

## CHAPTER 2

# THE LAND CLAIMS COMMISSION PROCESS

### 2.1 CROWN PRESUMPTIVE RIGHTS

To understand the process by which successive Land Claims Commissions investigated pre-Treaty transactions in New Zealand, it is necessary to understand both the legal framework for such investigations, and the legal assumptions embedded in that framework. The most fundamental legal assumption embedded in the commission process was that of the Crown's presumptive rights in New Zealand land. Broadly, the Crown presumed that, in 1840, it acquired title to all land in New Zealand as a function of sovereignty, subject to pre-existing Maori and settler claims.

When Governor Hobson proclaimed British sovereignty in New Zealand in May 1840, he believed that he was instituting a new legal system, one based on English common law. The Crown acted on the assumption that sovereignty conveyed what is sometimes referred to as the radical title to all land, and upon this basis, the Crown alone could issue valid title. To extend this principle to pre-Treaty transactions, Hobson proclaimed in January 1840:

that Her Majesty . . . does not deem it expedient to recognise as valid any Titles to Land in New Zealand which are not derived from or confirmed by Her Majesty.

The Crown's presumptive rights implicit in this Land Titles Validity Proclamation did not feature in the best documented Treaty discussions, those at Waitangi, Mangungu and Kaitaia between February and April 1840. Hobson's opening address at Waitangi on 5 February stressed the Crown's protective intent. He told Maori that the Crown would control the activities of lawless settlers, and it would encourage the emigration of responsible settlers. Maori, however, did not accept such assurances without question. Te Kemara challenged Hobson and his two major assistants in the drafting of the Treaty texts with the words: 'return me my

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1. Duncan Moore, a co-author of this report, has examined this concept in 'The Origins of the Crown's Demesne at Port Nicholson 1839–1846,' Wai 145 rod, doc e3, pp 18–19, 23
  2. Land Titles Validity Proclamation 30 January 1840 (at Kororareka), Hobson papers, ATL. Hobson issued the same proclamation in Sydney on 14 January before setting sail to New Zealand. The wording of this proclamation follows that of Normanby's instructions. Normanby to Hobson, 14 August 1839, BPP, 1840 (238), pp 38–39
  3. Hobson's address, 5 February 1840, Colenso journal, vol 1, pp 31–32, ATL

lands . . . the land on which we stand this day'. Hobson responded to Te Kemara's challenge (which Henry Williams translated to him) by stating 'that all lands unjustly held would be returned' to Maori.<sup>4</sup> Hobson's promise may have assumed the Crown's presumptive rights to determine title to disputed land, but most Maori probably understood it to be an affirmation of their rights. The context of the discussion was provided by Hobson's promise to protect their interests through lawful processes. Hobson said nothing that would have led Maori to understand that the Crown could convert its nominal or radical title (essentially its right to determine title) into a distinct proprietary interest (its subsequent claim to scrip and surplus land) as part of its presumptive rights.

The Crown's presumptive rights failed to feature in a transparent way in another promise at the Kaitaia Treaty discussion in April. On that occasion, Willoughby Shortland (acting for the incapacitated Hobson) promised Maori that 'the Queen would not interfere with their native laws nor customs'.<sup>5</sup> This promise was consistent with Normanby's instruction to Hobson that he protect Maori 'observance of their own customs'.<sup>6</sup> Again, this statement may have carried a subtle implication that the Crown's presumptive rights included the recognition of aboriginal title, but for Maori (and we do not know how the statement was expressed in their language) it probably carried with it the most obvious meanings. The Crown appeared to recognise that their ways would be respected and protected. Shortland's promise gave them no warning signals about the displacement of customary ways of dealing with land by ways controlled by English common law.

## **2.2 TREATY REFERENCES TO PRE-TREATY TRANSACTIONS**

Discussions of the implications of the Treaty for consideration of pre-Treaty transactions occupy much of the written record, but there are no explicit references to these transactions in the Treaty texts. Hobson's land titles validity proclamation promised an inquiry into the validity of Pakeha claims. It stated 'that all Persons having any such Claims will be required to Prove' them to a commission appointed by the Governor of New South Wales.<sup>8</sup> The Treaty texts, however, made no direct reference to Pakeha claims or to this commission. The implication of article 2 protection of Maori property rights was that all such rights were included, and the only reference to the alienation of such rights was put in the future tense. Maori

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4. William Colenso, *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (Wellington 1890) pp 17–19. Te Kemara had been a principal in the pre-Treaty transactions at both Waitangi and Pakaraka where James Busby and Henry Williams, respectively, later claimed thousands of acres.
  5. Dr John Johnson, the Colonial Surgeon, recorded this statement. Johnson journal, 28 April 1840, APL.
  6. Normanby to Hobson, 14 August 1840, BPP, 1840 (238), pp 39–42
  7. This may explain the 'violent and seditious' reception Commissioner Godfrey and his translator H Tacy Kemp received at Kaitaia less than three years later. Kemp reported that Maori objected 'to the Government assuming any authority over their possessions,' and asserted that 'any surplus lands . . . will be resumed by the original proprietors.' Kemp to Clarke, 10 February 1843, g30/3, pp 743–747
  8. Land Claims Proclamation, 30 January 1840, Hobson papers, ATL

property rights, henceforth, were to include the right ‘to alienate’ such property to the Crown.

Land claims, however, featured very prominently in the northern Treaty discussions. In addition to Te Kemara’s dramatic challenge at Waitangi and Hobson’s promise to return ‘lands unjustly held’, other Maori challenged Pakeha to respond. Manu Rewa and Moka Kaingamata named missionary claimants, George Clarke (later to become Protector of Aborigines) and Charles Baker, in challenging them to return land. Baker rose to the challenge, refusing to apologise for his claims and arguing that all his purchases included land reserved for Maori by ‘an inalienable deed of gift’. Henry Williams<sup>10</sup> then defended all missionary claims as being based on ‘good and honest titles’. Even Tamati Waka Nene, in his eloquent defence of the Treaty, punctuated his remarks with expressions of concern about Pakeha land claims. He asked Maori: ‘Is not the land gone? Is it not covered with strangers, over whom we have no power . . . [?]’. He then appealed to Hobson:

You must not allow us to become slaves. You must preserve our customs and never permit our lands to be wrested from us.

Maori continued this kind of debate at Mangungu on 12 February. There Taonui declared: ‘the land is our father . . . our chieftainship[,] we will not give it up;’ to which Kaitoke added, ‘we have been cheated. The Pakehas are thieves.’ On the other hand, Rangatira Moetara contended that Maori had sold their<sup>12</sup> land willingly, and had to live with the consequences of their foolhardiness. Mohi Tawhai countered by proposing that Pakeha could keep land acquired ‘by fair purchases,’ but, he asked Hobson, what would happen to land ‘stolen from us, will . . . [you] enquire about it . . . [?]’<sup>13</sup> Wi Tana Papahia then asked Hobson ‘whether it was right for two men to have all the land from the North Cape to Hokianga.’ In reply to this accusation, Kaitaia missionary Gilbert Puckey rose to the defence of his CMS colleagues by stating that ‘the land alluded to was held under a trust deed for the use of the natives’. The CMS, he said, was willing<sup>14</sup> to entrust the administration of such trust responsibilities to the Government. Land claims figured almost as prominently in the Kaitaia Treaty discussion (which Puckey interpreted). There, Reihana Teira Waero complained that he was unable to gather firewood because Pakeha claimed the land. Rawiri Tiro cautioned Shortland about the Governor taking ‘our land,’ but Paori Mahanga maintained it had ‘been taken before’ the

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9. In the Maori text alienation was expressed as ‘te hokonga o era wahi wenua,’ which Kawharu translated as ‘will sell land . . .’, I H Kawharu, *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Auckland, 1989) pp 316–321.

10. Colenso’s contemporaneous account of this exchange differs slightly from the one which he published fifty years later: Colenso memo, 5 February 1840, Colenso papers, ATL; Colenso, *Authentic History*, pp 18–22.

11. Colenso memo, 5 February 1840, Colenso papers, ATL; Colenso, *Authentic History*, pp 26–27; Hobson to Gipps 5, 6 February 1840, BPP, 1840 (560), pp 9–10

12. Rev Richard Taylor’s notes, 12 February 1840, encl in Taylor to CMS, 20 October 1840, Taylor papers, f10, ATL

13. Hokianga speeches encl in Shortland to Stanley, 18 January 1845, BPP, 1845 (108), pp 10–11

14. Taylor notes, 12 February 1840, Taylor papers, ATL

Treaty. Waratona Wero said that ‘Pakeha Maori have got it all’.<sup>15</sup> Panakareao, of course, disagreed. In his memorable speech, he concluded:

the shadow of the land goes to the Queen, but the substance remains with us; the governor will not take our land; we will get payment [for it] as before . . .<sup>16</sup>

Maori, therefore, left officials in no doubt that they would jealously guard their land rights. Even if the Treaty texts were silent on land claims, Maori were not.

### **2.3 THE LAND CLAIMS COMMISSION’S LEGISLATIVE FRAMEWORK**

Normanby’s August 1839 instructions limited Hobson’s ability to act Maori concerns about retaining their land rights. Normanby charged Gipps, the Governor of New South Wales, not his representative in New Zealand, with responsibility for setting up the legal basis for the investigation of pre-Treaty transactions. He anticipated a flood of pre-annexation claims which only New South Wales possessed the administrative resources to deal with. He also believed that Gipps would be better equipped to resist Pakeha claimant pressure for making extensive grants. A New South Wales-appointed commission, he hoped, would avoid ‘the dangers of the acquisition of large tracts of country by mere land-jobbers’.<sup>17</sup> None the less, Normanby also urged Hobson to pay careful attention to the vexed question of land claims. In keeping with this, Hobson met with Sydney-based claimants before departing for New Zealand. He told them that the Crown ‘would not acknowledge excessive claims’ or inequitable ones. He even declared that Maori:

never were in a condition to treat with Europeans for the sale of their lands, any more than a minor w[oul]d be who knows not the consequences of his own Acts . . .<sup>18</sup>

Gipps reiterated this view six months later in presenting his New Zealand Land Bill to the New South Wales Legislative Council. Two of the ‘general principles’ upon which he founded the legislative framework for investigating land claims were:

[1] that the uncivilized inhabitants of any country have but a qualified dominion over it, or a right of occupancy only; and that, until they establish among themselves a settled form of government, and subjugate the ground to their own uses, by the cultivation of it, they cannot grant to individuals, not of their own tribe, any portion of it, for the simple reason, that they have not themselves any property in it.

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15. Taylor Kaitaia notes, 28 May [sic] 1840, encl in Taylor to CMS, 20 October 1840, Taylor papers, ATL

16. This is as recorded in Shortland’s Kaitaia speeches, BPP, 1845 (108), p 10

17. Normanby to Hobson, 14 August 1839, BPP, 1840 (238), p 39

18. Hobson to Gipps, 16 January 1840, g36/1

## *The Land Claims Commission Process*

[2] the right of pre-emption of the soil, or in other words, the right of extinguishing the native title, is [or rests] exclusively in the government<sup>19</sup> . . . and cannot be enjoyed by individuals without the consent of their government.

The New Zealand commission Gipps established in accordance with these principles was, in fact, modelled on the New South Wales Court of Claims established in 1833 and extended in 1835. Section 4 of the 1835 Act stipulated a mode of enquiry based on:

the real justice and good conscience of the case without regard to legal forms and solemnities . . .

The Crown in New South Wales sought to replace informal occupation licenses with indefeasible grants through this legislation. Such licenses (and subsequent grants), ignored the rights of the aboriginal peoples.<sup>20</sup> Despite this fundamental difference between the two colonies, the 1840 New Zealand Land Claims Act followed the 1835 New South Wales legislation almost word for word.

Although Gipps stipulated a less formal procedure than might be required by a court, section 2 of the 1840 Act required:

a strict inquiry . . . into the mode in which such [claimed] lands have been acquired . . . and also to ascertain all the circumstances upon which claims may be founded.

The Act required commissioners to take sworn evidence, unless it was obtained from Maori who they deemed incapable of understanding the oath. In such cases, commissioners were to give Maori evidence ‘such credit as it may be entitled to from corroborating or other circumstances.’<sup>21</sup> This 1840 New South Wales Act was, in a slightly modified form, to become the legislative framework for the first inquiries into New Zealand claims for almost a decade.

In addition to the requirements specified in the 1840 Act, Gipps responded to questions directed to him by Commissioners Edward Godfrey and Matthew Richmond about the application of the Act in New Zealand. In reply to their question about how they should deal with claims not supported by deeds, Gipps instructed them on 2 October 1840 that they were to accept ‘proof of conveyance according to the custom of the country . . . in the manner deemed valid by the inhabitants’. He instructed them that the Protector of Aborigines (or his deputy) should attend all their hearings ‘in order to protect the rights and interests of the natives.’ They were also supposed to have a Crown surveyor at their disposal to accurately describe the boundaries of both recommended grants, and lands<sup>22</sup> ‘alienated . . . but not awarded,’ or what later became known as surplus land.

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19. Gipps speech, 9 July 1840, BPP, 1841 (311), pp 63–64. His third principle was the Crown’s exclusive right to establish a colony, a right not enjoyed by individuals.

20. Cited in Donald Loveridge, ‘The New Zealand Land Claims Act of 1840’ Wai 45 rod, doc i2 pp 44–49

21. Quoted in David Armstrong, ‘The Land Claims Commission: Practice and Procedure 1840–1845’ Wai 45 rod, doc i4, pp 7–10

22. Ibid, pp 13–17

Gipps also instructed Hobson on his responsibilities when claims threatened to dispossess a tribe of its ‘whole patrimony.’ Gipps maintained that in such cases, if:

the chiefs admit the sale of land to individuals . . . the title of such chiefs to such lands are of course to be considered extinct whether or not the whole or any portion of the land be confirmed to the purchaser . . . Should it appear in any case that the lands have been obtained for an insufficient consideration, it will be proper and necessary for you, in concert<sup>23</sup> with the official Protector of Aborigines to award them further compensation.

Unfortunately, Gipps gave commissioners insufficient guidance on what should be considered ‘sufficient consideration.’ Consequently, few claims were subjected to the kind of scrutiny that he appeared to want regarding adequacy of consideration.

Although Armstrong, in his study of the Land Claims Commission, argues cogently that Gipps set up a framework that provided for a thorough inquiry, his statement that Gipps ‘strongly implied that the validity of pre-Treaty transactions was to be determined with reference to the vendors themselves’ is more questionable.<sup>24</sup> The legislative framework which Gipps gave the New Zealand inquiry emerged out of the legal assumption of terra nullius which prevailed in New South Wales. His ‘principle’ that the ‘uncivilized inhabitants of any country’ possessed neither transferrable sovereign nor transferrable property rights left Maori in the same category as the aboriginal inhabitants of New South Wales. The Treaty of Waitangi contradicted the first aspect of this principle, and his 30 November instruction to Hobson contradicted the second aspect. If Maori were not competent to transfer sovereign rights, why did Hobson proclaim that they had done so by Treaty? If they were not competent to transfer property rights to Europeans, why did he instruct Hobson that ‘the title’ of chiefs admitting sales was ‘to be considered extinct’? Furthermore, this form of private extinguishment contradicted Gipps’ second principle: that ‘the right of extinguishing native title . . . [rested] exclusively in the government’.

When New Zealand ceased to be a dependency of New South Wales in 1841, Hobson redrafted the Gipps Act into the New Zealand Land Claims Ordinance which came into effect in June of that year. The language of the New Zealand Ordinance differed in significant respects from Gipps’. Instead of the ‘*strict inquiry*’ called for by Gipps, Hobson called for (in his section 3) only ‘an inquiry.’ Furthermore, instead of requiring commissioners ‘to ascertain *all the circumstances*’ surrounding pre-Treaty transactions, the 1841 Ordinance required them to inquire just ‘the circumstances upon which such claims may be . . . founded.’ The key difference between the 1840 and 1841 legislation came in Hobson’s section 2 which stated in declaratory fashion:

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23. Gipps to Hobson, 30 November 1840, quoted in Armstrong, pp 20–21

24. Armstrong, p 22

That all unappropriated lands . . . subject however to the rightful and necessary occupation and use thereof, by the Aboriginal inhabitants . . . are and remain Crown or domain lands of Her Majesty . . .

Otherwise, section 9 on taking ‘the evidence of any aboriginal native . . . subject to such credit as it may be entitled to from corroborating and other circumstances’ came verbatim from Gipps’ Act.<sup>25</sup> Hobson’s 11 July 1841 instructions to commissioners differed in only minor respects to Gipps’ 2 October 1840 instructions. Clause 4 of the 1841 instructions required the protector to attend hearings,<sup>26</sup> while clause 7 authorised commissioners to report claims prior to survey.

## 2.4 NOTIFICATION PROCEDURES

Although Maori expressed concerns about the extent and implications of Pakeha claims at meetings convened for Treaty signing during the first half of 1840, the first official notice pursuant to the Land Titles Validity Proclamation in New Zealand did not occur until 30 December 1840. In the first issue of the *New Zealand Government Gazette*, Gipps announced the appointment of Commissioners Godfrey and Richmond and the scheduling of the first (mainly Bay of Islands) claims for hearing in the Russell (Okiato) courthouse on 25 January 1841. The notice of hearing stated that ‘all parties interested are desired to be in attendance with their Documents and Witnesses.’ It then summarised about half the claims scheduled for hearing. These ‘Particulars’ included the claimant, the location and approximate acreage of the area claimed, the ‘alleged’ vendors, the ‘consideration,’ and the date of the deed lodged with the commission. Finally, commissioners announced:

All Parties opposing the above Claims, are to give Notice thereof to the Commissioners at Russell, without delay.<sup>27</sup>

For Maori to have been properly notified of this proceeding, the same information should have been issued in the Maori language. During the Muriwhenua Tribunal investigation, historians produced no direct evidence on this point. Armstrong (who appeared as a Crown historian) indicated that the commissioners were unable to secure the attendance of the Protector of Aborigines (or his deputy) to represent<sup>28</sup> Maori interests at either their first hearing, or the second in early March 1841.

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25. Moore regarded the ringing declaration regarding ‘unappropriated land’ in section 2 as revealing Hobson’s ‘acquisitive purpose,’ *New Zealand Land Claims Ordinance 1841* (sess 1, no 2); Moore, *Crown Demesne*, p 83

26. Hobson to Commissioners, 11 July 1841, olc 5/4 b; cited in Armstrong, pp 85–86

27. This first issue of what became the *New Zealand Government Gazette* was entitled *Gazette Extraordinary, New Zealand*, 30 December 1840, Hobson papers, ATL

28. Armstrong, pp 44–45, 49

This was despite the fact that Protector Clarke expressed concern during the previous month when he stated that:

many of the natives have been given to understand that the principal object of the Commission is to secure land for the Government at the expense of the Europeans, others again are hoping that through them [the commissioners] their lands (it matters not how fairly purchased) will revert again to them [ie Maori] . . .

Clarke concluded that Maori were understandably ‘complaining of the secrecy of the Government’ in this way of dealing with ‘both themselves and the country.’<sup>29</sup> He believed that as Protector he and his staff had an obligation to explain the purpose of the commission to Maori well in advance of hearings:

to make them intelligible to natives. The importance of proceeding as proposed will also appear, when it is considered that the greater part of these land transactions were conducted by parties *very partially understanding each other*; and I fear in many cases but little pains [were]<sup>30</sup> taken to ascertain to whom the land they claimed belonged. [Emphasis added]

Despite Clarke’s declared intentions, an English version of an 1841 notice to Maori was the only written notification evidence presented to the Muriwhenua Tribunal. This 1841 notice referred to a commission hearing to inquire into ‘the equity of the land sales by the Europeans to the New Zealanders.’ This would allow the Governor to ‘acknowledge or invalidate’ these transactions. The Governor wanted the Maori vendors to appear with the Pakeha claimants:

to give correct evidence concerning the validity or invalidity of the purchase of your lands. Hearken! this is the only time you have<sup>31</sup> for speaking; this, the entire acknowledgment of your land sale for ever and ever.

The most that can be said about the Crown’s fulfilment of its notification obligations is that it remains to be verified. Armstrong argued that the Protectorate attempted to carry out Clarke’s intentions in the Kaipara area during March 1841. H Tacy Kemp (Clarke’s deputy) reported that he:

endeavoured to explain fully and explicitly the [Crown’s] gracious intentions [to Kaipara Maori] . . . I referred them more particularly to the Treaty of Waitangi.<sup>32</sup> To this they readily agreed, and admitted their clear understanding of the same.

Although Armstrong argued that Kemp’s Kaipara mission ‘suggests . . . the Maori were likely to soon become aware of the commission and its activities through their own developed networks of communication,’ Kemp’s report does not bear this out.

