

EXECUTIVE SUMMARY

THE RANGAHAUA WHANUI RESEARCH PROGRAMME

es.1 Themes and Districts

The issues discussed in the following summaries derive from common threads among the 650 or so ‘historical’ claims lodged with the Waitangi Tribunal since 1985. A major purpose of the Rangahaua Whanui research programme was to identify those common threads or themes and research them to a point where an appraisal could be made of various actions of the Crown, in the light of its Treaty obligations, as they affected the various districts and tribes. It is part of the Crown’s own objectives that ‘the resolution process is consistent and equitable between claimant groups’.¹ It is hoped that this research will contribute to that purpose. About 16 research reports on national themes have been completed and are in turn being edited and published by the Tribunal. Similarly, some 12 district reports have been completed. These show the impact of Crown policies throughout the country, according to research districts defined for the programme. The reports are, for the most part, appraisals of various aspects of British colonisation as it affected the control and possession of lands and waters. The summaries in these volumes reflect that focus. Claims relating to other issues besides lands and waters have not been the special focus of the Rangahaua Whanui programme, important though they are, but aspects of them have been referred to in the chapter on rangatiratanga.

es.2 Treaty Principles

By section 6 of the Treaty of Waitangi Act 1975, actions of the Crown in breach of the principles of the Treaty may give rise to claims by Maori. Much has been written about those principles by the Waitangi Tribunal itself, by academics, by lawyers, and by many others. It is not necessary to recapitulate all of that discussion here.² But it is appropriate to refer briefly to perhaps the most authoritative exposition of Treaty principles in New Zealand jurisprudence, namely the decision of the

-
1. ‘General Principles for Settlement of Treaty of Waitangi Claims’, November 1994, in *Crown Proposals for the Settlement of Treaty of Waitangi Claims*, Office of Treaty Settlements, December 1994, p 6
 2. For a collation of some of the main statements of Treaty principles by the Tribunal and the higher courts, see vol ii, app i.

Court of Appeal in *New Zealand Maori Council v Attorney-General* in 1987. On the principles of the Treaty, the president of the court, Justice Robin Cooke, said that:

- (a) '[T]he Queen was to govern and the Maoris were to be her subjects; in return their chieftainship and possessions were to be protected, but . . . sales of land to the Crown could be negotiated.'
- (b) Because there was some inevitable potential conflict between those principles, both parties had a duty 'to act reasonably and with the utmost good faith' towards one another.
- (c) 'The principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected government to follow its chosen policy.'
- (d) The Crown assumed a duty of protection towards Maori: 'the duty is not passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable.'
- (e) The Crown has a duty to remedy past breaches: 'the Crown should grant at least some form of redress, unless there are good grounds justifying a reasonable Treaty partner in withholding it – which would only be in very special circumstances, if ever.'
- (f) The Crown had an obligation to consult with Maori in the exercise of kawatanga. Justice Cooke was guarded, however, as to the practical extent of that obligation: 'in any detailed or unqualified sense the duty to consult is elusive and unworkable. Exactly who should be consulted before any particular legislative or administrative step which might affect some Maoris, it would be difficult or impossible to lay down.'

On the matter of consultation, Justice Ivor Richardson added, 'the responsibility of one Treaty partner to act in good faith and reasonably towards the other puts the onus . . . on the Crown, when acting within its sphere, to make an informed decision'.

Although it has not been so much discussed in the higher courts, the Waitangi Tribunal has also evoked, among other principles, the principle of options. That is, the terms of the Treaty give Maori a choice whether to retain and foster custom under article 2 or to assimilate new ways in accordance with their article 3 rights as British subjects. Or, indeed, to blend the two or walk in two worlds. By this principle, choices should not be unduly forced.³

Regard has been had, however, to what might reasonably have been expected of the Crown in the circumstances and the state of knowledge then prevailing. Many aspects of the encroachment of the wider world upon New Zealand were beyond the control of governments. In a Privy Council hearing on the issue of radio and television broadcasting, Lord Woolf also invoked Treaty principles. In the exercise of its duty to protect taonga, he said, the Crown 'is not required to go beyond taking such action as is reasonable in the prevailing circumstances'.⁴ Presumably, though, 'prevailing circumstances' should not be taken to the limit of excusing the actions

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

4. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517

of Crown officials on the basis that they were ill-informed, when they could readily have made themselves better informed, or because to do otherwise would evoke settler objections or frustrate some investor's grand design. The Crown's honour and its Treaty obligations to Maori are presumably above mere electoral popularity, otherwise any action in breach of Treaty principles could be excused simply on the basis of having been driven by current electoral pressures or approved by a vote of the parliamentary majority of the day. How far the constraints of democratic politics, or the cost to the national economy at any given time, must be assumed to prevail in any assessment of 'reasonableness' is perhaps a fine point of jurisprudence, as far as the interpretation of statute law and common law is concerned.⁵

Leaving aside fine points of current interpretations of the law, and turning to the historical evidence, it emerges that, on many issues, the officials and politicians who constituted 'the Crown' in action had policy options available to them and that they debated among themselves (though rarely with Maori) before proceeding. Through that selection of policies and their impact upon Maori, viewed in the light of its own solemn and public undertakings in the Treaty and elsewhere, or in the light of alternatives raised at the time, a historian can appraise the Crown's record without imposing upon the past the assumptions of a later age. The other important measure, however, is what Maori were plainly telling the Crown as to *their* preferences, at and since 1840. The Treaty was made between the Crown and over 500 chiefs; others subsequently joined in the process of building a New Zealand nation state. Where the Crown's actions overrode Maori preferences, through the use of force or the manipulative use of the legal and administrative processes, or where the Crown simply put Maori aside and did not seriously consult with them at all on matters affecting their property and lives, Treaty principles were presumably breached. Especially in the English text of article 2, the Treaty includes very plain statements of respect for Maori 'possession' of lands and other property, until such time as Maori wished to alienate them. In the Maori text, the Crown undertook to respect the 'tino rangatiratanga' of chiefs, hapu, and people ('tangata katoa' in Maori, 'individuals' in English). Modern scholars are agreed that 'tino rangatiratanga' would have implied much more to Maori than the English term 'possession', tending more towards 'self-determination' and 'autonomy'. (Some have used the ambiguous term 'sovereignty'.) Yet settlement, some settlement at least, was legitimated by the Treaty itself. The following summary assumes that, in exercising its overriding responsibility to the whole community, the Crown had a duty to protect, indeed to assist, settlement but *not* at the cost of simply overriding or ignoring Maori preferences, Maori expressions of tino rangatiratanga. On that basis, the common justifications given by officials and settler politicians for aggressive land acquisition and tenure conversion (namely, the promotion of settlement and land development, and the alleged improvement of the lives of Maori) are not considered

5. In 1992, the Solicitor General noted some diversity among the judges as to whether Treaty principles should be taken into consideration in the absence of express statutory reference to them: J J McGrath, 'The Crown's Obligations under the Treaty of Waitangi as at 1992', typescript, Solicitor General's Department, 8 May 1992.

sufficient, of themselves, to constitute ‘reasonable’ proceedings under the Treaty. The Crown’s historical dilemma – that settlement was already establishing itself in New Zealand before the Treaty was signed – will be noted. Nevertheless, the plain meaning of the Treaty is assumed to be that the further advance of settlement should (except in extreme and genuinely unavoidable cases of public need) only have proceeded on the basis of Maori understanding and consent, and with the Crown exercising its Treaty responsibility of active protection of Maori throughout the colonisation.

es.3 ‘Balance Sheet’ or ‘Reckoning’?

It is sometimes commented that, even though Maori did experience historical injury through Crown actions in breach of the Treaty, they also gained countervailing benefits, which offset the injury, to some extent at least. Historically, Maori themselves have constantly weighed the advantages and disadvantages of their relationship with the Crown, sometimes very explicitly. In 1879, for example, an assembly or ‘parliament’ of northern chiefs was hosted by the Ngati Whatua leader Paora Tuhaere and fell to debating the ‘ora’ and the ‘mate’ of the Treaty relationship. One speaker was reported as saying:

It is through the good influence of that treaty that we are able to assemble in this house today and discuss our grievances freely, and that we are protected from attack by people of foreign lands. . . . Secondly, it was through that treaty that the wars between the Native tribes ceased.⁶

The meeting nevertheless went on to list a catalogue of grievances about such matters as the Native Land Acts, road boards, rates, the loss of fishing rights, and the failure of the Crown to consult seriously with Maori since the Kohimarama conference of 1860.

For Maori had rights under the Treaty, and it is these rights that are at issue now, as in 1879. Many of the ‘offsets’ were simply those rights owed to Maori as New Zealand citizens, affirmed under article 3 of the Treaty, and even then granted only imperfectly. Benefits, such as the defence of the realm (to which Maori themselves were to contribute at the cost of great loss and suffering) or the protection and advancement that individuals gained from formal legal equality with the settlers, should be acknowledged, and perhaps have some place in the negotiation of remedy for grievances, but they are mostly beyond the scope of this report.

A historical point of some importance, however, is that some tribes that were not doing too well in the ebb and flow of tribal warfare in the late 1830s, or were situated precariously between powerful neighbours, certainly benefited from alliance with the British or from official discouragement of tribal warfare. The return of Taranaki and Wairarapa tribes in the 1840s to lands that they had had to vacate in

6. AJHR, 1879, sess 2, g-8, p 16

the 1820s or 1830s, for example, owes something to the British presence. But the fact that, wittingly or unwittingly, the Crown contributed to these tribes' recovery of traditional lands hardly justifies any subsequent Crown actions in breach of the Treaty. Moreover, the boot was sometimes on the other foot. The British settlements themselves were at times heavily dependent on the deliberate neutrality or active support of tribes with whom they had become associated – Auckland during Heke's rising, for example, or Wellington, when Ngati Toa were considering some action in the wake of the affray at Wairau in 1843.

es.4 The Historical Foundations of Treaty Breaches

The number and range of Treaty breaches, and of Maori claims, no doubt appear voluminous to many eyes. There are two main reasons why breaches occurred:

- First, the kawanatanga responsibilities of the Crown in shaping a nation state inevitably rubbed up against the rangatiratanga of whanau and hapu, which previously shared sovereignty of pre-1840 New Zealand. Judging the extent and nature of Treaty breaches by the Crown is largely a matter of determining whether the Crown intruded upon Maori rangatiratanga unreasonably, needlessly, and excessively and whether it failed to permit Maori to share with it, as a joint enterprise, the task of nation building.
- Secondly, there is a cluster of historical reasons why the Crown was caught up in breaking the Treaty from the outset. By the late 1830s, the British Government believed, correctly, that colonisation was already under way in New Zealand, that more organised colonisation was about to take place, and that the Maori people were already suffering adverse effects. The British Government also believed, incorrectly, on the basis of incomplete information from people like James Busby, the official British Resident in New Zealand, that the Maori had already been overwhelmed, that much of their land had already been 'sold' to settlers, and that their independence was already 'little more than nominal'.⁷ The British Government therefore interposed itself in order to control and constrain settlers. It did not expect to have to coerce or manipulate Maori to make way for settlement. Rather, it expected to be protecting and rescuing Maori from a tide of settlement. The attitude of officials like Governor Hobson was therefore paternalistic. Wresting control of the land trade from the private settlers was the Government's primary reason for establishing its sovereignty. Maori expressions of concern about their future under the Crown were inconvenient and irritating to Hobson and were dealt with rather perfunctorily at Treaty negotiations.

The Crown's dilemma was compounded by the fact that it had assumed that large areas of land would become the Crown demesne, from which it would provide for further settlement and, very importantly, secure revenue with which to administer

7. Normanby to Hobson, 14 August 1839, BPP, vol 3, pp 85–86

the colony. It was presumed that this land would come from a surplus left over from the reduction to reasonable proportions of the massive New Zealand Company claims or Australian speculators' claims (Lord Normanby's much-cited 1839 instructions to Lieutenant-Governor Hobson reflect these assumptions). Or it would come (as in the view of the next Secretary of State, Lord John Russell) from the 'waste' or uncultivated land, which was not regarded as being in valid Maori possession or proprietorship, unlike village lands and cultivations.

