

Ngai Tahu Land Report

06 Otakou

6.1 Introduction

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On 31 July 1844 "the chiefs and men of the Ngaitahu tribe" ("Ko matou ko nga rangatira me nga tangata o Ngaitahu") sold over 400,000 acres of land at Otakou. This included the present site of Dunedin. A deed of sale was signed by 21 rangatira. They were the principal men from Otakou and included Tuhawaiki, Taiaroa and Karetai. The purchaser was "William Wakefield, the Principal Agent of the New Zealand Company, of London, on behalf of the Directors of the said Company". The price was £2400. No acreage was mentioned in the deed but the land sold fell within certain stated natural boundaries. Although at the time the area was estimated at 400,000 acres, the Department of Survey and Land Information (DOSLI) have indicated to the tribunal that the block may have been as large as 533,600 acres. Ngai Tahu excepted from the sale four separate parcels of land, the boundaries of which were also recorded in the deed. Before the deed was signed representatives of the Ngai Tahu vendors, the New Zealand Company and the Crown traversed the boundaries of the land being purchased and the land being withheld from sale.

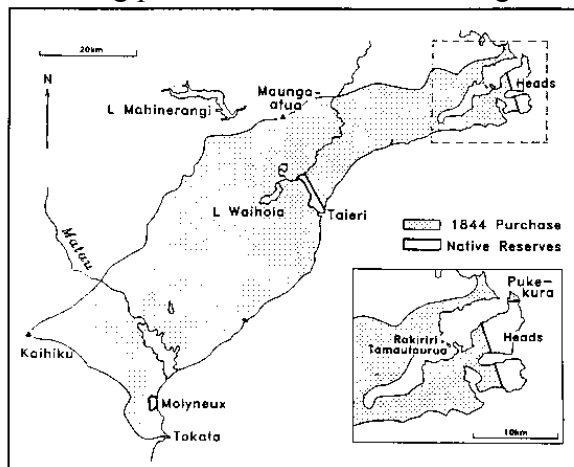


Figure 6.1: The Otakou purchase as defined by DOSLI and estimated at 533,700 acres, showing the reserves at the Otakou Heads, Taieri and Moiyneux (O45)

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6.2 Statement of Grievances

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The claimants say that during the negotiations which led to the sale of the Otakou block the Ngai Tahu chiefs were given to understand, and expected, that they would be granted special reserves, commonly known as tenths-that is, one-tenth of all the land sold. They have, at the hearing before us, made the following five specific grievances concerning this purchase:

1. The Protector, Symonds, failed to discharge his responsibilities at the time of the negotiation and afterwards.
2. The Crown failed to ensure that sufficient land was set aside to provide an economic base for Ngai Tahu after they had sold their land, and so to protect their Tribal Estate.
3. The Crown failed to set aside one-tenth of the 400,000 acre block as provided by the Waiver Proclamation.
4. The Crown failed to establish an administrative policy under the Waiver Proclamation by which Ngai Tahu would have been protected.
5. Governor Grey signed the Crown Grant without setting aside the Tenth required by the Waiver Proclamation (W6).

The Crown's failure to make provision for tenths is the principal grievance in respect of this purchase. At the heart of the claimants' case is the conviction that Ngai Tahu were either told directly that they would get tenths, or were, at the very least, led to believe that this would occur.

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6.3 Background to the Purchase

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The New Zealand Company begins colonisation

6.3.1 The Otakou block was bought by Colonel William Wakefield on behalf of the New Zealand Company. We will later show how it came about that the New Zealand Company and not the Crown, exercising its right of pre-emption, was the purchaser. The New Zealand Company and its predecessors had experienced a troubled relationship with the Imperial government. In May 1839 it dispatched its ship the *Tory*, with Colonel William Wakefield in charge of an expedition to purchase land from Maori in New Zealand. This was to be done as quickly as possible before the Crown intervened. The Colonial Office refused to approve the venture and warned that no pledge could be given that titles to land purchased from the Maori would be recognised. {FNREF|0-86472-060-2|6.3.1|1}

The *Tory* arrived at Port Nicholson (Wellington) in August 1839. Within two months Colonel Wakefield claimed to have purchased about 20 million acres of land on both sides of Cook Strait and at Taranaki. The first New Zealand Company settlers arrived at Port Nicholson in January 1840. Soon after, on 6 February 1840, Hobson obtained the signatures of northern chiefs to the Treaty of Waitangi. Article 2 gave the Crown the sole right to purchase lands from Maori, that is, the right of pre-emption. Even before the Treaty was signed, Hobson, on instructions from Lord Normanby, had issued a proclamation (on 30 January 1840) that the Queen would only acknowledge titles to land derived from the Crown. A commission would be appointed before which all purchasers would have to prove their claims. A Land Claims Act of 1840 passed by the New South Wales government, which for some time had jurisdiction over New Zealand, provided that no grant was to be recommended by the commissioners for more than 2560 acres unless the governor specially authorised it. This provision was re-enacted by the New Zealand government in 1841. William Spain was appointed by the British government as commissioner on 20 June 1841. He arrived in New Zealand at the end of that year to start work.

6.3.2 Fortunately for the New Zealand Company their relationship with the colonial office in London, which had been seriously ruptured by the dispatch of the *Tory*, was restored by Lord Normanby's successor as colonial secretary, Lord John Russell. In October 1840 Russell decided to reverse the policy of his predecessors and to recognise the company as an instrument of government in the colonisation of New Zealand. An agreement between the British government and the company in November 1840 was formally incorporated on 12 February 1841. {FNREF|0-86472-060-2|6.3.2|2} It will shortly be necessary for us to examine some parts of the agreement carefully. In the meantime it should be noted that under the agreement:

- a government-appointed accountant, James Pennington, was to ascertain how much the company had spent on colonisation in New Zealand. This included the purchase of land, sending emigrants to New Zealand, the provision of supplies and so on;

- the company would be entitled to a Crown grant of four acres for every pound spent on colonisation as determined by Pennington;

- the lands to be assigned to the company were to be in those parts of the colony at which their settlements had been established. The first 160,000 acres were to be selected in the Port Nicholson and New Plymouth localities; and

- in return the company was to surrender its claims to most of the 20 million acres of its pre-annexation "purchases" (C2:4:1-4){FNREF|0-86472-060-2|6.3.2|3}.

6.3.3 Unfortunately for the New Zealand Company, Commissioner Spain proved to be a thorough investigator. The company's expectation that he would confirm their extensive "purchases" proved illusory. Their strenuous objections, made to the Colonial Office in November and December 1842, met with an unsympathetic response from Lord Stanley (C2:4:5-7).{FNREF|0-86472-060-2|6.3.3|4} As a result the directors of the company in January 1843, concerned at the difficulties of obtaining a conclusive title, announced the cessation of land sales and a drastic retrenchment of their activities. {FNREF|0-86472-060-2|6.3.3|5} For a time the company was buoyed up by Lord Stanley agreeing in May 1843 that the governor should be instructed to grant it a conditional title to lands already selected by its agents. The company did not realise until early in 1844 that it was still obliged to show that its purchases were valid.

Meanwhile, in New Zealand, Spain recognised that it was impracticable to return certain disputed lands to Maori claimants at Port Nicholson. Wakefield offered to pay compensation but agreement could not be reached on the amount (C1:12).{FNREF|0-86472-060-2|6.3.3|6} It was not to be settled until FitzRoy's arrival in Wellington early in 1844.

Rennie's "New Edinburgh" scheme

6.3.4 A Scotsman, George Rennie, devised a scheme for a new settlement of 100,600 acres on the east coast of the South Island. He put his proposals before the New Zealand Company, and on 12 August 1842 the directors expressed support for the scheme but left it to Rennie to obtain the necessary consent of the British government. {FNREF|0-86472-060-2|6.3.4|7} The colonial secretary, Lord Stanley, was not encouraging (C2:5:9).{FNREF|0-86472-060-2|6.3.4|8}

For a time the project lapsed. But in May 1843 Rennie, assisted by one of his Scottish associates, William Cargill, a former army officer, raised the matter again with the New Zealand Company. The company, encouraged by its May agreement with Lord Stanley, had resumed land sales. It approved the scheme on 30 June 1843 and the new prospectus, known as the "terms of purchase", was published on 1 July 1843.

Rennie and Cargill envisaged the new settlement should be a Scottish one, open to all classes of Scottish society; it should include provision for religious and educational

purposes connected with the presbyterian Church of Scotland. The emigration fund arising from the sale of the company's lands at New Edinburgh was to be employed in assisting the emigration of Scottish labourers. {FNREF|0-86472-060-2|6.3.4|9}

6.3.5 Rennie, meanwhile, had been busy recruiting emigrants. Early in January 1844 he was able to announce that some 40 heads of families, in all numbering over 200 people, were enrolled for the first expedition, which it was hoped would sail in the spring. Word was anxiously awaited from Colonel Wakefield of the locality selected for a new settlement. Bad news came instead. A report came to hand of the Wairau affray. In March 1844 Rennie learned of the continuing difficulty the New Zealand Company was experiencing over the validity of their land titles. Negotiations with the Colonial Office were proving fruitless. {FNREF|0-86472-060-2|6.3.5|10}

Plan for New Edinburgh settlement deferred

6.3.6 On 30 April 1844 the New Zealand Company concurred with Rennie's recommendation that plans for the New Edinburgh colony should be suspended pending advice from New Zealand that a site had been chosen. Deposits paid by purchasers were to be returned to them (C2:5:6-7). {FNREF|0-86472-060-2|6.3.6|11} Not until June 1844 did the company learn that Governor FitzRoy had authorised the selection of a site for the New Edinburgh settlement in the South Island (C2:5:8). {FNREF|0-86472-060-2|6.3.6|12} In the event, it was not until three years later, in November 1847, that two emigrant ships finally left the United Kingdom for the Scottish settlement in Otago. In the interval Rennie was displaced by Cargill and the Reverend Burns. An association of lay members of the Free Church of Scotland, formed in May 1845, took over. In September 1845 it entered into a new agreement with the New Zealand Company. The area of the settlement was increased to 144,600 acres. Cargill became resident agent for the new settlement. {FNREF|0-86472-060-2|6.3.6|13}

Waitangi Tribunal, Department of Justice, Wellington.

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6.4 The Question of Tenths

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6.4.1 Before recounting the steps taken by the New Zealand Company to acquire the Otakou block it is necessary to explore the question of whether the Crown's policy for dealing with the New Zealand Company purchases required the Crown to reserve tenths or other large reserves within the Otakou purchase. To ascertain this it is necessary to go back to Wakefield's 1839 pre-Treaty purchases.

6.4.2 In Wakefield's 1839 instructions from the New Zealand Company, one-tenth of the land purchased by the company was to be reserved for the future benefit of the chief families of the tribe (C2:4:20-21). {FNREF|0-86472-060-2|6.4.2|14} This was done in the first of the pre-Treaty purchase contracts pertaining to Port Nicholson on 14 September 1839 (C2:4:26). {FNREF|0-86472-060-2|6.4.2|15} However the second and third deeds of purchase, dated respectively 25 October 1839 and 8 November 1839, did not refer to tenths but said that, "a portion of the land ceded by them [the Maori owners] suitable and sufficient for the residence and proper maintenance of the said chiefs, their tribes and families", would be reserved (C2:4:28-30). {FNREF|0-86472-060-2|6.4.2|16} The absence of any reference to tenths in the latter two deeds leaves open the question of what portion of land would be "suitable and sufficient".

The November 1840 agreement between the Crown and the New Zealand Company

6.4.3 This agreement was completed on 19 November 1840 (C2:4:4). {FNREF|0-86472-060-2|6.4.3|17} We have already referred to a number of its provisions (6.3.2). It was concerned to provide for Pennington's award which would determine the amount spent by the company on pre-Treaty purchases from the Maori and for colonisation expenses. As we have noted, four acres were to be awarded for every one pound of expenditure as found by Pennington.

Under clause 5, the lands to be assigned to the New Zealand Company under Pennington's award were to be within the bounds of Wakefield's pre-Treaty purchases. They would not, for instance, apply to Ngai Tahu land at Otakou (C2:4:1-4). {FNREF|0-86472-060-2|6.4.3|18}

Clause 13 of the agreement referred to the company having entered into engagements for the reservation of certain lands for the benefit of Maori; it being agreed that in respect of all lands to be so granted reservations would be made for the benefit of Maori by the Crown in fulfilment of such stipulations. Clause 13 further provided for "the Government reserving to themselves, in respect of all other lands to make such arrangements as to themselves shall seem just and expedient for the benefit of the Natives" (C2:4:3). {FNREF|0-86472-060-2|6.4.3|19} We note that under this second

part of the clause any reservations made by the government might or might not take the form of tenths.

6.4.4 In April 1841 the New Zealand Company asked the Colonial Office to remove the restriction imposed by clause 5 as to the location of the company's future settlements. On 22 April 1841 Lord Russell gave Hobson a discretion to comply with the company's request, subject to two conditions. One excluded settlements on the future capital of New Zealand or in close proximity to Auckland. The second is the relevant one:

Any lands which may be granted to the Company in exchange for those to which they are at present entitled, [ie within the company's "district"] must be so granted, subject to those reservations, and subject to all the other conditions which would, by the terms of the existing agreement, [of November 1840] attach to lands assigned to the company in the vicinity of their present settlements. (P3:195){FNREF|0-86472-060-2|6.4.4|20}

The question arises as to the application of clause 13 of the November 1840 agreement to lands bought by the New Zealand Company "in exchange" for those they were entitled to under the 1840 agreement. That is, as to land bought, say at Otakou, outside the company's pre-Treaty purchase "district". The question is whether the first or second part of clause 13, referred to above, applies to the Otakou purchase.

There are difficulties about applying the first part of clause 13 to the Otakou purchase in relation to tenths, because the provision of tenths as such was not a common provision in all the pre-Treaty New Zealand Company deeds of purchase. Which pre-Treaty purchase(s) was the Otakou purchase in exchange for? We do not know. So far as we are aware no such decision was ever made. This being so, we believe the second part of clause 13 applies. This left the government with a discretion to make such arrangements as it thought just and expedient for the benefit of Maori sellers. It did not impose any legal obligation to award tenths in respect of a purchase such as the Otakou purchase.

The terms of purchase for the New Edinburgh settlement

6.4.5 As earlier indicated, the New Zealand Company on 30 June 1843 approved a new prospectus known as the "Terms of Purchase". These provided that the New Zealand Company had decided to form a new settlement to be called New Edinburgh, of 120,550 acres in extent. The company offered the land for sale on terms specified in the prospectus. These included provision for the subdivision of the land into 550 town acres, 20,000 suburban acres and 100,000 rural acres with provision for further subdivision. This would enable each purchaser, for $\text{œ}120$, to obtain a quarter acre town lot, 10 acres of suburban land and 50 acres of rural land. Two hundred town lots were to be reserved free of cost for the future municipal corporation of the town. In addition, 200 properties (a property comprising one town lot, one suburban lot and one rural lot) were reserved to the company.

We particularly note clause 6 of the terms of purchase as relevant to the present claims:

It is contemplated that in addition to the Reserves to be made by the Company for itself [200 properties] and for the Corporation [200 town lots], the Local Government will make such further Reserves for the Natives, and for Public Purposes, as it may see fit. (C2:6:2-5){FNREF|0-86472-060-2|6.4.5|21}

This provision left it to the discretion of the local New Zealand government to make such reserves for Maori or for public purposes as it might think fit. It did not specify tenths.

Authority for the New Zealand Company to acquire land outside its districts

6.4.6 The new governor, Robert FitzRoy, was in England at this time. On 15 June 1843 he wrote to Lord Stanley asking (among other things) whether the New Zealand Company could take land "without" (outside) the districts now claimed by them in exchange for an equal quantity of land within those districts. In a confidential reply of 26 June 1843, Lord Stanley merely referred FitzRoy to Lord John Russell's instruction to Captain Hobson of 22 April 1841 (P3:181-182). {FNREF|0-86472-060-2|6.4.6|22}

Quite independently, the New Zealand Company had written to Lord Stanley on 23 June 1843 referring to Lord John Russell's despatch to Hobson of 22 April 1841 and seeking confirmation that the governor of New Zealand could sanction a new body of settlers locating themselves in a place they considered most eligible, subject to the terms and conditions laid down by Lord Russell (P3:192). {FNREF|0-86472-060-2|6.4.6|23}

Stanley referred the company to the commissioners of colonial land and emigration. The New Zealand Company wrote to the commissioners on 7 July, and on 27 July 1843 the commissioners informed the Colonial Office that, as far as they could see, the new governor of New Zealand was still authorised to exercise the powers given to Hobson. Copies of this correspondence were sent to FitzRoy by Lord Stanley on 1 September 1843 (P3:182-185). {FNREF|0-86472-060-2|6.4.6|24}

On 17 August 1843 the directors of the New Zealand Company gave detailed instructions to William Wakefield, their principal agent in New Zealand. It was envisaged the New Edinburgh settlement would be in the South Island. Wakefield was told:

It will be your duty to take Governor FitzRoy's directions with respect to Reserves for the natives, and for public purposes. (C2:5:3){FNREF|0-86472-060-2|6.4.6|25}

Port Cooper, now Lyttelton Harbour, was first envisaged as the likely site for the Scotch colony. The new governor would arrive in New Zealand shortly after Wakefield was likely to receive these instructions. Wakefield was supplied with a copy of the 30 June 1843 "terms of purchase" and told to get in touch with FitzRoy immediately concerning the New Edinburgh plans in particular (C2:5:2). {FNREF|0-86472-060-2|6.4.6|26}

Crown policy towards the purchase of land

6.4.7 The new governor arrived in Auckland on 23 December 1843, and departed for Wellington less than one month later, arriving there on 24 January 1844. His main concern was the Wairau affray of June 1843 and the major crisis in Maori-European relations which related specifically to the question of the New Zealand Company's title to land (P2:24).

