

CHAPTER 3

CASE STUDY: THE FAIRBURN PURCHASE

There are three main reasons why William Fairburn's 1836 purchase at Tamaki has been selected as the first case study for this report.¹ In the first instance, it is undoubtedly a significant old land claim. This significance derives from its size, more than 75,000 acres, and its location. As shown in figure 5, in modern day terms the Fairburn purchase covers most of South Auckland, from Otahuhu in the north to Papakura in the south. The second reason for beginning with the Fairburn purchase is closely related to the first. Because of its size and proximity to Auckland, with its burgeoning population and newly acquired status as the colony's capital, the Fairburn purchase provides a good opportunity to explore the Crown's approach to the question of 'surplus land'. As will be shown, this 'surplus', which was composed of the balance between the area concluded by the Land Claims Commissioners to have been the subject of a bona fide purchase, and the area eventually granted to the claimant, was an important component of Colonial Office policy. Thirdly, the Fairburn purchase, or specifically, the failure of successive Colonial administrations to honour the terms of the original purchase as recognised by the Land Claims Commissioners, stands out as a striking example of how the old land claims process sometimes failed to safeguard the interests of the Maori vendors.

Fairburn, in his notification of claim, originally estimated his purchase to encompass 40,000 acres. He subsequently modified this before the Land Claims Commissioners, Godfrey and Richmond, stating: 'The number of Acres contained in this Claim is I am sure more than 40,000. I have heard from other persons competent to judge that there are considerably more'.² A more accurate estimate of the supposed contents of Fairburn's purchase was provided by the Surveyor General, Charles Ligar, in 1851. He estimated that the purchase contained closer to 75,000 acres.³ The estimated size of the purchase increased a third time when, in 1948, the Myers Commission on surplus lands used planimeter readings to arrive at a figure of 82,947 acres.⁴

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1. All claim numbers used in the following case studies, unless specifically stated otherwise, are those assigned by Commissioner Bell. The equivalent Godfrey and Richmond number, from the original hearings, can be most conveniently found in Bell's 1863 app to his 1862 report: Land Claims Commission, 'Appendix to the Report of the Land Claims Commissioner', 8 July 1862, AJHR, 1863, d-14.
 2. Testimony of William Fairburn, 23 May 1842, recorded in Godfrey and Richmond, 14 July 1842, olc 1/590, NA Wellington
 3. Ligar minute, 17 October 1851, on Ligar and Gisborne to Colonial Secretary, 9 October 1851, olc 1/590, NA Wellington

The uncertainty surrounding the precise size of Fairburn's purchase derives from two inter-related causes. Firstly, the exact boundaries of the Fairburn purchase have never been satisfactorily defined. The description contained in the purchase deeds was typically imprecise:

the whole of the dragging place at Otahuhu, go on from thence to the Ararata, from thence to the Awatitio, from thence to Papakura; go on from thence to Rangiuru; from thence to the Wairoa; from thence to Wakakaiwera; from thence to Umupuia; from thence to the Poho; from thence to Maraitai; from thence to Motukaraka; from thence to Awakarihi; from thence to Mangimangiroa; from thence to Tawakaman; from thence to Waipapa; from thence to Okokino; from thence to the Panahoroiiwi; from thence to the River Wangamatau: continue on from thence to Otahuhu where it ends. That portion of the land to the Eastward is bordered by the sea called Mimirua, flowing towards Hauraki: that to the Westward is bounded by Manukau: that to the Southward by the river Wairoa.

Because of the sheer size of the block, and the unusual circumstances preceding the purchase itself, these boundaries were never traversed or even pointed out from an elevated position. Ideally, such an exercise would have occurred at the time of the original purchase, and involved both vendors and purchasers, in order to expose any misunderstandings between the two parties with regard to exactly what was being transacted. Certainly, a traversing of the boundaries should have been a pre-requisite to any determination by the commissioners as to the area which they considered to have been the subject of the bona fide purchase. Indeed, as has been argued in the main text of this report, the early commissioners made their recommendations under the assumption that a proper survey identifying the precise boundaries would be required before an indefeasible Crown grant was issued. As the imprecise estimates narrated above indicate, however, no such survey has *ever* been undertaken of the entire Fairburn purchase. Surveys of land conveyed in individual grants within the block did occur, but these smaller surveys were not conducted in a comprehensive manner which would have allowed an overview of the entire purchase. As will be shown later, the lack of such an overview had an extremely detrimental impact upon the Maori vendors, principally because it contributed to the fact that the third of the purchase reserved to them was never marked out.

The circumstances of Fairburn's Tamaki purchase in 1838 were, as he himself admitted, of a 'peculiar nature'.⁶ This peculiarity had its origins in the Nga Puhi raids of the 1820s. These raids resulted in the virtual desertion of South Auckland as the resident iwi fled into the Waikato, some directly, some via the Hauraki Plains.

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4. Alan Ward in Paul Husbands and Kate Riddell, *The Alienation of South Auckland Lands*, Waitangi Tribunal Research Series, 1993, p 14. It is interesting to note that this 'expansion' in the Fairburn purchase was in contrast to the 'shrinkage' evident in most old land claims. An excellent example of this is William Webster's Piako claim, the focus of a later case study, which was originally estimated at 80,000 acres but eventually surveyed at 51,000 acres.
 5. Turton's deed 347, reproduced in Husbands and Riddell, pp 74-75
 6. Fairburn to New South Wales Colonial Secretary, 2 January 1841, olc 1/590, NA Wellington

Figure 5: Boundaries of Fairburn purchase

Despite the fact that the Nga Puhi raiders declined to assert ahi kaa over the vacated lands, it was several years before South Auckland iwi deemed it safe to return. This occurred in 1835, under the protection of Te Wherowhero, a relationship symbolised by Te Wherowhero's taking up residence upon the Awhitu Peninsula. The re-occupation of the area was not, however, a completely smooth process. Considerable friction arose amongst the returning iwi over who could claim an interest in the various portions of what would soon become the Fairburn purchase. This is evident in the following 1851 statement of Ngati Paoa chief, Hauauru:

The whole purchase was very irregular – we were in great confusion at the time – Otara at the time was disputed by the Ngati Paua [Ngati Paoa] the Ngatimatira [Ngati Tamatera?] and the Akitai tribes . . . Munga Mungaroa and the back of it back to Papakura were disputed by the Akitai Tribe and 'Kati Kati' [whom he later identifies as 'Nga te tai'.]