Within months, however, the more thoughtful officials in New Zealand began to realise the profoundly false position they were in; Maori were far stronger on the ground than had been realised and far less compliant than London had been led to expect. The Crown found itself without a substantial pool of demesne land, either for public purposes or to sell to settlers and make revenue. But the British authorities did not feel they could pull out or block further settlement. They came from a world-order where, since the fifteenth century, European colonisers had been over-running indigenous peoples in the Americas, Africa, southern Asia, and Oceania. The authorities did not conceive that the flow of settlement could be stopped. Moreover, they had already agreed to grant a charter to the New Zealand Company. They therefore began to manipulate and press Maori into letting organised settlement expand far beyond the tribes' original expectations, taking control of as much land as they could to further the process. When Maori continued to resist and tried to retain tribal control of land, admitting settlers only on their terms, the Crown began to break the Treaty.

es.5 A Pattern in the Politics of Land

It is a reasonable argument that land was required to accommodate settlement in New Zealand. Settlement was occurring before 1840 and the Treaty itself legitimated its continuance. It is also doubtful whether the Crown could wholly have prevented the unofficial flow of settlement into New Zealand anyway, as each gold rush, for example, demonstrated. Yet the scale and the pace and the manner of settlement were dictated almost entirely to suit settler convenience, at Maori expense.

If there is any one main thread through the Maori attitude to settlement and the Crown's response, it is that, whenever Maori were able to exercise collective control over land alienation at the tribal, or supra-tribal, level, land sales slowed markedly or stopped. The tribal leadership was generally willing to admit settlement within defined areas. Where they were strong enough on the ground, they did not relinquish all rights, even over the settled areas. The settlers, however, with the Crown supporting them, invariably responded by finding ways to overcome, bypass, or undermine tribal or supra-tribal control in order to extinguish Maori customary title and secure the freehold.

This happened in a general way on a number of occasions:

- In the early and mid-1840s, Maori in many of the New Zealand Company settlement areas physically resisted surveys and settler encroachments. The Government eventually responded with force of arms.
- From about 1853, and in gathering strength to the early 1860s, Maori in most districts of the North Island reacted against Crown purchases. The Kingitanga, inter-tribal meetings like that at Manawapou in 1854, and various runanganui throughout the country began to resist sales and to ‘tapu’ the land in order to control land-selling factions. The Government responded by intensifying its practice of enticing some sections of the right-holders to sell, in the hope of inducing others to concur. At Waitara in 1860, it used military force to try to push through a purchase from a land-selling faction. In 1863, when Maori resistance to land selling was starting to lead towards a more general challenge to Crown authority, Governor Grey invaded Waikato.
- It is at this point that the New Zealand politicians and Grey are perhaps most culpable, because they did have the option presented to them by London of recognising the Kingitanga in some form. This alternative was not seriously pursued, because it would have meant ‘shutting up the Waikato’ and other prime areas desired for settlement. Following military occupation, of course, these most desired areas were subject to very large land confiscations.
- In the Native Land Acts of 1862 and 1865, settler governments forged their most effective instrument: the conversion of customary title to a form of title by which each individual named as an owner could sell his or her individual interest. Ministers called this ‘individualisation’, but it was not a true individualisation, in the sense of an individual receiving a small farm, demarcated on the ground (unless he or she was one of a small number of Maori whose support the Government wished to cultivate). It was a pseudo-individualisation, which systematically converted Maori customary land rights into negotiable paper. By the purchase of individual interests and progressive partitioning of blocks, the Crown and private settlers acquired the bulk of Maori land in the North Island. Sir Robert Stout (ex-premier and soon-to-be chief justice) admitted to James Carroll in 1894 that, in the process, ‘bit by bit this Treaty had been violated’.⁸
- The Maori leadership reacted through the Kotahitanga and the Kauhanganui by demanding restored tribal control. This was granted in legislation of 1900, and again new land sales ceased. Unfortunately, leasing slowed as well, and from 1905 settler impatience to occupy the land led to the dismantling of the system of 1900, the facilitation, once again, of sale by individuals or sections of owners, and the partitioning and re-partitioning of blocks.

8. NZPD, 1894, vol 85, p 556

es.6 The Scale and Pace of Land Acquisition

The scale and pace of the land acquisitions is not always appreciated. While it is perhaps remembered that almost all the 34 million acres of the South Island had been purchased by the Crown by 1865 (the northern part as well as the Ngai Tahu rohe), it is less well known that over seven million acres of the North Island was similarly acquired, including 75 percent of Wairarapa, about 50 percent of Hawke's Bay, 55 percent of Auckland, and much of Wellington. Those seven million acres involved Maori populations at least as large as those of the South Island and probably much larger. It is perhaps realised that under the Native Land Acts some eight million acres were acquired between 1865 and 1890, and a further three million acres by 1899. It is less well known that nearly four million acres more were purchased between 1900 and 1930, mostly under the Native Land Act 1909, at a time when many Maori communities had little land left, when the Maori population was known to be stable or growing, and when the Maori leadership had made very clear their wish to retain and farm most of the remaining land and to receive State support to that end. It is at best doubtful, in terms of Treaty principles, whether the Liberals' determined programme of buying Maori land in the 1890s should ever have been launched; it would seem to be a plain breach of the duty of protection to re-launch the programme again in 1910, in the face of the near-unanimous opposition of the Maori leadership before 1900 and in the light of the detailed recommendations of the Stout–Ngata commission of 1906 to 1908. For, even in the districts already too crowded to support reasonable living standards for all Maori, the land purchase process bore on, down to the 1920s and beyond.

When, in 1928, sales at last slowed and Apirana Ngata at last got funds for serious land development by and for Maori, it was too late: very little land suitable for development was left. By 1939, the migration of Maori to the towns had begun.

That is the essence of the long saga of Treaty breaches. The Crown does bear a heavy responsibility in it all. While London controlled policy, it could conceivably have called a halt to the pace and manner of land acquisition. Initially, the Crown felt committed to the New Zealand Company and other European settlement already under way; it therefore engaged in huge land purchases to assist them. In about 1860 to 1863, there was some consideration given to halting settlement, but New Zealand already had a constitution and a settler parliament and the option was not taken. Instead, military power was used to ensure that settler control was established and settler land purchasing could proceed. After 1870, there was the model of Fiji, where (ironically, largely in reaction to what had happened in New Zealand) the British Government rejected most of the settler land claims and returned the bulk of the land to Fijian hands; this was also done in Samoa, in the Solomons, and in Papua New Guinea. By 1865, however, the control of 'Native policy' in New Zealand had been transferred to the settler ministry; 'the Crown' in New Zealand was essentially the settlers themselves and their governments, who were pursuing their self-interest.

es.7 Emphasis on the Individual

The Crown – that is, governments – both before and after 1865, also determined the *manner* of land acquisition, often in defiance of expressed Maori wishes. As mentioned above, the Treaty guaranteed respect for the rangatiratanga of ‘the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof’: ‘ki nga Rangatira ki nga hapu ki nga tangata katoa o Nu Tirani’. Crown policies favoured the chiefs, when they were disposed to sell land, and the individuals. The hapu level, the level where the reciprocal responsibilities of chiefs and individuals were worked out and where the controls on the alienation of land outside the descent group were located, was bypassed or deliberately undermined (at least until the East Coast leaders secured some recognition for the system of incorporation of owners, which is in part built upon hapu or sections of hapu). True, there is an ambivalence in Maori society, a genuine tension between the individual, the whanau, and the wider group, which, when opportunity permitted, resulted in individuals seeking title to property and strengthening their family interest at the expense of their wider group interest. The individual liberties of the West are part of its attraction. Yet, Maori whose individual interests in land were recognised by the State were receiving not just the right they would have inherited as part of the tribal patrimony but an augmented right, a title that included the power to sell absolutely that which they had originally held as part of a tribal patrimony, governed by the checks and balances of Maori law. When they sold, they sold part of that patrimony and their children’s birthright. There is little doubt that this was, and perhaps still is, a matter of shame and recrimination among Maori. Yet, the tribal leadership had struggled, from the Kingitanga and the runanganui of the 1850s through to the development schemes of the mid-twentieth century, to retain land and find a balance of group and individual rights that would preserve valued aspects of the traditional social order while facilitating engagement with the commercial economy. They were not entirely successful, but the persistence of the efforts reveals a continuing aspiration.

That aspiration was continually undermined by the land laws, which made every individual owner’s signature a marketable commodity. As often as the law was amended to strengthen the group’s control and inhibit sales, it was amended yet again to remove restrictions and allow the free sale of undivided individual interests. This was not recognition of customary tenure, with its internal tensions, but a deliberate weighting of the scales in favour of the individual. But because the pseudo-individualisation of title facilitated individuals in selling their interests, rather than in developing family farms, it made a mockery – a hypocrisy – of the oft-repeated assertions that the Government was trying to help Maori to advance economically by taking their land out of tribal title and giving it some form of statutory title.

Nor was it only progressive land loss that ensued. For the knowledge that the land purchase agents were in the field, that Crown or private money had been laid out, was totally inhibiting of Maori efforts to develop land themselves. The process of

buying individual interests was very divisive, setting up tensions in the owner group and distracting communities from serious efforts at development. How could a group organise for sustained development when some of its members were interested in selling, or might become so? Or when there was a near-certainty that the block would be partitioned before long and that few had any confidence that they could determine just where the partition would fall? In such circumstances, it was easier not to try too hard but to succumb to the pressure and sell one's interest, clear some pressing debts, and have something left over to buy clothes for the children or to contribute to a hui. One does not have to look far to find the reasons why Maori sold their individual interests in land.

The flaws and the fallacies of the pseudo-individualisation of customary tenure were pointed out frequently by contemporary observers concerned at its impact on Maori society. It was particularly criticised by the 1891 Commission of Inquiry into the Native Land Laws (the Rees–Carroll commission), which advocated building Maori land tenure round the hapu and elected block committees. The Stout–Ngata commission of 1906 to 1908 proceeded similarly. But this was of itself no panacea; whether Maori communities benefited would depend upon what powers the statute law gave to the hapu and block committees.

es.8 Social Outcomes

The land laws not only led to the massive alienation of land but also contributed to the pauperisation of Maori people. As indicated in the previous paragraph, the land law after 1862 was conducive to the piecemeal sale of land rather than to its development. When opportunities to hold and develop resources were undermined, aspirations lowered, achievement lowered, and living conditions fell. When Maori people lived in rural slums, in miserable health much of the time and lacking educational opportunity, their aspirations diminished and the vicious cycle continued. By the 1920s, Maori had been brought very low indeed. It is hardly surprising that they turned in thousands to a charismatic leader like Wiremu Ratana and to a Labour Government whose policies in child endowment, health, housing, and education showed some promise of enabling people to break out of the vicious cycle of poverty. Migration to the towns offered still more opportunity in the days of full employment after 1945, but that too was at the cost of further dislocation of the Maori social order, as became fearfully apparent when economic recession occurred. To a great extent, socio-economic trends such as urbanisation are world-wide and by no means wholly within the control of governments. Social malaise can occur for many reasons, even among people who retain all their land. Even so, the maladroit tampering with customary land tenure by Pakeha governments, and the persistent buying of individual interests for over half a century, undermined Maori endeavours already begun, divided communities against themselves, and deprived them of the opportunity to develop a rural economic base through farming and forestry, or through leasing and joint venture arrangements, as they had been

doing before 1840 and for some time after. As for urban Maori, they never did get the tenth of the subdivisions promised in early New Zealand Company proposals, or the benefit of a Crown endowment in urban lands as Governor FitzRoy proposed. Hence, they did not gain access to the increased capital value of urban land, which would have given them something like the promised equality with Pakeha in the new society and perhaps helped provide an infrastructure that would have assisted the urban Maori migration.

es.9 Alienation of Land; Loss of Rangatiratanga

The alienation of Maori land, according to the main legislative and administrative regimes, is shown in the maps and tables in the front of this volume. Broadly speaking, they show that the most complete land loss occurred in the South Island (in both research districts of the Rangahaua Whanui programme) and in Auckland and Hauraki. In Taranaki, Waikato, Wairarapa, Hawke's Bay, and Poverty Bay too, Maori were left with little land by 1939. Official statistics of Maori land holding by district are not readily available and this research has relied upon digital calculation from maps created for the 1940 *Historical Atlas* project (curtailed because of the war).⁹ When the 1939 figures of remaining Maori land in each research district are divided by the population of the district (calculated from the closest available census, that of 1936), the arithmetic shows that, on a per capita basis, Maori in the Hauraki district were the most land-short, followed by those in Taranaki, Waikato, then Auckland (see app vii).

Of course, the raw figures say nothing about the quality of land remaining or the distribution between hapu and families. Some individual Maori and some hapu coped with the maelstrom of colonisation, or were favoured, were included in its benefits, and prospered.

