

CHAPTER 1

THE HIGH PRICE OF CROWN PROTECTION: LAND TRANSACTIONS, THE TREATY, AND INSTRUCTIONS TO THE GOVERNOR

1.1 Maori Law

One of the most important outcomes of Treaty claims and Treaty-related research is the disclosure of a more complex, dynamic, and subtle Maori social order than has commonly been believed. A somewhat oversimplified and rigid view of Maori society and land rights had been generated by a variety of influences such as land-selling, official administrative requirements and early anthropology. Above all the Native (later Maori) Land Court decisions produced a quasi-codification of land tenure. Modern Treaty claims often begin with confident assertions of ‘mana whenua’ or ‘tangata whenua’ status over particular areas, but intersecting claims and related negotiations soon reveal a much more complex social order, often frustrating and inconvenient to Government and Maori negotiators eager to achieve settlements, and bewildering to the public at large, but ultimately undeniable. The following paragraphs attempt to set out some of the important insights from recent scholarship and from the Treaty claims processes themselves.¹

It is useful to do this for several reasons:

- (a) In order to appraise the effect of various Crown policies it is necessary to know, in essence, what the Crown policies were impinging upon. In other words, how did Maori society function at 1840, what was it that the Treaty guarantees were guaranteeing, and what did Waka Nene and other rangatira mean when they urged Lieutenant-Governor Hobson to stay and preserve their lands and their customs? How far had Maori society and values already changed by 1840 as a result of interaction with the wider world?
- (b) From 1840 many (not all) British officials argued that Maori social structure and land rights systems were so inchoate and irregular that they did not warrant recognition at all, except in respect of lands under actual occupation and cultivation. This is the true meaning of ‘terra nullius’: not that the land was empty of people, for it manifestly was not; but that those people were

1. Other current projects currently under way are the study of the principles of succession being conducted by the Law Commission and a study of tikanga relating to land by the University of Waikato.

not organised in some form of government or regular system of authority and could not therefore make binding contracts about property or enter into serious international engagements. Although this narrow view was partly rejected by 1847, and Maori rights to uncultivated lands were acknowledged administratively by the Crown, many officials and settler politicians still held that such rights were confused, inchoate, and precarious, not able to be asserted and defended in the courts until replaced by a British type of tenure such as a Crown grant, after adjudication by some State-empowered tribunal. This view underlay the decisions of the judges in the New Zealand courts from the notorious *Wi Parata* judgement of Chief Justice Prendergast onwards.

- (c) On the other hand, the contrary assumption is widely held, among Maori as among Pakeha, that Maori society and land rights were governed by such precise rules that it is possible to determine by judicial or quasi-judicial process the exact boundaries of group interests and group identity. Modern exigencies might make it necessary to import or reinforce such processes (with all their expense and the negative consequences of determining ‘winners’ and ‘losers’) but it was not a customary approach. Renewed understanding and use of more subtle customary approaches, and reasonable expectations of what might be developed from them, could be one of the very real benefits to emerge from modern Treaty processes.

From the outset it must be recognised that Polynesian (including Maori) concepts of relationships between people and land or water are of a different order from British property concepts as received in New Zealand. They are about relationships between people and gods, between people and the land and between people and other people. They do not translate neatly into common law categories of property and title, even though the best approximations have to be made because categories of property and title are the basis of modern economic systems. Canadian judges have said of indigenous hunter–gatherer rights in Canada and Australian judges have said of Aboriginal rights in the 1992 *Mabo* decision, that they are ‘*sui generis*’, of their own kind; they are subtle and elusive of easy description. But it would be an ignorant and outmoded attitude to suggest that they do not exist as regular systems of rights; ‘Native title’ or ‘Aboriginal title’ has existed from time immemorial and survived the assertions of British sovereignty in Canada, Australia, and New Zealand as (in common law terms) a ‘qualification’ or ‘burden’ on the Crown’s ‘radical’ title. Moreover, though subtle and elusive, they are not incoherent and capricious. Again the superior common law courts, following the whole weight of modern anthropology and ethnohistory, have found among the indigenous systems regularity and consistency such as can be expected of a system of law. The Australian Supreme Court judge, Mr Justice Blackburn, hearing a claim by Aboriginal groups to proprietorship of certain areas of Arnhem land in 1971 said, ‘if a definition of law must be produced, I prefer ‘a system of rules of conduct which is felt as obligatory upon them by members of a definable group of people’ to ‘the command of a sovereign’ [this being the view of law adumbrated by the

jurist John Austin in the early nineteenth century and still dominant in British legal thinking until very recently. Blackburn went on to say: '[b]ut I do not think that the solution to this problem is to be found in postulating a meaning for the word 'law'. I prefer a more pragmatic approach. Having appraised the evidence of the Aboriginal elders and the anthropologists he concluded:

The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws and not of men', it is that shown in the evidence before me.²

This conclusion, often overlooked in legal histories, paved the way for the Mabo judgment a generation later. If this be true for the complex systems of Aboriginal hunter-gatherers how much more is it true for the systems of settled agriculturists such as the Austronesian peoples of the Torres Straits or Polynesia.³

It is also relevant to note that in the recent decision of the Australian Court of Appeal in the Wik case is to the effect that aboriginal title rights may survive the grant of pastoral leases, a decision which affirms the general principle developed in recent Canadian decisions as well as Mabo, that aboriginal title or native title survives unless explicitly extinguished by actions of state positively authorised by law. They cannot be extinguished by a 'side wind'.⁴

Dr Richard Boast has discussed the nature of the Crown's title to the foreshore in common law. This he regards as a presumptive title which 'can be displaced by proof of a Crown grant or continuous occupation'.⁵

Returning to the *nature* of aboriginal title, Mr Justice Blackburn encountered a difficulty in the Arnhemland case which is relevant to this discussion: although the Aboriginal claimants had demonstrated to his satisfaction that they held interests in the land under a regular and law-like system, he could not award them a proprietary title to the land claimed, because they did not hold it in 'exclusive possession'.

2. *Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia* 17 FLR 126, 126–127

3. The term 'Austronesian' needs to be much more widely understood and used than the erroneous division of Oceanic peoples into 'Melanesian, Polynesian, and Micronesian', a categorisation coined by the French explorer De Surville after his Pacific voyage of 1828 and taken up by French and British anthropology. De Surville's categories have only limited correlation with actual linguistic or ethnic boundaries. It is much more useful to apprehend the three-fold division between the very old 'Aboriginal' peoples now surviving only in Australia, the peoples often called 'Papuan' who entered the New Guinea/Solomon Islands archipelago about 10,000 years ago, and the 'Austronesian' or 'Malayo-Polynesian' family of peoples who entered south-east Asia from the south China region about 4000 years ago. The Austronesians peopled territories now called the Philippines, Malaysia, Indonesia, and coastal parts of what is commonly called 'Melanesia'. One branch then swung westward to occupy the huge island now called the Malagasy Republic; another branch or branches travelled eastward and, over 2000 years, colonised the hitherto unoccupied islands of 'Polynesia', including New Zealand. Maori are thus representatives of a family of peoples who accomplished one of the greatest migrations and settlements in human history, equalled only perhaps by that of the Germanic family of peoples which includes the English.

4. The current New Zealand law on customary title and its extinguishment, including the decision to like affect by Justice Blanchard in *Faulkner v Tauranga District Council* (1995), is noted by R P Boast, *The Foreshore*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), 1996, p 27

5. Boast, pp 25–27

Other Aboriginal people had rights in the land as well. Similarly, in New Zealand, it was (and is) typically the case that one Maori group had the dominant or controlling interest in an area of land but other individuals or groups had interests as well. As Professor Ron Crocombe said of Cook Islands land tenure, it is often more accurate to speak of ‘owning rights in land’ rather than of ‘owning land’: the rights are real and the ownership of them is real, but Crocombe’s phrase gets away from the (recent) European notion of all the rights being owned by a sharply definable group within sharply definable boundaries to the exclusion of all others.⁶ There are two important points in relation to this:

- (a) The Crown, in the Treaty, undertook to guarantee Maori ‘possession’ of lands, forests, fisheries, and other ‘properties’ which they may collectively or individually possess; or in the Maori version. ‘te tino rangatiratanga o ratou whenua o ratou kainga me o ratou taonga katoa’. The chiefs yielded to the Crown the exclusive right of pre-emption ‘over such lands as the *proprietors* thereof may be disposed to alienate’ at prices to be agreed upon between the *proprietors* of the land and the Queen’s officers, (emphasis added). An issue of fundamental importance to this report is how well, or how badly, the Crown honoured these undertakings, having regard to the fact that customary Oceanic (including Maori) land rights systems do not fit easily into common law categories of proprietorship.
- (b) Intersecting Maori claimant groups might avoid some of the difficulties the Arnhemland people encountered if they treat warily the English notions of exclusive possession, and accommodate instead the various levels of rights that Maori law allowed for in the same land, and the intersecting nature of groups.