On a more general level, Fairburn identified the various conflicts as occurring between the 'exterior districts' of 'Waikato and Thames . . . which parties had long been in a state of hostility to each other. The land at Tamaki appeared to be a bone of contention'.

It was as a means of ending these on-going hostilities, by removing the 'bone of contention', that Henry Williams suggested to Te Wherowhero that the entire area should be sold to the Church Missionary Society. The result was a meeting, in January 1836, at which most of what today constitutes South Auckland was sold to William Fairburn. The meeting was attended by the CMS missionaries Fairburn, Hamlin, Maunsell, Williams, and a 'large party' of Maori. There seem to have been two major Maori figures behind the sale: Te Wherowhero, under whose protection the contending iwi had returned to the area, and who was wishful of peace; and Turia, leader of Ngati Terau, who according to Fairburn 'was the principal Chief. He virtually sold it – the land. – The rest acquiesced'. Specifically mentioned in the 1836 deed of sale were 'Hauauru and people, Tuiru [Turia] and people, and Herua and people'. The deed also specified that they had 'received as return for that land Tamaki, ninety blankets, twenty-four axes, twenty-four adzes, twenty-six hoes, fourteen spades, eighty dollars, nine hundred pounds tobacco, twenty four combs, [and] twelve plane irons'. Fairburn would subsequently testify before Godfrey and Richmond that four further 'installments', with a total value of £902, were required to fully extinguish the title of all those who subsequently asserted an interest in the area of land originally purchased in 1836.

7. Alan Ward, *Historical Report on South Auckland Lands*, Preliminary Discussion Draft prepared for the Crown Congress Joint Working Party, 1992, p 3
8. Testimony of Hauauru, 14 June 1851, translated and recorded by John Grant Johnson, enclosed in Gisborne to Colonial Secretary, 1 July 1851, olc 1/590, NA Wellington
9. Fairburn to New South Wales Colonial Secretary, 2 January 1841, olc 1/590, NA Wellington
10. *ibid*
11. Fairburn, 19 June 1851, enclosed in Gisborne to Colonial Secretary, 1 July 1851, olc 1/590, NA Wellington
12. H Turton, *Maori Deeds of Old Private Land Purchases in New Zealand*, Wellington, 1882, p 307. Also reproduced in Husbands and Riddell, pp 74–75.

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The most significant of these subsequent deeds was that of 12 July 1837, by which Fairburn promised to return:

One third of the whole purchase the boundaries to be determined as soon as the country shall be surveyed. – That is to say that each of the Tribes known by the names Ngati Paoa, Ngati Tamatera, Ngati Terau, Te Akitai, and Ngati Whanaunga, shall have secured to them for their personal use for ever, in proportion to the number of persons of whom their tribes may consist residing in any part of the Thames and Manukau[.]¹⁴

As well as indicating which groups Fairburn considered to have possessed the most significant interests in the area purchased, the 1837 deed also raises the issue of exactly what was transacted in the Fairburn purchase. To be more specific, were those Maori who signed the deeds consenting to a total and complete alienation, or did they have in mind something less than that, for example, the sharing of rights to cultivate or reside within the boundaries defined? The issue of Maori perceptions of early ‘sales’ has been the subject of considerable submissions before the Muriwhenua Tribunal, the members of which are currently engaged in the writing of an interim report which is likely to deal with this issue.

Bearing this in mind, there are certain features specific to the Fairburn purchase which are certainly worthy of mention. Given the sheer size and location of the Fairburn purchase, it is not unreasonable to question whether Maori would have been willing in 1836 to sign away completely and forever all rights to such a significant area of land. While these rights were undeniably the subject of considerable dispute at the time of the sale, the fact that they were contested only serves to highlight the value that was placed upon the land itself. Significantly, even after the 1836 ‘sale’, Maori continued to reside on the land covered by the purchase. Indeed, Fairburn subsequently testified that it was understood during the negotiations that the purchase would in no way disturb any existing cultivations.¹⁵ These were principally located around, and to the east of, Maraetai. More importantly, Fairburn wrote to the New South Wales Colonial Secretary that he had invited Maori to return to Tamaki and settle upon the land. Of those who did, he wrote: ‘Many are now Christians and schools are carried on amongst them and they are cultivating the land without molestation’. It is not clear from this statement what the exact distribution of this settlement was, that is, whether it referred solely¹⁶ to the residents of Maraetai, or whether there were other settlements beyond this.

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13. Evidence of William Fairburn, 1 September 1841, recorded by the commissioners in olc 1/590, NA Wellington. The figure of £902 was a composite of £16 cash and £302 goods, the latter figure typically being multiplied by three to indicate the increased value of goods once they had been transported from Sydney to New Zealand.
 14. Deed of Conveyance, 12 July 1837, minuted on back of Deed of Purchase, 22 January 1836, olc 1/590, NA Wellington
 15. Fairburn, 19 June 1851, enclosed in Gisborne to Colonial Secretary, 1 July 1851, olc 1/590, NA Wellington
 16. Fairburn to New South Wales Colonial Secretary, 2 January 1841, olc 1/590, NA Wellington

In the same letter, Fairburn makes a positive linkage between his invitation to the Maori vendors for them to settle upon Tamaki, and the return of a third of the land by the 1837 deed. The lack of subsequent Maori habitation outside of the settlements around Maraetai strongly suggests, however, that, in the absence of a comprehensive survey to alert them otherwise, not all of the Maori vendors were aware of the existence of the third returned. How was this possible? The third was returned in 1837, by a deed written on the reverse side of the first, and main Fairburn purchase deed of 1836. The deed itself was signed by Fairburn alone, with no indication of how many other witnesses were present. Nor is Fairburn's testimony as recorded by the commissioners in 1841 any more illuminating in this regard. The commissioners also examined 11 Maori witnesses. While such a number of witnesses was not unusual for a missionary-related old land claim, it was considerably more than the minimum of two generally required by, and produced before, the commissioners. Significantly, nowhere in this unusually high level of Maori testimony is any reference made to the return of a third of the purchase by the 1837 deed. It was probably this glaring omission which saw Fairburn recalled by the commissioners for cross-examination: 'Have you given to the Natives a Deed transacting the third of this land to them'? To which Fairburn replied, 'No. But they understand the promise'.¹⁷ The commissioners obviously accepted this, subsequently reporting that: 'The Claimant has stated in evidence that he has reconveyed One third of this Purchase to the Natives, which the Commissioners recommend they may be left in undisturbed possession of'.¹⁸