On 29 January 1844 FitzRoy held his first conference with Wakefield. This was devoted to a discussion of the New Zealand Company's entitlement to land with particular reference to Maori counter-claims. {FNREF|0-86472-060-2|6.4.7|27} Present were Spain, Richmond, Hamilton (FitzRoy's private secretary), Protector Clarke, Protector Forsaith and Colonel W Wakefield. Dr Evans was sent for to assist Wakefield. The question of whether Maori should be compelled to give up their pa and cultivations was raised by Governor FitzRoy. {FNREF|0-86472-060-2|6.4.7|28} Wakefield equivocated, but under pressure from FitzRoy finally agreed that they should not be. It is apparent that this lengthy conference had its genesis in the difficulties arising from tenths and the Maori desire to remain in their pa and kainga.

6.4.8 Wakefield discussed the New Edinburgh settlement with FitzRoy the next day, 30 January 1844. On the same day Wakefield wrote to FitzRoy referring to their interview. He advised that he proposed, "with your Excellency's sanction", to send an agent to treat with Ngai Tahu for the territory in the neighbourhood of Port Cooper:

To effect this object in the most satisfactory manner to all parties, it would be highly desirable, and would greatly facilitate the transaction, were an officer of the Government, and a Protector of Aborigines, as interpreter, to be instructed by your Excellency to give their assistance and countenance to it on the spot. (P3:191) {FNREF|0-86472-060-2|6.4.8|29}

FitzRoy replied to Wakefield on 2 February 1844:

In reply I am happy to inform you that I have no objection to offer to the formation of a settlement in that locality [Port Cooper], provided that a valid purchase can be effected.

Directly that payment of the Compensation to the Port Nicholson natives (now under consideration) is made, I will order a Protector of Aborigines and another officer of Government to proceed to Port Cooper, and there assist in effecting a purchase of land for the contemplated settlement of New Edinburgh. (P3:191) {FNREF|0-86472-060-2|6.4.8|30}

On 3 February 1844 Governor FitzRoy sailed for Nelson, and from there to Kapiti on 11 February. He attended a service conducted by Hadfield in the presence of Te Rauparaha. The next day he held a more formal meeting with Richmond and Symonds from Wellington together with George Clarke. He returned to Wellington on 16 February 1844. In Wellington he appointed the former police magistrate Richmond as superintendent of the southern division of New Zealand.

Between 24-26 February 1844 he conducted negotiations with Wellington Maori over compensation, and settlement was effected on 27 February. The same day Bishop Selwyn, Bishop of New Zealand, arrived from Stewart Island and Banks Peninsula in

a small coaster owned and commanded by a chief described by FitzRoy as well known in New Zealand and named "Tou-wha-iki" (Tuhawaiki). They were accompanied by Te Rauparaha's son and five other Maori. FitzRoy gave no details as to any discussion he may have had with Tuhawaiki when Bishop Selwyn introduced the chief to him (C2:3:1-3). {FNREF|0-86472-060-2|6.4.8|31} There was considerable conjecture by counsel for the claimants and to some extent by Professor Ward. But this can only be speculation.

6.4.9 On 27 February 1844 FitzRoy gave written instructions to J J Symonds, a police magistrate based in Wellington. The following are the relevant provisions:

You are hereby required and directed to proceed to New Munster (or the Middle Island), and there superintend and assist the agent of the New Zealand Company in effecting the valid purchase or valid purchases of not more than 150,000 acres of available land, without regard to figure or continuity of blocks.

To such an extent of land, the Crown's right of pre-emption will be waived, upon your report of the validity of the purchase, under certain conditions.

You will be most careful not to countenance any, even the smallest encroachment on, or infringement of existing rights or claims, whether native or other, unless clearly sanctioned by their legitimate successor. [sic, for 'possessor']

You will inform settlers now established in New Munster, that their cases will be most carefully and kindly dealt with by Government, under existing regulations, or by a special act of grace, such as by waiving the Crown's right of pre-emption in their favour to a reasonable extent.

You will inform the aboriginal native population, that you are sent to superintend and forward the purchase of lands which they wish to sell, and that you, on behalf of the Government will not authorize, nor in any way sanction any proceedings which are not honest, equitable and in every way irreproachable. (C2:7:4-5) {FNREF|0-86472-060-2|6.4.9|32}

We note the waiver of the Crown's right of pre-emption and the absence of any reference to tenths or indeed the provision of any other reserves.

6.4.10 On the same day FitzRoy, through his secretary, W J W Hamilton, wrote to W Wakefield. A copy of FitzRoy's instructions to Symonds was enclosed. Wakefield was told that the Crown's right of pre-emption to the proposed purchase would be waived on certain conditions:

The conditions referred to, are-1st. That all existing arrangements made by the Government with respect to the New Zealand Company's settlements shall be strictly observed, except as altered by the present arrangement.

2d. That the land so purchased shall be counted in exchange for an equal number of acres claimed by, and to which a valid title can be proved by the New Zealand Company elsewhere; it being clearly understood, that the purchase-money in both

cases referred to is to be provided by the Company. (C2:7:4){FNREF|0-86472-060-2|6.4.10|33}

A third condition related to the survey of the exterior and interior boundaries of the land to be at the expense and by surveyors of the New Zealand Company.

Nothing is said in either memorandum about tenths or other reserves. The reference in the first condition to Wakefield to "existing arrangements" is a reference to the 1840 agreement as modified by Lord Russell's 1841 instructions (see our earlier discussion of these in 6.4.3-4). As we have earlier held, the second head of Lord Russell's 1841 conditions applies, that is, it was left to the New Zealand governor to make such reserves for the Maori vendors as he might see fit.

6.4.11 Did Governor FitzRoy give Wakefield, Symonds or Richmond either verbal or written instructions to include a provision for tenths (or an equivalent) in the New Edinburgh purchase agreement? The Crown's historian, Dr Donald Loveridge, suggested in his evidence that it was difficult to believe that Governor FitzRoy did not give explicit verbal directions of some kind in February 1844 (P2:34).

(a) Dr Loveridge noted that Wakefield had instructions to take Governor FitzRoy's directions with respect to reserves for Maori (6.4.6). He argued that Wakefield had to know what the governor's intentions were with respect to reserves for Maori people. We note, however, that under the New Zealand Company's terms of purchase it was for the New Zealand government to make such further reserves for Maori and for public purposes as the New Zealand governor saw fit (6.4.5).

(b) Dr Loveridge suggested that Symonds was in a similar position. He needed to know what the governor would define as a valid purchase; a sale agreement which included terms which FitzRoy would not accept, or excluded those which he deemed essential, would be a waste of time if the governor subsequently decided not to waive the Crown's right of pre-emption.

We note, however, that Symonds, as our account of the purchase negotiations will show, was extremely cautious and followed his instructions so carefully that he twice returned to Wellington having broken off his supervision of the purchase. As will be seen, he did not require any provision for tenths to be made in the deed when it was finally signed. In our view this strongly indicates that he was under no requirement from the governor to do so. We find it difficult to believe that he would have omitted to do so had he received instructions, whether in writing or verbal, to provide for tenths. Nor, as will be seen, did Symonds receive any instructions from Richmond to provide for tenths.

(c) As to Richmond, Dr Loveridge thought that he was definitely under the impression at one stage that one-tenth of the land purchased by the company would be returned to the original owners (P2:34).

(d) Dr Loveridge referred to Richmond's despatch of 23 May 1844 to Governor FitzRoy. Richmond informed the governor that:

In relation to the New Settlement, when the choice of Sections are being made, it will be necessary to have an Officer on the spot to select Reserves for the Government and Natives; for this duty (should I not be previously instructed by Your Excellency) it is my intention to appoint Mr. Symonds... I shall endeavour to furnish him with a list of what is required, in the event of my not learning in time what Reserves Your Excellency may consider necessary. (C2:9:1-5){FNREF|0-86472-060-2|6.4.11|34}

We are left wondering why the comment about the expected instructions being received from the governor is made, if Richmond had in fact already received instructions from the governor. In fact, Richmond wrote to Symonds on 30 May 1844 sending him a schedule of proposed reserves for government. But he made no reference at all to reserves for Maori. Why not? We would have expected him to do so had he been verbally told by FitzRoy that reserves (in particular tenths) were to be provided. We note the reservation about his not learning in time what reserves the governor might think necessary.

In fact, the above extract from Richmond's 23 May despatch is from the final two paragraphs. The principal subject of the despatch is a report to the governor explaining the reasons for Symonds' return to Wellington. Richmond gives details of the more stringent directions he has given Symonds to enable him to prevent any measures by Tuckett (the New Zealand Company representative) which might "bring on a collision with the aborigines..." (C2:9:3).{FNREF|0-86472-060-2|6.4.11|35} The paragraph cited above is concerned with an unrelated topic.

Governor FitzRoy evidently saw Richmond's despatch on 18 July 1844. He annotated the despatch as follows:

Dr. Sinclair,
Acknowledge the Receipt-Convey my approval of what the Supt. S.D. has done in these matters.

P.S. Do not express any feeling-or make any remark about the Company's Agents. (C2:9:6){FNREF|0-86472-060-2|6.4.11|36}

There is also a note on the governor's direction, presumably by Dr Sinclair:

General letter to the Supt, No.25; 19.7.1844. (C2:9:6){FNREF|0-86472-060-2|6.4.11|37}

Sinclair's letter to Richmond of 19 July 1844 was in the following terms:

With reference to the report contained in your letter of the 23d of May, No.15, I am to convey to you his Excellency's approval of all that HAS BEEN DONE BY YOU in the matter referred to. (C2:7:12){FNREF|0-86472-060-2|6.4.11|38} (emphasis added)

This is clearly a reference to Richmond's report concerning Symonds' difficulties with Tuckett and the "more stringent directions" and other steps taken by Richmond, as indicated in his report. In short, in FitzRoy's language, to what Richmond "has done". As instructed, Sinclair made no reference to the New Zealand Company agent Tuckett. In our view Richmond was not being commended for his intended actions on

public and Maori reserves, but for his dealings with the New Zealand Company agents.

(e) On 12 June 1844 Richmond wrote again to Governor FitzRoy. He enclosed a copy of his letter to Symonds of 30 May 1844 (see 6.4.11(d)) and added:

In addition to what is detailed in the Memorandum, I have directed Mr. Symonds to require a large space to be set apart as a place of recreation for the Inhabitants. (C2:9:13){FNREF|0-86472-060-2|6.4.11|39}

Did this mean a recreation place for the new settlers or for Ngai Tahu? Given the context, we believe the former.

Richmond then purported to quote from the sixth paragraph of the terms of purchase for the New Edinburgh settlement:

that the provision hitherto made for the Natives by the Directors of the New Zealand Company is left to the Local Government. (C2:9:13){FNREF|0-86472-060-2|6.4.11|40}

This is quite misleading-see clause 6 cited in 6.4.5 which says, "the Local Government will make such further reserves for the Natives and for public purposes as it may see fit".

Richmond then said:

I shall therefore demand on their [Ngai Tahu] behalf one-tenth of each description of Allotments i.e. Town, Suburban and Rural, and arrange with the Principal Agent of the Company, or the Agent for the New Settlement on the mode to be adopted for their selection, should I not receive Your Excellency's instructions on the subject previous to the arrival of the latter with the Emigrants. (C2:9:14){FNREF|0-86472-060-2|6.4.11|41}

In short Richmond advised Governor FitzRoy that:

- he had instructed Symonds in writing to arrange for specified public reserves to be set aside and verbally to reserve a large place for recreation for the settlers; and
- unless advised otherwise, he intended to arrange with either the New Zealand Company principal agent or the agent for the new settlement for tenths to be allotted on behalf of Ngai Tahu.

There appears to be no record of Richmond so instructing Wakefield, presumably because the emigrants did not arrive for some years.

FitzRoy evidently saw Richmond's despatch of 12 June on 10 August 1844. It bears two annotations by FitzRoy:

-I have answered this privately-both verbally & in writing

-Dr. Sinclair, Write to Superintendent-approving of what he has done in this matter and conveying my sanction of the arrangements. (C2:9:12){FNREF|0-86472-060-2|6.4.11|42}

Dr Sinclair did not write to Richmond until 9 October 1844, when he said:

Your proceedings, as reported in your letter No.17 (44/1928) of the 12th June last, relative to the selection by Mr. Symonds of public reserves at the settlement of New Edinburgh, have been approved by His Excellency. (C2:9:11){FNREF|0-86472-060-2|6.4.11|43}

This letter refers only to public reserves and omits any mention of tenths or Maori reserves. The tribunal concludes that there appears to be no record of any instructions, verbal or written, from Governor FitzRoy to Richmond concerning either tenths or reserves for Maori, nor of Richmond implementing what he told FitzRoy he would do.

The tribunal's view that no such record of instructions from FitzRoy to Richmond exists is confirmed by a report of a Joint Parliamentary Committee on Middle Island Native Claims of 1890 (M17:I:doc 2). {FNREF|0-86472-060-2|6.4.11|44} In 1889 a similar committee instituted inquiries to ascertain the nature of the governor's instructions sought by Major Richmond in his letter of 12 June 1844. The 1890 committee reported that, following a reference to the Colonial Office, no evidence could be obtained showing the instructions were ever given by the governor to reserve tenths. The committee advised that after careful consideration it had been "unable to satisfy itself that a principle of tenths was applicable to the Otakou purchase".

The tribunal also finds that there is no evidence before us that Symonds, Clarke or Wakefield received instructions whether verbal or written from Governor FitzRoy to make provision for tenths in the Otakou purchase.

FitzRoy's actions in waiving the Crown right of pre-emption

6.4.12 Before FitzRoy left England for New Zealand he wrote on 16 May 1843 to the colonial secretary seeking Lord Stanley's comments on several questions. His second inquiry was whether:

Under defined restrictions, may the Crown's right of pre-emption be waived in certain cases? (R36(b):II:329){FNREF|0-86472-060-2|6.4.12|45}

Lord Stanley responded on 26 June 1843. He told FitzRoy that:

In the absence of any report from the colony itself, stating the difficulties which you anticipate... I consider it premature to attempt to prescribe the mode in which it will be proper to attempt to meet and overcome them; and I should therefore prefer waiting for a report from you, after your arrival at your government, accompanied by such suggestions on the subject as, after inquiry on the spot, you shall deem it expedient to make. (R36(b):II:329){FNREF|0-86472-060-2|6.4.12|46}

Soon after FitzRoy's arrival in New Zealand he received addresses from the Waikato and Ngati Whatua tribes at a levee at Government House, held at Auckland on 26 December 1843. Both addresses included a complaint about the Crown's exclusive right of pre-emption. In his written reply to Waikato he said:

The Queen has heard of your wish to sell land to Europeans DIRECT, without in the first place selling them to Her Representative, and Her Majesty has authorised me to enquire among you, and make arrangements more pleasing to yourselves. (R36(b):II:439){FNREF|0-86472-060-2|6.4.12|47}(emphasis in original)

And to Ngati Whatua he replied:

The Queen has authorised me to make enquiries among yourselves with the view of altering the present method of selling your lands. (R36(b):II:438){FNREF|0-86472-060-2|6.4.12|48}

It is clear that while Governor FitzRoy was sympathetic to the request that the Crown should waive its right of pre-emption, he proposed to make further inquiries into the matter before settling on any new arrangements. This was still the position when he went to Wellington late in January 1844.

FitzRoy waives the Crown right of pre-emption in respect of the New Edinburgh purchase

6.4.13 We have already noted the instructions given by FitzRoy to Symonds (6.4.9) and his advice to William Wakefield (6.4.10), each given on 27 February 1844, in which he indicated to both his intention to waive the Crown's right of pre-emption in respect of the New Edinburgh purchase.

FitzRoy, in the course of his lengthy despatch of 15 April 1844 to Lord Stanley, explained why he had felt obliged to adopt this course as part of the arrangements for providing more land for the New Zealand Company. FitzRoy made the following points:

- the New Zealand Company had instructions to prepare immediately for the reception of the proposed Scotch settlement in New Munster (South Island);
- the government had no land there. Nor did the company except a small amount at Nelson;
- the government had neither the funds nor the personnel to effect a purchase; and
- the protectorate officers were fully occupied, as was Commissioner Spain.

FitzRoy continued:

In this dilemma, I adopted the only course which appeared to me practicable; namely, to waive the Crown's right of pre-emption over 150,000 acres of land in New Munster, where selected by the company's agent, and to leave it to him to effect the

purchase under the superintendence and with the assistance of the most efficient Government officer of whose services I could then avail myself.

I trusted that the bitter experience which the New Zealand Company's agent has had of the difficulty of effecting valid purchases of large tracts of land in New Zealand, and his present acquaintance with the native habits and customs, would be a security for the bona fide character of any purchase now made under his directions; but, in order to give a character to the whole transaction, to show that the Government gave it countenance, and to be a check on any unadvisable proceedings or over-hasty arrangements, I directed Mr. John Jermyn Symonds to superintend the whole transaction, and gave him the annexed instructions.

Mr. Symonds has been several years in New Zealand. He was employed as a surveyor, then as a sub-protector of aborigines, and is now a police magistrate. He speaks the native language, and bears an irreproachable character.

I have found myself under the necessity, not only of acting without instructions in this important matter, but of acting against the established regulations, with regard to the figure and continuity of blocks of land. (C2:3:5){FNREF|0-86472-060-2|6.4.13|49}

After discussing problems created by the topography of the New Zealand landscape in ensuring continuous blocks of land, he then referred to the need to provide land for New Zealand Company settlers in the region between Port Nicholson and New Plymouth. He enclosed a copy of his instructions to Commissioner Spain to assist the New Zealand Company to acquire specified areas of land in the Wairarapa and elsewhere within the company's areas under Pennington's award. The Crown's right of pre-emption would be waived for such purchases.

