

## CHAPTER 1

# INTRODUCTION

This report contains four main sections. Barry Rigby wrote the introduction and the section on the Land Claims Commission process. Matthew Russell wrote the section devoted to four case studies, and the quantitative analysis of the detailed claims list in the appendix. Finally, Duncan Moore wrote the section entitled ‘The Crown’s Surplus in the New Zealand Company Purchases.’ The remainder of this introduction will explain why we have written the report in this way. It will then discuss why old land claims, in our view, have never been satisfactorily investigated; why this report cannot claim to be the last word on the subject, and why old land claims assume their full significance only when they are related to subsequent Crown purchases.

### 1.1 REPORT ORGANISATION

The first main section of this report outlines the sequence of commission investigations, beginning with Godfrey/Richmond and Spain during the 1840s, continuing with Bell from 1856 until 1862, and concluding with the Myers Surplus Lands Commission of the 1940s. Included in the analysis of the work of these commissions is a certain amount of consideration of the statutory basis for each. Also covered in this section is the sequence of executive interventions beginning with Gipps and continuing with FitzRoy, Grey, and the various predecessors of the Lands and Survey Department which serviced the Myers Commission. In this way the commission process is portrayed as a nexus between judicial, legislative and executive functions.

Matthew Russell’s four case studies provides the local claim detail which is largely absent from the more general consideration of the commission process. He chose four cases which appear to be exceptional in many ways. He chose them to form a corrective to the impression which may be gained from the aggregate data in his quantitative section that most claims produced little interesting human interaction of historical significance. His case studies suggest the contrary. Fairburn’s Tamaki transaction looms large in the history of the southern approaches to the colonial capital during 1840–1865, and it raised major questions about both the Crown’s claim to surplus lands and whether or not it would honour pre-Treaty promises to return land to Maori. Webster’s claims became a proliferating saga of on-selling and litigation which eventually produced the first recognition of the

Treaty of Waitangi in international law as late as 1925.<sup>1</sup> In the case of the Hokianga scrip claims, Commissioner Bell assigned his powers of investigation to John White (apparently without proper official appointment) who then proceeded to renegotiate pre-Treaty transactions with the assistance of a private surveyor, William Clarke. In doing this White essentially rearranged the legal landscape of the upper Hokianga and Waima areas without apparently having the statutory authority to do so. The most exceptional of all the case studies, however, is the saga of the McCaskill Hikutaia claims in southern Hauraki. There Crown actions ratifying the claims and perennial Maori protest against such actions provoked ‘frontier’ violence which has previously escaped the attention of professional historians.

Violence, too, erupted within the vast New Zealand Company ‘purchase’ area on both sides of Cook Strait, roughly from Taranaki to Kaiapoi. Duncan Moore, in the third section of this report, analyses Crown actions upon company claims in relation to a major category considered previously by both Rigby and Russell, that of surplus lands. As generally defined surplus land was the balance between the acreage claimed and surveyed, and what the Crown granted to a given claimant (minus anything reserved for Maori). Rigby traces the development of the Crown’s general position on surplus lands, and Russell examines the question in relation to the Fairburn and Webster claims. Moore is the first historian to explore how this category, so prominent in the way Commissioner Bell considered claims from 1856 until 1862, may have entered into relations between the company and Crown in the crucial first decade of colonial history. Moore locates the category of surplus lands as a subset of Crown presumptive rights, rights which the Crown believed it acquired as a function of sovereignty, despite the fact that there was apparently no discussion of them during the 1840 Treaty deliberations.

Moore also highlights another theme which Rigby and Russell touch on, and which will be considered further in this introduction: the relationship between old land claims and subsequent Crown purchases. This problematic, but nonetheless crucial, relationship remains a key consideration which has yet to be fully investigated.

Finally, Russell provides a brief quantitative analysis of the appended lists of claims. His analysis includes an appropriate disclaimer regarding the accuracy of the data in the extensive 1375 claims listed in this report (organised by Rangahaua Whanui district). In this section Russell also defines some of the key terms used to describe aspects of old land claims. Since many of these terms are used throughout this report, a brief glossary follows:

- Crown grant: the legal instrument by which the Crown attempted to guarantee secure title to a defined area. Written boundary descriptions within the grant document defined 1840s grants. Only during the 1850s did the Crown require surveyed grant boundaries to be included in the document. The Crown grant is the precursor to the modern Torrens system introduced after 1870.