Testimony gathered a decade later by Commissioner for Crown Lands Gisborne, however, raises serious doubts about exactly how applicable was Fairburn's assurance that 'they understand the promise'. Kati Kati of Ngati Tamatera, for example, testified before Gisborne that 'I never heard of a third of the whole block being returned by Mr Fairburn to the Natives'.¹⁹ Kati Kati, a youth at the time of the original purchase, never signed the 1836 Deed but was 'among the party when the first payment was made'.²⁰ His lack of knowledge about the third returned is perhaps most easily explained by the fact that he never attended the Commissioners' investigations into the Fairburn purchase. As he stated to Gisborne: '[I] never heard till after it had ended, of the Commission that sat into this claim'.²¹ As the 1851 testimony of Hauauru of Ngati Paoa clearly demonstrates, however, non-attendance at the 1841 hearing of Godfrey and Richmond does not explain all instances of ignorance of the reversion of the third. Hauauru, who signed the 1836 deed and testified as much before the commissioners in 1841, subsequently told Commissioner Gisborne that:

17. Cross examination of William Fairburn, 1 September 1841, olc 1/590, NA Wellington

18. Godfrey and Richmond, 14 July 1842, olc 1/590, NA Wellington

19. Testimony of Kati Kati, 1 July 1851, translated and recorded by John Grant Johnson, enclosed with Gisborne to Colonial Secretary, 1 July 1851, olc 1/590, NA Wellington

20. Testimony of William Fairburn, 19 June 1851, enclosed with Gisborne to Colonial Secretary, 1 July 1851, olc 1/590, NA Wellington

21. Testimony of Kati Kati, 1 July 1851, translated and recorded by John Grant Johnson, enclosed with Gisborne to Colonial Secretary, 1 July 1851, olc 1/590, NA Wellington

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[While he had] heard that Mr Fairburn gave back Mungaroa, Maraetai, the Pouru and Onepuia to the Natives [. . . he had] not heard of a large undefined piece of Mr Fairburn's purchase having being returned by him to the Native Sellers to be afterwards divided amongst them according to their population.²²

It is clear then, that in spite of the high level of Maori testimony presented before the original Godfrey and Richmond hearing, knowledge of the third of the purchase returned by the 1837 deed was not as widespread as was implied in Fairburn's assurance to the commissioners in 1841 that the vendors 'understand the promise'.

Those Maori who did testify before Commissioner Gisborne that they were aware of the reversion of the third, did so in support of their right to ownership over various pieces of land within the purchase boundaries. Mohi of Akitai, who contested the occupation by a Major Gray of an area of land adjoining the Wharau inlet, testified that:

Mr Fairburn when we sold him the land, said we should not be disturbed in our cultivations. – We also heard that part of the land sold to Mr Fairburn was to be returned to the Natives and that the Government approved. – Wharau is part of the land that was returned as described by me – it was returned by Governor FitzRoy – we have no written document – we have only his word[.]²³

Similarly, We Tuke's statement in 1851 that: 'The lands mentioned in the deed were originally sold to Mr Fairburn . . . Governor Shortland gave us back Onepuia, under the arrangement of a third being returned by Mr Fairburn'.²⁴

Another aspect of the Maori testimony gathered by Commissioner Gisborne in 1851 which casts an interesting light upon the proceedings of the earliest commissioners is the statement of Mohi that:

The evidence just read to me is what I gave before the Commissioners, – except as regards the sale of all the land. – I told the Commissioners that I did not sell the Wharau (now occupied by Major Gray) but I excepted no other piece – I stated this through Mr Forsaith, – My evidence was not read to me. – Wakahara, when he was alive owned the same land as we did. – His evidence as read to me, is not correctly given[.]²⁵

Thomas Forsaith was the sub-protector of Aborigines who was assigned to the investigation of Fairburn's Tamaki purchase. In addition to translating the Maori testimony so that it could be recorded by the commissioners, it was also his job to ensure that the 'interests' of the Maori vendors were not ignored in the process of the investigation. This presumably would have included, amongst the many

22. Testimony of Hauauru, 14 June 1851, translated and recorded by John Grant Johnson, enclosed with Gisborne to Colonial Secretary, 1 July 1851, olc 1/590, NA Wellington

23. Testimony of Mohi, 23 June 1851, translated and recorded by John Grant Johnson, enclosed with Gisborne to Colonial Secretary, 1 July 1851, olc 1/590, NA Wellington

24. Testimony of We Tuke, 14 June 1851, translated and recorded by John Grant Johnson, enclosed in Gisborne to Colonial Secretary, 1 July 1851, olc 1/590, NA Wellington

25. Testimony of Mohi, 23 June 1851, translated and recorded by John Grant Johnson, enclosed with Gisborne to Colonial Secretary, 1 July 1851, olc 1/590, NA Wellington

responsibilities that attended such a role, his ensuring that those giving testimony were aware of what was being recorded. Like his immediate superior, Protector George Clarke, Forsaith was also an old land claimant himself claiming 3078 acres in the Kaipara region.

Of the 11 Maori witnesses who appeared before the commissioners, two, Tihi and Takanini, are recorded as having disputed that their portion of the land had ever been sold. This resulted in it being explicitly excepted by the commissioners in their subsequent recommendation. Like the third of the purchase returned by the 1837 deed, however, the exact location of this exception remained undefined. At the end of their investigation the commissioners reported that the considerable Maori testimony left no doubt that, with the two qualifications noted above, an equitable and total alienation had been conducted by Fairburn. Their report also noted that, under the terms of the 1841 Ordinance, they were restricted to recommending a maximum grant of 2560 acres. A third qualification upon Fairburn's grant was that it could not include any land which formed part of the Otahuhu canoe portage, linking Manukau Harbour to the River Tamaki and thence Waitemata Harbour. This, the commissioners recommended, should be reserved for the Government.²⁶