1.2 Maori Society and Relationships with the Land

It is now generally well established that the hierarchy of whanau, hapu, iwi, and waka were (and are) not tidy political structures, the smaller neatly encompassed by the larger, but conceptualisations of the history of kinship over many generations, designating linkages and tuakana and teina relationships. It was and is of fundamental importance to Maori to be able to invoke whakapapa relationships of greater or lesser depth, according to a variety of current purposes, and to find a root ancestor, or take tupuna, from whom to validate a claim. or to establish common ground with others. The fact and ideology of common descent from a particular waka can allow for the mobilisation of large confederations of hapu for purposes such as common defence. Whakapapa, however, do not operate as immutable blueprints, of automatic and binding application, but as charters of possibilities for the living generation, as sets of flexible human boundaries about which groups formed.⁷

6. R G Crocombe, *Land Tenure in the Cook Islands*, Melbourne, Oxford University Press, 1964

The important units of Maori society in day-to-day terms were the whanau, the extended family, and the hapu. Whanau and hapu varied in size but always had a strong core of common descent. Individuals and families acted alone in much day to day activity but for many common purposes, including the occupation of land, acted together under the authority of senior chiefs. Dr Ballara uses the term 'community' to describe these associations, typically of 200 to 1000 people. '[T]he operative unit [of society] in peace time was the community, or cluster of small hapu together with sections of large hapu . . . bound together by their collective recognition of the mana of a great chief.'⁸ That chief would normally be a member of the core descent group of the hapu in the cluster, and connected to the others. He might not be permanently resident in one kainga, but have two or three principal places of residence. Hapu, rather than iwi, is probably the term best translated by the English word 'tribe', as in the Treaty of Waitangi itself, though Dr Ballara notes that the line between big hapu clusters and iwi is indistinct. Hapu waxed and waned, divided when they grew large and ambitious leaders emerged, amalgamated with other hapu when numbers declined or when advantage suggested, relocated, and took new names from a recognised leader or ancestor. Often there were long periods of stability but warfare and migration could produce rapid change. The dynamics of hapu formation embodied the adaptability of Maori kinship systems to the exigencies of real life, avoiding the rigidity that had overtaken some Polynesian societies in the central Pacific. A hapu and its leaders would assert their distinctiveness in certain circumstances, as in visiting neighbouring hapu or receiving visitors: but their strength and survival also depended continually on making connections, on establishing whanaungatanga through whakapapa and other means. Clusters of closely inter-related hapu were stronger than those in isolation. Dr Stephen Webster, in recent draft papers, defines hapu as being both 'descent category' and 'descent group'. Individuals could claim membership of several hapu by whakapapa, so that hapu, in this sense, overlapped with one another. But they also grouped around strong leaders, people of mana, to meet political and territorial needs. Such groups could endure for several generations or reformed as a result of contingencies such as 'rising and declining influence of chiefs, conquest, migrations or refuge, political alliances and marriages'.⁹

The various whanau and individuals who comprised a hapu gained access to the land and other resources which the hapu controlled. They individually exercised rights over garden lands which they cleared and planted, and birding trees or fishing spots which they individually discovered, and they adjusted these rights within the

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7. Chief Judge E T Durie, 'Will the settlers settle? Cultural conciliation and the law', F W Guest Memorial Lecture, Dunedin, 25 September 1996, p 3; Ann Salmond, 'Tipuna – Ancestors: Aspects of Maori Cognatic Descent', in *Man and a Half: Essays in Pacific Anthropology and Ethnobiology in Honour of Ralph Bulmer*, A Pawley (ed), Auckland, Polynesian Society, 1991 (Memoir no 48), pp 343–356
 8. Angela Ballara, 'The Origins of Ngati Kahungunu', PhD thesis, Victoria University of Wellington, 1991, p 234
 9. Steven Webster, 'Maori Hapu as a Whole Way of Struggle: 1840s–1850s before the Land Wars', draft paper, cyclostyled, Department of Social Anthropology, University of Auckland, September 1996, p 13. See also Webster, 'Maori hapu and their history,' draft, University of Auckland, 1996

family without the senior hapu leaders necessarily being involved. But their security in the exercise of those rights also depended upon participation in hapu activities, such as major fishing expeditions, hosting of large hui, building, and stocking of central food storage facilities and of course defence against attack, and in the rituals that accompanied all of those activities. Land rights were not isolated from membership of the hapu, participation in its activities, and acknowledgement of the mana – the spiritual potency – of its rangatira. For this reason individuals had only limited capacity to transfer land rights to those *outside* the group – temporary usage at most – without the wider group, the hapu, becoming involved through its leaders. To attain significant and lasting land rights meant *joining* the group, giving it primary allegiance and probably marrying into it. As Chief Judge Durie puts it, ‘The essential point however is that the land of an area remained in the control and authority of an associated ancestral descent group. . . . Land and ancestors were fused’.¹⁰

‘The common feature then of Maori law’, the Chief Judge continued, ‘was that it was not in fact about property, but about arranging relationships between people’. A chief’s authority came from his relationship to his ancestors and to his people, and from those came his authority over land. That authority was not ‘ownership’ in a commodity sense . . . rangatira held chiefly status but might own nothing. It was their boast that all they had was the peoples’.¹¹ Maori today commonly speak of their kaitiakitanga, guardianship, over land and reserves: this too recognises their responsibility to their ancestors and future generations, and to the gods. It is not ‘ownership’ in a commodity sense, but it is perhaps an even more powerful and enduring conceptualisation.

The relationship of people and chiefs, and of both with the land were also relationships about power, ultimately spiritual power. When a group, under its rangatira, entered new land the chiefs formally claimed and named the land, and established sacred places on it. Establishing a strong community on the land and carrying out the religious duties that accompanied it, was the basis of chiefly power.¹²

As well as changes in the rights of individuals and families *within* groups there were obviously ways in which rights *between* groups constantly changed. The movement of a hapu, part of a hapu or a hapu cluster onto previously uncultivated land, and the building of settlements, planting of gardens and creation of wahi tapu, would establish the claims of that group. After a century or so most land was not wholly ‘virgin’ land but was used for hunting and gathering if not for cultivation by

10. Durie, p 5. Lyndsay Head makes the same point in slightly different language: ‘The essential issue of survival was not land but belonging, because the right to cultivate depended on being allowed to live as a member of the group. Belonging, not land, was at the root of the organisation of Maori society; land was, in the domestic situation, simply its consequence. Land was culturalised as a personal possession, named and handed down. People owned their land in the same way they owned their history, and for this reason the terms ‘useright’ or ‘right of usufruct’, employed then and now to describe Maori domestic land tenure in English, miss entirely the texture of the relationship.’ Lyndsay Head, ‘Chiefly authority over land’, draft report on Maori letters to Donald McLean, Waitangi Tribunal, 1996, p 31.

11. Durie, p 9

12. Head, p 22

some prior group; the process of migration and settlement therefore commonly involved displacement, or partial displacement of a previous group. Warfare generally began to secure *utu* for insult or injury but the need to control sufficient territory to secure the group's future was always an underlying imperative. Competition for resources was real within groups as well; knowledge about particular hunting or fishing places, for example, was often kept quite secret, within the lore of particular families whose right to safeguard it was respected. Maori society was competitive and the interests of group members were not equal. The term 'communal' to describe the way *hapu* and *hapu* members held rights is therefore somewhat misleading. But most agricultural practices were public and observable and many large-scale enterprises were *hapu* or inter-*hapu* based. The nineteenth century evidence includes statements by Maori to the effect that neighbouring groups, interconnected as they were, commonly used portions of each other's land or resources. Tacit if not explicit permission was implied – the *mana* of the principal right-holders was recognised.

Relationships could break down, however, over insult or injury, for which there could be many causes, or because of the competing ambitions of powerful men. Then physical conflict and displacement could occur. Yet total displacement was probably also rare. Sections of the previous occupiers commonly remained on the land, keeping the fires alight; or conquerors intermarried with them, their descendants acquiring the *mana* of the land through the ancestral claim as well as through *raupatu*. Land thus bore a greater or shorter historical sequence of occupation and *mana*. Some areas, such as the Urewera or the upper Waikato, saw relatively little change, with some *kainga* being occupied by the same groups over many centuries; other areas – Tamaki-makau-rau, for example – saw a succession of tribes enter, assume control and then be displaced in turn. No group that developed close associations with the land and named its features ever wholly relinquished claims in it. But if there were no resident members on the land for more than two generations – no resident grandparent through whom to claim an interest – it would be difficult to assert rights against the resident group. Conversely, while superior force and numbers could determine the outcome in the short term, continued occupation and control, giving birth and dying on the land, were the ultimate tests of legitimacy.

Given that the boundaries of groups were subject to continuous change as *hapu* and *hapu* clusters formed and reformed, it follows that the boundaries of group land were not immutable either, although the primary territory of a group might not change for very long periods. The rights of groups, and the individuals within them, were most closely defined by the cultivations and other forms of usage and association near the principal *kainga*, and became more attenuated further away, in the zones of hunting and gathering, where they might start to intersect with the interests of neighbour groups.¹³ The sharing of certain resources such as lagoons and other waterways would commonly be worked out, over time, probably with the re-ordering of some priorities of control and usage. Amicable neighbours would accord each other access to portions of their primary territory. But in times of

tension areas of overlapping occupancy might be avoided by all parties, for fear of provoking conflict. Boundary marks such as prominent rocks or headlands or streams might be agreed between parties to end or avert conflict; posts (pou) were erected for the same purpose. These would be recognised or honoured for greater or lesser periods, in relation to a variety of factors. But continuous boundaries encircling the whole of a group's territory and demarcating it precisely from that of neighbours were virtually unknown; indeed the concept seems to have been somewhat alien to customary Maori ways of thinking and acting.