The flow of claims to the Tribunal, however, is mainly about the processes that affected the wider family and tribal communities. Not only are they about blatant Crown actions such as confiscation; they are also about the more subtle processes that undermined tribal control of land, and tribal control of engagement with modernity, with the loss of rangatiratanga, the loss of balance, the loss of resources, and the sense of marginalisation and alienation that has followed. The sense of marginalisation and alienation does not show up on maps. It shows up in the statistics of unemployment, social malaise, crime, ill-health, and low educational attainment. But it is argued here (and there is much supporting evidence in the 1891 and 1906 commissions of inquiry) that there is a direct connection between these outcomes and the *manner* of land alienation, as much as the loss of the resource itself.

9. It would be of considerable assistance to researchers if the records of former counties were properly archived and accessioned, because their records of Maori land would assist in calculating the local and district figures.

es.10 Which Treaty Breaches Were the Most Serious?

What then does a comprehensive review of historical experience suggest as being the Crown's responsibility? This report discusses 20 areas of Government actions that feature commonly in Treaty claims alleging breach of Treaty principles and outcomes prejudicial to Maori. Which among these were the most serious and why? What criteria might be suggested for making such judgements?

The Crown's obligations under the Treaty have been defined by the superior courts in terms of the principles of dealing reasonably and in good faith with Maori and of offering them active protection, consistent with the Crown's obligations to the national community as a whole. In other words, as the Waitangi Tribunal has argued, the tino rangatiratanga of chiefs, hapu, and people recognised in the Treaty should be respected by the Crown through adequate consultation and cooperation with Maori and not intruded upon or diminished in the Crown's exercise of its kawanatanga responsibilities, except where it is evidently necessary for the public good.¹⁰

In the light of this, four criteria are suggested for evaluating the seriousness of Treaty breaches:

- (a) *Crown 'acts of commission'*: It is suggested that the most serious breaches of Treaty principles were those where the Crown most resorted to coercion, manipulation or pressure to achieve its objects, without seriously consulting Maori opinion or in opposition to evident Maori preferences (acts 'done . . . by or on behalf of the Crown', in the language of section 6 of the Treaty of Waitangi Act 1975).
- (b) *Crown 'acts of omission'*: Serious breaches also occurred when the Crown failed to carry out its own plain undertakings or commitments to Maori (acts 'omitted' to be done, in the language of section 6).
- (c) *Demography*: The breach is considered to be the greater when it affected more people.
- (d) *Quantity and value of resource loss*: The quantity and economic potential of land or other resources taken in breach of Treaty principles is also a valid measure of the seriousness of the breach.

The suggested ranking of (a) and (b) in this sequence is in terms of Treaty principles and the obligations of the Crown's honour. The ranking of (c) ahead of (d) owes much to the proposition, expressed in many ways in Maori culture and in the claims themselves, that people and relationships are more important than material wealth as such, important though that undoubtedly is for the maintenance of rangatiratanga or autonomy. An oft-quoted whakatauki runs:

*Huutia te rito o te harakeke, kei whea te koomako e koo?
Kii mai koe ki ahau 'He aha te mea nui o te ao?'
Maaku e kii atu 'He tangata, he tangata, he tangata'.*

10. Waitangi Tribunal, *The Ngai Tahu Ancillary Claims Report 1995*, Wellington, Brooker's Ltd, 1995, pp 10–11

*If you remove the heart of the flax, from where can the bell-bird sing?
And if it is asked of me, 'What is the most important thing in the world?'
I will reply, 'It is people, it is people, it is people'.*

Recent discussions of Maori law (cited in volume ii, chapter 1) refer to the mana or true wealth of a chief as being the number of people whose allegiance he can command. The wealth of a community was in its populace. Many statements also refer to the importance of balance and harmony in relationships and to the mutual respect that supports it. The rangatiratanga of chiefs, it seems, relied much upon the ability to maintain harmony, foster cooperation between hapu, and so strengthen the community in human terms. Treaty claims themselves commonly refer to the loss of mana and rangatiratanga, as well as resources, as a result of Crown actions.

The whakatauaki nevertheless tells us that resources are important, but it is the heart of the flax that is cited, the source of growth, rather than its bulk or quantity. The loss to Maori of its most precious resources, those that could have been fostered and could have supported a community's wellbeing, are presumably the most significant.

es.11 The Historical Evidence Assessed in the Light of these Criteria

The following pages will survey briefly some of the main findings of this report in the light of these criteria.

es.11.1 Criterion a, Crown 'acts of commission'

By the first criterion, the worst breaches would be the needless waging of war upon Maori and the seizure (confiscation) of land under military control or occupation. This report has not discussed the various New Zealand wars but they are well covered in published histories. Modern professional history and Waitangi Tribunal findings now generally agree that, whatever the culpability of some Maori (and the killings of Volkner and Fulloon in 1865, for example, were dreadful affairs, for which some modern attempts at justification are specious) they were used as little more than pretexts by the Government for the seizure of large districts. Whole communities were punished for the actions or indiscretions of a few, and the supposed return of land to the 'loyal' Maori was a botch and a confusion in every case. The objective of distinguishing between such categories was futile in the first place, and the machinery set up to handle the process (whether by 'Compensation Court' or by special commissioners) was cumbersome, arcane, and often arbitrary. When land was returned, much of it was soon reacquired by purchase. The recent focus upon raupatu claims in Waikato, Taranaki, and the Bay of Plenty through Government negotiations and in Waitangi Tribunal reports rightly recognises their seriousness.

War and
raupatu

Some points might be noted, however, about war and raupatu elsewhere:

The East
Coast raupatu

(a) In terms of coercion or pressure brought to bear by the Crown, following war, the distinction drawn between raupatu under the New Zealand Settlements Act 1863 and raupatu under other legislation is false. The Mohaka–Waikare District Act 1870 followed and legalised actions initially taken under the Settlements Act; the East Coast Land Titles Investigation Act 1866, and the East Coast Act 1868 underlay demands for ‘cession’ of land by Poverty Bay and Wairoa tribes allegedly implicated in rebellion in 1865, with threats being held out of proclaiming the land anyway. Both of these last districts were occupied by Armed Constabulary and under the authority of local commanders, with authority delegated by Donald McLean as Agent for the General Government on the East Coast. Perhaps more seriously still, as a threat to the local tribes, the offer by the Crown of confiscated (or ceded) land to its Maori allies (as in the Bay of Plenty) evoked ancient fears and rivalries. Moreover, the continued imprisonment without trial of Te Kooti and other prisoners from Poverty Bay and Wairoa while the Government pressed for the cessions invited the catastrophe that overtook the area in 1868 and 1869. The fact that Poverty Bay Maori, themselves compromised by the Crown’s actions and victims of Te Kooti’s vengeance, then agreed to a small cession hardly justifies the immoderate and inappropriate demands of the Crown in the first place (see sec pti.6).

Heke and
Rauparaha

(b) The war in the north with Hone Heke and Kawiti, and in the south with Te Rauparaha, Rangihaeata, and their allies, deserves further consideration. Treaty partners are required to act reasonably towards one another and with the utmost good faith. Heke was concerned about the loss of rangatiratanga as the constraints of kawanatanga pressed upon him, but FitzRoy tried hard to conciliate him by the waiver of Crown pre-emption and other concessions. Heke’s response was highly unreasonable, or so at least concluded the many northern chiefs who assisted the Crown in suppressing his rising. In the south, Ngati Toa and their allies Ngati Tama and Ngati Rangatahi certainly had rights in the Hutt Valley that they were entitled to protect. But the nature and kind of those rights are complex and the Government did attempt long years of negotiation before Grey sent troops into the valley. There was much contemporary opinion that some of the chiefs were not negotiating in good faith, though former Chief Historian Ian Wards and some recent researchers consider that Grey moved his troops in prematurely, just when Maori were making efforts to cooperate. Grey’s purchases of Porirua and Wairau from the rump of the Ngati Toa leadership, following his seizure of Te Rauparaha and others, were made in a military context (see secs pti.3, pti.4).¹¹

Prerogative
powers

More general in effect but also involving the unilateral exercise of British State power was the assumption of prerogative rights under the common law. This

11. I Wards, *The Shadow of the Land: A Study of British Policy and Racial Conflict in New Zealand, 1832–52*, Wellington, Government Printer, 1968, pp 224–258; R Anderson and K Pickens, *Wellington District*, Waitangi Tribunal Rangahaua Whanui Series, 1996

category of actions applies notably in respect of the assertion of radical title to all land and prerogative rights to foreshores and harbours, to navigable waters, and to sub-surface rights (historically linked with gold). In so far as the Crown failed to recognise or to compensate Maori for customary or aboriginal title rights to these resources, it would appear to be in breach not only of the Treaty but also of rights recognised in the common law as qualifications on the Crown's radical title. To consider each of these categories briefly:

- (a) The claim to radical title as a concomitant of national sovereignty underlies the Crown's claim to 'surplus land' arising from the many pre-1840 transactions between Maori and private settlers – those transactions being considered to have extinguished Maori title and created a title in the Crown that allowed it to award some of the land to the settlers and retain some as 'surplus'. (The issues arising are discussed briefly in section pt.2, at greater length in volume ii, chapter 2, and in the Waitangi Tribunal's *Muriwhenua Land Report*.¹²) Whatever the validity of the underlying legal doctrine, the Crown also chose to investigate whether the pre-1840 transactions were bona fide or equitable, and it took statutory power to this end. It is the view of this report that:

Radical title to land

(i) it is greatly to the Crown's credit that it undertook this investigation and disallowed, or caused to lapse, millions of acres of shoddy claims;

(ii) the investigations by the land claims commissions were nevertheless inadequate in many respects, notably in that they reduced all pre-1840 transactions to the single notion of a sale (of exclusive possession) rather than allowing the possibility of other forms of transaction intended by Maori, amounting to leases, joint ventures, or trusts;

(iii) notwithstanding this general doubt over the investigations, some or many of the transactions *were* investigated, modified, and adjusted to the mutual satisfaction of the parties, including Maori;

(iv) the Crown's failure to return more land to Maori or to hold more in trust for their benefit contributed to the undoubted land shortage of some tribes, particularly in the populous areas of the north.

- (b) The Crown's claim to foreshores and harbours has in many areas been reinforced by statutory authority such as the legislation conferring control over these resources on local bodies and harbour boards. But with or without specific legislative authority, the Crown appears commonly to have caused customary Maori rights in the foreshores to be extinguished, without compensation, for harbour development or roading. In some parts of the foreshore, however, aboriginal title rights might still endure. It is debatable, given the Maori traffic around coasts and the disturbed state of some of the districts, together with the European shipping and commerce thronging New Zealand shores, whether those rights in 1840 still amounted to the equivalent of exclusive possession of particular tribes; nevertheless, right up

Foreshores and harbours

12. Waitangi Tribunal, *Muriwhenua Land Report*, Wellington, GP Publications, 1997

to the Treaty, local tribes did assert rangatiratanga over their foreshores and sought to levy harbour dues on European ships – successfully where they were strong enough (for a discussion of the law relating to foreshores, see sec pti.13).

Inland waters (c) As regards navigable lakes, the Crown has acknowledged that customary rights existed and has come to a variety of arrangements to compensate the tribes affected, though how adequately is under consideration in some cases. As regards navigable rivers, the historical evidence is strong that (as with other waters and fisheries) Maori did not consider themselves to have automatically alienated their interests in water when they alienated adjacent land, although land purchase deeds commonly held mention waters and all things on and under the land. There would appear to be a strong argument that, in many cases at least, the same kinds of rights need to be acknowledged or compensated in rivers as in the case of lakes (see sec pti.14). This issue, and the question of which group or groups would be entitled, is currently before the Waitangi Tribunal, notably in the Whanganui River claim.

