

CHAPTER 3

THE NEW ZEALAND COMPANY PURCHASE

3.1 A Special Category of ‘Old Land Claims’

The Crown’s handling of the New Zealand Company claims is considered worthy of special consideration because they were dealt with according to principles and processes somewhat different from other pre-1840 purchases and because, at their fullest extent, they covered about one-third of New Zealand, and eventually affected land alienations from Taranaki in the north to Otakou in the south. The Company purchases have been the subject of numerous analyses, among the most important of which are, Rosemarie Tonk, ‘The First New Zealand Land Commissions, 1840–45’, MA thesis, University of Canterbury, 1986 and Patricia Burns, *Fatal Success: a History of the New Zealand Company*, Auckland, 1989. In the Rangahaua Whanui research series, Dr Robyn Anderson has made a careful study in her report (with Keith Pickens) on the Wellington District (Waitangi Tribunal, August 1996), and provided a very full bibliography. In the context of the Rangahaua Whanui research, however, it was realised that there was not a comprehensive analysis of the company’s relationship with the Crown through to the late 1840s, particularly in regard to the question (very important in other old land claims) of whether the alleged extinguishment of Maori title by private parties served to create a title in the Crown. To this end Mr Duncan Moore was commissioned to write a report on ‘The Crown’s Surplus in the New Zealand Company’s Purchases’. Moore’s report is original and very insightful. Among other things, it takes the perspective of the company–Crown relationship beyond well beyond Cook Strait and shows the interconnectedness of Crown and company activity from Taranaki to Otakou. Moore’s report is likely to change substantially the accepted views of the Company and its role. The report is published in Russell, Rigby, and Moore, ‘Old Land Claims’ (an appendix to ‘Old Land Claims’, Waitangi Tribunal Rangahaua Whanui Series unpublished draft). A summary of the report, prepared by Mr Moore himself, is appended to volume i of this report. This chapter also draws upon it heavily and upon Mr Moore’s submissions in the Wellington Tenths claim, Wai 145 record of documents, documents e3, e4, and e5.

3.2 The Scope of the Company Claims

The company's claims, as submitted in 1842 to William Spain, land claims commissioner, were based primarily on three purchase deeds made with Maori in 1839:

- (a) The Port Nicholson deed of 27 September 1839, signed with Te Atiawa chiefs, principally from Petone and Ngauranga, and encompassing an area including the harbour and the Hutt Valley between the Tararua Range and the Western Hutt hills
- (b) The Kapiti deed of 25 October 1839, signed with Te Rauparaha and Ngati Toa chiefs, encompassing all the land between 43 degrees south latitude (in the South Island) to a diagonal running from the Mokau River in the northwest to Castlepoint in the Wairarapa as the north-west corner.
- (c) The Queen Charlotte Sound deed of 8 November 1839 with Te Atiawa, Rangitane, and Ngati Apa chiefs in relation to the area described in the Kapiti deed.

Colonel Wakefield considered that he had thereby acquired for the company the rights of the 'overlord' chiefs, to an area of some 20 million acres.¹ In addition to the payments of goods made by the company at the signings, the deeds provided that one tenth of the urban, suburban, and rural sections which the company would demarcate in its huge purchase area, would be reserved by the company for the future benefit of the 'chief families' of the tribes.

Wakefield then negotiated a series of other agreements, for actual settlements, with chiefs whom he regarded mainly as 'resident' chiefs, in Taranaki (with deeds being signed on 15 February 1840), Whanganui (May 1840), and Manawatu (1842). The company's efforts to survey and occupy lands, however, met strong resistance in every area, either because the resident Maori did not know of the transactions or had not understood and concurred in them in the terms that the company intended. In Port Nicholson in particular they showed little inclination to give up their pa and cultivations for the neat company subdivisions, and had clearly not understood the 'tenths' system. Frustrated settlers began encroaching aggressively onto Maori habitations and officials had difficulty in keeping the peace.

3.3 The Crown's Policy

In New South Wales, Governor Gipps was shaping the New Zealand Land Claims Ordinance in line with Lord Normanby's instructions, based on the principle that no private purchaser could hold a title by virtue of a purchase from Maori without its first having been investigated by Crown commissioners and confirmed, up to a certain limit, by Crown grant. The company leaders joined in the settler protests against this law. In May 1840, however, Lieutenant-Governor Hobson declared British sovereignty over the whole of New Zealand, an action precipitated by the

1. Duncan Moore, 'The Crown's Surplus Lands in the Company's Purchases', Waitangi Tribunal Rangahaua Whanui Series unpublished draft, pp 3-13

company having set up a municipal government in Port Nicholson based on its purported deeds of cession from the chiefs. In June, Hobson sent the Acting Colonial Secretary, Willoughby Shortland, plus troops, to Wellington to disband the municipal government. In August, Shortland averted a serious clash between Maori and settlers at Te Aro, by securing the agreement of the chief, Mohi Te Ngaponga, to put the land in the care of the Queen's officers and await the outcome of the pending Land Claims Commission.² In London, meanwhile, the company pleaded its case for the recognition of its titles, without prior inquiry.

A House of Commons Select Committee considered the company's petition and other evidence through July 1840. The committee took the same view as underlay Normanby's instructions and Gipps's Land Claims Ordinance, namely that among Maori there was no law to regulate the possession of property, its descent, or its alienation was in force' and that, the Crown having assumed sovereignty, all private titles purporting to derive from transactions with Maori were invalid unless confirmed by the Crown. This narrow view of Maori law now seems absurd in the light of modern understandings of Maori society and rights to resources, even if these do not equate tidily with common law notions of property. The committee might have been more accurate in saying that, before 1840, there was no governmental structure, above the whanau, hapu, and iwi themselves, to enforce Maori law. That is another issue but, as many of the 'Pakeha Maori' living with tribes could testify, considerable security could be found, provided one observed tribal norms. European authorities at this time, however, were prone to deny that a society had 'law' if there was no *state-like* governmental structure capable of upholding and enforcing commercial contracts and property with their notions of regularity and order.

The Commons committee recommended, however, that the 'possessory' rights of the Maori should be recognised in full, and supported the concept of reserved tenths as offering them the best prospect of 'securing the benefits of civilization'.³

The Royal Charter of November 1840 that provided for the establishment of New Zealand as a colony separate from New South Wales authorised the Governor to make grants of 'demesne' land subject to the rights of Maori to land in 'actual occupation and enjoyment in their own persons, or in the persons of their descendants'.⁴ This meant village lands and cultivations. As Russell's supplementary instructions of January 1841, and his later comments indicate, he did not believe that Maori had title to all the uncultivated lands, and assumed that Maori land could readily be identified and granted (as inalienable); the remainder – millions of acres – would be Crown demesne. As Moore notes, Russell assumed, *from his view of waste lands rather than from an assumption as to the validity of the Company's purchases*, that there would be little difficulty in identifying land from which the company's award could be granted.⁵

2. Duncan Moore, 'The Origins of the Crown's Demesne at Port Nicholson, 1839–1846' (Wai 145 rod, docs E3–E5), pp 64–69

3. Ibid, pp 45–46

4. Russell to Hobson, 9 December 1840, BPP, vol 3, p 154

In November 1840 too, the British Government came to an agreement with the company to grant them four acres for every pound spent on colonisation in New Zealand, subject to their forgoing any other claims. By the time the Land Claims Commission commenced its hearings in Wellington in 1842 the accountant Pennington had calculated that the company was entitled to 531,929 acres, with a likelihood of a further half million. Meanwhile, the charter issued to the company in January 1841 proposed an initial selection by the company of 110,000 acres in Port Nicholson and 50,000 (or 60,000) in Taranaki. By early 1841 a 221,000-acre selection at Nelson had also been authorised.

Lord Russell and the Colonial Office nevertheless accepted that the Maori claims had to be disentangled from the 'waste' land. They assumed also, however, that some at least of the company's grant would come from land which had passed to the Crown by virtue of the company's alleged extinguishment of Maori rights by their purchase deeds. The claims thus had to be investigated and Russell appointed William Spain as commissioner for the purpose. The company claims, and other small claims within the company districts, were thus heard by Spain, not by Richmond and Godfrey who heard the pre-1840 claims in other parts of New Zealand.

3.4 Official View of Chiefs' Right to Alienate Lands

Statements by senior officials as regards the pre-1840 transactions show a considerable degree of confusion and contradiction, together with not a little expediency. As has been discussed earlier (ch 2), the position taken by Gipps from 1839 to 1841 was that:

uncivilized tribes, not having an individual right of property in the soil, but only a right analogous to commonage, cannot either by sale or lease, impart to others an individual interest in it, or in other words, that they cannot give to others what they do not themselves possess.⁶

This view had underlain the position taken in New South Wales and London that the pre-1840 private settlers could not acquire a title directly from Maori. Yet somehow the pre-1840 transactions had conveyed a title to the Crown. As Russell told the company:

The basis for the [Land Claims] inquiry will be the assertion on behalf of the Crown of a title to all lands situate in New Zealand, which have heretofore been

5. Moore, 'Origins', p 71, footnote 145. Russell stated in 1844: 'I believed the extent of land which it would be in the power of the Crown to grant to be far greater than would be enough to satisfy its engagements. I did not suppose that any claim could be set up by the natives to the millions of acres of land, which are to be found in New Zealand neither occupied, nor cultivated, nor in any fair sense, owned by any individual.' (Russell to Somes, 29 June 1844, nzc 1/3/13, cited in Moore, 'Origins', p 73).