Instead there was a constant process of adjustment to accommodate births, deaths, marriages, adoptions, alliances, migrations, wars, and a host of related matters. The primary rights of those born and resident on the land were qualified by the contingent rights of those who married or were adopted out but later returned, the rights of their children, and the permissive rights of those who married in from other lineages or came as refugees or war prisoners. Gifting of rights was a common practice, with certain conditions commonly applying and a right of reversion to the donors if the donees or their heirs ceased to occupy the land. Allocations of land to allies in war and migration, however, seemed to be of a different order; once the lands were allocated and the alliance relaxed from its war footing, the residence and use patterns of the various participating groups tended, over time, to assume a primary quality. Time was indeed of the essence in many of the complex situations that arose in Maori relationships with land. Maori culture was relatively homogeneous and, although there were regional variations created by the history and geography of particular places, the principles or norms that established priorities of right were widely shared among a people with an abundance of historical and kinship ties. The application of these principles was flexible but not capricious. Constant discussion of issues, and the searching out of the minutiae of circumstances governing a particular case, was one of the richnesses of Maori culture, enjoyed by all. Some of the modes of discourse by which matters were debated and resolved became high art forms and the protocols of meeting were themselves of fundamental political and symbolic importance.

In this process of constant adjustment the role of chiefs was extremely important. They had authority over the admission or refusal of rights to those from outside the primary resident group, for the chiefs were arbiters of who belonged to the group. 'Chiefs' is of course a very vague English term. Recent discussion has rightly focused on the meaning of 'rangatira' and 'rangatiratanga' because (among other good reasons) 'tino rangatiratanga' is what the Treaty assured to Maori and because of the exigencies of leadership and representation that modern Maori communities constantly face. Chief Judge Durie's discussion of the concept notes that, 'The basis for the political autonomy and the cohesion of a hapu was the mana of a rangatira'.¹⁴ That is, hapu as groups formed themselves largely through recognising the

13. Ballara cites the case of a person being killed because it was thought that he had been stealing kumara from a cultivation. His attackers were dismayed to discover that the man's kete contained only fern-root. Though taken from the same vicinity it was considered as open for collection by a number of groups. Ballara, p 347.

mana of important rangatira. The mana of a rangatira was the result of ascription (the mana recognised in people of senior lineage even as infants) and achievement, in the skills of peace and war. Mana was held in different degrees by all free people and was of different kinds. There is a sense in which all elders and heads of families, at least, were rangatira, though the extent of their authority varied considerably. Some held mana within their own hapu or within several related hapu or even within a whole district. Some rangatira led in war and others in peace. Senior rangatira were charged with such powers from the spiritual realm, with which all creation was kin, that contact with them or their artifacts was precarious, at least without the protection of appropriate ritual. They were tapu and could make other persons, property or places tapu. Rangatira demonstrated or enhanced their mana through qualities such as bravery, boldness, hospitality, eloquence, integrity, and honourableness. Rangatira were concerned to protect their name and station and were highly sensitive to insult or injury.

Although senior rangatira lines tended to preserve a certain distinction and to arrange marriages with one another there was not a distinct rangatira 'class' as in some islands of north and central Polynesia. Rangatira depended upon the support of the community. Powerful warriors of aggressive personality could act very independently in the short term and could sometimes be difficult to control. But, in the longer term at least, they could not persistently flout the opinion of the community upon whose support they depended. Widely shared norms constrained chiefly actions. 'To that extent', Chief Judge Durie writes, 'authority may be seen as vested in the community and the rangatira may be seen as a community representative and leader'.¹⁵ Professor Sir Hugh Kawharu considers that rangatiratanga involves trusteeship and nurturing of the land and the people on the land.¹⁶ Early in the settlement period Edward Shortland, a medical doctor, Sub-Protector, and one of the most perceptive of the early amateur anthropologists, remarked that Maori society was 'a democracy, limited by a certain amount of patriarchal influence'.¹⁷ In respect of land rights, Dr Ballara notes that the garden lands of individual families could not be capriciously interfered with or reallocated by rangatira, whose authority in that sense related only to their own family lands. But rangatira authority extended to resolution of disputes and competing claims and to the gifting of land to ranking persons from outside the hapu and to calls upon the produce of the land for hui, gift exchange, and so forth. She suggests that very powerful rangatira could, in the context of tribal politics, come to arrangements with one another about land and even the people on it, without first consulting the people affected. A chief might gift land to another chief without diminishing his own mana over it, or the occu-

14. Chief Judge E T Durie, *Custom Law*, discussion paper circulated by the New Zealand Law Commission, January 1994, p 36. The remainder of this subparagraph is drawn from pp 34–40 of that source.

15. *Ibid*, p 34

16. 'Common property issues; experience in New Zealand', paper delivered at the Common Property Issues conference, National Centre for Development Studies, Australian National University, Canberra, 19 September 1996

17. Edward Shortland, *Traditions and Superstitions of the New Zealanders: with illustrations of their manners and customs*, Christchurch, Capper Press, 1980, p 227

pants upon it. In such situations the mana of the land shifted (from the point of view of the occupants) rather than the land being transferred.¹⁸ In the longer term the people affected could repudiate the arrangement, by switching their allegiances, and recognising someone else's mana. In other words senior chiefs could initiate action with other senior chiefs, and some appear to have behaved very high-handedly. But, in the end, their authority relied on the active or tacit approval of their actions by the community.

1.3 Early European Dealings for Land

The ambiguities in the relative authority of chiefs and community over land were to become apparent when Europeans began to 'buy land' in the contact period. Most of the ships' captains and traders dealt with the chiefs whom they thought had full authority and subsequently discovered that many others had to be dealt with as well. Colonel Wakefield, conducting the negotiations for the New Zealand Company, deliberately dealt with the 'overlord' chiefs like Te Rauparaha first, and then sought to conciliate the 'resident' chiefs with supplementary payments later. This began a common European tendency to exaggerate the rights of 'conquerors' and to try to bypass the heads of the resident families. They then discovered that this did not work and began to lament the 'decline' of the authority of the allegedly all-powerful chiefs under the influence of Christianity. In fact officials vacillated about the authority or 'mana claims' of non-resident chiefs up until the Waitara purchase. Yet when it came to the authority of the 'overlord' chiefs to make land deals, Maori themselves seemed unsure, or the mana of great chiefs did indeed entitle them to a considerable authority to initiate arrangements. They gave contradictory evidence on the subject to Commissioner Spain's inquiry in 1843.¹⁹

Lyndsay Head's recent study of Maori letters to Donald McLean also suggests that it was not wholly inappropriate for the English to negotiate only with chiefs. It was a situation where power was meeting power. Maori communities would have expected the Pakeha to deal with the high-ranking chiefs. Head observes that when Wakefield negotiated with the Te Atiawa chiefs Te Puni and Te Wharepouri at Whanganui-a-Tara, or Te Hawe and Te Whiti at Queen Charlotte Sound, the Maori acted not as 'landowners' but as chiefs, reflecting their personal authority among the people on the land. When the Waikato chiefs Te Kati and Te Wherowhero were paid for their 'interest' in Taranaki lands in 1842, 'The payments recognised the authority they had gained by defeating Taranaki tribes; they were a tribute to chiefly power, not compensation for relinquishing homes and cultivations'.²⁰

Wiremu Maihi (Te Rangikaheke) of Te Arawa expressed his view of his authority over land at a Government enquiry of 1856. Referring to his 'individual claim' he said:

18. Ballara, pp 314–317

19. See Duncan Moore's analysis, Wai 145 rod, doc e4, vol 2, pp 245–275

20. Head, pp 24–25

Formerly I could have sold it after talking to the natives, even against their consent, but I must have divided the proceeds of the sale, or they would have seized the land from the person to whom it had been sold.²¹

This statement reflects both the extent of the chief's authority and its limits. Wi Maihi's reference to an 'individual claim' was not a reference to an individual property right in English terms but a reference to his own mana over that land and the people on it. Even so, he had to speak to them, and distribute the payment, in acknowledgement of their rights in the land. Two chiefs writing to McLean in 1851 said, 'Do not say the land belongs to the one. On the contrary, friend McLean, it belongs to the many'.²² Head comments; 'The 'many', however, does not speak of an amorphous group ownership, but a collection of individuals who expected to be paid individually. . . . land sales were major community events – everyone had a stake in it. The domestic perception of individual ownership also explains why the largest single category of communications to McLean and the Crown consists of individuals seeking payment for land'.²³ (The question of what was intended by 'sale' is another matter which will be discussed further.)

The English officials and missionaries who drafted the Treaty realised that rangatiratanga, including authority over land, was distributed through various levels of Maori society, with a prominent role for the hapu. James Busby, official British Resident from 1833 to 1840, wrote in 1835 that, 'every acre of land in this country is appropriated among the different tribes; and every individual in the tribe has a distinct interest in the property; although his property might not always be separately defined.'²⁴ This was not a bad try for an Englishman two years in the country. And, although the Treaty frequently refers to 'Chiefs' in the English and uses 'Rangatira' as the Maori equivalent, Article Two 'ka wakarite ka wakaae' ('confirms and guarantees'), 'ki nga Rangatira ki nga hapu – ki nga tangata katoa o Nu Tirani te tino rangatiratanga o ratou whenua o ratou kainga me o ratou taonga katoa'. Thus the drafters of the Treaty seem to have recognised that tino rangatiratanga was distributed through Maori society, involving the tribes (hapu) and the people as well as the chiefs. A major focus of the ensuing discussion will be how far the Crown continued to comprehend and respect its undertaking.