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29. Clarke to Colonial Secretary, 9 February 1841, ma 4/58, p 19; quoted in Armstrong, pp 46–47

30. This was a remarkable admission coming from the protector. His role is discussed in greater detail below. Clarke to Colonial Secretary, 25 February 1841, ia 1/1841/250; quoted in Armstrong, pp 48–49

31. Governor’s approval, 9 July 1841, ia 4/271, pp 12, 20; quoted in Armstrong, p 41

32. Kemp to Clarke, 24 March 1841, in H H Turton, *Epitome of Official Documents relative to Native Affairs and Land Purchases* . . ., Wellington, Government Printer, 1883, b2–3; quoted in Armstrong, pp 50–51

His only indirect reference to the commission was to say that he had prepared a list of Kaipara claim ‘particulars’. This was:

preparatory to investigation; but I think it improbable that the Natives will attend the claimants<sup>33</sup> to the township of Auckland for further investigation [at a commission hearing].

Evidently, Kemp failed to convince Maori of the importance of the hearing. Armstrong argued that prior to commission hearings, Protector Clarke ‘would advise the Commissioners of appropriate locations to hold their courts,’ and his subordinates (like Kemp) ‘would also no doubt have discussed the nature and purpose of the Commission with local people.’ Furthermore, he stated, that the Crown began a monthly publication in Maori in January 1842 which ‘was likely to have’ information on the commission.<sup>34</sup> Without direct evidence of such notification, however, the matter remains largely one of conjecture.

## **2.5 THE ROLE OF THE PROTECTORATE**

The extent to which the original Land Claims Commission protected Maori interests depended to a large extent upon the effectiveness of Protector Clarke. Clarke’s major problem was that, as a major land claimant himself, he had a conflict of interest. Clarke claimed a total of 5500 acres near the Waimate Mission Station where he resided as a member of the Church Missionary Society prior to taking up his 1840 appointment as Protector. Armstrong believed that his experience as a claimant served him well in understanding the process by which Maori entered into pre-Treaty transactions. Certainly, his February 1841 statement (quoted above) that most of these ‘transactions were conducted by parties very partially understanding each other’ suggests that he was aware of potential injustice to Maori. None the less, Armstrong went too far when he argued that the lack of recorded Maori protest regarding Clarke’s claims during the 1840s hearings rendered him beyond reproach.<sup>35</sup> In fact, few Maori recorded protests at any of the 1840s hearings.<sup>36</sup> This may have reflected their lack of understanding of what was at stake, because prior to systematic surveys and the Crown designating part of the surveyed area as surplus land, little appeared to have changed on the ground. When Maori became more aware of the area affected during the 1850s, Tamati Waka Nene objected to part of Clarke’s Whakanekeneke claim, and others objected to his Waimate claim, only to be overruled by Commissioner Bell.<sup>37</sup> In addition to this Maori protest, during the late 1840s Governor Grey used Clarke’s Whakanekeneke claim as a test

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33. Ibid, pp 51–52; Kemp to Clarke, 24 March 1841, *Epitome*, b2–3

34. Armstrong, pp 55–58

35. Ibid, p 68

36. In only 21 out of 1049 claims did commissioners register any form of Maori protest. Return no 1, *New Ulster Gazette*, 1849. For more discussion of these figures, see the section on ‘FitzRoy’s intervention’.

37. Bell hearing, 23 March 1858, olc 1/634; Bell, ‘Notes of various Sittings of the Court’, 13 October 1857, olc 5/34

case. Although the New Zealand Supreme Court upheld the validity of the resultant 4000 acre grant,<sup>38</sup> the Privy Council over-turned this judgement and voided Clarke's grant in 1851.

More important than his personal interest was Clarke's membership of a group of missionary land claimants which had come under assault well before his appointment as Protector. Missionary land claims became a major political issue in both New Zealand and Britain when the CMS began to oppose the New Zealand Company's colonisation plans in 1838–1839. Gibbon Wakefield quickly retaliated with a 'physician heal thyself message,' forcing the CMS parent committee in London into a defensive posture.<sup>39</sup> Clarke, in particular, believed that the critics of the missionary land claims had waged a vindictive political campaign. He believed that he and his colleagues claimed land in an honourable attempt to both support their families and protect Maori against Pakeha land-sharks.<sup>40</sup> None the less, Dandeson Coates, the CMS Secretary, instructed Clarke and his colleagues to cease purchasing land before news of the Treaty reached London.<sup>41</sup> Despite the fact that Maori challenged missionary land claims at the Waitangi and Mangungu Treaty debates, Hobson described the Protector's role to Clarke as one which bore 'a close affinity to the labours you are engaged in on their [Maori] behalf under the Church Missionary Society'.<sup>42</sup> When William Broughton, the Anglican Bishop of Australia, investigated CMS claims, he demanded that individual missionaries claim no more than the 2560 acre grant limit established by the 1840 Act. 'So shall you vindicate yourselves,' he concluded, 'from the aspersions cast upon you'.<sup>43</sup> Clarke and almost all his colleagues defied this instruction at the same time as they promoted themselves as mediators between the Crown and Maori.

All in all, Clarke's conflict of interest limited his ability to protect Maori interests in at least three different ways. It limited his willingness to support the enforcement of the statutory 2560 acre grant limit (which formed the basis of the Crown's 1849–1851 case against him), and it limited his effectiveness in criticising the monster New Zealand Company claims south of Taupo. Since he himself exceeded the grant limit, he could hardly sustain commission efforts to limit company grants in this way. Although Spain limited New Zealand Company grants to approximately 395,000 acres, this was well in excess of the 2560 acre statutory limit.<sup>44</sup> Finally, during 1840 and 1841, the first years of the Land Claims Commission, Clarke was required to act simultaneously as the Crown's Protector of Aborigines, and as its chief land purchase agent. The conflict between these roles was so pronounced that he was able to resign from his purchase responsibilities in 1842.<sup>45</sup> His dual roles

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38. *Queen v Clarke* 1849, 1851, vii Moore 77, pp 77–84; Privy Council order, 25 June 1851, olc 1/634. For further discussion of this decision, see below in the section in this chapter on 'Grey's Intervention'.

39. Coates testimony, BPP, 1837–1838 (680), pp 257–258; BPP, 1840 (582), pp 4, 79, 166–167, 177–178

40. Clarke to CMS, 20 January 1840, Clarke letters, ATL

41. Coates to Clarke, 18 February 1840, Williams CMS corres 1: 20–24, AIM

42. Hobson to Clarke, 4 April 1840, cms/cn/m12, microfilm, ATL

43. Broughton to Williams, 28 September 1840, Williams CMS corres 1: 31–33

44. Armstrong, p 70; Moore, *Crown Demesne*, pp 76–82

45. Armstrong, p 67

also prevented him from attending many commission hearings during 1841–1842. This undoubtedly limited Clarke’s effectiveness in protecting Maori interests during commission investigations.

## **2.6 COMMISSIONERS’ QUALIFICATIONS AND ADMINISTRATIVE SUPPORT**

Commissioners Godfrey and Richmond were almost totally reliant upon Clarke and his subordinates to deal with the Maori side of their investigations. Both were military officers serving in New South Wales at the time of their appointment. Neither had any New Zealand experience prior to their appointments, or much experience in colonial administration. Furthermore, neither had any legal training.<sup>46</sup> When they arrived in the new colony in early 1841 they were greeted with a very large number of claims, and by early 1842 the Governor had referred a total of 872 widely dispersed claims to them. Without adequate administrative support from a severely under-resourced colonial government, they were able to hear only 229 claims (about 26 percent of the total) in their first year of operation.<sup>47</sup>

Lack of revenue and the consistent refusal of imperial authorities to fund the administration of the infant colony virtually paralysed government in New Zealand throughout the entire period of the commission’s inquiries.<sup>48</sup> Imperial authorities appear to have misunderstood that New Zealand land did not translate easily into colonial revenue. Colonial Secretary Lord Russell’s instructions to Hobson in late 1840 and early 1841 called upon him to survey land granted to Pakeha and land occupied by Maori. He assumed that<sup>49</sup> the unsurveyed remainder would become part of a vast disposable public domain. Hobson, however, had only a small surveying staff at his disposal, and it was involved almost exclusively in the establishment of the colonial capital at<sup>50</sup> Auckland during 1841–1842 rather than in assisting the Land Claims Commission.

In a vain attempt to generate revenue out of land claims, Hobson attempted to speed up the commission’s work. In late 1841 he announced that the ‘successful settlement’ of these claims (which covered, he said, ‘every available tract’ of New Zealand land) would either make or break the ‘future prosperity of New Zealand.’ He proposed to streamline the commission’s process by introducing the simple New Zealand Company grant acreage formula in place of Gipps’ complicated sliding scale. Following Wakefield’s theory of colonisation, he also proposed the concentration of settlement in defensible areas such as the Bay of Islands,

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46. G H Scholefield, *Dictionary of New Zealand Biography*, Wellington, Government Printer, 1940, vol 1, p 302; vol 2, p 242

47. Commissioners to Hobson, 12 March 1842, co 209/14, pp 264–266, microfilm, NA Wellington; quoted in Armstrong, pp 114–115

48. Statement of Receipts and Expenditure, 1840; Hobson to Stanley, 15 January 1842, BPP, 1843 (134), pp 1–2, 10–11

49. Russell to Hobson, 9 December 1840, 28 January 1841, BPP, 1841 (311), pp 26–30, 51–52

50. Godfrey to Colonial Secretary, 9 March., 26 November 1842, olc 8/1; cited in Armstrong, p 61

Auckland and Wellington. Claimants in remote<sup>51</sup> areas would receive scrip in exchange for land nearer the main colonial towns. Hobson evidently believed that most of the outlying areas claimed by Pakeha would then become part of the public domain.

A storm of settler protest forced Hobson to remove the settlement concentration (via scrip exchange) provisions from his 1842 Land Claims Ordinance. Section 2 of this ordinance, like its predecessor, stated the Crown's presumptive rights:

All lands within the Colony which have been validly sold by the aboriginal natives thereof are vested in Her Majesty, her heirs and successors, as part of the demesne lands of the Crown.

Section 4 omitted the 2560 acre grant limit in the original Act and Ordinance (presumably for the benefit of the New Zealand Company).<sup>52</sup> Although commissioners operated in accordance with this Ordinance after it took effect on 25 February 1842, the imperial government disallowed it later that year. Colonial Secretary Lord Stanley believed that the company grant formula was not applicable to individual claims. He therefore instructed Hobson's successor, FitzRoy, to revive the original legislation.<sup>53</sup> Such legislative confusion can only have made the commissioners' already onerous duties even more difficult. They were somewhat relieved by the appointment of an additional commissioner to consider company claims after March 1842, but the task of examining the 1000 plus claims filed during the 1840s remained a monumental one.

## 2.7 DIFFICULTIES CONFRONTING COMMISSIONERS

The sheer number of claims requiring investigation in different parts of the country confronted commissioners with serious difficulties. As well as conducting hearings at Auckland and Kororaraka, Godfrey and Richmond had to travel to places as remote as Coromandel Harbour (where they heard 87 claims), Kaipara, Waimate, Mangungu, Mangonui and Kaitaia. Furthermore, Godfrey had to travel to the South Island in 1843 where he heard 117 claims (mainly at Akaroa and Otakou).<sup>54</sup> By mid-1843 Godfrey and Richmond had still heard only half the claims filed. Godfrey delayed reporting on the numerous scrip claims at Hokianga and Mangonui until after the arrival of the new Governor. As a result, he had to issue 72 reports in the space of nine days with minimal clerical assistance.<sup>55</sup>

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51. Hobson's Address to the Legislative Council, 14 December 1841, BPP, 1841 (569), pp 198–199. This policy followed Russell's 17 April 1841 instructions to establish 'the general system of forming the settlers of each district into a regular community . . . along Company lines'. Moore, *Crown Demesne*, p 168.

52. Section 8 also permitted a single commissioner to report claims, whereas previously two were required. 1842 Amended Land Claims Ordinance (sess 2, no 14).

53. Stanley to Hobson, 19 December 1842, co 209/14, p 370; cited in Armstrong, pp 103–106

54. Godfrey and Richmond to Shortland, 30 May 1843, BPP, 1845 (246), p 12

## *The Land Claims Commission Process*

In addition to under-resourcing, commissioners faced a number of other difficulties. Hobson believed that their chief difficulty lay in overcoming ‘the indolence and mutual hostility of the Natives’. In his words:

When it happens that the Claims occur on the land of friendly Natives, it is possible by bribing<sup>56</sup> very highly to procure attendance [at hearings], but these instances are very rare.

Godfrey and Richmond normally required the affirmation of at least two Maori during the examination of a claim. Walter Brodie, an aggrieved claimant, told the 1844 House of Commons New Zealand Committee that ‘nearly all’ claimants had to pay Maori to appear ‘to make them actually tell the truth’ and that this constituted ‘a prejudice in favour of the natives.’<sup>57</sup> Rather than publicly notifying Maori of the purpose and procedure of the commission, the Crown apparently relied upon claimants to notify Maori privately. Since claimants had no interest in notifying Maori objectors, this probably meant that the only Maori likely to be informed were those whose support claimants could rely upon.

Godfrey and Richmond saw a different set of problems. They referred to how absentee speculators claimed:

enormous tracts of land for trifling sums . . . [Maori apparently] had no objection to cede a whole district to an individual presuming that he could not . . . dispossess or inconvenience their greater numbers [residing there] . . .

Subsequently, of course, the<sup>58</sup> Maori residents would object to an unacknowledged Pakeha living on their land.

Although commissioners’ reports contained few references to this kind of situation, this omission could be explained by the fact that many of the monster claims were never brought to hearing. Clarke had made a similar observation when in August 1841 he deplored the fact that the company could claim the villages and cultivations of Maori.<sup>59</sup> The commissioners shared Clarke’s desire to provide at least some protection for Maori interests. They wrote in May 1842 that Maori:

cultivation[s], and fishing and sacred grounds, ought . . . to be in every case reserved to them, unless they have, to a certainty, been voluntarily and totally abandoned. If some express condition of this nature be not inserted in the grants from the Crown, we fear the displacement . . . of the natives, who, certainly,<sup>60</sup> never calculated the consequences of so entire an alienation of their territory.

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55. Godfrey to Colonial Secretary 3, 12 May 1844, olc 8/1; J W Hamilton to Partridge, 14 May 1844, olc 44/133, p 104

56. Hobson to Stanley, 26 March 1842, g25/1

57. Quoted in Armstrong, pp 125–126

58. Commissioners to Hobson, 12 March 1842, co 209/14, pp 264–266; quoted in Armstrong, pp 114–116

59. Armstrong, p 70

60. Commissioners to Hobson, 2 May 1842, ia 1/1842/721; quoted in Armstrong, pp 117–119

The main difficulty commissioners encountered in reserving areas essential to Maori welfare was in defining such areas, and then ensuring that they were administered in the interests of Maori. Not only were Maori residents of such areas unlikely to attend hearings, but the commission was never assisted by the surveyor Gipps originally instructed it to employ.<sup>61</sup>

Nor did the 1840, 1841 or 1842 land claims legislation make any provision for Native Reserves. Only Russell's 1842 supplemental instructions to Hobson made provision for such reserves,<sup>62</sup> but Hobson failed to embody this aspect of his instruction in statute.

## 2.8 PROTECTORATE AND SURVEY REPORTS

Godfrey had long been aware of the tendency of claimants to inflate the acreage of their initial claim in an attempt to obtain a more significant grant. This, for him, highlighted the need for accurate surveys.<sup>63</sup> Russell's 1840 and 1841 instructions to Hobson required the Surveyor-General to identify all land subject to pre-existing Maori and settler claims, and to define the remainder as Crown demesne. Surveyors were also to cooperate with the Protectorate to ensure that all lands deemed 'essential' to Maori became inalienable reserves.<sup>64</sup> By the time of Hobson's premature death in September 1842, Crown surveyors had failed to define either the 42,000 acres for which commissioners by then had recommended grants, or the 150,000 acres of surplus land arising from them. Surveyor-General Ligar reported that it would take the Crown over seven years to do the job. He prevailed upon the Executive Council, and Shortland prevailed upon Lord Stanley in London, to authorise private surveyors both to 'create an immediately exchangeable property,' and to 'considerably augment' the public domain.<sup>65</sup> As a result, Shortland proclaimed that claimants could employ private surveyors, and:

Should the boundaries marked out . . . be found to contain a greater quantity of land than shall be contained in the Deed of Grant, the excess will be resumed.<sup>66</sup>

This was the first public notice of the Crown's intentions regarding surplus land. Significantly, it was apparently addressed to settler 'Land Claimants,' not to Maori.

Despite this injection of private surveyors into the process, commissioners continued to complain about the absence of reliable surveys to allow them to visualise the land under consideration. They needed to know whether claims

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61. Gipps to Commissioners, 2 October 1840; cited in Armstrong, p 14

62. Russell to Hobson, 28 January 1841, BPP, 1841 (311), pp 51–52. For further discussion on this, see the section on 'Reserves' below.

63. Godfrey to Colonial Secretary, 9 March, 26 November 1842, olc 8/1; cited in Armstrong, p 61

64. Russell to Hobson, 9 December 1840, 28 January 1841, BPP, 1841 (311), pp 30, 51–52; Moore, *Crown Demesne*, p 110

65. Executive Council minutes, 19 September 1842, ma 91/8, exhibit b, pp 12–14; Shortland to Stanley, 24 September 1842, BPP, 1844 (566), pp 479–450; quoted in Armstrong, p 63

66. 'Notice to Land Claimants', 27 September 1842, ma 91/8 b, pp 14a–14b

overlapped with each other, with Maori land, and with the few Crown purchases (almost invariably unsurveyed) Clarke had negotiated in 1840 and 1841. In 1842, for example, Clarke failed to provide commissioners with more than a general boundary description of his 1840–1841 Mangonui purchases even though he admitted they overlapped ‘several purchases claimed by Europeans’.<sup>67</sup> When Godfrey was about to investigate Mangonui claims, he informed Clarke that it would undoubtedly prove ‘a rather troublesome business to discern what claims interfere with the land’ which the latter had purchased for the Crown.<sup>68</sup> Both Godfrey and Richmond, who began to hear claims separately after February 1842, assumed that while they could make general grant recommendations as a result of their hasty inquiries, the issuance of an indefeasible Crown grant would have to await an accurate survey of the precise boundaries of the land granted. They informed the local Colonial Secretary:

that, owing to the inaccuracies of the description of the boundaries in the deeds exhibited to us, we have very seldom been able to point out, exactly the actual situation and extent of the <sup>69</sup>land claimed. The Native Sellers can alone shew the boundaries to the Surveyors.

When private surveyors began to operate in 1843, they found some claimants less than cooperative when it came to boundary identification. Sampson Kempthorne discovered, when he began to survey CMS claims from Matamata northwards, that Maori disputed a number of the boundaries specified in the usually detailed deeds. He alleged that some of the missionaries deliberately obstructed his surveys, and that both Richmond and the newly-arrived<sup>70</sup> Chief Justice William Martin privately criticised the extent of their claims. Since commission hearings during 1843 numbered in the hundreds, Crown officials must have sensed the potential for wholesale confusion with the combination of lack of survey definition, and multiple overlapping and conflicting claims.

Apparently to provide a remedy to this situation, Shortland introduced verification of extinguishment procedures in the form of ‘special reports’ for both Protectorate officials and surveyors to complete in cases of overlapping or conflicting claims. The Colonial Secretary instructed Clarke that:

every precaution should be used to ensure a certain knowledge that the rights of the natives . . . have been completely extinguished . . .

Firstly, Crown surveyors were to define claim boundaries and report any Maori obstruction of their work. Then, a protectorate official was to complete a report which would:

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67. Clarke to Commissioners, 22 August 1842, ma 4/1, p 31

68. Godfrey to Clarke, 13 September 1842, olc 8/1, p 50

69. Commissioners to Colonial Secretary, March 1843, olc 8/1, pp 61–62

70. Kempthorne to CMS, 29 April, 3 November 1843, Kempthorne papers, ATL. Dieffenbach also criticised the extent of missionary claims. Ernst Dieffenbach, *Travels in New Zealand*, London, John Murray, 1843, vol 2, pp 166–168.

certify that after due inquiry<sup>71</sup> he is fully satisfied of the alienation of their lands by the former aboriginal owners.

Although Armstrong produced evidence that officials followed these procedures in the case of one Bay of Islands claim, the available evidence suggests that neither the Protectorate nor surveyors completed these ‘special reports’ with any consistency. John P Du Moulin and H Tacy Kemp filed some very brief reports in the Bay of Islands. For example, in the case of James Clendon’s Orongo claim, Du Moulin stated that no Maori obstructed his survey and: ‘No claims of ownership have been proffered on me by them, or on their behalf.’ Just as with Kemp’s report on the same claim,<sup>72</sup> he recited the boundaries but named no Maori verifying the accuracy of them. Without consistently completed ‘special reports’ on the boundaries and multiple interests associated with various claims elsewhere, northern commissioners must have been virtually ‘flying blind’ through the bulk of claims heard in 1842–1843.

