

CHAPTER 12

THE ADMINISTRATION OF RESERVES, 1840–82

12.1 INTRODUCTION

In earlier chapters, we discussed the survey and selection of company tenths. We also examined the McCleverty ‘exchanges’, which saw a considerable number of company tenths being assigned to Maori of particular pa, as well as the creation of new reserves from the town belt and unsurveyed land. In this chapter, we are concerned with the administration of the remaining tenths reserves (sometimes referred to as ‘unassigned’ reserves) and those McCleverty reserves that came under Crown administration in the period 1840 to 1882. We also consider the status of the tenths reserves: that is, whether Maori at Port Nicholson were intended to be the beneficial owners of these reserves. The alienation of Maori reserves between 1840 and 1882 is covered in chapter 13.

In their final amended statement of claim, the Wai 145 claimants allege that the Crown’s policies and administration of native reserves at Wellington were in breach of the Treaty in a number of respects.¹ These general breaches are particularised later in the statement of claim and in more detail in Wai 145 claimant counsel’s closing submissions. We consider these and the Crown’s response below. Crown counsel accepted that the reserves commissioners who administered the reserves until they were transferred to the Public Trustee in 1882 acted “by or on behalf of” the Crown for the purposes of s6(1) of the Treaty of Waitangi Act 1975.² Crown counsel acknowledged that the Tribunal therefore has jurisdiction to consider whether the commissioners’ actions were in breach of the principles of the Treaty.

12.2 ADMINISTRATION OF THE RESERVES TO 1869

In the period considered in this chapter – 1840 to 1882 – there was a good deal of policy confusion and indecision, initially on the part of the New Zealand Company and soon afterwards on the part of the Crown. In particular, there was indecision over whether to use the

1. Claim 1.2(d), p 30

2. Document P4, p 36

reserves for Maori occupation or as an endowment which would provide Maori with rental income from leases to settlers. The latter policy came to prevail, almost by default, by the end of the period discussed here, and remained in force thereafter. Policy indecision was also reflected in a failure to define the legal status of the reserves by legislation and to make effective provision for their administration. The status of the tenths reserves is discussed further at section 12.4. At different times, it was asserted that the title to the tenths reserves rested with the New Zealand Company, the Crown, and Maori. In 1841, commissioner of native reserves Edmund Halswell wrote to the company secretary that the reserves ‘can only be dealt with at present as the property of the Company’. Governor Hobson, however, was said to treat them as ‘the absolute property of the natives’.³ Despite Halswell’s belief to the contrary, the company had no valid claim to the tenths reserves’ title. The company had no title to any land in the Port Nicholson block until Grey issued it with a Crown grant on 27 January 1848, and that grant excepted the tenths reserves.

In later years, and especially after the demise of the company, some Crown officials assumed that title to the tenths reserves lay with the Crown, although there appears to have been no express assertion of the Crown’s title, either by declaration of a trust or by legislation. Indeed, it was not until the Court of Appeal judgment in the case *Regina v Fitzherbert* in 1872 that the tenths reserves were held to be demesne lands of the Crown. (We discuss *Regina v Fitzherbert* in the next chapter.)

There was further confusion over the McCleverty reserves that were assigned to Maori living at the main pa in the Port Nicholson block. Those Maori or their successors were not usually granted Crown titles to these reserves until the Native Land Court adjudicated ownership under the Native Lands Acts from 1865. The Wai 145 claimants allege in their amended statement of claim that the Crown became involved in the administration of the McCleverty reserves without Maori permission.⁴ We accept the Crown’s response that there appears to have been only one occasion when this was attempted by the board of commissioners and that the matter was quickly cleared up by an opinion of the Attorney-General.⁵

There was also indecision over whether the reserves should be retained by Maori ‘for ever’, as the Port Nicholson deed stated, or whether they could be sold by Maori, or by the Crown on their behalf. As we shall see in later chapters, almost all the Maori reserve land in our inquiry area was eventually sold, or taken by the Crown.

Finally, we note that the administration of the Wellington reserves was hampered by the lack of legislative guidance and authority. Indeed, there was no native reserves legislation in force until the New Zealand Native Reserves Act 1856. In the meantime, the reserves came under the administration of a reserves commissioner (originally appointed by the New Zealand Company, later by the Governor), with a board of trustees also playing a role in

3. Halswell to secretary, New Zealand Company, 11 November 1841 (doc A29, p 487)

4. Claim 1.2(d), paras 13.14, 14.2

5. Document Q1, pp 37, 42

managing the reserves for part of this period. However, the administration was for the most part ad hoc and intermittent. We discuss this by reference to successive commissioners.

12.2.1 Halswell's administration

Confusion and indecision over the reserves started with the New Zealand Company. Its plans for the administration of its tenths reserves were extremely vague. Its instructions to Colonel Wakefield required him to reserve from every purchase 'a proportion of the territory ceded, equal to one-tenth of the whole' and to hold it in trust 'for the future benefit of the chief families of the tribe'.⁶ Wakefield duly included in the Port Nicholson deed a provision stating that 'a portion of the land ceded by them [the chiefs of Port Nicholson], equal to one-tenth part of the whole, will be reserved by . . . [the] Company . . . and held in trust . . . for the future benefit of the said chiefs, their families, and heirs for ever'.⁷ Since there were only 16 signatory chiefs, they and their descendants would have become very wealthy had one-tenth of the settlement been reserved to them 'for ever'.

In October 1840, the company appointed Edmund Halswell, a lawyer who had been involved in the establishment of the company, to the office of 'commissioner for the management of the lands reserved for the natives in the New Zealand Company's settlements'.⁸ Halswell's instructions from the company secretary were further evidence of the ambiguities of the company's reserves policy. The company directors admitted to being uncertain as to whether the chiefs were qualified to manage the reserves themselves, either by letting or by cultivating the land. They were also unsure about who should benefit from the rental income and whether part of the rent should be 'permanently appropriated as a fund for promoting the moral and religious instruction of the chief families, or the native race generally'. In order to provide the directors with the information necessary to clarify such points, Halswell was instructed to carry out a census of the Maori population and to provide an assessment of their 'habits, character, and manner, and their capacity for instruction and civilization'. He was further instructed to act for Maori in the selection of rural tenths, to report on the quality and natural resources of the reserved land, and to make suggestions for its 'cultivation, improvement, or disposal'.⁹

Halswell arrived in Wellington around April 1841, and in July Hobson appointed him both protector of aborigines and the Crown's commissioner of native reserves in the southern district.¹⁰ These official appointments indicate that the Crown had accepted responsibility for native reserves in the company's settlements. Nevertheless, Halswell's position remained

6. 'Instructions to Colonel Wakefield, Principal Agent of the New Zealand Company', May 1839 (doc A29, p 372)

7. Port Nicholson deed of purchase, 27 September 1839 (doc A29, p 440)

8. Ward to Halswell, 10 October 1840 (doc A29, p 481); Ward to Wakefield, 13 October 1840, CO208 (doc C1(c), p 347). See also Patricia Burns, *Fatal Success: A History of the New Zealand Company* (Auckland: Heinemann Reed, 1989), pp 11, 99, 104, 148, 220–221, on Halswell and his involvement with the New Zealand Company.

9. Ward to Halswell, 10 October 1840 (doc A29, pp 481–483)

10. Document C1, p 77; doc E3, pp 131, 133

ambiguous, since he received instructions on the management of the Port Nicholson reserves from the company's principal agent, William Wakefield, as well as from the Governor and other Crown officials such as George Clarke senior (the chief protector of aborigines), and Willoughby Shortland (the Colonial Secretary). Halswell retained his company salary and tried to serve both masters.¹¹ He assumed that he should follow company policy for the administration of tenths reserves and Government policy for additional reserves subsequently set aside by the Crown. As Armstrong and Stirling noted, there was to be 'an increasing divergence in the attitude of the Crown and the Company concerning the way in which the reserves were to be utilised'.¹²

The company wanted Maori to vacate pa and cultivations on sections which had been allocated to settlers, and to move to the tenths reserves which had been selected for them. When Hobson visited Wellington in August 1841 he promised Maori that 'they would not be obliged to leave their pas and cultivations, which they had not alienated, [and this] was received by them with great satisfaction'.¹³ Halswell adhered to company policy, and, although he admitted in June 1842 that he was having 'great difficulty . . . in persuading [Maori] to remove to lands upon which they have not been accustomed to live', he claimed that he had been 'gradually making them understand the full advantages of the plan of the reserves made for them'.¹⁴

The Crown, however, preferred a policy of leasing the native reserves to settlers, with the rental income going to the benefit of Maori, rather than encouraging Maori to live on the reserves. In September 1841, Halswell was instructed by George Clarke senior to lease for up to seven years reserves not occupied by Maori. The proceeds were to be used for religious, educational, and health purposes for the benefit of Maori. This indicated that the Crown had abandoned the company's plan to make the chiefs and their families alone the beneficiaries of the tenths and had adopted a trust policy in relation to these reserves. A committee consisting of Halswell, police magistrate Michael Murphy, and Crown prosecutor Richard Hanson was established to superintend the leasing of reserves.¹⁵

To add to the confusion, some Maori claimed title to the reserves and attempted to lease them independently of the commissioner. Pipitea chief Wairarapa attempted to lease some of the Thorndon tenths in 1841, but Halswell stopped him. Wi Tako Ngatata leased the tenth reserve at Kumutoto, only to find that the rents were collected by the reserves commissioner.¹⁶ Maori also lived on and cultivated some reserves, though probably only those which had already been under cultivation when the reserves were created.

11. Document C1, p 91

12. *Ibid*, pp 80–81

13. George Clarke senior, 'Report of a Visit to Port Nicholson', enclosed with Hobson to Secretary of State for the Colonies, 13 November 1841, BPP, vol 3, p 522

14. Halswell to Wakefield, 4 June 1842 (doc A29, p 492)

15. Clarke to Halswell, 28 September 1841, Turton, *Epitome* (doc A26), s D, p 1

16. Document 14, p 85; doc C1, p 86

In November 1841, Halswell reported that he had advertised leases of reserves in accordance with his earlier instructions but that no tenders were received because the seven-year maximum term was too short to encourage lessees to erect buildings on urban lots or to clear rural land.¹⁷ Halswell admitted in June 1842 that he was still unable to let the reserves, with the single exception of town acre 514, on which Richard Barrett had erected a hotel, partly on the strength of a claim to the land by his wife's people.¹⁸

12.2.2 New trustees appointed

In June 1842, Halswell was informed by the Colonial Secretary that the committee established to administer the reserves was to be replaced by a new set of trustees.¹⁹ The Anglican bishop of New Zealand, the chief justice, and the chief protector of aborigines were appointed trustees for the native reserves made by the New Zealand Company at Port Nicholson and elsewhere, although the chief justice soon resigned as a trustee because he saw that role as being 'incompatible with his judicial duties'.²⁰ In appointing the trustees, the Colonial Secretary explained that the tenths were to be vested in them once they had become legally vested in the Crown. Rentals from these reserves were to be vested in the trustees, as was any surplus remaining after the costs of the protector's department had been deducted from the 15 to 20 per cent of the proceeds of Crown land sales which was allocated to Maori purposes. These two sources of revenue were to be used for the education, spiritual care, and social and political advancement of Maori.²¹ Halswell and his committee were asked to resign, but Halswell continued as agent for the Wellington town reserves until his replacement the following year.²² He was subsequently dismissed as the company's commissioner of native reserves, and thereafter the company had no further involvement with the administration of the tenths reserves.²³ The planned vesting of the reserves in the trustees never took place.