There was, of course, a considerable difference between the area concluded by Godfrey and Richmond to have been the subject of a bona fide purchase, and the area they subsequently recommended should be granted to Fairburn. Before examining how the government dealt with this 'surplus' area of land, it would be useful to trace the subsequent history of Fairburn's Tamaki grants. On reading the commissioners' report, Governor FitzRoy referred the claims back to another commissioner, Robert Fitzgerald, to see if there were grounds for extending the grants beyond the maximum prescribed in the 1841 Ordinance. Such a referral occurred for many of the missionary-related old land claims and was consistent with the fact that throughout his administration, 'FitzRoy was always concerned with serving the interests of Maori and long term settlers'.²⁷ Few old land claimants had been in the colony as long as the missionaries, and their work in promoting Christianity was an important ingredient in FitzRoy's personal philosophy about how best to 'civilise' Maori.²⁸ Commissioner Fitzgerald subsequently recommended in April 1844 that Fairburn's granted acreage should be extended to 'not more than 5,500 acres'. Justifying this extension, Fitzgerald highlighted Fairburn's 26 years of residence in the colony, the 'good feeling and friendship between him and the aborigines', the considerable Maori testimony before Godfrey and Richmond, the presence of Fairburn's family, and the considerable payment

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26. Godfrey and Richmond, 14 July 1842, olc 1/590, NA Wellington. In addition to the third returned to the Maori vendors by the 1837 deed, Fairburn conveyed, on 1 April 1840, another third of the entire purchase to the Church Missionary Society. This conveyance was disallowed by the commissioners who stated that any such conveyance must come out of the 2560 acres they recommended Fairburn should receive. While giving no reason for this disallowance in their report, the fact that it had occurred after the assumption of British sovereignty would not have helped the CMS case.
27. Dean Cowie, "'To Do All the Good I Can': Robert FitzRoy – Governor of New Zealand, 1843–1845", MA thesis, University of Auckland, 1994, p 66
28. *Ibid*, pp 45–46

made by Fairburn to the various Maori vendors.²⁹ Fitzgerald's recommendation was subsequently approved with FitzRoy minuting that 'I approve fully of the reasons for extending Mr Fairburn's claim'.³⁰

Because of the absence of an overarching survey it is difficult to be precise about the exact location of the 5494 acres subsequently selected by Fairburn. Further complicating the matter is the fact that Fairburn did not include all his land in a single grant, but instead spread it over nine different grants.³¹ The single largest of these, accounting for almost half of Fairburn's total acreage, was located in the proximity of Manurewa, that is, in the southern portion of his purchase. It seems likely that this large area, some 2507 acres, surrounded the Fairburn family dwelling.³² Further 'houses and several acres of cultivated ground' were included within a much smaller grant, just under 400 acres, situated at Maraetai (emphasis in original).³³ The remainder of the grants, accounting for 2148 acres of the total 5493, are recorded as being located in Pakuranga, although subsequent events would reveal that several of these can more accurately be located near Otahuhu, specifically, what would soon become the site of the Otahuhu pensioners' village. These Otahuhu allotments were selected by Fairburn in the presence of Governor FitzRoy.³⁴

As mentioned in the main text of this report, the close relationship between Governor FitzRoy and the missionaries would provide FitzRoy's successor, George Grey, with an angle from which he could attack FitzRoy's native and land policies. By way of illustration, Grey accused Protector of Aborigines and missionary land claimant, George Clarke, of failing to properly protect Maori interests when he recommended approval of Fitzgerald's extensions. Clarke's motive, according to Grey, was to get more land for himself than he would have done under the 1841 Ordinance.³⁵ As has already been stated, this politically-motivated attack was subsequently turned into a legal one when Attorney-General Swainson brought a civil case against the legality of FitzRoy's extension of Clarke's grant at Whakanekeneke.

George Clark, however, was not alone in being threatened with legal action against his FitzRoy-approved extension. In October 1847, Fairburn received a letter from the Attorney-General informing him that the government sought the surrender of all his grants to lands within the Fairburn purchase on the grounds that they were illegal. The letter further stated that under clause six of the 1841 Ordinance the Governor was under no obligation to issue a new grant in replacement of those surrendered. In this case, however, the Governor had indicated to the

29. Fitzgerald to FitzRoy, 22 April 1844, olc 1/590, NA Wellington

30. FitzRoy minute, 25 April 1844, on Fitzgerald to FitzRoy, 22 April 1844, olc 1/590, NAWellington

31. The size and approximate location of these grants is taken from a list compiled by the Surveyor General's Office, 16 November 1847, olc 1/590, NA Wellington

32. Ligar to Colonial Secretary, 26 June 1844, olc 1/590, NA Wellington. There was also a second, much smaller, Manurewa grant of 470 acres.

33. FitzRoy to Sinclair, 10 March 1845, olc 1/590, NA Wellington.

34. Ligar to Colonial Secretary, 26 June 1844, olc 1/590, NA Wellington

35. Cowie, p 94

Attorney-General that upon the grants being surrendered he ‘will cause to be issued to you a new Grant for 2560 acres of land (the maximum prescribed under the 1841 Ordinance)’.³⁶ On asking for clarification of the grounds upon which the grants were considered illegal, Fairburn was given a lengthy and somewhat convoluted explanation, his own summary of which is quoted below.³⁷ As he understood it, the Governor’s objections were:

founded on the fact that the two Commissioners (Messrs Richmond and Godfrey) appointed under the first Land Claims Ordinance having recommended that a Grant should be issued to me for 2560 . . . acres and their report to that effect having being confirmed by the Governor that therefore the case was disposed of and could not be legally gone into again under the [1842] land claims amendment Ordinance[.]³⁸

On receipt of the Attorney-General’s explanation, Fairburn was still reluctant to surrender his grants. While he did not dispute that the extended grants might in fact be illegal, he was not willing to concede that this necessarily required their invalidation:

I trust the Governor is too honourable to take advantage of a technical legal objection to invalidate its own Crown Grants founded upon an equitable and just claim . . .

Had I taken ground not my own – had I received property from the Crown for which I never paid – even under such adverse circumstances as these the honour of the Crown being pledged for the transaction it ought to be faithfully maintained, but in the present case when no one has been wronged . . . I cannot conceive it possible that the Crown would thus take advantage of its own neglect and shake public confidence in its Acts by such an invasion of private property and desecration of national faith as would appear to be contemplated from the remarks in your letter[.]³⁹

Grey, however, was unswayed by Fairburn’s argument and continued with his plans for the commencement of litigation. In the face of this pressure Fairburn ended his opposition to the surrendering of his grants and accepted Grey’s proposal for the issue of new⁴⁰ grants in accordance with the maximum prescribed by the 1841 Ordinance.

