

CHAPTER 10

THE McCLEVERTY TRANSACTIONS

10.1 INTRODUCTION

Once the conflict over Heretaunga was at an end, only one further obstacle remained to the New Zealand Company's gaining of secure title for the settlers who had purchased land at Port Nicholson from the company. Despite the clear understanding reached at FitzRoy's meeting with Wakefield in January 1844 that pa, cultivations, and urupa were to be excepted from land released by Maori (an understanding reflected in the deeds of release and Spain's award), the company rejected FitzRoy's 1845 Crown grant, principally because it provided for the retention by Maori of their pa and cultivations on sections purchased from the company by settlers. This chapter examines the Crown's efforts to overcome this difficulty by way of deeds signed in 1847 by Maori at each of the main pa, whereby Maori gave up their cultivations on 'settlers' sections' in 'exchange' for other land which was reserved for them. These transactions were arranged by Lieutenant-Colonel William Anson McCleverty, who had been specially appointed to assist in settling the company's land claims, and they left Maori with some 20,000 acres of reserved land. We discuss this land further in later chapters.

Once McCleverty's 'exchanges' had taken place, the way was clear for a Crown grant to be issued to the company. However, instead of granting only those lands which the company had acquired under the deeds of release and Spain's award, Governor Grey in 1848 granted the whole of the Port Nicholson block, comprising some 209,247 acres, apart from certain reserved and excepted land. The result was that the company acquired some 120,626 acres in addition to the land which Maori had surrendered in the 1844 deeds of release. We discuss the reasons for the company's acquisition of this land and make findings on the Crown's actions in granting it to the company. Finally, we look at the collapse of the New Zealand Company in 1850, which resulted in the company's land becoming vested in the Crown.

10.2 THE NEW ZEALAND COMPANY REJECTS FITZROY'S CROWN GRANT

On 8 August 1845, superintendent Richmond tendered to Wakefield a copy of FitzRoy's Port Nicholson Crown grant to the New Zealand Company, which Wakefield declined. Wakefield

indicated that he would have to refer the grant to the company's directors,¹ and shortly thereafter he published a letter in the *New Zealand Gazette and Wellington Spectator* in which he explained his objections to the grant. He claimed that the Crown had breached its agreement with the company that individual Europeans who had been claimants before Spain's inquiry would be compensated in cash instead of being granted land which Spain found they had validly purchased from Maori. Wakefield also described as erroneous FitzRoy's interpretation of the arrangements in respect of Maori cultivations agreed to during the Governor's meeting with Wakefield on 29 January 1844 (see s7.5.1). According to Wakefield, FitzRoy had 'specially excepted' from lands to be retained by Maori any cultivation ground 'if included in those lands which the Commissioner [Spain] should report to have been fairly purchased'.²

It is clear that Wakefield was misstating the agreement reached with FitzRoy. At the 29 January 1844 meeting, Wakefield had agreed that he was 'prepared to make a fair compensation to the natives who may be entitled to receive it, without including their paha, their burying places, and their grounds actually in cultivation' (see s7.5.1).³ As Crown historians David Armstrong and Bruce Stirling note, 'It was quite clearly the intention of the Crown to ensure that pa and cultivations were reserved from all land sales by Maori'.⁴

On receipt of a letter from Wakefield enclosing FitzRoy's Port Nicholson grant and Wakefield's letter to the *Spectator*, the company secretary wrote to the new Secretary of State for the Colonies, WE Gladstone, on 28 February 1846 along lines similar to those earlier advanced by Wakefield. The company strongly objected to the granting of valuable town land to non-company European claimants and to the extent of the cultivated lands excepted from the grant. In support, they referred to a private letter from 'a person wholly unconnected with the company, and of undoubted authority', who asserted that these reservations 'will exclude from the grant at least one-sixth, and not improbably one-fourth' of that part of Wellington township on which buildings had been erected.⁵

In March 1846, Gladstone sent copies to Governor Grey of the correspondence from the New Zealand Company. He requested that Grey ascertain whether the reports made by Wakefield were accurate, and, if so, authorised Grey to take such measures for the relief of the company as might be within his power to adopt.⁶

1. Richmond to Wakefield, 13 August 1845, BPP, vol 5, p 331; Wakefield to Richmond, 9 August 1845, BPP, vol 5, p 330

2. *New Zealand Gazette and Wellington Spectator*, 13 August 1845 (also reproduced in the New Zealand Company's twentieth report) (quoted in doc c1, p 231)

3. FitzRoy went on to define 'cultivation grounds' more broadly as including any land which had been cultivated by Maori since the establishment of the colony.

4. Document c1, p 231

5. Harrington to Gladstone, 28 February 1846, BPP, vol 5, pp 329–330

6. Gladstone to Grey, 21 March 1846, BPP, vol 5, p 329

10.3 THE APPOINTMENT OF McCLEVERTY

The genesis of Lieutenant-Colonel McCleverty's appointment is to be found in correspondence between Lord Stanley and the directors of the New Zealand Company in July and August 1845. In the course of this correspondence, Stanley proposed, with a view to facilitating the final selection of land by the company 'with the least possible delay', to:

despatch forthwith to the colony a properly qualified person, whose duty it should be to give his best assistance to the Company in their selection of land, to aid in surveying the exterior boundaries of such selections, and to judge of the reasonableness of the terms of any purchase which the Company may make from the natives, with reference to the Company's right to reimbursement in land in respect of moneys paid for such purchase.⁷

The company agreed to Stanley's proposal.⁸

On 15 August 1845, Stanley informed Grey that he intended to dispatch such a person, repeating the description given in his letter to the company of the role which this person was to perform in New Zealand. He added that he was adopting that course not from any distrust of the capacity or integrity of local officers but rather 'to facilitate and accelerate the selection of land by the New Zealand Company' and to afford Grey 'some relief amidst the many arduous duties imposed upon [him]' by providing him with assistance in settling the company's land claims.⁹

It was decided that it would be advantageous to appoint a military officer to this position, and Stanley was advised by the War Office of McCleverty's appointment on 15 December 1845.¹⁰ McCleverty, who had been born in England around 1806, had attended Sandhurst and served in India and Gibraltar. With the rank of lieutenant-colonel, he assumed command of the troops in the southern district of New Zealand upon his arrival in September 1846. He was promoted to colonel in 1854 and returned to England in 1857.¹¹

Shortly after he learned of McCleverty's selection, Stanley wrote to Grey notifying him of the appointment. In addition to his military duties, McCleverty was to have those civil duties relating to the selection of land by the company which were outlined in Stanley's dispatch to Grey of 15 August 1845. McCleverty was given extracts of the relevant company-Colonial Office correspondence to make him 'aware generally of the nature and object of the civil duties which will be required of him in New Zealand'. Grey was also to give him such particular instructions as the Governor might consider necessary. Stanley left it to the New Zealand Company to decide how, and to what extent, it would make use of McCleverty's assistance in selecting land. Having ascertained the company's views, Grey was to direct McCleverty to

7. Hope (for Stanley) to Ingestre, 7 August 1845, BPP, vol 4, p 591 (replying to Ingestre to Stanley, 24 July 1845, BPP, vol 4, pp 587-588)

8. Young to Stanley, 8 August 1845, BPP, vol 4, p 596

9. Stanley to Grey, 15 August 1845, BPP, vol 5, p 253

10. Document c1, pp 235-236

11. *Ibid*, p 237

‘take such steps as may appear most advisable for the purpose of rendering them the assistance they may desire’.¹²

Stanley’s letter advising of McCleverty’s appointment reached New Zealand in June 1846. Wakefield was duly advised of the appointment, and he promised to cooperate cordially with McCleverty on the basis of Stanley’s description of McCleverty’s role in his dispatch to Grey of 15 August 1845. In a letter of 18 July 1846 to the company, Wakefield reported that he had received verbal assurances from Grey that McCleverty would be instructed to facilitate the acquisition of land excepted from the Port Nicholson block Crown grant. Two months later, Wakefield wrote to the company expressing hope that McCleverty would adjust the ‘objectionable clauses’ in the company’s Crown grant. According to Grey, local Maori were also hoping that McCleverty would adjudicate on their claims against the company.¹³

10.4 GREY PROVIDES ADDITIONAL LAND TO MAORI IN PORT NICHOLSON

Before Grey learned of McCleverty’s appointment, he took action to meet certain grievances of Waiwhetu Maori and Taringa Kuri of Ngati Tama. He reported to Gladstone on these two matters in separate dispatches, each dated 20 June 1846.

10.4.1 Land for Waiwhetu Maori

In the first dispatch, Grey noted that, when he arrived at Port Nicholson in February 1846, he found two distinct tribes for whom a sufficient quantity of land had not been reserved, and that Waiwhetu Maori especially were ‘left without land to raise the necessary supplies’.¹⁴ For various reasons, many native reserves were not available for use by Maori, and thus some Maori had instead been cultivating sections purchased from the company by Europeans. The result was that:

as the Europeans took possession of the lands to which they were fairly entitled, it was found that some of the natives were left without land suited for their cultivation, or upon which they could have entered without incurring the hostility of some neighbouring tribe.

In fact, the reason why Waiwhetu Maori were left with insufficient land is apparent from our discussion of the ‘negotiations’ at Waiwhetu in 1844, when Spain and protector Clarke subjected the Maori people to considerable duress to induce them to sign the deed of release. During the meeting, Wiremu Kingi, the principal chief, asked whether any reserves would be made for them and said that the company reserves (tenths) were wholly unfit for use, being

12. Stanley to Grey, 18 December 1845, BPP, vol 5, p 259

13. Document C1, pp 239–240

14. Grey to Gladstone, 20 June 1846, BPP, vol 5, pp 572–573

swampy or covered with water. Only after further protest by Wi Kingi did Spain agree that the surveyor would mark out a sufficient quantity of eligible land for Waiwhetu Maori, although he could not then say precisely where (see s 8.4.2).