1.4 European Contact and Maori Efforts to Control it

Maori customary society was of course greatly affected by the advent of the wider world after Cook's landfall in 1769. Maori engaged eagerly and willingly with that world, travelling widely from the outset, engaging intellectually with the English explorers, welcoming the opportunities for new material goods including new weaponry, engaging in trade, taking employment on European ships and accepting

21. BPP, vol 2, 1860, p 279 (cited in Head, p 29)

22. Te Kahawai and Te Hapimana to McLean, 22 July 1851 (cited in Head, p 36)

23. Head, p 37

24. Claudia Orange, *The Treaty of Waitangi*, Wellington, Allen and Unwin, 1987, p 38

the on-shore posts of European whalers, sealers, traders, timber cutters, and missionaries. These processes of 'modernisation' (if one can use the term in a neutral or value-free sense, for there seems to be no better one) created formidable problems for Maori as well as rich opportunities. They sought to control the interaction of course, trying to maintain the selectivity of what came across the beaches of New Zealand.²⁵ In most respects their achievement was outstanding. One can instance Hongi Hika's sojourn at Cambridge University with the missionary Thomas Kendall, writing an orthography for the Maori language; the freed war captives of the Ngapuhi, with the texts from the missionary printing presses in their hands, teaching their own people to read and write; the adoption into the local economy of the European pig and the white potato so that within a few years Maori were trading a surplus of these to the ships from New South Wales; and much, much more. In short Maori, like other Austronesian peoples, showed both a desire and a formidable ability to master and manage the forces of modernity to their own enrichment.

But maintaining control and selectivity was far from easy. Unwelcome influences crossed the beaches, the worst being new epidemic and endemic diseases. Although demographers now think that the decline of the Maori population has sometimes been exaggerated (because the Maori population at 1769 was over-estimated) it was horrendous enough. A population of about 100,000 at 1769 had fallen to about 80,000 by 1840.²⁶ The incidence of loss varied widely; while some communities seem little impaired others were shaken by their losses and anxiety grew. Musket warfare also took a toll, not perhaps in the loss of life in battle (though again some communities suffered heavily) but in the sense that the traditional constraints and boundaries limiting the destructiveness of war had been breached. Much bigger groupings than before, armed with muskets, took the field; big combinations formed to resist and repel them; a wave of migrations and conquest took place as formidable leaders in war and politics such as Te Rauparaha vied for control of the ports where European shipping brought arms, and wealth through trade. From disease and warfare smaller tribes grew anxious and some chiefs lamented the loss of their young men, the absence of children in the villages. Still they sought to regain balance; their adoption and adaptation of Christianity, recognised, after a long period of scepticism, as a system of power was largely for that purpose. Then a new threat emerged, in part a product of the earlier ones: the unruly Pakeha²⁷ communities beginning to burgeon on New Zealand shores and the men on the armed ships, flying like sea eagles from the great fastness which was

25. For a rich study of the engagement of tradition and modernity, and of how the experience is only partially within the control of the people involved, see Greg Denning, *Of Islands and Beaches*, a study of contact in the Marquesas Islands over a similar period, Honolulu, University Press of Hawaii, 1980.

26. Ian Pool, *Te Iwi Maori: A New Zealand Population Past, Present and Projected*, Auckland, Auckland University Press, 1991, pp 53–57

27. I am, and always have been, perfectly content with the designation 'Pakeha' for white settlers and their descendants. It in no way derogates from my European heritage of which I am proud, while recognising that, like all societies, it is far from perfect. My forebears came to these islands with the intention of making a better society than the one they left and largely succeeded in doing so. I am not a European but a New Zealander of British descent. A W

Sydney to hang about the New Zealand coast and catch on deeds of sale the signatures of unwary Maori.

From the 1790s entrepreneurs based in Sydney began to place small parties on shore among Maori communities for the purpose of killing seals, trading flax, cutting timber and as depots for offshore whalers. In 1814 Marsden, with the agreement of Bay of Islands chiefs, established the Church Missionary Society in that area and negotiations for land for mission stations and farms began. In the 1820s traders began to establish posts on shore and bay whaling led to more elaborate shore stations. Places like Cloudy Bay, the Bay of Islands, and Hokianga began to support small Pakeha communities. Many of these residents negotiated deeds of purchase, usually of small portions of land, from the local chiefs. In 1825 an attempt at systematic British colonisation in these islands was launched by the first New Zealand Company under the principal direction of Colonel Robert Torrens and the Earl of Durham. The ships *Rosanna* and *Lambton* were sent out, with immigrants under Captain Herd. In 1826 Herd signed deeds of purchase with chiefs at Rakiura (Stewart Island), Otakou Harbour, Cloudy Bay, and the Thames.²⁸ But the immigrants apparently did not feel very secure and sailed on to New South Wales. The widow of Captain Herd later sold the land purchase deeds to Edward Gibbon Wakefield, progenitor of the second New Zealand Company, but there is no evidence that he ever tried to act upon them. Maori put their marks, and later their signatures to many more such deeds, in the 1820s and 1830s. They were often signed on the decks of visiting ships and purported to convey huge areas, sometimes from cape to cape and inland to the mountain ranges. Boundary descriptions were usually very vague. From about 1830 a standard form of conveyance in legalistic English was used by some of the Sydney business houses whose ships frequented the New Zealand coast.

What Maori thought they were doing when they signed these 'deeds of sale' has been the subject of intense debate, notably in relation to the Muriwhenua claim before the Tribunal. Claimants have argued that the transactions can only have been seen by Maori in terms of their own culture, and that they were essentially 'tuku whenua', that is grants of rights and occupation and use of portions of land within a general area discussed and then written in the deed. The mana of the land would be considered still to lie with the grantors, they would continue themselves to exercise rights in the land and they held a 'right of reversion' if the grantee moved away or did not fulfil obligations expected by the community that he had joined. On this view the chiefs had acquired a pakeha rather than sold land. There is indeed a great deal of evidence that this is precisely what obtained in respect of most of the 'purchases', especially the early ones. It would be fanciful in the extreme to believe that a few chiefs had sold the freehold of vast areas such as were covered by the deeds of whaling masters like Johnny Jones or the Weller brothers. Indeed, people like Jones occupied only a portion of the land they purported to have acquired and continued to make a series of gifts or payments of firearms and clothing, livestock

28. See journal of T Shepherd, on the *Rosanna*, Mitchell Library ms a 1966, Sydney, NSW

and farm equipment, whaleboats, and prefabricated cottages which the chiefs requested. Jones and Weller carefully wrote down the value of these gifts and used it in their subsequent land claims: in two years it amounted to over £1000, as much as they had paid for their land rights in the first place.²⁹

But that is not the whole story. The evidence is also strong that the nature of some of the transactions was changing by the middle and late 1830s. Many Maori had by then been closely engaged with the commercial world for decades and were aware of European commodity concepts. Many had visited Sydney and ports beyond, served for years on European ships or worked in New South Wales. These experiences, together with the shipping thronging the Bay of Islands and, the increasing number of Europeans ashore, revealed a European society which could not so readily be fitted into the Maori world and controlled. Moreover, Maori knew about the fate of the Australian Aborigines and had themselves experienced the destructive power of European guns, as in the French reprisals after the killing of Du Fresne in 1772 and again after the attack on the whaler *Jean Bart* in the Chathams in 1836. In the blundering butchery by the crew of the warship *HMS Alligator* in 1834 while rescuing a merchant captain and his wife whom south Taranaki hapu were trying to ransom for muskets, Maori were given a demonstration of what British naval power could do. This is the climate in which an intensified spate of land purchasing by agents from New South Wales occurred, triggered by Governor Gipps's tighter land regulations of 1837. By this time some land transactions were moving beyond traditional Maori confines. Examples exist of Pakeha on-selling the land to third parties without objection from the original Maori vendors and of Maori renting back portions of land from Pakeha to whom they had previously sold it.³⁰

The evidence from the missionary records in particular is that sections of the right-holders, usually chiefs, sold land in which others of the hapu had customary interests but did not seem able to stop the sale. They clearly saw the alienation as permanent or likely to be so – the land had gone to the Pakeha because the mana of the chief was apparently sufficient for him to make that arrangement. They sought the missionaries' aid in preventing the loss of more. The powerful chiefs entering into transactions with Pakeha may well have believed that they had everything (including the Pakeha) under control; in that sense they were still working within their tikanga. But clearly many Maori in the north, including the more far-sighted chiefs, were worried about the outcome of collusion between land-sellers and the burgeoning Pakeha. The missionaries themselves had been buying land, as permanent property, for some time, both to endow the missions and to provide for themselves and their numerous children. Indeed they had taken a leading role in inculcating the idea of individual property in land.³¹ Now, in the late 1830s,

29. See olc 251–253, NA Wellington

30. Fergus Sinclair, 'Issues Arising from Pre-Treaty Land Transactions' (Wai 45 rod, doc i3), pp 136, 166, 184

31. One of their best students, David Taiwhanga, educated at Marsden's agricultural school at Parramatta, ran 20 dairy cattle on land near Kaikohe and supplied butter to the Bay of Islands at two shillings a pound – the first of a long line of successful Maori dairy farmers (F Sinclair, p 92).

especially when news arrived of the plans of the New Zealand Association, Henry Williams began to buy land in the areas of likely settlement in order to hold it in trust for Maori. Eventually the CMS submitted 19 deeds of this nature to the Secretary of State for Colonies.