6. Gipps to Hobson, 6 March 1841 (cited in Moore, 'Origins', p 55)

granted by the chiefs of those islands according to the customs of the country and in return for some adequate consideration.⁷

To Russell he wrote, ‘the lands of each tribe are a species of common property, which can be alienated on behalf of the tribe at large only by the concurrent acts of its various chiefs’.⁸ Of course that is just what the private claimants, and many of the chiefs, said that their transactions had been before 1840. As we have seen in chapter 2, however, whereas the Maori view of the transactions was, in many cases at least, that they were conveying something less than the alienation of full freehold or exclusive possession, the settlers considered the transactions simply to be sales, in the European sense. As noted above, whereas Gipps’s 1840 ordinance appeared to contemplate transactions other than sales, in practice the land claims investigations simply boiled down to deciding whether the chiefs had sold or not sold (and the area concerned) not any kind of intermediate or qualified transaction. Thus Gipps, writing to Hobson in respect of Charles de Thierry’s big claims in the north, stated, ‘[i]n every case in which the chiefs admit the sale of land to individuals, the title of such chiefs to such lands are (sic) of course to be considered as extinct’.⁹

As Moore had pointed out, in this respect the Crown’s approach to the company districts was the same as in the other old land claims. The actions of the ‘overlord’ chiefs in signing the 1839 purchase deeds had served to create some kind of title in the Crown. From then on the Crown officials and company officials together set about ‘completing’ the purchases, by payment of additional consideration if necessary, usually described as ‘compensation’ for rights within an area already deemed to have been transferred.¹⁰

3.5 The Role of the Protectorate

Moore has also pointed out the central role of the Department of the Protector of Aborigines in the proceedings which unfolded. Writing to George Clarke snr, when re-appointing him Chief Protector in 1841, Hobson gave instructions which were in part identical with those he had himself received from Normanby in 1839.¹¹ The Crown had thus, via the Protectorate as well as the Land Claims Commission, bound itself in very closely to the resolution of the company’s claims and very explicitly assumed the duty of active protection of Maori rights. The Protectorate was charged also with the duty of buying Maori land for the Crown, and again Normanby’s instructions were the guideline: the price paid would be ‘an

7. Smith to Somes, 2 December 1840, cited in Moore, ‘Origins’, p 74

8. Russell to Hobson, 28 January 1841, cited in Moore, ‘Origins’, p 56

9. Gipps to Hobson, 30 November 1840, cited in D Armstrong, Wai 45 rod, doc 14, pp 20–21)

10. Moore, ‘Origins’, pp 68ff

11. ‘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 Island . . .; they must not be permitted to enter into any contracts in which they might be ignorant and unintentional authors of injury to themselves etc.’ Normanby to Hobson, 14 August, 1839, BPP, vol 3, p 87

exceedingly small portion' of the subsequent resale value, but the real payment to the Maori would be in the increasing value of their remaining lands.

Moore has pointed out that the paternalism of the Protector's role was very much a double-edged sword. The Protectors (most especially George Clarke jnr in the case of the company purchases and awards), would indeed be active in checking and limiting the company's exaggerated claims and cavalier attitude towards Maori rights. At the same time:

Preventing unintentional injury was a parental role . . . ignoring, redirecting, or rewarding Maori desires. Put simply, while Maori might have told the Protector they wanted something, under this instruction, it was the Protector's duty to give them something else. It gave the Protector licence to decide on behalf of Maori, a licence translated at Port Nicholson into a general agency to decide whether or not they had agreed to sell their land.¹²

George Clarke jnr, on investigating the situation in Wellington in 1841, found that while Maori were very concerned at the unexpected numbers of settlers debouching from the company's ships, and were resisting the company surveys and attempting to confine the settlements, they did not have an objection to settlement as such. On the contrary, as in the case of the pre-1840 transactions elsewhere, they wanted settlers among them for trade, employment, and to learn new skills from them. *This giving of possession to some company settlers*, as well as the signatures of some chiefs on the deeds, is the basis upon which Clarke, and later Spain, concluded that the company had effected a 'partial purchase' from Maori. Clarke did not accept, however, that the company had achieved a total alienation of Maori rights. Alienation of any land would require the consent of the resident chiefs and communities as well as that of the 'overlord' chiefs. Although Te Atiawa chiefs (Te Puni, Wharepouri, and others) had signed the company's Port Nicholson deed, chiefs at Pipitea, Te Aro and other kainga had either not signed or not received payment. Although they were willing to admit some settlement, it was also clear that they wanted their pa and extensive cultivations reserved.¹³

3.6 Hobson and Wakefield Seek a Way Forward

Since Wakefield had long accepted that additional payments had to be made to 'resident' chiefs, he and Hobson were able to concur, in September 1841, on a strategy of trying to complete the 'partial purchase', in respect of the 160,000 acres which Lord Russell's charter authorised the company to select in the first instance, by securing the agreement of the Maori occupants of the particular lands required for actual settlement. This was of course subject to the Land Claims Commission determining that the company had made valid purchases. Hobson privately informed Wakefield that he would approve 'any equitable arrangement you may

12. Moore, 'Origins', p 82

13. Clarke to Hobson, nd but probably 20 October 1841, cited in Moore, 'Origins', pp 89-93

make to induce those natives who reside within the limits referred to in the accompanying schedule, to yield up possession of their *habitations*' (emphasis added) but no force or compulsory measures would be permitted.¹⁴ The schedule (initially proposed by Wakefield) included 50,000 acres at New Plymouth, 50,000 acres at Whanganui and 110,000 acres 'near Port Nicholson' in fact to (be made up of 31,200 acres distributed from Porirua to Island Bay, and 78,000 in the Manawatu). Colonial Office approval for selection of the 221,000 acres in Nelson also reached the colony. Hobson's advice to Wakefield (sometimes called a waiver of Crown pre-emption) was of the greatest future significance because the company considered itself authorised to press Maori to leave pa and cultivations by additional payments or other inducements short of force.

Moore comments that in allowing the company to negotiate with the Manawatu resident chiefs the Crown was letting slip its protective duty, since that district was outside the ambit of the 1839 Port Nicholson deed.¹⁵ This may be so, although it is a little difficult to see on what basis the company could rightly pick or choose which of the myriad 'resident' chiefs to negotiate with, given acceptance of the Kapiti deed with the 'overlord' chiefs, covering the area from Mokau nearly to Kaiapoi. As it turned out Wakefield was unable to reach agreement with the Manawatu chiefs.

In Moore's view, Hobson and Wakefield 'probably' assumed that whatever lands within the company claim area were found to have been validly alienated, but which were not awarded to the company, would go to the Crown.¹⁶ By the same token, lands not found to be validly alienated would presumably remain Maori customary land.

In any case, through 1840 and 1841, the agreement of resident Maori to settler survey and occupation of portions of the claimed land was secured by painstaking negotiations, involving:

- (a) The company making additional payments to Maori and assuring them that they would not have to give up their pa.
- (b) The Crown officials making a range of promises:
 - (i) that a Native Reserves trust would be established, using the original company tenths to gain revenue for education, medical care, and so forth;
 - (ii) that all lands Maori did not want to sell would be excepted from the sale, especially pa, cultivations, and wahi tapu; and
 - (iii) that the services of the Protectors of Aborigines would be provided (as a result of Lord Russell's January 1841 instruction that between 15 and 20 percent of the land fund be directed towards this and other Maori purposes).