It is evident that the Crown failed to implement this undertaking, and it was left to Grey to honour it more than two years later by purchasing 106 acres of land from a settler. The land Grey acquired was Hutt section 19, which in 1847 was included in McCleverty's Waiwhetu award. Surveyor Fitzgerald described this section as one of the best in the Hutt.¹⁵

Grey, who was apparently unaware of Spain's 1844 undertaking, gave his own justification for his action. After noting that the Waiwhetu Maori had appealed to him, he said:

as I felt the hardship of their case and the strong claims that they had upon the sympathy of the Government, and as I was at the same time compelling the natives to abandon land which had been fairly purchased by the Europeans, and they, with apparent justice, requested me to deal fairly and to turn the Europeans off the land which had been reserved for the natives, and thus to give them a sufficiency of land for their cultivation, the best mode of arranging the difficulty appeared to me, to purchase in the market, in the usual manner, a section of land suited to the purposes of these people, and which they would consent to take in liquidation of any claims for lands which they might have; I accordingly adopted this course.

It will be seen that I was compelled to pay the sum of 350*l* for this section of land. Port Nicholson being situated in one of the Company's districts, the local Government had no land of its own in that portion of the colony. I thus could obtain land by no other means than purchase; and I propose that this sum of 350*l* should be subsequently refunded from the Native Trust Fund.

The good effect of this arrangement has already been evinced by the Waiwhetu natives having been among the first to tender their assistance to the Government during the recent disturbances.¹⁶

This statement is significant in several respects:

- ▶ Grey admitted to compelling Maori to abandon land which had been purchased by Europeans. However, there is no evidence that he compelled settlers to vacate land on which there were cultivations reserved to Maori under the 1844 deeds of release.
- ▶ Grey considered that, because Port Nicholson was situated 'in one of the Company's districts', the Government 'had no land of its own in that portion of the colony'. Accordingly, he authorised the purchase of land for Maori, believing that the Crown had no other option. This, he proceeded to authorise. This raises the question of whether Grey was aware of the limited scope of the 1844 deeds of release, which related to no more

15. Document 18, p 134

16. Grey to Gladstone, 20 June 1846, BPP, vol 5, pp 572–573. The 'recent disturbances' refers to the conflict in Heretaunga, discussed in chapter 9 above.

than 71,900 acres. Grey's statement leaves open the question (given the existence of the 1844 deeds of release and Spain's clear award) of who he believed owned the remaining 137,347 acres in the Port Nicholson block. He does not here suggest that it was 'waste land' belonging to the Crown; on the contrary, he clearly believed that the Crown had no land in the Port Nicholson district. We return to the question of the ownership of this extensive area at sections 10.8.4 and 10.8.5.

- ▶ Grey proposed that the land's purchase price of £350 should be refunded from the native trust fund. In other words, the Crown would not in fact pay for the land which had been promised by Spain and which should have been reserved; the money was to come from a fund held in trust for Maori. There is no evidence that Waiwhetu Maori were informed that the section was to be paid for out of Maori trust funds; nor, had they known, is it likely they would have considered Grey to have been acting fairly or justly. It is not clear whether any of the cost of purchasing this section was, in fact, refunded from the native trust fund, although this seems unlikely, since there was little money in this fund in the 1840s (see ch 12).

10.4.2 Land for Ngati Tama at Kaiwharawhara

In the second dispatch of 20 June 1846, Grey reported to Gladstone on the additional land that had been made available to Taringa Kuri and the Ngati Tama people at Kaiwharawhara, who had been forced to leave their cultivations there because the adjoining settlers were permitting their cattle to graze on Ngati Tama land.¹⁷ They moved to the Hutt Valley, from where they were later induced to leave (see ch 9). After their departure from the Hutt, Taringa Kuri wrote to Grey asking him to provide Ngati Tama with land.¹⁸ Grey avoided the need to purchase settler land by relinquishing a section of 100 acres which had been reserved for a country house for the Governor and by 'giving' Ngati Tama 200 acres from a block of five rural tenths reserved for Maori, as shown in the schedule to the 1844 deeds of release. In short, Kaiwharawhara Maori were assigned two 100-acre tenths reserves to which Maori were already entitled and, in addition, the 100 acres previously reserved for the Governor. The 100-acre Governor's reserve was not included in the 1844 deeds of release; it was Maori land which had been appropriated, without payment. An additional 100-acre section, Harbour section 4, was purchased for Ngati Tama at Kaiwharawhara later in 1846 at a cost of £350.¹⁹ All the land discussed in this section was subsequently awarded to Kaiwharawhara Maori by McCleverty.²⁰

17. Grey to Gladstone, 20 June 1846, BPP, vol 5, pp 574–575

18. Document H7, pp 90–92

19. Document C1, p 243

20. Document 18, pp 186–188

10.5 GREY'S INSTRUCTIONS TO McCLEVERTY

On 14 September 1846, shortly after McCleverty arrived in New Zealand, Grey gave him quite detailed instructions.²¹ They were intended to show the manner in which Grey proposed 'to relieve the Company from the difficulties arising from the loose exceptions which have been made in their grants of all native paha, cultivations, &c'.²² In his instructions, Grey recounted the difficulties which had arisen owing to the failure of the Crown to survey the pa and cultivations reserved for Maori. He indicated that the survey was now nearing completion and that the amount of land involved was estimated at about 380 acres. This estimate proved to be inaccurate, and McCleverty was later to cite 576 acres as being the approximate area of Maori cultivations on sections which were claimed by settlers.

Grey also outlined the origins of the problem which had arisen concerning Maori cultivations. The company had, he reported, mainly sold land at Port Nicholson to absentee proprietors, with the result that Maori were able to continue establishing their cultivations where they pleased. They made little use of the native reserves and, as a result, the administrators of the reserves let them on very long leases to Europeans, with the object of raising money for the benefit of Maori. When Pakeha settlers began to arrive and take up their sections, the Government was therefore unable to put Maori in possession of their reserves, and Maori continued occupying parts of sections which had been purchased from the company by the settlers. This led to 'constant and violent disputes' between Maori and Pakeha.

Grey next described action he had taken in the meantime to remove Maori from lands claimed by settlers:

as there have been no reserves at my disposal on which the natives could be placed, I have purchased, at the expense of the Government, lands for them in spots selected by themselves, and of such extent and quality as to render them good and obedient citizens, by giving them a valuable and permanent interest in the prosperity of the country, and having made over these lands to them, I required them to surrender to Europeans the properties to which they were justly entitled.

The only instance in which we are aware of Grey following this procedure in relation to Port Nicholson land is in respect of the purchase of Harbour section 4 for Ngati Tama, as noted earlier. His dealings with the Waiwhetu people consisted simply of making good Spain's omission by ensuring that they had some cultivatable land.

Grey considered that, where Maori had sufficient land for their wants (exclusive of those parts of their cultivations required by Europeans), they should be persuaded to sell their cultivations on settler-claimed sections at a moderate price. Where Maori would be left with

21. Instructions issued by Grey to McCleverty, enclosed with dispatch from Grey to Gladstone, 14 September 1846, BPP, vol 5, pp 610–612

22. Grey to Gladstone, 14 September 1846, BPP, vol 5, p 609

insufficient cultivation land if they gave up their cultivations on land claimed by Europeans, Grey recommended that:

the settler or the Company should be required to pay to the Government such sum as Colonel M'Cleverty may think proper, and that he should thereupon recommend the Government to purchase for the natives some portions of land selected by themselves, which should be given to them in lieu of those cultivations required by the Europeans. And it would be essential that every exchange of this kind should be one which is rather advantageous to the natives than otherwise, not only for the purpose of securing their immediate and cheerful acquiescence in the exchange, but with a view to securing, together with their comfort, their attachment to the form of Government under which they live.

We are not aware of Grey having adopted any of these procedures in the very few direct interventions he made in respect of land in the Port Nicholson block. As will be seen, McCleverty himself adopted quite different procedures, which involved little expenditure by the company or the Crown. Grey noted that any expenditure on purchasing land to give to Maori in exchange for their cultivations could be recouped by appropriating the proceeds of the sale of native reserves (tenths). Grey pointed out that many of these reserves were unavailable to Maori, either because they had been leased to Pakeha or because they were not well suited to Maori methods of cultivation, and so Grey proposed in effect to exchange these reserves for 'lands adapted to their wants'.

In the event, McCleverty avoided the need to purchase land (and hence avoided the need for the Crown to sell off Maori tenths to recoup the purchase price). However, some settlers or absentee owners received money in compensation for land selected by them but assigned by McCleverty to Maori: namely, the Te Aro Pa sections, and the parts of Harbour sections 7, 8, and 9 where Ngauranga Maori had cultivations which they refused to give up.²³ In general, McCleverty adopted the much simpler procedure of vesting in the Maori of particular pa certain reserved tenths already held in trust for Maori collectively in 'exchange' for the release by them of their cultivations on land claimed by settlers. He did this notwithstanding Grey's opinion that few suitable tenths reserves were available for such exchanges. In some cases, settlers living legitimately on tenths reserves as lessees were compensated for having to move off those reserves when they were assigned by McCleverty.²⁴ The other, and more extensive, method adopted by McCleverty was to 'exchange' for Maori cultivations on settler land other (unsurveyed) land owned by Maori which he erroneously considered to be 'waste' land belonging to the Crown.