Duncan Moore has cited evidence from the land claims commissioner's subsequent inquiries in Wellington to show that some of the chiefs there had very clear distinctions in mind between various kinds of alienation. Small lots which had been made available to traders like Tod, Scott, and Young, or whalers like Heberley, from the late 1820s onwards, were acknowledged as 'sales' in the 1842 and 1843 enquiries and eventually awarded to these Pakeha in freehold. Acquisitions by Henry Williams and his associates were regarded as 'tapu-ing the land' *against* sale, though some of them eventually did get exchanged for freehold sites for chapels or missionary residences. Colonel Wakefield's monster transaction for the New Zealand Company was quite something else again – at most a partial transfer of the rights within the area. But even the traders' small portions only assumed a 'freehold' character with the advent of British law. The individuals concerned had long had complex relations with the chiefs and communities with whom they resided, and these continued after 1840.³²

The reasons why Maori made transactions in land are varied and not entirely clear. The most common reason was to locate some Pakeha among them as a source and focus of trade. Many Maori had become regular consumers of imported goods. The need to acquire muskets had for a time been a dire necessity and remained strong, but imported clothing and foods were becoming part of daily life. The realisation that Europeans paid for land as a commodity was an easy way to clear debts or buy more imports. Lands never before precisely marked, outside the main areas of residence and cultivation (disputed lands perhaps), were often the first sold. There is evidence of a kind of fatalism among some individuals; probably because of the impact of disease some stated that the land was passing anyway and they might as well participate before they died or before someone else sold the land from under them.³³ But this does not seem to have been a general attitude. More commonly the desire for trade, spurred by a spirit of emulation, prompted the transactions; to own whaleboats, or gentlemen's clothing or horses was virtually a necessity after some chiefs had first acquired them. A negative pressure was the depredation of cattle on Maori cultivations, traditionally unfenced; this was a very real problem when a pastoral society met a horticultural one and seems to have led some Maori to sell some areas to the Pakeha to keep their cattle while the Maori communities drew their cultivations apart.

Still it would be quite wrong to assume that all sales were becoming complete alienations in the European sense. Various kinds of resistance to dangerous new trends emerged concurrently with those trends. Those opposed to the actions of their 'paramount' chiefs would sometimes repudiate them, or demand further

32. Duncan Moore, 'The Origins of the Crown's Demesne at Port Nicholson, 1839–46' (Wai 145 rod, doc e3), pt 1, pp 57–8

33. BPP, 1838, vol 1, p 65

payments if they had not shared in the initial payment.³⁴ The Hokianga people, under Mohi Tawhai, convened a committee and began to organise a pact against selling.³⁵

The need to organise to control dispersed interests was a real one because more large European consortia began to make purchases. The Manukau Company, for example, acquired from the widow of one Thomas Mitchell a deed purporting to embody the purchase from Ngati Whatua chiefs in 1836 of the whole of Tamaki-makau-rau. On the basis of this transaction a group of Scottish entrepreneurs formed the Manukau and Waitemata Land Company and sent out immigrants.³⁶ About this time various Sydney merchants secured deeds over most of the harbours and islands of the Hauraki Gulf and of the South Island. While in many – perhaps most – cases Maori vendors, in their view, still sold interests short of exclusive possession to ‘their Pakeha’ and expected them to maintain a relationship and provide ongoing benefits to the community, some localities, such as parts of the Bay of Islands, were becoming virtual European enclaves with the chiefs increasingly concerned about the independent behaviour of the Pakeha. Sections of Maori communities began to express anxiety that they were unable to restrain other sections of the right-holders – usually chiefs – who were entering into land transactions.³⁷ There appeared to be a good deal of confusion in the north and it is hard to generalise about how the hundreds of transactions seemed in Maori eyes. Some were kinds of joint occupancy, many were ‘tuku whenua’, others were something more than that. Each would need to be examined for its particular circumstances. But rarely would Maori have considered that they had totally and forever relinquished all interest in the land and they would eventually have sought to resume it if the Pakeha with whom they had dealt did not take up the land.

Meanwhile the possibility of settlers coming with such numbers and power as to assert *their* view of land transactions began to loom in the south. The threat came from three directions: New South Wales, France, and England.

By the late 1830s some of the whalers and traders from Sydney were claiming to have purchased huge areas of the South Island: the Weller brothers at Otago Heads for example, claimed over two million acres; Johnny Jones at Waikouaiti claimed inland as far as Wanaka. Various purchasers had deeds purporting to convey most of the good harbours and coastal plains. Purchases overlapped along the eastern coast while in New South Wales deeds were on-sold to third or fourth parties. Some – the Wellers among them – actually took up occupancy on the basis of deeds acquired in New South Wales, not directly agreed with Maori; nevertheless they continued also to make regular ‘gifts’ to the southern chiefs. How many of the

34. This is quite different from the person or group who had made the transaction and received the payment demanding further payments, over and above what was agreed.

35. Sinclair, p 160

36. olc file 629, NA Wellington

37. In discussion of his paper at the New Zealand History Association conference at the University of Auckland in 1994, Mr Rima Edwards of Muriwhenua was asked about this point. He replied that the burgeoning numbers and power of the Europeans was confusing people in the north. ‘We were in a whirlpool (he ripo)’.

deeds could have been enforced by the purchasers against Maori determination to continue to interpret them in *their* own terms is debatable but in involving themselves with the likes of W C Wentworth, the most wealthy man in New South Wales and the most powerful under the Governor, the Ngai Tahu chiefs had a tiger by the tail. For in January 1840 Johnny Jones took Tuhawaiki, Taiaroa, and Karetai to Sydney and in Wentworth's office signed a deed which purported to convey to the speculators' syndicate all of the South Island not already sold. In persuading the chiefs Wentworth probably made much of the fact that official British intervention was now in train and argued that he would help secure the chiefs' independence in partnership with him. This was to be a favourite line with private purchasers both before and after the Treaty. And in a crude sort of way it might temporarily have turned out well for the chiefs with such powerful 'protectors'. But it would not have left much of the South Island for Maori; New South Wales settlers had long shown a propensity to impose their demands by force against the Australian Aborigines and it is hardly credible that they would not have tried the same again in the grasslands and harbours of the South Island where they would very soon have outnumbered the Ngai Tahu. Armed European merchantmen had long shown that they could destroy a coastal village.³⁸ The danger was very real that without official British intervention the South Island would have become a bloody moving frontier as settlers seized harbours and rode into the interior, setting Maori against Maori in asserting their claims, as they had been doing for centuries among the indigenous people of the Americas and Africa and more recently in Australia.

Around Banks Peninsula the picture was being complicated by the French. Dr Peter Tremewan's fine study has shown how a very vague purchase deed secured by the whaling captain Langlois in 1838 from a few of the right-holders around Akaroa, became the basis of the mobilisation of capital in France and the despatch of a colonising expedition. The French entertained the possibility of a much larger settlement, embracing most of what came to be called Canterbury by the English and, though the French Government was circumspect about direct state involvement it did send a warship (*L'Aube* under Captain Lavaud) to support the private venture.³⁹ The French venture was forestalled by official British intervention but again it is fanciful to assume that the warship's guns and landing parties would not have been used against local Maori if they had tried to prevent the French from implementing their shoddy deeds, as the Tahitian and Marquesan islanders found to their cost a few years later and those of New Caledonia and the New Hebrides by the end of the century.

Meanwhile, in England, Wakefield's New Zealand Association, refused a charter by the Colonial Office (after some initial encouragement), turned itself into a joint stock company and sent out a colonising expedition anyway. Colonel William Wakefield's purchases from Maori on both sides of Cook Strait, and his claim to

38. In 1817 the village at Otakou was sacked by a Captain Kelly in revenge for the death of two of his seamen (Erik Olssen, *A History of Otago*, McIndoe, Dunedin, 1984, p 6).

39. P Tremewan, *French Akaroa: An Attempt to Colonise Southern New Zealand*, Christchurch, University of Canterbury Press, 1990, p 32

have extinguished customary rights between latitudes 40 and 43 degrees south, is typical of the monster purchases of the period. With these converging streams of settlement it is tenuous to assert that South Island Maori held exclusive possession by the end of 1839. A trial of strength on land was yet to occur but offshore the warships were irresistible and even armed whalers had run down Maori waka which challenged them and bombarded villages, while the involvement of English merchants in assisting Te Rauparaha showed their potential for fomenting struggles between tribes, as occurred throughout the Pacific islands in the nineteenth century. The willingness of the company to resort to force was eventually to be demonstrated at Wairau in 1843. That resulted in a conspicuous victory for Ngati Toa, which showed that Maori would certainly for years have retained military dominance against private settlers where their numbers and the terrain allowed. But that was not the issue in 1839 to 1840. The issue was that the situation as regards land rights was becoming very confused by the thrust of unofficial settlement and that many Maori were concerned about it. In this context they tended to accept missionary advice and assistance more than before, and to discuss with representatives of the British Crown ways and means of retaining or restoring stability, so that the engagement with the wider world could continue in positive ways. They also began to explore wider forms of combination among themselves.