## **2.9 HEARING PROCEDURES**

Armstrong argued in his analysis of Godfrey and Richmond’s hearing procedures, that they gave special consideration to Maori evidence. At least two claimant witnesses before the 1844 House of Commons New Zealand Committee believed that the commission gave Maori evidence greater weight than that offered by Pakeha claimants. Brodie claimed that Karikari Maori forced him to reduce the extent of his original claim, and that Godfrey told him that unless he complied with Maori wishes ‘he would receive nothing.’ Similarly, Thomas McDonnell, the former British Resident at Hokianga, alleged that the way commissioners privileged<sup>73</sup> Maori evidence encouraged the latter to extort further payments from claimants. Although some Maori undoubtedly used the commission’s requirement to have at least two Maori support a claim in hearing to extract further concessions from claimants, this does not appear to offer sufficient grounds for arguing that the commission<sup>74</sup> treated Maori evidence as more important than that produced by the claimants.

Firstly, Pakeha normally produced the Maori witnesses with an undoubted expectation that they would support the claim (for which they were sometimes paid).<sup>75</sup> Protectorate officials seldom recorded producing witnesses who objected to claims. In most cases these officials were busy enough translating Maori evidence for the commission, though what they wrote down was normally a very brief

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71. Colonial Secretary to Clarke, 21 April 1843, and enclosed ‘Protector of Aborigines Special Report . . .’ *Epitome* b8–9; cited in Armstrong, pp 174–175

72. Du Moulin and Kemp’s report [both undated], ma 91/18 (claim 121) pp 7–8. Armstrong cited the investigation of Gilbert Mair’s nearby Te Wahapu claim: Armstrong, pp 175–176.

73. Armstrong, pp 121–124, 133–135

74. *Ibid*, pp 143–146

75. In at least one case, Maori protested to Clarke prior to appearing before the commission: Wiremu Hau to Clarke, 19 February 1841, Hau sworn statement, 12 November 1841, ma 91/18 (59) pp 2, 4.

affirmation in English. The typical Maori statement written into the record would read something like:

That is my signature to the Deed now before the Court, I with the rest of the Natives who signed sold the Land described therein to [the claimant] for the Goods stated in the Deed. The land belonged to us and we had a right to dispose of it. We understood that we parted with it for ever. The Boundaries are correctly described in the Deed . . . The Deed was read and explained to us before I signed. We have<sup>76</sup> never sold this land to any other Person, nor has it been disputed by other Natives.

While such a declaration may appear to be a straightforward expression of informed consent, the fact that it was recorded only in English and in a way that varied little from witness to witness raises several questions. The first is: why was no Maori language evidence recorded by Godfrey and Richmond in the way that Spain insisted it be recorded when he investigated claims further south? What guarantee did the testimony of only two Maori give that the interests of other groups were properly represented and would not be violated by the grant resulting from the commission's recommendation? Finally, in cases where Maori appear to have entered into arrangements with Pakeha claimants that resembled something less than absolute alienations of property in perpetuity, what did<sup>77</sup> the commission do to recognise the Maori rights retained in such arrangements?

The answer to the first question about why Godfrey and Richmond's assistants recorded virtually no Maori language evidence, to allow affirmers to speak for themselves, appears to be simple enough. The welter of northern claims, which by 1844 exceeded 800, appeared to prohibit the painstaking process undertaken by Spain's Commission in the south (a process which even Spain suspended after only six months or so). The question of the adequacy of two Maori affirmers (normally selected by the claimant) was probably considered in the same light. To recognise multiple Maori interests, and to have sought proper representation for each, would have undoubtedly prolonged the investigations of the commission beyond the means of the still financially strapped colonial administration.

The question regarding the commission's treatment of transactions which it should not have considered to be straightforward alienations or sales is much more difficult to answer. Protector Clarke, himself, admitted in 1841 that the majority of pre-Treaty<sup>78</sup> transactions were conducted by parties very partially understanding each other'. Section 2 of the 1841 Ordinance required commissioners to consider:

all titles to land . . . held or claimed by virtue of purchases or pretended purchases gifts conveyances or pretended conveyances leases or pretended leases agreements or other titles . . . from the chiefs or other individuals . . . of the aboriginal tribes . . .

By section 3 they were required to inquire:

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76. Based on Te Kemara's unsworn statement recorded by Kemp, 2 January 1842, in the hearing of CMS Paihia claims, olc 1/666

77. This matter is explored further in the discussion of trust deeds in the 'Reserves' section below.

78. Clarke to Colonial Secretary, 25 February 1841, ia 1/1841/250; quoted in Armstrong, pp 48–49

into the mode in which such claims to land have been acquired, the circumstances under which such claims may be and are founded, and also to ascertain the extent and situation of the same . . .

Thus, commissioners were required to consider the nature of pre-Treaty transactions. They were not to simply assume that they all amounted to simple alienations or sales. None the less, in reporting their recommendations on claims, the northern commissioners adopted printed forms which appeared to prejudge this issue. Instead of the variety of different kinds of transactions referred to<sup>79</sup> in the Ordinance, the forms referred only to purchases, sales and alienations. Such report forms failed to account for multiple Maori interests in land, and cases in which Maori clearly believed that they retained an interest in the land.

The situation where Maori continued to reside on land claimed by Pakeha is difficult to quantify, but was recorded by Ernst Dieffenbach as a widespread occurrence. He wrote that many Maori appeared to enter into pre-Treaty transactions:

with the implied understanding that they should continue to cultivate the ground which they or their forefathers had occupied from time immemorial. It never entered their heads that they should be compelled to leave it and retire to the mountains . . . In transferring land to the Europeans the natives [believed] . . . that they gave the purchaser permission to make<sup>80</sup> use of a certain district. They wanted [above all else] Europeans amongst them . . .

After quoting Dieffenbach in this way, Armstrong argued he was ill-informed. He dismissed Dieffenbach's view that commissioners 'cannot be aware of the hardship and injustice which in some cases they will entail upon native tribes.' Using the Port Nicholson situation as his example, Armstrong contended that, contrary to Dieffenbach's position that Maori believed they had entered into a limited exchange of specified rights with the company, they contested only the extent of the company's purchase, not the nature of the transaction.<sup>81</sup> The extent to which Commissioner Spain was able to investigate both the nature, and extent, of New Zealand Company transactions therefore requires close examination.

## **2.10 SPAIN'S HEARING PROCEDURES**

Duncan Moore, in his report to the Waitangi Tribunal for Wellington Tenth's claimants, provided the most detailed analysis of Commissioner Spain's procedures. Spain, unlike Godfrey and Richmond, owed his appointment to imperial instructions that the colonial government deal expeditiously with a

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79. Commissioner's report form no 48 and no 49, olc 1/634. These forms referred to land 'purchased,' an 'alleged purchase,' a 'bona fide purchase,' 'sellers,' a 'Deed of Sale,' and Chiefs having 'admitted the payment they received, and the alienation of the Land . . .'

80. Dieffenbach, vol 2, pp 143-144; quoted in Armstrong, pp 138-140

81. Dieffenbach, vol 2, p 144; quoted in Armstrong, pp 140-142

particular set of claims, those of the New Zealand Company. Hobson's instructions to Spain under the provisions of the (later disallowed) 1842 Ordinance specified that he was to:

hold his court at such places as may afford claimants the greatest facility for producing native witnesses, and he will be guided [as in the 1841 Ordinance] . . . by the real justice and good conscience of the case without regard for legal solemnities . . .

The Protector or his deputy had to be present in court:

to represent the rights of the natives and protect their interests . . . [with responsibility] to conduct the native cases, giving due and timely notice of opposition or caveat on the part of the natives to the Commission.

In view of the well-known rivalry between the CMS and the company, Protector Clarke unwisely delegated to his sub-protector son, George Clarke jr, the duty of protecting Maori interests in the claims to be heard by Commissioner Spain. The father instructed his son that he was:

to superintend the hearing of these claims . . . notify . . . the Native population [of] the cause of his coming, and assure them that their complaints will be patiently heard, and that no lands will be taken from them except those which shall be proved to have been validly sold by them to the Europeans.<sup>83</sup>

Spain's hearings, begun at Port Nicholson in May 1842, proved to be (for the first three months, at least) an exhaustive investigation of voluminous Maori evidence. Although Spain had traveled to Auckland to receive his instructions, and while there he must have been fully briefed on Godfrey and Richmond's hearing procedures, he chose to depart from them. Instead of an examination of only two Maori witnesses per claim, recorded only in English in a very summary and repetitive fashion, in mid-1842 Clarke jnr recorded over 1000 pages of Maori testimony regarding company and related claims. He minuted evidence in both Maori and English and later translated these verbatim Maori minutes into English.<sup>84</sup> In addition to Clarke's painstaking attention to recording Maori evidence in both languages, Spain and Clarke interrogated both Maori and claimant witnesses. Moore criticised what he described as Spain's 'strict Interrogator-Witness style,' contrasting it with the post-1865 Native Land Court's 'rather open-ended (and Maori-led) Conductor-Challenger dialogue.' A more appropriate contrast is probably the extremely rushed and truncated hearings conducted by Godfrey and Richmond even as Spain began his much more painstaking hearings further south. Moore's observation that Spain's 'Court learned most about those Maori interests that appeared most useful to the interrogators' purposes – ie to the Court's and the

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82. Hobson's instructions encl in Shortland to Spain, 30 March. 1842, *ibid*, pp 11–12; quoted in Moore, pp 172–173

83. Shortland to G Clarke sr, 5 April 1842, ia 4/271, pp 46–47; quoted in Moore, *Crown Demesne*, p 173

84. Moore, *Crown Demesne*, p 180

colonists' purposes' should be considered in the context of the hearing process already operating in the north. Although Spain may have heard Maori mainly with a view to clearing the way for uncontested grants to the company and other claimants, at least he heard (and Clarke recorded) extensive Maori evidence, in contrast to their northern counterparts.

The first days of Spain's Port Nicholson hearings set the tone for the remaining three months. Clarke's 19 May 1842 cross-examination of the New Zealand Company's agent, Colonel William Wakefield, included a question about 'whether any Chiefs were told the [1839 company] payment was for anchorage only, and that when their names went to the Queen she might send them presents.' Wakefield denied this, and began his own cross-examination of Maori witnesses on the same day.<sup>86</sup> Halswell, acting as the company-appointed 'Protector of Aborigines,'<sup>87</sup> began questioning on 21 May, followed by Clarke, the official Sub-protector. Spain allowed Clarke's searching cross-examination, which clearly troubled Wakefield. Wakefield then challenged Spain to explain:

how the searching investigation going on into the Company's titles was compatible with his declaration that he had come<sup>88</sup> to carry out the agreement between the [British] Government and the Company . . .

Wakefield's challenge was, of course, consistent with the Colonial Office view of the essentially political purpose of Spain's commission to settle company claims as expeditiously as possible. On the other hand, Spain defended his judicial function, while Wakefield continued 'to urge upon Mr<sup>89</sup> Spain the mischievous consequences of a protracted examination of the natives.'

Not only did Spain persist with the cross-examination of Maori witnesses called by the company to support the 1839 transaction, he also called Maori witnesses who opposed it. During July and August he questioned these opponents about the customary ways of preventing one group from selling another's land. For example, he asked Mangatuku whether Te Puni or Te Wharekouri<sup>90</sup> had any right to sell his land at the village of Pipitea. Mangatuku answered: no. When Spain asked Te Puni on 7 July whether he and Te Wharepouri 'had a right to sell' the villages of Te Aro, Kumutoto, Pipitea, and Ngauranga<sup>91</sup> 'without the consent of the people of those tribes,' Te Puni answered: yes.

Unfortunately, after a rigorous examination of Maori evidence for three months in mid-1842, Spain transformed his activities into what Moore described as 'an Office-like purchase negotiation' for the following six months. He evidently completely misjudged the possible length and costs of such a thorough investigation. Consequently, he told Hobson that:

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85. Ibid, p 181

86. Ibid, pp 186–187. Spain called and questioned Wi Tako on 20 May. Ibid, pp 191–193.

87. Ibid, pp 195–200

88. Wakefield journal (21 May 1842), Wai 145 rod, doc a29, p 325; quoted in *ibid*, p 202

89. Wakefield to NZC Directors, 30 May 1842, Wai 145 rod, doc a29, p 645; quoted in *ibid*, pp 237–238

90. Ibid, pp 247–248

91. Ibid, p 258

Unless powers are vested in me to act as an arbitrator, in awarding compensation where certain principal native chiefs have joined in sales, but other natives, who held lands for cultivation within the boundaries conveyed, have not done so, I see little prospect of settling the question.

Spain therefore called upon Hobson<sup>93</sup> to empower him to arbitrate in the interests of both Maori and Europeans. The switch from investigation to arbitration, Moore contended, abbreviated the enquiry, restricted Maori participation in it,<sup>94</sup> and obligated the sub-protector to ensure the alienation of their interests. Moore concluded that Spain's investigation and switch to arbitration in late 1842 appeared to have been consistent with the Crown's long-term goal which he believed was the complete 'extinguishment of the Maori interests in the lands the company had sold to colonists.'<sup>95</sup> None the less, the significance of Spain's investigation for this study appears to be that it shows that the Land Claims Commissions elsewhere (and later) could have attempted a rigorous examination of Maori evidence had they been adequately resourced. Even though Spain suspended this kind of investigation after only three months in 1842, he showed what was possible if the commissioner chose to investigate both sides of the story with sufficient determination.

## **2.11 CLARKE'S CONCEPTION OF 'NATIVE TITLE'**

Despite the rigour of Spain's brief 1842 investigation of Maori witnesses on company transactions, neither he nor his sub-protector, George Clarke jr, appeared to have a clear conception of Maori interests in land and other resources. Clarke undoubtedly shared both his father's thinking and imperial conceptions of what constituted 'native title.' Although Clarke snr later took issue with the Crown's presumptive rights, while Protector of Aborigines he had to abide by imperial policy on this subject. In early 1841 when Russell instructed him (through Hobson) and the Surveyor General to identify the land 'that the natives should permanently retain', this implied that they should retain only those areas which they cultivated and resided upon,<sup>96</sup> and that the remaining unoccupied areas should go to the Crown. Clarke's attempts to carry out these instructions were notably unsuccessful during 1841 and 1842, when he also functioned as the Crown's chief land purchase agent. During these years he attempted Crown purchases in unsurveyed areas such as Mangonui, Mahurangi and Waitemata which were littered with old land claims and overlapping Maori interests. He later defined the largely abortive 1840–1841 Mangonui purchases as transferring to the Crown '(not the land, but) all the remaining interests of each chief in the disputed territory'.<sup>97</sup>

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92. Spain to Hobson, 16 September 1842, Wai 145 rod, doc a31, pp 178–179; quoted in *ibid*, p 280

93. *Ibid*, pp 279–280

94. *Ibid*, pp 284, 314

95. *Ibid*, p 338

96. Russell to Hobson, 28 January 1841, BPP, 1841 (311), pp 51–52

97. Clarke to Colonial Secretary, 1 September 1845, BPP, 1846 (337), p 123

Godfrey later complained to him that such an arrangement made his subsequent investigation of Pakeha claims difficult (to say the least), but Clarke was acknowledging the existence of multiple Maori interests in the same land. When the Mangonui and Wairau situations exploded into violence in 1843, Clarke became more aware of the need to articulate a clearer conception of ‘native title.’

In the aftermath of these conflicts, Clarke proposed a New Zealand Domesday Book in which he would both list and map areas of Maori land outside Crown purchases and Pakeha claims in accordance with Russell’s 1841 instructions. He declared that ‘native title’ was founded not upon conquest but ‘upon occupancy and the subjugation of the Land’. He saw this complete catalogue as something ‘from which all disputes might thenceforth be settled . . . [in] Native Courts’.<sup>98</sup> Later in 1843, Clarke reported that the complexities inherent in Maori multiple interests in land shackled all efforts to purchase large areas. He believed that Maori, even though they were able to sell small areas, encountered insurmountable obstacles. In his words:

in attempting to dispose of large tracts . . . [Maori] are certain either to injure themselves or come into collision with others . . . The natives are not only not willing, but cannot by any means be induced to part with their paternal possessions, which are generally the best lands . . .<sup>99</sup>

Although Clarke had come to an appreciation of the complexity of ‘native title,’ he did not appear to apply his understanding of the subject to Pakeha claims, including his own. In mid-1845 during the House of Commons debate upon the findings of its New Zealand committee investigation, the leading Colonial Reformer, Charles Buller, launched a withering personal attack on Clarke, and on his conception of ‘native title.’ He denounced Clarke as a land jobber masquerading as a protector of Maori interests. He ridiculed the idea that ‘cannibal . . . savages’ could transfer title to land in pre-Treaty transactions. These transactions, upon which Clarke based his private claims, lacked ‘the first requisite of all contracts, that of being understood by both parties to it.’<sup>100</sup> Buller described Clarke’s conception of ‘native title’ contained in his *Domesday Book* proposal as nothing but a set of:

monstrous fictions, which missionaries have invented for the sordid purpose of making out that the natives possessed and could convey to them a freehold tenure in their land. It can be of no advantage to the native race of New Zealand that we should compliment them by misunderstanding their social state.<sup>101</sup>

Buller’s rejection of Clarke’s approach, and the minimal resources available to colonial officials to either define Maori interests or assist commissioners,

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98. Clarke to Colonial Secretary, 1 June 1843, encl in FitzRoy to Stanley, 20 August 1845, BPP, 1846 (337), pp 109–114

99. Clarke to Colonial Secretary, 17 October, 1 November 1843, co 209/33, pp 356–360

100. BPD, 17 June 1845, vol 81, cols 674, 686, 688. Charles Buller, together with Gibbon Wakefield, helped Lord Durham produce his famous report on colonial self-government in 1839. W David McIntyre, *Colonies into Commonwealth* London, Blandford Press, 1966, pp 35–36, 46.

101. BPD, cols 673–675

compounded the problems FitzRoy faced when he arrived in New Zealand in late 1843. Just prior to his arrival, Acting-Governor Shortland informed London that Crown land policies:

have been drawn up on the assumption that the Natives have alienated vast tracts of land and that the Crown is consequently in possession,<sup>102</sup> through the land claims and other sources, of considerable disposable Demesne.

On the basis of commissioners' reports, Shortland rejected this assumption and he deplored how the lack of a disposable public domain crippled colonial administration.

## **2.12 FITZROY'S INTERVENTION**

By the time FitzRoy arrived in the virtually bankrupt colony, Godfrey and Richmond had considered over 1000 claims. During 1843 and 1844, according to Armstrong, they recommended grants in 490 cases (about 46 percent of the total), they recommended 'no grant' in 165 cases (15 percent) and they did not investigate 241 (just under 23 percent) in which the claimants failed to appear. Of the 165 cases where commissioners recommended 'no grant', Armstrong estimated that 'Maori opposition' featured in 30 of these claims.<sup>103</sup>

Our scrutiny of the source of these statistics, the 1849 *New Ulster Gazette*, reveals a much less tidy picture than that which Armstrong reported. Fewer than 30 cases of 'Maori opposition' resulted in 'no grant' recommendations. Altogether 14 such cases appeared to cause such recommendations. On the other hand, FitzRoy intervened to ensure that a further seven claimants received either grants or scrip, in spite of recorded Maori opposition.<sup>104</sup> Several other land claim returns published in the 1849 *Gazette* reveal further anomalies. FitzRoy appointed another commissioner, R A Fitzgerald, to revise Godfrey and Richmond's recommendations. Fitzgerald altered 99 out of 655 original reports 'without having heard the case'. Partly on the basis of these revised recommendations, FitzRoy issued 12 grants in spite of original recommendations for 'no grant.'<sup>105</sup> Finally, only 42 out of the 230 grants issued by FitzRoy were either surveyed, or required no survey (as in the case of grants identical to islands). In 1849, as a result, the Crown described 81 percent of FitzRoy's grants<sup>106</sup> as lacking sufficient 'description of the specific portions of the land conveyed'.

FitzRoy intervened in this chaotic fashion in an attempt to speed up the process of allowing claimants to obtain Crown grants. He began by waiving survey

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102. Shortland to Stanley, 30 October 1843, g25/1

103. Armstrong, pp 191–192. He added that commissioners failed to investigate 66 claims 'for unknown reason,' and a balance of 44 appear to be Hokianga and Mangonui 'scrip claims.'

