhere would be secure. Although a truce was negotiated in March 1861, Governor Browne nevertheless accepted the advice of Frederick Whitaker, the Attorney-General that the Waikato tribes should be called upon to make 'Submission without reserve to the Queen's Sovereignty' (including allowing roads and bridges to be made on their land) and to restore property taken during the fighting, or face possible military invasion.¹³

The Government of William Fox, which took office in July 1861, endorsed this policy, hoping for a decisive subjugation of Maori autonomists while the British Government and troops were still in the country. But the Colonial Office, already far from convinced that Browne was justified in his Taranaki policy, relieved him of his post. Newcastle, Secretary of State for Colonies, enjoined Browne's successor, Sir George Grey to try to reach a *modus vivendi* with the Kingitanga, consistent with the sovereignty of the Crown. Newcastle asked him to consider whether establishing Native Districts under clause 71 of the 1852 Constitution Act, separate from the settler-governed (European) provinces, might not promote 'the present harmony and future union of the two races'.¹⁴

For their part, it seems that the leaders of the Kingitanga were also prepared to cooperate with the Government. In late 1861, Grey sent John Gorst to explain to Wiremu Tamihana Tarapipipi Te Waharoa, the 'Kingmaker', his plan to establish officially recognised local and district runanga with powers to make regulations for such purposes as control of stock trespass and liquor sales. Tamihana expressed a willingness to accept Grey's 'new institutions' provided that the laws of a Waikato runanga went for assent to the Maori King (Matutaera, after 1864 known as Tawhiao) as well as to the Governor. Tamihana also put his plan before

12. Other works by professional historians who have researched and reflected upon the whole question include James Belich, *The New Zealand Wars* (Auckland: Auckland University Press, 1986); James Belich, *Making Peoples: A History of the New Zealanders* (Auckland: Penguin Press, 1996); Brian J Dalton, *War and Politics in New Zealand, 1855–1870* (Sydney: Sydney University Press, 1967); Harold Miller, *Race Conflict in New Zealand, 1814–1865* (Auckland: Blackwood and J Paul, 1966); W H Oliver, *The Story of New Zealand* (London: Faber and Faber, 1960); J Rutherford, *Sir George Grey KCB, 1812–1898: A Study in Colonial Government* (London: Cassell, 1961); MPK Sorrenson, 'The Maori King Movement, 1858–1885', in *Studies of a Small Democracy*, edited by Robert Chapman and Keith Sinclair (Auckland: University of Auckland, 1963); and Alan Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand* (Auckland: Auckland University Press, 1974).

13. Government House, 'Further Papers Relative to Native Insurrection', 21 May 1861, AJHR, 1861, E-1B, p 12

14. Newcastle to Grey, 5 June 1861, AJHR, 1862, E-1, sec 3, p 4 (Ward, p 127)

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the King's council at Ngaruawahia, who were very supportive, provided that the Governor would let their King and flag stand. They sent a delegation to a proposed meeting with Grey at Taupiri, lower Waikato.¹⁵

Office memoranda of December 1861 show that Fox's Ministers considered trying to find a way of accommodating the Kingitanga's conditions. Fox wrote:

If, as a Condition in the making or assenting to such laws, the Natives, or any part of them, from motives of any kind, chose to recognise a Head or Chief without whose assent no such laws should be introduced, we see nothing in principle objectionable to such a Rule . . . As an experiment at all events, we see nothing which should hinder its being fairly tried; nor in practice would it conflict with the ordinary course of Government . . . So also in the appointment of Magistrates or assessors, if they chose to make the assent of their principal Chief a Condition of their appointment, there would be nothing repugnant to the Queen's Authority in such a Rule, provided the functioning power of the magistrates and the ordinary Execution of the law were made to flow from and be dependent on the Governor. In this form, and to this extent, we see no objection to the recognition of Matutairi [*sic*] – On the contrary we see many political uses in having some constant nucleus of organization of the Native race.

The name of King is objectionable but some other may perhaps be found.¹⁶

In the event, however, Grey did not receive such advice before he attended the Taupiri meeting of 12 December 1861. Instead, he was urged by Government Ministers to show that, while no hostilities would be threatened against the King movement unless it molested settlers, it should be treated with indifference, and Grey's language should distinctly mark his 'disapprobation' of the movement.¹⁷ At Taupiri, Grey did indicate his disdain of the Kingitanga, offering instead to set up many kings in the land through his 'new institutions', the officially recognised runanga. The slender record of the meeting shows that one of Grey's principal concerns was that the Kingitanga would spread not only its influence but its control beyond the Waikato, and constrain by force Maori who were willing to sell land to the Crown. At the meeting, he got conciliatory answers from a Maori spokesman known only as 'Tipene'.¹⁸

15. John Gorst, *The Maori King, or, The Story of Our Quarrel with the Natives of New Zealand* (1864; reprint, Auckland: Reed, 2001), pp 140–141. See also the detailed discussion, together with contemporary documentation, in Evelyn Stokes, *Wiremu Tamihana Tarapipipi Te Waharoa: A Study of His Life and Times* (Hamilton: University of Waikato, 1999).

16. Fox, memorandum, 7 December 1861, PM1/1, Archives NZ

17. Ministers to Grey, 6 December 1861, AJHR, 1862, E-2, pp 19–22 (Ward, pp 127–128)

18. John E Gorst, *New Zealand Revisited* (London: Sir Isaac Pitman and Sons, 1908), pp 176–183. Counsel for Wai 72 and other claimants cite Gorst's 1908 book *New Zealand Revisited: Recollections of the Days of My Youth* (London: Sir Isaac Pitman and Sons, 1908) in support of the view that Grey intended from the outset of his second governorship to invade the Waikato: doc 79, p 78. Gorst in fact made ambiguous and contradictory statements: see Gorst, *New Zealand Revisited*, p 164; Miller, p 83.

There is no doubt that the determination of supporters of the Kingitanga to retain their King and flag posed problems for Grey and his Ministers, and the practical enforcement of law would have been an ongoing problem. (Gorst, who constantly expressed his admiration for the idealistic and moderate men who made up the King's council, nevertheless had little faith in their ability to actually enforce any of the laws they made, against the wishes of constituent hapu and rangatira.) We cannot know whether a more serious effort to negotiate a political settlement with the Kingitanga would have succeeded but it is clear that at that critical time the Government did not pursue such a settlement with any vigour. Part of the reason was the Ministers' almost universal hostility to the concept of native provinces, for fear that to establish them, especially in the Waikato, would close the district to white settlement while not actually solving law and order issues.

The failure at this critical stage to find a place for the Kingitanga within the officially recognised structure of government made the political situation volatile, with the potential for localised incidents to assume large significance. The published histories record a sequence of these, which it is redundant to repeat here, which link the events of Taranaki to those in Waikato. They culminated in a crucial event referred to in evidence before this Tribunal, namely the ambush and killing of eight soldiers at Oakura near New Plymouth on 4 May 1863, apparently instigated by Rewi Maniapoto. This was the context out of which emerged the crisis of July 1863 in South Auckland and Waikato.

While it appears that Crown counsel would like us to explore this context (see item (a) above), doing so would add little to the conclusions reached by the professional historians in their publications. We note that, for the most part, those historians have been very critical of Governor Browne and bellicose settler Ministers for their handling of the Waitara purchase and their threat to carry the war into Waikato. Grey too is criticised for not exploring possible avenues to reach a settlement with the Kingitanga and failing to prevent the resumption of hostilities in Taranaki in 1863. The 1928 Sim commission of inquiry into confiscated lands concluded:

Both the Taranaki wars ought to be treated, we think, as having arisen out of the Waitara purchase, and judged accordingly. The Government was wrong in declaring war against the Natives for the purpose of establishing the supposed rights of the Crown under that purchase. It was, as Dr Featherston called it, an unjust and unholy war, and the second was only a resumption of the original conflict.¹⁹

It therefore does not seem likely that any closer investigation of this wider context on our part would lead us to say much in mitigation of the Crown's existing acknowledgement of Treaty breaches.

19. 'Report of the Royal Commission into Confiscated Native Lands and Other Grievances', undated, AJHR, 1928, G-7, p 11

5.3 THE HAURAKI CONNECTION**5.3.1 The control of land**

It is generally acknowledged that one of the primary purposes of the Kingitanga was to try to preserve the autonomy and integrity of Maori society by supporting those opposed to selling land, often in situations where the interests of 'land-holders' and would-be 'land-sellers' were intermingled. The emerging Kingitanga found considerable support from Hauraki Maori, many of whom attended important hui in the late 1850s and early 1860s. The Crown has summarised reports of Hauraki attitudes towards the Kingitanga and the war in Taranaki which point towards ambivalence among Hauraki iwi. There was some support for the Kingitanga, but little desire for military involvement.

Also mentioned is the large meeting organised by Hauraki leaders at Kerepehi on the Piako River in May 1862, following the discovery of gold at Koputauaki (near Tokatea in the Coromandel district). This area was exempted by Ngati Tamatera from the prospecting agreement made between Hauraki Maori and Crown officials in 1861, but there was mounting pressure on Maori right-owners to open it to mining (see ch 8). Te Hira Te Tuiri, the local Ngati Tamatera rangatira, remained opposed, and sought the support of the Kingitanga. Over 1000 Maori were reported to have attended the Kerepehi meeting, including King Matutaera (also known as Tawhiao) and a large bodyguard of his soldiers. Crown counsel, citing Crown witness Dr Battersby, has stated that at the meeting Ngati Maru and Ngati Tamatera, but not Ngati Paoa, put their land under the mana of the King.²⁰ Dr Barry Rigby has stated that Ngati Whanaunga also put land in the Hunua Ranges, in or near the later East Wairoa confiscation boundary, under the King's mana.²¹

According to John Gorst, Maori saw the Kerepehi meeting as defensive in nature. Pakeha demands to open Tokatea had become increasingly militant:

The press began to advocate force, and the diggers to talk of taking the law into their own hands and driving both Maories and Government off the place. It was exactly a case in which the King party felt bound to interfere and protect their countrymen from injustice. They therefore endeavoured to persuade the owners of Coromandel to hand over the land to their league, by promising to protect them, if attacked.²²

But to Grey this was 'Kingite' interference in respect of land in which Waikato had no customary right, an activity he had condemned when he met the Kingitanga leaders in December 1861. He therefore wrote angrily to Matutaera that he would not permit him 'to march about the country with men whom he chose to call his soldiers, to the great terror of

20. Document AA1, pp 79–81. However, the reference in note 284 on page 81 to document O2 does not in fact support counsel's statement.

21. Document T3, p 78

22. Gorst, *The Maori King*, p 118

well-disposed persons', and a time would come when he would be punished for such misdeeds. The Kingitanga published Grey's letter in their press, together with a reply asking:

if the Governor would point out the portions of the Queen's territory which had been invaded by the King and his forces, or let them know which European settlement had been terrified, or the individual man who had suffered damage from the soldiers going to Hauraki, the Maories would be ready to pay compensation for their conduct; but if nobody had been harmed, it was idle to talk of punishing the King for his evil deeds.

In the event, Tokatea was opened, largely through Grey's persuasion of Riria, Paora Te Putu's niece (see ch 8). According to Gorst, however, Grey's letter convinced Matutaera that the Governor was as opposed to the King as his predecessor had been, and that 'He took his determination [to attack the Kingitanga] when I went to Hauraki. Though it was to Taranaki he went [in April 1863], his thoughts were all the time intent on Waikato.'²³

5.3.2 'Conspiracy' and the strategic importance of Hauraki

It is one thing to regard the Kingitanga as a well-intentioned movement which had difficulty in controlling some of its militant adherents; it is quite another to brand it as a 'conspiracy' against the Crown and settlers. On 6 April 1863, Governor Grey reported to the Secretary of State for the Colonies that the Waikato tribes who had fought in Taranaki had never really accepted the 1861 truce, but had 'prepared themselves for war, and a general *conspiracy* was formed among the Native Tribes for a simultaneous attack on all the European settlements the moment that we attempted to attack the Waikato country'. He was convinced that 'the Waikato Tribes were evidently the head and front on this great and general conspiracy against us'. Hence his determination to build the military road all the way to the Waikato River in an attempt to overawe them.²⁴ It should be noted that this dispatch was written a month *before* the Maori ambush of the soldiers at Oakura. Moreover, Grey's mention of his military preparations vis-à-vis Waikato casts doubt on whether his later, pre-war negotiations with the Kingitanga were being conducted in good faith.

After the attack at Oakura in May 1863, rumours ran rife that the conflict would spread. Professor Ward has written of this period:

Amid great tension the Government sent John Rogan [a Kaipara magistrate] to Ngaruawahia (no Maori guide daring to accompany him) to demand that the King movement openly disassociate itself from the Oakura killings or be held liable for punishment also. Rogan found the Kingites bitter about Grey's refusal to accept Tamihana's assistance

23. Ibid, p 119

24. Grey to Newcastle, 6 April 1863, AJHR, 1863, E-3, pp 22-23 (doc T3, pp 12-13)

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in reoccupying Tataraimaka, and inclined to blame what followed on that. After a lengthy conclave of the King's *runanga* Rogan was told that the chiefs could not agree on an answer, but that Matutaera had spoken once, to say '*Waikato takoto*' (Waikato, lie still). Rewi was known to have urged an attack on Auckland; the moderates to have blocked him. After a flurry of panic among the settlers in the out-districts, a calm returned as powerful chiefs with Kingite sympathies – Wi Tako of Otaki, Pehi Turoa of upper Wanganui, and the Hawke's Bay chiefs – all repudiated the action at Oakura.²⁵

Importantly, the Hauraki chiefs wrote to Bell, the Native Minister, repudiating the action: 'All that we desire is for our matters to be investigated by the Law . . . Ngatitamatera, Ngatiwhanaunga, Ngatipaoa and all the Hauraki tribes would not go to Taranaki, nor do they approve of evil.'²⁶

It was not inevitable that the war should be carried beyond Taranaki. Ward notes that on 8 May Grey had received a dispatch from Newcastle informing him that, while he should generally accept the policies recommended by his Ministers, he should act on his own judgement if the policies proposed were 'marked by evident injustice towards subjects of the native race' or involved the use of Imperial troops.²⁷

Despite the intelligence coming in that Rewi and the Kingitanga extremists were being checked, Grey continued to express fears of a 'general rising of the native population . . . for the purpose of making a simultaneous attack upon several centres of European population, with a view to the total expulsion of the whole white race of this island.'²⁸ According to Dr Rigby, the sources used to justify this elaborate conspiracy theory were the reports from James Fulloon (Hemi Te Mautaranui), a part-Maori member of staff in the Native Office, whose duty was to inform his superiors of Maori meetings in the Waikato and South Auckland. According to Ward, there were other reports in circulation of proposed attacks on settlements, of purchases of arms and ammunition by Maori and of Waikato exhuming their dead from the vicinity of Auckland.²⁹ Regardless of the want of verification of these reports, there is no doubt that settlers felt threatened.

Auckland newspapers probably contributed to settler anxiety. Following the Peria meeting in October 1862, the *Daily Southern Cross* commented, 'we cannot overlook this determination of the disaffected to oppose the peaceable development of the country', and it warned settlers that 'they cannot close their eyes to the fact that there is in this island a combination, among the native race, inimical to law and order'. The editorial writer suggested that a majority of the colonists wished to limit the 'conciliatory policy' of the Government,

25. Rogan, report, 18 May 1863, unpublished parliamentary papers, 1865, no 22, Le 1/1865/137, box 35, no 22, Archives NZ (Ward, p 158)

26. Document A8, p 110; see also doc 02, p 18, doc AA1, p 82

27. Ward, p 158

28. Grey to Newcastle, 9 May 1863, BPP, 1863–64, vol 13, p 365 (doc T3, p 13)

29. Ward, pp 158–159

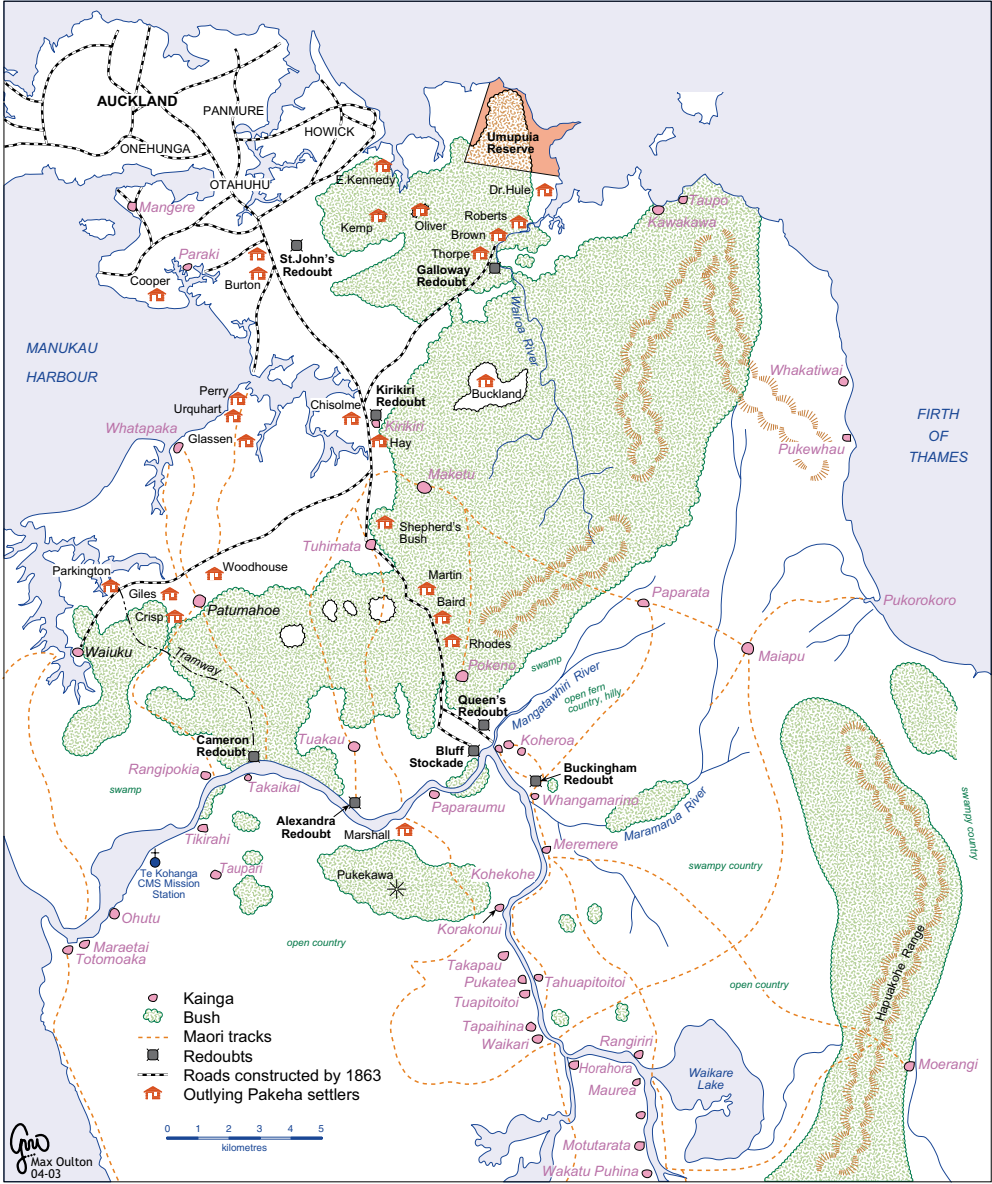


Figure 13: South Auckland, 1863. Source: GBPP, vol 13, 1864, p108.

and asked, ‘when does that particular crisis arise which will necessitate an entire change of policy?’³⁰

A report of 20 June 1863 by Fulloon put Hauraki land squarely in the ambit of the alleged conspiracy. He stated that when Browne proposed to invade the Waikato in 1861, Maori planned their own counter-strategy. This involved gathering forces at Maramarua, proceeding from thence to Paparata, occupying posts on the Great South Road and then attacking

30. *Daily Southern Cross*, 17 November 1862, p 3

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settlements in South Auckland or Auckland itself (see fig 13). Moreover, Thames Maori were to gather at Taupo (Clevedon) and join the attack on Auckland. Fulloon recounted information from a pro-Government chief who had been asked to join the ‘conspiracy’ that the Kingitanga leaders were currently considering a revised version of the same strategy.³¹

Grey was well aware of the strategic importance of the southern approaches to Auckland through Hauraki lands, and believed also that if General Cameron’s force was ordered to cross the Mangatawhiri, Waikato Maori would attack from the rugged, forested ranges between the Waikato and the Hauraki Gulf. Accordingly, the proposals which Grey put to the Executive Council in late June included South Auckland and Hauraki lands within their scope. According to Premier Domett’s 24 June account of the meeting, Grey had stated that it was ‘impossible to settle the Taranaki question so long as the Waikato was the centre of disaffection, and the wealthy and prosperous settlement of Auckland was constantly threatened with invasion and destruction from that quarter’.

Grey’s proposals included plans to seal off the Waikato by a line of posts extending from the confluence of the Waikato and Mangatawhiri Rivers to Pukorokoro, to confiscate the lands of ‘hostile Natives’ between Auckland and that line, to place military settlers on some of it, and to sell the balance to help defray the expenses of war.³²

Yet, up to late June 1863, the evidence does not in fact reveal a well-developed Kingitanga conspiracy for a general rising. Instead, it shows incomplete efforts to coordinate a Maori counter-strategy against the likelihood of a British invasion of Waikato, together with a propensity for militant actions by Rewi Maniapoto and some of his people, which other Kingitanga leaders discouraged but might not always be able to prevent. The situation was one of legitimate concern to the Governor, but Grey’s measures to deal with it were drastic, and soon drew anxious queries from London. Moreover, while *at that stage* Grey could construct a plausible argument for vigorous pre-emptive measures to establish the rule of law and the security of peaceful settlements, it is difficult to escape the conclusion that his June proposals came only at the *end* of a sequence of failures in statecraft in his and his predecessor’s relations with the Kingitanga and their handling of the Waitara question. While Rewi Maniapoto and other Kingitanga militants must bear some responsibility for precipitating the disasters that then overtook Waikato and Hauraki, bellicosity and inflexibility are also evident in the attitudes and actions of settler Ministers and Grey himself.

In short, we see little in the historical context which mitigates the Crown’s admitted breaches of the Treaty as regards the war which began in July 1863, and which involved the Hauraki tribes, primarily (or indeed only) because their lands happened to be among the strategic approaches to Auckland.

31. Fulloon, memorandum, 20 June 1863, AJHR, 1863, E-5B, pp 4–5 (doc T3, pp 11–12)

32. Domett, memorandum, 24 June 1863, AJHR, 1863, E-7, pp 8–9 (doc T3, p 13)

5.3.3 The immediate events of July 1863

We see no need to discuss at length the more proximate events of late June and July 1863. Claimants have submitted evidence to show that Grey continued to maintain a ‘conspiracy’ view of Maori intentions, to justify his proclamations of 9 and 11 July and his ordering Cameron across the Mangatawhiri on 12 July. The Crown has submitted evidence that the intelligence reaching Grey of Maori plots was such that ‘there is also little doubt that the Government and the settlers thought that vigorous steps were needed to defend Auckland in July of 1863.’³³

The difficulty was that in that climate of nervous anxiety it was scarcely possible for either side to sort out fact from rumour. According to Gorst, South Auckland and Waikato Maori took the series of bonfires lit in Auckland on 1 July to celebrate the Prince of Wales’ marriage to be signals for a Pakeha attack on *them*. Runanga were then held, excluding Tamihana and other moderates, to plan counter-measures, and reports of these began to reach the Government. Some of these were undoubtedly very serious councils of war, and the Crown is justified, in our view, in stating that the information received by the Government could not be ‘dismissed as mere rumour’.³⁴

It is clear from the evidence that moderate Kingitanga leaders continued to oppose Maori plans for attack. Dr Rigby has provided good evidence to show that a proposal by Rewi to send a taua to Auckland was not a plan for general attack but to free Aporo Taratutu, the leader of the group which had expelled Gorst from Te Awamutu, who had been arrested by constables in June. Matutaera, Tamihana, and others had frustrated this plan.³⁵ In late June, Tamihana warned the missionary Ashwell of a plan ‘by the false [Maori] friends of the Governor about Auckland’ to attack the out-settlers, and promised to frustrate their design.³⁶ On 7 July, Tamati Ngapora, still living at Mangere as a hostage for the Kingitanga’s desire for peace, warned that the peaceably disposed were working to defeat ‘murderous designs’, and if no murders had occurred by 12 July this would indicate that the moderates had prevailed.³⁷

However, according to Native Minister Bell, Grey had resolved by 7 July to move first:

The certainty of the existence of a conspiracy to commence the work of murder on our own frontier has determined the Governor to make the first move . . . The Governor’s mind has been very much influenced, as well as ours . . . by accounts similar to Ashwell’s relating to a general rise throughout the Country . . . he has come to the same conclusion that we all

33. Document AA1, p 84

34. Ibid, p 83

35. Chiefs of Ahuriri to Dr Featherston, 19 October 1863, AJHR, 1863, E-11, pp 3–4 (doc T3, p 36)

36. Ward, p 159

37. Statement by the Reverend A G Purchas, 7 July 1863, AJHR, 1863, E-3, p 61 (doc T11, sec 1)

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did in 1860–61, that fighting at Taranaki did nothing, and that the real issue must be tried in Waikato.³⁸

Here again is the now-familiar exaggeration: not just a legitimate fear that out-of-control Kingitanga militants might start murdering out-settlers, but that there was to be a general rising throughout the country. Here too is another admission that the settler leaders had resolved in 1860 or 1861 to coerce the Kingitanga rather than negotiate with it.

It may still be argued that, by about 7 July 1863, a prudent governor had to take pre-emptive action to safeguard the colony. As Crown counsel suggests, settler fears were genuine, and Grey would have wanted to forestall another Maori assault of the kind that had occurred at Oakura on 4 May. Equally, it could be argued that if he had made the effort to contact Ngaruawahia again (as he had when Rogan was sent in following the Oakura killings) he would have found that the moderates were indeed prevailing, and that Rewi was being stalemated.

What makes this rather unwinnable argument redundant are the statements of men like Domett and Bell, and of Grey himself, which show their *predilection* to deal with the situation by calls for submission rather than by serious negotiation with the Kingitanga. This predilection dates from 1861 when Ministers proposed and Governor Browne accepted that an ultimatum be given to Waikato demanding submission under threat of military occupation. In our view, it was the underlying failure of statecraft on the part of the Crown in Grey's second governorship which brought New Zealand to the crisis it faced in July 1863. In its bellicose statements and admissions, the Government condemned itself and showed that the policy put into effect in the second week of July was *not* merely a recent, reluctant response to the actions and plans of Maori militants.

One final point on the July events: we do not consider realistic Crown counsel's suggestion that following Grey's proclamation of 11 July a negotiated settlement might still have been possible.³⁹ It is unrealistic to expect that *Maori* might have taken such steps:

- First, because the proclamation of 9 July did not invite negotiation but offered South Auckland Maori and those of the 'Waikato frontier' a choice between an abject submission (which included the surrender of arms) and leaving their land and the district. This was seen by many Maori, outside the district as well as in it, as aggressive. As Domett had put it, the Government's objective was to 'clear out' hostile Maori from the district, but the choice offered could not but have polarised Maori who were hitherto unsure of what to do or even of what was happening. Certainly, many South Auckland Maori felt impelled to retire beyond the Mangatawhiri and join what they saw as defensive preparations. Even as they prepared to move, South Auckland chiefs such as Mohi

38. Bell to Mantell, 7 July 1863, Mantell MSS-224, ATL (Ward, p159)

39. Document AA1, p 84

Te Ahi a te Ngu and Tamati Ngapora were asking officials why the Government did not hold an investigation or whakawa into the alleged misdeeds of Waikato, or arrest Rewi, or take action against the leaders of plots against the settlements, rather than punish all Waikato. In Parliament later that year, Henry Sewell also asked if the Government had reason to believe that a plot was being hatched ‘why did they not arrest the ringleaders of that plot’.⁴⁰ Of course, that would have required the cooperation or at least the acquiescence of Kingitanga Maori, but such efforts could at least have been attempted before the Crown embarked upon full-scale invasion and confiscation of Maori land.

- ▶ Secondly, the proclamation of 11 July stated that ‘Those who remain peaceably at their own villages in Waikato or move into such districts as may be pointed out by the Government, will be protected in their persons, property and land’ (emphasis added).⁴¹ This implied a relinquishment of rangatiratanga over their lands, and possible forcible dispossession.
- ▶ Thirdly, few Maori would have received the 11 July proclamation until *after* the troops had moved, on 12 July. Gorst recorded that he had met a messenger carrying copies in Maori on the road between Otahuhu and Drury on the evening of 14 July 1844. (In cross-examination, Dr Rigby gave evidence that it did not actually reach Waikato until two days before the first engagement, at Koheroa on 17 July, though no doubt word-of-mouth accounts of it came earlier.⁴²) Indeed, few would have been aware of the precise terms of the earlier proclamation of 9 July until it was published in the *Daily Southern Cross* on 11 July.
- ▶ Fourthly, it had long been recognised by both sides that the Mangatawhiri was an aukati. Proclamations or no proclamations, Cameron’s crossing of it could not but be seen by Maori as an act of war. They would not have considered that negotiation was now feasible. They either had to surrender arms and make an act of submission or fight in what they saw as defence of their lands and liberties.

Paradoxically (as Sewell pointed out in Parliament later that year and Gorst pointed out in his 1864 book), the Government’s actions brought about the general conflict which it was Grey’s proclaimed intention to avert. Crown counsel’s assessment is therefore appropriate:

It is hardly surprising that there is debate over whether or not Governor Grey should have acted as he did in ordering troops across the Mangatawhiri. There is no doubt, however, that in doing so he combined extremist and moderate Kingite Maori alike into hostilities against the Crown. There is also no doubt that by crossing the Mangatawhiri certain groups within Waikato and Hauraki perceived the Crown to be attacking the Waikato.

40. Sewell, 6 November 1863, NZPD, 1861–63, p 801 (doc T3, pp 20–21)

41. ‘Proclamation of 11 July 1863’, AJHR, 1863, E-5, pp 5–6; doc T11, sec 2

42. Gorst, *The Maori King*, p 162 (doc T41, pp 13–14)

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Counsel continued: ‘On the other hand, there is also little doubt that the Government and settlers thought that vigorous steps were needed to defend Auckland in July of 1863.’⁴³

But, while the Government and settlers thought vigorous defensive steps were necessary, those actually taken were, in our view and in the view of many before us, much more sweeping and aggressive than the situation warranted.

5.4 HAURAKI INVOLVEMENT IN THE WAR

In 1864, Gorst wrote:

War being declared by the crossing of the Mangatawhiri, all those ill-disposed Maories whom Tamihana and his friends had with difficulty restrained in time of peace, swarmed into the Hunua forest, and there carried on guerrilla warfare with the raw colonial levies [militia], in the course of which much property was taken or destroyed, and many out-settlers murdered.⁴⁴

This is a slightly exaggerated but reasonably accurate description of what unfolded. Contrary to Professor Belich’s picture of an elaborately organised Kingitanga strategy and campaign, the evidence indicates that Maori actions demonstrate local motivation and initiative. But they were also more than ‘random banditry’ to defend territory or seek utu, as Mr Monin and Dr Gilling suggest. The fighting, which lasted only till December 1863, involved groups of Ngati Paoa and Ngati Whanaunga, Ngati Koheriki and possibly some Ngai Tai, together with sections of the Waikato tribes. Crown counsel has submitted that it is mistaken to analyse the military encounters of any one group (such as Ngati Koheriki) in isolation; many groups and encounters were inter-connected across the region from Raglan to Tauranga.⁴⁵ The Crown is probably correct in this, although local and particular motives can also be discerned.

Crown counsel also notes, correctly, that Hauraki iwi were divided as to how to respond to the initiation of hostilities, with particular chiefs or sections of the various tribes declaring their loyalty to the Crown or at least trying to remain uninvolved. Counsel also acknowledges, however, that ‘proximity to the “Waikato frontier”’ affected their choices.⁴⁶

Crown counsel further suggests that the Government could not ignore attacks on soldiers or out-settlers, but otherwise limited its military activity in Hauraki, essentially leaving Kauaeranga, the Coromandel Peninsula and the gulf islands alone. However, given that it had been planned since June, the ‘Thames expedition’ mounted by the Government in

43. Document AA1, p 84

44. Gorst, *The Maori King*, p 167 (doc T3, pp 21–22)

45. Document AA1, p 87

46. Ibid, pp 87–88

November 1863 to establish the line of forts from Pukorokoro to Pokeno cannot be seen solely as a response to Maori guerrilla activity. Even if their own actions had not made the Hunua area a theatre of war, Hauraki Maori between the gulf and the Waikato could not easily have escaped the Crown's military net. Unfortunately for Hauraki, once fighting had begun, the area was too strategically important to ignore.

The associated naval 'blockade' was also driven by strategic considerations. Claimants see it as needlessly indiscriminate and disruptive of Hauraki's peaceful commerce with Auckland. Crown counsel, however, notes that 'it involved no boycott of trade' but was intended to prevent the conveyance of arms by 'the institution of licences and some policing of these'. Taraia's vessel *The George*, for example, continued to trade. Although the war inevitably had some effect on trade, the disruption, from the naval patrols, it is suggested, was short-lived.⁴⁷ In the absence of more detailed information, we can say little on this subject.

Some of the Crown's actions during the war were undeniably brutal. The attack by Jackson's Forest Rangers on the Ngati Koheriki–Ngati Paoa encampment in the Hunua Ranges on Sunday 13 December 1863 was regarded by former Attorney-General Swainson as particularly murderous, involving the indiscriminate shooting of women and children. Similar action took place in the destruction of villages by naval bombardment and shore landing parties at and near Pukorokoro. Ngati Horowhenua hapu of Ngati Paoa (Wai 808) submit that they were displaced by the occupation of their land and construction of redoubts by the army.⁴⁸ They were affronted that their lands at Pukorokoro were renamed Miranda after the ship that bombarded them.⁴⁹ They note also the loss of the valuable ngawha at Pukorokoro in the East Wairoa confiscation. Elders of Ngati Rongo-u also recall that Papaaroha was also bombarded.⁵⁰ These actions, like some of the Maori attacks on out-settlers are, unfortunately, typical of warfare arising from a military campaign to subdue an armed local populace in its own territory. They flowed essentially from the strategy adopted by Grey in June 1863.

5.5 RAUPATU

In final submissions, the Crown has conceded that 'in general terms' the 'application' of the confiscation policy in respect of land at East Wairoa and central Waikato was unjust and in breach of the principles of the Treaty.⁵¹ But it has also made a number of propositions

47. Ibid, p 88

48. Document v6, pp 8–9

49. Document t31, p 5

50. Document u6, para 3.12. A papakainga of 454 acres remains to this day, much of it in residential sites, plus 160 acres declared general land: doc v2, pp 135–138. There is also mention of the current papakainga in document u7, para 2.

51. Document AA1, p 78

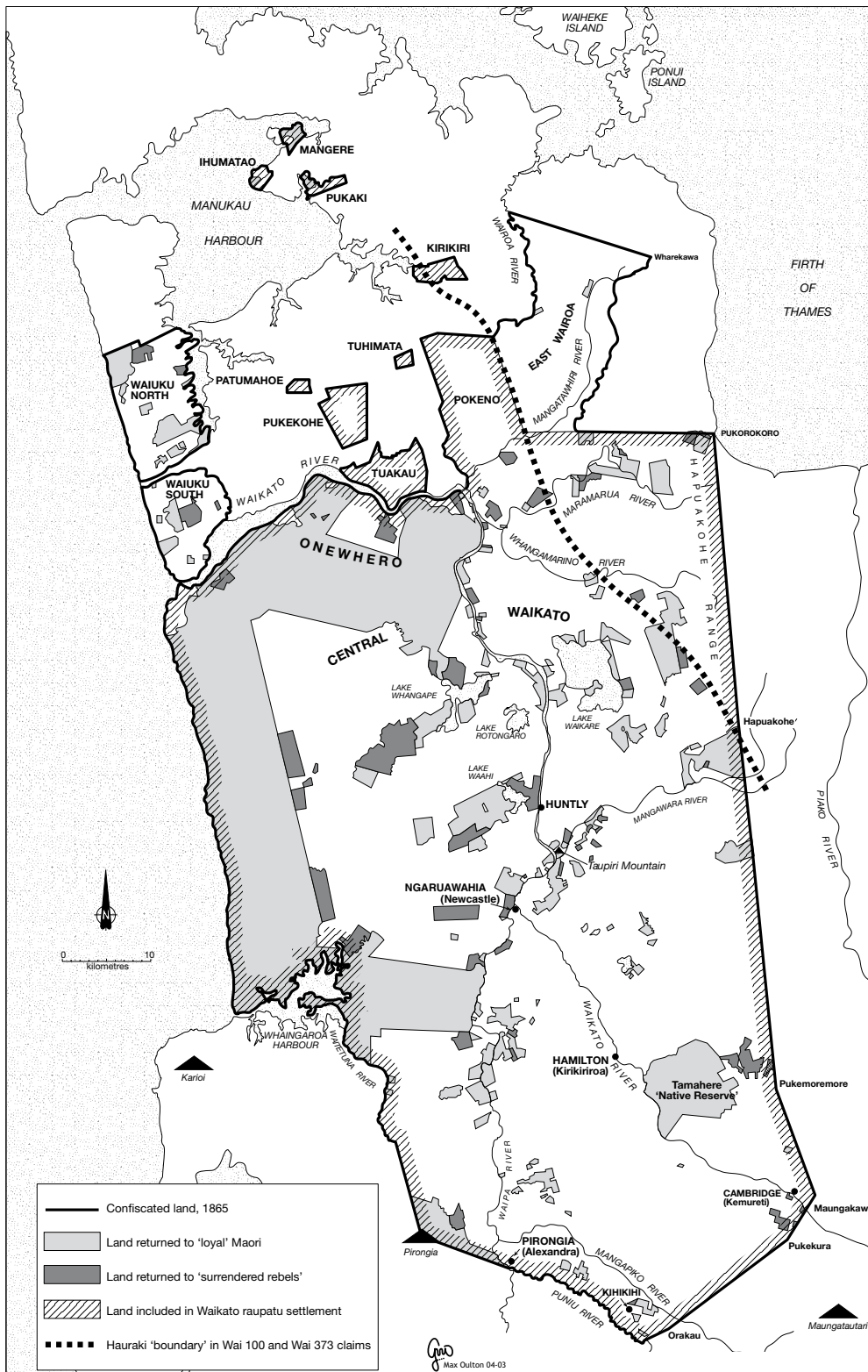


Figure 14: Waikato confiscated lands. Source: roll plan B43, DOSLI, prepared for the Sim commission, 1927.

in mitigation or even in justification of the policy. In view of the Crown's general acknowledgement of Treaty breach (see sec 5.8.2), we do not consider it necessary to discuss these in detail but will consider them briefly, along with claimant allegations. In figure 14 (redrawn from a plan prepared in 1927 for the Sim commission), we have set out the confiscated Waikato lands, and added the boundary of Hauraki claims in the north-east and the lands included in the Waikato Tainui settlement in 1995.

5.5.1 Legality and related issues

We make the following comments:

- The Crown does not accept that land confiscation was 'unlawful': it was standard practice and lawful in the empire, in situations where a state of rebellion existed. The Crown has entered into a discussion of 'rebellion' and considers inadequate the claimants' bald assertions that they were not in rebellion. 'For any historical judgement to be considered valid' Crown counsel suggests, 'this type of [historical] analysis is required.'⁵² The Tribunal is invited to decide on the issue.

In response, the Wai 100 claimants submit:

that the Crown attempt to analyse the meaning of rebellion . . . is simply irrelevant given that the chronology previously referred to indicates that Hauraki could not be held responsible for the war, and the Crown's concession that the response in this claim must be consistent with the [Waikato Raupatu Claims] Settlement Act [1995] (which expressly concedes that Waikato were unfairly labelled as rebels). In such circumstances it is hard to see how Hauraki could have been rebels if Waikato were not.⁵³

The claimants have logic on their side. It is difficult to see how the Crown can reverse the position taken in the 1995 Act, particularly given that the chronology of the steps to war do not show Hauraki to be either plotting or participating in an organised challenge to the State, prior to Cameron's crossing of the Mangatawhiri. However, to satisfy ourselves and the parties on the question, we have in previous sections of this chapter, analysed the steps to war and concluded that, notwithstanding militancy among some sections of Waikato–Maniapoto, the responsibility for general conflict lies heavily with successive governors and governments.

- The Crown argues that the raupatu was not as 'indiscriminate' as the claimants allege. The Government intended to take land mainly from 'rebels' but because of 'the difficulty of multiple ownership', the land of loyalists was taken as well, though much of it

⁵². Document AA1, p 90

⁵³. Document AA14, pp 29–30

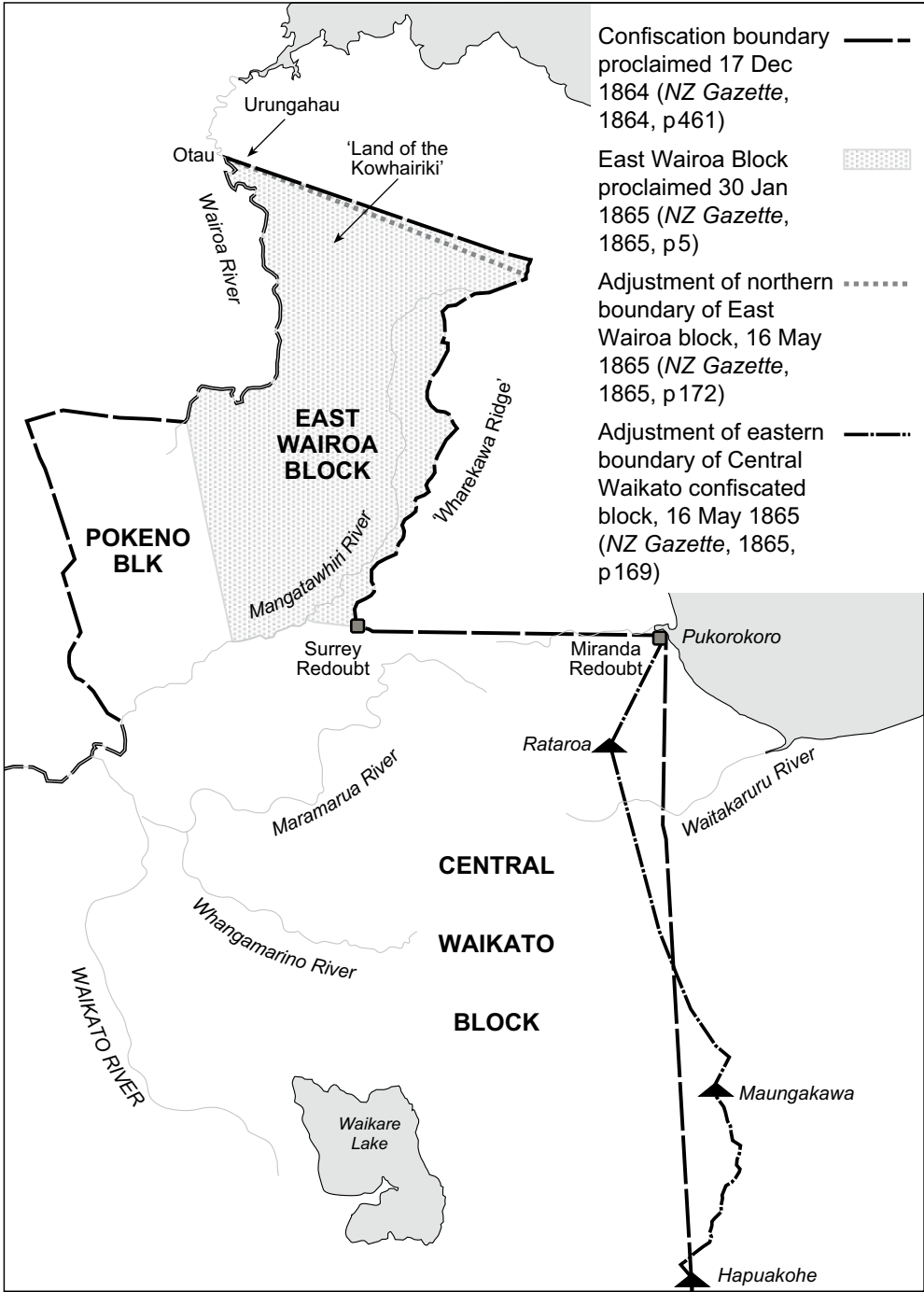


Figure 15: Boundary variations, East Wairoa and East Waikato blocks

was given back or compensation paid.⁵⁴ Crown counsel has discussed at some length Secretary of State Cardwell's concerns about the sweeping nature of the confiscation and noted that he conceded (to Grey and the New Zealand Ministers) that any other course would be difficult. However, Crown counsel also concedes that 'Clearly the application of the confiscation policy and failure to return any significant proportion of the East Wairoa lands overstepped the line fixed by Cardwell, given hindsight'.⁵⁵ In our view, it scarcely needs hindsight to see that the line was being overstepped in 1864 and 1865.

- Claimants point out that Cardwell would have preferred a *cession* of land by Maori, demanded as a condition of clemency, rather than a confiscation.⁵⁶ Grey's 'peace proclamation' of 25 October 1864 indeed invited 'rebels' to surrender and make such a cession. They did not do so before the deadline of 10 December 1864 set by the proclamation, and the Crown now acknowledges that any such expectation was unrealistic. The Crown is probably correct. The taking of land by cession was nominally in use in Tauranga and in Poverty Bay, but eventually the New Zealand Settlements Act 1863 was applied in Tauranga. Its use was threatened in Poverty Bay and eventually special legislation was employed for that district. On the evidence available, it is impossible to judge whether more strenuous efforts for cession could usefully have been made in Waikato and Hauraki. It would have been difficult to get agreement on a cession of land from any, let alone all, of the many Maori groups involved.

5.5.2 Procedural flaws

Claimant witnesses have argued that the procedures for the implementation of confiscation were flawed.

- On 17 December 1864, Grey issued a proclamation declaring that 'the Governor will retain as land of the Crown' all the Waikato and Hauraki land then occupied by the Queen's forces, though land would be returned to 'loyal' Maori and to surrendered 'rebels'. Tom Bennion has pointed out that the proclamation made no reference to the New Zealand Settlements Act 1863 (the statutory authority for the confiscations) and that Grey's legal authority for the proclamation is unclear.⁵⁷ The boundaries of the proclamation covered virtually all of Waikato and western Hauraki north to the lower reaches of the Wairoa River on the east, Waiuku on the west, and several separate blocks between Manukau Harbour and lower Waikato (see fig 14).

54. Document AA1, p 93

55. Ibid, p 96

56. Document Y15, para 6.17

57. Document A46, p 26

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- The Executive Council on 29 December 1864 reiterated Grey's proclamation and declared that the land of Maori implicated in rebellion would be from time to time brought under the provisions of the 1863 Act. A series of districts were proclaimed under the authority of the New Zealand Settlements Act including East Wairoa on 31 January 1865. Bennion notes that the order was made with reference to sections 2 and 3 of the 1863 Act but not section 4, which deemed the land to be Crown land, freed and discharged from all title, interest, or claim.⁵⁸ Possibly, reference to the section was thought redundant, since section 3 reserved the land as a site for settlement and colonisation. The description of the northern boundary of East Wairoa was vague in the proclamation of 17 December 1864, being 'the Wairoa River to the North Eastern boundary of the land of the Kowhairiki [Koheriki] Tribe, thence to the summit of the Whare Kawa Mountain, thence following the ridge of Whare Kawa.'⁵⁹ This boundary was amended on 16 May 1865 to exclude the northern portion (Urungahau) in recognition of the neutrality of most Ngai Tai, but notice of the alteration was not published till 7 June (fig 15). At Chief Judge Fenton's request, a call for Maori claims to be submitted to the Compensation Court in respect of East Wairoa was published on 8 April, but Fenton convened the hearing on East Wairoa in Auckland on 26 and 27 May, well before the six months notice required by the 1863 Act, and without notification in the *Auckland Gazette*. The Crown has acknowledged 'procedural faults' in respect of East Wairoa.⁶⁰
- There was confusion also in respect of central Waikato. The boundary description of the 17 December 1864 proclamation was amended when the central Waikato confiscation district was proclaimed on 16 May 1865, together with several 'sites for settlement' within it. But not all of it was so proclaimed and Maori were trickling back to their former settlements within the confiscation district. Dr Rigby has outlined correspondence between officials, who sought to resolve it by a proclamation of 5 September 1865. This 'reserved as sites for settlement and colonization agreeably to the provisions of the [1863] Act', virtually all the Waikato defined within the December 1864 proclamation not already so proclaimed. (These sites were subject to grants of land or monetary compensation in lieu for 'loyal' Maori and offers of grants to surrendered 'rebels'.⁶¹)

58. Document A46, p 26

59. Proclamation, 17 December 1864, *New Zealand Gazette*, 1864, no 49, p 461

60. Document AA1, p 100

61. 'Proclaiming Certain Lands under "New Zealand Settlements Act, 1863"', *New Zealand Gazette*, 1865, no 35, p 265 (doc A2, pp 187–190)

5.6 COMPENSATION AND THE FAILURE TO RETURN LAND**5.6.1 Crown promises to return land**

The Governor's proclamation of 17 December 1864 set out the boundaries of the land confiscated and also promised that 'The land of those natives who have adhered to the Queen shall be secured to them; and to those who have rebelled, but who shall at once submit to the Queen's authority, portions of the land taken shall be given back for themselves and their families.'⁶² We note that the confiscation of land by the Crown, ipso facto, extinguished Maori title to the confiscated land. In returning land to Maori, the Crown was not bound to do so within the district where individuals and their hapu had customary rights, and in many cases did not.

Among the most serious criticisms of the Crown in the implementation of its confiscation policy is that almost no land was returned in the Wairoa East block and very little in central Waikato (fig16). We set out the details below, including monetary payments made in lieu of land, but first we review briefly the legislative provisions for the award of compensation.

The New Zealand Settlements Act 1863 provided for the establishment of a Compensation Court. Judges were specifically appointed to it, with powers similar to existing resident magistrates. Specific classes of people were set out in section 5 as not eligible for the award of compensation: those persons who after 1 January 1863 had been in rebellion, involved in military action in carrying arms against the Crown, or who had aided or conspired or acted as accessory to such persons, and who had refused to comply with the Governor's proclamation to surrender their arms and agree to submit to British rule of law. Applications for compensation had to be made to the Colonial Secretary within six months of the date of the proclamation of land confiscated under the 1863 Act. The provisions of the 1863 Act were continued under several amending statutes: the New Zealand Settlements Amendment Act 1864, the New Zealand Settlements Act Amendment and Continuance Act 1865, the New Zealand Settlements Act Amendment Act 1866, and the Confiscated Lands Act 1867.

The 1863 Act, in sections 14 and 15, provided that the Compensation Court should grant a certificate setting out an amount of money and the name of the land in which the claimant's interest was recognised. This certificate entitled the person named on it to be paid from the Colonial Treasury. These provisions were repealed in section 14 of the 1865 Act, which allowed for compensation awards in money or land (or both). The 1865 Act became law on 30 October 1865, and had the effect that in Compensation Court awards made prior to that date, including the East Wairoa block, compensation was paid only in money, not land.

Early in 1866, James Mackay was appointed as the Crown agent with power to negotiate with claimants and reach settlements out of court. Almost all Hauraki claimants in the central Waikato confiscation block were dealt with in this way, and no records have survived to

62. 'A Proclamation by his Excellency Sir George Grey', *New Zealand Gazette*, 1864, no 49, p 461



Figure 16: East Wairoa and East Waikato confiscated lands returned to Maori. Source: roll plan B43, DOSLI, prepared for the Sim commission, 1927.

indicate the basis for these payments. Hauraki iwi clearly had significant interests in both East Wairoa and the East Waikato portion of the central Waikato confiscation. In the next two sections, we review the nature of compensation awarded.

5.6.2 The East Wairoa block

The Compensation Court, sitting in Auckland (Judges Francis Dart Fenton and James Mackay jnr presiding) on 26 and 27 May 1865, considered applications for compensation in both the Pokeno and East Wairoa blocks. It has been estimated by the Crown that within the Hauraki inquiry district, 51,111 acres were confiscated in East Wairoa.⁶³ Dr Ferguson considers that East Wairoa comprised 58,000 acres, and notes that in 1866 Charles Heaphy reported that 12,782 acres of the East Wairoa block had been sold by the Crown or appropriated, while 45,218 acres remained unsold – a total of 58,000 acres.⁶⁴ Grey and Ministers had repeatedly stated that confiscated land would be returned to ‘loyal’ Maori unless absolutely required for defence and other public purposes. The proclamation of 1864 repeated those undertakings and extended offers of land to surrendered ‘rebels’. Dr Ferguson has tabulated some 33 claims lodged both before and after the Compensation Court hearing of 26 and 27 May 1865.⁶⁵ These came mainly from chiefs of Ngai Tai, Ngati Paoa, Ngati Pou, Ngati Whanaunga, and others. There was a claim by Wikitoria (presumably, Wiropo) Hoterini Taipari on behalf of Marutuahu tribes to interests at Paparata near the south boundary of the East Wairoa block. But later it was found that a strict reading of the 1863 Act authorised only payments in money, and the Pokeno and the East Wairoa blocks were almost wholly dealt with on that basis. The awards were based on former Surveyor-General Charles Heaphy’s evidence as to land value, ranging from 10 shillings an acre for the best land to two shillings an acre for poorer land. Mackay’s sketch map which is part of the court record has been redrawn in figure 17.

Table 1 shows the awards relating to the East Wairoa block made by the Compensation Court on 27 May 1865. The payments were made by Mackay and the receipts were signed on 29 May 1865. There were also payments to individuals for claims lodged subsequent to the

63. Document AA1, p 98

64. Document T2, p 70; Heaphy’s ‘Report on Lands in Waikato District’, *Journals of the Auckland Provincial Council*, 1865–66, sess 19, sec A5, p 3 (doc A46, p 61). David Alexander considers the 58,000 figure to be an estimation only and states that ‘in actual fact the block was between 75,000 and 80,000 acres’: doc C3, p 32. He provides no source for this and we think it was an overestimate. Our cartographer, Max Oulton, has done a computer check on the area and concludes that it is about 51,000 acres, close to the Crown’s estimate. In a discussion of Dr Gael Ferguson’s report before the Tribunal, Heaphy’s 58,000-acre calculation was generally accepted. On a large cadastral plan prepared for the Sim commission by the Department of Lands and Survey in 1927 (roll plan B43), the area of the Wairoa East block was shown as 53,000 acres. No area is given in the Sim commission report. We conclude that the area of Wairoa East block is about 51,000 acres.

65. Document T2, pp 62–64

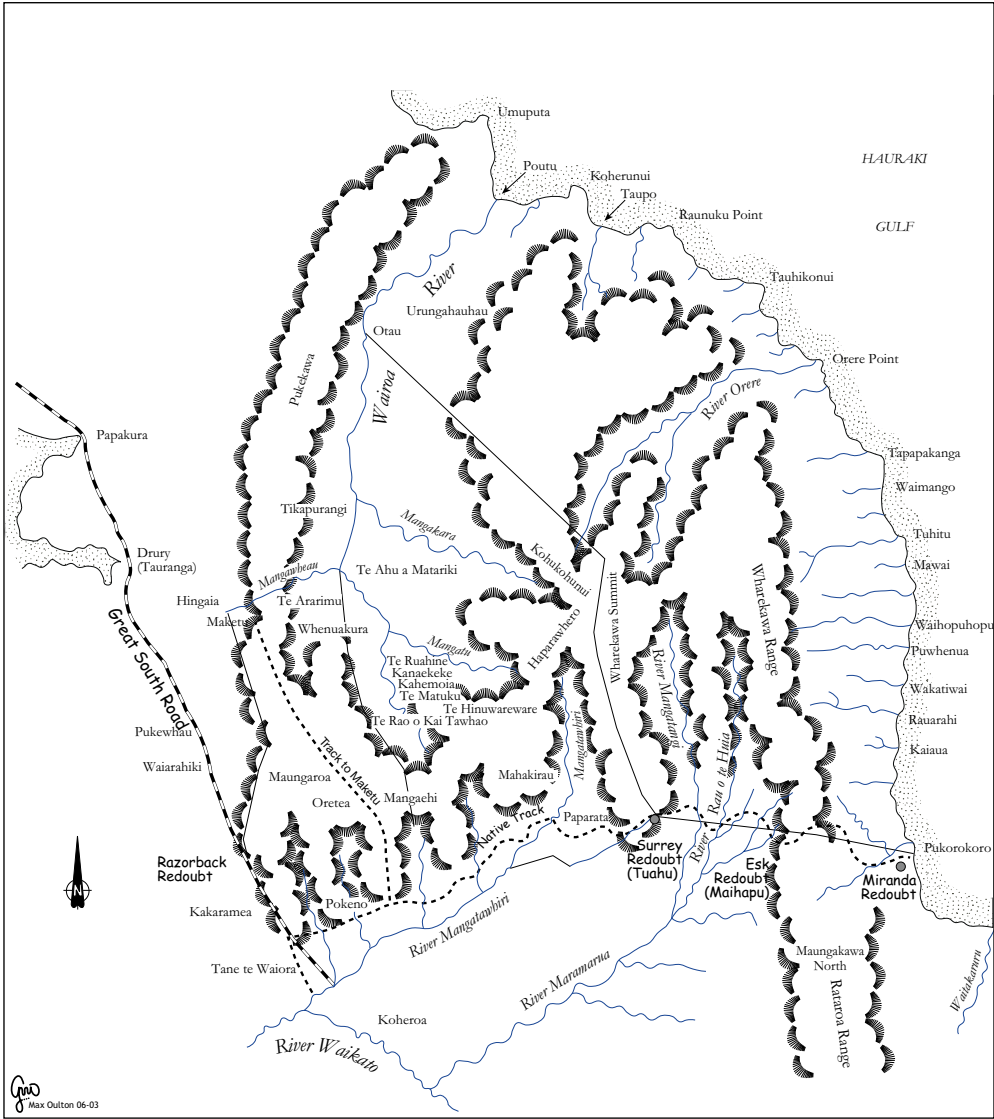


Figure 17: Mackay's sketch map of East Wairoa, 1865

Compensation Court hearing, which were arranged out of court by Mackay, and these are shown in table 2.

The total paid out was £2810, which, based on the Sim commission assumption of 58,000 acres in the block, represents about 11.5 pence per acre, or 8.5 pence to ninepence per acre on the area as calculated by Mr Alexander, that is 75,000 and 80,000 acres.⁶⁶

Some information about ancestral rights in the East Wairoa block can be gleaned from the minutes of the Compensation Court hearing. Honatana Te Irirangi of Ngai Tai claimed land north of a line from the junction of the Wairoa River and Mangawheau Stream, along

66. Document c3, p 32

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Claimant	Award
Honatana Te Irirangi, Hori Whetuki, and Matene Te Mapura, on behalf of Ngai Tai	£1000
Eruera Te Paerimu	£50
Ahipene Paerua (Ngati Paoa)	£200
Patene Puhata (Ngati Paoa)	£100
Wiremu Hoete, Mohi Te Puatau, and Wiremu Kepa, on behalf of Ngati Paoa	£100
Te Rauroha	£50
Hauira Maki, on behalf of Ngati Pou	£650
Rawiri Te Ua, on behalf of Ngati Whanaunga	£350
Hunia Te Nawe, on behalf of Ngati Pari	£100

Table 1: Compensation Court awards relating to the East Wairoa block, 1865

Claimant	Award (£)
Wikitoria Titihuia	60
Mata Te Kaha	20
Maihi Te Rahui	20
Hana Parongaepa	10

Table 2: Out-of-court awards relating to the East Wairoa block, 1865

the ridge of Te Ahu a Matariki to Kohukohunui, on the eastern boundary. This ‘boundary’ seems to have been accepted by other claimants who represented various hapu of Ngati Paoa and Ngati Whanaunga of Hauraki, and Ngati Pou and other Waikato hapu. The claims in the southern portion were complex. For example, Aihi Pene Paerua, who lived on Waiheke, said he belonged to the Ngati Para hapu of Ngati Paoa and Ngariki, a Waikato people. Wiremu Hoete of Ngati Paoa also had a claim to the Maketu area of Pokeno block, but not on behalf of Ngati Paoa, and was awarded £15. Rawiri Te Ua on behalf of Ngati Whanaunga also claimed rights in Pokeno and was awarded £100. The other seven awards in Pokeno block went to Waikato people.

There was no representative of Ngati Koheriki present in court although Honatana Te Irirangi of Ngai Tai acknowledged their occupation of land at Otau, along with some Ngai Te Rangi people from Tauranga. He dismissed their claims because they were ‘rebels’. He also named other ‘rebels’ and the court appeared to have accepted his word. However, the court minutes cannot be taken as a full record of ancestral rights in the East Wairoa block because not all who might have claimed rights were present, in particular Ngati Koheriki, who received neither money nor land within their rohe in the block.

In 1868, three adjacent lots were surveyed in the upper Mangatawhiri Valley in East Wairoa and Crown grants backdated to 1867 were issued in 1871 to individuals from Ngai Tai in the Parish of Otau (see table 3).

Dr Ferguson suggested this was a ‘seasonal resource gathering area’ for Ngai Tai in the

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Grantee	Area (acres)	Lot
Wikitoria Titihuia	100	5
Mata Te Kaha	100	6
Hana Parongaepa	50	7

Table 3: Crown grants in the upper Mangatawhiri Valley, 1871.

Source: document C3, p 39.

Tribe	Award (£)
Ngati Paoa	1045
Ngati Whanaunga	140*
Ngati Maru	130
Total	1315

* Plus 500 acres of land

Table 4: Payments to Hauraki tribes in the Eastern Waikato block.

Source: 'Waikato Confiscations: Compensation Court, Mackay's Awards, Returns', 1863–66, DOSLI, Hamilton, 3/17 (RDB, vol 104, pp 40,011–40,030).

Hunua Bush.⁶⁷ No land grants were made to Ngati Paoa or Ngati Whanaunga. All three blocks were sold to William Aitken, 'an Auckland land speculator' in 1869 (lot 5) and 1872 (lots 6 and 7) for a total of £17.⁶⁸

5.6.3 The East Waikato block

The East Waikato block includes the portion of the central Waikato confiscation block lying east of the Waikato River from the junction of the Mangatawhiri River and southern boundary of the East Wairoa block in the north, south along the Waikato River to the junction with the Mangawara River at Taupiri, and east to the eastern boundary of the confiscated land from Pukorokoro to Hapuakohe. Mackay did not provide a sketch plan of East Waikato, as he did for the Compensation Court hearings for East Wairoa and Pokeno. However, in figure 18 the East Waikato portion has been redrawn from Mackay's 1871 sketch map prepared for the Native Land Court investigation of Hauraki claims to the Aroha block. Within East Waikato, numerous claims were submitted to the Compensation Court by individual Hauraki people asserting ancestral rights and seeking compensation for the loss of their land.

67. Document T2, pp 68–69

68. Document C3, p 39

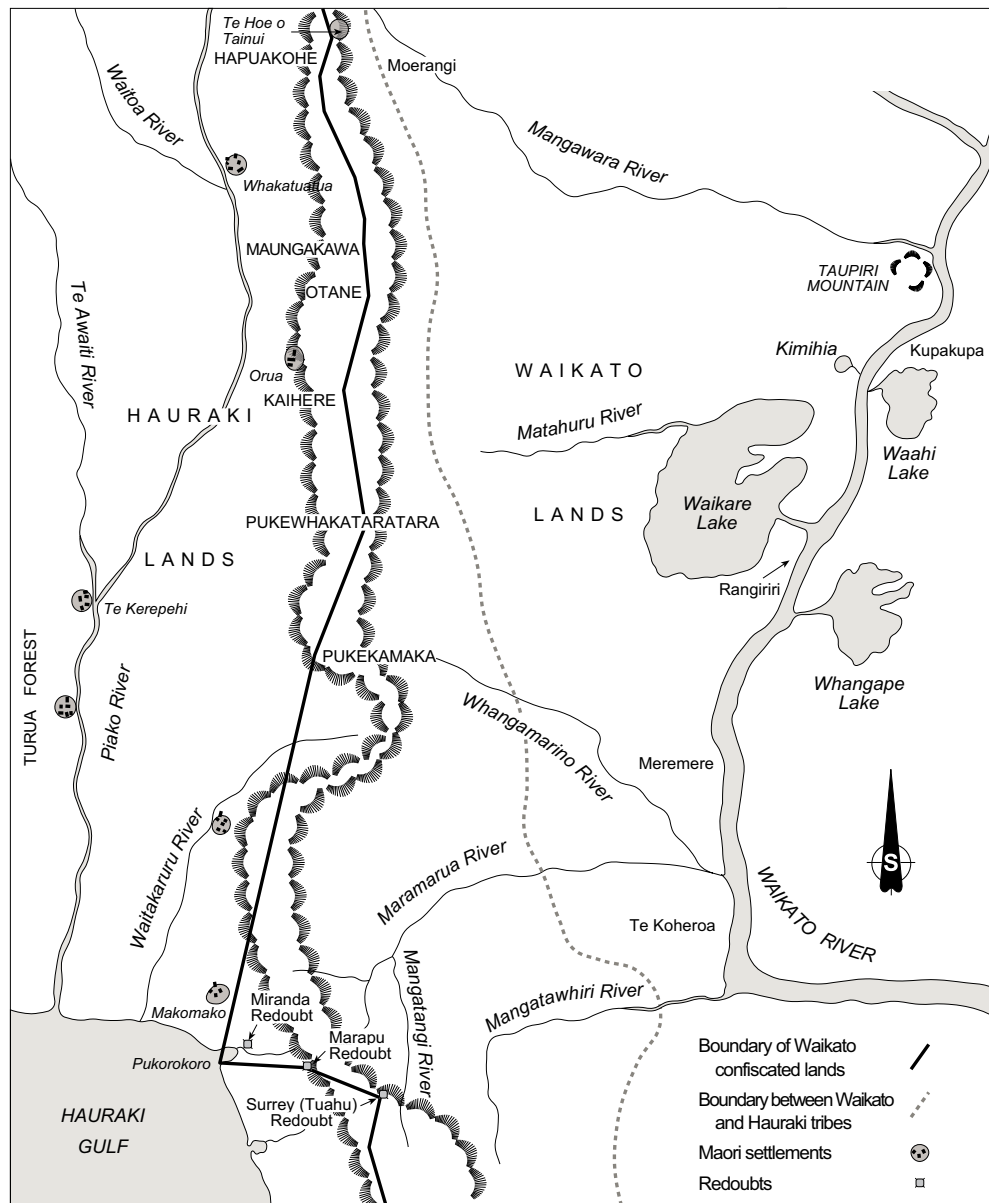


Figure 18: Mackay's sketch map of East Waikato, 1871

None of the Hauraki claims to East Waikato was actually heard by the Compensation Court. The central Waikato block claims were scheduled for hearing at Port Waikato early in 1866 but a number of Hauraki people protested about the distance they would have to travel to attend the hearing. In February 1866, Frederick Whitaker, agent for the general government in Auckland, authorised James Mackay jnr to negotiate out-of-court settlements with Hauraki claimants.⁶⁹ Mackay was already Civil Commissioner at Thames and

69. 'Waikato Confiscations: Compensation Court, Claims and Correspondence, James Mackay Jnr', 1866, DOSLI, Hamilton, 5/37 (RDB, vol 107, pp 41,227-41,241)

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Locality	Claimants	Amount (£)
Pukorokoro	Matiu Tauhehahe and Urikaraka of Ngati Paoa	25
	Rangituatea and Ngati Paoa	25
	H Tiki and Ngati Whanaunga*	5*
	Eruera Taiwiwi	5
	Patukirikiri of Ngati Paoa	20
Kaiakaka, Rau o te Huia, and Ratarua	Urikaraka (Ngati Paoa)	25
	Ngati Taurua hapu of Ngati Paoa	20
	Rapoutu and others	15
North Maramarua	Ngati Taurua hapu of Ngati Paoa	150
	Mate Ngahuia and others	100
(Kerikeri)	Mata Ngahuia and others	20
(Kerikeri)	W Hoete and others	20
South Maramarua	Urikaraka (Ngati Paoa)	75
	W Parata	10
	H Paura, N' Taurua (Ngati Paoa)	20
(Waikarakia)	W Hoete, Ngati Paoa	10
(Tawharoa)	Patukirikiri of Ngati Paoa	20
Koheroa	H Paura and N' Taurua	115
(Whakangutu)	Haora Tipa	10
Pokaiwhenua, Pukemore and Akatarere	Tamihana Tukere and others	100
	Heneri Paura	20
	Hori Rakena and Totore Anatipa	10
	Rawiri Te Ua	5
Wairenga	Ngati Paoa (whole tribe)	25
	Hera Hoete	5
Matahuru and Mangawhara	Mohi Te Hararei and Ngati Rakura of Ngati Paoa	55
Maungakawa North	H Rangituatea and others (Ngati Paoa)	30
Tikaokao	Mata Haora, Harata Kati, W Hoete, Heneri Te Paura, and others (Ngati Paoa)	40
	Hamiora Kewha	5
Kaihere	Hauauru Taipari and Ngati Maru	100
(Pukewhakatara)	Hauauru Taipari and Ngati Maru	20
(Ongo)	Hauauru Taipari and Ngati Maru	5
(Hue)	Hauauru Taipari and Ngati Maru	5
(Katirangi)	Mohi Te Puatau (Ngati Paoa)	5
(Tangoao)	Miroa (Ngati Whanaunga)	10
Waikare	Taniwha Kitahi, Rawiri Te Ua, and N'Whanaunga	20
East Waikato block (as a whole)	W Kepa (Ngati Paoa)	20
	Marata Tuohu (Ngati Paoa)	5
	H Tipa and T Tangiteruru for a number of small claims of Ngati Paoa	50
Total		1220

* Deleted by Mackay

Table 5: Out-of-court awards made to Hauraki claimants, 1866.

