

## CHAPTER 3

# INQUIRIES AND DEBATES ON CUSTOMARY TENURE IN THE 1850s

Grey's departure from New Zealand in December 1853 marked the end of an era. There was not to be another Governor until the arrival of Thomas Gore Browne in September 1855, and in these crucial leaderless months, tensions over land sales rose to new heights. In 1854, the King movement was extending its sway, and an important anti-land-selling hui was held at Manawapou in south Taranaki. In 1856 at Pukawa, Lake Taupo, the names of prominent chiefs were put forward as contenders for the kingship, and the choice fell on the ageing Waikato warrior chief Te Wherowhero. In 1854, too, the Land Purchase Department was established under Donald McLean. The activities of his land purchase officers in Taranaki exacerbated tensions between *tuku whenua* (sellers) and *pupuri whenua* (non-sellers) into a state of feud which simmered and flared until the Waitara purchase of 1859 led to all out war. And in 1854 the New Zealand Parliament, the General Assembly, met for the first time in Auckland. At last the settlers had government in their own hands. They had agitated for it from the start; self-government was the hallmark of a sovereign state and an important constituent of the Wakefieldian theory of colonisation.<sup>1</sup>

The Constitution Act 1852 of the Imperial Parliament had spelled out a legislative structure for New Zealand, consisting of six provincial assemblies and a bicameral General Assembly which, until 1865, met in Auckland. The provincial councils were each headed by an elected superintendent; in all but Auckland they were prominent New Zealand Company men. All the early premiers and the greatest proportion of all the early ministries were company officials or settlers. They cast a long shadow over New Zealand affairs. Edward Stafford, superintendent of Nelson, headed the two longest serving ministries, in 1856 to 1861 and 1865 to 1869 – and he married William Wakefield's daughter; William Fox, the New Zealand Company's principal agent from 1848, was Premier four times, the last in 1873. Francis Dillon Bell, a cousin of the Wakefields, was Colonial Treasurer in the first ministry in 1856, Native Minister in 1862, and several times a legislative councillor. He was also a land purchase agent for the company and for Governor Grey, and acted as a land commissioner at various times between 1851 and 1880, before becoming New Zealand's agent-general in Britain. The Richmond–Atkinson

---

1. Vattel (cited in Paul McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi*, Auckland, 1991, p 14

clan from New Plymouth (and later Nelson) provided a judge, Cabinet ministers, and parliamentarians: Harry Atkinson was Premier four times and died in office as speaker of the Legislative Council in 1892; C W Richmond and J C Richmond both filled the office of Native Minister at various times, and the former was still a Court of Appeal judge in 1895.

Thus Wakefieldian settlers held many of the highest public posts in New Zealand for 40 and even 50 years after Waitangi. They were members of ministries which passed New Zealand's most controversial legislation, especially that concerned with the acquisition, by one means or another, of Maori land. Inevitably, they brought their Wakefieldian beliefs and values to office with them.<sup>2</sup> Bell defended the Waitara purchase; Fox was instrumental in legalising the confiscation of Maori land for 'rebellion'; C W Richmond was out to destroy the 'beastly communism' of Maori society.

When the representative Parliament met for the first time in May 1854 members demanded the immediate introduction of ministerial responsibility. They were granted it for the 1856 session of the Parliament, and since the ministers would be responsible to a Parliament in which Maori were not represented, the new Governor, Gore Browne, chose to retain control of Maori affairs – in essence to stand between Maori and settlers. Parliamentarians were not pleased, and for the rest of the decade there was a continuing struggle between Governor and ministers over the control of native policy.<sup>3</sup> The ministry was entitled to be informed of, and to record its opinions on questions of native affairs, so they had some input, if not control.<sup>4</sup> But they did control the purse strings, and McLean had de facto charge of day-to-day native affairs, so Gore Browne could actually do little more than withhold assent from the most controversial legislation – and he did that sparingly.

The Governor's first months in New Zealand were taken up with travel and with consultation with various 'experts' on Maori affairs. In April 1856, Bishop Hadfield responded to Browne's request for information on native affairs by assuring him that around Otaki at least there appeared to be no hostile feeling towards settlers or Government, 'no inclination to provoke war, or create a disturbance'. There was, however, a kind of 'restlessness', and a feeling of dissatisfaction among Maori leaders, manifested in large meetings in various parts of the central and southern North Island. He noted that chiefs used to decision-making and the management of tribal affairs were now denied this role, and he warned that if it came to war it would be on a scale not seen since before the Treaty was signed. The main grievance, he said, had to do with land purchase, and it was a shared grievance since chiefs could now communicate over distance, and this would lead to more 'unanimity of purpose', more 'unity of action'. Hadfield put his finger on the problem when he said that until some 'clearly defined principle' of landownership

---

2. On Wakefieldian beliefs and values see Ann Parsonson, 'Nga Whenua Tautohetohe o Taranaki: Land and Confiscation in Taranaki, 1839–59', revised report no 1 to the Waitangi Tribunal, claim Wai 143 record of documents, doc a1, November 1991, p 172.