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1. Fred K Nielson, *American and British Claims Arbitration* Washington DC, US Government Printer, 1926, pp 540–546

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- Native reserve: area commissioners or the Crown set aside for Maori within a larger area claimed to have been alienated prior to 30 January 1840. In some cases, for example, at Waitangi, the Crown failed to implement commissioners' reserve recommendations which accompanied their grant recommendations.
- Surplus land: the difference between the area commissioners determined to have been alienated prior to 30 January 1840, and that included in the Crown grant and/or reserved area. After 1856, Commissioner Bell required most claimants to survey both areas at the same time, thereby defining the extent of surplus. The Crown claimed title to surplus land where commissioners determined that Maori consented to the original transaction.
- Scrip land: claimed areas which Pakeha claimants vacated after accepting a Crown offer of equivalent value in the form of either a promissory note (scrip) or cash. Claimants normally exchanged their scrip for land in the vicinity of Auckland after it became the colonial seat of government in 1841. The Crown then claimed title to the supposedly vacant scrip land.

Although these terms are not employed in the same way in the New Zealand Company claims, they provide readers with a general guide to the way in which the Crown dealt with most old land claims.

### **1.2 WHY HAVE OLD LAND CLAIMS NEVER BEEN SATISFACTORILY INVESTIGATED?**

Another theme running through all four sections of this report is that none of the four major commissions of inquiry into this subject during the nineteenth and twentieth century (Godfrey/Richmond, Spain, Bell and Myers) satisfactorily investigated it. The 1840s Godfrey/Richmond commission did not attempt to investigate all Maori interests affected by each Pakeha claim, and neither did the Protectorate. Spain began an exhaustive investigation of such interests, in collaboration with Sub-protector Clarke, but then suspended it within four months during 1842 at Port Nicholson. Bell declined to investigate either Maori interests (which he believed had been properly determined during the inquiries of his predecessors), or New Zealand Company claims in any way, shape or form. The Myers Commission of the 1940s went further than Bell by assembling several hundred precis files on individual claims, and by compiling elaborate tables to illustrate the outcome of Crown actions on particular claims, using a Lands and Survey team for this purpose. This commission, however, had to confine itself mainly to those claims producing surplus, and it considered subsequent Crown purchases (for example, in the Fairburn/Tamaki and New Zealand Company areas) to have superseded the original claims, and to have put them outside its jurisdiction.

The main shortcoming of each of these investigations, however, was that they failed to examine old land claims in the light of what the Treaty of Waitangi may have required. Godfrey/Richmond, Spain, Bell and Myers all shared to a greater or

lesser degree the presumption that, by signing the Treaty, Maori conveyed to the Crown a sovereign right to apply the laws of England to New Zealand, and an exclusive right ‘to extinguish Native title.’ The authors of this report do not discuss the legal implications of this presumption (a task they gladly leave to the various counsel appearing before the Tribunal). All that can be said is that the validity of this presumption does not appear to be supported by the available historical evidence. If Maori willingly and knowingly conveyed such specific sovereign rights to the Crown in 1840, we have yet to discover the historical documentation supporting this view.

Commissioners assumed rather than demonstrated that the Treaty gave the Crown the exclusive right to determine the way in which ‘Native title’ had or had not been ‘extinguished’ prior to or after the Treaty, and to determine how it would give legal effect to pre-Treaty transactions. Although Maori discussed these transactions in very general terms at Waitangi, Mangungu and Kaitaia in 1840, all they agreed to was that there would be a proper investigation, and that lands ‘unjustly held’ would be returned to them. Crown representatives also agreed to protect customary ways, and they recorded nothing about telling Maori what would happen as a result of the subsequent commissions.

The available evidence suggests that the Crown failed to explain to Maori, or to obtain their consent to, the commission process. The Crown evidently failed to openly discuss with Maori representatives the grounds for its position on surplus lands or waste land (a category related to, but distinct from, surplus lands) as it evolved during the 1840s. When Bell explained the Crown’s position on surplus lands to Maori at Mangonui, Whangaroa and Waimate in 1857, he evidently presented it as a *fait accompli*. Maori there were in no position to argue against the case Bell presented by evoking their Treaty rights. None the less, did not Maori have a right to see the Treaty as restraining the Crown’s power to determine title to land which had been the subject of pre-Treaty transactions?