Source: 'Waikato Confiscations: Compensation Court, Mackay's Awards, Returns', 1863–66, DOSLI, Hamilton 3/16, 3/17 (RDB, vol 104, pp 39,994–40,030).

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Ngati Paoa awardees	Lot	Area (acres)
Aperahama Pokai	72	74
Ngatai	78	75
Epiha Te Koiwi	77	50
Hohepa Te Ruinga	71	50
Anaru Te Whetu	70	50
Maaka	69	50
Haimona Ikahaere	68	50
Timoti Taumaunia	67	50
Wiremu Koro	66	49

Table 6: Ngati Paoa individuals who received land near Pukorokoro, 1879

Ngati Whanaunga awardees	Lot	Area (acres)
Tukaramaina	52	75
Hemi Te Ahipo	49	20
Wiremu Te Aramoana	48	20

Table 7: Ngati Whanaunga individuals who received land near the Te Rau o te Huia Stream, 1879

had been involved in settlement of Hauraki claims in Tauranga confiscation lands. He also acted as a judge of the Compensation Court in 1865 but had given up this role by the end of 1866.

There is no information in the records of the Compensation Court about how Mackay went about negotiating settlements, nor how representative were the individual recipients of monetary awards. The list of awards in table 5 has been compiled from Mackay's return of payments made under the New Zealand Settlements Act 1863 and the New Zealand Settlements Amendment and Continuance Act 1865 up to 30 June 1866.

The localities of these Hauraki awards in East Waikato are shown in figure 20. In addition, there were payments for Hauraki claims in the Waikato confiscation generally of £50 for Taniwha Kitahi and Rawiri Te Ua and Ngati Whanaunga and another £50 to Rawiri Te Ua for his claims at Whangape, west of the Waikato River at Rangiriri. Ngati Whanaunga were also promised 500 acres of land as compensation for three claims at Waikare in the East Waikato block, but no location was specified in 1866.

Mackay summed up payments to Hauraki tribes in the Eastern Waikato block as shown in table 4. There is a discrepancy of £30 between Mackay's total of £1315 and the total in table 5 of £1220 plus the £100 for Ngati Whanaunga claims west of the Waikato making £1345. We cannot explain this discrepancy, owed perhaps to possibly incomplete records of Mackay's transactions. Nor do we have information about where or whether title to the 500 acres promised to Ngati Whanaunga was granted. Dr Rigby has pointed out that most

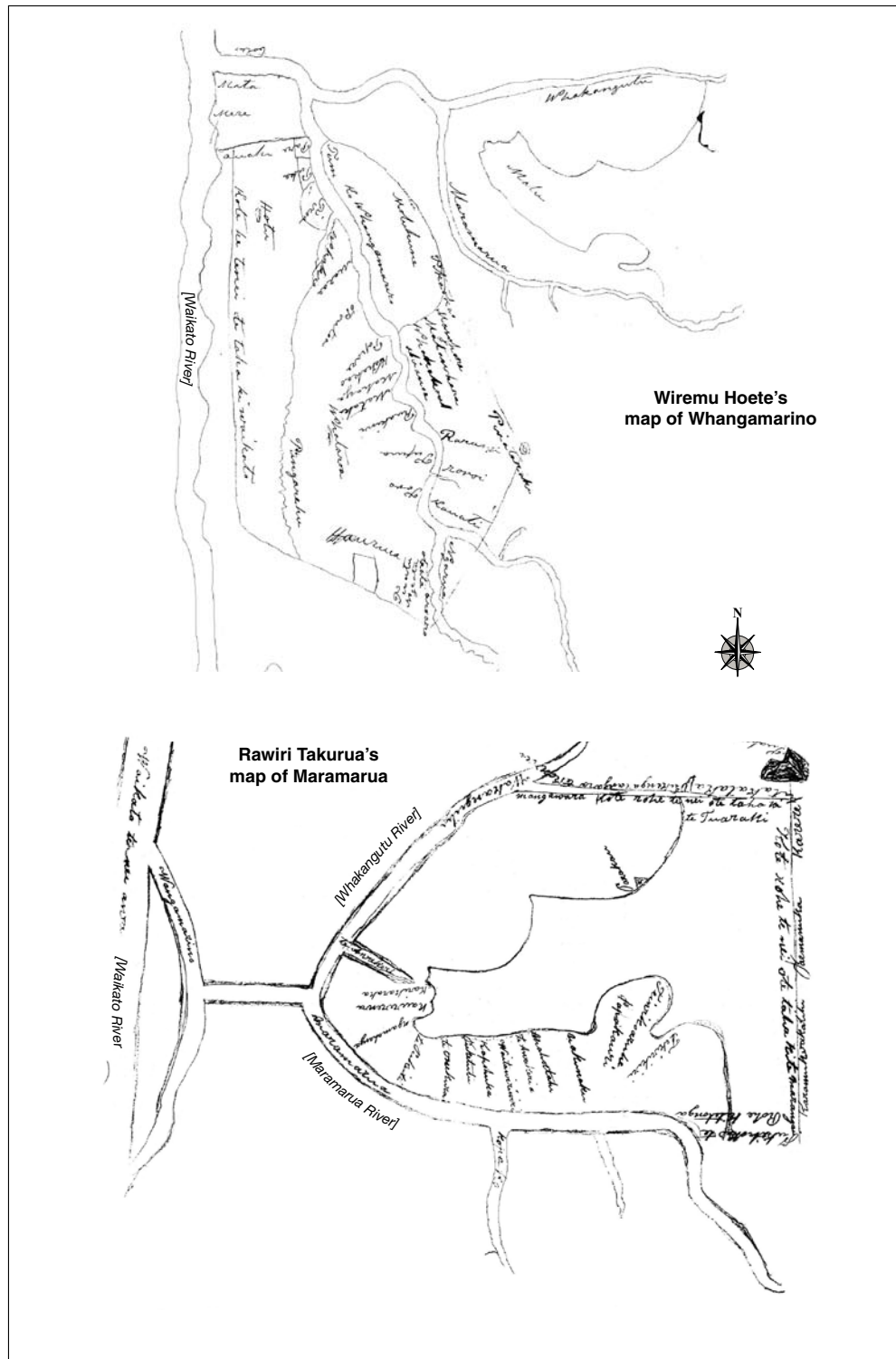


Figure 19: Maori maps of Hauraki claims in Maramarua and Whangamarino, 1864. Source: RDB, file 3/18.

Hauraki groups had made their submission to the Crown officers during 1864 and that some had surrendered under the terms of Grey's 17 December 1864 proclamation.⁷⁰

Some land was later granted to individual Hauraki people in the East Waikato block but we have little information about the circumstances (fig 20). For example, lot 74 (300 acres) at Pukorokoro was awarded by Civil Commissioner HT Clarke on 19 July 1870 to six people from Thames: Te Keene Pokorewa, Morohea Te Ahuru, Heneri Pango, Timoti Weneti, Wiremu Kotu, and Piripi Te Rakau.⁷¹ In 1879, a number of reserves were set aside for 'Rebel Natives' including Hauraki people.⁷² Table 6 shows the individuals of Ngati Paoa near Pukorokoro who received land.

In the valley of Te Rau o te Huia Stream, three small blocks were awarded to individual Ngati Whanaunga (see table 7). Several other blocks were awarded to various other hapu of Waikato in 1879.

In 1894, a section of 300 acres in Waikarakia block was awarded to Hori Ngakapa Whanaunga under section 5(4) of the Native Lands Claims and Boundaries Adjustment and Titles Empowering Act 1894 'in lieu of three hundred acres promised to him at Otaua'. We do not know the background to this award or whether it was in partial fulfilment of the promise of 500 acres for Ngati Whanaunga made by Mackay in 1866.

In 1894, the Hapuakohe Reserve (3736 acres) was awarded to Ngati Paoa under section 5(2) of the Native Land Claims and Boundaries Adjustment and Titles Empowering Act. This was the result of negotiations that began in 1870 when Tarapipipi Te Kopara wrote to Dr Pollen, agent general for the Government in Auckland, advising him that, as a result of the adjustment of the eastern boundary of the Waikato confiscation, his cultivations near Hapuakohe had been taken and he sought land for Ngati Paoa. Tarapipipi was promised a reserve and on this basis cooperated with the Government survey of the adjusted boundary already gazetted in 1865. However, in spite of much official correspondence Pollen's promise was not implemented. In 1882, there was an offer under the Waikato Confiscated Lands Act 1880 of unoccupied Crown land around Moerangi and Hapuakohe for landless Maori prepared to submit to the Queen's authority, but still no land was specifically allocated to Ngati Paoa. In the late 1880s, the issues became entangled in Crown efforts to purchase Piako lands east of the confiscation boundary, and in Ngati Paoa debts to the Crown.⁷³ Despite more official correspondence we do not have details of how the final area awarded was arrived at. Three decades after the original Waikato confiscation, Ngati Paoa were awarded the Hapuakohe Reserve, but this award was then referred to the Native Land Court for determination of the individuals to be named as owners.

70. Document T3, pp 50–51

71. 'Miscellaneous Papers: Schedule of Awards of Land', 1870–77, DOSLI, Hamilton, 9/1 (RDB, vol 111, pp 42,636–42,652)

72. 'Reserves Made under Section 4 Confiscated Lands Act 1867', *New Zealand Gazette*, 1879, no 109, pp 1482–1491

73. Document V1, pp 150–157

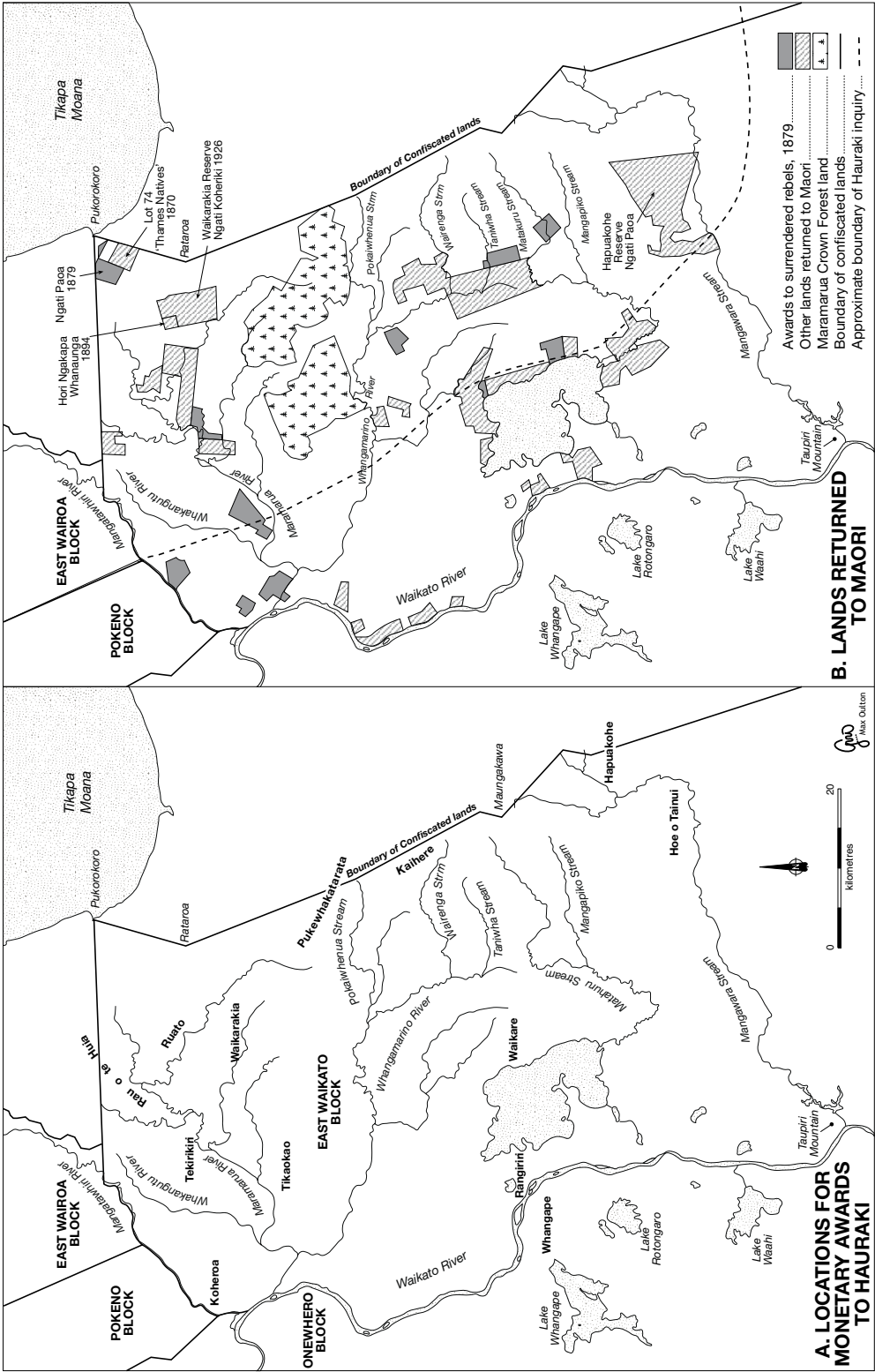


Figure 20: East Waikato confiscation block

As we have noted above, Ngati Koheriki were excluded from any monetary payments or land awards within their home territory in the East Wairoa block. In 1879, two Ngati Koheriki women, Ripora Totaea and Te Paea Hauparua and their children, were awarded grants in Onewhero block, on the south bank of the lower reaches of the Waikato River. In lot 77 (576 acres), their interests were shared with eight others of various Waikato hapu, and in lot 75 (99 acres) their interests were shared with 14 others of Waikato. No reserve was allocated to Ngati Koheriki at this time. After the fighting at Paparata in 1863, they had retreated south and some withdrew to the Tauranga district. By the late 1870s, some had drifted back to the Waikato. In 1879, Wiremu Waitangi petitioned for land for Ngati Koheriki.

In the 1880s, Ngati Koheriki were living on land in the Maramarua district variously referred to as Ruato, Rataroa, or Waikarakia. In 1882, consequent to the 1879 petition, Ngati Koheriki had a meeting with Chief Judge Fenton, Government agent Wilkinson, and Assistant Surveyor-General Percy Smith, when a promise was made to allocate 5200 acres near Ruato. There was then a community of 54 people. Nothing eventuated, and another reminder from Ngati Koheriki in 1885 resulted in a sketch plan of an area at Ruato of 3429 acres made the following year. Nothing resulted, but official records in 1891 indicated that this land was to be allocated to Ngati Koheriki. In 1894, a section of 300 acres in what was then called the Waikarakia block was awarded to Hori Ngakapa Whanaunga. Nothing was done for Ngati Koheriki, although the rest of the Waikarakia block (3129 acres) remained a 'native reserve' on Crown land.⁷⁴

The matter remained unresolved and seems to have come to a head in 1917 when the Crown lands ranger told the Ngati Koheriki occupants not to cut flax on the land amid persistent local settler requests to open up the block for returned servicemen. In 1919, Ngati Koheriki petitioned Parliament, and the Native Lands Commission investigated in 1920. Wi Taka told the commission that there were about 40 people living on the block and that their dead had been buried there over several decades of occupation. They had cleared and fenced some land to run stock, and their other sources of income were cutting flax and working for local Pakeha farmers.⁷⁵

The Native Lands Commission accepted the Ngati Koheriki claim to the land:

It is quite clear that some Natives have pretty continuously lived on the block, and that they never intended to abandon occupation thereof. They have had no title whatever beyond the promise which they have relied on for so many years, while at times there have been suggestions to dispossess them of the whole or the greater part of it. This is a case in which we think the promise made on behalf of the Government should be fulfilled.⁷⁶

74. 'Report of the Native-Land Claims Commission', AJHR, 1921-22, G-5, p 21

75. Document A2, pp 221-31

76. 'Report of the Native-Land Claims Commission', AJHR, 1921-22, G-5, pp 21-22

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In 1922, part of the Waikarakia block was reserved under section 22 of the Reserves and Other Lands Disposal and Public Bodies Empowering Act 'for the use and benefit of the Koheriki Tribe'. In the meantime, part of the Waikarakia block had been gazetted in 1920 as 'provisional state forest', but this was uplifted in 1923 and the land was brought under the Land Act 1924 and gazetted for settlement purposes. The pressure to reduce the area allocated to Maori had been long-standing. Gilling commented that this reduction of the reserve 'subverted' the 1920 commission's recommendation 'either coincidentally through the endemic lack of communication between Government departments, or as a deliberate result of the clearly expressed opposition of officials to Koheriki receiving this land'.⁷⁷ Parsonson also concluded that 'official views that the land would be better used by Pakeha than by Maori triumphed'.⁷⁸

In closing submissions, counsel for Ngati Koheriki submitted that Ngati Koheriki had been affected by Crown actions 'that would ultimately deprive them of their lives, freedom, rights, lands and other resources without consultation'. By the confiscation of the East Wairoa block, the Crown had 'Purported to extinguish, without cause or consent, the existing Ngati Koheriki customary title to their lands'.⁷⁹ Counsel sought recognition of the tangata whenua status of Ngati Koheriki in East Wairoa and in some adjacent blocks where their customary title had not been recognised in their absence by the Native Land Court. Ngati Koheriki see themselves as an independent tribal group and seek to negotiate a separate settlement with the Crown independent of any Hauraki 'natural' grouping. These issues were taken up again in counsel's response to Crown closing submissions because they had not been addressed by Crown counsel.⁸⁰ Although Ngati Koheriki are listed as beneficiaries in the Waikato Raupatu Claims Settlement Act 1995, their principal grievance concerns Crown actions in the East Wairoa confiscated block which was not included in the Waikato Tainui settlement. Furthermore, when they were belatedly granted title in 1926 to some Waikarakia land, it was a much smaller area than that promised in 1882, and they were forced to remain on land that is outside their traditional rohe.

Crown counsel has summarised in final submissions the complex and confusing arrangements made in the period 1867 to 1900 for reserves of land to be made in the confiscated areas, noting the evidence of Drs Anderson, Gilling, Ferguson, and Tulloch and Professor Parsonson.⁸¹ These arrangements include a negotiation with Ngati Paoa in relation to the Piako block when Tarapipipi Te Kopara sought to retain a portion of the confiscated land and officials 'agreed to amend certain boundaries, make reserves and wipe off a significant amount of debt (£3000)'.⁸² The Waikato Confiscated Lands Act 1880, amended and

77. Document T4, pp 75–76

78. Document A2, p 235

79. Document Y16, p 30

80. Document AA3, pp 21–22

81. Document A8, pp 129–134; doc T4, pp 81–82; doc T2, pp 89–99; doc V1, pp 149–157

82. Document AA1, pp 101–103

extended in 1882 and 1884, aimed at settling forlorn groups of ‘landless rebels’ on some of the confiscated lands.⁸³ These awards included the Waikarakia block awarded to Ngati Koheriki following the petition to Parliament by William Waitangi in 1879, in lieu of interests claimed in East Wairoa. But all analyses (including the Crown’s) show that these awards were limited and very belated.⁸⁴ Crown counsel concedes, ‘The fact that a number of the reserve arrangements were not formalised at the time led to confusion and problems 15 to 40 years later when they were eventually formalised.’⁸⁵

In spite of the lack of detailed information and the number of monetary awards instead of land, it is clear that the amount of land returned to Hauraki Maori was minimal. Mr Alexander and Dr Ferguson state (based on Sim commission figures) that 27.3 per cent of land confiscated in Waikato generally (excluding the Mangere, Pukaki, and Ihumatao blocks in South Auckland) was returned to Maori.⁸⁶ For Hauraki in East Waikato, we think that the percentage is very much less than this, but we are unable to calculate an accurate figure. We are also aware that Waikato claims within East Waikato have, with the rest of the Waikato claims, been settled in the Waikato Raupatu Claims Settlement Act of 1995. We do have to consider a residual Waikato claim to Maramarua Crown Forest (fig 20) and other Crown lands, the Maramarua claims, and we do this in section 5.7.

5.6.4 How equitably was the compensation distributed?

It is virtually impossible to decide, on the information available, how equitably compensation (such as it was) was apportioned between the various groups. There are many reasons for this. First, the whole concept of distinguishing in the Compensation Court between ‘loyal’ and ‘rebel’ Maori was almost absurd. It is obvious (even from our brief survey of the historical narrative) that many Maori were impelled to take up arms in what they considered to be the defence of their lives and lands; others supported their kin who were fighters. Similar problems of definition surrounded the concept of ‘loyalist’ or ‘kupapa’. Many simply tried to keep from being caught up in the conflict. Others chose to cooperate with the Crown’s forces or Crown officials out of the complexity of inter-hapu rivalry. Many changed sides (either way) during the course of the conflicts. Throughout the country, the courts and commissions charged with identifying ‘rebel’ and ‘loyal’ Maori found the task almost impossible to do with any precision, and in many cases virtually abandoned it.

Secondly, with regard to East Wairoa, we have noted the very short notice given of the Compensation Court hearing, which itself took place over only two days. Dr Rigby has suggested, reasonably in our view, that this brevity must have precluded an adequate testing of

83. Ibid, p 103

84. Ibid; doc A2, p 209; doc T3, pp 72–82

85. Document AA1, p 103

86. Document T2, p 70

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allegations of 'loyalty' and 'rebellion', or a detailed search for ancestral right.⁸⁷ Following the hearing there was a series of awards arranged out of court by James Mackay. There is little record of this process: no detailed court minutes or judgments such as the court provided in other areas.

We have noted that the Compensation Court awards of 1865 in East Waikato were almost wholly out-of-court awards, with no record of discussion of claim and counter-claim. 'Rebel' applicants were largely excluded. However, from the many claims lodged and discussed by Mackay with the applicants, there emerged a series of cash payments *related to particular locations within the confiscation*. From these, Mr Alexander drew the conclusion that 'Hauraki iwi clearly regard the whole north-eastern quadrant of the Central Waikato block (and other areas along the eastern side of the block) as within the rohe of Hauraki whanui'.⁸⁸

The recognition of the customary interests of right-owners in the East Wairoa confiscation was strongly affected by the Native Land Court's adjudication, between 1865 and 1870, of the land east and north of the confiscation, including the land excised from the East Wairoa confiscation in May 1865 at the request of the Ngai Tai rangatira Honetana Te Irirangi (see fig 21). Dr Ferguson has examined in considerable detail the sequence of applications to the Native Land Court, commencing in January 1865, and their relationship to the hearings of the Compensation Court, with which they overlapped in time. It is clear there was some communication between the two bodies, partly through James Mackay in his role as Civil Commissioner for the Hauraki region. Dr Ferguson and Mr Alexander have shown that 'The Ngai Tai leadership had been promised in the Compensation Court that they would be awarded [in the Native Land Court] lands that were owned by individual Ngai Tai rebels within the coastal blocks'.⁸⁹

Dr Ferguson has shown that, while considerable evidence of customary right was adduced and debated in respect of some of the blocks, there were also many out-of-court arrangements between claimant groups (mainly Ngai Tai and Te Urikaraka), commonly brokered by Mackay, to avert serious quarrels and separate intersecting customary interests into tidier block boundaries. Again, 'rebel' groups, such as Ngati Koheriki, were not represented.

Crown counsel has summarised the outcome of the land court proceedings in the following terms:

It is important to note that Ngaitai and Ngati Paoa [including Te Urikaraka] . . . were awarded title [variously] to Te Okenga Block, Puta, Okauanga, Uranguhau No 1, Whakakaiwhara, Mataitai Nos 1 to 6 and Wharekawa Nos 1 to 5 between March 1866 and 1870. Thus, it appears from the evidence of Dr Anderson, Mr Alexander and Dr Gilling that the Hauraki

87. Document T3, pp 62–66

88. Document C3, p 36

89. Document T2, p 88; see doc C3, p 57

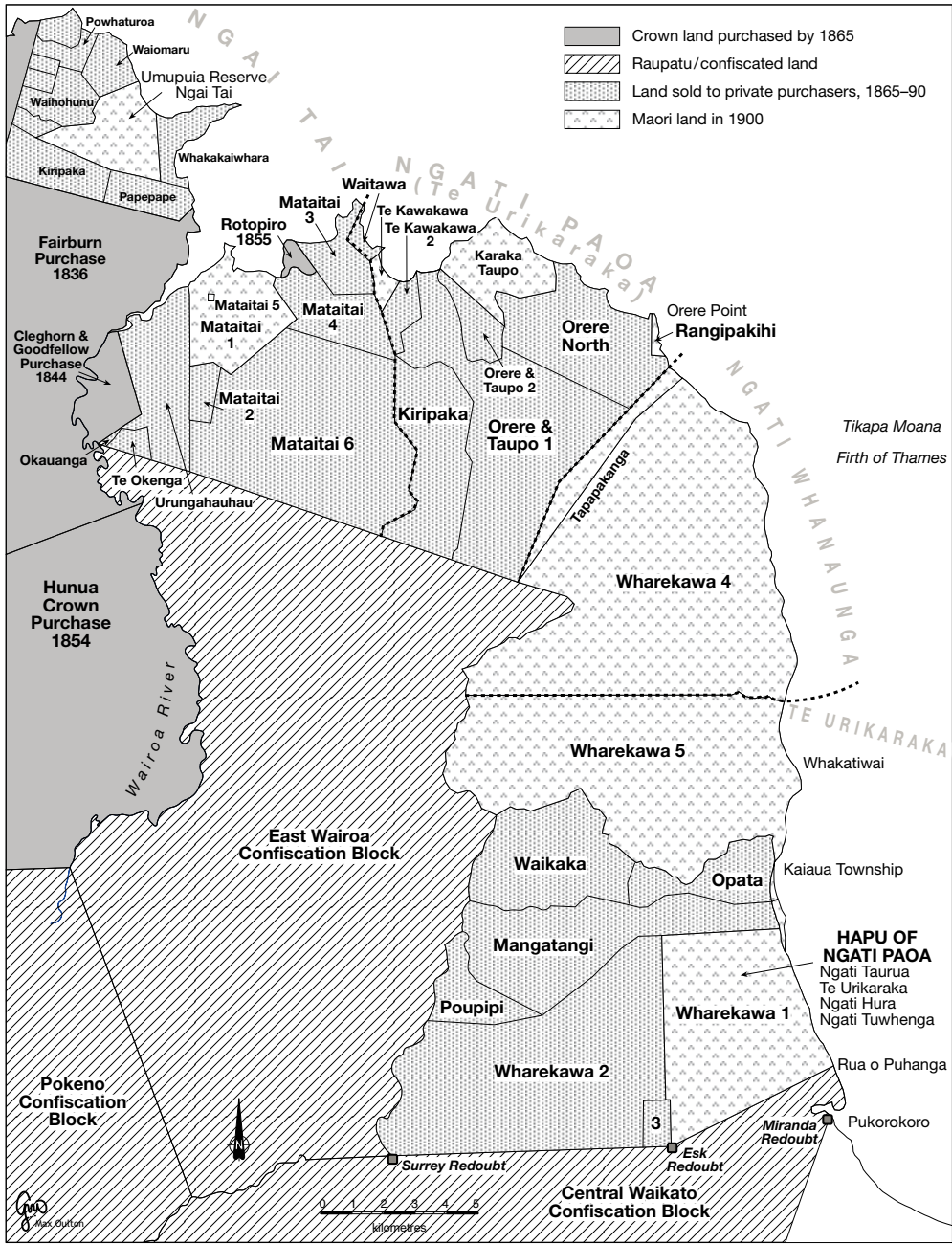


Figure 21: Alienation of land west of Tikapa moana before 1900

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and Waikato people defined as ‘rebels’ were excluded from the awards of title pursuant to the proclamation of 17 November 1864 [17 December 1864]. On the other hand, their compatriots recognised as ‘loyal’ succeeded to their interests, a matter to be taken into account when considering the effect of the confiscation of the East Wairoa block on these groups.⁹⁰

With the exception noted above that Ngai Tai ‘rebels’ were allowed for in the awards of the Native Land Court, this assessment seems justified.⁹¹

Nevertheless, it is clear that Ngai Tai had interests in the East Wairoa block. These were outlined by Ngai Tai leaders, Honatana Te Irirangi and Hori Te Whetuki during Compensation Court hearings and ‘were explicitly acknowledged by some of the Ngati Paoa witnesses’.⁹² Ngai Tai claim that they suffered disproportionate loss of land, despite the awards of the Compensation Court and Native Land Court.⁹³ This matter was not addressed by the Sim commission, and Ngai Tai have criticised that inquiry, specifically because it did not refer to the petition filed on their behalf by Anaru Maxwell (Makiwhara). As a young woman, shortly after the death of Anaru Maxwell, the claimant to this Tribunal, Neungeu Zister (now deceased) presented the Ngai Tai petition to the Sim commission.⁹⁴ Nevertheless, the Sim commission failed to consider Ngai Tai’s stance on the matter of loyalty and neutrality; a small section supported the Kingitanga but most Ngai Tai leaders remained neutral and loyal to the Crown.⁹⁵ The commission lumped them in with Waikato petitioners (thus assuming Ngai Tai were in rebellion), and failed to consider specifically the East Wairoa confiscation, despite making comments on smaller areas of confiscation such as Mangere, Pukaki, and Ihumatao. Ngai Tai claim they ‘have never been compensated for their losses in the East Wairoa confiscation block’, and that ‘at all times any compensation they are entitled to receive has historically been lumped in with the Tainui Maori Trust Board’.⁹⁶

Dr Ferguson’s assessment of the outcome of the confiscation for Ngai Tai is as follows:

In the case of the East Wairoa, the issue for Ngai Tai is not whether the settlement of land or money on groups such as Ngati Pou [Waikato] was unwarranted (it would be difficult to argue such a point). Nor is it whether Ngai Tai rights had been ignored in favour of other groups (Ngai Tai received clear recognition of iwi interests). The act of confiscation aside, the issue is more whether Ngai Tai received a just settlement (either in money or land) for

90. Document AA1, p 102

91. For a complete list of the land court awards and a detailed account of how they were arrived at, see document T2, pp 73–99. Whakakaiwhara is outside the inquiry district but several other blocks from the confiscation boundary north to the sea covered by Dr Ferguson’s analysis are within it. They are Te Kawakawa; Orere-Taupo 1, 2, and 3; Karaka-Taupo; Orere North; Rangipakihi; Te Kiripaka; and Tapapakanga 1 and 2. It is likely that ‘rebels’ had interests in some of these blocks. It is noted, for example, that Koheriki tried (apparently in vain) to assert claims to the Te Kiripaka block, on the northern border of the confiscation, in 1870: doc T2, p 62 fn 183.

92. Document Y15, pp 14–15; doc C3, app 1, pp 9–12

93. Document T20, p 24

94. Document A68, p 6

95. Document Y15, p 16; doc A46, p 30

96. Document T20, pp 24–25

the amount of Ngai Tai land confiscated. Relative to what happened with other confiscation blocks and relative to the amount of land claimed by Ngai Tai, it did not.⁹⁷

The same claim can certainly be made by other groups who lost land in East Wairoa. However, there are difficulties. In cross-examination on this issue, the Tribunal was presented with some estimates of what proportion of the land groups such as Ngai Tai or Ngati Koheriki held 'exclusively' before the confiscation, but in the absence of good evidence of customary ownership, it was clear that these were rough estimates at best. Indeed, the Tribunal is sceptical about the concept of exclusive ownership in customary law, especially in a situation where witnesses frequently referred to the close interconnection of hapu in the Wairoa area (by whakapapa and co-residence), and in respect of the rugged East Wairoa country where cultivations and settlements were few and many groups hunted and gathered the produce of forests and streams. We note, for example, that Mr Bennion, though a witness for Ngai Tai, suggests that much more needs to be known about the relationship between various hapu and iwi in the area (eg, between Ngai Tai and Ngati Paoa), and that the Te Kiripaka block (on the border of the confiscation) was bitterly contested in the land court between Ngai Tai and Te Urikaraka, a hapu of Ngati Paoa.⁹⁸ Given the interconnections between the hapu and the dearth of evidence on customary occupation, it would be very difficult for the Tribunal to gauge the appropriate apportionment of compensation as between iwi and the claimants have not invited us to do so.

In closing submissions, Crown counsel has stated that, in respect of East Wairoa especially:

Even though no significant proportion of land was returned . . . there was a significant measure of compensation paid. In the Crown's submission the Tribunal should take account of this compensation and the grant of reserves when it considers the questions of remedy for Treaty breach, and relief.⁹⁹

On the matter of valuation, Crown counsel has stated:

It is very difficult to calculate the value of the land in the East Wairoa block even with reference to Heaphy's evidence on valuation. Even using the upper size estimate contended for by some claimants this probably fell within the range of £6,000–£7,500. It would appear the compensation paid and the reserves made came very close to the probable market value of the land. Such a calculation does not of course take account of the compulsory nature of the takings, the manner in which the compensation was provided, or the spiritual and other ties to the land.¹⁰⁰

97. Document T2, p 72

98. Document A46, p 64; doc T2, pp 76–78, 95–98

99. Document AA1, p 104

100. Ibid

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The last sentence of course is very true, and in our view warrants a very high level of redress to the Hauraki peoples affected. As to the market value of the 51,000 acres of East Wairoa, the Crown's assertion is not backed by any comparative evidence, and is very unsatisfactory. We have noted above that some £2750 was paid to various 'loyal' individuals on behalf of their groups, and that 250 acres were returned to three named individuals. Very belatedly, a reserve totalling 1360 acres was made in the East Waikato confiscation block for Ngati Koheriki, displaced from East Wairoa. No reserve was granted in East Wairoa to Ngati Paoa or Ngati Whanaunga. Only by a very liberal inclusion of the Waikarakia reserves could the compensation come anywhere near the Crown's £6000 to £7500 estimate. Moreover, although native title was deemed to be extinguished by the proclamations of confiscation (and the Land Act of 1877 declared confiscated lands to be Crown lands), in making awards of such lands to ex-'rebels' the Crown was awarding land which it had not long previously taken from other hapu. It is difficult therefore to see how these reserves could be considered in mitigation of the original confiscation. There is great uncertainty about the fairness of the 1865–56 awards, due to the lack of information about customary right-owning prior to the confiscation and the very doubtful validity of the loyal–rebel dichotomy. We consider the total compensation paid to the previous Hauraki owners of East Wairoa and East Waikato to be almost derisory, in relation to their losses and their displacement, though some individuals or groups appear to have been favoured by the Crown's awards in 1865–66.

5.7 WAIKATO AND HAURAKI CLAIMS TO MARAMARUA LANDS**5.7.1 The Maramarua Crown Forest**

The Hauraki claims in the Maramarua district clearly overlap the area within the Waikato Tainui claims which have been settled in the Waikato Raupatu Claims Settlement Act 1995. While there are other small areas of Crown land in the Maramarua district, the principal object of both Hauraki (notably, Wai 100 and Wai 373) and Waikato (Wai 30) claimant groups is the Maramarua Crown Forest. The Maramarua State Forest was gazetted in 1927, an area of 14,431 acres of Crown land, to be planted in exotic pine forest 'to meet the future needs of the settlers from the sparsely forested Hauraki Plains and Waikato district'.¹⁰¹ The forest was planted in the early 1930s, mainly by unemployed workers recruited from Auckland on relief schemes. The forest area has been extended and managed by the New Zealand Forest Service until the restructuring of the 1980s when management and harvesting rights in Crown forest lands were offered to private organisations. The Maramarua Crown forestry licence comprises two blocks, in hill country to the south of Maramarua

101. 'Summarized Report upon State Afforestation in the Forest Conservation Regions of the Dominion', AJHR, 1928, C-3, p 24; Michael M Roche, *History of New Zealand Forestry* (Wellington: New Zealand Forestry Corporation and GP Books, 1990), p 215

township, of about 2186 and 3520 hectares, a total of some 5706 hectares. We have no information about the holder(s) of the licence, but the underlying title to the land remains with the Crown, and any subsequent transfer of title as a result of a settlement would be subject to existing leases, licences or other encumbrances.

The Waikato deed of settlement, as amended to 3 November 1995 when the Waikato Raupatu Claims Settlement Act was passed, contained a number of references to Maramarua Forest. In the 'redress' listed in clause 4 is 'making provision for the payment to the Land Holding Trustee of the accumulated rentals held by the Crown Forestry Rental Trust relating to the Maramarua and Onewhero Forests, subject to clause 17.3.' In clause 17.3, the parties, Crown and Waikato, 'acknowledge that the Maramarua Lands are the subject of a competing claim by the Hauraki Maaori Trust Board'. There are several subclauses, 17.3.1 to 17.3.5.

Subclause 17.3.1 states that 'It will be necessary for that matter to be resolved in favour of either the [Waikato] Claimants or the Hauraki Maaori Trust Board *by an appropriate authority or by agreement*' between Waikato and Hauraki before any assets relating to Maramarua Forest can be transferred (emphasis added). 'Both parties will endeavour to have the issue resolved expeditiously.'

No agreement has been reached, in spite of Tribunal efforts to encourage negotiation between elders of the two groups. The Tribunal has no evidence of Crown involvement in such efforts. The position of the Tainui Trust Board was set out in a letter to the Tribunal dated 2 September 1998: 'For the record, the Tainui Maaori Trust Board opposes any claims which may impact into the Waikato Raupatu Boundary as stated in the Waikato Raupatu Settlement Act 1995, specifically the Wairoa Land blocks and the Maramarua Forest.'¹⁰²

For the record, the map – attached to the letter written by Shane Solomon on behalf of the board – included the East Wairoa block, which was excluded from the boundary of the 'Waikato Tainui raupatu claim area' on the map attached to the Waikato deed of settlement. The Maramarua Forest is within the Waikato raupatu settlement boundary but the overlapping Hauraki claims are acknowledged. The subclauses 17.3.2 and 17.3.3 provide machinery for the transfer, removal of memorials, and so on, once either an agreement or another outcome of claims to Maramarua Forest is determined.

There was no agreement and the question became, who is 'the appropriate authority' to determine opposing claims to Maramarua Forest. The Hauraki Tribunal has been charged with hearing Hauraki claims and is therefore the appropriate authority to investigate these. On 26 August 1998, the Hauraki Tribunal issued a direction defining the boundaries of the Hauraki inquiry district, including Maramarua and the East Wairoa confiscated block, and reiterated 'that the inquiry district is not based upon any actual or presumed tribal boundaries.'¹⁰³

102. Paper 2.172

103. Paper 2.164

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A legal opinion, commissioned by the Waitangi Tribunal, and prepared by Alan Henwood and Andrew Caddie of Simpson Grierson, Wellington, in February 1998, concluded that, while there may appear to be some consistency between section 9 of the Waikato Raupatu Settlement Act 1995 (which removes the Tribunal's jurisdiction in the Waikato claim area) and section 26 (which deals with Maramarua Forest land), this did not preclude a Tribunal inquiry into 'the competing crossclaims' of both Waikato and Hauraki. The provisions of section 26 are discussed later.

An alternative option is to refer the matter to the Maori Land Court under section 30 of the Te Ture Whenua Maori Act. The Tribunal did not favour this as there is a high risk of turning the matter into a boundary dispute and long running litigation. The reality on the ground is that there was no sharp line of demarcation of tribal rights but a lot of overlapping and interlocking bundles of usufructuary rights among hapu along a border zone. In any case, both Waikato and Hauraki claimant groups all claim descent from Tainui waka ancestors. The central issue here is the settlement of claims and that is a matter for the Tribunal to make recommendations to the Government. However, in clause 14.9 of the deed of settlement, Waikato agreed:

To endorse any application to the Waitangi Tribunal by the Crown for a case to be stated to the Maori Appellate Court to determine any interests in relation to the Maramarua Lands and any other applications to any court to determine those interests, to provide information to enable the determination of such applications, to endorse the need to determine these matters at the hearing of such applications and otherwise to support steps taken by the Crown to resolve the Cross Claims.

The Crown has not made any application to this effect to the Tribunal and Crown counsel has gone along with Tribunal efforts to encourage negotiation between Waikato and Hauraki.

The situation has been complicated by a 'sunset clause' in clause 17.3.4 of the deed of settlement invoked by Waikato Tainui:

If, at the date which is 5 years after the date on which this Deed becomes unconditional the proper claimant for the Maramarua Lands had not been determined or agreed, the Maramarua forest will not be transferred to the Land Holding Trustee at that date, and the Crown will pay the remainder of the Capital to the Land Acquisition Trustee. However, if it is subsequently determined that the Claimants are the proper claimants for the Maramarua forest or any portion of it, the Land Holding Trustee will have an option to purchase with respect to the Maramarua forest or the relevant portion of it . . .¹⁰⁴

¹⁰⁴. *Deed of Settlement between Her Majesty the Queen in Right of New Zealand and Waikato*, 22 May 1995 (paper 2.61), cl17.3.4

There follows here the terms for such a transaction. Given the existence of this provision, there was probably little incentive for Waikato to negotiate any agreement with Hauraki.

The annual report of the Waikato Raupatu Lands Trust 2000, included a report of the 'principal negotiator', Sir Robert Mahuta, dated June 2000:

Because of the Hauraki cross-claim, the return of Maramarua Forest to Tainui has been delayed until the Tribunal has heard the Hauraki submissions. If the forest cannot be returned to Tainui by the end of November 2000, the Crown is obligated to pay the tribe the cash equivalent for the value of the forest, which is about \$14 million . . . This matter should be resolved within the next two or three months.

On 22 November 2000, the Crown paid \$13.6 million to Waikato Tainui. The annual report of the Waikato Raupatu Lands Trust was published in February 2001. A copy unofficially came into the hands of the Hauraki Tribunal, which immediately sought clarification. On 19 March 2001, the registrar wrote to the director of the Office of Treaty Settlements seeking an explanation:

Was the payment of \$13.6 million to Tainui . . . payment in lieu of Tainui interests in the Maramarua Forest? The Hauraki Tribunal is aware that the Hauraki and Tainui Trust Boards were in negotiation over interests in this forest and that these negotiations had not concluded. However, the Hauraki Tribunal was not aware of any sunset clause in the Tainui claim and seeks clarification on, the status of, and any impact of this payment on, the Hauraki claims to the Maramarua Forest. We would like to know the status of any Tainui claims to the forest.

We digress briefly to consider whether the Hauraki Tribunal could have or should have known about the sunset clause 17.3.4 in the Waikato deed of settlement signed in 1995. Dame Augusta Wallace was appointed presiding officer on 3 April 1998 and the full Hauraki Tribunal was constituted on 22 May 1998.¹⁰⁵ Notices were sent to Wai 30 Waikato Tainui as well as all Hauraki claimant groups. There had been much correspondence between May and November 1995 relating to the Waikato deed of settlement, the registration of the Wai 363 claim to the Maramarua Forest by Toko Renata Te Taniwha and the HMTB, the Waikato-Tainui Raupatu Claims Settlement Bill, and the Waikato Raupatu Claims Settlement Act 1995.¹⁰⁶ But all this occurred before the Hauraki Tribunal was constituted.

In her memorandum to the Waitangi Tribunal dated 15 November 1995, counsel for Wai 30 Waikato Tainui claimants, Denese Henare, advised that settlement of the Waikato raupatu claims had been reached and enclosed the amended deed of settlement.¹⁰⁷ In the amended Wai 100 statement of claim, the Wai 373 claim 'for all material purposes' is to be treated as

105. Papers 2.129, 2.134

106. Papers 2.61–2.75

107. Paper 2.74

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part of the Wai 100 comprehensive Hauraki claim. Counsel for Wai 30 indicated the exclusion of the East Wairoa block from the settlement and noted that the Hauraki claims, Wai 100 and others, were also excluded. She drew the Tribunal's attention to clause 14.7 of the deed, which listed under the heading 'Waikato's Obligations' that Waikato agree to 'use their best endeavours to ensure that the Overlapping Claims are withdrawn by the Parties making those claims on the basis that they have been settled by this Deed'. Counsel also referred to several other clauses relating to the settlement of claims but made no particular reference to the provisions relating to the Maramarua Forest in clause 17.3, nor did she remind the Tribunal of the sunset clause 17.3.4.

The Waikato Raupatu Claims Settlement Act 1995 makes no reference to provisions for the Maramarua Forest in clause 17.3.4 of the deed. In section 26(1) of the Act, 'Maramarua forest land' is defined as 'all those pieces of land situated in the Land Registration District of South Auckland containing together 5698.2000 hectares, more or less, being Lots 1 and 2, DP S56867, and Lot 1, DP S56868'.

Provisions in section 26(3) of the Act cover the removal of memorials under section 8HB(1)(a) of the Treaty of Waitangi Act 1975 by Order in Council in Maramarua Forest, subject to the conditions set out in section 26(5) of the 1995 Act. That subsection states:

(5) No Order in Council may be made bringing subsection (3) of this section into force unless, in the opinion of the Minister,—

- (a) A final recommendation has been made by the Waitangi Tribunal, or a final determination has been made by an appropriate judicial authority, on both the claim made by the [Waikato] claimants to the Maramarua forest land and the competing claim made by the Hauraki Maori Trust Board to the Maramarua forest land; or
- (b) An agreement has been reached between the claimants and the Hauraki Maori Trust Board on both the claim made by the claimants to the Maramarua forest land and the claim made by the Hauraki Maori Trust Board to the Maramarua forest land.

The Order in Council is required by section 26(6) to:

- (a) State whether the whole or part of the Maramarua forest land is to be transferred to the [Waikato] land holding trustee; and
- (b) Where only part of the Maramarua forest land is to be transferred to the land holding trustee, identify the part of that land that is to be so transferred.

There is nothing in the Waikato Raupatu Claims Settlement Act to suggest that there was a five-year deadline on any negotiations toward an agreement or determination by the Tribunal or any other judicial authority on Maramarua Forest claims. The Hauraki Tribunal agreed, very early in hearing the Hauraki claims, that to encourage Waikato and Hauraki tribal leaders to negotiate an agreement would lead to a better and more enduring settlement of their competing and overlapping claims. With the blessing of the Hauraki Tribunal,

Professor Wharehuia Milroy initiated discussions between Hauraki and Waikato elders. In spite of the goodwill among Waikato elders, the managers of the Waikato raupatu settlement decided to invoke the provisions of clause 17.3.4 of the deed of settlement and require a cash payment from the Crown. The Hauraki Tribunal accepted that agreement by negotiation had not been achieved, and proceeded, as suggested in section 26(5)(a) of the 1995 Act, to hear all claims to Maramarua Forest.

5.7.2 The \$13.6 million payment

We return to the implications of the Crown payment of \$13.6 million to Waikato Tainui. The Hauraki Tribunal was not made aware of the five-year limit that came due in November 2000. At no time did the Tainui Maori Trust Board or its successor or successors advise the Tribunal that it intended to invoke this provision. The Tribunal was not advised whether the HMTB was aware of the provision, or had considered the implications. The Tribunal tried to assess what, if anything, has been resolved by this cash payment in respect of Maramarua Forest.

A response to the registrar's request for clarification was sent from the Office of Treaty Settlements on 30 March 2001:

The settlement day for the payment of the last instalment of outstanding redress to Waikato–Tainui, according to the Deed of Settlement (the 'Deed'), is five years from the date the Deed becomes unconditional. The Deed also provides, in Clause 7.3.4 [*sic*], that if the proper claimant to 'Maramarua lands' specified in the Deed has not been determined or agreed by then, the equivalent cash value is to be paid on that final settlement date. Accordingly, on 22 November 2000, \$13.6 million was transferred to Waikato–Tainui as the cash equivalent of the value of the remaining settlement redress. Of that, \$13.5 million was with respect to the Maramarua lands which includes the Maramarua Forest.

The Payment to Waikato–Tainui was therefore in lieu of the Maramarua lands being available for possible use in settlement redress and not in lieu of their interests in the Forest . . .

I would re-iterate that Waikato–Tainui interests in the Maramarua Forest are undiminished. If the Waitangi Tribunal finds that Waikato–Tainui has a legitimate interest in the Maramarua Forest, a right of first refusal to purchase the said relevant part of the Forest comes into force as agreed in the Deed.¹⁰⁸

The Tribunal considered this response and raised a number of questions, set out in a letter by then Tribunal staff member Tony Nightingale, on 21 May 2001. We set out the five questions and the Office of Treaty Settlements' responses to each in order as addressed in the letter dated May 2001:

108. Correspondence C2001/0400549

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1. Q. Does the \$13.5 million paid to Tainui with respect to their interests in the Maramarua land represent the full value of Tainui's interest in the land? And how was that determined?
 - A. The Waikato-Tainui Deed of Settlement's (the 'Deed') Schedule 10 defines the Maramarua Lands as Airways Corporation, Landcorp, Railcorp and Coalcorp properties as well as the Maramarua Forest. The \$13.6 million was made up of the agreed transfer value for the Maramarua Forest of \$12.25 million, the agreed values of the other Maramarua Lands and the final capital payment of \$100,000, an outstanding amount of the agreed financial redress for the Tainui Settlement . . . [reference here to clause 17.3.4 of the deed] Therefore, the Crown has provided monetary redress for the value of Tainui's interest in the Maramarua Forest.
2. Q. Does this mean that Tainui were assessed as exclusive 'owners' of the land or was the competing Hauraki claim taken into consideration. If so how was that done?
 - A. Tainui were not assessed as having exclusive interests in the Maramarua Forest. The Deed explicitly acknowledges that the Maramarua Lands are the subject of a competing claim by the Hauraki Maori Trust Board. Section 17 of the Deed sets out the conditions on the Maramarua Lands in this situation. In the event that the relative interests of the two claimant groups had not been determined by the time the final capital payment became due ie 5 years from November 1995, the Maramarua Forest would not be transferred to Tainui (clause 17.3.4). If Tainui's interests are in future determined for all or a portion of the Forest, Tainui has a right of first refusal to *buy* all or the determined portion.
3. Q. To what extent should the \$13.5 million be taken into account in the later determination of the relative value of the accumulated rentals for Tainui and Hauraki? And/or the relative land area that is deemed to belong to Hauraki?
 - A. Provision is made in the Deed, that having received the final capital payment, the Maramarua Forest is foregone by Tainui and the accumulated rentals are also foregone [cl 17.3.5]. This remission is for the term of five years between the Deed becoming unconditional, November 1995, and the date of the final capital payment, November 2000. Funds accumulating from November 2000 to the time the overlapping claims are resolved, or relative interests are identified, will be disbursed in whatever proportion the Waitangi Tribunal deems appropriate (if it is the 'appropriate authority' that makes the findings on the cross claimed interests).
4. Q. In paragraph 2 of your letter of 30 March you state 'Of that, \$13.5 million was with respect to the Maramarua lands which includes the Maramarua Forest.' In paragraph 3 you state that the payment was made 'in lieu of the Maramarua lands being available for possible use in settlement redress and not in lieu of their interests in the Forest.'

We assume that the ‘inclusion’ simply means that the Forest is on the land rather than the \$13.5 million includes any value of the Forest to Tainui. Could you please confirm this or explain.

- A. \$12.25 million represents the value of the land and improvements encumbered by licences to harvest, plant, manage and process trees on the land.
- 5. Q. Given that the Tainui settlement deed recognises that there may be a Hauraki right in the Maramarua Forest, and assuming such a right is affirmed, in what differing ways would the respective rights of Tainui and Hauraki now be determined?
- A. Tainui’s remaining interests in the Maramarua Forest land are not ‘transfer value’ interests, they are legitimate customary or traditional interests in the land by reference to ancestral associations. These are to be determined, according to the Deed by ‘appropriate authority’ or mutual agreement by the respective claimant groups (clause 17.3.1). Similarly, the Eastern Bay of Plenty Tribunal clearly found that three iwi and some hapu of a fourth iwi had customary interests in the Rotoehu Forest near Matata after considering claimant submissions during the hearings (section 11.3, *Ngati Awa Raupatu Report*). Because the Crown has recognised Tainui’s interest in the Maramarua Forest by virtue of its being sited wholly within the raupatu boundaries, Hauraki’s interests or association have not been extinguished to it. Hauraki can claim prejudice by the Crown with regard to their interests in Maramarua Forest and seek redress from the Crown if that is appropriate and accords with the Tribunal’s findings. [Emphasis in original.]¹⁰⁹

In short, it seems that the Crown has paid off any Waikato Tainui interests in Maramarua lands, not just the forest, although this makes up a large chunk of the total, and it is not clear just how this sum was determined. The effect is to finalise settlement of Waikato raupatu claims, but the Office of Treaty Settlements also claims that the Crown has not extinguished Waikato Tainui ‘customary or traditional interests in the land by reference to ancestral associations’.

5.7.3 Drawing boundaries

In section 11.3 of its *Ngati Awa Raupatu Report*, the Tribunal commented on ‘overlaps’ and the problem of boundaries in general in a claim area bounded by a raupatu line:

Taking a European view of matters, it is considered that the boundaries between Ngati Awa, Whakatohea, Tuhoe, and Te Arawa are indistinct. To insist that the groups should define the boundary lines between them is to ask them to do that which is culturally impossible, or that which is an affront to cultural values. The relationships between the groups

109. Correspondence C2001/05/00879

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have been such that each can point to sites of ancestral significance to it well within the territories of the others, and each can whakapapa to persons who lived in the kainga of another group.¹¹⁰

The Tribunal suggested that drawing lines was unnecessary as 'there are too many variables to treat historical claims in the same way as current disputes in civil litigation'. Settlement of Maori claims was more likely to be a global lump-sum redress. However, the Tribunal also observed:

Were compensation to be settled in cash, there might be no further problem. The difficulty arises when groups seek particular lands on account of their share. Whose land is it? Invariably, more than one group can claim a legitimate interest in the same area and it will become necessary to consider a range of factors. Does one group already have a reasonable land base? Has any particular site more significance for one group than another? Are there other lands from which one group can be compensated? Is joint ownership feasible?¹¹¹

The Tribunal then suggested that 'Rotoehu Forest is a case in point', and acknowledged that 'Ngati Awa, Tuwharetoa, Ngati Makino, and other hapu of Te Arawa can all claim legitimate customary interests in the forest' as well as valid claims for recompense:

In managing these arguments, we think it necessary that each group acknowledge the customary associations of the others. We would be suspicious of claims that any particular area was held exclusively by one group throughout the whole of history. It may be appropriate that whoever takes a particular asset that is the subject of conflicting ancestral claims should do so on a clear understanding that the ancestral associations of others will also be acknowledged and respected. We require no less of Europeans in resource use planning. The owner of land that has passed from Maori hands may still be required to consider Maori ancestral associations in proposing developments. In the same way, the privilege of title may need to carry the burden that the holder will acknowledge cultural obligations to others.

In Rotoehu [Forest], the most important criterion may be the extent to which it can in practice be divided. Again, however, those taking a share may need to acknowledge that others have customary interests in any part taken by them. They may need to reserve particular sacred sites for separate administration.

In seeking solutions, it is important to bear in mind that Maori society is fundamentally about relationships. It is not enough to resolve the immediate problem. The people must continue to live together, and the more important task is to rebuild relationships based upon whakapapa and respect for the mana of each group. To that end, mediation is helpful, but it would be wrong in our view if the return of particular lands had to depend upon the

110. Waitangi Tribunal, *Ngati Awa Raupatu Report* (Wellington: Legislation Direct, 1999) p 134

111. *Ibid*, p 135

agreement of all contenders. Ever since the confiscation, the land returns, and the introduction of individual ownership through the Native Land Court, people have become so divided that agreements are probably not presently possible. The effect of requiring full agreements will only exacerbate the divisions caused by the wrongs already done. We propose that, where particular lands are sought and there is no agreement, the matter should be referred back to the Tribunal for a recommendation, after such further hearing of those interested as may be necessary.¹¹²

These observations of the Ngati Awa raupatu Tribunal are helpful, but do not provide a resolution of all claims to Maramarua Forest.

5.7.4 Tribunal jurisdiction

Late in 2002, the Hauraki Tribunal called for submissions from all parties concerned with Maramarua Forest on the question of the Tribunal's jurisdiction. These were heard on 6 November 2002, shortly before the deadline for closing submissions in the Hauraki inquiry. Counsel for Waikato Tainui (Wai 30) submitted that there were clear provisions in the Waikato Tainui raupatu settlement deed and 1995 settlement Act which contemplated the Tribunal making a finding as to whether Waikato or Hauraki were the correct claimants to Maramarua Forest. Counsel further stated that he sought a recommendation from the Tribunal that Waikato had an exclusive interest in the Maramarua lands which should be returned to Waikato.

In general, counsel for Hauraki claimants submitted that the ouster clauses in the Waikato Raupatu Claims Settlement Act 1995, and resultant amendments to the Tribunal's own enabling Act, had the effect of removing the Waikato Tainui raupatu claim and settlement from the Tribunal's jurisdiction. Furthermore, it was submitted, by leaving their submissions so late, Waikato Tainui had foregone their opportunity to participate in the Hauraki regional inquiry.

Counsel for the Crown submitted that the Tribunal had a limited jurisdiction to hear the Wai 30 claims, because in the 1995 Act the intention of Parliament was clear – that the Tribunal should make a 'boundary decision' as to who were the correct claimants against the Crown with respect to Maramarua lands. There was a 'strong presumption in the statute' and under laws of natural justice that Waikato Tainui had a right to be heard. The Tribunal could not, counsel submitted, order the return of Maramarua lands, or any portion thereof, to Waikato, but if Waikato were found to a correct claimant, Waikato Tainui had a right under the first option to purchase clauses in the settlement deed.

The Tribunal adopted the Crown submission and accepted it has a limited jurisdiction to receive and hear the Waikato Tainui (Wai 30) claim. The Tribunal received the two

112. Ibid, pp 135–136

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reports already submitted as evidence on the Wai 686 Hauraki record of inquiry and Wai 30 counsel submissions, which were taken as read.¹¹³ The Tribunal noted that Wai 30 counsel had accepted that his clients had foregone the opportunity in earlier hearings to examine Hauraki evidence and had not produced any further evidence in support of Waikato Tainui claims in Maramarua lands. The Tribunal also observed that its earlier efforts to encourage negotiations between Waikato and Hauraki had been unsuccessful, and it would proceed with the completion of the agreed hearing programme in the Hauraki Wai 686 inquiry.¹¹⁴ In closing submissions heard on 11 November 2002, Crown counsel commented specifically on claims to Maramarua Forest:

It is noted that the area of the Waikato confiscation in which the Maramarua Crown forest lies has not been the subject of significant evidence from the Crown, this area being in some limbo due to the ongoing negotiations between Hauraki and Waikato–Tainui. The claimants now seek interim recommendations in respect of that forest. The Crown's submission is, in essence, that whilst it is acknowledged that the claimants are anxious to move ahead, the complexity of the task for the Tribunal under the Crown Forests Act 1989 requires further assistance from the parties. We submit that the Tribunal has no jurisdiction to make interim orders for relief, this would not be appropriate in any event, and that this issue is better left to a separate remedies hearing.

The Crown does submit, however, that the Tribunal should now determine the narrow issue of who is the proper Treaty claimant to the Maramarua forest. The Tribunal has of course now ruled that it has jurisdiction to determine that issue. The Crown advises that it will abide the Tribunal's decision on the issue of the proper Treaty claimant.¹¹⁵

The Crown noted that the Tribunal had before it a number of reports 'that provide evidence of overlapping interests in the Maramarua area' and that some payments had been made to Ngati Paoa and Ngati Whanaunga, and that Ngati Tamaoho and Ngati Koheriki were said to have ahi ka rights. However, Crown counsel submitted that these matters were for claimants to address and details 'should be sourced from the primary records'.¹¹⁶

5.7.5 Tribunal findings regarding the Maramarua Crown Forest

The Tribunal has reviewed the evidence before it and conducted a further investigation of primary sources in the *Raupatu Document Bank* and come to the following conclusions on claims to Maramarua Crown Forest:

113. Documents A1, A2, Z7

114. Paper 2.593, p 3

115. Document AA1, p 79

116. Ibid, pp 105–106

- ▶ Hauraki tribes, in particular Ngati Paoa and Ngati Whanaunga, do have interests inside the Waikato raupatu settlement boundary.
- ▶ The Maramarua Forest remains Crown land and is perceived by Hauraki claimants as an asset that could be transferred by the Crown (with existing leases and other encumbrances) in settlement of Hauraki claims.
- ▶ There is no need to determine a 'boundary' between Hauraki and Waikato as both had customary interests within the Maramarua district and share kin links and overlapping and intersecting rights along a border zone between the Waikato and Hauraki section of Tainui waka descendants. Waikato and Hauraki hapu retain their ancestral connections with the Maramarua district.
- ▶ If Maramarua Forest is not transferred to Hauraki in settlement of their claims, then Waikato retain only the right of first refusal to purchase, having already been paid \$12.25 million as the value of the Forest land by the Crown in final settlement.
- ▶ We consider that the Crown has met all its obligations in the Waikato Raupatu Claims Settlement Act 1995 and deed of settlement by the payment of money in settlement of Waikato Tainui claims to Maramarua lands.
- ▶ The Maramarua Forest and other Crown lands in the district may therefore be considered by Hauraki claimants and the Crown, through the Office of Treaty Settlements, free of other claims and potentially the subject of negotiations in settlement of Hauraki claims.

5.8 TREATY ISSUES

5.8.1 Claimant submissions

Belgrave et al, for the Marutuahu claimants, note that the confiscation policy deprived those tribes and Hauraki generally of significant parts of their tribal estate and contracted their 'zone of influence in their traditional rohe'. They suggest that the impact was particularly severe on Ngati Paoa, who had already lost a considerable amount of valuable land to the combined effects of old land claims, pre-emption waiver purchases and Crown purchases before the wars. The early engagement of Ngati Paoa (and other groups) with the Compensation Court over East Wairoa (when only monetary compensation was being given) cost these tribes the chance to have land returned. The Marutuahu tribes were not able to attend later sittings of the Compensation Court, dealing with the central Waikato confiscation, and again had to settle for monetary compensation. The exclusion of 'rebels' from the proceedings in 1865 fostered division within communities. Much later, in 1894, the Crown returned some 3736 acres to Ngati Paoa in the Hapuakohe Reserve and 300 acres to Hori Ngakapa of Ngati Whanaunga 'rebels'. This was significantly less than Ngati Paoa

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had asked for, in return for their cooperation with the survey of the confiscation boundary, although the Crown also remitted some £3000 of debt owed by Ngati Paoa in relation to Piako.¹¹⁷

Belgrave et al also query the Crown's assumption 'that compensation payments to individuals extinguished tribal title'. This premise, they suggest, 'is open to question'. They do not elaborate upon this as a matter of law. Belgrave concluded:

Even if some Marutuahu had been involved in activities that could be described as rebellion, the confiscations themselves did not adequately identify these people, did not sufficiently recognise the rights promised to surrendered rebels and left completely unpunished those from outside the proclaimed confiscated blocks who had joined the fighting.¹¹⁸

Counsel for the Marutuahu claimants submitted that Maori were in an 'invidious negotiating position' in the confiscated lands. 'Compensation was invariably limited and bore no relationship to rights lost.' The Crown failed to return sufficient reserves to provide for the future support of Hauraki tribes.¹¹⁹

In closing, counsel for Wai 100 noted the concessions in the Crown's amended statement of response regarding the 'confusion and problems' arising from the raupatu, and the statement that 'The confiscation of land particularly affected those groups who remained largely loyal or neutral, and those that were induced to submit very early in the process.'¹²⁰

Counsel for Wai 100 noted that the confiscation affected others than those who took up arms and that the payment of monetary compensation to certain groups or individuals nevertheless amounted to a forced purchase. Indeed:

The confiscations themselves as the Crown has acknowledged, cannot be justified in Treaty terms because Hauraki were not in rebellion. Even then, as the Crown also acknowledges, the confiscations of Hauraki lands were excessive . . . Both war and raupatu were in breach of the Treaty by going way beyond the Crown's powers of kawanatanga at the expense of the tino rangatiratanga of Hauraki. Likewise, the war and raupatu breached the Crown's obligations to actively protect the interest of Hauraki and the Crown's duty to act with utmost good faith towards Hauraki.

The outcome was the loss of a significant area of land and disruption and dislocation within the rohe of Hauraki iwi.¹²¹

117. Document v1, pp 156–160

118. Ibid, pp 158–160

119. Document v11, pp 46–47

120. Paper 2.550, para 32.4; doc v1, p 54

121. Document v1, p 55

5.8.2 The Crown's position

Notwithstanding the historical evidence offered in mitigation, the Crown made frank concessions regarding the war and raupatu in Hauraki. Having regard to the concessions already made by the Waikato Raupatu Claims Settlement Act 1995, Crown counsel in closing submissions made comparable concessions in respect of Hauraki claims. Counsel stated:

For the Crown this set of issues on war and raupatu represents a major Treaty breach concession. It is clear that the Hauraki involvement in the Waikato war was as a part of the conflict settled with Waikato–Tainui. Most engagement was in the early period of the Waikato phase of the wars of the 1860s and there was an early submission by most Hauraki participants.

The Crown acknowledges in general terms that the application of the confiscation policy in respect of land in East Wairoa and central Waikato (Maramarua) was unjust and was in breach of the principles of the Treaty.