Sub-surface rights (d) (i) In respect of sub-surface rights, Maori tend to reject attempts to distinguish between minerals they used at 1840 and those they did not. Nevertheless, some resources such as pounamu clearly were taonga at 1840, as was geothermal power at least when it reached the surface, and these appear to be distinct from an undifferentiated sub-surface, which Maori did not enter or mine. Moreover, although the Maori concept of a tribal rohe did not sharply distinguish between land and water (as in foreshores, lagoons, swamps, and rivers), those waters were traversed and used by humans; the undifferentiated sub-surface was not. It appears to be importing a different concept, perhaps owing more to European notions of property and possession than to traditional Maori concepts, to suggest that the unused and unpenetrated sub-surface was owned in commodity terms in 1840 by the holders of the surface rights. On the other hand, in British common law the term ‘land’ included the sub-surface, and it was common in purchase deeds after 1840 to make reference to things under the surface (as well as forests and waters on the surface) as being transferred with the land. More recently, the Court of Appeal in *Tainui Maori Trust Board v Attorney-General* (1989) held that coal-mining rights were ‘interests in “land” and hence subject to the State-Owned Enterprises Act 1986’.¹³

(ii) The assertion of a public interest in the mineral wealth of New Zealand is nevertheless a legitimate expression of kawanatanga. Overseas experience of sub-surface right-holders contracting directly with developers to mine the sub-surface (as also in respect of exploiting forests) has led all too readily to the squandering of the resource, tax evasion, and environmental damage. The Resource Management Act 1991 includes a greater recog-

13. P McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi*, Auckland, Oxford University Press, 1991, p 254, referring to [1989] 2 NZLR 513, 513–515

dition of the interests of the surface right-holders than previously, and it is arguably not in the public interest to promote the further privatisation of the sub-surface (or indeed of surface minerals that were not taonga in 1840). This being said, the Crown would be acting unreasonably under the Treaty if it did not recognise generously the very great disturbance to the land and lifestyles of the surface right-holders created by the exploitation of the sub-surface. Consequently, the surface right-holders have a Treaty right at least to generous payments for access to the sub-surface and to involvement as joint-venture partners in its exploitation wherever possible. In respect of the gold discoveries in Hauraki and Taitapu last century, the Crown in fact did initially qualify its claim to the prerogative rights, if not to the metal itself then in respect of gaining access to it. Subsequently, however, it resiled from this approach and increasingly asserted kawanatanga authority, via the statute law, which diminished the rights of the Maori owners of the surface (see sec pti.10).

A third category of unilateral assertion of Crown right over Maori property is the taking of land for public purposes. A number of points might be noted:

Land for public purposes

- (a) A battery of legislation from 1864 gave the Crown legal authority to take land for public works. The Crown itself has acknowledged that in many cases Maori land was taken in preference to general land. This was because compensation was either not due under the law, or not at the same rate as for general land, or that it could be evaded. In the twentieth century, because of the multiple names on Maori titles, local bodies worked in cooperation with the Maori land boards and the Maori Trustee, who were senior Pakeha officials working within a powerful State-focused bureaucratic culture. They were responsible for a lot of public works takings. If Maori owners were consulted and compensated, it was often after the event. The public need for the land might well have been very real, and in most cases Maori as well as Pakeha probably benefited from the work. Nevertheless, Treaty obligations suggest that even more care than usual should have been exercised to take Maori land only when strictly necessary, not simply as a matter of administrative convenience, and with consultation and agreement wherever possible.
- (b) The option of taking a lease or licence over land needed for roads and public works in England had given way about this time to the taking of full title, and it is perhaps a little ahistorical to expect it to have continued in a new English colony. It was nevertheless still not unknown, and it might have been considered in such matters as ferries, which were in fact being developed by Maori across various estuaries and inland waters in the 1840s and 1850s.
- (c) The fact that local bodies, rather than general government, were responsible for public works takings in a great many cases would not seem to negate the Crown's Treaty responsibility, in that the statutory devolutions of power to

the local bodies were the considered actions of central governments and Parliament.

- (d) A feature of public works that impacted heavily upon Maori lifestyles was the drainage of swamps and alteration of watercourses. These areas were important for fish and wildfowl traditionally and had development potential. The issue has received considerable attention in respect of large lakes, but the question of rights to, and compensation for, the myriad waterways affected by the Land Drainage Acts and related legislation warrants closer consideration (see sec pti.11).

Land tenure
conversion
and land
purchase

Besides the unilateral assertions of Crown authority discussed above, a great deal of manipulation and pressure was involved in the whole programme of land tenure conversion and land purchase. This has been discussed at length in numerous published writings, in Waitangi Tribunal hearings and reports, and in this report. The sequence of purchase, Maori resistance to purchase, and the overcoming of that resistance has been outlined above in section 5 of this summary and has been discussed in detail in the chapters that follow. Of course, Maori were themselves prime movers in many land transactions. But there is overwhelming evidence that the pace and scale of alienation was taken far beyond their considered wishes. The expression 'considered wishes' is used advisedly. Individual Maori and sub-groups of Maori steadily sold their interests over a century or more. Indeed, they pressed for the removal of restrictions on title so that they could sell their land. The motives for this range from cupidity to common need, pressure from creditors, and considered strategies to raise capital and develop remaining land. But Maori leaders, especially when organised in runanganui and supra-tribal organisations such as the Kingitanga and Kotahitanga, consistently opposed land-selling, and the land laws and land court as they were constituted. Maori representatives in Parliament and experienced witnesses before commissions of inquiry also consistently protested. The fact that traditional rivalries and new exigencies impelled many of those same people to use the system is rather beside the point. Among the Crown actions which constituted pressure and manipulation to secure the sale of land were:

Prohibition on
leasing of
customary
land

- (a) The prohibition on direct leasing of customary land from 1840. This obliged Maori who wanted to raise capital from their land to sell to the Crown at the Crown's low prices. Although the Crown seems to have intended that Maori let their Crown-granted land, there was so little of that before 1865 that few Maori could take advantage of it. The Crown's neglect to foster Maori leaseholds and joint venture arrangements, as had been developing in some coastal communities before 1840, and informally with runholders after 1840, meant that Maori could not readily gain access to the increased capital value of their remaining land, although this was regularly stated by officials to be the real payment for the sale of some land in the first place (see sec pti.1).

Doubts of
validity of
customary
title

- (b) The Crown's recognition of Maori possession or proprietorship of 'waste' or uncultivated land was reluctant and incomplete. Earl Grey treated it as Crown 'demesne' in the 1846 constitution, and although Governor Grey

secured a retraction of that view, he and other officials considered that the overlapping and sometimes ill-defined interests of the various tribes did not give rise to a ‘valid’ proprietary title.

- (c) The Crown’s pre-emptive right of land purchase is defensible on the grounds given in early instructions to governors: that it was in the public interest and that it offered protection to Maori from private land-sharks. The Crown monopoly, however, created an enhanced responsibility upon officials to deal fairly and with the utmost good faith with Maori, as Normanby’s instructions to Hobson enjoined. But, as is now generally well known, Crown purchases, especially under Governor Grey and Chief Land Purchase Officer McLean, were highly manipulative. Maori customary tenure was complex, and as the early Protectors of Aborigines pointed out, a purchase involving full and free Maori consent (in Lord Normanby’s phrase) would have to be painstaking and slow. Instead, the Crown officials took advantage of the divisions and complexities of Maori tenure. Open public meetings, involving all interested parties, the traversing of boundaries, and the careful demarcation of reserves (as in the Otakou purchase) gave way to the blanket purchase of interests over huge areas, with the subsequent ‘mopping up’ of groups who missed out in the initial payments. Officials varied their tactics between buying from compliant chiefs, and thereby committing other right-holders, and buying from sub-chiefs in an effort to outflank non-selling senior chiefs – the tactic which led to war in Taranaki (see sec pti.5).

Manipulative
Crown
purchases

- (d) The provisions for direct dealing under the Native Land Acts exposed Maori to a great many pressures:

(i) The kind of court set up under the 1865 Act – a European-style court with a Pakeha judge and a Maori assessor, rather than a panel of Maori chiefs with an official chairman (as under the largely inoperative 1862 Act) – brought Maori into a very adversarial and rather arcane process, in which the determination of title rested ultimately on the judge’s decision about customary tenure. Maori right-holders, and assorted purchasers, lawyers, land agents, and interpreters, frequently made arrangements of greater or lesser equity during adjournments or before the land got to court. Maori were caught up in processes in which the principal rules were made by the Legislature and were required or enticed to enter a winner-take-all contest for absolute ownership.

Pakeha
judges rather
than rangatira
to interpret
Maori law

(ii) The conversion of customary tenure, with its checks and balances between hapu, whanau, and individual, to a listing of names on a certificate of title or memorial of ownership, each owner’s interest being negotiable, exposed the grantees to the full pressures of the market-place. They were inexperienced and commonly indebted. The very process of securing title itself created huge debts for survey and other costs, which were charged against the land. Up to 10 owners were named on titles to blocks passing through the court under the 1865 Act; from the 1873 Act onwards, all

Named
owners
exposed to
risk and
pressure

owners were to be named. The system of direct dealing between Maori and settlers was introduced in the full knowledge that Maori owners would be exposed to a rush of purchasers and their manipulative tactics. Competing Maori claimants were usually caught up with one or other of a number of Pakeha purchasers before the land went through the court.

Safeguards
inadequate

(iii) If customary title did have to be modified to meet the needs of a commercial economy, a whole range of alternatives were not taken up. Governments deliberately refrained from introducing important protections that were advocated by concerned officials and politicians, or they legislated for them but failed to administer them. For example, named owners were made absolute owners, not trustees; individual signatures could be purchased severally, without the prior check of a public meeting of the owners and their kin; dealings before title was awarded were only void, not illegal, until 1883 and then attracted only minor penalties; sale by public auction or tender only was not introduced until 1886, and then only briefly; administrative machinery to set aside a minimum of inalienable land was proposed in 1873 but not implemented, revived again in 1900, and then weakened again in 1909. After 1873, Maori land was not normally able to be sold by mortgagees – a genuine protection, though too late for land sold between 1865 and 1873. The Native Lands Frauds Prevention Act 1870 did introduce other important protections against outright fraud and inequitable dealings, but its implementation was only as good as the ‘Trust Commissioners’ appointed under it, and some of them proved to be very weak reeds. Moreover, a ‘Validation Court’ was set up in 1892 to validate transactions that were technically illegal (for want of a commissioner’s certificate or through some of a host of other possible irregularities). In theory, only transactions that could satisfy tests of equity and good conscience should have been validated, but some of the judges interpreted their role very widely; on the East Coast especially, dubious transactions over many thousands of acres were validated (see sec pti.9).

Piecemeal
acquisition of
individual
interests, and
partition

(iv) The main pressure or manipulation that the statute law authorised, however, was that every individual owner’s interest, whether that interest was defined by the court or ‘undivided’, could be acquired piecemeal and the land partitioned. Moreover, the partitioning of blocks was facilitated in the interests of purchasers. Thus, from 1877 the Crown, as well as Maori owners, could apply for a partition order, and from 1878 ‘any person interested’ (that is, including Pakeha purchasers or agents) could apply. The owning group as a whole could not resist partition once a purchaser had secured some interests. The constant, and often secretive, purchasing of individual signatures was divisive of the group, constantly frustrated group efforts to develop land, and ultimately demoralised whole communities. Under the circumstances, it proved all too easy to succumb to the need for cash and sell one’s interest. Not until the 1890s, when the East Coast chiefs

secured the recognition of a legal personality for the group (in the form of incorporation of owners) was this system in part curtailed (see sec pti.7).

(v) In 1900, with ample land in Crown title and in the face of nationwide Maori protest, new legislation set up the Maori land councils, through which Maori could lease land, rather than sell it, or develop it themselves. In consequence, new land sales ceased, but because Maori were also slow to *lease* land to settlers, the law was amended to include the compulsory vesting of certain categories of land in the councils (renamed boards) and the requirement that boards must sell as much vested land as they leased. Under the Native Land Act 1909, blocks with more than 10 owners in the title could be alienated on the vote of a majority of a meeting of ‘assembled owners’; that majority did not have to be a majority of *all* owners, and proxies could be used (by lawyers and land agents, for example). In 1913, the Maori land boards, which oversaw this process, ceased to be Maori in personnel; they were made synonymous with the judge and registrar of the Native Land Court of the district. Meanwhile the Crown went on buying undivided interests (see sec pti.15).