1.5 James Busby and the Declaration of Independence

It is well known that the British Government sought to regulate the conduct of British nationals in New Zealand by such devices as extending the authority of New South Wales courts to try them for offences committed on New Zealand shores, and by appointing some missionaries and some Maori chiefs as Justices of the Peace. These methods proved of limited success, partly because of the difficulty of establishing facts at such a distance and partly because of doubts about the extra-territorial jurisdiction of British courts. In 1831 a missionary-inspired petition from Hokianga chiefs seeking the protection of the British Crown against the French (occasioned by the visit of one of the warships that protected the French whaling fleet in the Pacific), and the involvement of the merchant captain Stewart in Te Rauparaha's bloody raid on Ngai Tahu, led to the appointment of James Busby as British Resident. This kind of appointment, beginning to be made to the courts of princes in British India and the sultans of the Malay Straits, assumed the formal independence of the local people concerned, but sought to influence them through a diplomatic official of some seniority, backed by soldiers and warships. As is again well known Busby was provided with no soldiers and no warship on station in New Zealand. He was, however, instructed to try to influence the Maori chiefs 'towards some settled form of government' and 'some system of jurisprudence' by which Maori courts 'may be made to claim the cognizance of all crimes committed within their territory'.⁴⁰ As in Asia the British Government hoped to avoid the expenses and entanglements of formal empire but to protect both their nationals' interests

and Maori interests by overseeing the development of some governing structure in New Zealand adequate to meet the needs of modern trade and international relations.

The first of Busby's efforts in this direction was to have a meeting of local chiefs in 1834 select a flag for the independent tribes of New Zealand and to establish a register for ships built in New Zealand. As E J Tapp has pointed out, this was largely for the convenience of New South Wales entrepreneurs building ships in New Zealand creeks and harbours and transporting cargoes from New Zealand through Sydney. At the time the British East India Company's monopoly of *British* (not foreign) trade through Sydney worked to the considerable disadvantage of local Sydney merchants. It therefore suited the latter to have their New Zealand based ships registered as distinctly foreign.⁴¹ It no doubt suited Busby's purpose to involve the chiefs in this as a step towards promoting confederation among them and the evidence does suggest that several in the immediate area did accept and use the flag as a symbol of their identity and independence.

Organisationally, however, Busby took a more important step in 1835 when he convened a meeting of about 34 northern rangatira to draw up and sign a constitution and Declaration of Independence of the Confederation of the United Tribes of New Zealand. In the immediate term this was to frustrate the ambitions of the French adventurer De Thierry, who laid claim to a substantial area of the Hokianga, but in the longer term the Confederation was intended to be the Maori government which would regulate the increasingly complicated affairs of the emergent nation. Much has been made recently of the Declaration of Independence. Indeed it has been seen by many Maori as the instrument by which Maori national sovereignty gained international recognition. It is common enough in human history for later generations to read into past actions meanings that they did not carry at the time they occurred. The English did this from time to time, perhaps most significantly in respect of the Magna Carta of 1215.⁴² But, at the time, the Declaration received only very limited recognition by the Crown; nor did it institute any working form of supra-tribal authority. At the 1835 conference Busby explained that, for the system to be effective, the individual rangatira would have to accept the superior authority of the Confederation congress. All present signed the Declaration but Busby reported that the chiefs had told him that if one of their number broke laws enacted by the congress he could not be compelled by the others to observe them.⁴³ It seems that Busby never convened the group again until they signed away their authority at

40. Bourke to Busby, 13 April 1833, cited Donald M Loveridge, 'The "Declaration of the Independence of New Zealand" of 1835, and the Confederation of the United Tribes, 1835-40', Wellington, May 1996 (typescript), pp 4-5

41. E J Tapp, *Early New Zealand; A Dependency of New South Wales 1788-1841*, Melbourne University Press, 1958, p 90. (Tapp cites Governor Bourke to Stanley, 29 April 1834 and Aberdeen to Bourke, 30 June 1834, *Historical Records of Australia*, vol I, pp 412, 609.)

42. The Magna Carta was a set of constraints on royal taxing power and property rights in baronial estates secured by the barons from King John for thoroughly selfish reasons. In the seventeenth century the leaders of the House of Commons, with the support of certain jurists, made the Magna Carta one of the bastions of the liberties of common people against the arbitrary exercise of executive authority by the Crown.

Waitangi in 1840. He did, however, continue to collect signatures to the Declaration and urge upon the chiefs the strength that would come from working together and diminishing their fierce rivalries. The act of signing did seem to reinforce in the rangatira concerned a sense of their independence; Te Hapuku of Hawke's Bay, for example, who signed while on a visit to the north, at first hesitated to sign the Treaty of Waitangi until a Ngapuhi chief in the official party persuaded him that his mana would not thereby be diminished.⁴⁴ But it was the sense of their personal mana, and that of their hapu, that remained the chiefs' dominant concern, not a national government. Moreover, the British recognition of the Confederation was limited. Busby forwarded to Sydney, for conveyance to the British King, the chiefs' thanks for recognising their flag, their offer of continued protection and friendship to British traders and settlers in New Zealand, and their entreaty 'that His Majesty will continue to be the parent of their infant State, and that he will become its protector against all attempts upon its independence'. The Secretary of State for Colonies, Lord Glenelg, sent a guarded reply to Governor Bourke in Sydney:

It will be proper that they should be assured in His Majesty's name, that He will not fail to avail Himself of every opportunity of showing his good will, and of affording to those Chiefs such support and protection as may be consistent with a due regard to the just rights of others and to the interests of His Majesty's subjects.⁴⁵

In 1840 Governor Gipps concluded that this response indicated 'a state of superiority and protection on the one side and of dependence on the other, rather than a state of equality such as exists between independent nations'.⁴⁶ The Chief Justice of New South Wales concluded that, 'there never was any distinct recognition of New Zealand as an independent foreign state'.⁴⁷ The point of these officials' statements was to deny Wentworth and his friends in the New South Wales legislature the basis of their land claims in New Zealand: if there was no New Zealand state there was no authority, in the view of Gipps and his superiors in London, capable of transferring land titles to foreign citizens. The legal correctness of this position and the question of what property rights tribes not organised in the form of a nation state can convey is beyond the scope of this report. In historical terms, the clearest statement of the British Government's view is that expressed in Lord Normanby's Instructions to Captain Hobson of 14 August 1839:

We acknowledge New Zealand as a Sovereign and independent State, so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous, dispersed and petty Tribes, who possess few political relations to each other, and are incompetent to act, or even deliberate, in concert.⁴⁸

43. Draft letter, Busby to Earl of Haddington, 28 October 1836, and Busby unpublished ms 'The Occupation of New Zealand 1833–1843' cited Loveridge, p 12

44. Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995*, Wellington, Brooker's Ltd, 1995, p 32

45. Busby to Under-Secretary Hay, 2 November 1835, in H H Turton, *An Epitome of Official Documents*, vol 1, p 1, pp 8–9; Glenelg to Bourke, 25 May 1836, *Historical Records of Australia*, vol 18, p 427, cited Loveridge, 'Declaration of Independence', pp 16–18.

46. Gipps' speech of 9 July 1840, BPP, 1840, (311), p 75 (cited in Loveridge, p 20)

47. *Sydney Morning Herald*, 13 July 1840 (cited in Loveridge, p 31)

This assessment was a result of Busby's disappointed reports of the failure of his efforts to develop an effective Maori government, the resumption of tribal fighting in the Bay of Islands in 1837 and the increase of land purchases. Maori *aspirations* towards a nation state seem to have developed in the north largely as a result of Busby's efforts, but there was as yet no *practical exercise* of sovereign authority by a supra-tribal structure. Up to 1840 effective sovereignty in New Zealand still lay with the respective rangatira and hapu throughout the land.

1.6 The British Assertion of Sovereignty and Normanby's Instructions

The British Government had in fact concluded in December 1837 that settlement had 'to no small extent' already taken place in New Zealand and that the only choice lay between 'a Colonization, desultory, without Law, and fatal to the Natives, and a Colonization organized and salutary'.⁴⁹ They therefore entered upon negotiations with the New Zealand Association. These were still inconclusive in early 1839 when the New Zealand Company (as it had now become) sent Colonel William Wakefield out to buy land in the Cook Strait area, followed by its shiploads of immigrants. The Colonial Office then resolved to extend the authority of the Crown over the areas of likely settlement by annexing parts or all of New Zealand to New South Wales. Authority for Gipps and Hobson to do this was provided by Letters Patent of June 1839. It is highly likely that this authority would have been used regardless of the outcome of the Treaty negotiations. Nevertheless, although they considered Maori national independence now to be 'precarious and little more than nominal', an independence 'which they [the Maori] are no longer able to maintain' (in the words of Normanby's Instructions to Hobson), the British Government, in conformity with its previous undertakings, had resolved not to take possession without first securing 'the free and intelligent consent of the Natives'.

The British assumed, from the prior history of European colonisation of the Americas, Africa, Asia, and Australia, that the thrust of settlement could not be checked and that the Maori, like most indigenous peoples before them, would be overwhelmed by it. That assumption was perfectly logical and understandable in the light of all previous experience. Governments were not as powerful then, in relation to their own armed settlers, as they have since become. This largely explains why only limited constraints were imposed upon settlers – that on the contrary they were assumed to be the dynamic factor in the equation, entitled moreover, as British subjects, to legal and constitutional rights, including the right to acquire land and eventually to attain self-government. It was to take two or three years for the British Government to discover that Maori, notwithstanding the difficulties they were encountering, were still in control of much of New Zealand.

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

49. Glenelg to Durham, 29 December 1837, co 209/2, p 410

The purpose of the British intervention was to take control of the land trade. There were three purposes for this: to protect Maori from fraudulent dealings; to promote orderly, genuine settlement, and deter speculation in land settlement; and to provide revenue to fund the colony.