Having achieved the capitulation of Fairburn, Grey, for reasons which may need to be uncovered by further research, subsequently relented from his proposed arbitrary reduction of Fairburn’s granted acreage. Instead, he instructed the Surveyor General to purchase from Fairburn any lands at Otahuhu that the government might require for the site of the pensioners’ village. The agreed purchase price was £2 per acre, for which consideration Fairburn sold 400 acres in

36. Attorney-General to Fairburn, 15 October 1847, olc 1/590, NA Wellington

37. Fairburn to Colonial Secretary, 2 November 1847, olc 1/590, NA Wellington. A draft of the Attorney-General’s response is attached to Attorney-General to Fairburn, 15 October 1847, olc 1/590, NA Wellington.

38. Fairburn to Colonial Secretary, 12 November 1847, olc 1/590, NA Wellington

39. Ibid

40. Fairburn to Colonial Secretary, 6 December 1847, olc 1/590, NA Wellington

1850.⁴¹ Thus, in one sale, Fairburn recovered almost the entire consideration he had paid between January 1836 and December 1839 for the nearly 83,000 acres contained within the original purchase boundaries. In addition to this, Fairburn voluntarily reduced the rest of his FitzRoy-granted holdings within the purchase boundaries by selling upon the open market⁴² allotments of land adjoining the pensioner village for prices of up to £30 an acre.

But Fairburn was not the only party who stood to reap considerable financial benefits from the increasing market value of the land encompassed within the Fairburn purchase. The Crown also stood to benefit from its ownership of the considerable ‘surplus’ deriving from the purchase. This surplus was composed of the difference between the area concluded by Godfrey and Richmond to have been the subject of a bona fide purchase, and the area eventually granted to the claimant. The assumption of Crown ownership over, and subsequent sale of, ‘surplus’ lands was an important part of Colonial Office policy. Working from the assumption that Maori had alienated vast tracts of land to speculators and Land Company agents, the so-called ‘monster claims’, the Colonial Office anticipated that limiting the amount that could be granted to a single individual would result in the creation of a considerable Crown demesne. It further anticipated that this demesne would not only assure the Crown’s control over the colonisation of New Zealand, but also that its subsequent sale would ensure that the colony was self-funding in its administration. Of course, this assumption of ‘monster’ alienations by Maori was not correct, with the result that ‘there was barely enough surplus land accruing to the Crown to fund colonial administration, and due to a chronic shortage of funds, the Crown could not purchase lands itself⁴³ and on sell them to settlers, despite the fact that Maori were clamouring to sell’.

The rationale by which the Colonial Office believed the Crown was entitled to assume ownership of the surplus lands arising from old land claims can be seen in the following letter from the Secretary of State for the Colonies, Lord Stanley. Responding to a query from Robert FitzRoy, about to depart to take up the governorship of the Colony, Stanley wrote:

1st. Your first enquiry is in the following terms – ‘To whom should land now belong which has been validly purchased from New Zealand Aborigines: but which exceeding a certain specified quantity cannot be held under existing Laws by the original Purchaser or his Representative[.]’

The case thus supposed is (if I rightly understand it) a case in which the Contract with the Native shall be found by the Land Claim Commissioners to have been untainted by any such fraud or injustice as would render it invalid. It is assumed that neither on the grounds of inadequacy of price, nor on any other grounds could the former proprietor of the Land require that the sale of it should be set aside. But it is, at the same time supposed that the lands thus acquired exceeded the limitation which

41. Surveyor General to Colonial Secretary, 30 July 1850, olc 1/590, NA Wellington

42. Surveyor General minute, undated, on Surveyor-General to Colonial Secretary, 30 July 1850, olc 1/590, NA Wellington

43. ‘Surplus Lands: Policy and Practice, 1840–1950’, submission of David Armstrong and Bruce Stirling (Wai 45 rod, doc j2), p 16

defines the extent of land to be holden by any European under a title originally derived from the aborigines. The question then is – who is the proprietor of the excess? To that question it must be answered that by the terms of the supposition the Purchaser is not the Proprietor; – and that the hypothesis being that the claims of the Aboriginal Sellers have been justly extinguished, they are no longer the Proprietors – hence the consequence seems immediately to follow, that the property in the excess is in the sovereign as representing and protecting the interests of Society at large. In other words⁴⁴ such Lands could become available for the purposes of Sale and Settlement.

While the rationale behind the Crown's assumption of surplus lands may have been clear to Lord Stanley, the submission of Armstrong and Stirling to the Muriwhenua Tribunal has shown that in the Colony itself the policy was neither accepted, or understood, by the majority of Europeans or Maori. In large part this can be attributed to a failure by the Crown to adequately explain its policy⁴⁵ beyond the realms of dispatches between the Colonial and Imperial Governments. Further contributing to this lack of understanding and acceptance was the behaviour of Governor FitzRoy himself. Within a month of his arrival in the Colony, FitzRoy was reported twice in the *Southern Cross* as having publicly stated that the Crown had no intention of retaining the surplus lands but that they would, instead, be restored to Maori.⁴⁶ FitzRoy was aware of course, that such pronouncements contradicted the principles underlying the Colonial Office policy as outlined in Lord Stanley's letter of 26 June 1843. It is clear, however, that FitzRoy strongly believed:

the only way that the government could maintain a position of integrity was if the surplus was returned to the original Maori owners. He knew he could not give land to settlers which Maori did not⁴⁷ want them to have, and that the Crown could lay no justifiable claim to the land.

In contending that attempts on the behalf of the Crown to assume possession of surplus lands would result in Maori becoming 'exceedingly irritated', FitzRoy used the specific example of the Fairburn purchase.⁴⁸ Prior to FitzRoy's arrival, Acting-Governor Shortland had issued a significant portion of the Fairburn surplus to a European settler by the name of Terry. Terry was not an old land claimant, but rather a significant creditor of the cash-strapped administration. As Walter Brodie testified in 1844 before a British Parliamentary Select Committee on New Zealand, Terry was prevented from taking possession of the surplus lands assigned to him by the Crown:

44. Stanley to FitzRoy, 26 June 1843, g 1/9, NA Wellington

45. Armstrong and Stirling, p 19

46. This was in the editions of December 30, 1843, and January 20, 1844. Extracts from both reports are quoted in Armstrong and Stirling, pp 13–14. Armstrong and Stirling also provide references for one other instance where FitzRoy's feelings on the return of surplus lands to Maori became known in the public arena.