Counsel for the Wellington Tenths Trust claimants noted that the ostensible reason for the New Zealand Company's rejection of FitzRoy's grant was that the extent of the Maori

23. Document I8, pp 108, 143–144

24. Document C1, pp 270–271

cultivations had not been properly defined. Grey appeared to accept this objection, even though, as counsel further observed, it was the Crown which had failed to survey these cultivations prior to the issuing of the grant. However, counsel submitted that the actual reason behind the company's refusal to accept the grant was not the lack of an adequate survey but the fact that Maori would retain highly valuable lands in the heart of the new settlement, lands that the company was determined to acquire.²⁵ Our discussion of McCleverty's activities which follows lends very considerable support to this view. Indeed, as will be seen, McCleverty admitted that he was removing Maori from much of their most valuable land in both the town and the country and that he felt obliged to offer larger areas of less valuable land as compensation.

10.6 McCLEVERTY COMMENCES HIS INQUIRY

A few days after receiving Grey's instructions of 14 September, McCleverty proceeded to Wellington. There, he became engaged on military duties for a time.²⁶ On 18 December 1846, he wrote to Wakefield outlining the approach he proposed to adopt. This letter has not been located, but Wakefield's reply on the same day acknowledged McCleverty's letter 'on the subject of land required for the use of natives of this District who now hold cultivations on sections allotted to Europeans'. Wakefield agreed with McCleverty's opinion that it was desirable to facilitate the 'willing removal [of Maori] from land required by the settlers' and concluded:

I am prepared, on the part of the New Zealand Company, to assent to the selection, under your direction, of a block or blocks of land (in addition to the native reserves unchosen) in the unsurveyed land within the Port Nicholson Grant.²⁷

It appears from this statement that Wakefield considered that the company owned the unsurveyed land, which clearly it did not.

McCleverty, who had become the officer commanding the troops in New Zealand, was then delayed for some months by further military duties. In the meantime, since McCleverty was unavailable, Grey had proceeded to settle the Porirua and Wairau claims. A new purchase of Porirua was necessary because Spain had disallowed the company's entire Porirua claim.²⁸

25. Document 03, pp 217–219

26. Document c1, pp 252–253

27. Wakefield to McCleverty, 18 December 1846, CO208 (doc c1(c), p 407)

28. Document c1, pp 254–255

10.6.1 McCleverty's preliminary report

McCleverty's undated preliminary report was received by Grey on 8 April 1847. It surveyed the Maori population and the area of Maori cultivations and discussed the problems involved in removing Maori from their cultivations on 'settler' lands. The report was based on the assumption that the settlers, not Maori, owned the land which Maori were or had been cultivating since 1840. This is notwithstanding the fact that all such cultivations, along with Maori pa and urupa, and tenths reserves, were expressly recognised as the property of Maori in the agreement reached between FitzRoy and Wakefield on 29 January 1844. This agreement was given effect to in each of the 1844 deeds of release signed by Maori. It is significant that neither Grey nor McCleverty gave any indication of ever having seen these deeds, including the attached schedule, which formed the basis of Spain's award and FitzRoy's grant.

We note here the principal matters discussed by McCleverty in his report:

- ▶ The Maori population resident at Petone, Waiwhetu, Ngauranga, Kaiwharawhara, Pipitea, Kumutoto, and Te Aro Pa was given as 633. There were no permanent residents at Tiakiwai. McCleverty commented that the population varied owing to frequent visitors.
- ▶ Maori belonging to the above pa were assessed as occupying 528 acres on sections 'belonging to settlers'. A further 111 acres of cultivations of Maori of these seven pa were either unsurveyed land or Maori reserves. This meant that 639 acres of land under cultivation were available for the Maori population of 633 adults and children. At Ohariu and Makara, there were 48 acres of cultivations on land said to belong to settlers and, in addition, some 185 acres on unsurveyed land and Maori reserves; in all, some 233 acres. No population figures were given for the occupants of these Maori lands being cultivated on the west coast of the Port Nicholson district.
- ▶ McCleverty pointed to the difficulty of finding land comparable in quantity and quality, and with ease of access from where Maori lived, so as to induce them willingly to relinquish the 576 acres of their cultivations on 'sections of European settlers'. It appears to have been taken for granted that it was Maori, not the settlers, who would have to move.
- ▶ All the existing Maori cultivations were composed of good land, suitable in terms of aspect and in other respects for their wants, and chosen on that account.
- ▶ To compensate for the 576 acres under cultivation on 'settlers' sections', at the very least 12 sections of 100 acres each would be required in exchange.
- ▶ Another difficulty was to obtain blocks of suitable land within a reasonable distance of town. McCleverty said that Maori naturally complained that, if they gave up their cultivations in the immediate vicinity of the town for others at a greater distance, the expense of time and labour to reach the port with their produce would be greater.
- ▶ In some cases, property was held in common between individuals of different pa at distances from each other; for instance, Maori at Pipitea had cultivations in the Hutt in

partnership with some Waiwhetu Maori, and they also had some shared cultivations with Te Aro Maori.

- ▶ Some patches of the town belt (amounting to about 62 acres) were being cultivated by Maori of Pipitea, Kumutoto, and Te Aro Pa (guaranteed to them by ‘FitzRoy’s arrangement’). Given the great difficulty of obtaining land in good situations, McCleverty recommended that an additional part of the town belt, not exceeding 150 acres, should be relinquished to Maori.

McCleverty then stated:

In recommending a portion of the Town Belt . . . to be given to the natives in exchange for other lands required for the settlers, which have been purchased by them from the New Zealand Company, I merely recommend an extension of the occupancy which they hold under Captain FitzRoy’s arrangement of 29th January, 1844, *and in the belief that the Town Belt is to be considered as waste land and belonging to the Crown.*

In this I have been guided by the grant to the New Zealand Company of the Port Nicholson district and the objection thereto, in which no allusion is made to the Town Belt or unsurveyed lands within the limits of that grant. The area is 209,372 acres within the boundaries, part of which only, viz, 71,900 acres, are surveyed by, and granted to, the Company, accepted by that body, and acknowledged hitherto as part of 1,300,000 acres granted by Lord Stanley in liquidation of expenditure, &c.

An objection is raised by the principal agent of the Company, *not to the quantity granted within the boundaries of the Port Nicholson district*, but as to its distribution in favour of certain bodies of natives on settlers’ sections and the Town Belt; the 71,900 acres are defined, viz, 70,800 acres of country sections of 100 acres each, and 1100 town sections of one acre each, and in which the Town Belt is not included. I conceive, the balance, . . . viz, 137,472, includes the Town Belt and other unsurveyed lands *as waste and pertaining to the Crown.* [Emphasis added.]²⁹

Accordingly, McCleverty recommended the award of part of the town belt to Maori in the belief that this was waste land belonging to the Crown. It is clear from the foregoing passage that McCleverty recognised that Wakefield was objecting not to the fact that the FitzRoy grant included only 71,900 acres but rather to the reservation in favour of Maori of their cultivations on ‘settlers’ sections and the Town Belt’. In concluding that 137,472 acres which were not included in FitzRoy’s grant were waste land belonging to the Crown (and not the property of the company or of Maori), McCleverty was laying the ground for the ‘exchanges’ which he was shortly thereafter to make. McCleverty would persuade Maori to surrender their cultivations on ‘settlers’ land’, in ‘exchange’ for such ‘waste land’. We will later

29. W A McCleverty, ‘Report on Port Nicholson Cultivations’, enclosed with Governor Grey to Earl Grey, 21 April 1847, BPP, vol 6, [892], pp 38–42

demonstrate that McCleverty was wrong in concluding that the 137,472 acres excluded from the FitzRoy grant were waste land of the Crown (see s10.7). On the contrary, this land was still owned by Maori (although part of it had been taken by the Crown as public reserves, as discussed in chapter 6). As a consequence, as ‘compensation’ for the valuable cultivations which they were persuaded to surrender in favour of the European settlers, Maori were awarded land which they already owned. In short, Maori received no compensation, apart from a very few purchases by Grey.

10.6.2 Grey’s comments on McCleverty’s preliminary report

On 21 April 1847, Grey sent a copy of McCleverty’s preliminary report to the Secretary of State for the Colonies, Earl Grey.³⁰ After commenting on some aspects of the report, Grey concluded that, pending hearing from Earl Grey on the subject, on the whole it appeared to contain nothing which would cause him to modify his earlier instructions to McCleverty.

Grey referred to McCleverty’s proposal that additional land should be awarded to Maori from the town belt, which McCleverty considered to be waste land. While recognising that some European residents of Port Nicholson were opposed to that proposal, he felt compelled to act contrary to their wishes. As justification, Grey noted that Commissioner Spain had disallowed the company’s original Port Nicholson purchase, and while thus ‘not admitting the rights claimed by the purchasers, he, at the same time, gave the natives certain rights, which must be respected’. He concluded that the necessity of the case compelled him to approve McCleverty’s recommendation concerning the town belt.

Grey also referred to McCleverty’s calculation that at least 12 sections of land, of 100 acres each, would be required to compensate Maori for the land which it was thought desirable they should give up, noting that McCleverty in fact thought an even larger area would be necessary. Grey then referred to a comment by McCleverty that:

the Port-Nicholson district not belonging to the Government, they have no land there applicable to the contemplated purpose, and that this renders it nearly impossible to put the natives in possession of the land requisite to effect an equitable exchange, without purchasing it from the Europeans. [Emphasis added.]

In fact, McCleverty did not, as Grey suggests, refer to ‘the Port-Nicholson district not belonging to the Government’. On the contrary, as we have noted, McCleverty expressed his belief that ‘the Town Belt is to be considered as *waste land and belonging to the Crown*’ and that the 137,472 acres which were within the boundaries of the Port Nicholson district but were excluded from FitzRoy’s grant ‘includes the *Town Belt and other unsurveyed lands as waste and pertaining to the Crown*’ (emphasis added). This being so, there was, as

30. Governor Grey to Earl Grey, 21 April 1847, BPP, vol 6, [892], pp 36–38

McCleverty subsequently demonstrated, no need for him to purchase any land. He simply used Maori land in the belief that it was waste land owned by the Crown.