While these various categories were blurred in the officials' thoughts and statements, Maori could not but have received the impression that they would both retain

14. Hobson to Wakefield, 6 September 1841, cited in Moore, 'Origins', pp 98–99

15. Moore, 'Origins', p 101

16. Ibid, p 102

their valued lands and also participate in the benefits of the developing town.¹⁷ Moore comments:

if the Crown took the Maori ‘residents’ surrender of peaceful possession as the real sign of their consent to land sales, then the particular Crown assurances which *won* that surrender must have formed the ‘real consideration’ due to those vendors. The Company’s title – and therefore the *Crown’s* title to any Company ‘surplus’ – appears highly dependent on how well the Crown honoured its early, possession-getting pledges.¹⁸

3.7 Issues Regarding Reserves

A number of Treaty-related issues arise from the selection of reserves in the company settlement:

- (a) Hobson and other Crown officials initially sought to regard pa and cultivations that Maori wished to retain, as lands *excepted from sale*, apparently in line with Lord Russell’s view that actual Maori habitations should be inalienable. But there appears to be a concurrent tendency, certainly favoured by the company officials, to designate the pa and cultivations as ‘tenths’, thereby diminishing the pool of tenths which were *also* supposed to be reserved for Maori.¹⁹
- (b) In fact there was a tendency among the officials themselves to relieve tension over disputed pa and other sites by formally making them reserves. Moore notes Willoughby Shortland’s intervention at Te Aro pa in 1840 and Police Magistrate Dawson’s intervention in disputed land at Whanganui as examples. This tendency later increased, among both Crown and company officials. Moore raises the question of whether in agreeing to these arrangements (as they commonly did) Maori knew that the making of *formal* reserves actually meant that title to them transferred to the Crown (in trust).²⁰
- (c) The selection of *public* reserves in Wellington by Felton Matthew in late 1841 appears to have infringed Maori rights. He, like the company officials, saw the spur upon which Pipitea pa was located as the ideal site for public buildings, but the Maori owners would not relinquish it. Matthew therefore designated the tidal mudflat off Lambton Quay – one of Pipitea’s food-gathering areas – for the customhouse and market reserve. Likewise he took Waitangi (the swampy ‘Basin’ near Te Aro, replete with bird life) for a public market. At the same time roads were being laid out, also encroaching on the foreshore near Kaiwharawhara. The officials were presumably relying on the authority of the Land Claims Ordinances and the Municipal

17. For a list of official statements about these undertakings, see Moore, ‘The Crown’s Surplus’, p 17

18. Moore, ‘The Crown’s Surplus’, p 18

19. See Moore, ‘Origins’, pp 140–141

20. *Ibid*, pp 108–109

Corporations Bill 1842 to assert Crown control of all tidal land, headlands, and islands (for example Matiu or Somes Island). All this is before the Land Claims Commission had investigated the company purchases. Moore comments that, once the Crown had asserted radical title via the Land Claims Ordinances (subject to Maori possessory rights), Maori were excluded from formal participation in these arrangements for the shaping of the town. The Public Reserves in the town (including the Town Belt), the promontories and the Native Reserves (including the pa) were all promulgated on 10 September 1841 along with the town boundaries of Wellington.

This, Moore comments, technically made the residents of the pa squatters on Crown land, living there by permission of the Police Magistrate.²¹ Once again the Crown's protection of Maori from private settler aggression involved some encroachments of its own.

Another extremely important limitation in respect of the urban reserves was the refusal of the company and Crown officials to let Maori lease them directly to settlers. The issue arose in respect of Barrett's Hotel in Wellington, when Barrett, who had been allowed the block by Wakefield on account of the whaler's marriage to Te Wharepouri's sister, Rawinia, tried to let it. Hobson intervened, claiming Crown right to the land still, and saying that the rent, if any, was payable to the Crown for the benefit of Maori.²² (Hobson had only recently inserted a prohibition on direct leasing as well as direct sale in the Land Claims Ordinance.) In 1842 the company's reserves officer, Halswell, stopped the chief Wairarapa from directly leasing some land at Pipitea designated as reserves.²³ Maori must rapidly have come to doubt the value of the tenths and reserves system, at least as a means of gaining revenue. (That doubt, and the confusion over reserves in Wellington generally, almost certainly led the Otakou chiefs in 1844 to opt not for 'tenths' in Dunedin but to take the bulk of their reserves at Otakou heads, where they already had a promising commercial association with the whaling venture of the Weller brothers.)²⁴

3.8 The Spain Commission

Hobson's letter accompanying his instructions to William Spain and reviewing the situation to date, included the remark, 'that the Town of Wellington and the shores of Port Nicholson have been guaranteed to the Company with the exception of the native paha cultivations and burying grounds'. Moore comments that this was a

21. Moore, 'Origins', p 115. Moore also refers (p 114, footnote 219) to the effects of the Land Claims Ordinance 1841 and Municipal Corporations Ordinance 1842 on the Crown's disposition of the foreshore. For a discussion of the Crown's presumptive right to the foreshore, in relation to Maori customary rights, see Richard Boast, *The Foreshore*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), 1996. This report is summarised in chapter 13 below.

22. Moore, 'Origins', pp 139–140

23. Ibid, p 263

24. Alan Ward, 'A Report on the Historical Evidence in the Ngai Tahu Claim', Wai 27 rod, doc t1, pp 97–109

strong indication to Spain ‘that his ultimate objective was to implement – as best he could – the Secretary of State’s guarantee to grant certain neighbourhoods to the New Zealand Company’.²⁵

Spain began his hearings in Wellington in May 1842 and took extensive evidence from the chiefs. He focused upon trying to determine who had authority to ‘sell land’ and who had done so, with considerable regard to the overlord/resident distinction, and to the relationship between Ngati Toa and Te Atiawa and other groups. As in the old land claims inquiries in the north, Spain’s commission too reduced all kinds of potential transactions to this one category – sale. Moore rightly notes the irony of the British authorities’ recognising a power of sale in the chiefs, when their whole intervention in the pre-1840 transactions was founded upon denial of the ability of tribal peoples to convey title, at least to private parties.²⁶

In terms of determining which areas the chiefs had alienated, Spain concentrated upon the ‘neighbourhoods’ listed for the company’s surveys and selections. Early inquiries focused upon the small claims of Tod, Scott, and other traders within the company’s claim area. Most of those claims were very strongly upheld by the chiefs (both on the ground and before the commission) even though they may have been agreed after the signing of the company’s deeds. In other words the Maori did *not* consider that they had conveyed exclusive possession to the company in 1839. Neither did Spain, who upheld the claims of Tod, Scott, and others.

Among other matters disclosed in the evidence was the assertion of authority over the land about Whanganui-a-Tara (Wellington Harbour), by Te Atiawa and other Taranaki groups but also some sense of threat from Ngati Toa, Ngati Raukawa and their Waikato and upper Whanganui allies, and from Ngati Kahungunu who were raiding the Hutt Valley from the Wairarapa. These tribal rivalries were given as reasons by Te Puni and Mahau for the movement of Ngati Tama and Ngati Mutunga to the Chatham Islands and as one reason for inviting the British to settle in the Hutt.²⁷ The movement of Ngati Rangatahi (originally from near Taumaranui) from Porirua into the upper Hutt seems to have been connected in part with Ngati Toa’s dissatisfaction over the Te Atiawa chiefs’ dealings with the British over the Hutt Valley.²⁸

It was not long before Spain, like Clarke before him, had come to the view that the company’s payments to ‘overlord’ chiefs were not sufficient to secure possession or ownership: the ‘resident’ Maori had to consent and receive payment as well.

25. Shortland to Spain, 26 March 1842, cited in Moore, ‘Origins’, pp 177–178

26. Moore, ‘Origins’, p 197, footnote 384. In fairness it will be recalled that in the debates on the New Zealand Land Claims Ordinance in New South Wales, the officials had shifted their stance from denying a power in the Maori to *convey*, to one of denying the right of private persons to ‘*acquire* a legal title to or permanent interest in’ land by virtue of conveyances from Maori. (See preamble to the NSW ordinance and to the Land Claims Ordinance 1841, and ch 2 above).

27. Moore, ‘Origins’, pp 253, 269, 273

28. *Ibid*, p 249

3.9 The Shift to Arbitration

During 1842, disputes in the company districts worsened as a result of the survey and selection of allotments, notwithstanding Wakefield's payments to resident Maori opposing the settlers. Wakefield, and Spain too, formed the view that recognising each new claim for payment had a snowball effect, evoking demands from the next level of Maori right-holders. They therefore sought an element of finality and proposed to Acting-Governor Shortland that a process of arbitration be introduced, with Spain as final arbiter. Shortland promptly agreed and in January 1843 authorised Wakefield and Clarke to act as 'referees' for the company and Maori respectively and Spain as 'umpire'.

According to the evidence of Shortland and Spain, Maori at Port Nicholson and Porirua agreed to be bound by the decision of the umpire. Clarke too reported that the Maori wanted finality. But the finality they wanted had more to do with clearly demarcating which areas were theirs and which were the settlers'. Settlers were constantly encroaching onto their cultivations and Clarke had difficulty in preventing retaliation. The occupants of the pa still seemed disinclined to relinquish them and, according to Clarke, the occupants of Te Aro in particular seemed disinclined to accept arbitration based on a monetary payment.²⁹ Clarke nevertheless stated later that, '[h]aving previously obtained the general consent of the natives to accept a fair award', he joined in the arbitration process.³⁰

Moore comments that:

shifting to arbitration effectively deprived Maori in the Company's settlement areas of many of the protections afforded by the strict provisions of the 1841 Land Claims Ordinance. Foremost amongst these was the right of any sub-groups or individuals to entirely *refuse* to sell the bulk of their interests within the Company's 1841 Charter areas.³¹

The right to proceed on this basis stemmed, in the officials' view, from the Company having acquired a part-interest within their 1841 Charter areas, through their initial transactions and subsequent possession. But whereas Wakefield considered that the Maori had effectively alienated the whole of the district by virtue of the 1839 transactions, save for reserves which the company, in the main, would define, Clarke declined to agree to Maori being required to relinquish any pa or cultivations without their free consent – a position certainly much closer to Maori understandings of what they had agreed to, and also to earlier assurances given to Maori by Crown officials.