In summing up Halswell's administration of the reserves, Wai 145 claimant counsel submitted that Halswell's dual position as company commissioner and Crown protector of aborigines 'led to an inherent conflict of interest, exacerbated by Halswell's apparent disregard for the mana and rangatiratanga of the tangata whenua. The Crown's complicity in creating this conflict of interest also created a Treaty breach.' Claimant counsel also characterised Halswell's attempts to get Maori to move to tenths reserves as:

17. Halswell to Colonial Secretary, 29 November 1841; Halswell to secretary, New Zealand Company, 10 February 1842 (doc A29, pp 488, 490)

18. Halswell to Wakefield, 4 June 1842 (doc A29, p 492)

19. Colonial Secretary to Halswell, 18 June 1842 (doc A29, p 496)

20. Shortland to chief justice, 26 July 1842 (doc A29, p 498); bishop of New Zealand to Arthur Wakefield, 23 May 1843 (doc A29, pp 470–471)

21. Shortland to chief justice, 26 July 1842 (doc A29, p 498)

22. Hobson to trustees of native reserves at Port Nicholson, 27 July 1842 (doc A29, p 498)

23. Document c1, p 100

a Crown condoned act of continual harassment. The Crown throughout did nothing tangible to stop the company from acting in so cavalier fashion. In its sly acquiescence it breached its Treaty obligations to actively protect tangata whenua.²⁴

Crown counsel replied that Halswell was quickly replaced, that he ‘met with no success in encouraging Maori to give up their kainga and live on Company reserves elsewhere’, and that there ‘is no evidence of prejudice to Maori from his official activities’.²⁵ (We have in earlier chapters discussed the pressure exerted on Maori to vacate their cultivations and pa, which pressure was mainly exerted by the settlers themselves.)

As for Halswell’s overall performance as reserves commissioner, we need to remember that he held the position for less than two years at a time when neither the company nor the Crown had established effective administration in Wellington. It is not surprising that there was only a rudimentary administration of the tenths reserves in those early years. However, any prejudice to Maori from an initial failure to let the reserves was compounded the longer they remained unlet.

12.2.3 St Hill’s administration

In March 1843, a Wellington land agent, Henry St Hill, was appointed by Bishop G A Selwyn (one of the reserves’ trustees) to take control of the urban tenths from Halswell. (St Hill had already taken over the administration of the rural tenths.) He was to be paid from rentals from the reserves rather than by the company or the Government.²⁶ St Hill had little more success than his predecessor in leasing out the tenths reserves. Although the term of the leases for the reserves was varied to up to 14 or 21 years, building covenants may have dissuaded settlers from taking leases. Wakefield also suggested that the failure to lease more than a few reserves was accounted for by the existence of many sections which had been purchased by absentee owners and which were available for lease in competition with the tenths reserves.²⁷ By mid-1848, only two urban tenths (including the site of Barrett’s hotel) and three country tenths had produced any rental income.²⁸

In 1844, FitzRoy passed a native trust ordinance, a first attempt to provide legislative backing for the effective administration of reserves and other land or property held in trust for Maori. It provided for the appointment of five trustees – the Governor, the bishop of New Zealand, the Attorney-General, the commissioner of land claims, and the chief protector of aborigines – who could lease trust property for up to 99 years and use the proceeds for educational and other benefits for Maori. Alienation of the property except by lease was

24. Document o1, pp 104–105

25. Document q1, p 17

26. Document c1, p 109

27. *Ibid*, pp 108, 111

28. ‘Account of Native Reserves’, October 1848, BPP, vol 6, [1280], p 125

prohibited, and all mortgages or encumbrances on the estate were declared void. The ordinance did not specifically mention the Wellington tenths, but the tenths would presumably have been vested in the trustees had the ordinance come into operation. It did not, however, because it was never gazetted.²⁹

FitzRoy refused to recognise the existing trustees, and as a result Bishop Selwyn ceased to act as a trustee in February 1844.³⁰ In November 1845, he wrote a long letter to FitzRoy expressing disappointment at the failure of the reserves administration in the Wellington settlement and elsewhere. Selwyn had hoped that the £4000 which had accumulated in the native trust fund would provide for schools, hostels, and hospitals, but not one of these objects had been attained.³¹ Instead, the money had been appropriated for what Hobson had described as ‘the necessary expenses of the Colony’. Selwyn also complained that the native reserves in the ‘Southern Settlements [had] entirely failed’ owing to the decline of the settlements and confusion about whether the reserves were to be occupied and cultivated by Maori or let to Pakeha in order to raise money for the benefit of Maori. As a result, ‘not one shilling of rental or revenue of any kind was ever received’ from the tenths reserves during his time as trustee.³²

In fact, a few tenths reserves did generate rental income in the period 1842 to 1848, but this was almost entirely swallowed up by St Hill’s remuneration. The administration of the Wellington reserves remained with St Hill, on what Armstrong and Stirling called ‘a very loose ad hoc basis, given that the trust under which he was ostensibly operating had effectively ceased to exist’.³³ Apart from collecting rents, St Hill’s main activity as reserves agent was selecting additional reserves for Maori, both at Port Nicholson and in the other districts where he acted as agent. In December 1847, he described the selection of these reserves as ‘the chief expense’ of his agency.³⁴

By the middle of 1848, £370 in rental income from Wellington tenths reserves had been received, of which £363 had gone to pay St Hill. This was because Bishop Selwyn had authorised St Hill to retain the first £100 of rental income, plus a percentage of any income above £100. The rental income from the tenths reserves never exceeded £100 annually, so, apart from one outlay of £7, the whole amount went to St Hill.³⁵ This charge against reserves revenue was characterised by Wai 145 claimant counsel as a breach of the Treaty, but Crown

29. Ralph Johnson, *The Trust Administration of Maori Reserves, 1840–1913*, Waitangi Tribunal Rangahaua Whanui series (working paper: first release), August 1997, pp 12–13; Native Trust Ordinance 1844 (doc A21, pp 1–5)

30. Alfred Domett, ‘Memorandum on Commissions Received by Agents for Native Reserves’, 3 December 1849, BPP, vol 6, [1280], p 122

31. This money had come from the 15 per cent taken out of income from Crown land sales.

32. Selwyn to FitzRoy, November 1845, G19/1, NA, Wellington (doc C1(d), pp 34–46)

33. Document C1, p 224

34. St Hill to Acting Colonial Secretary, 31 December 1847, BPP, vol 6, [1280], p 126

35. Native Reserves Account, October 1848, St Hill’s letter of appointment, 1 November 1842, BPP, vol 6, [1280], p 125

counsel said that it was consistent with the Crown's reserves policy and that the rate was not improperly high.³⁶

We consider that it would have been more appropriate for St Hill either to have been paid a salary by the Treasury or to have taken a fixed percentage of the rental income as payment for his services as agent. Moreover, St Hill's main activity as reserves agent, apart from collecting the rents from the few tenths reserves which had been leased out, was selecting additional reserves. Some of these were within the Port Nicholson block, but others were at Horowhenua and Manawatu.³⁷ Thus, the income derived from tenths at Port Nicholson, which should have gone to benefit Port Nicholson Maori, went instead to pay St Hill, in part for selecting reserves elsewhere in the country from which Port Nicholson Maori would derive no benefit.

12.2.4 A new board of trustees

On 23 June 1848, Lieutenant-Governor Eyre wrote a 'Memorandum relative to the Native Reserves', which summarised the recent history of the company tenths reserves and made recommendations for their future management. He noted that these reserves were to have been placed:

under the direction of Trustees, who without the power of alienation might make such arrangements for letting or leasing them as would secure the largest pecuniary return, and this return was to be devoted entirely to objects connected with the general welfare, advancement and improvement of the Native Race.

However, the trustees had found many obstacles preventing the execution of their trust and had ceased to act. Though some reserves or portions of reserves had been let to settlers on 'partial arrangements', these were not legally binding, and very few rents were ever paid. Eyre proposed the appointment of local boards of management which would be charged with 'investigating and considering all questions connected with the management of the Reserves'. These boards would make recommendations to the Government about how the reserves could best be used to generate income to be spent on 'the welfare and civilisation of the Natives'. Eyre considered it important that the Government should retain control of the reserves in order to use some of the tenths land for public purposes. We discuss this part of Eyre's memorandum, and his justification for the proposed appropriation of tenths reserve land, at section 13.2.1.³⁸

In accordance with Eyre's memorandum, a board of management for the Wellington

36. Claim 1.2(d), para 13.16; doc Q1, p 38

37. See the columns 'District' and 'By whom chosen' in St Hill's 'Account of Native Reserve Lands in the New Zealand Company's First and Principal Settlement', 31 December 1847, NM8/1850/1151 (doc A40, pp 301–304)

38. Eyre, 'Memorandum Relative to the Native Reserves', 23 June 1848, NM8/1850/1151 (doc A40, pp 311–314)

reserves was appointed which consisted of St Hill, McCleverty, and Attorney-General Daniel Wakefield.³⁹ The new board had no control over the McCleverty-granted lands other than advising on their alienation and ensuring that Maori retained sufficient land on which to maintain themselves.⁴⁰ St Hill remained in charge of the day-to-day administration and leasing of the remaining tenths reserves, which had been greatly diminished as a result of the McCleverty arrangements. Rental income from the tenths reserves was paid into a native reserve trust fund, which was administered by the board of management.

In 1851 and 1852, a total of £503 was paid out from the trust fund to three settlers in Taranaki. Two of the settlers were compensated for having to move off native reserves, while the third was compensated for losses resulting from an attack by Maori.⁴¹ Counsel for the Wai 145 claimants stated that these payments were in breach of the Treaty, while Crown counsel submitted in reply that there was insufficient evidence to enable the Tribunal to reach an informed view on the matter.⁴² We consider that there is sufficient evidence before the Tribunal to support the claim that Taranaki settlers were compensated with revenue from the Wellington tenths reserves and that such payments were an inappropriate use of money which was meant to benefit Port Nicholson Maori.

12.2.5 The New Zealand Native Reserves Act 1856

Although the board of management provided some guidance to St Hill in the administration of the reserves, he was still operating in a legislative vacuum. The New Zealand Native Reserves Act 1856 finally provided him with some guidance.

The Act was promoted by Henry Sewell, who said that the legislation was required because the Government had failed to manage the reserves for the benefit of Maori. He explained that the Act placed the:

reserved lands under the management of local commissioners, with whom native chiefs themselves may be associated . . . Out of Funds thus produced provision may be made for schools, Clergy &c in which the Natives themselves will have a voice through their Chiefs.⁴³

There was little debate in either House of Parliament when the Bill was introduced.⁴⁴

Although the Act's preamble said that it was expedient to place under effective management lands set apart for the benefit of the 'aboriginal inhabitants', it did not define those

39. Swainson to Native Minister, 21 May 1866, in Turton, *Epitome* (doc A26), s D, p 53

40. Domett to board of management for native reserves, 6 October 1848 in Turton, *Epitome* (doc A26), s D, p 14

41. See native reserves trust fund, board of management of native reserves accounts, NM8/1852/691, NM8/1852/972 (doc A40, pp 429–436); T1 1/1857/609 (doc C1(e), pp 56–64); CS1/1853/1412 (doc B13(a), pp 12–15)

42. Claim 1.2(d), para 13.10; doc O4, pp 329–330; doc Q1, p 35

43. WD McIntyre (ed), *The Journal of Henry Sewell, 1853–7*, 2 vols (Christchurch: Whitcoulls, 1980), vol 1, p 252 (quoted in Johnson, p 24)

44. Document A20, pp 2–4

reserves other than to distinguish between reserves over which the native title had or had not been extinguished. The former were to come under the administration of commissioners of native reserves, but the latter were not to be administered by the commissioners, except ‘with the assent of such aboriginal inhabitants’. The New Zealand Company tenths and the McCleverty-assigned reserves were not mentioned in the Act, although Attorney-General Frederick Whitaker referred to the company reserves when introducing the Bill’s second reading in the Legislative Council.⁴⁵ Officials usually assumed that the tenths came under the Act, but the position of the McCleverty-assigned reserves was not so clear-cut. The Attorney-General observed in 1859 that the McCleverty-assigned reserves were ‘not Native reserves within the meaning of “The New Zealand Native Reserves Act, 1856”’, and therefore not subject to the control of the reserves commissioners.⁴⁶ But, in the 1865 opinion of a later Attorney-General, Henry Sewell, the McCleverty reserves could be brought under the Native Reserves Act with the consent of the owners under section 14 of the Act.⁴⁷ (We discuss below an example of McCleverty reserves at Polhill Gully being put under the commissioner’s administration by their owners.)