3. See, for example, AJHR, 1858, e-5, pp 2–6

4. C W Richmond to Waikato Committee, 15 October 1860, AJHR, 1860, f-3, p 52

was laid down, difficulties must continue. Land purchase officers had no intelligible principle to guide them, and commissioners made arbitrary decisions in favour of occupiers or conquerors or conquered, according to which party was the more disposed to sell. Such actions inevitably led to disenchantment and a disrespect for the law. He suggested the establishment of courts presided over by ‘discreet magistrates’ assisted by native assessors to teach ‘natives of all ranks’ to respect the law. It was purely European law he had in mind. Tikanga Maori was to have no place, for at all costs Hadfield wanted the Government to ‘do nothing towards establishing the influence of the chiefs’, but rather to lessen it by ‘every legitimate means’. He made no suggestion as to how landownership was to be established, especially if chiefs were not to be given a leading role in the process.<sup>5</sup>

Gore Browne’s closest adviser on Maori affairs generally, and especially on land purchase policy, was McLean, on whom he was extraordinarily dependent. His correspondence with McLean was littered with such remarks as ‘I wish you were here to advise me’, and ‘You know how entirely I depend on you, and how ill I get on without you’.<sup>6</sup> It did not bode well for Maori whose interests were to all intents and purposes in McLean’s hands – especially since the position of Native Secretary was merged with that of Chief Land Purchase Officer in 1856, and McLean then held both posts. And it did not please settlers, the press, or parliamentarians, all of whom were scathing about McLean and his Native Department, which they saw as a barrier to colonial expansion and prosperity. The Governor noted ‘the constant abuse and misrepresentation heaped upon the meritorious department by which native affairs are conducted’.<sup>7</sup> But Fox called the Department ‘a great mystery, into whose sacred precincts none might penetrate’. There sat the Native Secretary ‘enveloped in clouds of darkness – a “medicine man” – a Grand Lama, absolute in power and irresponsible to authority’. No one knew on what principles McLean acted, he said:

no one had any clue to the rules by which he proceeded in his transactions with the Natives. . . . At one time they found him dealing with chiefs for tribal rights; at another he would only recognise individual claims, and the title of single hapu. At one time they saw incomplete purchases hastily hurried over; at another, Natives eager to sell, were put off from time to time, till at last they retracted their offers, and declined to sell when he was ready to buy.<sup>8</sup>

Fox’s rhetoric enlivened somnolent afternoons in the House, but there was more than a kernel of truth in his argument. McLean had engineered an empire for himself and made the Governor one of his subjects. C W Richmond (the Native Minister) complained that the Native Secretary acted on his own judgement; most of his correspondence was in Maori – and there was ‘no Interpreter specially

---

5. Hadfield memo, 15 April 1856, BPP, vol 11, pp 471–472

6. R W S Fargher, ‘Donald McLean, Chief Land Purchase Agent 1846–1861, and Native Secretary 1856–1861’, MA thesis, Auckland University, 1947 (quoted in Keith Sinclair, *The Origins of the Maori Wars*, Auckland [1957], 1980, p 56)

7. Gore Brown dispatch, 20 September 1859, BPP, vol 11, p 98

8. NZPD, 1861–63, p 361

attached to the Native Minister'.<sup>9</sup> For all that, the ministry of the day, despite their criticism in opposition, would hasten to defend the activities of the chief land purchase commissioner and his Department.<sup>10</sup> A little politicking was one thing, but the noble work of getting land out of Maori hands had to go on.

In 1856, Gore Browne appointed a 'Board of gentlemen . . . to inquire into the system of purchasing land from the Natives, and other matters'.<sup>11</sup> The board sat in April, just before the House convened, and reported back early in July. It took evidence from nine or 10 Maori, Christian and respectable, presumably; from the Bishop and several missionaries; and from an assortment of early settlers and others 'well informed' on native affairs. The Governor had asked them, among other things, to inform him about Maori authority and willingness to sell land. There was no unanimity about the answers received, in part because of tribal differences, but obviously also because of prejudice or ignorance or misunderstanding. The clearest ideas on the nature of native tenure came from the old identities whose knowledge and experience dated back to the 1820s and 1830s. Even so, when it came to the question of whether or not anyone had 'a strictly individual right to any particular portion of land, independent and clear of the tribal right', there were 27 negative replies and only two affirmative, and one of these was qualified.<sup>12</sup> This was the nearest to unanimity the witnesses came in their answer to any question (except for one on which all 33 were unanimous, and that concerned 'laws intended to restrain the Maories from indulgence in intoxicating drinks').<sup>13</sup> In some cases the proportion of affirmative and negative answers was nearer to half and half.

The board concluded that tribal title or claim to land arose from occupation, or conquest followed by occupation; that retention of title depended on successful defence of it – in other words, that might was right; that boundaries were known and often clearly defined, but they were often a source of strife; that all land was claimed by one party or another, but where it was disputed neither party could occupy it; that transfer of land came about through gifting, or as recompense for one reason or another, so that several tribes might have claims within another's tribal territory.

When it came to the claims of individual natives to land, the board reported that each native had a right in common with the whole tribe over the disposal of tribal land, and a right of usufruct in those parts that he or his parents had regularly occupied or cultivated or used, but that this individual claim did not amount to a right of disposal to Europeans 'as a general rule'. This qualification was added because one Pakeha witness maintained that some individuals of the 'Ngatewatua' tribe near Auckland had sold lands to settlers, and also to the Government, under the waiver of the Crown's right of pre-emption. A few examples of 'individual' sale were raised by witnesses, but it was never shown conclusively that they did not

---

9. AJHR, 1860, f-3, p 53

10. See, for example, NZPD, 1861–63, pp 359–360

11. Gore Browne dispatch, 23 July 1856, BPP, vol 11, p 473

12. Ibid, p 483

13. Fenton report, March 1857, AJHR, 1860, e-1c, p 9

have tribal consent. And in many cases when witnesses spoke of ‘individual’ claims to land they did not make it clear that they were speaking only of the right to use the land, not to dispose of it.