10.6.3 Deeds of exchange are signed

During 1847, McCleverty held discussions with Maori belonging to pa at Kumutoto, Te Aro, Waiwhetu, Ngauranga, Petone, Pipitea, Kaiwharawhara, and Ohariu. As a result, eight deeds of exchange were signed by Maori. Except for the Kaiwharawhara deed, they largely followed a common form.³¹ The Waiwhetu deed is typical. The English translation of the material part stated:

We the Landholders and Chiefs residing at and belonging to Waiwetu on the River Hutt, agree on the thirtieth day of August one thousand eight hundred and forty seven to give up to Her Majesty's Government all those cultivations which we have hitherto had on sections in the Harbour and Hutt Districts or elsewhere belonging to European Settlers on our receiving from Lieutenant Colonel McCleverty, subject to the approval of the Governor or Lieutenant Governor, portions of land which we have seen and agree to receive in the Hutt District. [Details of the land follow.]

In each deed, Maori agreed to give up all their cultivations on lands said to belong to European settlers, although an exception was made in the case of the Ngauranga deed for parts of three Harbour sections where Ngauranga Maori refused to give up their cultivations. In exchange, specific pieces of land in stated localities were to be assigned to them. Some pa sites – Te Aro, Pipitea, Waiwhetu, Kaiwharawhara, and 'Tiakiwai' (actually Pakuao) – were specifically guaranteed to Maori in the deeds, although in fact all the pa sites where deeds of exchange were signed were reserved by McCleverty for the Maori of those pa. We provide further details of the land assigned by McCleverty to each pa in chapter 11.

To his final report, dated November 1847, McCleverty attached four forms.³² Forms A and B described lands 'excepted and reserved' by McCleverty; that is, lands which would not be included in any grant to the New Zealand Company. Apart from minor exceptions, these lands were excluded from the 1848 Crown grant to the company. Forms C and D showed the total amount of land under Maori cultivation at Port Nicholson and the area cultivated on 'settlers' sections' by the Maori of each pa. These two forms served to 'elucidate the cause of Lands, in unsurveyed Districts and on the Town Belt, being extended in quantity to the Natives, beyond what they originally possessed'. Maori relinquished all cultivations on 'settlers' sections' except for 109½ acres of cultivations which Ngauranga Maori refused to give up.³³

31. See document A10(a), s 3, for the texts of the eight deeds.

32. W A McCleverty, 'Final Report on the Port Nicholson District', 20 November 1847. An abridged version of this report is in Turton, *Epitome* (doc A26), s D, p 13. The full report is in document C1(c), pp 262–280.

33. McCleverty's final report, 20 November 1847, CO208 (doc C1(c), pp 262–265)

It is clear that McCleverty envisaged the arrangements he had made as ‘exchanges’ – Maori cultivations on ‘settler’ sections were being relinquished in ‘exchange’ for Maori reserves and unsurveyed lands. He reported that:

The Natives are now put in possession of certain tracts of lands which the Government had at disposal, either by purchase, or by a proprietary title to the waste lands, or through the means of the Native Reserves; the Natives relinquishing their cultivations, and in one case a small Pah on Settlers country sections.³⁴

The Wai 145 claimants allege that, in breach of the Treaty, the Crown did not ensure that Maori were allowed to choose the lands which they would receive in exchange for the lands desired by the New Zealand Company.³⁵

As we have noted at section 10.5, Grey had directed McCleverty that the lands to be acquired to replace cultivations ‘required’ by settlers should be lands selected by Maori themselves. Grey added that every such exchange should be ‘rather advantageous to the natives than otherwise’. Claimant counsel referred to Anderson and Pickens as commenting that:

Replacement lands were to be selected by Maori themselves, but whether this directive was carried out is obscured by the lack of minutes or reports on the negotiations. There are indications, however, that this was not the case. McCleverty and Grey rejected the Maori request that they should be given lands within company subsidiaries larger than the 100 acres that were supposed to comprise the country sections. And although Maori expressed a wish to stay near the town, most of the land[s] allocated to them were in outlying areas.³⁶

Crown counsel submitted that the arrangements were consensual.³⁷ However, as we have noted above, McCleverty found it difficult to find land comparable in quantity and quality, and with ease of access from where Maori lived, so as to induce them willingly to relinquish the 576 acres of their cultivations on sections said to belong to settlers. McCleverty also noted that Maori naturally complained at being asked to give up their cultivations close to town.

34. McCleverty’s final report, 20 November 1847, C0208 (doc C1(c), p 271)

35. Claim 1.2(d), para 12.7

36. Document 12, pp 48–49 (cited in doc 03, p 242). The option of Maori being given lands in ‘company subsidiaries’ larger than 100 acres was an idea mentioned by McCleverty in his preliminary report. Since many rural sections were actually between 110 and 130 acres in size and the land orders purchased from the New Zealand Company were for only 100 acres, McCleverty suggested that settlers could be confined strictly to 100-acre sections and the difference of some 10–30 acres could be used by Maori for cultivation. Grey, however, rejected this suggestion, saying that this difference in acreage was ‘a question between the Company and their settlers’: McCleverty, ‘Report on Port Nicholson Cultivations’, enclosed with Governor Grey to Earl Grey, 21 April 1847, BPP, vol 6, [892], p 41; Governor Grey to Earl Grey, 21 April 1847, BPP, vol 6, [892], pp 37–38.

37. Document Q1, pp 27, 29; doc P1, pp 78–82

McCleverty claimed that he had adhered to Grey's instruction that 'the exchange should be in favor of the Natives'. He considered that, 'as far as practicable, and in convenient localities of their own selection', he had 'reserved sufficient for their future wants, as to Cultivations, fishing stations, facilities for obtaining firewood and their future attention to cattle'.³⁸ However, he followed this statement by noting that the greater part of the land assigned to Maori:

is only available for fishing purposes, or to depasture cattle, to which I believe it is advisable to attract, if possible, the native population. The Lands now relinquished by the Natives are the very best selected on account of soil, aspect, and vicinity to their homes, and are therefore scattered over a large extent of country. The Land they receive in exchange, has not these advantages, and it was therefore necessary to obviate some difficulty arising from this, by reserving for them large Blocks.³⁹

We would observe that exchanging a greater quantity of inferior land in more remote localities for the best land in convenient places does not, on its face, constitute a fair exchange.

The underlying principle in Grey's instructions to McCleverty was that Maori should be persuaded to relinquish the Maori cultivations 'required by the settlers'. It is apparent that Maori were placed under great pressure by McCleverty to relinquish much of their high quality cultivation land and to move, for the most part, to more distant and less fertile land, much of it suitable only for fishing purposes or the depasturing of cattle. The Tribunal cannot escape the conclusion that, given a free and unpressured choice, Maori would have elected to retain their existing cultivations, many of which were in close proximity to their homes and to the sea. Save for a few exceptional cases, no effort was made by the Crown or its agents to persuade, whether by financial or other inducement, the settlers to give up the Maori cultivations, or to remove to inferior and more remote land. Maori, not the settlers, were required to give way.

10.6.4 Tribunal finding of Treaty breach

The Tribunal finds that the Crown failed to ensure that Maori who were parties to the McCleverty deeds were given a free and unpressured choice as to whether they wished to relinquish their cultivations in favour of the settlers and a free and unpressured choice as to any land they might receive in exchange. By such failure, the Crown failed to protect the rangatiratanga of such Maori in and over their cultivations, as required by article 2 of the Treaty, and the Crown further failed to act reasonably and in good faith towards them. As a consequence, they were prejudicially affected thereby.

38. McCleverty's final report, 20 November 1847, CO208 (doc C1(c), p 268)

39. Ibid (p 269)

10.6.5 Land granted to Maori

Of the total area of land granted to Maori as a result of the McCleverty awards – nearly 20,000 acres – the largest portion came from outlying unsurveyed lands.

The four largest outlying blocks, which contained some 14,340 acres, were Orongorongo (6990 acres), Korokoro (1214 acres), Parangarau (Wainuiomata) (4704 acres), and Opau (Ohariu) (1431 acres).⁴⁰ These four blocks, all on unsurveyed land, amounted to nearly three-quarters of the lands awarded by McCleverty, who commented that they ‘may appear large in extent, but in reality they possess little land available for cultivation, particularly those at Orongorongo and Parangarau’. McCleverty also noted that nearly half of the Orongorongo block was not within the Port Nicholson deed of purchase area, being east of the ‘Turakirai range’ (that is, the Rimutaka Range, which meets the sea at Cape Turakirae and which formed the eastern boundary of the Port Nicholson block).⁴¹

McCleverty reported that Maori were cultivating 62 acres of the town belt at the time of the January 1844 agreement and that he had assigned 219 acres of the town belt to Maori, leaving more than 1300 acres available for public purposes.⁴²

The third source of land ‘exchanged’ by McCleverty was the New Zealand Company’s native reserves (tenths), which were expressly reserved to Maori in the schedule attached to the 1844 deeds of release: 39 country sections of 100 acres each (3900 acres) and 110 town sections of one acre (110 acres), totalling 4010 acres. McCleverty awarded to individual hapu 45 town acres and 3162 country acres which had been held in trust for all Wellington Maori. As a result, these reserves were taken out of the administration of the trustees for the tenths reserves and were vested in hapu members. Once assigned by McCleverty, these reserves were no longer known as tenths. Along with the land assigned by McCleverty from the town belt and unsurveyed land, they became known as ‘McCleverty reserves’.

In summary, the so-called ‘McCleverty exchanges’ came almost exclusively from three sources:

- ▶ the town belt, 219 acres of which were vested in Maori;
- ▶ company tenths Maori reserves which were converted to specific hapu reserves; and
- ▶ unsurveyed land, of which 14,340 acres, or nearly three-quarters of the total land ‘exchanged’ by McCleverty, was appropriated, which land McCleverty erroneously considered to be waste land belonging to the Crown.