The New Zealand Native Reserves Act 1856 provided for the appointment of commissioners of native reserves and gave them wide-ranging authority over the reserves under their control.⁴⁸ They could exchange, lease, sell, or otherwise dispose of such land, provided that any lease of more than 21 years or any other disposition of the land was approved by the Governor. They could also, with the Governor’s assent, set aside reserved land for churches, chapels, or burial grounds, or as special endowments for schools, hospitals, or other charitable institutions, for the benefit of the Maori inhabitants. Where land had been set apart for such purposes by Maori themselves, the Governor could, with their assent, grant this land to any person or body corporate, to be held for endowment purposes.

Section 14 of the Native Reserves Act authorised the Governor, with the assent of the Maori inhabitants of reserved land over which the native title had not been extinguished, to declare such lands to be subject to the Act. Such reserves would then be managed by commissioners as if native title had been extinguished. Section 17 required the Governor, in such cases, to appoint a competent person to ascertain the assent of the Maori inhabitants. Section 17 further provided that, whenever such assent had been determined, the land was to be conveyed to the Crown and then to become subject to the provisions of the Act. (The provision requiring such land to be conveyed to the Crown was repealed by section 6 of the Native Reserves Amendment Act 1862.)

45. 30 June 1856, NZPD, 1856, p 237 (doc A20, p 2)

46. Assistant Native Secretary to commissioners of native reserves, 24 September 1859, Turton, *Epitome* (doc A26), s D, p 34

47. Minute by Henry Sewell, 19 June 1865, Turton, *Epitome* (doc A26), s D, p 48

48. The New Zealand Native Reserves Act 1856 (doc A21, pp 6–8)

All moneys received under the provisions of the Native Reserves Act, except those from special endowments, were to be used for the benefit of those Maori for whom the reserves were set apart, although the commissioners could deduct administration expenses. The Governor was also empowered to issue rules to guide the conduct of the reserves commissioners.

12.2.6 Commissioners appointed

It was not until 12 April 1858 that commissioners for native reserves for Wellington province were appointed under the New Zealand Native Reserves Act 1856. St Hill was reappointed, along with six new commissioners: S Carkeek, RR Strang, the Reverend T B Hutton, Tamehana Te Rauparaha, Matene Te Whiwhi, and Rawiri Puaha.⁴⁹ According to a subsequent commissioner, George Swainson, the active administration of the reserves was undertaken by three of these men: St Hill, Strang, and Carkeek.⁵⁰ Wellington was the only province to appoint Maori commissioners, though they do not appear to have been given anything to do.

In April 1859, a land purchase commissioner, William Searancke, drafted a report for the Governor on the Wellington reserves. There are two drafts of this report on the record of this inquiry, although it is not clear whether either was ever sent.⁵¹ Searancke pointed out that ‘the discontent now existing among the Natives’ had been ‘much increased of late by the operations of the Commissioners of Native Reserves’. We comment further on this point below in our discussion of the so-called ‘twenty years of silence’, said by the Crown to signify the acceptance by Maori of the arrangements made for their reserves (see s13.2.4), but Searancke’s report is useful at this point of our discussion for its comments on the state of reserves administration.

Searancke wrote that not one of the urban tenths was ‘in the occupation or cultivated by Natives’ and, of the pa in the town, only Te Aro remained ‘constantly occupied’. Some tenths reserves had been let ‘without any beneficial result to the Natives for whom they were said to be reserved’, and Maori were ‘fully aware that the rents are received by the Board of Commissioners of N Reserves and loudly and openly claim that the Rents received . . . should be paid to them’. Instead, Searancke believed, the rents were ‘principally devoted to the support of Hospitals &c’. To overcome the discontent, Searancke suggested that a single commissioner should be responsible for leasing all the reserves not required for Maori occupation, collecting the rents, ascertaining the legitimate beneficiaries for each reserve, and paying the rents

49. CW Richmond, notice of appointment of commissioners of native reserves, 12 April 1858, Turton, *Epitome* (doc A26), s D, p 29

50. Swainson to Native Minister, 21 May 1866, Turton, *Epitome* (doc A26), s D, p 53

51. Draft letter, undated, MA W2218, box 8 (doc N1, pp 300–304); also draft of the same letter dated 20 April 1859, MA W2218, box 8 (doc N1, pp 296–299). The letters are unsigned, but Crown counsel identifies Searancke as the writer (doc P1, p 89), and this appears to be confirmed by comparing the handwriting to that in the signed letter by Searancke in document N1, pp 249–253.

to such beneficiaries.⁵² As will be seen, these desirable objectives were not achieved for many years, although a single commissioner was soon to be appointed.

12.2.7 The Native Reserves Amendment Act 1862

In 1862, the Wellington reserves commissioners resigned because they could not carry out their duties effectively under the New Zealand Native Reserves Act 1856. As a consequence, the Native Reserves Amendment Act 1862 was passed.⁵³ This vested in the Governor all powers and authorities previously vested in the commissioners under the 1856 Act but also enabled the Governor by Order in Council to delegate those powers to any person or persons. In this way, the Governor could vest his powers in one or more commissioners, acting where and when he chose.

Section 7 of the 1862 Act stated that, where under the 1856 Act the assent of the Maori inhabitants was required to bring land under the operation of the Act, the Governor could by Order in Council declare such assent to have been ascertained. Thereupon, the title of Maori to the land was deemed to be extinguished and the land vested in the Crown for the purposes of the Act.⁵⁴ This provision apparently applied to McCleverty reserves. Wai 145 claimant counsel characterised section 7 as giving the Governor ‘sweeping powers allowing him to extinguish Maori title without consent of Maori’.⁵⁵ Crown counsel, rightly in our view, contended that section 7 ‘imposed a positive duty on the Governor to obtain Maori consent to placing their land under the Act’.⁵⁶ This is because the Governor remained bound by section 17 of the 1856 Act to appoint a competent person to ascertain whether or not the Maori inhabitants consented to their land becoming subject to the provisions of the Act. We also agree with Crown counsel that, although the legal estate vested in the Crown, that estate was burdened with a trust.

12.2.8 Swainson’s administration

In October 1862, George Swainson was appointed native reserves surveyor and commissioner of native reserves. However, it was not until September 1863 that the Governor’s powers under the Native Reserves Amendment Act 1862 were formally delegated to him.⁵⁷ Swainson inherited an administrative nightmare: no annual accounts for the Wellington reserves had been published and there was no annual distribution of rents since there was

52. Draft letter, undated, MA W2218, box 8 (doc N1, pp 300–304); draft letter, 20 April 1859, MA W2218, box 8 (doc N1, pp 296–299)

53. Swainson to Native Minister, 21 May 1866, Turton, *Epitome* (doc A26), s D, pp 53–54

54. The Native Reserves Amendment Act 1862 (doc A21, pp 10–11)

55. Document O4, p 392

56. Document Q1, p 42

57. Document C1, pp 334–336

no list of beneficiaries. To help clear up the mess, Swainson was required to report on both the original New Zealand Company tenths reserves and those reserves provided by the McCleverty arrangements, and to advise on how these could be used with ‘most practical advantage to the natives for whom they were reserved’. He was also expected to survey the reserves, ‘assist in the work of enquiring into and individualizing native title’, and prepare Crown grants, leases, and other documents.⁵⁸

Swainson also found that, as Searancke had earlier observed, Wellington Maori were unhappy with the administration of their reserves. In 1863, when one Hemi Parai and others complained over Governor Grey’s alienation of reserved land at Ohiro, Swainson remarked that ‘The feeling intended to be evinced by this letter, is the general dissatisfaction expressed by all the Natives to the present management of the Reserves set apart for them’. Swainson added that the intention to spend rental money ‘in the erection of a hostelry’ was ‘strongly opposed by all’, since the proposed hostel would be for the benefit of Maori from any part of New Zealand who visited Port Nicholson, rather than for the owners of the reserves alone.⁵⁹ This correspondence is further evidence that Wellington Maori were far from silent over reserves administration, though in this instance their protest related to a mixture of unassigned tenths and McCleverty-assigned reserves.

Swainson did not report on the state of the Wellington reserves until May 1866, nearly four years after his appointment. Then, he wrote only a brief report, which distinguished between the remaining Wellington tenths, which were his responsibility, and McCleverty reserves ‘let by the Natives independently of the Commissioner’. Swainson noted that he was sometimes called in to settle disputes over the division of rents between owners of McCleverty reserves outside his jurisdiction. He provided little detail on his management of the remaining tenths reserves but admitted that the rental receipts for them amounted to a mere £69 6s. He also mentioned a change in the payment of salaries; Swainson’s salary was paid from the general ‘fund for Native purposes’, while that of his assistant was paid from rental receipts.

Swainson concluded with a brief comment on the suitability of the reserves for Maori purposes and the possibility of selling them:

As a general principle I would never advocate the sale of a single acre of reserve if it is suitably selected, either in point of value, present or future, or adapted to their own occupation, such as the valuable reserves in the Lower Hutt. But when I see reserves selected twenty-six years ago, which even now are barely accessible, and at any time perfectly unsuited to a Native, my general principle gives way: let such reserves be sold at the market price, and the proceeds be reinvested.

58. Domett to Swainson, 11 October 1862, MA4/5, pp 213–215 (doc E8, p 448)

59. Hemi Parai and others to Grey, 5 January 1863; memo by Swainson, 7 January 1863, MA W2218, box 8 (doc N1, pp 226, 230)

By way of example, Swainson referred to the two rural tenths at Lowry Bay – the first, ‘a perfect morass’; the second, ‘almost barren clay, which will not grow a potato’ – which had been sold and the proceeds invested in reserves in Palmerston North. (We discuss this exchange in chapter 15.) Finally, Swainson vigorously opposed the issuing of Crown grants to Maori for their reserves, without restriction on alienation. ‘Far better’, he said, to trust ‘the judgment and discretion of a Commissioner, who ought to know the nature of every reserve in his district, to recommend a sale, than to put an uncontrolled power in the Natives’ hands’.⁶⁰

Although Swainson’s administration was characterised by good intentions, it was not always effectual. Nevertheless, apart from half a dozen tenths on the outer fringe of the town in the suburb of Newtown, the remaining unassigned urban tenths were now let. Several unassigned rural tenths were also let, and rentals were paid to named beneficiaries in some cases. In addition, many of the McCleverty reserves were now leased by their Maori owners.⁶¹ Swainson resigned as reserves commissioner in 1867, and was not replaced by a resident commissioner in Wellington for five years.⁶² In the interval, the reserves were managed by a succession of rent collectors, acting on the authority of the Native Minister.⁶³

12.2.9 Summary of reserves administration to 1869

The above account of the administration of the Wellington reserves in the first three decades of their existence is necessarily somewhat sketchy, in part because of gaps in the information available to us about these reserves. However, it is possible to gain a general impression of reserves management over this period, and we pause here to summarise what we see as the key features of the administration of reserves at Wellington to 1869:

- ▶ There was a failure to develop consistent and coherent policies and administrative arrangements for the management of reserves.
- ▶ Nevertheless, by the end of the 1840s it was generally agreed that the remaining tenths reserves were to be leased out, with the rental income to be spent for the benefit of Maori.
- ▶ There was no legislative framework for reserves administration until the passing of the New Zealand Native Reserves Act 1856.
- ▶ Unassigned tenths reserves were managed by a succession of commissioners and management boards, while McCleverty reserves were managed by Maori themselves.