104. 'Return [no 1] showing the whole of the Cases heard by the Original Commissioners . . .', NUG, 1849

105. Return nos 2 and 3, NUG 1849

106. Return no 8, NUG 1849. The Privy Council described unsurveyed grants as 'void for uncertainty' in *Queen v Clarke*, 1851

requirements. Ligar reported that claimants lacked sufficient incentive to employ surveyors. They believed ‘that their titles to land, as derived from the natives, are equally as good as the title they would receive from the Crown.’ FitzRoy, therefore, announced that written boundary descriptions in grants would suffice to bring to an end ‘the long protracted subject of land claims’.<sup>107</sup>

Godfrey and Richmond had made all their recommendations in the expectation, required by section 9 of the 1841 Ordinance, that their written boundary descriptions (usually taken verbatim from deeds) would receive precise survey definition as a condition of the grant. In 1843 Godfrey and Richmond reported that:

owing to the inaccuracies of the description of the boundaries in the deeds exhibited to us, we have very seldom been able to point out, exactly, the actual situation and extent of the land claimed. The Native Sellers can alone shew the boundaries to the Surveyors.<sup>108</sup>

Godfrey alerted FitzRoy to the complications arising from unsurveyed grants in the Hauraki area where Maori disputes surfaced after his hearings. He admitted that during his hearings he was ‘very seldom’ able to get ‘an accurate description of the boundaries’ from Pakeha claimants. Should they receive grants:

with such boundaries as are simply defined in the Commissioner’s report, without a survey of them pointed out by the Natives and justified by the Protector of Aborigines of the districts, I fear that much confusion and opposition will arise hereafter; for we must expect that grants will be subdivided or disposed of to fresh settlers, and, if there are any such flaws in the original purchase, arising from unfulfilled promises [to Maori] or otherwise, payment will be instantly demanded from the new-comers, and should they refuse it they will be turned off the disputed ground quite as unceremoniously in the North as they have unfortunately been in the South [at Wairau?]. The class I speak of, the new derivative purchasers, being perfectly innocent of any error in the contract, and likely to consider a title springing from a Crown grant as an ample ground of pertinacious holding, either mischief will ensue to the claimant if the Natives be strong, or if they are weak or isolated the Natives will suffer injustice.

Godfrey applied the same criticism to FitzRoy’s ‘extension’ of his recommended grants for CMS and other favoured claimants (such as William Webster). He believed that these extended grants would almost invariably affect other Maori interests that he had tried to protect by limiting the area to be granted. He stated that he calculated recommended grant acreage not just on the basis of price paid, but also:

I have frequently deemed it necessary to regulate the amount of the grant recommended by the quantity of land which, making fair allowance for the claims of

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107. Executive Council minutes, 8 January, Legislative Council minutes, 9 January 1844, BPP, 1845 (247), pp 30, 96

108. Commissioners to Colonial Secretary, March 1843, olc 8/1, pp 61–62

opposing Native rights, it appeared probable to me that the sellers were clearly free to dispose of.<sup>109</sup>

After consulting Clarke, FitzRoy offered an astounding reply to Godfrey's concerns about the impact of unsurveyed boundaries and extended grants on the security of tenure. He maintained that unsurveyed grants did not necessarily undermine their validity, because the Crown was not required:

to maintain the correctness of the boundaries, or the extent of the lands granted – That for those who have made valid purchases, and have fairly satisfied all native claimants – such grants will be sufficient. For [those] who have *not* done so – it is neither *intended nor desired* that they should be sufficient . . . the Crown cannot grant that which it does not possess . . . if a valid and complete purchase has *not* been made – the Crown cannot give a title to the land. [Emphasis in original]<sup>110</sup>

In other words, FitzRoy offered to Pakeha claimants no legal safeguards from the very situation which Godfrey described as the most troublesome. In cases where Maori disputed boundaries after the commission hearings, FitzRoy was prepared to transfer responsibility for settling the dispute from the grantor (the Crown) to the grantee, despite the fact that the land may have been on sold to a settler who knew nothing of the original dispute. Further to this, Clarke made an even more astounding admission that despite the commission investigations:

all that has been ascertained is that various Europeans have made purchases from certain natives, but whether those natives had a right to sell or how that right was acquired, is still, *in the majority of cases*, quite a matter of doubt. [Emphasis added]<sup>111</sup>

The Protector of Aborigines appeared to be stating that 'in the majority of cases' the commissioners had failed to establish the Maori interests affected by Pakeha claims. Despite the 'special reports' on extinguishment his subordinates were supposed to have completed to assist commissioners in this matter, he concluded that Pakeha claims established no more than he had done with his 1840–1841 Mangonui purchases. His 1845 assessment of those two purchases was that they had purchased Maori claims, rather than land. In this, Clarke really admitted that neither commission investigations, nor his Crown purchases had succeeded in extinguishing all 'native title' within the purported purchase boundaries.<sup>112</sup> FitzRoy's chaotic legacy in the long, complicated story of Pakeha land claims was therefore bound to be a troublesome one.

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109. Godfrey to Colonial Secretary, 8 June 1844, *Epitome* b10–11; quoted in Armstrong, pp 187–188

110. FitzRoy to Colonial Secretary, 17 June 1844, ia 1/1844/1370; quoted in Armstrong, pp 189–190

111. Clarke report, 1 July 1845; quoted in Armstrong, pp 192–193

112. Clarke to Colonial Secretary, 1 September 1845, BPP, 1846 (337), p 123

## 2.13 GREY'S INTERVENTION

Upon replacing FitzRoy as Governor in late 1845, George Grey immediately launched an assault on both his native and land claims policies, and on his dependence upon a Protectorate department staffed largely with CMS affiliated people. In his famous 'blood and treasure' despatch of 25 June 1846, Grey argued that the missionary land claimants dominated Crown policy. He alleged that George Clarke snr and Henry Williams improperly influenced FitzRoy to extend their grants to 5500 and 11,000 acres respectively, and that Maori opposition to their extended grants led Heke, Kawiti and their followers to take up arms against the Crown. He concluded bitterly that the Crown had sacrificed blood and treasure to protect these self-interested Pakeha from the righteous wrath of Maori.<sup>113</sup>

FitzRoy defended his extended grants. He contended that Maori objected, not to his extension of missionary grants, but to their limitation to the statutory 2560 acres. FitzRoy believed that Maori sought to honour their original agreements with worthy claimants like Clarke and Williams. Above all, Maori resented the Crown's interference in their relationship with these claimants.<sup>114</sup> Grey countered with the argument, based on his reading of the pre-Treaty deeds, that:

It is by no means clear that they [Maori] understood that they gave an absolute title to the land such as the Crown title conveys . . .

Furthermore, Grey maintained that Maori continued to occupy areas within grant boundaries which, in any case, remained undefined in the absence of surveys.<sup>115</sup> To bolster his case against missionary claimants, Grey formed an alliance with George Augustus Selwyn, Bishop of New Zealand. Selwyn had his own political agenda. As early as 1843 he confidentially informed the CMS parent committee in London that extensive missionary land claims 'had a most injurious effect upon the minds of the Natives and the English Settlers'. He named 'Mr Fairburn's claim of 40,000 acres, Mr Taylor's of 50,000, Mr Clarke's, Mr Hamlin's, Mr H William's and others' as bringing the church into disrepute. He recognised that these missionary claimants were influential among Maori, but, he added, 'their own natives do not express their opinions to them as freely as they do to me.'<sup>116</sup> Selwyn protested FitzRoy's extension of the missionary grants in 1845, and in 1847 he won the parent committee's support for Grey's proposal to reduce them to the 2560 acre limit. With this support, Grey forced the claimants to either accept this reduction, or to face dismissal from the CMS. Grey told Selwyn that he would allow missionary claimants to save face with their Maori supporters by allowing them to 'voluntarily restore the surplus land [from the reduced grants] to the original native

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113. Grey to Gladstone, 25 June 1846, BPP, 1848 (1002), p 106

114. FitzRoy to Earl Grey 20 March 1847, BPP, 1847 (837), pp 73–78

115. Grey to Earl Grey, 2 August 1847, BPP, 1848 (1002), p 110. Some missionaries such as Clarke (who had a son trained as a surveyor) conducted surveys as a precautionary measure. Clarke Crown grant, 16 May 1844, olc 1/634.

116. Selwyn to CMS, 15 June 1843; quoted in Selwyn to Clarke, 1 September 1847, Selwyn papers, AIM. I am indebted to Richard Boast for this reference.

owners'.<sup>117</sup> When Selwyn put this same proposal to Clarke (Secretary for the CMS in New Zealand) two days later, he too emphasised that: 'The surplus land [is] to be restored to the original native owners.'<sup>118</sup>

At the very least, Grey insisted, the Crown should have reserved kainga and wahi tapu within these grants. In the case of the Williams Pakaraka grant, which included a kainga at Pouerua, Grey declared:

the Crown clearly recognised the native rights of property in this land . . . [The Crown] had no power without any regard to the claims of the natives to grant absolutely . . . to Archdeacon Williams that which in no respect belonged to the Crown.<sup>119</sup>

While Grey waged this battle to disempower missionary claimants, the imperial government gave his opponents powerful ammunition in the form of the 'wasteland' doctrine. Colonial Secretary Earl Grey (formerly chairman of the 1844 Commons New Zealand committee) announced this doctrine in his late 1846 Royal Instructions to Governor Grey. Although inconsistent with the terms of the Treaty of Waitangi, this doctrine underlay imperial policy throughout the 1840s. Gipps gave it expression with his 1840 pronouncement that Maori exercised only 'qualified sovereignty' because they failed to govern themselves in the European fashion, and they possessed no recognisable property without having 'subdued the soil.'<sup>120</sup> Earl Grey cited an amateur ethnologist, Dr Arnold, as the source of these assumptions. He asserted that only by continuous cultivation and occupation could Maori exercise property rights. The areas which they failed to use in this way he defined as wasteland, which should become the Crown's disposable domain.<sup>121</sup>

The storm of protest this doctrine provoked from defenders of the Treaty, such as Chief Justice William Martin, Bishop Selwyn, Te Wherowhero and the London-based Aborigines Protection Society, forced Earl Grey to adjust his instructions to include the words that the Crown would 'scrupulously and religiously' honour the Treaty.<sup>122</sup> To contain the damage to the Crown's reputation among Maori, Governor Grey sent military and naval envoys all over the country in late 1847 to persuade them that the Crown had no intention of confiscating wasteland.<sup>123</sup> Grey's Private Secretary, Captain Nugent, assured Panakareao in Kaitaia that the Crown would not dispossess him, but:

with respect to the missionaries, that it was in contemplation to take away a portion of land from individuals who had procured . . . larger quantities than they could use, to the exclusion of other Europeans, and reserve the portion taken away for the use of the natives.<sup>124</sup>

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117. Grey to Selwyn, 30 August 1847, encl in Grey to Earl Grey, 1 September 1847, BPP, 1848 (1002), pp 118–119

118. Selwyn to Clarke, 1 September 1847, Selwyn papers, AIM

119. Grey to Earl Grey, 10 February 1849, BPP, 1849 (1120), pp 73–74

120. Gipps speech, 9 July, encl in Gipps to Russell, 16 August 1840, BPP, 1841 (311), pp 62–68, 76–78

121. Royal Instructions encl in Earl Grey to Grey, 23 December 1846, BPP, 1846 (763), pp 68–71

122. Earl Grey to Grey, 3 May 1848, BPP, 1848 (1002), p 144

123. Sotheby to Maxwell, 31 August 1847, BPP, 1848 (899), pp 21–22

When the Kaitaia missionaries reported this to Henry Williams he immediately informed Grey that Maori rejected his vile insinuations. According to Williams, Maori trusted missionaries to deal honestly with them, but they distrusted the Crown which attempted to dispossess them using an imperial doctrine which violated the Treaty of Waitangi.<sup>125</sup>

Indeed, Henry Williams successfully rallied Maori support to his cause. In 1848 he had leading Waitangi and Pakaraka chiefs Te Kemara and Te Tao sign what amounted to affidavits in which they swore to have willingly ‘disposed of’ (i tukua) land Williams claimed at Pakaraka. When Williams asked them whether they wished the land returned, as Grey alleged, they answered:

He teka rahoki na te Wiremu tana wahi matou na matou wahi.

No indeed, Williams’ portion belongs to him and our portion belongs to us.<sup>126</sup>

Williams recorded the same sort of Maori declaration of support headed by Tamati Waka Nene in the case of Clarke’s Whakanekeneke claim (634). In the margin of Nene’s statement he wrote:

By the following statements recently made by Chiefs who sold land to the Mission families – Judgement may be formed as to the correctness of His Excellency’s communication ‘That the Missionaries have illegally and unjustly deprived the natives of land which they are entitled to . . . [are]<sup>127</sup> opposed to the rights of the natives . . . [and have] wrested [land] from the natives.’

In an unpublished manuscript now among the Williams family private papers, Henry Williams linked his extensive claims to the protective intent of a series of CMS trust deeds presented to George Clarke in his role as protector in 1840. Williams maintained that the CMS farm at Waimate, for example:

was formed for the sole benefit of the Natives to show them what could be accomplished by a steady and scientific mode of agriculture.

Maori were ‘repeatedly invited’ to live on CMS land at both Waimate and Paihia. None residing on CMS land had ‘ever been disturbed’. He referred to the fact that:

Many Natives were residing upon such land near the Waitangi [Haruru] Falls at the time of the [1845–1846] disturbance.<sup>128</sup>

Williams stressed that during the Northern War, Maori did not retaliate against missionary property. Since the war, he wrote, Maori had continued to offer the Crown land for purchase without becoming landless. He believed that Maori

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124. Nugent to Colonial Secretary, 2 January 1848, BPP, 1848 (1002), pp 99–100

125. Williams to Colonial Secretary, 14 February 1848, BPP, 1849 (1120), pp 5–6, 9–11

126. Williams provided the English translation. ‘Questions proposed to Two Chiefs of the Bay of Islands with the answers’, 23 August 1848, Williams papers, 73, 83 AIM.

127. Williams marginal note on Tamati Waka Nene’s statement, 10 Feb 1848, Williams papers 83, AIM

128. Land Purchases nd, Williams papers 95, AIM

trusted missionaries who had their welfare at heart (especially in training them in scientific agriculture and animal husbandry). Finally, Williams referred to his Pakaraka claim. He stated that ‘no disturbance’ between Maori and missionary families had occurred over this land.<sup>129</sup>

The missionary defence of their land claims simply motivated Grey to convert his political attack on their extended and largely unsurveyed grants into a legal one. In 1847 he informed the CMS that his objection to the missionary grants stemmed from the fact that they included ‘lands which the Natives may now justly claim, or which may be required for the use of the Natives’.<sup>130</sup> Grey’s legal attack, however, focused not on outcomes unjust to Maori, but on the irregular procedures followed by FitzRoy. Attorney-General William Swainson brought a civil case against the legality of Clarke’s Whakanekeneke grant on the basis of the contention that FitzRoy’s decision to extend it from 2500 to 4000 acres was contrary to the terms of the operative 1841 Ordinance. The New Zealand Supreme Court, however, rejected the Crown’s contention that this Ordinance required the Governor to abide by the recommendation of two commissioners who had heard the claim together. The court believed the Ordinance gave the Governor sufficient discretion to act as he did. Accordingly, in 1849 Chief Justice Martin upheld the legal validity of Clarke’s grant.<sup>131</sup> The Judicial Committee of the Privy Council overturned this judgement two years later with respect to the question of whether FitzRoy possessed, ‘under his general authority’ not prescribed by statute, the prerogative power ‘as relates to the making of grants of waste lands’. It found that FitzRoy could not claim authority from the 1842 Ordinance to grant more than 2560 acres since a disallowed colonial Ordinance ‘never had the effect of law,’ and the 1841 Ordinance required his grants to be based on the appropriate commission recommendations and Executive Council ratification.<sup>132</sup>

Although Grey successfully appealed the case to the Privy Council, his 1849 ‘Quieting Titles Ordinance’ appeared to concede the point. His new Ordinance sought to remove the stigma of legal defects from all grants, provided they were retrospectively surveyed and certified as to the ‘full’ extinguishment of ‘native title.’<sup>133</sup> In presenting the Crown’s case for providing grantees with the necessary security, Swainson reminded the Legislative Council of the ‘defects and irregularities’ afflicting existing grants. He pointed out that the law was the source of some of these defects, because it ‘did not require that the Commissioners should ascertain that the land had been purchased from the true native owners.’ It required commissioners to report ‘only that the claimants made a bona fide purchase from

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129. Ibid. Philippa Wyatt, a Muriwhenua claimant researcher, produced evidence that Taiamai Maori indeed disputed part of the Williams Pakaraka claim. ‘Issues arising from . . . [Crown historical evidence] in reference to Pre-Treaty Land Transactions’ Wai 45, rod, doc 16, pp 31–32

130. Grey to CMS, 6 August 1847, Williams CMS corres, vol 2, pp 4–5, AIM

131. Grey to Earl Grey, 10 February 1849, BPP, 1849 (1120), pp 72–84; Supreme Court judgment, 16 July 1849, BPP, 1849 (1280), pp 138–139

132. *Queen v Clarke* 1849, 1851, vii, in Moore, *Crown Demesne*, pp 77–84; Privy Council order, 25 June 1851, olc 1/634

133. New Ulster Quieting Titles Ordinance, 25 August 1849, BPP, 1849 (1280), pp 68–70

certain native chiefs'. Consequently, the Crown granted not 'an absolute title as against all the world, but only against the Crown itself'. He concluded that in cases where:

it should subsequently be found that the natives . . . had not the right to sell it, the true owner would be entitled to the aid of the Crown for the purpose of recovering the land which the Crown, having no title to it, had wrongfully disposed of.<sup>134</sup>

While the 1849 Ordinance appeared to provide a means with which the Crown could fulfil its Waitangi promise to return to Maori 'lands unjustly held,' to our knowledge, evidence of such restitution has yet to be presented to the Waitangi Tribunal. To begin with, the investigation process alluded to in the Ordinance, instead of requiring the Crown or grantees to prove they had satisfied all legitimate Maori interests in the land, required Maori to prove their 'title' before the Supreme Court within three years. On Maori access to this and other courts, Attorney-General Swainson commented a decade later:

Our Courts of Law, it is true, were open to all, without distinction of race; but what remedy was practically open to the New Zealander? He was unacquainted with our mode of procedure, living, it might be, at a distance of fifty miles from any of our settlements; unable to procure the attendance of witnesses, and without the means of paying the fees of Court.<sup>135</sup>

When the 1856 Parliamentary Select Committee on Old Land Claims came to sum up the effects of Grey's intervention, it concluded that less than 20 grantees had availed themselves of the provisions of the 1849 Ordinance. The committee consequently described it as 'inoperative,' partly because most claimants were ignorant 'of its provisions,' but mainly because they clung to a belief 'that their grants were good, and would ultimately be recognised'.<sup>136</sup> If settlers were ignorant of the provisions of the Ordinance, how could Maori be expected to avail themselves of its protective provisions?

## **2.14 THE LAND CLAIMS SETTLEMENT ACT 1856**

The 1856 select committee reserved its most scathing observations for FitzRoy's intervention. It reported how his grants were 'full of defects'. The combined effect of FitzRoy and Grey's intervention was:

Some of the grantees are in possession of the lands granted; but a greater part of those claimed are unoccupied by anyone. Some portions have been resumed by the natives, and some where the native title has [previously] been extinguished . . . have been considered as Crown Lands . . . [usually after making] the natives some

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134. Crown Titles Bill, Second Reading nd, BPP, 1849 (1280), pp 70–73

135. William Swainson, *New Zealand and its Colonisation*, London, Smith, Elder and Co, 1859, pp 176–177

136. Select committee report, 16 July 1856, BPP, 1860 (2747), p 350

additional payment. Still, in a great number of cases no possession has been obtained by anyone; the natives disputing the ownership of the land in the absence of the claimants, or the insecurity of the titles . . . preventing the latter from attempting to enforce their supposed rights.<sup>137</sup>

The resultant Land Claims Settlement Act of the same year attempted to do what the 1849 Ordinance had failed to do: to give Crown grants full cartographic definition and legal validity. Significantly, the full title of the Act was to ‘provide for the full settlement of Claims arising out of dealings with the Aborigines of New Zealand.’ The preamble referred to the need for final settlement of ‘disputed grants.’ It gave ‘Commissioners’ full power to set their own procedures, and provided for appeal to the Supreme Court. By section 15(2), the Act severely limited the commissioners’ scope for investigation into any claim previously heard. It forbade commissioners from investigating any claims which ‘shall have been heard and allowed wholly or in part, and in respect of which that claimant shall have accepted . . . compensation . . . or a grant of land.’ Section 19 required claimants ‘to survey the whole of the area claimed in the original transaction’ and authorised commissioners to issue new grants only if the transaction was found to be ‘valid’. Only with ‘new’ claims (that is, those not heard during the 1840s) could commissioners enquire into original payment to Maori and equivalent acreage (under section 25). Sections 38 and 39 prohibited grants in areas ‘over which it shall not be proved to the satisfaction of the commissioner that the Native title is extinguished,’ (or which were required for public purposes) unless the Governor<sup>138</sup> authorised the claimant to pay the estimated cost of such extinguishment. Armstrong and Stirling, in their report to the Muriwhenua Tribunal, argued that the 1856 Act ‘was not primarily concerned with establishing whether or not a sale had taken place, as this had, in most cases, been ascertained by the first Land Claims Commissions.’<sup>139</sup> This view probably reflects the way that Francis Dillon Bell, the only commissioner appointed under the Act, believed he should operate, and it is certainly supported by section 15(2). None the less, this limitation begs a number of questions. Had, in fact, the 1840s commissions established the nature of pre-Treaty transactions, and did the 1856 Act allow Bell to assume that they had? The foregoing analysis of the operations of the Godfrey–Richmond and Spain Commissions answers the first question negatively. Both commissions assumed too much and investigated too little about the nature of, and the circumstances surrounding, the original pre-Treaty transactions to be able to ‘establish’ that, without a shadow of a doubt, a fully understood ‘sale had taken place.’ Secondly, the 1856 Act did not excuse Bell from investigating all original transactions. Section 2 contradicted section 15(2) in that it empowered him ‘to hear and determine all claims which might have been heard examined and reported on’ by previous commissions ‘and to examine and determine all questions relating to

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137. Select committee report, 16 July 1856, BPP, 1860 (2747), pp 349–350. See David Armstrong and Bruce Stirling, ‘Surplus Lands: Policy and Practice 1840–1950,’ Wai 45 rod, doc j2, p 53

138. Land Claims Settlement Act 1856, 19 and 20 v, no 32

139. Armstrong and Stirling, p 65

grants' recommended by them. Unlike previous commissions which could only recommend grants, Bell could determine and issue them (except in cases of new claims in which he could grant no more than 2560 acres). Finally, section 50 gave Bell maximum discretion to proceed 'not according to strict law, but according to equity and good conscience'. In other words, he could be flexible in pursuing the most appropriate form of inquiry.<sup>140</sup>

## **2.15 SURVEY REQUIREMENTS**

The fundamental difference between Bell's investigation and those which preceded it was the fact that he insisted upon the precise definition of both grants and (in most cases) claims by survey. The 1856 select committee proposed that:

Commissioners, attended by surveyors, should, under proper precautions, cause the boundaries of all lands claimed to be marked out in an unmistakable manner; because it is absolutely essential that in every case it is decisively ascertained whether any obstruction to the occupation of the land would be raised by native owners or claimants; and no mode can be devised of ascertaining this fact so effectual<sup>141</sup> as the positive attempts to define, on the ground itself, the blocks of land claimed.