The Tribunal considers, for reasons which we next discuss, that almost all of the land said to have been given to Maori by McCleverty in fact already belonged to them. As a consequence, the valuable Maori cultivations were obtained at virtually no cost to the Crown or the company but at considerable cost to Maori, who lost much of their best land.

40. Schedule included with McCleverty’s final report, 20 November 1847, CO208 (doc C1(c), p 278)

41. McCleverty’s final report, 20 November 1847, CO208 (doc C1(c), pp 265–266)

42. Ibid (pp 269–270)

10.7 WHOSE LAND WAS EXCHANGED FOR MAORI CULTIVATIONS?**10.7.1 The town belt land**

The Tribunal has found in chapter 6 that the town belt was never validly purchased from Maori but was taken by the Crown without Maori consent, in breach of article 2 of the Treaty. Accordingly, in purporting to exchange part of the town belt for certain of their cultivations which Maori were asked to surrender, the Crown was doing no more than offering to Maori land which they had never willingly or knowingly parted with, and which they still rightly owned.

10.7.2 The company tenths Maori reserves

As we have seen, clause 13 of the November 1840 agreement between the Crown and the New Zealand Company stated that the Crown was to ensure the provision of the tenths reserves for Maori referred to in the Port Nicholson deed of purchase (see s 5.4.2). In 1844, Lord Stanley instructed FitzRoy that the Government was to reserve one-tenth of all lands acquired from Maori in Port Nicholson for the benefit of Maori.⁴³

The Tribunal finds in chapter 12 that Port Nicholson Maori were the beneficial owners of the tenths reserves (see s 12.4.3). We consider it to be plain that the Crown was obliged to ensure that the company provided the tenths reserves for Maori on any land it acquired in the Port Nicholson district. As we have seen, 39 such reserves of 100 acres each and 110 one-acre reserves were provided for in the schedule agreed upon by Wakefield and Clarke which formed part of each of the 1844 deeds of release.

However, most of these reserves, which were intended to be held in trust for Maori in the Port Nicholson block, were assigned by McCleverty to individual hapu. In short, the Crown assigned to the hapu reserves of which Maori were already the equitable owners.

10.7.3 The unsurveyed lands assigned to Maori

As we have seen, McCleverty made several references to the unsurveyed land in the Port Nicholson deed of purchase district as being waste land belonging to the Crown. It is apparent that he felt justified in awarding such land to Maori as compensation for the surrender of their rights to their cultivations on 'settlers' land'. It is clear that McCleverty did not consider that the unsurveyed land from which such 'exchanges' were made belonged to the New Zealand Company; rather, he believed that it was waste land and Crown demesne.

Crown counsel submitted that the Crown acquired ownership of this unsurveyed land as a result of the 1844 deeds of release. We have examined and rejected this submission in chapter 8, where we found that the deeds of release related only to the 71,900 acres of land

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

specifically referred to in the schedule attached to each of the deeds. They did not relate to the remaining land, comprising some 137,347 acres, and such remaining land had not been sold by Maori either to the New Zealand Company or to the Crown (see s8.3.10).

We agree with Crown counsel's submissions that the term 'waste lands' has several meanings depending on the context: 'It was applied generally to unallocated Crown lands (after the extinction of native title). It could also refer to the doctrine that certain lands inhered in the Crown by virtue of its sovereignty because no other party could show title to them.' In the New Zealand context, some officials questioned whether Maori could substantiate claims to every part of the country and argued that, where Maori could not substantiate claims, the land would vest in the Crown without any need to negotiate the extinction of the native title. However, Crown counsel further submitted that it is well established that a policy of identifying waste lands was never implemented in New Zealand.⁴⁴ Yet, this is what McCleverty assumed had occurred. For something close to a decade, various secretaries of state for the colonies (particularly Earl Grey) found it difficult to accept that no waste land existed in New Zealand.

10.7.4 'Waste lands'

The subject of waste lands in New Zealand in relation to the Treaty of Waitangi has been authoritatively considered by Peter Adams.⁴⁵ The following abbreviated discussion is based on his seminal work *Fatal Necessity*. In the following passage, Adams, after citing various authorities, describes the relationship of Maori to their land:

There is no doubt that in 1840 the Maoris claimed the ownership of the whole of the islands of New Zealand. In a country where the amount of habitable land was limited by climatic, geographic, and resource factors, competition between numerous tribes and sub-tribes had led, within the historical pattern of Maori settlement, to the establishment of more or less well-defined areas of tribal ownership. In these areas land was used both for cultivation and for the produce that lived and grew naturally upon it, or in the streams, lakes, and swamps which watered it: flax, timber, and fern root, rats, birds, eels, and fish. Partly because the Maoris practised shifting agriculture, but chiefly because the scarcity of edible flora and fauna demanded the full use of natural food resources to be found in the forests and swamps, any European distinction between 'cultivated' and 'waste' land was essentially inappropriate. Land and water, whether wild or tamed, provided the necessities of life.

44. Document p1, p 9

45. Peter Adams, *Fatal Necessity: British Intervention in New Zealand, 1830–1847* (Auckland: Auckland University Press, 1977), ch 6; see also Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 2, s 5.3

Beyond its economic utility, however, land had emotional and societal values. It conferred dignity and rank, providing the means for hospitality, the battlefield where prowess might be displayed and honour won, the resting place for the dead, and the heritage of future generations. It carried on its back the *pa* and the *marae*, the *wahi tapu*, or burial grounds, and the sacred places. Land was a giver of personal identity, a symbol of social stability, and a source of emotional and spiritual strength.⁴⁶

Lord Normanby, early in his instructions to Hobson, noted that the title of Maori 'to the soil and to the sovereignty of New Zealand is indisputable, and has been solemnly recognised by the British Government'.⁴⁷ Hobson was accordingly instructed that he was 'to obtain, by fair and equal contracts with the natives, the cession to the Crown of such *waste lands* as may be progressively required for the occupation of settlers resorting to New Zealand' (emphasis added). Normanby clearly envisaged that the 'waste lands' would have to be purchased from Maori. He also directed Hobson that he was not to purchase from Maori any territory 'the retention of which by them would be essential, or highly conducive, to their own comfort, safety or subsistence'.⁴⁸

However, in November 1840 the charter providing for the separation of New Zealand from New South Wales, which was drafted with Lord John Russell's approval, safeguarded the rights of Maori only to 'the actual occupation or enjoyment . . . of any lands in the said colony now actually occupied or enjoyed by such natives'.⁴⁹

The 1844 report of the House of Commons select committee inquiring into the state of the colony of New Zealand included among its resolutions a finding that the Treaty of Waitangi was 'injudicious'. A further resolution recommended that means be found for establishing the exclusive title of the Crown to 'all land not actually occupied and enjoyed' by Maori.⁵⁰

On 13 August 1844, Stanley sent FitzRoy a copy of the 1844 select committee report. He noted that the report proceeded on the assumption that 'the uncivilized inhabitants of any country have but a qualified dominion over it, or a right of occupancy only'.⁵¹ However, he thought it inappropriate to apply this assumption to Maori, given their superior ranking among native peoples. Moreover, to restrict the rights of Maori to 'lands actually occupied for cultivation' appeared to him 'wholly irreconcilable with the large words' of article 2 of the Treaty of Waitangi.⁵²

Later in 1844, in a dispatch to FitzRoy, Stanley again discussed the topic of 'waste land' with reference to the position of the New Zealand Company:

46. Adams, p 177

47. Instructions from the Marquis of Normanby to Captain Hobson, 14 August 1839, BPP, vol 3, p 85

48. *Ibid*, p 87

49. 'Royal Charter for Erecting the Colony of New Zealand', 16 November 1840, BPP, vol 3, p 154

50. 'Report from the Select Committee on New Zealand', 29 July 1844, BPP, vol 2, pp 12–13

51. Stanley to FitzRoy, 13 August 1844, BPP, vol 4, p 145. The words quoted are actually from a speech Governor George Gipps of New South Wales made on 9 July 1840 and were quoted approvingly by the select committee on New Zealand: BPP, vol 3, p 185; 'Report from the Select Committee on New Zealand', 29 July 1844, BPP, vol 2, p 6.

52. Stanley to FitzRoy, 13 August 1844, BPP, vol 4, pp 145–147

There is no doubt, that at the time of entering into the original undertaking, it was believed that there was an immense extent of territory, the claims to which had been previously obtained by fair purchase on the part of the Company, or to which no one could assert a valid claim. But subsequent experience seems to show that much more land than was supposed is owned in New Zealand according to titles well understood, either by some individuals, or at all events by some tribes.⁵³

Stanley's successors took a more hard-line approach. Gladstone had only a brief tenure at the Colonial Office and his successor, Earl Grey (as Lord Howick), had chaired the 1844 House of Commons select committee on New Zealand. Adams notes that Earl Grey was determined, on becoming Secretary of State, to put the select committee's principal recommendation into practice. Accordingly, Earl Grey instructed Governor Grey in December 1846 to undertake the registration of land titles (something his predecessors had also been urged to do), on the basis that Maori owned only those lands which they occupied and cultivated; the remainder (the 'waste lands') would belong to the Crown.⁵⁴ A new royal charter for New Zealand, sent with Earl Grey's letter, was accompanied by lengthy royal instructions, chapter 13 of which set out provisions for the settlement of the waste lands of the Crown.⁵⁵

Grey prevaricated in responding to Earl Grey's explicit instructions to compile a register of land titles. He did, however, advert to the topic of waste lands in a dispatch to the Secretary of State in April 1847.⁵⁶ He enclosed a letter from Wakefield in which the New Zealand Company agent was critical of Grey's action in purchasing the Porirua district from Ngati Toa while McCleverty was absent on military duty.⁵⁷ This followed Commissioner Spain's earlier finding that the company was not entitled to a Crown grant of any land in the Porirua district.