60. Swainson to Native Minister, 21 May 1866, Turton, *Epitome* (doc A26), s D, pp 53–55

61. ‘Return of All Lands Vested in the Governor by Virtue of the New Zealand Native Reserves Act, 1856, and the Native Reserves Amendment Act, 1862’, 1867, AJHR, 1867, A-17 (doc A24, pp 36–40)

62. Document c1, pp 350–351

63. Document E13, p 37

- There was little income from leasing tenths reserves, and much of this income was spent on the reserves' administration. Little of the revenue raised from the tenths reserves appears to have been paid to Maori directly, although some may have been used to subsidise Maori use of the hospital.

There were also two periods when the failure to appoint reserves commissioners appears to have led to problems. Following the passing of the New Zealand Native Reserves Act 1856, it was not until 1858 that commissioners were appointed under the Act. In 1857, land commissioner William Fox wrote to the Wellington superintendent noting that, as a result of the failure to appoint commissioners, 'difficulties affecting such Reserves and involving the relations of the European and Native Races, very frequently occur, which at present there are no means of adjusting'.⁶⁴ This gap in administration was claimed by the Wai 145 claimants to be a Treaty breach.⁶⁵ There was a further gap in administration between Swainson's resignation in 1867 and Charles Heaphy's appointment in 1869, which Heaphy did not take up effectively until he moved to Wellington in 1872. Heaphy reported that in the period 1867 to 1872 a number of disputes over tenths and McCleverty reserves broke out which he had to resolve when he arrived in Wellington, although he also noted that Maori appeared to be satisfied with Mr Young's performance of his duties of collecting and distributing rents.⁶⁶

We make findings on the administration of the reserves during this period at the end of the chapter.

12.3 HEAPHY'S AND MACKAY'S ADMINISTRATION

Charles Heaphy was the ablest of the reserves commissioners and for the first time put the reserves administration on a secure footing. He knew the Wellington settlement well, having been a draughtsman on Colonel Wakefield's original land-buying expedition and subsequently an assistant surveyor in Wellington. In later years, he made a noted exploration of the West Coast of the South Island, served as a goldfields commissioner at Coromandel, and was employed as a surveyor for the Auckland provincial government and the general government, surveying confiscated Waikato land for the latter. McLean had such experiences in mind when he appointed Heaphy commissioner of native reserves for the whole country.⁶⁷

64. Fox to superintendent, 24 September 1857, WP3/1857/756 (doc E13(a), pp 18–19)

65. Claim 1.2(d), para 14.3

66. Charles Heaphy, 'Report on Native Reserves in the Province of Wellington', 16 August 1872, AJHR, 1872, F-1B (doc A24, p 56); Charles Heaphy, 'Report of Commissioner of Native Reserves', 30 June 1873, AJHR, 1873, G-2 (doc A24, p 58)

67. Michael Fitzgerald, 'Charles Heaphy', DNZB, vol 1, pp 181–183; 'Papers Relating to Major Heaphy's Appointment as Commissioner of Native Reserves . . .', 1870, AJHR, 1870, D-16 (doc A24, pp 42–43)

Heaphy was appointed commissioner of native reserves in 1869 and was originally stationed at Auckland. In 1872, he moved to Wellington so that he could take over the collection and distribution of rents from the Wellington reserves, and also in order to settle disputes which had arisen among Maori claiming interests in reserves around Cook Strait.⁶⁸ From this time, Heaphy concentrated on the administration of North Island reserves, while Alexander Mackay administered the South Island reserves.⁶⁹ Once he arrived in Wellington, Heaphy set about trying to put the leasing of reserves and the payment of rents to Maori beneficiaries in order. He made considerable progress in these endeavours, but, by the time of his death in 1881, the task of determining the beneficial ownership of the tenths reserves remained incomplete. Heaphy's work was continued for a short time by Mackay, but in 1882 the tenths reserves were vested in the Public Trustee under the Native Reserves Act 1882 (although Mackay remained reserves commissioner for several more years).

12.3.1 The Native Reserves Act 1873

Heaphy's administration could have had a firmer legal backing had the Native Reserves Act 1873 been brought into operation. Amongst other things, the Act was a consequence of the Court of Appeal judgment in *Regina v Fitzherbert* (discussed in the next chapter), which demonstrated the need to provide legal security for the Maori reserves.

When he introduced the second reading of the Native Reserves Bill, Native Minister Donald McLean said that it was designed to consolidate and amend the various pieces of legislation dealing with Maori reserves throughout the country. These reserves included the New Zealand Company and McCleverty reserves in Wellington province. The Bill provided a strict definition of 'what really were Native reserves' and 'a legal mode' for setting apart and dealing with certain trusts. It also stipulated that receipts and expenditure relating to reserves should be reported to Parliament each year.⁷⁰ McLean admitted that there had been 'a want of definition of title' with respect to the New Zealand Company tenths, which had not been recognised by law. He referred to the judgment in *Regina v Fitzherbert*, by which the tenths reserves were held to be demesne lands of the Crown, and observed that 'Some dissatisfaction arose among Natives at the lands being dedicated to purposes which did not immediately benefit them; and it was necessary that these reserves should be placed in some definite position as Native reserves, and be administered as such'.⁷¹

68. Charles Heaphy, 'Report on Native Reserves in the Province of Wellington', 16 August 1872, AJHR, 1872, F-1B (doc A24, p 56)

69. Johnson, p 72

70. 7 August 1873, NZPD, 1873, pp 327-328 (doc A20, pp 31-32)

71. 8 August 1873, NZPD, 1873, p 353 (doc A20, p 34). *Regina v Fitzherbert* [1872] 2 NZLR 167 (CA) is discussed at section 13.2.5 below.

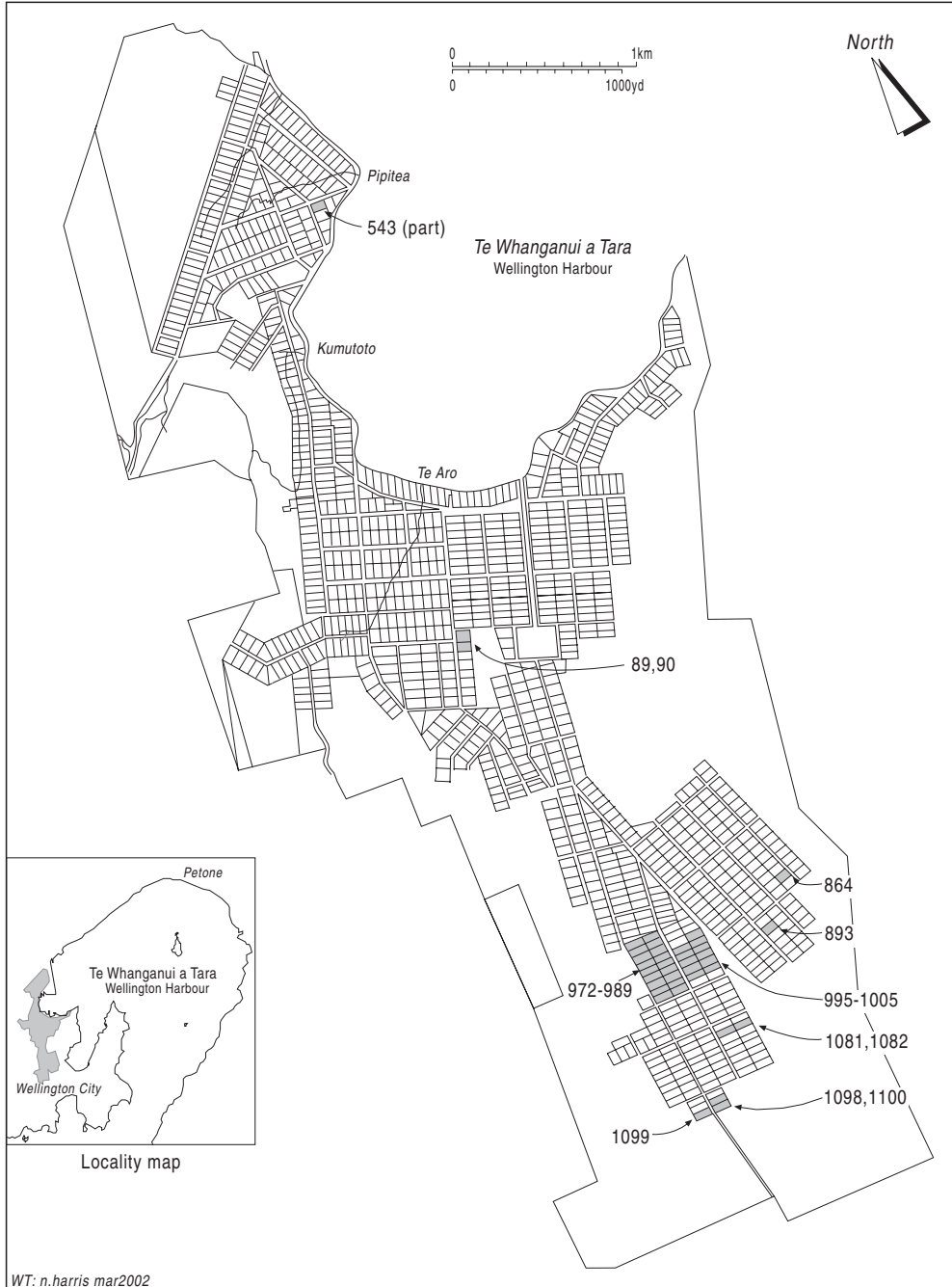
The concerns that McLean expressed in the debate were reiterated in the preamble of the 1873 Act.⁷² The Act was to provide for ‘the better administration of Native reserves throughout the Colony’, to overcome difficulties relating to some trusts intended to be created but which were not sufficiently defined, and to assist with the identification of heirs of original beneficiaries. It also repealed previous legislation relating to Maori reserves. The Act provided for a considerably expanded form of reserves administration, with the colony being divided into a number of districts and a native reserves commissioner being appointed for each one. The reserves commissioner was to be a corporation sole and was to be deemed a trustee of the lands vested in him. He was to chair a board otherwise composed of three elected Maori assistant commissioners. The board was to decide by a majority of its members all matters connected with the native reserves in its district, including any sale, lease, or exchange of a reserve. Decisions to sell, exchange or lease also had to be approved by the Governor in Council. The commissioners could lease native reserves for up to 60 years for building purposes and up to 21 years for other purposes. No lease could contain ‘any covenant or engagement for renewal’. The Maori assistant commissioners were given substantial powers, and, had the Act been implemented, for the first time since 1840 Maori representatives would have had effective control over reserves in their districts.