Section 7 of the Act, which gave Bell maximum discretion in setting and changing his procedures, allowed him to be much more precise than previous commissioners. This was particularly with respect to the production of surveys required by sections 19, 22, 23, 40, and 44. Section 23(e) specified that claimants, not the Crown, would pay for surveyors certified by the commission to prepare the necessary plans in advance of hearings. While this was certainly an improvement over the 1840s experience, Bell chose to rely upon the services of numerous private surveyors, instead of employing<sup>142</sup> Crown surveyors in accordance with select committee recommendations. Bell finally laid down standard operating procedures for private surveyors on 8 September 1857. These procedures (or 'Rules') required surveyors to connect plans 'with some neighbouring survey' to allow for some form of cartographic consistency in the absence of scientifically established coordinates. Bell followed select committee recommendations by requiring surveyors to file 'a written description of the boundaries' with each plan, and also 'a certificate . . . that every boundary line . . . has been properly cut on the ground,<sup>143</sup> and that the survey has been completed without disturbance from the Natives.'

Despite Bell's attempt to ensure procedural consistency, most surveyors failed to follow all these detailed procedures. Only an estimated 10 percent of the 450 or so old land claim plans for Auckland and Hauraki still held by Land Information New

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140. Land Claims Settlement Act 1856, 19 and 20 v, no 32

141. Select committee report, 16 July 1856, BPP, 1860 (2747), p 353

142. The major exception to this rule was the Hokianga scrip surveys, examined below by Matthew Russell.

143. 'Rules Framed and established by the undersigned Land Claims Commissioner, Francis Dillon Bell, Esquire, in pursuance of the power vested in him in that behalf of the "Land Claims Settlement Act, 1856"', 8 September 1857, ma 91/9, exhibit b, pp 81–82

Zealand (LINZ) contain a surveyor's certificate declaring the lines to be 'properly cut . . . [or] completed without disturbance by the Natives'.<sup>144</sup> Maori verification of boundaries largely depended upon whether or not they consented to the surveyor's work, but without consistent certification in this regard, available survey information says virtually nothing about Maori consent.

As Bell reported in 1862, his 'liberal survey allowances' encouraged claimants to survey 'the whole exterior boundaries' (or the whole claimed area), rather than just what claimants expected the Crown would grant them. Otherwise, he maintained:

The residue would practically have reverted to the natives<sup>145</sup> and must at some time or other have been purchased again by the Government . . .

In other words, Bell used his survey procedures to ensure that claimants' surveys defined surplus land for the Crown, despite the fact that neither the Act, nor his 'Rules' said anything about the Crown's claim to surplus. Again, the Crown's presumptive rights involved were implied rather than spelled out.

Bell justified private surveys as a cost saving device (using the Hokianga scrip surveys as the exception to prove this point), and summed up his accomplishment thus:

Land which had been abandoned by the original purchasers has been surveyed and secured to public use. A country which six years ago was almost unknown except to a few people residing there, has been mapped and made available to settlement.<sup>146</sup>

Bell privately revealed his full rationale for preferring private surveys when two Kaipara claimants in January 1857 proposed their willingness to allow Crown surveyors to 'chain off' a large part of their claim. In response to this request, Bell stated his:

supposition . . . that while the natives will give possession to a claimant and [allow private] surveys to be made of all land they originally sold [to] him, they were likely to object to the Crown taking possession of any surplus land afterwards, if only the part to be granted to the claimants is surveyed by him.<sup>147</sup>

Bell evidently wished to employ private (rather than Crown) surveyors in order to conceal the process by which the Crown acquired surplus. He believed that if Maori suspected that the Crown would get the land, they would oppose the survey. He warned that if 'the natives afterwards object to surrendering the surplus to the Crown,' a new Crown purchase would be costly. Bell proposed, therefore, that he work closely with the District Land Purchase Commissioner to establish 'that the

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144. I have quantified certification by inspecting all Auckland and Hauraki original old plans on microfiche at LINZ's National Office in Wellington. Since approximately 75 percent of old land claims occurred in these districts, this certification percentage applies only to those districts.

145. Land Claims Commissioner's report, 8 July 1862, AJHR, 1862, d-10, p 5

146. Ibid, p 15

147. Bell memo, 10 January 1857, ma 91/18 (9), pp 7-8

natives admit the alienation of the whole claim'.<sup>148</sup> He informed John Rogan, the Kaipara District Land Purchase Commissioner, that Crown surveyors should only survey areas known to be within a defined Crown purchase area:

The principal thing to avoid in transactions of this kind with the natives, is the appearance of uncertainty on the part of Government, and after the land having twice been gone over by the surveyors, it does not seem desirable to delay the land purchasing operations for the chance of getting a little more as included in the original claim.<sup>149</sup>

In areas, such as Kaipara, where old land claim boundaries frequently overlapped Crown purchase boundaries, Bell wanted claimants to get as much as possible privately surveyed. This would essentially allow the Crown to get the land without having to pay for it,<sup>150</sup> on the assumption that the claimant had already paid for it.

## **2.16 BELL'S CREDENTIALS AND HEARINGS**

Unlike the 1840s commissions whose compliance with Treaty obligations depended in large part upon the performance of Clarke's protectorate department, Bell's Treaty obligations would be almost entirely his own personal responsibility. Only at Hokianga, where he employed John White to investigate scrip claims, would he be assisted by anyone with Clarke's credentials regarding Maori matters. Like Commissioners Godfrey and Richmond, Bell lacked legal training. According to William Oliver, his main training prior to 1856 had been as a New Zealand Company employee and as a Commissioner of Crown Lands during Grey's first administration.<sup>151</sup> Although Oliver noted that many of Bell's colleagues in Government appear to have found him less than trustworthy, he argued that his credentials were as an agent of colonisation, and that this,<sup>152</sup> rather than any personal failings, marked his performance as a judicial officer. Oliver assessed Bell's 'identification with the cause of colonisation' as the 'lens' through which he saw the evidence presented to him on Pakeha claims. In Oliver's judgement,<sup>153</sup> Bell 'should not be relied upon as an interpreter' of Maori interests. The way Bell dealt with Maori interests at his various hearings in the North can be gathered from a critical reading of his 'Notes of various Sittings of the Court'<sup>154</sup> which he recorded between September and October 1857.

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148. Ibid

149. Bell to Rogan, 17 December 1857, ma 91/18 (8), p 13

150. For more discussion of surveys and the overlapping Kaipara old land claims and Crown purchases, see chapter 4 in R Daamen, P Hamer and B Rigby, *Auckland*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), July 1996, pp 185–191

151. W H Oliver, 'The Crown and Muriwhenua Lands: An Overview,' Wai 45 rod, doc 17, pp 16–17, 20–21

152. Ibid, pp 17, 21

153. Ibid, p 21

154. 'Notes of various Sittings of the Court', 21 September–14 October 1857, olc 5/34

Particularly instructive are Bell's notes of what transpired at his Waimate hearing on 13 October 1857. On that day George Clarke sr, the former protector and defendant in *Queen v Clarke*, presented his Whakanekeneke and Waimate claims for investigation. Clarke, whose Whakanekeneke grant had been rendered null and void by the 1851 Privy Council decision, protested the provision of the 1856 Act requiring him to surrender his grants. Bell assured him:

that his deposit of the Grants in obedience to the law in no way precluded him from bringing his case by petition before the Legislature hereafter for any further grant of land.

When Bell later ordered new Whakanekeneke grants in this claim, he noted the 1851 Privy Council judgement voiding the original grant. He believed, however, that 'notwithstanding' the illegality of the original grant, it was 'sufficient that I should deal' with Clarke's claim only in terms of the 1856 Act. He therefore ordered a total of 6568 acres in grants to Clarke and two of his sons (in contrast to the 4000 originally granted).<sup>156</sup> Thus Bell was exceedingly generous towards Clarke.

He was less generous towards Maori. On the evening of the same day on which Bell heard Clarke's evidence regarding his claims, what appeared to be a large group of Maori arrived to state their case. According to Bell's notes (which are reproduced almost verbatim below) these Maori:

brought before the Commr. several disputes & claims – relative to Mr. Clarke's, Achd[eaco]n. Wm. Williams, and the Rev. Mr Davis' Lands. [space] At a little before midnight the Comr. gave his decision, overruling all their objections upon the proofs afforded by repeated references to the old papers in the several claims. [space] They were asked whether it had ever happened that Government had taken from them and given to a European, any land stated to be their property by the former Commissioners; and in what light they would regard the present Court, if at the request of a European made 13 years after the former adjudications any land reserved for them were taken away? Equally they could not expect that after such a lapse of time I should listen to the claims of Natives to get back portions of land awarded by [to?] Europeans by the former Commissioners; and that although I had in accordance with my invariable practise heard all they had to say, I should certainly not give back an area which had been validly sold by those who in those days were really empowered to sell, nor allow the claim of anyone who had failed to bring his objection forward at the original Inquiry. [space] . . . We then went fully into the question of excess [surplus land] as at Mangonui and Whangaroa.

At the conclusion they expressed themselves perfectly satisfied, & went up to Mr. Williams & Mr Davis & apologised for having raised the objections they did.<sup>157</sup>

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155. Notes, 13 October 1857, olc 5/34

156. Bell order, 15 April 1859, olc 1/634. In addition, the Crown acquired 1914 acres of surplus land, and the 411 acre Native reserve surveyed in 1844 remained within Clarke's grant.

157. Notes, 13 October 1857, olc 5/34

Although this meeting may not have been typical of Bell's encounters during his hearings, it is particularly revealing of his underlying assumptions. Firstly, his disposition towards Maori 'disputes & claims' stood in marked contrast to the highly sympathetic hearing he gave Clarke earlier that day. Secondly, he refrained from describing what their claims were. Apparently, he thought them unworthy of any detailed record. We do not know, for example, whether any affected the Clarke Whakanekeneke claim he had endorsed a few hours earlier, or whether Maori disputed only his smaller Waimate claim. When Bell 'overruled' all Maori objections on the basis of commission records from the 1840s, he revealed his assumption that his predecessors had satisfactorily investigated all Maori interests in claims. Bell based his refusal to even consider returning land 'which had been validly sold by those who . . . were really empowered to sell' on the belief that his predecessors investigated all Maori interests, and that they had invited Maori to appear to testify on all interests affected. Clarke, himself, in a July 1845 report, and Swainson in introducing the 1849 Ordinance, specifically rejected this notion. Previous commissioners investigated nothing more than 'various . . . purchases from certain natives.'<sup>158</sup> Commissioners failed to investigate all Maori interests affected by Pakeha claims, apparently because they were not required to by statute, and because they were inadequately resourced. Bell simply failed to properly assess the history of these claims simply because he, too, was not legally required to do so.

Bell's treatment of Maori at Waimate in October 1857 had its sequel with a Kororareka hearing six months later. On 23 March 1858 Tamati Waka Nene appeared before him to protest the boundaries of Clarke's Whakanekeneke claim which Bell had agreed to at Waimate. Apparently, Nene claimed that Clarke had improperly included a place called Potaetupuhi and another place near his eastern boundary in his claim. Nene, it seems, also protested the Crown's acquisition of almost 2000 acres of surplus land at Whakanekeneke. Bell's record of the hearing read:

After a full hearing & reading over the evidence & Deeds produced before the [1840s] investigating Commissioners, it appeared clear that there was no encroachment whatever on the original boundaries sold. Waka Nene's objection to Potaetupuhi and to the piece adjoining Mr Shepherd's claim at [no placename given] were overruled as well as all the other [unrecorded] objections. The Natives were then informed that under the law, as they had been repeatedly told, the Surplus Land reverted to the Crown: and that if they desired the Government to make any Reserve out of the same for their use, they must at once address the Governor, with whom the decision on such a request rested.<sup>159</sup>

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158. Clarke report, 1 July 1845; quoted in Armstrong, pp 192–193; Swainson on the 1849 Ordinance, BPP, 1849 (1280), pp 70–73

159. Nene attended the hearing with Pirika 'and a number of other Natives,' after having lodged a written protest with Bell. He apparently objected to aspects of Clarke's Waimate claim, as well as his Whakanekeneke boundaries. Nene to Bell, 1 October? 1857; Bell's notes, 12 October 1857, 19 March 1858; Bell's hearing record 23 March 1858, olc 1/634.

Once again, Bell's response to the protest was one of peremptory dismissal. Presumably, he took such action after due consideration, especially because Nene was a powerful political figure. None the less, Nene fared no better than the larger Maori group at Waimate (of which he may have even been a member). Bell recited the commission records once more, and nothing Nene could say either about boundaries or surplus land shook his faith in the legal soundness of recorded realities. Maori, of course, did not have the advantage of access to the official written records. In such a situation, while Bell 'heard' Maori objections, a critical reading of the available evidence suggests that their objections 'fell on deaf ears.'

## **2.17 THE 'MAORI SIDE OF THE STORY'**

The records of all the Land Claims Commissions prior to 1865 carry very little of the 'Maori side of the story.' Godfrey and Richmond recorded virtually nothing in the Maori language. Although Pakeha claimants presented a large number of Maori deeds in support of their claims, and normally produced two Maori witnesses to affirm their authenticity, most of the deeds appear to have been written by Pakeha, and almost all Maori affirmations were recorded in English. Even when, in the case of Spain's Commission, George Clarke jnr and his assistants recorded extensive Maori testimony, this became of almost academic interest when Spain switched from investigation to arbitration in September 1842.<sup>160</sup>

Even missionary land claimants presented Maori testimony in a way which raises questions about whether it was the 'Maori side of the story.' During Grey's attack on missionary claims, Clarke's son Henry questioned Nene about the 'validity' of the Whakanekeneke 'purchase.' Nene apparently sought Grey's assistance:

to allow natives to occupy certain lands in the Bay of Islands, which they claimed as their property, although it was asserted that this land was included within the boundaries of one of the Church Missionary land claimants . . .<sup>161</sup>

Henry Clarke's leading questions to Nene were clearly intended to refute Grey's allegations that the missionary claimants were responsible for dispossessing Maori. He recorded the following dialogue:

*I tika hokonga o Wakanekeneke. o te Puri. e taku matua e te Karaka?*

Was the purchase of Wakanekeneke. and te Puri. by my Father. by Te Karaka. correct?

*Ae. he pono. e tika ana*

Yes. truly. it was correct

*I whakaae koe. ki nga utu i hoatu mo taua whenua?*

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160. Moore, *Crown Demesne*, pp 284, 314

161. Grey to Earl Grey, 1 September 1847, BPP, 1848 (1002), p 117

*Old Land Claims*

Did you consent to the payment which was given for that piece of land?

*I whakaae ano a hau*

I did consent

*I hokoa taua whenua ra ma wai?*

For whom was that piece of land purchased?

*Mau ano taua whenua . . .*

For you. is that piece of land . . .

*Kahore koe. i korero atu ki te tangata kia whakahokia atu taua whenua?*

Have you not spoken to any person /expressing a desire/ that piece of land should be returned?

*Mau te whakaaro ki tetahi wahi maku*

It is for you to say if I shall have a portion.<sup>162</sup>

Henry Williams added a marginal note to this, and several other similar recorded Maori statements in support of missionary claimants. Williams stated that with this evidence observers could judge ‘the correctness’ or otherwise of Grey’s allegations that ‘the Missionaries have illegally and unjustly deprived the natives of land which they are entitled to’.<sup>163</sup>

The meanings of the Maori answers to Clarke’s leading questions were, however, much more ambiguous than the simple affirmation of absolute alienation sought. Williams sought the same simple answers to leading questions in his dialogue with Te Kemara (of Waitangi fame) and Te Tao. The main author of the Maori Treaty text recorded this dialogue as follows:

*Nawai Pakaraka me era atu wahi wenua i tukua ki a te Wiremu me ana tamariki i mua i te unga mai o te Kawana tuatahi [?]*

By whom was Pakaraka and other pieces of land. disposed of to Te Wiremu/Williams/ and his children. before the arrival of the First Governor [?]

*Na maua. na te Kamera raua ko te Tao. ne era atu hoki*

By us two. By Te Kamera and Te Tao. & by others

*He pono koia. i mea atu koutou ki a te Kawana nei ki ara atu tangata ranei. ko ta koutou hiahia. kia waka hokia atu. era wahi wenua ki a koutou [?]*

Is it true. that you told the Governor. or any other person that it was your desire that those pieces of land. should be returned to you – [?]

*He teka rahoki. na te Wiremu tana wahi. na matou na matou wahi*

No indeed – Williams[?] portion belongs to him and our portion belongs to us –<sup>164</sup>

The most that can be said about these statements is that they should not be classed as independently expressed views. While the Maori language component gives greater clarity to Maori views than that afforded by Commissioners Godfrey,

162. Tamati Waka Nene statement (recorded by H T Clarke), 10 February 1848, Williams papers 73, 83, AIM

163. Williams marginal note on Nene statement, 10 February 1848, Williams papers 83, AIM

164. Te Kemara and Te Tao statements, 23 August 1847, Williams papers 73, 83, AIM

Richmond and Bell, the simple meanings Clarke and Williams attributed to Maori cannot be accepted as ‘authentic’ Maori expressions. Winifred Bauer, a specialist on the structure of the Maori language, has analysed the closing sentence. She considers its Maori meanings to be ambiguous.<sup>165</sup>

In the same vein, George Clarke snr attributed to Maori a critique of the entire old land claim process. Writing as Bay of Islands civil commissioner in 1862 to the then Premier, William Fox, Clarke expressed his view that widespread Maori disaffection arose:

out of what appeared to them the injustice done to the early Settlers. ‘If’ they say ‘the Queen’s own children are by enactments to be deprived of Lands fairly purchased from us[,] what must we aliens expect from the Governmen . . . We thought NZD belonged to us, and we thought we had a right to sell what portion of our lands we pleased, and to whom we pleased; We did sell some to the Pakehas and we told the Commission we had received a fairer payment for it and were satisfied, and that the Pakeha had a valid claim when[,] Lo! and behold![,] their Government gives them only part of what we sold them; it cannot by any possibility belong to the Government for they were not the purchasers, if it does not belong to the Pakeha, it belongs to us’[;] then with immeasured indignation they explain ‘*E tika ana tenei mahi a Kawanatanga?*’<sup>166</sup> ‘Is this the justice of the Government [?]’ What confidence can we have in it [?]

Again, the indignation Clarke attributed to Maori would be more convincing if it came directly from them, in their own cause, rather than from him. Once more, a colonial official with his own agenda assumed that he could speak for Maori. Premier Fox apparently ignored Clarke’s self-serving appeal on behalf of Maori.

Bell’s way of recording Maori testimony in English at Waimate in October 1857 illustrates how one-sided the ‘official’ record could be. Not only was Bell unwilling (and perhaps unable) to record what Maori said in their own language, he also often recorded them as agreeing with him after he had convinced them of how wrong-headed their protests were. Since Maori had no opportunity to record ‘their side of the story’ before Bell, what reliance can be placed on the way he summed up these discussions? As Oliver put it with reference to Bell’s frequently expressed view that he convinced Maori to accede to the Crown’s right to acquire surplus land:

One would have more confidence in that conclusion, and in its acceptance by the Crown’s historians, if there was any corroborative evidence from a source less implicated in the outcome than the Commissioner himself.<sup>167</sup>

The plain fact of the matter is that, throughout the voluminous old land claim files (over a thousand of them) held in the National Archives in Wellington, Maori voices are seldom heard speaking for themselves. Most of the Maori language evidence was recorded by colonial officials or by commissioners with an agenda of

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165. Personal Communication, 30 July 1996

166. Clarke to Fox, 29 May 1862 (Private), olc 6/2

167. Oliver, p 19

Figure 2: Whakanekeneke and Pakaraka

their own. When Maori spoke to commissioners, officials recorded what they considered significant. When Maori wrote in their own language to officials or commissioners, this too was invariably refracted through an English language lens by the translation process. In other words, we simply do not know the Maori ‘side of the story’ well enough to say much about Maori views on the process of investigating old land claims.