There are a number of issues relating to confiscation that show differences between Hauraki and Waikato–Tainui. These include the fact that the East Wairoa confiscation resulted in the confiscation of land from groups that were, for the most part, considered loyal. The consequences of this are that groups such as Ngati Paoa and Ngai Tai were the first within the Hauraki area to become landless. Unlike the Waikato confiscations, very limited land within the East Wairoa confiscation area were returned to Maori. We refer [in paragraphs discussed earlier in this report] to the reserves made and the compensation paid in mitigation. However, the failure to provide sufficient land to tribes that were rendered essentially landless by the confiscation is significant in the context of this claim.

We also acknowledge that many of the claimants find the use of the term rebel pejorative, particularly as it provides no recognition of the real and strongly felt grievances that have been acknowledged as the causes of warfare in this period. It is further acknowledged that this has had a detrimental effect.

The stark evidence of the dislocation caused by the period of war and confiscation, and the effects of this on Maori communities weighs heavily with the Crown, and is a major factor in the Maramarua cross-claim acknowledged as a Treaty breach.¹²²

With respect to the raupatu, Crown counsel continued:

As a policy in itself, confiscation was fraught with difficulties. It was draconian in nature and deliberately intended to be so. It has been observed that the legislative authority to take the land was never perfected and the practical machinery required to implement it never really existed in New Zealand. Much of the Crown's administration of land subject to the

122. Document AA1, pp 78–79

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legislation was arbitrary, slow and expensive. Confiscation relied heavily on Maori cooperation, occasionally on the threat of renewed hostilities, and often on monetary payments as compensation.

Given the very real potential for injustice arising from the inherently draconian nature of the powers – and having abrogated the Article 2 guarantee of protection, the Crown was under a Treaty duty to take particular care in implementing the legislation. However, it clearly failed to do so.

There was thus a clear failure to uphold the honour of the Crown.¹²³

5.8.3 Claimant responses to the Crown

Claimants in the main of course welcome the Crown's concessions. The Wai 100 claimants nevertheless remain puzzled by the effort put into the buildup of the confrontation with Waikato (which Hauraki regard as irrelevant to their grievance) and on conflict 'with a group that are not a Hauraki tribe, Ngati Koheriki'. They note that Grey had begun to consider confiscation of land even before the war began.¹²⁴ (We have observed that in June 1863 Grey discussed with his Executive Council the necessity of confiscating strategic land southwards towards Maramarua.)

However, we note that, while Ngati Koheriki's origins link them with Ngati Tamaoho and other Tainui ki Waikato peoples, they also had links with Ngai Tai and lived in the upper Wairoa area. Ngati Koheriki claimants were in fact bitterly disappointed with the Crown's closing submissions, because, although making the large concessions cited above, Crown counsel also dwelt on military operations in East Wairoa in a way that suggested that Ngati Koheriki initiated attacks on settlers and Government forces and that the Crown (rather than Ngati Koheriki) then had to take defensive measures.¹²⁵ Counsel for Ngati Koheriki states that on the contrary, the Crown had not contested the 'facts' that it was the Crown forces who had invaded Ngati Koheriki on their core lands in East Wairoa:

- ▶ The Crown forces attacked the Ngati Koheriki settlement at Otau on 17 September 1863, killing and wounding a number of Ngati Koheriki and forcing them to flee from their villages.
- ▶ In December 1863, Crown forces carried out a surprise attack on Ngati Koheriki men, women, and children attempting to flee the region, resulting in the killing of seven Ngati Koheriki men and the wounding of others at or near Paparata.
- ▶ Ngati Koheriki were forced from their lands to live in exile.¹²⁶

123. Document AA1, p 106

124. Document AA14, pp 28–29

125. Document AA1, pp 86–87

126. Document AA3, pp 3–4, 18

Furthermore, Ngati Koheriki had been ‘wrongfully labelled as rebels’ when there was evidence that others from Waikato, Ngati Paoa and Ngati Whanaunga had been involved in a number of violent incidents west of the Hunua Ranges. Having been branded rebels, and exiled, ‘it is hardly surprising that some Ngati Koheriki may subsequently have gravitated to the Kingitanga. Where else could they go?’ Then salt was rubbed in their wounds when their land was ‘confiscated without compensation.’¹²⁷ They remained landless until they were granted a reserve at Waikarakia in 1926, on land where they had been promised a reserve in 1882 and had been living, but outside their ancestral rohe in East Wairoa. Counsel submitted that exclusion of Ngati Koheriki from compensation awards in East Wairoa had separated them from their traditional land and resources with the subsequent ‘social dislocation and loss of tribal identity’. The Waikarakia Reserve ‘was not their ancestral land’.¹²⁸

5.8.4 Tribunal comments and findings

Reading the Crown’s concessions in closing, together with the preamble to the Waikato Raupatu Claims Settlement Act 1995, it is evident that the Crown has accepted that, as in the Waikato, its action in sending armed forces into Hauraki and confiscating large areas of Hauraki land seriously breached Treaty principles and gravely injured Hauraki iwi.

We note that these concessions supersede the findings of the Sim commission of 1928. The terms of reference of that commission were limited in important respects: the commission was directed that it should ‘not have regard to any contention that Natives who denied the sovereignty of Her then Majesty and repudiated Her authority could claim the benefit of the provisions of the Treaty of Waitangi’ and should not accept any contention that the Acts authorising confiscation were *ultra vires* of the New Zealand parliament.¹²⁹ The commission was directed mainly towards investigating whether the confiscations were excessive. In respect of Waikato, generally it did so find, and it recommended compensation of £3000 annually. But the commission did not consider the East Wairoa confiscation apart from the Waikato confiscations generally, nor the extent to which Hauraki tribes were particularly affected by the central Waikato confiscation.

We have shown, in our survey of the development of the war up to July 1863, that no good evidence has emerged that Hauraki Maori engaged in aggressive plans or actions against the Crown before Grey’s proclamations of July 1863 and Cameron’s crossing of the Mangatawhiri. Hauraki iwi and their lands were caught up in the mounting crisis between Waikato and the Crown largely because the western Hauraki lands and the Hauraki Gulf happened to lie in the strategic approaches to Auckland. The Hauraki claimants have pointed out that if (as

127. Ibid, pp 18–19

128. Document Y16, pp 5–7; doc AA3, p 21

129. Charles Ferguson, ‘Confiscated Native Lands and Other Grievances: Commission to Inquire Into and Report as to the Grievances Alleged by Maoris’, undated, AJHR, 1928, G-7, p 2

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the Crown has acknowledged) Waikato were not ‘rebels’ Hauraki could scarcely be ‘rebels’ either. The logical validity of this is supported by the fact that no historical evidence has been adduced to show that Hauraki Maori included any uncontrollable elements such as the Kingitanga had to contend with in Waikato.

We therefore welcome and accept the Crown’s frank and open admissions, in the light of which there seems little point in our labouring further the Crown’s responsibility for the outbreak of war and the evident shortcomings in the raupatu policy and its implementation.

In the light of the evidence here summarised, we consider that (notwithstanding the role of some militant Waikato) the Crown itself bears the principal responsibility for the descent into war, first in Taranaki in 1860 and then in Taranaki and Waikato in 1863. We consider that Hauraki iwi were essentially innocent parties, caught up in the conflict, primarily because of the strategic location of their lands and waters.

Consequently, we firmly deny that the Crown’s suggestion that ‘when war is engaged between Treaty partners the standards required by the Treaty must necessarily be modified, and in special cases put to one side’ has any validity in respect of Hauraki in the 1860s.¹³⁰ On the contrary, as the Crown’s concessions frankly and honestly reveal, the Crown breached Treaty principles in its failures of statecraft in the lead-up to war and in seeking military solutions to essentially political problems. Once General Cameron had been ordered to take his forces across the Mangatawhiri River, sections of Hauraki Maori responded militarily with what they regarded as defense of their lives and lands.

The Crown then compounded the injury to Hauraki tribes by extensive confiscations of their land, partly in punishment for their involvement in alleged rebellion but largely for the establishment of military posts and the planting of military settlements. We note the Crown’s admission that very little of this land was returned and reject the suggestion that monetary compensation and the belated making of reserves was in any way equivalent.

We therefore conclude that, as in respect of Waikato in 1995, Hauraki iwi are owed an apology by the Crown and commensurate compensation for the severity of their losses of land and the serious disruption to their lives.

130. Document AA1, pp 88–89

PART III

GOLD AND TIMBER

PROLOGUE

In this part, we examine the resources of gold and timber. Gold has been described by counsel for the Wai 100 claimants as the linchpin of their claim. Gold mining was of vital importance to the history and economy of the region, in the second half of the nineteenth century. Hauraki was not the only district in New Zealand where gold was discovered on Maori land, but nowhere else was so much Maori land affected or Maori themselves faced with the incursion of so large a mining industry and so great a number of miners. Goldfields were opened methodically, mining block by mining block over five decades; mines themselves were opened on quite a small percentage of the land. But the influx of population and the burgeoning economy of Auckland province put pressure on Maori and their land throughout the region. There was no part of Hauraki that was not affected, directly or indirectly by the gold discoveries. The issue of gold, closely linked to the ownership of land, is particular to the Hauraki regional inquiry.

The allure of gold in the European imagination was itself a powerful force for change. Gold rushes in California and in Nelson province stimulated prospecting in Coromandel and drew Maori as well as Pakeha into the hunt; the rushes in Otago, and in Victoria across the Tasman, got under way just before the opening of payable fields in Coromandel and Thames. The hope of great wealth, quickly gained, drew prospectors into Maori land ahead of official sanction or control. Each time payable gold was found, scores or even hundreds of miners rushed to the site. For their part, the general and Auckland provincial governments dreamed of finds that would rescue the faltering economy and lay the foundations of commerce and industry, based on the inflows of population and capital that gold invariably attracted.

Maori viewed all this with justifiable anxiety. They knew that goldfields had attracted rushes of population in Victoria, Otago, and Westland. Some Maori with experience in the South Island fields came to prospect in Hauraki, and some Hauraki Maori became interested in the commercial opportunities gold offered. Mostly, however, Hauraki Maori feared that the influx of miners would result in the loss of control of their land and their futures.

From the Maori perspective, the issue of gold mining was closely linked to the issue of rangatiratanga or effective tribal autonomy. From the Crown's perspective, it was linked to the extension on the ground of effective sovereignty in order to control what might become an unmanageable situation, and to the fostering of economic development.

There was a twist to the unfolding story of gold in Hauraki. The region's gold was mostly locked in quartz reefs reaching deep underground or mixed with complex ore bodies. Little of it was alluvial, easily accessible to the individual miner with his pan or cradle. Most

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Hauraki gold could be won only through complex technical processes requiring huge capital investment and enterprise sustained over decades, often for poor net returns. These facts shaped and sustained the industry long after the initial rushes had died and had particular consequences for Hauraki Maori and their lands.

From the early 1850s, the Crown and Hauraki rangatira alike sought to control the anticipated gold rushes. They approached the task from different standpoints: Maori had not traditionally regarded gold as a taonga; they valued pounamu and other materials. But they valued and owned the land in which gold and other minerals precious to Pakeha were found, and knew that gold offered commercial opportunities, much as the exploitation of manganese had offered on some of the gulf islands in the 1840s. Safeguarding the land and tribal autonomy were still the dominant priorities, but rangatira also pondered whether it was possible to allow mining in such a way as to enhance their engagement with the commercial economy, and perhaps their own prestige.

The officials of the Crown knew that, under the common law of England, natural deposits of gold and silver in that country belonged by prerogative right to the Queen. Most officials believed that this common-law right extended to New Zealand. Eventually, in the 1870s, the courts upheld that view. But in the 1850s and 1860s, some officials believed that the Treaty of Waitangi modified the situation. Or, even if it did not, they knew very well indeed that Maori valued their land intensely, and would fight to control entry on to it. In the end, access to the gold was most important and, while not formally relinquishing the royal prerogative, officials settled upon a pragmatic policy of negotiating with the various Maori leaders for the right to mine on their particular tribal territories.

Maori leaders also saw advantages in ceding *some* of their land for mining purposes only, allowing the Crown the management of the goldfields and the townships that sprang up, in return for a defined scale of payments. But other land remained closed to mining until the 1880s by Maori opposition, and when access was finally negotiated with the Crown, Maori still sometimes attempted to avoid its intervention and deal directly with the miners.

The following chapters describe and analyse this complex history, and its implications in Treaty terms. As it happens, the opening of the various fields followed a loose chronology: Coromandel in the early 1850s and again in the early 1860s, Thames from 1866 to 1869, Ohinemuri from 1875, Te Aroha from 1880, and the East Coromandel Peninsula fields from the later 1880s. We have devoted a chapter to each of those main areas, providing a historical narrative and an analysis of Treaty-related issues in each case. These chronological and area-specific chapters are framed by two general chapters analysing themes common to all the goldfields. The first, immediately following this prologue, explains the geology of Hauraki in relation to gold, and the economics of mining gold in quartz reefs. The second, chapter 13, is an overview chapter, drawing together the main themes and issues running through all the area-specific chapters. In its conclusion are our comments and findings in respect of gold issues.

For Hauraki Maori, timber – especially kauri timber – was one of the most valuable resources in their rohe, and the exploitation of Hauraki timber remained a dominant industry in the nineteenth and into the twentieth centuries. Kauri was almost as important as gold, and kauri and other timber needed for gold mining meant the two industries were linked in the fortunes of the Maori people of the Coromandel region. Not surprisingly, the issues of whether Maori were able to exercise adequate control over the extraction of timber from their land, and receive equitable returns from the industry are major issues in this inquiry.

Pre-1840 timber dealings including Royal Navy and trader searches for spars have been noted above in section 3.1.1. In the late 1830s, as commerce with the wider world and the prospect of full-scale colonisation of New Zealand increased, many timber and other traders made transactions with Maori. The nature of these transactions is discussed in section 3.2. In assuming sovereignty in 1840, the British Crown assumed responsibility for investigating and regulating these transactions (see secs 3.3–3.7). Maori problems with pre-emption and the issuing of licensing regulations are discussed in sections 3.7 and 3.8. Private transactions over timber continued to be made before the institution of the Native Land Court. In 1871–73, most of those transactions were renegotiated or ‘perfected’ under the Native Land Acts. Until the 1870s, most timber was extracted from land which remained in Maori possession and control. After that period, Crown purchasing of timber lands becomes an issue for claimants, and whether Maori owners were sufficiently and properly recompensed for their loss of revenue. Or whether, because of the Crown’s monopoly through pre-emption proclamations, Crown agents paid only discounted prices for timber lands, involving significant losses to Maori. Timber issues associated with gold mining are discussed in the chapters on gold (chs 6–12); issues related to timber as an industry are discussed in chapter 14, which also includes the Tribunal’s findings specifically related to timber lands and revenues.

CHAPTER 6

THE BACKGROUND TO GOLDMINING IN HAURAKI

6.1 INTRODUCTION

The purpose of this chapter is to provide the context in which issues surrounding gold can be assessed. When gold was discovered at Coromandel in 1852, certain matters were already established: the gold itself, laid down for millennia in the rocky formations of Hauraki; Maori attitudes and values regarding the land and its resources on and in the land; the already numerous British settlers and officials in New Zealand who brought with them certain legal traditions. In 1840, the Treaty had been signed and the governmental structure of a Crown colony introduced, including a Supreme Court in which the judges interpreted the law – notably the British common law – as they understood it; more recently there had been gold rushes in California and Australia which demonstrated the kind of situations likely to arise when significant strikes of gold were found in New Zealand. These considerations affected the likely responses of Maori and Crown to the discoveries of gold in 1852 and in subsequent decades.

6.2 MAORI PERSPECTIVES ON RIGHTS OVER GOLD

Vincent Pyke, a nineteenth-century historian, wrote in his history of mining in Otago: ‘That the Maoris were aware of the occurrence of gold, before the arrival of the European colonists, is a tolerably well established fact.’ Pyke had made inquiries in 1862 and was informed by one whaler that, in Pyke’s words:

many years previous to the settlement of Otago, he was told by a native chief . . . that ‘plenty *ferro*’ or yellow [*sic*] stone, such as that which the watch-seals of the white men were made, and which had attracted the old chiefs attention, was to be found on the river beaches inland, and that the Matau or Molyneux River was the place where it principally occurred.¹

According to Pyke, other Maori made similar statements.

1. Vincent Pyke, *History of the Early Gold Discoveries in Otago* (Dunedin: Otago Daily Times and Witness Newspapers, 1887), p 2

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Dr Anderson, however, wrote in her report on gold for the Waitangi Tribunal's Rangahau Whanui series that 'no example of pre-contact knowledge or mythologising of gold has been found'.² Anderson shows that Maori valued and mythologised other minerals: pounamu of course but also obsidian, flint and basalt. South Island Maori might well have observed the presence of gold before the arrival of Europeans – alluvial gold occurred much more abundantly in the South Island than in Hauraki – but without attaching any especial significance to it. That gold had attracted little or no notice in Hauraki before contact with Europeans was confirmed at the Patapata meeting in 1852. There Maori said of gold that it was not something that their forefathers had found and that, much as Europeans might value it, it was not a substance that Maori knew how to work or themselves held dear; greenstone was a Maori treasure and retaining the land mattered most of all (see sec 7.3).

Louise Furey gave archaeological evidence on behalf of the Hauraki claimants of the use by their ancestors – prior to contact with Europeans – of various mineral substances. All were varieties of stone, apart from an oxide obtained by burning haematite-bearing rocks, which was used as a paint or stain. Andesite was used as a cooking stone, and basalt, greywacke, andesite, obsidian, chert, and sandstone were used to make tools. Basalt from Tahanga, on the Otama Peninsula north of Whitianga, is particularly hard and was well suited to the manufacture of tools such as adzes. Tahanga basalt artefacts were fairly widely traded.³

Dr David Williams appended to his evidence on behalf of the Hauraki claimants a number of traditions concerning minerals which were collected by Taimoana Turoa. In one account, a taniwha clubbed down the side of the summit of the Tokatea saddle (where goldmines were opened in the 1860s) in order to open a quartz face and blind his pursuer. Other accounts tell of the activities in Hauraki of various beings: Poutini was the guardian-spirit of pounamu, but was eventually chased out of Hauraki; Hinetua-hoanga was the 'lady-bearer' and keeper of sandstone; Tamateahua was the guardian-spirit of obsidian, with his daughter Paretao. The traditions show such beings interacting with the Hauraki landscape: for example, by splitting mountains; by forming islands, peninsulas, and rocky outcrops; and by tramping down the rock to form the valuable Tahanga basalt. Some mineral personifications are described as residing at certain places in Hauraki.⁴

These examples show that, although gold was not a valued taonga in traditional Maori culture, Maori had deep spiritual and cultural affinities with the land and its minerals. In their economy they exploited the land and its resources and developed property rights in it, including the rights of rangatira to control it on behalf of their people, and the more particular rights of individuals and their families to cultivations and resources. These rights continued unchanged after European contact, although certain produce of the land, such

2. Robyn Anderson, *Goldmining: Policy, Legislation, and Administration*, Rangahau Whanui Series (Wellington: Waitangi Tribunal, 1996), p 5

3. Documents B1, K3

4. Document B3, attachment A

as flax and timber, came to be more heavily exploited as Maori engaged in the developing economy. By the early 1840s Hauraki Maori understood that Europeans valued sub-surface minerals such as the manganese of Pakihi and Waiheke islands, and had joined in their extraction. From the Maori perspective, gold was simply another item on the land they owned which Europeans evidently valued and which Maori landowners could use to their advantage in the new economy.

After the discoveries of gold in Hauraki some Maori rangatira planned to work the gold themselves or engage prospectors and miners for the purpose. At the Patapata meeting in 1852 others, acknowledging that they lacked the requisite skills, considered engaging with the Crown in the management of the resource. Either way, they assumed that because they owned the land the gold was theirs and, like other general-use resources, lay under the mana of their chiefs.

6.3 THE ROYAL PREROGATIVE

6.3.1 The origins of the prerogative: the *Case of Mines*

British attitudes to precious metals were different. The British monarchy first asserted a claim to be entitled by royal prerogative right to all the gold and silver in the lands of the realm of England, and its dominions, in the *Case of Mines* of 1568.⁵ This was a civil proceeding brought on behalf of Queen Elizabeth the First against Thomas Percy, Earl of Northumberland, and concerned the rights to a copper and gold mine on the earl's land.

Counsel for the Queen argued that the Queen should have a prerogative right to gold and silver in view of their importance to the financing of the army and navy and to maintaining the value of the English currency. The main argument offered on behalf of the Earl of Northumberland was that, even if this royal prerogative existed, he had the right to the mine in question because, when the lands were originally granted to him, it had been stipulated that all minerals were included. In reply, counsel for the Queen claimed that this stipulation did not include gold and silver, for the term 'minerals' was too broad to read into it an intention on the part of the granting monarch to alienate that which was the object of a prerogative right, for which express words should be used.

The court ruled in favour of the Queen, its most important findings being that:

- 'Inlaw, all mines (bodies of ore) of gold and silver within the realm, whether they be in the lands of the Queen or of subjects, belong to the Queen by prerogative, with liberty in the Crown to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore.'

5. *R v Earl of Northumberland* (1568) 1 Plowd 310; 75 ER 471 (*Case of Mines*). The royal prerogative right to gold and silver was not amongst the prerogatives listed in the statute *De Prerogativa Regis*, which was enacted in the reign of Edward II on the basis of a recital by sages, and which is the primary authority for most royal prerogative rights.

- The right to royal mines can be granted, but only with apt and precise words.

6.3.2 The Crown's prerogative rights of access

The finding in the *Case of Mines* strongly implies that the Crown has the right to enter onto the lands of any of its subjects to get out the gold or silver therein, but it was afterwards questioned whether the Crown might in fact do so under all circumstances. In *Lyddall v Weston* (1739), Lord Hardwicke distinguished between, on the one hand, the right to prospect for and commence to work a new mine and, on the other, the right to work an independently opened mine. He opined that the Crown had only the latter right:

No instance where the crown has only a bare reservation of royal mines, without any right of entry, that it can grant a licence to any person, to come upon another man's estate, and dig up his soil, and search for such mines; I am of opinion there is no such power in the crown, and likewise, that by the royal prerogative of mines, they have even no such power; for it would be very prejudicial, if the crown could enter into a subject's lands, or grant a licence to work the mines; but when they are once opened, they can restrain the owner of the soil from working them, and can either work them themselves, or grant a licence for others to work them.⁶

This dictum has been taken by several writers to be reliable, although it should be noted that it was doubted in *Seaman v Vawdrey* (1810)⁷ as being contrary to the finding in the *Case of Mines*, and, as a result, cannot be regarded as the last word in the matter.

6.3.3 The reception of the royal prerogative

There is a considerable body of law that confirms the reception of the Crown prerogative right to gold and silver in the dominions of the Crown. The general opinion of European jurists in the 1830s (such as John Austin of England) was that colonies founded by settlement (or 'plantations'), where there was no pre-existing body of positive law, promulgated and enforced by a sovereign authority, the law of the colonising municipal power entered with the colonisers. In the case of English law, that would include the royal prerogative.

The question is, whether that was the case for New Zealand. In recent years, it has been argued that Maori tikanga did constitute a body of law, and that English law was not filling a vacuum. Historians have shown that Hobson and other senior officials stated in a

6. *Lyddall v Weston* (1739) 26 ER 409; 2 Atk 18. The thesis that the Crown's prerogative was defective in respect of right of entry where there is no open mine, and that this defect may explain some of the goldmining policy in New Zealand, is advanced in James Parcell, *A Thesis on the Prerogative Right of the Crown to Royal Metals* (Wellington: Government Printer, 1960).

7. *Seaman v Vawdrey* (1810) 16 Ves 393

variety of ways that they were aware that Maori valued their customs and beliefs and that these would be respected. To begin with, Hobson promised at Waitangi that Maori 'ritenga' would be protected.⁸ At other Treaty signings Willoughby Shortland gave similar assurances that 'native laws or customs' would be respected.⁹ According to Lindsay Buick, Hobson also issued a circular letter assuring the chiefs that 'the Governor will ever strive to assure unto you the customs and all the possessions belonging to the Maoris'.¹⁰ The chief protector of aborigines was instructed to give similar assurances, in respect of customs that were not repugnant 'to the principles of humanity and morals'.¹¹

In the light of such statements, former chief judge of the Maori Land Court Eddie Durie has stated:

It cannot be then be said, as a matter of fact, that the Treaty introduced the law of England if the corollary is that Maori laws then ceased to be applicable. The Treaty is rather authority for the proposition that the law of the country would have its source in two streams.¹²

This proposition poses the question as to how the prerogative rights of the Crown should be balanced against the property rights of Maori.

This recent approach was not the view of administrators and judges in England or New Zealand in the decades after 1840. In their time, they considered that the undertaking by Hobson and others to respect Maori custom was not the same as saying that the British regarded Maori custom as a body of positive laws which were and would continue to be the law of the land. Indeed, the very fact that Hobson felt it necessary to say that custom would (with qualifications) be respected, indicates that he considered that generally, English law would be applied. Similarly, the purpose of subsequent statutes such as the Native Exemption Ordinance 1844 was to provide authority so that Maori would *not* be automatically brought under 'the yoke of Blackstone's commentaries', as under-secretary James Stephen put it.¹³

In short, it was assumed from the outset by British officials in New Zealand that with the extension of British legal jurisdiction, English law had been introduced. Significantly, the reception date in New Zealand of the laws of England was taken to be the date of Governor Gipps' swearing in of Captain Hobson as Lieutenant-Governor of the colony-in-progress (New Zealand). In such circumstances, according to European jurists, it was for colonial authorities to decide how much of the common and statute law of the relevant colonising

8. Claudia Orange, *The Treaty of Waitangi* (Wellington: Allen and Unwin, 1987), p 53

9. John Johnson, journal, 28 April 1840, Auckland Public Library (Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, p 114)

10. Alan Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand* (Auckland: Auckland University Press, 1974), p 45

11. Orange, pp 54–91; Ward, p 45

12. E T J Durie, 'Will the Settlers Settle? Cultural Conciliation and Law', *Otago Law Review*, vol 8, 1996, pp 460–461 (doc B3, p 7)

13. Ward, pp 42–71; Peter Adams, *Fatal Necessity: British Intervention in New Zealand, 1830–1847* (Auckland: Auckland University Press, 1977), pp 210–237

power, in this case the law of England, should take effect. And if no action was taken by the Legislature then the law of England, so far as applicable, would take effect.¹⁴

There would appear to have been no contemporary legal barrier to this belief. English and colonial courts spelled out the orthodox position in the 1870s and 1880s, including the view that the reception of English laws included reception of the royal prerogatives. The English case of *In re Bateman's Trust* (1873) – an appeal from an Australian decision – was that in settled colonies of Britain (ie, in colonies wherein the previous inhabitants were considered not to have a settled body of law), the royal prerogatives applied just as they did in England.¹⁵ In Australia and in Canada respectively, the reception of the Crown prerogative right to gold in particular was confirmed by *Woolley v Attorney-General of Victoria* (1876–77) and by *Attorney-General of British-Columbia v Attorney-General of Canada* (1889).¹⁶ In New Zealand, Chief Judge Prendergast shared the view that Maori custom did not amount to a settled body of law notwithstanding references to it in New Zealand statutes. In the *Wi Parata* case of 1877, he gave the opinion that a phrase in statute (in this case, the Native Rights Act 1865, which referred to the ‘Ancient Custom and Usage of the Maori people’) that spoke ‘as if some such body of customary law did in reality exist’, ‘cannot call what is non-existent into being.’¹⁷ While Prendergast’s opinions are now regarded as excessive, they were not untypical of the age.

The question of whether the prerogative right of the Crown to the royal metals applied in New Zealand was first considered by the domestic courts in *Borton v Howe* (1875). There, Judge Chapman gave the following account:

The well-known rule is, that colonies founded by settlement [colonies that were without ‘settled law’ at the time of colonisation, as New Zealand was presumed to be] take the common and statute law of England, ‘so far as the same is suitable or applicable to their circumstance and condition.’ Now, whenever the question of suitability or unsuitability arises, it has, so far as I have been able to discover, turned upon the construction of some statute or class of statutes; and it seems always to have been assumed that the common law passes to the colonies without abridgment or exception.¹⁸

The Court of Appeal concluded that the prerogative had been received as part of the common law and went on to apply it to the matter before them, concerning the fouling of a stream in Otago by goldminers.

Several points should be added, however, by way of qualification:

14. In this regard, see the Australian case *Cooper v Stuart* (1889) 14 App Cas 286.

15. *In re Bateman's Trust* (1873) LR 15 Eq 355

16. *Woolley v Attorney-General of Victoria* (1876–77) 2 App Cas 295; *Attorney-General of British Columbia v Attorney-General of Canada* (1889) 14 App Cas 295

17. *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, 79 (doc B3, p 4)

18. *Borton v Howe* (1875) 3 CA 5; 2 NZ Jur (NS) CA 97

- ▶ First, *Borton v Howe* related to Crown land and Crown granted land. To our knowledge, the question of the application of the prerogative to Maori customary land has never been fully tested in the courts: there have been some cases that concerned mining on Maori land but in all of these the decision turned on a question of statute law; the judges tended to assume that the prerogative applied but it was not necessary to decide as much.
- ▶ Secondly, despite the comments of Judge Chapman, the common law does not necessarily apply unabridged, and, indeed, some particular prerogative rights of the Crown have been found not to have come into New Zealand. Mr Justice Stout, in *Baldick v Jackson* (1910), ruled the prerogative right to whales not to be in force in New Zealand, noting that whaling operations had been conducted by both private European whalers and by Maori prior to colonisation and that the existence of a Maori right to fisheries was acknowledged in the Treaty of Waitangi (but Stout did not consider the Treaty itself to be legally binding on the Crown).¹⁹
- ▶ Recently, the Court of Appeal in the *Ngati Apa* case has decided that the common law rule that foreshores belong by prerogative right to the Crown does not preclude the investigation into and recognition by the Maori Land Court of Maori rights in foreshores; rather it is suggested that Maori rights in the foreshore, where they exist, 'block' the prerogative. In theory, a similar possibility might be raised in respect of the subsurface, but for the intervention of statute law and the purchase of the freehold of most Maori land.

This brings us to the larger question of Maori customary title, or 'native title', under the common law.

6.4 COMMON LAW NATIVE TITLE

6.4.1 In New Zealand

It is well established in the common law as received in New Zealand that the Crown's radical title which accompanied the establishment of British sovereignty, is qualified or 'burdened' by pre-existing Maori customary Maori rights. As Chief Justice Martin and Justice Chapman put it in *The Queen v Symonds* (1847), the Crown's title to unappropriated land in the colony was subject to the occupation and use of land by the aboriginal inhabitants which 'is entitled to be respected . . . [and] cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers' (or by legislation, adds Kent McNeil).²⁰ Dr David Williams draws attention to the fact that the decision affirmed

19. *Baldick v Jackson* (1910) 30 NZLR 343, 343–346

20. Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989), p 190

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the doctrines of common law aboriginal title and Crown pre-emption, but were dismissive of the Treaty. '[W]e have obviously no concern for the Treaty of Waitangi as it stands in the Native language', wrote Chapman. In the Treaty, 'The Crown's right of pre-emption in the English language text was seen by the judges as a confirmation of existing colonial law on aboriginal title – a view endorsed by modern writers who have spoken of the Treaty as declaratory of Common Law rights.'²¹

The affirmation of the general common law principle, however, did nothing to determine what customary rights exactly Maori did hold in their land, including those which touched upon the question of the royal prerogative – namely, rights to the foreshore and to royal metals. Both issues had to be addressed in New Zealand after gold was discovered in 1852.

There remained a further difficulty. While the British had accepted, albeit reluctantly in many cases, that Maori 'owned their land' both cultivated and uncultivated, and that it would normally have to be purchased from them, it was often not clear *who* among the intersecting and right-owners should be recognised in respect of particular areas of land, and by what means. This difficulty had become apparent in 1840 and if anything intensified through the 1850s. (The Crown's attempts at solution of these problems is discussed for 1840 to 1865 in chapter 3, and for the period after 1865 in part IV.)

6.4.2 Overseas recognition of native rights

Certain American and Canadian precedents in regard to the recognition of customary rights – in gold or in the sub-surface – have been cited by claimant witnesses in the Hauraki inquiry, and also in the Waitangi Tribunal's Rangahaua Whanui series of research reports. A recent Australian case also sheds some light on current thinking in that country.

(1) In the United States and Canada

In the United States it is more common than not to vest all sub-surface rights in the surface owner. In the United States therefore, customary ownership of land may be fairly readily assimilated into a property system in which ownership of the land carries with it all the beneficial incidents including all minerals, amongst which the 'royal metals' of English common law are not separately distinguished.

Two American cases that have been cited are *Choteau v Molony* (1853) and *United States v Shoshone Tribe* (1938).²² In the first case, it was found that aboriginal occupancy did provide grounds for supporting the claim to ownership of subsurface rights, and hence that the *purchase* of certain mining rights from the First Nation occupants was valid. In the second case, the court decided that the tribe had a claim to the minerals and timber deriving from

21. Document B3, p 24

22. *Choteau v Molony* 57 US 203 (1853); *United States v Shoshone Tribe* 304 US 11 (1938)

aboriginal right. The Federal Government had acquired legal title, but had signed a treaty in 1868 guaranteeing to the Shoshone the 'absolute and undisturbed use and occupation' of their remaining tribal land. Therefore, the aboriginal rights of the Shoshone persisted and the court found that the tribe had the right of occupancy with all beneficial incidents. For all practical purposes, the tribe owned the land, of which the minerals were a constituent element. Moreover, the court felt that the Government was under a fiduciary obligation and, although it held legal title to the land, 'it did not have the power to give to others or to appropriate to its own use any part of the land without rendering, or assuming the obligation to pay, just compensation to the tribe, for that would be, not the exercise of guardianship or management, but confiscation.'²³ In practice, the development of minerals in which First Nation peoples have an interest has since 1938 been jointly controlled by the Government and Indians.

In Canada, there has in recent years been a willingness to include subsurface resources in native settlements. The Inuvialut and Council for Yukon Indians settlements have included the award of absolute title to large tracts of land, surface rights in smaller areas, and a participatory role in resource management. In the Nisga'a Treaty of British Columbia, the agreement in principle of 16 February 1996 states that the Nisga'a Government will own all minerals within the area of the agreement, including precious metals and petroleum:

In addition, the British Columbia Government must enter into agreement with the Nisga'a regarding the Crown collection of Nisga'a royalties, and the application of provincial administrative systems with reference to claim-staking, recording, and inspection of subsurface exploration and development on Nisga'a lands.²⁴

Important principles concerning the interpretation of aboriginal rights were expressed in *Delgamuukw v British Columbia*. In Canada, section 35(1) of the Constitution Act 1982 provides that 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed'. In 1996, the Supreme Court held that the aboriginal rights recognised in section 35(1) were confined to activities that could be said to be 'an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right'. But in *Delgamuukw*, Chief Justice Lamer considered that those aboriginal rights were only the lower end of a spectrum of common law aboriginal rights at the upper end of which was aboriginal title. Aboriginal title conferred the right to the land itself, and included the right to exclusive use and occupation of traditional lands for a variety of purposes not confined to the 'lower spectrum', and which need not be aspects of practices integral to the aboriginal culture but only not irreconcilable with the nature of the

23. *United States v Shoshone Tribe* 304 US 11 (1938); Paul G McHugh *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Auckland: Oxford University Press, 1991), p 133; Anderson, p 5

24. Anderson, p 6. Dr Anderson acknowledges Alison Mortimer of the Canadian Department of Indian Affairs for this information.

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group's attachment to the land. Lamer also expressed the opinion that section 35(1) might go beyond common law rights and include rights recognised in traditional law. Any or all of the rights identified by Lamer might in fact be shown to have been extinguished in the past, but if not then they are afforded constitutional protection. The trend to take a broad approach towards aboriginal and treaty rights therefore takes on immediate significance.

However, in the United States and in Canada there are numerous treaties in which the territorial sovereignty of the native inhabitants has been recognised, and in both countries these treaties or treaty rights have been given some legal protection. This circumstance might be held to distinguish the judicial and Governmental approaches to the recognition of aboriginal rights from that which might be adopted elsewhere. Australian courts have felt at times unable to follow American or Canadian precedents. Nevertheless, on many occasions, the aboriginal rights that have been recognised in North America have been recognised on the strength of prior occupation. These rights survive under treaties and are not created by them.

(2) In Australia

In Australia, there was a recent appeal to the High Court in which native title in natural resources was examined. The appeal was in respect of a group of four cases, which were referred from the full court of the Federal Court: *State of Western Australia v Ward*, *Attorney-General of the Northern Territory v Ward*, *Ningarmara v Northern Territory*, *Ward v Crosswalk Pty Ltd*. These cases were heard by the Federal Court under the jurisdiction provided by the Native Title Act 1998. The central issue in these cases and in the appeal was the conditions for extinguishment of native title rights, but it was thought necessary to decide on what native title right – as provided for under the Native Title Act – had existed in the first place. The most relevant criterion applying to a determination of native title under the Native Titles Act is that provided in section 223(1)(a); native title rights are rights and interests which are 'possessed under the traditional laws acknowledged, and the traditional customs observed', by the relevant peoples. According to the High Court summary of the proceedings in the Federal Court:

the claimants had, in pre-trial particulars, alleged that they 'dug for and used stones, ochres and minerals on and from the land' and that they 'shared, exchanged and/or traded resources derived on and from the land'. At trial there was evidence that the claimants dug for and used ochre.²⁵

The trial judge, Judge Lee, determined that:

25. *State of Western Australia v Ward*, *Attorney-General of the Northern Territory v Ward*, *Ningarmara v Northern Territory*, *Ward v Crosswalk Pty Ltd* [2002] HCA 28, para 381

in the determination area, the native title holders had ‘the right to use and enjoy resources’ of the area, ‘the right to control the use and enjoyment of others of resources’ of the area, ‘the right to trade in resources’ of the area and ‘the right to receive a portion of any resources taken by others’ from the area [(1998) 159 ALR 483 at 639]. ‘Resources’ was not defined in the determination but there is no reason to conclude that it did not encompass all forms of resources, including minerals of all kinds.²⁶

Before the full court of the Federal Court, however, this determination was overturned, Judge North dissenting. Judges Beaumont and von Doussa pointed out that there was no evidence ‘of any traditional Aboriginal law, custom or use relating to *any* of the substances dealt with in either the *Mining Act 1904* or the *WA Mining Act*’ (these statutes deal with precious metals, coal, oil, and a host of other non-precious mineral resources); and it was found that no native title right or interest in those minerals had been established.²⁷

In the High Court, the decision of the full court that no native title right in minerals had been established by the claimants was accepted.²⁸ Judge Kirby, however, while agreeing that in any case such a right would have been extinguished by the mining legislation, wished to ‘explain a divergence in the approach concerning the *recognition* of native title rights to such resources.’²⁹ Judge Kirby noted the ‘differing views in the Full Federal Court’:

North J, in dissent, concluded that the determination of native title to ‘resources’ was broad enough to include minerals and petroleum, where these exist. In contrast, the majority of the Full Court held that Lee J’s determination should be restricted to the use of ochre, excluding petroleum or other minerals. This seems to have been based, in part, upon the argument that ‘minerals that are mined by modern methods’ cannot form part of native title rights and, in part, upon a view of the evidence that the only rights to resources that had been proved were the use of ochre.

In relation to the capacity of the common law to recognise change and development in traditional laws and customs, I prefer North J’s approach. It supports the recognition of historical uses of resources, such as ochre. It also includes other minerals. It envisages the extension of such recognition to modern conditions, developed over time, so as to incorporate the use of other minerals and resources of modern relevance. Such an approach is generally consistent with the authority of this Court and decisions in Canada. When evaluating native title rights and interests, a court should start by accepting the pressures that existed in relation to Aboriginal laws and customs to adjust and change after British sovereignty was asserted over Australia. In my opinion, it would be a mistake to ignore the possibility of

26. Ibid, para 376

27. Ibid, para 382

28. Ibid, paras 385, 468

29. Ibid, para 572

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new aspects of traditional rights and interests developing as part of Aboriginal customs not envisaged, or even imagined, in the times preceding settlement.³⁰

Judge Kirby also acknowledged but took issue with the requirement under the Native Title Act, 'for the claimants to prove how their traditional laws and customs in relation to the land and waters claimed have given rise to the propounded rights and interests in resources in the claim area'. Judge Kirby felt that where a native title claim to land was recognised as conferring exclusive possession, the claimants should be entitled to enjoy the same presumption of the right to use and enjoy the mineral resources as would any Australian; Kirby did not mention the royal prerogative in this respect.

Judge Kirby's remarks in respect of the recognition of native title rights in relation to modern uses of resources are not dissimilar to Apirana Ngata's often quoted remarks in the House, supporting Maori rights to benefit from resources of modern value, such as petroleum.³¹ Ngata's position therefore has supporters amongst the Australian and Canadian judiciary. So far in Australia, however, the rules governing the extinguishment of native title and the determination of native title under the Native Title Act have prevented judicial recognition of native title rights in minerals, without necessarily excluding rights of access deriving from surface rights.

6.4.3 Tribunal comment on native rights

The relevance to New Zealand of overseas decisions and practice in respect of the recognition of aboriginal rights is debateable. If, following Martin and Chapman in *Symonds v Regina*, and Prendergast in *Wi Parata*, the view is taken that the Treaty of Waitangi does no more (*and no less*) than affirm native title rights subsisting in common law, then the principles established overseas in respect of native ownership of minerals, might be seen as a valuable guide to Maori rights (where the customary use of and relationship to land and minerals are similar). If however, the Treaty of Waitangi is viewed as a genuine *exchange* of rights between Maori and the Crown, there is no necessity that Maori Treaty rights and Maori aboriginal rights should exactly coincide: some rights might have been gained by Maori and others diminished through the Treaty.

However, whatever is taken to be the relationship between Treaty rights and aboriginal rights, the same choice as was addressed by Justice Kirby and in *Delgaamukw* has already emerged in New Zealand, that is, whether to take a narrow or a broad approach to Maori rights in resources which have considerable modern – but little traditional – value.

30. *State of Western Australia v Ward, Attorney-General of the Northern Territory v Ward, Ningarmara v Northern Territory, Ward v Crosswalk Pty Ltd* [2002] HCA 28, paras 573–574

31. Apirana Ngata, 6 December 1937, NZPD, 1937, vol 249, p 1044 (Alan Ward, *National Overview*, 3 vols (Wellington: GP Publications, 1997), vol 2, p 300)

In addition, whether or not Treaty rights and aboriginal rights coincide, there is a common problem in that either form of right must be translated into rights that are compatible with the contemporary common law and statutory framework. In respect of this problem, a certain amount of failure is well nigh inevitable due to the incompatibility of any spiritual attitudes to land with modern property systems, as the following quotation from the Miriuwung-Gajerrong appeal demonstrates:

As is now well recognised, the connection which Aboriginal peoples have with 'country' is essentially spiritual. In *Milirrpum v Nabalco Pty Ltd*, Blackburn J said that:

'the fundamental truth about the aboriginals' relationship to the land is that whatever else it is, it is a religious relationship. . . . There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole.'

It is a relationship which sometimes is spoken of as having to care for, and being able to 'speak for', country. 'Speaking for' country is bound up with the idea that, at least in some circumstances, others should ask for permission to enter upon country or use it or enjoy its resources, but to focus only on the requirement that others seek permission for some activities would oversimplify the nature of the connection that the phrase seeks to capture. The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the NTA. The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them. The difficulties are not reduced by the inevitable tendency to think of rights and interests in relation to the land only in terms familiar to the common lawyer.³²

Whilst the spirituality of Australian Aboriginal and Torres Strait Islanders is different from that of the Maori, both peoples' relationship to the land is alike in having a spiritual character and in regarding it as an aspect of an integrated 'whole'.

Arising from the incompatibility of indigenous peoples' relationship to land with colonial property systems is a further problem: the question of what indigenous rights *ought* to be recognised is compounded with the question of *how* those sui generis rights, once recognised, can be incorporated into a general property system. Here, the Canadian settlements, which include some recognition of interests expressed in joint control, give an indication of what can be done.

32. *State of Western Australia v Ward, Attorney-General of the Northern Territory v Ward, Ningarmara v Northern Territory, Ward v Crosswalk Pty Ltd* [2002] HCA 28, para 14

6.5 THE GREATER IMPORTANCE OF ACCESS

The question of the theoretical or legal ownership of gold was soon overshadowed in practice by the question of access to it. It was of little worth to the Crown or settlers to assert ownership of gold but have no access. As noted above, it was unclear in English law whether the royal prerogative right to gold carried with it a right of access when the gold lay in privately owned land. Moreover, it had become manifestly clear by the 1840s that Maori would defend their land by force of arms against efforts by settlers or the Crown to dispossess them. Thus, unless the prerogative right to gold did carry with it the right of access to it, and the Crown was prepared to enforce the right, there was little point in the Crown asserting its theoretical right. By 1847, the 'waste lands' view of Maori rights to uncultivated land had given way to a policy of purchasing Maori land desired for settlement, whether cultivated or uncultivated. The obvious options available to the Crown were therefore to purchase land from Maori ahead of any settlement or development of the land (including mining), or to negotiate for the access rights, leaving the ownership of the freehold with Maori. As discussed below, the Crown pursued both options, but negotiation of 'mining cessions' (access rights) preceded the purchase of freehold in Hauraki.

6.6 THE GEOLOGY OF THE REGION AND ITS GOLD DEPOSITS

In Hauraki, in contrast to the South Island fields of the nineteenth century, hard-rock mining has dominated the history of gold extraction. The deposits are epithermal quartz deposits: that is, they are the product of volcanically heated (hydrothermal) water permeating through the surrounding rock; dissolved silicates, gold, and associated minerals either ascended from deep mineralised zones or were leached from the surrounding rock and were precipitated as mineralised quartz veins:

The Hauraki Goldfield contains some 47 separate gold-silver deposits spread at intervals along the Coromandel Peninsula and adjacent areas over a length of 200 km from Great Barrier Island in the north to Te Puke in the south. The gold-silver deposits are of the epithermal quartz vein type, associated with andesite-dacite-rhyolite volcanics of Miocene–Pliocene age, and constitute a geologically discrete metallogenic district.³³

Some isolated veins have been mined, many other deposits 'contain a number of spatially associated veins that were deposited in a single hydrothermal system', and some deposits were deposited by a number of adjacent or overlapping hydrothermal systems.³⁴

The deposits associated with a given hydrothermal system might consist of a mineralised feeder zone, thick veins deposited in the fissures that were the main channels along which

33. Document P2(c), p 1

34. Ibid, p 3

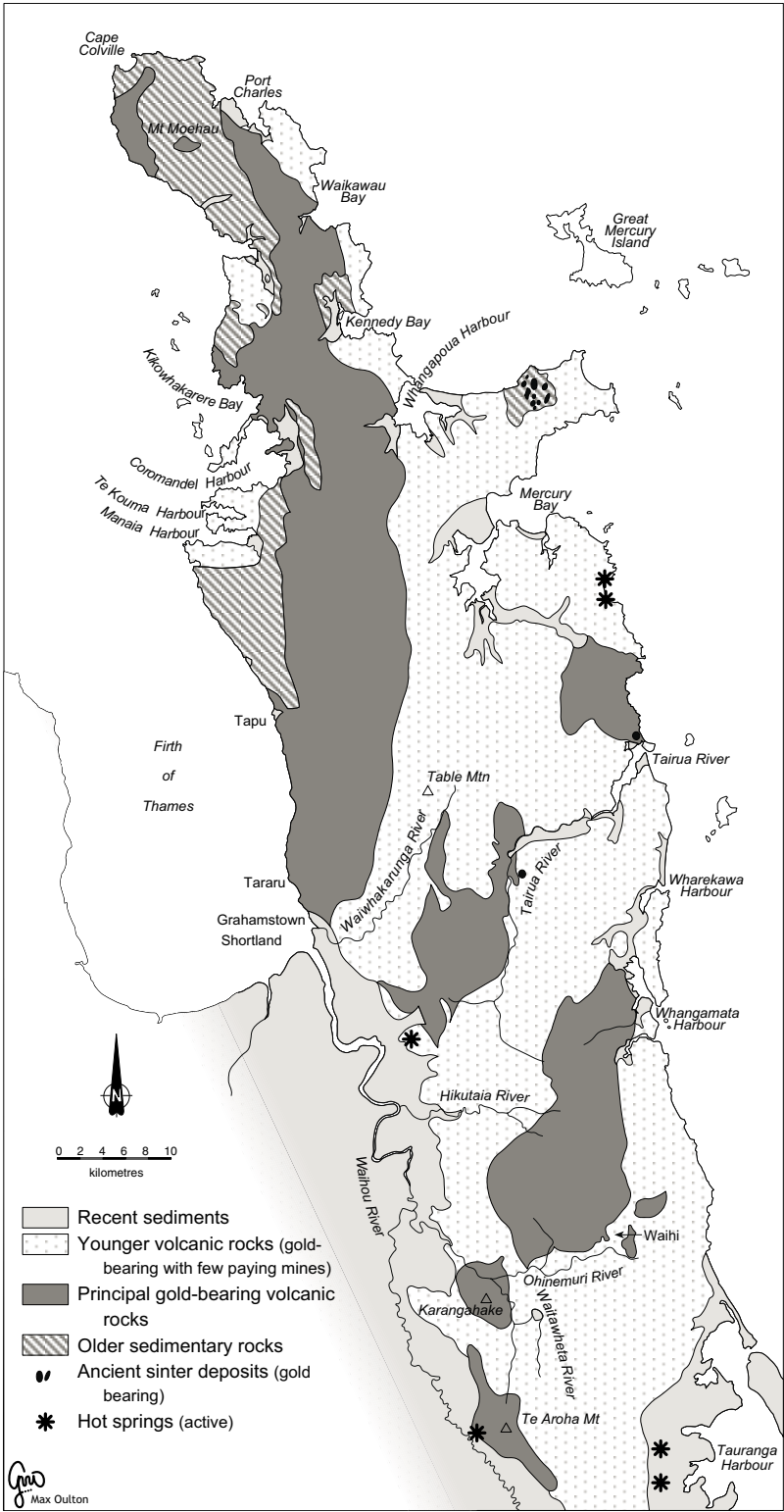


Figure 22: Coromandel Peninsula, Alexander Mackay's geological sketch map, 1897.
Source: AJHR, 1897, sess 2, C-9.

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the hydrothermal water ascended, and multi-branched 'stockwork' of thin veins. The thick veins were often very long and deep and quite often ran parallel to the shear planes in the surrounding rock. The stockwork, true to its origin, will often join together at depth. A 'reef' is basically a number of densely associated veins.

The little alluvial gold in Hauraki was derived from the denuding and weathering of the quartz reefs. But the hills were too steep and the sea too near for very much gold to collect. It was only on river flats and deltas that gold bearing quartz fragments were distributed through gravel. In every case, the alluvial rushes that occurred on such deposits were short-lived.

These facts were known soon after the discovery of Hauraki gold. The 1852–54 episode of mining at Coromandel and prospecting operations in the following years had established that whilst quartz reef gold was extensive throughout the Coromandel Peninsula there was little alluvial gold. The Government surveyor Charles Heaply travelled throughout the Coromandel in 1853 and 1854 and in 1857 published his opinion in the *New Zealander* that the gold would have to be worked at its source in the quartz reefs. A couple of years later, the geologist Hochstetter examined the Coromandel Peninsula and reached the same conclusion.

At Thames, parts of the larger quartz veins or 'shoots' were particularly rich in gold, perhaps the result of repeated dissolution and depositing of gold during the volcanic period:

The Thames goldfield was a classic bonanza mining area, with much of the gold being produced from six exceptionally rich pockets of ore (or 'bonanzas') of limited extent . . .

At least 75 per cent of the bullion produced from the [Thames] goldfield came from an area of less than 80 hectares, which included all the big bonanzas.

Approximately 43 percent of the total bullion production from the Thames area was contributed by just six major mines, with the Caledonian alone accounting for 12 per cent of the output.³⁵

The bonanza character of the deposits at Thames contributed towards the boom years there.

At Coromandel and at Thames, the gold was 'free': that is, it occurred mostly as distinct particles lodged in the quartz matrix. As a result the greater part of the bullion, which had a higher ratio of gold to silver than did the bullion obtained from other Hauraki goldfields, was able to be recovered from the ore with fairly simple crushing appliances. In other parts of the region, notably in the Waiorongomai Valley near Te Aroha, the ores were of a more complex nature. Although assay showed that they contained reasonable quantities of gold,

35. Phil Moore and Neville Ritchie, *Coromandel Gold: A Guide to the Historic Goldfields of Coromandel Peninsula* (Palmerston North: Dunmore Press Ltd, 1996), pp 53–56

THE BACKGROUND TO GOLDMINING IN HAURAKI

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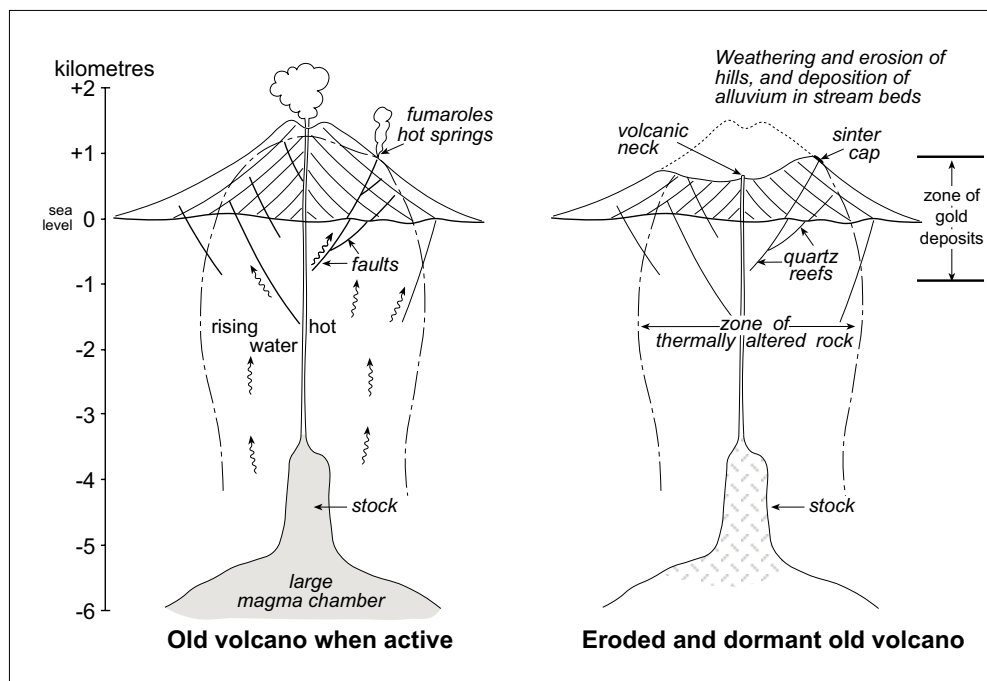


Figure 23: The formation of gold-bearing quartz reefs

it was compounded with iron pyrites and associated with sulphides to such an extent as to resist treatment. This hindered and sometimes prevented the profitable operating of mines.

The gold from the Auckland province goldfields was not especially pure. The *Thames Miner's Guide* gives an average assay from the Auckland goldfields in 1868 of 18.65 carats compared to the 22 carats and above being returned by South Island fields.³⁶ Whereas the 1858 Gold Duty Act had imposed a flat tax of two shillings sixpence per troy ounce of gold exported, a sliding scale was introduced in the Gold Duties Act 1870, because the gold sourced from different fields varied in quality; the gold from the Thames goldfields was much inferior.³⁷ Under this scale, gold with a fineness of between 16 and 18 carats attracted a duty of two shillings an ounce.³⁸ Mining inspector Downey argued in 1935 that estimates of the value of the gold produced from the Hauraki were too high because the low purity had not sufficiently been taken into account. He suggested that £2 13s per ounce would be more accurate than the £3 often taken as an approximation.³⁹ Regardless of the exact figure, the lower value of the gold produced would have had a serious impact on the margin of profit from every ounce recovered.

36. *The Thames Miner's Guide: With Maps* (Auckland: Edward Wayte, 1868) p 48

37. Julius Vogel, 21 July 1870, NZPD, 1870, vol 8, p 47

38. This rate became the blanket rate under the Gold Duties Act 1872. Under the Gold Duty Abolition Act 1890, duties were abolished in the South Island but retained in the North Island because a part of the goldfield revenues was going to Maori owners and not to local authorities.

39. John F Downey, *Gold Mines of the Hauraki District* (Wellington: Government Printer, 1935), pp viii-ix

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Although the deposits in the Ohinemuri district (including those at Waihi and in the area worked by the Martha mine) were by far the largest found in Hauraki, they were low grade deposits, unlike the bonanza type at Thames. The mining of these deposits was especially capital intensive and costly and was barely profitable until the introduction of the cyanide process improved yields. The disproportionate size of the Waihi deposit compared to other deposits in the region indicates that it is likely that even today large deposits remain to be discovered in the Hauraki district, since the size of deposits will usually be distributed less unequally. Mining and exploration permits are currently held in respect of a number of good prospects.

6.7 CHARACTERISTICS OF HARD-ROCK GOLD MINING**6.7.1 How ore is mined and treated**

The profitability of quartz reef mining has as much to do with the cost of recovering and of treating the ore as with the amount of gold recovered: 'The most profitable leads are usually those which afford a large supply of rock, obtainable at a cheap rate, and uniformly yielding an amount of gold in excess of the cost of extraction and treatment.'⁴⁰

Following a quartz vein will normally involve extensive tunnelling. The Moanataiari Tunnel at Thames was an exceptionally long drive, extended over a period of 30 years for a distance of 2.4 kilometres, and connecting several mines underground.⁴¹ Where the reef cropped out on the side of the hill, as at the Tokatea mine, it could be relatively easily worked by driving in horizontal 'adits'. The gold bearing ore could then be broken up in a cavity, or 'stope', above the adit and dropped into ore trucks. When a reef did not crop out so conveniently on a slope then shafts had to be sunk, and the cost of raising the ore was increased. Flooding of shafts at Coromandel and at Thames increased with the depth to which they were sunk.

The standard mid-nineteenth-century treatment of the extracted rock included crushing, separation, and amalgamation with mercury. After crushing, the pulverised rock would pass out through filtering screens leaving some of the free gold to be recovered from the battery itself. Sometimes the ore would be roasted beforehand to drive off the sulphides that would prevent amalgamation. The pulverised ore would be run through settling troughs where much of the heavier particles would be caught in blankets, and then through amalgamation troughs in which the finer gold particles would be caught on copper plates treated with nitric acid and coated with mercury. The tailings could then be further treated by concentrating the gold ore and mundic (auriferous iron pyrites) in a rocker, after which the concentrated tailings could be further ground and possibly roasted before amalgamation.

40. *The Thames Miner's Guide*, p 13

41. Moore and Ritchie, p 56

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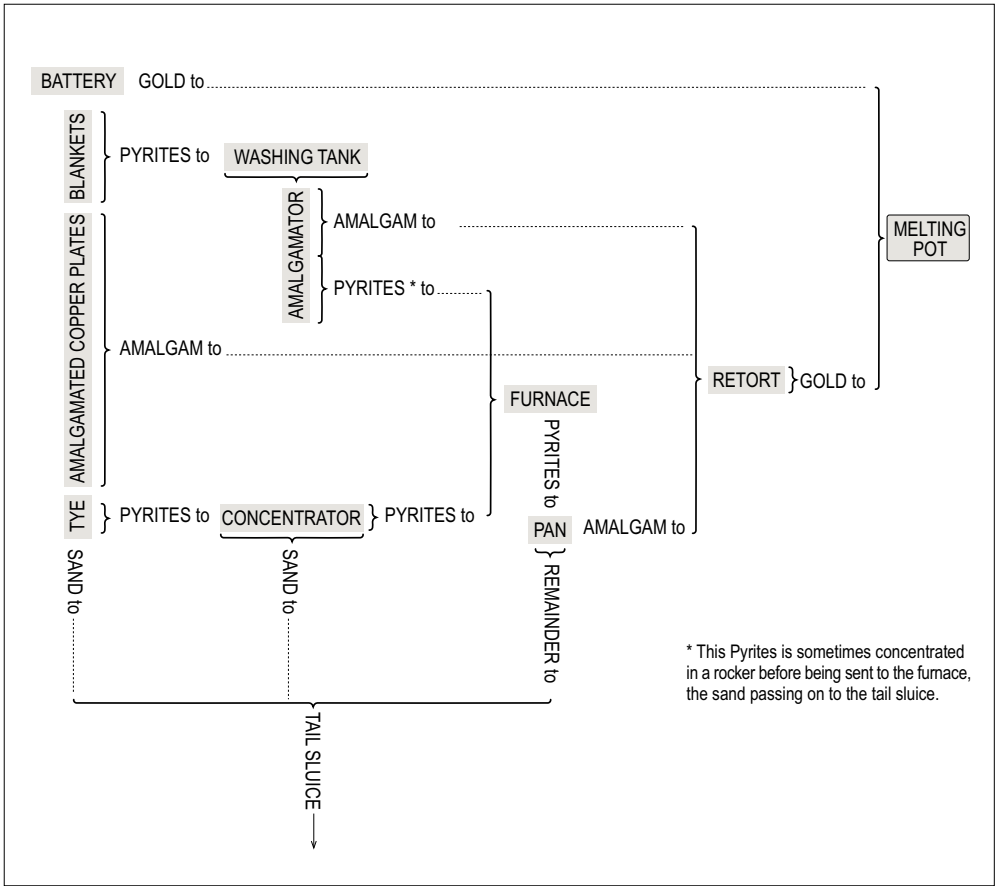


Figure 24: Methods of processing gold-bearing quartz.

Source: *The Thames Miner's Guide: With Maps* (Auckland: Edward Wayte, 1868)

The amalgam was heated in retorts to recover both the gold and the mercury. The treatment of amalgam did not need to be performed on site but all other steps were, or the cost of shipping the quartz would have been prohibitive.

The cyanide process, which succeeded the process described above as the standard treatment, was developed in 1887 in Glasgow. In this process, crushed and ground ore is mixed with a cyanide solution through which air is bubbled. The gold is oxidised and combines to form a soluble aurocyanide ion. The solution is then filtered off and zinc added so that the gold is precipitated. The precipitate can then be treated to remove the gold, zinc, and silver. Several major mining companies in Hauraki secured rights to use the patented process. The New Zealand Crown mine at Karangahake was one of the first mines in the world to trial the process commercially. In 1897, the Government negotiated the right to use patent rights and made the process available for a fee under the Cyanide Process Gold Extraction Act 1899, exempting those batteries which had acquired their own rights.

The cyanide process led to a large increase in bullion yield. From the Waihi deposit 65 per cent of the gold and 35 per cent of the silver by assay was recoverable by pan amalgamation.

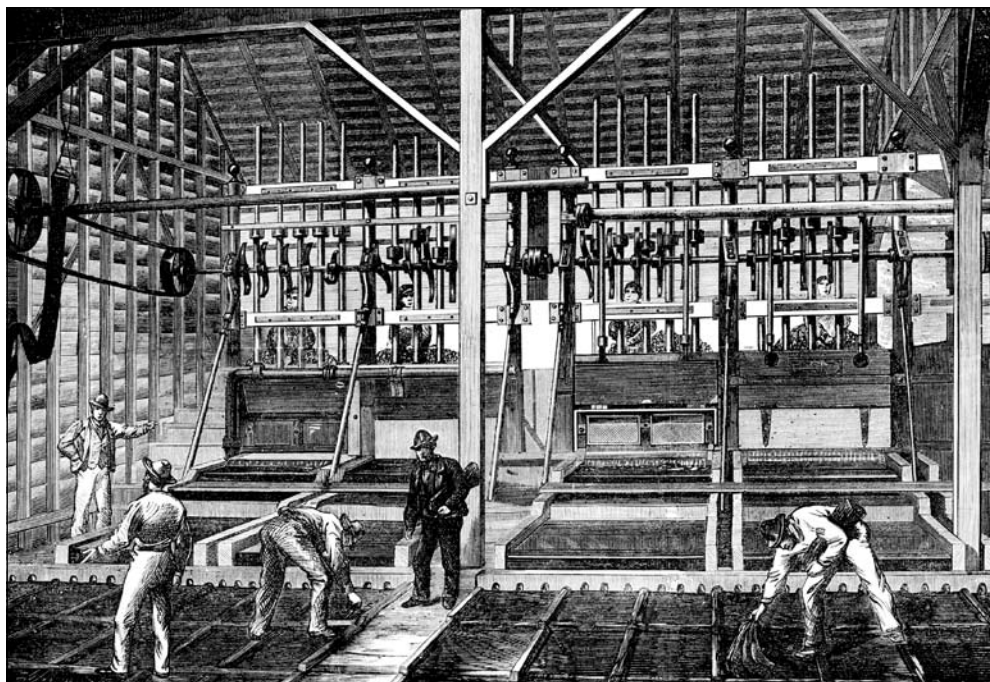


Figure 25: Interior of a gold quartz crushing battery, Thames goldfield

But cyanidation produced yields of 90 per cent and 50 per cent respectively. The superiority of the cyanide process and the development of dredging technology in the South Island led to the formation of the Ohinemuri Dredging and Mining Company late in the century. This company hoped to obtain a payable return from tailings discharged into the river from the Karangahake and Waikino batteries prior to the adoption of the cyanide process. The yields obtained from dredged tailings indicate that one ounce or more of gold per ton was lost during the treatment of ores.

6.7.2 Costliness and capital intensity

None of the goldfields of Hauraki was a 'poor man's field'; that is, a field that could be worked profitably using the means that an individual itinerant miner had at his disposal. Some easily won gold – in creek beds, loose quartz floaters, and exposed reefs – was to be found when a field first opened, but this was always quickly exhausted, leaving the field to miner's working the quartz lodes.

Quartz reefing demands high levels of capital investment. Batteries were established to operate as businesses in their own right, to which miner's had access, but the user charges and the costs involved in transporting the ore to the battery were such that it was much more economical for a mine to own its own plant. The *Thames Miner's Guide* gives several descriptions of crushing plants and their cost. These range from £1500 for a basic stamping

battery, to £3000 for a nearly complete treatment plant, comprising a 12-stamp crusher, drying-kiln, and retorting furnace, manufactured for the Kurunui Mining Company by an Auckland foundry.⁴²

Water for the plant constructed for the Kurunui Company was carried on a three-mile 'plume' from the Tararu River, no doubt at a significant additional cost. Companies would also often have had to invest in tramways and ore trucks to transport the ore to the treatment plant. A fairly extreme example was the eight-kilometre narrow-gauge railway that was built by the Martha Mining Company to transport ore from Waihi to the Victoria battery, which it built at Waikino because of the inadequate water supply at Waihi.

At deeper levels, pumps were required to drain shafts of water and engines were required to raise the ore. Mines near Coromandel Harbour, such as the Kapanga mine, and at Thames especially were troubled by flooding. The Thames Pumping Company was founded in 1872 to address the problem. This company had sunk the Big Pump shaft to a depth of 200 metres by March 1874. There was a temporary cessation of activity in 1879 when Government subsidies were withdrawn. Subsequently, an English company took over the operation, with the Government subsidising their investment on a pound-for-pound basis. The Cornish pump-house at Waihi is also a well-known landmark.

Operating costs remained high because of the continuing need for labour and timber to extend tunnels and shafts, because of user charges such as for water-races, and because of the costs of operating treatment plants.

6.7.3 Rapid displacement of independent miners by mining companies

In addition to high operating costs and levels of investment in machinery, which favours company mining, quartz mining also involved long lead-in times and start-up costs. All of this strained the resources of independent miners and favoured company mining.