Several of the miscellaneous provisions of the Act referred specifically to the Wellington reserves. Section 53 was designed to set at rest doubts that the company tenths in Wellington and Nelson (listed in schedule D to the Act) were lands set apart for the benefit of Maori and were subject to native reserves legislation. Section 54 validated any sale, exchange, or lease of those lands made by the commissioner under previous legislation. Section 55 laid down that the McCleverty awards hitherto set apart ‘for the benefit of the Aboriginal Natives by a simple declaration to that effect’ but without the issue of a Crown grant should now be vested ‘in Her Majesty or some proper authority in trust for such Natives’. However, because of the lapse of time, it was difficult to be certain who the legitimate owners were, so the reserves commissioner was to apply to the Native Land Court for a determination of ownership and to declare any necessary successions. Once the court had prepared a list of owners, it was to find out from them what purposes they wanted the land to be put to. This information was to be referred to the Governor in Council, who could either ‘grant the land to the Native Reserves Commissioner of the district, or to such person or persons as he may think fit, for such purposes accordingly’ (s57). Section 58 allowed the commissioner to apply to the Governor in Council to sell or otherwise dispose of ‘separate and isolated pieces’ of reserved land in order to facilitate the consolidation of reserved land into larger blocks. The Governor could, with the consent of a majority of the Maori owners, order that the land be sold, have the proceeds invested in trust for the owners, and make further orders, ‘with the view of furthering the consolidation of the secured lands of the tribe into one reservation’.

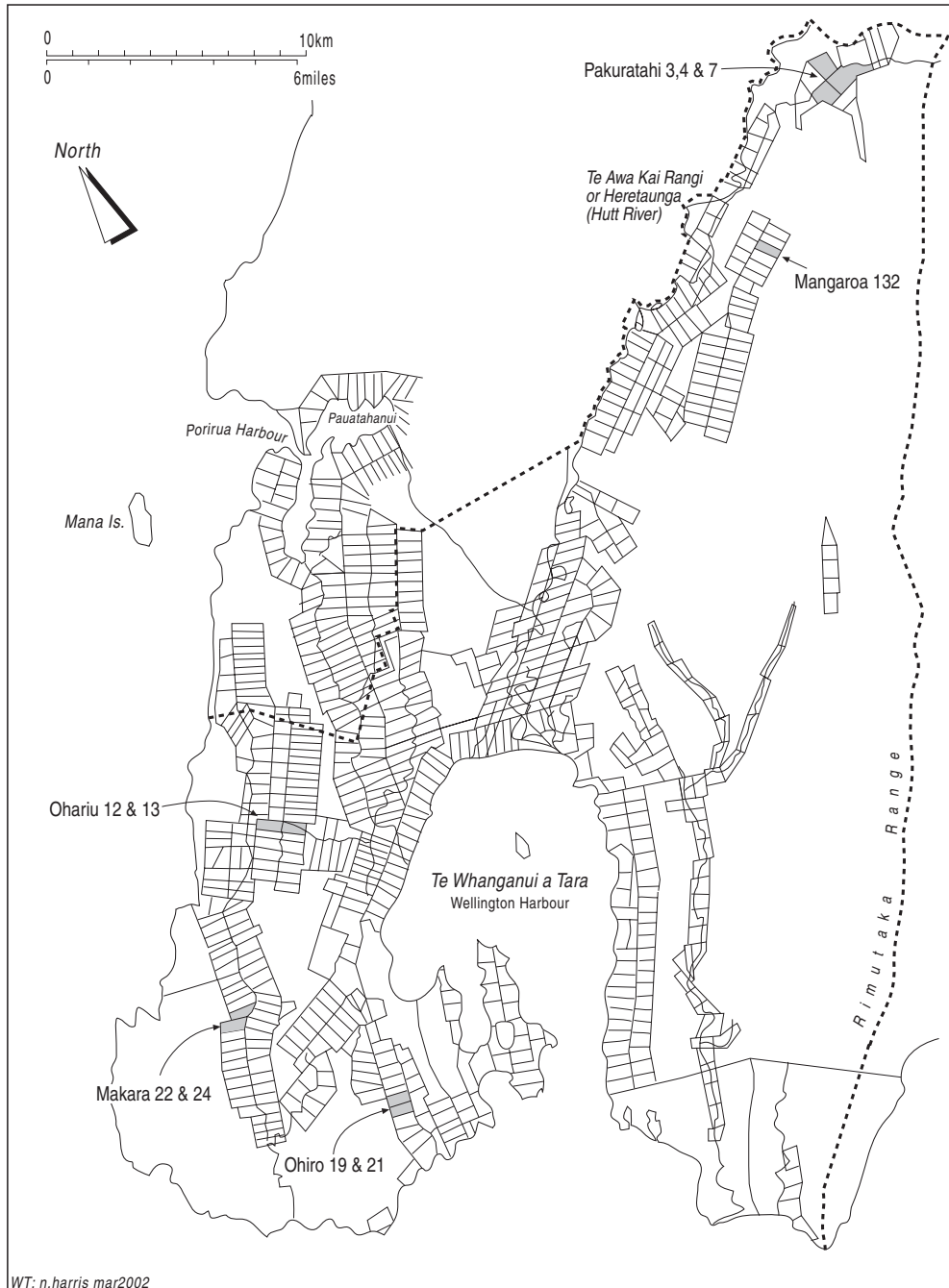
72. The Native Reserves Act 1873 (doc A21, pp12–28)

TE WHANGANUI A TARA ME ONA TAKIWA

12.3.1



Map 11: Remaining urban tenths in 1873



Map 12: Remaining rural tenths in 1873

Schedule D to the Act listed all that now remained of the Wellington tenths. The urban tenths consisted of the middle part of section 543 at Thorndon, sections 89 and 90 in upper Taranaki Street, and 36 tenths in Newtown. There were 10 rural tenths: 175 acres at Ohiro, 200 at Makara, 201.5 at Ohariu, 100 at Mangaroa, and 300 at Pakuratahi (although the Pakuratahi reserves were not in fact original tenths) (see maps 11, 12).⁷³

The Act has been characterised as providing for:

balanced local management and central control; it contained a number of provisions designed to safeguard the interests of the Maori beneficiaries; it gave Maori a large voice in the management of the reserves, amounting to veto rights; the powers and responsibilities of the commissioners were set out clearly; accounting procedures were refined, and the ways in which rental income could be expended carefully defined. In many respects, it was an admirable piece of legislation.⁷⁴

We agree.

However, the Act was never brought into operation, and reserves commissioners continued to function under the 1856 Act. By failing to implement the 1873 Act, the Crown missed an opportunity to improve the administration of the reserves and to provide some recognition of Maori rangatiratanga over those reserves. The Crown has accepted that ‘had the 1873 Act been implemented it would have gone some way towards meeting the expressed desire of Maori to have more say in the management of their reserves’. But it adds that ‘in practical terms Heaphy did during his commissionership involve Maori in the administration of the reserves’.⁷⁵ Crown counsel provided several examples of Heaphy’s consultation with Maori over the reserves’ administration.⁷⁶ We acknowledge this but note that consultation with Maori before reaching a decision differs markedly from allowing them a controlling say, as provided for by section 7 of the 1873 Act. In its overview of administration by the commissioners of native reserves, the Crown has accepted that, ‘to the extent that the Maori expectation of greater input into management of the reserves was still frustrated, . . . there may have

73. The history of the Pakuratahi reserves (located near Kaitoke, north of Upper Hutt) is exceedingly complex, and their origins are somewhat obscure. There is no evidence that they were originally New Zealand Company tenths, although they later came to be regarded as such. In the late 1840s or early 1850s, parts of these sections were cultivated by Ngati Tama under the leadership of Teira Te Whetu, who claimed that Grey had promised to give Pakuratahi to him. In the 1860s, Te Whetu and others were given a right of occupation to part of the Pakuratahi land, and, although the land was not granted to them, they proceeded to lease it out. By the time they returned to Taranaki in the early 1870s, it appears that they had leased out all 300 acres. Heaphy investigated the matter in the early 1870s and evidently considered the Pakuratahi reserves to be original tenths. He assigned the rent for part of the Pakuratahi land to particular owners, while rents for the rest went into the general native reserve fund. The Pakuratahi reserves were included in schedule D to the Native Reserves Act 1873 (though they were incorrectly listed as sections 2, 3, and 4 rather than as 3, 4, and 7) and were thereafter treated as rural tenths: see document 111, pp 61–66, and R L Jellicoe, ‘Report on Native Reserves in Wellington and Nelson under the Control of the Native Trustee’, 26 March 1929, AJHR, 1929, G-1, pp 46–47 (doc A24, pp 314–315).

74. Document 111, p 11

75. Document P4, pp 47–48

76. Ibid, pp 48–49

been a breach of Treaty principles'.⁷⁷ Indeed, we believe that there was a serious breach of Treaty principles in this respect.

It appears that the decision not to implement the 1873 Act was due primarily to fears that the powers given to the Maori majority on the reserves boards would be exercised to inconvenience European lessees, especially those who leased urban lots in Greymouth.⁷⁸ This point was emphasised by Alexander Mackay, who was asked to prepare a replacement for the Act.⁷⁹ Crown counsel suggested that the possible costs of administering the reserves under the 1873 Act may have been another reason why the Act was not brought into operation.⁸⁰ As we note below, and as the Tribunal has also noted in its *Ngai Tahu* and *Taranaki* reports, subsequent changes in reserves legislation were usually to the advantage of European lessees rather than Maori lessors.⁸¹

12.3.2 Heaphy's reports

Unlike Swainson, Heaphy submitted regular, detailed reports on the reserves under his administration. His first report on the native reserves in Wellington province included comment on some former reserves that had become trust endowments and were not strictly under his control. These included, as Heaphy put it, urban tenths appropriated by the Government for 'various religious, educational, and charitable purposes, from which Natives, in common with Europeans, might derive a benefit'. They also included the lands on which were located the Native Office and hostelry, the Governor's stables, and a part of the Te Aro (Mount Cook) barracks. Heaphy admitted that the appropriation of these reserves had caused dissatisfaction among Wellington Maori. However, like Eyre, Heaphy thought it reasonable for the Government to take such land in return for the considerable area of land provided for Maori by McCleverty (presumably in the mistaken belief that this land was not in fact owned by Maori).⁸² Nevertheless, Heaphy did press the Government over the next few years to compensate Wellington Maori for the urban tenths taken for endowments, and, when the Government decided to pay compensation for these reserves, he provided a valuation (see s13.2.6). Heaphy also negotiated payments to Maori when parts of Hutt Valley reserves were taken for railway purposes (see s17.3.2).

Heaphy's first report also included a schedule of native reserves in the province of Wellington, which provided details of leasing and, occasionally, of sale. His subsequent annual reports carried similar details, as well as accounts of receipts and disbursements. It is not

77. Ibid, p 59

78. Document 111, pp 11–13

79. Mackay to under-secretary, Native Department, 16 August 1876, AJHR, 1876, G-3A (doc A24, p 104)

80. Document 14, p 47

81. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 3, ch 14; Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), s 9.3

82. Charles Heaphy, 'Report on the Native Reserves in the Province of Wellington', 5 May 1871, AJHR, 1871, F-4 (doc A24, pp 45–46)

necessary to repeat or summarise these details, but we select some as examples to illustrate the variety of Heaphy's activities and his exercise of his trust responsibilities. His main activities were the leasing of reserves and the collection of rents, tasks that he appears to have carried out more efficiently than his predecessors.