## **2.18 THE CONSISTENCY TEST**

Since the colonial government invariably favoured settler interests over those of Maori, the most Maori could have expected from the Crown was consistency and clarity. But were Crown actions consistent and clear? Were they consistent with Treaty obligations, statute, or stated policy? And were Crown policies stated openly and clearly for the benefit of all?

To be consistent with Treaty obligations, Crown land claim policy should have given specific effect to promises made to Maori during the 1840 Treaty discussions. Indeed, the Crown legislated and implemented an inquiry into Pakeha claims, but neither the operative Acts nor Ordinances gave legal effect to the two major promises Crown officials made to Maori at the Waitangi and Kaitaia Treaty discussions. At Waitangi Hobson had promised that once a commission had enquired into claims, ‘lands unjustly held’ would be returned to Maori. Then at Kaitaia Shortland promised (in accordance with the letter of Normanby’s instructions) to respect Maori customary observances. The 1840 New South Wales Act, the 1841–1842 New Zealand Land Claims Ordinances, and the 1856 Land Claims Settlement Act all failed to give legal effect to these promises. The fact that investigation procedures established by statute eliminated a lot of so-called monster claims should not be seen as returning land to Maori. Such land (particularly in the South Island) remained Maori land; it had never been anything else.

Moore’s investigation of the Spain Commission shows how far short of Treaty expectations it fell. When the Colonial Office instructed Spain in 1841 that ‘the redress of past injustice to the natives is less the object of this commission than the prevention of future wrongs,’<sup>168</sup> it was acting contrary to the Crown’s obligations. The implications of Russell’s instructions to Spain was that he conduct a perfunctory inquiry with the main aim of giving effect to the Crown’s 1840 agreement to settle New Zealand Company claims as expeditiously as possible. In keeping with Russell’s essentially political purpose, he charged Spain with the duty to ‘determine’ claims. Since Hobson believed that this was at variance with the judicial functions required by both operative Ordinances, he insisted that while Spain might ‘determine’ (Russell’s term), as well as investigate claims, the issuance of grants would remain the Governor’s prerogative and would also depend upon proper surveys.<sup>169</sup> Thus there was a certain amount of inconsistency in the

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168. CO to Martin, 24 March 1841, ia 1/45/1247; in FitzRoy to Spain, 9 August 1845, ia 1/47/2117; quoted in Moore, *Crown Demesne*, p 167

way Spain drew contrasting instructions from two different masters (neither of whom referred explicitly to Treaty expectations). Colonial Secretary Russell defined his role as that of a servant of the Crown to give effect to its 1840 agreement with the company. On the other hand, Hobson instructed Spain to act in an essentially judicial capacity with the power to recommend, but not to award grants.

Hobson was also inconsistent in the degree of administrative support he was willing to offer Spain, which he was apparently unable to offer Godfrey and Richmond in the North. For example, he sent a survey party to accompany Spain to Wellington:

in order that you may be able to carry out that part of your instruction which regards<sup>170</sup> public reserves as well as the measurement and description of the Lands awarded.

Hobson instructed Spain to give preferential treatment to the company in recommending grants because, he stated, the company held ‘blocks of Land under their Charter from the Crown.’<sup>171</sup>

Hobson’s instructions also referred to how the Crown had ‘guaranteed’ both the ‘Town of Wellington and the shores of Port Nicholson’ to the company, ‘with the exception of native pahs cultivations and burying grounds.’ This, as Moore pointed out, implied that the company, not Maori, either already owned the area ‘or (more probably) must be enabled to own [it].’<sup>172</sup>

Despite Spain’s vigorous attempts to give effect to the 1840 agreement between the Crown and the company, in September 1843 he reported:

I am of the op[inion] 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 . . .<sup>173</sup>

Despite Spain’s strongly expressed reservations about the validity of the company’s claims, Lord Stanley authorised a settlement in mid-1843 ‘under the condition that the validity<sup>174</sup> of their purchases shall not be successfully impugned by other parties.’

Although Spain, to his credit, objected to the flaws in the original Port Nicholson transaction, he required Maori to ratify his subsequent settlement without sufficient consent. As Moore indicated, only 12 percent of Wellington’s adult male Maori population registered the formal consent to Spain’s 1844 settlement with the

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169. Shortland to Spain, 16, 30 March, ia 4/253, pp 6, 9; quoted in *ibid*, p 171

170. Shortland to Spain, 26 March 1842, *ibid* p 10; quoted in *ibid*, p 172

171. Instructions encl in Shortland to Spain, 30 March 1842, ia 4/253, pp 11–12; quoted in *ibid*, pp 172–173

172. Instructions encl in Shortland to Spain, 30 March 1842, ia 4/253, pp 11–12; quoted in *ibid*, pp 177–178

173. Spain to Shortland, 12 September 1843, Wai 145 rod, doc a31, p 350; quoted in *ibid*, pp 419–420

174. Stanley to FitzRoy, 26 June 1843, BPP, 1844 app 1, p 7; quoted in *ibid*, pp 431–432

company.<sup>175</sup> In sum, Spain's proceedings lacked the consistency and even-handedness so essential to ensuring a just outcome.

FitzRoy's intervention in 1844–1845 made inconsistency something that almost came to be expected of the Crown. His waiver of survey requirements made undefined grant, scrip and surplus land the norm for almost a decade. The 188 unsurveyed or 'floating' FitzRoy grants were not only, in Grey's words 'void on the ground of uncertainty,' but also virtually incomprehensible to settler and Maori alike.<sup>176</sup> Neither FitzRoy, nor his successors, gave either statutory authority or proper transparency to scrip and surplus land policies. FitzRoy announced publicly that surplus land would be held in trust for Maori in 1844, and Grey tried to force missionary claimants to return it to Maori in 1847. Both FitzRoy and Grey failed to act upon these stated intentions, and Bell's investigation after 1856 proved to be a determined effort to recover surplus for the Crown.<sup>177</sup>

Even George Clarke snr found the Crown's performance on old land claims to be fundamentally inconsistent with his view of justice. In his private 1862 letter to Premier Fox, the former Protector of Aborigines rejected not only land claims legislation, but also the unstated presumptive rights underlying all Crown actions. He believed that they had:

all been based on a rotten foundation and have proved a serious injury to the Colony as well as to the Settlers . . . [He firmly believed] that most of the Native jealousies and want of confidence in the Government have grown out of what appeared to them the injustice done to the early Settlers . . . A more fatal error was never committed by the Government than that of declaring and proclaiming all unoccupied lands in New Zealand and all lands purchased from the Natives before the Treaty of Waitangi, to be the Demesne lands of the Crown.<sup>178</sup>

Since Clarke here was pursuing his own self-interest, his words cannot be taken at face value. At the same time, he probably gave the Crown more credit than it deserved. While the Crown briefly asserted claims to 'wasteland' (unoccupied lands) and scrip/surplus, or 'Demesne lands,' it did not do so with the clarity or consistency necessary to allow Maori to know where they stood.

Oliver summed up the situation in presenting claimant evidence to the Muriwhenua Tribunal. In his professional opinion:

the Crown's policy was implemented in a contradictory, vacillating, dilatory and unintelligible manner. No effort was made to clarify it until the end of the 1850s, and only then in the course of Bell's hearings as he was putting it into effect. It was a lamentably deficient exercise in public relations which at least indicates a failure on the part of government to communicate their intentions to those who had some right to know what they were.<sup>179</sup>

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175. Ibid, pp 482–484, 532

176. Return no 8, nug 1849; Grey to Earl Grey, 1 September 1847, BPP, 1848 (1002), pp 117–118

177. The subject of scrip and surplus land will be discussed in greater detail in the following two sections.

178. Clarke to Fox, 29 May 1862 (Private), olc 6/2

The fact that the Crown failed to settle most claims prior to Bell's 1856–1862 commission was almost inevitably productive of confusion and inconsistency. Although Bell proclaimed that he had settled the vast majority of claims in 1862, he did so mainly by assuming that he need not reinvestigate the circumstances of the original transactions.

Bell was normally quick to dismiss Maori protests, but he spent a great deal of time calculating increases in grant acreage. Section 23(d) of the 1856 Act allowed him to increase the acreage of cancelled 1840s grants by no more than one-sixth. Section 44 prescribed an additional survey allowance equivalent to one acre for every 10 shillings paid to surveyors, and section 45 prescribed another allowance to defray commission fees. These additional allowances, however, should not have exceeded the one-sixth maximum increase set in section 23(d), since the 1856 select committee made the purpose of this section perfectly clear. That committee reported that:

new grants should not convey in any case more than one sixth more land than the amount the old grant declares the grantee to be entitled to. This sixth is given in order<sup>180</sup> to enable natural boundaries, where practicable, to be taken instead of survey lines.

This language was repeated in the crucial section 23(d) of the Act:

In no case shall any person be entitled to a new grant of more than the quantity expressed in the cancelled grant, except that the grant may be extended to one-sixth more than such expressed quantity.<sup>181</sup>

Instead of limiting grant acreage to this absolute maximum of one-sixth, Bell frequently added all the other allowances into his new grants. As a result, in Muriwhenua, for example, Bell increased the total grant acreage Godfrey recommended of 10,046 acres to 22,703 acres. Muriwhenua<sup>182</sup> claimant researcher, Maurice Alemann, termed this Bell's 'magic arithmetic.' This arithmetical increase in grant acreage was apparently in contravention of the Act.

Despite Bell's contention that he had closed the book on the subject, disputes concerning Pakeha claims continued to arise after 1862, particularly over surplus land. The 1873 Native Land Act contained a provision to enable the Native Land Court to settle Pakeha claims, and a series of twentieth-century commissions (including the Sim and Myers Commissions) attempted to deal with unresolved aspects of these claims. The very fact that the Waitangi Tribunal has heard voluminous evidence on this subject, particularly in the Muriwhenua and Wellington Tenths claims, suggests that the Crown failed to treat the nineteenth century roots of the problem with sufficient consistency and even-handedness.

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179. Although he referred more specifically to surplus land policy in this section of his report, his criticism applies also to general land claims policies. Oliver, p 6

180. Select committee report, 16 July 1856, BPP, 1860 (2747), p 353

181. Land Claims Settlement Act 1856, 19 and 20 v, no 32

182. Maurice Alemann, 'Muriwhenua Land Claim: Pre-Treaty Transactions' Wai 45 rod, doc f11, pp 27–28, 32–33

## 2.19 SCRIP LAND

Scrip and surplus land were two by-products of the inconsistent way in which the Crown treated Pakeha claims. Both originated as policies without statutory authority, arising apparently as a sub-set of the Crown's presumptive rights, and were therefore never explicitly, or consistently, defined.

Scrip entered the glossary of claims terminology in late 1841 when Hobson announced that the urgent necessity to settle Pakeha claims required a radical streamlining of the commission's process. He proposed the concentration of settlement in defensible areas such as the Bay of Islands, Auckland and Wellington where claimants from remote areas would move in return for scrip equivalent to the value of grants recommended for their original claims.<sup>183</sup> Evidently, Hobson assumed that most of the outlying areas claimed by Pakeha would then become part of the public domain which could be disposed of to settlers later, when his government had expanded its authority to such areas. A storm of settler protest forced Hobson to remove the settlement concentration (and scrip exchange) provisions from his 1842 Land Claims Ordinance. None the less, Hobson's scrip exchange policy went into effect without statutory authority after his death.

The implementation of this policy has received virtually no attention from historians, and remains mysterious in many ways. Acting-Governor Shortland pursued a course of encouraging claimants to employ private surveyors, and to accept scrip offers, as a cost-cutting exercise. He believed that by concentrating settlement:

Land claimants . . . would be afforded an opportunity of obtaining property of immediately exchangeable value, and . . . the demesne lands of the Crown would be considerably augmented . . .

The Colonial Secretary's subsequent 'Notice to Land Claimants' offered scrip to those 'who may prefer land in the immediate vicinity of the settled districts'.<sup>184</sup>

The Colonial Secretary authorised further scrip exchanges in a proclamation of 6 September 1843. It stated simply that claimants for whom commissioners had recommended grants could accept scrip in exchange for these grants. They could then purchase land 'in the unoccupied portions of the district in which the Town of Auckland is situated' with this scrip.<sup>185</sup> Following yet another FitzRoy proclamation in March 1844, the Colonial Secretary laid down specific 'Terms and Conditions relative to the Exchange of Land' in September that year. This stated that scrip claimants should select land surveyed for them either 'on the River Tamaki' for those granted less than 50 acres, or 'in the District of Papakura and on

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183. Hobson's Address to the Legislative Council, 14 December 1841, BPP, 1841 (569), pp 198–199. This policy followed Russell's 17 April 1841 instructions to establish 'the general system of forming the settlers of each district into a regular community . . . along Company lines': Moore, *Crown Demesne*, p 168.

184. Executive Council minutes, 19 September 1842; Notice to land claimants, 27 September 1842, ma 91/9, exhibit b, pp 12–14, 14a–14b

185. 'Government Notice – Exchange of Land', 6 September 1843, *Epitome* b9

the Wairoa' for those entitled to more than 320 acres.<sup>186</sup> These 'country lands' were to be offered at public auction in December 1844.

A policy as poorly defined as scrip was almost bound to cause confusion in its application. As initially conceived, only claimants with properly investigated, valid claims were eligible for scrip offers. In the case of approximately 40 claims in the vicinity of Mangonui, however, claimants received such offers in the absence of an investigation. When Godfrey arrived at Mangonui in 1843, Panakareao disputed claims east of the township, and Pororua disputed those west of it. Fearing tribal war, Godfrey withdrew without conducting an investigation. A year later he attempted to remove all Pakeha from the disputed area by offering them scrip, though none of the claimants should have been eligible for grants. In making these irregular offers, Godfrey apparently sought to teach Maori a lesson. The removal of settlers from Mangonui, he wrote, was necessary:

to prevent discord between the Tribes . . . to induce them to settle similar disputes [in future] more amicably and with less annoyance to the Settlers.

Godfrey believed that the absence of Pakeha from their area for a number of years would make Mangonui Maori appreciate the value of their services. Only then could Pakeha 'take quiet possession . . . of the lands *alleged* to have been purchased [emphasis added].'<sup>187</sup> Godfrey, then, based his offers on alleged rather than properly investigated claims. His departure from standard operating procedure, however, went undetected by FitzRoy and his successors, by Bell, and even by the Myers Commission of the 1940s. They simply assumed that Godfrey investigated the Mangonui claims, and that he had verified the 'extinguishment of native title.' It was partly upon this false assumption that the Crown claimed title to approximately 20,000 acres<sup>188</sup> of 'scrip land' at Mangonui during the nineteenth and twentieth centuries.

A more fundamental problem than the miscarriage of the policy in areas such as Mangonui was the category itself, loaded as it was with unexamined assumptions. The term 'scrip land' is essentially problematic. By what right could the Crown make arrangements with one party to pre-Treaty transactions, without consulting Maori, and then claim title to the land vacated as a result? Mangonui Maori had some say in the process by simply refusing to allow some of 'their' Pakeha to accept scrip. None the less, the Crown failed to consult them, or to even inform them of how scrip exchanges affected their interests. At Hokianga (examined below by Matthew Russell) and in the Bay of Islands, Godfrey and Richmond based their scrip recommendations on investigated claims in which they made the usual grant recommendation. But even there, Maori were left in the dark. The Crown failed to survey 'scrip land' in the Hokianga area until the late 1850s, and

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186. 'Terms and Conditions relative to Exchange of Land', 26 September 1844; Governor's Proclamation, 26 March 1844, *Epitome* b9-10

187. Godfrey to Colonial Secretary, 3 February, 12 May 1844, olc 8/1, pp 80-81, 86-87

188. Rigby, 'A Question of Extinguishment', Wai 45 rod, doc f9, pp 56-59, 69-70

some Bay of Islands scrip areas such as Kapowai were not properly defined by survey until the 1890s.

At Kapowai, a peninsula on the southern side of the Waikare inlet, the Crown surveyed a 2170 acre ‘Small Grazing Run’ for Henry Lane out of scrip land. Lane reported to the Commissioner of Crown Lands in 1893 that he could assist the Crown in establishing its title because he was confident that he could identify ‘the old Natives who sold Whitlaws [Whytlaw’s] OLC now leased to me’.<sup>189</sup> The Maori people living at Waikare rejected the Crown’s claim. In a petition to Parliament they stated ‘we are quite sure that this land Kapo[w]ai throughout all its extent was never sold to the Europeans.’<sup>190</sup> Gerhard Mueller, the chief surveyor in Auckland, dismissed the Maori claim, because he was equally convinced that Kapowai:

was originally purchased by the Crown from Matthew Whytlaw for the sum of £2560 paid in scrip . . . I cannot see how any [Maori] claim can now be set up to this land as it has been Crown land since 1844 . . .

Parliament saw fit to recognise the depth of Maori grievances at Kapowai and elsewhere by appointing its own commissioner in 1907. He heard local Maori make impassioned statements, such as ‘Ever since I had breath this land has been known to be ours’. Consequently, he recommended the return of Kapowai. The Crown, however, ignored his recommendation. Only when a further commission heard the grievances once more in 1920 was the Crown willing to return the land. However, even in taking remedial action the Crown failed to acknowledge the source of the problem, that is, the opaque and inadequately documented scrip policies.<sup>192</sup>

Remarkably, during a succession of twentieth century commissions of inquiry into Maori grievances arising from scrip exchanges with settlers, the Crown’s officers still failed either to adequately explain the legal basis of the Crown’s scrip policy, or to distinguish it from the more familiar Crown policy regarding surplus land. Thus, in regard to Mangonui ‘scrip land’, the Myers Commission concluded:

The whole question could only be one of surplus lands, and, even if there was any surplus in this case, any rights of whatever kind the Maoris might have had therein<sup>193</sup> were extinguished by the [1840, 1841 and 1863] Crown purchases from the Maoris.

In repeatedly failing to distinguish scrip from surplus land (and in suggesting that subsequent Crown purchases ‘wiped the slate’), the Crown only compounded the confusion over the legal basis of its claims.

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189. Lane to CCL, 25 July 1893, baaz 1108 (Lands and Survey records), box 88, file 2173, NA, Auckland

190. Wiremu Te Teete petition nd, Lands and Survey records, file 2173, NA Auckland

191. Mueller to Surveyor-General, 28 July 1904, Lands and Survey records, file 2173, NA, Auckland. In another letter to the same person on the same day, Mueller rejected Maori claims to Opuā surplus land nearby in the same categorical way.

192. Daamen, Hamer and Rigby, pp 111–113

193. Surplus Lands [Myers] Commission report, 18 October 1848, AJHR, 1848, g-8, p 15. On the 1840–1841 Mangonui purchases, see ‘Clarke’s conception of Native Title’ above; and on the 1863 Mangonui purchase, see Rigby, ‘A Question of Extinguishment?’, pp 56–70.