Maori land boards and ‘assembled owners’

This report takes the view that, taken together, the coercive and manipulative elements in the land law from 1862 on constitute one of the most serious of the breaches of Treaty principles by the Crown. It was more serious even than purchase under Crown pre-emption before 1865, because whereas before then the Maori tribal leaders and runanga could combine to limit selling (and did so throughout most of the North Island by the late 1850s), after 1865 it was almost impossible to stop some individual or individuals from taking a block into the Native Land Court and, once it had gone through the court, to stop individual interests being purchased and the block being partitioned. The rangatiratanga of hapu in particular was undermined in the interests of securing land for settlement, and the land law was deliberately manipulated to that end, above all others.

es.11.2 Criterion b, Crown ‘acts of omission’

The single most important area of breach in the category of Crown ‘acts of omission’ was the Crown’s failure to reserve enough land for the ‘present and future needs’ of Maori and to protect the reserves from subsequent sale. Several features about this issue may be noted:

- (a) The undertakings and policy directives to this end were plain enough, from Normanby’s 1839 instructions to Hobson through successive instructions to governors (or by assurances made by governors to secretaries of state) – ample reserves would be made. The assurances to Maori were also explicit. In almost every large Crown purchase, there were discussions about reserves and promises were given to make them. Sometimes they were marked out. But in a great many instances, the reserves were not protected. They were rarely followed by surveys and Crown grants to the owners – at least not quickly – and in many cases were purchased within a few years of

Confused reserves policy

being made. In 1847, when making the Wairau purchase, Governor Grey very explicitly recognised the need for very large reserves for a people still engaged in a hunter–gatherer economy. But this attitude was rapidly overtaken by an envy of Maori retaining large reserves, which they were letting informally to settlers for grazing and on which they were pursuing a semi-traditional lifestyle. From 1848 on, land purchase officers were strenuous in their refusal of Maori requests for large reserves and made none at all unless Maori pressed for them. Reserves made in the first instance in the Crown purchase period typically amounted to between 3 and 5 percent of the land purchased, but were often much less. With the Hua block purchase in Taranaki in 1854, McLean introduced an arrangement whereby chiefs could use some of the purchase money to buy back under Crown title a portion of the land they had just sold. The system has something of the quality of a confidence trick, though in fairness it was probably seen as a way of stopping the payment being squandered and a way of conveying a legal title. A hundred or so grants went to cooperative chiefs by this and other means, but the total area amounted to only a few thousand acres.

Reserves for
occupation or
reserves for
endowment?

- (b) There was a failure to distinguish clearly between the reserving of land for the occupation and use of Maori and the taking of reserved lands into trust to raise revenue for Maori education, medical care, and general welfare. The New Zealand Company proposed to reserve a tenth of the urban, peri-urban, and rural sections in its settlements for the benefit of the leading families of the tribes who sold to the company. The land was to be vested in the company for Maori, rather than left with them. Presumably, it was intended that Maori would live on some of the sections and others would be let to raise revenue. From 1840, the Crown also began to contemplate taking a tenth of the subdivisions into trust for Maori purposes and FitzRoy explicitly and publicly undertook to reserve, in the Crown, a tenth of the land transferred in the pre-emption waiver purchases authorised in the Auckland district in 1844 to 1846. Crown trustees were supposed to raise revenue from this land for the benefit of Maori. Instructions from Lord John Russell in January 1841 proposed an alternative source of revenue for such purposes; namely, 15 percent of profits from the on-sale of Crown land. In fact, very little of all this came to pass. The company’s proposals, however, were based on the assumption that Maori title would have been completely extinguished before it made its subdivisions, and Russell’s 1841 instructions were based upon the view that ‘waste’ or uncultivated lands formed a huge Crown demesne. Once it was clear that Maori did not consider that they had relinquished rights over more than limited areas, the settlers and officials did not pursue the trust arrangements with any vigour. In Wellington, such company tenths as were made tended to be used for Maori occupation, not for revenue-raising by trustees. In Auckland, Grey took the ‘Crown tenths’ into his general pool of surplus or allowed settlers to purchase them. In Nelson, a quantity of ‘tenths’ were made and, after a hesitant

start, eventually yielded some useful revenue to Maori beneficiaries, but not enough to provide for their needs. Proposals for the use of 15 percent of the land fund by the Maori purposes trust came to nothing. First, the proposal was redefined as relating to the net, not the gross, profits, and what net profits there were were absorbed into the general costs of government. The cost of running the Protectorate of Aborigines was deemed to be (and indeed was, for the most part) a service to Maori. When Grey abolished the protector's department in 1847, he instead made payments to the missionary societies for Maori education and provided some medical care and some assistance to Maori agriculture. From 1852, this was paid for variously by a £7000 allocation in the Civil List (under the Governor's control) and by a comparable amount voted by the General Assembly. By this time, Maori were left with a very limited stake in the growing settlements, either for residence or for revenue.

- (c) Another aspect of the Crown's early reserves policy was that Maori were actively discouraged from letting their urban reserves themselves. Te Atiawa chiefs were stopped at the outset from leasing parts of the Thorndon flats. Maori were not supposed to be economic rivals to the company settlements, and Wakefield was very happy to agree to Otakou Maori taking their reserves down at the Otakou Heads, not in Dunedin. From about 1850, Grey did begin to encourage short leases on the formal reserves, but there were not enough of these in desirable locations to support Maori occupation and leasing as well. When, later in the century, Maori did start to do well from urban rents, as in Greymouth and Rotorua in the 1880s and in the native townships set up in the King Country in the early 1900s, tenants very quickly began to demand the freehold or perpetual leases on low rents. Governments capitulated in every case, amending the law where necessary to allow tenants to buy, or buying themselves and then selling to the tenants. The settlers' economic envy of Maori success, touched with a racist dislike of being tenants of Maori landlords, has influenced the Crown at the expense of its early undertakings to ensure fair Maori participation in the growing wealth of the national community.
- (d) Another feature of reserves administration already alluded to is the extent to which the land was taken out of Maori hands and run for them, not by them. Some of the administrators (Alexander Mackay, Charles Heaphy) were very caring and professional, but they were reluctant to let the beneficial owners too closely into the management of the reserves. Provisions in the Native Reserves Act 1873 for the appointment of Maori co-trustees were allowed to lapse. Then the Native Reserves Act 1882 put the Crown-administered reserves under the Public Trustee (and, from 1920, the Maori Trustee). The law was then increasingly weighted towards the tenants' interests: the Greymouth reserves and some of the remaining Wellington tenths came under perpetual lease at peppercorn rents, as did at least 120,000 acres of the West Coast settlement reserves in Taranaki. With the Public (and Maori)

Opposition to
Maori as
landlords

Paternalism of
reserves
administration

Trustee having the power of sale, significant areas of land passed out of Maori ownership. The East Coast Maori Trust also managed over half a million acres from Wairoa to Tolaga Bay in autocratic fashion from 1902 to 1954, though here the objective was to salvage the land from debt and mortgagee's sales, and that objective was achieved in respect of most of the land. But one of the legacies of the paternalistic systems was that Maori were denied experience in land management. The maladroitness of some Maori today in managing capital stems largely from sheer inexperience and the lack of opportunity for beneficiaries to develop their own mechanisms of accountability. Maori were able negotiators when they set up joint ventures with whalers, traders, and timber merchants in the 1830s and 1840s; much has gone wrong since. On the positive side, the system of incorporated owners, based on the hapu and on a balance of authority between general meetings, elected block committees, and managers (with the Maori Land Court keeping perhaps an overly paternalistic eye on things), allowed Maori some management experience.

Restrictions
on title

- (e) Under the Native Land Acts, the placing of restrictions on titles, rather than the making of formal reserves, was the normal control against excessive or too rapid alienation. The restriction meant that land could normally only be leased for up to 21 years. But restrictions could be removed: first, with the consent of the Governor in Council; later, with the consent of the Maori Land Court. Before the restriction would be removed, the officials were supposed to ensure that proposed purchases were equitable and that Maori had ample other land besides. From 1909, all restrictions were removed from titles and an administrative check by Maori land boards (applying the same kinds of test) was substituted. The system has had a very chequered history. There was constant pressure from the 'free trade' lobby among the settlers to remove restrictions altogether; other sections of officials and settler politicians fought to retain them and relaxed them only sparingly. But generally the restrictions were not sufficiently strong to protect a sufficiency of land for Maori needs and they got progressively weaker as the century wore on. The Maori land boards' checks seem to have been perfunctory and formalistic in many cases. But the officials were often in a dilemma, for there was constant pressure from individual Maori owners to remove the restrictions and let them sell. The reasons for this have been discussed above. In addition, Maori have always disliked paternalistic restraints that put them under bureaucratic controls. Whereas early in the land court period they tended to ask for restrictions on title and complain when they did not get them, the constant need for money, the inadequate returns from leasing (in relation to the numbers of people on the fragmented titles among whom the rents were to be shared), and the belief that they could get better prices for the land on the open market if there were no restrictions (and no Crown pre-emption) led to some collusion between entrepreneurial Maori and the 'free-traders'.

- (f) The real failure in Crown policy though was that discussed in (a) above: simply the failure to categorise a large proportion of the land as inalienable save by fixed-term lease, without any possibility of removal of restrictions. An underlying reason was that early instructions requiring governors to set aside inalienable reserves were directed mainly at Maori residence and subsistence needs, not revenue needs. The Native Land Act 1873 did propose to reserve a minimum of 50 acres per person, for both subsistence and revenue purposes, but the provision was not enforced and Maori were so distrustful of Crown paternalism that they did not voluntarily vest land in Crown trustees. Inalienable ‘papatupu’ or ‘papakainga’ land (residence and subsistence land) was an important category in the legislation of 1900, but it was dropped by 1909, and all Maori land was exposed again to the purchase of individual interests or alienation by meetings of ‘assembled owners’. In any case, the concept of papatupu land, though far from unimportant, was inadequate, in that it did not allow for Maori leasing and joint venture arrangements. The Government did not seem to be able to envisage setting aside large areas for Maori *commercial* enterprise, inalienable save by fixed-term lease, with *no* prospect of removal of the restriction. Settler racial and economic jealousy was simply too strong for that (see sec pti.8).

Inadequate
reserves of
inalienable
land

The other huge area of non-fulfilled Crown promises is frequently said to be in the area of economic advancement and social wellbeing. There is certainly a case to be answered there. Very commonly, the Crown’s inducements for Maori to sell land or to accept a very low price for land included statements about the benefits to follow from the settlement that would ensue. Sometimes education and medical care were mentioned. More often, individual Crown grants, as the basis of economic advancement, were urged upon Maori and sometimes made a part of transactions. In so far as these statements were not made in good faith, or were made in good faith by some officials and then neglected by others, breaches of the Treaty arose. The research in this area is being undertaken in relation to specific claims and has not been a special focus of research in the Rangahaua Whanui programme. This report therefore offers only preliminary reflections:

Economic and
social
wellbeing

- (a) A distinction can be made between loose general assertions by officials and more deliberate undertakings to provide services. The British believed implicitly in the superiority of their civilisation to that of the Maori. If officials told Maori that they would benefit from the coming of settlement (or ‘civilization’) to their district, that would probably, in many cases, have simply been the expression of an axiomatic belief. Moreover, they would have assumed that it in fact happened: settlement did arrive; Maori often profited (sometimes only briefly) from new opportunities to sell their produce or to seek paid employment; residual tribal fighting possibly died down; people could travel freely on the Queen’s highways and visit the towns; and there were protectors and resident magistrates and others to regulate disputes about theft and cattle trespass and perhaps even adultery. Modern life and modern commerce is largely about freedom of movement

and opportunity for the individual, rather than the kinship group, to make choices and accept responsibility for the consequences. Although Maori today, with good reason, point to the disruptive effects of this, the contemporary record contains many statements by Maori showing that they were fully aware of the changing social order, weighed the pros and cons, and were largely supportive of new opportunities and different emphases. (See, for example, the comments from the Orakei parliament of 1879 at section es.3.) There was constant protest over the loss of lands and fisheries and about the absence of a fair share of State power, but Maori in the nineteenth and early twentieth centuries probably complained more about the lack of assistance and opportunity to engage with the modern world than about the inroads of modernity into their old order.