6.4.14 Stanley made a lengthy and considered reply to FitzRoy's report on 30 November 1844. After approving FitzRoy's findings in respect to the Wairau confrontation and other actions of the governor, the colonial secretary then discussed the problem of shortage of land for New Zealand Company settlers. In particular he referred to the arrangement made by FitzRoy on 27 February with the agent of the New Zealand Company, William Wakefield, and FitzRoy's reasons for waiving the Crown right of pre-emption in respect of 150,000 acres in New Munster. In the circumstances he approved FitzRoy's action. He also approved the waiver in respect of the purchases to be supervised by Commissioner Spain in the Wairarapa and elsewhere in the company's "district". The arrangement of 27 February was, Lord Stanley said, "adopted under the pressure of peculiar circumstances, limited in its amount, and designed to meet a specific exigency". He then referred to FitzRoy's "more general and extensive measure": the general waiver proclamation of March 1844 (R36(b):320-321).{FNREF|0-86472-060-2|6.4.14|50}

We will discuss this topic shortly. At this point we would emphasise that FitzRoy's action in agreeing, on 27 February 1844, to waive the Crown's right of pre-emption to enable the New Zealand Company agent to purchase direct from Ngai Tahu up to 150,000 acres for the New Edinburgh settlement, was approved by Lord Stanley. This approval was given quite independently and separately from his later consideration of FitzRoy's waiver proclamation of 26 March 1844. It is abundantly clear that the 27 February waiver was seen as a discrete action unrelated to the general waiver

proclamation which followed it one month later. We turn now to the 26 March proclamation.

FitzRoy's waiver proclamation of 26 March 1844

6.4.15 Colonel William Wakefield later reported, that the governor while in Wellington in February 1844 had "intimated to some private land-claimants his intention, at some future period, to allow the natives to dispose of their lands to private individuals upon certain conditions" (P3:148). {FNREF|0-86472-060-2|6.4.15|51} On returning to Auckland the next month, FitzRoy gave the matter further consideration. On 25 March 1844 he secured the approval of his Executive Council to, "the conditions on which he proposed to waive Her Majesty's right of pre-emption over certain portions of land in New Zealand", to enable "the aboriginal owners to sell their lands to certain persons" (C2:3:11). {FNREF|0-86472-060-2|6.4.15|52}

The Executive Council duly approved the governor's proposals which were publicly proclaimed the next day, 26 March 1844 (P3:197). In brief, the proclamation:

- called for an application to be made in writing to the governor to waive the Crown's right of pre-emption over a specified number of acres;
- stated that the governor was free to consent or refuse his consent. In doing so he would have regard to the public interest and the interests of the Maori owners and other considerations; and
- stipulated that sale of pa and urupa would not be approved.

Clause 5 provided for tenths as follows:

Of all land purchased from the aborigines in consequence of the Crown's right of pre-emption being waived, one-tenth part of fair average value, as to position and quality, is to be conveyed by the purchaser to Her Majesty, her heirs and successors, for public purposes, especially the future benefit of the aborigines. (P3:197) {FNREF|0-86472-060-2|6.4.15|53}

It will be noted that the tenths were to be vested in the Crown, not the Maori vendors, "for public purposes, especially the future benefit of the aborigines".

6.4.16 On the day the waiver proclamation was made public, 26 March 1844, the governor addressed a meeting of Maori chiefs at Government House, Auckland. He explained his reasons for making the new arrangements, cautioned the Maori not to sell their land hastily and elaborated on the arrangements he had made for the provision of tenths:

In the arrangement I have made for allowing Europeans to buy land from you, I have made distinct conditions that one-tenth of all land so purchased is to be set apart for, and chiefly applied to, your future use, or for the special benefit of yourselves, your children, and your children's children.

The produce of that tenth will be applied by Government to building schools and hospitals, to paying persons to attend there, and teach you not only religious and moral lessons, but also the use of different tools, and how to make many things for your own use.

Provision will thus be made, in order to prevent your children from suffering by neglect and want of education; the management of these reserves will be entrusted to a board or committee, consisting of the Governor, the Bishop, the Attorney-general, the Commissioner of Crown lands, and the Chief Protector of Aborigines.

(C2:3:10){FNREF|0-86472-060-2|6.4.16|54}

Again we find the governor making it clear that the tenths were to be vested by the Crown in trustees. The proceeds were to be principally applied for the future benefit of the Maori by the provision of hospitals, schools, religious, moral and vocational training and associated matters.

6.4.17 In his 15 April 1844 despatch to Lord Stanley, FitzRoy explained his reasons for the waiver proclamation. He described the Maori population as being clamorous to sell their lands, asking exorbitant prices, the Crown having no funds itself to purchase lands for resale, and the great discontent caused by the Crown neither buying nor letting others buy. He therefore:

determined to take that step which I proposed in a letter to your Lordship, dated 16 May 1843, on which a qualified opinion was given in your Lordship's answer, dated June 26th ultimo. (C2:3:7){FNREF|0-86472-060-2|6.4.17|55}

As we have seen (6.4.14), Lord Stanley had no difficulty in exercising the royal prerogative and approving FitzRoy's February action in waiving the Crown's right of pre-emption to enable the New Zealand Company to purchase land in the South Island for the New Edinburgh settlement. But the "more general and extensive measure, calculated to make a far more important alteration in respect to the sale of land" caused him very real concern, particularly in the light of a committee of the House of Commons resolution, which had been passed "unfavourable to this measure". Unlike FitzRoy's 27 February 1844 waiver to facilitate the New Edinburgh purchase, his 26 March waiver proclamation received Lord Stanley's somewhat grudging and qualified approval:

While I admit the cogency of the motives by which you have been influenced, and am not prepared at this distance to condemn, or disclaim the arrangement which you have made, I think it necessary to point out to you some objections, to which your plan is obviously liable, and which will require your attention. (R36(b):II:322){FNREF|0-86472-060-2|6.4.17|56}

After setting out his objections Lord Stanley said:

With these observations I am prepared to sanction and approve the step you have taken in admitting the natives, under restrictions, to the privilege of selling their lands directly to settlers. (R36(b):II:323){FNREF|0-86472-060-2|6.4.17|57}

6.4.18 In the course of lengthy closing submissions by Mr Temm, counsel for the claimants, it was contended that Governor FitzRoy, on receiving advice that the Otakou sale had taken place, was under a duty to ensure that the provisions as to tenths in clause 5 of his March waiver proclamation were complied with regarding the 400,000 acre New Zealand Company purchase. The Crown strongly disputed that the March proclamation applied to the Otakou purchase. After careful consideration of the submissions on the point, the tribunal has come to a clear view that the Otakou purchase stood alone and was not covered by, or intended to be covered by, the provisions of the 26 March waiver proclamation.

Governor FitzRoy gave his instructions to Symonds on 27 February 1844, a clear month before the decision was taken to issue the more general waiver proclamation on 26 March. His decision to authorise Colonel Wakefield to purchase direct from the Maori in the South Island was taken for the reasons which he subsequently related to the colonial secretary. Lord Stanley, in exercise of the Royal prerogative, expressly approved FitzRoy's decision to waive the Crown's right of pre-emption to enable the purchase of land for the New Edinburgh settlement to proceed. As we have seen, he was much less enthusiastic about FitzRoy's 26 March waiver proclamation. He clearly saw the two as discrete and unrelated actions on the part of the governor.

6.4.19 The March proclamation called for written application to be made to the governor through the colonial secretary for the waiver of the Crown's right of pre-emption. No such application was made by the New Zealand Company. Nor was it required to do so. There is nothing in the March waiver proclamation to suggest that it was intended to operate retrospectively. Nor is there anything in the proclamation to suggest that it was intended to override or be in substitution for the prior act of the governor in authorising the New Zealand Company purchase, in terms of the conditions conveyed to Wakefield by the governor's secretary on 27 February 1844. These conditions were laid down well before the waiver proclamation was issued. There would need to be clear evidence that FitzRoy, in making his March proclamation, expressly or by necessary implication repealed his earlier authorisation. There is no such evidence. On the contrary the tribunal considers, having regard to all the circumstances, that the only reasonable conclusion is that the March waiver proclamation did not and was not intended to apply to the New Edinburgh purchase. Included among the claimants' grievances are the following:

3. The Crown failed to set aside one-tenth of the 400,000 acre block as provided by the Waiver Proclamation.
4. The Crown failed to establish an administrative policy under the Waiver Proclamation by which Ngai Tahu would have been protected.
5. Governor Grey signed the Crown Grant without setting aside the Tenth required by the Waiver Proclamation. (W6)

The tribunal finds that none of these grievances are made out, for the reason that the waiver proclamation of 26 March 1844 did not apply to the purchase of the Otakou block for the New Edinburgh settlement. Accordingly there was no obligation on the Crown to comply with its provisions in respect of the Otakou purchase.

We must now turn our attention to the purchase itself to determine whether the claimants' remaining grievances are made out.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

06 Otakou

6.5 The Purchase

6.5. The Purchase

Tuckett's expedition

6.5.1 In anticipation of FitzRoy sanctioning the purchase of land in New Munster, Colonel William Wakefield appointed Frederick Tuckett, the principal New Zealand Company surveyor at Nelson, to select a suitable site for the New Edinburgh settlement. Tuckett accepted the assignment on the condition that he would not be tied to the Port Cooper locality but could look further afield in the South Island (P2:60-62). {FNREF|0-86472-060-2|6.5.1|58} On 2 April 1844 Tuckett, his assistant surveyors, Barnicoat and Davison, and Symonds sailed from Wellington on the *Deborah*. Earlier that day a meeting was held in the office of the southern district superintendent, Richmond, attended by Symonds, Colonel Wakefield, Tuckett and Commissioner Spain. Richmond gave written instructions to Symonds that in superintending the purchase, no survey was to be carried out prior to the land being purchased by the company (C2:7:7). {FNREF|0-86472-060-2|6.5.1|59} But, at Tuckett's request, it appears Richmond verbally modified these instructions to the extent that Tuckett could take soundings and survey harbours provided that Maori did not object and Symonds' consent was first obtained. Spain later recalled that Richmond instructed Tuckett to "be very cautious and not bring about another 'Wairau affair'" (P2:56-59). {FNREF|0-86472-060-2|6.5.1|60}

These instructions posed a problem for Tuckett in that he would not be able to begin negotiating with Ngai Tahu unless he could give a reasonably precise indication of the land he sought to purchase. The combination of Tuckett's impetuosity and Symond's cautious and somewhat literal approach to his duties was to produce much discord between them.

Following an inspection of the Port Cooper district, the *Deborah* proceeded south, reaching Waikouaiti on 19 April. Having obtained the consent of the local Maori, Tuckett proposed to survey the Waikouaiti Bay roadstead. Symonds would not consent and, in the face of Tuckett's persistence, departed for Wellington on the *Scotia*, a vessel owned by the whaler and trader John Jones. Tuckett proceeded on his expedition south without Symonds and made a thorough examination of all the districts between Waikouaiti and Fiordland. By 25 May he had virtually decided on Otago Harbour, the Taieri plains and Molyneux Bay for the settlement (P2:62-63; C2:8:1-8). {FNREF|0-86472-060-2|6.5.1|61}

6.5.2 Tuckett found that nearly 20 Europeans were living at Otakou, on the eastern harbour, with houses and cultivations of enclosed land. His journal continues:

If any claim has been advanced by any of these squatters, none has been approved by the Land Commissioners; yet they will consider themselves aggrieved if ejected from their dwellings without compensation; whilst, on the other hand, if the land is purchased for New Edinburgh, this locality will probably be a portion of the town. (C2:10:10-10a) {FNREF|0-86472-060-2|6.5.2|62}

As Professor Ward noted, this comment of Tuckett's foreshadowed what was to be a major aspect of the subsequent negotiations—who was to own or control the peninsula on the eastern shore of the harbour? Clearly the area was attractive to Europeans. If Ngai Tahu retained the peninsula there was a distinct danger that a settlement there, which included Europeans, would be an economic rival to any new settlement at the head of the harbour. Ngai Tahu had already developed their own social and economic relations with the squatters and, it appeared, wished to maintain that relationship (T1:88).

Because he was prohibited from surveying any land before he purchased it, Tuckett was unable to define with any real precision the 150,000 acres he wished to buy. The only solution appeared to be to purchase a substantially greater area and then survey off the land the New Zealand Company wished to retain. On 25 May 1844 he wrote to Colonel Wakefield. After stating his preference for a site at Otago he said:

I wish to be authorized to purchase and survey 150,000 acres interjacent between Otago and the South Headland of Molineux Bay (called the Nugget) or between Otago and the North Bluff river, or the North Headland of Moeraki Bay, the precise boundaries of such lands to be defined hereafter on completion of the ACTUAL SURVEY, the Reserves within said points to be specified by THE VENDORS in the Deed of Conveyance or agreement of purchase. (C2:8:1-2) {FNREF|0-86472-060-2|6.5.2|63}

Tuckett envisaged that it would be easy for Ngai Tahu to define within that larger block (likely to be considerably in excess of 150,000 acres), the areas they did not wish to sell and only then survey the company's 150,000 acres. Professor Ward noted Tuckett's emphasis was on Ngai Tahu defining their own reserves, rather than having them selected by the company. No suggestion was made about tenths (T1:89).

6.5.3 Meanwhile Symonds had arrived back at Wellington on 30 April. In his report to Superintendent Richmond he complained of Tuckett proceeding to survey lands and roadsteads without Symond's consent. He was also critical of the company's intention to pay Ngai Tahu for their land partly in goods and partly by cheque (C2:7:8). {FNREF|0-86472-060-2|6.5.3|64} He was backed up by Richmond who gave him more stringent instructions should Tuckett make any further surveys without his consent. To improve relations between Symonds and Tuckett, Colonel Wakefield decided to send his brother Daniel to Otago to act as an intermediary. Daniel Wakefield was also provided with the purchase money of œ2000.

Symonds now returned on the Scotia, accompanied by Daniel Wakefield, Wakefield's interpreter, David Scott and John Jones, the owner of the vessel. Tuhawaiki and Taiaroa joined them at Port Cooper. They reached the Otakou harbour on 8 June 1844 having left Jones at Waikouaiti the previous day. It appears Jones did not go down to Otago until 18 June (P3:6-7). {FNREF|0-86472-060-2|6.5.3|65}

Tuckett's proposal

6.5.4 Symonds first learned at Waikouaiti of Tuckett's choice of Otago as the site of New Edinburgh. Tuckett arrived three days later on 11 June having walked from Molyneux. By now he had a reasonably clear idea of the land he wanted. He asked Daniel Wakefield to advise Symonds that:

...I wish to effect a purchase of the 150,000 acres allowed for the settlement of New Edinburgh, in a district interjacent between the harbour of Otago and the South Headland (Tokata) of Molineux Bay (Kunesoo), the precise limits of such 150,000 acres to be defined hereafter on execution of an actual survey, the reserves within such limits, if any, are required to be defined by the sellers. It would greatly facilitate a clear understanding with the present proprietors, if a continuous block of land equal to about 12 miles in its extreme breadth, in a course inland about due west by compass, might be acquired. (C2:7:13-14){FNREF|0-86472-060-2|6.5.4|66}

With this letter Tuckett sent a note of his "Remarks on the District". He first described the principal places where Otakou Ngai Tahu were living and went on:

I wish it to be clearly stated in the deed of purchase, or clearly explained to the Maoris and recorded, that the names of such Maoris as are now actually resident and occupiers of land within the district described, and that other Maoris cannot, after the land is paid for, reside within the district, excepting on such land as may be specially reserved for the present residents or others. The two clearings of Te-kaki are near the mouth of the Taiarea; the other, on the plain on the east bank of the river, I have not coloured, supposing he would not part with them, otherwise, the latter I should like to acquire. The native proprietors at Otago are, I believe, known to Mr. Symonds; I do not wish to acquire any of their usual places of residence at the entrance of the harbour, but of a point occupied as a whaling station, and thence inland on the east side of the harbour, on which many Europeans reside, I consider it important that I should be put in possession, either by the magistrate or the aboriginal proprietors. (C2:7:14){FNREF|0-86472-060-2|6.5.4|67}

Professor Ward commented on two notable elements of Tuckett's approach, (the company approach in fact, for Colonel Wakefield shared his views). There was first the desire to assume possession of the land occupied by European squatters, notably on the eastern peninsula. Secondly, the desire, no doubt based on their bitter experience in Wellington and Nelson, to maintain a clear distinction between areas of Maori occupancy, and the lands of the proposed settlement (T1:90).

In a letter to Colonel Wakefield, also on 13 June 1844, Tuckett explained his proposal to purchase a large coastal block. This, he said, would "simplify the definition of the Boundaries between us and the Aborigines with the belief that the whole may be purchased for about the same sum as the half". He was, however, sceptical that the sum of £2000 provided would be sufficient (P3:82-83). {FNREF|0-86472-060-2|6.5.4|68}

Symonds approved Tuckett's proposals and advised Richmond that the long narrow piece of land extending from the Port of Otago to beyond the Molyneux River would be between 300,000 and 400,000 acres in extent. But Symonds' approval was, as

Richmond later reported to Governor FitzRoy, subject to the condition that "the unappropriated residue after the Company has selected 150,000 acres of available land, should be dealt with in such manner as Your Excellency may deem fit". Richmond advised that he had approved Symonds' decision (P3:97-98). {FNREF|0-86472-060-2|6.5.4|69} Dr Loveridge has shown that this letter, dated 16 July 1844, was misdated in transcription and was probably written by late June (P2:77). Richmond suggested the residue should be retained by the Crown and let to the settlers for grazing. He made no mention of tenths or indeed any other reserve for Ngai Tahu or public purposes, in any part of the block.