There are other aspects of the arbitration which are dubious in Treaty terms. First, as a consequence of the shift to arbitration the inquiry into the complex right-holding amongst Maori, and into what Maori thought they had actually conveyed to the company, ceased. Secondly, the basis of the monetary compensation was

29. Moore, 'Origins', pp 379–390

30. Clarke junior to Clarke senior, 29 June 1844 (cited in Moore, 'Origins', p 477)

31. Moore, 'The Crown's Surplus', p 27

unclear. It was apparently agreed amongst three principal officials that it would be based on 1839 valuations – very much less than those obtaining in 1843 and 1884.³² After an initial offer of £1050 in respect of Te Aro pa in Wellington (whereupon the occupants asked for much more) Clarke, in May 1843, proposed £1500 for the *whole area* of the company's Port Nicholson deed. Clarke apparently thought that the real payment to Maori should not be so much in money but in reserving them one-fifteenth of the land actually alienated (an adaptation of Russell's January 1841 instructions), in addition to the land they wished to retain.³³

The proposal was not taken up immediately. Clarke considered that Maori had not yet sold their pa and cultivations; Wakefield considered that they had. Their ideas were so far apart that Wakefield withdrew from the arbitration in April 1843.

Meanwhile Maori disputatiousness had increased, almost certainly encouraged by the now established practice of paying them goods to allow surveys to proceed. The arbitration had led to even higher expectations of payment and the Company's withdrawal from the arbitration heightened tensions. These overflowed in the disastrous affray at Wairau on 17 June 1843, followed by both Maori and settlers about Wellington preparing for further violence.

At this point some Wellington chiefs began to suggest to the local officials and to Shortland that the Crown buy the disputed district: that would get them their payment and settle the disputes.

3.10 Spain Persists with Arbitration

Meanwhile Spain had firmed up his views in a report to Shortland of 12 September 1843 to the effect that:

the greater portion of the land claimed by the Company in the Port Nicholson district, and also in the district between Port Nicholson and Wanganui, including the latter place, has not been alienated by the natives to the New Zealand Company; and that other portions of the same districts have been only partially alienated . . . I am further of the opinion that the natives did not alienate their pahs, cultivations and burying grounds . . . and that the explanation of the system of reserves was perfectly unintelligible to the natives.³⁴

He did not propose, however, that, in the face of Wakefield's intransigence, he cease his efforts and let the company flounder or fold up. Rather, he pressed Shortland to let him make his awards to the Maori and to advance him the money for the purpose of concluding an arbitration of the surveyed land. Shortland quickly concurred and allowed that the arbitration might extend to lands not yet purchased but which Maori might, without injury to themselves, be willing to abandon.³⁵

32. Tod's 265 foot frontage at Pipitea was calculated to be worth £1393.17 s at the rate of £5 5s per foot. (cited in Moore, 'Origins', p 267)

33. Clarke to Wakefield, 2 March 1843 (cited in Moore, 'Origins', p 386)

34. Cited in Moore, 'Origins', pp 419–420

35. Col Sec to Spain, 16 January 1843, ia 4/253, p 38 (cited in Moore, 'Origins', p 299)

The arbitration still had a kind of ‘general’ quality however. Spain did not propose to attempt ‘to separate the sold from the unsold portions of land’ at that point: ‘There would be the greatest difficulty in ascertaining correctly the boundaries and the quantities of the lands belonging to each division or family, or individual native claimant’. Since the Protectors (both George Clarke snr and jnr) were at that time moving towards the definition of Maori customary interests and boundaries, Moore is highly critical of Spain’s having ‘decided finally to treat those interests as a fuzzy mish-mash, to be swept away at a price he knew Maori would never consent to, but that he also knew was for their own good’.³⁶ Whilst the level of compensation and the manner of its imposition upon Maori are indeed very questionable, it would have been very difficult to determine with any precision the various customary rights in the claim areas *and their boundaries*. The multi-layered nature of Maori right-holding would have required Maori to make all kinds of mutual concessions in order to arrive at sharp boundaries for groups which were not in fact discrete. This is a somewhat different matter from ensuring that groups with interests in a given area had been identified, had consented to an alienation and been paid.

Certainly the concept of trying for some *prior* definition of interests, by systematic and public hearings (such as Spain had already in a sense embarked upon), before making any payments, would have promised greater equity. The making of payments to principal chiefs and letting them handle the distribution of it was not entirely out of keeping with custom, but in this instance it involved the most serious of all issues to Maori – the permanent alienation of land.

3.11 Lord Stanley’s Proposals and Fitzroy’s Implementation of Them

Meanwhile in London, in May 1843, Lord Stanley, in the face of company complaints of lack of support from the Crown, had agreed to issue a Crown grant to the company of its 1841 awards, conditional on the Land Claims Commission determining that Maori customary rights had been extinguished. Where Maori title still endured, the Crown would assist the company to continue negotiating for the required land, or compensate them for the shortfall. The new Governor, FitzRoy, was instructed to implement these arrangements.

FitzRoy did not make a conditional grant to the company but in February 1844 waived Crown pre-emption in its favour, appointing Spain to assist the company to negotiate for 150,000 acres in the Wairarapa and J J Symonds to assist the Company to purchase a similar amount in Otago.³⁷ In response to FitzRoy’s inquiry, the Colonial office took the view that the Crown had the right to claim lands surplus to the company’s awards, in the purchased land, but acknowledged that because of

36. Moore, ‘Origins’, p 425

37. Moore, ‘The Crown’s Surplus’, pp 36–37

Maori views of land alienation, the ‘social costs’ of trying to enforce a Crown claim to the surplus might be high and that it might be prudent to let it revert to Maori.

As for Port Nicholson, FitzRoy instructed Clarke, Wakefield, and Spain to estimate the compensation only for the land ‘surveyed or given out for selection . . . independent of paha, cultivations, and reserves’.³⁸

3.12 Compensation and Deeds of Release in Port Nicholson

At a meeting in Wellington between the officials and Colonel Wakefield on 29 January 1843, Wakefield raised the vexed question of defining what a Maori cultivation was, arguing that the fallowed gardens took up a great deal of the land required for the town and that Maori were reviving claims to abandon cultivations, including some upon which settlers had already built. FitzRoy replied that it was for the Maori to define the ground in actual use and occupation, and they would not be dispossessed, ‘unless it can be shown that such occupation is an encroachment on the part of the Natives upon lands, valid claims to which can be substantiated by the Company.’ FitzRoy further stated that the arbitration would not include paha or cultivations. However, that such ‘detail’ or exceptions could be ‘adjusted to mutual satisfaction afterwards.’ There was then discussion on what constituted a paha (as distinct from a kainga) and a cultivation or ngakinga. FitzRoy included within ‘paha’ the ‘cultivated lands’ outside the fence, and his definition of cultivations was lands used for vegetable production ‘or which have been so used’. FitzRoy also noted the tendency of Maori ‘to be exorbitant’ in their demands for payment, and told the officials to emphasise the ‘comparatively valueless nature of their lands’ at the time, when the settlement was formed.³⁹

Following the meeting, Clarke asked Wakefield for a schedule of the ‘surveyed and selected’ lands for which he would recommend compensation. In January 1844 Wakefield submitted to Clarke jnr a schedule of land prepared by the company surveyor Charles Brees, including sections at Porirua and Ohariu, outside the boundary of the 1839 Port Nicholson deed, and including some lands in the Hutt Valley still ‘under survey’. Clarke expanded the Ohariu sections considerably, but deleted the Porirua sections, and arrived at an area of 71,900 acres (or 67,890 acres when the Native Reserves were subtracted). This was the area for which £1500 was to be paid by way of compensation. Wakefield and Spain concurred in this proposal.

On 23 February 1844 the officials, including FitzRoy, went to Te Aro to offer the £300 allocated by Clarke as that community’s share. The assembled Maori were asked to sign ‘deeds of release’, relinquishing claims to any interests they had in the 67,890 acres to go to the company. Te Aro Maori vehemently rejected the offer, declaring it to be trivial in relation to the worth of the land. They compared it

38. Spain, final report, 31 March 1845 (cited in Moore, ‘Origins’, p 468)

39. Minutes of meeting, 29 January 1844 in FitzRoy to Stanley, 15 April 1844 (cited in Moore, ‘Origins’, pp 465–468)

unfavourably with prices paid by settlers for transactions amongst themselves, and with what Te Puni and Wharepouri had been in 1839.