The typical difficulties faced by miners were summarised by Professor Stone:

As an extractive process, quartz mining operated within a wider time-frame than its alluvial counterpart. Time was consumed with driving shafts among leaders and propping them, and shifting quartz to batteries for crushing (or otherwise processing) to obtain the final bullion. Such delays, and the costly nature of machinery to be installed, made this style of mining ill-suited to the financial resources of the usual individual transient miner, even to syndicates of such men unless well-to-do sleeping partners could be induced to buy shares or to 'grubstake'. In consequence the ephemeral, self-employed prospector quickly gave way on the Thames to a relatively static wage-labourer working within or employed by a syndicate, or (increasingly) employed by a company.⁴³

42. *The Thames Miner's Guide*, pp 73, 79

43. Document A12, p 58

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The rapid rise of company mining that occurred at Thames had been foreshadowed at Coromandel in the early 1860s.

According to Salmon's history of gold mining, miners at Coromandel in the early 1860s commonly tackled the need for financing the development of a claim by working in grub-staked associations. The regulations for the field permitted associations of miners to hold claims contiguously – usually an access way had to be left between claims – to the extent of eight claims:

It became customary for groups of about eight miners to form an association with an equal number of Auckland investors, who supplied the capital. The miners worked at wages of 30s a week until the claim became productive, and thereafter continued to work for a share of the profits or provided labourers to work for them . . . After operation for a year or so it was a common practice to amalgamate with neighbouring partnerships to pool resources and acquire machinery.⁴⁴

The Kapanga mine was established by such a process of association and amalgamation of small claims. How extensive this practice was is unclear, but, in any case, successful syndicates would not remain self-employed but simply become employers. The Coromandel goldfield warden, Charles Lawlor, wrote to the provincial superintendent in 1865 appealing for a revision of the mining regulations because 'the Rules now in force are applicable merely to individual claimants whereas there is not a single claim now on the diggings but what is worked by Companies'.⁴⁵ Many of the companies involved foreign capital: the Kapanga mine at Coromandel became the first mining property in New Zealand to be acquired by an English company, which took over in 1871.⁴⁶

At Thames, few miners had financial backing and, even if they had taken up good claims, rarely had the means of realising the potential wealth. A few claims, such as Hunt's claim, were both rich and easily worked, so that sleeping partners were quickly obtained, though initially only at a bargain price. Commonly, the miners endured hardship while seeking financial partners. A visitor to the Thames goldfields in October 1867 wrote that miners were stockpiling quartz while awaiting the arrival of crushing machinery; meantime few were earning any income. When machinery began to arrive the operators of plants often levied high charges and miners also faced difficulties transporting ore to the plants. The *New Zealand Herald* reported on 1 February 1868, when the goldfield had been open for six months, that many diggers were 'on their last legs for funds':

44. JHM Salmon, *A History of Goldmining in New Zealand* (Wellington: Government Printer, 1963), p 181

45. Document 06, p 78

46. Thomas W Rhodes, *The History and Resources of the Auckland Goldfields* (Coromandel: The County News Office, 1899), p 7

Taking the population at 6,000, and the return as, at the most, 3,000 ozs per month, and reckoning, as we must, that the largest portion of this gold comes from a few immensely rich claims, it stands to reason that the miners are not supported by the gold they get.⁴⁷

The *Herald* emphasised the need for the formation of more companies so that the field could be developed successfully and these miners would be provided with paid employment. It was in fact only after investment began to flow in to the field and the number of companies proliferated that the field prospered and the population increased still more.

The lower grade reefs mined elsewhere in Hauraki, and especially those in the Ohinemuri mining block, were even less amenable to mining by independent miners.

6.7.4 Demographic effects

Because they were predominantly wage-labourers, the miners of Thames were 'less transient and socially more stable' than their South Island counterparts.⁴⁸ James Mackay reported in 1869 that:

The nature of the mining is such as to guarantee its permanency, and it will probably assume more the appearance of a settled industry than on any gold field as yet discovered in the world. One proof of this is that tents are becoming scarce, and substantial and comfortable cottages have been substituted for them. The miners as a body are cheerful and persevering, and there is much less crime and riotous conduct than generally obtains on alluvial fields.⁴⁹

Mackay was over-optimistic about the longevity of the Thames mine. He also later referred to miners disparagingly, as unemployment on the Thames goldfield rose and they became more demanding of the opening of Ohinemuri to mining, as 'troublesome specimens of humanity'.

Besides itinerant miners from the South Island and Australia, the gold rushes drew to Thames the urban unemployed of depressed Auckland town and struggling rural settlers, including many of the soldier-settlers placed on confiscated land.⁵⁰ The end result, according to Professor Stone, was a demographic legacy of a permanent, land-demanding European population:

Hauraki quartz miners, after the frenzied rush of 1867–68, became an occupational group more analagous to industrial workers or European-style coal miners, part of a relatively

47. *New Zealand Herald*, 1 February 1868 (doc 06, pp 108–109)

48. Document A12, p 59

49. James Mackay, 'Report by Mr Commissioner Mackay Relative to the Thames Gold Fields', 27 July 1869, AJHR, 1869, A-17, p 11

50. Document A12, p 57

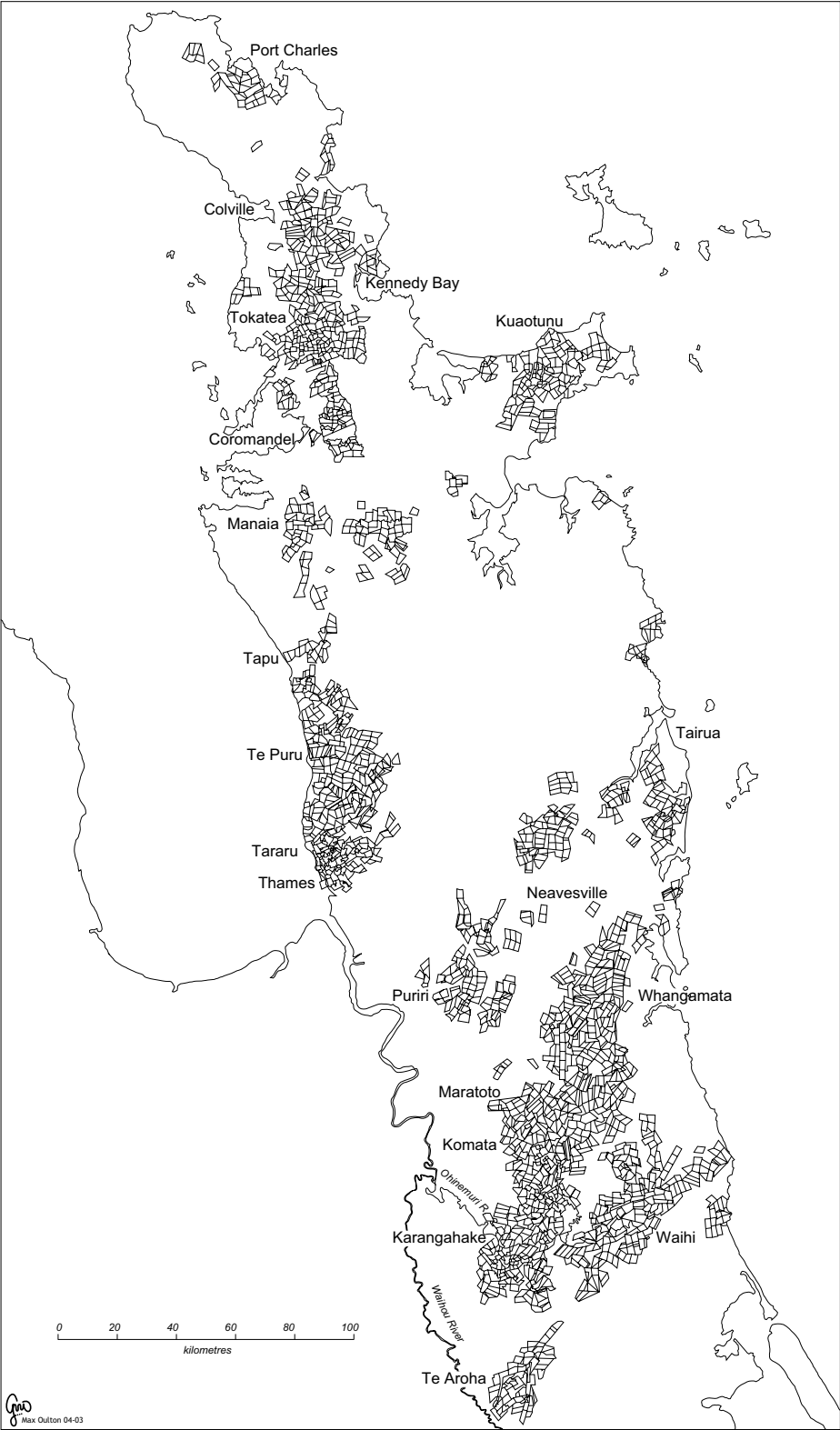


Figure 26: Coromandel Peninsula mining claims registered by 1897

static labour force, living in stable communities with an orthodox nuclear family structure of wives and children. Thames, Coromandel and Waihi miners were not content with short-term housing of tents, 'whares', or ramshackle huts, but turned to more permanent kinds of residence.

Having put down roots in the region, when returns fell off in nearby mines, say in the early 1870s, miners in settlements such as Grahamstown expected government either to put pressure on Maori to open up new mining areas in the Upper Thames Valley, or to make cheap homestead blocks available through purchase of Maori lands on the Hauraki plains . . . And the reality was that settlement of ex-miners could only be achieved by unsettlement of Maori presently in occupation; *they* would be dispossessed and displaced by such a process.

The emergence of a large, stable, vociferously radical 'poor white' community which Hauraki Maori found in their midst was not at all what they had expected. Nor was this Pakeha group much disposed to sacrifice its own economic well-being to Maori rights.⁵¹

Professor Oliver made a very similar point:

In the main the goldfields population was not a migratory collection of diggers but a relatively stable population of workers whose presence created a sizeable market and a source of supplementary employment for farmers. Settlement of this kind, especially as the industry fell away from its peak, required land for townships and farms and so brought about a demand for the outright transfer of ownership from Maori to Pakeha, either through the Crown or private purchase.⁵²

It would be hard to demonstrate direct causality between this demographic effect and the dispossession from Hauraki Maori and their land. But the on-going demands of the goldfields population can presumably be counted amongst the unintended consequences of the resource boom. Crown counsel assert that this is the appropriate framework for inquiry into the economic processes at work.⁵³

6.8 GOLD AND THE ECONOMY

The gold of Hauraki made a significant contribution to the economy of the Auckland region in particular. This has been challenged by counsel for the Crown, especially in the context of the long term and national economy, but the contribution could hardly have been insignificant.

51. Document A12, p 17

52. Document A11, p 4

53. Document P6, p 4

6.8.1 Production levels

Not much gold was produced from the Coromandel goldfields before the Waikato war. After the war the development of reef mines such as the Tokatea mine led to increased production levels but in 1868 the Tokatea mine was the only Coromandel mine operating.

The Thames goldfields yielded close to 300,000 ounces in the four years to the end of the January quarter of 1871. Some 330,000 ounces were obtained in 1871, the year of peak production and of the 'Caledonian' bonanza. Output dropped quite sharply after that year, but production at Thames lifted sharply during the boom in investment in mining caused by the introduction of the cyanide process and then fell away again in the 1890s.

Output from Ohinemuri grew steadily from the 1880s, and by the mid-1890s the Ohinemuri mines were producing over 100,000 ounces per annum. The Waihi mine grew particularly rapidly after the introduction of the cyanide process and was producing around 400,000 ounces per annum at the turn of the century, rising to 1.5 million ounces in 1905.

The output from the Waihi mine dwarfs the output from *all the other mines of Hauraki together*, in the proportion of 68 per cent to 32 per cent. Historically, however, the Thames boom of 1868–71 occurred at a more critical juncture, both for the Auckland economy and for Maori.

6.8.2 The impact of gold on the economy**(1) *The short-term impact of the Thames rush***

Before the Thames boom, Auckland town was in a depressed state. Imperial troops had been withdrawn and the capital had recently moved to Wellington. Commercial activity was low, unemployment high, and the population was in decline. The opening of the Thames goldfields brought the town out of this depression. In July 1867, the news that a goldfield would imminently be opened to mining raised expectations, and there was an upturn in business even before the fields were well established and gold production reached high levels. In January 1868, it was reported that 'We have had a long period of depression, of actual distress even, in Auckland, but the worst is over – trade is already becoming brisker, money more generally plentiful, and confidence is being quickly restored. And all this is the result of the Thames goldfield.'⁵⁴

By June 1868, the *New Zealand Herald* was able to report 'the satisfactory evidence afforded of the rapid progress in prosperity which the Thames Gold Fields is making'.⁵⁵ Shortland and Grahamstown grew rapidly through 1868, and in 1869 the amalgamated town of Thames was contended to be 'superior in size [and] in the excellence of its shops and stores to the capital city (Wellington) itself, and with a larger population, and not a mere collection

54. *New Zealand Herald*, 2 January 1868 (doc 06, p 107)

55. *Ibid*, 20 June 1868 (p 109)

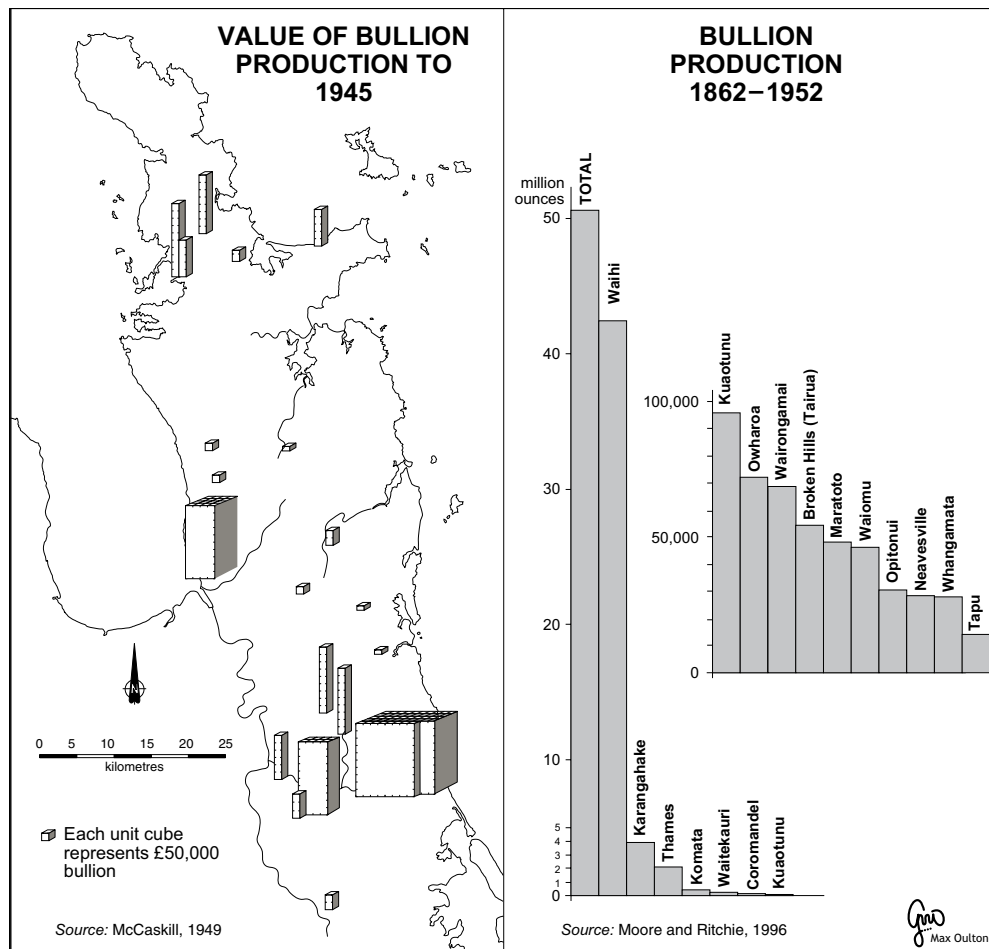


Figure 27: Bullion production from Coromandel Peninsula

of houses, but a busy, pushing, struggling mart of industry and commerce.⁵⁶ The population declined after 1869, but in 1871 Thames was the fifth most populous city in New Zealand.

The heightened activity in Auckland fell away temporarily when the Thames goldfields went into recession in 1870 but revived along with production levels on the goldfield in 1871:

Some hundreds of thousands of pounds worth of the precious metal have been extracted from the reefs at the Thames during the past six months, and that, too, at a cost for labour which has made the work a highly productive one. This amount of gold represents an exactly proportionate amount of specie imported into the colony and circulated amongst us, giving life and briskness to trade, and generally benefitting the revenue of the colony.⁵⁷

In 1871, gold accounted for some four-fifths of all exports from Auckland province.

56. Ibid, 5 July 1869 (p 111)

57. Ibid, 12 July 1871 (p 136)

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(2) *The long-term impact*

Crown counsel have asserted that ‘the claimant evidence overstates the significance of gold to the Auckland economy’.⁵⁸ Counsel is perhaps referring to evidence such as that of Professor Stone, who identifies as a feature of the Thames bonanza, ‘The size and revolutionary nature of the industrial development and its impact upon the environment which had previously sustained the traditional way of life of the tangata whenua.’⁵⁹ But Stone quotes independent sources on the wider influence of mining on heavy industry:

Salmon wrote: ‘The advent of heavy machinery gave Thames its special character at the peak of its prosperity’, reminding us that opportunities for company investment offered by quartz mining were not confined to the gold mines themselves. Cognate industrial activities such as foundries and engineering works – in Auckland and Thames – made an appearance. Also encouraged were coal mines providing for steam engines (for example, the Bay of Islands Coal Company), the timber trade (for example, the Hauraki Sawmill Company), and others – mines had a voracious appetite for pit props and ‘junk’ timber and heart stuff for their tramways.⁶⁰

Stone continues in respect of the development of the stock exchange:

The Auckland Stock Exchange has a direct lineal descent from Thames. Salmon in his history of goldmining, tells how the first trading in shares took place on ‘Scrip Corner’, the boardwalk intersection of Albert and Davy streets in Grahamstown . . . Just such an informal exchange grew up in Queen Street in Auckland (inspired by gold-mining companies, too) during the Thames rush. In time it absorbed its Thames counterpart.

The stock exchanges were simply part of a larger development. The Thames rush set Auckland firmly on the path of equity investment. Companies promoted to develop the goldfields spread the habit of investing in scrip throughout a surprisingly wide spectrum of the Auckland community. When the Thames field fell away, past winnings from gold were reinvested by local capitalists in a variety of companies – in timber companies above all.⁶¹

These are important economic outcomes, but what place did Maori have in them? In 1867, Auckland superintendant John Williamson promised that Maori as well as Pakeha would benefit from the development of goldfields: ‘If we unite together in this way we shall have treasures and riches, become a great people, and have everything that the heart can desire . . . This requires co-operation, mutual aid and assistance . . . Your children will be benefitted,

58. Document P6, p 3

59. Document A12, p 55

60. Salmon, p 195; doc A12, pp 58–59

61. Document A12, p 65

our children will be benefitted.⁶² It will be seen below that this promise remained largely unfulfilled for Hauraki Maori. The effects of goldfield development on Maori will be discussed in the following chapters.

6.9 MAORI AND THE MANAGEMENT OF GOLD STRIKES

The first significant discovery of gold at Coromandel occurred only three years after the great California rush of 1849 and a year after the onset of the Australian gold rushes. Thousands of men, including Australians and New Zealanders, flocked to these fields. There was much lawlessness, especially in California, where lynch-law and rioting were common and the authorities struggled for control. Ballarat in Victoria is remembered for the fight at Eureka stockade in 1854. By then, most of the readily accessible alluvial gold on the Victorian fields had been won; miners had to wrestle with quartz, and their average earnings fell dramatically. The difficulty of paying the 30-shilling monthly fee and the rough methods of the police in collecting it, led to the formation of the Ballarat Reform League under Peter Lalor, the declaration of the 'Republic of Victoria' and the hoisting of the blue and white flag at Eureka stockade. In the fight to take the stockade 22 miners and six soldiers were killed.⁶³

In the light of these events, the authorities in New Zealand were concerned about how to manage a major strike of gold, especially if it took place on Maori land. Their solutions and the effects of these on Maori are explored in chapters 7 to 12.

6.10 GOLD AND LEGISLATIVE DEVELOPMENTS

6.10.1 The legislative framework

In later chapters, we allude to various statutes developed in relation to the discoveries of gold at Coromandel and in the South Island and later applied to the various goldfields. The most relevant Acts were:

- ▶ The Gold Duty Act 1858, which levied a tax of two shillings sixpence on every ounce troy weight of gold exported from New Zealand.
- ▶ The Gold Fields Act 1858, which provided for the declaration of areas where mining could occur (the goldfields), regulated by claims, leases and licences the way land could

62. *Daily Southern Cross*, 5 June 1867, p 4 (John Hutton, 'Troublesome Specimens: A Study of the Relationship between the Crown and the Tangata Whenua of Hauraki, 1863–1869', MA thesis, University of Auckland, 1995, p 230); doc A8, p 139

63. Geoffrey Serle, *The Golden Age: A History of the Colony of Victoria, 1851–1861* (Melbourne: Melbourne University Press, 1963), pp 161–187; Russell Ward, *Australia, Sydney* (Sydney: Ure Smith, 1967), pp 55–60

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be occupied within a field; and provided for maintenance of law and order, and the use and occupancy of the land, through Warden's Courts.

- ▶ The Gold Fields Act Amendment Act 1860, which empowered the Governor to lease land in goldfields for agricultural purposes.
- ▶ The Gold Fields Act 1862, which was a consolidating measure and made little change to existing law.
- ▶ The Gold Fields Act Amendment Act 1863, which extended the definition of waste lands of the Crown to include 'any other Land whatever over which the Governor shall by lease agreement or otherwise have obtained power to authorise Gold Mining thereon'. This covered Maori customary land included within mining agreements such as those negotiated by Mackay.
- ▶ The Mining Companies Limited Liability Act 1865, which facilitated the incorporation of small mining companies, which could take out miner's rights. But each employee of a mining company working a claim also had to have a miner's right.
- ▶ The Gold Fields Act Amendment Act 1865, which facilitated the construction by miners of water races. Also, because it was believed that 'companies of capitalists' would not work a quartz field unless they could lease a significant area of land, the Act also provided that the Governor could lease for mining purposes an area 'four hundred yards by two hundred yards on a quartz reef' (720,000 square feet or 16.5 acres). This was the provision, carried into the 1866 Act, under which Superintendent Williamson issued his leasing regulations of October 1868 in relation to Thames (see sec 9.4.4).
- ▶ The Gold Fields Act 1866, which was a consolidating Act, repealing previous legislation and authorising the Governor to delegate most of his powers to the superintendent of a province.

6.10.2 Subsequent legislation to 1871

The law relating to mining continued to evolve. The changes involved very limited consultation with Maori, although from 1868 Maori members sat in Parliament under the Maori Representation Act 1867, and some notice was taken of petitions and protests, especially if they were supported in Parliament by sympathetic Pakeha members. We list the Acts passed between 1868 and 1871 and summarise some of their main features here:

- ▶ The Gold Fields Act Amendment Act 1868 was occasioned primarily by the problem Mackay encountered in Thames of having insufficient funds to pay Maori the miner's rights fees due to them (see sec 9.4.3). Section 4 of the Act empowered the Governor to order that payments be made out of the gold revenue of any province, notwithstanding that power to regulate the administration of gold revenue had been delegated to the provinces. But J C Richmond, then the Minister in Charge of the Native Department, took the opportunity to add other important provisions:

- Sections 5 and 6 debarred prospecting on Maori customary land without a prospector's licence, which in turn required the consent of the landowner.
 - Section 8 empowered the Governor to make regulations for mining on customary Maori lands within goldfields, superseding any relevant regulations which had been made under the 1866 Act, through the powers delegated to provinces. This was apparently a reflection of Mackay's concern about the leasing arrangements regarding Maori reserves within the goldfields then being promulgated by Superintendent Williamson (see sec 9.4.4).
 - Section 9 provided that the Governor could include within any goldfield land below the high-water mark; this was a reflection of the fact that mining activities were taking place on the Kauaeranga foreshore, and raises issues which we refer to in chapter 22.
- The Mining Companies Limited Liabilities Act Amendment Act 1869 extended the definition of 'person' in gold-mining legislation to include incorporated companies. This removed doubts as to whether a company could purchase and hold a miner's right. As drafted, the Bill included a clause which meant that only one miner's right was required per claim, no matter how many men worked the claim. That would have meant a significant reduction in Maori revenue. Hauraki Maori petitioned against the Bill, and their case was supported in the Legislative Council by Walter Mantell. The outcome was a new clause, which became section 24:

Nothing in this Act contained shall be construed to alter or affect any of the provisions of the several agreements entered into between the Governor or any other person acting on behalf of the Governor whereby gold mining has been authorized on any Native land or to prejudicially affect the rights and interests of the Native owners under any such agreements.

- The Auckland Gold Fields Proclamations Validation Act 1869 was passed at Mackay's urging, because of doubts about the technical validity of the agreements he had negotiated and the proclamations implementing them.
- The Gold Fields Amendment Act 1869 was enacted as a result of the debate on the Mining Companies Act Amendment Act 1869, which had revealed that miner's rights payments could be reduced by the amalgamation of adjoining claims. As mentioned above, the Government had also become aware of the protests by Mackay and by Hauraki Maori of the diminution of revenue due to the October 1868 regulations requiring only payment of lease rentals, not miner's right. The Gold Fields Amendment Act overcame the problem.
- The Shortland Beach Act 1869 provided that only the Crown could make any contract, lease, or conveyance with any customary Maori owners of the Thames foreshore. We discuss this issue in more detail below.

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- The Gold Mining Districts Act 1871 provided for the proclamation of gold-mining districts as opposed to goldfields. It was a consolidating Act, passed mainly for administrative convenience. As we mention in section 9.4.4, the Act introduced the concept of 'licensed holdings' in place of gold-mining leases, but retained the fee payable to Maori of £1 per annum per 15,000 square feet.⁶⁴

64. A detailed analysis of nineteenth-century mining legislation, from which this summary has been drawn, has been provided in the appendix to the Crown's opening submissions on gold and the Native Land Court: doc P6, pp 43–117.

CHAPTER 7

COROMANDEL : THE FIRST GOLDFIELD

7.1 INTRODUCTION

The discovery of gold near Coromandel Harbour in late 1852 brought into relief the tension between the Crown's sovereign rights and duties – including its governmental (kawana-tanga) responsibilities – and Maori rangatiratanga over their lands and resources. Claimants have asserted that the Crown's claims to ownership of gold by right of royal prerogative were in conflict with rights guaranteed to Maori under the Treaty of Waitangi. They also suggest that the Crown's policy towards gold – that the working of it should be brought under Crown management and made publicly available through the licence system – sat awkwardly with Maori property rights and tribal autonomy.

7.2 THE DISCOVERY OF GOLD AND FIRST REACTIONS

Early in 1852, two European residents of Waiheke Island told the Ngati Paoa chief, Te Ruinga, that they had found gold. Word of this was passed on through Te Ruinga's son and greeted with great enthusiasm by the Auckland press. Lieutenant-Governor Wynyard went to Waiheke to investigate the reports, and although unable to substantiate them, indicated that the Crown should have a role in managing the consequences of any discovery. He stressed to the alleged discoverers, and to Te Ruinga and other resident Maori, the advantages in making any find known and the certainty of trouble if it were concealed. Wynyard obtained from all concerned the promise that he would be informed of any future and more promising discoveries.

In January 1852, amidst the hype generated by the alleged find on Waiheke, a consortium of five leading Auckland citizens offered a reward of £100 for the discovery of gold in the vicinity. In September 1852, a mineralogical report was published stating that parts of the region displayed geological formations similar to those of the Australian goldfields. A goldfields reward committee of the New Ulster Provincial Council was formed soon after and on 11 October a reward of £500, raised by subscription, was offered for the discovery of a paying goldfield within 50 miles of Auckland.

Within a week, Charles and Frederick Ring came forward to claim the reward. (The Ring

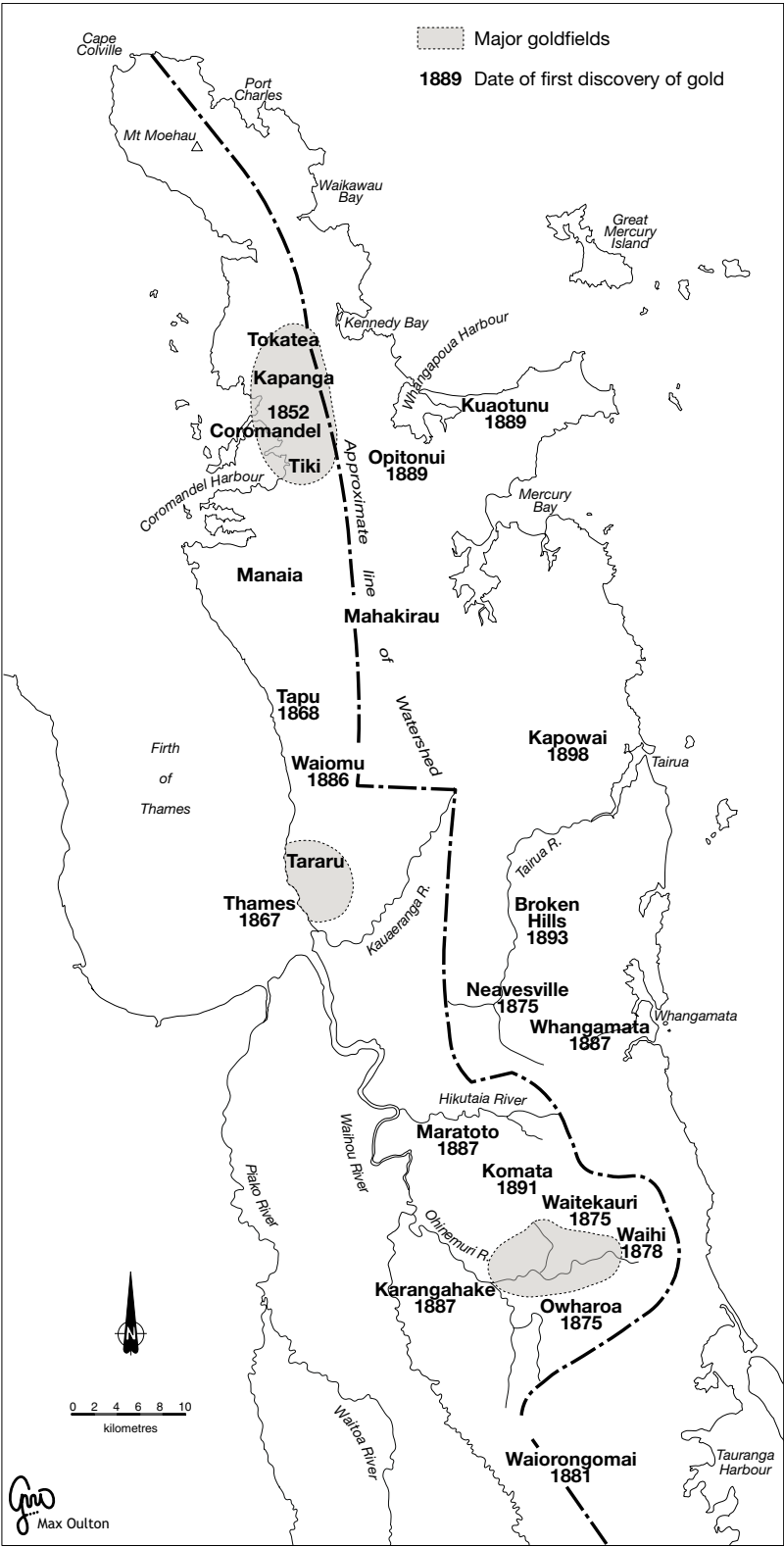


Figure 28: Gold discoveries in the Coromandel Peninsula

brothers had operated a timber mill at Coromandel in the 1840s, and, in 1848, had gone to try their luck on the Californian goldfields.) They announced that they had found gold in Driving Creek, the major tributary of the Whangarahi or Kapanga Stream that flows past the Kapanga settlement (now part of Coromandel township) and discharges into Coromandel Harbour. The site – which, as the crow flies, is closer to Kikowhakarere Bay than to Coromandel Harbour – lay in the territory of Te Matewaru hapu (an affiliate of Ngati Tamatera tribe) of with whom Paora Te Putu was the leading rangatira. Kapanga, downstream of the find, was Patukirikiri territory, and the search for gold soon spread in that direction.

Rumours of discoveries at Coromandel surfaced in the second week of October. Wynyard began to formulate an official policy concerning mining on Maori land. The essence of this was that Maori should be induced to entrust the management of any discovery of gold on their land to the Crown.

The trigger for official action possibly came on 18 October when the Commissioner of Police, Beckham, reported to Nugent, Native Secretary of New Ulster that the Ring brothers had found gold on Paora Te Putu's land.¹ Under instructions from Wynyard, Nugent set out for the Coromandel the same evening, bearing a letter from Wynyard for Paora Te Putu and Horeta Te Taniwha. A sub-committee of the Gold Reward Committee sailed with Nugent to investigate the find.

Wynyard later explained in his report to Governor Grey that:

I lost no time in sending to the spot the native secretary, armed with a communication direct from me to the native owner or chief of the soil, as in the event of the discovery leading to an available field, I instantly saw it is with the Natives of the Province (60,000 in number) the greatest prudence and circumspection will be required [*sic*]. As regards the white population (12,000 by last census) my course, I conceive as Lieutenant-Governor is simple enough, but with Natives it will be necessary to make them thoroughly understand any proceedings and convince them I have on the part of the Government, their interests, their rights, and their welfare at heart, in all I may arrange.²

Nugent proceeded to Paora's settlement at Kikowharere Bay, where he read out Wynyard's letter:

There is a report that gold has been found near Waiau [Coromandel Harbour] . . .

The white people will perhaps go down to search – but do not be alarmed, there is no harm in their searching – but they will not be allowed to carry much away with them until Regulations have been made by the Government.

1. Beckham to Colonial Secretary, 18 October 1852, G8/8, Archives NZ (doc 06, p 7)

2. Wynyard to Grey, 25 October 1852, dispatches from Governor Grey, encl 1 in no 1, BPP, 1854, cmmd 1779, p 166 (doc A8, p 78)

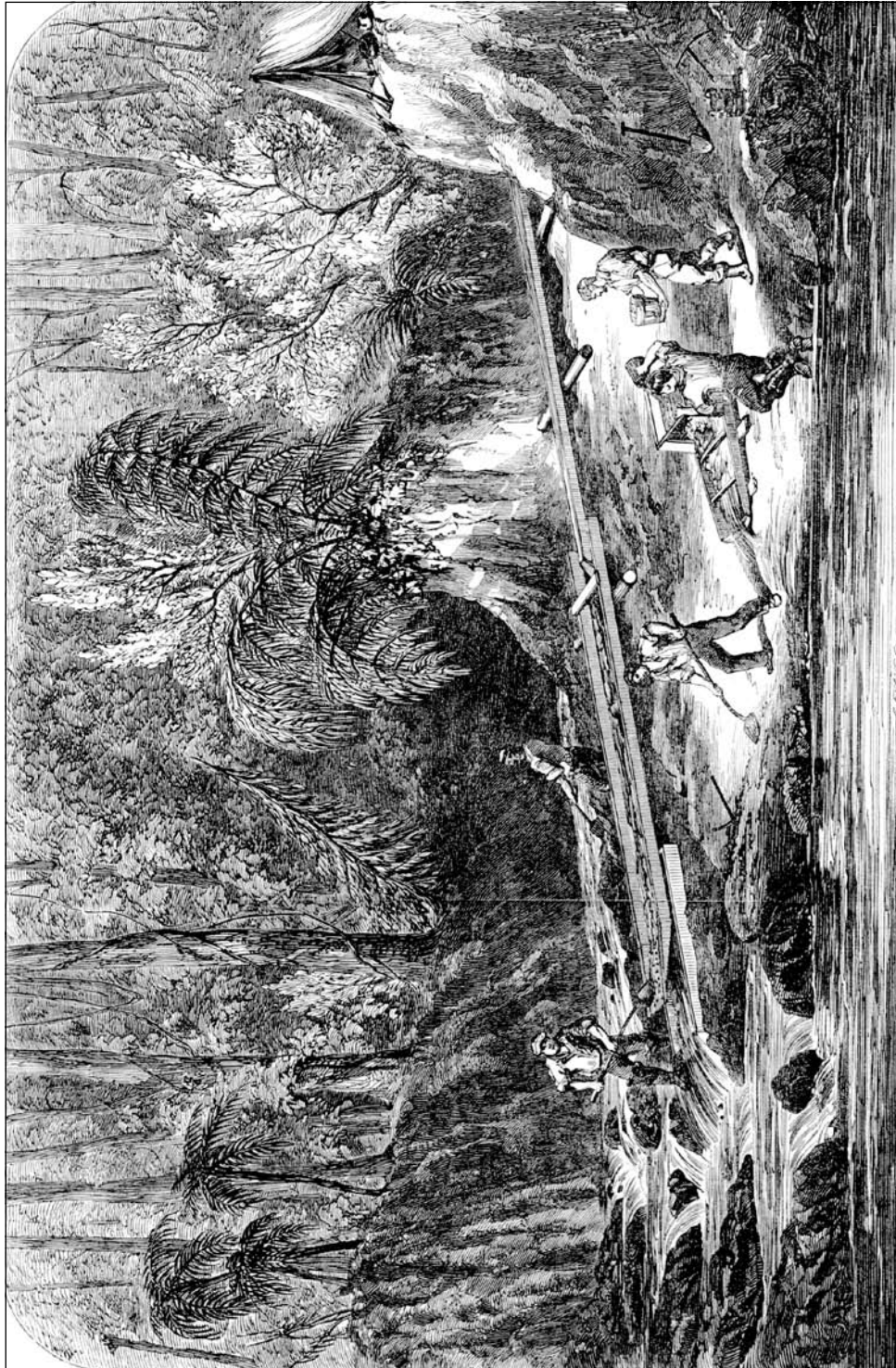


Figure 29: Discovery of gold near the source of the Kapanga Stream, about 40 miles from Auckland

As soon as it is known that gold has in truth been found on your land, I will come down, and we will hold a committee as to the best means of making the discovery available.

If no regulations are made, and the Natives are left to themselves, there will be nothing but confusion but if the Natives and the Government act together, all will be well.³

Nugent, acting on Wynyard's instructions, also told his audience:

that if gold was found in large quantities that people would flock from all parts and that disturbances would likely arise if proper measures were not taken to prevent them, and suggested to them that they should rely on the steps which the Government might think fit to take to keep order and regularity and pointed out the advantages they might be enabled to reap therefrom, not only by the money payment being made to them from the proceeds of the licence fees, as well as from the increased demands for their produce.⁴

Nugent reported afterwards that those Maori consulted were pleased at hearing from the Government but were alarmed at the thought of multitudes of Europeans flocking to their lands. They wished to consult with Taraia, Katikati, and other chiefs residing in the Thames district before giving any definite answer. Messages calling for a meeting to be held at Kikowhakarere the following week had been sent out.

In Auckland, Wynyard met with the Executive Council of New Ulster on 19 October to discuss how the Government should act in the event of a valuable goldfield being discovered on Maori land. The council agreed that:

the great object for the Government would be to endeavour to make the discovery available to both races . . . without disturbing the good feeling which at present exists between them and without impairing the confidence which the Natives possess in the good faith of the Government and at the same time without altogether abandoning the Prerogative right of the Crown to Gold in its natural place of deposit.

Three options were discussed by the council. The first was 'To assert and enforce the right of the Crown and to work the Gold Field – or to license others to do so, independently of and without reference to the Native Owners of the Soil'. It was dismissed because:

Although the Crown is entitled to all gold wherever found in its natural state the Council is unanimously of the opinion that it would be inexpedient to fully enforce Her Majesty's Prerogative Rights in the case of gold found on Native land because it would be impossible to satisfy the owners of the particular land in question – or the Natives of New Zealand generally, that such a proceeding on the part of the Government is consistent with the terms of the Treaty of Waitangi which guarantees to them the undisturbed possession of their lands,

3. Document A8, p 78

4. Nugent to Colonial Secretary, 23 October 1852, G8/8, Archives NZ (doc A8, p 78); doc O6, p 11

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estates &c, and because in the opinion of the Council, no proceeding could be taken by the Government which the Natives might deem to be an infringement of the spirit of the Treaty (however insignificant might be the tribe or party concerned) without exciting the suspicion of the whole Native People and without danger to the Peace of the Colony.

The second option was to 'abandon the Royal Prerogative leaving the Native Owners of the Soil either to work the Gold Fields themselves, or to make their own terms for allowing the public generally to work it'. This option was dismissed because the Maori owners might demand 'exorbitant' terms or refuse altogether to allow the public to work the fields, and the Government would miss out on a means of defraying the costs associated with the opening of the field.

After 'mature and careful consideration of the case', the council decided that the third option alone was viable. This option was to:

enter into an arrangement with the Natives by which they should be induced to entrust the management of the Gold Field to the Government on the condition that the Native Owners of the Land should be allowed to work themselves, and that they should receive also a fair proportion of the proceeds of the Licence Fees to be imposed by the Government.⁵

The deliberations of Wynyard and the Executive Council were summarised by Swainson:

It would no doubt therefore be held by English lawyers that the Crown, by virtue of her Majesty's sovereignty over the islands of New Zealand, was entitled to all gold in its natural place of deposit, though found on the lands of Her Majesty's native subjects. But it was at the same time equally certain that the practical assertion of that right would be viewed by the Natives of New Zealand as a violation of the terms of the Treaty. To obtain for all classes of her Majesty's subjects a participation in the advantages of discovery, having regard to the rights of the Crown – to the interests of the Native owners in the soil, and to the maintenance of friendly relations with them – was the problem which was now to be solved; and it was obvious that nothing but the united efforts of the Government, the colonists, and the natives, to carry out some well-considered system for the working of the gold-field, would prevent the discovery of gold in New Zealand from proving an unmitigated curse.⁶

It is striking that the Treaty of Waitangi was never mentioned in these deliberations except in the same breath as the practical impossibility of acting counter to what Maori would perceive as their rights under it, due to the danger to the peace. This supports the claimant witnesses' view that the course resolved upon by Wynyard and the Executive Council was a 'pragmatic solution', dictated by an awareness of Maori power rather than

5. Extract from the Minutes of the Executive Council, 24 November 1852, in despatch 121, G8/8, Archives NZ (doc A8(a), pp 54–59); doc O6, pp 9–10; doc A8, p 79

6. William Swainson, *Auckland, the Capital of New Zealand and the Country Adjacent* (London: Smith, Elder and Company, 1853), pp 93–94 (doc P6, p 7)

a genuine regard for Maori rights. The Executive Council's minutes also raise doubts as to whether it perceived the third option – in which the rights of both the Crown and Maori (as the Executive Council saw them) could be provided for – as the optimal approach, or merely as the only possible expedient.

A number of practical measures were considered by the council in the event that a viable goldfield was or had been discovered. Notably, the council recommended that the 30 shillings per month miner's licence fee and the goldfield regulations in force in the Australian colonies should be adopted if practicable. One-third of these licence fees would be payable to Maori registered as the owners of the land in which gold was found.

On 23 October, the Gold Reward Committee issued a public statement that the presence of gold at Kikowhakare and downstream had been confirmed, although a doubt remained about 'its being sufficiently abundant to be profitably worked'.⁷ Upon this announcement, 'numerous parties immediately proceeded to the scene of attraction'.⁸ Government surveyor Charles Heaphy was directed to oversee prospecting.

On 25 October, Wynyard reported to Governor Grey (who was in Wellington) on the proceedings to date, and stated his intention to go to Coromandel:

I shall immediately proceed to the spot myself, hold the promised meeting with the chiefs, and if I succeed in arranging satisfactorily with them so as to preserve the peace of the province, and find that an available field actually exists, issue the proclamation [of the goldfield], and permit the diggings to proceed under such laws and regulations as I shall in the meantime cause to be drawn up.⁹

Wynyard visited Coromandel.¹⁰ Finding that there little activity and feeling confident that the situation was under control, he took no further steps than to encourage Maori to resort to the Government if more gold were found:

Before leaving the Coromandel I visited the native settlement, and ascertained that no opposition whatever would be offered to the Europeans while searching the ravines; but as soon as Gold is found in any quantity they would then appeal to the Government; which I conceive is an agreeable assurance that nothing at present arising from the discovery is likely to disturb the good understanding that exists between the races.¹¹

7. Ibid, p 88 (p 11)

8. Ibid, p 90 (p 12)

9. Wynyard to Grey, 25 October 1852, enclosed in Grey to Pakington, BPP, 1854, cmmd1779, p 167 (doc A8(a), p 51); doc A8, p 78

10. Some historians have said that Wynyard was instructed by Grey to make this visit. Given that Grey was not present in Auckland, and had not received Wynyard's despatches of 25 October, it is more likely that Wynyard was acting autonomously.

11. Wynyard to Grey, 30 October 1852, G8/8, Archives NZ (doc A8, p 81). See also document O6, p 12, where the quotation is given slightly differently: 'searching about the Provinces' takes the place of 'searching the ravines', but makes little sense and is almost certainly a misreading.

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Wynyard reported to the Executive Council on 1 November that the time had not arrived 'for the Government to take any steps beyond those already taken', stating that the Maori owners would not hinder prospecting and would not appeal to the Government 'till the Gold be discovered in greater quantities'.¹²

However, the same day Paora Te Putu requested that Heaphy visit him at Papaaroha, the Te Mawaru settlement on the coast some miles north of Coromandel Harbour. Heaphy found Paora, Hoani Ngamu, and others assembled, and was told that messages had been received from Taraia the day before. After discussing the matter with Heaphy they called for a meeting to take place between themselves, including Taraia, Katikati, and other chiefs of the district, and the Lieutenant-Governor with Bishop Selwyn and Chief Justice Martin.¹³ Te Mawaru were willing that some prospecting operations should continue but objected to indiscriminate digging until discussions had taken place.

Thomas Lanfear, a CMS missionary at Kauaeranga, was also sent for that day, by Taraia and by Paora Te Putu separately. Lanfear visited Taraia at Te Puru on 2 November and found him and other chiefs fearful of the land being taken and determined to 'hold it with all in it and upon it'. They had agreed that Pakeha miners should be given notice to quit, and sent word to Paora Te Putu offering to join him in requiring them to do so if Paora wished.¹⁴ Lanfear then moved on to Papaaroha and found Paora annoyed at 'the clandestine search for Gold' on his people's lands and disappointed that Wynyard had not come to visit him. Paora was agreeable to working with the Government to keep trespassing prospectors off but intended to give them notice to desist until a meeting had been held.¹⁵ It is noteworthy that Taraia and Te Mawaru were concerned about losing control of the land rather than the gold.

Notices to quit were served on prospectors on 5 November: whether to all of them or only those who had not obtained permission we do not know. Lanfear asked 'Paora's people' if they would use force to drive off prospectors. The reply was in the negative, but they would look upon the encroachment as an act of the Governor and remember it at the forthcoming meeting.¹⁶ Later, Lanfear wrote to Governor Grey and stressed to Heaphy and Surveyor-General Ligar that it would be best if the prospectors were to desist. However, on 7 November, following a visit by an unidentified Government messenger, Paora consented to allow prospecting to continue for the moment.¹⁷

Meantime more gold deposits were discovered by Charles de Thierry and party south-east of the Coromandel Harbour, inland along the Waiau River. This party had obtained

12. Minutes of the Executive Council, 1 November 1852, EC1/1, Archives NZ (doc 06, p 12)

13. Heaphy, tabular journal, attached to Heaphy to Colonial Secretary, 3 November 1852, IA1 1852/2545, Archives NZ (doc 06, pp 13–15)

14. Lanfear, journal, 2 November 1852, MS micro coll 4, reel 54, CNO/57 (doc 06, p 14)

15. Ibid (p 15)

16. Ibid, 5 November 1852 (pp 16–17)

17. Ibid, 7 November 1852 (p 17)

permission to prospect from Ngati Whanaunga chiefs. De Thierry reported to Heaphy on 3 November that his party had commenced work on 27 October and found gold all the way up the river. Kitahi Te Taniwha (the son of Horeta Te Taniwha) was keen for De Thierry's party to keep working but 'determined to drive all Disturbers of the Peace from his Lands'. He intended to go to Auckland as soon as possible to visit the Lieutenant-Governor to make arrangements for the working of the gold.¹⁸

Ligar reported to Wynyard on 6 November that Heaphy was 'actively employed in superintending the diggings, and with the assistance of Mr Lanfear [a local missionary], inducing the natives of the district to meet with the Government to establish some regulations for the good Government of the gold diggings'.¹⁹ Such a meeting was urgently necessary. On 10 November, Wynyard instructed Ligar to make it known that he would be visiting the Coromandel within a week to meet with the Maori leaders.²⁰

The same day, he issued a proclamation to the effect that the Government intended to undertake the management of the goldfield and that once the necessary arrangements were in place, mining licences would be granted. Until such time, permission to explore for gold could be obtained from the Colonial Secretary's Office. A note attached to the file copy of this proclamation states that all applications to explore should specify the exact location and be accompanied by the written permission of the 'owner of the soil'.²¹

Up to this point, Wynyard had not received any specific instructions from Grey. However, in a letter dated 12 November (which probably did not reach Wynyard before the latter left for Coromandel) Grey took issue with the Executive Council's decision to pay one third of the licence fees to the Maori right-owners in the goldfield land. At the Australian rate of 30 shillings a month for a licence, wrote Grey, this would yield Maori a sum 'so large as to be useless to them and the money would be clearly foolishly squandered, and I think much envy and ill feeling would be excited upon the subject'.²² Grey preferred that if such large sums were payable they should be channelled into a fund for the benefit of all Maori:

I therefore have to direct you, *if you have already concluded such an arrangement*, to make every exertion in your power to purchase for a reasonable sum paid down in cash, the right thus secured to the particular Native claimants of the place where the gold is found, and upon the further condition that one third (1/3rd) of the licence fee shall be paid over to a fund for the purpose of constructing Hospitals and Schools, and for such like general purposes, in which the whole of the Native race have an interest. [Emphasis added.]²³

18. De Thierry to [Heaphy], 3 November 1852 (doc 06, p 16)

19. Ligar to Lieutenant-Governor, 6 November 1852, *New Munster Gazette*, 10 December 1852, p 182 (doc A8, p 81)

20. Wynyard, handwritten directions, 10 November 1852, IA1 1852/2545, Archives NZ (doc 06, p 18)

21. Proclamation, 10 November 1852, *New Ulster Gazette*, 10 November 1852, p 163; undated note in IA1 1852/2585, Archives NZ (doc A8, p 82)

22. Grey to Wynyard, 12 November 1852, IA1 1852/2743, Archives NZ (doc A8, pp 80–81)

23. Document A8, pp 80–81

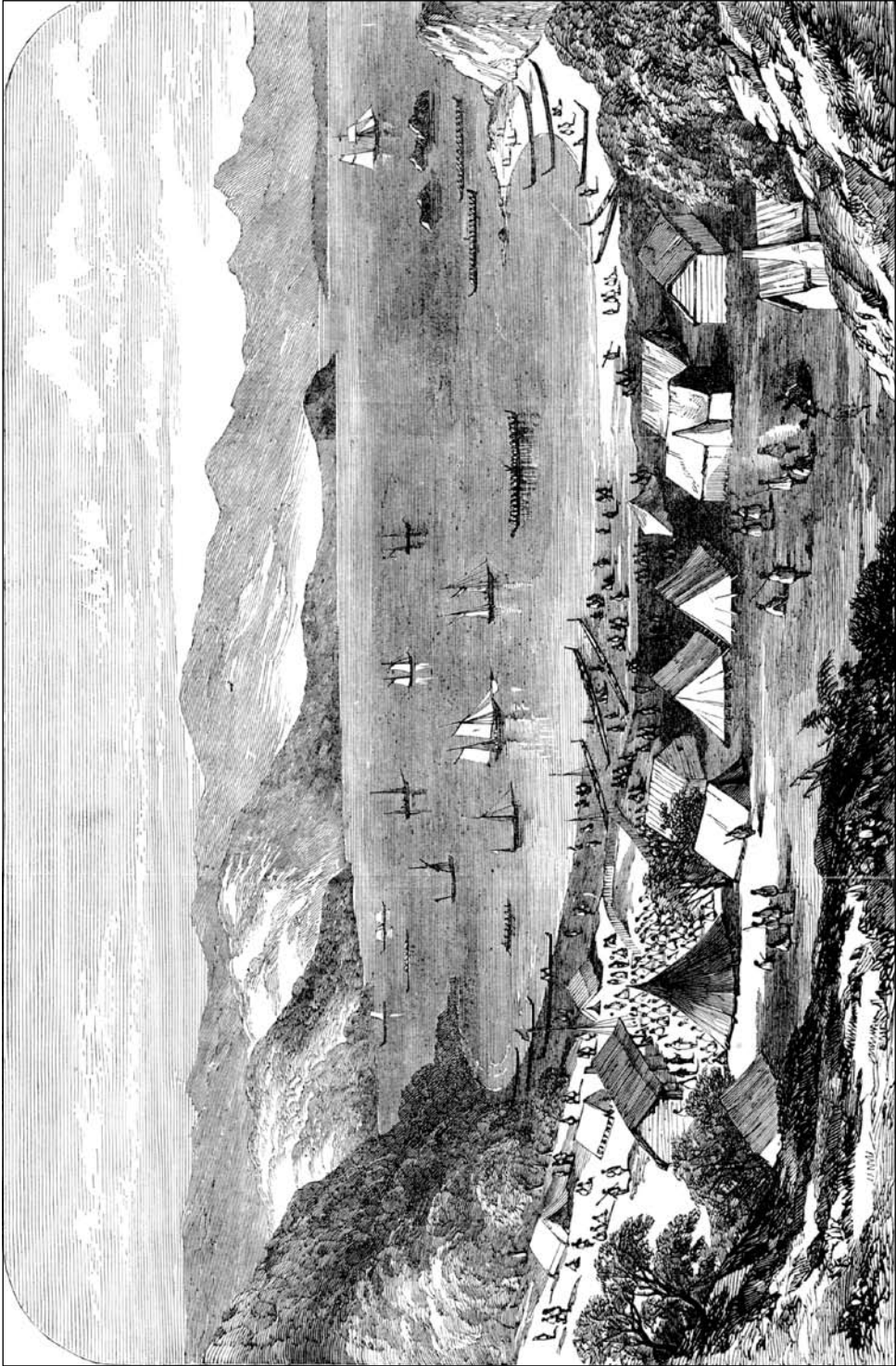


Figure 30: Conference of Lieutenant-Governor Wynyard and Maori chiefs in Coromandel Harbour

Several Crown and claimant witnesses have taken this directive as meaning that these payments were what Wynyard should offer Maori for the right to mine.²⁴ On face value though, they appear rather to be a directive as to how to buy out the right to receive one third of the licence fees from anyone to whom that right had been secured. As it happened, Grey's proposed scheme of payment was not instituted. Had it been, it would have conflicted with Lord John Russell's instructions to Hobson of December 1840 that expenditure on Maori health and education should be borne by the general revenue, and the acceptance by successive governors, including Grey, of this responsibility. It would have been inconsistent with this policy if those costs were now substantially to be charged against revenue from mining licences. As it turned out, the following year, 1853, a £7000 civil list vote under the Governor's – rather than the General Assembly's – control was provided for these and related purposes.

Meanwhile, the meeting to discuss how the goldfield should be managed was arranged to take place on the beach at Patapata, a small bay on the spit between Coromandel Harbour and Kikowhakarere Bay.

7.3 THE PATAPATA HUI

The Patapata hui was a great event for Hauraki Maori. Paul Monin describes the meeting as 'surely the grandest, most momentous event in the colonial history of Hauraki'.²⁵ He suggested that 'In a sense this was Hauraki's personalised agreement with the Crown'.²⁶ Wynyard saw the event as historic, and later wrote to Grey that the events were of 'vast importance not only to those immediately interested, but in all probability to the Province and the Colony at large'.²⁷

The meeting was attended at Maori request by Wynyard, Bishop Selwyn, and Chief Justice Martin, and by an estimated 1000 Maori. These included many Ngati Whanaunga, Ngati Paoa, Patukirikiri, Te Matewaru, and also representatives of Ngati Tamatera from elsewhere on the peninsula. Some of the chiefs present were: Hohepa Paraone and Te Horeta Te Taniwha and his son Kitahi, representing Ngati Whanaunga; Pita Taurua, representing Patukirikiri; Paora Te Putu, representing Te Matewaru; Wiremu Hoete, Patene Puhata, and Te Ruinga, representing Ngati Paoa; and Te Moananui and Taraia, representing wider Ngati Tamatera and Ngati Maru interests along the western Coromandel coast.²⁸

24. Document A8, pp 81, 85; doc 06, p 19

25. Paul Monin, *This Is My Place: Hauraki Contested, 1769–1875* (Wellington: Bridget Williams Books, 2001), p 141

26. Ibid, p 144

27. Wynyard to Grey, 25 November 1852, no 128, NU, Archives NZ (doc 06, p 28)

28. Document A8, pp 82–85

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The meeting commenced on 18 November, although Paora was still awaiting Taraia's arrival. The transcripts taken at the meeting and those published in the *New Zealander* differ slightly, but in general they agree with the precis recorded by Lanfear in his journal. Wynyard stated his purpose in coming:

I come to offer the protection of the Government to you the same as I would if the gold had been found in the land of the Europeans, to protect you from all and every annoyance, you might otherwise be exposed to from the strangers that may come here . . . and to preserve good right to your land and property, as subjects of the Queen.²⁹

Wynyard warned that miners would inevitably arrive but the 'Queen's authority was at hand to prepare such arrangements with [Maori] concurrence as [would] keep these strangers in order and check', and it was 'only with this object in view' that the meeting had been called.³⁰

The response was led by Ngati Paoa, Ngati Whanaunga and Ngati Maru chiefs. Horeta Te Taniwha of Ngati Whanaunga welcomed the Lieutenant-Governor. Hohepa Paraone of Ngati Maru expressed satisfaction with the recent diggings on the Waiau River, which he and Kitaha Te Taniwha had approved: 'it was not a going without authority as at Kikowhakarere'. He advocated the opening of Waiau as a trial run for Government management:

We shall only give up Waiau to be worked. We shall look to the good of that and then give up other places. The Europeans went to Manaia and broke this rule that we have agreed upon. I told them to go back . . . This is the thing we are averse to, the going of the Europeans without authority rather let them come and tell the owners of the land . . .

Here, Horeta Te Taniwha interjected, in favour of letting the gold be worked. Hohepa Paraone continued:

Let not the Europeans take the gold and we too [*Southern Cross* has 'the land too'] . . . if we knew how to work the gold, we should reserve it for ourselves. The Europeans understand the working of it. Let them work it, what we promise is that if the agreement of the Government is just, we will accede to it. If the arrangement is not just we will not grant it.³¹

Hauauru Te Otau agreed that the working of the gold should be left to the Europeans. He was reported in the *New Zealander* as stating:

With regard to the search after this thing, let us go back to our ancestors. But this thing we see its spirit only (alluding to the small grains of gold produced as specimens), who

29. Wynyard's address, enclosed in Wynyard to Grey, 25 November 1852, dispatch 128, G8/8, Archives NZ

30. Document A8, p 83

31. 'Speeches of Native Chiefs at a Meeting at Patu Patu in Coromandel Relative to an Agreement for Working Gold on their Lands Taken Literally 18, 19, 20, 22 November 1852', dispatch 128, encl c, G8/8, Archives NZ (doc A8, pp 81–82); *New Zealander*, 22 December 1852 (doc O6, pp 22–23)

would be trouble with it? Let them have it. Who knows how to break this kind of fern-root? (gold) I set no value upon it.³²

Or, alternatively, ‘Who would be bothered with this thing we can hardly see. Greenstone is our treasure. Who knows how to break this fernroot?’ Horeta Te Taniwha was reported to have supported this remark by touching his greenstone patu as Te Otau spoke. Te Otau also took up Wynyard’s offer of protection: ‘This is a ditch we are digging. The Governor is a fence about us to protect us.’³³ Wiremu Hoete of Ngati Paoa said:

The Governor will not see all the persons who go in search of gold. If gold be found in certain places, it should be taken to the Governor, so that he may make arrangements as regards its working . . . The Governor will be a place to reserve other places (where gold is not found).³⁴

After the formal speeches, Wynyard’s proposed agreement was examined. By the next day the payment system had been agreed upon, at least between Wynyard, Ngati Paoa and Ngati Whanaunga. After the boundaries of the land to be opened had been discussed, their representatives signed the agreement on 19 November. Selwyn and Martin left that evening on the understanding that the basis for agreements with other groups had been settled.

On 20 November, Pita Taurua and his mother Tauroa Te Tawaroa of Patukirikiri declared themselves in favour of the governor having the management of the gold at Kapanga so long as the land remained with them. In Tauroa Te Tawaroa’s words: ‘All I am agreeable to, is that the gold should be worked. The land will not be given up to you. The gold only will be given up. You have already heard that you are to have the gold – but the land is for myself.’³⁵ After initially asking for a higher payment, they and others of their group added their signatures to the agreement that had been signed by representatives of Ngati Whanaunga and Ngati Paoa.

By 22 November, Taraia of Ngati Tamatera had arrived and he and Te Matewaru hapu met to consider the arrangements that had been worked out in the previous days. Horeta Te Taniwha welcomed Taraia, saying that he, Te Taniwha, was taking farewell of the land: ‘The hills of Hauraki are about to be undermined.’³⁶ He did so ‘weepingly’, but ‘it was good’. Te Taniwha declared that the Europeans digging for gold were ‘the albatross seeking food only’. Taraia deferred to his judgement, but appealed to Te Taniwha to give only of his own, and spoke with concern about the alienation of the land. Ngati Tamatera did not oppose the opening of the fields agreed upon in the previous days, but did not like the mention of Cape Colville (Moehau) and Kauaeranga in the agreement:

32. *New Zealander*, 22 December 1852 (doc 06, p 22)

33. ‘Speeches of Native Chiefs at a Meeting at Patu Patu’ (doc 06, pp 22, 25)

34. Document A8, p 84

35. *Ibid*

36. ‘Speeches of Native Chiefs at a Meeting at Patu Patu’

Let your minds be clear with regard to Moehau and Kauaeranga, let those names be struck out. Chew up the gold of the land that has been given up; let the hands of the Europeans be there this is just. It is said the Governor will be a wall of defence. We are much pleased with this. Let that sentence be deemed sacred.³⁷

Paora Te Putu mistrusted Governor Grey on account of his military responses in 1846–47 and in 1851 when a Hauraki fleet demonstrated in Mechanics Bay, Auckland, over an affront to the Ngati Paoa chief Te Hoera.³⁸ He was concerned that if he signed the general agreement he might undermine his ability to withhold his land from miners, and was dissatisfied with the terms proposed by Wynyard. He proposed instead that the whole of the licence fees be handed over to him and that he reimburse the Government for its expenses. Despite these reservations, Paora promised to consider allowing nearby Te Matewaru land to be worked if the trial arrangements worked out well. Neither Paora Te Putu nor Taraia nor (according to Lanfear's minutes) anyone else signed the agreement on 22 November.

Wynyard reported to Grey after the meeting that he had acted 'in strict keeping . . . with the terms of the Treaty of Waitangi; and with strict faith towards the Natives as enjoying equal rights and privileges'.³⁹

A number of important themes were apparent in the speeches at Patapata:

- ▶ Gold itself was not seen as precious to Maori; speeches showed that it had never been valued traditionally. But Maori were fully aware that it was a 'great treasure' to Pakeha and that it had a high commercial value.
- ▶ Maori were ready to allow Europeans to work the gold because they were aware, from observing the operations of the Ring Brothers and others, that a high level of technical expertise as yet unknown to them was required to recover it.
- ▶ Maori took it for granted they owned the resources on and in their lands. Hohepa Paraone's saying that 'if we knew how to work the gold we should reserve it for ourselves' displays an assumption that Maori possessed rights not just over access but in the substance itself. In later years several chiefs did seek to reserve goldfields for working by Maori.
- ▶ At no stage was the legal ownership of gold discussed. Crown officials and independent observers made no mention of the Crown's claims to ownership by right of royal prerogative. The discussions proceeded without any challenge to the Maori assumption that their rights over the gold derived from their ownership of the land.
- ▶ Maori laid considerable stress on their desire to retain their rights in the land should they allow the Crown to exercise control over goldmining.

37. Document A8, p 84

38. Monin, pp 135–139

39. Wynyard to Grey, 25 November 1852, no 128, NU, Archives NZ (doc v1, p 189)

7.4 THE 1852 AGREEMENT**7.4.1 The terms of the agreement**

The agreement that issued from the Patapata hui was signed by about 36 members altogether of Ngati Paoa, Ngati Whanaunga, and Patukiriri. It was published in the *New Ulster Gazette* on 27 November 1852, as an 'Agreement of 1852, between the Government and the Native Tribes for the Management of Gold Fields on the Thames for the Term of Three Years'. The date of the agreement was given as 20 November.

The first clause of the 1852 agreement read: 'That one system be adopted for the regulation of all persons searching and digging for gold between Cape Colville and Kauairanga [*sic*].'⁴⁰ The area purportedly covered by the agreement was estimated to be about 600 square miles. However, a note on the agreement recorded that the arrangements for actual mining thus far involved the consent of the three named tribes to mining only on an area of about 16 square miles.

Two clauses were included that encapsulated the guarantees that had been discussed at Patapata:

8. The property of the Land to remain with the Native owners; and their villages and cultivations to be protected as much as possible.
9. If any of the Tribes of the Peninsula decline this proposal, their land shall not be intruded upon till they consent.

Under clause 2, the Government undertook to pay £600 per annum for up to 500 miners working in the area covered by the agreement, £900 per annum for up to 1000 miners, £1200 for up to 1500 miners and so on – the payment increasing by £300 for each 500 miners. Maori who consented to their lands being worked would receive the same proportion of these revenues as the area of their lands stood in proportion to the whole approximately 600 square mile area covered by the agreement.

It is important to be clear what the above terms implied for Maori who had agreed to open their lands. If there were fewer than 500 miners on the 16 square mile field, they would be entitled to a payment of £16 per annum, or, since there are 640 acres per square mile, three-eighths of a penny per acre per annum. This rate of remuneration was so ridiculously low that even the settler newspapers commented on its inadequacy.