6.5.5 When Symonds returned to Otago on 8 June accompanied by the Ngai Tahu leaders Tuhawaiki and Taiaroa, he soon met other Ngai Tahu chiefs. On 10 June 1844 he noted in his journal, "Many natives arrive Tuhawaiki, Taiaroa, Pokene, Karetai, Koroko etc" (P3:8). {FNREF|0-86472-060-2|6.5.5|70} On his way north overland from the Molyneux, Tuckett had told Ngai Tahu that he wished to negotiate a land purchase with them. No doubt they arrived in response to this invitation.

Did Ngai Tahu request two reserves at Otepoti?

6.5.6 Before discussing the negotiations which were set in train a few days later, it is convenient to consider a deposition made 23 years later in 1867. This deposition was made by John Jones in support of a petition of John Topi Patuki pertaining to the Princes Street reserve, which we discuss later in this chapter. In the following discussion we are indebted to an analysis and commentary made by Dr Loveridge (P2:80-84). Jones stated that in 1844 he had taken Symonds, Daniel Wakefield, David Scott as interpreter, and Tuhawaiki from Wellington to Otago on the Scotia. Jones stated that he then returned to Waikouaiti to bring down a large number of other Ngai Tahu. On their arrival a meeting took place at Koputai (Port Chalmers). Reserves were discussed. Wakefield agreed to a burial ground at Port Chalmers being reserved. Jones recited that they (Symonds, Wakefield, Jones and various Ngai Tahu chiefs) then went to "where Dunedin now stands". There, he says, the Ngai Tahu selected two spots referred to in clause 3 of Topi Patuki's petition. These are referred to in our later discussion of the Princes Street claim as the hostelry site and the Princes Street reserve site. Jones described them as being sought for boat harbours. According to Jones, Daniel Wakefield at first assented, but later "insisted upon retaining them". This brought the negotiations to an end. Jones claimed the "whole of the Natives, including Towaki" (Tuhawaiki), returned to Waikouaiti.

Ten days later, Jones claimed, Daniel Wakefield sent a "note" asking Ngai Tahu to return and resume negotiations, which they did. When negotiations resumed, Daniel Wakefield "gave in". Jones "was acting for the Natives". At the end of the deposition it is recorded that Jones was asked what he knew respecting the phrase in Patuki's petition that the petitioner "was also entitled to one-eleventh of the sections into which their lands might after their cession be divided". He answered that he was "quite certain that at the time of the purchase no such question as this was mooted". (A8:I:154-155) {FNREF|0-86472-060-2|6.5.6|71}

6.5.7 Jones' testimony can only relate to June 1844. Symonds, Daniel Wakefield and Scott did voyage to Otago on the Scotia in June, accompanied by Jones and, from Port Cooper on, by Tuhawaiki and Taiaroa. But when Symonds returned for a second time

in July 1844 he journeyed on the Deborah with Colonel Wakefield, Spain and Clarke. Daniel Wakefield, who had left Otago with Symonds on 20 June, did not return in July. We agree with Dr Loveridge when he said it is extremely difficult to fit Jones' story of two negotiating meetings in June, between Symonds and Daniel Wakefield on the one side and Jones and Ngai Tahu chiefs on the other, into the chronology of events. Jones claimed:

- that the first meeting took place a few days after Symonds and Daniel Wakefield reached Otago;
- that all the Ngai Tahu involved, including Tuhawaiki, then departed, staying away at Waikouaiti for at least 10 days; and
- that the second negotiations, again with Daniel Wakefield (and presumably Symonds) took place after their return to Otakou.

6.5.8 Dr Loveridge questioned whether Daniel Wakefield met with representatives of Ngai Tahu soon after 8 June as Jones claimed. He thought not. As he said, Symonds was present at Otakou from 8-20 June and makes no mention in his journal of any such meeting, nor do any of his surviving reports to Superintendent Richmond. Tuckett and his assistant Barnicoat were present from 11 June 1844 onwards. Neither Barnicoat's journal nor Tuckett's reports to Colonel Wakefield make any reference to formal negotiations taking place before 18 June. Moreover, neither of the two Ngai Tahu eye-witnesses who testified before the Smith-Nairn commission in 1880 suggest there were two sets of negotiations in June. Horomona Pohio and Rawiri Te Maire both referred to meetings which took place nearer the end of the month. Neither referred to the dramatic breakdown in negotiations and their resumption 10 or more days later (C2:14:18-66). {FNREF|0-86472-060-2|6.5.8|72}

No contemporaneous evidence suggests a large scale exodus by Ngai Tahu earlier in June. Dr Loveridge pointed out that Tuckett noted on 13 June that, "at present the negotiation has not been attempted, all the parties interested not having yet arrived" (P3:82-85). {FNREF|0-86472-060-2|6.5.8|73} Symonds recorded in his journal that Tuhawaiki was in Koputai on 11 June "with a working party, making [a] house" and on 13 June Maori people were still busy building houses (P3:8). {FNREF|0-86472-060-2|6.5.8|74} It appears that the principal Ngai Tahu chiefs were on hand in Otakou from the time of Symonds' arrival up to the start of negotiations on 18 June. Symonds records in his journal for 18 June that Jones arrived at Otago that evening and that on the nineteenth endeavoured "in his way to settle matters but does not succeed" (P3:9). {FNREF|0-86472-060-2|6.5.8|75} Tuckett's report of 20 June 1844 to Colonel Wakefield supports the likelihood of a discussion about reserves at Koputai. But we agree with Professor Ward, who found there to be no 1844 evidence in reference to reserves at Dunedin (T1:95).

6.5.9 The tribunal has come to the clear conclusion that there is no satisfactory evidence that Ngai Tahu, in 1844, requested the setting aside of two reserves in the location of the future Princes Street, as claimed by John Jones. We agree with Dr Loveridge's conclusion, "There was no exodus to Waikouaiti" (P2:84).

June 1844 negotiations

6.5.10 These have been succinctly described by Professor Ward and we largely adopt his account as an accurate record of the principal events (T1:91-95).

Symonds, while agreeing with Tuckett's proposal to acquire a substantially greater area than 150,000 acres, was still anxious that there should be no misunderstandings on the part of Ngai Tahu. Accordingly, he proposed to Tuckett that, before negotiations began in earnest, there should be an inspection of the proposed boundaries. Tuckett, representative Ngai Tahu chiefs and Symonds would all participate in the inspection. He suggested that the meeting with Ngai Tahu to ascertain whether they were prepared to sell, be deferred for a week - the boundary inspection to take place meantime. Tuckett was anxious to press on with discussions. Frustrated by Symonds' cautious approach, Tuckett wrote to Colonel Wakefield on 16 June 1844 asking to be relieved at once "from the vexations of office" (P3:86-89). {FNREF|0-86472-060-2|6.5.10|76} Symonds, aggrieved at what he felt to be "extraordinary conduct and correspondence" on the part of Tuckett, resolved on 17 June to return to Wellington on the Deborah. Daniel Wakefield supported Symonds and decided also to return to Wellington (C2:7:15-18). {FNREF|0-86472-060-2|6.5.10|77}

6.5.11 As Professor Ward noted, Symonds knew that Ngai Tahu would be displeased at having assembled to no good purpose. A series of meetings therefore took place on 19-20 June. These were, however, preceded by discussions on 18 June which were recorded by Scott, Daniel Wakefield's interpreter. Scott stated that since his arrival in Otago (on 8 June 1844), he himself had a number of conversations with the principal chiefs and Ngai Tahu generally, but more particularly that morning with Tuhawaiki, Taiaroa and other named chiefs:

who severally distinctly expressed themselves highly satisfied with the arrangement of pointing out and fixing the general boundary of the intended purchase, as well as the portions they wish to reserve, to prevent any future misunderstanding with the settlers, and they are all (chiefs and dependents without any exception) to my knowledge, willing to sell the block described in Mr. Tuckett's sketch plan, subject to the reserves I have mentioned, with a copy of which they have been furnished, and which was carefully examined and explained in my presence at a general meeting of the natives this morning, the result of which was an unanimous expression of their anxiety to complete the transaction with as little delay as possible. (C2:7:18) {FNREF|0-86472-060-2|6.5.11|78}

At the morning meeting Symonds told Ngai Tahu of his intention to return to Wellington with Daniel Wakefield and to come back as soon as possible, "to which they agree" (P3:9). {FNREF|0-86472-060-2|6.5.11|79} So by the afternoon of 18 June Tuckett became the principal negotiator. He attempted to reach an agreement. He reported on this meeting to Colonel Wakefield the next day:

I addressed the maories and did my best to explain to them the objects of my expedition and pressed them to give me the names of all the Proprietors of Land in the District which I wished to purchase, to state some reasonable amount of payment in money or goods for which they would alienate the Lands, the amount to be paid to each Proprietor[;] also if not disposed to sell the whole District to delineate on the Plan, that which they wished to reserve. Their expectations are perfectly childish in

fact they have no idea of the amounts which they specify and which are too extravagant to be worth recording (C2:11:51). {FNREF|0-86472-060-2|6.5.11|80}

As Professor Ward commented, "this was an early phase, when 'ambit claims' and inflated demands could be expected" (T1:92). Barnicoat noted in his journal that Tuhawaiki mentioned a million pounds as the purchase price (P3:47). {FNREF|0-86472-060-2|6.5.11|81} In his journal for the following day, 19 June, Barnicoat recorded that there were:

now 18 boats belonging to the natives lying on the beach. The number of natives present cannot therefore be less than 150. Today a meeting of the Chiefs took place, at which an attempt was made to get a price named. It was not altogether successful. (P3:47) {FNREF|0-86472-060-2|6.5.11|82}

6.5.12 The next day, 20 June 1844, a turnaround took place. Following further public negotiations, agreement was reached which established the main features of the Otago purchase (T1:93). Tuckett wrote the same evening to Colonel Wakefield, enclosing the following agreement:

Otago June 20th 1844.

The Maori Chiefs Tuawaite, Taiaroa and Karetai offer to the Principal Agent of the New Zealand Company the whole tract of Land colored Red and Green on this Plan excepting a Reserve of Land on the East side of the Lower or outer Harbour of Otago from 1 to 2 on the accompanying Plan, being about four miles in length measured along shore at high water mark from 1 to 2 for the sum of Twenty four Hundred Pounds (œ2400) to be paid to them this day month (20th of July) or in default of the payment being made to the parties entitled to receive payment for the Land, at the time above specified, the Company's Acting Agent Frederick Tuckett shall remove his party and effects from the ground which he now occupies and until the 20th of July has their PERMISSION TO OCCUPY

signed on behalf of themselves and others by Tuawaite Taiaroa & Karetai and witnessed by John Jones, T.H. Barnicoat and Frederick Tuckett. (C2:11:14-15) {FNREF|0-86472-060-2|6.5.12|83} (emphasis in original)

Barnicoat's journal for 20 June 1844 records that the three Ngai Tahu chiefs that day "signed a memorandum binding them to sell the whole country from Otago to Molineux...with a single reserve for the sum of œ2,400..." (P3:47) {FNREF|0-86472-060-2|6.5.12|84}

6.5.13 What had changed between 18-19 June, when negotiations stalled, and 20 June, when an agreement was reached that remained firm in all essentials and was to be formally concluded on 31 July? In answering this question Professor Ward pointed to two matters in particular:

(a) The price. Whereas on 18-19 June the company appears not to have gone above œ1200 or œ2000 at most, on 20 June the Maori negotiators had come down to œ2400 which presumably they thought realistic. Tuckett, whose limit was œ2000, realised it

would be sensible to agree to œ2400; he agreed to this sum subject to his superiors confirming it.

(b) The inclusion in the sale of part of the eastern side of the harbour. On 18 June Ngai Tahu indicated their wish to retain all the eastern side. Two days later they were willing to relinquish most of the eastern side except for a four mile reserve on the outer harbour. This included land occupied by European squatters which Tuckett was most anxious to acquire and which Colonel Wakefield, a month later would still try to buy. But on 20 June Tuckett must have realised that Ngai Tahu was unlikely to include any more. And so he recommended acceptance (T1:94 & C2:11:13). {FNREF|0-86472-060-2|6.5.13|85}

(c) Professor Ward made a third point, in his view of less importance, but still significant. Tuckett, in his 20 June report to Colonel Wakefield, referred to a piece of land on the western shore of the harbour near Koputai claimed by Taiaroa's sister, married to one Thomas Chasland, an associate of John Jones. The claim was presented by John Jones on behalf of Chasland's wife. However Tuckett was adamant that he would not recommend the purchase if any part of the western side was withheld. Ngai Tahu accepted this. Nevertheless Tuckett recommended to Colonel Wakefield that one of the future town sections near the spot and with a water frontage, be given to either Jones or Chasland's wife. Otherwise Jones might use his influence to have the portion (and Tiarea Island adjacent, where he had part of his fishery) reserved directly to him by Ngai Tahu. Or else, Tuckett suggested (apparently suspecting that there might be other Maori claims to portions on which they were not actually residing) that Wakefield should be prepared to pay one or two hundred pounds over and beyond the œ2400 sought, to extinguish any such claims (C2:11:13). {FNREF|0-86472-060-2|6.5.13|86}

We note that tenths were not mentioned in the agreement of 20 June 1844, or in Tuckett's report to Colonel Wakefield. He simply recommended that the:

offer of the Land...should be accepted, subject to obtaining the approbation of the Government, and its decision to whom the money shall be paid and in what proportions to each Proprietor. (C2:11:10) {FNREF|0-86472-060-2|6.5.13|87}

Symonds was not privy to Tuckett's negotiations with Ngai Tahu which led to the 20 June agreement. Further negotiations would be necessary with Symonds present. A decision by the company on the purchase price was required.

The July negotiations and the purchase

6.5.14 Symonds, who had left Otago on the Deborah with Daniel Wakefield on 20 June, reached Wellington on 29 June. Symonds duly reported the reasons for his return to Superintendent Richmond. Tuckett's report to Colonel Wakefield was also on the Deborah. Colonel Wakefield decided to go down to Otago himself in place of his brother Daniel. On the return south on the Deborah, in addition to Symonds and Colonel Wakefield, were George Clarke Jr, sub-protector of aborigines, and Commissioner William Spain. They arrived at Otago on 16 July 1844.

6.5.15 In his report on the purchase of 31 August 1844, Wakefield stated that Tuckett had left little to be done beyond verifying the boundaries in the presence of the principal vendors and effecting payment (C2:11:27). {FNREF|0-86472-060-2|6.5.15|88} Before the boundary inspection commenced however, Symonds was present at a meeting with Ngai Tahu on 18 July. He noted in his journal for that day:

Hold a meeting of natives concerning reserves, the point in question viz their extent having been settled we start for the Head of the Harbour with Col. W[akefield], Mr Clarke and Mr T[uckett]. (P3:10) {FNREF|0-86472-060-2|6.5.15|89}

The boundary inspection party set out later on 18 July accompanied by "six natives deputed by the assembled natives of the district..." (C2:11:27) {FNREF|0-86472-060-2|6.5.15|90} It went up the harbour, over to the Taieri valley and by boat to Lake Waihola. They camped about 6 miles from the lake by a hill named "Owiti" (C2:11:40). {FNREF|0-86472-060-2|6.5.15|91} From, the top of Owiti they could see the south-western boundaries. On returning to Taieri they reached agreement on the boundaries of the Taieri reserve. They returned to Otakou on 26 July and the following day the party inspected the boundaries of the Ngai Tahu reserve on the south side of the harbour (Omate). Symonds then notes in his journal, "matters satisfactorily arranged" (P3:11). {FNREF|0-86472-060-2|6.5.15|92}

6.5.16 On Monday 29 July Symonds and Clarke prepared the deed of purchase in Maori and English (P3:137-138). {FNREF|0-86472-060-2|6.5.16|93} That day Symonds also obtained Wakefield's signature to a statement in which Wakefield undertook:

to select 150,000 acres, to which the Crown's right of pre-emption has been waived in favour of the said [New Zealand] Company,...leaving the unappropriated residue to be dealt with in such manner as his Excellency the Governor shall deem fit. (C2:7:3) {FNREF|0-86472-060-2|6.5.16|94}

The deed is signed

6.5.17 On 31 July 1844 all was ready. Ngai Tahu were assembled and Wakefield had the £2400 purchase money. Symonds, in his report of 2 September 1844 to Richmond, with which he enclosed a copy of the deed, explained that before it was formally read over and signed he had requested George Clarke, the protector, to explain to Ngai Tahu the nature of the transaction:

that in disposing of their land they for ever surrendered their interest and title to such land; that their consent to sell it was binding on their children, as well as themselves, that they should remove from any portion then occupied by them, and confine themselves exclusively to their reserves, and never expect to receive further compensation, that they should not alienate or let any portion of their reserves without having previously obtained the sanction of his Excellency the Governor; to all which stipulations they unanimously consented. (C2:7:2) {FNREF|0-86472-060-2|6.5.17|95}

Symonds further reported that the boundaries were frequently explained by Clarke to Ngai Tahu who "stated that they fully understood all the terms and conditions of the purchase, as specified in the deed" (C2:7:2). {FNREF|0-86472-060-2|6.5.17|96}

Wakefield later reported that Karetai (the senior chief of Otakou itself) then spoke to the assembly, reiterating the need to respect each other's areas to avoid disputes (C2:11:57-58). {FNREF|0-86472-060-2|6.5.17|97}

The deed was then read over in Maori and English. The Maori version was signed by the influential Ngai Tahu chiefs (twenty three in all, plus two by proxy), then by Tuckett and Scott for the company and Symonds and Clarke for the Crown. The purchase money was amicably divided among the different families under Tuhawaiki's supervision. A copy of the deed is in appendix 2.1.