A principal justification of his purchase was given by Grey as follows:

the position I understand to be adopted by the New Zealand Company's Agent, that if tracts of land are not in actual occupation and cultivation by natives, that we have, therefore, a right to take possession of them, appears to me to require one important limitation. The natives do not support themselves solely by cultivation, but from fern-root, – from fishing, – from eel ponds. – from taking ducks, – from hunting wild pigs, for which they require extensive runs, – and by such like pursuits. To deprive them of their wild lands, and to limit them to lands for the purpose of cultivation, is in fact, to cut off from them some of their

53. Stanley to FitzRoy, 30 November 1844, BPP, vol 4, p 205

54. Adams, p 187. See Earl Grey's dispatch to Governor Grey, 23 December 1846, BPP, vol 5, pp 520–528, where, in a lengthy discourse, Earl Grey opines that 'From the moment that British dominion was proclaimed in New Zealand, all lands not actually occupied in the sense in which alone occupation can give a right of possession, ought to have been considered as the property of the Crown in its capacity of trustee for the whole community': pp 524–525.

55. 'The Queen's Instructions ... Accompanying the New Zealand Charter', ch 13, BPP, vol 5, pp 540–543

56. Governor Grey to Earl Grey, 7 April 1847, BPP, vol 6, [892], pp 14–17

57. Wakefield to superintendent, southern division, 25 March 1847, BPP, vol 6, [892], pp 17–18

most important means of subsistence, and they cannot be readily and abruptly forced into becoming a solely agricultural people. Such an attempt would be unjust, and it must, for the present, fail, because the natives would not submit to it: indeed they could not do so, for they are not yet, to a sufficient extent, provided even with the most simple agricultural implements; nor have they been instructed in the use of these. To attempt to force suddenly such a system upon them must plunge the country again into distress and war; and there seems to be no sufficient reason why such an attempt should be made, as the natives are now generally very willing to sell to the Government their waste lands at a price, which, whilst it bears no proportion to the amount for which the Government can resell the land, affords the natives (if paid under a judicious system) the means of rendering their position permanently far more comfortable than it was previously, when they had the use of their waste lands, and thus renders them a useful and contented class of citizens, and one which will yearly become more attached to the Government.

I am satisfied, that to have taken the waste lands I have now purchased by any other means than those I have adopted, would once more have plunged the country into an expensive war, which, from its supposed injustice, would have roused the sympathies of a large portion of the native population against the British Government, and would thus probably have retarded for many years the settlement and civilization of the country.⁵⁸

Although, in this passage Grey does not appear to dispute the notion of waste land, he is at pains, in the case of the Ngati Toa people, to limit its scope. In recognising the need for Maori to be left with their 'wild lands' (which he appears, somewhat confusingly, to include in their 'waste lands'), Grey justifies his decision to purchase the whole of Ngati Toa's land at Porirua rather than arbitrarily take possession of those lands which Ngati Toa were not occupying and cultivating. As will later appear, Grey had no such inhibitions in granting title to the company over much of the Maori land in the Port Nicholson district which was of a similar character to that purchased by him at Porirua. No effort was made by McCleverty to purchase the extensive lands belonging to Maori which the Crown had not acquired in the Port Nicholson block. Nor did Grey require that he should do so.

Grey finally, and very belatedly, responded to Earl Grey's instruction of December 1846 that he compile a register of land titles. In a letter to Earl Grey of 15 May 1848, he expressed his dissent from the opinions of 'high authorities' in the northern part of the North Island that 'there is no waste land in this colony which can be appropriated to the Crown without purchase'. He stated that, even in the most densely inhabited parts of the northern part of the island, 'there are very large tracts of land claimed by contending tribes to which neither of them have a strictly valid right'. He forecast that, when these tracts of country came to be occupied by Europeans, Maori would 'cheerfully relinquish their conflicting and invalid

58. Governor Grey to Earl Grey, 7 April 1847, BPP, vol 6, [892], pp 16–17

claims in favour of the Government, merely stipulating that small portions of land, for the purposes of cultivation, shall be reserved for each tribe'.⁵⁹

As to chapter 13 of the royal instructions, which dealt with the settlement of waste lands of the Crown, Grey stated that he had found it expedient to move slowly in relation to the registration of Maori land. He considered a requirement that Maori should register their claims to land within a certain time limit would almost certainly meet with strong resistance. Unless a general survey of the island was undertaken, and the boundaries of the different claims mapped, the registration of claims by Maori would provide little information and be of little use. It would be preferable not 'to disturb the present tranquillity of the country' by requiring Maori generally to register their claims. Instead, he followed a practice of purchasing Maori land 'for a trifling consideration' in advance of actual needs of European settlers.⁶⁰

Adams concludes that, during the first seven years of the Crown colony in New Zealand, the Colonial Office politicians either failed to understand or were reluctant to accept the full implications of what article 2 of the Treaty guaranteed to Maori, though by the end of the period they were prepared to let the matter be decided in New Zealand.⁶¹

As we have seen, Grey was equivocal. He appeared to consider that some waste land existed in New Zealand, while at the same time stating that Maori should not be stripped of their 'wild land'. Rather than asserting the Crown's right to assume such waste land as he considered might exist, he preferred to purchase Maori land in the interest of peace and tranquillity. For this reason, he declined to establish a register of land occupied by Maori, as required by Earl Grey.

Grey thought it essential to purchase the land in the Porirua district from Ngati Toa, yet he dealt very differently with equivalent land in the adjoining Port Nicholson block. He allowed McCleverty to assign to Maori, in 'exchange' for their valuable cultivations, land which they already owned and which they had never surrendered. McCleverty did so in the erroneous belief that such land was 'waste land' belonging to the Crown. In addition, as we discuss at section 10.8.4, Grey granted to the company in 1848 some 120,626 acres which had never been purchased from Maori either by the company or by the Crown. Given Grey's assurances to Earl Grey that the appropriate course in New Zealand was to purchase from Maori the land required for settlement, we would have expected him to follow this course in the Port Nicholson district as he had done in the adjoining Porirua district.

10.7.5 Tribunal finding of Treaty breach

The Tribunal finds that the land assigned to Maori by McCleverty, in exchange for the release by Maori in the Port Nicholson district of their cultivations on land claimed by settlers, was

59. Governor Grey to Earl Grey, 15 May 1848, BPP, vol 6, [1120], p 24

60. *Ibid*, pp 24–25

61. Adams, pp 188–189

not waste land belonging to the Crown, nor did it belong to the New Zealand Company. This land (comprising portions of the town belt, tenths reserves, and the unsurveyed lands) was in part reserves held in trust for Maori, while the remainder was land belonging to Maori having customary interests in the Port Nicholson block. As a result, the Crown failed to protect the article 2 Treaty rights of such Maori to their land, and they received no compensation for the release of their valuable cultivations to the Crown.

The Tribunal further finds that, as a consequence of the foregoing, the Crown failed to fulfil its obligation under article 2 of the Treaty to protect the rangatiratanga of Maori in and over their land by ensuring that their tenths reserves remained intact and that they received adequate compensation for the surrender of their valuable cultivations, which had been expressly reserved to them. As a consequence, Maori having customary rights in the Port Nicholson block were seriously prejudiced thereby.

10.8 GREY'S 1848 PORT NICHOLSON CROWN GRANT

McCleverty's final report of 20 November 1847 was sent by Lieutenant-Governor Edward Eyre to Wakefield. Eyre urged the company agent to accept a Crown grant in terms of the report.⁶² Wakefield replied promptly, accepting such a grant.⁶³

Early in December, Eyre advised McCleverty that Wakefield had agreed to accept a Crown grant for 'that portion of the Port Nicholson claim which is comprised within the limits of the *surveyed lands*, subject to the exceptions and reservations marked in Schedules A and B . . . to your report' (emphasis in original).⁶⁴ However, Eyre was shortly thereafter to revise his initial decision to confine the company's grant to the surveyed lands only.

On 24 December 1847, Eyre wrote to Grey concerning the Port Nicholson Crown grant, informing him that:

In consequence of the recent arrangements entered into between Her Majesty's Government and the New Zealand Company by which the demesne lands of the Crown are for three years to be placed entirely in the hands of the Company, I have directed the Crown Solicitor in preparing the Deed of Grant to let it embrace the whole area comprised within the limits of the purchase (excepting the lands reserved) without reference to any specific quantity to which the NZ Company laid claim or which had been awarded to them in that particular district. I have adopted this arrangement upon the consultation with the Special Commissioner Lt Col McCleverty.⁶⁵

62. Eyre to Wakefield, 23 November 1847, CO208 (doc C1(c), pp 250–261)

63. Wakefield to Eyre, 29 November 1847, CO208 (doc C1(c), pp 281–284)

64. Eyre to Wakefield, 2 December 1847, Turton, *Epitome* (doc A26), s D, p 14

65. Eyre to Grey, 24 December 1847, NM4/1/47/96, pp 122–124 (doc E7, p 271e)

10.8.1 The Loans Act 1847

To understand Eyre's reference to 'recent arrangements' between the Crown and the company, it is necessary to refer to the Loans Act 1847, which was passed by the British Parliament. On 19 June 1847, Earl Grey sent to Governor Grey a copy of the Loans Bill, which was later enacted on 23 July 1847.⁶⁶ It is evident that this reached Grey (and Eyre) by December 1847, if not earlier.