12.3.3 Urban tenths

In negotiating leases and rentals, Heaphy was prepared to stand firm against European lessees who attempted to get favourable terms at the expense of the Maori beneficiaries. By way of example, we look briefly at the struggle over the leasing of the Newtown tenths. These constituted all that was left of the unassigned urban tenths, apart from a tiny fragment of a tenth at Thorndon. There were also two sections at Mount Cook, but these had been occupied, rent-free, by a military barracks since 1848, and were purchased by the Crown in 1874 (see ss 13.2.2, 13.2.6).

Most of the Newtown tenths were in two contiguous blocks containing sections 972 to 989 and 995 to 1005. Sections 972 to 989 had been leased in 1865 to Walter Mantell. When Swainson resigned in 1867, Mantell stopped paying rent on the grounds that he had no properly executed lease, that no boundaries had been pointed out, and that there was no one legally qualified to receive the rent. He said that, if the Government would refund the rent he had already paid and discharge him from further rent payments, he was willing to give up his lease so that Mohi Ngaponga and the Te Aro people could cultivate the land. The Native Department declined to accept this proposal, and in 1871 Mantell was required to pay his rent, though he was given a proper lease for the 15 years remaining on the term of his original lease. In 1873, Mantell assigned his lease to one Alexander Johnston and one Mary Burns.⁸³ Johnston also leased sections 995 to 1005 from 1873, these sections having previously been leased to Hemi Parai at a nominal rent. In 1877, Johnston's leases were renewed, with rent for sections 972 to 989 set at £35 for the first seven years, £45 for the next seven, and £60 for the last seven. The rent for sections 995 to 1005 was set at £20 for the first four years, £25 for the next seven, £30 for the next seven, and £40 for the final three years.⁸⁴

The fact that Johnston had obtained control of 29 acres of urban reserves on favourable terms for 21 years, at a time of rising land values, was not accepted by Maori without protest. Wi Tako and some Te Aro Maori told Native Minister John Bryce in 1880 that the reserves were theirs and that they wanted the land 'as a permanent place of residence for ourselves'.⁸⁵ Later that year, they again protested to Bryce that they wanted to manage the reserves themselves.⁸⁶ In response, Heaphy argued that these were 'general' tenths reserves and that, unlike

83. Document c1, pp 351–352; doc 14, pp 232–234; doc 111, p 80

84. Document 111, pp 79–80

85. Wi Tako and others to Bryce, 19 July 1880, 13 August 1880, MA17/6 (doc A35, pp 54, 61)

86. Document 111, pp 81–82

the McCleverty-assigned reserves, they had not been allocated to ‘any particular native or family’ and the income from them was being allocated to general purposes, not to particular individuals or groups.⁸⁷ In 1882, Tamati Te Wera and others petitioned Parliament, claiming that the reserves were not being administered for their benefit and that favourable private arrangements were being made for Johnston.⁸⁸ The Native Affairs Committee heard evidence on the petition, and, although it made no recommendation on the matter, its hearing disclosed some disquieting facts about the leasing of Wellington tenths. Mackay (who had replaced Heaphy as reserves commissioner) gave evidence that rents from the Newtown reserves had not been specially assigned to anyone and therefore the petitioners were not entitled to all the rents. He also admitted that the ownership of the land had never been fully ascertained.⁸⁹

It is apparent from researcher Dr Keith Pickens’s examination of the dispute that Heaphy did not favour Johnston, but he did not meet the wishes of the Maori complainants either, since he was determined to keep the unassigned tenths under his control.⁹⁰ Heaphy was unwilling to allocate the tenths to Maori, preferring to keep the rents in a general purposes fund that included unallocated funds for reserves throughout the North Island. It was not until 1888 that the question of determining the beneficial ownership of the Wellington urban tenths was taken before the Native Land Court. In contrast, Heaphy had compiled lists of beneficiaries for the rural tenths.

Heaphy’s handling of the Newtown rents dispute has been cited by Crown counsel as an example of ‘conscientious administration in the interests of the beneficial owners’.⁹¹ (Wai 145 claimant counsel made no comment.) We accept the Crown’s point but add that Heaphy’s ‘conscientious administration’ did not extend to determining who those beneficial owners were and paying them income from the leased reserves.

In his time as reserves commissioner, Heaphy managed to rent the remaining urban tenths, except for several of the more remote Newtown tenths, one of which was not successfully leased until 1900. Others occasionally became vacant and were not re-let for some time.⁹² There was also considerable variation in the rents, with a small portion of section 543 in the commercial centre of Thorndon bringing in £18 per annum in 1875, while five full tenths in the more distant suburb of Newtown were let for £10 per annum the following year.⁹³ Wellington Maori had long since ceased to occupy urban tenths, and few remained even on the remnants of harbour-front pa land reserved for them by McCleverty at Te Aro and Pipitea. With Heaphy’s full approval, most of the Te Aro and Pipitea Pa land was being

87. Heaphy to Lewis, 9 August 1880, MA17/6 (doc A35, p 58)

88. Document 111, p 82

89. *Ibid.*, p 83

90. *Ibid.*, pp 83–85

91. Document P4, pp 54, 54–56

92. Document 111, pp 73–77

93. *Ibid.*, pp 75, 77

alienated, and it was subsequently cut off from the waterfront by harbour reclamations. We discuss these matters in chapters 13 and 18.

12.3.4 Rural tenths

It was a different story with the rural tenths. By 1873, these reserves had been reduced to 175 acres at Ohiro, 200 at Makara, 201.5 at Ohariu, 100 at Mangaroa, and 300 at Pakuratahi.⁹⁴ By 1876, all these reserves were leased, producing an annual return of £128 14s.⁹⁵ Many Maori with rights in these reserves now lived outside the Wellington district, but Heaphy paid rents only to those Maori remaining in Wellington whom he thought entitled to payments. Sometimes, there were disputes over rights to, or rentals from, the reserves. In one such dispute regarding Ohiro sections 19 and 21, Heaphy, in consultation with the Te Aro Maori who claimed ownership of the reserves, drew up a list of 15 persons who were to receive equal shares of the rent.⁹⁶ He applied this practice to other rural tenths, thereby creating lists of beneficial owners on whose behalf these tenths were to be held in trust. He did the same with McCleverty-assigned reserves which were handed over for his administration, including the Polhill Gully reserves. His list of owners for the Polhill Gully McCleverty reserves was almost identical with that for the two Ohiro tenths sections, and soon afterwards the Ohiro and Polhill Gully rents were amalgamated into one account. While this amalgamation of the accounts may have simplified their administration, it helped to blur the distinctions between the remaining tenths and the McCleverty reserves. Ohiro 19 and 21, though remaining as rural tenths (and designated as such in schedule D to the Native Reserves Act 1873), were subsequently treated as McCleverty awards until as late as 1912.⁹⁷

12.3.5 Polhill Gully reserves

As another example of Heaphy's administration, we now discuss the Polhill Gully reserves, the most important of the McCleverty awards to come under Heaphy's control. They consisted of some 90 acres of land on the edge of the town, including 31 former urban tenths and three town belt blocks assigned by McCleverty to Maori at Te Aro. These reserves were leased by the owners in the late 1860s, but in 1873 the owners placed them, together with other McCleverty reserves at Kinapora and Ohariu, under Heaphy's administration, because, as he put it, they were 'unable to manage them themselves'.⁹⁸ A list of 17 owners

94. The origins of the Pakuratahi reserves are explained in footnote 73 above.

95. Document 111, p 90

96. *Ibid*, pp 21, 23

97. *Ibid*, pp 23–25

98. 'Return of all Lands Vested in the Governor . . .', 1867, AJHR, 1867, A-17 (doc A24, p 37); Charles Heaphy, 'Report of Commissioner of Native Reserves', 30 June 1873, AJHR, 1873, G-2 (doc A24, p 59); Charles Heaphy, 'Report of Commissioner of Native Reserves', 29 May 1874, AJHR, 1874, G-5 (doc A24, p 84)

was produced, and they agreed to distribute the rentals on a 'share and share alike' basis. In November 1873, Heaphy made a first distribution of Ohiro and Polhill Gully rentals, with each owner receiving £4 1s 2d.⁹⁹

The owners sometimes disagreed with Heaphy's administration of the Polhill Gully reserves, and on one occasion they disputed his ruling that a proposal to lease some of the gully town sections to Alexander Johnston must be opened to public competition. The owners withdrew the sections from Heaphy's administration in order to let the land to Johnston, but subsequently put them back under his control.¹⁰⁰ Heaphy continued to pay out rental income, and in 1875 he reported:

The collective proceeds of all the Wellington lands so intrusted to me by the owners to let, I divide periodically amongst the people interested. I have induced the chiefs, who generally have other sources of income, to share alike with the inferior people in the division.¹⁰¹

Heaphy also noted that the owners of the Polhill Gully land had approved each of the lease arrangements he had made on their behalf, a clear indication that he administered these McCleverty reserves in consultation with their owners.

The Crown has characterised the transfer of Polhill Gully and other McCleverty reserves to Heaphy's administration as an 'indication of the high degree of confidence placed in Heaphy by the beneficiaries'.¹⁰² The point is well made, but it must be remembered that only a few McCleverty reserves were administered by the commissioner. It is clear that most Maori still preferred to retain full control of their McCleverty reserves.

12.3.6 Payment of beneficiaries

In the 1870s, Heaphy assigned the rents for all but two of the rural tenths to a small number of Maori families.¹⁰³ At this time, the rural tenths brought in more revenue than the urban tenths: two-thirds of the tenths income in 1875–76 came from them. In the same year, administration expenses took about 17 per cent of tenths income, about 50 per cent was paid to beneficial owners, and the remaining 33 per cent was retained in the reserves account. From 1878, rental receipts for the urban tenths, and for other reserves for which there were no identified beneficiaries, were paid into a general purpose account for the whole North Island. This account was used to pay salaries and administrative expenses, but it was also occasionally used to assist needy Maori in Wellington.¹⁰⁴ Although the amounts paid out to beneficiaries were still small, the situation had at least improved since the first three decades

99. Document 111, p 86

100. *Ibid.*, pp 86–87

101. Charles Heaphy, 'Report of Commissioner of Native Reserves', 30 June 1875, AJHR, 1875, G-5 (doc A24, p 91)

102. Document P4, p 49

103. Document 111, p 96

104. *Ibid.*, pp 91–92

of the Wellington settlement, when there was scarcely anything left over after the payment of salaries and administrative costs.

In May 1878, in an endeavour to clear up the confusion over beneficial ownership, Heaphy was appointed a royal commissioner with responsibility to inquire into Maori claims to the New Zealand Company tenths and the McCleverty reserves. By July 1879, the commission had reported on 60 of the 110 cases brought before it, and it had recommended Crown grants for nearly all the claimants. However, Heaphy died in 1881 before issuing a final report.¹⁰⁵ Some of the evidence from Heaphy's commission has survived and was presented to us by the Crown.¹⁰⁶ It provides useful glimpses into Heaphy's procedures. However, most of the surviving documents relate to inquiries into the ownership of McCleverty-assigned reserves. In these instances, Heaphy began with the relevant McCleverty deed, then inquired whether any of the original signatories were still alive, and, if they were not, whether any of their children were alive. Usually, the witnesses before the commission agreed amongst themselves as to the legitimate original owners or their successors.¹⁰⁷ At times, Heaphy was able to supplement their evidence by referring to Native Land Court hearings. Indeed, his own hearings resembled those of the land court, with Maori witnesses supporting their claims to reserves by reference to occupation and whakapapa. (We note that Heaphy had in fact been made a Native Land Court judge in 1878.)