Hobson was therefore instructed to issue a proclamation, immediately upon arrival in New Zealand, that no previous acquisition of land by British subjects would be acknowledged as valid until confirmed by a grant from the Crown. Settlers would not, however, be dispossessed of property 'acquired on equitable conditions', at least 'not upon a scale which must be prejudicial to the latent interests of the community'. The instructions continued:

Having, by these methods, obviated the dangers of the acquisition of large tracts of country by mere land jobbers, it will be your duty to obtain, by fair and equal contracts with the natives, the cession to the Crown of such waste lands as may be progressively required for the occupation of settlers resorting to New Zealand. All such contracts should be made by yourself, through the intervention of an officer expressly appointed to watch over the interests of the aborigines as their protector. The re-sales of the first purchases that may be made, will provide the funds necessary for future acquisitions; and, beyond the original investment of a comparatively small sum of money, no other resource will be necessary for this purpose. I thus assume that the price to be paid to the natives by the local government will bear an exceedingly small proportion to the price for which the same lands will be re-sold by the government to the settlers. Nor is there any real injustice in this inequality. To the natives or their chiefs much of the land of the country is of no actual use, and, in their hands, it possesses scarcely any exchangeable value. Much of it must long remain useless, even in the hands of the British Government also, but its value in exchange will be first created, and then progressively increased, by the introduction of capital and of settlers from this country.

In the benefits of that increase the natives themselves will gradually participate. All dealings with the aborigines for their lands must be conducted on the same principles of sincerity, justice and good faith as must govern your transactions with them for the recognition of Her Majesty's Sovereignty in the Islands. Nor is this all: they must not be permitted to enter into any contracts in which they might be the ignorant and unintentional authors of injury to themselves. You will not, for example, purchase from them any territory, the retention of which by them would be essential, or highly conducive, to their own comfort, safety or subsistence. The acquisition of land by the Crown for the future settlement of British subjects must be confined to such districts as the natives can alienate without distress or serious inconvenience to themselves. To secure the observance of this, will be one of the first duties of their official protector.⁵⁰

These instructions contained admirable measures for the protection of Maori against landlessness and envisaged their participation in the developing economy through the increasing value of land. They have been quoted repeatedly in Tribunal reports and claimant submissions in this sense. What has not been so frequently observed, however, is that they contained also a contradiction that was to be the

50. Normanby to Hobson, 14 August 1839, BBP, vol 3, p 87

origin of the systematic economic marginalisation of the Maori people. For although theoretically assured of the increasing capital value of their land, Maori were effectively denied much of that capital value by the combined effect of the Crown's monopoly of land purchase and the instruction to buy land at prices which 'will bear an exceedingly small proportion to the price for which the same Lands will be resold by the Government'. Moreover, it was false to assert that the land, in its unregistered and undeveloped condition, 'possesses scarcely any exchangeable value'. The site value of most of the harbours and accessible coastal lands was already high, as evidenced by the burgeoning trade, between third, fourth, and subsequent parties, in purchase deeds that traders and speculators had signed with Maori. Certainly a lot of the prices paid were speculative and the derivative purchasers lost their money when the Government investigated the titles and struck down the fraudulent ones, but the private titles that were confirmed after 1840 rapidly sold for many times the price that the original purchaser had paid to Maori. What gave them added value was the security of title offered by British property law (and later by the Torrens system of title registration). That alone, and the prospect of development even before development itself occurred, gave added capital value to the land. But that added value was denied to Maori, because of the Crown monopoly and the policy of paying minimal prices. This is discussed further in chapter 3 below but it should be appreciated that the root of the problem lies in the British Government's policy established in 1839.

It is difficult to discuss this in terms of a Treaty breach for there was not yet a Treaty. Moreover, when Maori signed the Treaty the following year they consented to Crown pre-emption, though with what degree of understanding is debateable. But they did not consent to a Crown policy of buying at low prices that bore little relation to the resale value of the land. There is a degree of subterfuge here which does not sit well with Normanby's instruction to Hobson to deal for Maori land on the principles of sincerity, justice, and good faith, and to protect Maori from becoming the unwitting instruments of their own destruction. The contradiction in the Crown's policy was to become more and more evident to Maori eyes and underlay their organised resistance to land-selling by the middle of the 1850s.

Crown officials and settler politicians later argued, explicitly or implicitly, that since the Crown did have to have a revenue to pay for the administration of the colony's infrastructure, the roads and port facilities and Government services from which Maori benefited along with settlers, the land fund – the profits from resale of Maori land – was a reasonable charge for Maori to bear, a reasonable offset for the land guarantee of article 2 of the Treaty. That was certainly how many officials subsequently justified the Crown monopoly and the low prices paid. The difficulty with that argument is that it is discriminatory, that as far as domestic revenue at least is concerned it involved Maori paying the bulk of the cost of the infrastructure at that time. True, Normanby proposed a tax on 'waste' or undeveloped land owned by settlers (which was not in fact levied) and local body rates began to be charged on settler property (and Maori property too eventually) when local government became established. But there is little comparability between annual charges on

registered titles and developed land, (or taxes on the resale of that land) and the minimal prices for extinguishment of customary title in the first place. Once the land had passed to the Crown the Maori had, to that extent, lost their capital base and that was an irremedial loss. The point was understood by some of the planners in London and was in theory addressed in the 1840–41 instructions, but very inadequately (see sec 1.9).

1.7 The Treaty

It is not necessary to traverse again, for this report, the detail of the drafting and signing of the Treaty, but the following conclusions, drawn from the available evidence, are relevant:

- (a) The language of the Treaty reflected the British officials' belief that political authority in Maori society lay essentially with the rangatira (chiefs). Hence the 'cession' of 'sovereignty' (in the English version) or the 'tuku rawa atu' of 'kawanatanga' in the Maori version, was made by the rangatira (chiefs) of the Confederation and the independent chiefs elsewhere.
- (b) On the other hand the officials and their missionary advisers seemed to understand better, though imperfectly, that rights in land were distributed through several levels of society. Hence the English language text of article 2 'confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective individuals and families thereof the full exclusive and undisturbed possession of their Lands and Estates Forests and Fisheries and other properties which they may individually or collectively possess so long as it is their wish and desire to retain the same in their possession.' In the Maori text the Queen affirms 'ki nga Rangatiratanga ki nga hapu ki nga tangata katoa o Nu Tirani te tino rangatiratanga o ratou whenua o ratou kainga me o ratou taonga katoa', subject to their agreeing to the sale ('hokonga' in the Maori text) of any of these resources to the Queen. The British were clearly thinking of property rights in the drafting of article 2, but as authoritative academic writers and the Waitangi Tribunal have argued on several occasions, the expression 'tino rangatiratanga' would have conveyed rather more than this to the Maori participants; it would still have implied, among other things, personal relationships and mana, rather than 'ownership' and 'use rights'.
- (c) The Treaty does not confine the Crown's right of kawanatanga to Pakeha only. The Preamble makes clear that the Crown's authority would extend over the territory covered by the agreement and, by implication, to all within that territory. The records of discussion also show the Crown's determination to prohibit warfare and other violent practices within Maori society.
- (d) Contrary to some academic opinion, the author is not of the view that the drafting of the Treaty was deceptive – in particular that the term 'mana', to indicate what the chiefs were ceding was deliberately avoided.⁵¹ On the

contrary the British officials and missionaries were working under the assumption that the chiefs' mana was already under threat from unregulated settlement and they actually saw themselves as protectors of that mana, at least in its non-violent expressions. They frequently said that they would enhance the chiefs' standing through giving them access to individual property. On the other hand the relationship between kawatanga and rangatiranga was not pursued in detail; Hobson tended to regard the Treaty signings with a certain cynicism, peremptorily brushing aside suggestions that Maori participants may not have understood the Treaty. His missionary supporters and minor officials seem to have gone along with this on the paternalistic assumption that, unless British sovereignty was secured promptly, Maori were going to suffer heavily from unregulated settlement. The strategy was first to secure the transfer of sovereignty and thus control the land trade; other matters would be dealt with later. Meanwhile the missionaries would get on with their evangelical and educative roles. The neologism 'kawatanga' was coined to refer to a new concept or institution (leaving aside the erstwhile Confederation), that is a functioning *national* government. Although it did not amount to a deliberate deceit in the author's view, the term kawatanga, as various commentators have pointed out, would probably not have conveyed to Maori the full sense of the English term 'sovereignty', and the summary nature of official explanations left much room for misunderstanding.