## 2.20 SURPLUS LAND

Armstrong, Stirling and Oliver adequately summarised the origins of the Crown surplus land policy in their reports presented to the Muriwhenua Tribunal. Although the Crown had attempted to claim surplus land (the balance between a claimed and a granted area) out of William Fairburn's Tamaki claim in 1842, the policy lacked any sort of definition until Governor-designate FitzRoy demanded a suitable definition from Lord Stanley in mid-1843. Stanley saw surplus land as based on Crown presumptive rights. His position was that, in Oliver's words:

all land equitably purchased from Maori before 1840 lapsed to the Crown and so became its property. As a result of subsequent [commission] investigations, and in recognition of their interest in these lands, some of it was to be granted to the original [Pakeha] purchasers. Part was to be reserved to Maori, as required by the terms of the original transactions and in response to Maori requests. The balance [surplus] would become the property of the Crown and eventually available for sale and settlement. Thus apart from small reserves the land considered to have been equitably obtained would be assigned by the Crown either to the claimants or to itself.<sup>194</sup>

Significantly, Stanley described the Crown's legal position in hypothetical language, and gave FitzRoy the discretion to adapt it to local circumstances. FitzRoy confused the situation by his pronouncements upon his arrival in New Zealand. On several occasions, in late 1843 and early to mid-1844, he announced that the Crown would hold surplus land in trust for Maori rather than treating it as part of its disposable domain.<sup>195</sup>

Prior to FitzRoy's arrival, Shortland had questioned Surveyor-General Ligar on unsurveyed claims. Ligar calculated that since commissioners by then had recommended grants totalling 42,000 acres, and the unsurveyed area of 'the[se] original claims amounted to 192,000 acres; 150,000 acres will consequently remain demesne lands of the Crown' (emphasis added).<sup>196</sup> The *Gazette* notice appearing eight days later stated:

. . . Crown Grants will convey the number of acres, to which the Claimant shall be found entitled. Should the boundaries be found to contain a greater quantity of land than shall be contained in the Deed of Grant, *the excess will be resumed*. [Emphasis added]<sup>197</sup>

Although the Crown directed this notice of its intention to acquire surplus land to claimants rather than Maori, Muriwhenua Maori explicitly denied that the Crown had any rightful claim to the surplus in early 1843. As Commissioner Godfrey recorded it, they declared:

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194. Oliver, p 5

195. See, for example, FitzRoy's statement that surplus land should be held in trust 'for the benefit of the aborigines generally.' *Southern Cross*, 6 July 1844; quoted in Armstrong and Stirling, p 15

196. Executive Council minutes, 19 September 1842, ma 91/8 b, p 12

197. Notice to Land Claimants, 27 Sept 1842, ma 91/8 b, p 14a

1. That the sales of land around Kaitaia already made by Nopera [Panakareao] and his party to individuals should be acknowledged; *but that any surplus lands (ie., those the Government does not grant to the claimants) will be resumed by the chiefs who sold them . . .* [Emphasis added]<sup>198</sup>

This forthright declaration may have influenced FitzRoy to apparently reverse the Crown's position upon his arrival. Yet his pronouncements did not become policy. He merely delayed the implementation of the policy. Armstrong and Stirling pointed out that while the policy remained latent, even Pakeha claimants 'found it almost impossible to comprehend'.<sup>199</sup> By October 1844, FitzRoy decided not to assert the Crown's surplus land claim within the boundaries of the Fairburn Tamaki claim in the face of concerted Maori opposition. He reported to Stanley that such an assertion 'would have injured the character of the queen's government very seriously, if not irretrievably.' On surplus land, he regretted that it was 'quite impossible to make them [Maori] comprehend our strictly legal view'.<sup>200</sup>

In his last days as Protector of Aborigines, George Clarke reported Maori disenchantment with Crown actions regarding old land claims. He reported to Governor Grey that Maori had become convinced that the Crown set up commissions as a quasi-judicial disguise to allow it to dispossess Maori. He wrote:

This opinion was still further strengthened when it became known that the surplus land confiscated under the sanction of the Land Claims Ordinance were to be appropriated and resold for the benefit of the government and not restored to the natives, as the original proprietors, as in the case of Mr Fairburn.<sup>201</sup>

Grey, of course, hit back at Clarke by launching his attack on missionary land claimants with his 'blood and treasure' despatch three months later. Grey also won Selwyn's support in his campaign to reduce missionary grants to the statutory maximum, a campaign which further highlighted the surplus land issue. If the Crown reduced all grants to 2560 acres, what then would happen to the increased area of surplus land? Grey and Selwyn had the same answer: missionaries would 'voluntarily restore the surplus land to the original native owners'.<sup>202</sup> When the missionaries refused to comply with this request, Grey took Clarke to court and prevailed upon the CMS to dismiss Henry Williams. But he failed to return surplus land to Maori.

According to Armstrong and Stirling, the Crown failed to implement its surplus land policy during the decade after FitzRoy and Grey's intervention, 'either

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198. Godfrey to Colonial Secretary, 10 February 1843, *Epitome*, b7

199. Armstrong and Stirling, p 19. They also pointed to how, in May 1843 (even before Stanley formulated the Crown's position), the editor of the *Southern Cross* lampooned the justification of its claim to surplus land: pp 27–29.

200. FitzRoy to Stanley, 15 October 1844, BPP, 1845 (369), pp 28–30; quoted in Armstrong and Stirling, pp 26–27. Brodie testified to the House of Commons New Zealand Committee on this Maori opposition to Crown acquisition of surplus land at Tamaki: BPP, 1844 (556), p 53.

201. Clarke to Grey, 30 March 1846, co 209/44, pp 89ff. I am indebted to Duncan Moore for this reference.

202. Grey to Selwyn, 30 August 1847, BPP, 1848 (1002), pp 118–119; Selwyn to Clarke, 1 September 1847, Selwyn papers, AIM

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because it lacked the resources to define its interests; or because the land was remote and was of little commercial importance.’<sup>203</sup> It was not until Bell introduced his September 1857 instructions for private surveyors that the Crown defined surplus on the ground. But even though Bell was to urge surveyors to define surplus land, his rule number 17 did not do so explicitly, and it did not require them to do so in all cases. It stated:

As a general rule claimants will be required to survey the whole exterior boundary of their claim as the same was originally acquired from the Natives; but this will not be demanded in cases where the extent of the claim greatly exceeds the maximum quantity to be granted.<sup>204</sup>

Sections 44 and 46 of the Act which provided generous survey allowances gave claimants ample incentive to ‘survey the whole exterior boundary of their claim’ (including the surplus).<sup>205</sup> This gave claimants a tangible incentive to ensure that surplus land would not ‘revert’ to Maori. In his words:

The result has been not only to produce a large surplus of land which, under the operation of the existing Acts, goes to the Crown; but to connect the claims together, and lay them down on a map. Under the arrangements which I directed to be adopted by the surveyors . . . , I was enabled, as the original boundaries of a great number of the Claims were coterminous, to compile a map of the whole country about the Bay of Islands and Mangonui, showing the Government purchases there as well as the Land Claims; and a connected map now exists of all that part of the Province of Auckland which lies between the Waikato River and the North Cape.<sup>206</sup>

A remarkable feature of Bell’s 1862 report was how little attention he devoted to the almost 300,000 acres granted to claimants, and how much was devoted to surplus land and unsettled claims. Only two short paragraphs are devoted to grants, while almost a page of explanation and a two-page return refer to surplus land claimed by the Crown.<sup>207</sup> He explained that he had not pressed the Crown’s rights to surplus land in all cases. He regretted that his report took:

no account of any claims which lapsed or were not referred to any Commissioner, with the exception of those cases where the land was given up to myself by the natives. There are many cases where (so far as I can form a judgement) bona fide purchases were made . . . and *if the state of the country had permitted I should have taken measures to recover as much as the natives would agree to give up of this land for the Crown.* [Emphasis added]<sup>208</sup>

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203. Armstrong and Stirling, p 39

204. Bell’s ‘Rules . . . in pursuance of . . . the “Land Claims Settlement Act 1856”’, 8 September 1857, ma 91/9, exhibit b, pp 81–82

205. Land Claims Settlement Act 1856, 19 and 20 v, no 32

206. Bell report, 8 July 1862, AJHR, 1862, d-10, p 5. This map appears to be that held today at LINZ, Auckland, titled ‘Auckland Roll plan 16’. See Daamen, Hamer and Rigby, pp 125–126.

207. Ibid, pp 6–7, 8–9, 21–22

208. Ibid, p 8

Evidently, Bell was deterred from ‘recovering’ all such surplus land, not because Maori needed it, but because such actions (during the New Zealand Wars) may have encouraged Maori to repudiate previous sales in other areas. He believed that his ‘recovered’ 200,000 acres of surplus land, plus neighbouring Crown purchased areas, were virtually ‘open for settlement.’<sup>209</sup>

In spite of Bell’s determination to recover surplus and scrip land for the Crown, Maori claimed many such areas in the Native Land Court after 1865. Judge Maning in 1870 awarded Maori almost 5000 acres at Taemaro and Whakaangi which the Crown claimed as either scrip, surplus or as part of the disputed 1863 Mangonui Crown purchase.<sup>210</sup> After Maori lodged several more similar Native Land Court claims, the Lands Department sent John Curnin, its legal draftsman, north to combat them. He reported that all scrip and surplus land should be ‘at once gazetted as Crown lands and marked on the survey maps as such . . . One such map . . . would save a ream of correspondence.’<sup>211</sup> On the same day he reported to the Native Minister:

that the Chief Judge of the Native Land Court gave Judgement this morning [apparently in Rawene] in relation to the surplus lands of the Crown . . . that the lands having been alienated by the Natives before the Treaty of Waitangi, and such alienations having been confirmed by the Queen after proper examination during the lifetime of the alienors, the said lands were demesne of the Crown and not Native lands within the Treaty, nor therefore within the jurisdiction of the Court.

Curnin added that, once gazetted and mapped, surplus areas should promptly be ‘sold to the public, so as to get them for ever out of the reach of the Natives.’<sup>212</sup>

Less than a month later, Curnin articulated what became the Crown’s standard legal position on surplus land for almost half a century:

By International Law all the territory in a country which becomes conquered by, or ceded to a nation, belongs to the nation and not to its individual members, or as it is generally said, vests in the sovereign of the nation as part of the estate of the Crown. This was the case in New Zealand saving as modified by the Treaty of Waitangi, which conserved to the Natives their lands, that is to say the lands in their possession at the time of making the Treaty.

If at the time of that treaty, it would be proved that they had parted with any of their lands, those lands at once belonged to the Crown.

The question of surplus lands must not be debated in relation to the Natives, but really in relation to the Crown. For, it is indisputable that all lands bought by individuals from Natives in New Zealand, became absolutely the property of the Crown on the treaty of Waitangi, or even before that; and that it was out of the pure bounty and equity of the Crown that the old land claimants were granted some land, which no doubt they had originally bought,<sup>213</sup> but which equally without doubt belonged to the Crown by International Law.

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209. Ibid, pp 8–9

210. B Rigby, ‘The Mangonui area and the Taemaro claim’ Wai 45 rod, doc a21, pp 26–27

211. Curnin to Smith, 16 March 1885, ma 91/5, p 45

212. Curnin to Native Minister, 16 March 1885, ma 91/5, pp 42–43

The Surveyor-General approved Curnin's proposal to gazette and map all surplus land, but his assistant, S Percy Smith, foresaw problems when many such areas still had not been surveyed.<sup>214</sup> To overcome these problems, Curnin compiled detailed lists of scrip and surplus areas. He sent them to Smith with instructions to locate a number of unsurveyed claims on the map.<sup>215</sup> Curnin in Wellington, and Smith in Auckland, teamed up as the Crown's scrip and surplus land experts after 1885. The Native Department referred the complicated Mangonui/Taemaro dispute to them. In this case, Curnin accused Maori petitioners of deliberately trying to throw him 'off the scent' by renaming the disputed area Te Kapara.<sup>216</sup> Smith argued that 'Taemaro was included in one of the old Land Claims but was not allowed by the Commissioner, it therefore became Surplus Land of the Crown as usual under those circumstances'. He clearly did not know what he was talking about, as he virtually admitted when he added that although he was convinced that Taemaro was surplus land:

by what process of law or equity these extensive areas became the property of the Crown I have never been able to learn . . .

Smith followed this admission a year later with further speculation regarding the same Taemaro land:

As far as I can make out the whole of the unsurveyed lands in this neighbourhood are absorbed in . . . old Land Claims . . . It can be proved I expect that the surplus out of these claims became Crown land and consequently no Maori land is left.<sup>218</sup>

Smith and Curnin just kept revealing their confusion. Taemaro was, in fact, not surplus but scrip land. Furthermore, the Crown never 'proved' satisfactorily that Maori there either knew about or consented to the original pre-Treaty transactions which both Godfrey and Bell failed to investigate.<sup>219</sup>

Even though the Crown stuck to Curnin's 1885 definition of its legal rights, and to Smith's guesswork as to where they applied, successive twentieth century investigations of Maori grievances arising from surplus and scrip land began to question the Crown's legal and ethical position. In 1926 Native Land Court Chief Judge R N Jones referred eight Maori petitions to Judge F O V Acheson under the terms of the Native Land Claims Adjustment Act of the previous year. In referring these petitions further on to the 1927 Sim Commission to investigate both confiscation and 'other grievances', Acheson stated that he was:

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213. Curnin to Smith, 15 April 1885, baaz 1108 (Lands and Survey records), box 88, file 2173, NA, Auckland. An imperfect copy of this document was reproduced in ma 91/5, p 41.

214. McKerrow to Smith, 19 October 1885; Smith to McKerrow, 18 December 1885, ma 91/5, pp 39–40

215. 'List of original Land Claims Records left at Auckland for Mr Smith's reference to be returned to Mr Curnin at Wellington by registered parcel', 6 March 1886; Curnin memos 6, 8 March 1886, Lands and Survey records, file 2173, NA Auckland

216. Curnin to T W Lewis, 23 August 1886, ma 91/9, exhibit g p 47a

217. Smith to Under-Secretary Lands, 22 March 1887, ma 91/9, exhibit g p 48

218. Smith to Lewis, 10 February 1888, Wai 45 rod, doc h1a

219. Rigby, 'A Question of Extinguishment?', pp 56–70

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compelled to say that the retention of ‘Surplus Lands’ by the Crown<sup>220</sup> was an act which would hardly meet with the approval of anyone at the present day.

When the Sim Commission refrained from making recommendations on these petitions, Acheson sought to reopen the matter in the Native Land Court. For almost 20 years the Crown forestalled this investigation by repeatedly promising a full inquiry by a Royal Commission.<sup>221</sup> During this time, Chief Judge Jones expressed a legal position which flew in the face of that which Curnin had expressed on behalf of the Crown. Jones maintained that the Crown could not legitimately claim an interest in pre-Treaty transactions which it deemed ‘null and void’ in the 1841 Ordinance (and earlier in the 1840 Land Titles Validity Proclamation). He stated:

The surplus land therefore never passed from the Natives<sup>222</sup> and no declaration by the Land Claims Commissioners could alter the Native title.

On the other hand, when the Myers Commission came to review the surplus land question during the 1940s, it agreed with Bell and Curnin’s fundamental assumption that surplus land ‘must be considered as the Demesne of the Crown.’<sup>223</sup> The Myers Commission’s very general terms of reference made it reluctant to investigate particular transactions, even though Lands and Survey department staff prepared literally hundreds of typed summaries of old land claim files for its use. Although it was required to report on scheduled petitions, it made no attempt to grapple with the historical issues raised, for example, by those in the Mangonui area. In fact, the commission complained that no petition raised:

the question of surplus lands as such, nor do the petitioners base their claims on considerations of equity and good conscience . . . What they do is claim on other and altogether different grounds.<sup>224</sup>

Most Maori petitions<sup>225</sup> raised historical issues, such as missionary promises to return surplus land. True, they failed to document most of them, but that was almost invariably due to their lack of access to the essential public records. The commission’s chair, former Chief Justice Sir Michael Myers, evidently wanted Maori petitions to deal with the legal issues raised by surplus land, which he was most competent to adjudicate. Of course, Maori could not be expected to raise such issues because they almost always lacked proper legal assistance when they prepared their petitions.

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220. Acheson to Under-Secretary Native Department, 7 March 1927, ma 38/18/6; quoted in Michael Nepia, ‘Muriwhenua Surplus Lands’ Wai 45 rod, doc g1, pp 24

221. Nepia, pp 24–27

222. Jones to Ngata, 30 March 1933; quoted in Nepia, pp 25–26

223. Bell report, 8 July 1862, AJHR, 1862, d-10, p 18

224. Myers Commission report, 18 October 1848, AJHR, 1948, g-8, p 13

225. For example, Joseph Matthews tried to return surplus land to Maori at Aurere and Tangonge (near Kaitaia). ma 91/9 d, p 15; e, pp 27–28.

In the end Maori had to be satisfied with the commission's extremely opaque final recommendation:

We are agreed that in the case of many [unidentified] transactions there was an area of surplus land to which the Maori vendors would have had no right in equity and good conscience but that in a number of other [also unidentified] transactions where there was an area of surplus land they would have had a claim in equity and good conscience to the whole or <sup>226</sup>part of such area. We are agreed, too, that some compensation should be paid.

## **2.21 RESERVES**

One of the Treaty expectations of Maori discussed in 1840, and also previously required in Normanby's instructions to Hobson, was that Maori would be left with sufficient resources to sustain their communities. The way Normanby expressed this requirement was that Maori:

must not be permitted to enter into any [land purchase] contracts in which they might be the ignorant and unintentional authors of injuries to themselves. You will not, for example, purchase from them any territory, the retention of which by them would be essential, or highly conducive, to their own comfort, safety or subsistence. The acquisition of land by the Crown for the future settlement of British subjects must be confined to such districts as the natives can alienate, without distress or serious inconvenience to themselves. To secure the <sup>227</sup>observance of this – will be one of the first duties of their official [Crown] protector.

Hobson and Shortland's promises to return lands 'unjustly held' and to respect Maori custom were consistent with the protective obligations spelled out in Normanby's instructions. Maori, of course, seized the opportunity afforded by the Treaty hui to dramatise their case regarding pre-Treaty transactions, and their fears of dispossession arising from the welter of such transactions (particularly in the north).

Church Missionary Society missionaries and Busby responded to dramatic Maori accusations by referring to trust deeds designed to allow Maori to continue living within claimed areas. In early 1839 CMS missionaries in the Bay of Islands announced that their trust deeds ensured that 'immense tracts of good land . . . remain in [the] possession of the natives' who otherwise were 'continually parting with their land'. These trust deeds differed from regular purchases or alienations which were:

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226. Myers report, p 18. The Crown paid various Maori Trust Boards (particularly the Tai Tokerau Board) a total of £61,307: Nepia, p 116.

227. Normanby to Hobson, 14 August 1839, BPP, 1840 (238), p 39

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made with the full understanding that they do not revert again to the New Zealanders. They are secured <sup>228</sup> to the purchasers and his heirs forever with a right to everything pertaining thereto.

The CMS subcommittee apparently deposited seventeen trust deeds with George Clarke when he left the CMS to become Protector of the Aborigines in 1840. The trust deeds designed by the CMS apparently protected Maori land particularly in areas of the Bay of Islands, Tamaki, Port Nicholson and Whanganui.<sup>229</sup> The standard English wording in such a deed, from the 1835 Kawakawa example, devised for and signed by Maori, read:

No part of our Land at Kawakawa or any of the places around shall be sold to Europeans; but let it continue for us and for our Children for ever. The Missionaries at Paihia shall fix marks, and make sacred the Boundaries, and hold in Trust that no one may sell any Part without the Consent of the Missionaries.<sup>230</sup>

Upon receipt of these trust deeds, Governor Gipps instructed Land Claim Commissioners to:

not recommend the alienation to other Individuals (ordinary claimants) of any portion of the lands vested by those deeds of Trust in the missionaries for the benefit of the Aborigines or at least . . . not . . . without fully considering these [Trust Deed] Claims,<sup>231</sup> and being perfectly satisfied that a Counter Claimant may have a better Title.

In at least one case, Clarke intervened as Protector of Aborigines to ensure the enforcement of a trust deed. At Whananaki Clarke maintained that an 1835 trust deed<sup>232</sup> meant that the land could not be granted to John Salmon, a later claimant. In a further twist to the story, Salmon attempted to exchange his Whananaki claim for Crown land, apparently derived from the Fairburn Tamaki claim. There he encountered once more the obstacle of a CMS trust deed. Governor FitzRoy instructed the Colonial Secretary to inform him:

that the land formerly purchased by Mr Fairburn cannot be touched, except under the authority of the Trustees of Native Reserves, who we are not yet embodied.<sup>233</sup>

According to Clarke, the area Fairburn claimed was also protected by a CMS trust deed as ‘A Tract of Country situated on<sup>234</sup> the River Thames on a river called “Wairoa” containing at least 30,000 acres’.

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228. ‘Remarks of the Northern [cms/nz] Subcommittee on Parent Committee’ letter of 9 August 1838, cms/cn/m11

229. Each deed is described briefly in Clarke to Colonial Secretary, 16 November 1840, ia 1/1841/135

230. D Coates testimony (before House of Lords New Zealand Committee), 11 May 1838, BPP, 1837–1838 (680), p 261. See also transcription of deed no 1, Wai 45 rod, doc i3(a), app 6.

231. E Deas Thompson (on behalf of Gipps) to commissioners, 2 January 1841, *ibid*. Commissioners requested copies of these deeds and Hobson directed that they be supplied with them. Hobson memo, 5 February 1841, *ibid*.

232. Summary, ma 91/19 (408), p 1

233. FitzRoy to Sinclair, 18 February 1845, ma 91/19 (408), p 5

Lord Russell in January 1841 set the Crown's own standard for the creation of Native reserves. He stated very clearly that Hobson was to instruct his Surveyor-General to define lands 'essential' to Maori, and that his Protector of Aborigines was to ensure that these reserves were held inalienable for the foreseen needs of Maori.<sup>235</sup> Unfortunately, Hobson and his successors failed to follow these instructions.

The New Zealand Company's tenths system provided an inauspicious beginning to Crown reserves practice. The company reserves were well described by its official naturalist during 1839–1841, Ernst Dieffenbach. As a highly educated and humane scientist, his views on this subject<sup>236</sup> were widely read in official circles after he published them in London in 1843. While praising the company tenths as a 'judicious and expedient' attempt to finance the Crown's 'protecting and civilizing' agencies, he expressed grave reservations about their administration. He believed that the company would attempt forcible removals of whole Maori communities, and that it would not provide sufficient land for their long-term welfare.<sup>237</sup> His three key recommendations to the Crown were that it should guarantee:

[1] Security in their titles to the land which they [Maori] occupy, provided such land is a sufficiency . . .