- (b) The other assumption that most British officials and settlers shared was the belief that the basis of economic and social advancement was individual property. It was not only in the interests of land-purchasing that governments sought to individualise Maori land tenure; it was a constantly reiterated theme that Maori advancement would take place only when 'communal' tribal society was broken up and Maori were enabled to develop individual estates. This had been the purpose behind the company tenths for 'the leading families'; it was part of the purpose of the grants of 100 or 200 acres to individual chiefs; allegedly it underlay the Native Land Acts and the individualisation of title to reserves such as Kaiapoi and the Otago Heads. But the land Acts did not usually create individual holdings on the ground – only individual negotiable interests in a multiple title; and the individualised reserves created the first of tens of thousands of uneconomic interests. Governments' main instrument for assisting (or compelling) Maori advancement was a disaster.
- (c) In terms of more material assistance to enable Maori to engage with modernity, the Crown's responsibilities in respect of education, employment opportunities, housing, and medical care are very relevant. They are especially relevant where the statements by Crown officials in land purchases were not simply general expressions of optimism about the expected benefits of settlement but more specific assurances that the Crown would assure their protection and welfare. Such assurances were explicit in the early company settlements, especially Wellington. In the seven years during which Maori were induced to leave their cultivations and pa for the new town and move to more limited and more remote reserves, the protectors and company agents together certainly talked about a trust to be set up to provide for Maori health care and education, or the 15 percent of profits from the resale of the land for the same purpose – but only when the Port Nicholson purchase had been completed (see sec pti.3). As noted above, the trust proposal came to very little. Much of the money voted by the General Assembly from 1856 on went towards the salaries of Maori assessors and the police; this was very important in terms of recognising Maori in local

administration, but it did not secure general Maori welfare or economic opportunities. The development of the native schools system after 1867 was extremely important – an opportunity which Maori pursued eagerly, giving land for the schools. But virtually nothing was done to assist Maori secondary and technical education until well into the twentieth century, when the Labour Government's programmes especially began to meet some of the educational needs of poorer Maori and Pakeha alike. A comparable story can be told in respect of health care. Native Department subsidies for doctors attending Maori were miserable, and even the increased effort through the Maori Councils Act 1990 was under-funded and depended on dedicated individuals to be effective.

- (d) Employment was not seen to be an obligation of the State, and the roading contracts given by McLean in the 1870s were intended more to pacify and open up the country after war than to promote Maori economic advancement. Roads were not in fact well-maintained unless they served settler communities. The issue was of course mixed up with the difficulty that Maori communities had in raising revenue to pay local body rates, other than by selling more land. The rating laws did recognise this to an extent; for example, exempting Maori land unless it was revenue-producing or in the vicinity of a road. Nevertheless, both Maori and local authorities have long been in a dilemma over rating (see sec pti.19).
- (e) The welfare issue is closely linked with the land laws. Once the Crown had conceded that Maori had possessory or proprietary rights to the 'waste' lands, it was as if they then saw Maori as owing something to the settler community rather than the settler community owing something to Maori for having got the land cheaply. This was reflected in the provision under the Native Lands Acts whereby 5 percent of Maori land could be taken for roads without compensation, and other aspects of public works takings that discriminated against Maori.
- (f) The early governors' public undertakings can reasonably be regarded as constituting an obligation to provide Maori with at the very least the full article 3 rights due to New Zealand citizens. Very little can be pointed to in the way of special efforts being made by the State on behalf of Maori before the 1930s, except probably the native schools service, while on the other hand there were a number of serious negative discriminations, such as the failure to include Maori ex-servicemen in rehabilitation benefits after the First World War to the same extent as Pakeha servicemen and the lower rate of unemployment benefit for Maori before 1936. Indeed, if social outcomes for Maori are a measure of the non-fulfilment of Crown promises or implied undertakings, then the condition of Maori in the 1930s is a damning indictment. Maori housing was appalling, and though rehousing programmes commenced before the Second World War, they were overwhelmed by the flood of applications from Maori and had made little progress before they had to be suspended during the fighting. After the war, the Maori Affairs

Department made renewed efforts to improve Maori housing, but Maori were not especially assisted by the general State housing programme. The land development schemes provided some kind of employment, or disguised relief work, for about 5000 Maori before the Second World War, but that was recognised as only a provisional and part solution to a fast-looming problem: the remaining Maori land could not support economically viable communities (see sec pti.17). Given the data compiled by the department from 1930 to 1939, and again after the war, about the Maori situation as regards employment, housing, health, education, and family support, it scarcely needs new research to show that it amounted to a national disgrace. The *proportions* of Maori in need seem clearly to be much greater than for non-Maori, and every district seems to have been affected.¹⁴ Tragically, the situation of Maori in rural slums was at first cited in some quarters in support of negative stereotypes and *against* giving Maori new houses ‘until they learn to look after them better’.

Tino rangati-
ratanga

The third area of non-fulfilment of Treaty undertakings concerns the guarantee of ‘tino rangatiratanga’. The question relates to the extent to which Maori would be recognised as having political or jural authority in their own communities and be able to share in the central governing institutions of the new nation state. On these matters, a number of points can be noted:

- (a) Colonisation revealed the sharp conflict of interest between Maori and settler. Colonisation involves a struggle for the control of valued resources, notably land. Needing land, forests, and fisheries, the Crown and the settlers did not want to include Maori in the institutions of government, *unless* Maori were willing to pay the price of continued alienation of those resources. Whenever tentative efforts to include Maori in State power led to the slowing or cessation of land sales, the power was removed.
- (b) Maori in fact protested early, and continually, about their exclusion from the processes of government, where decisions were made about their property and their lives, usually without even the courtesy of consultation. Heke’s rising was driven by a realisation that power was passing rapidly from the chiefs to the Governor. The creation of settler parliaments in the constitutions of 1846 and 1852 was accompanied by local wrangles over the voting rolls, which showed Maori that they were effectively excluded from Parliament. Thus, Maori began the movements to have a parliament of their own, or perhaps a monarch. The Kingitanga and the Kotahitanga arose from this and were largely directed at stopping land alienation. A more local response was the emergence of tribal runanganui, which also sought to control land (see sec pti.5).
- (c) In 1860, Governor Browne called a great meeting of chiefs at Kohimarama to discuss serious issues, including the Taranaki war. The chiefs greatly welcomed consultation through such a forum and asked that it be continued.

14. Much relevant data is provided in Claudia Orange, ‘A Kind of Equality: Labour and the Maori People, 1935–1949’, MA thesis, University of Auckland, 1977.

But Grey did not want a national Maori assembly to emerge and did not reconvene the meeting. He did seek to make official the various runanga around the country, providing for the salaries of Maori assessors and police and giving them the power to make bylaws. It was hoped that the official runanga would facilitate the sale and lease of land in a manner acceptable to Maori; but when the runanga did not want to be used in this way, Grey and his Ministers lost interest and the system waned.

- (d) 'Native committees' or 'councils' nevertheless remained an issue. After 1865, Maori leaders concerned at the dominance of the Native Land Court began to seek recognition for the committees, for the purpose of determining land titles and managing land, as well as dealing with minor offences and civil disputes in their areas. Some senior officials supported the concept, and in 1872 Donald McLean introduced a Bill to establish the councils formally. The Bill was bitterly opposed by settler politicians and by Chief Judge Fenton of the land court, who were all fearful that Maori would resume control of the land again. McLean was forced to withdraw the Bill.
- (e) John Bryce did secure the passage of the Native Councils Act 1883, but there were only about six councils, covering vast areas, and their authority was confined to making determinations of customary title for blocks coming before the land court. John Ormsby and his colleagues in the Kawhia Committee made good use of their opportunity in determining ownership of the vast Aotea block; other than that, the Act was of little value (see section 20).
- (f) Of great potential importance, however, was the Maori Land Councils Act 1900. This emerged from the ferment of discussion between the Kotahitanga and Kingitanga (together commanding the support of Maori in almost all districts), the Government (headed by Richard Seddon and James Carroll), and the young educated reforming Maori led by Apirana Ngata. The Act at last gave the land councils, with their elected Maori majorities, control over the management of land (as well as authority to advise the court on title). Together with the Maori Councils Act of the same year, dealing with matters of health, sanitation, and the control of alcoholic drink, the law offered Maori a genuine possibility of fostering their tribal autonomy based on the development of their own land. The law was received by Maori in that spirit. Even the Kingitanga came out of isolation to engage with the system, and King Mahuta took a seat in the Legislative Council. The Kotahitanga accepted a motion from Ngata to formally disband. But their hopes were all betrayed. The councils took a while to be elected, and the land was not vested in them and leased at a rate sufficient to satisfy the demands of the settlers and the parliament. By 1905, the Act was amended to deprive the Maori land boards (as they were renamed) of their Maori majorities. By 1907, they were obliged to sell as much vested land as they leased. By the Native Land Act 1909, they became the supervisors more of

land alienation than of land development.¹⁵ By the 1913 amendment Act, the boards were reconstituted to comprise the judge and registrar of the Native Land Court and ceased to be Maori (see sec pti.15). So much for local or regional Maori self-management. In what can only be regarded as a gross breach of faith, the Government had gone back on the undertakings and assurances given to the national Maori leadership in the negotiations leading to the Act of 1900. A most promising development, based on deeply-felt and long-expressed Maori aspirations, was emasculated and made the instrument of a greedy scramble for the last few million acres of Maori land capable of being farmed.

- (g) New Zealand has paid dearly for this. A system of tribal councils, properly resourced, staffed, and encouraged to develop the capacity for both economic and social self-management, would have helped enormously to deal with the problems soon to arise from the Maori demographic resurgence and from economic change. They would have at least assisted with the transition to urban living, although urban Maori have shown their need for new structures, forming new groupings on principles not wholly different from the way rural hapu clusters or communities once formed.
- (h) There was to be yet one more chance to recognise Maori capacities in tribal self-management. This was the Maori Social and Economic Advancement Act 1945. The Act arose from the Maori people's own magnificent War Effort Organisation, formed as the civilian home front behind the Maori Battalion and national defence generally. The Act was intended to give the organisation a peacetime role, helping in the rehabilitation of Maori servicemen and women and handling new needs in employment and social welfare. It was, however, regarded with jealousy by the Pakeha bureaucrats of the Department of Maori Affairs. Prime Minister Peter Fraser had intended that the 'Maori Social and Economic Welfare Organisation' should be 'as self-controlling and autonomous as possible . . . to the full limits of its potential development . . . to a large extent independent and self-reliant', not 'merely another branch of the Maori department'.¹⁶ But the department, and others in Cabinet, were too jealous and distrustful. A pyramid of local councils and tribal councils was put in place, but their attempts to act autonomously were discouraged. The local committees established under the Social and Economic Organisation were required to work through the department's rapidly expanding network of welfare officers and land development staff and were not able to hold the responsibility and release the energies revealed by the War Effort Organisation. When the national 'top' was put on the system in 1962, in the form of the New Zealand Maori Council, it drew away the

15. Because James Carroll and Apirana Ngata were deeply involved in shaping the legislation from 1900 to 1910, their role in the weakening of the land council (board) has come under recent scrutiny. The difficulty is to know how far they were themselves supporters of the changes and how far they had to make concessions at the behest of their own party (the Liberals) in order to retain power against the even more land-hungry Reform Party.

16. Fraser to under-secretary, 21 September 1948, ma 35/1 (cited in Orange, p 192)

authority of the tribal structures rather than complementing and adding to them (see sec pti.20). Admittedly, urbanisation and the individual freedom that went with good wage packets in a time of full employment were already weakening the sense of community and tribal authority upon which the 1945 Act was based. Nevertheless, once again the nation missed a chance. A system of tribal executives, holding real authority as the vehicles for the equitable distribution and management of resources and assisting directly in the shaping of policy at the centre, might have provided a structure capable of mediating the change to a new, largely urban, order, while retaining a vitality of its own.

- (i) As for central government, the Maori members of Parliament themselves complained that they were too few in number to be effective. Great hui such as the Orakei parliament of 1879 noted that the Maori electorates were too vast for the members properly to represent their constituencies. The issue, though, is not as simple as merely increasing the number of Maori members, because it is by no means certain that constructing a national parliament on the basis of communal representation is the most helpful principle or emphasis. Excess emphasis on voting by race or ethnicity has been disastrous for inter-communal relations in some countries overseas. The concept of Maori being predominantly represented through the general roll and the general electorates is also valid, especially if Maori themselves are nominated to winnable general seats. This has been a long time coming, and the wonder is that Maori people at large, and organisations like the Ratana movement in particular, have remained willing to work patiently through the national parliament. The dignity and courtesy that the Maori members have brought to the parliamentary process for more than a century ought to be recognised, and men like Carroll and Ngata have been giants in Parliament, bridging the divide between communities even if in the end they were unable to do more than slow the land-grab. The mixed member proportional electoral system appears to be allowing more Maori representation in central government than ever before.

es.11.3 Criterion c, demography

It has been argued above that an assessment of the extent of Treaty breaches, and consequently of the redress due, should have regard to the numbers of people affected in any district. Estimates of the Maori population of the various Rangahaua Whanui districts at 1840, 1891, and 1936 are given in appendix vi.