Furthermore, Tribunal commissioned historians have to ask basic questions about what the Treaty may have required. Did the Treaty require the Crown to undertake a thorough investigation of all Maori interests affected by Pakeha claims? Did the promise to return lands ‘unjustly held’ and the promise to respect Maori customary ways obligate the Crown to, before anything else, discover the nature of custom and the nature of Maori grievances relating to pre-Treaty transactions?

Jack Lee, in his recently published book entitled *The Old Land Claims in New Zealand*, argued that the Crown and its commissioners in effect returned most of New Zealand to Maori. He stated that:

by 1840 Maori vendors had eagerly disposed of most of New Zealand to speculators, developers and bona fide settlers. And it was only by relentless elimination of extravagant and dubious land claims that the Governors and their Commissioners had, by the end<sub>2</sub> of the 1850s, reduced them [old land claims] to a little over 10,000,000 acres.

Lee then argued that the Crown and commissioners reduced this figure even more to the acreage alienated either as granted, surplus or scrip land north of Taranaki (which he estimates at 600,000 acres), and to the 2.5 million acres he calculates the Crown alienated from Maori out of New Zealand Company and ‘post-Bell [or post 1862] settlements.’ This<sup>3</sup> process of claim reduction, he maintained, saved Maori from certain ‘calamity.’

Was the process by which the Crown and commissioners reduced the extent of original claims carried out in fulfilment of the Waitangi promise to return ‘lands unjustly held’? This question should be answered with proper consideration of the motives behind some of the largest claims. For example, Wentworth’s claim to 20 million acres in the South Island (advanced after the date of the Land Claims Validity proclamation) was never intended to withstand serious judicial scrutiny. Lee himself admitted that its main purpose was to challenge the Crown’s jurisdiction over pre-Treaty transactions. In setting up a system which discouraged the pursuit of such ‘monster’ claims, the Crown may have ultimately protected Maori interests, but this definitely did not directly fulfil the promise to return land. Since Wentworth failed to substantiate his ‘monster’ claim, the South Island remained Maori land. What Maori retained, the Crown could not return.

### **1.3 THE LIMITATIONS OF THIS REPORT**

In this report we have not attempted to cover everything related to old land claims. We have omitted examination of the 200 or so pre-emption waiver claims filed as a result of FitzRoy’s 1844 proclamations. We hope this will be the subject of a separate Rangahaua Whanui national theme report. Furthermore, although the authors touch on the relationship between old land claims and Crown purchases, a thorough treatment of this must await further investigation. Russell has prepared a brief analysis of pre-1865 Crown purchases similar to his quantitative section in this report. His Crown purchase analysis was used in the preparation of Professor Alan Ward’s national overview report.

In other respects this report is still very much a preliminary examination of a multi-faceted subject. The extensive claim list appended to this report and the sometimes quite voluminous claim files held at the National Archives illustrate the difficulty of generalising in the face of local diversity. Russell’s four case studies indicate that for every group of claims there may be a completely different history. This report is designed to encourage more studies of localised claims. In the case of the McCaskill Hikutaia claims we know that a claimant group is actively pursuing a more thorough investigation than that which Russell has completed. We hope that Tribunal commissioned historians are able to assist this kind of thorough investigation. Ultimately, we believe that the Tribunal should consider

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2. Jack Lee, *The Old Land Claims in New Zealand*, Kerikeri, Northland Historical Publications, 1993, p 20

3. Ibid, pp 20–21

4. Ibid, pp 33–35

commissioning further localised investigations, using its own staff as well as claimant researchers.

If the Tribunal does decide to commission further research on old land claims, there are two areas which appear to require immediate attention:

- (a) The untold ‘Maori side of the story;’ and,
- (b) The relationship between old land claims and subsequent Crown purchases.

As alluded to in Rigby’s process section, nineteenth and twentieth century commissioners invariably failed to allow Maori to speak with their own voice. As late as 1947 the Myers Commission appointed ‘Counsel for Maori’ told his clients that they could not possibly speak with any authority on matters which transpired during the first half of the nineteenth century. They were therefore denied a hearing at Kaikohe in October of that year.<sup>5</sup> Although the voluminous original claim files held in Wellington contain only a small proportion of evidence recorded by and for Maori, the Tribunal should consider commissioning a proper professional examination of this rare, but crucial, material. We believe that this is related to questions arising from the debate over deed language initiated in the Tribunal’s investigation of the Muriwhenua claim.<sup>6</sup>