Sometimes Maori and Pakeha views were at odds; for example Ngapora: ‘The Waikato tribes could not at present define their respective boundaries’; Wilson: ‘The Natives, as tribes, can define very accurately their boundaries’; Whiteley: ‘In some cases the natives would not define the boundaries unless it was done with the consent of the adjoining tribes’; Te Ahu: ‘The natives mark off their boundaries without reference to other tribes who may dispute the boundary’.<sup>14</sup>

On the question of whether or not the natives were generally willing to sell their lands, opinion was divided, with 16 believing they were, and seven saying they were not. Maori opinion was split: four witnesses were undecided, saying that opinion differed from area to area, that there was more suspicion than formerly about disposal of land, and that they would refrain from selling on political grounds because of a ‘feeling of nationality’ that had grown up amongst them.<sup>15</sup>

In answer to the question ‘after the boundaries are defined, should a public notice be given, calling upon all claimants to appear within a given time or forfeit their claims’, there was a clear majority in favour by 16 to four. This did not bode well for the future, especially since only two of the respondents (McLean and Johnson, a district land commissioner) stated clearly that claimants could not be compelled to forfeit their claims; and the board’s recommendation was that a notice be published setting out the details of any block for sale and listing the known claimants. Other claimants would then be given a certain time – ‘at least three months’ – or their claims would be considered as forfeited.<sup>16</sup>

There was a strong divergence of opinion over whether or not Crown grants should be given, and if so whether they should contain a restriction on alienation. One witness thought Maori should be encouraged to get Crown grants so they could register as voters. Some thought Crown grants would ‘civilize the natives’, but that they would not accept restrictive clauses as these would suggest inferior titles; others thought awarding Crown grants would just cause confusion and dishonesty as conflicting claims were advanced, and that grants must contain a restrictive clause at least until Maori were ‘out of their minority’.<sup>17</sup>

The board noted that Maori were becoming more unwilling to sell ‘their large tracts of land’ because they were profiting from rising land values, and the longer the Crown delayed, the more it would cost to extinguish native title. The solution was to give them security of tenure through Crown grants for any land they actually required for occupation, and thus they would be induced to ‘part with their surplus lands’. At the same time they would have an incentive to improve their ‘social condition’, for as long as they held land as communities, they would look to them, not to British law and institutions, for protection.<sup>18</sup> The board had noted Bishop

---

14. BPP, vol 11, pp 552–553

15. Ibid, pp 551–552

16. Ibid, p 479

17. Ibid, pp 559–562

Selwyn's complaint that native title was recognised readily enough when the Crown wanted to alienate the land, but that it should also be recognised to enable Maori 'to hold their own land by a more secure tenure, and as a legal estate protected by our laws'. Selwyn also wanted the land of principal chiefs entailed, at least for a time, so that the family would be secured 'in its hereditary influence and respectability'.<sup>19</sup> This was a less appealing idea; most preferred to destroy, not perpetuate, chiefly influence.

McLean and Fenton pointed out some of the practical difficulties of trying to separate individual claims from tribal claims. According to McLean, Maori would only consider relinquishing native title in the case of sale; they could see no point in obtaining an individual Crown grant for land they wished to retain. His solution was not to deal with individual claims at all, but to extinguish native title over a whole block through purchase by the Crown, and then, possibly by making Government loan money available, encourage Maori to 'acquire land at the Government sales, both town, rural and country sections'. He hoped by this means every native would get a Crown grant: 'it would be the means of dissipating many jealousies, and breaking up their confederacies' – and no amount of money, he said, would induce them 'to part with the lands they hold by Crown grant when they obtain it by purchase from the Crown'.<sup>20</sup> The question of the morality of buying land for a trifle and obliging Maori to get into debt to buy a fraction of it back was not raised.

Various witnesses made it abundantly clear that the Crown should not consider buying disputed land. The bishop said it was 'dangerous' to buy land from one tribe if it was disputed by another, and anyway the seller could not put the buyer in undisputed possession unless the title was 'clear and good'.<sup>21</sup> McLean emphasised that the 'utmost caution' should be observed at every step of the purchase programme, and that 'the respective merits of rival claimants' had to be ascertained at the start. He said he had already instructed his land purchase officers to study the whakapapa and history of the people in their area, as well as the nature of the tenure, and to familiarise themselves with the 'various conflicting claims'. They were to walk the external boundaries of land offered for sale with the native owners, and survey the reserves, but on no account were they to attempt the survey of land unless there was unanimous agreement to its sale. Surveying was considered 'an exercise of the right of ownership', and would only excite animosity towards his officers and prejudice their land purchasing.<sup>22</sup>

The question of chiefly power was raised by various witnesses. According to one historian, McLean 'strongly emphasized the general influence of chiefs in land sales'.<sup>23</sup> Certainly McLean pointed out that Te Heuheu had decreed that 'a large portion of the interior of Waikato, Waipa, Whanganui, and the Rotorua Lakes' was sacred and not to be sold, but Te Heuheu's wishes, he said, 'would only be partially