12.3.7 Mackay's administration

After Heaphy's death, Alexander Mackay, formerly the commissioner of South Island reserves, replaced him in Wellington. Mackay does not appear to have written an annual report for 1882, though he did produce a statement of receipts and expenditure for the North Island reserves account from 1 April 1880 to 31 March 1882.¹⁰⁸ The rental income from the Wellington reserves was £910 13s 8d for the year to 31 March 1881, and £961 10s 6d for the year ended 31 March 1882. The 'Rents paid to Natives' for the year to 31 March 1881 for the 'Wellington Account' were £735 7s 8d, and for the following year were £726 11s 11d. Substantial expenses for the salaries of Heaphy and his clerk had been deducted from the rents, as had £149 4s 6d of expenses for Heaphy's still incomplete commission of inquiry.

There is little other record of Mackay's administration of the Wellington reserves, though there is evidence that he tried to complete some of the inquiries begun by Heaphy as part of his royal commission. In September 1882, for instance, Mackay's 'Commissioner's Court', as he called it, conducted inquiries into various reserves at Petone.¹⁰⁹ However, the inquiries

105. Charles Heaphy, 'Report of the Commissioner of Native Reserves', 1 July 1879, AJHR, 1879, G-7 (doc A24, p 128); Pickens, doc 111, p 97

106. Documents N1, N2

107. See, for instance, minutes of hearings concerning Polhill Gully, 2-7 August 1878, 23 April 1879, MA W2218, box 31 (doc N1, pp 9-25)

108. 'North Island Native Reserves Account . . .', 19 August 1882, AJHR, 1882, G-6 (doc A24, pp 178-179)

109. Document N1, pp 96-171

were not completed, and it seems that the Crown grants which Heaphy's commission had recommended were never issued.¹¹⁰ The beneficial ownership of the remaining urban tenths was still unresolved and was not considered until the 1888 hearing of the Native Land Court with Mackay by then the presiding judge. We discuss this in chapter 15.

Mackay's role as reserves commissioner was modified by the passing of the Native Reserves Act 1882, which vested all native reserves previously controlled by the Governor or native reserves commissioners, including the Wellington tenths, in the Public Trustee. (The trustee had already been required by the Public Revenues Amendment Act 1877 to administer the income from native reserves.¹¹¹) Section 27 of the 1882 Act provided for the appointment of a native reserves commissioner who could act on delegated authority from the Public Trustee. Mackay was appointed to this position, but his appointment as a Native Land Court judge in 1884 meant that he ceased to be a commissioner. However, he continued to advise the Public Trustee unofficially for some years.¹¹² We discuss the Native Reserves Act 1882 further in chapter 14.

12.4 THE STATUS OF THE WELLINGTON TENTHS

It is apparent from our discussion of the administration of the Wellington tenths to 1882 that the Crown neglected adequately to define the status of the tenths in this period. We have deferred any detailed discussion until this point, because an account of how the tenths were viewed from 1839 to 1882 is relevant to reaching a conclusion on their status and the Crown's responsibility for them. More specifically, we need to determine who were the intended beneficial owners of the Wellington tenths.

12.4.1 Evidence of the status of the Wellington tenths reserves

The following evidence is relevant to our consideration of the status of the Wellington tenths:

- ▶ The 1839 deed of purchase concluded with William Wakefield on behalf of the New Zealand Company promised the chiefs of the Port Nicholson district that:

a portion of the land ceded by them, equal to one-tenth part of the whole, will be reserved by . . . the New Zealand Land Company . . . and held in trust by them for the future benefit of the said chiefs, their families, and heirs for ever.¹¹³

110. Document C1, pp 425–426

111. Document I11, pp 13–14

112. *Ibid.*, pp 15–16

113. Document A29, p 440

- ▶ In evidence given before a House of Commons select committee in 1840, Edward Gibbon Wakefield advised that the company was very desirous of placing the tenths in a trust for the benefit of Maori and that it would be necessary to create a permanent trust.¹¹⁴
- ▶ On 10 October 1840, the company appointed Halswell commissioner for the management of native reserves, and Halswell's instructions noted that these reserves were to be held 'in trust for the future benefit of the chief families of the ceding tribes'.¹¹⁵
- ▶ In chapter 5, we discussed an agreement made between Lord John Russell and the New Zealand Company in November 1840. Clause 13 of this agreement referred to the land to be reserved for Maori by the company and provided that the reservation of such lands for the benefit of Maori was to be undertaken by the Crown in fulfilment of and according to the tenor of the stipulations made by the company (see s 5.4.2). It is apparent that, from November 1840, the Crown assumed responsibility for ensuring that the tenths were reserved and administered for the benefit of Maori.
- ▶ On 28 September 1841, Halswell was issued with instructions from Governor Hobson on the management of the native reserves.¹¹⁶ Halswell was instructed that the reserves could be leased out, subject to certain conditions, and that the rental income from them was to be used for:
 - the education and religious instruction of Maori;
 - the improvement of the Maori churches at Te Aro and Pipitea;
 - the funding of a dispensary and medical advice; and
 - the funding of a schoolmaster and school for Maori children.
- ▶ In a report to the company of 11 November 1841, Halswell noted that Governor Hobson 'always appeared to treat the reserves as the absolute property of the natives'. Halswell, however, considered that the reserves were the property of the company, which had been willing to release, in trust for the benefit of Maori, portions of the lands purchased by it.¹¹⁷
- ▶ On 26 July 1842, Colonial Secretary Shortland advised chief protector Clarke that, once the reserves made by the company had been legally vested in the Crown, the Governor proposed to submit to the Legislative Council a Bill for vesting them in three trustees (the bishop, the chief justice, and the chief protector). Revenue from the reserves was to be applied to the establishment of schools for Maori and 'in furtherance of such other measures as may be most conducive to the spiritual care of the Native race, and to their advancement in the scale of social and political existence'.¹¹⁸

114. E G Wakefield, 'Evidence to the House of Commons Select Committee on New Zealand', 16 July 1840, BPP, vol 1, [582], p 25

115. Ward to Halswell, 10 October 1840 (doc A29, pp 481–482)

116. Clarke to Halswell, 28 September 1841, Turton, *Epitome* (doc A26), s D, p 1

117. Halswell to secretary, New Zealand Company, 11 November 1841 (doc A29, p 487)

118. Shortland to chief protector, 26 July 1842, Turton, *Epitome* (doc A26), s D, pp 3–4

- ▶ On 10 January 1843, G W Hope (for Lord Stanley) wrote to the New Zealand Company concerning the company's claims under the November 1840 agreement with Lord John Russell. After rejecting a company proposal that settlers who had been unable to obtain particular lands should be compensated from out of the native reserves, Hope advised that:

Should it appear in consequence of a diminution of the extent to which a title is established by the Company at Wellington, that more than the proper proportion has been set apart as a reserve, Lord Stanley will, of course, not object to the reserve being so reduced as to bring it within the proportion which it ought to bear to the whole, but he can permit no diminution to take place in the amount once definitively ascertained to be the proper proportion.¹¹⁹

We note that this makes it clear that, whatever the area of land acquired by the company under the 1844 deeds of release, a full one-tenth of this land would have to be reserved for Maori. In fact, as we have seen, the company failed to meet this requirement, as did the Crown (see s8.8.1). That it was the Crown's duty to ensure that this requirement was met is reinforced by an instruction from Lord Stanley to FitzRoy dated 18 April 1844:

Turning now to the subject of the native reserves, there can, I think, be no question that they should be taken out of the Company's lands. The Company had, in former instructions to their agent, provided for reserving one-tenth of all the lands which they might acquire from the natives, for their benefit. By the 13th clause of their agreement of November 1840, the Government was, in respect of all lands to be granted to them, to make reservation of such lands for the benefit of the natives, in pursuance of the Company's engagements to that effect. It seems quite plain, therefore, that the Government is to reserve for this purpose one-tenth of the Company's lands.¹²⁰

- ▶ The 1844 deeds of release signed on behalf of the various pa at Port Nicholson reserved in all 39 country sections of 100 acres each and 110 one-acre town sections, being 4010 acres in total, as tenths reserves.
- ▶ In 1844, FitzRoy secured the passage of the Native Trust Ordinance, which he referred to Lord Stanley for royal approval in a dispatch dated 22 October 1844, commenting that, 'Until legal authority is given to those who are ready to act as trustees, no step can be taken in respect of land reserved for the future benefit of the aboriginal race, and no fund can be raised or managed by such trustees for education, or for the care of the sick'.¹²¹

119. Hope (for Stanley) to Simes, 10 January 1843, BPP, vol 2, apps, p 22

120. Stanley to FitzRoy, 18 April 1844, BPP, vol 2, apps, p 77

121. FitzRoy to Stanley, 22 October 1844, BPP, vol 4, p 422

The preamble to the ordinance stated that it was expedient to appoint trustees for the better administration of lands and moneys appropriated for the advancement of Maori.¹²² While not specifically referred to, it is clear that the Wellington tenths were intended to be included in the ordinance and were to be held in trust for the beneficial owners. However, the ordinance was never brought into operation.

- ▶ In his final award of 31 March 1845, Spain determined that 39 native reserves of 100 acres each and 110 town acres were to be excluded from the 71,900 acres in the Port Nicholson district awarded to the New Zealand Company. These were the Wellington tenths reserves, which were not vested in the company but, as Lord Stanley had made clear, were to be reserved by the Crown for the benefit of Maori.¹²³
- ▶ On 29 July 1845, FitzRoy issued a Crown grant of 71,900 acres to the New Zealand Company, with the same exclusion of the tenths reserves as in Spain's award.¹²⁴ This grant was rejected by the company.
- ▶ McCleverty assigned to the Maori of particular pa some 45 urban tenths and 3162 acres of rural tenths. This left some 65 urban tenths, and 738 acres of rural tenths, from the area reserved to them in the deeds of release.
- ▶ Grey's Crown grant of 27 January 1848 reserved for Maori 110 acres of urban tenths and 4200 acres of rural tenths.¹²⁵ This was 300 acres more than the 3900 acres of rural tenths reserved under the schedule to the 1844 deeds of release. As we have just noted, most of this tenths land had been converted into McCleverty reserves owned by the Maori of particular pa.
- ▶ The preamble to the New Zealand Native Reserves Act 1856 stated:

Whereas in various parts of New Zealand lands have been and may hereafter be reserved and set apart for the benefit of the aboriginal inhabitants thereof, and it is expedient that the same should be placed under an effective system of management . . .¹²⁶

Neither the New Zealand Company tenths nor the McCleverty-assigned reserves were expressly mentioned in the Act, but, while the Act remained in force (to 1882), officials usually assumed that the tenths came under the Act and that the McCleverty reserves could be brought under section 14 of the Act.

- ▶ The Native Reserves Act 1873 was passed in part to overcome the 1872 decision of the Court of Appeal in *Regina v Fitzherbert*, which we discuss in our next chapter. The Wellington tenths referred to in the Act were deemed by section 53 to have been set

122. Document A21, pp 1–2

123. Spain's final report, 31 March 1845, BPP, vol 5, p 25

124. BPP, vol 5, p 123

125. The Crown grant is in doc A10(a), pp 10:1–10:2; schedules of land reserved in urban and rural areas are on the plans attached to the grant (docs A9(a) and (b) respectively).

126. Document A21, p 6

apart for the benefit of Maori. Provision was made for the appointment of a native reserves commissioner, to be a corporation sole, and native reserves were to vest in him.