- (a) Of the districts defined for the Rangahaua Whanui programme, using the 1936 census, much the most populous districts were those of the north, especially Auckland, and the East Coast districts. Then came the Bay of

Distribution of
population
between
regions

Plenty and the central North Island districts.¹⁷ These proportions will have changed somewhat by now as a result of out-migration, although the effect will be mainly to enhance still more the significance of greater Auckland. It is suggested, however, that in evaluating *historical* grievances it is more appropriate to take the earlier date, before urban migration greatly altered the numbers or proportions in the areas where the injuries occurred. (It should be noted though, that out-migration affected some districts much earlier than 1936.) Some research also suggests that the progress of the Native Land Court, district by district, correlates strongly with population decline, for epidemic disease was spread during long court sittings and cycles of crop production were disrupted.

Per capita
holdings of
land

- (b) Simple population numbers, however, are perhaps less significant than the relationship of land loss to those numbers. If we assess the Maori land remaining per capita in 1939, Hauraki emerges as the most land-short district at 3.5 acres per head, followed by Taranaki at 5.2 acres, Waikato at 5.3, then Auckland at 9.7. These four are in a group considerably worse off in per capita holdings than the next district, Wellington, at 38.2 acres per head.¹⁸ These are very raw figures, derived from dividing the Maori population (as calculated from the 1936 census) into the area of Maori land remaining (estimated by digital calculation from the 1939 map of Maori holdings reproduced on page xxiv). Moreover, the Rangahaua Whanui district boundaries have been drawn arbitrarily for research purposes on the basis of geographic features and local government district boundaries. Different boundaries and smaller districts would produce very different figures, and both the land and the population databases need to be refined. The exercise has been done, however, to show that the extent of prejudicial effect looks very different according to how various factors are weighted. If one takes the proposition that it is not so much the area of land lost, or the manner of its passing, that is most important, but the *outcomes* for Maori, then, on a per capita basis of land remaining as at 1939, the Auckland, Hauraki, Waikato, and Taranaki districts have very strong claims.

17. The table reads, from the largest to the smallest: Auckland 22,426; Hawke's Bay–Wairarapa 8606; Gisborne–East Coast 8449; Bay of Plenty 7671; Waikato 6242; King Country 5744; Wellington 4924; volcanic plateau 4576; Taranaki 3828; Whanganui 2312; southern South Island 2221; Urewera 2105; Hauraki 2056; northern South Island 690; Chatham Islands 303. The figures have been derived from adapting census returns given by counties to the Rangahaua Whanui district boundaries, with some averaging of figures where a county boundary falls across two districts.

18. The full table reads from the lowest to the highest acreage per head: Hauraki 3.5; Taranaki 5.2; Waikato 5.3; Auckland 9.7; Wellington 38.2; Bay of Plenty 39.4; Hawke's Bay–Wairarapa 40.4; Gisborne–East Coast 53.6; Urewera 55.2; King Country 56.6; southern South Island 101.1; volcanic plateau 110; Whanganui 115.6; northern South Island 153.6; Chatham Islands 232.8 (in the case of the South Island districts, the land area estimates for 1910 were used; they had diminished slightly by 1939).

es.11.4 Criterion d, quantity and value of resource loss

On the basis of area of land lost, clearly southern South Island Maori lost the most and lost it earliest. They are closely followed by the northern South Island and Wairarapa–Hawke’s Bay. Of course, the raw figures of distribution say nothing about the quality of the land remaining. Much of the land still owned by Maori in districts such as the East Coast, the Urewera, and the volcanic plateau is mountainous. The South Island per capita holdings are inflated by the land given under the Landless Natives Act 1906, most of which is steep, remote, and inaccessible. By the same token, though, much of the remaining Maori land in Taitokerau has poor quality soil and is not easily developed.

How to
measure
resource
loss?

Then there is the question of the economic worth of both the land lost and the land remaining, and *that* looks different in different decades, as the effects of new technologies or new markets affect the productive potential and the value of the land. Should the value of land be assessed in terms of what it could produce at the time of its transfer or according to its potential as subsequently revealed? Both bases of comparison have their complexities: the kauri-forest lands of the north were probably worth more per acre in the 1840s than most rural lands, while the hapu of Wairarapa and Hawke’s Bay were earning at least as much from informal leasing or ‘grass-money’ than the hapu of north Canterbury and Kaikoura when the land was transferred. But the people who owned the land around the natural harbours and the sites of the growing towns had the most valuable land of all, and their loss, *relative* to the settler community that grew around them, appears the greater. Relative deprivation is often regarded as worse than absolute deprivation. Speaking relatively, rural hapu who kept enough land to farm were not always so economically distant from the settlers who were also milking cows on uneconomic holdings in the vicinity. Urban hapu, on the edge of great wealth but not sharing it, might have felt relatively worse off than their rural cousins, who could at least still usually hunt and fish fairly readily until the 1950s. Or did the urban hapu, despite losing almost all their land, make up some of the ground through their access to employment and education, which their rural cousins did not gain until they migrated to the cities after the Second World War? The measuring of the worth of what was lost and what was retained is perhaps the hardest task of all.

es.12 The Criteria Considered Together

The various criteria in sections es.11.1 to es.11.4 cannot be put together to produce a precisely ranked ‘order of magnitude’ as in a scientific equation. The variables are many and the weighting of them subjective. Even to make tentative suggestions seems foolhardy. Yet neither can the weighing of loss, and of reparation due, be left entirely to the confidential deliberations of the Government and particular tribal negotiators. There is a legitimate public interest in the way injury is measured and the ambit of reparation determined. Some kind of rationale must be presumed to operate and there are good reasons why that rationale (though not the negotiations

themselves) should be as open and public as possible, so that the population at large may share in a debate of great national importance. Moreover, as research reports and Tribunal reports emerge and settlement negotiations proceed, there is an inevitable tendency for tribes, and the Government too, to compare one tribe's historical experiences and current situation with those of others. While each tribe's or district's experience is unique and none is *strictly* comparable with another's, and while the Government may wish to avoid engaging in a discussion of relativities between tribes and districts, this cannot altogether be avoided, because of the common or comparable factors that apply to many tribes. The frequent references in public discourse to 'benchmarks' implies an awareness of emerging precedents and levels of reparation. Furthermore, to talk of assessing claims 'on their merits' does not really mean that each case is treated in strict isolation from others, because 'merits' implies some sense of relativity to presumed standards of right and wrong, of extent and seriousness of breach. This involves comparing one kind of Crown action with another; for example, raupatu with compulsory takings for public works or with failure to protect promised reserves and so on. How seriously each of these issues will be viewed by Maori in each district is a matter for them, and in this sense each case will be unique. Nevertheless, equity requires, and will be increasingly seen by Maori negotiators to require, some common ground as to the weight to be given to common or comparable factors.

What then does a comprehensive appraisal of the historical evidence suggest are the most serious breaches and the prejudicial effects that it is most necessary to remove? This report would argue as follows:

- (a) On the basis of the Crown's actions being most deliberate, and hurtful of most people, the most important issue is the loss of rangatiratanga, or legitimate scope for autonomous Maori action. This has two major aspects:
 - (i) the loss of resources, which underpin autonomy and self-determination at the individual and tribal level; and
 - (ii) the exclusion of Maori from the decision-making institutions that affect their lives and their resources. The establishment or re-establishment of mechanisms of consultation and empowerment will be as important as the restoration of a resource base.
- (b) In terms of the cause of the loss of resources, carried out by manipulative methods that deliberately set aside the considered wishes of the Maori leadership and caused great social and economic disruption to large numbers of people over some 60 years, the purchases under the Native Land Acts can be regarded as the most serious issue. This issue includes the persistence of heavy purchasing of remaining lands, well into the twentieth century, and the various mechanisms employed, such as the form of title created in 1862 and the way partition orders could be secured by purchasers as well as Maori owners.
- (c) Close behind, in terms of the quantity of land lost and the effect on a considerable number of people and districts, were the Crown purchases in the period 1840 to 1865. These purchases were frequently manipulative and

inequitable in themselves, but the Crown's total preoccupation with securing the freehold involved also the denial or discouragement of Maori leasehold and of joint venture arrangements and the coexistence of aboriginal title rights, which Maori did not wish to relinquish or did not believe themselves to have relinquished. This issue also arises in the Crown's handling of pre-1840 purchases.

- (d) Raupatu – that is, confiscation or forced cession after military occupation – was an evident Treaty breach, which drastically affected particular districts and tribes, although the area of land and the number of people affected were much less than were affected by manipulative land purchasing.
- (e) Closely related to (b), (c), and (d) is the Crown's failure to ensure that adequate reserves of land were maintained, either in the possession of Maori or in trust to fund Maori welfare. The 'trustee' role of the Crown, sometimes explicit, always implicit, in the negotiations for land was neglected and overridden by the drive to get possession of the land. The 'individualisation of title', which the Crown promoted, partly in the belief that it would assist or compel Maori to manage and develop their land, was distorted in the interests of land purchasing and reduced to a pseudo-individualisation, which made each owner's signature a marketable commodity but resulted in very few farms being marked out on the land. Apart from the general failure to reserve land, particular forms of reserve-taking affected particular groups of Maori: for example, the disappearance of most of the 'tenths' from the New Zealand Company settlements; Grey's annulment of the 'Crown tenths' in the Auckland pre-emption waiver purchases; the placing of reserves under the Public Trustee or Maori Trustee, where they were put under perpetual lease at peppercorn rents and some were sold; and the amendment of the law to permit the purchase of the leaseholds in the native townships.
- (f) The loss of ownership or control of rights in foreshores and inland waterways is almost as important as the loss of land (if not more so for some groups) and affected Maori everywhere. Given the Treaty undertaking to respect 'fisheries', and the lack of clear agreement that 'waters' were being alienated along with the land, this remains an issue to be addressed, although the Treaty of Waitangi (Maori Fisheries) Act 1992 has addressed it in terms of commercial sea fisheries.
- (g) Public works takings disproportionately imposed upon Maori land affected most Maori communities to some degree. The areas involved were not usually as large as those transferred through land purchasing but commonly affected important pieces of land, and the takings persisted after general land acquisition had largely ceased.
- (h) Issues such as the rating of Maori land and the good and bad consequences of development schemes are complex. Prejudicial effects undoubtedly occurred, but benefits also accrued. More than most, these issues call for a case-by-case consideration.

es.13 Relating the Criteria and Rankings to Districts

Potentially, the Rangahaua Whanui research on themes and issues can be set against the research on the various districts to help form conclusions about appropriate levels of reparation. The districts are large, however, and deliberately cross tribal boundaries; the ranking of the seriousness of injury is also expressed in broad terms, to promote reflection rather than to produce a formula. The themes can, nevertheless, be related in general terms to the districts, to highlight what has been the particular feature of a district's experience, and this has been done in part ii of this volume and in volume iii of the report. Thus, one district might have been most heavily affected by raupatu, another by Crown purchases, and a third by purchases under the Native Land Acts.

Focus on
processes or
focus on
outcomes?

A decision will first need to be made as to whether it is indeed the *means* by which land was transferred that constitutes the main basis of a claim or whether it does not so much matter *how* the land was lost as the fact that it *was* lost. In that case, the *outcome* of 150 years of colonisation, in terms of the amount of land left to a tribe and its current economic potential, might be the most important measure of injury done. The more populous a district in 1840, moreover, the more need the people had of the Crown's active protection. It is not only that people are the most important thing of all, as reflected in the whakatauaki cited above, but that, in Maori culture as well as British culture, generally speaking the more intensively land (or water) was used, the more valuable it was. In that sense, allowing a populous tribe's precious thousands of acres to be lost was a more serious breach than, or at least as serious a breach as, allowing the loss of a less populous tribe's hundreds of thousands. It is the people that are the measure. What was left on a per capita basis again becomes the guide.

It is a principal conclusion of this report that it will be necessary to reappraise, in the light of the historical evidence, the seriousness of Treaty breaches and their impact upon Maori. Judicial proceedings and commissions of inquiry (notably the Sim commission of the 1920s) have established a number of issues as particularly serious and warranting substantial remedy. The raupatu in Taranaki, Waikato, and the Bay of Plenty, and the Ngai Tahu claim, are obviously well established in the historical record and have rightly received early attention from the Waitangi Tribunal and in settlement negotiations with the Crown. But dubious methods of land purchasing and the leaving of tribes with minimal areas of land occurred in other districts as well. Indeed, it was still going on in the twentieth century in the populous districts of northern New Zealand. The upwelling of protest in the 1970s and the host of claims now before the Tribunal came largely from those districts and are mostly about the cumulative effect of the loss of lands, forests, and fisheries as a result of methods that bypassed tribal authority systems and left very little land in Maori hands. On this measure, other districts were affected at least as seriously as those defined by earlier inquiries.

es.14 Future Strategies

It may appear alarming that most of the various themes discussed in this report are considered to involve Treaty breaches, often serious ones. It may be wondered, 'How is all this to be made manageable, both in terms of research and reporting and in terms of the reparation due?' Yet the report has not added any category that is not already stated in Treaty claims. The claims reiterate constantly the loss of resources and the loss of rangatiratanga. All the report has sought to do is to reveal more about the processes that brought these losses about and to try to assess how heavily felt or widespread was the impact of various Crown actions. Hopefully, this will save many people a lot of time in future.