---

18. Ibid, p 476

19. Ibid, pp 561–562

20. Ibid, pp 542, 562

21. Ibid, p 555

22. Ibid, p 545

23. Sinclair, p 139

carried out in the Waipa and Waikato districts'; and he said that when a chief undertook to sell land he did 'not allow after claimants to trouble the purchasers'; and he recommended 'some distinctive dress' being given to deserving chiefs who 'evinced a decidedly friendly feeling for the Government'.<sup>24</sup> But none of that constitutes strong emphasis on chiefly influence in land sales. In fact, McLean suggested that it might be desirable, when arrangements were being made to purchase land, 'to make it a special condition . . . that certain properties should be secured by the Crown to influential and deserving chiefs and others'.<sup>25</sup> This sounds rather as though McLean intended to buy the compliance of chiefs in the business of land sales. One Maori witness explained that, while the chiefs laid claim to 'some right over the whole of the land', this was resisted by the younger men of the tribe; and a Pakeha witness maintained that chiefs claimed the right to retain or sell the land.<sup>26</sup> The strongest acknowledgement of chiefly influence came from a Maori witness: 'Many individuals would like to get their land set out and surveyed . . . but I think the chief would oppose it'.<sup>27</sup> The board summed up these diverse opinions in a few words: 'The chiefs exercise an influence in the disposal of the land, but have only an individual claim, like the rest of the people, to particular portions'.<sup>28</sup>

In several instances, the question of a combination or a league against selling land was raised. McLean talked of it operating in Taranaki, Waikato, and Bay of Plenty. He thought it originated out of Maori fear of losing their independence and being dispossessed of their own country. But John Whiteley, a Wesleyan missionary, formerly of Kawhia, spoke of 'an idolatrous clinging to the land by the old native party', and he thought the Crown should adopt whatever plan would 'most expeditiously settle the land question', since possession of large tracts of land was 'injurious to the natives'.<sup>29</sup> Clearly, land and mana and pagan beliefs in false gods were closely linked in his mind. The board dismissed the idea of a 'combination' as a passing fad since 'no advantage of a practical nature to the natives' could be derived from it.<sup>30</sup>

On the question of whether Maori would rather sell land to the Government or the private individual, there was a clear consensus (including most of the Maori witnesses) in favour of sale to the Government. But opinion was less clear on whether Maori would be satisfied with the Government acting as agents for them, perhaps at auction, and simply giving them the net proceeds of the sale.<sup>31</sup> Maori witnesses were sceptical of the idea, one of them explaining that he would want to see an upset price fixed for each acre, and any land remaining unsold he would want returned to him, clothed with its native title. He would not be willing to allow the Government simply to set the level of expenses for such a service as it saw fit,

---

24. BPP, vol 11, pp 524, 543

25. Ibid, p 545

26. Ibid, p 557

27. Ibid, p 560

28. Ibid, p 475

29. Ibid, pp 512–513

30. Ibid, p 478

31. Ibid, p 483

since it would probably leave but little for himself. Time enough to part with the title, he said, when he received payment for the land. He did not even want to see his evidence written down, lest it bind him to the plan submitted to the board for its consideration.<sup>32</sup>

The board concluded that such a plan, involving 'complete surrender and extinguishment of the native title' before the receipt of any payment, would be contrary to native custom and therefore not generally popular. They preferred the existing mode of land purchase and thought it the best adapted to the difficulties of the time, but they put forward some suggestions for its improvement. They began with Lord Howick's 1844 idea – registration of all native claims and claimants. They wanted greater publicity given to purchases under negotiation, to bring rival claimants forward before the sale was completed; and they wanted no instalments paid before completion of the sale – in other words no laying of 'ground bait' by McLean's land purchase agents; and they wanted all the land surveyed, whether or not it was offered for sale.<sup>33</sup>

McLean dissented from some of these suggestions of the board, which he obviously saw as quite impractical. He pointed out that survey before sale was not a valid option; that notification of land offered for sale would be ineffective as claimants in the more remote districts would simply never see the *Kahiti*; and he defended his practice of drip-feeding the purchase money over a period of months and years, saying that it provided for 'absentee proprietors' who missed out on the first payment – but he thought notification in the *Kahiti* of final payments might bring forward dissenting claimants. He warned that care must be taken to ensure that those offering land were indeed the rightful owners and not dubious claimants trying to make a sale of land to which they had a questionable title. The true owners, he said, were often not so ready to sell, and would not come forward to defend their claim but would make a point of ignoring a Government notice triggered by an offer of disputed land.<sup>34</sup> McLean showed a keener understanding of Maori views and values than the board did, but in the end it was immaterial. Regardless of McLean, the board, and the Governor, the ministers would get their way.