#### **1.4 THE RELATIONSHIP BETWEEN OLD LAND CLAIMS AND SUBSEQUENT CROWN PURCHASES**

As stated above, old land claims appear to assume their full significance only when related to subsequent Crown purchases. The total acreage of perhaps three million acres directly affected by old land claims (including New Zealand Company claims) looks insignificant when compared to the estimated 44.6 million acres purchased by the Crown as at 1865.<sup>7</sup> Duncan Moore, in his treatment of New Zealand Company claims and the Crown’s actions upon them, suggests that the two subjects (old land claims and Crown purchases) cannot be viewed in isolation from each other. What the Crown eventually acquired in Taranaki, Wanganui, Manawatu, Porirua, Port Nicholson, and in the northern South Island was ‘set up’ by the original company claims.

The relationship between private claims and Crown purchases can also be illustrated by following the career of someone who moved back and forth between old land claims and Crown purchases throughout the crucial pre-1865 period. Francis Dillon Bell entered the service of the New Zealand Company at the behest of his father’s cousin, Edward Gibbon Wakefield, in 1839. He followed the

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5. Myers Commission proceedings 25 February 1947, ma 91/2, pp a3–a4

6. See particularly Margaret Mutu, ‘Tuku Whenua or Land Sale?’ Wai 45 rod, doc f12; and Lyndsay Head, ‘An analysis of linguistic issues raised in (f12) Margaret Mutu’s, and (f13) Joan Metge’s report.’ Wai 45 rod, doc g5.

7. This figure includes the 34.5 million acres Crown purchased in the southern South Island (or Ngai Tahu rohe), 3.2 million which Matthew Russell estimates as that purchased in the northern South Island, and 9.9 million purchased in the North Island by 1865. See Matthew Russell, ‘Quantitative Analysis of pre-1865 Crown Purchases’, report commissioned by the Waitangi Tribunal.

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company to New Zealand in 1843 and was involved in establishing its settlement at Nelson during the mid-1840s. In the period 1847–1850 he simultaneously served company and Crown in negotiating purchases at Taranaki and Waitohi (Queen Charlotte Sound) and attempting to negotiate a Crown purchase on behalf of the company at Wairarapa. Governor Grey appointed him Commissioner of Crown Lands in 1850, and his successor, Browne, appointed him the sole Land Claims Commissioner in 1856. In his commissioner's role, Bell pursued the standard company practice of ensuring that title to the soil was based on professional surveys, and on necessary Crown ratification.

As commissioner he collaborated closely with local Resident Magistrates such as William Bertram White at Mangonui (himself a former New Zealand Company surveyor) and Native Land Purchase Commissioners such as Henry Tacy Kemp (who had previously purchased 20 million acres in the South Island for the Crown on behalf of the company). At the conclusion of his old land claims investigation he reported with considerable pride that he had produced a map which connected an unbroken chain of Old Land Claim and Crown purchase surveys all the way from North Cape to the Waikato River. During 1861 and 1862, while completing his commission report, Bell became a champion of the Crown purchase policies which provoked the violence in Taranaki and Waikato. According to Dalziel, he ran the Native Office after McLean's departure from July 1861 until May 1862. A month after tabling his commission report, Bell became Native Minister and as such he was formally in charge of native policy during the invasion of the Waikato in mid-1863.

Bell's career illustrates the merging of private and public interests in the name of colonisation, so typical of nineteenth century New Zealand. As the largest land claimant, the New Zealand Company and its servants collaborated closely with the Crown before 1850, and often moved into key Crown or judicial positions after 1850. Company supporters in Britain and New Zealand such as Earl Grey and Governor Grey saw people like Bell, White and Kemp as valuable agents of colonisation, and apparently paid little heed to the distinction between their private and public roles. In the hands of such people, old land claims became a Crown controlled form of colonisation; or private colonisation in the public interest. This public interest they assumed to be consistent with Maori interests and with the Crown's protective obligations. Thus Maori were not to be sent along a Cherokee 'trail of tears,' but neither were they to be allowed to impede the inexorable progress of colonisation. The Treaty had little weight in such thinking, but it must have more weight today as we review old land claims, and the Crown's actions upon them, since 1840.

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8. Raewyn Dalziel's entry on Francis Dillon Bell, DNZB, Wellington, Allen and Unwin, 1990, vol 1, pp 23–25

9. Bell report 8 July 1862, AJHR, 1862, d-10, p 5

10. Dalziel, DNZB, vol 1, pp 24–25