Despite declarations from FitzRoy and other officials that Maori had previously agreed to accept what the Queen's representative declared fair, the impasse lasted into the second day, when FitzRoy announced his intention to leave. He reminded Mohi Te Ngaponga of his acceptance of Shortland's August 1840 arrangements when Te Aro was threatened by a settler mob and argued 'that their own welfare was entirely dependent upon the satisfactory outcome of this question'. Abruptly Ngaponga and the other chiefs changed their stance, sent an apology to FitzRoy and agreed to accept the payment. Maori of other harbour kainga then followed suit, Kumapoko and Pipitea accepting £200 each and Tiakiwai £30.⁴⁰

It seems clear that the chiefs were responding directly to FitzRoy's challenge, in order to defend and strengthen their relationship with the Queen's representatives. In the face of that, the question of the size of compensation payment was an entirely secondary consideration. But in offering to secure and promote the welfare of Wellington Maori, FitzRoy had certainly put the honour of the Crown on the line.

3.13 Other Company Neighbourhoods

As in Porirua, the Crown officials (minus FitzRoy) had little success. Te Rauparaha offered to accept the proposed £300 payment for Ngati Toa interests about Wellington harbour, but not if it included the Hutt Valley. Clarke and the officials were angry because they had been led to understand from previous discussions with him that Te Rauparaha would include the Hutt, and secure the removal of Taringa Kuri and his Ngati Tama people who had moved there, allegedly as a result of settler encroachments on his land at Kaiwharawhara.

At Petone, Te Puni declined the £30 offered as a gift acknowledging his mana, but agreed that he had sold the land.

At Waiwhetu the sum offered was rejected as trivial but Maori were told that the land would be given over to the settlers anyway and the money banked. Discussion followed on Maori requests for adequate reserves, then the chiefs signed.

At most other small kainga around Wellington a similar scenario ensued. The chiefs frequently accepted payment and signed releases only after being told that the Europeans would, in any case, be given occupancy of the land, except for pa, cultivations, and reserves.

At Manawatu, Watanui and other chiefs affirmed their decision to sell but Taikaporua reiterated his refusal. This time Spain's declaration that the land would be awarded to the company and the money banked did not bring about the chief's acquiescence.

40. Moore, 'Origins', pp 496–498

At Wanganui, there was a similar result, Te Mawai refusing to sell. Despite another attempt by J J Symonds in 1846 the Wanganui transaction was not yet agreed.

At Taranaki, Spain listened to Maori testimony and announced his decision that 60,000 acres should be awarded to the company. FitzRoy, shortly afterwards, declined to confirm this award, but secured Maori agreement to sell 3500 acres (the FitzRoy block).

In August 1844, awards were made and deeds of release signed in respect of Company selections at Wakatu, Waimea, Moutere, and Motueka–Golden Bay totalling 109,000 acres. At Motupipi–Motueka, Maori refused to accept the payment and it was deposited in trust for them.

At the end of the arbitration proceedings Clarke reported that the company had been put in position of their entitlement in the Port Nicholson district, except for the Hutt Valley where Te Rauparaha and Rangihaeata continued to resist and where Taringa Kuri and his associates remained in occupation.⁴¹ Spain's final report in 1845 awarded the company 71,900 acres, saving all pa burial grounds and grounds 'actually in cultivation', together with 39 Native Reserves of 100 acres each (the country sections) and 110 town acres. Small areas were awarded by Spain to Scott, Young, Todd, and the Wesleyan mission.⁴²

3.14 Problematic Features of these Arrangements

The arbitration procedures raise some serious concerns in term of the principles of the Treaty:

The supposed prior 'general agreement' of Maori to be bound by the award, upon which Spain and Clarke proceeded, would need closer inquiry. Maori certainly told the Crown officials from time to time that they were willing to have them resolve the disputes between Maori and the company, and put the issue in the officials hands in effect, but that does not amount to agreeing to accept a defined level of monetary compensation.

The imposition of the compensation payments under threat that the company would be given occupancy anyway, was a very strong action, clearly accepted with reluctance by the Port Nicholson Maori and firmly rejected by others. This was less than the full and free consent by Wellington tribes to the purchase – rather a reluctant acquiescence in an imposed award, on trust that somehow the Crown would provide for their future wellbeing.

While it may be accepted that Maori had indeed given settlers possession of some of the disputed lands, the question of *which* lands exactly they had given over was not closely defined. The general or blanket nature of the arbitration cut across that. Spain had given up trying to separate the sold from the unsold land; instead Maori were assured of retaining their pah and cultivations, though these were as yet

41. Ibid, pp 499–522

42. Spain report, 31 March 1845 (actually submitted 6 May 1845), cited in Moore, 'Origins', p 533

still imperfectly defined. Nor were the Native Reserves, and the external boundary of the whole purchase, defined at the point of the arbitrations. As Moore comments, these ‘remained a matter of pledges and policies which Maori apparently accepted largely on trust.’⁴³

The compensation payments made in the arbitration were, in themselves, very small. It must be noted, of course, that many Maori had participated in varying degrees in the payments made by Wakefield in 1839. The distribution of this appears imperfectly related to the customary right-holding – Wellington Harbour kainga, for example, received little or none of the goods paid in 1839.

It may be accepted, however, that the real payment to Maori would be in the form of the reserved ‘tenths’, according to the company’s theory, or other endowments such as the 15 to 20 percent of the profits of the land fund which Russell’s January 1841 instructions said should be reserved to promote Maori welfare. The Crown officials made some effort to keep these categories of benefit distinct. Thus in April 1844 Forsaith referred to the retention of sufficient land for Maori cultivations, as well as the company reserves in Wellington; and in May at Wanganui, Clarke defined certain lakes, eel weirs, etc, to be reserves, at Maori request, as well as recommending that one section out of every 10 given out by the company should be for Maori.⁴⁴ Nevertheless, the three categories did get confused and conflated. The company tenths proposal had been based on the supposition that Maori would relinquish their pa and cultivations and move on to the selected tenths. When Maori declined to move, many of their pa and cultivations were formally designated (by Crown or company) to be Native Reserves, while some of the intended Maori tenths became settler sections.⁴⁵ One might foreshadow here that most of the proposed Port Nicholson tenths disappeared along with the demise of the proposed Manawatu purchase, where half of them were to be located.⁴⁶

Clarke’s February 1844 schedule listed 4010 acres of Native Reserves, short by one-third of the amount of tenths which 68,000 acres about to be granted to the company would have amounted to. Clarke publicly declared that these reserves were a payment to Maori for the remainder of the land. Maori therefore looked upon them as their own and they effectively ceased to be available to be let on their behalf by Crown trustees. Thus when FitzRoy enacted the Native Trust Bill in June 1844, the trustees, who were meant to lease the Native Reserves and secure a revenue for ‘Native Institutions’ – schools, hospitals etc, but FitzRoy had to recognise that many of the reserves were in fact Maori habitations and the ordinance itself provided that they could be conveyed or let on peppercorn rents to the Maori beneficial owners. The Trust as a means of raising funds for Native Institutions never functioned.

As for the 15 to 20 percent of the land fund, the Crown in fact gained revenue from resale of Crown land only in the Auckland area, and that was insufficient to

43. Moore, ‘Origins’, p 532

44. Ibid, pp 513, 520

45. Moore lists most of the Wellington Native Reserves in ‘Origins’, p 451

46. Moore, ‘Origins’, p 534

pay for the cost of Government administration. The Protectorate certainly defended Maori interests to a considerable extent and can be seen as a service to them for general revenue. But there were no funds to pay for other services to Maori. Hence the Crown's public undertakings to them that their welfare would be assured and they would share in the benefits of the settlement (the inducements to give place to the settlers and accept the minimal arbitrated compensation payments) were already being vitiated even as FitzRoy and others were making those payments.

3.15 Manawatu

Spain concluded that no purchase had been effected in the Manawatu districts by the 'over-riding deeds' of 1839. Moreover, the company's negotiation of February 1842 with Manawatu chiefs had exceeded the authority given by Hobson in 1841 to make equitable arrangements to induce Maori to yield position of their 'habitations' in the 'vicinity' of Port Nicholson. The 1842 negotiation was, in Spain's view, effectively a new purchase. He nevertheless recommended that the Government allow a continued pre-emption waiver to the company to purchase in Manawatu, partly to ensure that the 'Port Nicholson' tenths were provided. Just why Manawatu was different in Spain's eyes from say, Taranaki or Wanganui in relation to the 1839 deeds, is not clear. Moreover Spain *had* tried to threaten the Manawatu chiefs with awarding the land to the company during the arbitration negotiations earlier that year – being blocked only by the intransigence of Taikaporua.⁴⁷ Given Spain's confused reasoning, the implication is that if Maori had held out in other areas, the dealings there would have eventually had to be treated as new purchases, beyond the authority of Hobson's 1841 advice to Wakefield.

3.16 Surveys

In 1844 and 1845, two very important surveys were conducted under the direction of the Land Claims Commission surveyor T H Fitzgerald.