Tuhawaiki then removed a tapu from a burial site at Koputai and took away the remains for reburial. The Union Jack was raised and formalities thereby completed. Wakefield, Spain, Symonds and Clarke immediately departed north on the Deborah (C2:11:60-61). {FNREF|0-86472-060-2|6.5.17|98}

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

06 Otakou

6.6 The Claim for Tenths

6.6. The Claim for Tenths

6.6.1 The foregoing account is drawn from records made at the time, in 1844. Professor Ward considered they testify to a completed transaction. We agree that this is a reasonable conclusion, but remind ourselves that we have yet to consider later testimony.

Under the English version of the deed, Ngai Tahu consented, "to give up, sell, and abandon altogether" to William Wakefield, on behalf of the New Zealand Company, specified lands within certain named boundaries, together with some eight named islands, for œ2400. The deed excepted certain places "which we have reserved for ourselves and our children". The boundaries of the lands excepted from the sale and reserved to Ngai Tahu were then described in some detail; "which said reserved places we agree neither to sell nor let to any party whatever without the sanction of His Excellency the Governor of New Zealand" (appendix 2.1).

The latter provision reflects Wakefield's concern that Ngai Tahu might sell to the European squatters and that some part of the 6665 acres reserved on the eastern peninsula might be developed in competition with the New Edinburgh settlement. The total area of the four reserves was later found to be 9615 acres. We now know that the land sold, once thought to be 400,000 acres, was more like 533,000 acres. At the time Colonel Wakefield estimated that Ngai Tahu had retained about 13,000 acres for (as he erroneously thought) a resident population of about 60 people (C2:11:49). {FNREF|0-86472-060-2|6.6.1|99}

6.6.2 The deed makes no mention of tenths or anything like them. There was no contractual obligation on the part of the company or the Crown to make further provision by way of reserves for Ngai Tahu. But the subject was adverted to by Symonds in his final report of 2 September 1844. In his account, the question of reserves was linked to the question of who, Ngai Tahu or European, was to have control or management over them. He reported that:

[Ngai Tahu] expressed their anxiety to make some special provision for the future benefit of themselves and children, by reserving certain portions of land within the limits of the purchase, WHICH THEY NOW PARTIALLY OCCUPY, THE MANAGEMENT OF WHICH, TO A CERTAIN EXTENT, THEY WERE DESIROUS OF RETAINING IN THEIR OWN HANDS. (C2:7:1) {FNREF|0-86472-060-2|6.6.2|100} (emphasis added)

Symonds approved their selections (those named in the deed). He went on:

I pursued this course as regards native reserves, from the conviction that the system heretofore adopted in other purchases of large tracts, was beyond the comprehension of the aborigines, and at the suggestion of Colonel Wakefield I left the further choice of reserves, namely, the tenth part of all land sold by the New Zealand Company, to be decided by his Excellency the Governor, without making any express stipulation with the natives on the subject. (C2:7:1-2){FNREF|0-86472-060-2|6.6.2|101}

Both the claimant and Crown witnesses agreed that this statement suggested that some kind of tenths system was probably discussed with Ngai Tahu. But it does not appear to have been their preferred choice. Professor Ward, in his report on the historical evidence, expressed the opinion that this would not be surprising, given that a tenths system in 1844 did not involve the transfer to Maori of sections in the new subdivision, but rather their vesting in the Crown, mainly, but not exclusively, for Maori purposes. He pointed out that Ngai Tahu, by Symonds' account, wanted to have the land in their ownership and control. All the 1844 evidence, Professor Ward suggested, from Tuckett's journal entries to the accounts of Karetai's speech, emphasise the wish on both sides for these separate spheres (T1:98).

6.6.3 We agree with this analysis of the 1844 evidence by Professor Ward and his conclusion that the outcome was exactly what the deed states—an excepting or reservation of the named areas in favour of Ngai Tahu, with them binding themselves not to let or sell the land retained without the governor's consent. Whether the governor, in addition to this, wished to provide for tenths was left entirely to his discretion. On the contemporary (1844) evidence of the negotiations, and on the plain meaning of the deed, no obligation rested on the governor to provide for tenths.

In his report to London Colonel Wakefield expressed regret that the deed did not prevent, as fully as he would have liked, Ngai Tahu from disposing of the land exempted from the sale (C2:11:52-53).{FNREF|0-86472-060-2|6.6.3|102} Later in his report he said:

The right of pre-emption of the excepted land by the Company might have been reserved in the deed or it might have been made a special reserve for the natives as the tenths in the other settlements are; but the latter provision would have placed it in the hands of the trustees lately appointed by an Ordinance and they might hereafter have thought it their duty to grant leases of portions of it to the detriment of the property of the purchasers from the Company. Two other points there are of special application to the Governor: the one respecting the future disposal of the residue of the block beyond the 150,000 acres to be selected by the Company: the other as to the special native reserves, as in the other settlements; not contemplated in the Company's New Edinburgh scheme, which cannot be made till the surveys are completed and selections made. (C2:11:54-55){FNREF|0-86472-060-2|6.6.3|103}

Wakefield was nervous about land being vested in trustees. Nevertheless he recognised that although special Maori reserves were not contemplated for the New Edinburgh scheme, the possibility remained that the governor, in his discretion, might require tenths to be vested in the Crown.

While we believe the position to be as we have found on the contemporary (1844) evidence, it remains to be seen whether later evidence, both Maori and European, leads to a different conclusion.

A twenty years silence?

6.6.4 Unfortunately Tuhawaiki, one of the principal Ngai Tahu involved in the sale of Otakou, died by drowning in October 1844. It was suggested to us by Dr Ann Parsonson that this was a major calamity for the tribe and that, had Tuhawaiki not died so tragically, the question of the provision of tenths would have been raised much sooner (R35:33-35).

But, as Professor Ward testified, a number of letters from Taiaroa, Karetai, Tiramorehu and other Ngai Tahu leaders to government officers in the 1850s still survive, as does evidence of meetings with Governor Grey in 1848, with Governor Browne in 1857 and with the premier and native minister in 1858. These cover a whole range of contentious matters with Pakeha or among themselves. None has so far emerged which suggests that anything like tenths were to follow on the survey and sale of the Dunedin settlement (T1:100).

6.6.5 On 27 September 1872 Matenga Taiaroa's son, Hori Kerei Taiaroa, produced to a parliamentary inquiry a statement dated 13 February 1862, said to have been made by his father. Included in the statement is the following:

Secondly. After that land purchase commenced in this Island, the first land we sold was Otago; it was sold to Colonel Wakefield. We pointed out all the boundaries, and all stipulations were mentioned to Colonel Wakefield, as follows:- We said the first payment for this land would be £100,000. Colonel Wakefield said, "That is too much, £2,400 will be ample, and that is all the cash consideration; it had better be arranged in this manner, viz., that one acre in every ten shall be reserved for you." We agreed to this, and said, "You can have the land according to these terms." We do not know whether these words were written down or not, but all the people present heard these words.

These are the places about which we spoke, and stated that we desired to retain- Otakori, Taiari, Maranuku, Te Karoro, and other places. (C2:21:9){FNREF|0-86472-060-2|6.6.5|104}

We are inclined to agree with Professor Ward, who suggested it is difficult to know what weight to put on this document. While it is very likely that before his death Matenga Taiaroa did make a statement to his people about Ngai Tahu claims, it is surprising, if it was reduced to writing during his lifetime, that it was not produced earlier. While it is true that Ngai Tahu began airing their principal grievance regarding the Princes Street reserve in the early 1860s, by 1867-68 a growing claim for tenths was also coming under parliamentary scrutiny. If not written down until later, its accuracy may be open to question.

Topi Patuki's petition

6.6.6 The first documentary claim to tenths made public by Ngai Tahu was a petition by John Topi Patuki dated 17 August 1867. The petition appears to be principally concerned with the failure of the New Zealand Company and the Crown to set aside two small reserves at Princes Street, Dunedin. But Patuki also claimed that he was entitled, "under the arrangements then existing between your Majesty's Government and the said [New Zealand] Company, to one-eleventh of the sections into which their lands might after cession be divided". (C2:12:5){FNREF|0-86472-060-2|6.6.6|105}

We note that Patuki does not claim that the arrangement had its genesis in discussions or an agreement with Ngai Tahu at the time of the sale. Rather he invoked "arrangements then existing" between the government and the New Zealand Company. For reasons we have earlier stated, no such arrangement existed in 1844. Further, in 1844, no tenths arrangements contemplated by the government, or company officials, would have envisaged vesting the sections in the Maori tribes themselves. As Professor Ward indicated, Patuki, in 1867, appears to be beginning to "read back to 1844 a later concept of `tenths'". This, said Professor Ward, is not entirely surprising, for in 1866-67 the tenths in Wellington, plus McCleverty's awards which were already in Maori hands, were processed through the Native Land Court. And in the same year, 1867, preparations were in hand to put the Otago reserves secured under the 1844 deed through the court to obtain the issue of individual Crown grants (T1:101).

Mantell's assertions

6.6.7 Walter Mantell, whose various activities as a commissioner to extinguish Maori claims (1848-1854) and as commissioner of Crown lands in Otago (1851-1854) will engage our attention in the Kemp, Banks Peninsula and Murihiku purchases, and the Princes Street reserve claim, also gave evidence before the 1872 parliamentary inquiry. In 1872 he testified that his official connection with Ngai Tahu commenced in 1848. But before then, he said, he knew Tuhawaiki who told him that he "considered the Natives were entitled to these tenth parts". Mantell added that the "old chiefs Taiaroa and Karetai-in fact all of the older chiefs ... repeatedly asked me about these reserves". He explained his inaction at the time on the grounds that he had no knowledge of the documentary evidence; that for a time he had no authority over Crown lands in the Otago block, and that later he was too busy (C2:21:7). {FNREF|0-86472-060-2|6.6.7|106}

Professor Ward in his report considered Mantell's hypocrisy and deceit to be blatant. He pointed out that since 1855-when he resigned office as commissioner of lands-Mantell had been waging an unrelenting campaign about unfulfilled promises to Ngai Tahu (principally concerning schools and hospitals), some of it to good effect. Moreover, as Professor Ward reminded us, Mantell had twice held office as native minister in the 1860s, making it a condition of his accepting office in 1861 that certain promises be fulfilled, and instructing his officers to investigate other outstanding grievances. He had supported Topi Patuki's petition in 1867. But, Professor Ward said, in all these 17 or more years Mantell did nothing about the Otago tenths-did not even mention them. Quite apart from Tuhawaiki, who died in October 1844, Karetai and Matenga Taiaroa were principal owners in the block and leading participants in the 1844 negotiations. Yet they failed to raise the issue of tenths publicly, as they raised many other issues (T1:101-102). We share Professor Ward's scepticism about Mantell's 1872 recollections.

1872 Maori witnesses

6.6.8 At the same 1872 inquiry at which Mantell gave evidence, the committee heard evidence from two Ngai Tahu witnesses to the 1844 negotiations.

(a) Tare Wetere Te Kahu

The following account is taken from Professor Ward's report and accurately records and comments on the salient points of Te Kahu's evidence (T1:102).

Te Kahu confirmed the general boundary agreed with Colonel Wakefield and Symonds. With regard to reserves he said that one was asked for and granted at Port Chalmers. He went on:

A reserve was then asked for at Dunedin, when Captain Symonds proposed to arrange it in this manner, that Maori and European land should be in alternate pieces, i.e., Maori land, then European, then Maori, and then again European. (C2:21:11){FNREF|0-86472-060-2|6.6.8|107}

According to the witness, David Scott was unable to interpret to Wakefield's satisfaction, Clarke was sent for and "talking then commenced again":

It was then clearly stated that a Native reserve would be made at Dunedin or Otepoti, where it was absolutely decided that a reserve should be made. The lands on either side of Otepoti Creek marked A and C on tracing (made by witness) were reserved for the Natives by Colonel Wakefield. The intervening part marked B was to be European land; these reserves were made to draw up the boats on. (C2:21:11){FNREF|0-86472-060-2|6.6.8|108}

When Kettle came to survey the area, Te Kahu said, he confirmed this arrangement and Ngai Tahu from the Heads lived in three houses on the land. Shortly after this the first two immigrant ships arrived. John Jones built a house on the portion marked B (C2:21:11). {FNREF|0-86472-060-2|6.6.8|109}

Though this evidence tends to telescope time, and probably reflects the fairly common confusion between Daniel Wakefield (with Scott in June) and Colonel William Wakefield (with Clarke in July), it is evidence of a reserve at Princes Street and of the interest and role of the ubiquitous Jones. It also provides the first, and perhaps most authentic reference, to an alternation of Maori and European sections - in one specific location. Te Kahu proceeded:

- There were to be reserves at Taiari, Molyneux, and Kai Tangata. These are the only reserves of which I am aware. I heard the promises made about these reserves.
- 29. Was anything said about reserves to be made afterwards? -I do not know.
- 30. If the reserves mentioned in Symond's deed, and which I have now read over to you, together with those at Port Chalmers and Otepoti were made, would you consider conditions of sale fulfilled? -If the reserve at Otepoti was returned to Maoris, I should think all promises made by Colonel Wakefield and Captain Symonds would be fulfilled.
- 31. Did you ever hear anything about reservation of one section for Maoris to every

ten sections for the Europeans? -I do not know anything about that condition. The alternate sections to which I referred before I understood only to refer to the Otepoti Block.

35. [Mr Macandrew]. How old were you at the time of the negotiations for the land purchases? -I do not know, but I at the time had two children.

36. How many pieces did Colonel Wakefield promise? -He promised us two pieces. The whole block was divided into three allotments, the centre piece to be for the Europeans. I do not know what were the exact boundaries of these pieces.

(C2:21:12){FNREF|0-86472-060-2|6.6.8|110}

We conclude this account by observing that this evidence in no way substantiates a claim that tenths were to be provided.

(b) Hoani Wetere Korako

Korako said he was present at the negotiations and signed Symonds' notebook, not the deed itself. The name Korako does appear on the deed as a signatory, but Korako explained it was that "of old Korako", not his. He claimed that Taiaroa, Karetai and Tuhawaiki told Colonel Wakefield they wanted œ800,000 for their land, which Colonel Wakefield refused to give. Later the Maori were told "they were to receive œ2,400 and a piece of land at Port Chalmers and two pieces in the town with allotment of European land between them" (C2:21:12).{FNREF|0-86472-060-2|6.6.8|111} The chairman then read over part of the Otakou deed of purchase to the witness. He was asked:

45. Would you consider that all promises made to you by Colonel Wakefield and Captain Symonds, concerning reservation of land for Natives, had been fulfilled, if you were now to obtain the reserves at Port Chalmers and at Otepoti? -No; I heard that promises were made concerning hospitals and schools.

46. I am not alluding to hospitals or schools, but to the reserves? -There are many things connected with the land sales still unfulfilled.

47. [Mr Taiaroa] If you got reserves at Port Chalmers and at Otepoti, would you consider promises fulfilled? -No, I should not.

48. [Mr Sheehan] How would there, in that case, be still unfulfilled promises? -The reserves were the principal subject of discussion at sale of land, and now the Natives have no reserves.

49. Can you mention hearing of reserves not handed to Natives? -The land at Molyneux, near the present reserve, does not belong to the Natives, as it ought to do. It is situated towards the north of the Molyneux, and called Kaitangata.

(C2:21:12){FNREF|0-86472-060-2|6.6.8|112}

As with the evidence of the other Ngai Tahu witness, Te Kahu, there is nothing in Korako's evidence to suggest that tenths or anything like tenths were promised by the European negotiators.

The Smith-Nairn Royal commission

6.6.9 Five Ngai Tahu gave evidence before the Smith-Nairn commission in 1880 concerning the July negotiations. All said that "wakawakas" were discussed with Colonel Wakefield. (Wakawaka is defined by H W Williams, A Dictionary of the

Maori Language, 7th ed, 1985, as "share" or "division"). But the evidence of one Merekeherike Hape, was entirely hearsay as he was not personally present (P3:116-119). {FNREF|0-86472-060-2|6.6.9|113} The evidence of Hone Kahu was brief. He said that Maori portions were to be chosen from the places which had been occupied by their ancestors ("Ko nga whenua Maori hei nga Papatupu") and he claimed four named places (P3:120-124). {FNREF|0-86472-060-2|6.6.9|114} More specific evidence was given by Wiremu Potiki, Horomona Pohio and Rawiri Te Maire. The latter two were present in June 1844 as well.

6.6.10 They told the commission that the purchase price was the first matter discussed and that the question of "wakawakas" was raised in this context. Potiki said:

When I got here I heard that the price of the land was named. Taiaroa, Karetai & Tuhawaiki asked what was the amount of money ... Wakefield said it was œ2,400. Karetai & the natives did not agree to that amount. Then Wakefield told them that the land would be divided, and then they agreed to that amount ... He mentioned that the land was to be divided into sections, and that was the reason why they [the Ngai Tahu] agreed to take the œ2400. (P3:100-111){FNREF|0-86472-060-2|6.6.10|115}

Horomona Pohio first referred to Mr Wakefield (presumably Daniel Wakefield) offering them œ1200, which was rejected. Wakefield then asked to have the land divided into sections but Taiaroa, Karetai and Tuhawaiki told him they would not sell the land. Wakefield then said if the land was divided into sections he would make them an additional payment. "They would not agree to sell the land. Mr Wakefield returned" (C2:14:25-37). {FNREF|0-86472-060-2|6.6.10|116} We note that Pohio had either forgotten, or did not know, that on 20 June 1844 the three chiefs referred to above offered to sell the land for œ2400.