The 1856 parliamentary session was a shambles. There was dissension between the provinces, and between provincialists and centralists, and too much bickering for parliamentarians to attend to native affairs. Continuing dissension with his ministers over responsibility for native affairs led Gore Browne, in September 1856 to seek once more 'the advice and opinion of persons best acquainted with the Native race, and least likely to be biassed by political or party motives'. The Governor wanted their opinion on whether the management of native affairs could be conceded to a (possibly unstable) ministry chosen from a purely European assembly and restrained only by the Governor's veto; or whether the 'evil' that might result from such a system of shared responsibility would indicate that the

---

32. Ibid, pp 555–556

33. Ibid, pp 477–479

34. Ibid, pp 544–545

entire management of native affairs should be reserved to the Governor alone. He was surely gratified to find that all but two of his 38 informants agreed, although for various reasons, that the control of native affairs must remain with the Governor.<sup>35</sup>

Several of the Governor's 'experts' agreed that, while Maori had confidence in the Governor as the Queen's representative, they did not have confidence in a settler ministry, and it would be an injustice to Maori to leave their affairs in the hands of an assembly where they were not represented, and where many members belonged 'to a school who have described the treaty of Waitangi as a harmless device to amuse savages'.<sup>36</sup>

Archdeacon Hadfield's minority view was that ministers and legislature could not continue to neglect Maori affairs, but would have to give much more care and attention to them if they were obliged to take responsibility for them.<sup>37</sup> In the light of future events this was a somewhat pious hope.

There was no parliamentary session in 1857, but C W Richmond, who held five portfolios (two of them twice) in the first Stafford ministry, lent his learned judgement to advising Gore Brown on Acts regarding Maori affairs which the ministry wanted to bring forward in the 1858 session. Since the Governor meant to retain Native Affairs, no Native Minister was appointed in 1856, but Richmond was de facto Native Minister until his appointment to the post in 1858. So although the final decision was in the Governor's hands, the ministry managed to pass legislation that required the assent not simply of the Governor, but of the Governor in Council – the Governor acting on the advice and with the consent of the Executive Council.<sup>38</sup> Richmond, particularly, wielded a strong influence, and he brought to the post not only his Wakefieldian prejudices and values but also the typical views of the hard-done-by, land-starved Taranaki settler. Above all, he was determined to purchase at least a site for a town and port at the Waitara – although he warned Parris against buying a disputed title. The Government, he said, would not 'have anything to do with land which it would require an armed force to keep possession of'.<sup>39</sup>

Robert Parris was appointed Land Purchase Commissioner for Taranaki in 1857, and under pressure from the Governor, Richmond, and the settlers, he was ultimately responsible for the Waitara purchase because he was on the spot, while McLean managed to keep his distance. McLean had instructed Parris in 1857 on his duties. He was to buy the land 'in such a manner as to prevent disturbances', he was to buy it as cheaply as he could get it, and if he was forced to make large reserves he should allow 'the Natives (subject to certain limitations) a pre-emptive right over such portions as they may desire to re-purchase'. They were then to hold their lands under individual Crown grants, instead of holding large reserves in common; thus 'their present system of communism' would be gradually dissolved.<sup>40</sup> McLean

---

35. Gore Brown despatch, 21 September 1856, BPP, vol 10, pp 634, 639

36. Ibid, pp 641, 660, 661

37. Ibid, pp 648–649

38. Sinclair, pp 88–89

39. C W Richmond to Parris, 6 July 1857, in *The Richmond–Atkinson Papers*, G H Scholefield (ed), Wellington, 1960, vol 1, p 282

impressed on Parris the points he had outlined to the board: he was to study native title in his district through getting local Maori to 'converse freely' on genealogies, tribal history, and tradition; he was not to attach too much weight to the claims of absentees, since they had probably 'acquired a vested interest in lands elsewhere, and should not now be considered as having an equal claim with their relatives who remain in actual possession of the soil'. At the same time he was to make a separate investigation into their claims at their actual place of residence. McLean warned Parris to beware of those claimants who were the first to offer their lands for sale, since they often had a defective title, while the 'actual owner' seldom made a 'noisy or boasting demonstration', but quietly showed that his rights were not to be trifled with.<sup>41</sup>

When it came to the crunch, though, neither the claims of residents nor those of absentees were allowed to stand in the way of the Waitara purchase. Those who were the first to offer the land for sale were heeded, while those who remained silent were slighted. The Governor's advisers knew very well how they should proceed, but they ignored all the rules, and the result was war.

The impasse grew out of settler attitudes – embodied in the Premier Stafford, and C W Richmond, the most influential minister in Stafford's Cabinet. According to Richmond, the two alternatives facing the Maori population were extinction of the race or its fusion with the European population, and obviously the moral duty of the colonists was to 'preserve and civilize the Native people'. The Government intended to do this by bringing them 'under British institutions', no easy task since they were dealing with a 'self-willed, suspicious and warlike race'. Since the Government lacked sufficient military power to overawe Maori, they meant to harness 'the good sense of the people and their innate capacity, under wise guidance, for self-government'.<sup>42</sup> In other words, they would capture and contain the Maori initiatives flourishing at the time, by bringing runanga under Government control.<sup>43</sup>

In 1858, Richmond introduced to Parliament three important Bills: the Native Districts Regulation Bill, the Native Circuit Courts Bill, and the Native Territorial Rights Bill. All three passed the General Assembly, but the Native Territorial Rights Act 1858 failed to receive the royal assent. The other two underpinned the Native Department for the next 30-odd years until their repeal in 1891.<sup>44</sup> The Native Districts Regulation Act 1858 provided that the Governor in Council, working as far as possible in cooperation with the local runanga, would make and enforce regulations concerning local matters such as petty crime, health, and stock trespass. The regulations would apply only to districts in which native title had not been extinguished, and they would be enforced by courts, set up under the Native Circuit

---

40. McLean to Parris, 26 August 1857, AJHR, 1860, e-3, pp 1–2

41. Ibid, p 1

42. Richmond memo, 29 September 1858, *Epitome*, a-1, pp 58–59

43. See Stafford memo, 6 May 1857, AJHR, 1858, e-5, pp 8–10; Fenton memo, March 1857, AJHR, 1860, e-1c, p 8

44. Alan Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand*, Auckland, 1973, p 303

Courts Act 1858, where the resident magistrate, styled a Circuit Court judge, would be assisted by Maori assessors and juries. It was proposed that Fenton should introduce the new system in the Waikato on a trial basis. Stafford hoped the Circuit Courts would ultimately have jurisdiction over intra- and inter-tribal disputes concerning territorial rights – ‘decisions being given according to Native usage’.<sup>45</sup> However, they never did deal with issues of land rights.