Wynyard was conscious that the first 'sum agreed upon' would provide an insignificant return to right-owners, and so added a 'Further Guarantee' which in fact represented the main payment: from each licence a tax of two shillings (or £1 4s per annum) would create a fund for the purpose of 'rewarding the Native owners for their faith and confidence in the Government, as well as recompensing them for any damage, annoyance, or inconvenience

40. 'Agreement of 1852, between the Government and the Native Tribes for the Management of Gold Fields on the Thames for the Term of Three Years', *New Ulster Gazette*, 27 November 1852, vol 5, no 29, pp 170–171

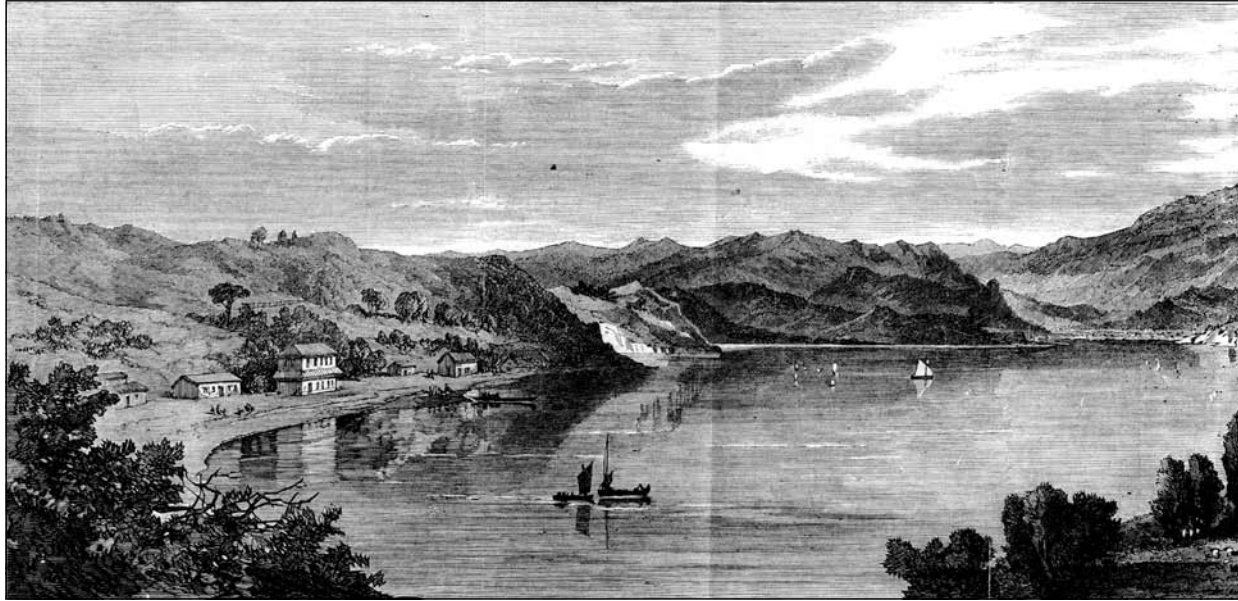


Figure 31: The harbour and gold district of Coromandel, 1864. Original watercolour by A Harris. This engraving published in the *Illustrated London News*, 14 January 1865, pp 32–33.

they may experience from Europeans [while digging on their lands]'. It was hoped that this additional payment would act as inducement to Maori who were as yet unwilling to open their lands to mining.⁴¹

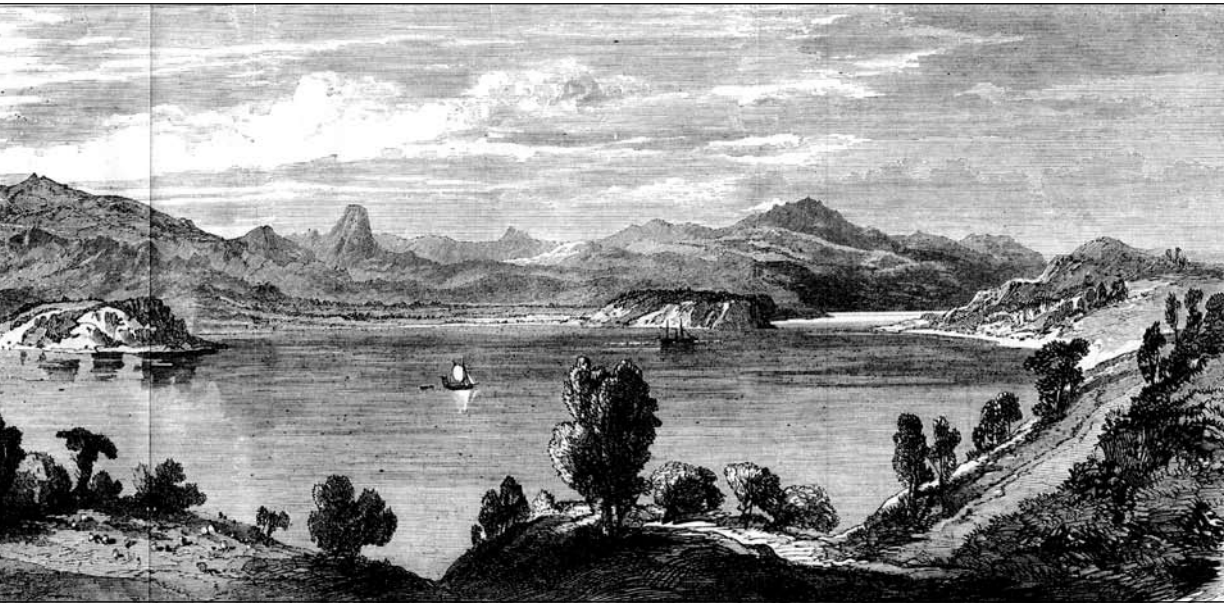
Wynyard's report to Grey of 25 November gives his reasons for the scale of payments offered by the Crown:

Seeing that a third of a Licence fee might be a fluctuating sum, difficult of explanation, and might moreover increase far beyond their powers to expend judiciously, while it would lessen the means at the disposal of the Government for carrying on the arrangements consequent on the assemblage of such multitudes as may speedily arrive from the sister colonies alone, I have guaranteed to secure to the Natives of the Peninsula on which the Gold Field exists, fixed sums, in consideration of their yielding to the right of *digging, searching and removing Gold* from the Lands in question and leaving the entire management of the same in the hands of the Government for the peace, safety and good order of both races. [Emphasis in original.]⁴²

Written beside this in the margin of the letter in a different ink are the words '£1 per square mile for three years on a slight ascending scale . . . with 2/- a head per month on each Licence issued by Government'.

41. Document A8, p 86

42. Wynyard to Grey, 25 November 1852, dispatch 127, G8/8, Archives NZ



Dr David Williams has suggested that Wynyard recast clause 2, subsequent to agreement being reached, in order to meet Grey's objections.⁴³ But Wynyard's account suggests that before the meeting he had already resiled from the one-third of 30 shillings per month proposal, independently of Grey's advice, although for similar reasons. There is no indication that this scale of payment was ever put to the Patapata meeting or formed part of clause 2. If it had been it is scarcely conceivable that Maori would have settled for anything less. Wynyard's report to the Executive Council and his report to Grey of 25 November both indicate that the original clause 2 contained the miserly payment per acre, and that the two shillings from each annual licence fee was added during the negotiation at Patapata, on the evening of 18 November because he was making little headway. Rangatira of Ngati Paoa, Ngati Whanaunga, and Patukirikiri then accepted Wynyard's revised agreement. However, Paora Te Putu of Te Matewaru hapu of Ngati Tamatera (principal right-owners of Tokatea), and other rangatira of the wider Ngati Tamatera grouping, still rejected the Government's offer as inadequate.⁴⁴

To implement the agreement, and in order to receive payment, 'native owners' were required to register themselves and to point out the boundaries of their land. No one was to be permitted to work without a licence, including resident landowners, but they were entitled to receive licences without making payment. Dr Anderson has located a register, drawn up at Patapata, of 'resident owners' entitled to 'free licences': 36 Patukirikiri, 19 Te Matewaru,

43. Document B3, p 38. Dr William's allegation is repeated in document B5, p 6.

44. 'Speeches of Native Chiefs at a Meeting at Patu Patu'

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and 12 Ngati Paoa.⁴⁵ Maori were to 'undertake to assist the Government' by reporting all persons who were found digging without a licence. Licences would be available immediately but payment of licence fees would be reckoned from 1 December, the first payment to the Maori right-owners to be made on 31 March 1853.

The regulations for the working of the field were published alongside the 1852 agreement in the *New Ulster Gazette* on 27 November 1852. Miners were to apply for and carry mining licences which would allow them to dig for alluvial gold only on pegged out claims. Regulations for the working of 'matrix gold' were to follow but were not in fact promulgated during the lifetime of the agreement.

The kinds of rights Maori retained in the ceded lands were left vague, save that their occupation, including settlements and 'cultivations', was to be undisturbed. Maori rights in ceded lands, other than retention of the underlying title and the right to revenue, are further discussed in succeeding chapters.

7.4.2 The extent of the goldfield

At Patapata, Te Taniwha gave to the Crown the management of the goldfield along the Waiau River (the Wynyard field). Also included in the first goldfield as proclaimed were lands on the flats near Coromandel Harbour, the lower reaches of the Kapanga Creek and Patukirikiri lands to its south-east. Ngati Paoa had interests in the land in between, with some overlap, and had consented to the opening of these.

In December 1852, Heaphy negotiated an extension of the field some four chains to the north. Paora Te Putu objected to the extension because it encroached on the interests of Hakapa, a member of Patukirikiri who had married into Te Matewaru, but after extensive discussion, Heaphy 'succeeded in establishing the sole right of Pita [Taurua] to the land, to the limit of the extended boundary'.⁴⁶

7.5 FURTHER GOLDFIELD NEGOTIATIONS

7.5.1 Negotiations with Te Matewaru

Over the next year, Heaphy, in particular, continued with his efforts to persuade Maori to consent to the opening of their lands to gold miners. He negotiated with Paora Te Putu and Te Matewaru and with Taraia of Ngati Tamatera, whom Paora continued to consult. To win their favour, Heaphy recommended that Te Matewaru be paid the equivalent amount to the two shilling per month licence tax for each digger who had illegitimately worked their lands

45. Document A8, p 85

46. Ibid, p 86

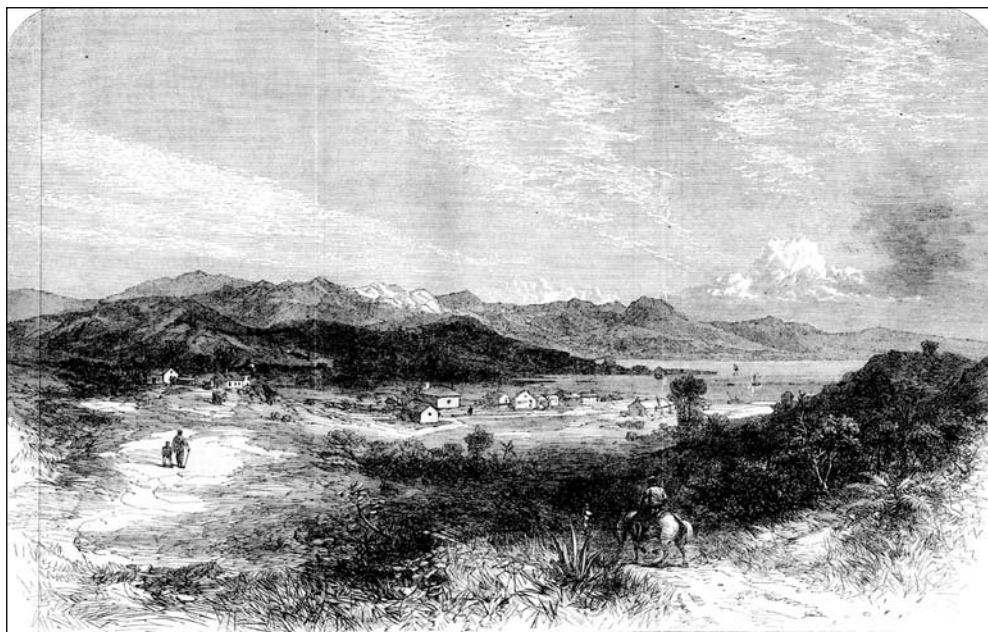


Figure 32: The Kapanga flat

prior to the Patapata agreement.⁴⁷ This was adopted and the moneys paid out at the same time as the scheduled March 1853 payment to the consenting owners under the Patapata agreement.

In April 1853, Heaphy came close to reaching an agreement with Paora Te Putu and Taraia on more favourable terms than those of the 1852 agreement: no £1 per square mile per annum, but four shillings per digger per month instead of two shillings, and a bonus proportionate to the value of the gold recovered. Agreement was close, but Hoani Ngamu renewed the demand made by Paora at Patapata for the whole of the licence fee to be paid over and the Crown reimbursed for its expenses, which led to the collapse of negotiations.⁴⁸ Unfortunately, Paora's proposal that Maori receive a bonus payment proportionate to the value of the gold recovered also collapsed.

7.5.2 Negotiations on the east coast

Negotiations took place in April 1853 with Maori from the eastern side of the peninsula, after continued prospecting revealed that in all probability the gold deposits extended over the dividing range from Coromandel. Importantly, in these discussions there was some attempt to deal with the issue of lease arrangements suitable for the mining of 'matrix' gold (gold occurring in quartz rock), foreshadowed in the Patapata agreement. Mr Walzl for the Wai

47. Heaphy to Colonial Secretary, 19 March 1853, IA1 1853/700 (Robyn Anderson, *Goldmining: Policy, Legislation and Administration*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1996), p 14)

48. Anderson, p 14

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110 (Ngati Hei) claimants explained that Heaphy was invited by Tararoa and other chiefs of Mercury Bay 'to discuss with me terms for the cession of the right to dig in their district'. He reported that there were a 'very great number of quartz veins' in the Kuaotunu area, and that Tararoa was willing to allow the Government to licence diggers on the following terms:

1st. That any person under the authority of the Government shall have liberty to prospect for a fortnight, and if in that time he shall not have found gold at a satisfactory nature (sic) he shall leave the district, without any payment being required.

That in the event of the prospector finding during the fortnight, or previously, satisfactory quantities of gold he shall be allowed to remain in the district, on the Government paying for him at the rate of five shillings per month.

2nd. That the payments shall be made when due, *and monthly*.

3rd. That in the event of gold, or other metals being found in the *matrix*, and to obtain which mining in, or blasting from the solid rock shall be necessary, other rates, hereafter to be agreed upon, shall be paid. This arrangement *not, however, to refer in any way* to gold which may be obtained with the Pan, Tom or Cradle

4th. That efficient protection be given to the Natives against the acts of diggers by Police etc. [Emphasis in original.]⁴⁹

Nothing came of this proposal, perhaps because the Coromandel field was already being regarded as a failure. The discussion is revealing, however, in that the difficulties and costs to miners of matrix mining had been recognised by Heaphy and Tararoa, and a different scale of payment envisaged from more accessible gold; but they had left the actual rate of fees for further negotiation.

7.5.3 The failure of the Coromandel goldfield

Wynyard had reported to the Executive Council that the 16 square mile area of the Coromandel goldfield would afford, 'sufficient space for the employment of, from 3,000 and 4,000 diggers.'⁵⁰ But this estimation was wildly over-optimistic; Heaphy reported that only 21 people were engaged in full-time mining between 22 November 1852 and 28 February 1853.⁵¹ The goldfields reward committee decided not to pay the reward that they had offered for the finding of a payable field.⁵²

49. Heaphy to Colonial Secretary, 7 May 1853 (doc N9, p 34); doc 06, pp 34–35

50. Minute for the Executive Council, undated, enclosed in dispatch to Grey, no 128, 25 November 1852, G8/8, Archives NZ (doc 06, p 29)

51. Heaphy to Wynyard, 7 March 1853, G8/9, Archives NZ (doc 06, p 33)

52. *New Zealander*, 5 February 1853 (doc 06, p 31)

In February 1853, Wynyard reported to Grey that the field was not sufficiently remunerative to enforce the licence fees.⁵³ The requirement that all miners hold current licences was virtually abandoned, contrary to the terms of the 1852 agreement, and payments were collected only sporadically, when miners wanted to register claims. By mid-1854, interest in the field had petered out.

Heaphy made payments to Maori rightholders of £9 5s in June 1853; £16 in September 1853; and £4 5s in March and June 1854. There is no record of any further payments being made, though arguably the base payment of £1 per square mile of land made available to mining under the agreement should have been paid for its whole three-year duration. At Heaphy's estimate, the goldfield had produced only 300 to 350 ounces of gold, worth between £1100 and £1500, and extracted at a cost of £2000 in labour.⁵⁴

The failure of the goldfield in 1852–54 can be ascribed to the paucity of the alluvial gold. Few miners would have possessed the expertise or means to search out and profit from quartz reef deposits. Heaphy's efforts to extend the field were also hampered by the unruly behaviour of miners who, he reported, 'would recognise no authority . . . but Digger's Law'.⁵⁵ For that matter, 'English law' did not recognise offences that were serious to Maori, such as cursing:

Heaphy, as Gold Commissioner, reported that Maori resident in the area were complaining of Pakeha conduct and had demanded that he bring the 'English law' to bear. Acting in his capacity as Justice of the Peace, Heaphy arrested a digger who had cursed Pita for threatening to stop up a path leading through plantations where his peach trees were suffering damage and fruit was being stolen.⁵⁶

Heaphy was subsequently prosecuted for false imprisonment and obliged to make an out-of-court settlement. The Government compensated him for the expense, but he was warned against repeating the action.

7.6 TREATY ISSUES ARISING

7.6.1 Was the Patapata agreement a 'Treaty', a 'template', or a 'benchmark'?

(1) Claimant and Crown submissions

A number of claimant submissions have argued that the 1852 agreement had such significance for Hauraki generally that all other mining agreements in the district must be

53. Wynyard to Grey, 4 February 1853, G8/9, Archives NZ (doc 06, p 32)

54. Document v1, p 167. *The Thames Miner's Guide: With Maps* (Auckland: Edward Wayte, 1868, p 61) estimated that £11,000 of gold had been extracted. But since miners deserted the field so readily, it is unlikely that working the field was as profitable as that estimate implies.

55. Document A8, p 86

56. Ibid



Figure 33: A digger's hut

measured against it. Some claimant witnesses have asserted that it amounted to a ‘Treaty’. Dr Anderson, for the Wai 100 claimants, stated that the Patapata meeting ‘was possibly considered of greater significance by Hauraki iwi than the ceremonies around the Treaty of Waitangi’.⁵⁷ Dr Anderson has also suggested that the agreement set a ‘benchmark’ from which the Crown resiled in subsequent mining agreements. Counsel for Wai 100 goes further, submitting that it was a Treaty for all Hauraki Maori, and a ‘blueprint’ or ‘template’ for subsequent agreements:

The claimants have argued that the agreement reached at Patapata in 1852 between Hauraki Maori and the Crown giving access to the original Coromandel gold field, provided not only a form of blueprint for later agreements but indeed had the appearance of a Treaty between the Crown and Hauraki. It should have been given effect to as such rather than simply restricted on its terms to one geographic location.

It is the latter interpretation which is urged on the Tribunal by the Crown in the Amended Crown Response, emphasising that the 1852 agreement was expressed to be for a 3 year period ‘*after which the agreement either had to be re-negotiated, or, if mining had ceased, it lapsed.*’ As the 1852 gold rush concluded quickly, the agreement lapsed.

Having emphasised the contractual nature of the agreement, the Crown nonetheless concedes in relation to the subsequent opening of the Coromandel in 1861–1862 that it ‘*was not relevant . . . except to the extent that it shows the context in which the parties were operating.*’

It is submitted that it is this context that is all-important. As argued in opening, the 1852 agreement was far more than simply a fixed-term contract, but amounted to a Treaty between the Hauraki signatories and the Crown, of perhaps far more importance to Hauraki than the signing of the Treaty of Waitangi itself. The fact that there was estimated to have been over 1,000 Hauraki [Maori] present at Patapata, together with the Lieutenant Governor and Chief Justice, bears witness to this . . .⁵⁸

Counsel submitted that there were a number of defects in the 1852 agreement, but that it was at least an agreement, not a regime arbitrarily imposed by the Crown:

following the start of the second gold rush in Hauraki, agreements were either increasingly imposed, or arbitrarily altered, not reached through negotiation and in the end the use of the term ‘*agreement*’ was simply dropped. It is submitted that it is in this latter context that the greatest significance of the 1852 agreement should have been seen by the Crown, that it should have provided the template for further gold fields agreements, based on the undertakings given by the Crown officials involved to protect the interests of Hauraki, to ensure that the ownership of their lands in particular were preserved, that mining would not take place without Hauraki consent and that Hauraki would receive fair payment for access to

57. Document A8, p 82

58. Document Y1, pp 30–31

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their lands. As Dr Anderson notes however, within a short space of time the lands subject to the agreement were being actively pursued for purchase by the Crown. Thus, the fact that the principles of the 1852 agreement were increasingly disregarded notwithstanding the significance to Hauraki of the 1852 agreement, is, it is submitted, a significant breach of the Treaty . . . ⁵⁹

Historians for the Marutuahu claimants reiterated that the 1852 agreement was regarded by Marutuahu as a treaty between Marutuahu and the Crown as important, in many ways, as the Treaty of Waitangi. They gave additional reasons for attributing a very high level of significance to the agreement:

- ▶ The agreement was in front of everyone and therefore could be seen as sanctioned by the whole Marutuahu community;
- ▶ The agreement was between rangatira and the Crown, again with everyone present;
- ▶ It was a Marutuahu agreement involving all Marutuahu rangatira and not just the land holders at Coromandel
- ▶ It was a general agreement; some rangatira were able to include their lands in the agreement and others were able to keep them out;
- ▶ The agreement promised mutual benefits to both Maori and the Crown without the need for title to land to be transferred.⁶⁰

Crown counsel has rejected key elements of these submissions:

The Crown does not dispute that for some Hauraki Maori the 1852 Patapata agreement was of importance. However, its significance has been overstated by the claimants. The Crown also rejects the suggestion that this agreement represents a benchmark from which the Crown had progressively retreated.

Some of the fundamental principles reflected in the 1852 agreement – and in particular, the principle that goldmining could only occur on Maori land with the Maori landowners' consent, has remained a constant feature of New Zealand law ever since. So too the principle of rental payments pegged to the number of miners on the goldfields . . .

Equally, it is unreal to conceive that the precise terms of 1852 agreement could and would have applied throughout Hauraki for the duration of the 19th century. Changes were inevitable and this was reflected in the limited duration the document itself provided for. The agreement itself contemplated further agreements.

Counsel for Wai 100 saw the last paragraph of the above as misconstruing their submissions:

59. Document v1, pp 32–33; doc A8, pp 87–88

60. Document v1, p 192. The witnesses stated that this last bullet point 'was a major concession on the part of the Crown . . . Until that time, lands that Maori were able to develop commercially were always expected to be lands where native title had been extinguished': doc v1, p 193.

The Crown misconstrues the claimants' arguments regarding the 1852 agreement in suggesting that the claimants said '*the precise terms of the 1852 agreement could and would have applied throughout Hauraki for the duration of the 19th century.*' Instead the claimants had asserted that the 1852 agreement provided a context or overall understanding for the agreements that followed. [Emphasis in original.]⁶¹

(2) Tribunal comment

First, we take it that counsel for Wai 100 does not intend the words 'blueprint' and 'template' to be taken literally. It appears that both claimants and Crown accept the inevitability of some change, agree that there would be some variation on the Patapata terms in subsequent agreements, according to circumstances.

Claimants have emphasised, above all, the prestige and authority of the European and Maori leaders and the numbers who attended the Patapata meeting. This, they say, shows the importance of the agreement to Maori and the high regard in which its principles should have been held by the Crown.

We agree. There is no question that a set of principles for the exploitation of gold on Maori land, arrived at through due deliberation of the Governor and Executive Council, negotiated with a very large assembly of Hauraki Maori and publicly promulgated by senior officials, involved the Crown in most serious commitments, from which it could not (having regard to the principle of good faith inherent in the Treaty of Waitangi) lightly depart.

But was the 1852 agreement a 'treaty' in its own right? We accept that the 1852 agreement was more than a lease agreement by which the newly discovered Coromandel goldfield could be opened to miners. The peaceful opening and management of that field was the *chief and proximate* goal of the Crown. Yet, by its first clause, the 1852 agreement proposed that one 'system' be adopted for the regulation of mining on any Maori land on the Coromandel Peninsula. Although the Coromandel goldfield turned out in fact to be the only field opened under the agreement, the Crown was clearly seeking to provide for the eventuality – indeed the expectation – of further goldfields being shortly discovered. The public espousal by Wynyard of the Patapata 'system' strongly implies the Crown's commitment to its basic principles.

Moreover, Wynyard's opening address to the Patapata meeting was a proclamation at large. Given that the scope of the agreement was intended to be the whole Coromandel Peninsula, his offers of protection from trespass or interference by miners and of preservation of 'good right to your land as subjects of the Queen' must be read as offers to all the iwi and hapu of the peninsula. The prospect held out – of economic benefit under Crown management of the field while Maori retained the underlying freehold – should be read likewise,

61. Document AA1, p 14; doc AA14, p 16

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as a promise made to all. On such a momentous occasion and before so many witnesses, these were indeed solemn, public undertakings.

Wynyard also established by his proceedings that Maori had the right of control over access to their land. That the Crown came to negotiate publicly for access and signed an agreement, even if only with some groups, signalled to all the Crown's commitment to operating on that understanding.

At Patapata, the chiefs manifested a desire to encourage the discovery and exploitation of gold on their land, despite the prospect of an immediate rush at Coromandel. For them, like the Crown, this was not just a question of dealing with a particular emergency but of trialling a scheme of management which might be applied throughout the Coromandel Peninsula. An awareness of such wider significance was reflected in the speech of one of the Patukirikiri chiefs: 'This is an honourable work which we are engaged in, laying down good rules for their land – which will extend to all places of this country.'⁶²

Dr Williams, for the Wai 100 claimants, described the Patapata meeting as a Treaty partnership consultation. Marutuahu witnesses have expressed the view that the agreement illustrated a pragmatic partnership between the Crown and Marutuahu. We concur with both views.

We cannot, however, ignore the fact that some groups declined to sign the agreement. Representatives of non-signatory iwi, such as Ngati Tamatera, did endorse the opening of land by the signatories, but this cannot be conclusively construed as anything other than recognising those groups' right to speak for their own land. Moreover, Hoani Ngamu of Te Mawaru did ask that the names Moehau and Kauaeranga should be struck out, indicating that the agreement should (at this stage at least) apply only within sharp geographical limits.

Neither can we ignore the evidence that Maori reserved their position. Ngati Whanaunga decided to open the Waiau Creek area on the basis that 'we shall look to the good of that and then give up other places – If we are not satisfied with the working of Waiau we shall not give up other places.'⁶³ Te Mawaru spokesmen also declared that, if the arrangement with Taniwha Te Horeta to open Waiau gave satisfaction, then they would give up their lands to be worked. While the basic principles were accepted by most, if not all, at the Patapata negotiations, judgement on the practical working arrangements was reserved.

Despite its potentially wider applications discussed above, the 1852 agreement was basically a three-year leasing deal, not a treaty defined as an enduring agreement. Much of what passed at Patapata was concerned with the specific question of the opening of particular pieces of land to mining under a proposed scheme of management for a precise consideration. While the 1852 agreement presented a scheme of management for mining on Maori land, it was not drafted as a protocol for the actual terms of mining. The concept of 'treaty',

62. William Tokhou, 20 November 1852, 'Speeches of Native Chiefs at a Meeting at Patu Patu'

63. Hohepa Paraone, 22 November 1852, 'Speeches of Native Chiefs at a Meeting at Patu Patu'

as used in the claimants' argument, implies a certain rigidity as to terms and conditions that the agreement did not possess.

For all of these reasons we believe it inappropriate to accord the Patapata agreement the status of a 'treaty', or that it should be seen as a 'template' for future mining arrangements. The agreement was occasioned by the need to meet an immediate and novel situation in New Zealand. It was experimental. In view of the uncertainties about the future of mining and the positions taken in 1852, the agreement was limited to three years, and its terms left sketchy.

The Patapata agreement was negotiated in expectation of a rush of individual miners seeking accessible, alluvial gold. It scarcely touched on the issue of appropriate fees for mining deep seams in hard rock. By April 1853, Heaphy had broached this question with Tararoa at Mercury Bay, but agreement on an appropriate scale of payment had been deferred for further consideration. The beginnings of a code for gold mining on Maori land had been established, but should mining greatly expand this would have to evolve to meet changing circumstances and new participants.

Finally, Crown counsel are on strong ground when they point out that even in changing circumstances as gold mining evolved, the Crown *did* adhere to two of the fundamental principles established at Patapata, namely that gold mining on Maori land could only occur with the Maori landowners' consent, and that rental payments would in some way be pegged to the number of miners on the field.

7.6.2 Did the 1852 agreement preclude the Crown purchase of goldfield land?

(1) Claimant and Crown submissions

The 1852 agreement was negotiated on the basis that Maori clearly wished to retain possession of their land, while allowing the Crown to licence access for gold-mining upon certain conditions. But what would be the situation if Maori no longer owned the land?

In saying that the 1852 agreement provides a benchmark, Dr Anderson seems primarily to be saying that it provides a measure by which a later observer or analyst can assess how far the Crown has moved away or adhered to the standards set at Patapata. She maintains that changes occurred:

It is a basic contention of my [overview] report that the Crown's attitude to the question of the ownership of gold and other important sub-surface resources underwent considerable change in the course of the nineteenth century; that unequivocal assertions of the dominance of the Royal Prerogative over the rights of Maori were not made until the last quarter of the century, when the dominance of common law was more firmly established and the Legislature had begun constructing an elaborate code of mining law strengthening rights of access. The Crown's response to the discovery of gold in native land in 1852 when

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the balance of power was more favourable to Maori than in later years, thus provides an important standard by which to assess the later development of mineral policy.⁶⁴

She has further stated:

the 1852 agreement was signed when Maori were at their most powerful, and represents a practical acknowledgment of their rights. Officials knew they could not take gold out of the land without Maori consent, without danger of provoking armed opposition of all right-holders in the peninsula.⁶⁵

These comments suggest that Dr Anderson sees the Crown in 1852 as responding to the exigencies of the situation in 1852 but not necessarily negotiating in bad faith. Marutuahu witnesses, however, construe the Crown's pragmatism as something more sinister, not only as regards subsequent mining agreements with Maori but also impugning the Crown's good faith in 1852:

We have used the term 'pragmatic partnership' to describe the agreement, because despite the terms of the agreement and the process that was invoked to reach the agreement, the Crown's concessions at Patapata were based on its comparative powerlessness in 1852. There was never any long term intention of protecting Maori determination to retain ownership of gold fields. The numeric superiority of Maori in the North Island and the need to keep the peace with Marutuahu created the negotiating parameters for the Crown. Almost as soon as the immediate threat of a rush of miners had passed the Crown began seeking to extinguish Marutuahu rights to the land. The all inclusive discussions of 1852 would soon be abandoned as the Crown sought to identify and buy out individual right holders piecemeal, and often against tribal opposition.⁶⁶

They consider that the Crown, while proceeding consensually and with an appearance of good faith at Patapata, was making false promises, and not acting in the spirit of Treaty of Waitangi partnership. Counsel for Wai 100 too, in their closing submissions on the 1852 agreement quoted above, have cited the Crown's active pursuit of the freehold of goldfield land at Coromandel as an example of its disregarding of the principles of the 1852 agreement.

Counsel for the Crown did not so much reject claimant criticism of Crown purchasing activity as deny that such criticism could be based on the 1852 agreement:

The Wai 100 claimants are also critical of the fact that 'within a short space of time the land subject to the agreement were being actively pursued for purchase by the Crown'. Again, the Crown responds by submitting that such criticism is misplaced. The 1852 agreement did

64. Document B2, p 6

65. Ibid, p 12; doc Y1, p 32

66. Document V1, p 193

not preclude the Crown from acquiring the freehold, that the Crown should have been interested in doing so, is not in itself evidence of a Treaty breach.⁶⁷

In turn, counsel for Marutuahu, whilst not denying that Crown purchase was not precluded, saw the Crown's submission as an inadequate response:

The Crown states that the important issue with regard to Hauraki gold bearing land was retention of land ownership rather than the ownership of gold. However, it subsequently rejects claimant criticisms regarding the Crown's pursuit of the freehold of goldfield lands. The contradiction is apparent.

The Crown notes that the 1852 agreement did not preclude the Crown from acquiring the freehold, and that the Crown's interest in doing so is not evidence of a Treaty breach. However, the Crown did more than express an interest in acquiring the gold field lands, it actively pursued and purchased those lands. Its gold field land purchases contributed to the overall diminution of Marutuahu's land base and the largely landless state of the Marutuahu tribes by the early twentieth century. If the important issue was the retention of land ownership, as the Crown closing submissions indicate, then the Crown's contribution to Maori loss of land is highly significant and should not be downplayed in this manner.⁶⁸

(2) Tribunal comment

We have said above that the 1852 agreement was not a 'treaty' in the sense that some of the claimants have argued but, nevertheless, the Crown was bound in good faith to honour the principles agreed so publicly at Patapata. Given that Maori had shown such concern at Patapata that they should not lose the land because of the gold in it we believe that the Crown was indeed obliged to have great regard to their wishes.

We agree with Crown counsel that the 1852 agreement, and the Crown officials' public assurances to Maori that underlay it, did not absolutely preclude the Crown's acquiring the freehold of Maori goldfield land. What was vouchsafed to the Maori right-owners at Patapata was simply that their property in the land, which included the right of alienation of the underlying freehold, was to be unaffected by the agreement.

At the same time, the submission of counsel for Marutuahu is, in our opinion, a strong submission. We cannot but view with concern the contrast between the Crown's offer to protect Maori from the threat miners posed to their continued possession, control and enjoyment of the land and its vigorous pursuit of the freehold of goldfield lands within a few years of the agreement. (Wynyard had said: 'I come to offer the protection of the Government to you . . . and to preserve good right to your lands and property as subjects of

67. Document AA1, p 16; doc v1, p 32

68. Document AA13, pp 47–48; doc AA1, pp 15–16; see also doc v1, pp 210–214

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the Queen.’⁶⁹) The contemporary evidence suggests that Wynyard and his colleagues on the Executive Council were responding to the situation as they saw it, and sought to construct a framework for gold-mining that was equitable to all concerned. The Crown’s later emphasis on purchases was a subsequent bringing to Hauraki of the Crown’s long-standing preference, already well established in the South Island and the southern North Island, of trying to buy the freehold of Maori land likely to be sought after for settlement and development.

Given the sensitivities of the region and of the times we believe the Crown should not have pressed so determinedly for purchases in the Coromandel district. Even so, the transactions of the late 1850s and 1860s were separate transactions from the agreement at Patapata, and as we shall see in the next two chapters, mining cessions rather than purchases remained the dominant Crown practice in Hauraki throughout the 1860s.

7.6.3 The failure to discuss the ownership of gold**(1) Claimant and Crown submissions**

The claimants are critical of the fact that the question of who owned the gold – whether the Crown or the Maori owners of gold-bearing land – was not explicitly discussed at Patapata, and in particular that the royal prerogative was not mentioned. The claim made is that the Crown was insufficiently ‘open’ in its dealings. As submitted on behalf of the Wai 100 claimants:

despite the negotiations, the Crown had clearly done its utmost to ensure that the issue of ownership remained off the agenda. In relation to this issue, it is not sufficient for the Crown simply assert as it does in the Amended Crown Response that ‘*Maori sought no recognition of ownership of gold*’, because clearly Hauraki understood that they already owned the resource, an assumption understood explicitly by the Crown as the New Ulster Executive Council minutes showed. On the contrary, it is submitted that it was a breach of the Crown’s obligation of utmost good faith to negotiate an obligation with Maori without either raising or explaining the Crown’s own pretensions to ownership, particularly in circumstances where the Crown was merely biding its time before enforcing the prerogative in respect of gold. The parties were thus negotiating from different understandings and as a result, on this issue the agreement was fatally compromised in Treaty terms. [Emphasis in original.]⁷⁰

Marutuahu witnesses made a not dissimilar submission:

69. Document A8, p 83. See also clause 8 of the 1852 agreement: ‘The property of the land to remain with the Native owners; and their villages and cultivations to be protected as much as possible.’

70. Document Y1, pp 31–32

There is no evidence that to indicate that the Crown ever discussed the concept of its prerogative right over minerals with Maori while engaging in cession negotiations in the 1850s or 1860s. This raises some questions regarding the Crown's willingness to deal with Maori in a full and frank manner. Faced with the immediate prospect of miners rushing Hauraki land in search of gold, the Crown kept a pragmatic silence on an issue likely to antagonise Maori. Had Marutuahu been aware of the Crown's claims to all gold 'wherever', it is likely that they would have been less co-operative. Given the likelihood that the Crown would assert the prerogative in future, it is reasonable to argue that Marutuahu should have had some forewarning of the Crown's belief in its prerogative right to gold on their lands.⁷¹

Both sets of claimants pointed out that the Crown's tacit acquiescence in the Maori assumption of having complete rights over gold, was conditioned by awareness of Maori power in 1852.⁷² The Crown was in no position to enforce its claimed ownership rights or to antagonise Maori by challenging their rights.

Crown counsel has responded:

The claimants' suggestion that the 1852 agreement was 'fatally compromised' in Treaty terms should be rejected. Such an assertion overlooks the very clear regard and concern that the Crown had to the Treaty and to Maori interests in the compromise that was ultimately achieved at Patapata. This is closely analysed by Dr Battersby in his report. In his analysis Dr Battersby refers to commentary from a number of prominent Hauraki Maori that they saw little value in the gold itself – it was the land that was of real significance and that is reflected in the importance of retention of underlying land ownership. It is submitted that Dr Anderson, in recording that the 1852 agreement represented 'a pragmatic recognition of Maori rights over the sub-surface resources' is essentially a recognition that this in fact did occur.⁷³

Implicit in claimant submissions on the issue of ownership is that it been raised explicitly then the Crown, if it wanted to secure the peaceful opening of the Coromandel goldfield, would have been obliged to bow openly to the Maori perception of who owned the gold. Thus, the assertion that the Crown's common law rights of ownership of gold ought to have been disclosed verges on the assertion that those rights would had to have been renounced vis-à-vis Maori rather than shelved for possible later exercise.

(2) Tribunal comment

Unquestionably, a full and frank approach would have required the disclosure of the royal prerogative and discussion of the question of ownership of gold. However, we do not think

71. Document v1, p 189

72. Document B2, p 12; doc v1, pp 189, 193

73. Document AA1, p 15; doc v1, p 32; doc A8, p 85

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that it has been shown that the Crown avoided the probable consequences of the disclosure of the common law doctrine of Crown ownership of precious metals out of any sinister design. Since the Crown considered that the potential for conflict between miners and Maori required it to secure to itself the management of the goldfield in the interests of all concerned, it was not acting from improper motives. We note that the independent observers, Bishop Selwyn and Lanfear, also apparently kept silent on the matter.

Moreover, the agreed policy of the Executive Council was that, whatever the Crown's view of its legal rights to gold, the prerogative would not be asserted out of respect for the Maori understanding of their rights to the land and whatever minerals lay within it. Given this deference to the Maori position, discussing the ownership of gold separately from the land became superfluous.

Equally importantly, we have noted in the previous chapter that the question of access to the gold was more important than the question of ownership in the abstract. Even if the prerogative did carry with it the right of access to private land (about which there is some doubt), the Crown could not peacefully have asserted it against Maori determination to retain control of the land.

In the event, the parties were sufficiently of one mind to reach meaningful agreement on most of the matters covered by the 1852 agreement. That the Crown and Maori were operating on the basis of different assumptions as to who 'owned' the gold did not preclude a common understanding that Maori retained control over the right of access, and the option whether or not to bring their land under the agreement. This being so, we cannot see that the 1852 agreement was 'fatally compromised' by the Crown officials' omitting to mention a theoretical right under common law which they had no intention of asserting.

CHAPTER 8

COROMANDEL AFTER 1854

8.1 CROWN EFFORTS TO PURCHASE THE FREEHOLD

By 1857, interest in the Coromandel goldfield, virtually abandoned in 1854, had revived considerably. Heaphy considered that the diggings had been ‘abandoned before they were half examined.’¹ In March 1857, he reported that Coromandel gold would have to be worked at its ‘fountain head’, its source in the quartz reefs. This would require considerable capital investment but offer commensurate rewards.

Maori control over goldfields was made the scapegoat for the languishing state of mining in Coromandel; Maori were seen as ‘bottling up’ the colony’s wealth. The field’s failure was blamed on the risks of investing capital on land that could be closed by Maori, and on the small area available.² In August 1857, gold-bearing quartz was exhibited in Auckland; the press called for the field’s reopening, and drew attention to Paora Te Putu’s objection to mining on his land.³

To accuse Coromandel Maori of ‘bottling up’ the goldfields was far from the whole truth. Maori willingness to permit the development of quartz reef deposits was not fully explored. Dr Anderson asserted: ‘The ambitions of Government and settlers were . . . fixed primarily on the acquisition of freehold of land rather than on leasing arrangements allowing only limited access to resources.’⁴

Donald McLean, chief commissioner of the Native Land Purchase Department, indicated his preference for purchase to Governor Grey:

Chief Puhata . . . has offered to give up a space of land containing about [f]our or five square miles for the purpose of gold digging, which offer may be availed of by the Government, if necessary, although I conceive it would be more prudent to discourage the search for gold until negotiations connected with the purchase are more matured.⁵

Nothing came of Puhata’s offer, and McLean appointed the retired missionary, James Preece as sub-commissioner for Coromandel, instructing him to ‘use every endeavour to

1. *New Zealander*, 28 January 1857 (doc 06, p 39)

2. *Ibid* (doc A8, p 88)

3. Document 06, pp 39–40

4. Document A8, p 88

5. McLean to Governor, 5 June 1857 (doc v1, p 172)

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carry on the purchase of land in the Coromandel district as vigorously as possible.⁶ Preece shared McLean's preference for purchase:

I shall embrace every opportunity to extend the purchase when there is a chance of doing so, because I am convinced that before the mineral resources of this district can be developed, the Native title to the land must be extinct, or every effort to prove them will fail.⁷

Preece was eager to purchase *before* gold was found, because, 'should gold be found in large quantities . . . there would be great difficulty in completing the purchase [of a Mercury Bay block] at all, as then, I believe, that no sum would induce [the owners] to part with it'.⁸

The attitudes of McLean and Preece expressed Government policy. Premier Stafford stated in Parliament that the Government was opposed to any arrangements for access other than Crown purchase:

It was perfectly true that the government had not entered into any arrangements . . . to enable Europeans to search for gold, because experience had shown that allowing irregular occupancy of Native Land was the greatest obstacle to obtaining an extinction of the native title.⁹

In accord with this was James Preece's 1857 purchase for the Crown of the Patapata block (including Poroporo Island) from Patukirikiri. With the previous private purchasing in this area, Europeans thus owned all the harbour's coastal lands, less two reserves.¹⁰ Many other purchases for the Crown were made by Preece from Ngati Whanaunga and Ngati Paoa during the interval while the area was closed to miners, including extensive lands south of the lower Waiau and either side of its middle reaches.¹¹ He acquired Matakītaki,¹² and part of Pukeatua, both in 1858.¹³

None of these purchases was achieved easily, partly because of the complexity of traditional right-holding, and partly because of Maori expectations of higher prices for the land if and when gold mining resumed.¹⁴ But McLean's drive to purchase Coromandel land had waned by September 1861:

6. Document A8, p 90

7. Document v1, p 171

8. Ibid, p 172

9. Stafford, 27 April 1858, NZPD, p 408; Paul Monin, *This Is My Place: Hauraki Contested, 1769–1875* (Wellington: Bridget Williams Books, 2001), p 145

10. Document A8, p 91; doc A10, pt 1, p 194

11. The Awakanae block, in a series of purchases – Papawhakanoho and Tawhitirati in 1858, Kopuranui in 1859, and Te Roto in 1861; Hinau in 1858; and Mamaupaki in 1862: doc A10, pt 1, pp 155, 159, 185.

12. Document A10, pt 1, p 182

13. Ibid, p 195

14. Preece to McLean, 16 July 1861, in Henry Hanson Turton, *An Epitome of Official Documents Relative to Native Affairs and Land Purchases in the North Island of New Zealand* (Wellington: Government Printer, 1883) (doc A4, p 30)

there is no particular urgency for acquiring land in the vicinity of Coromandel Harbour, as the district, except for its probable mineral wealth, is of very little value otherwise; . . . the price expected by the Natives is beyond its intrinsic value; and I confess I do not see any particular object in paying a high price for land there at present.¹⁵

At this time, Patukirikiri retained two valuable auriferous land blocks north-east of Coromandel Harbour: Te Karaka, near Coromandel township, and Whakanekeneke. The latter, adjoining Te Matewaru land to the north, was also known as 'Pita's block'; it included the homestead of Charles Ring.¹⁶ These blocks would later form part of the Kapanga mining block.

Ngati Paoa and Ngati Whanaunga retained auriferous lands north-east of the Waiau River near Matawai Creek. Ngati Paoa had major interests north of Matawai Creek as far as Pukewhau Creek (the Tiki or Waiau 1 block) and between Matawai Creek and the Motutere Ridge (the Motutere block), later part of the 'Ngaurukehu' mining block. Ngati Whanaunga may have had interests in the Motutere block and had major interests on the south bank of Matawai Creek (the Purunui block), later part of the 'Matawai' mining block.¹⁷

8.2 REVIVAL OF GOLD MINING IN THE COROMANDEL, 1861–63

In this section, we will address the 1861 prospecting agreement, the opening of the Koputauaki area (Tokatea mining block); and the administration of the goldfields from 1861 to 1863.

8.2.1 The 1861 prospecting agreement

The reopening of the Coromandel goldfield in 1861 appears to have been hastened by a surge of interest in gold mining among colonists in Auckland province after South Island successes, especially in central Otago. These finds brought about an exodus of people from Auckland, and its business community and provincial officials became increasingly impatient for the development of the mineral resources of Hauraki.¹⁸

John Williamson, the superintendant of Auckland province, wrote to the Colonial Secretary concerning population loss. He advocated greater Government intervention, either

15. McLean to Preece, 3 September 1861 (doc A4, p 4)

16. Document A10, pt1, p 224

17. See document A10, pt1, p 211, where all of these blocks are discussed. See pages 210 to 220 for the Waiau 1 block and pages 183, 198, and 186 to 190 for the Matawai, Purunui, and Motutere blocks.

18. J R Haglund, 'History of the Coromandel Goldfield, 1853–1868: The Second Phase of Development', honours dissertation, University of Auckland, 1949, pp 21–23 (doc A8, p 98); doc O6, p 42

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in the purchase of Maori land or in negotiating prospecting arrangements.¹⁹ Pressure was put on the Government when a large public meeting resolved that auriferous Maori lands should be purchased, and that the Coromandel field should be opened immediately. A deputation conveyed these resolutions to Governor Grey, almost immediately on his return to New Zealand to assume his second governorship.²⁰

In response, Premier Fox directed Donald McLean to attempt to arrange for the Coromandel Peninsula northwards of Waiau and Mercury Bay to be opened immediately to prospecting. McLean was to assure Maori that 'such an arrangement would be independent of any question as to the sale of the land itself'. He was 'of course' to enter into purchase negotiations should he find that Maori were disposed to sell. But, should he 'find the Natives still resolved to keep their land', McLean should make a prospecting agreement the 'first object of his attention'.²¹ As a guide, Fox wrote:

I understand from one of Mr Preece's reports that the Natives will consent to gold-digging operations being carried on, provided the Government does not issue gold licences itself. You will carefully explain to them that . . . the Government has no power to issue Licences under the Gold Fields Acts within Native Land, and that they need therefore be under no apprehension of any infraction of their rights. At the same time it will be your duty earnestly to advise them to consent to placing the district under the supervision of [the] Government, even if they should not be willing to sell any of the land. You should point out, that in the event of prospecting been [*sic*] really successful, and a large number of persons being consequently attracted to the district, it would be indispensable that police and other regulations be established for the maintenance of order, and for the prevention of any collision between the races; that their own interests would therefore be best served agreeing on their part to any measures which should be found necessary for these objects being taken by the government; and that as a considerable expense might ultimately be found necessary, some source of revenue must accrue out of which the same could be defrayed.²²

Fox wished McLean to impress upon Maori the desirability of ultimately conceding to the Crown the right to issue mining licences, even if they were not willing to do so in the first instance. Fox evidently expected that Maori would not permit prospecting unless they were compensated financially, so gave McLean the authority to offer a payment. Interestingly, the options made available to McLean appear to include payments to Maori that were not from the gold duty account, but were related to the amount of gold duty revenue collected:

19. Williamson to Colonial Secretary, 20 September 1861, *New Zealander*, 2 October 1861 (doc A8, p 98)

20. Document A8, p 98

21. Fox to McLean, 14 October 1861, *New Zealand Gazette*, 1861, no 49, p 300 (doc A8, p 99)

22. *Ibid* (pp 99–100)

The Natives are probably aware that a fixed duty of 2s 6d per oz is levied on the export of gold. The application of that revenue is limited by law, and it is not possible therefore to make any appropriation of it towards such an arrangement as is contemplated with the Natives. But it appears to the Government that, for the present at least, an equitable arrangement would be, that the Natives should receive out of other funds, for the permission of prospecting, a sum which should bear a proportion to the total amount of gold revenue collected in the district during a given period. You are authorised therefore to treat either on that basis, or (if you find that impracticable) then on the basis of a fixed annual payment, or as a last resource, of a sum for the present year so as to allow exploration to proceed without further delay.²³

Dr Anderson wrote that the prospect of Maori being paid in proportion to the yield of gold was ‘undercut’ by Fox’s phrase, ‘for the present at least’, implying that Fox assumed that ‘the Government could change the basis of any agreement it reached.’²⁴ However, the whole text reads as a set of options for negotiation. There is no assumption that the Government could *unilaterally* change the arrangement. ‘For the present’ was presumably intended to cover the prospecting period, with further negotiation to follow if a field was actually opened.

On 2 November, McLean met with rangatira from Coromandel and the northern peninsula. In the expectation of future economic benefit, they were generally amenable to opening their lands to prospectors as long as they retained some control:

The Natives, at a Meeting held with them on the 2nd instant, assured me that every facility would be afforded to parties searching for gold within their territories, if only, in the first instance, they gave notice to the Native proprietors of their intention to do so.

They considered the discovery of gold as calculated to be beneficial not only to Europeans but to themselves also, as affording them a readier market for their produce, enhancing the value of their property, and yielding them an immediate revenue, should gold be found in any considerable quantity.²⁵

Dr Anderson has written that it can be assumed that McLean encouraged Coromandel Maori in these expectations of financial benefit.

McLean also ascertained that rangatira attending the meeting were ‘prepared to abide by the Agreement of 1852, for the working of the Gold Fields; or, if necessary, to enter into a fresh Agreement for an equitable proportion of the yield of gold’. He decided that ‘Gold has

23. Ibid

24. Document A8, p 100

25. McLean to Minister for Native Affairs, 7 November 1861, *New Zealand Gazette*, 1861, no 49, p 301 (doc A8, pp 100–101)

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not yet been found in sufficient quantities to admit of any prospective arrangement regarding it, beyond that of obtaining the sanction of the Native proprietors to explore their country'.²⁶ Accordingly, he settled on a loose arrangement that would give prospectors access to the former Coromandel goldfield and parts of the northern Coromandel Peninsula, but which left the details of any future mining agreement still to be determined.

The agreement reached on 2 November 1861 included no payment for permission to prospect even though McLean had been authorised to offer one. It was signed by 26 representatives of Ngati Paoa, Ngati Whanaunga, Patukirikiri, and Ngati Tamatera.²⁷ The signatories consented to permit any Europeans wishing to seek for gold to do so within their lands from Waiau to Moehau on both sides of the Peninsula. There were four additional clauses: if gold was found in considerable quantities then 'terms' would be made with the Government for the working of it; the title to the land was to remain with the Maori right-holders and be unaffected by the agreement; if European 'gold-seekers' came in large numbers then the Government was to adopt 'measures' to preserve order among Europeans and Maori; each 'tribe' was to conduct European prospectors to its own land.²⁸

The Government was troubled by the silence of the 1861 agreement on some important matters. Henry Sewell, the Acting Minister for Native Affairs, wrote to McLean seeking confirmation that:

supposing any digger find gold, he will be entitled to remove it, whatever may be the quantity, without hindrance from the native owners of the soil; [and] whatever question of compensation may arise in that case, is to be settled, not between the Natives and the individual digger, but between the Natives and the Government.²⁹

McLean replied that the signatories, who 'included all the leading chiefs of the Peninsula', had assured him they would not impede the 'removing [of] gold off their land at any time'; they expected to make terms with the Government for payment only if gold was found in 'considerable quantities'. He anticipated no difficulties if Maori were 'judiciously managed' and observed that 'they also expect a Government agent to be stationed there [Coromandel] to arrange matters of dispute as they arise'.³⁰

Marutuahu historians point out that Ngati Paoa and Patukirikiri, among the leading

26. McLean to Minister for Native Affairs, 7 November 1861, *New Zealand Gazette*, 1861, no 49, p 301 (doc A8, pp100–101)

27. Dr Anderson pointed out that a number of tribes with interests in the area nominally covered by the agreement do not appear to have been consulted; as examples, she named Ngati Maru, Ngati Hei, and Ngati Porou: doc B2, p 16. However, the agreement did not necessarily infringe the rights of non-signatories since it concerned only the lands in which the signatories had an acknowledged right to authorise prospecting. This was something of a grey area though. As it happened, prospectors were turned away in some places: doc O6, p 48.

28. McLean to Minister for Native Affairs, 7 November 1861, *New Zealand Gazette*, 1861, no 49, p 301 (doc A8, pp100–101)

29. Document A8, p 101

30. McLean to Minister for Native Affairs, 14 November 1861, *New Zealand Gazette*, 1861, no 49, p 305 (doc A8(a), p 110)

participants in the agreement reached with McLean, were under financial strain. They had engaged in considerable commercial activity during the 1850s and were experiencing difficulties in servicing debts from capital investment in flour mills and trading vessels.³¹ This predicament must have contributed towards their acceptance of the prospect of more gold-mining on their lands, but in any case their entrepreneurial disposition might have inclined them to a similar view.

Prospectors were once again denied access to Te Mātewaru lands inland from Kiko-whakarere and Koputauaki Bays, in accordance with the wishes of the recently deceased chief Paora Te Putu that the area be worked by Māori. Paora Te Putu was 'represented', in McLean's words, by Te Hira Te Tuiro who did not sign the agreement. The leading Ngāti Tamatera chief, Te Moananui (for Moehau only), Tareranui of Te Mātewaru, and Paora Te Putu's grandnephew, Takarei Te Putu did sign the agreement.³² McLean advised the Government:

It should . . . be distinctly understood and notified to persons searching for gold, that the land known as Paora's claim, at Koputauaki is not to be interfered with. These claims extend from a place near Ring's mill to Koputauaki, and to Umangawha, and thence to Arataonga on the east side of the range, where a portion of the land was given by Paora to the Ngāti Porou tribe of the East Coast. These reservations will be pointed out to a surveyor at any time by the claimants, and it would be desirable to define the boundaries without delay.³³

8.2.2 The Coromandel goldfield, November 1861 – June 1862

There was no immediate rush of prospectors to the Coromandel in November, but a large party of miners from Victoria via Otago arrived in Auckland in late December 1861. After requesting Government assistance in obtaining access they were accompanied to the field by the newly appointed Coromandel resident magistrate and commissioner of Crown lands, Hanson Turton. A circular letter was sent to Te Moananui, Taniwha, Pita Taurua, and Preece informing them of the aims of the mining party and requesting the last to render them such assistance as he could.³⁴

31. Monin, p 178 (doc v1, pp 172–173). Monin suggests that 'only compelling considerations could have induced Māori to consent to this next round of colonisation'. He cites the report of Drummond Hay (AJHR, 1862, E-7) to the effect that Hauraki Māori were generally fearful of being overwhelmed by Europeans and unfavourable towards large-scale European settlement.

32. Te Moananui was nominated to point out at Cabbage Bay the boundaries within which prospectors might work. He later wrote to McLean that Europeans should come quickly to Moehau. 'I will divide them and (some) natives to different places', wrote Te Moananui, 'Let there be fifty pakehas': *Daily Southern Cross*, 6 December 1861 (Monin, p 178).

33. McLean to Minister for Native Affairs, 14 November 1861, *New Zealand Gazette*, 1861, no 49, p 305 (doc A8, p 102).

34. Halse to Preece, 28 January 1862, MA4/4, p 42, micro 6542, Archives NZ (doc 06, p 47).

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The Auckland Provincial Council promoted the field by voting £500 to assist prospectors. This aid was directed primarily, apparently, to those working on flats near the Coromandel Harbour.³⁵ The council then offered £2000 for a discovery that could support 500 men for three months.³⁶ But these incentives had little effect, and in March 1862 miner numbers remained low. Many were reported to have left in disgust at the continued barrier to entry to Paora Te Putu's block.³⁷

Provisional regulations for the Coromandel goldfield were drawn up in mid-March by a committee of miners, and witnessed by Turton. These regulations included provisions that mining was restricted to the area opened under the 1861 agreement, and that 'the exceptions [reserves] made by the Natives . . . be duly respected *until such time* as better terms may be arranged' (emphasis added).³⁸

As winter approached, miners began to move north from the Otago goldfield, and the numbers arriving at the Coromandel soared. By 5 April, Turton estimated that 248 miners were on the field, of whom 99 had arrived in the previous week alone.³⁹ The *Daily Southern Cross* reported the coming of 150 more.⁴⁰ Increasing numbers of miners swelled the demand for Paora's land to be opened. The boundary between the opened lands and the prohibited area saw mounting friction between miners and Te Matewaru. One party of miners had sunk shafts near the boundary; although still short of it they were visited by Maori who told them that boring under the land was trespass, and likened them to 'mice under-mining a flour bag'.⁴¹ Miners entered the prohibited land at night and boasted of having removed substantial weights of gold.⁴² Under the leadership of Te Hira, Te Matewaru began to patrol the boundary.⁴³ The success of the Coromandel goldfields came increasingly to be seen as dependant on expanding into Paora's land.

8.2.3 The opening of the Tokatea goldfield

It has been argued by the Wai 100 claimants that the opening of the Tokatea field involved undue pressure by the Crown. It is important, therefore, to analyse how the outcome was in fact achieved.

The Governor himself made the first effort to secure Maori consent. According to the

35. *Daily Southern Cross*, 18 February 1862; *New Zealander*, 15 March 1862 (doc 06, p 48)

36. Document A8, p 103

37. *New Zealander*, 8 March 1862 (doc 06, p 48)

38. Turton to Secretary of Crown Lands, 20 March 1862, no 1, BAOL A208/688; *The New Zealander*, 26 March 1862 (doc 06, p 49)

39. Document 06, p 49. Anderson has written that 199 had arrived in the past week but this appears to be in error: doc A8, p 103.

40. *Daily Southern Cross*, 4 April 1862 (doc 06, p 49)

41. Document A8, p 103

42. *Ibid*, p 104

43. *Daily Southern Cross*, 6 May 1862 (doc A8, p 103)

New Zealander of 8 March 1862, Sewell informed the Auckland superintendent that Grey was at Coromandel, 'engaged in personal negotiation with the Native owners'.⁴⁴ According to Turton, Maori right-owners in the ceded area 'are all in the best of humour with their stranger guests who supply them with a ready market for their produce & appear willing to treat them with kindness'. Yet, Maori were in no mood to sell, nor would they 'come to any immediate arrangements for the work[ing] of the gold when found'. Turton was confident that Riria (Lydia) Karepe, Paora Te Putu's niece, was succumbing to the pressure.⁴⁵ A press reporter stated that he had been informed by Turton that Riria, described as 'the heiress of the land', had assented when she saw the influx of miners, and waited only the concurrence of the young people returning from trading peaches in Auckland).⁴⁶

But even if Turton was correct about Riria, Te Hira, Paora Te Putu's nephew and the heir to his mana, remained opposed. Relations between Maori and Pakeha were generally uneasy during this period and the opening of the field became a political rather than mainly economic issue. In April 1861, Patukirikiri hosted a hakari at Kapanga at which the King's flag was hoisted alongside the British flag. As discussed in section 5.3.1, Te Hira also had considerable sympathy with the Kingitanga and its objectives. In May 1862, he had placed the land of Ngati Tamatera, including Koputauaki, under the mana of the King.

In late May, Premier Fox visited Coromandel and made a desperate offer of £10,000 for the purchase of the Tokatea block – which included the Koputauaki land – or, alternatively, a payment of 10 shillings per miner for permission to work the block for a month. These offers were refused. In Turton's eyes, matters were approaching flashpoint: 100 diggers had arrived who would scorn the prohibition on working the reserved land; the peace of the district, argued Turton, would be broken if Paora's land was not opened immediately.⁴⁷

Governor Grey again intervened personally, arriving unannounced at Coromandel on 4 June 1862 with a letter for Riria, expressing his wish that miners should be allowed to work on Paora's land at once. Riria should:

come and arrange with [Turton] for the due registration of their names and the days during which they should be working until His Excellency returns to make a final settlement for the mining of the District when proper compensation would be given them for such an interim occupancy of the land.⁴⁸

The letter was not well received at first, and Grey was departing by sea when Riria hastened to the shore and declared, 'O Governor! do not go away with a dark heart; I too renounce the land.'⁴⁹

44. Document 06, p 47

45. Turton to Secretary for Crown Lands, 5 April 1862, BACL A208/688 (doc A8, p103)

46. *Daily Southern Cross*, 8 April 1862 (doc 06, p 52)

47. Turton to Attorney-General, 27 and 30 June 1862, BACL A208/634 (doc A8, p104)

48. Turton to Secretary for Crown Lands, June 1862, BACL A208/688 (doc A8, p104)

49. *Daily Southern Cross*, 23 June 1862 (Monin, p183)

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Despite Riria's declaration, any agreement was still difficult. Riria demanded that she should be paid £100 for the gold already taken and the unlawful manner in which it was taken.⁵⁰ Turton agreed to this if the land was opened immediately, and believed that he had now secured the agreement of 'all the chief parties'. However, after consulting with those who had been absent, Riria was prepared only to agree to the opening of a small piece of the land. This offer Turton declined. The issue remained highly politicised. Miners stayed on the field, hearing that agreement had been reached. But, on 20 June 1862, Turton wrote to Daniel Pollen stating that 'the Maori King party . . . now say they will work the [Tokatea] gold themselves and [convert] it into sovereigns at Waikato for the benefit of the Maori nation.'⁵¹

The impasse was broken when Grey came to Coromandel a third time. Grey reported to London that he had returned, partly from fear of collision between Maori and miners, and partly because 'I was informed by the Natives that, if I would personally arrange with them for the occupation of their country by diggers, they would offer no further opposition to them.'⁵² This probably implies a Maori preference for negotiation with the Queen's representative and the chief of the Europeans, perhaps agreed to in principle among the right-owners.

The agreement, dated 23 June 1862, between Grey, Riria, Tareranui, Karaitiana and nine others, was for an annual rental payment of £500, of which the first two years payment was to be made in advance, and £1 per annum for every miner above 500. The agreement was to run as long as gold was mined, but because the right-owners were unhappy about the way in which the 1852 agreement had lapsed, they demanded (and officials agreed) that the Crown be required to give one year's notice before terminating the agreement.

On 28 June, Te Hira, accompanied by some Waikato Maori, arrived at Koputuaki. He intimated wrathfully that he would bring allies from Tauranga and Thames to help him protect the boundary. But Te Hira had been presented with a *fait accompli* and eventually accepted a payment from Riria of £600 out of the £1000 (two years' rent in advance) paid her by the Government. Turton wrote that Te Hira declared that henceforth the land was to be considered as belonging to him and the gold to Riria.⁵³ In July, Te Hira made further protest, saying, according to Turton, that the £600 payment was a penalty for Riria having 'trampled under foot the Maori law'. Turton, however, argued that Te Hira's position was not accepted by Riria's group and that the payment had been given in recognition of Te Hira's 'joint proprietorship' of the land.⁵⁴

50. Document A8, p104

51. Turton to Pollen, 20 June 1862, BACL A208/ 688, resident magistrates' outward letterbook, Justice Department file (John Hutton, 'Troublesome Specimens: A Study of the Relationship between the Crown and the Tangata Whenua of Hauraki, 1863–1869', MA thesis, University of Auckland, 1995, pp185–186)

52. Grey to Newcastle, 29 June 1862, BPP, 1863, cmmd 467, p19 (doc A8(a), p111)

53. Turton to Secretary of Crown Lands, 1 July 1862, BACL A208/688 (doc A8, p106)

54. Turton to Pollen, 13 August 1862, BACL A208/688 (doc A8, p106)

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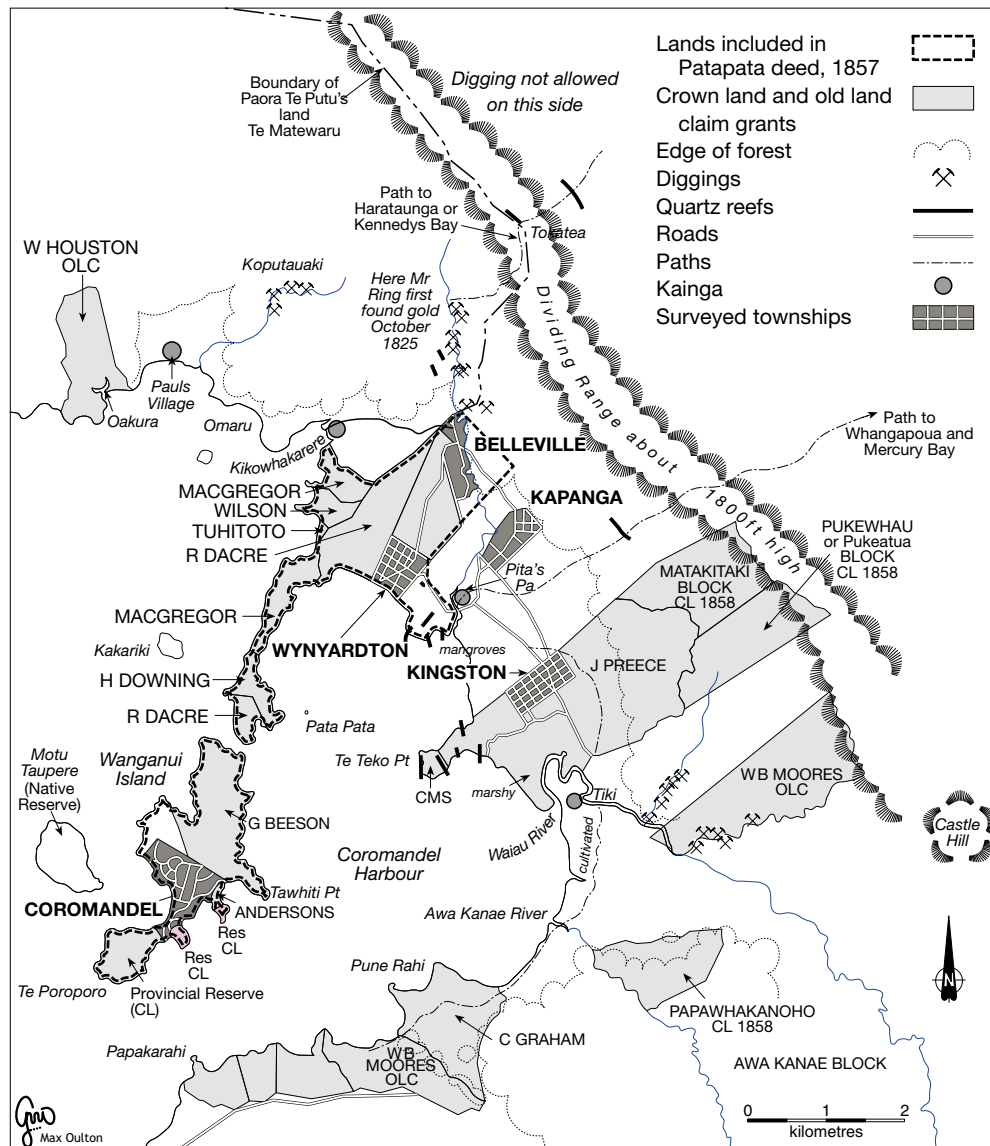


Figure 34: Coromandel goldfield, 1862. Source: Heaphy, 1862.