[2] The internal arrangement of all the reserved landed property to be left to the natives themselves . . .

[3] Procuring by treaty or purchase a sufficiency of land for conquered tribes, who are henceforth to be under the protection of government . . .<sup>238</sup>

George Clarke jr, the man charged with upholding the Crown's responsibilities in this, by 1844 condemned the company tenths system of reserves as 'pregnant with evil,' and the Port Nicholson purchase Spain authorised as alienating 'the whole land of several tribes.' He went on:

the reserves – with the cultivations[,] are barely adequate to support the natives – or will be insufficient for the purpose in a few years.

He opposed leasing reserves to raise funds for Native purposes, but thought that the Crown could: 'take such surplus lands as from Mr Fairburn's purchase and let them for the benefit of the natives'. This area he distinguished from 'a large portion of land within the [Port Nicholson] district unsurveyed – and which therefore belongs to the natives'.<sup>239</sup> FitzRoy planned to grant 'the outlying lands that the Crown acquired in [scrip] exchanges (with colonists)' to Native Reserve Trustees.<sup>240</sup> He

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234. Deed no 17, Wai 45 rod, doc i3(a), app 6; Paul Husbands and Kate Riddell, *The Alienation of South Auckland Lands*, Waitangi Tribunal Research Series, 1993, pp 9–14

235. Russell to Hobson, 28 January 1841, BPP, 1841 (311), pp 51–52

236. On Dieffenbach's personal history, see Denis McLean's entry on him in the *New Zealand Dictionary of Biography*, Wellington, Port Nicholson Press, 1990, vol 1, pp 107–108

237. Dieffenbach, pp 145–149

238. Ibid, p 171

239. Clarke jnr to Clarke sr, 1 April 1844, Clarke letters, pp 66–68; quoted in Moore, *Crown Demesne*, pp 558–560

also proposed vesting surplus land in the same trustees later in 1844.<sup>241</sup> Nothing like this was ever done, however, and Moore concluded that the Wellington Tenths, far from providing for Maori needs, simply justified the alienation of most of their land at Port Nicholson.<sup>242</sup>

The situation at Tamaki and Waitangi appeared to follow the Port Nicholson precedent, even though the Crown did not have to deal with parallel company control there. William Fairburn, another CMS missionary, had transacted an area estimated to contain at least 75,000 acres in 1837. The deed documenting that transaction promised to return one-third of the entire area to Maori, something which the 1840s commissioners included as a condition of the 5500 acre grant they recommended.<sup>243</sup> When the Crown tried to lease a section of the area outside Fairburn's grant to Charles Terry in 1842, Maori challenged him on the basis of the fact that the Crown, not being a party to the original transaction, had no rights within the area. This, of course, was an area that the Crown would later describe elsewhere as 'surplus land.'<sup>244</sup> In late 1842, Protector Clarke informed the Surveyor-General that:

the land claimed by the Natives, said to be included in Mr Fairburn's claim, never belonged to that gentleman, a reserve of one-third to themselves apparently formed a part of the original agreement between the parties, and upon that ground they have taken possession of certain portions of the land. Some of the Natives have never even removed from it, but are now, and have heretofore been, cultivating on localities included within Mr. Fairburn's boundary.

Clarke, therefore, instructed the Surveyor-General to prepare 'a map of the district of land claimed by Mr. Fairburn' at his 'earliest convenience'. This map was to show:

the Native villages as reserves, and . . . a fair proportion of the Tamaki land should also be reserved for their benefit. The Ngatipaoa Tribe,<sup>245</sup> being the principal claimants of the Tamaki, will expect their portion of land there.

Despite Clarke's willingness to point out the location of the necessary reserves to surveyors, they were apparently never properly established. Nine years later Ngati Tamatera, a Hauraki group led by Katikati, opposed the sawyer William McGee's occupation of Maraetai land they claimed as their own. Katikati also testified before Commissioner William Gisborne that he had never been informed of the earlier Godfrey/Richmond Commission's inquiry.<sup>246</sup> According to Husbands and Riddell, Surveyor-General Ligar recommended the return of 15,000 acres to Maori

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240. FitzRoy to Stanley, 15 April 1844, Wai 145 rod, doc a32, p 11; quoted in *ibid*, p 562

241. *Southern Cross*, 6 July 1844; quoted in Armstrong, p 15

242. Moore, *Crown Demesne*, pp 568–569

243. Husbands and Riddell, pp 9–11

244. *Ibid*, p 13

245. Clarke to Ligar, 19 December 1842, *Epitome*, b6

246. McGee to Commissioner of Crown Lands, 24 March 1851; 'Statement of the Native Chief Kati Kati or Moananui', 9 June 1851, olc 1/ 590; cited in Husbands and Riddell, pp 11–12

Figure 3: Fairburn's Tamaki claim

in 1851. Instead of creating the promised reserves, however, the Crown began paying off different tribal groups that year. Husbands and Riddell concluded:

It was a very dubious proceeding on the part of the Crown not to grant the one-third back to Maori, as contracted in the 1837 deed and recommended by the LCC, and, having allowed the land to be occupied by settlers, to buy off various entitled Maori groups for small payments . . . In this the Crown would appear to be in breach of its own clear undertakings.<sup>247</sup>

The situation at Waitangi appears to have followed the pattern established at Tamaki. There James Busby claimed a total of 10,000 acres. Commissioners Godfrey<sup>248</sup> and Richmond recommended that he receive no more than 3264 acres in grants. Three commission recommendations for Busby's nine Waitangi claims specified Native Reserves. One reserve clause for example referred to the Ratoa Valley as 'reserved to the Natives'.<sup>249</sup> Another referred to:

One hundred and fifty (150) Acres that were returned or granted<sup>250</sup> to the Natives by Mr Busby . . . [on] 19 Feb 1839 to be reserved for them . . .

A third report referred to the fact that Busby had deposited a kind of trust deed with the Protector of Aborigines 'returning and guaranteeing to the Natives a portion of the above [claimed] land' along the Waitangi River.<sup>251</sup>

The question of what happened to these three reserve recommendations remains a puzzle. William Clarke apparently surveyed Busby's Waitangi claims during the 1850s. In January 1858 he sent Bell a 'Sketch of the Claims at Waitangi & c' which clearly shows the '10,400' acreage figure for Busby.<sup>252</sup> Neither this sketch, nor the eventual survey plan (so 930a), show the location of any of the reserves Godfrey and Richmond recommended in 1842.<sup>253</sup> Two of the three reserves are shown, however, on new grant plans, apparently prepared during the 1850s, but dated 1844.<sup>254</sup> These grant plans, however, were not incorporated in the survey plan.

When Busby appeared before Bell on 23 September 1857 at Russell, he refused to recognise the validity of the 1856 Act under which Bell operated. Bell threatened him with the cancellation of his original grants, but also sought to persuade Busby:

that the Act was an advantage and not an injury to him as well as others, [and] that there was a further step to be taken after the repeal of the Grants – namely the making out of a new Grant to any person who showed good title to the land. If therefore he would give me the plan of the survey he had made of the 10,000 acres claimed by

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247. Husbands and Riddell, p 14. For further investigation of the Fairburn Tamaki claim, see Matthew Russell's case study below.

248. Commissioners reports, 2 May, 14 June 1842, olc 1/14–24

249. Ibid (claim 18)

250. Ibid (claim 20)

251. The reserve boundary description suggests that it straddled both sides of the river: ibid (claim 21).

252. See Clarke's Waitangi sketch map dated 14 January 1858 filed with Clarke's survey letters in olc 4/32

253. For the eventual 1872 survey, see Busby's Waitangi grant, plan so 930a (original held at LINZ, Auckland).

254. Busby Crown Grants r10e fol 8; r16e fol 14; r17e fol 15, LINZ, National Office, Wellington

him, I should probably prepare a new Grant for the amount to which the Act entitled him . . .<sup>255</sup>

Busby enquired whether filing his survey plan would prejudice his legal position. Bell answered him it would not, but again warned him:

that it was probable if I did not get *his* survey I would make an order for a[nother] survey . . . charging him for the same pursuant to the Act. [Emphasis in original]<sup>256</sup>

Although Bell did not record having received Busby's Waitangi survey, the fact that it received an olc plan number (281) indicates that he filed it. Busby continued to insist upon the validity of his 1844 grants, but, after the Supreme Court dismissed his case, he agreed in 1867 to submit the dispute to binding arbitration. Two of the three arbitrators reported in Busby's favour in 1868, assuring him of clear title to all except 1000 acres of surplus within the originally claimed area.<sup>257</sup>

Although nothing in the award statement referred to reserves for Maori, in a subsequent letter to Busby seeking to clarify the terms of the award, the two arbitrators wrote:

we award you the Bay of Islands [Waitangi] land only, *from which we withheld small portions you reconveyed to the Natives.* [Emphasis added]<sup>258</sup>

What the arbitrators thought they had 'withheld' (or reserved) for Maori we do not know.<sup>259</sup> According to the available survey information, they 'withheld' nothing. The only possible explanation of this apparent anomaly may lie within the terms of the original Waitangi grants. Although they restated the commissioners' 1842 recommendations regarding Maori reserves, later surveys ignored them. The arbitrators, Jackson and Mackelvie, may well have thought that all the reserved areas were outside the surveyed and granted area.<sup>260</sup>

A letter from James Busby to Land Claims Commissioner Alfred Dommet in 1870 may shed some light on the Waitangi reserves mystery. He indicated that he wished to have his grant issued in one block:

I would also beg your attention to the reservations made for the natives in two of the former grants and to the terms in which the plots of land in these grants were leased to the natives. These will appear from the enclosure No 1 which is the original draft prepared by Mr Colenso from which the several leases were prepared, so far as regards the conditions upon which those leases were to be held.

In every case the land purchased by me from the natives was purchased absolutely and without any reservation whatever. This will appear from the certified copies of

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255. Bell, 'Notes of various sittings', 23 Sept 1857, olc 5/34, pp 4–5

256. Ibid, p 5

257. 'Arbitrator's Award in the Case of James Busby Esq' 6 April 1868, AJHR, 1869, d-11, pp 3–4

258. Jackson and Mackelvie to Busby, 15 October 1868, AJHR, 1869, d-11, p 4

259. See Busby's Waitangi plan, so 930a.

260. Plan so 930a surveyed by William Busby (probably during the 1860s) does identify a 'Waitangi Reserve' on the south side of the river upstream from Haruru. This, however, was outside the Busby claim area. It may also have been a public reserve, rather than a native reserve.

the original deeds which, as well as copies of the original leases granted by me at Wangarei and the Bay of Islands were delivered to [Land Claim] Commissioners . . .

I have always therefore considered that I was entitled to grants without any reservation whatever on the Government being satisfied that the natives entitled to the leases were in possession of them, and enjoyed the right of occupation which continued only so long as they continued to occupy.

With regard to the reservation at a place called Otuwhere or Wharengarara in the grant of 5,000 acres, this right ceased within two years of the date of the purchase, having been abandoned by the natives and never afterwards occupied. But their only representation lately preferred a claim for it before the Native Land Court which was dismissed by the Court, and afterwards relinquished by the claimant as will appear by the original documents enclosed Nos. 2 & 3.

The other reservation in the grant called Te Puke has been occupied by the descendant of the parties to whom it was leased, and their right of occupation therefore still exists: but it is a right of occupation only, held from me, and ought not to interfere with the integrity of the grant.

Busby's surveyor son William submitted a very hastily prepared plan. He asked Commissioner Dommet to return it later for him to 'fill in all the details which were left out.'<sup>261</sup>

The 'enclosure No 1' Busby referred to consisted of Hare Wirikake's signed statement dated 1 December 1868. It read:

E hoa e Te Pukipi [sic]

Kia rongo mai koe kua mutu taku totohe ki a koe mo Otuwhere – ara mo Wharengarara – Hera <sup>262</sup>matu, kua rite a mana korero, ko mita Wiremu Puhipi – ko te mutunga tenei ake ake

This Busby understood as Wirikake's absolute relinquishment of his claim to the Otuwhere reserve at Waitangi. In addition, Judge Maning verified Busby's assertion regarding the location of the land. He stated:

The land named in this document (Otuwhere) is identical with the [Native Land Court] claim No. 93 – 1866 . . .<sup>263</sup>

Busby's 'enclosure No 2' was a lengthy undated Maori document purporting to be a 'copy of a deed reconveying a piece of land at the Puke to Tona [or 'Toua'] & party.' Finally, his 'enclosure No 3' was the Hokianga Native Land Court register entry on Wirikake's 1866 Otuwhere claim:

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261. Otuwhere is located at the western extremity of Busby's Waitangi grant: see figure 3; Busby to Dommet 6 May 1870, ia 15/5.

262. Wirikake statement, 1 December 1868; encl in Busby to Dommet, 6 May 1870, ia 15/5. Witnessed by F E Maning, H Williams and Hopkins Clarke. Niwa Short believes that this statement 'sounds like someone is fed up with all the debate . . . concerning Otuwhere, and that this will be the end to it all for Ever' Personal communication, 10 March 1997.

263. Maning signed statement, 12 February 1869; encl in Busby to Dommet, 6 May 1870, ia 15/5. Maori apparently surveyed land at Waitangi as ml 2488, but the plan is missing from LINZ Auckland. See Auckland roll plan no 33.

Figure 4: Busby's Waitangi grant

which Manning<sup>264</sup> dismissed on 4 May 1867 after two successive non-appearances by the claimant.

Finally, William Busby wrote to Dommet on 28 November 1870 stating:

I have the honour to forward herewith, the ‘Amended’ plan of Mr James Busby’s land at Waitangi.

The plan shows the boundaries of the original purchase from the Natives. The blocks marked No 1 & 2 containing respectively 460 and 586 acres both of which adjoin Government land have<sup>265</sup> been cut out, in order to reduce the quantity . . . to that allowed by the Arbitrators.

This appears to have been Busby’s Waitangi grant plan, later designated so 930a. The two blocks William Busby ‘cut out’ totalling over 1000 acres were the blocks designated as Crown surplus land. At Waitangi Busby got 9374 acres, the Crown got 1010 acres, and Maori got nothing.

## **2.22 WHAT WERE MAORI LEFT WITH?**

Maori reserves out of areas claimed by Pakeha claimants amounted to very little anywhere in the country, as indicated in our quantitative introduction to this national theme report. The Crown appears to have assumed that Maori had always plenty of land outside the areas claimed by Pakeha, and those later purchased by the Crown. Yet the Crown was forewarned about the need to plan in advance by ensuring that adequate reserves were set aside for Maori. In 1843 Ernst Dieffenbach estimated the Maori population of the North Island (divided into 12 tribal groupings) to be 114,890. He estimated that the Crown should reserve at least ten acres of arable land for each man, woman and child. This estimate was perhaps based on the false assumption that Maori needed only small plots of arable land, when they practised a form of shifting cultivation, and hunting and gathering, which required a much larger area than sedentary horticulture. None the less, on his very conservative reasoning, Dieffenbach reckoned<sup>266</sup> the Crown need to reserve 1,148,900 acres for North Island Maori in 1843.

Part of the problem was the absence of a single Crown agency devoted to implementing the Crown’s often-stated policy of defining and administering inalienable Maori reserves. Although Russell instructed Hobson to create such reserves in 1841, the only land claims<sup>267</sup> statute which even mentioned such reserves, did so to provide for their alienation. The appointment of Charles Heaphy as a

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264. Wirikake Otuwhere claim no 93–1866, Hokianga Native Land Court register; encl in Busby to Dommet, 6 May 1870, ia 15/5

265. William Busby to Dommet, 28 November, 1870, ia 15/5

266. Dieffenbach, vol 2, pp 149–150

267. This was section 8 of the 1858 Act which appeared to contradict section 7 of the Native Reserves Act 1856 requiring reserves to be inalienable for 21 years. Land Claims Extension Act 1858, 21 and 22 v, no 76; Native Reserves Act 1856, 19 and 20 v, no 10.

national Commissioner of Native Reserves in 1870 should have allowed the Crown to remedy this situation.

In his first major report to Parliament, Heaphy identified part of the problem. He identified that although reserves created out of pre-1865 Crown purchases in Auckland province appeared to be ‘a tolerably sufficient provision for the future wants’ of Maori, he believed that some tribes had ‘sold recklessly, and are in danger of becoming paupers.’ He identified the endangered tribes as Te Rarawa, Ngati Whatua, and Patukirikiri of Hauraki.<sup>268</sup> These people came from areas which had experienced some of the most intensive old land claim and Crown purchase activity. Heaphy calculated that Te Rarawa reserves in the Muriwhenua area amounted to only about 19 acres per person. He therefore recommended that the Crown should allow ‘none of the cultivations of the Rarawa and Ngatiwhatua . . . to be sold’.

Heaphy further recommended that the Crown should create endowments for Maori purposes out of the Hokianga/Bay of Islands surplus land. This was the area which contained the greatest concentration of old land claims. The Commissioner of Native Reserves stated that the Crown would find it difficult to settle Pakeha on this land (without explaining why). He went on to state:

These difficulties would not exist, however, in many cases if the lands were appropriated as endowments towards the support of Natives in local hospitals . . .<sup>269</sup>

Although Heaphy listed 715,009 acres of Native Reserves in the North Island, he included in this list<sup>270</sup> both restricted Native Land Court titles, and several reserves already alienated. Even then, the Crown apparently failed to act upon Heaphy's modest recommendations, both with respect to calling a moratorium on Crown purchases from Te Rarawa and Ngati Whatua, and with respect to creating endowments out of Hokianga/Bay of Islands surplus land.

In addition to harbouring a general sense of grievance, Maori in many old land claim areas were left without any clear information on what had happened to their land. In spite of Bell's insistence that he explained surplus land to Maori, they apparently never accepted his explanations. Furthermore, did the Crown ever attempt to fully explain to Maori the full implications of its presumptive rights? It certainly did not do so at the three main Treaty gatherings in the north in 1840. Since the Crown frequently failed to operate in a consistent and transparent fashion regarding old land claims, Maori often suspected it of downright duplicity. Successive nineteenth and twentieth century investigations of several aspects of the

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268. Report of Commissioner of Native Reserves, 19 July 1871, AJHR, 1871, f-4, p 5

269. Ibid. This hearked back to FitzRoy's 1844 promise to hold surplus land in trust for Maori and his 1845 statement that the reserve arising from Fairburn's Tamaki claim would be administered by ‘Trustees.’ FitzRoy to Sinclair, 18 February 1845, ma 91/19 (408), p 5

270. List e, encl in native reserves report 19 July 1871, AJHR, 1871 f-4, pp 7–44, 47–59, 62–63. The NLC could issue titles restricting land from alienation for 21 years, but it could also lift such restrictions during that period. None the less, this ‘restricted’ category accounted for almost 70 percent of Heaphy's ‘reserved’ area.

subject fell far short of restoring Maori confidence that their interests were considered in a full and fair way.

Almost 150 years after the signing of the Treaty, Muriwhenua claimants called for ‘an enquiry as to the extent to which and the circumstances in which the[ir] original land . . . and their Taonga passed into other and particularly into Crown hands’.<sup>271</sup> In this statement they expressed a dual loss. They believed that they had not only lost their land, but also that they had lost almost all knowledge of how they had lost it. In other words, they were left with very little of either their land, or the history of their land.

## **2.23 CONCLUSION**

As highlighted in the general introduction to this report, old land claims appear to assume their full significance only when considered together with subsequent Crown purchases. All the issues arising from old land claims invariably apply with greater significance to pre-1865 Crown purchases:

- (a) Crown purchases, too, were characterised by the lack of an adequate ‘Maori side of the story.’ This is especially important when historians attempt to establish whether or not Maori knowingly and willingly consented to ‘extinguishment.’
- (b) The Ngai Tahu Tribunal, for instance, found that in pre-1865 purchases south of Wairau, the Crown’s actions were frequently inconsistent with its Treaty obligations.<sup>272</sup>
- (c) Scrip and surplus land issues arose during many Crown purchase negotiations. In 1857, for example, Kemp reported how scrip ‘claims frequently come to notice during negotiations with the natives . . . they form a very large part of the Public Domain’.<sup>273</sup>
- (d) Crown purchases, even more than old land claims, threw up issues regarding the adequacy of native reserves.

The issues arising from Crown purchases inevitably assumed greater significance than those arising from old land claims simply because pre-1865 Crown purchases were so much more extensive. The estimated three million acres directly affected by old land claims pale to relative insignificance when compared with the 44.6 million acres purchased by the Crown by the end of 1865. As a proportion of the total land area of New Zealand, Crown purchases accounted for approximately 67.5 per cent, and old land claims only 4.5 percent. None the less, old land claims were, in a sense, the forerunner of Crown purchases. They set the pattern of extinguishment that the Crown repeated with its subsequent purchases.

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271. ‘Statement of Claims’, Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1988, p 249

272. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols, Wellington, Brooker and Friend Ltd, 1991, vol 2, pp 274–277, 454–458

273. Kemp listed over 100,000 acres of scrip land north of Whangarei: Kemp to McLean, 11 February 1857, AJHR 1861, c-1, pp 16–18.



## PART II

### Case Studies