In 1847, the directors of the New Zealand Company, frustrated at the long delay in obtaining title to the lands on which their settlers were living and by associated problems, sought compensation from the British Government. They asked that 'the Government relieve them of the enterprise which it has marred, and take to itself both their liabilities and their assets'.⁶⁷ Earl Grey's response was to admit that the company had established a claim against the Government. He outlined proposals by which the company would be enabled to carry on trading for a further three years, at which time it could elect whether or not it wished to continue.⁶⁸ These proposals formed the basis of the Loans Act 1847.⁶⁹

The principal relevant provisions of the Loans Act were:

- ▶ The provisions on the settlement of the waste lands of the Crown in chapter 13 of the royal instructions of 23 December 1846 (except those relating to the registration of land title, the means of ascertaining the demesne lands of the Crown,⁷⁰ the claims of Maori to land, and the restrictions on the conveyance of Maori land to persons other than the Crown) were suspended for three years until 5 July 1850 (s1).
- ▶ The demesne lands of the Crown in the province of New Munster were vested for three years in the New Zealand Company in trust and were to be administered in the best way to promote the efficient colonisation of New Zealand (s2).⁷¹
- ▶ A minimum price of £1 per acre was fixed for any land so vested in the company which it wished to sell, with the exception of land to be used for public purposes (s3).

66. Earl Grey to Governor Grey, 19 June 1847, BPP, vol 5, pp 663–665

67. Harrington to Earl Grey, 23 April 1847, BPP, vol 5, p 654

68. Hawes (for Earl Grey) to Harrington, April 1847 (sent 10 May 1847), BPP, vol 5, pp 656–659

69. The Loans Act 1847, 10 and 11 Victoria, c 112 (doc E7, pp 312–317)

70. The phrase 'demesne lands of the Crown', which is used on several occasions in the instructions, is not defined. The demesne lands of the Crown are defined in W J Byrne's *A Dictionary of English Law* (London: Sweet and Maxwell, 1923) at page 293 as being:

those which belong to the sovereign in his public capacity, that is, by succession from his predecessors, or by escheat, etc, as opposed to his private estates, namely, such as have been acquired by him by moneys out of his privy purse, or by gift or inheritance from any person other than his predecessors in their public capacity. The demesnes are under the management of the Commissioners of Woods, Forests, and Land Revenues, and their revenue forms part of the Consolidated Fund.

In short, 'demesne lands of the Crown' are those held in the name of the monarch in her or his public capacity in contrast to being the monarch's personal private property. They are administered by public officials, and any revenue from them is public property. They may include land from which the native title has been extinguished or where no other party could show a claim to them.

71. New Munster was made up of the South Island, and the southern part of the North Island (including Port Nicholson).

- ▶ The Treasury was authorised to advance up to £136,000 to the company over the three-year period. This was in addition to £100,000 earlier authorised to be paid to the company, and all such advances were to be free of interest (s15).
- ▶ The company was able to relinquish its undertaking if it thought fit, in which event all company lands in New Zealand would revert to and become vested in Her Majesty as part of the demesne lands of the Crown (s19).

It appears that Eyre either believed or adopted McCleverty's belief that the remainder of the 209,247 acres in the Port Nicholson block, beyond the 71,900 acres covered by the deeds of release and Spain's award, were demesne lands of the Crown and hence covered by the Loans Act 1847. We are unaware of any basis for such a belief. It may be that Eyre simply adopted McCleverty's assumption or that he misinterpreted the Loans Act's provisions.

10.8.2 Grey signs the Port Nicholson Crown grant

Six days after Eyre's letter to Grey, Daniel Wakefield, the Crown solicitor for New Munster, sent a draft Crown grant to Wakefield for his perusal. This draft purported to grant 168,000 acres to the company and to exclude from the grant certain reserves and exceptions.⁷² Although approved by Wakefield, it was subsequently amended by substituting 209,247 acres for 168,000 acres, and was duly signed by Grey on 27 January 1848.⁷³

It is apparent that Grey agreed with his deputy Eyre that the Crown grant should embrace the whole area of the 209,247 acres contained within the limits of the 'purchase' (excepting the lands reserved), 'without reference to any specific quantity to which the NZ Company laid claim or which had been awarded to them in that particular district'.⁷⁴ We infer from Eyre's instruction and Grey's concurrence that neither of them was concerned with the fact that both Spain's award and FitzRoy's Crown grant were limited to 71,900 acres (less the Maori tenths reserves and pa, cultivations, and urupa). Nor were they concerned that all that Maori surrendered under the 1847 McCleverty deeds were their cultivations on lands said to belong to European settlers, which amounted to some 467 acres.⁷⁵

At most, Maori may be said to have released the 67,890 acres covered by the deeds of release, less pa, urupa, and any cultivations not surrendered under the 1847 McCleverty deeds. Neither Eyre nor Grey is on record as explaining how land which Maori had never willingly or knowingly sold or alienated had, in his opinion, become demesne lands of the Crown and hence subject to the provisions of the Loans Act 1847. Nor is there any basis for such an assumption.

72. Daniel Wakefield to William Wakefield, 30 December 1847, C0208 (doc C1(c), pp 299, 301–304)

73. William Wakefield to Daniel Wakefield, 31 December 1847, C0208 (doc C1(c), p 300); Port Nicholson Crown grant (doc A10(a), pp 10:1–10:2)

74. Eyre to Grey, 24 December 1847 (cited at s 10.8)

75. According to McCleverty, there were 576½ acres of Maori cultivations on settler-claimed sections, but Ngauranga Maori refused to surrender 109½ acres of these cultivations, leaving 467 acres which were surrendered in the 1847 deeds.

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10.8.3

10.8.3 Land reserved for Maori under the 1848 Crown grant

Attached to the Crown grant were two plans. The first was a plan of the town of Wellington.⁷⁶ The second was a map of the Port Nicholson district showing the country sections and the land excepted from the Crown grant to the company from these plans and the schedules endorsed on them, it appears that the total quantity of land reserved for Maori was some 20,070 acres, as shown in the following table.

Area left to Maori under 1848 Crown grant

Categories of reserved land	Area		
	Acres	Roods	Perches
1 Reserves in town of Wellington, cultivations on town belt, Te Aro Pa	335	3	13
2 Pa and cultivations not surrendered on rural 'settlers' sections'	113	2	18
3 Reserved blocks on unsurveyed land	14,340	3	28
4 Country Maori tenths reserves	4200	–	–
5 West coast additional reserves *	770	–	–
6 Grey's purchase of Hutt section 10 (106 acres) and Harbour section 4 (104 acres), and surrender of Kaiwharawhara district Government domain (100 acres)†	310	–	–
Total	20,700		

* McCleverty excepted from the land he granted to the New Zealand Company 20,600 acres on the south-west coast of the Port Nicholson district to enable land to be reserved for the smaller Maori settlements on the coast between Cape Terawhiti and Ohariu. These communities were on unsurveyed land and had no cultivations on sections claimed by settlers. McCleverty proposed in his report that their cultivations be surveyed, as well as convenient blocks for future cultivations as selected by them (McCleverty's report, 20 November 1847, CO 208 (doc 1(c), pp 270-271)). Moore states that in June and July 1849 McCleverty returned to the west coast settlements and surveyed and assigned Maori reserves of 400 acres at Waiariki, about 20 acres at Oterongo, and 350 acres at Ohaua/Te Ika a Maru. The remainder of 20,600 acres excepted from McCleverty's award (18,300 acres) was effectively claimed by the Crown and thus went to the Company under the Loan Act 1847, Moore, doc 7, pp 7, 44).

† See sections 10.4.1 and 10.4.2 above. Although the 100 acre Government domain was assigned to Kaiwharawhara Maori by McCleverty, it was still shown as a public reserve in the schedules to the 1848 Crown grant.

In round figures, Maori were reserved some 20,000 acres out of the 209,247 acres in the Port Nicholson district. It should be noted, however, that almost none of the land reserved for Maori had ever been purchased from Maori by the company or the Crown. The 106 acres for Waiwhetu Maori was purchased by the Crown from a settler, but this purchase did no more than meet Wiremu Kingi's insistence, before signing the 1844 deed of release at Waiwhetu, that Spain provide land for cultivations. Spain neglected to do so, and Grey simply met the obligation unmet by Spain. The only other section purchased for Maori from a settler was Harbour section 4, which was purchased for Kaiwharawhara Maori. Thus, the

76. so10408 (doc a9(a))

77. so10456 (doc a9(b))

reservation of some 20,000 acres for Maori was not an act of generosity on the part of the Crown, since almost all this area was already Maori land.

10.8.4 The terms of Grey's 1848 Port Nicholson Crown grant

The preamble to the 1848 grant, made in the name of Queen Victoria, recited that:

Whereas it hath been made to appear to Us that the New Zealand Company hath acquired from certain aboriginal Natives in the Province of New Munster in the Colony of New Zealand entitled in that behalf a full and valid cession of all the right of such aboriginal Natives to the lands hereinafter particularly described (subject to the reservations hereinafter made) . . .

There then followed a description of the boundaries of the 'District of Port Nicholson or Wanganui Atera', which were estimated to contain 209,247 acres. Excluded from this area were the reserves and exceptions described in the two plans and in the schedules to the plans attached to the grant. The plans are those referred to in section 10.8.3.⁷⁸

The preamble claims that the New Zealand Company acquired from certain Maori 'a full and valid cession of all the right' of such Maori to the lands in the Port Nicholson district. It does not state in what manner the company acquired such 'full and valid cession' of those lands. The company did not acquire it by means of the so-called 1839 Port Nicholson deed of purchase or as a result of the McCleverty 'exchanges', which, with minor exceptions, 'exchanged' Maori land for Maori land. Nor was the land acquired under the 1848 Crown grant waste land or demesne land of the Crown.