The Native Territorial Rights Act 1858 was to have provided for both individualisation of title and direct sale to settlers. Circuit Court judges and Maori juries would have determined tribal titles, and up to 50,000 acres a year could then be Crown-granted to individual Maori and on-sold to settlers who would be liable for a tax of 10 shillings per acre on their purchases. This was supposed to limit demand, but in effect it simply meant Maori would end up paying the tax, which settlers would subtract from the purchase price. Browne was not in favour of limiting the area which could be Crown-granted each year. He wanted Maori to be granted title to more extensive areas but restricted from alienating most of it, a provision which would never find favour with settlers. Since he would have had little control over the workings of the Act under the Governor in Council clause, he advised its rejection by the Colonial Office.<sup>46</sup> This brought on a new round of discussions on native tenure and highlighted the issue of who was to control native affairs. The division was between the Governor and McLean on the one hand, and the ministers backed by Fenton on the other, and it was brought to light by the deliberations of the Waikato Committee of the House of Representatives in 1860. Despite Richmond’s assertions to the contrary, it was a measure that would enhance settler interests and do incalculable damage to Maori. McLean described it as a means of legalising speculation.<sup>47</sup> It was not that McLean was against individualisation; but he had grave objections to the way ministers intended to carry it out; and he meant to keep the business in his own hands.

Richmond launched into a passionate defence of his Bill, claiming that it had but two inseparable objects: to civilise the natives and to promote European settlement of the country. But it was by no means a measure designed ‘to increase the immediate facilities for the acquisition of land by Europeans’ – although he did mention in passing that ‘the proposed registration of Native title (too long neglected) would facilitate the operations of the Land Purchase Department’.<sup>48</sup> Richmond expressed the inherent feelings of racial superiority of many settlers when he said:

It is . . . indisputable that the communistic habits of the aborigines are the chief bar to their advancement. Separate landed holdings are indispensable to the further progress of this people. Chastity, decency and thrift cannot exist amidst the waste, filth and moral contamination of the pas.<sup>49</sup>

---

45. Stafford memo, 6 May 1857, AJHR, 1858, e-5, pp 9–10

46. Ward, pp 107–108

47. McLean memo, 25 June 1858, *Epitome*, f, p 6

48. C W Richmond memo, 29 September 1858, *Epitome*, f, pp 7–8

49. *Ibid*, p 8

He went on to say that even if the business of extricating native title 'from its present entanglement' might entail a measure of risk:

that surely ought not to deter a great Christian Power from some effort to avert the shame and sin of remaining . . . the passive witness of murderous affrays between Her Majesty's subjects almost under the guns of her garrisons.<sup>50</sup>

Richmond's pious, self-serving protestations were in vain. The Colonial Office shared the Governor's misgivings and mistrust of settler intentions and disallowed the Bill. It was only a temporary set-back, however, for the ministry and land-hungry settlers. This Bill was a clear indication of the policy they were working to get in place.

In September 1859 Gore Browne sent the Duke of Newcastle, Secretary of State for the Colonies, the results of his latest consultations with yet another group of 'influential persons best acquainted with native affairs', this time on the question of 'the waste lands belonging to the aboriginal natives'.<sup>51</sup> He considered the time had come for a change in land purchase methods before the increasing settler numbers on one hand and Maori reluctance to sell on the other led to a clash of mammoth proportions. It was clear to him that 'a ministry, responsible to a popular assembly', would yield to settler pressure to make land available, with or without the 'full and intelligent consent' of the Maori owners. Thus it was imperative that Maori affairs continue to be the responsibility of the Crown and not the ministers, but he recommended the establishment of a permanent council of native affairs, nominated by the Crown, to assist the Governor to govern the Maori. He suggested a panel of seven Europeans – men of the calibre of the Bishop and the former chief justice, William Martin; men who were known and trusted by Maori. Together with the Governor they would draw up regulations concerning the settlement of the 'waste lands'.