8.2.4 The proclamation of the goldfield

On 28 June 1862, Grey proclaimed much of the Coromandel Peninsula to be a goldfield under the Gold Fields Act 1858. The area proclaimed was 'that part of the Coromandel Peninsula lying to the north of the line drawn from the mouth of the Waihou River on the West to the mouth of the Whitianga River on the East, thence following the Whenuakite River to its source, and thence by a straight line to the Haho point.'⁵⁵ The last stretch of the line took in the Crown owned land in southern Mercury Bay. The Governor issued

55. Document A8, p106

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regulations relating to the field, to come into effect on 30 June 1862, defining the kinds of claims miners could work.⁵⁶

The proclamation embraced areas which were still Maori land. Strictly speaking it could apply only to waste lands of the Crown; the Gold Fields Act 1858 and the consolidating 1862 Act contained no provision for the inclusion of land other than Crown land in a goldfield. However, Grey also proclaimed that from 30 June 1862, licences to work specified Maori lands in Coromandel (those covered by the agreements with Maori owners) would be issued under the Native Land Purchase Ordinance 1846, on the basis that the licence-holders would have the same rights and entitlements as miners holding a licence issued under the Gold Fields Act, that is, they would be subject to the same regulations as applied on Crown land in the proclaimed goldfield.⁵⁷ (In 1863, the Gold Fields Act 1862 was amended to construe 'Waste Lands of the Crown' to include 'any other Land whatever over which the Governor by lease agreement or otherwise [shall?] have obtained power to authorise Gold Mining thereon'.⁵⁸)

In any event, miners arrived in considerable numbers. Turton swore in extra police and managed to keep the peace. (He also called for weekly visits of the gunboat *Caroline* and credited these with keeping good order.) On 30 June, the rights were issued and the field rushed by miners.⁵⁹ Meanwhile, Te Hira and Taraia were coming to terms over the Government's payment. Ironically, by August 1863, with the field in decline because of the war and difficulties of quartz mining, they both visited Koputauaki to persuade the diggers to remain.⁶⁰

8.2.5 The July 1862 agreement

The Tokatea agreement was followed on 23 July 1862 by another with Pita Taurua (for Patukirikiri), Kitahi Te Taniwha (for Ngati Whanaunga) and Patene Puhata (for Ngati Paoa), in respect of the Kapanga, Ngaurukehu, and Matawai mining blocks. The Government was to pay Maori right-owners £1 per miner per annum (which was the cost of a miner's right), which would require a tally of miners on the land. There was no annual rental as at Tokatea, but neither was there the high threshold of numbers of miners before the fee per miner took effect. Further negotiation was to follow when gold was found in payable quantities.⁶¹

56. Document P6, pp 49–50

57. Ibid, p 50; 'Proclaiming Coromandel a Goldfield', 25 June 1862, and 'Rules and Regulations for the Management of the Coromandel Goldfields', 28 June 1862, *New Zealand Gazette*, 1862, no 27, pp 233–235

58. Gold Fields Act Amendment Act 1863, s 2

59. Turton, Coromandel, 30 June 1862, no 18, BACL A208/688, Archives NZ (Ak) (doc 06, pp 61–62)

60. Document 06, p 61; Monin, p 189

61. Mackay, 'Report by Mr Commissioner Mackay', p 3; Mackay to Native Minister, 19 October 1864, AJHR, 1869, A-17, encl E, pp 16–17

Some important matters were overlooked. The date of commencement of the July 1862 agreement was left unclear; that is, whether it applied to miners who had been on the field since November 1861, a matter Mackay had to resolve when calculating the payment of arrears in 1864. Neither was a date set when the first payment was due nor any plan made for the division of revenues amongst the Maori signatories.

8.3 THE ADMINISTRATION OF THE COROMANDEL GOLDFIELD

The Wai 100 claimants have submitted that the Crown's administration of the Coromandel goldfield had much to be desired and prejudiced the interests of Hauraki Maori.

8.3.1 Ambiguity over Maori landowners' and customary rights

As mining began, ambiguities over the relative rights of Maori and miners were exposed. Pita Taurua and Makoare Te Ahuroa attempted to charge ground rent for tent sites and for timber removed from their lands. Turton regarded this as 'extortionate'. In his opinion, when miners paid £1 for the right to mine, a right of residence was also implied. Moreover, while it had been agreed that miners were not to use kauri trees (reserved by Maori owners for transactions with millers), Turton believed that the taking of other timber for mine shafts and such works essential to mining also came with the miner's right.⁶² Mackay reported in 1864 that Pita and Riria had received £600 between them, apparently for 'damage done to kauri timber' by the miners, but the information available is ambiguous.⁶³

Resident Maori questioned the Government's right to construct roads in the growing settlement and, by way of protest, built on them. When the Government proposed to bridge the Kapanga Creek, Maori opposed it on the basis that it could interfere with their ability to navigate the creek. They maintained that the Crown controlled only one bank and moored a cutter across the ford. They also sought to lease out part of the harbour's landing place. Turton was unsympathetic:

As to the native right to lease away the road or wharf now that the Gold Field is established . . . I deny it altogether; . . . the natives by agreeing to our occupation and working of the Gold Field necessarily give up the right of road to it [ie, to build roads across it, and the] right of all suitable landing places leading to them. I suppose that they are to derive a large revenue from the gold mines and yet interfere with the means . . . quite inconsistent

62. Document A8, pp 107–108

63. Mackay, 'Report by Mr Commissioner Mackay', p 3

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with the question of property and would soon occasion the Government and diggers much embarrassment.⁶⁴

Dr Anderson describes Turton's attitude as treating Maori rights as subordinate to that of the 'public good'.⁶⁵

The Coromandel goldfields were worked until the war in July 1863. An 1864 regulation allowed claims to be retained, even though not worked, if the 'Maori insurrection' was the given reason for the break in operations.

8.3.2 The renegotiation of the July 1862 agreement

Miners began to return to the Coromandel diggings from February 1864. Coromandel was by then a centre of the timber trade and only a minority of Europeans were miners.

The issue of payment of arrears to Maori right-holders emerged at once. In September 1863, Pita Taurua had requested Lawlor, who had succeeded Turton as resident magistrate, to pay for mining on Patukirikiri lands; although the 'late commissioner' had spoken of making some arrangements for payment of revenues due, Pita had heard nothing further on the matter.⁶⁶ In February 1864, demands were made dating from 1861; Lawlor rejected this date, believing that Maori were entitled to payment only from the date of the July 1862 agreement.⁶⁷

In October 1864, James Mackay was sent to the Coromandel to sort out these matters, and reported on 19 October.⁶⁸ Riria's claims were a relatively simple matter since the first two years rent had been paid in advance. For the future, Mackay arranged to pay the annual rental of £500 in four instalments, and made the first payment of £125. A formal deed of agreement was signed; as negotiated in 1862, it could be terminated with a year's notice.

Settlement with the owners of the Kapanga, Ngaurukehu, and Matawai mining blocks was more difficult. Mackay reported that 'Pita and Tanewha urged that they should be paid from the 2 November, 1861, stating that Mr McLean promised that the terms were to be the same as those entered into with Colonel Wynyard in 1852 (Mr Preece confirms this statement)'. Mackay disputed the point, claiming that no precise starting date had been agreed, pending the working of gold in payable quantities. The reply was: 'This may be correct; but we never supposed that it would take upwards of eight months to try the land, or that we should have 500 diggers from Otakou to damage it.' They also pointed out that the diggers were engaged in actual mining and must have recovered considerable quantities of gold.

64. Document A8, p 108

65. Ibid, p 109

66. Ibid, p 107

67. Lawlor to Native Minister, 1 September 1863, outward letterbook, Resident Magistrate's Office, BACL A608/634; Lawlor to Native Secretary, 26 February 1864, BACL A208/688 (doc A8, p 107)

68. Mackay to Native Minister, 19 October 1864, in Mackay, 'Report by Mr Commissioner Mackay', p 4

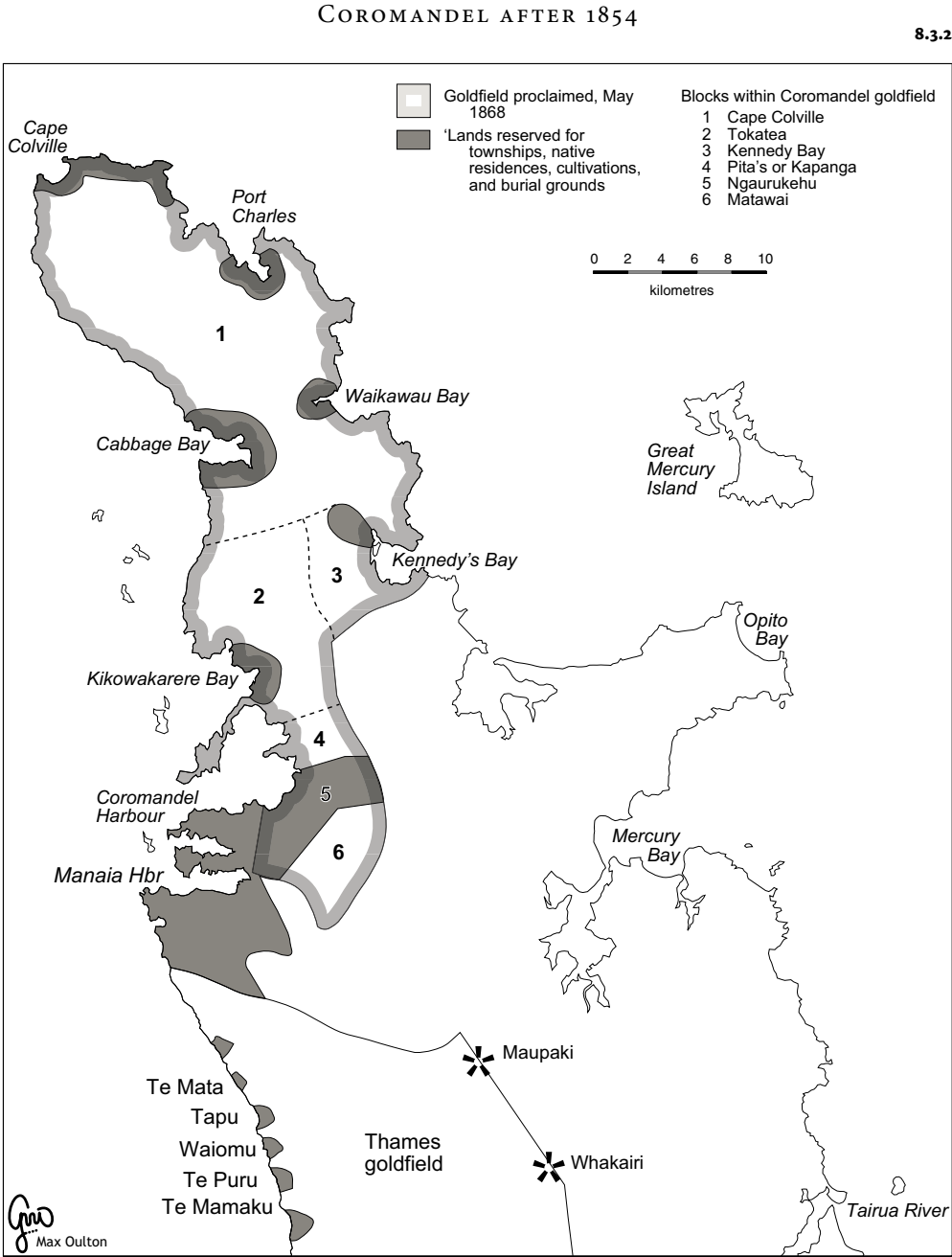


Figure 35: The Coromandel goldfield, 1869. Source: Mackay's sketch map, AJHR, 1869, A-17.

Without reaching agreement on the date from which payment was due, Mackay turned to negotiating an acceptable amount of compensation, a matter complicated by poor records of the number of miners on each block. Mackay negotiated arrears based on approximate estimates of numbers made by Turton and Lawlor, Preece, and the policeman Hastie. Mackay also took into account the number of miner's rights that had been issued for the whole Coromandel goldfield, including Tokatea, 613 in total. Finally, Pita consented to a payment of £101, and Kitahi Te Taniwha and Patene Puhata consented to payments of £75 each.

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To prevent further confusion, Mackay negotiated a new agreement dated 11 October 1864. Under this, payments would be calculated on the number of licences issued, and licence holders would be permitted to cut timber other than kauri for mining purposes and to erect buildings. Mackay recommended that Pita Taukaka (Taurua), Kitahi Te Taniwha, and Patene Puhata be authorised to check that miners were not working without licences. The Government was also to pay a sum of £1 for every business licence and £2 for every publican's licence issued in respect of ventures operating on Maori land. In May 1868, the Kapanga, Matawai, Ngaurokehu, and Tokatea mining blocks were all proclaimed afresh under the Gold Fields Act 1866.

8.4 THE EXTINGUISHMENT OF MAORI RIGHTS**8.4.1 Pre-1865 purchases**

We have discussed in chapter 3 early land acquisitions (old land claims) and pre-emption waiver purchases, in chapter 4, and, in section 8.1, the Crown's efforts to purchase the freehold of Coromandel land before 1862.

These Crown and early private purchases circumscribed the extent to which Coromandel Maori were in a position to benefit from the development of the goldfield after 1861–62. Coromandel Maori, Patukirikiri in particular, would have missed out on direct benefit from the mines that were established close to the coast, and on the profits to be made from the increased demand for township allotments. However, in July 1862 Coromandel Maori were still in possession of auriferous lands in each of the Kapanga, Matawai, and Ngaurokehu mining blocks and all of the Tokatea mining block. (They also exercised rights in the fore-shore, discussed below in chapter 22.)

8.4.2 The Kapanga mining block

In 1862, the principal lands of Patukirikiri in the Kapanga mining block comprised the Whakanekeneke and Te Karaka blocks. The Whakanekeneke (or 'Pita's') block took in some of the Driving Creek mining area adjoining the Tokatea block, and the 50-acre site of Ring's homestead. This site appears to have been purchased by the Crown from Pita Taurua for a nominal consideration in December 1864, in association with the purchase of Whakanekeneke block proper, 1147 acres, for £573 10s (10 shillings an acre).⁶⁹

Te Karaka was left as Patukirikiri's only goldfield land block. In 1871, it was awarded by the Native Land Court to Pita Taurua solely; his successor was Wiremu Pita Taurua. That

69. Document A10, pt 1, p 224

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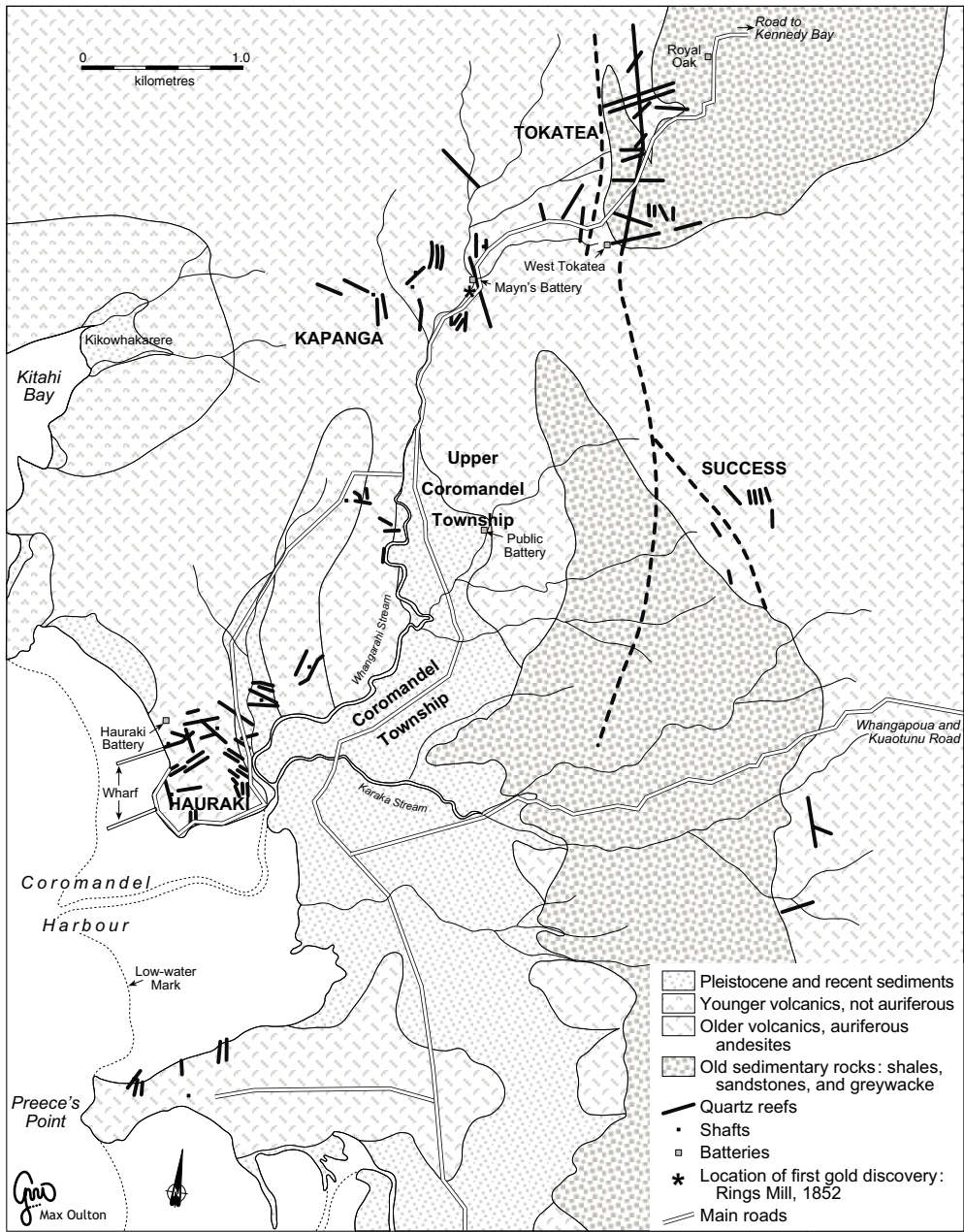


Figure 36: Coromandel gold mines, 1900. Source: JM McLaren, 1900.

same year, two private settlers, William Fraser and Alfred Cadman, purchased five acres and 4.5 acres respectively, and Cadman leased a further 583 acres for an initial payment of £100 and an annual rent of £1. In 1899, Wiremu Taurua was willing to sell the whole block of 770 acres. Cadman, now the Minister of Mines and the local member of Parliament, advised that the land was ‘an important mining block, and the native title over [it] should be extinguished as soon as possible, otherwise the price will be raised by Europeans as the

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mines become developed'. In September 1899, Wiremu Taurua agreed to sell the block for £2 10s per acre, a relatively high price by the standards of the time.⁷⁰

8.4.3 The Matawai and Ngaaurukehu mining blocks and Manaia**(1) Matawai and Ngaaurukehu**

The Matawai and Ngaaurukehu mining blocks were divided by Matawai Creek, a tributary of the Waiau River. On the north bank of the creek was an old land claims block of 536 acres awarded to W B Moore in 1857.⁷¹ Ngati Whanaunga and Ngati Paoa still retained collectively goldfield lands to the north and south of Moore's grant.

Most of the Matawai mining block, south of Matawai Creek and taking in the upper reaches of the Waiau River, was purchased from Ngati Whanaunga by the Crown by 1862, in the series of purchases making up the Awakanae block (see sec 8.1). The lands remaining – primarily in Ngati Whanaunga possession – included what Mackay then referred to as the Waiau and Matawai block, corresponding more or less with what the Native Land Court named as the Purunui block. In 1872, Mackay wrote that 'Gold has been found in the Matawai Stream, but not in any quantity in the block.'⁷² Purunui remained in Maori ownership until 1972 but it seems that little gold was ever found on the block.

The Ngaaurukehu mining block, primarily Ngati Paoa land, included the Waiau 1 and Motutere land blocks. Mackay reported in 1872 that 'several gold mining claims have been and are now successfully worked' within the limits of the block.⁷³ In 1882, when the 1098-acre Waiau 1 block was yielding gold revenues of £120 per annum, the Native Minister authorised purchase for £600, or close to 11 shillings per acre. But no purchase ensued. Gold revenues declined to between £20 and £30 per annum from 1886 to 1889. The Crown did not pursue the freehold until 1891 when Native Minister Cadman instructed that any individual interests available be purchased at the rate of 10 shillings per acre. In 1895, the block was subdivided, the Crown being awarded 706 acres. The grazier Martha Uncles acquired the remainder in 1897.⁷⁴

(2) Manaia

Ngati Maru agreed in late 1867 to lease their land at Manaia to the Crown for gold mining purposes but a boundary dispute between Ngati Maru and Te Tawera (also known as Ngati Pukenga) prevented Mackay from concluding an agreement for the time being. Mackay arranged a boundary in July 1868 and a cession agreement was signed by representatives of

70. Document A10, pt 1, p 165

71. Hamilton OLC plan 116, certificate of title 77/198 (doc A10, pt 1, p 183)

72. Mackay to Minister for Public Works, 24 January 1872, MA-MLP1885/18 (doc A10, pt 1, p 211)

73. Document A10, pt 1, p 211

74. Ibid, pp 211–220

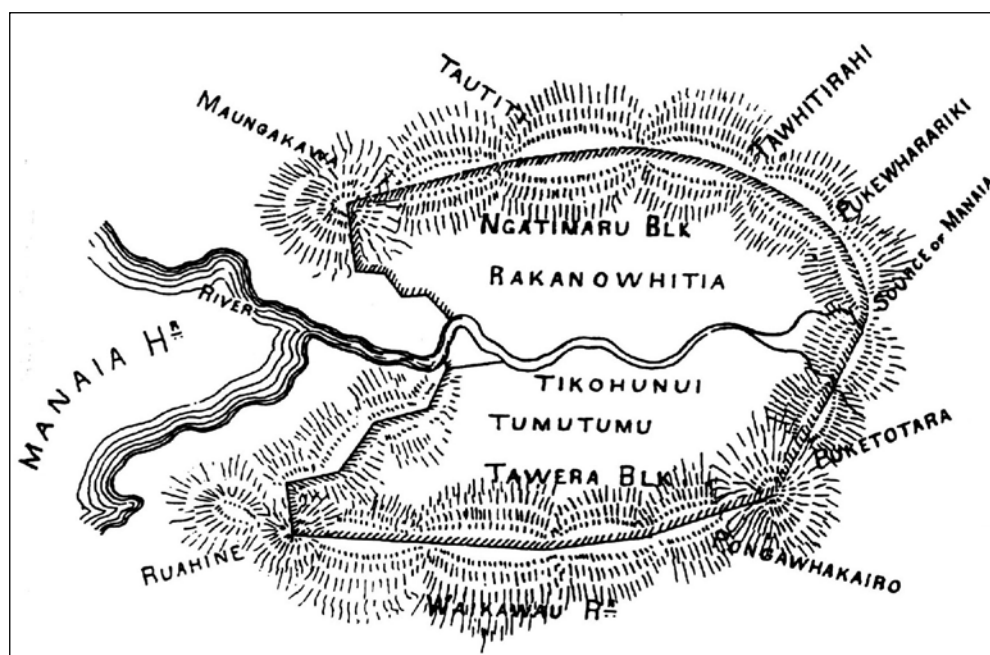


Figure 37: The Manaia goldfield, 15 October 1868. Source: Henry Hanson Turton, *Plans of Land Purchases in the North Island of New Zealand*, 2 vols (Wellington: Government Printer, 1877), vol 1, deed 345.

both tribes the following month. Both the Ngati Maru and the Te Tawera blocks were then proclaimed as part of the Coromandel goldfield.

Native agent Puckey reported in 1880 that there had not been any regular mining in the block although various prospecting parties had taken out miner's rights at various times. Gold mining had little impact until payable deposits were found in the upper reaches of the Manaia land block in late 1884 or early 1885.

To develop the field, native agent Wilkinson negotiated a deal with owners in the Manaia land block and adjacent uninvestigated customary land (also part of the mining block), in which the right-owners agreed to donate land for a road leading up the Manaia Valley to the goldfield and to pay one-fourth of the associated costs, including fencing off cultivations. A right-owner named Katerina (Kataraina) later raised objection to the road passing through her land, brought trespass charges against contractors working on it (which were not heard for technical reasons), and blocked it once it was completed. We have not seen evidence showing how this issue was resolved.⁷⁵

Wilkinson also reported that the owners were willing to have a township site surveyed once it was established that the goldfield would generate enough revenue to warrant the expense. The owners appear to have been keen for its development, but the Manaia goldfield was not a success. Although a number of claims were taken up little gold was produced.

⁷⁵ Ibid, pp161, 170

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8.4.4 The Tokatea mining block (Moehau 4)

Although the history of this block involves gold-revenues, prejudice to Maori owners derived in the main from the time when the block was purchased by the Crown. For this reason, discussion of it is included in chapter 17 on Crown purchasing of land in the nineteenth century (see sec 17.4.2(2)(d)).

8.5 THE DEVELOPMENT OF THE COROMANDEL GOLDFIELD

Mining in Coromandel from 1852 to 1854 had not been a success. The reopening of the field in 1861 and 1862 brought greater numbers of less easily discouraged miners. Coromandel Harbour was a centre for the timber industry as well as gold mining, and the developer Michael Wood made a considerable profit after demand increased for sites for housing and businesses, by buying up (European?) land in Kapanga and subdividing it into township lots.⁷⁶ Local Maori were unhappy to see such profits being made from land which they had previously sold for low prices (one reason why Ngati Maru later insisted that Shortland town be laid out under leasehold arrangements).

The need for capital and machinery to work the quartz deposits was quickly appreciated. One of the first crushing batteries was erected in 1862 by a company floated with an initial issue of 100 fully subscribed £100 shares. However, it was liquidated 15 months later.⁷⁷

The common approach to mining on a corporate basis was for miners to work in syndicates. The 1862 regulations for the Coromandel goldfield permitted up to eight contiguous claims to be held by associations. Salmon explained:

It became customary for groups of about eight miners to form an association with an equal number of Auckland investors, who supplied the capital. The miners worked at wages of 30s a week until the claim became productive, and thereafter continued to work for a share of the profits or provided labourers to work for them. After operation for a year or so it was a common practice to amalgamate with a neighbouring partnership to pool resources and acquire machinery.⁷⁸

The early Kapanga mine was established by such a process of association and amalgamation of small claims, although in 1871 it was acquired by the English Kapanga Mining Company.⁷⁹ The interests of this company, and of English capital generally, would later spur

76. In early 1865, Pita Taurua and other local chiefs passed some of their Coromandel land through the newly established Native Land Court (under the 1862 Act) and sold subdivisions (see ch 15).

77. Preece wrote in 1858 that 'I fear that not much land will be sold except the purchase money is increased; the Natives have by some means got to know the price Keven's land has sold for, which be very injurious here for some time': Preece to chief commissioner, 16 July 1858 (doc A8(a), doc 11, p 77; doc A8, p 95).

78. JHM Salmon, *A History of Goldmining in New Zealand* (Wellington: Government Printer, 1963), p 181.

79. T W Rhodes, *The History and Resources of the Auckland Goldfields* (Coromandel: County News Office, 1899), p 7.

the Crown to extinguish Maori interests in the Tokatea block, as described below in section 17.4.2(2)(d).

By 1865, the displacement of individual miners by companies was so advanced that Warden Lawlor wrote to the provincial superintendent appealing for a revision of the mining regulations because ‘the Rules now in force are applicable merely to individual claimants whereas there is not a single claim now on the diggings but what is worked by Companies.’⁸⁰

Despite the formation of companies with capital the field was still not a great success. By the end of 1868 three major companies had closed down or suspended operations, some of them shipping their machinery to the expanding Thames goldfield. However, in that same year the ‘Tribute’ leader was discovered in the Tokatea Ranges. The Tokatea mine would become one of the largest producing mines of the Coromandel field. Rich lodes were also struck on the ‘Green Harp’ reef, and on the ‘Union Beach’ claim, in 1871.

Between 1861 and 1953, some 50,000 ounces of gold was extracted from the ‘Driving Creek’ area, shared between the Kapanga block and the Tokatea block. About 80,000 ounces were extracted from the Tokatea peaks area, shared between the Tokatea and Harataunga mining blocks. About 115,000 ounces was extracted from mines near the harbour coast, what proportion from Maori land we cannot determine, since some blocks have not been researched. Only about 7000 ounces were extracted from the Tiki–Matawai area.

8.6 TREATY CLAIMS ARISING

The issues arising from the Crown’s purchasing of auriferous land on the Coromandel Peninsula while the Coromandel goldfields were closed to miners were examined in chapter 4. Most gold-mining issues arise in relation to the period in which the Coromandel goldfields were reopened and the Tokatea mining block opened for the first time; that is, 1861 to 1862. Claimants have questioned the tactics used by the Crown to obtain the November 1861 prospecting agreement and, more especially, the June 1862 Tokatea agreement. The claimants have also expressed concerns about the Crown’s administration of the ‘early agreements’, concentrating on the July 1862 mining agreement, which supplemented the 1861 prospecting agreement.

8.6.1 Claimant submissions

(1) *The 1861 agreement*

Counsel for Wai 100, drawing on the evidence of Dr Anderson, characterise the instructions

80. Lawlor to superintendent, Auckland, 16 February 1865, no 131, BACL A208/688, Archives NZ (Ak) (doc 06, p78)

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given to Donald McLean by Premier Fox as ‘revealing’, and interpret them as containing a threat designed to induce the reopening of the Coromandel goldfields:

The instructions noted that although the Crown would not force Hauraki to open the field, Hauraki were to be clearly advised that it was in their interests to consent to opening up of the goldfields, as if ‘a large number of persons’ were:

‘ . . . attracted to the district, it would be indispensable that police and other regulations should be established for the maintenance of order, and for the prevention of any collision between the races; that their own interests would best be served [by] agreeing on their part to any measures which should be found necessary for these objects being taken by the Government . . . ’

The instructions give no hint that the Crown had indeed already assumed such an obligation to maintain order and to prevent ‘collision between the races’ in committing itself to the Treaty of Waitangi. Instead, as Dr Anderson notes: ‘*The Hauraki people were threatened with the consequences of disorder if they did not let the Government control the situation . . .*’ [Emphasis in original.]⁸¹

With reference to Fox’s advice to the Government that the period, ‘*for the present*’, was an equitable basis for payment, counsel for Wai 100 submitted:

Likewise, although the Crown accepted that some payment should be made for the opening up of the gold fields, the instructions to McLean show clearly that the basis for this had not been thought out or documented, but could be changed abruptly in the future. In the event the first agreement negotiated by McLean and signed at Waiau on 2 November 1861, allowed access but left not only the details of payment, but also the organization to administer the gold fields and protect Maori to be settled later.⁸²

(2) *The administration of the early agreements*

The ‘early agreements’ referred to are the 1861 prospecting agreement, and the July 1862 agreement, which supplemented the initial agreement in regard to the Coromandel goldfields (the Kapanga, Ngaurukehu, and Matawai mining blocks). The agreement negotiated by James Mackay in 1864, which replaced the July 1862 agreement, ends the period under consideration here. Some of the issues raised also apply to the administration of the Tokatea mining block but to a much lesser extent.

Counsel for Wai 100 in closing made the general or umbrella claim that the Crown was responsible for ‘chaos’ or ‘difficulties’ in the administration of the goldfields:

81. Document Y1, p 33; doc A8, p 99; see sec 10.2.1

82. Document Y1, p 34; doc A8, pp 99–100

It is submitted that the chaos, which Dr Anderson describes, was largely confirmed by Dr Battersby, and was entirely the responsibility of the Crown. The Crown had actively striven to open up the fields because of the perceived benefits they offered. To achieve this, certain promises, albeit short on detail, were made to Hauraki, yet once the fields were open, the Crown made no provision for administering the gold fields, and more particularly, ensuring that the agreements with Hauraki were complied with.

The difficulties that resulted were entirely foreseeable.⁸³

In Dr Anderson's account, many of the 'difficulties' were occasioned by a lack of detail in the agreements, conflicts of interpretation about when payment for the working of the field should be dated from, and about uses of the resources of the field by miners, as opposed to Maori rights. Dr Anderson noted that:

- ▶ no mechanism was set up for the distribution of revenues amongst the various right-owners in the goldfields;
- ▶ the date from which the July 1862 agreement was to come into effect was not stipulated, resulting in confusion in the calculation of revenues – some right-owners claiming payment from the opening of the field in 1861;
- ▶ 'There was no real agreement between Maori and the Government about the terms of the opening, the relationship that had been established between them by the fact of cession, or, of the principles under which the field was to operate';
- ▶ Maori found themselves in dispute with Turton over the Government's right to use land for public purposes – to lay out roads, construct a bridge over the Kapanga Stream, and to reserve the landing-place for public use; and
- ▶ Turton 'continually refused to countenance Maori efforts to participate in the profits being generated by mining developments'; he expressed disapproval of Maori seeking to charge miners ground rent and for timber other than kauri.⁸⁴

Counsel for Wai 100 submits that, 'although the Crown denies "*forced appropriation of timber, roads and bridges*"', Crown historian Dr Battersby's own evidence details disputes over these matters.⁸⁵

83. Document Y1, pp 36–37. The reference to 'certain promises . . . made to Hauraki' is probably to promises that McLean *might have made* at Waiau when negotiating the 1861 agreement. See, for example, document B5, pp 8–9: 'the assurances given by McLean to Hauraki that they would be "treated with a just consideration for their prejudices and customs, and with an equitable recognition of their rights as proprietors of the soil"' (emphasis added). Dr Anderson also describes McLean as 'holding out the prospect of protection and advantage', citing the same remark: doc A8, p 100; doc B5, p 17. However, the remark is drawn from McLean's report to the Minister for Native Affairs on the 1861 agreement. It is speculative to assume that McLean made actual *promises* along the same lines at the Waiau meeting.

84. Document A8, pp 107–108; see also doc B2, p 17

85. Document O6, pp 64–66 (doc Y1, p 37). The claim of 'forced appropriation', denied by Crown counsel, refers to the claim of 'forced taking of residence sites for miners, all timber (except kauri), and the buildings of roads and bridges without negotiation, agreement or compensation to Hauraki': doc A5, p 27.

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The outcome of the Crown's 'mal-administration' of the goldfields, counsel submitted, 'was non-payment to Hauraki':

By August 1864 when Mackay was instructed to take a tour, rents were in arrears at Tokatea while no payments at all had been made to Hauraki right-holders in respect of the Kapanga, Ngaurukehu and Matawai blocks since the field was reopened in late 1861. Following negotiations, Mackay arranged for payments to be made to the Maori right-holders and the Crown then, and now, considers this to be the end of the matter. In particular, the Crown points to the fact that Mackay ended up paying more in miners' rights to Maori than the Crown had in fact received, but it is submitted that such considerations are entirely irrelevant. The fact was that the evidence of both Dr Anderson and Dr Battersby shows that Mackay's calculations were entirely arbitrary and the resulting payments begrudgingly paid to the right-holders, with Mackay insisting that he had obtained a good deal for the Crown . . .

In Counsel's submission, the belated payments made by Mackay . . . did not entirely remove this breach of the Crown's duty of active protection towards Hauraki.⁸⁶

(3) *The 1864 agreement*

The Wai 100 claimants claim that the Crown required Maori to police the holding of miner's rights when this should properly have been the responsibility of the Crown. Apart from this, there have been few if any legal submissions concerning the 1864 agreement.

Dr Anderson stated that, whereas Mackay represented the fresh arrangements negotiated by him as fully satisfying Maori rights:

the adjustment of terms may be seen as, rather, as indicating the general behaviour of Government with reference to mining agreements with Maori – a willingness to tamper with former agreements, which supposedly had been binding on its honour, but which, in fact, were put aside and renegotiated at its convenience.⁸⁷

8.6.2 Crown submissions and claimant responses

(1) *The 1861 agreement*

Crown historian Dr Battersby has submitted that 'the language used in Fox's instructions was moderate and conveyed no threat'.⁸⁸ Crown counsel did not address the subject of the negotiation of the 1861 agreement in their closing submissions but stated in their amended

86. Document A8, pp 136–137, 147–152; doc 06, pp 114–122; doc Y1, pp 37–38

87. Document A8, p 137

88. Fox to chief land purchase commissioner, 14 October 1861, *New Zealand Gazette*, 1861, no 49, pp 300–301 (doc 06, p 44 fn 155)

statement of response that ‘The 1861 Agreement was by the mutual consent of the parties and was not imposed by one on the other.’⁸⁹

(2) *The administration of the early agreements*

Crown counsel rejected the contention that the administration of the goldfields was chaotic, that the ‘chaos’ was ‘entirely the responsibility of the Crown’, and the ‘difficulties entirely foreseeable.’ They also rejected the suggestion that Dr Anderson’s description of the situation was ‘largely confirmed by Dr Battersby’.⁹⁰

Crown counsel quoted Dr Battersby’s evidence that:

From 1862 to 1868 the administration of the Coromandel goldfield ran fairly smoothly. The only major failure in administration was due to the rudimentary and inexperienced bureaucracy and the impact of the Waikato war on the mining population . . .

Dr Anderson’s criticisms, which include the view that Maori were denied participation in the profits of the gold field, that Maori rights were subordinated to those of the diggers, and that Maori landholders were under-compensated by Mackay’s settlement, will not bear a close scrutiny of the evidence.⁹¹

Dr Battersby’s view was that it is not surprising that there were administrative shortfalls given: ‘the general shortage of resources for the administration of the field . . . , the interruption of the war and the nature of [the] gold deposits – which caused many inexperienced or alluvial miners to prospect for very short times and then leave.’⁹²

Crown counsel also submitted that:

the claimant’s criticism of chaos is much over-stated. Such criticism erroneously presupposes a pervasive and efficient 19th century Crown bureaucracy with onerous Crown obligations in terms of Government planning and direction.

. . . That there should have been disputes [over roads, timber, and ground rents] is hardly surprising. The notion implicit in the Wai 100 claimants’ submissions that Maori were simply victims in these processes does not bear scrutiny. As Dr Battersby notes, Maori were, in a number of instances, in a strong bargaining position.⁹³

Counsel for Wai 100 replied that the Crown had restricted its criticism to the issue of payment whereas the claimant closing submissions looked at the administration as a whole:

89. Paper 2.550, p 12

90. Document AA1, p 17

91. Document 06, pp 81–82

92. Ibid, p 75

93. Document AA1, p 18; doc Y1, p 37. It is submitted that Dr Battersby’s evidence details a number of disputes over such matters: doc 06, p 66.

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The Crown criticism overlooks the fact that the claimants, relying on the evidence of Dr Anderson, were critical of the lack of certainty in the terms of the cession agreements which made disputes about a wide range of matters, including what could or could not be done on the ceded land, inevitable. In this regard Counsel reiterates that these wider disputes were indeed confirmed by Dr Battersby.⁹⁴

Counsel for Wai 100 also disputed that they had claimed that Maori were ‘*simply victims*’. What their submissions focussed on, they asserted, was that while ‘there were matters in dispute ultimately such disputes were resolved by the Crown appointed officials.’⁹⁵

(3) Tokatea

Dr Anderson drew attention to the seriousness of the issues raised by the opening of the Tokatea mining block (also known as the Koputauaki block and as Moehau 4) by making a direct comparison with the Waitara purchase: ‘The same issue which had triggered war at Taranaki, was played out at Tokatea in 1862, with Grey successfully challenging the right of a senior rangatira, Te Hira, to veto the alienation of that land even though he was an acknowledged right-holder.’⁹⁶

The Wai 100 claim regarding Tokatea is that the agreement of 23 June 1862:

breached the principles of the Treaty of Waitangi in that, following the refusal of Paora Te Putu, Rangatira of Te Matewaru to cede Tokatea for gold mining, the Crown instead sought the agreement of the other major right-holder in the area, Riria (Lydia) Karepe. Sir George Grey arranged for a lease directly with Karepe and ignored the legitimate claims of Te Hira who had taken on the mana of Te Putu in respect of the block.⁹⁷

Counsel for Wai 100 drew on the evidence of Dr Anderson and Crown historian Dr Battersby in support of their submission that the ‘sequence of events shows . . . that the claim is well founded.’⁹⁸ The main points made by counsel were that:

- ▶ ‘The Crown was indeed well aware of Te Hira’s opposition and that he had gone so far as to place “*the District under the Maori King*”.’⁹⁹
- ▶ ‘Grey was determined that neither Te Hira nor the Maori King should be allowed to prevent access to the block and pushed ahead with negotiations with Riria.’¹⁰⁰
- ▶ ‘[I]t is apparent . . . that Te Hira was not present when Lydia [Riria] and “all the claimants” had signed the agreement with Grey.’¹⁰¹

94. Document AA14, pp 17–18

95. Ibid, p18

96. Document B2, p 18

97. Document Y1, p 34

98. Ibid

99. Document A8, p105 (doc Y1, p 34)

100. Ibid (p 35)

101. *New Zealander*, 25 June 1862 (doc Y1, p 35; doc O6, p 78)

- ‘The exclusion of Te Hira is further supported by Turton’s report that Te Hira was subsequently very “wrathful with Lydia.”’¹⁰²

Counsel for Wai 100 continued:

Although Te Hira subsequently accepted payment of £600 from Riria and withdrew further opposition, at that point it is difficult to see what else he could have done. The deal had been done and from the Crown’s perspective, the lands were open for gold mining. As Battersby notes, there was an immediate influx of prospectors, with over 500 estimated to have arrived by 9 July 1862.

Quite simply, Te Hira was faced with a fait accompli. Grey deliberately ignored his claims and chose to deal directly with Riria knowing that once the lands were opened, Te Hira would have no choice but to acquiesce. Taken together, it is submitted that the Crown’s conduct in relation to the opening of Tokatea amounted to a clear breach of the Treaty. If it was not an example of sharp practice, bad faith and divide and rule tactics, it is difficult to imagine what would in fact constitute such a breach.¹⁰³

Marutuahu historical witnesses described the opening of Tokatea as: ‘a stark example of how the Crown was prepared to divide Maori in order to achieve its aims.’¹⁰⁴ Counsel for Marutuahu asserted that Crown counsel ‘underplays the conflict and tensions between Riria, Te Hira and others regarding the opening of the block’ and ‘fails to take into account the 1862 meeting of over 1000 people at Kerepehi at which many Marutuahu expressed their opposition to opening the land to mining.’¹⁰⁵

The Crown does not dispute that officials (including Grey) were well aware of Te Hira’s opposition to the opening of Tokatea to gold-mining, pushed ahead with negotiations with Riria, ‘and ultimately excluded’ Te Hira. However, the Crown submits ‘that this is far from [being] a clear case of sharp practice’ or improper, divide-and-rule tactics. Crown counsel suggests that Hauraki right-owners were ‘clearly divided’ on the issue of whether to open their lands to gold-mining, and that Riria and Te Hira had ‘different agendas’:

Had Te Hira not unilaterally handed over the land to the King, Riria may not had been as keen to deal with Grey. Te Hira and Riria subsequently came to their own arrangement – and this may had suited Te Hira who, by then, had reasserted his rights . . . in 1863, with the goldfield in decline, Te Hira and Taraia both visited Koputauaki to plead with the gold diggers to remain there.

It is far from clear that the Crown, which clearly viewed the opening of the goldfield as of mutual benefit to Crown and Maori, should have refrained from pushing ahead because of the opposition of Te Hira.

102. Turton, undated note, 1 July 1862, BACL A208/688, Archives NZ (Ak) (doc 06, p 59; doc Y1, p 35)

103. Document Y1, pp 35–36

104. Document V1, pp 195–196

105. Document Z6, p 22

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Crown counsel rejects the suggestion of the Marutuahu claimants that the Crown ‘failed to take into account’ the Kerepehi meeting at which many Marutuahu expressed their opposition to opening the land to mining. There was always a range of views on gold-mining amongst Hauraki Maori, and:

The legislation . . . consistently recognised the importance of Maori consent. Furthermore, it is unreal to suggest that the Crown should have required unanimous or near unanimous consent of Maori owners before concluding goldmining agreements, this would, in effect, have amounted to a total prohibition on mining.

As to the terms of the agreement itself, ‘There was no departure in principle from the fundamental terms of the 1852 Patapata agreement’.

Finally, Crown counsel observes, the fact that the claimants refer to an immediate influx of prospectors, with another 500 estimated to have arrived by July 1862, indicates that ‘A breakdown in law and order was always a potential issue for the Crown – and a matter which it could not ignore in its negotiations with Maori.’¹⁰⁶

In closing responses to these submissions, counsel for the Marutuahu claimants comments that ‘the Crown fails to recognise that Riria had also resisted Government attempts to open the land . . . and that her consent to mining on the block was not obtained until Governor Grey personally intervened in the case’. Moreover, while the Government may have been concerned about potential disorder, given the pressure from miners to open the block, ‘it was overly influenced by the miners, and the strongly expressed Maori opposition to the opening of the block should have been given greater consideration under the Treaty.’¹⁰⁷ Counsel for Wai 100 observes that Te Hira’s eventual agreement with Riria is irrelevant. It is beyond dispute that ‘the Crown chose to deal with Riria behind Te Hira’s back and without his knowledge.’¹⁰⁸

8.6.3 Tribunal comment**(1) The 1861 agreement**

McLean was not instructed, as counsel for Wai 100 have suggested, to advise Maori that it ‘was in their interests to consent to opening up of the goldfields’ because disorder might arise if they did not. Rather, McLean was instructed to advise Maori against opening up their lands to prospectors without also allowing the Government to have a hand in ‘controlling the situation’ because disorder might then arise. We recall Fox’s words:

¹⁰⁶. Document AA1, pp 16–17

¹⁰⁷. Document AA13, p 48

¹⁰⁸. Document AA14, p 17

You should point out, that *in the event of prospecting been [sic] really successful*, and a large number of persons being *consequently* attracted to the district, it would be indispensable that police and other regulations be established for the maintenance of order, and for the prevention of any collision between the races; that their own interests would therefore be best served agreeing on their part to any measures which should be found necessary for these objects being taken by the government; and that as a considerable expense might ultimately be found necessary, some source of revenue must accrue out of which the same could be defrayed. [Emphasis added.]

The most straightforward interpretation of this instruction is not that it warns of the disorder or conflict that might arise if Maori did not consent to open their lands to prospectors, but rather that problems might arise *after* an agreement permitting prospecting was reached, if the Government was not given an *attendant* supervisory role.

Thus, Fox's instructions do not support the construction placed on them by Counsel for Wai 100, 'that, although the Crown would not force Hauraki to open the field, Hauraki were to be clearly advised that it was in their interests to consent to opening up of the gold-fields'. Counsel appear to have overlooked that the 'disorderly' scenario that Maori were to be warned of is a scenario that presupposes their having *already* consented to opening their lands, to prospecting at least. It is hard to see how the instructions can be construed as including a 'threat' designed to put pressure on Maori to agree to open their lands.

It is clear from the instructions that the Government regarded any prospecting agreement that did not involve Maori consent to a Government-administered licence system, as being less than their preferred outcome. This was not an unreasonable attitude in our view. Counsel for Wai 100 have pointed out that the Government was under a standing obligation to maintain law and order and prevent 'collision between the races'.¹⁰⁹ It is consistent with that obligation that, in respect of any Maori land where gold discoveries were likely to attract large numbers of prospectors and miners, the Government's ability to maintain order would have been hampered if it did not have jurisdiction to police the field and licence the miners.

In her evidence, Dr Anderson has also put a pejorative gloss on Fox's instructions: 'The Government now explicitly linked the exercise of its kawanatanga powers to maintain order among the European population, as contingent upon the Hauraki agreement to surrender their authority over the field.'¹¹⁰ But, if the Government was to be able to maintain order on a goldfield, some surrender of authority was necessary. We do not see that it was unreasonable for Government officials to draw attention to that.

109. Document Y1, p 33

110. Document A8, p 99

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As to the payment options being considered as options ‘for the present’, again we do not see how it can be concluded from this phrase that at this time (1861–64) the Government felt it could unilaterally change the basis for payment in any agreement reached. The intention behind the phrase is unclear, but it was probably meant that, just as the contemplated prospecting arrangements would be in some way provisional, so too would be the basis for payment. Any prospecting agreement reached would itself be an agreement ‘for the present’. If any payable deposits were found, then payment might be made on a different basis, such as miner’s right fees.

We note that Fox’s instructions necessarily had to be somewhat tentative, given the lack of certainty of gold strikes. He himself wrote to McLean that it was not possible to give clear instructions as to what arrangements he should make. It seems likely that Fox hoped for an arrangement that would be elastic enough for prospecting to shade over into actual working of the field if that should happen, preferably under Government control.

We also note that, upon his arrival at Coromandel, McLean discovered that Patukirikiri, Ngati Paoa, and Ngati Whanaunga representatives were not disinclined to allow their lands to be prospected, so much so that, though he had been authorised to offer payment for this permission, he did not find it necessary to do so. Given this willingness, it does not seem likely that Maori really were pressured into an agreement by ‘threats’ conveyed by McLean.

Further to this, we note that, before 1861, McLean and others had tended to oppose the development of gold deposits on Maori land, fearing that if this were allowed to happen then the Crown’s efforts to purchase those lands would be hampered. We feel that the Crown’s shift in priorities, that is, its deciding that the reopening of the Coromandel goldfields could not wait until the land was in the hands of the Crown, was positive for Maori.

(2) *The administration of the early agreements*

There is no question that there were inadequacies in the Crown’s arrangements with Maori in 1861–62. The July agreement in particular was made belatedly *after* the Coromandel field had been proclaimed and regulations for its management drawn up. Grey’s proclamation of the field and the regulations to manage it, and his accompanying proclamation that the Native Land Purchase Ordinance would be used to bring Maori land (as well as Crown land) within the ambit of the Gold Fields Acts, still left Maori owners the option of *not* consenting to a mining agreement, but by then miners were flocking into the district.

The July agreement was vague on many points, and disputes arose over some of the gaps and ambiguities. As the Wai 100 claimants submit, many of the issues that required clarification were foreseeable, but the Crown failed to address them.

In fairness to the Crown, it should be remembered that the negotiation of mining rights agreements with an indigenous population was something new. In North America and Australia, British colonisers had little regard to the customary rights of indigenous peoples, not only with respect to gold or other minerals as such but also with respect to the right of

access to mine them. In New Zealand, the position arrived at at Patapata in 1852 was that Maori had a right to consent to or withhold access to mining on their land. That gave Maori considerable authority in negotiations. We note that the Maori reluctance to sell, and the pressure from miners and Auckland province to reopen the Coromandel field, pushed the general government in 1861 towards a hasty negotiation of a prospecting agreement and then mining agreements with Hauraki Maori. Events then unfolded quickly, and the shaping of the agreements was rather in the nature of 'making policy on the run'. The general government was expected, by Maori as well as by settlers, to manage the situation that had developed, and had a kawanatanga right and responsibility to do so. But they were doing so with few precedents to guide them.

Clearly, there were misunderstandings. Crown officials, already broadly familiar with the way the Victorian and South Island goldfields had been managed, would have understood a mining right to carry with it a right of residence to work claims and to cut timber, as implied in the sections on miner's rights in the Gold Fields Act and associated regulations. They would probably have assumed that Maori understood that their consent to open land to mining carried with it consent for the miners to reside on the claim or cut timber. Crown officials also assumed that Maori would acknowledge the right of government to lay out streets or build bridges in the developing settlements. For their part, however, Maori considered that, because they still owned the land, all or most of these matters remained within their realm of authority and were subject to their consent and perhaps to further payments, such as levying charges for miner's tent sites (although we do not know whether such fees were actually paid). Disputes between the Coromandel rangatira and Crown officials were bound to arise over these differences, given the gulf of understanding. We note that the Crown was slow to make the needed adjustments.

The Crown is particularly open to criticism for its failure in 1862 to fix a date from which Coromandel Maori were to be paid mining revenues. Maori leaders expected to be paid for any actual mining since the 1861 prospecting agreement, but Crown officials assumed that this was a matter for further discussion if and when prospecting gave way to significant extraction of gold. In fairness to the Crown we note that the situation in 1861 was fluid and it remained far from clear where, or even whether, gold really would be found in payable quantities. It was thus understandable for McLean to leave the date open at that stage. By 1862, however, it was evident that considerable numbers of miners would be entering the field, and that mining rather than prospecting would ensue. It should have been apparent that discussions were needed on the date from which payments would commence and the manner of payment. Assurances in 1862 that a head count would be taken pending further discussion of payment was a very inadequate response on the part of the Crown. The failure in 1862 to fix a date from which payments should commence was certainly avoidable.

Turton's death and the onset of war in 1863 did not help the situation. By the time the Government had instructed Mackay to investigate, in October 1864, the rental for Tokatea

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had fallen into arrears and the owners of the blocks embraced by the July 1862 agreement had to put up with miners sinking shafts on their land and cutting their timber for nearly two years without payment. This is poor administration by any standards. Then it emerged from Mackay's October 1864 inquiries that the Crown officials had been unduly optimistic about their ability to make an accurate tally of miners on the ground. There was much coming and going at Coromandel, and whether men were 'prospecting' or 'mining' must have been difficult to tell, especially as many only stayed for short periods and left discouraged by the difficulties of quartz mining. Perhaps because of such difficulties, Mackay found that little effort had been made to keep an accurate tally. Crown counsel's submission that officials were few on the ground and inexperienced is relevant in this context. In the end, Mackay was able to negotiate a revision of the 1862 agreement: payments for mining up to that time were agreed and the respective rights of miners and Maori owners were clarified. These were realistic responses to the problems on the ground.¹¹¹ The 1864 review, though belated, shows that the Crown was willing to learn from its mistakes and to work with Maori leaders to rectify them.

Maori landowners at Coromandel were left confused about their rights vis-à-vis miners, and owed money, for about two years. Yet, in the *totality* of the unfolding situation it is difficult to see that they were seriously prejudiced by the Crown's actions in 1861–64 in respect of mining at Coromandel. Of overwhelming importance is the fact that the Crown had turned away from its preference for buying the freehold ahead of mining and entered into negotiations for mining agreements. Whatever the administrative shortcomings in the early stages of the agreements, Maori were able to secure mining revenue, either by an annual ground rent (as in Tokatea) or through miner's rights and other fees, and to engage in commerce with the miners and settlers, all the while holding the freehold of the land. Relatively few miners came to the Coromandel field, but Maori perceived their presence to be more beneficial than disruptive, to the extent that Te Hira joined Riria in 1863 in urging them not to leave.

(3) *Tokatea*

The most important Treaty issue involved in relation to Tokatea is whether the Crown employed sharp practice or improper 'divide and rule' tactics to open the block to mining. Dr Anderson's suggestion that 'the same issue' which had produced war in Taranaki 'was played out' at Tokatea in 1862 is a most serious one, given the uneasy truce that lay over Taranaki in 1862, the Crown's relationship with the Kingitanga, and that fact that Te Hira and other Marutuahu leaders had invoked the support of that movement for their stand against opening Tokatea.

111. Mackay recommended that Pita Taurua, Taukaka, Kitahi Te Taniwha, and Patene Puhata be authorised to inspect miner's rights under clause 2 of the Gold Fields Regulations. It was a practice that he brought from the gold-field on Maori land at Taitapu, Nelson province: Mackay to Native Minister, 19 October 1864 (doc 06, p75).

We note, however, that the two cases are not strictly comparable, in that what was at issue in Tokatea was not a purchase but a mining agreement. The Government did try to purchase Tokatea; Fox offered £10,000 for the block, but all the right-owners, including Riria, firmly declined to sell. There was no division amongst them on the question of sale which the Crown could have exploited even it had wanted to.

There was division, however, over the granting of a mining cession. The situation was confused in that it had not come about from unilateral action by the Crown but from the 1861 agreement with some Maori to open areas of the Coromandel to prospecting. The Crown is correct that Maori were not united on the question of mining. With the prospecting agreement in place, the Government had actively encouraged increased numbers of miners on the field, but had respected the arrangement of 1861 that Tokatea should be reserved for Maori, and policed its boundary. But, as pressure from the miners on adjacent land built up, officials sought to negotiate the purchase of Tokatea or a mining agreement over it.

For their part, the Maori right-owners of Tokatea had also patrolled the block's boundaries and complained to officials when miners trespassed. Turton's report of 5 April 1862 indicates that by that date, Riria had decided that the situation was getting out of hand and was willing to negotiate with the Crown for a controlled opening of the block. This was a crucial shift of position. The claimants are not wholly correct to say that Riria only changed her mind as a result of Grey's intervention or at the last minute. She and others were meeting with Turton and other officials in April and May, resumed negotiation following Grey's 4 June visit, and eventually concluded the agreement with Grey on 23 June.

During this time, Te Hira maintained his opposition. We are handicapped in our interpretation by lack of information about the precise relationship between Riria and Te Hira, and their respective standings within Ngati Tamatera. Riria was Paora Te Putu's niece, and a substantial right-owner in Tokatea. (In 1882, the land court awarded her and her group three-fifths of the interests in it.) Te Hira was a nephew of Paora Te Putu and an inheritor of his authority amongst his people. It is likely that he too was entitled to claim personal interests in the land. His status among Ngati Tamatera was high, and from 1867 he was the acknowledged leader of resistance to the opening of Ohinemuri. Yet at that time he had joined in the opening of other Ngati Tamatera land on the eastern shore of the firth, apparently following the lead of Te Moananui (see chs 9, 10). Like many Maori leaders before and since, he was in favour of a controlled opening of some territory to development while striving to keep other areas firmly under Maori control and closed to settlement. In 1862, however, he tried hard to uphold Paora Te Putu's wishes in respect of Tokatea.

It is possible that there was rivalry between Riria and Te Hira, but Crown counsel's suggestion – that Riria might not have been keen to deal with the Crown if Te Hira had not tried to put Tokatea under the mana of King Matutaera (Tawhiao) – is speculative. It is also speculative to suggest that it somehow 'suited' Te Hira to let Riria front the negotiations.

Te Hira had been left out of Grey's meeting of 4 June and, seemingly, from Turton's

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subsequent negotiation with Riria. Despite his various protests, he eventually accepted £600 of the £1000 rent advances that the Government had paid Riria. His other option, hypothetically, was to return the money to Turton and repudiate Riria's action. Why he did not do so is obscure, but he may well have considered himself confronted with a *fait accompli*. Yet Wiremu Kingi did not similarly accept Teira's 1860 deal with the Crown. Instead, he stood upon his superior mana among Te Ati Awa to repudiate the deal. The apparent acceptance of a *fait accompli* over Tokatea suggests some respect by Te Hira for Riria's standing in the community or her authority over this particular land. Her initiative in negotiations certainly implies that she had a fairly wide mandate from the community. She even had the cloak which Te Hira had offered to Waikato at the Kerepehi meeting of May 1862 (see sec 5.3.1), and which she gave to Grey.

If the majority of the right-owning community was supportive of Riria rather than Te Hira at this stage, this too was a marked difference from Waitara, because Wiremu Kingi was supported in his resistance by most Te Ati Awa and by many Maori nationally. Te Hira, in June 1862, apparently had Kingitanga support for challenging the agreement (suggested by the presence of Waikato men with him on 28 June), but there is no indication of widespread anger among Hauraki about it, notwithstanding the Kerepehi meeting a month earlier. A year later Te Hira himself was happy for mining to continue on Tokatea.

Nevertheless, in our view even if Te Hira was in a minority position regarding Tokatea in 1862, the Crown's behaviour towards him was ruthless and cavalier, particularly in proclaiming the agreement (on the very day of his arrival from Thames) rather than giving him a chance of further discussion with Riria. In mitigation of the Crown's conduct, however, we note that mining was already under way in the surrounding land and the situation would have remained precarious until an agreement had been negotiated. Moreover, because of wider political tensions, any delay in proclaiming the field following the agreement with Riria might have increased rather than diminished the likelihood of Tokatea becoming another Waitara. It is significant that, at the time, Grey's decisive action was regarded, even by his critics, as having relieved a difficulty, not created one, and Ngati Tamatera did not immediately protest.

We share the Crown's scepticism about how much the Kerepehi meeting of May 1862 (in which the mana over the land was passed to the King) should have been allowed to govern the situation regarding Tokatea, given that Riria and other principal right-owners in the block apparently did not wish to invoke the mana of King Matutaera. But we are less willing to accept the Crown's proposition that it is 'unreal' to require the unanimous or near-unanimous consent of the right-owners in a given area before an agreement can be reached.

Article 2 of the Treaty does not oblige the Crown to uphold the rangatiratanga of *supra*-tribal authorities (such as the Kingitanga) but it clearly recognises the rangatiratanga of chiefs and tribes in respect of their lands and other valued possessions. In negotiations

regarding the Thames goldfield a few years later James Mackay did not declare land open to mining if a significant hapu leader had not given his consent, even when other leaders had consented (see ch 9). Moreover, in respect of Ohinemuri, where Te Hira was his formidable opponent, Mackay himself drew an analogy with Waitara (see sec 10.1.3).

Tokatea in 1862 was not closely analogous with Waitara. Nevertheless we accept the claimants' basic proposition that in by-passing Te Hira, a significant hapu leader, and making an agreement with Riria and her group, the Crown had breached the standards of informed tribal consent that observance of Treaty principles would normally require.

8.6.4 Purchase of the land

The real disadvantage to Coromandel hapu arose from the fact that so much of the land around the harbour had been sold before mining began, and more would be purchased by the Crown. The Crown's purchase of the freehold of land already subject to mining agreements (with the consequent loss of mining revenues by the former Maori owners) was to persist throughout the later nineteenth and early twentieth centuries, and we shall consider closely the Crown's role in this, especially in Ohinemuri and Te Aroha (see chs 10, 11). Here, we note that the Crown brought great pressure to bear to purchase Tokatea (Moehau 4) in the 1880s, against the clear preference of Riria Karepe and her group to retain the freehold (see ch 17). The Crown's first strategy – which later chapters will make familiar – was that of purchasing the undivided individual interests of owners after the land went through the court in 1882. In 1885, with Riria and her group (the majority shareholders) resisting overtures to sell, the Crown gave one year's notice of cancelling the £500 annual rental for the mining rights block agreed in 1862. For some time, this had seemed to Crown officials be an excessively high rental, relative to the gold being recovered. But the Crown did not invite the owners to engage in negotiations for an equitable review of miner's rights fees or company rentals for the mining that was still going on. Instead, it acted unilaterally, terminating the £500 annual rental. Moreover, it neglected to revise the 1862 proclamation to exclude from the goldfield the great bulk of Tokatea which was not being mined. Accumulating mining revenues were not paid, partly because no basis of their collection and disbursement had been agreed. The upshot was that by the time the court sat in late 1887, Riria and her group were in an adverse situation. In these circumstances, they accepted the Crown's offer for the freehold in 1888.

By the pressure brought on Tokatea owners to sell against their wishes, by the unilateral termination of the 1862 rental agreement and the continued use of the land for mining, without agreement on the collection and disbursement of mining revenue, the Crown in our opinion fell short of a reasonable level of active protection of Tokatea owners' rights.

CHAPTER 9

THE THAMES GOLDFIELD

9.1 THE 1857 KAUAERANGA MEETING

In November 1857, several Ngati Maru and other chiefs met at Kauaeranga to discuss gold-mining in Hauraki, prompted by recent gold discoveries by Joseph Cook. Speeches recorded at the meeting were sent to Donald McLean with a request that they be published in the *Maori Messenger*.¹

The first speaker, Aperahama Te Reiroa, a right-owner in the Waiotahi (or Waiotahe) Creek area, emphasised that chiefs should not allow the mana over their land to pass to Pakeha:

Friends, think of the land which descended to us from our ancestors. They died and left us their words, which were these– ‘Farewell: hold fast to the land, however small it may be’. And now, as gold has been discovered in our land, let us firmly retain it, as we have the power over our own lands, lest the management of them be taken by the Europeans. Who made them chiefs over us? No, we will ourselves be chiefs.

Aperahama was supported by the great majority of the succeeding speakers, one of whom, Riwai Te Kiore, clearly expressed the fears of many: ‘Friends, we may bid farewell to the land, inasmuch as gold has been discovered, the European’s great treasure. This is the thing which will cause our land to be taken.’

Like others, Riwai was firmly of the opinion that Europeans should not be permitted to occupy the land, declaring that they ‘must not be allowed to come on shore’. Only Eruera Te Ngahue expressed qualified support for Government supervision over Hauraki lands:

Friends, let us properly arrange our lands. If it is right to yield up our lands to the management of the Government, let us give it up to them; and I think that if we do so, the Government will not mismanage them, because it was they who gave us just laws. Our only fear is for us Maoris, lest the Europeans should molest them. The Governor will not break his own laws.

1. ‘The Chiefs of Hauraki to Donald McLean’, 27 November 1857, AJHR, 1863, D-8, pp 1–4

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The potential for trouble in Maori *themselves* prospecting and mining was foreseen by Te Kapihana Tuahurau who said:

Hearken, O Ngatimaru! You say do not allow the Pakeha to come and dig gold. Yes, that is right, but the Pakehas would not have come had you not dug the gold yourselves. But are you to dig, and the Europeans and ourselves stay away? That is not right; better let all the gold you have obtained be brought, and cast into the waters here, that we may all see it done. Then your words to keep away the Pakeha would be right; as it is, you drive off the Europeans, and persist in digging yourselves. Who are you digging it for? . . . If the Maoris dig it, they do not know how to make it into money; and then not being able to make it into money themselves, they will say – I will sell my gold to the Pakehas. Then when the Europeans see it, they will ask – Where did this gold come from? Perhaps they will reply ‘From Hauraki’. Then the Pakehas will flock thither, and the fault will not be theirs, but the Maoris in persisting to dig. But now cease digging.²

This speech provides evidence that Maori were prospecting for and finding gold, and exposes the divisions over gold that were emerging amongst Thames Maori. The meeting showed a will to resist mining, or at least to keep it in check. The request for the publication of the recorded minutes in the *Maori Messenger* reflects a desire amongst Thames Maori to forestall schisms in their approach to gold-mining, in order to retain their land.

9.2 THE OPENING OF THE KAUAERANGA GOLDFIELD

As the 1857 meeting shows, the presence of gold in the Kauaeranga region was an open secret, and it was no secret either that Thames Maori were determined in their opposition to mining. Hitherto, the Coromandel goldfields had claimed much of the attention of miners, settlers, and the Crown, but after the end of the Waikato war in 1864 the Thames–Ohinemuri region became the main focus of interest.

9.2.1 James Mackay’s arrival

James Mackay was to become the most important figure in Hauraki in respect of gold-mining, especially in opening and managing the Thames goldfields. He was an experienced administrator, capable of working with Maori. He had been goldfield commissioner in the Nelson district and had negotiated the opening of the goldfield there, and had, as discussed in section 8.3.2, renegotiated the Coromandel agreement in 1864.

2. ‘The Chiefs of Hauraki to Donald McLean’, 27 November 1857, AJHR, 1863, D-8, pp 3–4

When receiving the surrender of arms in Hauraki in the autumn of 1864, Mackay encountered Nepia Te Ngarara, a member of Ngati Raukawa known to him from the Collingwood goldfields, who reported that he had found alluvial gold near Ohinemuri. Mackay was also told by Te Hauauru Taipari (baptised as Te Hoterene) of Ngati Maru that gold had been discovered near Kauaeranga.