(1) *The Wellington external boundary*

In April 1844 with only partial reference to the boundary description given in the company's 1839 Port Nicholson deed, Spain authorised company and Crown surveyors together to cut an external boundary enclosing the 68,000 acres of company lands. This boundary, when completed by October 1844, would eventually be found to embrace 209,372 acres. This was apparently agreed to by Clarke jnr, to accommodate the additional sections he had provided for at Ohariu. Clarke seemed confident that Taringa Kuri and the Ngati Tama would take the compensation allocated for their interests there. (They eventually did in 1846.) The external

47. Ibid, p 535

boundary, which embraced some 37,472 acres more than FitzRoy's award to the company, included Maori cultivations (which were to be excepted in the surplus area as in the company's lands), but no additional payment had been made to Maori other than what they received in 1839 and in the arbitrations of 1844.

(2) *Port Nicholson*

From November 1844 Fitzgerald started to survey the Maori pa and cultivations in Port Nicholson. He managed, with difficulty, to survey and plot the gardens under actual cultivation, except in the Hutt Valley where the gardens of Petone and Waiwhetu were mixed in part with those of the 'intruding' Maori like the Ngati Tama and the Ngati Rangatahi; and except for areas cultivated two or three years previously 'which of course they have a right to' but which Fitzgerald had not time to survey.⁴⁸ FitzRoy nevertheless issued the Port Nicholson deed to the company on 29 July 1845 before Fitzgerald had time to survey the fallowed cultivations.

3.17 Erosion of the Reserved Lands

While Fitzgerald plodded on, with what time could be spared, in surveying old cultivations, the officials had begun to accept a blurring between the cultivations (excepted from purchase) and the reserves (an endowment trust for native purposes). In 1844 FitzRoy had authorised the use of the Native Reserves at Thorndon for a military barracks. He still intended, however, to maintain the quantity of reserves, the grant to the military being dependent on other land being given in lieu for Native Reserves.⁴⁹ But FitzRoy and Clarke had begun to accept the selection of the Native Reserves for cultivation purposes, while Maori relinquished the cultivations they had on sections ear-marked for company settlers. George Clarke snr noted that the company plan of subdivision allowed not for a tenth of the purchase area but less than a twentieth for Native Reserves. But his plea to FitzRoy to make up the shortfall was not heeded. George Clarke jnr hoped the reserves might be found within a *Crown* surplus, but he appeared to have given up hope of maintaining even such Native Reserves as had already been created, for the endowment trust. He replied to his father that he regarded the reserves in Wellington as a essential for providing a 'sufficiency' for Maori cultivation, and opposed them being leased by the trustees. In fact officials delayed setting up the 1844 trust with adequate lands until the company purchases were settled. Aware that the system of endowment tenths was languishing, Bishop Selwyn, one of the trustees, sought a fixed annual grant to enable the trust to meet Maori educational and medical needs. It was not provided and in 1846 Selwyn resigned as trustee. Moore comments:

as Governor Hobson had remarked in 1842, once the Native Reserve were put at the disposal of the Company, available to be assigned to Maori in exchange for them

48. Ibid, p 547

49. Ibid, p 557

relinquishing their traditional habitations, the same could be repeated *ad infinitum*, until there remained *neither* any excepted traditional pa and cultivations, *nor* any reserves available for leasing. Rather than feeding each other and catalyzing social and economic developments [as Bishop Selwyn hoped], the two forms of reserve could be made to swallow each other up, depriving the vendors of both their traditional mode of life, *and* failing to provide the full tenth of new-tenured lands – leaving the vendors overly dependent on the Government’s 15–20 percent and/or its good graces.⁵⁰

3.18 Developments Elsewhere

At Otakou the outcome was more promising. In July 1844, the Otakou block, estimated to be 400,000 acres but later surveyed at 534,000 acres, was purchased by Colonel Wakefield with J J Symonds assisting for the Crown. The company was to select its 150,000 acres within the block, the balance remaining with the Crown. The Ngai Tahu chiefs participated in the definition of the outer boundary, and of the reserves equivalent to approximately a tenth of 150,000 acres. But they did not receive reserves equivalent to a tenth of the balance of the block.⁵¹

3.19 Lord Stanley’s Arrangements with the Company

The terms of Lord Stanley’s 1845 to 1846 arrangements with the company were to open the way for extensive colonisation in three new respects:

- (a) By the end of FitzRoy’s governorship the company had been put in place of its awards at Port Nicholson and Nelson but nowhere else. The House of Commons Committee on New Zealand (1844) strongly supported the Company’s wider claims, and also the waste land theory. Lord Stanley remained cautious in both respects. However he did, in discussion with the company relating to his instructions to the new Governor, George Grey, agree to ‘compulsory proceedings against the Natives’ in respect of the lands arbitrated and awarded by Spain. Clearly if this was to extend to areas where Maori had resolutely declined to accept Spain’s award and sign releases (the Hutt, Whanganui, Porirua, and Wairau) the potential for conflict would be heightened.
- (b) The company, supported by Pennington’s award, now claimed rights to acquire 1.3 million acres under the terms of the 1841 charter. Stanley therefore maintained and extended the waiver of pre-emption in favour of the company to select blocks in respect of its whole 1839 claim area from the Mokau–Ahuriri line in the north, as well as the South Island south of the 43rd parallel. The Crown would assist its purchases within that area. In

50. Ibid, p 555

51. See Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols, Wellington, Brooker and Friend Ltd, 1991, vol 1, pp 29–51

conformity with this arrangement Stanley instructed Grey to grant the *whole* of the Otago block to the company, and authorised the company to buy 300,000 acres in the Wairarapa. Stanley further agreed to advance the company £100,000, mortgaged against the land selected under the 1841 charter. Grey was also granted £10,000 to make purchases ‘in the last resort’ to assist the company.

- (c) Major (later Colonel) William McCleverty was appointed to assist the company in the selection and acquisition of lands. Meanwhile the company had learned that FitzRoy’s Port Nicholson grant excluded Maori pa and cultivations (which Fitzgerald was meanwhile surveying) amounting to about a quarter of Wellington. The directors refused to accept the award so Grey and McCleverty’s duties were widened to include adjusting the arrangements apparently already arbitrated in Port Nicholson.⁵²

3.20 Grey’s Initial Steps

On arrival Grey promptly took a number of important steps. On 21 February 1846 he waived pre-emption in favour of the company in the entire zone of the company’s districts. On 13 April 1846 he granted the whole Otago block to the company. On 17 April he sent Symonds to Whanganui to acquire the area to which the company was entitled by Spain’s award and to determine *which* pa and cultivations were to be reserved (that is, not all of them were). Symonds’ mission failed due to continued Maori resistance over the eastern (Whangaehu) boundary.

He also began building a road out of Wellington on one of the major Maori tracks to Porirua, partly to secure Crown land within the 1844 arbitration boundary, and the location of reserves and FitzRoy’s grant. He had the approval of Te Ati Awa and at least the tacit consent of Te Rauparaha. He also exchanged and purchased land in the Hutt Valley to meet Spain’s 1844 promise to find Waiwhetu better reserves. Grey’s purpose was also to try to induce Ngati Tama and Ngati Rangatahi to leave the Hutt. Finally, he arranged for the construction of a hospital for Wellington.

3.21 The War in the Hutt

The rights and wrongs of the war in the Hutt Valley are complex. One of the best discussions of the complexities remains that of Ian Wards, *The Shadow of the Land*.⁵³ Spain rightly concluded that the Kapiti deed of 1839 was, at best, insufficient authority for company or Crown to occupy the land. The issue was whether the partial purchase’, and five years of subsequent negotiations with the Ngati Toa

52. Moore, ‘The Crown’s Surplus’, pp 60–63

53. Ian Wards, *The Shadow of the Land; A Study of British Policy and Racial Conflict in New Zealand, 1832–52*, Wellington, Government Printer, 1968

chiefs, and their Ngati Tama and Ngati Rangatahi associates, warranted the Government asserting possession.

Ngati Toa claimed rights in the valley and Te Rauparaha maintained that it was not part of the territory they had sold. Ngati Rangatahi moved into the upper portion of the valley from Porirua, paying tribute to Ngati Toa chiefs. But according to Sub-Protector Kemp, they also had permission from Te Puni and paid an annual tribute of snared birds to the Te Atiawa chief.⁵⁴ Underlying the complex and shifting rights to the valley was the tension between Ngati Toa and Te Atiawa. Taringa Kuri (Te Kaeaea) and the Ngati Tama also moved into the valley, their crops at Kai-wharawhara having apparently been trampled by settler cattle.