47. Cowie, pp 69–70, in which Cowie summarises Stanley to FitzRoy, 26 June 1843

48. FitzRoy to Stanley, 15 October 1844, cited in Armstrong and Stirling, p 26

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There is the case of Mr Fairburn, a missionary, a case well known; he had 40,000 acres of land that he had purchased . . . This piece of land was investigated by the Commissioners, and they awarded Mr Fairburn about 3,000 acres of land, and the rest the Government was to take themselves. When Mr Terry went out with his flax machinery, in May 1842, he had a sort of certificate from the government, to chose 20,000 acres of land; the only 20,000 acres the government had in one piece was a part of those 37,000 acres that they had taken from Mr Fairburn; consequently the Government gave Mr Terry 20,000 acres which really belonged to the missionary. Mr Terry was not aware what land it was. He went down, with all his machinery, and the natives went down too. They allowed him to land everything; and as soon as everything was landed, the natives asked him who he was. He told them, and they asked him who sent him there. He told them that the Government had given him the land. The natives said the Government had no authority to give it to him; that if it did not belong to Mr Fairburn, it did not belong to Government, but to the natives themselves; and that those parties⁴⁹ should not erect any thing on the ground, unless with the consent of Mr Fairburn.

It cannot be denied that Walter Brodie, as a frustrated land claimant, certainly had ‘an axe⁵⁰ to grind’ in respect of the Colonial government’s handling of old land claims. Nonetheless, his testimony is valuable for providing evidence of very early opposition by Maori to the Crown’s assumption of surplus lands. It should also be noted that Lord Stanley was certainly not unaware of the likelihood of Maori resisting the Crown’s assumption of any surplus for the reason that, as FitzRoy himself protested, it was ‘quite impossible to make them comprehend our strictly legal view of such cases’⁵¹. This is evident in Stanley’s writing to FitzRoy that:

not only the difficulties you yourself suggest but others not now distinctly perceptible will probably arise. Especially it may happen that the Natives may be found in possession of some such [surplus] lands; or may be prompted by feelings entitled to respect, earnestly to solicit the resumption of them. In any such contingency it would be your duty (I am well aware how much it would be your inclination) to deal with the original Proprietors with the utmost possible tenderness; and humour their wishes so far as it can be done, compatibly⁵² with the other and higher interests over which your Office will require you to watch.

While Stanley was by no means questioning the soundness of the original policy, the sale of surplus lands by the Crown being central to the Colonial Office blueprint for the colonisation of New Zealand, he was none the less allowing FitzRoy, the

49. Walter Brodie, 4 June 1844, BPP, 1844, vol 2, p 42

50. Brodie was found by the comissioners to have completed a bona fide purchase. Frustrated at the delay in having a Crown grant issued on the basis of that recommendation, Brodie took the highly unusual step of having his claim surveyed, at his own expense, having gained an assurance from Acting-Governor Shortland that this would be sufficient to ensure the issuance of his grant. On production of the completed surveys, however, Governor Shortland refused to issue any grant before FitzRoy arrived and Brodie was forced to leave the Colony before his grant could issue: *ibid*, p 31.

51. FitzRoy to Stanley, 15 October 1844, cited in Armstrong and Stirling, p 26

52. Stanley to FitzRoy, 26 June 1843, g 1/9, NA Wellington

Queen's representative at the scene, maximum discretion in how the policy should be implemented.

When this discretion allowed to FitzRoy is combined with the 1842 recommendation of Godfrey and Richmond that Maori were entitled to be left in 'undisturbed possession' of one-third of the Fairburn purchase, it is manifest that Maori too stood to benefit from the rising price of South Auckland land. That this should be the case was in fact consistent with Colonial Office policy, as embodied in Lord Normanby's 1839 instructions to Hobson. In those instructions, Lord Normanby assumed that the primary benefit that would derive to Maori from land sales would not be the initial consideration paid for the land, but the subsequent increase in the value of remaining⁵³ Maori land as a result of the introduction of European settlement and capital.⁵⁴ As Alan Ward has argued, however, this hypothesis only held true as long as Maori remained in possession of a 'pool of land' which was not only of a reasonable quality, but also in reasonable proximity to areas of European settlement.⁵⁴ The reservation of a third as recommended by Godfrey and Richmond in 1842 would certainly have met this criteria, particularly if the title was made inalienable. Such a reservation would also have satisfied another element of Normanby's 1839 instructions, that Maori 'must not be permitted to enter into any contracts in which they might be the ignorant and unintentional authors of injury to themselves. You will not, for example, purchase from them any territory, the retention of which would be essential, or highly conducive, to their own comfort, safety or subsistence'.⁵⁵

It would seem that Colonial officials were initially sincere in their intention to give effect to the commissioners' recommendation with regard to the return of a third of the Fairburn purchase. According to an 1851 memorandum by Charles Ligar, Surveyor General, the commissioners' recommendation was subsequently⁵⁶ 'approved by the Government', most probably a reference to Governor FitzRoy.⁵⁶ Such an assumption is supported by the example given in the main text of this report, whereby John Salmon, a land claimant, was prevented by FitzRoy from exchanging his Whananaki claim for land in South Auckland on the grounds that 'that the land formerly purchased by Mr Fairburn cannot be touched, except under the authority of the Trustees of Native Reserves, who are not yet embodied'.⁵⁷ Even had such a

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53. Normanby to Hobson, 14 August 1839, BPP, 1840, vol 3, pp 85–90. It was the 'tenths' proposal of the New Zealand Company, however, which gave the greatest exposure to the idea that Maori would reap substantial benefits from the sale of land for European settlement. Under the tenths: 'The New Zealand Company . . . proposed to reserve, and hold in trust for the benefit of Maori, one in ten of each of the sections in its [Wellington] subdivisions . . . [it thus] involved a recognition that if the Wellington Maori were to generally share in the growth of the town to be built on the land they had sold to the Company a generous proportion of land would need to be reserved, the added value of that land providing the revenue for the benefit of the former customary owners of the land': Ward, *Historical Report on South Auckland*, pp 13–14.
54. Alan Ward, *Supplementary Historical Report on Central Auckland Lands*, Preliminary Discussion Draft prepared for Crown Congress Joint Working Party, p 58
55. Normanby to Hobson, 14 August 1839, BPP, 1840, vol 3, p 87
56. Ligar to Gisborne, 17 May 1851, enclosed in Gisborne to Colonial Secretary, 1 July 1857, olc 1/590, NA Wellington
57. FitzRoy to Sinclair, 18 February 1845, ma 91/19 (408), NA Wellington, p 5

body been in existence, FitzRoy's publicly aired opposition to the Crown's assumption of the surplus makes it seem unlikely that he would have been inclined to allow the issuance of a Crown grant to Salmon until the location of the third recommended by the commissioners had been defined by survey. But for all his good intentions, FitzRoy's term in office was marked by its shortness and multitude of more pressing problems. FitzRoy was recalled before he was able to oversee the implementation of Fairburn's 1837 deed.