Mackay reported to the Colonial Secretary, then temporarily head of the Native Department, in a letter dated 23 April 1864:

Sir, I have the honor to inform you that during my recent visit to the Thames District, I received information from various sources that gold had been discovered in the Kauaeranga and Ohinemuri Streams . . .

I had some conversation with the Natives about working the fields in the Thames district. I found them very determinedly opposed to this, principally that they feared the Europeans would kill them, miners being reported as a very riotous people. I took advantage of Nepia Te Ngarara and another Native having been at Collingwood, and requested the former to state in what manner the gold fields at Nelson were managed, and whether Native miners did not receive the same protection as Europeans. The answer being given in the affirmative, I observed a marked difference in the demeanour of the Natives.

I would suggest that if a Magistrate is appointed for that district, it should be one of his duties to endeavour to bring about an arrangement for the working of the Thames Gold Fields. If an available gold field was discovered there, it would be very useful to this Province, and would tend to prevent that depression which otherwise will be felt after the cessation of military expenditure. I visited the Coromandel Gold Field, and as far as I could judge from the limited survey I took of it, am of the opinion that it is only the outside of a gold district, and a better field exists in the neighbourhood of the Thames.³

Mackay, as Civil Commissioner for the Hauraki district from May 1864, was instructed to strive to open the district for gold-mining.⁴ But the unsettled state of political affairs, including the disaffection of many Maori with the Crown, further agitated from 1865 by the Pai Marire movement, delayed the advent of gold-mining. But a campaign to open the area, led by Mackay with the support of the Government, had evidently commenced.

9.2.2 Prospecting at Thames

At first, Mackay made little headway. He later reported that 'At the numerous political meetings' held in 1864 and 1865 in the Thames district 'I always endeavoured to point out to the Natives the advantages which would be derived from the leasing of their auriferous lands,

3. James Mackay, 'Report by Mr Commissioner Mackay Relative to the Thames Gold Fields', 27 July 1869, AJHR, 1869, A-17, p 16

4. Ibid, p 4

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but was met invariably by the old arguments used by the Land League party.⁵ (Mackay's language and thinking, like that of many Crown officials, was marked by a tendency to treat 'Land League', Kingitanga, and 'Hauhau' as one kind of Maori, opposed to sale of land or mining agreements, and to define 'friendly' or 'loyal' Maori by their willingness to transact rights in land).

Thames Maori were aware of difficulties for Maori in the Coromandel goldfield. Some were very likely to have been involved. Others had learned to prospect in the South Island fields, at least for alluvial gold. In his analysis of Maori participation in gold-mining, Philip Hart suggests that Maori from outside Hauraki, including some from the South Island and from Te Tai Tokerau, were drawn to the region to join the search.⁶

Parallel with the fears of Thames Maori that gold mining would result in loss of control or even ownership of their land, was a growing interest in mining, either through admitting Pakeha miners, or (where alluvial deposits were believed to exist) by mining themselves. By 1865, Ngati Maru were aware that a goldfield would yield revenue and also create a market for their produce.⁷

Among Ngati Maru rangatira convinced of the advantages of mining was Wiropo Hotereni (Willoughby Shortland) Taipari, the son of Te Hauauru Taipari, who had informed Mackay of the gold at Kauaeranga. Exploration of the lower Thames (Waihou) River was to depend materially on Taipari's endeavours.

Two prospectors, Walter Williamson and James Smallman, were engaged by Mackay at Taipari's request to prospect between the Hape and Karaka Streams where Taipari was the principal right-owner. Te Moananui also gave permission for some prospecting. Williamson and Smallman received aid from the provincial government as well from Taipari. However, the two prospectors reported to the superintendant in May 1865 that they had found alluvial gold at Waiotahi and between the Kauaeranga and Karaka Streams, but no payable find.

The *New Zealand Herald* reported in 1866: 'Every now and again we hear of a payable goldfield having been discovered at the Thames, only there is always the insuperable difficulty that it has been found on native land, and that the owners will not allow the gold-field to be worked.'⁸

The chances of a new goldfield were bolstered by the re-election of John Williamson as superintendant of Auckland province in March 1867. He offered a reward of £5000 for a substantial find. In June, Williamson attended the tangi for Wiremu Hoete and Patene Pahuta. In a comment much alluded to by the claimants,⁹ cited above in section 6.8.2(2), he spoke enthusiastically about the potential wealth and benefits for Maori in opening a goldfield,

5. Mackay, 'Report by Mr Commissioner Mackay', p 4

6. Philip Hart, 'Maori and Mining: A Case Study of Hone Werahiko and Te Aroha', *Journal of Australasian Mining History*, vol 1, no 1 (September 2003), pp 82-84

7. *Daily Southern Cross*, 31 May 1865, p 4

8. *New Zealand Herald*, 27 March 1866 (doc 06, p 88)

9. See doc A51, p 12; doc v1, p 193

whilst stressing the importance of working in partnership with the Crown.¹⁰ Williamson's promise was reported in the Auckland press as being warmly received by Maori. Taraia in particular had adopted a more favourable attitude towards gold mining.

Meanwhile, during 1866 and 1867, Taipari had arranged for Paratene Puhai (Paratene Whakautu) and Hamiora Kewa to continue prospecting, assisted by young men of his hapu. From an interest in South Island mining, Taipari did so even before Williamson's reward was posted, but he later recounted that the reward spurred his efforts. In 1867, he directed Puhai and Kewa to explore Karaka Stream. When promising samples were found, perhaps to present his people with a *fait accompli* and to secure the reward, Taipari arranged that 'The gold was given to me secretly lest the Ngatimarus should hear of it. We [Taipari and Judge Rogan] left that night for Auckland.'¹¹ The samples were shown to Mackay and the general government agent, Dr Daniel Pollen.

According to Mackay: 'The news of the discovery of gold at Kauaeranga caused immediate excitement, and the offices of Dr Pollen and myself were besieged with applicants for permission to go to the Thames.' Pollen and Mackay at first felt 'compelled to refuse, but the danger of, the district being "rushed" and a quarrel with the Natives was so imminent' that they decided they should proceed to Kauaeranga and try to negotiate a lease.¹² We have heard submissions that the dangers were exaggerated, but there were clearly good reasons to try to regulate the situation by agreement with Maori. Taipari had arrived with his samples on 22 July. By 26 July, Mackay and Pollen were in Kauaeranga to negotiate.

9.2.3 The July 1867 agreement

On arrival at Kauaeranga, Mackay and Pollen, having first satisfied themselves of the presence of gold, convened a meeting at Taipari's house in Parawai. Although a considerable number of Ngati Maru were away gum-digging, about 90 attended. There was great opposition to opening the land but, according to Taipari, 'My father and I persisted in having the place opened, and in consequence of our firmness Rapana [Maunganoa] came over to our side.'¹³

By Mackay's account:

Taipari . . . contended for a long time against the whole of the Ngatimaru, of whom his father [Te Hotereni Taipari] is the principal chief, and it was only because of the constant

10. John Hutton, 'Troublesome Specimens: A Study of the Relationship between the Crown and Tangata Whenua of Hauraki, 1863–1869', MA thesis, University of Auckland, 1995, pp 227–231

11. Evidence of WH Taipari to Goldfield Discovery Reward Investigation, April 1870, pp 271–276, Auckland Provincial Government papers, MS595, box 21, sess 26, Auckland Public Library (Phillip Hart, 'Maori and Goldfields Revenue', unpublished paper, University of Waikato, p 11)

12. Mackay, 'Report by Mr Commissioner Mackay', p 4

13. Evidence of WH Taipari (Hart, 'Maori and Goldfields Revenue', pp 11–12)

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pressure put on the tribe *by him* that they at last agreed to allow him to permit Europeans to prospect for gold on his own land. [Emphasis added.]¹⁴

Crown officials then negotiated an agreement with the two Taipari, and with Rapana Maunganoa and his son. It seems that Ngati Maru had agreed to let these four rangatira make an agreement respecting their particular family lands. Ngati Maru were reported as saying ‘that they did not want to keep back the land, but they would only let a portion go in the meantime till they saw how we managed’.¹⁵

Mackay reported that there was ‘considerable difficulty’ in arranging the terms of the agreement: ‘a large annual rental was first demanded, and two years’ notice of intention to terminate the lease, the same as in the Coromandel case.’ The *Daily Southern Cross* had called on the Government to avoid repeating the ‘Coromandel blunder, by agreeing to pay an annual rent for a piece [of land] before we know what it is worth’.¹⁶ No doubt aware of these sentiments and, ‘bearing in mind the complaints made by the Provincial Government against paying £500 per annum rent for that field [Tokatea]’, Mackay and Pollen:

considered it safer for the Government, and greater justice to the Natives to agree to give the sum of £1 for each miner’s right issued for the block. If the number of miners were small, the rent would thus be in the same ratio: and if large and the field valuable, then proportionately greater.¹⁷

Dr Battersby pointed out that Mackay did not say how much the ‘large annual rental’ was; Dr Anderson assumed that it was £500 per annum, the same as in respect of Tokatea, but cites no primary evidence other than Mackay’s report.¹⁸

An agreement based on Maori receiving £1 per annum for each miner’s right issued was signed on 27 July 1867. The Maori signatories to the agreement were Te Hoterene (*sic*) Taipari, Wiroke Hoterene (*sic*) Taipari, Raika Whakarongotai, and Rapana Maunganoa, representing the Ngati Hape, Ngati Rautao, and Ngati Hauauru hapu of Ngati Maru.¹⁹ Eventually, W H Taipari was awarded £300 by the reward committee, Paratene Puhai and Hamiora Kewa were also awarded £300 and Charles Ring was awarded £200 for the first find at Coromandel.²⁰ Under the agreement, the relevant land was ceded to the Governor for gold-mining purposes under the Gold Fields Act 1866. Rather than for a fixed term, the agreement was to extend for as long as the Governor should require the land for those purposes. The term

14. Mackay, ‘Report by Mr Commissioner Mackay’, p 4

15. *Daily Southern Cross*, 30 July 1867, p 4 (Hart, ‘Maori and Goldfields Revenue’, p 13)

16. *Ibid*, 22 July 1867 (doc 06, p 77)

17. Mackay, ‘Report by Mr Commissioner Mackay’, p 5

18. Document 06, p 95 fn 59

19. Mackay, ‘Report by Mr Commissioner Mackay’, p 19

20. ‘Report of the Goldfield Reward Enquiry Commission’, 26 April 1870, Auckland Provincial Council, sess 26 1870, A-1, p 6 (Hart, ‘Maori and Goldfields Revenue’, p 14)

‘Governor’ rather than the word ‘Crown’ was employed in order to comply with the mining legislation.

The negotiations of July 1867 took account of lessons learnt from the development of the township at Coromandel. Thames Maori wished to ensure that they benefited from the rising value of township allotments; they had witnessed the high prices received by private developers rather than Maori owners for allotments sold at Kapanga (see sec 8.5). For their part, Crown officials wished to ensure that the development of townships and other infrastructure was not ‘without plan or system.’ It was agreed therefore that the Government would lay out the township, lease the allotments, and collect rent on behalf of the Maori owners. Although not explicit in the agreement, the understanding, according to Mackay, was that the Crown would have the right to authorise mining beneath the town sites.²¹

Subsequently, the town of Shortland was laid out between Kauaeranga and the Karaka Creek. Regulations developed under the Gold Fields Acts included provision for business and residential leases, initially for terms of seven years, and renewable for terms of seven, 14, and 21 years, with rentals calculated per foot of frontage and regularly revised.²²

The 1867 agreement also clarified the rights miners gained for their £1 per annum licence fee. They had the right to build dams, construct water races, fell timber other than kauri without fee, and do all other acts connected with gold-mining operations. For felling kauri there was an additional fee of £1 5s per tree to be paid, as with all other revenues due to Maori, to a Government official, not directly to Maori owners.

The outer landward boundary of the cession was:

commencing on the sea coast at the mouth of the River Kauaeranga, thence by that river to the junction with the Kakaramata Stream, thence by that stream to its source on the ridge of the hills [well below the watershed ridge of the range]; thence along the said ridge to the sources of the Hape, Karaka, Waiotahi, Moanataiari and Kuranui Streams, turning thence down the Kuranui Stream to the sea coast.

Some land between the coast and this outer boundary was excluded, namely that between the Moanataiari Stream, across the Waiotahi Stream to the Karaka Stream, and as far inland as the spurs of Waiowhariki; this area was known as the Waiotahi block. Right-owners in this block were either opposed to the agreement or, like Rapana Maunganoa, only willing to open part of their land. Reserved from mining were Maori places of residence, cultivations and burial grounds.²³

The Kauaeranga or Shortland goldfield was proclaimed under the 1866 Gold Fields Act by Pollen on 30 July 1867, with 1 August to be the date of the opening of the field. Administration of the goldfield and regulation of its revenues were delegated to the province of Auckland.

21. Mackay, ‘Report by Mr Commissioner Mackay’, p 5

22. Document 06, p 122

23. Mackay, ‘Report by Mr Commissioner Mackay’, pp 19–20

Regulations under the Act were promulgated in April 1868. Importantly, ‘one man’s ground’ was normally limited, for quartz mining, to 15,000 square feet, that is 30 by 150 feet, or equivalent dimensions, though adjacent claims could be aggregated. River and creek bed claims were limited to 50 feet of water frontage, 20 feet in width. ‘Beach claims’ were to be no greater than 50 feet by 50 feet. Holders of miner’s rights could also occupy an area 33 feet by 66 feet at no extra cost for a residence. Claims had to be continuously worked to be maintained.²⁴

9.3 THE EXTENSION OF THE THAMES GOLDFIELD: MACKAY’S 1867–69 NEGOTIATIONS

9.3.1 Eastern shores of the Firth of Thames to Te Mamaku

In August 1867, Mackay busied himself with negotiating the opening of the lands to the north of the Kauaeranga goldfield along the western shore of the Coromandel Peninsula. He soon succeeded in ‘annexing’ the land from the Kuranui Stream (the northern boundary of the land covered by the 27 July agreement) to Opitomoko, south of the Tararu Stream. This later became part of the Karaka mining block. After some difficulty in fixing the boundary, Ngati Naunau, a major descent group kin to Ngati Maru, consented to the opening of the adjacent land as far north as Maeroero, later designated the Tararu mining block.

Rights to the land to the north as far as Otoi (Ngarimu Bay) were disputed between Ngati Naunau and Te Tawera (or ‘Te Waka Tawera’, the Ngati Pukenga allies of Ngati Maru who had come from Tauranga). This land was known as ‘Whakatate’ according to Mackay’s report as printed (but almost certainly indicating ‘Whakatete’, as the bay is known today). Because customary ownership was contested, consent was obtained for prospecting in this block on the basis that Mackay would hold the miner’s rights revenues until the division of them was agreed upon. Finally, Te Tawera consented to the opening of their land as far north as Te Mamaku, a little south of Te Puru, the southern boundary of Ngati Tamatera interests on the eastern shore of the Firth of Thames. This was later designated the Wharau (land) block.²⁵

These were all verbal agreements, Mackay stipulating that one deed of agreement covering all the relevant lands would be drawn up later. In the meantime, mining on these blocks was able to proceed. On 4 September 1867, Mackay arranged cultivation reserves in the foregoing lands and in the Kauaeranga goldfield:

For Taipari and his people at Te Hape, within the town of Shortland. For the Ngatinaunau, at Tararu Point; this included a piece of five acres belonging to the Ngatipaoa tribe. For Te

24. Document P6, pp 57–58

25. See doc A10, pt1, pp 380–382

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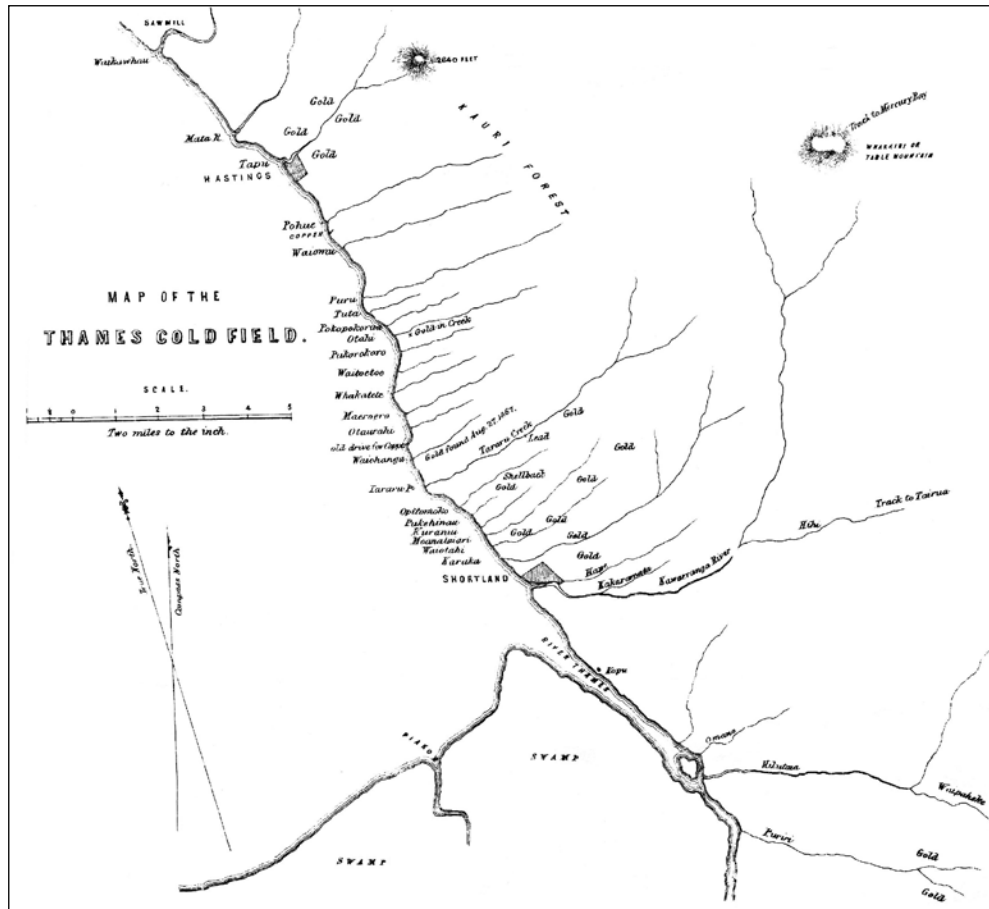


Figure 38: The Thames goldfield. Source: *The Thames Miner's Guide: With Maps* (Auckland: Edward Wayte, 1868).

Waka Tawera and others, two pieces at Oti and Te Puru. I also caused notice boards to be put up at burial grounds at Hongikore and Te Wharau.²⁶

The flat coastal land above high-water mark between the Moanataiari and Karaka Streams was also a cultivation reserve under the terms of the verbal agreement under which the Waiotahi block was opened (see below).

9.3.2 Waiotahi

The opening of the Waiotahi block is important because Salmon, in his history of gold mining, accuses the Crown of unscrupulous handling of Maori interests, a charge which has been picked up by the claimants in these proceedings.²⁷ Following the signing of the July

26. Mackay, 'Report by Mr Commissioner Mackay', p 6

27. JHM Salmon, *A History of Goldmining in New Zealand* (Wellington: Government Printer, 1963), pp 184–185.

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1867 agreement, Mackay had upheld its boundaries. The *New Zealand Herald* reported that rights to the block were disputed, it remained closed and Mackay had sent packing two groups of miners who strayed into it. On 5 August, however, Mackay reported to Pollen:

I have been compelled to confine the prospecting operations to the south side of the Karaka stream on account of an objection made by Te Moananui, Riwai and others to the lower portion of the Waiotahi stream being worked, I have been all over the ground with them, and have ascertained correctly the boundaries of the piece in dispute and these will be cut the first thing tomorrow morning. The Natives do not dispute Ropana [Rapana Maunganoa?] being the principal owner of the land but deny his right to claim the sole ownership of it. It is satisfactory to know that all concerned are quite ready to hand the land over for gold mining, as soon as they can arrange the question of title. The area of land contested is about five or six hundred acres.

I am happy to inform you that on the 3rd inst the chief Moananui withdrew his opposition about the Waiotahi block and in addition he has agreed to enter into an arrangement with me for the opening up for goldmining of all the country on the shore of the Thames Gulf from Taruru point to Matariki near Coromandel.²⁸

Still holding out, however, in respect of Waiotahi, was Aperahama Te Reiroa, who, as discussed above, had spoken strongly against opening the land to mining in the 1857 hui and had excluded the block from the July 1867 agreement. Following a meeting on 19 August, Mackay reported to Williamson that he had secured agreement for the opening of:

All the country for Gold mining from Keriti on the north to Hikutaia to the south and extending eastward to Mount Whakairu and Tairua and Whangamata. I commenced to arrange the various minor questions of in[ter] tribal boundaries reserves for cultivations burial ground &c up to the present time [31 August]. I succeeded in opening up for immediate use and occupation for Gold Mining all the lands (with the exception of the Waiotahi Block) between the Kauaeranga River on the south and the Puta Stream on the north and extending inland [to] the watershed range.

Dr Battersby, paraphrasing the same document, concludes that Mackay 'reported that he had gained consent to open one half of the Waiotahi block, and predicted that he would have the rest in matter of days'.²⁹

The actual opening of Waiotahi was indeed achieved within a few days, but under controversial circumstances. By Mackay's account, the pressure to open the block became intense as the number of miners on the surrounding Kauaeranga goldfield grew rapidly:

28. Mackay to superintendent, Auckland, 5 August 1867, no 3, BACL A208/611, Archives NZ (Ak) (doc 06, p101)

29. Mackay to superintendent, Auckland, 31 August 1867, no 10, BACL A208/611, Archives NZ (Ak) (doc 06, p102)

the forbidden land at Waiotahi was supposed to be the richest on the field, and the Natives were constantly complaining of Europeans trespassing on it. The two policemen had quite enough to do to keep miners off the block . . .

On the 2nd a quarrel took place between a miner and two of the sons of Aperahama te Reiroa (one of the principal owners of Waiotahi). The Natives succeeded in getting the man into the Kauaeranga River, where they nearly drowned him. A great disturbance ensued, and fearing a serious fracas between Natives and Europeans, I went with the police, and arrested the three disputants. [Wiremu Jeremiah and Meke, and the miner Louis Lewis].³⁰

The case was heard by the Resident Magistrate's Court, comprising Mackay himself in his capacity as resident magistrate, Alan Baillie, warden, and W H Taipari, assessor. Mackay later recorded:

On the 3rd September the man was convicted of assaulting a Native, and was fined £3, or one month's imprisonment. The Natives were proved to have nearly drowned him, and they were fined £5 each and costs, or two months' imprisonment. They were unable to pay the fine and would have been removed to Auckland. Their father, Aperahama te Reiroa, came to solicit their release; and asked me to lend him the money to pay the fine. I agreed to do so if he would take it as an advance, on miners rights for the Waiotahi Block. He consented to do this, provided a line was cut along the base of the hills, and the flat land left as a cultivation reserve. He paid the fine, and his sons were released. That afternoon, the line of demarcation was laid off on the ground, and the Waiotahi was rushed by the miners.

I have been thus circumstantial in reporting this proceeding, as there were many misrepresentations about it at the time.

Obtaining the right to mine over the Waiotahi Block, was a fortunate circumstance, which prevented a serious misunderstanding arising between the two races at that time.³¹

We shall discuss in the concluding section of this chapter the Treaty issues arising from these events.

At this time, Maori began making their own arrangements with miners. Part of the cultivation reserve between the coast and the first line of hills of Waiotahi became the site of the Tookey's Flat township. In August 1867, Daniel Tookey had staked out a claim on the land above the mouth of the Moanatairi, but installed his crushing battery on the flat land below, 'leased by agents employed by the Maori themselves'.³² The *Herald* reported other instances of Maori and miners prospecting together on new ground.³³ By August 1868, Tookey's Flat had become a 'flourishing township' with a coach service running to Shortland.³⁴

30. Mackay, 'Report by Mr Commissioner Mackay', p 6

31. Ibid; see also *Daily Southern Cross*, 5 September 1867, p 3

32. *New Zealand Herald*, 29 January 1868 (doc 06, p 104)

33. Ibid, 16 March 1868 (p 104)

34. *The Thames Miner's Guide: With Maps* (Auckland: Edwards Wayte, 1868) p 69

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Early in 1868, the right-owners in the rest of the reserve between Tookey's Flat and Shortland requested Mackay to arrange a survey of it so as to lease it for town allotments. Mackay took the preliminary steps, but shortly afterwards sanctioned its lease to Robert Graham. As in the July 1867 agreement, Mackay reserved the right to lay out the main streets and to approve the town plans.

At this time, it was not made explicit whether the site of Grahamstown would remain a 'cultivation reserve', and therefore not open to miners, or whether it would become a 'township reserve' within the goldfield. Mackay assumed the latter:

At the time of signing the document it was not distinctly stated whether the Crown was to have the right of mining under Graham's Town or not, but it was clearly understood that the land was to be leased for town purposes by the Government, the same as Shortland. I therefore believe I am right in assuming it was a township reserve, although, since the land has become valuable for mining purposes, it has been disputed by the Natives, and they say it is still a 'cultivation reserve.'

On the basis of these assumptions, the boundary of the goldfield was taken 'along the beach at high water-mark, instead of being under the base of the hills as by the first [verbal] agreement' to open Waiotahi.³⁵ Grahamstown (including Tookey's flat) therefore became a township reserve within the goldfield with the Crown having the right to authorise mining in or under it.

9.3.3 The Te Mamaku 1 agreement, Waikawau, and Moehau

In early September 1867, Mackay met with Te Moananui and other Ngati Tamatera at Coromandel. He 'found them favourably inclined to opening up their lands between Tuapo on the north, on the sea coast, and Te Mamaku on the south', which land Mackay would designate the Waikawau mining block. (He was also advised that Te Hira would not agree to the opening of Ohinemuri.)

In late October or early November, gold was found near the Tapu Creek. Mackay, wanting to distract miners from the Ohinemuri district and to link the Thames goldfield with the Coromandel goldfield, bent his efforts towards the opening to gold mining of Ngati Tamatera interests north of Shortland. On 9 November 1867, Mackay signed an agreement with Te Moananui and 26 others of Ngati Tamatera, including Te Hira, whose position in respect of the Coromandel Peninsula differed from that regarding Ohinemuri.

Known as Te Mamaku 1, this deed covered all Ngati Tamatera interests from Te Mamaku to Moehau, around to Whitianga, and back to Te Mamaku. The terms were similar to those of the Kauaeranga agreement, with two notable additions. Clause 4 of the agreement

35. Mackay, 'Report by Mr Commissioner Mackay', p 8

specified that £500 should be paid immediately, to be refunded to the Crown out of revenue arising from miner's rights.³⁶ Interestingly, in the light of later controversy about survey costs, clause 5 stipulated that 'The Governor shall pay the surveyors for surveying the pieces of land which are excepted, and also the boundaries of the lands owned by other tribes'.

At the time this agreement was negotiated, Mackay was primarily interested in opening Waikawau. Moehau or Cape Colville was not then of great potential as a goldfield. No substantial deposits were found there until the late 1880s, by which time the Crown had acquired much of the block, partly in payment of raihana debts created during the purchase of Waikawau, Cape Colville itself, and Ohinemuri (see ch 10). But little gold was recovered from the district.

9.3.4 Waiwhakaurunga River to Omaha Stream

With the Te Mamaku 1 deed, Mackay had reached agreement on the opening to gold mining of all the west side of the Coromandel Peninsula except Manaia, for which negotiations were in train. He then turned his attention to the lands south of the Waiwhakaurunga (Kauaeranga) River and about its upper reaches. We note that Mackay was vigorous in protecting local rangatira from bullying tactics by miners:

Some malcontents, incited by a man named Edmonds, determined to proceed up the Waiwhakarunga [*sic*] River on to land which the old chief Riwai of Ngatimaru had declared should not be opened for gold mining. I determined to teach these men a lesson, and sent Detective Crick and three Native Police, all well armed with carbines and revolvers, and ordered them to bring back the trespassers. This had the effect of stopping further proceedings of this kind. A deputation of twelve men, who had been selected to visit Te Hira and induce him to consent to open Ohinemuri, were also deterred from going there.³⁷

Mackay was negotiating patiently, 'quietly putting in [my] wedges and letting them draw', as he put it.³⁸ On 13 November, he signed a 'memorandum to permit mining' with Ngakapa Whanaunga and four other principal men of Ngati Whanaunga, in all the Ngati Whanaunga lands bounded by the Waihou River to its junction with the Hikutaia, across to Whangamata, and north to Cape Colville. This 'memorandum' acknowledges the receipt of a deposit of £100 to be repaid out of future miner's rights.³⁹

On 18 and 19 November, he met again with Ngati Maru, gaining verbal agreement on the opening of the upper Waiwhakaurunga River area, to the ridge of the range and north

36. Mackay, 'Report by Mr Commissioner Mackay', p 21. This payment is not to be confused with another payment of £1500 to Ngati Tamatera a month later in respect of Ohinemuri.

37. Mackay, 'Report by Mr Commissioner Mackay', p 7

38. Mackay to Rolleston, 29 November 1867, Rolleston MSS (doc A8, p 140)

39. Mackay, 'Report by Mr Commissioner Mackay', p 22

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to Whakairi mountain; this became the Whakairi block. But: 'The old chief Riwai and the Land League party would not, however, hear of any mining operations being carried on within the Otunui block, lying between Shortland and Whakairi.' Again, Mackay arranged that a formal deed of agreement would follow, when 'the whole of the Ngatimaru and Ngatiwhanaunga claims were arranged'.⁴⁰

Despite there being no formal deed, on 21 November Superintendent Williamson officially extended the Thames goldfield from the western peninsula from Tuapo to the summit of Ruahine and thence by the watershed ridge of the Coromandel Ranges as far south as the Kirikiri Stream, excepting the Otunui block. Mackay did not describe negotiations for the land between the Otunui block and the Kirikiri Stream – the Kirikiri block – but evidently, between negotiations with Ngati Maru and Ngati Whanaunga, and perhaps some Ngati Tamatera, he had obtained consent. The Otunui block was now enclosed on all sides down to the coast by lands opened to mining or prospecting. On 16 December, Mackay 'completed an arrangement with the Ngatimaru Tribe, and my old opponent Riwai, to allow mining over the Otunui Block'.⁴¹

The southern end of the land covered in the 'memorandum of agreement' with Ngati Whanaunga – in the neighbourhood of Hikutaia and Whangamata – was, wrote Mackay, 'disputed with these people by Herewini te Rangai and other Hauhaus of Ngatimaru [Ngati Pu], residing at Hikutaia'. Mackay had decided to take no further action about that portion of land, but in February 1868 it became a matter of urgency because of the discovery of gold at Te Puriri.

Mackay went to Hikutaia to try to resolve a boundary. He found Ngati Pu 'civil' but obstinate about the land they claimed (against Ngati Whanaunga and Ngati Maru) and about refusing to allow mining. Finding that the inter-tribal dispute 'was confined to the lands between the Oretai [Onetai] Stream and Hikutaia, I then arranged that the southern boundary of the gold field should be fixed at the Omahu Stream, which was undisputed country'.⁴²

9.3.5 Te Mamaku 2

By March 1868, Mackay was in readiness to pull together the various agreements made verbally or via memoranda with Ngati Maru and Ngati Whanaunga since August 1867. He fixed residence and cultivation reserves, additional to those previously arranged, 'at Puriri, Warahoe, Parawai, and Kakaramata, for the Ngati Maru and Ngati Whanaunga Tribes, and at Waionui, Te Mata, Kerita, and Matariki, for the Ngati Tamatera'. These new reserves having been agreed upon, a deed of agreement dated 9 March 1868, often referred to as Te Mamaku 2, was signed by 80 members of Ngati Maru and Ngati Whanaunga.

40. Mackay, 'Report by Mr Commissioner Mackay', p 7

41. Ibid

42. Ibid, pp 23–24

The Te Mamaku 2 agreement was similar to the 27 July Kauaeranga agreement, which it superseded, with two changes. First, it expanded on the leasing of townships:

Shortland Town, and any other towns that may be formed within the said boundaries shall be left for the Natives. The leaving is this:—The Government shall lease the said towns (shall act as lessors); if any person desires to lease a piece of land within any of the said towns, the Government shall fix the amount of rent for each piece of land; the rents accruing from the said towns shall be paid by the Government to the Native owners of the land.⁴³

But, as with the Kauaeranga agreement, it was not explicitly stated that the Crown would have the right to authorise mining underneath such towns.

Secondly, timber licences were introduced, as Mackay explained:

Complaints had been made about Europeans cutting timber for other than mining purposes, and it was therefore deemed expedient to agree to issue timber licences at £5 per annum; the money arising therefrom to be payable to the Native owners for which the license was issued.⁴⁴

No person would be allowed to cut timber for sale without both a miner's right and a timber licence. Kauri trees were reserved as before, subject to cutting for a fee of £1 5s per tree.

The deed covered all Ngati Maru and Ngati Whanaunga interests between Te Mamaku and the Omahu Stream, and inland to the dividing range. 'In consequence of the jealousies existing between the various hapus of the two tribes', the area was broken into nine blocks for the distribution of miner's rights income between them: they were Te Wharau, Whakatete, Tararu, Te Karaka, Otunui, Whakairi, Te Kirikiri, Warahoe, and Te Puriri.

The opening of most of these blocks has been recounted above. However, considerable dissatisfaction concerning the Kirikiri block was expressed by Hohepa Tarawerawera, Te Hoterene Taipari, and most vehemently by Riwai Te Kiore: he called Mackay deceitful, a slave of the Governor and a reptile. They were dissatisfied because Mackay had drawn the boundary of the block at the watershed ridge, whereas they maintained that their customary interests extended across the ridge towards the source of the Tairua River, and that this piece of their land across the ridge should not have been excluded from the mining block. As expressed by Tarawerawera, 'Who originates this idea? To leave the body of the canoe in one place, and the stern piece (which is joined on to the remainder) in another?'⁴⁵ Mackay explained that he had drawn the boundary where he had so as to be able to allocate miner's rights, and that the piece over the ridge would be safe from the claims of Tairua Maori because 'it is held in my hand'.⁴⁶ There the quarrel rested.

43. Ibid, p 23

44. Ibid, p 8

45. 'Address of Mr James Mackay to the Ngatimaru Tribe of Hauraki', 25 May 1896 (doc B11(a), p 28)

46. Ibid (p 29)

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9.3.6

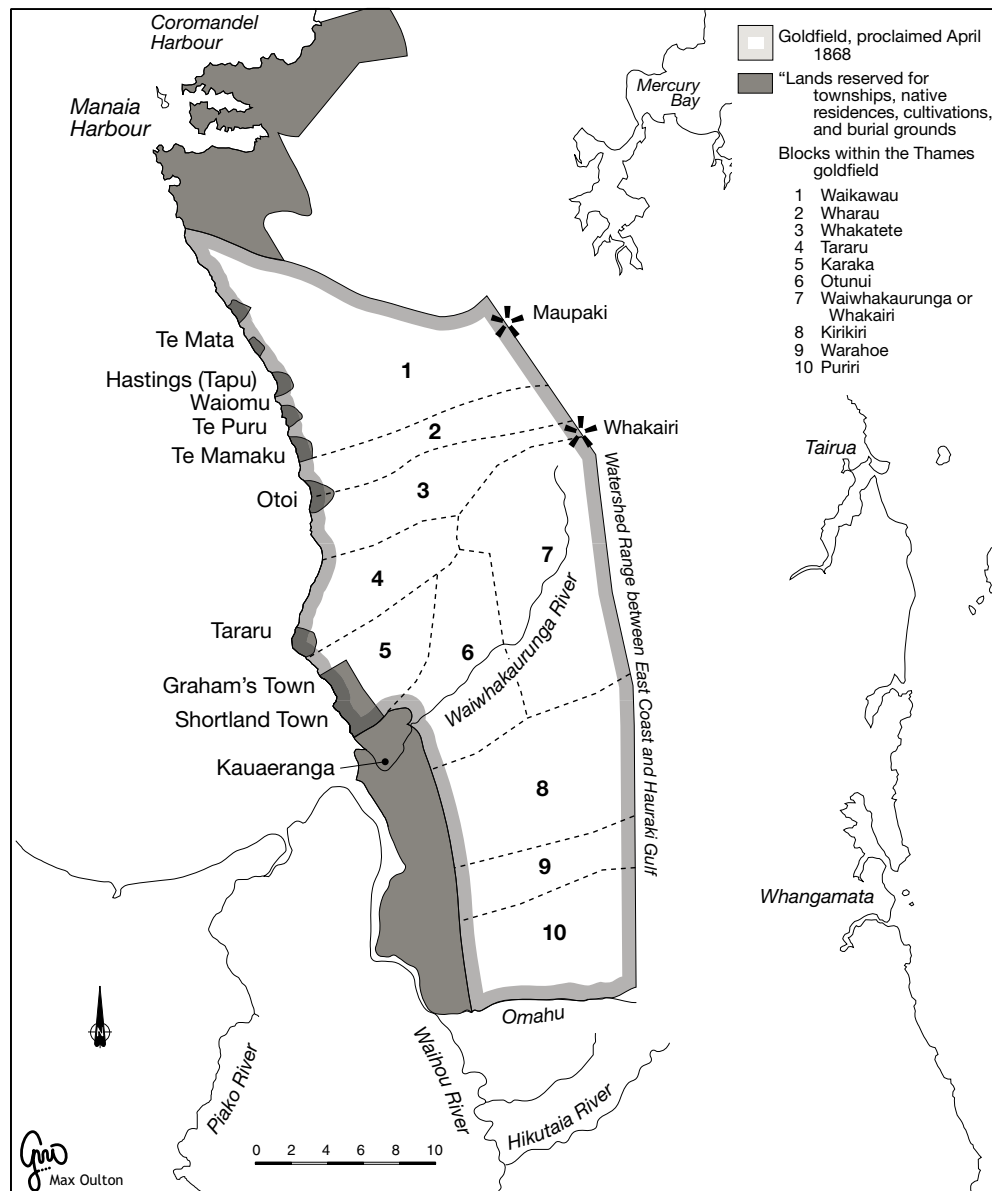


Figure 39: The Thames goldfield, 1869. Source: Mackay's sketch map, AJHR, 1869, A-17.

The lands covered by the Te Mamaku 2 agreement, together with the Waikawau block covered by the Te Mamaku 1 agreement, were proclaimed by Superintendent Williamson to be a goldfield under the Gold Fields Act on 16 April 1868.

9.3.6 Subsequent negotiations

During the next 13 months, Mackay obtained deeds of agreement with Ngati Porou in respect of Harataunga, and with Te Tawera (Ngati Pukenga) and Ngati Maru in respect of Manaia.

A prospecting agreement was reached with Mohi Mangakahia, his brother Hamiora and one other in respect of Whangapoua. Preliminary agreements were reached with sections of Ngati Tamatera in respect of Waitekauri and the Ohinemuri block as a whole, and with Ngati Haua in respect of Te Aroha. Mackay also received the consent of the two Taipari chiefs and Meremana Konui to the mining of part of the Kauaeranga tidal flats.

These agreements are discussed in other chapters of this report (see chs 10, 12). Only the Harataunga and Manaia cessions led directly to the proclamation of goldfields; these were included in the wider Coromandel goldfield as proclaimed in 1868 (see sec 8.3.2).⁴⁷ In June 1869, Mackay resigned from his Government positions and commenced work as a private land agent.

9.4 THE DEVELOPMENT OF THE THAMES GOLDFIELD

9.4.1 Early growth

In order to evaluate the outcomes for Hauraki Maori of the opening of the Thames goldfield, it is useful at this point to outline its dramatically changing economic fortunes.

The first land to be opened to gold mining at the Thames was declared to be open on 1 August 1867. On that day, prospecting for claims began in real earnest. Mackay began laying out township allotments near the landing place at the mouth of the Kauaeranga River and surveying boundaries, in expectation of large numbers arriving. By the end of the week, buildings had begun to be erected and Mackay marked out building allotments on Pollen Street. Businessmen and storekeepers followed hard on the heels of the miners. By the end of August, 56 business allotments had been taken up.

By 9 August, some 190 persons, including miners, shopkeepers and mechanics were on the field. By the end of August, between 400 and 500 people were at the diggings. Miner's rights began to be issued on 12 August, once administrative arrangements were in place. By November, Mackay had appointed a total of six constables and was complaining of the strain that he and his staff were being put under by the rapidly rising population, swelled by miners from the diminishing fields of the South Island west coast.

There was little alluvial gold, but on 10 August a party of four miners found a quartz leader in the Kuranui Stream; 'Hunt's claim' was the first reefing claim to be taken up. Although the auriferous quartz in this leader was at first of very poor quality, although plentiful in quantity, the claim was to become highly profitable as it was very easy to work and richer deposits were soon struck.⁴⁸

47. 'Sketch Map of Thames Gold Field, Showing Proclaimed Gold Fields, Native Blocks &c', AJHR, 1869, A-17, encl 18, p 37

48. *The Thames Miner's Guide*, pp 70, 72-73, 77

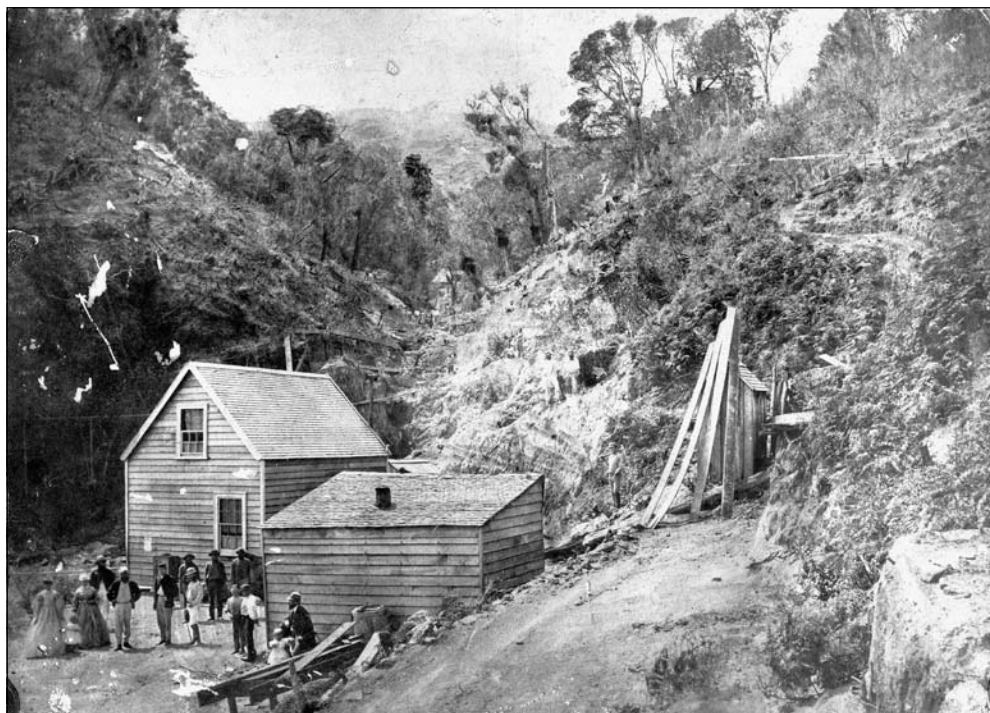


Figure 40: The Shotover mine, Kuranui Creek, Thames, circa 1868–70. Photographer unknown. Reproduced courtesy of the Alexander Turnbull Library, Wellington, *Auckland Star* collection (G-003165-¼).

The second claim pegged out nearby was Barry's claim. This claim was bought and mined by the Kuranui Mining Company, which applied for registration in December 1867; it was 'the first registered company on the Thames Gold Field, and has been the most successful'. From its first few shafts, hundreds of ounces of gold were extracted, and subsequently, about 200 tons of quartz was got out per month, yielding from eight to 10 ounces of gold per ton, about £4000 worth per month.⁴⁹ Another valuable claim marked out in August was Daniel Tookey's claim, situated near the mouth of the Moanataiari Stream. Tookey also profited from other enterprises, as discussed in section 9.3.2.

Miners were not compelled to take out miner's rights on first arriving. Nevertheless, by the end of August 129 miner's rights had been issued. By mid-September, 276 miner's rights had been issued in respect of the Karaka block (including the Oritomoko and Waiotahi Streams).

Despite the successes, progress was slow. In mid-October 1867, Mackay explained that:

There were many instances where men owned valuable claims which they could not work for want of means; or, where they had obtained payable quartz, there was no adequate machinery to crush it. The capital left in Auckland was already tied up in claims, and in the

49. *The Thames Miner's Guide*, pp 72–73

purchase of plant and machinery, and there was but little chance of selling valuable interests. The prospects of the individual struggling miner were indeed dark at that period. Many had wealth in their grasp, which they could not realise or in any way render available. The suffering and privation endured at this time were extreme.⁵⁰

The first machinery began to arrive in October or November but the charges levied for crushing were high and the difficulty of transporting the ore to the few batteries great, so that the situation of independent miners was little improved.

Even the owners of Hunt's claim had initially struggled to attract investors. Yet, the fame of rich claims such as Hunt's and Barry's and press reports of growing production, drew miners to the field in their thousands; this was more than could earn a living from the field, especially given the nature of quartz mining and the barrenness of most claims. At the start of February 1868, the *Herald* reported that many diggers were 'on their last legs for funds':

Taking the population at 6,000, and the return as, at the most, 3,000 ozs per month, and reckoning, as we must, that the largest portion of this gold comes from a few immensely rich claims, it stands to reason that the miners are not supported by the gold they get.⁵¹

The next phase of the development of the field was dominated by the rise of company mining.

9.4.2 Company mining and the Thames boom

By January 1868, confidence in the Auckland economy and the richness of the Thames goldfield, was growing. Investors and capital became easier to find and raise than in the previous year. A 'bonanza' strike on the Manukau claim at Thames spurred speculators on. The number of companies increased rapidly, materially aided by the bullish market in mining shares. Increases in investment and prosperity saw a rising population at Thames.⁵²

As recounted in section 9.3.2, during 1868 the Auckland entrepreneur Robert Graham laid out the township of Grahamstown on reserved flats, near Tookey's Flat. The modern town of Thames incorporates both Shortland and Grahamstown. The population reached a peak of about 15,000 by September 1868.⁵³ Despite a falling population from 1869, Thames was in 1871 the fifth largest town in New Zealand. Mackay estimated that in 1869 the value of buildings erected there was £250,000.

50. Mackay, 'Report by Mr Commissioner Mackay', p 6

51. *New Zealand Herald*, 1 February 1868 (doc 06, pp 108–109)

52. Mackay, civil commissioner, Gold Fields Office, Shortland, to Auckland superintendant, 13 July 1868, no 74, BAOL A208/611, Archives NZ (Ak) (doc 06, p 109)

53. Paul Monin, *This Is My Place: Hauraki Contested, 1769–1875* (Wellington: Bridget Williams Books, 2001), p 214

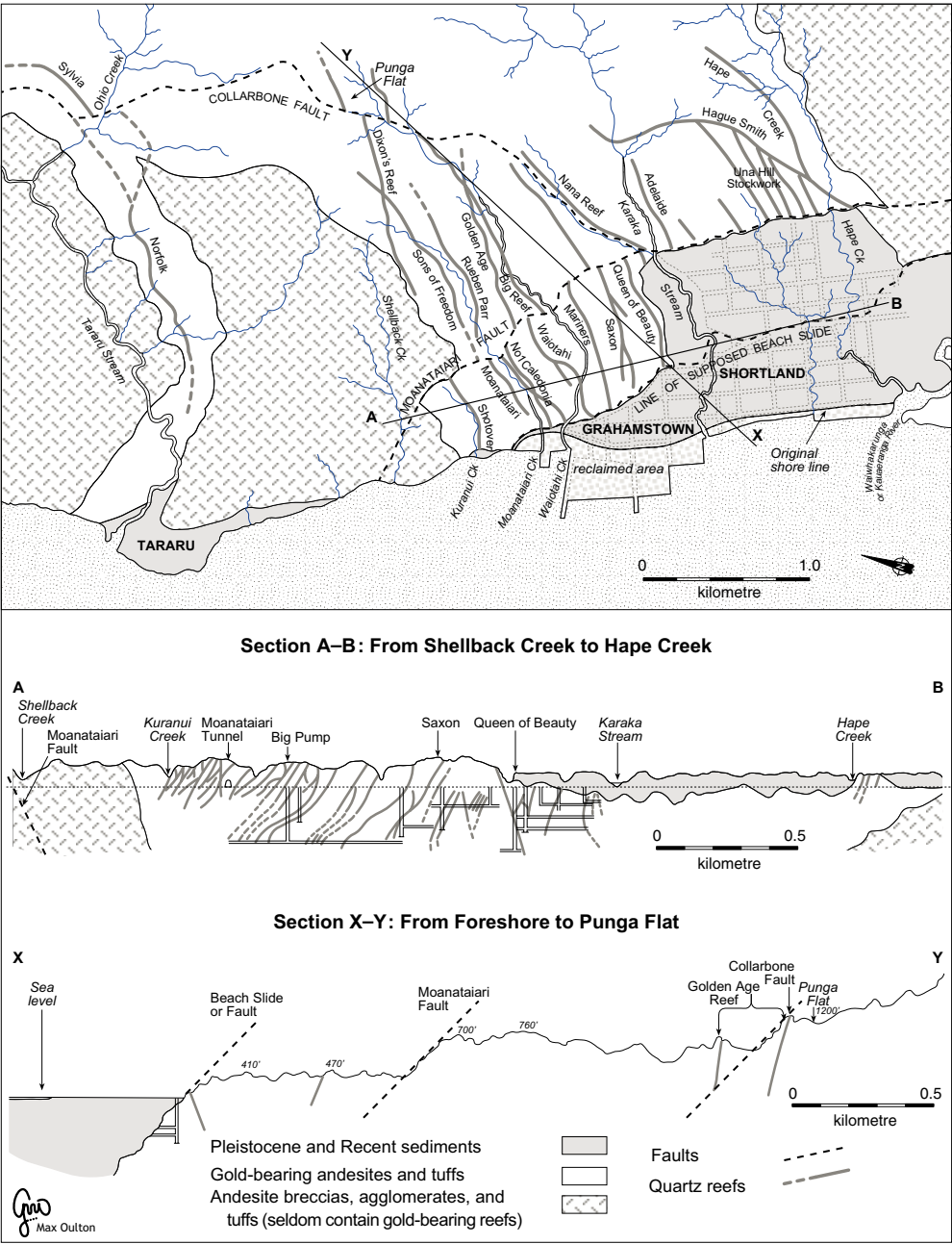


Figure 41: The geology of the Thames goldfield. Source: James Park, *The Geology, Mineral Resources and Future Prospects of the Thames Goldfield* (Auckland: Wilsons and Horton, 1894).

The explosive population growth created a pressing need for public amenities. From late 1868 and during 1869, the Government spent large sums on roading and drainage, the wharf at Shortland, and a tramway linking Shortland and Grahamstown. Roads and wharves were also built to connect with the mining villages of Hastings and Puriri.⁵⁴ Private enterprise was also investing heavily: by mid-April 1868, an estimated £100,000 had been spent on machinery and buildings on the Karaka field alone.⁵⁵ Large companies were formed and established throughout 1868.

Speculation in shares was especially rife immediately following the introduction of leasing regulations in 1869:

land applied for under these [leasing] provisions was protected from the date of application until the lease could be granted. Many claims, and some companies ceased work therefore; and the individuals composing them sought more profitable employment in the promotion of companies, which were floated, each with a nominal capital bearing an extravagant proportion to the value of the property, to the amount of work done, and to the real available capital of the company. Then was commenced the *furor* in speculation, amounting almost to positive insanity, which, in one form or other, seems to have prevailed on every gold field. The proper work of mining was neglected for the more tempting bait of profits on the sale of scrip, the price of which was only governed by the caprice of the dealer in the article. By the neglect of work, which was fostered, if not engendered, by the delay in the hearing of applications for, and granting or refusing leases, the yield of gold fell off notwithstanding the produce of such claims as the 'Long Drive' and 'Golden Crown,' and the Thames Gold Field appeared to be yielding a very small percentage on the (fictitious) capital involved.⁵⁶

Few of the companies formed during this 'furor' of speculation would ever pay dividends.

The risks of trading in mining companies were much greater because of the 'bonanza' character of the gold deposits at Thames. A company which had not been performing well might strike one of these bonanza deposits and suddenly start paying excellent dividends; another company might reach the end of a rich lode and go into a sudden decline. Investment in the Thames goldfields was even riskier than was usual in the mining world.

In 1870, the Thames goldfield fell into recession, exacerbated by the previous speculation. The *New Zealand Herald* reported that the field had been mismanaged, that too much unproductive ground had been taken up, and shareholders' funds were beginning to be exhausted.⁵⁷ The low profitability of mining at Thames during the boom years 1868 and 1869

54. Document 06, pp 111–112

55. Document 06, p 112

56. Thomas B Gillies to Colonial Secretary, 'Report of the Thames Gold Field District', [June 1870], AJHR, 1870, D-40, p 19 (doc 06, p 128)

57. *New Zealand Herald*, 11 February 1870 (doc 06, p 132)

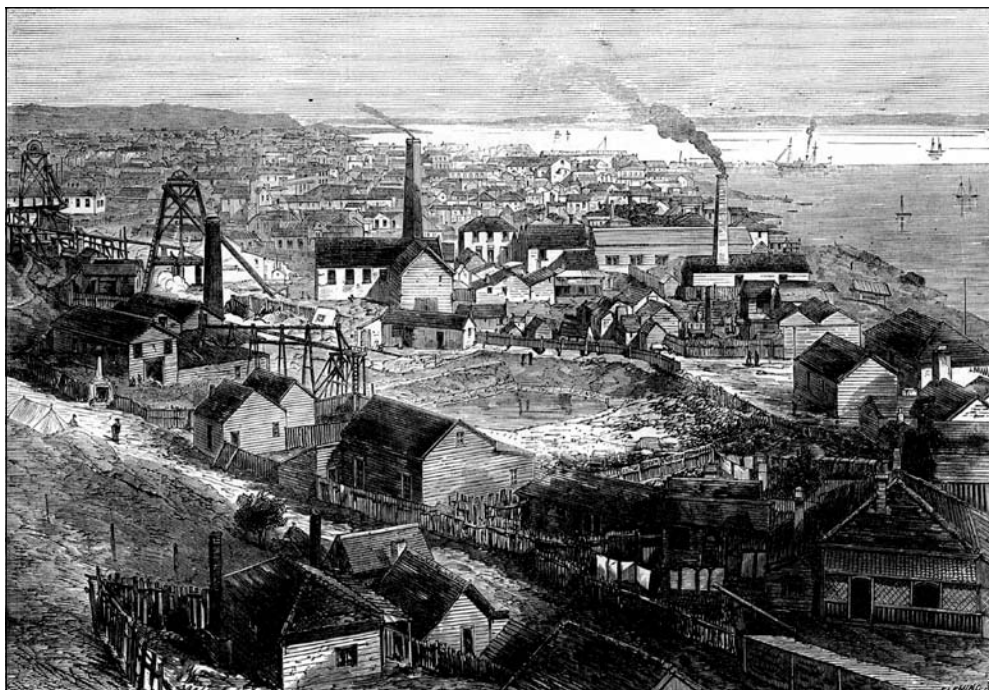


Figure 42: Thames goldfields, Grahamstown

can be largely ascribed to too many companies having entered the market rather than to the low value (net of costs) of the deposits. In mid-1870, out of at least 238 companies with total capital of £7 million at the Thames, only 23 paid dividends.⁵⁸ Over 1870 to 1871, there was considerable rationalisation of the industry; many of the smaller companies folded or were bought out. By the end of 1871, there were 130 companies with a total capital of £3 million.⁵⁹

Despite this reduction, 1871 was the year of peak production at the Thames goldfield. Production had fallen from around 132,400 ounces in 1869 to 85,500 ounces in 1870. In 1871, production reached 330,000 ounces. Rich strikes produced a large proportion of this amount, but the field was being worked much more efficiently.⁶⁰

After 1871, however, output levels fell quickly. The rich pocket struck in 1870 was exhausted and, as other deposits were worked out or became marginally profitable, the Thames goldfield went into a decline. Mining at Thames was in the doldrums from roughly 1874 to the 1890s. In the 1890s, the introduction of the cyanide process and the injection of English capital brought about a brief revival. The Government sponsored deep-level prospecting until 1902, after which the field went into an accelerated decline.

58. 'Return of Dividend Paying Companies', in 'Report of Thames Gold Field District', [June 1870], AJHR, 1870, D-40, p 22; Salmon, p 188 (doc 06, p 134)

59. Salmon, p 188 (doc 06, p 134)

60. *New Zealand Herald*, 12 September 1870 (doc 06, p 134)



Figure 43: Grahamstown, circa 1870. Photographer unknown.
Reproduced courtesy of the Alexander Turnbull Library, Wellington (F-004108-½).

9.4.3 Crown administration and payments to Maori

Maori received income from the goldfield from two main sources: rental from residential and business sites, and miner's rights fees. In addition, they received fees for kauri trees cut on their land (under the agreements) and income from sale of their produce and their labour.

In respect of rental income, the usual charge in 1869 was six shillings per foot of frontage for the first seven-year term, rising by one shilling or one shilling sixpence per foot (depending upon locality) for each additional seven-year term. Mackay estimated that in 1869 Maori were receiving 'about £5,000' from this source.⁶¹ (In 1870, Puckey wrote that he was trying to persuade Maori owners to reduce the rents in Shortland to prevent an exodus of tenants to cheaper premises in Grahamstown.⁶²) Many thousands of pounds were also payable from miner's rights fees.

There was, however, some official delay in making the money available to Mackay to make the due payments to Maori. Because of this, in August 1868 Mackay tendered his resignation.

The problem had arisen because of the awkward division of responsibility between the general and provincial governments of the costs of administration, including the salary of Mackay and his 'departmental expenses'. At a meeting between JC Richmond, John Williamson, and Mackay in late 1867 or early 1868, it was agreed that the accumulating miner's rights fees which were 'not immediately required' could be used to meet departmental

61. Mackay, 'Report by Mr Commissioner Mackay', p 11

62. Puckey to McLean, 25 July 1870, McLean MS32, ATL (Monin, p 228)

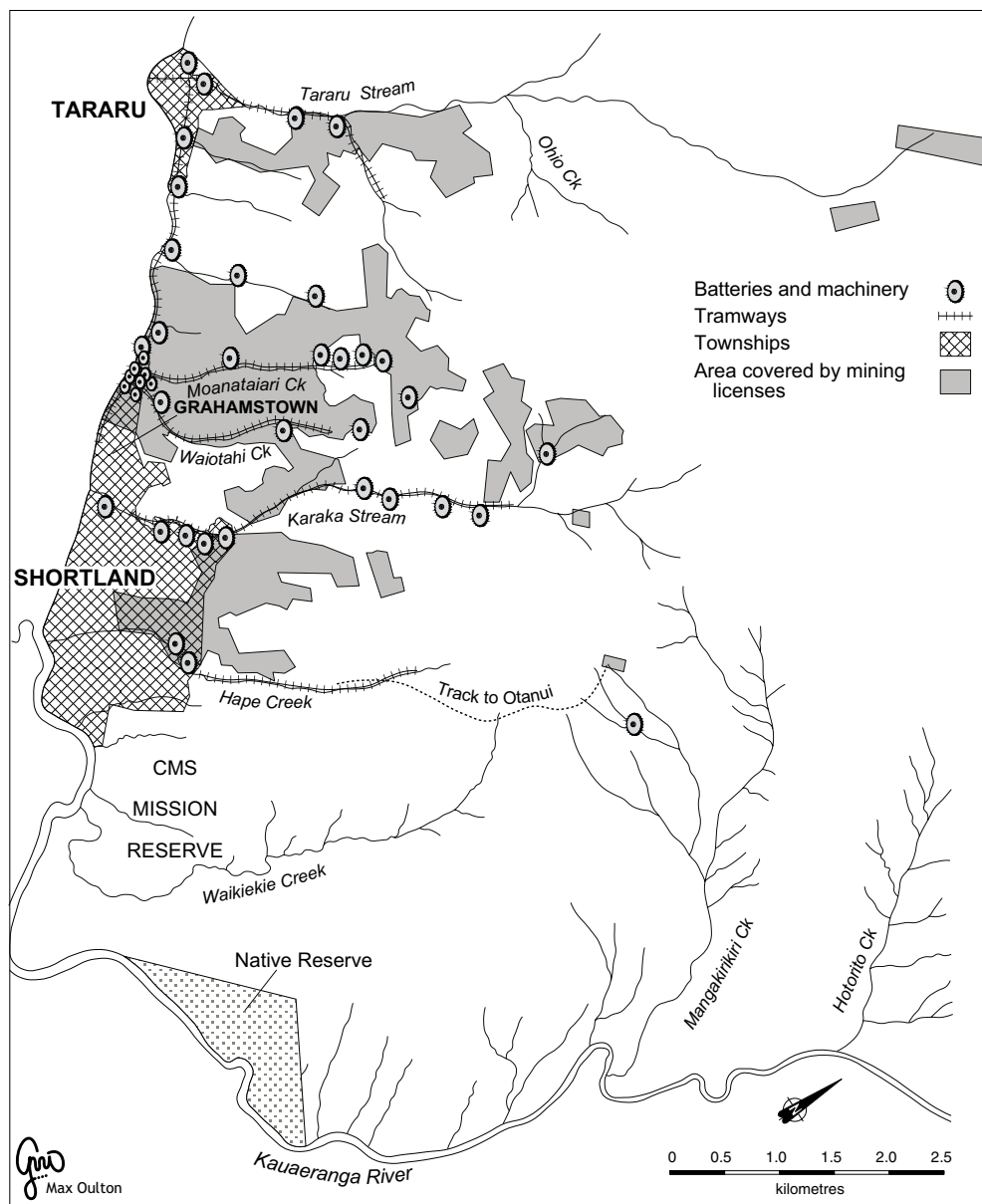


Figure 44: The Thames goldfield, 1872. Source: AJHR, 1871, D-8; AJHR, 1872, D-4.

expenses. The money was to be replaced from gold revenue duties collected by the Customs Department. (Mackay estimated that, in the period 1 August 1867 to 30 June 1869, 129,211 ounces of gold had been extracted to the value of £264,425, upon which duty of £16,151 was payable.) Under the July 1867 agreements, the payments of miner's rights fees to Maori should have been quarterly, and Mackay seems to have deviated from this, in that he refers to an 'annual' payment. As Mackay explained, when the 'Time at length came round when it was necessary to pay the Natives their miners' rights fees or rents, no money was remitted

to me, because the gold duty had been impounded by the General Government as against Provincial liabilities.⁶³

Following his protest, the money was remitted and Mackay was persuaded to stay on at increased salary, mainly to negotiate for the opening of Ohinemuri, but he was relieved of warden's duties at Thames and allowed to undertake private business that did not interfere with his public duties. He was succeeded in June 1869 by H T Clarke as civil commissioner and by E W Puckey, designated as native agent.

The administrative problems at Thames gave rise to demands in Parliament for more information, including how much was being paid to Maori in miner's rights fees and rents. But not until a Thames land buyer named O'Keefe undertook to provide information to local chiefs did some figures become available. These showed that, in a two-year period from August 1867, £22,176 payable to Maori had been collected by the Government. Of that, less than half (£10,975) had been paid over to them up to 31 January 1869.

Not only were payments delayed, but the distribution to that point between the various rangatira was very uneven: 'Taipari et al' had received £4520; 'Pepene et al' had received £1600; 'Rapana et al' had received £1520; 'Pahau et al' had received £520; and the remaining £891 was distributed in varying amounts between 25 other recipients. At the meeting at Parawai where O'Keefe presented this information, one speaker expressed his dissatisfaction about so much going to Taipari and Rapana. No precise figures are available as to later distributions.⁶⁴

The distribution was made more complex for want of survey and marking on the ground of Maori owners' customary interests. Mackay pointed out that 'This, by the verbal, and in one or two instances written understanding, was to have been done at the cost of the Government', but he had hesitated to incur the expense after the superintendent had refused to refund £266 he had advanced for a survey of the Kennedy Bay block. Yet, said Mackay:

From conversations I have had with the Natives generally, I feel assured that, after the external boundaries of the tribal and intertribal blocks were defined, they would be only too happy to survey the 'family holdings' at their own cost, and then apply for their title to be investigated by the Native Lands Court.⁶⁵

When he took over, Puckey soon got the payments on to a regular quarterly basis, but felt that in order to distribute them correctly, he needed 'to acquire a thorough knowledge of all the native claims to the land within the gold field'.⁶⁶

63. Mackay, 'Report by Mr Commissioner Mackay', pp 11–13

64. *New Zealand Herald*, 19 October 1869 (doc 06, pp 117–119)

65. Mackay, 'Report by Mr Commissioner Mackay', p 12

66. Puckey to under-secretary, Native Department, 31 July 1880, Thames goldfields notes, MA13/35c [MA13/35g], Archives NZ, p 6

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This was not easy, because, as Puckey found, 'a considerable number of the owners' had not signed the Goldfields Agreements and 'ignored the whole matter, they being Hauhaus', until years later when many abandoned politics or returned home from campaigning and began to demand a share in the revenue. Political absences, and, as Dr Anderson suggests, Mackay's agreements with willing owners may both have contributed to the effect of 'Hauhaus' not being on the initial distribution lists.⁶⁷ Difficulties were also created for Puckey by the fluctuating numbers of miners, and their moving about to different claims on the field:

I see no other plan than that which I adopted which was to find out how much land the property of a native or family of natives was held under Gold Mining leases or licences, what number of residence sites, if any, were on that land, what was the fair average of men working in the claims situated on that land, and if there were any other rights in existence on that land, to ascertain what the fair value of the same were, and to pay the owner or owners accordingly.⁶⁸

Puckey also decided to even out the fluctuations in revenue by averaging the payments between quarters, so that Maori could plan on more regular income. He also apparently made some advances on payments due, and got into difficulty when the field declined; in one particular quarter, insufficient revenue came into the account to make up the advances.

Te Moananui and Taipari petitioned Parliament in 1876 complaining that their fees were overdue. The Native Affairs Committee found that no wrong-doing had occurred, that the accounts were properly kept and there was no unnecessary delay in payment. But they also acknowledged that Maori had no ready way of knowing this and recommended that the Government give full facility for the inspection of the books by a Maori appointee.⁶⁹

Puckey also tried to achieve a more equal distribution of the moneys payable:

In apportioning many of the payments I had to fight the battles of the weak against the strong so as to ensure justice being done to all the owners; several natives who had fair claims to participate in the Miners Rights fees but for me would have come very badly off . . . I was aware there were other persons who ought to receive a portion but these claims were in no way recognised by the principal owners. These persons, acting on my advice at length, had the land, in which they claimed to be interested, surveyed and adjudicated on by the Native Land Court and the extent of their interests defined.⁷⁰

67. Document A8, pp165–6; Puckey to under-secretary, Native Department, 31 July 1880, Thames goldfields notes, MA13/35c [MA13/35g], Archives NZ, p1

68. Puckey to under-secretary, Native Department, 31 July 1880, Thames goldfields notes, MA13/35c [MA13/35g], Archives NZ, p6

69. Document A8, p168

70. Puckey to under-secretary, Native Department, 31 July 1880, Thames goldfields notes, MA13/35c [MA13/35g], Archives NZ, p6

The introduction of the Native Land Court into the process soon revealed that some owners in various blocks had been receiving little or no share in the distribution of payment.⁷¹ Puckey was evidently trying to get to grips with this problem. His endeavours received a vote of confidence from Hauraki Maori, in that they did not take up his offer to give back to them the duty of collecting and distributing rents themselves. They agreed that a commission equivalent to the salary of an inspector of miner's rights should be deducted from the moneys collected.