The attempts by the officials to secure possession by an additional compensation payment have been summarised carefully by Robyn Anderson in the Wellington district report.⁵⁵ Te Rauparaha was apparently willing to concede; Te Rangihaeata was not. Ngati Rangatahi and Ngati Tama sought at least to secure payment for the crops they had cultivated there since 1842. The issue was affected by the Wairau affray. Distrust increased on both sides and through 1845 the Government began to construct blockhouses to protect the settlements. Te Rangihaeata moved into the valley in strength, as did Te Mamaku of the upper Whanganui, to assist his Ngati Rangatahi connections. Grey, arriving with more military force in 1846, did succeed eventually in persuading Ngati Tama to take compensation and leave the valley. Ngati Rangatahi also left, reluctantly. Then Grey moved soldiers into the vacated area where they looted, burned the chapel and violated urupa. According to Wards, 'this hasty and ill-considered act put Grey irretrievably in the wrong'.⁵⁶ When Ngati Rangatahi retaliated at Boulcott's Farm, Grey proclaimed martial law in the whole district. He upgraded the road to Porirua, seized Te Rauparaha and other Ngati Toa chiefs and garrisoned Paremata, on Maori land. Te Atiawa assisted Grey in driving Te Rangihaeata out of the Hutt Valley.

3.22 Grey's 1847 Purchases

In 1847 Grey used the funds Stanley had put at his disposal for several purchases.

(1) *Taranaki*

Gladstone, who had succeeded Stanley as Secretary of State informed Grey in July 1847 that he doubted the wisdom of FitzRoy's reversal of Spain's 60,000-acre award to the company in Taranaki and instructed Grey to use his utmost to procure land for the company there. Grey apparently then tried to stop Wiremu Kingi from returning from Waikanae to Waitara. Grey believed – or said he believed – that the

54. Moore, 'Origins', pp 158, 249–250

55. Dr Robyn Anderson and Keith Pickens, *Wellington District: Port Nicholson, Hutt Valley, Porirua, Rangitikei, and Manawatu*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), 1996, pp 36–38, 41–44

56. Wards, p 245 (cited in Anderson and Pickens, p 43)

1840 Ngamotu transaction (to the summit of Mount Taranaki) from resident Maori was not intended to be set aside by FitzRoy; it still stood, the company had a partial purchase, and Maori had no general right to refuse its completion – only a right to compensation as in the Cook Straits settlements.⁵⁷ Grey accordingly instructed McLean to make reserves, register settler and Maori interests and compensate Maori on that basis. McLean purchased the Taitaraimaka, Omata, and Grey blocks between May and October 1847. Most of this land was outside the Ngamotu deed boundary and although represented by Grey as completing an existing purchase, it has much of the character of a new purchase.

(2) *Porirua*

In anticipation of company needs and taking advantage of his recent military successes against Ngati Toa, Grey purchased about 70,000 acres from the Porirua chiefs in February 1847. Te Rauparaha was still in captivity and Rangahaeata in refuge. The payment of £2000 and reserves of about 10,000 acres appear generous by comparison with other Crown purchases to that date.⁵⁸

A few days later Grey paid £3000 to Ngati Toa chiefs in Wellington for the Wairau district – all the way to Kaiapoi, including some two million acres. These purchases were essentially Crown purchases for the company, rather than a company exercise of its pre-emption waiver.

3.23 The Loan Act 1847

Meanwhile Earl Grey (who succeeded Gladstone as Secretary of State for Colonies) and the company had negotiated a new loan, to be ratified by Act of the Imperial Parliament. This was based on the company having succeeded in persuading the British Government that the Crown was responsible for non-fulfilment of the company's 1841 charter. The agreement involved an advance of a further £136,000 over three years, with the Crown undertaking to buy back from the company its unexercised rights of selection of land at the end of the three years, at the same rate as they had been awarded under the 1841 charter, namely five shillings an acre. The Act authorised the company to manage the demesne land as if it were the Crown – on selling the land and using the proceeds to purchase more Maori land. The company was to indicate which lands it wished to purchase, Governor Grey was to retain the 'exclusive management of all negotiations with the Natives for the sale of the lands' but the New Zealand Company was to provide the funds and 'have the disposal of the lands so acquired'.⁵⁹

57. Moore, 'The Crown's Surplus', pp 72–73

58. Anderson and Pickens, pp 45–47

59. Earl Grey to Grey, BPP, vol 5, p 177

3.24 Implementation of these Arrangements

The arrangements in London shaped Grey's handling of purchases and grants of land in New Zealand:

(1) *Port Nicholson and Porirua*

Colonel McCleverty had ascertained that there were 209,372 acres in FitzRoy's Port Nicholson grant, after the 1844 arbitrations and award. This included 71,900 acres awarded to the company (including Native Reserves) and 137,472 acres of town belt and unsurveyed land, claimed by McCleverty as wasteland of the Crown. Grey continued his policy of exchanging Maori cultivations wanted for settlement in favour of grants within the town belt or elsewhere in the surplus. These 'McCleverty awards' continued through 1847. Following completion of the exchanges, Grey granted the entire area within Spain's external boundary to the company, minus Maori and public reserves (without reference to any specific quantity of land awarded to the company, as in FitzRoy's 1845 grant). It totalled 209,372 acres. A Crown grant was also issued for Grey's large 1847 purchase at Porirua, except for reserves of about 10,000 acres.

The McCleverty exchanges of 1847 are currently at issue in the Wellington tenths claim before the Waitangi Tribunal. As Anderson states, in general Te Atiawa relinquished smaller fertile areas in and about Wellington for larger areas of land further out, though three pa, 105 acres of surveyed sections and 219 acres of town belt were retained. The McCleverty awards amounted to about 18,000 acres altogether. Some of the land granted was good quality land in the Hutt Valley (now considered to have been purchased), but included a large area in the Orongorongo Range for hunting and gathering. The exchanges did not entirely accommodate Maori preferences, but they were accepted probably because the Te Atiawa believed they gave them some security in a world that had become very volatile. The awards might be considered to have met the occupation needs of Te Atiawa at the time but they greatly reduced their prospect of a significant stake in the future economic life of the town, as the original company tenths scheme had envisaged. In the 1850s Te Atiawa and Ngati Tama sold some of the McCleverty awards and moved north.⁶⁰

(2) *Nelson*

In August 1848, Grey granted the whole 'Nelson' block of some two million acres (following his 1847 'Wairau' purchase) less Maori reserves. This grant enveloped the company's existing estate. But the survey of the 'Gross Block' was not completed until February 1850, shortly before the company's demise. Meanwhile internal adjustments with Maori continued as in the Port Nicholson model, with Crown agent Major Richmond and the company agent F D Bell cooperating. In particular, at the company's request, Waitohi (Picton) was exchanged for a village and ploughed land at Waikawa.

60. Anderson and Pickens, pp 45–52

(3) *Wanganui*

McLean, in May 1848, completed negotiations for the block at Wanganui awarded by Spain to the company, for the £1000 additional compensation payment first offered in the 1844 arbitrations. It was seen by Government as a compensation for outstanding claims within a partial purchase, rather than a new purchase. As in Wellington this involved Maori relinquishing some reserves inside the original company surveyed areas for lands outside them, but still within the external boundary. Again as in Port Nicholson the original block, supposed to be of 40,000 acres, was found to encompass a much larger area (86,000 acres), which grew to 110,000 acres when Maori agreed to accept natural boundaries for the back boundary. Again the Crown–company secured a larger area than the compensation payment was stated to be for. The evidence suggests, however that McLean achieved clear public agreement with all Maori engaged in the negotiations, both as to the external boundary and boundaries of reserves.

(4) *Canterbury*

The huge 1848 Kemp purchase was also to provide land for company settlement at Canterbury. The ‘surplus’ to the Crown was some 20 million acres. The purchase deed was made in the name of the company although Kemp was a Crown official. Duncan Moore sees this as entirely consistent with the arrangements whereby the Crown acted as agent for the company within a vast pre-emption waiver district. However, it was later considered by Daniel Wakefield (of the company) and by Lieutenant-Governor Eyre to have been a mistake. Under the 1847 arrangements the Crown was to buy *for* the company.

(5) *Wairarapa*

In 1848, company and Crown agents Bell and Kemp also went to the Wairarapa to buy land for the company. They did not succeed however. By the time Grey and McLean bought the land the company had been dissolved.