Pohio later testified that he recalled Mr Wakefield coming down a second time about a month afterwards. This is obviously a reference to the arrival in July of Colonel William Wakefield, who came instead of his brother Daniel. Pohio said:

The natives then asked Mr Wakefield how much money he would give for the land. He replied œ2,400, and he said "And the land also shall be divided into sections for you natives ["]". The natives then consented, as the land was to be divided into sections. (C2:14:31){FNREF|0-86472-060-2|6.6.10|117}

The portion of the deed relating to reserves was then read to Pohio. He was asked why Ngai Tahu did not sell those pieces, to which he replied, "Because they considered the payment was too small. It was not what they had asked for" (C2:14:27-35). {FNREF|0-86472-060-2|6.6.10|118}

6.6.11 Rawiri Te Maire early in his evidence related that Wakefield, presumably Daniel Wakefield, came down on the Scotia. He held a discussion about boundaries and offered œ1200 for the land. Te Maire said that Ngai Tahu would not part with the land; that "they would not sell the land, and Wakefield returned". He came back about three weeks or a month later. We note that this account resembles that of Horomona Pohio, except that he makes no reference to Daniel Wakefield offering to divide the land into sections. Like Pohio, he has either forgotten or did not know that Taiaroa, Karetai and Tuhawaiki had offered to sell the land for œ2400 in June. Te Maire then

relates that after Wakefield "returned" in July he offered œ2400 (C2:14:44-49). {FNREF|0-86472-060-2|6.6.11|119} He was questioned by the lawyer Izard:

Did the natives at first refuse to take the œ2,400 altogether for the land? -The natives did not agree to take the œ2,400.

When the natives refused to take the œ2,400 did Wakefield say anything to them further? -He said that he would return a portion of the land he wanted to buy to the natives.

Did he explain in what way the land was to be returned? -There were to be sections made, and the land given to the natives. (C2:14:50){FNREF|0-86472-060-2|6.6.11|120}

A discussion about the sections or wakawaka then ensued. Te Maire said that no size (acreage) of the wakawaka was mentioned. They were to be allocated after the survey was made and were to be in addition to the blocks reserved from the sale. Izard then asked:

Then it was after Wakefield had mentioned these wakawakas that the natives agreed to take this œ2,400; is that not so? -It was after these promises were made that they accepted the money. (C2:7:52){FNREF|0-86472-060-2|6.6.11|121}

When Te Maire resumed his evidence the next day he was asked who had acted as the interpreter at the meeting. He said that Clarke and Scott were involved. Izard then asked:

Was it Scott or Clarke who explained to them what Wakefield said about the wakawakas? -It was Clarke.

Did Symonds say anything to them about the wakawakas? -No; I did not hear him say anything about the wakawakas. (C2:14:62-63) {FNREF|0-86472-060-2|6.6.11|122}

Soon afterwards Izard asked:

Did Mr Clarke explain to the natives that the land would be divided in a similar manner [i.e. into sections in the same manner as Maori cultivations] after the survey? -Yes. Mr Clarke explained to us that the divisions would be the same as in a cultivation. I myself was listening to it. (C2:14:62-63){FNREF|0-86472-060-2|6.6.11|123}

6.6.12 We are unable to reconcile the evidence of Horomona Pohio and Rawiri Te Maire as to Daniel Wakefield's first visit and the alleged refusal of Taiaroa, Karetai and Tuhawaiki to sell the land, with the proved action of those chiefs in signing the 20 June offer to sell for œ2400. As to the July meeting with Colonel William Wakefield, the three witnesses agreed that Wakefield opened the July negotiations by offering œ2400. They do not specify what reserves were offered in conjunction with this offer. Ngai Tahu are said to have rejected it. Wakefield then offered to return a portion of the land in the form of sections or wakawaka, unspecified as to area, after the land was surveyed. Te Maire claimed that George Clarke explained how the system would

work. None of the witnesses stated what proportion of the land was to be returned in this way. They said that Wakefield's offer of œ2400 was accepted after-and because-the promise regarding sections or wakawaka was made.

6.6.13 There are problems in reconciling this evidence with what we know the three leading chiefs-Taiaroa, Karetai and Tuhawaiki-had done on 20 June 1844. The evidence of Potiki, Pohio and Te Maire is that in July, the three chiefs were not willing to sell for œ2400. They made no mention of the chiefs' offer of 20 June to sell for œ2400. Instead they maintained that the Ngai Tahu leaders agreed to the sale in July only after Colonel Wakefield is said to have offered sections or wakawaka. If the recollection of these witnesses some 36 years after the event was correct, we would have expected Symonds, in his daily journal or his final report, or Wakefield in his comprehensive report, or Clarke in his Smith-Nairn evidence or memoirs, to have recorded discussions on such an important matter. In fact Colonel Wakefield's only comment on the œ2400 price was:

It is probable that the natives would have consented to receive something less; but the sum having been fixed upon by Mr Tuckett before my arrival at Otago, I thought it better not to disturb his arrangement and that every security against future dissatisfaction of the natives should be taken by a compliance with their expectations. (C2:11:56-57){FNREF|0-86472-060-2|6.6.13|124}

On the question of tenths we have already cited from Wakefield's report (6.6.3), in which he expressed his reservations about tenths being vested in trustees under the 1844 ordinance. He went on to say:

Two other points there are of special application to the Governor: the one respecting the future disposal of the residue of the block beyond the 150,000 acres to be selected by the Company: the other as to the special native reserves, as in the other settlements, not contemplated in the Company's New Edinburgh scheme, which cannot be made till the surveys are completed and selections made. (C2:11:55){FNREF|0-86472-060-2|6.6.14|125}

Colonel Wakefield expressly stated that the "special native reserves, as in the other settlements"-a reference it would appear to tenths-were "not contemplated in the Company's New Edinburgh scheme..." Had Colonel Wakefield in fact promised sections or wakawaka to secure the agreement of Ngai Tahu to sell, he must be guilty of practising a massive deception in hiding this from his superiors. He must also have deceived Symonds and Clarke or secured their connivance in his deception. Wakefield's report was written on 31 August 1844, a month after the sale. We have no reason to suspect its accuracy on this matter. We are not able to find that the evidence of the three Ngai Tahu, based on their recollection of events some 36 years later, should be preferred to the contemporaneous evidence recorded in 1844. This latter evidence makes no reference to tenths being part of the bargain for the sale of the Otakou block.

Later European evidence

6.6.14 It remains to consider later evidence of Symonds and Clarke given before the Smith-Nairn commission in 1880.

Symonds gave evidence on 18 February 1880. He said that Ngai Tahu pointed out the land they wished to keep for themselves:

I had some trouble to get Colonel Wakefield to agree that this land should be kept back for them [Ngai Tahu]. I mean the large reserve up to the Heads. (C2:14:2-13){FNREF|0-86472-060-2|6.6.14|126}

Later, asked whether he had any discussion with Maori about the tenths he replied: "No, none whatever". Asked whether Colonel Wakefield had any discussion with Maori about tenths he answered: "I cannot tell". When questioned by Commissioner Smith as to whether he had any knowledge of the fact that Colonel Wakefield alluded to the tenths (to Ngai Tahu), he answered: "No". He made it clear that he himself had not told Ngai Tahu that tenths were part of the agreement. Later, the following dialogue took place:

Mr Nairn -Do you remember any particular spot of land which the natives desired to except from the sale, and which was not reserved? -No, I do not. The places they mentioned to me were reserved by me. I do not know of any reserve which the natives desired to reserve from sale which was not reserved.

Mr Izard -Did the Maoris point down to where Dunedin now is, and say they wanted any land reserved there? -No; I don't know that they did. I was very careful in reserving what they desired, and think I should have remembered it if they had requested land to be reserved which was not reserved. (C2:14:16-17){FNREF|0-86472-060-2|6.6.14|127}

6.6.15 George Clarke, in 1880, was a congregational minister in Hobart, Tasmania. The Smith-Nairn commission sent him a copy of Symonds' evidence to the commission. It asked him to comment. In his affidavit of 7 April 1880 he said that Symonds' report, "accords very well with my recollection of what took place". But he added "some particulars with which I am strongly impressed" (T1:106).{FNREF|0-86472-060-2|6.6.15|128} He went on to say he had gone straight to Otago from assisting Spain to sort out the confusion in Wellington:

I went into the matter with the determination that the whole terms of the purchase should be expressed in the Deed of Conveyance, and that I would have nothing to do with any sort of engagement that was not put clearly on record. I pressed the necessity of this on all the parties concerned and cited the case of other purchases as a reason why we should be specially careful in our conduct of this. (T1:106){FNREF|0-86472-060-2|6.6.15|129}

Therefore he approved of Symonds' insistence on the boundary inspection, although Ngai Tahu themselves were doubtful about the necessity for it. He continued:

Then came the question of Reserves. I need hardly say that before a purchase of this kind is concluded a good many conversations pass, between the contracting parties. All kinds of proposals are made and discussed, and they are accepted, modified, or rejected as the case may be. It is quite possible that in some such conversations Colonel Wakefield may have proposed as a condition of sale that a certain proportion of the alienated land should be set apart for the natives. I think that he did propose it

on the understanding that the natives should make over the whole Block to the Company. But this they were unwilling to do. They said that such promises had been given in the other purchases of the Company, and they feared lest only the worthless sections would be assigned to their use. To the best of my belief such a proposal formed no part of the final arrangement. If it did it would certainly be expressed in the Deed of Conveyance. What happened was, I think, this. There were certain lands about Omate, Pukekura and Taiari which the natives were very anxious to retain, and Colonel Wakefield just as anxious to buy. The Chiefs took us over the ground and pointed out how thickly it was studded with the graves of their relations. They told how only a few years before the tribe had been decimated by measles and other epidemics, and how whole families had been swept off in the course of a few weeks; and when pressed by Colonel Wakefield, they angrily declared that sooner than part with these places they would throw up the bargain altogether. It was then that Colonel Wakefield said that if they would only sell these grounds, the actual burial places should be respected, and ample reserves should be made for the natives elsewhere. The chiefs however were decided, and refused to let these lands be included in the sale. What arrangement Colonel Wakefield may have made with the Government as to the reservation of any part of the alienated land for the Natives I do not know, - but my impression is that there was no such stipulation in the bargain as between the natives and Captain Symonds and myself.

I am not able, Gentlemen, after so many years to recall the provisions of the Deed, but of this I am certain, that whatever its terms, they were most carefully and elaborately explained to the natives at the time (and I was not without experience as an Interpreter)-and I am almost as certain, that **NOTHING WHATEVER BEYOND THE CONTENTS OF THE SALE WAS PROMISED AS A CONDITION OF THE SALE.** (T1:107){FNREF|0-86472-060-2|6.6.15|130}(emphasis in original)

We note that Clarke gave a similar account in his memoirs, published in 1907 (P3:135-138).{FNREF|0-86472-060-2|6.6.15|131}

Was the provision of tenths a condition of the Otakou purchase?

6.6.16 After carefully considering all the evidence (including more than 1000 pages of documentation put in by Dr Ann Parsonson on behalf of the claimants) and counsel's submissions, the tribunal finds that the deed of purchase, signed on 31 July 1844, accurately reflected the agreement reached between the parties. While a decision remained to be made by the governor, as to whether provision would be made for tenths, this was not part of the contractual arrangements between the parties. Nor was, as we have earlier indicated, the Otakou transaction governed by the waiver proclamation of March 1844.

6.6.17 It was strongly urged on us on behalf of the claimants, that even though no provision was made in the deed of purchase for tenths, Ngai Tahu at the time believed that tenths would be provided after survey. It is certainly possible that Colonel Wakefield discussed with Ngai Tahu leaders the possibility of providing for tenths if they would agree to surrender the whole block free of reserves, especially the eastern peninsula. But other evidence suggests that Wakefield was not keen on the provision of tenths, especially as they would be vested in trustees over whose actions the company would have no control. Reference was made to publication of the March

proclamation in Te Karere (U10(c):27). But Dr Ann Parsonson was critical of the Maori translation as being difficult to follow. We do not know what, if anything, FitzRoy may have said about tenths to Tuhawaiki in Wellington on 27 February. There is no evidence that Symonds had instructions from the governor, or Superintendent Richmond, to ensure that provision was made for tenths. It is clear that he did not discuss the subject with Ngai Tahu. George Clarke, although recollecting events many years later, considered that tenths were no part of the arrangement which he fully discussed with Ngai Tahu. We are disposed to agree with Professor Ward, that Ngai Tahu much preferred to have land they wished to retain set aside as excepted from the sale, and thereby reserved. In short, we believe there is no good contemporary evidence that Ngai Tahu had an expectation that the company or the government would provide tenths on their behalf. Nor are we persuaded by any later evidence that such was the case.

We agree with Professor Ward when he said that the matters raised by Topi Patuki in 1867 probably reflect very well the real and actual concerns of the southern Ngai Tahu at that time. As will be seen in chapter 7 when we discuss the claim over the Princes Street reserve, Ngai Tahu by 1867 felt a genuine grievance about specific pieces of land at Dunedin and, as Professor Ward said, "the beginnings of a wondering about entitlement to 'tenths' in view of the matter having been left for FitzRoy's decision and in the light of general Company/Government undertakings" (T1:109). How was this non-contractual matter, that had been left for the governor's discretion, dealt with? This question and related matters we will consider shortly. But before doing so we must consider a further complaint by the claimants.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

06 Otakou

6.7 Symonds' Responsibilities for the Purchase

6.7. Symonds' Responsibilities for the Purchase

6.7.1 The claimants in their first grievance complained that "the protector Symonds, failed to discharge his responsibilities at the time of the negotiations, and afterwards" (W6).

The claimants referred to Symonds as "the protector". A reference to the instructions dated 27 February 1844, which Symonds received from FitzRoy (6.4.9), shows that Symonds was required:

- to proceed to the South Island and there superintend and assist Tuckett, in effecting a valid purchase of not more than 150,000 acres;
- to be careful not to infringe the slightest way on existing rights or claims, whether Maori or otherwise. (This direction was made with the recent Wairau affray very much in mind); and
- to inform the Maori population that he was sent to superintend the purchase of lands which they wished to sell, and that he, on behalf of the government, would not authorise or sanction any proceedings which were not honest, equitable and in every way irreproachable.

He received no instructions as to reserves for the Maori vendors.

It is apparent from the foregoing that Symonds had dual responsibilities. First, to assist the New Zealand Company agent to make a valid purchase. Secondly, to ensure that the company only purchased lands which the Maori owners wished to sell and that the proceedings were honest, equitable and irreproachable. Symonds therefore had obligations to both parties-the New Zealand Company and the Maori-but he was not designated protector. That role was assigned later to George Clarke Jr, a sub-protector who was sent down by FitzRoy in July, when it appeared an agreement to sell might be finalised.

6.7.2 Counsel for the claimants, in the course of his closing address, made various criticisms of Symonds' conduct:

(a) He complained that Symonds absented himself from the negotiations because of his quarrel with Tuckett in June 1844. We have already related the reasons for Symonds' return to Wellington (6.5.10). He had proposed to Tuckett that before the negotiations began in earnest, there should be an inspection of the proposed boundaries by Tuckett, representative Ngai Tahu chiefs and himself. He suggested

deferring the meeting with Ngai Tahu for a week, to enable this to be done. Tuckett was anxious to press on with the discussions and very reluctant to participate in a prior boundary inspection. He made very clear his opinion of Symonds in a note to Daniel Wakefield. Symonds, aggrieved at what he felt to be "extraordinary conduct and correspondence" by Tuckett, resolved on 17 June to return to Wellington. Daniel Wakefield, the New Zealand Company agent, supported Symonds and not Tuckett. He also decided to return to Wellington. Symonds told Ngai Tahu the following morning of his decision to return, to which it is said they agreed.

All this, however, did not deter Tuckett, lacking an adequate interpreter, from proceeding with negotiations with Ngai Tahu. We are not able to find that Symonds acted otherwise than as he saw proper in the circumstances. Tuckett chose to proceed with negotiations without Symonds' sanction and knowing that no final agreement could be reached in his absence. In fact, it was more than five weeks later before an agreement was reached.

(b) Mr Temm submitted that from March 1844 to October 1844 FitzRoy, Richmond, Wakefield and Symonds all expected tenths to be made from the Otago purchase (W1:96). The tribunal is not satisfied there is any convincing evidence that Symonds had any such expectation. As he indicated in his 2 September 1844 report to Superintendent Richmond, the question of tenths was left to the discretion of the governor. If FitzRoy or Richmond had any such expectation, they do not appear to have communicated this to Symonds. Wakefield also took the view that it was a matter for the governor.

(c) It was further submitted by Mr Temm that Symonds, on his own admission, took no part in the negotiations and had nothing to do with the price or terms of purchase except to record in the deed the land Ngai Tahu were not willing to sell (W1:111-112). In our opinion this does not fully represent the burden of Symonds' evidence before the Smith-Nairn commission. We set out the following passage from Symonds' testimony on being questioned by Izard, counsel for Ngai Tahu, about the July negotiations:

Mr Izard: -Then negotiations took place with the natives about the purchase of the land, I believe? -Well, that I am not aware of. They were carried on by Mr. Tuckett, and so far completed when we arrived that the sum had been agreed upon.

That is to say, when you arrived you found Mr. Tuckett had agreed with them as to the land and price? -Yes; to give them œ2,400 for such land as they were willing to point out, and they pointed out certain boundaries to him.

Did you go over the boundaries yourself? -Yes, with Colonel Wakefield, Mr. Tuckett and six young natives, sons of chiefs, in order to point these boundaries out and to remember them.

Mr Smith: -You traversed the whole of the boundaries? -No; we went to all the points named in the Deed, from which we could see the boundaries.