His first requirement was consideration of the 'real interests of the aboriginal owners'. As much land as was 'necessary for their use and support' – perhaps one-fifth of their lands – was to be Crown-granted to them and made inalienable, and another fifth was to be set aside as reserves exclusively for their use. Then in European districts, once native title had been 'well ascertained', the land could be 'clothed with a Crown title' and sold by public auction 'for the benefit of the aboriginal owners'. All the remaining lands, which were not only useless, but actually harmful to Maori, should then be made available to settlers, with part of the proceeds from sale set aside for the 'moral and social improvement of the Maori race in the locality from whence it is derived'. Such a scheme, so obviously advantageous to Maori, should 'induce them to sell their lands more freely to the Crown', and thus satisfy settler demand and reduce the risks of a clash between the two races.<sup>52</sup>

---

50. Ibid

51. Gore Brown dispatch, 20 September 1859, BPP, vol 11, pp 93–99

52. Ibid, pp 93–96

Although Gore Browne obviously believed he was putting the interests of Maori first, he showed no inclination to consult them on the issue; and while he understood full well that Europeans coveted the best land and were not about to sacrifice themselves to ‘sympathy for the natives, and all that kind of humbug’ (as a member of the Auckland Provincial Council had put it),<sup>53</sup> he did not face the fact that that was exactly the land Maori would wish and need to retain for themselves. Nor did he suggest how native title was to be ‘well ascertained’, or how settlers with their importunate demands were to be restrained in the meantime. While his scheme might not be a ‘panacea for all evils’, he thought it was surely an improvement on the present system;<sup>54</sup> and he looked back rather nostalgically to the time when the South Island was acquired ‘for an almost nominal sum’, and large parts of the North Island for not much more. The pity was that the remaining millions of acres had not then been acquired too, ‘at a cost too insignificant to be calculated by the acre’.<sup>55</sup> He obviously did not think it in Maori interests to be paid fairly for their land.

In the years after Grey’s departure there was an escalation in Taranaki of tensions over land sales, caused and exacerbated by the operations of McLean and his land purchase officers. They reached dangerous proportions in 1858, only to subside again in mid year. As Parris prepared to take up his land purchase operations again, McLean warned him to wait, saying the Government was considering a ‘more general plan’ for the purchase of land in Taranaki, the effect of which might take ‘some little time to unfold’. He would not be more specific.<sup>56</sup>

At the end of 1858 Parris reported that Teira was ‘working hard’ for the sale of Waitara.<sup>57</sup> The Governor’s acceptance of Teira’s offer of the land in March 1859 marked a turn around in Government policy. Possibly this was ‘the more general plan’ McLean had mentioned some months before. Certainly Gore Browne had told a delegation of ‘respectable inhabitants’ of New Plymouth that he would not allow ‘the rights of chieftainship’ to prevail over the rights of ‘such as have a claim in the land in question’<sup>58</sup> – those he would call ‘owners’, but who were merely useholders. He told the Maori gathering on 8 March:

that he would never consent to buy land without an undisputed title. He would not permit anyone to interfere in the sale of land unless he owned part of it; and . . . he would buy no man’s land without his consent.<sup>59</sup>

And the offer of the land was not unexpected. McLean most probably, and Parris certainly knew, though perhaps not the Governor nor even Richmond.<sup>60</sup> Wi Kingi

53. Ibid, p 96

54. Ibid, p 97

55. Ibid, pp 93–94

56. McLean to Parris, 14 August 1858, AJHR, 1861, c-1, p 224

57. Parsonson, pp 164–165

58. Gore Brown dispatch, 29 March 1859, AJHR, 1861, c-1, p 226; A S Atkinson journal, 12 March 1859 (cited in Scholefield, vol 1, p 452)

59. *Taranaki Herald*, 12 March 1859 (quoted in Sinclair, p 137)

60. AJHR, 1861, f-2, p 4

knew too, and a month before the meeting with the Governor, wrote to remind him that he had always said he would not sell his land at Waitara.<sup>61</sup>

There is no doubt there was quite a conspiracy among McLean and his men to engineer the situation in the hope that this offer of land would trigger further offers so that the long-desired Waitara would finally pass into European hands – and just as importantly rid the area of what Richmond was pleased to call ‘a pack of contumacious savages’.<sup>62</sup> Just how far the Governor was implicated in the plot is unclear. Maybe he had succumbed to ministerial pressure. Certainly, he had gone to Taranaki determined to deny chiefs their right of chieftainship, their rangatiratanga guaranteed by the Treaty, and there was no better chance than this to do it. All the advice he had sought and received over the years had gone for nothing. His stubborn single-mindedness and the lack of any word of caution from his officials, led to a decade of war.

In December 1860, in the midst of the first Taranaki war, C W Richmond wrote a memo in answer to a question from the Colonial Office to Gore Browne, on the question of whether or not there existed in the chief or tribe:

a right distinct from one of property, to assent to or forbid the sale of any land belonging to members of the tribe, in cases where all the owners are willing to sell.

He was convinced no such right existed prior to European settlement since at that time ‘such a thing as a sale of land, in our sense, had not been heard of’; and by very sophisticated and self-serving argument he showed, at least to his own satisfaction, that it had not been ‘recognized or asserted’ since then, and therefore no such right could be supposed to exist. But he warned that did not mean in future principal chiefs might not attempt to use their influence ‘to check the exercise by Native landowners of those independent rights of alienation which they have hitherto enjoyed’; and he thought it would be ‘generally prudent’ to respect de facto chiefly authority and influence ‘without too nice an enquiry’ as to whether it really existed de jure.<sup>63</sup>

In his attempt to answer the Colonial Office’s question Gore Brown at least turned for information to ‘reliable authorities’ – all those he could find who could or had already expressed an opinion on the topic. They included the Board of Inquiry of 1856, several missionaries, officers of the protectorate or the native office, and other Crown officials, many with long experience in New Zealand and native affairs. They did not include members of his current ministry.<sup>64</sup>