FitzRoy's successor, George Grey, did not share his predecessors' misgivings as to the equity of the Crown's assumption of surplus lands. Quite to the contrary, it is clear that for Grey the sale of surplus lands offered at least a partial solution to the colony's serious financial problems. It should come as no surprise then, that no initiative was made under his administration to effect the survey and return of the third as recommended by Godfrey and Richmond in 1842.

The matter remained unresolved for several years until the actions of a Ngati Tamatera Chief, Kati Kati, prompted the Colonial administration to re-investigate the matter. In March 1851, Kati Kati halted the timber-cutting activities of William McGee, the holder of a Crown timber license on part of the Fairburn surplus land. As McGee informed the Colonial Secretary:

I have been hindered and prevented from executing the [timber licence . . .] by the Chief named Kuttikut, and his tribe who have recently made a settlement and reside on the Creek within about two or three hundred yards of my location . . . [Kati Kati has demanded £26] in default of which they ordered me forthwith to leave the yard,⁵⁸ or they would burn everything belonging to me, and do me other serious injury[.]

The £26 was to be in compensation for the timber taken under the license; Kati Kati asserting that the timber being logged by McGee was owned by him.⁵⁹ The subsequent correspondence provoked by McGee's letter shows that the Colonial administration had forgotten about the 1842 recommendation of Godfrey and Richmond that a third of the Fairburn purchase should be returned to the Maori vendors. Upon receiving McGee's letter, the Colonial Secretary forwarded it to the Surveyor General with the request that he 'state whether the Natives have any claim to the lands for which the Timber Licence alluded to have been granted'.⁶⁰ This request solicited the following reply from the Surveyor General's department: 'The Land is the property of the Crown, the Natives have no proper claim on the West of a cut line which bounds Handy's land [one of McGee's workers], on the East of it, they have been permitted to occupy'.⁶¹ Not only did the Surveyor General's response contain no reference to the third to be restored to Maori, but it also implied that those Maori residing east of Handy's line did so at the Crown's sufferance. As was mentioned earlier, these settlements seem to have located around, and to the east of, Maraetai; specifically, Ngati Terau residing at Onepuia, and, at least

58. McGee to Sinclair, 23 April 1851, olc 1/590, NA Wellington

59. Gisborne to Sinclair, 18 June 1851, olc 1/590, NA Wellington

60. Sinclair minute, undated, on Gisborne to Colonial Secretary, 26 March 1851, olc 1/590, NA Wellington

61. James Baker minute on Gisborne to Colonial Secretary, 26 March 1851, olc 1/590, NA Wellington

according to the 1851 testimony of We Tuke, by their sufferance, Ngati Paoa at Owhe.⁶² Nevertheless, Fairburn himself testified that it was explicitly understood during the purchase negotiations that those who resided in the vicinity of Maraetai would not be disturbed in their cultivations.⁶³ Furthermore, as has already been shown, those in residence at Maraetai believed their right to reside there to be firmly derived from the 1837 deed.

By the time of Kati Kati's protest, however, the Colonial administration had clearly forgotten about the recommendations and intentions of earlier officials. Comprehending no possible reason for Kati Kati's actions, the government dispatched Commissioner for Crown Lands, William Gisborne, to investigate. Gisborne subsequently conducted a series of interviews with various Rangatira at the mouth of the Thames River, and later, at Maraetai. The interviews, recorded and translated by his companion, Native Department interpreter John Grant Johnson, are in many places difficult to reconcile with each other, particularly in regard to establishing the exact relationship between the various hapu or iwi mentioned.⁶⁴ As has already been highlighted, it was during one of those interviews that Kati Kati stated that he had 'never heard of a third of the whole block being returned by Mr Fairburn to the Natives'. Instead, Kati Kati based his claim of ownership over the land being logged by McGee on the fact that it had never been sold. He maintained that Fairburn had specifically excepted from the original sale all the land between the Munga Munga Roa Stream and Te Pouru, Maraetai.⁶⁵ This might be contrasted with the evidence of We Tuke, of Ngati Terau, who testified to Gisborne that: 'When Governor Shortland gave us back Onepuia, under the arrangements of a third being returned by Mr Fairburn. – Kati Kati saw that none had been returned to him and claimed between Munga Munga Roa and Maraetai as his share'.⁶⁶

Gisborne's subsequent report makes it clear that he preferred We Tuke's interpretation of events over that of Kati Kati. 'After a careful consideration of the various conflicting statements, I am of [the] opinion that all the land in dispute was originally sold to Mr Fairburn, and that the only just claim which Kati Kati can prefer arises out of the reversion of the third'.⁶⁷ While this may have disappointed Kati Kati, he might have drawn some satisfaction from Gisborne's admission that Kati Kati's protests had 'forced upon my attention' the issue of the third of the Fairburn purchase which the 1837 deed had promised would be restored to the original Maori vendors. As Gisborne subsequently reported to the Colonial Secretary:

62. Testimony of We Tuke, 14 June 1851, translated and recorded by John Grant Johnson, enclosed in Gisborne to Colonial Secretary, 1 July 1851, olc 1/590, NA Wellington

63. Testimony of William Fairburn, 19 June 1851, enclosed in Gisborne to Colonial Secretary, 1 July 1851, olc 1/590, NA Wellington

64. See Ward, *Historical Report on South Auckland Lands*, pp 24–25

65. Testimony of Kati Kati, 9 June 1851, translated and recorded by John Grant Johnson, enclosed in Gisborne to Colonial Secretary, 1 July 1851, olc 1/590, NA Wellington