It is apparent from the provisions of the Act that the Crown recognised that the Wellington tenths reserves were in the beneficial ownership of Maori in the Port Nicholson district. Unfortunately, this Act, like FitzRoy's 1844 ordinance, was not brought into operation. It was not until the passage of the Native Reserves Act 1882, which vested the administration of the Wellington tenths and other Maori reserves in the Public Trustee, that an appropriate legal framework was established. We note that Crown counsel accepts that from 1873 the remaining tenths were lands set apart for the benefit of Maori.¹²⁷

12.4.2 Crown submissions on the status of the Wellington tenths

In a review of the history of the company reserves to 1877, Crown counsel made a series of submissions, the general tenor of which was that Maori rejected the company's tenths scheme and showed little interest in these reserves.¹²⁸ The main points made by Crown counsel are set out below in italics. Our comments follow each point.

Maori rejected the tenths reserve scheme and refused to move from their existing pa and cultivations.

Maori refused to move from their pa and cultivations because from the outset they were emphatic that they had never agreed to sell them. Their lack of interest in the tenths selected on their behalf and without consultation with them was due to the fact that many of the tenths were unsuitable for their then needs when compared with their existing pa and cultivations. They had not, however, agreed to part with their tenths reserves. This is confirmed by the reservation of these reserves in the schedule to the 1844 deeds of release.

The Crown supported Maori in their rejection of the company's scheme. It assured Maori that they would not be required to leave their pa and cultivations. The Crown assumed control of the company reserves and saw those not occupied by Maori as a source of income for Government expenditure on Maori purposes.

It is difficult to reconcile this interpretation of events with the provisions of clause 13 of the Russell agreement of November 1840, which provided that the tenths were to be reserved by the Crown for the benefit of Maori.

Nor can it be reconciled with Lord Stanley's statement in the letter of 10 January 1843 referred to above that he could not permit anything less than the full one-tenth of the land acquired by the company to be reserved for Maori. Stanley, as we have seen, reinforced his

127. Document P4, p 3

128. Document P1, pp 101–104

earlier statement by advising FitzRoy in April 1844 that the Government was to reserve such tenths for the benefit of Maori.

In answer to a question from the Tribunal, Crown counsel stated that the 1840 Russell agreement was superseded by a subsequent view that the 1839 deed of purchase was a nullity. But counsel has ignored the clear and unambiguous confirmation by Stanley of the requirement that the Crown was to make provision for the appropriate number of tenths to be reserved for Maori. The full quota of tenths was not in fact reserved in the 1844 deeds of release.

The 1844 agreements 'apparently' included the company reserves in the lands that would 'remain for' Maori.

The 1844 deeds of release *expressly* reserved 110 urban tenths and 39 rural tenths to Maori. We are at a loss to understand Crown counsel's reference to this having only 'apparently' been done. It is important to note that Maori had never sold or surrendered the land making up these tenths reserves. Counsel overlooks the fact that, at the meeting between FitzRoy and Wakefield at Wellington on 29 January 1844, it was agreed that 'the paha, cultivations and reserves' would be excluded from any lands acquired from Maori (see s7.5.1). The tenths reserves were owned by Maori and were, along with their pa and cultivations, reserved for them in the deeds of release.

The Government continued to see the unoccupied company reserves as a means of raising income.

The Government was aware that the tenths were to be held for the benefit of Maori, for whom they had been reserved. There is no evidence that the Crown consulted with the Maori beneficiaries as to the use of their reserves.

There was no Maori awareness of or interest in these reserves at the time.

The Crown and Maori were well aware that the tenths listed in the schedule to the 1844 deeds of release had been reserved for Maori, but many of the tenths were unsuitable for cultivation by Maori. Accordingly, the onus was on the Crown to take all reasonable steps to ensure that they were let and that Maori were consulted as to the disposition of the rental income.

The Crown viewed the reserves not selected by Maori in 1847 as being available, as before, to supply income for Maori purposes. It considered that these assets might be used to set off other expenditure on Maori and thought it proper if some were taken and used for the public good.

There is no evidence that Maori 'selected' the reserves assigned to them by McCleverty in 1847 or that, in agreeing to the McCleverty arrangements, they were giving up any claim to the remaining tenths reserves. Moreover, at no stage did the Crown obtain the consent of Maori beneficiaries to the appropriation of their tenths reserves, nor did the Crown consult

with or obtain the consent of Maori to the use of these reserves to set off other expenditure on Maori.

The Tribunal is satisfied that there is no matter of substance referred to by Crown counsel in reviewing the history of the tenths reserves to 1877 which can reasonably be held to establish that, from November 1840 on, the Crown was not required to ensure that it held and administered the tenths reserves in trust for the benefit of Maori, as directed by Lords Russell and Stanley. The Treaty clearly required consultation with Maori by those charged with the administration of the tenths reserves.

12.4.3 Finding on the status of the Wellington tenths

The Tribunal finds that Maori having customary rights in the Port Nicholson block as at 1840 were intended to be the beneficial owners of the tenths reserves to be provided for out of the land in the block acquired by the New Zealand Company, and that these reserves were to be held in trust for such Maori.

This intention was manifested in different ways by the New Zealand Company and by Hobson. Lord Russell in November 1840 and Lord Stanley in 1843 and 1844 made it abundantly clear to the New Zealand Government that the appropriate proportion of tenths was to be reserved for the benefit of Maori. Hence Governor FitzRoy's insistence that the tenths be reserved to Maori in the 1844 deeds of release. These deeds expressly reserved 110 urban and 39 rural tenths to the Maori signatories and those they represented. In his final 1845 award, Spain confirmed the reservation of those tenths, as did FitzRoy in his Crown grant of the same year. So, too, did Grey in his later Crown grant of January 1848.

As we have seen in chapter 9, despite Spain's promise to Ngati Toa that tenths reserves would be set aside for them (see ss 9.4.2, 9.7.2), no such provision was made. In the result, tenths were reserved in the deeds of release for the other Maori having customary interests in the Port Nicholson block; namely, Te Atiawa, Taranaki, Ngati Ruanui, and Ngati Tama (collectively referred to below as 'Wellington Maori'). The Native Land Court did not determine the beneficial ownership of the urban tenths reserves until 1888 and the list of beneficiaries was not completed until 1895. The beneficial ownership of the rural tenths was determined by the court from 1888 onwards (see ss 15.3.1–15.3.3).

It is apparent that, however defective their administration of the tenths, the various Crown officials appointed to carry out that administration acknowledged that the tenths had been reserved for the benefit of Wellington Maori. The Native Reserves Acts of 1856 and 1873 were further evidence that the tenths reserves were to be administered on behalf of the Maori having a beneficial interest in them.

12.5 FINDINGS ON THE CROWN'S ADMINISTRATION OF RESERVES, 1840–82**12.5.1 The Crown's responsibility**

From early in the period of more than 40 years covered by this chapter, the Crown assumed responsibility for the administration and management of the Wellington tenths. The Tribunal recognises that until 1844 the situation in Wellington was confused by the uncertainties as to the respective rights of Maori and the New Zealand Company and its settlers arising under the 1839 Port Nicholson deed of purchase. As a result of the signing of the 1844 deeds of release, the tenths were reserved to Maori. This clarified the Crown's responsibility to ensure that the interests of Wellington Maori were protected in accordance with article 2 of the Treaty of Waitangi, which imposed on the Crown a clear duty actively to protect the beneficial interests of Wellington Maori.

It is to the credit of Governor FitzRoy that, soon after the signing of the 1844 deeds of release, he secured the passage of the Native Trust Ordinance 1844. This received the Queen's assent early in 1845, but the Crown failed to bring the ordinance into operation. This omission occurred notwithstanding the fact that FitzRoy had clearly recognised the need for statutory authority for the appointment of trustees to administer the tenths reserves for the benefit of Wellington Maori. Given that Wellington Maori were the beneficial owners of the reserves, the Crown was under a continuing obligation to respect and protect their mana and rangatiranga in the land and to consult with and involve them in the management of the reserves.

12.5.2 Tribunal findings of Treaty breaches

The Tribunal finds that the Crown failed in its Treaty duty actively to protect the interest of the beneficial owners of the Wellington tenths reserves in the following respects, and that such owners were prejudicially affected thereby.¹²⁹

- ▶ For much of the period under consideration, the Crown failed to devise a satisfactory policy to administer the reserves in the best interests of the Wellington Maori beneficiaries.
- ▶ Having finally settled on a policy – that the tenths reserves that were not assigned to Maori by McCleverty would be used as an endowment for the benefit of the Maori beneficiaries – the Crown failed to pass legislation that fully defined the legal status of the reserves and provided for their effective administration.

The sole piece of operative legislation in the period, the New Zealand Native Reserves Act 1856 (as amended in 1862), did not achieve either of these objectives. Its replacement, the Native Reserves Act 1873, which could have met the objectives, as well

129. We make no findings of Treaty breaches in relation to the administration of the McCleverty reserves, which for the most part were managed by Maori themselves.

as giving Maori an effective role in the administration of the reserves, was not brought into operation.

- ▶ The Crown failed to make adequate provision for the effective administration of the reserves.

Though commissioners of native reserves were appointed as agents of the Crown, they usually had numerous responsibilities besides the Wellington reserves, and, on two occasions (1856–58 and 1867–72), there was no commissioner in Wellington. We agree with the submission of the Wai 145 claimants that ‘Throughout the 1840s, the management of the reserves was on an ad hoc basis, consequently producing no benefits for Maori’, though we would add that that ad hoc administration continued at least until 1862.¹³⁰ We do not accept the Crown’s view that the reserves were administered in ‘a conscientious manner’, except for Heaphy’s administration from 1872 and possibly Mackay’s administration which followed.¹³¹ Prior to Heaphy’s arrival in Wellington, there was considerable inefficiency in the keeping of records, the letting of reserves, the collection of rents, and the distribution of income to beneficiaries. Problems with the latter were not even solved in Heaphy’s time as commissioner, at least in relation to income from urban tenths.

- ▶ The Crown failed to provide adequate continuous supervision of the reserves commissioners by way of a board of trustees or board of management, though such a body was in existence between 1842 and 1844. New trustees were appointed in 1848 but remained in office only for a relatively short period. A board of commissioners was appointed in 1858 and continued until 1862. For the rest of the time, the commissioners of native reserves, when they were in office at all, were left very much to their own devices.
- ▶ The Crown failed to consult with Wellington Maori as to the arrangements made from time to time for the administration of their reserves and, further, failed to involve Wellington Maori formally in the administration of the tenths, although some of the prominent chiefs were consulted on an informal basis, usually to help sort out the distribution of rentals to beneficiaries.
- ▶ The Crown, through the board of management of native reserves, in 1851–52 wrongly approved several payments out of the native reserves fund to Taranaki settlers who had been required to vacate certain Maori reserves in Taranaki, and in one case for losses sustained by a Taranaki settler due to alleged aggression and interference by Maori.
- ▶ The Crown, through its reserves commissioners, was slow to rent reserves not required for Maori occupation, allowed too large a portion of the reserves fund to be used for salaries (including, for much of the period, the full salary of the reserves commissioners), and was slow to pay out any surplus to beneficiaries. We consider the failure to ascertain the beneficiaries for the urban tenths, and therefore the failure to pay them any

130. Document 04, p 287

131. Document Q1, p 33

benefits throughout the lengthy period covered by this chapter, to be a significant breach of the Crown's trusteeship responsibility.

Although it may well have been appropriate for the Crown to take a reasonable percentage of reserves income for the costs of administration (as was to happen later under the Public Trustee's administration of the reserves), there was no justification for taking full salaries. Some or all of those costs should have been met from the Crown's own funds (after the 1852 constitution came into effect, from the Native Department's share of the Civil List).