(6) *Division of territory between Crown and company*

Within the vast areas purchased by 1848, 1.3 million acres nominally belonged to the company under the terms of the 1847 Loan Act. In practice it never did select this amount before it wound up in July 1850, so the distinction between Crown surplus land and simply Crown estate, becomes a little semantic. Yet, when the company did wind up, the Crown paid five shillings an acre not only for the 628,000 acres which the company had selected (in fact 828,000 acres minus 199,000 acres which the company had on-sold to settlers); *plus* 472,000 acres of unexercised ‘right of selection’ under the 1846 Act. Nor was the company required to refund the money advanced to it by the Crown. The total due to the company was £275,000, later commuted to £200,000 apportioned amongst the New Zealand’s Provinces according to how much each had benefited from the company’s activities. The company had negotiated extremely well in 1847 and the Loan Act and its outcome saddled New Zealand with a debt it could have done without – a debt ultimately

redeemed by the Crown's policy of buying Maori land cheaply and on-selling it at considerable profit.⁶¹

3.25 Comparison of Company Claims and Other Old Land Claims

Several points of comparison and contrast may be noted:

- (a) Moore characterises as Crown 'surplus' the bulk of the land acquired by the Crown or company, or both acting together, in Taranaki, Whanganui, Wellington, Nelson, Canterbury, and Otago up to 1850. That amounts to some 22.2 million acres, less the 1.1 million acres the Crown bought back from the company in the 1850 wind-up. The designation of the land as 'surplus' arises from the arrangements made in 1847 and 1848, which saw the Crown acting as agent for the company in a vast zone where pre-emption was waived in favour of the company. The categories are not quite as neat as that, however, and Moore too sees the outcome as 'quite a hall of mirrors'.⁶² 'Surplus land' in respect of other pre-1840 purchases or after FitzRoy's waiver or pre-emption in the Auckland area, means land retained by the Crown after a *private* purchase from Maori had been deemed to have extinguished Maori claims. Whatever the formal arrangements, the Crown was rather too much the actor in the southern purchases for the same categorisation to fit so neatly. The analogy between the Otago purchase and Grey's taking of a surplus in the Auckland pre-emption waiver purchases is close, however. The 'completion' of company purchases in Port Nicholson and Wanganui also has close parallels with the adjustments and additional payments sometimes made by the Land Claims Commissions to purchases in the north. But, notwithstanding the company claim based on the Kapiti deed, Commissioner Spain had concluded that it had not purchased the Wairau and Porirua and these areas were acquired by Grey in 1847 essentially as new purchases. FitzRoy has disallowed the Taranaki purchase and award too and however much Grey tried to dress them up as completions' of an existing purchase, his acquisitions in that district from 1847 appear very much like new purchases, and were seen that way by the Te Atiawa returning from further south. Similarly the huge Kemp purchase was essentially a Crown affair. Daniel Wakefield of the company, and Lieutenant-Governor Eyre both considered that it was an error to have drawn up the purchase deed in the name of the company.⁶³ No Crown grant was made to the company before it surrendered its charter in 1850. Although 2.5 million acres was granted to the Canterbury Association by the Company, and confirmed by the Canterbury Land Settlement Act 1850 (an English Act), this was little different from Crown grants to any other immigrants on

61. Moore, 'The Crown's Surplus', pp 100–103

62. Ibid, p 102

63. *The Ngai Tahu Report 1991*, vol 2, pp 403, 468

Crown purchases. In 1850 the Crown resumed whatever it had granted to the company in all the other settlements, except for the Maori reserves and whatever had already been on-sold to settlers.

- (b) The most important point of inquiry about the Crown's handling of old land claims is whether the officials' investigations and awards adequately established that Maori had given full and free consent to the transactions and that the agreed settlements conformed with the Crown's own solemn engagements not to allow Maori to unwittingly injure themselves by excessive alienation. The evidence raises a number of doubts that this was the case.
- (c) (i) As Moore points out, the legal theory on which the Crown's investigations were posited, and the Land Claims Ordinances, created an 'invisible layer' of Crown-held interests, which the Crown asserted even before the land claims inquiries and arbitrations. These are evidenced in the Crown's taking of land for public reserves, Native Reserves, and town belt in Port Nicholson from late 1841. Similarly roads were laid out and constructed without compensation to Maori.⁶⁴
- (ii) The acceptance of the company's 1839 deeds and the 'overlord' chiefs' acceptance of some settler occupation as constituting a partial purchase placed other chiefs, the resident' chiefs, and their communities in an invidious position. There is a good deal of evidence that they accepted the additional compensation' payments with great reluctance, and there is doubt as to whether they had agreed in advance to accept a binding arbitration of the kind conducted by the Crown in 1843 and 1844.
- (iii) There is ambiguity as to what areas exactly the payments finally accepted by Maori were for. In Port Nicholson especially they seem to have been presented as payments for the company's surveyed lands, but FitzRoy's Crown grant to the company enclosed considerably more land within the outer boundary. The company did not accept the grant and Grey made further adjustments of the Maori reserves, via the McCleverty exchanges of 1847, and a new and even bigger grant to the company. The nature of Te Atiawa understandings of this is currently an issue before the Waitangi Tribunal.
- (iv) From 1840 the Crown intervened in the physical struggle between Maori and settlers in the Cook Strait settlements. In one submission, Moore characterises that as the Crown having stopped Maori efforts to repel the intruders'. This is rather one-sided, for the Crown also stopped mobs of settlers from expelling Maori from pa and cultivations. As Moore says, 'racial tensions threatened to get out of hand'. It was a reasonable endeavour on the part of the Crown to try to police the situation, and it was not unwelcome to Te Atiawa Maori in particular.⁶⁵
- (v) The Crown's use of military force in the Hutt Valley and Wanganui in 1846 is more problematic. The officials' patience had certainly been greatly

64. Moore, 'Origins', pp 568–569

65. Ibid, pp 569–570

tried by the vacillation and perhaps the lack of good faith on the part of some of the Ngati Toa chiefs and their associates, but there is considered professional opinion that Grey's sending of troops into the areas vacated by Ngati Rangatahi was premature and provocative.

(vi) The Crown lent its support to the company to get Maori to relinquish the most desired land in Wellington and elsewhere for the new settlements. The inducements, in addition to the money awarded in the arbitrated compensation' included promises to protect Maori pa and cultivations (unless Maori agreed to relinquish them), and the benefits of a trust managing some, at least, of the company 'tenths', and 15 to 20 percent of the profits of the onsale of land, according to Russell's instructions to Hobson of January 1841. But these categories became confused together. When Maori would not relinquish their pa and cultivations, many of the tenths were awarded over that land, which then ceased to be available for raising revenue. The 15 to 20 percent of the land fund did not materialise either, while the Protectorate Department, funded by the Crown served the process of settlement as much as the protection of Maori rights. Nor were Maori themselves permitted, in the early formative years of the Maori-settler relationship, to become lessors of reserved lands. In the 1850s some of the McCleverty awards were let but there was not much spare land available for leasing. Other reserves were eroded by the individualisation or pseudo-individualisation of title, and the subsequent removal of restrictions on alienation. Some of the tenths and other reserves administered by trustees were let on perpetual lease at peppercorn rental.

(vii) The Crown was in something of a dilemma of course, once (on the one hand) settlement had been admitted via the company's 1839 deeds, and (on the other hand) the limits of what Maori considered they had sold became apparent. The Crown tried to find a way through this, having regard to its obligations to both Maori and settler. In the event they leaned their weight heavily on the settler side. The most obvious measure of this was that by the 1850s the Maori of Port Nicholson and Nelson especially, were on the margins of, or confined to small areas within, lands which had once been of central importance to them, and into which they had invited settlement having been led to believe that they would participate equally with the settlers in its development. If part of the purpose of groups such as Te Atiawa in inviting the British in was to secure their position against Ngati Toa and Ngati Raukawa, they paid a very considerable price for the alliance.

(viii) The Crown's handling of company claims at Wanganui resulted, after several attempts, in full and public agreement with local hapu, at the end of McLean's careful negotiation of 1848. The outside boundary and the reserves were publicly agreed and marked. Even the extension of the back boundary in 1850 to the Whangaehu River was apparently entirely acceptable. The fact that the area of land embraced by the purchase was more than double that in the company's award, implies a considerable under-payment

in per acre terms, but perhaps that is of secondary importance when the boundaries and reserves were made with full Maori consent, and were reasonably substantial even if they were not 'tenths'. As in most of the old land claims, Maori generally dealt in terms of natural boundaries and important features within those boundaries, not in per acre terms.

(ix) For, regardless of 'full and free' Maori consent at the time, the Crown had an obligation, which it publicly accepted in the early years, to leave with Maori, and/or take in trust for Maori, an endowment of land sufficient for their future needs. Future needs might reasonably be construed to include land required for occupation and subsistence, land required for commercial development (for example, leasing) and trust lands used to raise revenue for health care, education, and housing (or the money equivalent thereof). This was not done adequately in any of the company settlements. Rather there was a process of erosion of Maori interests that began in 1840 and 1841 and continued step by step and piecemeal over many decades. For these reasons the duty of active protection can hardly be said to have been adequately carried out.

(x) Thus, as in the north, so in the southern settlements, *provided* the renegotiation, by the Crown, of the original private purchase was thorough, clear, and involved full Maori consent (rather than only reluctant and unhappy concurrence), and involved the protection in Maori title of adequate land for 'present and future needs' the Crown's obligations under the Treaty may have been reasonably honoured, at least at the time of the renegotiation. By this measure the Crown's handling of some of the company purchases stands up better than others in Treaty terms. But the price, in Maori eyes, was not simply the money; it included the security of the important lands they wished to have reserved, and a reasonable expectation of ongoing benefit from association with the settlement and with the Crown. It is also in the Crown's neglect to foster the relationship with Maori subsequent to the purchase that Treaty breaches arose.