It would certainly be unfortunate if the revelation of the full range of Treaty grievances, whether through the claims, through this report, or through any other means, led the Crown to deny what is fairly self-evident or already amply admitted by former Ministers of the Crown or by earlier inquiries. Much of the vehemence of Maori protest derives from irritation at the refusal of governments, or Pakeha society generally, to acknowledge the extent and nature of avoidable injury that Maori have experienced. The spirit of the Treaty and of the Treaty of Waitangi Act call for a frank and generous acknowledgement by the Government of the range of reasonably demonstrated Treaty breaches and their prejudicial effects upon Maori.

Nor is the research task or the cost of reparation as insurmountable as is sometimes feared. Much will depend upon how Maori claimants and the Government view the task. Some alternative ways of approaching historical grievances have been raised for possible consideration in part iii of this volume, in fulfilment of the writer's supplementary commission of 4 November 1996 (see app iii). These are not recapitulated at length here, but for the purposes of this summary section, some points may be highlighted:

- (a) There was inadequate discussion with the Maori leadership and people in 1983 and 1984 as to how the massive review of New Zealand colonial history (about to be invited by the Treaty of Waitangi Amendment Act 1985, which returned the jurisdiction of the Waitangi Tribunal to 1840) was to be handled or how the redress was to be provided. That review was necessary and has had enormously positive effects in providing a due process for the expression and remedy of Maori grievances. But it also carries the possibility of having highly divisive effects upon Maori communities and of creating new inequities.
- (b) Complete agreement upon principles for evaluating claims and determining levels of redress is unlikely, but a period of reflection and discussion between the Government and the Maori leadership is likely to be very useful in shaping guidelines to secure an equity of outcome between tribes.¹⁹

Lack of wide discussion in the 1980s

Need for wider discussions now

19. The previous round of consultation was unfortunately distorted by the unilaterally imposed fiscal cap. If the restoration of damaged rangatiratanga is one of the necessary objectives, then clearly the fewer unilaterally imposed policies there are, the better.

'Full
restitution' or
restoration of
a capital
base?

- (c) The informed Maori leadership knows full well that the national economy cannot sustain redress based upon 'full restitution' (even if that were measurable with any degree of precision, which it is not). Without relinquishing their right, in principle, to full restitution, Maori negotiators have in practice already agreed to settlements based on the objective of restoring to tribes a sufficient capital base from which to rebuild their economic, social, and cultural autonomy. There is no reason why this basis of negotiation should not be continued.
- (d) More consideration should be given to extending the time period over which the retransfer of capital and assets to tribes should take place:

Staged
settlements

(i) Taken together, the ethos of a 'fiscal cap' (even if it has formally been removed) *and* a limited time-frame for settling Treaty claims would unduly constrain the Government and tribes alike and carry a serious risk of creating new inequities. It would be very sad indeed if the whole process degenerated into the modern equivalent of an 1839 rush for a limited pile of goods on a New Zealand Company ship. Yet time is money too, from the tribes' point of view. The sooner a significant reparation payment is received by a tribe or tribes, the sooner the tribal development programme can be advanced. A large part of the answer may be to reach *agreements* with tribes, say within two or three years, and to pay a substantial proportion of the settlement at that time, with a schedule of further payments to be made over 10 or 20 years, having regard both to what tribes urgently need in order to get started on reconstruction and to what is manageable in the national economy. This is precisely the kind of subject that is an appropriate topic of discussion between the Government and the national Maori leadership.

(ii) From the Pakeha perspective, there is much to be said for spreading the load over a number of years (the New South Wales Parliament agreed in 1983 to levy a portion of the tax base over 14 years to meet Aboriginal land claims). Historically, the Crown and settlers spent the first 100 years in New Zealand getting the land at low, or indeed derisory, prices; it would not be unreasonable to spend some decades in paying a fairer price. An appropriate analogy has been drawn between a foreign debt, to be amortised over time, and an internal debt to Maori.

Restoring ran-
gātiratanga

- (e) (i) Given the opportunities missed and the institutions already damaged or destroyed, the restoration of rangātiratanga can be only a work of time, based on the most widespread and careful discussion between the Government and the Maori people and leadership. But it would help in removing the prejudice if the obligation and goal were plainly accepted by the Crown. There will always be Maori and Pakeha peoples in New Zealand. Their integration with one another in the nation state will be advanced by the appropriate empowerment of Maori at local and regional, as well as at central, level.

(ii) The complexities of modern resource management and inter-group relations create a strong argument for facilitating the growth of local and

district Maori organisations on a more systematic basis than currently exists. Where there are overlapping and possibly competing Maori authorities in a given area – trust board, runanganui, local marae committees, for example – relationships with the Government and the private sector can be confused and confusing, to the possible detriment of Maori enterprises or joint venture enterprises. In this context, current discussions within Tainui on future corporate structures will have wide possible application. These discussions include debate on the elected component of management bodies and whether the elections should be on the basis of adult franchise or by hapu or marae representation. Other possible approaches are to revisit the legislation of 1900 or 1945 with a view to the evolution of regional councils and a national body such as the Australian Aboriginal and Torres Strait Islander Commission.

- (f) The process of researching and hearing the claims could become overly protracted in some respects.

Risk of overly protracted process?
Many issues still require very careful research and hearing

(i) It has not been too protracted so far. On the contrary, the questions at issue in Treaty claims are of such serious and far-reaching implications that they warrant the very careful consideration that they have been receiving through research and Tribunal hearings. Indeed, it is necessary that, in regard to many issues concerning land and water, these processes continue, so that the relationships between Maori aboriginal title right or Treaty right and the received common law and statute law are most carefully worked out for the enrichment of New Zealand life.

(ii) Nevertheless, there is a danger that Treaty claims are becoming hydra-headed, with claims by trust boards or runanganui being accompanied or followed by claims at the hapu, whanau, or individual level. This is partly because the 1985 amendment simply took the 1975 Act, which was drafted for *prospective* application and allowed ‘any Maori’ to bring a claim, and made it *retrospective*. There are some genuine dilemmas here:

But some claims may become hydra-headed

(1) Individual Maori and individual whanau have Treaty rights, and their claims may or may not fit precisely within the wider claims of hapu and iwi. In so far as a proliferation of small-group claims amounts to the declaration of an interest in the land concerned, the lodging of many claims may assist rather than hinder the process of resolution, especially if the claimants then cluster under a larger framework for the eventual hearing or negotiation. But if individual or small-group claims are each to attract the full privilege or entitlement of research funding, legal representation, and Tribunal hearings, the settlement of the large-group claims could well be delayed and the expense of the process would certainly rise.

(2) Delay and cost will also accrue if the large-group claims are worried down to the level of every individual block. To examine the Native Land Court purchases, for example, on a case-by-case basis would not only be very costly in terms of time and money but also very likely prove futile in many instances. The lack of surviving evidence and the

distance of time would make it at least very difficult to decide whether a block was awarded to, or sold by, the ‘right owners’. Given that hapu never were neatly defined groups sitting within neatly defined boundaries, the whole land court process involved a degree of arbitrariness, and it may be better for hapu as constituted now to recognise the overlaps and common interests than to continue the Pakeha game of drawing tidy boundaries and competing with each other. Treaty breaches arise as much in the cumulative effect of land loss, by a variety of means, as in alienations of particular parcels of land.

Broad-brush approach to settlement of issues up to a certain date

- (g) A comprehensive review of the historical evidence therefore suggests that a broad-brush approach would achieve substantial equity in respect of most major issues without highly particularised research. Serious consideration should thus be given to seeking settlements of the major historical issues, on a tribal or district basis, up to a chosen date, while leaving some particular points of grievance outside the settlement for further consideration, possibly by a less expensive process. To elaborate:

A possible divide at 1940?

(i) A suggested possible date is 1940; that is, 100 years after the signing of the Treaty. The principal reason is that by that date the emphasis of Crown policy had shifted from the systematic acquisition of Maori land for white settlement to the development of remaining land for Maori. Not that acquisition had entirely ceased – it had not. There seems to have been a spate of public works takings during and after the Second World War, while the compulsory taking of ‘uneconomic interests’ and compulsory tenure conversion intensified in the 1960s. Nevertheless, the sequence of great bursts of land acquisition, where the transfers were measurable in millions of acres, had come to an end. There was not much good land left, after all. Other reasons for suggesting 1940 are:

(1) The data on the land remaining and the Maori population in the various districts before substantial urbanisation had occurred provide a statistical base by which the outcomes of the historical period of land-takings can be measured, district-by-district or tribe-by-tribe. It would be possible to divide the Rangahaua Whanui districts into sub-districts, for example, complete a survey of land alienation under the various legal and administrative regimes operating in the areas, and assess the outcomes at 1940. If tribes wish to take a ‘broad-brush’ approach of this kind, it would then be feasible to move to settlements of pre-1940 issues on the basis of relatively limited additional research.

(2) Injuries occurring since 1940 have occurred within the living memory of many claimants. Of course, there are kaumatua whose memories go back much earlier than 1940, and the oral tradition from *their* kaumatua stretches back for generations. But any cut-off date will be arbitrary to some extent, and the claims lodged with the Tribunal in relation to particular blocks (as distinct from general losses) tend to be

more frequent for the post-war period because more people now living actually experienced the events.

(3) The picture of the Crown's actions towards Maori from the late 1930s onwards is complicated by the growth of welfare programmes and by some attempts to remedy past injuries. Research has not yet adequately explored these matters. (Relevant issues are alluded to in volume ii, chapter 15, part ii.)

(4) The onset of the Second World War marks a convenient watershed.

(ii) The suggested matters for possible inclusion in a broad-brush settlement package are:

- (1) old land claims and 'surplus land';
- (2) New Zealand Company purchases;
- (3) Crown pre-emption purchases;
- (4) FitzRoy's waiver purchases;
- (5) purchases under the Native Land Acts to 1940;
- (6) alienation of reserves and failure to maintain restrictions on title;
- (7) land taken for survey costs;
- (8) loss of land in the native townships;
- (9) public works takings to 1940;
- (10) loss of land through consolidation and development schemes;
- (11) inadequate compensation paid for gold-mining and access to other minerals;
- (12) takings of land in lieu of rates; and
- (13) alienations by the Public Trustee and Maori Trustee to 1940.

Issues for possible broad-brush approach

(iii) Neither the package as a whole nor any element within the package should be made mandatory upon Maori. Where any of these matters can be shown to apply in respect of a given tribe or district, it should be a matter of negotiation as to what is included in the settlement package and what is left out for further research and deliberation.

A negotiated package

(iv) It is a matter for individuals, whanau, and hapu to decide whether they include themselves within a major tribal negotiation and settlement, whether they include themselves for the most part but reserve for separate consideration a particular issue or claim, or whether they stand outside the tribal claim and pursue an entirely independent claim. The Government, and possibly the Waitangi Tribunal (through its statutory power of mediation), could assist the individuals, whanau, hapu, and wider tribal groupings to meet and make these decisions.

Small groups may cluster under a larger group

(v) The Government could reasonably be expected to give priority to the settlement of large-group claims over small-group claims, in the interest of restoring a capital base to the largest possible number of Maori people in the shortest possible time.

Priority for negotiation with larger groups

Foreshores
and inland
waters require
further
consideration

(vi) Claims in respect of the foreshore and inland waters may not be easily included in a settlement package relating to Treaty claims, because the question of still-enduring rights under aboriginal title has also to be resolved. Neither can they be dismissed until there is broad agreement about aboriginal title.

Post-1940
claims

(vii) Claims in respect of matters arising after 1940 should continue to be received, but consideration should be given to dealing with claims relating to small areas of land through the Maori Land Court and Maori Appellate Court, leaving the Waitangi Tribunal free to deal with issues of wider application.

es.15 In Conclusion

This report is submitted in the hope that the data and historical interpretations provided will assist the Tribunal and other interested parties in the swifter identification of Treaty breaches, the swifter resolution of major historical grievances, and the swifter return of resources to injured Maori communities on an equitable basis.