None of Gore Browne’s authorities really answered the question. Several talked of a tribal right to alienate, but not a chiefly right to forbid alienation. Only Bishop Hadfield (in evidence to the House in August 1860) came close to a full answer when he repeated his 1845 opinion, written for Grey in the wake of the ‘collision’ at Wairau. It dealt with the exercise of rangatiratanga, and implied that of course a

---

61. AJHR, 1860, E-3A, p 5

62. Cited in Sinclair, p 133

63. C W Richmond memo, 3 December 1860, *Epitome*, f, pp 27–28

64. Gore Brown dispatch on ‘Seigniorial Right’, 4 December 1860, AJHR, 1861, e-1, pp 5–25

chief would have power of veto over any sale which might threaten the tribe's well-being. He said:

Allowing [the] very questionable right of the chief to alienate any part of the territory of a tribe, it can scarcely be allowed to any chief of a hapu, even should he act in accordance with the various individuals of the hapu. It must be remembered that a tribe, however subdivided into hapu, is one, and cannot allow its integrity and strength to be impaired by the independent act of one hapu, which it is bound to identify with itself in all things, and to protect if involved in any quarrels or difficulties.<sup>65</sup>

But in any case, the Colonial Office's question was totally illogical, since it confused owners with users. It had long been acknowledged that title was tribal, not individual, so if all owners were willing to sell, then the chief, who was ipso facto an owner, was also willing to sell, and the question of his forbidding the sale would not arise.

The illogicality escaped Gore Browne, and he embarked on a lengthy justification for his denial of Wi Kingi's 'seigniorial right' to veto the sale of the Waitara. He admitted that in the case of 'certain great tribes in full possession of their tribal territories', the Crown had recognised both the tribal right to sell their 'ancient inheritance', and the influence of their 'principal men in assenting to or preventing sales':

No Government for instance would have thought of making a purchase at Ngapuhi or at Waikato, in the teeth of the veto of great Chiefs such as Tamati Waka Nene and Potatau Te Wherowhero.

But in the case of tribes 'broken and scattered by conquest', the Crown had neither recognised the tribal right of alienation, 'nor permitted the exercise of a veto on such alienation by the chiefs'. This was the case with 'the Ngatiawa of Taranaki',<sup>66</sup> and whether or not it was correct policy, he was not prepared to argue. It was sufficient for him that that was how it had been 'since the foundation of the Colony'; he was simply following precedent.<sup>67</sup>

He illustrated this by detailing actions of Hobson, FitzRoy, and Grey 'in the matter of the Taranaki Land Question',<sup>68</sup> and although none of these precedents had provided any solution to Taranaki's problems, Gore Browne was prepared to try more of the same. When it led to war he thought it right to justify his actions by saying he had done no more at Waitara than all the governors before him had done in Taranaki.<sup>69</sup>

As well as asking Gore Browne about the existence of an 'alleged' seigniorial right, the Colonial Office also asked whether he believed there were reasons 'apart

---

65. 'Opinions of Various Authorities on Native Tenure', AJHR, 1890, g-1, pp 9–10

66. In the nineteenth century, Te Ati Awa of Taranaki were referred to in official documents as Ngatiawa.

67. AJHR, 1861, e-1, p 8

68. Ibid, pp 10, 13–14

69. Ibid, p 14

from the Treaty of Waitangi, in favour generally of the recognition of such a right', and whether they justified Wi Kingi's stance over the Waitara.<sup>70</sup> Gore Browne questioned whether in fact such a right was guaranteed to the chiefs by the Treaty. Busby, he said, absolutely denied it; he could find no evidence that Hobson 'anywhere admitted it'; and he thought the Maori interpretation of the Treaty was clearly demonstrated by a lower Waikato man, who had told a recent Kingite hui that each man should be allowed to do what he liked with his own land, 'that their right to their land was secured to them by the Treaty of Waitangi', and that no king ever interfered with his people when they wished to sell their land.<sup>71</sup> This was 'humpty dumptyism' taken to extremes: the Treaty could be made to mean whatever it was chosen to mean.<sup>72</sup>

Gore Browne quoted Sir William Martin, who said that the Treaty 'neither enlarged nor restricted the then existing rights of property. It simply left them as they were'. The Governor claimed that this principle had been recognised 'in every cession of territory since the Treaty', and that to attempt to introduce some new kind of right now would be an immensely difficult task:

Assuming any right, distinct from a right of property in the soil, to be admitted in a Chief to assent to or forbid the sale of land where the real owners are willing to sell, it would still have to be determined in whom that right should vest. The Government would first have to decide what was the 'Tribe', and who was the 'Chief' of the Tribe. Failing this they would have to decide what were the respective subdivisions of the tribe, and who were the Chiefs of those subdivisions.<sup>73</sup>

He felt it would be both 'unjust' and 'impolitic' for the British Government suddenly to announce that 'any Chief whatever, distinct from his right of property in the soil', had the right to forbid the 'real owners of the land' from ceding it to Her Majesty.<sup>74</sup>

It seems that despite all the 'expert' advice handed out over the years, the decision-makers could not or more likely would not understand the fundamental issues of rangatiratanga; that article 2 of the Treaty guaranteed Maori not just 'ownership', but full authority over their lands. This was something Europeans did not want to know.

---

70. Ibid, p 5

71. Ibid, pp 9–10

72. See Bruce Biggs, 'Humpty-Dumpty and the Treaty of Waitangi', in *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, I H Kawharu (ed), Auckland, 1989, p 304

73. AJHR, 1861, e-1, p 25

74. Ibid