After Puckey's departure in 1880, various Crown agencies took over the distribution of payments due: Treasury from 1881, the Post Office from 1917, and the Waikato–Maniapoto District Maori Land Board from 1928 (see sec 13.5). Ultimately, the administrative problems led to the appointment of the MacCormick inquiry in 1939. We consider its findings at section 13.7.3.

9.4.4 Miner's rights and company leases

An issue of great importance to the Hauraki claimants was a change made in the method of charging companies for working the goldfield, and the impact of that on revenue payable to Maori. The miner's right system had been worked out to accommodate individual miners, and fitted less comfortably with permanent claims operated by companies.⁷² Mining interests began to lobby against this system as oppressive and costly. Mackay thought that 'all claim holders and their servants [ie, employees]' had to hold miner's rights, but 'Neither I nor they then contemplated the necessity of having one of these documents for every minute interest held [ie, a share in a claim or a shareholding in a company]'. He thought that 'By this the Natives received more than they otherwise would have.' Nevertheless, the agreement was 'they were to get £1 for every miner's right issued'.⁷³

On 29 October 1868, provincial superintendant Williamson, without consulting Maori, had begun to change this. He introduced the system authorised by mining legislation in 1865–66, whereby the intending miner or mining company marked out a proposed *area* for lease and applied to the warden for a lease, paying a deposit of £20.⁷⁴ The area was then protected until the lease was either granted or refused (by the superintendent, on the warden's recommendation). The lease terms followed the prescription in the Gold Fields Act Amendment Act 1865, but not previously applied: leases were initially restricted to a term of 15 years and were not to exceed 400 yards by 200 yards for quartz reefs (720,000 square feet, or 16.5 acres); rents, payable to the province, were £2 per acre per year, plus an additional £100 miner's right per year per 15,000 square feet, though this latter fee could be

71. Document A8, p166

72. Document o6, p123

73. Mackay, 'Report by Mr Commissioner Mackay', p12

74. The relevant legislation is the Mining Companies Limited Liability Act 1865 and the Gold Fields Act 1866.

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offset against the wages of labourers employed on the claim.⁷⁵ It is not clear how much, if any, of this revenue would be payable to Maori right-owners.

Mackay's attention was first drawn to the new system through the leasing of mining sites within the township of Shortland itself.⁷⁶ Notwithstanding his personal view that Maori were receiving more in miner's rights fees than was contemplated when the agreements were negotiated, in his consolidating report of July 1869 Mackay wrote:

in my opinion the leasing regulations issued by His Honor the Superintendent of Auckland are likely to cause considerable injustice to the Native owners of the gold field, as entailing a certain falling off in the miners' rights fees received, and a consequent diminution in the amount of rent payable to them by the Crown; unless a portion of the money paid for mining leases is awarded to them by the Provincial Government.⁷⁷

In August, perhaps with Mackay's assistance, 13 chiefs of Ngati Maru, Ngati Whanaunga and Ngati Tamatera, who had been party to the agreements negotiated by Mackay, petitioned the Government complaining about three aspects of the new regulations: that they omitted to mention the reservation of lands for residences, cultivations and burial grounds; that Williamson had not consulted them about the leasing regulations; and that the new arrangements would reduce their revenue without their agreement and without acknowledging their right as owners to receive a portion of the lands leased for mining purposes.⁷⁸

Dr Battersby notes that the fears of falling revenue might not have been fully realised, as some companies continued to pay for miner's rights for all involved in the enterprise, for fear of 'claim jumping' and the litigation that would have followed. There was also some downturn in revenue for other reasons, such as numbers of miners leaving the field. But part of the problem was the huge administrative bottleneck, brought about by the new Auckland regulations, that arose in processing the thousand and more company applications for leases, during which work slowed or ceased on many claims.⁷⁹

According to Dr Anderson's evidence, Mackay's representations to the Public Petitions Committee on behalf of the Maori petitioners failed. The committee argued that the leasing system would actually yield more revenue to Maori owners (assuming it was passed on from the provincial government) than the miner's rights fees.⁸⁰ However, following Mackay's representations, the Gold Fields Act Amendment Act 1869 introduced the concept of the leaseholders' miner's right. This required that all holders of gold-mining leases take out a miner's right for every lease held at the rate of £1 per 15,000 square feet of land leased.

75. Document P6, p 59

76. Mackay to superintendent, 30 June 1869, no35 AGG-A1/4 69/497, Archives NZ (doc 06, p 125); Mackay, 'Report by Mr Commissioner Mackay', p 12

77. Mackay, 'Report by Mr Commissioner Mackay', p 11

78. Document A8, p 154

79. Document 06, p 127

80. Document A8, p 155

To assist companies, the act also removed the limit of six on the number of claims (limited in area as they were) which could be held by any one person, company, or corporation, provided that at least one man (also the holder of a miner's right) was employed to work every claim. In introducing the Bill to the Legislative Council, Colonial Secretary William Gisborne reported that Mackay had informed the Government that, by these arrangements 'the agreements with the Natives as explained by him to them at the time, would be literally and equitably fulfilled, and the Natives would have no ground for complaints of injustice arising from that agreement [*sic*].'⁸¹

The problems arising from leases were further resolved by regulations effective from January 1872, made under a new consolidating act, the Gold Mining Districts Act 1871. This replaced goldfield leases by licences, which could be issued by the warden (rather than by the superintendent of the province on the warden's recommendation). Licenced holdings could be up to 30 acres, but again involved fees of £1 per annum per 15,000 square feet, payable to Maori. Puckey described additional benefits for Maori: 'there were also several new sources of revenue for the natives opened up as residence site fees. Water rights and battery site fees were paid to the credit of the Deposit Account . . . and eventually paid to the owners of the land.'⁸²

It is difficult to gauge how well the new system worked for Maori owners. Puckey later complained that new regulations under the Gold Mining Districts Act 1871 completely changed the manner in which revenues were assessed for the individual blocks which comprised the Hauraki gold-mining district. He stated: 'There is no machinery for the transfer of Miners' Rights and it became merely a matter of approximate allocation.'⁸³

The complexity of the administration of the collection and disbursement of revenues was so great that, as a later goldfields warden reported: 'Much must be left to the discretion of officers in the field – upon whose report the revenue is allocated. When taking over the allocation of this revenue I found the grossest abuse of this discretionary power had been permitted to grow up.'⁸⁴

9.5 THE KAUAERANGA FORESHORE

The related issues of gold mining and ownership of the foreshore in front of the township of Shortland were brought to a head by the encroachment of gold miners below the high-

81. Goldfields Act Amendment Bill, NZPD, 1869, p 671 (doc P6, p 67)

82. Puckey to under-secretary, Native Department, 31 July 1880, Thames goldfields notes, MA13/35C [MA13/35g], Archives NZ, pp 5–6 (doc O6, p 128)

83. Puckey to under-secretary, Native Department, 31 July 1880, Thames goldfields notes, MA13/35C [MA13/35g], Archives NZ, p 5 (Robyn Anderson, *Goldmining: Policy, Legislation, and Administration*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1996), p 49)

84. Kenrick to under-secretary, 1 May 1884 (Anderson, p 49)

water mark. The issue of ownership of the foreshore is discussed in chapter 22, and only the issue of how the Government was to respond to the encroachment of miners will be examined here.

During 1868, Mackay, in his office of warden of the Kauaeranga goldfield, began to receive applications to approve mining on claims that the applicants had marked out below the high-water mark. He declined them, having been advised that they lay outside the boundary of the proclaimed goldfield and that therefore he had no authority probably even to receive them. The seaward boundaries of both the 1867 Kauaeranga agreement and the Te Mamaku 2 agreement of March 1868, into which the Kauaeranga agreement was incorporated, were described in the deeds of agreement as the 'sea coast', without elaboration as to the tidal area. Mackay, however, testified before the select committee on the Thames Sea Beach Bill that 'The boundary line of the land ceded for gold-mining purposes was always supposed to be the high-water mark; and I never raised any question about lands below high-water mark, nor did the Natives.'⁸⁵

Mackay's position was that the tidal flats were not covered by the goldfield. But section 9 of the Gold Fields Act Amendment Act 1868 allowed the Governor in Council to include land below the high-water mark in a goldfield, provided that the land abutted Maori-owned land over which mining consent had been given (see ch 22).

Subsequently to the applications which he had declined, a group of miners, Messrs Beetham, Severn, Walker, and company, came to Mackay concerning a large area of the flat with an application under a clause of the 1866 Mining Act that allowed for extended claims under extraordinary circumstances. This application was forwarded by Mackay to the Government. The provincial government advised Mackay to decline the application, it being probable in any case that the superintendant did not have the delegated authority to approve it.⁸⁶ From the Native Department of the general government, Mackay received a letter dated 17 October 1868 in which acting under-secretary Cooper conveyed the opinion of Richmond, the Native Minister, that the tidal flats were in an 'exceptional legal position'.⁸⁷ It was likely, thought Richmond, that native title to the flats would not be recognised in law, but neither would the land fall within the definition of Crown land or under the provisions of the wasteland laws.

Richmond advised that 'The Gold Fields Act of this session points out how it may be dealt with – that is by agreement between the Colonial Government and the Native owners of adjacent lands.' Mackay was instructed to 'endeavour to arrange with the Native owners

85. Mackay, 'Report of the Committee on the Thames Sea Beach Bill', AJHR, 1869, F-7, p 7

86. See the evidence of Mackay and Superintendent Williamson before the committee on the Thames Sea Beach Bill published in 'Report of the Select Committee on the Thames Sea Beach Bill', AJHR, 1869, F-7. The superintendant may have had delegated authority over land which was Crown land for the purposes of the Gold Mining Act, but the tidal flats were outside the proclaimed goldfield.

87. GS Cooper, acting under-secretary, to civil commissioner, 17 October 1868, papers brought before Parliament and select committees, Le 1/1869/133 (doc A8(a), doc 21, p 257)

for the occupation of this tidal flat upon reasonable terms.⁸⁸ Richmond considered that the foreshore should be treated just the same as the mainland and a gold-mining cession agreement sought with the Maori right-owners. Richmond was not concerned about the recognition of Maori property rights in the foreshore that negotiating such agreements would imply. The royal prerogative over gold had not been asserted over the main land, and Maori title had been acknowledged in the Native Lands Act 1862:

Having thus, as he had pointed out, swallowed the camel, it seemed that we were now to strain at the gnat – that this wretched little strip of land on the Shortland beach was now, on the plea of prerogative rights unknown and incomprehensible to the Natives to cause a renewed assertion of those beneficial rights which we had abandoned as to every other part of the Colony. We had done more than swallowed an admission of the general rights of the Natives; for at the Thames gold fields we had winked at the seizure by the Natives of one of the supposed prerogative rights, that of the Crown mining on the main land.⁸⁹

After receiving the instructions of 17 October, Mackay endeavoured to stop the encroachment of miners on the flats by placing an advertisement in a Thames newspaper warning of the penalties set out under the Mining Act 1868 for mining on Maori land that was not subject to agreement with the Governor. In April 1869, he negotiated with W H Taipari, Te Hoterene Taipari, and Meremana Konui of Ngati Hauauru hapu to allow mining over the part of the flats claimed by them. This Te Hape agreement covered the signatories' interests in the foreshore in front of Shortland between the Hape Stream and the northern bank of the Kauaeranga River. The area covered by the agreement was to come under the terms of the Te Mamaku 2 Agreement, 1868, but was not proclaimed.

Further measures were taken to control the situation on the foreshore. In January 1869, a proclamation by the Governor in Council under the Public Reserves Act 1858 declared the sea beach as a public reserve.⁹⁰ In July 1869, Tole, the commissioner of Crown lands, issued a public notification that 'no part of the land between high and low water-mark . . . has been included within any Gold Field, and that consequently, no person whatever has any right to enter upon or occupy any such land for the purpose of mining for gold.'⁹¹

Neither Mackay's advertisement, nor the public reserve proclamation nor Tole's public notice succeeded in putting a complete end to the encroachment of miners on the tidal flats; sometimes this had a degree of official sanction. The lease of the Kuranui Mining

88. Ibid (pp 257–258)

89. Richmond, Shortland Sea Beach Bill, NZPD, 1869, p 903

90. The tidal flats were proclaimed a public reserve in January 1869 by the Governor in Council. Superintendent Williamson applied for the delegated power over the flats so reserved for the sake of building a tramway or railway. The application appears in fact to have been left in abeyance. One of the matters considered by the Thames sea beach committee was the right of the general government to make a grant of the beach to the provincial government: 'Report of the Committee on the Thames Sea Beach Bill', AJHR, 1869, F-7.

91. Public notification, 'Report of the Select Committee on the Thames Sea Beach Bill', AJHR, 1869, F-7, app c

Company, which had been approved by the superintendant, extended below the high-water mark. In the House, Dillon Bell justified this, drawing attention to several Thames mining companies registered under the Joint Stock Companies Act.⁹² The practice in each case was to obtain miner's rights for the abutting goldfield block, mark out a claim that extended below the high-water mark, and then open a shaft that commenced on the dry land within the goldfield but drove below the high-water mark.⁹³

In addition to these claims that straddled the boundaries of the proclaimed goldfield, several claims were marked out on the tidal flats in the hope of Maori right owners gaining Crown-granted title to the flats or adjacent land. Rapana Maunganoa refused to enter into a leasing agreement with Mackay, hoping to make a more profitable private arrangement. Mackay reported him as having entered, through the agency of CO Davis, into an arrangement with 'some Europeans' to rent some land near the claim of the Kuranui Gold Mining Company for £150 a year. Davis was a former licensed interpreter for the Native Department and an investor in the Thames goldfields; Mackay described Rapana as being greatly influenced by him.⁹⁴ The lease does not appear to have been validated by any Government official;⁹⁵ and, being overtaken by subsequent developments, was unable to come into effect.

A select committee was appointed to discuss the Thames Sea Beach Bill of 1869, which was drafted to assert the Crown's prerogative right to the foreshore. It would have deemed the tidal flats to be Crown demesne land. Mining leases would have been issued by the Government, although mining revenues would have been paid to Maori owners of abutting dry land. The committee was concerned to discover whether any mining on the flats had received any degree of official sanction, which might expose the Government to claims from mining companies for compensation. The recommendation of the committee was that it would be unnecessary and inexpedient to pass the Bill, particularly while the status of the prerogative rights of the Crown to the foreshore and gold, and of the claims of Maori, were unresolved. The Bill was not proceeded with.

The Act that took its place, the Shortland Sea Beach Act 1869, had the more modest aim of reimposing Crown pre-emption and prohibiting private dealings in the foreshore until such time as the questions of title could be resolved. The full title of the Act was, 'An Act to restrict the Sale and Letting of a certain part of the Sea Beach in the Province of Auckland'. In the preamble was recited the lawfulness (under section 9 of the Gold Fields Act Amendment Act 1868) of the Governor in Council including the land below high-water mark in a goldfield, subject to the provision contained in that section: that Native title would be deemed not to be extinguished, and the expediency of preventing other parties from interfering with the dealings of the Crown. Section 2 of the Shortland Beach Act provided that:

92. James Bradshaw, 'Report of the Select Committee on the Thames Sea Beach Bill', AJHR, 1869, F-7, p 11

93. Daniel O'Keefe, 'Report of the Select Committee on the Thames Sea Beach Bill', AJHR, 1869, F-7, p 14

94. Document O6, p 150

95. Document A8, p 158. Dr Anderson's references do not support her conclusion.

It shall not be lawful for any person other than Her Majesty to make any contract lease or conveyance with or from any aboriginal Native of or concerning the piece of land described in the Schedule hereto [that part of the flats adjacent to the Thames goldfield between the wharf at the mouth of the Kauaeranga Creek and the mouth of the Tararu Creek] or any part thereof or any estate or interest therein and all transactions and dealings of or concerning the said piece of land or any part thereof are and shall be absolutely invalid.

This section prevented miners from raising legal claims against the Crown, and clarified that the encroachment of mining companies below the high-water mark was extra-legal, although not illegal. The Bill was passed on 31 August and given the Governor's assent on 2 September 1869.

However, there was nothing in the Shortland Beach Act that gave the Government any standing to deal with those parties already in actual possession of the tidal flats. Apart from reimposing Crown pre-emption, the Act did little to disturb the status quo as far as Maori rights were concerned. However, the potential for Maori right-holders to mine under the tidal flats was ultimately negated by Fenton's decision in the Native Land Court in 1870 that Maori held no more than a right of fishery on the foreshore surface.⁹⁶ This case and the ownership of the foreshore are taken up again in chapter 22.

9.6 THE PURCHASE OF THE FREEHOLD

By the late 1860s, another profoundly important development was beginning to impact upon Hauraki. This was the conversion of Maori customary tenure to titles under the Native Land Acts and the purchase or leasing of the lands concerned by private interests or the Crown. These Acts and the role of the Native Land Court are discussed below in chapters 15 and 16. In the Thames goldfield, their direct impact was more on its margins than on the field itself. But the new system began to affect relationships in Thames, between Maori and settler, and among Maori themselves.

Rangatira who had entered into the Thames gold-mining agreements were soon involved with the land court, and its associated costs. Dr Anderson has described how Ngakapa Whanaunga, representing Ngati Whanaunga, engaged RC Jordan to prepare the survey of blocks near Shortland and at Wharekawa; these surveys were required for an application to the court. Ngakapa had signed a promissory note to Jordan, expecting to recover the cost from leasing the blocks. But the lease arrangement fell through and Jordan took the chief

96. Hauraki minute book 4, fol 260. Fenton's judgment as to the nature of the interests that he was willing to award was delivered in December 1870. The final order awarding fishing rights to the applicants was issued the following year: see Hauraki minute book 4, fol 259, and Richard Boast, *The Foreshore*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1996), pp 32–34, 50.

to the Supreme Court to recover £500 to £600. He was awarded £700 inclusive of costs. In the forced sale that followed (which Mackay said he tried in vain to prevent) Ngakapa's boat was seized and his land was sold for £35.⁹⁷ Soon other chiefs, including some of Mackay's old adversaries such as Aperahama Te Reiroa, were being pursued by writs and bailiffs for debts incurred.⁹⁸

Crown purchases of the freehold of the Kauaeranga foreshore are discussed in chapter 22. An important part of the context of the purchases was that gold-mining companies had long since been using the foreshore to erect batteries, goods sheds and jetties, paying some rents to Maori informally. In November 1872, the foreshore was excluded from the occupation, residence and building site provisions of the Gold Mining District Act, while the Crown maintained its pressure to buy out Maori interests.⁹⁹

Apart from the foreshore, the Crown did not at this stage target for purchase lands already within Thames goldfields. A number of goldfield blocks such as Karaka and Te Hape were, however, put through the court, partly at Puckey's suggestion, in an effort to determine the appropriate recipients of miner's rights fees and rentals. The awards of fully negotiable title to a few named individuals fed a growing desire among Thames Maori to lease lands directly to private lessees. This was stimulated by the rapidly escalating value of Thames land in the 1869 boom. Maori owners, having arranged residential and business leases through Mackay and others, could not but be irritated to see their tenants sub-letting – probably illegally – for much higher rents. In the new, confused era of direct dealing, Maori owners began to double-lease or seek to break leases and renegotiate, assisted at times by Pakeha not averse to sharp practice.¹⁰⁰

Frustrations arose concerning the raft of sites generously gifted by rangatira to all the churches (20 sites), the hospital, the school, the courthouse, and the police station when they and Mackay had been laying out Shortland township. In the new, frenetic context of the land court and the Thames boom, Taipari began to demand the return of the sites being used by the Government. Mackay recommended compensation instead, but no evidence is available as to how much, if any, was paid.¹⁰¹ By 1870–71, the issue faded with the declining boom and the accompanying fall in land values, but the close relationship between Crown officials and rangatira in the opening of the Thames field had given way to a new, competitive, commercial order.

97. 'Papers Relative to the Working of the Native Land Court Acts', AJHR, 1871, A-2A, pp 6, 43–45

98. Document A8, p 179

99. Ibid, pp 179–180

100. Ibid, pp 170–171

101. Ibid, pp 171–172

9.7 TREATY ISSUES ARISING**9.7.1 Claimant submissions**

Counsel for the Wai 100 claimants had stated in closing submissions that ‘Both the manner in which Mackay went about opening the field and the terms of the agreement, including the subsequent alterations of those terms by the Crown have been put at issue in this claim’. In particular he refers ‘the opening up of Waiotahi in September 1867’ and ‘making advance payments to Ngati Tamatera and Ngati Whanaunga in respect of Te Mamaku block.’¹⁰²

(1) Waiotahi

With regard to Waiotahi, counsel quotes from Mackay’s 1869 report setting out the court case involving Aperahama Te Reiroa’s sons, and his advance of £10 to pay their fines against miner’s rights for the block, whereupon Te Reiroa agreed to the block being opened. He notes that Crown counsel ‘denied the sons were kidnapped’ and that Crown witness Dr Battersby argued that ‘Mackay did not use his judicial powers to coerce Aperahama to open Waiotahi’. Counsel for Wai 100 submitted:

neither argument bears scrutiny nor can they mask the fundamental Treaty breach evident in Mackay’s conduct, in mixing his roles as arresting officer, Resident Magistrate, and Land Purchase Commissioner responsible for arranging the cession of gold fields. This combination of roles enabled Mackay to exploit the situation that presented itself and enabled him to effectively hold Aperahama’s sons to ransom, unless he agreed to open Waiotahi to mining.¹⁰³

Belgrave et al, for the Marutuahu claimants note that Mr Monin applied the terms ‘coercion’ and ‘extortion’ to Mackay’s actions in this episode, and comment: ‘At the very least, Mackay took advantage of Maori distress for the benefit of the Crown’. They also note that Mackay took steps to remove trespassing miners from Waiotahi but continue:

However, the Crown’s pursuit of the cession of Waiotahi, through Mackay, reflected the miners’ refusal to respect Ngati Maru’s boundaries, and suggests a lack of will, or ability, on the part of the Crown to defend the Maori rightholders’ right to keep the land closed indefinitely.¹⁰⁴

(2) Mackay’s negotiating methods

With regard to the Te Mamaku 1 agreement, counsel for Wai 100 considered that Mackay’s payment of advances of £500 to Ngati Tamatera rangatira against anticipated miner’s rights revenue, as an ‘inducement’ to open the land to mining, breached Treaty principles:

102. Document Y1, pp 38–39

103. Ibid, p 40

104. Ibid, p 176

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Like the inter-related system of raihana/debt and cash advances utilised heavily by Mackay in purchasing land from Hauraki it is submitted that such payments breached the Crown's duty of active protection by encouraging Hauraki into a cycle of dependency and debt which the Crown invariably took advantage of.

Counsel suggests that Mackay was 'not adverse to overlook [*sic*] his protective duties as a Crown Officer in order to advance the Crown's position', citing in support Mackay's own comment that he was 'quietly putting in wedges and letting them draw'.¹⁰⁵

Belgrave et al, for the Marutuahu claimants, are very critical of Mackay's persistence in seeking agreement to open land to mining:

By approaching and reapproaching key individual right holders, Mackay wore down their resistance. Mackay's efforts appear to have been underpinned by the view that the ceding and sale of land, and the consequent arrival of numerous Europeans, were inevitable processes. Consequently, Maori opposition to European incursions onto their lands was something to be worn down rather than accepted and respected.¹⁰⁶

(3) *The Crown's unilateral extension of regulatory power*

A further aspect of the Wai 100 claim related to Thames (and Coromandel) was the increased regulatory powers 'unilaterally imposed by the Crown' over the ceded goldfields lands from the 1858 Gold Fields Act onwards, with little or no consultation with Maori. Hauraki Maori found their lands increasingly affected by the various laws and regulations, even though they still owned them under customary tenure. Claimant counsel submitted that:

As well as leading to greater Crown control of the ceded lands, often for purposes other than the extraction of gold, the miner's rights system was drastically altered by the introduction of a leasing system by regulation without discussion with Hauraki. Although the lease revenues were subsequently deemed to be '*money arising from miner's rights*', the charge [change?] introduced proved to be a watershed. Later agreements contained a much lower revenue base while . . . agreements reached in the Thames and Coromandel fields were further amended by statutes so as to reduce the payments due to Hauraki. [Emphasis in original.]¹⁰⁷

Counsel for Wai 100 quotes Dr Anderson as follows:

The problems with accountability in the administration of the revenues demonstrated how distanced Maori had become from the resources of their land. The protests over the

¹⁰⁵. Document v1, p 41

¹⁰⁶. Document v1, p 177

¹⁰⁷. Document v1, pp 42–43. The emphasised phrase is attributed to section 3 of the Gold Mining District Act 1871 and section 173 of the Gold Mining District Act 1873: doc A8, p 156.

introduction of leases and moves on the part of the Government to extend its mining jurisdiction to lands below the high-water mark, expressed Hauraki dismay at the way their rights, confirmed by negotiated agreement, were legislated away without consultation with them.¹⁰⁸

(4) Unfulfilled promises of social and economic benefits

Counsel for Wai 100 also quotes Dr Anderson in the context of unfulfilled promises, speaking of:

a sense of disappointment in the way promises of partnership in the social and economic benefits of mining which had been implicit to the cessions, and explicitly stated during the negotiations leading up to those agreements, had proved false. In the meantime the impact of their agreement to open the Thames area to mining had been far greater than they could have expected – the alienation of cultivations and residence reserves and of natural coastal resources, as Grahamstown, Tararu, and the Kauaeranga foreshore were drawn into the imperatives of an expanding gold field.¹⁰⁹

Counsel concludes that the opening up and administration of the Hauraki goldfields discloses significant breaches of the Treaty:

Not only were the problems apparent with negotiation documentation of many, if not all, of the original cession agreements, but that the Crown's overall failure to honour the agreements made, either by adhering to the terms or otherwise ensuring that the Hauraki right-holders were treated in accordance with those agreements, was a substantive breach of the Treaty duty of active protection. Although on occasions, issues were addressed by the Crown or its agents, the overall story is one of progressive erosion of the original understandings that had begun with the agreement of 1852.¹¹⁰

Belgrave et al also cite the 1868 leasing regulations as illustrative of a fundamental shift:

However, the more significant issue is the Government's willingness to amend agreements entered into with Maori without consulting those directly affected by the changes. As stated by Paul Monin, the new leasing system 'was a significant step in [the Legislature's] political disempowerment of Thames Maori'. Such behaviour shows that by the late 1860s the Government no longer felt the need to engage in the form of 'pragmatic partnership' which had characterised the Patapata agreement of 1852. The balance of power had shifted sufficiently in its favour for it to act in a more unilateral fashion.¹¹¹

108. Document A8, p 170

109. Document Y1, pp 43–44; doc A8, p 170

110. Document Y1, p 45

111. Document V1, p 179

9.7.2 Crown submissions and claimant counsels' responses**(1) *Waiotahi***

The allegation that Mackay, in mixing his roles as arresting officer, resident magistrate, and land purchase commissioner, effectively held Aperahama Te Reiroa's sons to ransom is rejected by the Crown. Crown counsel cites the work of Dr Battersby as showing the difficult working conditions on the field for Mackay and his over-worked and under-resourced staff. Mr Monin is also quoted, to the effect that Mackay was 'caught in a juggling act. Simultaneously, he had to protect Maori interests, secure new goldfields for the diggers, and make do with insufficient government funding.'¹¹² In the light of these circumstances, Crown counsel submits that:

It is unreasonable in the context of the time to assume that the Crown could have had three different people carrying out these roles. There simply wasn't the manpower. Also at the time there was more of an expectation that people could carry out different roles and not automatically be seen to have a conflict of interest.¹¹³

At worst, Crown counsel suggests, Mackay's role in relation to the opening of Waiotahi might be described as 'opportunistic'. Counsel quotes Dr Battersby at some length on the issue:

The issue of the Waiotahi extension has been overstated, with all but one of the owners having agreed to opening the area before the brawl in which the sons of Aperahama Te Reiroa were arrested. Salmon's accusation of sharp practice extends from the brevity with which he examined the episode and a little licence – in fact Mackay did not 'offer' to pay the fine as Salmon has alleged. Anderson's conclusion that Mackay used his judicial powers to coerce Aperahama to open Waiotahi is not supported by the sequence of events. It was not until after the arrest trial and sentencing of Aperahama's sons that the latter asked to borrow the money, which Mackay agreed to on security of miners' rights. The criticism of Mackay's integrity by Anderson seems undermined by the fact that Mackay was quite open in stating what he had done, and there is no hint that either he, or anyone else, considered this arrangement inappropriate.¹¹⁴

These explanations have not wholly satisfied claimants. Counsel for the Marutuahu claimants consider that 'The Crown's justifications for his [Mackay's] actions may explain why he acted as he did, but they do not resolve the ethically bankrupt and opportunistic exploitation by Mackay of Aperahama's situation.'¹¹⁵

Counsel for the Wai 100 claimants submits that:

^{112.} Document AA1, p 19; Monin, p 217

^{113.} Document AA1, p 19

^{114.} Document O6, p 105

^{115.} Document AA13, p 49

the claimants' central criticism, that Mackay was hopelessly conflicted is more than made out by the Crown's analysis and in particular the quote from Paul Monin which Crown Counsel cites with approval. It is submitted that the fundamental conflict which resulted was entirely foreseeable even at the time, and was in breach of the Treaty duty of active protection.¹¹⁶

(2) Mackay's negotiating methods

Crown counsel notes that claimants have placed great emphasis on Mackay's statement that he was 'quietly putting in wedges and letting them draw', and accepts that on the face of it 'this is a troubling acknowledgement' (presumably because the Crown considers that it implies covert and manipulative methods). But counsel asks whether the comment reflected Mackay's general practice or whether he was perhaps inflating his success in the letter to Rolleston. Counsel also questions whether the statement was, in any case, indicative of a 'divide and rule' strategy by the Crown:

in many instances, it was natural for Mackay and other Crown agents to seek to deal with Chiefs prepared to sell or open their lands to goldmining – and in circumstances of great change inevitable that Maori would differ in their responses to these new developments. Some Maori saw them as opportunities, others were more cautious – some such as Te Hira implacably opposed.¹¹⁷

Crown counsel also notes that, while Mr Monin's also criticises the Crown's 'alleged divide and rule tactics', he nevertheless observes that the Crown's approach stood no chance of success without the willing participation or active agency of some chiefs: 'Mackay presented Maori with new forms of power, an alternative field of play.'¹¹⁸

Counsel for the Marutuahu claimants rejects what he considers the Crown's effort to downplay the significance of Mackay's statement:

Mackay's strategy was part of a wider Crown policy of acquiring the freehold, where possible, or cession of Maori gold bearing lands. It is clear that many Marutuahu rangatira felt under pressure to cede or sell their lands through Mackay's 'wedge' tactics or by other pressures, such as the pressure of miners camped on their borders.¹¹⁹

Counsel for Wai 100 considers that the Crown's analysis of Mackay's actions is slight, omits features such as the advance payments given in respect of Te Mamaku, and focuses instead on 'Maori agency' and the comments of other analysts:

¹¹⁶. Document AA14, p 18

¹¹⁷. Document AA1, p 20

¹¹⁸. Ibid; Monin, p 210

¹¹⁹. Document AA13, p 49

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In this regard it is submitted that it is artificial to address agency simply in terms of the goldfields agreements without considering the wider context of the Crown purchase programme and the operations of the Native Land Court and in the aftermath of war and confiscation. It is submitted that Maori agency must be looked at in this overall context, and the concentrated pressures applied by the Crown meant that in reality Hauraki possessed little choice.¹²⁰

(3) *The Crown's unilateral extension of regulatory power*

Crown counsel submits that the Wai 100 claimants' analysis of legislative and administrative changes (leading to lower revenue for Maori) is 'weak' (lower gold revenues for Maori are discussed below and in chapter 13):

First there is little engagement by the claimants with the extensive legal analysis set out in the appendix to the Crown's opening submissions on gold. Second, little account is taken of changing economic circumstances – which the Crown had limited capacity to control.¹²¹

Crown counsel argues that the history of gold-mining legislation shows that the Crown protected Maori rights in the industry by:

- ▶ prohibiting mining on Maori lands that were not open to mining; and
- ▶ Ensuring the revenue to which Maori were entitled from cession agreements was maintained¹²²

Counsel then retraces the history of gold-mining legislation, both as set out in section 6.10, and through to 1896. Although after 1873 the Crown took some powers of compulsory resumption of private land for mining, 'None of these Acts applied to Maori lands':

Customary Maori land that Maori did not want to be mined was always protected by the legislation. The Land Purchase Ordinance 1846 prohibited the sale or leasing of mining rights on customary Maori lands. From 1868 there was a penalty for mining on customary Maori lands not ceded for mining purposes without a prospecting licence which required, among other things, the owners' consent. The penalty was between £5–£50. The penalty remained at that level throughout the 19th century and was included in the Mines Act 1926. [It] was substantially higher than the penalty for unauthorised mining on private lands . . . Even though Parliament (controversially) permitted mining on private lands (under the Acts of 1873, 1888 and 1896), it never extended these laws to customary Maori land. When Parliament did legislate to facilitate the opening of Maori lands for mining purposes in 1892 it required the consent of the majority of Maori land owners to the proposal.¹²³

120. Document AA14, pp 18–19

121. Document AA1, p 22

122. Ibid, p 23

123. Ibid, p 24; see ch 16

Similarly, Crown counsel argues, legislation continued to protect the fees payable to Maori for mining on their land. With regard to the Thames field, counsel draws attention to the legislation of 1869 which, largely in response to the Maori petition about the effect of recent legislation and regulations relating to company mining (see sec 9.4.40), restored the previous entitlements.¹²⁴ Counsel suggests that ‘The real grievance may lie in the manner in which some of the changes were brought about, rather than in the results of those changes.’¹²⁵ Crown counsel also draws attention to other factors, besides the fees payable to Maori, which may have affected the perceived diminution of income: these include the recession in Thames in 1869–70 and the general decline of the field from the early 1870s.¹²⁶

Counsel also notes that Dr Battersby’s evidence regarding the reports of the Native Affairs Committee on the Maori petitions of 1876 and 1877 exonerated the Crown officials concerned (notably Puckey) and found that accounts had been regularly kept and no unreasonable delays in payments had occurred. This, he suggests, does not support the claims of Belgrave et al that ‘the Crown failed to administer the agreements in a way as to ensure that the terms were adhered to in a readily verifiable manner.’¹²⁷

Counsel for the Marutuahu claimants, in reply, nevertheless consider that ‘As the Crown grew more powerful in the late nineteenth and early twentieth century, it became less consultative in its dealings with Maori’ and changed mining agreements without negotiating such changes with Maori who were affected. Counsel notes that the Crown acknowledges that legislative changes in the mid-1880s affected the revenues paid to Maori, and that ‘inefficiencies’ in administration could be found in the early twentieth century in particular.¹²⁸ (These issues are discussed in chapter 13.) In his responses, counsel for Wai 100 has submitted that the survey of mining legislation ‘is of only peripheral relevance’ and does not undermine claimant criticism of the Crown’s unilateral changes, which reduced the revenue to Maori in the later nineteenth century. Counsel also questions the Crown claim that ‘Customary Maori land that Maori did not want to be mined was always protected by the legislation’: ‘While the legislation may have purported to protect such lands the evidence shows that the threat of lawlessness if land was not opened to mining was used by Crown officials on a number of occasions and indeed was referred to in Crown submissions.’¹²⁹ This remark is referenced to Fox’s 1861 instructions to McLean expressing the need to prevent ‘collision between the races’ as a result of miners assembling to seek gold on Maori land, and to the Crown’s concern about a breakdown in law and order at Tokatea in 1862. We have discussed these matters in chapter 8.

124. Document AA1, p 26

125. Ibid, p 27

126. Ibid, pp 27–28

127. Ibid, p 28

128. Document AA13, p 50

129. Document AA14, p 19

(4) Unfulfilled promises of social and economic benefits

This issue relates to the promise of benefits for Maori and on-going prosperity if their land was opened for gold mining, held out to Maori by Crown officials such as Superintendent Williamson, at an important tangi in 1867. It also partly relates to falling gold revenues, discussed below. Crown counsel comments that ‘the Crown agents firmly believed that Maori participation in these new economic opportunities was for the benefit of the colony as a whole, including Maori’, and that comments such as Williamson’s were genuinely intended. However, Crown counsel maintains that ‘Professor Hawke has relevantly observed that no-one, including Crown officials, fully understood the context in which they were operating.’¹³⁰

Counsel then quotes Mr Monin’s reflections on the effect on Maori society of economic change: wealth was no longer coming mainly from the cooperative labour of rangatira and their hapu and shared through customary exchanges, or later from trade, but from miner’s rights fees and rents. Such earnings, Monin suggests, ‘were not tagged with social obligations’, and the chiefs, who received the bulk of the payments, were ‘beholden to no kin workforce’. Consequently, the chiefs were less constrained than formerly in how they spent the money. The flush of wealth in the boom years in Thames thus became a ‘culturally destabilising factor’.¹³¹

Belgrave et al consider that Monin’s argument ‘overstates the extent to which a cash economy initiated a dramatic cultural transformation’. It was true that for Europeans the Thames rush was extremely speculative, and soon dominated by limited liability companies, investing much capital. However, they suggest, where Maori were concerned, this analysis overlooks to some extent ‘the extensive [and long term] engagement Hauraki Maori had in the context of rents, timber revenue and other income, drawing on their experience of the European economy generally’.¹³² We note that there is very limited evidence distinguishing how the income collected by the Crown for Maori was divided between rents, miner’s rights fees and timber-cutting fees, and no evidence on how much Maori earned from wage labour or from supplying food to the miners and the town.

Crown counsel observes that the economic changes were complex. Consequently, ‘it is very difficult to identify or determine any particular responsibility or obligation that the Crown ought to have met, in terms of assisting Maori to adjust to these new circumstances’. Indeed, counsel cites Belgrave et al on the question of whether the Crown should have built up a capital fund for future development from the revenues payable to Maori:

The speed with which the rush took place and the dramatic social and economic transformation of major parts of the Coromandel Peninsula and Thames areas were such that

¹³⁰. Document AA1, p 20

¹³¹. Ibid, pp 20–21; Monin, p 226

¹³². Document AA1, p 21

to have established and maintained a regime would have required an unusual degree of foresight and administrative rigour.

Given that, in the light of experience since 1840, Maori were very suspicious of Crown trusteeship and determined to maintain as much control as possible themselves of their lands and revenue, ‘The Crown submits that it is unreal[istic] to conceive of a regime for the compulsory investment of Maori gold proceeds – this was simply not the role of the Government at the time.’¹³³

We should note, however, that Belgrave et al go on to say:

It could, perhaps, have been possible for the Crown to establish some form of trust managed by leading representatives of the major iwi of Marutuahu. This would have been a difficult exercise and would not necessarily have been successful, but had it been attempted then much of the revenue of the period could have been retained for the ongoing development of the tribe.¹³⁴

9.7.3 The Tribunal’s comments and findings

(1) *Waiotahi*

With regard to Waiotahi and its cession for gold mining, possible breaches of Treaty principles focus upon Mackay’s arrest of Aperahama Te Reiroa’s two sons for their fight with a miner, and his loan of £10 to pay their fine, to be set against future miner’s rights fees from Waiotahi. This deal resulted in Aperahama withdrawing his opposition to the opening of Waiotahi the same day. The context of this incident, including negotiations for Waiotahi with other rangatira and mounting miner pressure to enter the block, was given in section 9.3.2.

There is no evidence to suggest that the incident involving Te Reiroa’s sons was anything other than fortuitous. Because of the mounting tension between Maori and miners, Mackay appears to have been justified in fearing that their fight with a miner (which broke out on the beach beside the Kauaeranga River) may have led to a general fracas. He acted responsibly in arresting and charging the miner and the two Maori involved.

The next day, they were brought before a bench of the Resident Magistrate’s Court consisting of Resident Magistrate Mackay, the goldfield warden, Baillie, and W H Taipari, assessor, and charged with a breach of the peace. All three were found guilty of common assault and were fined.¹³⁵

133. Ibid, pp 21–22; doc v1, p 75

134. Document v1, p 75

135. *Daily Southern Cross*, 5 September 1867, p 3

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Although the two Maori had difficulty paying the fine (and would have been removed to Auckland to serve their sentences) it is extravagant to suggest that Mackay ‘kidnapped’ Te Reiroa’s sons or effectively held them to ransom. Mackay’s multiple roles are not surprising. As Crown counsel has pointed out, it was not unusual in those days of slender staffing and resources for officials to wear several hats.

It is also true, as Crown counsel pointed out, that Te Reiroa *came to Mackay* to solicit his sons’ release and ask for a loan to pay the fines. Once again, it was far from unusual for chiefs to seek assistance from officials for contingencies of various kinds. Under Grey, it had become virtually a technique of government. The only question at issue that we can see is whether Mackay should have made the loan as an advance on miner’s rights fees *from Waiotahi*, rather than against any other income Te Reiroa may have had. Certainly, his action was ‘opportunistic’, as Crown counsel has put it. It possibly even constituted unfair pressure on Te Reiroa, though Mackay had already written on 31 August that he expected the field to be open in a few days’ time, and perhaps took it as a matter of course that it was from that source that Te Reiroa would repay the advance. Mackay’s proposal seems to have resulted in negotiation, with Te Reiroa requesting, and Mackay agreeing, that the flat land be demarcated as a cultivation reserve and mining confined to the hills. The strong pressure to secure an agreement was apparent; the line was cut and the field rushed that afternoon. It seems very likely that, in the circumstances, and with considerable Maori consent to opening Waiotahi already negotiated, some such result must have soon occurred, with or without the fight and the court case.

We consider that the situation in which Mackay and Te Reiroa found themselves arose fortuitously, and Mackay’s action in tying the £10 advance to the anticipated mining revenue from Waiotahi was opportunistic rather than pre-meditated. It nevertheless involved a confusion of his roles as magistrate and principal negotiator of mining cessions which strictly speaking he should have avoided. In this case the possible conflict of interest was ameliorated by the fact that the Bench included Baillie and Taipari.

(2) Mackay’s negotiating methods

Mackay’s negotiating methods are regarded by claimants as generally unprincipled. Examples given are his advances to selected chiefs, and his comment to Rolleston about ‘putting in wedges and letting them draw’. These are regarded as ‘divide and rule tactics’, designed to overcome widespread and general Maori opposition to opening the land to mining.

We note that governments of the day were very eager to have gold-bearing lands opened to mining, because of the investment and economic growth they would stimulate. Fox’s 1864 instructions to Mackay and the £5000 reward offered by Superintendent Williamson in 1867 are indicative of that. The issue is whether the tactics used by Mackay (in particular) were in any way unprincipled and involved undue pressure or manipulation.

It is clear that in the Thames district some Maori were interested in opening their land to gold mining. That had been evident in the 1857 Kauaeranga meeting, and again in the mid-1860s. Mackay had been meeting local rangatira on many occasions from 1864 to mid-1867, and WH Taipari himself took a leading role in prospecting on his hapu lands and in negotiating with Mackay. His enthusiasm and influence, bolstered by (though not founded upon) Williamson's offer of a £5000 reward, resulted in the opening of the Kauaeranga field. As he explained on claiming the reward, it was 'from my persevering work that gold was prospected for here', and only because of 'the firmness of myself and my relatives' that the Thames field was opened.¹³⁶

The find by Taipari's Maori prospectors in the Karaka Stream precipitated intense interest in Auckland. It is difficult to gauge the risk of an uncontrolled rush, but it was entirely constructive, in our view, for Mackay and Pollen to go to the district and seek to negotiate an agreement ahead of any rush. If, in the context of negotiation, Crown officials referred to the risk of 'lawlessness' from encroaching miners, we are inclined to give them the benefit of the doubt and treat such remarks as no more than practical warnings, rather than 'threats' to pressure Maori.

The more important question in terms of Treaty principles, is whether the agreement should have been made with only a section of Ngati Maru, and afterwards extended hapu by hapu. The evidence shows that those at the meeting of 26 July allowed Taipari and his son, and Rapana Maunganoa and his son to make an agreement respecting their family lands, and the next day respecting the lands of Ngati Hape, Ngati Rautao, and Ngati Hauauru (three hapu out of many associated with Ngati Maru). Had Crown officials tried to drive through an agreement with these men by private deals we would have had little hesitation in saying that a 'divide and rule' strategy was being employed and Treaty principles were thereby breached. But the agreement emerged from a general hui of Ngati Maru, and there is some evidence that others at the meeting were treating the agreement as an experiment, which (if it proved favourable), would lead to more hapu opening their land. We therefore see no particular problem with the initial negotiation.

Miners then began to arrive in numbers and Maori began to profit from the field. The collection and payment to Maori of miner's rights fees and rents would have taken some time but there would have been an immediate market for Maori labour and produce (Taipari apparently anticipated killing and selling the pigs that ran wild on the land). Mackay and his small staff showed themselves to be firm in policing the boundaries of the field, knowing that this would engender Maori confidence in a controlled opening of their land and engagement with mining, and lead to more agreements. This is precisely what happened.

From September to November 1867, Mackay met at least twice more (additionally to the August meetings) with Te Moananui and others of Ngati Tamatera, and negotiated the

136. Hart, 'Maori and Goldfields Revenue', p 14

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Waikawau and Te Mamaku 1 agreements. This could hardly be said to be a persistent pressure against a reluctant chief, because Te Moananui had indicated his general agreement on 5 August. Nor was the negotiation divisive of the tribe: Te Moananui's status was indisputable, and in September, even Te Hira ('implacably opposed' to the opening of Ohinemuri) agreed to gold mining north of Shortland. Negotiations continued, resulting in agreement with Ngati Maru and Ngati Whanaunga over the area from the Waiwhakauranga River to the Omahu Stream. Mackay's meetings appear to have been general meetings with the tribal leadership. A dissident such as Riwai Te Kiore secured the exclusion of the Otunui block, but on 16 December 'the Ngati Maru tribe, and my old opponent Riwai' agreed to allow mining even there. Finally, when all residence and cultivation reserves had been fixed for the main tribes (over a period of two months) the Te Mamaku 2 agreement was drawn up and signed, on 9 March 1868.

It is difficult to characterise these proceedings as manipulative or involving improper methods. They appear to have been conducted openly with the main leaders of each of the Marutuahu iwi, and the consent of all the principal chiefs seems to have been sought before an area was declared open. The vetoes of hapu leaders such as Aperahama Te Reiroa or Riwai Te Kiore were respected over the opening of their particular lands (Waiotahi and Otunui respectively), even though others of the tribe had agreed. Given that (as Crown counsel says) a wide variety of views was held among Hauraki Maori, from Patapata onwards, towards mining on their land, given that hapu and iwi rights were interspersed through the area, and given that rangatira's wishes were respected if they wanted to keep their hapu lands closed to mining, it is difficult to see how Crown officials could have proceeded any other way.

At least as regards the Thames goldfield, we do not see the soliciting of agreements by Mackay as involving any serious breach of Treaty principles. His 'wedges' comment in a private letter (made on 29 November 1867 after he had already reached agreements with most chiefs), reads as something of a throwaway, slightly boastful remark. If it implied secretive dealings and bribery, we would be very concerned. But Mackay had in fact been working patiently over several months through open methods, and continued to do so. Obviously, he would first approach chiefs who he thought would be amenable, or they would approach him. As the field opened and seemed to promise prosperity, a general consensus among Maori to open the Thames emerged over a period of months: by late 1867, barely five months after the find by Taipari's prospectors, there was no general volition among Thames Maori to keep this relatively small area closed to mining.

We do not regard the advance payments of £500 made to Ngati Tamatera rangatira in respect of the Te Mamaku 1 agreement or the £100 advance payment to Ngakapa Whanaunga as particularly heinous. The Ngati Maru leaders in July 1867 had also asked for a large, initial, advance payment in the form of rent, a request which the Crown officials declined in favour of the miner's rights system. It is not clear in the two later negotiations referred to which

party proposed the advance payment, but the desirability to Maori of an initial payment, to discharge existing obligations and meet pressing current needs, is obvious. We do not consider that advances against expected annual miner's rights fees and rents, *within reasonable limits*, are of the same order as *raihana* – the extension of almost unlimited credit for store debts – or that, of themselves, they enticed Maori into 'a cycle of debt and dependency'. It was, however, not a wise practice. The advances may have favoured individual chiefs who received them, and those made to Te Moananui meant that for several years no miner's rights fees were paid to them.¹³⁷ At section 9.7.3(4), we discuss the little information we have on the extent to which those chiefs distributed these payments.

We consider that there is a discernible line, albeit a fine one, between giving advances against anticipated annual revenue and giving almost unlimited credit for piecemeal consumer spending against the security of land. We do not think that line was crossed in the case of the negotiations for gold-mining agreements in Thames.

Nor are we persuaded by the evidence that Mackay's negotiating strategy *in respect of Thames mining cessions* should be evaluated as part of a wider Crown policy of acquiring the freehold of Maori land, or that the operations of the Native Land Court, plus the aftermath of war and confiscation meant that Maori in Thames had little choice but to open the field. The negotiating strategy was part of a pattern of seeking mining agreements over many areas where gold deposits were expected, including Ohinemuri (for which Mackay was also actively negotiating; see chapter 10). But the drive to purchase the freehold, as operative in Ohinemuri and Te Aroha in the 1870s (see chs 10, 11), came *after* the opening of the Thames field, which we believe should be appraised in its own time and context.

Once the agreement had been struck with the Taipari and Maunganoa families other agreements came quite quickly. Crown witness Dr Battersby says that they proceeded 'slowly', but that is in the context of making the point that Mackay proceeded very largely by a series of open meetings with Maori groups, not just negotiations with individual chiefs.¹³⁸ It is also clear that Mackay's success in securing further agreements did not come from 'force' or even from 'pressure'. It came mainly from the fact that he firmly policed the boundaries set by rangatira, and did not declare blocks open until *all* the principal right-owners had agreed. Thames Maori were thus able to feel that they could make a controlled engagement with gold mining, while still retaining title to the land they valued so highly. Given the heavy and constant pressure Mackay and other Crown officials were under simply to push Maori aside, this was a creditable aspect of the Crown's policy and administration. We cannot help but observe that it is a great pity that the Crown – including Mackay later in his career – did not conduct more of its later land dealings on similar principles.

A partial exception to this interpretation is of course the Thames foreshore, where the

137. Puckey to under-secretary, Native Department, 31 July 1880, Thames goldfields notes, MA13/35c [MA13/35g], Archives NZ; Hart, 'Maori and Goldfields Revenue', pp 18–19

138. Document P6, pp 22–23

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Crown discouraged direct private leasing but itself declined to lease the rights awarded by the land court in 1870 and insisted on their purchase. The Thames foreshore is further discussed in chapter 22.

(3) *The Crown's unilateral extension of regulatory power*

It is undeniable that, once the Thames field was opened and the boom occurred, Maori found themselves caught up in very complex processes, over which they had limited influence or control. What is difficult to determine is how far the Crown could control these processes, and also observe their Treaty responsibility to consult Maori and protect their interests.

We would agree with the claimants that the general government to some extent abrogated its responsibilities by delegating the management of the goldfields to the provinces, under the Gold Fields Act 1866. The Auckland provincial government clearly supported investment. Superintendent Williamson's offer of a very large reward for the discovery of gold contributed substantially to the opening of the field. Thereafter, as we have observed (and especially in 1868), Williamson introduced regulations concerning mining rights fees which favoured the mining companies and threatened to reduce the revenue payable to Maori.

There was a case for some change. The miner's rights fees system was suited to active miners rather than a plethora of company shareholders. In a sense, Maori owners were getting 'windfall' profits from a system designed for individual rather than company mining. But the changes were made without any consultation with rangatira, in a manner which Mackay *himself* saw as putting him (as the negotiator of the original agreements) in bad faith with Maori. We agree that the kind of unilateralism displayed by the province did breach Treaty principles.

But the story is not complete if it does not take into account Mackay's support for the Maori petition to Wellington and the subsequent modifications to legislation in 1869. As explained by Dr Battersby, these changes included:

- A modification in the Legislative Council to the Mining Companies Limited Liability Act Amendment Act 1869 to ensure that Maori owners continued to receive at least £2 for each claim held by a company – that is, the company miner's right and the miner's rights of the employees who worked the field. (Without the change, the Bill could have reduced the payment to £1 for each claim, regardless of how many men worked it.¹³⁹)
- Modifications to the Gold Fields Act Amendment Act 1869. This introduced the concept of the leaseholders miner's right, which required that all holders of gold-mining leases take out a miner's right for every lease held at the rate of £1 per 15,000 square feet of land leased.¹⁴⁰

139. Document P6, p 66

140. Ibid, pp 67–68

We agree with the Crown that it is not sufficient to note Maori protests about the administration of the field and the revenues therefrom; the research does need to follow through the subsequent outcomes, including legislation and regulations, which sought to meet Maori complaints.

We note the Crown researchers' efforts in this regard, and we accept that they have shown that, at least until the 1880s, whatever changes the Crown made with little or no consultation with Maori, it did firmly uphold the principle that Maori consent was required for gold-mining on Maori land.

The question of the maintenance of revenue flows to Maori right-owners is more difficult. Counsel for Wai 100 has asserted confidently that agreements later than 1868 'contained a much lower revenue base' for Maori, and that statutes reduced the payments due to Thames and Coromandel Maori under the initial agreements.¹⁴¹

In spite of Dr Battersby's research on legislative responses which sought to maintain the Maori revenue base, we have little or no information which would show clearly the effects of the various laws and regulations on Maori revenue. Belgrave et al, referring to Williamson's leasing regulations of 1868, acknowledge that 'It is not clear how the change affected revenues paid to Maori in these years.'¹⁴² We also note the remarks of Puckey which suggest very variable outcomes under the Gold Mining Districts Regulation Act 1871. On the one hand, several new sources of revenue were created, including water rights fees and battery site fees. On the other hand Puckey later complained that regulations under the Gold Mining Districts Act 1871 completely changed the manner in which revenues were assessed for the land blocks which comprised the Hauraki gold-mining district and 'it became merely a matter of approximate allocation', with so much left to the discretion of the administering officers that abuses grew up.¹⁴³

We are greatly handicapped in trying to assess these various opinions because we have in fact received in evidence a number of assertions but virtually no calculations of the effects on Maori income of various statutes and regulations. Dr Phillip Hart's and Mr Monin's independent research has provided some figures:

- The early flush of mining produced substantial returns to Maori. Between 1 August 1867 and 31 January 1869 £17,761 was paid in miner's rights fees and £10,075 distributed.¹⁴⁴ Puckey estimated that fees over the following years up to 1874 totalled £30,000.¹⁴⁵ Rents were additional according to Hart, with £1708 being paid by way of a first instalment of

141. Document v1, p 42

142. Document v1, p 179

143. Puckey to under-secretary, Native Department, 31 July 1880, Thames goldfields notes, MA13/35c [MA13/35g], Archives NZ, p 5 (Anderson, *Goldmining*, p 49)

144. 'Return of Revenue Received from Miners' Rights at the Thames Goldfield', AJHR, 1869, B-15

145. Puckey to under-secretary, Native Department, 29 May 1874, AJHR, 1874, G-2, p 5; Monin, p 22

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rent 'after the first three months of mining'.¹⁴⁶ They provided £5000 per year according to Mackay, presumably referring to the boom years.¹⁴⁷

- ▶ According to a *Thames Star* report based on official sources, between August 1867 and August 1880, Thames Maori received £59,562, comprising: in miner's rights fees, £33,107 under the 1866 Act and £1803 under the 1871 Act; in leasehold rights, £4786; and in machine sites, water races, and the like, £17,620.¹⁴⁸
- ▶ An analysis of the cash books of the receiver of gold revenue at Thames shows from 1 August 1867 to 31 March 1881 payments of £42,895 from miner's rights, and with timber licences and rents, a total of £62,451.¹⁴⁹

Without a more precise breakdown and comparison of figures, it is not possible to draw clear conclusions, but the *Thames Star* account does tend to support Puckey's contention that the decline in miner's rights fees payable under the company lease system was considerably made up by fees introduced in 1871 for 'water races and the like'. However, the contention that changes in mining laws did drive down revenue from fees is supported by the evidence of G T Wilkinson who was appointed in 1889 to investigate Maori complaints about the management of revenues. Wilkinson reported that, 'By substituting the leasing tenure (with its extended area, and the non-necessity for fully manning the ground)', there was an 'uncertain' but 'considerable' reduction in revenue, 'because, by not fully manning the ground less Miners Rights were taken out & ground locked up against others'.¹⁵⁰ But Wilkinson was writing in the light of the impact of the Mining Act 1886, which was more severe because it increased the normal measure of one man's ground from 15,000 square feet to 60,000 square feet.

We shall discuss the late nineteenth-century developments, across all Hauraki fields, in a later chapter. For present purposes, we conclude that the revenue to Maori from miner's rights and rents was indeed reduced, not so much from the 1868 regulations (which were corrected by legislation in 1869) but by regulations under the 1871 Act. This fall seems to have been partly compensated by the introduction of new charges for 'water races and the like', but, arguably, these charges should have been in place earlier. We have no information as to whether these new charges arose out of discussion with Maori before they were introduced.

146. Hart, 'Maori and Goldfields Revenue', p 19

147. Mackay, 'Evidence Given before the Public Petitions Committee of the Legislative Council', 5 August 1869, Thames goldfields notes, MA13/35c [MA13/35g], Archives NZ

148. Hart, 'Maori and Goldfields Revenue', pp 24–25

149. Ibid. Hart, following 'The Native Purposes Act, 1935', AJHR, 1940, G-6A, p 19, states that the revenues to which he refers were authorised by 'the Native Rents Act 1871', but no such Act existed. The principal statute governing the disbursement of goldfields fees and rents in the period concerned was the Gold Mining Districts Act 1871.

150. Wilkinson to under-secretary, Native Department, 20 June 1889, AJHR, 1889, G-3, p 5 (Hart, 'Maori and Goldfields Revenue', p 40)

We have little information on the actions of the Auckland Provincial Government before its abolition in 1876, but in general the provincial governments represented propertied settler interests, and did not consider themselves as having a Maori constituency. As the above examples indicate, the general government in Wellington did pay some regard to Maori protests *after* the impact of particular laws and regulations was felt. Studies of land legislation show that it was usually drafted in Wellington, often with some input from the Native Affairs Committee or from select committees on particular questions. We have received no studies of how mining legislation was drafted but presume it followed a similar pattern. Maori members would have spoken on various bills but (being only four in number) could not usually shift governments from their chosen course. In this sense, the flow of legislation was, in the main, unilateral.

All in all, we feel that the claimants' view – that their revenue base was reduced from its 1867 level by unilateral legislation – is justified. But we are not in a position to say how serious this reduction was, partly because some of the legislation was intended to uphold the original agreements and partly because the picture is confused by other factors. Clearly, there was a decline in revenue in any case, as the Thames boom passed and mining slowed dramatically from the early 1870s. But we do not have enough information to discuss the issue further.

What is clear is that Maori felt dissatisfied with the way the revenue was being managed. Our view is that this situation stemmed from the fact that Maori right-owners in the land were not included to any significant extent in the management of the goldfields. We shall take up this question in a later general chapter. (Administrative measures taken from 1870 are discussed in section 13.5.3.) But we are firmly of the view that it does not sit well with the Crown's Treaty obligations that most Thames Maori, having given their consent to opening their land to mining, were set aside with little role or responsibility other than to receive revenue. This was not true of leading men like W H Taipari, who had many roles, official and unofficial, on the goldfield. But most Maori were left with no administrative options but to complain and petition when revenues declined or were delayed.

Partnership under the Treaty points at the very least to some kind of board or council, comprising representatives of all major hapu as well as miners' representatives and officials, to manage the goldfield jointly. That, at least, would have reduced the possibility of unilateral action by provincial or general government in the regulations governing the field. It would, moreover, have given the landowners valuable experience in business and administration which they could use in their own ventures or in leadership roles generally.

Nor are such arrangements merely hindsight. In the late 1850s and early 1860s, there were several official projects which would have given Maori considerable influence or partial control over the use of resources. The 1858 legislation, which authorised a place for Maori in district councils with power to make and enforce by-laws, and George Grey's plans, discussed

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in chapter 4 and in section 15.3.3, had offered some scope for Maori leaders to work with officials in framing local by-laws. But the tenor of New Zealand government changed after 1865: 'the Crown' was now effectively the settler governments, little influenced by London in domestic matters, and much less inclined than before to involve Maori in the machinery of government, locally or nationally.¹⁵¹ Thames was mainly a Pakeha town, indeed mainly a company town.

(4) Unfulfilled promises of social and economic benefits

Williamson's 1867 promise to Thames Maori – that if they opened their land to gold-mining 'treasures', 'wealth', and 'benefits' would flow to them and their children – has been cited as if it contained promises which the Crown should have upheld. It was of course political rhetoric and should perhaps be dismissed as such. Yet, the provincial superintendent – to Maori the face of officialdom – was speaking at the burial of two leading rangatira; undoubtedly he raised Maori expectations. A significant component of the claims relating to gold is that Hauraki Maori were disappointed in their expectations and that the Crown could and should have done much more to ensure that the gold discoveries provided them with more sustained prosperity. The issue is whether sustained prosperity was within the Crown's control.

We will return to this theme in our concluding chapter on gold issues (ch 14), when we have considered the experience of Ohinemuri and Te Aroha. But a number of points may be made here in relation to Thames.

First, it is evident that, in the short term, wealth did flow into the goldfield and that Maori shared in it, albeit unevenly. WH Taipari and three other rangatira between them received over 90 per cent of the revenue up to January 1869, Taipari alone getting 45 per cent. Mr Monin's evidence indicates that Taipari distributed his payments among his community, 'first keeping only that for firewood and kauri trees, but then also that for miners' rights when these began to decline in 1871'.¹⁵² Te Moananui reportedly gave all but perhaps £1 to the tribe and let them divide it.¹⁵³ We have no way of knowing whether that pattern was maintained, but Puckey's statements indicate that he himself strove to distribute more widely, in accordance with customary right-owning in the land.

There has been discussion in evidence as to how Taipari and others spent the gold revenue. Taipari built a fine house and enjoyed a gentrified lifestyle, but he also contributed significantly to community projects; his and other rangatira's lavish hakari and other conspicuous hospitality were a means of distribution. Te Hira and Tukukino, on the other hand,

151. Other than four Maori members in Parliament, instituted from 1867 (but largely ineffective because vastly outnumbered), and the presence of a few chiefs in the Legislative Chamber.

152. Hauraki minute book 7; Karaka and Hape, 31 August 1872, Native Affairs Department, MA13/35, Archives NZ (Monin, p 223)

153. 'Report of the Commission Appointed to Inquire into the Subject of Native Land Laws', AJHR, 1891, G-1, p 40 (Monin, p 223)

were said to be contemptuous of Pakeha-style ostentation and continued to live frugally. Contemporary accounts by missionaries indicate that many Maori in Thames indulged in heavy drinking and gambling, no doubt like the miners about them.¹⁵⁴

Dr Anderson has suggested that the promises of social and economic benefits ‘proved false’. She points to impacts far greater than Maori anticipated and to the erosion of their rights to cultivation and residence reserves and the foreshore. However, we have seen how Thames Maori themselves initiated the leasing arrangements for the Kauaeranga foreshore, and with Daniel Tookey and Robert Graham, which led to the development of Tookey’s flat and Grahamstown. Dr Anderson notes that these areas and Taruru ‘were drawn into the imperatives of an expanding field’, an apt observation indicating that the situation was by no means wholly within Government control. It is not in itself an indication that Maori had been excluded from participation in development (save in the foreshore, discussed in chapter 22.)

We lack a thorough analysis of the administration of the town sections which remained in Maori ownership during the boom years of the Thames field. Given the Crown’s management of these urban leases, it could have acted here, if anywhere, to ensure that Maori enjoyed sustained benefits from the Thames goldfield. Partly for a constructive purpose – that is, to assist the correct distribution of rents – most sections were passed through the land court in the 1870s and vested in named owners. This meant that, later, many could be and were sold. We shall return to this question further in chapters 15 and 16 (on land policy and law), but we remark that the failure to preserve a significant proportion of urban lands in Maori ownership – not only in Thames but throughout the country – meant that the original communities, on whose lands the townships were formed, lost their access to the increased value of the land. This was contrary to the intention of the Thames agreements made in 1867–68, when rangatira had expressed a strong determination to own and let the township lands themselves.

One of the major reasons for Maori selling the freehold, in Thames as elsewhere, was indebtedness, or the need for income to maintain living standards. The volatile economics of a goldfield did not help. Puckey’s reports and evidence collated by Phillip Hart show that, despite the efforts of officials to warn Thames Maori that they should not expect the 1868–71 levels of income to endure, they continued to have high expectations. The decline of the field was said by officials to be one of the main reasons for discontent: other complaints were about alleged failure to distribute revenue or to distribute it correctly. The reduced revenue was only partially related to administrative or legislative changes (see sec 9.8.3(3)).

It is not easy to define Government responsibility in this situation. Some rangatira signed promissory notes and the Government advanced £300 to Frederick Whitaker, creditor of Te Moananui and Aperahama Te Reiroa when they were being pursued by bailiffs.¹⁵⁵ This,

¹⁵⁴. Monin, pp 227–228

¹⁵⁵. Ibid, p 229

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of course, was merely palliative. Some effort was made to address the issue of debt and land loss in land law changes (see chs 15, 16.)

The question arises whether the Crown officials should have invested a certain amount of the income for Maori landowners during the boom period (discussed further in chapters 16 and 17). Belgrave et al acknowledge that this would have been difficult but suggest that it should nevertheless have been attempted. We agree. An investment scheme, with trustees chosen from chiefs and local business leaders might well have added a new dimension to partnership. It is true that most trusts, such as that of the Wi Pere family in Poverty Bay, came later, but a similar scheme had been suggested in 1852 by Governor Grey (see sec 7.2). It is hard to believe that men like Taipari, who invested some of their wealth in mining and other ventures, would have been unreceptive to such suggestions.

We touch here upon the Crown's responsibility, not so much to take control of Maori income in a trustee role but to help Maori to engage carefully but fully with private enterprise. (This issue was previously discussed in section 4.2.3 in relation to early Crown purchases.) Today, in the South Pacific it is not uncommon – indeed, it is usual – for governments to require overseas investors to take a local partner in their enterprises as a condition of entry. It would be unhistorical to expect that model in Thames in the late 1860s. Nevertheless, at best governments showed a disappointing lack of vision when they merely watched Maori establish a life-style based on conspicuous spending and awaited the inevitable distress when gold revenues diminished.

In evaluating 'pragmatic partnership', we note the huge capital inputs by the Government and the private sector in the development of the Thames goldfield, including the large sums invested by the time the field was fully developed (see sec 9.4.2). These were the requirements of quartz mining and the building of a town on a rain-swept, swampy coast. We have not had in evidence any careful modelling of alternative modes of developing the resource, but we would caution against easy assumptions that other approaches would have led to better results for Maori landowners. Even if they had sought to develop the goldfield themselves, the requirements of quartz mining meant they would have had to seek partners with huge amounts of capital to extract the gold, and that capital would have come at a price: private investors would have insisted that costs were covered and a profit taken before they made commitments. Differences on lease terms were mostly about margins of profit, and the companies kept up their pressure throughout the century. Even if the Government had remained uninvolved and the field developed as private ventures between Maori and Pakeha capitalists, the outcome would have been little different. The miner's rights and rents system gave Maori some security of income while the field was being worked; sometimes they received revenue even when miners were not making profits. The situation changed, however, when Maori were no longer the owners of the land. We now turn to this question in relation to the opening of Ohinemuri.