- (e) A most serious area of misunderstanding related to the leasing of land, or dealing with timber, or other kinds of transactions short of actual sale. The officials intended that all such transactions would be controlled by the Government. Some Maori took away the view that the Queen had the first right of 'hokonga' of the land; others that she had the sole right. But that related to the near-permanent and more total kinds of transfer, not to the myriad other kinds of dealings relating to the land. It is unthinkable, in the author's view, that Maori would have considered that all of these too had been interdicted except through the Crown; after all the chiefs had just been confirmed in the rangatiranga of the land! Indeed they simply continued to make a variety of kinds of arrangements with private Pakeha. Within weeks of the signing at Waitangi Hobson began to consider the need explicitly to bring leases as well as sales under the constraints of Crown pre-emption, and did so in the Land Claims Ordinance 1841. The cutting of kauri timber and taking of other resources also began to come under licens-

51. James Belich, *Making Peoples: A History of New Zealand from Polynesian Settlement to the End of the Nineteenth Century*, Penguin Books, Auckland, 1996, p 194 argues that there was 'probably' deliberate or 'semi-deliberate' deception in the translation of the Treaty into Maori. The Waitangi Tribunal, perhaps the senior Maori body to assess the issue, considers that the Maori terms of the Treaty are appropriate. In their view, the two versions are complementary rather than contradictory (Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (the *Muriwhenua Report*) Wellington, Department of Justice: Waitangi Tribunal, 1988, p 212). Both versions must be consulted, but the stress, even so, is on the underlying principles (*Muriwhenua Report*, p 213).

ing controls from 1841, to the irritation even of chiefs like Waka Nene. The tight interpretation of pre-emption by the Crown, especially in respect of leases, would further deny Maori access to the capital value of their land and resources.

- (f) For Maori the Treaty presented a serious and difficult choice. They knew well that the authority of the British Crown, backed by its military power, could result in their subordination and loss of liberties. Speaker after speaker made this clear at Waitangi and at subsequent meetings. On the other hand, unregulated settlement had already encroached, land already seemed to be passing and the threat of further loss of control was real. On balance, it seemed to Tamati Waka Nene and those who argued in favour of signing, that it was better for the Governor to stay, to be a protector of their chieftainship and of their lands. Again many speakers made it clear that it was on that basis that they signed. The rangatiratanga of the chiefs and hapu was to be respected, and (as article 3 affirmed) Maori would also join with the British authorities in building the new nation state.
- (g) Given the way effective sovereignty had been distributed in Maori society before 1840, and given the terms of the Treaty and the manner in which the chiefs' signatures were collected, the Treaty was not a compact between two parties only, one British and one Maori, but a compact between the Crown and many Maori chiefs and hapu, inside and outside the Confederation. Nor was the Treaty alone the sole act by which Maori affirmed their engagement with the Crown. Over the following years there were chiefs, like Hone Heke, who signed the Treaty but who subsequently rejected the Crown's authority, and others, who had not signed, who entered into the state-building process by taking disputes to the new courts, accepting such offices as were made available to them in the machinery of government or assisting in military actions by the Crown. Years later, at the Kohimarama conference of 1860, chiefs who had and had not signed the Treaty, continued to affirm their basic commitment to the pact of 1840, but to protest very strongly at the Crown's failure to involve them fully, along with the settlers, in the making and administration of law, both as it related to land and to personal relations.⁵² In short they were still strongly committed to supporting the kawanatanga of the Crown but were waiting for their rangatiratanga to be genuinely recognised.

1.8 The Company 'Tenths' and Similar Proposals

As is well known the New Zealand Company proposed to include at least the heads of leading Maori families in the growing economy of their settlements by reserving, *in the title of the Company but for their benefit*, one in 10 (or 11 in some versions)

52. See the official record of proceedings, ma 23/10.

of the urban and rural sections in the company subdivisions. Ambiguity about whether some of these would be occupied by Maori (rather than leased on their behalf) soon bedevilled the scheme, together with the taking of some of the tenths by the Crown for public purposes and Maori reluctance to abandon their villages for the neat subdivisions. But, in principle, the scheme did offer the Maori vendors a share in the new economy. Indeed, as Wakefield and the chiefs alike recognised, the pool of land reserved for Maori within the settlements was to be crucial to their future and far more important than the initial purchase price.

The House of Commons Select Committee on New Zealand, in 1840, recommended, among other things, that in all sales of land by the Crown (once having purchased the land from Maori) ‘reserves be made for the natives of a quantity equal to one-tenth’; the Committee was of the opinion that ‘a plan of reserves, similar to that adopted by the New Zealand Company’ would offer the best prospect of securing Maori the benefits of British colonisation.⁵³

1.9 The 1840 and 1841 Instructions

In 1840, with the ink of the Treaty scarcely dry, a new threat to Maori lands and rangatiratanga emanated from London. This came from Lord John Russell, who had replaced Normanby as Secretary of State for Colonies in September 1839. Russell was a supporter of the doctrines of theorists such as Vattel, who argued that people did not have valid title to land unless they occupied and used it. He argued in 1840 that the Government had proceeded in New Zealand in accordance with Vattel’s principles, thus indicating that he believed the Treaty of Waitangi guarantee to Maori extended only to occupied lands. Thus the ‘waste lands’ theory was introduced into New Zealand, ‘waste’ here meaning not only that the land was uncultivated (which was the sense in which Normanby and James Stephen used the term) but that *because the land was unoccupied it would become the demesne lands of the Crown*, by virtue of the transfer of sovereignty from the Maori chiefs and tribes to the British Crown. He stated later that he had not imagined that ‘any claim could be set up by the natives to the millions of acres which are to be found in New Zealand neither occupied nor cultivated, nor, in any fair sense, owned by any individual’.

Russell’s instructions to Hobson of 9 December 1840, consequent on New Zealand being created a colony separate from New South Wales, were drafted, as were the 1839 instructions, by the Permanent Under-Secretary, James Stephen. The instructions included some passages distinguishing Maori from the hunter–gatherer peoples and noted that they had ‘established by their own customs a division and appropriation of the soil’. They also acknowledged that they had formerly been recognised by Britain as ‘an independent state’, which was going much further (by the absence of any qualifying remark) than Normanby had gone in 1839 or Gipps

53. Report of the 1840 select committee, 3 August 1840, BPP 1840, 582, p ix (IUP, vol 1)

in 1840. But the instructions required Hobson to separate out the Crown's lands from private lands 'and from those still retained by the aborigines' and the charter accompanying the instructions referred to the rights of Maori 'to the actual occupation or enjoyment in their own persons, or in the persons of their descendants, of any lands *now actually occupied or enjoyed by such natives*' (emphasis added).⁵⁴ This was the waste land theory. It was never fully applied in practice but it underlay the very nominal payments to Maori for uncultivated land in the decades that followed. By 1841 even, Hobson was making allocations of Town Belts and other public facilities in Wellington and elsewhere on no other basis than the New Zealand Company deeds, still under investigation.

What did constitute a fair price to pay to Maori for uncultivated lands is a contentious question but the inference that they were strictly ownerless and therefore worth nothing in monetary terms is a doctrine which has been strenuously resisted by indigenous peoples throughout the Pacific.

On 28 January 1841 Russell issued supplementary instructions: 'the lands of the aborigines should be defined with all practicable and necessary precision' on the maps of the colony. The Surveyor-General and Protector of Aborigines were to indicate the areas to be made inalienable, for Maori use and occupation. The balance, the 'waste land', would form the Crown demesne. All conveyances of any kind by Maori to Europeans were invalid unless expressly authorised by the Governor. Assuming that the bulk of the land had passed, or would soon pass, to private purchasers or the Crown the Maori had to be provided for. Therefore, 'As often as any sale shall hereafter be effected in the colony of lands acquired by purchase from the aborigines, there must be carried to the credit of the department of the Protector of Aborigines a sum amounting to not less than 15 nor more than 20 percent in the purchase-money' to pay the cost of the Protectors' department and to promote the 'health, civilization, education and spiritual care of the natives'.⁵⁵ In fact the land fund did little more than pay the expenses of the Protectorate before it was abolished in 1846 and the 15 to 20 percent fund was not made available after self-government in 1852 (see ch 20).

1.10 Conclusion

By these means the Crown was at the same time protecting and pauperising the Maori people. The threat to Maori from organised private settlement and French settlement was real. The Maori acceptance of Crown intervention via the Treaty was appropriate and the Treaty, from the Maori perspective, embodied recognition of their tino rangatiratanga and the joint enterprise of the Crown and the tribes in building a nation state. But the Crown's price for its intervention was extremely high – far higher than was made clear to Maori at the time. The recognition of Maori property rights was a considerable advance on what had happened recently

54. Charter of 16 November 1840 accompanying Russell to Hobson 9 December 1840, BPP, vol 3, p 154

55. Russell to Hobson, 28 January 1841, BPP, vol 3, pp 173–174)

in Australia but it was hedged around with qualifications which threatened to reduce it to a formality, or worse. For the strict application of the Crown's right of pre-emption (especially the ban on direct leasing), the deliberate payment of low purchase prices by the Crown and the looming influence of the waste land doctrine together worked to shut Maori out substantially from securing the true economic value of their land. That was mostly to be creamed off by the Crown to run the colony, and Crown titles were to pass to settlers in order to attract private capital. It all made good economic sense but by 1840 to 1841 it was already doubtful that there would be much place for Maori in the new scheme of things. Much would depend on the extent to which they too received secure titles to reserves or areas exempted from sales. But even here there was a problem. If the reserves were wholly inalienable Maori would not be able to get access to the rising value of land (according to Normanby's theory), in order to secure capital for development, or even money for consumer goods, without selling more land – at the Crown's low prices. Only by allowing Maori to enter into the leasehold market or joint venture arrangements would the contradiction be resolved. Of course the depth of the problem was not immediately apparent as Maori still held almost all the land and the resources – even the food supplies upon which settlers depended. The British planners expected this to cushion them for a long time even as the Maori diminished as a separate population by death or by assimilation. Meanwhile provision was made for the Maori to receive the Government's benefice from its profits from land sales. But this would be viewed by Maori as poor compensation for being able to retain and develop their own land and resources. That is essentially what the 600 and more claims to the Waitangi Tribunal are saying.