Mr Izard: -Then the natives understood, I suppose, that they were parting with all the land within the boundaries, except certain lands which they would not sell at all? - Yes; they are excepted in the Deed.

Did you have any personal negotiations with the natives about the price to be paid? - None.

Or about the boundaries? -No. I was merely there to see fair play, and that the natives were not imposed upon; to see that the boundaries were clearly defined. The Govt wished to avoid anything that might lead to a collision with the natives.

Then, in fact, you considered it no part of your duty to interfere as to the price, or as to the land? What you did was to see that the thing was conducted in a fair, straight-forward, honest way?" -Yes; and that the natives were satisfied.

Then as to the negotiation, you had nothing whatever to do with it? -No.

I suppose the negotiations were quite completed, or did Colonel Wakefield finish them after arrival? -That I can hardly tell you. I imagine they put their heads together, and managed to complete the negotiations.

The natives pointed out to you the land they did not sell? -Yes; what they wished to keep for themselves. I had some trouble to get Colonel Wakefield to agree that this land should be kept back for them. I mean the large reserve up to the Heads. (C2:14:5-8){FNREF|0-86472-060-2|6.7.2|132}

Although he does not say so in his evidence, the boundaries inspection was made at Symonds' insistence. Ngai Tahu were not overly anxious to participate. But Symonds, as he said in evidence, was there to see fair play, that the Maori were not imposed upon and that the boundaries were clearly defined. Not only was he concerned to see that the transaction was "conducted in a fair, straight-forward, honest way", but also that Ngai Tahu "were satisfied". We note too, that despite his agreement that he had nothing to do with the negotiations, he did in fact intervene. How otherwise would he have had "some trouble to get Colonel Wakefield to agree" that "the large reserve up to the Heads" should be kept back for Ngai Tahu. We also recall that Sub-Protector Clarke recorded in his memoirs that:

With Symonds's consent, as well as Colonel Wakefield's, I started with the understanding that the whole negotiation with the Maoris should pass through my hands, and I told the natives that I should be answerable for no conditions or promises whatever, except what I myself should tell them. (P3:135){FNREF|0-86472-060-2|6.7.2|133}

It is clear that Clarke in his role of protector played an active part in ensuring that Ngai Tahu understood the arrangements being entered into.

(d) Mr Temm further submitted that Symonds, Wakefield, Richmond and FitzRoy all knew in July 1844 that the governor was to set aside reserves from the land that was to be sold under the March waiver proclamation. We do not accept this submission. There was no persuasive evidence before us that this was so, quite apart from the

consideration that, in our view, for reasons we have given, the March waiver proclamation did not apply to the Otakou purchase.

6.7.3 We conclude our discussion of this grievance, which we do not find to be made out, by observing that the evidence showed Symonds, if he had a fault, to have been over cautious in his efforts to superintend the activities of the New Zealand Company agents who had the responsibility of negotiating the purchase. But, in so acting, he did not disadvantage Ngai Tahu.

6.7.4 But while we believe Symonds conscientiously followed his instructions, we are bound to say that his instructions were defective. FitzRoy made no reference to the question of reserves when he formally commissioned Symonds, on 27 February 1844, to undertake the supervision of the purchase. Nor did he specifically refer to reserves in his letter of the same date to Colonel Wakefield. He did, it is true, make it one of the conditions of the waiver of the Crown's right of pre-emption, that all existing arrangements made by the government with respect to New Zealand Company settlements should be strictly observed. As we have indicated (6.4.4), these left the government with a discretion to make such arrangements as it thought just and expedient. In the same way clause 6 of the terms of purchase provided that the local (New Zealand) government would make such further reserves for Maori vendors and public purposes as it might see fit. Further, the company's detailed instructions to Colonel Wakefield told him he was to take FitzRoy's directions with respect to reserves for Maori and for public purposes (6.4.6).

Nor did FitzRoy, or anyone authorised by him, give verbal instructions as to what reserves, if any, should be set aside. Their instructions were to purchase the lands which Maori "wish to sell" up to 150,000 acres. FitzRoy failed to give any instructions that Symonds or the others involved in the purchase were to ensure that the Maori retained sufficient land for their present and future needs. In short that they were left with an adequate endowment. The fault, in our view, lay not with Symonds, but with Governor FitzRoy, who failed in his instructions to advert to the question of adequate reserves being secured to Ngai Tahu.

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6.8 Developments After the Purchase

6.8. Developments After the Purchase

6.8.1 Symonds duly reported on 2 September 1844 to Superintendent Richmond on the successful completion of the purchase. As noted earlier, Symonds advised that he had:

left the further choice of reserves, namely, the tenth part of all land sold by the New Zealand Company, to be decided by his Excellency the Governor, without making any express stipulation with the natives on the subject. (C2:7:2){FNREF|0-86472-060-2|6.8.1|134}

Richmond sent Symonds' report to Governor FitzRoy early in September 1844 (P2:126). By this time news had reached Wellington from London that the company's operations had been suspended due to difficulties between the New Zealand Company and the Colonial Office. Consequently, in September Colonel Wakefield instructed Tuckett to defer any further work in Otago (P3:159).{FNREF|0-86472-060-2|6.8.1|135}

As there was no longer any urgency to advance the proposed New Edinburgh settlement, FitzRoy deferred reporting to the colonial secretary until December 1844. He assembled a large number of documents and correspondence relating to the purchase. These he sent to Lord Stanley with a brief covering letter dated 10 December 1844:

I have the honour of transmitting to your Lordship copies of correspondence relative to the purchase of a tract of land at Otago, in New Munster (Middle Island) accompanied by tracings of the plans made by the New Zealand Company's surveyors.

Mr. J. Jermyn Symonds has acquitted himself of his difficult task more speedily and successfully than I could have anticipated, satisfied, as I felt of his ability and judgment.

The principal known qualifications of Otago as a site for a settlement, are, a moderate harbour (not accessible in strong northerly winds), an extensive tract of country well adapted for pasturage, but without timber; a fine climate, neither too wet nor too windy; and an abundant supply of good bituminous coal.

There are so few natives in New Munster, not more than 1,500 altogether, that colonization might there be carried on unimpeded, if the Government were to buy

from the few native claimants (securing them ample reserves), and then dispose of the land. (C2:7:1){FNREF|0-86472-060-2|6.8.1|136}

Symonds' report of 2 September was with the first enclosure which also included a copy of the deed. FitzRoy spoke of Symonds' conduct in a complimentary manner. But he made no mention of Symonds' action in leaving to him as governor the decision as to whether further reserves in the form of tenths would be provided. He did however suggest that, given the small Maori population in the South Island, colonisation could proceed there unimpeded.

6.8.2 No evidence was put before us that FitzRoy considered that further provision for reserves in the form of tenths, or any other form, should be made for Otakou Ngai Tahu. We infer from his brief uncritical letter to Lord Stanley that FitzRoy entirely approved of the transaction, including the provision for reserves in the deed, and that he did not propose to take any further action as to the provision of tenths. Whatever his intention may have been at the time, in fact he took no further action. Tenths were not provided either by FitzRoy or by Grey who succeeded him as governor soon after in 1845.

The Colonial Office response

6.8.3 FitzRoy's 10 December despatch was received by the Colonial Office on 29 May 1845 (P2:128). It arrived at a time when a fresh round of negotiations concerning the New Zealand Company's entitlement to land was coming to a head. On 6 July 1845 Lord Stanley sent a lengthy despatch to George Grey, who had by then replaced FitzRoy as governor (C2:18:1-6). {FNREF|0-86472-060-2|6.8.3|137} This contained instructions for implementing Pennington's award, under which it appeared the New Zealand Company was entitled to some 885,000 acres. Lord Stanley reviewed the company's claims, district by district, including Otago. Stanley referred to it as having been purchased under "special circumstances", these being that the Crown's right of pre-emption had been waived in favour of the company to the extent of 150,000 acres, the company being limited to that quantity. The colonial secretary went on to say that, as soon as the survey was completed and Colonel Wakefield was able to apply for a Crown grant, Grey was:

to make it to him with the least possible delay, not only for the 150,000 acres, to which the Company would be entitled, under the arrangement sanctioned by Captain FitzRoy, but to any larger extent of available land not already reserved by Mr. Symonds for the natives or Government purposes, out of the tract included in the deed of sale, dated the 31st July 1844. (C2:18:3){FNREF|0-86472-060-2|6.8.3|138}

6.8.4 Dr Ann Parsonson, on behalf of the claimants, suggested to us that:

as Lord Stanley had seen the Otakou deed of sale, he was clearly not referring to the lands named therein which the sellers wished to keep for themselves, but considered that Symonds might since have made further selections for them. (C1:63)

This does not seem to us a tenable view. Lord Stanley also had before him Symonds' report of 2 September 1844. There Symonds referred to Ngai Tahu "reserving certain portions of lands within the limits of the purchase", which he approved

(C2:7:1). {FNREF|0-86472-060-2|6.8.4|139} Moreover, the deed itself refers to Ngai Tahu "excepting the following places which we have reserved". Lord Stanley was saying that the company, in addition to the 150,000 acres, could be given any other lands in the block not "already reserved" by Symonds for Maori or government purposes.

That this was his intention is confirmed by a letter at the direction of Lord Stanley to the company directors on 7 August 1845, in which it was said:

With respect to the proposed settlement at Otago, Lord Stanley will at once instruct the Governor to make to the Company an unconditional grant of the 400,000 acres, purchased at Otago, EXCLUDING, OF COURSE, THE LAND RESERVED TO THE NATIVES; the Company engaging, within a limited period, to select the 150,000 acres proposed, and also such further quantity thereof as they may desire, and to re-convey the remainder to the Crown. (P3:206) {FNREF|0-86472-060-2|6.8.4|140} (emphasis added)

On 15 August 1845 Lord Stanley sent two despatches to Governor Grey. In one he requested Grey to convey to Symonds "my approbation of his conduct and my sense of the service which he rendered on that occasion" (P3:211). {FNREF|0-86472-060-2|6.8.4|141} In the other, a copy of the letter of 7 August to the company directors was enclosed, and Grey was instructed "to take the instructions intimated in that letter as here repeated for your guidance". {FNREF|0-86472-060-2|6.8.4|142} That is, as if they were direct instructions from Stanley.

We infer from Lord Stanley's directions to Grey that the British government considered that the reserves already approved by Symonds adequately met the obligations of the Crown so far as land endowment for Ngai Tahu was concerned. The question of tenths was not mentioned. But it does not follow that Grey, who would have had before him Symonds' report on the sale, could not have exercised the discretion vested in his predecessor, FitzRoy, to provide for tenths had he thought this appropriate. In fact, given that the block was surveyed while Grey was governor, he may have had even more responsibility to consider the matter than his predecessor.

The New Zealand Company response

6.8.5 While it is apparent that neither of the governors in New Zealand appear to have given any real consideration to the question of tenths being provided once the Otakou block was surveyed, the New Zealand Company officials did at least discuss the matter. Thus William Cargill, who had replaced Rennie as leader of the New Edinburgh Association, wrote to Harington, the New Zealand Company secretary, on 29 August 1845. He expressed the view that:

inasmuch as the Natives are so few in number (being under 60 in all), and as a distinct block of land, of ample dimensions has been reserved for them at their own desire and not included in the purchase-no other Native reserves ought to be laid out within the boundaries of this Settlement.

Had these people been more numerous it would have given the leaders of our enterprize the greatest pleasure to have forwarded the Company's general views upon

this subject, and to have promoted the location of Natives under their own chiefs and amidst the examples of a civilized community; but it is strongly felt that in the present instance any such reserves would be not only unnecessary but an absolute hindrance to the purposes of the Settlers, by interposing unoccupied wastes, and increasing the expense of roads &c, without benefit to anyone. (C2:6:6-7){FNREF|0-86472-060-2|6.8.5|143}

A meeting of directors on 4 September 1845 accepted Cargill's recommendations (C2:6:9-10).{FNREF|0-86472-060-2|6.8.5|144} Under clause 6 of the 1843 terms of purchase the responsibility for the provision of reserves for Maori and for public purposes rested not on the company but on the New Zealand government. Accordingly the company acted within its rights in deciding that no additional reserves ought to be provided for Ngai Tahu within the boundaries of the purchase.

On 13 April 1846, Grey issued a Crown grant to the New Zealand Company for the whole of the Otakou block, estimated to contain 400,000 acres, but excepted from the grant the reserves named in the deed.

The governors' responsibility

6.8.6 Professor Ward told us that while he could understand FitzRoy's hesitation in taking tenths, especially as the settlement had been deferred, he agreed with the claimants that:

to be consistent with its own public undertakings, the government should have taken an endowment equivalent to tenths, if not within the 150,000 acres (if that were deemed to be already balanced by the agreement over the Heads) then within the balance of the block, before it was Crown Granted to the Company. I have suggested ...that this would have eventually provided useful revenue to government for Maori purposes, and some of the land might, in later generations have come back into Ngai Tahu hands. (V9:13)

Support for this view is to be found in the following:

- Lord Russell's direction of 31 December 1840 that in future sales of public land by the Crown, not less than 15 and not more than 20 per cent was to be appropriated by the governor to the use and benefit of Maori. (Lord Russell said he did not mean that money should be given to them but that the salary of the protector, the cost of agricultural tools, the salaries of schoolmasters etc should be paid partly by this sum) (T1:78);{FNREF|0-86472-060-2|6.8.6|145}

- additional instructions on 28 January 1841 embodying the 31 December instruction were sent to Governor Hobson. It was now contemplated that the fund would, in addition, be used "for promoting the health, civilization, education and spiritual care of the natives" (T1:78);{FNREF|0-86472-060-2|6.8.6|146}

- the action, in July 1842, of the New Zealand governor, in appointing the chief justice, the anglican bishop of New Zealand and the chief protector of aborigines as trustees to administer the funds directed by Lord Russell to be set aside, and also the

New Zealand Company's reservation of "one-eleventh of their town, suburban and country allotments for the benefit of the natives". The chief justice was advised that:

With a view to the most efficient administration of this property for the benefit of the native race, it appears desirable that all the reserves so made, or to be made, by the New Zealand Company, and any monies which may prove from time to time to be disposable out of funds, so to be set apart, after paying the expenses of the protector's department, should be vested in one set of trustees (C2:4:36){FNREF|0-86472-060-2|6.8.6|147}

It was made clear that the company reserves were to be legally vested in the Crown. Further, and of special reference to Otago, it was expressly provided that "the funds arising from the company's reserves shall be expended in the promotion of these objects in the settlement or district from which they may respectively arise..." (C2:4:36).{FNREF|0-86472-060-2|6.8.6|148} See our earlier discussion for the problems which the trustees encountered (5.6.2);

- the 26 March 1844 waiver proclamation, although it did not apply to the Otakou purchase, made provision for tenths to be vested in the Crown "for public purposes, especially the future benefit of the aborigines" (P3:197){FNREF|0-86472-060-2|6.8.6|149}; and

- Governor FitzRoy's belief in 1844 that tenths should be provided for Maori vendors as demonstrated by Dr Ann Parsonson. FitzRoy, in a memorandum of 14 October 1844, later sent to the colonial secretary, said:

With respect to the interests of their descendants they [the Maori] are indifferent, and require the provision of at least a tenth of all lands sold, besides extensive reserves in addition. (R36(b):II:374){FNREF|0-86472-060-2|6.8.6|150}

6.8.7 The tribunal can only speculate why FitzRoy, given the Imperial government's directions and his own stated views that tenths should be provided in addition to "extensive reserves", did not in fact make provision for tenths. It may have been that because the purchase coincided with news the New Edinburgh scheme was in abeyance, he simply deferred it. It may be he did not address the question: he makes no reference to it in his December report to the colonial secretary. It may be he decided that the land excluded from the sale and reserved to Ngai Tahu, which amounted, on estimates made at the time, to something approaching one-tenth of the 150,000 acres, substituted for tenths. If so, what of the remaining land, over 380,000 acres, which in the event were also to be vested in the New Zealand Company in April 1846?

6.8.8 The tribunal accepts that, having regard to government policy prevailing in 1844 in relation to the provision of tenths, FitzRoy, or failing him his successor Grey, should have provided for an endowment equivalent to tenths and that this should have been in respect of the whole block. But having said this, the question remains whether the failure of the Crown so to provide constitutes a breach of the Treaty of Waitangi. We turn now to that question.

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6.9 Crown Actions-A Breach of Treaty Principles?

6.9. Crown Actions-A Breach of Treaty Principles?

Grievance no 2: Crown failure to provide Ngai Tahu with an economic base

6.9.1 In our opinion the answer to the question of the Crown's responsibility under the Treaty turns on the issue of whether, given the absence of provision for tenths, the retention by the Otakou Ngai Tahu of some 9600 acres out of 533,600 acres sold was sufficient for their present and future needs and constituted an adequate endowment. The claimants, in their remaining grievance which we now consider, said that:

The Crown failed to ensure that sufficient land was set aside to provide an economic base for Ngai Tahu after they had sold their land, and so to protect their Tribal Estate. (W6)

We see no significant difference in this formulation from the Treaty principle enunciated by us in 4.7.8. Nor could the Crown escape its Treaty obligation by waiving its right of pre-emption, as it did here, and permitting a direct purchase from Ngai Tahu.