In calculating the area acquired by the New Zealand Company under the 1848 Crown grant, allowance must be made for the 4010 acres of tenths reserved for Maori under the 1844 deeds of release. In addition, the land occupied by Maori for their pa, cultivations, and urupa within the lands set out in the schedule to the deeds of release was probably of the order of 900 acres. If these areas are deducted from the 71,900 acres, Maori may be said to have released some 67,000 acres to the New Zealand Company under the deeds of release. We assess the area of land acquired by the New Zealand Company under the 1848 Crown grant as set out over.⁷⁹

On the assumption that Maori agreed to release to the company some 67,000 acres under the 1844 deeds of release for £1500, the question remains whether Maori willingly and knowingly agreed to release the balance of the 187,626 acres effectively granted to the company.

78. Documents A9(a), (b)

79. Figures for public reserves taken from the schedules on the plans attached to the Crown grant (docs A9(a), (b)), and enclosed with Wakefield to secretary, New Zealand Company, 28 February 1848, CO208 (doc C1(c), pp 312–319). Although these schedules list the 100-acre Government Domain as a public reserve, this is not included in our figure for public reserves because this land had been assigned to Kaiwharawhara Maori and is counted as land reserved to Maori in section 10.8.3 above.

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10.8.5

Gross area of grant				209,247 acres
Less (1) Area left with Maori as per table in section 10.8.3	20,070 acres			
(2) Public reserves				
Country	180 acres 1 rood 25 perches			
Town	49 acres 3 roods 22 perches			
Town belt	132 acres 2 roods 34 perches	155 acres	21,621 acres	
				187,626 acres
Area acquired by the New Zealand Company under 1848 Crown grant				

That balance reduces to 120,626 acres after deducting the 67,000 acres released under the deeds of release.

It is clear that Maori received no payment for this large remaining unsold area of 120,626 acres. As we have seen, the McCleverty deeds did no more than require Maori to give up Maori cultivations to the Government 'in exchange' for land they already owned. That was the only land they surrendered. The McCleverty deeds are silent about the remaining 120,626 acres of land, which Maori have never willingly or knowingly surrendered and for which they were never paid. Such lands were neither 'waste lands' nor demesne lands of the Crown. Nor were they within the scope of the Loans Act 1847.

10.8.5 To whom did the remainder lands belong?

We need to determine who had rights in the 120,626 acres (the 'remainder lands') included in Grey's Crown grant to the New Zealand Company on 27 January 1848 (see map 8). These lands were never sold by Maori, nor were they paid for them.

In chapter 2, the Tribunal gave detailed consideration to the question of which Maori groups had customary rights as of 1840 to the lands within the Port Nicholson block (as extended to the south-west coast in 1844). At section 2.6.7 we concluded that those with take raupatu were the independent groups who were members of the collective which conquered Te Whanganui a Tara and its environs. This take raupatu, which covered all lands within the Port Nicholson block which were not covered by ahi ka rights in 1840 gave them the potential to further develop ahi ka rights within the block.

The Tribunal in section 2.7 made a finding that:

- . At 1840 Maori groups with ahi ka rights within the Port Nicholson block (as extended in 1844 to the south-west coast) were:
 - m Te Atiawa at Te Whanganui a Tara and parts of the south-west coast;
 - m Taranaki and Ngati Ruanui at Te Aro;
 - m Ngati Tama at Kaiwharawhara and environs, and parts of the south-west coast;
 - m Ngati Toa at Heretaunga and parts of the south-west coast.

- ▶ These Maori groups also had take raupatu over the remainder lands of the Port Nicholson block.

At this point in time, some 150 years after the 1844 deeds of release were signed, it is impossible to determine with any precision the lands in the Port Nicholson block over which Maori had ahi ka rights. The closest the Tribunal can get to resolving this question is to assume that Maori had ahi ka over those lands which were surrendered under the deeds of release as described in the schedule to such deeds, plus the pa, cultivations, urupa, and tenths reserves which were reserved to them.

In the case of Ngati Toa, we have used the same touchstone in section 9.5.1 in concluding that, when in 1845 Te Rangihaeata finally acceded to the November 1844 'agreement', he surrendered Ngati Toa's ahi ka rights to the lands allotted to the New Zealand Company under the schedule to the 1844 or later deeds of release, subject to the condition that land be reserved for Ngati Rangatahi in Heretaunga. But Ngati Toa retained their take raupatu over the remaining land in Heretaunga and elsewhere in the Port Nicholson block over which the other Maori in the Port Nicholson block also had take raupatu (see s9.7.2).

10.8.6 Tribunal findings of Treaty breach

The Tribunal finds that:

- ▶ As at January 1848, when Grey issued his Crown grant to the New Zealand Company, Ngati Toa, Te Atiawa, Taranaki, Ngati Ruanui, and Ngati Tama had customary take raupatu rights over the remainder lands of some 120,626 acres in the Port Nicholson block.
- ▶ Maori having rights in this block had not, as the 1848 Crown grant claims, made a full and valid cession of all their rights to the land in the Port Nicholson district. In particular, such Maori had not relinquished their take raupatu rights over some 120,626 acres or thereabouts included in the grant to the New Zealand Company.
- ▶ As a result, the Crown failed to act reasonably and in good faith towards its Treaty partners in disposing of the remainder lands without making any payment to or gaining the consent of such Maori and, further, failed actively to protect the rights of such Maori having an interest in such lands under article 2 of the Treaty of Waitangi, and such Maori have been seriously prejudiced thereby.

10.9 THE COLLAPSE OF THE NEW ZEALAND COMPANY

By 1850, the affairs of the New Zealand Company were in a critical state. On 18 June, the directors of the company wrote to Earl Grey complaining that, in the three years allowed, the company had not been able to recoup its losses. It had anticipated that large tracts of demesne land of the Crown would have been made available to it, but this had not occurred. It sought

an extension of time and a variation of the terms of the Loans Act 1847.⁸⁰ Appended to the letter was a statement showing that between April 1847 and June 1850 the company had sold only 2½ acres to private individuals in Wellington.⁸¹

An interim reply to this letter from the Colonial Office advised the company that Earl Grey would not be able to recommend to Parliament any alteration in the terms of the agreement embodied in the Loans Act.⁸² This letter was followed by a letter of 4 July from the directors to Earl Grey, enclosing a formal notice under section 19 of the Loans Act, in which the company advised that it was ‘ready to surrender the Charters of this Company to Her Majesty, and all claim and title to the lands granted or awarded to them in New Zealand’.⁸³

Section 19 of the Loans Act provided that, if the company advised the Crown by no later than 5 July 1850 that it was ready to surrender its charter and lands in New Zealand, then, among other consequences, all the company’s lands in New Zealand would ‘thereupon revert to and become vested in Her Majesty as Part of the Demesne Lands of the Crown’. On 5 July 1850, company secretary T C Harrington wrote to William Fox, who had succeeded the late Colonel Wakefield as the company’s principal agent in New Zealand, enclosing a copy of the section 19 notice and advising that, as a consequence, the company had discontinued its colonising operations in New Zealand as from 5 July 1850.⁸⁴

Soon after the cessation of the company’s business, several shareholders wrote to Earl Grey seeking a reprieve.⁸⁵ Earl Grey responded to this letter, sending a copy to the company, on 22 July 1850.⁸⁶ He denied that the British Government had in any way caused or contributed to the company’s lack of success. He then dealt with the directors’ complaint that they had expected that a large area of demesne lands would be placed at the company’s disposal clear of native titles. As to this, he said:

That it was anticipated from the first that there were native titles to land in New Zealand, which would require to be extinguished, and that this could only be effected by purchases by the Company, is abundantly clear. The Act of Parliament [ie, the Loans Act 1847] (section 6.) expressly states that the compensation, if any, to be made to the aboriginal inhabitants of New Zealand, for the purchase or satisfaction of their claims, rights, and interests in the demesne lands, is to be regarded as among the first charges on the Company’s income to be derived from the sale of them. Consequently, it clearly was not contemplated that the demesne lands would, or could, pass at once into the Company’s hands free of all pecuniary liability for the extinction of native titles. And in the despatch communicating the agreement to Governor Grey (June 19th, 1847), his Lordship informed the Governor ‘when

80. Harrington to Earl Grey, 18 June 1850, BPP, vol 7, [1398], pp 5–10

81. BPP, vol 7, [1398], p 11

82. Hawes (for Earl Grey) to Harrington, 1 July 1850, BPP, vol 7, [1398], pp 11–12

83. Harrington to Earl Grey, 4 July 1850, BPP, vol 7, [1398], pp 2–3

84. Harrington to Fox, 5 July 1850, BPP, vol 7, [1398], p 4

85. Drane and others to Earl Grey, 9 July 1850, BPP, vol 7, [1398], pp 15–18

86. Hawes (for Earl Grey) to Drane and others, 22 July 1850, BPP, vol 7, [1398], pp 18–23

any transactions of this sort,' that is, for the purchase of lands from the natives, 'are concluded in the southern province, the New Zealand Company will provide the means of payment from funds placed at their disposal, and have the disposal of the lands so acquired.'⁸⁷

As we have seen, £1500 was provided by the company and expended by the Crown in 1844 in respect of some 67,000 acres (after allowing for tenths reserves, cultivations, pa, and urupa). No additional funds were provided by the company (or the Crown) for the further 120,626 acres owned by Maori which were vested in the New Zealand Company by Grey's 1848 Crown grant. Grey failed to ensure that the 120,626 acres were first purchased from Maori before granting them to the company, and he also failed to obtain the necessary funds from the company to effect such a purchase.

As a consequence of the New Zealand Company ceasing business in New Zealand, its lands, including those awarded to the company by Grey in the 1848 Port Nicholson Crown grant, became vested in the Crown. Maori in the Port Nicholson block have never been paid for the 120,626 acres granted to the company and subsequently vested in the Crown on the company's collapse.

87. Ibid, p 20