66. Testimony of We Tuke, 14 June 1851, translated and recorded by John Grant Johnson, enclosed in Gisborne to Colonial Secretary, 1 July 1851, olc 1/590, NA Wellington

67. Gisborne to Sinclair, 1 July 1851, olc 1/590, NA Wellington

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This claim of reversion had never been properly defined and given to the different Native Sellers of the original block, – some verbal promises, it seems, have been made them by different Governors, – and now, owing to the immensely enhanced value of their claims, – to their great desire of location in the vicinity of Auckland, and to their regret at having received so little for the original sale (about £300 for 75,000 acres) they have commenced seizing, in spite of the Government, upon some of the most valuable spots they can find.⁶⁸

After acknowledging the equity of Kati Kati's claim to a share in the third, Gisborne outlined potential remedies to resolve the situation. 'Two courses remain open, in my opinion, to the Government, either to mark off what may appear a reasonable quantity of land, for the Thames Tribes, at Maraetai, or altogether to buy [out] their claims, – either with land [from] elsewhere [within the purchase], or with land and money, combined'. It was the last option, buying out their claims with a combination of money and land, that Gisborne considered to be the best one. This was because he believed that those iwi currently residing in the vicinity of Maraetai, that is, Ngati Terau and Ngati Paoa, would not react favourably to the Crown offering other iwi the right to settle upon the land around Maraetai; land which they had always considered to constitute their share of the third. At the same time, Gisborne did not consider it practical or desirable to concede in its entirety the 'extravagant' area claimed by Kati Kati. As was briefly alluded to much earlier, Gisborne further recommended that, once the balance of land and cash to be paid to Kati Kati had been determined by the government, 'a Surveyor should mark out, with definite boundaries, all lands so set apart for the Natives, – that a certificate should be given to each tribe to that effect, and a written relinquishment on their part of all other claims, within the original deed of sale, be also obtained'.⁶⁹ In making this recommendation, Gisborne was referring not only to those lands which might subsequently accrue to Kati Kati, but to all the lands returned as a result of the 1837 deed. For as was highlighted earlier, despite the fact that Ngati Terau had been resident at Maraetai since before the purchase, the fact that the Crown had clearly forgotten about the reversion of the third meant that the exact status of their holdings was not at all clear. While approximately 5000 acres at Maraetai was marked off on various plans as Native Reserve, the initial appraisal of the Surveyor General's department that resident Maori 'had been permitted to occupy' the land at Maraetai would suggest that the settlement had not received any formal recognition of its reserve status.⁷⁰

Disregarding the advice of Gisborne, the Government eventually resolved to settle the dispute with Kati Kati through a purely cash payment of £200. This was to be delivered in two installments, an initial payment of £100 in October 1851, with the remainder to be paid once Kati Kati and his fellow protestors had removed their settlement from within the purchase. A further condition of the cash payment was that its acceptance was to be seen as a relinquishment of any further claims by

68. Ibid

69. Ibid

70. James Baker minute on Gisborne to Colonial Secretary, 26 March 1851, olc 1/590, NA Wellington

Ngati Tamatera to any land within the boundaries of the Fairburn purchase.⁷¹ A similar extinguishment of any future claims was the intention of an earlier payment of £100, this time to Mohi and Epiha, on behalf of Te Akitai. A third and final payment, this time of £500, was made in February 1854. The beneficiaries of this largest cash payment were Ngatitai.⁷²

By these payments, the Crown considered itself to have fully extinguished all claims by Maori to land within the Fairburn purchase. Two points might be made about this assumption. Firstly, none of the payments included either Ngati Whanaunga or Ngati Paoa, both of which were amongst the five iwi explicitly mentioned by Fairburn's 1837 Deed.⁷³ Secondly, the total payment made, £800, seems a highly inadequate consideration for the relinquishment of ownership of at least 25,000 acres of South Auckland land, especially when the formalisation of this ownership had been recommended by Godfrey and Richmond in 1842, and subsequently 'approved by government'.⁷⁴ The 1850s payments appear even more inadequate in light of the decision of the 1948 Myers Commission on Surplus Lands to exclude the Fairburn purchase from its calculations. This was on the basis that the 'Crown Purchases' of the 1850s had covered the entire Fairburn purchase, not just the third restored by the 1837 deed. In this way, the 1850s payments also served to deny the descendants of the original Maori vendors an investigation into whether their forebears 'had a right in equity and good conscience to have the surplus lands returned to them'.⁷⁵

The decision of the Myers Commission to exclude the Fairburn purchase from its considerations was merely the latest in a series of missed opportunities by the Crown to give effect to the promises and intentions conveyed in Lord Normanby's 1839 instructions. The potential benefit which would have derived from a third of the Fairburn purchase being restored to Maori was 'kept alive', as it were, by the commissioners in 1842 and FitzRoy during his short term as the Queen's representative. With the arrival of Grey, however, another potential benefit of the considerable surplus deriving from Fairburn's purchase was given precedence. Grey perceived the surplus in terms of its potential for easing the colony's financial problems. Ironically, this was also consistent with the Colonial Office policy conveyed in Normanby's instructions, which assumed that Crown ownership of the considerable demesne accruing from surplus lands would not only assure Colonial Office control over the colonisation of New Zealand, but also that its subsequent sale would ensure that the colony was self-funding in its administration. In the instance of the Fairburn purchase, these contradictions within Lord Normanby's

71. Ligar and Gisborne to Sinclair, 9 October 1851, olc 1/590; H Turton, *Maori Deeds of Land Purchases in the North Island*, deed no 221, pp 279–280

72. H Turton, *Maori Deeds*, deed no 219, p 278; deed no 233, p 290

73. This is assuming that 'Ngati Terau' of the 1837 deed and 'Ngatitai' of the 1851 deed are one and the same, as asserted by Ngati Tai today.

74. Ligar to Gisborne, 17 May 1851, enclosed in Gisborne to Colonial Secretary, 1 July 1857, olc 1/590, NA Wellington

75. 'Report of the Royal Commission to Inquire into and Report on Claims Preferred by Members of the Maori Race Touching Certain Lands Known as Surplus Lands of the Crown', AJHR, 1948, g-8, p 18

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1839 instructions were resolved, at least as far the Crown was concerned, by the cash payments of the early 1850s which removed the obstacle to government revenue presented by the promises of the 1837 deed.