6.9.2 Before discussing the question further however, we should consider a suggestion made by counsel for the claimants, that in considering the adequacy or otherwise of reserves made for Ngai Tahu no account should be taken of the land, some 9600 acres, which were excepted by Ngai Tahu from the sale. We do not accept this contention. Among the instructions given Hobson by Lord Normanby was a prohibition on the Crown purchasing from the Maori any land "the retention of which by them would be essential, or highly conducive to their own comfort, safety or subsistence"(A8:I:15). {FNREF|0-86472-060-2|6.9.2|151} This tribunal has found it to be abundantly clear from these instructions, read in the light of the instructions as a whole, that no land was to be purchased by the Crown which was required for the comfort and subsistence of Maori people. In short, to comply with Treaty principles, they were to be left with a sufficient endowment for their own needs, both present and future. If, however, this requirement was not followed, whether in part or in whole, then the Crown would be obliged, out of the land purchased, to set aside by way of reserves sufficient land to secure an adequate endowment.

6.9.3 In our earlier discussion of Treaty principles we noted various factors to be considered in deciding what constitutes a sufficient endowment (4.7.9). We pointed out that much might depend upon a wide range of demographic factors including the size of the tribal population; the land they were then occupying or over which various members enjoyed rights; the principal sources of their food supplies and the location of such supplies; the extent to which they depended upon fishing of all kinds and on

seasonal hunting and food gathering. In short, their dependence upon the many forms of mahinga kai.

There is no evidence that the officials involved, whether agents of the Crown or the New Zealand Company, gave any real consideration to these questions. It is true, as we have indicated, that the importance of these various elements could vary depending upon the date at which the Crown sought to acquire tribal land. Otakou was the first official sale of which Ngai Tahu had any experience. They welcomed the prospect of Europeans settling among them. Although they had some years of experience of sealers and whalers living alongside them, in 1844 they had no notion of the likely magnitude and rate of settlement both in their immediate locality and elsewhere where they enjoyed a variety of hunting and food-gathering rights. Nor, as we have earlier indicated, in fairness to the Crown, would the governors of the day have anything approaching a precise knowledge of the timing, scale and momentum of future settlement. Nor, for that matter, did the New Zealand Company have any certain knowledge.

6.9.4 The New Zealand Company, with the consent of the Crown, purchased approximately 534,000 acres from Ngai Tahu. Some 9615 acres was excepted from the sale as follows:

Reserve Acres Roods Perches

Otago Heads 6665 1 12

Taieri 2310 0 0

Te Karoro 640 0 0

Total 9615 1 12

(C2:17:10){FNREF|0-86472-060-2|6.9.4|152}

We have no knowledge of what consideration, if any, the Crown officials or the company agents gave as to the adequacy of 9615 acres to meet present and reasonably foreseeable needs of Ngai Tahu. In part, this would depend upon the number of Ngai Tahu who were dependent on this land. Wakefield appears to have thought there were not more than 50 in the Otago block and about a dozen in the southern part. He was aware of the earlier decimation of the Ngai Tahu population through diseases such as measles, so he may have considered 9615 acres sufficient (C2:11:47-50). {FNREF|0-86472-060-2|6.9.4|153}

6.9.5 We received detailed evidence from Professor Atholl Anderson, an associate professor of anthropology at the University of Otago, on the population of Ngai Tahu in various localities at various periods. He produced a graph showing the estimated Maori population, including those of mixed descent, in east Otago between 1820 and 1870 (H3:fig 13). East Otago included the area of Moeraki in the north, and all settlements on the coastal strip south to a little below Nugget Point. His graph

indicates that, based on the survey made in 1844 by Edward Shortland, there were some 535 Ngai Tahu people in the east Otago area. Detailed figures are shown in Professor Anderson's figure 9, which gives Edward Shortland's population figures for the following settlements, commencing with Moeraki about 45 kilometres north of the present Dunedin and running south to Karoro/Matau just north of Nugget Point. All the settlements, apart from that at Mataipapa/Taieri, were sited on the coast:

Settlement Population

Moeraki 200

Waikouaiti 101

Otakou 160

Purakaunui 32

Mataipapa/Taieri 19

Karoro 23

Total population 535

(H3:fig 9)

The people at Otakou, Mataipapa/Taieri and Karoro were all occupiers of the land included in the approximately 534,000 acres sold to the New Zealand Company, while those at Purakaunui lived very close by. Those at Moeraki had close links with Ngai Tuahuriri at Kaiapoi. We have no detailed information as to the precise nature of the rights of the 100 or so Ngai Tahu resident at Waikouaiti but it cannot be doubted that they did have rights in the Otakou land. They were only 15 kilometres by sea from the Otago Heads and would appear to have enjoyed some community of interest. If the 200 people at Moeraki are excluded from the population having ownership or associated rights in the Otakou purchase we are left with a figure of some 335 Ngai Tahu. We are also conscious that some Ngai Tahu living further south in Murihiku and Ruapuke also had interests in the Otago land. The figure of 335 may be understated. But we are unable to say by how much.

We are also conscious of the fact that, just as other Ngai Tahu living beyond the boundaries of Otakou had interests in Otakou, so the Otakou Ngai Tahu had interests beyond the boundaries of the purchase. They would have looked to those rights to sustain them and in part at least compensate for the loss of a major portion of their Otakou land. And so the question of the adequacy of the reserves at Otakou is linked to both their then existing, and future, rights in the lands subsequently included in the Kemp and Murihiku purchases. But, as this report will demonstrate, insufficient reserves were made in all the Crown purchases from Ngai Tahu. They were demonstrably and grossly inadequate in both Kemp and Murihiku, as the Crown has conceded in this inquiry.

6.9.6 Had the Ngai Tahu people affected by the loss of some 534,000 acres known that when other land in which they had interests came to be sold the reserves would be so pitifully few, we cannot believe they would have agreed to sell all but 9600 acres out of over half a million acres. While they may have realised that over time, as settlement progressed in Otakou, they would no longer be able to hunt and forage with the same freedom, they would have had little appreciation that their eel-weirs and other important fresh-water based sources of food would diminish, in many cases to the point of extinction. Nor could they have reasonably contemplated that this would occur on a large scale throughout the vast areas of Te Wai Pounamu over which they had rights.

If it had transpired that in later purchases the Crown had recognised the need for generous areas of land to be retained not only for their residences and cultivations, but for their wider hunting and foraging requirements and as a future base for pastoral and other agricultural pursuits, it would perhaps have mattered less that a mere 9600 acres was left with Ngai Tahu compared with 534,000 acres acquired by the Europeans. But this did not happen. In subsequent transactions, as we will demonstrate, the reserves left to Ngai Tahu were infinitesimal. They were totally inadequate for their present, let alone their future, needs.

John Jones' award of 11,060 acres

6.9.7 We have had occasion to refer more than once to the whaler and trader Johnny Jones. In 1843 Jones lodged a claim for the award of 20,000 acres based on alleged purchases of land from Ngai Tahu. On 21 December 1843 the land commissioners, Colonel Godfrey and Major Richmond, reported that Jones had made a bona fide purchase. They recommended that the maximum grant of 2560 acres be awarded to him. Jones was very dissatisfied with this award. He complained to Governor FitzRoy. His claim was re-opened before a third commissioner, R A Fitzgerald, with a recommendation from FitzRoy and his Executive Council for a large extension of the grant. After investigation, Fitzgerald, on 27 December 1844, recommended an award of 10,000 acres. On the same day Fitzgerald's award was confirmed by FitzRoy to the extent of 8650 acres near Otakou. Unfortunately for Jones, Governor Grey replaced FitzRoy in 1845. Grey refused to sanction any award in excess of 2560 acres to Jones. A grant for this area was prepared. Jones refused to accept it until 1849 when Governor Grey gave his personal assurance that such acceptance would not prejudice Jones' claim to the large amount awarded by Governor FitzRoy, should grants in excess of 2560 be agreed to at any future time. Jones never gave up. His persistence was finally rewarded by the passing of a special enactment in 1867 entitled the John Jones Land Claims Settlement Act 1867. Section 2 of this Act empowered the governor to issue a land order to Jones to purchase land to amount to œ8500 subject to the extraordinary provision that such purchase could be made by Jones without his making any payment in cash. His biographers, Alfred Eccles and A H Reed, John Jones of Otago from whose account we have drawn, disclose that Jones' land claims were brought to a close with a total grant of 11,060 acres. {FNREF|0-86472-060-2|6.9.7|154}

It will be seen that FitzRoy, in December 1844, confirmed the award to one man, John Jones, of some 8650 acres. Finally, in 1867, Parliament was to award him 11,060 acres. By contrast, if the land retained by Ngai Tahu, of 9615 acres was divided

among say 335 Ngai Tahu, each of them was entitled on an individualised basis to approximately 29 acres per person. Jones had a wife and seven children. Even if the 11,060 acres is divided by nine, each member of the family would have received approximately 1230 acres. The contrast is startling. We note that in the same month, December 1844, that FitzRoy confirmed an award of 8650 acres to Jones he decided to do nothing about an award of tenths to the 335 or so Ngai Tahu who had reserved to themselves a mere 65 more acres (9615) than FitzRoy thought one European should receive.

A social and demographic analysis

6.9.8 Mr Bill Dacker, a claimant historian from Dunedin, presented a detailed examination of Ngai Tahu's position in Otakou from the time of the sale, down to the present day (F11). He argued that Ngai Tahu were seriously disadvantaged in not being able to retain sufficient land to ensure their economic and cultural survival as a tribe. His evidence is discussed in more detail in chapter 18. He argued that Ngai Tahu had been able to trade successfully prior to the coming of the Otakou settlers, and for a short period after their arrival, but were soon marginalised and overwhelmed by settlers, unable through a lack of land to profit from the pastoral economy which soon developed across the province as a whole. While in Mr Dacker's view, subdivision and individualisation were welcomed by Ngai Tahu at Otakou as a solution to their difficulties, these only compounded Ngai Tahu's economic and social problems. With the Crown historian and the demographer who gave evidence in response to his paper, Mr Dacker saw Alexander Mackay's 1891 report on the condition of the tribe as clear proof that Ngai Tahu in Otakou were without sufficient land for their needs in the new world.

6.9.9 The Crown called evidence from Tony Walzl, an historian, and Professor D I Pool, a leading demographer and author of *The Maori Population of New Zealand: 1769-1971*. {FNREF|0-86472-060-2|6.9.9|155} In response to Mr Dacker's paper Mr Walzl gave evidence on the Ngai Tahu economy and society in the areas of Canterbury, Otago and Southland, concentrating on the post-purchase period (Q8 & Q9). Mr Walzl pointed out that although in South Otago there had been little involvement in commercial agriculture, at Otakou Ngai Tahu had become heavily involved in agriculture in pre-purchase days when there was a market. The decline in this agriculture was due to the loss of that market when the whaling ceased. The non-resurgence of large-scale agriculture in the area, Mr Walzl suggested, was because post-purchase European settlement in the area was not conducive to the creation of a new market. It lapsed to a subsistence-based economy off-set for a time by a market in fish. Mr Walzl noted however, that the Otakou reserves in the years immediately post-purchase did not seem to come under pressure. Thus no evidence for this period suggests that Otakou Ngai Tahu fully utilised their reserves agriculturally, or needed to go beyond their boundaries, or seek other solutions as happened elsewhere in Otago and Canterbury (Q8:44-45).

6.9.10 Professor Pool's evidence was concerned with the adequacy of South Island Ngai Tahu reserves based on a demographic analysis (O15). He considered this question on the basis first of "present needs" and then of "future needs". We will confine our discussion of his evidence largely as it relates to the Otakou purchase and

its outcome. In opening his discussion Professor Pool emphasised that any judgment about the adequacy of reserves must depend on the quality of the land.

(a) A suitable amount of land

Professor Pool cited various formula employed at the time of the different purchases and subsequently which suggest that 10-15 acres per person was the range adopted as sufficient for Maori. He compared this with the standard adopted for the contemporary Wakefield system and others. This gives a minimal figure for a European family which, when divided by an average family size of four or five, approximates the level of 10-15 acres as used by most European officials involved with the allocation of Maori reserves. In this sense, Professor Pool said, the formula did not seem out of line with what was considered equitable for Europeans. It needs to be remembered that under the Wakefield scheme only the wealthy would own land at all, the vast majority of the European population was expected to comprise of landless labourers. Professor Pool then said:

In reality, however, the relative sufficiency of 50 or even 100 acres was soon to be challenged for Pakeha settlers. Thus it was already clear by 1850 to many observers that pastoralism, implying more extensive holdings, had more potential as a farming system than did cultivation. Indeed, as the several sources quoted above make very clear, in the Otago and Canterbury Provinces Europeans in one way or another had gained access, often through de facto occupation rather than "legally", to extensive pastoral holdings. Thus it can be argued that for Maori land to be viable according to the "normal" use patterns emerging by the 1850's, much higher per capita allocations would have been essential. It is not surprising, therefore, that by the 1880's some observers had already documented that the Maori reserves were inadequate.

He noted Mackay's comments that:

The small quantity of land held per individual [-]viz. 14 acres and in some cases the maximum quantity is less-altogether precludes the possibility of the Natives raising themselves above the position of peasants. A European farmer finds even a 100 acres too small to be payable. (O15:12-13){FNREF|0-86472-060-2|6.9.10|156}

(b) Quality of land

Professor Pool pointed out that the adequacy of land reserved to the tribe depended not only on the quantity, but also on the quality of the land. For Canterbury reserves he applied a formula which took in to account the varying quality of the reserves, based on contemporary information. This could not be applied in Southland and Otago due to the absence of such data. However, on the basis of the crude ratio of acres per person, which Professor Pool estimated at 28.4 acres per head, he concluded that provisions for Ngai Tahu at Otago met the prevailing formula of 10-15 acres per head at the time of the sale.

While Professor Pool's conclusion is no doubt logical, we do not consider the "present needs" of Ngai Tahu can be based solely on a narrow and somewhat mechanistic formula. In any event, Professor Pool himself noted that the relative sufficiency of 50 or even 100 acres was soon to be challenged for Pakeha settlers. We must remember,

however, that this was Ngai Tahu land which the Europeans wished to acquire. The Treaty required that the interests of Ngai Tahu in retaining land for their present and future needs was to be generously and fully recognised. The rigid application of a formula of say 10-15 acres is totally inconsistent with such an approach. Ngai Tahu, as owners of the land, were entitled to be left with "ample", that is to say more than adequate land. Ten or fifteen acres per head was no more than sufficient for a bare subsistence. The Crown's obligation under the Treaty was to respect the right of Maori, in this case Ngai Tahu, to retain sufficient land to enable them to live comfortably and to prosper. This would be possible only if extensive areas of land remained in their possession and control. While reference is made to both present and future needs, the two are necessarily interwoven. There is an air of unreality about attempting to separate one need from the other.

Future needs

6.9.11 On this question Professor Pool stated:

For future needs several issues stand out. Firstly, it was to become clear, as the earlier quote from Mackay suggests, that the land granted was insufficient. In part this was because needs, some of which were already apparent in 1868 were changing, and in part because of issues such as the distribution of land within the Maori population. By 1881, as the following table shows, Mackay was demonstrating that significant proportions of the Maori were "landless" while even for those with land the majority had "insufficient to achieve a reasonable standard of living". Only a small minority in each province had "sufficient" land.

Mackay's Assessment of the Sufficiency of Land Available to Maori, 1891 (in percentages):

Province	Sufficient	Insufficient	None	Total
Canterbury	12.9	49.7	37.4	100
Otago	12.8	40.5	46.7	100
Southland	7.7	50.6	41.7	100
Totals	11.6	46.9	41.5	100

SOURCERaw data: Dacker appendix 2 table A; Mackay 1891 (O15:29)

In summarising his conclusions Professor Pool acknowledged that the allocation of reserves to Otago Ngai Tahu for their "present needs" was satisfactory in terms of the formula employed at the time, but he concluded that the "future needs" of Ngai Tahu did not seem to have been adequately met. His conclusion comes from both contemporary observation and his analysis of population dynamics (O15:39).

6.9.12 We have found the evidence of Mr Walzl and Professor Pool helpful in considering the question of the adequacy of the 9615 acres retained by Ngai Tahu. But in separately discussing Ngai Tahu's "present" from their "future" needs there is a very real danger that the outcome is distorted. The Crown was under a duty to Otakou Ngai Tahu to ensure that ample land was set aside to provide an economic base for the future. In fact it left Ngai Tahu with sufficient land only for bare subsistence with no opportunity to turn, as European settlers soon did, to pastoral farming on a relatively large scale. Moreover, the Europeans were able, through their immensely greater land reserves, to provide more than adequately for their agricultural products, thereby closing the Maori out of what in pre-purchase times had been lucrative trade. Except for a few individuals, Otakou Ngai Tahu did not prosper. We discuss their subsequent economic plight later in this report. The table in 6.9.11 graphically demonstrates the landless or near landless condition of so many Ngai Tahu some decades later.

6.9.13 The tribunal has no hesitation in finding the claimants' grievance that the Crown failed to provide an economic base is made out. In short, the Crown acted in breach of Treaty principles in failing to ensure Ngai Tahu retained or were allocated sufficient land for their present and future needs.

6.9.14 Governor FitzRoy, in 1844, was committed to a policy that tenths should be provided when Maori sold land, in addition to their retaining adequate reserves. We consider that the Crown was under a residual obligation to make further provision for the Otakou Ngai Tahu, which the provision of tenths vested in the Crown substantially for Maori purposes might have met. We have in mind that, as later occurred for other tribes, some tenths might have become vested in Ngai Tahu as owners. The failure on the part of the Crown either to make such provision for tenths or to make other adequate provision, we consider constitutes a breach of the Treaty principle we have discussed. It is clear that Ngai Tahu have been prejudicially affected by such failure on the part of the Crown. A final comment. Had the Crown granted tenths in respect of this purchase, Ngai Tahu would have secured, in addition to a substantial interest in rural Otago, an interest in the new town, Dunedin, which was to develop at the southern end of the harbour. Had this happened the subsequent events, which we next chronicle, leading to a claim by Ngai Tahu over the Princes Street reserve would almost certainly not have occurred.

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